

TICL eNews

The official newsletter of the Torts,
Insurance and Compensation Law Section

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**January 2012
Annual Meeting Issue**

Letter from the Section Chair, Thomas J. Maroney

The NYSBA Annual Meeting is just around the corner, January 23 – 28, 2012 at the Hilton New York, New York City. This year's NYSBA Meeting promises to be the best ever for the Torts, Insurance and Compensation Law Section.

Our thanks go out to TICL **Vice Chair Jean Gerbini** and **TICL Annual Meeting Co-Chairs Mirna Martinez and Richard Kokel** for coordinating all that is required for a well run Annual Meeting.

TICL will hold its Joint Dinner with the Trial Lawyers Section Wednesday, January 25TH at Cipriani's Wall Street. On January 26TH the TICL Section and the Trial Lawyers Section will each present two panels for a combined 7 credit hours in Professional Practice. You will find each panel interesting, informative and useful in your practice. For Dinner tickets, register for the CLE and for further information, email Lori Nicoll at the NYSBA at Lnicoll@NYSBA.ORG



Thomas J. Maroney

The first TICL Panel is our Keynote Panel, ***Strength by Association – Recruitment and Retention of the Diverse Associate and Partner***. That panel will be the third of TICL's ***Strength by Association Series*** which is a continuing TICL conversation on diversity and mentoring that started at the TICL Summer Meeting in Bar Harbor, Maine, this past August.

The Keynote Panel is chaired by TICL Executive Committee Members **Mirna Martinez Santiago** and **Ken Krajewski**. We will hear from prominent attorneys leading the way to strengthen our profession through the power of diversity; **Mercedes Colwin**, Managing Partner at Gordon Rees, and frequent commentator for Fox News; **Miles Afsharnik**, Legal Director at Wells Fargo Bank; **Richard Lau**, Managing Partner of Richard Lau Associates; along with TICL Executive Committee Members **Paul Jones**, Phillips Lytle LLP and **Matthew "Jim" Kelly** of Roemer Wallens Gold & Mineaux LLP.

The second TICL panel is our Blockbuster Panel, ***Exceeding Every Expectation – The Art of Persuasion – Communication with the Court, Jury and your Adversary***. That panel will be moderated by **Robert Adams**, **NAM Mediator** and former Sr. VP Risk Management for Tishman Construction. The panel will feature some of the most effective communicators in litigation today; TICL Executive Committee Members **Richard Dawson** of Conway, Farrell, Curtin & Kelly, P.C. and **Jeffery Block** of Block O'Toole & Murphy; along with **Chris McGrath** of Sullivan Papain Block McGrath & Cannavo P.C. and **Evan Torgan** of Torgan & Cooper.

The Trial Lawyers Section will present ***Hot Topics in Civil Litigation*** with a panel by **Cathy Fleming** of Hodgson Russ LLP, **Rosevelie Marquez Morales** of Harris Beach PLLC and **Joshua Cohen** of Garson DeCorato R. Cohen LLP. The all day CLE will conclude with ***How to Win Your Client's Case Including the Art of Successful Negotiation***, by **Eleni Coffinas** of Sullivan Papain Block McGrath & Cannavo P.C. and **David Horowitz** of Ressler & Ressler.

The Torts, Insurance and Compensation Law Section will honor the following members for their outstanding

contributions to the TICL Section at the Dinner January 25TH at Cipriani Wall Street:

Doug Hayden,
John E. Leach Memorial Award

Mirna Santiago and Joanna Young,
Outstanding Committee Co-Chairs, TICL Diversity Committee

Sharon Stern Gerstman and Paul Jones,
Outstanding District Representatives, Eighth Judicial District

The TICL Diversity Team,
TICL Chair Outstanding Service Award

The TICL Diversity Team has worked tirelessly with outreach to law schools and diversity receptions throughout New York State. The TICL Diversity Team planned and held the first ever **TICL Open Executive Committee Meeting** and **Diversity Networking Reception** this past November in Brooklyn.

The TICL Section thanks team members **Mirna Santiago, Joanna Young, JP Delaney, Rod Coyne, Lawton Squires, Hon. George Silver, Jean Gerbini** and **Carlos Calderón** for their time and effort in exceeding every expectation of the NYSBA Section Diversity Challenge made to the NYSBA Practice Sections by NYSBA President Vincent Doyle.

Not a member of the TICL Section? Have you renewed your NYSBA membership? Now's the time to put a little TICL in your practice for 2012.

Send me an email at tmaroney@maroneyoconnorllp.com or email Megan O'Toole, Manager Membership Services at motoole@nysba.org and we'll get you signed up.

Come lead with the NYSBA and TICL today.

Thomas J. Maroney, Chair
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Message from the Annual Meeting Co-Chairs, Mirna M. Santiago and Richard W. Kokel

We would like to personally welcome you to the Torts, Insurance and Compensation Law (TICL) Section's Annual Meeting. The TICL Section is growing, but still continues to remain adaptable and responsive to the needs of our members. We are motivated and committed to be on the cutting edge of the legal profession. This is an exciting time for TICL as we move forward into the New Year.

The Section has put together an excellent schedule of events, seminars and receptions, including a fine MCLE program. We believe that the Annual Meeting will provide interesting, challenging and educational experiences for each of you over the days that you can spend here at the Hilton Hotel and the off-site venues.

It is our sincere hope that you enjoy all of the various presentations, and that your attendance results in a rewarding experience. To the



organizers, chairs, speakers and New York State Bar Association staff, who have made this all

Mirna Santiago

Richard Kokel

possible, we express our deepest gratitude. We especially want to thank our Section Chair, Tom Maroney.

Most importantly, we thank each and every one of you for attending this event and for supporting the TICL Section.

Mirna M. Santiago, of White Fleischner & Fino, LLP in White Plains, is Co-Chair of the Diversity Committee. Richard W. Kokel, of New York, is Co-Chair of the Membership Committee.



Judges Silver and Douglas react to comments from the floor at November 2011 program in Brooklyn.



NYSBA President-Elect Seymour James at the November 2011 program.

TICL Rises to the NYSBA Section Diversity Challenge

The following report was submitted to the President, Vincent Doyle, on January 6, 2012.

*TICL Diversity Challenge Status Report
January 6, 2012*

In our previously submitted Diversity Challenge Plan, the Torts, Insurance and Compensation Law (TICL) Section articulated a metric to measure the success of the Plan. Specifically, we indicated that there would be a “dramatic” increase in minority and diverse speakers at all TICL events and CLE panels. With all modesty, we can honestly say that we have surpassed our highest expectation in that area:

2011 Diversity Reception, Open Meeting and Diversity Seminar.



Tom Maroney (TICL Section Chair) and Lawton Squires (TICL Committee Chair, Laws and Practices) with attendees at the TICL Open Executive Committee Meeting



Strength By Association: November 17 CLE at the Brooklyn Sheraton

NYSBA President-Elect Seymour W. James, Jr.
NYSBA TICL Chair Tom Maroney
NYSBA Executive Committee Member Sherry Levin Wallach
NYSBA Vice President Manny Romero

At the TICL Section Summer 2011 Meeting held in Bar Harbor, Maine, the Executive Committee members unanimously agreed to utilize the funds allotted to its TICL Executive Committee Fall Meeting and instead hold a “Diversity Reception”.

In November 2011, the TICL Executive Committee brought that Diversity Reception to fruition. The Reception was held at the Sheraton Hotel in Brooklyn Heights on Thursday, November 17, 2011. The reception was preceded by an open TICL Executive Committee meeting, at which all attendees were allowed to participate. Following the meeting, but prior to the reception, was an interactive symposium led by minority jurists, Hon. Lucindo Suarez (Supreme Court, Bronx County), Hon. George Silver (Supreme Court, New York County), Hon. Laura Douglas (Supreme Court, Bronx County) and Hon. Gloria Dabiri (Supreme Court, Kings County), and entitled, “Strength by Association – Mentoring and the Power of Diversity.” The lively—and often movingly personal—discussion was moderated by TICL’s Co-Chairs of Diversity, Mirna Martinez Santiago and Joanna Young. Carlos Calderón, a member of TICL’s Diversity Team, lent support as a floor moderator. One and one-half hours of free Mandatory Continuing Legal Education (ethics) credits were offered in connection with the symposium. We should note that the entire panel for this event – including the moderators – consisted of diverse individuals.

One recurrent theme at the event was the importance of creating a personal “board of directors” to help guide an attorney on his or her path to success in the legal profession. We were gratified that a number of minority law students and newly-admitted attorneys used this opportunity to recruit leaders of our Section into their personal “boards,” and we look forward to an ongoing relationship with them.



The TICL Diversity Team (Left to Right) Carlos Calderón, Jean Gerbini, Joanna Young, Tom Maroney, Mirna Martinez Santiago, Roderick Coyne, JP Delaney and Lawton Squires.



Judge Lucindo Suarez and Judge George Silver

Upcoming Events

The “Strength by Association” Series is a continuing TICL conversation on diversity and mentoring that started in at our Summer Meeting in Bar Harbor, Maine, in August 2011. The Strength by Association Series will continue that important conversation at the January 2012 NYSBA Annual Meeting with a discussion titled “Strength by Association – Recruitment and Retention of the Diverse Associate and Partner.” The panel is chaired by TICL executive committee members Mirna Martinez Santiago and Ken Krajewski. The panel consists of various prominent attorneys, but most notably Mercedes Colwin, Managing Partner at Gordon Rees and frequent commentator for Fox News, who also happens to be a Latina. We were also fortunate enough to secure the appearance of attorney Miles Afsharnik, Legal Director at Wells Fargo Bank, who is prepared to speak to the attendees about the influence of his gay, Middle-Eastern background upon his legal career.

We expect the program to be a rousing success.

The TICL Diversity Team

Although TICL has had a Diversity Section for many years now (led by Co-Chairs Joanna Young and Mirna Martinez Santiago), we recently fleshed out our Diversity Team to assist with event planning and CLEs. The Team is comprised

of TICL Executive Committee Members (a diverse group itself): Tom Maroney; Jean Gerbini; Lawton Squires; Carlos Calderón; Hon. George Silver; Roderick Coyne; Mirna Martinez Santiago; Joanna Young and JP Delaney.

The inaugural event for the Team was the highly successful Diversity Reception on November 17, 2011.



Judge Douglas and attendee Caitlin Goetz at Diversity Reception November 17, 2011.



Moderator Mirna Martinez Santiago and Judge Gloria Dabiri

Regional Drives toward Diversity of Membership – the “TICL 2011/3000 Project”

Throughout 2011, the TICL Section continued to make efforts to diversify its membership through regionally-based membership recruitment events and through offering free Section membership in 2011 to NYSBA members that become new Section members. The TICL 2011/3000 Project has, as one of its goals, outreach to bring TICL Section membership to 3000 in these challenging economic times.

To that end, a number of recruitment events were held. In June, 2011, the Section held a wine tasting in Albany New York, to which NYSBA members in a broadly-defined region, including the Capital District, were invited. Outreach specifically targeted NYSBA members who did not belong to the Section already, and who self-identified themselves as minority/diverse.

On October 26, 2011, the TICL Section, in collaboration with the Minority Bar Association of Western New York, held a reception in Buffalo honoring NYSBA President, Vincent Doyle III. Special efforts were expended to invite non-Section members of diverse backgrounds, hailing from the western region of the State. The reception was organized by Sharon Gerstman, a member of the TICL Executive Committee, as well as the NYSBA Executive Committee, and Paul Jones, also a member of the TICL Executive Committee. (Sharon and Paul will be honored at the Annual Meeting this year, partly for their efforts to arrange the Buffalo reception with the Minority Bar Association of Western New York).

In addition, TICL would like to thank Megan O'Toole and her staff for their unwavering dedication and support in bringing the Reception together.

Law Student Events

As part of the Section's outreach plan, representatives of the Section attended a number of Law School events in 2011 in an effort to recruit our future diverse leaders. Section leaders attended a law student reception at Albany Law School in September. Students expressing an interest in the Section were put directly in touch with the Section's Diversity Chairs and Law Journal Editor, and invited to network in person at the TICL Section's “Law School for Insurance Professionals.”

The Section participated in outreach to diverse law students at NYSBA events in Brooklyn Law School, New York Law School, Cardozo School of Law, SUNY Buffalo School of Law, Syracuse University School of Law and Pace University School of Law in October and November.

Tim Fennell, of the Executive Committee, spoke on behalf of the NYSBA at the Syracuse University School of Law event. As previously noted, Tim has been instrumental in leading TICL's outreach to young lawyers and law students. In addition to speaking at law schools, Tim participates on the faculty of the Young Lawyers Trial Academy and TICL is a proud sponsor of that event every year.

Upstate Membership Chair Robert Coughlin and Downstate Membership Chair Rich Kokel served as the coordinators for the October – November law school events.

Of note is that for those events occurring prior to the Diversity Reception on November 17, 2011, the attending

Executive Committee members were directed to extend invitations to the open meeting, CLE and Reception to all interested students. As a result, numerous law students attended the event and were able to network with the panelists and other attendees.

Collaboration with Minority Bar Associations.

Planning for the TICL Section's 2012 Summer Meeting in Montréal, Quebec (at an accessible and inexpensive location) includes collaboration with the leaders of New York's minority/ethnic bar associations, women's bar associations and LGBT bar associations. Outreach has already begun, with invitations to help plan a panel addressing diversity in the bar. Leaders of the Quebec and Montreal Bar Associations will also be asked to collaborate with the TICL Section.

Conclusion

TICL has tackled the Diversity Challenge set forth by the New York State Bar Association with gusto in 2011. We submit that we have not only met the metrics we set for ourselves, but exceeded our own expectations. We look forward to continued success in 2012, beginning with Part 3 of the Mentoring for Diversity Series that will take place at the Annual Meeting.

Respectfully submitted,

Thomas Maroney, Chair, TICL Section

Jean Gerbini, Vice Chair

Mirna M. Santiago, Chair, Diversity Committee

A Greater Voice: TICL Section Supports NYSBA By-Laws Amendment

The Executive Committee of the TICL Section has expressed its support for a proposed amendment to the Association's Bylaws, under which the 22 Sections of the Association would be given two at-large representatives on the Association's Executive Committee. The proposal will be up for a vote at the Annual Meeting this month. The proposed amendment will give the sections a needed voice in matters directly affecting the sections' interests and operations, including, in particular, decisions affecting the allocation of staff resources and revenue.

At the November meeting of the TICL Section's Executive Committee, the Committee expressed strong support for the proposed Bylaws amendment, provided that a concrete procedure should be put in place that fairly reflects the choices of the sections themselves and ensures balanced representation over time. The current proposal of the Section Delegates Caucus of the Association's House of Delegates addresses the concerns: The proposal offers a concrete plan for the selection of nominees by the Section Delegates of the House of Delegates, no section may have more than one representative on the Section Nominating Committee, and a section representative chosen through this process cannot be from the same section as any existing Section Executive Committee member or immediate past Section Executive Committee member.

The Section's Delegates to the NYSBA House of Delegates in 2011 have been Brendan F. Baynes (Section Treasurer), of The Baynes Law Firm, PLLC, Ravena, Gary A. Cusano, the Law Office of Gary A. Cusano PC, Yorktown Heights (Past Section Chair), and Hon. Douglas J. Hayden of Wright Risk Management (Past Section Chair).

YOUR VOTE WILL COUNT:

We strongly urge each TICL Section Member to attend the NYSBA Annual Meeting at 8:45 a.m. on January 27, 2012 at the Trianon and Petit Ballrooms to vote in favor of the proposed amendment to the Association By-Laws to allow Section delegates to select two members of the Association's Executive Committee.

Any NYSBA member may vote. No proxies are permitted.

Save the Date: Montréal Meeting

August 16-19, 2012

Montréal Intercontinental Hotel

The Section's annual summer meeting will be in exotic yet accessible Montreal, Quebec.

- Join colleagues in the Bar and Bench for practical CLE and networking.
- Engage in the colloquy on diversity in the legal profession.
- Learn to navigate domestic and trans-border litigation.
- Bring friends and family for a great vacation in a superb but reasonably-priced setting.
- Surround yourself with history, art, gourmet food and entertainment for all ages.



A view of the Old Port of Montreal, © Montreal Tourisme Stephan Poulin (used with permission).

Third and Fourth Districts

The Third and Fourth Districts participated in the wine tasting reception held in Albany in June as part of the regional "2011/3000" membership drive and diversity initiative. The gathering attracted a diverse group of newly-admitted and experienced attorneys, as well as members of the judiciary. The Third and Fourth Districts also held a CLE and networking event in Lake Placid in August, in collaboration with the Essex County Bar Association. A group of Fourth District judges were in attendance.

The Third District Representatives for 2011 have been William N. Cloonan of Cook Netter Cloonan Kurtz & Murphy PC in Kingston, and Matthew J. Kelly of Roemer Wallens Gold & Mineaux LLP in Albany. The Fourth District Representatives for 2011 have been Edward B. Flink of Flink Smith LLC in Albany and Claudia A. Ryan of Towne, Ryan & Partners, PC in Albany.

Eighth District

The Eighth District participated in the regional "Meet the President" diversity and membership event held in Buffalo in October. The event was co-sponsored by the Minority Bar Association of Western New York.

The 2011 Eighth District Representatives are Sharon Stern Gerstman of Magavern Magavern Grimm LLP in Buffalo and Paul F. Jones of Phillips Lytle LLP in Buffalo.

Thirteenth District

In June 2011 the Thirteenth District of the Section held a reception at the Staaten Catering Hall to promote the Bar Harbor Summer Meeting. Administrative Judge Philip Minardo, court attorneys for Hon. Fusco and Hon. McMahon, several members of the TICL Executive Committee, and several members of the Richmond County Bar Association joined members of the 13th District TICL Section at the reception. The TICL Lobster also made an appearance. [Note: The Lobster, a mylar balloon, was the official mascot of the summer meeting in Bar Harbor in 2011.]

A priority of the 13th District TICL Section is to help ensure the smooth transition from former Richmond County Administrative Judge Philip Minardo to the newly appointed Administrative Judge, Hon. Judith McMahon. Hon. Minardo was required to step down as Administrative Judge after reaching the mandatory retirement age of 70 last year. Hon. McMahon recently told the local newspaper, the Staten Island Advance, that she will personally conference all civil cases headed for jury selection, and will see if parties will consider summary jury trials for cases that cannot be settled. Hon. Minardo will continue to serve as a state Supreme Court Justice because he has received certification for an additional two-year term.

The 13th District TICL Section also looks forward to the completion of the new Richmond County Court complex, just up the street from the existing building. Upon completion, the new building will house criminal and civil terms of the state Supreme Court, as well as house the Central Jury Assembly Room. This should be a vast improvement, as currently, Richmond County Supreme Court justices sit in three different buildings - 10 Richmond Terrace, 18 Richmond Terrace and 130 Stuyvesant Place.

The 13th District TICL Section is also looking forward to the Montreal Summer Meeting in August 2012. We will consider a similar promotion for Montreal 2012, possibly at a French-themed restaurant on Staten Island (such as Chez Laurent, Bayou or Zest) or at the Staten Island Skating Pavilion to tie in the Quebecois affinity for ice skating and ice hockey.

2011 Thirteenth District Representatives are Ronald Balter of Caruso, Spillane, Leighton, Contrastano, Ulaner & Savino in New York and Michael P. O'Brien of O'Brien & Jacobs, PLLC in New York.

Alternative Dispute Resolution Committee

The ADR Committee recently updated its webpage with important ADR Committee resource information. The Committee Chair has also reached out to a number of well-known mediators and arbitrators to engage them in the work of the Section, participate in our CLE programs and consider sponsorship opportunities. ADR professional Dan Jansen previously spoke at the Section's meeting in Disney world, and his company and others have panels of former judges who are attractive headliners for the Section's programs. In 2012, the Committee anticipates submitting an article to the TICL Journal and coordinating with other sections on a judicial reception.

Brian Rayhill, Chair of the ADR Committee, is partner in the Elmsford law firm of Epstein & Rayhill.

Class Action Committee

The Class Action Committee prepared and published its annual review of 2010 New York State class actions last January in the *New York Law Journal*, and has submitted to the NYLJ for publication its review of 2011 NYS class actions.

Hon. Thomas A. Dickerson, Associate Justice, Appellate Division, Second Department, is Chair of the Class Action Committee.

Continuing Legal Education Committee

The CLE Committee has been busy with numerous programs offered throughout the last several months. Worker's Compensation update was held in September and Law School for Insurance Professionals took place in September and October. The Law School for Insurance Professionals Program had an aggregate attendance of 198 people. We will need to discuss the scheduling of the program for the upcoming year.

Several programs are scheduled for Spring 2012 including a medical malpractice update in March, Tough Issues in Handling a Plaintiff's Personal Injury case scheduled for April, a Motor Vehicle Accident program, a Construction Site Accident program and we are in the process of scheduling a full day deposition program as well as the annual Advanced Insurance Coverage program which will be held in May/June. Basic Torts and Insurance Practice update is also scheduled at five venues in June.

Co-Chairs of the Continuing Legal Education Committee are Elizabeth A. Fitzpatrick of Lewis Johns Avallone Aviles LLP in Melville, and John H. Snyder of Gitto & Niefer LLP in New Hartford.

Insurance Coverage Committee

The Insurance Coverage Committee is pleased to report the organization of the Advanced Coverage Seminar for this Spring. We welcome topics and suggestions. It promises to be an educational experience and interesting seminar. We are working on our Spring Edition of the Newsletter. We invite everyone to participate. Tell us about your victories and legal battles. We will publish the decision or a summary for our members to hear about. Members are always welcomed to join and communicate our List-Serve as a way to communicate with each other, ask questions and share ideas.

Insurance Coverage Committee Chair, Johanna M. Roberto, is with the firm of Goldberg Segalla LLP in Garden City.

Products Liability Committee

The Committee has three distinct goals for 2012. The first is to secure a Vice Chair that continues to enhance and

advance the sections diversity challenge. Secondly, the Committee intends to have an article published in the journal by a committee member; preferably article that follows up on the New York State Bar's 2010 Task Force on New York Law in International Matters (published June 25, 2010). Specifically, the Committee seeks an article that focuses on the continued trend and the challenges that exist, to ensure that New York's courts retain and expand their role as the venue of choice not only of US manufacturers but of those who manufacture throughout the international communities. Lastly, the Committee co-chaired a very successful function designed to develop membership that was held in Queens, and would like to see another function be planned and held in the Nassau County area to draw lawyers from the other boroughs, given the fact that many who work in Manhattan, Brooklyn, the Bronx & Queens reside in Nassau. The event may also draw some of the Suffolk County attorneys as well.

Dennis J. Brady, Chair of the Products Liability Committee, is with Mackay Wrynn & Brady LLP, Douglaston.

Professional Liability Committee

The Committee has three distinct goals for 2012. The first is to secure a Vice Chair that continues to enhance and advance the sections diversity challenge. Secondly, the Committee intends to have an article published in the journal by a committee member; preferably article that follows up on the New York State Bar's 2010 Task Force on New York Law in International Matters (published June 25, 2010). Specifically, the Committee seeks an article that focuses on the continued trend and the challenges that exist, to ensure that New York's courts retain and expand their role as the venue of choice not only of US manufacturers but of those who manufacture throughout the international communities. Lastly, the Committee co-chaired a very successful function designed to develop membership that was held in Queens, and would like to see another function be planned and held in the Nassau County area to draw lawyers from the other boroughs, given the fact that many who work in Manhattan, Brooklyn, the Bronx & Queens reside in Nassau. The event may also draw some of the Suffolk County attorneys as well.

Professional Liability Committee Chair, Roderick J. Coyne, is with McMahon, Martine & Gallagher, LLP in Brooklyn.

Bar Harbor Meeting, 2011

A few treasured memories from the Section's summer meeting in Bar Harbor, Maine, August 2011: Scintillating conversation with colleagues in the Bar and Bench, timely professional education and a warm welcome for friends and family.



NYSBA President Vincent Doyle with Section members and families at Bar Harbor, August 2011.



Section Chair Tom Maroney and NYSBA President Vincent Doyle with Former U.S. Senator George J. Mitchell at Bar Harbor, August 2011.



Mirna Santiago addresses a panel presentation at Bar Harbor, August 2011 with TICL Section Immediate Past Chair Laurie Giordano; John Fixter, Travelers Insurance and Deborah Boucher, Nationwide Insurance.



Sightseeing in Acadia National Park, Bar Harbor, Maine. A great day was had by all.

The Journal—Request for Submissions

Get published this year. We are always interested in articles, particularly on new important cases in the tort and insurance fields. Please contact Paul S. Edelman, pedelman@kreindler.com, or David A. Glazer, dglazer@shaferglazer.com. Your name and city of practice should appear under the title. E mail your submission or put it on a disc.

Cases of Interest

By John J. McDonough III and Vincent P. Pozzuto

Labor Law: Defendants' Verdict on Labor Law §240 Upheld in *Ramirez v. Willow Ridge Country Club, Inc.*, 2011 N.Y. Slip Op. 03714 (1st Dept. 2011)

In a Labor Law §240 case, during trial, plaintiff testified that while removing wooden posts from a deck with a crow bar, he fell off of the deck through a space where a railing had been removed. In contrast, plaintiff's foreman testified that the plaintiff's accident occurred while plaintiff was straddling between an A-Frame ladder leaning against the deck railing and an extension ladder affixed to the wall of the building, and that plaintiff was pulling a gutter down at the time. According to the foreman, he admonished plaintiff to stop, but the gutter gave way, causing plaintiff to lose his balance and fall to the ground below. The jury found that defendants had violated Labor Law §240(1), but that the violation was not a substantial factor in causing the accident. Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. On appeal, the Appellate Division found that a fair inference is that the jury determined that a statutory violation existed with respect to the guardrail of the deck, but that it accepted the foreman's version of the event and found that the violation was not a proximate cause of the accident. The Court further held that the trial court judge properly charged the jury that an inference could be drawn from plaintiff's refusal to waive his attorney-client privilege and allow a former paralegal at the firm that represented him in his Worker's Compensation case to testify. The Court held that it is now established that in civil proceedings an inference may be drawn against the witness because of his failure to testify or because he exercises his privilege to prevent another from testifying, whether the privilege is constitutional or statutory. Finally, the Court held that plaintiff's counsel could not use the foreman's deposition to cross-examine him as plaintiff could not establish that the deposition was sent to the witness for his review, pursuant to CPLR §3116.

Products Liability: Plaintiffs' Testimony Regarding Alleged Manufacturer of Product was Insufficient for Purposes of Product Identification; Plaintiff's Expert Affidavit was Insufficient to Defeat Motion for Summary Judgment: *Spiconardi v. Macy's East, Inc.*, 2011 W.L. 1364285 (1st Dept. 2011)

Plaintiff was injured when a shirt she was wearing caught fire as she was cooking. She brought an action against Macy's and Liz Claiborne, Inc., the alleged seller and manufacturer of the shirt. The Court held that Liz Claiborne demonstrated that the garment at issue was not contained in any of Liz Claiborne's "line books" during the relevant time period, nor was the garment contained in Fabric Utilization Reports which showed all garments manufactured and

shipped to the store where the garment was allegedly bought. The Court held that the Fabric Utilization Report could be considered on the motion for summary judgment, as it was not an existing business record subject to the motion court's discovery orders, but rather was a document created for litigation. The Court held that plaintiff failed to raise a triable issue of fact on the product identification issue, as subjective statements about where a product was purchased are not sufficient to create triable issues of fact where there is objective proof that a defendant did not sell the allegedly defective product. The Court further held that in any event, because defendant's expert tested an exemplar of the garment and found that both the "ignite time" and "burn time" met or exceed federal regulations, defendant's satisfied their burden on a motion for summary judgment. The Court found that conclusory allegations raised by plaintiff's expert, absent evidence that the product violated other relevant industry standards or accepted practices, or statistics showing the frequency of injuries arising out of the use of the product, was insufficient to create issues of fact warranting the denial of the motion.

John McDonough and Vincent Pozzuto are Co-Chairs of the Newsletter Committee. Both are members of the law firm of Cozen O'Connor in New York.

Newsletter Co-Chairs: John McDonough and Vincent Pozzuto

Go to www.nysba.org for a complete listing of association events and web resources.