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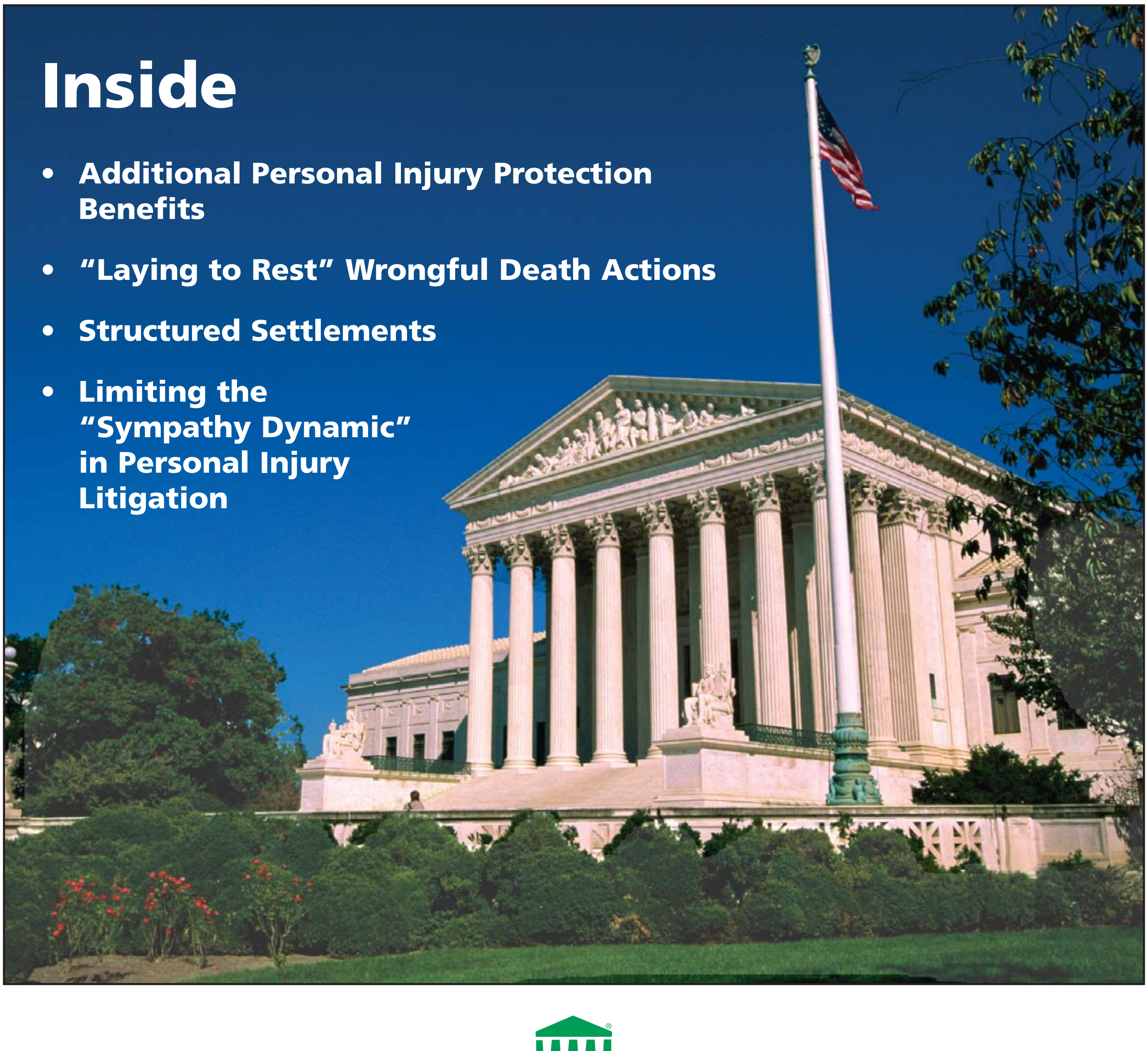

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A View from the Outgoing Chair

Dear Members,

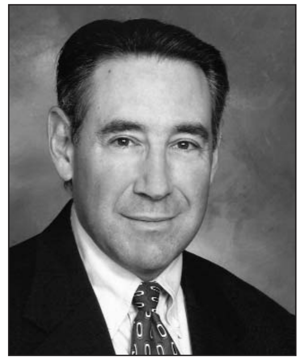
As I conclude my term as Chair of this great Section, I will look back with fondness and pleasure for the great year that we had. We highlighted our Section and the role our Section plays with the New York State Bar Association throughout the year in numerous events that our Section conducted. We increased our membership and I believe we increased awareness for those across the state practicing in the area of law related to torts, insurance and compensation of the benefits of being a member of this Section. No doubt our meetings at Gurney's Inn and, significantly, in Ireland where we had record attendance and fantastic CLE presentations while taking in the beauty of Ireland will not be forgotten by those who attended.

At the Annual Meeting, we were pleased to have with us a distinguished guest—Congressman Peter T. King, Chairman of the House Committee on Homeland Security. Congressman King gave an excellent speech to those who were in attendance that night at Tavern on the Green. A special acknowledgment to Tom Maroney and Tim Gallagher for co-chairing the Annual Meeting in New York City, and I thank those who participated and spoke at the meeting as well. On that night, the Hurwitz Award was given to Tony Martine; Ed Flink and Dennis McCoy were the recipients of the Leach Award; and Dennis Glascott was presented with the Chair of the Year Award.

Finally, it is with great pride that I hand over the gavel of chairing this Section to Paul Suozzi. No doubt, Paul will have an immediate impact on this Section putting into place his leadership and vision for the upcoming year. He will be supported by our Vice Chair—Gary Cusano—and our Secretary—Dan Gerber. We know that Paul will be able to count on the Executive Committee of this Section and we look forward to working with Paul in what should be an exciting year for the TICL Section.

Douglas J. Hayden

A View from the Incoming Chair



A Commitment to Service

As the first quarter of my term as Section Chair is nearing completion, I find myself thinking about how our Section serves both members and non-members who practice law in New York. I have been a member of the Executive Committee for nearly ten years. During that time I have served with dozens of people from across the state. Some are no longer members of the Executive Committee, but a surprising number joined long before me and continue to serve. We are a collegial group. Our meetings always include opportunities to socialize and be entertained. But the common thread that binds us together is the commitment to serve the bar.

Let me take a moment to review what our Section has already accomplished this year.

At the end of January we celebrated at our annual dinner where we honored past Chairs and others who have ably served the Section. At our Executive Committee meetings in January and April we considered legislation affecting our practices. A report on proposed changes to CPLR 4545, authored by Jim O'Connor, Chair of our Laws and Practices Committee, was circulated and reviewed by Executive Committee Members. Our report supporting those changes has been sent to the NYSBA. These changes will provide that only statutory rights of reimbursement (such as Workers' Compensation and Social Security liens) will be an exception to the collateral source rule. This will effectively prohibit health care insurers' equitable subrogation in tort actions, unless they can obtain a statutory right to do so. This will make settling personal injury actions much easier for the litigants and counsel.

The Executive Committee has reviewed and reported on a proposed change to the CPLR to allow a notice in lieu of subpoena for compelling trial testimony of parties. Since the proposal codifies the common practice of mailing subpoenas to opposing counsel, this change was overwhelmingly recommended. Our Section's approval of the measure was sent to the NYSBA for its consideration. An *ad hoc* committee of the Executive Committee is also considering a proposal to legislate mandatory dram shop coverage.

(Continued on page 4)

A View from the Incoming Chair *(Continued from page 3)*

The seminar "Law School for Insurance Claims Professionals," sponsored by our CLE Committee, was a resounding success. It was held in Melville, New York City, Syracuse and Buffalo. Given the very positive feedback, we expect this to become a regular event.

Numerous other CLE programs sponsored by our Section have been held throughout the state on subjects such as automobile liability, insurance law, premises liability and civil practice. These programs are often chaired by members of our Executive Committee, who work in cooperation with our Section CLE Committee. The consistently high quality of these programs makes them a popular choice for attorneys to fulfill their CLE requirements.

Publications like the *TICL Journal* provide articles and updates on the areas of law practiced by our members. The Section website offers case note updates in various subject areas. These publications are another example of how members of our Section serve other members and the bar in general.

We also know how to have fun. At our spring Executive Committee meeting on April 19, 2006 at Shea Stadium we conducted our business meeting and then enjoyed the Mets vs. the Braves on a beautiful sunny day. We were treated to a classic pitcher's duel between Tom Glavine and Tim Hudson. With both pitchers going the distance and few base runners, the game was completed in less than two hours, a very rare occurrence nowadays. While the Braves won, 2-1, the Mets had the chance to hit a game winning homer in the bottom of the ninth inning, which kept us in our seats until the last out.

Our Fall Meeting this year will be held on September 28 through October 1, 2006 at The Sagamore Resort in Bolton Landing, NY on Lake George. This is a first-class resort with entertainment opportunities for the entire family. The outstanding golf course, designed by renowned architect Donald Ross, will challenge and delight those who play. Visit the TICL website at http://www.nysba.org/ticl for more details.

I encourage you to become one who serves the bar by joining a Section committee, writing an article for the *TICL Journal*, speaking at a CLE seminar and attending our general meetings. If you are not a member, please join. Contact our Membership Chair:

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Paul J. Suozzi

Additional Personal Injury Protection (APIP) Benefits—Not for the Faint at Heart

By Gregory V. Pajak and Kevin E. Loftus

Introduction

An automobile insurance carrier should be very wary when considering its ability to obtain reimbursement via subrogation for APIP benefits paid. While an insurance carrier has a subrogation right against a tortfeasor to recoup such payments, as this article will explain, such a recovery can be illusory and, in many instances, is terminated before an APIP payment is even made. Plaintiff's attorneys and defense counsel representing insureds should also be very cautious in handling cases where APIP benefits are a factor. The practitioner, either plaintiff or defense, may believe a case is resolved. However, if an APIP issue is not addressed properly, a case all parties thought to be settled may not be. APIP issues can unravel a settlement resulting in a continuation of litigation and unfortunately serve as a potential fertile ground for attorney malpractice.

> *"A major difference between the PIP and APIP endorsements . . . is that APIP is potentially reimbursable to the insurer while PIP, except in limited circumstances, is not."*

Background of APIP

When the no-fault statute was created in 1973, New York State was looking to reform a system that was in dire need of change. Personal injury claims arising out of motor vehicle accidents were increasing at an alarming rate, sending insurance premiums skyrocketing. In an effort to curtail this near crisis, the legislature of New York enacted the No-Fault Law.[1] No-fault insurance, which was required for all New York drivers, provided for the "prompt disposition of claims and a swift resolution of priority obtainment issues."[2] Many of the claims which would have been litigated in the past due to questions regarding who was at fault would be disposed of rather quickly. The goal was to have a large percentage of litigation regarding motor vehicle claims resolved regardless of fault.

The No-Fault Law of New York State provides mandatory insurance coverage for any person involved in a motor vehicle accident. Any accident victim will be covered for "basic economic loss" up to $50,000.[3] Under the Insurance Law, "basic economic loss" includes medical expenses, loss of earnings, and any other reasonable and necessary expenses arising out of the accident.[4] These benefits are commonly called "no-fault payments" or "personal injury protection benefits" (PIP).

A year after the institution of the no-fault statute, the Superintendent of Insurance enacted the "Additional Personal Injury Protection (APIP)" endorsement.[5] This endorsement, which gave insureds the option for more coverage, contained mandatory language to be included in any automobile insurance policy issued in the State of New York. Insureds who opted for APIP coverage would be covered for any "extended economic loss," i.e., economic loss above and beyond "basic economic loss" that is referred to in the mandatory PIP endorsement.[6] Thus, like basic PIP, APIP provides an insured with additional coverage for medical expenses and/or lost wages.

A major difference between the PIP and APIP endorsements, which will be the focus of this article, is that APIP is potentially reimbursable to the insurer while PIP, except in limited circumstances, is not. Indeed, basic PIP paid out under the mandatory endorsement is rarely recovered by the carrier. In only extreme limited circumstances is a carrier even permitted to recover basic PIP payments.

One example is under Insurance Law § 5105 where an insurer pays PIP due to the negligence of a vehicle weighing more than 6,500 pounds or a vehicle used in the transportation of people for hire.[7] If one of the vehicles involved in the accident fits either of these categories an insurer has a right of recovery. The only other circumstances where PIP payments are recoverable are in accidents involving a "covered person" versus a "non-covered person." Insurance Law § 5102(j) defines a "covered person" as any pedestrian injured through the use or operation of a motor vehicle or any owner, operator, or occupant of a motor vehicle which has in effect the financial security requirements required by New York State Law. This would include most passenger vehicles within the state. Common exceptions would be farm vehicles and motorcycles. Another exception would be a tortfeasor involved in an automobile accident that is not a vehicle at all, such as a municipality where there is an allegation of negligent road maintenance. These would be examples of "non-covered persons." Thus, in a case between a "covered person" and a "non-covered person" Insurance Law § 5104 gives the no-fault carrier a right to sue for reimbursement and it has a lien on the plaintiff's recovery.

In direct contrast with the limitations on PIP recovery by the insurers is the mandatory APIP endorsement which was included in the regulations, which appears to grant broad recovery rights through subrogation to obtain reimbursement of APIP benefits paid. This mandatory subrogation clause states:

> In the event of any payment for extended economic loss, the company is subrogated to the extent of such payments to the rights of the person to whom, or for whose benefit, such payments were made. Such person must execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing to prejudice such rights.[8]

As expected, the creation of this new system brought along new problems and disputes. Recently, these have focused on the area of subrogation or reimbursement for APIP benefits paid.

The common law doctrine of equitable subrogation allows the insurer to stand in the shoes of the injured party already connected in some way to the carrier and gives insurers the same rights that its insured would possess. Subrogation in theory attempts to prohibit a "double dip" recovery by the plaintiff. For example, if an injured person recovers lost wages and medical from her APIP carrier, she should not be entitled to recover that amount from the tortfeasor. Subrogation requires the tortfeasor to reimburse the insurer for the damages he or she had caused. As soon as the first APIP payment is paid out, a right is created for the insurer to obtain recovery. Importantly, the plaintiff who received the APIP benefits has an obligation under the doctrine of subrogation to protect the APIP insurer's rights. This duty of the plaintiff to protect the APIP insurer's rights usually arises in settlement negotiations. This is because the execution of a general release by an insured who has received APIP benefits running in favor of the tortfeasor will terminate the subrogation rights of the APIP carrier. In a perfect world, a plaintiff who has received APIP would not enter into a settlement with the tortfeasor unless first notifying its APIP insurer. As its definition clearly states, subrogation allows the insurer to take on the rights of its insured and no more. Thus, a release could be fatal to an APIP carrier's right of recovery.

Since an APIP carrier's right of subrogation is derived from the insured's rights and subject to the same limitations and restrictions, this dynamic presented interesting questions for courts across the state as to when the statute of limitations for an APIP subrogation action began. If one adhered to the strict definition of subrogation, a right of recovery for APIP payments would always have a statute of limitations of three years and would always begin on the date of the underlying accident. A competing view was that the APIP carrier's right of recovery would exist when the cause of action accrued, i.e., when a payment was made. Initially, some Appellate Divisions held that an APIP insurer's right to recovery accrues not on the date of the accident, but on the date of first payment; others disagreed. This issue came to a head in January 2004 when the Court of Appeals ruled on *Allstate Ins. Co. ex rel. Walker v. Stein*.[9]

History of *Allstate v. Stein*

On May 24, 1995, the plaintiff, Amy Walker, was involved in a motor vehicle accident with the defendant, Daniel Stein. Ms. Walker was seriously injured and she collected PIP benefits from her no-fault carrier, Allstate. Ms. Walker also carried APIP coverage on her vehicle. However, it was not until June 29, 1998, that Ms. Walker's no-fault carrier, Allstate, made its first APIP payment to her as a result of the accident. Thus, Allstate's first APIP payment occurred three years and one month after the accident.

On November 20, 2000, Allstate notified the attorneys for Walker and the tortfeasor Stein that $42,000 had already been paid in APIP benefits and that Allstate had a subrogation right in order to obtain reimbursement for these benefits. A few months later, on February 20, 2001, counsel for Walker, Stein, and Allstate all appeared before Supreme Court Justice John Lane (J.S.C.) to place a $300,000 settlement on the record relative to the underlying bodily injury claim. Allstate, not a party to the action, appeared as a courtesy to all parties to settle its APIP claim. Importantly, all parties were aware that there was $1.1 million in coverage to settle all claims. On the record, it was stated that all parties were aware of Allstate's APIP subrogation right. Justice Lane even specifically stated, "all three parties are saying that they intend to fully enforce their rights to the full extent of the law and the defenses they may have." Shortly after that settlement conference, the attorney for Stein sent the plaintiff Walker a general release along with two settlement checks. One of the settlement checks was for $200,000 and was made out to "Amy Walker." The second check, for $100,000 was payable to Walker *and* Allstate Insurance Company. This was the tortfeasor's attempt to tie up loose ends with the APIP claim and walk off into the sunset. Walker retained the $200,000 check and returned the $100,000 check and filed a judgment for that amount against Stein. On May 4, 2001, Allstate commenced the action against the tortfeasor Stein seeking reimbursement of the APIP benefits paid to Ms. Walker.

In response to Allstate's action, the counsel for Stein immediately moved to dismiss Allstate's subrogation action based upon the statute of limitations defense. It was Stein's main contention that the time to bring any action for subrogation expired three years from the date of accident. The trial court ruled in favor of Allstate and dismissed Stein's motion. The Fourth Department reversed.[10]

The Fourth Department Decision

In a 3-2 decision, the Fourth Department stated Allstate's subrogation action was "governed by the same statute of limitations applicable to action number one, the personal injury action."[11] That court characterized Allstate's action as a "non-statutorily derived" subrogation action.[12] The court also adhered to the strict definition of "subrogation" and held that Allstate's claim was derivative of the underlying claim "with no enlargement or diminution of rights."[13] The Fourth Department also had a different view of accrual. The majority characterized the lower court's ruling that accrual occurred at first payment as "erroneous."[14] It was their opinion that this situation was entirely the fault of Allstate, in that Allstate should have known about this potential problem from the date of accident in 1995. In other words, Allstate should have been planning for APIP recovery long before any APIP payment was even made.

The Fourth Department also took issue with the lower court's reliance on so-called "statutory recoupment" cases, where the statute of limitations begins three years from the date of first payment. The majority refused to compare this set of facts to cases involving the Motor Vehicle Accident Indemnification Corporation (MVAIC) because, in their opinion, MVAIC was "purely a creation of statute," in contrast to APIP, which was considered optional. The Fourth Department, in its decision, specifically distinguished the Court of Appeals decisions of *MVAIC v. Aetna Casualty*[15] and *Aetna Life & Casualty Company v. Nelson*.[16]

The *MVAIC v. Aetna* case warrants further elaboration. In 1986, the New York State Court of Appeals was faced with essentially this same issue regarding the statute of limitations and its accrual in the area of no-fault payments. In *MVAIC,* the Court stated that the statute of limitations in an action by MVAIC to recover no-fault benefits paid is three years and begins to run upon the initial payment of those benefits.[17] In *MVAIC*, the plaintiff sought confirmation of an arbitration award ordering the no-fault insurer of the owner of a vehicle to reimburse MVAIC for benefits paid to injured passengers. At issue in the case was not only when the statute of limitations began, but whether or not the statute of limitations was the three-year limitation period for actions arising out of statutorily imposed or created liabilities or was it the six-year period for contract actions.

MVAIC contended that despite the statutory basis for its obligations and remedies under the no-fault system, the six-year contract action statute of limitations (CPLR 213(2)) was applicable because MVAIC had stepped in to fulfill an insurance carrier's obligations under its contract of insurance covering the accident, i.e., the payment of first-party benefits to the insured passengers in that vehicle.[18] MVAIC argued that CPLR 213(2) governed because its rights against that carrier were grounded in quasi-contract indemnification.

In contrast, Aetna, the insurance carrier for the vehicle, contended that the applicable statute of limitations was set forth in either CPLR 214(2), the three-year statute of limitation period arising out of liabilities created or imposed by statute, or CPLR 214(5), a three-year limitation period for actions to recover damages for personal injury. In either case, Aetna maintained that MVAIC's right to recover payment of no-fault benefits was in the nature of subrogation and thus MVAIC could only assert the rights each injured party was entitled to assert against the primary insurer. Aetna's position was since the covered party's claim arose as a result of the injuries sustained in the accident, MVAIC's cause of action accrued upon the date of accident.

After examining New York State public policy and applicable case law, the Court of Appeals concluded that MVAIC was entitled to recover payments of no-fault benefits from the primary insurer and that the three-year limitation period of Section 214(2) of the CPLR controlled, since the liability was created or imposed by statute.[19] The Court of Appeals further stated that the statute of limitations began to run against MVAIC upon the initial payment to the claimant.[20] The Court stated that a statute of limitations is triggered once a cause of action accrues. The Court reasoned that a cause of action accrues "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court."[21] The Court's reasoning appeared to be that when MVAIC made its first payment to the claimant, it was only at that point that all of the facts necessary to afford MVAIC a right to recovery were in existence.

The Court in *MVAIC* relied heavily on the opinion of *Aetna Life*, which was also decided in 1986. In *Aetna*, the issue involved Aetna's attempt to recoup first-party no-fault benefits that it had previously paid to its insureds by enforcing a statutory no-fault lien against that portion of the damages Aetna's insureds received as settlement, which represented reimbursement for losses paid by Aetna under Insurance Law § 5104(b).

Once again, the Court of Appeals was faced with two issues in *Aetna*. Initially, the Court of Appeals had to determine whether or not the statute of limitations was three years pursuant to CPLR 214(2), dealing with liabilities created or imposed by statute. In engaging in this analysis, the Court stated that CPLR 214(2) only governs liabilities that would not exist but for a statute.[22] It does not apply to liabilities existing in common law which have been recognized or implemented by statute. The Court then examined the insurance law and no-fault scheme it created and concluded that no-fault modifies the common law system of reparation for personal injuries under tort law since first-party no-fault benefits are a form of compensation unknown to common law resting on predicates independent of the fault or negligence of the injured party and thus No-Fault Law cannot be held to codify common law principles.[23] Instead, no-fault creates new and independent statutory rights and obligations in order to provide a more efficient means for adjusting financial responsibilities arising out of the automobile accidents. Thus, the option available to the insured to recoup amounts paid as first-party benefits, as Aetna was trying to do, created new liabilities subject to three-year statute of limitations of CPLR 214(2).

After holding that the applicable statute of limitations was three years based on CPLR 214(2), the Court of Appeals noted that the question was not when the lien belonging to Aetna first attached, or when the insurer could have established the lien, but when the insurance company first had the opportunity to enforce or foreclose the lien and actually recover from the defendants the amounts it had previously paid to them as first-party benefits under the No-Fault Law.

The Court ultimately held that Aetna's time to commence its action was when it had its opportunity to enforce the lien. This holding, along with the Court's holding in *MVAIC*, essentially stated that where reimbursement for no-fault benefits is sought, the statute of limitations is three years from the date the cause of action accrues or, in other words, when all of the facts necessary to that cause of action have occurred.

The majority of the Fourth Department in *Allstate* also chose to disregard the Third Department case of *Cardinell v. Allstate Insurance Company*.[24] The Fourth Department stated that the Third Department in *Cardinell* erroneously relied on a statutory recoupment case in its decision. The Third Department in *Cardinell* held an insurer's subrogation claim arising out of APIP payments accrues on the date of first payment. The Third Department also relied heavily on the Court of Appeals decision in *MVAIC.*

The dissenting opinion of the Fourth Department in *Allstate* adhered to the reasoning of *MVAIC*, *Aetna* and *Cardinell* and agreed with the lower courts ruling that Allstate's action was timely commenced. The dissent based its opinion on the general principal that "a cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court."[25] This definition of accrual, the dissent points out, is not simply limited to statutory recoupment cases, but to all cases.

The dissent at the Fourth Department provided an excellent description of the paradox which APIP insurers must face. If Allstate's right of subrogation is dependent on an APIP payment, how can its statute of limitations begin to run before any such payment is ever made? The majority's proposal that Allstate should have commenced a preemptive subrogation action would be "a waste of judicial resources"[26] according to the minority, not to mention a logistical nightmare for insurers all over the state.

The Court of Appeals Decision

Allstate appealed as of right to the Court of Appeals. In a unanimous decision, the Court of Appeals affirmed the Fourth Department's holding stating that the statute of limitations began to run on the date of accident and not the date of first payment.[27] Within its opinion, the Court carefully distinguished *Allstate*'s set of facts from those of *MVAIC* and *Aetna*'s. What *Allstate* was ultimately decided on was whether or not the APIP subrogation right asserted by Allstate was a "creature of statute."[28] If it was, *MVAIC* and *Aetna* would apply and the statute of limitations would begin at first payment. The Court stated however that the *Allstate* case was different from *MVAIC* and *Aetna* because it involved a "traditional equitable subrogation, not a liability created by statute."[29]

In its brief and at oral argument, Allstate based a large part of its reasoning on the fact that APIP benefits were created solely through New York State Insurance Regulations. Allstate referred specifically to the additional personal injury protection endorsement which is set forth at 11 N.Y.C.R.R. § 65-1.3. This endorsement contains mandatory language to be included in any automobile insurance policy issued in the State of New York.

Allstate further argued that as a result of these insurance regulations, a subrogation right had been created which previously did not exist in common law which allows the insurance carrier which pays out APIP benefits to be subrogated to its insured and to obtain reimbursement from the tortfeasor responsible for the loss. Just as in the Court of Appeals cases of *MVAIC* and *Aetna*, the liability and this particular right of subrogation only existed because of the No-Fault Law and this is an obligation created by statute and is therefore governed by CPLR 214(2) for APIP benefits. Despite the fact that Allstate's subrogation right in *Walker v. Stein* was created by regulation, the Court of Appeals still refused to acknowledge that it was statutorily derived, instead referring to it in terms of basic common law subrogation. APIP has no basis in any statute and is only referred to in an Insurance Department Regulation.

The Court's reasoning was that the Insurance Regulation does not create a new right which did not exist at common law, but instead merely prescribes the form of a clause that declares Allstate's pre-existing right. The Court stated that even if there was no applicable regulation or clause in an insurance policy the right of subrogation would still exist. The doctrine of subrogation has been around for years and was not, in the words of the Court, "a recent invention of the Insurance Department."[30]

According to the Court, the situation Allstate was faced with was one of the risks inherent with subrogation. Subrogees are limited to only what rights the subrogors possess. If the subrogee's claim is defeated by a subrogor's action or inaction, as was the case with Allstate, the Court of Appeals states that it is just one of the risks it signed up for.

The Court also supported the Fourth Department's holding that Allstate should have somehow "insisted" on the resolution of its claim during the underlying personal injury settlement.[31] The Court did not explain, however, how an APIP insurer is supposed to insist on a settlement when technically it is not even a party to the underlying lawsuit. The Court ignored the fact that Allstate was not even required to be at the settlement table in the lower court and was only there as a courtesy.

Impact of *Allstate v. Stein*

The Court of Appeals decision in *Allstate v. Stein* prejudices all insurance carriers in their ability to obtain reimbursement for any APIP benefits paid. Clearly, the Court of Appeals recognized Allstate's reimbursement right. It did not deny its existence. However, according to the Court in *Walker v. Stein*, Allstate should have somehow attempted to obtain reimbursement for monies it had not yet paid out from the tortfeasor in the underlying bodily injury action. The Court did not explain how Allstate was to do this. It goes without saying that it would have been problematic for Allstate to attempt to obtain reimbursement from the tortfeasor and his or her insurance carrier for amounts which had not been expended in the form of APIP benefits while Allstate had a ripe APIP claim. How does a carrier facing an approaching statute of limitations, which had not yet made an APIP payment when it was obvious it would occur, "insist on a settlement of its case?" It would have been interesting indeed had State Farm, the tortfeasor carrier in *Allstate*, agreed to settle with Allstate for a hypothetical or potential APIP subrogation claim. How likely would it be for that to occur? Not very. No insurance carrier is going to settle a claim which may, in fact, never materialize. Yet, that is what the Court of Appeals seems to suggest Allstate and, presumably, any APIP carrier do. The Court also appeared not to realize that an APIP reimbursement claim is against the *tortfeasor* and not the APIP insured. It is not a lien on the APIP insured/plaintiff's recovery.

Therefore, an APIP carrier faced with an uncooperative plaintiff's attorney and tortfeasor carrier will not be in a position to insist on anything. If its cause of action is still alive, it can commence its own action as Allstate did in *Allstate v. Stein*. Naturally, if no payment has been made and the hoofs of the statute of limitations are close enough to be heard, there is little the APIP carrier can do in light of *Allstate v. Stein*.

With its decision in *Allstate*, the Court of Appeals has greatly impacted the area of APIP subrogation, leaving insurers with more questions than answers. The most obvious question insurers will have is: What is the value of a right of recovery if it expires before payment is even made? What could Allstate and other APIP insurers have done to guarantee reimbursement? The Court in *Allstate*, while referring to the Fourth Department opinion, stated that Allstate "failed to insist on the resolution of its subrogation claim against the tortfeasor for APIP payments as part of a global settlement of the personal injury claims."[32] This could appear to give APIP insurers the option of commencing an action within three years from the date of accident and before an APIP payment is ever made. An action such as this could perhaps take the form of a declaratory matter and request that a court determine that the APIP insurer does, in fact, have a right for reimbursement. Of course, such an action would face arguments that it was not ripe or that there was no judiciable controversy. In a hypothetical scenario where PIP payments were at $45,000 and a three-year statute of limitation is winding down, it would be wise and essential for the APIP insurer to commence an action for APIP recovery. If any attorney objected regarding the ripeness of such a claim, the APIP insurer now has *Allstate* to fall back on. Commencing an action, even before any APIP payment is made, is one way of "insisting on the resolution of its subrogation claim."[33] How else is an APIP insurer going to obtain reimbursement?

From a policy standpoint, APIP coverage as a whole will need to be re-evaluated by its providers. APIP coverage, which has always been seen as recoverable by the insurers, will now be regarded as somewhat of a gamble. This could ultimately raise premium rates and make APIP coverage more expensive. The *Allstate* decision should also force insurance companies to petition for a change in the law. Lobbying the Superintendent of Insurance for a change in the regulations or the New York State Legislature for an amendment to the CPLR could help solve this problem and curtail the commencement of potentially hundreds of declaratory actions by APIP insurers.

What alternatives are used and how insurance companies confront this problem remains to be seen. What is certain is that as a result of the *Allstate* decision, APIP insurers need to be alert and vigilant.

Lawyers, both plaintiff and defense, also need to be extremely cautious when handling any case where APIP benefits are an issue.

From the plaintiff's perspective, an attorney must be careful when settling the case to resolve any outstanding APIP issues. This is because an execution by the plaintiff of a general release in favor of the tortfeasor will extinguish any subrogation right which the APIP carrier may have against the tortfeasor. The regulation also requires an APIP recipient to protect the APIP carrier's subrogation rights. A plaintiff/APIP recipient who does not do so could find themselves a defendant in a subsequent lawsuit by the APIP carrier. Counsel for the plaintiff may also end up a named defendant as well.

For example, if plaintiff's counsel knows that his client has been receiving APIP benefits and is aware that the statute of limitation remains alive for the recoupment of APIP benefits by the APIP carrier, and if a case is settled without taking into consideration a resolution of the APIP issue, the APIP carrier may commence an action against both its insured and plaintiff's counsel. This is because the general release given to the tortfeasor prevents the APIP carrier from commencing its own action against the tortfeasor.

Plaintiff's counsel should also be very careful in resolving a case particularly when, as often happens, plaintiff's counsel takes responsibility for satisfying any "liens" or rights of reimbursement. While APIP certainly does not create a lien, it is a reimbursement right. A plaintiff's attorney which promises the tortfeasor, either in writing or on the record, to "take care of" a reimbursement right could potentially be held responsible for the APIP carrier's claim.

On the defense side, an attorney representing an insured defendant also must be very careful. Since the defense attorney's client is the insured and not the tortfeasor carrier, a defense attorney must keep in mind that any potential APIP claim would be against his or her client. If the tortfeasor carrier is paying its entire insurance policy to the injured party, then potentially the tortfeasor himself or herself would be personally responsible for any eventual APIP claim made by the APIP carrier. Defense counsel should make every effort, therefore, to resolve both a viable APIP claim when the underlying claim between the injured plaintiff and the tortfeasor is being negotiated.

In situations where the tortfeasor carrier is not paying its entire policy to the injured party, a defense attorney is not going to make a good impression on an insurance carrier client if he or she has to contact that carrier to advise that the APIP carrier has now started a lawsuit for APIP benefits in a case which the carrier thought was long resolved.

"A word to the wise would be to make an APIP issue known early and often in any underlying personal injury lawsuit."

Conclusion

In conclusion, APIP benefits are a complicating factor in every personal injury lawsuit. From the insurance carrier's perspective, APIP benefits provide a limited right of recovery vis-à-vis a tortfeasor. However, given the fact that the statute of limitations starts to run from the date of the underlying accident as opposed to first payment, such a right of recovery can, unfortunately, from the carrier's perspective, end before it has even begun. APIP insurance carriers need to be very proactive in resolving any APIP claim. A word to the wise would be to make an APIP issue known early and often in any underlying personal injury lawsuit. An APIP carrier should participate in any settlement discussions and advise the court of the existence of an APIP claim or potential APIP claim.

For the attorney, plaintiff's counsels must be very careful in resolving a case to make sure that he or she does not end up a defendant in a subsequent lawsuit with the APIP carrier. The defense attorney too must remember that his or her client is the insured and that a resolution of any bodily injury case against the client must also include a resolution of any APIP claim since such a claim would also be against the insured and if there is limited insurance coverage, the insured would be personally responsible in such a situation.

The key to navigating this minefield is vigilance. If one is aware of one's right and responsibilities in an APIP situation, the potential pitfalls can usually be avoided.

Endnotes

1. N.Y. Insurance Law § 5102.
2. *Motor Vehicle Accident Indemnification Corporation v. Aetna Casualty and Surety Company*, 89 N.Y.2d 214, 222, 652 N.Y.S.2d 584 (1996).
3. N.Y. Insurance Law § 5102.
4. *Id.*
5. N.Y.C.R.R. tit. 11, § 65-1.3.
6. N.Y.C.R.R. tit. 11, § 65-1.1.
7. N.Y. Insurance Law § 5105.
8. 11 N.Y.C.R.R. § 65-1.3.
9. 1 N.Y.3d 416, 775 N.Y.S.2d 219 (2004).
10. *Id.*
11. *Id.* at 974.
12. *Id.*
13. *Id.*
14. *Id.* at 975.
15. 89 N.Y.2d 214, 652 N.Y.S.2d 584 (1996).
16. 67 N.Y.2d 169, 501 N.Y.S.2d 313 (1986).
17. *MVAIC* at 222.
18. *Id.* at 220.
19. *Id.* at 221.
20. *Id.*
21. *Id.*
22. *Aetna* at 174.
23. *Id.* at 175.
24. 258 A.D.2d 853, 686 N.Y.S.2d 155 (3d Dep't 1999).
25. *Walker* at 977.
26. *Id.*
27. *Allstate* at 422.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

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Difficulties in "Laying to Rest" Wrongful Death Actions

By James P. Connors and Warren A. Herland

Each year in New York State literally thousands of actions are commenced and claims filed arising out of the death of an individual allegedly due to the negligent or intentional acts of others. Because of the almost routine nature with which such matters are litigated, one would think that the final resolution and formal court approval of such matters would also be routine. Unfortunately, this is not the case.

There is some uncertainty under New York law with regard to whether court approval is necessary in respect of the settlement of a wrongful death claim where the administrator, executor or other representative has simply been issued general or unlimited letters of administration.

The starting point then for any analysis of this problem as it relates to any particular case is to review the letters of administration, and the court decree upon which such were issued, to determine in the first instance whether such letters are restrictive and require by their terms the approval of any wrongful death settlement before it can be finalized.[1] If such is the case, court approval must obviously be obtained in order to complete the settlement. Conversely, if the letters affirmatively give the administrator, executor or other representative authority to settle wrongful death actions, without court approval, presumably, such approval would not be required.

The more difficult question is whether court approval must first be obtained where the administrator, executor or other representative is simply issued general or unrestricted letters of administration. In such case, the administrator, executor or other representative would, as a general proposition, be afforded all the powers afforded to fiduciaries under N.Y. EPTL 11-1.1. N.Y. EPTL 11-1.1(b)(13) states, in relevant part, as follows (emphasis added):

> (b) In the absence of contrary or limiting provisions in the court order or decree appointing a fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every fiduciary is authorized
>
> * * *
>
> (13) To contest, compromise or otherwise *settle* any claim *in favor of the estate*, trust or fiduciary or in favor of third persons *and against the estate*, trust or fiduciary.

"There is some uncertainty under New York law with regard to whether court approval is necessary in respect of the settlement of a wrongful death claim where the administrator, executor or other representative has simply been issued general or unlimited letters of administration."

This broad authority would seem then to confer authority on the administrator or executor to compromise a wrongful death claim without court approval. However, on the other hand, N.Y. EPTL 5-4.6(a) and (b), which specifically applies to the settlement of a wrongful death claim, appears to require that approval be obtained. It provides (emphasis supplied):

> (a) Upon the application of an administrator appointed under 5-4.1 or a personal representative to the court in which an action for wrongful act, neglect or default causing the death of a decedent is pending, *the court may*, after inquiry into the merits of the action and the amount of damages proposed as a compromise:
>
> (1) *Approve in writing a compromise for such amount as it shall determine to be adequate* and, except for good cause shown, transfer the action to the surrogate's court which issued the letters for determination of the issues of allocation and distribution of proceeds and related matters; or
>
> (2) Disapprove the application
>
> (b) The written approval by such court of the compromise is conclusive evidence of the adequacy of the compromise in any proceeding in the surrogate's court for the final settlement of

the account of such administrator or personal representative.

Under paragraph (a), the Surrogate's Court would have jurisdiction to approve a wrongful death settlement in a situation where no action is pending. Specifically, N.Y. SCPA 1813 permits a fiduciary to apply for authority to settle or compromise a claim either in favor of or against an estate. However, apart from such statutory provision, the case law also recognizes the right of an administrator, executor or other representative to apply to the Surrogate's Court for approval of a wrongful death settlement.[2]

There appears to be only one case in New York which has directly confronted the issue of whether court approval (either from the court in which a wrongful death action is pending or the Surrogate's Court) is required to finally settle a wrongful death action where the administrator has been issued general or unrestricted letters. In that case, *Bell v. Jolly*,[3] the court, finding the issue to be one of first impression, held that, with one exception, all settlements of wrongful death claims, whether by a representative with unrestricted authority or not, must be court approved in order to be finalized. The one exception, where court approval was not required, was when all the wrongful death beneficiaries or distributees were adults and each had executed a general release of their respective claims.[4]

In its decision, the Court in *Bell v. Jolly*[5] reasoned:

> *Plaintiff contends that, because she holds unlimited and unrestricted letters, she is empowered under EPTL 11-1.1 (b)(13) to settle the action without having to comply with EPTL 5-4.6 (a).*
>
> Although there is ample authority both in case law and in legal commentary supporting the general principle that a fiduciary with unrestricted authority may compromise, without court approval, any claim brought either by or against an estate *(Matter of Essenberg, 120 Misc.2d 993; Matter of Rappaport, 102 Misc.2d 910;* 9C Rohan, N.Y. Civ Prac ¶ 11-1.1 [19]; 37 N Y Jur 2d, Death, § 550, *plaintiff does not address the distinction between a wrongful death claim and a claim by or against an estate. A wrongful death claim, as defined in EPTL 5-4.1, exists for the benefit of the distributees of the decedent and is not a claim which belongs to the decedent's estate (Central N.Y. Coach Lines v. Syracuse Herald Co., 277 N.Y. 110).* A wrongful death claim is separate and distinct from the so-called survival action, which is an estate asset, brought under *EPTL 11-3.2* and *11-3.3*.
>
> Plaintiff refers to the claim which she has agreed to settle as a "wrongful death" claim and the pleadings confirm that classification. *The court has found only one area wherein judicial approval of settlement of wrongful death claims isunnecessary, namely where all the persons for whose benefit the action is brought (the decedent's distributees) are adults and where all such distributees execute general releases of their claims (Matter of Fortunoff, 167 Misc. 119; Matter of Finkelstein,1 Misc.2d 1067, affd 6 A.D.2d 1055.* In the instant case, decedentis survived by a wife and three adult children. There is no indication that these four distributees have separately released their claims so as to bring the case within this limited exception.

The Court, in short, found that the authority typically conferred in unrestricted letters to settle any claim in favor of the estate did not confer authority to settle, without court approval, a wrongful death claim because the latter claim was not a claim in favor of the estate but a claim directly for the benefit of the distributees. This decision in *Bell v. Jolly* was never appealed and the case itself has only been cited twice, in each case favorably.[6]

It may be noted that, while *Bell v. Jolly* as stated is apparently the only New York case to confront this issue directly, there is at least language in several other cases suggestive of the conclusion that court approval of wrongful death settlements is required in all cases (except where the distributees are all adults who have released their respective claims and perhaps where the letters otherwise affirmatively confer specific authority to settle wrongful death claims.). In *In re Seventh Judicial District Asbestos Litigation*,[7] for example, such Court notes generally that wrongful death claims are one of the few types of civil lawsuits, in the State of New York, that require court approval for resolution by settlement, another being an action commenced on behalf of an infant or a judicially adjudicated incapacitated person. Similarly, in *Pollicina v. Misericordia Hospital Medical Center*,[8] the Court of Appeals states, at one point, that it is the right *and obligation* of the trial court to evaluate and resolve the fairness and reasonableness of a wrongful death settlement.

On the other hand, there are numerous cases which assume that a fiduciary, with unrestricted letters, can settle a wrongful death claim, without specifically considering the possible conflict between N.Y. EPTL 11.-

1.1(b)(13) (unrestricted powers), on the one hand, and N.Y. EPTL 5-4.6(a) and (b) (court approval of wrongful death settlements), on the other.[9]

One might think some guidance could be gained from analyzing an analogous situation, that being the settlement of infants' claims. There is no ambiguity or question about the need for court approval of an infant's claim. CPLR 1207 makes it clear that such approval is mandatory and details how to conclude such a matter whether a formal action has been commenced or not.[10]

"[P]ending the introduction of . . . legislation, counsel would be well advised . . . to obtain court approval of wrongful death settlements where even the slightest question exists as to the extent of authority granted in the letters upon which the authority to commence such actions is based."

It would seem advisable, in light of the Court's decision in *Bell v. Jolly*,[11] to insist that the representatives, in settling any wrongful death claim, seek court approval of such proposed settlements, where such representatives have only general or unrestricted letters, from the applicable court having jurisdiction thereof, before considering such settlement binding. If such is not done, it is possible that such settlement could be held invalid, and set aside, were one or more of the respective distributees to challenge the adequacy thereof and were the reasoning of the *Bell v. Jolly* case, mandating court approval, then to be followed.

In that regard, it is in the interest of all such representatives, in any event, to seek approval not only of the total amount of any such settlement but the distribution thereof. This would involve both the apportionment of such settlement amount between the wrongful death claim and the survival claim, if any, and the apportionment of the settlement amount attributable to the wrongful death claim among the decedent's distributees.[12] It would appear that the only situations in which the defendants need not insist upon court approval is where all of the decedent's distributees are adults who have all released their claims or where the letters actually confer specific authority to settle wrongful death claims.

To make matters more complicated for counsel representing defendants in such actions, it should be noted that the defendants may not have standing as such to seek court approval of any proposed settlement. Their interests, among other things, are obviously adverse to that of the decedent's distributees. The only remedy that may be available is refusal to agree to the settlement absent such court approval.[13] In *Bell v. Jolly*, the defendants refused to complete the agreed upon settlement unless the administratrix first obtained court approval thereof. The administratrix moved for an order compelling the defendants to comply with the terms of the settlement. The Court denied such relief because, as noted, it agreed court approval of the settlement was mandatory and refused to force defendant's compliance without court approval of the underlying settlement.

Conclusion

Clearly, there exists uncertainty in New York State regarding the manner in which wrongful death cases should be formally concluded. The cleanest and most certain way to resolve this uncertainty would be clarification through legislative action. However, pending the introduction of such legislation, counsel would be well advised, where economically feasible, to obtain court approval of wrongful death settlements where even the slightest question exists as to the extent of authority granted in the letters upon which the authority to commence such actions is based. At the very least, counsel and clients should be aware of this troublesome issue and guide themselves accordingly.

Endnotes

1. *See* N.Y. SCPA 702(1). (McKinney's 2003).
2. *See Transit Casualty Company v. The Estate of Jay B. Rappaport*, 102 Misc. 2d 910, 424 N.Y.S.2d 675 (Sur. Ct., Nassau Co. 1980). *See also Pollicina v. Misericordia Hospital Medical Center*, 82 N.Y.2d 332, 604 N.Y.S.2d 879 (1993); *Conejero v. LaJam*, 190 Misc. 2d 393, 738 N.Y.S.2d 539 (Sup. Ct., Queens Co. 2002); *Estate of Franco*, 108 Misc. 2d 1084, 439 N.Y.S.2d 278 (Sur. Ct., Bronx Co. 1981) and *Estate of Alfred Elder*, 90 Misc. 2d 460, 395 N.Y.S.2d 337 (Sur. Ct., Suffolk Co. 1977), for general discussion of the interplay between, and the overlapping jurisdiction of, the Surrogate's Court and a trial court (i.e., Supreme Court, Federal District Court) in which an action for wrongful death is pending.
3. 173 Misc. 2d 273, 660 N.Y.S.2d 820 (Sup. Ct., Saratoga Co. 1997).
4. The Court in *Bell v. Jolly* did not consider the possibility that in some cases the letters themselves might affirmatively confer specific authority on the administrator, executor or other representative to settle wrongful death claims. In that event, arguably court approval would similarly not be required despite the provisions of N.Y. EPTL 5-4.6(a) and (b).
5. 173 Misc. 2d at 275-76; 660 N.Y.S.2d 822 (Sup. Ct., Saratoga Co.1997); (emphasis added).
6. *See Casey v. Ryder Truck Rental, Inc*., 2005 WL 1150228*17 (noting that the *Jolly* court found only one area wherein judicial approval of settlement of wrongful death claims is unnecessary, i.e., where all distributees are adults who have executed general releases of their claims) and *Stone v. CSX Transportation, Inc.*, 10 F. Supp.2d 602, 604-5 (S.D.W. Va. 1998) ("Unlike other types of estate claims, a wrongful death action exists for the benefit of the decedent's beneficiaries. * * * Consequently, court approval of settlements is a requirement in many state wrongful death statutes.").

7. 4 Misc. 3d 457, 460, 778 N.Y.S.2d 867, 869 (Sup. Ct., Monroe Co. 2004).

8. 82 N.Y.2d 332, 338, 604 N.Y.S.2d 879, 881 (1993).

9. *See, e.g., DelRossi v. Defendant V*, 6 Misc. 3d 454, 789 N.Y.S.2d 816, 823 (Sup. Ct., Suffolk Co. 2004) ("An estate fiduciary who prosecutes a wrongful death claim on behalf of the decedent's distributees and/or a survival action on behalf of the decedent's estate is free to compromise said claims absent restrictions imposed on the right to compromise by the appointing court").

10. Section 1207. Settlement of action or claim by infant, judicially declared incompetent or conservatee, by whom motion made; special proceeding; notice; order of settlement.

    Upon motion of a guardian of the property or guardian ad litem of an infant or, if there is no such guardian, then of a parent having legal custody of an infant, or if there is no such parent, by another person having legal custody, or if the infant is married, by an adult spouse residing with the infant, or of the committee of the property of a person judicially declared to be incompetent, or of the conservator of the property of a conservatee, the court may order settlement of any action commenced by or on behalf of the infant, incompetent or conservatee. *If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the infant, incompetent or conservatee in any court where an action for the amount of the proposed settlement could have been commenced*. Unless otherwise provided by rule of the chief administrator of the courts, if no motion term is being held and there is no justice of the supreme court available in a county where the action or an action on the claim is triable, such a motion may be made, or special proceeding may be commenced, in a county court and the county judge shall act with the same power as a justice of the Supreme Court even though the amount of the settlement may exceed the jurisdictional limits of the county court. Notice of the motion or petition shall be given as directed by the court. An order on such a motion shall have the effect of a judgment. Such order, or the judgment in a special proceeding, shall be entered without costs and shall approve the fee for the infant's, incompetent's or conservatee's attorney, if any.

11. 173 Misc. 2d 273, 660 N.Y.S.2d 2d 820 (Sup. Ct., Saratoga Co. 1997).

12. The State Tax Commissioner would be an interested party in that regard since the amount apportioned to any survival claim would be taxable to the estate. Similarly, creditors of the estate would also be interested parties. *See generally Pollicina v. Misericordia Hospital Medical Center*, 82 N.Y.2d 332, 604 N.Y.S.2d 879 (1993).

13. *See, e.g.*, *In re the Application of Dennis S. DeLong*, 89 A.D.2d 368, 455 N.Y.S.2d 896 (4th Dep't 1982).

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Can I Close This File? Partially Executed Stipulations of Discontinuance

By Julian D. Ehrlich

There comes a time in the life of every case when the attorney informs the client that the matter has resolved and legal action no longer need be a concern. Ideally, this is a moment of certainty and finality for attorney and client. Even if the terms of the resolution were less than favorable, at least there should be a benefit of getting on with life. However, nagging questions may linger, rendering an apparent outcome in doubt in cases involving partially executed stipulations of discontinuance.

Where the plaintiff discontinues with prejudice against one defendant but the remaining defendants refuse to discontinue, competing statues come into play. In such a case, the courts' application of CPLR 3217[a](2) and the General Obligations Law can cloud finality.

> *"Even if the terms of the resolution were less than favorable, at least there should be a benefit of getting on with life. However, nagging questions may linger, rendering an apparent outcome in doubt in cases involving partially executed stipulations of discontinuance."*

CPLR 3217[a](2) provides that a claim may be discontinued without an order by filing a "*stipulation signed by attorney's of record for all parties* (emphasis added)."

GOL § 15-108 is entitled "Release or covenant not to sue." Section (b) of that statute precludes a claim for contribution against a settling tortfeasor, while section 15-108(c) precludes a settling tortfeasor from seeking contribution from a non-settling tortfeasor.

In other words, pursuant to the GOL, cross claims and third party claims for contribution are barred after settlement.[1]

On its face any stipulation of discontinuance that does not comply with the CPLR would appear ineffective. Thus, defendants who refused to sign these stipulations could expect to pursue their cross claims. Similarly, defendants who were beneficiaries of plaintiffs' change of heart could expect to remain participants actively defending their clients.

Since this scenario involves discontinuance without payment or consideration, plaintiff has not settled in the conventional sense and no release would be issued customarily.

Accordingly, practitioners may be surprised to learn that, while there is a dearth of cases on the topic, notable decisions have applied GOL § 15-108 to bar cross claims in such cases. (Those familiar with the plethora of uncertainties generated by the GOL[2] may be more dismayed than surprised.)

For example, in *Hanna v. Ford Motor Co.*,[3] the Second Department held that a partially executed stipulation signed only by plaintiff had the effect of a release and thus barred cross claims against the defendant named in the stipulation.

Decided in 1998, *Hanna* attracted little attention and has been cited infrequently. Nonetheless, *Hanna* may yet necessitate change to the way practitioners approach closing documents. Pursuant to the doctrine of *stare decisis*, all trial courts are required to follow the Second Department's precedent in *Hanna* until the Court of Appeals or another Department issues a contrary ruling.[4]

In that case, Mr. Hanna originally brought a products liability claim against Ford Motor Company, the manufacturer of the vehicle in his accident, and negligence claims against Lockwood Lumber Sales Corp., the owner of the loss site, and Yonkers General Hospital, where he was treated.[5] However, plaintiff subsequently had a change of heart and discontinued against Ford without any payment or consideration.[6] The remaining defendants did not discontinue their cross claims and did not sign the stipulation.[7]

In dismissing the cross claims for contribution by Lockwood and Yonkers General against Ford, the Court stated "[n]otwithstanding the failure of the stipulation to conform to CPLR 3217, it was intended to release Ford from the action and constitutes a release within the meaning of GOL § 15-108 (citations omitted)."[8]

What interest did the plaintiff have in cross claims by the remaining defendants after he discontinued against Ford? If the plaintiff had intended to release Ford, couldn't those two parties have settled for one dollar? Indeed, pursuant to GOL § 15-303, the plaintiff could have also issued a release without any consideration.

The Court in *Hanna* also noted in *dicta* that "[i]n any event, the respondents have not submitted sufficient evidence of an alleged design defect in the van to oppose Ford's motion for summary judgment on the merits."[9]

Would the result be different if there was ample evidence submitted to support the cross claims for contribution?

Would the result be different if the remaining defendants had commenced a third party claim instead of only relying on their cross claims?

The 2005 case of *Dembitzer v. Broadwall Management Corp.*[10] discussed the third-party claim question at length. As in *Hanna*, the plaintiff in *Dembitzer* voluntarily discontinued a products liability claim with prejudice against one defendant without consideration.[11] The remaining defendants discontinued their cross claims without prejudice but then started a third-party action against the discontinued defendant.[12]

In *Dembitzer,* Civil Court Judge Engeron, citing *Hanna*, dismissed the third party claims, bluntly stating, "[a] discontinuance with prejudice acts as a release, plain and simple."[13] Indeed, the court thereafter referred to the stipulation as a release and described the traditional practice of separate closing documents as "belt and suspenders."

Do releases and stipulations of discontinuances serve different purposes or is the established practice of providing both a meaningless redundancy?

In addition to finding a stipulation of discontinuance and a release synonymous, Judge Engeron in *Dembitzer* also found no difference between those documents and the "covenant not to sue." Interestingly, the "covenant not to sue" is referenced in the title of GOL § 15-108 and section (a), which deals with the set off, but not in sections (b) and (c), which deal with contribution claims.

Also remarkable is that the plaintiff in *Dembitzer* opposed the motion for summary judgment by the discontinued defendant. However, the *Dembitzer* court explicitly rejected "as a matter of philosophy" the very plaintiffs' intent that the Court in *Hanna* found important.

Also noteworthy is that Judge Engeron parenthetically found that pursuant to CPLR 3217(b), without motion courts can simply order the remaining defendants to discontinue with prejudice.

In addition, while GOL § 15-108(a) and (b) speak of "injured persons" and "tortfeasors," the court in *Dembitzer* considered three cases applying CPRL 3217(a)(2) outside the personal injury context.

For example, *Barclays Bank of New York N.A. v. M&M Electronics Associates, Inc.*[14] involved settlement with two of six named defendants in an action relating to a default on a promissory note. In *Barclays*, the Third Department found that a stipulation of discontinuance was merely "technically defective because it is signed only by counsel for plaintiff." Moreover, that technicality was "of no moment for no prejudice accrued to the" remaining defendants and thus the stipulation did not affect the cross claims asserted by the defendants who did not sign.[15]

"Do releases and stipulations of discontinuances serve different purposes or is the established practice of providing both a meaningless redundancy?"

Also, in *Cohen Swados Wright Haninfin Bradford & Brett, LLP v. Frank R. Bayger*,[16] which involved a dispute over attorney's fees, the Fourth Department, citing *Barclays,* held that a stipulation of discontinuance not signed by all parties violated CPLR 3217(a)(2) but was "of no consequence because they have failed to show that they were prejudiced thereby."

However, in *C.W Brown v. HCE, Inc.*,[17] in 2004 the First Department questioned the *Barclay* decision stating, "[w]e do not necessarily embrace the holding of the Appellate Division, Third Department . . . because it overlooks a substantive requirement of CPLR 3217(a) and relegates its violation to a technical defect." The *C.W. Brown* holding then found prejudice to the defendant who did not sign and held the partially executed stipulation of discontinuance was properly rejected.[18]

Is the requirement that all parties sign a stipulation a technicality or a substantive requirement?

The reference in CPLR 3217(a)(2) to "all parties" notwithstanding, stipulations of discontinuance not signed by all parties have been held enforceable in the context of third party actions. In *Gonzalez v. United Parcel Service,*[19] the First Department held that neither a plaintiff's signature nor consent is required for a stipulation discontinuing a third party action since "plaintiff was neither a party nor interested in its subject matter."

Also, stipulations of discontinuance without prejudice do not preclude reinstitution of suit, thus, not are "within the ambit of GOL § 108" and have no effect on cross claims.[20]

Regardless of plaintiffs' arguably academic interest in taking a position on a motion to dismiss cross claims, as a practical matter any uncertainty of cross claims viability will complicate plaintiff's chance of potential settlement with the remaining defendants.

A related and compelling question that more directly involves plaintiffs is, if CPLR 3217(a)(2) is not going to be strictly construed, can they reinstate claims discontinued with prejudice where one or more defendants never signed the stipulation?

Usually when a client asks his or her attorney whether the case is over, the question can be directly answered yes or no. But as the above discussion illustrates, when remaining defendants refuse to discontinue cross claims, more elaborated explanation will be necessary. Understanding the current state of the law and the available arguments must guide parties assessing risks and determining strategy.

Endnotes

1. The GOL does not bar either contractual indemnity (*Glaser v. M. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 646, 529 N.Y.S.2d 59, 60 (1988)) or common law indemnity claims (*Williams v. New York City Health and Hospitals Corp.*, 262 A.D.2d 231, 694 N.Y.S.2d 355 (1st Dep't 1999)).
2. *See, e.g.*,"The Risky Business of Settling Out" by Julian D. Ehrlich, *New York Law Journal*, September 14, 2005.
3. 252 A.D.2d 478, 675 N.Y.S.2d 125 (2d Dep't 1998).
4. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep't 1984).
5. 252 A.D.2d 478, 675 N.Y.S.2d at 126 (2d Dep't 1998).
6. *Id.* at 127.
7. *Id.*
8. *Id.*
9. *Id.*
10. 6 Misc. 3d 1035 (J. Engeron , N.Y. Civil Court 2005).
11. *Id.*
12. *Id.*
13. *Id.*
14. 185 A.D.2d 580, 582, 586 N.Y.S.2d 384, 386 (3d Dep't 1992).
15. *Id.*
16. 269 A.D.2d 739, 742, 703 N.Y.S.2d 319, 323 (4th Dep't 2000).
17. 8 A.D.3d 520, 522, 779 N.Y.S.2d 514, 515 (2d Dep't 2004).
18. *Id.*
19. 272 A.D.2d 129, 709 N.Y.S.2d 390 (1st Dep't 2000).
20. *Frost v. County of Rensselaer*, 220 A.D.2d 969, 632 N.Y.S.2d 702 (3d Dep't 1995).

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The Jury Has Reached Its Verdict. What Now?

By Matthew Lenhard

Few civil cases reach trial. Fewer still get to the point of a jury verdict. For those that do, the battle is not yet over. A number of issues must be addressed before a judgment may properly be entered. It is the intent of this article to discuss a number of the issues, but surely not all, that must be resolved prior to entering a final judgment. Those issues include post-trial motions, interest considerations, the application of the collateral source rule, and the application of Article 50-B of the CPLR.

Post-Trial Motions

Article 44 of the CPLR governs the motions that may be made after a jury has rendered its verdict. Pursuant to CPLR 4404(a), either party may move to set aside the jury's verdict, request an order directing judgment in favor of either party, or, in the alternative, request that a new trial be held on any issue. Trial courts may grant such relief when the jury's verdict is contrary to the weight of evidence in the matter, where the jury members cannot agree on a verdict, or in the interests of justice. In addition to an oral motion immediately following the jury's verdict, the CPLR provides that any party may bring an additional motion in writing. However, only one such motion is permitted and the motion must address all grounds for the relief requested.[1] In addition, CPLR 4405 provides a relatively short time period for bringing such motions—15 days. In light of the possible difficulties in obtaining trial testimony transcripts, and the significance of such motions, it is often advisable to request additional time to bring such motions on the record immediately following the jury's verdict. It is not uncommon for trial courts to permit 30 to 60 days for motions that affect the final judgment.

In addition to motions to adjust the jury's verdict, it may be necessary to move post-verdict to amend a party's pleadings to conform to the proof offered at trial. For example, if one defendant has settled with the plaintiff during the pending trial, the non-settling defendants should move to amend their answers to include a defense pursuant to General Obligations Law § 15-108. Such a defense grants non-settling defendants a reduction in the jury's award in an amount equal to the greater of the amount of the settlement reached, or the percentage of liability assessed by the jury to the settling defendant. To be entitled to the offset, the defense must specifically be pled.[2] Motions to amend a party's answer to include a General Obligations Law § 15-108 defense are to be freely granted post proof, and even post verdict, absent a showing of substantial prejudice.[3] The amount of the General Obligations Law § 15-108 offset shall then be determined at a hearing outside of the presence of the jury.

The parties should also move to amend their pleadings to include any other defenses or causes of action that arose during the trial that must be specifically pled, such as the failure to mitigate damages or the application of collateral source rule.[4]

Interest Considerations

A jury verdict and judgment also raises several issues with respect to the interest to which the plaintiff may potentially be entitled. Three sources of interest are most often discussed—interest from the date the cause of action accrues until verdict, interest between the date of the verdict and the filing of the judgment, and post-judgment interest. These issues are addressed by CPLR 5001, 5002, and 5003 respectively. CPLR 5004 further provides that unless otherwise specified by law, interest shall be calculated at 9% per annum.

CPLR 5001(a) provides that interest from the date the cause of action accrues until verdict is recoverable only in breach of contract claims or actions affecting real property. As such, no interest is awardable in personal injury actions until after a verdict is rendered. CPLR 5002 provides for the accrual of interest on the amount of the verdict until judgment is entered in all actions. Interest awardable pursuant to CPLR 5001 and 5002 is included in the final judgment entered by the clerk of the court.

CPLR 5003 provides for the accrual of interest upon the entry of judgment in *all* actions. However, when more than one judgment is entered in a single action, the date from which interest begins to run must be determined. For example, bifurcated trials, with separate trials on the issues of liability and damages, are becoming more and more common in personal injury actions and are in fact favored in the law unless the plaintiff's injuries and damages have an "important bearing" on liability issues.[5] In a bifurcated trial, there are two separate trials and two separate judgments to be entered. The question then becomes from which verdict does interest begin to run—the liability verdict or the damages verdict, which sometimes can be several months or years later in time?

The Court of Appeals has held that except in rare circumstances, interest is awardable from the date of the liability verdict, rather than from the assessment of the plaintiff's damages. The assessment of fault for any delay between the liability and damages verdict is irrelevant to the determination of interest.[6] By extension, interest seemingly begins to run on any eventual damages award once partial summary judgment is entered on liability. This places defendants in the unenviable position of being charged interest on an unknown amount to be determined at a later date by the trier of fact. Thus, defendants should be aware that once liability is entered against them, by verdict or summary judgment, interest at 9% begins to run on any eventual award. Certainly that is a consideration that must be weighed before deciding to pursue any interlocutory appeal which may delay resolution of the matter.

On a related topic, there recently has arisen some disagreement among the departments of the Appellate Division as to whether a determination of summary judgment on liability in an automobile accident encompasses a determination that the plaintiff has suffered a "serious injury" as defined by Insurance Law § 5102(d). For example in *Simone v. City of Niagara Falls*[7] the Court held that a stipulation to liability does include a determination that the plaintiff has been seriously injured. Contrast *Simone* with *Zecca v. Riccardelli*,[8] holding that the grant of summary judgment as to "liability" does not resolve the serious injury question in favor of the plaintiff.

The Appellate Division, Fourth Department recently discussed the conflict among the departments.[9] The central issue is whether the serious injury threshold is to be considered an element of liability or damages. The Second and Third Departments do not include a finding of serious injury in the liability determination, while the First and Fourth Departments have held that a determination as to liability includes a determination that the plaintiff has sustained a serious injury.[10] The question then becomes whether interest begins to run after a determination of liability if there has been no finding of "serious injury." The Appellate Division, Fourth Department seems to lean toward requiring a finding of serious injury for interest to begin to run, stating, "[r]egardless of whether serious injury is viewed as an element of liability or an element of damages, the issue of serious injury must be decided either by the court as a matter of law or by the trier of fact before a defendant will be held liable for a plaintiff's non-economic loss."[11] Thus, the trier of fact would have to determine that the plaintiff has sustained a serious injury before interest would begin to run.[12]

When the jury verdict exceeds the insurance coverage available, the plaintiff should also investigate whether interest in excess of the policy limits may be collected from the tortfeasor's insurance carrier. There is no question that a defendant must be indemnified by his or her insurance carrier in addition to the limits of the defendant's liability coverage for interest accruing after the jury verdict until the policy limits are tendered to the plaintiff on at least the policy limits.[13] Thus, insurance carriers are wise to tender their policy without delay after a verdict, as their exposure is not limited to the policy limits.

Plaintiff's counsel also should be sure to review the insurance contract language between the defendant and its carrier when substantial interest considerations are involved. While the regulations of the New York State Superintendent of Insurance only require an insurance carrier to provide coverage for interest on its policy limits after a verdict, if carriers are not careful, the policy may be interpreted as requiring payment of interest in excess of the policy limits on the entire amount of the judgment. *Dingle v. Prudential Property & Cas. Ins. Co.*[14] In *Dingle*, the liability insurer agreed by contract to pay interest on the entire amount of the verdict until the tender of its policy limits. The Court of Appeals held that while liability carriers must provide coverage with terms at least as favorable as the terms required by the Insurance Department regulations, they are free to provide coverage in excess of the minimum requirements. Ambiguities in the language of the insurance contract will, of course, be construed against the insurer. Where the insurance policy undertakes to pay interest on the entire amount of a judgment until tender of the policy, the contract term will be enforced.

Thus, plaintiffs should be sure to review the actual language of the insurance policy itself to determine whether coverage extends on its own terms to include interest on the entire amount of the judgment after the verdict until the policy's tender, rather than just on the policy limits. When the verdict exceeds the available insurance coverage, and interest has begun to run long before the jury's verdict due to a grant of summary judgment or for some other reason, the plaintiff may recover a substantial sum from the liability carrier above the policy limits if the liability policy contemplates such coverage. Plaintiffs should therefore require disclosure of the complete insurance policy pursuant to a demand made under CPLR 3101(f), and should not be satisfied with mere disclosure of a policy number and liability limits as is common practice.

The Collateral Source Rule

The collateral source rule (codified by CPLR 4545) is designed to prevent double recovery by plaintiffs on their economic losses. Specifically, CPLR 4545(c) provides that in personal injury actions in which a plaintiff seeks to recover the costs of medical care, loss of earnings, or other economic loss, past or future, the court shall consider evidence that such economic loss was or will be replaced from other sources with reasonable certainty. The plaintiff's recovery will then be reduced by the amount of such outside source to prevent dual recovery. The existence of collateral sources must be affirmatively pled by the defendant to gain the benefit of the rule.[15] As with claimed offsets pursuant to General Obligations Law § 15-108, leave should freely be granted for a defendant to amend its answer to include a collateral source defense.[16]

The non-exclusive list of collateral sources that reduce the jury's verdict includes insurance (excluding life insurance), Social Security benefits (excluding Medicare), and Workers' Compensation benefits. Upon the requisite proof, the trial court shall reduce the amount of any award by the amount of such collateral sources. The award shall not be reduced, however, by the expense of any premiums paid by the plaintiff in the two years immediately prior to the accrual of the plaintiff's cause of action to obtain those benefits, or the projected future cost to the plaintiff of maintaining the collateral source benefits.

Defendants are advised to demand discovery as to the plaintiff's available collateral sources during the ordinary course of pretrial discovery. CPLR 4545 is merely an evidentiary rule and does not afford an opportunity to renew discovery after the verdict. The proper procedure is to request a hearing to determine the plaintiff's collateral source offsets after the verdict. Requests for such hearings are timely if made before the final judgment is entered.[17] At the post-trial hearing, the defendant will bear the burden of proof and must establish that the plaintiff's right to the collateral source is "reasonably certain" to continue to be entitled to any offset.[18]

Although the collateral sources identified in CPLR 4545(c) are a non-exclusive list, it is interesting to note that no-fault benefits received by the plaintiff after a motor vehicle accident are not a collateral source. Insurance Law § 5104(a) states, "There should be no right of recovery for non-economic loss, except in the case of serious injury, or for basic economic loss." Nonetheless, elements of basic economic loss, while not recoverable, may be pled and proven to the extent they are relevant to the proof of non-economic loss.[19] Thus, although plaintiffs have the option of proving basic economic loss, and a jury may award elements of basic economic loss, plaintiffs have no right of recovery for the first $50,000 in lost wages, medical expenses, and household expenses.

If the plaintiff chooses to plead and prove basic economic loss, and the jury chooses to make such an award, the trial court must reduce the jury award by the portion of recovery intended to represent basic economic loss as defined by Insurance Law § 5102(a) without resort to a collateral source hearing.[20] Whether the plaintiff actually received no-fault benefits is irrelevant, since the prohibition against the recovery of basic economic loss from a tortfeasor is absolute. Basic economic loss simply is not recoverable.[21] Thus, unlike collateral sources that reduce a jury's verdict only if proven by the defendant to have been received by the plaintiff, no-fault benefits are automatically deducted from the jury's verdict. The defendant does not bear the burden of proving at a hearing that no-fault benefits have been received by the plaintiff in order to be entitled to a reduction of the verdict.

Past medical expenses that are paid on behalf of the plaintiff by Medicaid ordinarily would be considered a collateral source that must be removed from the verdict. However, to the extent the local County Department of Social Services asserts a lien with respect to payment of such benefits, such payments are not to be considered a collateral source.[22] Defendants also should be aware that they may face exposure for the amount of the Social Services benefits received by the plaintiff on top of the verdict amount. If a defendant pays a settlement to the plaintiff without addressing a Social Services lien after having been provided with proper notice, the defendant can be held directly responsible by the Department of Social Services for the amount of the lien, despite any payment made to the plaintiff.[23] Similarly, while Workers' Compensation benefits generally are considered a collateral source, to the extent that the compensation carrier asserts a lien under the Workers' Compensation Law, such payments do not represent a collateral source, and the verdict should not be reduced.[24]

Private health insurance also constitutes a collateral source. To the extent past medical benefits have been provided by a private health insurer, and past medical expenses have been recovered by the plaintiff at trial, the tortfeasor is entitled to a reduction of the award. Likewise, if the defendant establishes that the plaintiff's private health insurance benefits are reasonably certain to continue, the award of future medical expenses must be reduced as well. The plaintiff is entitled to recover the cost of two years of past premiums and all future premiums that must be paid to maintain the level of private health insurance benefits, however.

Increasingly, private health insurers have been seeking reimbursement from tortfeasors for medical benefits paid on behalf of the injured plaintiff either through purported liens or subrogation claims. From the plaintiff's perspective, it would seem that the existence of subrogation rights or liens does not necessarily affect the application of the collateral source rule to verdicts. Plaintiffs should have no fear that once a verdict has been reduced by application of the collateral source rule, the private health insurer could bring claim against the plaintiff seeking to recover a portion of the remaining verdict amount. Such an attempt by the health insurer would be barred by the anti-subrogation rule which prohibits an insurer from subrogating against its own insured.[25]

The private health insurer only has a lien against the plaintiff's recovery if by explicit agreement or by operation of law.[26] Private health insurers' rights typically are only enforceable to the extent the plaintiff's settlement/verdict specifically identifies the recovery of past medical expenses and are timely raised.[27]

More typically, private health insurers assert rights that are subrogated to those of their insureds, rather than liens. Inasmuch as the plaintiff cannot recover for past medical benefits that have been paid on its behalf by application of the collateral source rule, the private health insurer, standing in the shoes of the insured, may not recover such benefits after a verdict either.[28] Therefore, while not prejudicing the rights of plaintiffs, the collateral source rule greatly hinders private health insurers' attempts to assert their subrogation rights. Recent developments suggest, however, a trend toward the protection of private health insurers' equitable subrogation rights, despite the application of the collateral source rule.[29] Of course, the collateral source rule only applies to verdicts and has no application to settlements.[30] Thus, the collateral source rule does not prevent the private health insurer from attempting to intervene before trial or assert a lien against a settlement.

If the private health insurer asserts an independent claim or intervenes in the plaintiff's action before the verdict, those claims will have to be addressed. Defendants must ensure those claims are resolved prior to settlement for fear that a release accepted from the plaintiff with notice that such claims exist would be ineffective to extinguish them.[31] The rights of private health insurers currently are in great dispute, and plaintiffs and defendants would be wise to address the issues before resolving any case by settlement or satisfaction of a judgment.

Future earnings may also be offset by future Social Security benefits. CPLR 4545(c) excludes only benefits under title XVIII of the Social Security Act (Medicare) as a collateral source. All other Social Security benefits, including survivor and disability benefits, therefore have been ruled by implication to be subject to the collateral source rule as reasonably certain to continue.[32] The defendant is entitled to a reduction for Social Security disability benefits (past and future) if able to establish those benefits are reasonably certain to continue.[33] Post verdict, the defendant then has the incentive of proving that the plaintiff is so severely injured that his benefits will not be reduced in the future. Social Security benefits also increase with inflation. Therefore, an argument also should be made that the offset occasioned by the collateral source rule should take into account a reasonable rate of inflation. All possible collateral sources available to the plaintiff, past or future, should be investigated as part of the pretrial discovery process such that the appropriate reductions may be sought post verdict.

Article 50-B of the CPLR

For awards of non-economic losses in excess of $250,000, Article 50-B of the CPLR imposes a structure defined by statute on awards of future damages. The structure imposed mirrors that had been applied to awards for medical malpractice contained in Article 50-A of the CPLR. Like the collateral source rule, Article 50-B of the CPLR applies only to judgments, and not settlements. Therefore, settlements reached after verdict, but before judgment is entered, are exempt from the stringent requirements of Article 50-B. In addition, the payments received by plaintiff in satisfaction of a judgment subject to Article 50-B end upon the death of the plaintiff. As such, there are significant advantages to reaching a structured settlement with the defendant to avoid the application of Article 50-B if possible. For that reason, post-verdict settlements to avoid the application of Article 50-B are quite common.

The legislative purpose of Article 50-B is to "maintain the moderate cost of liability insurance premiums, while assuring adequate compensation for tort victims throughout the entire period of their loss."[34] The statutory scheme permits liability insurers to compensate tort victims for future damages through the purchase of an annuity, rather than paying the plaintiff the present value of future damages in a lump sum, as was the prior practice. As the intent of the statute is to lower liability insurance premiums, Article 50-B should never be employed in a manner so as to increase the liability owed by the tortfeasor.[35]

The methodology for reducing a verdict for future damages to a final judgment under Article 50-B can be reduced to a number of simple mathematical calculations. As will be discussed below, the only variable that can be disputed by the parties is the discount rate to be applied when calculating the cost of the annuity to be purchased to satisfy the award for the plaintiff's future damages. If the parties are unable to stipulate to the Article 50-B computations, it may be necessary to hold a post-trial hearing for final resolution. Typically, the testimony of competing economists would be offered at that hearing.

The following steps, completed in order, will result in an accurate calculation of future damages under Article 50-B:

Step 1. ***Separate out all lump sum payments.*** All past damages and $250,000 of future damages will be paid to the plaintiff up front in a lump sum. As such, separate all past damages and $250,000 of future damages from the remaining future damages.

Step 2. ***Reduce each item of future damages proportionately to compensate for the $250,000 lump sum payment.*** Each category of future damages awarded, whether it be future pain and suffering, future lost wages, or future medical expenses, must be reduced proportionately to compensate for the $250,000 paid to the plaintiff in a lump sum. For example, if future pain and suffering comprised 60 percent of the total of future damages awarded to the plaintiff, future pain and suffering must be reduced by 60 percent of the $250,000 lump sum payment, or $150,000.

Step 3. ***Divide each category of future damages by the number of years for which the jury made its award.*** To determine the amount of the annual annuity payment due the plaintiff for each category of damages, the next step is to divide the adjusted future damages awards by the number of years the jury intended its award to compensate the plaintiff. For future pain and suffering, Article 50-B limits the time period over which the award may be paid to the lesser of the jury's award, or ten years.[36] For all other categories of future damages the time period determined by the jury is used. In other words, if the plaintiff was awarded $450,000 in lost wages by the jury (after having been reduced by its proportionate share of the lump sum payment), which was intended to compensate the plaintiff for a 15-year work life expectancy, the first annual payment would be calculated by dividing $450,000 by 15 years, resulting in the sum of $30,000.

Step 4. ***Prepare a schedule of future payments which increases at a rate of 4% each year.*** For each category of damages, prepare a schedule of future payments using the annual payment calculated in Step 3 where each subsequent year's payment is 4% greater than the year before. The schedule shall include a payment for each year awarded by the jury for each category, except, again, for future pain and suffering, which is limited to a period not to exceed ten years. In the prior example for future lost wages, the second year of the schedule would have a payment of $31,200, which would continue to increase at the rate of 4% until year 15.

Step 5. ***Compute the present value for each schedule of future damages.*** The present value of each schedule of future damages is then calculated by applying a discount rate to the payment schedule, and determining the price of an annuity that could be purchased to provide the payments called for in the schedule prepared as part of Step 4. CPLR 5401(e) provides that the present value of the future damages award shall be determined in accordance with "generally accepted actuarial practices." There is little guidance as to what discount rate is to be applied to determine the present value of the schedules of damages. As will be discussed below, this is really the only area for potential disagreement between the parties.

Step 6. ***Calculate plaintiff's counsel's fees.*** Plaintiff's counsel's fees are then calculated by applying the contingent fee percentage to past damages (net of litigation expenses) plus the $250,000 lump sum payment of future damages previously removed. The contingent fee percentage is also applied to the present value of the annuity calculated in Step 5 to complete the counsel fee calculation.

Step 7. ***Deduct plaintiff's counsel's fees.*** The attorney's fees for future damages calculated in Step 6 are then subtracted proportionately from the present value of each schedule of future damages calculated in Step 5. The present value of the remainder of the plaintiff's future damages is then used to purchase an annuity that will provide annual payments to the plaintiff over the terms of the jury's award, with the 4% growth factor. With the deduction of attorney's fees, it is clear that the schedule of payments calculated in Step 4 will never actually be received by the plaintiff. Rather, a lesser annuity must be purchased with the remainder of the present value of the plaintiff's future award once it is reduced by attorney's fees.

Step 8. ***Enter the judgment.*** The judgment now can be entered. It consists of the award of past damages, the $250,000 lump sum future damages, the award of attorney's fees, and the award of the present value of the annuity contract purchased that will actually make payments to the plaintiff.

As previously indicated, the only variable in these many equations is the discount rate to be applied when determining the present value of the annuity schedules. The higher the discount rate, the lower the present value of the plaintiff's award. Consequently, the higher the discount rate, the lower the award of attorney's fees. By failing to define the discount rate in the statute, the Legislature provided for a flexible approach for determining the present value of the plaintiff's damages.[37]

While the parties and their attorneys are certain to fight over the proper discount rate to be used—whether the Treasury Bill/Bond rate is to be applied, the annuity rate for annuities purchased on the open market, or some other method, a practical approach was taken by the Supreme Court in Kings County in *Molinari v. City of New York*.[38] In that case, the court held that the statute implicitly recognized that the most favorable rate available in the annuity market should be used. Thus, the plaintiff was directed to obtain several quotes from various insurance or structured settlement companies and provide the quotes to the defendants. Noting the defendants' incentive to "comparison shop," the defendants were given one week to obtain a lower quote, or adopt the plaintiff's quote. Certainly such an approach would seem to be in line with the flexible design of the statutory scheme.

Only after post trial motions have been decided, pre-judgment interest has been calculated, offsets for settlements and collateral sources have been applied, and Article 50-B has been applied (if necessary), is the judgment properly entered after verdict. It is important not to be too high on your victory, or too depressed over your loss, to ignore the details of the post-verdict issues that must be addressed. Certainly, the failure to ensure necessary offsets are made, or small adjustments in the discount rates applied, can impact greatly on the judgment that ultimately is filed.

Endnotes

1. CPLR 4406.
2. *Whalen v. Kawasaki Motors Corp.*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998).
3. *Id*.
4. CPLR 4522-b.
5. 22 N.Y.C.R.R. § 202.42(a); *Guizzotti v. English*, 273 A.D.2d 932, 711 N.Y.S.2d 807 (4th Dep't 2000); *Loncz v. Blagrove*, 254 A.D.2d 735, 678 N.Y.S.2d 804 (4th Dep't 1998).
6. *Love v. State*, 78 N.Y.2d 540, 577 N.Y.S.2d 359 (1991).
7. 281 A.D.2d 923, 721 N.Y.S.2d 892 (4th Dep't 2001).
8. 293 A.D.2d 31, 742 N.Y.S.2d 76 (2d Dep't 2002).
9. *Ruzycki v. Baker*, 301 A.D.2d 48, 750 N.Y.S.2d 680 (4th Dep't 2002).
10. *Id*. at 51.
11. *Id.*
12. *See also Manzano v. O'Neil*, 285 A.D.2d 966, 727 N.Y.S.2d 231 (4th Dep't 2001) *rev'd and remitted,* 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) *upon remittur*, 298 A.D.2d 829, 747 N.Y.S.2d 813 (4th Dep't 2002) (interest runs from the serious injury and causation findings at trial, rather than from the date of a prior stipulation of "liability" that expressly reserved the right of the defendant to contest the plaintiff's injuries).
13. 11 N.Y.C.R.R. § 60-1.1(6).
14. 85 N.Y.2d 657, 628 N.Y.S.2d 15 (1995).
15. *Wooten v. State*, 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dep't 2002).
16. *Id*. at 270, citing *Whalen*, *supra note 2*.
17. *See Wooten*, *supra* note 15 at 269.
18. *Caruso v. Russell P. LeFrois Builders, Inc.*, 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dep't 1995).
19. Insurance Law § 5104(c).
20. *Austin v. Meade*, 257 A.D.2d 844, 685 N.Y.S.2d 308 (3d Dep't 1999), *Ellis v. Johnson Motorlines, Inc.*, 198 A.D.2d 258, 603 N.Y.S.2d 528 (2d Dep't 1993).
21. *Hughes v. Ryder Truck Rental, Inc.*, 125 A.D.2d 177, 508 N.Y.S.2d 442 (1st Dep't 1996).
22. CPLR 4545(c).
23. Social Services Law § 104-6(b).
24. CPLR 4545(c).
25. *Neimann v. Luca*, 168 Misc. 2d 1023, 645 N.Y.S.2d 401 (Sup. Ct., Suffolk Co. 1996).
26. *Teichman v. Community Hospital of Western Suffolk*, 87 N.Y.2d 514, 640 N.Y.S.2d 472 (1996).
27. *Independent Health Assoc., v. Grabenstatter*, 254 A.D.2d 722, 678 N.Y.S.2d 220 (4th Dep't 1998).
28. *Humbach v. Goldstein*, 229 A.D.2d 64, 653 N.Y.S.2d 950 (2d Dep't 1997).
29. *Omiatek v. Marine Midland Bank, N.A.*, 9 A.D.3d 831, 781 N.Y.S.2d 389 (4th Dep't 2004)
30. *See Teichman*, *supra* note 26.
31. *Scavone v. Kings Craft Corp.*, 55 A.D.2d 807, 390 N.Y.S.2d 20 (4th Dep't 1976).
32. *Bryant v. New York City Health & Hospitals Corp.*, 93 N.Y.2d 592, 695 N.Y.S.2d 39 (1999).
33. *See Caruso*, *supra* note 18.
34. *Doe v. State*, 189 A.D.2d 199, 595 N.Y.S.2d 592 (4th Dep't 1993).
35. *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 614 N.Y.S.2d 714 (1994).
36. CPLR 5041(e).
37. *Doe v. State of New York*, 189 A.D.2d 199, 201, 595 N.Y.S.2d 592 (4th Dep't 1993).
38. 176 Misc. 2d 523, 672 N.Y.S.2d 662 (Sup. Ct., Kings Co. 1998).

Removal of Personal Injury Actions to Federal District Court: An Update Following the 2003 Amendments to Section 3017(c) of the CPLR

By Robert A. Barrer

For the practitioner interested in properly and timely removing a personal injury action from a New York State Court to Federal District Court, there are several issues that must be examined and certain steps that must be followed. The following issues and steps should be promptly examined upon receipt of the pleading from your client. Failure to act promptly and diligently can lead to a successful motion to remand the action back to state court.

1. Determine the date when your client first became aware that an action had been commenced against it, noting that it is entirely possible that this date will be prior to completion of formal service. Because the time within which to remove is very short (thirty days), consider the commencement of the removal period from the client's first knowledge rather than relying upon possibly incorrect calculations relating to the proper completion of formal service of process.

2. Determine if there is complete diversity between the plaintiff and all defendants. Remember, in-state defendants cannot remove to Federal Court. Further, consider whether there is a good faith basis to argue that a New York defendant has been "fraudulently joined" such that this defendant's citizenship can be ignored.

3. Determine whether the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs. Remember, an action seeking exactly $75,000 is not removable because the amount in controversy must **exceed** the jurisdictional amount in 28 U.S.C. § 1332.

4. Determine, in the case of multiple defendants, whether all defendants consent to the removal to Federal Court. Once the determination is made, secure formal written consents to the removal and arrange for their filing with the Clerk of the Court either at the time of the filing of the Notice of Removal or shortly thereafter. One recalcitrant defendant can stand in the way of removal.

5. Determine, in the case of an action that was not recently commenced (e.g., your client was named as a third-party defendant), whether more than one year has elapsed since the action was commenced. If more than one year has elapsed, the action is not removable.

6. Determine, in the case of a pleading without an *ad damnum* showing that the jurisdictional amount has been satisfied, whether the injury to the plaintiff is "worth" more than the jurisdictional amount. This can be accomplished by service of a demand pursuant to CPLR 3017(c) **and/or** with direct inquiries to the plaintiff's attorney requesting medical records, photographs or a bill of particulars or interrogatory answers describing the nature of the injuries. The plaintiff's attorney should be informed immediately that you want to remove the action and are seeking information from which you can meet your obligations under both 28 U.S.C. § 1441 and Fed. R. Civ. P. 11. Follow up on your inquiries so that there can be no question raised later whether you acted diligently.

7. Once the determination has been made to remove, prepare a notice of removal that complies with 28 U.S.C. § 1446(a) and file the notice (with copies of all state court papers attached) with the Clerk of the Federal District Court. You will need a filing fee together with a Civil Cover Sheet. Check with the Clerk of the Federal District Court for electronic filing requirements. A copy of the Notice of Removal must be served on the plaintiff or the plaintiff's attorney as well as all other parties or their counsel.

8. Following removal, file a notice with the State Court (both County Clerk and Supreme Court Clerk) showing that removal has occurred thereby divesting the State Court of Jurisdiction and file proof of service with the Federal District Court Clerk.

Structured Settlement Factoring Transactions: New Laws Protect Clients Who Sell Their Structured Settlement Benefits

By Matthew Garretson

To the extent that structured settlements[1] provide needed financial protection to seriously injured tort victims, they generally have enjoyed strong support from the plaintiff's bar, judges, mediators and casualty insurance companies. However, unregulated factoring threatened to undermine this legacy.

Now, attorneys and injured clients have some direction from the Internal Revenue Service regarding how structured settlement benefits from a prior settlement can be "sold" (a.k.a. Structured Settlement Factoring Transaction).[2] As of January 23, 2002, the Internal Revenue Code contains a new section addressing "Structured Settlement Factoring Transactions." I.R.C. Section 5891, enacted as part of the Victims of Terrorism Tax Relief Act of 2001, represents a meeting of the minds between the National Structured Settlement Trade Association (representing those who put structured settlements in place) and the National Association of Settlement Purchasers (representing those who take structured settlements apart). The compromise reached by these two associations came after years of heated debate in our nation's capital (and virtually every state's capital) following the dramatic growth in the "factoring" transaction.[3] Currently, thirty-five states have enacted structured settlement protection statutes that serve as a necessary companion to this new Federal law.[4]

Indeed, many plaintiff attorneys receive calls from former clients inquiring about "selling" their structured settlement. Lawyers should understand the new federal law as well as the companion law in their respective states. Such knowledge will benefit inquiring clients as well as help protect attorneys from post-settlement professional liability claims. This article sheds light on the rationale, tenets and interplay between the growing body of federal and state law related to structured settlements.

A Glimpse of the Past

To appreciate why addressing the issue requires a federal tax and the ongoing involvement of the overcrowded state courts, a quick overview of the related history should be helpful.

Historically, settlements and judgments have been paid in one lump sum. The concept of the structured settlement is a rather recent phenomenon. *M & P Stores, Inc. v. Taylor*[5] is the 1958 case that is commonly identified as establishing the precedent for compensating plaintiffs for damages with a future stream of payments. In that case, the jury awarded periodic payments instead of a single lump sum. It was not until the 1960s, however, that the concept enjoyed a more auspicious debut when substantial claims were filed on behalf of birth defect victims of the drug Thalidomide. The drug company, Richardson Merrill, which did not have insurance for the claims, settled cases by agreeing to make a stream of lifetime payments to the victims rather than one up-front lump sum. Merrill secured its obligation to make these future payments with annuities.[6]

The concept did not experience widespread use, however, until the Internal Revenue Service issued a series of revenue rulings in the 1970s.[7] These rulings established that a personal injury claimant could receive a future stream of payments and enjoy the same tax-exempt status afforded lump sum settlements of personal injury claims under Section 104(a)(2) of the Internal Revenue Code, provided certain criteria were met.[8] The Periodic Payment Act of 1982 provided statutory certainty to these administrative rulings. Then, in an Act signed by the President in August of 1996, which codified the "Origin of the Claim Test," Congress made clear its intent to continue to afford this favorable tax treatment to all claimants whose claim (other than punitive) has its origin in a physical injury, including awards for any derivative claimants (e.g., spousal loss of consortium, survivors in a wrongful death action).[9]

Congress's purposes were not solely altruistic. Congress sought to keep injured persons from dissipating settlements and thereby being left without any means of support other than the taxpayer-financed social safety net.[10] When settlements are dissipated, the responsibility to care for many disabled people falls on the state Medicaid system and other public assistance programs.[11] In addition to public policy concerns, Congress sought to maintain the integrity of the "constructive receipt"[12] doctrine in the Internal Revenue Code. Congress was concerned that the injured victims would not have the ability to exercise such control over their structured payments, that they would be deemed to have "constructively received" a lump sum recovery that was then invested on his or her behalf. Such immediate control would undermine the justification in our tax code for fully tax-free future payments to the injured victim. (H.R. Rep. No. 97-832, 97th Cong., 2d Sess. (1982), 4; Sen. Rep. No. 97-646, 97th Cong., 2d Sess (1982), 4.). As a result, the essential documents involved with structuring a settlement included language that prohibited the victim from being able to "accelerate, defer, increase, or decrease" the structured settlement payments (i.e., the indicia of control). These restrictions placed injured persons in the position of needing to decide whether or not to accept a structured settlement before accepting the cash proceeds. Once they commit to a structured payment plan, those payments become forever fixed.

Unregulated factoring companies found a way to sidestep the anti-assignment restrictions in the structured settlement agreements. They typically would have the injured payee present the structured settlement company with a change of address to a post office box in order to forward the payments to the factoring company. This practice left the structured settlement companies in the dark and appropriately fearing they might become the target of later claims that they paid the wrong party. If that were the case, structured settlement underwriters (annuity issuers) worried that they would be required to make the payments (again) as originally required under the initial settlement agreement.

Factoring companies finance the purchase of the structured settlement payments through the use of asset-backed securitizations. Such financing transactions involve the transfer of assets, such as the future income stream on a structured settlement, to a trust. Thereafter, interests in those trusts (typically in the form of a bond backed by the assets in the trust) are sold to major banks and investment houses. The obvious attractiveness of those bonds is the quality of that paper—highly rated life insurance companies underwrite the structured settlement income streams backing those bonds. What is somewhat ironical is that additional purchasers of this type of investment are property and casualty as well as life insurance companies.

Supply and Demand

Despite these restrictions, the use of structured settlements continues to grow. Industry figures indicate that the amount of structured settlement annuity premiums has risen 50% in recent years—from $4 billion in 1999 to $5 billion in 2000 to $6.15 billion in 2002.[13] In the absence of any regulation, this growth in the use of structured settlements represented fertile ground for the factoring companies. In a statement given on behalf on the National Structured Settlement Trade Association, Thomas Little[14] shared the following statistics with the House Committee on Ways and Means:[15]

> One major factoring company, J.G. Wentworth, stated in a 1997 Securities and Exchange Commission filing that during the first 9 months of 1997 alone, it ran 56,000 television commercials. Wentworth's SEC filing states that it runs a telemarketing call center with 200 telemarketing stations operating 24 hours a day, 6 days a week.

In that same nine-month time period, J.G. Wentworth reported that it undertook 3,759 structured settlement purchase transactions with a total undiscounted maturity value of $163 million. The company reported that it purchased these structured settlements for $74.4 million. Shortly thereafter, in October of 1999, *U.S. News & World Report* ran an article chronicling the egregious human costs associated with some of these unregulated factoring transactions.[16] In one case, a 20-year-old structured settlement recipient who was receiving monthly payments from a tort settlement when she was a child was persuaded to sell her future structure payments for approximately 36% of their discounted present value. A short while thereafter, she was persuaded to sell additional future payments for approximately 15% of their discounted present value.[17]

Like all stories, however, this one has two sides. The needs of injured people change over time due to advancements in medical technology as well as unforeseen hardships. In this regard, it is important to consider that the settlement annuity may only be part (albeit a significant part) of a well-considered settlement portfolio that provides future tax-free income as well as growth, security, and liquidity. As stated above, currently, a structured settlement annuity cannot be altered to change with the client's needs. Also, since most structured settlement annuity brokers are only licensed to sell that single product, one can argue that subjectivity and overreaching by a few, coupled with the product's "never change" limitations, contributed to the "demand" for factoring.

The Structure of "Unstructuring"

A reasonable question is why look to the federal tax system instead of each state's respective consumer protection laws to regulate factoring companies? The Joint Tax Committee's analysis of the factoring issue sheds light on the rationale. The Joint Committee recognized that consumer protection traditionally has been the territory of the states. On the other hand, the Committee noted, "the tax law already provides an incentive for structured settlement arrangement, and if practices have evolved that are inconsistent with its purpose, addressing them should be viewed as proper."[18] Since the factoring companies were thwarting the congressional policy underlying structured settlement tax rules, the committee considered it appropriate to deal with those concerns in the tax context.[19]

The basic requirements of I.R.C. Section 5891 are as follows:

- A 40% excise tax is imposed on any person who acquires structured settlement payment rights[20] in a factoring transaction;
- The excise tax is inapplicable, however, if the transfer is approved pursuant to a qualified order[21] issued under applicable state statute[22] by an applicable state court.[23]
- In determining whether to grant the qualified order, the court will consider the "best interest" of the structured settlement payee, taking into account the welfare and support of the payee's dependents.
- Effective February 19, 2003, the IRS released temporary regulations relating to the matter and method in which a person (or entity) buying structured settlement payment rights must report and pay the nondeductible 40% excise tax.[24]
- I.R.C. Section 5891 imposes no other obligations or tax consequences on the original parties to the underlying settlement.[25]
- In general, Section 5891 applies to structured settlement factoring transactions entered into on or after February 22, 2002.[26] A transition period existed between February 22 and July 1, 2002 to permit enactment of structured settlement protection legislation in the states that had not yet done so.[27]

By and large, the legislation in the thirty-five states that have adopted companion structured settlement protection acts has the following tenet—the factoring transaction is not effective and the structured settlement annuity obligor and issuer is not required to pay a transferee (purchasing company) without prior court approval. The standard for court approval includes:

- The "best interest" of the structured settlement payee, taking into account the welfare and support of the payee's dependents;
- The structured settlement payee has received independent professional advice;[28] and,
- The transfer does not contravene any other applicable statutes, agreements or court orders.[29]

Certain disclosures by the factoring company must be made in advance and evidenced by the payee/seller's signature as well as notarization. The Ohio statute,[30] for example, requires the following:

- The amounts and due dates of the structured settlement payments that would be transferred under the factoring agreement;
- The aggregate amount of the payments transferred;
- The discounted present value of payments transferred as determined using the applicable federal rate for valuing annuities;
- An itemized listing of all commissions, fees, costs and expenses;
- The net amount payable to the payee (seller) after deducting commissions, fees, costs and expenses;
- The quotient, expressed as a percentage, obtained by dividing the net amount payable to the payee by the present value of the payments being transferred;
- The amount of any penalty (or liquidated damages) payable by the payee (seller) in the event of any breach of the transfer agreement by the payee.

Going Forward—New Responsibilities for All Parties Involved?

This new body of federal and state law should greatly benefit injured persons and maintain the positive legacy of structured settlements—a legacy of helping injured persons to protect their settlement proceeds and thereby lessening the burden on the taxpayer-financed social safety net. Factoring transactions now have a much-needed system of checks and balances. There still, however, is more work to be done. Product-focused structured settlement brokers will need to obtain additional financial planning skills and credentials, recognizing that an injured client's post-settlement financial plan must address needs that change over time.

Lawyers, too, must reevaluate their practice—especially the settlement documentation—in light of these new laws. For instance, neither Section 5891 nor the Joint Committee on Taxation's Technical Explanation shed light on how the integrity of the I.R.C.'s "constructive receipt" doctrine will be maintained. Recall from above that it was this doctrine which lead to the language in structured settlement documentation that structured payments "cannot be accelerated, deferred, increased, or decreased by the recipient." Practitioners should consult with knowledgeable structured settlement professionals before reusing sample forms and agreement language from prior cases. In light of the foregoing discussion, many lawyers should reconsider their indifferent reliance on the defense for structured settlement broker selection and related documentation.

Furthermore, lawyers should develop "risk management" protocols within their firm for dealing with former clients who inquire about selling structured settlement benefits. Recall from the discussion above that the standard for court approval in most states, including Ohio, requires that the client receive independent professional advice before consummating a factoring transaction. Be cautious that a casual inquiry from a past client does put you in a professional liability bind. Former clients may be under the impression that you still represent them and are providing the required "professional advice." In a legal malpractice case, the type of evidence that supports a finding of an attorney-client relationship varies state-to-state and often case-to-case. In Ohio, for example, the "ultimate issue is whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client."[31] Relevant evidence that establishes whether an attorney-client relationship has been created in Ohio may include: 1) whether the attorney advises the putative client as to their legal rights or the method for pursuing those rights; 2) whether the attorney has invoked the putative client's trust and confidence; and 3) whether the attorney received payment of a fee from the putative client.[32] Against this backdrop, a lawyer's subjective opinion on the matter is by no means definitive.

Inquiring former clients should be sent a written letter stating that you are not providing advice concerning the factoring transaction unless that is a professional obligation you are competent and willing to undertake. For "belt and suspenders," initial retainer agreements and end-of-representation agreements for perspective clients perhaps should be revised to include some reference and/or acknowledgment that you will not represent them in a subsequent structured settlement factoring transaction.[33] Experts are now available to which you can refer your clients to guide them, as the client's advocate, through the transaction and controlling statutes.

Awareness of the new law and the proverbial "ounce of prevention" should greatly benefit injured clients as well as help personal injury lawyers avoid professional liability claims, now and in the future.

Endnotes

1. By definition, a "structured settlement" describes compensation for a personal injury or workers' compensation claim where at least part of the settlement is paid over time, rather than with a single lump sum. In lieu of receiving all monies up front, the claimant receives a promise from some entity to make future payments according to an agreed-upon schedule. Structured settlement payments are income tax-free and contain guarantees. Although lump sum settlements for personal physical injuries are also initially tax-free, the interest earned on investing that money is usually fully taxable.
2. The term "Structured Settlement Factoring Transaction" is defined as a transfer of structured settlement payment rights made for consideration by means of sale, assignment, pledge, or other form of encumbrance or alienation for consideration. I.R.C. Section 5891, Structured Settlement Factoring Transactions.
3. Both at the Federal and State level, the Structured Settlement Protection Act received considerable debate. Thomas Little, the former president of the National Structured Settlement Trade Association and a managing partner at Little, Meyers, Garretson & Associates, Ltd (LMGA)., provided key testimony to the House Committee on Ways and Means, 106th Congress. Karen Meyers, also a partner at LMGA, provided influential testimony to the Ohio Legislature. Ms. Meyer also has provided expert testimony in various courts for factoring transactions.
4. AZ, CA, CT, DE, FL, GA, ID, IL, IN, IA, KY, LA, ME, MD, MA, MI, MN, MS, MO, NE, NJ, NY, NC, OH, OK, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV.
5. *M & P Stores, Inc. v. Taylor*, 326 P.2d 804 (1958). *See also* Richard G. Halpern, Structured Settlements § 1.02 (1992) and Paul J. Lesti et al., Structured Settlements § 1:2 (1986).
6. Daniel W. Hindert et al., Structured Settlements and Periodic Payment Judgments § 1.02[4] (1986).
7. Rev. Rul. 77-230, 1977-2 C.B. 214; Rev. Rul. 79-220, 1979-2 C.B. 74; *and* Rev. Rul. 79-313, 1979-2 C.B. 75. *See also* Hindert et al., *supra note 6*, § 2.03 (further discussion of taxation of damages).
8. That is, structured settlement payments are received free from Federal income taxation, provided certain criteria are met. The basic requirement is that the claimant has no control over the investment that secures the obligation to make the future payments (a.k.a. Constructive Receipt). Claimants have only the right to receive the future periodic payments.
9. In response to widespread misunderstanding, Congress sought to clarify the taxation of the claimant under Section 104(a)(2) in the Small Business Job Protection Act of 1996. In essence, this law restricted 104(a)(2) to physical injury or sickness. This restriction, commonly known as the "Origin of the Claim Test," clarifies that in addition to being a "personal" injury to the claimant, an injury must truly be "physical" (as opposed to "emotional") to receive the favorable tax treatment afforded by 104(a)(2). Applying this "origin of the claim" test, if an action has its origin in a physical injury or physical sickness, then all damages (other than punitive) that flow therefrom are excludable, including awards for any derivative claims (e.g., loss of consortium). This law eliminated the exclusion for punitive damages on account of personal injuries or sickness, with the exception of punitive damages in a wrongful death action where state law provides that such damages are the exclusive remedy.
10. Some studies suggest that 90% of accident victims dissipate lump sum settlements within five years. The Rutter Group, Ltd., California Practice Guide: Personal Injury (1992).
11. In introducing the 1981 legislation that originally enacted structured settlement tax rules, Sen. Max Baucus (D-Mont.) pointed to the concern over squandering a lump sum and being without any means, besides taxpayer-financed government benefits, for support. (Congressional Record (daily ed.) 12/10/81, at s15005; *see also*, Congressional Record (daily ed.) 10/5/98, at s11499).
12. This doctrine is particularly set forth in Treasury Regulation Section 1.451.2. The Regulations state that income, "although not actually reduced to a taxpayer's possession, is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could draw upon it during the taxable year if notice of intention to withdraw had been given."

13. Randy Dyer, Executive Vice President, National Structured Settlement Trade Association, *Structured Settlements: An Effective Way to Resolve Airline Litigation*, Issues in Aviation Law & Policy (2003).

14. *See* note 2, *supra*.

15. *Statement of Thomas W. Little (Little, Meyers, Garretson & Associates, Cincinnati, Ohio; On Behalf of National Structured Settlement Trade Association). Structured Settlement Protection Act: Hearings on H.R. 263 Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives,* 106th Cong., 1st Sess. 41 (1999).

16. *Settling for Less—Should Accident Victims Sell Their Monthly Payments?* U.S. News & World Report, Jan. 25, 1999, 62-66.

17. *Structured Settlement Protection Act: Hearings on H.R. 263 Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives*, 106th Cong., 1st Sess. 41 (1999).

18. *Joint Committee on Taxation, Description of Revenue Provisions Contained in the President's Fiscal Year 2000 Budget Proposal* (JCS-1-99), Feb. 22, 1999, 329.

19. Congressional Record (daily ed.), Feb. 10, 1999 at 192.

20. I.R.C. Sec. 5891 defines structured settlement payment rights as "rights to receive payments under a structured settlement."

21. Qualified Order is defined as a "final order, judgment or decree" which satisfies two requirements: (1) the transfer must be in the best interest of the payee and must not contravene any Federal or State statute or any preexisting order of any court or responsible administrative authority; (2) a qualified order must be issued under the authority of an applicable state statute or by any responsible administrative authority which has exclusive jurisdiction over the underlying action or proceeding which was resolved by means of the structured settlement.

22. An "applicable state statute" is defined by I.R.C. Section 5891(b)(3) as a statute providing for the entry of an order, judgment or decree described in I.R.C. Section 5891(b)(2)(A) enacted by either: (1) The state in which the structured settlement payee is domiciled; or (2) if no such state statute exists, then the state in which the party to the structured settlement (including an assignee under a I.R.C. Sec. 130 Qualified Assignment) or the person issuing the structured settlement funding asset is domiciled or has its principal place of business.

23. An "applicable state court" is defined by I.R.C. Section 5891(b)(4) as a court of the state that enacted the statute. If no such statute exists in the structured settlement payee's state of residence, a court of the state in which the structured settlement payor/issuer is domiciled may serve as the "applicable state court."

24. 26 C.F.R. §157 (2003) outlines, among other things, the general requirements of a return, including timing, place and verification requirements.

25. A structured settlement factoring transaction does not affect the application of the I.R.C. Sections that originally enabled the parties to settle a claim with a structured settlement (72, 104(a)(1) and (2), 130 and 461(h)) provided those sections were satisfied at the time of the settlement. Additionally, Section 5891 (d)(2) exempts the person making the periodic payments from withholding tax on those payments.

26. Note that Section 5891 (d)(2), which exempts the person making the periodic payments from withholding tax on those payments, applies to structured settlement factoring transactions entered into before February 22, 2002 as well.

27. Two conditions apply: (1) the structured settlement payee must be domiciled in a state that has not enacted an applicable state statute; and (2) the person (entity) acquiring the structured settlement payment rights must make specific disclosures in advance to the structured settlement payee.

28. Some states may relax this requirement and only require that the payee be advised to seek such advice or waive such advice.

29. In Ohio, if the transfer contravenes the terms of the structured settlement involved, court approval requires that the court that previously approved the structured settlement has expressly approved the transfer in writing (Ohio Rev. Code Ann. Sec. 2323.583(D)). Before I.R.C. 5891 was adopted, most structured settlement agreements included "anti-assignment" language in order to conform with I.R.C. Sec. 130 requiring that "periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments."

30. Ohio Rev. Code Ann. Sec. 2323.582.

31. *Henry Filters, Inc. V. Peabody Barnes, Inc*. (1992), 82 Ohio App. 3d 255, 261, 611 N.E.2d 873.

32. *See Landis v. Hunt* (1992), 80 Ohio App. 3d 662, 610 N.E.2d 554; *Riley v. Clark*, 1999 Ohio App. LEXIS 5436 (4th App. District).

33. In this author's opinion, malpractice risk management concerning structured settlement (and related "form-of-settlement issues) should begin at case intake. Law firms should include data fields on case intake documents for gathering information concerning the types of government benefits every client and his/her dependents are receiving (SSI, SSDI, Medicaid, Medicare, subsidized housing, food stamps, etc.). Retainer agreements should be revised to include acknowledgments that clients will keep the law firm informed of any change in eligibility status. Additionally, information should be provided concerning reimbursement obligations under the Medicare Secondary Provider (MSP) statute as well as the interaction of an ERISA policy on a client's recovery. Furthermore, retainers should include some reference and/or acknowledgment that the client was presented with an educational package concerning the advantages and disadvantages of structured settlements and subsequent factoring, special needs trusts and the taxation of damages. Finally, at the appropriate time prior to settlement, the law firm should send again (perhaps even by certified mail) an educational package concerning the same topics.

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The Emergency Doctrine as a Defense in Motor Vehicle Cases

By Nelson E. Timken

The emergency doctrine remains a viable defense in motor-vehicle-accident cases. Numerous instances in which a driver would be ordinarily cast in a liability scenario can be negated through the successful interposition of the emergency doctrine as a defense, either by way of dispositive motion or at trial.

The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance not of his or her own making, which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be held negligent if the actions taken are reasonable and prudent in the emergency context, even if it later appears that the actor made a wrong decision, provided the actor has not created the emergency. [1] The essence of the emergency doctrine is that, where a sudden and unexpected circumstance leaves a person without time to contemplate or weigh alternative courses of action, that person cannot reasonably be held to the standard of care required of one who has had a full opportunity to reflect, and therefore should not be found negligent unless the course chosen was unreasonable or imprudent in light of the emergent circumstances.[2] "This is not to say that an emergency automatically absolves one from liability for his conduct. The standard then still remains that of a reasonable man under the given circumstances, except that the circumstances have changed."[3]

Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact,[4] they may, in appropriate circumstances, be determined as a matter of law by way of a summary-judgment motion.

Courts have summarily absolved defendants of liability within the context of an emergency situation, where, for example, a defendant attempted to avoid two vehicles which were spinning out of control,[5] where an emergency stop was made by a bus operator only after distressed and panicking passengers urgently told the driver that a man had left a bomb on the bus,[6] where a bus operator was forced to brake suddenly to avoid colliding with a vehicle that suddenly drove in front of the bus,[7] where a vehicle crashed into the wall of a highway, and suddenly came to rest blocking two traffic lanes, including the defendant's,[8] or where another vehicle suddenly crosses over into the defendant's lane.[9]

In addition, it is well settled that, under the emergency doctrine, "a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic."[10] Thus, there is a plethora of appellate authority for the proposition that summary judgment lies in cases where the defendant reacts to avoid a car which suddenly crosses over into opposing traffic.[11]

"Courts have summarily absolved defendants of liability within the context of an emergency situation . . ."

The quintessential requirement in order to prevail by way of dispositive motion is that the defendant encountered "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration." As a practical matter, appellate authority has established the paradigmatic benchmark for meeting that requirement as one in which the defendant only has one or two seconds at most in order to react to the sudden circumstance with which he or she is confronted.[12]

By contrast, a situation in which the emergency is one of the defendant's own making, or caused by the defendant's own actions, will not be held to be a qualifying emergency for purposes of invoking the emergency doctrine. This occurs, for example, where the defendant fails to maintain a safe distance between his/her own vehicle and the vehicle ahead of him/her,[13] where the defendant fails to be aware of potential hazards presented by traffic conditions, including stoppages caused by accidents up ahead,[14] or where the defendant simply strikes a completely-stopped vehicle in the rear.[15]

Moreover, as a general proposition, weather and roadway conditions have been regarded as foreseeable and capable of being anticipated, and have, as a result, been held to be removed from the context of the emergency situation. The Court of Appeals, for example, has held that, when a defendant has an admitted knowledge of worsening weather conditions, where, at the time of the accident the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours, the presence of ice and slippery road conditions at the location of the accident cannot be deemed a sudden, unforeseen, and unexpected emergency.[16]

Appellate tribunals in the Second Department have followed suit, applying the holding in *Caristo v. Sanzone*, *supra*,[17] in a myriad of cases, holding that "[a]n emergency instruction should not be given where, as here, the defendant driver should reasonably have anticipated and been prepared to deal with the situation with which [he] was confronted."[18] Thus, wet, slippery, or icy roadway conditions have been held not to be emergencies, since they should be anticipated and dealt with by defendant driver.[19]

At trial, the appropriate emergency charge to be given under qualifying circumstances is P.J.I. 2:14,[20] which is based upon the case of *Caristo v. Sanzone*.[21] In *Caristo*, the Court of Appeals defined the role of the trial judge in assessing the propriety of an emergency charge request, as follows:

> We require the Judge to make the threshold determination that there is some reasonable view of the evidence supporting the occurrence of a "qualifying emergency" (Rivera v New York City Tr. Auth., supra, 77 NY2d, at 327). Only then is a jury instructed to consider whether a defendant was faced with a sudden and unforeseen emergency not of the actor's own making and, if so, whether defendant's response to the situation was that of a reasonably prudent person (see, PJI 2:14 [3d ed]). The emergency instruction is, therefore, properly charged where the evidence supports a finding that the party requesting the charge was confronted by "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration" (Rivera v New York City Tr. Auth., supra, 77 NY2d, at 327; Kuci v Manhattan & Bronx Surface Tr. Operating Auth., 88 NY2d 923, 924; see also, Restatement [Second] of Torts § 296).[22]

When a reasonable view of the evidence supports the occurrence as "qualifying emergency,"it is reversible error for the trial court not to give the emergency instruction to the jury.[23]

In conclusion, in order for a situation to fall within the context of a qualifying emergency, it must be a sudden, unanticipated, unforeseeable event. It can be invoked by way of summary-judgment motion, assuming that it can be established, as a matter of law, that the defendant was confronted with a sudden and unexpected circumstance which left him or her with little or no time for thought, deliberation or consideration. This must be established by admissible evidence, such as the uncontroverted deposition testimony of the parties, by a police accident report, in which a statement of a party, which is admissible, is utilized,[24] or through the affidavit of a party with knowledge. At trial, the question of the reasonableness of the defendant's conduct under the attendant circumstances is submitted to the jury when the trial judge determines that there is a reasonable view of the evidence supporting the occurrence as "qualifying emergency." Under those circumstances, it is an error for the trial court not to give the emergency instruction to the jury. Thus, the emergency doctrine should be carefully considered as a viable option by defense counsel in motor-vehicle cases in which the defendant's conduct neither created nor contributed to the emergency, and where the circumstances surrounding the occurrence were neither foreseeable nor readily capable of being anticipated by the defendant-driver.

Endnotes

1. *See Caristo v. Sanzone*, 96 N.Y.2d 172, 174 (2001); *Rivera v. New York City Tr. Auth.*, 77 N.Y.2d 322, 327 (1991); *see also Kuci v. Manhattan & Bronx Surface Tr. Operating Auth.*, 88 N.Y.2d 923 (1996); *Pawlukiewicz v. Boisson*, 275 A.D.2d 446 (2d Dep't 2000).
2. *See Bello v. Transit Auth.*, 12 A.D.3d 58, 60 (2d Dep't 2004); *Amaro v. City of New York*, 40 N.Y.2d 30, 36 (1976).
3. *See Ferrer v. Harris*, 55 N.Y.2d 285, 293 (1982).
4. *See Morgan v. Ski Roundtop*, 290 A.D.2d 618 (3d Dep't 2002); *Cathey v. Gartner*, 15 A.D.3d 435 (2d Dep't 2005); *Takle v. N.Y. City Transit Auth.*, 14 A.D.3d 608 (2d Dep't 2005); *Tseytlina v. N.Y. City Transit Auth.*, 12 A.D.3d 590 (2d Dep't 2004).
5. *See Wenz v. Shafer*, 293 A.D.2d 742 (2d Dep't 2002).
6. *See Bello v. Transit Auth.*, *supra* note 2.
7. *See Roviello v. Schoolman Transp. Sys.*, 10 A.D.3d 356 (2d Dep't 2004); *Rivas v. Metropolitan Suburban Bus Auth.*, 203 A.D.2d 349 (2d Dep't 1994).
8. *See Garcia v. Prado*, 15 A.D.3d 347 (2d Dep't 2005).
9. *See, e.g.*, *Guevara v. Zaharakis*, 303 A.D.2d 555 (2d Dep't 2003); *Kyoung Ran Yoon v. Rechler*, 2 A.D.3d 690 (2d Dep't 2003).
10. *See Huggins v. Figueroa*, 305 A.D.2d 460, 461 (2d Dep't 2003), *citing Bentley v. Moore,* 251 A.D.2d 612, 613 (2d Dep't 1998).
11. *See, e.g.*, *Lyons v. Rumpler*, 254 A.D.2d 261 (2d Dep't 1998); *Huggins v. Figueroa*, 305 A.D.2d 460 (2d Dep't 2003); *Eichenwald v. Chaudhry*, 2005 N.Y. App. Div. LEXIS 3888 (2d Dep't 2005); *Foster v. Sanchez*, 792 N.Y.S.2d 579 (2d Dep't 2005); *Pawlukiewicz v. Boisson*, *supra* note 1; *Stoebe v. Norton*, 278 A.D.2d 484 (2d Dep't 2000); *Coss v. Sunnydale Farms, Inc.*, 268 A.D.2d 499 (2d Dep't 2000); *Turner v. Mongitore*, 274 A.D.2d 512 (2d Dep't 2000).
12. *See Rivas v. Metropolitan Suburban Bus Auth.*, 203 A.D.2d 349 (2d Dep't 1994) (vehicle crossed over into the opposing lane of traffic leaving bus operator with only two seconds to react); *Rosario v. Morias*, 8 A.D.3d 108 (1st Dep't 2004) (defendant did not see the plaintiff until one second before the accident); *Edwards v. Gaines Serv. Leasing Corp.*, 244 A.D.2d 279 (1st Dep't 1997) ("just a second or two" elapsed after other vehicle was first observed by defendant); *Caban v. Vega*, 226 A.D.2d 109 (1st Dep't 1996) (defendant had only a fraction of a second to react to an instantaneous cross-over emergency).

13. *See* VTL § 1129(a); *Burke v. Kreger Truck Renting Co.*, 272 A.D.2d 494 (2d Dep't 2000); *Pappas v. Opitz*, 262 A.D.2d 471 (2d Dep't 1999); *Johnston v. El-Deiry*, 230 A.D.2d 715 (2d Dep't 1996); *Dawkins v. Craig*, 216 A.D.2d 436 (2d Dep't 1995).

14. *See Cascio v. Metz*, 305 A.D.2d 354, 355 (2d Dep't 2003).

15. *See*, e.g., *Campanella v. Moore*, 266 A.D.2d 423, 424 (2d Dep't 1999); *Bournazos v. Malfitano*, 275 A.D.2d 437 (2d Dep't 2000).

16. *See Caristo v. Sanzone*, 96 N.Y.2d 172, 175 (2001) (Rosenblatt and Smith, JJ., dissenting).

17. *See* note 16, *supra*.

18. *See Muye v. Liben*, 282 A.D.2d 661 (2d Dep't 2001), *citing Pincus v. Cohen*, 198 A.D.2d 405, 406 (2d Dep't 1993); *see also Cascio v. Metz*, 305 A.D.2d 354 (2d Dep't 2003); *Lamuraglia v. N.Y. City Transit Auth.*, 299 A.D.2d 321 (2d Dep't 2002).

19. *See Marsicano v. Dealer Storage Corp.*, 8 A.D.3d 451 (2d Dep't 2004); *Bellantone v. Toddy Taxi, Inc.*, 307 A.D.2d 979 (2d Dep't 2003); *Gadon v. Oliva*, 294 A.D.2d 397 (2d Dep't 2002); *Muye v. Liben*, 282 A.D.2d 661 (2d Dep't 2001); *Pincus v. Cohen*, 198 A.D.2d 405 (2d Dep't 1993).

20. *See* PJI 2:14 (3d ed. 2005), entitled, Common Law Standard of Care—Emergency Situation, which provides:

> A person faced with an emergency and who acts without opportunity to consider the alternatives is not negligent if (he, she) acts as a reasonably prudent person would act in the same emergency, even if it later appears that (he, she) did not make the safest choice or exercise the best judgment. A mistake in judgment or wrong choice of action is not negligence if the person is required to act quickly because of danger. This rule applies where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence.
>
> If you find that (defendant, plaintiff) was faced with an emergency and that (his, her) response to the emergency was that of a reasonably prudent person, then you will conclude that (defendant, plaintiff) was not negligent. If, however, you find that the situation facing (defendant, plaintiff) was not sudden, or should reasonably have been foreseen, or was created or contributed to by (defendant's, plaintiff's) own negligence, or that the (defendant's, plaintiff's) conduct in response to the emergency was not that of a reasonably prudent person, then you may find that (defendant, plaintiff) was negligent.

21. *Caristo v. Sanzone, supra* note 16 at 175.

22. *See* note 21, *supra*.

23. *See, e.g., Kyoung Ran Yoon v. Rechler*, 2 A.D.3d 690, 691 (2d Dep't 2003); *Cathey v. Gartner*, 15 A.D.3d 435 (2d Dep't 2005); Sing-Lam Ng v. Beatty, 300 A.D.2d 648 (2d Dep't 2002); *Whiteside v. City of New York*, 293 A.D.2d 743 (2d Dep't 2002).

24. *See Guevara v. Zaharakis, supra* note 9.

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Additional Insured Coverage in Construction Site Litigation

By I. Paul Howansky

Introduction

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

I. Contractual Indemnification v. Additional Insured Coverage

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

A. Negligence Is Irrelevant

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

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

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

B. Negligence as a Factor

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

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

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

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

II. "Arising Out Of"

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

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

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

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

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

III. Notice Issues

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

A. Prejudice Is Immaterial

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

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

The Court in *Rose v. State of New York*,[18] followed the reasoning in the *Rosen* case and held that the insurer was obligated to defend and indemnify the additional insured notwithstanding the additional insured's purported late notice. The Court held that since the insurer received timely notice from its named insured (a non-party to the lawsuit), and since the State was "similarly situated" to the non-party named insured, the notice provided by the named insured was deemed applicable to the State.

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

B. What Constitutes Timely Notice

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

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

C. Time to Disclaim

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

D. Contents of the Disclaimer

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

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

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

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

IV. The Certificate of Insurance

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

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

V. Additional Insured Coverage Not Purchased

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

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

VI. Co-Insurance Considerations

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

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

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

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

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

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

VII. Conclusion

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

Endnotes

1. *ADF Construction Corp. v. Premiere Dry Wall*, 295 A.D.2d 965, 965, 743 N.Y.S.2d 350, 351 (4th Dep't 2002).
2. 287 A.D.2d 362, 731 N.Y.S.2d 441 (1st Dep't 2001).
3. *Id.* at 363, 731 N.Y.S.2d at 442.
4. 236 A.D.2d 211, 652 N.Y.S.2d 742 (1st Dep't 1997).
5. 302 A.D.2d 228, 735 N.Y.S.2d 375 (1st Dep't 2003).
6. *Id.* at 229, 735 N.Y.S.2d at 376.
7. 242 A.D.2d 566, 662 N.Y.S.2d 529 (2d Dep't 1997).
8. 275 A.D.2d 603, 713 N.Y.S.2d 161 (1st Dep't 2000).
9. *Id*. at 603-04, 713 N.Y.S.2d at 162.
10. *O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518 (1982).
11. *J. Michael Orifici & Associates, Inc. v. Liberty Mutual Insurance Co.*, 159 F.3d 1347 (2d Cir. 1998).
12. 1994 WL 150818 (S.D.N.Y. 1994).
13. *Id., citing O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518 (1982).
14. *American Home Assurance Co. v. International Insurance Co.*, 90 N.Y.2d 433, 661 N.Y.S.2d 548 (1997); *Unigard Security Insurance Co. v. North River Insurance Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992).
15. *Travelers Insurance Co. v. Volmar Construction Co.*, 300 A.D.2d 40, 752 N.Y.S.2d 286 (1st Dep't 2002).
16. *Security Mutual Insurance Co. v. Acker-Fitzsimmons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972).
17. 245 A.D.2d 202, 666 N.Y.S.2d 594 (1st Dep't 1997).
18. 265 A.D.2d 473, 696 N.Y.S.2d 527 (2d Dep't 1999).
19. *Safer v. Government Employees Insurance Co.*, 254 A.D.2d 344, 678 N.Y.S.2d 667 (2d Dep't 1998).
20. *Deso v. London & Lancashire Indemnity*, 3 N.Y.2d 127, 164 N.Y.S.2d 689 (1957).
21. *Goodwin Bowles Associates, Ltd. v. Eastern Mutual Insurance Co.*, 259 A.D.2d 381, 687 N.Y.S.2d 126 (1st Dep't 1999).
22. *Power Authority of the State of New York v. Westinghouse Electric Corp.*, 117 A.D.2d 336, 502 N.Y.S.2d 420 (1st Dep't 1986).
23. *Heydt v. American Home Assurance Co.*, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dep't 1989).
24. *Steadfast Insurance Co. v. Sentinel Real Estate Corp.*, 283 A.D.2d 44, 727 N.Y.S.2d 393 (1st Dep't 2001); *Viles Contracting Corp. v. Hartford Fire Insurance Co.*, 271 A.D.2d 349, 708 N.Y.S.2d 281 (1st Dep't 2000).
25. *Fireman's Fund Insurance Co. v. Hopkins*, 88 N.Y.2d 836, 644 N.Y.S.2d 481 (1996).
26. *Nationwide Mutual Insurance Co. v. Steiner*, 199 A.D.2d 507, 605 N.Y.S.2d 391 (2d Dep't 1993) (41 days deemed untimely); *West 16th Street Tenants Corp. v. Public Service Mutual Insurance Co.*, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dep't 2002) (30 days untimely).
27. *Hartford Insurance Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979).
28. *General Accident Insurance Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 516 (1979).
29. *Id.*
30. *TIG Insurance Co. v. Town of Cheektowaga*, 142 F. Supp. 2d 3443 (W.D.N.Y. 2001); *Hubbell v. Trans World Life Insurance Co.*, 54 A.D.2d 94, 387 N.Y.S.2d 647 (2d Dep't 1976).
31. *See Hartford Insurance Co. v. County of Nassau*, *supra* note 27.
32. *Maryland Casualty Co. v. Nationwide Insurance Co.*, 262 A.D.2d 458, 692 N.Y.S.2d 154 (2d Dep't 1999).
33. *Dinney v. Allstate Insurance Co.*, 295 A.D.2d 797, 744 N.Y.S.2d 74 (3d Dep't 2002).
34. *Hamilton v. City of New York*, 256 A.D.2d 382, 681 N.Y.S.2d 563 (2d Dep't 1998).
35. *Public Administrator of Bronx County v. Equitable Life Assurance*, 198 A.D.2d 105, 603 N.Y.S.2d 830 (1st Dep't 1993).
36. *Bucon, Inc. v. Pennsylvania Manufacturing Ass'n Insurance Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (3d Dep't 1989).
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Enforcing the Roles of Judge and Jury to Limit the "Sympathy Dynamic" in Personal Injury Litigation

By Richard Paul Stone

A central dynamic in personal injury litigation pits prudence against sympathy. Judicial wisdom has for decades balanced many factors to define tort principles serving the whole of society. However, the sympathy naturally felt for a fellow human being tends to obscure the jury's application of those legal principles if they limit plaintiff's recovery. To fuel this "sympathy dynamic," plaintiff's counsel employs a broad spectrum of emotional colors, seeking to replace the judicial wisdom of the common law with the passion of a lay jury moved to be plaintiff's champion.

The art of the defense bar is responding to the "sympathy dynamic," which must begin right at the start of the action by the rigorous application of two techniques. First, counsel must shrink plaintiff's evidentiary canvas by removing improper claims and theories, limiting the images presented to the jury. Second, counsel must press the court to resolve all legal issues before they can come to the jury mixed among the fact issues. By confining the role of the jury, counsel empowers the common law to diminish the impact of the "sympathy dynamic."

Limiting the Reach of Plaintiff's Claim

The first step in controlling the "sympathy dynamic" is recognizing that plaintiff may only offer at trial evidence on claims the court anticipates it will charge to the jury. Fewer claims mean fewer elements and, in turn, fewer theories of liability, restricting the universe of emotionally persuasive evidence presented to the jury.

Keen plaintiff's counsel tries to expand that universe, asserting claims that may not go to the jury, but which support colorful evidence enhancing those claims the court does charge. A common example is the medical malpractice plaintiff who claims lack of informed consent to justify emotional testimony about the defendant doctor's promise that there was no alternative to the proposed experimental surgery which he or she asserted had always brought terrific results. Even if the consent claim is dismissed at the close of plaintiff's case, the jury will dwell on this informed consent testimony as it deliberates on the surviving negligence claims.

The defense must address this right at the start of the case, by confirming the standards for dismissing insufficient claims and pressing plaintiff for detailed allegations clarifying each theory of liability: If plaintiff cannot allege specifics, or if the response proves the flaws in the claim, defendant may move to dismiss for failure to state a claim. While dismissal may be sought at the close of discovery on summary judgment, winnowing the claims early may prevent plaintiff from identifying damaging evidence in the first place. Of course, this cuts both ways: A sloppy complaint suggesting every claim known to Blackstone may support defendant's request for far reaching discovery, such as distant medical history. The key is setting strategy early.

While it is critical to eliminate wholly invalid claims, it is just as important to use judicial authority to limit the scope of the remaining claims by holding plaintiff to one version of how the accident happened. The value of this is clear in the ubiquitous motor vehicle field, where vehicles' size and speed and the diversity of surfaces and layouts of roadways allow for myriad accident scenarios: Unless plaintiff is bound to a specific story early, the claim may well migrate to a new fact pattern at trial and no defendant gains by shooting at a moving target.

The same holds true with premises liability cases, in which plaintiff typically makes one of three claims, that they caught their toe and tripped, stepped on something and slipped, or stepped in a depression and lost their balance. The mechanics of each type of claim are fairly consistent, with trippers falling forward, slippers falling backward and those stepping into depressions following their momentum in the direction of the depression. Pinning plaintiff down early may set up victory if plaintiff testifies in conflict with the natural mechanics of their asserted claim.

A somewhat different issue presents itself with claims of injuries from mechanical products, in which jurors' sympathetic response to sudden, vivid injuries may warp their application of the law to such an extent that they may presume liability from the happening of the accident. The law requires such plaintiffs to establish either that the machine was unreasonably dangerous or that the mechanics of the accident were reasonably foreseeable and preventable. However, unless defendant insists, right from the start, on specific allegations of unreasonable danger, or bases for foreseeability, the trial may turn on the jury's presumptions rather than the proof the law requires.

Similar are claims in the subjective area of the medical arts, where the complex relationship of objective medical science to subjective clinical experience allows diverse opinions about standards of care. Unless plaintiff's theories are clarified, and limited, surplus theories will broaden the scope for damaging evidence and multiple theories will create a cumulative sense of the physician's wrongdoing. Such a stew of vague, subjective opinions nourishes the "sympathy dynamic."

Keeping the Court's Issues Away from the Jury

Once the claims have been narrowed, defense counsel must focus on which issues are for the court rather than the jury. The court's role frequently favors the defense by limiting liability for societal benefit. A jury will create much mischief if it is allowed to tacitly resolve issues of law while expressly making findings of fact.

The Court's Role Regarding Duty

Judicial intervention is particularly important with respect to the tort duty. However, it is important to recall that duty is argued at two levels. The first is whether any duty runs from defendant to plaintiff. The second is the nature and scope of the duty.

The first question, of the existence of a duty, is a purely judicial inquiry, usually based on the parties' status and relationship. For example, it is for the court to determine whether a physician who has provided only non-therapeutic care, such as an employment physical, owes the patient a duty of due care. Similarly, the court decides whether the acts of public employees create a tort duty to the public. In premises liability claims, the court considers legal status of ownership or control, a particularly thorny problem with licensees such as those renting facilities for just a few hours, like flea markets. Sharp legal disputes may also arise regarding a parent's duty to those injured by their minor children.

The most common judicial inquiry is whether the uninsured bad actor was the agent or employee of the insured defendant, creating liability per *respondeat superior*. Defendant should usually test this early, since costs of discovery cannot be justified if no claim lies in the first instance. However, if there are underlying factual disputes, the legal issues may be deferred until trial. For example, if a court is asked whether a worker was the defendant contractor's agent or employee, the jury may first need to resolve disputes among witnesses to the bad actor's control over the means and methods of the work.

But act the court must. If the issue of duty cannot be resolved before trial, the verdict sheet must first ask the jury the necessary fact questions on duty, followed by a judicial resolution of the existence of a duty: Only if the court finds that some duty was owed should the jury continue with the balance of its deliberations.

While the jury is typically left to ponder the nature and scope of the tort duty, that too may raise other strictly judicial tasks. Imagine the slip and fall plaintiff whose witness saw plaintiff fall on the gleaming, newly waxed floor in the office lobby. The defense counters with testimony of an engineer, experienced in evaluating coefficients of friction on walkways, who tested the floor shortly after the incident, and who opines that the floor was not unreasonably slick. Once the lay witness's testimony has been challenged by expert testimony, the jury cannot deliberate until the court determines whether plaintiff made out a *prima facie* case without an expert opinion.

A related issue is whether any expert opinion is warranted, i.e., will aid the jury's appreciation of the nature and scope of defendant's duty: If not, expert testimony may invade the province of the jury to evaluate matters of common experience.

If expert testimony is deemed useful generally, the court's next question is whether the particular expert, who usually has no personal knowledge of the underlying facts, considered enough of the admissible evidence to fairly inform the jury of the standard of defendant's conduct.

A final question will be the expert's qualifications and experience, particularly in medical negligence actions in which physicians should never be allowed to testify in areas in which they have no clinical experience, though some jurisdictions allow this on the dubious premise that the lay jury will fairly limit the weight given to the testimony of the marginally incompetent expert.

These four challenges, whether (i) plaintiff can state a claim without expert testimony as to duty, (ii) the expert opinion to be offered is necessary and useful, (iii) the expert opinion supports his or her opinion with sufficient, admissible evidence, and (iv) the expert is qualified to render an opinion, under plaintiff's support, and limit the impact of the "sympathy dynamic."

The Court's Role Regarding Breach

Many practitioners use the shortcut of lumping duty and breach into the single concept, "negligence." Plaintiffs often go a step further and eschew evidence of either component, hoping the jury will infer "negligence" from the happening of the incident. This comes easily if defendant's responsibilities are complex, such as in a medical negligence action where plaintiff may raise a litany of "bad acts" and their expert condemns those "bad acts" *en masse*: By relating plaintiff's bad result to defendant's "bad acts," plaintiff's counsel may invoke the "sympathy dynamic" without proving an actual breach of any particular standard of care.

While taking care not to stretch thin the jury's patience, defense counsel must force plaintiff to present at trial proof of both duty and breach, breaking down any cluster of alleged "bad acts" to demonstrate the lack of proof of each of the components of each "act." This focuses the claim, limiting the "sympathy dynamic."

The court's role is to force plaintiff to commit to specific allegations of the duty and breach components and to limit plaintiff's proof at trial to conduct allegedly constituting the breach of each specific duty. Defense counsel earns this strict handling by preparing the court with a memo before opening statements, discussing the law limiting proof on the basis of relevance.

The Court's Role Regarding Causation

Defendant must also protect its rights on the issue of causation. Plaintiff may be in a particularly strong position to take advantage of emotionally compelling facts if there has been a legal finding of duty and a *prima facie* showing of breach. The "sympathy dynamic" is most dangerous when it may appear that defendant is doing nothing more than blaming plaintiff for maiming him or her self.

This is common with claims of defect in mechanical products since, when a worker is injured while using such a product, they have a clear relationship to the product and juries often infer from horrific injuries that something happened that should not have. Defendant's obligation is to focus the jury on just what it was about the machine that was unreasonably dangerous. Counsel must clarify to the jury that there is no claim unless it can trace a straight line of proof from a specific defect through the element of causation to a particular injury. Then the court must be persuaded, often at the jury charge conference, to read the strictest possible jury instruction, hammering home the point—"but for" a specific defect causing some particularly injury, there is no claim. The final step is to insist that the court dismiss a claim as to which plaintiff cannot make the required connection of proof from duty, through breach and then causation.

As with so much of defense practice, the argument at the charge conference or the motion to dismiss at the close of plaintiff's case should complete a process which began much earlier. All of the ground work of limiting claims and securing detailed allegations may lead to a dismissal, but even a losing motion may create a record either limiting what plaintiff can argue at trial or forcing a late amendment that leaves only a claim which plaintiff cannot adequately support because they did not take discovery on all of its key points.

Conclusion

The hallmark of every professional career is the improvement of professional habits. Incorporating these practices into any defense practice can bring consistently better results as they form the foundation of defendant's response to the "sympathy dynamic."

The Impact of the Supreme Court's Decision in *City of Sherrill v. Oneida Indian Nation of New York* on Sovereign Immunity

By Richard T. Saraf and Susan E. Van Gelder

The United States Supreme Court recently issued a groundbreaking decision that has impacted New York State's plans for opening five tribal-owned casinos in the Catskills, and may serve as both a basis for the imposition of taxes on currently operating tribal-owned casinos and precedent for further limiting the doctrine of sovereign immunity. In *City of Sherrill v. Oneida Indian Nation of New York*, the Supreme Court, in an 8-1 decision, held that former reservation lands recently repurchased by the Oneida Nation do not automatically revert to sovereign tribal status, thereby permitting the imposition of local taxes.[1]

The impact of this decision was felt immediately, when the Governor's plans to resolve pending Indian land claims and to open five tribal-owned casinos in the Catskills were both put on hold out of concern that the *Sherrill* decision may form the basis for local taxation on currently operating casinos and those casinos in the planning stages.[2] In the months since the *Sherrill* decision, the Oneidas and New York State officials have been involved in a power struggle over the implications and scope of the decision. Local governments have taken steps to place tribal-owned land now subject to taxation under the *Sherrill* decision on local tax rolls, including the massive Turning Stone complex, which has been assessed at approximately $384 million, and more than 200 other properties.[3] It has been estimated that property taxes on the Turning Stone Casino and the other 200 Oneida owned properties could equal $400,000 per year.[4] The Oneida Nation has vowed to fight back, filing 217 grievances challenging the tax assessments, arguing among other things that the Oneidas are a federally recognized tribe, and therefore cannot be taxed.[5]

In an attempt to avoid taxation imposed under the *Sherrill* decision, the Oneidas recently filed an application requesting that the federal government place the subject properties in a federal trust status, which would effectively exempt the properties from local taxation and regulation.[6] The procedure was suggested by the Supreme Court in its decision. New York State officials reacted immediately to the Oneidas' application, forwarding letters to the Oneidas telling the Nation to settle its land claims by the end of June 2005 or face consequences. New York State officials also forwarded letters to federal government officials asking that they reject the Nation's application to transfer its land to federal trust.[7]

As shown by the Second Circuit's recent decision in *Cayuga Indian Nation of New York v. Pataki*, the *Sherrill* decision has already proven to have a dramatic impact on Indian land claims and the doctrine of sovereign immunity.[8] Relying upon the equitable considerations set forth in *Sherrill*, including laches, the Second Circuit dismissed the Cayuga Nation's land claims in upstate New York. This decision was issued after 25 years of litigation and a damages trial awarding the Cayuga Nation significant monetary damages.

"The impact of this decision was felt immediately, when the Governor's plans to resolve pending Indian land claims and to open five tribal-owned casinos in the Catskills were both put on hold out of concern that the Sherrill *decision may form the basis for local taxation on currently operating casinos and those casinos in the planning stages."*

With local governments threatening foreclosure on tribal-owned properties subject to taxation under *Sherrill*, the next likely battle will be over whether these local governments have a mechanism to enforce the imposition of those taxes under the doctrine of sovereign immunity.[9] To fully understand the impact of *Sherrill*, it is important to analyze the underlying principals of sovereign immunity, its historic foundations and recent interpretations of its scope and necessity. This article will briefly address these issues, as well as case law interpreting the doctrine in the context of enforcement of the imposition of local taxation on tribal-owned business ventures. Following this discussion, the article will fully analyze the *Sherrill* decision, and its potential impact in the context of case law interpreting the power of local governments to enforce taxation under the principles of sovereign immunity.

I. Sovereign Immunity

Indian nations hold a unique status in the constitutional order and are distinct political entities with an inherent power to manage internal tribal matters.[10] Courts have long held that Indian tribes are "distinct, independent political communities" that retain their original, natural right to self-government.[11] The relationship between tribal nations and the federal government has evolved through time. Tribal nations are considered quasi-sovereign nations without the full attributes of sovereignty and have thus been described as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[12] With inherent authority over their members and territories, tribal nations have the power to make and enforce their own laws, with certain limitations on their powers to exercise jurisdiction over non-Indians.[13]

As a general rule, states, counties and cities cannot assert regulatory or jurisdictional power over a tribal government unless expressly granted this power by the federal government by statute or with the express consent of the tribe.[14] Congress has the plenary power to limit, modify or eliminate a tribal nation's powers of local self-government.[15]

Similarly, tribal nations, as quasi-sovereign nations, are in many circumstances immune from state, county and local taxation. An exception exists, however, when a state, county or local government seeks to impose taxes on tribal nations for activities occurring outside Indian country and for commercial transactions involving non-members.[16] Courts routinely distinguish, however, between a government's power to demand compliance with those regulations and that government's power to seek enforcement of those regulations. In other words, the authority to tax is closely linked to, and is often muted by, the tribal nation's sovereign immunity from suit.[17]

Courts have long held that federally recognized tribal nations, absent a clear and unequivocal waiver by the tribe or a congressional act, are immune from suit for civil damages under the doctrine of sovereign immunity.[18] Sovereign immunity extends to suits arising from a tribal nation's commercial activities both on and off reservation lands[19] and the activities of tribal entities, including casinos.[20] Tribal sovereign immunity is a matter of federal law and is not subject to diminution by the states.[21] States are bound by the sovereign immunity doctrine in their relationship with tribal entities, even in cases where the state has waived its own immunity from liability. [22]

Tribal sovereign immunity further extends to individual tribal officials acting in their respective capacity and within the scope of their authority.[23] Tribal members and officials are amenable to suit in federal and state court, however, if the subject of the suit is not related to the officials' performance of official duties.[24]

Courts throughout the country, including New York have upheld the doctrine of sovereign immunity, barring suits against tribes and tribal entities. In *Frazier v. Turning Stone Casino*, an action commenced by a former boxer against the Oneida Nation, Turning Stone Casino and various individuals, the Northern District of New York held that the Oneidas and the casino were entitled to sovereign immunity, and were therefore immune from suit.[25] In interpreting long-standing case law enforcing the doctrine of sovereign immunity, the District Court held that "[t]his Court clearly lacks the authority to abrogate the long-recognized common-law immunity from suit that Indian tribes and tribal entities have enjoyed."[26] In dismissing plaintiffs' complaint against the Oneidas and Turning Stone, the *Frazier* court determined that it lacked subject matter jurisdiction over the plaintiffs' claims insofar as they were asserted against those entities.[27]

Immunity from suit also holds true in cases where the state has the authority to impose regulations and taxes upon a tribe for its commercial activities. In *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, the Court held that tribes enjoy immunity from suit in state courts for recovery of state taxes on the off-reservation sale of cigarettes to non-Indians by tribal commercial entities, even where the state had the right to collect the tax.[28] In *Okla. Tax Com'n*, the Potawatomi tribe initiated suit against the Oklahoma Tax Commission in state court seeking injunctive relief from the state's assessment of taxes on cigarette sales to non-Indians. The Court held that the tribe's initiation of the lawsuit in state court seeking injunctive relief did not serve as a waiver to the tribe's sovereign immunity from suit, thus barring the state's counterclaim to enforce the tax assessment and enjoin future sales.[29] The United States Supreme Court upheld the sovereign immunity doctrine, precluding the state from seeking judicial enforcement of an otherwise properly imposed tax.[30]

Although the Court determined that the tribe was immune from suit, it noted that the sovereign immunity doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes.[31] The Court acknowledged the state's argument that permitting the imposition of taxes upon tribal nations, without permitting judicial intervention, in effect gives the state a right without a remedy. The Court suggested various remedies that may provide the state with a means to enforce the lawfully imposed taxes, including suing individual tribal agents or officers, seizing unstamped cigarettes off the reservation, assessing wholesalers who supply unstamped cigarettes to the tribal stores, entering into agreements with the tribes for a mutually agreeable means for tax collection, or seeking redress from Congress.[32]

Sovereign immunity and regulation of tribal-owned entities, including casinos, continues to be a controversial topic both in the courts and at the state and local legislative levels. While the Supreme Court has expressed its doubts concerning "the wisdom of perpetuating the doctrine" of sovereign immunity, particularly in light of tribes' increased involvement in the national commerce, the Court has refused to abrogate that doctrine, instead deferring to Congress to enact laws limiting the doctrine's application.[33] Thus, tribal nations have been successful at the federal level in protecting the doctrine. Notwithstanding the Court's unwillingness to abrogate the doctrine without a congressional act, the Supreme Court has, however issued decisions limiting certain aspects of sovereign immunity, including immunity from taxation, potentially opening the door for further state involvement and regulation over tribal nations.[34]

II. *City of Sherrill v. Oneida Indian Nation of New York*

City of Sherrill v. Oneida Indian Nation of New York is one recent Supreme Court decision further limiting certain aspects of a tribal nation's sovereign immunity. In the underlying matter, the City of Sherrill, New York, commenced eviction proceedings against the Oneida Indian Nation ("OIN") for failure to pay property taxes on commercial property and businesses owned by the OIN within the boundaries of the City. In response to the City's eviction proceedings, OIN commenced an action seeking equitable relief prohibiting current and future imposition of property taxes on the subject properties, which the OIN considered tribal lands immune from taxation. The District Court and Second Circuit found in favor of OIN, holding that the subject properties were reservation lands and were thus tax exempt under sovereign immunity principles.[35] The Supreme Court disagreed, reversing the Second Circuit's decision, finding that the subject property was not immune from local taxation.

The *Sherrill* decision was issued with a background of protracted litigation between New York and the Oneida Nation in which the Oneidas sought compensation for certain land claims arising from New York's alleged illegal purchase of a majority of the Oneidas' historic reservation lands. In companion actions, the Oneidas argued that New York's purchase of nearly all of the 300,000-acre reservation from the Oneidas was prohibited under the Non-Intercourse Act of 1790 that barred the purchase of tribal lands without the prior authorization of the United States.[36] The Oneidas argued that land purchases violating the Non-Intercourse Act did not terminate the Oneidas' right to possession under the applicable federal treaties and statutes.[37] In *Oneida II*, the Supreme Court determined that the Oneidas could maintain their claim for compensation for violation of their possessory rights under federal common law, but noted that the question of whether equitable considerations should limit the available relief to the present-day Oneidas for alleged wrongdoing taking place generations ago was not presented to or ruled upon by the Court.[38]

The *Sherrill* case arose from the City's efforts to tax certain tribal commercial activities on property owned by the OIN within the City's boundaries. The OIN purchased the subject properties in 1997 and 1998 and began operating a gasoline station, convenience store and textile facility on the properties.[39] These separate parcels of land were once contained within the Oneidas' original 300,000-acre reservation, the same property at issue in the companion land claim suits. The parcels of property had long ago been sold by the Oneidas and had not been owned by the OIN since 1805. For over two hundred years, the parcels were owned by non-Indians and were continuously governed by New York State and its county and municipal entities. OIN argued that because the subject parcels were located within the historic boundaries of the reservation originally occupied by the Oneidas, and the Supreme Court had recognized the Oneidas' aboriginal title to the property in *Oneida II*, OIN's acquisition of fee title to the parcels had revived OIN's ancient sovereignty over each parcel, thereby barring the imposition of any state or local taxes.[40] Consequently, OIN argued that the tribe maintained exclusive regulatory authority over the property, which no longer resided within the City for tax purposes.

The Supreme Court disagreed with OIN's analysis, holding that equitable consideration of laches, acquiescence and impossibility barred OIN's claim that its open-market purchases of the parcels unified the fee and aboriginal title in the parcels, thereby permitting OIN to assert sovereign dominion over the property and avoid payment of City property taxes.[41] The Court reasoned that the appropriateness of OIN's demand for relief "must be evaluated in light of the long history of state sovereign control over the territory" and the fact that the subject parcels had for generations been subject to state and location taxation.[42]

In reaching its decision the Court detailed the historical treatment of the subject land, including the surrounding population and corresponding expectations of governance in support of its rationale. For nearly 200 years, the Court reasoned, the United States largely accepted and took no steps to end New York's governance of the land and failed to question the validity of the original sale of that land away from the Oneidas.[43] The Court also recognized that over 99% of the population in the City was non-Indian and cited to case law in the context of diminishment of Indian reservation land that "'[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,' may create 'justifiable expectations.'"[44] Such expectations of the general population concerning governance of the parcels and New York's lengthy exercise of regulatory jurisdiction, the Court reasoned, merited "heavy weight" in determining OIN's arguments relative to its purported sovereign dominion over the subject land.[45]

The Court focused primarily upon the laches argument, a doctrine barring long-dormant claims for equitable relief based upon one side's inaction and the other's legitimate reliance.[46] In support of this argument, the Court focused on various factors, including OIN's failure to seek to regain possession of their aboriginal lands by court decree until the 1970s, OIN's failure to repurchase portions of the historic reservation lands until the 1990s and the dramatic alteration in the property over the 200-year time period from forest land to a city.[47] This long lapse of nearly 200 years, "during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the property, preclude OIN from gaining the disruptive remedy it now seeks."[48] Thus, the changes in the character and value of the land over the 200-year time period, reasoning accepted by the Court in other land claim disputes involving tribal nations,[49] played an important role in the Court's analysis and the alleged inequities in permitting enforcement of the claim in light of the changes in the condition and value of the property in question.[50]

The Court considered the impossibility doctrine and the "impracticability of returning to Indian control land that generations earlier passed into numerous private lands."[51] The impossibility doctrine was first established by the Court in the early 1920s and stands for the proposition that it is impossible to restore tribal nations to their former rights because the subject lands have been opened to settlement and are now in possession of innumerable innocent purchasers.[52] The Court rejected the Second Circuit's rationale that the impossibility doctrine does not apply in this case because OIN acquired the land in the open market and does not seek to remove current property owners. In rejecting this analysis, the Supreme Court reasoned that the reestablishment of Indian sovereign control over land purchased at market price would have disruptive practical consequences and could potentially create a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest—would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches."[53] The Court expressed concern that a contrary ruling could have a slippery slope effect, encouraging the OIN to initiate additional litigation freeing the areas from local zoning and other regulatory controls.

The Court further offered an option to resolve this controversy, noting that Congress had provided a mechanism for the acquisition of tribal lands.[54] Congress has empowered the Secretary of the Interior to acquire land in trust for Indians, taking into consideration the interests of others with a stake in the area's governance. In deciding to purchase lands in trust for Tribal Nations, the Secretary of the Interior must consider various elements, including the tribe's need for additional land, the proposed use for the land, the impact on the local community if the land is removed from the tax rolls and jurisdictional concerns arising from transferring the land to tribal sovereign control. In the event the Secretary of the Interior determines that the property should be held in trust, the land will be exempt from state and local taxation because the tribe will have sovereign control over that property.[55]

III. The Potential Impact of the Supreme Court's Decision in *Sherrill*

The most obvious initial impact the *Sherrill* decision will likely have is that it opens the door for local taxation on tribal commercial entities, including casinos, that are not located on properly designated tribal lands, and those properties that are not held in trust by the Secretary of the Interior. The potential taxation on these ventures, particularly Indian-owned casinos, while providing a substantial tax source for local governments could prevent economic development in those areas of the State where economic growth and employment opportunities have otherwise remained stagnant. Proponents of the *Sherrill* line of reasoning have argued that it is fundamentally unjust to permit tribal nations to enjoy the benefits of the municipality's services, including police and fire protection, while at the same time not paying taxes for those services. According to proponents of the *Sherrill* line of reasoning, a contrary ruling would in effect force non-Indian residents of municipalities to subsidize services consumed by but not paid for by the tribal nations.[56]

The *Sherrill* decision has already impacted significant tribal nation land claims in upstate New York. In dismissing the Cayuga Nation's land claims in *Cayuga Indian Nation*, the Second Circuit noted that the *Sherrill* decision "has dramatically altered the legal landscape against which we consider plaintiffs' claims."[57] The Second Circuit reasoned that although the Cayuga Nation was awarded monetary damages, in place of eviction of current property owners, its claims were nonetheless a possessory land claim subject to equitable doctrines, including laches.[58] In interpreting the scope of the *Sherrill* decision, the Second Circuit held that "we understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations."[59] Relying upon the rationale in *Sherrill*, the Second Circuit emphasized the disruptive nature of the action, which at the outset sought to remove current residents from the property. The Second Circuit further reasoned that the District Court's substitution of monetary damages nineteen years after the commencement of this action in place of "plaintiffs' preferred remedy of ejectment" could not salvage this claim, "which was subject to dismissal *ab initio*."[60] The Court noted that had the Cayuga Nation filed the complaint today, exactly as worded, a District Court would be required to find the claim subject to and barred by the doctrine of laches as interpreted by the Supreme Court in *Sherrill*.

In addition, the *Sherrill* decision could potentially implicate other aspects of tribal sovereign immunity as well. The *Sherrill* decision may provide the impetus for the imposition of the state and local government's substantive and regulatory laws to tribal commercial activities taking place on properties located within the state, but outside the reservation. State and local government officials have now sought clarification from the federal government concerning the scope of their respective regulatory authority over tribal-owned business activities, including the operation of the Turning Stone Casino.[61] The decision may also call into question the adjudicatory scope of tribal courts and tribal law on those lands.[62]

The next round of litigation arising from the *Sherrill* decision will likely relate to the scope of a local government's authority to seek enforcement of the imposition of those taxes. Although taxation of tribal commercial activities and properties will now be permitted in certain circumstances, the *Sherrill* decision does not provide any insight as to what mechanisms will be available to municipalities to seek enforcement of those taxes. For those tribal nations that have not waived their sovereign immunity, and absent congressional action, it appears that the *Sherrill* decision has not abrogated their sovereign immunity from suit. As articulated in *Okla. Tax Com'n*, a municipality's power to tax is wholly distinct from and does not automatically equate with a power to enforce payment of those taxes. Thus, those tribal nations may arguably still enjoy immunity from lawsuits seeking enforcement of those taxes. Remedies available to municipalities for enforcement of those taxes may be limited to those enumerated in *Okla. Tax Com'n*.[63]

While the *Sherrill* decision had an immediate impact on New York's plan for future casino construction plans with tribal nations, and has the potential to further impinge upon sovereign immunity, municipalities may find it difficult to enforce locally imposed taxes against those tribal nations that have not waived the protections afforded under the doctrine of sovereign immunity.

Endnotes

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11. *Davids v. Coyhis*, 869 F. Supp. 1401, 1405 (E.D. Wisc. 1994); *see also Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995).
12. *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 305 (N.D.N.Y. 2003), quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 509, 111 S. Ct. 905 (1991).
13. *Poodry v. Tonawanda Band of Seneca Indians, supra* note 10, 85 F.3d at 880, *citing Fisher v. District Court*, 424 U.S. 382, 388-89, 96 S. Ct. 943, 947-48 (1976). Tribal courts have limited jurisdiction and their regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981). Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id*. at 564, 101 S. Ct. at 1245. The Montana court recognized an exception to this general rule permitting tribal regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Id.* at 565, 101 S. Ct. at 1245. Subsequent case law, interpreting the Montana ruling has held that "As to non-members . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S. Ct. 1404 (1997). *See Atkinson Trading Co. v. Shirley*, 532, U.S. 645, 121 S. Ct. 1825 (2001); *Nevada v. Hicks*, 196 F.3d 1020, *rev'd*, 533 U.S. 353, 121 S. Ct. 2304 (2001).
14. Heidi McNeil Staudenmaier, *Tribal Sovereign Immunity: Will These Rights Survive Judicial Review?* 7 Gaming L.Rev. 245 (August 2003).
15. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978).
16. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. at 756, 118 S. Ct. at 1703, *citing Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270-71 (1973), *Organized Village of Kake v. Evans*, 369 U.S. 60, 75, 82 S. Ct. 562, 570-71 (1962).
17. *Id.*
18. *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d at 305, *citing Santa Clara Pueblo v. Martinez*, 436 U.S. at 55, 98 S. Ct. at 1677.
19. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 118 S. Ct. 1700, 523 U.S. 751 (1998) (Indian Tribes enjoy sovereign immunity from civil suits on contracts even if those contracts were made off the reservation).
20. *See World Touch Gambling, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-76 (N.D.N.Y. 2000); *Doe v. Oneida Indian Nation*

of N.Y. 278 A.D.2d 564, 565, 717 N.Y.S.2d 417 (3d Dept. 2000), *leave to appeal denied*, 96 N.Y.2d 716, 730 N.Y.S.2d 790 (2001).

21. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. at 1703, 523 U.S. at 756, *citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877, 891, 106 S. Ct. 2305, 2313 (1986).
22. *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 111 S. Ct. 905 (1991).
23. *Zeth v. Johnson*, 309 A.D.2d 1247, 1248, 765 N.Y.S.2d 403, 404 (4th Dept. 2003), *citing Romanella v. Hayward*, 933, F. Supp. 163, 167, *aff'd*, 114 F.3d 15 (2d Cir. 1997); *see also Frazier v. Turning Stone Casino, supra* note 18, 254 F. Supp. 2d at 307, *citing Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985).
24. *Id. See also Frazier v. Turning Stone Casino,* 254 F. Supp. 2d at 307, *citing Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 173, 97 S. Ct. 2616 (1977).
25. *Frazier v. Turning Stone Casino,* 254 F. Supp. 2d at 305.
26. *Id.*
27. *Id.*
28. *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 US. at 505, 111 S. Ct. at 907.
29. *Id.* at 510.
30. *Id.*
31. *Id.* at 514.
32. *Id.*
33. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,* 523 U.S. at 758, 118 S. Ct. at 1704-05.
34. *Id.* at 757.
35. *City of Sherrill v. Oneida Indian Nation of New Yor*k, 145 F. Supp. 2d 226, *aff'd in part, remanded and vacated in part*, 337 F.3d 139, *rev'd*, 125 S. Ct. 1478 (2005).
36. The Supreme Court noted that the Non-Intercourse Act of 1790 governed Indian lands within the boundaries of the original 13 states, including New York. The Non-Intercourse Act, which remains in force today, provides "[t]hat no sale of lands made by an Indian, or nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Act of July 22, 1790, ch. 33 § 4, 1 Stat. 138.
37. *City of Sherrill v. Oneida Indian Nation of New York,* 2005 WL 701058 at *7.
38. *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.* (Oneida II), 470 U.S. 226, 236, 253 n. 27, 105 S. Ct. 1245 (1985).
39. *City of Sherrill v. Oneida Indian Nation of New York,* 2005 WL 701058 at *9.
40. *Id.* at *4.
41. *City of Sherrill v. Oneida Indian Nation of New York,* 2005 WL 701058 at *4.
42. *Id.* at *10-11.
43. *Id.* at *11.
44. *Id.* at *11, quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S.584, 604-5, 97 S. Ct. 1361 (1997); *accord*, *Hagen v. Utah*, 510 U.S. 399, 421, 114 S. Ct. 958 (1994) (noting that the "jurisdictional history" and "current population" demonstrate a "practical acknowledgement" of reservation diminishment and a "contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."
45. *City of Sherrill v. Oneida Indian Nation of New York,* 2005 WL 701058 at *11.
46. *Id.*
47. *Id.*
48. *Id.*
49. *See Felix v. Patrick*, 145 U.S. 317, 12 S. Ct. 862 (1892).
50. *City of Sherrill v. Oneida Indian Nation of New York,* 205 WL 701058 at *11.
51. *Id.* at 13, *citing Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S. Ct. 142 (1926).
52. *Id.*
53. *Id.*, quoting *Hagen v. Utah*, 510 U.S. 399, 421, 114 S. Ct. 958 (1994).
54. 25 U.S.C. § 465; *Cass County v. Leech Lake Bank of Chippewa Indian*s, 524 U.S. 103, 114-15, 118 S. Ct. 1904 (1998).
55. *City of Sherrill v. Oneida Indian Nation of New York,* 2005 WL 701058 at *14, *citing* 25 CFR § 151.10 (2004).
56. Legal Information Institute, Supreme Court Oral Argument Previews—*City of Sherrill v. Oneida Indian Nation, citing* Alexis Grant, *Indian Sovereign: Taxation Without Reservation*, Medill News Service (July 12, 2004).
57. *Cayuga Indian Nation of New York v. Pataki,* 2005 WL *7.
58. *Id.* at *8.
59. *Id.* at *7.
60. *Id.* at *10.
61. Krista J. Karch, *State Sends Message to Oneidas*, The Observer-Dispatch (May 14, 2005).
62. An analysis of the individual compacts between various tribal nations and the state and the claims procedures established by those compacts is outside the scope of this article. Most compacts establishing tribal-owned casinos set forth the procedure in which any injured person can seek compensation for injuries caused by the Nation's alleged negligence. For example, the compact between the Seneca Nation of Indians and New York State sets forth a Class III Gaming Facility Tort Claims Ordinance providing that a claims commission established by the Nation shall determine what, if any, damages an individual injured person should receive. Significantly, the compact explicitly provides that the Nation, by enacting the ordinance, does not waive in any respect its sovereign immunity. *See* Class III Gaming Casino Compact between Seneca Nation of Indians and New York State.
63. *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. at 514, 111 S. Ct. at 905.

Tips for Deposing a Personal Injury Plaintiff

By David A. Glazer

The most important piece of discovery is the deposition. Yet, it is often treated as only a necessary inconvenience. A successful deposition is not the same as a successful cross-examination at trial and should not be treated as such. In reality, the deposition of the plaintiff is the key to winning the case, because a proper deposition prevents surprise and enables you to fully prepare for the trial.

The purpose of the examination before trial is to gather information. According to the Appellate Division, the purpose of a deposition is to advance the function of a trial to ascertain truth and to accelerate disposition of suits, and thus, the better practice is to permit a witness to answer questions, reserving objections for trial.[1] For an attorney, it is used to prevent surprise at trial (or summary judgment motion); pin the witness down to a specific story, authenticate documents and potentially establish future impeachment possibilities. In other words, a good deposition sets up the trial.

Before one can conduct a useful deposition of a plaintiff, there are three basic things that every attorney must do before the deposition even starts. First, the attorney must know the file. Second, the attorney must know the law affecting the case, including valid objections in a deposition. Third, as much information as possible on the plaintiff must be obtained, including medical records, employment records and collateral source records.

Know the File First

Knowing the file is not always easy, but it is necessary. Even a simple auto accident has its own nuances that one can miss without reading the file. Frequently, correspondence with the client or the carrier will note an important issue to be explored at the deposition. An attorney who fails to ask the questions that were previously highlighted hurts the client, him or herself and the firm for which he works. Plus, when you know the file, you are able to determine not only the case strengths, but also the weaknesses. A smart plaintiff will tailor his testimony to focus on your client's perceived weaknesses. Thoroughly knowing the file will enable you to anticipate this tactic and frame your questions accordingly. Thus, you can truly pin the plaintiff down to a specific.

Know the Law of the Case

With knowledge of the basic facts from the file, make sure that you, the attorney, know what areas of the law apply. You cannot ask the proper questions if you do not know what the plaintiff has to prove. Remember, every plaintiff must prove cause and proximate cause. Without knowledge of the law, you will never get beyond the basics of the case and into the depths of the law where the case will be won or lost.

Knowing the objections is part of knowing the law. The primary objection in a personal injury deposition is to the form. CPLR 3115(b) reserves all objections to the time of trial except for those which can be cured at the time of trial. You must ask the question specifically in a proper form. Otherwise, as long as the question is related to the claims being asserted by the plaintiff, the question is proper. A plaintiff attorney can also object to the content of the question if it is beyond the scope of discovery. A witness at a deposition may not be compelled to answer questions of law, particularly those which relate to witnesses' understanding of contentions of lawsuit, and may not be compelled to answer questions seeking legal and factual conclusions or asking the witness to draw inferences from facts.[2] For instance, you cannot ask about a prior hand injury in a knee injury case because there is no relation to the claims being made.

Get and Know the Medical Records

Finally, as defense counsel, you need to obtain as much information on the plaintiff as possible prior to the deposition. Most important are the emergency room records. People are usually honest when they go to the emergency room because they are thinking about their own well-being instead of a lawsuit. The emergency room visit sets up the questions that need to be explored at the deposition. For instance, you can usually find out about prior injuries from the emergency room records and whether or not the plaintiff was on any medication. Also, these records sometimes relate a version of the accident that differs from later testimony. Cases can be won by a good defense attorney who can exploit this inconsistency.

Remember to Ask Enough Questions

Now that these three basics are covered, how can a defense attorney make the most of a deposition? First and foremost, don't be afraid to ask questions. We have all seen the attorney race through a deposition because it was assumed that the case was very simple and clear-cut. Even the simple case deserves to be properly explored. If the plaintiff never answers "I don't know" to a question, then you have not asked enough questions. This is your opportunity as defense counsel to probe the plaintiff's mind. Use it. Do not let the complaints of the other attorneys affect your quest for information. CPLR 3113(b) specifically prevents opposing counsel from unilaterally ending any deposition. Therefore, you can safely ignore any threat that the opposing counsel makes in seeking to end a deposition because you are asking too many questions. Ask as many questions as you need to get the specifics of the case. Do not stop at the generalities. Cases have been lost because the plaintiff left enough room in his answers to give himself an out. Your job is to eliminate the outs.

Deposition Tactics and Strategies

A very useful method of pinning the plaintiff firmly into a story is the bill of particulars. Every bill of particulars will list the alleged acts of negligence. Use it as a guide for your questions. It will also list the injuries. Ask about every injury listed, even in the boilerplate section. Plaintiff attorneys add the boilerplate to cover themselves in case they missed something. Use it against them. Make them withdraw allegations on the record, or allow your questions. A good plaintiff attorney will not hesitate to claim that an injury to one part of the body will affect another. Use that to justify questioning about areas of the body that are not specific to the case.

To obtain specific answers, you cannot accept simple answers to the important questions. Start out broad and narrow it down. If the plaintiff's attorney objects, then remind him or her of the usual stipulations, which allow your questions. As long as you are asking about allegations made in either the complaint, or the bill of particulars, then you have every right to ask the question. To protect yourself, bring the judge's phone number with you to the deposition. An attorney who knows that he is obstructing a legitimate question will not want to have to deal with the judge. If you are willing to fight for your rights, then your opponent will usually back down. Do *not* bother the judge if you have any doubts about whether or not you are right.

Most importantly, ask the plaintiff what caused the accident. You may get an objection, but it is a legitimate question since the plaintiff was there. Make sure that you force the plaintiff to name all of the causes of the accident. Let the plaintiff name as many as he thinks. The key is to make sure that you cannot be surprised later. After all, if the plaintiff contradicts himself, then you have the ability to attack his credibility. You will never lose the case by forcing the plaintiff to name the actual causes of the accident, but you can lose if he does not name them.

On damages, ask the plaintiff questions as if you were presenting the case for the plaintiff. Force the plaintiff to go over every last bit of treatment. Let the plaintiff exaggerate the injuries. Let him state that that pain was intolerable and that he could not work. Make the plaintiff be as specific as he can possibly be. Remember that a plaintiff who cannot remember his treatment basics looks insincere.

Do not forget to ask about the plaintiff's employment history. A plaintiff might have a varied employment history or a long stretch of unemployment. Either can affect the plaintiff's damages and is fair game. People spend more time at work than anywhere else. Cover the basics of the job and all of the physical actions related to the job. Do obtain the information of the plaintiff's supervisors and co-workers as possible sources of information. If the plaintiff has a desk job, ask about phone and computer work. If the job involves physical labor, ask about the tools used to perform the job and their weight. As a defense counsel, you will often argue that the alleged injury is pre-existing. Having evidence of physical activity that could have caused the alleged degeneration is necessary to prepare for trial.

Remember That It Is Your Deposition

Finally, remember that you are in control of the deposition. It can go as fast or as slow as you wish. After reviewing the file, if you think that the deposition will last a long time, be up front about the length before starting the deposition. The other attorneys might grumble, but at least you are being honest. You are there to represent your client and learn as much about the case as possible. Do not worry that plaintiff's testimony may ruin a motion for summary judgment. If the plaintiff's deposition testimony can defeat the motion, then you were not going to win anyway, because the plaintiff's attorney would have filled in the facts with an affidavit in the areas you did not question the plaintiff about in the first place. It is always better to know how the plaintiff might attack your defense than to guess as to how it might be done.

Endnotes

1. *Byork v. Carmer*, 109 A.D.2d 1087, 487 N.Y.S.2d 226 (4th Dep't 1985).
2. *Lobdell v. South Buffalo Ry. Co.*, 159 A.D.2d 958, 552 N.Y.S.2d 782 (4th Dep't 1990).

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Book Review

Commercial Litigation in New York State Courts, Second Edition

Robert L. Haig, Esq., Editor-in-Chief
West Publishing, 2005, 6,444 pages

Reviewed by Paul S. Edelman

The Second Edition of the treatise entitled *Commercial Litigation in New York State Courts* has been published recently by Thomson-West in a joint venture with the New York County Lawyers' Association. The Second Edition is a five-volume, 6,500-page publication which contains 88 chapters covering all aspects of civil procedure in New York State courts as well as numerous substantive law subjects. The authors include 122 of the most capable judges and litigators in New York State, led by Editor-in-Chief Robert L. Haig.

The First Edition of this work was published in 1995. In its June 1996 issue (vol. 25, no. 1), the *Torts, Insurance and Compensation Law Section Journal* published a book review of the First Edition by Hon. Eugene L. Nardelli, a Justice of the Appellate Division for the First Judicial Department. In that book review, Justice Nardelli evaluated the First Edition from the perspective of a member of the TICL Section and concluded:

> I am confident that every member of the Torts, Insurance and Compensation Law Section, no matter their specialty, will find this set to be a real timesaver, as well as a source of valuable ideas and insights. It is particularly useful because of its balanced presentation with strategic considerations for both plaintiff and defense. Although the focus is commercial litigation, it is a superb analysis of litigation in general, as much of its content is applicable to any type of civil litigation.

Justice Nardelli also commented in that book review:

> Members of this Section who handle commercial cases from time to time will find *Commercial Litigation in New York State Courts* a perfect resource because the substantive chapters on commercial subjects such as sales of goods, contracts, collections, agency, warranties, and contracts for services are filled with helpful advice as well as a wealth of case and statutory authority. However, even those whose practice is exclusively personal injury will find much assistance in these volumes.

Justice Nardelli's book review set forth a detailed analysis of the contents of the First Edition and of its relevance and value to members of the TICL Section. He focused on the comprehensive treatment in the First Edition of all procedural aspects of civil litigation, noting that the coverage extended from jurisdiction, venue, pleadings, and third-party practice through discovery, depositions, motion practice, and settlements. He devoted particular attention to the nine extensive trial chapters, the chapters on appeals to the Appellate Division and the Court of Appeals as well as to the chapters on punitive damages, judgments, and enforcement of judgments. Finally, Judge Nardelli singled out for particular praise the substantive law chapters on "Insurance," "Construction Litigation," "Environmental Litigation," "Torts of Competition," and "Theft or Loss of Business Opportunities."

The Second Edition of this treatise continues to deserve all of the praise which Justice Nardelli lavished on the First Edition. In fact, the Second Edition is even better and more useful to members of the TICL Section.

In light of Justice Nardelli's comprehensive discussion of the contents of the First Edition and his strong endorsement of its value to members of the TICL Section, I will limit this review to several new subjects of particular interest and value to TICL Section members which have been added to the Second Edition. These new subjects are extensive. The Second Edition contains 21 new chapters in addition to the 67 chapters carried forward (and substantially expanded) from the First Edition. As a result, the Second Edition contains two more volumes than the three-volume First Edition and nearly 3,000 more pages.

Of the 21 new chapters in the Second Edition, I have selected three for particular attention in this book review because of the importance and relevance of their subject matter to TICL Section members. The first of these new chapters is Chapter 5 on "Case Evaluation," which was written by Alan I. Raylesberg of Chadbourne & Parke LLP. The introduction to this chapter notes that its "focus will be on evaluation of cases from both the plaintiff's and defendant's perspective, from the initial stage of a matter through trial and appeal." In separate divisions, this chapter discusses: (1) evaluation of a case at the outset (including development of a litigation plan based on cost-benefit analysis and quantitative models for evaluating litigation risks and costs); (2) evaluating the likelihood of dismissal based on a CPLR 3211 motion in response to the complaint or based on a motion for summary judgment; (3) evaluating the case for settlement (including formulas and other models for settlement evaluation, assessment of settlement overtures from one's adversary, and factoring in settlement initiatives by the court); (4) evaluating the case in the context of alternative dispute resolution procedures (including court ordered mediation and other ADR procedures); and (5) evaluating the case before and after trial (including cost-benefit analysis of going to trial, post-trial motions, and appeals). As readers can readily see, these are some of the most important issues which members of the TICL Section confront every day. Mr. Raylesberg has done a superb job of providing useful and practical advice in all of these important areas which will enable TICL Section members to practice more effectively and efficiently.

Another new chapter in the Second Edition which is of particular interest and value to TICL Section members is Chapter 56 on "Techniques for Expediting and Streamlining Litigation" by David Klingsberg and Jeffrey A. Fuiz of Kaye Scholer LP. The introduction to this chapter notes that it "is designed to provide methods by which parties can cooperatively speed up the litigation process" and "[j]ust as importantly, the discussion is aimed at providing ammunition to a litigant faced with delaying tactics by the opposing party." New Chapter 56 discusses: (1) motions that can expedite litigation; (2) devices to expedite the discovery process (including stipulated facts, use of technology, protective orders, and sanctions); and (3) devices to expedite the trial (including motions *in limine*, streamlining the expert phase of trials by using techniques to limit or exclude expert testimony, and separate or bifurcated trials). I am not aware of anywhere else a lawyer can turn to find all in one place such practical and valuable advice for streamlining and expediting litigation and overcoming delay.

Finally, the Second Edition contains a superb new Chapter 71 on "Products Liability" written by James V. Kearney and Francis K. Decker, Jr. of Latham & Watkins LLP. In 120 pages, the authors present a excellent practical discussion of litigating products cases including: jurisdiction, choice of forum, and choice of law considerations; product defects and causation; legal theories and defenses; damages; successor liability; class actions; discovery issues; use of expert witnesses; settlement, trial, and appeal. This chapter, like the other substantive law chapters in the Second Edition, also contains helpful checklists of allegations and defenses and of proof of allegations and defenses, as well as illustrative jury instructions.

As Justice Nardelli noted in his book review in 1996, the First Edition of *Commercial Litigation in New York State Courts* will be invaluable to every member of the TICL Section. The Second Edition is bigger, more comprehensive, and better than the First Edition and even more valuable to TICL Section members. Don't be without it!

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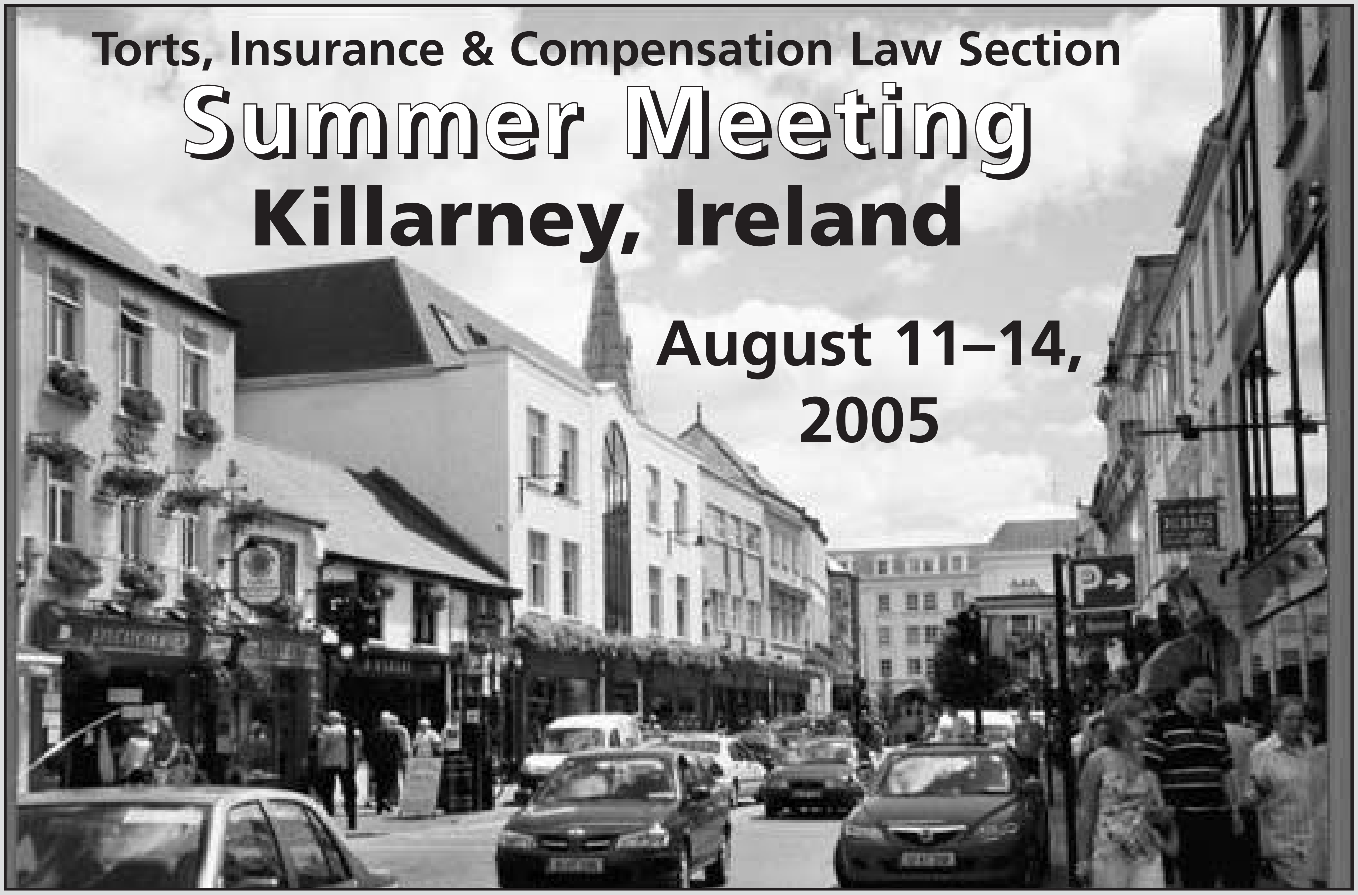

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Glen Monk and his wife, Sue

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Tony Martine, Vince Buzard, Doug Hayden and A.J. Smith

Gary Cusano with his wife, Adrienne, and daughter, Alexandra

Eileen Buholtz, Paul Suozzi. and Dennis Glascott (front) with other attendees

The "Irish TICL Kids"—a family affair

Gary Cusano, Mike Tromello, Grace Marascia, Barbara Siegel and son, Charlie Siegel, Jr.

The Cusanos

The Gap of Dunloe tour

The Gap of Dunloe tour

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