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Labor Law Developments: The Battle Over Absolute Liability

By Glenn A. Monk

Inevitably, any interest in recent developments in construction accident claims always finds its way to the "big issue," much the same way as it does in any particular case. Absolute liability—is it to be, or not to be, that is the question! Obviously, the statutory scheme of what is generally known as the "scaffold law" favors injured claimants who can come within its protective umbrella. On the other side, with the stakes so high, it becomes the focus of those representing the targets of the absolute liability scheme—owners and their contractors—to find ways to push a particular claim outside the extraordinary protection afforded by the statute. The battle line being fairly easy to define, this may just be one of those situations where winning the battle means winning the war. What follows is a discussion of some of the fields on which the two sides have met, and how various courts from trial level to the Court of Appeals have recently decided the issue at stake.

I. The Absolute Liability Challenge

A. Question of Fact: Is Plaintiff's Conduct the "Sole Proximate Cause"?

A relatively short time ago, the Court of Appeals rendered a decision in which it reversed the trial court's directed verdict under Labor Law § 240(1) in favor of an injured construction worker who fell from a ladder. The decision, *Weininger v. Hagedorn & Co.*,[1] led to commentary by both sides of the bar and the judiciary over the past year. To the plaintiff's bar, the Court's analysis is seen as injecting comparative negligence into Labor Law § 240(1) cases, while the defense bar sees a more realistic nod to the elemental requirement of proximate cause.

The facts set forth by the Court of Appeals in *Weininger* are sparse, indicating only that the plaintiff was standing on a ladder while routing telecommunications wire through the ceiling. The Court held that under "the circumstances presented, a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) did not attach"[2] Clearly, there was not much guidance from "the circumstances presented," although something can be gleaned from the lower court's reference to Mr. Weininger standing on the cross bars of the backside of the ladder, rather than the steps. It is, after all, a "question of fact."

It is instructive to look at how *Weininger*'s use of the concept of plaintiffs' conduct as the "sole proximate cause" has been applied to avoid summary judgment under Labor Law § 240(1), or the application of the statute altogether.

Post-*Weininger* Decisions

1. *Smazaski v. Herber Rose, Inc. et al.*[3]

Plaintiff was removing window sills on a high-rise building utilizing a motorized swing scaffold. The contractor also provided plaintiff with a rope grab used in conjunction with a safety line attached to the building as part of the fall protection devices. On the day of the accident, as plaintiff began ascending the building, the scaffold became blocked by an air conditioner. Plaintiff attempted to get around the air conditioner by extending his body out between the scaffold and the building to push the scaffold away from the wall. This maneuver caused the scaffold to shake, plaintiff lost his balance and fell approximately 30 feet. The Appellate Division held that "to demonstrate entitlement to partial summary judgment on the issue of liability under Labor Law § 240(1), plaintiff must demonstrate that the statute was violated, and that such violation was a proximate cause of his injuries."[4] The court acknowledged that "the distinction between the situation when a worker's conduct is the sole proximate cause of an accident," and when it is merely a contributing factor, can be difficult to discern. Further, the court conceded that plaintiff's actions could have been a contributory factor. However, because plaintiff's actions were foreseeable, and only a contributory factor, they were not the "sole cause" of his fall. The court reversed and granted plaintiff's motion for summary judgment.

The factual concepts were developed by the parties as follows: Plaintiff's counsel argued that the fall protection didn't meet the statutory "safeguarding" requirement because the scaffold lacked an inside (wall side) guard rail. Defendant argued that the rope grab was found to be working properly both before and after the fall and proffered testimony that plaintiff must have held the rope grab in the disengaged position as he descended. The court deemed the latter to constitute contributory negligence, an unavailable defense for § 240(c) liability, and that such conduct was not so unforeseeable as to amount to a superseding cause.

2. *Lardaro et al. v. New York City Builders Group, Inc. et al.*[5]

The worker injured in this case fell through a hole in the floor that materialized, as far as he was concerned, for the first time when he removed a plywood board to allow him to reposition a movable scaffold. The Court found issues of fact existed as to whether or not the board was brightly marked "danger" and otherwise provided proper protection, and whether Lardaro's own actions were the sole proximate cause of the accident.

3. *Sniadecki v. Westerfield Central School District*[6]

The injured worker here was engaged in the common practice of cutting pipe running in the ceiling with a torch while standing on a ladder, about 12 feet from the floor. An inadequately secured piece of pipe swung down and knocked the plaintiff off the ladder. The Fourth Department reversed and granted plaintiff's motion for a § 240(1) liability noting that the defendants (owner and contractor) failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident. How the defendants supported their bid was left unsaid.

4. *Griffin v. MWF Development Corp.*[7]

The plaintiff, a masonry worker, fell down an unguarded elevator shaft when he slipped or lost his balance as he reached down to hand something to his supervisor. The court rejected defendants' contention that the plaintiff's losing his balance raised an issue of fact as to whether his own conduct was the sole proximate cause of the accident. The facts here just don't amount to anything more than contributory conduct, and citing to such will not suffice, particularly where safety devices are conspicuously absent.

5. *Eitner v. 119 West 71st Street Owners Corp., et al.*[8]

In this case, the plaintiff himself gave "diametrically opposed" statements in his examination before trial as to how the accident occurred. He initially testified he fell off a ladder leaning against an oil tank as he descended, leaving the ladder upright. Later he stated the ladder slid off to one side. The hospital record noted under "Patient Statement" that he twisted his knee after he stepped off the ladder. The credibility gap was wide enough for the court to cite the specter of "sole proximate cause" conduct articulated in *Weininger*, and preclude summary judgment to plaintiff.

6. *Wasilewski v. Museum of Modern Art*[9]

This case establishes that mere speculation upon a conflicting accident theory will not stall judgment in favor of a plaintiff who establishes defendant's statutory breach was a contributing factor. Here, plaintiff fell from an A-frame ladder that was found not to be secured, held by a co-worker, checked or wedged in place. The fact that plaintiff told his supervisor he had slipped and that the ladder was found standing upright, did not amount to the kind of conduct by the plaintiff that would warrant a reasonable jury to conclude his injuries were solely caused by his own conduct, nor was there a bona fide challenge to plaintiff's credibility.

B. Misused Safety Devices

The Bakers scaffolds keep on rolling with those "unlocked wheel" claims, although who prevails is not simply a spin of the wheel.

1. *Barreto v. Pall Corporation*[10]

The facts here provide a glimpse of what really goes on during construction. Plaintiff was installing steel hanging rods onto a ceiling. At the time of the accident, plaintiff was standing on the platform of a Bakers scaffold and moving the scaffold by holding onto the ceiling beams. At one point one of the wheels became blocked by a piece of debris. As he went to look at the wheel, the wheel became unblocked and the scaffold shifted. Plaintiff fell approximately seven feet to the floor. Plaintiff testified he was told to work in this manner by his foreman, who, of course, submitted an affidavit that denied sanctioning this short-cut method of maneuvering the scaffold. The foreman set out the safe and more time-consuming procedure he had instructed. That was enough for the motion court to deny summary judgment to plaintiff and declare that an issue of fact was raised as to whether plaintiff's conduct was the sole proximate cause of the accident. The court expressed its view that the deliberate failure to utilize the wheel locks constituted misuse of the safety device.

2. *Lawrence v. Forest City Ratner Companies*[11]

As in the case above, plaintiff was injured while working on a rolling scaffold. He fell 16 feet from the scaffold when the plank apparently broke in two and he was thrown against a wall. The court held that plaintiff was entitled to recovery despite the fact that he had failed to lock the wheels of the scaffold. Citing *Weininger*, the court concluded that "[t]o the extent that plaintiff may have failed to lock the wheels of the scaffold, it cannot be said that this was the sole proximate cause of his accident."

3. *Bahrman v. Holtsville Fire District*[12]

Plaintiff was working on the second floor of a new firehouse. You can probably see where this case is going right up through the fire pole hole cut through the floor. Of course, the pole was not yet installed by the defendant contractor, who had the foresight to place a plywood cover over the opening, purportedly with a large "fire truck" red "X" emblazoned on it. The twist is how

the plywood cover gets removed from over the hole. The plaintiff, a painter, needed a drop cloth so he grabbed the plywood cover, began to drag it, and fell through the hole he exposed.

Even the hardened might agree with the court here—"There is a question of fact as to whether the injured plaintiff's fall was due to his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries."

C. The Recalcitrant Worker Defense

The "sole proximate cause" analysis seems to have energized the recalcitrant worker defense, and the concept is showing up in decisions where that defense is raised.

1. *Lozada v. State of New York*[13]

This case was tried in the Court of Claims, which found that plaintiff was not wearing a supplied safety belt when he fell off the back of an elevated work platform on a truck. The truck had a safety line and plaintiff's own testimony established safety belts were available and that he had been repeatedly told to use one while on the platform.

The Appellate Division held that the Court of Claims improperly analyzed the recalcitrant worker defense and reversed, dismissing the Labor Law claims. "The defense is premised upon the principal that the statutory protection [of Labor Law § 240(1)] does not extend to workers who have adequate and safe equipment available to them but refuse to use it" (citations omitted).[14]

2. *McGuire v. State*[15]

Here, the owner of the construction site, where plaintiff was injured when he fell from a scaffold, unsuccessfully raised the recalcitrant worker defense. The facts are not set forth in this memorandum decision; however, the court sets forth the elements the defendants failed to establish "a purposeful or deliberate refusal to heed a specific order to use a safety device that is immediately and visibly available to the worker or actually put in place." The plaintiff secured summary judgment on his § 240(1) cause of action and the court rejected defendants' position that plaintiff's conduct was the sole proximate cause of his injuries. The link in reasoning was articulated here—the defendants failed to raise a triable issue of fact on causation.

3. *Salotti v. Wellco, Inc.*[16]

The plaintiff seeking summary judgment under Labor Law § 240(1) was met with a double barrel defense. In rejecting the recalcitrant worker defense, the court stated: (i) it is not enough to show plaintiff was instructed to avoid an unsafe practice; and (ii) the presence of a safety device elsewhere on the job will not defeat liability.

Nonetheless, plaintiff's motion was denied. The divergent accounts of how the accident occurred left an issue of fact as to whether the defendants' violations or the plaintiffs own actions were the sole proximate cause of the injuries.[17]

4. *Jamison v. GSL*[18]

In this wrongful death action, the full panoply of Labor Law violations (including those unique to window washers) were brought against owner, manager and the scaffold maintenance contractor for Minskoff Theatre, where the accident occurred. Decedent was killed when he fell from a two-person hydraulic-powered scaffold suspended by cable from a single roof mounted arm. The two workers each were wearing a safety harness with a lanyard that used a rope grab to clamp onto the safety line that hung down from the roof. The scaffold got hung up on a protruding ledge and unexpectedly began to tilt. At that point, the two workers "made the fateful decision to abandon," by disconnecting from their safety lines. In the attempt to climb from the tilted scaffold to the roof, only one made it.

The motion court dismissed the complaint and found decedent to be a "recalcitrant worker." It reasoned that the safety lines were working properly and that the proximate cause of the fatal accident was the decision to detach and abandon the scaffold and their safety lines. The First Department called it differently, and reinstated the complaint. The court reasoned that the tilting of the scaffold without apparent reason was *prima facie* evidence of a statutory violation of § 240(1) and, further, it held that it could not be said that decedent's act of unhooking his safety line was the sole proximate cause of the accident.

D. Worker Jumps But Court Won't, Not So Fast Anyway

1. *Egan et al. v. A.J. Construction Corp. et al.*[19]

As the workday dawned on Manhattan, 25 to 30 construction workers found themselves in a stalled elevator, six feet above the lobby of the subject building. The freight elevator operator immediately called for assistance. Although stable and lit, the fellows who were ever anxious to get to work manually opened the elevator doors after 10-15 minutes and jumped to the lobby floor. Plaintiff was last out and first to bring suit for impact injuries that caused him pain in his back, neck and foot.

As the case ascended from Supreme Court to the Court of Appeals, the Labor Law claims were successively dismissed at each level until the complaint was empty. The trial court dismissed § 241(6) and § 211(a)

against the general contractor and the elevator manufacturer. A divided Appellate Division was unanimous about dismissing the § 240(1) claim, but left intact the § 200 and the common law negligence causes of action. The Court of Appeals agreed with the dissenters on the floor below. The plaintiff's jump was deemed unforeseeable and superseded the defendants' conduct. The remaining causes of action were told to exit. Essentially, the Court of Appeals viewed the circumstances as not posing the type of threat or emergency that warranted the plaintiff's placing his own safety at risk by jumping. The Court held that as a matter of law, the plaintiff's act was unforeseeable and therefore, superseded the defendants' conduct and their liability for his injuries.

2. *Castronovo v. Maer Murphy, Inc. et al.*[20]

The plaintiff, an artist, was injured while descending a scaffold at a church restoration project. He sued the project owner, Catholic Church of St. Boniface, and his employer, Maer Murphy, Inc. The plaintiff claimed that he fell from the scaffold when it shifted due to defects in the wheels. His motion for summary judgment was met by an affidavit from Murphy's representatives stating that plaintiff had reportedly lost his balance while descending and jumped off the scaffold. (Hence, no defect). The trial court granted summary judgment in favor of the plaintiff on the issue of liability. The Appellate Division, reversed, and held that the conflicting testimony regarding the accident rendered summary judgment inappropriate. The court further held that "[g]iven the evidence that the plaintiff stated that he lost his balance and jumped from the scaffold, a triable issue of fact exists as to whether the accident was proximately caused by the defects in the scaffold or by the plaintiffs actions."[21]

II. General Contractor and Construction Manager—Not Synonyms

A. Definition of Terms

The role and responsibilities of a construction manager (CM) cannot be confused with the role and responsibilities of a general contractor (GC). These two legal relationships cannot be viewed interchangeably; they are in fact different. The courts have expressly recognized the critical difference, with its attendant ramifications, between these two different legal relationships.

1. *Balthazar v. Full Circle Construction Corp.*[22]

1. In *Balthazar*, a plumber fell from an allegedly defective ladder while installing a fire sprinkler. He sued the owner and the construction manager, Full Circle, alleging violations of §§ 200 and 240(1) on the basis that he was provided with an inadequate safety device—a ladder without rubber skid pads to prevent slipping. Plaintiff obtained summary judgment on a Labor Law § 240(1) claim against Full Circle. On appeal, Full Circle sought reversal and contended that it was not a general contractor for purposes of Labor Law § 240(1), but a construction manager. Full Circle argued that plaintiff's employer fabricated the sprinkler components, supervised and directed the installation, and provided the equipment to its employees. Full Circle further asserted that the employer was an independent contractor of the owner and that it had not contracted to do sprinkler work. The First Department reversed, reasoning:

> The terms "general contractor" and "construction manager" are not synonymous. As construction manager, under an American Institute of Architects form contract, which is different from that for a general contractor, Full Circle worked with the architect to plan the renovations, hired subcontractors, obtained bids and work permits, and supervised the subcontractor's work. Although Full Circle was required to review the subcontractors' safety programs, the contract was specific that "the Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions" other than Full Circle's own employees.[23]

2. *Buccini v. 1568 Broadway Assocs.*[24]

The First Department analyzed a construction manager's liability where the defendant entered into a construction management contract with the owner of a building. Pursuant to the contract, defendant's duties were defined and limited to "business administration, management and coordination." The *Buccini* court held that "a construction manager whose 'duties [are] limited to observing the work and reporting to the contractor safety violations by the employees' does not thereby become liable to the contractor's employee when the latter is injured."[25] The court held that:

> The construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees. The *general duty to supervise the work and ensure compliance* with safety regulations does not amount to supervision and control of the work site such that the superior entity would be liable for the negligence of the contractor who *performs the day-to-day operations* (emphasis added).[26]

Furthermore, the court held that "[w]here the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment."[27]

B. Construction Manager: *Respondeat Superior*

It is settled law in New York that a "principal is not liable for the acts of independent contractors, because unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work."[28] The First Department has held that "[c]ontrol of the method and means by which work is to be performed . . . is a critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability."[29]

Comment: The determination of whether a Construction Manager is liable pursuant to the respondeat superior doctrine requires a determination of whether the Construction Manager had the duty or obligation to control the manner in which the independent contractors performed their work.

C. Application: It's Not All in the Title

1. *Loiacono et al. v. Lehrer McGovern Bovis, Inc.*[30]

In *Loiacono* a worker brought an action to recover damages for injuries he sustained when he and another worker were standing on top of a scaffold and attempted to hold in place a piece of stone weighing approximately 200 pounds to be affixed to a bracket. As his partner let go of the stone, plaintiff felt a "snapping pop in his shoulder." The construction manager on the site coordinated contractors on the project, had authority to review safety on site, and told contractors where to work each day. The court held that "such conduct did not rise to the level of supervision or control necessary to hold [a manager] liable for [plaintiff's] injuries."[31] Furthermore, there was no evidence that the construction manager directed or controlled the manner in which the plaintiff carried out his work. Rather, the plaintiff testified his employer supplied his equipment and he determined for himself the means and method of installing the stone. The result: complaint dismissed on appeal.

2. *Griffin v. MWF Development Corp.*[32]

The opposite conclusion was reached in this case, showing titles alone are meaningless. The court affirmed the defendant's (construction manager) liability under Labor Law § 240(1), where the construction management agreement "unambiguously authorized MWF to select the various contractors and to supervise and control their work." The key criterion in finding MWF liable as the owner's agent was "not whether the party charged with the violation actually exercised control over the work, but whether he had the right to do so." The analysis looks at the level of supervision and control to determine whether vicarious liability will attach or whether a contractor's liability can be passed through to another contractor via contractual or common law indemnification.

Endnotes

1. 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998), *rearg. denied*, 92 N.Y.2d 875.
2. *Id.* at 841. *See Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 524, 493 N.Y.S.2d 1021.
3. 264 A.D.2d 364, 694 N.Y.S.2d 371 (lst Dep't 1999).
4. *Id.* at 365.
5. 706 N.Y.S.2d 174 (2d Dep't 2000).
6. 708 N.Y.S.2d 209, ___ A.D.2d ___ (4th Dep't 2000).
7. 709 N.Y.S.2d 322 (4th Dep't 2000).
8. 677 N.Y.S.2d 555, 253 A.D.2d 641 (1st Dep't 1998).
9. 688 N.Y.S.2d 547, 260 A.D.2d 271 (1st Dep't 1999).
10. N.Y.L.J. June 19, 2000 (Sup. Kings, Harkavey, J.).
11. 268 A.D.2d 380, 701 N.Y.S.2d 429 (1st Dep't 2000).
12. 70 N.Y.S.2d 660 (2d Dep't 2000).
13. 700 N.Y.S.2d 38 (1999).
14. *Id.*
15. 710 N.Y.S.2d 291 (4th Dep't 2000).
16. 709 N.Y.S.2d 733 (4th Dep't 2000).
17. *Citing Weininger v. Hagedorn & Co.*, 91 N.Y. 2d 958 (1998), *rearg. denied*, 92 N.Y.2d 875.
18. WL 1031282 (1st Dep't 2000).
19. 702 N.Y.S.2d 574 (1999).
20. 711 N.Y.S.2d 27 (2d Dep't 2000).
21. *Id.*
22. __A.D.2d__, 707 N.Y.S.2d 70 (1st Dep't 2000).
23. *Balthazar*, 707 N.Y.S.2d at 72.
24. 250 A.D.2d 466, 673 N.Y.S.2d 398, 401 (1st Dep't 1998).
25. *Id.* at 400.
26. *Id.* at 401.
27. *Id.*
28. *Melbourne v. New York Life Ins. Co.*, 707 N.Y.S.2d 64 (1st Dep't 2000).
29. *Id.*
30. 704 N.Y.S.2d 658, (2nd Dep't 2000).
31. *Id.*
32. 709 N.Y.S.2d 322 (4th Dep't 2000).

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Preclusion of the *Ipse Dixit* Expert: A Summary of Relevant Case Law

By Harold Lee Schwab

Prior Federal Case Law

Ipse Dixit: He himself said it; a bare assertion resting on the authority of an individual.

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[1]

Present Day Federal Case Law

1. The judge should exercise a "gatekeeping role."

"—In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertains to 'scientific knowledge' establishes a standard of evidentiary reliability.

"Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'"

"—Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication."

"—Submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."

"—Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error."

"—Finally, 'general acceptance' can yet have a bearing on the inquiry.—Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community'—may properly be viewed with skepticism."[2]

2. In exercising its gatekeeper function, the District Trial Court can be reversed only if has abused its discretion.[3]

3. All matters of expert testimony—scientific, technical and other specialized knowledge are to be reviewed for their methodology in forming conclusions or opinions. *Daubert* is not limited only to scientific testimony.[4]

New York State Cases

A. The Validity of *Frye* Reaffirmed

1. Although the majority in *Daubert* held that "general acceptance" was not a necessary pre-condition to the admissibility of scientific evidence in federal trials and thus concluded that Federal Rule of Evidence 702 superseded the *Frye* general acceptance test, it noted that one of the factors to be considered in assessing whether testimony is reliable and relevant is whether the theory itself has attracted widespread acceptance within a relevant scientific community. Further, notwithstanding the potential significance of *Daubert* to any case involving the issue of expert methodology, New York follows *Frye*.[5]

2. Testimony taken at a *Frye* hearing regarding a spinoscope, an instrument to measure limitation and functions due to back pain, was excluded as evidence because the procedure had not gained general acceptance in the scientific community. Publication of an article by the inventor in a peer-reviewed journal regarding the spinoscope and sporadic use of the invention was not enough to establish general acceptance in the scientific community.[6]

3. Diagnosis of multiple chemical sensitivity (MCS) syndrome had not gained general acceptance in the relevant scientific community and physician's testimony in support of his diagnosis that employee had MCS syndrome was inadmissible.[7]

4. The use of a Fourier Transform Infrared Spectrophotometer (FTIR) for chemical analysis for seven years does not establish general acceptance in the scien-

tific community. It was an error for the Supreme Court not to have held a *Frye* hearing.[8]

B. *Frye-Daubert* Interface in New York

1. Where, however, the evidence is not scientific or not novel, the *Frye* analysis is not applicable. Inasmuch as the testimony in the case at bar is that of an engineer, and inasmuch as the testimony is based upon, according to the witness, recognized technical or other specialized knowledge, the court finds that the stricter standard of *Frye* is not applicable. The court will apply the liability standard as derives from *Daubert* and *Kumho Tire*.[9]

2. "However, the accelerated pace at which science travels is today far faster than the speed at which it traveled in 1923 when *Frye* was written. Breakthroughs in science which are valid may be relevant to a case before the courts. Waiting for the scientific community to 'generally accept' a novel theory which is otherwise valid and reliable as evidence may deny a litigant justice before the court. A trial judge's role as a gatekeeper of evidence is not a role created by *Daubert* and rejected by the Court of Appeals; it is an inherent power of all trial court Judges to keep unreliable evidence ('junk science') away from the trier of fact regardless of the qualifications of the expert."

"Using repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact is not a generally accepted method in any relevant field of engineering or under the laws of physics. Hence, under the *Frye* test of general acceptance, the opinion upon which it relies is inadmissible. By applying the *Daubert-Kumho* factors this court also finds this methodology to be invalid."[10]

C. Qualifications/New York

1. "Generally speaking, a predicate for the admission of expert testimony is that its subject matter involves information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable."[11]

2. Expert testimony by an engineer who, although not a designer of ball joints, had experience in disassembling more than one hundred ball joints and analyzing their performance was properly allowed concerning the difference a plastic insert in the ball joint would have made to the functioning of the accident-producing ball joint.[12]

3. An architectural engineer who had never seen or designed a loading platform of the type in question could not testify that the use of a subway grating platform was contrary to good engineering practice.[13]

4. A basketball coach was not permitted to testify as an expert regarding the safety of design of a basketball court where there was no showing that the proposed expert had ever rendered advice regarding basketball court construction or had aided in the designing or planning of gymnasiums or recreation areas.[14]

5. In an automobile products liability case, plaintiff's expert was found to be qualified in the specialty of physical metallurgy but was not competent to testify as an expert in dynamics and forces and was therefore not permitted to give opinions as to whether the guardrail pulled the wheel off at impact and as to what caused the wheel to fall off.[15]

6. "The trial court did not abuse its discretion in excluding from evidence the testimony offered by the expert witnesses called by appellants. . . . The experts' qualifications were not such as would substantiate his status as an expert in the field of accident reconstruction."[16]

7. An architect whose primary professional concern was to insure compliance by building contractors with architectural specifications could not testify as an expert regarding the accepted standard relating to temporary lighting on construction sites where his expertise did not embrace daily maintenance of lighting systems.[17]

8. A consulting engineer who had taken a few months training in technical and scientific reconstruction of accidents was not qualified to testify as to speed of an automobile at the time of its impact with another automobile based on his analysis of photographs of positions of automobiles after the accident, damage to automobiles and other scientific formulae.[18]

9. The trial court did not err by precluding plaintiff's counsel from questioning his expert witness with regard to certain skid marks located at the accident since the expert was not qualified to testify with regard to accident reconstruction and additionally, there was no proof that the skid marks were made by any of the vehicles involved in the collision.[19]

10. There was no proof that the police officer was qualified to conduct a post-incident expert analysis and render a conclusion as to the cause of the accident.[20]

11. A licensed engineer without specialized knowledge, experience, training or education regarding consumer shelving, package retrieval or customer safety not qualified as an expert regarding falling box from shelf.[21]

12. Neurosurgeon not necessarily an expert in toxicology.[22]

13. Mechanical engineer with extensive exposure in safety engineering of vehicles excluded from testifying

about design/development of golf courses and recreational areas.[23]

D. Foundation/Methodology/New York

1. "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness."[24]

2. There are two limited exceptions to the general rule that opinion evidence must be based on facts in the record or personally known to the witness. An expert may rely on out-of-court material if "it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross-examination on the trial."[25]

3. DNA profiling evidence was properly admitted at trial based upon a *Frye* hearing which found such evidence to be generally accepted as reliable by the relevant scientific community and since a proper foundation for the admissibility of the particular evidence was made at trial.[26]

4. "Expert testimony that the incident rate of leukemia resulting from exposure to benzol was 'quite high' was without significance since the witness was unfamiliar with any statistical data in the medical literature or in his own practice."[27]

5. "We are of the belief that the expert's opinion was against the weight of the evidence in view of his failure to subject this or any other similar stopper to testing under pressure. In the absence of actual testing, the expert's opinion is insufficient in the face of the widespread use of such plastic stoppers in the industry."[28]

6. "Reversible error was committed when plaintiff's expert was permitted to assume a fact, not previously nor subsequently established, that a certain flask was non-homogeneous and from it to infer what caused the flask to cleave since opinion testimony must be based on facts in the record, which did not exist in that case."[29]

7. The trial court improperly received the opinion testimony of the expert that the fire had been caused by a sticking valve which became overheated and that the temperature required for melting could not be achieved unless there was a malfunction in the thermostat and limit switches since there was no evidence that these instruments were non-functioning. "Thus, the opinion offered by the plaintiffs' expert was based on facts which were assumed and which were neither in evidence nor properly inferable from facts that were in evidence."[30]

8. "When an expert opinion lacks factual support and is bolstered only by the expert's qualifications, it carries little probative value—for it cannot be weighed intelligently. If an appraiser's opinion has any substantial basis in fact, it is fair to assume that the facts will be spread on the record."[31]

9. Plaintiffs' expert testified in detail regarding his inspection of a guardrail some three years after the accident. The Appellate Division concluded that the trial court correctly struck the testimony of plaintiffs' expert and dismissed the action against the city of New York. There was no evidence that the suspect guardrail had, in fact, been 22 inches of height as of the date of the accident or that it had not been replaced prior to the expert's inspection. Moreover, no evidence whatsoever established that the station wagon had hit the rail at an angle of 25 degrees or less. "Speculation and surmise are not a substitute for proof and where (as here) evidence is capable of an interpretation equally consistent with the presence or absence of an wrongful act, that meaning must be ascribed which accords with its absence."[32]

10. "It was prejudicial error to receive in evidence the police officer's reconstruction of the accident since there were insufficient facts in the record to support his opinions which were, in effect, mere speculation."[33]

11. Expert testimony that a portion of the steering mechanism of a school bus was defective at the time of manufacture was based on speculation and surmise and a verdict against the automobile manufacturer was contrary to the weight of the credible evidence.[34]

12. The expert's opinion as to how the accident occurred was wholly speculative since he had never examined the interior of the hoist or any manufacturer's brochures and the cursory inspection four years after the accident was too remote.[35]

13. "The plaintiff, in opposition to a motion for summary judgment, produced 'only' an attorney's affirmation and an affidavit of an expert in accident reconstruction whose opinion was based upon photographs of the scene and his review of depositions. 'Such speculation, grounded in theory rather than fact' was deemed insufficient to defeat a motion for summary judgment."[36]

14. The engineer's affidavit that sight distance at the intersection was inadequate and created a hazardous condition "—was purely speculative and, thus, lacked sufficient probative force to constitute *prima facie* evidence of negligence" since no foundational facts were presented to support the opinion. "Notably, he does not state the type of sight distance which he investigated and offers no detail as to running speed, roadway conditions, reaction time or braking time, nor does he give any indication of applicable industry standards or practices."[37]

15. The accident reconstruction expert was not permitted to testify since he did not inspect the intersection

until three years after the accident and was not familiar through other sources with the condition of the intersection at the time of the accident.[38]

16. The opinion was based upon material outside of the record which was not "—of the kind ordinarily accepted by experts in the field."[39]

17. The opinion was not based on mechanisms or methodology which are "generally accepted as reliable in the scientific community."[40]

E. Junk Science/New York

1. The testimony of an engineer must be rejected as having no probative value when it is contrary to the physical laws of nature or science."[41]

2. Opinions of an expert regarding violations of a code which are clearly erroneous must be rejected.[42]

3. "The testimony of plaintiff's expert to the effect that insured's automobile was hit by another car, causing it to veer off the road, was wholly speculative and tailored to meet a desired result since there was no direct evidence of contact with insured's automobile prior to the contact of truck of third party who arrived at scene after front of insured's, automobile had been demolished, and road did not give any indication of skid marks."[43]

4. In a case involving the claim of rare lung disease resulting from exposure to a variety of cleaning detergents, summary judgment was properly granted since plaintiff's expert did not know what chemicals were in the defendants' products, admitted that he had never before heard of an instance of bronchiolitis obliterans being caused by exposure to detergents, conceded that diesel exhaust was known to instigate the disorder, and that the causes of 50 percent of reported cases were idiopathic, i.e., unknown.[44]

5. "The expert's opinion was too speculative to support the verdict, and the complaint was properly dismissed for failure to establish a *prima facie* case. As the trial judge observed, the initial premise employed by the expert, i.e., that the glass was defective because broken by the blow of a fist, was unsupported by any empirical data. Indeed, the expert admitted that a person wearing a ring could have shattered the glass. The expert's theory that the wooden frame rotted, that nails were then exposed, that the glass became loose, that the loosened glass hit against the nails, and that microscopic cracks were thereby formed, is either unsupported by or contrary to the evidence. Although plaintiff testified that the wooden frame was rotten, there was no indication that nails were exposed, or that the glass was in contact with them. No witness observed exposed nails, and the photographs do not show any. Plaintiff himself, quite contrary to the expert's surmise, testified squarely that he did not observe that the glass was loose within the frame."[45]

6. The opinions presented were "contingent, speculative, or indicative that something is merely possible."[46]

Endnotes

1. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923) (Lie detector based on blood pressure).
2. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 125 L.Ed.2d 469, 61 U.S.L.W. 4805 (1993). (Bendectin epidemiologist).
3. *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997).
4. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (*Ipse Dixit*, Tire Expert).
5. *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97 (1994) (DNA profiling) ("General acceptance" is the rule).
6. *Castrichini v. Rivera*, 175 Misc. 2d 530, 669 N.Y.S.2d 140 (Sup. Ct., Monroe Co., Fisher, J., 1997).
7. *Collins v. Welch*, 178 Misc. 2d 107, 678 N.Y.S.2d 444 (Sup. Ct., Tompkins Co., Relihan, J., 1998).
8. *People v. Donald Roraback*, 242 A.D.2d 400, 662 N.Y.S.2d 327 (3d Dep't 1997).
9. *See Wahl v. American Honda Motor Co.*, 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Cty., Oshrin, J., 1999) (all terrain vehicle/*Frye* hearing held/citations omitted).
10. *Clemente v. Blumenberg*, 183 Misc. 2d. 923, 705 N.Y.S. 2d 792, 799 (Sup. Ct., Richmond Co., Maltese, J., 1999).
11. *Mattot v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532 (Ct. App. 1979).
12. *Caprara v. Chrysler Corporation*, 52 N.Y.2d 114, 436 N.Y.S.2d 251, 417 N.E.2d 545 (Ct. App. 1981).
13. *Dillon v. Socony Mobil Oil Co.*, 9 A.D.2d 835, 129 N.Y.S.2d 818 (3d Dep't 1959).
14. *McGovern v. Riverdale Country School Realty Co.*, 51 A.D.2d 894, 380 N.Y.S.2d 687 (1st Dep't 1976).
15. *Hileman v. Schmitt's Garage, Inc.*, 58 A.D.2d 1029, 397 N.Y.S.2d 501 (4th Dep't 1977).
16. *Medina v. New York Transit Authority*, 57 A.D.2d 946, 395 N.Y.S.2d 89 (2d Dep't 1977).
17. *Molinari v. Conforti & Eisele. Inc.*, 54 A.D.2d 1113, 388 N.Y.S.2d 782 (4th Dep't 1976).
18. *Lombard v. Dobson*, 16 A.D.2d 1031, 230 N.Y.S.2d 47 (4th Dep't 1962).
19. *Coffey v. Callichio*, 136 A.D.2d 673, 523 N.Y.S.2d 1011 (2d Dep't 1988).
20. *Casey v. Tierno*, 127 A.D.2d 727, 512 N.Y.S.2d 123 (2d Dep't 1987).
21. *Hofmann v. Toys-R-Us*, 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dep't 2000).
22. *Shevalier v. Bentley*, Misc 2d. N.Y.S. 2d. (Sup. Ct., Tompkins Co., Relihan, J., June 6, 2000), __ Misc. 2d__, __N.Y.S. 2d__, *dismissal affirmed on other grounds*, 268 A.D.2d 622, 700 N.Y.S.2d 585 (3d Dep't 2000).
23. *Hong v. County of Nassau*, 139 A.D.2d 566, 527 N.Y.S.2d 66 (2d Dep't 1988).

24. *Cassano v. Hagstrom*, 5 N.Y.2d 643, 187 N.Y.S.2d 1, 159 N.E.2d 348 (Ct. App. 1959); *Hambsch v. New York City Transit Authority*, 63 N.Y.2d 723, 480 N.Y.S.2d 195, 469 N.E.2d 516 (Ct. App. 1984).
25. *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923, 323 N.E.2d 169 (Ct. App. 1974).
26. *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97 (Ct. App. 1994).
27. *Miller v. National Cabinet Co.*, 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811 (Ct. App. 1960).
28. *Cosgrove v. Estate of Delves*, 35 A.D.2d 730, 315 N.Y.S.2d 369 (2d Dep't 1970).
29. *Stracher v. Corning Glass Works*, 39 A.D.2d 560, 331 N.Y.S.2d 764 (2d Dep't 1972).
30. *Smith v. Square Homes. Inc.*, 38 A.D.2d 879, 329 N.Y.S.2d 243 (4th Dep't 1972).
31. *Shore Haven Apartments No. 6, Inc. v. Commissioner of Finance*, 93 A.D.2d 233, 461 Supp. 2d 885 (2d Dep't 1983).
32. *Tucker v. Elimelech*, 184 A.D.2d 636, 584 N.Y.S.2d 895 (2d Dep't 1992).
33. *Loaez v. Yannotti*, 24 A.D.2d 758, 263 N.Y.S.2d 523 (2d Dep't 1965).
34. *Cross v. Board of Education, etc., Delaware County*, 49 A.D.2d 67, 371 N.Y.S.2d 179 (3d Dep't 1975).
35. *Espinosa v. A&S Welding and Boiler Repair*, 120 A.D.2d 435, 502 N.Y.S.2d 451 (1st Dep't 1986).
36. *Levitt v. County of Suffolk*, 145 A.D.2d 414, 535 N.Y.S.2d 618 (2d Dep't 1988).
37. *Morrison v. Flintosh*, 163 A.D.2d 646, 558 N.Y.S.2d 690 (3d Dep't 1990).
38. *DuIin v. Maher*, 200 A.D.2d 707, 607 N.Y.S.2d 67 (2d Dep't 1994).
39. *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923(1974); *Hambsch v. NYCTA*, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984).
40. *People v. Hults*, 76 N.Y.2d 190, __ N.Y.S.2d __ (1990); *People v. Hughes*, 59 N.Y.2d 523, __ N.Y.S.2d __, (1983); *People v. Tarsia*, 50 N.Y.2d 1, __ N.Y.S.2d __ (1980).
41. *Higgins v. Mason*, 226 A.D.2d 426, 255 N.Y.S.2d 441 (3d Dep't 1929).
42. *Marquat v. Yeshiva*, 53 A.D.2d 688, 385 N.Y.S.2d 319 (2d Dep't 1976).
43. *Aetna Casualty and Surety Company v. Barile*, 86 A.D.2d 362, 450 N.Y.S.2d 10 (1st Dep't 1982).
44. *Cracker v. Spartan Chemical Co., Inc.*, 183 A.D.2d 810, 585 N.Y.S.2d 216 (2d Dep't 1992).
45. *Skipper v. New York*, 186 A.D.2d 439, 589 N.Y.S.2d 21 (1st Dep't 1992).
46. *People v. Roth*, 139 A.D.2d 605, 527 N.Y.S.2d 97 (1988); *O'Shea v. Sarro*, 106 A.D.2d 435, 482 N.Y.S.2d 529 (2d Dep't 1984).

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Parental Responsibility for Children's Motor Vehicle Accidents

By Andrea M. Alonso and Kevin G. Faley

Some of the questions most frequently asked by insurance claim professionals involve scenarios where an insured's vehicle is driven by their children, or their children's friends, and an accident occurs. These scenarios are based upon convoluted fact patterns and involve a claim by the parent of alleged unauthorized use of a motor vehicle. For personal lines carriers, especially out of state, it is difficult to comprehend the broad interpretation of permissive use in New York and its far-reaching implications.

Permissive Use—Vehicle and Traffic Law § 388(1)

VTL § 388 imputes to the owner of the car the negligence of one who uses it or operates it with the owner's permission, express or implied.[1] This section creates a very strong presumption that the vehicle is being operated with the owner's consent. That presumption must be rebutted by substantial evidence to the contrary. A plaintiff must only prove that the negligently operated vehicle was owned by the defendant to get the case before a jury.[2] Statutes based on VTL § 388 have been enacted for snowmobiles,[3] all-terrain vehicles[4] and boats.[5]

In weighing whether to move for dismissal based on non-permissive use, the legislative intent behind this historical statute[6] must be considered. The legislature's goal was to ensure that vehicle owners act responsibly with regard to their vehicles. Vicarious liability is linked to the owner's obligation to maintain adequate insurance.[7] The courts, in weighing a dismissal motion, will consider that the purpose of the statute is to allow access by the injured party to the financially responsible defendant.[8]

The defendant's burden of rebutting the presumption of permissive use with substantial evidence is not an easy one. In *Rodak v. Longnecker*,[9] the defendant father allowed his son to take his car to college in New York State, where he was enrolled as a student. While at college, the son allowed a friend and fellow student to use the car for local trips, one, at least, to a local ski resort. The friend was driving the father's vehicle when an accident occurred. The defendant father, in his affidavit, stated that his son was advised that he, and only he, had permission to drive the car. The father moved to dismiss based on the ground that the friend did not have permission to operate the car and that he was not vicariously liable for his negligence.

The court denied the motion reasoning that clearly no express permission was claimed but that the issue of implied permission must go to the jury. The court weighed the circumstantial facts and held:

> Given the climate of the times, a jury might conclude, a parent should be held to the knowledge that so generous an entrustment, so far from home and for such a protracted period, is not reasonably susceptible to a limitation of the kind relied upon by the father. Hence, the jury might find, the entrustment to the son implied a consent that a friend might be allowed an occasional use of the car for local errands.

In *Schrader v. Carney*,[11] the issue of permissive use went to the jury. Therein it was uncontroverted that the defendant father had given express permission only to his son. While on a drinking spree in a motel with the son, a non-party to the action handed the keys to the defendant's vehicle to the defendant driver, a friend of the son. He, in turn, lost control of the automobile, hitting a utility pole, causing plaintiff to suffer severe brain injuries. The jury found that although express permission was not given there was some vague testimony that the son may have given his friend permission to drive the vehicle. On those facts the statute's presumption was not overcome and the jury's finding of permissive use was not unreasonable.

In comparing *Rodak* and *Schrader,* it is significant to note the extent to which a Court will find that permissive use was given. In *Rodak,* the car keys went from the father to the son with permission and then to the son's friend again with permission. The presumption of permissive use went to the jury as there was permission down the chain. In *Schrader*, the keys went from father to son to a non-party, apparently without permission, however, the non-party in turn gave the keys to the defendant driver and still the presumption of permissive use was not rebutted to the satisfaction of the jury or the reviewing Appellate Court.

The limitation of time upon the permission does not overcome the presumption. In *Lawrence v. Myles*,[12] the defendant driver submitted an affidavit of his mother along with her deposition. In both she claimed that she gave him express permission to operate the vehicle on the day before the accident but did not give him permission to operate it on the day of the accident. Sum-

mary judgment was denied and the issue of permissive use was again allowed to go to the jury.

In rare instances owners have rebutted the presumption that a defendant driver was operating the vehicle with the owner's consent. In *Jimenez v. Regan*,[13] the vehicle owner rebutted the presumption that the defendant Regan, his daughter's boyfriend, had been driving with his consent. At a framed issue hearing the owner presented uncontroverted evidence that he explicitly told Regan that he was not permitted to drive his vehicle and that his daughter allowed the boyfriend to drive the car after she arrived at his home on the date of the accident. Obviously, the fact that the owner of the car expressly told the driver that the driver did not have permission to drive the car weighed heavily with the court. This element was lacking in *Rodak* and *Schrader*.

If an owner establishes a theft of the vehicle by a family member the presumption of permissive use is rebutted. In *Manning v. Brown*,[14] the defendant driver and her high school friend were involved in a one car accident involving a car owned by her grandparents. The granddaughter found the keys under loose papers in the car's console while it was parked at a local community college. The granddaughter and her plaintiff friend, both unlicensed, took turns operating the vehicle.

The defendant granddaughter testified that she was not given permission to use the car and had, in fact, pleaded guilty to its theft. The grandfather testified and submitted an affidavit that he never allowed the defendant to operate his cars. Lastly, plaintiff testified she knew the car was stolen. Under those circumstances, the defendant owner's motion for summary judgment dismissing the complaint was granted.

The court also found that the defendant owner bore no responsibility under Vehicle and Traffic Law § 1210(a).[15] That statute holds the owner of a stolen vehicle liable for proximately caused injuries if the car keys were negligently left in the ignition switch. This statute only applies to vehicles upon public highways, private roads open to public motor vehicle traffic, and any other parking lot.[16] Thus, if a vehicle is stolen from a private garage liability does not attach.[17] In *Manning*,[18] the statute did not apply since it specifically states that the ignition key may be left in or on the vehicle, provided it is not in plain view.[19] The defendant had testified that the keys were located in the console covered by loose papers, such that they were hidden from sight.

Negligent Entrustment of a Motor Vehicle

Plaintiffs have contrived a negligent entrustment theory of liability in situations where the defendant child's motor vehicle policy has minimum limits and the parents' motor vehicle policy is clearly unavailable. Plaintiffs will assert a negligent entrustment cause of action in an attempt to bring into the lawsuit the parents' homeowners, excess or other personal policies and thus artificially create sufficient coverage.

In a situation related to *Manning*,[20] the defendant's infant son, a 15-year-old, took his mother's car keys from her and gave them to a friend who was involved in an accident. The court in *Sherri v. Gerwell*,[21] found no evidence that the son had a propensity to utilize automobiles without permission or to steal or borrow items he was not authorized to use. The cause of action for negligent entrustment was dismissed.

In other cases involving infants and the issue of negligent entrustment the courts have found that when an infant bought his own automobile, had successfully completed a driver's education course and possessed a junior operator's license, his parents were not charged with negligent entrustment.[22] This, despite the fact that there was some evidence the infant plaintiff had caused damage on two separate incidents by spinning the tires of his automobile.

In *Alfano v. Marlboro Airport*,[23] the mother of the decedent sued his father for negligent entrustment of a snowmobile. The court found the 17-year-old son was properly trained in the operation of a snowmobile six years prior. Additionally, the father had legally separated from his wife and had no custody over the son or the snowmobile. Under these circumstances, the court dismissed the cause of action based on negligent entrustment.

If negligent entrustment is difficult to prove with infant children, it is virtually impossible with adult children. This is true despite a history of prior traffic accidents, criminal convictions and other histories. The adult son in *Weinstein v. Cohen*,[24] had two previous accidents. The court found that this did not support a finding of negligent entrustment. A stronger argument for negligent entrustment was rejected in *Mimoun v. Bartlett*,[25] where the adult son had previous convictions for excessive speeding. The court did not find it constituted a propensity sufficient to sustain a claim of negligent entrustment. Co-signing a loan for the vehicle's purchase knowing the son's license had been suspended was also found not to be a basis to cast the father in liability.

Generally, once a vehicle is registered in an adult child's name, he is the insured under the policy, he holds a valid New York State operator's license and only he possesses the key to the vehicle a theory of negligent entrustment will be dismissed.[26]

Negligent entrustment of a motor vehicle to children of an insured is virtually impossible to prove in

New York. The attempt to attach a parental policy of insurance is usually unsuccessful.

The Family Automobile Doctrine

In another attempt to bring into the realm of available insurance coverage a parent's homeowner's policy, excess/umbrella policy or other assets plaintiffs have relied upon the "family automobile doctrine." This is an indemnification cause of action based upon a principal-agent relationship. It is widely subscribed to throughout the United States.[27] Basically a parent is vicariously liable for damages which occur if a vehicle is owned and used for family purposes, by a member of the household with a parent's authorization or in a parent's business.

In *Laiacona v. Ten Eyck*, the Court of Appeals, in applying New Jersey law, addressed the family automobile doctrine, apparently for the first time, and determined that a father was liable for the actions of his daughter in an automobile collision accident.[28] At the time of the accident, defendant's daughter was 20 years old and driving home from college where she was a student. The father conceded that he paid the tuition charges for his daughter, and paid for all automobile maintenance and repairs. At the time of the collision, the automobile was available for use of any member of his family who cared to use it.

Justice Steuer, dissenting, stated that in New Jersey, by case law, an absent owner is liable if the automobile is used in his business, and that in case of an automobile owned by the head of the family and driven by a member of the family, there is a rebuttable presumption that the driver is the agent of the owner. Under New Jersey law, where an automobile is being used by one member of the family for his own purpose the presumption is rebutted.[29]

In 1993, the Second Department adopted the family automobile doctrine in New York State. In *Maurillo v. Park Slope U-Haul* a father instructed his son to rent a U-Haul vehicle in the father's name, with the father's credit card, and instructed him to transport furniture to the family's summer home.[30] After delivering the furniture from the family home to the summer residence the son and his brothers were returning home when they stopped at a nightclub. While in the nightclub parking lot the van came to a sudden and abrupt stop. One of the sons, who was standing in the cargo area was thrown to the floor of the van and sustained severe cervical injuries which rendered him paraplegic.

A motion to dismiss the counterclaim for indemnification against the father was denied. The court, applying the widely accepted family automobile doctrine, reasoned that the son was acting upon the request of his father, at the father's direction and for the father's benefit. Under these circumstances a triable issue of fact regarding agency defeated the plaintiff's motion to dismiss. The doctrine of the "family automobile" is recognized in New York as a viable means to attach intra-familial insurance policies or assets in a motor vehicle case.

In sum, parental responsibility for their children's motor vehicle accidents is broadly based under the theory of vicarious liability pursuant to VTL § 388. It is difficult to establish under the theory of negligent entrustment yet possible under the not widely used theory of the "family automobile doctrine." Parents must think twice before they answer the question: "Can I have the car keys?"

Endnotes

1. Vehicle and Traffic Law § 388(1) provide as follows:

   > Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder.

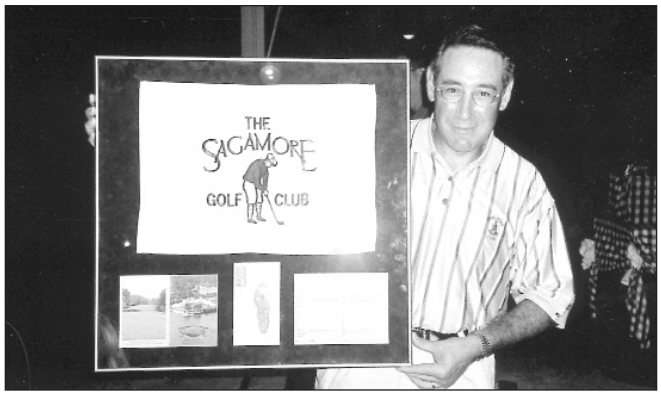
2. *Horvath v. Lindenhurst Auto Salvage, Inc.*, 104 F.3d 540 (2d Cir. 1997).
3. Parks, Recreation and Historic Preservation Law § 25.23.
4. Vehicle and Traffic Law § 2411.
5. Navigation Law § 48.
6. Section 388 traces its origin to § 282-e of the Highway Law of 1909.
7. *Fried v. Seippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247 (1992).
8. *Griffin v. Fung Jung La*, 229 A.D.2d 468, 645 N.Y.S.2d 528 (1996).
9. *Rodak v. Longnecker*, 176 Misc. 2d 833, 673 N.Y.S.2d 998 (Sup. Ct., Tompkins Co. 1998).
10. *Id*. at 835, 673 N.Y.S.2d 999.
11. *Schrader v. Carney*, 180 A.D.2d 200, 586 N.Y.S.2d 687 (4th Dep't 1992).
12. *Lawrence v. Myles*, 221 A.D.2d 913, 634 N.Y.S.2d 316 (4th Dep't 1995).
13. *Jimenez v. Regan*, 248 A.D.2d 510, 669 N.Y.S.2d 968 (2d Dep't 1998).
14. *Manning v. Brown*, 232 A.D.2d 849, 649 N.Y.S.2d 202 (3d Dep't 1996).
15. Section 1210 of the Vehicle and Traffic Law provides:

   > Unattended Motor Vehicle.
   >
   > (a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle . . . provided, however, the provisions for removing the key from the vehicle

shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency.

16. Vehicle and Traffic Law § 1199(a).
17. *Albouyeh v. County of Suffolk*, 62 N.Y.2d 681, 476 N.Y.S.2d 522 (1984).
18. *Id.*
19. *See also Banellis v. Yackel*, 49 N.Y.2d 882, 427 N.Y.S.2d 941 (1980).
20. *Id.*
21. *Sherri v. Gerwell*, 262 A.D.2d 394, 691 N.Y.S.2d 144 (2d Dep't 1999).
22. *Larsen v. Heitman*, 133 A.D.2d 533, 519 N.Y.S.2d 904 (4th Dep't 1997).
23. *Alfano v. Marlboro Airport, Inc.*, 85 A.D.2d 674, 445 N.Y.S.2d 517 (2d Dep't 1981).
24. *Weinstein v. Cohen*, 179 A.D.2d 806, 579 N.Y.S.2d 693 (2d Dep't 1992).
25. *Mimoun v. Bartlett*, 162 A.D.2d 506, 556 N.Y.S.2d 705 (2d Dep't 1990).
26. *See Fischer v. Lunt*, 162 A.D.2d 1016, 557 N.Y.S.2d 220 (4th Dep't 1990).
27. *Marshall v. Whaley*, 238 Ga.App. 776, 520 S.E.2d 271 (1999); *Willett v. Ifrah*, 298 N.J. Super. 218, 689 A.2d 195 (1997); *Hunt v. Richter*, 163 Conn. 84, 302 A.2d 117 (1972); *Murphy v. Barron*, 236 N.Y.S.2d 770 (1962).
28. *Laiacona v. Ten Eyck*, 21 N.Y.2d 980, 290 N.Y.S.2d 570 (1968).
29. The collision took place in New Jersey.
30. *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 606 N.Y.2d 243 (2d Dep't 1993).

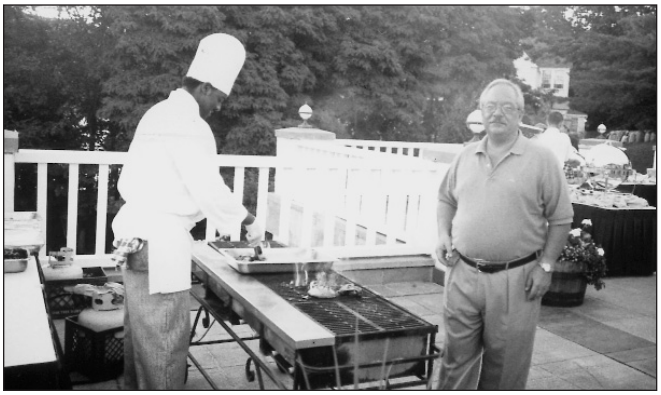
Scenes from the Sagamore
July 2000



Paul Suozzi with plaque for a hole-in-one at the Sagamore

The Sagamore

Eric Dranoff, Automobile Liability Chair, and Louis B. (Bucky) Cristo, Section Chair, at the Sagamore



Saul Wilensky, Vice-Chair, at the Sagamore barbecue

Construction Site Accidents: Consolidated Insurance Programs vs. Traditional Approach in Construction Projects

By Gerry McCarthy

In the typical or "traditional" program regarding a construction project, all of the participants in the project—from the owner to the construction manager(s), general contractor(s), contractors, subcontractors, etc.—are obligated to provide their own separate insurance. Naturally, the cost of that insurance, including markup for overhead, administration and profit, are included in the particular bid on the project.

The consolidated insurance program (known most commonly as a "wrap-up" policy) is a centralized insurance and loss control program authorized by the project sponsor (owner or general contractor) and applicable to a defined work site. It has become an increasingly popular alternative to the traditional approach. Under a wrap-up, all of the participants at the project are covered under a single policy, purchased and administered either by the owner (known as an "OCIP"—Owner Controlled Insurance Program) or the general contractor ("CCIP"—Contractor Controlled Insurance Program). The contractors are advised before bidding on the job that insurance for the project (most often general liability and workers' comp) will be provided by the sponsor and that the cost of insurance must be excluded from that contractor's bid on the job.

The differences between a traditional program and a wrap-up are numerous and significant, from a number of perspectives. An overview of the two approaches will readily demonstrate the differences that can result when litigation ensues involving a construction site accident.

Traditional Approach

Contractual Obligations

The project owner will typically contract with a general contractor for a particular site. That contract requires the general contractor to indemnify and procure insurance, at certain specified limits and types of[1] coverage, for the owner's benefit. The general contractor is then required to ensure, typically through its insurance agent or broker, that its particular carrier(s) affords coverage to the owner pursuant to the terms of its construction contract.

The general contractor engages various individual trade contractors. Each of these contracts contains the appropriate indemnification and insurance procurement clauses in favor of the general contractor (and possibly the owner as well). It is then up to the individual trade contractors to ensure (also via their agent or broker) that their carriers provide the additional coverage as required under their construction contracts. It is fairly common for any large construction project ($100 million in construction value) to have 50-100 contractors working at the site during the course of construction.

In many cases, the subcontractors themselves may subcontract out a portion of their work to a sub-subcontractor, with similar indemnification and insurance procurement requirements contained in their agreements.

Multiplicity of Insurance Issues

With the individual participants (which could exceed 100) at the project responsible for providing insurance coverage for themselves and their indemnitees, the situation is ripe for potential problems, such as failure to procure any coverage for the additional insured, failure to procure the required types or limits of insurance for the additional insured, procuring coverage with a large self-insured retention (SIR) or deductible that was clearly not contemplated by the indemnitee, procuring coverage with a carrier that becomes insolvent during the course of the project, etc. Unfortunately, these issues do not generally surface until it is too late to cure—that is, it is well after the accident has occurred and the litigation is underway.

Litigation Posture Under Traditional Approach

Perhaps not surprisingly, most litigation involving construction site accidents concerns injuries to employees of a hired contractor. Invariably, the complaint will allege violations of §§ 240, 241(6) and 200 of the Labor Law, irrespective of their actual application to the facts. The typical defendants in such litigation are the owner, general contractor and/or the construction manager, since each of these entity's liability is absolute (if § 240 applies)[2] or strict (if § 241(6) applies).[3] One or more of the potentially responsible contractors may also be named in the action. As discovery proceeds, the impleading of one or more of the other potentially responsible contractors is quite common as well. Prior to the Workers' Compensation Reform Act[4] in 1996, adding the plaintiff's employer as a third party was a virtual certainty. Today, however, the employer may only be impleaded (for common law indemnity or contribution) upon a demonstration that the plaintiff has sustained a statutorily defined "grave injury."[5] As a practical matter, impleading the employer for common law indemnity or contribution is virtually eliminated

for any action commenced on or after September 10, 1996, the effective date of the statute.[6]

Contractual Risk Transfer Issues

Relying upon the terms and conditions of their construction contracts, the owner and/or its carrier will tender its defense of the litigation to the general contractor and its carrier. The general contractor, in turn, will tender its defense (and perhaps the owner's as well) to its downstream contractors and their carriers. The downstream contractors may continue the chase and tender their defense to the sub-subcontractors and their carriers. And on and on it may proceed.

This plethora of tenders can be expected to produce an equal plethora of responses from the indemnitors and their insurers. One carrier may decline a tender because its insured did not procure the required coverage and therefore the tendering indemnitee is not additionally insured under that policy. In this situation, the indemnitee will no doubt include in its cross-claim or third-party claim against the downstream contractor a cause of action for breach of contract to procure the required insurance coverage, ala *Kinney v. Lisk*.[7]

Another carrier may decline the tender because, in its opinion, the language of its additional insured endorsement does not afford coverage to the tendering party. A different carrier may accept the tender of the upstream contractor, but only on a co-insurance basis with the indemnitee's own GL carrier.[8]

Another not-uncommon scenario is for a downstream carrier to acknowledge the tendering indemnitee's status as an additional insured, but nevertheless decline the tender based upon a policy defense, such as "late notice."[9] Any response short of a full-fledged acceptance of the tender will in most cases lead to further litigation among the various defendants and their respective carriers.

Increased Cost and Delay

It becomes readily apparent that litigation involving construction site accidents produces a multitude of parties and issues. There are customarily three or four direct defendants and two or three third-party or fourth-party defendants dragged into a particular lawsuit. That translates into six or seven assigned law firms to represent the various parties' defendant, as well as six or seven different insurers, six or seven different construction contracts and insurance policies with widely varying terms and conditions and an equally large number of claims adjusters. Add to that the additional lawyers, carriers, contracts, policies and adjusters assigned to the separate coverage litigation that typically accompanies construction site personal injury litigation and the result can border on the surreal. From a global defense perspective, the costs associated with defending construction site actions quite often far exceed the actual value of the underlying case. This multiplicity of parties, attorneys, carriers and claims adjusters also accounts in large measure for the grinding delays, redundant discovery and motion practice, depositions and court conferences so prevalent in this area of litigation. These cases seem to take on a life of their own and spiral endlessly into oblivion.

Consolidated Insurance Program (CIP)

Under a CIP, the project sponsor (in most situations either the owner or the general contractor) obtains insurance coverage placement, through a single broker, from one insurer for all of the contractors and subcontractors that will be retained to work at the site. Workers' comp., general liability and excess/umbrella coverage are most often included in the "wrap-up" coverages afforded.

With regard to the general liability coverage, all of the participants at the site are insured by one carrier under a single, master policy, for losses occurring at the project site during the term of construction. The various trade contractors are advised prior to bidding on the job that insurance coverage (for the designated lines) will be provided by the project sponsor and that their cost of insurance must be excluded from their bid on the job. Each contractor is required to execute an assignment to the sponsor of all return premiums, premium refunds, dividends, and any other monies due or to become due in connection with the insurance.

While the sponsor pays the premium and receives any dividends on these insurances, each contractor has a direct financial stake in its safety performance on the project. Each contractor's loss experience on the project must be reported by the insurance company to the appropriate workers' compensation rating bureau and will directly affect that contractor's future rates on policies not related to the project.

Although there is no specific rule on the subject, $50 million in hard costs (construction value) is generally recognized as the minimum-sized project suited for a wrap-up to be worthwhile. Wrap-ups are particularly suitable for labor-intensive projects that generate in excess of $2 million in workers' compensation premiums. Construction projects of this magnitude are required to enable the sponsor to achieve the necessary economies of scale to attract insurer interest and sufficient bargaining power.

Benefits Under a Wrap-up Program

There are a number of advantages associated with a wrap-up program, the principal ones being project control, cost savings and improved coverage(s).

Management and control over a wrap-up project is streamlined by the coordination of loss control, safety, security, claims management, record keeping and other similar functions. The wrap-up provides a vehicle for enforcing a consistent, and in most cases more stringent, level of loss control effort and compliance with safety rules throughout the term of the project.

The project sponsor is responsible for preparing and implementing the project's loss control program. Each contractor employed at a wrap-up site is required to submit its own written program for evaluation by the sponsor's loss control personnel to ensure that it meets with the established program. The project manager has the authority to take whatever action is required, up to and including termination of a particular contract, to effect a safe and productive project. Additionally, the written loss control program is reviewed with the individual contractors, each of whom is responsible for designating their own loss control representative. Reduction of injuries and deaths at construction sites is clearly the most beneficial result of any consolidated, safety-driven insurance program. Improved safety and worker morale under a wrap-up can often lead to increased productivity at many sites.

By providing a single source of insurance coverage, the wrap-up provides a significantly coordinated and streamlined approach when defending litigation arising out of the project, since all of the party defendants will be covered under a single policy by a single insurer for that claim. Each contractor participating in the wrap-up will be issued an individual workers' comp and general liability policy that will apply only to the activities of the contractor on the project site.

Centralizing the purchase of insurance coverage realizes economies of scale and allows special risk funding mechanisms that are not available where policies are purchased separately by each of the contractors engaged at the work site. Potential cost savings may also be realized in several areas, including premium credits for volume purchasing of insurance by the sponsor; elimination of the trade contractors' markups for overhead and profit in their individual insurance costs; the sponsor's ability to assume large deductibles, as well as any workers' comp. dividend or retro premium return resulting from favorable loss experience.

Because of the typically large size and premium volume associated with a wrap-up, an insurer is usually willing to negotiate with the sponsor and broker for broader coverage, higher limits of liability and other more favorable terms than could be accomplished when the insurance is purchased separately by each contractor. Additional benefits include uniformity of coverage and insurer stability. Under a typical wrap-up, there is usually only one broker and one carrier (at least for the workers' comp and general liability) with which to deal.

Litigation Under a Wrap-Up

When an injured construction worker commences a Labor Law action against the "usual suspects" (the owner, general contractor, and one or more potentially responsible contractors), and that project is insured under a wrap-up policy, the defense of that litigation will in most cases be assigned to one law firm to represent all defendants. Since under a wrap-up all of the parties are insured by the same policy by the same insurer for the same risk, any cross-claims among them are barred, under the doctrine of anti-subrogation.[10] This eliminates, in most circumstances, the cross-litigation and impleader actions so common in the non-wrap settings. It also eliminates the necessity for coverage litigation among the various entities and their insurers because a single policy is providing coverage to all named defendants. Thus, instead of multiple parties being represented by multiple counsel under multiple policies, with multiple carriers and claims adjusters, the case is assigned to a single law firm to handle by one carrier pursuant to one policy and will be adjusted by one claims professional. The litigation process is immensely streamlined when a wrap-up affords coverage to the project participants.

Advantages Obtained With a Wrap-Up

Investigation. Because of the coordinated and centralized administration of a wrap-up program, accidents of any consequence are reported and investigated as soon as they occur, affording valuable, contemporaneous information in any subsequent lawsuit. By contrast, in the non-wrap setting a particular contractor may first learn of an accident at a construction site when they are served with pleadings several years after the accident has occurred and the project has been completed. Investigating an accident at that time is virtually useless—the conditions have substantially changed, potentially responsible contractors and carriers may be out of business, witnesses/fellow employees may be long gone, memories have faded, etc. Defending a case under such circumstances is equivalent to finding a needle in a haystack.

Consolidated Control of the Litigation. With a single insurer and counsel defending all of the parties named in a lawsuit, the opportunity for a coordinated defense strategy and evaluation is significantly greater than when there are six or seven defendants with separate insurers, counsel, policies, and interests. In the non-wrap setting, the defendants are often so concentrated on pursuing their individual coverage, indemnity and contribution claims against the other defendants and their insurers that the facts of the case, the plaintiff's injuries, potential defenses or the valuation of the case

become secondary, or worse. Experience suggests that such a defense posture inures to no one's benefit at the end of the day. The case will tend to drag on and on and on, becoming ever more expensive to the involved carriers. The plaintiff's counsel willing to engage in a constructive settlement dialogue, or to pursue an ADR forum, to obtain an expeditious resolution for his client will have a most difficult time finding an adversary with either the interest or financial authority to settle the case on behalf of all defendants.

Cost Savings

Construction litigation involving multiple defendants and carriers tends to get resolved, at the earliest, on the courthouse steps, many years after the action was commenced and mountains of defense dollars have been incurred.

The savings in loss adjustment expenses (not to mention indemnity dollars) that can be realized through a wrap-up program versus a traditional insurance arrangement at a construction site are self-evident and significant. Instead of involving an army of insurers, attorneys, claims adjusters, underwriters, investigators, insurance brokers and risk management personnel in defense of the typical construction case, a wrap-up requires, in the vast majority of cases, one insurer, counsel, adjuster, broker, etc. All of the named defendants are insured under the same policy, with the same terms and conditions and limits of liability. Cross-claims are unnecessary as well as precluded under New York law.[11] Impleaders are also eliminated, since any other potentially responsible contractor is also insured under the wrap.[12]

Counsel and the carrier can formulate a defense and resolution strategy based upon the facts of the particular circumstances. If, for example, it is clear that the owner defendant or general contractor defendant faces Labor Law § 240 liability, the defense strategy may be to posture the matter for an early resolution via mediation, arbitration or some other ADR mechanism to get the case settled and closed—sooner rather than later. Since it is irrelevant in most wrap-up situations where Labor Law § 240 applies whether any of the other covered contractors may be solely or partially responsible for the injuries, a coordinated and streamlined defense of all the named defendants can be fashioned. Cross-claims, discovery and motion practice among them is substantially eliminated.

Conclusion

The bottom line is that a well administered and coordinated wrap-up program has the potential to save significant dollars in insurance costs as compared to traditional contractor-furnished insurance. In order to achieve these savings, however, there must be a well-structured implementation of the wrap-up at the inception of the project. Choosing an experienced insurance broker and carrier is crucial to the success of this endeavor. The success of the project will turn in large measure on the expertise employed in and attentiveness paid to the principal administrative functions—loss control, claims handling, premium computation, accurate application of contractors' experience modification factors, proper credits, retro calculations and, generally, close communications among the participants at the project site.

Endnotes

1. A third type of consolidated insurance program is the "rolling" wrap-up. A rolling wrap-up covers multiple sites under one program. The sites may be developed concurrently or in linear fashion. This program is desirable when either there exists multiple construction sites with a single source of funding, or where there are multiple smaller construction projects that individually would not be feasible for a wrap-up but collectively would be large enough to enjoy the benefits of a wrap-up program.
2. *Crawford v. Leimzeider*, 100 A.D.2d 568 (2d Dep't 1984).
3. *Kemp v. Lakelands Precast, Inc.*, 55 N.Y.2d 1032 (1982).
4. L. 1996, ch. 635, § 2.
5. *Id.* A "grave injury" is defined as: a. death; b. permanent and total loss of use or amputation of an arm, leg, hand or foot; c. paraplegia/quadriplegia; d. total and permanent blindness or deafness; e. permanent and severe facial disfigurement; f. brain injury resulting in permanent total disability; g. loss of multiple fingers or toes; h. loss of nose or an ear; and i. loss of index finger.
6. *Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577 (1998) (The Court of Appeals held that the Act applied prospectively to "actions by employees for on-the-job injuries against third parties filed after the effective date [9/10/96]." The Act preserves a third-party action against an employer ". . . based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." L. 1996, ch. 635, § 2.
7. 76 N.Y.2d 215 (1990).
8. *Continental Insurance Co. v. Commercial Union Insurance Co.*, 27 A.D.2d 333 (1st Dep't 1967).
9. *SSBSS Realty Corp. v. Public Service Mutual Ins. Co.*, 253 A.D.2d 583 (1st Dep't 1998); *cf. Jefferson Insurance Co. of New York v. Travelers Indemnity Co.*, 92 N.Y.2d 363 (1998).
10. *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281 (1993); *see also National Casualty Co. v. State Insurance Fund,* 216 A.D.2d 641 (1st Dep't 1996).
11. *Id.*
12. *Id.*

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Advanced Techniques for Clarifying Medical Evidence

By Benjamin B. Broome

I. Introduction

For as long as there have been trials, there has been demonstrative evidence. The more complex the issue, the more the need for assistance in presenting ideas, and rarely is there a type of case more complex for the layman than the medically oriented. Medical demonstrative evidence has improved tremendously over the past 10 to 20 years. Where once the attorney was forced to rely on a few models, educational charts, textbooks or chalkboard drawings, now software products, presentation hardware and professional illustrators are at hand to help communicate every issue involved in a case. Computers and, more recently, the Internet have made medical illustration and graphic solutions easier to locate and obtain, as well as reducing the time and expense required for their production. If any case involves issues that may be difficult to communicate during trial, today's attorney has no reason not to employ effective demonstrative evidence. A picture is worth a thousand words!

II. Do It Yourself Courtroom Presentations

Whether you prefer traditional printed and mounted exhibits or you have incorporated the use of electronic presentations, there are a few basic exhibits which can be created in-house with little or no expense. The first is an effective presentation of document evidence.

In most medically related cases, records, depositions and other documents will play a key role in your presentation. But we must remember that the presentation of the actual document is secondary to making a clear and persuasive point. Therefore, it is best to go beyond simply enlarging the document in total. It is often more effective to show the document with pertinent portions highlighted and enlarged. Draw attention to the crucial items contained within the document. This can be done in moments with a copy machine or the most simple computer software.

If you are lucky enough to have effective radiographic evidence a photographic enlargement can make presentations easier and more effective. Why struggle with a lightbox and small films, when any photo house can create print enlargements visible from across the room?

It is also recommended that your expert be allowed to highlight pertinent portions of the film with neon colored pens or to have such colorized films prepared professionally. This will focus the laymen on the issue at hand and prevent eyes from wandering to unimportant details.

Finally, PowerPoint presentations are my recommended presentation method. Similar to traditional slide shows, PowerPoint is an effective and easily crafted presentation option for any that are willing to invest a few hours in computer training and practice. Computers will never replace lawyers, but lawyers with computers soon will. I encourage you to check out opportunities to expand your computer skills or the skills of an assistant. You will find that an effective PowerPoint presentation can help you to organize documents, illustrations, radiographic evidence and even video in one carefully crafted presentation.

III. Options for Medical Illustration

Surely most trial attorneys involved in medically related litigation have at one time used textbook illustrations, educational charts or models to supplement a trial presentation. We all know the limitations of such tools, with them often being too broad and complex for the pertinent point to be made. Also, such products are far too often generic, showing only normal anatomy rather than the actual issues at hand. With some investment, custom-tailored medical illustrations can be created to your specifications illustrating your specific facts. A variety of companies are available which specialize in creating illustrations for courtroom use. While not necessary in all cases, custom illustrations are the best tool available to simplify complex subjects or dramatize medical cases.

Professional presentations can vary as widely as the types of cases. Simple charts, graphs and document services can enhance most presentations. Often actual illustrations or animations are required for effective communication. I suggest you research the various national providers or your local illustrators to see what is available and what is best for you. But, I would like to provide a bit of information about three types of computerized presentations.

A. Animations

There are a broad range of animation styles and options. Dramatic 3D animation, flexible 2D animation and many variations and hybrids can be employed to create a presentation that can communicate concepts and hold interest unlike any other tool. We are a television age, and people are accustomed to getting and believing information seen on screen. This makes both animation and video invaluable in many trial presentations.

Your provider can explain the value in depth, but I would say, as a general rule, that animation is best used to communicate issues dealing with motion. Where did something originate? How does it travel? Where does it go? What occurred along the way? These are the questions best answered by animation.

B. PowerPoint Presentations

I've discussed PowerPoint above. I will add here that, in the hands of a professional or skilled provider, PowerPoint can allow you to blend all your visuals in one simple-to-use presentation. Documents, illustrations, charts, graphs, video, and animation can all be organized in a step-by-step presentation organized well before trial.

C. Multimedia Presentations

Unlike PowerPoint, multimedia presentations are almost limitless in their flexibility. Multimedia can allow you to change direction and depart from planned presentations to adjust to sudden challenges or unforeseen avenues. I truly believe that multimedia will be the only form of presentation in the near future. I urge you to check out what is currently available in this regard and begin making plans to utilize the full power of the computerized courtroom that is rapidly approaching.

IV. Conclusion

Regardless of the type of presentation you select or whether you or a professional create the presentation, it is important to remember that all these options are only tools. They will be effective or wasteful depending on your use. As a general rule, I would offer two points of advice: 1) Find your focus before investing time or expense in demonstrative evidence. Know your key points and pursue them specifically. Determine if your goal is to educate or to persuade and craft your visuals to achieve that goal. And finally, utilize the laymen around you (spouse, assistants, or receptionist) to help you review your visuals. They will be more valuable than your professional and your expert in determining what is effective for the jury. 2) Support your expert. Make sure that your expert witness is involved in creating your visuals and that they will support his or her testimony. The expert will best communicate the basic issues if assistance is given through the demonstrative evidence. I have given a simple overview. I hope you will investigate your opportunities and take advantage of the tools and expertise that are available to today's trial attorney.

Benjamin B. Broome, M.A., is Medical Content Director at Medical Legal Art in Atlanta, GA.

Conduct by the Insurer That Can Lead to Coverage

By Kevin A. Lane, Frank V. Fontana and David J. Cummings

I. Introduction and Overview

There is a great deal of confusion over the separate and distinct roles involving the three basic principles and their application in the context of coverage issues and disputes: statutory preclusion (Insurance Law § 3420(d)), waiver and estoppel. The confusion seems to have arisen from misuse of the terms (courts referring to estoppel when waiver or preclusion is really the issue or vice versa). These doctrines are discussed in the Court of Appeals' decisions in *Zappone v. Home Insurance Co.*, and *Schiff v. Flack.*[1]

These doctrines can be summarized as follows: "The statute (3420(d)) . . . depends merely upon the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel. . . ."[2]

While each of these three principles affect the carrier's duty to deny coverage and to disclaim liability, they involve different applications and rely upon considerations of different factors. The following provides a brief overview of their genesis and the basic rationale for each principle.

A. Statutory Preclusion

- Created by Statute (Insurance Law § 3420(d)).
- Only Relevant to Accidents Involving Personal Injury or Death Occurring in New York.
- Only under Policies Delivered in New York or Issued for Delivery in New York.
- Strictly a Matter of Time!
- Requires Written Notice—ASAP.
- Applies to Defense of No Coverage by Reason of Exclusion.
- Cannot Create Coverage!

B. Waiver

- Governed by Common Law (i.e., Case Law).
- Involves a Release of Carrier's Rights.
- Knowledge and Intent of Insurer Are Key.
- Cannot Waive Defense of No Coverage by Reason of Exclusion.
- Cannot Create Coverage!

C. Estoppel

- Governed by Common Law (i.e., Case Law).
- Stops a Denial of Coverage.
- Prejudice to the Insured is the Key.
- Applies to Defense of No Coverage by Reason of Exclusion.
- Can Create Coverage!

The following discussion attempts to provide you with a working knowledge of these important and challenging aspects of insurance coverage. Since these principles all arise out of and relate to the carrier's duty to deny coverage and disclaim liability, that will be our starting point. Then, since the retention of counsel letter, the reservation of rights letter or the non-waiver agreement is often the first communication with the insured—although it does not discharge the carrier's basic duties—that becomes our next consideration. Finally, the key analysis then becomes the application of the above three principles. We hope this helps you in your future analysis and handling.

II. Duty to Deny Coverage and Disclaim Liability

A. Derived from Comparing Known/Alleged with Complaint

The carrier's duty to defend is derived from the allegations of the complaint and the terms of the policy. Where the complaint contains allegations that bring the claim even potentially within the policy's coverage, the carrier is obligated to defend.[3] However, there is no duty to defend if the carrier establishes that the complaint's allegations are solely and entirely within the policy exclusions and that the allegations, in toto, are subject to no other interpretation.[4] The carrier who disclaims based upon a policy exclusion has the burden of proving the applicability of the exclusion,[5] and the carrier who disclaims based on an insured's failure to satisfy a condition of coverage has the burden of proving the insured's material breach of a policy condition.[6] The insured, however, must first show there was a policy[7] and that it suffered a loss under the policy.[8] Where a carrier disclaims based on cancellation, the carrier has the burden of coming forward with proof of cancellation of the policy.[9]

There is no duty to deny coverage when the alleged insured does not have an insurance policy that is alleged to exist.[10] If there is no insurance contract, or

the contract was canceled prior to the accident, there is no requirement that the insurer deny coverage or otherwise respond to the claim.[11]

B. Separate and Distinct from Duty to Defend

The duty to deny coverage and disclaim liability is separate and distinct from the duty to defend.[12] It arises once a carrier has knowledge of the grounds to disclaim.[13] This is usually a question of fact, precluding summary judgment.[14] Although a significant amount of case law has developed concerning the obligation of a carrier to defend or deny coverage when the loss arises from an accident in New York State that resulted in bodily injury or death, to which Insurance Law § 3420(d) applies, it is unclear how those decisions are to be applied to losses that do not involve the statute.

Finally, where a complaint alleges a covered loss, but the carrier becomes aware of facts upon which it can deny any obligation to indemnify, the carrier must continue to defend the action but must issue a timely disclaimer of liability. The carrier cannot wait until the time that the plaintiff obtains a judgment, or serves an amended complaint within which the facts previously known by the carrier are asserted, to disclaim liability.[15]

C. Potential for Bad Faith

Even where a carrier is wrong as a matter of law in disclaiming, a carrier will not be liable for acting in bad faith since more than an arguable case of coverage responsibility must be shown before liability for bad faith may be imposed.[16] Under New York law, an insured who institutes a declaratory judgment action for coverage against his carrier cannot recover his legal expenses for that action, even if he prevails in obtaining coverage;[17] the carrier is liable for the cost of defending its insured in the underlying action for which the insured sought coverage and for the amount of recovery, if any, against the insured in that action.[18] A carrier, however, that institutes a declaratory judgment action against its insured, and loses, is liable for the reasonable legal fees and necessary costs incurred by its insured in defending the coverage action, as then the insured would have been placed in a defensive posture by the legal steps taken by its carrier in an effort to free itself from its policy obligations. The theory is that a carrier's responsibility to defend reaches the defense of any actions arising out of the occurrence, including those instituted by the carrier.[19]

III. Letter Advising of Retention of Counsel, Reservation of Rights Letters and Non-Waiver Agreements

A. Letter Advising of Carrier's Retention of Defense Counsel

A carrier's letter, advising the insured that it has retained counsel to represent the insured, constitutes an agreement with regard to the terms under which the carrier will assume the defense of the action.[20] Thus, a carrier should use this opportunity to reserve its rights under the policy or face a claim that it waived its right to contest coverage by conducting the defense of the insured.[21] However, at least one court has allowed a carrier who apparently sent an unrestricted retention of counsel letter to the insured to escape waiver where the carrier sent a follow-up letter two weeks later advising the insured that coverage had still not been confirmed.[22]

B. Non-Waiver Agreement and Reservation of Rights Letters

A reservation of rights letter basically reserves the carrier's rights under the policy. A non-waiver agreement signed by the carrier and the insured allows the carrier to investigate the loss without waiving its rights under the policy. However, neither a reservation of rights letter nor a non-waiver agreement has any relevance to the issue of whether the carrier has timely disclaimed liability or denied coverage in compliance with Insurance Law § 3420(d).[23] Thus, neither a reservation of rights letter nor a non-waiver agreement extends the time for notice of disclaimer or denial of coverage.[24] Instead, the reservation of rights letter and the non-waiver agreement would only be relevant if the insured claims the carrier waived its right to disclaim by investigating the claim or conducting the defense.[25]

A carrier, which has initially reserved its rights under a policy but agreed that its attorney should defend the case with the understanding that the question of liability should await the results of trial, is not required to provide a further reservation of rights letter when it appeals the judgment of the trial court.[26]

IV. Common Law Waiver

A. Definition

Waiver is the intentional relinquishment of a known right.[27] Courts have used the concept of waiver to avoid policy forfeiture due to an insured's failure to comply with policy conditions.[28] Where the dispute is between carriers, however, the doctrine may not apply.[29]

Waiver should not be presumed lightly, because of the consequences that it brings about.[30] Nonetheless, waiver can be based upon constructive as opposed to actual notice by a carrier.[31] In addition, the intent to abandon a policy defense can be shown by either direct or circumstantial proof.[32]

B. General Rule: Question of Fact

Generally, the issue of whether a carrier intended to abandon a defense to coverage is said to be a question of fact to be resolved at trial.[33] There are, however, a

number of cases that find that a carrier waived certain defenses as a matter of law.

It has been held that, when a carrier issues a denial/disclaimer letter and fails to include the failure of an insured to comply with certain policy conditions such as timely notice,[34] the duty to forward suit papers,[35] obtain consent to settle,[36] cooperate with carrier,[37] or exclusions from coverage,[38] the carrier will be found to have waived those rights,[39] provided that the grounds were known, or should have been known, by the carrier.[40]

C. Non-Written Conduct May Result in Waiver

An insurer may be found to have waived certain rights to disclaim by engaging in certain non-written conduct.[41] It has been held that, where a carrier participated in the arbitration of a property damage claim on the part of the insured, the carrier was found to have waived the right to disclaim.[42] Furthermore, where a carrier takes no action in the adjudication of a lawsuit for 3½ years, it waived the right to get involved in the appeal.[43] Similarly, where a carrier takes action that was inconsistent with non-coverage, it will be found to have waived the coverage issue.[44]

D. Waiver Cannot Create Coverage

Waiver, however, cannot be used to create coverage where none previously existed. Waiver cannot expand an insuring clause or constrict the exceptions to such a clause. Thus, where the issue is whether coverage exists, or whether the risk is beyond the coverage obtained, a carrier will not be prevented from disclaiming through waiver.[45]

For example, it has been held that waiver does not apply to a carrier who fails to include in its denial letter the ground that the policy was canceled before the date of the accident,[46] that the person seeking coverage was not a covered person,[47] that a particular risk was excluded from the coverage of the policy, that coverage was not available because of the completed operations hazard exclusion[48] or the products hazard exclusion,[49] or that the insured committed a material misrepresentation.[50]

E. Not All Conduct on the Part of the Carrier Will Lead to Waiver

It has been held that a carrier may send the insured a request for details on a claim while advising that it is still investigating the loss and will not be subjected to waiver by such conduct.[51] In addition, when a carrier advises an insured that the insured will be personally liable for any liability for intentional conduct, the carrier has preserved its right to deny its obligation to provide a defense to its insured for that claim.[52] One court appears to have held that a carrier escapes the application of waiver if, two weeks after sending the insured a letter advising that defense counsel had been retained, it sends out a letter advising that coverage had still not been confirmed.[53] A carrier's waiver of a certain policy exclusion in one case will not carry over to another case involving the insured.[54]

V. Preclusion (Insurance Law § 3420(d))

A. History

Before April 21, 1959, a carrier only had to deal with the doctrines of common law waiver and equitable estoppel when seeking to deny or disclaim. Effective April 21, 1959, an additional doctrine came into play with the enactment of Insurance Law § 167(8). This statute differed from common-law waiver and equitable estoppel as it prevented a carrier from asserting certain grounds of denial or disclaimer because of the mere passage of time; it required neither an act on the part of the carrier nor prejudice on the part of the insured.[55] This is still the case. Because of this difference in requirements, it seems best to discuss the impact of the statute in a way that does not confuse it with the other two doctrines. Thus, we will refer to this impact as "preclusion."

When Insurance Law § 167(8) was first enacted, it applied only to motor vehicle accidents that occurred in New York State and resulted in bodily injury or wrongful death. The goal with its passage was to avoid prejudice to the insured, the injured party and the MVAIC. It was not intended to create an added source of indemnification.[56] Effective October 1975, the statute was amended to also include all other accidents that occur in New York State and result in either bodily injury or wrongful death.[57] In 1984, this statute was renumbered as Insurance Law § 3420(d), but no substantive changes were made to the statute.

B. Policies to Which Insurance Law § 3420(d) Applies

Insurance Law § 3420 applies to liability policies that are issued or delivered in the state of New York. Not all such policies are included, however. Insurance Law § 3420(i) provides that "the kinds of insurances set forth in Insurance Law § 2117(b)(3) as well as certain workers' compensation policies, are not subject to the provisions of Insurance Law § 3420." Insurance Law § 2117(b)(3) delineates certain kinds of marine insurance policies.[58] The statute does apply to both primary and excess policies.[59]

C. Losses to Which Insurance Law § 3420(d) Applies

Since October 1975, Insurance Law § 3420(d) has applied to most policies providing coverage for liability arising out of accidents that occur in New York State, and result in either bodily injury or wrongful death.[60]

Thus, despite an occasional case to the contrary, Insurance Law § 3420(d) does not apply to property damage claims.[61]

D. Requisites and Impact of Insurance Law § 3420(d)

Insofar as the duty to deny coverage or disclaim liability is concerned, Insurance Law § 3420(d) provides that a carrier must deny coverage or disclaim liability by giving "written notice as soon as is reasonably possible." A carrier which fails to give such notice is precluded[62] from denying coverage or disclaiming liability on certain types of grounds: policy conditions and policy exclusions.[63] An insured does not have to show prejudice to invoke this statutory preclusion.[64] Thus, it is distinct from equitable estoppel, which requires prejudice on the part of the insured,[65] and from waiver, which requires some act on the part of the carrier.

E. When Does Time to Deny or Disclaim Begin to Run

A carrier must give written notice of denial/disclaimer as soon as reasonably possible after it learns of the grounds upon which to deny or disclaim.[66] Neither the wording of the statute nor case law supports the contention that when a carrier has knowledge of the facts that call for a denial or disclaimer before the initiation of a lawsuit, it may wait for the service of a summons and complaint before denying/disclaiming. Indeed, since the duty to disclaim is separate from the duty to defend,[67] such conduct would be extremely questionable. An excess carrier must deny/disclaim once it has a basis to deny/disclaim and there is a reasonable likelihood that its coverage will be reached. It cannot wait for the entry of a judgment against the insured.[68]

F. Written Notice Must Be Given to . . .

A denial/disclaimer letter must be sent to the insured, the injured party and all other claimants.[69]

In *Hartford Acc. & Indemnity Co. v. J.J. Wicks, Inc.*[70] the Fourth Department held in favor of its disclaimer against its insured. However, Hartford failed to notify the injured person and a co-defendant hospital where the court, citing subdivision (d) of § 3420 of the Insurance Law, indicated that Hartford failed to give written notice of disclaimer, "as soon as it is reasonably possible to the injured person and any other claimant."

It has been held that giving notice to the insured does not equal giving notice to the injured party.[71] A prime example of not giving valid notice of disclaimer is when an insurance company only notifies the insured owner of a motor vehicle, not the defendant driver.[72] Again, citing Insurance Law § 3420(d), the Appellate Division Second Department rejected the carrier's contention that the statute required notice only to the named insured.

There is a line of cases indicating some leniency in identifying precisely to whom the denial/disclaimer letter must be sent. In *Miranda v. Aetna Casualty & Surety Co.*,[73] the insurer sent a disclaimer letter to its insured. A copy of this letter was sent to the injured plaintiff's attorney. The court held that this carbon copy satisfied the statutory requirement.[74]

Where a party is represented by an attorney, a disclaimer letter sent to the attorney need not be sent to the party.[75] Where the disclaimer is sent to an insured who also happens to be the claimant's *guardian ad litem*, a disclaimer is valid.[76]

There have also been attempts to invalidate a denial/disclaimer letter by attacking the validity of the sender. However, a letter from counsel retained by a carrier has been held to be sufficient.[77]

G. Required Content of Denial/Disclaimer Letters

The general rule regarding content is delineated by the Court of Appeals in *General Accident v. Cirucci.*[78] It was stated that a notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. This uncertainty could prejudice the claimant's ability to ultimately obtain recovery. In addition, the insurer's responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome upon the insurer, being highly experienced and sophisticated in such matters.

A letter misquoting the precise language of the exclusion will be excused, if it provided the requisite specificity.[79] A carrier may not disclaim pursuant to Insurance Law § 3420(a)(3) merely because the notice came from the injured party rather than the insured.[80] However, in some instances where both an injured party and an insured have failed to give timely notice, the first notice by the insured could be found to be superfluous.[81]

H. How Much Time Is Reasonable?

Reasonableness is the standard by which insurers actions are judged and reasonableness is a question of fact determined by the circumstances of the case which require an insurer to take more or less time to make, complete and act diligently on an investigation.[82] The Court of Appeals has held that where no explanation is offered by an insurance company for a delay in disclaiming of as little as two months, the two-month delay is unreasonable as a matter of law.[83]

The reasonableness of any delay in disclaiming must be judged from the time that the insurer is aware of sufficient facts to issue a disclaimer.[84] If a carrier has delayed denying/disclaiming, then the carrier has the burden of proof for excusing its delay.

An explanation which has been found to be an issue of fact is the carrier's assertion that its postponement of its decision to disclaim coverage pending receipt of the report of its reviewing agent was reasonable.[85] Evidentiary proof must be submitted. An attorney's affidavit that an investigation was made difficult due to police investigation of an incident was found not to be a justifiable excuse. The Court indicated that an affidavit from someone with personal knowledge of the investigation was required.[86]

It is quite difficult for an insurer to explain away failure to disclaim on late notice. When a carrier receives notice of an incident, it is immediately aware of the extent of delay. A case in point is *Nova Casualty Co. v. Charbonneau Roofing Inc*.[87] The carrier offered all sorts of excuses, but the Court indicated that none of the excuses applied to failure to disclaim for late notice.

A classic example of the difficulties in determining the ground on which to disclaim is found in *Aetna Casualty & Surety Co. v. Brice*.[88] This case involved an accident with fatalities, and the investigation faced many obstacles. The persons in both cars were dead. Questions arose as to who drove the vehicles. Intoxication was also an issue, as well as whether an automobile was involved in a speed race. They were each subject to legitimate review of the insurance company in its determination as to whether or not to disclaim. The evidence also revealed that the carrier had difficulty obtaining some of the evidence in resolving some of the fact questions.

In *Allstate v. Moon*,[89] the Court would have adhered to the two-month failure to disclaim rule propounded by *Hartford v. Nassau*[90] but accepted Allstate's excuse in justifying its two-month delay, namely that it had to verify coverage and act upon its verification. The reasonableness of the time taken by Allstate constituted a factual question which could not be resolved on a motion for summary judgment. Another factual scenario which created issues was when an insurance company attempted to interview an insured, but found that she had just become a mother. They waited for a more convenient time, and this was not found to be unreasonable.[91]

I. What a Carrier Can Be Precluded From Raising

As the case with common law waiver, preclusion will not prevent a carrier from denying/disclaiming when there is no coverage in place.[92] In 1982, the Court of Appeals held that preclusion will come into play when a denial/disclaimer is based either on the failure of an insured to comply with conditions of the policy, such as the duty of an insured to give timely notice or to cooperate with the carrier, or when, while the policy would otherwise provide coverage for the loss, the circumstances of the particular accident call an exclusion into play.[93] This latter situation, referred to as "no coverage by reason of exclusion," occurs in situations such as where the plaintiff was hurt during his employment with the insured (workers' compensation or employee injury exclusion) or where the plaintiff was injured while a private passenger in a motor vehicle which was being used as a public conveyance by the insured.

The Court of Appeals also held that preclusion will not be applied when there was "no coverage by lack of inclusion." It identified two ways in which this can occur: first, where there was no contract of insurance between the carrier and both the person seeking coverage and the vehicle involved in the accident; and second, while there may have been an insurance policy in effect at one time, the policy was canceled by the carrier or terminated by the insured before the underlying accident occurred.

VI. Estoppel

A. Definition

Estoppel is an equitable principle that will prevent one from denying his own expressed or implied admission which has been accepted and acted upon by another in good faith.[94] An insurance carrier will be estopped from denying coverage to an insured if, with knowledge of a defense to coverage, it continues its representation of the insured for an unreasonable period of time.[95] An estoppel will not lie, however, unless the insured can establish prejudice as a result of the carrier's actions.[96]

B. Elements

Although prejudice is the critical factor in the estoppel analysis, there are several formal elements of estoppel. With respect to the estopped party, the following factors are considered:

1. conduct which amounts to a false representation or concealment of material facts;
2. intention that such conduct will be acted upon by the other party; and
3. knowledge of the real facts.

With respect to the party asserting estoppel, the following factors are considered:

1. lack of knowledge of the true facts;
2. reliance upon other party's conduct; and
3. prejudicial change in position.[97]

C. Estoppel Can Create Coverage

Unlike waiver and preclusion, estoppel can reach beyond cases where a carrier is prevented from asserting valid exclusions or defenses to coverage, it can also create coverage where none previously existed.[98] A decision from the Third Department demonstrates this. The carrier issued a certificate of insurance that indicated that the general contractor was an additional insured, the carrier was estopped from denying coverage to the general contractor since the general contractor had reasonably relied on the revised certificate in permitting the subcontractor to proceed with the work and in electing not to obtain its own coverage.[99] Despite the carrier's assertions, coverage was created because the general contractor detrimentally relied upon the certificate of insurance. Although a number of other appellate division cases have held that coverage cannot be created by estoppel,[100] those decisions appear to be in conflict with the decisions of the Court of Appeals that have addressed this issue.[101]

Some of the more frequently cited decisions on estoppel from the Court of Appeals are presented in a chart (Appendix A). A review of this material reveals that estoppel can indeed apply where waiver will not apply. While we have not found a case that squarely states that estoppel can create coverage, these decisions do certainly imply it.

In *Hanover v. Eggelton*,[102] the Court of Appeals, when it affirmed on opinion below, seemed to say that, if the insured had reasonably relied to her detriment on the erroneously issued "proof of insurance form," then estoppel would have applied. In *Schiff v. Flack*,[103] the court found that, while waiver could not be used to provide coverage to the insured, since the loss did not fall within the insuring agreement, estoppel would not be applied to the "defense of non-coverage" because the insured had not been prejudiced where the insurer has at all times denied liability to indemnify and refused to defend.

In earlier decisions, the Court of Appeals had held that estoppel would be invoked against a carrier attempting to disclaim based upon non-liability under the policy when it defends an action, on the insured's behalf, with knowledge of facts constituting a defense to the coverage of the policy.[104] Thus, at least when the carrier is dealing with an insured, it appears that the Court of Appeals is willing to apply estoppel to create coverage where it refuses to do so under either waiver or preclusion (Insurance Law § 3420(d)).

D. Prejudice

Whether an insured has been prejudiced by a carrier's delay in disclaiming or by the effects of the carrier's exclusive control of the defense is normally a question of fact.[105] The following factors will typically be examined by a court in determining whether a disclaimer prejudices an insured who has been represented by counsel selected by the carrier:

1. Does the insured have an adequate time to prepare a defense;
2. Does the insured have a reasonable opportunity to negotiate a settlement; and
3. Does the insured have a reasonable opportunity to gather and preserve evidence and institute certain pre-trial procedures.[106]

It is the insured's burden to establish prejudice. Prejudice does not flow from mere delay. Instead, the real issue is whether the carrier has so controlled the defense that it would be unfair to now abandon the insured.[107] The mere fact that an insurer has provided for the defense of the insured, without more, does not establish the requisite prejudice.[108]

1. Prejudice as a Matter of Law

Understandably, the longer a carrier defends its insured before disclaiming, the greater the chance prejudice will be established. Thus, the Court of Appeals in New York has held that an insured is presumed to have been prejudiced when a carrier retains control of the defense of the lawsuit through a final judgment or settlement.[109] Prejudice as a matter of law has also been found: established as a matter of law when carrier controlled defense for four years;[110] carrier controlled defense for seven months and unreasonably delayed in bringing declaratory judgment action;[111] carrier controlled defense for two years and case was placed on trial calendar;[112] insurer attempted to deny coverage five years after cause of action accrued and after jury selection took place;[113] carrier controlled defense for nine months and waited seven more months to commence declaratory judgment action;[114] and carrier was estopped where it undertook defense without protest or reservation, drew an answer by its own counsel, prepared the case for trial, subpoenaed witnesses, tried the case without inviting the insured to participate in the defense, refused to compromise or settle the case which resulted in a verdict for the plaintiff, did not appeal or definitely declined an appeal within the time period after conferencing with the insured which resulted in the insured's being ultimately obliged to pay the judgment.[115] The Fourth Department reached a contrary decision in 1989. There, the court held that because coverage could not be created by estoppel, the fact that the carrier defended an action for one and a half years would not prevent it from denying or disclaiming coverage.[116] Indeed, three of the four appellate divisions (the First, Second and Fourth Departments) appear to adhere, and we believe erroneously (or, at the very least, inconsistent with the rulings of the Court of

Appeals on the subject), to the rule that coverage cannot be created by estoppel.

A carrier was also estopped from denying coverage on a second burglary where it had 79 days between first burglary and second burglary to inspect premises and inform insured of its non-compliance with policy's protective device; insured was prejudiced, because had the carrier acted promptly on plaintiff's first claim, plaintiff would have had the opportunity to secure coverage elsewhere to meet the policy requirements.[117]

2. Prejudice as a Factual Question

Where a liability carrier disclaimed coverage two years after the carrier undertook the defense, a factual question existed as to whether a town police officer was prejudiced, where police officer had retained independent counsel who raised the coverage issue in response to the carrier's counsel's motion to withdraw; Special Term advised the police officer to bring a separate action against the carrier to resolve the issue; but where the police officer failed to bring a separate action against the carrier until the action was settled by all the other defendants.[118]

Whether plaintiff was prejudiced by carrier's delay in disclaiming or by effects of carrier's exclusive control of the early stages of the litigation are factual issues which may not be resolved on a motion for summary judgment. For example, a summons and complaint were forwarded by the plaintiff's attorney to a carrier on June 18, 1980 and the carrier retained a law firm to defend plaintiff. The law firm served an answer and a demand for a bill of particulars, commenced a third-party action, accepted service of a third-party complaint, accepted a notice of motion to consolidate the two actions, and continued to represent the plaintiff until August 26, 1980 when the carrier disclaimed.[119] This scenario presented factual issues.

3. No Prejudice

A typical situation where prejudice is normally not established is where a carrier is compelled to defend its insured because some of the allegations in a complaint are covered by the policy. In these situations, the carrier is not voluntarily defending with knowledge of a basis to disclaim. Instead, the defense is mandated. Prejudice does not flow from a later rescinding of the defense when it becomes clear that none of the remaining allegations are covered.

Situations where no prejudice has been found include the following: carrier not estopped from asserting defense that policy was canceled before the accident, a little over a month after the carrier had communicated to the injured party that he refrain from suing until the carrier could investigate the case and examine the plaintiff's vehicle; the court held these actions did not mislead the injured party to his prejudice;[120] carrier was not estopped from disclaiming on the basis that the policy did not provide completed operations coverage but was limited to accidents occurring during the progress of work where it delayed for 42 days while it investigated the project's completion date and obtained a statement of insured's foreman; where there had been no change in insured's position during this time period;[121] carrier's agent's statement in conversation with insured's offices that carrier "is going with the case and is going to take care of it" did not so mislead the insured that the carrier was not estopped from asserting its rights when carrier later discovered that policy did not provide coverage and promptly brought this information to the insured's attention.[122] Further, when a complaint asserts covered and non-covered causes of action, the carrier has a duty to provide a defense to the entire claim. One court refused to find prejudice where the carrier used counsel of its own, rather than its insureds' choice, to defend the claim.[123] This case is significant because the decision does not discuss whether the carrier was obligated to notify the insured of his possible right to obtain independent counsel.

A troublesome situation does indeed arise when the complaint alleges both covered and non-covered causes of action. Under this scenario, the carrier must both provide a defense for the entire claim and timely issue a limited disclaimer of liability letter setting forth the grounds upon which it will not be obligated to indemnify the insured in the event that the plaintiff prevails on the non-covered cause of action. Depending upon the particular allegations in the complaint and provisions of the policy, this may or may not result in a conflict of interest on the part of the attorney retained to defend that action, and therefore entitle the insured to counsel of its choice.

Suppose the insured is not aware of this right to have independent counsel? Should the carrier alert the insured of the conflict and ask for the name of counsel of the insured's choice, or ignore the conflict and retain its own counsel for the insured? Each option brings along its own risks. Insofar as estoppel is concerned, the carrier may be facing an argument that its continued control of the defense, even when it has promptly issued a partial disclaimer, prejudiced the insured and therefore should estop the carrier from being able to avoid liability on the non-covered ground. This would seem to make sense, especially since an "unsophisticated insured" could not be expected to know it had such a right.

Surprisingly, we have found little case law on this point. The decision of the Court of Appeals in *O'Dowd v. American Surety*[124] appears to indicate that a timely reservation of rights letter will allow the carrier to con-

tinue to defend the action. There is, however, no discussion of the conflict of interest issue. This case also holds that a question on estoppel will arise if the reservation of rights letter is tardy. Thus, retaining either house or usual counsel may result in a problem down the road for the carrier. Perhaps a solution, admittedly untested, is to retain house or independent counsel, but at the same time advise the insured that it can have its own counsel substituted if it so chooses.

Silence on the part of a carrier may not be enough of an act upon which to base prejudice. For example, a passenger, injured in a vehicle allegedly insured by a carrier, gave notice of the claim to the carrier. During the arbitration, the carrier claimed that it did not insure the vehicle. Although the time within which the passenger could assert a claim against the MVAIC had lapsed, the carrier was not estopped. The court reasoned that the passenger could not have reasonably relied upon the silence of the carrier in failing to file a claim with the MVAIC.[125] This is simply an application of the rule that where there is no coverage in place, there is no duty to deny.

VI. Conclusion

Three distinct doctrines (Insurance Law § 3420(d), common law waiver, and equitable estoppel) must be analyzed whenever a coverage question is being evaluated. Each of these doctrines has it own requirements and impact. While Insurance Law § 3420(d) and common law waiver cannot create coverage, we do not believe that the same holds true with respect to equitable estoppel.

Much of the confusion in dealing with this area of the law comes about because of an apparent lack of attention, by both the courts and counsel, to the labels that are placed upon the different lines of analysis. We believe that this situation can be remedied by referring to waiver as waiver, estoppel as estoppel and Insurance Law § 3420(d) as preclusion. A generic phrase that could be used when discussing all three doctrines is "prevented," since that may well be the ultimate outcome for the unfortunate carrier that does not understand or fails to follow these basic principles affecting its duty to deny coverage and disclaim liability.

Endnotes

1. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Albert J. Schiff Assoc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980).
2. *Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 317 N.Y.S.2d 309, 314 (1970).
3. *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39 (2d Cir. 1991); *City of Johnstown v. Bankers Std. Ins. Co.*, 877 F.2d 1146, (2d Cir. 1989). *But see Federal Ins. Co. v. Cablevision*, 637 F.Supp. 1568, 1577 (E.D.N.Y. 1986) ("while the complaint might suggest that there may be facts giving rise to covered claims, such claims simply are not alleged is this complaint, and, under New York law, this court may not recast the pleadings in order to find a claim covered by [the] policy"); *Village of Newark v. Pepco Contractors*, 99 A.D.2d 661, 472 N.Y.S.2d 66 at 67 (4th Dep't 1984), *aff'd*, 62 N.Y.2d 772, 477 N.Y.S.2d 325 (1984) ("Although the duty to defend extends to a cause of action in which facts are alleged within the coverage of the policy, an insured may not, by use of a "shot-gun" allegation, create a duty to defend beyond that which was anticipated by the parties when they entered into the policy contract"); *Warrensburg Board & Paper Corp. v. Unigard Mut. Cas. Co.*, 143 A.D.2d 602, 533 N.Y.S.2d 422 (1st Dep't 1988) ("mere speculation as to the possibility that additional facts later may be developed" will not trigger a duty to defend).
4. *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39 (2d Cir. 1991); *City of Johnstown v. Bankers Std. Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989); *Brooklyn Law School v. Aetna Cas & Sur. Co.*, 849 F.2d 788 (2d Cir. 1988).
5. *Jakobson Shipyard, Inc. v. Aetna Cas. and Sur. Co.*, 961 F.2d 387 (2d Cir. 1992); *Servidone Constr. Corp. v. Security Ins. Co.*, 64 N.Y.2d 419, 488 N.Y.S.2d 139 (1985).
6. *Garcia v. Abrams*, 101 A.D.2d 601, 471 N.Y.S.2d 161 (3d Dep't 1984).
7. *Emons Industries Inc. v. Liberty Mut. Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982).
8. *Jakobson Shipyard, Inc. v. Aetna Cas. and Sur. Co.*, 961 F.2d 387 (2d Cir. 1992).
9. *Banner Cas. Co. v. De La Torre*, 72 A.D.2d 573, 420 N.Y.S.2d 940 (2d Dep't 1979).
10. *Aetna Cas. & Sur. Co. v. Rodriguez*, 102 A.D.2d 744, 476 N.Y.S.2d 874 (1st Dep't 1984).
11. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Aetna Cas. & Sur. Co. v. Rodriguez*, 102 A.D.2d 744, 476 N.Y.S.2d 879 (1st Dep't 1984).
12. *Goldberg v. Lumber Mut. Cas. Ins. Co. of N.Y.*, 297 N.Y. 148 (1948); *International Paper Co. v. Continental Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974); *Adams v. Perry's Place*, 168 A.D.2d 932, 564 N.Y.S.2d 1019 (4th Dep't 1990); *Erlich v. Aetna Cas. & Sur. Co.*, 95 A.D.2d 936, 463 N.Y.S.2d 934 (3d Dep't 1983); *Foremost Ins. Co. v. Rios*, 85 A.D.2d 677, 445 N.Y.S.2d 511 (2d Dep't 1981); *Galpern v. General Motors Corp.*, 102 Misc. 2d 975, 425 N.Y.S.2d 1008 (Civ. Ct., N.Y. Co. 1980).
13. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *Adams v. Perry's Place*, 168 A.D.2d 932 564 N.Y.S.2d 1019 (4th Dep't 1990).
14. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d (1979); *Security Ins. Group v. Priestly*, 61 A.D.2d 795, 401 N.Y.S.2d 860 (2d Dep't 1978).
15. *Foremost v. Rios*, 85 A.D.2d 677, 445 N.Y.S.2d 511 (2d Dep't 1981).
16. *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 334 N.Y.S.2d 601 (1972).
17. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 21, 416 N.Y.S.2d 559 (1979); *Johnson v. General Mutual Ins. Co.*, 24 N.Y.2d 42, 298 N.Y.S.2d 937 (1969); *Doyle v. Allstate Ins. Co.*, 1 N.Y.2d 439, 154 N.Y.S.2d 10 (1956).
18. *Gordon v. Nationwide Mutual Ins. Co.*, 30 A.D.2d 427, 334 N.Y.S.2d 601 (1972).
19. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 21, 416 N.Y.S.2d 559 (1979).
20. *Allstate Ins. Co. v. Colonial Realty*, 121 Misc. 2d 640, 468 N.Y.S.2d 800 (Sup. Ct., Kings Co. 1983).
21. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979).
22. *Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.*, 822 F.2d 267 (2d Cir. 1987).

23. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *U.S. Liability Ins. Co. v. Staten Island Hospital*, 162 A.D.2d 445, 556 N.Y.S.2d 153 (2d Dep't 1990); *Progressive Cas. Ins. Co. v. Conklin*, 123 A.D.2d 6 (3d Dep't 1986); *Allstate Ins. Co. v. Moon*, 89 A.D.2d 804, 453 N.Y.S.2d 467 (4th Dep't 1982); *Regional Traffic Service, Inc. v. Kemper Ins. Cos.*, 73 A.D.2d 1036, 425 N.Y.S.2d 400 (4th Dep't 1980); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 136, 465 N.Y.S.2d 136 (Sup. Ct., Sullivan Co. 1983).

24. *Greater New York Sav. Bank v. Travelers*, 173 A.D.2d 521, 570 N.Y.S.2d 122 (2d Dep't 1991); *Kasson & Keller, Inc. v. Centennial Ins. Co.*, 359 N.Y.S.2d 760 (Sup. Ct., Montgomery Co. 1974).

25. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *Allstate Ins. Co. v. Gross*, 21 N.Y.2d 267, 317 N.Y.S.2d 309 (1970); *Long Island Ins. Co. v. Graziano*, 64 A.D.2d 944, 408 N.Y.S.2d 145 (2d Dep't 1978).

26. *Frank Knauss, Inc. v. Indemnity Ins. Co.*, 270 N.Y. 211 (1936).

27. *Lone Star Indust., Inc. v. Liberty Mutual Ins. Co.*, 689 F. Supp. 329 (S.D.N.Y. 1988); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988) (citing 5 Williston on Contracts 3d sec. 696, 697, pp. 338-340); *Spatz v. Aetna Cas. and Sur. Co.*, 36 Misc. 2d 950, 237 N.Y.S.2d 133 (N.Y. Co. 1962).

28. *Prudential Ins. Co. v. Brown*, 215 N.Y.S.2d 652 (Westchester Co., 1961) (citing 16 Appleman, Insurance Law and Practice, sec. 9081, pp. 594-599 and 3 Couch, Cyclopedia of Insurance Law, sec.. 690, pp. 2288-2284); *New England Mutual Life Ins. Co. v. Markman*, 652 F. Supp. 1097 (E.D.N.Y. 1987).

29. *Travelers Indem. Co. v. Republic Ins. Co.*, 70 Misc. 2d 208, 333 N.Y.S.2d 303 (New York City Civ. Ct., 1972).

30. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

31. *Luria Bros. & Co., Inc. v. Alliance Assurance Co., Ltd.*, 780 F.2d 1082 (2d Cir. 1986).

32. *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *Powers Chemco Inc. v. Federal Insurance Co.*, 122 A.D.2d 203, 504 N.Y.S.2d 738 (2d Dep't 1980).

33. *Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.*, 822 F.2d 267 (2d Dep't 1986); *Reliance Ins. Co. v. Daly*, 38 A.D.2d 715, 329 N.Y.S.2d 504 (2d Cir. 1987).

34. *General Accident v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979); *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *Appell v. Liberty Mutual Ins. Co.*, 22 A.D.2d 906, 255 N.Y.S.2d 545 (2d Dep't 1964); *Elmuccio v. Allstate Ins. Co.*, 149 A.D.2d 653, 540 N.Y.S.2d 465 (2d Dep't 1989); *Heen & Flint Assoc. v. Travelers Indem. Co.*, 93 Misc. 2d 1, 400 N.Y.S.2d 994 (Monroe Co. 1977). But, insured must show prejudice: *Bleckner v. General Accident*, 713 F. Supp. 642 (S.D.N.Y. 1984).

35. *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *In re Allstate Ins. Co. (Zenaty)*, 174 A.D.2d 832, 570 N.Y.S.2d 761 (3d Dep't 1991).

36. *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989).

37. *Allstate v. Moon*, 89 A.D.2d 804, 453 N.Y.S.2d 467 (4th Dep't 1982); *Fabian v. Motor Veh. Acc. Indemnity Corp.*, 111 A.D.2d 366, 489 N.Y.S.2d 581 (2d Dep't 1985); *Olenick v. Government Employees Ins. Co.*, 68 Misc. 2d 32, 328 N.Y.S.2d 50 (Nassau Co. 1971).

38. *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989). *But see Herbil Holding Co. v. Commonwealth Land Title Ins. Co.*, 183 A.D.2d 219, 590 N.Y.S.2d 512 (2d Dep't 1992) (in which insurer was not estopped where insured could not show prejudice).

39. *Government Employees Ins. Co. v. Cusi*, 163 A.D.2d 918, 558 N.Y.S.2d 430 (4th Dep't 1990); *Powers Chemco Inc. v. Federal Insurance Co.*, 122 A.D.2d 203, 504 N.Y.S.2d 738 (2d Dep't 1980); *In re Allstate Ins. v. Flammenbaum*, 69 Misc. 2d 32, 308 N.Y.S.2d 447 (N.Y. Co. 1970).

40. *Luria Bros. & Co., Inc. v. Alliance Assurance Co., Ltd.*, 780 F.2d 1082 (2d Cir. 1986); *Guberman v. William Penn Life Ins. Co. of N.Y.*, 146 A.D.2d 8, 538 N.Y.S.2d 571 (2d Dep't 1989); *Walsh v. Prudential Ins. Co.*, 101 A.D.2d 988, 477 N.Y.S.2d 473, *aff'd*, 64 N.Y.2d 1053, 489 N.Y.S.2d 902 (1984); *Powers Chemco Inc. v. Federal Insurance Co.*, 122 A.D.2d 203, 504 N.Y.S.2d 738 (2d Dep't 1980). *But see Whiting Corp. v. Home Ins. Co.*, 516 F. Supp. 643 (S.D.N.Y. 1981) (holding that initial assertion of one policy defense does not waive an insuror's right to rely on other portions of the policy).

41. *Graziane v. National Surety Corp.*, 102 A.D.2d 950, 477 N.Y.S.2d 813 (3d Dep't 1984); *Frankart Distributor's Inc. v. Federal Ins. Co.*, 616 F. Supp. 589 (S.D.N.Y. 1985); *Whiting Corp. v. Home Ins. Co.*, 516 F. Supp. 643 (S.D.N.Y. 1981); *Albert J. Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980); *Donato v. City of N.Y.*, 156 A.D.2d 505, 548 N.Y.S.2d 622 (1st Dep't 1989); *Young v. Sherman*, 197 A.D.2d 450, 602 N.Y.S.2d 622 (1st Dep't 1993) (holding that where excess insuror advised insured it would cover losses above $100,000, it could not later contend that primary policy of $250,000 was required); *Caprari v. Hartford Acc. & Indem. Co.*, 69 Misc. 2d 354, 330 N.Y.S.2d 206 (Sup. Ct., Broome Co. 1972) (discussing estoppel).

42. *Government Employees Ins. Co. v. CUSI*, 163 A.D.2d 918, 558 N.Y.S.2d 430 (4th Dep't 1990).

43. *Rajchandra Corp. v. Title Guar. Co.*, 163 A.D.2d 765, 558 N.Y.S.2d 1001 (3d Dep't 1990). *See also Dryden Mutual Ins. Co. v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 781 (3d Dep't 1989) (delay of seven months); *But see also Tantillo v. USF&G*, 155 A.D.2d 970, 547 N.Y.S.2d 781 (4th Dep't 1989) (no liability to defend even though "appreciable period of time" had elapsed before disclaimer).

44. *Frankart Distributor's Inc. v. Federal Ins. Co.*, 616 F. Supp. 589 (S.D.N.Y. 1985); *Whiting Corp. v. Home Ins. Co.*, 516 F. Supp. 643 (S.D.N.Y. 1981); *Albert J. Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980); *Donato v. City of N.Y.*, 156 A.D.2d 505, 548 N.Y.S.2d 622 (1st Dep't 1989); *In re Allstate Ins. v. Flaumenbaum*, 69 Misc. 2d 32; 308 N.Y.S.2d 447 (Sup. Ct., N.Y. Co. 1970).

45. The primary case for this principle is *Schiff Assoc., Inc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980), (holding that reliance on policy exclusions in a denial letter did not waive coverage defenses not expressed in the denial letter.) Another good case discussing this distinction is *Van Wyck Associates v. St. Paul Fire & Marine Ins. Co.*, 115 Misc. 2d 447, 454 N.Y.S.2d 266, *aff'd*, 95 A.D.2d 989, 464 N.Y.S.2d 266 (2d Dep't 1982); Given the fundamental nature of the concept, authority is extensive: *Frankart Distributor's Inc. v. Federal Ins. Co.*, 616 F. Supp. 589 (S.D.N.Y. 1985); *Fogelson v. Home Ins. Co.*, 129 A.D.2d 346, 514 N.Y.S.2d 346 (1st Dep't 1987); *Progressive Cas. Ins. Co. v. Conklin*, 123 A.D.2d 6 (3d Dep't 1984); *Lehman v. Engle*, 97 A.D.2d 675 469 N.Y.S.2d 168 (3d Dep't 1983); *Drew Chemical Corp. v. Fidelity & Cas. Co.*, 60 A.D.2d 552, 400 N.Y.S.2d 334 (1st Dep't 1977); *Nassau Ins. Co. v. Manzione*, 112 A.D.2d 408, 492 N.Y.S.2d 66 (2d Dep't 1985); *Van Buren v. Employers Ins. Co. of Wausau*, 98 A.D.2d 774, 469 N.Y.S.2d 488 (2d Dep't 1983); *Sears Oil Co. v. Merchant's Insurance Group*, 88 A.D.2d 753, 451 N.Y.S.2d 474 (4th Dep't 1982); *National Union Fire Ins. Co. of Pittsburg v. Medical Liability Mutual Ins. Co.*, 85 A.D.2d 851, 446 N.Y.S.2d 480 (3d Dep't 1981); *Allstate Ins. Co. v. Walsh*, 115 Misc. 2d 907, 454 N.Y.S.2d 774, *aff'd, In re Allstate*, 99 A.D.2d 987, 472 N.Y.S.2d 867 (1st Dep't 1984); *Taft v. Equitable Life Assu. Soc. of US*, 173 A.D.2d 267, 569 N.Y.S.2d 660 (1st Dep't 1991); *Aetna v. Cartigano*, 178 A.D.2d 472, 557 N.Y.S.2d 314 (2d Dep't 1991). BUT, where an insuror has issued a certificate of insurance, it may be estopped to deny coverage, even though the party seeking coverage has not been listed as an "additional insured" in the policy document itself: *Bucon, Inc. v. Penna Mfgs Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (3d Dep't 1989).

46. *Lehmann v. Engel*, 97 A.D.2d 675, 469 N.Y.S.2d 168 (3d Dep't 1983).

47. *Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *Liberty Mutual Fire Ins. Co. v. Home Ins. Co.*, 164 A.D.2d 857, 559 N.Y.S.2d 363 (2d Dep't 1990); *Servido v. Superintendent of Insurance*, 53 N.Y.2d 1041, 442 N.Y.S.2d 488 (1980).

48. *Rhinebeck Bicycle Shop, Inc. v. Sterling Ins. Co.*, 151 A.D.2d 122, 546 N.Y.S.2d 499 (3d Dep't 1989). *But see Lone Star Indus., Inc. v. Liberty Mut. Ins. Co.*, 689 F. Supp. 329 (S.D.N.Y. 1988) (contra).

49. *Rhinebeck Bicycle Shop, Inc. v. Sterling Ins. Co.*, 151 A.D.2d 122, 546 N.Y.S.2d 499 (3d Dep't 1989).

50. *Truscelli v. Fireman's Fund Ins. Co.*, 137 A.D.2d 806, 525 N.Y.S.2d 269 (2d Dep't 1988); *Ferraraccio v. Hartford Ins. Co.*, 187 A.D.2d 954, 590 N.Y.S.2d 968 (4th Dep't 1992).

51. *Lehmann v. Engel*, 97 A.D.2d 675, 469 N.Y.S.2d 168, 170 (3d Dep't 1983). *See also Berger v. Manhattan Life Ins. Co.*, 805 F. Supp. 1097, 1109-10 (S.D.N.Y. 1992).

52. *Frankart Distrib., Inc. v. Federal Ins. Co.*, 616 F. Supp. 589, 592 (S.D.N.Y. 1985).

53. *Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.*, 822 F.2d 267, 274 (2d Cir. 1987).

54. *Hartford Acc. & Indem. Co. v. Regent Nursing Home*, 67 A.D.2d 935, 413 N.Y.S.2d 195, 198 (2d Dep't 1979).

55. *Dryden Mut. Ins. Co. v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 509, 510 (3d Dep't 1985); *Hartford Acc. & Indem. Co. v. J.J. Wicks, Inc.*, 104 A.D.2d 289, 482 N.Y.S.2d 935, 938-39 (4th Dep't 1984); *State Farm Mut. Auto. Ins. Co. v. Elgot*, 48 A.D.2d 362, 369 N.Y.S.2d 719 (1st Dep't 1975).

56. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Accord Preferred Mut. Ins. Co. v. Ryan*, 175 A.D.2d 375, 572 N.Y.S.2d 447, 449 (3d Dep't 1991).

57. *Western World Ins. Co., Inc. v. Jean & Benny's Restaurant, Inc.*, 69 A.D.2d 260, 419 N.Y.S.2d 163, 165 (2d Dep't 1979).

58. *Dunn v. American Home Assurance Company*, 158 A.D.2d 505, 551 N.Y.S.2d 268, 270 (2d Dep't 1990).

59. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911, 913 (1982); *Cassara v. Nationwide Mut. Ins. Co.*, 144 A.D.2d 974, 534 N.Y.S.2d 277, 278 (4th Dep't 1988).

60. *Ogden Corp. v. Travelers Indem. Co.*, 739 F. Supp. 796, 803 (S.D.N.Y. 1990), *aff'd*, 924 F.2d 39 (2d Cir. 1991); *New York v. Amro Realty Corp.*, 697 F. Supp. 99, 106 n.14 (N.D.N.Y. 1988).

61. *New York v. Amro Realty Corp.*, 697 F. Supp. 99, 106 n. 14 (N.D.N.Y. 1988); *Corcoran v. Abbott Sommers, Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511 (2d Dep't 1988); *Tel-Tru Mfg Co., Inc. v. North River Ins. Co.*, 90 A.D.2d 670, 456 N.Y.S.2d 287, 288 (4th Dep't 1982).

62. *Liberty Mutual Ins. Co. v. Lapicola*, 184 A.D.2d 322, 584 N.Y.S.2d 834, 835 (1st Dep't 1992); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, 140 (Sup. Ct., Sullivan Co. 1983).

63. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539, 541 (1979); *Nationwide Mut. Ins. Co. v. Steiner*, 199 A.D.2d 507, 605 N.Y.S.2d 391, 392 (2d Dep't 1993); *Alice J. v. Joseph B. v. Berkshire Mut. Ins. Co.*, 198 A.D.2d 846, 604 N.Y.S.2d 419, 420 (4th Dep't 1993); *U.S. Liab. Ins. Co. v. Staten Island Hospital*, 162 A.D.2d 445, 556 N.Y.S.2d 153, 155 (2d Dep't 1990); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, 140 (Sup. Ct., Sullivan Co. 1983).

64. *Hartford Acc. and Indem. Co. v. Insurance Co. of North America*, 80 A.D.2d 842, 436 N.Y.S.2d 777, 778 (2d Dep't 1981).

65. *Corcoran v. Abbot Sommers, Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511, 513 (2d Dep't 1988); *Dryden Mut. Ins. Co. v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 509 (3d Dep't 1985); *Harford Acc. & Indem. Co. v. J.J. Wicks, Inc.*, 104 A.D.2d 289, 482 N.Y.S.2d 935, 938 (4th Dep't 1984); *Insurance Co. of North America v. Norris*, 116 Misc. 2d 314, 455 N.Y.S.2d 190, 195-96 (Sup. Ct., Nassau Co. 1982).

66. *Liberty Mutual Ins. Co. v. Lapicola*, 184 A.D.2d 322, 584 N.Y.S.2d 835 (1st Dep't 1992); *U.S. Liab. Ins. Co. v. Staten Island Hospital*, 162 A.D.2d 445, 556 N.Y.S.2d 153, 155 (2d Dep't 1990); *Western World Ins. Co., Inc. v. Jean & Benny's Restaurant, Inc.*, 69 A.D.2d 260, 419 N.Y.S.2d 163 (2d Dep't 1979).

67. McKinney's Insurance Law § 3420(d); *U.S. Liab. Ins. Co. v. Staten Island Hospital*, 162 A.D.2d 445, 556 N.Y.S.2d 153,155 (2d Dep't 1990); *Adams v. Perry's Place*, 168 A.D.2d 932, 564 N.Y.S.2d 1019 (4th Dep't 1990); *Erlich v. Aetna Cas. & Sur. Co.*, 95 A.D.2d 936, 463 N.Y.S.2d 934, 936-37 (3d Dep't 1983); *Foremost Ins. Co. v. Rios*, 85 A.D.2d 677, 445 N.Y.S.2d 511 (2d Dep't 1981).

68. *Galpern v. General Motors Corp.*, 102 Misc. 2d 975, 425 N.Y.S.2d 1008 (Civ. Ct., N.Y. Co. 1980). *See also Kamyr, Inc. v. St. Paul Surplus Lines*, 152 A.D.2d 62, 547 N.Y.S. 964, 967 (3d Dep't 1989).

69. *Home Ins. Co. v. Corcoran*, 65 N.Y.2d 1035, 494 N.Y.S.2d 294 (1985).

70. 104 A.D.2d 289, 482 N.Y.S.2d 935 (4th Dep't 1984).

71. *Hartford Acc. & Indemnity Co. v. J.J. Wicks, Inc.*, 104 A.D.2d 289, 482 N.Y.S.2d 935 (4th Dep't 1984).

72. See *Eveready v. Dabach*, 176 A.D.2d 879, 575 N.Y.S.2d 347 (2d Dep't 1991).

73. 51 A.D.2d 1035, 381 N.Y.S.2d 320 (2d Dep't 1976).

74. *See also New York Mutual Underwriters v. O'Connor*, 105 A.D.2d 994 (3d Dep't 1984).

75. *See New York Mutual Underwriters v. O'Connor*, 105 A.D.2d 994, 482 N.Y.S.2d 144 (3d Dep't 1984).

76. *See Losi v. Hanover*, 139 A.D.2d 702 (2d Dep't 1988), *appeal dismissed*, 72 N.Y.2d 950 (1988). *Also, Allstate Ins. Co. v. Furman*, 84 A.D.2d 29, *aff'd*, 58 N.Y.2d 613 (1982).

77. *See New York Mutual Underwriters v. O'Connor*, 105 A.D.2d 994, 482 N.Y.S.2d 144 (3d Dep't 1984).

78. 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979).

79. *General Accident v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979).

80. *See Walters by Walters v. Hartford*, 179 A.D.2d 1067, 579 N.Y.S.2d 525 (4th Dep't 1992).

81. *See Massachusetts Bay Ins. v. Flood*, 128 A.D.2d 182, 513 N.Y.S.2d 182 (2d Dep't 1987).

82. *See Aetna Casualty & Surety Co. v. Brice*, 72 A.D.2d 927, 422 N.Y.S.2d 203 (4th Dep't 1979), *aff'd*, 50 N.Y.2d 958, 431 N.Y.S.2d 528 (1980).

83. *See Hartford Ins. Co. v. County of Nassau Co.*, 46 N.Y.2d 1028, 416 N.Y.2d 539 (1979); *State Farm Mutual Ins. Co. v. DelPizzo*, 185 A.D.2d 351, 586 N.Y.S.2d 310 (2d Dep't 1992), (where a four-month delay without explanation is unreasonable as a matter of law). *See also Mt. Vernon Fire Ins. Co. v. Unjar*, 177 A.D.2d 479, 575 N.Y.S.2d 694 (2d Dep't 1991), (where a 2½ month delay without explanation is unreasonable as a matter of law).

84. *See Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 317 N.Y.S.2d 309 (1970); *Farmers Fire Ins. Co. v. Briton*, 142 A.D.2d 547, 530 N.Y.S.2d 215 (2d Dep't 1988).

85. *Mirza v. Allstate Ins. Co.*, 185 A.D.2d 302, 586 N.Y.S.2d 281 (2d Dep't 1992).

86. *Interboro v. Gatterdum*, 163 A.D.2d 788, 558 N.Y.S.2d 749 (3d Dep't 1990).

87. 185 A.D.2d 489, 585 N.Y.S.2d 876 (3d Dep't 1992).

88. 72 A.D.2d 927, 422 N.Y.S.2d 203 (4th Dep't 1979), *aff'd*, 50 N.Y.2d 958, 931 N.Y.S.2d 528 (1980).

89. 89 A.D.2d 804, 453 N.Y.S.2d 467 (4th Dep't 1982).

90. *Supra*.

91. *Norfolk & Dedham Mutual Fire Ins. Co. v. Petrizzi*, 121 A.D.2d 276, 503 N.Y.S.2d 51 (1st Dep't 1986).

92. *Pawelek v. Sec. Mut. Inc. Co.*, 143 A.D.2d 514, 533 N.Y.S.2d 161 (4th Dep't 1988) *appeal denied*, 74 N.Y.2d 603, 542 N.Y.S.2d 518 (1989); *Maryland Cas. Co. v. Hopkins*, 142 A.D.2d 946, 530 N.Y.S.2d 730 (4th Dep't 1988) *appeal denied*, 73 N.Y.2d 702, 537 N.Y.S.2d 940 (1988); *John v. Centennial Ins. Co.*, 91 A.D.2d 1104, 458 N.Y.S.2d

266 (Sup. Ct., Queens Co. 1982), *aff'd w/o op.*, 95 A.D.2d 989, 464 N.Y.S.2d 617 (2d Dep't 1983); *United Serv. Auto. Ass'n v. Meier*, 89 A.D.2d 998, 454 N.Y.S.2d 319 (2d Dep't 1982); *Smith v. Motor Veh. Acc. and Indemn. Corp.*, 74 A.D.2d 639, 425 N.Y.S.2d 42 (2d Dep't 1980); *Prudential Prop. & Cas. Ins. Co. v. Hobson*, 67 N.Y.2d 19, 499 N.Y.S.2d 637 (1986); *Empire Ins. Co. v. Fleishman*, 106 A.D.2d 295, 483 N.Y.2d 9 (1st Dep't 1984); *Aetna Cas. Ins. Co. v. Rodriguez*, 102 A.D.2d 744, 476 N.Y.S.2d 879 (1st Dep't 1984); *Employer's Ins. Co. of Wausau v. Nassau County*, 141 A.D.2d 496, 530 N.Y.S.2d 157 (2d Dep't 1988); *Progressive Cas. Ins. Co. v. Conklin*, 123 A.D.2d 6 (3d Dep't 1984); *Allstate Ins. Co v. Mende*, 176 A.D.2d 907, 575 N.Y.S.2d 520 (2d Dep't 1991).

93. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982).

94. *Walls v. Levin*, 150 A.D.2d 873, 540 N.Y.S.2d 623 (3d Dep't 1989); *Prudential Ins. Co. v. Brown*, 215 N.Y.S.2d 652 (Sup. Ct., Westchester Co. 1961); *Spatz v. Aetna Cas. and Sur. Co.*, 36 Misc. 2d 950, 237 N.Y.S.2d 133 (Sup. Ct., N.Y. Co. 1962).

95. *Spinosa v. Hartford Fire Ins. Co.*, 90 A.D.2d 140 (3d Dep't 1982); *Frankart Distributor's Inc. v. Federal Ins. Co.*, 616 F. Supp. 589 (S.D.N.Y. 1985); *Whiting Corp. v. Home Ins. Co.*, 516 F. Supp. 643 (S.D.N.Y. 1981); *Albert J. Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980); *Donato v. City of N.Y.*, 156 A.D.2d 505, 548 N.Y.S.2d 622 (1st Dep't 1989); *Corcoran v. Abbot Sommers. Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511 (2d Dep't 1988); *Dryden Mutual Ins. Co. v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 781 (3d Dep't 1989).

96. *Hartford Acc. & Indem. Co. v. Carson C. Peck Memorial Hosp.*, 162 A.D.2d 659, 558 N.Y.S.2d 959 (2d Dep't 1990); *Foremost Insurance Company v. Sotiriou*, 66 A.D.2d 812, 411 N.Y.S.2d 362 (2d Dep't 1978); *State Farm Mut. Auto v. Elgot*, 48 A.D.2d 362, 369 N.Y.S.2d 719 (1st Dep't 1975); *Hartford Acc. & Indem. Co. v. Regent Nursing Home*, 67 A.D.2d 935, 413 N.Y.S.2d 195 (2d Dep't 1979); *Vanguard Ins. Co. v. Polchlopek*, 23 A.D.2d 625, 257 N.Y.S.2d 740 (4th Dep't 1965); *Callahan v. American Motorists Ins. Co.*, 56 Misc. 2d 734, 289 N.Y.S.2d 1005 (Sup. Ct., Orange Co. 1968); *Frankart Distributor's Inc. v. Federal Ins. Co.*, 616 F. Supp. 589 (S.D.N.Y. 1985); *Corcoran v. Abbot Sommers, Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511 (2d Dep't 1988); *Sears Oil Co. v. Merchant's Insurance Group*, 88 A.D.2d 753, 451 N.Y.S.2d 474 (4th Dep't 1982); *Mattimore v. Patroon Fuels, Inc.*, 103 A.D.2d 981, 478 N.Y.S.2d 839 (3d Dep't 1984); *Touchette Corp. v. Merchants Mut Ins. Co.*, 76 A.D.2d 7, 429 N.Y.S.2d 952 (4th Dep't 1980).

97. *Walls v. Levin*, 150 A.D.2d 873, 540 N.Y.S.2d 623 (3d Dep't 1989).

98. *Newman v. Ketani*, 54 A.D.2d 926, 388, 788 N.Y.S.2d 128 (2d Dep't 1976); *Roaenwasser v. Globe Indemn. Co.*, 183 A.D. 882, *aff'd without opinion,* 224 N.Y. 561 (1918).

99. *Bucon, Inc. v. Penna Mfgs. Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (3d Dep't 1989).

100. *Chrupa v. Johncox*, 60 A.D.2d 55, 401 N.Y.S.2d 332 (4th Dep't 1977); *Colluccio v. Knopf*, 68 Misc. 2d 784, 328 N.Y.S.2d 31 (1st Dep't 1971); *Grossman v. Phoenix of Hartford Ins. Co.*, 324 N.Y.S.2d 526 (1st Dep't 1971); *Taft v. Equitable Life Assu. Soc. of US*, 173 A.D.2d 267, 569 N.Y.S.2d 660 (1st Dep't 1991); *American Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 893 (1st Dep't 1984); *Nassau Ins. Co. v. Manzione*, 112 A.D.2d 408, 492 N.Y.S.2d 66 (2d Dep't 1985); *Van Buren v. Employers Ins. Co. of Wausau*, 98 A.D.2d 774, 469 N.Y.S.2d 488 (2d Dep't 1983).

101. *Supra*, notes 97 and 98.

102. *Hanover v. Eggelton*, 88 A.D.2d 188, 453 N.Y.2d 898, *aff'd*, 57 N.Y.2d 1020, 457 N.Y.S.2d 479 (1982).

103. *Schiff v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972 (1980).

104. *Moore v. USF&G*, 293 N.Y. 119 (1944); *Gerka v. Fidelity*, 251 N.Y. 51 (1929) "However, it is well established that an insuror may, by timely notice to the insured reserve its right to claim that the policy does not cover the situation at issue, while defending the action"; *O'Dowd v. American Surety*, 3 N.Y.2d 347, 355, 165 N.Y.S.2d 458, 463 (1957), *citing Moore v. USF&G*, 293 N.Y. 119 (1944); *Knauss, Inc. v. Indemnity Ins. Co. of NA*, 270 N.Y. 211 (1936); *Jewtraw v. Hartford Accident & Indem. Co.*, 280 A.D. 150, 112 N.Y.S.2d 7272 (3d Dep't 1952) and 8 Appleman on Insurance Law and Practice sec. 4694.

105. *Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.*, 822 F.2d 267, 273 (2d Cir. 1988); *Spinosa v. Hartford Fire Ins. Co.*, 90 A.D.2d 574, 456 N.Y.S.2d 140, 141-42 (3d Dep't 1982); *Sears Oil Co., Inc. v. Merchants Ins. Group*, 88 A.D.2d 753, 451 N.Y.S.2d 474, 476 (4th Dep't 1982).

106. *Hartford Ins. Group v. Mello*, 81 A.D.2d 577, 437 N.Y.S.2d 433, 434 (2d Dep't 1981); *Globe Indem. Co. v. Franklin Paving Co.*, 77 A.D.2d 581, 430 N.Y.S.2d 109, 111 (2d Dep't 1980).

107. *Corcoran v. Abbott Sommers, Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511 (2d Dep't 1988); *County of Sullivan v. State of New York*, 135 Misc. 2d 810, 571 N.Y.S.2d 671, 674 (1987); *Caprari v. Hartford Acc. & Indemn. Co.*, 69 Misc. 2d 354, 330 N.Y.S.2d 206, 214 (Sup. Ct., Broome Co. 1972).

108. *Tantillo v. USF&G*, 155 A.D.2d 970, 547 N.Y.S.2d 781 (4th Dep't 1989). *See also Hartford Acc. & Indem. Co. v. Carson C. Peck Memorial Hospital*, 162 A.D.2d 659, 558 N.Y.S.2d 959, 960-61 (2d Dep't 1990).

109. *Moore Construction Co. v. USF&G.*, 293 N.Y. 119 (1944).

110. *County of Sullivan v. State of New York*, 137 A.D.2d 165, 528 N.Y.S.2d 227, 229 (3d Dep't 1988).

111. *Dryden Mutual Insurance Company v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 509, 510 (3d Dep't 1985).

112. *Hartford Insurance Group v. Mello*, 81 A.D.2d 577, 437 N.Y.S.2d 433, 434-35 (2d Dep't 1981).

113. *County of Nassau v. Royal Globe Ins. Co.*, 42 A.D.2d 755, 346 N.Y.S.2d 311, 315-16 (2d Dep't 1973).

114. *Long Island Ins. Co. v. Graziano*, 64 A.D.2d 944, 408 N.Y.S.2d 145, 147 (2d Dep't 1978).

115. *Rosenbloom v. Maryland Cas. Co.*, 153 A.D.2d, 137 N.Y.S. 1064, 1065 (1st Dep't 1912).

116. *Tantillo v. USF&G.*, 155 A.D.2d 970, 547 N.Y.S.2d 781, 782 (4th Dep't 1989).

117. *Val Drugs, Inc. v. Lynn*, 402 F. Supp. 174, 177 (W.D.N.Y. 1975).

118. *Spinosa v. Hartford Fire Ins. Co.*, 90 A.D.2d 574, 456 N.Y.S.2d 140, 141-42 (3d Dep't 1982).

119. *Sears Oil Co., Inc. v. Merchants Ins. Group*, 88 A.D.2d 753, 451 N.Y.S.2d 474, 475-76 (4th Dep't 1982).

120. *Jones v. Aetna Ins. Co.*, 59 Misc. 2d 698, 300 N.Y.S.2d 59 (Sup. Ct., Kings Co. 1969), *aff'd*, 35 A.D.2d 738, 316 N.Y.S.2d 430 (2d Dep't 1970).

121. *Security Ins. Co. of Hartford v. Utilities Contractors*, 29 A.D.2d 623, 285 N.Y.S.2d 212 (4th Dep't 1967).

122. *Mason-Henry Press v. Aetna Life Ins. Co.*, 211 N.Y. 849 (1914); *Jewtraw v. Hartford Acco. & Indem. Co.*, 280 A.D.2d 155 (3d Dep't 1952).

123. *Corcoran v. Abbott Sommers, Inc.*, 143 A.D.2d 874, 533 N.Y.S.2d 511 (2d Dep't 1988).

124. *O'Dowd v. American Surety*, 8 N.Y.2d 347, 165 N.Y.S.2d 458 (1957).

125. *Aetna v. Rodriguez*, 102 A.D.2d 744, 476 N.Y.S.2d 879 (1st Dep't 1984).

Appendix A

Can It Be Lost?

No.	Reason for Denial/Disclaimer	Preclusion & Waiver	
		Apply	**Do Not Apply**
1.	Late notice.	*Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982).	
2.	Failure to forward suit papers.	*Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *Empire Mut. Ins. Co. v. Mahmud*, 114 A.D.2d 324, 494 N.Y.S.2d 316 (1st Dep't 1985).	
3.	Failure to cooperate.	*Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 699, 435 N.Y.S.2d 772 (1980); *Reliance Ins. Co. v. Kenosian*, 46 A.D.2d 38, 361 N.Y.S.2d 60 (3rd Dep't 1974).	
4.	Settlement of action without consent of carrier.	*Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S 2d 319 (2d Dep't 1989); *Appell v. Liberty Mut. Ins. Co.*, 22 A.D.2d 906, 255 N.Y.S. 2d 545 (2d Dep't 1964).	
5.	Failure to serve notice of intention to obtain uninsured benefits.	*Empire Mut. Ins. Co. v. Mahmud*, 114 A.D.2d 324, 494 N.Y.S.2d 316 (1st Dep't 1985).	
6.	Failure to obtain written consent before obtaining default judgment against at-fault uninsured driver.	*Empire Mut. Ins. Co. v. Mahmud*, 114 A.D.2d 324, 494 N.Y.S.2d 316 (1st Dep't 1985).	
7.	Failure to report hit-and-run accident to police.	*Eagle Ins. Co. (Ruiz)*, 141 Misc. 2d 814, 535 N.Y.S.2d 294 (Sup. Ct. 1988).	
8.	Insured operating an owned vehicle not listed on policy.	*Progressive Cas. Ins. Co. v. Conklin*, 123 A.D.2d 6, 510 N.Y.S.2d 246 (3d Dep't 1986).	
9.	Personal auto being used to carry people or property for hire in business pursuits of insured.	*Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 699, 435 N.Y.S.2d 772 (1980); *Allstate Ins. Co. v. Kuper*, 140 A.D.2d 479, 528 N.Y.S.2d 591 (2d Dep't 1988).	
10.	Business pursuits exclusion.	*Ellis v. Allstate Ins. Co.*, 151 A.D.2d 543, 542 N.Y.S.2d 318 (2d Dep't 1989); *Dryden Mut. Ins. Co. v. Michaud*, 115 A.D.2d 150, 495 N.Y.S.2d 509 (3d Dep't 1985); *United Serv. Auto Ass'n v. Meier*, 89 A.D.2d 998, 454 N.Y.S.2d 319 (2d Dep't 1982).	
11.	"Dram Shop" exclusion.	*Farmers Fire Ins. Co. v. Brighton*, 142 A.D.2d 547, 530 N.Y.S.2d 215 (2d Dep't 1988); *National Casualty v. Levittown Events*, 595 N.Y.S.2d 93 (2d Dep't 1993); *Associated v. Samicabani*, 168 A.D.2d 883, 577 N.Y.S.2d 737 (3d Dep't 1991).	
12.	Employee injury or workers' compensation exclusion.	*Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Squires v. Town of Islip*, 697 F.2d 66 (2d Cir 1982); *General Accident v. Villani*, 607 N.Y.S.2d 70 (2d Dep't 1994).	
13.	Exclusion for liability due to furnishing medical or surgical supplies or appliances.	*Hartford Acc. and Indem. Co. v. Ins. Co. of North America*, 80 A.D.2d 842, 436 N.Y.S.2d 777 (2d Dep't 1981).	
14.	Exclusion for liability to any patients or outpatients.	*U.S. Liability Ins. Co. v. Staten Island Hosp.*, 162 A.D.2d 445, 556 N.Y.S.2d 153 (2d Dep't 1990).	

Can It Be Lost?

No.	Reason for Denial/Disclaimer	Preclusion & Waiver	
		Apply	**Do Not Apply**
15.	Completed operations hazard.	*Hartford Acc. and Indem. Co. v. J.J. Wicks, Inc.*, 104 A.D.2d 289, 482 N.Y.S.2d 935 (4th Dep't 1984); *Hanover v. Suffolk*, 615 N.Y.S.2d 742 (2d Dep't 1994).	*Rhineback Bicycle Shop, Inc. v. Sterling Ins. Co.*, 151 A.D.2d 122, 546 N.Y.S.2d 499 (3d Dep't 1989); *Globe Indem. Co. v. Franklin Paving Co.*, 77 A.D.2d 581, 430 N.Y.S.2d 109 (2d Dep't 1980).
16.	Products hazard exclusion.	*Hartford Acc. and Indem. Co. v. J.J. Wicks, Inc.*, 104 A.D.2d 289, 482 N.Y.S.2d 935 (4th Dep't 1984).	*Rhineback Bicycle Shop, Inc. v. Sterling Ins. Co.*, 151 A.D.2d 122, 546 N.Y.S.2d 499 (3d Dep't 1989).
17.	Insured's auto being operated by thief or person without permission.	*Insurance Co. of North America v. Norris*, 116 Misc. 2d 314, 455 N.Y.S.2d 190 (Sup. Ct. 1982).	*Katz v. Allstate*, 96 A.D.2d 930, 466 N.Y.S.2d 376 (2d Dep't 1983).
18.	Non-owned vehicle was routinely available for the insured to use.	*Greater NY Mutual v. Clark*, 613 N.Y.S.2d 295, (3d Dep't 1994); *Richardson v. Leatherbee Ins. Co.*, 47 A.D.2d 891 (1st Dep't 1975); *Gill v. Gouchie*, 620 N.Y.S.2d 679 (4th Dep't 1994).	*Creech v. Knitter*, 57 N.Y.2d 712, 454 N.Y.S.2d 709 (1982), *aff'g. on opinion below*, 88 A.D.2d 985, 451 N.Y.S.2d 825 (2d Dep't 1982); *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Liberty Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 168 A.D.2d 121, 571 N.Y.S.2d 735 (2d Dep't 1991); *American Home Assurance Co. v. Aprigliano*, 161 A.D.2d 357, 555 N.Y.S.2d 106 (1st Dep't 1990); *Schmidt v. Prudential Ins. Co.*, 143 A.D.2d 997, 533 N.Y.S.2d 614 (2d Dep't 1988).
19.	No coverage for non-owned vehicle being used for non-business purposes.		*American Home Assurance Co. v. Aprigliano*, 161 A.D.2d 357, 555 N.Y.S.2d 106 (1st Dep't 1990); *Interboro Mut. Indem. Ins. Co. v. Karpowic*, 116 Misc. 2d 947, 456 N.Y.S.2d 967 (Sup. Ct. 1982).
20.	Car involved in hit-and-run neither stolen nor came into contact with insured's vehicle.		*Prudential Prop. and Cas. Co. v. Hobson*, 67 N.Y.2d 19, 499 N.Y.S.2d 637 (1986); *Aetna Cas. & Sur. Co. v. Mari*, 102 A.D.2d 772, 476 N.Y.S.2d 910 (1st Dep't 1984); *Aetna Cas. & Sur. Co. v. Smith*, 100 A.D.2d 751, 474 N.Y.S.2d 17 (1st Dep't 1984).
21.	Intentional conduct.		*Pawelek v. Security Mut. Ins. Co.*, 143 A.D.2d 514, 533 N.Y.S.2d 161 (4th Dep't 1988).
22.	Interspousal claims exclusion.		*Empire v. Fleischman*, 106 A.D.2d 295, 483 N.Y.S.2d 9, (1st Dep't 1984); *American Motorists Ins. Co. v. Salvatore,* 102 A.D. 2d 342, 476 N.Y.S.2d 897 (1st Dep't 1984).
23.	Material misrepresentation.		*Truscelli v. Fireman's Fund Ins. Cos.*, 137 A.D.2d 806, 525 N.Y.S.2d 269 (2d Dep't 1988); *Fogelson v. Home Ins. Co.*, 129 A.D.2d 346, 514 N.Y.S.2d 346 (1st Dep't 1987).
24.	Absence of an "occurrence" or "accident."		*Drew Chem. Corp. v. Fidelity and Cas. Co. of New York*, 46 N.Y.2d 859, 414 N.Y.S.2d 515 (1979), *affg. on opinions below*, 96 Misc. 2d 503, 413 (Sup. Ct.), *aff'd*, 60 A.D.2d 552, 400 N.Y.S.2d 334 (1st Dep't 1977).

No.	Reason for Denial/Disclaimer	Preclusion & Waiver	
		Apply	**Do Not Apply**
25.	Insuring clause limits coverage to error, omission or negligent act committed while performing services in professional capacity as actuary, employee benefit plan consultant and life insurance agent or broker.		*Schiff Assoc. Inc. v. Flack*, 51 N.Y.2d 699, 435 N.Y.S.2d 972 (1980).
26.	No insurance in place on date of loss.		*Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982); *Rajchandra Corp. v. Title Guar. Co.*, 163 A.D.2d 765, 558 N.Y.S.2d 1001 (3d Dep't 1990); *Van Wyck Assoc. v. St. Paul Fire & Marine Ins. Co.*, 115 Misc. 2d 447, 454 N.Y.S.2d 266 (Sup. Ct. 1982), *aff'd without opinion*, 95 A.D.2d 989, 464 N.Y.S.2d 617 (2d Dep't 1983).
27.	Policy canceled pre-suit.		*Lehmann v. Engel*, 97 A.D.2d 675, 469 N.Y.S.2d 168 (3d Dep't 1983).
28.	Person seeking coverage is not an insured.		*Fireman's Fund Ins. Co. v. Freda*, 156 A.D.2d 364, 548 N.Y.S.2d 319 (2d Dep't 1989); *Aetna Cas. & Sur. Co. v. Facciponti*, 133 A.D.2d 60, 519 N.Y.S.2d 3 (1st Dep't 1987); *Aetna Cas. & Sur. Co. v. Rodriguez*, 102 A.D.2d 744, 476 N.Y.S.2d 879 (1st Dep't 1984); *NY Central v. Kowalski*, 600 N.Y.S.2d 977 (3d Dep't 1993) [P not resident].
29.	Erisa exclusion.		*Multiplan v. Federal Ins. Co.*, 579 N.Y.S.2d 451 (1st Dep't 1992).
30.	Communicable disease exclusion.	Preclusion: *Alice J. v. Berkshire Mut.*, 604 N.Y.S.2d 419 (4th Dep't 1993).	

Recent Developments in Evidence

Robert H. Coughlin, Jr.

Demonstrative Evidence

Models

Must be fair and accurate.

***People v. Kanner*, 272 A.D.2d 866 (4th Dep't 2000)**

Defendant appeals from a judgment convicting her of arson in the first degree (Penal Law § 150.20). and four counts of murder in the second degree (Penal Law § 125.25) for setting a fire in which her two small children were killed.

The court did not abuse its discretion in admitting demonstrative evidence in the form of a full-size replica of the children's bedroom (*see Harvey v. Mazal Am. Partners*, 79 N.Y.2d 218, 223-224). The probative value of the model in showing the size of the room outweighed any prejudicial effect (*see People v. Herr*, 203 A.D.2d 927, *aff'd* 86 N.Y.2d 638).

Summary Charts

***Carroll v. Roman Catholic Diocese*, 26 A.D.2d 552, *aff'd*, 19 N.Y.2d 658**

***Johnston v. Colvin*, 145 A.D.2d 846**

***Public Operating Corp v. Weingart*, 257 A.D. 379**

Witness must be familiar with underlying facts.

Chart must reflect a summary of the underlying information in evidence or calculations or events at issue or conclusions reached.

Photographs

Relevant, fairly representative and not inflammatory.

***Axelrod v. Rosenbaum*, 205 A.D. 722; *Taylor v. NYC Transit Auth.*, 48 N.Y.2d 903**

Videotapes

22 N.Y.C.R.R. 202.15.

Foundation

Same as photos.

***Caprara v. Chrysler Corp.* 71 A.D.2d 515, *aff'd*, 52 N.Y.2d 114**

Demonstrations

***People v. Barnes*, 80 N.Y.2d 867 (1992)**

The trial court did not abuse its discretion in allowing a demonstration in which court officers portrayed the defendant and the victim for the limited purpose of illustrating their relative positions, according to the witness' testimony, at the time of the shooting (*see People v. Acevedo*, 40 N.Y.2d 701, 704; *Uss v. Town of Oyster Bay*, 37 N.Y.2d 639, 641). The prosecutor's attempts to carry the demonstration further were curtailed by the court in response to defendant's objections and appropriate limiting instructions were given. Under the circumstances, we agree with the courts below that no undue prejudice resulted.

***Harvey v. Mazal Am. Partners*, 79 N.Y.2d 218 (1992)**

The primary issue on appeal is whether the trial judge did in fact err in permitting Harvey, who was not sworn, to appear before the jury and answer a series of questions that were designed to demonstrate the extent of his injuries.

We have in past cases recognized the importance of demonstrative evidence and have allowed parties to exhibit their injuries to the members of the jury. In *Mulhado v. Brooklyn City R.R. Co.* (30 N.Y. 370), for example, we permitted a plaintiff injured in an accident on a city railroad car to exhibit his injured arm to the jury. In *Clark v. Brooklyn Hgts. R.R. Co.* (177 N.Y. 359), the trial judge permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water. The display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty. We stated that the decision whether to permit such demonstrative evidence was entrusted to the discretion of the trial judge.

In the case now before us, most of the questions asked of the plaintiff were of a general nature and did not touch upon any of the issues involved at trial. Further, the plaintiff's answers illustrated the extent to which his cognitive abilities had been affected by the accident.

***People v. Franco*, 270 A.D.2d 160 (1st Dep't 2000)**

The court properly exercised its discretion in permitting the People to exhibit before the jury the victim, who had sustained catastrophic injuries during the incident and who was unable to testify (*see Harvey v. Mazal Am Partners*, 79 N.Y.2d 218). After the court delivered thorough instructions in order to prepare the jury, the victim was brought into the courtroom during the testimony of the People's medical expert, who made use of the victim's presence for purposes of illustration and to conduct several demonstrations establishing the victim's condition. The display of the victim was relevant to issues raised at trial and was not conducted simply

for its inflammatory effect (*see People v. Wood*, 79 N.Y.2d 958).

***In re Miata v. McCall*, 715 A.D.2d 496 (3d Dep't 2000)**

Petitioner, a police officer with the Long Island State Parks and Recreation Commission, applied for performance of duty disability retirement benefits based upon a left ankle injury that he sustained while leaving work on August 24, 1995 when he tripped on a step and twisted his ankle. . . . [W]e reject petitioner's assertion that the Hearing Officer abused his discretion in not permitting petitioner's medical expert to demonstrate the range of motion in petitioner's ankle (*see generally Harvey v. Mazal Am. Partners*, 79 N.Y.2d 218, 223-224). We find no reason to disturb the Hearing Officer's determination that without medical expertise the demonstration would be meaningless and, in any event, the medical expert's testimony was adequate to assess petitioner's injury.

Post-Accident Modifications

***McGarvin v. J.M. Weller Associates Inc.*, 273 A.D.2d 623 (3d Dep't 2000)**

It is well settled that in a negligence action, a plaintiff is generally not permitted to offer proof of a defendant's post-accident repair or improvement (*see Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 122). There are, however, recognized exceptions which "include evidence of a postmanufacture design change in a strict products liability cause of action premised on a defect in manufacture * * * and, not an exception so much as outside of the rule, evidence offered not to establish negligence but, rather to establish control * * * or feasibility * * * or to impeach a witness." (*Ramundo v. Town of Guilderland*, 142 A.D.2d 50, 54 (citations omitted)).

Surveillance

***DiMichel v. S. Buffalo RY*, 80 N.Y.2d 184**

***Thomas v. Fletcher & Sons Auto Repair, Inc.*, 201 A.D.2d 554 (2d Dep't 1994)**

The defense attempted to offer a surveillance videotape into evidence in order to controvert the plaintiff's evidence with respect to the severity and purported permanence of his alleged disabilities. Without explanation, the court precluded the use of the surveillance videotape.

We have reviewed the surveillance videotape, which was marked as a court's exhibit, and find that it is highly relevant and material on the issue of damages, especially with respect to damages for future pain and suffering (*see DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184; *Kane v. Her-Pet Refrig.*, 181 A.D.2d 257).

The plaintiff claimed surprise and moved to preclude use of the videotape because it was not served until the eve of jury selection. However, the plaintiff did not challenge the authenticity of the videotape or its accuracy. Additionally, the plaintiff did not request a continuance to have the videotape examined by an expert for possible tampering or distortion. Under the circumstances, we find the plaintiff's claim of surprise and undue prejudice to be unpersuasive, and we conclude that the court should not have precluded the defense from showing the videotape to the jury. Thus, we grant the appellants a new trial on the issue of damages.

***Barnes v. NYS Thruway*, 176 Misc. 2d 195 (1998)**

Claimant's counsel served a subpoena duces tecum on the investigative agency requiring production of "All documents and records * * * including but not limited to: correspondence; memoranda; notes; reports; surveillance materials and videotapes." The instant motion to quash ensued.

The **videotape in issue shows claimant washing his car, working on his car, putting gas in his car, and going to class.** Claimant had admitted his ability to do these activities in his examinations before trial.

Beyond the specific items mentioned in CPLR 3101 N.Y.C.P.L.R. (i), however, the courts have continued to impose the CPLR 3101 N.Y.C.P.L.R. (d)(2) requirement for a showing of substantial need and undue hardship when faced with demands for such ancillary items as "invoices, reports, correspondence, bills, records of footage, proof of payment, logs of surveillance, etc." because such items comprise attorney work product and materials prepared in anticipation of litigation and for trial (*Grossman v. Emergency Cesspool & Sewer Cleaners*, 162 Misc. 2d 440, 443).

In *Hicklen v. Broadway W. St. Assocs.* (166 Misc. 2d 12), the court concluded that depositions of the person or persons who had made the surveillance tapes in issue were not mandated by CPLR 3101 N.Y.C.P.L.R. (i), but were instead subject to the requirement of CPLR 3101 N.Y.C.P.L.R. (d)(2) that a factual showing of substantial need and undue hardship be made before they could be ordered. In that case, an order to compel depositions was denied.

The questions before the court now are (1) whether the additional material sought in the trial subpoena must be produced; and (2) whether claimant may make offensive use of the videotapes at trial.

With regard to the first question, **the court concludes that unless the material sought can be shown to be privileged matter, it must be produced pursuant to the subpoena**. CPLR article 31 governs the disclosure

process, not the question of what is relevant and admissible at trial.

With respect to the second question, the court has found only one case on point, *Baird v. Campbell* (155 Misc. 2d 857), which was decided subsequent to *DiMichel v. South Buffalo Ry. Co.* (80 N.Y.2d 184, *supra*), but prior to enactment of CPLR 3101 N.Y.C.P.L.R. (i). In *Baird*, a plaintiff sought to introduce as part of her case-in-chief on damages six surveillance tapes made by defendant's investigator, on the grounds that the tapes were material, necessary, relevant and admissible evidence irrespective of the burden of proof. The court refused to permit such use.

This court respectfully disagrees. In the case at bar, the court sees no unfairness in permitting claimant to use the tapes at trial. As stated in the *Grossman* case, *supra*, the tapes show what they show, and claimant has already testified at deposition that he was able to perform the activities taped, but with difficulty. The tapes are essentially no more than bootstrapping, and normally could be dismissed as merely cumulative. Given the strong defense waged in this case, however, and the suggestions that claimant may be malingering or even fabricating a disability, the court concludes claimant is entitled to make use of the tapes as a means of corroborating his other evidence since they were made without his knowledge or consent and essentially constitute an independent source of evidence as to his disability. The *DiMichel* case does not prohibit all use of surveillance tapes by the party videotaped. Rather, it prohibits encouraging a jury to speculate as to the contents of tapes that a defendant chooses not to use.

***Rankin v. Waldbaum, Inc.*, 176 Misc. 2d 184 (1998)**

This court's preliminary conference order provided, in pertinent part, that: "All parties [are] directed to furnish each [other] the names and address of eye and notice witnesses to the occurrence within twenty days from the date of this order, as well as (photographs) of scene and any surveillance depicting accident, if any."

In response, the defendant stated that "video surveillance of the incident, if any, shall be provided in accordance with CPLR 3101 N.Y.C.P.L.R. (i) and *DiMichel v. South Buffalo Railway Co.* (80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992)) and its progeny."

The defendant now moves for a protective order that it does not have to exchange the video surveillance tape until after the plaintiff's deposition and that it does not have to produce 12 hours of videotape.

In this case **the surveillance tape depicts the actual happening of the accident,** not merely the plaintiff performing physical activities contrary to her claimed injuries.

Nevertheless, the logic behind *DiMichel*, *supra*, is applicable here. The danger is present that the plaintiff would tailor her testimony based upon what is depicted on the videotape. **The best way to ensure honest testimony is to conduct the plaintiff's deposition before the videotape is exchanged.**

Further, the plaintiff has not demonstrated how she is prejudiced by being deposed before receiving the videotape.

***DiNardo v. Koronowski*, 252 A.D.2d 69 (4th Dep't 1998)**

The issue presented on appeal is whether, pursuant to CPLR 3101 N.Y.C.P.L.R. (i), defendant must turn over surveillance tapes upon request by plaintiff prior to the completion of depositions. This issue is one of first impression before this Court. We hold that plaintiff is entitled to the surveillance tapes upon request, regardless of whether depositions have been completed.

The statute is silent concerning the timing of the disclosure. The question remains whether the Legislature intended to require full disclosure of surveillance materials without any restriction concerning the timing. From the wording of the statute, as well as its legislative history, we conclude that the Legislature intended not to restrict the timing of the disclosure as had the Court of Appeals in *DiMichel*.

We further note that in *DiMichel* the Court held that surveillance tapes should be treated as material prepared in anticipation of litigation pursuant to CPLR 3101 N.Y.C.P.L.R. (d)(2).

However, the Legislature, in furthering the liberal disclosure policy, did not include the new discovery provision under CPLR 3101 N.Y.C.P.L.R. (d)(2), but rather created a new subdivision, CPLR 3101 N.Y.C.P.L.R. (i). The result is that defendants no longer enjoy a qualified exemption for disclosure of surveillance tapes. We conclude that the liberal disclosure policy of CPLR article 31 is best served by interpreting CPLR 3101 N.Y.C.P.L.R. (i) to **require full disclosure of surveillance tapes upon demand.**

***Hawkins v. Lucier*, 255 A.D.2d 553 (2d Dep't 1998)**

In this personal injury action, examinations before trial of the injured plaintiff took place in November 1994 and July 1997. After the second examination before trial, the defendants engaged in video surveillance of the injured plaintiff. Thereafter, the defendants' counsel advised the plaintiffs' counsel of the surveillance and offered to provide copies of the videotapes on condition that the injured plaintiff appear for a further examination before trial regarding damages. The plaintiffs' counsel responded by demanding a copy of the surveillance tapes pursuant to CPLR 3101

N.Y.C.P.L.R. (i), and rejected the request for a further examination before trial.

Since the **injured plaintiff has already been deposed twice, we agree with the Supreme Court that the defendants should have made a detailed showing that the injured plaintiff's prior testimony was inadequate to cover the issues raised by the surveillance tapes** (*see Simon v. Krueger Intl.*, 169 Misc. 2d 331, 335) in order to justify an additional examination before trial. Having failed to do so, the defendants are not entitled to depose the injured plaintiff again.

***Rotundi v. Massachusetts Mut. Life Ins. Co.*, 263 A.D.2d 84 (3d Dep't 2000)**

The issue presented on this appeal is **whether** the pronouncement in *DiMichel* that a **plaintiff must submit to a deposition in advance of obtaining requested surveillance tapes** survives the subsequent enactment of CPLR 3101 N.Y.C.P.L.R. (i). It is a question not previously addressed by this court, although the Fourth Department has **answered the question in the negative** (*see Di Nardo v. Koronowski*, 252 A.D.2d 69). We agree and, therefore, affirm Supreme Court's order granting plaintiff's motion to compel disclosure.

CPLR 3101 N.Y.C.P.L.R. (i) makes no mention of the timing of the "full disclosure."

The Legislature (and Governor)—aware of the *DiMichel* holding decided under CPLR 3101 N.Y.C.P.L.R. (d)(2) regarding the timing of disclosure in advance of a plaintiff's deposition and how the proposed bill adding subdivision (i) to CPLR 3101 N.Y.C.P.L.R. deviated from it—did not expressly codify that aspect of the holding limiting disclosure to after a plaintiff's deposition.

In so ruling, we are mindful that requiring disclosure of video surveillance materials, inter alia, in advance of depositions permits a plaintiff to "tailor the trial testimony accordingly," a danger which "can be largely eliminated by providing that surveillance films should be turned over only after a plaintiff has been deposed." (*DiMichel v. South Buffalo Ry. Co.*, *supra*, at 197). Indeed, this danger appears to exist regardless of whether disclosure is governed by subdivision (d)(2) or subdivision (i) of CPLR 3101 N.Y.C.P.L.R. Further, the "full disclosure" required by subdivision (i) is not necessarily incompatible with requiring plaintiff to first submit to a deposition (*see* Siegel, Supp. Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3101:50, 1999 Supp. Pamph, at 23-24). However, the timing aspect of the *DiMichel* ruling—limiting pretrial disclosure of surveillance tapes to after a plaintiff is deposed—was imposed by the Court of Appeals as an integral part of the "substantial need" showing required of plaintiffs under subdivision (d)(2). In our view, since that statutory showing was not codified into subdivision (i), *DiMichel*'s analysis and timing rule have no application to CPLR 3101 N.Y.C.P.L.R. (i). **The wisdom of omitting such a timing limitation or showing in subdivision (i) is a matter for the Legislature, not the courts** (*see Schulz v. State of New York*, 84 N.Y.2d 231, 237, *cert. denied* 513 U.S. 1127; *Hope v. Perales*, 83 N.Y.2d 563, 575; *Rent Stabilization Assn. of N.Y. City v. Higgins*, 83 N.Y.2d 156, 174, *cert. denied* 512 U.S. 1213).

Computer-Generated Evidence

Ordinary Business Records

***In re Wayne County Dep't, S.S. v. Petty*, 73 A.D.2d 943 (4th Dep't 2000)**

The Hearing Examiner dismissed the petitions seeking reimbursement for medical assistance expenditures made in connection with the out-of-wedlock births of respondents' children. Thus, petitioner is entitled to seek reimbursement for the entire amount of the medical assistance expended in connection with the births, although the court must consider the ability of respondents to pay the expenses at the time of the hearings (*see In re Commissioner of Social Servs of Franklin County v. Bernard B.*, 87 N.Y.2d 61, 68-69).

Finally, we conclude that the **certified computer-generated records submitted by petitioner, kept in the ordinary course of business, are admissible in evidence and are prima facie evidence** of the medical assistance expenditures made by petitioner.

Actual Reconstruction

Witness must establish that all factors have been taken into consideration, e.g., crush characteristics, actual speeds, the workings of the brakes, seatbelt. This is a very difficult, if not impossible, burden to meet.

Model

Generally, the model would be admissible with cautionary instructions to the jury that it is not intended to be the actual accident but a demonstration of the expert's opinion.

The computer-generated model may be admissible as an aid to assist the jury in understanding of the expert's testimony. However, there of course is an expense associated with the creation of the model and the accompanying testimony, and the objections of the evidence being considered duplicative cumulative and prejudicial are still viable even if the model is admissible.

Business Records

People v. Surdis, 275 A.D.2d 553 (3d Dep't 2000)

Defendant was indicted for two counts of falsely reporting an incident in the first degree stemming from two bomb threats made by telephone.

Defendant argues that County Court improperly admitted into evidence the record of a telephone call from a pay phone allegedly used by defendant. William Perk, a senior investigator for Bell Atlantic, identified special billing tapes on phone records kept in the normal course of the company's business. He testified that the records showed that two calls were made from the same pay phone. Bell Atlantic's phone record showed that the first call originated from the pay phone number allegedly used by defendant and was unanswered. Bell Atlantic's record of the second call showed that it was made at 12:42 P.M., but unlike the earlier call it did not display the originating phone number. According to Perk, the record showed that the call was operator assisted, answered, that it lasted 11 seconds and was placed through another carrier, American Exchange. He stated that American Exchange provided the originating number in a fax sent to his office. Perk indicated that he then maintained that fax as part of his records of the investigation in this matter.

In our view, Perk's **testimony failed to provide the necessary foundation as to the regular, systematic, routine and contemporaneous nature of the American Exchange record to permit its admission into evidence** (*see People v. Kennedy*, 68 N.Y.2d 569, 579; *see generally People v. Cratsley*, 86 N.Y.2d 81, 89-90). Notably, Perk failed to testify that he had knowledge of American Exchange's particular recordkeeping procedures such that he could state that the record he received was made in the regular course of its business, that it was in the regular course of its business to make the record and that it was made contemporaneously with the phone call *(see* CPLR 4518 N.Y.C.P.L.R. (a)). Under the circumstances here, Perk's mere receipt and retention of the record is insufficient to qualify it as a business record (*see People v. Cratsley, supra*, at 90).

In re R. Children, 264 A.D.2d 423 (2d Dep't Aug. 9, 1999)

Under the circumstances of this case, we find no merit to the appellant's contention that the Family Court committed reversible error by admitting the entire case file of the child protective agency into evidence. The agency established a proper foundation for admission of the file into evidence as a business record by establishing that it consisted of **entries made by caseworkers who were under a business duty to timely record all matters relating to the welfare of the subject children** *(see* CPLR 4518 N.Y.C.P.L.R. (a); *In re Department of Social Servs. v. Waleska M.*, 195 A.D.2d 507, 510; cf., *In re Leon RR*, 48 N.Y.2d 117, 123). Furthermore, as required by principles of "fundamental fairness," the appellant's counsel was afforded an opportunity to review the case file prior to its admission into evidence *(see In re Rosemary D.*, 78 A.D.2d 889; *In re Melanie Ruth JJ*, 76 A.D.2d 1008, 1009).

Hospital Records

Martin v. City of New York, 275 A.D.2d 351 (2d Dep't 2000)

The plaintiffs were injured when they were struck by a car as they attempted to cross a street in Queens. The car was driven by the defendant Frank P. Squillante and leased by the defendant City of New York. After the accident, the plaintiffs were transported to Elmhurst Hospital. The dissent is correct that **the trial court erred in not admitting the complete hospital record pertaining to the plaintiff Michael Martin, including that portion setting forth his blood alcohol level.** However, under the circumstances of this case, this error was harmless and does not require reversal. *(see Pulitano v. Suffolk Manor Caterers*, 245 A.D.2d 279, 280; *Flamio v. State of New York*, 132 A.D.2d 594).

McGinity, J., dissents.

At trial, a certified copy of Martin's hospital record was admitted into evidence at the behest of his counsel, with a request to redact that portion of the hospital record pertaining to Martin's blood alcohol level. The defendants attempted to introduce portions of Martin's hospital record which indicated that he had a blood alcohol level of .374 at the time of his admission to the hospital. The trial court excluded that portion of the hospital record relating to Martin's blood alcohol level stating, inter alia, that it would be sheer speculation to allow the jury to infer that Martin's blood alcohol level affected his ability to ambulate and that he needed assistance in crossing the street, and that these factors were a proximate cause of the accident.

The results of Martin's blood alcohol test, taken for the purposes of treatment and diagnosis, as set forth in a certified hospital record, were admissible pursuant to CPLR 4518 N.Y.C.P.L.R. (c) as *prima facie* evidence of Martin's blood alcohol level *(see Cleary v. City of New York*, 234 A.D.2d 411; *Maxcy v. County of Putnam*, 178 A.D.2d 729; *LaDuke v. State Farm Ins. Co.*, 158 A.D.2d 137).

Wright v. New York City Housing Authority, 273 A.D.2d 378 (2d Dep't June 22, 2000)

The court erred in redacting from the emergency room record, which was otherwise admissible as a business record (*see* CPLR 4518 N.Y.C.P.L.R.) a **statement that the plaintiff had been running immediately prior to sustaining the injury.** As the "business of a

hospital * * * is to diagnose and treat its patients' ailments," a "narration of the accident causing the injury is inadmissible if "not germane to diagnosis or treatment." (*Williams v. Alexander*, 309 N.Y. 283, 287). However, **"a patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case"** (*Williams v. Alexander*, *supra*, at 288). The circumstances of this case do not present an instance in which detail irrelevant to the rendering of medical diagnosis or treatment was included in the emergency room record.

***Rodriguez v. Triborough Bridge*, 276 A.D.2d 769 (2d Dep't 2000)**

The plaintiff in Action No. 1, Nicholas Rodriguez, while driving on a bridge owned and operated by the defendant Triborough Bridge and Tunnel Authority (hereinafter the TBTA), lost control of his vehicle and went into the opposing lane of traffic, resulting in a multiple-vehicle collision. At trial, the TBTA offered a certified copy of Rodriguez's hospital record, which set forth the result of a blood test indicating a blood alcohol level of .114. The court denied admission into evidence of that portion of the record which set forth the test result.

The blood alcohol test result, as set forth in a certified hospital record, was admissible as prima facie evidence of the same pursuant to CPLR 4518 N.Y.C.P.L.R. (c). (*see Cleary v. City of New York*, 234 A.D.2d 411; *Maxcy v. County of Putnam*, 178 A.D.2d 729; *LaDuke v. State Farm Ins. Co.*, 158 A.D.2d 137; *Tinao v. City of New York*, 112 A.D.2d 363; *Campbell v. Manhattan & Bronx Surface Tr. Operating Auth.*, 81 A.D.2d 529). To the extent that our decision in *Marigliano v. City of New York* (196 A.D.2d 533) may be read to the contrary, it should not be followed.

Police Reports

***Chubb & Son v. Riverside Tower Parking Corp.*, 267 A.D.2d 128 (1st Dep't 1999)**

In this action by a subrogation plaintiff to recover the value of a vehicle bailed to defendant's parking garage, defendant submitted competent proof in opposition to plaintiff's summary judgment motion, showing that the vehicle was stolen at gunpoint, thus raising a triable issue in response to plaintiff's prima facie case. **The police report of the theft was based on information from defendant's now deceased garage attendant, who had a business duty imposed by his employer to report such events to the police (*see* CPLR 4518 N.Y.C.P.L.R.(a);** *In re Leon RR*, 48 N.Y.2d 117, 122-123). Given the admissibility of the police report, a more detailed signed statement of the criminal incident by the deceased employee to what appears to be an insurance investigator, as well as two depositions containing considerable hearsay, were also properly considered in opposition to the motion. (*see Guzman v. L.M.P. Realty Corp.*, __A.D.2d __, 691 N.Y.S.2d 483; *Koren v. Weihs*, 201 A.D.2d 268).

***Miller v. Alagna*, 203 A.D.2d 264 (2d Dep't 1994)**

We find that the police report containing Detective Densing's conclusion that the defendants' vehicle did not strike the plaintiff was properly admitted because it was based on "postincident expert analysis of observable physical evidence" which Detective Densing was qualified to render. (*cf., Conners v. Duck's Cesspool Serv.,* 144 A.D.2d 329).

***Murray v. Donlan*, 77 A.D.2d 337 (2d Dep't 1980), *appeal dismissed* 52 N.Y.2d 1071**

The issue is whether the police accident report was admissible as a business record under the statutory exception to the hearsay rule. (*see* CPLR 4518 N.Y.C.P.L.R.). The Third Department, laid down the following guidelines, making them specifically referable to police reports in accident cases:

Subdivision (a) of CPLR 4518 N.Y.C.P.L.R. permits a police report to be admitted as proof of the facts recorded therein if (1) the entrant of those facts was the witness, or (2) the person giving the entrant the information was under a business duty to relate the facts to the entrant *(Johnson v. Lutz, supra).* If neither of these two requisites is satisfied but the report recites a statement of an outsider, the record may be admitted (under *Kelly v. Wasserman, supra),* to prove that the statement recorded therein was made by the outsider (even though the main facts set forth in the business record are hearsay and excludable pursuant to *Johnson)* and, then, the facts recited in the statement may be proven by the business record if the statement qualifies as a hearsay exception, e.g., an admission, as in *Kelly and Chemical Leaman.* (*Toll v. State of New York,*32 A.D.2d 47, 49-50; *see also Wright v. McCoy,* 41 A.D.2d 873; *Mahon v. Giordano,* 30 A.D.2d 792; *Sinkevich v. Cenkus,* 24 A.D.2d 903; *Yeargans v. Yeargans,* 24 A.D.2d 280).

Police Officer Conlan who had prepared the accident report received into evidence, had not witnessed the accident. He testified, however, to having interviewed several witnesses. The sources of information for the police accident report were therefore unclear. The police accident report, therefore, contained hearsay statements relevant to ultimate issues of fact in the instant case. Accordingly, the report's admission into evidence constituted prejudicial and reversible error.

***Dennis v. Capital Dist. Transportation Auth.*, 274 A.D.2d 802 (3d Dep't 2000)**

In the absence of any evidence that the police officer witnessed the accident or was qualified to render an opinion as to its cause, the notation on the officer's

report referring to "bicyclist error" was inadmissible. (*see Cleary v. City of New York*, 234 A.D.2d 411; *Murray v. Donlan*, 77 A.D.2d 337, 347, *appeal dismissed,* 52 N.Y.2d 1071).

Hearsay

Quintanilla v. Harchack, 183 Misc. 2d 569 (Sup. Ct. Nassau Co. 2000)

In this case the court is presented with the novel issue of **whether a co-defendant's guilty plea allocution is admissible against a defendant in a civil case arising from the co-defendant's criminal activity.** This is an action for personal injuries under the Dram Shop Act. It is alleged that Harchack was intoxicated at the time of the incident and had been drinking at a tavern owned by the defendants Je Suis, Inc. and Yankee Peddler. Defendants Je Suis, Inc. and Yankee Peddler are moving for summary judgment dismissing the complaint on the grounds that they did not serve alcoholic beverages to Harchack and that, even if they did, there is no evidence that he was visibly intoxicated when served.

Submitted is the transcript of Mr. Harchack's plea allocution. The plea allocution is the only evidence submitted indicating that Mr. Harchack was served alcoholic beverages at the Yankee Peddler. In the course of his allocution, Mr. Harchack stated, that he had drunk four bottles of beer and two shots of liquor at Yankee Peddler.

The court concludes that Mr. Harchack's plea allocution is admissible, at least for the purposes of this summary judgment motion. In *People v. Thomas,* 68 N.Y.2d 194 (1986) the Court of Appeals understandably articulated the higher standard of "exacting scrutiny" which must be applied before the plea allocution of a co-defendant may be introduced against a defendant in a criminal case. Where, by contrast, a criminal defendant seeks to offer a co-defendant's statement because it is exculpatory with respect to the defendant on trial, the standard is more lenient. (*People v. Settles,* 46 N.Y.2d 154 (1978); *People v. Smith,* 195 A.D.2d 112 (1st Dep't 1994). In such circumstances, **to qualify for admission as a declaration against penal interest four elements must be present: 1) the declarant must be unavailable as a witness at trial, 2) when the statement was made the declarant must be aware that it was adverse to his penal interest, 3) the declarant must have competent knowledge of the facts underlying the statement, and 4) supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability. (46 N.Y.2d at 167).**

The court concludes that in the context of this civil case, the more lenient standard should apply. Moreover, the court concludes that Mr. Harchack's plea allocution satisfies all of these requirements. Mr. Harchack has disobeyed five court orders directing him to appear for a deposition. Thus, Mr. Harchack is clearly unavailable, although it has not been established that he is absent from the jurisdiction, has refused to testify on constitutional grounds, or is dead.

With respect to the second element, by pleading guilty to a felony, Mr. Harchack was plainly acting contrary to his penal interest.

Inasmuch as Mr. Harchack was describing his own actions of imbibing alcoholic beverages prior to the accident, he had competent knowledge of the facts underlying his statement.

Finally, the blood alcohol reading and the police officer's observations on the scene are circumstances independent of the statement which corroborate its trustworthiness and reliability. Thus, the court concludes that the plea allocution should be admissible at least for the purposes of this summary judgment motion.

People v. Harvey, 270 A.D.2d 959 (4th Dep't March 29, 2000)

"Hearsay evidence is admissible as a declaration against penal interest only if four prerequisites are met: (1) the declarant must be unavailable to give testimony, whether by reason of absence from the jurisdiction, refusal to testify on constitutional grounds or death; (2) the declarant must have been aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability (citations omitted)." (*People v. Thomas,* 68 N.Y.2d 194, 197, *cert denied,* 480 U.S. 948). The assertion of defense counsel that his private investigator was unable to locate the declarant failed to establish that he was absent from the jurisdiction and thus unavailable (*see generally People v. Gates,* 234 A.D.2d 941, *lv. denied,* 89 N.Y.2d 1011; *People v. Anderson,* 153 A.D.2d 893, 895-896, *lv. denied,* 74 N.Y.2d 894). Moreover, defendant failed to establish that when the declarant made the alleged incriminating statement, he was aware that the statement was contrary to his penal interest. The witness who heard that statement testified that she did not understand it to mean that the declarant killed the victim. Defendant therefore failed to establish that the declarant knew at the time he made the statement that it was against his penal interest *(see generally*, Prince, Richardson on Evidence § 8-411, at 622 (Farrell 11th ed)).

Expert Testimony

Frye v. United States, 293 F. 1013 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 US 579 *(see People v. Wesley*, 83 N.Y.2d 417 (1994))

Basis for Opinion

Facts in the record or personally known to the witness except may rely on out-of-court material if it is a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full examination at trial. (*But see Hambsch v. NYCTA,* 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984) (error for doctor to testify re: x-rays without producing the x-rays and putting them into evidence); *see also Schozer v. Wm. Penn Life Ins. Co.*, 84 N.Y.2d 639 (best evidence rule applied holding that secondary evidence of the contents of the x-ray is admissible when the absence of the x-ray was satisfactorily explained); *see also Serra v. City of New York*, 215 A.D.2d 643 (1995)). (expert treating doctor relied on an MRI report, court finding that it is professionally reliable information.))

The defendant contends that the trial court erred by allowing the plaintiff's magnetic resonance imaging (hereinafter MRI) report into evidence, and in permitting the plaintiff's treating physician to testify concerning the results of the MRI test. In light of the fact that an MRI report is data which is "of the kind ordinarily accepted by experts in the field," it was not error for the trial court to permit Dr. Lehman to testify with respect to the MRI report. (*People v. Sugden,* 35 N.Y.2d 453, 459; *see also Munoz v. 608-610 Realty Corp.,* 194 A.D.2d 496; *Flamio v. State of NewYork,* 132 A.D.2d 594). However, since the MRI report itself was hearsay and there was no foundation laid to permit its admission under an exception to the hearsay rule, the MRI report should not have been admitted into evidence. (*Greene v. Xerox Corp*., 244 A.D.2d 877 (4th Dep't 1997) (vocational rehabilitation expert testified based on a labor market survey he conducted by phone with potential employers was admissible))

Vocational Rehabilitation

Kavanaugh v. Ogden Allied Maintenance Corp., 92 N.Y.2d 952 (1998)

Although the plain language of CPLR 3121 N.Y.C.P.L.R. (a) authorizes physical or mental examinations "by a designated physician," and defendants' vocational rehabilitation expert was not a medical doctor, CPLR 3121 N.Y.C.P.L.R. does not limit the scope of general discovery available, subject to the discretion of the trial court, under CPLR 3101 N.Y.C.P.L.R. That statute broadly mandates "*full* disclosure of all matter material and necessary in the prosecution or defense of an action." (CPLR 3101 N.Y.C.P.L.R.(a)).

As a general proposition in personal injury litigation, requiring the plaintiff to submit to extensive vocational assessment procedures might well be unduly burdensome. Here, however, to establish damages for plaintiff Kavanaugh's personal injuries, plaintiffs retained a non-physician vocational rehabilitation expert who was prepared to testify that examination and testing established her present lack of capacity to perform in the workforce. Plaintiffs thereby overtly made vocational rehabilitation assessment procedures "material and necessary in the * * * defense" for the purposes of rebuttal.

Neuropsychology

Knauer v. Anderson, 184 Misc. 2d 621 (Sup. Ct., Erie Co. 2000)

Plaintiff sustained a severe head injury. He was in a coma for two weeks after his fall, and apparently has permanent speech, memory and balance deficits.

Pending before this Court are two discovery motions. Plaintiff seeks a protective order with regard to a physical examination of him noticed by defendant B.T.S. Services, Inc. (BTS), while BTS has cross-moved to compel that physical examination and for production of authorizations and/or documents.

The notice sent by BTS to plaintiff states that "a physical examination of the plaintiff by Jerid Fisher, Ph.D. is to be conducted over a two-day period." Plaintiff objects to the examination being conducted over two days and seeks to have Dr. Fisher, a neuropsychologist, precluded from asking him any questions that were already asked of him during his July 28, 1999 EBT. He also asserts that the examination must be conducted under the supervision of a physician.

Plaintiff, relying on cases such as *Greene v. Xerox Corp.*, 244 A.D.2d 877, *Antonelli v. Yale Materials Handling Corp.*, 239 A.D.2d 951 and *Rook v. 60 Bay Centre, Inc.*, 237 A.D.2d 901, argues that any examination of plaintiff by Dr. Fisher *must* be supervised by a physician.

For its part, BTS relies upon a decision by our Court of Appeals, *Kavanagh v. Ogden Allied Maint. Corp.,* 92 N.Y.2d 952, which was decided after the cases upon which plaintiff relies.

Kavanagh did not address the "supervision" issue raised by plaintiff here and required by the line of cases upon which plaintiff now relies. However, inasmuch as *Kavanagh* permits non-medical expert examination under CPLR 3101 N.Y.C.P.L.R., I see no reason why a "supervision" requirement should be read into either such an examination or CPLR 3101 N.Y.C.P.L.R.. If the expert is otherwise qualified, and the examination is relevant to the issues in the case, there is nothing in

CPLR 3101 N.Y.C.P.L.R. which would require "supervision" by a medical expert.

Speculation

Skycock v. Burlington Northern-Santa Fe Co., 265 A.D.2d 545 (2nd Dep't 1999)

The conclusion of the plaintiffs' expert that the subject boxcar was in the same condition on the date that he inspected it as it was on the date that Van Skycock was injured was based upon speculation. (*see Romano v. Stanley*, 90 N.Y.2d 444, 451; *Chambers v. Roosevelt Union Free School Dist.*, __A.D.2d__ (2d Dep't, Apr. 26, 1999)). Moreover, **the plaintiffs' expert did not state the nature of his qualifications, nor did he identify authoritative material "'of a kind accepted in the profession as reliable in forming a professional opinion'" that supported his view.** (*Hambsch v. New York City Tr. Auth.,* 63 N.Y.2d 723, 726, quoting *People v. Sugden,* 35 N.Y.2d 452 (35 N.Y.2d 453), 460-461; *see Bova v. City of Saratoga*, __A.D.2d__ (3d Dep't, Feb. 11, 1999)).

Mosher v. Town of Oppenheim, 263 A.D.2d 605 (3d Dep't 1999)

Plaintiff lost control of her automobile and struck a tree. She commenced this action alleging that the accident was due to "defendants' negligence in * * * failing to properly design, construct, maintain and sign Sweet Hill Road." Plaintiff moved to supplement her responsive papers by submitting the affidavit of Alvin Bryski, a consultant who provided an opinion concerning alleged design and construction defects of the road. Based upon our review of plaintiff's proof, her burden of coming forward with evidence raising a question of fact concerning the active negligence of defendants has not been satisfied. In this regard, plaintiff relies upon the affidavit of Bryski who opined that "[t]he roadway is * * * sloped at an excessive rate," "[t]he pavement is in very poor condition" and"[t]he road is only 16 feet wide." Even setting aside the fact that Bryski is not a licensed professional engineer, **his affidavit fails to provide any specific facts or observations supporting these conclusions nor does it reference industry standards and/or practices which, if implemented, would have remedied the claimed defects** (*see Morrison v. Flintosh*, 163 A.D.2d 646, 647-648; *see also Romano v. Stanley*, 90 N.Y.2d 444). Inasmuch as Bryski's affidavit lacks probative force to establish a prima facie case of active negligence by defendants, defendants were entitled to summary judgment dismissing the complaint.

Alcohol

Adamy v. Zirikasis, 92 N.Y.2d 396 (1998)

The question is whether there was evidence to support the jury's verdict that defendant T.G.I. Friday's served alcohol to a customer while he was "visibly intoxicated." First, there was the testimony of plaintiff's expert, Dr. Michael Baden, a forensic pathologist. Dr. Baden opined, based on Ziriakus's 0.17 blood alcohol content at 3:00 a.m., that he consumed 12 drinks at Friday's, and his BAC would have been at 0.20 at the time he left the bar. He further testified that if Ziriakus' BAC was 0.20 when he left Friday's, he would have been visibly intoxicated when last served.

Likening Dr. Baden's proffered testimony to that of the plaintiff's expert in *Romano*, Friday's urges that there was an insufficient foundation for Dr. Baden's testimony, rendering his opinion purely speculative and conclusory. To be sure, in *Romano*, we noted that "the personal professional background of plaintiffs' expert—a clinical forensic pathologist whose specialty was the performance of autopsies—is not alone sufficient to lend credence to his opinions, since individuals in his field are not ordinarily called upon to make judgments about the manifestations of intoxication in live individuals." (90 N.Y.2d at 452). Likewise, we recognized that the expert's affidavit in *Romano* "was devoid of any reference to a foundational scientific basis for its conclusions. No reference was made either to [the expert's] own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed." (*Id.*).

Friday's reliance on *Romano* is misplaced. In that case, an expert's affidavit was the only evidence offered to defeat the summary judgment motion of the vendor-defendants. In that context, we noted that **"an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor"** (*id*. at 451-452). **By contrast, when expert testimony is offered at trial, "the technical or scientific basis for a testifying expert's conclusions ordinarily need not be adduced as part of the proponent's direct case"** (*id.* at 451; *see Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410, 414). Rather, it falls to the opponent of the testimony to bring out weaknesses in the expert's qualifications and foundational support on cross-examination—which is, of course, unavailable to a party seeking summary judgment, as in *Romano*.

There having been no objection to the reliability of the relation-back testimony offered by Dr. Baden, we have no occasion to address the admissibility of such evidence. *(see Romano v. Stanley*, *supra*, 90 N.Y.2d, at 450-451; *People v. Ladd*, 89 N.Y.2d 893; *People v. MacDonald*, 89 N.Y.2d 908).

***Romano v. Stanley*, 90 N.Y.2d 444 (1997)**

This litigation arises out of a January 18, 1991 automobile accident in the Town of Colonie in which plaintiff Marie Romano was injured and Nancy Stanley, defendant Harold Stanley's decedent, was killed. Alleging that Stanley had been intoxicated at the time of the accident plaintiff brought the present action against Stanley's estate and the three establishments that had purportedly served alcohol to her on the evening of the accident.

In response to the submissions by defendants, plaintiffs submitted copies of a town police accident report and a New York State Police Crime Laboratory report indicating that Stanley had a blood alcohol level of 0.26% and a 0.33% level in her urine when she died. Additionally, plaintiff submitted an affidavit by a Dr. Thomas Oram, a forensic pathologist. Oram's affidavit, which relied on the toxicology report, asserted that she would have had "a substantial amount of alcohol—approximately 0.15 or more percent blood alcohol by weight—four to five hours prior thereto." Consequently, Dr. Oram opined, she "had to have been intoxicated prior to the time that she reportedly arrived at Dee Dee's Tavern." It was Dr. Oram's opinion "to a reasonable degree of medical certainty" that "Stanley would have and did show visible signs of intoxication. . . ." Although it provided some information about the manner in which alcohol is metabolized, Dr. Oram's affidavit did not refer to the scientific or personal professional basis for his conclusions about Stanley's blood alcohol count or for his assertions about how she must have looked and acted at that time.

Proof of a high blood alcohol count alone, however, generally does not establish the "visible" intoxication that Alcoholic Beverage Control Law 65(2) requires. First, permitting blood and urine alcohol content to serve as an automatic substitute for perceptible intoxication would run counter to the legislative goal of requiring an innkeeper's actual knowledge or notice of the customer's condition as a predicate for an "unlawful" sale. Second, it is well known that the effects of alcohol consumption "may differ greatly from person to person" (*Burnell v. La Fountain,* 6 A.D.2d 586, 590) and that tolerance for alcohol is subject to wide individual variation (*People v. Cruz*, 48 N.Y.2d 419, 426). Thus, even where it can be established, a high blood alcohol count in the person served may not provide a sound basis, for, drawing inferences about the, individual's appearance, or demeanor.

In this case, the proof offered to bridge this evidentiary and logical gap was an expert's affidavit asserting that in view of Stanley's blood alcohol level when she was served at Jack's and Martel's, she necessarily must have exhibited the symptoms of intoxication that are familiar to trained bartenders: gaze nystagmus, glassy eyes, motor impairment and difficulties in controlling her speech and voice levels. The problem with this proffered proof was not that it was based on laboratory tests, but rather that **the expert's ultimate conclusions were both speculative and conclusory.** As this Court has previously stated, **"where the expert states his conclusion unencumbered by any trace of facts or data, the testimony should be given no probative force whatsoever."** (*Amatulli v. Delhi Constr. Corp.,* 77 N.Y.2d 525, 533-534, n. 2).

Here, although the underlying facts on which plaintiffs' expert based his opinion—i.e., Stanley's blood and urine alcohol counts and her physical characteristics—were set forth in detail *(see, e.g., People v. Samuels,* 302 N.Y. 163; *see generally*, 5 Weinstein-Korn-Miller, N.Y. Civ Prac 4515.03, at 45-429 to 45-437; *cf., Costa v. 1648 Second Ave. Rest.,* 221 A.D.2d 299, 300) **there was nothing in the expert's affidavit at all from which the validity of its ultimate conclusions about Stanley's appearanceon the evening of the accident could be inferred. While the technical or scientific basis for a testifying expert's conclusions ordinarily need not be adduced as part of the proponent's direct case** *(see, e.g, Tarlowe v. Metropolitan Ski Slopes,* 28 N.Y.2d 410, 414; *People v. Crossland,* 9 N.Y.2d 464; *Christie's [Intl.] v. Gugliarda,* 65 A.D.2d 714, 715; *Horn v. State of New York,* 45 A.D.2d 799, 800; 5 Weinstein-Korn-Miller, *op. cit.,* at 45-437) **an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor.**

Moreover, plaintiffs' expert's affidavit was devoid of any reference to a foundational scientific basis for its conclusions. No reference was made either to Dr. Oram's own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed. Thus, Dr. Oram's affidavit had no probative force and was not by itself sufficient to defeat these defendants' motions for summary judgment (*see Caton v. Doug Urban Constr. Co.,* 65 N.Y.2d 909, 911; *Fallon v. Hannay & Son,* 153 A.D.2d 95, 101-102).

In the present case, defendants Jack's and Martel's have not questioned the reliability or scientific accuracy of Dr. Oram's "relation-back" conclusions about Stanley's blood alcohol level at the time she was served in their establishments. Thus, as in *Ladd* and *MacDonald,* we do not reach the question of the admissibility of such evidence here.

***Roy v. Volonino*, 262 A.D.2d 546 (2d Dep't 1999)**

The plaintiff submitted an expert affidavit from a forensic toxicologist who, in his opinion, stated "with a large degree of medical and technical certainty, that

defendant Volonino was visibly intoxicated when he was served his last beer at (the Blue Spruce Inn] establishment."

The toxicologist's expertise regarding the effects of alcohol is sufficient to support the inference that his opinion is based on knowledge acquired through personal professional experience, lending credence to his opinion *(see Adamy v. T.G.I. Friday's, Inc.*, 92 N.Y.2d 396; *Romano v. Stanley*, 90 N.Y.2d 444).

Further, the expert's affidavit includes the scientific data upon which his conclusions are drawn *(see Romano v. Stanley*, *supra*, at 451-452). The expert's affidavit, together with the eyewitness's affidavit, was sufficient to raise a triable issue of fact as to whether Volonino was visibly intoxicated when he was served alcohol at the Blue Spruce Inn *(see Marconi v. Reilly*, __A.D.2d__ (2d Dep't, Oct. 26, 1998)). Consequently, the Supreme Court properly denied the Blue Spruce Inn's motion concerning the cause of action which alleged Dram Shop Act violations.

***People v. Peeso*, 266 A.D.2d 716 (3d Dep't 1999)**

County Court acted well within its discretion in precluding defendant's expert, a physician specializing in neurology, from giving an opinion based upon defendant's hospital records as to whether defendant was intoxicated at the time of the accident. Although the witness was likely qualified to render an opinion as to whether defendant's slurred speech and glassy eyes may have been caused by a head injury sustained in the accident, nothing in his professional background qualified him to give an opinion as to the extent of defendant's intoxication at the time of the accident solely on the basis of a subsequent neurological examination *(see Romano v. Stanley*, 90 N.Y.2d 444, 452).

Accident Reconstruction

***Gonzalez v. 98 MAG Leasing Corp.*, 95 N.Y.2d 124 (2000)**

Defendants moved for summary judgment. In opposition, plaintiff argued that there were material issues of fact regarding the circumstances of the accident. Plaintiff submitted the affidavit of an accident reconstruction expert who concluded that, based on the "physical facts and testimony, . . . Hateau had sufficient time to bring his vehicle to a stop and/or to swerve to avoid * * * [plaintiff] prior to impact." Though he was not present at the scene, the expert further stated that "Hateau failed to keep a proper look out (sic] and failed to exercise reasonable care and proper control of his motor vehicle."

Moreover, we reject plaintiff's contention that the trial court erred in granting defendants' motion for summary judgment on the merits. When defendant moved for summary judgment and established a prima facie entitlement to a judgment as a matter of law, the burden shifted to plaintiff to produce evidence, in admissible form, demonstrating that material issues of fact existed (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 326-327; *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853). The conclusory assertions proffered by plaintiff's accident reconstruction expert were insufficient to defeat defendants' motion for summary judgment *(see Alvarez v. Prospect Hosp.*, *supra*, at 325).

***Litts v. Wayne Paving Co., Inc.*, 261 A.D.2d 906 (4th Dep't 1999).**

Supreme Court abused its discretion in limiting the testimony of plaintiff's expert witness, a traffic and transportation civil engineer and accident reconstrustionist. Plaintiff established that **the witness possessed the requisite skill, training, education, knowledge and experience to reconstrust the accident and provide technical evidence to the jury** to clarify the conflicting evidence concerning the speed of the motorcycle and the operation of the motorcycle and the steam roller. Because plaintiff established that the technical analysis of plaintiff's expert was beyond the ken of the typical juror, the court should have admitted the expert's testimony *(see Van Scooter v. 450 Trabold Rd.*, 206 A.D.2d 865, 866; *see also Adamy v. Ziriakus*, 231 A.D.2d 80, 88-89, affd 92 N.Y.2d 396). The error may not be deemed harmless. Because the jury was prevented from hearing expert testimony concerning the contested question of the speed of the motorcycle and its operation, plaintiff's rights were substantially impaired. *(see LaPenta v. Loca-Bik Ltee Transp.*, 238 A.D.2d 913, 914; *Rodriguez v. New York City Hous. Auth.*, 209 A.D.2d 260). Consequently, a new trial is required.

The court **did not abuse its discretion, however, in refusing to permit plaintiff to introduce into evidence two exhibits concerning the topography of the road that were drawn to differing scales.** The court properly determined that those exhibits may have been misleading to the jury. Additionally, the **court properly refused to permit plaintiff's expert to render an opinion whether defendant violated provisions of the Vehicle and Traffic Law and applicable regulations** *(see LaPenta v. Loca-Bik Ltee Transp.*, *supra*, at 914).

Spoliation

Sanctions Applied

Dismissal.

***Rose v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243 (1st Dep't 1995)**

Dismissal of the amended complaint is also warranted because of plaintiff's negligent loss of a key piece of evidence which defendants never had an

opportunity to examine *(see Interested Underwriters at Lloyd's v. Rheem Mfg. Co.*, N.Y.L.J., May 12, 1994, at 28, col. 4).

Kirkland v. NYCHA, 236 A.D.2d 170 (1st Dep't 1997)

Plaintiffs alleged that decedent had been trying to light a stove in the apartment to cook breakfast, that the stove was defective, that her clothes caught fire when accumulated gas ignited and that as she ran, in flames, through the apartment, she fell out of the window.

Plaintiffs sued the NYCHA, as owner and operator of the apartment complex, and defendant J.B. Slattery & Bro., the manufacturer of the stove. In 1991, Mrs. Moore requested NYCHA as landlord to remove the stove, which was done. For all practical purposes, the allegedly defective stove thereafter was destroyed. During the following year, NYCHA commenced the third-party action against Vitanza.

Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence *(e.g., Abar v. Freightliner Corp.*, 208 A.D.2d 999; *see generally*, Hoenig, *Spoliation of Evidence: Preserving the Crown Jewels*, N.Y.L.J., Dec. 23, 1988, at 3, col. 1, and citations therein). A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial "witness" to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission (Hoenig, *id.).* The trend is particularly pronounced in litigation involving products liability, but also is found in negligence cases.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them (*cf., Abar v. Freightliner Corp., supra*). We have found dismissal to be a viable remedy for loss of a "key piece of evidence" that thereby precludes inspection. (*Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243.)

Although dismissal is the most severe sanction and precludes adjudication on the merits, "(t]he stark result is that relevant evidence was irreparably lost by the actions" of the party basing a claim on that evidence (*Capitol Chevrolet v. Smedley*, 614 So. 2d 439, 443 (Ala. Sup. Ct. 1993)). There is a view that destruction or loss of evidence should be "rendered costly enough an enterprise that it will not be undertaken" (Sempert, *Remedies for Spoliation of Evidence in Product Liability Litigation*, 19 Prod. Safety & Liab. Rep. (BNA) (No. 21) 618 (May 24, 1991)). inasmuch as it "often leaves the offended party prejudicially bereft of appropriate means to confront a claim with incisive evidence and turns trials into speculative spectacles based on rank 'swearing contests.'" (Hoenig, *Products Liability, Impeachment Exception; Spoliation Update*, N.Y.L.J., Apr. 12, 1993, at 6, col. 5).

Squitieri v. City of New York, 248 A.D.2d 201 (1st Dep't 1998)

Plaintiff is a city sanitation worker who was operating a street sweeper when the cab filled with carbon monoxide fumes. The sweeper in question had been manufactured by third-party defendant Elgin and purchased by the City. Plaintiff commenced an action against the City in March 1985, alleging negligent maintenance and repair of the sweeper, and the City filed its answer. Yet in September 1985, though knowing that the sweeper was the subject of pending litigation against it, the City disposed of the sweeper.

The City then waited until 1993 to bring a third-party action against Burke, the distributor from whom it had bought the sweeper (not a party to this appeal) and only impleaded Elgin, the manufacturer, in 1994.

When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation (*Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243 (dismissing plaintiff's claim due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine") or, at the very least, preclude that party from offering evidence as to the destroyed product (*Strelov v. Hertz Corp.*, 171 A.D.2d 420, 421 (defendant precluded from presenting any evidence in defense of suit based on allegedly defective rental car, except as to the parts of the car that defendant had not destroyed)).

In light of this extreme prejudice to Elgin's case, dismissal of the third-party complaint is appropriate (*Interested Underwriters at Lloyds v. Rheem Mfg Co.*, N.Y.L.J., May 12, 1994, at 28, col. 4).

DiDomenico v. C&S Aeromatik, 252 A.D.2d 41 (2d Dep't 1998)

Separate and apart from CPLR 3126 N.Y.C.P.L.R. sanctions is the evolving rule that a spoliator of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation (*see, e.g., Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170 (dismissal of third-party action appropriate where crucial evidence was negligently

destroyed); *accord*, *Healey v. Firestone Tire & Rubber Co.*, 212 A.D.2d 351, *rev'd on other grounds* 87 N.Y.2d 596; *Vaughn v. City of New York*, 201 A.D.2d 556; *see also Squitieri v. City of New York,* 248 A.D.2d 201). To quote *Squitieri v. City of New York*, *(supra*, at 2030 "[s]poliation sanctions * * * are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to [an]other party's ability to present (a case or] a defense" *(see also Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243 (dismissal of complaint warranted where plaintiff negligently lost key piece of evidence before defendants could examine it).

Here, UPS destroyed the package that caused the plaintiff's injury, as well as all of the records that might have identified the culpable party. In addition, its delay in responding to the plaintiff's discovery demands resulted in CA's routine destruction of its own shipping records. The plaintiff was therefore left without the means to prove his case, while CA could not properly defend itself. **Where, as here, one party has destroyed critical physical proof, such that its opponents are "'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence,'" the spoliator's pleading is properly stricken in order to obviate a trial that is "'based on rank "swearing contests."** (*Kirkland v. New York City Hous. Auth, supra*, at 174, quoting Hoenig, *Products Liability, Impeachment Exception, Spoliation Update*, N.Y.L.J., Apr. 12, 1993, at 6, col. 5).

Liz v. William Zinsser & Co., 253 A.D.2d 413 (2d Dep't 1998)

The plaintiff Freddy Liz allegedly sustained physical injuries when vapor from a can of BIN Primer Sealer Stain-Killer, a spray paint manufactured by the defendant, was ignited by a pilot light in the plaintiffs' kitchen. The plaintiff and his wife commenced the instant action, inter alia, to recover damages based on negligence, strict product liability, and breach of implied and express warranties.

To the extent that the plaintiffs' causes of action are based on a manufacturing defect theory, they also should have been dismissed because of the plaintiffs' spoliation of evidence *(see Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170; *Lee v. Boyle-Midway Household Prods.*, 792 F. Supp. 1001).

Puccia v. Farley, 261 A.D.2d 83 (3d Dep't 1999)

Plaintiffs purchased a wood-burning stove which was installed in their home by defendant in October 1993. On January 11, 1995, plaintiff detected a fire in the vicinity of the wood-burning stove.

Plaintiffs' insurance carrier retained Intricate Investigative Services. Intricate's investigative report, dated January 17, 1995, concluded that the fire was caused by the negligent installation of the wood-burning stove, with no evidence of a manufacturing defect. It concluded, after having eliminated "all other natural and accidental sources of ignition * * * in the area of origin * * * that subrogation may exist." Shortly thereafter, plaintiffs' agent arranged for a demolition contractor to dispose of the fire debris.

A certified investigator hired by defendant, reviewed the report of the local fire department, news articles, Intricate's report, photographs taken after the first fire and various manuals and statements. Finding the photographs to be an inadequate substitute for an actual inspection of the stove due to their failure to accurately depict the proximity of the wood studs to the pipes, he contended that although there was a possibility of a chimney fire or product defect, he could not conclusively state his opinion without a physical inspection of the pipes for creosote build-up or leaks.

Defendant thereafter moved to dismiss the complaint pursuant to CPLR 3126 N.Y.C.P.L.R. due to plaintiffs' destruction of evidence crucial to the underlying action despite its knowledge that a viable claim for subrogation existed.

Courts have discretion to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection *(see, e.g., Matthews v. McDonald,* 241 A.D.2d 808; *In re Cullen*, 143 A.D.2d 746). We have agreed that such **sanctions might even be appropriate for the negligent disposal of evidence deemed crucial to the underlying action when the adversary had not been given an opportunity for inspection** *(see Abar v. Freightliner Corp.*, 208 A.D.2d 999, 1001; Hoenig, *Products Liability*, N.Y.L.J., Aug. 8, 1994, at 3, col. 1). Although we had yet to be confronted with such facts, other courts have so found," *(see Squitieri v. City of New York*, 248 A.D.2d 201; *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170) recogniz[ing] that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and [that a resultant] * * * unfairness [is] inherent in allowing a party to destroy evidence and then * * * benefit from that conduct or omission" (*Kirkland v. New York City Hous. Auth.*, *supra*, at 173, citing Hoenig, *Spoliation of Evidence: Preserving the Crown Jewels*, N.Y.L.J., Dec. 23, 1988, at 3, col. 1).

Trial courts are given broad discretion to determine when and to what extent a discovery sanction should be imposed. Such determination must remain undisturbed unless there is a clear abuse of discretion *(see Abar v. Freightliner Corp., supra)*. Although reluctant to strike a pleading absent a willful or contumacious fail-

ure to facilitate discovery *(see Vaughn v. City of New York*, 201 A.D.2d 556), courts will look to the extent that the spoliation of evidence may prejudice a party and whether a dismissal will be necessary as "a matter of elementary fairness" (*Kirkland v. New York City Hous. Auth.*, *supra*, at 175; *see Squitieri v. City of New York*, *supra,* at 201).

Here, **plaintiffs' agent posited that a potential claim for a subrogation against defendant may exist premised upon his improper installation. Plaintiffs' agent certainly found the "debris" which they now state serves no useful purpose to be relevant to their own inspection and investigation, forming the basis for the allegations made here. Since circumstantial evidence will not be sufficient to prove whether defendant negligently installed the wood stove, we can find no abuse of discretion in the determination to strike the pleading** (*see Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243).

***Sage Realty Corp.*, 275 A.D.2d 11 (1st Dep't 2000)**

The issue before us is whether plaintiffs intentionally and in bad faith destroyed tape recordings relevant to their claims and, if so, what is the proper remedy for plaintiffs' spoliation of evidence.

Defendant Proskauer was legal counsel for Robert and Melvyn Kaufman in connection with a complex mortgage-backed securities transaction. In 1996, plaintiffs discharged Proskauer. Plaintiffs then sued Proskauer and NSI in the present case, asserting claims sounding in legal malpractice, breach of fiduciary duty and breach of contract, in connection with the terms of the transaction.

During discovery, defendants demanded production of the tape recordings. Obviously, to the extent that defendants' advice to plaintiffs was thus memorialized on tape, that advice has critical importance to the basic thrust of plaintiffs' entire complaint. that the necessary advice was not imparted. Apparently, though, plaintiffs were less than willing to release the tapes.

Several former employees provided testimony on this issue significantly at variance with plaintiffs' position and especially undermining key aspects of Kaufman's affidavit. Another employee recalled that several tapes were disposed of during the summer of 1999—the coincidence of the timing is, of course, remarkable.

The IAS court granted defendants' motion. In reaching its conclusion, the IAS court relied on the uncontroverted evidence noted above, including Kaufman's own testimony, and his admitted conduct of destroying numerous tapes at such a critical point in time without even advising his attorney of such destruction of potential evidence to ascertain its evidentiary value and hence whether the tapes were within the scope of pending discovery orders.

Whether we review on the basis of the common-law doctrine of spoliation, allowing dismissal when key evidence is destroyed prior to examination by the opposing party, in which case willfulness or bad faith may not be necessary predicates *(see Squitieri v. City of New York*, 248 A.D.2d 201), or on a proper exercise of the court's discretion under CPLR 3126 N.Y.C.P.L.R., addressing willful conduct by a nondisclosing party, we agree with the position of the IAS court.

We also conclude that the destruction of the tapes was done in bad faith, an inference also circumstantially supported by the nature of Kaufman's conduct and the timing (CPLR 3126 N.Y.C.P.L.R.; *Sonmez v. World on Columbus*, *supra*; *cf.*, *Christian v. City of New York*, __A.D.2d __, 703 N.Y.S.2d 5). Again, the record clearly supports this conclusion. **Evidence by former employees established that "hundreds" of tapes were present in his office when this litigation commenced, and that they no longer existed during the time period the discovery dispute was occurring.** Kaufman himself admitted taking home several tapes with the expressed intention of destroying them. This indication of bad faith is buttressed by Kaufman's failure to take even the elementary precaution, knowing that tapes were being sought, of delivering the tapes to counsel or having a third party verify their lack of relevance prior to their destruction. This record also clearly indicates that, given the singularity of this evidence *(see DiDomenico v. C&S Aeromatik Supplies*, 252 A.D.2d 41) defendants are substantially prejudiced in interposing a defense without it.

CPLR 3126 N.Y.C.P.L.R. provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just. . . ." As such, courts have "broad discretion" that must not be disturbed absent "clear abuse" to impose sanctions under CPLR 3126 N.Y.C.P.L.R. when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection (*Puccia v. Farley*, 261 A.D.2d 83, 85; *cf.*, *Hill v. Douglas Elliman-Gibbons & Ives*, 256 A.D.2d 31 *lv. granted,* 1999 N.Y. App. Div. LEXIS 5200). We have recognized that under such circumstances, dismissal may be appropriate as a matter of "elemental fairness" (*Kirkland v. New York City Housing Authority*, 236 A.D.2d 170, 175), especially when the destruction of the evidence is "reprehensible" (*Hyosung [America] v. Woodcrest Fabrics*, 106 A.D.2d 298, *appeal dismissed*, 64 N.Y.2d 934). Although we also have recognized that dismissal may be an excessive remedy where the destroyed evidence is not crucial, with prejudice diminished accordingly (*Atlantic Mutual Insurance Co. v.*

Sea Transfer Trucking, 264 A.D.2d 659), and other courts have not dismissed when evidence was discarded in good faith, pursuant to normal business practices and in the absence of pending litigation or notice of a specific claim (*Conderman v. Rochester Gas & Electric Corp.*, 262 A.D.2d 1068, 1070), those factors are inapplicable in this case. Rather, dismissal is justified by the deliberate nature of the conduct that effectively impede the ability of the deprived party to assert a claim or a defense (*Hyosung*, *supra*; David Siegel, Practice Comm., McKinney's Cons Laws of N.Y., Book 7B, CPLR 3126 N.Y.C.P.L.R. 7, pp. 757-758; 6 Weinstein-Korn-Miller, N.Y. Civil Practice, ¶ 3126.04).

Non-Dismissal

Sanctions Not Applied

Popfinger v. Terminix Int'l Co. Ltd., 251 A.D.2d 564 (2d Dep't 1998)

The plaintiff had the termite damage repaired and discarded the damaged wood without notifying the defendant. The defendant failed to demonstrate that the' plaintiffs action was an intentional attempt to hide or destroy evidence. Furthermore, while sanctions may be imposed for negligent or nonintentional destruction of evidence *(see Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170), we find that the imposition of sanctions is inappropriate here.

Abar v. Freightliner Corp., 208 A.D.2d 999 (3d Dep't 1994)

On April 7, 1986, as plaintiff was entering the cab of his truck that was designed and manufactured by defendant in 1976, several parts of the grab rail assembly that he was using to hoist himself up gave way, causing him to fall.

A grab rail assembly is comprised of a 20-inch tube attached to upper and lower brackets by fastening devices with two bolts. Abar's accident allegedly occurred when the lower bracket gave way.

Although plaintiffs' expert observed the broken bolts, he neither removed them nor preserved them as evidence.

Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them *(see* Hoenig, *Products Liability*, N.Y.L.J., Aug. 8, 1994, at 3, col. 1). Such sanctions have been applied where the plaintiffs had portions of the defective product in their possession, but lost them prior to allowing the defendant to inspect them *(see Roselli v. General Elec. Co.,* 410 Pa Super 223, 599 A.2d 685) and where plaintiffs had possession of the product and allowed it to be destroyed after their expert inspected it (*see Schwartz v. Subaru of Am.*, 851 F. Supp. 191). This case is distinguishable in that **plaintiffs never had possession of the truck or the bolts.** Further, according to plaintiffs' expert, it appears that it would have been extremely difficult to remove the bolts from the truck. Also, there is no evidence that plaintiffs' attorneys intentionally misled defendant's attorneys by indicating that they had possession of the broken bolts when, in fact, they did not. Therefore, under these circumstances, Supreme Court did not abuse its discretion in denying defendant's request *(compare, Brown v. Michelin Tire Corp*., 204 A.D.2d 255).

Conderman v. Rochester Gas & Electric Corp., 262 A.D.2d 1068 (4th Dep't 1999)

During the evening of January 27, 1994, an ice storm was in progress in the Rochester area. Plaintiff Beverly A. Conderman was driving home from work on Spencerport Road in the Town of Ogden when 14 utility poles broke off and fell into the road. One pole, identified as pole 103, crashed through the windshield of Beverly Conderman's vehicle.

Defendants Rochester Gas & Electric Corporation (RG&E) and Ogden Telephone Company (Ogden) rushed emergency crews to the scene. As a result of the downed poles, **the road was impassable in the area and many customers were without power. Some of the poles had broken into pieces and others were entangled among the downed wires. Workers cut the poles into four-foot lengths capable of being carried by hand, and moved them to the side of the road. Within 24 hours of the incident, the pieces were then loaded into trucks and removed to a landfill.** Crews working nonstop erected new poles and restored service to all customers within 24 hours.

Plaintiffs moved for summary judgment on liability and/or sanctions based upon spoliation of critical evidence by RG&E and Ogden. Plaintiffs argued that summary judgment was warranted given the disposal of the poles prior to plaintiffs' being able to inspect them, at a time when RG&E and Ogden should have known that litigation was probable.

In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices *(see Schidzick v. Lear Siegler, Inc.*, 222 A.D.2d 841; *Hallock v. Bogart*, 206 A.D.2d 735, 736).

Gallo v. Bay Ridge Lincoln Mercury, Inc., 262 A.D.2d 450 (2d Dep't 1999)

The testimony demonstrated that the **plaintiff's failure to preserve the destroyed automobile at issue was not intentional, and that the plaintiff did not obtain any unfair advantage from the failure to pre-**

serve it as evidence. As a result, the Supreme Court properly denied the defendant's motion for summary judgment based on the spoliation of that evidence, and properly declined to impose a sanction. (*see Popfinger v. Terminix Int'l Co. Ltd. Partnership*, 251 A.D.2d 564; *Prasad v. B.K. Chevrolet*, 184 A.D.2d 626).

***Atlantic Mutual Ins. v. Sea Transfer Trkg.*, 264 A.D.2d 659 (1st Dep't 1999)**

Although it was undisputed, inter alia, that defendant received possession of the goods that it failed to deliver them as agreed, that the goods disappeared from defendant's warehouse, that defendant's employee filed a police report to the effect that the removal of the goods was unauthorized, and that a portion of the goods was recovered two years later, these facts permitted more than one inference to a finder of fact: either that the goods were stolen by a third party or they were converted by defendants. **The facts as to the salvaging of the recovered goods and the notice to defendant thereof—was not crucial to the determination of the key issue here, whether or not the goods were converted.**

***State Farm Ins. Co. v. Amana Refrigeration*, 266 A.D.2d 372 (2d Dep't 1999)**

The plaintiff's subrogee purchased a refrigerator from Sears in January 1992. The refrigerator was manufactured by the defendant Amana. After experiencing numerous problems with the refrigerator, which were promptly reported to Sears, Anobile's apartment caught fire on October 29, 1992. Fire investigators retained by the plaintiff inspected the scene and determined from burn patterns and other evidence that the fire originated inside the freezer. A toaster oven found unplugged on the counter near the refrigerator, which had not been used since that morning, was discarded and not examined as a possible cause of the fire.

The defendants' contention that its defense was compromised because of the spoliation of evidence is without merit. The toaster oven, which the defendants contend was an alternative cause of the fire, **was not a key piece of evidence that should have been preserved** *(see Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170).

***Fellin v. Sahgal*, 268 A.D.2d 456 (2d Dep't 2000)**

The nature and degree of the penalty to be imposed for failing to disclose is within the discretion of the court *(see Garnett v. Hudson Rent A Car,* 258 A.D.2d 559; *Soto v. City of Long Beach*, 197 A.D.2d 615). The drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith *(see Harris v. City of New York*, 211 A.D.2d 663). Under the circumstances of this case, the Supreme Court providently exercised its discretion in denying the plaintiffs' motion to strike the defendants' answer *(see* CPLR 3126 N.Y.C.P.L.R.; *cf., Zoref v. Glassman*, 258 A.D.2d 460; *Jaffe v. PJA Motor Corp*., 253 A.D.2d 853; *DiDomenico v. C & S Aeromatick Supplies*, 252 A.D.2d 41).

Ethical Obligations and Prohibitions Facing Counsel

By Warren Seifert, Jim Hogan, Douglas Hayden and Kenneth Brownlee

I. Whom Do I Represent?

"The paramount duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, including the Disciplinary Rules and enforceable professional regulations."[1] The question in the insurance defense realm then becomes, who is the client and what happens when an attorney is simultaneously representing two clients with potentially conflicting interests?

A. Insured v. Carrier

The relationship between client and attorney in a liability case where the claim is covered by liability insurance is more complicated that a typical "attorney-client" relationship. Typically, the insurer has retained an attorney to represent its insured. As a result, there are actually three parties involved, the insured, the insurance carrier, and the attorney hired by the insurance carrier to defend its insured.

This arrangement contractually binds defense counsel to the insurance company and, therefore makes the carrier a client of the attorney. The defense attorney, however, has an attorney-client relationship with the insured it is retained to represent. Pursuant to the Canons of Professional Ethics and the case law, an attorney owes the same unqualified loyalty to the insured in this arrangement as it would if that individual had retained the attorney personally. The "duty to the assured is paramount."[2]

B. Effect of Who Pays the Bill

"There is no question that the assured is the client of the retained attorney and that the attorney is obligated to represent him with undivided fidelity regardless of the fact that his fee for legal services is being paid by another."[3]

The American Bar Association Model Code of Professional Conduct recognizes the fact that an attorney may be paid for his/her services by an entity other than the party represented. This is permissible, however, only after full disclosure has been made and the consent of the client has been obtained. Even then, the Disciplinary Rules specifically state: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services."[4]

The insured is the client regardless of who pays the bill. But what happens when the insurance carrier has paid the limits of its policy or is otherwise no longer obligated to defend or indemnify the insured? For example, in *Presbyterian Hospital v. Empire Insurance Co.*,[5] the Second Department held that once the carrier had paid the full monetary value set forth in its policy, that its duties under the policy ceased. Similarly, the Second Department in *Champagne v. State Farm*,[6] held that the carrier had no duty to defend or indemnify the insured with respect to the separate loss of consortium claim because it had paid out the limits of its policy. Neither of these cases, however, addressed the duties of the attorneys retained by the carrier to represent the insured once the carrier's duty had been exhausted.

As early as 1932, one court held that an order of liquidation enjoining all agents and employees of an insurance carrier from proceeding with business did not relieve the attorney furnished by the insurance company from his duty to continue to represent the interests of the insured, his client, at least until relieved of this duty by the court.[7]

In *Dordal v. Laces Roller Corp.*,[8] the Second Department held that the court below properly allowed a law firm to withdraw as counsel for a client who refused to henceforth pay the attorneys' fees after liquidation of the insurance company which appointed the law firm to represent their client.

A similar result was reached by the First Department in *Cullen v. Olins Leasing, Inc.*[9] However, in *Cullen*, two justices dissented noting that the record was insufficient because nothing contained in the moving papers indicated whether or not any provision had been made in the liquidation proceedings for the continued defense of the pending action and because the record failed to reflect how the moving law firm had been compensated by the insurer at the inception of the litigation and the scope of such representation.

In *Turzio v. Ravenhall & Dworman*,[10] attorneys for an insurance carrier that became insolvent made a motion for leave to withdraw as counsel. In this case the insureds consented to the withdrawal on the condition that the attorneys turn over all papers. Although willing to turn over all pleadings, the attorneys were unwilling to turn over inspection reports, witnesses' statements, and examinations before trial without compensation therefor, asserting that they had a lien on these papers. In holding that the attorneys had no enforceable lien, the court stated that the attorneys' retaining lien is valid only to the extent of the, unpaid balance remaining due from their clients, and that their clients, the defendants, owed them nothing as the attor-

neys were furnished, and to be paid, by the insurer. Citing *Leviten v. Sandbank*,[11] the *Turzio* court noted that a court should not permit an attorneys' retaining lien when to do so would be unfair and unequitable.

Defense counsel may still have a problem withdrawing as counsel for once having undertaken representation there is an obligation to conduct the proceedings to its termination, unless for good reason the court permits withdrawal by motion with notice to the client.[12]

For example, suppose that the policy limits are paid out but litigation continues (two plaintiffs are paid the policy limits and one plaintiff remains); the litigation is complex and has been ongoing for several years; and the defendant wants the assigned attorney to continue, but at an hourly rate less than the insurer paid. In this situation, what would the court rule on a motion to withdraw?

Finally, does defense counsel have a duty to inform the insured of the insurer's potential insolvency? In *Venetsanos v. Zucker, Facher & Zucker*,[13] the plaintiff sued the defendant on negligence and strict liability theories arising out of a boat accident in which the plaintiff was seriously injured. The defendant's insurer filed for bankruptcy after assigning defense counsel.

Following a jury trial, the plaintiff was awarded a judgment approximately three times the limits of the defendant's policy. The defendant assigned his rights to the plaintiff who sued, among others, the assigned defense counsel alleging it was responsible for the full amount of the jury verdict because it failed to fully inform the defendant of the insurer's financial problems and its effect on the resolution of the case.

At the trial court, the assigned defense firm prevailed on a motion for summary judgment because the law firm had indisputably advised defendant of the insurer's financial problems. The defense firm's motion for summary judgment was not contested on appeal. Based on this decision, it may be the most prudent course for assigned defense counsel to notify the insured of all significant developments, including the insurer's precarious financial situation.

C. Malpractice

An insurance carrier is not liable to an insured for the alleged malpractice of the defense counsel that it retained to defend its insured.[14] In *Feliberty*, the insured tried, unsuccessfully, to argue that the carrier was liable for the malpractice of the attorney it had retained to defend him. The Court rejected this position as a viable cause of action and noted that the insurer, the employer, was not liable for the acts of counsel, an independent contractor. The Court held that, given the insurer's inability to provide or control the legal services in issue, and the existence of a remedy for incompetence against counsel, the imposition of vicarious liability was unwarranted. It should be noted that the Court recognized the fact that this was an action against the carrier for the malpractice of the attorneys, and not a claim that the insurer designated incompetent or conflicted counsel.

A federal appeals court, however, has held to the contrary. In *Smoot v. State Farm Mut. Auto Ins. Co.*,[15] the court "concluded that an insurer's duty to defend is subject to vicarious liability, noting that the duty is an important and frequently distinguishable part of the insurance contract and that the insurer therefore stands liable for the agents it selects to execute its promises."[16]

In addition, the Second Circuit has held that an excess carrier cannot maintain a malpractice action against the law firm retained by the primary insurer to defend the insured, at least under Connecticut law.[17] The court held that the law firm's fealty was only to the insured and that an attorney-client relationship between the law firm for the insured and the excess carrier had not been shown.

Other jurisdictions have allowed malpractice actions under the doctrine of equitable subrogation. For example, the First Department recognized the existence of such a claim by the excess carrier against the law firm retained by the primary insurer in *Great Atlantic Insurance Company v. Weinstein*.[18] Relying, at least in part, on the First Department's decision in *Great Atlantic Insurance Company*, the United States District Court for the Eastern District of New York, applying New York law, recognized a cause of action by an excess insurer against an insured's counsel founded upon the principles of equitable subrogation.[19]

II. Confidentiality and Disclosure

An attorney's duty of confidentiality to the client is of paramount importance to the attorney-client relationship. Insurance defense counsel are not relieved of any part of this duty despite the unique triangular relationship involved. Defense counsel has a duty to report to the carrier and the insured information that affects the common goals of the defense.

Contrary to positions taken by insureds in some matters, providing status reports to the insurance carrier is not a violation of privilege.[20] The court in *Goldberg* suggested, however, that a better practice might be to provide the insured with courtesy copies of all such reports, while noting that there is *no obligation to do so*.

Additional issues of confidentiality and disclosure arise when the attorney obtains information from the insured which could affect the insurance company's interests, i.e., information that could affect the insured's coverage for the action. Recognizing this issue, in May

1969, the National Conference of Lawyers and Liability Insurers published the "Guiding Principles" which included:

III. Conflicts of Interest

A. Ethical Considerations

Perhaps more than anywhere else, the *potential* for conflicts of interest arise when the insurer hires defense counsel to represent the insured. A conflict may exist because an attorney cannot represent two clients with conflicting interests. One of the first things an insurer must do when it receives notice thata claim or suit has been filed against its insured is to determine whether there is a conflict of interest between it and the insured as to how the claim or suit should be defended. The determination of whether or not a conflict of interest exists turns largely on the course of action the insurer adopts with respect to the claim or suit.[21] If the insured's interests are different from the carrier's, such a conflict will arise. The Code provides that:

> DR 5-105. Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> A. A lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> C. In the situations covered in DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation in the exercise of the lawyer's independent professional judgment on behalf of each.
>
> D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A), (B) or (C), DR 5-108, or DR 9-101(B) except as otherwise provided therein. (In January of 1997, the House of Delegates of the New York State Bar Association approved certain amendments to the Code of Professional Responsibility. One such proposed amendment would modify this section by eliminating the necessity for the entire firm to be disqualified when one lawyer in the firm had a personal conflict of interest.)
>
> E. A law firm shall keep records of prior engagements which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagement are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with subdivision (d) of this disciplinary rule. Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of subdivision (d) of this disciplinary rule occurs, shall be a violation by the firm. In cases where a violation of this subdivision by the firm is a substantial factor in causing a violation of subdivision (d) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of subdivision (d).

On January 24, 1997, the House of Delegates of the New York State Bar Association completed a project which began five years ago and approved a comprehensive set of proposed amendments to the Lawyers' Code of Professional Responsibility. Disciplinary Rule 5-105 was amended to add a new subdivision requiring law firms to "keep records of prior engagements" and to have a policy implementing a conflicts check to assist lawyers in the firm in complying with the prohibitions against conflicts of interest in Disciplinary Rule 5-105(D).[22] The amendment requires that the conflicts check "render effective assistance to lawyers within the firm" in complying with the vicarious disqualification provision in 5-105(D). The failure to keep such records,

or to have a policy implementing a conflicts check, constitutes a violation by the firm, even if a violation of the conflicts provision does not occur. Moreover, if a violation of this provision by the firm is a substantial factor in causing a lawyer to violate the conflicts rules, "the firm, as well as the individual lawyer, shall also be responsible for the violation. . . ."[23]

The rules are silent as to the form of discipline to be imposed on a firm found guilty of a violation under these amendments, apparently because of a disagreement among the four appellate divisions. Judiciary Law § 90(2) grants the appellate division power to "censure, suspend from practice or remove from office any attorney" who is guilty of professional misconduct. This provision does not expressly allow the imposition of monetary fines on those found guilty of misconduct and may not allow for the imposition of such fines on law firms.

Normally, the defense of a tort action under a liability policy does not give rise to a conflict of interest between the insurer and the insured because they have common goals and interests in resolving the matter. When a conflict does arise, however, "the attorney is obligated under Canon 6 to disclose to the carrier and to the assured the apparent conflict of interest with a full disclosure of the facts and advise the carrier that even though his legal services are being paid by it, his undivided allegiance and fidelity is to the assured."[24]

The Guiding Principles have also addressed this issue:

IV. Conflicts of Interest Generally—Duties of Attorney

> In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflict of interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.[25]

This principle parallels the Canons of Ethics and the case law, except in regard to the words, "at his own expense." Most jurisdictions hold that where a conflict exists, the insurer must bear the costs of independent counsel.

A. Insured's Choice of Counsel

Normally, an insurer's duty to indemnify is paired with the right to control the defense of the litigation.[26] The rationale behind this is that it permits the insurer to protect its financial interest in the outcome of the litigation and minimize unwarranted liability claims.

In situations where conflicts of interest and loyalties are apparent, however, "(t)he insurer's desire to control the defense must yield to its obligation to defend the insured."[27] The Court of Appeals has held that if such a conflict of interest arises, "the selection of the attorneys to represent the assureds should be made by them rather than by the insurance company, which should remain liable for payment of the reasonable value of the services of whatever attorneys the assureds select."[28] In *Prashker*, a conflict of interest resulted because the underlying action involved theories of recovery under only some of which the insurer would be liable. The insurer's interest in defending the suit was in conflict with the insured's since the insurer was liable on only some grounds for recovery and not others.[29]

New York courts hold that defense counsel furnished by the insurer to the insured in fulfillment of the insurer's defense obligation owes its paramount allegiance to the insured, not the insurer.[30] "The insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client," and is "prohibited from itself conducting the litigation or controlling the decisions of the insured's lawyer."[31]

This rule is grounded in the Model Code of Professional Responsibility: EC 5-17 (identifying a situation in which a lawyer is asked to represent an insured and his insurer as involving "potentially differing interests"); EC 5-21 ("The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment."); and EC 5-23 ("Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.").[32]

New York courts thus hold (as do the courts of a minority of other jurisdictions) that, where a coverage question is presented by the insurer's reservation of rights to deny coverage, an actual conflict of interest exists between the insurer and insured that entitles the insured to a "defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer."[33]

Some New York cases indicate, however, that the insured does not have the right to select independent counsel at the insurer's expense in all instances.[34] "It is not inherently objectionable to permit an insurer to participate in the selection of independent counsel for the insured as long as the insurer discharges its obligation in good faith and the attorney chosen is truly independent and otherwise capable of defending the insured."[35]

1. Conflict of Interest Based on Different Theories of Recovery and/or Claims

A review of the cases on this issue indicates that the potential for a conflict of interest arises most often when the best interests of the insurance company and the insured are served if different theories of recovery and/or claims are upheld. In *Allstate Insurance Company v. Kenneth Riggio*,[36] the insured was involved in a negligence action and the insurer claimed that it was not obligated to defend or indemnify the insured because the injuries claimed in the underlying suit were the intentional consequences of the insured's actions. The First Department held that Allstate was obligated to defend its insured and that the insured should be permitted to retain independent counsel at Allstate's expense since his interest in proving the unintentional nature of the injuries was in conflict with that of his insurance company. The First Department also found such a conflict in *Major Builders Corp. v. Commercial Union Insurance Company*.[37] There, a suit against the insured sounded both in negligence, which was covered by the policy, and contract, which was not. The First Department found that the insurance company disclaimed coverage without basis. The court held that, in light of the fact that, as a result of the disclaimer, the insured had had an attorney of its own choosing for three years, and because of the potential conflict, between the insured and the carrier on how the case should be pursued, it was appropriate for the insured to choose its own counsel.

In *Gorman v. New Hampshire Insurance Comp.*,[38] the court found a conflict of interest between an insured and the insurer representing it on a counterclaim. In *Gorman*, the insured brought suit against the other driver involved in an auto accident. The defendant counterclaimed alleging negligence on the part of the insured. Counsel retained by the insurer replied to the counterclaim on the insured's behalf. The insured then sought disqualification of that counsel based upon a conflict of interest, in that the insurance company would not be obligated to pay anything if the insured was found 100% liable for the accident. The court stated that the attorney was "faced with a choice: whether to put forth its best effort on behalf of its client, the plaintiff, or on behalf of the insurance company which retained it and paid its fees."[39] The Second Department concluded that this conflict of interest required disqualification of the attorney and that insured was entitled to retain, at the insurance company's expense, an attorney with no business connection to the carrier and who would defend solely the insured's interests.

In *Baron v. Home Insurance Company*,[40] the court ruled that a potential conflict of interest in a negligence action because the homeowner's policy contained an exclusion for incidents arising out of business pursuits. As a result, the insured was entitled to select its own attorney, the reasonable value of whose services were to be paid by the insurer. In *Ladner v. American Assurance Company*,[41] the policy provisions governing claims of sexual misconduct made it advantageous for the insurer to have all of the claims against the insured linked to sexual misconduct, making them subject to a monetary limit in the policy. The Second Department, therefore, held that a potential conflict of interest existed rendering the insured's representation by an attorney employed by the insurer improper.

In *Nelson Electrical Contracting Corp. v. Transcontinental Insurance Co.*,[42] the court held when a conflict of interest exists between insured and a liability insurer with respect to defense of action, interests of the insured are paramount. When the interests of the insured are at odds with those of its insurer, the former is entitled to select independent counsel to conduct the defense so that, inter alia, tactical decisions will "be in the hands of an attorney whose loyalty to [the insured] is unquestioned."[43] The court reasoned that inherent in this rule is the axiom that when such a conflict exists, the interests of the insured are paramount.[44] The court ruled that to hold, as defendant urges, that counsel, having been employed for the very purpose of safeguarding the interests of the insured, must nonetheless obtain the insurer's consent before pursuing a course of action tailored to serve that end, or risk a loss of coverage for "failure to cooperate," would be untenable; it would effectively enable the insurer to take control of the defense and subordinate the insured's interests to its own. This would not only defeat the purpose of assigning independent counsel, it would pose an ethical dilemma for the insured's attorney, who, being bound to "exercise professional judgment solely on behalf of the client * * * disregard[ing] the desires of others that might impair the lawyer's free judgment"[45] cannot permit the insurer "to direct or regulate his or her professional judgment in rendering such legal services."[46]

2. Not All Conflicts Require Separate Counsel

It should be noted that not every potential conflict of interest demands separate representation. In *Goldfarb*,[47] the Court of Appeals noted that its ruling was not meant to indicate that a conflict of interest requiring retention of separate counsel will arise in every case where multiple claims are made. The court said that independent counsel "is only necessary in

cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only on grounds which would render the insurer liable." There is no conflict when the question of insurance coverage is not intertwined with the question of the insured's liability. In *Goldberg*,[48] the First Department also recognized that not every potential conflict of interest demands representation for each party under a policy to be chosen by the insureds. In that case the insurance company retained separate and independent counsel for its insureds, the attorneys in a law firm. The court ruled that the carrier's retention of separate counsel for its insureds fulfilled its initial obligation to its mutually antagonistic insureds. The court distinguished the case from *Prashker*, as there was no conflict or dispute regarding coverage.

In *ACP Services Corp v. St. Paul Fire*,[49] the court held that the insured was not entitled to retain independent counsel since they failed to establish conflict of interest with insurer. In *ACP Services*, a vehicle lessee and driver brought action against lessor's liability insurer for declaratory judgment that insurer had a duty to defend and indemnify in tort action arising out of automobile accident. The Supreme Court, Ontario County, dismissed complaint based on a violation of the restriction in rental agreement that provided that no employee of a lessee could operate the vehicle unless the employee was a qualified, licensed driver at least 25 years old. Lessee and driver appealed. The Fourth Department[50] held, inter alia, that the lessee and driver were not entitled to retain independent counsel since they failed to establish conflict of interest with insurer; and the lessee and driver were entitled to reimbursement for litigation expenses, including reasonable attorney fees, incurred in defending underlying action.

B. Reservation of Rights and Coverage Issues

It is well settled that, absent a conflict between the insured and the insurance carrier; the insurance carrier has a right and a duty to defend the insured. This right and duty includes a right to choose defense counsel.[51]

In the case of *Vanguard Ins. Co. v. Guagenti*,[52] the defendant moved for an order directing that their carrier Vanguard Insurance Company pay for counsel other than counsel chosen by the carrier. The Court held that the insured had a right to choose counsel only because there was a conflict between the insurance carrier and the insured. In *Vanguard*, the Court relied upon the case of *Public Service Mut, Ins. Co. v. Goldfarb*,[53] in particular, a footnote in the case. The *Goldfarb* case stated that:

> This is not to say that a conflict of interest requiring retention of separate counsel will arise in every case where multiple claims are made. *Independent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds that would render the insurer liable.*

However, when an insurer reserves its right under its policy of insurance to deny coverage, it places itself in conflict with its insured's interests. When an insurer reserves its rights to deny coverage, the insurer nonetheless remains obligated to continue providing the insured with a defense to the underlying claim and lawsuit.

When the insurer reserves its right to deny or disclaim coverage at a later time, it does not breach the insurance contract so long as it continues to provide a defense to the insured. The insurer meets its duty to defend, even when it has issued a reservation of rights, so long as it proffers a complete defense on all issues and claims asserted against the insured. The insurer may not seek to defeat liability only on the grounds which are not the subject of the reservation of rights.[54]

1. Defense Under a Reservation of Rights

The best known case addressing an insurer's proper handling of a defense following the issuance of a reservation of rights is *San Diego Navy Federal Credit Union v. Cumis Insurance Society. Inc.*[55] The position taken by the court was that any reservation of rights automatically raises a conflict of interest which gives the insured the right to select counsel to be paid at the insurer's expense.

The *Cumis* decision has not received universal support in all jurisdictions. That case does not distinguish between a reservation of rights based on a coverage issue which will be affected by a factual determination in the underlying lawsuit against the insured (e.g., intentional acts and/or negligent acts giving rise, to an injury) as compared to a reservation of rights based on issues independent of the facts to be determined in the underlying action (e.g., the insured's fulfillment of the cooperation condition in the policy). If the factual issues on which coverage turns are independent from those to be determined in the underlying action, presumably there is no conflict of interest present which requires selection of defense counsel by the insured.

New York case law supports the position that when an insurer issues a reservation of rights, based upon a fact issue and advising the insured that the defense will be proffered but that the claim may not be fully indemnified because some elements were not within the purview of the coverage, the insured can demand the right to select defense counsel whose reasonable fees

and costs will be paid by the insurer.[56] In *Goldfarb*,[57] the Court of Appeals stated:

> Independent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds that would render the insurer liable.

In situations where the insurer's interest in defeating a claim in the underlying lawsuit does not conflict with the insured's interest in defeating all the claims in that underlying lawsuit, New York courts have not mandated that the insured be given the right to select defense counsel.[58] These situations are distinct from those cases where there are conflicting claims involving theories which are diametrically opposed to one another and where proof of the non-covered act would negate coverage for the covered act.[59]

2. Coverage Issues

The most usual and frequent coverage disputes where conflicts of interest for defense counsel may arise are:

- Cases where recovery may be based upon differing theories—some covered and some non-covered;[60]
- Cases where the insurer owes a duty to defend to multiple defendants whose, interests are not united and who may raise claims against one another;[61]
- Cases involving the potential for a recovery in excess of the policy limits;[62]
- Cases where defense counsel has received confidential information and disclosure of that information could affect and jeopardize the insured's coverage.[63]

a. Defense Counsel's Position on Coverage Issues

The responsibility of an attorney to the client is paramount. Once counsel has been retained (or, in the case of counsel selected by the insurer pursuant to the terms of an insurance contract, appeared for an insured following assignment by the insurer) the relationship and duties between the defense counsel and the insured client are defined by the ethical rules governing all lawyers.

The rule in New York is that "(t)here is no question but that the assured is the client of the retained attorney and that the attorney is obligated to represent him with undivided fidelity regardless of the fact that his fee for legal services is being paid by another."[64]

The duty of loyalty and the attorney-client relationship with the insured client precludes the retained counsel from passing on or divulging any confidential information received from the insured that may indicate or support a lack of insurance coverage for the insured. Recognizing this issue, in May, 1969, the National Conference of Lawyers and Liability Insurers published the "Guiding Principles" which included:

V. Duty of an Attorney Not to Disclose Certain Acts and Information

Where the attorney selected by the company to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the *insured's belief* that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosure made directly to the attorney should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question."[65]

Therefore, if counsel receives confidential information from the insured that may indicate a lack of insurance coverage for the insured, counsel cannot pass that information on to the carrier. It logically follows that retained counsel cannot specifically attempt to ferret out such information. Courts have been critical of such conduct by attorneys.[66]

In *State Farm Mutual Auto Insurance v. Walker*,[67] defense counsel was informed by the insured that his earlier version of the accident was untrue and was made so as to not risk insurance coverage for the accident. Despite this knowledge, counsel continued in his representation of the insured; participated in depositions; and, took an *ex parte* statement from the insured which he later used against the insured. The court held that, at the time the attorney learned of the false version, he should have refused to participate any further in light of the conflict of interest between the insured and the carrier.

In *Schwartz v. Sar Corp.*,[68] the court, on a summary judgment motion, recognized an inherent conflict of interest for the attorneys representing the defendants and held that the attorneys should withdraw from further proceedings in the matter. The attorneys in this matter were retained by the carrier to represent the insured driver being sued by his uncle/passenger. In opposing the plaintiff's motion for summary judgment the defense submitted counsel's affidavit and that of an investigator. Basing his conclusion on the investigator's information, the defendant's attorney stated that "deliberate deception . . . has been practiced," and "I am of the belief that the claimed accident never occurred."

The court stated that the facts of the case presented a conflict of interest on the part of the attorney for the defendant/insured. An attorney may not "take up the cudgels of this insurance carrier, when its interests are diametrically opposed to the interests of the assured."[69] Where the interests, as here, are adverse to one another, the attorneys may not "assist the lost traveler along the road and at the same time prepare a trap into which he will ultimately fall."[70]

It should be noted that, despite this reasoning, an attorney is not required to participate or help in perpetrating a fraud. If an attorney believes a client is doing so, it is the attorney's duty, as an officer of the court, to withdraw as counsel.[71]

The duty of non-disclosure in the above-referenced guideline is not as all encompassing as it might initially appear. A component of the requirement is the insured's belief that the disclosure would be treated as a *confidential communication* to the attorney. This is not to say that attorneys could or should try to get around this guideline by stating that they did not believe that the insured considered this a confidential disclosure. It does, however, indicate that not all information obtained in the course of a lawsuit is protected by the attorney-client privilege. Examples of communications that are non-confidential and which, therefore, an attorney would not be precluded from conveying to the carrier are deposition testimony and communications with other individuals, such as independent investigators.

The situations where an attorney learns of information which can affect coverage from a non-confidential source provides counsel with a most difficult dilemma. The competing and conflicting responsibilities to the insured client and the insurer have not been definitively resolved in New York.

One thing which is clear, however, is that counsel who had been assigned to represent the insured cannot simultaneously or subsequently engage in any action on behalf of the insurer against the insured even after withdrawing as counsel for the insured.

A. Defense Counsel's Pursuit of Additional Coverage for the Insured

No specific duty exists under New York law requiring an attorney to pursue additional insurance coverage for a client; nor is there a duty imposed upon the insurer to secure or seek insurance for the insured client.[72]

Note: If an insurer acts in "gross disregard" to its insured's interests and such "deliberate and reckless failure" results in harm to the insured, the insurer may be found responsible for the failure to secure additional or excess coverage.[73]

There is a developing, trend wherein the obligation to pursue and secure insurance (excess and/or additional) which may be available to provide protection for the client for the claim being defended is imposed upon counsel (either personal or assigned).

A recent California case, *Jordache Enterprises. Inc. v. Brobeck Phleger & Harrison*,[74] held that counsel's failure to advise the client on the possible existence of insurance may amount to legal malpractice entitling the clients to bring a claim for damages. Counsel's failure to advise the client is claimed to have been a reason that the client's notice to the insurer was late and, therefore permitted the insurer to disclaim coverage.[75]

In addition to cases sounding in malpractice in other jurisdictions, counsel cannot overlook the responsibilities imposed by the *Code of Professional Responsibility* as adopted by the New York State Bar Association effective 1/1/70. Canon 6—A Lawyer Should Represent a Client Competently—contains language which sets out the standards which a lawyer is bound to attain: "In addition to being qualified to handle a particular legal matter, the lawyer's obligation to the client requires adequate preparation for and appropriate attention to the legal work, as well as promptly responding to inquiries from the client."[76]

These obligations of preparation and attention will lead the attorney to seek the best possible protection for a client. That protection, in the defense counsel scenario, will be most expanded by finding the broadest possible insurance coverage. Among the areas where expanded insurance coverage may be found are (separately or in status as an additional insured, omnibus insured or third-party beneficiary):

1. Employer's policies covering claims arising from employee's actions;
2. Motor vehicle policies covering drivers when operating other person's motor vehicles;
3. Contractor's and sub-contractor's policies covering claims arising from their work.

Nevertheless, New York Court of Appeals cases have held that it is not an attorney's obligation to advise a client as to whether the client has an insurance policy with coverage when a particular claim is made.

In a 1989 decision in *A. Mayers & Sons Corp. v. Zurich American Ins. Group*, the New York Court of Appeals held that an insurance policy requiring coverage of a claim based on an "advertising injury" doesn't cover an infringement claim made against the insured by a competitor. This was the rule involved in the more recent case of *Darby & Darby v. VSI International, Inc.*[77] In the *Darby* case, the allegation was that the plaintiff, seeking payment of its legal fees, had failed to advise defendant that the infringement claim against it might be covered by the "advertising liability" clause of its

insurance policy. If there were coverage, significant legal fees would be saved. At the time of the claim, coverage was a novel question, so the Court held that the lack of advice was reasonable under the circumstances. There was no malpractice since there was no duty to inform the defendant that it might be covered by insurance. Florida, another state whose law might be applicable, had rejected coverage in a similar situation.

B. Representation by Staff Counsel

1. In General

This is an area which has generated much discussion and some disparate decisions in various jurisdictions.

The American Bar Association Committee on Ethics and Professional Responsibility has stated, in a 1950 opinion, that "[a] lawyer, employed and compensated by an . . . insurance company which holds a standard contract of insurance with an insured, may with propriety defend the insured in an action brought by a third party."[78] The ABA has not retreated from or reversed its position on this point.

Some jurisdictions, notably North Carolina in *Gardner v. North Carolina State Bar*,[79] and Kentucky in *American Insurance Association. et al. v. Kentucky Bar Association*,[80] have barred the use of insurance staff counsel. The decisions in North Carolina and Kentucky have been uniformly rejected in other jurisdictions; but, challenges addressing the issue of staff counsel, arguing that such activity is an unauthorized practice of law by insurers, continue to be brought.

The New York State Bar Association Professional Ethics Committee has stated that "it is proper for an insurance carrier to hire an attorney as house counsel to defend its assureds."[81] In this opinion the committee cited the American Bar Association Committee on Professional Ethics as stating that an attorney employed by an insurance company exclusively, on a salaried basis, may defend lawsuits against assureds on behalf of the company.

An issue which has arisen as a sub-category in the context of staff counsel is the question of whether such "captive law firms" must disclose their connection to and affiliation with their particular insurer. The State Bar of Arizona has opined that " . . . lawyers employed as salaried in-house insurance company attorneys should not hold themselves out as a separate law firm under one or more of their surnames."[82]

Similar holdings have been issued an other jurisdictions, namely Ohio,[83] New Jersey[84] and Virginia.[85] Resolution of this issue in these jurisdictions was accomplished by having the firm letterhead and the attorney's business cards reflect that the lawyers and staff were employees of the insurer.

The question of proper disclosure of the staff counsel status of a law firm has been addressed in New York. In 1995, the Committee on Professional Ethics of the Bar Association of Nassau County issued a formal opinion wherein the Committee reaffirmed its position that an insurer may use house counsel to defend its insureds in third-party initiated litigation and also opined that there was no duty of such house counsel to indicate on their letterhead that they are employees of the insurance company. The Committee did state that the house counsel must apprise the client of the relationship between the lawyers and the insurer and must repeat this information whenever appropriate during the course of the representation.

> As long as the lawyer fully explains this employment relationship at the outset and the potential for conflict this may represent and continues to repeat this admonition at any necessary subsequent point in the relationship. . ., there would seem no ethical duty to state the relationship in the lawyer's letterhead and other identifications as well.[86]

The Committee also stated that the information could be communicated in an introductory letter or telephone call.

In summary, New York law supports the position that insurers may provide for the defense of covered claims by using staff/house counsel and that disclosure of the relationship between counsel and the insurer is adequately addressed by written or verbal communication with the insured client.

2. When Coverage Disclaimed or Reservation of Rights Issued

The issue of a conflict of interest between the insurer and the insured clearly arises when the insurance company seeks to disclaim or deny coverage. In this situation, counsel who has been assigned by the insurer to defend the insured is caught in the middle of the controversy. Such situations have possibly even greater impact in the staff counsel scenario.

An Ethics Opinion has held that if an insurance company persists in disclaiming coverage on a matter, staff counsel should not handle either the third-party action or the declaratory judgment proceeding.[87] The case at issue in that opinion involved an automobile which was in an accident while being driven by the owner's acquaintance. The company disclaimed coverage for the driver asserting that he lacked the owner's consent. Nonetheless, the company assigned a staff attorney to represent the driver. The Ethics Committee stated that:

> [w]hile theoretically a staff lawyer might be so isolated from his employer's affairs as to provide the assured with counsel capable of contending against the carrier, we are convinced that, in actual practice, the difficulties of preserving client confidences and exercising independent professional judgment would prove insurmountable. *Accordingly, we believe that a* per se *rule of disqualification is fully warranted*. (emphasis added).

The Committee went on to say that, even after full disclosure of the conflict of interest and with the driver's consent, the situation is so fraught with risk to the lawyer's professional responsibilities that the representation should not be permitted and that the assured cannot, by his consent, nullify the attorney's ethical obligations.[88]

The Committee in the previous opinion noted as support for their opinion the ethics opinions of other states. It referenced a Louisiana opinion which stated that where an insurer either denies coverage or reserves its rights to do so subsequently, the same attorney may not properly represent both the assured and the insurer. The Committee also cited an Oregon opinion that held that an attorney may not represent the assured and advise the insurer on matters relating to coverage.[89]

Query: If a carrier disclaims and thereafter withdraws its disclaimer or loses a declaratory judgment action, does the carrier or the insured have the choice of counsel?

Generally speaking, New York courts have held that only when a conflict exists between a carrier and its insured will the insured be entitled to choose counsel.[90]

Recently, the United States District Court, Eastern District of New York was asked to decide whether a carrier could exercise its right to choose counsel after it unsuccessfully attempted to disclaim coverage.

In the case of *Mount Vernon Fire Ins. Co. v. J.J.C. Stucco and Carpentry Corp.*,[91] the court was first asked to decide if Mount Vernon had properly disclaimed coverage. The court held that the disclaimer was invalid because it was not timely.

Having determined that there was coverage, the court was then asked to pass on the issue of whether the carrier could now retain counsel. The court held:

> Since Mount Vernon is estopped from disclaiming coverage under J.J.C. Stucco's policy, it must defend and indemnify J.J.C. Stucco for all liability arising out of the [underlying] action. As a result, Mount Vernon's interests and J.J.C. Stucco's interests are identical. Mount Vernon therefore retains the right to choose J.J.C. Stucco's counsel and control J.J.C. Stucco's defense.

One major area of controversy which can be anticipated in an insurer's attempt to reinstate its right to control selection of counsel in these withdrawal situations is the likelihood that the effort to re-establish the right to select counsel may follow the insured's having already selected personal counsel who is being paid by the insurer during the pendency of the coverage dispute. It would be unlikely that the courts would compel the insured to change counsel when the present attorney has already become fully familiar with the case especially, when it was the insurer's decision to disclaim or deny coverage which initially created the circumstances whereby the insured gained the right to select counsel.[92]

C. Punitive Damages

The majority of litigation involving insureds, wherein punitive damages may be routinely contained in the to *ad damnum* clause, may predictably, regularly and properly be defended and controlled by the insurer. This is consistent with the general rule that an insurance company has a right to control the defense of a claim by selecting counsel, choosing experts and engaging in settlement negotiations.[93]

A New York court in *Parker v. Agricultural Ins. Co.*[94] created an exception to this rule and held that separate counsel must be retained for the insured and paid for by the carrier when the claim for punitive damages substantially exceeds the claim for compensatory damages which, in and of itself, substantially exceeds the applicable coverage.[95] The court held that the insured should control the defense as the claims for punitive damages totaled $169 million, six times the claim for compensatory damages and where the primary coverage was $1 million. This court noted that, had only one lawsuit been involved, it may have been more inclined to allow the carrier to continue and conclude the litigation. As there were, however, seven lawsuits involving 12 plaintiffs, and no indication as to how many more might be involved, the court stated that, without doubting the carrier's commitment to defending the insured, it must recognize the existence of a conflict of economic interests. The court held that the insured was entitled to choose counsel and control all litigation, the reasonable expense of which shall be borne by the primary insurer.[96]

D. Carrier Participation in Selection of Independent Counsel

One issue which seems unresolved, but may be the subject of future litigation, is the right of the carrier to participate in the selection of independent counsel after it has been determined a conflict exists. This issue can be very significant because the courts have recognized that the insured's counsel also has an attorney-client relationship with the insurance carrier.

In the case of *Liberty Mutual Insurance Company v. Engels*[97] this relationship was recognized.

In *Engels,* the court held as follows: "The attorney selected [by the insurance company) is counsel not only for the insured, but also acts as the attorney for the insurer."[98]

In a similar federal case, *Car and General Insurance Corp. v. Goldstein*,[99] the federal court recognized that an attorney acting in an insurance defense situation has an attorney-client relationship with both the insured and the insurer.

In *Goldstein*, the court required that statements provided by the insured to the insured's appointed counsel must be turned over to the insurer. The court recognized an attorney-client privilege between the law firm and the insured, but that the circumstances of this case created an exception to any claim of privilege.[100]

At least one case has held that the carrier may be allowed some input into the selection of independent counsel for the insured. In *N.Y. State Urban Development Corp. v. VSL Corp.*,[101] the court held that the carrier had the right to either choose counsel or approve counsel selected by the insured. In that matter the carrier rejected insured's choice of counsel, the firm that had represented the insured in the declaratory judgment action against the carrier. The court held that it was not unreasonable for the carrier to insist on counsel independent of both itself and the insured.

In a recent unreported case, *Debbie Rubin v. Camp Shane*,[102] several issues regarding the conflict between a carrier, an insured and defense counsel were analyzed. In this case, the carrier initially chose defense counsel. During the course of the litigation, the defense counsel chosen by the carrier agreed to accept an unrelated declaratory judgment action against the carrier that had retained them to defend Camp Shane. The carrier decided to remove the law firm from the defense of the *Rubin* action.

The insured, Camp Shane, refused to consent to a change of counsel. There was a claim for punitive damages and the insured claimed that this created a conflict between Camp Shane and the carrier. Therefore, it was Camp Shane's position that it was entitled to choose defense counsel, and they chose to stay with the firm the carrier had chosen.

The carrier, citing a conflict between the carrier and the defense firm, insisted on the firm's removal. A motion was brought to compel the change in counsel. The law firm that was retained by the carrier submitted opposition to the motion and also sought attorneys' fees claiming that the carrier had put themselves in an adversarial position with their insured.

While the motion was pending, the carrier settled the action. The motion to have counsel removed therefore became moot. However, the court determined that the law firm had in fact placed itself in a conflicting position with the insurance carrier and thus their legal fees could not be recovered. It seems apparent that the carrier would have been able to have the firm removed had their removal not been rendered moot by the settlement of the underlying case.

VI. Conflicts of Interest—Multiple Insureds

An attorney may not represent two insureds under one policy in a matter where there are conflicting interests. Where such conflicts exist, the insurer must hire separate counsel for each insured or group of individuals with conflicting interests. The retention of separate independent counsel, however, will fulfill an insurer's obligation to mutually antagonistic insureds.[103]

The determination of whether a conflict of interest exists is often difficult. Generally, it can be said that separate counsel needs to be retained if one insured files a cross-claim against another or one insured has a defense against plaintiff's claims that in some way adversely affects the interests of the other insureds.[104]

One situation in which courts outside of New York have held that a conflict does not exist between clients is when the liability of coverage limits are sufficient to assure that both or all the clients are insulated from personal liability and there are no cross-claims between them.[105]

When an insurer undertakes the defense of several parties with adverse or conflicting interests, there inevitably exists the risk that the insurer cannot render all parties a fair and impartial defense.[106] In *Rimar*, the company insuring an accounting partnership provided a defense to various members of the firm. The record and cross-claims in the suit reflected adversity and conflict of interest among the insureds. The Fourth Department ruled that this was a "classical example of a situation where the insureds should be permitted to retain counsel of their own choosing whose reasonable fees and expenses should be paid by the insurance carrier."[107] In *Penn Aluminum, Inc. v. Aetna Casualty and Surety Company*,[108] the Fourth Department also reasoned that, since the insurer had divided loyalties, both of its

insureds must have the right to obtain counsel of their own choosing. In this case a conflict of interest arose when the additional insured, a defendant in a suit, brought a third-party action against the named insured. Despite the fact that the additional insured did not object to the appointed counsel's continued representation of it, the Fourth Department ruled that, because of the insurer's divided loyalties, it should not choose counsel for either the named insured or the additional insured.

In *Cornwell v. Safeco Ins. Co.*,[109] an attorney was retained to represent a defendant and, eventually, his purported business partners, including Cornwell. During the course of the trial, counsel and the carrier abandoned a defense available to Cornwell. The court stated that, having undertaken the defense of Cornwell, the carrier was bound to use reasonable care in maintaining it and was liable for breach of its duty of due care and good faith to the additional defendants. The court found that:

> "[w]hen Safeco undertook the joint defense of several parties with adverse or conflicting interests, it assumed the risk that it could not afford all a fair and impartial defense, and its failure to fully protect the interests of certain defendants in order to obtain an apparent advantage for other defendants or for itself rendered it liable for the damages naturally resulting from such conduct."[110]

VII. Settlement

The majority of insurance policies make it clear that the decision to settle rests with the carrier. An insurer, however, "is obligated in most cases to respond accurately to requests from its insureds with reference to the progress of settlement negotiations."[111] This ruling rested on the fairness in providing the insureds sufficient information in response to their requests so that they could adequately and properly protect themselves against liability that exceeded their coverage.[112]

In *Feliberty* the New York State Court of Appeals held that no fraud or breach of contract claim was stated against an insurer who settled a claim against the insured for well within the policy limits.[113] The insured in *Feliberty* did not allege that the carrier had failed to respond to his requests regarding settlement offers, but based his claims on the fact that the insurer settled the claim without his knowledge or consent. In dismissing plaintiff's claim, the Court noted that the policy at issue specifically granted the carrier the unconditioned right to settle a claim or suit without the insured's consent.

An Illinois case, however, indicates that counsel for the insured not only has the duty to report the status of the settlement demands and negotiations to the insured, but may also have a duty to advise the insured of the insurer's intent to settle without the insured's consent.[114] In *Roger*, a physician brought a malpractice action against defense counsel as the carrier had settled a malpractice action against a physician without his permission or consent. The policy at issue did not require either. The physician had told his attorneys that he would not consent to a settlement. The Illinois Supreme Court held that the physician had a valid cause of action against his attorney and stated that the attorney's duty to disclose this information to the insured was grounded in the attorney-client relationship and was *not affected* by the carrier's authority to settle without the insured's consent.

Normally, the insured and the carrier share a common interest regarding settlement. A divergence emerges where the matter can be settled within the policy limits and there is a chance of exposure to liability which exceeds those policy limits, it is, of course, in the best interests of the insured to settle within the limits of the policy and avoid the potential of an excess judgment. The conflict exists if the carrier prefers to proceed with the action rather than pay the policy value, or majority thereof.

New York Pattern Jury Instructions § 4:67 recognize the duty of an insurer to inform the insured of all settlement possibilities. The only referenced cases directly discussing this issue of duty, however, are federal cases.[115] At least one New York court, however, has held that retained counsel was negligent in failing to notify the insured before settling the action.[116] In *Rejohn*, the court hold that defense counsel was negligent by representing both State Farm and the insured without disclosing their diverse interests and by failing to notify the insured before settling the action.

Another interesting issue surrounds whether an insurer's strategy or speed to settle a matter be subject to a bad faith claim. In *Fredericks v. Home Indemn. Co.*,[117] the court held that a primary insurer which was unaware of the amount of its coverage on the eve of trial was guilty of bad faith because. the insurer's lack of knowledge frustrated meaningful settlement negotiations. The court's language was rather terse when it set forth that this "lack of knowledge necessarily frustrated the serious attempts made to settle this litigation and was tantamount to intentional misconduct."[118]

An insurer will not be liable for a breach of good faith just because he refused to settle when the insured thinks they should have. In *Guarantee Ins. Co. v. City of Long Beach*,[119] the court held that in deciding bad faith "it is necessary for the plaintiff to prove that the rejection by an insurer of an offer of settlement within its

policy limits constituted a deliberate, or at least reckless, decision to disregard the interests of its insured."

Finally, there are many circumstances where an insurer may be prepared to settle within the policy limits but where the insured objects to settling the case. The insured may be concerned about the impact on its future premiums if a large settlement is paid. The insured may also be concerned that the settlement may result in potential litigants seeing the insured as an easy target for future lawsuits and gainful settlements. Moreover, from the insured's perspective, they may view the settlement as an admission of liability which could harm or, depending on the circumstances, destroy their business and reputation. This leads to the inevitable question of can an insurer settle a matter without the insured's consent and/or where the insured actually objects to settlement? As with most difficult ethical questions, the answer depends on the particular facts.

Generally, as was the case in *Feliberty*, the language of the insurance policy itself will dictate the amount of control over settlement to the insured. Absent language addressing this issue, the insurer has the right to settle a case on behalf of its insured, even if the insured objects to the settlement. The basic rationale being that it is the insurer whose assets are truly at risk, therefore, the insurer ultimately decides.[120]

VIII. Emerging Conflicts Issues

A. Positional Conflicts

An emerging conflict of interest issue arises from what have been called "issue" or "positional" conflicts of interest. This refers to an attorney litigating an issue in favor of one client that is contrary to another client's interests, although that other client is not involved in the litigation in which the issue is to be decided. This can arise when the attorney advocates for an interpretation of law or public policy for one client which could, if the attorney is successful, establish a precedent which would harm the legal or business interests of another client who is not involved in the present matter. In short, an issue or positional conflict of interest arises when clients have opposite interests, but in different matters. The clients differ on what the law or public policy ought to be.

A hypothetical example would be a law firm suing an insurance company (not a client or former client of the firm) for unreasonably failing to pay a claim for a client's loss. The complaint presents causes of action for bad faith, breach of fiduciary duty, and breach of contract. The problem is that the firm also does insurance defense work, and its insurance company clients object to the firm advocating a position which could set a precedent that could negatively affect them in the future. Is the firm required to withdraw from the litigation?

Rule I .7(b) of the Model Rules of Professional Conduct provides:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes that the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

To satisfy this role, the law firm would have to reasonably believe that its representation of the present client would not be inhibited by its desire to keep its insurance company clients happy. The rule would also require the law firm to first obtain the present client's consent to its representation. The firm would probably have to obtain its insurance clients' consent to go forward with the lawsuit as well. That consent can only come after consultation, which the rule contemplates as full disclosure.

There are provisions in the New York Code of Professional Responsibility which may have application. For example, DR 5-105 provides as follows:

> Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer
>
> A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

> C. In the situations covered in DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

See also DR 5-101(A), which provides as follows:

> Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment
>
> A. Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

Ethical Considerations 5-1 and 5-14 provide as follows:

> EC 5-1: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of the other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.
>
> EC 5-14: Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

B. Litigation Against Former Clients

There is no blanket prohibition against suing a former client or being in a position adversarial to the former client in subsequent litigation. The ethical issue is whether the attorney gained information, especially confidences or secrets, during his former representation which could be used to the disadvantage of the former client who is now an adversary; *see* Model Rule 1.8(b), which provides: "A lawyer shall not use information relating to representation of a client to the disadvantage to the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."

In New York, a lawyer is not permitted to use a confidence or secret of a client to the disadvantage of the client, or to use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.[121] EC 4-5 provides as follows:

> A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

This issue is addressed by NYSBA Committee on Professional Ethics Opinion #628, dated 3/19/92. It is stated therein that a lawyer may not represent a plaintiff in a civil action against a former client unless (1) confidences or secrets were imparted during the prior representation which are relevant to the current representation or (2) the prior litigation is substantially related to the current litigation. The consent of the former client may cure the conflict, but if the former client does not authorize release of confidences and secrets, the current client's consent may be necessary and in some cases cannot be practicably obtained.

Model Rule 1.9(a) provides that: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

For instructive discussion by the Pennsylvania Supreme Court, see *Maritrans G. P. Inc. v. Pepper Hamilton and Scheetz*.[122] That case is complicated but essentially involves the attempt of a law firm to represent new clients who were business competitors of the firm's former client which objected to the representation.

Successive representations chiefly jeopardize client confidences. Thus, a former client seeking to disqualify an attorney must demonstrate a substantial relationship between the subjects of the successive matters. Courts analyzing whether matters are "substantially related" must consider (1) the nature and scope of the prior representation; (2) the nature of the pending suit; (3) whether, in the course of the prior representation, the client might have disclosed relevant confidences to the attorney, especially confidences that might be detrimental to the client in the pending litigation.

In a New Jersey case, *Gray v. Commercial Union Insurance Co.*,[123] an attorney who once was one of Commercial Union's New Jersey outside counsel defending the company's insureds in personal injury litigation sued the insurer on behalf of its former New Jersey claims manager who alleged that the company had breached his employment contract and engaged in other unlawful employment practices. The insurer moved to disqualify the attorney, arguing that he had access to confidential claim and litigation materials and was privy to other information about the company's business and litigation practices. The court did disqualify the attorney, holding that the insurance company was a former client for the purpose of this issue although the attorney had officially represented insureds in the personal injury litigation and not the company itself.

The court further concluded that there was a substantial relationship between the subject matter of the present case and the attorney's former defense work. While the legal issues were not identical, the former defense work had created a climate for disclosure of relevant confidential information and the attorney had knowledge of the company's claims, practices, and operations, which were an integral part of the present plaintiffs claims.

On the other hand, a Minnesota court held in *Buysse v. Baumann-Furrie & Co.*,[124] that a law firm engaged in insurance defense work for a particular insurance carrier represents the plaintiff in an action against an insured of that carrier does not necessarily signify a disqualifying relationship to overlap in representation of the insurance carrier. The court balanced the equities surrounding the plaintiffs' right to retain counsel of their free choice and the general need to uphold ethical standards, and concluded that plaintiffs' counsel should not be disqualified.

C. Insurer Insolvency and (Defense) Cost Cutting

Insurance company dissolutions and insolvencies are frequent and are an economic threat to many insureds. What are defense counsel's duties to the insured when insolvency is threatened, or the defending insurer is actually declared insolvent? It is thought by some that defense counsel have an obligation to disclose an insurer's precarious financial position to the insured, whose personal assets are potentially exposed.

Model Rule 1.4 governs client communication, providing that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A lawyer has an affirmative duty to volunteer information, and to provide all information necessary to allow the client to make considered decisions.

Model Rule 2.1 addresses attorneys' role as an advisor to their clients, providing: "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, *economic*, social and political factors, that may be relevant to the client's situation." (emphasis supplied).

A New Jersey case, *Vencisanos v. Zucker, Facher & Zucker,*[125] illustrates the susceptibility of defense counsel when hired by a financially unsound insurer. This was a serious personal injury case in which plaintiff obtained a $315,000 judgment against the insured, and the insurer subsequently filed for bankruptcy protection. The insured assigned all of his rights to the plaintiff who sued defense counsel as well as other defendants, alleging that defense counsel breached an obligation to fully inform the insured of the insurance company's financial problems and their effect upon the resolution of the case. The case was decided without reaching that issue, but it is illustrative of the possible exposure of insurance defense firms in such a situation.

IX. Conclusion

An attorney is obligated to represent his/her client zealously within the bounds of the law. Conflicts of interest can arise, however, when an attorney is representing the interests of more than one entity in an action. If such a conflict arises, the attorney cannot continue to represent all/both of those entities. An attorney retained to defend an insured owes an undivided loyalty to the insured. As a result, the attorney may not take any position adverse to the insured's interests, even if such a position is in the best interests of the carrier paying for the legal services. If that point arises in an action, the attorney has a conflict of interest and cannot continue to represent both the carrier and the insured in that matter.

Endnotes

1. Code of Professional Responsibility, Ethical Consideration (EC) 7-1.
2. *American Employer Ins. Co. v. Goble Aircraft Spec.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (1954); *Schwartz v. Sar Corporation, et al.*, 19

Misc. 2d 660, 195 N.Y.S.2d 496 (Sup. Ct., Kings Co. 1959); *Trieber v. Hopson*, 27 A.D.2d 151, 277 N.Y.S.2d 241 (3d Dep't 1967).

3. New York State Bar Association Professional Ethics Committee Opinion #73 (1968).
4. Code of Professional Conduct, Disciplinary Rule (DR) 5-107(B).
5. 220 A.D.2d 733 (2d Dep't 1995).
6. 185 A.D.2d 835, 586 N.Y.S.2d 813 (2d Dep't 1992).
7. *Heller v. Alter*, 143 Misc. 783 (App. Term. 1st Dep't 1932).
8. 143 A.D.2d 727, 533 N.Y.S.2d 291 (2d Dep't 1988).
9. 91 A.D.2d 537, 475 N.Y.S.2d 9 (1st Dep't 1982), *appeal dismissed*, 61 N.Y.2d 867, 474 N.Y.S.2d 479 (1984).
10. 34 Misc. 2d 17, 227 N.Y.S.2d 103 (City Ct., Kings Co. 1962).
11. 291 N.Y. 352 (1943).
12. N.Y. Jur. 2d, Vol. 6, Attorneys at Law, § 54 at p. 514 (1980 Edition).
13. 638 A.2d 1333 (N.J. Super. Ct. App. Div. 1994).
14. *Feliberty v. Damon*, 72 N.Y.2d 112, 531 N.Y.S. 2d 778 (1988).
15. 299 F.2d 525 (5th Cir. 1962).
16. *Feliberty*, *supra*, quoting *Smoot*, *supra*.
17. *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991).
18. 125 A.D.2d 214, 509 N.Y.S.2d 325 (1st Dep't 1986).
19. *Allstate Insurance Co. v. American Transit Insurance Co.*, 977 F. Supp. 197 (E.D.N.Y. 1997).
20. *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409, 439 N.Y.S.2d 2 (1st Dep't 1981).
21. N.Y. Code of Professional Responsibility DR 5-105(A).
22. *See* N.Y. Code of Professional Responsibility DR 5-105(E).
23. N.Y. Code of Professional Responsibility DR 5-105(E).
24. New York State Bar Association Professional Ethics Committee Opinion #73 (1968).
25. "Guiding Principles," 120 Fed. Ins. Counsel (1970), officially adopted by the ABA in 1972.
26. *Parker v. Agricultural Insurance Company,* 109 Misc. 2d 678, 440 N.Y.S.2d 964 (Sup. Ct., N.Y. Co. 1981) citing 7C Appleman, Insurance Law and Practice, § 4681, pp. 2-5; *Podolsky v. Devinnev*, 281 F. Supp. 488.
27. *Penn Aluminum, Inc. v. Aetna Casualty and Surety Company,* 61 A.D.2d 1119 (4th Dep't 1978).
28. *Prashker v. United States Guar. Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910 (1956).
29. *See also Hartford Acc. & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S. 47 (1979); *Rimar v. Continental Cas.*, 50 A.D.2d 169, 376 N.Y.S.2d 309 (4th Dep't 1975).
30. *Feliberty v. Damon*, 72 N.Y.2d 112, 120 (1982); *see also Jackson v. Trapler*, 42 Misc. 2d 139 (Sup. Ct., Queens Co. 1964).
31. *Feliberty*, 72 N.Y.2d at 120.
32. *See Feliberty*, 72 N.Y.2d at 120.
33. *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 422 N.Y.S.2d 442.
34. *See New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 65-66 (2d Cir. 1984); *Golotrade Shipping & Chartering Inc. v. Travelers Indemnity Co.*, 706 F. Supp. 214, 219 (S.D.N.Y. 1989).
35. *VSL Corp.*, 738 F.2d at 65-66 (insurance policy expressly provided that the insurer was not obligated to pay for defense counsel unless it consented to the choice of counsel).
36. 125 A.D.2d 515 (2d Dep't 1986).
37. 155 A.D.2d 267 (1st Dep't 1989).
38. 145 A.D.2d 411 (2d Dep't 1988).
39. *Id*.
40. 112 A.D.2d 391, 492 N.Y.S.2d 50 (2d Dep't 1985).
41. 201 A.D.2d 302, 607 N.Y.S.2d 296 (1st Dep't 1994).
42. 231 A.D.2d 207, 660 N.Y.S.2d 220 (3d Dep't 1997).
43. *See also Ladner, supra*.
44. *See Feliberty, supra*.
45. Code of Professional Responsibility EC 5-21.
46. Code of Professional Responsibility DR 5-107(B) [22 N.Y.C.R.R. 1200.26(b)].
47. *Supra*.
48. *Supra*.
49. 224 A.D.2d 961, 637 N.Y.S.2d 566 (4th Dep't 1996).
50. *Public Serv. Mut, Ins. Co., supra* and *Ladner, supra*.
51. *Vanguard Ins. Co. v. Guagenti*, 157 Misc. 2d 900, 599 N.Y.S.2d 215 (1993); *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981).
52. *Supra*.
53. *Supra*.
54. Windt, Allan D., *Insurance Claims and Disputes. Third Edition,* Vol. 1 (1995).
55. 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984).
56. *Prashker v. United States Guarantee Company*, 1 N.Y.2d 584, 154 N.Y.S.2d 910 (1956). *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981).
57. *Supra*.
58. *Prudential Property & Casualty Insurance Company v. Godfrey,* 169 A.D.2d 1035, 565 N.Y.S.2d 315 (3d Dep't 1991).
59. *Parker v. Agricultural Insurance Company*, 109 Misc. 2d 678, 440 N.Y.S.2d 964 (Sup. Ct., N.Y. Co. 1981).
60. *See Public Service Mutual Insurance Company v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981); *Utica Mutual Insurance Company v. Cherry*, 45 A.D.2d 350, 358 N.Y.S.2d 40 (1975).
61. See *Rimar v. Continental Casualty Company*, 50 A.D.2d 169, 376 N.Y.S.2d 309 (4th Dep't 1975); *Goldberg v. American Home Assurance*, 80 A.D.2d 409, 439 N.Y.S.2d 2 (1st Dep't 1981).
62. See *American Employer Insurance Company v. Goble Aircraft Specialties*, 205 Misc. 1066, 131, N.Y.S.2d 393 (Sup. Ct., N.Y. Co. 1954).
63. See, *State Farm Mutual Insurance Company v. Walker*, 3 F.2d 548 (7th Cir. 1967), *cert denied*, 389 U. S. 1045; *Schwartz v. Sar Corp.*, 19 Misc. 2d 660 (Sup. Ct., Kings Co. 1959), *rev. on other grounds*, 9 A.D.2d 910, 195 N.Y.S.2d 918 (2d Dep't 1959).
64. New York State Bar Association Professional Ethics Committee Opinion #73 (1968). *See also American Employees Insurance Company v. Goble Aircraft Specialties*, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct., N.Y. Co. 1954).
65. "Guiding Principles," 120 Fed. Ins. Counsel (1970), officially adopted by the ABA in 1972, (emphasis added).
66. *State Mutual Auto Insurance v. Walker*, 382 F. 2d 548 (7th Cir. 1967), *cert denied*, 389 U. S. 1045; *Schwartz v. Sar Corp*, 19 Misc. 2d 660 (Sup. Ct., Kings Co. 1959).
67. 382 F. 2d 548 (7th Cir. 1967), *cert. denied*, 389 U.S. 1045, *supra*.
68. 19 Misc. 2d 660 (Sup. Ct., Kings Co. 1959), *supra*.
69. *Id*.
70. *Id*.

71. *Id*.
72. *Monarch Cortland v. Columbia Cas. Co.*, 224 A.D.2d 135, 646 N.Y.S.2d 904 (3d Dep't 1996).
73. *Monarch*, *supra*.
74. 49 Cal. App. 4th 609 (1996).
75. Anderson, Parr and Gold, *Pursue Insurance Coverage for Clients, N.Y.L.J.*, 1/13/97.
76. *Code of Professional Responsibility*, Canon 6, EC 6-4.
77. __ N.Y.2d __, __ N.Y.S.2d __ (Oct. 24, 2000).
78. ABA Committee on Professional Ethics, Formal Opin. 282 (1950).
79. 316 N. C. 285, 341 S.E.2d 517 (1986).
80. 917 S. W. 2d 563 (Kentucky 1996).
81. New York State Bar Association Professional Ethics Committee, Opinion #109 (1969).
82. State Bar of Arizona—Committee on the Rules of Professional Conduct, Formal Opinion No. 97-01 (1997).
83. Ohio Supreme Court Board on Grievances and Discipline, Opinion No. 95-14 (1995).
84. New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 593 (1986).
85. Virginia State Bar, Opinion No. 775 (1986).
86. Committee on Professional Ethics, Nassau County (N.Y.), Formal Opinion No. 95-5.
87. New York State Bar Association Professional Ethics Committee Opinion #519 (1980), citing the Code of Professional Conduct, EC 5-14, EC 5-15, and DR 5-105(A).
88. *Id*. citing DR 5-105(C); *In re Kelley*, 23 N.Y.2d 368 (1968).
89. New York State Bar Association Professional Ethics Committee Opinion #519 (1980), citing La. Op. 338 (1974), Ore. Op. 254 (1973), respectively indexed at 8580 and 9815. O. Maru, *Digest of Bar Association Ethics Opinions* (1975 Supp.).
90. *See Vanguard* and *Goldfarb*, *supra*.
91. 1997 WL 177864 (E.D.N.Y. 1997).
92. *Purcigliotti v. Risk Enterprise Management*, 653 N.Y.S.2d 296 (1st Dep't 1997); *Jadwiga Reality, Inc. et al. v. General Accident Insurance Company of America*, 232 A.D.2d 831, 648 N.Y.S.2d 758 (3 Dep't 1996).
93. 7C Appleman, Insurance Law and Practice, at 4681, pp 2-5; *Podolskv v. Devinney*, 281 F. Supp. 488.
94. 109 Misc. 2d 678 (1981).
95. *Id.*
96. *Id*. at 685.
97. 41 Misc. 2d 49, 244 N.Y.S.2d 983 (Sup. Ct., N.Y. 1963).
98. *Id*. at 51, 244 N.Y.S.2d at 986.
99. 179 F. Supp. 888 (S.D.N.Y. 1959).
100. *Id*. at 890-891.
101. 738 F. 2d 61 (2d Cir. 1984).
102. Sullivan County 1997.
103. *Goldberg v. American Home Assur.*, 80 A.D.2d 409, 412, 439 N.Y.S 2d 2, 4 (1st Dep't 1981).
104. Windt, Allan D., *Insurance Claims & Disputes*, Vo1. 1 (1995).
105. *See Davenport v. St. Paul Fire & Marine Ins. Co.*, 978 F.2d 927 (5th Cir. 1992). *Cf. Wolpaw*, 639 A.2d at 340, 271 N. J. Super. 41 ("[W]here there is the risk of a judgment *that will exceed the policy limit*, separate independent counsel for each insured must be employed to decide whether and how to act in light of the conflict." (emphasis added)).
106. *Rimar v. Continental Cas*., 50 A.D.2d 169, 376 N.Y.S.2d 309 (4th Dep't 1975), *supra*.
107. *Id.* at 174, 314.
108. 61 A.D.2d 1119, 402 N.Y.S.2d 877 (4th Dep't 1978), *supra.*
109. 42 A.D.2d 127, 346 N.Y.S.2d 59 (4th Dep't 1973).
110. *Id*. at 135-136, 69.
111. *Knobloch v. Royal Globe Ins. Co*., 38 N.Y.2d 471 (1975).
112. *Feliberty v. Damon*, 72 N.Y.2d 112, 531 N.Y.S.2d 778 (1988).
113. *Id*.
114. *Roger v. Robson, Masters, Brumund and Belom*, 74 Ill. App. 3d 467 (1979), *aff'd*, 81 Ill. 2d 201 (1950).
115. See PJI § 4:67 and Comment thereto.
116. *Rejohn v. Serpe*, 125 Misc. 2d 148, 478 N.Y.S.2d (Dist. Co., Suffolk Co. 1984).
117. 101 A.D.2d 614, 474 N.Y.S.2d 870 (3d Dep't 1984).
118. *Id*. at 615, 873.
119. 106 A.D.2d 428-429, 482 N.Y.S.2d 522 (2d Dep't 1984).
120. *Orion Ins. Co. v. Gen. Elec. Co.*, 129 Misc. 2d 466, 493 N.Y.S.2d 397 (N.Y. Sup. Ct. 1985), *aff'd, United States Aviation Underwriters v. Gen. Elec. Co.*, 125 A.D.2d 567.
121. DR 4-101(B)(2), (3).
122. 602 A.D.2d 1277 (Pa 1992).
123. 468 A.D.2d 721 (N.J. Super Ct. App. Div. 1983).
124. 448 N.W.2d 865 (Minn. 1989).
125. 638 A.D.2d 1333 (N.J. Supp. Ct. App. Div.).

Obtaining Discovery in the Context of Supplemental Uninsured/Underinsured Motorist (SUM) Arbitrations

By Paul F. McAloon

I. Introduction

Insurance policies providing Supplemental Uninsured/Underinsured Motorist (SUM) coverage routinely contain provisions requiring claimants to submit to depositions and medical examination. Quite often, whether through laxness on the part of the carrier or lack of cooperation on the part of the insured, such provisions are not voluntarily complied with prior to the service of a demand for arbitration. This article addresses the methods available to compel compliance with those provisions once the arbitration demand has been served.

The arbitrator is not authorized to order such discovery. Such arbitrations are governed by the *AAA Rules for Arbitration of SUM Disputes in the State of New York* (hereafter "AAA SUM Rules").[1] Thus, it will be necessary to apply to court.

Until recently, it appeared that the proper method was to proceed under CPLR § 3102(c). However, beginning in 1997, the Appellate Division, Second Department has granted a number of temporary stays of arbitration pursuant to article 75, in order to permit insurers to obtain discovery, and that discovery has been of a far broader scope than had been previously permitted by any court under CPLR § 3102(c). To further complicate matters, the Second Department's decisions under article 75 routinely cite CPLR § 3102(c) as a basis for the relief.

As a practical matter, the two methods are generally similar, but there is one crucial distinction. There does not appear to be any time limit on making an application grounded in CPLR § 3102(c), although better practice would be to make the application as soon as possible. In contrast, once an arbitration demand has been served, an application for a stay must be made within 20 days and that time limit is strictly interpreted.

This article examines the theoretical distinctions between an article 75 stay application and a special proceeding brought under CPLR § 3102(c). A discussion of the developments in the Second Department follows. Recommendations are then made concerning the appropriate procedural vehicle to choose when seeking discovery in aid of a SUM arbitration.

II. An Application to Stay Arbitration Pursuant to CPLR Article 75 (§ 7503)

The scope of the issues which a court can address in determining an application to stay arbitration under CPLR article 75 (§ 7503) is discussed in *County of Rockland v. Primiano Construction Co., Inc*.[2] There, the Court noted that it must be determined whether an agreement to arbitrate exists, whether the particular claim is within the scope of the agreement and whether there has been compliance with any contractual "condition precedent to access to the arbitration forum."[3]

Thus, an article 75 stay application can address the discovery issue only if the discovery is viewed as a condition precedent. In *County of Rockland*, the court distinguished between contract provisions which are conditions precedent to access to arbitration and those which are procedural conditions in arbitration. The court has the power to stay arbitration only when the first category of condition precedent is violated; questions of compliance with procedural conditions are left to the arbitrator:

> Whether the particular requirement falls within the jurisdiction of the courts or of the arbitrators depends on its substance and the function it is properly perceived as playing—whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process.[4]

The first category, of conditions precedent, is made up of those provisions which are meant to be complied with before any arbitration proceeding can be commenced, such as a provision requiring that before a demand for arbitration can be made the dispute must be submitted to another specific party for review.

The second category, of procedural conditions, includes even such fundamental matters as the time within which the demand for arbitration must be made.[5] No doubt, providing discovery would be considered such a procedural condition.

In cases decided before *County of Rockland*, some courts had already held that providing discovery was not a condition precedent to arbitration and, therefore, that such relief could not be sought in an article 75 stay application and should be sought under CPLR § 3102(c).[6] In a slightly different context, the Court of

Appeals' discussion of CPLR § 3102(c) as the means of obtaining discovery in arbitration implied that an article 75 stay application was not a proper vehicle.[7]

Applying the *County of Rockland* criteria to policies issued in conformity with the current requirements for SUM endorsements as promulgated by the N.Y. State Insurance Department,[8] the discovery provisions would be categorized as mere procedural conditions. Thus, the court would have no jurisdiction under an article 75 stay application to order discovery.

The parties do have the right, in drafting the arbitration agreement, to expressly make any condition, such as the discovery provisions, an explicit condition precedent, *County of Rockland*.[9] However, this would require redrafting of the standard insurance contracts.

It is questionable whether such redrafting could be undertaken without approval from the Insurance Department, given the current regulation governing SUM endorsements. In any event, such a change would not necessarily be beneficial to carriers. While it would make compliance with the discovery provisions mandatory, it would also subject any compliance proceeding brought by a carrier to the stringent 20-day requirement of CPLR § 7503(c).

III. Discovery in Aid of Arbitration Under CPLR § 3102(c)

While an application for discovery in aid of arbitration under CPLR § 3102(c) is addressed to the discretion of the court, there has been a growing recognition that such discovery is appropriate.

Older cases decided under that statute had required that the movant demonstrate "extraordinary circumstances" to justify the discovery. Not surprisingly, discovery was usually denied.[10] In *MVAIC v. McCabe*,[11] the court even refused to direct a deposition where the policy gave the insurer (MVAIC) the right to such an examination.

One decision held that discovery issues should be addressed by the arbitrator, *Jamaica Hosp. v. Vogel & Strunk*,[12] but as noted above, the *AAA SUM Rules* do not authorize discovery.

More recent cases reflect a loosening of the standard and an acceptance of the need for such discovery. In *State Farm Mutual Auto Ins. Co. v. Wernick*,[13] the carrier was granted an order directing a physical exam of the claimant, with the court nominally adhering to the "extraordinary circumstances" test.

The court held that the exam was a necessity. The claimant was alleging permanent injuries. The court stated that without the exam the carrier would be "severely prejudiced":

> It will be unable to disprove any of the claimant's assertions, and will be severely limited in its ability to present a viable defense. In contradistinction, the claimant will suffer no prejudice if compelled to submit to the examination. We find no indication in the record that petitioner intended to waive its right to compel the claimant to submit to a physical examination, or that its delay in seeking the examination constituted a dilatory ploy.[14]

In *Moock v. Emanuel*,[15] the court again acknowledged a need for "extraordinary circumstances." However, the court then simply went on to hold that, where the claimant sought to prove that his interest in a partnership was undervalued, he was entitled to access to partnership books and records, "in order . . . to present a proper case to the arbitrator."[16] At the same time, the court refused to order depositions.

Subsequently, the court applied the identical analysis in *Hendler & Murray, P.C. v. Lambert*,[17] ordering discovery of books and records that were required "to present a proper case to the arbitrator."

Most recently, the Second Department has cited CPLR § 3102(c) in several cases to support discovery granted under a different procedural device. There are procedural complications in those cases,[18] but substantively they greatly broaden the scope of discovery in aid of arbitration and should be cited for that reason.

It is assumed that the insurance policy in question contains the usual provisions requiring the insured to submit to a deposition and to medical disclosure. Such provisions should be accorded great weight by the courts. It would be particularly prejudicial to deprive the carrier of information which the insureds have contractually obligated themselves to provide.

The appropriate procedure by which to seek the relief is to commence a special proceeding seeking to compel the discovery, CPLR § 7502(a). If the arbitration arises out of a pending action or there is already a special proceeding pending, then the application can be made by a simple motion in the action or proceeding.[19]

If the special proceeding is to be commenced before the demand for arbitration has been served, then the special proceeding would have to be commenced by a method of service appropriate for the service of a summons. However, if the insured has already served an arbitration demand, the papers seeking discovery can be served on the insured's attorney by ordinary mail. Rule 5 of *AAA SUM Rules* provides:

5. Serving of Notice

With the exception of the demand, which shall be served by registered or U.S. Certified Mail, return receipt requested, or by any other method legally authorized for the service of a summons, each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served upon such party or its attorney at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard has been granted to such party.

The court which is entertaining the application for discovery has the corollary power to stay the arbitration pending disclosure.[20] That power derives from CPLR § 3102(c), perhaps in conjunction with CPLR § 2201. In the view of those courts, the power is not derived from CPLR art. 75.[21]

There is no specific time limit for proceeding under CPLR § 3102(c), but the application should be made as soon as possible.

IV. The Second Department Creates a Hybrid Remedy

In the past, as discussed above in Part III, the Appellate Division, Second Department, has been willing to grant discovery in the context of proceedings brought under CPLR § 3102(c). In *State Farm Mutual Auto Ins. Co. v. Wernick*,[22] arbitration had been demanded in January 1981 and the arbitration hearing was scheduled for July 8, 1981.[23] Only days before that hearing, State Farm brought a petition seeking a physical examination of the insured.[24]

The respondent-insured Wernick opposed the petition on the ground that it was beyond the 20 days required by CPLR § 7503(c), and the petitioner-insurer countered that it was not seeking a stay of arbitration but merely a physical examination.[25] The arbitration was ultimately stayed on the consent of both parties, pending the outcome of the discovery application.[26]

The Supreme Court initially ordered the physical examination in a brief conclusory order, which did not cite any authority.[27] The respondent-insured Wernick then moved to reargue. The Supreme Court granted reargument, adhered to its original decision and explicated its reasoning by citing CPLR § 3102(c) as the source of its power to order the physical.[28]

On appeal, the Appellate Division held that the court was empowered by CPLR § 3102(c) to order discovery in the aid of arbitration, in the presence of "extraordinary circumstances." As discussed above in Part III, the Appellate Division affirmed, holding that the standard had been met. By implication, the court rejected the respondent-insured's argument that the application was subject to the requirements of CPLR § 7503(c), but that issue is not discussed in the opinion.

In *Hendler & Murray, P.C. v. Lambert*,[29] the arbitration demand had resulted in extended preliminary litigation concerning the scope of the arbitration. An application for a stay of arbitration under article 75 was denied by the lower court. The Second Department affirmed the denial of the stay and then directed the lower court to appoint a third arbitrator to the panel, if the parties did not choose one.[30]

Following the failure of one of the parties to comply with the selection procedure for the third arbitrator, the other party moved in the lower court for appointment of an arbitrator. Also, for the first time, the party sought discovery "pursuant to CPLR § 3102(c)."[31] The discovery was granted.[32]

As discussed above in Part III, the Second Department affirmed the grant of discovery, in an opinion that applied the "extraordinary circumstances" standard of CPLR § 3102(c).[33]

As recently as 1995, the Second Department suggested that an application for a stay under article 75 would not be the proper vehicle for seeking discovery.[34] At the same time, that court has affirmed orders denying discovery under article 75, on the ground that there was undue delay in seeking discovery, without questioning whether an application for an article 75 stay was the proper method.[35]

The most recent stage of development in the Second Department begins in 1997, with *Metropolitan Property & Casualty Insurance Co. v. Keeney*,[36] and encompasses those cases in which the court has created a hybrid remedy. The court has approved the granting of temporary stays of arbitration, pursuant to article 75, for the purpose of granting discovery, without any discussion of the jurisdictional limits on article 75, which were delineated in *County of Rockland v. Primiano Construction Co., Inc.*[37] The decisions ostensibly analyze the discovery requests under the standard of CPLR § 3102(c), but discovery is granted more readily and has been much more expansive than what was permitted in prior cases.[38]

In *Metropolitan Property v. Keeney*,[39] the Appellate Division reversed and ordered that discovery be grant-

ed to the insurer. In *State Farm Insurance Co. v. McManus*,[40] the Appellate Division affirmed an order granting a physical examination and deposition of the insured. In *Allstate Insurance Co. v. Baez*,[41] the court affirmed an order which provided for medical authorizations, medical records and reports, depositions and physical examinations of the insureds. In *Peerless Insurance Co. v. McDonough*,[42] decided on the same day as *Baez*, the court affirmed an order directing compliance with all outstanding discovery demands.

V. Conclusion

If discovery is sought within the Second Department within the 20-day period governing an application for a stay of arbitration pursuant to article 75, the proceeding can make reference to both article 75 and CPLR § 3102(c). Since an application for a stay under article 75 is arguably the incorrect procedure,[43] making reference to it in other Departments may unnecessarily introduce confusion; this is a judgment call.

In any Department, if the 20-day period has passed or if arbitration has not yet been demanded, the application should be made under CPLR § 3102(c). If the issue is raised by the insured in response to such an application, it can be argued that article 75 is not the proper vehicle.

That argument will face the greatest opposition in the Second Department, in light of the *de facto* acceptance of an article 75 stay application as the preferred remedy, but in truth that court has not ruled on the issue.

Endnotes

1. *See* 11 N.Y.C.R.R. § 60-2.4(a), and those rules do not make any provision for discovery; *cf. DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974) (CPLR does not authorize arbitrator to order discovery).
2. 51 N.Y.2d 1, 431 N.Y.S.2d 478 (1980).
3. The Court will also determine compliance with periods of limitation imposed by statutes.
4. 51 N.Y.2d at 9, 431 N.Y.S.2d at 482.
5. *County of Rockland*, *supra*, 51 N.Y.2d at 9, 431 N.Y.S.2d at 482; *Matter of Spencer-Van Etten Central School District*, 179 A.D.2d 855, 578 NYS2d 278 (3d Dep't 1992).
6. *International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S.2d 253 (1st Dep't 1976); *MVAIC v. McCabe*, 19 A.D.2d 349, 243 N.Y.S.2d 495 (1st Dep't 1963).
7. *DeSapio v. Kohlmeyer*, *supra*, 35 N.Y.2d 402, 362 N.Y.S.2d 843 (1974); *see also Goldsborough v. N.Y.S. Dep't of Correctional Services*, 217 A.D.2d 546, 628 N.Y.S.2d 813 (2d Dep't 1995).
8. 11 N.Y.C.R.R. § 60-2.3.
9. *Supra*, 51 N.Y.2d at 8, 9, 431 N.Y.S.2d at 481, 482.
10. *Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 90 A.D.2d 468, 455 N.Y.S.2d 88 (1st Dep't 1982); *Katz v. State of Dep't of Correctional Services*, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep't 1978); *Frenkel v. Old Dominion Dairy Products, Inc.*, 91 Misc. 2d 849, 398 N.Y.S.2d 816 (Sup. Ct., N.Y. Co. 1977).
11. *Supra*, 19 A.D.2d 349, 243 N.Y.S.2d 495 (1st Dep't 1963).
12. 57 A.D.2d 843, 394 N.Y.S.2d 43 (2d Dep't 1977).
13. 90 A.D.2d 519, 455 N.Y.S.2d 30 (2d Dep't 1982).
14. 90 A.D.2d 519, 455 N.Y.S.2d at 31.
15. 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep't 1984).
16. *Id*. at 1004, 473 N.Y.S.2d at 794.
17. 127 A.D.2d 820, 511 N.Y.S.2d 941 (2d Dep't 1987).
18. *See* Part IV, *infra*.
19. *Supra*.
20. *International Components Corp. v. Klaiber*, *supra*, 54 A.D.2d 550, 387 N.Y.S.2d 253 (1st Dep't 1976); *MVAIC v. McCabe*, *supra*, 19 A.D.2d 349, 243 N.Y.S.2d 495 (1st Dep't 1963).
21. *See MVAIC v. McCabe*, *supra*.
22. *Supra*, 90 A.D.2d 519, 455 N.Y.S.2d 30.
23. Record at R13, 27. The recital of facts in the *Wernick* opinion is rather sketchy. Citations here are to the *Wernick* Record on Appeal.
24. Record at R6.
25. R13-R14, R17-R18.
26. 31.
27. R5.
28. R30.
29. *Supra*.
30. *Hendler Moving, P.C. v. Lambert*, 114 A.D.2d 1003, 495 N.Y.S.2d 443 (2d Dep't 1985).
31. Record at 21. Citations are to the Record on Appeal filed in connection with 127 A.D.2d 820, 511 N.Y.S.2d 941.
32. Record at 17.
33. *Hendler & Moving, P.C. v. Lambert*, 127 A.D.2d 820, 511 N.Y.S.2d 941.
34. *Goldsborough v. N.Y.S. Dep't of Correctional Services*, *supra*, 217 A.D.2d 546, 628 N.Y.S.2d 813 (2d Dep't 1995).
35. *Interboro Mutual Indemnity Insurance Co. v. Noel*, 265 A.D.2d 557, 697 N.Y.S.2d 303 (2d Dep't 1999); *State Farm v. Smith*, 255 A.D.2d 386, 679 N.Y.S.2d 702 (2d Dep't 1998); *Allstate v. Riaz*, 253 A.D.2d 875, 678 N.Y.S.2d 507 (2d Dep't 1998); *Allstate v. Garcia*, 251 A.D.2d 500, 673 N.Y.S.2d 589 (2d Dep't 1998); *Allstate v. Faulk*, 250 A.D.2d 674, 671 N.Y.S.2d 689 (2d Dep't 1998); *Liberty v. DeCaro*, 244 A.D.2d 487, 665 N.Y.S.2d 910 (2d Dep't 1997); *Allstate v. Nebedum*, 208 A.D.2d 624, 618 N.Y.S.2d 220 (2d Dep't 1994); *Allstate v. Urena*, 208 A.D.2d 623, 618 N.Y.S.2d 219 (2d Dep't 1994). Citations are to the Record on Appeal filed in connection with 127 A.D.2d 820, 511 N.Y.S.2d 941.
36. 241 A.D.2d 455, 660 N.Y.S.2d 54 (2d Dep't 1997).
37. *Supra*, 51 N.Y.2d 1, 431 N.Y.S.2d 478.
38. *See* Part III, s*upra*.
39. *Supra*.
40. 249 A.D.2d 311, 670 N.Y.S.2d 599 (2d Dep't 1998).
41. 269 A.D.2d 392, 702 N.Y.S.2d 878 (2d Dep't 2000).
42. 269 A.D.2d 398, 702 N.Y.S.2d 880 (2d Dep't 2000).
43. *See* Part II, s*upra*.

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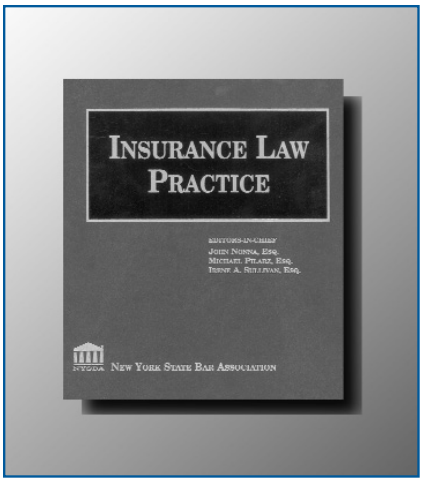

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Recent Court Decisions on New York Tort Law

By David Beekman and Blanca I. Rodriguez with the assistance of Brian J. Alexander, Justin T. Green, Daniel Rose, Susan Friery, Victoria Maniatis and Karen Stanislaus-Fung

I. Intentional and Other Non-Negligence Torts

A. Actions Under New York Civil Rights Law

Ruling on questions certified by the Second Circuit Federal Court of Appeals (175 F.3d 262), the New York Court of Appeals held in *Messenger v. Gruner & Jahr Printing & Publishing*, 94 N.Y.2d 436 (2000), that the 14-year-old plaintiff-model could not recover under the New York Civil Rights Laws for use of her photograph in conjunction with an article on teenage sex. The plaintiff argued that the use of the photograph associated her with the content of the article and gave a false impression of her. While there is no New York common law right of privacy, there is a limited statutory right of privacy available under Civil Rights Law §§ 50 and 51. Recovery under the statute is "strictly limited to non-consensual commercial appropriations of the name, portrait or picture of a living person." *Id*. at 441, *citing Finger v. Omni Publs. Intl.*, 77 N.Y.2d 138, 141. The courts have consistently held that §§ 50 and 51 do not apply to use of a person's name, photograph or likeness in publications on matters of public interest or newsworthy events. Newsworthiness has been defined to include articles concerning "political happenings, social trends or any subject of public interest." *Messenger* at 442. Because this teenage model's photos (taken with her consent) appeared in a teen magazine in conjunction with an article addressing serious adolescent sexual issues, the court held that the use of the photos had a real relationship to the article and were not an advertisement in disguise, and therefore did not qualify for protection under §§ 50 and 51.

B. Malicious Prosecution

In *Smith-Hunter v. Harvey*, 712 N.Y.S.2d 438 (N.Y. 2000), the Court of Appeals held that dismissal of trespass criminal charges against plaintiff based on violation of the right to a speedy trial was a termination of the criminal proceeding in plaintiff's favor, so as to meet the prerequisite requirement to sustain a cause of action for malicious prosecution. The tort of malicious prosecution, the groundless institution of criminal proceedings against another, requires that the plaintiff prove lack of probable cause for the prosecution and termination of the criminal proceedings in plaintiff's favor. Criminal proceedings can be terminated for any number of reasons apart from a full determination of the merits, raising the question of what is a termination in favor of the plaintiff. In this case of first impression, the Court of Appeals held that a termination of the criminal proceedings for trespass because of a violation of plaintiff's speedy trial rights, after the prosecution failed to appear on six separate court dates, was a termination in plaintiff's favor. The prosecution's failures to appear indicated the lack of merit of the prosecution. Therefore, summary judgment dismissing plaintiff's claim for malicious prosecution was error.

In *Kemp v. Lynch*, 713 N.Y.S.2d 790 (4th Dep't 2000), the court held that an investigating police officer was liable for malicious prosecution for failure to provide to the district attorney's office exculpatory evidence about another officer. In this case, a police officer was being prosecuted for harassing a former girlfriend. The assertions were being investigated internally by the police department and a file containing largely exculpatory evidence was compiled. The investigating officer failed to provide the information to the District Attorney prior to the criminal prosecution. The court rejected the defendant's argument that the file could not be turned over because it was a confidential personnel record, since its relevance to the criminal prosecution overrode any confidentiality privilege. The cause of action for malicious prosecution was made out because the exculpatory evidence removed any probable cause basis for the plaintiff's arrest.

C. Abuse of Process

The tort of abuse of process involves the commencement of an action or the causing of legal process to issue against another with the subjective intent to accomplish an ulterior purpose outside the purposes of the law. In *Dobies v. Brefka,* 710 N.Y.S.2d 438 (3d Dep't. 2000), a father accused of child neglect by the mother and maternal grandparents brought an action against them for abuse of process based on a "911" call they made to the police. The court determined that the "911" call to the police did not support an abuse of process claim, as there was no process issued and no court proceeding. A call to the police by itself is not an initiation of a court proceeding or legal process.

D. Defamation and Libel

1. Competition's Ad, Saying "We Speak English," Was Not Defamatory

The Court of Appeals, in *Lenz v. Wilson*, 707 N.Y.S.2d 619 (N.Y. 2000), affirmed summary judgment to the defendant in this defamation case. The plaintiff hardware store owner alleged that its competitor, St.

Johnville Hardware, defamed the plaintiff through its advertisement, which compared the two stores, and stated, *inter alia*, "We speak English," implying that at the plaintiff hardware store, English was not spoken. The court held that a natural reading of the advertisement, in context, did not make it reasonably susceptible of a defamatory connotation.

2. Common Interest Privilege Exists Among Members of a University Department

The Fourth Department addressed the common interest conditional privilege to defamation in *Anas v. Brown*, 702 N.Y.S.2d 732 (4th Dep't 2000). Here, a university faculty member alleged that a departmental memo criticizing his response to other members' complaints about plaintiff's leadership skills was defamatory. The defendant raised the defense of common interest privilege, which provides that speech is protected when the publisher and the recipient have a common interest on an issue and the communication is reasonably calculated to protect that interest. The court determined that the defense requires that the parties need only have "such a relation to each other as would support a reasonable ground for supposing an innocent motive." Members of an academic department do have a common interest in the subject matter of the leadership skills of its members, held the Court. The court further acknowledged that while common law malice would defeat the privilege, the plaintiff in this case did not raise an issue of fact on malice. Accordingly, the defendants were properly granted summary judgment.

3. Accusing Antique Dealer of Re-Gluing Broken Items and "Looking for Suckers" Supports Claims for Defamation

In *Sepenuk v. Marshall*, 2000 WL 1808977 (S.D.N.Y. Dec. 8, 2000), N.Y.L.J., Dec. 18, 2000, plaintiff, trading as Gallery 63 Antiques, sought damages from defendants, the owners of a rival art gallery. Plaintiff contended that the defendants persuaded a potential customer not to purchase from plaintiff's shop by making defamatory statements about plaintiff's merchandise. Defendants made claims that a particular item for sale at plaintiff's store was broken and had been re-glued, that other items were significantly overpriced, and that the plaintiff was "looking for suckers." Plaintiff alleged that these statements were false and made to induce the purchaser not to deal with plaintiff. He sought recovery based on defamation, tortious interference with prospective economic advantage, unfair competition and conspiracy.

The court held that an issue of fact existed that defendants had lied about the condition of plaintiff's objects and plaintiff's honesty as a merchant in order to harm the plaintiff's business. The court allowed plaintiff to proceed on his defamation and tortious interference claims.

II. Negligence

The tort of negligence is essentially an obligation imposed by law, as a matter of policy and public interest, to prevent injury to another and to be held accountable in damages should injury result. *See New York University v. Continental Ins. Co.*, 639 N.Y.S.2d 283 (N.Y. 1995). The tort of negligence evolves as new social relationships come into existence or as new social needs arise. Essential to a claim of negligence is the existence of a duty to another. Whether or not a duty to another exists is a question of law for the courts. That a duty exists is the conclusion that a court reaches after balancing a host of social, moral and policy factors, including foreseeable risk of harm, the nature and extent of the harm, the blameworthiness of the defendant's conduct, the social utility of the defendant's conduct and the consequences of allocating the responsibility for loss on the defendant. This year, a number of courts grappled with the social policy questions of what conduct should be recognized as a tort and when is a duty of care owed to another.

A. Recent Case Law Concerning Duty of Care to Others

1. When Is There a Duty of Reasonable Care to Another?

a) A divided Court of Appeals holds that a medical examiner owes no duty to a father to correct an error in his son's autopsy report and death certificate that mistakenly attributed the son's death to homicide and led to a prolonged criminal investigation of the father. *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112 (2000)

In *Lauer v. City of New York,* the Court of Appeals was faced with a question of first impression: Does a medical examiner who mistakenly attributes death of a child to homicide, resulting in a prolonged criminal investigation of the father, and who discovers the error a few weeks after the autopsy, have a duty to the father to correct the autopsy report and death certificate and thus exculpate the father? The Court of Appeals divided 5-2 on this issue with the majority ruling that no duty exists to the father. The facts of this case are tragic. Three-year-old Andrew Lauer died August 7, 1993. The New York City Medical Examiner performed an autopsy and reported death by homicide caused by blunt injuries to neck and brain. The following day a death certificate was issued stating death by homicide. It was noted, however, that further medical studies would be undertaken. On August 31, 1993, the Medical Examiner conducted the more detailed study of the child's brain and discovered that the cause of death was actually a

ruptured brain aneurysm. An internal report was prepared in October, but the Medical Examiner never corrected the autopsy report or death certificate and did not notify the District Attorney's Office that was investigating the father, despite a statutory duty under New York City Charter § 557 to provide all pertinent records in cases indicative of criminality to the appropriate District Attorney.

The criminal investigation of the plaintiff father lasted 17 months, and ended only after a newspaper article exposed the ultimate conclusion of the Medical Examiner's Office. Plaintiff thereafter bought suit against the City, the Medical Examiner's office and the Police Department, alleging negligent and intentional infliction of emotional distress. The Supreme Court had allowed plaintiff to pursue his emotional distress claims. The Appellate Court dismissed the claim for intentional infliction of emotional distress and divided over negligent infliction of emotional distress, a majority finding that plaintiff could maintain such a claim. The viability of that claim, which centered on the question of duty, was on appeal to the Court of Appeals. The majority held that no duty was owed to the father to correct the autopsy report and prevent his emotional distress.

Because the defendants were all municipal entities, the Court had to first determine whether governmental immunity existed or not. The Court held that while immunity exists for "discretionary" governmental acts involving policy-based decisions, there is no immunity for failure to perform non-policy-based "ministerial" acts. The Court agreed that the Medical Examiner's failure to correct the autopsy report and deliver a corrected report to the proper authorities was ministerial. While the ministerial negligence sufficed to remove the bar of governmental immunity from suit, by itself it did not create a tort. There must still be a duty owed to the victim. The majority found that no duty to plaintiff arose from the medical examiner's statutory duty to promptly deliver to the District Attorney all pertinent autopsy records in cases in which there is an indication of criminality. The Court noted that violation of a statute supports a tort action only when the *intent* of the statute is to protect an individual against invasion of a property or personal interest. The Court found that New York City Charter § 557 protects public interests in the governmental function of performing autopsies. It does not protect private interests.

The Court also rejected the plaintiff's argument that a duty was owed to him as a result of the "special relationship" the municipality had with him through the Medical Examiner's Office. The Court held that the Medical Examiner had no direct contact with the plaintiff and had never assumed a duty to him, as required under the doctrine of "special relationship." Lastly, the Court refused to recognize a new duty as a matter of public policy, concluding that even the limited group of criminal suspects is too broad a group to whom to extend a new duty.

The Court did not discuss, however, whether City Charter § 557, imposing a duty on the Medical Examiner to promptly deliver pertinent records to the prosecutor, combined with the state's constitutional due process responsibility to turn over all exculpatory evidence to an accused, suffices to create, as a matter of public policy, a direct duty to the accused to correct a mistaken conclusion of homicide as a cause of death. The majority also did not discuss the possibility of a duty based on negligent non-disclosure of important information which misleads a third party and results in injury to a plaintiff. *See Eiseman v. State of New York*, 70 N.Y.2d 175, 518 N.Y.S.2d 608(1987).

b) Disclosure of confidential psychiatric records by HMO's medical clerk is actionable as a tort, holds divided court

In *MacDonald v. Clinger*, 446 N.Y.S.2d 801 (4th Dep't 1982), the court held that because the duty to maintain the confidentiality of medical records springs from the implied covenant of trust and confidence inherent in the physician-patient relationship, its breach is actionable as a tort. *MacDonald* involved a psychiatrist. The Third Department later extended the ruling to certified social workers providing psychological treatment. *Harley v. Druzba*, 565 N.Y.S.2d 278 (3d Dep't 1991). The Third Department has now further held that a health maintenance organization (HMO), which by statute must preserve the confidentiality of medical, nursing and dentistry records, is answerable in tort under *respondent superior* when a clerk-employee discloses confidential records. The court's holding essentially imposed strict liability on the HMO when it further concluded that the only defenses to such an action are waiver by the patient or legal justification. The dissent disagreed with the court's ruling imposing *respondeat superior* liability on the HMO. The dissent noted that the HMO's liability for disclosure of confidential medical, nursing and dental records existed only in statute, not in the common law, and that statute, Public Health Law 4410(2), did not apply to certified social worker records. Furthermore, stated the dissent, Public Health Law § 4410(1) immunizes an HMO from liability for negligent or wrongful acts of its health care professionals, and the majority's creation of a cause of action for damages based on respondent superior is inconsistent with that statute.

c) Health insurance contact held to create a duty of reasonable care to the insured in *Logan v. Empire Blue Cross and Blue Shield*, 714 N.Y.S.2d 119 (2d Dep't 2000)

The Second Department has ruled in *Logan* that a medical health insurer has no tort duty to perform its contractual obligations with reasonable care. The plaintiffs in *Logan* suffered from chronic Lyme disease. Defendant insurer denied their requests to authorize payment of benefits for prolonged intravenous antibiotic treatments. The insurer's written criteria on this treatment had been revised periodically to conform to medical research results. The court refused to create a tort duty arising from the contract, because (1) the injury to plaintiffs was financial—denial of benefits—not a typical tort claim; (2) the plaintiffs were essentially seeking enforcement of a contract bargain and (3) the insurer's drafting of new criteria for approving benefits for antibiotic treatment occurred to maintain consistency with medical research, not to defeat plaintiffs' contract benefits.

d) First Department, in split decisions, holds that landowner has duty of care in its construction work on its premises to avoid loss of profits of business owners located a short distance away, notwithstanding the "economic loss rule"

On December 7, 1997, a 15-block section of Madison Avenue in Manhattan from 42nd Street to 57th Street was ordered closed by the city of New York for two weeks due to the collapse of a section of the wall of 540 Madison Avenue during construction work. Nearby businesses remained closed for five weeks. In one action, *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 711 N.Y.S.2d 391 (1st Dep't 2000), a store owner located one-half block away sued the building's owners and managers for loss of profits, alleging negligence and public nuisance claims. The plaintiff had sustained no property loss or personal injury. The Supreme Court had dismissed the complaint based on the "economic loss rule," which holds that a plaintiff sustaining purely economic losses has only a contract remedy for damages.

In a companion action, *5th Avenue Chocolatiere, Ltd. v. 540 Acquisition Co.*, 712 N.Y.S.2d 8 (1st Dep't 2000), two businesses located two blocks away, which had also sustained purely economic losses, brought a class action suit, alleging negligence and public nuisance. This complaint had also been dismissed on the basis of the "economic loss rule." In two 3-2 split decisions, the First Department departed from the "economic loss rule," concluding that in these cases requirement of personal injury or physical injury to property as a prerequisite for recovery in tort was arbitrary and contrary to the goals of tort law.

The general purposes of tort law, stated the majority in *5th Avenue Chocolatiere*, are to hold accountable those who cause socially unreasonable injuries, deter similar conduct and compensate wronged persons. The majority concluded that these goals are undermined "by an arbitrary formula that has the effect of holding to a lower standard those whose negligence causes only non-physical damage, which, as in the instant case, is often more ruinous than physical property damage." The majority examined the Court of Appeal's adoption of the "economic loss rule" in the product liability case, *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720 (1982), noting that the Court refused to impose *strict liability* when a defendant's product caused no personal injury and no property damage to the plaintiff, except the damage to the product itself, and thus only economic loss to the plaintiff. The court restricted plaintiff's recovery to contract remedies, which the Court held were more suited to allocating the risks from a product malfunction in terms of purchase price, warranties and insurance. The First Department majority concluded that the "economic loss rule," which has arisen primarily in product liability cases, is ill-suited to negligence cases that do not involve a defective product or a contractual relation.

While the majority noted that the "economic loss rule" should therefore be relaxed in negligence cases, it also recognized that as a matter of policy, there needed to exist "some mechanism in place to prevent uncontrolled liability." *5th Avenue Chocolatiere*, 712 N.Y.S.2d at 13. The majority stated that there must exist a stricter test of forseeability of injury to the plaintiffs, which the majority labeled the "particularly foreseeable" test. The class of plaintiffs had to be clearly identifiable and harm to them "particularly foreseeable" "in terms of the types of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted."

The majority in both decisions held that the plaintiffs had stated a claim for relief in negligence, because: (1) they were "close-by business neighbors" to the high-rise building whose wall collapsed; (2) the area was an "intensely crowded urban environment" in which collapse of a building wall is "particularly likely to cause the closure of surrounding areas . . . thereby causing loss of trade"; and (3) there was evidence of reckless disregard. The majority in both decisions also found that the plaintiffs had sufficiently alleged an action for public nuisance, in that their injuries were "special" or "peculiar" because they were located in the limited geographical area affected by the closure of public streets.

The dissent strenuously objected to departing from the "economic loss rule" and its requirement that absent "privity and personal injury or property damage, mere economic loss is insufficient to cast defendants in tort liability." *5th Avenue Chocolatiere*, 712 N.Y.S.2d at 17. The dissenters' greatest concern, in a case involving an area from 42nd to 57th Streets, bounded by Fifth and Park Avenues, was "where do we

draw the line of liability," a question not answered by the majority.

Note: *See* discussion of *Hydro Investors Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8 (2d Cir. (N.Y.) 2000), below under III. Professional Malpractice, C. *Engineering Malpractice*, a case in which the Second Circuit held that the economic loss rule does not apply to professional malpractice claims.

e) Closing of Manhattan's Times Square, however, does not entitle plaintiffs to recovery for purely economic losses

By contrast, in *Goldberg Weprin & Ustin, LLP v. Tishman Constr. Corp.*, 713 N.Y.S.2d 57 (1st Dep't 2000), the court did draw the line in the defendants' favor. There, plaintiff law firm brought a class action suit, purporting to represent all commercial and private residents in the Times Square area for business losses resulting from the closing of the Times Square area due to collapse of an elevator tower being used in connection with defendants' construction project. The plaintiffs' complaint sought recovery for lost profits and for all ancillary inconvenience costs on behalf of a proposed class that would include even "taxi drivers and hot dog vendors." Without referring to *532 Madison Avenue Gourmet Foods* and *5th Avenue Chocolatiere*, the court's opinion held that in the absence of physical property damage, the connection between defendants' activities and plaintiffs' losses were too tenuous and remote to permit recovery in tort. The concurrence of Justice Ellerin, emphasized the distinctions between this case and *532 Madison Avenue Gourmet Foods* and *5th Avenue Chocolatiere*, namely that this case had an unlimited class of proposed plaintiffs, pleaded all-encompassing ancillary damages and did not allege egregious misconduct.

2. When Is There a Duty to Control the Acts of Third Persons?

a) Third Department panel splits on whether parade organizers and village authorities owed duty of care to infant parade participant

In *Plante v. Hinton, et al.*, 706 N.Y.S.2d 215 (3d Dep't 2000), a child riding in a mule-driven wagon during a parade was injured when the mules, startled by a skateboarder who lost control of his skateboard, jumped and tipped the wagon over on top of the infant. The majority held that the parade organizer had no ability to control the conduct of participants or spectators, and even assuming that the village authorities had created a park-like setting by allowing and providing security at the parade, skateboarding did not rise to the level of an ultra-hazardous activity so as to impose a duty on the village defendants to prevent it. The dissent argued that the level of the parade organizer's involvement in the parade and its prior knowledge of the dangers posed by frightened animals were sufficient to impose a duty to safeguard the parade participants. The dissent also concluded that the village defendants' issuance of the parade permit imposed a duty of reasonable care which may have been breached when a police officer ordered the skateboarders off the road, but failed to pursue them.

b) Store owner has no duty to protect patron from a spontaneous attack by a fellow patron

In *Scalice v. Kullen*, 710 N.Y.S.2d 632 (2d Dep't 2000), the court held that while a public premises owner has the duty to control the conduct of persons on its premises when it has the opportunity to do so and is reasonably aware of the need for such control, no duty exists to protect a customer from an unforeseen and unexpected assault by another customer. In this case, there was no proof of any escalating situation between the plaintiff and the assaulting customer.

c) Grandmother has no duty to protect guest in her home from the intentional assault by her granddaughter

In *Johnson v. Waters*, N.Y.L.J., Dec. 15, 2000, p. 33,, col. 2 (Sup. Ct., Queens Co.), the court granted summary judgment to the defendant, the grandmother of a 20-year-old woman who slashed a guest in the grandmother's home with a box cutter. The grandmother was not present in the house during the attack. There was no evidence that the granddaughter lived in the house or that the box cutter belonged to the grandmother. There was some evidence of knowledge of the granddaughter's violent propensities. The court held that, nevertheless, the grandmother had no duty to hide every item in her household that could possibly be used as a weapon by her adult granddaughter.

3. When Is There a Duty to the Public?

a) Highway contractor hired to install temporary traffic lights has duty of care to public

In *Uvaydova v. J.W.P. Welsbach Elec. Corp., et al.*, 713 N.Y.S.2d 750 (2d Dep't 2000), the court held that a contractor under contract with the State DOT to provide comprehensive roadway rehabilitation work, including the installation of temporary traffic lights and the provision of "adequate protection for pedestrian traffic," had a duty of care to a decedent killed as a result of a malfunctioning temporary light. The dissent argued that defendant's duties ran only to the State DOT.

4. Heightened Duty of Care to Children

An animal owner is held liable for injuries caused by his/her animal when the owner has knowledge of any vicious propensity of the animal. The First Department has held, however, that a higher duty exists when the animal owner is providing daycare services in her home to infants. In *Diamond-Fisher v. Greto*, 714 N.Y.S.2d

296 (1st Dep't 2000), the court held that despite the lack of proof of any vicious propensity of defendant's Siberian husky, the defendant had a duty to separate a 20-month-old infant from her dog while it was feeding. The defendant saw the infant approach the dog's bowl while the dog was feeding and did nothing to stop the infant from reaching for the bowl. The dog bit the infant's face, requiring 104 sutures. The court held that "where there is a small child involved in a babysitting context, there is a heightened duty to protect the small child from potential danger."

5. Danger Invites Rescue Doctrine—Duty of Care to Rescuer

a) Question of fact exists whether defendant driver was liable to plaintiff when after plaintiff attempted to rescue the intoxicated defendant on the highway, the plaintiff was injured by another vehicle

The rescue doctrine, so eloquently defined by Judge Cardozo in *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921), has been expanded over the years to

> create a duty of care toward a potential rescuer where a culpable party has placed another person in a position of imminent peril which invites a third party, the rescuing plaintiff, to come to his aid, and also to encompass situations where the culpable party has placed himself or herself in a perilous situation which invites rescue.

See Villoch v. Lindgren, 703 N.Y.S.2d 131, 133 (1st Dep't 2000) (citations omitted). In *Villoch*, the defendant had been driving while intoxicated and had gotten into an accident which left his disabled automobile facing the wrong way in the left lane of a highway. Plaintiff was driving on the highway, saw defendant's vehicle, and stopped to render aid. A police car arrived and stopped on the right side of the road. The police officer summoned the plaintiff and as plaintiff was crossing the highway to approach the officer, he was struck by an on-coming vehicle. The court held that plaintiff was still in an emergency situation when he was crossing the road. The court concluded that plaintiff's injury was not so attenuated from his attempt to rescue defendant so as to break the causal connection between plaintiff's injury and defendant's anteceding negligence in driving while intoxicated. The court further held that the danger invites rescue doctrine does not require that the plaintiff's injury occur at the precise scene of the anteceding negligence.

b) Nursing home may be liable to rescuer when after its employee left his shift an hour early, a fire broke out in disabled patient's home

In *Villarin v. Onobanjo, et al.*, 714 N.Y.S.2d 90 (2d Dep't 2000), the defendant nursing care provider was providing in-home nursing care to a disabled man. The defendant's visiting nurse employee left his shift an hour early, and during that hour a fire broke out in the patient's home, which allegedly either would not have occurred or would have been detected had the nurse remained on duty. During the fire, decedent was killed while attempting to rescue the disabled patient. The court held that a question of fact existed under the theory of danger invites rescue whether defendant was liable for decedent's death.

c) Duty to rescuer exists even when rescuer is reasonably mistaken about danger to another

The doctrine of danger invites rescue applies even when the rescuer makes a reasonable mistake in believing that another is in peril. In *Gifford v. Haller*, 710 N.Y.S.2d 187 (3d Dep't 2000), the defendant parked her van and exited with her infant daughter, but left the van running. The van began to roll backward. The plaintiff, who had just spoken with the defendant while she was in her van, believed that the infant was still in the van and sustained injuries as he tried to stop the van in order to rescue the child. The court held that whether the plaintiff's belief that the child was in the van was reasonable and whether plaintiff had, therefore, acted reasonably in pursuing the van was a question for the trier of fact. The law requires only that there be more than a suspicion of danger to another person in order to extend a duty of care to a rescuer.

B. Proximate Cause

a) A driver's act of checking for oncoming traffic before entering a highway is not a superseding act which severs the causal nexus between a collision and defendant's prior act of motioning to the driver that passage was safe

Beware the driver who motions to another driver that passage on a roadway is safe. In *Golding v. Farmer*, 710 N.Y.S.2d 213 (4th Dep't 2000), plaintiff A's moving vehicle was to the left of and behind defendant B's vehicle, which had stopped to allow driver C to make a left turn in order to enter the roadway. Defendant B had motioned to driver C that it was safe for C to enter the roadway. Driver C, however, still checked for oncoming traffic and nonetheless struck A's vehicle. The court held that Driver C's act of checking for oncoming traffic was not a superseding act which severed the causal nexus between defendant's own alleged negligence and the collision. Summary judgment was properly denied to defendant.

C. Imputed or Vicarious Liability

1. Vicarious Liability of Hospital or Medical Office for Negligence of Independent Contractor

a) Apparent agency or agency by estoppel

In *Guadagnoti v. Seaview Radiology, P.C.*, 712 N.Y.S.2d 812 (Sup. Ct., Richmond Co. 2000), the court held that while the general rule is that a hospital cannot be held liable for the malpractice of a physician who is an independent contractor and not an employee, an exception exists under apparent agency and agency by estoppel principles when the patient enters a medical office or hospital and seeks treatment from the office or hospital, not from a particular physician. Decedent's estate was not bound by the private limitations in the contract between the treating radiologist and the defendant radiology clinic which held itself out to the public as rendering radiology services. The court held that a genuine issue of fact exists precluding summary judgment to one who hires an independent contractor when a reasonable person could have considered the physician a *de facto* or apparent employee.

In *McDonald v. Ambassador Construction Company, Inc.*, 709 N.Y.S.2d 177 (1st Dep't 2000), the court held that a patient's belief that a doctor was acting as an agent of the hospital, if reasonable, was sufficient to hold the hospital vicariously liable for the doctor's alleged malpractice, notwithstanding the fact that the doctor was actually an independent contractor.

2. Vicarious Liability of a Master for Servant's Negligence

a) Employer may be held liable under social host statute for accident caused by under-age employee

In *Lopez v. Tarana, et al.*, 704 N.Y.S.2d 629 (2d Dep't 2000), the court held that a jury question existed as to whether the employer could be held liable under the social host statute for a motor vehicle accident caused by the employer's infant employee, who had been drinking alcohol on the employer's premises at an after-hours employer-sponsored party hosted by an officer of the employer.

b) Employer is not liable for the unforeseeable intentional torts of an employee, unconnected to the employee's duties

In *Correira v. Bannon,* N.Y.L.J., Dec. 5, 2000, p. 30, col. 1 (Sup. Ct., Queens Co.), the court held that defendant's bar owner and manager were entitled to summary judgment dismissing plaintiff's claim for damages which arose from the tortious acts of an employee bouncer. The evidence demonstrated that the employee-bouncer broke up a fight at the subject bar and went back to his work station. Later, however, the employee-bouncer left the bar, went to his car to retrieve a hand gun, and traveled to a remote location where he shot three of the persons involved in the bar fight. The court held that such conduct was clearly unconnected to the employment relationship and was motivated solely by feelings of personal revenge. The employer could not have foreseen the employee's acts.

In *Davis v. Manhattan & Bronx Surface Transit Operating Authority*, (N.Y.L.J., Dec. 14, 2000, p. 33, col. 2) (Civil Ct., Kings Co.), the court held that a common carrier is not vicariously liable for the personal injuries of a passenger caused by its employee's unforeseeable assault, which was wholly outside the scope of employment.

3. Vicarious Liability of a Principal for His/Her Agent

In *Christopher S. (Anonymous) v. Douglaston Club*, 713 N.Y.S.2d 542 (2d Dep't 2000), the court held that, as a general rule, the knowledge acquired by an agent acting within the scope of his/her agency, is imputed to the principal, who will be bound by the knowledge even if never actually communicated to the principal. An exception to the rule occurs when the agent abandons the principal's interests and acts entirely for his, her or another's purposes. In this case the defendant club was entitled to summary judgment when the evidence established that two board members of the club knew that one member's son had committed a sexual assault upon the plaintiff while at the club. The board members learned of the sexual assault in their capacity as the fathers of the boys involved. The court held they were not acting within the scope of their duties as agents of the club when they became aware of the assault. Thus, the club could not be held liable for failure to maintain its premises in a safe condition.

4. Vicarious Liability Under Vehicle and Traffic Law § 388

In *Beddingfield v. LaBarabera*, 714 N.Y.S.2d 312 (2d Dep't 2000), the court held that the owner of a motor vehicle was not vicariously liable to an injured pedestrian when the driver of the vehicle intentionally struck the plaintiff. The court held that Vehicle and Traffic Law § 388 imposes vicarious liability on the owner for the *negligent* operation of his or her vehicle.

5. Insurance Company Not Vicariously Liable for Independent Contractor Paramedic

In *Melbourne v. New York Life Insurance Co.*, 707 N.Y.S.2d 64 (1st Dep't 2000), the determinative issue was whether the principal insurance company had control over the work done by an independent contractor who performed paramedical examinations for purposes of insurance underwriting, so as to fall within an exception to the rule that ordinarily a hirer has no vicarious

liability for the negligence of an independent contractor. The court held that because there was insufficient degree of control over the work of the paramedic independent contractor, summary judgment on the issue of vicarious liability was proper.

D. Premises Liability

1. Second Circuit Holds That Landowner May Be Liable in Negligence for Open and Obvious Dangerous Condition

In *Michalski v. Home Depot, Inc.*, 225 F.3d 113 (2d Cir. 2000), the Second Circuit Court of Appeals held that under New York law, the open and obvious nature of a dangerous condition on property does not relieve the landowner from a duty of care where harm to a visitor is readily foreseeable by landowner, and the landowner has reason to know that a visitor might not expect, or might be distracted from observing the hazard. Plaintiff was a first time shopper at Home Depot and allegedly tripped and fell over a four inch pallet resting on the forks of a forklift in the aisle. The store argued that the forklift and pallet were open and obvious, thereby precluding liability. The court said that fact issues existed whether the store breached its duty of care and whether the customer was comparatively negligent.

2. No Duty Existed to Timely Assist a Customer

In *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111 (2d Cir. 2000), the Second Circuit Court of Appeals held that defendant retail store was not liable for injuries sustained by a wheelchair-bound customer who was struck on the leg by two cans of paint that he was attempting to retrieve from a shelf after having waited for assistance. A store employee had been assisting the customer and had gone to find someone else to answer the customer's questions about paint gloves. Although the customer had waited ten to fifteen minutes for assistance, the court was unpersuaded that the retail store had assumed a specific duty to assist the customer in a timely manner when its employee told the customer to wait while she could find someone who could help him. Significant to the court's decision was the fact that the customer never asked the store employee for assistance in retrieving the paint cans.

3. Landlord's Counterclaim Against Tenant-Father Was Dismissed in Case Involving Scalding Hot Water

In *Deshler v. East West Renovators Inc.*, 712 N.Y.S.2d 518 (1st Dep't 2000), the court held that tenants, whose baby was accidentally scalded when bath water suddenly turned hot as the babysitter bathed him, were not liable for their baby's injuries, and the landlord's counterclaims were dismissed. The court refused to find negligence in the father's failure to warn the babysitter of bath water's tendency to suddenly turn hot.

4. No Liability for Wet Leaves on Roadway Abutting Home

In *Celestin v. City of New York, et al.*, N.Y.L.J., Dec. 12, 2000, p. 31, col. 6 (Sup. Ct., Queens Co.), plaintiff was injured in a one-car accident after apparently encountering wet leaves on the roadway abutting the defendant homeowner's property. The plaintiff asserted that the homeowner had a duty to keep the road clear of wet leaves. The court granted summary judgment in favor of the homeowners, noting that the homeowners were no more responsible for the leaves in the roadway than they were for the rain making them wet. The court noted that the law is well settled that an abutting landowner will not be liable to a passerby on a public roadway, unless he or she negligently repaired the roadway or created the defect that caused the accident.

5. Hotel Owner's Security Was Not Inadequate

In *Pascarelli v. LaGuardia Elmhurst Hotel Corp*, N.Y.L.J., December 13, 2000, p. 30, col. 1 (Sup. Ct., Queens Co.), the court set aside a verdict against the hotel owner, holding that the plaintiff who was assaulted in the hotel failed to adduce sufficient evidence of prior criminal activity at the building to establish the element of forseeability. The court noted that plaintiff must prove that the owner breached its duty to maintain minimal security measures to protect guests from foreseeable criminal activity. In this case, there was no evidence that the hotel's security policy was inadequate, given the foreseeable risks, or that additional operating security cameras or locks on the rear door would have prevented assault of the plaintiff.

6. Parents Were Not Negligent in Failure to Prevent Assault During a Party at Their Home

In *Guercia v. Carter*, 712 N.Y.S.2d 143 (2d Dep't 2000), the court held that the plaintiff, who was assaulted by two allegedly intoxicated teenage boys during a party at defendants' residence, failed to demonstrate a cause of action predicated on negligence against the parent-homeowners. There was no evidence that the homeowners had the opportunity to control the conduct of the assailants or that they were aware of any need to do so. The court noted that the parent-homeowners were not at home during the party, had not authorized any drinking of alcohol in their home, and had asked an adult daughter to return home.

7. Builder Owner Was Not Liable for a Sidewalk Beating

In *Tancredi v. Helmsley-Spear, Inc.*, 708 N.Y.S.2d 471 (2d Dep't 2000), the court held that actions taken by the owner were sufficient and the incident was not foreseeable or controllable. Accordingly, the owner of the apartment building was not liable for an assault to a tenant/construction company foreman, who was beaten by picketing union members outside the building. The

court noted the owner had called the police and the minor incidents that preceded the assault would not have rendered the assault foreseeable and, in any event, the owner did not have a right to control the public sidewalk.

8. Question of Fact Existed That Beach Club Had Constructive Notice of Protruding Nails on Lifeguard Stand

In *Buckley v. Sun and Surf Beach Club Inc*., 2000 WL 1728109 (N.Y. 2000), the Court of Appeals denied summary judgment to the premises owner, holding that evidence that the beach club's management had knowledge that children frequently played on the lifeguard stand after hours and that the nails sticking out of the wood of the stand had been there all summer created triable issues of fact as to whether the beach club had constructive knowledge of the dangerous condition.

9. Mechanic Should Have Appreciated Danger Posed by Inadequate Lighting

In *Cornwell v. Otis Elevator Company,* 713 N.Y.S.2d 321 (1st Dep't 2000), the court held that a building owner was not liable for injuries sustained by an elevator mechanic when a protruding pin caught his shirt sleeve and drew his arm into a moving part located in the building's motor room. The mechanic contended that the motor room lighting was inadequate. The court observed, however, the mechanic had worked in the motor room for three months prior to the accident without putting the building owner on notice of the poor lighting and any such danger should have been appreciated by the mechanic.

10. Beer Bottles on Stairwell Create Fact Issue of Owner's Liability

In *Osorio v. Wendall Terrace Owners Corp.*, 714 N.Y.S.2d 116 (2d Dep't 2000), the court denied the owner's motion for summary judgment, finding that a fact issue existed as to whether the property owners had actual or constructive notice of beer bottles in an unlighted stairway on which plaintiff allegedly tripped. Plaintiff testified that she had previously complained about people drinking in the stairwells and leaving their bottles behind. The decision noted that a defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition.

11. Store Owner's Evidence of Regular Checks for Debris on Floors Defeats Plaintiff's Claim

In *Mueller v. Hannaford Brothers Co.*, 713 N.Y.S.2d 789 (3d Dep't 2000), the court held that a grocery store was not liable for injuries suffered by customer who allegedly slipped and fell on yogurt on the floor. There was no evidence that the store owner had actual knowledge or constructive notice of the presence of yogurt on its floor. The evidence demonstrated that the floor had been mopped 1-1½ before the accident, employees frequently patrolled the store to pick up debris, and the yogurt was not dirty and did not have footprints through it.

12. Evidence of Exceptionally Shiny Waxed Floor Is Insufficient to Create Issue of Fact

In *Malmut v. Lindenwood Village Coop Corp*., 708 N.Y.S.2d 442 (2d Dep't 2000), the court held that in the absence of proof of a negligent application of wax or polish, a slippery condition on a waxed floor by reason of its smoothness or polish does not give rise to a cause of action in negligence. Unsupported allegations that the floor was over-waxed and exceptionally shiny for a week prior to the accident failed to raise an issue of fact concerning alleged negligent application of the wax or notice of a dangerous condition.

13. Court Holds That Unfinished Floor Was Readily Observable to the Plaintiffs

In *Meyer v. Tyner*, 709 N.Y.S.2d 618 (2d Dep't 2000), the court held that homeowners were not liable for injuries sustained by plaintiffs, who were looking at the house as prospective buyers, when, while viewing the attic, they stepped onto and fell through the insulation on the unfinished floor. The court noted that while landowners have a duty to maintain their property in a reasonably safe condition so as to prevent foreseeable injuries, this duty does not extend to conditions readily observable or in plain view. Despite similarities in the color of the floor and the insulation, the unfinished floor was determined by the court to be readily observable thereby precluding a duty to warn.

14. Roots Should Not Be Present in Parking Lot Grassy Median

In *Charvala v. Kelly & Dutch Real Estate Inc*., 709 N.Y.S.2d 785 (4th Dep't 2000), the court concluded that plaintiff proved by a preponderance of the evidence that the parking lot owner's negligence was a proximate cause of her injuries. Although plaintiff could not say what she tripped on, her testimony that her foot caught on something and photographs of the grassy median which demonstrated roots and thick stalks that protruded from the ground, but were covered with grass, were sufficient to support the jury's verdict.

15. Branches Over Sidewalk Are Not Special Use

In *Grant v. Schwartz*, 713 N.Y.S.2d 769 (2d Dep't 2000), the court found that the owner of abutting property did not put a public sidewalk to a "special use" by instructing the landscaper not to cut bushes back so far as to destroy them. Accordingly, the court decided that the owner was not liable on a "special use" theory to the plaintiff pedestrian who tripped over a branch that

was located on owner's property but encroached on the sidewalk. The court noted that a landowner has no common law duty to control the vegetation on his property for the benefit of users of the public highways, and no claim was made that the owner created the condition. The "special use" exception is a narrow one, existing only when the landowner receives some special benefit from his use of the public sidewalk. Merely wishing not to destroy his bushes did not put the sidewalk to a special use.

16. Premises Owner Is Not Liable for Giving Plaintiff Ineffective Bug Spray

In *Stanton v. Pomfrey*, 712 N.Y.S.2d 437 (N.Y. 2000), the Court of Appeals held that a premises owner was not liable for injuries to plaintiff who fell while running away from a beehive after an unsuccessful attempt to kill the bees with bug spray provided by the homeowner. The Court ruled that the evidence was insufficient to show the homeowner's breach of reasonable care by maintaining a dangerous condition on his property or providing ineffective bug spray.

III. Professional Malpractice

A. Medical Malpractice

1. Duty of Physician to Non-Patients

a) Court of Appeals holds that there is no duty to wife of patient undergoing fertility treatment

The Court of Appeals, in *Cohen v. Cabrini Medical Center et al.*, 94 N.Y.2d 639, 730 N.E.2d 949, 709 N.Y.S.2d 151 (2000), held that a physician owes no duty to the wife of his patient for the allegedly negligent performance of a procedure intended to increase the patient's fertility. Although the wife participated in her husband's consultation with the doctor and would have derived a benefit had the procedure been successful, the Court of Appeals emphasized that no treatment or care for the wife was ever contemplated and no physical harm to the wife resulted from the failed procedure. The Court distinguished this situation from that of an unwanted pregnancy after a negligently performed vasectomy on the grounds that a vasectomy is intended to prevent physical harm to the wife, i.e. a pregnancy. The Court found that any "physical harm" to the wife, as a result of submitting to in-vitro fertilization after the failed procedure, was voluntary. The Court also rejected, as too speculative, any claim based on "wrongful nonbirth," particularly given the fact that donor eggs were successfully used with plaintiff's husband's sperm after eight failed attempts at in-vitro fertilization using the wife's eggs and her husband's sperm.

b) Failure of defendants to instruct plaintiff on care of her mother's Hepatitis C and its contagious nature is breach of a duty to the plaintiff, but is a negligence, not malpractice, action

In *Candelario v. Dr. T. Tepperman and New York University Medical Center*, N.Y.L.J., Aug. 1, 2000, p. 23, col. 6 (Sup. Ct., Bronx Co.), the court held that where a doctor failed to advise plaintiff of how to properly care for her mother who was infected with Hepatitis C, the complaint lies in negligence, and not medical malpractice, for purposes of determining the applicable statute of limitations.

Plaintiff's mother was released by defendant hospital to her daughter's care after having been treated for Hepatitis C. Plaintiff claimed defendants were negligent in failing to advise her of the contagious nature of Hepatitis C and the necessary precautions to take while caring for her mother. Defendants made a cross-motion to dismiss plaintiff's action on statute of limitations grounds, claiming that the complaint was based in malpractice, not negligence, and the suit should be barred because plaintiff filed suit more than 2½ years after the last contact between plaintiff and defendants.

The court noted that defendants were not treating plaintiff as a patient, but had released the mother from their care to the plaintiff's care and may have thereby breached a duty of care to the plaintiff in failing to inform her of necessary precautions she needed to take. 10 N.Y.C.R.R. 2.27 states that a physician caring for a patient with a highly communicable disease, such as Hepatitis C, shall advise other members of the patient's household of appropriate methods of disinfection and disposal of infective secretions and excretions. Plaintiff's complaint alleged that defendants failed to comply with these regulations. The court held that based on the breach of duty set forth in 10 N.Y.C.R.R. 2.27 and the ordinary definition of negligence, as conduct falling below the standard established by the law for the care of others, plaintiff's complaint lay in negligence.

2. Advice Rendered Through Third Person May Create Physician-Patient Relationship

A physician-patient relationship may arise when a physician gives advice to a patient, even if that advice is communicated through another health care professional. So held the Fourth Department in affirming the denial of a cardiologist's motion for summary judgment in *Campbell v. Haber, M.D. et al.*, 710 N.Y.S.2d 495 (4th Dep't 2000). The plaintiff patient presented at the emergency room complaining of chest pains. The emergency room physician examined plaintiff and ordered tests. After obtaining test results that indicated there might be heart muscle damage, the emergency room physician consulted a cardiologist by telephone. The cardiologist opined that plaintiff's symptoms and test results were

not caused by plaintiff's heart. The emergency room physician communicated the cardiologist's opinion to the plaintiff and discharged him. The cardiologist denied that he had an "on call" relationship with the hospital. The emergency room physician testified that he telephoned the cardiologist because he was the "on call" cardiologist. The Fourth Department followed *Cogswell v. Chapman*, 249 A.D.2d 865, 866, 672 N.Y.S.2d 460, stating, "Whether the physician's giving of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship had arisen is ordinarily a question of fact for the jury." *Campbell*, 710 N.Y.S.2d at 496 (quoting *Cogswell*). The Fourth Department concluded that whether the cardiologist had "more than an informal interest and involvement in plaintiff's condition" was a question of fact for the jury.

3. Proximate Cause

a) Failure to order sonogram results in liability

In *Galandauer v. Brookdale Hospital Medical Center*, 710 N.Y.S.2d 396 (2d Dep't 2000), the court affirmed a jury award in the amount of $235,000 against defendant physician for patient's pre-death pain and suffering where the physician negligently failed to order a sonogram for a patient during the first visit and the patient died six weeks later of widespread metastatic cancer and an enlarged liver.

b) Covering physician may be liable for failure to perform procedure promptly

The Second Department held that where a covering physician did not perform a certain surgical procedure on the plaintiff's decedent during the 11-hour period between her initial assessment of the decedent's condition and the time the physician for whom she was covering decided on the need for surgery, there was legally sufficient evidence of causation. Specifically, the Second Department credited the plaintiff's expert's testimony that the failure to operate earlier increased the damage to the decedent and reduced the decedent's chances of survival, stating that "the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival, had occurred." *Jump v. Facelle*, 712 N.Y.S.2d 162 (2d Dep't 2000).

4. Proof of Medical Malpractice Through *Res Ipsa Loquitur*

The Fourth Department found that a trial court's references to the doctrine of *res ipsa loquitur* during trial were not prejudicial where defendant hospital was found negligent for leaving a laparotomy pad in plaintiff's abdominal cavity during a surgery. The court also held that the award of $225,000 for 11 months of pain and suffering after the surgery did not materially deviate from what would be reasonable compensation. *Genco v. Millard Fillmore Suburban Hospital*, 714 N.Y.S.2d 173 (4th Dep't 2000).

5. Liability for Lack of Informed Consent

a) Higher duty may exist to a patient suffering from a mood disorder

Lack of informed consent can be predicated on the physician's failure to disclose a less invasive alternative procedure, even where the surgery is elective and cosmetic in nature. So held the First Department in *Lynn G. v. Hugo, M.D.*, 710 N.Y.S.2d 334 (1st Dep't 2000). The First Department found a genuine issue of fact existed as to whether the plastic surgeon properly informed the patient that she could have had a less invasive suction-assisted lipectomy, rather than the abdominoplasties he performed. The patient had 51 consultations with the physician over the previous six years and had undergone numerous cosmetic surgeries, including significant liposuction in the abdominal area just a few months earlier. The First Department also held that where a patient's judgment appears to be impaired, a physician who merely presents the patient with the options, but does not advise as to which procedure is better or whether doing nothing at all is better, may not have sufficiently met his informed consent obligations. The court found factual questions existed as to whether the plastic surgeon should have consulted a mental health professional for advice about how to proceed, or otherwise attempted to explore his patient's psychiatric history, where the patient had disclosed that she was using antidepressants and "mood elevators." The plaintiff alleged she suffered from Body Dysmorphic Disorder, which affected her ability to assess the risks and benefits of cosmetic surgery, because patients with this disorder possess irrationally exaggerated perceptions of their bodily imperfections.

b) Physician may rely on another physician's explanation to the patient

The Second Department reversed and granted a new trial where the jury was not instructed that the defendant physician could rely upon information previously furnished to the plaintiff patient by another physician in determining whether she had received sufficient information to allow her to make an informed decision. *Klatsky v. Lewis*, 702 N.Y.S.2d 319 (2d Dep't 2000).

6. *Prima Facie* Cases of Medical Malpractice

a) Pain in nonsurgery site after surgery creates *prima facie* case of negligence

In *Lo Presti v. Hospital for Joint Diseases*, 712 N.Y.S.2d 110 (1st Dep't 2000), the court reversed the trial court's dismissal of the complaint at the close of the evidence

and ordered a new trial, finding that a *prima facie* case of medical malpractice had been made. The plaintiff-patient alleged that she began experiencing severe pain in her left foot after surgery performed elsewhere in her body. The plaintiff did not allege that the surgery was improperly performed, but, rather, that the defendants negligently positioned her on the operating table, causing compression of a nerve while she was unconscious. The plaintiff could not determine exactly what caused the nerve compression, but opined that either the operating table straps or the anti-embolic stockings on her legs were too tight. The defendants offered their own medical reasons, which disagreed with plaintiff's theory of causation, and contended that operating table straps were not used. The First Department, stated: "To establish a *prima facie* case plaintiff need not eliminate entirely all possibility that defendant's conduct was not a cause, but only offer sufficient evidence from which reasonable [persons] may conclude that it is more probable that the injury was caused by defendant than that it was not." *Id*. at 112 (quoting *Monahan v. Weichert*, 82 A.D.2d 102, 108, 442 N.Y.S.2d 295). The court concluded that factual disputes remained that needed to be resolved by the jury.

b) Plaintiff fails to make out *prima facie* case in aborted angioplasty procedure

In *Rossi v. Arnot Ogden Medical Center*, 702 N.Y.S.2d 451 (3d Dep't 2000), the court affirmed the trial court's grant of summary judgment in favor of defendants where the plaintiff could not establish a deviation from accepted medical practices. Plaintiff was diagnosed with a severe blockage in one of his arteries. Defendant doctor recommended and subsequently performed an angioplasty procedure to relieve the blockage. During the angioplasty, the doctor discovered the artery was not going to open and aborted the procedure. Rather than initiating bypass surgery at that time, he decided upon conservative medical treatment. Thereafter during the angioplasty procedure, plaintiff suffered a mild myocardial infarction. The plaintiff filed suit, alleging that the doctor was negligent in recommending the angioplasty procedure, as well as in the actual undertaking of the procedure, and that the hospital was negligent in failing to maintain an adequate quality assurance plan in connection with its angioplasty unit. Defendants successfully moved for summary judgment demonstrating, through expert affidavit, that angioplasty was the appropriate course of treatment, that plaintiff's myocardial infarction was a recognized risk of the procedure and that defendant doctor's decision to treat plaintiff conservatively was within good and accepted medical practice. The Third Department found that the expert affidavit submitted on behalf of plaintiffs failed to raise a triable issue of fact. The court stated that: "The expert's conclusory statement that the procedure was not indicated, without more, was insufficient to establish a deviation from accepted medical practices and the requisite nexus between the alleged malpractice and injury."

7. Evidence of Prior Negligence Excluded

In *Maraziti v. Weber*, 713 N.Y.S.2d 821 (Sup. Ct., Dutchess Co. 2000), the court excluded from evidence findings of prior negligent acts of the defendants made by the New York State Department of Health, Office of Professional Medical Conduct (OPMC). The infant's mother brought a medical malpractice action alleging that defendants mismanaged her labor and delivery by failing to perform a timely cesarean section which caused the fetus to be deprived of oxygen, resulting in its significant brain damage. Plaintiff sought to introduce OPMC's reports regarding unrelated prior negligent acts of defendants which resulted in defendant's medical license having been revoked subsequent to the birth in question. While the court allowed OPMC findings which directly involved the birth in question, it excluded those OPMC findings unrelated to the instant case.

8. Lessor Burden of Proof in Wrongful Death Actions Is Held Not Applicable Where Patient Survived Medical Treatment, But Died Before Trial

The Third Department held in *Orloski v. McCarthy*, 710 N.Y.S.2d 691 (3d Dep't 2000), that the rationale of *Noseworthy v. City of New York*, 298 N.Y. 76, 80 N.E.2d 744, which provides for a lesser burden of proof in death cases was not applicable where the decedent died subsequent to her videotaped deposition, but before trial. The plaintiff alleged that defendant physician was negligent in failing to diagnose decedent patient with colorectal cancer at the time she performed a hysterectomy on patient. Patient was diagnosed with colorectal cancer approximately eight months after the hysterectomy. Two years and two months after the diagnosis, patient died. The Third Department concluded that the *Noseworthy* rule did not apply, because the plaintiff and defendant had equal access to the facts surrounding the decedent's death and decedent's videotape deposition was taken and presented at trial. Any contrary testimony by defendant physician and nurses merely presented question of credibility for the jury to resolve.

9. Statute of Limitations in Medical Malpractice

a) Monitoring of breast tissue abnormality may constitute continuous treatment to toll CPLR 214-a 2½ year statute of limitations

The First Department found that issues of fact existed as to whether defendant hospital made timely diagnosis of breast cancer and continued to treat the plaintiff, thus precluding summary judgment in favor of the City of New York on statute of limitations grounds. In

Oksman v. City of New York, 705 N.Y.S.2d 360 (1st Dep't 2000), plaintiff-patient was given a breast exam on January 5, 1995 and referred for a mammogram. The February 27, 1995 mammogram report identified a benign lobulated soft tissue density in the left breast and recommended a routine follow up. On March 3, 1995, the plaintiff was informed that her mammogram was negative. Plaintiff stated that her doctors advised her that they would "keep an eye on" the lobulated soft tissue density. On March 19, 1996, plaintiff returned to the doctors, complaining of pain in her left breast. On April 5, 1996, plaintiff was diagnosed with breast cancer. Plaintiff filed a Notice of Claim on June 6, 1996 and filed a Summons and Complaint on October 23, 1996, alleging failure to diagnose breast cancer on February 27, 1995, which was more than one year and 90 days prior to the filing of the Notice of Claim. The First Department, relying on *Young v. New York City Health and Hospitals Corp.*, 91 N.Y.2d 291, 296, 670 N.Y.S.2d 169, 693 N.E.2d 196, affirmed the trial court's denial of the defendants' motion for summary judgment, stating, "The monitoring of an abnormality to ascertain the presence or onset of a disease or condition may constitute treatment for purposes of tolling the Statute of Limitations."

b) Once diagnostic exam shows abnormality, later monitoring may be continuous treatment

In *Mandel v. Herrmann*, 706 N.Y.S.2d 195 (2d Dep't 2000), the court reversed a trial court's grant of summary judgment in favor of defendant physician. The court found that an issue of fact existed as to whether the defendant physician monitored the decedent's lung condition, after receiving a report which revealed abnormalities suggestive of a pulmonary malignancy, so as to constitute continuous treatment and toll the CPLR 214-a 2½ year statue of limitations for medical malpractice. The Second Department stated: "Although routine diagnostic examinations, even when conducted repeatedly over a period of time, do not constitute a course of treatment, diagnostic examinations which are specifically prescribed as part of ongoing care for an existing medical condition may be sufficient to invoke the continuous treatment toll."

c) Medical malpractice limitations period applies to actions against physical therapists

In *Wahler v. Lockport Physical Therapy*, 713 N.Y.S.2d 405 (4th Dep't 2000), the court found that the 2½ year statute of limitations period for medical malpractice actions applied to an action against a physical therapist and reversed the trial court's denial of the defendant's motion for summary judgment. Plaintiff alleged that on June 16, 1994, while receiving treatment, the physical therapist failed to insure that the chair in which plaintiff was seated while using a wall-mounted pulley device was adequately secured or positioned. Plaintiff fell backward in the chair and sustained injuries. The court found that the complaint, which was filed on February 11, 1997, sounded in medical malpractice, rather than negligence, and was time-barred.

d) In *Application of Henry*, court holds that appointment of *guardian ad litem* for mother does not affect the toll for disability

In *Costello v. North Shore University Hospital Center for Extended Care and Rehabilitation*, 709 N.Y.S.2d 108 (2d Dep't 2000), the court considered whether a plaintiff's disability, for purposes of the running of a statute of limitations, ceases when a *guardian ad litem* is appointed for the disabled plaintiff. In 1992, plaintiff's son had commenced a medical malpractice action on behalf of his mother, in connection with a brain hemorrhage, after he had obtained power of attorney over his mother's affairs. In 1993, the plaintiff sustained stomach and intestine perforations after undergoing a small procedure. Then, in 1996, the plaintiff's son was appointed *guardian ad litem*, and the instant action for the injuries to the stomach and intestine was commenced a year later. The trial court dismissed the action, reasoning that plaintiff's son had been capable of protecting his mother's rights due to her total incapacitation and thus plaintiff was not entitled to a toll of the limitations period.

The Second Department reversed, relying on the Court of Appeals decision, *Henry v. City of New York*, 94 N.Y.2d 275 (1999), which held that an infant is entitled to a full toll on the statute of limitations, regardless of whether a lawyer had been retained to represent the infant and regardless of the acts of a parent, guardian, or legal representative in taking certain steps to protect the infant's rights. Applying the reasoning of *Henry*, the Second Department held that the appropriate inquiry is plaintiff's status, not the acts of a representative. Because plaintiff was still under disability in 1996, her son's action on her behalf was not time-barred.

B. Legal Malpractice

1. No Duty to Advise Client of Possible Insurance Coverage for Litigation Costs When Law Was Not Favorable to Client at Time of Representation

In *Darby & Darby, P.C. v. VSI International, Inc.*, 95 N.Y.2d 308, 716 N.Y.S.2d 378 (2000), the Court of Appeals found that a New York law firm did not have a duty to advise its Florida corporate client regarding possible insurance coverage for the costs of a patent infringement litigation. The defendant law firm had been retained to represent the client in a patent infringement litigation, the costs of which might have been covered under the corporation's general liability policy. At the time of the law firm's representation, however, neither New York nor Florida law recognized

the duty of an insurer to defend an infringement claim under a general liability policy. Accordingly, the Court held there was no breach of duty.

2. Lack of Privity Defeats Legal Malpractice Claim

In *State of California Public Employees' Retirement System v. Shearman & Sterling*, 2000 WL 1710566 (N.Y. 2000), defendant law firm was retained to represent Equitable in negotiating and selling a commercial property loan to plaintiff California Public Employees' Retirement System (CALPERS). Subsequently, the debtor on the loan defaulted and CALPERS accelerated the loan. The loan sale agreement, which had been sent to CALPERS by defendant law firm, however, provided for only a $1.1 million acceleration fee, rather than the standard CALPERS note which provided for a $9.1 million acceleration fee. Subsequently, Equitable entered into a settlement agreement with CALPERS in which Equitable assigned to CALPERS all claims, including legal malpractice claims, that it may have. CALPERS then commenced a legal malpractice suit against defendant law firm. The Court of Appeals affirmed the Appellate Division's dismissal of the complaint in its entirety, finding that CALPERS and defendant Shearman & Sterling were not in privity of contract, since the only contact between them was the letter Shearman & Sterling sent that accompanied the loan agreement and which specifically asked CALPERS to have its counsel review and approve the loan agreement. The Court of Appeals also rejected CALPERS claim that it was an intended third-party beneficiary of the law firm's services contract between Equitable and Shearman & Sterling. Finally, the Court rejected CALPERS claim that it had been assigned Equitable's rights to pursue a legal malpractice action against Shearman & Sterling. The Court reasoned that because Equitable had been paid fully by CALPERS for its role in negotiating and selling the loan, Equitable was not "injured" and therefore had no malpractice claim against Shearman & Sterling.

3. *Prima Facie* Case for Failure to Interpose Answer

In *Shapiro v. Butler*, 709 N.Y.S.2d 687 (3d Dep't 2000), the court held that an attorney's failure to interpose a timely answer on behalf of his client and seek an extension of time to answer constitutes, as a matter of law, a breach of the standard of professional care and skill. The court, however, noted that plaintiff client would still have to prove that he would have prevailed in the underlying action. In this regard, the defendant attorney was not judicially estopped from asserting that plaintiff client would not have prevailed in the underlying action, even though during his representation of the client he advised him that he would prevail in the underlying action. The court found that the outcome of the underlying action is a question of fact that precluded summary judgment.

4. Failure to File Timely Suit and Insurer's Obligation to Defend

In *Holloway v. Sacks and Sacks, Esqs.*, 713 N.Y.S.2d 162 (1st Dep't 2000), the court found that the defendant law firm had committed malpractice where an associate failed to timely file suit on behalf of a client who would have otherwise prevailed on his Labor Law claims. Furthermore, the court found that although the law firm did not have actual or constructive knowledge of the associate's malpractice, and the associate had concealed his misconduct, the law firm's insurer had a duty to defend and indemnify.

5. Statue of Limitations for Legal Malpractice

a) Accrual of statute of limitations

In *Britt v. Legal Aid Society, Inc.*, 2000 WL 1754456 (N.Y. 2000), the Court of Appeals held that in legal malpractice claims arising out of criminal proceedings, the cause of action accrues, for statute of limitations purposes, when the criminal proceeding is terminated in favor of the client's innocence, i.e., on the date when the indictment against the plaintiff is dismissed. In so holding, the Court followed its rule in *Carmel v. Lunney*, 70 N.Y.2d 169, 173, 518 N.Y.S.2d 605, 511 N.E.2d 1126, where the Court stated:

> To state a cause of action for legal malpractice arising from negligent misrepresentation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense ***, for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie.

The Court reasoned that if a claimant could succeed in the tort action after having been convicted in the underlying criminal prosecution, the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions could be frustrated.

b) Infancy toll

The Fourth Department held that the infancy toll provided in CPLR 208 applies to legal malpractice claims asserted on behalf of minors, but does not apply to parent's derivative cause of action. *Cadieux v. Gough*, 709 N.Y.S.2d 756 (4th Dep't 2000). Plaintiff mother alleged that she and her three infant children suffered personal injuries from bacteria-contaminated water on the property she purchased in September 1994. Plaintiff moved in September 1998 for leave to serve a supplemental complaint to add as a defendant the attorney who represented plaintiff in the purchase of the property. The Fourth Department held that the motion with respect to the children's legal malpractice claims should

be granted pursuant to the tolling provision of CPLR 208. The court held, however, that the motion should be denied with respect to the plaintiff mother's claim for legal malpractice and the derivative claims as time-barred by the professional malpractice three-year statute of limitations under CPLR 214(b).

c) Continuous representation tolls statute of limitations

In *Mancino v. Levin*, 702 N.Y.S.2d 357 (2d Dep't 2000), defendant attorney represented plaintiff client in a matrimonial action which was settled in 1992 pursuant to stipulation. In August 1997, plaintiff commenced the instant action alleging legal malpractice. The Second Department found that an ongoing representation of the plaintiff in connection with the enforcement of the stipulation of settlement of the matrimonial action tolled the statute of limitations and accordingly defendant's affirmative defenses alleging that the action was time-barred under the statute of limitations and the equitable doctrine of laches should have been dismissed.

C. Engineering Malpractice

1. The Economic Loss Rule Is No Bar to Tort Remedy for Engineering Malpractice

In *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8 (2d Cir. 2000), the Second Circuit affirmed the trial court's denial of defendant engineering firm's motion for judgment notwithstanding the verdict or new trial. The court found that an engineering firm's failure to properly calculate the drop in height of water at the site of proposed hydroelectric plants, which resulted in extremely optimistic estimates of energy outputs for the plants, constituted professional malpractice and was the proximate cause of the damages plaintiff investors sustained in proceeding with the development of the project. The Second Circuit also held that the economic loss rule, which bars tort remedies in cases involving the sale of goods where the product causes no personal injury or property loss to the plaintiff and the plaintiff sustains only economic loss resulting from the malfunctioning product, did not apply in malpractice claim sounding in tort not contract. The court reasoned that although the parties may have entered into contracts governing some aspects of their relationship, the damages were due to a violation of a professional duty—a harm distinct from those contracts. Finally, the Second Circuit also held that prejudgment interest should be awarded as a matter of right where, as here, a defendant's act or omission deprives or otherwise interferes with title to, or possession or enjoyment of, property.

2. Engineering Firm Not Responsible for Deficiencies in Client's Evacuation Plan Manual

The Fourth Department found that defendant engineering firm was not responsible, as a matter of law, for any deficiencies in the evacuation plan of its client, a chemical company. The defendant engineering firm provided training to the corporation's employees on emergency responses, but it was the corporation employer who included a deficient evacuation plan in the reference manual it distributed to its employee who died as a result of injuries sustained while trying to escape from smoke at the place of employment. *Jordan v. Lehigh Construction Group, Inc.*, 702 N.Y.S.2d 729 (4th Dep't 2000).

IV. Products Liability

A. Preemption of State Law Claims

1. State Law Deceptive Acts and Misleading Business Practices Claims Not Preempted by Federal Law

In *Morelli v. Weider Nutrition Group, Inc.*, 712 N.Y.S.2d 551 (1st Dep't 2000), the court held that the federal Nutritional Labeling and Education Act (NLEA) did not preempt New York state law deceptive acts and misleading business practices claims alleging that the defendants had misrepresented the nutritional contents of "Power Bar," the defendants' sports nutrition product. The court held that General Business Law §§ 349 and 350 did not conflict with NLEA's preemptive provision, 21 U.S.C.§ 343-1(a), which bars states from enacting requirements for food in interstate commerce that are not identical to those prescribed in the NLEA. Defendants' alleged conduct violated the NLEA as well as the state laws. The court further held that plaintiffs' General Business Law § 349 claims are governed by a three-year limitations period.

2. Common-Law Claims Are Not Preempted by Consumer Product Safety Act

In *Colon v. BIC USA*, 2000 WL 1862811 (S.D.N.Y. Dec. 19, 2000), the court held that the Consumer Product Safety Act (CPSA), 15 U.S.C. §§ 2051-2084, and the safety standard issued by the Consumer Product Safety Commission (CPSC) that provide minimum standards for disposable lighter safety did not preempt state common law liability claims.

The CPSA was enacted to provide uniform national safety standards for consumer products. *See* 15 U.S.C. § 2051(b)(3). The CPSA authorizes the CPSC to issue product safety standards "'that requires disposable and novelty lighters . . . to meet specified requirements for child resistance.'" *Safety Standard for Cigarette Lighters*, 58 Fed. Reg. 37557 (July 12, 1993). The requirements are "intended to reduce the risk of injuries and deaths that

occur from fires started by children under the age of five playing with cigarette lighters."

The CPSA has two clauses relevant to the preemption question, a preemption provision and a savings clause. Effect must be given to both. The preemption provision provides:

> [N]o State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the federal standard. 15 U.S.C. § 2075(a).

The savings clause provides "Compliance with the consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under state statutory law to any other person." 15 U.S.C. § 2074(a).

The court held that the Supreme Court's decision in *Geier v. American Honda*, 120 S.Ct. 1913 (2000), prevents a broad reading of the CPSA's preemption provision to include common law claims. The *Geier* court held that "a savings clause assumes that there are a significant number of common law liability cases to save" and that "reading an express preemption clause narrowly to exclude common-law tort actions gives actual meaning to the literal language of the savings clause. . . ."

The court concluded that the CPSC merely established minimum standards with which all manufacturers or importers of lighters must comply. By no means, however, should compliance with these minimum standards automatically relieve a manufacturer from liability under state common law. State common law liability standards do not conflict with the CPSC's minimum standards.

B. Scope of Duty—Question of Gun Manufacturers' Duty to Victims of Gun Violence Certified to Court of Appeals

In *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000), victims of handgun violence brought an action against 25 handgun manufacturers alleging negligent marketing and distribution of the weapons. At trial, the jury found 15 manufacturers negligent and assessed damages against three manufacturers. The trial court denied the defendants' Rule 50(b) motion for judgment as a matter of law and the defendants appealed, arguing that they owed the plaintiffs no duty under New York law and, even if they owed such a duty, apportioning liability on a market share basis is impermissible under New York law. The Second Circuit certified the following questions to the Court of Appeals: whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the hand guns they manufacture, and whether liability in this case may be apportioned on a market share basis, and if so, how?

C. Duty to Warn

1. Manufacturer Had Duty to Warn of Tire Explosion Hazard

In *Brady v. Dunlop Tire Corporation*, 711 N.Y.S.2d 633 (3d Dep't 2000), the court reversed the Supreme Court's entry of summary judgment for the defendant, holding that the risk of an explosion while inflating a tubed tire is a danger that a jury could reasonably find was concealed or was not reasonably apparent to the plaintiff. Accordingly, the defendant tire manufacturer, had a duty to warn of the danger. The court also concluded on the facts that the defendant had not met its burden to demonstrate as a matter of law that the plaintiff was actually aware that the improper sealing of a tubed tire on a single-piece rim posed a risk of explosion.

2. No Duty to Warn Experienced User and Other Issues

In *Schriber v. Melroe Co.*, 710 N.Y.S.2d 416 (3d Dep't 2000), the court held that the defendant lessor of a trencher did not owe a duty to warn the plaintiff, a lessee, because the plaintiff, a mechanical engineer, was an experienced user of power tools. Furthermore, the defendant had previously warned the plaintiff twice of the specific danger at issue. The court also held that the plaintiff had failed to produce evidence that, at the time of manufacture, it was possible to design the trencher safer or that the manufacturer could have spread the cost of the design change. Further, the court held that the plaintiff had failed to produce evidence concerning the alleged product defects. As for the plaintiff's failure to warn claim against the manufacturer, the court held that the manufacturer had placed sufficient warnings on the trencher.

3. No Duty to Warn of Defect When Risk Obvious

In *Lauber v. Sears, Roebuck and Co.*, 709 N.Y.S.2d 325 (4th Dep't 2000), the court held that the defendants met their initial burden of establishing that there was no defect in the design or manufacture of the tractor at issue and that, in the exercise of reasonable care, the plaintiff should have discovered the alleged defect. The defendants also proved that the tractor was reasonably safe for the purposes for which it was used and the

danger at issue was an obvious risk. Accordingly, the defendant had no duty to warn.

D. Design Defects

1. No Design Defect Claim for Failure to Require Optional Items on Trailer and Other Issues

In *Merritt v. Raven Co.*, 706 N.Y.S.2d 233 (3d Dep't 2000), the court held that in the absence of any opposition to the defendant's cross-motion for summary judgment that sought dismissal of plaintiff's strict products liability claim for failure to warn, the claim should have been dismissed by the trial court. The court further held that the trailer, the product at issue, was reasonably safe for its intended use, even though it was sold without steps, foot holds, or ladders, all of which were optional items. The court held that the affidavit of plaintiff's expert, a licensed professional engineer, was insufficient to raise a triable issue as to the design defect claim, because the expert lacked the necessary experience to render an opinion with respect to the product at issue. The court concluded that the plaintiff's employer was in the best position to determine what optional safety features the product should have had based upon its intended use of the product.

2. Design Defect and Warranty Causes of Action Improperly Dismissed Where Negligence Claim Survives

In *Searle v. Suburban Propane*, 700 N.Y.S.2d 588 (3d Dep't 2000), the court held that the Supreme Court erred in dismissing plaintiffs' design defect and breach of warranty causes of action in an action involving a defective propane transmission system. The court found that because the plaintiffs' causes of action alleging negligence, defective design and breach of warranty were predicated on a common factual background, the Supreme Court's conclusion that the plaintiffs had raised a material question of fact as to the defendant's negligence mandated a like finding with regard to the defective design and breach of warranty causes of action. The court, however, was unpersuaded by the plaintiffs' argument that the installation and maintenance of a propane gas storage tank, transmission system and fixtures were ultra-hazardous activities, imposing absolute liability on the defendants, and rejected the plaintiff's *res ipsa loquitur* and manufacturing defect claims.

3. Product Defect—Appellate Division Holds That Forklift Was Not Defective Even Though It Was Not Equipped With a Back-up Warning Alarm and Its Rear View Mirrors Had Blind Spots

In *Geddes v. Crown Equipment Corporation*, 709 N.Y.S.2d 770 (4th Dep't 2000), the court held that the defendants met their initial burden of proof by establishing that the forklift truck at issue was reasonably safe and that a back-up warning alarm was not mandated by any federal or state law, rule or regulation. The court concluded that plaintiff's employer was aware that warning alarms were available and was in the best position to evaluate the need for such safety devices based upon the environment in which the truck would be used. The employer had made a deliberate decision not to install the alarms. The court further held that the defendants were not responsible to warn the plaintiff of the obvious risk of injury due to the unsafe backing up of the forklift truck.

E. Proving a Defect

1. No Expert Evidence Required to Establish *Prima Facie* Products Liability Case

In *Silvestri v. General Motors Corporation*, 210 F.3d 240 (4th Cir. 2000), the Fourth Circuit, applying New York law, held that the plaintiff was not required to produce expert evidence in order to establish a *prima facie* products liability case. The plaintiff was not required to produce expert testimony as to how the air bag, the product at issue, actually performed or why it failed to inflate during the plaintiff's accident. Rather, the plaintiff was only required to prove that the airbag system did not perform as intended and to exclude all causes of his injuries not attributable to the defendant.

2. Evidence of Safer Alternative Designs

a) Defense verdict upheld despite evidence of available safer alternative design

In *Puznowski v. Spirax Sarco Inc.*, 712 N.Y.S.2d 216 (3d Dep't 2000), the court held that sufficient evidence supported the jury's verdict in favor of the defendant. The court credited the testimony of the defendant's engineering manager that taking the recommended steps for isolating the steam powered pump, the product at issue, would have prevented the plaintiff's injuries. Accordingly, the court found that despite evidence of "safer" alternative designs, the jury verdict should stand. The court also ruled that the trial court had not erred in refusing to admit a letter prepared by the defendant's chief engineer (who did not testify at trial) concerning possible causes of the accident. The letter was not prepared in the routine operation of the defendant's business and, therefore, did not qualify for admission under the business record exception to the hearsay rule of CPLR 4518(a) and the letter was not an admission against interest.

b) Product defect claim precluded because of absence of allegation that there was a safer feasible design

In *Sabater v. Lead Industries Association, Inc.*, 704 N.Y.S.2d 800 (Sup. Ct., Bronx Co. 2000), the court granted the defendants' motion to dismiss the plaintiffs' design defect claim because the plaintiffs failed to plead

and were unable to prove that there was a feasible design alternative that would have made the lead paint product safer. The court held that the "plaintiffs have failed to allege that the white lead pigment could have been designed differently." The court rejected the plaintiffs' argument that lead paint was so irremediably and unreasonably dangerous that it should not have been produced at all, holding that plaintiff must allege a safer alternative design. The court reluctantly rejected the plaintiffs' argument that the requirement of an alternative design for dangerous products is against public policy because it results in no liability where the product is inherently dangerous.

The court further held that the plaintiffs' warranty action was time-barred because the last possible sale of the lead paint occurred in 1960 and, accordingly, the warranty action expired no later than 1966. Finally, the court dismissed the plaintiffs' nuisance claim and held that the consumer fraud statute, General Business Law, § 347, did not apply retroactively.

F. Product Modifications—Employer Modification of Laminating Machine Precludes Manufacturer's Liability

In *McGregor v. Flexcon Co.*, 713 N.Y.S.2d 637 (4th Dep't 2000), the court held that the employer's modification of a laminating machine that removed a guard designed to keep a person's hand from coming into contact with the machine's rollers absolved the defendant manufacturer from liability. The court found that the "substantial modifications made by plaintiff's employer destroyed a key safety feature of the laminating machine and, therefore, precluded recovery by plaintiff under a design defect or warning claim."

Breach of Warranty

1. Conspicuous Disclaimers of Warranties Effective to Disclaim All Warranties

In *Naftilos Painting, Inc. v. Cianbro Corp.*, 713 N.Y.S.2d 626 (4th Dep't 2000), the court held that conspicuous disclaimers of warranties in invoices reflecting the sale of paint and paint thinner were effective to disclaim all warranties, including that of fitness for a particular purpose. The court also found that the Supreme Court had erred in denying the defendant's motion for summary judgment dismissing the plaintiff's negligence and/or negligent misrepresentation causes of action because none of the plaintiff's causes of action were predicated upon a violation of a legal duty independent of that created by the contract between the plaintiff and the defendant.

2. Magnuson-Moss Warranty Act Applied to Warranty Claim Asserted by Lessee Who Had an Option to Buy

In *DiCintio v. Daimler-Chrysler Corp.*, 713 N.Y.S.2d 808 (Sup. Ct., N.Y. Co. 2000), the court held that the Magnuson-Moss Warranty Act (the "Warranty Act") applied to the breach of a written warranty claim asserted by the lessee of an allegedly defective automobile against the automobile manufacturer where the lessee had an option to purchase the automobile at the end of the three-year lease period. The question of whether the Warranty Act applies to leases of automobiles that contain options to buy is unsettled under New York law. In light of the unsettled decisional law, the court turned to the Warranty Act's legislative history and concluded that Congress intended that the Warranty Act would apply to leases. The court noted that "[t]he Warranty Act's objective is clear—to protect the public interest against manufacturer's abuses by enforcing warranties on consumer products regardless of whether an individual is a lessee or a consumer."

The court dismissed the plaintiff's claim of implied warranty under the Warranty Act against the defendant Chrysler, the manufacturer, because New York does not recognize a cause of action for breach of implied warranty to recover purely economic losses absent privity of contract. The court denied the defendants' motion as to the defendant Adzam Auto Sales, Inc., Chrysler's sales agent, because the plaintiff established privity of contract with that defendant.

H. New York City Consumer Protection Law Applied to Alleged Deceptive Trade Practices in Purchase, Repair and Resale of Foreclosed Residential Homes

In *Polonetsky v. Better Homes Depot, Inc.*, 712 N.Y.S.2d 801 (Sup. Ct., N.Y. Co. 2000), the court, addressing an issue of first impression, held that New York City Consumer Protection Law applied to deceptive trade practices in the purchase, repair and resale of foreclosed residential homes. The court observed that the Consumer Protection Law seeks to protect the public from deceptive and unconscionable trade practices and that its legislative history "leaves no doubt that the legislature sought to confer broad jurisdiction on the Commissioner of Consumer Affairs over unfair trade practices."

V. Liability Based on Statutory Violations

A. Negligence *Per Se* Versus Evidence of Negligence

1. Violation of State Statute Requiring County Sheriff to Provide for Safety of Inmates Held Negligence *Per Se*

In *Arnold v. County of Nassau*, 89 F. Supp. 2d 285 (E.D.N.Y. 2000), the court held that the violation of New

York Correction Law 500-b7, which required the sheriff to exercise good judgment and discretion in the safe housing of prisoners, was negligence *per se* under New York law. The court further held that the jury could find that the defendant county was negligent in failing to stop an inmate "trial" of the plaintiff, an accused sex offender, that resulted in plaintiff's severe beating, and that the county displayed indifference to the plaintiff by adopting a policy of housing accused sex offenders with mentally ill prisoners.

2. Building Code Applicable but Violation Does Not Constitute Negligence *Per Se*

In *Madura v. Davi*, N.Y.L.J., Aug. 2, 2000, p. 31, col. 2 (Sup. Ct., Richmond Co.), the court refused to charge that a violation of the New York City Administrative Code constituted negligence per se, but instead charged that the jury may consider the violation as some evidence of negligence. The plaintiff was injured when she fell backwards down the outside stairs leading to the entrance to her apartment. The landlord admitted that the requirements of Building Code § 27-375 had not been met but argued they were not applicable to exterior stairs. The court decided that certain sections of Code 27-375 which apply to interior stairs were applicable to exterior stairs by virtue of the requirements of Code § 27-376, because the doorway was clearly the only exit from the apartment and the exterior steps were an exit in lieu of interior stairs under the code. On the plaintiff's argument that the code imposes a duty on the land owner with the force and effect of a statute, the court noted that it has long been the rule in New York that a regulation of an administrative agency is merely some evidence to be considered on the question of defendant's negligence.

B. Liability Under General Municipal Law § 205-e as Exception to Common Law Firefighter Rule

Under the common law, the firefighter rule was adopted to preclude tort suits by police officers and firefighters for line-of-duty injuries, on the rationale that line-of-duty injuries were an assumed risk for firefighters and police officers. The work itself puts the officers at increased risk of injury. Some recent cases applying the firefighter rule include:

Church v. City of New York, 702 N.Y.S.2d 274 (1st Dep't 2000) (firefighter rule provided a complete defense where police officer's injuries arose in connection with his duties of transporting prisoners).

Carter v. City of New York, 708 N.Y.S.2d 426 (2d Dep't 2000) (police officer could not recover for injury received while performing police function that exposed her to a heightened risk of injury; officer was issuing a parking citation when she fell because of a sidewalk defect).

Melendez v. City of New York, 706 N.Y.S.2d 132 (2d Dep't 2000) (police officer, performing function of "recorder" in patrol car, was at increased risk of injury and, because she was acting in furtherance of her police function, she could not maintain common-law action).

General Municipal Law § 205-e affords a narrow passageway around the common law firefighter rule by providing to firefighters and police officers a statutory cause of action for line-of-duty injuries resulting from negligent noncompliance with the requirements of any governmental statutes, rules, orders and requirements. The following cases discuss liability under this statute.

1. Court of Appeals Holds That Police Procedures Are Not Part of a Duly-Enacted Body of Law Or Regulations That Give Rise to Liability Under General Municipal Law § 205-e

In *Galapo v. City of New York*, 2000 WL 1754448 (N.Y. 2000), the Court of Appeals held that a violation of Procedure 104-1(k) of the New York City Police Department Patrol Guide, which at the time stated that to "minimize the possibility of accidently discharging a weapon, firearms shall not be cocked and should be fired double action," would not give rise to liability under General Municipal Law § 205-e. In *Galapo*, a police officer was fatally shot by a fellow officer.

Pursuant to General Municipal Law § 205-e, "a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a 'well-developed body of law and regulation' that 'include clear duties.'" The Court of Appeals held that Procedure 104-1(k) is not part of a duly-enacted body of law or regulation. Furthermore, establishing Procedure 104-1(k) as a basis for monetary lawsuits under § 205-e would be bad policy, because it would operate as a powerful disincentive to the adoption of internal rules by the Police Department. Finally, the history and purpose of General Municipal Law § 205-e was at odds with it being the basis for liability because the law was not intended to give police officers greater rights and remedies than those available to the general public. General Municipal Law § 205-e was not intended to allow suits by police officers or their survivors for breaches of all government pronouncements, and Procedure 104-1(k) is not a statute, ordinance, rule, rider or requirement giving rise to § 205-e recovery.

Judge Smith dissented, with Judge Wesley concurring with the dissent, stating that Patrol Guide Procedure 104-1(k) is part of a well-developed body of law with a particularized mandate.

2. Revival Clause of General Municipal Law § 205-a Is Constitutional

In *Raquet v. J.M. Braun Builders, Inc.*, 709 N.Y.S.2d 292 (4th Dep't 2000), the court held that the "revival"

clause in General Municipal Law § 205-a was constitutional. The defendants contended that the revival clause unconstitutionally deprives them of property and that they were entitled to rely on the Court of Appeal's affirmance of the Fourth Department's order dismissing plaintiffs' action prior to the 1996 amendment of General Municipal Law § 205-a. The Fourth Department rejected defendant's argument, concluding that General Municipal Law § 205-a was enacted to ameliorate the harsh effects of the common-law firefighter rule and expand the rights of injured firefighters, and that the revival clause met constitutional muster.

3. Property Owners Not Liable Under General Municipal Law § 205-e or Common-Law Negligence to Police Officer Injured in Pursuit

In *Wedlock v. Troncoso*, 712 N.Y.S.2d 328 (Sup. Ct., Richmond Co. 2000), the court held that the property owner defendants were not liable to a police officer who was injured in a fall from a chain-line fence that bent inward as the officer scaled it in pursuit of a suspect. The court held that the plaintiff failed to present any evidence that the fence was dangerous or structurally not fit for its intended purpose, to keep persons out of a vacant lot. Merely asserting that the defendant property owners violated New York Administrative Code sections was insufficient. The plaintiff had not established that the property owners violated a code, regulation or statute that caused his injury and, accordingly, his claim failed.

VI. Comparative Fault Contribution and Indemnity

A. Comparative Fault

In *Sammis v. Nassau/Suffolk Football League*, 95 N.Y.2d 809, 710 N.Y.S.2d 834 (2000), plaintiff, an assistant football coach in a recreation league, was injured while assisting in the removal of a box from an elevated shelf in an equipment shed. The Supreme Court denied plaintiff's motion for summary judgment and, *sua sponte*, granted summary judgment to the defendants. The lower court applied the doctrine of assumption of risk, holding that by electing to aid in removing the box, plaintiff voluntarily undertook an activity that posed an obvious risk of injury. The Court of Appeals reversed, holding that factual issues as to comparative fault existed for a fact finder to consider under C.P.L.R. § 11. The Court stated that the doctrine of primary assumption of risk did not apply to this case.

B. Right to Contribution

In *Augustine v. Dandrea*, 710 N.Y.S.2d 748 (4th Dep't 2000), the court held that factual issues existed precluding summary judgment to dismiss a third-party claim against the injured plaintiff's employer and a co-worker when plaintiff, a member of a recycling crew, was struck by a motorist's vehicle while crossing the road near the recycling truck. The recycling truck had been stopped facing the wrong way in the wrong lane on a street barely wide enough for two vehicles to pass. Upon encountering the truck, defendant attempted to pass, a portion of her car leaving the road as she did so. Defendant impleaded the employer and co-worker, seeking contribution based on the allegedly negligent operation of the recycling truck by plaintiff's co-worker. The Fourth Department found that triable issues of fact existed as to whether the co-worker was negligent in stopping the truck facing the wrong way in the wrong lane and whether the alleged negligent obstruction of the road contributed to the accident.

The court also affirmed the trial court's order granting plaintiff's motion to set aside the verdict finding that the motor vehicle operator was not negligent in the operation of her vehicle. The evidence clearly showed that defendant failed to slow her vehicle when faced with a special hazard of which she was aware, failed to give any warning before she passed the truck, and failed to keep a proper lookout. However, the court held that the lower court erred in directing a verdict in favor of plaintiff, because a decision to set aside a verdict as against the weight of evidence results only in a new trial.

C. Right to Indemnification

1. Workers' Compensation Grave Injury

Generally, workers' compensation benefits are the exclusive remedy of an injured employee against the employer, but it does not bar actions by the employee against a third party at fault. Since 1972, when the Court of Appeals decided *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143 (1972), third-party actions were permitted against employers for contribution or indemnity from accidents occurring in the scope of employment. *Dole* only concerned implied or common-law indemnification issues, but indemnification can arise out of a contract and may be express or implied in law. In 1996, Workers' Compensation Law § 11 was revised to repeal *Dole* in part. While the 1996 Workers' Compensation Reform Act bans indemnification in third-party actions for all but "grave" injuries, it does not mention whether a ban on claims for contractual indemnification is included.

In *Bender v. TBT Operating Corp.*, 2000 WL 1852236 (Sup Ct., N.Y. Co. 2000), the Supreme Court, New York County faced the issue whether the "grave injury" standard does not apply to a claim for contractual indemnity. Plaintiff was injured while working for Regional Scaffolding & Hoisting Co., when he fell while dismantling scaffolding. Plaintiff sought partial summary judgment against the general contractor, Peter Scalamandre & Sons, Inc. ("Scalamandre"), and Lehrer

McGovern Bovis, Inc. ("Bovis"), the site construction manager. Scalamandre cross-moved for summary judgment against the employer Regional with respect to contractual indemnification.

The Supreme Court noted that neither the Workers' Compensation Reform Act itself, nor the debates preceding its enactment, addressed the issue of contractual indemnity. However, the court found other evidence indicative of the legislature's intent. First, the New York State Superintendent of Insurance wrote to the Governor's counsel prior to the enactment and stated that the amendment "would protect employers and their employees from other than contract-based suits for contribution and indemnity by third parties." This same statement appeared in a review of the proposed Act sent to various constituents prior to executive action. The Supreme Court ruled in favor of allowing the claims, given that *Dole* dealt with common-law indemnity, the reform Act was intended to repeal *Dole* except in cases of grave injury, and the legislature did not intend that contract-based indemnification fall within the ban on third-party actions.

2. Right to Indemnification Runs to Parties Vicariously Liable Without Fault of Their Own

In *Colyer v. Kmart Corp.*, 709 N.Y.S.2d 758 (4th Dep't 2000), the court held that the owner of a construction site and the general contractor were not entitled to contractual indemnification from the subcontractor in an action arising from an accident at the construction site where the indemnification provision at issue could only be triggered by negligence on the part of the subcontractor, and no basis to find negligence could be found. However, the court affirmed the granting of summary judgment on the owner's and general contractor's common-law indemnification claims. The court stated that the right of common-law indemnification belongs to parties determined to be vicariously liable without any proof of negligence on their part. The court held that, as a matter of law, the owner and general contractor were such parties because they lacked supervision, direction, and control over the work. Meanwhile, the subcontractor was obligated to indemnify the owner and general contractor because it was actively at fault in bringing about the injury by virtue of its contractual obligation to supervise and control the work. The court also denied the subcontractor's cross claim for indemnification from a third-party defendant because the subcontractor was held to be obligated to indemnify the owner and general contractor and indemnification runs only in favor of a party not actively at fault against a party actively at fault.

In *Drivas v. Breger*, 709 N.Y.S.2d 187 (1st Dep't 2000), the court held that building owners who did not control or supervise plaintiff's work were entitled to common-law indemnification from plaintiff's employer. Plaintiff testified that he had been installing windows when the metal balcony on which he was standing collapsed. Plaintiff stated he had examined the balcony before he stood on it and did not see anything wrong with it. His employer argued that on the basis of this testimony, the owners must have been negligent in inspecting and maintaining the balcony. However, because the employer never identified any kind of defect, the owners could not be held liable for failing to take remedial action.

3. Rental Agreements

In *Elrac, Inc. v. American Home Assurance Co.*, 710 N.Y.S.2d 91 (2d Dep't 2000), an automobile rental company brought an action against defendant insurer and its insured, who rented a vehicle, seeking a declaration that the defendants were obligated to indemnify it for a settlement paid to third parties for personal injuries and property damage arising out of an accident with the insured. The rental agreement contained an indemnification clause, which has consistently been held as valid and enforceable. *See, e.g.*, *Ward v. Elrac, Inc.*, 704 N.Y.S.2d 274 (2d Dep't 2000). In *Elrac*, the Second Department held that plaintiff was not the primary insurer of one who rents its vehicles, and, thus, the anti-subrogation rule does not apply and plaintiff was entitled to contractual indemnification from the renter. However, the court also held that plaintiff was not entitled to contractual indemnification from the renter's insurer, because there was no evidence of a contractual relationship between plaintiff and the insurer.

4. Indemnification in Vehicle and Traffic Law § 388 Cases

The Court of Appeals has consistently held that neither public policy nor Vehicle and Traffic Law § 388 prohibits a party from disclaiming that portion of its vicarious liability which exceeds the amount for which motor vehicle owners are required to be insured and seeking indemnification above such limits pursuant to agreement between parties. *See Morris v. Snappy Car Rental*, 84 N.Y.2d 21 (1994). However, in *Snorac, Inc. v. Skura*, 709 N.Y.S.2d 311 (4th Dep't 2000), the court held that where a rental company has settled with a pedestrian struck by a rental vehicle for the amount of insurance an owner is statutorily required to maintain, public policy would void a contractual indemnification agreement for that amount.

5. *Res Judicata* Inapplicable on Indemnification Claim

The case *Spring Sheet Metal & Roofing Co., Inc. v. Koppers Industries. Inc.*, 710 N.Y.S.2d 743 (4th Dep't 2000), arose out of prior litigation in which the owners and operators of a mall had sought damages from a roofing contractor for an allegedly defective roof. The defendant contractor in that prior action had commenced a third-party action against the roofing manu-

facturer seeking common-law indemnification (the "Techniplex action"). Defendant contractor later amended its third-party complaint, withdrawing the indemnification claim and substituting a claim for contribution against the manufacturer. The Supreme Court granted the manufacturer's motion to dismiss, agreeing that any liability was based upon breach of contract and contribution was not available. The prior action, the Techniplex Action, later settled, after which time the contractor commenced the instant action seeking common-law indemnification from the manufacturer in the amount of the settlement paid to the mall owners. The Supreme Court dismissed the second complaint on the ground of *res judicata*. On appeal, the Fourth Department held that the manufacturer had failed to show a prior judgment on the merits which would entitle it to the benefit of *res judicata*, because in dismissing the third-party action in the prior Techniplex Action and denying leave to amend, the court had not ruled on the merits of the action for common-law indemnification.

6. Distinguishing Contribution from Indemnification

In *Johnson City Central School District v. Fidelity and Deposit Co. of Maryland*, 709 N.Y.S.2d 225 (3d Dep't 2000), the court held that a release from liability given by a school district to the village in connection with the village's agreement to provide fire department personnel for snow and ice removal from buildings' roofs did not preclude the building contractor's contribution claims, and that apportionment through contribution, rather than shifting of the entire loss through implied indemnification, was the appropriate remedy.

At plaintiff's request, the village of Johnson City agreed to provide fire department equipment and personnel to assist plaintiff in the removal of snow and ice from two of plaintiff's buildings, which showed signs of structural distress from snow and ice. The parties executed an indemnification agreement in which plaintiff acknowledged the possibility of structural collapse during the operation and agreed to release the village from all liability arising out of the operation. During the removal, one building completely collapsed and the other partially collapsed. Plaintiff commenced an action against the building's contractor, who, in turn, commenced a third-party action against the village seeking contribution and/or indemnification, based on the fire department's alleged negligence in causing or contributing to the collapse. The Supreme Court denied the villages's motion to dismiss the third-party complaint.

On appeal, the village argued that pursuant to the release, it had no liability to plaintiff, and thus could not be liable to defendant for contribution. The Third Department rejected this contention because of the well-settled rule that a defendant may seek contribution from a third party at fault, even if the injured plaintiff has no right of recovery against that party.

The village next asserted that because apportionment by contribution requires the breach of a duty to the plaintiff by the contributing party and causation, this was not proper case for contribution because the village fire department was performing a governmental function for which there can be no liability for negligence. The Third Department found, however, that the attempts to remove snow and ice from the roofs were not undertaken for the protection and safety of the public (a purely governmental function), but rather were performed pursuant to the village's agreement to assist plaintiff in maintaining its buildings. The court held that this maintenance work was a proprietary duty which required performance in a non-negligent manner, and questions of fact existed as to whether the fire department was negligent in its actions.

The village also contended that for contribution to apply the parties must have contributed to the same injury. The Third Department noted that plaintiff's complaint against the contractor sought damages as a result of the abrupt collapse of the buildings caused by negligent construction. The contractor sought contribution from the village for negligently adding weight to the snow load on top of the buildings, thereby contributing to the building collapses. The court found that while both the contractor and village might be liable under different theories, it is possible that their acts and/or omissions may have jointly contributed to the collapses.

Finally, the Third Department agreed with the village's argument that the contractor's common law indemnification claim should be dismissed. Implied indemnification allows a party legally liable, but not actively at fault, to shift the entire loss because failure to do so would result in the unjust enrichment of one party at the expense of another. Apportionment through contribution was appropriate here, rather than shifting of the entire loss, because the tortfeasors shared the responsibility for the same injury.

VII. Defenses

A. Lack of Personal Jurisdiction Under Long-Arm Statute

In *LaMarca v. Pak-Mor Manufacturing Co.*, 95 N.Y.2d 210, 713 N.Y.S.2d 304 (2000), the Court of Appeals held that a Texas corporation, which manufactured a loading device used on a sanitation truck which injured plaintiff, expected or should reasonably have expected that its allegedly tortious acts outside of New York would have consequences in the state, derived substantial revenue from interstate commerce, and thus came within the scope of the long-arm statute. Defendant did not have any property, offices, or telephone numbers within

New York, but had a New York distributor and district representative. In the year of the accident, defendant derived over $500,000 in income from the New York market. Pak-Mor sold the loading device to its New York distributor, which in turn sold it to the town of Niagara. Defendant's invoice indicated that the loader was to contain a "New York Light Bar." Pak-Mor installed the device in its Virginia facility, and the distributor picked up the truck in Virginia and delivered it to the town of Niagara. The court found that the invoice referencing the "New York Light Bar" shows defendant knew the loader was destined for use in New York, and Pak-Mor had reason to expect that any defects would have direct consequences in the state. Additionally, the court found that Pak-Mor was engaged in interstate commerce; it was a Texas corporation with a manufacturing facility in Virginia; it had a New York distributor and district representative; it nationally advertised; and it derived substantial revenue from interstate commerce.

In *Lebel v. Tello*, 707 N.Y.S.2d 426 (1st Dep't 2000), the court held that defendant, a California corporation, transacted business within the State of New York so that the trial court had personal jurisdiction over defendant. Defendant wished to purchase an aircraft within the state, and contracted with plaintiff to inspect the plane, determine if it was airworthy, and ferry the plane to Westchester County Airport. Plaintiff also agreed to provide defendant with 25 hours of flight instruction, which would include a cross-country flight to California. Following three days of instruction, the parties began their cross-country trip. A few days into the trip, the aircraft crashed on takeoff in Santa Fe, New Mexico. Plaintiff asserted claims for negligence, and claimed personal jurisdiction existed under C.P.L.R. § 302(a)(1). The court noted that the statutory test for transacting business within the state could be satisfied by showing purposeful acts performed by the defendant within the state in relation to a contract. While typically applied to cases involving contractual liability, C.P.L.R. § 302(a)(1) also has application in tort actions. The court held that defendant's significant and purposeful acts in the state with regard to the transaction were sufficient to confer jurisdiction. Further, although the accident occurred in New Mexico, it arose out of the transaction of business in New York.

B. Emergency Doctrine

In *Caristo v. Sanzone*, 711 N.Y.S.2d 23 (2d Dep't 2000), the court held that an instruction to the jury of a qualifying emergency was appropriate in a case involving a collision of two vehicles on an icy road, where the defendant driver testified that he had encountered no problems on the road prior to the accident, even though snow and freezing rain had been falling, that he did not see any ice until he reached the top of a hill, when he tapped on his brakes in an unsuccessful effort to stop his vehicle as it slid downhill and entered an intersection against a stop sign. The majority distinguished this case from others which had held that an emergency doctrine charge was unwarranted when rear-end collisions were caused by vehicles slipping on wet roadways. Here, both parties agreed that road conditions were not icy at the time and place of the collision. The court analogized this case to those in which the evidence showed that the drivers had seen no ice after driving for some time, but then lost control when they encountered ice in an area of decreased roadway visibility, such as on a curve or incline.

The dissent believed that the emergency doctrine charge constituted reversible error, because the defendant should reasonably have anticipated and been prepared to deal with the situation. Immediately before the accident, the driver acknowledged that he encountered freezing rain, hail, and snow on a day when the temperature was well below the freezing mark.

C. Justification

In *Wood v. Strong Memorial Hospital of University of Rochester*, 709 N.Y.S.2d 779 (4th Dep't 2000), the court held that the defendant hospital was not entitled to a jury instruction on the defense of justification where a security guard forcibly removed the plaintiff-patient from a hospital elevator and broke plaintiff's thumb, on the ground that the patient was not about to commit suicide or inflict serious injury on himself so as to justify the use of force. Plaintiff, a competent adult, had the right to decline treatment.

D. Releases

In *Williams v. City of Albany*, 706 N.Y.S.2d 240 (3d Dep't 2000), the court held that a release signed by the plaintiff flag football player in favor of a corporation sponsoring the league was void as against public policy in light of the team's payment of a fee to participate in the league. Prior to game time, and unbeknownst to plaintiff, a good deal of broken glass was observed on the field. Rather than cancel the game, the league commissioner and various team members walked the field and removed all visible glass. During the game, plaintiff fell on a large piece of glass. Plaintiff contended that the release from liability he executed was void against public policy under General Obligations Law § 5-326. The corporate sponsor claimed that since plaintiff himself did not pay a fee on game day, he could not rely on § 5-326.

The Third Department, however, relied on the Court of Appeals' inclination to interpret § 5-326 broadly. The court did not deem the statute to be limited in application to the person who actually pays the fee; rather, by its very terms, the statute applies to an owner or operator of a recreational facility who receives a fee.

Accordingly, since the sponsor received a fee for use of the facilities, the release was void and unenforceable.

The Third Department also rejected the sponsor's contention that it did not own or operate the facility, but merely sponsored the event and, as a result, the release should be enforced. The court noted that the sponsor controlled numerous aspects of the enterprise and deemed that the relevant inquiry is whether the sponsor, as operator of the activity, received compensation.

E. Seat Belt Defense

Under New York law, an automobile passenger must exercise reasonable care and mitigate damages by wearing seat belts. A defendant can rely on a plaintiff's failure to wear a seat belt to reduce any award of damages, if defendant can show that plaintiff's injury would have been less serious had plaintiff been wearing a seat belt. In *Estevez v. United States*, 72 F. Supp. 2d 205 (S.D.N.Y. 1999), the court held that a back-seat passenger who carried her infant son in her lap and placed a seat belt around herself and her child was in an inherently dangerous seating arrangement, which rendered her 50% liable for her own injuries. The court also held that another back-seat passenger who failed to wear her seat belt could not have her award reduced when there was no credible evidence at trial that her injury would have been any different had she been wearing her seat belt.

F. Spoliation of Evidence

In *Velasquez v. Brocorp*, N.Y.L.J., Aug. 1, 2000, p. 27, col. 1 (Sup. Ct., Richmond Co.), the Supreme Court held that where defendant, who anticipated litigation after plaintiff was injured when his chair collapsed, negligently misplaced the chair, an order striking defendant's answer was appropriate. The court noted that the sanctions provided for in C.P.L.R. § 3126 are no longer limited to situations in which a party acted willfully, because the negligent loss of evidence can be just as fatal to the other party's ability to present an action or defense. Under the spoliation doctrine, sanctions are appropriate when a litigant, intentionally or negligently, disposes of crucial items of evidence.

G. Statute of Limitations

1. Non-medical Professional Malpractice Claims

In 1996, Governor Pataki signed into law a statute amending C.P.L.R. § 214(6) to shorten the statute of limitations for non-medical malpractice claims to three years "regardless of whether the underlying theory is based on contract or tort." The amendment was effective immediately.

In *Brothers, et al. v. Florence*, 716 N.Y.S.2d 367 (N.Y. 2000), the Court of Appeals faced consolidated appeals in which malpractice actions were brought under a contract theory of recovery upon claims which accrued prior to the effective date of the amendment, but were not interposed until after that date. In all four cases, the Appellate Division had applied the new, shortened limitations period to the previously accrued claims, and held that the actions were time-barred.

In *Brothers v. Florence*, plaintiff commenced his legal malpractice claim almost a year after the effective date of the amendment and almost 5½ years after the cause of action had accrued. In *Easton v. Sankel*, the plaintiff's legal malpractice claim accrued in April, 1993, and plaintiff filed his action ten months after the amendment's effective date and over five years after the claim accrued. In *Rachimi v. Robinson*, plaintiff commenced a legal malpractice action ten months after the amendment's effective date and four years after the cause of action accrued. In *Early v. Rossback*, plaintiff commenced his action for malpractice in connection with defendants' performance of real estate appraisals almost seven months after the amendment's effective date and three years after accrual. The Court of Appeals noted a significant distinction between *Early* and the other three cases. In *Early*, the shortened limitations period did not immediately render the action time-barred. Plaintiff still had over four months after the amendment's effective date in which to commence the action within the limitations period. Conversely, in the other three cases, plaintiffs' causes of action would have been immediately time-barred under the new three-year statute of limitations.

The Court of Appeals found that the legislature intended that the amendment would apply to claims that accrued prior to, but were not commenced until after, the amendment's effective date. Retroactive application was warranted because the amendment said it was to take effect immediately and the legislative intent was to enact the amendment to clarify the legislature's original intent that there be a uniform three-year limitations period in all non-medical malpractice cases. Accordingly, the purpose of the amendment would be undermined if it were applied only amendments prospectively to claims arising after the amendment's effective date.

In addressing the constitutional challenge raised by the non-*Early* appellants, the Court stated that where there is no legislatively prescribed grace period, a court may uphold retroactive application of a new statute by interpreting it as authorizing suits upon otherwise time-barred claims within a reasonable time after the statute's effective date. This can be accomplished in two ways. A court may consider on a case-by-case basis whether the period of delay in interposing a claim after the effective date of a shortened limitations period was no longer than necessary to provide a reasonable

opportunity to sue in the particular case. Alternatively, a court may make a balanced determination of what fixed time period would be necessary to afford a reasonably opportunity to file in all cases. The Court of Appeals concluded that the second method was the better alternative, because a case-by-case approach fails to provide adequate and clear notice and guidance to potential litigants of what might be reasonable, and could lead to inconsistent application. The Court held that a one-year grace period for claims immediately time-barred upon the amendment's effective date was appropriate. The *Early* action, however, provided a different challenge, where, even under the new limitations period, plaintiff had four months remaining to commence an action. The Court held that the *Early* plaintiff would similarly be afforded a one-year grace period.

2. Equitable Estoppel Did Not Apply to Toll the CPLR 214(c) Statute of Limitations Period

The three-year statute of limitations under CPLR 214-c(2), for toxic torts, began to run when plaintiff was fully apprised by defendant hospital in 1987 that she had contracted HIV as a result of a blood transfusion given to her at the hospital in 1984, and absent deceit, the doctrine of equitable estoppel would not maintain the viability of the action brought 10½ years after the statute had run. So held the First Department in *Fuchs v. New York Blood Center, Inc.*, 712 N.Y.S.2d 519 (1st Dep't 2000), where it reversed the trial court's invocation of the doctrine of equitable estoppel. The plaintiff's equitable estoppel argument was based on allegations that the hospital nurse told plaintiff in 1987 that the hospital could not be blamed for plaintiff's HIV infection, because no effective blood screening processes were available at the time of the transfusion; that if she told anybody about her HIV infection, she would jeopardize her medical insurance coverage; that HIV may not impair her health or her ability to live a normal life; and that she had to sign a release. The First Department followed *Simcuski v. Saeli*, 44 N.Y.2d 442, 450, 406 N.Y.S.2d 259, 377 N.E.2d 713, and found that where the hospital made a full disclosure to plaintiff of a possibly grave condition of which she had no knowledge, coupled with appropriate warnings for swift diagnosis and treatment, which the defendant hospital both urged and offered in this case, the hospital could not be said to have acted deceitfully. Indeed, the plaintiff was not mislead by the nurse's alleged statements and did seek treatment for her HIV infection. Plaintiff's failure to exercise due diligence in seeking a legal remedy would not estop the hospital from asserting the statute of limitations defense.

3. Tolling Based on Incapacity

In *Nussbaum v. Steinberg*, 703 N.Y.S.2d 32 (1st Dep't 2000), the court held that defendant was not entitled to a jury trial on the question of whether plaintiff was so disabled as to toll the one-year statute of limitations for intentional tort. The court found that ample evidence existed that for the ten-year period prior to commencing this action, plaintiff was unable to protect her rights because of an overall inability to function in society, thus tolling the statute.

4. Relation Back of New Claims

In *Fitzpatrick v. City of New York*, 714 N.Y.S.2d 185 (Sup. Ct., N.Y. Co. 2000), the court held that where a defendant commenced a third-party action against a contractor, plaintiff was not permitted to add the contractor to his action because the statute of limitations period had expired. More than three years after plaintiff's accident, and four years after the contractor had completed its work, defendant Con Ed served the contractor with a third-party complaint based on indemnification, breach of contract, and negligence. The contractor answered this complaint. Almost six months later, plaintiff moved to amend her complaint to add the contractor as a direct defendant, claiming its negligence caused plaintiff's injury. The Supreme Court stated that whether plaintiff can add an additional party after expiration of the applicable limitations period depends on the nature of the notice conveyed by the earlier pleading and whether its service made it reasonable for the party plaintiff later seeks to add to have anticipated being sued by plaintiff. Here, the contractor did not become a participant at all in the litigation until after the expiration of the three-year limitations period. Because the third-party complaint sounded in contract and indemnification, the contractor could not reasonably have expected to be sued by plaintiff on a negligence claim.

In *Hauck v. New York Hilton*, 714 N.Y.S.2d 71 (1st Dep't 2000), the court held that plaintiff's amended complaint adding a defendant related back to the original, timely filed complaint where the claim against the added defendant arose out of the same incident. Additionally, the new defendant was not prejudiced by plaintiff's delay in serving the amended complaint where defendant had notice of the claim.

In *Ramos v. Cilluffo*, 714 N.Y.S.2d 88 (2d Dep't 2000), the court held that where the plaintiff was aware of the defendants' potential liability and intentionally decided not to assert a claim against them, the new action did not relate back to a prior medical malpractice action against a hospital and thus was barred by the limitations period set forth in C.P.L.R § 214-a.

H. Unavoidable Accident

In *Van Ostberg v. Crane*, 709 N.Y.S.2d 774 (4th Dep't 2000), the court held that a defendant motorist established a complete defense when he showed that a vehicle coming in the opposite direction had crossed into his lane only a second before the two vehicles collided.

I. Workers' Compensation Bar

In *Evans v. Citicorp, N.A.*, 714 N.Y.S.2d 473 (1st Dep't 2000), the court held that a building maintenance worker was a tenant's special employee and was barred by the Worker's Compensation Law from recovering for injuries sustained while working on an icy roof. While the third-party defendant paid the worker's salary and workers' compensation benefits, the building tenant controlled the worker's duties, and plaintiff considered certain of the tenant's employees to be his supervisors with authority to fire him.

In *Lane v. Fisher Park Lane Co.*, 2000 WL 1793406 (1st Dep't 2000), the court held that plaintiff was a special employee of defendant UBS and therefore was limited to workers' compensation benefits for injuries sustained when a file cabinet fell on her head. Plaintiff was hired by *Mademoiselle* and immediately assigned to work at UBS's offices. For about a month prior to the accident, she was assigned to the same department on a daily, full-time basis, where she worked exclusively for two people she considered her bosses. Her desk was situated outside her bosses' offices. While plaintiff was paid by *Mademoiselle*, her time sheets were signed by her bosses at UBS. Additionally, plaintiff never had to seek advance approval from *Mademoiselle* before working on the tasks assigned to her by UBS. Indeed, plaintiff was injured while obtaining materials necessary for a proposal on which she was working for her UBS bosses. Accordingly, plaintiff was a special employee "transferred for a limited time of whatever duration to the service of another." (Quoting *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 1, 8, 578 N.Y.S.2d 106, 108 (1991).

VIII. Damages

A. Material Deviation from Reasonable Compensation on the Basis of Excessiveness

1. Court Partially Reinstates Jury Verdict and Modifies Trial Court's Remittitur of Damages to 12-Year-Old Victim

The First Department, in *Carl v. Daniels*, 702 N.Y.S.2d 279 (1st Dep't 2000), significantly modified a trial court's remittitur of damages awarded to a 12-year-old victim and partially reinstated the jury's verdict. The 12-year-old plaintiff had sustained a severe comminuted fracture of the left femur mid-shaft, requiring two surgeries within a week of the accident and a third to remove a rod. The injury resulted in substantial limitation in range of motion, on-going chronic pain and the likelihood of future surgery. The jury had awarded $4 million for past pain and suffering and $3 million for future pain and suffering. The trial court reduced the awards to $1.5 million and $1 million respectively. On appeal, the First Department partially reinstated the jury's verdict to the extent of $2,300,000 for past pain and suffering, and $2,500,000 for future pain and suffering.

2. Damages for Fracture of Non-dominant Wrist Held to Be Excessive

In *Carl v. Daniels*, 702 N.Y.S.2d 279 (1st Dep't 2000), plaintiff was awarded $300,000 and $340,000 for past and future pain and suffering, respectively, for a fracture to her non-dominant wrist. Her husband was awarded $50,000 for loss of consortium. The First Department held that the damages were excessive, noting that the injured plaintiff was able to perform most of her usual activities, there was only some evidence of her diminished ability to perform household chores, and she felt pain only during bad weather. The court reduced the awards to past and future pain and suffering to $130,000 and $160,000, respectively and reduced the award for loss of consortium to $10,000.

3. Damages for Future Pain and Suffering Reduced to $4 Million for a Devastatingly Injured Infant

The First Department held that damages for future pain and suffering were excessive to the extent they exceeded $4 million, for an infant plaintiff who, as a result of medical malpractice, suffers from severe mental retardation, spastic cerebral palsy, microcephaly, and seizure disorder, can neither talk, walk or use her arms purposely, and is incontinent and totally dependent on others for all of her needs. The court also reduced the award for future medical expenses to $1 million and the award for lost earnings to $800,000. *Martelly v. New York Health and Hospital Corp.*, 714 N.Y.S.2d 64 (1st Dep't 2000).

4. Awards of $50,000 and $20,000 to Mother and Father, Respectively, for Wrongful Death of 15-Year-Old Child Held to Be Adequate and Award of $4 Million for Child's Pre-Death Pain and Suffering Held to Be Excessive

In *Johnson v. Queens-Long Island Medical Group, P.A.*, 708 N.Y.S.2d 134 (2d Dep't 2000), the parent plaintiffs brought an action to recover damages sounding in medical malpractice for the wrongful death of their 15-year-old child. The Nassau County jury had awarded $4,000,000 for the child's pre-death pain and suffering, $2,400 for wrongful death and $10,000 for loss of services to the parents. The trial court increased the $2,400 award for wrongful death damages to the mother to $50,000 and increased the $10,000 award to the father to $20,000. On appeal, the Second Department denied the plaintiffs' cross-appeal, which argued that the wrongful death award was inadequate, noting that the child did not contribute monetarily to the household support of either the father or the mother. The court, however, granted the appeal of the defendant

and held that the award for pain and suffering was excessive to the extent it exceeded $1,200,000.

5. Trial Court's Reduced Award of Over $9 Million to Infant Plaintiff and His Father Is Further Reduced on Appeal to $2,900,000

Martinez v. New York City Transit Authority, 709 N.Y.S.2d 200 (2d Dep't 2000), involved an infant plaintiff seriously injured when a subway door closed on the stroller holding the infant. The father struggled to pull the stroller out of the doors, but he lost his grip and fell. The infant and stroller were then dragged by the subway for some distance. When the father was finally able to stand up, he saw his infant son lying on the wooden crossbeams holding up the tracks and then fall to the ground below. The infant survived. The jury had awarded to the infant $5 million for past pain and suffering, $5 million for future pain and suffering (which the trial court reduced to $3 million), $500,000 for future medical expenses, $268,667 for future special education, $102,554 for future speech therapy and $1 million for lost earnings. To the father the jury had awarded $600,000 for his past pain and suffering. The Second Department struck the award for future special education as not warranted by any evidence, and reduced the $5 million for past pain and suffering to $2,100,000, reduced the $3 million for future pain and suffering to $400,000, reduced the $500,000 for future medical expenses to $125,000, reduced the $102,554 for speech therapy to $35,000, and reduced the $1 million for lost earnings to $300,000. The father's award was reduced from the $600,000 to $350,000.

6. Damages to Two Brothers, One Rendered a Quadriplegic and the Other a Pentaplegic, Reduced to $3 Million for Future Pain and Suffering and $1 Million for Past Pain and Suffering to Each

Damages issues were on appeal in *Brown v. City of New York*, 713 N.Y.S.2d 223 (2d Dep't 2000). There, one brother, Virgil, dove off a pier at Coney Island, striking his head on the ocean floor and suffering injuries which rendered him a quadriplegic. His brother, John, dove in to save Virgil and also struck his head on the ocean floor, rendering him a pentaplegic. The city was held negligent for its failure to install a sign warning against diving. The jury had awarded Virgil $15,711,665 for past damages and $34,188,553 for future damages, and had awarded John $20,607,815 for past damages and $34,286,998 for future damages. The Second Department granted new trials on damages unless each plaintiff stipulated to $3 million for future pain and suffering and $1 million for past pain and suffering. The Appellate Court also awarded a new trial on liability as to plaintiff, Virgil, holding that the jury's finding that Virgil was negligent in diving off the pier, but that his negligence was not a proximate cause of his injuries, was against the weight of the evidence.

7. Award Reduced to $300,000 for 30 Minutes of Conscious Pain and Suffering

In *Rodd v. Luxfer*, 709 N.Y.S.2d 93 (2d Dep't 2000), the decedent sustained a fatal wound to the left side of his chest when the oxygen tank which he was refilling exploded. Thirty minutes after the accident, decedent's level of consciousness was listed as "unresponsive." The court held that the jury's award of $1,000,000 for pain and suffering was excessive to the extent it exceeded $300,000.

8. Damages Award to Elevator Repair Worker Were Excessive and Worker's Social Security Disability Benefits Were Required to Be Deducted from Award

In *Rodgers v. 72nd Street Associates*, 703 N.Y.S.2d 456 (1st Dep't 2000), an elevator repair worker fell through an elevator roof door, sustaining injuries. The jury's award of $800,000 for past pain and suffering and $1.2 million for future pain and suffering were reduced to $350,000 and $650,000 respectively. As to plaintiff's award for lost wages, the court held that his Social Security disability benefits were a collateral source offset under CPLR § 4545, but that the deduction for the collateral source payments should precede the deduction for plaintiff's comparative fault.

9. Wrongful Death Damages for Divorced Immigrant Who Had Not Seen His Children Since 1988 Reduced From $1,250,000 For Each Child to $400,000 for Each Child

Altmajer v. Morley, 710 N.Y.S.2d 616 (2d Dep't 2000), involved the wrongful death of a Polish national immigrant who had divorced his wife and moved to the United States in 1988. He had not seen his two children since then. In the United States, his gross annual wages were close to $23,000. The Second Department held that based on these facts the wrongful death awards of $1,250,000 to each child were excessive to the extent they exceeded $400,000 to each child. The court also held that the discount rate in effect at the time of the award was the long-term treasury bond rate as of the date of the verdict.

10. Medical Malpractice Damages Reduced for 8-Month-Old Infant Who Sustained Severe, Permanent Injuries in Connection With a Spinal Tap

Another case reducing an award to an infant suffering catastrophic injuries is *Cabrera v. NYCH&HC*, 708 N.Y.S.2d 429 (2d Dep't 2000). In this medical malpractice case, the 8-month-old baby girl sustained severe, permanent injuries, including bilateral hypoxic encephalopathy, spastic quadriplegia, cortical blindness

and mental retardation as a result of a negligently performed spinal tap. The jury awarded $987,466 for past medical and custodial costs, $200,000 for past pain and suffering, $950,000 for future pain and suffering, $2,900,000 for future lost earnings and $15,939,189 for future medical and custodial care. The Second Department reduced the award for future care to $3,600,000 and the award for future lost earnings to $850,000. The court held that under CPLR § 4546, requiring a reduction in a lost earnings award for future federal, state and local income taxes, the award should have been reduced by 23.75%, the amount of taxes that defendant's expert stated infant plaintiff would have been obligated to pay. Plaintiff did not refute this figure.

B. No Material Deviation from Reasonable Compensation Based on Excessiveness

1. $1 Million for Future Pain and Suffering for Laceration of Ulnar Nerve in Dominant Hand Is Not Excessive

The Fourth Department upheld a damages award of $1 million for future pain and suffering to an iron worker who suffered an ulnar nerve laceration. In *Keefe v. E&D Specialty Stands, Inc.*, 708 N.Y.S.2d 214 (4th Dep't 2000), the plaintiff had a permanent loss of his feeling and permanent 50% loss of strength in his dominant right hand, after three surgeries. The award for future pain and suffering was to cover a 40-year period. The court held that the award did not deviate from reasonable compensation. The court also held that there was no error in the admission of evidence regarding the wage rates and fringe benefits of union ironworkers, because the plaintiff had completed all written and physical tests and had been accepted into an apprenticeship program. Thus, the loss of earnings award was established with reasonable certainty.

2. Jury's Award to Construction Worker Was Not Excessive

In *Strangio v. New York Power Authority*, 713 N.Y.S.2d 613 (4th Dep't 2000), plaintiff sustained spinal injuries as a result of a 40-foot fall from scaffolding. The court held that the award of $550,000 for future and past pain and suffering did not deviate from what would be reasonable compensation, given plaintiff's daily pain from bulging and possibly herniated discs. Also, the award of $1,500,000 for 18 years of future lost earnings was warranted by the evidence, showing that plaintiff was permanently and totally disabled from construction work. The award of $100,000 for future medical care was, however, held to be based on speculation that plaintiff would require life time physical therapy or chiropractic services, and was reduced to $53,400.

3. Damages of $150,000 to $215,000 to Adult Aircraft Passenger For Fear of Dying Was Not Excessive

A group of 13 passengers on an American Airlines flight which experienced severe turbulence were awarded total damages of $2,225,000 for past and future emotional distress in *Spielberg v. American Airlines, Inc.*, 105 F. Supp. 2d 280 (S.D.N.Y. 2000). The District Court affirmed the jury's verdicts to the adult passengers, each of whom recovered $150,000 for past pain and suffering and three of whom recovered additional amounts for future pain and suffering. The plaintiffs had cited to the court numerous New York cases involving pure emotional distress in which the courts had upheld awards ranging from $150,000 to $600,000. As to a two-year old infant passenger, however, the court ordered remittur of the full award of $150,000, finding that the mother's lay testimony of her daughter's post-accident anxiety and clinginess did not support the jury's finding of emotional damage to the infant.

C. Material Deviation from Reasonable Compensation on the Basis of Inadequacy of Damages

1. Court Sets Aside Verdict in Which the Jury Irrationally Awards Identical Amounts for All of the Past Losses and Identical Amounts for All of the Future Losses

Whether damages awarded were so inadequate and irrational that they could not have been reached on any fair interpretation of the evidence was the issue in *Reynoso v. Prospect Associates, L.P.*, N.Y.L.J., Nov. 17, 2000, p. 29, col. 2 (Sup. Ct., N.Y. Co.). In this case, a 35-year-old construction worker fell two stories through the floor of a staircase during demolition work, causing him to land straddled over a metal or wood post. He sustained a deep laceration near his scrotum, exposing his pelvic bone. Plaintiff presented proof of penis erectile dysfunction and an L-1 vertebrae compression fracture which prevented him from returning to physical labor. The injuries allegedly caused plaintiff's divorce two years later. The jury awarded $21,420 for past pain and suffering, $104,580 for future pain and suffering, $21,420 for past lost earnings, $104,580 for future lost earnings, $21,420 for past medical expenses, and $104,580 for future medical expenses. The total award was $378,000. The trial court set aside the jury's verdict, holding it "could not have been reached on 'any fair interpretation of the evidence.'"

The court said,

> Significantly, the jury's identical awards of $21,420 for past pain and suffering, past lost earnings and past medical expenses, and the jury's identical awards of $104,580 for future pain and

> suffering, future lost earnings and future medical expenses bespeak such irrationality and capriciousness as to require the Court to find, in the interest of justice, that the trier of fact has incorrectly assessed the evidence.

(Citations and internal quotes omitted).

To underscore further the irrationality of the award, the court noted that while the evidence of past medical expenses amounted to $19,434 and the evidence of future medical care amounted to $10,000, the jury awarded $21,240 for past medical expenses and $104,580 for future medical expenses. Given the identical awards for all of the past losses and for all of the future losses, the court concluded that the entire verdict was tainted and had to be set aside. The court ordered a new trial.

2. Appellate Court Holds for a Second Time That Damages Awarded to Plaintiff Were Inadequate

For the second time in one Queens County case the jury's award was held to be inadequate on appeal. In *Dooknah v. Thompson*, 714 N.Y.S.2d 531 (2d Dep't 2000), upon the plaintiff's first appeal, the appellate court granted a new trial on damages unless defendants stipulated to increase the award for past pain and suffering to $75,000 and the award for future pain and suffering to $125,000. The plaintiff had sustained a nondisplaced fracture of the right acetabulum and two fractures of the pubic ramus. The defendants opted to have a second trial, and after the jury awarded $30,000 for past pain and suffering and $20,000 for future pain and suffering, the plaintiff appealed again. On the second appeal, the court again granted a new trial unless the defendants stipulated to increase the awards of past and future pain and suffering to $75,000 and $125,000, respectively.

3. Damages Were Inadequate to 8-year-old Plaintiff Found to Be 65% at Fault for His Injuries

Is it the contributing fault of the plaintiff that results in an unreasonably low damages award? This may be the only explanation of the jury's award in *Dulmer v. Lange*, 708 N.Y.S.2d 449 (2d Dep't 2000), in which an 8-year-old child, found to be 65% at fault, was awarded only $25,000 for past pain and suffering and $0 for future pain and suffering, despite having been struck by defendant's vehicle and having suffered a fractured clavicle, a fractured skull which required life-saving emergency exploratory brain surgery to remove a blood clot, and despite having been in a coma for several days. The child was left with neurological and neuropsychological dysfunction, which was even corroborated by one of the defendant's experts. The Second Department increased the award for past pain and suffering to $125,000 and the award for future pain and suffering to $150,000.

4. Court Increases Award for Past Pain and Suffering Eightfold from $50,000 to $400,000

In *Smith v. Monro Muffler Brake, Inc.*, 713 N.Y.S.2d 581 (4th Dep't 2000), the plaintiff was injured at a muffler and brake shop when he was struck by an overhead garage door that lowered on him. Plaintiff sustained a herniated disc which required surgery, underwent physical therapy, required pain medication, sustained post traumatic stress disorder, and was disabled from his work as a correctional officer. The court held that the jury's award of $50,000 for past pain and suffering was inadequate and that $400,000 was reasonable compensation. Future damages were properly limited to five years.

5. New Trial Awarded to Motor Vehicle Accident Victim Where Jury's Verdict on Damages Was Unreasonably Inadequate

The plaintiff, dressed in dark clothes, was struck by defendant's automobile as he attempted to cross a four-lane road at night. The jury apportioned liability 75% to the plaintiff and 25% to the defendant-operator. The plaintiff suffered several foot fractures, could not place weight on his ankle for five months, missed 11 months of work, underwent unsuccessful surgery and developed an ulcer on his calf. Future surgery, involving lost time from work, was required. The jury awarded $30,000 in lost earnings, $7,000 for past pain and suffering, $0 for future damages and $0 for the wife's derivative claim, despite the testimony that she performed all household chores, missed work and treated plaintiff's wounds at home. The trial court had ordered a new trial unless defendant stipulated to settle the claims of the injured plaintiff for $65,000 and the claim of his wife for $20,000. The Fourth Department reversed and ordered a new trial on damages, concluding that the jury's verdict was against the weight of the evidence on all damages items, and that the figures recommended by the trial court were "unexplained."

6. Award for Past Pain and Suffering Increased, But $0 Award for Future Damages Upheld

A plaintiff is not entitled to any presumption that a serious injury will result in future pain and suffering. In *Ordway v. Columbia County Agricultural Society*, 709 N.Y.S.2d 691 (3d Dep't 2000), the plaintiff sustained a bimalleolar fracture dislocation requiring two surgeries and hospitalization. The plaintiff was discharged from further medical care about 10 months prior to trial when the hardware was removed from the ankle. The plaintiff had told the doctor that she was feeling much better. The jury awarded $11,500 for medical expenses, and no award for past or future pain and suffering. The

trial court had ordered a new trial unless defendant stipulated to total damages of $60,000. The Third Department agreed with the Supreme Court's additur of $48,500 for past pain and suffering and concluded that, based on the evidence, the jury's verdict of $0 for future pain and suffering was not unreasonable.

D. No Material Deviation from Reasonable Compensation Based on Inadequacy of Damages

1. Plaintiff's Weakened Credibility Results in Affirmance of Low Damages Award

Maintaining credibility as a witness is a plaintiff's strongest trial strategy. When that does not exist, even a perfect liability case is irrelevant. In *Molter v. Gaffney*, 710 N.Y.S.2d 654 (3d Dep't 2000), the plaintiff sustained a cervical sprain from a motor vehicle injury and there was conflicting evidence as to its impact on plaintiff's ability to work. Also, there was evidence that an osteophyte or bone spur in plaintiff's right shoulder may have pre-existed. Plaintiff had clearly exaggerated her prior earnings as a home health aide and her lack of credibility on that issue tainted her credibility on the severity of her physical pain and her inability to perform any work. The jury's awards to the injured plaintiff of $10,000 for past pain and suffering, $12,000 for future lost income, $27,500 for future pain and suffering, and the $0 award on the husband's derivative claim were affirmed.

2. Juror's Post-verdict Affidavit, Stating That the Jury Had Speculated That the Plaintiff Would Receive Worker's Compensation and Disability Benefits and That Another Juror Had Expressed Concern That Her Taxes Would Be Affected by the Verdict, Held Insufficient to Attack Jury's Verdict and Court Held Damages Awards Were Not Inadequate

In *Lopez v. Kenmore-Tonawanda School District*, 713 N.Y.S.2d 607 (4th Dep't 2000), the plaintiff appealed from the verdict entered on his second damages trial. The injured plaintiff had sustained a burst fracture of the vertebrae at L-2, resulting in a spinal fusion surgery and a second surgery to remove the rods which had begun to protrude. Plaintiff also suffered from major depression and post-traumatic stress disorder and had not returned to work. The evidence conflicted on the extent of plaintiff's disability to return to some gainful employment. Given this conflict, the Fourth Department held that the jury's award, totaling almost $1.5 million for past and future losses (including only $150,000 for future lost earnings) was reasonably based on the evidence. The appellate court also held that the trial court had properly denied plaintiff's post-trial motion to set aside the verdict as affected by improper outside influences. The court held that an affidavit by one juror, stating that the jury had awarded damages based on the speculation that plaintiff would receive worker's compensation and Social Security disability benefits and that one juror was concerned about how the verdict would affect her taxes, did not meet the test of exceptional circumstances required to attack a jury's verdict.

E. Reductions for Taxes and Collateral Source Benefits

In *Giventer v. Rementeria*, 705 N.Y.S.2d 863 (Sup. Ct., Richmond Co. 2000), a medical malpractice case, the jury awarded $53,735,955 in damages to a severely brain damaged child and his parents. The court held that the defendants were entitled to a 25.6% reduction on the award for lost earnings (which was $3,472,950) to account for future income taxes, as required by CPLR § 4546. Because one defendant, who was held to be 50% at fault, had previously settled with plaintiffs for $3,000,000, pursuant to GOL § 15-108, the remaining defendants were liable for only 50% of the judgment, as reduced for taxes, or $26,423,440. These defendants tried to reduce their damages obligations further by arguing that under CPLR § 4545 they were entitled to offset the verdict based on the following collateral sources: the mother's employer-provided health insurance coverage; the child's entitlement to federal benefits under the Individuals with Disabilities Act (IDEA) (20 U.S.C. § 1400(c)); and the availability of an HMO insurance plan that could cover the child's future medical expenses. The court rejected defendants' arguments. It held that the mother's insurance benefits did not meet the reasonable certainty standard of CPLR § 4545, since the mother did not control these benefits and could lose them altogether in the future. The court also held that the infant could not be forced to purchase an HMO medical insurance plan which could never, with reasonable certainty, replace what the jury awarded or replace the parents' prerogative to choose the medical care and the medical health providers that would best serve their child. Finally, the court held that IDEA school nursing benefits were not an offset to the jury's award for nursing care, because (1) the jury did not award damages for school related nursing and (2) prior courts have repeatedly rejected claims by defendants that school services qualify as collateral sources.

F. Parents' Damages for Loss of Services of Injured Child Should Not Be Reduced Due to Parents' Failure to Require Child to Wear Helmet

Under Vehicle and Traffic Law § 1238(5)(b), a parent is required to have children under 14 wear a safety helmet when bicycle riding. In *Lamica v. Pecore*, 709 N.Y.S.2d 694 (3d Dep't 2000), the court held that this statutory provision was neither a basis for a negligent supervision counterclaim against the parents of a child struck by the defendant's motor vehicle, nor a basis to

reduce the damages the parents could recover for loss of services. The court noted that while there is a dangerous instrumentality exception to the usual rule that a parent may not be held liable to his/her child for negligent supervision or liable in contribution, that exception did not apply in a case involving violation of Vehicle and Traffic Law § 1238. The statute itself, in subdivision (7), provides that violation of the statute is not grounds to diminish or reduce damages due in a personal injury action.

G. Punitive Damages Awarded in Defamation Case

In *K. Capolino Constr. Corp. v. White Plains Hous. Auth., et al*., 712 N.Y.S.2d 158 (2d Dep't 2000), the plaintiff corporation and a private individual plaintiff were awarded punitive damages against two nongovernmental defendants for their intentional and malicious conduct resulting in defamation. The trial court entered judgment reducing the verdict for punitive damages, without ordering a new trial unless the plaintiffs stipulated to the reduction. The trial court had also vacated in its entirety the award of punitive damages in favor of the plaintiff corporation. On appeal, the Second Department held that it was error to vacate the award of punitive damages to plaintiff corporation, because the defendant's malicious conduct and defamatory statements were not directly solely at the individual plaintiff. The court also held that it was error not to give the plaintiffs the option of a new trial on the issue of punitive damages. A total of $1 million in punitive damages against the two defendants to the two plaintiffs was held to be excessive to the extent it exceeded a total of $100,000.

H. Medical Liens

1. First Department Joins Third Department in Holding That DSS Has Unfettered Right to Recoup a Medical Lien Against All of the Settlement Proceeds of a Person Under 21 Years of Age

In *Calvanese v. Calvanese*, 93 N.Y.2d 111, 688 N.Y.S.2d 479, *cert. den. sub. nom., Callahan v. Suffolk Co.*, 120 S.Ct. 323 (1999), the Court of Appeals held that a DSS Medicaid lien filed pursuant to Social Services Law § 104-b (SSL) may be satisfied out of the entire proceeds of a Medicaid recipient's personal injury settlement, and not just that portion allocated to past medical expenses. *Calvanese* involved an adult plaintiff. The First Department, joining the Third Department, held in *Santiago v. Craigbrand Realty Corp.*, 706 N.Y.S.2d 87 (1st Dep't 2000), that the *Calvanese* rule applies also to liens against the settlement proceeds of a person under 21 years of age, notwithstanding SSL § 104(2), which limits recovery against persons under 21. Prior to *Calvanese*, the Court of Appeals, in *Baker v. Sterling*, 39 N.Y.2d 397, 384 N.Y.S.2d 128 (1976), held that a DSS lien filed under SSL § 104(1) was limited by SSL § 104(2), which restricts recovery of liens against minors in excess of their "reasonable requirements." Because the purpose of personal injury damages is to provide for the "reasonable requirements" of a minor, *Baker* held that recovery of a lien was limited to an award for past medical expenses. Subsequent to *Baker* the legislature enacted SSL §§ 366(4)(h)(1) and 367-a(2)(b), which provide that notwithstanding other inconsistent law, the DSS is subrogated to any rights the recipient has against third parties. Accordingly, *Calvanese*, the Court of Appeals held that the DSS could enforce its lien against the entire settlement proceeds of an adult plaintiff. In *Santiago*, the First Department held that *Calvanese* applies as well to liens against persons under 21, because the right of DSS recoupment now comes from §§ 366(4)(h)(1) and 367-a(2)(b), not § 104. This result also conforms to federal regulations, which direct that the Medicaid program "remain the payer of last resort." Leave to appeal was granted and the Court of Appeals will rule on this issue in 2001.

Automobile

A. Serious Injury

1. Bulging Disc

In *Villalta v. Schecter*, 273 A.D.2d 299, 710 N.Y.S.2d 87 (2d Dep't 2000), the court granted respondent's motion for summary judgment because plaintiff failed to submit sufficient evidence to raise a triable issue of fact with regard to whether he sustained a "serious injury" as a result of the accident. The sworn report of the plaintiff's treating chiropractor failed to explain the objective tests which were performed to support his conclusion that plaintiff suffered restricted range of motion. The court also noted that although plaintiff's chiropractor indicated that plaintiff suffered from a bulging disc, he never stated that this condition was causally related to the accident, nor had plaintiff proven that he was prevented from performing substantially all of his usual activities for at least 90 of the 180 days following the accident.

2. Limitation of Use of Arm

In *Oberly v. Bangs Ambulance Inc*., 271 A.D.2d 135 710 N.Y.S.2d 676 (3d Dep't 2000), the court affirmed summary judgment, although plaintiff did raise a question of fact as to whether he suffered a causally related permanent limitation in the use of his right arm and hand. It was not, however, shown to be significant enough to be a statutory serious injury under N.Y. Ins. Law 5102(d). Because plaintiff was only alleging a limitation of use, based on the plain language of the statute, he had to show that his injury was significant. While plaintiff tried to bolster his showing of significance of

his injury by showing it was permanent, permanence was held to be not a substitute for significance in a limitation of use case.

3. Chronic Cervical Syndrome

In *McCarthy v. Perault*, 716 N.Y.2d. 463 (3d Dep't 2000), it was held that the trial court erred in not allowing a trial. Plaintiff was involved in an automobile accident. Although he did not initially experience pain, he later felt stiffness in his shoulder and neck. His condition progressively worsened and his orthopedist diagnosed permanent, chronic cervical syndrome, concluding the symptoms could worsen with time and result in permanent limitations. Plaintiff filed a personal injury lawsuit and defendant interposed a bill of particulars seeking a statement and description of the permanent injuries plaintiff would claim at trial. Plaintiff failed to respond to the permanent injury query and defendant field a motion for summary judgment, arguing that plaintiff should not have been allowed in invoke N.Y. Ins. Law 5102(d) pertaining to permanent injuries, since no such injuries were detailed in the bill of particulars. The trial court granted the motion and plaintiff appealed. The appellate court reversed, holding plaintiff's and his orthopedist's affidavits demonstrated a specific serious injury had been identified and that the injury claimed was not merely a minor limitation. Therefore, the trial court erred by not allowing the matter to go to trial.

4. Failure to Produce Objective Evidence of Injury

In *Bidetto v. Williams*, 713 N.Y.S.2d 764 (2d Dep't 2000), it was held that a motion to dismiss would lie upon evidence at trial that there was no rational process by which the trier of fact could have found that the plaintiffs sustained *serious injury* within the meaning of the applicable statute: N.Y. Ins. Law 5102(d). Where a treating physician's conclusion that an injured plaintiff had suffered an injury to his neck was not based upon any objective medical tests, and the treating physician last saw the injured plaintiff more than two years before trial, her projections of permanent limitations have no probative value in the absence of a recent examination, and the injured plaintiff's evidence is insufficient, as a matter of law, to demonstrate serious injury.

5. Use of Knee

In *Cizek v. Aberbach*, 715 N.Y.S.2d 909 (2d Dep't 2000), the Department reversed a lower court judgment in which the infant plaintiff was allegedly injured when she was hit by a car driven by the defendant as he was crossing a two-lane road. The court held that the trial testimony failed to adduce any evidence that the defendant operated his vehicle in a negligent manner, and for that reason the plaintiffs failed to establish a *prima facie* case of negligence. The court stated that were it not reversing on the ground of liability, it would reverse the judgment for the plaintiffs' failure to establish that the infant plaintiff suffered a serious injury within the meaning of Insurance Law 5102(d). Though the infant plaintiff claimed that she suffered "permanent consequential limitation of use" and "significant limitation of use" (Insurance Law 5102(d), of her right knee, the medical evidence proffered by her doctor failed to quantify or objectively measure the extent of the limitation (*see McHaffie v. Antieri*, 190 A.D.2d 780, 593 N.Y.S.2d 844).

6. Proof on Motion

In *Dufresne v. Cestra*, 185 Misc. 2d 383, 712 N.Y.S.2d 807, (Sup. Ct. 2000) it was held that summary judgment may be granted based upon moving papers only. A plaintiff passenger in a vehicle driven by defendant driver was struck in the rear by a vehicle owned or operated by defendant owner/operators, pushing the defendant driver's vehicle into the stopped vehicle of defendant owners. All defendants moved for summary judgment. Plaintiff did not submit any opposing papers. The court granted summary judgment in defendant driver's and owners' favor because there were no triable issues of fact with regard to the liability of these defendants. No evidence was offered by either plaintiff or defendant owners to controvert the manner in which the accident occurred. While application of summary judgment rules presumed a litigated motion, defendants' moving papers established the right to summary judgment. However, although defendant owners' moving papers established the right of summary judgment, defendant owners' motion on the issue of serious injury was denied. The rationale was that the doctor's proffered evidence, in the form of an unsworn doctor's report, was inadmissable and could not be considered.

B. Verdicts

1. Recovery for all Injuries

In *Berby v. Farkas-Galindez*, 714 N.Y.S.2d 734 (2d Dep't 2000), it was held that the plaintiff sustained a fractured foot and other injuries in an automobile accident. During the damages trial, the trial court charged the jury that the plaintiff sustained a fractured foot as a matter of law; however, it also instructed the jury to determine whether the plaintiff sustained a permanent consequential limitation of his sternum. Upon a jury verdict finding that plaintiff sustained no damages for future pain and suffering, judgment was entered against defendants in the amount of only $35,000 for past pain and suffering. The appellate court reversed, holding that since plaintiff had established a *prima facie* case that he had sustained a "serious injury" within the meaning of N.Y. Ins. Law 5102(d), he was entitled to seek recovery for all injuries incurred as a result of the accident. The trail court's erroneous jury instructions

mandated that plaintiff be granted a new trial on damages only.

2. Jury Confusion

In *Rita Clarke, et al. v. Order of the Sisters of St. Donimic, et al.*, 273 A.D.2d 431, 710 N.Y.S.2d 108 (2d Dep't 2000) it was held that where the record indicated substantial confusion among jurors in reaching their verdict, a new trial should be granted. Further, the court held that the verdict was internally inconsistent and the trial court should have required the jury to reconsider its verdict because it was aware that the jurors had previously expressed difficulty in comprehending the concept of proximate cause. The judgment was reversed and a new trial was ordered.

C. SUM Proceedings

In *Butler v. New York Central Mutual Fire Insurance Co.*, 274 A.D.2d 924, 711 N.Y.S.2d 607 (3d Dep't 2000), Passenger was seriously injured in a two car accident in which her mother was killed. Passenger's actions for personal injuries and wrongful death against respondent, driver of the other automobile, were settled. After passenger died, appellant, executor of passenger's estate, brought an action seeking benefits under passenger's supplemental uninsured motorist coverage. The trial court granted respondent insurer's motion for summary judgment on the basis that the prior settlement was more than the maximum recoverable under the policy. The court found that the average insured would have reasonable expected that $25,000 of supplemental uninsured motorist coverage would have been available under appellant's policy, and affirmed the order granting summary judgment because the settlement recovered was greater than that amount.

In *State Farm v. Hernandez*, 713 N.Y.S.2d 618 (4th Dep't 2000), it was held that where respondent insured was injured in a motor vehicle accident, and did not provide petitioner insurer with notice of a supplemental uninsured motorist (SUM) claim until two years after the accident, despite the fact that the notice provision of respondent's policy required that notice of the SUM claim be given as soon as practicable, the appellate division still found an issue of fact as to whether respondent acted with due diligence. Thus, the court reversed the trial court's denial of petitioner's request for a permanent stay of arbitration and remitted the matter back to the trial court for a hearing on the issue.

D. Common Carrier Duty

In *Georges v. Winston Rajnarine et al.*, 715 N.Y.S.2d 81 (2d Dep't 2000), it was held that a common carrier owed a duty to an alighting passenger to stop at a place where the passenger could have safely disembarked and left the area. The court admonished that duty terminated when the passenger alighted safely onto the curb. The court noted that appellee was allowed to exit the bus sufficiently close to the curb, but he chose to walk behind the bus and out into traffic before being hit. The court reversed as to appellant's liability, holding there was no causal connection between appellee's accident and appellant's exercise of its duty of care toward him.

Scenes from Kiawah Island Resort September 2000

Seminar
(l to r) Harold Lee Schwab (summations); Kevin A. Lane (insurance coverage); Eric Dranoff (Program Chair); Robert Coughlin (evidence)

TICL Executive Committee Meeting
(l to r) Saul Wilensky, Vice Chair; Dennis McCoy, Secretary; Louis B. Cristo, Chair; Eric Dranoff, Program Chair; Kevin A. Lane

Picnic Time

Executive Committee Meeting with Dennis P. Glascott and Steven C. Krane, President-Elect, New York State Bar Assoction

Entertainment—Barbecue Dinner

Municipal Liability—Recent Case Notes

The following case notes were prepared by members of the TICL Municipal Law Committee and edited by Committee Chair Paul J. Suozzi of Hurwitz & Fine, P.C., Buffalo. Contributors are Bert Bauman of Bauman & Kunkis, P.C., New York; Louis B. Cristo of Trevett, Lenweaver & Salzer, P.C., Rochester; Vincent R. Fontana of Wilson, Elser, Moskowitz, Edelman & Dicker, New York; Philip M. Gulisano of Hurwitz & Fine, P.C., Buffalo; Stanley J. Sliwa of Sliwa & Lane, Buffalo; and John J. Walsh of Boeggeman, George, Hodges & Corde, P.C., White Plains.

Recreational Facility/Premises Liability Cases

When Is a Municipality Responsible for Recreational Accidents That Happen Offsite?

In *Mercer v. City of New York*, 255 A.D.2d 368, 679 N.Y.S.2d 694 (2d Dep't 1998), the Second Department addressed when a municipality is responsible for recreational accidents that happen offsite, holding that if the municipality has any involvement in the organization, management or maintenance of the offsite operation, liability may attach. Absent this, a municipality may be viewed as an event sponsor only and no liability attaches.

In *Burrows v. Union Free School District of the Tarrytowns*, 250 A.D.2d 799, 673 N.Y.S.2d 463 (2d Dep't 1998), a 16-year-old was injured at an amusement park attending an event sponsored by a contract agent of the school district. The court held that the defendant, as the sponsor, was insulated because the plaintiff failed to prove that the defendant had the authority or ability to supervise or control the event.

When Is a Release Prohibited Under § 5-326 of the General Obligations Law?

General Obligations Law § 5-326 prohibits an owner or operator of a recreational facility from enforcing a release which would exculpate the owner or operator from liability for injuries at a "place of amusement or recreation." In *Tedesco v. Triborough Bridge and Tunnel Authority*, 250 A.D.2d 758, 673 N.Y.S.2d 181 (2d Dep't 1998), it was held that the GOL § 5-326 is inapplicable because a bicycle race conducted on the Verrazano Bridge by the Authority was not an event conducted at a place of amusement or recreation. Hence, the releases were not invalidated.

In *Barone v. St. Joseph's Villa*, 255 A.D.2d 973, 679 N.Y.S.2d 782 (4th Dep't 1998), a children's center was determined not to be the owner or operator of a recreational facility and, thus, the release was upheld. *See, however, Brancati v. Bar-U-Farm, Inc.*, 183 A.D.2d 1027, 583 N.Y.S.2d 660 (3d Dep't 1992) (allowing the case to proceed to trial where the organizer of a trail-riding excursion was alleged to have been negligent in failing to shoe a horse properly and stating that the defendant's outdoor stable could be considered a place of amusement or recreation).

Recreational Facility Cases

In *Santa Lucia v. County of Broome*, 228 A.D.2d 895, 644 N.Y.S.2d 408 (3d Dep't 1996), the county was held to be responsible for its maintenance of a bicycle/pedestrian path. In *Blanco v. Elmont Union Free School Dist.*, 179 Misc. 2d 918, 687 N.Y.S.2d 235 (Sup Ct., Nassau Co. 1999), the plaintiff was injured in a relay race when she slipped and struck her head on a gymnasium wall. The court held that contact with the adjacent wall was not an inherent risk in running and the school district could be held responsible for increasing the risks above those inherent in the sport. *See also Greenburg v. Peekskill City School Dist.*, 255 A.D.2d 487, 680 N.Y.S.2d 622 (2d Dep't 1998) (holding that the absence of padding in a gymnasium housing a basketball court could increase the dangers above those inherent in the sport of basketball, denying summary judgment).

In *Sauray v. City of New York*, 261 A.D.2d 601, 690 N.Y.S.2d 716 (2d Dep't 1999), the Second Department affirmed the trial court's decision setting aside a jury verdict on liability in favor of the plaintiff-bicyclist who was injured while riding his mountain bike down a dark wooded trail that was off-limits. The plaintiff rode into a low-lying chain that was suspended across the trail to prevent access. He alleged the city created a dangerous condition by using a chain or wire barricade to close off the trail, despite its knowledge that such trails were commonly used by bicyclists. After the liability phase of the trial, the jury returned a verdict finding the city 100% liable. The appellate division rejected the city's argument on appeal that the plaintiff's case should be dismissed entirely based on the doctrine of assumption of the risk. However, it held that the trial court properly concluded that the verdict, which entirely absolved the plaintiff of fault for his injuries, was against the weight of the evidence. According to the court, no fair interpretation of the evidence supports a finding that the plaintiff, who elected to ride his bicycle, which was not equipped with a light, along an unlit trail after sunset, was free from negligence.

In *Sheridan v. City of New York*, 261 A.D.2d 528, 690 N.Y.S.2d 620 (2d Dep't 1999), the Second Department

affirmed the dismissal of a basketball player's complaint who was injured when he tripped in a large hole on an outdoor municipal basketball court. According to the plaintiff, the hole was two feet by two feet, two inches deep, and located just to the front and right of a basket. The court stated that the basketball player had assumed the risks inherent in playing on the outdoor basketball court, including those risks associated with the construction of the playing surface and any open and obvious conditions on it. *See also Green v. City of New York*, 263 A.D.2d 385, 693 N.Y.S.2d 43 (1st Dep't 1999) (dismissing another lawsuit filed by an injured basketball player and holding that it is well-settled that by engaging in a sport or recreational activity, the participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation—including those risks that are associated with the construction of the playing field and any open and obvious defects on it).

In *Shamelashvili v. City of New York*, 262 A.D.2d 631, 692 N.Y.S.2d 695 (2d Dep't 1999), the Second Department held that liability could not be imposed on the owner and operator of an ice skating rink. While the infant plaintiff was ice skating, she was suddenly and abruptly struck by another skater. The court determined that the conduct of the other skater could not have been anticipated or avoided by any degree of supervision.

In *Brown v. City of New York*, __ A.D.2d __, 713 N.Y.S.2d 223 (2d Dep't 2000), the court affirmed the jury's finding of liability against the city for injuries to the plaintiff, Virgil Brown, who dove off the Steeple Chase Pier at Coney Island, striking his head on the ocean floor and rendering him a quadriplegic. The court noted that the city failed to establish that the plaintiff knew or, as a matter of law, should have known, the depth of the water. The court did order a new trial on the issue of the plaintiff's culpable conduct finding that its determination that the plaintiff was negligent but that his negligence was not a proximate cause of his injuries was against the weight of the evidence. The court also reduced plaintiff's damages.

In *Cusano v. Board of Education of Liverpool Central School District*, __ A.D.2d __, 713 N.Y.S.2d 383 (4th Dep't 2000), the Fourth Department affirmed the granting of summary judgment to the school district finding that the student assumed the risk of injury by voluntarily participating in a game of lacrosse which took place in a gymnasium at Sole Road Middle School. The court found that the plaintiff voluntarily participated and that the school district breached no duty to protect the plaintiff from "unassumed, concealed or unreasonably increased risks."

School District Liability for Traffic Accidents

In *Ernest v. Red Creek Cent. Sch. Dist.*, 1999 N.Y. LEXIS 1434 (Slip Op. 06554, Ct. App., 1999), *rearg. den.* 1999 N.Y. LEXIS 2919 (September 14, 1999), the school district, town and county all moved for summary judgment. A student was walking home along the shoulder of a road where there was no sidewalk, nor crossing designation for school students. The Court of Appeals held that a jury could conclude that the school district breached its duty as did the county. A jury could infer that the failure to extend the sidewalk, after having notice of the danger, could constitute negligence against the county. It was a county road in the Town, and the town was, therefore, released from liability.

In *Hanley v. East Moriches Union Free School District*, __ A.D.2d __, 712 N.Y.S.2d 617 (2d Dep't 2000), the Second Department considered the liability of a school for an injury to a student who was waiting in the driveway of her home for her mother to walk her and her brothers to the school bus stop. The infant plaintiff suddenly and inexplicably ran into the street and was hit by a car. The court determined that the school district owed no duty to the infant plaintiff at the time of the incident since she was in the custody and under the supervision of her mother and was not involved in any activity relating to her transportation to school.

Civil Rights

Attorney's Fees

In *N.A.A.C.P. v. Town of East Haven*, 44 F. Supp. 2d 422 (D. Conn. 1999), the plaintiff sued alleging racial discrimination in hiring practices in violation of Title VII after the defendant agreed to adopt an aggressive program to recruit black employees but declined to pay plaintiff's legal fees. The issue here is the plaintiff's entitlement to attorney's fees when the result obtained after trial was the same result possible before trial by way of settlement. The plaintiff sought $445,215 in fees and $55,435 in disbursements, almost all attributable to the trial. The court noted that the plaintiff incurred approximately $3,000 up to the time a settlement could have been secured. Because the court concluded that the filing of the lawsuit was nothing more than an attempt to get attorney's fees, the court awarded plaintiff only $10,366.20. In doing so the court noted that a party should not be permitted to increase a fee award by making unreasonable settlement demands that unnecessarily prolong the litigation. The defendant also sought attorney's fees as a prevailing party on the grounds that it prevailed on the claims of disparate impact and discriminatory intent that it substantially offered to meet all the plaintiff's demands before litigation. However, the court rejected this theory and upheld the standard in this circuit that a defendant can collect attorney's fees only when the claim was frivo-

lous, unreasonable and groundless, or that plaintiff continued to litigate after it clearly became so.

In *Quarantino v. Tiffany & Co.*, 166 F.3d 422 (2d Cir. 1999), the Second Circuit rejected the district court's adoption of a "billing judgment" approach to calculating the amount of fees to be awarded and reaffirmed the "lodestar" method.

In *Perry v. S.Z. Restaurant Corp.*, 45 F. Supp. 2d 272 (S.D.N.Y. 1999), the district court granted a prevailing defendant attorney's fees payable by the plaintiff plus sanctions of $2,500 against the plaintiff's attorneys. The plaintiff claimed he was denied use of a bathroom in the defendant restaurant because he was black. The court noted that the plaintiff's trial testimony was not credible and that earlier defense motions for summary judgment were denied because plaintiff left out key facts known to him in his affidavits opposing summary judgment. One key fact was that plaintiff had used the restaurant's restroom in the past and knew it was out of order when he tried to use it on the day in question.

Fourth Amendment

In *Flores v. City of Mount Vernon*, 41 F. Supp. 2d 439 (S.D.N.Y. 1999), an arrestee brought a § 1983 action against the city, its police department and various police officers alleging she was arrested and strip-searched in violation of the Fourth Amendment. On cross-motions for summary judgment the court held that the defendant police officers lacked the right to subject the arrestee to a strip/body cavity search. The court further found that the commander executing the search warrant was not entitled to qualified immunity. The court further noted that the Second Circuit precludes a strip/body cavity search of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee and/or circumstances of the arrest.

In *Carson v. Lewis*, 35 F. Supp. 2d 250 (E.D.NY. 1999), plaintiffs asserted causes of action for violations of § 1981 (alleging that because plaintiffs were black they were treated differently than white citizens), § 1983 (alleging police and prosecutorial misconduct) and § 1985(3) (alleging that the defendants conspired to deprive the plaintiffs of the equal protection of the law). The § 1983 claim alleged violations of the First, Fourth, Fifth, Eighth and Fourteenth Amendments in connection with plaintiffs' arrest and search of their residence. In concluding that the arrest and search were appropriate, the court made the following observations: (a) an arrest pursuant to an outstanding warrant is presumably valid; (b) probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity; (c) an officer's subjective motivations are never an issue; (d) so long as the police are doing no more than they are legally permitted and objectively authorized to do, their actions are constitutional; (e) an officer's arrest based on a victim's positive identification is presumptively valid; (f) even if the information provided the officer was wrong, probable cause exists so long as the arresting officer was reasonable in relying on that information; and (g) a grand jury indictment establishes probable cause even if the indictment is subsequently dismissed; on the other hand, the failure to indict does not mean as a matter of law that there was not probable cause to arrest.

In *Rossi v. City of Amsterdam*, __ A.D.2d __, 712 N.Y.S.2d 79 (3d Dep't 2000), the court reviewed issues surrounding a police investigation into the sale of drugs and use of a "no knock" search warrant. When the warrant was issued it contained an accurate physical description of the target residence but listed the wrong address. The warrant was executed against the wrong residence with the police, armed with the "no knock" warrant, using battering rams to crash through the front door of the residence.

The court held that the search warrant was facially valid and supported by probable cause despite the "technical error" of containing the wrong address. The court found that the warrant as issued did enable police with reasonable effort to identify the residence authorized to be searched because it contained an appropriate physical description of the target and particularized where the suspect resided in the multiple dwelling. The court also found that the county sheriff's department which played no role in obtaining the warrant but only provided assistance to the city in executing it had an objectively reasonable belief that it was acting in a manner that did not violate the plaintiff's rights and therefore it was immune from liability.

The court found that there was an issue of fact regarding whether the city police officers were entitled to immunity for their claimed intentional torts holding, "while execution of a facially valid, though erroneously issued, warrant is not sufficient to foist liability upon the executing officer, the immunity is not absolute and will not shield an officer who, because of his misfeasance, has stepped outside the scope of his authority."

The court also dismissed plaintiff's claims of violation of civil rights against the city finding that plaintiffs failed to demonstrate either that any custom or official municipal policy of the city caused the claimed violations of their constitutional rights. It reaffirmed that municipal liability under 42 U.S.C. § 1983 cannot be predicated upon a *respondeat superior* theory.

Eighth Amendment

In *Baker v. Willett*, 42 F. Supp. 2d 192 (N.D.N.Y. 1999), the plaintiff-jail inmate brought an action against

Warren County, its sheriff's department and deputy sheriff, alleging that the deputy used excessive force on him in violation of § 1983. The facts revealed that plaintiff was sitting on a metal table, his feet not touching the ground, watching television from a catwalk adjacent to his cell. When the deputy sheriff stood in front of the television screen, another inmate called the deputy a "fat boy" and demanded that he move out of the way. The deputy left to continue his rounds, returning several minutes later. The plaintiff was conversing with another inmate and did not notice the deputy return. The deputy pushed plaintiff in the back, causing him to fall off the table and strike his head on the metal bars of his cell approximately four to five feet from where he had been sitting. Plaintiff sustained a laceration on his forehead which required sutures. Although the court concluded that there were sufficient factual questions to preclude summary judgment in favor of the deputy sheriff, the court made the following observations insofar as the Eighth Amendment was concerned: (a) when prison officials are accused of using excessive force, the standard is whether the force was applied in good faith to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm; and (b) the complained-of conduct must be inconsistent with contemporary standards of decency and repugnant to the conscience of mankind. The court also addressed the county's liability for the deputy's conduct. Here the court concluded that plaintiff had no § 1983 claim against the county based on a failure to train because the plaintiff could not establish that a failure to train amounted to a deliberate indifference to the rights of persons with whom the police come into to contact.

Pre-trial Detainees' Rights

In *Ford v. Nassau County Executive*, 41 F. Supp. 2d 392 (E.D.N.Y.), the plaintiff alleged that he was advised, while a pre-trial detainee, that he must serve as a "food cart worker" in the Nassau County Jail, without pay. He sought $2.5 million in damages. Plaintiff was allegedly told that if he refused to perform these services, he would be subject to a 14-day lock-in, or perhaps be "written up." In exchange for these services plaintiff was provided with additional food with his own meals. Eventually the plaintiff was sentenced to time served. The issue of whether pre-trial detainees can be required to work was apparently an issue of first impression in the Second Circuit. Using precedent from other circuits, the court here applied the old adage, "no-harm, no-force." Because a prisoner can be forced to perform "household" chores, the court concluded that his domestic services would have been appropriate and applied the concepts applied to prisoners to pre-trial detainees who were sentenced retroactively to time served.

Age Discrimination in Employment Act

In *McNulty v. New York City Dep't of Finance*, 45 F. Supp. 2d 296 (S.D.N.Y. 1999), plaintiff sued under Title VII and the ADEA. She was employed by the city from December 1978 to February 1995. In 1990 plaintiff began working for the then sheriff. As a result of that appointment plaintiff was considered a provisional, at-will employee and, therefore, she could be terminated summarily. After Rudy Guiliani was elected mayor he appointed a new sheriff, and in 1995 the sheriff was given a list of seven members of the sheriff's department to terminate. The plaintiff, who was then 59 years of age, was one of those fired. Three of the seven were immediately re-hired upon reconsideration and the remaining three, except plaintiff, were given other jobs within the city. Plaintiff was replaced by a woman aged 47. The court denied defendants' motion for summary judgment on the grounds that the plaintiff has stated at least minimal facts that preclude summary judgment. In doing so, the court also found that the defendants proffered non-discriminatory reasons for only some of their adverse employment actions, but not all. Therefore, the case was not ripe for summary judgment.

First Amendment—Retaliation

In *Kane v. Krebser*, 44 F. Supp. 2d 542 (S.D.N.Y. 1999), the plaintiff, a town of Ossining police officer, alleged that he was retaliated against for exercising his First Amendment rights, and that his rights of due process were also violated. Plaintiff claims he had informed the Chief of Police and Lt. Donato of security violations involving the police computer database (NYSPIN). At the time the plaintiff was the Terminal Agency Coordinator for the town. According to the plaintiff, Lt. Donato told him that he was aware of the breach and intentionally did not inform the state police of the problem for fear of losing the equipment. Nonetheless, plaintiff sent a letter to the President of the Town of Ossining Police Association to inform him of this breach. The next day, the plaintiff was relieved as Terminal Agency Coordinator, without explanation. In addition, plaintiff contends that Lt. Donato ordered plaintiff to falsify billing records. When he refused, the chief allegedly told plaintiff he could no longer "trust" him. The court found that the plaintiff's letter complaining of the breach in security of NYSPIN did involve speech on a matter of public concern which is protected by the First Amendment. Having so determined, the court must then determine whether removing plaintiff from his position as Terminal Agency Coordinator was an adverse employment action. The court noted that an adverse employment action can include diminution of job responsibilities, being given inferior and less desirable work duties, or being deprived of perks. Actual demotion or termination is not necessary. Although the plaintiff's letter was on a matter of public concern and an adverse employment

action appears to have been taken against the plaintiff, plaintiff must also establish that the adverse employment action was proximately caused by the exercise of that right. Here the court concluded that there was sufficient evidence to establish proximate cause to defeat a motion for summary judgment.

Police and Fire Cases

Firefighters'/*Santangelo* Rule

In *Ciervo v. City of New York*, 93 N.Y.2d 465, 693 N.Y.S.2d 63 (1999), the Court of Appeals refused to extend the firefighters' rule articulated in *Santangelo* to sanitation workers injured in the course of their employment. The city had urged that sanitation workers, like police officers and firefighters, are also specially trained to confront risks and hazards on behalf of the public and are compensated accordingly. However, the determinative factor in applying the rule is whether the injury sustained is related to the particular dangers which the employee is expected to assume as part of their duties. The court held that city sanitation workers are not expected or trained to assume the hazards routinely encountered by police officers and firefighters. The court noted that sanitation workers are not required to pick up garbage in situations where doing so will compromise their safety.

In *Flynn v. City of New York*, 258 A.D.2d 129, 693 N.Y.S.2d 569 (1st Dep't 1999), the Appellate Division dismissed claims against the city based on common law and GML § 205-e filed by police officers who suffered line-of-duty injuries during a riot in Tompkins Square Park. The injuries allegedly resulted from instructions by an inspector to plaintiffs not to wear helmets when attempting to enforce the expiration of a city permit. The court held that the firefighters' rule applied since the officers knew that the crowd was rioting and were well aware of the dangers presented. They were performing a police function that put them at a heightened risk of injury. Furthermore, the court held that the inspector's order not to wear a helmet was based upon the inspector's professional judgment—it was a call for a non-confrontational approach successfully used in the past—a classic exercise of discretion, for which the city cannot be held liable. Regarding GML § 205-e, the court held that the police department's training manual and patrol guide could not serve as a basis for such liability since they did not constitute a well-developed body of law and regulation. The court stated that the utilization of the patrol guide and training manual to support a GML § 205-e claim would serve as a powerful disincentive to the promulgation of rules that attempt the laudable goal of imposing a higher standard of conduct for law enforcement officials.

General Municipal Law § 205-e Claims

In *Gonzalez v. Iocovello*, 93 N.Y.2d 539, 693 N.Y.S.2d 486 (1999), the Court of Appeals reviewed two decisions of the Appellate Division. In *Gonzalez*, the Court held that an injured police officer has a viable cause of action under General Municipal Law § 205-e against the city based on a fellow officer's violation of Vehicle and Traffic Law § 1104. The city argued that fellow-officer suits are not authorized under GML § 205-e and, alternatively, that V&T Law § 1104(e) cannot serve as the predicate for liability. The Court recognized the numerous expansive amendments by the legislature to 205-e and stated that since 205-e does not contain a categorical exemption to preclude lawsuits derived from fellow officer conduct, such lawsuits are deemed to be permitted and any contrary expression must come from the Legislature. Furthermore, the Court held that V&T Law § 1104(e) could serve as a predicate for liability under GML § 205-e since it satisfies *Desmond*, and constitutes a well-developed body of law which imposes a clear duty. In *Cosgriff*, the issue before the Court was whether violations of New York City Charter § 2903(b)(2) and § 2904 and Administrative Code § 7-201(c) and § 19-152 could serve as predicates for liability under GML § 205-e. Recognizing that it has previously determined that City Charter § 2904 and Administrative Code § 19-152 cannot form a basis for a cause of action under GML § 205-e, the Court found that City Charter § 2903(b)(2) and Administrative Code 7-201 are part of a well-developed body of law and impose a clear legal duty on the city to take appropriate steps to keep the sidewalks in safe repair. Thus, they can form a basis for § 205-e liability.

Discretionary Judgment (*McCormack)* Rule

In *Levy v. State*, 262 A.D.2d 230, 692 N.Y.S.2d 354 (1st Dep't 1999), *app. den.*, 95 N.Y.2d 751, 711 N.Y.S.2d 153, 733 N.E.2d 225 (2000) the First Department held that the "discretionary judgment (or *McCormack*) rule" applied to the discretionary command decisions of the defendant police department that responded to a distress call at a city college celebrity basketball game. The plaintiff claimed that the police voluntarily assumed a duty to all persons attending the game since they took over functions that would otherwise have been performed by private security or by the game's organizers. The court reasoned, however, that where the police merely respond to a particular person's distress as part of their overall duty to the public, the immunity applies. In order to meet its burden of proof, the plaintiff would have had to demonstrate that the police in some way assumed responsibility for the planning and management of the security for the celebrity basketball game beyond merely responding to a problem within the scope of their duties owed to the public.

Special Duty

In *Bernardo v. City of Mount Vernon*, 259 A.D.2d 574, 686 N.Y.S.2d 498 (2d Dep't 1999), the Appellate Division held that the police department had no special relationship to an elderly woman who suffered fatal injuries after she was pushed to the ground by a group of youths. The plaintiff urged that the city had negligently failed to protect elderly pedestrians from large groups of youths who were released from middle school in the afternoon. In opposition to the defendant's motion to dismiss, plaintiff submitted proof indicating that the police had focused extra attention on the area where the incident occurred in order to combat problems created when large numbers of youths were released from school. However, the court held the city did not assume a special duty towards the decedent by targeting the area where the incident occurred for extra police attention. Furthermore, it was fatal to plaintiff's case that he could not demonstrate the decedent was aware that the police had focused extra attention in the vicinity of the street where decedent was pushed, or that decedent relied upon this increased attention to her detriment.

In *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112 (2000), the Court of Appeals reversed the Appellate Division, Second Department finding that a medical examiner assumed a special duty to the plaintiff who remained a suspect in a homicide investigation for a year and a half because of the medical examiner's failure to correct his own records to reflect that no crime had been committed. In a lengthy opinion which reviews the law regarding "discretionary" and "ministerial" governmental acts, the Court found that the plaintiff's claim was not supported by existing law and it refused to enlarge the orbit of duty based on a "foreseeability of harm." The Court also found that there was no "special relationship" created with the plaintiff since the medical examiner never undertook to act on plaintiff's behalf, made no promises or assurances to the plaintiff and assumed no affirmative duty upon which the plaintiff might have justifiably relied. The opinion of Chief Judge Kaye was concurred by Judges Levine, Ciparick, Wesley and Rosenblatt. Judges Bellacosa and Smith dissented and voted to affirm in separate opinions in which each concurred.

In *Luisa v. City of New York*, 253 A.D.2d 196, 686 N.Y.S.2d 49 (1st Dep't 1999), the plaintiff was pushed into her apartment from behind by an unknown assailant, then assaulted and raped. The Appellate Division held, among other things, that the police department did not assume a special duty to act on the plaintiff's behalf since she could not have justifiably relied on the police department's asserted promise to protect her. The vague assurances by city employees that they would "fix the building" (which was regularly frequented by drug dealers) cannot reasonably be construed as a promise of police protection.

In *Varghese v. Sewanhaka Cent. High Sch.*, 260 A.D.2d 573, 688 N.Y.S.2d 643 (2d Dep't 1999), the Second Department held that no special duty was owed to the infant plaintiff who was injured when he was hit by a flying object while crossing the street after leaving the premises of the high school where he had attended an evening activity known as "Asian Cultural Night." The infant plaintiff was not a student at the high school. The court held that the provision of security against physical attacks by third parties is a governmental function involving policymaking regarding the nature of the risks presented, and that no liability arises from the performance of such a function absent a special duty of protection. The complaint was dismissed since it was premised upon the alleged failure to provide proper security on the night of the event and the plaintiff did not establish that the school owed him any special duty of protection.

In *Weeks v. City of New York*, 1999 N.Y. Misc. LEXIS 220 (Sup. Ct., Richmond Co. 1999), the Court held that the plaintiffs stated a viable cause of action against the city and its police department for negligent entrustment, despite the lack of a special duty. Decedent Michael Weeks had attempted a robbery and fled the scene while tearing off his clothes. Weeks was apprehended by the police standing next to his car naked, waving his hands and jumping about. Weeks was placed in his car by the police officers since it was cold and he was naked while the police officers allegedly looked for Weeks' car keys. Weeks then started his car and drove away, eventually getting in a fatal accident with a car driven by decedent Julia Allan. Defendant city moved for summary judgment, claiming that it owed no special duty to Allan because there was never any direct contact between Allan and the police officers. The plaintiffs argued, however, that the "special relationship" doctrine was not relevant to the case because they were not alleging the city breached a duty owed to the public at large. That is, the negligence of the officers did not arise from the failure to detain Weeks, but arose from the breach of a common-law duty to refrain from placing a thing that is in one's control in the hands of a person you have reason to know is likely to operate that thing in a manner that will create a foreseeable risk of harm—negligent entrustment. In denying the defendant's motion for summary judgment, the Court stated that the policy considerations that support municipal immunity with respect to the breach of a duty owed to the public at large are relevant to situations in which the conduct of a police officer fails to ameliorate a dangerous condition that already exists. Thus, the city will not generally be held liable for a police officer's failure to protect. However, these policy considerations are not served in a situation where, as here, the dangerous condition does not exist before police intervention, but is then created by the negligent acts of police officers. In such cases, rather than applying principles of govern-

mental immunity to shield the city from liability, principles of general tort liability prevail.

In *Price v. New York City Hous. Auth.*, 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998), the mother of an infant tenant who was attacked in the lobby an apartment building by an intruder brought an action against the Housing Authority alleging, *inter alia*, that it had a duty to warn of ongoing criminal activity. The Court of Appeals held that when a public entity acts in a proprietary capacity as a landlord, it is held to the same duty as private landlords in providing security devices in the building. However, it remains immune from negligence claims arising out of governmental functions such as police protection unless a special relationship with a person creates a specific duty to protect, and that person relies on performance of that duty. Recognizing that plaintiff did not allege such a special relationship, the Court concluded that since the duty to warn of ongoing criminal activity in an area involves the governmental function of allocation of police protection, the plaintiffs were properly precluded from maintaining a duty to warn claim.

Highways

Immunity for Planning Decisions

In *Zecca v. New York State*, 247 A.D.2d 776, 669 N.Y.S.2d 413 (3d Dep't 1998), the Third Department dismissed a claim against the state of New York that was premised upon improper pavement markings during a resurfacing project engaged in by the Department of Transportation. The plaintiff claimed the state was negligent in failing to warn a motorcycle operator of a "no passing zone." Pavement markings were obliterated by the construction project. Nevertheless, this assertion was deemed to be insufficient as a matter of law. Facts established that the DOT conformed with the mandates of the Uniform Traffic Control Devices Manual. There were road construction warning signs in place prior to the accident scene. The court determined that the state's "qualified" immunity can only be overcome by proof that the highway planning decisions evolved without adequate study or lacked reasonable basis.

Highway Design and Traffic Control Devices

In *Onorato v. City of New York*, 258 A.D.2d 633, 684 N.Y.S.2d 637 (2d Dep't 1999), the plaintiff was injured when he was struck by an automobile at an intersection that was not controlled by a safety control device. At the time of the accident, a traffic signal had been approved by the municipality but had *not* yet been installed. The court determined that there was no unjustified delay in implementing the installation, thus, suit dismissed.

In *Elmer v. Kratzer City of Niagara Falls*, 249 A.D.2d 899, 672 N.Y.S.2d 584 (4th Dep't 1998), the court dismissed a lawsuit against the city of Niagara Falls for injuries resulting from an accident which occurred when plaintiff's motorcycle collided with a tractor trailer trying to make a right hand turn. The court determined that the municipality's qualified immunity precluded suit. The proof submitted on the summary judgment motion indicated that there was an adequate study *and* a reasonable basis for the street designation as a truck route. The court also determined that irrespective of this, the city was not responsible since its negligence did *not* proximately cause the plaintiff's injuries. Rather, the injuries resulted when the plaintiff attempted to pass the truck on its right. Thus, the City's decision to establish the truck route with a "wide" driving lane in each direction *cannot* be regarded as being causally related to the plaintiff's injuries.

Municipally Owned Trees

In *Newman v. City of Glens Falls*, 256 A.D.2d 1012, 682 N.Y.S.2d 314 (3d Dep't 1998), the Third Department held that a municipality owes a duty to maintain and inspect the trees on its property which border streets and roadways and to maintain them in a reasonable condition. The plaintiff was injured when a branch fell from a tree located on city-owned property. On two occasions prior to the accident, plaintiff's husband informed the city forester about problems in relation to the tree which was inspected and deemed to be "structurally sound." An issue of fact was created. Experts hired by the city and plaintiff disagreed on whether the condition of this branch (signs of obvious decay) existed prior to accident. The court also determined that the prior written notice provisions of the city ordinance did not apply.

Prior Written Notice of Defect

In *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999), the Court of Appeals held that constructive notice by a city employee of sidewalk defect cannot satisfy statutory requirements of prior written notice. Rather, there must be a formal written notice. Proof that indicated a city worker, who was specifically employed to search for damaged or missing street signs and who had gone through the area at issue on numerous occasions, was insufficient as a matter of law to defeat the city's motion for summary judgment. There is no "constructive notice" exception to the prior written notice provisions.

In *Woodson v. City of New York*, 93 N.Y.2d 936, 693 N.Y.S.2d 69 (1999), the plaintiff was injured when he fell on a defective concrete stairway which led from a public sidewalk to a municipal park. Prior written notice provisions were required to be filed with the municipality since, pursuant to the New York City Administrative Code, the term "sidewalk" included a "stairway." Thus, although General Municipal Law § 50-e(4) explicitly

limits the prior written notice provisions to streets, highways, bridges, etc., it cannot be said that as a matter of law a stairway is not a "sidewalk," especially where the stairs are integrated or serviced part of a connected sidewalk. Thus, suit dismissed.

In *Nguyan v. Brentwood School District*, 239 A.D.2d 406, 658 N.Y.S.2d 343 (2d Dep't 1997), the Second Department dismissed the plaintiff's complaint alleging he slipped and fell on a patch of ice. Ice had accumulated in a depression in a public road owned and maintained by the town outside of school property. The town established that it had not received prior written notice of this defect. The plaintiff failed to establish that this defect was caused by active negligence of the town.

In *Sparrock v. City of New York*, 242 A.D.2d 289, 661 N.Y.S.2d 47 (2d Dep't 1997), the Second Department held that an intra-departmental work/repair order reflecting stairs in disrepair was insufficient to constitute "prior written notice" under New York City's "pothole law." As long as the defect is not "manifest," liability cannot attach absent written notice.

In *Meehan v. County of Nassau*, 239 A.D.2d 321, 657 N.Y.S.2d 987 (2d Dep't 1997), the action was dismissed where plaintiff stumbled and fell on a depression in sidewalk. The area where plaintiff fell previously contained a tree (planted by the county) which was removed because it had been knocked down by a car. No prior written notice of defect was provided to the county. There was no proof establishing that the county affirmatively created the defect. *See also ITT Hartford Ins. v. Village of Ossling*, 257 A.D.2d 606, 684 N.Y.S.2d 258 (2d Dep't 1999) (holding lack of prior written notice of allegedly dangerous manhole cover precluded village's liability).

In *Rooser v. City of Kingston*, 251 A.D.2d 936, 674 N.Y.S.2d 877 (3d Dep't 1998), the plaintiff was allegedly injured when he slipped and fell while attempting to place money in a city-owned parking meter. Plaintiff conceded that no prior written notice was filed and served as required by applicable provisions of the law. However, he opposed the city's summary judgment motion claiming that notice was not required because the city was acting in a "proprietary" capacity. The court determined that the installation, operation and maintenance of meters on public streets is a governmental function and, in the absence of prior written notice, the lawsuit was not viable.

In *Sorrento v. Duff and Town of Portland*, 261 A.D.2d 919, 690 N.Y.S.2d 368 (4th Dep't 1999), the fact that the town had actual notice of a potential road defect did not relieve the plaintiff of the responsibility of establishing that prior written notice of the defect was filed with the municipality. However, there was an issue of fact of whether the town's affirmative activities caused or created the hazard and condition complained of.

Sidewalks

In *Albano v. City of New York*, 250 A.D.2d 555, 672 N.Y.S.2d 413 (2d Dep't 1998), the Second Department held that a municipality is under no legal duty to install a sidewalk in front of business premises. Thus, a suit by a person injured when they slipped and fell on unpaved "pathway" was dismissed.

In *Rojo v. City of New York*, 178 Misc. 2d 569, 679 N.Y.S.2d 805 (Sup. Ct., N.Y. Co. 1998), the city's failure to respond to discovery requests for information as to who allegedly caused the condition in a city-owned sidewalk justified entry of order holding the city had created the condition. The court determined that such sanction was appropriate in light of the fact that the time for plaintiff to bring in other potential defendants had expired.

Snow Removal

In *Gorman v. Ravesi*, 256 A.D.2d 1134, 684 N.Y.S.2d 386 (4th Dep't 1998), the plaintiff brought an action against, *inter alia*, the city of Fulton alleging it was negligent in failing to promptly remove a large accumulation of snow from a city sidewalk, forcing the decedent to walk onto the adjoining roadway, where she was struck and killed by an automobile. The city moved for summary judgment, citing lack of prior written notice. The plaintiff asserted as an exception to the general rule that the city's affirmative acts of negligence created or caused the defective condition. However, the Court held that the city's failure to remove the snow constituted mere nonfeasance, as opposed to affirmative negligence, and does not invoke the exception.

In *Crichton v. Pitnev Hardin Kipp & Szuch and the City of New York*, 255 A.D.2d 155, 679 N.Y.S.2d 392 (1st Dep't 1998), the plaintiff slipped on ice on a sidewalk abutting an office building. The ice was the result of the blizzard which deposited 24 inches of snow five days previously. The city had not cleared the sidewalk of the snow and ice. The First Department determined whether a five-day period was adequate to remove the snow accumulation to be an issue of fact. The reasonableness of the action requires a factual evaluation which is for a jury to decide.

Trivial Defect

In *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 655 N.Y.S.2d 615 (1997), the Court of Appeals found that whether a dangerous/defective condition exists depends upon the peculiar facts and circumstances of the case and is generally an issue for the jury. Thus, in New York, there is no "trivial defect" rule. However, under the appropriate circumstances, a Court may determine as a matter of law that there is not sufficient

notice of the dangerous/defective condition. Factors to be considered are: width, depth, elevation, irregularity and appearance of condition. Slabs raised a little more than half an inch, at an angle to adjoining slabs was not of a type where constructive notice could be inferred.

Procedural Matters

Stay to Conduct 50-h Exam

In *Jusino v. New York City Housing Authority*, 255 A.D.2d 41, 691 N.Y.S.2d 12 (1st Dep't 1999), the court was confronted with a case in which an infant plaintiff was injured when a window in a New York City housing authority building fell on his hand. A Notice of Claim was filed on his behalf by his aunt within the 90-day statutory period. At the time the Notice of Claim was filed the infant plaintiff was residing with his father who was on active duty with the United States Army in Germany. The First Department held that the stay set forth in § 304 of the New York State Military Law was applicable to the claimant's request for an extension of time in which to hold the examination pursuant to § 50-h of the General Municipal Law despite the fact that it was the infant's parent who was in the military and not the infant himself. The First Department then went on to hold that the claimant's infancy was a factor in considering whether or not there was a reasonable excuse for the delay in conducting the § 50-h examination stating that § 50-h gives the court discretion to extend the time to appear at an examination though not requiring it to do so.

Effect of Infancy Toll

In *Rosado v. Langsam Prop. Serv. Corp.*, 251 A.D.2d 258, 675 N.Y.S.2d 53 (1st Dep't 1998), the First Department held that representation by counsel did not obviate the infancy toll nor did it obviate the effect of infancy on an application to extend the time to appear at a § 50-h examination. Thus, the First Department reversed the Supreme Court and allowed the claimant's request to extend the time to appear for the 50-h examination.

In *Henry v. City of New York*, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372 (1999), an action based on the ingestion of lead paint, the Court of Appeals reversed the Second Department and held that CPLR § 208 tolls statutes of limitation for infancy, and that the toll is not terminated by the filing of a Notice of Claim. The Second Department had held that such a filing was indicative of a lack of disability based upon infancy. The Court of Appeals found that the mere fact that a guardian for an infant plaintiff had filed a Notice of Claim was not grounds to terminate the infancy toll and thus a claim brought more than one year and 90 days after the cause of action accrued was nonetheless timely. The Court stated "infancy itself, the state of being "a person [under] the age of 18" (CPLR 105(j)), is the disability that determines the toll." Derivative claims brought on behalf of plaintiff's parents were dismissed. *See also Aponte v. Brentwood Union Free School District*, 270 A.D.2d 295, 704 N.Y.S.2d 285 (2d Dep't 2000) and *Blackburn v. Three Villages Central School District*, 270 A.D.2d 298, 705 N.Y.S.2d 53 (2d Dep't 2000).

In *Knighter v. City of New York*, 269 A.D.2d 397, 702 N.Y.S.2d 643 (2d Dep't 2000), a case decided after *Henry v. City of New York*, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372 (1999), the Second Department denied the infant plaintiff's application to serve a late Notice of Claim noting that the plaintiffs had failed to establish any nexus between the delay and the infancy of the plaintiff which would excuse the delay and further that the delay had prejudiced the ability of the municipality to maintain its defense on the merits. *See also Rogers v. City of Yonkers*, 271 A.D.2d 593, 706 N.Y.S.2d 444 (2d Dep't 2000). *But see Fierro v. City of New York*, 271 A.D.2d 608, 706 N.Y.S.2d 451 (2d Dep't 2000), allowing infant plaintiff to serve a late Notice of Claim where the interests of fairness militate in favor of the discretionary application of the infancy toll.

Continuous Treatment Toll

In *Oksman v. City of New York*, 271 A.D.2d 213, 705 N.Y.S.2d 360 (1st Dep't 2000), an action based on alleged medical malpractice, the court found that the time within which to file a Notice of Claim is tolled by the continuous treatment doctrine noting that General Municipal Law § 50-e(1) requires filing of Notices of Claim within 90 days after a claim arises or the cause of action accrues and that the cause of action accrues in medical malpractice on termination of treatment. The court went on to find that monitoring of a medical condition may constitute treatment for purposes of tolling. *See also Irazarry v. New York City Health and Hospital Corporation*, 268 A.D.2d 321, 701 N.Y.S.2d 203 (2d Dep't 2000); *McKoy v. County of Westchester*, 272 A.D.2d 307, 707 N.Y.S.2d 203 (2d Dep't 2000); and *Watson v. City of New York*, __ A.D.2d __, 709 N.Y.S.2d 546 (1st Dep't 2000).

Statute of Limitations in Public Authority Cases

In *Davis v. City of New York*, 250 A.D.2d 368, 673 N.Y.S.2d 79 (1st Dep't 1998), the importance of checking the Public Authorities Law when bringing an action against such an entity was again emphasized. In this action plaintiff fell at the New York Convention Center injuring her ankle. A Notice of Claim was served upon the mayor and the corporation counsel of the city of New York and eventually an action was brought against both the City and the Convention Center ten days after the one year statute of limitations for bringing an action against the Convention Center had run (*See* Public Authorities Law § 2570). The Convention

Center moved to dismiss. Reversing the Court below, the Appellate Division held that while a court has broad discretion to grant permission to file a late Notice of Claim, a court is nonetheless precluded from granting such an application when permission is sought after the statute of limitations has run. The court went on to find that the Convention Center is not an alter ego of the city and notice to the city may not be imputed to the Convention Center. Citing *Seif v. City of New York*, 218 A.D.2d 595, 630 N.Y.S.2d 742. The vourt also found that defendant was under no obligation to advise the plaintiff of her failure to file a timely Notice of Claim and that such grounds for dismissal may be timely raised at any time prior to trial. *See also Robles v. City of New York*, 251 A.D.2d 485, 674 N.Y.S.2d 422 (2d Dep't 1998).

Effect of Errors in Notice of Claim

Lomax v. New York City Health and Hospital Corporation, 262 A.D.2d 2, 690 N.Y.S.2d 548 (1st Dep't 1999), sets forth the reasoning of the First Department in an action where a Notice of Claim contains an error and therefore needs correction. Plaintiff, who had been a patient at North Central Bronx Hospital claimed to have been a victim of medical malpractice and her Notice of Claim inadvertently indicated treatment at Bronx Municipal Hospital. An examination pursuant to § 50-h of the General Municipal Law was conducted at which plaintiff identified the correct hospital though the Summons and Complaint again misidentified the treating hospital as Bronx Municipal. The Bill of Particulars named the correct hospital. The First Department, noting that both hospitals are run by the New York City Health and Hospital Corporation, upon whom the Notice of Claim and the Summons and Complaint had been served, granted plaintiff's motion to correct the Notice of Claim citing § 50-e(6) of the General Municipal Law since the records of both hospitals were in the defendant's possession and the defendant could simply have looked for the plaintiff's file and definitively ascertained which hospital had rendered her treatment.

In *Torres v. New York City Housing Authority*, 261 A.D.2d 273, 690 N.Y.S.2d 257 (1st Dep't 1999), *app. den.*, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 224 (1999), the court held that an action should be dismissed when the Notice of Claim requires more than minimal correction to adequately identify the location of plaintiff's accident and the theory of plaintiff's claim. Eight days after an alleged accident plaintiff had filed an incident report claiming a slip and fall on snow and ice at the entrance of a courtyard between 420 and 428 West 26th Street. The Notice of Claim, also indicating an accumulation of ice, set the accident site as 427 West 26th Street. The New York City Housing Authority rejected the Notice of Claim on vagueness though the city of New York apparently went forward with an examination pursuant to § 50-h of the General Municipal Law, at which plaintiff identified 428 West 26th Street as the location of the fall but testified that it was caused by a snow covered hole. Plaintiff's Summons and Complaint went back to the location identified in the Notice of Claim though now stating that the accident was caused by a crack in a sidewalk. Eventually plaintiff moved to amend the Notice of Claim to place the accident at 428 West 26th Street, per plaintiff's 50-H testimony, but now plaintiff wished to assert that the accident had been caused by an uneven portion of a concrete border surrounding a tree. The court noted that though technical mistakes such as an error as to location in a Notice of Claim may be corrected, the multiple mistakes in this particular case resulted in prejudice to the defendant and that whatever actual notice the city of New York had acquired at the 50-h hearing could not be imputed to the Housing Authority, a distinct municipal entity not united in interest with the city.

Preclusion for Failure to Comply With 50-h Notice

In *Patterson v. Ford*, 255 A.D.2d 373, 679 N.Y.S.2d 706 (2d Dep't 1998), plaintiff made a claim to recover damages for false arrest and malicious prosecution against two police officers and their employer, the Freeport Police Department. A Notice of Claim was timely filed and the defendants requested an examination pursuant to 50-h of the General Municipal Law. Plaintiff's attorney adjourned this examination multiple times and eventually served a Summons and Complaint without the examination having been conducted. The court granted the motion of the municipal defendant to dismiss stating that the law is well established that a potential plaintiff who has not complied with General Municipal Law § 50-h(1) is precluded from commencing an action against a municipality.

Filing of Late Notice of Claim

Continental Insurance Company a/s/o Paul D. Collins v. City of Rye, 257 A.D.2d 573, 683 N.Y.S.2d 585 (2d Dep't 1999), involved a three-car motor vehicle accident, one of the vehicles being that of the Chief of the City of Rye Fire Department. The insurer/subrogee sought to file a late Notice of Claim which the Second Department allowed noting that, though a police report regarding an automobile accident does not itself constitute notice to a municipality, where the vehicle involved was that of a city fire chief and where not only was a City police accident report prepared, but also where there was an investigation into the accident by the Board of Fire Wardens, and a further report prepared by the city of Rye Fire Department, no prejudice could be found to the municipality and the late Notice of Claim was allowed.

In *Scuteri v. Watkins Glen Cent. Sch. Dist.*, 261 A.D.2d 779, 689 N.Y.S.2d 751 (3d Dep't 1999) and *Hunt v. County of Madison*, 261 A.D.2d 695, 690 N.Y.S.2d 154 (3d

Dep't 1999), the Third Department permitted the late filings of notices of claims, where the respondents had knowledge of the essential facts underlying the claims shortly after the claims accrued and an opportunity to investigate the claims, despite the lack of a reasonable excuse by petitioners for failing to timely file their notices of claims.

In *Kittredge v. New York City Housing Authority*, __ A.D.2d __, 713 N.Y.S.2d 219 (2d Dep't 2000), a slip and fall action based on allegedly defective interior ramp, the court found that law office failure was not an acceptable reasonable excuse for failure to serve a timely Notice of Claim particularly where the municipality had not acquired actual notice of the essential facts of the claim within 90 days of its accrual.

Identifying Defective Conditions in Notice of Claim

In *Bayer v. City of Long Beach*, __ A.D.__, 713 N.Y.S.2d 71 (2d Dep't 2000), the court found plaintiff's Notice of Claim to be defective where plaintiff claimed to have tripped over an uneven board on a boardwalk in Long Beach in a 100-square-foot area identified by road name and address. The court found this identification of location insufficient to enable defendant to conduct a proper investigation. *See also Prevete v. City of New York*, 272 A.D.2d 333, 707 N.Y.S.2d 192 (2d Dep't 2000), denying plaintiff's application to file a late Notice of Claim after learning the correct location of the accident site at an examination pursuant to § 50-h of the General Municipal Law.

In *Berfas v. Town of Oyster Bay*, __ A.D.2d __, 711 N.Y.S.2d 472 (2d Dep't 2000), the Court found that the location of the alleged defect was sufficiently identified in a Notice of Claim which included the lane of travel of the alleged defect, the approximate distance of the defect from a particular intersection and which attached photographs showing the defect in question.

In *Raisner v. City of New York*, 272 A.D.2d 460, 707 N.Y.S.2d 498 (2d Dep't 2000), plaintiff alleged that she had stopped into a depression while alighting from a New York City Transit Authority Bus, allegedly as a result of the negligence of the bus driver in stopping in the area of the hole. The Notice of Claim failed to identify the route number of the bus and plaintiff was unable to provide this information at her 50H examination. This made it impossible for the transit authority to identify the driver of the bus at issue and the Notice of Claim was deemed insufficient to allow the municipality to conduct a meaningful investigation.

Failure to File Timely Notice of Claim

In *Hassett-Belfer Senior Housing, LLC v. Town of North Hempstead*, 270 A.D.2d 307, 705 N.Y.S.2d 61 (2d Dep't 2000), in an action against a municipality based on alleged breach of contract, the court found that a Summons and Complaint served on a town clerk was not equivalent to service of a Notice of Claim for the purpose of satisfying the Notice of Claim requirement.

In *Olivera v. City of New York*, 270 A.D.2d 5, 704 N.Y.S.2d 42 (1st Dep't 2000), the court granted the city's cross-motion to dismiss a Complaint for personal injuries where the Notice of Claim indicated property damage only. Plaintiff's reliance on a police report which stated that the plaintiff had been injured was misplaced, the court stating that to adopt plaintiff's position would be to substitute instance, requiring municipalities to investigate every possible cause of action that might be suggested in a police accident report.

In *Augustyn v. County of Wyoming*, 2000 N.Y. App. Div. LEXIS 9632 (4th Dep't 2000), the court reversed the lower court's decision and granted the county's motion to dismiss the complaint, finding that the Notice of Claim was not served within 90 days of the accrual of the claim, nor was leave to serve a late Notice of Claim sought within one year and 90 days. Plaintiff alleged the county was responsible for creating conditions that gave rise to structural problems in his property. The court held that the claim arose when the county informed plaintiff by letter that no Certificate of Occupancy would be issued until the structural problems were resolved.

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