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A View from the Chair

At the one-third mark of my year (June 1, 2004), I am pleased to report that the TICL executive committee is fully constituted with no vacancies. In addition, we are updating the roles and duties of the members of the executive committee (that is, the district representatives and the chairs of both substantive law and administrative functions). We will be reviewing our by-laws once those roles and responsibilities have been defined. Even more importantly, we are striving to increase diversity in the membership of both the Section and the executive committee, so any thoughts, comments and volunteers to that end would be most welcome.

Our website (http://www.nysba.org/ticl) continues to provide you with information on Section-sponsored CLE programs and Section activities and with updates on the law in various substantive areas. The *TICL Journal* and the *Construction and Surety Law Newsletter* continue to provide you with up-to-date articles on the law. Our newsletter keeps you current on administrative matters.

Our CLE offerings around the state this fall include comprehensive overviews of municipal law (in conjunction with the Municipal Law Section), workers' compensation, automobile liability, products liability and a new program on law for insurance claims professionals. Watch our website (http://www.nysba.org/ticl) as well as your mail for registration forms for each of these.

Most importantly, watch the TICL website for a preview of the programs and events that we are planning for our fall meeting in Savannah, GA, October 14–17, 2004 and mark the date on your calendar. Each of the Section's substantive law committees has been asked to present on an up-to-the-minute topic germane to its subject matter. And we're working on a Georgia barbecue with the Savannah Bar Association at the Roundhouse Museum (a pre-civil war landmark), lunch at The Lady & Sons to meet Paula Deen (the Lady herself) and her two sons, a low-country boil on the Savannah River and a special tour based on the book *Midnight in the Garden of Good and Evil*.

Eileen E. Buholtz

P.S.: The recently released book *1,000 Places to See Before You Die* has three listings in it relating to Savannah. Attend our conference and you'll have only 997 places left to see after that.

Request for Articles

If you have written an article, or have an idea for one, please contact *Torts, Insurance and Compensation Law Section Journal* Editor:

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Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Developments in Spoliation of Evidence Law in New York

By Brian W. McElhenny

In personal injury litigation product liability actions and medical malpractice cases, physical evidence is often relevant and sometimes of critical importance in the presentation of the case.

For many years, plaintiffs, defendants and their agents have on occasion carelessly let evidence be destroyed or discarded. Sometimes the evidence has been intentionally discarded or destroyed.

In 1997, the Appellate Division, First Department issued a landmark decision in *Kirkland v. New York City Housing Authority*[1] dealing with spoliation of evidence.

The plaintiff commenced a suit against the Housing Authority alleging that the stove in the apartment was defective, causing a fire which engulfed a tenant in the apartment who was trying to cook breakfast. Plaintiff sued the housing authority and manufacturer of the stove.

Plaintiff retained an expert to inspect and photograph the stove. The tenant asked the authority to remove the stove. They did so without inspecting its condition to determine the cause of the fire. The stove was destroyed. *Subsequent* to destruction of the stove, the authority impleaded a contractor that installed connections between the gas lines and the stoves in the apartment complex.

The contractor moved for dismissal based on the third-party plaintiff's failure to preserve the evidence it needed to determine if it had installed the stove in question. The Trial Court denied the motion finding that the loss of the evidence was not done in "bad faith." The Appellate Division reversed, holding that "spoliation sanctions are appropriate where a litigant intentionally or negligently disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them."

The Court found that the crucial evidence was negligently destroyed. The failure of the Housing Authority to preserve the evidence when it was aware of the litigation justified the sanction of dismissal.

The following year the First Department again applied the ultimate sanction for spoliation of evidence and dismissed a third-party complaint by the City of New York in *Squitieri v. City of New York.*[2]

A city sanitation worker alleged injuries due to carbon monoxide exposure while operating a street sweeper. *Subsequent* to commencement of the lawsuit, the City disposed of the sweeper. Years later they impleaded the manufacturer and distributor of the sweeper. The third-party defendants sought dismissal based on spoliation of the key evidence but the lower court denied the motion.

On appeal the First Department reversed and dismissed the City's third-party complaint holding that dismissal was appropriate when the key evidence was lost or destroyed before the other party's expert could examine it.

In *DiDomenico v. C&S Aeromatik Supplies*,[3] the Appellate Division, Second Department struck the answer of defendant United Parcel Service as a result of its destruction of the package involved in the litigation *and* relevant records. Their failure to preserve the package and records prevented plaintiff from ascertaining the identity of the manufacturer and shipper of the defective product.

In *Baglio v. St. John's Queens Hospital*,[4] the Second Department struck the answer of the hospital for negligent loss of fetal monitoring strips in a malpractice action.

Litigants and their counsel took notice of these appellate precedents which decided cases without the need for a trial based on their adversaries' spoliation. This led to an increase in motions seeking sanctions based on spoliation of evidence.

In the following case, the ultimate sanction was denied. In *Tawedros v. St. Vincent's Hospital of New York*,[5] the hospital lost the complete original record but produced an incomplete copy. The Court held that defendant's answer should not be stricken but the jury would be instructed with an adverse inference regarding loss of the original records.

Likewise, in *Chung v. Caravan Coach Company*,[6] the Second Department denied a motion to strike defendant's answer even though defendant removed three shock absorbers from the bus despite a court order enjoining defendant from repairing the bus before plaintiff inspected it. The Court held that defendant's conduct did not prevent plaintiff from proving his claim because inspection reports, photos and maintenance records were available and plaintiff could depose witnesses with relevant knowledge. Therefore, defendant's actions did not cause sufficient prejudice to plaintiff.

In *Mylonas v. Town of Brookhaven*[7] the Appellate Division affirmed an order precluding defendant from offering evidence at trial about a vehicle's condition because the vehicle and repair records were destroyed. The Court did not strike defendant's answer. The vehicle was destroyed BEFORE the lawsuit was started.

Likewise, the Second Department held that imposition of a lesser sanction at trial was warranted in *Klein v. Ford Motor Company*.[8] Plaintiff was injured in a rollover of her SUV. Defendant's engineer inspected the vehicle and photographed it. The vehicle was inadvertently scrapped

by the storage facility where plaintiff kept the vehicle. The Court denied the sanction of dismissal of the complaint because the loss of the vehicle was accidental, *and* defendant's engineer had examined and photographed it.

Who Is Responsible for Spoliation?

In *O'Reilly v. Yavorsky*[9] the Court denied plaintiff's motion to preclude defendant from offering evidence at trial because the *defendant* was not the party *responsible* for the loss of the tire. Likewise, in *McLaughlin v. Brouillet*,[10] the injured plaintiff photographed defendant's vehicle after the accident but did not have an expert inspect it. Defendant Brouillet destroyed the vehicle. Plaintiff then sued Chrysler Corporation and Brouillet, alleging a defective seat belt mechanism. Chrysler sought dismissal of plaintiff's complaint based on spoliation. The Appellate Division, Second Department *denied* the motion holding that *PLAINTIFF* was *NOT* the *PARTY RESPONSIBLE* for loss of evidence. It was destroyed by the vehicle owner. Chrysler and plaintiff were equally prejudiced by loss of evidence.

These decisions illustrate that the ultimate spoliation sanction is available where the movant can show:

1) negligent or intentional destruction of the evidence by the adverse party when it knows or should know litigation exists and the evidence is needed;
2) prejudice because the loss of the evidence has precluded the party from effectively defending itself or prosecuting its claim.

Are Sanctions for Spoliation Available Against Third Parties?

In *Fada Industries v. Falchi Building Co., L.P.*,[11] the Supreme Court held that a cause of action for negligent spoliation of evidence existed against an insurance company. The carrier removed a water heater suspected for causing a water leak and resultant property damage. It was subsequently lost or destroyed while in the possession of the carrier's agent. The carrier moved for dismissal arguing there was no valid tort against a third party for negligent spoliation of evidence. The Supreme Court denied the motion.

In *Hartford Ins. Co. v. Rosa*,[12] an insurance company brought a subrogation action against a property owner arising out of a fire loss involving desktop computer equipment. The defendant's carrier retained a claim service company to investigate the loss. After inspecting the equipment, the claims company asked the carrier for instructions regarding the computer, which was ignored. The computer was disposed of and later the carrier inquired about the location of the computer.

The defendant property owner sued the claims service company alleging spoliation. The Supreme Court agreed with the claims company's argument that there was no independent tort against a third party for spoliation of evidence. The Court declined to follow the holding in *Fada Industries, supra*.

In *Met Life Auto & Home v. Joe Basil Chevrolet, Inc.*,[13] a homeowner's insurer brought a fire loss subrogation action. The fire started in a Chevrolet vehicle parked in the garage attached to the house insured by Met Life. After the fire, Royal Insurance Company arranged to safeguard and store the vehicle at a lot. Shortly before the parties were to inspect the vehicle, Met Life learned it had been sold and removed from storage, so that a thorough technical inspection to identify the cause of the fire was prevented.

Royal moved for dismissal of the complaint arguing that spoliation of evidence is not recognized as a separate tort against a third party in New York. The Appellate Division, Fourth Department dismissed the complaint against Royal, holding that "no cause of action for negligent or reckless spoliation of evidence/impairment of claim lies against a non-party to the underlying claim."[14]

The Court of Appeals affirmed dismissal of the complaint against Royal. It noted that Royal was not a party to the underlying dispute and there was no court order or contract requiring preservation of evidence. There was no duty and in light of the difficulty of assessing damages, the Court declined to recognize a cause of action for spoliation against a non-party.

Conclusion

Spoliation sanctions are available when a party negligently or intentionally destroys key evidence that prejudices the adversary. New York's appellate courts have not recognized a cause of action for spoliation of evidence against a non-party to the underlying claim or suit.

Endnotes

1. 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dep't 1997).
2. 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dep't 1998).
3. 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998).
4. 303 A.D.2d 341, 755 N.Y.S.2d 427 (2d Dep't 2003).
5. 281 A.D.2d 184, 721 N.Y.S.2d 237 (1st Dep't 2001).
6. 285 A.D.2d 621, 728 N.Y.S.2d 767 (2d Dep't 2001).
7. 305 A.D.2d 561, 759 N.Y.S.2d 752 (2d Dep't 2003).
8. 303 A.D.2d 376, 756 N.Y.S.2d.
9. 300 A.D.2d 456, 755 N.Y.S.2d 81 (2d Dep't 2002).
10. 289 A.D.2d 461, 735 N.Y.S.2d 154 (2d Dep't 2001).
11. 189 Misc.2d 1, 730 N.Y.S.2d 827 (2001).
12. 2002 N.Y. Slip Op. 50460(u).
13. 303 A.D.2d 30, 753 N.Y.S.2d 272, *lv. app. granted* 99 N.Y.2d 510, 760 N.Y.S.2d 101.
14. *Met Life, supra* note 13.

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Absolute Liability: Labor Law § 240 Proof

By Julian D. Ehrlich

For tort lawyers, one of the most compelling areas of the law is Labor Law § 240.[1] Commonly referred to as the "Scaffold Law," § 240 imposes liability on owners and their agents for construction accidents involving falling workers and falling objects. Claims brought under this statute typically involve 1) union workers earning high wage and benefit packages, 2) all-or-nothing scenarios and 3) verdict sheets destined for appeal. The Jury Verdict Reporter's highest awards regularly include § 240 cases. With the stakes this high, understanding this law is crucial for all parties litigating such a case.

Although § 240 has been interpreted in a multitude of cases for over 100 years,[2] it still remains an enigma.

From time to time an appellate court will issue a detailed decision on § 240 which commentators will hail as the start of a new era of clarity.[3] These cases are cited as proof that application of the statute is expanding or contracting.[4] However, spotting general trends has been difficult. Moreover, reference to the wording of the statute itself and speculation as to the intent of the statute provides little guidance in understanding how the law applies to a particular fact pattern. Indeed, the statute itself does not speak of "vicarious" or "absolute liability" although case law has imposed both.

In 2001, Judge Wallach of the First Department wrote:

> Although the statute seems deceptively simple on its face, few legislative enactments have taxed the courts more, probably because of the infinite factual variables that are continually presented to them.
>
> Well-intentioned efforts by courts to fashion overarching rules have often failed, and calls for a legislative overhaul of the statute are becoming more strident.[5]

Three years later, despite long-standing rumors,[6] Labor Law § 240 has not been overhauled or repealed. So, in the words of Judge Wallach, "[i]n the meantime, we face the challenge of threading our way through the luxuriant forest of existing law."[7]

This discussion will focus on developments in the following three areas of § 240: 1) plaintiff's negligence as the sole proximate cause of injury; 2) protected workers and protected activity; and 3) falling objects.

Sole Proximate Cause

The analysis of causation in tort cases is tricky as a rule and this is no different in the context of § 240's strict liability.

In recent years, two cases held that § 240 was properly dismissed where the plaintiff's actions were the sole proximate cause of the accident. These cases, *Weininger v. Hagedorn & Co.*[8] and *Blake v. Neighborhood Housing Services of New York City, Inc.*,[9] have generated great interest from the bar[10] and the bench.[11] The plaintiff's bar in particular has raised practical and theoretical concerns in response to these cases.

As a practical matter, allowing fact finders to decide whether plaintiff's actions were the sole proximate cause of the accident means that often the plaintiff's motions for summary judgment under § 240 are properly denied. In addition, even if there is ultimately a § 240 finding, plaintiffs are concerned that the evidence of plaintiffs' unwise actions might linger on jurors' minds when they later consider awarding damages.

Theoretically, some in the plaintiff's bar have suggested that permitting a jury to decide whether plaintiff's actions were the sole proximate cause, rather than finding plaintiff entitled to § 240 as a matter of law, is a backdoor reintroduction of plaintiff's comparative negligence or a creation of a new qualification, exception or defense to § 240.[12] However, a closer examination reveals that there has been no dramatic revision in the law.

Certainly, *Blake* was a *battle royale* with the New York Trial Lawyers Association and Defense Association of New York submitting *amicus curiae* briefs and the *New York Law Journal* described the decision, issued on December 23, 2003, as a "tutorial opinion."[13] As noted by Professor David Siegel, large sections of the decision can be viewed as dicta since the court held that neither defendant was an owner for § 240 purposes but "[t]o the wise and the wary, a Court of Appeals dictum may be worth a thousand holdings, especially when polished, like this one, to a fare-thee-well."[14]

The plaintiff, Rupert Blake, operated his own contracting company and set up an extension ladder that he owned.[15] He fell when the upper portion of the ladder suddenly retracted while he stood on it.[16] The

plaintiff conceded at trial that he was not sure whether he had locked the extension clips prior to ascending the ladder.[17]

The Court upheld a jury finding that the extension ladder constituted proper protection and held that a defendant was not liable under § 240 since the plaintiff's negligence was the sole proximate cause of the accident and injury.[18] The Court explained that rather than an exception or defense, plaintiff's negligence as the sole proximate cause and liability under § 240 are mutually exclusive. Writing the opinion for a unanimous bench, Judge Rosenblatt stated:

> [I]t is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation.[19]

Blake cites with approval *Weininger v. Hagedorn & Co.*,[20] the 1998 Court of Appeals memorandum decision finding that it was error to direct a judgment pursuant to § 240 when the plaintiff's acts might be considered by a jury to be the sole proximate cause of the accident and injury.

In *Weininger,* the plaintiff fell from a ladder while stepping on a cross brace instead of on a rung.[21] Although the preclusive effect of plaintiff's acts was addressed in *Weininger*, it is arguable that the extent of the plaintiff's misuse of the ladder in that case was more egregious than in *Blake*. Certainly, the *Blake* decision contained a more comprehensive discussion of the issue and the statute. In addition, *Blake*'s discussion of foreseeability and reasonableness within the context of absolute liability and causation can enhance an understanding of 20 years of case law from the Court of Appeals.

In the 1985 Court of Appeals case of *Zimmer v. Chemung County Performing Arts, Inc.*,[22] the Court held that unlike Labor Law § 241(6), which "requires a determination of whether the safety measures actually employed on a job site were reasonable and adequate," § 240 is self-executing, mandatory and imposes absolute liability, rendering "[t]he question of circumstantial reasonableness . . . irrelevant."[23] Hence, reference to outside sources and external considerations such as rules, regulations, and contracts is improper.[24] Accordingly, *Zimmer* held that it was error for two lower courts to permit expert testimony as to what safety devices were used in custom and industry practice.[25]

Is it ever proper then to consider whether either party acted reasonably? If the reasonableness of defendants' acts as demonstrated by compliance with custom and industry practice is "immaterial" under *Zimmer,*[26] is it relevant to consider whether plaintiffs' actions were fair and reasonable under the circumstances?

Under *Blake*, the plaintiff's actions were not important to determine whether he was negligent. Rather, the reasonableness of plaintiff's acts was considered only as part of the determination of the cause of the accident. The courts have never eliminated the requirement that plaintiff prove that a statutory violation caused the accident.[27] Viewed this way, the *Blake* decision did not change either the duty, which continues to be defined by the statute, or what constitutes a breach.

Does the *Zimmer* holding always preclude expert opinion on liability in a § 240 case?

It should be remembered that while the statutory standard replaces the common law duty, case law does not prohibit the parties from using experts to argue that a violation caused or did not cause the accident.

Besides plaintiff's acts, can superceding causes preclude plaintiff's recovery?

The answer is yes. In *Gordon v. Eastern Railway Supply, Inc.*,[28] the Court of Appeals held that "[a]n independent intervening act may constitute a superceding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not be *reasonably* attributed to them." Causation will generally be decided by the fact finder except where the only view of the evidence is that an absence of safety devices caused the accident.[29]

However, pursuant to *Gordon*, defendants are liable for all "normal and foreseeable consequences of their acts."[30]

What if even after diligent investigation and discovery there is still no plausible explanation at all for the cause of the device failure?

The answer is that the plaintiff may be entitled to statutory protection. In dicta, footnote 8 of the *Blake* decision states that § 240 will apply where a ladder or scaffold malfunctions for no apparent reason since then there will be a "presumption that the ladder or scaffold device was not good enough to afford proper protection."[31] Thus, the plaintiff need not rule out every possible cause.

Nonetheless, counsel—knowing at the onset of a case only that a ladder or scaffold failed—will be well-

served by conducting further inquiry through investigation or discovery to determine whether there is a known cause or reason for the failure. If the accident was caused by defendants' violation or for no known cause, § 240 will apply.

One lesson from *Blake* is that instances like in *Zimmer*, where it was uncontroverted that the defendant failed to provide any devices, will be analyzed differently from the case where the parties disagree as to whether the device was proper or used properly.

In *Blake*, the plaintiff conceded that the ladder he selected was the appropriate device for the task[32] and that nobody was needed to hold the ladder while plaintiff worked on the upper portion.[33] These admissions were the basis for the Court in *Blake* to distinguish the outcome of its 1985 decision in *Bland v. Manocherian*[34] which held that § 240 protected a plaintiff who also fell from a ladder that he had placed.

In *Bland,* the Court of Appeals upheld a jury liability finding that the defendants failed to provide proper protection within the meaning of § 240 for a plaintiff who placed his ladder upon a bare, highly polished and shiny floor.[35] Moreover, in *Bland,* the Court found that there were better safety devices not provided that could have prevented the accident, such as a scaffold, a secured ladder or having a co-worker hold it.[36]

Accordingly, it is common for plaintiffs involved in ladder accidents to argue that scaffolds were the proper device. Similarly in scaffold accidents, plaintiffs often argue that safety lines should have also been provided. It does not require much creativity to argue in virtually any height-related accident that additional or different devices should have been provided.

Does § 240 apply where the sole proximate cause of the accident is a plaintiff's own improper placement of the ladder?

The answer may be no. In dicta, footnote 10 of *Blake* states "[t]hat the ladder was inadequately secured was due to the plaintiff's improper use of it, which would not give rise to a Labor Law violation."[37]

Does § 240 apply where the plaintiff selects the wrong device for a particular task, for example, he or she chooses a ladder instead of a scaffold?

The answer may depend upon whether the plaintiff had responsibility to select appropriate equipment and whether other safer devices were available. In *Plass v. Solotoff*,[38] which follows *Blake*, the plaintiff was the owner of his own company and selected the type of elevated device to work on. The court in *Plass* found that plaintiff was not protected by § 240 since plaintiff chose to use one of three available planks on which to stand.[39]

As a matter of fact, accidents often occur where plaintiff has placed the device (for example, locked scaffold wheels) and there are several possible causes but no single clear cause. In such cases, we can expect a future battle of the *Blake* footnotes. Plaintiffs will argue that pursuant to footnote 8, there should be a presumption that the device was not good enough to provide proper protection, while defendants will argue that under footnote 10, the § 240 claim should be properly dismissed since plaintiff placed the ladder.

Early issue identification and case development can make all the difference. Plaintiff's counsel who sense early on that their client is largely responsible for the accident should develop facts through investigation and discovery that support an argument that some statutory violation was a contributing cause or that the cause cannot be known. Conversely, defendants' counsel in such cases should develop facts that rule out contributing causes other than plaintiff's fault. In addition, defendants must ask detailed deposition questions as to the plaintiff's role in selecting, placing and using the ladder or scaffold to ascertain all factors in the cause of the accident.

Protected Workers and Protected Activity

Section 240 applies to workers "so employed" performing the seven activities of erection, demolition, repairing, altering, painting, cleaning, and pointing. However, cases continue to refine exactly who is protected and what work is covered.

A cluster of decisions address inspections and inspectors.

Inspection is not one of the seven protected activities and the 1999 Court of Appeals case of *Martinez v. City of New York* held that § 240 did not protect an asbestos inspector who fell off of a ladder since work "integral and necessary" to enumerated activity was not protected.[40]

However, on October 21, 2003, the Court of Appeals held, in *Prats v. Port Authority of New York and New Jersey*,[41] that § 240 protected an assistant mechanic who fell 15 feet while readying an air-handling unit for inspection to determine the extent of cleaning, repair and rehabilitation that would be necessary. Since the plaintiff in *Prats* was preparing to inspect, he was not even contemplating an enumerated activity. The Court held that even though plaintiff was not performing an enumerated activity, his work was "ancillary" to such activity and thus protected.[42]

How can § 240 protect work "ancillary" to enumerated activities but simultaneously not protect work "integral and necessary" to such activities?

Judge Rosenblatt, writing the unanimous opinion in *Prats,* stated that the distinguishing factor in *Martinez* was that the asbestos removal had not yet started, thus the plaintiff's inspection was merely investigatory.[43] The asbestos work would be done by another contractor later.[44] In contrast, the investigation performed by Mr. Prats was part of ongoing and contemporaneous enumerated activities performed under a single contract that had commenced at the time of the accident.[45] With a nod to the subtle nature of the distinction, Judge Rosenblatt cautioned that a case-by-case analysis is necessary[46] since a "confluence of factors" were important, including whether the plaintiff, or plaintiff's employer, routinely engaged in enumerated activity at the site.[47]

An examination of Appellate Division cases reveals differing approaches in how to weigh the factors.

For example, a divided First Department in *Campisi v. Epos Contracting Corporations,*[48] found that § 240 protected a City of New York construction superintendent inspecting the progress of contractors' work. Justice Ellerin writing for the majority stated, "Labor Law § 240 may be applicable despite the fact that the particular job being performed at the moment the plaintiff was injured did not in and of itself constitute construction."[49] The plaintiff was investigating a pause in the contractors' work and Justice Tom writing for the dissent argued that § 240 should not apply since Mr. Campisi was not a construction worker, did not work for a contractor and had only administrative duties including inspection.[50] The 3-2 decision reflects the close call and the mix of factors.

Section 240 has also been found to protect plaintiffs with duties that include enumerated activities who are injured while walking or climbing in non-work areas within active sites.[51]

One case that granted plaintiff's § 240 motion but is difficult to reconcile is the 2003 Fourth Department case of *Buskirk v. State of New York*,[52] where the president and owner of a general contractor fell off a roof while inspecting subcontractors' work. The court stated that "he was involved in a protected activity under the statute because the work was *necessary and incidental* to the construction of a building."[53] Nearly identical language had been expressly rejected years earlier in *Martinez.*

In contrast, in a 3-1 decision, the First Department in *Adair v. Bestek Lighting and Staging Corp.*, dismissed the plaintiff's § 240 claim where she was injured when a man lift tipped over while she was focusing light for a temporary stage.[54] The court found that she was not engaged in enumerated activity of erecting or altering and noted that the work could not be considered "necessary," "integral" or "incidental" to protected activity.[55]

In addition, § 240 has been dismissed in other cases where plaintiffs were injured in accidents involving inspectors, managing agents, building porters, night watchmen and in accidents that occur off site or during a pause in enumerated activity.[56]

As stated in *Prats*, "job titles are not dispositive,"[57] but where plaintiffs are injured while inspecting, special attention must be paid to their duties beyond inspecting, their co-workers' and employers' duties and the stage of work.

Falling Objects

In 2001, the Court of Appeals held that § 240 applied to falling workers and falling objects in *Narducci v. Manhasset Bay Assoc*.[58] Further, that decision stated that for § 240 to apply, "[t]he plaintiff must show that the object fell while being hoisted or secured, because of the absence of a safety device of the kind enumerated in the statute."[59]

There now are a plethora of summary judgment motion decisions citing *Narducci* that can be categorized as follows: 1) judgment for plaintiff, 2) dismissal of § 240 and 3) denials of both parties' motions based on issues of fact findings.

Similar fact scenarios have resulted in different outcomes and, as with sole proximate cause, theoretical questions arise as to the nature of strict liability.

For example, *Acosta v. Kent Bentley Apartments, Inc.*[60] and *Monir v. 393 Jericho Turnpike, LLC*,[61] both dealt with plaintiffs who were injured by falling retractable fire escape ladders used to access different levels of job sites. In *Acosta*, the First Department directed § 240 for the plaintiff but in *Monir* the Second Department dismissed § 240, finding that the descending ladder was not a falling object being secured or hoisted within the meaning of *Narducci*.[62]

Indeed, as has been noted,[63] *Acosta* is difficult to reconcile with the earlier First Department case of *Almanzar v. Goval Realty Corp*.[64] which dismissed § 240 where a retractable fire escape ladder that the plaintiff was repairing fell on his arm.

Also, in both *Thomas v. 2 Overhill Road Assoc.*[65] and *Salinas v. Barney Skanska Construction Co.*,[66] the plaintiffs were struck by falling objects that they were removing from the ceiling. In *Thomas*, the First Department denied a § 240 motion made by a plaintiff struck by a pipe that he was removing.[67] However, in *Salinas* the Second Department granted § 240 to a plaintiff who was struck by a duct that he was removing.[68]

Salinas is also significant because it broadens the *Narducci* language. *Narducci* states specifically that § 240 applies where the object fell while being hoisted or

secured. Yet *Salinas* stated that the "statute applies where there is a significant risk inherent in the relative elevation at which material or loads must be *positioned* or secured."[69] The court in *Salinas* held that lowering the duct without appropriate devices was a violation, so the falling object was secured while it was being lowered, albeit as the court found, inadequately.[70]

Nonetheless, "positioned" is broader than "hoisted or secured." "Hoisted" connotes that the object is being moved by a hoist, crane or similar mechanism. "Secured" connotes that the object is affixed by internal or external means such as ropes, blocks, braces or other devices enumerated in the statute. However, arguably, every object is positioned whether at rest or moving.

It remains to be seen whether future decisions will broaden *Narducci* in this direction.

In addition, *Narducci* may require revisiting the expert opinion and custom and industry evidence forbidden in *Zimmer* as discussed in the above section on sole proximate case.

Narducci established that it is important to consider whether a hoist or securing device would be necessary or expected.[71] However, the question is expected by whom, if not experts and those with knowledge of construction industry norms? Should jurors' expectations and opinions as to what devices are necessary replace the opinions of industry professionals?

Also, *Narducci* does not appear to address the situation where the falling object is a tool that would be secured only by a worker using it.

This discussion is intended to highlight just some of the developing areas of § 240 and is certainly not the last word. The four Appellate Divisions are continually issuing new decisions applying § 240 to new facts.

The importance of preparing a § 240 case from the onset cannot be overstated. Early identification of legal issues must frame the development of the facts. Inevitably such cases will be tested in motions at the pretrial stage, at the close of evidence, at the post-trial stage and often appeal. The Labor Law case will be both fact specific and law intensive. Handling attorneys must be mindful of this when preparing witnesses for deposition and then trial, when obtaining documents and when pursuing investigation.

Endnotes

1. New York Labor Law § 240(1) provides:

   Scaffolding and other devices for use of employees

   (1) All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

2. *See* L. 1885, ch. 214.

3. See, e.g., "Court of Appeals Redefines Labor Law § 240" by Harry Steinberg, *New York Law Journal*, Dec. 27, 2001.

4. See, e.g., "Court of Appeals Applies Cautious Reading of Labor Law § 240" by Brian Heermance and Demi Sophocliaous, *New York Law Journal*, Sept. 26, 2003, stating "In recent years the Court has taken a more conservative approach when reviewing Labor Law cases."; "Panel Declines to Broaden Labor Law" by John Caher, *New York Law Journal*, May 27, 2003, finding a "recent restrictive trend"; "Does Labor Law Section 240(1) Apply to Falls Below Ground Level?" by Robert Vilensky, *New York Law Journal*, Nov. 4, 2002, stating that courts have "started taking a more conservative approach."; "The Pendulum Swings Back: *Narducci v. Manhasset Bay* and the 'Falling Object' Test" by Judge Andrew J. Siracuse, *New York Law Journal*, Apr. 2, 2002, stating that "Liability under Labor Law § 240 keeps expanding and contracting like a pair of bellows"; "The Evolution of Labor Law Section 240(1) from *Weininger/Joblon*" by Timothy Gallagher, *Torts Insurance & Compensation Law Section Journal*, Fall 2002, stating "The beginning of the backlash; the narrowing of Labor Law § 240"; "The Scaffold Act: Has the Court of Appeals Defined Its Outer Limit?" by James K. O'Sullivan and Andrew Zajac, *Torts Insurance & Compensation Law Section Journal*, Fall 2001; "Emerging Issues and Recent Developments in Labor Law" by Anthony Russo, *Torts Insurance & Compensation Law Section Journal*, Winter 2000, stating "recent trend seems to be back in line . . . limiting protection of Labor Law"; "The Lowering of Recalcitrance: Recent Changes in the Scaffold Law Part 2" by Judge Andrew J. Siracuse, *New York Law Journal*, May 10, 1999; and "Labor Law after Ross and Rocovich" by Bert Bauman, *Torts Insurance & Compensation Law Section Journal*, June 1994.

5. *Hargobin v. KAFI Corp.*, 282 A.D.2d 31, 724 N.Y.S.2d 155 (1st Dep't 2001).

6. See, e.g., "Labor Law Section 240 Unfair to Owners" by Gail Ritzert, *New York Construction News*, January 2004; "Tearing Down the Scaffold Law: The Proposed Amendments" by Judge Andrew J. Siracuse, *New York Law Journal*, Apr. 9, 2001.

7. *Id.*

8. 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998).

9. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

10. See "Court of Appeals Ruling Significantly Affects Labor Law Cases" by Michael P. Mezzacappa and Stephanie B. Gitnik, *New York Law Journal*, March 11, 2004 and Breakstone, Jay, "Notes and Decisions" New York State Trial Lawyers Association *Bill of Particulars* December 1998, at 16.

11. See "The Evolution of Labor Law Section 240(1) from Weininger/Joblon" by Timothy Gallagher, *Torts Insurance & Compensation Law Section Journal*, Fall 2002; "In Scaffold Cases, Courts are Moving From Absolute to Relative Liability" by Judge Andrew J. Siracuse, *New York Law Journal*, March 10, 1999; "Labor Law Developments: The Battle Over Absolute Liability" by Glenn A. Monk, *Torts Insurance & Compensation Law Section Journal*, Winter 2001 and "Dropping in on the Causation Controversy in Strict Liability Cases" by Julian D. Ehrlich, *Defendant: The Journal of the Defense Association of New York*, Summer 2000.

12. See "In Scaffold Cases, Courts are Moving From Absolute to Relative Liability" by Judge Andrew J. Siracuse, *New York Law Journal*, March 10, 1999.

13. "Court of Appeals Rejects Expansion of Scaffold Law" by John Caher, *New York Law Journal*, Dec. 24, 2003.

14. "Extensive Review of Scaffold Law: Labor Law § 240(1)," *New York State Law Digest*, No. 531, March 2004.
15. *Blake* at 2, 771 N.Y.S.2d at 283.
16. *Id.*
17. *Id.*
18. *Blake* 1 N.Y.3d at footnote 10.
19. *Id.* at 290, 771 N.Y.S.2d at 491.
20. 91 N.Y.2d 958, 672 N.Y.S.2d 840 *reh'g denied* 92 N.Y.2d 875, 677 N.Y.S.2d 777 (1998).
21. See "In Scaffold Cases, Courts are Moving From Absolute to Relative Liability" by Judge Andrew J. Siracuse, *New York Law Journal*, March 10, 1999 (noting that plaintiff's misuse by stepping on the cross brace is not mentioned by the Court of Appeals in the *Weininger* decision but is mentioned by that Court shortly thereafter in *Joblon v. Solow*, 91 N.Y.2d 457) (1998).
22. 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).
23. *Id.* at 523, 493 N.Y.S.2d at 107.
24. *Id.*, 493 N.Y.S.2d 106–7.
25. *Id.* at 524, 493 N.Y.S.2d at 107.
26. *Id.* at 523, 493 N.Y.S.2d at 106–7.
27. *Id.*
28. 82 N.Y.2d 555, 562, 606 N.Y.S.2d 127, 131 (1993) (emphasis added).
29. *Id.*
30. *Id.*
31. *Blake* at footnote 8.
32. *Id.* at 3, 771 N.Y.S.2d at 283.
33. *Id.*, 771 N.Y.S.2d at 284.
34. 66 N.Y.2d 452, 457 (1985).
35. *Id.*
36. *Blake* at 7–8, 771 N.Y.S.2d at 291–2.
37. *Id.* at footnote 10.
38. 2004 WL 383338 (2d Dep't 2004).
39. *Id.*
40. 93 N.Y.2d 322, 326, 690 N.Y.S.2d 524, 527 (1999).
41. 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003).
42. *Id.* at 882, 768 N.Y.S.2d at 182.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 883.
47. *Id.*
48. 299 A.D.2d 4, 747 N.Y.S.2d 218 (2002).
49. *Id.* at 220.
50. *Id.* at 224.
51. *Ramos v. Port Authority*, 306 A.D.2d 147, 761 N.Y.S.2d 57 (1st Dep't 2003) (where a bridge worker fell while climbing a cable to access his work site); *Crimi v. Neves Assoc.* 306 A.D.2d 152, 761 N.Y.S.2d 186 (1st Dep't 2003) (where plaintiff fell off ladder due to debris on a step of a ladder that was the only access to the work site); *O'Connor v. Lincoln Metrocenter Partners*, 266 A.D.2d 60, 698 N.Y.S.2d 632 (1st Dep't 1999) (where a worker fell on route to 24th floor work site where he stripped forms from recently poured concrete).
52. 303 A.D.2d 970, 757 N.Y.S.2d 213 (4th Dep't 2003).
53. *Id.* 757 N.Y.S.2d at 214 (emphasis added).
54. 298 A.D.2d 158, 748 N.Y.S.2d 362 (1st Dep't 2002).
55. *Id.* at 154 footnote 1, 748 N.Y.S.2d at 365 (1st Dep't 2002).
56. *Fabrizio v. City of New York*, 306 A.D.2d 87, 762 N.Y.S.2d 41 (1st Dep't 2003) (where an electrician and part owner of the plaintiff's employer fell into an open manhole cover while inspecting a vault to estimate cost, even though the plaintiff had done prior work at the site and had an oral understanding to do future work); *McMahon v. HSM Packaging Corp.*, 302 A.D.2d 1012, 755 N.Y.S.2d 186 (4th Dep't 2003) (a 5-2 decision where the president of an HVAC contractor fell off a roof inspecting for future work); *Adams v. Pfizer, Inc*. 293 A.D.2d 291, 740 N.Y.S.2d 315 (1st Dep't 2002) (where the driver of a motorized scaffold tipped over while working off site on a mock up to be used for renovating the defendant's premises); *Keenan v. Just Kids Learning Center*, 297 A.D.2d 708, 747 N.Y.S.2d 393 (2d Dep't 2002) (where the injury occurred during a lunch hour); *Ciesielski v. Buffalo Industrial Park*, 750 N.Y.S.2d 246 (4th Dep't 2002) (where plaintiff fell off a ladder while measuring for a new warehouse racking system); *Petermann v. Ampal Realty Corporation*, 288 A.D.2d 54, 733 N.Y.S.2d 9 (1st Dep't 2001) (where the managing agent's chief engineer fell off a ladder while closing a valve to allow plumbing work to begin.); *Higgins v. 1790 Broadway Associates*, 261 A.D.2d 223, 691 N.Y.S.2d 31 (1st Dep't 1999) (where a building porter fell when a ladder broke while he was attempting to repair an elevator—found to be acting beyond the scope of his employment); *Agli v. Turner Construction* 246 A.D.2d 16, 676 N.Y.S.2d 54 (1st Dep't 1998) (where construction netting fell on a managing agent reading a meter); *Shields v. St. Mark's Housing Associates*, 230 A.D.2d 903, 646 N.Y.S.2d 854, *lv. denied*, 91 N.Y.S.2d 806 (2d Dep't 1996) (where plaintiff was a night watchman hired by the general contractor).
57. *Prats* at 882, 768 N.Y.S.2d at 180.
58. 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).
59. *Id.* at 268, 727 N.Y.S.2d at 41.
60. 298 A.D.2d 124, 747 N.Y.S.2d 507 (1st Dep't 2002).
61. 293 A.D.2d 585, 741 N.Y.S.2d 78 (2d Dep't 2002).
62. *Id.* at 587, 741 N.Y.S.2d at 80.
63. "Following the Falling Object Case" by Julian D. Ehrlich, *Defendant: Journal of the Defense Association of New York* Fall 2003.
64. 286 A.D.2d 278, 729 N.Y.S.2d 133 (1st Dep't 2003).
65. 1 A.D.3d 174, 766 N.Y.S.2d 563 (1st Dep't 2003).
66. 2 A.D.3d 619, 769 N.Y.S.2d 559 (2d Dep't 2003).
67. *Thomas* at 174, 766 N.Y.S.2d at 564.
68. *Salinas* at 620, 769 N.Y.S.2d at 560.
69. *Id.* (emphasis added).
70. *Id.*
71. *Narducci* at 268, 727 N.Y.S.2d at 42.

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Court of Appeals Clarifies Strict Liability Provisions of New York Labor Law

By Alan Kaminsky

Section 240(1) of the Labor Law of the State of New York is among the most highly litigated provisions in all of New York civil practice. On a virtual daily basis, it is safe to assume that dozens of injured plaintiffs are prevailing in trial courts throughout the state on motions for summary judgment on issues of liability against general contractors and/or owners of construction sites. It has become accepted practice that plaintiffs injured while performing work at an elevated job site will be entitled to "absolute liability," against one or more defendants, and further, that the plaintiff's own actions may not be considered as possible contributory negligence.

"By way of background, Labor Law § 240(1), often referred to as the 'Scaffold Law,' was designed to protect workers from hazards relating to gravity-related risks, such as 'falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.'"

The recent Court of Appeals decision in *Blake v. Neighborhood Housing Services of New York City, Inc.*,[1] however, firmly establishes that regardless of the "absolute liability" provisions of the Labor Law, an injured plaintiff may not recover when his or her own negligence is the sole cause of the underlying accident and injuries.

The plaintiff in *Blake* suffered injuries while working on a second-story window using his own extension ladder. He testified at trial and at his deposition that he was unaware of any defect with the ladder, and that he alone had used the ladder in question. He nonetheless moved for summary judgment, arguing that the defendants were strictly liable for failing to provide a safe workplace, regardless of any contributory negligence on the plaintiff's own behalf. The defendants opposed the motion, arguing that there was no evidence to suggest a defect with the ladder, or that the workplace was unsafe.

The jury found that the ladder was not defective and, hence, that the workplace was "safe." The trial court denied plaintiff's motion to set aside the verdict, and the appellate court affirmed. Hence, the case worked its way up to the Court of Appeals.

By way of background, Labor Law § 240(1), often referred to as the "Scaffold Law," was designed to protect workers from hazards relating to gravity-related risks, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[2] The legislative intent for the special protections afforded to workers as set forth in § 240(1) is to "protect workers by placing ultimate responsibility for safety practices at building construction sites upon the owners and general contractors, or their agents, instead of the workers who are not in a position to protect themselves."[3]

As far back as 1923, the Court of Appeals held that employers had an "absolute duty" to furnish safe scaffolding and that liability would be imposed if failure to do so resulted in an injury.[4] Twenty-five years later, the Court described an employer's duty to ensure a safe workplace as "absolutely imposed."[5] In 1958, the Court worded the concept as "absolute liability" under § 240(1).[6] Finally, in 1990, the Court introduced the term "strict liability" in describing the duties of owners and contractors.[7]

Regardless of the evolution of terminology employed by the Court, the purpose of § 240(1) to protect workers from gravity-related risks has not changed. However, the *Blake* decision makes it clear that contractors and owners should only be punished when they have failed to provide a safe workplace. Liability under § 240(1) is contingent upon a violation of the statute and proximate causation.[8]

The Court in *Blake* reiterates that contractors and owners are in the best position to control a worksite and provide safe work conditions. Thus, an owner's or general contractor's failure to provide a safe workplace subjects them to liability and damages. However, neither the Court nor the legislature intended for a contractor or an owner to be treated as an insurer after providing a safe workplace. "The intent of Labor Law § 240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so."[9]

With its focus on the purpose of § 240(1), the Court in *Blake* analyzes the application of "strict liability" in a § 240(1) lawsuit. The Court notes that the words "strict liability" do not appear in Labor Law § 240(1) and that

it was the trial and appellate courts who began using the terminology in their interpretation of the statute.[10]

In many contexts, the term "strict liability" often means liability without fault. "It is imperative, therefore, to recognize that the phrase 'strict (or absolute) liability' in the Labor Law § 240(1) context is different from use of the term elsewhere."[11] The use of the term strict liability "may have given rise to the mistaken belief that a fall from a scaffold or a ladder, in and of itself, results in an award of damages to the injured party."[12] Consequently, trial courts have routinely granted plaintiffs partial summary judgment as to liability simply when any elevation-related accident was at issue. Clearly, this should change in the wake of *Blake.* However, this is not a novel concept as "not every worker who falls at a construction site, and not any [every] object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)."[13]

"The Blake *decision adds yet another chapter to the evolving interpretation of Labor Law § 240(1)."*

The Court in *Blake* clarifies that a defendant's liability under § 240(1) is contingent upon a violation of the statute and that "an accident alone does not establish a violation."[14] In *Blake*, the Court affirms its position in *Duda v. Rouse* that a plaintiff has the burden to establish that a defendant's violation of § 240(1) was a contributing cause of the accident.[15]

In *Blake*, the Court affirms that Labor Law § 240(1) should be interpreted as broadly as possible to provide workers with proper protection from hazards associated with gravity-related risks. However, the decision revives a seemingly dormant notion of the legislature's intent by refusing to impose liability when all safety precautions are met. To hold otherwise would not further the legislature's intent. "It would, instead be a sweeping and dramatic turnabout that the statute neither permits nor contemplates."[16] As the Court in *Blake* noted, if liability were to attach to defendants merely upon the existence of a height-related accident, the legislature would have worded the statute accordingly or made owners and contractors into insurers.[17]

Now, in rendering decisions to summary judgment motions, courts must look beyond the mere existence of a height-related injury and examine the cause of the accident. If plaintiff cannot establish that the violation was a contributing cause of the injury, summary judgment should be denied. Conversely, if defendant can establish that plaintiff's negligence was the sole proximate cause of the injury, no statutory violation can exist and plaintiff's motion for summary judgment should be denied.[18]

From a defense perspective, the Court's decision in *Blake* is a step forward in clarifying and perhaps eliminating the concept of strict liability in a § 240(1) context and should prevent plaintiffs from circumventing the legislative purpose of the statute through the use of summary judgment. Conversely, plaintiffs will contend that the facts in *Blake* were unique, and the holding of the Court should not be expanded into other situations.

The *Blake* decision adds yet another chapter to the evolving interpretation of Labor Law § 240(1). The interpretation and insight into the intent of the statute provided by the Court of Appeals will likely be an issue of intense debate in the litany of litigation that is certain to follow.

Endnotes

1. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
2. *Rocovich v. Consolidated Edison Company*, 78 N.Y.2d 509 (1991).
3. *Zimmer v. Chemung County Center for Performing Arts*, 65 N.Y.2d 513 (1985).
4. *Maleeny v. Standard Shipbuilding Corp.*, 237 N.Y. 250, 253 (1923).
5. *Koenig v. Patrick Construction Corp.*, 298 N.Y. 313 (1948).
6. *Connors v. Boorstein*, 4 N.Y.2d 172 (1958).
7. *Cannon v. Putnam*, 76 N.Y.2d 644, 649 (1990).
8. *Blake* at 3.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 3–4.
13. *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001).
14. *Blake* at 4.
15. 32 N.Y.2d 405, 410 (1973).
16. *Blake* at 6.
17. *Id.*
18. *Id.* at 5.

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Additional Insured Coverage in Construction Site Litigation

By I. Paul Howansky

Introduction

This material examines insurance coverage issues typically prevalent in construction site litigation, and provides detailed analysis of common additional insured endorsement provisions and how these clauses have been interpreted by the courts. The material also addresses recent developments in the law that indicate a trend towards providing primary, non-contributory coverage for the benefit of the additional insured.

I. Contractual Indemnification v. Additional Insured Coverage

It is well-recognized that an agreement to procure insurance on behalf of another is a separate and distinct risk transfer device from agreements which purport to indemnify against liability. Although indemnification clauses and insurance procurement clauses seek common goals, the circumstances of a case normally dictate whether one risk transfer device is more effective than the other. In this regard, it has been widely held that "an agreement to procure insurance is not an agreement to indemnify or hold harmless and thus a contractual requirement to procure insurance is not rendered void or unenforceable by General Obligations Law § 5.322.1."[1]

A. Negligence Is Irrelevant

The benefit of securing risk transfer through enforcement of an insurance procurement clause within a contract is apparent. Unlike the contractual indemnification context, a party seeking to enforce its rights to additional insured coverage need not wait until the close of discovery (or, in some cases, the close of trial) to do so. If a party qualifies as an additional insured on the other party's policy, any negligence on the part of the additional insured is normally irrelevant to its eligibility for defense and indemnity under the policy. In other words, General Obligations Law § 5-322.1 (GOL) is a non-factor. If the carrier on whose policy the additional insured claims coverage refuses to voluntarily honor the demand for coverage, enforcement can be sought immediately by commencement of a declaratory judgment action.

In *Ribadeneyra v. The Gap, Inc.*,[2] the First Department held that because the "insurance procurement clause at issue . . . was entirely independent of the indemnification provisions in the parties' contract, the final determination of third-party defendant's liability need not await a factual determination as to whose negligence, if anyone's, caused plaintiff's injuries."[3] Third-party defendant's claim that the insurance procurement provision of the contract violated GOL § 5-322.1 was without merit, since the insurance clause did not require the third-party defendant to indemnify defendant for its own acts of negligence.

Similarly, in *Tishman Construction Corp. v. CNA Insurance Co.*,[4] the First Department held that the lower court improperly denied Tishman's summary judgment motion for a declaration of additional insured coverage on the ground that GOL § 5-322.1 constituted a bar to such indemnification. The First Department reaffirmed the principle that the agreement to indemnify another through insurance was enforceable and did not implicate any statutory prohibition against indemnifying another for that party's negligence.

B. Negligence as a Factor

One notable exception to the general principle that negligence is irrelevant for purposes of obtaining additional insured coverage is if the additional insured endorsement qualifies coverage in a manner in which the determination of negligence in the underlying action is a factor.

In *Kajima Construction Services v. CATI, Inc.*,[5] the additional insured endorsement in the policy specifically provided that the additional insured coverage will be primary only if the underlying claim is determined to be solely as a result of the negligence or responsibility of the named insured. The First Department held that in the event the underlying claim is found not to have arisen out of the named insured's sole negligence or responsibility, then the subject policy would only provide excess coverage. "[T]he issue of coverage with respect to indemnity is necessarily deferred pending a determination of the underlying action."[6]

Also, in *N. Kruger, Inc. v. CNA Insurance Co.*,[7] the language of the additional insured endorsement provided that the general contractor would be covered only for vicarious liability stemming from the work of the named insured subcontractor performed for or on its behalf. The Court concluded that it was premature to grant summary judgment to the general contractor until the facts in the underlying case were developed enough to conclude whether the injuries resulted from the sub-

contractor's work or solely from the acts or omissions of the general contractor.

Under these circumstances, it is good practice for a contractor to not only obtain a certificate of insurance evidencing whether it is named on its subcontractor's policy, but also any additional insured endorsements which may ultimately limit the scope of coverage notwithstanding the broad coverage normally contemplated within the construction contract.

II. "Arising Out Of"

Typically, additional insured endorsements qualify coverage by limiting it to liability "arising out of" the named insured's work by or for the additional insured. Courts have interpreted the "arising out of" language in the broad sense, and any ambiguity in the endorsements has been interpreted to the carrier's detriment. The basic rule is that the "arising out of" language refers to the general nature of the operation in the course of which the injury was sustained and not the precise cause of the accident itself.

In *Structure Tone v. Component Assembly Systems*,[8] the general contractor entered into a contract with Component, a carpentry subcontractor, which required that the general contractor be named as an additional insured on Component's GL policy. Component purchased a policy with Royal Insurance. The additional insured endorsement of the Royal policy limited coverage "to liability arising out of your work . . . by or for you." In the underlying action, an employee of Ledgerock (Component's carpentry subcontractor) was injured when he fell on electrical wiring. Royal refused to defend and indemnify the general contractor on the grounds that (1) the injury did not arise out of Component's work and (2) the general contractor was responsible for work site clean-up and thus might be liable. The general contractor brought a declaratory judgment action against Royal and moved for summary judgment. Although the lower court denied summary judgment, the First Department reversed and granted the motion, stating as follows:

> The sole focus in determining whether coverage under the additional insured endorsement was triggered, thus obligating Royal to indemnify [the general contractor] is whether the incident arose out of Component's work or its subcontractor Ledgerock's work performance by them for [the general contractor] at the construction site. Even the [plaintiff] was a carpentry subcontractor who fell on electrical cable, the language of the endorsement is sufficiently broad to cover the present situation.[9]

"Arising out of" also contemplates instances in which an employee is simply leaving or arriving at the work site.[10] In fact, "the injury need not be sustained while actually engaging in the work of the named insured; merely walking through the named insured's work area has triggered coverage under an 'additional insured' clause."[11] The Court in *Insurance Companies of North America v. Liberty Mutual Insurance Co.*,[12] in addressing the broad scope of the "arising out of" qualifying language, stated as follows:

> All parties acknowledge that [claimant] was employed by [subcontractor] and was working at the construction site on the day of the accident. His alleged injuries arose out of [subcontractor's] work, regardless of whether [claimant] was performing a work-related task in the stairway or . . . was simply in the process of leaving his workplace.[13]

III. Notice Issues

New York law provides that an insured's compliance with the notice requirements contained in a liability policy is a condition precedent to coverage, and an unexcused failure by the insured to adhere to these provisions will vitiate coverage under the policy.[14] The notice obligation applies to additional insureds in the same manner as it applies to named insureds.[15]

A. Prejudice Is Immaterial

New York allows insurers to strictly enforce notice conditions since prompt notice enables the insurer to properly investigate, settle or defend a claim, rights that insurers routinely reserve in their policies. For these reasons, the carrier need not show prejudice in order to disclaim for late notice.[16] However, New York courts have recently begun to question whether the "no prejudice" rule is a viable exception to the contract law principle that one seeking to escape an obligation to perform under a contract generally must demonstrate a material breach and prejudice.

In *Rosen v. City of New York*,[17] the insurer asserted "late notice" in disclaiming coverage to multiple additional insureds prior to the additional insureds' assertion of a cross-claim against the named insured. The Court concluded that at the time of the disclaimer, the named insured and additional insureds were similarly situated and, therefore, the notice given by the named insured was applicable as to the additional insureds. The Court also emphasized that the insurer could not demonstrate any prejudice attributable to the additional insureds' late notice.

The Court in *Rose v. State of New York*,[18] followed the reasoning in the *Rosen* case and held that the insurer was obligated to defend and indemnify the additional

insured notwithstanding the additional insured's purported late notice. The Court held that since the insurer received timely notice from its named insured (a non-party to the lawsuit), and since the state was "similarly situated" to the non-party named insured, the notice provided by the named insured was deemed applicable to the state.

As these cases demonstrate, the main factor in determining whether an additional insured and a named insured are "similarly situated" for purposes of attributing a named insured's timely notice to an additional insured is whether the additional insured has asserted any claims against the named insured. In circumstances when an additional insured is faced with a "late notice" disclaimer, consideration should be given to holding off on any cross-claims or third-party actions against the named insured in an effort to rely on the named insured's timely notice.

B. What Constitutes Timely Notice

While what constitutes timely notice is typically viewed as a question of fact, the length of delay can at times be determined by a court as a matter of law. Relatively short periods of unexcused delays such as one month,[19] 51 days,[20] two months,[21] and 53 days[22] have been held unreasonable as a matter of law.[23]

The fact that the insurer has obtained knowledge of an occurrence independent from the additional insured typically does not alleviate the additional insured's obligation to comply with the terms and conditions of the policy.[24] Depending upon the requirements of the policy, the failure to promptly transmit suit paper may provide an independent basis for denial of coverage.[25]

C. Time to Disclaim

An insurer must give written notice of disclaimer on the grounds of late notice "as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability, and failure to do so 'precludes effective disclaimer.'"[26] The insurer's disclaimer must be timely even if the insured's or claimant's notice was untimely.[27] Stated differently, a late disclaimer trumps late notice. An unexplained delay of two months in disclaiming liability for late notice has been held unreasonable as a matter of law.[28]

D. Contents of the Disclaimer

New York Insurance Law § 3420(d) sets forth the requirements for a valid disclaimer letter. A disclaimer letter must be sent to the insured, the injured party and all other claimants. The written document must apprise these parties with a high degree of specificity of the grounds for the denial of coverage.[29] An insured's justification for denying coverage is limited to those grounds stated in the notice of disclaimer.[30] As such, an insurer which has denied liability on a specific ground may not thereafter shift the basis for the disclaimer to another ground known to it at the time of the original disclaimer.[31] The failure to properly send a disclaimer to all required parties with the required specificity may result in a coverage obligation unless, of course, there was never any coverage to begin with.

Notably, a reservation of rights letter does not stop the clock when it comes to issuing a timely disclaimer letter. Such a letter has no bearing on whether a timely notice of disclaimer has been transmitted.[32]

The failure to set forth all bases for disclaiming can potentially create a situation in which the insurer is estopped from subsequently disclaiming on different grounds. A distinction, however, must be drawn between two lines of authority: The first establishes that insurance coverage cannot be created by the subsequent conduct of the insurer where no coverage can be found in the original contract.[33] The second, invoking equity, stops the insurer from asserting the undeniable absence of any such contractual obligation to the insured.[34]

Where the policy would provide coverage *but for* a policy exclusion, the insurer must disclaim coverage, and the failure to do so in a reasonably timely manner stops the insurer from disclaiming coverage based on the exclusion.[35]

IV. The Certificate of Insurance

If a contract only requires a certificate of insurance, then there is no requirement to purchase insurance for the other party.[36] A notation on the certificate of insurance is not enforceable absent an endorsement. However, an estoppel argument can be made against the insurer if the certificate's notation was issued by the insurer or its agent (not a broker).[37]

In *New York City Transit Authority v. Fireman's Fund Insurance Co.*,[38] defendant commenced a declaratory judgment action seeking declaration that the insurers were obligated to defend and indemnify the worksite owner in the underlying action. The owner's insurance policy issued by Fireman's Fund named plaintiff as an additional insured and was in effect at the time of the accident. The Court determined that questions of fact existed as to whether the policy covered the particular project where the underlying plaintiff was injured, whether the plaintiff relied on the certificate of insurance indicating that the policy did cover for the project, and whether plaintiff's reliance was reasonable in light of the certificate's provision stating that it was issued "for information only" and "does not confer any rights upon the certificate holder." The Court also concluded that as a matter of law, the certificate of insurance created no affirmative duties on any party whatsoever.

V. Additional Insured Coverage Not Purchased

If a party, who was contractually obligated to purchase insurance for the benefit of another party, fails to do so and the other party has its own coverage which is applicable to the risk, damages for the breach are limited to out-of-pocket expenses; i.e., cost of premiums, deductibles, additional cost of future premiums.[39] As a result, a breach of a contractual obligation to purchase insurance has minimal resulting value in a Labor Law case.

Prior to 2001, the party that suffered the breach was generally entitled to "all resulting damages," including the owner's and general contractor's liability to the claimant.[40]

VI. Co-Insurance Considerations

On February 13, 2003, the Court of Appeals decided the case of *Pecker Iron Works of New York v. Travelers Insurance Company.*[41] Pecker Iron Works retained Upfront Enterprises ("Upfront") on a construction project. Pursuant to the subcontract, Upfront agreed to provide Pecker Iron Works with certificates of insurance for liability and agreed to name Pecker Iron Works as an additional insured. Upfront's insurance contract with Travelers provided Upfront with primary coverage. That policy also "covered such 'additional insureds' as Upfront would designate in a written contract," but also provided that coverage for additional insureds would be excess, unless Upfront "had agreed in a written contract for this insurance to apply on a primary or contributory basis."[42]

An Upfront worker was injured on the construction site and brought suit against the owner and general contractor. The main party defendants instituted a third-party action against Pecker Iron Works. Pecker Iron Works thereafter asserted a claim under Travelers' policy and Travelers disclaimed coverage stating that its policy was excess to Pecker Iron Works' primary insurance in the absence of a written designation that Travelers' coverage be primary. Pecker Iron Works brought an action against Travelers requesting a declaration that Travelers was obligated to defend and indemnify Pecker Iron Works in the underlying action. The Supreme Court granted Travelers' motion to dismiss, but the Appellate Division reversed, holding that "coverage for 'additional insureds' was primary coverage unless unambiguously stated otherwise."[43]

The Court of Appeals stated that the meaning of the term "additional insured" was crucial to its decision and reiterated that the "well-understood meaning" of the term is "an 'entity enjoying the same protection as the named insured.'"[44] The Court of Appeals found that "when Pecker engaged Upfront as a subcontractor and in writing provided that Upfront would name Pecker as an additional insured, Pecker signified, and Upfront agreed, *that Upfront's carrier—not Pecker's*—would provide Pecker with primary coverage on the risk" (emphasis added). Accordingly, the Court of Appeals affirmed the order of the Appellate Division and held that Pecker Iron Works, as an additional insured, was entitled to primary coverage from Travelers.

Language in the decision, i.e., that "[t]his case involves the *relative obligations of two liability insurance carriers* covering the same risk," and later that "Pecker signified, and Upfront agreed, that Upfront's carrier—*not Pecker's*—would provide Pecker with primary coverage on the risk" suggests that the Court of Appeals signaled an intent to place coverage issued by Travelers below primary coverage issued by Upfront's carrier. Based on this interpretation, the additional insured that procured its own insurance coverage would be entitled to primary, non-contributory coverage from the subcontractor's insurer rather than the typical co-insurance arrangement. However, this issue was not specifically briefed or argued by the parties. Moreover, the parties themselves entered into an agreement which provided that Travelers would be a co-primary (rather than sole primary) carrier if the Court of Appeals held Travelers as a primary carrier.

The *Pecker Iron Works* decision has been interpreted by some to focus not on "other insurance" considerations, but rather on contractual intent and whether the parties to an underlying construction contract intended for the additional insured coverage to be primary or excess when the contract is silent as to the type of coverage to be procured. In other words, it stands for the narrow holding that implicit in an obligation to name a party as an additional insured pursuant to an underlying contract is that the insurance procured be primary unless otherwise specifically stated. How broadly or narrowly the *Pecker Iron Works* decision will be interpreted at the Appellate Division level remains to be seen. At a minimum, the case stands for the proposition that implicit in all construction contracts requiring coverage for contractors as "additional insureds" is the requirement that such coverage be afforded on a primary basis, unless the contract specifically provides otherwise, notwithstanding contrary provisions in the additional insured endorsement.

Rather than rely on the indefinite scope of the *Pecker Iron Works* decision, insurers are encouraged to issue within their own general liability policy an "other insurance" endorsement which specifically renders the policy excess in the event that its named insured qualifies as an additional insured on another's policy, thereby assuring primary, non-contributory coverage for the benefit of the additional insured contractor.

VII. Conclusion

In addressing coverage issues in the context of construction site litigation, it is imperative not to assume additional insured coverage for a claim simply because the contractor is named on a certificate of insurance. Qualifying language of an additional insured endorsement, notice requirements, execution of underlying contracts and "other insurance" considerations are just some examples of factors that can ultimately limit or even preclude coverage. The value of obtaining these relevant documents as early as possible is potent in assessing whether or not to seek enforcement of an insurance procurement provision on a claim.

Endnotes

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2. 287 A.D.2d 362, 731 N.Y.S.2d 441 (1st Dep't 2001).
3. *Id.* at 363, 731 N.Y.S.2d at 442.
4. 236 A.D.2d 211, 652 N.Y.S.2d 742 (1st Dep't 1997).
5. 302 A.D.2d 228, 735 N.Y.S.2d 375 (1st Dep't 2003).
6. *Id.* at 229, 735 N.Y.S.2d at 376.
7. 242 A.D.2d 566, 662 N.Y.S.2d 529 (2d Dep't 1997).
8. 275 A.D.2d 603, 713 N.Y.S.2d 161 (1st Dep't 2001).
9. *Id.* at 603–04, 713 N.Y.S.2d at 162.
10. *O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518 (1982).
11. *J. Michael Orifici & Associates, Inc. v. Liberty Mutual Insurance Co.*, 159 F.3d 1347 (2d Cir. 1998).
12. 1994 WL 150818 (S.D.N.Y. 1994).
13. *Id., citing O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518 (1982).
14. *American Home Assurance Co. v. International Insurance Co.*, 90 N.Y.2d 433, 661 N.Y.S.2d 548 (1997); *Unigard Security Insurance Co. v. North River Insurance Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992).
15. *Travelers Insurance Co. v. Volmar Construction Co.*, 300 A.D.2d 40, 752 N.Y.S.2d 286 (1st Dep't 2002).
16. *Security Mutual Insurance Co. v. Acker-Fitzsimmons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972).
17. 245 A.D.2d 202, 666 N.Y.S.2d 594 (1st Dep't 1997).
18. 265 A.D.2d 473, 696 N.Y.S.2d 527 (2d Dep't 1999).
19. *Safer v. Government Employees Insurance Co.*, 254 A.D.2d 344, 678 N.Y.S.2d 667 (2d Dep't 1998).
20. *Deso v. London & Lancashire Indemnity*, 3 N.Y.2d 127, 164 N.Y.S.2d 689 (1957).
21. *Goodwin Bowles Associates, Ltd. v. Eastern Mutual Insurance Co.*, 259 A.D.2d 381, 687 N.Y.S.2d 126 (1st Dep't 1999).
22. *Power Authority of the State of New York v. Westinghouse Electric Corp.*, 117 A.D.2d 336, 502 N.Y.S.2d 420 (1st Dep't 1986).
23. *Heydt v. American Home Assurance Co.*, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dep't 1989).
24. *Steadfast Insurance Co. v. Sentinel Real Estate Corp.*, 283 A.D.2d 44, 727 N.Y.S.2d 393 (1st Dep't 2001); *Viles Contracting Corp. v. Hartford Fire Insurance Co.*, 271 A.D.2d 349, 708 N.Y.S.2d 281 (1st Dep't 2000).
25. *Fireman's Fund Insurance Co. v. Hopkins*, 88 N.Y.2d 836, 644 N.Y.S.2d 481 (1996).
26. *Nationwide Mutual Insurance Co. v. Steiner*, 199 A.D.2d 507, 605 N.Y.S.2d 391 (2d Dep't 1993) (41 days deemed untimely); *West 16th Street Tenants Corp v. Public Service Mutual Insurance Co.*, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dep't 2002) (30 days untimely).
27. *Hartford Insurance Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979).
28. *General Accident Insurance Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 516 (1979).
29. *Id.*
30. *TIG Insurance Co. v. Town of Cheektowaga*, 142 F.Supp.2d 3443 (W.D.N.Y. 2001); *Hubbell v. Trans Word Life Insurance Co.*, 54 A.D.2d 94, 387 N.Y.S.2d 647 (2d Dep't 1976).
31. *Hartford Insurance Co., supra* note 27.
32. *Maryland Casualty Co. v. Nationwide Insurance Co.*, 262 A.D.2d 458, 692 N.Y.S.2d 154 (2d Dep't 1999).
33. *Dinney v. Allstate Insurance Co.*, 295 A.D.2d 797, 744 N.Y.S.2d 74 (3d Dep't 2002).
34. *Hamilton v. City of New York*, 256 A.D.2d 382, 681 N.Y.S.2d 563 (2d Dep't 1998).
35. *Public Administrator of Bronx County v. Equitable Life Assurance,* 198 A.D.2d 105, 603 N.Y.S.2d 830 (1st Dep't 1993).
36. *Bucon, Inc. v. Pennsylvania Manufacturing Ass'n Insurance Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (3d Dep't 1989).
37. *New York City Transit Authority v. Fireman's Fund Insurance Co.,* 251 A.D.2d 166, 673 N.Y.S.2d 906 (1st Dep't 1998).
38. *Inchaustegui v. 665 5th Avenue Ltd.*, 96 N.Y.2d 111, 725 N.Y.S.2d 627 (2001).
39. *Kinney v. G.W. Lisk Co.,* 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990).
40. *Pecker Iron Works of New York v. Travelers Insurance Co.*, 99 N.Y.2d 391, 756 N.Y.S.2d 822 (2003).
41. *Id.* at 393, 756 N.Y.S.2d at 824
42. *Id.*
43. *Del Bello v. General Accident Co.*, 185 A.D.2d 691, 692, 585 N.Y.S. 2d 918 (4th Dep't 1992): *quoting* Rubin, Dictionary of Insurance Terms (Barrons 1987).
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A Counterpoint on Bankruptcy and Personal Injury Actions: Some Practical Observations for the Everyday Practitioner

By Anthony Michael Sabino

The recent *Journal* article of Steven Wilkins, M.D., J.D., entitled "Bankruptcy Can Affect Actions for Medical Malpractice" regarding the impact of bankruptcy upon the prosecution of medical malpractice actions, was well-written and a thoughtful analysis of esoteric bankruptcy law-related problems often encountered by general practitioners and those without extensive experience with our nation's Bankruptcy Code.[1] As an experienced bankruptcy practitioner and professor of law teaching bankruptcy and creditors' rights, it compelled me to focus on some relevant concepts that have significant importance for attorneys finding themselves in such unfamiliar situations. With that in mind, I wanted to share those observations, both in counterpoint and in supplementation to Dr. Wilkins' well-founded article.

In my reading, I gathered an implication from the article that a civil attorney can start a personal injury action for a debtor just like any other action. Unfortunately, this is not true. Any cause of action that actually arose or could arise prebankruptcy is the exclusive property of the estate. Section 541 of the Bankruptcy Code vests all interests, legal or equitable, in the debtor's estate.[2] It is a statute that was deliberately crafted by Congress to be expansive in scope, and court rulings have consistently and vigorously given it an all-encompassing sweep of any and all interests into the bankruptcy estate. Therefore, any lawsuit, one already in progress or merely potential, falls strictly within the jurisdiction and control of the bankruptcy court.

Of paramount importance is that the court-appointed trustee is in control, not the debtor. An attorney for a debtor simply can't file suit; only the trustee can prosecute the action, and does so in the name of the estate. Furthermore, the trustee decides who counsel shall be, and that choice must be approved by the bankruptcy court upon proper application. The Bankruptcy Code strictly regulates the hiring of attorneys to represent the estate, and moreover carefully regulates their fees, which likewise cannot be paid without proper motion and approval of the bankruptcy judge.[3]

The article indicates that a civil suit *might* be estopped by the bankruptcy filing. Not true—an independent filing IS barred. Only the trustee can file, and in the name of the estate, with the counsel of his or her choice.[4]

If the cause of action is brought after the bankruptcy case is closed, having the trustee in the caption is just not enough, as the article implies. It must be the trustee who sues; again, the debtor can't do an end run.

Potential litigants must appreciate that they cannot play a "waiting game." If the claim arose or could have arisen prebankruptcy, again it falls well within the exclusive domain of the bankruptcy process. Similarly, a putative plaintiff cannot "forget" to list the real or potential cause of action. The lawsuit is an important asset of the estate, and a failure to disclose it invites disaster. Don't play that game!

I respectfully differ with the article's description of "abandonment" under the Bankruptcy Code. Pursuant to Section 554 of the Bankruptcy Code, a trustee must make a knowing and willful abandonment of any asset, with court approval, before said asset revests in the debtor.[5] A party can also ask the court via motion to compel abandonment by the trustee. The only exception is if the asset is listed, but the trustee does nothing, and the case is closed. In short, you can never presume abandonment.

In the scenario the article posits, you must convince the trustee to abandon the civil cause of action to the debtor. In the real world, that just doesn't happen; a bankruptcy trustee never abandons a potentially valuable lawsuit.

The comment about abandoning in Chapter 11 is flawed in a number of respects. It is true that there is normally no trustee in a Chapter 11 case. However, individuals rarely file for Chapter 11, so it's just not apropos. Second, there is still accountability to the bankruptcy court and the creditor body. A real or potential lawsuit will be an asset to be realized upon to pay creditors, not the debtor. Most important, as noted, in Chapter 11 there is no trustee because the debtor is in nominal control.[6] But since no court would ever let you abandon something to yourself, any civil suit remains an asset of the bankruptcy estate.

For practitioners, here are a few other points worth bringing out. If a lawsuit is already pending, then personal injury counsel for the debtor should approach the trustee and seek permission to continue in place. I've helped friends with this many times, and typically the trustee agrees, and with the trustee's backing the civil

attorney obtains the essential bankruptcy court approval for continuing the case and later taking the typical fee of one-third of the recovery, the balance of which goes to the bankruptcy estate (and thus creditors), not the debtor. Remember that court approval of the civil attorney's retention and fee structure is essential, for without it the attorney is entitled to nothing. In sum, a civil attorney should work with the trustee to stay on the case.

"[A]ppropriately armed with knowledge, a competent trial counsel can reconcile the necessities of standard civil litigation with the requirements of bankruptcy practice, and still achieve just results."

Conversely, if the defendant is in bankruptcy, an excellent and customary tactic is to stipulate pursuing the insurance policy only, assuming also that the insurer will defend. Section 362 of the Bankruptcy Code automatically stays all pending or potential litigation against a debtor/defendant.[7] Entering into such a stipulation as described above lifts the automatic stay of Section 362, and authorizes the plaintiff to proceed, while limiting recovery to third-party insurance money. But never forget that you must lift the stay with court approval; otherwise you have seriously violated the Bankruptcy Code. For the record, this is a commonplace and efficacious solution.

In closing, the plain truth is that the intervention of a bankruptcy proceeding is both unfortunate and unwelcome to the general practitioner. However, that does not make it something to be feared, and appropriately armed with knowledge, a competent trial counsel can reconcile the necessities of standard civil litigation with the requirements of bankruptcy practice, and still achieve just results. My compliments to Dr. Wilkins for his analysis, and I hope my own humble observations are helpful to the bar on this highly relevant and commonplace issue.

Endnotes

1. 11 U.S.C. §§ 101, *et seq.* This is the "modern" Bankruptcy Code, enacted in 1978, and having just celebrated twenty-five years of innumerable court decisions and interpretations, and showing no signs of becoming any less controversial for its next twenty-five years.
2. 11 U.S.C. § 541(a).
3. 11 U.S.C. § 327 (court must authorize employment of professionals, including attorneys); 11 U.S.C. § 330 (regulating the process and court approval of professional fees, most especially attorneys' fees).
4. 11 U.S.C. § 704 (trustee assume complete control, subject to court oversight, of all the debtor's assets and affairs).
5. 11 U.S.C. § 554.
6. 11 U.S.C. §§ 1107 and 1108.
7. 11 U.S.C. § 362.

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Funding Terrorism: How and Why to Set Up a Program to Identify Potential Insurer Links to Terrorist Organizations

By Douglas Hayden and Howard Feldman

Terrorism is about secretly hostile operatives striking against innocent civilians to wreak fear and havoc unjustified by their true political and military strength. Operationally, terrorism is about moving money and obtaining and placing strategic assets. Without large amounts of untraceable money and local sources of equipment, terrorism could not exist. In that sense, terrorism has an eerie similarity to international drug dealing and other aspects of organized crime.

In the immediate aftermath of the terrorist attacks of September 11, 2001 on the World Trade Center and the Pentagon, President George W. Bush issued an Executive Order[1] prohibiting transactions with persons who commit, threaten to commit or support terrorism.[2]

"Without large amounts of untraceable money and local sources of equipment, terrorism could not exist."

The New York State Insurance Fund (NYSIF) has joined several state funds in establishing procedures to observe protocols established by the Office of Foreign Assets Control (OFAC) division of the United States Treasury, which, by federal mandate, stem the flow of money that feeds and sustains international terrorist operations.

Lawyers representing banks and clients engaged in international commerce have for years been familiar with the due diligence/compliance aspects of OFAC policy. In recent years, OFAC compliance obligations have broadened to include domestic insurance companies, domestic real estate companies[3] and other traditionally less federally regulated areas of commerce. Roughly classified as *non-traditional financial institutions,* these industries share in common the ability to transfer assets representing large sums of money in swift, solitary transactions.

Lawyers practicing in the post-9/11 period who have not already been called upon to advise their clients about OFAC compliance should advise their clients to pay attention every time they enter into a contract or pull out their checkbook. Their failure to counsel observance of the new regulations may expose their clients to excruciating audits, enforcement actions and, in egregious cases, to the most heinous forms of adverse publicity.

OFAC has termed it "critical" that the insurance industry gain a better understanding of the economic sanctions and embargo programs. "The programs are a front line defense against foreign threats to our national safety, economy and security."[4]

These state funds have embarked upon an ambitious project to cross-check their databases with the United States Treasury Department's list of known terrorists and those who lend support to them. They recognize that an insurance company is a financial institution capable of being co-opted by international terrorism and organized crime.

As an aspect of war, federal economic sanctions actually go back to the War of 1812.[5] Modern sanction policy began in World War I and has generally been instituted under the authority of the Trading with the Enemy Act of 1917 (TWEA).[6]

OFAC itself was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency under the TWEA and blocked all Chinese and North Korean assets subject to U.S. jurisdiction.

What we now know as peacetime economic sanctions began with the International Emergency Economic Powers Act of 1977 (IEEPA),[7] the first U.S. law involving peacetime sanctions.

Modern sanction legislation weaves the provisions of TWEA, IEEPA and several additional federal laws,[8] some of which originally targeted international narcotics trafficking, money laundering, and organized crime. The legislation was also used as a tool for foreign policy to isolate rogue nations such as Cuba and North Korea. These are all tied to together by a series of Executive Orders and Presidential Declarations of Emergency under IEEPA.

Many in the insurance industry incorrectly interchange OFAC with the USA Patriot Act. As property and casualty insurance companies were temporarily exempted from the Patriot Act, those who confuse the

two acts believe that the insurance industry is exempt from OFAC requirements. As you have seen, OFAC compliance is governed by a group of separate federal laws that, in most cases, predated the USA Patriot Act.

Money Laundering

Money laundering through the use of legitimate business is the lifeblood of terrorism. Money laundering is the process by which one conceals the existence, illegal source or illegal application of income, and disguises that income to make it appear legitimate. While banks were the traditional money laundering vehicle, enforcement of banking rules have led money launderers to seek other financial institutions.[9] One substitute may be domestic insurance companies. These are the steps commonly followed by money launderers:

- Placement: Money is deposited in the financial system without drawing notice;
- Layering: Money is moved through multiple institutions and property ownership, often internationally, to make it difficult to trace the origins of the money;
- Integration: The now difficult-to-trace money is placed in the legitimate financial system of the locale where the terrorist organization is operating.

The Terrorist Next Door/NYSIF's Close Call

At this point, you may be wondering how this relates to the casualty insurance industry as a whole, or the workers' compensation insurance industry in particular. At NYSIF, it quickly hit home when a former long-term insured, Carnival French Ice Cream, suddenly appeared in the news.

In November of 2003, acting on a tip, federal agents raided a tiny ice cream shop in the Park Slope section of Brooklyn. Agents who reviewed seized accounts were astonished to learn that Abad Elgeeh's tiny Carnival French Ice Cream Shop had deposited $20 million in just the past five years. Upwards of $5 million had been deposited into the Carnival account in a one-year period alone. Tax records indicated an annual gross in ice cream sales of just $185,000.

Elgeeh, a Yemeni immigrant who lived upstairs from the shop, was soon accused of making illegal money transfers to fellow Yemeni Sheik Hasa al-Moayad. Al-Moayad is in custody in Germany, accused of funneling $20 million, recruits and weapons to al-Quaida. Elgeeh is facing a possible 10-year prison sentence.

Osama bin Laden has boasted that *hawalas*, informal money transfer networks, have created cracks in the Western financial system that "were as familiar to him and his al-Quaida colleagues as the lines of their own hands."[10]

On May 11, 2004, Federal Eastern District Judge Charles P. Sifton allowed Mr. Elgeeh to withdraw his guilty plea. The decision stated that the plea that had been entered before a federal magistrate was flawed because Mr. Elfgeeh did not understand some of its terms and never acknowledged taking part in any conspiracy. As a result, Judge Sifton vacated the plea.[11]

While NYSIF has no indication that Elgeeh misused his NYSIF policy, long-term business relationships are one of the cornerstones of financial trust. Fraud detection systems used by many insurers may not be capable of detecting a sophisticated assault perpetrated by hostile foreign governments or internationally based money launderers. These would be uncharted areas of fraud to most insurers.

Domestic insurance companies can catch the average claimant committing fraud. Whether one could deal with professional agents of a foreign government who target casualty insurance companies is another matter. Could a scam that involved a long-term insured colluding with a claimant and provider be discovered?

Domestic casualty insurers are not used to viewing themselves as financial institutions. They may not realize that a terrorist or money launderer may be willing to accept a huge discount on money to legitimize it.

How OFAC Works

Here's how an OFAC compliance program works. A U.S. insurance company is prohibited, under any circumstance, from paying a claim or entering into a contract, including issuing a policy, with anyone on the OFAC list. The OFAC list contains the names of some 50,000 Specially Designated Nationals (SDN) and Blocked Persons, including numerous foreign agents and front organizations for terrorists and narcotics traffickers. The list is available at the OFAC web site, www.ustreas.gov/offices/eotffc/ofac.

Anybody who comes into possession of money or property belonging to an OFAC-listed SDN or Blocked Person must freeze those assets. Once frozen, the holder must notify the Treasury Department's Compliance Program Division and await instructions for their disposition. OFAC may need additional time to research the entity and notify the insurance company of its final determination.

The list may be based on legislation from Congress, orders from the president or U.S. intelligence. OFAC is aware of the confusion that can be caused by similar names on the list, and will provide whatever assistance

is necessary to help insurers avoid adjusting a claim or entering into a policy with an SDN or Blocked Person. OFAC is additionally aware of the unavoidable weakness under workers' compensation, the inability of an insurer to be aware of the names of all of its policyholder's related entities or policyholder's employees. OFAC will not hold the employer responsible for information that it did not know and is not in its possession, instead employing a *reason to know* standard.

OFAC Penalties

OFAC violators face both civil and criminal penalties. Civil penalties are set between $11,000 and $1 million per violation. Criminal violations can bring up to 12 years in prison. Here are some examples of violations settled with OFAC:

Company	Penalty	Offense
L.A. Dodgers	$75,000	Signing Two Cuban Nationals
CNA Insurance	$2,300,000	Selling Reinsurance to Cuban Companies
Ikea	$8,000	Importing Rugs From Taliban-Controlled Afghanistan
Tyson Foods	$150,000	Chicken to Pre-War Iraq
Goodyear Tire	$195,000	Shipping Tires to Cuba through Venezuela and Colombia
Johnson & Johnson	$110,000	Medical Supplies to Pre-War Iraq
GRE Insurance Group	$250,000	Insurance Coverage for Shipments to Pre-War Iraq and to Libya

Problems with OFAC

OFAC has its share of detractors who believe that OFAC is not rigorous enough. The Senate Finance Committee recently sent OFAC a letter setting forth its perceived deficiencies. Chairman Charles Grassley, the Committee's Republican chairman, and Senator Max Baucus, its senior Democrat, cited numerous concerns about OFAC's performance, including evidence of sloppy record keeping, failure to provide required information to Congress and reliance on voluntary compliance by banks to impose sanctions against suspected terrorists. "This leaves OFAC in a position of not knowing what it does not know," the two senators wrote.[12]

Indeed, as we went to press, NYSIF still had not found Carnival French Ice Cream on the OFAC list.

Setting Up a Program

Setting up an OFAC program will require the preparation of a clear policy linked to effective controls.

For a large integrated insurance company, just identifying all of the payment and contract centers—from claimant benefit payments, to policy issuing, to vendor, contractor and provider payments—would be a gargantuan task.

Because OFAC is an industry regulator, it does not mandate the adoption of any particular type of due diligence program. The program that is developed has to be tailored to your unique method of doing business. A domestic insurer will come upon an SDN or Blocked Person less frequently than will an international insurer. Although a domestic insurer is looking for a needle in a haystack, it is an important needle.

Here are some practical pointers for setting up a program:

1. Appoint an OFAC compliance officer or better yet, a multi-disciplinary compliance committee. The major departments involved in policies, benefits and procurement should be represented, as well as the legal, finance and internal audit departments.
2. Identify all payment centers, policy issuance and contract sources. Here are some places that a state fund might look:

   Claims: Benefit payments, legal counsel, investigators and providers.

   Policyholders: Existing and new policies are written. Canceled policies where refunds are possible.

   Company Vendors: Includes both contracts and purchasing.

   Financial: Banks, investment managers, insurance and real estate brokers.

   Internal: Employees, consultants, independent contractors including third-party administrators, and vendors of employee reimbursable expenses.
3. Begin searching manually. Since every searching system produces matches, culling the true hits

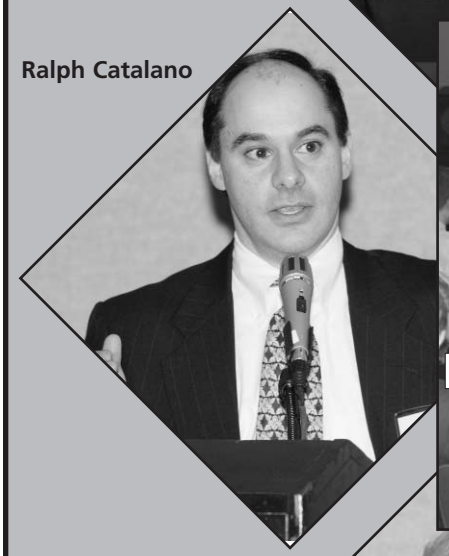
(Continued on page 26)

Lazar Emanuel

William Cloonan

Jacqueline Polito

Paul Goldstein



Ralph Catalano

TICL Section Program
New York Marriott Marquis
2004 Annual Meeting
January 29, 2004

Jean Marie Ha

Barbara Sherk

James Harinski

Heath Szymczak

Paul Suozzi

A. Thomas Levin and James Carville

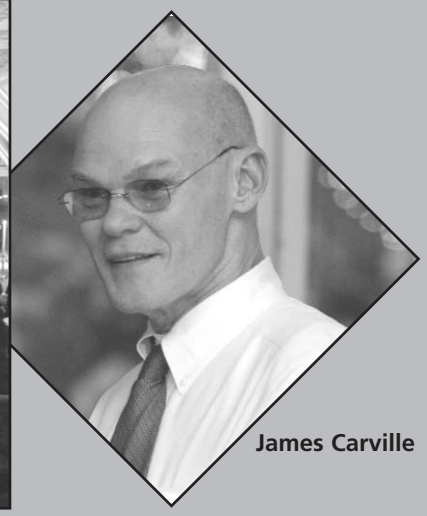
James Carville, Daniel Gerber and Eileen Buholtz

From left:
James Carville, A. Thomas Levin
and Daniel Gerber

SBA

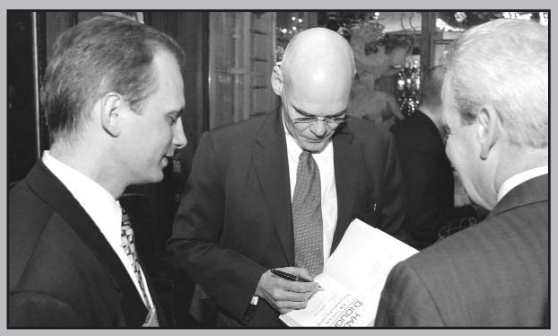
azelton

TICL Section Dinner
Tavern on the Green
2004 Annual Meeting
January 28, 2004



James Carville

From left: Daniel Gerber,
James Carville and Eric Dranoff



(Continued from page 23)

from false positives is the most difficult part of the program. You can manually download the list from the OFAC web site (www.ustreas.gov/offices/enforcement/ofac) or utilize web-based services such as www.bridgertracker.com. The Insurance Service Office (ISO) is another good source of software.) Remember, the OFAC list can be updated as often as every three days.

4. Look for an automated solution. Once you begin searching high volume areas such as claims benefit payments, you will need an automated solution. You can download the OFAC list and write a solution in-house. Or you can obtain one of many commercially available interdiction programs. Some providers will run your data through their program periodically, notifying you of all hits. These programs typically utilize filters that compare information, such as a policyholder's name, with selected data fields such as a terrorist's name, address and home country. A defined scoring system will determine whether a given transaction requires blocking or further inquiry.

"Very few domestic insurers are even aware of OFAC requirements, much less implemented them. Yet a clear policy and implementation program is necessary to avoid problems later."

5. Maintain records. Since you may need to demonstrate your commitment to OFAC compliance someday, it is advisable to maintain a record of your internal OFAC guidelines, internal controls and of searches conducted, including how 'hits' were investigated. This will also help when repeat hits are obtained in the case of continuing transactions with the same source.

Matches, Similar Names and False Positives

Once you begin mechanized matching, you will come up with a steady stream of hits. The list contains names from a large number of foreign countries, including many similar names. These can render most name matching algorithms useless.

There is no one solution, but here are some ideas on how to proceed:

1. Check the score of your software program rating and try and figure out why it is not 100%. If it is 100%, look for information parameters beyond the scope of the search.
2. Check the country of origin of your claimant/policyholder against the one on the OFAC list.
3. See how long your claimant/policyholder has been in the U.S. and how long at the same address.
4. If your claimant/policyholder is not in the U.S., or if the money is received from sources outside of or to be sent out of the U.S., that is certainly a red flag, as is a foreign address. But don't rule out domestic sources of terrorism.
5. If you do not have an exact hit, but can't rule it out, call the OFAC hotline at 1-800-540-6322.

You may wish to assign an investigative unit, such as your special investigations unit to run down your hits. Computer-related investigative skills go a long way toward resolving those issues.

What to Do When You Get a Match

If you get a match involving a monetary transaction such as a claim, you must first freeze the money. You must then report the transaction to OFAC within 10 days. Although there is no statutorily prescribed method for reporting the transaction, OFAC provides a form on its web site. Be sure to include the names of the parties, dollar amount involved and information about the employee who is responsible for maintaining your blocked accounts.

You must then await instructions from OFAC. Assets must be frozen by placing them in interest-bearing accounts, at commercially reasonable rates, and holding them in instruments with maturities of less than 90 days. Blocked accounts may not be released without special permission from OFAC. Again, this is an important reason for integrating the finance department into your compliance committee.

Prior to confiscating the assets, OFAC itself may elect to give the SDN or Blocked Person notification, and hence, an opportunity to free the assets. Finally, upon notification by OFAC, the assets are either freed or ordered to be paid over to OFAC.

In the case of a policy or contract, the insurance company may not enter into or maintain a policy with an SDN or Blocked Person. Does this require cancellation of existing policies? According to one source, no, but such policy would have to be frozen. What does frozen mean? The unearned premium must be calculated as though the policy had been canceled and deposited into the account established for OFAC-blocked transactions. No claims may be paid out of the policy.[13]

In the commercial arena, licenses for entering into transactions that would otherwise be blocked can be sought through the Department of Commerce (e.g., selling a computer to a Cuban company). The OFAC insurance regulations do not as yet encompass such a process for insurance companies.

Very few domestic insurers are even aware of OFAC requirements, much less implemented them. Yet a clear policy and implementation program is necessary to avoid problems later. The commitment of resources should match an insurer's exposure to the possibility of an adverse revelation and willingness to shoulder the result of the public disclosure of an SDN or Blocked Person transaction. Being known as the insurer that funded the next terrorist bombing or international drug deal is not something that any insurer would want to be associated with.

Endnotes

1. Executive Order 13224 is entitled, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism." 66 FR 49079.
2. Terrorism is defined in Executive Order 13224 as an activity that, "involves a violent act or an act dangerous to human life, property or infrastructure, and appears to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, kidnapping or hostage taking." 66 FR 49079.
3. William W. Weisner and Hope K. Plasha, *Anti-Terrorism Law Imposes Duties upon Lenders and Others Must Stay on Alert for 'Restricted Parties,'* New York Law Journal, Nov. 25, 2002.
4. *Foreign Assets Control Regulations and the Insurance Industry*, Office of Foreign Assets Control, U.S. Department of the Treasury, Mar. 12 2003, *available at* http://www.treas.gov/offices/eotffc/ofac/regulations/t11facin.pdf.
5. Bans on trade with Great Britain and France under the Embargo Act of 1807 (2 Stat. 451), and against Britain under the Non-Intercourse Act of 1809 (2 Stat. 528), were failed attempts to enforce American neutrality during the Napoleonic Wars.
6. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917), codified as 50 U.S.C. Appx. §§ 1-44 (2004).
7. International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, 91 Stat. 1625 (1977), codified as 50 U.S.C. §§ 1701-07 (2004).
8. In addition to TWEA and IEEPA, OFAC relies on the Iraq Sanctions Act of 1990 (Pub. L. No. 101-513, codified as 50 U.S.C. § 1701 (2004)), the United Nations Participation Act of 1945 (22 U.S.C. § 287(c) (2004)), the International Security and Development Cooperation Act of 1985 (22 U.S.C. §§ 2349aa-8, -9 (2004)), the Cuban Democracy Act of 1992 (22 U.S.C. §§ 6001-10 (2004)), the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (22 U.S.C. §§ 621-91 (2004)), the Anti-terrorism and Effective Death Penalty Act of 1996 (8 U.S.C. § 219 (2004); 18 U.S.C. §§ 2332d, 2339B (2004)) and the Foreign Narcotics Kingpin Designation Act (21 U.S.C. §§ 1901-08 (2004); 8 U.S.C. § 1182 (2004)).
9. The Bank Secrecy Act of 1970 requires U.S. banks to file a Currency Transaction Report (CTR) for cash deposits of $10,000 or more. 31 U.S.C. §§ 5313, 5316(a) (2004). Persons who conspire to conceal existence, origin and transfer of bank deposits of more than $10,000 in cash by making deposits in sums less than $10,000 at several different banks or in increments at one bank (known as smurfing) violate the Conspiracy Act. 18 U.S.C. § 371 (2004); *United States v. Richter*, 610 F. Supp. 480 (N.D. Ill. 1985).

   These laws were followed by several additional banking and other types of financial institution control laws, including: the Money Laundering Control Act of 1986 (Pub. L. No. 99-570, codified as 18 U.S.C. § 981 (2004)), the Money Laundering Prosecution Improvement Act of 1988 (Pub. L. No. 105-310, codified as 18 U.S.C. § 981 (2004)), the Crime Control Act of 1990 (Pub. L. No. 101-647, codified as 18 U.S.C. § 1 (2004)), the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. No. 102-242, codified as 12 U.S.C. § 1811 (2004)), the Annunzio-Wylie Anti-money Laundering Act (Pub. L. No. 102-550, codified as 12 U.S.C. § 1811 (2004)), the Money Laundering and Financial Crimes Strategy Act of 1998 (Pub. L. No. 105-310, codified as 31 U.S.C. § 5301 (2004)), the Civil Asset Forfeiture Reform Act of 2000 (Pub. .L. No. 106-185, codified as 18 U.S.C. § 981 (2004)) and the USA Patriot Act of 2001 (Pub. L. No. 107-56, codified as 18 U.S.C. § 1 (2004)).
10. *As terror war spreads into money-moving network, an ice cream shop takes center stage,* Associated Press State and Local Wire, Nov. 9, 2003.
11. Glaberson, William, *Judge Vacates Guilty Plea in Yemeni Case,* The New York Times, May 12, 2003, at Section B, Pg. 1.
12. Solomon, John, *Senators Question U.S. Ability to Block Terror Money,* The New York Sun, Jan. 2, 2004, at National, Pg. 4.
13. Jensen, Kathleen, *On the trail of terror: insurers that do business with known terrorists or drug traffickers may face stiff penalties under new rules enforced by the Office of Foreign Assets Control*, Best's Review, Sept. 1, 2002.

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The Marketing of Travel Services Over the Internet and the Impact Upon the Assertion of Personal Jurisdiction: 2004

By Justice Thomas A. Dickerson

Consumer use of the Internet to make travel arrangements has risen dramatically in recent years.[1] While consumers remain cautious about the reliability of information, the prospect of hidden fees and insecure credit card transactions, travel shopping on the Web is increasing,[2] particularly as travel suppliers (e.g., hotels and air carriers) and travel sellers (e.g., Cheap Tickets, Expedia, One Travel, Travelocity, TravelNow and Orbitz[3]) offer exclusive fares on their own Web sites with 24-hour accessibility and retailers continue to develop creative ways to sell travel services (e.g., Priceline,[4] Travelot,[5] Site59's "last-minute-air-plus-land-packages"[6]). While offering many conveniences, the unlimited access of unlicensed, uninsured and irresponsible travel suppliers and travel sellers to the Internet threatens consumers by exposing them to complex travel scams.[7] However, the Internet, as opposed to selling travel services through travel agents or over an "800" telephone number, may give injured travelers an edge in establishing personal jurisdiction over foreign travel suppliers and travel sellers.

"[T]he Internet, as opposed to selling travel services through travel agents or over an '800' telephone number, may give injured travelers an edge in establishing personal jurisdiction over foreign travel suppliers and travel sellers."

The Solicitation-Plus Doctrine

If a foreign travel supplier (e.g., a hotel or an air carrier) conducts business through an agent,[8] a wholly owned subsidiary,[9] a parent corporation[10] or joint venturer[11] or maintains an office with a staff, a bank account and a local telephone number, then the assertion of personal jurisdiction would, generally, be appropriate. In the absence of such indicia of physical presence in the forum, however, the assertion of personal jurisdiction is more problematic. For example, a foreign travel supplier or travel seller may conduct business through an independent contractor,[12] travel agent,[13] tour operator[14] or the Internet. Under these circumstances New York courts have found personal jurisdiction if there was active solicitation of business plus "some financial or commercial dealings in New York or (the foreign company) holds itself out as operating in New York"[15] and/or contract formation in New York State. This concept, known as the "solicitation-plus" doctrine, is still followed with some exceptions[16] by most U.S. courts.[17]

Jurisdiction and the Internet

The extent to which an Internet Web site confers personal jurisdiction in the forum in which the traveler's computer is located (and through which reservations can or have been made) has been addressed recently by several courts.[18] Initially, it is important to identify two non-issues relied upon by some courts in rejecting interactive Internet reservation Web sites as a basis for the assertion of personal jurisdiction.

First, at least one court has made a distinction between the purchase of goods and services over the Internet[19] and the making of travel arrangements over the Internet, finding the former but not the latter, as a sufficient basis for the assertion of personal jurisdiction.[20] Such a distinction is unwarranted since the focus of a proper jurisdictional analysis should be on the situs of the transaction, which is the consumer's computer screen, and not on when the actual delivery of the purchased service takes place.

Second, some courts have refused to assert personal jurisdiction over foreign travel suppliers by trivializing the marketing of travel services over the Internet and analogizing interactive Internet reservation Web sites to little more than a hotel reservation's "800" number.[21] These two instrumentalities, however, are qualitatively different in their impact upon the assertion of personal jurisdiction over foreign travel suppliers and travel sellers.

A Transactional Analysis of Internet Commerce

A useful jurisdictional analysis appears in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[22] a trademark infringement action brought by the manufacturer of "Zippo" lighters against a computer news service using the Internet domain name of "zippo.com." In *Zippo*, the defendant was a California-based news service with an interactive Web site "through which it exchanges infor-

mation with Pennsylvania residents in hopes of using that information for commercial gain later." The defendant had entered into news service contracts[23] with 3,000 Pennsylvania residents and seven "contracts with Internet access providers to furnish services to their customers in Pennsylvania." Since it was defendant's "conscious choice to conduct business (in Pennsylvania)" the Court asserted personal jurisdiction based upon the following analysis:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise (of) personal jurisdiction . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Passive Web Sites

If the foreign company maintains an informational Web site accessible to the general public but which cannot be used for making reservations, then most,[24] but not all,[25] courts would find it unreasonable to assert personal jurisdiction. For example, in *Weber v. Jolly Hotels*[26] a New Jersey resident purchased a tour packaged by a Massachusetts travel agent, not an exclusive selling agent, which featured accommodations at a Sicilian hotel owned by an Italian corporation, Itajolly Compagnia Italiana Dei Jolly Hotels ["Jolly Hotels"]. Jolly Hotels conducted no business in New Jersey but had a subsidiary which owned a hotel in New York City which could make reservations at all of its hotels. The plaintiff sustained injuries at defendant's Sicilian hotel and brought suit against Jolly Hotels in New Jersey. Jolly Hotels maintained a Web site accessible in New Jersey which provided "'photographs of hotel rooms, descriptions of hotel facilities, information about numbers of rooms and telephone numbers.'" The Web site could not be used to make reservations at any of Jolly Hotels. Finding the Web site to be passive in nature, the Court dismissed the complaint for a lack of personal jurisdiction but transferred the case to New York because defendant's subsidiary's New York City hotel could make reservations at all Jolly Hotels.

Passive Web Sites Plus

However, passive Web sites combined with other business activity (e.g., the activities of subsidiary corporations in the forum,[27] providing trainees to a company doing business in the forum,[28] entering into a licensing agreement with a company in the forum and selling to three companies in the forum,[29] entering into a contract with a company in the forum which contained a forum selection clause and multiple e-mail communications to the forum,[30] e-mail, fax and telephone communications,[31] contracts and various correspondence surrounding those contracts,[32] various support services incident to sales,[33] e-mail, fax, telephone and regular mail communications[34] and 12 sales in the forum and plans to sell more,[35] mortgage loan applications printed out and chats online with mortgage representatives,[36] fielding e-mail questions about products and sending information about orders,[37] "the web site contains several interactive pages which allow customers to take and score performance tests, download product demos, and order products on-line (and) provides a registration form whereby customers may obtain product brochures, test demonstration diskettes or answers to questions"[38]) may provide a reasonable basis for the assertion of personal jurisdiction.

Interactive Web Sites

If the Web site provides information, e-mail communication, describes the goods or services offered, downloads a printed order form or allows on-line sales[39] with the use of a credit card and sales are, in fact, made[40] in this manner in the forum, particularly by the injured consumer,[41] then some courts[42] but not all[43] may find the assertion of personal jurisdiction reasonable. This seems to be the trend for the sale of goods and services that are delivered after they are ordered by the consumer on his or her home computer. As noted above, however, at least one court has made an unwarranted distinction between placing Internet orders for the immediate delivery of goods and services and making reservations for delivery of hotel accommodations some time in the future.[44] Although this area of the law is developing, it is fair, at this point, to make the following conclusions:

First, the lowest level of travel Web site interactivity, involving e-mail communications which allow travelers to request information but not make reservations,

would be an insufficient basis for jurisdiction [*Smith v. Basin Park Hotel, Inc.*[45] (although the hotel had a Web site, the Court found no basis for asserting jurisdiction since "There is no evidence that any commercial transactions are actually completed on (the hotel's) website. The website merely permits a user to submit an e-mail to (the hotel) requesting reservations information. No reservation is confirmed over the website"); *Cervantes v. Ramparts, Inc.*[46] ("Ramparts' only 'continuous' contact with this state is that it maintained a Web site that allowed Internet users in California, or anywhere else, to learn about and send e-mail to the Luxor Hotel. That the Ramparts Web site permitted limited interactivity does not distinguish it from maintenance of an '800' telephone number for purposes of establishing general jurisdiction")].

Second, the middle level of travel Web site interactivity, involving the ability to obtain information, communicate by e-mail and, in fact, make hotel reservations has generated cases finding a sufficient basis for jurisdiction [In *Brown v. Grand Hotel Eden-A Summit Hotel*,[47] a case in which a guest was injured at a Swiss hotel, the services of which were marketed through a joint reservation Web site, the Court found that "Hotel Eden's presence on the Summit Hotels website, which also permits reservations to be confirmed automatically supports our finding that Hotel Eden is 'doing business' in the State of New York"].

After discovery *Brown* was modified[48] finding that, in actuality, neither Summit's Web site nor the Hotel Eden's Web site could confirm reservations. "The only interactivity Hotel Eden's website allows is the opportunity for users to inquire into room availability. Upon receiving these inquiries, the hotel responds, through e-mail or fax, with an offer if a suitable room is available; the user then must respond to the hotel to accept the offer". [*Decker v. Circus Circus Hotel*[49] (". . . it is clear that any customer can reserve a room through the Web site . . . by making reservations available on the Internet, the defendants have effectively placed their hotel and its services into an endless stream of commerce"); *Grutkowski v. Steamboat Lake Guides*[50] ("This site does not permit a reader to purchase or reserve tours over the Internet and thus, does not permit SLO to 'transact business' over the Internet "); and cases finding an insufficient basis for jurisdiction: *Rodriguez v. Circus Circus Casinos, Inc.*[51] (no jurisdiction based upon interactive reservations Web site); *Imundo v. Pocono Palace, Inc.*[52] (no jurisdiction based upon interactive reservations Web site); *Snyder v. Dolphin Encounters Limited*[53] (no jurisdiction based on interactive reservations Web site); *Bell v. Imperial Palace Hotel/Casino, Inc.*[54] (no jurisdiction based upon interactive reservations Web site); *Arriaga v. Imperial Palace, Inc.*[55] (no jurisdiction based upon interactive reservations Web site)].

Third, the highest level of travel Web site interactivity, involving the purchase of travel services on the Web site together with other business contacts with the forum, would provide a sufficient basis for jurisdiction [*Silk Air v. Superior Court*[56] (general jurisdiction over foreign air carrier "based upon (1) Silk Air's continuing and substantial revenue in California, (2) its advertising in California by means of flyers distributed through its parent company's Los Angeles offices and (3) its interactive internet site allowing Californians to purchase tickets on its airline"); *In re Ski Train Fire in Kaprun, Austria*[57] ("Siemans AG conducts substantial and continuous business . . . conducting sales in New York over the Internet, being listed on the New York Stock Exchange . . . buying a New York company . . . employs a press contact here and has sued in New York")].

Interactive Web Sites and Forum Selection Clauses, Choice of Law Clauses and Arbitration Agreements

To reduce the likelihood of being haled into the consumer's local court, foreign travel suppliers and travel sellers may rely upon forum selection clauses, arbitration clauses and choice of law clauses contained in the Internet transaction documents.

> For instance, an Internet business may want its users to agree that any dispute arising between them shall be resolved in the courts of the Internet business's home state or city, or that it shall be resolved before an arbitration tribunal rather than a court, or that a judge rather than a jury will decide the case, or that the law of a particular state will govern the relationship.[58]

Forum Selection Clauses: The enforceability of an Internet forum selection clause was addressed by the Court in *Decker v. Circus Circus Hotel*.[59] In *Decker*, New Jersey consumers made reservations at a Nevada hotel using an interactive Web site. The reservation form which appeared on the computer screen contained a forum selection clause informing guests that should they wish to commence a lawsuit against the hotel it could only be brought in Nevada. In the *Decker* case the Court decided to enforce the Nevada forum selection clause. The Court also found that the combination of an interactive Web site with a forum selection clause negates any intent of being haled into a local courtroom.

Forum selection clauses are used by **cruiselines** [*Carnival Cruise Lines, Inc. v. Shutte*[60] (Florida forum selection clause enforced); *Kessler v. Royal Caribbean Cruises, Ltd.*[61] (Florida forum selection clause enforced); *Elliott v. Carnival Cruise Lines*[62] (Miami, Florida forum

selection clause enforced); *Moeller v. Cruiseshipcenters*[63] (Washington forum selection clause enforced); *Effron v. Sun Line Cruises, Inc.*[64] (Greek forum selection clause enforced); *Schaff v. Sun Line Cruises, Inc.*[65] (Greek forum selection clause not enforced); *Hodes v. SNC Achille Lauro*[66] (Naples forum selection clause enforced); *O.C. Harden v. American Airlines*[67] (Hawaii forum selection clause enforced); *Jewel Seafoods, Ltd. v. M/V Peace River*[68] (Chinese forum selection clause enforced); *Carron v. Holland America Line-Westours, Inc.*[69] (Washington forum selection clause enforced); *Rawlins v. Clipper Cruise Lines*[70] (Missouri forum selection clause enforced); *Hollmann v. Cunard Line Limited*[71] (England forum selection clause enforced)]; **hotels** [*Doe v. Sun International Hotels, Ltd.*[72] (female guest raped at hotel; Bahamas forum selection clause in guest registration form signed by minor guest's stepfather not enforced; void by reason of guest reaching age of majority)]; **tour operators** [*Shea v. Global Travel Marketing, Inc.*[73] (estate of child tourist on safari killed by hyenas not bound by contract clause requiring arbitration of disputes in Fort Lauderdale, Florida); *Sachs v. TWA Getaway Vacations, Inc.*[74] (tour participant contract stated that "Any litigation concerning the trip may be brought only within the state of Missouri and nowhere else, and Missouri law will be applicable to any and all such litigation"); *Rodriquez v. Class Travel Worldwide*[75] (minor tourist injured after being pushed into hotel pool; California forum selection clause in tour operator's registration form enforced); *Paster v. Putney Student Travel, Inc.*[76] (tourist contracted oral yeast infection on the Blackfeet Indian Reservation in Montana during a "sweat ceremony," one portion of which included the passing of a tobacco filled pipe; Vermont forum selection clause in tour participant contract enforced)] and **resort time share operators** [*World Vacation Travel, S.A. v. Brooker*[77] (time-share purchasers alleged breach of time share agreement; Mexico forum selection enforced)].

With respect to **airline** tickets, however, the D.O.T. has prohibited the use of forum selection clauses [see July 15, 1996 D.O.T. Industry Letter from Samuel Podberesky ("We are sending . . . this letter to advise you of . . . problematic practices . . . (1) choice of forum provisions in contracts of carriage and tariffs . . . We view such provisions to be unlawful (and) unconscionable"); see http://airconsumer.ost.dot.gov/rules.htm].

Arbitration Clauses: The enforceability of arbitration clauses in tour contracts has been addressed by some courts [*Shea v. Global Travel Marketing, Inc.*[78] (child tourist was "killed while on safari with his mother in Botswana. He was sleeping alone in a tent at a campsite when he was dragged from his tent and mauled by hyenas." The tour contract, signed by the child's mother, provided "that all disputes between the parties be settled by binding arbitration in Fort Lauderdale, Florida." The Court refused to enforce the clause finding that the parent did not have "the authority to bind a minor child to arbitrate potential personal injury claims"); *Milgrim v. Backroads, Inc.*[79] (tourist injured on bicycle tour of Loire Valley; clause in tour participant contract stating that "the dispute shall be settled by binding arbitration through the American Arbitration Association at San Francisco, California" enforced)].

Choice Of Law Clauses: Choice of law clauses often appear in cruise contracts. The law selected may be that of the **Bahamas** [*Kirman v. Compagnie Francaise*[80] (choice of Bahamian law clause enforced; cruise between Singapore and Australia)], **China** [*Jewel Seafoods Ltd. v. M/V Peace River*[81] (choice of Chinese law clause enforced)] or **Italy** [*Falcone v. Mediterranean Shipping Co.*[82]]. Recently tour operators have used choice of law clauses [*Sachs v. TWA Getaway Vacations, Inc.*[83] (tour participant contract stated that "Any litigation concerning the trip may be brought only within the state of Missouri and nowhere else, and Missouri law will be applicable to any and all such litigation;" court applied Missouri and Florida law in dismissing claims against tour operator)].

Choice of law clauses are, generally, enforceable unless the passenger can demonstrate that enforcement would be unreasonable, to prevent fraud or overreaching [*Long v. Holland America Line Westours, Inc.*[84] (passenger falls during land tour of museum; maritime law does not govern land tour; choice of law clause in tour contract stating that "except when maritime law applied, the contract would be construed according to Washington state law" rejected; Alaska law applied)] or that "enforcement would contravene a strong public policy of the forum in which the suit is brought" [*Milanovich v. Costa Crociere, SPA*[85]].

The Internet May Have Expanded Jurisdiction

The Internet may have changed the way in which the courts decide what types of business contacts justify the assertion of personal jurisdiction. Although the courts are not yet in agreement on what constitutes a threshold of interactivity in the marketing of travel services over the Internet (often coupled with more traditional contacts with the forum), there has been some movement towards a re-evaluation of the archaic solicitation plus doctrine as an appropriate analytical framework for resolving jurisdictional issues within the context of travel consumer litigation.

Endnotes

1. Pfenning, *Internet travel shows moment of weakness*, Travel Weekly, October 14, 2002, p. 10 ("For the past seven years, the Travel Industry Association of America (TIA) has been tracking Internet use . . . each year . . . TIA has reported a rise in Internet travel planning . . . until this year . . . According to the TIA's newly

released study, Traveler's Use of the Internet, 2002 Edition, 45% of all travelers and 67% of travelers with online access used the Internet to plan a trip in 2002 . . . Online travel agency sites—such as Expedia, Travelocity and Priceline—are still as popular as they were a year ago").

2. *See* Limone, *Report: Direct sales on the rise*, Travel Weekly, June 30, 2003, p. 43 ("Traditional travel agencies don't sell cruises as well as they should and will lose significant market share to supplier-direct initiatives and online agencies in the next three years . . . traditional agencies' share of the cruise market will shrink from 90% to 60% by 2006, while supplier-direct sales (Web and phone) will reach 25% by that time . . . online agencies will be selling 15% of cruises by 2006"); *Untangling the Web*, Stop Press, Conde Nast Traveler, June 2002, pp. 57–64.

3. For a comparison of these travel seller Web sites see *Travel web sites: You still need to compare*, Consumer Reports Travel Letter, June 2002, p. 1 ("We looked at five key factors: ability to provide lowest fares, ability to provide viable flight itineraries that make sense for most travelers, ease of use, customer services and privacy and security policies").

4. *See How Low Can You Go? Priceline Adds Hotel Bids*, Consumer Reports Travel Letter, December 1998, p. 1 ("Priceline.com. The Internet bidding system that claims it lets travelers name their own prices for airline tickets, quietly launched a similar service for hotel rooms in 26 cities"); Wilkening, *The ins and outs of Priceline.com: Good fares come with drawbacks*, Travel Weekly, June 24, 1999, p. 1 ("But if you think the price is right, don't overlook the minuses—including uncertain hours of travel, nonstandard purchase conditions and some potential hidden costs").

5. *See In re Travelot Company*, 286 B.R. 447, 450 (S.D. Ga. 2002) ("The concept developed by Travelot involves coupling the benefits of on-line bookings with the customized services of a pre-screened, high quality travel agent in the destination locality so that a given traveler could obtain not only availability and cost information but also qualitative comments about various facilities and attractions. Through continuing e-mail contacts, that traveler would then be able to develop a customized travel itinerary. Travelot conceived of a business model whereby it would link to a pre-existing high traffic website to attract customers, advertise the availability of its services through broadcast and internet advertising, and obtain its revenue through commissions paid to Travelot by travel agents in the destination localities who arrange the bookings. The agents would, in turn, derive their commissions from the providers of hotel, auto and other requested services.").

6. See *Untangling the Web*, Stop Press, Conde Nast Traveler, June 2002, p. 62.

7. See *D.O.T. Prohibition on Deceptive Practices In the Marketing of Airfare to the Public Using the Internet*, January 18, 2001, at http://airconsumer.ost.dot.gov/rules.htm.

8. *See e.g.*,

   Second Circuit: *Brown v. Grand Hotel Eden*, 2003 WL 21496756 (S.D.N.Y. 2003) ("a hotel is subject to the general jurisdiction of the New York courts . . . (Where) full confirmation powers (have been granted) to their New York agents"); *In re Ski Train Fire in Kaprun, Austria*, 2002 U.S. Dis. LEXIS 14563 (S.D.N.Y. 2002) (subsidiary qualified as an agent in the forum); *Pavis v. Club Med, Inc.*, 1998 WL 229912 (D. Conn. 1998) (solicitation through travel agents in the forum by agent sufficient basis for jurisdiction over principal); *Sankaran v. Club Mediterranee, S.A.*, 1998 WL 433780 (N.D.N .Y. 1998) ("Defendants' activities through their agents also suffice to show that they have established the requisite contacts with New York").

   Sixth Circuit: *Catalano v. BRI, Inc.*, 724 F. Supp. 1580 (E.D. Mich. 1989) (Michigan has personal jurisdiction over Las Vegas hotel based upon conducting business through an agent with offices in Michigan).

   Seventh Circuit: *Cummings v. Club Mediterranee, S.A.*, 2002 WL 1379128 (N.D. Ill. 2002) (solicitation through travel agents in the forum by agent sufficient basis for jurisdiction over principal).

9. *See e.g.*,

   Eleventh Circuit: *Meier v. Sun International Hotels*, 288 F. 3d 1264 (11th Cir. 2002) (jurisdiction over foreign parent corporation based upon activities of subsidiary corporations in the forum).

   State Courts:

   Connecticut: *Hersey v. Lonrho, Inc.*, 807 A. 2d 1009 (Conn. App. 2002) (no jurisdiction over parent hotel based solicitation of subsidiary in the forum).

   Florida: *Universal Caribbean Establishment v. Bard*, 543 So. 2d 447 (Fla. App. 1989) (jurisdiction based upon activities of subsidiary corporations in the forum).

   New York: *Taca Intl. Airlines v. Rolls-Royce of England*, 15 N.Y. 2d 97, 256 N.Y.S. 2d 129, 204 N.E. 2d 329 (1965).

10. *See e.g.*,

    Intermor v. Walt Disney Company, 250 F. Supp. 2d 116, 119–120 (E.D.N.Y. 2003) (the presence of Walt Disney Company in New York insufficient to impose jurisdiction over subsidiary Walt Disney World theme park in Florida); *Dorfman v. Marriott International Hotels, Inc.*, 2002 WL 14363 (S.D.N.Y. 2002) (New York has jurisdiction over Hungarian elevator company which is a mere department of U.S. elevator company); *Grill v. Walt Disney Co.*, 683 F. Supp. 66, 69 (S.D.N.Y. 1988) ("There is nothing in the record which suggests that Disney Co. acts as agent for Disney World Co. or that Disney World Co. is merely a department of Disney Co. Accordingly, the presence of the parent company in New York does not confer jurisdiction over . . . Disney World Co.").

    Third Circuit: *Weintraub v. Walt Disney World Co.*, 825 F. Supp. 717 (E.D. Pa. 1993) (Pennsylvania has jurisdiction over Florida resort Walt Disney World based upon connections of parent corporation Walt Disney Company to Pennsylvania).

11. *See e.g.*,

    Second Circuit: *Dorfman v. Marriott International Hotels, Inc.*, 2002 WL 14363 (S.D.N.Y. 2002) (Hungarian and U.S. elevator companies joint venturers).

12. *See e.g.*,

    Second Circuit: *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F. 2d 116 (2d Cir. 1967).

    State Courts:

    New York: *Guile v. Sea Island Co., Inc.*, 11 Misc. 2d 496, 66 N.Y.S. 2d 467 (1946), *aff'd* 272 App. Div. 881, 71 N.Y.S. 2d 911 (1947).

13. *See e.g.*,

    Second Circuit: *Pavis v. Club Med, Inc.*, 1998 WL 229912 (D. Conn. 1998) (solicitation through travel agents in the forum by agent sufficient basis for jurisdiction over principal).

    Third Circuit: *Romero v. Argentinas*, 1993 WL 416547 (D.N.J. 1993).

    Tenth Circuit: *Afflerbach v. Cunard Line Ltd.*, 11 F. Supp. 2d 1260 (D. Wyo. 1998).

    State Courts:

    New York: *Savoleo v. Couples Hotel*, 136 A.D. 2d 692, 524 N.Y.S. 2d 52 (1988).

14. *See e.g.*,

    Sixth Circuit: *Hughes v. Cabanas del Caribe Hotel*, 744 F. Supp. 788 (E.D. Mich. 1990).

    Seventh Circuit: *Wilson v. Humphreys*, 916 F. 2d 1239 (7th Cir. 1990).

15. *See e.g.*,

Second Circuit: *Intermor v. Walt Disney Company*, 250 F. Supp. 2d 116, 119–120 (E.D.N.Y. 2003).

16. *See*

First Circuit: *Sigros v. Walt Disney World Co.*, 129 F. Supp. 2d 56 (D. Mass. 2001) (advertising sufficient basis for jurisdiction); *Edwards v. Radventures, Inc.*, 164 F. Supp. 2d 190 (D. Mass. 2001) (solicitation sufficient basis for jurisdiction); *Szafarowicz v. Gotterup*, 1999 WL 782028 (D. Mass. 1999) (Massachusetts may have jurisdiction over Cayman Island diving company if a significant amount of business was done in the U.S.); *Nowak v. Tak How Inc. Ltd.*, 1995 WL 521874 (D. Mass. 1995).

Second Circuit: *Pavia v. Club Med, Inc.*, 1998 WL 229912 (D. Conn. 1998) (solicitation through travel agents in the forum sufficient basis for jurisdiction); *Sankaran v. Club Mediterranee, S.A.*, 1998 WL 433780 (N.D.N .Y. 1998) (solicitation through travel agents in the forum sufficient basis for jurisdiction); *Mallon v. Walt Disney World Co.*, 42 F. Supp. 2d 143 (D. Conn. 1998) (continuous and extensive advertising in the forum, without contract formation, is sufficient to establish jurisdiction over foreign resort); *Begley v. Maho Bay Camps*, 1994 WL 136016 (E.D.N.Y. 1994) (jurisdiction based upon newspaper ads and contact in New York City).

Third Circuit: *Weintraub v. Walt Disney World Co.*, 1993 WL 244064 (E.D. Pa. 1993) (advertising, staffing and customer relations activities sufficient to support jurisdiction); *Gavigan v. Walt Disney World, Inc.*, 646 F. Supp. 786 (E.D. Pa. 1986) (jurisdiction based upon ongoing promotional activities in the forum).

Fifth Circuit: *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383 (E.D. Tex. 1989) (solicitation of business sufficient for jurisdiction).

Sixth Circuit: *Raftery v. Blake's Wilderness Outpost Camps*, 1997 WL 14795 (E.D. Mich. 1997) (advertising sufficient for jurisdiction).

Seventh Circuit: *Wilson v. Humphreys*, 916 F. 2d 1239 (7th Cir. 1990) (advertising and contacts with local tour operators sufficient for jurisdiction); *Cummings v. Club Mediterranee, S.A.*, 2002 WL 1379128 (N.D. Ill. 2002) (solicitation through travel agents in the forum sufficient basis for jurisdiction).

State Courts:

Connecticut: *Stewart v. Air Jamaica Holdings Ltd.*, 2000 U.S. Conn. Super. 1107 (Conn. Super. 2000) (plaintiff fails to prove solicitation of business in Connecticut).

17. *See e.g.*,

First Circuit: *Rosich v. Circus & Circus Enterprises, Inc.*, 3 F. Supp. 2d 148 (D.P.R. 1998) (advertising through travel guide and brochures insufficient contact); *Clark v. City of St. Augustine, Florida*, 977 F. Supp. 541 (D. Mass. 1997) (advertising in forum insufficient contact).

Second Circuit: *Brown v. Grand Hotel Eden*, 214 F. Supp. 2d 235 (S.D.N.Y. 2002) mod'd, *Brown v. Grand Hotel Eden*, 2003 WL 21496756 (S.D.N.Y. 2003) ("there is well-developed law addressing jurisdiction over foreign hotels. If a New York agent possesses independent authority to make and confirm reservations on behalf of a hotel, the hotel is considered present . . . merely soliciting business from prospective customers in New York does not suffice to establish jurisdiction); *Dorfman v. Marriott International Hotels, Inc.*, 2002 WL 14363 (S.D.N.Y. 2002) (no jurisdiction over Marriott Hotel in Budapest, Hungary or Marriott International Hotels, Inc. based upon solicitation without contract formation in the forum; reservations contracts entered into in Nebraska at worldwide reservations system); *Ciarcia v. Venetianm Resort Hotel Casino*, 2002 WL 265160 (S.D.N.Y. 2002) ("mere solicitation by mailings and telephone calls does not confer jurisdiction"); *Muse v. Vagabond Inn Hotel*, 2002 WL 15803 (E.D.N.Y. 2002) (solicitation of business through toll-free telephone number insufficient for assertion of jurisdiction); *Hinsch v. Outrigger Hotels Hawaii*, 153 F. Supp. 2d 209 (E.D.N.Y. 2001) (placement of ad in publication insufficient for assertion of jurisdiction); *Andrei v. DHC Hotels and Resorts*, 2000 U.S. Dist. LEXIS 4107 (S.D.N.Y. 2000) (mere solicitation of business insufficient for jurisdiction); *Feldman v. Silverleaf Resorts, Inc.*, 2000 U.S. Dist. LEXIS 1005 (S.D.N.Y. 2000) (solicitation, regardless of how substantial, is insufficient to establish jurisdiction); *Swindell v. Florida East Coast Railway Co.*, 42 F. Supp. 2d 320 (S.D.N.Y. 1999) (railroad ticket sales by travel agents and employees at separately owned train stations insufficient to establish jurisdiction); *Weinberg v. Club ABC Tours, Inc.*, 1997 WL 37041 (E.D.N.Y. 1997) (ticket of ticket insufficient to confer jurisdiction); *Lane v. Vacations Charters, Ltd.*, 750 F. Supp. 120 (S.D.N.Y. 1990) (ads and toll-free number insufficient contact).

Third Circuit: *Inzillo v. Continental Plaza,* 2000 U.S. Dist. LEXIS 20103 (M.D. Pa. 2000) (advertising and selling hotel accommodations through travel agents and 800 number insufficient basis for jurisdiction); *Poteau v. Walt Disney World Company*, 1999 U.S. Dist. LEXIS 12459 (E.D. Pa. 1999) (solicitation of business through travel agents insufficient to establish jurisdiction); *Romero v. Holiday Inn, Utrecht*, 1998 U.S. Dist. LEXIS 19997 (E.D. Pa. 1998) (advertising through franchisor's Worldwide Directory and making reservations through 800 number insufficient for jurisdiction).

Fourth Circuit: *Pearson v. White Ski Company, Inc.*, 228 F. Supp. 2d 705 (E.D. Va. 2002) (solicitation through advertising and Internet in the forum insufficient to establish jurisdiction in the absence of a connection between advertising and the injury sustained).

Fifth Circuit: *Luna v. Compagnie Paramena de Aviacion*, 1994 WL 173369 (S.D. Tex. 1994) (solicitation of business and 800 number insufficient).

Sixth Circuit: *Denham v. Sampson Investments*, 997 F. Supp. 840 (E.D. Mich. 1998) (sending brochures to forum and reserving rooms at hotels insufficient contact).

Seventh Circuit: *Dresden v. Treasure Island, LLC*, 2001 U.S. Dist. LEXIS 13928 (N.D. Ill. 2001) (indirect advertising in the forum insufficient contact).

Tenth Circuit: *Rainbow Travel Service, Inc. v. Hilton Hotels Corp.*, 896 F. 2d 1233 (10th Cir. 1990) (jurisdiction based upon solicitation and contract formation in the forum); *Afflerbach v. Cunard Line, Ltd.*, 14 F. Supp. 2d 1260 (D. Wyo. 1998) (national advertising and selling tours through travel agents insufficient contact).

State Courts:

California: *Silk Air v. Superior Court*, 2003 WL 40818 (Cal. App. 2003) ("It is true that case law holds jurisdiction cannot be assumed over a foreign corporation based solely upon sales by independent non-exclusive agents").

Connecticut: *Hersey v. Lonrho, Inc.*, 807 A. 2d 1009 (Conn. App. 2002) (no jurisdiction over parent hotel based on solicitation of subsidiary in the forum).

Illinois: *Stein v. Rio Parismina Lodge*, 296 Ill. App. 3d 520, 521, 695 N.E. 2d 518, 231 Ill. Dec. 1 (1998) (transaction of business through travel agents insufficient contact); *Kadala v. Cunard Lines, Ltd.*, 226 Ell. App. 3d 302, 304, 589 N.E. 2d 802, 168 Ill. Dec. 402 (1992) (solicitation of business in the forum insufficient contact).

New York: *Sedig v. Okemo Mountain*, 204 A.D. 2d 709, 612 N.Y.S. 2d 643 (1994) (mere solicitation insufficient).

Texas: *M.G.M. Grand Hotel, Inc. v. Lee Castro*, 8 S.W. 3d 403 (Tex. App. 1999) (solicitation plus doctrine followed in Texas).

18. *See e.g.*,

Second Circuit: *Brown v. Grand Hotel Eden*, 214 F. Supp. 2d 235 (S.D.N.Y. 2002) *modified, Brown v. Grand Hotel Eden*, 2003 WL 21496756 (S.D.N.Y. 2003); *Rodriquez v. Circus Circus Casinos, Inc.*, 2001 U.S. Dist. LEXIS 61 (S.D.N.Y. 2001); *In re Ski Train Fire in Kaprun, Austria*, 2002 U.S. Dist. LEXIS 14929 (S.D.N.Y. 2002).

Third Circuit: *Imundo v. Pocono Palace, Inc.*, 2002 WL 31006145 (D.N.J. 2002); *Snyder v. Dolphin Encounters Limited*, 2003 WL 31771189 (E.D. Pa. 2002); *Decker v. Circus Hotels*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999); *Romero v. Holiday Inn, Utrecht*, 1998 U.S. Dist. LEXIS 19997 (E.D. Pa. 1998); *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

Fourth Circuit: *Pearson v. White Ski Company, Inc.*, 228 F. Supp. 2d 705 (E.D. Va. 2002).

Fifth Circuit: *Arriaga v. Imperial Palace, Inc.*, 252 F. Supp. 2d 380 (S.D. Texas 2003).

Eighth Circuit: *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087–1088 (E.D. Mo. 2001).

Tenth Circuit: *Smith v. Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225 (N.D. Okla. 2001).

State Courts:

California: *Silk Air v. Superior Court*, 2003 WL 40818 (Cal. App. 2003); *Cervantes v. Ramparts, Inc.*, 2003 WL 257770 (Cal. App. 2003).

19. *See e.g.*, *Imundo v. Pocono Palace, Inc.*, 2002 WL 31006145 (D.N.J. 2002) ("personal jurisdiction has been found over operators of Web sites who could enter into contracts through the Web site to provide goods and services over the Internet. *CompuServe, Inc. v. Patterson*, 89 F. 3d 1257 (6th Cir. 1996) (contracts to distribute software over the Internet); *Zippo Manuf. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1996) (contracts to provide news service over the Internet); *Thompson v. Handa Lopez, Inc.*, 998 F. Supp. 738, 744 (W.D. Tex. 1998) (continuous interaction with players on their casino Web site)"). *See also American Eyewear, Inc. v. Peeper's Sunglasses*, 106 F. Supp. 2d 895, 899-903 (N.D. Tex. 2000) (personal jurisdiction proper over defendant which established virtual store on its Web site).

20. *See e.g.*, *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087–1088 (E.D. Mo. 2001) ("Although reservations can be made over the internet this case is clearly distinguishable from those where goods may be ordered over the internet . . . In internet cases involving the sale of goods, the entire transaction (order, payment and confirmation) can be completed online. The resident can bring about the transmission of the goods into the forum state through the order alone. Hotels, on the other hand, are somewhat unique in the internet context. Neither party anticipates that goods, services or information of intrinsic value will be transmitted or provided in the forum state as a result of the interest exchange of information. To the contrary, both parties recognize that the internet exchange is simply preliminary to the individual traveling outside the forum state to use the service. In this respect, the exchange of information over the internet is not unlike a toll-free reservation hotline. The purpose of the internet interaction is not achieved until the resident customer leaves the forum state and arrives at the hotel destination.").

21. *See e.g.*,

Second Circuit: *Brown v. Grand Hotel Eden*, 214 F. Supp. 2d 235 (S.D.N.Y. 2002) *modified, Brown v. Grand Hotel Eden*, 2003 WL 21496756 (S.D.N.Y. 2003) ("The only interactivity Hotel Eden's website allows is the opportunity for users to inquire into room availability. Upon receiving these inquires, the hotel responds, through e-mail or fax, with an offer if a suitable room is available; the user then must respond to the hotel to accept the offer. This type of interaction is similar to corresponding through a telephone and is insufficient to establish jurisdiction over the defendant "); *Rodriquez v. Circus Circus Casinos, Inc.*, 2001 U.S. Dist. LEXIS 61 (S.D.N.Y. 2001) ("For jurisdictional purposes, there is no material difference between using the Internet to make a reservation with an out-of-state entity and placing a telephone call to that entity for the same purpose").

Third Circuit: *Romero v. Holiday Inn, Utrecht*, 1998 U.S. Dist. LEXIS 19997 (E.D. Pa. 1998) ("an Internet connection allows a consumer to contact a hotel chain for reservations directly and without charge. The distinction of using a computer hooked to a telephone/data line is not relevantly different from using a handset connected to that same line; one is in writing and one is by voice—a distinction without difference in this context").

Eighth Circuit: *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087–1088 (E.D. Mo. 2001) ("the exchange of information over the internet is not unlike a toll-free reservation hotline").

State Courts:

California: *Cervantes v. Ramparts, Inc.*, 2003 WL 257770 (Cal. App. 2003) ("Maintenance of an Internet Web site accessible from California also does not support general jurisdiction. Such an activity is directly analogous to maintaining an '800' telephone number . . . That the Ramparts Web site permitted limited interactivity does not distinguish it from maintenance of an '800' number for purposes of establishing general jurisdiction").

22. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

23. *Id.* at 952 F. Supp. 1121 ("Dot Com's Web Site contains information about the company, advertisements and an application for its Internet news service . . . A customer who wants to subscribe . . . fills out an on-line application . . . Payment is made by credit card over the Internet or the telephone. The application is then processed and the subscriber is assigned a password which permits the subscriber to view and/or download Internet newsgroup messages that are stored on the defendant's server in California").

24. *See*

Second Circuit: *American Homecare Federation, Inc. v. Paragon Scientific Corp.*, 1998 WL 790590 (D. Conn. 1998) ("The Website does not list . . . products which are sold nor does it provide any process for ordering . . . No sales . . . occur through the Website and an individual accessing the site cannot order . . . It does not provide anyone with files to download nor does it link to anyone else's Website"); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998) ("there is no evidence that any user in Connecticut accessed Neogen's Web site or purchased products based upon the Web site advertisement . . . Internet users could not order products directly from the Web site . . . it required them to call an '800' number in Michigan or write Neogen in Michigan or Kentucky"); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997) (Web site with e-mail contact); *Benusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd* 126 F. 3d 25 (2d Cir. 1997) (Missouri nightclub's passive Web site).

Third Circuit: *Remich v. Manfredy*, 1999 WL 257754 (E.D. Pa. 1999) (passive Web site offering general information and advertising insufficient contact with forum); *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, 1999 WL 695579 (E.D. Pa. 1999) (passive Web site does not confer jurisdiction); *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*, 1998 U.S. Dist. LEXIS 20255 (E.D. Pa. 1998) (Web site contains information, photographs, map and e-mail connection; reservations can not be made on the Web site).

Fourth Circuit: *American Information Corp. v. American Infometrics, Inc.*, 2001 U.S. Dist. LEXIS 4534 (D. Md. 2001) ("A visitor (to Web site) may not enter into a contract, purchase goods or services or transact business on the Web site"); *Roche v. Worldwide Media, Inc.*, 90 F. Supp. 2d 714 (E.D. Va. 2000) (pornographic

Web site can only be described as passive); *Esab Group, Inc. v. Centricut, LLC*, 1999 WL 27514 (D.S.C. 1999) (Web page which provides information but requires customer to place an order through an 800 telephone number is insufficient for assertion of personal jurisdiction).

Fifth Circuit: *Mink v. AAAA Development, L.L.C.*, 190 F. 3d 333 (5th Cir. 1999) (no long arm jurisdiction based upon printable mail-in order form and toll free number and e-mail address); *Amazon Tours, Inc. v. Wet-A-Line Tours, LLC*, 2002 U.S. Dist. LEXIS 1649 (N.D. Tex. 2002) (tour operator's Web site "provides information about tours offered by the company. It includes a bulletin board that allows customers to post messages . . . a fishing report . . . a form to request a brochure . . . If a user wants further information about a tour, he or she must contact the company at its offices in Georgia"); *Lofton v. Turbine Design, Inc.*, 100 F. Supp. 2d 404 (N.D. Miss. 2000) ("the primary purpose of the website is for advertising. The website does not contain a price list for services, contract for engagement of services, or order form. It is not suited for shopping or ordering online"); *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648 (N.D. Tex. 2000) (passive Web site does not confer jurisdiction); *Broussard v. Deauville Hotel Resorts, Inc.*, 1999 WL 62152 (E.D. La. 1999) (slip and fall in Florida hotel; no long arm jurisdiction based upon passive Web site); *Mid-City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 35 F. Supp. 507 (E.D. La. 1999) (no personal jurisdiction based upon passive Web site).

Sixth Circuit: *Bailey v. Turbin Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000) ("there is no indication whatsoever that TDI's website is anything other than wholly passive").

Seventh Circuit: *MJC-A World v. Wishpets Co.*, 2001 U.S. Dist. LEXIS 13178 (N.D. Ill. 2001) (passive Web site and sale of 90 toys insufficient basis for jurisdiction); (*Dow v. Abercrombie & Kent International, Inc.*, 2000 U.S. Dist. LEXIS 7290 (N.D. Ill. 2000) (passive Web site touting quality of services); *First Financial Resources v. First Financial Resources, Corp.*, 2000 U.S. Dist. LEXIS 16866 (N.D. Ill. 2000) ("website does not allow customers to enter into contracts or receive financial planning services over the Internet").

Ninth Circuit: *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, 419 (9th Cir. 1997) ("conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the Web"); *McDonough v. Fallon McElligott, Inc.*, 1996 WL 753991 (S.D. Cal. 1996) ("fact that (defendant) has a Web site used by (forum state residents) cannot establish jurisdiction by itself").

Tenth Circuit: *Soma Med. Int'l v. Standard Chartered Bank*, 196 F. 3d 1292 (10th Cir. 1999) (no jurisdiction based on Web site that only provided information); *SF Hotel Company, L.P. v. Energy Investments, Inc.*, 985 F. Supp. 1032, 1035 (D. Kan. 1997) ("Boto's advertisement in a trade publication appears on the Internet. Boto did not contract to sell any goods or services . . . over the Internet site").

Eleventh Circuit: *JB Oxford Holdings, Inc.*, 1999 WL 1068444 (S.D. Fla. 1999) (Web site providing connections to Internet, listing of national toll-free telephone number and a pending application to do business in Florida provided insufficient contacts with Florida to permit exercise of personal jurisdiction).

State Courts:

California: *Jewish Defense Organization, Inc. v. Superior Court*, 85 Cal. Rptr. 2d 611 (Cal. App. 1999) (defamation action; a passive Web site delivering only information insufficient contact with forum for assertion of personal jurisdiction).

New Jersey: *Ragonese v. Gaston Rosenfeld*, 318 N.J. Super. 63, 722 A. 2d 991 (1998) (foreign air carrier's passive Web site insufficient for jurisdiction).

New York: *Nationwide Insurance Co. v. Holiday Inn*, New York Law Journal, Jan. 27, 2000 (N.Y. Sup.) (passive Web site and 800 number insufficient for jurisdiction); *Messelia v. Costa*, New York Law Journal, Feb. 14, 2000 (N.Y. Civ.) (passive Web site providing information insufficient for assertion of personal jurisdiction).

Oregon: *Millennium Enterprises v. Millenium Music*, 49 USPQ2d 1878 (Oregon Jan. 4, 1999).

25. *See*

    Second Circuit: *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (Web site and toll-free number; "advertising via the Internet is solicitation of a sufficient repetitive nature").

    Fourth Circuit: *Bochan v. La Fontaine*, 1999 WL 343780 (E.D. Va. 1999) (posting of libelous messages on the Internet by Texas and New Mexico residents sufficient grounds for the assertion of personal jurisdiction in Virginia where Web site was accessed).

    Ninth Circuit: *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996) (fraud claims; jurisdiction based upon Web site contact alone).

    District of Columbia Circuit: *Heroes, Inc. v. Heroes Found*, 958 F. Supp. 1 (D.C.D.C. 1996) (Web site, toll-free number and local newspaper ad).

26. *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

27. See *Meier v. Sun International Hotels*, 288 F. 3d 1264, 1274 (11th Cir. 2002) (jurisdiction in Florida over Bahamian parent hotel corporations based upon activities of subsidiary corporations in the forum and passive Web site; "The Sun Defendants maintain and staff several Florida telephone numbers listed on the 'Sun' website as contacts for the Sun Defendants. See http://www.sunint.com (last visited March 22, 2002)").

28. *See Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 38 (D. Mass. 1997).

29. *See Digital Equipment Corp. v. Altavista Tech*, 960 F. Supp. 456 (D. Mass 1997).

30. *See CompuServe, Inc. v. Patterson*, 89 F. 3d 1257 (6th Cir. 1996).

31. *See EDIAS Software Int'l v. BASIS Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

32. *See Catalytic Combustion Corp. v. Vapor Extraction Technology, Inc.*, 2000 Wisc. App. LEXIS 774 (Wisc. App. 2000).

33. *See Amazon Tours, Inc. v. Wet-A-Line Tours, LLC.*, 2002 U.S. Dist. LEXIS 1649 (N.D. Tex. 2002) (presence of booking agent in the forum who booked no tours in the forum insufficient contact); American *Eyewear, Inc. v. Peeper's Sunglasses And Accessories, Inc.*, 2000 U.S. Dist. LEXIS 6875 (N.D. Texas 2000).

34. *See Resuscitation Tech., Inc. v. Continental Health Care Corp.*, 1997 WL 148567 (S.D. Ind. 1997).

35. *See Gary Scott International, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

36. *See Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549 (S.D.N.Y. 2000).

37. *See TY, Inc. v. Max Clark*, 2000 U.S. Dist. LEXIS 383 (N.D. Ill. 2000) (no jurisdiction; "However, at the same time, the defendants do not clearly do business over their web site, for they do not take orders nor enter into contracts over the web site").

38. *See People Solutions, Inc. v. People Solutions, Inc.*, 2000 U.S. Dist. LEXIS 10444 (N.D. Tex. 2000).

39. *See e.g.*,

    Second Circuit: *Andrei v. DHC Hotels*, 2000 U.S. Dist. LEXIS 4107 (S.D.N.Y. 2000) (tourist injured at Aruba hotel made reservations through American Airlines Web site but actual hotel reservations were confirmed when tour operator GoGo Tours contacted Aruba hotel; no jurisdiction over Aruba hotel).

Tenth Circuit: *Smith v. Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225 (N.D. Okla. 2001) (slip and fall at Arkansas hotel; no jurisdiction found; "The website merely permits a user to submit an e-mail to BPH requesting reservation information. No reservation is confirmed over the website").

40. *See e.g.*,

First Circuit: *Dagesse v. Plant Hotel, N.V.*, 113 F. Supp. 2d 211 (D.N.H. 2000) (although hotel had interactive reservations Web site, plaintiff failed to show that any reservations were actually made using the Web site).

Third Circuit: *Hurley v. Cancun Playa Oasis Hotel*, 1999 U.S. Dist. LEXIS 13716 (E.D. Pa. 1999) (Mexican hotel's Georgia booking agent had 800 number and interactive reservations Web site but plaintiff used neither and failed to show that any actual reservations were made using Web site).

Tenth Circuit: *D.J.'s Rock Creek Marina v. Imperial Foam*, 2002 U.S. Dist. LEXIS 13470 (D. Kan. 2002) (Defendant's Web site had the capacity for accepting orders but there was no evidence of sales or other activity in Kansas. "CW has had no actual Internet-based contacts with residents of Kansas: no sales, no inquiries, no requests for quotes, no e-mails, nor any phone calls, letters or contacts emanating from the Web site information . . . CW has never made a sale to a Kansas resident."); *Smith v. Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225 (N.D. Okla. 2001) ("There is no evidence that any commercial transactions are actually completed on BPH's website. No reservation is confirmed over the website").

41. *See e.g.*,

Eighth Circuit: *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082 (E.D. Mo. 2001) ("The central reason why plaintiffs fail to establish the necessary minimum contacts for specific jurisdiction, however, is because they have failed to demonstrate that their cause of action has any relation to Imperial Palace's contacts with Missouri. From the record before the Court, the defendant's only contact with Missouri is a website that is accessible to residents in Missouri. The subject matter of plaintiff's suit is a slip and fall accident that occurred on the hotel premises in Las Vegas. That event is entirely unrelated to the defendant's website. While the Court is not suggesting that these facts would necessarily change the analysis, the plaintiffs do not maintain that they used the website to make reservations with the Imperial Palace, that their travel agent used the website to secure their reservations, or that they were enticed by the website to visit the Imperial Palace. In fact, they do not claim to have ever viewed the website prior to their visit to the defendant's hotel. The Court can see no causal link or connection between Mr. Bell's accident and the sole forum contact by Imperial Palace, its website.").

Contra:

Second Circuit: *Rodriguez v. Circus Circus Casinos, Inc*., 2001 WL 21244 (S.D.N.Y. 2001) ("Even if Rodriguez has made his hotel reservations over CCC's website—and it is not alleged that he did—the personal injuries at the heart of this lawsuit arose, if at all, from the allegedly negligent conduct of the defendants in Nevada rather than from the making of a hotel reservation. Absent the requisite nexus, there is no basis for long-arm jurisdiction over CCC").

42. *See e.g.*,

Second Circuit: *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997) (subscriptions for Internet services sold to customers in the forum through contracts entered into on Web site).

Third Circuit: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

Fourth Circuit: *Easb Group, Inc. v. Centricut, LLC*, 1999 WL 27514 (D.S.C. 1999) (Web page which provides information but requires customer to place an order using an 800 telephone number is insufficient to confer jurisdiction).

Fifth Circuit: *Origin Instruments v. Adaptive Computer Systems*, 1999 U.S. Dist. LEXIS 1451 (N.D. Texas 1999) (no jurisdiction; failure to show sales in forum through interactive Web site); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998) (corporation subject to personal jurisdiction in Texas based upon entering into contracts to play casino games with Texas citizens); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 785 (E.D. Texas 1998) ("Web site lists various categories . . . individuals can view various furniture selections . . . individual pieces of furniture can be viewed . . . as well as price information . . . an order form can be printed . . . (customers may) check the status of their purchases . . . information is available regarding freight costs . . . communicate directly with 'on-line' sales representatives").

Eighth Circuit: *Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters*, 96 F. Supp. 2d 919 (E.D. Mo. 2000) (inoperable interactive Web site still under construction insufficient for jurisdiction).

Ninth Circuit: *Stomp, Inc. v. NeatO*, 61 F. Supp. 2d 1074 (C.D. Cal. 1999) (Web site functioned as a "virtual store" where consumers [could] view descriptions, prices and pictures of various products [and could] add items to their "virtual shopping cart" and "check out" by providing credit card and shipping information); *Park Inns International v. Pacific Plaza Hotels, Inc.*, 5 F. Supp. 2d 762, 764-65 (D. Ariz. 1998) (interactive Web site accepted seven hotel reservations from customers in the forum).

District of Columbia Circuit: *Gorman v. Ameritrade Holding Corp*., 293 F. 3d 506 (D.C. Cir. 2002) (continuous and systematic sale of securities on Internet Web site sufficient basis for personal jurisdiction); *Blumenthal v. Drudge*, 992 F. Supp. 44, 56 (D.C.D.C. 1998) ("The Drudge Report's web site allows browsers . . . to directly e-mail defendant . . . thus allowing an exchange of information . . . browsers who access the website may request subscriptions to the Drudge Report, again by directly e-mailing their requests to Drudge's host computer . . . the Drudge Report is . . . sent . . . to every e-mail address on his subscription list . . . constant exchange of information and direct communication").

State Courts:

Connecticut: *Gates v. Royal Palace Hotel*, 1998 Conn. Super. LEXIS 3740 (Conn. Super. 1998) (jurisdiction based upon concentrated advertising, bookings through travel agents and "invitation to Connecticut citizens to make reservations and other arrangements directly through the Internet").

Oregon: *Millenium Enterprises v. Millenium Music,* 49 USPQ2d 1878 (Oregon, Jan. 4, 1999).

43. *See also*

Eleventh Circuit: *Butler v. Beer Across America*, 83 F. Supp. 2d 1261 (N.D. Ala. 2000) (interactive Web site allowing consumers to purchase beer by using a credit card does not confer jurisdiction; "Beer Across America's site does not even anticipate the regular exchange of information across the Internet . . . Rather it is closer to an electronic version of a postal reply card").

44. *See e.g.*, *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087–1088 (E.D. Mo. 2001) ("Although reservations can be made over the internet this case is clearly distinguishable from those where goods may be ordered over the internet . . . In internet cases involving the sale of goods, the entire transaction (order, payment and confirmation) can be completed online. The resident can bring about the transmission of the goods into the forum state through the order alone. Hotels, on the other hand, are somewhat unique in the internet context. Neither party anticipates that goods, services or information of intrinsic value will be transmitted or provided in the forum state as a

result of the interest exchange of information. To the contrary, both parties recognize that the internet exchange is simply preliminary to the individual traveling outside the forum state to use the service. In this respect, the exchange of information over the internet is not unlike a toll-free reservation hotline. The purpose of the internet interaction is not achieved until the resident customer leaves the forum state and arrives at the hotel destination.").

45. 2001 WL 1682810 (N.D. Okla. 2001).
46. 2003 WL 257770 (Cal. App. 2003).
47. 2002 U.S. Dist. LEXIS 7773 (S.D.N.Y. 2002).
48. *Brown v. Grand Hotel Eden-A Summit Hotel*, 2003 WL 21496756 (S.D.N.Y. 2003) ("Hotel Eden withholds from Summit the right to book rooms during time periods of Hotel Eden's choosing and thus Summit's power to reserve rooms is subject to the hotel's grant of authority. Absent an outright grant of authority to confirm reservations, an agent is not 'doing business' on behalf of a hotel").
49. 49 F. Supp. 2d 743, 748 (D.N.J. 1999).
50. 1998 U.S. Dist. LEXIS 20255 (E.D. Pa. 1998).
51. 2001 WL 21244 (S.D.N.Y. 2001).
52. 2002 WL 31006145 (D.N.J. 2002).
53. 2003 WL 31771189 (E.D. Pa. 2002).
54. 200 F. Supp. 2d 1082 (E.D. Mo. 2001).
55. 252 F. Supp. 2d 380 (S.D. Texas 2003).
56. 2003 WL 40818 (Cal. App. 2003).
57. 2002 U.S. Dist. LEXIS 14563 (S.D.N.Y. 2002).
58. Dee Lewis, *Avoiding Internet Litigation in Inconvenient Forums*, New York Law Journal, May 14, 2002, p. ("Such precautions . . . include having users of Internet services or products enter into binding agreements before using the services or products in which they agree on how and where any dispute that arises will be resolved.").
59. 1999 WL 319056 (D.N.J. 1999).
60. 499 U.S. 585, 111 S. Ct. 39, 113 L. Ed. 2d 622 (1991).
61. 2002 WL 32130105 (E.D. Pa. 2003).
62. 231 F. Supp. 2d 555 (D. Tex. 2002).
63. 2001 WL 34057009 (N.D. Cal. 2001).
64. 67 F. 3d 7 (2d Cir. 1995).
65. 999 F. Supp. 924 (S.D. Tex. 1998).
66. 858 F. 2d 905 (3d Cir. 1988).
67. 178 F.R.D. 583 (M.D. Ala. 1998).
68. 39 F. Supp. 2d 628 (D.S.C. 1999).
69. 51 F. Supp. 2d 322 (E.D.N.Y. 1999).
70. 1998 American Maritime Cases 1254 (N.D. Cal. 1995).
71. 1998 American Maritime Cases 2168 (N.Y. Sup. 1996).
72. 20 F. Supp. 2d 1328 (S.D. Fla. 1998).
73. 2003 WL 1916874 (Fla. App. 2003).
74. 125 F. Supp. 2d 1368 (S.D. Fla. 2000).
75. 2000 U.S. Dist. LEXIS 1926 (E.D. La. 2000).
76. 1999 U.S. Dist. LEXIS 9194 (C.D. Cal. 1999).
77. 799 So. 2d 410 (Fla. App. 2001).
78. 2003 WL 1916874 (Fla. App. 2003).
79. 142 F. Supp. 2d 471 (S.D.N.Y. 2001).
80. 1994 American Maritime Cases 2848 (Cal. Sup. 1993).
81. 1999 WL 166559 (D.S.C. 1999).
82. 2002 U.S. Dist. LEXIS 11392 (E.D. Pa. 2002).
83. 125 F. Supp. 2d 1368 (S.D. Fla. 2000).
84. 26 P. 3d 430 (Alaska Sup. 2001).
85. 954 F. 2d 763, 768 (D.C. Cir. 1992).

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Medical Malpractice: The Advantage of Early Thorough Expert Review of Medical Records

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

A medical malpractice case begins when a potential client contacts an attorney and relates an experience with a medical caregiver (doctor, dentist or podiatrist) or hospital that turned out poorly. Although there is a natural tendency to evaluate a case's potential by focusing on the amount of damages, this is a classic example of backwards thinking. The decision to proceed with litigation is more efficiently made when it is based upon facts in the medical record that can unequivocally substantiate the existence of negligent conduct. An experienced malpractice attorney will always put the chart, not the cart, before the horse.

Classically, in order to comply with CPLR § 3012(a), a licensed medical caregiver should review the facts of the case and agree that there is a reasonable basis to commence an action even before a complaint is filed. In practice, though, this is usually an informal expert review. It is unrealistic for this certifying caregiver to be the ultimate testifying expert. Testifying often requires specialists whose rates for such an initial review are prohibitive, even in this high-stakes game. What's more, many specialist reviewers focus only on their own backyard. Hiring a cardiologist to review a case will often lead to disregarding the potentially negligent actions of a gastroenterologist. Other specialist reviewers, equally defensive, tend to justify the actions of their specialty-group peers and place blame on other specialists in other fields. Only when other experts in the alternate fields are hired does this misdirection become evident.

The ability to scrutinize a medical chart for potential errors is a talent borne of wide experience, and is contrary to the mind-set of most practicing specialist physicians. Further, the ability to identify the legal theory most likely to persuade a jury is the real Holy Grail, and specialist physicians do not typically involve themselves in this type of a search. Although any intelligent, objective specialist expert can scrutinize a record to corroborate a theory already proposed to him or her, the ability to actively search for a potential mistake is often viewed by these medical experts as a defiance of their medical fraternity, and is therefore somehow distasteful. As a result, their searching is not performed completely objectively.

Solving this dilemma has led most plaintiffs' attorneys to a composite two-stage system of review—the initial review and the specialist's corroboration before trial. My basic point is that cases proceed more smoothly when the initial review is thorough, compelling and performed by a medical caregiver with a wide experience and no allegiances. Money spent on this kind of a thorough expert review at the outset of a case avoids the embarrassment and anxiety of finding out too late that the theory of the case is suspect or that the case is not as strong as you thought.

The first stage of review now usually begins when an informal general review by a licensed medical caregiver, often by phone, certifies a case after a nurse reviewer or paralegal in the attorney's office ("reviewer") has developed both a timeline and a theory of the case. When these phone call assessments rely solely upon the work of the reviewer, they suffer from the latter's limited medical knowledge. The initial reviewer doesn't always see the forest, and the certifying caregiver predictably may bark up the wrong tree. This happens because although most reviewers can competently decipher handwriting and find data sheets in the record confirming actions taken, they don't always understand what the underlying thought processes of the treating physician were. Nuances, couched by the writer in phrases like, "pain out of proportion to the findings" or "PPP," may fail to alert the initial reviewer to the significance of the fact that the writer had an underlying belief that bowel ischemia was present, or that pulses were stated to be palpable at a time when an emboli had already occluded a limb (providing evidence that a thorough exam was not performed). The initial reviewer may fail to understand these phrases, but even if understood, may fail to recognize their significance in the malpractice action. Too often, reports by initial reviewers are peppered with parentheses, their contents beseeching the attorney to "find out from an expert what this means."

Alternatively, if the attorney has access to a physician willing to help injured, neglected patients and ignore the jeers of his or her peers, then the initial assessment acts as a template for the rest of the case. With the help of these enlightened medical caregivers, discovery becomes a more focused search for the medical office records of important ancillary medical care providers who can corroborate the proposed theory. Depositions are no longer a blind search, but instead become an opportunity to lock a defending caregiver into an explanation before there is an opportunity to concoct an alternate theory justifying his or her actions. The trick is in finding an enlightened physician who recognizes that helping a plaintiff's attorney is akin to helping a patient. To palliate the effects of iatrogenic injuries, fighting disease sometimes means fighting physicians. Only physicians willing to buck the establishment are willing to take this step.

Provided you are fortunate enough to find such an ideal case reviewer, what are the steps you should expect the reviewer to take in helping you to assess a case? In my practice, I like to be involved even as early as the initial patient intake. This helps to show the potential client that the attorney is serious in the review of the events leading to the injury. It helps me to dispel any plaintiff notions that a bad result necessarily equates with malpractice. It contributes to a client's respect for the firm handling the case.

Once the initial meeting of the attorney, client and medical reviewer takes place, a decision to obtain the records follows whenever a potentially negligent action is suspected. This frequently, but not always, happens. When it doesn't, bad cases are nipped in the bud at minimal expense. Otherwise, the pertinent medical records are obtained.

My careful evaluation of these medical records requires that I ignore any chronologies prepared by office staff. Sometimes, innocuous entries provide the most compelling cases. In one recent example, a woman suffered a complication of her pelvic surgery. Although the complication, (ARDS), is a known risk and cannot be predicted, in this case, while she was in the intensive care unit, seven days after hospital admission, an alcohol level was ordered. The suspicious circumstances surrounding this order led to the theory that a hospital cover-up of an inadvertent administration of medication had occurred. Predictably, the ordering of the alcohol level was never mentioned in the initial paralegal's review.

After preparing a chronology, I then analyze each action of every potential defendant. When a course of conduct is puzzling to me, I approach experts in the field or research the relevant issue in the medical library of a nearby university hospital. In so doing, I also develop relationships with experts who later may become testifying experts on the case. When the assessment is complete, I write an analysis. I explain the negligent action and the causative link to the various injuries suffered. After the attorney has had an opportunity to read the report, I present it in person, providing the opportunity for the attorney and any associates to fully understand what happened. This meeting of the minds assures that pleadings are artfully drawn.

I like to also participate in preparation for depositions, settlement conferences and in the trial itself. However, the success of each case is clearly most strongly related to the early preparation devoted to each case.

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Estimating the Value of a Plaintiff's Earnings Losses

By Harriet Zellner

I. Introduction

The economist's major task in connection with personal injury, wrongful death, medical malpractice or wrongful termination cases is, in general, to put a dollar value on the plaintiff's earnings losses. We may have additional estimation tasks in any given case: for example, estimating lost employment benefits, particularly retirement benefits, or estimating losses in home production. But since almost every case involves estimating the loss in earnings; since the magnitude of the earnings loss is often the most important factor in estimating the value of the other losses; and since, in most cases, earnings losses account for the most significant portion of the damage, it's best to begin our discussion with the techniques we use to estimate them.

To project the plaintiff's *net* loss in earnings, it's necessary—except in death cases or in injury cases involving total and permanent disability—to project two earnings streams. The first—the "but-for" stream—is an estimate of the earnings the plaintiff would have enjoyed over the rest of his or her work life but for the injuries sustained. The second—the "offset" stream—is an estimate of the earnings the plaintiff can now, post-injury, be expected to enjoy. Once we have projected these two streams, we find our lost-earnings estimate as the difference between them—that is, as "but-for" earnings minus "offset" earnings.

Most labor economists are—when functioning as professors and researchers—in broad agreement about the basic economic principles governing individual earnings over the life cycle and thus in broad agreement about the appropriate way to project future earnings. The literature on individuals' life-time earnings streams is well-developed and any recent text—one published in the last 20 years or so—is likely to cover the same material in much the same way.

However, the consensus in the classroom or university seminar does not translate into consensus in the courtroom. One will, in fact, find two quite distinct approaches to lost earnings estimation in the courtroom today. And the two approaches can, and often do, produce *materially* different damage estimates. In other words, the methodological differences are not only important to academics concerned with theoretical issues. They have great practical significance as well.

To summarize here the points that will be discussed in detail below, the two approaches yield different loss estimates because they differ with respect to the number of factors that are taken into account in the earnings projection. One—which I will refer to below as the "two-factor approach"—rests entirely on general historical trends in price and output per man hour. The other—the "three-factor approach"—incorporates life-cycle and other plaintiff-specific factors into the earnings projection. This approach requires a good deal more information than the two-factor approach, which has the advantage of simplicity, but it generally yields more accurate loss estimates. How much more accurate the three-factor approach is will vary from case to case, depending upon the characteristics of the plaintiff.

Before proceeding, let me note that I will focus in the following sections on the projection of "but-for" earnings. Although the same basic principles underlie projection of the "offset" stream, the fact that the plaintiff may not yet have obtained alternative employment creates several additional—and rather complex—estimation problems. For this reason, discussion of the "offset" earnings stream is best left to another article.

II. Projecting "But-For Earnings" Using the Three-Factor Approach

A. Inflation

I have occasionally been asked why we can't simplify the task of earnings projection by assuming that the plaintiff's earnings would have been about the same in coming years as they were in past years. While such an approach—which has the considerable advantage of not requiring an expert—may sound appealing, it is, in most cases, completely inappropriate.

To see why, let's look at Table 1, which shows us the average annual earnings of American men with a college degree at two points in time: first, in 1981 and then 20 years later, in 2001. As shown in the table, college graduates in 2001 earned, on average, double—in fact nearly triple—the $30,593 they earned two decades earlier. Calculating the average annual rate of growth over the period, we find that it was equal to 4.9% per year. Other education groups enjoyed a similar rate of growth in average earnings over the period.

Table 1

Growth in the Earnings of American Men with Four or More Years of College Who Worked Full-Time/Year-Round

1981 to 2001

Annual Earnings		Average Annual Increase In Earnings
In 1981	**In 2001**	**1981 to 2001**
$30,593	$80,170	4.9%

What factors underlie the observed growth in the average earnings of American workers over these two decades? The answer to this question is vital for our purposes because there is no reason to expect that these factors will cease to operate in future. And, as we are projecting the plaintiff's future, we need to take their future operation into account.

Economists distinguish two major factors underlying the increases shown in Table 1. One of these is, of course, inflation. According to the U.S. Bureau of Labor Statistics, the average annual rate of inflation between 1981 and 2001 was equal to 3.4% per year. Economic theory predicts that—in competitive labor markets such as ours—increases in the price level lead to increases in the average wage. So—on this account alone—we would expect to observe an average rate of increase in wages equal to 3.4% per year over the period.

B. Increases in Average Output Per Man Hour

As shown in Table 1, however, the annual rate of increase in earnings over the period averaged 4.9% per year, fully 1.5 percentage points above 3.4%. This observation brings us to the second factor underlying the increase in average earnings shown in the table: increasing labor "productivity," measured as output per man-hour. Workers in 2001, using more sophisticated equipment than was available 20 years earlier—more powerful computers and communications devices, for example—were able to produce more per man-hour than was possible in 1981 and saw their earnings rise, on average, by 1.5% per year over the period on this account.

To account adequately for the effects of inflation and increases in output per man-hour on plaintiff's future earnings, we require a reasonable estimate of expected price and productivity increases over his or her remaining work life. We generally rely on history for these estimates. That is, if the plaintiff can be expected to work for another 20 years, we determine the average annual rate at which prices and output per man-hour increased over the *past* 20 years, and use these historical rates for the purpose of projecting future earnings. If the plaintiff can be expected to remain in the labor force longer—say, for 30 years—we will base our earnings projection on the average annual rate of inflation and of productivity increase over the past 30 years. And, if the plaintiff's work life expectancy is shorter—say, 15 years—we'll go back 15 years in time for the relevant rates of change.

C. Life-Cycle Factors

1. What We See in the Data

We have now seen how general economic factors—price inflation and increasing average output per man-hour—determine the rate at which the average wage grows over time. And we have seen how we can estimate future rates of inflation and of productivity increase to use in projecting the plaintiff's future earnings. However, the economist's job is not finished—in fact it is only just beginning—when this task is completed. After all, we are asked to project the future earnings stream—not of the *average* worker—but of the very particular worker who happens to be the plaintiff. We must now, therefore, take account of additional factors—specific to the plaintiff—that can be expected to result in a rate of earnings growth that is above or below the workforce average.

Economic research over the past 40 years or so has shown that the rate at which an individual's earnings grow from year to year depends on his or her age as well as on the general factors discussed above. An individual's real earnings increase most rapidly in the early years of the work life. While increases continue thereafter, the rate of growth in earnings falls as individuals move into the middle years of their work lives. Finally, real earnings "flatten out" and may ultimately decrease towards the end of the work life. We can see these "life-cycle" effects in the Table 1 data, once we break the data down by age cohort. I do this in Table 2.

Table 2

Breaking Down the Earnings Data Shown in Table 1 By Individual Age Cohort

1981 to 2001

Age In 1981	Age In 2001	Average Annual Increase In Earnings Over The Period
18 to 24	40 to 44	9.2%
25 to 34	45 to 54	6.8%
35 to 44	55 to 64	5.2%
45 to 54	65 to 74	4.0%

Let's look at what happened to the earnings of the *younger* as compared to the *older* college graduates shown in Table 1 as they aged over the 1981-to-2001 period. The youngest age group studied were 18 to 24 at the start of the period. When we look at these men 20 years later, we find that their earnings had grown over the period at an average annual rate of 9.2%.

We see a very different picture when we look at the other end of the age spectrum. As shown in the last row of the table, those who were in the 45-to-54 age group at the start of the period saw their earnings grow at a much lower rate: only 4% per year, on average, as they aged into their 60s and 70s. And, the intermediate age groups enjoyed rates of earnings growth intermediate between these two extremes.

In other words, although all the men in our table lived through the same inflation rates between 1981 and 2001 and the same rate of increase in average output per man hour, they enjoyed very different rates of growth in earnings over the period. These differences are explained by life-cycle effects.

2. Why We See Life-Cycle Effects

Most labor economists attribute the patterns we see in Table 2 to the way people invest in their own personal productivity over the life cycle, initially through formal education, and later through various forms of training on the job. Utilizing the "human capital" model of earnings growth—developed initially in the late 50s and early 60s—we bring a theoretical framework to the analysis of human behavior, and its consequences, that closely resembles the approach business economists take to studying investments in physical capital.

The human capital model differs, however, from the physical capital model in several important ways. First, we assume, quite reasonably for the present, that a human being is mortal and cannot be replicated—skills as well as character intact—by placing an order with one's equipment supplier. Second, we assume that investments in human capital are personal in the sense that no market exists in which shares of a particular person's degrees, licenses or certificates can be efficiently traded. This assumption too appears—at least for the present—quite reasonable. After all, a machine cannot (yet) decide to step off the assembly line and start a new life, whereas a person might do so. Investing resources in someone else's human capital is thus fairly risky and the willingness to do so is, therefore, probably limited to parents and, later in life, to spouses. Third, we assume that the labor market is competitive, rewarding greater skill with greater compensation.

If these assumptions are correct, we would expect to see the time devoted to human capital investment declining over the work life. Since the worker is mortal, each year that passes reduces the length of time over which he or she can enjoy the returns from further human capital investments. A training course in some relevant area that might have looked appealing at age 30, will look less profitable at age 60. Not only does the individual see a shorter future period of returns, but the "opportunity" cost—the value of the hours the course requires—is now higher. For example, the value—in terms of forgone billings—of a young associate's time is much lower than the value of a senior partner's time. A day's training course is, in this sense, more expensive for the senior person than for the beginner.

With the "opportunity" cost of further training increasing over the work life and the total expected return decreasing, it is not surprising that a person makes fewer investments in new skills and abilities as he or she ages. And—as the rate of new investment in human capital falls—the rate at which his or her earnings grow can be expected to fall with it.

III. Projecting Earnings Using the Two-Factor Approach

The "two-factor approach" completely ignores life-cycle effects in projecting the plaintiff's future earnings. The economist using this approach seeks a single rate—invariant over the plaintiff's remaining work life—at which to project out his or her future earnings. This rate will reflect two factors. The first is the expected rate of future inflation. The second is the rate at which general technological advances can be expected to increase average output per man-hour. Both rates will be based on general historical trends in price and output per man-hour. Their sum will be used to project plaintiff's future earnings stream. With no account taken of life-cycle effects, the "two-factor approach" can be expected to yield a less accurate projection.

IV. In Conclusion

The "three-factor approach" is generally the appropriate approach to use in projecting the plaintiff's "but-for" earnings stream. The "two-factor approach" is, however, quite common in the courts today. The approach is often defended as a simple way to obtain a reasonably good approximation to the loss estimate that application of the "three-factor approach" would yield. In particular, it is argued that—although the single rate used to project out the plaintiff's earnings may underestimate growth in the early years of the work life—it will also overestimate growth in the later years, so that these estimation errors more or less cancel each other out. In cases involving relatively young plaintiffs for whom we are projecting over the entire work life, some such cancelling out will indeed occur. And, if for some reason, simplicity of technique is at least as, or more important than, accuracy, the "cancelling-out" argument must be considered.

However, in most cases we doing a projection for a plaintiff in his or her 40s or 50s so that no cancelling out can occur: only errors of over-estimation will enter the "two-factor approach" loss estimate. In these cases, the "three-factor approach" is clearly the appropriate choice.

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For that we say, *thank you.*

The NYSBA leadership and staff extend thanks to our more than 72,000 members — attorneys, judges and law students alike — for their membership support in 2004.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Kenneth G. Standard
President

NYSBA

Patricia K. Bucklin
Executive Director

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Scenes from the Torts, Insurance & Compensation Law Section

April Meeting

Shea Stadium • New York City

Participants assemble at Shea Stadium with then NYSBA President, A. Thomas Levin

Executive Committee meets at Shea Stadium

Eileen Buholtz, Section Chair, officiates at the meeting

A. Thomas Levin, 2003-2004 NYSBA President