TICL Journal

Volume 34, No. 1
Summer 2005 Issue

ISSN 1530-390X

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A View from the Outgoing Chair

As my year as Chair has drawn to a close (January 31, 2005), I am pleased to report that the TICL Executive Committee is fully constituted for the upcoming year. We have updated the roles and duties of the members of the Executive Committee (that is, the district representatives and the chairs of both substantive law and administrative functions). We have updated our by-laws now that those roles and responsibilities have been defined.

We have adopted a diversity policy and more importantly actively strive to increase diversity in the membership of both the Section and the Executive Committee, so any thoughts, comments and volunteers to that end continue to be most welcome.

Our website continues to provide you with information on Section-sponsored CLE programs and Section activities and with updates on the law in various substantive areas.

The *TICL Journal* and the *Construction and Surety Law Newsletter* continue to provide you with up-to-date articles on the law. Our newsletters keep you current on administrative matters.

Our CLE offerings around the state this fall have included comprehensive overviews of municipal law (in conjunction with the Municipal Law Section), Workers' Compensation, automobile liability, products liability, and a new program on law for insurance claims professionals. Watch our website as well as your mail for registration forms for upcoming seminars.

Most importantly, watch the TICL website for a preview of the program and events that we are planning for our 2005 section meeting in Killarney, Ireland August 14–17, 2005 and mark the date on your calendar. The incoming Chair Doug Hayden promises that it will be a meeting to be remembered.

Eileen E. Buholtz

PS: The recently released book *1,000 Places to See Before You Die* includes Killarney as one of the places to visit. Those who attended the 2004 meeting in Savannah, GA (which had three listings in the book) and who attend the August meeting in Killarney will have visited four of the listings and have only 996 remaining after that!

A View from the Incoming Chair

Dear Members,

It is with great pleasure that I have begun my term as Chair of this great Section. The job requirements have been lessened based upon the great work and leadership of our immediate past Chair, Eileen Buholtz.

The goal of the Section has and always will be to continue being involved and active in all areas of the law that impact Torts, Insurance and Compensation. A close examination of the Executive Committee underscores that point. We are proud of the roles that all members of the Executive Committee play on a daily basis. We have leaders from all areas of the law that will challenge us to continue moving this great Section forward.

How to increase membership and become active in this Section are two questions that are always asked. Our membership is currently at approximately 3,900 members. To increase membership we plan on having numerous "marketing events" throughout the state to highlight the benefits of being a member of this Section.

How to be a more active member? That is easy, come join us at any of our fall programs (this year, August) and get acquainted with our members. By being active, you will find that the benefits of dealing with lawyers across the state in a professional and social manner can offer great advantages to you. In addition, for those who want to "get their name out" or talk on a legal area of expertise, you will find that our CLE chair, Laurie Giordano, can make that happen. We encourage participation and speakers at all our CLE events that we host across the state. Rather than participate on a panel of "local members of your bar association," TICL CLE events allow you to participate with lawyers across the state. Laurie Giordano can be reached at:

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What is happening this year? While the Section observes the trend in Washington and across the nation for "tort reform," recent decisions by the Court of

(Continued on page 4)

Appeals such as *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (Labor Law § 240) and *Cahill v. Triborough Bridge & Tunnel Auth.*, __ N.Y.3d __ (recalcitrant worker defense), as well as enactment of new privacy laws and best practice standards that impact the insurance industry, we as a Section are even going "global"—as in the number one fastest growing economy in the world—Ireland.

Ireland

In August during the 11th-14th our Section will be hosting our annual meeting at Hotel Europe overlooking the Lakes of Killarney in Ireland. We are pleased to have leaders from AIG, CNA, Willis, and other insurance carriers participating in what should be a great CLE program as well as a great time to learn about the rich heritage and culture of Ireland. We are also pleased to have joining us the Honorable Paul Crotty. Judge Crotty was formerly in charge of Corporation Counsel in New York City under Mayor Rudolph Giuliani, past group president of Verizon and now a distinguished member of the Federal Judiciary. Judge Crotty will be a featured guest speaker in Ireland. In addition, we will be having many distinguished lawyers and elected officials from Ireland joining and sharing with us the state of the Irish legal system.

Also, look for save-the-date flyers and advertisements. On behalf of the Section, I would like to thank all of those in attendance at the kick-off to the "Road to Ireland" social event at Harbour Lights in New York City on March 16th.

The event was an overwhelming success with close to one hundred people in attendance. Participating and joining in the festivities were John Kelly, Chairman of Willis Risk Solutions-NYC; William Fishlinger, Chairman of Wright Risk Management and creator of NYSIR & NYMIR, two insurance reciprocals that Wright Risk Management oversee; Don DeCarlo, former General Counsel of Travelers and Gulf Insurance, as well as the founder of American Compensation Professionals (AMCOMP); Arthur J. Dunne, Jr., Chairman and CEO of Risk Management Planning Group; and Gerry McCarthy, Vice President of AIG Construction Risk in NYC.

The above-mentioned will also participate as speakers at the conference in Killarney and each have held distinguished careers in the insurance industry. Also in attendance was former TICL Chair Eric Dranoff, as well as current Secretary of TICL Gary Cusano. A special thanks to program Co-Chairs Anthony Martine of the First District and A.J. Smith of the Tenth District for their assistance and support in putting this together, as well as Second District representative Rob McCarthy. The event raised awareness of our upcoming meeting and conference in Ireland that will be well-attended.

Finally, I will continue to update the membership during the year with information of importance to the Section. I look forward to sharing in the challenge of leading this great Section with Paul Suozzi, our Vice Chair and Gary Cusano, our Secretary.

I am confident these events will help us attract new members and raise awareness of the TICL Section and what it offers in its membership.

Douglas J. Hayden

"Trust, but Verify": New York Refuses to Sanction Third-Party Spoliation Claims

By Dennis R. McCoy and Mary Kate Walders

Spoliation of Evidence

How to address the problem of spoliation of evidence has been a persistent issue in our legal system. "Spoliation, is defined as 'failure to preserve property for another's use as evidence in pending or future litigation.'"[1] The courts have dealt with spoliation of evidence in a number of different ways, including the use of summary judgment, directed verdict, exclusion of testimony and jury instructions. However, these traditional "remedies" for spoliation can fall short: the remedies do not send a deterrence message to the potential spoliators; the remedies are geared to be used during a trial and not after; and the remedies do not compensate the victimized litigant who usually bears the full cost of the spoliation. In particular, one of the most "critical shortcomings" is that the remedies do not adequately address the situation when a non-party spoliates.[2]

Under the traditional remedies, when a non-party negligently or intentionally spoliates, the court has charged the plaintiff or defendant who is accountable for the non-party, misdirecting the blame. A non-party spoliator may be any third party, such as an individual or business who is not named a party in the underlying case. The individual could be an attorney, an expert witness, or someone else who was entrusted with the responsibility of preserving the evidence.

However, there are some relationships in which the plaintiff or defendant may be responsible for the actions of the non-party, such as in a contractual relationship or agent/principal relationship; but the situation becomes a concern when a party is wrongly punished for the non-party spoliator's behavior.[3]

MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 1 N.Y.3d 478, 87 N.E.2d 865, 775 N.Y.S.2d 754

In a recent New York Court of Appeals case, *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*,[4] the Court of Appeals considered the question whether New York should recognize a cause of action for third-party negligent spoliation of evidence or whether there should be an independent tort for impairment of a claim or defense.

In the case, Michael Basil had borrowed a 1999 Chevrolet Tahoe from defendant Joe Basil Chevrolet, Inc., when a fire broke out in the vehicle. The vehicle had been parked in the garage attached to the home of Faith and Michael Basil, and resulted in over $330,000 in property damage to the home. MetLife, Michael Basil's home owners' insurance carrier, paid the homeowner's claim. Royal, Chevrolet's insurance carrier, took possession of the vehicle. After fire investigators determined that the fire originated on the driver's side of the vehicle dashboard, all of the parties involved agreed to have a joint inspection of the vehicle at a later date. A representative from Royal orally agreed to preserve the vehicle. However, before the date of inspection arrived, Royal notified the parties that the vehicle had been disassembled and destroyed.

MetLife commenced an action asserting a cause of action for third-party spoliation against Chevrolet's insurance carrier, Royal, as the result of the destruction of the evidence. The Court refused to create a third-party spoliation cause of action in this case because Royal did not have a duty to MetLife to preserve the vehicle. In addition, MetLife had made no efforts to preserve the vehicle through a written contract or court order.

The Court of Appeals concluded that Supreme Court properly dismissed the complaint because no cause of action exists in New York for "third-party spoliation" of evidence/impairment of claim or defense, either under the principles of negligence law or as an independent tort.

Remedies

In general, when a party is responsible for spoliation, the court may use the following factors to decide how severe the sanction should be and which remedy to use: "(1) the degree of fault of the party who spoliated the evidence; (2) the degree of prejudice suffered by the opposing party; (3) the availability of a lesser sanction that will avoid substantial unfairness to the opposing party; and (4) the potential of the sanction deterring such conduct by others."[5]

Pursuant to N.Y. CPLR 3126, "If any party, or a person who at the time a deposition is taken or an examination or inspection is made . . . refuses to obey an order for disclosure or willfully 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, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or item of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Spoliation by the Plaintiff

In cases of spoliation which has been committed by the plaintiff, the courts have used several different remedies.

First, the court may issue an order of preclusion, which forbids a party from using certain evidence or bringing certain issues before the trier of fact. The second remedy the courts may use is an adverse inference jury instruction, which is the most commonly used remedy. The third remedy that may be used is dismissal of a case, which occurs especially in cases where the evidence has been intentionally destroyed or altered. The fourth remedy a court may use is granting summary judgment.[6]

Spoliation by the Defendant

As for spoliation by the defendant, the court may use remedies based on the same principles as those available when spoliation is committed by a plaintiff. The courts may direct a verdict for the plaintiff, issue a default judgment, or exclude an expert's testimony. The courts may also give a rebuttable presumption jury instruction, where the judge instructs the jury that unless the defendant offers a reasonable explanation, the spoliated evidence will be presumed to have been unfavorable to the defendant's case.[7]

States Which Have Recognized the Tort of Spoliation of Evidence as an Independent Cause of Action

California was the first state to recognize the independent tort of intentional spoliation of evidence in 1984, and later in 1985, California went on to recognize an independent tort for the negligent spoliation of evidence.

In the 1984 case, *Smith v. Superior Court for the County of Los Angeles*,[8] plaintiff's car collided with a van. The plaintiff alleged that the van/car dealer agreed to retain parts of the van for further investigation. Thereafter, the dealer, destroyed or lost the parts, which significantly affected plaintiff's chance to be compensated for her injuries. The California Court of Appeals affirmed the Appellate Court's decision and recognized intentional spoliation of evidence as an intentional interference tort, allowing for a recovery even when there was no legal binding agreement.

Almost six months later, in a Florida case, *Bondu v. Gurvich*,[9] the Florida District Court of Appeal for the Third District also recognized negligent spoliation of evidence as an independent cause of action. In the case, appellant Bondu brought a negligence action against the hospital and the anesthesiologists for the death of her husband. Appellant's husband went into surgery for a triple bypass, and during the procedure when he was receiving anesthetic, he suffered a cardiac arrest and died. Appellant requested the medical records in order to establish her case, but the hospital replied that the records could not be found. Appellant made a motion for leave to amend her complaint to add an additional charge against the appellees for the negligent loss of the records, which prevented her from establishing medical malpractice. The hospital made a motion for judgment on the pleadings, which the court granted.

On appeal, the court reversed the judgment on the pleadings. The court held that appellant stated a cause of action in alleging that appellee hospital breached its duty to maintain the medical records, preventing appellant to pursue her medical negligence suit. The tort that was recognized in the case was based upon a statutory duty, and was different than an independent common law duty to preserve evidence.

In another example, the Supreme Court of Alaska found the reasoning in the California case, *Smith v. Superior Court for the County of Los Angeles,*[10] persuasive, and recognized a new tort of spoliation of evidence in the case, *Hazen v. Municipality of Anchorage*.[11] Plaintiff Hazen was the owner of a massage parlor in Anchorage when an officer wired with a hidden recorder went in undercover and arrested plaintiff for prostitution. Afterwards, plaintiff's attorneys listened to the arrest tape, and testified that it was very clear the plaintiff had not offered sexual services. The attorneys asked for the tape to be preserved, so that plaintiff could file a civil suit for false arrest against the four arresting officers and the Municipality of Anchorage.

Subsequently, when plaintiff's civil attorneys received the tape, they found most of it to be inaudible, and concluded that the tape had been altered. The court granted plaintiff's motion to amend her complaint to include the Municipal Prosecutor Bailey as a defendant and to add claims for violation of state and federal civil rights by destruction and/or alteration of the arrest tape. However, when plaintiff refused to turn over her

customer lists to defendants, the superior court dismissed plaintiff's false arrest and malicious prosecution claims as a discovery sanction.

On appeal, the court held that the superior court abused its discretion in dismissing the false arrest and malicious prosecution claims and by instructing the jury that the officers had probable cause for the arrest. The court concluded that the customer lists discovered after the arrest had no bearing on the probable cause of issue. The court recognized a new tort of spoliation of evidence, held that the municipality was not liable for damages, and that plaintiff was entitled to a new trial on these issues.

In addition to California, Florida and Alaska, the following jurisdictions have also recognized spoliation of evidence as an independent and actionable tort:

- The District of Columbia, *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 296;
- New Mexico, *Coleman v. Eddy Potash, Inc*., 120 N.M. 645, 905 P.2d 185 (1995);
- Ohio, *Smith v. Howard Johnson Co*., 67 Ohio Sty. 3d 28, 615 N.E.2d 1037 (1993);
- Washington, *Ingham v. United States*, 167 F.3d 1240, 1246.

States Which Have Recognized a Third-Party Spoliation of Evidence as a Tort

Interestingly, the states which have recognized spoliation of evidence as an independent tort do not necessarily recognize spoliation of evidence against a third party, and likewise, the states which recognize spoliation of evidence against a third party do not always recognize spoliation as an independent tort.

For example, California, although it was the first state to recognize an independent tort for spoliation of evidence, has rejected a cause of action for the intentional spoliation of evidence by a party to the litigation or by a third party in two recent cases, *Cedars-Sinai Med. Ctr. v. The Superior Court of Los Angeles County*[12] and *Temple Community Hosp. v. The Superior Court of Los Angeles County.*[13]

Montana, on the other hand, had a case, *Oliver v. Stimson Lumber Co*.,[14] where the court concluded it was "necessary to recognize the tort of spoliation of evidence, as an independent cause of action with respect to third parties who destroy evidence."[15] The court concluded that under situations where evidence was destroyed by one party in the case, there was no need to recognize a new tort because remedies were available under the Montana Rules of Civil Procedure. But, in situations where a third party becomes involved, the court stated, "the various sanctions available to the trial judge are inapplicable and other considerations arise,"[16] which creates the need for the tort of spoliation of evidence with respect to third parties who destroy the evidence.

Alabama has also recognized a cause of action against a third party for spoliation of evidence under the traditional doctrine of negligence. In the case, *Smith v. Atkinson*,[17] plaintiff was driving with his wife and children in their minivan when they were struck from behind by a vehicle driven by Richard Ferguson ("Ferguson"). All of the passengers in the minivan experienced injuries, and plaintiff's wife ultimately died. Plaintiff filed a claim with his insurance company, Metropolitan Property & Casualty Insurance Company ("Met P&C"), and defendant Atkinson, the claims adjuster, and also investigated bringing a claim against the Chrysler Corporation. When the minivan was handed over to Atkinson and Met P&C, plaintiff requested for the minivan not to be destroyed, but Met P&C and Atkinson failed to comply with the request.

Subsequently, plaintiff brought a claim against Met P&C and Atkinson for allowing the vehicle to be destroyed. Defendants moved to dismiss the complaint, and argued that Alabama law did not recognize the independent tort of evidence spoliation. The court proceeded by certifying a question to the Supreme Court of Alabama, as to whether the independent tort of evidence spoliation exists under Alabama law.

The Supreme Court of Alabama answered that there was "no need to recognize a new cause of action for spoliation of evidence," but there was a need to recognize "a claim against a third party for spoliation of evidence, under the traditional doctrine of negligence. . . ."[18] As a result of Supreme Court's response, defendants' motion to dismiss plaintiff's claim was denied.

Alaska is another state that recognizes third-party spoliation as a tort. In the case, *Hibbits v. Sides*,[19] appellants Hibbits and Purvis (collectively, "Hibbits"), were riding their motorcycles when they crashed into a pick-up truck driven by Michael Vogus. The State Trooper, Dan Sides, arrived at the scene and removed Vogus from the area, allegedly to keep him away from hearing the threats made by Hibbits. However, Hibbits stated in their complaint that Sides knew Vogus was under the influence of marijuana, and removed him away from the area so Vogus could improve his condition. Hibbits also alleged that Sides acted "with malice bad motives, or reckless indifference" to Hibbits interests.[20]

Later, after Hibbits filed a civil suit against Vogus, Hibbits also filed a separate suit against Sides, claiming that Sides' actions amounted to intentional third-party spoliation of evidence. Hibbits's complaint was dismissed when Sides argued that Alaska would not recognize intentional third-party spoliation as a tort.

The court concluded that even though "Alaska has recognized intentional first-party spoliation, and to recognize third-party spoliation would create an anomaly in the law . . . given the limited availability of evidentiary sanctions in the third-party context, there is reason to recognize third-party spoliation as a tort even if first-party spoliation is not so recognized."[21] The Court reversed the dismissal of Hibbits's complaint and it was remanded for further proceedings.

Lastly, in the case, *Builder's Square, Inc. v. Shaw*,[22] Florida also recognized a tort of third-party spoliation of evidence. In the case, plaintiff fell from a ladder while working at Builder's Square. As a result, he sued the manufacturer in products liability and his employer in negligence relating to the use of the ladder. Plaintiff then amended his complaint and made a claim against Builder's Square for the spoliation of evidence, after he found out the ladder had been destroyed.

In order for an employer not to be held liable for a spoliation of evidence claim, Builder's Square argued that an employee must make a request to the employer to preserve specific evidence.[23]

The jury returned a verdict for the plaintiff, and then defendant and plaintiff both appealed and cross-appealed. On appeal, defendant raised the issue of whether an employer is entitled to specific notice when there is a request to preserve the evidence. Plaintiff contested on appeal that the jury adjusted the award of damages as a result of defendant disclosing to the jury the settlement amount between the manufacturer and the plaintiff.

The court held that the jury should not have been told the amount of the settlement. It also held that plaintiff gave proper notice to his employer on the date of the injury. Because Builder's Square knew on the day of the incident or within 3 days thereafter that one of the ladders were actually involved in the fall, Builder's Square should have known that certain evidence could be needed for plaintiff's claim. Defendant cross-appellee had sufficient notice of the broken ladder and should have preserved the evidence.

No Cause of Action for Spoliation of Evidence in New York State

Some New York courts and commentators have argued for having an independent spoliation tort. Some believe that a third-party spoliation tort is needed because the traditional remedies do have the power to deter spoliation, arguing that the "integrity of our judicial system is jeopardized,"[24] and without the recognition of a third-party spoliation tort, "there may be no civil remedy to compensate a litigant who is victimized by a non-party spoliator."[25]

Despite these arguments, the vast majority of lower New York State courts and most federal courts, have considered the issue but refused to recognize a cause of action for spoliation.[26] The reasons the courts have rejected the use of a spoliation tort, include: (1) "the belief that existing remedies for spoliation are sufficient; (2) the uncertainty of the existence or extent of damages; (3) the tort would interfere with a person's right to dispose of his property; (4) the new tort may be inconsistent with the policy favoring final judgments; and (5) the plaintiff who loses his primary suit may bring a second suit by trying to establish that some relevant piece of evidence was not preserved."[27]

In New York appellate courts, it has been held that spoliation of evidence by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third party tortfeasor. For example, in *DiDomenico v. C & S Aeromatik Inc.*,[28] DiDomenico, a United Parcel Service ("UPS") employee, damaged his eye when a liquid sprayed from a package he was handling. DiDomenico asked UPS to identify the manufacturer, packer and shipper of the liquid that injured him, but UPS failed to preserve the package containing the liquid and also delayed in providing the appropriate information. Plaintiff filed a complaint against UPS and the codefendant shipper. Because UPS failed to comply with plaintiff's discovery requests and to comply with court orders, plaintiff requested that defendant's answer be struck and summary judgment be granted to sanction defendant under N.Y. CPLR 3126. The court concluded that plaintiff was entitled to the requested relief because defendant intentionally destroyed the evidence, thwarted discovery and disobeyed the lower court's orders.

Similarly, in the case, *Fada Industries Inc. v. Falchi Building Co., L.P.*,[29] the court stated that the facts in the case, "clearly support extending the *DiDomenico v. C.S. Aeromatik Supplies* decision, which applies to an employer-employee relationship, to the insured-insurer relationship, and to the recognition of a negligent spoliation cause of action under the circumstances such as those presented here."[30]

In the case, a tenant commenced an action to recover damages to property caused by a water leak, against Falchi Building Co., L.P. (owner); ATC Management, Inc. (manager) and Koolwear, Inc. (the cotenant whose water heater was allegedly responsible for the water leak). Codefendants, Falchi Building Co. and ATC Management cross-claimed against Koolwear.

During the investigation of the water leak damage, General Accident Insurance Co., Koolwear's insurer, allegedly removed the offending water heater from the premises and subsequently lost or destroyed the water

heater while in its possession. Koolwear thereafter commenced a third-party action against General Accident seeking recovery for the negligent loss of water heater, which impaired its ability to defend the action brought by Fada and prevented it from impleading those entities which negligently manufactured, installed and repaired the water heater. Defendant moved to dismiss the third-party complaint on the ground that it failed to state a cause of action. Koolwater cross-moved for leave to serve an amended third-party complaint.

The court found that the alleged facts were sufficient to establish the elements necessary to state a cause of action in negligence. The motion to amend the complaint was granted, except to the extent that it sought to leave to amend the complaint to add a cause of action for intentional spoliation of evidence.

States that Do Not Recognize a Third-Party Spoliation of Evidence Tort

Like New York, the majority of states do not recognize a third-party spoliation of evidence tort. The following states have expressly denied the third-party spoliation of evidence tort in the attached cases:

- Arkansas—*Wilson v. Beloit Corp*., 725 F. Supp. 1056 U.S. Dist. LEXIS 14275 (D. Ark., November 29, 1989, Decided)
- Indiana—*Murphy v. Target Products,* 580 N.E.2d 687, 1991 Ind. App. LEXIS 1745 (Ind. Ct. App., October 29, 1991, Filed)
- Iowa—*Meyn v. State*, 594 N.W.2d 31, 1999 Iowa Sup. LEXIS 111 (Iowa, April 28, 1999, Filed)
- Louisiana—*Edwards v. Louisville Ladder Co*., 796 F. Supp. 966, 1992 U.S. Dist. LEXIS 17746 (Da. La., May 18, 1992, Decided)
- Massachusetts—*Fletcher v. Dorchester Mut. Ins. Co. N3*., 437 Mass. 544, 2002 Mass. LEXIS 529 (Mass., August 16, 2002, Decided)
- Mississippi—*Richardson v. Sara Lee Corp*., 847 So.2d 821, 2003 Miss. LEXIS 270 (Miss., June 5, 2003, Decided)
- Nevada—*Timber Tech Engineered Bldg. Prods. V. Home Ins. Co*., 55 P.3d 952, 2002 Nev. LEXIS 80 (Nev., October 18, 2002, Decided)
- New Jersey—*Kolanovic Pak Gida A/S (Turk.)*, 77 F. Supp.2d 595, 1999 U.S. Dist. LEXIS 19861 (D.N.J., December 28, 1999, Decided)
- Pennsylvania—*Olson v. Grutza*, 428 Pa. Super. 378, 1993 Pa. Super. LEXIS 2861 (Pa. Super. Ct. August 31, 1993, Filed)
- Texas—*Austin v. Consolidation Coal Co.,* 256 Va. 78, 1998 Va. LEXIS 83 (Va., June 5, 1998, Decided)
- Virginia—*Bass v. E.I. DuPont de Nemours & Co*., 28 Fed. Appx. 201, 2002 U.S. App. LEXIS 474 (4th Cir., January 10, 2002, Decided)

Federal Obstruction of Justice Statutes

Under the laws of New York, taking possession of the evidence is most likely the best practice for a party to insure its protection against third-party spoliation.

The first obstruction of justice statute was 18 U.S.C. 1503, created in 1831 when Congress enacted a statute forbidding obstruction of justice in general terms, but the first reported cases which applied the destruction of evidence to this statute did not occur until the 1950s. In the "omnibus clause" of 18 U.S.C. 1503, it is stated, "whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished."[31]

Along with 18 U.S.C. 1503, sections 1505, 1512, 1519, and 1529 also concern the obstruction of justice. Section 1505 concerns the obstruction of pending agency and congressional hearings;[32] section 1512 forbids the destruction of evidence by tampering with a witness, victim or informant; section 1519 is a general anti-shredding law; and section 1520 concerns the retention of audit work papers.

The last two statutes, recently created by the Sarbanes-Oxley Act of 2002, were a response to the recent corporate scandals and document destruction, as seen in the case involving Arthur Anderson, LLP and the Enron Corporation.[33] Section 1519 was "enacted to correct the ambiguities and technical limitations found in the interpretations of sections 1503, 1505, and 1512 by federal courts."[34] Section 1519 extends to acts done in contemplation of a federal matter or bankruptcy case and "the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution."[35]

The second statute the Sarbanes-Oxley Act of 2002 created was 18 U.S.C. 1520, which was made to preserve an accountant's audit work papers for five years from the end of the fiscal period in which the audit was concluded.[36]

Today, most companies, firms and partnerships have turned to document retention policies, which should "clearly state the categorization of documents and electronic files, what documents must be preserved, the retention period for each category, the document destruction procedures, and what to do when litigation or an investigation commences."[37]

Conclusion

Currently under New York State law, the courts do not recognize as an independent tort a cause of action for third-party negligent spoliation of evidence and impairment of a claim or defense. However, it has been held that spoliation of evidence by an employer or insurer may support a common law cause of action when such spoliation impairs an employee or insured's right to sue a third-party tortfeasor. From the recent case, *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*,[38] it was shown that in order to assure that a party is going to preserve the piece of evidence at issue, an application should be made to the court. This can be done by an injunction action against the defendant or a motion under 3120(c) for pre-action discovery. Finally, it can be seen, particularly with the newly enacted federal obstruction of justice statutes, that the courts and lawmakers, together, are making a joint effort to respond to the growing need for deterrence of the spoliation of evidence. At least for the time being, it does not appear the New York courts will offer much additional assistance to a litigant who is the victim of third-party spoliation.

It goes without saying that the best way to preserve evidence which is important to your client is to take physical custody of the evidence. The next best approach is to find a way to subject the custodian of the evidence to the Court's jurisdiction and obtain an order which provides for remedies. Finally, if the first two approaches cannot be utilized, a written agreement with the custodian may provide your client with a measure of protection and help to deter potential spoliation.

Endnotes

1. Jay E. Rivlin, *Recognizing an Independent Tort Action will Spoil a Spoliator's Splendor*, 26 Hofstra L. Rev. 1003 (Summer, 1998); Conning the IADC Newsletters, 63 Def. Couns. J. 567, 567 (1996); Black's Law Dictionary, at 1401 (6th ed. 1990).
2. Jay E. Rivlin, *Recognizing an Independent Tort Action will Spoil a Spoliator's Splendor*, 26 Hofstra L. Rev. 1003 (Summer, 1998).
3. *Id.*; *see Townsend v. American Insulated Panel, Co.*, 174 F.R.D. 1, 3 (D. Mass. 1997).
4. 1 N.Y.3d 478, 87 N.E.2d 865, 775 N.Y.S.2d 754.
5. *See Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); Jay E. Rivlin, *Recognizing an Independent Tort Action will Spoil a Spoliator's Splendor*, 26 Hofstra L. Rev. 1003 (Summer, 1998).
6. Jay E. Rivlin, *Recognizing an Independent Tort Action will Spoil a Spoliator's Splendor*, 26 Hofstra L. Rev. 1003 (Summer, 1998).
7. *Id.*
8. 151 Cal. App.3d 491, 198 Cal. Rptr. 829 (Cal. App. 1984).
9. 473 So.2d 1307, 1313 (Fla. Dist. App. 1984).
10. 151 Cal. App.3d 491, 198 Cal. Rptr. 829 (Cal. App. 1984).
11. 718 P.2d 456.
12. 18 Cal. 4th 1, 74 Cal. Rptr.2d 248, 954 P.2d 511 (1998).
13. 20 Cal. 4th 464, 84 Cal. Rptr.2d 852, 976 P.2d 223 (1999).
14. 1999 MT 328, 1999 Mont. LEXIS 345 (Mont., December 22, 1999, Decided).
15. *Oliver v. Stimson Lumber Co.*, 1999 MT 328, 1999 Mont. LEXIS 345 (Mont., December 22, 1999, Decided).
16. *Id.*
17. 98 F. Supp.2d 1334.
18. *Smith v. Atkinson*, 98 F. Supp.2d 1334.
19. 34 P.3d 327, 2001 Alas. LEXIS 150.
20. *Hibbits v. Sides*, 34 P.3d 327; 2001 Alas. LEXIS 150.
21. *Id.*
22. 755 So.2d 721, 1999 Fla. App. LEXIS 12411 (Fla. Dist. Ct. App., September 17, 1999, Opinion Filed).
23. *General Cinema*, 689 So.2d at 279.
24. *See Callahan v. Stanley Works*, 703 A.2d 1014, 1017 (N.J. Super. Ct. Law. Div. 1997).
25. Jonathan Judge, *Reconsidering Spoliation: Common Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 459, (2001); Benjamin T. Clark, *The License to Spoliate Must be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation*, 59 J. Mo. B. 308, (Nov/Dec 2003).
26. *Hulett, et al., v. Niagara Mohawk Power Corporation et al.*, 2002 NY Slip Op. 40402U; 2002 N.Y. Misc. LEXIS 1125.
27. *Fada Industries, Inc. v. Falchi Building Co., L.P.*, 189 Misc. 2d 1, 730 N.Y.S.2d 827 (N.Y. Sup. Ct. 2001); *Hulett, et al., v. Niagara Mohawk Power Corporation et al.*, 2002 NY Slip Op. 40402U; 2002 N.Y. Misc. LEXIS 1125.
28. 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dept. 1998).
29. 189 Misc. 2d 1, 730 N.Y.S.2d 827.
30. *Fada Industries, Inc. v. Falchi Building Co., L.P.*, 189 Misc. 2d 1, 730 N.Y.S.2d 827 (N.Y. Sup. Ct. 2001).
31. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction to Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721 (2003); *see* Edward Brodsky, *Think Before you Shred That Document*, N.J. L.J. July 6, 1998 at 4; *see also United States v. Aguilar*, 515 U.S. 593, 598 (1995) (stating that the omnibus clause serves as a catchall prohibition).
32. 18 U.S.C. 1505 (2002).
33. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction to Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721 (2003).
34. *Id.*
35. 148 Cong. Rec. S7418 (daily ed. July 25, 2002) (statement of Sen. Leahy).
36. Sarbanes-Oxley Act 802.
37. *See* Robert M. Barker et al., Document Retention, Internal Auditor, Dec. 1, 1996, at 48; Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction to Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721 (2003).
38. 1 N.Y.3d 478 (2004).

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The Erosion of the "No Prejudice" for Late Notice Rule in New York

By Alan J. Pierce

I. The Policyholder's Obligations to Give Timely Notice of Claim and to Forward Suit Papers

Other than to "cooperate" with the insurer, a policyholder has two primary obligations under any liability insurance policy:

1. to provide "timely notice" of an accident or occurrence to the insurer ("notice of claim"); and
2. to "forward immediately" to the insurer the Summons and Complaint in any action against the policyholder ("notice of suit").

Most cases in New York either concern the policyholder's purported failure to give timely notice of claim (accident/occurrence), rather than notice of suit, or simply use the terms somewhat interchangeably.

A **typical notice of claim** (accident or occurrence) provision in an "occurrence-based" CGL policy reads as follows:

> In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents **as soon as practicable**.

A standard CGL policy typically contains the following **notice of suit** provision:

> If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Ostrager and Newman, Insurance Coverage Disputes § 4.02[b] at 119 [12th ed.]

In addition, a typical Homeowners' Policy also requires prompt notice of a "loss" under the policy. Although most "no prejudice" cases have not arisen in the context of first-party policies, there is no reason that the principles discussed herein would not apply to notice requirements in any insurance policy.

II. The Judicial Adoption of New York's "No Prejudice" Rule

For years it was settled law in New York that an insurer need not show prejudice to be relieved of the obligation to provide coverage when it received late notice of claim (occurrence or accident) from a policyholder; an irrebuttable presumption of prejudice arose. *See Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 340 (1972); *see also White v. State of New York*, 81 N.Y.2d 955 (1993); *Whiteside v. North Am. Acc. Ins. Co. of Chicago*, 200 N.Y. 320 (1911) (insured's failure to provide timely notice was not excused, even though the insured's illness left him delirious and unable to remember that he had a policy and where the policy permitted another to file the requisite notice); *Matthews v. American Cent. Ins. Co.*, 154 N.Y. 449 (1897).

In this regard, New York has been known far and wide as the "no prejudice" state. Thus, under almost all insurance policies governed by New York law, an insured's failure to furnish timely notice of a claim (occurrence or accident) or a suit vitiates an insurance contract, and the insurer may rely on this defense regardless of whether it can demonstrate that the insured's failure operated to its prejudice.

The Court of Appeals has acknowledged that **New York's "no prejudice" rule is a judicially created** "limited exception to two established rules of contract law: (1) that ordinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice * * *; and (2) that a contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition * * *." *Unigard Security Ins. Co., Inc. v. North River Ins. Co.*, 79 N.Y.2d 576, 581 (1992) (numerous citations omitted).

There have been a number of reasons expressed by various New York courts to justify the "no prejudice" rule as it applies to **primary insurers**. For instance, in 1972 the Court of Appeals held that "the insurer must have an opportunity to protect itself." *Security Mutual, supra*, 31 N.Y.2d at 440. In 1986 the First Department held that without timely notice "an insurer may be deprived of the opportunity to investigate a claim and is rendered vulnerable to fraud," and that late "notifica-

tion may prevent the insurer from providing a sufficient reserve fund." *Power Auth. v. Westinghouse Elec. Corp.*, 117 A.D.2d 336, 339 (1st Dep't 1986).

III. Reinsurance Carriers and Excess Insurers—Split Decisions on Changing New York's No Prejudice Rule in the 1990s

The first significant erosion of New York's no prejudice rule came in the 1992 decision of the Court of Appeals in *Unigard Security Ins. Co., Inc. v. North River Ins. Co.*, 79 N.Y.2d 576, 581 (1992), where the Court held that the "no prejudice" rule does not apply to a failure to comply with the prompt notice requirement in a contract of reinsurance. The notice provision in question provided:

> Prompt notice shall be given by the company to the Underwriting Managers on behalf of the Reinsurers of any occurrence or accident which appears likely to involve this reinsurance and while the Underwriting Managers or the Reinsurers do not undertake to investigate or defend claims or suits, the Underwriting Managers directly, or through its representatives and/or counsel, shall nevertheless have the right and be given the opportunity to associate with the Company and its representatives at the Reinsurers' expense in the defense and control of any claim, suit or proceeding which may involve this reinsurance with the full cooperation of the Company.

Id. at 579–580.

The Court reviewed the rationales for New York's no prejudice rule—that an insurer must "have an opportunity to protect itself" and that without timely notice the insurer might lose its opportunity to properly investigate a claim, provide a sufficient reserve fund, or exercise other early control over the claim—and found that these reasons did not apply to a reinsurer who is not responsible for providing a defense, investigating the claim or attempting to get control of the claim in order to affect an early settlement. *Id*. at 581–583. Moreover, the Court noted that "the interests of a reinsurer and the ceding primary insurer with respect to a pending claim are generally identical" insofar as "the interests of both parties are furthered through the primary insurer's efficient investigation and defense of the claim and through the resolution of the claim on the best terms possible * * *." *Id*. at 583. The Court wrote that in contrast "the interests of a primary insurer and its insured may often be adverse. There may be disputes over cooperation or coverage or over claimed collusion on the part of the insured. These factors make prompt notice of the claim and expeditious processing and control of it a matter of vital concern to the primary insurer. Such considerations have greatly diminished application to the reinsurer." *Id*.

In conclusion, the Court stated:

> This is not to suggest that a reinsurer may never assert late notice as a ground for avoiding its obligations under a reinsurance contract. All we hold here is that the reinsurer must demonstrate how it was prejudicial and may not rely on the presumption of prejudice that applies in the late notice disputes between primary insurers and their insureds.

Id. at 584.

The first application and extension of *Unigard* came less than a year later in *Crum & Forster Organization v. Morgan*, 192 A.D.2d 652, 654 (2d Dep't 1993). In *Morgan* the Second Department refused to apply New York's "no prejudice" rule to a dispute between two primary insurers contributing pro rata to uninsured motorist coverage for an insured where one insurer sought contribution from the other. Given that the two primary carriers' interests with respect to the insured's uninsured motorist claim were "essentially identical," the Court found that the insurer claiming untimely notice had to establish prejudice.

Then, in 1996 in *American Home Assur. Co. v. International. Ins. Co.*, 219 A.D.2d 143, 144 (1st Dep't 1996), the Appellate Division, First Department continued the trend away from New York's "no prejudice" rule with respect to timely notice so long as the insurance company claiming untimely notice was not a primary insurer. The court held that an **excess insurer** must allege and demonstrate **prejudice** when asserting **late notice of claim or occurrence** as a defense against the **claim by a co-excess insurer** suing for contribution.

The Appellate Division found that the present co-excess insurer situation was "functionally more akin to that of a reinsurer and significantly different from that of a primary insurance carrier" such that the requirement to plead and prove prejudice in the reinsurance context—recently adopted by the Court of Appeals in *Unigard*—should be applied here rather than New York's long-standing "no prejudice" rule applicable to primary insurance carriers. *Id*. at 144–145. The court found that an excess insurer like International is in the same position as the reinsurer in *Unigard* insofar as neither was responsible for providing a defense, investigating the claim, or attempting to settle the action. Moreover, the court noted that requiring an excess

insurer to prove prejudice is "a fair burden which applies to any party seeking to escape performance under a contract." *Id*. at 148–151.

The following year, however, the Court of Appeals reversed the First Department in *American Home* and held that excess insurers can assert the defense of late notice without showing prejudice. 90 N.Y.2d 433 (1977). According to the Court, in *American Home* it was called upon to decide "whether the analysis in *Unigard* should be applied to a breach of the prompt notice clause in a policy providing excess liability coverage." *Id.* at 437. The Court specifically held that the limited "prejudice" rule recently adopted by the Court with respect to reinsurers in *Unigard* is inapplicable to excess insurers. *Id.*

The Court of Appeals explained that in *Unigard* it "took a close look at the jurisprudential policies underlying the *Security Mutual* rule and concluded that there was no sound reason to apply it to notice disputes in the reinsurance industry" for two reasons: (1) reinsurers, unlike primary insurers, are not responsible for providing a defense, investigating a claim or acquiring control of the claim in order to effect an early settlement; and (2) the interest of a reinsurer and the ceding primary insurer with respect to a pending claim are generally identical and the "follow-the-fortunes" clause in most reinsurance agreements leaves reinsurers with little room to dispute the reinsured's conduct of the case. *Id*. at 441.

The Court held that the Appellate Division overlooked "the important function of prompt notice in furnishing even an excess carrier with an opportunity to participate in settlement discussions at a time when its input is most likely to be meaningful. *Id.* at 442. For example, a typical excess policy notice clause reads as follows:

> Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered [by the policy] involves injuries or damages which, in the event that the Insured should be held liable, are likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided however, that failure to notify the Company of any occurrence which at the time of its happening did not appear to give rise to claims hereunder, shall not prejudice such claims.

Ostrager and Newman, Insurance Coverage Disputes § 4.02[b] at 121.

The Court noted that even if the defendants had not undertaken an independent investigation, they would likely have insisted on some role in the settlement negotiations. *Id.* at 442. Moreover, the Court wrote that "the Appellate Division's emphasis on what it believed 'common sense' and 'prudence' would dictate represents an impermissible substitution of the court's judgment for that of the excess insurer, which—unlike the reinsurer in *Unigard*—had a bargained-for contractual right to decide for itself whether and how extensively to investigate." *Id.* Thus, according to the Court of Appeals, the Appellate Division's focus on the "practical similarities" between excess insurers and reinsurers lead that court to overlook important differences in contractual rights of reinsurers and excess insurers. *Id.*

Taking contractual rights and obligations into consideration, the Court wrote:

> it is apparent that excess insurers have little in common with reinsurers and, in fact, have the same interest that lead us to conclude in [*Security Mutual*] that prompt notice to primary insurers is a condition precedent to coverage. Apart from the fact that their coverage does not immediately attach after an occurrence but rather attaches only after the primary coverage for the occurrence is exhausted * * *, excess insurers have most of the rights and obligations of primary insurers.

Id. The Court noted that excess insurers have the right to investigate claims and participate in settlement negotiations. *Id.* The Court further held:

> Critically, excess policies do not contain the "follow the fortunes" clauses that typify reinsurance contracts and leave reinsurers "little room to dispute the reinsured's conduct of the case". * * * Thus, their interests may differ substantially from all those of the primary insurer or other excess carriers. Accordingly, all of the salient factors point to the conclusion that excess carriers have the same vital interest in prompt notice as do primary insurers and that the *Security Mutual* rules should be applicable.

Id. at 443.

The Court of Appeals' decision in *American Home* was a blow to policyholders who had hoped that *Unigard* would provide a true foothold for dismantling New York's "no prejudice" rule, which is followed in only a small minority of jurisdictions throughout the country.

IV. *In re Brandon*—A Breakthrough Event in New York?

In *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491 (2002), the Court of Appeals, in an opinion by Chief Judge Kaye, rejected an auto insurer's argument that the failure of its policyholder seeking to recover Supplementary Uninsured Motorists (SUM) benefits to timely submit a summons and complaint—**notice of suit**—vitiated the policy without the insurer demonstrating that it had been prejudiced by the delay. **Although it had been 10 years since the *Unigard* decision, the Court of Appeals once again rejected the "no prejudice" rule in favor of one requiring the insurer—this time a primary insurer—to prove it had been prejudiced by the policyholder's alleged late notice, albeit it late notice of suit rather than notice of claim.**

The Court determined that the factors that supported the "no prejudice" rule when an insured fails to furnish timely notice of a claim did not apply when an insured provides late notice of suit. The Court conceded that immediate notice of legal action may indeed help SUM insurers protect themselves against fraud, set reserves, and monitor and perhaps settle the tort action, but it stated that the notice of claim requirement also serves this purpose. *Id*. at 497.

It concluded by noting that "unlike most notices of claim—which must be submitted promptly after the accident, while an insurance carrier's investigation has the greatest potential to curb fraud—notices of legal action become due at a moment that cannot be fixed relative to any other key event, such as the injury, the discovery of the tortfeasor's insurance limits, or the resolution of the underlying tort claim." *Id*. at 498. The Court also concluded that "[u]nder these circumstances, and given the protection SUM insurers already enjoy by virtue of the notice of claim requirement and the clauses governing settlement, insurers relying on the late notice of legal action defense should be required to demonstrate prejudice." *Id*.

Although the Court continued to **distinguish between timely notice of claim and notice of suit**, it remains to be seen whether the adoption of a prejudice rule for late notice of suit for disclaiming coverage under SUM policies will lead to the adoption of a prejudice rule in other contexts. Indeed, in a footnote that has all coverage practitioners talking, the Court wrote:

> New York is one of a minority of states that still maintain a no-prejudice exception (*see* Ostrager and Newman, Insurance Coverage Disputes § 4.04 [11th ed.]). Formerly a majority of states took this approach, but, as the Supreme Court of Tennessee noted when it recently adopted a prejudice requirement in a case involving a **late notice of claim** for uninsured motorist coverage, "the number of jurisdictions that still follow the traditional view has dwindled dramatically" (*Alcazar v. Hayes*, 982 S.W.2d 845, 850 [Tenn. 1998]). Indeed, that court noted that in the preceding 20 years, only two states—New York and Colorado—had "considered the issue" and "continued to strictly adhere to the traditional approach" (*id*. at 853). Since then, Colorado adopted the majority rule, requiring insurers to demonstrate prejudice (*see Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 230 [Colo. 2001]).
>
> As *Clementi* and *Alcazar* illustrate, states often begin the shift to a prejudice requirement in the uninsured motorist context, where various policy considerations—the adhesive nature of insurance contracts, the public policy objective of compensating tort victims, and the inequity of the insurer receiving a windfall due to a technicality—are clearly implicated (*see Clementi*, 16 P.3d at 229). **The issue of whether New York should continue to maintain the no-prejudice exception when insurers assert late notice of claim as a defense is not before us.**

Id. at 496, fn. 3 (emphasis supplied).

V. Other Jurisdictions Have Long Ago Rejected the No Prejudice Rule

As demonstrated in the now famous *Brandon* footnote, all other jurisdictions in the United States have, in one form or another, rejected (or cast great doubt on the continued strength of) the once traditional, but now abandoned—except perhaps for notice of claim in New York—"no prejudice" rule for late notice by the policyholder. And this is not a recent development in most jurisdictions. In the 1960s and 1970s a majority of jurisdictions overruled the no prejudice exception in favor of a "prejudice" rule and either required the insurer to prove it was prejudiced or, in some instances, placed the burden of proving that the insurer was not prejudiced on the policyholder. *See* Ostrager & Newman, Insurance Coverage Disputes, §4.02[c] at 144–149; *id*. § 4.04 at 170–197 (Table of Cases by jurisdiction on whether prejudice is necessary and who has the burden of proof).

VI. Post-*Brandon* Decisions in New York

We originally did not think we would have to wait long for another decision from the Court of Appeals on the continuing viability or erosion of the no prejudice rule in New York. *Brandon* was decided by the Court in April 2002 and only 7 months later the Second Circuit Court of Appeals certified to the New York Court of Appeals the question whether New York requires an insurer to demonstrate prejudice to disclaim coverage based on the insured's failure to timely provide notice of suit under a professional liability (legal malpractice) policy. *See Mark A. Varrichio & Assocs. v. Chicago Ins. Co.*, 312 F.3d 544 (2d Cir. 2002), *certified question accepted* 99 N.Y.2d 545 (2002), *certified question withdrawn* 328 F.3d 50 (2d Cir. 2003) *and* 100 N.Y.2d 527 (2003). Unfortunately, the much anticipated sequel to *Brandon* did not occur. Although the Court of Appeals accepted the certified question by the Second Circuit, after the case was briefed, but before oral argument occurred, the parties entered into a settlement of the lawsuit and the Second Circuit withdrew its certification of the question accepted by the Court of Appeals. As a result, the Court of Appeals marked the certified question withdrawn and never heard oral argument or rendered a decision in the case.

Since its determination on April 30, 2002, lower courts immediately began culling the language from *Brandon*. In August 2002, the Appellate Division, Second Department cited to *Brandon's* requirement that the SUM insurer prove prejudice in order to disclaim SUM coverage due to late notice of commencement of litigation. *State Farm Mut. Auto. Ins. Co. v. Sparacio*, 297 A.D.2d 284 (2d Dep't 2002). In 2003, the Appellate Division, First Department reiterated that, "[a]n insured's late notice to the insurer of the pendency of a legal action against the tortfeasor does not vitiate SUM coverage absent a demonstration that the insurer has been prejudiced by the delay." *Banks v. American Manufacturers Mut. Ins. Co.*, 306 A.D.2d 120, 122 (1st Dep't 2003).

Without a doubt, however, the biggest and most significant post-*Brandon* decision is that of the Supreme Court, and now Appellate Division, First Department Justice James Catterson in *St. Charles Hosp. & Rehab. Center v. Royal Globe Ins. Co.*, ___ Misc. 2d ___ (Sup. Ct., Suffolk Co. 2004). In a strongly worded Decision dated April 28, 2004, Justice Catterson ordered Royal, a primary liability insurer, to **indemnify** its insured, St. Charles Hospital, despite a nine-month delay in giving **notice of claim and suit**, clearly suggesting that the time has come for New York to eliminate the "no prejudice" exception regardless of the type of insurer.

The facts were largely undisputed. This declaratory judgment action was commenced by St. Charles Hospital against Royal for a defense and indemnification of an underlying medical malpractice action involving a claim for malpractice in the delivery and post-delivery care of then-21-year-old Tara Mulholland, who was born on March 16, 1975. In June 1994 the Medical Records Department of St. Charles received a letter from the law firm of Black & Black requesting Tara's medical records. Three months later the Medical Records Department received a letter from a different law firm requesting the obstetrical records of Tara's mother. On March 7, 1996 Tara's grandparents and legal guardians commenced the underlying medical malpractice action on her behalf against St. Charles and three doctors employed by the Hospital. At the time of commencement of the malpractice action, neither the Diocese of Rockville Centre, nor St. Charles were insured by Royal; they were self-insured. At the time of Tara's birth, however, St. Charles was named as an additional insured on a $500,000 primary policy and on a $12 million excess policy sold by Royal to the Catholic Diocese. The Risk Department Manager for St. Charles forwarded the Summons and Complaint to the Hospital's attorney, who wrote to Royal about the underlying lawsuit on January 15, 1997, nine months after it had been commenced. The attorney wrote in his letter that "It wasn't until we forwarded a bill to St. Charles that we were advised that Royal should be paying the bill." On March 10, 1997 Royal disclaimed coverage "on the grounds that Royal did not receive notice [. . .] until January 16, 1997, nine months after a lawsuit had been filed." Slip op. at 4.

The underlying malpractice action was settled for $4.3 million before the court in March 2004. St. Charles moved for summary judgment on the grounds that Royal's disclaimer was improper because New York required that Royal must show prejudice and that as a matter of law Royal cannot show prejudice. In the alternative, St. Charles argued that it had a reasonable excuse for the delay in giving notice and that there was a triable issue of fact on the reasonableness of its excuse. Royal cross-moved for summary judgment on the ground that St. Charles did not comply with the notice of claim provision and that Royal properly disclaimed coverage because it was not required to show prejudice and that St. Charles' claim of a reasonable excuse was a "fantasy." *Id.* Justice Catterson held that "Royal was required to demonstrate prejudice" and that "Royal, as a matter of law, cannot show prejudice." *Id.* The court began by acknowledging New York's stance as one of two states maintaining a "no prejudice" standard in insurance law, but observed, after citing and discussing *Brandon*, that "the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected." *Id.* at 5. Royal maintained that the *Brandon* Court did not disturb the traditional "no prejudice" exception as it

applies to primary insurers. The court's response was emphatic:

> Royal has failed to recognize the turning of the tide. Indeed, this Court finds Royal's reasoning oddly oblivious to the demonstrable aversion with which the Court of Appeals has scrutinized the "no-prejudice" rule which allows insurers to "avoid their obligations to premium-paying clients."

Id. Justice Catterson then discussed and analyzed the recent decisions in Tennessee and Colorado to reject the no prejudice rule, which were cited in *Brandon*, as well as the Court of Appeals' prior decision in *Unigard*. In discussing *Unigard*, Justice Catterson noted that "New York's Court of Appeals has not newly arrived at this juncture," clearly referring to rejection of the no prejudice rule. *Id.* at 6.

The court then considered the circumstances of this case and found "that no sound reasons exist for extending the 'no-prejudice' exception to a situation where notice of legal action served also as notice of claim, and where an investigation of the underlying claim could not have been launched any sooner than twenty-one years after the occurrence." *Id.* at 7. Quite simply, Justice Catterson found that since the earliest date that St. Charles could have provided notice of claim or suit to Royal was March 1996 and this was twenty-one years after the occurrence, Royal had already lost the opportunity to investigate the claim or negotiate a settlement on a timely basis through no fault of its insured. Therefore, the rationales for the no prejudice rule simply did not apply. In so holding, the court rejected Royal's argument that the 1994 requests for medical records should have prompted St. Charles to notify Royal of a potential claim. *Id.* at 7.

Not surprisingly, Royal has reportedly appealed Justice Catterson's Order.

Finally, while it clearly appears that New York's once immovable "no prejudice" rule is eroding, and that the Court of Appeals is apparently again leading the way, perhaps we should not be absolutely sure of that. Take, for example, the Court of Appeals' decision in *American Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71, 2004 WL 1472632 (2004), which addresses a unique timely notice of suit statute. This case involved a motor vehicle accident between a taxicab and a motor vehicle, implicating Vehicle & Traffic § 370(4), a statute which requires a taxi owner and operator to provide written notice to its insurer within 5 days of an accident or face a misdemeanor. Interestingly, the injured party, Sartor, notified the insurer of the accident three months after it occurred and requested policy and adjuster information. American Transit never responded to Sartor's notice and request and no one ever notified it that he commenced an action against the insureds. The issue in the case was whether the statute obligated American Transit to satisfy a default judgment later entered against the insureds. 2004 WL 1472632 at *1.

In reaching its conclusion, the Court reiterated the standard, well-settled principles of insurance law. "Distinct from notice of an accident, an insurer may also demand that it receive timely notice of a claimant's commencement of litigation." *Id.* at *2. Reviewing the language of the policy, the Court found that the insurer's receipt of notice is a condition precedent to its liability. Citing *Brandon* and *Unigard*, the Court asserted, "[t]he failure to satisfy this requirement may allow an insurer to disclaim its duty to provide coverage. *Id*. Although the Court did not specifically mention "prejudice," the Court's citation to only *Brandon* and *Unigard* clearly suggests that their "prejudice" standard is applicable here. Moreover, substantial prejudice can be inferred from the fact that no one ever notified the insurer of the suit and the default judgment that was subsequently taken, although American Transit was aware of the motor vehicle accident and never responded to the notice and request from Sartor's attorney. If the Court applied a prejudice standard, it must have found it present because the Court held that American Transit "properly disclaimed coverage of the default judgment on the ground that it did not receive notice of the federal litigation." *Id.* at *4.

Finally, for a good, albeit abbreviated, discussion of the legal and public policy pros and cons of abolishing New York's "no prejudice" rule after *Unigard* and before the Court of Appeals ruled in *American Home*, *see* Alan J. Pierce (*Yes: New York Should Adopt Majority Position*) and Evan H. Krinick (*No: Public Policy Considerations Are Paramount*), *Should 'No Prejudice' Rule be Abolished?*, N.Y.L.J., Jan. 13, 1997.

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The "No-Prejudice" Rule Survives, Somewhat

By Nelson E. Timken

For years the rule in New York had been that when a contract of primary insurance, as a condition precedent to coverage, requires that "in case of an accident or occurrence, the insured shall . . . give written notice to us or our agent as soon as it is practical," the absence of timely notice of that occurrence, as a matter of law, vitiates the contract and absolves the carrier of its obligations thereunder.[1]

The rule owes its origins to an exception to traditional contract-law precepts that the breach of a condition by one party does not excuse performance by the other party unless the breach causes actual prejudice, and that a contractual duty requiring strict compliance ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition.[2] In *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*,[3] however, the Court of Appeals held that a "limited exception" to this general rule exists for breaches of notice provisions in insurance contracts.[4] The theory behind the rule requiring strict compliance with the notice provision is that it protects the carrier from fraud or collusion, gives the carrier an opportunity to investigate claims while evidence is still fresh, allows the carrier to make an early appraisal of the insured's prospective exposure and to set its reserves accordingly, and provides an opportunity for the carrier to make an early assessment of the claim, thereby facilitating the potential for settlements.[5] Thus, in cases where the timely notice provision is breached, no showing of prejudice is required, hence the genesis of the moniker, the "no-prejudice" rule.[6]

By way of background, an exception to this rule exists insofar as the insured's delay or failure to give timely notice may be excused where the insured had a reasonable belief that it would not be liable for the accident.[7] At issue with regard to this exception is not whether an insured believes that he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him.[8] It is generally held that questions as to whether there exists a good-faith belief that an injured party will not seek to hold the insured liable and whether the belief is reasonable under the circumstances are questions of fact reserved for the fact finder.

With regard to the issue of a delay in providing notice where required, the insured bears the burden of proving that his delay in reporting the incident to the defendant was excusable.[9] While "a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice," the insured bears the burden of demonstrating that the delay in giving notice was reasonable under the circumstances.[10]

Courts have held that such notice must be provided within a reasonable time in view of all of the facts and circumstances of the case, including the reasonable possibility of the policy's involvement; and that it is the insured who bears the burden of demonstrating the reasonableness of the delay. Precisely how long constitutes a reasonable time has been the subject of numerous appellate decisions.[11]

Conversely, an insurer must give timely notice of a disclaimer "as soon as is reasonably possible" after it first learns of the accident or the ground for the disclaimer of liability.[12] It is the insurer's burden to explain the delay in notifying the insured of its disclaimer; and the reasonableness of the delay must be determined from the time the insurer was aware of facts sufficient to disclaim.[13]

Decisions such as the one issued by the First Department in *Great Canal Realty Corp. v. Seneca Ins. Co.*,[14] and the Court of Appeals in *Brandon v. Nationwide Mut. Ins. Co.*,[15] created some conjecture that New York would soon abandon the "no-prejudice" rule, as have a majority of states, and would instead require insurance companies to demonstrate actual prejudice emanating from the failure of an insured to comply with the timely notice conditions of their policies. Support for this notion is best demonstrated by the concurring opinion of Justice James Catterson in *Great Canal Realty Corp*, in which he wrote:

> Ultimately, we see no reason to extend the "no-prejudice" exception to allow insurers to disclaim coverage on the basis of late notice of claim where "lateness" is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer. In any event, in jurisdictions which have struck down the no-prejudice exception the insurer may still prevail by demonstrating it was prejudiced by the late notice.[16]

In *Brandon v. Nationwide Mut. Ins. Co.*,[17] the Court of Appeals declined to hold that an insurer need not demonstrate prejudice to rely on the defense that the insured forfeited SUM coverage by failing to timely submit the tort action summons and complaint. Since the insurer already enjoyed the protection of a notice of claim requirement and contractual clauses governing set-

tlement, the court held that, when relying upon the late-notice-of-legal-action defense, an insurer must be required to demonstrate prejudice.[18]

In two decisions issued by the Court of Appeals on April 5, 2005, New York's highest court laid to rest any speculation that the "no-prejudice" rule would no longer be followed in New York within the context of coverage under primary liability insurance policies, while holding that, in a Supplemental Uninsured/Underinsured Motorists (SUM) context, where an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of the SUM claim before it may properly disclaim coverage.[19]

In *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*,[20] the Court of Appeals held that an SUM carrier that receives timely notice of a claim must show prejudice before disclaiming SUM benefits based on late notice of a legal action, even where the plaintiff does not submit her notice of SUM claim as soon as practicable. This holding follows logically from the court's pronouncement in *Brandon*,[21] in which the Court of Appeals held that a SUM carrier that received timely notice of a claim must show prejudice before disclaiming SUM benefits based on late notice of a legal action.

Notwithstanding the fact that it found that plaintiff's notice of her SUM claim—which was filed six months after she was informed that the defendant's insurance was insufficient to provide full compensation for her injuries—was untimely, the Court of Appeals in *Rekemeyer* held that:

> The facts of the current case, while different from Brandon, also warrant a showing of prejudice by the carrier. Here, plaintiff gave timely notice of the accident and made a claim for no-fault benefits soon thereafter. That notice was sufficient to promote the valid policy objective of curbing fraud or collusion. Moreover, the record indicates that State Farm undertook an investigation of the accident. It also required plaintiff to undergo medical exams in December 1998 and February 2000. Under these circumstances, application of a rule that contravenes general contract principles is not justified. Absent a showing of prejudice, State Farm should not be entitled to a windfall (Brandon, 97 N.Y.2d at 496 n 3, citing Clementi v Nationwide Mut. Ins. Co., 16 P.3d 223, 230 [Colo 2001]). Additionally, State Farm should bear the burden of establishing prejudice "because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative" (id. at 498; see also Unigard, 79 N.Y.2d at 584 [placing the burden of showing prejudice on the reinsurer]). Thus, we hold that where an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage.

By contrast, in *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*,[22] on January 2, 1997, the claimant, a tenant of the plaintiff's, slipped and fell on ice on the sidewalk adjacent to plaintiff's premises. On February 23, 2000, the claimant brought suit for personal injuries against plaintiff Argo by serving a summons and complaint on the New York Secretary of State, receipt of which was acknowledged by plaintiff. On November 10, 2000, plaintiff was served with a default judgment. On February 13, 2001, plaintiff received a notice of entry of the default judgment and of the scheduling of a hearing on that judgment. On February 21, 2001, plaintiff received service of a note of issue for trial readiness. Plaintiff first notified its commercial liability insurance carrier on May 2, 2001. On June 4, 2001, the insurer disclaimed coverage because of the late notice of the lawsuit and occurrence, which was a condition precedent to coverage under the insurance policy. Thus, plaintiff did not notify defendant of claimant's suit until 14 months after service of the complaint upon the Secretary of State as their agent, until 6 months after service of the default motion upon plaintiffs, until more than 3 months after default was entered, and until almost 3 months after service of the Note of Issue upon plaintiffs.

On these facts, the Court of Appeals in *Argo* held:

> Brandon did not abrogate the no-prejudice rule and should not be extended to cases where the carrier received unreasonably late notice of a claim. The facts here, where no notice of claim was filed and the first notice filed was a notice of law suit, are distinguishable from Brandon where a timely notice of claim was filed, followed by a late notice of law suit, and distinguishable from Rekemeyer, where an insured gave timely notice of the accident, but late notice of a SUM claim. . . . The rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy. A liability insurer, which has a duty to indemnify and often also to

> defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no prejudice rule. Argo's delay was unreasonable as a matter of law and thus, its failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of law suit.[23]

The recent Court of Appeals pronouncements in this area underscore the fact that the "no-prejudice" rule, while extant, will be treated as an elastic standard which will be applied only in cases where it serves to promote the longstanding policy goals of protecting the insurance carrier against fraud or collusion, allowing the carrier to investigate early, establish proper reserves, and exert early control over the claims process with an eye towards settlement. Thus, in cases in which the carrier had prior notice of the occurrence or claim before the action was commenced, such as in the SUM context, the "no-prejudice" rule does not serve this purpose, and will likely not be applied, requiring the carrier to establish actual prejudice. While New York's highest court has yet to address the issue, it would appear to logically follow that actual notice to the insurer by a third party, particularly the claimant, or other potential third-party beneficiary of the policy of insurance, of the event, occurrence or claim would also justify a departure from the "no-prejudice" rule, since the aforementioned policy goals would have been satisfied by such notice. While not fully abrogated, it is this author's opinion that the "no-prejudice" rule has been pruned by the Court of Appeals, using a common-sense approach, to avoid a windfall to insurers who have acquired notice of the underlying claim.

Endnotes

1. *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp*., 31 N.Y.2d 436, 440–443 (1972); *Brandon v. Nationwide Mut. Ins. Co*., 97 N.Y.2d 491, 496 (2002); *Am. Transit Ins. Co. v. Sartor,* 3 N.Y.3d 71 (2004).
2. *See Restoration Realty Corp. v. Robero*, 58 N.Y.2d 1089, 1091 (1983); *American Home Assur. Co. v. International Ins. Co.*, 90 N.Y.2d 433, 440 (1997).
3. *See Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., supra* note 1 at 440–443.
4. *See Unigard Sec. Ins. Co. v. North River Ins. Co*., 79 N.Y.2d 576, 581 (1992).
5. *Id.* at 582 (1992).
6. *Id.*
7. *See Paramount Insurance Co. v. Rosedale Gardens, Inc*., 293 A.D.2d 235, 239 (1st Dep't 2002), *citing Forest Ave. Corp. v. Aetna Casualty & Surety Co*., 37 A.D.2d 11, 12 (1st Dep't 1971), *aff'd*, 30 N.Y.2d 726 (1972).
8. *See SSBSS Realty v. Public Service Mutual Insurance Co*., 253 A.D.2d 583, 584 (1st Dep't 1998), *citing White v. New York*, 81 N.Y.2d 955, 957 (1993).
9. *See Winstead v. Uniondale Union Free Sch. Dist.*, 201 A.D.2d 721 (2d Dep't 1994); *White v. City of New York*, 81 N.Y.2d 955, 957 (1993); *Security Mutual Insurance Co. of N.Y. v. Acker-Fitzsimons Corp., supra* note 1; *Eveready Insurance Co. v. Levine*, 145 A.D.2d 526 (2d Dep't 1988).
10. *See Security Mutual Insurance Co. v. Acker-Fitzsimons Corp., supra* note 1 at 441; *Vradenburg v. Prudential Prop. & Cas. Insurance Co*., 212 A.D.2d 913 (2d Dep't 1995); *Winstead v. Uniondale Union Free School District, supra* note 9.
11. *See generally Metropolitan New York Coordinating Council on Jewish Poverty v. National Union Insurance Co*., 222 A.D.2d 420 (2d Dep't 1995); *Interboro Mutual Indemnity Insurance Co. v. Fatsis*, 279 A.D.2d 450 (2d Dep't 2001); *Paramount Insurance Co. v. Rosedale Gardens, Inc*., 293 A.D.2d 235 (1st Dep't 2002) (unexplained 7-1/2 month delay); *Zadrima v. PSM Insurance Co.*, 208 A.D.2d 529 (2d Dep't 1994) (lack of reasonable excuse for delay of 4 months vitiates coverage); *see also Winstead v. Uniondale Union Free School District, supra* note 9 (unexplained 4-month delay); *Khan v. Convention Overlook, Inc*., 253 A.D.2d 737 (2d Dep't 1998) (unexplained year and 4 month delay); *Sayed v. Macari*, 296 A.D.2d 396 (2d Dep't 2002) (almost 3-month delay unreasonable); *1700 Assocs. v. Public Service Mutual Insurance Co.*, 256 A.D.2d 456 (2d Dep't 1998) (over 6-month delay unreasonable); *Interboro Mutual Indemnity Insurance Co. v. Mendez*, 253 A.D.2d 790 (2d Dep't 1998) (delay of over one year unreasonable); *Travelers Indemnity Co. v. Worthy*, 281 A.D.2d 411 (2d Dep't 2001) (one-year and three-month delay unreasonable).
12. *See* Insurance Law § 3420(d); *Pawley Interior Contr., Inc. v. Harleysville Ins. Cos*., 11 A.D.3d 595 (2d Dep't 2004); *Moore v. Ewing*, 9 A.D.3d 484 (2d Dep't 2004); *Halali v. Evanston Ins. Co.*, 8 A.D.3d 431 (2d Dep't 2004); *79th Realty Co. v. Wausau Ins. Cos*., 7 A.D.3d 507 (2d Dep't 2004); *Hartford Ins. Co. v County of Nassau*, 46 N.Y.2d 1028 (1979); *see also Mount Vernon Hous. Auth. v Public Serv. Mut. Ins. Co*., 267 A.D.2d 285 (2d Dep't 1999).
13. *See Mount Vernon Hous. Auth. v Public Serv. Mut. Ins. Co., supra* note 12; *Ward v Corbally, Gartland and Rappleyea*, 207 A.D.2d 342 (2d Dep't 1994).
14. 13 A.D.3d 227 (1st Dep't 2004), *leave granted*, 2005 N.Y. App. Div. LEXIS 1509 (1st Dep't 2005).
15. 97 N.Y.2d 491, 493 (N.Y., 2002).
16. *Great Canal Realty Corp. v. Seneca Ins. Co., supra* note 14 at 235–236 (1st Dep't 2004).
17. 97 N.Y.2d 491, 493 (2002).
18. *Id.* at 491.
19. *Argo Corp. v. Greater N.Y. Mut. Ins. Co*., 2005 N.Y. Slip Op. 02572, 2005 N.Y. LEXIS 770 (April 5, 2005); *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 2005 N.Y. Slip Op. 02573, 2005 N.Y. LEXIS 771 (April 5, 2005).
20. 2005 N.Y. Slip Op. 02573, 2005 N.Y. LEXIS 771 (April 5, 2005); *see* note 19.
21. 97 N.Y.2d 491, 494–95, 498, 769 N.E.2d 810, 743 N.Y.S.2d 53 (2002).
22. 2005 N.Y. Slip Op. 02572, 2005 N.Y. LEXIS 770 (April 5, 2005).
23. *Id.*

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A Note on the Workers' Compensation Law

By Andrew J. Schatkin

The Workers' Compensation Law[1] is a statutory method and mechanism whereby every employer must provide for the payment of the benefits to its employees for injury or death either through the purchase of a Workers' Compensation Insurance Policy, authorized to provide such coverage by the New York Superintendent of Insurance[2]; purchase a policy from the State Insurance Fund[3]; or offer to self-insure its liability to pay benefits upon proof of financial security and ability to pay benefits when an injury occurs with the permission of the Chair of the Workers' Compensation Board.

"How far . . . may an employee deviate from his 'normal and regular duties,' incur an injury, and still be covered by Workers' Compensation?"

The statutory mechanism is operative, regardless of the fault of the employer or employee, but only in a statutory amount dependent upon wages received by the employee.[4] The Workers' Compensation Law, Chapter 67 of the Consolidated Laws, consists of a number of articles which relate to and provide compensation to an employee for injuries or death in the course of employment. In addition, there are subsequent enacted articles, the Disability Benefits Law[5]; and the Workers' Compensation Act for Civil Defense Volunteers.[6]

Many treatises and articles have been written on this complex and comprehensive statute. This particular article will consider one small point: What may be considered to be the case where an injury can be said to occur "in the course of employment"?

The Workers' Compensation Law states that to be compensable an accidental injury must arise out of and in the course of employment.[7] The statute goes on to define as employment a trade or business or occupation, carried on by an employer, for pecuniary gain.[8]

The general rule is that for an injury to be compensable it must arise out of employment as well as in the course thereof.[9] Many are the cases glossing and interpreting the above rule. Thus, in *Burton v. Mallouk*[10] the Appellate Division, Third Department held that where, at the time of the accident, the employee was moving a piece of furniture which had been given to him, and he had been directed to move it, the Board might legitimately infer that he was acting within the scope of employment until the furniture had been completely and safely set at rest; and that the record sustained a finding that the injury arose out of and in the course of employment.

It has been held that in determining whether an injury arises out of and in the course of employment, each case must be judged on its own facts and the test is whether the activity is a reasonable activity at that place and, if so, only then may the risks inherent in such activity be an incident of employment.[11]

There must be, it has been held, a sufficient nexus to the employment for it to arise out of and in the course of employment. Thus, in *Robinson v. Village of Catskill Police Department*[12] the Appellate Division, Third Department held that the police officer's injuries which occurred when his wife shot him during a domestic dispute that erupted during their lunch together, had no nexus to his employment, and so he was not entitled to benefits, even though his service revolver was involved, and he was on duty when shot. The Court held that substantial evidence supported the finding that the wound was intentionally inflicted and arose out of personal differences.

In the same way in *Williams v. Schenectady County Department of Social Services*[13] again, the Appellate Division, Third Department held that a back injury sustained by the claimant while bending over to tie her shoe, during breaks from work, did not arise out of or in the course of her primarily sedentary employment and, therefore, did not give rise to Workers' Compensation benefits.

The pattern is so far clear: The injury must arise out of and in the course of employment.[14] The general test is that the activity to be compensable must be reasonable at that place, and only then may the risks inherent in such activity be an incident of employment. Further, a sufficient nexus must exist to the employment to arise out of and in the course of employment.[15]

Let us, however consider a more distinct and defined problem, the exact subject of this article. What of where there is some deviation from employment or duties, or there is a question or allegation that the employee was injured in the course of personal or private business. What are the parameters and definitions set forth by the case law on these issues? How far, for example, may an employee deviate from his "normal and regular duties," incur an injury, and still be covered by Workers' Compensation?

In *Scheper v. Board of Education UFSD No. 2*[16] the Appellate Division held that the school cleaner's trip to the school in order to return a package, which belonged to another, and which she had mistakenly taken home after work the previous evening, fell within the Workers' Compensation scheme.

Similarly in *Armstrong v. Aero Mayflower Transit Co.*[17] the Appellate Division stated that in determining whether the employee has deviated from the course of his employment it is irrelevant that the claimant is not taking the best route to his business destination, so long as she is heading in the general direction.[18]

The scene is so far clear: the deviation must arise to the level of an unconnected, personal, virtual abandonment of the employer for the workers' injury under the circumstances not to be covered by Workers' Compensation. In effect, there must be some complete severance, for the Workers' Compensation Law to be operative.

Thus, in *Commissioner of Taxation and Finance v. Fisher*,[19] the Appellate Division held that evidence in a Workers' Compensation proceeding sustained a finding that the employee had not abandoned his employment at the time he was run over by a bus and that his death resulted from a causally related accident. Stating that where an employee temporarily departs for a brief period of time in an interest other than his employer but directly or indirectly this interest may result in a benefit or advantage to his employer, it is a natural and normal incident of his employment, and within the scope of the Workers' Compensation Law.

What does the law say further of what may be considered to be the case when an employee is pursuing his private interests? The general rule is that when an injury was incurred while an employee is pursuing his own private interests on his own time and at a distance from the employer's premises as such, is not considered in the course of employment.[20] What, it may be asked, is the pursuit of one's private interests, such as to bring the consequent injury out of the statutory scheme?

In *Daly v. Bates*[21] the Court of Appeals held that a laundress injured while using her employer's plant after regular working hours to do her own laundry cannot be regarded as injured in the course of her employment. On the other hand in *Bailey v. Gilbert*[22] the Appellate Division held that the fact that the employee "punched out" and began to leave the employer's premises for lunch did not change the nature of his acts from "employment related" to "personal" so as to remove him from the Workers' Compensation Law.

Similarly, in *Summa v. Westchester County*[23] the Appellate Division held that an accident sustained by the claimant who regularly parked her car in a municipal parking lot located a short distance from where she worked, who several times a day left the office with the employer's permission to deposit money in a parking lot meter, and who was struck in a parking lot on her return to the office after putting money in a meter, happened within the course of her employment.

Even where the purpose of the trip is partly personal, it has been held that there need not be a finding that the decedent's death did not arise out and in the course of employment for the purpose of determining whether the accident arose out of and in the course of the decedent's employment.[24]

If there is any sense to the case, the rule, as in deviation rule, is that there must be a complete dissociation from the business context to take the injury out of the statute. Thus, in *Joslyn v. Oneida Community*[25] the Court of Appeals held that an employee injured in another building than that in which he was employed while purchasing goods for a friend, was not entitled to an award.

Conclusion

This brief analysis and consideration of what may constitute an injury "arising out of and in the course of employment" shows a general rule of reasonableness. Further law states that a sufficient nexus must exist to the employment activity. If the employer maintains that the employee was deviating from the work assignment or hours, or that the employee was acting on solely personal or private business, in either case, there must be a complete break, sufficiently substantial, to take the employee's activities and actions out of this statutory mechanism. Part is not enough if still somehow, or in some way, there is work relation.

Endnotes

1. N.Y. Workers' Compensation Law Ch. 67 Consolidated Laws.
2. N.Y. Workers' Compensation Law Art. 4 Sec. 50(2).
3. N.Y. Workers' Compensation Law Art. 6 and Sec. 50(1).
4. 109 NY Jur 2d, Workers' Compensation Sec. 1, pp. 158, 159.
5. CLS Workers' Compensation Law, Art. 9 which provides for payment of benefits to employees for disabilities resulting from non-occupational injury and sickness; Vol. 109 NY Jur 2d, Workers' Compensation, Sec. 4, p. 163.
6. CLS Workers' Compensation Law, Art. 10; Vol. 109 NY Jur 2d, Workers' Compensation, Sec. 4 pp. 163, 164.
7. N.Y. Workers' Compensation Law Sec. 2(7).
8. N.Y. Workers' Compensation Law Sec. 2(5).
9. *Davis v. Newsweek Magazine*, 305 N.Y.20, 110 N.E.2d 406 (1953); *Anadio v. Ideal Leather Furnishers*, 32 A.D.2d 40, 299 N.Y.S.2d 489 (3d Dep't 1969).
10. 268 App. Div 935, 51 N.Y.S.2d 131 (1944).

11. *Hancock v. Ingersoll-Rand Co.*, 21 A.D.2d 703, 249 N.Y.S.2d 43 (3d Dep't 1964).
12. 209 A.D.2d 748, 617 N.Y.S.2d 475 (3d Dep't 1994).
13. 232 A.D.2d 677, 648 N.Y.S.2d 180 (3d Dep't 1996).
14. *Hancock*, 21 A.D.2d 703.
15. *Robinson*, 209 A.D.2d 748.
16. 27 A.D.2d 612, 275 N.Y.S.2d 627 (3d Dep't 1966).
17. 14 A.D.2d 958, 221 N.Y.S.2d 225 (3d Dep't 1961).
18. *See also Morningstar v. Corning Baking Co.*, 6 A.D.2d 178, 176 N.Y.S.2d 388 (3d Dep't 1958) (Held: where in the course of employment an employee temporarily departs for a brief period of time in an interest other than his employment, but directly or indirectly his interest may result in a benefit or advantage to his employer, it is a natural and normal incident of employment and within the system of the Workers' Compensation Law); *Rosebrock v. Glen and Mohawk Milk Ass'n Inc.*, 40 A.D.2d 978, 338 N.Y.S.2d 366 (3d Dep't 1972) (Held: negligent operation of motor vehicle, even apparently in violation of traffic law, prior to fatal accident, while acting pursuant to employer's instruction to call on customer while en route home, did not amount to a deviation from employment and did not bar compensation under Workers' Compensation Laws.
19. 89 A.D.2d 644, 453 N.Y.S.2d 103 (3d Dep't 1966); *Cf., however, Walter v. Ed Walters, Inc.*, 26 A.D.2d 870, 273 N.Y.S.2d 1006 (3d Dep't 1966) (Held: record supported findings of deviation from employment and that the employee was engaged in personal activity at the time of the injury, which was unconnected with his employment).
20. *Malacarne v. City of Yonkers Parking Authority*, 41 N.Y.2d 189, 391 N.Y.S.2d 402 (1976).
21. 224 N.Y.126, 120 N.E.118 (1918).
22. 76 A.D.2d 955, 428 N.Y.S.2d 737 (3d Dep't 1980).
23. 63 A.D.2d 1114, 406 N.Y.S.2d 392 (3d Dep't 1978).
24. *Wright v. General Electric Co.*, 81 A.D.2d 722, 439 N.Y.S.2d 456 (3d Dep't 1981).
25. 256 N.Y. 599, 177 N.E.156 (1931). S*ee also Hill v. All Seasons Service Inc.*, 255 A.D.2d 680, 674 N.Y.S.2d 456 (3d Dep't 1998); *Knaub v. Real-Time Business-Systems Inc.*, 251 A.D.2d 840, 674 N.Y.S.2d 799 (3d Dep't 1998).

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Who Pays? Insurance Coverage for Mold Claims

By Daniel W. Gerber

I. Introduction

Developments over the past few years have made it clear to policyholders and insurers alike that coverage for mold-related claims is a critically evolving situation. Awards against insurance companies have been in the tens of millions of dollars, threatening the insurance industry.[1] Some have characterized mold as the next asbestos or lead paint, while others see no need to be alarmist.[2] However, claims across the nation have been increasing, with Texas and California having the greatest mold claims crisis.[3] Mold-related claims in Texas for the three largest homeowner insurers have increased from $9.1 million to $79.5 million in a single year.[4] In this clear national trend, homeowners and commercial property tenants are adamantly pursuing claims against builders, building owners, and other third parties for property damage and health issues arising from mold in the buildings that they occupy.[5] In turn, the targets of those claims look to their insurers to cover these losses.

Coverage determinations can be difficult because mold damage is typically a latent problem that arises progressively, yet sometimes rapidly. Any insurance coverage determination requires an extensive review of each and every policy held by the claimant during which the mold problem developed.[6] This analysis is particularly important because policyholders may attempt to rely upon older policies without language inserted in later policies with a direct eye towards barring mold-related claims.

Two basic types of claims arise from mold-related losses: (1) first-party claims involving owners, tenants and residents suing their own insurance providers for failure to investigate, remediate, and pay for mold damage;[7] and (2) third-party claims involving defendants in mold-related damage cases seeking defense and indemnification from their insurers. Possible defendants in these lawsuits include owners, landlords, contractors, repairmen, architects, engineers, sellers, realtors, etc.[8]

Mold claims require immediate attention because the rapid spread of mold and spores within the property may lead to a greater loss in an abbreviated span of time. As recent cases emphasize, this proactive approach to coverage analysis may avoid substantial extra-contractual losses. By way of example, plaintiffs have been awarded as much as four million dollars in punitive damages for careless delay in remediating mold contamination.[9] There have been awards as high as two million dollars to plaintiffs in a case of bad faith by the insurer regarding mold claims.[10] In Texas, one award was as high as $32.1 million to homeowners for an insurance carrier's negligent adjustment of a leak resulting in mold infestation.[11]

Since coverage for mold-related losses is an evolving area of insurance law, very few courts have addressed whether these claims are covered under first-party property or third-party liability policies. However, the cases decided to date are illustrative of some of the key grounds upon which carriers deny coverage for these claims. These include:

- **Conditions to Coverage: Who Is covered?**

  Before an analysis can begin regarding coverage issues and exclusions, insurers must first ascertain if all conditions to coverage have been met, such as whether the person asserting a claim is an insured.

- **Direct Physical Loss**

  Insurers may have defenses to mold-related claims if the policyholder has not experienced an actual physical injury to property.

- **Water Damage Exclusion**

  This exclusion operates to bar coverage for loss or damage caused directly or indirectly by water. Mold growth is arguably a direct consequence of the presence of moisture.

- **Pollution Exclusion**

  This exclusion operates to bar insurance coverage for injury arising from "discharge" or "release" of toxic substances, which can include "biological" agents.

- **Latent Defect, Faulty Workmanship and Design**

  Claims or losses resulting from the faulty design or construction of property may not be covered under this exclusion, which is designed to exclude coverage for the typical business risk undertaken by a contractor, and maintenance risks assumed by an owner.

- **Late Notice**

  Insurers may attempt to deny coverage where a policyholder begins remediation on its own, but fails to notify its insurer until after the remediation has occurred; where a condition has existed for a long period of time; or, where the condition was caused by a flood or moisture causing event in the past for which notice was not provided.

- **Occurrence**

  Any claim made by a third party for either property damage or personal injury must be a result of a covered occurrence in order to trigger coverage.

- **Mold Exclusions**

  In response to the mold crisis, new policy language is being proposed and adopted to exclude mold coverage in part or in toto. Carriers may also seek to apply older exclusionary language related to rot and deterioration.

II. The Importance of Timeliness in Determining Coverage

Due to the prolific reproductive characteristics of mold, massive damage can occur within very short periods of time, making mold claims unique. This can make what would seem to be a reasonable amount of time to investigate and settle a property claim from the insurer's point of view, unreasonable from the policyholder's perspective because of the rapid rate at which damage can occur. In *Nicholson v. Metro Property Management*, within a span of approximately ten days, the plaintiffs were forced to abandon their condominium after a water leak in the unit above them caused mold growth in their own unit. The plaintiffs were awarded over $200,000 in a lawsuit against the management of the property.[12]

Mold growth generally occurs when moisture from water damage, excessive humidity, water leaks, condensation, water infiltration, or flooding lingers in wood or other carbon-based cellulose materials.[13] While mold claims vary from type of fungus, source and specific causation, many commentators trace the rise of these claims to new building construction techniques and heightened public awareness.[14] In particular, air-tight construction, which exacerbates mold growth, shoddy construction practices such as flashing missing from windows, and the application of synthetic stucco exteriors have been linked to the increase in toxic mold claims.[15] In 2000, a construction company in Virginia was found liable for mold damage in over 20 homes that it had built in a single subdivision. The synthetic stucco used by the construction company allowed water to seep into the walls of the homes which then decayed the wood and fostered the growth of mold.[16] Additionally, the increasing use of central HVAC systems may foster the spreading and re-circulation of mold spores.[17]

III. Specific Coverage Issues

A. Conditions to Coverage: Who Is Covered?

Analyzing mold loss for coverage issues is initially no different than any other claim. It requires a thorough reading of the policy to ensure that the policyholder has met the conditions of coverage and that the applicable definitions apply. For example, all homeowners' policies define "insured." The portions of the definition of insured relevant to mold claims contained in the standard homeowner's policy published by the Insurance Services Office (ISO) states as follows:

> Insured means:
>
> a. You and residents of your household who are:
>
> 1. your relatives; or
>
> 2. other persons under the age 21 under and in the care of any person named above;

Thus any person residing in the household who was neither a relative, nor in an insured's care and under 21 is *not* an insured for determining first-party coverage.

Some policies will extend coverage to those not meeting the above definition of insured. Usually such coverage is available under a notice provision, requiring that the named insured requests coverage while the personal property is part of the residence premises of the insured. If such a coverage extension is available, it is only available so long as the insured has requested it. If it was not requested, then first-party coverage for this additional resident's belongings may be precluded in the first instance.[18]

B. Actual Physical Loss

Insurers may attempt to deny mold claims when a policyholder has not experienced any actual physical damage or injury. Determining the type of physical damage and whether that constitutes a direct loss with respect to mold claims can be difficult. This is because mold remediation can be as simple as a thorough cleaning of the affected areas with biocides like bleach or industrial antifungal cleaners, or as great as razing the property because the mold spread is so severe as to degree and toxicity that the property is rendered useless.[19] Additionally, when no structural damage is apparent, as is the case with most mold-loss claims, determining the degree of loss is difficult.[20]

Some courts, however, have held that first-party coverage is triggered where the loss or damage is imminent. This analysis is common and is similar to the logic applied in collapse claims. In *Doheny West Homeowners' Assoc. v. American Guarantee & Liab. Ins. Co.*, the court construed the "collapse peril" provision of a commercial property insurance policy to cover imminent collapse as well as actual collapse of a building where the provision covers "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building."[21] In New York, an imminent collapse constitutes a loss because a substantial impairment of the structure prevents its use.[22]

Similarly, some courts have held that the mere "loss of use" or uninhabitability of a property constitutes a direct physical loss.[23] As such, policyholders may maintain that the loss of use of their property rises to the level of damage that is covered under the first-party benefits of the policy. Policyholders with mold-related claims are more likely to make this type of analogous argument of imminent loss through inhabitability than policyholders with other types of damage that are more apparent in both physical loss and causation. They often seek damages, not when their property has been physically destroyed, but when it has been rendered less useful or uninhabitable. The specific policy language will determine whether there is a need for actual physical injury in order to trigger coverage or whether a mere loss of use will suffice. In New York, courts have not addressed the issue of whether mold constitutes actual property damage; therefore, it is unsettled whether a loss of use due to mold constitutes property damage or physical loss. However, a finding in favor of coverage would be a reasonable presumption based upon the cases dealing with imminent collapse.[24]

C. Water Damage Exclusion

Because mold growth requires the presence of moisture, water damage exclusions are relevant in mold claims analysis. These exclusions operate to bar coverage for loss or damage caused directly or indirectly by water. Many standard first-party policies include an exception to the water damage exclusion for ensuing losses that result from fire or an explosion. Mold, however, is not one of the specified exceptions to the exclusion.

The water damage exclusion contained in the standard homeowner's policy published by the Insurance Services Office (ISO) states as follows:

> 1. We do not insure for loss caused directly or indirectly by any of the following . . .
>
> c.) **Water Damage**, meaning:
>
> (1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
>
> (2) Water which backs up through sewers or drains or which overflows from a sump; or
>
> (3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure,
>
> Direct loss by fire, explosion or theft resulting from water damage is covered.

Disputes over whether the water damage exclusion will bar coverage for mold-related damage will focus on the source of the water that caused the mold to develop. One New York appellate court has held that the water damage exclusion only applies to water damage resulting from natural phenomena and, therefore, does not apply to water damage sustained as a result of a broken town water main.[25] Another court in Michigan has held that water damage exclusion precluded coverage where plaintiff's losses were the result of heavy rainfall creating surface water that failed to drain away because of debris blocking the drainage system.[26]

D. Pollution Exclusion

Most standard homeowners, commercial general liability policies, and commercial property policies exclude coverage for damage caused by pollution through an absolute pollution exclusion. The language of this absolute pollution exclusion usually states that there is no coverage for "bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a peril insured against." A standard pollution exclusion (often existing in older policies) excludes pollution-related losses except when they are caused by a release that is "sudden and accidental."

Pollutants are typically defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." Notwithstanding the language used in the typical pollution exclusion, many courts have hesitated to apply those exclusions to bar coverage for "indoor pollution" and toxic exposure cases outside the context of traditional environmental claims.[27] Determining if toxic mold falls under this exclusion requires a two-prong analysis of whether the mold is a "pollutant" and whether there has been any "discharge, dispersal, seepage, migration, release or escape."

1. "Discharge, Dispersal, Seepage, etc."

In 1990, the Wisconsin Court of Appeals, in *Leverence v. United States Fidelity & Guaranty*, addressed mold in the context of a pollution exclusion clause.[28] The language of the exclusion provision at issue stated as follows:

> This insurance does not apply:
>
> f. to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke,

> vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.[29]

The court held that the exclusion did not apply to bar coverage for mold damage because the mold resulted from water vapor that was trapped in the walls. The court adopted the trial court's reasoning that no contaminants were "released"; therefore, the exclusion did not apply.[30]

By contrast, in *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, an insurer brought a declaratory judgment action seeking a declaration that it was not liable to its insured for damages that it incurred from mold damage caused by a severe rainstorm and flooding at its apartment complex.[31] The pollution exclusion provision stated:

> This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.[32]

The policyholder argued that the pollution exclusion did not apply because the mold was not released, discharged, or dispersed, and it did not escape within the meaning of the policy language. The court disagreed with the policyholder based on physical evidence that showed how mold spores are dispersed into the air and the surrounding environment.[33] The fact that the exclusion expressly included the term fungi was also taken into consideration by the court.[34]

2. Mold as a "Pollutant"

In the cases to date, policyholders have maintained that the pollution exclusion has historically only been directed at chemical and hazardous substances produced by industry and not at live organisms such as mold.[35] However, the symptoms of mold inhalation may qualify mold as a contaminant or irritant, thus bringing it within the scope of the pollution exclusion. Defined broadly, the term can include naturally occurring substances; but, defined narrowly, it can only include extreme toxins such as hazardous waste.

In *East Quincy Services Dist. v. Continental Ins. Co.*, the court held that the pollution exclusion provision at issue barred coverage for damages resulting from sewage-borne bacteria because bacteria is a pollutant within the meaning of the exclusion provision.[36] The court stated that nowhere within the definition of pollutant "is there a requirement that the irritant or contaminant be 'man-made' or 'unnatural,' and, indeed, the inclusion of 'biological' agents and 'any irritant' suggests the contrary."[37]

On the other hand, the court in *Keggi v. Northbrook Property and Casualty Ins. Co.*, adopted a narrow view of what constitutes a pollutant.[38] The plaintiff suffered injuries after consuming water that was contaminated with bacteria. The definition of pollutant in the pollution exclusion provision at issue stated:

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[39]

The court held that the pollution exclusion clause did not preclude coverage for the plaintiff's injuries because bacteria did not fall within the definition of a pollutant.[40] "To the extent that bacteria might be considered 'irritants' or 'contaminants' they are *living, organic* irritants or contaminants which defy description under the policy as 'solid,' 'liquid,' 'gaseous,' or 'thermal' pollutants."[41]

Normally, policyholders argue that mold is not a pollutant as defined under the exclusion in order to obtain coverage. Yet, recently, in *Cooper v. American Family Mutual Insurance,* the court rejected the plaintiff's contention that mold was *included* in the definition of pollutant where the plaintiff had supplemental coverage for pollutant cleanup and removal.[42] It relied upon the fact that mold was neither expressly listed as a covered pollutant, nor was it listed as a hazardous substance by any governmental agency.[43]

As a result of inconsistent opinions interpreting pollution exclusions, policyholders can expect their insurers to consider the applicability of the pollution exclusion when adjusting claims for mold-related damages. The application of the exclusion to these types of claims, however, has not been uniformly resolved. Depending on the language of the pollution exclusion provision and the court's interpretation of what constitutes a pollutant, the mold claim may or may not be covered. However, unless the pollution is widespread and external, it is unlikely that a court will apply such exclusions in New York.[44]

E. Latent Defect, Faulty Workmanship and Design

Most personal and commercial insurance policies contain language excluding coverage for losses arising out of latent defects, faulty design, and improper workmanship. The purpose of such exclusions is to exclude coverage for the normal contractual risk of design, con-

struction and maintenance.[45] Design deficiencies may lie at the heart of property damage resulting from moisture buildup or inadequate ventilation. Accordingly, mold claims arising from the faulty workmanship and design, such as HVAC, plumbing, or other construction-related causes may be excluded.

Design defects include latent defects, defined as an imperfection in the material used or as a defect that is hidden or concealed from knowledge as well as from sight, and which a reasonable customary inspection would not reveal.[46] As explained by the court in *Derenzo v. State Farm Mut. Ins.*:

> such construction defects constitute latent defects which are excluded from coverage under the policy. To hold otherwise . . . would impose an enormous burden upon [the insurance company] to continually inspect an ongoing construction project for defects. . . . It was thus plaintiff's duty to insure that the work was adequately and properly performed.[47]

In *Century Indemnity Co. v. Golden Hills Builders, Inc.*, homeowners filed an action alleging that their home was defective because a subcontractor of the defendant constructed the synthetic stucco exterior of their home in a manner that caused moisture damage to the properly constructed parts of the home.[48] The court held that coverage for damage caused to the properly constructed parts of the home was precluded under the faulty workmanship exclusion.[49]

However, coverage may be restored if the faulty workmanship exclusion contains a provision covering ensuing loss.[50] Generally, this exception to the workmanship exclusion applies when the defective item causes tangential damage. For instance, if a defective wall falls, and then breaks several windows and ruins other structures, then the cost to repair the wall is not covered, but the windows and other structures are covered.[51] Thus, in the context of mold claims, if plumbing was poorly designed and drainage became a problem, while the plumbing itself would not be a covered loss; the mold growth resulting from the moisture leading to loss of use or inhabitability could constitute an ensuing covered loss.

F. Timely Notice of Loss

Timely notice of the loss is very important in mold claims. The spread of mold growth can be very rapid.[52] Time can mean the difference between simple remediation and total loss.[53] For example, a pipe burst may result in mold growth. Without timely notice of the occurrence, an unsuspecting homeowner may be facilitating the growth of mold, whereas an insurance company, cognizant of the risk and liability, with timely notice may remediate a potential mold problem before the loss is total. Furthermore, as with any claim for coverage, policyholders must timely notify their insurers of their mold claims pursuant to the policies' notice requirements in order to obtain coverage.

Many policies require that the insured notify its insurer as soon as practicable after discovery of the loss. Several jurisdictions follow a "notice-prejudice" rule in determining whether an insurer can avoid coverage as a result of a policyholder's failure to provide notice to the insurer "as soon as practicable." Under this rule, an insurer must demonstrate that it has been prejudiced by the insured's failure to notify the insurer of the loss promptly. Insurers may be able to establish prejudice in instances where the policyholder begins to remediate a mold problem before notifying its insurer. If an insured takes steps to correct the problem before the insurance company is given an opportunity to investigate, the insurer has been prejudiced in its ability to evaluate the claim. Similarly, an insurer may be prejudiced where an insured failed to attempt to remediate a mold problem and did not notify its carrier in a timely fashion, thereby worsening the damage.

In order for an insurer to claim prejudice, the insured must be shown to have known about the loss and have failed to notify the insurer. Knowledge of the loss is judged from an objective standard (*i.e.*, when an average policyholder would have reasonably expected a claim).[54]

By contrast, in New York, the traditional rule has been that an unreasonable and unexcused delay in providing notice to the carrier constitutes grounds for denying coverage—without any demonstration of prejudice to the insurer.[55] However, there have been small signals from the New York Court of Appeals that it may indeed soon require prejudice.[56] This issue of whether prejudice is required remains unsettled since the Court of Appeals case that required prejudice may apply only to a type of auto claim, or to lawsuit notice provisions, and not general notice provisions for property damage or injury claims not arising out of a lawsuit.[57]

However, as it currently stands, there are two primary exceptions to the timely notice requirement in New York. In his or her request for coverage, an insured may argue one of two recognized exceptions that prevent its insurer from asserting a denial based on late notice. First, the insured may argue that he had a reasonable belief in his non-liability. Where an "occurrence" is so trivial "that a reasonable person would not believe that liability could possibly be imposed on the basis of it," the excuse may be recognized.[58] Second, the insured may assert that he lacked knowledge of a potentially covered event at the time when notice would otherwise be required.[59] In *Briggs v. Nationwide Mut. Ins. Co.*, the court noted that because "neither the manner in which . . . injury occurred nor the nature of the injury sustained or the medical treatment received by her on the day of the incident were

such that plaintiff would have been made aware that a personal injury claim would be pursued," the insured's two-and-one-half-year delay in giving notice of the incident was excused.[60] It is important to note that the insured has the burden of proof on such excuses.[61]

It should be kept in mind that, as noted above, the policy imposes an obligation on the insured to protect and preserve property from further damage at the time of loss and following loss. This policy condition, arguably, requires the insured to begin drying out and commence restorative procedures immediately upon becoming apprised of the loss and damage. However, as a practical matter, insureds are not always in a position to retain appropriate restoration experts either because of lack of knowledge of the identity of such experts or for financial reasons. Often, the insurance carrier may assist in this process, whether there is a determination of coverage or not, by recommending an expert and, in some cases, providing the insured with an advance under the policy to cover the initial remediation costs.

This policy requirement, in partial loss cases, to protect the property from further damage has not been the subject of extensive judicial construction in New York. However, a breach of the insured's duty to protect and preserve property after a loss will relieve the insurer from liability.[62] Nevertheless, a court will strictly construe the contract of insurance in such an instance. Thus, even if the insured breached the above policy provisions, this will not be fatal to an action on the policy, in the absence of proven damage by the insurance company.[63]

G. Occurrence

If a claim is made or suit is brought against an insured for personal injury or property damage which results from mold, in order for the claim to trigger any coverage, the mold must be a covered occurrence.[64] Thus it brings the analysis squarely within whether there was a covered peril. An occurrence is defined by ISO HO-03 as an accident, including continuous or repeated exposure to substantially the same general harmful conditions which results during the policy period in bodily injury or property damage. It further defines "bodily injury" as bodily harm, sickness, or disease. Thus covered bodily injury must arise out of a covered occurrence.

An analysis of whether bodily injury has occurred as a result of the mold, even if mold exposure is a covered occurrence, is difficult because to date,there has been a paucity of clinical studies and the results have been inconclusive.[65] In order to prove causation on a toxic tort, both general and specific causation are required. General causation requires that it merely be proven that the toxin is capable of causing the injury alleged, while specific causation requires proof that the toxin actually caused the injury.[66] Testimony of such causation must be based on a reliable foundation. In the *Ballard* appeal, the court found that the expert testimony offered was based on "premature" results. Consequently, it failed to meet the reliable foundation prong of the *Daubert* test for expert testimony.[67]

Many general commercial liability policies which cover personal injury, medical payments, and property damage have a similar pollution exclusion clause, thus the analysis would be similar to that as for first-party coverage.

H. Exclusions for Mold

Due to the increase in mold claims in recent years, insurance policies are being written to expressly exclude mold damage from coverage. The 1991 HO-3 published by the Insurance Services Office (ISO), the most common homeowners' policy, contains an exclusion which states: "We do not insure, however, for loss: . . . 2. Caused by: . . . (3) Smog, rust or other corrosion, mold, wet or dry rot." This exclusion is commonly known as the "wear and tear" clause, which excludes damage appearing over time and not as a result of an identifiable covered event. Many industry experts believe that this exclusion operates to bar coverage for mold damage that arises naturally due to high relative humidity or an otherwise excluded loss, and not due to a covered loss such as a burst water pipe.[68] This is because mold damage caused by high humidity is considered a home maintenance issue.[69] The New York State Department of Insurance currently takes the perspective that if mold is a proximate result of a covered peril, then coverage exists despite a mold exclusion.[70] However, where mold is a result of natural conditions not caused proximately by a covered peril, then it may be excluded under this language.[71]

The few courts that have analyzed this exclusion have acknowledged coverage for mold where the proximate cause for the mold was a covered peril under the policy. For instance, in *Bowers v. Farmers Ins. Exchange*, the court reasoned that a tenant's act of growing marijuana in the basement of a rental house was the "efficient proximate cause" of mold damage caused by a sauna-like atmosphere in the basement, lack of heat supplied to the remainder of the house, and excessive water condensation, and thus, the damage fell within the covered peril of vandalism rather than the excluded peril of mold damage under the landlord's insurance policy.[72] Under the "efficient proximate cause rule," if an insurer is liable for a loss caused by a covered peril, even if other non-covered perils form a part of the causation, the resulting loss is covered.[73]

However, not all jurisdictions have adopted the "efficient proximate cause rule" for concurrent causation mold claims.[74] In *Cooper v. American Family Mutual Insurance,* the court held that Arizona has not adopted the "efficient proximate cause" rule for concurrent causation.[75] Furthermore, the court held that the policy

language which specifically excluded losses resulting from concurrent causation of covered and non-covered perils did not violate public policy.[76] Thus there was no coverage for mold-related loss, even where the initial causation was a covered peril.

The ISO 2000 HO-3 form has gone even further in attempting to exclude mold-related damage from coverage. The model policy places mold and wet rot into their own exclusionary category. It also adds "fungus" to the category. It states:

> 2. We do not insure, however, for loss:
>
> c. Caused by:
>
> (5) Mold, fungus, or wet rot. However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within . . .

This new clause explicitly acknowledges coverage for mold claims arising out of certain named perils, such as plumbing leaks. It is silent, however, as to other traditionally covered perils. If this language is incorporated into the policy, a carrier may attempt to argue that by not mentioning other perils, the provision intends to exclude coverage for mold resulting out of those perils not named. On the other hand, a policyholder may counter that because it does not mention those perils, the provision is ambiguous and should be interpreted in favor of coverage. Where an ambiguity exists in a standard-form contract supplied by one of the parties, the well-established *contra proferentem* principle requires that the ambiguity be construed against that party.[77]

As of May 23, 2002, the New York State Department of Insurance received more than 100 filings for approval for language restricting mold coverage. Whether the Department of Insurance has yet approved the language of any single applicant has been the subject of debate. In *Gallup v. State Farm Ins. Co*., the court, while finding a mold exclusion ambiguous, also determined that the carrier had submitted enough evidence to create an issue of fact regarding Department of Insurance approval.[78] *Gallup* notwithstanding, the Department has not formulated a policy on whether to require some form of mold coverage, or to allow total mold exclusions due to the paucity of information and limited clinical research. "[T]he Department will not approve any limitations or exclusions for mold-related coverages until it receives information sufficient to warrant such exclusions or limitations."[79] Additionally, authorized insurers have been reminded that use of "an unapproved policy form for a New York risk or operation containing a mold exclusion (where prior approval was required) [is not enforceable] against the insured."[80] Despite the Department's opinions regarding approval, it should be noted that in his testimony before a Joint Senate Committee on Health and Environmental Conservation on the Issue of Toxic Mold, Gregory V. Serio, the Superintendent of the Department of Insurance stated that current mold coverage excludes property damage "unless it is a consequence of a covered loss such as a burst pipe or wind-driven rain."[81]

Regardless of Insurance Department approval, the Appellate Division, First Department on May 26, 2005 enforced a mold exclusion in a first party loss. In *Hritz v. Saco,* the plaintiff's home was insured against risk of physical loss, but the policy excluded "any loss that is contributed to, made worse by, or in any way results from . . . fungi [or] mold." Mold and mycotoxins were discovered during renovations and the house was razed. During investigation of the claim, the carrier advanced the plaintiff's living expenses with an agreement to repay the amounts should it be determined that their claim was not covered. The carrier then denied coverage on the grounds that leaks and mold growth occurred prior to commencement of coverage, the loss was not fortuitous, and the policy excluded loss caused by "wear and tear, gradual deterioration, . . . fungi, . . . mold, . . . dry or wet rot." Plaintiffs sued the carrier to recover the policy proceeds for the complete loss of their home. The court dismissed the action, concluding that mold was clearly and unambiguously excluded from coverage, and that mycotoxins were excluded as caused by mold. The plaintiffs failed to meet their burden of demonstrating that mold was not the efficient proximate cause of the loss. The court reasoned "while dampness and moisture can contribute to the development of mold, the mere fact that water or moisture, arising under ambient conditions over time, contributes to the loss does not make it the efficient proximate cause. . . . Nor was there any showing that the loss was fortuitous or ensued from something entirely different from the damage that naturally flowed from perils associated with mold contamination."[82]

IV. Conclusion

The wave of mold litigation has caused obvious concern for the insurance industry as mold claims are often costly to adjust and remediate. Consequently, insurers are faced with policyholder efforts to increase carrier liability for mold coverage losses through current policy language. Until there are more decisions on coverage for mold claims, or changes to policy language, this area is bound to be one of concern for insurers and insureds alike. As always, attentiveness to the particular facts of the loss and applicable policy language is paramount to assessing whether there is coverage.

Endnotes

1. *See, e.g., Anderson v. Allstate Ins. Co.,* 2000 WL 33914116 (E.D.Cal. 2000) (reducing a jury award of $18 million dollars in punitive damages, to $2 million) *affirmed* in part and *reversed* in part by 2002 WL 2021617 (9th Cir. 2002) (holding no punitive damages were available because the insurer's actions, although arising to bad faith, were not despicable enough to arise to fraud or malice); *Ballard v. Fire Ins. Exch., No. 9905252* (Tex. Dist., 345th Dist. Travis Co., filed May 5, 1999) (awarding $32.1 million) *affirmed* in judgment, reversed in punitive and mental anguish damages, remanded for recalculation of award for deceptive trade practices, *sub. nom. Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, (Tex. App. 3d 2002); *Centex-Rooney Construction Co. et al. v. Martin County, Florida,* 706 So.2d 20 (Fla. Ct. App. 1997) ($17.3 million total paid for a negligently constructed county court house). For smaller, yet still significant awards, *see also Hatley v. Century-National Insurance Co., No. CV 2000-006713* (Ariz. Super. Ct. Maricopa Co. November 24, 2001) (awarding $4 million); *Mazza v. Raymond Schurtz,* No. 00AX04795 (Cal. Super. Ct., Sacramento Cty. Nov. 7, 2001) (awarding $2.7 million); *New Haverford P'ship v. Stroot,* 93 A.2d 411 (Del. Super. Ct. 1999) (awarding $1.04 million) *affirmed* 772 A.2d 792 (Del. 2001).
2. *See Testimony of the New York State Insurance Department by Gregory V. Serio, Superintendent of Insurance Before The Joint Senate Committees on Health and Environmental Conservation Regarding the Issue of Toxic Mold*, given May 23, 2002, at 4-5, available at http://www.ins.state.ny.us/acrobat/gststnew.pdf [hereinafter *Testimony of Serio*]; 02-07-20 Op. Off. General Counsel, N.Y.S. Dept. of Ins. (July 23, 2002), available at http://www.ins.state.ny.us/rg207231.htm; s*ee also,* Ron Fazio, *These Chemicals Have Taken Over My Life!* The HAA Mold Forum available at http://www.themoldsource.com/starter.html in the links section.
3. *Testimony of Serio,* at 8-11.
4. *Id.* at 9.
5. *See, e.g., Hodgson Russ v. Isolatek International Corp.*, 300 A.D.2d 1051, 752 N.Y.S.2d 767 (4th Dep't 2002).
6. *See Consolidated Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002).
7. *Young v. Ceramic Tile Contractors,* 288 A.D.2d 570 (3d Dep't 2001).
8. *Bannon v. Auerbach*, 10/26/2004, N.Y.L.J. 19, (col. 3).
9. *Hatley, supra* note 1.
10. *Anderson*, *supra* note 1.
11. *Ballard, supra* note 1.
12. *See* Christine M. Fleming, *An Overview of Mold-Related Litigation Against Insurers*, P & C PERSPECTIVES: CURRENT ISSUES IN PROPERTY AND CASUALTY, Spring 2002, at 1.
13. *See A Brief Guide to Mold, Moisture, and Your Home,* at 2, *available at* http://www.epa.gov/iaq/molds/images/moldguide.pdf [hereinafter *EPA's Mold Guide*]; *Managing Asthma in the School Environment*, available at http://epa.gov/iaq/schools/asthma/eat-cumcm.htm.
14. *Testimony of Serio,* at 4.
15. *See Centex-Rooney Construction Co. et al. v. Martin County, Florida,* 706 So.2d 20 (Fla. Ct App. 1997) (holding that defective installation of exterior synthetic hardcoat systems resulting in leakage and mold growth); *Beaton v. Zander Insulation, Inc.*, 211 Wis.2d 890 (Wis. App. 1997); *Home Ins. Co. v. Dennis D.,* 2000 WL 144115 (Tex. App. Dallas 2000) (holding coverage for mold caused by a poorly constructed roof available).
16. *Maday v. Toll Brothers, Inc.*, No. 184844 (Va., Fairfax Co. Cir. Ct. Sept. 29, 2000).
17. *Testimony of Serio*, at 4.
18. *See, e.g., Knasel v. Insurance Co. of Illinois*, 254 Il. Ap.3 638, 621 N.E.2d 137 (1993).
19. *See EPA's Mold Guide,* at 9; s*ee also Ballard, supra* note 1 (total loss to house, contents, and outbuildings, due to mold spread).
20. *See EPA's Mold Guide,* at 14.
21. 60 Cal.App.4th 400, 405 (Cal.App. 1997).
22. *Royal Indem. Co. v. Gruberg,* 155 A.D.2d 187 (3d Dep't 1990); *Fantis Foods, Inc. v. North River Ins. Co.,* 332 N.J.Super. 250 (2000) (interpreting New York law).
23. *See, e.g., Adams-Arapahoe Joint School Dist. No. 28-J v. Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989); *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 249 (1962) (holding landslide did not damage house, but left it perched precariously over a cliff; the uninhabitability of the house was held to be a loss).
24. *See* 155 A.D.2d 187, 332 N.J. Super. 250.
25. *See, e.g., Novick v. United Services Auto. Assoc.*, 225 A.D.2d 676, 677-78 (2d Dep't 1996).
26. *Sunshine Motors, Inc. v. New Hampshire Ins. Co.*, 209 Mich.App. 58, 59-60 (1995).
27. *See, e.g., Belt Painting Co., v. TIG Ins. Co.,* 100 N.Y.2d 377 (2003) (holding that drifting fumes are not discharged, dispersed, released, seeped, migrated, nor escaped, and declining to expand the definition of pollutant to anything that could irritate a person); *Continental Casualty Company v. Rapid-American Corp.*, 80 N.Y.2d 640 (1993) (holding that "discharge, dispersal, seepage, migration, release or escape" are terms of art in environmental law which are ambiguous to the reasonable person); *Roofers' J.T. Training Apprentice & Educ. Comm. v. General Accident Insurance Co.*, 275 A.D.2d 90 (4th Dep't 2000) (holding that the environmental terms of art were ambiguous because they could lead an ordinary person to believe that the pollution exclusion applied to only large scale environmental pollution).
28. 158 Wis.2d 64.
29. *Id*. at 96.
30. *Id*. at 97.
31. 2002 WL 356756 (N.D.Tex. March 5, 2002).
32. *Id*. at *2
33. *Id*. at *3.
34. *Id*.
35. *Droegkamp v. Langdon,* 2003 WL 21749514 (Wis. App. July 30, 2003) (pointing out that there is support that mold does not constitute a pollutant); *see also Allianz Inc. Co. v. SSR Realty Advisors, Inc.*, 2003 WL 21324430 (E.D.Pa. June 5, 2003) (holding that the pollutant provision does not include mold); *Lexington Ins. Co. v. Unity/Waterford Fair Oaks, Ltd*, 2002 WL 356756 (N.D. Tex. March 5, 2002) (holding that mold qualified as a pollutant only where it had been expressly listed as one); 158 Wis.2d at 97.
36. 864 F. Supp. 976, 979-80 (E.D.Cal. 1994).
37. *Id*. at 980.
38. 199 Ariz. 43 (Ariz. Ct. App. 2000).
39. *Id*. at 47.
40. *Id.* at 48.
41. *Id*. at 47.
42. 184 F. Supp.2d 960 (Arizona 2002).
43. *Id.* at 965-66.
44. 100 N.Y.2d 377 (2003).
45. *Derenzo v. State Farm Mut Ins.*, 141 Misc. 2d 456, 460 (Rensselaer Co. 1988).

46. *Luttenberger v. Allstate*, 122 Misc. 2d 365 (Suffolk Co, N.Y. 1984); *see also 40 Gardenville, LLC v. Travelers Property Casualty of America*, 2005 WL 327108 (W.D.N.Y. Feb.9, 2005); *Acme Galvanizing Co. Inc. v. Fireman's Fund Ins. Co.*, 270 Cal. Rptr. 405 (1990); *Employers Casualty Co. v. Holm*, 3935 S.W.2d 363, 367 (Tex. App. 1965); *State Farm Fire & Casualty Co. v. Volding*, 426 S.W.2d 907 (Tex. App. 1968); *but compare American Home Assurance Co. v. J.F. Shea, Co., Inc.*, 445 F. Supp. 365, 368 (D.C. 1978).

47. 141 Misc. 2d at 460.

48. 348 S.C. 559, 562 (2002).

49. *Id*. at 566.

50. *Laquila Constr., Inc. v. Travelers Indem. Co.*, 66 F. Supp. 2d 543 (S.D.N.Y. 1999), *aff'd*, 216 F.3d 1072 (2d Cir. 2000).

51. *Narob Dev. Corp. v. Insurance Co. of N. Am.*, 219 A.D.2d 454 (1st Dep't 1995), *lv. to app. denied*, 87 N.Y.2d 804 (1995).

52. Fleming, *supra* note 12, at 2 (condominium owners forced to vacate only 10 days after a pipe burst in the unit above due to mold growth).

53. *See Ballard, supra* note 1. The initial water damage was detected in February 1998. Other than replacing warped floor boards and some carpeting, no remediation was done. By April of 1999, the house and outbuildings were a total loss to the mold infestation.

54. *Tadd v. Bankers Life & Casualty Co.*, 135 A.D.2d 1066 (3d Dep't 1987); *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 693 N.Y.S.2d 81 (1999); *Centrone v. State Farm*, 713 N.Y.S.2d 211 (2d Dep't 2000); *Flores v. Allstate Texas Lloyd's Co.*, 2003 WL 21713773 (S.D. TX July 16, 2003) (holding "a homeowner's failure to provide initial notice of a water event within the home should not, as a general rule, prevent the homeowner from subsequently providing prompt notice of, and receiving coverage for, ensuing mold damage that becomes manifest well after the initial water event, where such initial failure to provide notice is reasonable under the circumstances").

55. *See, e.g.*, *Commercial Union Ins. Co. v. Int'l Flavors & Fragrances, Inc.*, 822 F.2d 267 (2d Cir. 1987); *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436 (1972); *United Talmudical Academy v. Cigna*, 676 N.Y.S.2d 645 (2d Dep't 1998).

56. *See In re Brandon*, 97 N.Y.2d 491, 498 (2002) (holding that "insurers relying on the late notice of legal action defense should be required to demonstrate prejudice" in a SUM action); *Varrichio v. Chicago Ins. Co.*, 321 F.3d 544 (2d Cir. N.Y. Nov. 14, 2002) (holding that *Brandon* casts doubt on New York's traditional rule that an insurer need not show prejudice to disclaim coverage when an insured fails to comply with an immediate notice of suit provision. The Second Circuit requested and then withdrew certification of the issue from the New York Court of Appeals); *see also U.S. Underwriters Ins. Co. v. 203-211 West 145th St. Realty Corp.*, 37 Fed. Appx. 575 (2d Cir. N.Y. June 18, 2002); *New York Mut. Underwriters v. Kaufman*, 257 A.D.2d 850, 851 (3d Dep't 1999) (holding that an insurer may not disclaim coverage absent a showing of prejudice where a homeowner provided timely notice of a claim, but not a suit).

57. *See* 321 F.3d 544.

58. *Winstead v. Uniondale School Dist.*, 170 A.D.2d 500, 503 (3d Dep't 1991).

59. *See, e.g., Mt. Vernon Fire Ins. Co. v. Creative Housing Ltd.*, 797 F. Supp. 176, 184 (E.D.N.Y. 1992).

60. 176 A.D.2d 1113, 1114 (3d Dep't 1991).

61. *Olin Corp. v. Insurance Co. of North America*, 966 F.2d 718, 724 (2d Cir. 1992).

62. *Johnson v. Sun Insurance Company*, 94 Misc. 163, 288 A.D.2d at 570-572 (Supreme Court Appellate Term, 1st Dep't 1916).

63. *Kramnicz v. First National Bank of Greene*, 32 A.D.2d 1009 (3d Dep't 1969); *see also Royal Indemnity Company v. Michael Grunberg*, 155 A.D.2d 187 (3d Dep't 1990) (insured obligated to make repairs to prevent collapse of dwelling).

64. *See, e.g., Continental Casualty Co. v. Rapid American Corp.*, 80 N.Y.2d 640 (1993).

65. 03-04-04 Op. Off. General Counsel , N.Y.S. Dept. of Ins. (April 1, 2003) available at http://www. ins.state.ny.us/rg030404.htm [hereinafter *Serio April Opinion*]; *Testimony of Serio*, at 11-12; *State of the Science on Molds and Human Health: Statement for the Record of Stephen C. Redd, M.D., Chief, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services Before the Subcommittees on Oversight and Investigations and Housing and Community Opportunity, Committee on Financial Services, United States House of Representatives,* given on July 18, 2002, *available at* http://www.cdc.gov/nceh/airpollution/images/moldsci.pdf.

66. *Allison v. Fire Insurance Exchange*, 98 S.W.3d 227, 239 (Tex. App. 2002).

67. *Id.*

68. *See Testimony of Serio,* at 3.

69. *Id.*

70. *Id.*

71. *Id.*

72. 99 Wash.App. 41, 46-47 (2000).

73. *Sunbreaker Condominium Assoc. v. Travelers Ins. Co.*, 79 Wash.App. 368 (1995) (stating that mold damage would be covered if it is found that the proximate cause was wind-driven rain).

74. *Myers v. State Farm Fire & Cas. Co.*, 2002 WL 1547673 (Minn. App. 2002).

75. 184 F. Supp.2d 960, 962 (D. Arizona 2002).

76. *Id.* at 963.

77. *Westchester Resco Co., LP v. New England Reinsurance Corp.*, 818 F.2d 2, 3 (2nd Cir. 1987) (applying New York law).

78. 2004 WL 1592626 at 7 (N.D.N.Y.) *vacated* 2004 WL 2732127 (N.D.N.Y.).

79. *Id.*

80. *Id*; *see also* N.Y. Ins. Law § 3103 (McKinney 2000); *Bersani v. General Accident Fire & Life Assurance Corp.*, 36 N.Y.2d 457 (1975).

81. *See Testimony of Serio.*

82. 2005 WL 1252595 (1st Dep't 2005).

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The Rise of Air Quality Personal Injury Litigation

By Steven R. Kramer

Just a year ago mold litigation was proclaimed (and feared) to be the successor to asbestos litigation and the newest wave of air quality ("AQ")-related personal injury claims. Articles appeared in magazines and newspapers warning of litigation to come,[1] and as that litigation indeed proceeds throughout New York State (and the nation), plaintiffs' and defendants' counsel are now convening for yet the newest wave of AQ claims—welding rod litigation.[2] It seems clear that the primary cause of the rise of AQ personal injury claims (other than media publicity) is lack of governmental standards. This omission has permitted common law and novel statutory claims supported by "expert proof" to survive motions for summary judgment (and related *Daubert*[3] and *Frye*[4] challenges).

"It seems clear that the primary cause of the rise of AQ personal injury claims (other than media publicity) is lack of governmental standards."

AQ claims present themselves in a myriad of legal theories including traditional common law tort concepts such as negligence, trespass and nuisance, as well as novel statutorily predicated claims invoking The Americans With Disabilities Act,[5] The Rehabilitation Act of 1973[6] and Civil Rights/Section 1983.[7] The extent of claimed AQ injuries are myriad as well: nausea, headaches, congestion, nosebleeds, throat aches, respiratory distress, multiple chemical sensitivity ("MCS"), Parkinson's disease and parkinsonian-like neurologic deficits. AQ claims generally present themselves as indoor or outdoor claims. Indoor AQ ("IAQ") claims fall roughly into two categories—Sick Building Syndrome ("SBS") and Building Related Illness ("BRI"). The Occupational Health and Safety Administration ("OSHA") considers BRI to relate to "[s]pecific medical conditions of known etiology which can often be documented by physical signs and laboratory findings" and SBS "[n]ot . . . to a specific substance, but . . . as resulting from some unidentified contaminant or combination of contaminants."[8] Similarly, the United States Environmental Protection Agency ("EPA") considers BRI as "[r]eserved for situations in which signs and symptoms of diagnosable illness are identified and can be attributed directly to specific airborne building contaminants" and SBS as "[a] situation in which reported symptoms among a population of building occupants can be temporarily associated with their presence in that building."[9] Outdoor claims include exposure to asbestos and, now, welding rod fumes.

A. Lack of IAQ Governmental Regulation

The federal government, to its credit, attempted to establish uniform IAQ standards. The government's regulatory attempt was occasioned not by concern for workers being present in "sick" office buildings, but rather by health hazards claimed to relate to exposure to tobacco smoke. On April 5, 1994, OSHA published a proposed rule relating to all indoor non-industrial work environments.[10] The history of the proposed rule is a long one. In May of 1987, public interest groups filed petitions with OSHA requesting promulgation of an emergency temporary standard, the petitions were denied in 1989 due to lack of evidence of a "grave danger," and the public interest groups responded by filing an unsuccessful lawsuit. Two years later, OSHA issued a request for information on IAQ problems[11] and, one year later, the AFL-CIO petitioned OSHA to promulgate an overall IAQ standard. The prospect for regulatory uniformity ceased on December 17, 2001 when OSHA withdrew its IAQ proposal and terminated the rulemaking proceeding.[12] Since then, OSHA has issued piecemeal AQ rules[13] and "Interpretation and Compliance" letters.[14] Despite the existence of piecemeal federal and state regulations for certain chemicals,[15] and the creation of the Federal Interagency Committee on Indoor Air Quality,[16] uniform IAQ regulations do not exist. Without the clarity of regulatory control, business and trade groups have responded by creating voluntary industry standards. The American Society of Heating, Refrigerating and Air Conditioning Engineers ("ASHRAE") has, for example, set forth a standard concerning ventilation rates for commercial and institutional buildings.[17] Unfortunately, as we know all too well, compliance with industry or governmental standards does not win a case, but is only evidence of due care.[18]

B. SBS/BRI Litigation

Lack of IAQ regulation has resulted in SBS and BRI litigation. Thus far, most litigation that has proceeded on the merits has involved employment benefit claims. The reason for this may be that the majority of true personal injury litigation cases have been dismissed on statute of limitation grounds.[19]

An SBS employment benefit claim was analyzed in *Rakowski v. New York State Department of Labor*,[20] where claimant sought Workers' Compensation benefits claiming that she was suffering from SBS due to the build-

ing's poor ventilation. Claimant began her employment with the Department of Labor in 1975 and she filed her claim in 1990 after experiencing dizziness, headaches and nausea. The Workers' Compensation Administrative Law Judge ("ALJ") found for claimant, but the Workers' Compensation Board (the "Board") reversed based on lack of causation. The Third Department affirmed the dismissal of the claim, reasoning that "[t]he record clearly establishes that the condition did not arise from the nature of the work."[21]

SBS causation was also litigated in *Nicholson v. Mohawk Valley Community College*,[22] where the claimant was relocated to a newly renovated building and shortly thereafter complained of congestion, headaches, nosebleeds, rashes, itching and chronic cough. The Community College re-relocated her and the symptoms subsided. The ALJ determined that claimant was suffering from SBS and the Board affirmed the determination. The employer moved for full Board review and, surprisingly, the full Board reversed the panel's decision and remanded the matter back to the Board. The Board then reversed itself concluding that claimant had failed to establish a causal connection between her symptoms and employment. Not surprisingly, claimant appealed. The Third Department affirmed the dismissal of the claim, reasoning:

> Although claimant offered the findings and testimony of several physicians, each of whom indicated that claimant's symptoms were caused or exacerbated by poor air quality at work, none were able to identify the specific allergen(s) allegedly present in, and exclusive to, claimant's work environment which caused her symptoms. Moreover, the employer's physician and toxicologist testified that claimant was allergic to house dust, molds, trees, grasses, weeds and dust mites, i.e., common allergens which could not be confined exclusively to the workplace. Recognizing that the Board may accept or reject all or part of any medical evidence presented, and that such a determination is solely within its province, we conclude that there was substantial evidence to support the panel's determination that claimant had failed to establish a causal connection between her symptoms and her employment.[23]

An MCS IAQ employment benefits claim was litigated in *Marks v. County of Thompkins*.[24] Marks is an unusual case because the defendant apparently did not challenge the "general acceptance" of an MCS diagnosis but, instead, fought (and won) a causation argument. Most state and federal courts within New York have concluded that MCS is not "generally accepted."[25] In *Marks*, both claimant's treating physicians and the Workers' Compensation carrier agreed that claimant was suffering from MCS and the MCS was caused by her exposure to environmental toxins. The employer defended the claim by relying on air quality testing of the workplace which revealed no contaminants at levels which could cause permanent adverse health effects. Based on the "clean workplace" finding, the Board concluded that there was "[n]o scientific evidence to support a causal relationship between claimant's condition and her place of employment."[26] The Third Department affirmed the Board's finding, reasoning:

> [w]e cannot conclude that the Board lacked substantial evidence to support its rejection of the medical evidence on the issue of causal relationship in concluding that claimant failed to establish the necessary causal link between her multiple chemical sensitivity and her employment.[27]

The scientific debate and legal battle over causation of SBS and BRI injuries mirrors the debate and battle in mold litigation. The latter has, however, received increased media attention and involved greater litigation.

C. Mold Litigation

Mold is a microscopic member of the fungi family, exists indoors and outdoors and over 1,000 different species have been found inside U.S. homes. On the positive side, it has lead to the discovery of medicines such as Penicillin, Closporin and Mevacor.[28] On the negative side, ingestion of mold-tainted foods has been documented to cause mycotoxin poisoning in animals and humans[29] and mold sometimes metabolizes to produce mycotoxins[30] which can be cytotoxic and disrupt cellular structures.[31] Lack of federal, state or city indoor aerosol mold exposure limits has spawned the wave of mold litigation and experts not bound by definitive science were free to issue causation opinions as they pleased. That should change because the National Academy of Science recently issued a definitive report on alleged airborne mold causation.

1. Lack of Mold Legislation and Rulemaking

Over ten years ago, the New York City Health Department's Bureau of Environmental and Occupational Disease Epidemiology issued a paper entitled "Guidelines on Assessment and Remediation of Fungi in Indoor Environments."[32] The guideline—which remains unchanged today[33]—candidly remarked:

> This document is not a legal mandate and should be used as a guideline. Currently there are no United States Federal, New York State, or New York City regulations for evaluating potential health affects of fungal contamination and remediation.[34]

New York State tried unsuccessfully to enact mold regulation. In 2001, Senate Bill 5799, entitled "Toxic Mold Protection Act," was introduced and it proposed to establish a task force to advise the New York State Department of Health on developing standards for the presence of mold so that exposure limits could be adopted. The bill made it as far as the Rules Committee and was never enacted into law. Proposed federal mold regulation met a similar fate. On March 13, 2003, Representative John Conyers, Jr. introduced H.R. 1268, "The United States Toxic Mold Safety and Protection Act of 2003," which proposed to direct (i) the EPA and Centers for Disease Control ("CDC") to examine the effects of indoor mold on human health and develop scientific data on the hazards presented by indoor mold, and (ii) EPA and the Department of Housing and Urban Development to establish guidelines to identify and prevent the conditions that facilitate indoor mold growth. The bill never made it out of Committee. The same year, OSHA issued a publication entitled "Reiteration of Existing OSHA Policy on Indoor Air Quality: Office Temperature/ Humidity and Environmental Tobacco Smoke." The title's reference to "Reiteration of Existing OSHA Policy" is somewhat ironic because the publication expressly states that:

> OSHA has no regulations specifically addressing temperature and humidity in an office setting. However, *Section III, Chapter 2, Subsection V of the OSHA Technical Manual*, 'Recommendations for the Employer,' provides engineering and administrative guidance to prevent or alleviate indoor air quality problems.[35]

There are three primary sources for environmental evaluation of workplaces: (i) National Institute for Occupational Safety and Health ("NIOSH") recommended exposures limits ("RELs"), (ii) American Conference of Governmental Industrial Hygienists ("ACGIH") threshold limit values ("TLVs"), and (iii) OSHA permissible exposure limits ("PELs").[36] Of these, only OSHA has the force of law, but a critical regulatory flaw is that OSHA has not issued PELs for aerosol exposure.[37] Without the guideposts of governmental rulemaking, mold litigation has lived up to its hype of becoming the successor to asbestos litigation.

2. Authoritative Airborne Mold Science Arrives From the National Academy of Science

The debate over the "general acceptance" of aerosol mold causation took new meaning when the CDC withdrew its support of the *Cleveland* study. That famous study was prompted by an outbreak of infant pulmonary hemorrhage in the Cleveland area in 1993–1994 and the discovery that approximately 50% of the infants had recurrence of symptoms upon returning to their homes. An epidemiological investigation was undertaken and different types of mold, including *Stachybotrys atra* (now called *S. chartarum*), were discovered in the infants' homes. CDC case studies issued a "preliminary opinion" that the pulmonary hemorrhage was associated with major household water damage during the months before illness and increased levels of household fungi.[38] In 1997, the *Cleveland* study concluded that mycotoxins could cause infant pulmonary hemorrhage.[39] The CDC, however, over the course of four separate papers[40] withdrew its support for the *Cleveland* study, concluding that "the reviews led CDC to conclude that a possible association between acute pulmonary hemorrhage/hemosiderosis in infants and exposure to molds, specifically *Stachybotrys chartarum*, commonly referred to by its synonym *Stachybotrys atra*, was not proven."[41]

Faced with a crisis in the reliability of mold science, the CDC asked the National Academy of Science's Institute of Medicine ("IOM") to conduct a comprehensive review of the scientific literature regarding the relationship between damp or moldy indoor environments and the manifestation of adverse health effects. The IOM did so, and in May of 2004 the IOM issued a 355-page epidemiological study entitled "Damp Indoor Spaces and Health."[42] The study utilized five standards to categorize the probability of health outcomes: (1) sufficient evidence of a causal relationship (defined as "[t]he evidence fulfills the criteria for 'sufficient evidence of an association' and, in addition, satisfies the evaluation criteria discussed above: strength of association, biologic gradient, consistency of association, biologic plausibility and coherence and temporally correct association"); (2) sufficient evidence of an association (defined as "[a]n association between the agent and the outcome has been observed in studies in which chance, bias, and confounding could be ruled out with reasonable confidence"); (3) limited or suggestive evidence of an association (where chance, bias and confounding could not be ruled out); (4) inadequate or insufficient evidence to determine whether or not an association exists; and (5) limited or suggestive evidence of no association.[43]

The IOM study reached the following conclusion concerning the state of scientific evidence regarding the

presence of mold and the probability of health outcomes:

> **The association between fungal exposures and opportunistic fungal infections of the skin of severely immunocompromised persons is well established. For all the other listed outcomes, the committee concludes that there is inadequate or insufficient information to determine whether an association exists between them and exposure to a damp indoor environment or the presence of mold or other agents associated with damp indoor environments.** A small number of case studies have associated those adverse health outcomes with damp or moldy environments but only in persons with highly compromised immune systems or when the circumstances, such as ingestion of contaminated foodstuffs, are not relevant to this report (emphasis added).[44]

The study's conclusions are summarized below[45:]

Sufficient Evidence of a Causal Relationship
- none

Sufficient Evidence of an Association
- Upper respiratory (nasal and throat) tract symptoms
- Wheeze
- Asthma symptoms in sensitized asthmatic persons
- Cough
- Hypersensitivity pneumonitis in susceptible persons

Limited or Suggestive Evidence of an Association
- Lower respiratory illness in otherwise healthy children

Insufficient Evidence to Determine Whether an Association Exists
- Dyspnea
- Skin symptoms
- Airflow obstruction (in otherwise healthy persons)
- Asthma development
- Mucous membrane irritation syndrome
- Gastrointestinal tract problems
- Chronic obstructive pulmonary disease
- Fatigue
- Inhalation fevers (nonoccupational exposures)
- Neuropsychiatric symptoms
- Lower respiratory illness in otherwise healthy adults
- Cancer
- Rheumatologic and other immune diseases
- Reproductive effects
- Acute idiopathic pulmonary hemorrhage in infants

The IOM study also analyzed the state of science concerning the presence of damp indoor environments and the probability of health outcomes. The following summarizes the study's conclusions:[46]

Sufficient Evidence of a Causal Relationship
- none

Sufficient Evidence of an Association
- Upper respiratory (nasal and throat) tract symptoms
- Wheeze
- Cough
- Asthma symptoms in sensitized asthmatic persons

Limited or Suggestive Evidence of an Association
- Dyspnea
- Asthma development
- Lower respiratory illness in otherwise healthy children

Insufficient Evidence to Determine Whether an Association Exists
- Airflow obstruction (in otherwise healthy persons)
- Skin Symptoms
- Mucous membrane irritation syndrome
- Gastrointestinal tract problems
- Chronic obstructive pulmonary disease
- Fatigue
- Inhalation fevers (nonoccupational exposures)
- Neuropsychiatric symptoms
- Lower respiratory illness on otherwise-healthy adults
- Cancer
- Acute Idiopathic pulmonary hemorrhage in infants
- Reproductive effects
- Rheumatologic and other immune diseases

Now that the National Academy of Science has determined that there is no sufficient scientific evidence to link airborne mold exposure to health outcomes in nonimmunocompromised individuals, it seems clear that the next wave of AQ litigation will concern a different area—welding rods.

D. Welding Rod Litigation

Welding rod litigation concerns the health outcome of workers being exposed to airborne end-products (fumes, gases and particulates) of welding operations. Welding is the joining of metal parts by melting the parts at the joint and filling the space with molten metal. Typically, heat is generated (by either electricity or gas flame), the tip of a welding rod (which is an electrode) is inserted into the gap between the metal parts and is melted. The thrust of these claims is that certain welding rods contain manganese alloy, and exposure to manganese alloy fumes causes neurologic impairments such as the onset of Parkinson's disease or parkinsonian-like symptoms referred to as manganism.

1. Regulatory Control Exists

Unlike mold, governmental regulation does exist. Although OSHA has not set forth a PEL for total welding fumes, it has established PELs for individual welding contaminants (i.e. manganese, iron, etc.) and the time weighted average PEL for manganese is 5.0 milligrams of contaminant per meter of air.[47] It should be noted that this is a 1969 standard, and it remains the law of the land today because OSHA's 1989 proposed PELs were vacated by a federal appellate Court.[48] Since then, NIOSH has proposed a manganese REL of 1.0 milligram per cubic meter[49] and even lower is the ACGIH's manganese TLV of 0.2 contaminant per cubic meter.[50] As it now stands, the law today is 5.0 milligrams of contaminant per cubic meter of air.

2. The Causation Debate

There is no dispute that certain exposures of manganese has been documented to cause harm.[51] The causation debate is therefore a "dose-response" debate, i.e., can exposure to manganese cause Parkinson's disease or parkinsonian-like neurologic deficits? The science on this issue is sparse at best. Welding rod manufacturers won eight straight defense verdicts before a plaintiff's verdict was issued in *Elam*.[52] The pre-*Elam* cases were won by establishing that the plaintiffs were suffering from idiopathic Parkinson disease and the absence of reliable science establishing causation between exposure to welding fumes and the onset of Parkinson's disease. But in *Elam*, the plaintiff supported its case with new "science" in the form of: (i) the 2001 *Racette* study which opined that manganese exposure may lead to the acceleration of Parkinson's disease[53] and (ii) testimony by Dr. Paul Nausieda, medical director of the Regional Parkinson Center at St. Joseph's Hospital in Milwaukee (who is now reported to be conducting welder "screenings"). Since *Elam*, MDL and class action litigation has begun. Like the frenzy over mold (and breast implant) litigation, it may take the involvement of the National Academy of Sciences to resolve this scientific debate.

Conclusion

AQ litigation will continue to rise as long as governmental regulation and science from authoritative sources are lacking. The lack of these guideposts permits novel and ever-changing claims supported by "experts" to go to the jury. Defense counsel will need to retain eminently qualified toxicologists, industrial hygienists and neurologists (and other experts) to battle these emerging claims in *Frye/Daubert* challenges and at trial.

Endnotes

1. *See, e.g.*, *Spreading Mold Lawsuits Threaten NY Infection: Residential Claim Triple to 4th Highest*, Crain's New York Business, February 17, 2003.
2. Mealeys, for example, is sponsoring a welding rod litigation conference this fall.
3. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.E.2d 469 (1993).
4. New York State follows the *Frye* standard (*Frye v. United States*, 293 F.2d 1013 (Columbia. Cir. 1923)), which is stricter than the *Daubert* one. *See People v. Wesley*, 83 N.Y.2d 417, 423, n.2, 611 N.Y.S.2d 97, 100, n.2 (1994); *Selig v. Pfizer, Inc.*, 185 Misc. 2d 600, 713 N.Y.S.2d 898 (Sup. Ct., N.Y. Co. 2000).
5. *See* 42 U.S.C. §§ 12101 *et seq.*; *see also Johns-Davila v. City of New York*, __ F. Supp.__, reported at 2000 WL 1725418 (S.D.N.Y. November 20, 2000) (dismissing claim that the City violated the ADA because the plaintiff was suffering from a fibromyalgia, which was allegedly exacerbated by SBS, and the City refused to relocate her to a "clean" building).
6. *See* 29 U.S.C. §§ 701, *et seq.*; *see also Heilweil v. Mount Sinai Hospital*, 42 F.2d 718 (2d Cir. 1994) (dismissing Rehabilitation Act claim where the plaintiff alleged that poor ventilation in the hospital's blood bank exacerbated her asthma and she could not work in the blood bank as well in as any poorly ventilated location within the entire hospital).
7. *See* 42 U.S.C. § 1983; *see also Bolton v. Goond*, 992 F. Supp. 604 (S.D.N.Y. 1998) (dismissing inmates' challenge to "double bunking" based in part on sub-standard ventilation claim).
8. 59 Federal Register 15968 (April 5, 1994).
9. *Indoor Air Pollution—An Introduction for Health Professionals* <http://www.epa.gov/iedweb00/pubs/hpguide.html>.
10. *See* note 6, *supra*.
11. 56 Federal Register 47892 (September 20, 1991).
12. 66 Federal Register 64946 (December 17, 2001).
13. *See, e.g.*, 29 CFR 1910.94 (ventilation standard for the general industry).
14. *See, e.g.*, *Reiteration of Existing OSHA Policy on Indoor Air Quality: Office Temperature/Humidity and Environmental Tobacco Smoke* (February 24, 2003) <http://www.osha slc.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS &_id=24602>.
15. *See, e.g.*, 29 C.F.R. 1910.1000, Table Z-l Limits for Air Contaminants.
16. In 1989, the EPA at Congress' direction established the Federal Interagency Committee on Indoor Air Quality to coordinate the activities of the Federal Government on issues relating to Indoor Air Quality. *See* Title IV, § 403(c), of the Superfund Amendments and Re-Authorization Act of 1986. The committee is co-chaired

by EPA, the Consumer Product Safety Commission ("CPSC"), the Department of Energy ("DOE"), the Centers for Disease Control ("CDC"), National Institute for Occupational Safety and Health ("NIOSH") and OSHA.

17. ASHRAE Standard 62-2001.
18. *See, e.g., Lugo v. LGN Toys, Ltd.*, 146 A.D.2d 168, 539 N.Y.S.2d 922 (1st Dep't 1989), *aff'd*, 75 N.Y.2d 850, 552 N.Y.S.2d 914 (1990).
19. *See, e.g., Martin v. 159 W. 80 Street Corp.*, 3 A.D.3d 439, 770 N.Y.S.2d 720 (1st Dep't 2004); *Searle v. City of New Rochelle*, 293 A.D.2d 735, 742 N.Y.S.2d 314 (2d Dep't 2002); *Bartlett v. Moore Business Forms, Inc.*, __ F. Supp. __, reported at 2000 WL 362022 (N.D.N.Y. March 30, 2000); *Barban v. Schnurmacher Brothers Real Estate*, __ Misc. 2d __ (Sup. Ct. N.Y. Co. 1998/J. Braun), reported at N.Y.L.J., March 31, 1998. p.25, col. 2.
20. 243 A.D.2d 1020, 663 N.Y.S.2d 428 (3d Dep't 1997).
21. *Id.* at 1021.
22. 274 A.D.2d 677, 711 N.Y.S.2d 542 (3d Dep't 2000).
23. *Id.* at 678.
24. 274 A.D.2d 764, 711 N.Y.S.2d 554 (3d Dep't 2000). Although the defendant did not challenge the "general acceptance" of an MCS diagnosis, many courts have concluded that MCS is not generally accepted. *See Hammond v. Alekna Construction*, 269 A.D.2d 773, 703 N.Y.S.2d 332 (4th Dep't 2000); *Oppenheim v. US Charities*, 266 A.D.2d 116, 698 N.Y.S.2d 144 (1st Dep't 1999); *Zwillinger v. Garfield Slope*, __ F. Supp. __, reported at 1998 WL 623589 (E.D.N.Y. August 17, 1998); *Frank v. State of New York*, 972 F. Supp. 130 (N.D.N.Y. 1997).
25. *Id.*
26. 274 A.D.2d at 765.
27. *Id.*
28. *The Fungi Hunt, So Many Species Ripe for the Finding*, New York Times, September 7, 2004.
29. *See, e.g.*, Fung, et al., *Stachybotrys, A Mycotoxin-Producing Fungus of Increasing Toxicologic Importance*, Clinical Toxicology 36:79–96 (1998).
30. *See* Mold: A Growing Problem, Joint Hearing Before the Subcommittee on Oversight and Investigations and the Subcommittee on Housing and Community Opportunity of the Commission on Financial Services, 107th Congress, 2d Session 8 (2002).
31. *Id.*
32. <http://www.ci.nyc.ny.us/html/doh/html/epi/moldrptl.html>
33. Guideline visited online on September 3, 2004.
34. *See* note 32, *supra*.
35. <http://www.osha slc.gov/pls/oshaweb/owadisp.show_document ?p_table=INTERPRETATIONS&p_id=24602. Similarly, the EPA/NIOSH's "Building Air Quality Action Plan" (EPA Publication No. 402-K-98-001 (June 1998)), and "Building Air Quality: A Guide for Buildings Owners and Facility Managers" (EPA Publication No. 40011-91/003 (December 1991)) are mere guidelines and not promulgated rules.
36. *See* NIOSH Recommendations for occupational safety and health: compendium of policy documents and statements; ACGIH TLVs and BEIs: threshold limit values for chemical substances and physical agents and biological exposure indices; and 29 C.F.R. 1910.1000.
37. *See* NIOSH Health Hazard Evaluation Report, HETA #2001-0067-2896 (March 2003) <http://www .cdc.gov/niosh/hhe/reports/pdfs/200 1-0067 - 2896. pdf>.
38. *CDC Update: pulmonary hemorrhage/hemosiderosis among infants—Cleveland, Ohio, 1993–1996.* Morbidity Morality Weekly Report ("MMWR") 46:33–5 (1997).
39. Montana, E.; R. A. Etzel; T. Allan; T. E. Horgan; and D. G. Dearborn. *Environmental Risk Factors Associated with Pediatric Idiopathic Pulmonary Hemorrhage and Hemosiderosis in a Cleveland Community*, Journal of Pediatrics 99:EI-E8 (1997).
40. *CDC Update: pulmonary hemorrhage/hemosiderosis among infants—Cleveland, Ohio, 1993–1996.* Journal of the American Medical Association ("JAMA") 283: 1951–1953 (2000); CDC Report of the CDC working group on pulmonary hemorrhage/hemosiderosis, <http://www.cdc.gov/odlads>; CDC Reports of members of the CDC External Expert Panel on Acute Idiopathic Pulmonary Hemorrhage in Infants: a synthesis (1999); *CDC Update: pulmonary hemorrhage/hemosiderosis among infants—Cleveland, Ohio, 1993–1996*, MMWR 49:180–184 (2000).
41. *CDC Update: pulmonary hemorrhage/hemosiderosis among infants—Cleveland, Ohio, 1993–1996*. JAMA 283:1951–1953 (2000).
42. *Damp Indoor Spaces and Health*, National Academies Press (2004).
43. *Id*. at 26–27.
44. *Id*. at 252.
45. *Id.* at 254.
46. *Id*. at 253.
47. *See* note 15, *supra*.
48. *AFL-CIO v. OSHA*, 965 F.2d 962 (11 th Cir. 1992) (vacating PELs promulgated at 54 Federal Register 2332 (1989)).
49. *See* NIOSH Pocket Guide to Chemical Hazards, Publication No. 97-140 (February 2004).
50. *See* ACGIH TLVs and BEIs: threshold limit values for chemical substances and physical agents and biological exposure indices (2004).
51. *See, e.g.*, Cooper, J., *On the Effects of Black Oxide of Manganese when Inhaled into the Lungs*, British Ann. Med. Pharm. 1:41–42 (1837).
52. *Elam v. Airco*, et al. (Circuit Court for Madison County, Illinois, Case No.: 01-L-1213). The jury's verdict is on appeal.
53. Racette, B.A. et al., *Welding-Related Parkinsonium: Clinical Features, Treatment, and Pathophysiology*, Journal of Neurology (January 2001).

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The Current "State" of Emotional Distress Claims in New York

By David Henry Sculnick

A. Introduction

In most tort cases, recovery for mental distress is not controversial. When a defendant's negligence causes physical harm to a plaintiff, recovery for accompanying emotional distress is included as a component of damages. *See* Henderson & Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 816, 824 (2002) (such recovery is "a staple of American tort law"). However, American courts have always been hesitant to award stand-alone damages for emotional distress absent physical injury. Keeton, et al., *Prosser and Keeton on Torts*, § 54 (5th ed.). The question addressed by the Second Department early this summer, in *Sheppard-Mobley v. King*, 778 N.Y.S.2d 98, 2003 WL 23531418 (2d Dep't June 7, 2004), whether parents of a child born with birth defects because of injuries inflicted on the fetus *en utero* can recover damages for their own emotional distress, is particularly daunting because it combines the traditional hesitancy of the courts to allow recovery for emotional distress with their traditional hesitancy to wade into the debate over when life begins. What *Sheppard-Mobley* did was extend a recent Court of Appeals ruling allowing a mother's claim for emotional distress associated with a still birth, to include the right to claim emotional distress damages for injuries to her child *even* when the child is born alive. *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 777 N.Y.S.2d 416, 809 N.E.2d 645 (2004).

In the first American case to address stand-alone recovery for the negligent infliction of emotional distress, the New York Court of Appeals refused to recognize the tort because of the potential for a "flood of litigation in cases where the injury . . . may be easily feigned . . . and where damages must rest upon mere conjecture or speculation." *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 110 (1896) (plaintiff could not recover for miscarriage caused by a near-collision with a horse-drawn carriage); *see also* Note, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind*, 61 Brook. L. Rev. 1399 (1995) (reviewing the history of emotional distress in New York).

Despite the concerns articulated in *Mitchell*, in *Battalla v. New York,* 10 N.Y.2d 237 (1961) New York did away with the physical injury bar to the negligent infliction tort (child could recover for psychological injuries where ski lift attendant's failure to secure her with a safety belt caused emotional distress and "consequential injuries"). The *Battalla* Court overruled *Mitchell* with a broad statement of policy: "It is fundamental to our common-law system that one may seek redress for every substantial wrong." *Id.* at 240. Later courts lamented that *Battalla's* ideal is not a reality. *See., e.g., Tobin v. Grossman*, 24 N.Y.2d 609, 619 (1969) ("[w]hile it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world"). While the concerns voiced in *Mitchell*, but minimized in *Battalla*, have continued to temper the judiciary's approach to negligent infliction of emotional distress, the bulwark has been steadily eroded.

B. Elements of Recovery for Emotional Distress

From its roots in *Battalla*, the doctrine has diverged into two branches: (1) recovery for emotional distress absent physical injury where the defendant breaches a duty owed directly to the plaintiff, and (2) recovery for emotional distress absent physical injury where the defendant breaches a duty owed to a third party.

1. Emotional Distress Caused by Breach of Duty Owed Directly to Plaintiff

New York allows recovery for emotional distress when (1) the defendant breaches a duty owed directly to the plaintiff, (2) the defendant's acts are the proximate cause of the harm, and (3) the harm is such that "there exists 'an especial likelihood of genuine and serious mental distress [that] serves as a guarantee that the claim is not spurious.'" *Johnson v. New York*, 37 N.Y.2d 378, 382 (1975) *quoting*, Prosser, § 54 (4th ed.). In addition to cases of intentional infliction of emotional distress, New York courts have extended the doctrine to include a variety of negligent acts. *See, e.g., Spielberg v. American Airlines. Inc.*, 105 F. Supp.2d 280 (S.D.NY. 2000) (awarding damages for "fear of dying" caused by severe turbulence on an airplane); *Brown v. New York City Health and Hosp. Corp.*, 255 A.D.2d 36 (2d Dep't 1996) (awarding damages for reasonable fear of contracting HIV); *Bishop v. Mount Sinai Medical Center*, 247 A.D.2d 329 (1st Dep't 1998) (fear of contracting HIV); *Fosby v. Albany Memorial Hosp.*, 252 A.D.2d 606 (3d Dep't 1998) (fear of contracting HIV).

2. Emotional Distress Caused by Breach of Duty Owed to Third Party

New York recognizes a bystander's right to recover for emotional distress when (1) the defendant breaches a duty owed to a member of the plaintiff's "immediate family"; (2) the plaintiff "observe[s] . . . the serious injury or death" of the family member; and (3) the defendant

exposes the plaintiff to "an unreasonable risk of bodily injury or death." *Bovsun v. Sanperi*, 61 N.Y.2d 219, 231 (1984) (the area within which an "unreasonable risk of bodily injury" is possible is often called "the zone of danger").

In *Bovsun*, plaintiffs, mother and daughter, were sitting in their station wagon as the father stood at the rear of the car. "Although neither mother nor daughter actually saw the . . . car strike their station wagon . . . both were instantly aware of the impact and the fact that Jack Bovsun must have been injured." *Id.* at 225. The Court added that "the emotional disturbance must be serious and verifiable" and "must be tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant. "*Id.* at 231–232.

Interestingly, Judge Kaye was the author of a strong dissent. She criticized the decision as an imprudent expansion of liability that "must in fairness give way to far-reaching liability" (*Id.* at 240) and lamented that "as a matter of fairness, one parent is no more entitled to recover for mental distress from observing a child's injury than another who suffered the same anguish though not technically within the 'zone of danger.'"

3. Distinction Between Duty Owed Directly to the Defendant and Duty Owed to a Third Party

The success of a claim for negligent infliction of emotional distress will often turn on the plaintiff's ability to characterize the loss as stemming from the breach of a duty owed directly to the plaintiff. *See Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 506 (1983) ("there is no duty to protect from emotional injury a bystander to whom there is otherwise no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when [the injury is] a direct, rather than a consequential, result of the breach"). As the following cases illustrate, this characterization is not always easy—or logical.

The courts have found a duty running directly to a plaintiff where a hospital incorrectly informs a plaintiff that a family member has died, *Johnson*, 37 N.Y.2d 378; where a corpse has been mishandled or misidentified, *Torres v. New York*, 228 N.Y.S.2d 1005 (Ct. of Claims 1962); *Weingast v. New York*, 254 N.Y.S.2d 952 (Ct. of Claims 1964), where a family member's body cannot be found because of a hospital's negligence, *Lando v. New York*, 39 N.Y.2d 803 (1976) (child's dead body found eleven days after she wandered out of hospital); *but see Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523 (1984) (no duty to parents where child was abducted from hospital), and where a public school returned from a field trip without searching for a child who had drowned in a swimming pool and without informing his mother that he was missing. *Maracallo v. New York City Board of Ed.*, 769 N.Y.S.2d 717 (NY Sup. Ct. 2003).

The courts have refused to extend a duty to protect third parties from emotional distress when the circumstances appear strained. The distinctions which these cases use to support the ruling demonstrate just how artificial the boundary is between when a third person "should" or should not be allowed to pursue a claim for their own emotional distress injuries. *See Lafferty v. Manhasset Medical Center*, 54 N.Y.2d 277 (1981) (daughter-in-law cannot recover for her emotional distress even though hospital staff allowed her to attempt to "rescue" her mother-in-law after witnessing a negligent blood transfusion); *Kennedy*, 58 N.Y.2d 500, 506 (1983) (dentist could not recover from medical equipment supplier that labeled nitrous oxide tank "oxygen" and caused dentist to kill patient).

C. Emotional Distress Caused by Injury to Child *En Utero*

Emotional distress caused by negligence that injures a fetus *en utero* creates a special problem of classification. As Chief Judge Kaye observed in her dissenting opinion in the now "overruled" case of *Tebbutt v. Virostek*, 65 N.Y.2d 931 (1985), "[t]he interests of the mother and the unborn child are intertwined during the mother's pregnancy."

The *Broadnax* Court stated the question presented very simply: "whether, absent a showing of independent physical injury to her, a mother may recover damages for emotional harm when medical malpractice causes a miscarriage or stillbirth." 2 N.Y.3d at 151. The answer: Yes she can. It seems clear from the dialogue contained within the opinion, that the Court could no longer reconcile the "logical gap in which the fetus is consigned to a state of 'judicial limbo.' . . . If the fetus cannot bring suit, 'it must follow in the eyes of the law that any injury here was done to the mother.'" 2 NY.3d at 152, fn. 2, quoting from Judge Kaye's dissent in *Tebbutt.* The Court did not allude to how it might answer the same question if the child was born alive, but the *Sheppard-Motley* Court made the extension, and advanced the scope of protection to that situation just two months after *Broadnax* was handed down.

1. Duty to Prevent Harm to Fetus Does Not Vest Until Live Birth of Child

The distinction between damages owed to the prospective mother and damages owed to the fetus developed from traditional common law concepts and is formalized in a line of cases beginning in 1951.

The decision of Justice Holmes, sitting in the Massachusetts Supreme Court, appears to be the first acknowledgment that American "rule" is that a fetus is not a "person" *en utero. Dietrich v. Northampton*, 138 Mass. 14

(1884) overruled in part, *Keyes v. Construction Serv. Inc.*, 165 N.E.2d 912 (Mass. 1960). The New York Court of Appeals modified this distinction in *Woods v. Lancet*, 303 N.Y. 349, 357 (1951) overruling, *Drobner v. Peters*, 232 N.Y. 220 (1921), where it held that a cause of action for personal injury to a fetus could exist where injury occurred *en utero* "to a viable foetus, later born."

In 1969, the Court determined that New York's wrongful death statute does not authorize a cause of action for the death of an unborn child. *Endresz v. Friedberg*, 24 N.Y.2d 478 (1969) ("liability attaches only upon fulfillment of the condition that the child be born alive"); *see also*, *La Bello v. Albany Medical Center Hosp.*, 85 N.Y.2d 701 (1995) (statute of limitations ["s.o.l."] for infant plaintiffs medical malpractice action does not begin to toll until birth because "[s.o.l.] cannot run until there is a legal right to relief'). The Court explained:

> The considerations of justice which mandate the recovery of damages by an infant, injured in his mother's womb and born deformed through the wrong of a third party, are absent when the foetus, deprived of life while yet unborn, is never faced with the prospect of impaired mental or physical health. [First,] proof of pecuniary injury and causation is immeasurable more vague than in suits for prenatal injuries [and second,] since the mother may sue for any injury which she sustained in her own person . . . an additional award to the 'distributees' of the foetus would . . . constitute not compensation to the injured but punishment to the wrongdoer. *Endresz*, 24 N.Y.2d at 483.

The Court has also refused to recognize an action by a live child for the emotional distress of living with a debilitating injury, arising from injuries suffered *en utero*. *Becker v. Schwartz*, 46 N.Y.2d 401 (1978). Claims for "wrongful life," as the Court classified them, are not cognizable because (1) "[w]hether it is better to never have been born at all . . . is a mystery more properly to be left to the philosophers and theologians . . . " and (2) the measure of damages is indeterminate because "wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence." *Id.* at 411–412.

2. Injury to Fetus *En Utero* Causes Stillbirth or Abortion

In *Broadnax,* the Court held that "even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress." 2 N.Y.3d at 155.

Broadnax can be said to have been foreshadowed by a series of cases decided in the 1980s and 1990s, in which the Court of Appeals allowed prospective mothers to recover for emotional distress stemming from professional negligence that injured a fetus *en utero* and which they alleged caused them to seek a termination of their pregnancy. *See Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697 (1987) (prospective mother entitled to damages for emotional distress as a result of abortion if doctor was negligent in advising her that child would be born with birth defects); *Lynch v. Bay Ridge Obstetrical and Gynecological Assoc.*, 72 N.Y.2d 632 (1988) (prospective mother entitled to damages for emotional distress as a result of abortion if doctor had prescribed medicine that causes birth defects in pregnant woman); *Ferrara v. Bernstein*, 81 N.Y.2d 895 (1993) (prospective mother entitled to damages for emotional distress where unsuccessful abortion caused stillbirth). In each of these cases, the Court made a careful distinction between emotional injuries inflicted directly on the prospective mother by the tortfeasor and injuries inflicted on the fetus. *See, e.g.*, *Martinez*, 70 N.Y.2d at 697 ("[plaintiff's] mental anguish [is] the direct result of defendant's breach of a duty owed directly to her"); *Lynch*, 72 N.Y.2d at 635 ("plaintiff is not seeking to recover emotional distress resulting from the injuries inflicted on the fetus").

3. Injury to Fetus *En Utero* Causes Child to Be Born with Injuries

In *Howard v. Lecher*, 42 NY.2d 109 (1977), the Court refused to allow the parents of a child born with Tay Sachs disease to recover for the emotional distress that they experienced as a result of his subsequent death. The parents argued that, had their doctor warned them that the children of Eastern European Jews were at high risk for this genetic disorder, then they would have chosen to abort the pregnancy. *Id.* at 111. The Court rejected their claim, noting that "the law has long recognized that it need not provide relief for every injury suffered." *Id. See also Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809 (1980) (mother cannot recover for her emotional distress as a result of child born with birth-defects because doctor negligently prescribed a drug that caused the defects). These rulings would now seem to have little more than historical relevance.

We know, of course, that plaintiffs can now recover for the "pecuniary loss for extraordinary expenses for their [child's] care, arising from the injuries and disabilities . . . sustained as a result of the [physician's] alleged failure to diagnose and treat both mother and [child], as well as any negligence in pre-natal care and delivery." *Sample v. Levada*, 779 N.Y.S.2d 96, 99 (2d Dep't. 2004); *Alquiiay v. St. Luke's-Roosevelt Hosp. Ctr.*, 63 NY.2d 978 (1984). The only claim which the Courts still appear committed to disallowing is a pure "wrongful life" claim. We can only ponder when that too may fall.

Annotated Bibliography of Cases of Historical or Developmental Curiosity

I. Recovery by Mother for Emotional Distress as a Result of Miscarriage

Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 108–110 (1896) (where pregnant woman miscarried after she was nearly hit by a horse-drawn carriage, the woman could not recover damages for her emotional distress because (1) "it would naturally result in a flood of litigation," (2) "the injury complained of may be easily feigned," and (3) "the damages must rest upon mere conjecture or speculation").

The Court of Appeals overruled *Mitchell* in *Battalla v. State of New York*, 10 N.Y.2d 237, 239 (1961) (where ski lift attendant placed infant plaintiff in chair lift without securing her with a safety belt, child could recover for her emotional distress and "consequential injuries"). The broad statement of principle with which the Court began its decision marks the high-water mark for the doctrine of recovery for emotional distress in New York: "It is fundamental to our common-law system that one may seek redress for every substantial wrong." *Id.* at 240.

The Court rejected the public policy argument in *Mitchell* because "it seems that fraudulent accidents and injuries are just as easily feigned in the slight-impact cases and other exceptions wherein New York permits a recovery. . . . The ultimate result is that the honest claimant is penalized for his reluctance to fashion the facts within the framework of the exceptions." *Id.* at 241. The Court conceded that "[t]he only substantial policy argument of Mitchell is that the damages or injuries are somewhat speculative and difficult to prove." *Id.* at 242. As such, the Court concluded that "the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions, and 'it is beside the point . . . in determining the sufficiency of the pleading.'" *Id. quoting*, *Woods v. Lancet*, 303 N.Y. 349, 356 (1951).

In *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697 (1987), the Court allowed plaintiff to recover for *her* emotional distress when she learned that the doctor had incorrectly advised her that her child would be born with birth defects and that the mother had relied on the doctor's advice in aborting the pregnancy. The Court was careful to distinguish the direct nature of her damages, from the bystander cases where recovery had been denied. "[Plaintiff's] mental anguish and depression are the direct result of defendant's breach of a duty owed directly to her in giving erroneous advice on which she affirmatively acted in deciding to have an abortion." *Id.* at 699.

The Court affirmed the cause of action for emotional distress caused by negligence that causes stillbirth in *Lynch v. Bay Ridge Obstetrical and Gynecological Assoc.*, 72 N.Y.2d 632 (1988) (where plaintiff underwent abortion because doctor had negligently prescribed medicine that may cause birth defects to plaintiff while she was pregnant, plaintiff could recover for her emotional distress as a result of the abortion); *Ferrara v. Bernstein*, 81 N.Y.2d 895 (1993) (plaintiff entitled to damages for emotional distress where unsuccessful abortion caused stillbirth of fetus while on toilet in hospital). The Court in *Lynch* made clear, however, that, "plaintiff is not seeking to recover emotional distress resulting from the injuries inflicted on the fetus." *Id.* at 635.

II. Recovery by Child for Injuries Inflicted "En Ventre Se Mere"

In a line of cases beginning with *Woods v. Lancet*, 303 N.Y. 349 (1951), the Court recognized that a child injured while "en ventre se mere," who survives such injury, may recover for those injuries suffered as a result of the negligence of another. *Id.* at 357 ("a viable foetus [sic.], later born"). The Court also noted that the mother could not recover damages for the infant in her own name. *Id.* ("such a child, still in the womb [when the injury occurred] is, in one sense, a part of the mother, but no one seems to claim that the mother, in her own name and for herself, could get damages for the injuries to the infant"). This decision overruled the Court's earlier and contrary opinion in *Drobner v. Peters*, 232 N.Y. 220 (1921).

In *Endresz v. Friedberg*, 24 N.Y.2d 478, 482 (1969) the Court refused to allow a wrongful death action to be maintained for the death of an unborn child. The Court based its interpretation of the wrongful death statute, in part, on the policy concern that "to compensate the parents [of a stillborn child] any further than they are entitled by well-settled principles of law and to give them a windfall through the estate of the fetus is blatant punishment." *Id.* at 484–485. The Court made clear that an unborn fetus does not have legal rights, "the law has never considered the unborn foetus [sic.] as having a separate judicial existence or a legal personality or identity until it sees the light of day." *Id.* at 485. "[T]o make viability rather than birth the test would not remove the difficulty but merely relocate it and increase a hundredfold the problems of causation and damages." *Id.* at 486. *See also LaBello v. Albany Medical Center Hosp.*, 85 N.Y.2d 701 (1995) (statute of limitations for personal injury action where injuries were caused to fetus does not toll until live birth).

In *Becker v. Schwartz*, 46 N.Y.2d 401 (1978), the Court made clear that there could be no recovery by the child for wrongful life. "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians" and "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between . . . life in an impaired

state and nonexistence. This comparison the law is not equipped to make." *Id.* at 412.

III. Recovery for Emotional Distress by Mother as Bystander

In *Tobin v. Grossman*, 24 N.Y.2d 609 (1969), the Court of Appeals refused to extend the cause of action for emotional distress to include emotional distress suffered by a mother as a result of having heard the car accident that killed her two-year-old son. The Court "concluded that under the well-established applicable doctrines no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries." *Id.* at 611. Public policy supported the decision because "the eyewitness limitation provides no rational practical boundary for liability." *Id.* at 618. The Court pulled back on the sweeping language of *Battalla* and admonished, "[w]hile it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world." *Id.* at 619. The cause of action for negligent infliction of emotional distress was at its nadir.

In *Howard v. Lecher*, 42 N.Y.2d 109 (1977), the Court refused to allow the parents of a child born with Tay Sachs disease to recover for the emotional distress that they experienced as a result of his subsequent death. The parents argued that, had their doctor warned them that the children of Eastern European Jews were at high risk for the genetic disorder, then they would have chosen to abort the pregnancy. *Id.* at 111. The Court rejected their claim, noting that "the law has long recognized that it need not provide relief for every injury suffered." *Id. See also*, *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809 (1980) (mother cannot recover for her emotional distress as a result of child born with birth-defects because doctor negligently prescribed a drug that caused the defects).

The Court has also refused to expand bystander liability by broadening the "rescue exception" (*see Lafferty v. Manhasset Medical Center*, 54 N.Y.2d 277 (1981) (daughter-in-law cannot recover for her emotional distress even though hospital staff allowed her to attempt to "rescue" her mother-in-law after witnessing a negligent blood transfusion). The Court held that "any extension of the [hospital's] liability for negligence to include emotional harm to third parties is not reasonably circumscribed by limiting recovery to would-be rescuers or even rescuers recruited by the defendant, as opposed to volunteers." *Id.* at 280–281) or by permitting a third party to recover for emotional distress that is the proximate—but not the direct—cause of a breach of duty owed directly to that third party. *Kennedy v. McKesson Co.*, 58 N.Y.2d 500 (1983) (No liability for emotional distress suffered by dentist who accidentally killed patient by administering nitrous oxide to patient because defendant had negligently labeled the bottle "oxygen." *Id.*) The Court held that "[t]he rule to be distilled from those cases is that there is no duty to protect from emotional injury a bystander to whom there is otherwise no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when [the injury is] a direct, rather than a consequential, result of the breach." *Id.* at 506.

The cause of action for emotional distress began to wax again on February 23, 1984 when the Court of Appeals adopted the "zone of danger" test for bystander recovery in *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984). The Court held that, "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover . . . damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family." *Id.* at 231. In *Bovsum*, plaintiffs, mother and daughter, were sitting in their station wagon as their father stood at the rear of the car. "Although neither mother nor daughter actually saw the . . . car strike their station wagon both were instantly aware of the impact and the fact that Jack Bovsum must have been injured. . . ." *Id.* at 225. The Court added that "the emotional disturbance must be serious and verifiable" and "must be tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant." *Id.* at 231–232.

Finally, in *Broadnax v. Gonzalez*, 2 NY.3d 148 (2004) the Court overruled its earlier decision in *Tebbutt v. Virostek*, 65 NY.2d 931 (1985). The Court held that "even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress." The Court made reference to Chief Judge Kaye's dissent in *Tebbutt*, indicating that this decision stood for the proposition not taken up in *Tebbutt*, that, "[i]f the fetus cannot bring suit, 'it must follow in the eyes of the law that nay injury here was done to the mother.'" *Id.* at 154 *quoting*, *Tebbutt*, 65 N.Y.2d at 940 (Kaye, J., dissenting).

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Mr. Schulnick would like to both acknowledge and thank Daniel London, a third year student at Brooklyn Law School, who worked for the firm this summer as a law clerk, for his prodigious effort, thoughtfulness and crisp insight. This piece would not be possible without his valued assistance.

Expert Witness Discovery in Medical Malpractice Cases: Supplementing Disclosure with On-line Investigation

By Steven Wilkins, M.D., J.D.

Your case appears solid. A qualified physician has assisted you by reviewing the medical records early in the course of the case, strengthening the preparation of the pleadings, allowing you to focus on the proper questions during depositions, and helping to frame the relevant issues at the settlement conference. The client's injuries were certainly severe enough to warrant this litigation. Unfortunately, the defense is unwilling or unable to settle. A trial date is set. You prepare yourself for battle. "Know thine enemy" springs to mind. How do you expect to counter the testimony of the defendant's expert witness?

Cross-examination of an expert witness in a medical malpractice action is one of the key areas where a case may be won or lost. Trial attorneys know that a successful outcome rests, in part, on undermining the credibility of the opposing expert. Weaknesses in the training, knowledge, skill, or experience of the expert need to be exposed. The expert's compensation for his testimony must be critically questioned, so as to make the jury aware of a possible financial incentive for the decision to provide testimony. The experienced plaintiff's attorney understands that the opposing expert may be utilized to make the jury aware of the 'conspiracy of silence' by which physicians are fraternally bound to protect each other (fraternal incentive).[1] Besides these universal, typical attacks on expert credibility, though, there are individual lines of questioning that can only be identified with adequate pre-trial investigation, but that are infinitely more powerful than any of the above general, universal insinuations. The best attacks on an expert are when the expert is forced to concede your view of the underlying medicine, but getting there takes a lot of work. When you can indent some chinks into his protective armor of 'Marcus Welby' demeanor or 'Michael DeBakey' wisdom,[2] well, that's not too bad either.

First, though, in order to prepare an effective cross-examination of an expert, you have to know who the expert will be. All New York medical malpractice attorneys are well aware of the paradox that the CPLR places upon discovery when the subject is identifying the opposing medical expert. In fact, New York stands alone in its refusal to require[3] that expert to be either deposed or to answer interrogatories.[4] In New York, the attorneys only become aware of the identity of the opposing party's expert at the time that their request for this information is answered.[5] Failure by the opposing counsel to give adequate notice of the expert's identity does not necessarily preclude the expert from testifying, although there can be some consequences to this oversight.[6] Of course, even the meaning of 'identity' is somewhat skewed, since only the pertinent qualifications[7] and not the name of the expert need be given.[8]

Standing in stark contrast to this limitation on information regarding the expert is the general statutory acknowledgment that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[9] Thus, the CPLR simultaneously and confusingly endorses full disclosure and limits its exchange.

This critical game of 'kiss and tell' usually plays itself out in real life with disclosure of an expert's qualifications only a few days before trial begins. Since the time constraints are so severe, this article will concentrate on the Internet-based methods of investigating the likely opposing expert. By appealing to a sense of fair play, it is usually possible to get sufficient information from the opposing attorney to successfully distinguish the opposing expert from other physicians. What do you do with that information?

Computer programs that are widely available commercially can be used like a reverse telephone book to identify the physician by his vital statistics[10] Once the name of the physician is obtained, investigative techniques and Internet-based services allow a more complete investigation to be performed.

1. Obtain past testimony by the expert. Previously given testimony is often available on-line. Remember to check any state in which it is likely that the expert has testified. Clearinghouses are run for members by many state societies in a cooperative fashion. By making your transcripts available to others, you gain access to a much larger number. Commercial groups throughout the country also have transcripts available for purchase, grouped by the physician expert's name.[11] These transcripts are especially important whenever the expert's point of view involves an issue in the case. When the expert has registered with an expert service, the service may be helpful in finding the past testimony of the expert in an attempt to tout their "product."

When a jury is confronted with contradictory testimony on a crucial matter, the outcome is questionable. However, when the opposing counsel's expert has stated both points of view, then the case is usually going well.

2. Obtain information on any past civil or criminal actions with which the expert was involved. The wit-

ness's character for truthfulness or untruthfulness is relevant to any credibility decision the jury is impaneled to decide. Because little uniform case law exists in New York on the admissibility of particular collateral issues involving an expert witness, any documented falsifications, misrepresentations, or outright lies are worth pursuing, even if the source of the 'untruth' is far from the medical malpractice field.[12] The physician can be investigated through a WestLaw or Lexis search to identify any civil or criminal actions in which he was named as a party, or in which he provided testimony as an expert. Public records are also widely available on-line, including a website allowing New York doctors' licenses to be researched. Classically, this investigation might uncover an expert's own related medical malpractice cases too.

3. Obtain copies of all contributions to the medical literature made by the expert. Computerized medical collections of peer-reviewed journals are not as well organized nor are contributions as easily found as in the legal literature, but several services, like the National Library of Medicine, http://www.nlm.nih.gov, and www.medscape.com can be used to research past articles authored by the expert. These, too, may provide contradiction to the expected testimony. Equally important, when these writings cite to a relevant reference text, the expert is hard-pressed to explain why that text is not authoritative in his opinion. If he agrees that it is, then the text may be used as a source for cross-examination in order to discredit his testimony.

4. Research any license infractions on the OPMC website. New York State maintains an extremely powerful discrediting tool.[13] Although less than one percent of all physicians have been sanctioned with an action on their license, when discovered prior to trial and queried during cross-examination, the effect on the jury is devastatingly powerful.

5. Look at hospital websites for all hospitals where the expert physician has privileges. An often underutilized source of information is the website of the hospitals at which the expert has privileges. Some experts even maintain their own websites. If the expert truly is an expert in the kind of case at issue, then his public writings to entice patients to use his services are often excellent sources for his true opinions.

6. Get a copy of the curriculum vitae of the expert. The C.V., or resume, is usually offered after the expert has taken the stand. However, in order to completely review it, examining all of the journal articles, periodicals, and books that the expert has authored, it is preferable to obtain it in advance of the day of cross-examination. If the expert maintains an academic, university-based practice, then a call to his department or to his secretary by an investigator merely requesting that the C.V. be faxed has sometimes been successful.

7. Do an Internet search on the physician. Finally, merely typing the name of the expert into a search engine will often uncover excellent background information. 'Googling' is easy to perform and leads to related websites that may be of use.

Preparing for a medical malpractice trial requires understanding of the underlying medical principles, but it also requires investigative skills that are made easier by the world wide web. Don't go into battle without a full and timely assessment of the strengths and weaknesses of your adversary and his expert.

Endnotes

1. Richard Shandell and Patricia Smith, *The Preparation and Trial of Medical Malpractice Cases*, § 15.05, Law Journal Press, New York, 2004.
2. Thomas Moore, *Trial Tactics*, in Practising Law Institute's Litigation and Administrative Practice Course Handbook Series, PLI Order No. HO-OOB6, 656, April, 2001.
3. Though rarely invoked, New York does have provisions to voluntarily bind each side to an agreement to make their expert available for deposition. CPLR 3101(d)1(ii).
4. Richard Basuk, Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York. NYU Law Review, Vol 76, pages 1527–1561, Footnote 6, October 2001.
5. CPLR 3l0l(d)1(i). No strict time limit is given for the exchange of information.
6. *Id*. It is assumed that when failure to comply is inadequately explained, the attorney will be chastised, and perhaps, sanctioned.
7. Medical school attended, any residencies or fellowships completed, and board certifications.
8 CPLR 3101(d)1(i).
9. CPLR 3101(a).
10. The most widely used of these is the ABMS Directory of Medical Specialists: ABMS Medical Specialists Plus, from Elsevier, 11830 Westline Industrial Drive, St. Louis, MO 63146.
11. These services are arranged by state, so testimony given in other states cannot easily be obtained, but www.verdictsearch.com, www.verdicts.com, www.jurispro.com and www.trialsmith.com are among the larger depots for previous transcripts.
12. For instance, divorce proceedings are often the source for useful background information.
13. The New York State website, http://www.nydoctorprofile.com/welcome.jsp. allows any New York licensed physician's record to be profiled. Regarding out-of-state experts, other states maintain similar websites.

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The No-Fault Threshold: Serious Injury

By Melanie L. Sarkis

I. Serious Injury

Section 5102(d) of the New York State Insurance Law defines serious injury as a "personal injury which results in"

(1) death;

(2) dismemberment;

(3) significant disfigurement;

(4) a fracture;

(5) loss of a fetus;

(6) permanent loss of use of a body organ, member, function or system;

(7) permanent consequential limitation of use of body organ or member;

(8) significant limitation of use of a body function or system;

(9) a medically determined injury or impairment of a non-permanent nature preventing the injured person from performing substantially all the material acts that constitute his usual and customarily daily activities, for no fewer than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

II. Categories Defined

A. Significant Disfigurement

1. Facial Scars

The *Waldron v. Wild Standard*—a facial scar will constitute a significant disfigurement if "a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the object of pity or scorn." ***Waldron v. Wild***, 96 A.D.2d 190, 468 N.Y.S.2d 244 (4th Dep't 1983)

McCabe v. Bose, 2 A.D.3d 1375, 770 N.Y.S.2d 495 (4th Dep't 2003)."A scar on the forehead that the plaintiff testified was "very, very slight" was insufficient to constitute a significant disfigurement.

Johnson v. Grant, 3 A.D.3d 720, 770 N.Y.S.2d 487 (3d Dep't 2004). Plaintiff failed to show, *prima facie*, a significant disfigurement as a result of the surgical scars on the plaintiff's neck or hip.

O'Brien v. Golan, 284 A.D.2d 256, 726 N.Y.S.2d 429 (1st Dep't 2001). The barely perceptible loss of half a nail on the second toe is not a disfigurement that a reasonable person would view as unattractive, objectionable or "the subject of pity and scorn."

Abdallah v. Flattery, 280 A.D.2d 917, 721 N.Y.S.2d 174 (4th Dep't 2001). "Minor," "trivial" won't meet serious injury.

Sirmans v. Mannah, 300 A.D.2d 465, 752 N.Y.S.2d 359 (2d Dep't 2002). A scar 7/8th of an inch in length on a plaintiff's lower lip did not constitute significant disfigurement to constitute serious injury.

Hoffman v. Stechenfinger, 4 A.D.3d 778, 772 N.Y.S.2d 432 (4th Dep't 2004). The trial court did not abuse its discretion in denying the plaintiff's cross motion to amend her Bill of Particulars to allege a "significant disfigurement" when the defense IME described the alleged disfigurement as "almost imperceptible."

B. Fracture

Bebry v. E.J. Farkas-Galindez, 276 A.D.2d 656, 714 N.Y.S.2d 734 (2d Dep't 2000). Since a "fracture" is included within the statutory definition of "serious injury," the trial court erred in instructing the jury to determine whether the plaintiff sustained a consequential limitation of his foot.

Once a plaintiff establishes a *prima facie* case that any one of several injuries he or she sustained in an accident is a "serious injury" within the Insurance Law § 5102(d), he or she is entitled to seek recovery for all injuries incurred as a result of that one accident. *See Rizzo v. DeSimone*, 6 A.D.3d 600, 775 N.Y.S.2d 531 (2d Dep't 2004).

Tooth Fracture

Moffitt v. Murray, 2 A.D.3d 1110, 768 N.Y.S.2d 685 (3d Dep't 2003). Fractured teeth constitute serious injury but,

Epstein v. Butera, 155 A.D.2d 513, 547 N.Y.S.2d 374 (2d Dep't 1989). The Appellate Division declined to characterize a "chipped tooth" as a serious injury merely because the plaintiff's dentist described the injury as "fracture."

Nasal Fractures

Poma v. Ortiz, 2 A.D.3d 616, 768 N.Y.S.2d 336 (2d Dep't 2003). A hairline fracture of the nasal bone is insufficient to sustain serious injury. In order to recover, a plaintiff must sustain a complete fracture to establish an entitlement to judgment as a matter of law.

Rodriguez v. Wheels, Inc., 276 A.D.2d 779, 714 N.Y.S.2d 761 (2d Dep't 2000). The affirmation of the plaintiff's treating physician claims the plaintiff sustained a "fracture of the nasal bone" was insufficient to rebut the defense physician's report that indicated the plaintiff suffered a "contusion" to her nose and an x-ray report noted "normal study of nasal bones."

C. Permanent Loss of Use of a Body Organ, Member, Function or System

1. The Breakdown

Member—(1) a part of the body distinct from the rest in function or position (2) an outlying part or limb.

Function—(1) the special, normal or proper action of any part or organ, (2) the function of the spinal cord which depends on the integrative action of their several parts.

System—[a complex or organized whole] a set or series of interconnected interdependent parts or entities (objects, organs, or organisms), which function together in a common purpose or produce results impossible of achievement by one of them acting or operating alone.

See ***Daviero v. Johnson***, 110 Misc. 2d 381, 441 N.Y.S.2d 895 (N.Y. Sup. Ct., Schenectady Co. 1981).

2. ***Oberly v. Bangs Ambulance, Inc.***, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001). "Permanent loss of use" must be a "total loss" of use to constitute serious injury.

Geloso v. Monster, 289 A.D.2d 746, 734 N.Y.S.2d 340 (3d Dep't 2001). The trial court's instruction on the permanent "loss of use" category that indicated it was not necessary to find a "total loss" of the member, function or system was in error.

Cancel v. City of New York, 2003 WL 21911931 (N.Y. Sup. Ct., Bronx Co. 2003). If both "permanent" and "loss of use" are established, the serious injury threshold is satisfied whether a body organ, member, function or system is involved. In the case of "mere limitation of use" however, an important statutory distinction is drawn between injuries affecting "a body member or organ," on the one hand, and a "body *function or system,*" on the other. The latter requires the limitation be "consequential" or "significant," which courts deem as synonymous.

Housman v. Hoffman, 2004 WL 1698923 (3d Dep't July 29, 2004). Plaintiff failed to demonstrate that his cervical and lumbar sprain/strain constituted a "total loss."

Cummings v. Riedy, 4 A.D.3d 811, 771 N.Y.S.2d 629 (4th Dep't 2004). Defendant met his initial burden that the plaintiff failed to raise an issue of fact whether she sustained a permanent and total "loss of use" of her cervical and thoracic spine. Plaintiff's treating chiropractor indicated the plaintiff sustained a "minimal to mild" permanent limitation.

Paradis v. Burlarley, 3 A.D.3d 718, 769 N.Y.S.2d 920 (3d Dep't 2004). The Plaintiff claims the fact that her physician permanently severed a ligament in her shoulder as part of her treatment did not constitute a "permanent loss of use."

D. Permanent Consequential Limitation of Use/ Significant Limitation of Use

1. Permanent Consequential Limitation of Use of a Body Organ or Member

Tourev v. Avis RentACarSystem, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002). Nature and extent of qualitative, objective medical proof.

Hoffman v. Stechenfinger, 4 A.D.3d 778, 772 N.Y.S.2d 432 (4th Dep't 2004). The Affidavit of the Plaintiff's chiropractor and its accompanying report raise issue of fact whether Plaintiff sustained serious injuries under the permanent consequential limitations of use when the chiropractor noted that the Plaintiff had subluxations at C2 and C6 on palpation and that the joint mobility of the Plaintiff's cervical region was "fixed" in comparison to that region's normal range of motion. The chiropractor concluded the Plaintiff's condition would be permanent and would "likely worsen."

Pinkowski v. All-States Sawing & Trenching, Inc., 1 A.D.3d 874, 767 N.Y.S.2d 5092 (3d Dep't 2003). The proof must relate to medical significance and must involve a comparative determination of the degree or qualitative nature of an injury based on the normal function. *See also* ***Leahey v. Fitzgerald***, 1 A.D.3d 924, 768 N.Y.S.2d 55 (4th Dep't 2003).

Aleksieiuk v. Pell, 300 A.D.2d 1066, 752 N.Y.S.2d 504 (4th Dep't 2002). To prove the extent or degree of physical limitation, an expert's determi-

nation of a numeric percentage of the Plaintiff's loss of range of motion can be used to support serious injury under the no-fault law. Also, an expert's qualitative assessment of the Plaintiff's condition may also suffice, but only if the evaluation has an objective basis and compares the Plaintiff's limitation to a normal function.

Murphy v. Arrington, 295 A.D.2d 865, 744 N.Y.S.2d 255 (3d Dep't 2002). A 7% percent schedule loss of use of the right shoulder in Workers' Compensation is insufficient to constitute serious injury under the no-fault threshold when the Plaintiff's treating physician did not refer to any objective medical data.

McCarthy v. Perault, 277 A.D.2d 664, 716 N.Y.S.2d 463 (3d Dep't 2000). A 33% reduction in range of neck motion, which was deemed to be permanent by an orthopedist, qualified a serious injury.

2. Significant Limitation of Use of a Body Function or System

Burford v. Fabrizio, 8 A.D.3d 784, 777 N.Y.S.2d 810 (3d Dep't 2004). Plaintiff did not successfully demonstrate that she sustained a serious injury when her orthopedic specialist opined that she suffered a "mild cervical and lumbar sprain" that cleared without permanent loss or limitation of use of a body part. Furthermore, although the treating physician opined that the motorist's range of motion was limited to 30 to 50%, he failed to identify any diagnostic tests or other objective medical evidence.

Ariona v. Calcano, 7 A.D.3d 279, 776 N.Y.S.2d 49 (1st Dep't 2004). A bulging or herniated disc may constitute serious injury and a CT scan or MRI constitutes objective medical evidence to support subjective complaints, but the Plaintiff must still offer some objective evidence of the *extent or degree of the alleged physical limitations that result from the disc injury.*

Rose v. Furgerson, 281 A.D.2d 857, 721 N.Y.S.2d 873 (3d Dep't 2001). A diagnoses of a herniated disc or bulging disc do not establish, per se, a serious injury. There must be proof of causation and there must be proof of limitation of use or loss of use.

Buster v. Parker, 1 A.D.3d 659, 766 N.Y.S.2d 468 (3d Dep't 2003). Plaintiff failed to demonstrate a serious injury despite submitting a chiropractor's affidavit, which listed the numerous tests the chiropractor performed, but failed to identify the tests he used to formulate his opinion.

3. Emotional/Psychological Injuries

Chapman v. Capoccia, 283 A.D.2d 798, 725 N.Y.S.2d 430 (3d Dep't 2001). An emotional injury, which is causally related to an accident, can constitute serious injury. Here, the Plaintiff's post-traumatic stress disorder was sufficiently established by her psychiatrist.

Gielai v. Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643 (1st Dep't 2001). The Plaintiff's medical proof was insufficient because the psychiatrist's diagnosis of depression was not related to the Plaintiff's ability to function as a homemaker.

E. 90/180 Days

Section 5102(d) of the New York State Insurance Law allows a plaintiff to recover if he or she sustains a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Owad v. Mayone, 299 A.D.2d 795, 751 N.Y.S.2d 90 (3d Dep't 2002). The Plaintiff's treating physician's office notes and affirmation were sufficient to demonstrate a serious injury as evidenced by the significant restriction of motion in the Plaintiff's back and legs as evidenced by "straight leg tests."

Monk v. Dupuis, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dep't 2001). A court requires objective, credible medical findings to support the 90/180 thresholds; however, the court does not require proof must be demonstrated solely through CT scan, X-rays or MRIs.

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Trial Preparation and Relevant Ethical Considerations

By Saul Wilensky

I. Trying and Winning Cases Is 90% Preparation—

II. File Review

A. *Initial review of every page* of the file to include correspondence, reports, hospital/medical records, police records, investigation records, photographs, employment/financial/IRS records, school records, pleadings, discovery demands, discovery responses including bills of particulars, and examinations before trial for overview of the case.

- Is the file complete?
- Know the theory for both the prosecution and defense.
- Understand how the law applies to each aspect (issue) of the case.
- **DR 6-101**[1]—a lawyer must handle any matter entrusted to him/her with competence, and preparation adequate in the circumstances.
- **EC 6-1**—a lawyer should act with competence and proper care in representing clients.
- **EC 6-3**—a lawyer may accept employment in an area in which he/she is not qualified if in good faith he/she expects to become qualified through study and investigation, as long as preparation would not result in unreasonable delay or expense to the client.
- **EC 6-4**—a lawyer may accept employment in a matter beyond his/her competence but if so, he/she should diligently undertake the work and study what is necessary to qualify himself/herself.

B. Do you need a trial investigator for liaison with witnesses, subpoenas, etc.?

C. Retain trial investigator.
- Must obtain authority to do so and confirm authority *in writing*.

D. Know court and veniremen.

E. Prepare an inventory of records and witnesses to be subpoenaed.

F. Ensure that your medical and non-medical experts have received all appropriate records and confirm their availability for trial.

Plaintiff's focus, i.e.—

(i) Construction—

Defendants' agents, employees and eye-witnesses; all non-party witnesses; signed contracts with all changes, additions and modifications; sub-contracts; specifications; safety meeting minutes; job minutes; inspector's reports; superintendent's diaries; incident and accident reports; statements; investigation; names and present whereabouts of former key employees; daily logs; time sheets; payroll records; blueprints; drawings; progress photographs; site safety plans and filings.

(ii) Products liability—
All claims and lawsuits for same or similar products; design plans and specifications; pre-production testing of product; statutory compliance testing; post-manufacturing re-evaluations and testing; recalls; government investigations; governmental or quasi-governmental inquiries; brochures; pamphlets; promotional and advertising material; consumer complaints; invoices; bills of sale; as-shipped photographs (most of the foregoing should have already been identified by name, model number, document or type so that they can be readily identified in the subpoena).

(iii) Automobile—
Department of Motor Vehicle driving and registration abstracts; MV-104s; Certificates of Conviction; no-fault personal injury and property damage files; property damage appraisal, repair and billing records; photographs of vehicles taken post-accident; photographs of the accident site, photographs/videos of plaintiff's injuries, police reports.

Defendant's focus—

(i) All employers; prior and subsequent accident records; doctors; hospitals; unions; Workers' Compensation carrier and Board;

Unmasked Department of Motor Vehicle driving and registration abstracts; MV-104s; criminal records search through the County Clerk; Certificates of Conviction; pharmacies; police reports (accident reports, aided cards, UF-61, DD-5s); City accident reports (PD 301155); EMS reports; co-workers; eyewitnesses; plaintiff for his tax returns and diaries; co-defendants' personnel files; accident reports; work records; payroll records; work logs; daily reports; and minutes

G. Preparing subpoenas:

(1) If possible, obtain *agreement* that *copies* identified in discovery shall be admitted at trial, in lieu of originals, to avoid necessity of subpoena.

A subpoena *duces tecum* may not be used as a substitute for pretrial discovery. *In re Terry D.*, 81 N.Y.2d 1042, 601 N.Y.S.2d 452 (1993); *Mestel & Co. v. Smythe, Inc.*, 215 A.D.2d 329, 627 N.Y.S.2d 37 (1st Dep't 1995)

(2) No "Any and All" language:

"Any and all" language may be used if the phrase modifies a *limited* number of specific items. *Soho Gen. of N.Y. v. Tri-City Ins. Brokers*, 236 A.D.2d 276, 653 N.Y.S.2d 924 (1st Dep't 1997)

(3) Know the court, IAS Part, calendar and index numbers, and return date.

(4) Make sure to obtain **"So Ordered"** subpoenas when necessary, i.e., to obtain records from any bureau, subdivision, or agency of a municipality or of the state.

CPLR 2306—the subpoena to obtain hospital/medical records must be served at least three (3) days before the time stated on the subpoena for the return date.

CPLR 2307—the subpoena to obtain non-medical records must be served at least 24 hours before the time fixed on the subpoena for the return date.

(5) Motions to hold witness in Contempt.

CPLR 2308 allows the Court to (i) order compliance with a subpoena, (ii) impose costs not exceeding $ 50.00, (iii) compel the subpoenaed person to pay damages by reason of that person's failure to comply with the subpoena, (iv) issue a warrant directing the sheriff to bring the witness before the person or body requiring the appearance; if the subpoenaed person refuses to answer questions or produce the records sought in the subpoena without reasonable cause, the Court may issue a warrant directing the Sheriff of the County where the person is, committing the person to jail until he/she agrees to comply. *See also* Judiciary Law § 753.

(6) Obtain affidavits of service.

(7) Maintain contact with witnesses under subpoena.

(8) Maintain contact with medical and non-medical experts.

(9) Regular review of records in court.

H. Prepare detailed pre-trial report with full evaluation. (Different clients have different formats.)

– Greatest sin is to fail to inform client of all risks.

– **EC 7-5**—a lawyer furthers the interests of his/her client by giving his/her professional opinion as to what he/she believes would likely be the ultimate decision of the courts on the matter at hand and by informing his/her client on the practical effects of such decision.

– **EC 7-8**—a lawyer should ensure that the decisions of the client are made only after that client has been informed of relevant considerations.

I. Do you want surveillance? It is discoverable. *See* **CPLR 3101(i)**; *DiMichel v. South Buffalo and Poole v. Consolidated Rail*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992); *Tran v. New Rochelle Hospital*, 291 A.D.2d 121, 740 N.Y.S.2d 11 (1st Dep't 2002); *rev'd*, 99 N.Y.S.2d 383, 786 N.E.2d 444, 756 N.Y.S.2d 509 (2003).

J. If new or additional adverse experts are disclosed just prior to trial, perform a jury verdict search, Westlaw run, contact defense bar or A.T.L.A., obtain expert bank files.

KEY: Prepare a motion to preclude for untimely disclosure of experts pursuant to **CPLR 3101(d)**.

– *Vigilant Insurance Company v. Barnes*, 199 A.D.2d 257, 604 N.Y.S.2d 248 (2nd Dep't 1993)—the Court precluded the Plaintiff from certain expert witnesses because the Plaintiff failed to disclose the identities of the experts despite knowing from the very beginning of the litigation that it would be calling said experts at trial.

– *Hudson v. MABSTOA*, 188 A.D.2d 355, 591 N.Y.S.2d 31 (1st Dep't 1992)—the Court precluded the defendant from calling its medical expert who was retained on the eve of trial and whose medical report was served on the eve of trial. The Appellate Division unanimously affirmed the Trial Court's decision.

K. Parameters of Expert Opinion—adversary experts sometimes do not express an opinion as to causation and as to permanency; if this is the case, prepare a Motion to Preclude the introduction of such testimonial evidence at the time of trial.

– *Interstate Cigar Co., Inc. v. Dynaire Corp.*, 176 A.D.2d 699, 574 N.Y.S.2d 789 (2nd Dep't 1991)—opinion testimony of an expert must be based on facts in the record or personally known to the witnesses.

– *Hambsch v. NYCTA*, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984)—if plaintiff's expert seeks to offer opinions on sources not inherently reliable, particularly if it is material prepared out of court, a Motion to Strike the expert's testimony should be prepared. *See also Velez v. Svehla*, 229 A.D.2d 528, 645 N.Y.S.2d 842 (2nd Dep't 1996).

– An expert may be permitted to testify on "the ultimate issue in the case" where 1) the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary intelligence, and 2) where the facts or skill cannot be stated or described to the jury in such a manner as to enable the jury to form an accurate judgment. *See People v. Cronin*, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983); *Kravitz v. Long Island Jewish Hillside Medical Center*, 113 A.D.2d 577, 497 N.Y.S.2d 51 (2nd Dep't 1985).

– Admissibility Hearing Outside Jury Presence

– Use of Prior Reported Testimony

III. Familiarize Yourself with Site/Product

– **Never** try case without visiting site or studying product (preferably done prior to depositions).

– Do you need new or additional photographs/measurements?

– Do you need expert/photographer/client/witness to accompany you?

– Bring camera, flashlight, video recorders, audio recorders, measuring tape, micrometer, notepads, writing instrument, etc.

IV. Preparing Trial Book(s)/Folder(s)

1) Reports; correspondence; rider of attorneys, addresses and phone numbers; bills of particulars/interrogatories; pleadings; medicals; defendant physical examination reports; expert reports and curriculum vitaes; statements; technical; discovery and inspection; subpoenas *and* Affidavits of Services; photographs

2) Marked Pleadings/Briefs/Motions *in Limine* to court/EBTs/Requests to Charge

3) Witness folders

4) Relevant Legal Research—Cases and Statutes

V. Demonstrative Evidence

(i.e.—photographs, records, charts, models, videotapes, the product and its components)

Prepare blow-ups of all critical documents, charts, diagrams and photographs. **BIGGER IS BETTER.**

– Redaction—avoids wasting time at trial

– Exemplars of product, machine or part

– Client corporation flow chart

– Exhibit list

– Forgeries—handwriting & ink analysis

– Computer simulations

– Models of topography, building, rooms, etc.

– Use of "Elmo" or "Coar Communicator"

Note 1) Be prepared to establish legal foundation for admissibility of the evidence (brief the point).

Note 2) If at trial the witness uses a blackboard or charts and they are placed into evidence,

take photographs or precisely copy for trial as well as appellate purposes.

– Low-Tech v. High-Tech

VI. Contact Client/Witnesses/Doctor(s)/ Adversary

– Confirm their availability.

– If your witness(es) is/are unavailable, send immediate letter to court and parties. **AVOID SURPRISES!**

– Schedule meetings to prepare witnesses.

* Review client's and expert's complete *original* file(s). **AVOID SMOKING GUNS!**

* Review depositions with witness(es).

* Prepare outline of witness(es) direct testimony and then review with respective witness(es).

* Review potential exhibits with witness(es).

* In court, survey the jury pool.

VII. Summarizing Deposition Transcripts

– Reference by witness, date, page and line.

– Highlight critical liability and damage issues.

– Do not re-write "Gone With The Wind."

VIII. Preparing Trial Brief

– All significant issues of law which will be addressed at trial.

– The art of drafting a factual statement.

– Include motions for directed verdict, if appropriate.

– **DR 7-102**—do not advance a claim or defense which is unwarranted under the existing law (this should have been resolved early in the litigation).

IX. Preparing Motions *in Limine* ("Preliminary to Trial")

– *State v. Metz*, 241 A.D.2d 192, 671 N.Y.S.2d 79 (1st Dep't 1998)—The function of a Motion *in Limine* is to permit a party to obtain a preliminary order before or during trial excluding introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use.

– Directed at *Voir Dire*

– Directed at evidentiary or other trial issues (i.e., unified trial/bifurcation/trifurcation; exclude witness/evidence; limit testimony)

– Common issues include, subsequent repairs/modifications, other lawsuits or complaints, recalls, inflammatory photographs, hearsay in records, speculative testimony of experts; late disclosure of witnesses/experts.

X. Preparing Requests to Charge

– Know your legal theories and defenses *before* jury selection.

XI. Economics

– **CPLR Articles 50-A** (Periodic Payment of Judgments in Medical and Dental Malpractice Actions) & **50-B** (periodic Payment of Judgments in Personal Injury, Injury to Property and Wrongful Death Actions)

– **CPLR 4111(t)—**itemized verdicts in, *inter alia*, personal injury and wrongful death actions

XII. New Rules—HIPAA/Subpoenas

Endnote

1. The Disciplinary Rules ("DR") and Ethical Canons ("EC") cited in this outline are set forth in the Code of Professional Responsibility, as promulgated by the American Bar Association in August, 1969, and subsequently adopted by the New York State Bar Association as its own code of ethics, effective January 1, 1970, with certain amendments which were incorporated into the Code.

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How to Settle Your Inventory of Mass Tort Cases Ethically

By Paul D. Rheingold

A. What Is the Problem?

You are handling a large number of cases arising out of the same event, let us say clients all injured by the same drug product. Defendant's counsel comes to you and says that they want to dispose of your entire inventory of cases. Either they ask how much will it take, or, if they are more aggressive, they offer you a very large sum of money to settle all your cases. They could care less how you apportion it among your cases. Their client just does not want to spend the time and money arguing over the value of the cases individually, let alone cutting individual checks.

As many lawyers who have been in this position know, the defendant's proposal is unethical—in the making and in the accepting. You only have to worry about the latter however. It is clear from New York's codes of ethics and from the text books that you cannot simply accept the sum and make the allocation yourself.[1]

There is judicial authority that if an attorney unethically enters into an aggregate settlement, this could amount to a breach of fiduciary duty with the effect that the attorney might have to forfeit his fees. In *Burrow v. Acre,* the court held that forfeiture could occur even in the absence of proof of harm to the client.[2]

B. How Not to Do It

Thus, the question is how can you ethically settle a large number of cases more or less at the same time. We could start with the negative: how not to do it. That is illustrated by a RICO complaint recently filed in New York against a firm, which it is said (you can plead anything you want) to have accepted a large sum of money and settled its very large inventory of diet drug cases. It is alleged that:

- the firm did its own allocation of the overall sum of money itself;
- it allocated more money to cases which came to it directly than those in which a forwarding fee would have to be paid;
- it told the clients that a specific offer had been made by the defendant for their case (and that they should take it); and
- where a client refused to accept the offer, they pretended to return to the defendant to negotiate a larger offer, whereas they simply took money from a general fund to enhance the amount; or
- they pressured the clients to take the offer, making threats and using coercion . . .
- and a lot more.

A somewhat similar situation was involved this year in *Williamson v. Edmonds*,[3] a decision by the Mississippi Supreme Court. There an attorney had settled his inventory of 31 fen phen cases for a lump sum and then divided the money on his own between his clients. One of his clients began to suspect that she did not get a fair share and sued. She sought to discover what the other 30 clients had received. Williamson objected to making disclosure on the ground that it would violate his attorney-client privilege. The decision holds that he must make this disclosure. The court stated that for the lawyer to withhold this information to shield himself from a malpractice suit would be a disservice to the public and the profession.

C. What the Ethical Canons Call For

Almost every state has adopted either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. In New York, we have the Code. On the issue of aggregate settlements, they are very similar.[4] One can, therefore, count on complying with ethical requirements if he or she takes these prescribed—but very unrealistic—steps in these rules. This requires informing each and every client in the proposed settlement of:

a. the existence and nature of all claims in the group;

b. the total amount of the settlement;

c. the amount each person is getting.

One could accommodate to this rule if one were representing two passengers in an auto accident. But how about 1,000 people, spread all over the country? What sort of confidences would be violated if we had to tell all of them that client X is getting more than average since she developed a debilitating mental illness, and client Y is getting less since he had a venereal disease? While some attorneys claim that they have complied with this method of making an aggregate settlement, I have my doubts. Human nature being what it is, people, once they learn what someone else is getting,

will claim they are hurt worse than that, and want more money.

Could this rule be complied with by the attorney getting each individual client, when he or she is initially retained, to sign a written retainer agreement stating that they waive a portion of the rule and will abide by some committee or neutral person to make the allocation?[5]

What if in the full disclosure process of seeking the agreement, which the rules call for, most but not all of the plaintiffs agree to take the allocated amounts? Can the majority rule? No, said the court in a group of asbestos cases, because each client has his or her own rights.[6]

As many people have recognized, the ethics codes are out of date when it comes to mass tort, and therefore we must come up with alternatives which at least seek to satisfy the reasons underlying the rule against aggregate settlements: that clients cannot entrust an attorney, who after all is only human, with too much discretion.

D. Three Possible Ways to Effect an Aggregate Settlement Ethically

We all know that inventory settlements in mass torts take place frequently. I can suggest several ways in which counsel can accomplish what they want and yet have some degree of comfort that they have complied with ethical restraints—and at the same time do the right thing for the client. After all, if they insist on a one-by-one settlement with the defendant, they will never get the cases settled, which is a disservice.

1. The "Add Up" Method

It would be hard to find fault with the simple method of finding out what each plaintiff would take, and then adding up the amount desired and going to the defendant to pay a round sum which equals the total. Experienced practitioners will recognize how unrealistic this scenario is, however. Who says the defendant will pay that exact amount? First you would have to inflate the demand in order to work out a settlement. The total is likely to be less or more than the added-up sum. If more, will it be spread around? If less, how will counsel do the spreading?[7]

2. A "Three Step Grid" Method

This method has been used by many firms, mine included.[8] Step one is to meet with defense counsel and work out some sort of grid for the injuries involved in the group of cases. There is plenty of precedent for the use of grids in settlement, and sometimes one has already been created in another phase of the same litigation. The complexity of the grid depends upon the range of injuries and ages in the group of course. Defense and plaintiffs' counsel tentatively assign a sum of money to each pigeon hole in the grid.

Step two is for you to meet with your clients, individually or in a group (or, even by mail if the person cannot come in), and to work toward an agreement as to what pigeon hole each will fall in and to show them what amount they would get—and then to get their consent to the sum. (In some respects, this is what the codes call for, since they each know what everyone will get, depending, of course, upon the specific facts.)

Step three is for counsel to return to the defendant and negotiate a total settlement. This depends of course upon an agreement as into which category each case fits. This step may take some time and examination of records, but should not be a matter of real dispute if the categories were properly delineated. At this point plaintiffs' counsel will usually be demanding more money, on the basis that the clients were not happy with the sums in the grid.

Knowledgeable counsel will not paint themselves into a comer whereby all of their clients must agree to the plan. Given human nature and the variable way people see the world, it is predictable that not all clients will take a pre-determined offer, no matter its seeming reasonableness. Therefore, some provision must be made for a client who refuses to take the offer. A common approach is to set a percentage which must accept the plan before it goes into effect. (Sometimes defendants prescribe the delivery of a number of releases to set the payment program into operation.) A figure of 90% acceptance has been used.[9]

An approach of allowing a small percentage of claimants represented by one firm not to accept a settlement figure taken from a grid raises downstream ethical questions as to what is to become of those people. If counsel can go on representing them, then the defendant has not gained the resolution it had sought; the plaintiffs' attorney still has cases to bring to trial—perhaps the best. Thus the defense will expect counsel to no longer represent these clients, creating this new issue: Under what methods may the attorney ethically cease representing them? One can rationalize to some extent that you don't want to represent the client because he or she has not taken your advice; or that, for the same reason, the client does not trust counsel and therefore should get new counsel. Assuming the attorney can ethically terminate the representation, what is the responsibility, first, to locate new counsel, and, second, has the outgoing attorney surrendered his lien (not to mention a claim for expenses, which may be substantial)? It is of course easier to pose these questions than answer them.[10]

3. Evaluations Made by Some Impartial Party

A third way to do an aggregate settlement which has met with some approval is to shift some of the decision making to some impartial person-judge, magistrate, special master, mediator or the like. There is a great amount of precedent for this type of resolution of mass torts, of course, when done in the public arena, by which I mean a settlement class approved by a judge, or a proceeding in bankruptcy.[11] But to what extent can ethical constraints be satisfied through the use of an impartial in the private setting of a single law firm and its clients? It would appear that, if properly handled, this method of using a mediator or some other impartial person will generally avoid the stricture against aggregate settlements. At least the attorney alone is not making the divisions of a round sum.

In the precedent situations for the use of an impartial, there usually is a sum already decided upon and it is the neutral's job to divide it up. Of course, one can ask how that sum came into being—a sum privately accepted by plaintiffs' counsel for the group. This situation will be more palatable, I suppose, if the mediator can spread the money in a way where everyone is satisfied as to the amount. The second major hurdle is the lack of authority of the neutral.

Unlike the judge who approves a settlement class with a grid built in, a private mediator would lack the power to bind all claimants. Hence, we would be in the situation discussed earlier where provision should be made for a certain small percentage of persons to reject their claims.

In the purest example of the impartial process, the neutral person would do all of the work: determine the facts of each case, assign them to some sort of categories, and assign values. In reality this person needs input from the law firm at least as to the factors that go into evaluating cases. Some with larger injuries, for example, may have causation problems, or statute of limitations problems. As the influence of the law firm upon the mediator increases, of course, the impartiality benefit of this plan diminishes. Where the tort is a mature one, such as in the asbestos litigation, the mediator obviously has an easier time assigning values since one can look to precedents to set values.

E. Conclusion

Various commissions which have revised the rules of ethics have passed over the opportunity to deal with ethical issues which arise in mass tort litigation. It is therefore up to the bar to do the best job it can in realistically settling groups of cases, but at the same time trying to adhere to core requirements of proper professional practice.

Endnotes

1. *See* Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 Loyola of LA Law Review 396 (1998); Silver and Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake For. L. Rev. 733 (1997).
2. *Acre v. Burrow*, 997 S.W. 2nd 229 (Tex. 1999) (chemical plant explosion).
3. 2004 Miss. Lexis 1031.
4. Model Code, CR 1.8 (a):

   > A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

   Model Rules, DR 5-106 (a):

   > A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendre pleas, unless each client consents after consultation, including disclosure of the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.

5. There is a precedent for that; *see* Rheingold, *Ethical Constraints*, *supra* note 1 at 403.
6. *Hayes v. Eagle-Pitcher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975).
7. This method was done, it is claimed, in an IUD mass settlement. *See* Rheingold, *Mass Tort Litigation*, § 14:14 (West Group 1996, with annual supplement).
8. See example of its use in the DES litigation, Rheingold, *Mass Torts, supra* note 7 at § 14:15.
9. There is an obvious potential for a percentage agreement to be coercive; counsel might be tempted to appeal to the group to accept their amounts for the common good.
10. There are other ethical issues closely related to these which I explore in my book. One is whether the defendant may, as a condition for settling an inventory of cases with counsel require that the attorney not take on any new clients. Rheingold, *Mass Torts*, c. 21. *See also Feldman v. Minars,* 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dep't 1997) (finding no violation of CR2-108(b) by entering into an agreement as part of a settlement not to assist or cooperate with other partners in the same litigation; Opinion 730 of the New York State Bar Association Committee on Professional Ethics, 6/27/00 (contra to the holding in *Feldman*)).
11. *See* Rheingold, *Mass Torts*, C. 14.

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Ethical Considerations in the Settlement of Actions

By Ralph A. Catalano

I. Communicating Settlement Offers to the Client

Ethical Considerations 9-2 and 7-7 articulate standards by which lawyers are counseled to inform their clients of all material developments concerning the representation, and to allow clients to make informed decisions affecting their cases. By these standards an attorney is obligated to: (i) report any settlement offers to the client; (ii) give good counsel as to whether the settlement should be accepted or rejected and; (iii) allow the client to make the ultimate decision on the matter.

EC 9-2:

> Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to non-lawyers to be unethical. In order to avoid misunderstandings and hence to maintain confidence, *a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client*. . . .

EC 7-7:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples *in civil cases, it is for the client to decide whether to accept a settlement*. . . .

It should be noted that, unlike the Disciplinary Rules, the Ethical Considerations have not been formally adopted by the courts and do not automatically subject the attorney to discipline. Instead, they set out standards to be aspired to and are generally looked to as a guide for professional behavior. An ethical violation will not, in and of itself, create a duty that gives rise to a cause of action for malpractice, *Shapiro v. McNeill*, 92 N.Y.2d 91, 677 N.Y.S.2d 48, 699 N.E.2d 407 (1998). Nevertheless, the Ethical Considerations contribute to the professional standard of care in the practice of law; and, therefore, the violation of a pertinent EC may be received in court as evidence of professional malpractice.

II. Settlements as a Basis for Malpractice Liability

Beyond the issue of ethical responsibility, settlements are a frequent basis for legal malpractice claims. These claims generally fall within four categories: i) Settlements made because the attorney's negligence compromised the claim; ii) Recommending and accepting an inadequate settlement; iii) Failing to inform the client of, or to accept, an existing settlement offer; and iv) Unauthorized or fraudulent settlements, including settlements to conceal malpractice.

- **Settlements Induced by Malpractice:** Here, the basis for malpractice liability is that a settlement was paid or accepted because the attorney's negligence or misconduct so impaired the case or defense that the matter had to be settled on unfavorable terms. The damages are generally the difference between the settlement figure that was accepted and the value of the claim or defense had it not been compromised by the attorney's conduct. *N. A. Kerson Co. v. Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 N.Y.2d 730, 408 N.Y.S.2d 475, 380 N.E.2d 302 (1978); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 674 N.Y.S.2d 280 (1st Dep't 1998); *Lattimore v. Bergman*, 224 A.D.2d 497, 637 N.Y.S.2d 777 (2d Dep't 1996);

- **Inadequate Settlements:** The attorney's representation in the matter is competent, but the client ends up being unhappy with the settlement—usually after the matter is closed by means of a settlement agreement or release. The issue is typically whether the attorney appreciated the value of the client's case or appropriately counseled the client to accept an offer that the client is not satisfied with. Here the client's burden of proof tends to be more severe. The client must generally prove that the terms of the settlement were unreasonable and that a better settlement was probable. *Colleran v. Rockman*, 275 A.D.2d 222, 712 N.Y.S. 2d 108 (1st Dep't 2000); *Weiler v. Kuba & Kuba*, 251 A.D.2d 118, 674 N.Y.S. 2d 322 (1st Dep't 1998); *Rapp v. Lauer*, 229 A.D.2d 383, 644 N.Y.S.2d 569 (2d Dep't 1996). The attorney will have a defense if the settlement was a reasonable course of action, or if a better result by some other

means was speculative. *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376 (S.D.N.Y. 2000).

- **Lost Settlement Opportunities:** A missed settlement opportunity can expose an attorney to liability in malpractice if the client is either uninformed of the offer or lacked sufficient counseling from the attorney to make an informed decision at the time that the offer was open. An attorney has an ethical obligation and the professional duty to advise the client of a settlement offer and to counsel the client to enable him or her to make an informed judgment. However, a claim asserted with nothing more than the wisdom of hindsight is generally defended as an exercise of professional judgment employed against the uncertainty of litigation.

- **Unauthorized Settlements:** The decision to accept or reject a settlement belongs exclusively to the client. The attorney's role, both ethically and as a matter of professional duty, is to give counsel. However, the attorney is an agent of the client and can consequently bind the client to a settlement by means of his apparent authority. Although the settlement will not be set aside, the attorney will be liable to the client for any resulting damage if the attorney lacks actual authority to settle on behalf of the client. *Marcus Garvey Nursing Home, Inc. v. Ciccone*, 149 A.D.2d 672, 540 N.Y.S.2d 312 (2d Dep't 1989). A fraudulent settlement offer, perhaps to conceal malpractice liability for causing the dismissal of the case, is grounds for discipline over and above civil liability in damages under DR 1-102(4).

Proof, Defenses and Ethical Considerations: Plaintiff's burden of proof is generally twofold: to establish liability plaintiff must demonstrate that the settlement was improvident, coerced or otherwise improper. To satisfy the causation element it must be proved that the client would have achieved a better result—by settlement or litigation—if the attorney had not been negligent. *Becker v. Julien, Blitz & Schlesinger, P. C.*, 95 Misc. 2d 64, 406 N.Y.S.2d 412 (N.Y. Sup. 1977). Any speculation with regard to the latter element of proof warrants dismissal of the claim. *Metz v. Coopers & Lybrand*, 210 A.D.2d 624, 619 N.Y.S.2d 393 (3d Dep't 1994). Generally, the client's agreement to the settlement will not qualify as an intervening cause to bar a malpractice action against the attorney; where the client alleges that professional misconduct or negligent representation compelled the settlement on unfavorable terms. *N. A. Kerson Co. v. Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 N.Y.2d 730, 408 N.Y.S.2d 475, 380 N.E.2d 302 (1978); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 674 N.Y.S.2d 280 (1st Dep't 1998). However, if the client negotiated and controlled the terms of the settlement of the underlying lawsuit the client's conduct can be construed as an independent intervening cause such that the attorney will not be held liable. *Sutherland v. Milstein*, 266 A.D.2d 33, 698 N.Y.S.2d 15 (1st Dep't 1999).

Quite obviously, any misconduct by the attorney amounting to dishonesty or fraud, whether perpetrated in conjunction with a settlement or during some other aspect of the representation, will violate DR 1-102(4) (conduct involving dishonesty, fraud deceit, or misrepresentation). However, even simple negligence on the part of the lawyer carries an ethical obligation to inform the client of the mistake and to refrain from compromising the malpractice claim without first advising the client to seek independent representation. DR 6-1 02(A).

III. Settlement Funds—Trust Accounting DR 9-102

The trust accounting rules of DR 9-102 are strictly enforced, and are the basis for the great majority of disciplinary actions taken against attorneys. Minor and even unintentional violations of trust accounting rules often result in harsh discipline or disbarment. In sum and substance DR 9-102 prohibits the commingling and misappropriation of client funds and property. It also requires lawyers to maintain a qualified IOLA account for client funds (21 NYCRR Pt. 7000) and sets out elaborate rules for trust accounting and recordkeeping. A summary of each of the subdivisions of DR-9102 are set out below;

- **9-102(A)** Prohibits misappropriation of client funds and commingling of the attorney's own funds with funds or property belonging to *another person.* Another person means the client or a third party.

- **9-102(B)** Requires lawyers to maintain client funds in a qualified IOLA account and establishes detailed rules of accounting.

- **9-102(C)** Requires lawyers to promptly notify the client *or third person* about the receipt of their funds, maintain complete records and promptly pay the funds to the client *or third person* as requested. Promptly means within a matter of days, not weeks. Third parties with an interest in the settlement proceeds are entitled to the same notification and accounting requirements.

- **9-102(D)** Requires lawyers to maintain copies of trust accounting records for seven years.

- **9-102(E)** Restricts the manner in which funds may be withdrawn. Withdrawals must be made to a named payee, not to cash. Only an attorney

admitted to practice in New York may be a signatory to the account.

- **9-102(F)** Sets forth the procedure for paying funds to a client whose whereabouts are unknown by applying to the Supreme Court where the action is pending. The procedure is only mandated for clients.
- **9-102(G)** Procedure for designation of successor signatories to the trust account.
- **9-102(H)** Procedure for maintaining trust accounts and records when the law firm dissolves.
- **9-102(I)** Requires law firms to make trust accounting records available to the appropriate grievance committee or disciplinary committee for investigation.
- **9-102(J)** Provides for disciplinary action against the lawyer for violations of trust accounting rules.
- **DR 1-104** holds lawyers responsible for violations of trust accounting rules by non-lawyers.

Settlement proceeds are the property of the client and must be treated as such for the purposes of DR 9-102. However, an attorney with a contingency fee arrangement has a lien interest in the settlement to the extent of the fees owed the attorney. The attorney must deposit the settlement draft into his IOLA account, notify the client of receipt and promptly withdraw that portion of the settlement that amounts to the attorney's fees and advanced disbursements.

An attorney may accept a settlement check drawn to the attorney or to the client and the attorney in trust. If the client disputes the attorney's fee, the attorney must keep the disputed portion of the settlement proceeds in the client trust account and pay the client any portion of the settlement that is not in dispute. DR 9-102(B)(4); NY County Lawyer's Association Op. 718 (1996).

Note that the Rules of the Chief Administrator of the Courts (22 N.Y.C.R.R. Pt. 137) now require that most disputes with clients concerning fees must be submitted to arbitration under the New York State Fee Dispute Resolution Program, if requested by the client.

IV. Settlements Restricting the Practice of Law—DR 2-108(B)

DR 2-108:

A. A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

B. In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

- **Noncompete Agreements:** Non-compete agreements between law firms and exiting attorneys are not permitted except as a condition of receipt of retirement benefits.
- **Nonrepresentation Settlements:** DR 2-108(B) prohibits settlement agreements that require a lawyer for any party to refrain from representing the same or similar clients in the future. The prohibition applies to attorneys for either side of the transaction. The defendant may not offer a settlement on such terms and the plaintiff's attorney may not accept. The phrase "controversy or suit" incorporates settlements of disputes both in and outside of litigation.
- **Discovery Stipulations and Agreements—BANC Opinion:** Discovery stipulations and settlement agreements that prevent a lawyer from using information acquired during the course of the representation against the settling party in future litigation can violate the ethical prohibition against agreements restricting the practice of law. ABA Model Rule 5.6(b), the counterpart of DR 2-1-08(B), expressly prohibits a lawyer from agreeing to restrict his or her right to practice as part of a settlement agreement. Pursuant to this rule, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 00-417 (April 7, 2000). That Opinion concluded that a settlement agreement that restricted the claimant's lawyer from using information learned during the course of the representation against the adverse party in future litigation violates the principle of the Rule by effectively restricting the lawyer from representing other clients in similar litigation.

N.Y. State Bar Opinion 730 (2000) concluded that a plaintiff's lawyer in an employment matter could not agree to a settlement that prohibited the attorney from disclosing any information regarding: 1) any matters relating "directly or indirectly" to the settlement agreement or its terms; 2) the business or operations of the corporate defendant; and 3) the termination of the plaintiff's employment with the defendant. The Com-

mittee found that the practical effect of the agreement was to restrict the attorney from undertaking any future representation of other clients against the same employer.

The Bar Association of Nassau County Committee on Professional Ethics Draft Opinion of Inquiry No. 695 of 2004 proposes to apply the same rationale, as well as conflict of interest concerns, against a discovery stipulation which would restrict the claimant's attorney from making use of documents disclosed for arbitration proceedings *for any other purpose;* where the attorney would consequently be restricted from using the documentation in other pending arbitration proceedings in which the attorney represents different clients.

V. Settlements that Limit the Attorney's Liability to the Client DR 6-102 (Settling Your Own Malpractice Claim)

EC 6-6:

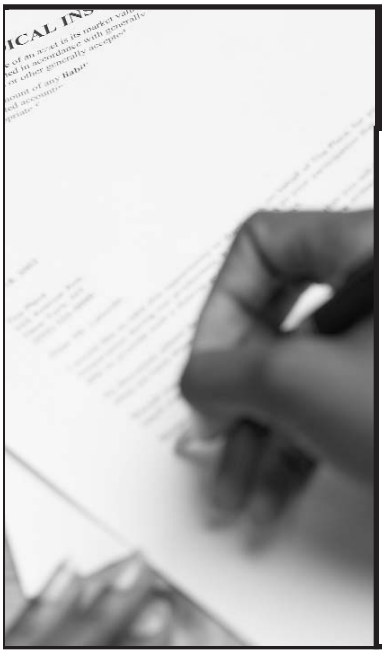
> A lawyer should not seek, by contract or other means, to limit prospectively the lawyer's individual liability to the client for malpractice nor shall a lawyer settle a claim for malpractice with an otherwise unrepresented client without first advising a client that independent representation is appropriate. A lawyer who handles the affairs of the client properly has no need to attempt to limit liability for professional activities and one who does not handle the affairs of the client properly should not be permitted to do so.

DR 6-102:

> A. A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.

A lawyer is prohibited from securing a client's advance agreement not to sue the attorney for malpractice. Consequently, the attorney's retainer agreement may not include a hold harmless provision against malpractice liability. The second part of the rule forbids the lawyer from settling a malpractice claim with a client without first having advised the client that it would be "appropriate" to obtain independent legal counsel. The rule does not require that the client actually consult with another attorney in order for the parties to settle their claim. However, a settlement with a client may not include terms which prevent the client from filing a disciplinary charge, require the withdrawal of an existing complaint, or restrict the client from cooperating with disciplinary authorities. Simons' New York Code of Professional Liability Annotated, 2003 Ed. p. 693.

Ralph A. Catalano is a member of the firm of Catalano Gallardo & Petropoulos, LLP in Mineola, NY.



Save the Dates!

New York State Bar Association
Torts, Insurance & Compensation Law Section

Summer Meeting

Killarney, Ireland

August 11–14, 2005
Hotel Europe

It's official—the most scenic place in Ireland is Killarney. Nestled amidst deep, lake-filled valleys with astounding sights such as the famous Ladies' View (Named after Queen Victoria's Ladies in Waiting) and the MacGillicuddy Reeks—Ireland's largest mountain range, the wild country landscape and the charming villages are a welcome retreat from the daily grind.

Killarney's tradition of entertaining visitors began over two centuries ago and the affability of its inhabitants is unparalleled. There are countless breathtaking sites to see here, but some of the best are Killarney State Park and the Lakes of Killarney, upon which, sits Hotel Europe.

Hotel Europe is surrounded by countryside and a miraculous view of the Killarney Lakes. The views from your room will leave you captivated and the rustic décor of the Hotel Europe will welcome you with warmth. Fishing, golfing, and a lavish spa are all conveniently located on the grounds. The Hotel Europe is central to many of the unique towns that encircle Killarney, which allows you to easily wander down to a local pub or slip in to a great restaurant for some Irish fare.

Killarney's sparkling blue lakes and magnificent sandstone mountains, inland from the peninsulas, have a unique and romantic splendor, immortalized in the 19th century by the writings of William Thackeray and Sir Walter Scott. Killarney is a thriving town offering loads of attractions and entertainment.

In this enchanted "Green Isle" every imaginable taste can be catered for. Please join us somewhere over the rainbow for the chance to escape and earn some MCLE.

For more information, visit our website at www.nysba.org/ticl.

Road to Ireland

Social Event at Harbour Lights in New York City on March 16, 2005

Hosted by the TICL Section

A little Irish humor by jokemaster Tom Hayden

Irish Brigade: Cody McCone, Kathleen Sweeney, Bill Gallagher and Chris Downes

Section Chair Doug Hayden addressing the crowd

Steve Cohen, Gerry McCarthy and Grace Marascia

Bill Fishlinger, John Kelly and John Flaherty

Chair Doug Hayden, Secretary Gary Cusano and speakers at Ireland conference

Co-Program Chair A.J. Smith with two of his Irish brethren

Former TICL Section Chair Eric Dranoff and Mike Tromello

NYSIF CEO Ken Ross and John Kelly, Chairman of Willis

Mr. and Mrs. Vairo, Executive Committee member Mike Tromello and Richard Dawson

Section Chair Doug Hayden and Co-Program Chair Tony Martine outside Harbour Lights

John Flaherty, Tony Martine, Tom Maroney and Greg Mayer

Tom Maroney, Bill Gallagher, Jim Certa and Gary Molampe enjoying some Irish spirits

Young lawyers

Section Chair Doug Hayden with young attorneys

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TICL Section Meetings and Events

Savannah Meeting, October 2004: Speaker Melanie Sarkis, Rochester

Annual Meeting, January 2005: Then TICL Chair Eileen Buholtz presents an award to Paul S. Edelman for his work as Co-Editor of the *TICL Journal*

Savannah Meeting, October 2004: Speaker Saul Wilensky, New York City

Savannah Meeting, October 2004: George Washington has a drink with Gary Cusano, Barbara Sherk and Doug Hayden (2005 TICL Chair)

Savannah Meeting, October 2004: Laurie Giordano, Program Chair and Dennis McCoy, speaker

Savannah Meeting, October 2004: Speakers Barbara Sherk, Ralph Catalano and Paul Rheingold

Savannah Meeting, October 2004: Executive Board Meeting—Doug Hayden (2005 Chair), Paul Suozzi (2005 Vice-Chair) and Eileen Buholtz (2004 Chair)

Author Index: 2000 - Summer 2004

Torts, Insurance & Compensation Law Section Committees: Great Opportunities for Involvement

The New York State Bar Association's Torts, Insurance & Compensation Law Section offers excellent ways to enhance your knowledge and expertise through committee participation. Committees allow you to network with other attorneys from across the state, and give you the opportunity to research issues and influence the laws that can affect your practice. Committees are also outstanding avenues to achieve professional development and recognition for members of both the plaintiff bar and the defense bar.

The Section offers two Law Divisions: The Construction and Surety Law Division and the Workers' Compensation Law Division. Divisions operate as separate entities and direct their efforts in specific areas of specialization: Surety Law and Workers' Compensation Law. These Divisions offer publications and programs at no extra fee. Simply indicate your interest in the space provided below.

☐ Please consider me for appointment to the TICL Committees as indicated below.

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Divisions

These Divisions offer publications and programs at no extra fee. Please indicate below if you wish to join these Divisions.

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