NYSBA

SUMMER 2011 | VOL. 40 | NO. 1

Torts, Insurance & Compensation Law Section Journal

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

Inside

- Reining in the Doctrine of Assumption of Risk
- Gulf Coast Oil Spill Coverage Impact on the Insurance Industry
- New York's Anti-Subrogation Law
- Notice, Disclaimers of Coverage and the New Prejudice Requirement
- Employee Privacy in the Digital Computer Age
- Horizontal Exhaustion
- Reckless Disregard Protection

AUGUST 14 - 17, 2011
SAVE THE DATES!!!

NYSBA President Stephen P. Younger, TICL Section Chair Thomas J. Maroney, and NYSBA President-Elect Vincent E. Doyle with the TICL Lobster

TICL ANNOUNCES BAR HARBOR, MAINE!

THE TORTS, INSURANCE and COMPENSATION LAW SECTION (TICL)
WILL HOST THE 2011 SUMMER MEETING and PRESENT 6.5 HOURS of CLE
AUGUST 14 - 17, 2011

AT THE HARBORSIDE HOTEL and MARINA, BAR HARBOR, MAINE

THE TICL LOBSTER IS GOING TO MAINE!

WARNING: ***TICL EVENTS ARE EXTREMELY FAMILY FRIENDLY, JUST ASK THE 52 KIDS THAT WENT TO DISNEY WORLD LAST OCTOBER. YOU SHOULD ONLY ATTEND IF YOU ARE INTERESTED IN GREAT CLE, UNFORGETTABLE AFTERNOONS, EVENINGS WITH YOUR FAMILY and NETWORKING WITH TICL ATTORNEYS and INSURANCE REPRESENTATIVES FROM ACROSS NEW YORK STATE.***

FOR MORE INFORMATION VISIT OUR WEBSITE AT:
www.nysba.org/TICLSummer2011

TICL Journal

Vol. 40, No. 1
Summer 2011 Issue

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

Torts, Insurance and Compensation Law Section Officers and Committee Chairs

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

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

Secretary
Robert F. McCarthy
Nationwide Mutual Insurance Co.
45 Crossways Park Drive, Ste. 102
Woodbury, NY 11797
robert.mccarthy@rocketmail.com

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

TICL *Journal* Co-Editors
Paul S. Edelman
Kreindler & Kreindler
750 Third Avenue
New York, NY 10017
pedelman@kreindler.com

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

TICL *Newsletter* Co-Editors
John J. McDonough, III
Cozen O'Connor
45 Broadway, 16th Fl.
New York, NY 10006
jmcdonough@cozen.com

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

Division Chairs
Construction and Surety Law Division
Kenneth Thomas Boyd
Polin Prisco & Villafane
One School Street, Ste. 206
Glen Cove, NY 11542
ktfboyd2@aol.com

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

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

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

Business Torts and Employment Litigation
Heath J. Szymczak
Jaeckle Fleischmann & Mugel, LLP
12 Fountain Plaza, Ste. 800
Buffalo, NY 14202-2222
hszymczak@jaeckle.com

Class Action
Thomas A. Dickerson
Associate Justice, Appellate Division,
Second Department
Courthouse Square, 6th Fl.
140 Grand Street
White Plains, NY 10601
judgetad@aol.com

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

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

Diversity
Mirna M. Santiago
White Fleischner & Fino
303 Old TarryTown Road
White Plains, NY 10603
MSantiago@wff-law.com

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

Ethics and Professionalism
George J. Silver
Civil Court, Kings County
80 Centre Street, Room 136
New York, NY 10013
gjsilver@courts.state.ny.us

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

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

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

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

Insurance Coverage
Joanna M. Roberto
Goldberg Segalla LLP
200 Old Country Road, Ste. 210
Mineola, NY 11501-4293
jroberto@goldbergsegalla.com

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

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

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

Municipal Law
Shawn P. Martin
Law Office of Shawn P. Martin
3686 Seneca Street
West Seneca, NY 14224
Shawn.Martin.Law@gmail.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
McMahon, Martine & Gallagher, LLP
55 Washington Street, Ste. 720
Brooklyn, NY 11210
rcoyne@mmglawyers.com

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

Table of Contents

Vol. 40, No. 1

Page

A View from the Chair

As the incoming Chair of the Section, I am honored with the trust that the Torts, Insurance and Compensation Law ("TICL") Section's Executive Committee has placed in me to lead this diverse Section of over 2,600 active members of the New York State Bar Association.

Our Section is about as diverse a group as can be imagined. We come from all four corners of the State, from Buffalo to Montauk. Some of our members are from out-of-state. Our practice areas are complex, divergent and our membership includes the old, young, newly admitted and extraordinarily accomplished. Our members include respected members of the Judiciary as well as Mediators and Arbitrators.

Our diversity causes us to address a wide range of issues that lead to robust debate, but by working together we have a significant role in our Association and in the issues that we face in our professional lives.

A current example of our Section having a significant voice in helping shape the direction of the New York State Bar Association was the debate over this year's New York State budget that was recently adopted.

Included in Governor Cuomo's proposed budget this year was a proposed cap on non-economic damages in medical malpractice actions. Our Section played an influential role in shaping the opinion of the Association and the Association's voice against the proposed damages cap was clearly heard in the halls of Albany.

A special thank you to my fellow members of the Executive Committee, Jean Gerbini, Sharon Stern Gerstman and Rob Coughlin for serving on the drafting committee with respect to our Section's position paper on the proposed damages cap provided to the New York State Bar Association's House of Delegates.

I would be remiss if I did not thank Laurie Giordano, for the outstanding job that she did in the leading the Section the past year. She led by building consensus and with much time, effort and hard work. Her leadership was marked with grace, wit and charm. Great job, Laurie. On behalf of the Section, please accept our gratitude.

One of the unique TICL Section membership benefits is the *Journal* that you are reading right now. Our thanks to *Journal* Editor David Glazer for all of his hard work to deliver this issue to you. Our thanks as well to Paul Edelman as *Journal* Editor Emeritus. Paul was honored for his many years of service to the Section at our Annual Dinner on January 26th.

Finally, my thanks to all of our article contributors to this issue.

This issue includes a compelling article by Joanna Roberto of Goldberg Segalla entitled, "Gulf Coast Oil Spill Coverage Impact on the Insurance Industry." Joanna's article is a nice follow-up to the CLE panel presentation given by Doug Hayden and Heath Szymczak at our 2010 Fall Meeting in Disney World. As we commemorate the 100-year anniversary of the Triangle Shirtwaist Factory fire, the Gulf Oil Spill is a tragedy of epic proportion for our time and it will be with us for many years to come.

In conclusion, I offer all TICL members the opportunity to get more involved in our Section. There are many opportunities to speak on CLE Panels and write articles for both the *TICL Journal* and the *TICL Newsletter*. Our Section presents a comprehensive full day CLE Seminar held in conjunction with the Trial Lawyers Section at the New York State Bar Association's Annual Meeting each January.

Throughout the year, we host and present many different CLE programs around the state on topics important to our respective practice areas. Our state of the art electronic *TICL Newsletter* is a useful practice tool, as is the *TICL Journal*.

Each year, we host a TICL Section Meeting that includes a family-friendly environment that mixes CLE with social networking and family fun. In recent years, these Section Annual Meetings have been held in Walt Disney World in Florida; Mohegan Sun in Connecticut; San Diego, California and Puerto Rico.

This year the TICL Section will host the 2011 Summer Meeting in Bar Harbor, Maine at The Harborside Hotel and Marina. We will offer 6.5 hours of CLE and receptions where you can mingle with our panel speakers, including prominent attorneys, experts, Judges and Bar Presidents, and let's not forget the TICL Lobster. This year we will be in an unforgettable family fun venue with all that Bar Harbor and nearby Acadia National Park has to offer. We promise fun for all ages! Check it out at www.theharborsidehotel.com.

As your Section Chair, I encourage every member to get involved. If you enjoy your Section membership, get a friend to join who would benefit from the networking and opportunity to make a difference.

Have a question, comment or a suggestion on how you can get more involved? Email me anytime at tmaroney@maroneyoconnorllp.com.

Looking forward to a great year.

Tom Maroney

Playing Sports Versus Horseplay: Reining in the Doctrine of Assumption of Risk in *Trupia v. Lake George Central School District*

By Ayesha Syed

Since 1972, the tug of war between plaintiffs and defendants over the reach of the doctrine of assumption of risk has been a tricky one for the courts to referee. Primary assumption of risk is an affirmative defense that is incidental to a voluntary association between the plaintiff and defendant. It has been asserted in various contexts ranging from athletic and recreational activities to animal attacks. Due to the doctrine's grounding in public policy, the courts had resisted calling a foul as its application strayed further out of procedural bounds, but in the case of *Trupia v. Lake George Central School District,*[1] decided in April 2010, the Court of Appeals decided that the buck stopped there.

In *Trupia,* twelve-year-old plaintiff Luke Trupia sought recovery for an injury he sustained at a summer program when he chose to slide down a banister from which he then fell. The main theory of liability alleged against the program administrators was that their lack of supervision permitted him to slide down the banister, which all parties referred to as "horseplay," that resulted in his injury. The defendants moved to amend their answer to include the affirmative defense of primary assumption of risk, namely, that the plaintiff assumed the risk of falling by choosing to slide down the banister. The Court of Appeals affirmed denial of the defendants' motion to amend, holding that "[n]o suitably compelling policy justification has been advanced to permit an assertion of assumption of risk in the present circumstances." The circumstance referred to was the activity that the plaintiff was engaged in, namely, horseplay.

The social policy grounds for denying the use of the affirmative defense to the defendant in *Trupia* was that it would erode the responsibility of schools to supervise the children in their charge if the children could "generally be deemed to have consented in advance to risks of their misconduct." As the dissent stated, "that is a risk a great many children would happily assume." While this is sound reasoning, the effect on plaintiffs may appear counterintuitive. A plaintiff engaged in a socially useless pursuit such as sliding down a banister does not face dismissal based upon assumption of risk, while a plaintiff engaged in a sanctioned recreational event does.

Courts have held that the promotion of socially valuable activities is a compelling public policy reason to assert the affirmative defense of assumption of risk. They have acknowledged that since athletic and recreational activities pose heightened risks resulting in heightened exposure to liability, there may be a deterrent effect on hosting such activities. In order to prevent that deterrent effect, the affirmative defense may be used to establish that by engaging in a sport or recreational activity, a participant consents to known or obvious risks which are inherent in the nature of the sport. The participant is not deemed to have assumed the risk of the host or co-participant's reckless or intentional conduct as that would violate public policy at the other end of the field.

The interplay between the doctrine of assumption of risk and the interests of public policy is straightforward, unlike the clash between the doctrine and the law of comparative fault. The courts have wrestled with that clash since as far back as 1902. In *Dowd v. New York, O. & W. Ry. Co.,*[2] the court established the doctrine as an affirmative defense to be proven by the defendant. It pointed out that "[t]he doctrine of assumed risks…is distinct in principle from the doctrine of contributory negligence although they have frequently been confounded by the courts."

The debate re-emerged when the system of contributory negligence, which operated as a complete bar to plaintiff's recovery, was abolished by the courts and legislature in favor of one of comparative fault. The case was *Dole v. Dow Chemical Co.,*[3] and the legislative enactment was CPLR 1411. In *Dole*, the Court of Appeals held that "[i]n any action to recover damages for personal injury…the culpable conduct attributable to the claimant…including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages… shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."

Sports and recreation have been the main arena for application of the assumption of risk affirmative defense. In *Turcotte v. Fell,*[4] decided under the comparative negligence standard, the plaintiff horse jockey alleged that the racetrack owner's negligence in having a wet patch on the track caused his horse to run into another one and resulted in his fall. When the term applies to sporting events, it involves what is called "primary" assumption of risk, which is incidental to a relationship of voluntary association between the parties.

In *Turcotte*, the Court of Appeals attempted to harmonize the doctrine of assumption of risk with the comparative fault system by incorporating some measure of analysis above and beyond what plaintiff's hand was in causing his or her own injury. The court stated that "[w]ith the enactment of the comparative negligence statute, assumption of risk is no longer an absolute defense (see CPLR 1411); thus, it has become necessary…when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff." The court held that the racetrack owner did not have a duty to the plaintiff other than avoiding reckless or intentional conduct, because based on plaintiff's experience as a jockey and his opportunity to observe the track during a prior race that day, the plaintiff was deemed to have impliedly assumed the risk of the conditions that led to his injury. Since the defendant owner had no duty, there was no need for any further analysis beyond that of assumption of risk, and the defendant was awarded summary judgment.

In its decision in *Trupia,* the court seems to back off from its prior opinion in *Turcotte*, holding that "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." The court stated that if a plaintiff's mere participation in a sport implies that he or she assumed the risk, leading to the determination that there is "no duty," this would again act as a total bar to recovery and "a renaissance of contributory negligence." Despite the incompatibility, the court decided that "[i]n the end, [the assumption of risk doctrine's] retention is most persuasively justified not on the ground of doctrinal or practical compatibility, but simply for its utility in 'facilitat[ing] free and vigorous participation in athletic activities.'" The affirmative defense of primary assumption of risk was permitted to live on, but is restricted to the context of sports and activities which the court deemed worthy of protection, so that organizers of activities are entitled to the protection of the affirmative defense while hosting them.

The Court of Appeals last major pronouncement on assumption of risk came in 1997 in *Morgan v. State.*[5] There the court held that defendant's duty in the sport and recreational activity area is to exercise care to make the conditions as safe as they appear to be. Express assumption of risk, when the risk is disclosed to the plaintiff prior to his or her engagement in the activity, is a complete bar to recovery.

The advantage for a defendant in using an assumption of risk defense is that a case can be brought to conclusion upon a motion for summary judgment without getting involved in fact-based questions of proximate cause, which usually go to a jury. No duty is owed to the plaintiff who assumed the risk inherent in the sporting event or activity engaged in. See *Assumption of Risk* by Salvatore J. DeSantis, NYLJ Outside Counsel 12/2/97.

The Court of Appeals pointed out in its decision in *Trupia* that "the Second and Fourth Departments permitted broader use of the doctrine, and presumably granted defendants leave to appeal from its unanimous decision so that the inter-departmental inconsistency over the applicability of the doctrine might be resolved." One such case is that of *Lamandia-Cochi v. Tulloch,*[6] where the same facts existed as those in *Trupia* with the opposite result. In *Lamandia,* a 13-year-old boy who slid down a handrail on a porch at the defendant's home was deemed to have assumed the risk that the handrail might bend or shift beneath him and he could fall. The court cited various other inconsistent cases which allowed the doctrine to go outside of the scope of sports-related injuries. In *Davis v. Kellenberg Memorial High School,*[7] where the plaintiff was injured by a bench he was standing on and rocking, the court stated that "[t]he evidence submitted established that the injured plaintiff assumed the risk of injury inherent in his horseplay." Now, however, *Trupia* conclusively establishes the law in New York.

The successful use of the assumption of the risk doctrine led defense counsel to attempt to apply it to various other scenarios, including products liability and attacks by domestic animals. Defendants in *Rose v. Brown and Williamson Tobacco Corp*.[8] asserted the assumption of risk affirmative defense in an action brought by a plaintiff who alleged that the defendant negligently designed the cigarette that led to her illness. The judge allowed the tobacco company to raise an express assumption of risk defense on the grounds that the warnings printed on the cigarette boxes informed consumers of the risks of related injuries. The court declined to extend the doctrine of primary assumption of risk, reasoning that smoking was not within the kinds of "recreational activities" similar to sports, which give rise to risks with immediate consequences. Some may consider smoking cigarettes and sliding down banisters recreational activities, but as per the decision in *Trupia*, protection of the affirmative defense will not be afforded to those who enable them.

Although the application of the affirmative defense of primary assumption of risk may have been significantly restricted, it appears that the courts will continue to grapple with what activities are "athletic and recreational," and out of those, which are "beneficial pursuits" and should be deemed by society as "worthy of protection" on a case-by-case basis. It is clear that the doctrine will apply to horse racing, and not horseplay, but what about skateboarding?

Endnotes

1. *Trupia v. Lake George Central School District*, 2010 NY Slip Op. 02833.
2. 170 NY 459 (1902).
3. 30 NY2d 143 (1972).
4. 68 NY2d 432 (1986).
5. 90 NY2d 471 (1997).
6. 305 AD2d 1062 (4th Dept., 2003).
7. 284 AD2d 293 (2nd Dept., 2001).
8. 10 Misc3d 680 (2005).

Ayesha Syed is an associate with Molod Spitz & DeSantis, P.C. Her areas of concentration include insurance coverage analysis, construction litigation, and premises liability.

Gulf Coast Oil Spill Coverage Impact on the Insurance Industry

By Joanna M. Roberto

The British Petroleum ("BP") oil rig accident and ensuing oil spill have keenly proven that all liability coverages will be triggered with respect to the enormous property damage loss that has occurred. As quoted by Moody's Investors Service on July 3, 2010, the cost of insurance policies covering deep water oil rigs has increased by more than 50% since the BP oil spill. The estimations assessed against insurers and reinsurers are astounding. Total insured losses from the worst oil spill in U.S. history are expected to be between $1.4 billion and $3.5 billion.[1] For instance, Partner Re has estimated its losses will be in the $60-$70million range; Munich Re follows with $80 million; Hannover Re with $53 million and Swiss Re predicts the heaviest loss in the industry, estimating a $200 million loss from the disaster.[2]

Within days of the incident, Transocean Ltd.'s excess insurers filed a complaint for declaratory judgment in a Texas federal court, seeking a ruling that no additional insured coverage is owed to BP plc with respect to pollution claims arising out of the explosion of BP's oil well in the Gulf of Mexico.[3] The complaint alleges that BP is not entitled to coverage as an additional insured because the release of oil on April 20, 2010 emanated from BP's well and not Transocean's oil rig. Transocean owned the Deepwater Horizon oil rig that BP contracted to use for its drilling activities. The drilling contract requires BP be named as an additional insured under Transocean's excess policies issued by Certain Underwriters.

On May 14, 2010, BP plc provided notice of claim to the insurers, which include Certain Underwriters at Lloyd's, London; Axis Specialty Europe Ltd.; Arch Insurance Co., Ltd.; Berkeley Insurance Co.; Houston Casualty Insurance Co.; National Union Fire Insurance Co. of Pittsburgh, Pa.; Navigators Insurance Co.; Infrassure Ltd.; Great American Insurance Co. of New York; Liberty Mutual Insurance Co.; New York Marine and General Insurance Co.; Valiant Insurance Co.; Max America Insurance Co.; XL Specialty Insurance Co.; and Zurich American Insurance Co.

Transocean's drilling agreement, Article 24.1 addressed Transocean's pollution-related liabilities to BP and provides that Transocean "shall assume full responsibility for…and hold [BP] harmless from demand or liability for pollution or contamination, including control and removal thereof, originating above the surface of the land or water from spills, leaks or discharges of fuels…in the possession and control of [Transocean]." Article 24.2 of the agreement sets forth BP's pollution-related liabilities to Transocean, stating that BP assumes full responsibility for and holds Transocean harmless from pollution claims "arising out of or connected with operation under this contract hereunder and not assumed by Transocean."

The excess insurers claim that the liabilities BP faces for pollution emanating from BP's well are not within the scope of the additional insured protection because they are emanating from below the surface and from BP's well. Accordingly, the excess insurers seek declarations that BP assumed full responsibility in the drilling contract for any and all liabilities arising out of or related to the release of oil from its well, that the insurers have no obligation to BP under any of the policies for pollution liabilities, and that BP is not entitled to coverage under any of the policies for current or future pollution liabilities.

Following along the lines of lawsuits, the State of Alabama has also filed two lawsuits over the BP oil spill. According to an Associated Press report, one names BP as a defendant, while the other names Transocean, Halliburton and other companies associated with the spill. The lawsuits accuse the defendants of damaging Alabama's coast and economy through "negligent or wanton failure to adhere to recognized industry standards." The lawsuits seek both punitive and economic damages, but do not state a dollar figure. A spokesperson for the governor's office told the Associated Press the State is still compiling a list of economic damages that it will submit to BP. These are just a few examples of the many lawsuits emanating from the BP oil spill.

Damage

Manifesting itself from the BP oil spill is the argument that cleanup and/or remediation costs may not necessarily constitute "damage" under the policy. There are a select amount of cases stating that an insurer is not obligated to indemnify an insured where the government seeks response costs for the cleanup of a hazardous waste. The logic is that the response costs constitute an economic loss and not property damage as defined in the policy. *See Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

It has frequently been held in New York—and elsewhere—that a liability policy insuring against an award of legal damages does not cover an award of equitable relief, such as an injunction, or an order of restitution. Legal damages are subject to clear limits, which is the measure of damages for distortion of the property limits of the value of that property. Applying this logic to environmental cleanup situations, several of the costs attributable to the pollutant release fall outside the scope of the policy. For example, costs relative to the contaminant of prevention of future spills are not considered property damage under the scope of the policy. *See Hakin v. Mass. Ins. Insolvency Fund*, 675 NE2d 1161 (Ma. 1997).

Similarly, a liability policy may not extend itself to compensating for costs linked to cleanup and / or to mitigate the possibility of future losses, often, it is key to determine the process of the cleanup in relation to the insured's normal operations and waste removal. It is possible, for example, that procedures of cleanup had been combined with normal operating procedures and costs. Along these lines, courts have regularly concluded that the cost attributable to compliance with regulatory directives of a federal agency does not constitute a claim for damages under a policy. *See Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758 (Ct. Appeals Md 1993). In accordance with the policy's definition of property damage which includes "physical damage to or destruction of tangible property," an insurer may not be obligated to compensate for costs attributable to regulatory compliance as they would not be a response cost.

Pollution Coverage

Almost every liability insurance policy includes some form and variation of a pollution exclusion. To be debated is whether the oil, spilling from the oil well, is a "pollutant," as defined under various property insurance policies. The policies generally define "pollutants":

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The definition and interpretation of pollution are substantially contested issues for the insurance industry. Even today and even aside from BP, courts remain divided on the general application of the pollution exclusion.

In a recent case, *Mastec, Inc. v. United States Fire Ins. Co.*, 361 Fed. Appx. 37 (11th Cir. 2010), coverage for pollution damages caused by a punctured gas pipeline was addressed. In applying Florida law, the court stated that although the general rule is that insurance provisions susceptible to more than one reasonable interpretation are ambiguous and should be strictly construed against the insurer in favor of coverage. However, despite this general principle, the court found that Mastec had not proposed—nor could the court devise—a *reasonable* interpretation of the exclusions that would allow it to construe the policy in favor of coverage.

The Ninth Circuit has also spoken on the application of the exclusion. In *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526 (9th Cir. 1997), the court addressed the contention that the "pollution exclusion" in a commercial general liability policy applied so as to exclude coverage for losses sustained as a result of the addition of a foreign substance to crude oil transported in a pipeline. 132 F.3d at 528. In that case, the at-issue policy excluded coverage for loss resulting from "pollution or contamination." *Id.* at 529. Recognizing that an insurance policy clause is ambiguous when different persons looking at the clause in light of its purpose cannot agree upon its meaning, the Ninth Circuit agreed that "although 'contamination' is not defined in the policy, it must be construed *within the context of the pollution exclusion*." *Id.* (emphasis supplied). The term "contamination," the court explained, "is an environmental term of art and applies only to discharges of pollutants into the environment." *Id.* The court also agreed with the district court's rejection of the insurers' common-sense approach to defining "contamination," as that approach would render an interpretation that was "virtually boundless" and would reach "far beyond the reasonable expectations of the insured." *Id.*

The *Enron Oil* court found that the insurers' expansive definition of "contamination" demonstrated the ambiguity convincingly; under their interpretation, the contamination exclusion would be virtually limitless, extending to claims for product liability (for example, a bottle manufactured with impure glass) or for negligence (for example, spoiled food served in a restaurant) that arguably involved an impurity resulting from contact with a foreign substance. *Id.* The Ninth Circuit concluded that the use of the words "'seepage, pollution and contamination,' together with the specific exclusion of 'the cost of removing, nullifying or cleaning-up seeping polluting or contaminating substances,' sends an unmistakable message to the reasonable reader that the exclusion deals with environmental-type harms." *Id.* The Ninth Circuit thus opted for a contextual definition of contamination.

Similarly, in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992), the Seventh Circuit examined an insurance policy's pollution exclusion clause, in which the definition of pollutant included "any…thermal irritant or contaminant." 976 F.2d at 1043. The court held that the "terms 'irritant' and 'contaminant,' when viewed in isolation, are virtually boundless, for 'there is virtually no substance or chemical in existence that would not irritate or damage some person or property.'" *Id.* at 1043 (quoting *Westchester Fire Ins. Co. v. Pittsburg*, 768 F. Supp. 1463, 1470 (D. Kan. 1991)).

Expanding on the contextual definition theory, some courts have illustrated how the term "contamination" may be used improperly as a synonym for various types of damage and chemical processes, which may or may not properly be classified as contamination or excluded from coverage under the terms of a policy. *See, e.g., McConnell Constr. Co. v. Ins. Co. of St. Louis*, 428 S.W.2d 659, 11 Tex. Sup. Ct. J. 430 (Tex. 1968). By way of further example, in the context of a liability insurance policy, at least one New

York State court has also found the term "contamination" or "contaminant" to be ambiguous. In *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 13 A.D.3d 599, 788 N.Y.S.2d 142 (2nd Dept. 2004), the insured used faulty raw ingredients in its soft drink products, which caused the products to have an unintended taste and which necessitated the destruction of the damaged products. 788 N.Y.S.2d at 143. The insurance carrier in that case disclaimed coverage, relying on the policy's contamination exclusion. The carrier claimed that contamination meant "to make inferior or impure by mixture." *Id.* at 144. The Appellate Division, however, determined that:

> [t]o accept [the insurance carrier's] interpretation would require that the term "contamination" be read literally, whereas New York courts, in construing terms in pollution exclusions, favor a commonsense approach over a literal approach. [The insurance carrier's] reading also ignores the general purpose of pollution exclusions, which is to exclude coverage for environmental pollution.

Bearing significance to the treatment of "oil" in contamination matters, in *Wilshire Westwood Assocs. v. Atlantic Richfield Corp*., 881 F.2d 801 (9th Cir. 1989), the developers claimed that former landowners should have been responsible for clean up of the subject land under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C.S. § 9601 (14), because the landowners knowingly allowed hazardous substances to leak into the ground over the period of their ownership. The court affirmed and found that the only issue was whether the exclusion from the definition of hazardous substances in CERCLA for petroleum, including crude oil and any fraction thereof, included refined gasoline and all of its components and additives. The court held that CERCLA specifically excluded crude oil from the list of hazardous substances requiring appellees to bear cleanup costs under the statute and that if the court ruled that petroleum was not excluded, then every person that ever spilled oil or gasoline would be liable under CERCLA.

New York Speaks on Environmental Coverage

In *American Commercial Lines LLC v. Water Quality Insurance Syndicate*, 2010 U.S. Dist. LEXIS 33251 (S.D.N.Y. March 29, 2010), the court held the insurer was obligated to continue reimbursement of defense and investigation costs despite policy limits and indemnity for oil spill claims. This coverage action addressed the extent to which the insurer's policy covers the insured's investigation and defense costs involving a maritime accident and oil spill on the Mississippi River in July 2008. Specifically, the accident occurred when an unmanned barge sank and released approximately 300,000 gallons of fuel oil into the river.

As a result of the accident the insured, as owner of the barge, was sued for the cleanup costs. The policy issued by WQIS required the insurer to (1) indemnify ACL for "such amounts as it shall have become liable to pay and shall have paid for pollution response or damages" as owner or operator of the barge, and (2) reimburse ACL for "certain other costs and expenses" including costs associated with the discharge of oil (Coverage A), the discharge of hazardous substances (Coverage B), and investigation and defense (Coverage C). In ruling against the insurer, the court held that the policy language was unambiguous and that the provision, on its face, contained no temporal or quantitative limit on the reimbursement obligation.

Thus, the insurer's argument that its obligation to make payments for investigation and defense costs under Coverage C ended because payments under coverages A & B met the policy limits was deemed meritless. As such, the court ordered that the insurer was obligated under the policy to reimburse ACL for costs incurred in the investigation and defense of all claims asserted against it regardless of whether other indemnity limits under the policy have been reached.

On a local level, in *Griffith Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (N.Y. App. December 30, 2009), the New York State Supreme Court, Appellate Division, Fourth Department interpreted a "products completed operations hazard" provision in the plaintiffs' commercial general liability insurance policy and in doing so found that the petroleum spill was covered by CGL Policy. The dispute stemmed from a petroleum spill from a spur pipeline in Steuben County, New York. The plaintiff purchased petroleum from a non-party, which transported the petroleum through a pipeline network until it reached the spur pipeline in Steuben County. It was undisputed that the petroleum never reached plaintiff's facility, which was connected to the spur pipeline. As with petroleum deliveries in the past, the purchased petroleum remained stored in the spur pipeline until the non-party seller notified plaintiff to open its valves in its terminal to receive the petroleum. The discharge occurred while the petroleum was still stored in the spur. The notification never occurred; plaintiff had no involvement with the product at issue.

Plaintiffs sought a declaration that their insurer was obligated to indemnify them in an underlying action regarding the spill. Their insurance policy contained a "Comprehensive Pollution Exclusion Endorsement Including Products Completed Operations Exception for Specified Business Activities." The policy contained an exception to that exclusionary clause, providing that it did not apply to any property damage "that may arise out of the 'products completed operations hazard' for…[t]he sale, storage and/or transportation of fuels."

The court held that the petroleum leak fell within the ambit of the PCOE exception, thereby affording coverage. The court concluded that the exception was unambiguous. Reasoning that the property damage occurred "away from premises" owned by the plaintiffs and that the property damage arose from fuel purchased by plaintiffs that leaked either while it was transported to their facility or stored in the spur awaiting transportation, the court held that the property damage arose out of the plaintiffs' product. The dissent, however, reasoned that the exception did not apply because (1) the oil was spilled before it ever came into the plaintiff's possession and it had not been placed in the stream of commerce, and (2) the oil was not plaintiff's "product."

Apart from cleanup costs and now applying the exclusion, in *Plants & Goodwin, Inc. v. St. Paul Surplus Lines Ins. Co.*, 99 F. Supp. 2d 293 (W.D.N.Y. 2000), the court announced that oil or petroleum is commonly considered a "pollutant" and is excluded under pollution exclusions in insurance policies in New York courts. In *Plants & Goodwin,* the plaintiff insured was sued for allegedly causing a discharge of crude oil which damaged a farmer's cattle. Plaintiff sued defendant insurer, seeking a judicial declaration that defendant was obligated to defend and indemnify it. Both parties sought summary judgment. Defendant contended that the insurance contract contained an absolute pollution exclusion which barred coverage for any damage arising from the discharge of pollutants**.** Plaintiff argued that the pollution exclusion was not applicable since the crude oil leakage did not constitute "pollution" under the terms of the exclusion. The court held the only reasonable interpretation of the insurance contract, based upon the common use of the language, was that the pollution exclusion applied to any damage, including damage to wildlife, resulting from the leakage of crude oil as occurred in this case.

Business Interruption and Business Income

First-party claims for damage and for business interruption have prompted serious litigation in recent years. First party claims of those directly involved in the ownership and operation of the oil rig for their own losses, or by other first party claims of Gulf Coast businesses will be revisited. The hospitality industry will certainly have to account for the apparent gap in coverage relevant to business interruption due to environmental exposure to the oil. The extent of an interruption in business will be disputed where restaurants and hotels suffered decreased tourism business. *See 730 Bienville Partners, Ltd. v. Assurance Co. of America*, No. 02-106F, 2002 WL 31996014 (E.D. La. Sept. 30, 2002) yet limitations on coverage may apply. The issue becomes whether a prospective claimant can recover for the loss of its business although its loss was not caused by direct physical harm. *See United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128 (2d Cir. 2006).

More than a dozen Gulf Coast restaurants, a food service distributor and a seafood processor[4] filed a lawsuit in U.S. District Court in New Orleans seeking compensation from BP as a result of the Deepwater Horizon oil spill. *See* http://www.seafoodsource.com/newsarticledetail.aspx?id=4294993499. The plaintiffs claim loss of business because fishing closures are inhibiting their ability to obtain fresh, local seafood and, as a result, increasing prices. The plaintiffs also claim that misinformation about fish are frightening customers who are now reluctant about eating at restaurants.

Many also may file claims under their own business interruption, contingent business interruption and similar policies. In ascertaining the extent of an insured's coverage under an insurance policy, a court will look to the entire contract to determine "its purpose and effect" and the "apparent intent of the parties." *Maryland Cas. Co. v. Cont'l Cas. Co.*, 332 F.3d 145, 161 (2d Cir. 2003). Because contingent business interruption provisions *extend* the scope of coverage beyond that provided by the BI provision, property covered by the former falls outside the scope of the latter. Business-interruption insurance replaces profits lost as a result of physical damage to the insured's business, whereas contingent business-interruption coverage protects the insured against the consequences of a supplier's problems. Generally, claimants are entitled to liability damages only if pollution touches their property. Business interruption claims might not have such a restriction and could arise further downstream. Business interruption policies typically appear within a commercial property policy, so such claims will depend on the definition of property, which often excludes land, such as a beach at a coastal hotel. Some insurers may assert that they do not insure the water offshore of property and therefore the policy is not triggered, including business interruption.

Traditionally, seamen have been recognized as favored in admiralty and their economic interests have commanded the fullest possible legal protection. At least one court has recognized that although fishermen and clammers have no individual property rights with respect to the aquatic life harmed by oil pollution, they could sue for the tortious invasion of a public right, having suffered damages greater in degree than the general public. *See Burgess v. M/V TAMANO*, 370 F. Supp. 247 (S.D.Me.1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977). In *Burgess*, the court rationalized that when an oil spill prohibits fishermen from plying their trade, it is considered an interference with the direct exercise of the public right to fish and dig clams which is, in fact, a special interest different from that of the general public. Thus, in instances where fishermen have established a course of business conduct which makes commercial use of a public right with another party, pecuniary losses may be recoverable.

Accordingly, in instances where there has been a tortious invasion of commercial fishing areas by the introduction of pollutants or contaminants, courts have affirmatively protected those fishermen who incurred actual economic losses. But in *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981), the court gave categorical consideration to entities that could not recover as a result of a collision between two vessels which ruptured toxic chemicals in the Mississippi River Gulf Outlet. As a result, a substantial number of square miles of the Louisiana waterways and marshes were closed by the Coast Guard. The court dismissed claims from the following, the claims of persons or business entities falling into the following categories:

1. Shipping and / or other shipping type interests unable to traverse the area.
2. Marina and boat rental operators.
3. Wholesale and retail seafood enterprises not actually engaged in fishing, shrimping, crabbing or oystering in the mandated area.
4. Seafood restaurants.
5. Tackle and bait shops.
6. Fishermen, oystermen, shrimpers and crabbers engaged for recreational purposes only.

Whether the principles in *M/V Testbank* will guide the litigation brewing now brought by the affected food industry as a result of the BP incident remains to be seen.

Directors and Officers

There is also a shareholders derivative lawsuit against the Board of Directors for BP for allegedly negligently managing the company and hiding safety problems which contributed to the oil spill. The suit also includes Transocean Ltd., Cameron International Corp., and Halliburton Energy Services. Interestingly, the complaint also purports to name as defendants the third-party defendants' insurers since the action is advantageously venued in Louisiana which excepts direct action suits from the general rule of prohibition.

The present derivative lawsuit references with significant momentum the prior BP shareholder litigation arising out of the 2006 Alaska spill where part of the settlement included acquiescence by BP to change corporate maintenance and operation. As can be expected, the shareholders maintain that BP failed to comply with that agreement by failing to enhance the operational integrity and safety oversight function, among others. The lawsuit affirmatively seeks the immediate appointment of new directors and an independent board to monitor the exposure. The BP derivative litigation has gained significant interest and numerous followers also because it contains the atypical set of parties: a foreign company facing D&O claims in a U.S. Court attempting to enforce U.S. securities laws. The next question would probably be—who will foot the bill for the enormous defense costs in this litigation?

Conclusion

Undoubtedly, even before the BP oil spill, deep water drilling was considered a high risk by the insurance market. Since the oil explosion, the cost of insurance policies covering deep water oil rigs has increased by more than fifty percent (50%).[6] Operators and oil companies are seeking to purchase new or expanded coverage. As explained by Gregory Thomas, chief of offshore activities at an insurance underwriting company in Oslo for deep-water oil contractors, insurance companies are revisiting what they can afford to underwrite as the spill reveals higher levels of liability than previously considered. The insurance industry potentially faces financial changes as Congress contemplates lifting the $75 million cap on liability damages connected to the BP oil spill. If indeed that $75 million limit is lifted, companies involved in offshore drilling likely will have to pay more for insurance; that is, if it is offered. See Anne C. Mulkern, GULF SPILL: A lucky few manage to profit from disaster *(Greenwire, 06/18/2010).*

Endnotes

1. http://www.insurancejournal.com/news/national/2010/06/03/110403.htm#ixzz0z8byEHzI.
2. http://www.insurancejournal.com/news/national/2010/06/03/110403.htm#ixzz0z8caSTkD.
3. *Certain Underwriters at Lloyd's, London, et al. v. BP plc. et al.*, No. 10-01823 (S.D. Texas).
4. The restaurants include the Crazy Lobster Bar & Grill in New Orleans and Destin, Fla.; Poppy's Seafood Factory in Destin, Fla.; Tello's Bistro and Zeke's Restaurant and Oyster Bar, both in Metairie, La.; and Eleven 79 and Franky and Johnny's Restaurant, in New Orleans. The food service distributor is P.A. Menard in New Orleans and the processor is New Orleans Fish House. The fishermen and seafood suppliers include Gastian's Pier and Hillman Shrimp and Oyster Corp., both of Dickinson, Texas.
5. *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir. 2001).
6. Moody's Investors Service on June 3, 2010.

Joanna M. Roberto is a Partner at Goldberg Segalla LLP.

New York's Anti-Subrogation Law Update

By Mirna M. Santiago

Subrogation Defined

The doctrine of subrogation entitles an insurer to stand in the shoes of its insured to seek indemnification from the party whose wrongdoing has caused the loss for which the insurer is bound to reimburse.[1] Equitable subrogation is based upon the premise that a person who pays a debt that is owed by another should be allowed the opportunity to be reimbursed in full by the one primarily responsible for the loss.[2]

Subrogation versus Anti-Subrogation

Boiled down to its essence, the anti-subrogation doctrine states that an insurance company "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured is covered."[3]

The "Anti-Subrogation Statute of 2009"—General Obligations Law § 5-335

In November 2009, the anti-subrogation rule—which had heretofore been a common law doctrine—was codified with respect to the rights of health care providers and carriers in personal injury actions. In summary, the governor signed into law a statute that precludes health care providers/carriers from recovering any sums paid as health care benefits to their insureds in pending actions for personal injury, medical, dental or podiatric malpractice and wrongful death, if a premium was collected for such benefits.

In other words, health care carriers could no longer obtain reimbursement of medical expenses from the proceeds of a lawsuit, if they had already obtained premiums from their insured for that very same risk, i.e., medical services.[4]

The necessity of such a statute was highlighted by the *Fasso v. Doer*[5] case, wherein the plaintiff's health insurance provider intervened in the personal injury action and refused to accept less than the full amount of its demand ($780,000). Ultimately, the trial court approved a settlement in the amount of $900,000 and dismissed the health provider's equitable subrogation claim. The Appellate Division, Fourth Department, affirmed the trial court's decision. However, the Court of Appeals reversed, stating that the health provider's right to equitable subrogation could not be extinguished where the policy limits had not been exhausted. In that case, there remained $1.1 million of the $2,000,000 policy limits available to satisfy the claim. Therefore, in essence, the court held that the defendant's liability did not end, even with the settlement of the plaintiff's action.

The results of *Fasso v. Doerr* were more far reaching than perhaps the Court intended. Health insurers now had *carte blanche* to essentially hold up the settlement between two willing parties. And defendants could not settle a case for less than the policy limits with just the plaintiff, since they would potentially remain liable to the third-party insurer for the balance.

The passage of General Obligations Law § 5-335 provided some much needed relief from the effects of the *Fasso v. Doerr* ruling. However, with the relief entered ambiguity regarding the application of the statute.

The Loopholes

a. Charitable and public hospitals appear to be exempt

Pursuant to NY's Lien Law § 189, charitable and public hospitals would likely be exempt from this statute, provided that the services were provided on an emergency basis within one week of the injury resulting from negligence, tort or other wrongful act and that the provider otherwise complies with the requirements set forth in the Lien Law.

b. Does the statute apply to a claim that has been made against an insured, but that has not been placed into suit?

The statute states: "When a plaintiff settles with one or more defendants *in an action*…"

Does this mean that—as long as no action is filed—the health care providers may assert their rights of subrogation with respect to any settlement effectuated?

As of the writing of this article, the matter had not been litigated, but this phrasing seems to create an ambiguity in the reading of the statute.

c. What about the action that is ongoing, but has not settled?

Again, the statute indicates: "When a plaintiff *settles* with one or more defendants in an action…"

This is another issue that has not been decided by the First, Second and Third Judicial Departments since the passage of this statute. However, the Fourth Department[6] has declared itself to have a "quagmire" on its hand and refused to dismiss a health care provider's claim, finding that some "incidental equitable relief" may be in order in cases by health care providers seeking money damages under CPLR 1012.[7] Confusingly, the Court permitted the provider to "intervene only to the extent of introducing evidence of the amount of medical and health expenses it has paid on behalf of the [the plaintiff]," but failed to note whether it would grant such provider's claim for equitable relief.

d. The statute does not apply to those entities with a "statutory right of reimbursement"

As noted above, the statute provides an exception for providers with a "statutory right of reimbursement." The following is a non-exhaustive list of some such providers:

Workers' Compensation

Pursuant to Section 29(1) of the Workers' Compensation law, should the injured employee bring a third party action, the compensation carrier will have a lien on the proceeds of any recovery, after the deduction of reasonable and necessary expenditures, including attorney fees, incurred in effectuating such recovery, to the extent of the total amount of compensation provided or estimated.

The Legislature provided this lien right to the compensation carrier to prevent a double recovery by the injured employee.

Medicare

Medicare is a federally funded program that provides medical care to senior citizens and others.

By statute, Medicare is available to the following classes of people:

(a) aged 65 or older;

(b) those (of any age) with End-Stage Renal Disease (permanent kidney failure treated with dialysis or a transplant);

(c) those (of any age) with Lou Gehrig's Disease (ALS); and

(d) those (of any age) who have been paid social security disability benefits for 24 months or more.

In 1980, Congress enacted 42 USCA § 1395y (b), called the Medicare Secondary Payer Statute ("MSP"), which made Medicare secondary to any other responsible entity, including liability insurance carriers.

In 2007, Congress passed the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA"), which imposed certain duties upon insurance carriers (including liability plans, private self-insured entities, Group Health Plans, no-fault insurance plans and workers' compensation plans). Specifically, each of these entities is now obligated to report payment information to the government regarding the claim "after the claim is resolved through a settlement, judgment, award or other payment (regardless of whether or not there is a determination or admission of liability)."

Refusal to comply with the statute is not option as any provider who fails to comply with the reporting requirements is subject to a civil penalty of $1,000 per day for each day of noncompliance with respect to each claimant. And failure to report a settlement can also lead to "double damages" if the Medicare lien is not timely satisfied.

Compliance with any Medicare liens is paramount and preempts New York's anti-subrogation statute.

No-Fault

New York's Insurance Law § 5105 allows for reimbursement between carriers under the following circumstances:

> Any insurer liable for the payment of first party benefits to or on behalf of a covered person and any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay…has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. In any case, the right to recover exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire.

Based on this provision, if one vehicle is either over 6,500 pounds or is a vehicle for hire, the other carrier is statutorily entitled to reimbursement of any No-Fault/PIP benefits paid and would not be subject to the provisions of the anti-subrogation law.

ERISA Plans

ERISA plans (established under the Employee Retirement Income Security Act of 1974) are also exempt from the anti-subrogation statute as they are established under Federal Law (which preempts any State statute). Unfortunately, it is often difficult to distinguish ERISA plans from the run-of-the-mill health plans facilitated by many employers for the benefit of their workers. The following are some guidelines that may assist with recognizing a legitimate ERISA plan:

Initially, one must find out whether the plan is actually self-funded. In a self-funded plan, the employer assumes the financial risk for providing health care benefits to the plan participants. The employer *may* contract with a third-party administrator to assist in the administration of the plan, the payment of benefits, etc., but the employer is ultimately responsible financially for the payment of those benefits.

Second, an ERISA plan must file Form 5500. The plan administrator must retain a copy of such filing and provide it upon request. FreeERISA.com may also provide some insight into Form 5500 filings, but it is best to obtain the document directly from the administrator. State Departments of Insurance may also shed some light on how a specific entity / plan is licensed.

Third, there must be a written Summary Plan Description ("SPD") provided to employees. The SPD must state it is an ERISA Plan.

Last, the plan must not constitute a Multiple Employer Welfare Arrangement ("MEWA"). MEWAs provide health and welfare benefits to employees of two or more unrelated employers who are not parties to collective bargaining agreements (i.e., a plan sponsored by a trade association for its members).[8] Although MEWAs are self-funded, they are not ERISA plans. In fact, in 1983, Congress amended ERISA Section 514 to except MEWAs from federal preemption of State regulation.

If a plan meets the definition of an ERISA plan, it would be exempt from the anti-subrogation statute and it would be entitled to reimbursement from the proceeds of any liability settlement.

Conclusion

The foregoing is designed to be an overview of General Obligations Law § 5-335 and the potential pitfalls associated with asserting it. Of course, each case and claim by a health insurance provider must be reviewed on its own merits to determine whether it would fall under the purview of the anti-subrogation statute.

Endnotes

1. *Layaw v. Maguire Ford Lincoln-Mercury, Inc.*, 219 A.D.2d 73, 639 N.Y.S.2d 544 (3d Dep't 1996).
2. *Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 690 N.Y.S.2d 489 (1999).
3. *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294, 604 N.Y.S.2d 510, 516 (1993).
4. The statute reads:

    NY CLS Gen Oblig § 5-335

    § 5-335. Limitation of non-statutory reimbursement and subrogation claims in personal injury and wrongful death actions

    (a) When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement. By entering into any such settlement, a plaintiff shall not be deemed to have taken an action in derogation of any nonstatutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement constitute a violation of any contract between the plaintiff and such benefit provider.

    Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.

    (b) This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to article fifty-one of the insurance law. The term "additional first-party benefits," as used in this subdivision, shall have the same meaning given it in section 65-1.3 of title 11 of the codes, rules and regulations of the state of New York as of the effective date of this statute.

5. 12 N.Y.3d 80 (2009).
6. *Rink v. State*, 901 N.Y.S.2d 480 (4th Dep't 2010).
7. CPLR § 1012.

    Intervention as of right; notice to attorney-general, city, county, town or village where constitutionality in issue

    a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

    1. when a statute of the state confers an absolute right to intervene; or

    2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or

    3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

8. 29 U.S.C. 1002(40) defines "multiple employer welfare arrangement" as an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries…).

Mirna M. Santiago is Of Counsel to White Fleischner & Fino LLP in White Plains, New York.

Notice, Disclaimers of Coverage and the New Prejudice Requirement
No Prejudice No More

By Elizabeth Fitzpatrick

Most policies of insurance, whether personal or commercial, auto or homeowners, include a condition requiring an insured to provide notice of an occurrence or loss to the insurer as soon as practicable or as soon as reasonably possible. Absent an excuse for the delay, notice provided by the insured more than a month after the loss is typically held to be untimely, often as a matter of law. This is exemplified by the 1st Department's recent decision in *Juvenex Ltd. v. Burlington Ins. Co.*, 2009 NY Slip Opinion 05166 (1st Dept. 2009).

In *Juvenex*, the court held that the insured's delay of two months in giving the insurer notice of the claim was unreasonable as a matter of law, citing *2130 Williamsbridge Corp. v. Inner State Indem. Co.*, 55 AD 3d 371 (2008). Addressing the right of an injured party to provide notice to the insurer, the court declined to consider the plaintiff's argument that notice of the claim provided to the defendant by the injured person was timely, noting that, in any event, it would consider the injured claimant's delay in providing notice to the insurer also unreasonable as a matter of law.

An even shorter delay was held to be unreasonable in *Young Israel v. Guideone Mutual Insurance Company*, 2008 WL 2277599 (1st Dept. 2008), where the court held that the insured's 40 day delay in notifying the insurer of the accident was unreasonable as a matter of law. The court rejected the insured's proffered excuse for the delay, to wit, a reasonable belief in nonliability, as the accident involved a rear end collision by the insureds and the claimant was removed from the accident by ambulance.

While, as demonstrated by the court's decision in *Young Israel*, *supra*, a good faith belief of non-liability may excuse or explain a failure to give timely notice, the insured bears the burden of demonstrating that the delay in giving notice was reasonable. *Travelers Indemnity Company v. Worthy*, 281 AD2d 411 (2nd Dept. 2001). The issue of whether an insured possesses a reasonable good faith belief as to its non-liability is ordinarily a question of fact. *Argentina v. Otsego Mutual Fire Insurance Company*, 86 NY2d 748 (1995).

In *Argentina*, although the insureds notified their liability insurer 171 days after a slip and fall accident by the insureds' brother, the court concluded that the insureds had a reasonable good faith belief in non-liability, based, in part, on the close familial relationship between the insureds and the accident victim.

In *Kambousi Rest., Inc. v. Burlington Ins. Co.*, 2009 NY Slip Op. 00241 (1st Dept. 2009), the court held the insured's notice given 6 months after the incident was excused based upon his reasonable belief in nonliability and the insurer was thus obligated to defend and, if necessary, indemnify the insured.

In *422-428 West 46th Street Owners, Inc. v. Greater NY Mutual Ins. Co.*, 2008 Slip Opinion 08257 (1st Dept. 2008), the court held that despite a ten-month delay by the insured in notifying the insurer of the incident, questions of fact existed as to whether the failure was excused based upon the insured's good faith, reasonable belief of non-liability.

The case law demonstrates that the courts strictly construe the insured's proffered excuses for their delay in providing notice, though not as strictly as the courts construe the timeliness of an insurer's denial.

Insurance Law 3420 Amendments

In July 2008, New York's governor signed into law legislation which significantly altered an insurer's ability to rely on late notice as a defense to coverage. The law imposes a prejudice requirement on insurers who seek to disclaim coverage based upon their insured's late notice of the loss. Until the recent amendment to Insurance Law § 3420, New York was in the minority of states that did not require an insurer to demonstrate that they were prejudiced by the insured's untimely notice of the loss or claim in order to disclaim coverage. The following is a summary of the key points of the law.

Effective Date

The law applies to claims made under policies issued or renewed 180 days after the bill became law, to wit, January 17, 2009. Thus a claim that occurred on January 30, 2009 is not governed by the prejudice requirement unless the policy under which defense and indemnity is sought either incepted or was renewed after January 17, 2009.

Prejudice

The legislation constitutes a significant change to New York law by imposing a prejudice requirement on an insurer seeking to disclaim coverage based upon the insured's late notice of the claim or occurrence. To establish prejudice, the insurer must demonstrate that the failure to timely provide notice materially impairs the ability of the insurer to investigate or timely defend the claim.

The law imposes a burden of proof such that if notice is given within 2 years of the time required, there is a presumption that the insurer has not been prejudiced and the burden will be upon the insurer to demonstrate prejudice. If the notice is given more than two years after it was required, prejudice is presumed and the insured, injured party or other claimant has the burden to show that the insurer was not prejudiced.

An irrebutable presumption of prejudice will apply where the insured's liability has been established by a court or by binding arbitration or where the insured has resolved the claim through settlement or otherwise.

Direct Action

The legislation also overrules, at least partially, the Court of Appeals's holding in *Lang v. Hanover*, 3 NY3d 350 (2004). In particular, a new § 3420(a)(6) allows the injured party in bodily injury and wrongful death cases to bring a direct action to establish the validity of the insurer's disclaimer or denial where the denial is based upon the failure to provide timely notice and neither the insurer nor insured has commenced a declaratory judgment action within sixty (60) days of the denial

Policy Disclosure

Finally, the law obligates insurers issuing certain types of coverage to disclose the existence of a policy and its limits. Specifically, with respect to liability policies subject to § 3425 of the Insurance Law, that is, personal lines auto or homeowner's policies, but excluding excess or umbrella policies, or a policy used to satisfy a financial responsibility requirement imposed by law, an insurer who receives a written request for coverage confirmation by an injured person or any other claimant must respond within sixty (60) days advising whether the insured had a policy and if so, its limits.

If the insurer does not have sufficient information to allow the insurer, with reasonable diligence to provide the information, the insurer shall advise the person making the inquiry. Once the information is thereafter provided, the insurer has an additional (45) days to respond unless a court or arbitrator has granted the insurer additional time. A failure to comply with the written request to confirm coverage could result in Insurance Department sanctions. There is much uncertainty on the part of the industry regarding this aspect of the legislation and it is anticipated that the Insurance Department will provide further guidance.

While an insured has an obligation to provide timely notice of a loss for which coverage is sought, most practitioners who handle bodily injury claims in New York are familiar with Insurance Law § 3420 and the strict construction applied by the courts to its directive that an insurer advise the insured, injured party and any other claimant of a denial or disclaimer of coverage as soon as reasonably possible. An insurance carrier who fails to issue a disclaimer as soon as reasonably possible after it first learns of the accident or grounds for disclaiming will be precluded from relying upon a policy exclusion or its insured's breach of a policy condition and it is the insurer's burden to explain any delay in issuing a disclaimer.[1]

Insurance Law § 3420 provides in pertinent part as follows:

> (2) If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.[2]

Thus, the statute applies to claims involving bodily injury or death arising from an accident in New York, where the insurance policy under which the claim is being made was issued or delivered in New York. The purpose of the statute is to protect the insured, an injured party and any other claimant from belated delays by an insurer in issuing a denial. In particular, the law was intended to prevent dilatory practices by an insurer which, the Legislature concluded, inhibit the fair and expeditious resolution of liability claims by allowing the consumer to pursue, in a timely manner, an alternative method of recovering damages.[3]

The reasonableness of the insurer's delay in disclaiming is measured from the point in time when an insurer first knew or should have known of the grounds for disclaimer of liability or denial of coverage.[4] If, however, the claim is outside the scope of the coverage afforded by the policy, no disclaimer is required.[5] The issue of the timeliness of an insurer's denial is frequently litigated and the courts have held that unexcused delays as minimal as 30 days are untimely, thereby precluding the insurer from relying upon the denial.[6] A challenge to the timeliness of the denial where the statute is inapplicable requires a demonstration of prejudice as a result of the delay in disclaiming.

In a narrow line of cases, decided primarily by New York's 1st Department, the court has held that the statute does not apply where the claim was between insurers. For example, in *Bovis Lend Lease v. Royal Surplus Lines Ins. Co.*,[7] after discussing the purpose of Insurance Law § 3420, the court concluded that a co-insurer was not within the class of protected persons under the statute and thus could not challenge another insurer's denial based upon noncompliance with the statute, for untimeliness, for example.

In *Bovis*, *supra*, during the pendency of the underlying action, National Union tendered the defense of mutual insureds, Bovis and Columbia, to insurer, Royal. Several months after the tender, Royal declined National Union's tender. The denial was issued shortly after National Union, Bovis and Columbia had commenced a declaratory judgment action against Royal seeking a declaration that Royal was obligated to defend and indemnify the National Union mutual insureds in the bodily injury suit. In that litigation, National Union also sought reimbursement of the defense fees it had incurred in its defense of the mutual insureds between the date of tender and the commencement of the coverage action. National Union argued, in opposition to Royal's motion for summary judgment, that Royal's disclaimer was untimely.

The court ultimately determined that while National Union was not permitted to rely upon the untimeliness of the denial by Royal so as to allow its recovery of defense costs incurred in defense of the mutual insured, the disclaimer issued somewhere between 36 and 60 days after notice was provided was untimely as to its insureds and therefore, Royal was responsible for the defense and indemnity of both the mutual insureds. The court in *Bovis* noted the distinction between an insurer's own claim, as opposed to a tender by an insurer on behalf of the insured.

Similarly, in *American Guarantee v. State National*,[8] the 1st Department held that the excess insurer for a mutual insured could not raise the untimeliness of the primary insurer's disclaimer since it was not within the class of protected persons the statute was designed to protect.

In a recent decision by the 2nd Circuit, entitled *New York State Insurance Fund v. Mount Vernon Fire Ins. Co.*,[9] the court affirmed the decision of the Southern District, holding that under the circumstances presented, the disclaimer of coverage issued by Mount Vernon was subject to New York's timely disclaimer requirement as set forth in Insurance Law § 3420(d). The court distinguished the 1st Department's decision in *Bovis*, *supra*.[10]

In *NYSIF*, *supra*, NYSIF contended that the disclaimer of coverage issued by Mount Vernon to its insured, a subcontractor at the site, was untimely and therefore invalid. The disclaimer was issued some two years after Mount Vernon was placed on notice of the loss and undertook its insured's unconditional defense and 56 days after the jury rendered a verdict in the underlying bodily injury action. In an effort to justify the denial's lateness, Mount Vernon cited the independent contractor exclusion to its policy, claiming that it only became aware of facts allowing it to rely upon the exclusion following the jury's verdict. Mount Vernon argued that in any event, NYSIF lacked standing to raise the untimeliness argument, citing the 1st Department decisions set forth above.

Unlike the situation present in *Bovis*, NYSIF and Mount Vernon were not co-insurers of the same insured. Instead, NYSIF had satisfied the underlying verdict, thereby becoming subrogated to the rights of its insured, who had a judgment against Mount Vernon's insured for 20% of the underlying verdict. The Second Circuit thus found the statute applicable as NYSIF had become equitably subrogated to the rights of its insured, noting that: "It is so well-settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing." The court concluded that NYSIF had a real stake in the outcome so as to invoke the protections of Insurance Law § 3420 as "any other claimant."

Although the New York Court of Appeals has not weighed in on the issue, the 2nd Circuit's decision has provided clarity as to the applicability of the statute where notice of a claim and a request for coverage is made by an insurer to another insurer. It is likely an issue which will arise in future litigation involving multiple insurers, although once the effects of the prejudice requirement contained in the amendment to New York Insurance Law § 3420 are felt, it is expected that significantly fewer disclaimers founded on late notice will be issued by insurers.

Endnotes

1. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC.*
2. An Amendment to Insurance Law Section (a)(5) obligates an insurer to demonstrate prejudice as a result of alleged untimely notice under the policy for claims made under policies issued or renewed on or after January 17, 2009.
3. N.Y. Bill Jacket, L 1975, ch 775.
4. *Hartford Ins. Co. v. County of Nassau*; *In the Matter of Prudential Property & Cas. Ins. Co.*
5. *Ciasullo v. Nationwide Ins. Co.*, 32 AD3d 889 (2nd Dept. 2006); *National Union Fire Ins. Co. of Pittsburg, PA v. Utica First Ins. Co.*, 6 AD3d 681 (2nd Dept. 2004).
6. *West 16th Street Tenant's Corp. v. Public Service Mut. Ins.*, 290 AD2d 278 (1st Dept. 2002).
7. *Bovis Lend Lease v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (1st Dept. 2005).
8. *American Guarantee v. State National*, 67 AD3d 488 (2009).
9. *New York State Ins. Fund v. Mount Vernon Fire Ins. Co.*, 2010 WL 1299088.
10. U.S. Liability seriously misreads *Bovis*.

Elizabeth Fitzpatrick is a partner with Lewis, Johs, Avallone, Aviles, LLP in the firm's Melville, New York office where she heads the firm's insurance coverage unit. She is the co-chair of the CLE Committee for the NYSBA, TICL Section.

Horizontal Exhaustion: Challenges and Solutions

By Jeremiah M. Welch and Julian D. Ehrlich

In today's tough economic climate, unmet insurance expectations can result in a holdback of contract payments, turn an otherwise profitable job unprofitable or bust a deal and even a company.

Often the greatest difficulty in resolving high value cases is not disagreement with the claimant over settlement values but rather disagreement between the defendants and their carriers over who owes payment of the claim and the order of insurance policy obligations.

Owners, tenants, general contractors and trades typically agree to allocate or transfer risk through the use of two types of provisions in their contracts, namely indemnity and insurance procurement. These provisions are intended to determine who pays and in what order before any claim occurs. To a large extent, when used in conjunction, indemnity and insurance procurement provisions complement each other and are different paths to push responsibility downstream with the same outcome.

However, the determination of party and carrier obligations depends upon the interpretation of both agreed-to contract wording and the language of applicable insurance policies by courts of the relevant jurisdiction. Moreover, courts have recognized that carriers are not parties to, or necessarily bound by, the construction contracts.

One manifestation of this recognition which has been particularly vexing and frustrating to parties is the "horizontal exhaustion" rule. This rule has resulted in several recent court decisions that dictate outcomes that are contrary to the parties' intentions. This leaves party expectations unmet and, worse yet, at times even leaves claims uncovered by insurance.

This discussion will review the horizontal exhaustion rule, how it relates to contractual indemnification and then examine how parties to construction contracts can best increase the likelihood that losses will be paid in accordance with their expectations and covered by insurance. Although these issues present frequently in the construction site accident context, the same issues arise in claims against landlords and tenant as well as other scenarios involving multiple defendants who have entered into agreements contemplating risk transfer.

1. Horizontal v. Vertical Exhaustion

"Horizontal exhaustion" is the principle of insurance priority whereby an excess policy is not triggered unless *all* applicable primary policies have exhausted. Although the principle is simply stated, its application can become complex when multiple parties, contracts and layers of insurance are involved.

"Vertical exhaustion," by contrast, is the priority principle that primary and excess policies purchased by the downstream entity pay before any policies purchased by the upstream entity. Typically, vertical exhaustion reflects the intent of the parties seeking to transfer risk downstream.

Nonetheless, horizontal exhaustion has become the default rule in a number of influential states including New York, California and Illinois.[1]

Understanding horizontal exhaustion from the eyes of the insurer, the insured and the court is the path to potential solutions for parties. A study of horizontal exhaustion's evolution through the New York courts provides a useful perspective. But first, a brief review of risk transfer concepts is necessary to lay a foundation for further analysis.

2. Insurance Procurement and Contractual Indemnity Obligations

Insurance procurement and contractual indemnity each have their strengths and weaknesses. Accordingly, most contracts obligate the downstream party to provide both.

Additional insured coverage has the benefit of giving a buyer or receiver of services direct access to the seller's or service provider's insurance, which can actually avoid the need for litigation between the contracting parties. Moreover, broad additional insured endorsements will provide upstream entities with coverage for their own active negligence.[2]

However, this track of risk transfer is restricted to the limits of insurance purchased by the downstream party. The upstream party must also comply with the terms and conditions of those policies. This can present practical problems of knowing what those terms are since it is commonplace for policyholders to have difficulty timely obtaining copies of their policies and, correspondingly, even more challenging for additional insureds to get copies of policies they did not purchase.[3]

Thus, a typical contract between an owner or general contractor and a trade subcontractor also includes an indemnity agreement requiring the trade contractor to defend and indemnify the owner and / or general contractor from any liability arising out of the trade's work. Contractual indemnity has the advantage of not being restricted to policy limits. This track also does not subject the upstream party to the myriad of exclusions and conditions that may be on the policy purchased by the contractor.

However, most states limit the scope of permissible indemnity based on public policy. New York, like most, prohibits indemnity for a party's own negligence. Therefore, contracts typically provide for indemnity up to the limits allowed by law. Moreover, while additional insured status requires a viable insurance carrier to recover, contractual indemnity requires a viable downstream contractor with assets or coverage for itself to satisfy the relief.

3. Issues Arise

Additional insured coverage is typically required on a "primary and noncontributory basis" precisely because the upstream party wants the additional insured coverage to pay before the upstream party's own insurance, i.e., vertical exhaustion.

However, due to the realities of the insurance marketplace, the limits called for in many contracts typically exceed what a trade contractor can purchase in a primary policy. Accordingly, most additional insured coverage is provided through a combination of primary and excess insurance. The contracting parties intend that where the additional insured coverage involves both primary and excess policies, the excess policy should respond *before* any of the additional insured's own primary insurance.

Disagreement begins when the excess carrier, whose coverage the first named insured has pledged to an additional insured on a primary basis, takes a different view on which policy is triggered next. Typically, excess policies state that their coverage is not triggered until all applicable underlying insurance has exhausted. Accordingly, excess carriers resist vertical exhaustion in the additional insured setting, and instead argue for "horizontal exhaustion"; i.e., that the additional insured's own primary insurance must exhaust before the excess policy is triggered.

Moreover, the excess carriers' priority position is often not contained in any coverage position letter since the carrier is not technically denying or reserving the right to deny coverage. Thus, as a practical matter, excess carriers may not make their horizontal exhaustion position known until settlement negotiations begin in earnest, maybe on the eve of trial. In addition, a horizontal exhaustion priority position may mean, in effect, that the excess carrier refuses to contribute at all to a settlement if the value of the case is within all primary policy limits.

4. The *Bovis* Decision

In the landmark 2008 decision of *Bovis Lend Lease LMB, Inc. v. Great American Insurance Company*,[4] New York's First Appellate Department held that priority of insurance coverage is determined only by the insurance policies themselves, and not by trade contracts. Put simply, a contractor's promise to provide certain limits of insurance to an upstream party on a "primary and non-contributory basis" is not enough to achieve vertical exhaustion.

The *Bovis* decision provides an instructive exemplar.

The New York appellate court's decision in *Bovis* announced to the contracting world that New York had joined the ranks of the horizontal exhaustion states. *Bovis* involved the question of insurance priority between a subcontractor's excess general liability policy and the general contractor's own primary general liability policy.

The Court ruled that horizontal exhaustion applied because it found no evidence in the excess policy itself that the policy was supposed to respond on a primary basis for an additional insured. The Court reasoned that the excess carrier should not be bound by a trade contract that it was not a party to, and which was created after the policy was already in place.[5]

Interesting to note is that *Bovis* was a declaratory judgment action pertaining only to priority of coverage issues. Thus, the Court specifically declined to rule on the contractual indemnity claim as that claim was not before it. Accordingly, this decision did not answer the question of who ultimately pays the claim. The underlying personal injury matter subsequently settled before further motions or appeals answering that question were heard.

The Court's reasoning flowed from traditional contract principles, and while the result may have frustrated the business purposes of the contracting parties, the terms of the excess policy may well have warranted such a finding.

It is important to recognize that where an excess insurer successfully argues horizontal exhaustion to defeat an additional insured's coverage claim, the first named insured will likely still be liable to the additional insured / upstream party for: (1) breach of contract to purchase insurance (i.e., the trade contract called for a certain limit of primary insurance which the downstream party has now failed to provide), and (2) contractual indemnity.

However, most insurance does not cover breach of a contractual insurance procurement promise, and while the first named insured's contractual indemnity liability is typically covered (i.e., "insured contract" coverage), a suit between the contracting parties is usually necessary. Moreover, in the general liability context, defense costs typically do not deplete indemnity limits, whereas defense costs sought as part of a contractual indemnity claim are paid as damages, and therefore do deplete indemnity limits.

5. Potential Solutions

The same New York appellate court's recent decision in *Indemnity Insurance Company of North America v. St. Paul Mercury Insurance Company*[6] provides an important exception to the application of horizontal exhaustion, which has also been recognized by many other courts around the country, known as "circuity of litigation."

In many jurisdictions, the courts will not apply horizontal exhaustion where the target primary policy's insured owes contractual indemnity for the sum in question to the party on whose behalf the excess insurer paid. This is referred to as "circuity of litigation" because in this situation, applying horizontal exhaustion would just result in litigation by the additional insured against the first named insured, and the excess carrier would then be obligated to indemnify the first named insured. "Circuity" refers to the concept that whatever indemnity the excess carrier could avoid as respects the additional insured through horizontal exhaustion would come back around to it anyway on the contractual indemnity claim. Rather than force a second round of litigation, the courts elect to shortcut the process and make the excess carrier pay the additional insured on a vertical basis.

Indemnity is the first such case for New York.[7] In *Indemnity*, the Court affirmed the horizontal exhaustion rule but stated the rule was "irrelevant" since 1) contractual indemnity against the downstream trade contractor at fault had been established, and 2) the contractors' excess policy had accepted additional insured status to the owner and general contractor "without reservation or qualification."[8]

In light of the *Indemnity* decision, additional insureds with contractual indemnity rights against a named insured should consider promptly establishing a contractual indemnity claim via summary judgment motion as a potential tool to defeat horizontal exhaustion.

However, parties should be mindful that 1) tender acceptances by downstram excess carriers may reserve priority of coverage positions and 2) "clean" contractual indemnification pass throughs will not be possible where there are questions as to the upstream entities' negligence.

Moreover, the Court in *Indemnity* addressed an important concept known as anti-subrogation that may bar contractual indemnity claims. Under the anti-subrogation doctrine, recognized in many states as pre-indemnification, where an insurer provides coverage from the same policy to two insureds, cross claims between those insureds are barred to the limits of the policy.

So, for example, in *Indemnity*, since the trade contractors' primary and excess GL policies acknowledged additional insured status to the owner and general contractor, those parties' claims, including contractual indemnification claims, against the trade were barred up to the limits of the excess policy. Interestingly, and for the first time in New York, the Court in *Indemnity* applied the anti-subrogation doctrine even where the trade contractors' excess carrier took a horizontal exhaustion position.

In addition, the *Bovis* decision, and others like it around the country, point the way to another potential solution, which is the specific endorsement of excess policies to provide that they will provide primary and noncontributory coverage for additional insureds where required by contract. This solution has yet to be tested in the excess versus primary horizontal exhaustion context, but the New York courts have certainly embraced the concept of a policy allowing its priority of insurance to be determined by a trade contract.[9]

In the authors' experience, excess carriers have generally been willing to address horizontal exhaustion from an underwriting point of view and have provided coverage consistent with trade contract promises.

This solution is not perfect. It puts an administrative burden on owners and upstream parties to ensure that their downstream parties have properly endorsed their excess coverage. Again, it is difficult and perhaps impractical to actually review downstream parties' policies to verify compliance. Upstream parties often rely on contractual promises and certificates of insurance, but neither of these is actually binding on the insurer from whom the coverage ultimately must come.

Conclusion

As this discussion has intended to highlight, there simply is no way to absolutely ensure that all risks are always transferred smoothly the way the parties intend.

Upstream parties are, to some extent, at the mercy of downstream contractors properly fulfilling their obligations to purchase insurance that will meet the parties' expectations. Timely tenders based on both additional insured status and contractual indemnity to downstream parties and carriers are important but no guarantee that risk transfer will work as expected. Even prompt summary judgment motions will not prevent priority of coverage positions from impeding claim resolutions.

The insurance industry has yet to make endorsements that reflect the parties' desire for vertical exhaustion a standard part of general liability excess coverage. Until this happens, risk managers are best served by knowing the likely carrier positions and understanding governing principles such as priority of coverage, circuity of litigation and anti-subrogation as interpreted in their jurisdiction.

Endnotes

1. *Bovis Lend Lease LMB v. Great Amer. Ins. Co.*, 855 N.Y.S.2d 459 (App. Div. 1st Dept. 2008); *Kajima Const. Services, Inc. v. St.Paul Fire and Marine Ins. Co.*, 227 Ill. 2d 102 (2007); *Reliance Nat'l. v. General Star Indemnity*, 72 Cal. App. 4th 1063 (1999).

2. Policies differ on the scope of additional insured coverage. Most policies require that the additional insured's liability either "arise out of" the work of the first named insured, or result from an "act or omission" of the first named insured.

3. For example, the New York State Insurance Department issued an advisory in Circular Letter No. 20 on October 16, 2008 that required carriers to promptly issue and deliver policies within 30 days of inception.

4. 53 A.D.3d 140 (1st Dept. 2008).

5. The *Bovis* court also noted that the premium paid for the excess policy was much lower than the primary policy, which reinforced its finding that there was no evidence that this particular excess carrier had agreed to be primary under any circumstances.

6. 74 A.D.3d 21 (1st Dept. 2010).

7. In *Tishman v. Great American*, 861 N.Y.S.2d 38 (1st Dept. 2008), a significant New York horizontal exhaustion decision following *Bovis*, circuity of litigation was not raised and the published decision is silent as to what contractual indemnity rights existed between the insureds, if any.

8. *Id.* at 28. Note that the *Indemnity* court also based its decision on the fact that the additional insured's primary carrier was never afforded the opportunity to participate in the settlement decision.

9. *Pecker Iron Works of N.Y. v. Traveler's Ins. Co.*, 99 N.Y.2d 391 (2003).

Jeremiah M. Welch, Esq. is Of Counsel to Saxe, Doernberger & Vita, P.C. in Hamden, CT.

Julian D. Ehrlich, Esq. is Senior Vice President Claims of Aon Construction Service Group in Jericho, NY.

Employee Privacy in the Digital Computer Age

By Kevin Harrington and John Rosenthal

I. Introduction[1]

Within the last decade, the advent of ever smaller, more powerful computers, the internet, and digital technology has dramatically changed the workplace. These new technologies now allow companies and their employees to create, gather, store and share immense amounts of information, almost instantaneously, at relatively little or no cost. Information that once took months to research and gather can now be obtained with a few key strokes. Information that once took entire warehouses to store is now stored on devices no larger than the size of a paperback novel.

Businesses generally support the use and expansion of these new technologies. They acknowledge amazing efficiencies achieved through use of these technologies by employees. However, as computers, digital technology and the internet have become an integral part of how employers conduct business in the global economy, employers are increasingly required to deal with all the complications and potentially adverse conduct of employees that accompany access to and use of such technologies.[2] The improper use of such technologies by employees can cost employers significant resources, including lost employee productivity, loss of available bandwidth and server storage due to improper e-mail and internet use, and theft or improper transfer of trade secrets and intellectual property.[3] Use of computers, e-mail, cell phones, and the internet can also create other means of improper conduct between employees, like sexual harassment and retaliation through e-mails, text messaging, and social networking.[4]

To protect against theft and / or inefficiency, as well as to ensure workplace safety for employees, employers have begun to extensively monitor employee use of the internet, e-mail and computers.[5] In conjunction with increased monitoring of employee computer use, employers are being required to implement and publish ever more detailed workplace policies and rules regarding employee use of new technologies to provide both a deterrent effect, and a basis for terminating employees that violate the rules. However, employer monitoring of employee conduct using these new technologies does not come without potentially serious ramifications. An employer's disclosed and / or undisclosed monitoring of employee conduct with respect to computer, cell phone and internet use (both on and off the job) can open employers up to litigation concerning invasion of an employee's privacy rights, and claims of discrimination, retaliation, defamation, tortious interference with contract, and violations of free speech, among others.

In order to prevent being subject to litigation as a result of monitoring of employees, or to maximize the chances of success in litigation should it arise, employers must understand the nature of their employee's privacy rights, and the limits of an employer's right to monitor and these new technologies. Employers must also be aware of the legal framework surrounding employee privacy rights in order to implement effective, proper and defensible written monitoring policies and procedures regarding employee use of these new technologies, including how employers investigate potential employee misconduct, and the processes used to screen potential employees or terminate existing employees for misconduct if warranted.

Lawyers representing both employers and employees must be aware of ethical considerations regarding discovery of electronic information, either on computers or on social networking sites. Accessing such digital information by counsel, particularly those counsel involving in pending litigation, may implicate a lawyer's ethical obligations causing grounds for disqualification or other sanctions.

II. Individual Privacy Rights Under Federal and New York Law

A. Common Law Right of Privacy

The common law right of privacy generally falls within the tort law of a given state. Torts involving individual common law privacy rights include: (1) unreasonable intrusion on the seclusion of another, (2) unreasonable publicity of another's private life, (3) misappropriation / right of publicity, and (4) false light.

B. New York Statutory Privacy Rights

New York does not recognize these common law privacy right torts.[6] However, under New York law, certain privacy rights are protected by statute pursuant to Civil Rights Law §§ 50, 51.[7] The application of these statutory privacy rights in New York is particularly germane to those employers / employees involved in the arts, advertising or entertainment industries. To establish a cause of action for violation of a person's privacy rights under New York Civil Rights Law, a plaintiff must allege and prove: (1) use of plaintiff's name, image or portrait or voice by defendant; (2) within the State of New York, (3) for purposes of advertising or trade, and (4) without written consent.[8] Neither oral nor implied consent is a sufficient basis for an employer to use the image or likeness of an employee for commercial gain. The protections of the New York Civil Rights Law have been narrowly construed by the Courts.[9] It is a complete defense to a cause of action under Civil Rights Law §§ 50, 50 if the image or likeness of the individual / employee at issue was used in conjunction with reports of newsworthy events or matters of public interest.[10] In addition, there exists no liability under the statute for the incidental use of the likeness; the statute requires "direct and substantial connection" between the appearance of plaintiff's name or likeness, and the main purpose of the work at issue.[11]

C. Statutory Protection of Individual Privacy For Electronic Communications

State and Federal statutory law also provide certain protections for the privacy rights of individuals regarding various sorts of electronic communications. These same laws may apply to the privacy rights of employees in the workplace.

1. The Federal Wiretap Act. This Act makes it a crime to willfully intercept and / or listen to, and / or record any wire or electronic communications. 18 U.S.C. §§ 2510, *et seq*. There are two recognized statutory exceptions to the Act: (1) "consent," and (2) "business extension." Under the Wiretap Act, many courts have held that the "consent" requirement is to be broadly construed,[12] but that "constructive" consent is not sufficient.[13] Under the "business extension" exception, an employer can monitor employee business calls, but may not monitor an employee's personal calls.[14] Such monitoring of business calls by an employer needs to serve a business purpose *and* be part of the ordinary course of such business.[15]

Federal Courts have determined that review of stored e-mails, as opposed to "interception" of e-mails during transmission, does not fall within the purview of the Federal Wiretap Act.[16] Some courts have indicated an electronic communication may not be simultaneously actionable under both the Wiretap Act and the Stored Communications Act,[17] while others have held that both Acts may be implicated by e-mails.[18]

2. The Federal Electronic Communications Privacy Act ("ECPA"). This Act, an adjunct to the Federal Wiretap Act, provides for civil and criminal remedies for the intentional and unauthorized interception of, or access to, certain wire or stored electronic communications, including e-mails. 18 U.S.C. §§ 2510, *et seq.*; 18 U.S.C. §§ 2701, *et seq*. The ECPA does provide several exceptions that may apply to employers: (a) **Consent**—By one party, either express or implied, allowing another to listen to or view the communication (the Act requires only one party consent, unlike many state wire tapping statutes);[19] (b) **Provider**—Employer can be construed as a system provider, and interception done in ordinary course of business, if either necessary part of providing service, or necessary to protecting employer's rights or property; (c) **Stored Communications**—Employer providing electronic communications services, like servers used to store e-mail, may monitor stored communications;[20] (d) **Ordinary Course of Business**—Interception occurs in ordinary course of employer's business, and interception done by use of equipment provided to employers from a provider of wire or electronic communications services in the ordinary course of the provider's business.[21]

While the ECPA may preclude the "interception" of e-mail or voicemail communications, the Act may not preclude an employer from accessing those communications once they have been "stored" on an employer's database or computer server system. Electronic communications stored on the electronic communication systems of a third party, pursuant to contract, may not be reviewable by employer, *absent lawful* consent by employee.

3. Federal Stored Communications Act ("SCA"). This Act is part of the ECPA and applies to stored communications like e-mails, and may well apply to stored electronic communications of messages posted on social networking sites.[22] The SCA also allows for a "provider" exception and a "consent" exception.[23] The storage requirement of the Act may not apply to information stored on the hard drive of an employee's company-issued computer, possibly allowing for employer inspection of e-mails or materials stored on the hard drive of company desktop or laptop computers.[24] This issue, however, remains undetermined.

The SCA also allows a "user" of the electronic communication to authorize a third-party to access the communication, including stored electronic communications on websites. However, such third-party access cannot be obtained through coercion of employees by the employer. The individual privacy protections of the ECPA and SCA are particularly strong. Courts have precluded parties in civil litigation from obtaining stored electronic communications, like e-mails, from third party providers (like You Tube), even when served with a Subpoena.[25]

4. New York wiretapping law: New York also has a wiretapping law similar in nature to the Wiretap Act / ECPA; *e.g.*, N.Y. Penal Law §§ 250, *et seq*. This state wiretap law provides for civil penalties if violated. However, state laws regarding interception, recording, storage and review of electronic communications do vary, and may be much more restrictive than federal or New York laws relating to the interception, storage, and review of telephone and e-mail communications.[26]

D. State Lifestyle Discrimination Statutes

In addition to Federal and State regulations regarding various forms of electronic communications, New York has enacted what is generically referred to as "Lifestyle Discrimination Statute," which implicates employers and employees. This law provides certain limited restrictions on forms of employer regulation regarding the off-duty / after-hours conduct of employees, including but not limited to political activities and recreational activities (*i.e.*, lawful, leisure-time activities for which the employee is not compensated). *See, e.g.*, New York Labor Law § 201-d. Under New York law, an employee's conduct may not be protected under statute if it is not considered recreational; i.e., extramarital affairs.[27]

E. Constitutional Right of Privacy

In addition to common law and statutory protections of an individual's privacy rights, the U.S. Constitution also provides a certain level of protection regarding individual privacy rights. Under the Fourth Amendment, individuals are protected from unreasonable searches and seizures by government actors. This prohibition applies to state government actors through the Fourteenth Amendment. Such Fourth and Fourteenth Amendment rights are violated if a public employee has an expectation of privacy, and the public / state actor employer conducts a search which is not done for legitimate business reasons, i.e., supervision, control, efficiency or prevention of theft.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court found that a public sector employee had a reasonable expectation of privacy in desks and filing cabinets, which were not shared with other employees, and which the psychiatrist employee had occupied and / or controlled for 17 years. The Court held that a search by a public sector employer for a non-investigatory work-related purpose, or to investigate work-related misconduct, is constitutional if the scope of the search is reasonable under the circumstances. The Court also indicated that whether an employee's expectation of privacy is reasonable will depend, in part, on workplace policies and practices in effect prior to the conduct of the search. New York courts have applied the *O'Connor* holding to suppress electronic evidence gathered by police in criminal cases.[28]

Fourth and Fourteenth Amendment restrictions regarding workplace searches and seizures generally do not apply to private employers, *unless* such employers are acting under color of Federal or State law, or possibly pursuant to government contract.

III. The New Digital/Computer Workplace

Computer and digital technology, in conjunction with the internet, have radically changed the workplace in the United States. By late September 2001, 174 million people, or approximately 66% of the U.S. population, were using computers at home, at school, in libraries, and at work.[29] Some 65 million of the 115 million adults over the age of 25 use computers at work.[30] The percentage of adults using computers in the workplace, while large, is nothing in comparison to the percentage increase of employees who now use the internet and / or e-mail in the workplace; that figure has grown from 18% in 1998 to almost 42% in 2001, and continues to grow exponentially.[31] According to a decade-old study, in 1999 some 130 million workers in America sent 2.8 billion e-mail messages each day.[32]

In addition to the significant increases in the numbers of employees using computers and / or the internet and e-mail, there are also a significant number of employees who use computers and the internet to conduct work other than in a formal workplace setting.[33] By 2006, approximately 12.4 million Americans worked for employers that allowed them to telecommute approximately one day per month.[34] In addition, 28.7 million Americans, both those working for employers and the self-employed, did work remotely from home or on the road at least once a month.[35] This ability of employees to telecommute has blurred the former arbitrary distinction between what employers and employees consider "off duty" behavior as opposed to "on duty" behavior.[36] In fact, legal commentators are already anticipating overtime lawsuits by employees who are accessible and working more than eight (8) hours per day due to use of their laptop computers or BlackBerries after hours.[37] All of these changes have had an impact on how employers and employees view the issue of privacy in the workplace.

IV. Monitoring of Employee Conduct in the Digital Workplace

A. Overview

Changing computer / digital technologies continue to be great facilitators of efficiency in the workplace. Like previous technologies (i.e., the telephone), computers, cellular phones, GPS, e-mail, and the internet may also facilitate potential employee misconduct. Improper use and abuse of these new technologies by employees can lead to employer losses, workplace investigations, employee terminations, and litigation. Given the scope of the potential problems, employers often use new computer technologies to monitor employees, and conduct investigations of possible employee misconduct. Recognition of the pervasive and intrusive nature of employer monitoring of these new technologies triggered an investigation into such employer conduct by Congress. The investigation resulted in a report issued to Congress by the Government Accounting Office in 2002, with recommendations about how to regulate this employer conduct.

B. E-Mail/Internet

According to a 2007 AMA Survey,[38] over 25% of the employers surveyed had fired employees for e-mail misuse, and provided the following reasons: (1) violation of company e-mail policies, (2) inappropriate or offensive language contained in e-mails, (3) excessive personal use of e-mails, (4) breach of confidentiality rules of the employer, among others.[39] In this same survey, employers also indicated that they had fired employees for internet misuse, like (1) viewing, downloading or uploading inappropriate or offensive content, (2) violation of company internet policies, and (3) excessive personal use. A more recent June 2009 survey by Proof Point found that 31% of the employers responding had terminated an employee for violating workplace e-mail policies.

The 2007 AMA / E-Policy Institute Survey found that fully 43% of employers surveyed monitored e-mail of their employees. Out of those employers surveyed that monitor employee e-mail, some 73% use technologies that automatically monitor such e-mail, and fully 40% assign an individual to read and review the e-mail of their employees.

Employer monitoring of employee internet connections has also increased. According to the AMA / E-Policy Survey, fully 66% of employers surveyed monitored internet connections of their employees. Some 65% of companies surveyed indicated that they monitor employee internet connections, and use software to block connections the company deems inappropriate, a 27% increase over the results of a survey conducted by the AMA / E-Policy in 2001. Employers surveyed who blocked employee access to websites expressed concern about their employees visiting the following types of sites: (a) sites with pornographic content, (b) game sites, (c) social networking sites, (d) entertainment sites, (e) shopping sites, (f) sport sites.

C. Social Networking Sites/Blogs

In addition to monitoring employee e-mails and employee use of worldwide web, employers are also beginning to monitor and restrict employee access to and use of social networking sites. This should come as no surprise given the omniscient presence of sites like Facebook. By way of example, Facebook has 500 million users.[40] Of those users, one-half (1 / 2) log onto Facebook on a daily basis. Those users who do log onto Facebook spend literally millions of man hours on the site during any 24-hour period.

According to a 2009 Fulbright & Jaworsky Annual Litigation Trend Survey Report, fully 46% of U.S. companies restrict employees from accessing various mixtures of social networking sites, including Facebook, Twitter, and You Tube, among others. The survey seems to suggest the bigger the company, the more likely the company is to restrict or monitor access to social networking sites by its employees. Along with restricting employee access to social networking sites, fully 12% of employers surveyed in the AMA 2007 Survey monitor the blogosphere to see what kinds of things or comments are being written about the company. Some 10% of those companies surveyed monitor various social networking sites to review if anything is disclosed about the company. In the Proof Point 2009 Survey, 8% of the companies surveyed indicated they had fired an employee in the past 12 months for misuse of social networking sites.[41] An additional 17% of those companies surveyed indicated they had disciplined an employee for violating blog or message board policies.[42] The 2009 Proof Point Survey also found that 18% of employers had investigated some sort of data loss event that may have been triggered as a result of a blog or message board posing in the past 12 months.[43]

Many employers now use the internet to investigate the activities of potential employees. A 2006 Execunet Survey of 100 executive recruiters indicated that 77% had used internet search engines, like Google or Yahoo, to check on the background of candidates.[44] Some 35% of these executive recruiters removed potential candidates based on information gleaned from online.[45] Knowledge that potential employers and recruiters are searching the web for information has caused a corresponding change in how job seekers view and use social networking sites. In a 2006 Collegegrad.com Survey, over 36% of those surveyed indicated that they had or intended to change the content of their MySpace or Facebook sites due to their job search.[46] The use and misuse of social networking sites by college students has prompted a response by colleges; universities are now providing advice and career counseling regarding proper use of social networking sites by graduates seeking employment.

D. Twitter

Company monitoring of "Twitter" communications has significantly increased, and has led to numerous lawsuits. A lawsuit for defamation filed by Horizen Group Management against a former tenant who sent "Tweets" about mold in her apartment was recently dismissed in Cook County, Illinois. A pending "Twitter" case involves TV star Kim Kardashian, who was sued by a Miami doctor who markets a type of weight loss diet; Ms. Kardashian sent "Tweets" indicating she was not on the doctor's cookie diet regimen, and that the regimen seemed "unhealthy." "Twitter" communications have become so pervasive, and the potential for liability and PR problems so self-evident, Human Resource periodicals and websites have begun providing recommendations and advice to businesses regarding company policies for such activity.[47]

E. Instant Messaging

Ironically, while instant messaging is one of the most popular means of communication in the digital age, this aspect of employee computer use is rarely, if ever, monitored by employers. According to the 2004 AMA / E-Policy Survey, only 6% of employers surveyed at the time retained or archived instant messages from employees, while some 58% of employees surveyed used instant messaging for personal on-line conversations. The ability of employers to save, archive and review employee instant messaging is difficult, given that employees often download and use free software tools from the internet, outside of the employer's firewalls, precluding or limiting archiving or review of instant messaging.

V. Employee Privacy in the New York Digital Workplace

Employee use of computers, e-mail and the internet, coupled with employer monitoring of such conduct, has resulted in increased litigation. More often than not, courts have determined that employees do not have a reasonable expectation of privacy when using employer assets to send and receive e-mails, or conduct other activities using employer computers with respect to the worldwide web. Even so, monitoring of employee conduct regarding computers and the internet has inevitably resulted in litigation. This is generally because many employees *believe* that some personal internet and / or e-mail use at work is no different than engaging in limited personal telephone calls at work. In addition, because employees often treat these new technology mediums as if comparable to using a telephone, employees often communicate with others (internally and externally) far too freely, without the recognition that electronic documents, like e-mails, can be forwarded on to literally millions of others, and that such electronic documents are rarely, if ever, permanently deleted / erased.

A. Vicarious Liability for Employee Internet and Computer Misconduct

***Doe v. XYC Corp.*, 887 A.2d 1156 (N.J. Sup. Ct. App. Div. Dec. 27, 2005).** In *Doe*, Plaintiff mother was suing stepfather's former employer on behalf of minor child for negligence. Stepfather had been an accountant at defendant corporation. During stepfather's period of employment, defendant's internet service manager became aware of the fact that stepfather had been visiting pornographic internet sites while using company computer systems. Network personnel advised employee to stop, but did not actually review the websites and their content. Stepfather was ultimately arrested in June 2001 on charges of child pornography, including exchanging pictures of his minor step-daughter with others via the internet. A search of stepfather's work space and company computer by authorities resulted in recovery of numerous images of child pornography.

Trial court issued summary judgment for defendant employer, but the Court of Appeals reversed. The Court of Appeals held that based upon the record: (1) the employer had a duty to monitor employee's internet and computer activities at work, as a result of employer's internet policy, (2) employer knew of employee's improper internet activities at work involving pornography, and possibly child pornography, (3) and employer had a duty to prevent employee from continuing such activities at work. The Court of Appeals remanded the case for determination of whether defendant employer's failures could be construed as proximate cause of plaintiff's injuries.

B. Office Computers

***Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001).** In this action, a state employee brought a §1983 civil rights action against the Assistant Commissioner for the Office of Budget and Finance in the Department of Transportation of the State of New York ("DOT"), among others, alleging violation of due process rights and freedom from unreasonable searches and seizures; the lawsuit was a result of the agency search of plaintiff's work computer and resulting disciplinary actions. The District Court granted summary judgment for defendants, the employee appealed, and the Second Circuit affirmed.

The Second Circuit held that, under the Fourth Amendment, Leventhal had a reasonable expectation of privacy in the contents of his office computer: (1) Leventhal occupied a private office with a door, (2) he had exclusive use of the computer in his office, (3) he did not share use of his computer with other employees, and (4) there was no evidence that visitors had access to Leventhal's computer. The Court also indicated that although DOT had an anti-theft policy, there was no provision in that policy prohibiting storage of personal materials on the office computer, and that this storage did not violate DOT's anti-theft policy. The Court suggested that limited access by DOT's IT staff to Leventhal's computer did not indicate the lack of expectation of privacy, in particular, because IT *rarely* undertook computer searches that would limit an employee's expectation of privacy. Despite finding that Leventhal had some expectation of privacy with respect to the contents of his office computer, the Court held that the DOT searches of the office computer did not violate the Fourth Amendment. The Court held that the DOT searches were reasonable related to DOT's investigation of Leventhal's misconduct, and that the scope of the searches was not excessively intrusive in light of the conduct at issue.

C. Employee E-Mails

Courts have been addressing the issue of employer monitoring of employee e-mails for almost two decades. Litigation results have depended on how clear an employer policy is with respect to prior notification to employees of the employer's right to review all materials sent via company e-mail assets, or using company computers, and whether review by the employer is actually done.

1. *Brown-Criscuolo v. Wolfe*, 601 F. Supp. 2d 441 (D. Conn. 2009). Plaintiff in *Brown* was the principal of a middle school. At some point in early 2005, plaintiff went out on extended medical leave and defendant supervisor assumed the role of acting principal and remained in that position until plaintiff returned to work. In her complaint, plaintiff alleged that the defendant used plaintiff's work computer and reviewed plaintiff's e-mails without permission; during her employment, plaintiff was provided with an e-mail account with a private password known to only plaintiff and the computer system administrator.

The *Brown* Court denied defendant's motion of summary judgment regarding plaintiff's Fourth Amendment claim. The *Brown* Court indicated that in determining whether a state employee had an expectation of privacy in e-mails sent or received on her employer's computer or e-mail system, the Court would consider the following four (4) factors: (a) does the employer maintain a policy banning personal or objectionable use, (b) does the employer monitor the use of the employee's computer or e-mail, (c) do third parties have a right of access to the computer or e-mails, and (d) did the employer notify the employee or was the employee aware of the use and monitoring policies of the employer. The *Brown* Court found that the plaintiff had a reasonable expectation of privacy in her e-mails at work. In addition, the *Brown* Court indicated that there was an issue of fact as to whether the search at issue by the superintendent was within the scope of appropriate searches of employee e-mails under the circumstances, and that there remained a question of fact as to how plaintiff's e-mail and associated letter to her lawyer ended up on defendant's e-mail account.

2. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008). In *Pure Power Boot Camp*, a former employer brought an action against defendants seeking injunctive relief and damages as a result of former employees' alleged theft of employer's business model, customer list and internal documents. During initial discovery, the former employee filed a motion to preclude use or disclosure of some 34 of the employee's e-mails obtained by the employer; these e-mails did not reside on the employer's computer system, but were resident on the former employee's third party e-mail service provider's storage facilities. Defendants objected to the use of any of these e-mails, and sought their preclusion and return, asserting that plaintiff's conduct violated the ECPA, the SCA and / or New York Penal Law, § 250.05.

The Court determined that employer's conduct in opening, reviewing and retrieving defendant's e-mails from his private, *personal* e-mail accounts, did not violate the ECPA or New York Wiretap Act, but that such conduct did *violate* the SCA. The Court determined that employer had logged directly onto defendant's private Hotmail account through the Hotmail storage system, accessed that account, as well as defendant's Gmail or WFBC accounts, and downloaded material directly. The Court indicated that employer's access to these three separate electronic communication services and retrieval of the information stored on the service provider systems, without authorization or consent from defendant, was a clear violation of the SCA. The Court further determined that employer was not authorized to view the e-mails in defendant's personal e-mail accounts and, therefore, her conduct did not fall within exceptions to the SCA. The Court indicated that while Pure Power had an e-mail policy, that policy *did not* apply to defendant's personal e-mails which were not stored in, created on, received from, or sent through Pure Power's e-mail system.

In fashioning remedy for plaintiff's conduct, the Court balanced the inequitable conduct alleged to have taken place by both sides; namely, that defendants had stolen confidential business information from plaintiff while employed there, against the inequitable conduct of plaintiff's owner accessing defendants' e-mails in private e-mail accounts. Ultimately, the Court precluded plaintiff from using any of the e-mails in litigation, except for impeachment purposes, and that one of the e-mails be returned or destroyed pursuant to attorney-client privilege.

D. Attorney-Client Privilege/Attorney Work-Product[48]

Employee access to and use of computers and e-mail at work has complicated the already complex area of attorney-client privilege. Recently, courts in the tri-state area have struggled with the issue of whether an employee has waived attorney-client privilege by sending e-mails and letters from work computers over the internet to the individual employee's lawyer, particularly e-mails or messages concerning work-related issues.

1. *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007). A doctor initiated a lawsuit against Beth Israel regarding breach of contract; the doctor alleged that he was entitled to $14 million in severance, as he was terminated without cause, while the hospital alleged the termination was with cause.

Early in the action, counsel for Beth Israel sent plaintiff's counsel a letter indicating that Beth Israel was in possession of e-mail correspondence between the physician and two separate counsel regarding two separate disputes. Counsel for Beth Israel indicated that while the e-mails had not been read, they believed that any potential privilege attached to these e-mails had been waived by the doctor's use of Beth Israel's e-mail system. The doctor's counsel responded to the letter demanding that the privileged documents be returned, and that no waiver had occurred. The physician asserted that the e-mails were confidential and privileged and subject to attorney-client privilege as a result of CPLR § 4548; that section provides that no communication shall lose its privileged character for the sole reason that it is communicated by electronic means.

The Court held that despite CPLR § 4548, the physician had waived attorney-client privilege through use of defendant Beth Israel's e-mail computer systems. The Court indicated that Beth Israel's e-mail policy of no personal use, combined with knowledge by the employee that the hospital monitored employee use, diminished any expectation of confidentiality. The Court also indicated that despite CPLR § 4548, that section did not preclude an employer from adopting a "no personal use" policy with respect to e-mails. Moreover, the Court indicated that the physician had both actual and constructive knowledge of Beth Israel's policy through dissemination to employees, particularly since Dr. Scott was an administrator at the hospital.

2. *Stengart v. Loving Care Agency, Inc.*, 990 A.D.2d 650 (N.J. 2010). Plaintiff was executive director of nursing facility until January 2008, when she resigned; she subsequently filed suit against former employer for discrimination. During her employment with defendant, plaintiff was provided a company laptop computer and a company e-mail address. Defendant company had written workplace policies regarding employee e-mail communications using company assets: (1) company reserved the right to audit matters done on company media systems, *without* notice, (2) e-mail and internet communications were considered company property, and not considered private to any employee, (3) principal purpose of e-mail is for company business, but occasional personal use permitted, and (4) certain uses of company electronic communications systems prohibited, including business activities not related to company, and political activities. Prior to resignation, plaintiff Stengart sent e-mail communications to her counsel; such communications included information relating to plaintiff's intention to file suit against company. Plaintiff sent the e-mails to her lawyers using work laptop, but these e-mails were sent to her lawyers through plaintiff's personal, web-based, password-protected Yahoo e-mail account.

After litigation commenced, defendant took a forensic image of the hard drive of plaintiff's company laptop. In reviewing information gleaned from the forensic image, defendant's counsel discovered plaintiff's e-mails to her lawyers. The e-mails were not disclosed to plaintiff's counsel *until* referenced by defendant's counsel in certain discovery demands. Plaintiff demanded their return, and when not forthcoming, moved before the trial court for their recovery. Such motion was denied by the trial court, which held that any privilege had been waived as a result of plaintiff's use of a company laptop to send such e-mails. Plaintiff appealed.

The Appellate Court reversed the trial court's decision. In its decision, the Appellate Court focused on the company's written e-mail policy, in particular that portion allowing for *occasional* personal use. The Appellate Court indicated that such language provided some expectation of privacy by the employee regarding e-mails, even if sent using company computer assets. The Appellate Court specifically rejected the notion that the company's ownership of the laptop computer was the *sole* and only determinative factor in assessing whether employee e-mails could be deemed company property. Employer appealed.

The New Jersey Supreme Court affirmed holding that, under the circumstances, plaintiff had a reasonable expectation of privacy with respect to e-mail communications with her lawyer, and that sending and receiving such e-mail communications via a company laptop did not waive the attorney-client privilege. The New Jersey Supreme Court also indicated that, by reading the e-mails that were at least arguably privileged, and failing to notify plaintiff's counsel promptly, defendant's counsel had breached its obligations under RPC § 4.4(b). The New Jersey Supreme Court remanded the case to the trial court to determine what, if any, sanctions should be imposed on counsel for defendant regarding its actions with respect to the e-mails at issue.

E. Text Messaging[49]

***City of Ontario v. Quon,* 130 S.Ct. 2619 (2010).** In a case of first impression, the U.S. Supreme Court determined that a police department had *not* violated the Fourth Amendment rights of various city employees, as well as the individuals with whom these employees exchanged text messages, by reviewing personal text messages created on pagers owned and issued by the city employer.

The city employer had a *written* workplace policy clearly notifying employees that use of department computers for e-mail and / or internet access had to be strictly limited to official departmental business. The written policy also stated that internet and e-mail systems and their use were not to be used for personal purposes. The written policy clearly indicated that employee use of company computers, e-mail and internet systems entitled the employer to monitor and / or audit such use. Contrary to the *formal* written policies, the department appeared to have an *informal* practice of allowing its employees to use their pagers to send personal text messages as long as the employee's use did not exceed the 25,000-character limit allotted to each pager by employer contract. If an employee exceeded this 25,000-character limit, the employee was required to pay for the excess usage from their individual funds.

At some point, the employer police department decided to review employee text messages to ascertain what portion was business related, and what portion was personal in nature, in order to determine if the character limit should be changed. Employees subsequently sued when they determined that their personal text messages had been provided by the third party message service provider to the employer, and reviewed. The Trial Court ruled in favor of defendants. Plaintiffs appealed, the Ninth Circuit Court of Appeals reversed, and the city appealed to the U.S. Supreme Court.

The U.S. Supreme Court reversed the decision of the Ninth Circuit, holding that the city's review of the police officer's text messages was reasonable under the circumstances and, thus, did not violate the Fourth Amendment. The Supreme Court assumed that (1) plaintiff had a reasonable expectation of privacy in the text messages sent on the pager, (2) the police department's review of the transcript of those text messages constituted a search under the Fourth Amendment, and (3) principles applicable to government employer's search of an employee's physical office apply with the same force when the employer intrudes on employee and employee's privacy in a digital environment. The Supreme Court held that, despite such assumption, the Ninth Circuit erred in finding the search unreasonable under the circumstances. Rather, the search was motivated by a legitimate work-related purpose, and was not excessive in scope, causing the search to be reasonable under the Court's *O'Connor* opinion.

F. Social Networking Sites[50]

The use of social networking sites and their importance has mushroomed in the last several years. The importance is underscored by the fact that in the recent successful presidential campaign of Barack Obama, his Facebook page had 1.3 million supporters and some 56,000 people followed him on Twitter.[51] However, with use of such social networking sites has come the inevitable workplace controversy and misuse.[52]

1. *Pietrylo v. Houston's Restaurant Group,* 2009 US Dist. Lexis 88702 (D.N.J. Sept. 25, 2009). Two employees of Houston's Restaurant in New Jersey posted unflattering messages about their supervisors on an invitation-only MySpace group page created for employees to vent about their jobs at Houston's. Managers of the restaurant subsequently learned about the page, and were provided access to the site after apparently coercing one of the employees to provide them with her user name and password. Employees sued Houston's for alleged violation of state and federal communications statutes. A jury verdict was entered awarding plaintiffs damages, as well as punitive damages. Upon motion of employer, the Court held that a reasonable jury could conclude that the employee was coerced into giving her managers access to the web page and, therefore, the employer access to the social networking site had *not been authorized* for purposes of the statutory exceptions under the various state and federal electronic communications statutes.

2. *Romano v. Steelcase, Inc.,* 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). In a recent decision regarding discovery in a personal injury case, a New York Supreme Court required a plaintiff to execute a consent and authorization form allowing operators of Facebook and MySpace social network pages to permit defendant to gain access to plaintiff's Facebook and MySpace records, including records previously deleted or archived. Plaintiff brought a personal injury action against defendant. During discovery, defendant contended that review of the public portions of plaintiff's MySpace and Facebook pages indicated plaintiff had an active lifestyle and traveled extensively during the time period she claimed her injuries prohibited such activity. Defendant served plaintiff with discovery demands, requesting authorizations to obtain full access to and copies of plaintiff's current and historical files on her Facebook and MySpace accounts. Plaintiff refused to provide the requested authorizations. Defendant then moved by order to show cause to require plaintiff to execute such authorizations. The Court granted defendant's request. In granting such request, the Court indicated there was no New York case law directly addressing the issues raised in defendant's application, but that cases outside of New York were instructive. The Court indicated that, under New York law, there is no common law right to privacy, but that other case law indicates that a reasonable expectation of privacy for internet postings or e-mails is overcome when postings have been purposely shared by the posting individual with others. The Court also indicated that neither Facebook nor MySpace guaranteed complete privacy and, therefore, plaintiff had no legitimate reasonable expectation of privacy regarding her postings on either social networking site. The Court made its order despite the dictates of the SCA, which allows for disclosure of electronic communications only with consent of the owner.[53]

3. *New York Bar Association Ethical Guidance Regarding Social Networking Sites.* Recently, both the New York State Bar Association and the New York City Bar Association have issued ethical opinions regarding whether lawyers can properly access social networking sites of opposing parties during discovery.[54] Both ethics opinions indicate that a lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent. While a lawyer who represents a client in a pending litigation may access and review the *public* social networking pages of that party, the lawyer may not "friend" the other party, or direct a third person to do so in order to access private social networking pages of that party.

4. *Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02*. The Philadelphia Bar Association recently issued a Professional Guidance Opinion about such networking sites. The Guidance Opinion indicates that it would be *improper* for a lawyer to have an acquaintance request to be permitted to become a "friend" of a MySpace member, without disclosure of intentions, in order for counsel to gain access to that person's website page, to allow the lawyer to obtain information about the individual through information posted on the page.[55] Such unauthorized access by counsel might violate the SCA, which requires *lawful consent* before access to stored electronic communications. Social networking sites have also impacted the judiciary.

VI. Considerations for Setting Workplace Policies Regarding Employee Use of Company Computers and the Internet

The presence of computers, e-mail, the internet, and digital devices in today's workplace, coupled with the ability of employees to engage in significant and serious misconduct with these technologies, requires action by employers. Employers should consider setting up clear, detailed written regimes, policies and procedures to monitor employee use of such technologies. Such written policies should be published, and disseminated to all employees, and should include a discussion of what conduct is deemed appropriate regarding these technologies.

In order to maximize the effectiveness of such written employer workplace policies regarding use of computers, the internet, and social networking sites, employers should consider the following issues when creating and implementing the workplace policies:

(1) Written policy should include explicit statements that the company computers, computing systems, and electronic communication systems are provided to employees for business use, and business use *only*, and all information created, sent, accessed or stored on the company's computers or electronic information systems, or created, sent, accessed or stored on third-party service provider electronic systems, as a result of contract with the company, are deemed the property of the company;

(2) If personal use of company computers and electronic communication systems is allowed, specify in detail the extent and scope of permissible use, and during what period of employee work schedule, incidental limited personal use of these assets is allowed, *e.g.*, lunch breaks, meal period, or after shift (the policy regarding personal use should provide that such limited personal use is *not* deemed private use, and the limited personal use is subject to all of the other aspects of the written policy, including collection, audit and review by the company);

(3) Written policy should clearly delineate what company assets are covered by the policy, including company -issued laptops, desktops, printers, BlackBerries or other PCDs;

(4) Written policy should clearly indicate that employee use of company computers, company electronic communication systems, and employee access to the internet using company assets or communication systems, are all subject to monitoring, auditing and review at any time, without prior notice to the employee, and that such review may occur after the employee has left the company;

(5) Written policy explicitly stating that employee has no expectation of privacy when using company computers or electronic communication systems or assets;

(6) Written policy should include specific provisions for how employees are to handle proprietary company information using computers and / or electronic communication systems, particularly when sending the information outside the company via e-mail;

(7) Written statement indicating the rationale behind company's monitoring, auditing and review policy for company computers and electronic communication systems, including but not limited to, safety of employees, safety of proprietary company information, protection of company trade secrets and company intellectual property, protection of company computer assets, and maintaining professional and productive environment for all employees;

(8) Clear written statement that improper use of company computers, electronic communication systems or use of the internet through these company assets may result in penalties and disciplinary actions, including termination;

(9) Clear statement that employee accessing of personal e-mail accounts or instant messaging systems while using company computers or electronic communication systems is prohibited, and that information from personal e-mail accounts or instant messaging systems which is saved to or retained on company computer assets or electronic communication systems is also deemed to be company property and subject to collection, audit and review by the company without prior notice;

(10) Written statement indicating that it is impermissible for employees to load any sort of software on company computers, other than software specifically provided to employees by company, and / or approved for use by company;

(11) Written policy should contain explicit statements that certain uses of company computers or electronic communication systems are inappropriate in *any context*, including specific notices banning offensive material which includes obscenity, sexual content, defamatory comments, racial slurs, as well as explicit written language indicating that e-mails, text messaging, instant messaging and internet use that might constitute discrimination, harassment or retaliation are prohibited under any circumstances;

(12) Written policy indicating that password protection provided by company to employees for company computer and electronic communication systems does not provide for an expectation of employee privacy, and that information contained or saved or accessed using company computer or electronic communication assets is still subject to monitoring, audit and review, without prior notice, and that passwords and other protective devices are employed for the purpose of protecting company assets and information, not for employee privacy;

(13) Company should consider whether it is desirable to block access to certain internet sites, or types of internet sites using blocking software, and if this is done, advise employees in writing of this policy;

(14) Company should consider whether to provide for a written social networking policy, describing what is deemed appropriate use, and publish the policy to all employees in employee handbook, as well as posted on company intranet site, if available;

(15) Written, signed acknowledgement (provided at beginning of employment and updated annually) by all employees indicating they understand the company poli-

cies regarding computer use and use of company electronic communication systems, and will be responsible for and adhere to such policies;

(16) Periodic written reminders regarding company policies, which may involve periodic mass e-mails of specific policies sent to all employees;

(17) Periodic classes, reminding all employees of company policies regarding use of company computers, electronic communication systems and the internet;

(18) If warranted, software installed on company computers which allows for pop-up notification, prior to allowing for use by employee, that computer is company assets, and use obligates employee to abide by company policies regarding use of the assets;

(19) If the company decides to research potential employees, or existing employees regarding conduct using the internet, the employer must take precautions not to engage in improper selective or discriminatory conduct; *e.g.*, an employer should conduct such internet research of *all* applicants, not just of a certain category or class of applicants.

Endnotes

1. Justin Conforti, *Comment: Somebody's Watching Me*, 5 Seton Hall Cir. Rev. 461 (2009); Ariana R. Levinson, *Industrial Justice*, 18 Cornell J.L. & Pub. Pol'y 609 (2009); Matthew Chivvis, *Consent to Monitoring of Electronic Communications*, 19 Fordham Intell. Prop. Media & Ent. L.J. 799 (2009); Robert Sprague, *Orwell was an Optimist*, 42 J. Marshall L. Rev. 83 (2008).
2. Maria Sullivan: *Strike a Balance*, BizTech, at 60 (Sept. 2009) (discussing balance between providing employees with increased access to technologies and increased possibilities and costs of security breaches); Eric Friedberg and Michael McGowen, *Lost Back-up Tapes, Stolen Laptops, and Other Tales of Data-Breach Woe*, N.Y.S.B.A.J.at 42 (February 2007).
3. *Taxsalelists.com LLC v. Rainer*, 2009 WL 4884273 (D.Colo. Dec. 11, 2009); Mindy C. Calist, *You are being Watched: The Need for Notice in Employer Electronic Monitoring*, 96 Kentucky L.J. 649 (2008).
4. *Greenslide v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 864 (7th Cir. 1997); *Knox v. Indiana*, 93 F.3d 1327, 1330 (7th Cir. 1996); *Burl v. Principi*, 181 Fed. Appx. 760 (11th Cir. 2006); *Peters v. Molloy College, et al.*, Case No. 07-CV-2553 (E.D.N.Y. 2007) (Harrington, Ocko Monk, LLP is counsel for Defendants); *Kassemy v. Telvista, Inc.*, 2009 WL 530571 (W.D.Va. Mar. 3, 2009); Tari Williams and Abigail Morrow, *Want to Know Your Employees Better? Log on to Social Network*, 69 Ala. Law. 131 (March 2008); *Zakrzewska v. New School*, 543 F.Supp.2d 185 (S.D.N.Y. 2008).
5. Neil A. Lewis, *Rebels in Black Robes Recoil at Surveillance of Computers*, N.Y. Times, (Aug. 8, 2001).
6. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276 (1959); *Messenger v. Gruner*, 94 N.Y.2d 436 (N.Y. 2000).
7. *Greenaway v. Corcoran Group*, 2010 WL 58299 (N.Y. Sup. Ct. Jan. 7, 2010).
8. *Id*.
9. *Candaleria v. Spurlock*, 2008 WL 2640471 (E.D.N.Y. July 3, 2008).
10. *Dominguez v. Vibe Magazine*, 873 N.Y.S.2d 510 (N.Y. Sup. Ct. 2008), *but see Pierce v. Manhattan Ensemble Theatre, Inc.*, 528 F.Supp.2d 175 (S.D.N.Y. 2007); *Walter v. NBC Television Network, Inc.*, 811 N.Y.S.2d 521 (4th Dept. 2006); *Caesar v. Chemical Bank*, 460 N.Y.S.2d 235 (N.Y. Sup. Ct. 1983).
11. *Candaleria*, 2008 WL 2640471, at * 2.
12. *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990); *States v. Amen*, 831 F.2d 373 (2d Cir. 1987); *In Re DoubleClick, Inc. Privacy Lit.*, 154 F.Supp.2d 497 (S.D.N.Y. 2001); *Hay v. Burns Cascade*, 2009 WL 414117 (N.D.N.Y. Feb. 18, 2009).
13. *Deals v. Spears*, 980 F.2d 1153 (8th Cir. 1992).
14. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983).
15. *Briggs v. American Air Filter, Inc.*, 630 F.2d 404 (5th Cir. 1980).
16. *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994); *U.S. v. Szymuszkiewicz*, 2009 WL 1873657 (E.D.Wis. 2009).
17. *Bunnell v. Motion Picture Assoc. of America*, 567 F.Supp.2d 1148 (C.D. Cal. Aug. 22, 2007).
18. *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005); *Hall v. Earthlink*, 396 F.3d 500 (2d Cir. 2005).
19. State law in California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, South Carolina, South Dakota, Vermont and Washington requires the consent of all parties to a communication for the tapping of a communication. www.rcfp.org/taping/. Many of these states have laws allowing for significant civil penalties for violation of wiretapping laws. *Id.*
20. *Freedom Calls Foundation v. Bukstel*, 2006 WL 845509 (E.D.N.Y. March 3, 2006); *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3d Cir. 2003).
21. *Freedom Calls*, 2006 WL 845509, at * 27.
22. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002); Presentation by Mark Howitson, *Facebook: Perspectives on Corporate E-Discovery and Social Media* (Feb. 2, 2010).
23. *Ideal Aerosmith, Inc. v. Acutronic USA, Inc.*, 2007 WL 4394447 (E.D.Pa. Dec. 13, 2007).
24. *Borninski v. Williamson*, 2005 WL 1206872 (N.D.Tex. May 17, 2005).
25. *Viacom Int., Inc. v. You Tube, Inc.*, 2008 WL 2627388 (S.D.N.Y. July 2, 2008); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp.2d 606 (E.D.Va. 2008); Tresa Baldas, *Subpoenas Seeking E-Mails Meet Resistance*, NYLJ (June 24, 2008).
26. *See* Note 36.
27. *Hudson v. Goldman Sachs & Co., Inc.*, 725 N.Y.S.2d 318 (1st Dept. 2001). Some thirty (30) states and the District of Columbia provide some sort of statutory protection concerning off-duty conduct of employees. Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work*, 6 U. Pa. J. Lab. & Empl. L. 625 (2004).
28. *People v. Wilkinson*, 859 N.Y.S.2d 356 (N.Y. Sup. Ct. 2008).
29. GAO Report, *Employee Privacy: Computer Monitoring Practices* (Sept. 2002).
30. *Id.*
31. *Id.*
32. D. Hawkins, *Office Politics in the Electronic Age Workplace*, U.S. News & World Report (March 22, 1999).
33. Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L.J. 857 (2001); Christina V. Bonavita, *Weighing Benefits, Pitfalls of Off-Campus Workers*, NYLJ, August 31, 2010.
34. James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 Ga. L. Rev. 133 (2008).
35. *Id.* According to a more recent survey, by 2011 the world-wide "mobile-worker population" may hit one billion people, or more than thirty percent (30%) of the human workforce. Wylie Wong, *On the Move*, BizTech, at 35 (Sept. 2009).

36. Robert M. Howie & Lawrence A. Shapero, *Lifestyle Discrimination Statutes*, 31 Empl. Rel. L. J. 21, 35 (2005).

37. Tresa Baldas, *Overtime Suits May Ripen with Blackberrys*, Nat'l L.J., at 6 (Apr. 28, 2008); Laura Merritt, *Factor Gadgets into Remote Access Policies*, NYLJ April 27, 2006.

38. AMA, 2007 *Electronic Monitoring and Surveillance Survey*.

39. *Id.*

40. Howitson, at Note 31; John Quain, *Social Network Cause and Effect*, U.S. News, at 36 (Nov. 2010).

41. Tresa Baldas, *New Hires to Monitor Outbound E-mails*, Nat. L. J. (Sept. 29, 2009).

42. *Id.*

43. *Id.*

44. Williams and Morrow, *supra* at note 4.

45. *Id.*

46. *Id.*

47. www.theHRSpecialist.com / socialpolicy.

48. *See also Long v. Marubeni America Corp.*, 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (privilege waived through use of company computers), *but see U.S. v. Hatfield*, 2009 WL 3806300, at *8 (E.D.N.Y. Nov. 13, 2009) (holding attorney-client privilege not necessarily waived by client through use of company computer and e-mail); *In re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (privilege may not have been waived*); Curto v. Medical World Communications*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006) (privilege not waived despite employee use of company computer to save attorney-client communications); *Orbit One Communications, Inc. v. Numerex Corp.*, 255 F.R.D. 98 (S.D.N.Y. 2008) (no waiver); *Forward v. Foschi*, 2010 WL 1980838 (N.Y. Sup. Ct. May 18, 2010); Mark Berman, *Expectation s of Privacy in E-mail Communications*, NYLJ July 6, 2010; *Alamar v. County of Boise*, 2009 WL 3669741 (D.Idaho Nov. 2, 2009).

49. Mark Schreiber and Barbara Lee, *Practice Tips: New Liabilities and Policies for Incidental Private Use of Company Electronic Systems and PDAS*, 52 Boston Bar J. 11 (Dec. 2008).

50. Jennifer T. Arnold, *Twittering and Facebooking While They Work*, HR Magazine, at 53 (Dec. 2009).

51. Ken Strutin, *Hiding in Plain Sight: Evidence on Social Networking Sites*, NYLJ, at 5, 9 (Nov. 10, 2009); Ken Strutin, *Pre-texting, Legal Ethics and Social Networking Sites*, http: / / www.llrx,.com / features / pretexting.htm; Mara E. Zazzali-Hogan and Jennifer Marino Thibodaux, *Ethics of 'Friending' Adverse Witnesses*, NJLJ Sept. 1, 2009.

52. Klein & Pappas, *Update: Legal Risks for Employers Who Use Social Networking Website*, NYLJ April 5, 2010; Laza & Schwartzreich, *Employees' Privacy Rights in the Digital Age*, NYLJ April 29, 2010.

53. 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010); *Bass v. Miss Porter's School*, 2009 WL 3724968 (D.Conn. Oct. 27, 2009); *EEOC v. Simply Storage*, 2010 WL 3446105 (S.D.Ind. May 11, 2010).

54. New York State Bar Association, Opinion 843; New York City Bar Association, Opinion 2010-2; Mark Berman, *The Ethics of Social Networking Discovery*, NYLJ Nov. 2, 2010; New York State Bar Association, Opinion 08-176; New York City Bar Association, Opinion 2003-04; Nelson & Simek, *Lawyers "Step In It" Through Social Media Incompetence*, http: / / www.slaw.ca.

55. The Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009).

This article is a significantly abridged version of an article that appeared in SES, *Fundamentals of Employment Law*, February 2010. The endnotes have been renumbered and shortened for the purpose of this publication.

Reckless Disregard Protection Does Not Extend to Emergency Vehicle Operators as Plaintiffs

By John M. Shields

Emergency personnel are frequently confronted with exigent circumstances, where they must act decisively to protect human life. Enabling emergency personnel to conduct their critical responsibilities inevitably increases the risk of harm to innocent bystanders. Accordingly, pursuant to Vehicle and Traffic Law (VTL) § 1104, a driver of an authorized emergency vehicle is exempt from certain rules of the road, when engaged in emergency operation, but is not protected from the consequences of reckless disregard for the safety of others. The qualified privilege of the reckless disregard standard for police vehicles even extends to non-emergency circumstances.

The Court of Appeals, in *Ayers v. O'Brien*, 13 N.Y.3d 456 (2009), recently clarified that emergency operators cannot benefit from the protection of the reckless disregard standard when they proactively initiate civil lawsuits as plaintiffs, or attempt to use the heightened standard to ward off a comparative fault defense. The protection afforded by VTL § 1104 is to be applied solely in circumstances when the emergency operator is sued or countersued. Courts have indicated that permitting such protection is inconsistent with the intent of the statute and would result in the unfair consequence of imposing a disproportionate share of liability upon innocent bystanders.

Vehicle and Traffic Law § 1104 Protects Operators of Emergency Vehicles

It is well settled that the driver of an authorized emergency vehicle, engaged in an emergency operation, is exempt from certain rules of the road under VTL § 1104.[1] This qualified privilege, however, does not protect the driver from the consequences of "reckless disregard for the safety of others." *See Ayers v. O'Brien*, 13 N.Y.3d 456 (2009). The reckless disregard standard is an exacting standard, requiring a deliberate decision to ignore a likely harm. It is well defined that to establish a breach of the reckless disregard standard of care, the plaintiff must show that the driver has intentionally done an act of an unreasonable character in disregard of an obvious risk that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome. *See Greenawalt v. Village of Cambridge*, 888 N.Y.S.2d 295 (3rd Dept. 2009). The reasonableness of the driver's conduct must be judged as of the time and in light of the circumstances in which he acted, not with the benefit of hindsight. *Id.* More than a momentary lapse of judgment is necessary to meet the reckless disregard test. *Id.*; *Green v. State of New York*, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3rd Dept. 2010).

In *Saarinen v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994), a civilian driver was struck by a recklessly driven third-party van, being chased by a police vehicle, with the emergency lights activated. *Saarinen* at 497-98. The common law and VTL § 1104 recognize that emergency and police vehicles are frequently faced with emergency situations. *Id.* at 501-02. The Court in *Saarinen* reasoned that any standard other than a recklessness standard would result in judicial second-guessing of split second decisions made by emergency personnel in the midst of highly pressurized situations. *Id.* at 502. Such retrospection could have the unintended and undesirable result of deterring trained emergency personnel from acting decisively to protect or save human life or property.

There has been an assortment of varying results in recent decisions involving the interpretation and application of the standards of VTL § 1104. Some decisions have affirmed that police officers were engaged in emergency operation; while other Courts have ruled that the emergency driver's conduct did arguably rise to the level of recklessness, thus removing the actions from the protection of VTL § 1104. *See Green v. State of New York*, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3rd Dept. 2010); *Tutrani v. County of Suffolk*, 64 A.D.3d 53, 878 N.Y.S.2d 412 (2nd Dept. 2009); *Kabir v. County of Monroe*, 68 A.D.3d 1628 (4th Dept. 2009); *Britt v. Bustamante*, 55 A.D.3d 858, 866 N.Y.S.2d 740 (2nd Dept. 2008); *Smith v. Hastings*, 22 Misc. 3d 1130A, 881 N.Y.S.2d 367 (Sup. Ct. Ulster Cty. 2009). The Court in *Kabir*, in a narrow application of VTL § 1104, which the dissent calls a departure from established case law, held that a Deputy Sheriff responding to a "highest priority" burglary call was not entitled to qualified immunity.

In *Green v. State of New York*, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3rd Dept. 2010), a State Trooper was involved in an accident when attempting to make a U-turn to pursue a tractor trailer that had crossed into oncoming traffic to pass several vehicles in a no-passing zone. The Court held that the Trooper took appropriate precautions, prior to attempting the U-turn, which precluded his conduct from rising to the level of reckless disregard. Prior to initiating the U-turn, the Trooper activated his emergency lights, pulled to the side of the road, turned on his left turn signal and looked over his left shoulder and out of the front window several times, to ensure that traffic had stopped in both directions. Given the evidence of the precautionary measures taken by the Trooper, which was corroborated by an independent witness to the accident, the Court held that the Trooper's actions did not constitute "conscious indifference."

A number of the decisions have focused on the specific conduct of the driver, as well as the issue of whether the emergency operator violated established departmental guidelines, procedure or training. *Alvarado v. Dillon*, 888 N.Y.S.2d 673 (3rd Dept. 2009); *Greenawalt v. Village of Cambridge*, 888 N.Y.S.2d 295 (3rd Dept. 2009); *Demers v. State of New York*, 2009 NY Slip Op 52288U (Ct. Cl., Claim No. 109168, 2009); *Simmons v. State of New York* (Ct. Cl., Claim No. 113125, 2009). Courts have held that VTL § 1104 "strikes a balance" that permits police officers to perform their important responsibilities while still protecting against disproportionate and overreactive conduct.

In *Simmons*, the Court reiterated that the speed of the emergency vehicle, in pursuit, alone is not the critical issue. In determining whether a police officer acted recklessly, in addition to speed, the Court should consider the totality of the circumstances, including the nature of the original offense, length and duration of the chase, weather conditions, road conditions, traffic, neighborhood characteristics and visibility. *Simmons*.

The protection provided to emergency vehicles under section 1104(e) represents the recognition that the duties of emergency personnel often bring them into conflict with the rules that are intended to regulate general conduct. *Riley v. County of Broome*, 95 N.Y.2d 455, 467, 719 N.Y.S.2d 623 (2000). The Court recognized that the importance of public safety and law enforcement justifies a qualified privilege afforded to emergency personnel, where necessary to conduct their vital responsibilities that will inevitably increase the risk of harm to innocent motorists and pedestrians. *Id.* at 467-68.

Emergency Vehicles Are Entitled to a Reckless Disregard Standard, Even During Non-Emergency Operation

In *Criscione v. City of New York*, 97 N.Y.2d 152, 736 N.Y.S.2d 656 (2001), the Court of Appeals held that a police officer who was driving a patrol car in response to a *non-emergency* dispatch call was engaged in the "emergency operation" of a vehicle, as defined in VTL § 114-b. *Criscione* at 154-55. As a result, his actions should not be measured by ordinary negligence standards, but rather by the "reckless disregard" standard of VTL § 1104(e).

In *Criscione*, plaintiff and defendant, both New York City police officers, were traveling in a patrol car during a tour of duty. *Criscione* at 154. Defendant officer was the driver of the vehicle, while plaintiff communicated with the police dispatcher. *Id* at 154-55. While responding to a radio call to investigate a *non-criminal* family dispute, the patrol car entered an intersection and collided with a civilian vehicle, causing injuries to the plaintiff. *Id.* at 155. In accordance with departmental policy regarding non-criminal calls, defendant did not increase the speed of the vehicle or activate the siren or turret lights while driving to the scene, because the call did not fit the criteria for an emergency response. *Id.* at 155.

Vehicle and Traffic Law § 101 specifically designates a police vehicle as an "authorized emergency vehicle." *Criscione* at 156-57. Among the particular circumstances that the Legislature specified in section 114-b as qualifying as an "emergency operation" of a vehicle is the operation of an authorized emergency vehicle, while responding to a police call. *Id.* Although section 114-b does not define the phrase "police call," the Court in *Criscione* determined that a radio call to officers on patrol, by a police dispatcher regarding a 911 call, falls squarely within the plain meaning of the term "police call." *Id.* There is no evidence of any legislative intent to vary the definition of "emergency operation" based on individual police department incident classifications, including, but not limited to, criminal, non-criminal or emergency. *Criscione* at 157. Emergency vehicles operating as police vehicles, *even without activating their siren or red lights*, continue to fall within the statutory exemptions. *Steinhilper v. State of New York* (Ct. Cl., Claim No. 108993, 2009); *Soto v. State of New York*, 21 Misc. 3d 1107A, 873 N.Y.S.2d 237 (Ct. Cl., Claim No. 111499, 2008).

In *Soto*, the Court held that the acts of initiating the emergency lights and sirens and availing himself of the side-view mirror showed a conscious effort to concern himself with the safety of others. *Soto*. VTL § 114-b specifies *two* distinct police operations as within the definition of emergency: "pursuing an actual or suspected violator of the law," and "responding to" a "police call." *Id.* In *Rusho v. State of New York*, 24 Misc.3d 752, 878 N.Y.S.2d 855 (Ct. Cl., Claim No. 109168, 2009), involving parole officers pursuing a suspected parole absconder, the Court of Claims discussed the fact that the term "pursuit" should not be narrowly interpreted. One category of VTL § 114-b exemplifies the need to act with urgency, while the other encompasses responses to the remaining gamut of "police calls." *Soto*. In fact, the police officer's perception of whether a situation is an emergency is irrelevant to the determination as to emergency operation. *Harrington v. State of New York* (Ct. Cl., Claim No. 109113, 2009); *Harrington v. State of New York* (Ct. Cl., Claim No. 109113, 2007).

No Reckless Disregard Protection for Emergency Operators as Plaintiffs

Until recently, Courts differed in whether the reckless disregard standard protects emergency operators as plaintiffs in civil personal injury lawsuits. *Ayers v. O'Brien*, 870 N.Y.S.2d 587 (3rd Dept. 2008), *affirmed* 13 N.Y.3d 456 (2009) (deputy sheriff); *McGloin v. Golbi*, 49 A.D.3d 610, 853 N.Y.S.2d 387 (2nd Dept. 2008) (ambulance driver); *Sierk v. Frazon*, 32 A.D.3d 1153, 821 N.Y.S.2d 689 (4th Dept. 2006) (peace officer); *Harrington v. State of New York* (Ct.

Cl., Claim No. 109113, 2007) (Department of Correctional Services' van). In *Ayers*, plaintiff Ayers was a sheriff that was involved in a motor vehicle accident, while on duty. *Ayers* at 587. With emergency lights activated, Ayers attempted to make a U-turn from the shoulder, in order to pursue a speeding vehicle. *Id.* Upon initiating the U-turn, Ayer's vehicle was immediately struck by defendant O'Brien's vehicle. *Id.* It is undisputed that O'Brien was not speeding and was not issued any traffic citations. *Id.*

Ayers commenced this action against O'Brien, alleging that O'Brien's negligence caused the accident and his resulting injuries. *Ayers* at 587. O'Brien asserted an affirmative defense, alleging that plaintiff's own culpable conduct caused or contributed to his damages. *Id.* Plaintiff moved to dismiss this defense pursuant to VTL §1104, because he was engaged in the emergency operation of an authorized vehicle at the time of the accident, prohibiting his own negligence from being considered by the jury. *Id.* The Court in *Ayers* held that, due to the distinction that the plaintiff is suing in his personal capacity, as opposed to being sued in his professional capacity, he is not entitled to the protections afforded under the reckless disregard standard established by VTL § 1104 (e). *Id.*

Although the plaintiff in *Criscione* was a police officer, he was seeking to impose liability for his injuries against a co-worker, his municipal employer and a third-party bystander. *Ayers* at 587. In *Criscione*, the bystander was found not liable by a jury, so the Court of Appeals had no occasion to consider the correct standard to be applied as between these two particular parties with respect to that plaintiff's damages. *Id.* The Court of Appeals has made clear that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander, unless the officer acted in reckless disregard for the safety of others. *Id.*, citing *Saarinen* at 501. In *Ayers*, the plaintiff is not an injured bystander, and O'Brien is not seeking to hold him or his municipal employer civilly liable as a result of this accident. *Id*, citing *Campbell* at 512.

Applying ordinary comparative negligence principles to an operator's own claim for damages against a bystander does not hinder the stated purpose of VTL § 1104, to recognize the importance of operators of emergency vehicles to respond quickly. *Ayers* at 587. More importantly, permitting the protection of the reckless disregard standard to assist an operator's own claim for damages "could result in potential financial windfalls to negligent operators of emergency vehicles," which would result in partially negligent bystanders sharing a greater share of responsibility than otherwise permitted. "Fairness and logic dictate that this would be an unfair and unintended result of the statute." *Id.*

Conclusion

The reckless disregard standard balances the importance of enabling law enforcement to successfully perform their essential responsibilities, while still protecting against unnecessary risk of danger to the public. Even a police officer responding to a non-emergency call, without emergency lights and sirens, is to be evaluated by the reckless disregard standard contained in VTL § 1104. However, the protection of the reckless disregard standard does not extend to benefit emergency operators when they elect to become plaintiffs in civil lawsuits or attempt to use VTL § 1104 as a sword to ward off a comparative fault defense.

Endnote

1. *See Criscione v. City of New York*, 97 N.Y.2d 152, 736 N.Y.S.2d 656 (2001) at 156, citing *Riley v County of Broome*, 95 N.Y.2d 455, 462, 719 N.Y.S.2d 623 (2000); *Saarinen v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994); *Szczerbiak v Pilat*, 90 N.Y.2d 553, 556-557, 664 N.Y.S.2d 252 (1997); *Campbell v City of Elmira*, 84 N.Y.2d 505, 510-511, 620 N.Y.S.2d 302 (1994); *Meade v. City of Mount Vernon*, 53 A.D.2d 645, 863 N.Y.S.2d 446 (2nd Dept. 2008); *Carallo v. Martino*, 58 A.D.2d 792, 873 N.Y.S.2d 102 (2nd Dept. 2009); *Lubecki v. City of New York*, 304 A.D.2d 224, 758 N.Y.S.2d 610 (1st Dept. 2003); *Johnson v. State of New York* (Ct. Cl., Claim No. 99250, 2006); *Lynch v. State of New York* (Ct. Cl., M-73831, 2007); *Fleisher v. State of New York* (Ct. Cl., Claim No. 109685, 2007); *Pacheco v. State of New York* (Ct. Cl., Claim No. 113861, 2008); *State Farm v. State of New York* (Ct. Cl., Claim No. 116513, 2010).

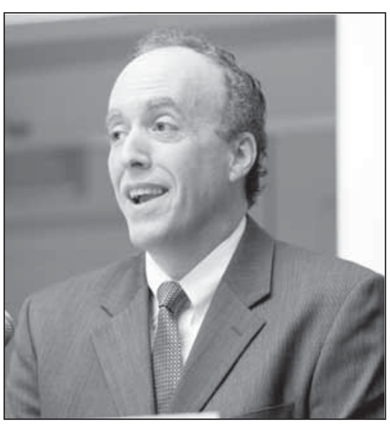
John M. Shields is an Assistant Attorney General in the Suffolk Regional Office. Any opinions expressed in the article are exclusively those of the author and not the Office of the Attorney General. **A previous version of this article was published and is reprinted with permission from the July 16, 2010 issue of the New York Law Journal.**

Scenes from the Torts, Insurance and Compensation Law Section ANNUAL MEETING

January 27, 2011

Hilton New York • New York City



Book Review:
“The Hellhound of Wall Street”— How Ferdinand Pecora’s Investigation of the Great Crash Forever Changed American Finance

By Michael Perino

Reviewed by Andrea M. Alonso

The release of the biography of Ferdinand Pecora, Chief Counsel to the United States Senate Committee on Banking and Currency (1933-1934), is marvelously timed. The parallels between the economic conditions that led to the Wall Street Crash of 1929 and the banking collapses of 2008 are uncanny. Michael Perino’s eminently readable account of what became known as the “Pecora Commission” brings this to light in a book that is a page turner considering the inherently dry material.

Born in Nicosia, Sicily in 1882 Pecora’s family left Italy when he was four years old. In an unusual twist to the Italian immigration saga Pecora’s father left for religious freedom. Having converted to Protestantism he was shunned in his village. Pecora attended Episcopal schools and studied to be a minister in New York. Pecora’s father was a shoemaker, his mother worked in a sweatshop. In an age of intense bigotry toward Southern Italians, Pecora was determined to prove the stereotype wrong. If Italians were viewed as lacking intellectual capacity, he would excel in school; if they were viewed as lazy, he would work harder. More importantly, while Al Capone was the symbol of Italian lawlessness, he would become a lawyer.

Pecora briefly attended New York Law School and eventually became a prosecutor in New York County. His reputation as the best cross-examiner in New York led to his appointment as Chief Counsel to the Senate Commission that was investigating the causes of the 1929 collapse. From the beginning Pecora’s mission was to lay the groundwork for sorely needed federal legislation to control Wall Street. He felt that the two main problems which led to the crisis were the absence of any regulations requiring disclosures to shareholders and investors and security affiliates of commercial banks. In order to establish the need for corrective legislation he would have to shock the moral conscience of the American people whose public outcry in turn would compel their elected representatives to action. In this endeavor he succeeded spectacularly.

Three previous Chief Counsel had achieved nothing in terms of obtaining information regarding the immoral, overreaching practices of Wall Street which pressured ordinary citizens into buying millions of dollars of worthless securities. Pecora succeeded where his predecessors had failed because of his tenacity and preparation. When given the power to subpoena City Bank’s records he personally went to their attorney’s, Shearman & Sterling, offices at 55 Wall Street and scoured the records, taking notes till late in the evening for twelve days prior to the hearings. Pecora did his homework on City Bank and it showed. Like all great trial lawyers, he had facts at his fingertips and the prospect of jousting with his witnesses exhilarated him.

His primary target was the imperious head of City Bank, Charles Mitchell. In a few days with a surgeon’s skill, Pecora cut “Sunshine Charlie” down to a greedy, arrogant, malefactor who would sell any securities to the trusting American public. In an era when a New Yorker on relief got ten dollars a week and homeless squatters camps filled forty blocks on the Upper West Side, Mitchell made the equivalent of a half billion dollars, in current dollars, from 1927 to 1929. In 1929, the year of the Crash, Mitchell paid no taxes because of a shady stock loss. The reputation of the country’s leading banker had been shattered, the American public was furious. Other revelations of the intentional steering of bank customers to buying the securities offered by wholly owned investment affiliates enraged the public. This, taken with “morale” loans to bank officers and an outlandish bonus system, similar to our present day hedge funds, further angered the Depression-weary American public.

Pecora’s motivation was the thousands of letters from ordinary investors detailing their tales of financial devastation at the hands of City Bank and J.P. Morgan. When the hearing wound down in 1934, the Senate proposed a “special allowance” in recognition of Pecora’s work. Pecora refused, stating that the comfort he received from letters from the public had been “of more value to me than any special compensation.”

The author draws an interesting conclusion: that the Pecora Commission marked a turning point in American History. As described by one reporter, “the Sicilian immigrant boy” had exposed, in fact humiliated, a leading banker and member of the Anglo-Saxon ruling class. Mitchell’s disdain for the finances of the common man proved to be his downfall. The public perception of the impeccable integrity of the banking community had been destroyed. In the ten days of the hearings America’s social fabric had been changed forever.

Prior to the "Pecora Commission" there was no federal law which prohibited affiliates and no federal law requiring disclosures in security offerings. There was no law against paying unconscionable bonuses. Ferdinand Pecora led the country to believe there should be.

As a result the "Security Act of 1933, 1934" and the "Glass-Steagall Act" were passed and the Securities and Exchange Commission (SEC) was formed. Pecora was sorely disappointed when Franklin Delano Roosevelt appointed Joseph P. Kennedy, the future President's father, as Chairman of the SEC. The author speculates that Roosevelt viewed Pecora as a highly skilled lawyer, not as an administrator. I opine that other factors swayed Roosevelt's decision. Pecora served as an SEC commissioner for only six months. He became a New York State Supreme Court Judge, ran unsuccessfully for mayor and returned to a lucrative private practice at the end of his life.

In 1933 Senator David Walsh, a Democrat, stated that corporations:

> Have paid their entrenched officials unconscionable salaries, that they have speculated and gambled with private financial resources they have been entrusted [sic] with, and have carried on their functions in disregard of the public interest and without an effort to do justice to their employees or even to their stockholders.

This description is frighteningly familiar in light of the recent banking, investment banking and sub-prime mortgage brokers scandals. Michael Perino's book leads us to hope that our nation will find a modern day Ferdinand Pecora.

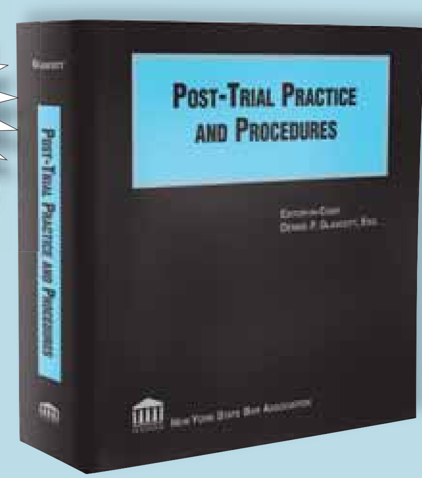
Andrea M. Alonso is a partner in the law firm of Morris Duffy Alonso & Faley in New York City.

NEW YORK STATE BAR ASSOCIATION

From the NYSBA Book Store >

Post-Trial Practice and Procedures in New York

Section Members get 20% discount* with coupon code PUB1094N



There is no shortage of legal references to guide attorneys through the process of seeing a trial through to its end. This book, however, takes the next step by acknowledging that the end of the trial is not necessarily the end of the civil litigation process. *Post-Trial Practice and Procedures* is the comprehensive guide to dealing with complex post-trial issues. The authors – experienced trial attorneys and an appellate justice – cover everything from challenging verdicts before and after the jury has been discharged, to post-verdict setoffs.

Table of Contents

Addressing Defective Verdicts While the Jury Is Empaneled; Post-Trial Motion Practice – Challenging the Verdict after the Jury Has Been Discharged; An Introduction to Post-Verdict Setoffs: Collateral Source Reductions Under CPLR 4545; Setoffs Under General Obligations Law § 15-108; Reductions to a Lost Earnings Claim in Certain Malpractice Actions; Collateral Sources and No-Fault Insurance; Periodic Payments of Future Damages Awards: An Overview of CPLR Articles 50-A and 50-B; Interest on Damage Awards and Money Judgments; Preparing and Entering Judgments and Bills of Costs in New York; Appellate Considerations for Post-Trial Motions to Set Aside a Jury Verdict; Post-Trial Motions: A View from the Bench.

Authors

Brendan F. Baynes, Esq.; Eileen E. Buholtz, Esq.; J. Peter Coll, Jr., Esq.; Gary A. Cusano, Esq.; Barbara Decrow Goldberg, Esq.; Joseph M. Hanna, Esq.; Richard A. Jacobsen, Esq.; Matthew S. Lerner, Esq.; Justice Sallie Manzanet-Daniels; Thomas J. Maroney, Esq.; Michael F. Perley, Esq.; Carl J. Schaerf, Esq.; Saul Wilensky, Esq.

EDITOR-IN-CHIEF

Dennis P. Glascott, Esq.

PRODUCT INFO AND PRICES

2010 / 242 pages, looseleaf / PN: 4175

Order Now!

$60 Nonmembers
$45 Members

** Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

***Discount good until July 1, 2011.**

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB1094N

NYSBA

NYSBA
NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE & 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