



NEW YORK STATE BAR ASSOCIATION

TICL eNews

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

Section: Events | Newsletter | Journal | Committees | Blog

Newsletter contact: Jean F. Gerbini, Jgerbini@woh.com

May/June 2012

Letter from the Section Chair, Jean F. Gerbini

Think of the Torts, Insurance and Compensation Law Section as a career toolbox. To perfect our craft, the Section offers critical CLE, substantive electronic debate and scholarship in the *TICL Journal*. To provide exposure to key decision makers, the judiciary and potential clients, the Section organizes networking events at the Section, Division, Region and District levels and at the unique Law School for Claims Professionals. In 2012, the Section adds another tool to the box: Active mentoring. To get ahead, a lawyer needs mentors—a “personal board of directors,” as the Section’s Diversity Committee Co-Chair, **Mirna Santiago** puts it.

So we’re working to provide the best mentors we can. At our 2012 Summer Section Meeting at the Montreal Intercontinental, August 16-19, attendees will hone their skills as mentors and “mentees” at a workshop facilitated by members of the Bar and Bench and in networking activities throughout the four days. [Click here for Save the Date notice](#)



Jean F. Gerbini

Diversity Award. The mentoring program takes its cue from diversity panels the Section convened during 2011 as part of the Section’s ongoing drive to reflect the fabric of society in its membership. As a result of the efforts of 2011 Section Chair, **Thomas Maroney**, and the Section’s Diversity Team members **Mirna Santiago**, **Joanna Young**, **JP Delaney**, **Rod Coyne**, **Lawton Squires**, **Hon. George Silver**, **Jean Gerbini** and **Carlos Calderón**, I am delighted to report that the TICL Section was named a Diversity Champion at the NYSBA Section Leaders Conference on May 10.



Tom Maroney and other Diversity Champions.



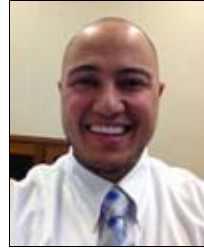
Diversity Planning Committee

Transitions. In June, **Gary Cusano** and **Hon. Douglas Hayden** will complete their terms as our Section’s representatives on the NYSBA House of Delegates—the Association’s board of trustees. **Daniel Gerber** and **Laurie Giordano**, both former Chairs of the Torts, Insurance and Compensation Law Section, have been appointed to serve in their place, joining **Brendan Baynes** as Regular Delegates. **J. Matthew Kelly** will continue serving as Alternate Delegate.

Paul Edelman, Editor and Co-Editor of the Section Journal for many years, is retiring to the position of Editor Emeritus. We honor him for his scholarship and dedication to the Section.



Javid Afzali



Kirill Muchnik

David Glazer continues on as Journal Chair. We are pleased to welcome **Javid Afzali** and **Kirill Muchnik** to the editorial staffs of the *Journal* and *Newsletter*.



Nicole Cedarleaf

Nicole Cedarleaf has been appointed to join **Thomas Cunningham** as Co-Chair of the Automobile Liability Committee.



Laurie Giordano

Laurie Giordano is heading up the newly-created No-Fault Committee. Section Secretary, **Lisa Berrittella**, unfortunately resigned from her post due to challenges of a new public sector appointment; the Executive Committee is working to fill the vacancy, and will announce its decision soon

Legislative Initiatives. The Torts, Insurance and Compensation Law Section brings its members' special expertise to the forefront, advising the NYSBA (which is a registered lobbyist) on legislative and regulatory matters affecting our areas of practice. So far this year, the Section (and its Fast Action Committee) has provided the Association with commentary on:

- A proposed bill that would have capped damages in medical malpractices cases;
- Provisions of the Governor's Budget Proposal that would have added burdens to plaintiffs and defendants seeking to

effect service of process upon business entities through the Secretary of State;

-A proposed amendment to the CPLR concerning finality of orders for purposes of appeal; and

-Proposed workers' compensation rulemaking affecting due process rights.

Make your voice count. If you wish to have the Section put forth a position for the Association to take on legislation or regulation, or if you wish to get involved with the Section's process, please contact me at jgerbini@woh.com.

Speaking and Writing Opportunities. The Section sponsors a plethora of continuing legal education seminars throughout the year for all levels of expertise. [\[LINK TO LIST OF SEMINARS\]](#) Service on a CLE panel provides an excellent showcase for our members' talents. To find out about how to get involved, contact CLE Committee Co-Chairs, **Elizabeth Fitzpatrick** at efitzpatrick@lewisjohs.com and **John Snyder** at jsnyder@gittolaw.com.

CLE in Your Neighborhood. Of immediate interest to insurance law practitioners: Advanced Insurance Coverage, held May 21 in Albany, Buffalo and Long Island, [June 1 in New York City](#) and June 7 in Syracuse. [\[LINK TO FLYER\]](#)

In 2012, the Section is active, engaged, and working to further its members' interests. Thanks for being a part of it!

Very truly yours,

Jean F. Gerbini
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, New York 12260
(518) 487-7600

jgerbini@woh.com

TICL Section Successfully Supports NYSBA By-Laws Amendment

The Section strongly supported 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 amendment passed at the NYSBA Annual Meeting in January. The amendment gives all 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. Thanks to our Delegates to the House of Delegates, Brendan Baynes, Gary Cusano and Douglas Hayden, for turning out the vote.

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).

[Click here for for the latest on the Summer Meeting](#)

Road to Montréal

The first "Road to Montreal" event took place in NYC sponsored by several TICL districts and committees on May 29th at the Harbor Lights at Pier 17, South Street Seaport, with drinks and hors d'oeuvres, suggested contribution \$50. A good time was had by all as the Summer Meeting and NYSBA and TICL membership were promoted. A second "Road to Montreal" is in the works.

Third and Fourth Districts

The TICL Section and Trial Lawyers Section hosted a Celebration to honor Justice Karen A. Peters, upon her designation as Presiding Justice of the Third Department. The reception was held on Thursday, May 24, from 5:30-8 pm in the Great Hall, at the New York State Bar Association, One Elk Street, Albany, NY 12207.

This was a complimentary reception for section members and a celebration of Judge Peters' appointment .
Insert photo from n drive peters reception use the only decent one—the one with four people:

Past NYSBA President Kate Madigan, Presiding Justice of the Third Department Karen A. Peters, Maryann F. Degroot, Program Chair Jim Kelly

The Third District Representatives for 2012 are William N. Cloonan of Cook Netter Cloonan Kurtz & Murphy PC in Kingston, and Matthew J. Kelly of Roemer Wallens Gold & Mineaux LLP in Albany. Fourth District Representatives are Edward B. Flink of Flink Smith LLC in Albany and Claudia A. Ryan of Towne, Ryan & Partners, PC in Albany.

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 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 Vincent P. Pozzuto

NEW YORK'S APPELLATE DIVISION, FIRST DEPARTMENT, ABROGATES ITS HOLDING IN DiGuglielmo AND HOLDS THAT AN INSURER CANNOT DELAY ISSUING A DISCLAIMER OF COVERAGE ON GROUNDS THAT IT KNOWS TO BE VALID WHILE INVESTIGATING OTHER GROUNDS FOR DISCLAIMING.

In George Campbell Painting v. National Union Fire Insurance Company of Pittsburgh, PA, 2012 N.Y. Slip Op. 254 (1st Dept. 2012), New York's Appellate Division, First Department, declined to follow and expressly overruled its prior holding in DiGuglielmo v. Travelers Prop. Cas., 6 A.D.3d 544, 766 N.Y.S.2d 542 (1st Dept. 2004), which held that "[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."

In Campbell, an owner and general contractor, Campbell and TBTA, sought coverage for an underlying personal injury action from National Union, the excess carrier for, Safespan, the subcontractor who employed the underlying personal injury plaintiff. Plaintiffs in Campbell sought such coverage on the grounds that they were additional insureds under the primary and excess policies issued to Safespan. Notwithstanding the fact that Campbell and TBTA knew in August, 2004 that the underlying personal injury claim would exceed Safespan's primary limits, it did not give notice of the claim to National Union, Safespan's excess carrier, until November, 2005. National Union requested that Campbell and TBTA provide certain documents, including status reports from defense counsel representing Campbell and TBTA. On January 17, 2006, Campbell and TBTA provided to National Union an August, 2004 status report from defense counsel advising that the value of the underlying personal injury claim would exceed Safespan's primary limits. National Union did not issue a disclaimer based on late notice until May 17, 2006, four months later.

Campbell and TBTA brought a declaratory judgment against National Union seeking coverage for the underlying claim. Campbell and TBTA moved for summary judgment on the grounds that National Union's disclaimer was untimely under Insurance Law § 3420(d)(2) which obligates insurers to disclaim "as soon as is reasonably possible." National Union cross moved for summary judgment. The lower Court granted summary judgment to Campbell and TBTA, and National Union appealed. The First Department affirmed the lower Court's grant of summary judgment to Campbell and TBTA.

On appeal, National Union argued that under DiGuglielmo, it was permitted to delay its disclaimer while it investigated

other possible grounds for disclaimer, specifically that Campbell and TBTA were not in fact additional insureds under the excess policy. The First Department disagreed, and stated that it was declining to follow DiGuglielmo pursuant to the express language of Insurance Law § 3420(d)(2), prior holdings of the Court of Appeals and policy grounds.

The Campbell Court held that the plain language of Insurance Law § 3420(d)(2) “cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim.” The Court further reasoned, “[i]f the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of ‘reasonably possible’ by the insurer’s ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all.”

The First Department also cited two prior holding of the Court of Appeals which it found to be inconsistent with DiGuglielmo, Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 317 N.Y.S.2d 309 (1970) and First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 769 N.Y.S.2d 459 (2003). The First Department noted that in Gross, the Court of Appeals held “[t]he literal language of the statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical exclusion, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time.” The First Department further noted that in Jetco, the Court of Appeals held “[t]he timeliness of an insurer’s disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage.” The First Department concluded “[i]n view of the foregoing, adhering to the DiGuglielmo rule would be tantamount to deliberately setting aside the rule promulgated by the Court of Appeals (and flowing naturally from the language of the statute) that once the insurer has sufficient knowledge of facts entitling it to disclaim...it must notify the policy holder in writing as soon as is reasonably possible.”

Finally, the Campbell Court also held that DiGuglielmo must be abrogated on policy grounds. It noted that the legislative intent that motivated the enactment of Insurance Law § 3420(d)(2) was “to expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously.”

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.

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

Practice Tip

By Jason L. Beckerman

SHIFTING THE BURDEN TO EXPERTS AT TRIAL

Often as trial attorneys, we spend a great deal of time preparing for cross-examination of expert witnesses. We spend many hours locating, obtaining and reviewing prior testimony transcripts; performing internet searches to obtain information; and performing detailed analysis of their findings and opinions. In doing so, we overlook some of the more accessible, and less time consuming tools that we have available to us – specifically, the subpoena. In a recent trial I was faced with cross-examination of an expert economist who has been testifying for over 40 years. One would expect that there are few lines of questioning that he has not been confronted with. Thus, I was forced to get a bit creative. I served a subpoena on this economist directing him to bring to court a copy of every one of his publications and books listed in his curriculum vitae, and more specifically, publications related to projecting future lost earnings of construction workers (the central issue he was testifying about). I further demanded that he produce a copy of his PhD degree in economics, and a copy of his PhD school transcript to see what courses he had taken. It will not surprise you to learn that the expert appeared in court without any of these materials. Expecting that would be the case, I started my cross-examination with this expert by asking him if he had brought the materials I subpoenaed, entirely expecting that the most I was going to achieve with this line of questioning was putting on a show in front of the jury about his failure to comply with same. To my surprise, however, the judge presiding over the trial became outraged at this expert for failing to comply with same, admonished him in front of the jury, and interrupted the trial to send the expert back to his home (over an hour away) to compile the materials and return to court that afternoon to testify regarding same. As if this was not enough, when the expert returned with the materials that afternoon, many of the publications which his curriculum vitae suggested were in the field of economics, in fact, were not. This created the basis for a very effective cross-examination - undermining the witnesses credibility well before we even began discussing his findings in the case - ultimately leading to a verdict that was very favorable to the defense. A simple example of what can be achieved with a simple subpoena, and a little bit of creativity.

Jason L. Beckerman is a partner with the law firm of Cozen O'Connor in New York.

**Newsletter Staff: John McDonough, Co-Chair; Vincent Pozzuto, Co-Chair; Javid Afzali, Vice-Chair;
Kirill Muchnik, Assistant Editor**

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

NEW YORK STATE BAR ASSOCIATION, ONE ELK STREET, ALBANY, NY 12207
PH: (518) 463-3200 FX: (518) 487-5517