NYSBA SPRING 2008 | VOL. 37 | NO. 1

Torts, Insurance & Compensation Law Section Journal

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

Inside

- Jury Trials
- Notable Cases in the Appellate Courts
- Will Change to GOL § 15-108 Promote Settlements?

NYSBA

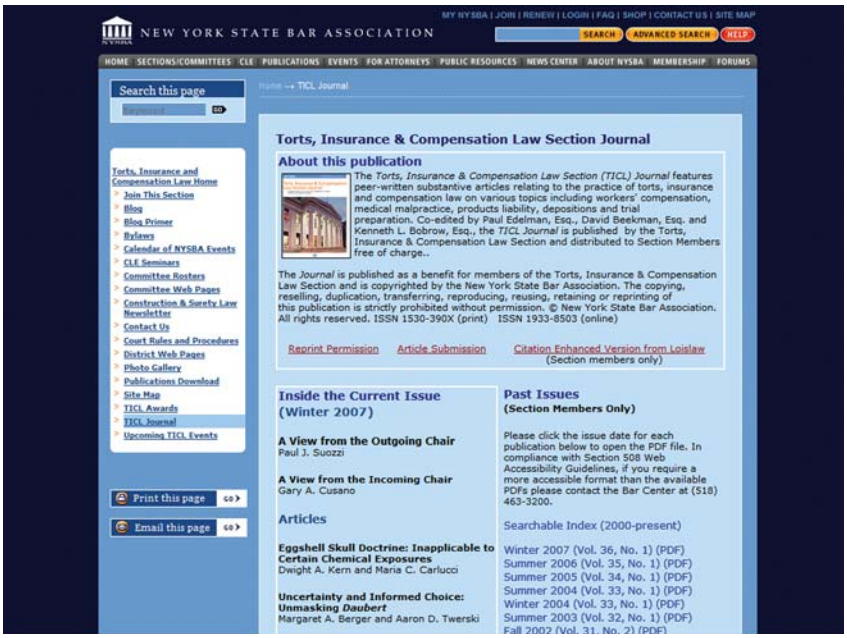
Your key to professional success…
A wealth of practical resources at www.nysba.org

- **Downloadable Forms organized into common practice areas**
- **Comprehensive practice management tools**
- **Forums/listserves for Sections and Committees**
- **More than 800 Ethics Opinions**
- **NYSBA Reports – the substantive work of the Association**
- **Legislative information with timely news feeds**
- **Online career services for job seekers and employers**
- **Free access to several case law libraries – exclusively for members**

The practical tools you need. The resources you demand. Available right now.

Our members deserve nothing less.

And now . . . the *Torts, Insurance & Compensation Law Section Journal* has a new online look!



Go to www.nysba.org/TICLJournal to access:

- Past Issues (2000-present) of the *TICL Journal**
- *TICL Journal* Searchable Index (2000-present)
- Searchable articles from the *TICL Journal* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Torts, Insurance and Compensation Law Section member and logged in to access. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

For more information on these and many other resources go to **www.nysba.org**

NYSBA

TICL Journal

Volume 37, No. 1
Spring 2008 Issue

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

Torts, Insurance and Compensation Law Section Officers and Committee Chairs

Chair

Daniel W. Gerber
Goldberg Segalla LLP
665 Main Street, Suite 400
Buffalo, NY 14203
dgerber@goldbergsegalla.com

Vice-Chair

Charles J. Siegel
Law Offices of Charles J. Siegel
40 Wall Street, 7th Floor
New York, NY 10005
charles.siegel@cna.com

Secretary

Laurie A. Giordano
Leclair Korona Giordano Cole LLP
150 State Street, Suite 300
Rochester, NY 14614
lgiordano@leclairkorona.com

Treasurer

Brendan F. Baynes
D'Agostino, Krackeler, Baynes & Maguire, PC
The Sage Mansion
16 Sage Estate
Albany, NY 12204
bfb@dkbmlaw.com

TICL *Journal* Co-Editors

Paul S. Edelman
Kreindler & Kreindler
100 Park Avenue, 18th Floor
New York, NY 10017-5516
pedelman@kreindler.com

David A. Glazer
Shafer Glazer, LLP
90 John Street, Suite 607
New York, NY 10038
dglazer@shaferglazer.com

TICL *Newsletter* Editor

Jean F. Gerbini
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12206
jgerbini@woh.com

Division Chairs

Construction and Surety Law Division
Henry H. Melchor
Bond Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1324
hmelchor@bsk.com

Workers' Compensation Law Division
William W. Crossett IV
Meggesto Crossett & Valerino LLP
313 East Willow Street, Suite 201
Syracuse, NY 13203-1977
crossett@mcvlaw.com

Committee Chairs

Alternative Dispute Resolution
James E. Morris
Morris and Morris
120 Corporate Woods, Suite 240
Rochester, NY 14623
JimMorris@MorrisandMorris.net

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

Business Torts and Employment Litigation
Heath J. Szymczak
1805 Route 78
Java Center, NY 14082
hszymczak@jaeckle.com

Class Action
Thomas A. Dickerson
35 Hampton Ave.
Yonkers, NY 10710
tdickers@courts.state.ny.us

Continuing Legal Education
Dennis P. Glascott
Goldberg Segalla LLP
665 Main Street, Suite 400
Buffalo, NY 14203
dglascott@goldbergsegalla.com

John Eng
NY State Insurance Fund
Receivable Management
199 Church Street
New York, NY 10007
jeng@nysif.com

Diversity
Joanna L. Young
Carroll, McNulty & Kull, LLC
570 Lexington Avenue, 10th Floor
New York, NY 10022
jyoung@cmk.com

Ethics and Professionalism
Robert F. McCarthy
119 Hendrickson Avenue
Rockville Centre, NY 11570
rfmccarthy@verizon.net

Future Sites
Eileen E. Buholtz
Connors and Corcoran, LLP
45 Exchange Street
250 Times Square Blvd.
Rochester, NY 14614
ebuholtz@connorscorcoran.com

General Awards
Louis B. Cristo
Trevett Cristo Salzer
& Andolina PC
2 State Street, Suite 1000
Rochester, NY 14614-1803
lcristo@trevettlaw.com

Governmental Regulations
Jeremy Brad Cantor
London Fischer LLP
59 Maiden Lane
New York, NY 10038-4502
jcantor@londonfischer.com

Information Technology
Charles J. Siegel
Law Offices of Charles J. Siegel
40 Wall Street, 7th Floor
New York, NY 10005
charles.siegel@cna.com

Matthew S. Lerner
Goldberg Segalla LLP
8 Southwoods Boulevard, Suite 300
Albany NY 12211-2364
mlerner@goldbergsegalla.com

Insurance Coverage
Stephen M. Lazare
Lazare Potter Giacovas
& Kranjac LLP
950 3rd Avenue, 27th Floor
New York, NY 10022-2705
slazare@lpgk.com

Laws and Practices
Thomas P. Cunningham
Rupp Baase Pfalzgra, Cunningham
& Coppola LLC
1600 Liberty Building
Buffalo, NY 14202-3670
cunningham@ruppbaase.com

Membership
Robert H. Coughlin Jr.
Flink Smith LLC
23 British American Boulevard
Latham, NY 12210
Rcoughlin@flinksmithlaw.com

Municipal Law
Shawn P. Martin
Hurwitz & Fine, PC
1300 Liberty Building
Buffalo, NY 14202-3670
spm@hurwitzfine.com

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

Products Liability
Dennis J. Brady
Mackay Wrynn & Brady LLP
40-26 235th Street
Douglaston, NY 11363
dbrady@mwb-law.com

Professional Liability
Roderick John Coyne
Bivona & Cohen, PC
Wall Street Plaza
88 Pine Street
New York, NY 10005-1886
roderick.coyne@bivonacohen.com

Table of Contents

Vol. 37, No. 1

Page

Cover photo of the New York State Capitol in Albany, NY by JoAnn Haring

A View from the Outgoing Chair

What a year 2007 has been for the Torts, Insurance and Compensation Law Section. We started off with a bang with our yearly Section Meeting in Puerto Rico, March 29–April 1. We arrived on the sandy beaches of Rio Grande, Puerto Rico, at the Western Rio Mar Resort with a focus on diversity. We provided two days of presentations, interactive discussion, and presentation from local experts, which included both the legal differences in the practice of law in the Commonwealth and the history and rich tradition of the people of Puerto Rico. These presentations were highlighted by the effervescent Justice Sallie Manzanet, who is both a Puerto Rican native and a well-respected Supreme Court Justice from Bronx County. She participated in three of the six presentations and her enthusiasm for her homeland and genuine love of the law helped her steal the show.

Representatives from four major U.S. insurance companies provided a lively panel discussion and an insider's view of the insurance industry. We provided practical skills training on the use of computers, e-mail, blogs and the Web in the modern practice of law.

This year's scheduled Spring Meeting was at the spectacular Hotel Coronado in San Diego April 10–13. The CLE program featuring insurance executives and members of the bench did not disappoint.

We sponsored the Second Annual Law School for the Claims Professional seminars, which were held across the state in four locations. Each location was completely sold out and the response from the insurance industry was much more than we could have ever anticipated. This all-day seminar covered a multitude of insurance issues, from supplementary underinsured motorist coverage to construction site accidents and insurance disclaimers, among many other topics. We look forward to next year's presentation and a similar turnout by the insurance industry. Clearly, we are providing a service that is needed and well received.

On September 27, our Section is sponsoring a cocktail reception in honor of Justice Theodore Jones, celebrating his appointment to the New York State Court of Appeals. It will be held at the Powerhouse Arena in downtown Brooklyn, where the Judge started his judicial career.

The TICL Blog is up and running and providing our members with updated information and cases and commentary with regard to the ever-changing field in which we practice. I encourage everyone to visit the Blog as well as to contribute.

This year found us early and often having our Section's input requested on a multitude of proposed legislations, bills and codes of conduct for attorneys and associations. We have been very busy debating, evaluating and presenting position papers to the State Bar on various topics ranging from the "No Prejudice Rule," direct actions against insurers, and the changes in the Workers' Compensation Administrative Rules.

If you missed the Annual Dinner at the Water Club in New York City on January 30, you missed Chief Justice Kaye and 30 other esteemed members of the Judiciary who were in attendance. You also missed some amazing views of the city.

Being part of this section has many advantages, including unparalleled CLE programs and a state of the art Web site and Blog. The most important reason for joining and staying a member of this section is the members themselves. I could walk into any major city in the state and have a colleague to call about the local rules of the courts in that area. I have the ability to ask questions of co-members about an area of law that I do not practice in regularly. How can you put a price on the value of that? We are all competing for much of the same business, yet in this Section we help each other for the greater good. That is why this is a great Section. That is why you should be a member.

Gary A. Cusano

A View from the Incoming Chair

As I begin my year as Chair of the Torts, Insurance and Compensation Law Section ("TICL"), I think it is important to acknowledge the achievements and leadership of our immediate past Chair Gary A. Cusano. Gary made diversity a central theme of his year as Chair. He increased diversity of TICL's Executive Committee and focused the Section's Spring Meeting on this critically important issue. Gary also significantly involved the Section in legislative issues involving Insurance and Workers' Compensation Law. Gary also led the Section's creation of a Treasurer's position. I have big shoes to fill, but I know with the support of Vice-Chair Charlie Siegel, Secretary Laurie Giordano, Treasurer Brendan Baynes and your Executive Committee we will have a successful year.

The Section's scheduled Spring Meeting in San Diego at the Del Coronado combined a wonderful venue, great CLE and tremendous networking opportunities. The CLE panel included top insurance executives from New York, California and Bermuda, as well as respected jurists, and national experts on e-discovery issues. Many thanks to Brian Rayhill and Bob McCarthy, Co-Chairs of the San Diego meeting who worked tirelessly.

This year, I have several goals. First, I want to make sure that every member of TICL is aware of the opportunities it creates and benefits it provides. To this end, I have appointed Jean Gerbini as our newsletter chair. Jean will regularly update you on the Section's activities and opportunities. The Section's website will also be kept current by Matt Lerner. Second, I will ask our Executive Committee to consider and adopt a strategic plan that puts in place growth and value for members in years to come. Third, we will be active on legislative issues of importance to Section members. Last, it is my goal to grow and diversify our Section's membership by ensuring its committees are active.

One of the many benefits of membership in TICL is this first-rate publication. The Section's Executive Committee has looked for innovative ways to create further membership benefits. This includes the Law School for the Claims Professional seminar. I had the pleasure of co-chairing this seminar last year and am proud to say that it sold out in each location. The seminar is designed to create an atmosphere where Section members can interact for a day with insurance claim professionals. Last year, over 500 claim professionals attended. The seminar will repeat again this year in the Fall, with Lou Cristo and Steve Lazare as its co-chairs.

I am honored to serve as this Section's Chair and look forward to it. If anyone has any questions at any time, please feel free to contact me at dgerber@goldbergsegalla.com or 716-566-5425.

Daniel W. Gerber

Summary Jury Trial, an Experiment That Is Working

By Hon. Barry Salman

Since 2000, New York's Eighth Judicial District has resolved over 320 cases through binding and non-binding Summary Jury Trials without the necessity of a traditional trial. Although extension of this program to other areas has been discussed, it had not been implemented in New York City until recently.

In June 2006, the Supreme Court, Bronx County instituted this innovative program, which has as its goal conducting civil trials which begin and end in one day. The program is designed to help clear up the backlog of civil cases, while giving litigants the opportunity to have their matters heard in an expedited way. Attorneys should also consider the program when considering making motions for Summary Judgment, especially on insurance threshold issues.

Initially many reacted skeptically, especially because the original upstate plan allowed for non-binding jury decisions. The lawyers did not want to disclose their cases and strategies only to have the case heard in a full-length trial. After a complete review of all options, the Bronx Supreme Court decided to implement a program which accepted the jury decision as binding.

The program, which is supported by the Office of Court Administration, the Bronx County Bar Association and practitioners who represent both plaintiffs and defendants (including defendants' insurance carriers), is a voluntary program. No appeal of the verdict is allowed. The trial is conducted with relaxed rules of evidence. In addition, reports of physicians and other medical records can be submitted to the jury (redacted, if necessary) without the need for like expert witnesses.

The program allows various methods of presenting evidence, such as overhead projections, Power Point presentations and trial packages for each juror.

The selection of a jury is expedited as well, with the judge presiding in order to encourage brevity. Thereafter, the trial limits each side's evidence presentation to one hour, and limits each party to a 10-minute opening and closing. Each attorney participates in jury selection along with the presiding judge. To ensure that a case is completed within one day, jurors are assembled by 9:30 a.m. and lunch is provided for the jurors.

Trials to date have shown that the juries give careful consideration to the issues, even though the trial is expedited. In addition, jurors who participate in the program complete their jury service in one day instead of serving for an extended time period.

The success of the program will also have an effect on the entire litigation calendar because the more serious cases will be able to move to trial more expeditiously.

To date, more than 75 cases have been heard and many more are awaiting scheduling. The verdicts have been almost equally divided between plaintiffs and defendants, with many having high-low agreement in place.

At the inception, I invited former Justice Joseph Gerace, who started the upstate experiment, to preside over our first two weeks of trial in June.

In September, Justice Wilma Guzman presided; in October, Justice Dianne Renwick presided; and Justice Mark Friedlander presided in November. Plans are readied to have others assigned into the Spring of 2008.

The Bronx program is part of a statewide plan of the Office of Court Administration, which appointed Supreme Court Justice Lucindo Suarez as Statewide Coordinator. Summary Jury Trials have been used in federal district courts and by at least 17 states' courts.

Many attorneys who have participated in the program have said that as long as their client received a fair hearing on the facts, the program provides an important cost-saving mechanism in resolving disputes. These attorneys are only too happy to be able to save the cost of bringing experts to court, and thus look forward to trying their case in one day instead of weeks.

The participants also favor the fact that there are no appeals, no directed verdicts and no motions to set aside the verdict. The program requires an exchange of items sought to be used at trial 30 days prior to the scheduled trial date and a final conference within 10 days of trial with the Judge to resolve any outstanding issues. The parties are aware in advance of what will be presented to the jury.

Most of the cases heard to date have involved automobile accidents, although many other types of cases, including "slip and fall," property damage and intentional tort cases, would be appropriate. In each case, where policies of insurance exist, the parties have agreed to have the award capped at the amount of the insurance policy.

It is my belief that this program, which to date has many insurance carriers participating, would be advantageous to the City of New York and the Transit Authority, whose participation has been sought.

In New York State, other judicial districts are considering the program; when implemented, the Summary Jury Trial will go a long way toward streamlining the judicial process and giving litigants their day in court, with only minimal delay.

Hon. Barry Salman is an Administrative Judge in the 12th Judicial District.

The Vanishing Jury Trial and the Lawyer's Role in Reversing the Trend

By Dan D. Kohane

As a young lawyer, I had the pleasure and honor of having a mentor, Shelly Hurwitz, former Chair of this Section and of course the namesake for this Section's Young Lawyer's Award. Shelly was a wonderful man, kind and generous with his time, a great teacher and a gifted lawyer. He taught me so many other things about professionalism and advocacy and did the same for so many in the firm and around the country. A true professional, he captured what it meant to be a lawyer, a tireless protector of his clients, a friend among lawyers throughout the world, respected and admired by lawyers for plaintiffs and defense, by corporate clients and insurers, by judges, both trial and appellate.

"We are trial lawyers and we have an obligation, defense and plaintiffs' lawyers alike, to do our part to protect against the elimination of the civil jury trial."

I'm one of the last of a dying breed. I started clerking at Hurwitz & Fine when I was a mere pup; it was the end of my first year in law school, actually in July of that summer when the firm was only 45 days old. I learned at the feet of the master and have tried to remember all the lessons he taught me about being a professional, a counselor and an advocate.

I remember so well preparing for my first deposition. I was defending a Chinese restaurant, Le Chu's, in a lawsuit involving a man named Gerard, who choked on a duck bone in a dish served at the eatery. I had studied the law, scoured the medical records and had drafted more questions from form books for Mr. Gerard to answer than there were items on the menu.

Shelly called me in to ask about my preparation and I showed him my notes and questions and discussed what I had planned to do. He listened intently, saying nothing. When I finished my presentation, he took my notes and with a red pen at the top of the yellow pad, inscribed a large letter "P."

Seeing that I had no idea where he was going or what the letter meant, Shelly asked me a simple question which taught me a critical lesson: "what's the 'P'—what's the POINT of this deposition," he asked. "How will it help move this lawsuit forward and closer to resolution? Someday, this case may go to trial and you'll have a jury before you who will be deciding the fate of your client. When that happens, you will want to look back at this deposition transcript and hopefully, since you had a POINT when you conducted it, it will help you prepare for trial. Without a POINT, you have nothing. Litigation without a POINT is wasteful. You don't want to be a litigator; you want to be a trial lawyer." He was right.

We are trial lawyers and we have an obligation, defense and plaintiffs' lawyers alike, to do our part to protect against the elimination of the civil jury trial. We stand together as brothers and sisters in this quest. We must recognize the historical and practical importance of our clients' right to have their cases adjudicated by our citizenry and battle the forces that seek to restrict their ability to do so. We need to partner with the courts, with our clients, with corporate America, with trial associations and others interested in the civil jury system to jointly undertake remedial measures to reverse the long-developing trend away from civil disposition by jury verdict.

Almost 800 years ago, in 1215, it is said that a dispute between and among Pope Innocent III , King John and his English barons about the rights of the King led to the creation of the Magna Carta Libertatum, the "Great Charter of Freedoms," under which the King renounced certain powers and guaranteed certain freedoms to the people. Included in that great charter were certain rights and privileges that have carried down for all these centuries.

> Article 39: No freeman shall be arrested or imprisoned or dispossessed or outlawed or exiled or in any other way harmed. Nor will we [the king] proceed against him, or send others to do so, except according to the lawful sentence of his peers and according to the Common Law.

Guaranteed by the Seventh Amendment to the United States Constitution, the civil jury trial has provided the framework for the adjudication of civil disputes through American history. Indeed, Justice Joseph Story, great and revered Supreme Court Justice, wrote in his 1883 treatise *Commentaries on the Constitution of the United States*,

> It is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.

Often forgotten and more often ignored, the first of New York State's five constitutions also included a Bill of Rights, and the Second Amendment to that document similarly provides guarantees to a right to a jury trial.

How many of us have talked about the importance of the civil jury trial to jurors in closing arguments to the jury? How many of us have talked about the importance of jurors to the process, the critical role that citizens play in the determination of civil disputes? How many of us have discussed the Seventh Amendment, and the fundamental rights and privileges it guarantees?

"It isn't a perfect system; in fact, sometimes the results rendered by civil juries are perplexing and not sustainable. However, with the checks and balances that the system offers for plenary and appellate review, it's a darn good system."

Imagine, in New York for example, six strangers, nominated randomly by property tax lists, election rosters and social services records, are examined by two or more lawyers, asked questions that are meant to reveal their innermost secrets and empaneled to decide on the future of civil litigants' most important rights. What do we want from these people? Do we want them to know the parties or the subject matter or be experts in the areas where the dispute is to be resolved? No, we want them to be ignorant of all of that, to be completely impartial and without special knowledge or training, and decide the case based not on their own investigation and research, but on the facts as produced at the time of trial and the law as the judge gives it to them.

If you explain that system to someone not schooled in our concept of democratic principles, they may think you daft. Why not turn the resolution of civil disputes over to experts? Let designers decide products liability cases. Let doctors consider medical malpractice disputes. Allow engineers to evaluate automobile accidents and assess fault.

But we who are in the trenches understand why it is so important to protect and preserve the right of parties to allow jurors—members of the community, lay men and women who are free from prejudice, strangers to the proceeding—to bring their everyday experiences to bear on civil disputes, to hear and evaluate witnesses, to consider documentary and expert proof, and render a verdict based on the evidence produced in the courtroom. It isn't a perfect system; in fact, sometimes the results rendered by civil juries are perplexing and not sustainable. However, with the checks and balances that the system offers for plenary and appellate review, it's a darn good system. While we surely do not agree with all jury verdicts, we understand most of them and should fight our hardest to make certain that this system of adjudication remains viable and available.

Is there a fight which must be fought? Is there a concerted effort to eliminate jury trials? I suggest so, and I am not alone. The civil jury trial is disappearing and it is our obligation to do what is necessary to preserve it and protect it.

Are there fewer civil disputes? Not a chance. We are certainly more of a litigious society than we were *back in the day*. The statistics are compelling and it's worth spending a moment reviewing empirical studies. The decline in federal court trials is documented in a 2004 article by University of Wisconsin Law School professor Marc Galanter in the *Journal of Empirical Legal Studies*. In the federal courts, in 1962 there were 5,802 civil trials. Despite a five-fold increase in the number of new civil filings, by 2002 there were only 4,569 civil trials in the federal courts. Think of it, 1,200 fewer civil trials although new civil filing multiplied by five. Put another way, in 1962, 11.5% of civil matters were resolved by a jury in federal court, but by 2002, that figure had dropped to 1.8%.

The National Center for the State Courts has verified the figures. In its Spring 2005 issue of *Civil Action*, the NCSC reported that data from current studies confirm while the number of filings and dispositions continues to rise, the number of trials is falling for both civil and criminal cases. "There has been a long-term decline, but a dramatic drop in the number of trials over the past twenty years." Quoting from a study of state court juries prepared by Bryan J. Ostrom, the National Center reported that:

> Between 1976 and 2002 the civil jury trial rate decreased about two-thirds in both state and federal courts, from 1.8% to 0.6% in state courts of general jurisdiction, and from 3.7% to 1.2% in federal courts. During the same period, the number of civil dispositions increased 168% in state courts and 144% in federal courts. Other data indicates that during the most recent period (1992 to 2002) the absolute number of civil jury trials declined between 24% and 46% in tort and contract cases resolved in state and federal courts.

Why? Surely, one of the major factors in the vanishing jury trial is the need of judges and justices to "manage" their caseloads. Cases that do not settle are considered failures. Judges who do not convince parties to move their matters into alternative dispute resolution formats, court annexed or proprietary, are scolded by judicial administrators who press them to decrease the number of "pendings" and establish "standards and goals" for prompt disposition. A settlement is a disposition. A

resolution by motion is a disposition. Moving a case out of the courts for resolution elsewhere is a disposition. Pressuring parties to mediate, arbitrate and resolve by alternative means is a disposition. In some jurisdictions, arbitration has become mandatory. Mediation is required. Insurance carrier representatives can now be forced into the process by Court-approved regulation in New York.

What has led to these dramatic changes in civil dispositions? What has led to younger lawyers losing the ability to learn and craft trial skills in the courtroom? Is it all bad? Are there ways to maintain a vibrant jury system in an environment of judicial management? I suggest so, but it takes a partnership among clients, attorneys and the courts to reinvigorate the jury trial system.

The journal of the Litigation Section of the American Bar Association spearheaded the "Vanishing Trial Project" and reported on its findings in the Winter 2004 edition of *Litigation News Online*. The Section Chair, Patricia Refo, suggested several factors that have led to the decline in the use of juries to determine civil cases. Surely, after more than 25 years in the practice, it is not difficult to understand those and supplement them with other suggestions. It is my contention that this decline is NOT only the fault or responsibility of the courts, but we, as advocates and counselors, bear part of the fault and we need to 'fess up and do something about that which we can do:

- The sheer size of the civil docket—the number of civil cases has increased so dramatically that it is impossible for the stagnant number of judges elected or appointed to resolve civil disputes to actually try enough cases;
- Pressure from above—judicial administrators and others rate and rank judges, not on scholarly ability or the jurists' competence in *trying a good case*, but on the number of pending cases in their dockets. If a judge isn't disposing of as many cases as his brother or sister on the bench, there must be a failure in ability;
- The mantra of "failure"—how many judges have made it quite clear to trial attorneys that a failure to resolve a case is an abject failure in the ability of the lawyers to best serve their clients? How many times has a trial lawyer been told, in direct or indirect language clearly understood, that a failure to be "reasonable" or make or accept an offer that the judge considers fair is tantamount to a judicial death sentence? The judge considers himself or herself to be *great* at resolving cases by settlement and an inability to negotiate or dispose of *this* case would be a poor reflection on the court.

Surely, other factors come into play, and lawyers and courts need to pay heed, or the tales of our battles in the courtroom will become historical fodder for up-and-coming lawyers to consider wistfully as they turn to other arts and crafts of the profession:

- The client is getting educated. More sophisticated and litigation-savvy clients are calling the shots because they are no longer novices in civil dispute resolution.
- We lost the confidence of our clients in remembering and paying heed to the cost of litigation. Face it. Clients are fearful of the mounting costs of resolution by jury trial. We surely have some role in creating that problem, although it is certainly not ours only. Let's spend a moment on that issue:
  - The efficiency of computers and word processing has made it easier for us to generate omnibus discovery demands of size and dimension never imagined by previous generations of lawyers, and, often, for no sustainable goal. Interrogatories, demands for document production with 10 pages of introductory material defining every possible term that may be defined without attention being paid to substance have led only to more paperwork, motion practice, applications for protective orders and court appearances. Battles are fought over commas and other punctuation, sometimes without regard to the real issues that divide the litigants. Discovery proceeds forward at a snail's pace, as parties *fight the good fight*, often with no justifiable reason to do so.
  - And motion we do. Discovery motions, applications for sanctions, disputes over deposition questions unanswered, late Bills of Particulars, spoliation, overreaching discovery requests, lengthy and irrelevant interrogatories, and countless court applications have led to skyrocketing litigation costs for litigants who simply want resolution.
  - We depose everyone about everyone and discover everything for fear of surprise. Anyone and everyone remotely connected to a civil dispute is put under oath and lawyers traverse the nation to uncover that one last bit of information that will be necessary to resolve the dispute. Despite the presence of wonderful, new and less expensive means to conduct examinations before trial by Alexander Graham Bell's invention or video conferencing, we find ourselves accumulating frequent flier miles traveling throughout the fruited plains and elsewhere for a 45-minute deposition, or worse, participate in a three-hour deposition that could have been efficiently and effectively conducted in one-quarter of the time;

– We now believe we have access to computer-generated documents clearly being secreted by the other side. Discovery of electronic data is taking on the proportions of a bad dream. The Federal Rules of Civil Procedure have been amended, effective December 1, 2006, to provide for a more efficient means to deal with *electronically stored information.* Those rules require parties to meet and confer about electronic discovery in the early stages, discuss how to resolve information not easily retrievable, assess and allocate costs of that discovery, discuss review of privileged information, describe the form of production of that information, deal with the discovery of information not readily accessible and, of course, discuss sanctions.

– The cost of expert testimony. Our clients in New York State courts often thank their lucky stars that New York stands virtually alone in not permitting, generally, the deposition of medical witnesses. The cost of doctors and other experts is exploding exponentially.

- Our clients, both plaintiffs and defendants, are fearful of the costs to be incurred in moving forward where an adverse verdict can bankrupt the client, simply because of the costs of getting there, and a favorable verdict becomes Pyrrhic because of the fees and expenses invested to arrive there. Entering the practice years ago, there was no such thing as a "litigation budget." Our clients trusted us to use our best judgment to achieve justice.

- How many of you have talked to senior lawyers who tried cases before 1974, when No Fault came into New York? They all told the same story. They would pick up a file that was no more than a half inch thick. The folder would contain a 20-page deposition, a few medical reports and medical invoices and a Bill of Particulars. They would go over to pick a jury in the morning and try the case to verdict in the afternoon and start the process again the next day. Have any of you seen a civil litigation folder less than five inches thick when a case in now ready for trial? Do you think their clients received *less* justice?

- Supervision of my work by the client was arm's-length at best. The client may have suggested substantive defenses or approaches, but surely not litigation strategy, tactics and procedural protocols. It is difficult to forget the first time I attended a meeting called by a new insurance company vice president, the first of the *bean counters* to take over a mid-sized mutual company whose insureds I had been representing for a number of years. "I am the 'C,'" he said. "I am the 'customer' and you are the 'V,' the 'vendor.' That is our relationship. If you do not follow our guidelines and rules, I will replace you with another vendor, just as we can replace suppliers of paperclips, pencils and staplers."

- We have lost the trust of our clients in giving unabashed, practical legal advice. The dominance and presence of in-house litigation specialists help clients serve as intermediaries between counsel and client. The clients believe, at least, that someone who doesn't have a vested interest in continuing and fostering litigation can better and more objectively advise on litigation strategy. I suggest we need to reinstitute that trust so that our clients know and understand that we are indeed in partnership with them and are looking out for their best interests.

- Judges are far more willing to issue summary judgment—to decide the case on the papers, without a trial.

- Some of us—and many of our clients—are afraid to recommend taking cases to verdict for fear of the outcome. Juries are scary to some and merely unpredictable to others.

- Everyone appeals everything, every time, and the costs of interlocutory appeals to overburdened appellate courts, and the time it takes to go through the process, only add to the cost.

- Filing fees for every paper filed, every application, every visit to the courthouse have added to the financial burden. Slow and expensive justice is not real justice.

- Arbitration can be less expensive, but need not be. Mediation can bring parties together.

- Mediation resolves cases a very high percentage of the time, and parties are more sophisticated in electing to utilize it.

Clearly, there are not fewer dispositions; there are a significantly greater number. There must be, with a dramatic uptick in the number of civil filings.

Where are the cases getting resolved?

In some jurisdictions, judges are personally successfully hammering away at lawyers, insurers and parties to resolve cases. In other courts, judicial clerks have that responsibility. Who hasn't faced the wrath, for example, of a pre-appeal conference at the Second Circuit, where a law clerk advises the counsel of the insignificant chance of success on appeal? Retired justices are becoming Judicial Hearing Officers and are being assigned bench trials to resolve disputes between and among parties. Court-

annexed arbitrations, some mandated, some voluntary, some pressured, are being used to dispose of more and more cases. Mediation, court-annexed or privatized, is the method adjure, and is used successfully to settle disputes.

So how do we reverse the trend?

We must work to dramatically reduce the cost of litigation. We must find ways to expedite it, relying less on costly pre-trial protocols and voluminous, often-unnecessary document production. We need to stop the practice of deposing every living and breathing creature who has some marginal contact with a litigated matter. We must better partner with our clients to more sharply focus our attention on the litigation's goals. We must eliminate worthless, tiresome and duplicative discovery demands and concentrate on the endgame. We need to sit and confer with our adversaries to resolve differences without involving the courts in every single dispute that arises between and among counsel. We need to expedite lawsuits and bring matters to justice earlier rather than later. We need to invest in efficiencies and economies of scale and reward those who use them. We need to discourage those who seek to abuse the system, and there are lawyers who seek to do that, perhaps with higher fees. We need to reward those who can resolve matters efficiently and without judicial intervention, perhaps financially, with lower court access fees and perhaps other perks including calendar preferences.

We should remember, as Shelly Hurwitz reminded me, to have a POINT to what we do, and then go and do it well.

In an article which appeared in the *Journal of the International Academy of Trial Lawyers*, the author described the demise of the jury trial in the United Kingdom:

> Prior to 1873, probably ninety percent of all cases in Britain were tried before juries. It was not until World War 1, with the passage of the juries Act of 1918, that manpower shortages curtailed the use of the civil jury. A jury trial was required only in cases of fraud, libel, slander, false imprisonment, seduction, malicious prosecution, breach of promise to marry, divorce, or probate. With the 1925 repeal of the juries Act of 1918, jury trials reemerged. Discontent mounted; trial delays and excessive costs were attributed to the civil jury system. Consequently, Parliament passed the Administration of Justice Act of 1933 which again severely restricted the general right to a jury. The courts, however, retained the discretion to order a jury trial in any cases where it was not required.
>
> World War II and the Emergency Provisions of 1939 effectively terminated the civil jury trial in England. At least one prominent British jurist, Sir William Diplock, attributed the disappearance of the civil jury to habit and inertia: "Habit, the most potent force in procedural matters, which had previously operated to preserve the jury trial now operated against its revival." . . . Habit, manpower shortages due to two devastating World Wars, and the existence of a bar unaccustomed to the tradition of the civil jury, probably all contributed to its demise.

While we respect and admire our brothers and sisters *across the pond*, let us not kill our time-honored method of achieving civil justice. Yes, let us encourage ADR where appropriate, but allow those who seek to utilize the benefits guaranteed by the Seventh Amendment the right to do so. Let us consider it a success, not a failure, that we have the opportunity to call upon the wisdom of a lay jury to settle and resolve civil disputes.

Dan D. Kohane is a senior trial partner at Hurwitz & Fine, P.C. in Buffalo, New York. He serves as President of the Federation of Defense and Corporate Counsel and on the Board of Directors of both the Defense Research Institute and Lawyers for Civil Justice. In addition, Mr. Kohane teaches Insurance Law as an adjunct professor at the Buffalo Law School.

Labor Law § 240 in 2006

By David A. Glazer

New York Labor Law § 240(1) is the plaintiff's attorney's best friend and a defendant's worst nightmare. A violation effectively makes a case damages only and forces the defendants to point fingers at each other. However, after *Blake*,[1] defendants have had stronger arguments that Labor Law § 240(1) should not apply. The year 2006 saw the Courts define Labor Law § 240(1) more strictly to the benefit of defendants.

Limitations Regarding Type of Work

The type of work performed by the plaintiff at the time of the injury determines whether Labor Law § 240(1) applies.[2] The Courts have more closely adhered to the four corners of the statute by limiting the law to situations where the plaintiff was actually involved in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building." In *Jones v. Dannemora*, the plaintiff was gathering sludge from a lagoon when he fell off of a ladder positioned against a trailer that had tumbled forward.[3] The Third Department dismissed the plaintiff's complaint since the plaintiff's work did not constitute altering or repairing under Labor Law § 240(1) because the lagoon was neither malfunctioning nor inoperable due to the sludge and, thus, not a repair.[4] Plaintiff's work comprised a separate phase from the larger repair project—the lagoon system upgrade—and Labor Law § 240(1) "affords no protection to a plaintiff injured before any activity listed in the statute was under way, even where the work is incidental or necessary to a larger project within the purview of the statute."[5] Thus, even though the plaintiff was part of the project which could have been covered by Labor Law § 240(1), the plaintiff himself was not and could not obtain its protections.

The Fourth Department also followed this reasoning in *Schroeder v. Kalenak Painting & Paperhanging, Inc.* The Court found that wallpapering was neither integral nor part of a larger repair project because another entity had already been assigned to conduct all future repair work.[6]

In *Zirkel v. Frontier Commc'n of Am. Inc.*, the plaintiff's complaint was dismissed because while the plaintiff was instructed to remove a utility pole, it fell and struck the plaintiff before he had attached the necessary mechanical device needed to remove the pole.[7] Therefore, the plaintiff was unable to demonstrate that the pole fell during the course of removal and plaintiff failed to satisfy the "hoisted or secured" elements required to recover for an injury resulting from a falling object.[8]

Gravity Redefined

The First Department effectively held that gravity is not enough to create a violation of Labor Law § 240(1). In *Meslin v. New York Post*, the injured worker stepped off of a ground-level scaffold onto a pipe which subsequently rolled and caused the worker to fall into a three-foot hole.[9] The Court found that the accident was not the result of the "extraordinary elevation-related risk" that is contemplated by Labor Law § 240(1).[10] Likewise, in *Trippi v. Main-Huron, LLC*, the Fourth Department held that a metal prop that struck and forced the plaintiff off of a stepladder was not encompassed by the statute because it was situated at the same height as the injured plaintiff and did not constitute an object that fell while being hoisted or secured.[11]

In line with this notion, the Second Department in *Gonzalez v. Turner Construction Co.*, affirmed the trial court's order granting the defendant summary judgment because plaintiff's injuries resulted when he struck a beam while standing on a roof shifting a rope with two other workers standing below roof level.[12] Simply because the injury occurred on a roof, it did not automatically entitle the plaintiff to recover under Labor Law § 240(1).[13] Rather, the Court limited the protection to only gravity-related accidents where objects fall from a great height or from being improperly hoisted or inadequately secured, as opposed to protecting against all remote incidents.[14]

Routine Maintenance

A plaintiff engaged in routine maintenance at the time of his injury will not be afforded the protections of Labor Law § 240(1). The courts further defined this in 2006.[15] In *Arevalo v. NASDAQ Stock Mkt., Inc.*, the plaintiff's Labor Law § 240(1) claim was dismissed because at the time of his fall the plaintiff was conducting a daily inspection of an electric sign.[16] Similarly, in *Broggy v. Rockefeller Group, Bax v. Allstate Health Care Inc.* and *Wein v. Amato*, the Courts found that cleaning the interior windows of a twenty-eight floor commercial building, clearing a smoke hatch of snow and ice, and replacing a boiler's defective safety valve all amounted to mere routine maintenance. Thus, Labor Law § 240(1) will not apply.

Nuances of New York Labor Law § 240(1)

While the above cases outline the basic limits of Labor Law § 240(1), there were a few unique situations that arose and require a closer examination. First, the Court of Appeals further defined *Blake*[17] by expanding the definition of sole proximate cause. *Blake* stated that when the worker is the sole proximate cause of his own accident, then Labor Law § 240(1) will not apply and the case should be dismissed. In *Robinson v. East Medical Center*, a worker fell while using a six-foot ladder when he should have used an eight-foot ladder.[18] The job site had eight-foot ladders that were readily available for the plaintiff

to use. He did not need to speak to his supervisor before changing ladders. He was also aware that he should have used the eight-foot ladder. Thus, the Court of Appeals held that the plaintiff was the sole proximate cause of his own fall because adequate safety devices were provided, but the plaintiff chose not to use them.

In *Molyneaux v. N.Y.*, the Second Department held that the defendants could not be held accountable for the injuries sustained by the plaintiff when he slipped on an unidentified substance that covered the entire scaffold but had never been observed prior to the incident.[19] The court held that the defendants could not be held liable without fault because it would impermissibly turn them into insurers of the workplace. Labor Law § 240(1) is meant to require that owners and employers furnish a safe workplace rather than assign liability without fault. Thus, by providing adequate safety devices, building owners and general contractors can avoid liability under Labor Law § 240(1). An accident on a scaffold is no longer an automatic finding of a violation of Labor Law § 240(1).

More interestingly, in *Woszczyna v. BJW Assoc.*, the court found that where the plaintiff was the sole witness to an accident and the plaintiff's credibility was at issue, the plaintiff could not succeed on a Labor Law § 240(1) summary judgment motion. Thus, a plaintiff's credibility can be used to defend against a motion for summary judgment by a plaintiff.

Finally, the Second Department, in *Rodriguez v. Indus. Assoc.*, found that pulling an electrical cable from a ceiling did not amount to altering within the meaning of the statute because it failed to constitute "a significant physical change to the configuration or composition of the structure."[20] Unfortunately, the *Rodriguez* Court did not provide more guidance into the scope of "a significant physical change." While the pulling of an electrical cable from a ceiling does not represent a significant physical change, the courts have not yet defined what will constitute a significant physical change.

Conclusion

The Appellate Divisions are applying Labor Law § 240(1) more strictly and it should be treated as such. Both plaintiffs and defendants should realize that Labor Law § 240(1) will not apply unless the plaintiff's activity falls within the statute and the injury is actually gravity related. Mere maintenance or modification are not enough for Labor Law § 240(1) to apply even if gravity related. Finally and more importantly, if adequate safety devices are provided and readily accessible to the plaintiff, the plaintiff will lose because of sole proximate cause. Accordingly, defendants now have a greater opportunity to dismiss claims alleging a violation of Labor Law § 240(1).

Endnotes

1. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
2. *Jones v. Dannemora*, 27 A.D.3d 844, 845, 811 N.Y.S.2d 186, 188 (3d Dep't 2006).
3. *Id.*
4. *Id.*
5. *Id*.
6. 27 A.D. 1097, 1098, 811 N.Y.S.2d 240, 241 (4th Dep't 2006).
7. 29 A.D.3d 1188, 1189, 815 N.Y.S.2d 324, 325 (3d Dep't 2006).
8. *Id.*
9. 30 A.D.3d 309, 310, 817 N.Y.S.2d 279, 281 (1st Dep't 2006); *see also Zirkel*, 29 A.D.3d at 1189, 815 N.Y.S.2d at 325 (Labor Law § 240(1) is not intended to cover all dangers tangentially related to gravity).
10. *Id*.
11. 28 A.D.3d 1069, 1070, 814 N.Y.S.2d 444, 445 (4th Dep't 2006).
12. 29 A.D.3d 630, 631, 815 N.Y.S.2d 179, 180 (2d Dep't 2006).
13. *Id*.
14. *Id.*
15. *Broggy v. Rockefeller Group*, 30 A.D.3d 204, 205, 818 N.Y.S.2d 6, 7 (1st Dep't 2006) (citing *Panek v. Albany*, 788 N.E.2d 616, 758 (2003) (cleaning the eighth floor interior windows falls into the category of routine maintenance)); *Wein v. Amato Prop.*, 30 A.D.3d 506, 507; 816 N.Y.S.2d 370 (replacement of a boiler's safety valve did not amount to repair but rather mere routine maintenance); *Bax v. Allstate Health Care Inc.*, 26 A.D.3d 861, 862, 809 N.Y.S.2d 378, 380 (4th Dep't 2006) (clearing a smoke hatch of snow and ice constituted routine maintenance).
16. 28 A.D.3d 242, 813 N.Y.S.2d. 383, 384 (1st Dep't 2006).
17. *Blake*, *supra* note 1.
18. 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006).
19. 8 A.D.3d 438, 439, 813 N.Y.S.2d 729, 730 (2d Dep't 2006).
20. 30 A.D.3d 576, 816 N.Y.S.2d 383 (2d Dep't 2006).

David A. Glazer is a managing partner at the law firm of Shafer Glazer, LLP in New York City. His practice focuses on personal injury defense litigation, labor and employment law and corporate law. Mr. Glazer is a member of the American Bar Association's Tort Trial and Insurance Practice Section, the New York State Bar Association (member of the Torts, Insurance & Compensation Law Section and Premises Liability/Labor Law Committee), and the New Jersey State Bar Association. He can be reached at DGlazer@ShaferGlazer.com. Mika Mooney, a law school intern, assisted in the preparation of this article.

Alternative Dispute Resolution: A Win-Win Proposition

By Irwin Kahn

As practicing attorneys we all know that 95% of our civil cases are ultimately settled before coming to trial. Therefore it makes good sense to avail yourself of Alternative Dispute Resolution as soon as practicable. When we are talking about mediation, since both parties must agree to the settlement, there is no downside to sitting down and discussing your case before a trained neutral. In some situations the parties wish to continue their relationship. In other situations it just makes common sense from a business point of view to dispose of the matter without having to invest more time, energy and money. Getting prompt payment is a plus for the claimant. Capping the potential exposure is a good business judgment on behalf of the defendant. That is one reason why mediation is a win-win proposition.

Arbitration can result in a economical time-saving end to a dispute that would linger in the Court system for a great period of time. This is another win-win situation.

Naturally, for any aspect of Alternative Dispute Resolution to be successful it is necessary that both sides have evaluated the liability, damages, and potential verdict in the venue in which the action is pending. For mediation to be successful, both sides must be agreeable to entering into good-faith negotiations before a skilled neutral who acts as an agent for reality. One should approach Alternative Dispute Resolution in the same way you prepare for trial. In a mediation, a concise memorandum setting forth the facts, the law, liability, damages, and current applicable jury verdicts will be of great value in educating both the neutral and your adversary. Similarly, in an arbitration what amounts to a trial memorandum should be prepared.

At the present time there are many tools under the umbrella of Alternative Dispute Resolution. They are mediation, arbitration, mini-trials, fact or coverage determination, and as many variations of same as the imagination and creativity of the participants, including the neutral, can create.

In the Securities industry, both the New York Stock Exchange and the National Association of Securities Dealers have instituted mediation programs in addition to the well-established arbitration programs that they have traditionally provided.

The American Arbitration Association has arbitration and mediation programs in a number of areas, such as commercial, construction, insurance and labor. In the federal courts, Alternative Dispute Resolution is in effect in both the Southern and Eastern Districts. George O'Malley, Alternative Dispute Resolution Administrator of the Southern District of New York, reports an 83% settlement success rate. Gerald P. Lepp, Alternative Dispute Resolution Administrator for the Eastern District of New York, reports that 68% of the cases submitted for mediation were successfully settled. This number does not reflect cases that were settled after they returned to the Court. Both administrators indicate that those who participated have also benefited from expedited discovery and the narrowing of issues.

The New York State Unified Court System Office of Alternative Dispute Resolution Programs is led by Daniel M. Weitz, Esq., State Alternative Dispute Resolution Coordinator. There are a number of Alternative Dispute Resolution programs throughout the state including Family Court, Community Dispute Resolution Centers, the New York County Commercial Division, and several other County Commercial Division programs. New York County also has a Matrimonial Mediation pilot program as well as the availability of Tort Mediation. The evaluations are handled by Michael Tempesta, Esq., telephone number (646) 386-3691, and Shelley Rossoff Olsen, Esq., telephone number (646) 386-3689.

There are a number of commercial providers that supply skilled neutrals at a reasonable cost. These providers usually aid the parties in agreeing to participate, deciding which Alternative Dispute Resolution modality would be most beneficial, and scheduling the session at a convenient situs before a well-qualified neutral.

Overall the statistics show that utilizing Alternative Dispute Resolution in your practice as a case management tool will result in speeding up the turnover of your caseload while enhancing the effective conclusion of your cases to your clients' satisfaction. This is why I contend that Alternative Dispute Resolution is a win-win proposition.

Irwin Kahn has been a civil litigator for more than forty years. He is a principal of the New York City law firm of Kahn & Horwitz, P.C. He is the past Chair of the Arbitration Committee of NYSBA's General Practice Section and a past Chair of the Alternative Dispute Resolution Committee of the New York County Lawyers' Association. He is an experienced arbitrator and mediator. He has served as a Neutral for the New York Stock Exchange, National Association of Securities Dealers, American Arbitration Association, and National Arbitration and Mediation. He is a Special Referee and was a Panel Chair for the Appellate Division, First Department, Departmental Discipline Committee. He has served as an Administrative Law Judge for New York City.

A Refresher on New York Dram Shop Liability

By Howard S. Shafer and Mika Mooney

Introduction

At common law an individual who excessively consumed alcohol was solely liable for any injuries caused due to her intoxication. The Dram Shop Act established an exception to this rule by providing a cause of action against any person who unlawfully sold or assisted in procuring alcohol for an intoxicated person or a person under the age of twenty-one.[1] Specifically, the sale of alcohol to any person visibly intoxicated or any person actually or apparently under the age of twenty-one is prohibited.[2]

During the 1990s numerous cases interpreted and established the limits of New York's Dram Shop Act. However, over the past few years there has been a lack of activity in the Appellate Division and the Court of Appeals regarding such claims. This article provides a refresher to those who have not had Dram Shop cases and for those who have not recently handled one.

Applicable Statutes

New York General Obligations Law § 11-100 and § 11-101 read in tandem with New York Alcoholic Beverage Control Law § 65 comprise New York's Dram Shop Act. Section 11-100 provides a cause of action against "any person who knowingly causes such intoxication or impairment of ability by *unlawfully furnishing* to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years." Section 11-101 provides a cause of action against any person who *unlawfully sold* or assisted in procuring liquor for such intoxicated person and caused or contributed to such intoxication. The unlawful conduct set forth in § 11-100 and § 11-101 is defined in New York Alcoholic Beverage Control Law § 65, which provides that "no person shall sell, deliver or give away or cause or permit or procured to be sold, delivered or given away any alcoholic beverages to (1) Any person, *actually or apparently*, under twenty-one years and (2) Any *visibly intoxicated* person."

Commercial Sale of Alcohol to an Intoxicated Person

Courts have consistently held that § 11-101 of the Dram Shop Act applies *only* in the context of a commercial sale of alcohol; that is, the sale of alcohol for profit. [3] Accordingly, in *D'Amico v. Christie*, the Court of Appeals declined to apply the Dram Shop Act in the context of an employer and employee social function, and held that a commercial sale of alcohol did not exist even where the employees contributed funds to purchase the alcohol.[4] The Second Department also declined to impose Dram Shop liability in *Carr v. Kaifler* and *Custen v. Salty Dog, Inc.*, because of the non-existence of a commercial sale of liquor where the employers provided free alcoholic beverages to their employees during their work shifts.[5] Beyond the workplace, Dram Shop liability will not be imposed in the context of alcohol consumption within the private home, even where the consumption was by underage individuals.[6] Thus, in *Place v. Cooper*, the Second Department declined to impose § 11-101 Dram Shop liability on an underage individual's mother where it was undisputed that she had not commercially sold alcohol to her son and his friend.[7]

Direct Sale to the Tortfeasor

The Court of Appeals explicitly held in *Sherman v. Robinson* that once a commercial sale has been established, it must then be determined that a sale of liquor was made *directly* to the individual who allegedly caused the injuries at issue.[8] An indirect sale irrespective of the quantity of alcohol purchased is insufficient to impose Dram Shop liability upon a vendor.

The plaintiff in *Sherman* contended that although the tortfeasor was not present during the actual sale, Dram Shop liability existed since the convenience store should have been alerted by the quantity of alcohol purchased, and realized that the purchaser was not intended to be the sole consumer of the alcohol. However, the Court found that the convenience store could not be held liable for an indirect sale, and that there is absolutely no duty imposed upon a defendant to investigate possible consumers of alcohol based upon the quantity of alcohol purchased. The Court noted that in order to impose such liability, the surrounding facts and circumstances would have had to dispel the notion of an indirect sale and have suggested that there was a sale to both the purchaser and the alleged tortfeasor. Such a showing would have been made if the tortfeasor was present during the sale, provided the money to purchase the alcohol, or took possession of the alcohol after the sale concluded.

Visible Signs of Intoxication

Much of the Dram Shop Act litigation arises regarding the requirement that there was a sale of alcohol to an inebriated tortfeasor who displayed visible signs of intoxication.[9] This provision is meant to limit a commercial seller's liability where there was no reasonable basis for knowing that the consumer was inebriated.[10] Visible

intoxication need not be established solely by direct evidence but may also be established by circumstantial evidence, including expert and eyewitness testimony.[11]

Overall, courts find that a single piece of circumstantial evidence is insufficient to satisfy the requirement of visible intoxication. Blood and urine tests are the most common piece of circumstantial evidence utilized by plaintiffs; however, alone it is insufficient to meet the visible intoxication requirement since noticeable signs of intoxication vary from person to person.[12] Likewise, an eyewitness may also testify, for example, to the odor of alcohol on the alleged tortfeasor's breath or to the tortfeasor's motor impairment, but additional evidence is still needed.[13] Thus, while individual pieces of circumstantial evidence may be inadequate to fulfill the requirement of visible intoxication, when considered in total the requirement may be satisfied.[14]

In *Romano v. Stanley*, the Court of Appeals held that an expert's conclusions that the tortfeasor must have exhibited symptoms of intoxication while frequenting the defendants' establishments was inadequate and speculative where it was based solely upon the tortfeasor's blood alcohol content at the time of her death.[15] The expert's testimony merely gave information about how alcohol is metabolized but failed to provide a basis for the tortfeasor's blood alcohol content at the specific times when she was present at the defendants' establishments.

Similarly, in *Wolf v. Paxton-Farmer*, the Fourth Department found that mere evidence that a tortfeasor consumed one mixed alcoholic beverage and a portion of another was insufficient to establish visible intoxication.[16] There *must* be adequate evidence to support the conclusion that the tortfeasor was visibly intoxicated, and when examining any circumstantial evidence supporting an assertion of visible intoxication, it must be "supported by the surrounding facts and circumstances in order to be probative."

Furnishing or Procuring Alcohol and Minors

With the objective of decreasing underage drinking rather than requiring a commercial sale, § 11-100 of the Dram Shop Act applies to *any provider* that unlawfully furnishes or assists in procuring alcoholic beverages for a minor under the age of twenty-one. In *Bregartemer v. Southland Corp.*, the Second Department determined that the phrase "assists in procuring" includes using one's own money to purchase alcohol and contributing money to the purchase of the alcohol.[17] Further, actual knowledge or a reasonable belief that the individual is under the age of twenty-one is required, but a defendant will *not* be liable under § 11-100 where he was unaware of any alcohol consumption by minors, did not authorize the consumption of alcohol on his premises, and did not provide the alcohol to the minors.[18]

Accordingly, the First Department in *McGlynn v. St. Andrew the Apostle Church* found that adults in attendance at a private party were not liable where they were aware of alcohol consumption by underage individuals but had not encouraged the consumption. However, the court refused to dismiss the claims against the individual who had rented the hall to host the party and had procured and furnished the alcohol to the minors. The court also declined to impose liability upon the church as owner of the premises since it did not host the party and did not provide the alcohol or make it available to the minors.[19] Similarly, in *Lombart v. Chambery*, the Fourth Department affirmed the lower court's decision granting the defendant summary judgment where the owner of the premises was unaware that alcohol was served to minors.[20]

Regarding a commercial sale of alcohol to a minor, there is little guidance on what behavior is sufficient to protect the seller from liability where the seller verified the alcohol purchaser's identification but it was later proved that the identification was a counterfeit. Careful examination of the identification is imperative. Earlier this year the Third Department in *Johnson v. Verona Oil, Inc.*, denied defendant's summary judgment motion where the commercial seller had admitted that she had failed to adequately compare the identification card photograph to the purchaser. By contrast, a seller of simulated licenses will not be held liable under the Dram Shop Act. In *Etu v. Cumberland Farms, Inc.*, the Third Department declined to hold such a seller liable under a theory that the seller assisted the minor in procuring alcohol since there was no actual sale of alcohol.[21]

Lastly, concerning a bar's sale of alcohol to a minor, in order for the establishment to be held liable under the Dram Shop Act, there must be evidence demonstrating that the underage tortfeasor was intoxicated at the time of the incident. Thus, in *Basile v. Francino*, the court did not impose Dram Shop liability because there was no evidence that the minor tortfeasor was intoxicated despite evidence that she consumed alcohol at the defendant's bar.[22]

Plaintiff's Own Intoxication

It is well settled that there is no Dram Shop Act cause of action for an individual injured due to his or her own intoxicated condition. Thus, in *Searley v. Wegmans Food Markets*, the Fourth Department held that the plaintiff could not prevail under the Dram Shop Act where the defendant unlawfully sold alcohol to the plaintiff's minor son but no other individual besides the minor sustained injuries.[23] Similarly, a plaintiff may not claim Dram Shop Act liability where the plaintiff was responsible for procuring and providing alcohol to the intoxicated individual who caused plaintiff's own injuries.[24] Accordingly, in *Reese v. Sierra*, the Second Department determined that

there was no cognizable cause of action against a restaurant for serving alcohol to a visibly intoxicated person, where it was the plaintiff who had purchased the alcoholic beverages for that person, and thus plaintiff was unable to recover for injuries sustained in the ensuing automobile accident.[25]

Dram Shop Liability and Lessors of Premises

Dram Shop liability will not be imposed upon the premises owner where he leased the premises and his tenants are responsible for the operation and commercial sale of alcohol on the premises. Generally, a "premises owner has no duty to control the conduct of its patrons or tenants for the benefit of third persons."[26] The premises owner will only be liable if he "is present and is aware that he can and has the opportunity to control the third parties' conduct and is reasonably aware of the necessity for such control."[27]

Thus, in *Winter v. Jimmy's Lakeside Inn Inc.*, the Third Department declined to hold the landlord of a bar liable where the landlord had leased out the premises and retained no control of the premises or the operation of the bar.[28] Likewise, in *McGlynn*, the First Department held that a church was not liable for injuries sustained due to an assault by an intoxicated tortfeasor where the church did not host the party but had rented out the use of its hall in exchange for a donation.[29]

Conclusion

Case law reflects that the Dram Shop Act requirements and limits are rather concrete, but each case requires careful analysis of the facts and circumstances to evaluate potential liability. In order to have a valid Dram Shop Act cause of action under § 11-101 there must be a commercial sale of alcohol made directly to an intoxicated tortfeasor who displayed visible signs of intoxication. Under § 11-100, liability will be imposed upon *any person* who furnishes or assists in the procurement of alcohol for a minor, thus resulting in the minor's intoxication or impairment of ability. Importantly, remember that plaintiffs may not bring a Dram Shop claim for injuries suffered due to their own intoxication. Further, absent very limited circumstances, a landlord will not have Dram Shop liability for the commercial sale of alcohol by a commercial tenant. Finally, be mindful that although Dram Shop liability may not be imposed, common law liability may still remain.

Endnotes

1. N.Y. Gen. Oblig. Law §§ 11-100, 11-101 (2007).
2. N.Y. Gen. Oblig. Law § 11-100 (2007); N.Y. Alco. Bev. Cont. Law § 65 (2007); *Johnson v. Verona Oil, Inc.*, 2007 N.Y. Slip Op. 00031 (3d Dep't 2007).
3. *D'Amico v. Christie*, 518 N.E.2d 896, 898 (1987).
4. *Id.*; N.Y. Alcoholic Beverage Control Law § 65(1).
5. *Carr v. Kaifler*, 601 A.D.2d 584, 585 (2d Dep't 1993); *Custen v. Salty Dog, Inc.*, 170 A.D.2d 572 (2d Dep't 1991).
6. *Place v. Cooper*, 35 A.D.2d 1260 (4th Dep't 2006).
7. *Id.*
8. *Sherman v. Robinson*, 606 N.E.2d 1365, 1368 (1992); *Stewart v. Taylor*, 167 A.D.2d 846 (4th Dep't 1990).
9. *Kelly v. Fleet Bank*, 271 A.D.2d 654, 655 (2d Dep't 2000); *Nehme v. Joseph*, 160 A.D.2d 915, 916 (2d Dep't 1990).
10. *Romano v. Stanley*, 684 N.E.2d 19, 21 (1997).
11. *Romano*, 684 N.E.2d at 21-2; *Kish v. Farley*, 24 A.D.3d 1198, 1200 (4th Dep't 2005).
12. *Romano*, 684 N.E.2d at 21-2.
13. *LaCatena v. M.C. & E.D. Beck, Inc.*, 35 A.D.3d 388 (2d Dep't 2006).
14. *Id.*
15. *Romano*, 684 N.E.2d at 23.
16. 23 A.D.3d 1046 (4th Dep't 2005).
17. 257 A.D.2d 544, 255 (2d Dep't 1999).
18. *Guercia v. Carter*, 274 A.D.2d 553 (2d Dep't 2000).
19. 304 A.D.2d 372 (1st Dep't 2003).
20. 19 A.D.3d 1110 (4th Dep't 2005).
21. 148 A.D.2d 821, 824 (3d Dep't 1989).
22. 253 A.D.2d 779 (2d Dep't 1998).
23. 24 A.D.3d 1202 (4th Dep't 2005).
24. *Vandenburg v. Brosnan*, 129 A.D.2d 793, 795 (2d Dep't 1987).
25. 17 A.D.3d 439, 440 (2d Dep't 2005).
26. *Cavanaugh v. Knights of Columbus Council*, 142 A.D.2d 202, 204 (3d Dep't 1988).
27. *Id.*
28. 200 A.D.2d 826, 827 (3d Dep't 1994).
29. *McGlynn*, 304 A.D.2d at 373.

Howard S. Shafer, Esq. is a Partner in the firm of Shafer Glazer, LLP. The firm concentrates its practice in representing businesses and individuals in negligence, employment, insurance coverage and related matters. Howard can be reached through the firm's Web site at www.shaferglazer.com. Mika Mooney, a law school intern, assisted in the preparation of this article.

Long-Awaited Decision Issued by the New York Court of Appeals Clarifies Whether All Additional Insured Coverage Is Primary: *BP Air Conditioning Corp. v. One Beacon Insurance Group*

By Bryan Richmond and Daniel W. Gerber

A current debate in New York has been whether "other insurance" clauses in contracts of insurance had any effect when a party was named as additional insured. In other words, is all additional insurance primary? Since the Court of Appeals' Decision in *Pecker Iron Works of New York, Inc. v. Travelers Insurance Company*, 99 N.Y.2d 391 (2003) and, more recently, the First Department's Decision in *BP Air Conditioning Corp. v. One Beacon Insurance Group*, 33 A.D.3d 116 (1st Dep't 2006), arguments have been made from co-insurers in New York that an insured's coverage as an additional insured is always primary to any coverage as a named insured, regardless of whether the "other insurance" clause purports to provide excess coverage only. On June 27, 2007, the Court of Appeals issued its decision in *BP Air Conditioning Corp. v. One Beacon Insurance Group*, which should put an end to the debate.

In 2003, New York's highest court rendered a decision in *Pecker Iron Works of New York, Inc. v. Travelers Ins. Co.* that has a significant impact on the insurance and indemnification obligations a subcontractor and/or its insurer have in New York litigation. In that case, the Court of Appeals determined that implicit in an obligor's contractual obligation to procure liability coverage naming the obligee as an additional insured was the premise that the coverage for the additional insured under the obligor's liability policy would be primary and noncontributory, even where the contract between the parties did not expressly state that such coverage would be or should be primary.

However, the Court of Appeals in *Pecker* did not address the issue of priority of coverage between insurers. The *Pecker* court simply examined whether Pecker was entitled to primary or excess coverage from Travelers based upon the specific additional insured endorsement at issue. Once the court found that Pecker was entitled to primary coverage from Travelers, it was not asked to consider the relationship between Travelers' and the other insurer's policies. In other words, the court did not consider whether Travelers' policy was the sole primary coverage or co-primary with the other insurer.

The First Department's holding in *BP Air Conditioning Corp. v One Beacon Insurance Group*, 33 A.D.3d 116 (1st Dep't 2006) contains similar facts and appeared to base its holding on *Pecker*. The lower court had granted BP's motion for summary judgment to the extent that One Beacon is obligated to provide a defense in the underlying action. It refused to declare that One Beacon was primarily responsible for BP's defense costs since no other policies were submitted on the motion and it could not ascertain whether some other carrier should be treated as co-insurer or excess insurer to One Beacon without comparison of the policy language.

In modifying the lower court's decision, the Appellate Division, First Department in *BP Air Conditioning* extended *Pecker* by finding that between an insured's coverage as an additional insured, and its coverage as a named insured, the additional insured coverage is always sole primary, without comparison of the language used in the policies. To support its conclusion that the insurer affording additional insured coverage was the sole primary coverage, the *BP Air Conditioning* court relied exclusively on a passage by the Court of Appeals in *Pecker*:

> 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.

In its decision, however, the First Department apparently extended *Pecker* beyond its intended reach by ignoring the circumstances of that case and setting aside the long-held and well-recognized tenet that insurance agreements, and not underlying subcontracts, govern priority disputes among insurers.

In the Court of Appeals' decision, New York's highest court addressed this issue and clarified its holding in *Pecker*. *BP Air Conditioning Corp. v. One Beacon Ins. Group*, ___ N.Y.3d ___, 207 WL 1826923, 2007 Slip Op. 05581 (June 27, 2007). In its decision, the Court of Appeals first addresses whether an insurer's duty to defend an additional insured is triggered by the allegations in the underlying complaint or must await some judicial determination as to whether the loss occurred as a result of the work. Relying on a number of its previous holdings, the Court held that "an insurer's duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage." Holding that One Beacon was obligated to provide coverage, the Court noted:

> A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured and it is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusionary provisions. The merits of the complaint are irrelevant and, an insured's right to be accorded legal representation is a contractual right and consideration upon which a person's premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured. An insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense "litigation insurance" expressly provided by the insurance contract.

Turning to the issue of priority, the Court stated in the first paragraph of its decision that it was "unable to answer a second question regarding priority of coverage since the relevant parties and policies at issue are not before us." In addressing the issue later in the decision, however, the Court nonetheless held that the First Department erred in finding that One Beacon's additional insured coverage is primary and BP's coverage under its own policy is excess. Modifying the Appellate Division's order by reinstating the Supreme Court's decision, the Court of Appeals held:

> In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue. Here, Supreme Court correctly concluded that because none of the other insurance carriers are parties to this declaratory judgment action and no other relevant policies have been submitted, the priority of coverage cannot be determined.

The Court of Appeals' decision in *BP Air Conditioning* should eliminate arguments stemming from the First Department's conclusion that *Pecker* stood for the proposition that additional insured coverage is always sole primary without regard to the language utilized in the policies at issue. By concluding that the issue of priority cannot be judicially determined without a comparison of the policies, the Court of Appeals implicitly held that additional insured coverage is not always sole primary, although it did not expressly state as much in its decision.

Timely Notice: What Are the Courts Holding in the Post-*Argo*/*Rekemeyer* Era?

By Kenneth A. Krajewski and Tara E. Waterman

The No-Prejudice Rule

Generally, "one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice." *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 496, 743 N.Y.S.2d 53, 56 (2002), *citing Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 581, 584 N.Y.S.2d 290, 292 (1992). In a "limited exception" to traditional contract-law principles, New York courts have long-maintained the rule that "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy, . . . and the insurer need not show prejudice before it can assert the defense of non-compliance." *Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 905 (1972); *see also Argo Corporation v. Greater New York Mutual Insurance Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005). This is known as the "no-prejudice exception." *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 496, 743 N.Y.S.2d 53 (2002).

The courts have expressed numerous reasons to justify the "no prejudice" rule as it applies to primary insurers. For instance, "the insurer must have an opportunity to protect itself," *Security Mutual*, *supra* at 440, 340 N.Y.S.2d at 905; without timely notice "an insurer may be deprived of the opportunity to investigate a claim and is rendered vulnerable to fraud," *Power Auth. v. Westinghouse Elec. Corp.*, 117 A.D.2d 336, 339, 502 N.Y.S.2d 420, 422 (1986); and late "notification may prevent the insurer from providing a sufficient reserve fund." *Id.* at 339, 502 N.Y.S.2d at 422.

Thus, under the no-prejudice rule, an insured's failure to timely place a primary insurer on notice of an occurrence relieves the insurer from having to perform under the insurance contract without regard to whether the insurer can show prejudice resulting from the delay. *Argo Corporation, supra* at 339, 794 N.Y.S.2d at 706; *Rekemeyer v. State Farm Mutual Auto. Insurance Co.*, 4 N.Y.3d 468, 474-75, 796 N.Y.S.2d 12, 17 (2005) *citing Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, *supra*; *see also Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992).

The no-prejudice rule has been applied to the insured's duty to notify the insurer of the occurrence, as well as to the insured's duty to notify the carrier of a lawsuit against the insured. *Melhado v. Catsimatidis*, 182 A.D.2d 576, 582 N.Y.S.2d 434 (1st Dep't 2002). In the context of first-party claims, there is a third duty imposed upon the insured. New York's prescribed Supplementary Uninsured Motorists Endorsement (SUM) requires that the insured give notice of his or her own lawsuit against the tortfeasor. 11 N.Y.C.R.R. § 60-2.3(f), Condition 4. In *In re Brandon (Nationwide Mut. Ins. Co.)*, *supra*, the Court of Appeals held that an insurer *is* required to show prejudice in order to successfully disclaim due to the insured's late notice of legal action.

In re Brandon (Nationwide Mut. Ins. Co.) (2002)

Condition "4" of the New York mandatory SUM endorsement requires an insured, after commencing suit against the tortfeasor, "immediately" to forward a copy of the summons and complaint to the SUM carrier. In the past, the failure to do so resulted in the forfeiture of SUM coverage. *Nationwide Mut. Ins. Co. v. Vivas*, 267 A.D.2d 105, 699 N.Y.S.2d 410 (1st Dep't 1999); *Allstate Ins. Co. v. Kruger*, 264 A.D.2d 443, 694 N.Y.S.2d 132 (2d Dep't 1999). However, in *Brandon*, *supra*, the Court of Appeals held that where the SUM carrier receives timely notice of the accident, but the insured does not timely forward the summons and complaint pertaining to such, the SUM carrier must show prejudice in order to disclaim on this ground. *Brandon*, *supra* at 498, 743 N.Y.S.2d at 57-58; *Banks v. American Manufacturers Mutual Insurance Co.*, 306 A.D.2d 120, 762 N.Y.S.2d 588 (1st Dep't 2003); and *State Farm Mutual Insurance Company v. Sparacio*, 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dep't 2002).

Rekemeyer v. State Farm Mutual Automobile Insurance Co. (2005)

In *Rekemeyer v. State Farm Mutual Automobile Insurance Co.*, 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005), the Court of Appeals re-affirmed its decision in *Brandon* and expanded the exception to the no-prejudice rule in the SUM context. Recall that in *Brandon*, the Court held that prejudice must be shown where the insurer disclaims for late notice of the insured's lawsuit, where the insurer received timely notice of the SUM claim. In *Rekemeyer*, the Court held that prejudice must be shown where the insurer disclaims for late notice of the SUM claim, where the insurer received timely notice of the accident. In *Rekemeyer, id.* at 476, 796 N.Y.S.2d at 17-18.

Prior to *Rekemeyer*, timely notice of the accident itself or a claim for no-fault benefits would not place a carrier on notice of a potential SUM claim. However, after *Rekemeyer*, where the carrier has received timely notice of the accident and delayed notice of the SUM claim, the carrier remains obligated to provide SUM benefits, unless

it can show prejudice resulting from the delay. *See also State Farm Mutual Auto. Insurance Co. v. Rinaldi*, 27 A.D.3d 476, 810 N.Y.S.2d 346 (2d Dep't 2006) (holding that a carrier must demonstrate prejudice where it received timely notice of the accident and late notice of the SUM claim); *In re Nationwide Mut. Ins. Co. (Mackey)*, 25 A.D.3d 905, 808 N.Y.S.2d 797 (3d Dep't 2006) (holding that a SUM carrier failed to demonstrate prejudice resulting from untimely receipt of "Proof of Claim" form regarding the SUM claim, where the insured gave timely notice of the accident, made a claim for no-fault benefits and even previously indicated that a SUM claim may be implicated).

Both *Rekemeyer* and *Brandon* place the burden of showing prejudice on the insurer, because the insurer has the relevant information about its own claims-handling procedures.

Argo Corporation v. Greater New York Mutual Insurance (2005)

Note that the Court of Appeals issued its decision in *Argo Corporation v. Greater New York Mutual Insurance Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005), on the same day it decided *Rekemeyer*. In *Argo*, the Court of Appeals decided not to extend the exception to the no-prejudice rule where a commercial liability insurer received late notice of a lawsuit under a liability insurance policy. Specifically in that case, the insurer did not receive any notice of either the "occurrence" or the underlying lawsuit until fourteen (14) months after the insured had received the summons and complaint; in that time, a default judgment against the insured had been taken. The Court, again, reaffirmed its holding in *Brandon*, noting that the no-prejudice rule had not been abrogated and should not be applied to "cases where the carrier received unreasonably late notice of claim." *Id.* at 399-340, 794 N.Y.S.2d at 707. The Court in *Argo* clarified its holding and stated, "The facts here, where no notice of claim was filed and the first notice filed was a notice of a lawsuit, are distinguishable from *Brandon*, where timely notice of claim was filed, followed by a late notice of lawsuit, and distinguishable from *Rekemeyer*, where an insured gave timely notice of the accident, but late notice of the SUM claim." *Id.*

Post-*Argo*/*Rekemeyer* Era

1. *Great Canal Realty Corp. v. Seneca Insurance Co.* (2005)

After *Brandon* was decided, and before *Argo* and *Rekemeyer* were handed down, the First Department decided *Great Canal Realty Corp. v. Seneca Insurance Co.*, 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004). In that case, the Appellate Division interpreted *Brandon* as a move toward a "prejudice standard." A worker was injured while working on property owned by Great Canal Realty Corp. on May 7, 2002. Great Canal did not give the insurer any notice of the accident or notice of the underlying suit until September 10, 2002, which was almost a month after the worker commenced suit. The insurer disclaimed coverage for late notice of an "occurrence." The Court found that the insurer was required to make a showing of prejudice in order to disclaim based on late notice of an occurrence by the insured. However, in June 2005, after *Argo* was decided, the Court of Appeals reversed the Appellate Division's decision, and held that the insured's failure to give notice of the occurrence "as soon as practicable" vitiated the contract. *Great Canal Realty Corp. v. Seneca Insurance Co., Inc.*, 5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005). Citing to *Argo*, the Court of Appeals reiterated, "the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence." *Great Canal*, 5 N.Y.3d at 743, 833 N.E.2d 1196 at 1197, 800 N.Y.S.2d 521 at 522.

2. Continued Application of No-Prejudice Rule

Argo and *Great Canal* both stated that the *Brandon/Rekemeyer* exceptions to the no-prejudice rule do not extend to cases where late notice of claim has been given by the insured. In the decisions that have followed, New York courts have continued to strictly apply the no-prejudice rule to situations where the insured gave late notice of an "occurrence" or claim. For example, in *Wilson v. Quaranta*, 18 A.D.3d 324, 795 N.Y.S.2d 532 (1st Dep't 2005), the Court held an eight-and-one-half month delay in providing a legal malpractice carrier with notice of a potential claim was untimely, notwithstanding the fact that the insurer could not show prejudice. *See also Brownstone Partners/AF & F, LLC v. A. Aleem Construction, Inc.*, 18 A.D.3d 204, 796 N.Y.S.2d 41 (1st Dep't 2005) (noting that a comprehensive general liability insurer was not required to show prejudice before disclaiming where insured did not give notice of the occurrence until five months after the accident and four months after the underlying action was commenced); *United States Underwriters Insurance Co. v. Falcon Construction Corp.*, 2006 WL 1292206 (S.D.N.Y. 2006) (holding that a commercial general liability insurer was not required to show prejudice where the notice of the underlying occurrence or claim was untimely); *Sorbara Construction Corporation v. AIU Insurance Company*, 41 A.D.3d 245, 838 N.Y.S.2d 531 (1st Dep't 2007) (delay of notice of occurrence for five and one-half years to excess insurer vitiates contract as a matter of law without a showing of prejudice).

In *St. Charles Hospital and Rehab. Center v. Royal Globe Insurance Co.*, 18 A.D.3d 735, 795 N.Y.S.2d 343 (2d Dep't 2005), the Court declined to accept the insured's argument that the insurer was required to show prejudice where untimely notice of claim was given. *See also Pennsylvania Lumberman's Mutual Insurance Co. v. D & Sons Construction Corp.*, 18 A.D.3d 843, 796 N.Y.S.2d 122 (2d

Dep't 2005); *Gershow Recycling Corp. v. Transcontinental Insurance Co.*, 22 A.D.3d 460, 801 N.Y.S.2d 832 (2d Dep't 2005); *Long Island Lighting Co. v. Allianz Underwriters Insurance Co.*, 24 A.D.3d 172, 805 N.Y.S.2d 74 (1st Dep't 2005).

Since *Argo*, the Courts have applied the no-prejudice rule to even relatively short periods of delay, where the insured failed to promptly give notice of the accident or occurrence to the insurer. *See Steinberg v. Hermitage Insurance Co.*, 26 A.D.3d 426, 809 N.Y.S.2d 569 (2d Dep't 2006) (insured's failure to notify insurer of an occurrence until 57 days after it had become aware of a potential claim was untimely as a matter of law); *Kambousi Restaurant, Inc. v. Burlington*, 11 Misc. 3d 1073(A), 2006 WL 870506 (N.Y. Sup., Bronx Cty. 2006) (five-month delay was untimely as a matter of law); *Figueroa v. Utica Nat. Ins. Co. Group*, 16 A.D.3d 616, 792 N.Y.S.2d 556 (2d Dep't 2005) (two-month delay was unreasonable as a matter of law).

3. Application of the Exception to the No-Prejudice Rule in SUM Context

After *Rekemeyer*, many predicted that the application of the no-prejudice rule in the SUM context would be very limited, if not completely eliminated. *See* Mitchell S. Lustig, Jill Lakin Schatz, *Outside Counsel: End of No-Prejudice Rule in Claims for SUM Benefits*, 2/2/2006 N.Y.L.J. 4 (col. 4) (stating, "This limited exception to the abandonment of the no-prejudice rule will be of minimal benefit to the SUM insurer as in virtually all cases involving claims for SUM benefits, the insurer will typically be provided with prior notice of the accident. . . ."). That prediction has come to fruition, evidenced by the various Appellate Division cases which have strictly applied this exception to the no-prejudice rule to disputes involving SUM carriers. Courts have continued to recognize that, "where an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage." *Nationwide Mutual Insurance Co. v. Mackey*, 25 A.D.3d 905, 808 N.Y.S.2d 797 (3d Dep't 2006), *quoting Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 476, 796 N.Y.S.2d 13, 828 N.E.2d 970 (2005); *See also Progressive Northeastern Insurance Co. v. Heath*, 41 A.D.3d 1321, 837 N.Y.S.2d 476 (4th Dep't 2007) (insurer entitled to disclaim coverage for SUM claim based upon insured's seven-month delay in notifying insurer of the accident or claim without showing prejudice); and *Assurance Company of America v. DelGrosso*, 38 A.D.3d 649, 831 N.Y.S.2d 545 (2d Dep't 2007) (insurer entitled to disclaim coverage for SUM claim based upon insured's 22-month delay in notifying insurer of the accident or claim without showing prejudice).

See also State Farm Mutual Auto. Ins. Co. v. Rinaldi, 27 A.D.3d 476, 810 N.Y.S.2d 346 (2d Dep't 2006) (holding where an insured gave timely notice of the accident, the insurer must show prejudice before it may disclaim for late notice of the SUM claim).

In *Nationwide Mutual v. Mackey*, the insurer denied an insured's application for SUM benefits because, although timely notice of the accident was given, the insured failed to complete and return a "Proof of Claim" form regarding the SUM benefits application. The Court noted that the carrier had been given notice of the accident, notice of a claim for no-fault benefits and notice of the claim for the SUM benefits. Applying *Rekemeyer*, the Court held that the insurer had previously been given notice of the accident, and, therefore, must show prejudice before disclaiming based on late submission of the "Proof of Claim" form. As the carrier failed to show any prejudice, the Court held that the carrier could not disclaim SUM benefits. *Nationwide Mutual Insurance Co. v. Mackey*, 25 A.D.3d 905, 808 N.Y.S.2d 797; *see also New York Central Mutual Fire Insurance Company v. Ward*, 38 A.D.3d 898, 833 N.Y.S.2d 182 (2d Dep't 2007) (where insured gives timely notice of occurrence and written notice of the accident, insurer must show prejudice in order to disclaim SUM coverage for failure of insured to return "proof of claim" form). Other courts have not required a showing of prejudice to disclaim based upon late submission of proof of claim so long as the disclaimer was timely. *See New York Central Mutual v. Gonzales*, 34 A.D.3d 816, 825 N.Y.S.2d 132 (2d Dep't 2006); *New York Central Mutual Fire Ins. Co. v. Aguirre*, 7 N.Y.3d 772, 820 N.Y.S.2d 848 (2006).

Note that the requirement that the insurer must show prejudice in order to disclaim due to late notice of a claim for supplementary uninsured/underinsured motorist benefits, so long as the insured has given timely notice of the accident, also extends to claims for uninsured motorist benefits made pursuant to a SUM endorsement. *New York Central Mutual Insurance Co. v. Davalos*, 39 A.D.3d 654, 835 N.Y.S.2d 247 (2d Dep't 2007).

4. Expanded Application of the Exception to the No-Prejudice Rule

While many predicted the abandonment of the no-prejudice rule with respect to SUM cases, other cases extending the exception to the no-prejudice rule beyond the SUM context have come as more of a surprise.

In *City of New York v. Continental Cas. Co.* 27 A.D.3d 28, 805 N.Y.S.2d 391 (1st Dep't 2005), the First Department required a showing of prejudice by a liability insurer, distinguishing *Argo*, and citing to *Brandon* as precedent. In the *City of New York v. Continental Cas. Co.*, the City contracted with Welshbach Electric for the maintenance of traffic signals in Queens. In procuring liability coverage with Continental Casualty Company, Welshbach named the City as an additional insured. Thereafter, on April 4, 2001, an employee of Welshbach was electrocuted while repairing a defective light on a utility pole. Accordingly,

the employee sued Con Edison, who then impleaded Welshbach, seeking indemnification and contribution. At that point, Continental assumed Welshbach's defense of the action. In December of 2002, the City of New York was impleaded by Con Edison. More than three months later, the City of New York forwarded the third-party suit papers to Welshbach, requesting that Welshbach forward the same to Continental with a request for defense and indemnification. Upon receipt of such, Continental disclaimed on the basis that the City did not give notice of the April 2001 accident and did not promptly forward the third-party suit papers when they were served in December of 2002. The Court held that Continental was required to defend and indemnify the City because Continental was given timely notice of the occurrence by Welshbach, was actively participating in the litigation surrounding the accident, and was served with a copy of the third-party complaint against the City when it was originally served in the action. *City of New York v. Continental Cas. Co.* 27 A.D.3d 28, 805 N.Y.S.2d 391.

In this decision, the Court distinguished *Argo*, where the insurer was not previously given any notice by another insured of the accident involved. The Court found the facts to be in accord with those in *Brandon*, because Continental had received timely notice of the accident, but late notice of the underlying third-party action. Accordingly, the insurer could not disclaim without a showing of prejudice.

In a similar case, the Supreme Court of New York County again dealt with a liability policy involving Welshbach Electric and the City of New York in *City of New York v. Welshbach Electric Corp*., 11 Misc. 3d 1085(A), 2006 WL 1072064 (Sup. Ct., New York Cty. 2006). Again, in this case, Welshbach included the City as an additional insured on its liability policy. The insurer received notice of the underlying accident and personal injury suit from Welshbach, but did not receive any notice from the City, which had also been named as a defendant. In holding that the insurer did not have an obligation to defend or indemnify the City of New York, the Court distinguished the First Department's decision in *City of New York v. Continental Cas. Co.*, 27 A.D.3d 28, 805 N.Y.S.2d 391, stating, "Here, the City has not presented any evidence that it forwarded any notice or suit papers or demand to Welshbach with a request that it forward them to [the insured], nor has it controverted [the insurer's] assertion that its receipt of the complaint herein in 2003 was its first notice of the ten-year old [. . .] claim from the City." *City of New York v. Welshbach Electric Corp*., *supra* at 4. The Court also noted that, unlike in *City of New York v. Continental Cas. Co.*, the City and Welshbach could not be considered "united in interest" for purposes of the timely notice requirement because, in the underlying suit, Welshbach had cross-claimed against the City and the parties were adverse to each other.

A New York County Supreme Court also extended the exception to the no-prejudice rule recited in *Brandon* beyond the SUM context. In *American Transit Insurance Co. v. B.O. Astra Management Corp.*, 12 Misc. 3d 740, 814 N.Y.S.2d 849 (Sup. Ct., New York Cty. 2006), the Court held that an automobile insurer, who received proper notice of the accident, but untimely notice of the lawsuit, was obligated to show prejudice before it was relieved of the duty to defend and indemnify. Unlike *Brandon*, this case did not deal with SUM benefits. However, the Court applied the rationale in *Brandon*, and employed the exception to the no-prejudice rule. Citing to *City of New York v. Continental Cas. Co.,* 27 A.D.3d 28, 805 N.Y.S.2d 391, the Court found that the insurer was required to show prejudice in receiving late notice of the lawsuit because the plaintiff in the underlying suit had timely given notice of claim and informed the insurer that counsel had been retained. Further, the Court noted that the insurer had already provided first-party no-fault benefits to their insured. *American Transit Insurance Co. v. B.O. Astra Management Corp.*, 12 Misc. 3d 740, 814 N.Y.S.2d 849.

The First Department later affirmed, stating, "Having received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice, and such prejudice was not shown." *American Transit Insurance Co., v. B.O. Astra Management Corp.*, 39 A.D.3d 432, 835 N.Y.S.2d 106 (1st Dep't 2007) (citations omitted).

Legislative Initiatives

In June 2007, the Senate and Assembly simultaneously introduced a bill intended to amend CPLR 3001 and to add new Section 3451 to the Insurance Law. *See* Senate Bill S06306 and Assembly Bill A08363A.

The proposed Section 3451 of the Insurance Law would require an insurer to demonstrate material prejudice in the event an insured failed to give timely notice of a claim. Moreover, the bill provided that in the event the insurer had knowledge of the occurrence for either the claimant or the claimant's representative or health care provider, or from any other injured person or injured person's representative or health care provider, or from such insurer to the insured regarding the occurrence, such notice would create a rebuttable presumption that the insurer has not been prejudiced by delayed notice. The bill also provided that notice given to any licensed agent of such insurer in this state with particulars sufficient to identify the insured would be deemed notice to the insurer.

The proposed amendment to CPLR 3001 would add a second sentence to the existing language of Section 3001, authorizing a declaratory judgment action by any party who has a claim against another for the determination of

the existence or extent of coverage owed by an insurer to that other. This would allow injured or damaged third parties to directly sue a tortfeasor's insurer before obtaining a judgment of liability against the tortfeasor.

On August 1, 2007, Governor Spitzer vetoed the bill. In his statement accompanying the veto, the Governor expressed his approval of the intent of the bill, i.e., to prevent insurers from denying coverage to its insureds based on a technicality. However, the Governor also expressed his concern over the way the bill was presented, noting that the bill was introduced on June 17 and passed both houses a mere 3 days later.

In his veto memorandum, the Governor indicated that he was directing the Superintendent of Insurance to investigate the efficacy of the proposal, signaling willingness to support a change in the present state of the law.

At this time, it not known whether there has been any further activity by the Superintendent or the legislature.

Conclusion

Cases in the Post-*Argo/Rekemeyer* era raise some issues as to how far the exception to the no-prejudice rule will reach. Specifically, it is unclear as to how far *Brandon* and *Rekemeyer* will be expanded beyond the SUM context. As of yet, the Court of Appeals has not taken up this issue again. However, the argument that an insurer is required to show prejudice before disclaiming for timely notice continues to be made in various contexts. For example, in *Briggs Ave. LLC v. Insurance Corp. of Hannover*, 2006 WL 1517606 (S.D.N.Y. 2006), the insured did not dispute that the no-prejudice rule applied where a liability insurer disclaimed for untimely notice of the insured, but asked the District Court to preserve the issue for appeal, which the District Court noted was "presumably a bid at certification to the New York Court of Appeals for reconsideration of the issue." *Id.* at 3. In denying such a request and applying the no-prejudice rule, the Court noted that the insured had argued, "The times are changing, since New York seems, in this regard, to be well behind its sister states in considering lack of prejudice as an element for an effective and proper disclaimer under a late notice defense." *Id.* at 3. While the Court of Appeals has yet to join the increasing number of jurisdictions which no longer follow the no-prejudice rule in any context, recent cases, such as *American Transit Insurance Co. v. B.O. Astra Management Corp.*, *supra,* and *City of New York v. Welshbach Electric Corp.*, *supra*, demonstrate the pressure litigants are placing on the courts to expand the exception to the no-prejudice rule. It is unclear whether New York courts will slowly move even farther away from the traditional rule.

Nor is it clear that the courts will have much more time in which to consider such changes. The passage of Senate Bill S06306 and Assembly Bill A08363A are a clear indication of the legislature's apparent interest in changing the way the courts are handling late notice cases. Likewise, the Governor has already signaled his willingness to sign a bill which shifts the burden to the insurer to establish prejudice in late notice cases.

It remains to be seen whether the "no-prejudice rule" will continue in New York.

Notable Cases in the Appellate Courts in 2007

By David A. Glazer

This year, the publications have discussed a variety of important subjects that are of note to the Torts, Insurance and Compensation Law Section of New York State Bar Association. This article discusses how the courts addressed the duty of common carriers, post–note of issue interviews with doctors in medical malpractice cases, requirements for an insurer's duty to defend, high-low agreements, Labor Law § 240, legal malpractice, and premises liability.

Post–Note of Issue Interviews with Doctors in Medical Malpractice Cases

In two different Appellate Division cases, both the Second Department and the Fourth Department have held that defense counsel may not compel plaintiffs to consent to private interviews of non-party treating physicians after a note of issue has been filed.[1] In *Arons*, plaintiffs refused to execute authorizations which would permit defense counsel to informally and privately interview non-party treating physicians who rendered care to the plaintiff-decedent. A defendant moved to compel the production of the authorizations. The Supreme Court granted the motion and directed plaintiffs to provide the authorizations permitting such interviews.

The Second Department held that private interviews of non-party treating physicians are a form of disclosure beyond the scope of CPLR Article 31 and the Uniform Rules. After the filing of a note of issue, a court's authority to allow additional pretrial disclosure is limited to a party's demonstration of "unusual or unanticipated circumstances."[2] Unlike the production of medical reports and hospital records, there is no statutory or regulatory authority which requires a plaintiff to execute authorizations permitting *ex-parte* interviews between their treating physicians and defense counsel.

Following the Second Department's decision in *Arons v. Jutkowitz*, the Fourth Department held that defense counsel may not compel plaintiffs to execute HIPAA-compliant authorizations to grant access to non-party treating physicians for private interviews and enunciated four reasons. First, "there are no provisions in the law permitting such informal disclosure."[3] Second, formal discovery procedures allow "on the record" discussion with witnesses in the presence of the adversary. Third, although a person's medical history is placed at issue when he or she commences an action, access to that medical history is not without boundaries. Unsupervised *ex-parte* interviews with treating physicians may result in the intentional or inadvertent revelation of irrelevant aspects of a person's medical history. Finally, there is no reason to allow discovery after the note of issue is filed when it is not permitted prior to the filing of a note of issue. However, there was a dissent in the Fourth Department. As such, this issue may not yet be fully decided.

Duty to Defend Additional Insureds

In *BP Air Conditioning Corp. v. One Beacon Insurance Group*, [4] the Court of Appeals held that an insurance carrier is obligated to provide a defense for an additional insured as well as a primary insured where the underlying tort action triggers coverage under the policy. This obligation to defend an additional insured applies even if there are other claims that might fall outside the coverage. This obligation occurs even if the other claims are in fact the primary claims in the underlying action where the client invoking coverage is based on a minor claim. Thus, an additional insured must be treated as if it is a primary insured for purposes of a defense.

In 2000, the general contractor subcontracted the HVAC work to BP Air Conditioning Corp., which then subcontracted the HVAC-related steamfitting work. The subcontract contained an indemnification and hold-harmless clause which named BP as an additional insured on the subcontractor's policy issued by defendant One Beacon Insurance Group. In December 2000, an employee of a subcontractor hired by BP was allegedly injured when he slipped and fell on an oil slick at the worksite. The plaintiff sued the general contractor, who then brought a third-party action against BP and the subcontractor. BP tendered its defense to One Beacon, which declined to defend BP although it defended the subcontractor.

BP moved for partial summary judgment against One Beacon. The Supreme Court granted BP's motion to the extent that One Beacon is obligated to defend BP in the underlying tort action. However, the court declined to declare that One Beacon was primarily responsible for BP's defense costs. The Appellate Division modified the Supreme Court's order, holding that One Beacon must provide BP a defense in the underlying action and that the coverage is primary over BP's policy, which would now be treated as excess.

The Court of Appeals held that additional insured coverage is not contingent upon a liability finding and that the obligation of an insurer to provide a defense to an additional named insured under the policy exists to the same extent as it does to a named insured. The Court reinstated the order of the Supreme Court and determined that One Beacon was obligated to provide BP a defense in the underlying lawsuit, regardless of the merits of the

claim. Furthermore, and more importantly, the Court of Appeals held that because the other policies were not presented to the court, the Appellate Division was wrong in deciding that the One Beacon policy would be primary over BP's own policy. Thus, the courts must look to the language of all the contracts to determine whether or not shards would exist, or whether or not one of the respective policies would be primary over the other.

High-Low Agreements

The Court of Appeals held in *In re Eighth Judicial District Asbestos Litigation*[5] that whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendants.

The high-low agreement stipulated that the plaintiff would be paid at least $155,000 at trial on the low side with a high side of $185,000. While the Supreme Court knew of this agreement, but not the terms or amounts involved, it did not disclose the agreement to the other defendant. The trial resulted in an any damages verdict of $3,750,000. The defendant who made the agreement thus had to pay only $185,000 while the non-agreeing defendant had to pay the remainder.

The Court of Appeals held that the Supreme Court erred in failing to disclose to all the parties the existence of a high-low agreement between plaintiffs and one of the defendants because it prejudiced the determination of the rights and liabilities of the non-agreeing defendant at trial, which was deprived of its right to a fair trial and the opportunity to seek appropriate procedural and evidentiary rulings from the trial court. In particular, the Court of Appeals noted that the high-low agreement appeared to be a trial tactic on the part of the plaintiff at the expense of the non-agreeing defendant. As such, the very nature of the agreement prejudiced the rights of the non-agreeing defendant.

Labor Law § 240(1)

The Court of Appeals held in *Broggy v. Rockefeller Group, Inc.*[6] that cleaning qualifies as an independent category of work but falls within the elevation-related risks protected by the "scaffold law." As such, the act of cleaning does not require that it be part of an alteration or contraction project in order to qualify for the protections of Labor Law § 240. In fact, the court concluded that "cleaning" is an entirely discrete item that qualifies for its own protections under Labor Law § 240. This holding effectively expands the number of claims that can fall within the purview of Labor Law § 240.

The plaintiff in this action was part of the window cleaning crew at Rockefeller Center. He was cleaning the inside of the windows while others were cleaning the outside. He was using a squeegee with an extended pole so that he could clean the top of these tall windows. When one of his co-workers decided that he needed to go inside, the plaintiff lifted one of the windows from the bottom. Unfortunately, the window did not stay up and the plaintiff tried to get out of the way of the closing window. The Court of Appeals held that while Labor Law § 240 did in fact apply to the plaintiff, the plaintiff failed to establish a claim because the accident did not occur from a gravity-related risk.

Legal Malpractice

In *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*,[7] defendant law firm was retained to represent plaintiff in an automobile accident case in which plaintiff was a pedestrian and was struck at an intersection controlled by a traffic signal. Defendants requested the jury to be charged with VTL § 1151, which addresses intersections without traffic signals and imposes a duty on pedestrians not to dart into the path of an oncoming vehicle. The jury returned a verdict of $255,000, to be reduced by half to reflect plaintiff's comparative negligence in accordance with VTL § 1151. Plaintiff then retained another law firm for the second trial in which the jury determined that the driver was solely responsible for the accident and the parties settled for $750,000. Plaintiff then brought a malpractice suit against defendants, alleging that they were negligent in failing to request VTL § 1111, the statute regarding intersections regulated by traffic signals and granting pedestrians facing any green signal the right of way in an intersection, to be charged to the jury in the first trial.

Defendants did not dispute that they were negligent in requesting § 1151 in light of the evidence that the intersection at issue was controlled by a traffic light. Plaintiff incurred litigation expenses totaling $28,703.27 to correct defendants' error and to hire experts for the retrial. The Court of Appeals held that plaintiffs were entitled to consequential damages of the same amount.

Duty of Common Carriers

In *Bingham v. New York City Transit Authority*,[8] the plaintiff tripped and fell over metal strip covering the outer edge of a step on a subway station stairway. She sued the New York City Transit Authority and the Metropolitan Transportation Authority, claiming that they failed to maintain the stairway in a safe condition and failed to provide notice or warning of the stairway defect.

The Court of Appeals reiterated that common carriers have a duty of care not only for the maintenance of trans-

portation vehicles, but also regarding the safe maintenance of means of ingress and egress for passengers. The Court further held that where a stairway or approach is "primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger."[9] Whether the means of approach is used primarily for ingress and egress from the common carrier would be a factual question. The stairway in question was found to be used for such a purpose, and "defendants had a duty to maintain the stairway or to warn patrons of any dangerous condition." Even if another entity possessed the responsibility to maintain the stairway, defendants still retained their responsibility to at least warn passengers of the hazard.

Premises Liability

The Court of Appeals has held in *Clementoni v. Consolidated Rail Corporation*[10] that a landowner has no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the landowner has created or contributed to it. Plaintiff's vehicle collided with a train. Plaintiff was driving across railroad tracks at an unmarked grade crossing intersecting a private road owned by defendants. The rail company owned the tracks and the right of way in which they were centered. The adjacent landowner defendants owned property bordering the right of way. Plaintiff alleged that the adjacent landowners negligently failed to warn him of oncoming trains by failing to put signs, gates or warning signals at the crossing. Plaintiff alleged that the property obstructed his view of oncoming trains.

The Court of Appeals held that the adjacent landowners did not create or contribute to the hazard of oncoming trains because the railroad crossing existed before they purchased the property. They also had no reason to expect that plaintiff would not observe the crossing. The Court further held that a landowner is not generally liable for the existence of uncut vegetation obstructing the view of motorists at an intersection. As such, this case appears to eliminate claims that a property owner's landscaping, which may obstruct a vehicle's view of an intersection, is not a valid basis for a claim of negligence.

Endnotes

1. *Arons v. Jutkowitz*, 37 A.D.3d 94, 825 N.Y.S.2d 738 (N.Y. A.D. 2d Dep't 2006); *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 (N.Y.A.D. 4th Dep't 2007).
2. 22 N.Y.C.R.R. § 202.21(d).
3. *Kish v. Graham*, 40 A.D.3d at 123.
4. 8 N.Y.3d 708, 871 N.E.2d 1128 (2007).
5. 8 N.Y.3d 717, 872 N.E.2d 232 (2007).
6. 8 N.Y.3d 675, 839 N.Y.S.2d 714 (2007).
7. 8 N.Y.3d 438, 867 N.E.2d 385, 835 N.Y.S.2d 534 (April 26, 2007).
8. 8 N.Y.3d 176, 864 N.E.2d 49, 832 N.Y.S.2d 125 (2007).
9. *Id.*, 864 N.E.2d at 52.
10. 8 N.Y.3d 963, 868 N.E.2d 187, 836 N.Y.S.2d 507 (2007).

David A. Glazer is a managing partner at the law firm of Shafer Glazer, LLP in New York City. His practice focuses on personal injury defense litigation, labor and employment law and corporate law. Mr. Glazer is a member of the New York State Bar Association (member of the Torts, Insurance & Compensation Law Section and Premises Liability/Labor Law Committee), the American Bar Association Tort Trial and Insurance Practice Section, and the New Jersey State Bar Association. He can be reached at DGlazer@ShaferGlazer.com. Melissa Wu, a law school intern, assisted in the preparation of this article.

Civil Damages: What Is and What Should Never Be

By Roderick J. Coyne

The role, objectives and perspective of defense counsel concerning the damages aspect of personal injury litigation.

Discussion

1. Strategic retention and use of economic and vocational rehabilitation experts
2. Quantifying future medical expenses
3. Minimizing impact of a Day-in-the-Life video

Overview of Damages

Where a jury finds a defendant liable, plaintiff is entitled to a recovery of damages. The jury renders verdict in that sum of money that will justly and fairly compensate plaintiff for all losses resulting from the injuries sustained. Pattern Jury Instructions 2:277.

Purpose of an award of damages is to restore the aggrieved party to the position he held prior to the injury. *McDougald v. Garber,* 73 N.Y.2d 246, 538 N.Y.S.2d 937, 536 N.E.2d 372 (1989).

Economic Damages

1. Replacement of past and future lost earnings
2. Past and future medical costs

Non-economic Damages

1. pain and suffering
2. mental anguish
3. compensation for physical and emotional consequences of injury

Preparation of Case

1. develop theory of damages over course of discovery
2. gather documents, discovery, evidence for use by experts and for use at trial and in settlement negotiations

Measure of Damages: Focus on Economic Damages

1. A tortfeasor should be required to put his victim in the same economic position that he would have occupied had he not been injured. *McCrann v. U.S. Lines, Inc.*, 803 F.2d 771 (2d Cir. 1989).
2. With regard to claims for economic damages, such as lost wages, tortfeasor is required only to put plaintiff in same economic position as he or she would have occupied had he or she not been injured. *Battista v. U.S.*, 889 F. Supp. 716 (S.D.N.Y. 1995).
3. Basic rule in determining damages for impairment of earning ability is that loss of earnings must be established with reasonable certainty, focusing on plaintiff's earning capacity both before and after the accident. *Clanton v. Agoglitta*, 206 A.D.2d 497, 615 N.Y.S.2d 68 (2d Dep't 1994).
4. An award for loss of future earnings may not be based on speculation. *Davis v. New York*, 264 A.D.2d 379, 693 N.Y.S.2d, 230, *amended on other grounds*, 1999 WL 637163, 1999 Slip Op. 07151. *Eichler v. New York,* 196 A.D.2d 524, 601 N.Y.S.2d 318 (2d Dep't 1993).
5. In assessing extent of personal injury victim's loss of earning capacity in future, jury is entitled to consider victim's age, health condition and other factors predating subject injury. *Melito v. Genesee Hosp.*, 561 N.Y.S.2d 951, 167 A.D.2d 842 (4th Dep't 1990).
6. It is plaintiff's burden to establish his own loss of actual past earnings with reasonable certainty, e.g., by submitting tax returns and other relevant documentation. *Papa v. City of NY,* 598 N.Y.S.2d 194, 558 A.D.2d 527 (2d Dep't 1993), *leave to appeal dismissed by* 610 N.Y.S.2d 146, 82 N.Y.2d 918, 632 N.E.2d 457. *See also Naveja v. Hillcrest*, 148 A.D.2d 429, 538 N.Y.S.2d 584 (2d Dep't 1989).

Awards for lost earnings and loss of future earnings must be itemized in a special verdict. CPLR 4111.

Experts: Economic Loss

Economist

Economist to evaluate:

- Lost or diminished future earnings or ability
- Plaintiff's life expectancy at time of injury (health and habits at time of injury)
- Plaintiff's work-life expectancy at time of injury

Information and materials to be obtained in discovery:

- Plaintiff's birth date
- Gender

- Place of birth
- Education; level of and where educated
- Residence
- Tax returns, W-2s
- Employment records (income history, prior employers)
- Union records, collective bargaining agreements
- Medical records, physician's observations concerning current disability and prognosis for future
- Prior medical records (health history, pre-injury health and outlook for future)
- Expert disclosure from adversary
- Other items deemed necessary by expert to support conclusions

Attack plaintiff's expert with respect to:

- Bias
- Expertise/qualifications
- Assumptions (i.e., continued favorable economic conditions, continued health, continued steady employment, continued employment at specific earnings level, continued residence in U.S.—tortfeasor is required only to put plaintiff in same economic position he would have occupied had he not been injured)
- Methodology
- Analysis (predicting economic loss is a subject full of uncertainty)

Vocational Rehabilitation Expert

Vocational Rehabilitation expert evaluates and offers opinions as to injured plaintiff's vocational capabilities and potential employability given residual disability:

Evaluation to pose questions including:

- What is plaintiff's vocational capacity?
- Can plaintiff return to prior work?
- Has prior work experience provided him with transferable skills to be used in performing work requiring less physical capability?
- If no transferable skills, what other jobs can plaintiff perform?
- What is residual earning capacity?
- What is the effect of impairment on plaintiff's work life?
- Can plaintiff participate in a vocational rehabilitation program?

Information and materials to be obtained in discovery:

- Medical records containing physician's observations concerning extent of disability and prognosis for future
- Employment record
- Plaintiff's birth date and place of birth
- Education; level of and where educated, military background
- Residence
- Tax returns, W-2s
- Employment experience/records (income history, prior employers)
- Union records
- Prior medical records (health history, pre-injury health and outlook for future)
- Expert disclosure from adversary
- Other items deemed necessary by expert to support conclusions.

Vocational Rehabilitation Methodology

- Vocational diagnostic interview
- Vocational testing to ascertain vocational trait factors
- Vocational analysis of past relevant work (used to assess pre-injury work capacity)
- Transferability skills analysis (skills and physical demands)
- Labor market analysis

Plaintiff has a duty to mitigate loss of earnings by reasonably seeking vocational rehabilitation. *Bell v. Shopwell*, 119 A.D.2d 715, 501 N.Y.S.2d 129 (2d Dep't 1986); *Aman v. Federal Express Corp.*, 267 A.D.2d 1077, 701 N.Y.S. 2d 571 (4th Dep't 1999).

Medical Expenses

1. Plaintiff is entitled to recover the amount of reasonable expenditures for medical services and medicines including physician's charges, nursing charges, hospital expenses, diagnostic expenses and x-ray expenses. PJI 2:285.
2. If injuries are permanent and plaintiff will have medical, hospital or nursing expenses in the

future, the jury is to include in verdict an amount for those anticipated medical, hospital or nursing expenses which are reasonably certain to be incurred in the future and that were necessitated by plaintiff's injuries. PJI 2:285.

3. The jury should not be charged on future medical expenses unless there is evidence of the need for them and their reasonable costs. *Beyer v. Murray*, 33 A.D.2d 246, 306 N.Y.S. 2d 619 (4th Dep't 1970).

4. An award for future medical expenses must be supported by evidence of the cost of such expenses and evidence of the necessity of such care. *Faas v. State*, 249 A.D.2d 731, 672 N.Y.S.2d 145 (3d Dep't 1998); *Cramer v. Kuhns*, 213 A.D.2d 131, 630 N.Y.S.2d 128 (3d Dep't 1995).

Day-in-the-Life Video

Whether a motion picture is admissible is within the sound discretion of the trial court and depends on the facts and circumstances of each case. *Caprara v. Chrysler Corporation*, 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979).

Suggestion: Have the trial judge review the film in chambers to assess whether probative value of production outweighs prejudice to defendant.

Query: Does the film portray the victim in unlikely circumstances?

- If there is "any tendency to exaggerate any of the true features which are sought to be proved" the trial court may reject the videotape. *Kane v. Triborough Bridge and Tunnel Authority*, 8 A.D.3d 239, 778 N.Y.S.2d 52; *Boyasky v. Zimmerman Corp.*, 240 App. Div. 361, 270 N.Y.S. 134 (2d Dep't 2004); *Mechanik v. Conradi*, 139 A.D.2d 857, 527 N.Y.S.2d 586 (3d Dep't 1988).
- Conduct that serves little purpose other than to create sympathy for the plaintiff is highly prejudicial. *Bannister v. Town of Noble, Oklahoma*, 812 F.2d 1265, 55 USLW 2535 *citing Grimes v. Employers Mutual Liab. Ins. Co*. 73 FRD 607, D. Alaska 1977 (10th Cir. 1987).

Duty to Mitigate Damages

Damages Mitigation General Principles

1. General rule is that plaintiff is required by law to keep out-of-pocket expenses and loss to a minimum. *Wilmot v. State*, 32 N.Y.2d 164, 344 N.Y.S.2d 297, 350 N.E.2d 90 (1973).

2. An injured party is under a duty to make a reasonable effort to minimize the consequential damages, and if such reasonable effort is not made, he or she will be barred from recovering those damages which result from such failure. *Bell v. Shopwell*, 119 A.D.2d 715, 501 N.Y.S.2d 129 (2d Dep't 1986).

3. The *defendant* has the burden of proving that plaintiff failed to mitigate damages. *Rebh v. Lake George Ventures, Inc.*, 241 A.D.2d 801, 660 N.Y.S.2d 901 (3d Dep't 1997).

4. Where appropriate upon the evidence, a defendant is entitled to a charge that the plaintiff was under a duty to mitigate damages with respect to loss of earnings by endeavoring to obtain alternate employment. *McLaurin v. Ryder Truck Rental*, 123 A.D.2d 671, 507 N.Y.S.2d 41 (2d Dep't 1986).

5. The plaintiff has a duty to mitigate loss of earnings by reasonably seeking vocational rehabilitation. *Bell v. Shopwell*, 119 A.D.2d 715, 501 N.Y.S.2d 129 (2d Dep't 1986); *Aman v. Federal Express Corp.*, 267 A.D.2d 1077, 701 N.Y.S. 2d 571 (4th Dep't 1999).

6. The failure to mitigate or minimize damages prevents the plaintiff from recovering only the damages which could have been avoided by making a reasonable effort. All other damages may be recovered.

7. The jury may reduce damages to prevent the plaintiff from recovering for additional injuries occasioned by the plaintiff's actions taken in disregard of medical advice. *Perla v. New York Daily News*, 123 A.D.2d 349, 506 N.Y.S.2d 361 (2d Dep't 1986).

8. A defendant was entitled to a jury instruction on mitigation of damages insofar as it related to plaintiff's claim for lost wages where plaintiff (an injured security guard) testified he did not seek part-time security employment even though he was not under any medical restriction with respect to such employment. *Gerbino v. Tinseltown*, 788 N.Y.S.2d 538, 13 A.D.3d 1068 (4th Dep't 2004).

9. See also Pattern Jury Instructions 2:235.

Cases

Aman v. Federal Express Corp., 267 A.D.2d 1077, 701 N.Y.S.2d 571 (4th Dep't 1999).

Bannister v. Town of Noble, Oklahoma, 812 F.2d 1265, 55 USLW 2535.

Battista v. U.S., 889 F. Supp. 716 (S.D.N.Y. 1995).

Bell v. Shopwell, 119 A.D.2d 715, 501 N.Y.S.2d 129 (2d Dep't 1986).

Beyer v. Murray, 33 A.D.2d 246, 306 N.Y.S. 2d 619 (4th Dep't 1970).

Boyasky v. Zimmerman Corp., 240 App. Div. 361, 270 N.Y.S. 134 (2d Dep't 2004).

Caprara v. Chrysler Corporation, 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979).

Clanton v. Agoglitta, 206 A.D.2d 497, 615 N.Y.S.2d 68 (2d Dep't 1994).

Cramer v. Kuhns, 213 A.D. 2d 131, 630 N.Y.S. 2d 128 (3d Dep't 1995).

Davis v. New York, 264 A.D.2d 379, 693 N.Y.S.2d, 230, *amended on other grounds*, 1999 WL 637163, 1999 Slip Op. 07151.

Eichler v. New York, 196 A.D.2d 524, 601 N.Y.S.2d 318 (2d Dep't 1993).

Faas v. State, 249 A.D. 2d 731, 672 N.Y.S.2d 145 (3d Dep't 1998).

Gerbino v. Tinseltown, 788 N.Y.S.2d 538, 13 A.D.3d 1068 (4th Dep't 2004).

Grimes v. Employers Mutual Liab. Ins. Co., 73 FRD 607, D. Alaska 1977 (10th Cir. 1987).

Kane v. Triborough Bridge and Tunnel Authority, 8 A.D.3d 239, 778 N.Y.S.2d 52.

McCrann v. U.S. Lines, Inc., 803 F.2d 771 (2d Cir. 1989).

McDougald v. Garber, 73 N.Y.2d 246, 538 N.Y.S.2d 937, 536 N.E.2d 372 (1989).

McLaurin v. Ryder Truck Rental, 123 A.D.2d 671, 507 N.Y.S.2d 41 (2d Dep't 1986).

Mechanik v. Conradi, 139 A.D.2d 857, 527 N.Y.S.2d 586 (3d Dep't 1988).

Melito v. Genesee Hosp., 561 N.Y.S.2d 951, 167 A.D.2d 842 (4th Dep't 1990).

Naveja v. Hillcrest, 148 A.D.2d 429, 538 N.Y.S.2d 584 (2d Dep't 1989).

Papa v. City of NY, 598 N.Y.S.2d 194, 558 A.D.2d 527 (2d Dep't 1993), *leave to appeal dismissed by* 610 N.Y.S.2d 146, 82 N.Y.2d 918, 632 N.E.2d 457.

Perla v. New York Daily News, 123A.D. 2d 349, 506 N.Y.S.2d 361 (2d Dep't 1986).

Rebh v. Lake George Ventures, Inc., 241 A.D.2d 801, 660 N.Y.S. 2d 901 (3d Dep't 1997).

Wilmot v. State, 32 N.Y.2d 164, 344 N.Y.S. 2d 297, 350 N.E.2d 90 (1973).

Streamlining Evidence: Alternative Methods of Authenticating Medical Records in Tort Actions

By Bran C. Noonan

Authentication is perhaps the purest example of a rule respecting relevance: evidence admitted as something can have no probative value unless that is what it really is.

—Judge Friendly[1]

In almost every case involving physical injury, whether premises liability, toxic tort, or automobile accident, the plaintiff's attorney will seek to offer the victim's medical records into evidence at trial. Before the contents of a document can be considered as evidence, a court must first ascertain the authenticity of the document offered.[2] If documents, such as public records or newspapers, are not self-authenticating, a party must submit evidence that lays a proper foundation to establish their legitimacy.

"While case law on the subject is sparse, New York and federal courts have recognized, if sometimes tacitly, alternative methods of document authentication that may further simplify the authentication process."

At trial, whether in federal or state court, a custodian of records traditionally authenticates the medical records by testifying that the records were kept in the ordinary course of business.[3] This method has become rather outmoded and inefficient: A custodian is summoned to court to offer a few minutes of testimony unrelated to the substantive matters with minimal cross-examination, a service for which the plaintiff typically pays.[4] Both courts and legislatures have intervened in this costly and time-consuming procedure, devising methods to streamline document authentication balanced against the need to ensure valid submissions. At the very least, a plaintiff may submit a certification from a custodian. Parties are also encouraged to stipulate to the entry of documents into evidence.[5] There are, however, instances when these remedies are unavailable, when an adversary refuses to stipulate or a custodian fails to execute a certification. While case law on the subject is sparse, New York and federal courts have recognized, if sometimes tacitly, alternative methods of document authentication that may further simplify the authentication process.[6]

Authentication in New York Courts

Unlike its federal counterpart, the New York State legislature has not codified rules of authentication into its civil code. A few statutory rules of authentication are scattered throughout Article 45 of the New York Civil Practice Law and Rules, such as sections 4518 and 4525. Nonetheless, New York offers five less-traditional methods of authentication.

1. Authentication-by-Production

New York courts have found documents authentic under what is termed the doctrine of "authentication-by-production," which maintains that documents are authenticated when produced by the party against whom they are offered.[7] In *Arbour v. Commercial Life Ins. Co.*, the appellate court found the documents authentic on the basis that the "records relied upon by defendant were submitted by plaintiff in response to defendant's discovery demands."[8] States, such as Texas and Georgia, have in fact concretized this doctrine into their civil codes, classifying such documents within the self-authentication index.[9] Authentication-by-production rests on the logic that the act of production itself serves as a representation for the party in receipt that the documents are what they claim to be. Therefore, a producing party is then effectively estopped from altering his position at summary judgment or trial.

Case law has not, however, addressed if a party may authenticate documents on the grounds that he produced them during discovery. Whether or not a producing party submits the actual documents into evidence cannot be the primary concern that prohibits him from employing this method since the same question arises when a party receiving documents submits them into evidence. In other words, the production of documents during discovery does not guarantee their validity—it simply compels the producing party to ensure that the documents are genuine; otherwise, the documents may be used against him at trial. If a receiving-party suspects a problem, he still has to conduct his own investigation. Accordingly, there is a limited basis for courts to prohibit plaintiffs from admitting medical records that they produced during discovery.

2. Medical Releases

A hybrid of the authentication-by-production doctrine is the use of medical releases to authenticate documents. A defendant who receives a release from a plain-

tiff for medical records can use the release as proof of authenticity. The situation works similarly to authentication-by-production: Instead of the plaintiff producing the documents, he provides the instrument to obtain them. In *Burnett v. Zito*, the appellate court adopted the lower court's finding, which held that defendant's submission of unsworn medical reports were authentic because, *inter alia*, "plaintiff's authorization for release insured their authenticity."[10]

Yet the question remains whether or not a party may authenticate his own medical records at trial on the basis that his counsel obtained them pursuant to his medical release. No case has addressed this issue. The countervailing concern is whether a hospital has produced genuine medical records for a plaintiff to offer into evidence. Typically, under the CPLR, a custodian of records provides a certification, which authenticates the records. However, defendants who use a plaintiff's medical release to obtain and authenticate plaintiff's records sidestep the CPLR's certification commands. The idea is that a custodian's explicit approval is not truly mandatory, as long as a party utilizes an alternate mechanism, such as a medical release, that raises a presumption of validity. Thus, no legitimate basis exists against allowing both parties to authenticate records with a medical release.

3. Subpoenas

Whether an attorney may authenticate medical records on the basis that they were obtained in response to a subpoena has scarcely been addressed. In *Hoffman v. City of New York*, one of the few cases that mention the use of subpoenas in the authentication context, the defendant sought to preclude plaintiff from offering his x-rays into evidence since they were not authenticated pursuant to CPLR 4532(a).[11] The court held that the documents were authentic since among other reasons, they were present due to defendant's own subpoena.[12] The court did not hint at whether it would have found the documents equally authentic had plaintiff received the documents in response to his own subpoena and then sought to authenticate them on that basis.

A narrow area of constitutional law surprisingly sheds some light on the possible authentication authority of subpoenas. In *Fisher v. U.S.,* the U.S. Supreme Court addressed whether the 5th Amendment's protection against self-incrimination shielded taxpayers from responding to subpoenas for potentially incriminating documents.[13] The Court stated that "The act of producing evidence in response to a subpoena . . . has communicative aspects. . . . Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control. . . . It also would indicate the [subpoenaed person's] belief that the papers are those described in the subpoena."[14] In *Prudential Sec. Inc. v. Brigianos,* one of the few New York cases citing *Fisher*, a non-party moved to quash plaintiff's subpoena for business records.[15] The court stated, in dictum, that the "[n]on-party's production of [certain documents] would implicitly authenticate those documents as his own."[16] The only apparent barrier to authenticating documents on the basis that they are those produced by a non-party pursuant to a subpoena is that CPLR 4518(c) requires medical records to "bear a certification."[17] However, a litigant should certainly be permitted to skirt the certification requirement based on the authentication power of subpoenas alone, particularly in light of the fact that the authentication-by-production method allows a party to avoid the certification requirement.

4. Judicial Notice

Another method of authentication is for a litigant to request that a court take judicial notice of facts that establish the authentication requirements. In *Carmen I. v. Robert K.*, the petitioner sought the admission of a laboratory report concerning the results of a blood test, to which respondent refused to stipulate.[18] A certification authenticating the report would be inadmissible since CPLR 4518(c) had yet to be amended to include laboratory records. The court nonetheless took "judicial notice of the standards and procedures inherent in the administrating of blood tests . . . coupled with the intent of the Legislature to have the evidence admitted, the court's desire to serve the interests of justice, consider competent evidence, and the exigencies of the court itself."[19] Additionally, the court noted that the respondent could protect himself by exercising his right to subpoena the doctors or technicians if he suspected the report unauthentic.

5. Section 4543 Catch-All

Pursuant to CPLR 4543, nothing in Article 45 "prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law."[20] Therefore, litigants may utilize other statutes to authenticate documents, such as Business Corporation Law § 107 (corporate seal serves to authenticate documents), Domestic Relations Law § 14-a (marriage certificates are automatically deemed authentic), and CPLR 2105 (attorney certification may authenticate copies of documents). Unfortunately, few courts have employed and discussed this section; it has emerged only in the criminal context.[21] Nonetheless, the section indicates that if an authentication method is permitted in federal court, the method may be carried over into the state system. The New York Proposed Evidence Code in fact closely mirrors the Federal Rules of Evidence. That would also follow with the legislature's intent that the rules of authentication not be rigid and formulaic. For example, "the salutary purpose of CPLR § 4518 [the business records rule] . . . is to obviate the call of each employee who participated in making entries in business records."[22] Consider also CPLR 4532-a, which governs the

admissibility of certain pictorial and graphical medical documents and maintains that failure to comply with its terms is not fatal if the document is "otherwise admissible" in some other manner.

Authentication in Federal Court

Under the Federal Rules of Evidence § 901(a), evidence must be tendered to sufficiently support a finding that a document is genuine. While FRE § 901(b) catalogs a list of authentication methods, the Advisory Committee's Notes point out that "[t]he examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of law."[23] Therefore, in the absence of a witness or certification, the FRE and case law offer four additional methods of authentication.

1. Authentication-by-Production

As with New York, federal courts have endorsed the doctrine of authentication-by-production.[24] Documents may be deemed authentic when produced in response to discovery demands.[25] While the doctrine has been primarily reserved for parties authenticating documents received in response to their discovery demands, the principle was recently expanded in a case arising out of the Southern District of Indiana. In *Schmutte v. Resort Condominiums International, LLC*, the court extended the doctrine of authentication-by-production by allowing parties that produce documents to authenticate them on that basis.[26] There, the plaintiff sought to admit medical records he received from a non-party hospital and then turned over to the defendant. The district court did not consider as evidence of authentication the fact that the plaintiff procured the documents via a medical release. The court found instead that among other reasons, plaintiff's documents were authentic because the plaintiff produced them during the course of discovery.

2. Attorney Testimony/Declaration

In *Schmutte*, the district court also held that the medical records were authentic on the basis of the attorney's declaration.[27] Plaintiff annexed the medical release and the suspect documents as exhibits to his summary judgment motion. In her declaration to the summary judgment motion, plaintiff's counsel declared she had personal knowledge that one exhibit was the medical release sent to the non-party hospital and another exhibit was the documents received from the non-party in response to the release. The court held that this was a *prima facie* showing of authenticity under FRE § 901(b)(1), which authorizes authentication by testimony of a witness with personal knowledge. The court's use of FRE § 901(b)(1) is peculiar and potentially inappropriate since plaintiff's attorney lacked the requisite personal knowledge to verify the origin, completeness, and accuracy of the medical records, as well as to confirm that the medical records were kept in the ordinary course of business, which is required under the statute. That does not imply the method is unusable—the court instead should have held that the plaintiff's method of authentication simply consisted of an unenumerated method.

3. Circumstantial Evidence

Pursuant to FRE § 901(4), a party may offer circumstantial evidence of authenticity. This section acts as a catchall and allows authentication on the basis of distinctive characteristics, such as appearance, contents, patterns, logos and so forth, taken in conjunction with circumstances. A court will consider the appearance and content of the document, such as the presence of a letterhead, a signature, and the parties' names, references to issues in dispute, and whether or not the contents conform to the type of document it appears to be.[28] Courts will also consider other evidence in the record to buttress the circumstantial evidence. For example, a signature on an affidavit in the record that matches the signature on a letter may help to authenticate the letter.[29] The precise number of distinctive features a document must possess for authentication, however, is largely determined on a case-by-case basis. Some courts also view the doctrine of authentication-by-production as a part of—or concomitant with—FRE § 901(4).[30] Given that most hospital records contain specific indicia (hospital name, letterhead, author, and patient name and medical information), they should generally be deemed authentic on this basis alone.

4. Medical Releases and Subpoenas

Recently in *Evans v. CIDR*, the district court tacitly approved medical records produced in response to a medical release as a viable method of authentication.[31] In this case, the plaintiff authorized the release of medical records to the defendant/employer, which plaintiff later sought to admit as evidence. The defendant challenged the admissibility of plaintiff's medical records under the hearsay business record exception of FRE § 803(6), since the records were unsworn. The court determined that upon review of the records, there was nothing on the face of them to indicate that they lacked trustworthiness. The court in essence bypassed the issue of authentication and moved directly to the question of admissible hearsay, which leads to the logical conclusion the court found the records authentic on the basis that they were received in response to the medical release.

A case from the Southern District of New York suggests that a party may authenticate documents obtained in response to a subpoena using the *Fisher* and authentication-by-production rubrics. In *John Paul Mitchell Systems v. Quality King Distributors*, plaintiff sought the admission of a non-party entity's corporate records obtained in response to plaintiff's subpoena.[32] The court noted "there

[was] no dispute that [the] documents were produced by [the non-party's] custodian of records, in response to a request for [its] documents . . . [therefore] he has implicitly authenticated these documents by his act of production as records maintained by [the non-party]."[33] The key issue the case raises, however, is that the non-party entity's custodian of records, who produced the documents, was also a named defendant in the action. There is no indication whether the court would have arrived at the same conclusion had the non-party entity's custodian not been a party. Nonetheless, the principle of *Fisher*, which maintains that responding to subpoenas has authentication power, is sufficient grounds for the authentication of subpoenaed medical records produced by a hospital custodian.

Conclusion

New York and federal courts have recognized alternative methods to authenticate medical records that help conserve judicial, party, and non-party resources. These methods follow a trend that is moving away from the need for a custodian's approval and toward simple, flexible, and liberal procedures. Because evidentiary procedures are often in flux and intended to be functional rather than formulaic, courts and litigants should continue to devise alternative authentication methods. The common thread to remember among the methods is there is some mechanism that creates a presumption of authenticity and streamlines the procedure.

Endnotes

1. *U.S. v. Sliker*, 751 F.2d 477, 4499 (2d Cir. 1984).
2. *See generally Kassim v. City of Schenectady*, 415 F.3d 246, 251 (2d Cir. 2005); *Mayer v. Angelica*, 790 F.2d 1315 (7th Cir. 1986).
3. *See* Civil Practice Law and Rules 4518; Federal Rules of Evidence §§ 901(b)(1), 902(11).
4. *See, e.g., Carmen I. v. Robert K*, 110 Misc. 2d 310, 311, 441 N.Y.S.2d 926, 927 (Fam. Ct., Kings Co. 1981).
5. *Id*.
6. While the dearth of case law that addresses the issue primarily does so at the summary judgment stage, no policy or jurisprudential principle prevents extending the use of the additional methods to authenticate documents at trial.
7. *See Barefield v. Board of Trustees of CA State Univ.*, 500 F. Supp. 2d 1244, 1257 (E.D. Cal. 2007); *Arbour v. Commercial Life Ins. Co.*, 240 A.D.2d 1001, 659 N.Y.S.2d 525 (3d Dep't 1997); *Oeffler v. Miles, Inc.*, 241 A.D.2d 822, 660 N.Y.S.2d 897 (3d Dep't 1997); *U.S. v. Brown*, 688 F.2d 1112, 1115-1116 (7th Cir. 1982); *John Paul Mitchell Systems v. Quality King Distributors*, 106 F. Supp. 2d 462, 471-473 (S.D.N.Y. 2000).
8. *Arbour*, 240 A.D.2d at 1002.
9. *See* Tex. R. Civ. P. § 193.7 and Ga. Code. Ann. § 24-7-3.
10. 252 A.D.2d 879, 880, 676 N.Y.S.2d 318, 319 (3d Dep't 1998); *and see Oeffler*, 241 A.D.2d at 824.
11. 141 Misc. 2d 893, 535 N.Y.S.2d 342 (Sup. Ct., Kings Co. 1988).
12. *Id*. at 894.
13. 425 U.S. 391 (1976).
14. *Id.* at 410; *see also Beatie v. U.S.*, 522 F.2d 267, 270 (2d Cir. 1975) ("A subpoena demand that an accused produce his own records is taken to be the equivalent of requiring him to take the stand and admit their genuineness." Friendly, J.).
15. 233 A.D.2d 18, 662 N.Y.S.2d 484 (1st Dep't 1997).
16. *Id.* at 22.
17. *See generally In re Kelly V.*, 94 Misc. 2d 172, 175-177, 405 N.Y.S.2d 207, 208-209 (Fam. Ct., New York Co. 1978); *Restrepo v. State*, 146 Misc. 2d 349, 352-354, 550 N.Y.S.2d 536, 539-541 (N.Y. Ct. Cl. 1989).
18. 110 Misc. 2d at 311.
19. *Id*.
20. CPLR 4543.
21. *See, e.g. People v. Richardson*, 88 N.Y.2d 1049, 673 N.E.2d 918 (1996); *People v. D'Agostino*, 120 Misc. 2d 437, 465 N.Y.S.2d 834 (Co. Ct., Monroe Co. 1983).
22. *Hoffman*, 535 N.Y.S.2d at 343.
23. FRE § 901 advisory committee's notes, note to subdiv. (b).
24. *See Brown*, 688 F.2d at 1115-1116; *Quality King Distributors*, 106 F. Supp. 2d at 471-473.
25. *See Hood v. Dryvit Systems, Inc.*, No. 04 Civ. 3141 (N.D. Ill. Nov. 8, 2005).
26. 2006 WL 3462656, *16 (S.D. Ind. 2006).
27. *Id*.
28. *See U.S. v. Bagaric*, 706 F.2d 42, 67 (2d Cir. 1983); *Quality King Distributors*, 106 F. Supp. 2d at 471-473; *Air Land Forwarders, Inc. v. U.S.*, 38 Fed.Cl. 527 (Fed. Cl. 1997).
29. *See Miller v. Whipker*, No. 02 Civ. 924 (S.D. Ind. Mar. 31, 2004).
30. *See Quality King Distributors*, 106 F. Supp. 2d at 471-473; *McKenna v. Pacific Rail Services*, 817 F. Supp. 498, 514 (D.N.J. 1993).
31. 2006 WL 1209904, *4 n.5 (S.D.N.Y. 2006).
32. 106 F. Supp. 2d 462 (S.D.N.Y. 2000).
33. *Id*. at 472.

Bran C. Noonan is a litigation associate at the law firm of Koehler & Isaacs LLP, where his practice focuses on employment, commercial, and civil rights law.

This article originally appeared in the May 2008 issue of the New York State Bar Association Journal*, Vol. 80, No. 4, published by the New York State Bar Association.*

The Scope of Permissible Discovery in Reinsurance Disputes: Recent Developments in New York State Appellate Jurisprudence

By Paul Friman

A recently decided New York State intermediate appellate case, *American Re-Insurance Co. v. United States Fidelity & Guar. Co.*, 19 A.D.3d 103, 796 N.Y.S.2d 89 (App. Div. 1st, Dep't 2005), is of potential national importance with respect to "access to records" clauses found in reinsurance agreements.

Facts

The case consisted of a reinsurance dispute stemming from an approximately $1 billion settlement in 2002 by Defendants-Appellants United States Fidelity & Guaranty Company (hereinafter referred to as "USF&G") and St. Paul Fire & Marine Insurance Company (hereinafter referred to as "St. Paul") of assorted underlying claims related to asbestos.

Issue

At issue was the scope of discovery.

Plaintiff-Respondent American Re-Insurance Company (hereinafter referred to as "Am Re") sought discovery concerning, *inter alia*, the background, negotiation and allocation of the underlying settlement.

USF&G and St. Paul objected and refused to provide the requested discovery.

Procedural Background

A Special Referee issued an order requiring USF&G and St. Paul to produce documents related to the settlement in the underlying litigation between them and their insureds.

USF&G and St. Paul made a motion in the Supreme Court of New York, New York County, to vacate the Special Referee's order.

By order entered December 9, 2004, Justice Richard B. Lowe III denied the motion and directed the ordered document production to proceed forthwith.

Appellate Opinion

USF&G and St. Paul appealed to the intermediate appellate court.

USF&G and St. Paul asserted two grounds for their resistance to the production of the documents. First, they claimed a purported "settlement privilege." Second, they relied on the "follow the fortunes" doctrine.

In a June 2, 2005, opinion, a five-judge panel of the Appellate Division, First Department, of the Supreme Court of New York rejected both of those arguments and unanimously affirmed the lower court, with costs.

The appellate court concluded the motion court had properly ruled that the disputed documents relating to the settlement negotiations are discoverable. The court found that those documents were material and necessary to Am Re's defense of the reinsurance coverage action. The court based this determination on the general scope of disclosure provision of New York State's Civil Practice Law and Rules (CPLR 3101(a)) and its opinions as to disclosure in *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250, 750 N.Y.S.2d 5 (App. Div. 1st Dep't 2002), and 3 A.D.3d 305, 771 N.Y.S.2d 72 (App. Div. 1st Dep't 2004) (all documents relevant to settlement with defendant executive should have been disclosed by corporation in its suit to recover another defendant executive's excess compensation).

With regard to USF&G and St. Paul's assertion of the so-called "settlement privilege," the court ruled it inapplicable. The court based its determination on the finding that Am Re's purpose in seeking the items related to the settlement was not to use the information to prove USF&G and St. Paul's liability to its insureds in the underlying asbestos coverage cases. Instead, the reinsurers merely sought information concerning the reasoning and methodology by which the settlement had occurred and been allocated. The court cited the provision of New York State's Civil Practice Law and Rules that bars the admissibility of evidence concerning settlement negotiations for the circumscribed purposes of proving liability or damages in dispute (CPLR 4547).

Concerning USF&G and St. Paul's reliance on the "follow the fortunes" doctrine, the court found that the doctrine did not constitute a bar to disclosure. The court agreed with Am Re's claim that the record supported the applicability of exceptions to that doctrine in this case. The court cited New York's highest state appellate court's extended discussion of the "follow the fortunes" doctrine in *Travelers Casualty & Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583, 760 N.E.2d 319, 734 N.Y.S.2d 531 (2001) ("follow the fortunes" doctrine

provides that reinsurer is required to indemnify its reinsured—subject to, *inter alia*, reinsurance treaty's loss definition, allocation language, and liability cap—for good-faith payments made for claims reasonably within the terms of the underlying insurance policy, even if technically not covered by it). The court also cited *American Ins. Co. v. North Am. Co. for Property & Casualty Ins.*, 697 F.2d 79 (2d Cir. 1982) (rejecting reinsured's claim that reinsurance agreement's "follow the fortunes" clause obliges reinsurer to reimburse reinsured's settlement of underlying punitive damage award that had been unambiguously excluded from reinsurance policy).

Commentary

Interestingly, the court could have simply based its determination on the fact that neither of the two propositions asserted by USF&G and St. Paul in resisting disclosure was designed to pertain to discovery. The purported "settlement privilege" is actually a rule of evidence, tailoring the purposes for which settlement-related evidence is admissible at trial. The "follow the fortunes" doctrine does not primarily concern itself with the scope of discovery, but is a substantive proposition of reinsurance law.

Only six months earlier, that court—with the same appellant's counsel before a bench including two of the same justices reviewing an order of the same lower court judge—had dealt with an actual discovery privilege in *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 788 N.Y.S.2d 44 (App. Div. 1st Dep't 2004).

In *Gulf Ins. Co.*, the court had been presented with the issue of whether a boilerplate Access to Records clause in a quota (i.e., proportionate share) reinsurance agreement constituted a blanket waiver of attorney-client or attorney work product privileges against the disclosure of the files of counsel to an underlying settlement.

Holding that a standard access to records clause does not waive legitimate privilege claims concerning such documents, the court unanimously reversed a lower court order that had compelled the reinsured's production of attorney-client privileged files.

The appellate court, looking to federal case law from out of state, reasoned as follows:

> Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless.

Id., 13 A.D.3d at 279, 788 N.Y.S.2d at 45-46 (*citing North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992)).

Conclusion

In sum, the standard "access to records" clause found in reinsurance agreements, while expansive, does not allow for unfettered discovery. In New York, it appears subject to reasonable limitation when presented with an applicable and genuine disclosure privilege. The cases discussed in this article, one of which looks to another jurisdiction for guidance, may be of similarly shared significance to comparable disputes occurring nationwide.

Will the Change to General Obligations Law § 15-108 Promote More Settlements?

By Dennis P. Glascott and Joseph M. Hanna

Introduction

The stated purpose of § 15-108 was to encourage settlement by allowing a joint tortfeasor to "buy his peace by terminating completely his rights and liabilities in the action."[1]

For the first time in many years, the New York State Legislature made a change to General Obligations Law § 15-108 by adding a new subdivision (d). This article will discuss the changes brought about by subdivision (d) and whether this change signals a willingness on the part of the Legislature to make further changes to the statute in order to promote settlements.

Background

The experienced practitioner is very well aware of the effects of § 15-108. Its provisions establish the rules for apportionment of damages and contribution claims among joint tortfeasors where a plaintiff settles with one or more defendants in multi-defendant litigation.

Section 15-108 allows a plaintiff to continue his case against a non-settling tortfeasor but provides the non-settling tortfeasor a reduction or set-off against any damage award in an amount equal to the greater of the settlement amount or the equitable share of the settling tortfeasor.

Section 15-108 prohibits a settling tortfeasor from obtaining contribution from any other person.[2] Conversely, the settling tortfeasor is relieved from liability to any other person for a contribution.[3]

The statute provides as follows:

(a) "Effect of release of or covenant not to sue tort feasors." When a release or covenant not to sue or not to enforce the judgment is given to one or two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under Article 14 of the Civil Practice Law & Rules, whichever is the greatest.

(b) "Release of tort feasor." A release given in good faith by the injured to one tortfeasor as provided in Subdivision A relieves him from liability to any other person for contribution as provided in Article 14 of the Civil Practice Law & Rules.

(c) "Waiver of Contribution." A tortfeasor who has obtained his own release from liability should not be entitled to contribution from any other person (Added L. 1972 C. 830, §3, amended L. 1974, C. 742, §3).

(d) "Releases and Covenants within the Scope of this Section." A release or covenant not to sue between a plaintiff or claimant and a person who is liable or claims to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

(1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;

(2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who is claimed to be liable; and

(3) such release or covenant is provided prior to entry of judgment. (Added L. 2007)

By way of an example, assume a plaintiff sues defendants A and B, and A settles for $250,000 and B proceeds to trial. The jury returns a verdict for the plaintiff in the amount of $1 million, finding that A, the settling defendant, was 50 percent at fault. Under § 15-108, then B, the defendant who took her case to verdict, will now be able to reduce the verdict against her by 50 percent or $500,000. Conversely, if A, the settling defendant, were found only 10 percent at fault, then B would be entitled to reduce the verdict by $250,000 and not $500,000 because in this scenario the settlement would be greater.

Criticism

Even before the addition of subdivision (d) in July 2007, § 15-108 has long been the target of harsh criticism, especially from plaintiff's counsel who have traditionally viewed the statute as a disincentive to settlement because it can result in under-compensation to plaintiff and a possible windfall to a non-settling defendant.[4] It has been described unkindly as a "plaintiff beware" statute because the set-offs allowed under its operation can be quite substantial, sometimes serving to negate a large award rendered against a non-settling defendant.

Although the stated goal of § 15-108 in 1972 was to promote settlement, it has been criticized for the way in which it adds uncertainty to litigation. Indeed, the ultimate amount of recovery payable to the plaintiff and owed by the non-settling defendant is not determinable until the final apportionment of liability and award of damages has been made by the trier of fact.

The Addition of Subdivision (d) to Section 15-108 in July 2007

With calls from practitioners and legal commentators alike to eliminate or scale back the scope of § 15-108, the New York Legislature instead enacted subdivision (d) in 2007, which contained three subparts. Each subpart serves to eliminate three kinds of releases from the scope of § 15-108, all of which are discussed below.

Section 15-108(d)(1)—Release Not to Sue for Less than $1

The most pronounced change made by the Legislature to § 15-108 was the addition of subsection (d)(1), which pertains to discontinuances given without monetary consideration.

By removing the voluntary discontinuance from the scope of § 15-108, the Legislature is attempting to remove any penalty to the plaintiff seeking to discontinue against a defendant who should not have been sued in the first place. This provision allows the plaintiff to discontinue, without penalty, against the "ostensibly blameless defendant," so long as the consideration paid does not exceed $1.

Before this change came about in subsection (d), a plaintiff would be very reluctant to issue a voluntary discontinuance to the apparently blameless defendant. Doing so before subsection (d) was added would present great risk to the plaintiff. If one of the remaining defendants could establish at trial that the released defendant was, after all, partially at fault for plaintiff's damages, then the non-settling defendant could obtain a set-off under § 15-108. Under these circumstances, a cautious plaintiff would be wise to routinely decline a request for discontinuance from the "ostensibly blameless defendant." Of course, the blameless defendant would feel compelled to move for summary judgment and the remaining (non-settling defendants) would similarly feel compelled to oppose the motion for summary judgment, fearing their loss of the right of contribution.

Subsection (d)(1) now seeks to allow the plaintiff to freely give discontinuances without monetary consideration, safe in the knowledge that the released tortfeasors fall outside the scope of § 15-108. The remaining defendants are reportedly left no worse off having the right to seek contribution or indemnity should they later decide a claim against the released tortfeasor is appropriate.

Section 15-108(d)(2)—Releases that Fail to Completely or Substantially Terminate the Dispute

The addition of subsection (d)(2) limits the application of § 15-108 to releases that "completely or substantially terminate the dispute against the released defendant or tortfeasor." This new subdivision is intended to exclude high/low agreements in which the parties agree to confine damages to an agreed-upon range. This new change also excludes agreements in which the parties might attempt to narrow issues (perhaps by conceding liability or jurisdiction) without fully resolving the action. This legislative amendment overruled prior case law which treated most high/low agreements as settlement agreements under § 15-108. Parenthetically, it would appear that a high/low agreement may be deemed as settlement for purposes of CPLR 5003-a but not for the purpose of § 15-108.[5]

Section 15-108(d)(3)—Releases Provided Subsequent to Entry of Judgment

Out of the three subparts, subsection (d)(3) is the least significant. The New York Legislature's exclusion of post-judgment settlements from the application of § 15-108 is nothing more than a codification of the existing case law.[6]

Conclusion

From its inception, subdivision (d) appears to be generating almost as much controversy as the original provisions of § 15-108. Most practitioners certainly support the idea of encouraging plaintiffs to discontinue claims against "ostensibly blameless defendants." However, some legal scholars have suggested that § 15-108(d)(1) simply shifted the burden of recovering money judgments from plaintiffs to the non-released co-defendants who are now left to do so in actions for contribution. One commenter described the effect of § 15-108(d)(1) as "a nearly consequence free manner for plaintiffs to release defendants they deem blameless and places upon a non-released defendant the obligation of paying the full amount of a damages award, including the released defendants' comparative share."[7]

It simply remains to be seen whether subdivision (d) will actually serve to promote settlements. The Legislature certainly intended to ease the burden of plaintiff's counsel contemplating a release to a defendant, and this appears to be in keeping with the statutory goal of § 15-108.

Any discussion about the recent change to § 15-108 would not be complete without mention of everything in the statute left unchanged by the New York State Legislature. It should not go unnoticed that the change to § 15-108 came in the form of a distinct subdivision. This is significant, as it suggests the Legislature deliberately intended to keep all of the original provisions of § 15-108 intact, as well as the case law interpreting these provisions.[8]

Although there have been calls from many circles to abolish § 15-108, it appears that the Legislature is satisfied with its performance and content to leave the provisions of § 15-108 intact. As a result, counsel must be familiar with the set-off provisions of § 15-108 in order to make informed decisions whether to settle or proceed to trial.

Endnotes

1. *McDermott v. City of New York*, 50 N.Y.2d 211, 220, 428 N.Y.S.2d 643, 648 (1980). *See also Gonzales v. Armac Industries, Ltd.*, 81 N.Y.2d 1, 595 N.Y.S.2d 360 (1993); *Bradt v. Lustig*, 280 A.D.2d 739, 721 N.Y.S.2d 114 (3d Dep't 2001).
2. General Obligations Law § 15-108(c).
3. General Obligations Law § 15-108(b).
4. *Williams v. Niske*, 81 N.Y.2d 437, 443, 599 N.Y.S.2d 519, 523 (1993). *See also In re New York City Asbestos Litigation (Brooklyn Naval Ship Yard Cases)*, 82 N.Y.2d 342, 345, 604 N.Y.S.2d 884, 885 (1993); *Godfrey v. Soto*, No. 06-CV-428, 2007 WL 2693652 *6 (E.D.N.Y. Sept. 10, 2007); *Pollicina v. Misericordia Hosp. Medical Center*, 82 N.Y.S.2d 332, 340 (1993), 604 N.Y.S.2d 879, 883; *Chase Manhattan Bank v. Alvin, Gump, Strauss, Hauer & Feld L.L.P.*, 309 A.D.2d 173, 180, 763 N.Y.S.2d 588, 593 (1st Dep't 2003); *Whalen v. Kawasaki Motors Corp., U.S.A.*, 242 A.D.2d 919, 920, 662 N.Y.S.2d 339, 340 (4th Dep't 1997), *aff'd as modified*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998).
5. Patrick M. Connors, N.Y.L.J., Vol. 238, September 10, 2007.
6. *See Rock v. Reed-Prentice, Div. of Package Machinery Co.*, 39 N.Y.2d 34, 40, 382 N.Y.S.2d 720 (1976).
7. Patrick D. Bonner, Jr., "Defense Counsel and Amendments to GOL § 15-108," N.Y.L.J., Vol. 238, August 17, 2007.
8. *See Siegel's Practice Review* 187, 3 July 2007.

Violation of Internal Company Procedures in Negligence Claims

By Julian D. Ehrlich

When discovery in a personal injury case discloses that the defendant failed to comply with its own safety procedures, practices, policies or training, the parties and their counsel may initially react with irrational exuberance or unwarranted dejection.

For example, revelations that a construction contractor failed to follow a provision in its own safety program, like a periodic site inspection requirement or a so-called "zero tolerance" for safety violations, might appear on first impression to be irrevocably devastating.

However, several recent decisions have held that evidence of a defendant's deviation from its own internal procedures is properly excluded from the jury.

This rule of evidence was succinctly explained by the Court of Appeals, which stated in *Gilson v. Metropolitan Opera*, 5 N.Y.3d 574, 577, 807 N.Y.S.2d 588, 590 (2005) that "[v]iolation of a company's internal rules is not negligence in and of itself, and where such rules require a standard that transcends reasonable care, breach cannot be considered evidence of negligence."

In essence, defendants cannot raise or lower the duty set by the law. Although "every accident is preventable" may be a valuable slogan for striving to minimize workplace and premises injuries, such a policy does not create a new legal standard.

Moreover, this evidentiary rule encourages safety efforts beyond what is required by law. Admitting such evidence "would, in effect, be punishing [the defendant] for attempting to ensure an exceptional level of courtesy" or safety. *Gilson v. Metropolitan Opera*, 15 A.D.3d 55, 59, 788 N.Y.S.2d 342, 345 (1st Dep't 2005), *aff'd*., 5 N.Y.3d 574, 807 N.Y.S.2d 588 (2005).

Since violations of internal procedures are inadmissible, it follows that evidence of the internal rules themselves, whether in site safety programs, training manuals or the like, will be properly excluded absent any evidence that the rules reflect an industry standard or generally accepted safety standards. *Gilson, supra,* 807 N.Y.S.2d at 590, 5 N.Y.3d at 577.

Incident reports often include findings of departure from company practice. Some reports may suggest company fault or recommend corrective courses of action. When these reports contain references to internal rules and admissions against the interest of the defendant, it is important to consider the duties of the person making the report, the basis for the conclusions and purpose of the findings. In fact, disclosure of such a report may prompt taking a statement or a deposition of the person generating the report or a person with knowledge of company procedures.

In *Montes v. The New York City Transit Authority*, __ A.D.3d __, 843 N.Y.S.2d 622 (1st Dep't 2007), a divided court carefully analyzed internal Transit Authority rules in the context of findings contained in an incident report created after a city bus struck an 11-year-old boy. A TA "memorandum/report" prepared during an internal investigation concluded that the bus operator failed in the following: 1) to use caution; 2) to anticipate, while approaching a very active intersection; 3) to properly observe and recognize potential hazard; 4) to drive defensively by sounding the horn and stopping in a timely manner. *Id*. at 623.

While the report did not directly cite the TA code of conduct, the deposition testimony of the TA investigator revealed that his findings were an assessment "as to how the driver's operation of this vehicle measured up to the Transit Authority's internal rules and standards," which the court found exceeded the common law standard. *Id.* In addition, the author testified that the purpose of the report was to identify safety trends, training initiatives, and future actions to prevent accidents. *Id.* at 627.

Moreover, the court found it "[e]qually important" that, while "viewed in the abstract" the documented opinions might appear to be admissions against the TA's interests, the report actually contained no findings of fact that supported any apparent concession of liability. *Id*. at 624, 625. Furthermore, the court stated that "the business record statute does not make admissible evidence which is otherwise inadmissible." *Id*. at 624.

Ultimately, the court found that the report was properly excluded from evidence. *Id*. at 625. Significantly, however, as the concurring Justices in *Montes* cautioned, there is no bright-line rule that all investigative reports are inadmissible. *Id*. at 626.

Nonetheless, New York appellate courts have excluded evidence of violations of internal rules in a myriad of assorted claims, at times when they had been offered by a plaintiff to prove notice.

Examples of such preclusion include: 1) an owner's practice of clearing ice and snow during storms before the four hours after snowfall permitted in § 16-123 of the Administrative Code of the City of New York,[1] 2) a bus company's policy of lowering buses for elderly passengers,[2] 3) hospital rules,[3] 4) a theater's practice of checking the aisles and audience every 15 to 20 minutes during movies [not admissible to prove notice of a tripping hazard],[4] 5) the Metropolitan Opera's practice of providing usher escorts to seats at opera performances and prohibitions of seating after the house lights are lowered.[5]

The plethora of reported cases repeatedly rejecting plaintiff's offer of this type of proof may reflect the depth of claimants' belief that evidence of internal rule violation is effective in winning large awards from juries.

Just as a defendant cannot unilaterally alter the legal standard, neither can a nonparty. Non-mandatory recommendations, suggestions or guidelines issued by governmental and professional entities that have not been adopted into actual practice in the industry do not impose a heightened standard of care on defendants. *Capotosto v. Roman Catholic Dioceses of Rockville Center,* 2 A.D.3d 384, 386, 767 N.Y.S.2d 857, 858 (2d Dep't 2003) (where the court held that the plaintiff could not rely on school guidelines as to the danger of an asphalt playground surface for touch football), *cf. Kosicki v. Spring Garden Association, Inc.,* 42 A.D.3d 909, 839 N.Y.S.2d 660 (4th Dep't 2007) (where the court found that the United States Consumer Product Safety Commission (CPSC) guidelines on hard packed dirt under playground swings were admissible since the rules did not impose a higher standard than required by common law).

Internal company practices and non-mandatory recommendations are admissible where they adopt the standard set forth by law or if the plaintiff has detrimentally relied on a standard exceeding a legal duty. However, as a practical matter, evidence of a defendant's violation of internal rules that mirror the duty set by law lack the same shock value. In addition, detrimental reliance will typically be difficult to prove since the plaintiff is not likely to have knowledge of non-mandatory recommendations or the defendant's policies prior to the accident.

While defendants' rules are, as discussed above, often properly kept from the jury, in at least one reported case the court did consider such internal rules when deciding a summary judgment motion. In *Olivero v. Lawrence Public Schools,* 23 A.D.3d 633, 805 N.Y.S.2d 638 (2d Dep't 2005), the court found that evidence of school rules which forbade running on the playground created an issue of fact in a negligent supervision claim where the plaintiff played tag for 20 minutes prior to the accident.

The issue of defendants' violations of internal rules has, to some extent, divided courts.[6] The Appellate Division was split in the above-cited *Gilson, Branham* and *Montes* decisions. However, it is decidedly preferable for litigants to rely on the common law, Pattern Jury Instructions, Labor Law or other statues that define the parties' duties than a system of widely varying individually set standards.

As businesses become attuned to the recommendations of loss-control professionals and safety consultants, revelations of defendants' failures to comply with internal rules can be expected to increase.

Plaintiffs' attorneys vigorously representing their clients will try to move such rule violations into evidence on pretext, or to "paper wave." Defendants will want to make motions *in limine* to preclude this type of evidence, which if allowed at trial, may well sway a jury.

However, defendants' deviations from internal rules that forever remain in the purgatory of inadmissible discovery become akin to the proverbial tree falling in the empty forest. Parties, their counsel and carriers should factor the likelihood of preclusion into their case evaluations accordingly.

Endnotes

1. *Prince v. New York City Housing Authority*, 302 A.D.2d 285, 756 N.Y.S.2d 158 (1st Dep't 2003).
2. *Carlino v Triboro Coach Corp.*, 22 A.D.3d 624, 803 N.Y.S.2d 106, 106 (2d Dep't 2005).
3. *Diaz v. New York Downtown Hosp.*, 287 A.D.2d 357, 731 N.Y.S.2d 694 (1st Dep't 2001), *aff'd.*, 754 N.Y.S.2d 195 (2002).
4. *Branham v. Loews Orpheum Cinemas, Inc.*, 13 A.D.3d 319, 819 N.Y.S.2d 250 (1st Dep't 2006), *aff'd.*, 8 N.Y.3d 931, 834 N.Y.S.2d 503 (2007).
5. *Gilson v. Metropolitan Opera*, 15 A.D.3d 55, 788 N.Y.S.2d 344-345 (1st Dep't 2005), *aff'd.*, 5 N.Y.3d 574, 807 N.Y.S.2d 588 (2005).
6. *See* Joseph Nohavicka, *Transit Authority's Internal Accident Memos Admissible?* N.Y.L.J., December 7, 2007 ,for a discussion of Appellate Division decisions both admitting and excluding Transit Authority reports.

Julian D. Ehrlich is Claims Counsel for AIG Construction Risk Management Group in Manhattan.

The Intentional Act Exclusion— An Unresolved Conflict in the Interpretation of Policies

Elizabeth A. Fitzpatrick and Milton Thurm

"I really didn't mean to hurt him, just to scare him!" What happens when an individual intends to do one thing but his actions result in an entirely different set of consequences, causing injury or death for which he is sued for damages? If he or a member of his household is insured under a homeowner's policy, or his company is insured under a general liability policy, before the suit papers get cold in his hands, he will no doubt look to the insurer for defense of the action and indemnification for any sums for which he may be found liable.

Since policies are drafted to provide coverage for fortuitous events "neither expected or intended from the standpoint of the insured," in many cases the insurer will disclaim coverage or defend under a reservation of rights while contesting coverage in a declaratory judgment action. This has given rise to a multitude of divergent court decisions causing uncertainty as to the availability of insurance coverage where the alleged acts are arguably intentional in nature.

Contract Interpretation

An insured seeking to obtain defense and indemnification under a general liability policy for a claim that may be precluded by the application of an exclusion is afforded the substantial benefit of certain well-established principles of contract interpretation. In particular, where an insurer seeks a declaration that it has no duty to defend or indemnify its insured on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision.[1] However, while the timeliness of the disclaimer and the insurer's adherence to the technical requirements of Insurance Law § 3420 should be considered, a disclaimer is not required in all instances, as the incident may fall outside the scope of coverage afforded under the policy.

Where the conduct for which coverage is sought is arguably intentional in nature, the insurer typically relies upon the policy's definition of an "occurrence," as well as any intentional act, criminal act or assault and battery exclusion, depending on the policy and the exclusionary language included. This is particularly true where the timeliness of the disclaimer is at issue, because a disclaimer is not required if the conduct for which coverage is sought falls outside the scope of coverage afforded by the policy.[2]

In determining if coverage is available for an assault, the language of the policy must be closely examined as there exist many variations of the exclusionary language. While the pronouncement by the New York Court of Appeals in 1995 in the seminal decision, *U.S. Underwriters Insurance v. Val-Blue Corp.*,[3] laid to rest much of the confusion surrounding the application of the assault and battery exclusion in a general liability policy, there continues to be considerable litigation concerning the application of the intentional and criminal act exclusions. As the cases discussed below illustrate, application of the exclusion is extremely fact sensitive with results that are often seemingly irreconcilable.

Val-Blue (d/b/a Rascals) involved the shooting of an off-duty police officer by the club's security guard. In the complaint, the plaintiff contended that the shooting was negligent and alleged *respondeat superior*, as well as negligent hiring, supervision and training against the employer. The pertinent exclusion provided that "no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery and Assault and Battery shall not be deemed an accident, whether or not committed by or at the direction of the insured." Holding that the insurer had no obligation to defend or indemnify its insured, the court found the exclusion unambiguous and concluded that the plethora of claims which arose from the shooting were **based on** assault and battery and, therefore, were excluded from coverage under the policy.

In numerous decisions since *Val-Blue*, New York courts have granted the insurer's motion for summary judgment, determining that the assault and battery exclusion precluded coverage. Recently, in *Haines v. New York Mutual Underwriters*,[4] the court, citing to *Val-Blue*, articulated the generally accepted principle that "if no cause of action would exist **but for** the assault, the claim is based on assault and the exclusion applies." This is so despite the inclusion of other allegations in the complaint such as negligent hiring or supervision.

However, where there are no intentional assault allegations and the injuries may have resulted from "unintentional acts," including allegations that a bouncer "negligently and carelessly escorted" a patron from the premises, the insurance carrier was obligated to provide a defense notwithstanding the existence of an assault and battery exclusion.[5]

In *Essex Insurance Company v. Zwick*,[6] the court denied the insurer's motion for summary judgment, determining the incident was accidental from the perspective of the insured and the insurer did not establish that the claims against the bouncer for his conduct in restraining the claimant were barred by the assault and battery exclusion.

Restrictive Interpretation

The subjective nature of the exclusion combined with the courts' understandable desire to find coverage for the "innocent victim" has led to a restrictive interpretation of the exclusion, which is highly fact sensitive. The Court of Appeals' decision in *Cook v. Automobile Insurance Company of Hartford*[7] is illustrative.

In *Cook* the insured shot and killed Richard Barber, a 360-pound acquaintance of the insured, who burst into the insured's home, leading the insured to retrieve a shotgun from his bedroom. After warning him to leave or he would shoot, Cook shot Barber, who later died. Cook was acquitted of intentional and depraved indifference murder, as well as the lesser included offenses of manslaughter.

The complaint in the wrongful death action alleged that Cook negligently pointed and discharged the gun and, during depositions, Cook testified that he knew firing the shotgun would injure Barber but he did not intend to kill him. In determining that the incident fell within the policy's coverage for an "occurrence," which included an accident, the court observed that their previous definition of an accident, albeit in a different context, included not only an unintentional or unexpected event which would foreseeably cause death, but equally an intentional or expected event which unintentionally or unexpectedly had that result. Thus, the court concluded that the insurer owed a defense, with indemnity to await the outcome of the trial.

This decision was followed by the Third Department in *Merchants Insurance Company of New Hampshire v. Weaver*.[8] In *Weaver* the insured's son pled guilty to attempted assault in the first degree, admitting that he aimed and fired what he knew was a loaded and operable flare gun. The flare struck Weaver, causing serious physical injuries, including the loss of his left eye. The policy contained the identical expected or intended exclusion considered by the New York Court of Appeals in *Cook* and the complaint similarly alleged the insured had negligently fired the weapon. Not surprisingly, the court concluded that the insurer owed its insured a defense, with indemnity to await the underlying trial.

In the context of a life insurance policy, a liberal interpretation of intentional conduct resulting in unintended results was demonstrated by the New York Court of Appeals' conclusion that the act of an insured who overdosed on heroin after intentionally shooting up was an accident, thereby allowing recovery by the insured's mother, the beneficiary to the policy.[9]

Perspective of the Insured

The applicability of the exclusion is further complicated because it is determined from the perspective of the insured. In *RJC Realty v. Republic Franklin Insurance Company*,[10] the New York Court of Appeals held that an alleged sexual assault by an employee of a beauty salon/health spa was an occurrence within the meaning of a general liability policy and that coverage was not precluded by the exclusion for injuries expected or intended from the standpoint of the insured. The claimants alleged that the spa negligently hired and retained the masseur and failed to properly supervise his activities. The court identified the critical question as whether the masseur's intention and expectation in committing the assault should be attributed to his employer. The court concluded that the acts of the masseur were a departure from his duties and were thus unexpected, unusual and unforeseen from the perspective of the insured, thereby constituting an accident within the meaning of the policy.

Injury Is Inherent

In a narrow group of cases, the courts have held that the intentional act exclusion applies regardless of the insured's subjective intent. *Progressive Northern Insurance Company v. Rafferty.*[11] In essence, the courts have concluded that with respect to certain behavior, the injury is inherent in the nature of the wrongful act, i.e., "to do the act is necessarily to do the harm which is its consequence; and that since unquestionably the act is intended, so also is the harm." *Progressive, citing Allstate Insurance Co. v. Mugavero*.[12]

In *Progressive* the insured and another person were fighting. The insured got into his car and the other person stood in front of his vehicle, placing himself between the vehicle and a garage door while a friend of the claimant stood behind the insured's vehicle. The insured stepped on the accelerator injuring the claimant. Progressive obtained a judicial declaration that it owed neither defense nor indemnity because the act was intentional. The insured and claimant appealed, arguing that the insured only stepped "lightly" on the accelerator intending to scare the claimant, not injure him. The court disagreed, holding that the injuries were inherent in the act of placing a car in forward motion when but two feet of space existed between the car, a pedestrian and an immovable object, clearly invoking the intentional act exclusion of the policy.

In these types of cases, "the theoretical possibility that the insured lacked the subjective intent to cause the harm does not preclude a finding that, for purposes of the

policy's intentional act exclusion, such injuries are, as a matter of law, 'intentionally caused.'"[13]

In *Tangney v. Burke*,[14] the court held that the plaintiff's fall from a ledge during a fight with the insured was not an "occurrence" within the meaning of the policy since the injuries sustained by the plaintiff were inherent in the assault.

In *Monter v. CNA Insurance Companies*,[15] the court held that the intentional act exclusion precluded coverage where the insured had hired someone to break the claimant's legs and they instead shot and killed him, finding that the harm was inherent in the nature of the acts alleged and thus, the resultant injuries were, as a matter of law, intentionally caused within the meaning of the policy.

Applying the principle articulated in these cases to *Cook v. Hartford* and *Merchants v. Weaver, supra,* would have, arguably, led to a contrary result, as the injury resulting from the act of pointing and firing a loaded gun certainly seems inherent in the nature of the act. However, based upon the pleadings in *Cook*, the court concluded the insurer had failed to establish that the allegations were subject to no other interpretation than that Cook expected or intended the harm to Barber, distinguishing *Mugavero*[16] where the harm was inherent in the nature of the acts alleged to have been committed.

Public Policy

In *Slayko v. Security Mutual Insurance Company*,[17] the New York Court of Appeals interpreted a criminal activity exclusion in a homeowner's policy, opining that public policy did not prohibit its application, which barred coverage for the insured's shooting of a friend while the two were drinking and smoking marijuana. The court noted that while public policy does not prohibit coverage for liability arising from criminal acts, neither does it require such coverage.

The desire of the court to compensate an innocent victim must be weighed against the countervailing concern that "an ordinary person would be startled, to say the least, by the notion that someone would receive insurance protection for the consequences of criminal acts of which he was found guilty after a trial."[18] Stated differently, "the average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [that person] would not want to share that type of risk with other homeowner's policyholders."[19]

Conclusion

Determining if the intentional, criminal or assault and battery exclusion precludes coverage under a homeowner's or general liability policy is a fact-sensitive inquiry which is shaped by the competing desire to find coverage for an innocent victim and the public policy against affording coverage for criminal conduct. Establishing the subjective intent of the insured is often difficult, but a narrow line of cases which hold that the injury is inherent in the act provides a means for the insurer to establish that coverage is not available, where otherwise they would likely be unable to do so.

Endnotes

1. *Continental Casualty v. Rapid American Corp.*, 80 N.Y.2d 648 (1995); *Utica First Ins. Co. v. Stan-Brite Painting & Paperhanging*, 36 A.D.3d 794 (2007).
2. *Ciasullo v. Nationwide Insurance Company*, 32 A.D.3d 889 (2d Dep't 2006); *National Union Fire Insurance Company of Pittsburgh, PA v. Utica First Insurance Company*, 6 A.D.3d 681 (2d Dep't 2004).
3. 85 N.Y.2d 821 (1995).
4. 30 A.D.3d 1030 (4th Dep't 2006).
5. *Anastasis v. American Safety*, 12 A.D.3d 628 (2d Dep't 2004).
6. 27 A.D.3d 1092 (4th Dep't 2006).
7. 7 N.Y.3d 131 (2006).
8. 31 A.D.3d 945 (3d Dep't 2006).
9. *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675 (1976).
10. 2 N.Y.3d 158 (2004).
11. 17 A.D.3d 888 (3d Dep't 2005), (*citing Slayko v. Security Mutual Insurance Co.*, 98 N.Y.2d 289 (2002)).
12. *Allstate Insurance Co. v. Mugavero*, 79 N.Y.2d 153 (1992).
13. *Progressive Northern Insurance Company v. Rafferty*, 17 A.D.3d 888 (3d Dep't 2005).
14. 21 A.D.3d 367 (2d Dep't 2005).
15. 202 A.D.2d 405 (2d Dep't 1994).
16. *Allstate v. Mugavero*, 79 N.Y.2d 153 (1992).
17. 98 N.Y.2d 289 (2002).
18. *Massachusetts Bay Insurance v. National Surety Corp.*, 215 A.D.2d 456 (2d Dep't 1995); *citing Allstate Insurance Company v. Mugavero*.
19. *Rodriguez v. Williams*, 42 Wash. App. 633, 713 P.2d 135, 137-138, *aff'd* 107 Wash.2d 381, 729 P.2d 627.

Elizabeth A. Fitzpatrick and Milton Thurm are counsel to Lewis Johs Avallone & Aviles, LLP in Melville, New York, concentrating their practice on complex insurance disputes.

Insurance Coverage Topics of Recent Importance

By Elizabeth A. Fitzpatrick

Insurance Law § 3420(d) governs an insurer's disclaimer for accidents occurring within New York involving claims of death or bodily injury and obligates the insurer to provide written notice as soon as is reasonably possible of such disclaimer to the insured and the injured person or any other claimant. The statute has generated significant case law involving the required specificity of an insurer's disclaimer as well as the timeliness of the disclaimer vis-à-vis the insured, the plaintiff and any other claimant.

Recently, the New York bar was abuzz with the news of proposed legislation which would allow an injured party to commence a declaratory judgment action against an insurer for a coverage determination prior to entry of a judgment against the insured, abrogating the Court of Appeals' holding in *Hanover v. Lang*, 3 N.Y.3d 350 (2004). The legislation, introduced by Senators DeFrancisco, Golden and Maltese, also sought to preclude an insurer from disclaiming coverage based upon late notice of claim unless the insurer was able to demonstrate not just prejudice, but material prejudice as a result of the delayed notice. The bill further provided that the insurer's notice of the accident or loss shall create a rebuttable presumption that the insurer was not prejudiced by the delayed notice of the claim.

To the surprise of many, the legislation was vetoed by Governor Spitzer. In the governor's veto memo, the governor applauded the purpose of the bill, but cited the lack of notice to interested parties, noting that the bill was not introduced until June 17, 2007 and passed both houses just three days later. The governor advised that he instructed his staff and the Superintendent of Insurance to investigate the issue further, obtaining input from the affected parties. The governor concluded by stating: "As noted above, this bill's dual goals—streamlining litigation and prohibiting the denial of coverage for mere technicalities—are sound, and hopefully we can enact a new bill that accomplishes these important goals in a manner that protects the interests of claimants, policyholders and insurers alike."

The Insurance Department's Response

In response, the Insurance Department submitted its own proposed changes to Insurance Law § 3420. The proposed changes would require the insurer to demonstrate that the insured's failure to provide timely notice has prejudiced the insurer's rights, which would require a showing that the failure hampers or hinders the insurer's ability to effectively investigate, negotiate, settle, or defend the claim.

The proposed changes would also allow an injured party to commence a direct action against the insurer if the insured does not do so within 180 days from the denial on the sole question of whether the insurer's rights have been prejudiced by the late notice. The Department's proposed changes also obligate the insurer to confirm within 45 days whether the insured had a liability policy with the insurer upon the written request by an insured, injured person or other claimant, and the limits of such policy. Negotiations regarding proposed changes are ongoing as of the writing of this article.

The Current State of Section 3420(d)'s Timely Disclaimer Requirements

The written notice of disclaimer requirement can be fulfilled by pleadings, so that an insurer's timely commencement of a declaratory judgment action or (in the case of an SUM claim) petition to stay arbitration can serve as a disclaimer. *Thomson v. Power Authority of State of New York*, 217 A.D.2d 495 (1st Dep't 1995); *Glens Falls v. Smith*, 221 A.D.2d 529 (2d Dep't 1995). Although the law was seemingly well settled that a disclaimer must notify the insured with a high degree of specificity of the grounds upon which the disclaimer is predicated and that grounds not raised will be deemed waived, *General Accident v. Cirucci*, 46 N.Y.2d 862 (1979), a recent decision of the Second Department held that the insurer's failure to cite late notice by the injured party did not invalidate the disclaimer. *Schlott v. Transcontinental Insurance Company*, 2007 N.Y. Slip Opinion 05637 (1st Dep't).

The timeliness of the delay in disclaiming is measured from the date that the insurer knew or should have known of the grounds for disclaimer. *Allcity Insurance Company v. Jimenez*, 78 N.Y.2d 1054 (1991). Typically, the timeliness of the disclaimer is a question of fact. *Allstate Insurance v. Gross*, 27 N.Y.2d 263 (1970). While the courts frown on piecemeal disclaimers, the disclaimer must be issued when the insurer has sufficient knowledge to disclaim coverage and the insurer cannot wait until all factual issues regarding coverage have been resolved. *Republic Franklin v. Pistilli*, 16 A.D.3d 477 (2d Dep't 2005); *Digugliemi v. Travelers*, 6 A.D.3d 344 (1st Dep't 2004).

The insurer bears the burden of demonstrating a reasonable excuse for the delay in disclaiming. *Hartford Insurance Company v. County of Nassau*, 46 N.Y.2d 1028 (1979). While the courts continue to whittle away the number of days that an insurer has to disclaim coverage without such being deemed untimely, the Second Department in *North Sea Insurance Company v. Schoenig*, 28 A.D.3d 462 (2d Dep't 2006), reversed the trial court and granted the insurer's motion for summary judgment, finding that a disclaimer issued 21 days after it became aware that its insured had breached the notice condition of the policy was timely as a matter of law.

Where the delay in disclaiming is based upon late notice, which the courts typically hold requires no investigation by the insurer, the timeliness is measured more strictly and delays as minimal as 30 days have been held unreasonable as a matter of law. However, in *Tully Construction Co., Inc. v. TIG Insurance Co.*, 2007 N.Y. Slip Opinion 06983, issued by the Second Department on September 25, 2007, the court held that the insurer had met its burden and justified its 42-day delay in disclaiming. The accident occurred on November 27, 2000, when a vehicle operator and passenger were killed when their vehicle hit a backhoe parked on the shoulder of the Staten Island Expressway. A primary policy issued by Zurich afforded $1,000,000 of coverage and TIG afforded excess coverage. The court concluded TIG had met its burden of establishing that its investigation was reasonably related to its completion of a thorough and diligent investigation into whether it had reasons to disclaim for late notice.

In contrast, a 37-day delay in disclaiming was held untimely as a matter of law by the First Department in *Bovis Lend Lease v. Royal Surplus Lines*, 2007 N.Y. Slip Opinion 07317 (Oct. 2, 2007). The delay was measured from the date Royal received its investigator's report, which presumably provided a basis for the denial of coverage. Where the insurer attempts to justify its delay in disclaiming upon the need to perform an investigation, the court will look beyond the excuse to determine its legitimacy. *McGuiness v. Mandracchia*, 291 A.D.2d 484 (2d Dep't 2000).

The claimants' failure to fill out and return proof of claim forms did not extend the time for the insurer to disclaim coverage, declared the Court of Appeals in *New York Central Mutual v. Aguirre*, 2006 WL 1593955 (2006). "That completed forms were never returned or that the letter did not set a precise deadline for their return does not extend the insurer's time to disclaim or deny coverage, or excuse its delay in doing so." J. Smith dissented, opining that the time to disclaim should not be triggered until the required document is supplied.

How Does the Insured Satisfy the Condition?

The providing of notice is a contractual obligation or condition to coverage. The insurer is not obligated to disclaim coverage until the insured provides notice. *Roofing Consultants v. Scottsdale Insurance Company*, 73 A.D.2d 933 (4th Dep't 2000). The insurer is not obligated to include the failure of an insured who has not provided notice in its disclaimer. *Dryden Mutual Insurance Company v. Brockman*, 259 A.D.2d 947 (4th Dep't 1999).

Where the plaintiff failed to establish that the agent to whom notice was given was an agent of the insurer, the insurer's time to disclaim was not invoked. *Escobar v. Colonial Indemnity*, 22 A.D.3d 633 (2d Dep't 2005). Notice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier. *Gershow Recycling v. Transcontinental*, 22 A.D.3d 460 (2d Dep't 2005).

Notice to an employee of the in-house legal department for GEICO of a potential excess claim was sufficient to notify it of the claim and GEICO's denial issued 62 days after the notice was received, which was based on lack of timely notice, was untimely as a matter of law. *Banuchis v. GEICO*, 14 A.D.3d 581 (2d Dep't 2005).

Notice by Other than Insured

The insurer has no obligation to disclaim where notice of the accident was provided by counsel to one of the insured's co-defendants in the personal injury action, according to the Appellate Division, Second Department in *Hernandez v. American Transit Insurance Company*, 2006 N.Y. Slip Opinion, 06052 (2d Dep't 2006). The court distinguished the decision of the Court of Appeals in *First Financial v. Jetco* (2003), which held the insurer was obligated to issue a timely disclaimer where notice was provided by other than its named insured, noting that the issue regarding the source of the knowledge was evidently not raised in that litigation and that the insurer took the unusual step of acknowledging receipt from the third party and reserving its rights to disclaim.

The law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source. *Travelers Insurance Co. v. Volmar Construction Co.*, 300 A.D.2d 40 (1st Dep't 2002). AIU's disclaimer issued 14 days after the tender was timely as a matter of law.

The injured party has an independent right to provide notice and thus, the injured party will not be charged vicariously with the insured's delay in providing notice. *Lauritano v. American Fidelity Fire Insurance Company*, 3 A.D.2d 564, *aff'd* 4 N.Y.2d 1028 (1958). In determining the reasonableness of an injured party's notice, the notice requirement is measured less rigidly than that required of the insureds. *Mt. Vernon Fire Insurance Company v. NIBA Construction*, 195 A.D.2d 425 (1st Dep't 1993). The sufficiency of notice by an injured party is governed not by the mere passage of time but by the means available for such notice. *National Grange Mutual Insurance Company v. Diaz*, 111 A.D.2d 700 (1st Dep't 1985). Where the insurer disclaims coverage based upon late notice by the insured, but the plaintiff later exercises its independent right to provide notice, the insurer is not obligated to disclaim coverage to the claimant. *Steinberg v. Hermitage*, 26 A.D.3d 426 (2d Dep't 2006).

The disclaimer must be sent to all insureds so that a disclaimer issued to the vehicle owner, but not the driver, who is an insured under the omnibus clause of the policy is ineffective to disclaim coverage. *Eveready Insurance v. Dabach*, 176 A.D.2d 879 (1st Dep't 1991). However, where

the carrier did not know who the driver of the vehicle was because of the insured's misrepresentations as to his identity, the disclaimer issued two years after the accident was timely. *Allstate v. Rico*, 28 A.D.3d 353 (1st Dep't 2006).

Where the primary insured provides notice, another insured whose interests are adversary to the prime insured is not excused from the policy's notice condition. *Sayed v. Macri*, 296 A.D.2d 396 (2d Dep't 2002). However, where two claimants are similarly situated, notice by one claimant may be deemed applicable to the other. *National Union v. INA*, 188 A.D.2d 259 (1st Dep't 1992). In *National* the doctor and health service were united in interest, no cross claim was asserted in underlying malpractice action, and thus, notice by the health service was accepted as notice by the individual doctor.

Where the disclaimer cites two separate grounds for disclaiming, one of which is erroneous, it may rely upon the other cited ground since it never attempted to rely upon a ground not cited in the denial. *State Insurance Fund v. Utica*, 25 A.D.3d (1st Dep't 2006).

Estoppel

Where an insurer provided a defense for twenty months before determining that the party was not an additional insured on its policy, it was not estopped from denying coverage. *Federated Department Stores, Inc. v. Twin City Fire Insurance Company*, 28 A.D.3d 32 (1st Dep't 2006).

Does Insurance Law § 3420 Apply to Claims Between Insurers?

On December 15, 2005, the First Department held in *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Insurance*, 2005 WL 3435238, that the requirements of Insurance Law § 3420(d) do not apply to tenders between insurers. In *Bovis*, National Union, the insurer for the construction manager at a job site, tendered its insured's coverage to Royal Insurance Company, the insurer for a subcontractor. Royal did not immediately respond to the tender, but sought to obtain a copy of the contract between its insured and Bovis and conducted another investigation. Ultimately, approximately two months after the tender was made, Royal rejected the tender by National Union.

Shortly before the tender, Columbia, the site owner and Bovis, who were both additional insureds on the Royal policy, commenced a declaratory judgment action. In the context of the declaratory judgment action, Royal moved for summary judgment citing a policy exclusion. The plaintiffs argued that Royal's disclaimer was untimely. Royal argued in reply that Insurance Law § 3420(d) cannot be asserted by one insurer against another and that in any event, its denial was timely.

Concluding that Insurance Law § 3420 does not apply between insurers, the court interpreted the plain meaning of the statute as obligating the insurer to give prompt written notice of disclaimer not only to the insured but also to any party that has a claim against the insured arising under the policy. The court concluded that another insurer does not fall within the specified categories. The court also reviewed the legislature's budget report on the bill and its stated purpose as "to assist a consumer or claimant in obtaining an expeditious resolution to liability claims by requiring insurance companies to give prompt notification when a claim is being denied." The court thus opined that the notice requirement, which was designed to protect the insured and the injured person or other claimant against the risk posed by a delay in learning the insurer's position, was not a risk to which another insurer seeking contribution was subject. The court also cited *Tops Market v. Maryland Casualty*, 267 A.D.2d 999 (4th Dep't 1999) and *AIU Insurance Company v. Investors Insurance Company*, 17 A.D.3d 259 (1st Dep't 2005) in support of its determination.

The First Department decision in *Bovis* was perhaps presaged by its decision in *Realm National v. Hermitage*, 8 A.D.3d 110 (1st Dep't 2004). In *Realm*, the worker's compensation carrier was seeking contribution from the general liability carrier, who had disclaimed coverage based upon the employee exclusion. In determining that the disclaimer was effective, despite the gl carrier's citation of only part of the relevant exclusion, the court stated: "The disclaimer was not rendered ineffective by defendant's quotation of only part of the relevant exclusion, especially since the claim of ineffectiveness is being raised not by the insured but by a coinsurer seeking contribution."

Cases Outside the Purview of Insurance Law § 3420

Where Insurance Law § 3420 is not applicable, the insured must rely upon the common law doctrines of waiver and estoppel. Most notably, the insured must establish prejudice based upon the delay by the insurer in disclaiming coverage in a timely manner. *Guberman v. William Penn Life Insurance Company*, 146 A.D.2d 538 (2d Dep't 1989).

Conclusion

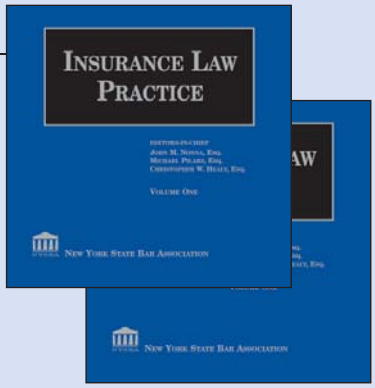
It seems likely that there will be a significant change in the law regarding an insurer's ability to disclaim based upon late notice. Many who practice in the field of insurance coverage have cited the inequity of altering the law to impose upon the insurer the obligation to establish prejudice before a disclaimer based upon late notice will be upheld without a corresponding change in the law governing an insurer's obligation to issue a disclaimer promptly, citing the minimal delays the courts have found invalidated a disclaimer based upon a legitimate policy exclusion or breach.

Elizabeth A. Fitzpatrick is counsel to Lewis Johs Avallone & Aviles, LLP, in Melville, New York, concentrating her practice on insurance coverage and appellate practice.

TICL Section
Spring Meeting
March 29 – April 1, 2007
The Westin Rio Mar Beach
Puerto Rico

NYSBA**BOOKS**

Insurance Law Practice, Second Edition



Gain the confidence and knowledge to skillfully represent either an insurer or insured, whether it be during the policy drafting stage or a claim dispute.

Contents At-a-Glance

2006 • 1,382 pp., looseleaf, two volumes • PN: 41256
List Price: $140
Mmbr. Price: $110

To order call **1-800-582-2452** or visit us online at **www.nysba.org/pubs**
Mention Source Code: PUB0255

NYSBA
New York State Bar Association

NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE AND COMPENSATION LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155