NYSBA SUMMER 2012 | VOL. 41 | NO. 1

Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section
of the New York State Bar Association

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TICL Journal

Vol. 41, No. 1
Summer 2012 Issue

ISSN 1530-390X (print) ISSN 1933-8503 (online)

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Jean F. Gerbini
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12210
jgerbini@woh.com

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45 Crossways Park Drive, Ste. 102
Woodbury, NY 11797
robert.mccarthy@rocketmail.com

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37 Chippenham Drive
Penfield, NY 14526
berrittella@aol.com

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Brendan F. Baynes
The Baynes Law Firm PLLC
130 Main Street
Ravena, NY 12143
bfb@bayneslawfirm.com

TICL *Journal* Editor

David A. Glazer
Shafer Glazer LLP
90 John Street, Ste. 701
New York, NY 10038
dglazer@shaferglazer.com

TICL *Journal* Editor Emeritus

Paul S. Edelman
Kreindler & Kreindler
750 Third Avenue
New York, NY 10017
pedelman@kreindler.com

TICL *Newsletter* Co-Editors

John J. McDonough, III
Cozen O'Connor
45 Broadway, 16th Fl.
New York, NY 10006
jmcdonough@cozen.com

Vincent Pozzuto
Cozen O'Connor
45 Broadway, 16th Fl.
New York, NY 10006
vpozzuto@cozen.com

Division Chairs

Construction and Surety Law Division

Kenneth Thomas Boyd
Smith Sovik Kendrick & Sugnet, PC
626 RXR Plaza
West Tower, 6th Floor
Uniondale, NY 11556
kboyd@smithsovik.com

Workers' Compensation Law Division

Christopher R. Lemire
Lemire Johnson LLC
P.O. Box 2485, 2534 Rte. 9
Malta, NY 12020-2485
crl@lemirejohnsonlaw.com

Committee Chairs

Alternative Dispute Resolution
Brian J. Rayhill
Epstein & Rayhill
565 Taxter Road, Suite 275
Elmsford, NY 10523
brianrayhill@gmail.com

Automobile Liability
Thomas P. Cunningham
Rupp Baase Pfalzgraf Cunningham & Coppola LLC
1600 Liberty Building
Buffalo, NY 14202-3694
cunningham@ruppbaase.com

Nicole True Cedarleaf
Trevett Cristo Salzer & Andolina, PC
2 State Street, Suite 1000
Rochester, NY 14614
ncedarleaf@trevettlaw.com

Business Torts and Employment Litigation
Heath J. Szymczak
Jaeckle Fleischmann & Mugel, LLP
Avant Building, Suite 900
200 Delaware Avenue
Buffalo, NY 14202
hszymczak@jaeckle.com

Class Action
Thomas A. Dickerson
Associate Justice, Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201
judgetad@aol.com

Continuing Legal Education
John H. Snyder
Gitto & Niefer LLP
605 French Road
New Hartford, NY 13413
jsnyder@gittolaw.com

Elizabeth A. Fitzpatrick
Lewis Johs Avallone Aviles, LLP
425 Broadhollow Road, Suite 400
Melville, NY 11747
eafitzpatrick@lewisjohs.com

Diversity
Joanna L. Young
Carroll, McNulty & Kull LLC
570 Lexington Avenue, 8th Floor
New York, NY 10022
jyoung@cmk.com

Mirna M. Santiago
White Fleischner & Fino, LLP
303 Old Tarrytown Rd
White Plains, NY 10603
msantiago@wff-law.com

Ethics and Professionalism
George J. Silver
New York State Supreme Court, New York County, Civil Branch
80 Centre Street
New York, NY 10013
gjsilver@courts.state.ny.us

Future Sites
Eileen E. Buholtz
Connors & Corcoran, PLLC
45 Exchange Street
Times Square Building, Suite 250
Rochester, NY 14614
ebuholtz@connorscorcoran.com

General Awards
Dennis R. McCoy
Hiscock & Barclay LLP
1100 M&T Center
Three Fountain Plaza
Buffalo, NY 14203-1486
DMcCoy@hblaw.com

Paul J. Suozzi
Hurwitz & Fine, PC
1300 Liberty Building
Buffalo, NY 14202-3670
pjs@hurwitzfine.com

Governmental Liability
Jeremy Brad Cantor
Gallo Vitucci & Clark LLP
90 Broad Street, 3rd Floor
New York, NY 10004
jcantor@gvlaw.com

Information Technology
Charles J. Siegel
Law Offices of Charles J. Siegel
125 Broad Street, 7th Floor
New York, NY 10004
charles.siegel@cna.com

Insurance Coverage
Joanna M. Roberto
Goldberg Segalla LLP
100 Garden City Plaza, Suite 225
Garden City, NY 11530-3203
jroberto@goldbergsegalla.com

Laws and Practices
Lawton W. Squires
Herzfeld & Rubin, P.C.
125 Broad Street, 12th Floor
New York, NY 10004
lsquires@herzfeld-rubin.com

Membership
Robert H. Coughlin Jr.
Flink Smith LLC
449 New Karner Rd
Albany, NY 12205
Rcoughlin@flinksmithlaw.com

Richard W. Kokel
11 Broadway, Suite 1163
New York, NY 10004
rwk1998@aol.com

No Fault
Laurie A. Giordano
Leclair Korona Giordano Cole LLP
150 State Street, Suite 300
Rochester, NY 14614
lgiordano@leclairkorona.com

Premises Liability/Labor Law
Glenn A. Monk
Harrington Ocko & Monk LLP
81 Main Street
White Plains, NY 10601
gmonk@homlegal.com

Products Liability
Dennis J. Brady
Goldberg Segalla LLP
100 Garden City Plaza, Suite 225
Garden City, NY 11530-3203
dbrady@goldbergsegalla.com

Professional Liability
Roderick John Coyne
McMahon, Martine & Gallagher, LLP
55 Washington Street, Suite 720
Brooklyn, NY 11210
rcoyne@mmglawyers.com

Sponsorships
Thomas J. Maroney
Maroney O'Connor LLP
11 Broadway, Suite 831
New York, NY 10004
tmaroney@maroneyoconnorllp.com

Toxic Tort
Kenneth A. Krajewski
Brown & Kelly, LLP
1500 Liberty Building
Buffalo, NY 14202-3663
kkrajewski@brownkelly.com

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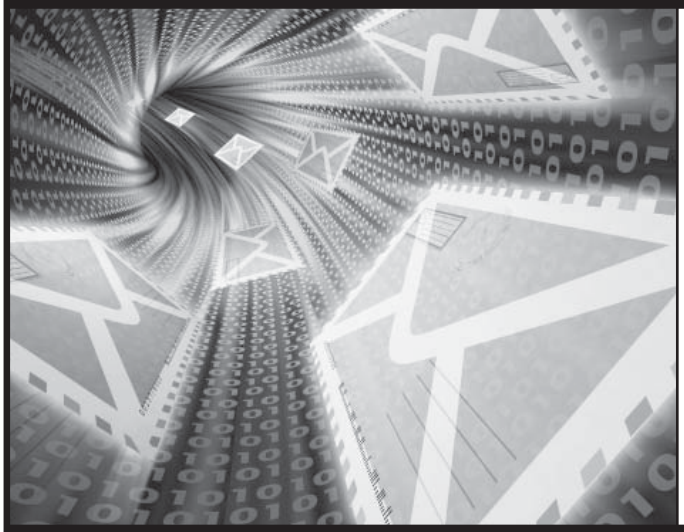

If you have written an article you would like considered for publication, or have an idea for one, please contact the *TICL Journal* Editor:

David A. Glazer
Shafer Glazer LLP
90 John Street, Suite 701
New York, NY 10038
dglazer@shaferglazer.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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A View from the Chair

The Torts, Insurance and Compensation Law Section is committed to the enhancement of the legal profession. Our approach combines monitoring legislation affecting our members' areas of practice, fostering professional growth through top-notch continuing legal education seminars and networking, and encouraging diversity in the legal profession through recruitment and mentorship.

These themes will be explored at our annual Summer Meeting, to be held August 16-19, 2012 at the Montréal Intercontinental Hotel, Montréal, Québec. The meeting, co-sponsored by the Association of Black Women Attorneys, the Latino Lawyers Association of Queens County, the Minority Bar Association of Western New York and the Nigerian Lawyers Association, will feature a mentorship workshop or *charette*. The NYSBA President, Seymour James, will give a welcoming address. The meeting will include seminars on cutting-edge social media law, cross-border auto injury litigation and critical updates on the law of insurance, workers' compensation and torts. Elizabeth Fitzpatrick (Lewis Johs Avallone Aviles, LLP, Melville), George Skandalis (Pinsky & Skandalis, Syracuse) and Kenneth Krajewski (Brown & Kelly, LLP, Buffalo) are serving as Program Co-Chairs, representing the three major areas of New York that the Section serves. Please join us in Montréal for great CLE, networking with prominent jurists and attorneys from both sides of the border, and sightseeing in North America's most European city.

The Section's flagship publication, *The Torts, Insurance and Compensation Law Section Journal*, is an important tool in every practitioner's toolbox. It also offers Section members a valuable opportunity to showcase their scholarship. Please contact the Editor, David Glazer, at dglazer@shaferglazer.com with proposals for case notes and articles.

The Torts, Insurance and Compensation Law Section is proud to co- sponsor a series of continuing legal education seminars throughout the year. This spring, in conjunction with the NYSBA Continuing Legal Education Committee, we co-sponsored *Basics of Handling an Auto Accident Case, Basic Tort and Insurance Law Practice, Advanced Insurance Coverage, The EBT: Honing Your Deposition Skills, Handling Tough Issues in Plaintiff's Personal Injury Cases,* and *Medical Malpractice*. Proposed programs for the fall season include *Premises Liability, Products Liability*, and *Automobile and Truck Litigation Institute*. We will again host our stand-alone *Law School for Insurance Professionals* event as well. Watch our website for updates. For information about participating in these events, please contact CLE Co-Chairs Elizabeth Fitzpatrick, eafitzpatrick@lewisjohs.com or John Snyder, jsnyder@gittolaw.com.

Your membership in the Torts, Insurance and Compensation Law Section is valued. Please do not hesitate to contact me to discuss how the Section may better serve you.

Regards,

Jean F. Gerbini
Whiteman Osterman & Hanna LLP

2012 Workers' Compensation Update

By Ronald Balter

One area of the law that the Court of Appeals does not frequently review involves workers' compensation in New York State. However, since the fall of 2011 the Court of Appeals has already decided four cases concerning either the Workers' Compensation Law or that impacts workers' compensation claims. Some of the cases impact the day to day practice under the Workers' Compensation Law while others only tangentially impact the run-of-the-mill workers' compensation cases. The cases have interpreted key provisions of the 2007 reform of the Workers' Compensation Law and changed the understanding of how workers' compensation and negligence actions are interrelated.

The first case decided by the Court of Appeals was a challenge by a number of different private workers' compensation carriers to part of the 2007 reform act creating mandatory Aggregate Trust Fund deposits in all cases in which a finding was made that the injured worker had a permanent partial disability after July 1, 2007 regardless of the date of accident.[1] Before the court were a total of six cases decided November 15, 2011 with the lead case being *Raynor v. Landmark Chrysler*.[2]

The court first looked at the statutory text of the amended §15(3)(w) of the Workers' Compensation Law. Although the amended §15(3)(w) applied to accidents occurring on or after the effective date of amendment (March 13, 2007) the provisions regarding Aggregate Trust Fund deposits in Workers' Compensation Law §27(2) refer to "any such award made on or after July first two thousand seven..." without any limitation as to the date of accident or disability. Without similar language relating to the date of accident or disability the deposit provisions apply to all cases if a finding of a permanent partial disability is made after July 1, 2007.

The workers' compensation carriers once again argued that applying the law to accidents before the amendment was a retroactive application of the law. The Court of Appeals adopted the rationale of the Appellate Division that the law was not being applied retroactively but prospectively to actions taken by the Workers' Compensation Board after July 1, 2007.

The court also rejected the reliance of workers' compensation carriers on *Burns v. Varriale*,[3] claiming that because the future benefits payable were not ascertainable there was no way to properly determine the Aggregate Trust Fund deposit amount. That argument was rejected because the court indicated that the method of calculating the deposit is set by law and actuarial tables. Because of the certainty of the method of determining the value of the deposit there was nothing speculative about the determination.

The constitutional challenges raised by the workers' compensation carriers before the Court of Appeals were also rejected. A takings clause challenge was rejected because nothing was being taken from the workers' compensation carriers for a public purpose. The deposit has no effect on the liability of the workers' compensation carrier. It only requires the workers' compensation carrier to pay the present value of what it owes the claimant to the Aggregate Trust Fund to ensure that the claimant is paid in a timely fashion.

A Contracts Clause violation was also rejected because even before the amendment was enacted a discretionary deposit into the Aggregate Trust Fund was possible. The amendment only made what was discretionary mandatory.

The Aggregate Trust Fund deposit only applies to private workers' compensation carriers. It does not apply to the State Insurance Fund or a self-insured employer. This led to an equal protection challenge as well. The Aggregate Trust Fund was created to protect claimants from the insolvency of a workers' compensation carrier. There are other methods that ensure the payment of benefits to a claimant by the State Insurance Fund or a self-insured employer. The different treatment by the legislature of a private workers' compensation carrier from the treatment of the State Insurance Fund or a self-insured employer is rational and therefore survives the challenge.

The Court of Appeals also found no Due Process violations in the law because at every step of a case from the date of the injury until the date the deposit is directed and made the workers' compensation carrier has many procedural protections in the law and process. Furthermore, the workers' compensation carriers failed to show that they were losing a "cognizable vested property interest" and that the state was "wholly without legal justification" in enacting the law.

Although, the issues concerning the deposits into the Aggregate Trust Fund were heavily litigated by the workers' compensation carriers, the ultimate result from the Court of Appeals really was not surprising. The biggest argument that the court never dealt with had to do with the original creation of the Aggregate Trust Fund. The Aggregate Trust Fund was not part of the original Workers' Compensation Law.[4] When the Aggregate Trust Fund was created the original deposits were also required in cases that occurred prior to the creation of the Aggregate Trust Fund. Those deposits were found to be constitutional[5] and there was no argument put forth to show that the expansion of the types of cases requiring an Aggregate Trust Fund in 2007 should have been treated differently.

The next issue before the Court of Appeals did not reach it as a workers' compensation claim. The case was a personal injury action that was also a workers' compensation case and affected the obligation of a workers' compensation carrier to reduce its statutory lien and to contribute

to its future benefit in accordance with the requirements of Workers' Compensation Law §29(1) and *Kelly v. State Insurance Fund*.[6] In *Bissell v. Town of Amherst*[7] the court was faced with how much money should be allocated to the future medical expenses of an injured worker who had been found to have a permanent total disability when contributing its share of the expenses of litigation and contributing for the future benefit it receives as a result of the settlement of the personal injury action. Originally the Fourth Department had ruled that it was not possible to determine the present value of the future medical care and said that future medical care should be governed by the case of *Burns v. Varriale*.[8] This would mean that a workers' compensation carrier would only have to contribute to the cost of the litigation and pay for its future benefit on the medical portion of the Workers' Compensation Board claim on an going basis, giving the claimant the right to have his medical expenses reimbursed to him at the percentage of the cost of litigation[9] as the expenses are incurred.

In early 2002 Mr. Bissell fell while working on a building owned by the Town of Amherst. After litigation a jury awarded him $30,000,000 that after post verdict applications was eventually settled for $23,400,000 with a present value of $4,259,536 for future medical expenses. The workers' compensation carrier was willing to waive all but approximately $48,000 of its lien as its share of the costs of litigation. The plaintiff sought $1,399,734.80 in fresh money from the workers' compensation carrier as the value of its overall future benefit because of the settlement. The workers' compensation carrier rejected the demand. Erie County Supreme Court ordered the State Insurance Fund to pay the money sought by the plaintiff. On appeal to the Fourth Department the decision was reversed.[10] The Fourth Department agreed with the State Insurance Fund and indicated that *Burns* should apply to future medical expenses even in a case where the injured worker has been found to have a permanent total disability, as Mr. Bissell was found to have.

Despite a unanimous decision in the Fourth Department the Court of Appeals granted leave to appeal. The court rejected the belief that the award by the jury is the way to determine the workers' compensation carrier's share of the cost of litigation and future benefit, for medical benefits, even in a permanent total disability case. The Court looked at its language in *Burns*, and decided that when they were talking about future benefits, other than for a permanent total disability, scheduled loss of use or death benefits, the future benefits could not be reliably calculated. Compared to other benefits under the Workers' Compensation Law, future medical expenses, it is "impossible to reliably predict the future medical the claimant will need,..." The Court then went on to say that as the medical expenses are incurred the workers' compensation carrier can contribute its equitable share of the costs. Furthermore, the Court indicated that all future medical care will be determined by the Workers' Compensation Board under the Workers' Compensation Law and not according to an award by a jury in the personal injury action.

In the aftermath of *Bissell* one must wonder how much longer *Kelly* will be the governing principle on the obligation of a workers' compensation carrier at the time of the settlement and afterwards. The question that will face the courts of New York is whether or not *Kelly* should be overruled and *Burns* should be the only method used by the courts and the Worker' Compensation Board.[11] [12]

These two cases were unanimous decisions from the Court of Appeals. The two most recent decisions had a sharply divided court. In one case the divisions show the contentiousness of the issue and in the other, despite the dissent, that issue may now be moot because of amendments to the Workers' Compensation Law in 2009. Both cases that ruled against the position of the injured workers were ironically decided on May Day.

For the better part of the last decade there has been more and more litigation before the Workers' Compensation Board on the issue of voluntary withdrawal from the labor market and continued attachment to the labor market, and whether or not injured workers are entitled to weekly monetary payments. There have been decisions from both the Workers' Compensation Board and the Appellate Division, Third Department on the issue. However, none of the decisions set up a bright line rule for when a claimant is entitled to benefits and what the standard is so as to show they remain attached to the labor market. When the Court of Appeals was required to hear[13] the appeal from the Third Department in *Zamora v. New York Neurological Associates*,[14] the workers' compensation bar was hoping to receive a decision that would clear up the issue so that those who represent both injured workers and the workers' compensation carriers would know how future cases would be governed.

In reversing the Appellate Division the Court of Appeals in *Zamora*[15] cut back on the Appellate Division's requirement that an inference must be drawn that the subsequent wage loss is related to the disability and that the workers' compensation carrier has the obligation to show that a reason other than the disability is sole reason the injured worker is out of work. The Court of Appeals indicated that the mandated inference is contrary to the Court of Appeals' prior decisions in *Burns v. Varriale*[16] and other decisions from the Third Department. The inference that an involuntary removal from the labor market creates is a permitted inference and not a presumed or mandatory inference. The Court of Appeals indicated that the Third Department changed the inference into a presumption.

The dissent by Chief Judge Lippman and two of his fellow judges may be the most honest interpretation of Workers' Compensation Law on this issue over the last decade since withdrawal and attachment became a common issue before the Workers' Compensation Board.

> "Attachment to the labor market" is a concept that is conspicuously absent from the Workers' Compensation Law. The majority's formulation of the issue in this case distracts from the proper identification of the question before the Court, which is whether a worker who has involuntarily withdrawn from his or her employment due to a compensable disability must demonstrate "attachment to the labor market" in order to be eligible to receive benefits. Nothing in the statute suggests that this is a prerequisite to entitlement to workers' compensation benefits.

He goes on to indicate that there is sufficient case law to show that an inference does arise for the entitlement to benefits until such time as the employer could show that a factor other than the disability was the sole cause of the reduced earning capacity. He continues that there is no reason to treat an involuntary removal as other than an involuntary retirement case. Chief Judge Lippman correctly understands that the key issue is why did the person stop working? If it is related to the injury, then the employer or workers' compensation carrier should be required to show that the reduction in earning capacity is unrelated to the disability. Attachment to the labor market is only relevant in a claim for total industrial disability or in the absence of a finding of an involuntary retirement or removal from the workplace. To hold differently would be to interpret the Workers' Compensation Law inconsistently "with its plain language and core objectives."

As far as Attachment and Voluntary Withdrawal jurisprudence goes in New York State, *Zamora* has become a just another case along with every other case from the Appellate Division. The case only stands for the principle that the Workers' Compensation Board has an option to infer that the subsequent loss or reduction of earnings of an injured worker who has stopped working because of a disability is related to the compensable accident. In other words, it is a question of fact for the Workers' Compensation Board to determine on a case-by-case basis.

One part of the Appellate Division decision was not mentioned by or disavowed by the Court of Appeals. In the Appellate Division the court stated that there was no difference in how an injured worker who has retired because of a compensable accident and an injured worker who has merely stopped working for a period of time because of a compensable accident are to be treated in determining eligibility for awards. Interestingly enough, this was the issue that was the basis of the two Justice Dissents in the Third Department. Taken with the Appellate Division decision in *Funke v. Eastern Suffolk BOCES*,[17] which eliminated any perceived differences between those claimants who have and have not been classified as having a permanent partial disability, the parties now know that all injured workers who are not totally disabled, who are out of work, are to be treated similarly regardless of whether or not they are retired or merely out of work and whether or not they have been classified as having a permanent partial disability.

In reaching its decision the Court of Appeals followed both the Workers' Compensation Board and the Third Department and failed to set a standard for how much of a search is required and when a claimant can give up the search because it is futile. Both sides of the bar are where they were before *Zamora*. Each case is to be decided based upon the facts as found by the Law Judge or the Board Panel. The Court failed to give any guidance to the parties in future cases as to when or when not a claimant is entitled to an award.

The litigation of this issue should also be reduced in the future as injured workers with accidents after the effective date of the 2007 amendment begin to be classified as having a permanent partial disability. Part of the 2007 reform law amended Workers' Compensation Law §15(3)(w) to indicate that a claimant who has been classified with a permanent partial disability "**shall** be [paid] during the continuance of such permanent partial disability…"[18] (emphasis added). The addition of the word "shall" into the law should have effect of ending this type of litigation since the Workers' Compensation Law now mandates payment of benefits after classification.

The final case decided by the Court of Appeals involved the issue of overlapping awards to an injured worker between two different claims. In *Schmidt v. Falls Dodge, Inc.*,[19] the court indicated that because of subsequent amendments to the Workers' Compensation Law in 2009 that this case may have little long-term effect.

When the Court of Appeals decided *LaCroix v. Syracuse Executive Air Service*[20] the court questioned the validity of the Third Department decision in *Miller v. North Syracuse Central School District*[21] and the way the Workers' Compensation Board applied it as it related to scheduled loss of use awards not representing a period of time and allowing the possibility of overlapping awards.

The Court of Appeals in *LaCroix* could not reach the overlapping award issue because it was not before the Court. However, the State Insurance Fund (the workers' compensation carrier in both *LaCroix* and *Schmidt*) continued to pursue the issue and looked for the proper case to get before the Court of Appeals to challenge the effects of *Miller*. The case was *Schmidt v. Falls Dodge Inc*.[22]

Mr. Schmidt was out of work and collecting temporary (as opposed to permanent) disability benefits. Because he was out of work and removed from a noisy work environment he filed a claim for an occupational hearing loss. Eventually an award was made to him for the hearing loss. The effect of that award was for Mr. Schmidt to have received the equivalent of $800 per week for the length of the scheduled loss of use award. This exceeded the $400 maximum rate in effect on both claims.

With the *Miller* issue now squarely before the Court of Appeals, it rejected it in a 5-2 decision. The Court went through a number of variations that all still failed to prevent a claimant from receiving more than the maximum amount of benefits for any week when the two awards were running. Therefore, the Court reversed the Appellate Division in this case and overruled *Miller*.

The Court also indicated that because of amendments to the Workers' Compensation Law subsequent to the *LaCroix* decision this case may have little impact. In 2009 the Workers' Compensation Law was amended in response to the *LaCroix* decision to allow for a scheduled loss of use award to be paid at once and, therefore, possibly eliminate the problem of "overlapping" awards. The Court was very clear that it was in any way seeking to apply or interpret the provisions of the amended Workers' Compensation Law §25(b).

One concession by the State Insurance Fund during oral arguments may have helped it win this case. It conceded that at some time in the future it would be liable to pay out the award and that they would not be getting a windfall. It even indicated that under Workers' Compensation Law §15(4) it would be liable to pay the entire (as in this case) or the balance of a scheduled loss of use award after the claimant died, if he was paid benefits for the rest of his life on the other case.

The dissent in this case did not have any problems with the *Miller* decision and felt that because the 2007 amendments were silent about the *Miller* issue the legislature had no problems with the holding in the case. Had the legislature objected to the holding it could have been overruled in the 2007 amendments, but there was no change made in 2007. The dissenters also believed that when the 2009 amendments in response to the *LaCroix* decision were made the legislature endorsed *Miller* because no statutory change was made in response to its holding.

After these four cases one would think that the Court of Appeals would not have additional cases on its docket for a while relating to workers' compensation. However, there are still two more cases on its docket that may have a profound impact on workers' compensation cases in New York. Both of the pending cases involve the use of collateral estoppel against injured workers. In *Howard v. Stature Electric, Inc.*[23] the issue is whether or not a claimant who enters an *Alford* plea to a charge of violation Workers' Compensation Law §114 can litigate the issue when the civil sanctions of §114-a are raised before the Workers' Compensation Board. The Court of Appeals granted the Motion for Leave to Appeal on March 27, 2012. The other major case is *Auqui v. Seven Thirty Ltd. Partnership*.[24] In *Auqui* the First Department reversed the trial court and stated that an injured worker who was found at the Workers' Compensation Board to have no further disability still had the right to litigate whether or not he remained disabled after the date found by the Workers' Compensation Board that he had recovered. The reversal was a 3-2 decision invoking the mandatory jurisdiction of the Court of Appeals, as in the *Zamora* case. If the Court of Appeals reverses the Appellate Division in this case, the litigation of further disability at the Workers' Compensation Board may very well become the trial of the related personal injury action. Neither case will be argued before the Court of Appeals before September 2012.

Endnotes

1. Workers' Compensation Law §27(2).
2. 18 N.Y. 3d 48 (2012).
3. 9 N.Y. 3d 207 (2007).
4. Laws of New York 1913 Chapter 816.
5. *Brophy v. Prudential Insurance Co.*, 241 A.D. 306 (1934).
6. 60 N.Y. 2d 131 (1983).
7. 2012 NY Slip Op. 02250.
8. 9 N.Y. 3d 207 (2007).
9. The percentage cost of litigation is obtained by dividing the sum of attorneys' fees (AF) plus expenses (E) by the amount of the gross settlement (GS), or in algebraic form (AF+E)/GS.
10. 79 A.D. 3d 1638 (2010).
11. For further discussion of this possibility see Teff, Justin, After Burns v. Varriale: *Essential Lessons for Workers' Compensation Third-Party Action Attorneys*, NYSBA Journal January 2011.
12. As a side note in addition to this litigation about the liability of the workers' compensation carrier under Workers' Compensation Law §29 there is an ongoing litigation in the Court of Claims between the Town of Amherst and the State Insurance Fund about the State Insurance Fund's obligation to indemnify the Town of Amherst under Dole v. Dow Chemical, 30 N.Y. 2d 143 (1972). The Buffalo News has reported on this litigation on December 18, 2011, February 27, 2012 and March 5, 2012. All three articles are available on the paper's website.
13. The Appellate Division's decision was 3-2 decision. If appealed to the Court of Appeals the court has mandatory jurisdiction under CPLR §5601 (a). This case was appealed not only by the workers' compensation carrier, but also by the Worker' Compensation Board. The Workers' Compensation Board is a party to all appeals to the courts (Workers' Compensation Law §23). The fact that the decision was appealed by the Workers' Compensation Board to the Court of Appeals against an injured worker is very rare. In the nearly one hundred year history of the Workers' Compensation Board it has have taken this position less than five times.
14. 79 A.D. 3d 1471 (2010).
15. 2012 NY Slip Op. 03357.
16. 9 N.Y. 3d 207 (2007).
17. 80 A.D. 3d 971 (2011).
18. Laws of New York 2007 Chapter 6 §4.
19. 2012 NY Slip Op. 03359.
20. 8 N.Y. 3d 348 (2007).
21. 1 A.D. 3d 691 (2003).
22. 67 A.D. 3d 1303 (2009).
23. 72 A.D. 3d 1167 (2010).
24. 83 A.D. 3d 407 (2011).

Ronald Balter is an attorney with Caruso, Spillane, Leighton, Contrastano, Ulaner & Savino, P.C. in New York.

Proposed Reform to New York's Scaffold Law: Will the Comparative Negligence of Workers Be Considered?

By James R. Denlea and Kerry F. Cunningham

New York State Senator Patrick M. Gallivan (R-59) and Assemblyman Joseph Morelle (D-132) have sponsored legislation (S.6816/A.2835) to reform New York's controversial "Scaffold Law," which imposes absolute liability on contractors and property owners to provide appropriate scaffolding and other safety measures where workers are engaged in elevation-related building work. The proposed legislation would replace the Scaffold Law's absolute liability standard with a comparative negligence standard.

Introduction

The "Scaffold Law," codified in New York Labor Law Sections 240, 241 (1)-(6) and 241-a,[1] dates back to the late 1800s and was intended to reduce the fatalities and injury rates among construction laborers. The Scaffold Law, particularly Section 240, and the absolute liability imposed thereunder, has generated much discussion in recent years because of the significant judgments and settlements property owners, contractors and municipalities have been facing as a result of the absolute liability standard it imposes. Many view the Scaffold Law as unjustified in the present day where construction workers are afforded workers' compensation and where the federal government has imposed workplace safety rules.

Section 240 of the Labor Law provides as follows:

> All contractors and owners and their agents…in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

This Scaffold Law is intended to protect workers from elevation-related risks and to impose absolute responsibility for safety practices on the contractors and property owners. The absolute liability imposed does not necessarily mean strict liability, but rather (1) that a plaintiff's recovery will not be reduced by another party's comparative negligence; and (2) that the statute imposes a non-delegable duty. However, simply because an accident occurs on a work site does not mean that the owner and contractor will automatically be liable. The defendants can avoid liability if they can establish the "recalcitrant worker" defense. This defense precludes liability under the Scaffold Law where there is no violation of the statute, *i.e.*, the injury is solely and proximately caused by the injured worker's failure to use an adequate safety device provided by the owner/contractor. If, however, there is a violation of the Scaffold Law, the worker's negligence is not considered and the defendants' liability is absolute.

The Proposed Legislation

New York is the only state to maintain a law like the Scaffold Law. The legislature has been urged to reform the Scaffold Law over the last few years, but several legislative proposals designed to amend or repeal the Scaffold Law have failed to pass, or even be debated, in the legislature.

Under the proposed legislation, a new Section 1414 would be added to the Civil Practice Law and Rules ("CPLR") which would state that contractors who provide safety training and equipment, including safety courses offered by the Occupational Safety and Health Administration ("OSHA"), have the right to demonstrate in court that the worker contributed to the injury and therefore utilize the CPLR's contributory negligence standard. Under the proposed law, only if a contractor proves that the worker failed to use the safety equipment provided, disobeyed safety instructions, or worked while under the influence of drugs and alcohol would the contributory negligence rule be invoked. In contrast to the recalcitrant worker defense, under the proposed legislation, a worker's negligence could be considered when assessing liability even when the owner or contractor had violated the Scaffold Law and the worker's negligence was not the sole, proximate cause of the injury. The proposed legislation does not prevent injured workers from bringing lawsuits for their injuries or prevent them from receiving workers' compensation benefits, but simply affords the owners and contractors the chance to defend themselves when the injuries are caused in whole, or in part, by the worker's own negligence.

The Argument Against Scaffold Law Reform

Supporters of the Scaffold Law in its current form contend that the law has forced the construction industry to provide a safe workplace for construction workers which has reduced deaths and injuries. Those who support the Scaffold Law contend that the proposed legislation will allow contractors, property owners and other responsible

parties to avoid liability for workers' injuries by claiming that the workers are responsible for their injuries. The proposed bills, it is suggested, will act as a disincentive to contractors and property owners to provide a safe workplace environment for workers who engage in risky construction work. According to the Occupational Safety and Health Administration, each year falls from scaffolds injure about 4,500 American construction workers and result in the deaths of 50 more.[2]

The Scaffold Law, and the absolute liability imposed thereunder, it is argued, is essential to worker safety and provides for fair compensation to those injured as a result of contractors and owners violating the statute. Those in support of Scaffold Law would point to a 2010 jury verdict in New York County awarding a construction worker $50.5 million for injuries he sustained after a fall from a scaffold as evidence of the continued need for the Scaffold Law. In *Savillo v. Greenpoint Landing Associates, L. L. C.*, the plaintiff fell from a scaffold and was severely injured, including among other injuries, paralysis, brain damage and hearing loss. In granting summary judgment in favor of plaintiff on liability, the court noted the defendants' disregard for the safety of their workers and their failure to require scaffold workers to wear lifelines and failure to provide such lifelines.[3] Consistent with the Scaffold Law, the court disregarded defendants' contention that plaintiff's injuries were the result of his consumption of alcohol the night before the accident and his poor judgment. In 2011, the trial court denied defendants' motion to set aside the verdict as excessive[4] and the defendants' appeal was withdrawn on April 26, 2012.[5]

The Argument in Favor of Scaffold Law Reform

Proponents of Scaffold Law reform contend that the Scaffold Law, in its current form, unfairly puts contractors or owners in a position of not being able to defend themselves in actions brought under the law due to the absolute liability imposed thereunder. They also contend that Scaffold Law reform would stimulate the economy by lowering liability costs for local governments, reducing costs for capital projects and creating jobs, and would improve workplace safety.

These sentiments, and others, were articulated by a coalition of advocacy groups including the Associated General Contractors of New York State, the Business Council of New York State, Lawsuit Report Alliance of New York, and the Real Estate Board of New York, in a May 8, 2012 letter to Governor Andrew M. Cuomo and the Mandate Relief Council, in which the coalition urged them to support Scaffold Law Reform.[6] The coalition, cited lower liability costs for local governments, reduced costs for capital projects, and job creation and economic stimulus as reasons to support the Scaffold Law reform.

While those who oppose Scaffold Law reform contend that the Scaffold Law ensures a safe work environment for laborers, Scaffold Law reformers point out that there is no empirical research which establishes, or even suggests, that New York's safety record is a result of the Scaffold Law.[7] Indeed, studies suggest that New York's safety record is not driven by the absolute liability standard under the Scaffold Law, but is the result of the activities of OSHA, technological developments, risk management techniques, and workers' compensation incentives.[8] Proponents also support Scaffold Law reform as a way to improve safety at construction sites. Supporters believe that the absolute liability imposed by the Scaffold Law causes workers to put too much reliance on the absolute liability imposed and allows them to escape responsibility for their actions, which is inconsistent with the goal of maintaining safe working environments at construction sites.

Reformists also cite the heavy burden the Scaffold Law puts on local governments. In an average year, New York municipalities pay over $1 billion for total claims and legal judgments, including increased liability under the Scaffold Law.[9] These costs, in addition to the associated liability insurance costs, can have a devastating impact on a local government's budget. Pure premium losses for construction projects in New York, particularly New York City, are three times higher than any other state and these costs are factored into every taxpayer-funded construction project, which has a significant impact on total project costs.[10] According to the Insurance Services Office, bridge and elevated highway construction liability loss costs in New York City are equivalent to 74.7% of payroll costs, compared to 15.7% and 11% in Chicago and Los Angeles respectively.[11]

Moreover, the Scaffold Law renders general liability insurance coverage prohibitively expensive or completely unavailable. Contractors and small businesses are particularly threatened by the rising liability costs associated with the Scaffold Law, including the significant judgments rendered thereunder. Scaffold Law reform could lower costs to taxpayers by making infrastructure spending go further.

In addition, supporters of reform cite the effect in Illinois since it repealed its "Structural Work Act" in 1995, which was comparable to New York's Scaffold Law. In Illinois, after the Structural Work Act was repealed, the number of construction jobs rose 25% between 1994 and 2000 and construction fatalities declined by 26% during the same period.[12] Supporters of Scaffold Law reform in New York expect the same impact in New York.

Conclusion

It cannot be disputed that workplace safety, particularly for those who engage in dangerous construction

work, should be of utmost importance to the State, municipalities, and property owners and contractors. While the Scaffold Law ensures that injured construction workers can be compensated for construction-related injuries, other interests and concerns, including the fractured financial condition of the State, local municipalities, and the construction industry as a whole, must also be considered. While the state legislature has shown little or no interest in passing Scaffold Law reform in the past, the current economic climate may provide incentive to pass the proposed legislation to allow courts and juries to consider the comparative fault of the construction worker.

Endnotes

1. Section 240 is discussed herein. Section 241 establishes requirements for flooring and elevators in buildings under construction, and 241-a requires appropriate covering of elevator shaftways, hatchways and stairwells in buildings under construction.
2. U. S. Department of Labor, Occupational Safety & Health Administration, Workers Safety Series, Pocket Guide OSHA 3252-05N-2005, found at http://www.osha.gov/Publications/OSHA3252/3252.html.
3. *Savillo v. Greenpoint Landing Associates, L.L.C.,* No. 114418/07, 2010 N.Y. Slip Op. 32470(U) (Supreme Court, N.Y. County, September 7, 2010).
4. *Savillo v. Greenpoint Landing Associates, L.L.C.,* No. 114418/07, 2011 WL 2941341 (Supreme Court, N.Y. County, June 6, 2011).
5. *Savillo v. Greenpoint Landing Associates, L.L.C.,* 2012 N.Y. Slip Op. 71361(U) (App. Div. 1st Dep't, April 26, 2012).
6. The Coalition's May 8, 2012 letter to Governor Cuomo and the Mandate Relief Council can be found at http://www.nylawsuitreform.org/wp-content/uploads/2012/05/Letter-to-Governor-and-Mandate-Relief-Council_Scaffold-Law_5.8.12.pdf.
7. Michael J. Hutter, *Reforming Labor Law 240/241: Bringing New York State Into The 21st Century*, Government Law Center of Albany Law School, September 1998, at p. 34.
8. *Id.* at 35.
9. May 8, 2012 letter from coalition groups to Governor Andrew M. Cuomo and the Mandate Relief Council, *citing* Creswell, S. and Landon-Murray, M., *Assessing the Fiscal Impact of Lawsuits on New York State Municipalities,* Rockefeller College of Public Affairs and Policy, Program on Local and Intergovernmental Studies, October, 2011.
10. *Id.* at p. 1, n. 2, citing Insurance Services Office Data; General Liability Loss Costs by State/Region, 2010.
11. *Id.* at p. 1-2, n. 3.
12. *Id.* citing United States Bureau of Labor Statistics, *Survey of Occupational Injuries and Illnesses (SOII),* 1995-2010 Data.

James R. Denlea is a partner and Kerry F. Cunningham is an attorney with Meiselman, Denlea, Packman, Carton & Eberz P.C. in White Plains, New York.

Construction Defect Claims Are Occurrences

By James A. Johnson

"You can guard against the high percentage of risk but you can't guard against risk itself."

Introduction

One of the most litigated issues in insurance law is whether construction defect claims constitute "occurrences" under the Commercial General Liability (CGL) policy. This article answers the question in the affirmative and explains the nascent majority view.

Keep in mind that today we are all involved in a multijurisdictional practice. A New York lawyer may find himself or herself in New Jersey, Michigan, Texas or any court outside New York State. Moreover, in the insurance context, both plaintiff and defendant counsel will need to know the law of the jurisdiction that will be applied by the court in deciding the insurance coverage dispute. Attorneys who reread this article will have an advance starting point.

Currently the majority view is that construction defects constitute "occurrences" with the Supreme Courts of Tennessee,[1] Indiana,[2] Florida,[3] Alaska,[4] Wisconsin,[5] South Dakota,[6] Mississippi,[7] Georgia,[8] Texas,[9] South Carolina,[10] Minnesota[11] and Kansas.[12] These states all find in favor of policyholders. Moreover, Colorado,[13] Arkansas,[14] Hawaii[15] and South Carolina[16] have passed statutes that essentially mandate that construction defects are "occurrences."

Analysis

In determining if construction defects are "occurrences," the analysis should focus on whether the faulty workmanship and resulting damage was expected or intended by the insured. If the faulty workmanship and resulting damage were unexpected and unintended by the contractor, it follows that the resulting construction defects and any related property damage were caused by an "occurrence." An ***"occurrence"*** as set out in the Insurance Services Office (ISO) standard for policy is defined as: *An accident, including continuous or repeated exposure to substantially the same general harmful conditions.*[17]

The rules of insurance policy interpretation dictate that construction defects are "occurrences." Under the rules of insurance interpretation, such as *contra proferentem, the reasonable expectations doctrine together with construing the policy as a whole, there is no question that construction defects are "occurrences."* All of the policy provisions should be analyzed, including the business risk exclusions to determine if the policy covers the claim at issue. Contractors do not intend for their workmanship to be faulty or defective. Nor do they generally expect that their work will result in property damage. Thus, when construction work is done defectively it generally is an "accident." If construction defects were not "occurrences" the business risk exclusions, which purport to exclude coverage for certain risks inherent in doing business, would be superfluous. *The drafters of the Commercial General Liability policy did not intend to provide illusory coverage to contractors.* And, contractors who purchase CGL insurance expect that liability claims will be covered under CGL policies they purchase. This expectation is reasonable because contractors are in the construction business.

Insurance companies maintain that allowing coverage for construction defects convert CGL policies into performance bonds because such claims are reasonably foreseeable and therefore not "accidents." This counsel maintains that permitting recovery for construction defect claims does not convert the Commercial General Liability into performance bonds. Performance bonds are issued to the owner to ensure that the construction will be completed. CGL policies insure the contractor against third party claims and lawsuits. Thus, performance bonds and liability insurance provide financial security to different entities and requires a separate and independent analysis of the facts.

In applying the expected or intended language the majority of courts have adopted the ***subjective test.***[18] These courts have reached their conclusions by applying the definition of "occurrence" to the facts of the case. And, then determined it was undisputed that the insured did not expect or intend to do the work defectively or cause the resulting damage.

Additional Case Law

CONNECTICUT—*Royal Indemn Co. v. Soneco/Northeastern, Inc.*, 183 F. Supp. 2d 526, 533 (D. Conn. 2002)—determining intent for the intentionality exclusion requires the court to apply a subjective standard.

MASSACHUSETTS—*Quincy Mut. Fire Ins., Co. v. Abernathy,* 469 NE 2d 797, 800 (Mass. 1984)—an injury is nonaccidental only where the result was actually, not constructively, intended.

NEW HAMPSHIRE—*High Country Assoc. v. New Hampshire Ins. Co.,* 648 A.2d 474, 478 (N.H. 1994)—property damage to condominium units caused by defective workmanship is an "occurrence" within the meaning of the CGL policy.

MICHIGAN—*Arco Indus. Corp v American Motorists Ins. Co.,* 531 NW 2d 168,179 (Mich. 1995), overruled on other

grounds by *Frankenmuth Mut. Ins. Co. v. Masters*, 595 NW 2d 832 (Mich. 1999)—trial court should have adopted a subjective standard.

OHIO—*Erie Ins. Exchange v. Colony Dev. Corp.*, 736 NE 2d 941, 947 (Ohio App. 1999)—property damage caused by contractor's negligence in constructing and designing a condominium complex reasonably falls within the policy's definition of property damage caused by an occurrence, i.e., an accident.

WEST VIRGINIA—*Farmers & Mech. Mut. Ins. Co. of W. Virginia v. Cook*, 557 S.E. 2d 801, 807 (W. VA. 2001)—courts must use a subjective rather than objective standard for determining the insured's intent.

LOUISIANA—*Great American Ins. Co. v Gaspard*, 608 So. 2d 981, 985 (La. 1992)—the subjective intent of the insured is the key and not what the average or ordinary reasonable person would expect or intend; *Williams v. City of Baton Rouge*, 731 So. 2d 240, 253 (La. 1999)—the subjective intent of the insured will determine whether an act is intentional.

ALABAMA—*U.S.F & G Co. v. Armstrong*, 479 So. 2d 1164, 1167 (Ala. 1985)—the legal standard to determine whether the injury was either expected or intended is a purely subjective standard.

Conclusion

When you apply the rules of policy interpretation such as *contra proferentem*, the reasonable expectations doctrine together with construing the policy in its entirety, the ineluctable conclusion is that construction defects are occurrences. Contractors do not expect or intend to do their work defectively. *Moreover, construction defects must be "occurrences" in order for business risk exclusions to have any purpose. Also, the subcontractor exception would be superfluous.*

In the final analysis, the test should be ***subjective*** whether the damage was actually expected or intended by the insured and not whether the damage was reasonably foreseeable. Thus, if construction defects were not "occurrences" under CGL policies such coverage would be illusory. Therefore, construing CGL polices as a whole leads inexorably to the conclusion that construction defects are "occurrences."

Endnotes

1. *Travelers Indem. Co. v. Moore & Associates, Inc.*, 216 SW 2d 887, 894-95 S.D. 2002)—defective installation of windows causing water penetration constitutes property damage for purposes of the CGL.
2. *Sheehan Const. Co., Inc v. Continental Cas. Co.*, 935 NE 2d 160 (Ind. 2010), modified on other grounds, 2010 WL5135322 (Ind. 2010)—if faulty workmanship is unexpected and without intention or design and not foreseeable from the viewpoint of the insured, then it is an accident within the meaning of a CGL policy.
3. *United States Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871, 883 (Fla. 2007)—defective soil work done by subcontractor that caused damage to homes was an occurrence under CGL policies.
4. *Fejes v. Alaska Ins. Co.*, 984 P 2d 519, 523 (Alaska 1999)—improper or faulty workmanship constitutes an accident.
5. *American Family Mut*. Ins. Co., 673 NW 2d 65, 70 (Wis. 2004)—settlement of soil after building was completed that caused the building's foundation to sink was property damage caused by an occurrence within the meaning of the CGL policies general grant of coverage.
6. *Corner Construction Co. v. U.S. Fid. & Guar. Co.*, 638 NW 2d 887, 894-95 (S.D. 2002)—construction defects resulting in ventilation problems constituted an accident and such damage is covered by the policy at issue.
7. *Architex Assn. Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1162 (Miss. 2004)—the term "occurrence" cannot be construed in such a manner as to preclude coverage for unexpected or unintended property damage resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss.
8. *American Empire Surplus Lines Ins. v. Hathaway Dev. Co.*, 707 SE 2d 369, 372 (Ga. 2011)—an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property.
9. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 SW 3d 1, 9 (Tex. 2007)—no basis exists in the definition of "occurrence" to distinguish between damage to the insured's work and damage to a third party's property from an occurrence as defined in the CGL policy.
10. *Auto Owners Ins. Co. v. Newman*, 684 SE 2d 541 (S.C. 2009)—defectively installed stucco resulted in a covered occurrence.
11. *Wanzele Const., Inc. v. Employers Ins. of Wausau*, 679 NW 2d 322 (Minn. 2004).
12. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P. 3d 486, 493 (Kan. 2006).
13. *Colo. Rev. Stat*. § 13-20-808 (2010).
14. *Ark. Code Ann.* § 23-79-155 (2011).
15. *Haw. Rev. Stat.* § 431-1 (2011).
16. *S.C. Code Ann.* § 38-61-70 (2011).
17. *Insurance Service Office 2004 form for Commercial Liability Polices—ISO is an insurance industry organization that prepares and disseminates standard form policies.*
18. *Royal Indem. Co. v. Soneco/Northeastern, Inc.*, 183 F. Supp. 2d 526, 533 (D. Conn. 2002)—determining intent for the intentionality exclusion requires the court to apply a subjective standard.

James A. Johnson (johnsonjajmf@yahoo.com) of James A. Johnson, Esq. in Southfield, Michigan is a trial lawyer and an active member of the Michigan, Massachusetts, Texas and Federal Court Bars. Mr. Johnson is an accomplished attorney and concentrates on insurance coverage under the Commercial General Liability policy. He can be reached at www.JamesAJohnsonEsq.com.

Making Sure Your E-Discovery Isn't Unreal

By Adam R. Dolan

"Are you on Facebook?" It's a common question these days. Everyone from fourteen-year-olds to Fortune 500 companies has a page on Facebook, and it doesn't stop there. LinkedIn. Myspace. Twitter. YouTube. The amount of information that is available online is staggering. But how do we utilize it? What are our ethical obligations when trying to find it? And maybe most importantly—How do we preserve it? We'll touch on the first two questions briefly—as numerous other articles have delved into their intricacies. The third question—How do we preserve electronic data?—presents unique problems that our current laws may not have fully grasped yet.

Utilizing Electronic Information and Our Ethical Obligations

As we have progressed farther and farther into the electronic age, less and less of our personal information is stored in hard, i.e. paper, files. We exist in the ether, all of our defining information present on one website or another—birth and marriage records on the County Clerk's website, graduation dates on our school's website, job information on our firm's website. However, it is the explosion of social media sites that has many in the legal profession anxious.

Current case law is still evolving, but it's not hard to see the allure of a social media website in cases involving insurance companies and personal injury lawsuits. After all, if a person is claiming catastrophic injuries, but posts pictures on Facebook of himself or herself playing at the beach, it's fair to say that those pictures are something he or she might not want the insurance company to know about. And since most, if not all, social media sites have some sort of privacy settings, in most cases a person is unable to view anything but the most basic information without first becoming "friends" with the person in question.

Ethical Obligations

So what ethical obligations do attorneys have when trying to access this information. While all Rules of Professional Conduct are important, the following five New York Rules of Professional Conduct require special attention when you encounter questions regarding social media websites:

1) Rule 4.1: prohibits a lawyer from making a false statement of fact or law to a third person (*i.e. using a third-party to friend a person you are seeking information on*). So don't go asking your paralegal to "friend" the plaintiff so you can see what he or she did this past Saturday night.
2) Rule 4.2: prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer (*if the person you are attempting to get information on is a PARTY to the litigation*). It shouldn't come as a shock that you shouldn't try and "talk" to your opposing party on social media sites.
3) Rule 4.3: prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client (*if the person you are attempting to get information on is a non-party to the litigation*). So, again, don't try to contact the plaintiff's boyfriend or girlfriend, and try and find out little pieces of information about the plaintiff this way.
4) Rule 5.3(b)(1): holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer. (*We're responsible for a non-lawyer's conduct if he acts on our behalf and at our direction.*) This goes right back to Rule 4.1. Don't think that by implying to your paralegal that you'd really like to know what the plaintiff is up to will get you off the hook ethically, simply because you didn't EXPLICITLY tell him or her not to friend the plaintiff.
5) Rule 8.4(c): A lawyer is prohibited from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation."

While these Rules seem straightforward and clear, the N.Y. City Committee on Professional and Judicial Ethics went even further and issued a formal opinion in 2010 entitled "Obtaining Evidence from Social Networking Sites" (September 2010). This opinion dealt with "friending" a witness or an unrepresented party. It stated that an attorney may engage in the truthful, non-deceptive "friending" of unrepresented persons, "without also disclosing the reasons for making the request." The lawyer must not, however, engage in the direct or indirect use of affirmatively deceptive behavior to "friend" the witness, such as creating a fraudulent profile that falsely portrays the lawyer or agent as a long-lost classmate, a prospective employer or a friend of a friend.

This opinion encompasses all the rules mentioned above and gives a concrete example of conduct we as attorneys need to be cognizant of and avoid when attempting to gather evidence.

Case Law on the Gathering of E-Discovery

Courts have recognized the fact that oftentimes there is pertinent information on social media websites that an attorney is unable to gain access to without a plaintiff's consent. Their decisions have run the gamut of what they are requiring parties to turn over with regards to social media sites.

In Pennsylvania, one court decision granted access to a party's account and forced the requested party to turn over its account name and password, *McMillan v. Hummingbird Speedway, Inc.* No. 113-2010 CD (C.P. Penn. 2010). In New York the courts have not seen fit to go as far. In the case of *Romano*, the court decision forced the requested party to turn over authorizations to defense for both PAST and PRESENT content on social media sites—but did not force the production of a password. *Romano v. Steelcase*, 30 Misc.3d 426, 907 N.Y.S.2d 650 (NY 2010).

In *Romano*, the court opined that plaintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action. *Id.* at 428. The court further held that information sought by the defense regarding the plaintiff's Facebook and Myspace accounts was both material and necessary to the defense and COULD lead to admissible evidence. *Id.* at 430. In this case, the plaintiff was shown smiling in a photo outside the confines of her home, despite claims that she sustained permanent injuries and was largely confined to her house and bed. *Id.* The court found that preventing the defense access to the plaintiff's private postings would be in direct contravention to the liberal disclosure policy of New York State and that there was a reasonable likelihood that the private portions of the plaintiff's site may contain further evidence which would be material to the defense. *Id.*

On the federal level, the courts have been just as sweeping as both New York and Pennsylvania. And it's not surprising. Almost a decade ago, one of the original cases addressing the preservation of ESI was heard in the Southern District Court of New York. In *Subulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y, 2003), the Court held that a party's duty to preserve evidence extends to all ESI that a party knows, or reasonably should know, is relevant to the subject matter of the litigation. Applying this decision therefore to social media sites is the next step—however, unlike simple business records stored as ESI, the preservation of social media information presents unique challenges, as data is constantly changing, being deleted, altered, etc.

Preservation of Electronically Stored Information on Social Media Websites

The biggest problem faced by everyone with regards to preserving electronically stored information is that it's just that—electronic. Gone are the days of hard paper files, stored in a specific location, accessible via a key or combination lock, under armed guards. All of our information today exists in cyberspace, accessible from anywhere, by anyone with the password and an Iphone. While this is not as big a problem for large corporations—their information while electronically stored is often encrypted and accessible only by a small number of people—what about social media websites? By their very nature, social media websites are open and, well, social. This brings us back to our original question of how do we preserve electronic information that is posted on a plaintiff's social media page?

In *EEOC v. Simply Storage Management*, 270 F.R.D. 430 (S.D. Ind. 2010), the court did not hesitate to permit broad discovery of any information from a social media site that would detail a person's mental, physical, or lifestyle condition, particularly when that condition is called into question by the very case itself. The court found it reasonable to expect severe emotional or mental injury to manifest itself in some social networking site content and determined that the scope of relevance is any profiles, posting, messages, photographs or videos, etc., that have revealed, refer, or relate to any emotion, feeling or mental state or related to events that could be reasonably expected to produce significant emotion, feeling or mental state, and that third party communications must be produced if they place claimant's own communication in context. *Id.*

This case could prove to be particularly useful with regards to the type of information defense attorneys are seeking when requesting discovery from a social media site. However, its not just case law that has weighed in on the issue. On the other side of the coin, Congress passed the Federal Stored Communications Act (18 USC §§ 2701 *et seq.*), which could provide a barrier to accessing a website's data regarding its users.

A California district court found that the Federal Stored Communications Act applied to messages exchanged over Facebook and Myspace. In the case of *Crispin v. Christian Audigier*, 717 F.Supp.2d 965 (CD Cal. 2010), the court found these websites were providers of communication services within the meaning of the act, and were prohibited from divulging private communications without the user's consent. To the extent that the plaintiff's Facebook wall and Myspace comments were not closed to the public, those portions of the accounts fell beyond the protection of the act. *Id.* at 982.

So how do we know what we're getting from a social media website is authentic? How do we know who posted it? When it was posted? Also, what if someone has altered a "page" on a social media website—deleting images or posts? What are the possible consequences? Are there consequences? How would we even find out if something was deleted or altered?

What about gaining access to data that WAS altered or deleted once a case began? What if an attorney directed his client to "clean up" his social media website page? What if the attorney had no actual knowledge of a client proac-

tively removing postings after an incident once he or she realized those posting could harm his or her case?

Well, we know what one Virginia Court thought of a plaintiff's attorney directing a client to "clean up" his social media sites. In *Lester v. Allied Concrete Co.*, "the court's findings reflect that Murray told his client to remove several photos from his Facebook account on fears that they would prejudice his wrongful death case brought after his spouse's fatal automobile accident." http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/; citing *Lester v. Allied Concrete Co.*, Final Order. One of the photos depicts the allegedly distraught widower holding a beer and wearing a t-shirt emblazoned with "I [heart] hot moms." Murray instructed his client through his assistant to "clean up" his Facebook account. "We do not want blow ups of other pics at trial," the assistant's email to Lester said, "so please, please clean up your Facebook and Myspace!" *Id.*

But how do we authenticate all this data? How can we confirm that what we're receiving is actually truthful and not merely the work of another party? The next few sections address these questions.

Authenticating Electronically Stored Information

As any attorney can probably guess, one of the things any attorney will want to confirm when dealing with information gathered from a social media website is that the information is authentic, that was has been posted has not been altered and that to the best of one's knowledge, it came from the "owner" of the page.

The case of *Griffin v. State of Maryland* and its progeny are instructive in this area. In his initial trial, the defendant was convicted of second degree murder after a comment that purportedly threatened a key witness was posted on his girlfriend's profile, and thereafter was admitted into evidence. The problem? According to the Maryland Court of Appeals, the Myspace posting had not been authenticated properly. During the defendant's trial, the prosecution used a Police Sergeant to authenticate the posting. The Court of Appeals found this to be insufficient.

During the trial, the defendant's girlfriend had testified, but she was not asked about her Myspace page where the comment was posted. In an earlier decision, Maryland's Court of Special Appeals ruled that social media profiles on Myspace or Facebook could be authenticated circumstantially by their content and context in the same manner as other forms of electronic communications. *Griffin v. State*, 2010 Md. App. LEXIS 87 (Md. Ct. Spec. App. May 27, 2010).

The Maryland Court of Appeals disagreed and overturned the defendant's conviction and the Court of Special Appeals decision. The Court of Appeals decision is instructive as to what steps to take when authenticating electronic information, particularly from social media sites.

The Maryland Court of Appeals held that since the State only identified the date of birth and the picture of the girlfriend with defendant appearing on the site, someone other than the girlfriend could have created the profile and posted the threat. *Griffin v. Maryland*, No. 74 (Maryland, April 28, 2011). The Court suggested the following methods to authenticate a printout from a social media website:

> The first, and perhaps most obvious method would be to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Rule 5-901(b)(1). The second option may be to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question. A third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it. *Id. citing Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).

This method was apparently successfully employed to authenticate a Myspace site in an earlier case from New York, *People v. Clevenstine*, 891 N.Y.S.2d 511 (N.Y. App. Div. 2009). In *Clevenstine*, the defendant was convicted of raping two teenage girls; thereafter he challenged his convictions by asserting that a computer disk containing instant messages sent via Myspace between himself and the victims was improperly admitted into evidence. The defendant's claim—the electronically stored information was not properly authenticated. Clevenstine argued that "someone else accessed his Myspace account and sent messages under his username." *Id.* at 514. The Appellate Division agreed with the trial judge that the Myspace messages were properly authenticated, due to the fact that "both victims testified that they had engaged in instant messaging about sexual activities with Clevenstine through Myspace." *Id.* In addition, an investigator from the computer crime unit of the State Police testified that "he had retrieved such conversations from the hard drive of the computer used by the victims." *Id.* Finally, the prosecution was able to attribute the messages to Clevenstine, because a legal compliance officer for Myspace explained at trial that "the messages on the computer disk had been exchanged by users of accounts created by [Clevenstine] and the victims." *Id.* The court concluded that such testimony provided ample authentication linking the Myspace messages in question to Clevenstine himself. *Id.*

These case are very instructive on how to authenticate and introduce evidence at trial, but what about during the discovery process in a civil case? How can you make sure that the information you receive has not been changed? Or if it has been altered, seeing a record of when these changes were made? All of these questions lead us to a subsection of ESI that may prove particularly useful in any personal injury case. I'm talking about Metadata.

Metadata: What Is It and When Do I Request It?

What is Metadata? Metadata is frequently referred to as "data about data." It describes the history, tracking or management of an electronic document. *Aguilar v. Immigtation and Customs Enforcement*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) *citing Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 647 (D.Kans. 2005). Gathering this information during the discovery phase will make your job of authenticating any electronic information you receive much easier. However, while many people will simply lump metadata into one overarching category, there are in fact a number of types. We'll focus on three: substantive, embedded and system metadata.

Types of Metadata

Substantive (or application) metadata often lacks evidentiary value because of irrelevancy. This type of metadata, also known as application metadata, is "created as a function of the application software used to create the document or file" and reflects substantive changes made by the user. *Aguilar citing Sedona Principles,* 2d Cmt. 12a; Md. Protocol 26. This category of metadata reflects modifications to a document, such as prior edits or editorial comments, and includes data that instructs the computer how to display the fonts and spacing in a document. *Id*. Substantive metadata is embedded in the document it describes and remains with the document when it is moved or copied. *Id*.

System metadata reflects information created by the user or by the organization's information management system. This data may not be embedded within the file it describes, but can usually be easily retrieved from whatever operating system is in use. Examples of system metadata include data concerning "the author, date and time of creation, and the date a document was modified." Courts have commented that most system (and substantive) metadata lacks evidentiary value because it is not relevant. *See Mich. First Credit Union v. Cumis Ins. Soc'y, Inc.*, No. Civ. 05-74423, 2007 U.S. Dist. LEXIS 84842, 2007 WL 4098213, at *2 (E.D. Mich. Nov. 16, 2007). System metadata is relevant, however, if the authenticity of a document is questioned, or if establishing who received what information and when is important to the claims or defenses of a party. *Id*. This type of metadata can be extremely useful when requesting information from social media sites.

Embedded metadata is often crucial to understanding an electronic document. For instance, a complicated spreadsheet may be difficult to comprehend without the ability to view the formulas underlying the output in each cell. *Id*. It consists of text, numbers, content, data or other information that is input into a file, but is not typically visible to the user viewing the output display (think spreadsheet formulas, hidden columns, hyperlinks, etc.). For most, if not all personal injury lawsuits, this type of metadata will be irrelevant.

How does all this impact our discovery searches of social media sites? Well, generally, the more interactive the application, e.g. an Excel spreadsheet vs a Word document, the more important the metadata is to understanding the application's output. Therefore, metadata provides little to no assistance in understanding a word-processed document; it is somewhat useful in understanding a spreadsheet application; and it is critical to grasping the significance of a database application, like Facebook.

The U.S. District Court for the Southern District of New York stated that "it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of the electronic record." *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency,* 2011 U.S. Dist. Lexis 11655, *11. (S.D.N.Y. Feb. 7, 2011).

Discovery of Metadata

Since all of this is fairly new territory, metadata is obviously not addressed directly in the Federal Rules of Civil Procedure; however, it is subject to the general rules of discovery. *Aguilar* at 355. It is therefore discoverable if it is relevant to the claim or defense of a party and the information is not privileged. *Id*. *citing* Fed. R. Civ. P. 26(b)(1). So what are the steps required for requesting metadata?

Although metadata is not specifically referenced, the production of electronically stored information is mentioned in the Federal Rules of Civil Procedure. *Id*. *citing* Fed. R. Civ. P. 34(a)(1)(A), (b)(2)(E). Under the Rule, a requesting party may specify a form of production and request metadata. *Id*. *citing* Fed. R. Civ. P. 34(b)(1)(C). The responding party must then either produce the electronically stored information in the specified form or object. *Id*. "If the responding party objects, or the requesting party has not specified a form of production, the responding party must "state the form or forms it intends to use" for its production of ESI. *Id*. *citing* Fed. R. Civ. P. 34(b)(2)(D). Thereafter, if the requesting party objects and suggests an alternative form, the parties "must meet and confer under Rule 37(a)(1) in an effort to resolve the matter before the requesting party can file a motion to compel." *Id*. *citing* Fed. R. Civ. P. 34(b), advisory committee's note, 2006 amendment. If the requesting party does not specify a form, the responding party must produce the ESI in a form "in which it is ordinarily maintained or in a reasonably usable form." Fed. R. Civ. P. 34(b)(2).

One of the leading sources for all questions involving electronic discovery is the Sedona Conference (hereafter re-

ferred to as "Conference"). It is a legal policy research and education organization comprised of judges, attorneys and electronic discovery experts. One of their most instructive and helpful publications with regards to electronic discovery is the Sedona Principles. *See Autotech Techs. Ltd. P'Ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 560 (N.D.Ill. 2008).

In the first edition of the Sedona Principles, the Conference noted that because most metadata has no evidentiary value, there should be a modest legal presumption against the production of metadata. However, if the metadata is relevant, it should be produced. *Aguilar* at 356, citing *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production,* Principle 12, Cmt. 12a. As we stated earlier, when dealing with information uploaded onto a social media site, a database application that is constantly being altered, updated and changed, the metadata from that website is incredibly relevant.

For a more in-depth discussion into resolving any and all questions regarding electronic document production issues, the Sedona Principles are a good place to begin. *See*, *Sedona Principles 1st & 2nd.*

Case Law Regarding the Production of Metadata

There is a clear pattern in the case law concerning motions to compel the production of metadata. Generally speaking, courts have ordered the production of metadata when it is sought in the initial document request and the producing party has not yet produced the documents in any form. *See In re Payment Card Interchange Fee & Merchant Discount*, 2007 WL 121426 at *4. However, if a party is careless in its discovery requests, and the requested party has already produced documents in another form, courts have tended to deny further requests which include metadata, concluding that the metadata is not relevant. *See Autotech*, AT 559-60. (Court refused to compel production of metadata not sought in initial request); *D'onfrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48 (D.D.C. 2008).

What can we take from these cases? If you want metadata—ask for it, UP FRONT. This will be incredibly important when dealing with social media websites. Otherwise, if you've already received discovery in another form, or if you're too late in requesting metadata, you may be out of luck. Adam J. Levitt & Scott J. Farrell, *Taming the Metadata Beast,* N.Y.L.J., May 16, 2008 at 4. In addition, when asking for electronically stored information (ESI), it is important to understand the form of electronically stored information you are seeking. Rule 34 of the Federal Rules of Civil Procedure addresses the production of electronically stored information. Fed. R. Civ. P. 34(a)(1)(A), (b)(2)(E).

Not only is it imperative to know what "form" of ESI we are seeking, but by requesting the correct form at the outset, you strengthen your argument with the court as to why the requested data is necessary to your case. For instance, one form that electronic data can be produced in is native format.

Native format is the default format of a file to which access is typically provided through the software program on which it was created. However, documents in native format cannot be identified with traditional bates numbers, cannot be effectively redacted and can be opened and used by a requesting party only if that party has the software on which the documents were created. An important feature of documents produced in native format is that they will contain metadata. Knowing the format which will best assist your client's case will therefore become extremely important.

For example, in one case a plaintiff demanded electronic data produced in native format in his first request. *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 Civ. 3109, 2006 WL 665005, at *1 (N.D.Ill. March 8, 2006). The defendant's rejected this request and produced the documents in a format called TIFF.[1]

Compare this with another instance in which the court denied a motion to compel metadata for Word documents after the plaintiff had already produced the requested documents in both paper and PDF format. *Autotech* at 557. In this instance, the initial request did not specify a form of production. *Id*. The court found that the format the documents were produced in constituted a reasonably usable form and relied heavily on the defendant's failure to request metadata at the outset. *Id*. at 559-60.

Now we've come full circle back to the question of how to authenticate documents, pages, any and all information retrieved from social media networking sites. Relying on simple printouts of social media site pages is a very risky value proposition, as was noted in the *Griffin* case. How should one proceed, then, after you've received authorizations to access data on a social media site? Or if you've received discovery and you need to authenticate that it's not been altered?

One of the best ways to try and confirm what you've received is correct is to utilize best practices technology, which enables scaleable, mainstream social media e-discovery. *Next Generation: e-discovery law and tech blog: Facebook Spoliation Costs Lawyer $522,000*, http://blog.x1discovery.com/.[2]

Why would you need such a platform when collecting e-discovery from social media sites?

There are a number of problems that can occur when trying to collect information from social media sites. For example, there is a longstanding and growing concern by photographers that social media websites are not preserving metadata in the images that their users upload. *Pro-Imaging—Who is Stripping your Metadata*, http://www.pro-imaging.org/content/view/900/32/. In many cases, the image metadata is being stripped out, rendering these images as "orphans," meaning it is no longer possible to identify

the owner of the image. *Id*. In some cases, the information is removed on upload; in other cases, it may be preserved in the original uploaded file, but any images derived from the original may no longer contain that same information, i.e. a copied photo. *Id*. This is where best practices technology can help prevent, or better still, identify, any changes made to important data you seek from your adversary.

What has all of this taught us? It is already clear that while the law is catching up to the technology out there, the technology out there is evolving as well. The best practice of all is to stay on top of decisions related to e-discovery, but even more importantly, to know what it is you're looking for and how to obtain it. As we increasingly become a more wired world, it is inevitable that more of our lives will be online. As lawyers, we need to know where that information is and how we can go about obtaining the most complete and unaltered forms.

Endnotes

1. The court noted that TIFF documents did not contain such relevant information as the creation and modification dates of documents, email attachments and recipients, and other metadata. *Id*. The court further observed that said metadata was relevant because it allowed the plaintiff to piece together when documents were created, who received them and thereby create a chronology of events. *Id*. The court therefore ordered the production in native format, despite that the defendants had already made a production of the documents. *Id*. at *4.
2. X1 Social Discovery is one of the best platforms for managing social media discovery. It is recommended on Next Generation: e-discovery law and tech blog. According to its website, X1 Social Discovery collects and indexes social streams relevant to a litigation matter or investigation and provides for search, link expansion, live previews, and instant search of the content behind embedded links. As was noted earlier, since merely viewing a Facebook or LinkedIn page in a browser or other tools can alter important metadata, X1 Social Discovery accesses social media sites in read-only mode to ensure evidence is not altered by the examiner.

Adam Dolan is an Associate with the law firm of Shafer Glazer LLP. His practice focuses on automobile liability defense, premises liability defense and construction and surety law defense.

Trial Brief

By James A. Johnson

Introduction

The purpose of this article is to demonstrate the importance of presenting to the judge in both state and federal court, in litigation, a Trial Brief. It applies to all types of disputes such as insurance, breach of contract, securities, consumer protection, environmental, class actions and intellectual property.

A Trial Brief is a short written summary explaining your position to the judge. It states the facts, evidence and legal arguments that you plan to present at trial and should include citations to legal authority, statutes and case law to support your position. In addition, the trial brief should address issues of law not disposed of by motions in liminie. It is particularly useful where the substantive claim is one in which the trial judge may be unfamiliar and to help him or her understand how it applies to your case. Trial Judges are very busy and operate under demanding circumstances. The key is to get the judge's attention and keep it. Do not waste a valuable opportunity to persuade. ***Put your summary up front at the very beginning.*** The entire opening paragraph should be your conclusion or points with persuasive reasoning.

The Trial Brief is the advocate's first opportunity to inoculate, educate and persuade the judge on the ***specific outcome*** of your case. It is an opportunity almost too good to be true because you get a head start to persuade the judge and opposing counsel. ***Thus, the second purpose is to educate and persuade opposing counsel and create doubt and risk in his or her position.***

The Trial Brief must demonstrate to the judge before trial that your position is just and true, mandated by the law and supported by the facts, case law and statutes, if any. An artful Trial Brief will convince the judge that your version of the facts are the true facts and supports a plaintiff's or defendant's verdict. Language and choice of words with ***one central theme*** together with ***organization and boldface section headings*** are the cornerstones of an effective and persuasive trial brief.

Outline

What to include in a Trial Brief depends on the case and should be tailored accordingly. The only proviso this writer requires is to keep it brief. A well-crafted Trial Brief demonstrates your credibility—the judge can rely on you and inherently he or she is persuaded to your position. The following is a short outline for preparing an effective trial brief:

1. Statement of Facts
2. Legal Argument—Analysis of Liability
3. Causation
4. Damages
5. Witnesses
6. Exhibits
7. Conclusion

Develop a persuasive and exciting writing style with bold captions, short paragraphs in a bullet-point format on key areas and no string citations. A single case on point is sufficient and will be greatly appreciated by the judge. Depending on state and local rules, file your trial brief before the last pre-trial conference. And then hand deliver another copy or supplemental copy to the judge and opposing counsel before voir dire. The following is an ***abbreviated sample Trial Brief***:

TABLE OF AUTHORITIES

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996)

Festo Corp. v. Shoketsu Kinzoku Kabushiki Co. Ltd., 122 S. Ct. 1831 (2002)

State Street Bank & Trust Co v. Signature Fin. Gr., Inc. 149 F. 3d 1368 (Fed. Cir. 1998)

eBay Inc. v. MercExchange, LLC, 126 S. Ct.1837 (2006)—the traditional four-factor test for injunctive relief applies in patent cases

Robert Bosch LLC v. Pylon Manufacturing Corp, U.S. Ct. of Appeals Federal Circuit; No.2011-1096 (Fed. Cir. Oct. 13, 2011)

Biomedino, LLC v. Waters Technologies Corp., 490 F. 3d 946, 950 (Fed. Cir. 2007)

Bilski v. Kappos, 130 S. Ct. 3218 (2010)

Lighting Ballast Controll LLC v. Philips Elecs. N. Am. Corp, No 7:09-cv-29-O, 2011 U.S. Dist. Lexis 96148 (N.D. Texas Aug. 26, 2011)

Paice LLC v. Toyota Motor Corp., 609 F. Supp. 2d 620, 624 (E.D. Texas 2009)

KSR Int'L Co v. Teleflex Inc., 550 U.S. 398 (2007)—rules governing injunctive relief

Uniloc USA Inc v. Microsoft Corp, 2011 WL 9738 (Fed. Cir. Jan 4, 2011)—requirement that damages analysis be tailored precisely to the technology, products and parties in each case

Global-Tech Appliances Inc. v. SEB S.A., 131 S. Ct. 2060 (2011)—inducing infringement in violation of 35 U.S.C. § 271(b) requires actual knowledge or willful blindness

Microsoft Corp v. i4i L.P., 2011 WL 2224428 (June 9, 2011)—patent invalidity must be established by clear and convincing evidence

Patent Statutes—35 U.S.C. §§ 101–376

Section 283—Injunction

Section 284—Damages

Section 285—Attorney Fees

U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHNSON INSTRUMENTS, INC.
Plaintiff

v.

TEXAS CONTROLS, INC.
Defendant

PLAINTIFF'S TRIAL BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Plaintiff, **JOHNSON INSTRUMENTS, INC.,** and presents to the Court and opposing party, the following Trial Brief.

SUMMARY

Plaintiff, ask this Court:

1. To enter judgment in favor of the Plaintiffs, _____ and against the Defendants, _____ because the evidence will show Defendants intentionally and willfully infringed Plaintiff's Patent No.7472426. Alternatively, plaintiff will show by the ***Doctrine of Equivalents,*** the Defendants infringed Patent No 7472426. The Doctrine of Equivalents is applicable in the case sub judice because the Defendant's **purported patent** ***elements are equivalent and substantially perform the same function in the same way as Patent No. 7472426.***
2. An award of damages adequate to compensate plaintiffs for infringement that has occurred, together with prejudgment interest from the date the infringement began, but in no event less than a reasonable royalty permitted by 35 U.S.C. § 284.
3. We ask the Court not to consider a paid-in-full lump sum award as asserted by the defendant under Lighting Ballast Control LLC v. Philips, No.7:09-cv-29-O, 2011 U.S. Dist. Lexis 96148 (N.D. Texas Aug. 26, 2011) as a form of relief that covers future infringement. Neither the Federal Circuit nor the U.S. Supreme Court has specifically addressed whether paid-in-full, lump-sum damages are a legally permissible form of relief.

   The basic right to exclude future infringment is identified in the U.S. Constitution and made explicit by statute. U.S. Const., Art. 1 § 8; 35 U.S.C. § 154 (a) (1). Thus, a jury verdict cannot result in an actual, compelled license. Moreover, Section 284 provides compensation for past infringement. John Hopkins Univ. v. Cellpro Inc., 152 F. 3d 1342. 1367 (Fed. Cir. 1998). The Federal Circuit has interpreted § 283 as addressing prospective infringement through either an injunction or an ongoing royalty. Paice LLC v. Toyota Motor Corp., 609 F. Supp. 2d 620, 624 (E.D. Texas 2009). The right to exclude has a value apart from the compensatory nature of a reasonable royalty for past infringement. It also accounts for the willfulness of future infringement.
4. A finding that Defendants' infringement was willful and this case be declared as "exceptional" and award treble damages as provided by U.S.C. § 284 & 285, including an award of reasonable attorney fees, expenses and costs incurred in this action.
5. A ***permanent injunction*** prohibiting further infringement. The facts in this case satisfy the four pronged test: there must be irreparable harm; straight money damages would be insufficient recompense; the balance of hardships favors an injunction and an equitable remedy is in the public interest as set out by U.S. Supreme Court in ebay v. MercExchange and reaffirmed in Robert Bosch LLC v. Pylon Manuf. Corp. by the U.S. Court of Appeals for the Federal Circuit on Oct. 13, 2011.

STATEMENT OF FACTS

On August 10, 2011, Patent No.7472426 was issued to Plaintiff. A true copy of Patent No. 7472426 is attached hereto as Exhibit "A".

This action arises under the patent laws of the United States, 35 U.S. C. §§ 271, 281, 283-285. Subject matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1338. Venue is proper in this Court under 28 U.S.C. §§ 1391 (b), 1391(c) and/or 1400(b).

Plaintiff is the owner of all rights, title and interest in Patent No.7472426 entitled _____. Upon information and belief, in violation of 35 U.S.C. § 271, Defendant _____ is and has been directly infringing, contributing to the infringement of, and/or inducing others to infringe the Patent No.7472426.

As a result of Defendants _____ unlawful infringement of Patent No.7472426, Plaintiff has suffered and will continue to suffer damage.

PATENT COSTS

Patent litigation is expensive. Litigation costs per side for a substantial patent infringement lawsuit is, at least, one million dollars. Product manufacturers typically pay attorney fees exceeding $3 million dollars, regardless of the result. PatentFreedom.com below is a subscription service that helps operating companies reduce specific threats posed by non-practicing entities (patent trolls) in identifying, assessing and recommending specific strate-

gies. The largest components of patent infringement costs are expert witness fees, travel costs, attorney fees, document management and production costs. The following is a short list of financing, enforcement and insurance companies that can be used to reduce these costs.

Helpful Websites for Patent Insurance, Enforcement and Financing*

U.S. Patent Office	www.uspto.gov
European Patent Office	www.espacenet.com/
Lloyds of London	www.Lloyds.com
Intellectual Property Insurance Services Corp	www.infringeins.com
Enpat Inc.	www.enpat.com
Thinkfire Services	www.Thinkfire.com
General Patent Corporation	www.generalpatent.com
Subscription Service	www.PatentFreedom.com
Software	www.Patentwizard.com
Search Engine	www.PatentCafe.com

***The above listing is not and should not be construed as an endorsement or indication of competency of any organization. The above listing is an information source only.**

Summary—abbreviated sample 2—INSURANCE COVERAGE CASE

Plaintiffs ask this Court:

> To enter Judgment in favor of the Plaintiff _____ and against the Defendant, contractor _____ for the following reasons:
>
> ***"You can guard against the high percentage of risk but you can't guard against risk itself."***

1. A contractor's business ***risks are not covered by insurance*** in general and the subject Comprehensive General Liability policy, in particular.
2. Liability policies are designed to cover only damages for accidental or fortuitous events.
3. **Insurance coverage is anchored on the concept of fortuity.**
4. **Faulty or defective construction does not constitute an accident, occurrence or fortuitous event necessary to trigger coverage.**
5. *Coverage for the Defendants' claims turns on the meaning of "occurrence," "property damage" and* **"business risk exclusions." Occurrence as defined in the policy is** *"an* ***accident, including the continuous or repeated exposure to substantially the same harmful conditions."***
6. *Property damage as defined in the policy includes physical injury to tangible property and loss of use,* ***but not the replacement or repair of the insured's defective product.***
7. *Defendant's claim for additional expenses and the replacement of its defective work is based on its own negligence and nothing more.*
8. *Plaintiff _____ directs the Court's attention to Exclusions j(5), J(6) and (L) that are the* ***business risk exclusions in the subject policy.***
9. *An insurance contract and this CGL Policy, in particular,* **is not any type of performance bond or malpractice contract.**

TABLE OF AUTHORITIES

CGL Policy No……. Exhibit "A"

Jakobson Shipyard, Inc. v. Aetna Casualty & Surety, 775 F. Supp. 606 (S.D.N.Y. 1991, 961 F.2d 387 (2d Cir. 1992))—defects in the boats' steering systems did not constitute an "occurrence" because the policy definition of that term made no reference to liability from an insured's breach of contract. Faulty installation of steering components does not constitute an occurrence because the definition of occurrence cannot be construed to encompass mechanical failure due to faulty design, construction or installation.

Royal Ins. Co. of Am. v. RuVal Elec. Corp.; 1996 U.S. Dist. LEXIS 3094, March 8, 1996.—fire in home of the subrogee's insured was a covered occurrence that was caused by electrical work performed by the insurer's insured.

Metropolitan Property & Casualty Ins. Co. v. Marshal, Slip WL 265138 (July 2010)—murder under the homeowner's policy should be deemed "an accident" as defined in the policy. Since the insured did not expect and could not foresee her son murdering the underlying claimant. That act was in fact an accident from the insured's point of view.

Chubb Ins. Co v. HTFD Fire Ins. Co., (S.D.N.Y.) 1999 U.S. Dist. LEXIS 15362—plaintiff's insured unintentionally sold allegedly defective product that was incorporated into a third party's finished product. The resulting impairment to the finished product was an occurrence under the insurance policy.

James A. Johnson (johnsonjajmf@yahoo.com) of James A. Johnson, Esq. in Southfield, Michigan is a Trial Lawyer. Mr. Johnson concentrates on insurance coverage cases under the Commercial General Liability Policy. He is an accomplished attorney and an active member of the Michigan, Massachusetts, Texas and Federal Court Bars. Mr. Johnson can be reached at 248-351-4808 or through his website at www.JamesAJohnsonEsq.com.

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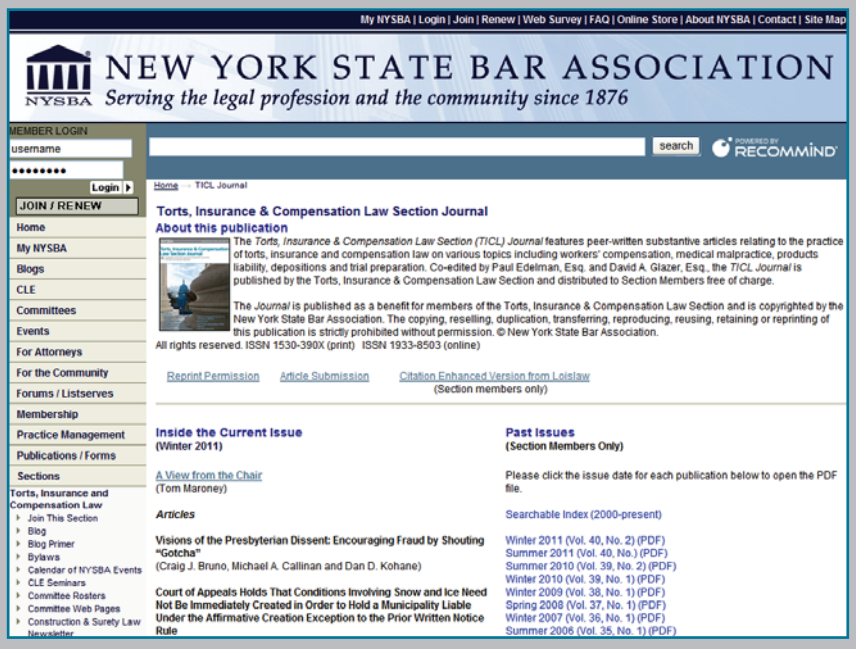

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