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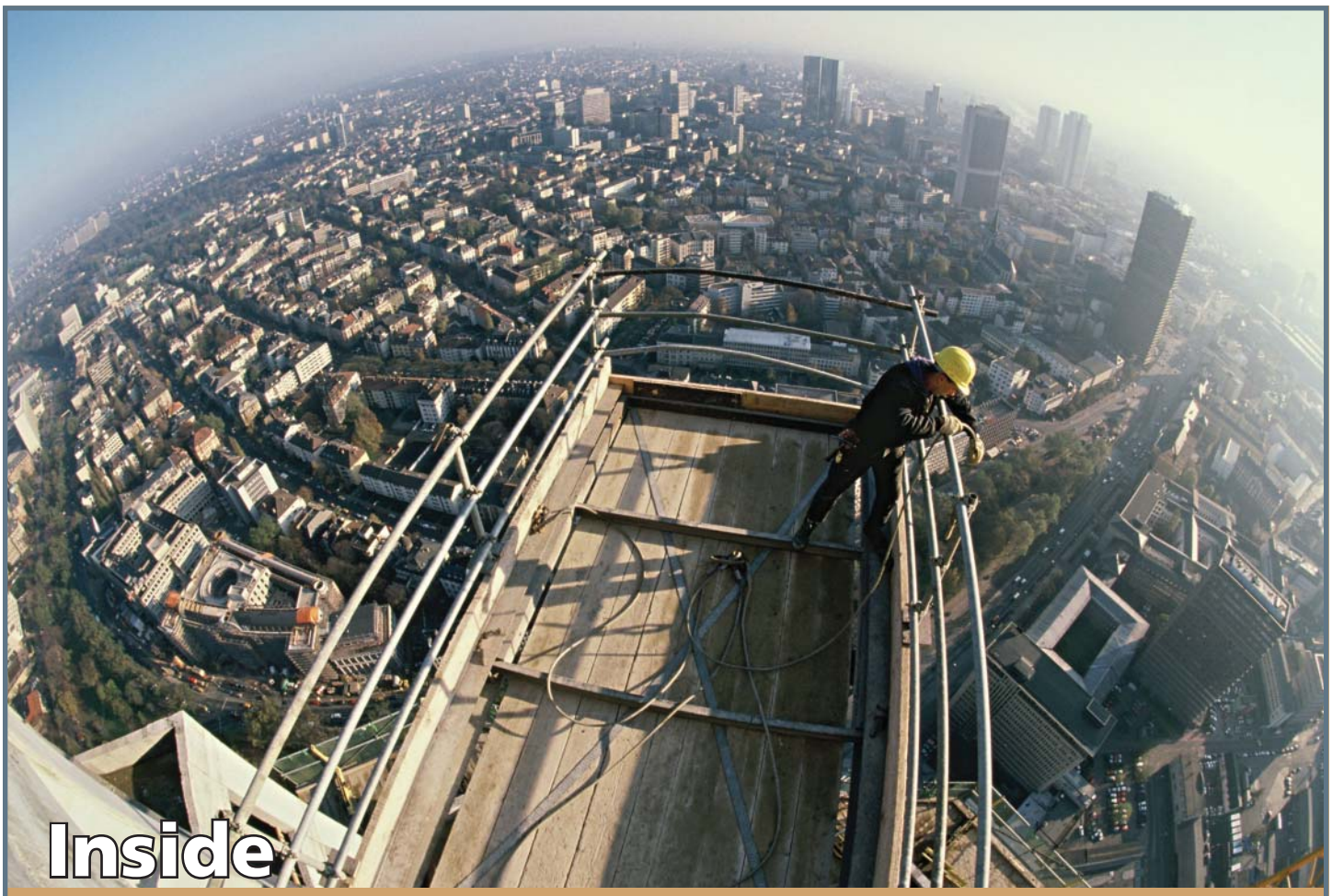

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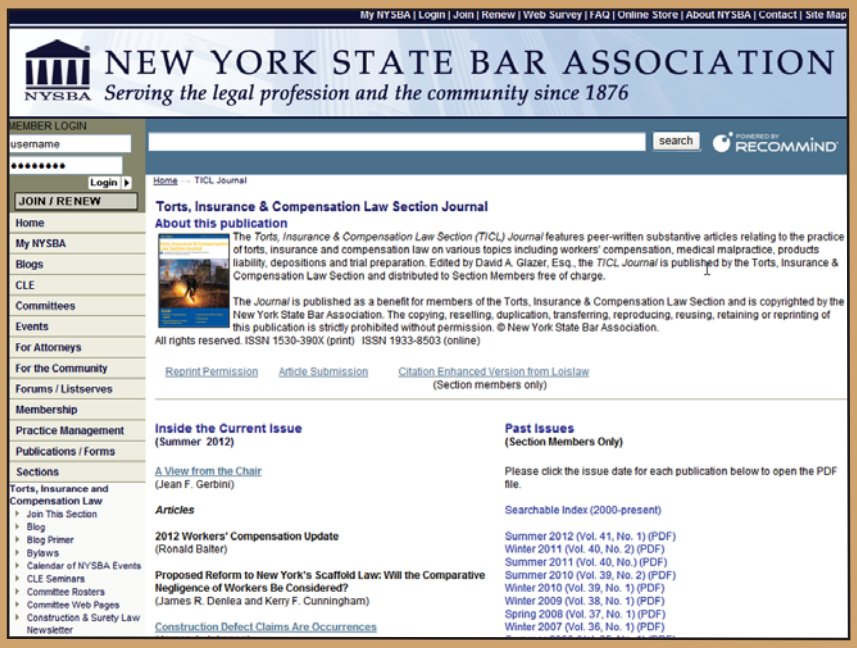

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A View from the Chair

The *Torts, Insurance and Compensation Law Section Journal* is the Section's flagship publication. The *Journal* serves as an important resource to our members on cutting-edge legal issues affecting our areas of practice. This issue is no exception. Congratulations and thanks to the talented authors who contributed articles to this issue, and to our indefatigable Editor, David Glazer.

The issue's authors, like TICL Section members generally, practice law in a variety of settings throughout the State and represent diverse points of view. Through their active involvement in the work of the Section, they enliven the experience of Section membership for all of us. Their contributions are many. To list just a few examples, Hon. Thomas Dickerson (Appellate Division, Second Department), currently serves as Chair of the Class Action Committee of the Section, Eileen Buholtz, Esq. (Connors & Corcoran, PLLC, Rochester) currently chairs the Future Sites Committee, and John Snyder, Esq. (Gitto & Niefer LLP, New Hartford) is Co-Chair of the Section's Committee on Continuing Legal Education.

Diversity of legal perspective enriches the Section; so too does diversity of individual background. On behalf of the Section's Diversity Team, I am pleased to present the TICL Section's 2012 Diversity Plan, which builds on last year's award-winning Strength by Association initiative.

The Torts, Insurance and Compensation Law (TICL) Section has long been at the forefront of the diversity movement in the NSYBA and continues to foster an atmosphere of collegiality and inclusion this year.

At our award-winning "Strength by Association" diversity seminars held in November, 2011 and January, 2012, our diverse panels of minority attorneys and jurists brought home to us a key fact: That active *mentoring* is critical to an individual's professional success, particularly in the case of a minority or woman attorney. He or she needs to have senior attorneys to turn to for guidance and for access to needed professional resources—a "personal board of directors," as one of our panelists put it. This year, the TICL Section makes mentoring the centerpiece of our diversity challenge plan.

A bar association section is uniquely placed to furnish mentoring opportunities, as it naturally attracts lawyers who share a common practice area and intellectual interest. But it is not enough simply to recruit a minority or woman attorney (which we do) and hope that he or she will find some benefit. Rather, the Section must also:

(1) Actively introduce that individual to a prospective mentor, and

(2) give both parties the skills on which to build a beneficial relationship.

The TICL Section's 2012-2013 diversity challenge plan aims to do both.

Interactive Mentoring-for-Diversity Workshops

At last year's "Strength by Association: Mentoring and the Power of Diversity" programs, TICL's diverse panels of jurists and attorneys movingly related their personal experiences with the mentoring process. This year, our panels are hopping off the podium to interact directly with attendees.

August, 2012 Section Meeting. The Section's Summer Meeting held in Montréal, Québec (an accessible and inexpensive location) featured an interactive workshop, in which panelists modeled good mentoring skills by guiding small teams of attendees through hypothetical ethical scenarios faced by litigators. Diversity was approached at multiple levels:

(1) The hypotheticals were specifically designed to foster meaningful discussion of tough workplace and courtroom dilemmas faced by women and minority professionals.

(2) The workshop leaders were themselves diverse, including two prominent minority jurists and representatives of the Black Women's Bar Association and Nigerian Lawyers Association, Latino Lawyers Association of Queens County and Minority Bar Association of Western New York.

(3) The foregoing minority bar associations served as event co-sponsors, an arrangement that enabled the TICL Section to reach and invite a broader and more diverse group of participants to the event, at half price.

November, 2012 Open Executive Committee Meeting, Workshop and Reception. The Montréal workshop was thoroughly engaging and very well received. Based on its success, the Section determined to take the show on the road, and scheduled another such workshop in Queens, New York, on November 8, 2012.

(1) This program, billed as "Strength by Association II," was co-sponsored by the Latino Lawyers Association of Queens, County and will feature a full two-hour ethics/mentoring workshop guided by minority jurists, minority litigators and a minority educator.

(2) The program, offered for only $20 for two hours of MCLE ethics credits, was intended to be attractive and accessible to a broad spectrum of young and newly admitted attorneys in Downstate New York. The event announcement was sent to (among others) NYSBA members in the Downstate region who practice in our Section's practice areas and self-report as minorities, admitted to practice ten years or less, or both.

(3) To encourage active engagement by Section members, the event afforded a glimpse at the inner workings of the Section, with an open meeting of the Section's Executive Committee.

(4) The evening concluded with informal networking, at a free reception to celebrate diversity in the bar and judiciary.

(5) To encourage attendees to join our Section on the spot, we offered Section membership dues-free through the end of 2013 to any NYSBA member who enrolled in TICL at the event.

For 2013, the Section plans to continue to schedule mentoring workshops, in collaboration with a broader array of minority and women's bar associations.

Informal Networking and Team-Building to Develop Mentoring Relationships

Mentoring has an informal, social dimension as well, and the TICL Section has considered that dimension in organizing its events. The Summer, 2012 meeting in Montréal included social events attended by the President and Immediate Past President of the NYSBA and their counterparts from the Montréal and Province of Québec Bar Associations, as well as by our diverse panel of workshop leaders.

Additionally, the Section expanded its traditional one-on-one "ambassador" program to include not just attorney-registrants, but everybody. Registrants, speakers, and their respective spouses, children and guests were assigned to "teams" for the duration of the meeting. Each team was led by one of the mentoring-for-diversity workshop leaders. The teams competed for a prize to be awarded to the first team to successfully complete a quiz on Montréal's history and famous people. The quiz was written to encourage teammates to interact and explore the city together. It did; delightfully.

Giving Diverse Section Members an Opportunity to Shine

The TICL Section's mentoring-for-diversity initiative does not end with introducing people to prospective mentors and polishing their interaction skills. Rather, the Section recognizes the importance of engaging diverse members in meaningful work of the Section on an ongoing basis. To that end, several attorneys of diverse backgrounds who attended the Montréal workshop were immediately recruited as program Co-Chairs to help plan the Queens event for November, 2012 and one was appointed Vice-Chair of a substantive Committee of the Section. At the next mentoring workshop in November, 2012, the Executive Committee and its Diversity Team (one of NYSBA's oldest) was on alert for additional talented people to recruit to active participation in substantive committees that address their particular areas of practice and intellectual interests.

The TICL Section also looks for opportunities to showcase the expertise of its diverse members by appointing them to its substantive CLE panels, including the Section's signature Law School for Insurance Professionals, offered in September/October at various venues statewide. The active recruitment of diverse speakers and writers will continue throughout 2012-13.

Collaboration with Minority Bar Associations

The TICL Section has successfully partnered with minority and women's bar associations, and will continue to seek such partnership opportunities. The partnership is many-fold:

(1) The co-sponsoring organization agrees to promote our Section's event to its members.

(2) The Section offers a discount on registration to the co-sponsor's members and an opportunity to interact with attendees.

(3) The co-sponsor helps the Section to assemble panels that better reflect the diversity of the Bar.

Such collaboration took place in connection with the Section's summer 2012 meeting, and continued with the planning of the "Strength by Association" event in Queens in November, 2012.

Cultivating Monetary Sponsorship of Diversity Efforts

The Diversity Team has commenced work on a Diversity Partner Sponsorship initiative to project the worthy goals of this year's Challenge and support the Section's diversity efforts monetarily on an ongoing basis. The program is still very much in the development

stage, but if the details are approved by the Section's Executive Committee, the Diversity Team expects to begin implementation in January. The general concept is that sponsoring firms and vendors that are willing to partner with the TICL Section on an agreed set of principles would be given permission to identify themselves publicly as "TICL Diversity Partner" under an agreed set of parameters, for example, by referring to that brand name on their websites. TICL Diversity Partners' donations (realized as annual fees) would be dedicated to TICL diversity/mentoring programs and events. Further, a TICL Diversity Partner would be encouraged to share valuable insights into its own efforts to embrace diversity in the workplace, for example, by providing a panelist to speak at a Section meeting or workshop. As vendors and firms recognize the value of the partnership, we would expect them to renew their participation annually and additional TICL Diversity Partners to join them.

Law Student Outreach

Current law students are our future colleagues, and the Section works both to recruit and engage them early. On the recruitment side, the TICL Section is sending representatives to the NSYBA "Meet the Sections" events held at law schools across the State. To maximize law student recruitment, the TICL Section has voted to extend Section membership to law student members of the Association dues-free through the end of 2013, provided that the law students enroll at the law school events. A number of students have already joined TICL this year, thanks to sign-ups at the Meet the Sections event held in September at Albany Law School.

Mentoring of law students occurs in different contexts:

(1) "Speed mentoring" affords students the benefit of many attorneys' advice on legal education and careers in five-minute bursts. To that end, the Section participated in Albany Law School's speed-mentoring event on October 18, 2012, and is actively seeking other such events to join.

(2) Ongoing mentoring includes putting students to work under attorney direction on the editorial boards of the Section's publications. Two law students were recruited to the Section's e-Newsletter staff in 2011 to work on case notes and member surveys; several more came on board this fall.

(3) Student recruits were also invited to attend the Open Executive Committee meeting, workshop and reception on November 8 in Queens, as a way to link the students up with a broader group of Section members.

Other Support for Diversity

The TICL Section strongly supports the diversity efforts of other NSYBA sections. TICL has co-sponsored the Young Lawyers Section's Trial Academy at Cornell University for a number of years. It did so again in 2012, sending two deserving minority attorneys to the Trial Academy on full scholarships and sending speakers to serve on the Academy's panels. The Section also co-sponsored the Smooth Moves event of the Commercial and Federal Litigation Section this spring, and will continue to look for similar opportunities in 2013.

Finally, TICL gives the leaders of its diversity initiative due recognition. The Section's Diversity Committee Co-Chairs, Mirna Martinez Santiago and Joanna Young, and their Diversity Team members, Tom Maroney, Jean Gerbini, Lawton Squires, Carlos Calderón, Hon. George Silver, Roderick Coyne and JP Delaney, were honored at the Section's Annual Meeting in January 2012 for their valuable contributions to the vitality of the Section. We fully expect to be able to celebrate the Section's diversity achievements this coming January as well.

Very truly yours,

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The Recalcitrant Worker Defense: Current State of the Law

By Elizabeth Walker

Introduction

New York Labor Law § 240(1) states, in pertinent part:

> All contractors and owners and their agents…in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish, erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to the person employed.

In order to prevail under a § 240(1) claim, a plaintiff need only prove that the statute was violated and that the alleged violation was a proximate cause of the injuries sustained.[1] Once the statutory requirements under § 240(1) are met, liability is supposed to be strict and nondelegable: an employee's own negligence cannot be used to diminish the responsibility of the owner or contractor.[2] There are, however, several exceptions, one of which includes the "recalcitrant worker defense."

The "recalcitrant worker defense" originated in a 1982 case called *Smith v. Hooker Chems. & Plastics Corp.* In *Smith*, the plaintiff fell while repairing a roof. His fall would have been prevented had he re-erected the safety equipment that had been put away the night before.[3] The Fourth Department concluded that in enacting § 240(1), the Legislature intended to protect workers from a failure by owners or contractors to provide adequate safety equipment, but did not intend for this statutory protection to extend to workers who already had safety equipment available, but refused to use it.[4] Accordingly, defendants under § 240(1) have no absolute duty to supervise workers and a worker who did not use available safety devices was not protected under § 240(1).

In the years following the *Smith* decision, numerous court decisions so severely limited the recalcitrant worker defense that *Smith* was all but officially overruled.[5]

For many years following *Smith*, the recalcitrant worker defense would be invoked only to be rejected, and was confined to a small handful of cases where the plaintiff disobeyed an immediate order to use available safety equipment. This restrictive trend continued on until the revival of § 240(1) defenses in the *Cahill* and *Blake* cases.

Blake and *Cahill*: The Recalcitrant Worker and Sole Proximate Cause Defenses

A. *Blake*

In 2003, the sole proximate cause defense was solidified by the Court of Appeals in *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*[6] In *Blake*, the plaintiff had set up a ladder which he owned and used frequently. As he was scraping rust from a window, the upper portion of the ladder retracted and he injured himself. He testified that the ladder was in good condition, but that he was unsure if he had locked the extension clips in place. The Court affirmed the defendant's trial verdict, writing: "Even when a worker is not 'recalcitrant,' we have held that there can be no liability under section 240(1) when there is no violation and the worker's actions (here his negligence) are the 'sole proximate cause' of the accident."

The *Blake* case is significant in that it established the "sole proximate cause" defense as broader than the recalcitrant worker defense, as it did not require a showing that overt instructions were given to the plaintiff. Because it did not require proof of disobedience either, it emerged as a stronger, more far-reaching defense that could cover a wider variety of cases.

B. *Cahill*

A year after *Blake*, the Court of Appeals overturned a First Department ruling which granted plaintiff summary judgment on a violation of § 240(1) in *Cahill v. Triborough Bridge and Tunnel Authority*.[7]

Timothy Cahill was a construction worker involved in the repair of the Triborough Bridge. He fell 10 to 15 feet as he was climbing a "form" wall without a safety line. Several weeks before his accident, his supervisor caught him ascending the walls without a safety line, and informed him of the need to use one. Such safety lines were attached to the form wall that the plaintiff was climbing; however, the plaintiff chose to use a "position hook" instead, which was not designed or intended for such use.[8]

The First Department said the recalcitrant worker defense was inapplicable because the defendant did not prove that the plaintiff had disobeyed an "*immediate instruction*" to use the safety line. The Court of Appeals rejected this rationale, eliminating the requirement for defendants to prove that the recalcitrant worker disobeyed instructions immediately prior to the accident.

The Court further linked the recalcitrant worker defense to the sole proximate cause defense: "As we held in *Blake*, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. Cases upholding the so-called 'recalcitrant worker' defense exemplify this rule."[9] The Court then went even further, explaining that the "controlling question is not whether the plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct rather than any violation of Labor Law § 240(1) was the sole proximate cause of his accident."[10] Thus, the Court implied that in order to have the recalcitrant worker defense, the plaintiff's recalcitrance needed to be the sole proximate cause of the accident.

The Court of Appeals set forth four criteria for exonerating a defendant from liability under § 240(1): (1) the plaintiff had adequate safety devices available; (2) he knew both that they were available and that he was expected to use them; (3) he chose for no good reason not to do so; and (4) had he not chosen not to use the available safety devices, he would not have been injured.[11]

Aftermath of *Cahill* and *Blake*

A. *Montgomery* and *Robinson*: Expanding *Cahill* and *Blake*

The Court of Appeals' decisions in *Blake* and *Cahill* were viewed as strengthening § 240(1) defenses. For a few years, decisions seemed consistent with these results. Two more Court of Appeals cases echoed the *Cahill* ruling: *Montgomery v. Federal Express Corp.* and *Robinson v. East Medical Center, LP*.

In *Montgomery*, instead of using a ladder, the plaintiff stood on an inverted bucket in order to climb up to a motor room elevated above the building's roof.[12] He then injured himself when he jumped down to the roof. Although ladders were available elsewhere on the jobsite, the plaintiff chose to use a bucket since it was nearby and he would have had to walk farther in order get a ladder. The plaintiff was denied recovery under §240(1) because although there was no ladder in the immediate vicinity, there were ladders on the worksite. It did not matter whether the plaintiff knew the other ladders were available. The Court held that "readily available" did **not** necessitate that safety equipment be in the "immediate vicinity" of the injured worker.[13] Additionally, "…since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. Plaintiff's choice to use a bucket to get up and then to jump down, was the sole cause of his injury and he is therefore not entitled to recover under Labor Law §240(1)."[14]

In *Robinson*, the Court of Appeals affirmed the dismissal of the plaintiff's § 240(1) claim arising out of an accident when the plaintiff lost his balance while standing on the top cap of a six-foot ladder.[15] The plaintiff knew that his employer stored six-foot and eight-foot ladders on the first floor of the jobsite, yet chose not to look for them prior to starting his work. The Court rejected the plaintiff's argument that because he had asked his foreman for an eight-foot ladder and his foreman did not bring him one before his accident, he was forced to complete his work with an unsafe six-foot ladder, which was not tall enough for the piping work he was performing. It was immaterial if all the eight-foot ladders were in use, as the plaintiff was not instructed to finish the piping before undertaking other tasks, and had enough other work to occupy him for the rest of the workday, during which time he could have waited for the eight-foot ladder. The Court concluded: "Plaintiff's own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were as a matter of law, the sole proximate cause of his injuries."[16]

B. *Miro*: Court of Appeals Sets Limitations on Sole Proximate Cause Defense

Then, in late 2007, the scope of *Cahill*, *Montgomery*, and *Robinson* was again restricted in *Miro v. Plaza Constr. Corp*.[17] In this case, the plaintiff fell down a ladder that was partially covered with slippery fire-proofing material. Instead of asking for another ladder, the plaintiff testified that he thought he could handle the one he had. He also testified that his employer had a "lot of ladders" available and that if a ladder was in bad shape, it was discarded. Using the 4 criteria set forth in *Cahill*, the First Department granted summary judgment to the defendants, finding that the plaintiff had safety devices available to him, that he recognized the undesirability of the fireproofing material on the ladder, that he knew he could have requested another ladder, and that yet he chose not to make such a request, and this choice was the sole proximate cause of his accident.

The Court of Appeals modified the Appellate Division's decision by denying summary judgment to the defendants on the grounds that "it was not clear from the record how easily a replacement ladder could have been procured,"[18] thereby rejecting the First Department's ruling that "readily available" was not limited to "being stored on site"[19] and narrowing the reaches of the sole proximate cause defense.

C. The *Cherry* Case

One of the most recent decisions from the First Department, issued in August of 2009, reinforces the recalcitrant worker defense as simply a sub-defense of sole proximate cause and disregards the "general knowledge" of available safety equipment in *Montgomery* and *Robinson*, refashioning it into a "specific knowledge" requirement.

Cherry v. Time Warner, Inc. involved a plaintiff who fell from a scaffold while securing sheet rock to a ceiling. He claimed he fell because the scaffold only had guardrails on two of its four sides. The defendants argued the plaintiff was told not to use scaffolds without four guardrails and that such scaffolds were available the date of his injury.[20]

In reaching its decision, the Court ignored the plaintiff's disobedience of his supervisor's instructions. Instead, it applied the sole proximate cause criteria formula from *Montgomery* and *Robinson*. In the process, it focused on ambiguities in both cases. It accused the Court in *Montgomery* of offering no concrete definition of "readily available" safety equipment within the meaning of section 240(1), stressing that in order for safety equipment to be "readily available" it should be in the immediate work location.[21] If safety equipment was on another floor, "it is highly unlikely…that…would qualify as 'ready' or 'easily' available."[22] Then, the Court suggested that in order to have a defense to a § 240(1) claim, it must also be proven that the injured worker *knew* the safety equipment was available. In support of this proposition, it distinguished *Cherry* from *Robinson*, explaining that the sole proximate cause defense worked in *Robinson* because, in that case, "the Court's narrative included the facts that the worker knew there were eight-foot ladders on the job site and 'knew what part of the garage [they] were in.'"[23]

The Court concluded its analysis by saying that "the requirement of a worker's 'normal and logical response' to get a safety device" is limited to those circumstances where the worker had knowledge of the availability of safety equipment. This knowledge is not just a general awareness that there is safety equipment on site; rather it is a very specific knowledge as to the "exact location" where the equipment is stored. Moreover, knowledge is not gained from merely seeing or hearing about the storage site; it must have been obtained through "practice of obtaining such devices."

Thus, *Cherry* effectively specified the knowledge requirement, hinging it onto "prior practice."

Total Extinction of the Recalcitrant Worker Defense?

Recent Appellate decisions not only indicate a shift backwards to pre-*Cahill* status, but also suggest that the recalcitrant worker defense is becoming harder for defendants to invoke successfully. Indeed, it has been slowly but steadily losing its identity. Although there are some cases like *Palacios v. Lake Carmel Fire Dept., Inc.*, where the Second Department denied plaintiff's summary judgment motion because the supervisor's testimony that the plaintiff was instructed to use a scaffold created a triable issue of fact, and *Yax v. Development Team, Inc.*, where the Court found a triable issue of fact as to whether the plaintiff was a recalcitrant worker by submitting the affidavit of plaintiff's supervisor, who testified he provided plaintiff with readily available safety devices and instructed him to use them,[24] which support a more liberal application of the recalcitrant worker defense, most cases have been shifting towards a narrower interpretation.

The recalcitrant worker defense has been limited by the return to pre-*Cahill* standards. It has also been constrained in that it is increasingly analyzed in terms of sole proximate cause. In *Kwang Ho Kim v. D&W Shin Realty Corp.*, the Second Department reversed a grant of summary judgment for defendants on a 240(1) claim. According to the case facts, the plaintiff was standing on an unsecured ladder when it slipped, causing him to fall. The plaintiff's supervisor testified that he had previously directed the plaintiff to stop working because it was raining and he was alone. The Court rejected the recalcitrant worker defense because the defense failed to prove that the plaintiff's actions were the sole proximate cause of his accident.[25] Finally, in *Lovall v. Graves Bros., Inc.*, the plaintiff was using an extension ladder which gave out, causing him to fall. The defense argued that he was a recalcitrant worker in that he had been instructed to use scaffolding instead of a ladder. The Court declined to apply this defense, evaluating it under the sole proximate cause standard: "To be held liable pursuant to section 240(1), 'the owner or contractor must breach the statutory duty…to provide a worker with adequate safety devices, and [that] breach must proximately cause the worker's injuries."[26]

A. The *Gallagher* Case

In its 2010 decision in *Gallagher v. New York Post*,[27] the Court of Appeals reversed the lower court, granting summary judgment to the plaintiff. This decision expanded upon *Cherry* even further. In *Gallagher*, the plaintiff was cutting metal with a two-handled powered saw when its blade jammed, propelling him forward so that he fell through a nearby uncovered opening. The Court echoed *Cherry*, requiring that "availability of safety devices" be defined as being located not just at the job site, but at the specific area in which the plaintiff was working.[28] It further held that a standing order to use such safety devices does not raise an issue as to whether the plaintiff knew they were available.

B. Post-*Gallagher*

In the wake of *Gallagher*, appellate courts have become more reluctant to recognize the recalcitrant worker defense, while simultaneously treating it as part of the sole proximate cause defense. As a result, defendants have been less likely to invoke the recalcitrant worker defense, trying instead to use the broader sole proximate cause theory. However, in the past two years, even the sole proximate cause defense has met with little success as the courts are hinging it on recalcitrance, and the standard for recalcitrance has become increasingly impossible to meet.

For instance, in the 2011 case, *Auriemma v. Biltmore Theatre, LLC*, the Appellate Division held that safety devices were readily available only when the worker knew exactly where they were and there was a prior practice of the worker retrieving his own safety devices .[29] The Court rejected the argument that a standing order to use safety devices raised a question of fact that the plaintiff knew such safety devices were available.

Furthermore, the court in *Silvas v. Bridgeview Investors, LLC* declined to apply the recalcitrant worker defense, defining it according to the pre-*Cahill* terms, stating that the plaintiff's supervisor's affidavit was insufficient in establishing that the plaintiff had disobeyed immediate, specific instructions to avoid an unguarded balcony and that this recalcitrance was the sole proximate cause of his accident.[30]

Likewise, the Second Department's *Ortiz v. 164 Atlantic Avenue, LLC,*[31] and the Fourth Department's *Kuhn v. Camelot Association, Inc.,*[32] returned to the old requirement that in order for the recalcitrant worker defense to apply, there must be immediate specific instructions to use an actually available device or to avoid using a particular unsafe device.

Gallagher has been applied in cases like *Nechifor v. RH Atlantic-Pacific, LLC*[33] and in *Torres v. Our Townhouse, LLC*.[34] In *Nechifor,* the plaintiff fell twelve feet from a scaffold when he tried to descend without using a ladder. In *Torres*¸ the plaintiff injured himself when he fell while descending from a sidewalk shed. Instead of using an available ladder, he chose to climb down a tree. In both cases, the Court cited *Gallagher* and held that even if the plaintiff knew that a ladder or other appropriate safety devices were readily available to him, there had to be proof that the plaintiff was told to use the safety devices for the assigned task.

In a recent decision in September of 2102, the First Department granted summary judgment to plaintiff in a case where the plaintiff alleged he fell due to a faulty ladder.[35] The Court stated that the plaintiff was not required to prove that the ladder was defective, but that in order to invoke the sole proximate cause defense, the defendants had to prove that the plaintiff was specifically instructed to use a different, safer ladder or that the plaintiff was specifically instructed not to use the ladder he fell from.

As illustrated above, with few exceptions, since *Gallagher,* recent cases have revealed a trend that has not only weakened § 240(1) defenses by adding burdensome requirements, but has also demoted the recalcitrant worker defense to a sub-defense of sole proximate cause.

Endnotes

1. *See Bland v. Manocherian*, 66 N.Y.2d 452 (N.Y. 1985).
2. *Maleeny v. Standard Shipbuilding Corp.,* 237 N.Y. 250 (N.Y. 1923); *Koenig v. Patrick Constr. Corp.,* 298 N.Y. 313 (N.Y. 1948); *Connors v. Boorstein*, 4 N.Y.2d 172 (N.Y. 1958).
3. *Smith v. Hooker*, 89 AD2d 361, 362-363 (4th Dept. 1982).
4. *Id*. at 366.
5. *See Stolt v. Gen. Foods Corp.,* 81 N.Y.2d 918, 920 (1993); *Hagins v. State of N.Y.,* 81 N.Y.2d 92 (1993); *Lightfoot v. State of N.Y.,* 245 A.D.2d 488 (2d Dept. 1998); *Jastrezebski v. North Shore School District*, 223 A.D.2d 67 (2d Dept. 1996) (Court found recalcitrance where plaintiff ignored specific safety instructions the moment his supervisor left the worksite).
6. *Blake v. Neighborhood Housing Services of N.Y.C., Inc.,* 1 N.Y.3d 280 (2003).
7. *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35 (2004).
8. *Id.*
9. *Id*. at 39.
10. *Id.*
11. *Id.* at 40.
12. *Montgomery v. Federal Express Corp.,* 4 N.Y.3d 805, 806 (2005).
13. *Id.*
14. *Id.*
15. *Robinson v. East Medical Center, LP.,* 6 N.Y.3d 550, 552 (2006).
16. *Id.* at 555.
17. *Miro v. Plaza Constr. Corp.,* 9 N.Y.3d 948 (2007); 38 A.D.3d 454 (1st Dept. 2007).
18. 9 N.Y.3d 948.
19. *Miro v. Plaza Constr. Corp., supra,* at 455.
20. 885 N.Y.S.2d 28, 32 (1st Dept. 2009).
21. *Id.*
22. *Id.*
23. *Id.*
24. 2009 WL 4067212 (2d Dept. 2009).
25. 47 A.D.3d 616 (2d Dept. 2008).
26. 63 A.D.3d 1528 (4th Dept. 2009).
27. 14 N.Y.3d 83 (2010).
28. *Id.*
29. 82 A.D.3d 1 (1st Dept. 2011).
30. 79 A.D.3d 727 (2d Dept. 2010).
31. 77 A.D.3d 807 (2d Dept. 2010).
32. 82 A.D.3d 1704 (4th Dept. 2011).
33. 92 A.D.3d 514 (1st Dept. 2012).
34. 91 A.D.3d 549 (1st Dept. 2012).
35. 2012 WL 4069801 (1st Dept. 2012).

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Civil RICO: A Tool of Advocacy

By James A. Johnson

Introduction

The Racketeer Influenced and Corrupt Organizations Act was enacted as Title IX of the Organized Crime Control Act of 1970.[1] The Act sought to eradicate organized crime in the United States by providing enhanced and novel legal tools. Apart from governmental intervention, civil RICO cases rarely have anything to do with organized crime. Since 1985 RICO has become the weapon of choice for civil plaintiffs because of the broad and liberal construction of the statute and the potential of the litigation equivalent of terror or a thermonuclear device—*the availability of treble damages.*

Who May Sue

This weapon of choice has no allegiances. Civil RICO can be utilized by institutions, corporations, banks, brokerage firms and a bevy of other individuals and associations as plaintiffs, and counterclaims by defendants. The civil RICO cause of action is created by 18 U.S.C § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustained and cost of the suit, including a reasonable attorney fee,…[2]

The purpose of this article is to provide guidance and an advance starting point on civil RICO claims. Civil RICO is intended for use by general practitioners, private law firms, in-house corporate law departments and government agencies. This article touches the high points and sets out specific details of prosecuting and defending a RICO claim. Additionally, the information herein is designed to invoke the question by plaintiffs—is there a RICO claim or count in the facts of my case? And, a similar question by defendants—how can I dismiss this lawsuit?

The civil racketeering provisions of RICO involve three main sections of the statute: section 1961 provides the definitions, section 1962 describes the prohibited conduct and section 1964 details the remedies. Federal subject matter jurisdiction is conferred by section 1964(c) which creates the civil RICO cause of action. Personal jurisdiction is conferred by section 1965 which authorizes nationwide service of process. Section 1965(a), the principal venue provision, permits a party to institute a civil RICO action in any district in which a defendant resides, is found, has an agent, or transacts his affairs. Civil RICO actions are subject to a four-year statute of limitations. The limitation period accrues no later than the date the plaintiff first knew or should have known of its injury.[3]

The term *person* is broadly defined in section 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in a property." To determine who may bring suit under RICO has been liberally construed to include not only people, partnerships, corporations and joint ventures but also domestic state governmental units.[4] However, a showing of injury for a civil RICO claim requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.[5] In addition, the *"by reason of"* language of section 1964(c) imposes a proximate cause requirement on the plaintiff. The section 1962 violations must proximately cause the plaintiff's injury to business or property.[6] *Money is a form of property.*[7]

"Civil RICO can be utilized by institutions, corporations, banks, brokerage firms and a bevy of other individuals and associations as plaintiffs, and counterclaims by defendants."

Sedima

The U.S. Supreme Court's 1985 decision in *Sedima*[8] is the most frequently cited RICO precedent. It eliminated a bevy of defense arguments and set out the minimal pleading standards a civil racketeering claim must meet. For example, the U.S. Supreme Court overruled earlier lower court decisions that the defendant must have been convicted of criminal offenses constituting the predicate acts and that the plaintiff must have suffered a *"racketeering injury" distinct from the harm inflicted by the predicate acts.* A RICO-based complaint must be drafted with the following instructions from *Sedima* as a guide. A violation of section 1962(c), the section on which *Sedima* relies, requires *(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.* The plaintiff must allege each of the elements to state a claim. They are all equally essential components and the complaint will fail if any one of them is not adequately pleaded. The practitioner through his pleadings must articulate with great care and attention a viable racketeering claim. In addition, sections 1962(a), (b) and (c) are limited in scope to conduct involving enterprises engaged in or the activities of which affect interstate commerce. It is the activities of the enterprise, not each predicate act, that must affect interstate or foreign commerce. RICO requires no more than a slight effect upon interstate commerce.[9] Even a minimal

effect on interstate commerce satisfies this jurisdictional requirement.[10]

The most prominently litigated subsection of 1962 is section 1962(c). A plaintiff only has standing to sue if he has been injured in his business or property by conduct constituting the violation. The violation requires that (1) the *"person" and the "enterprise"* be distinct, (2) what constitutes being *"associated with"* an enterprise and (3) what it means *"to conduct or participate*…in the conduct of the enterprise's affairs."

Section 1962(c) requires that the *"person"* who violates this section must be distinct from the *"enterprise"* whose affairs that person is allegedly conducting or participating in. It is because only the person, and not the enterprise, can be liable under section 1962(c). The *"person"* and *"enterprise"* must be separate entities. The violator of section 1962(c) who commits the pattern of predicate racketeering acts must be distinct from the enterprise of predicate racketeering acts whose affairs are thereby conducted.[11] Therefore, the unlawful enterprise itself cannot also be the person the plaintiff charges with conducting it.[12] However, the U.S. Supreme Court unanimously decided to narrow, but not eliminate, the concept that the "RICO *"person"* had to be clearly and completely different from the RICO *"enterprise."* In reversing the Second Circuit's decisions in *Bennett*[13] and *Riverwoods Chappaqua*,[14] the Supreme Court determined that an individual who owns a corporation "is distinct from the corporation itself."[15] The Court reached its decision by applying the traditional analysis that a corporation as a legal fiction is an entity different from its owners. Also note that the Eleventh Circuit never enforced the person/enterprise distinction under 1962(c).[16]

Notwithstanding the distinctness requirement of the person and enterprise, the circuits are in conflict as to the distinctness and *Association-in-Fact Enterprises.* It appears that the District of Columbia Circuit[17] and the Fourth Circuit[18] follow Cedric Kushner.[19] However, the Eighth Circuit in *Atlas Pile Driving Co. v. DiCon Fin. Co*.[20] holds an opposite view in espousing that a defendant may be a member of an associated-in-fact enterprise without disturbing the required distinction of 1962(c).

The federal mail fraud statute is one of the most frequently utilized federal criminal statutes and is also one of the predicate offenses for RICO purposes. The statute provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations…places in any post office or authorized depository for mail matter…to be sent or delivered by the Postal Service…shall be fined under this title or imprisoned not more than 20 years, or both.[21]

The mail fraud statute prohibits any person from knowingly causing the use of the mails or private carrier services like Federal Express for the purpose of executing any scheme or artifice to defraud. The actual violation is the mailing, which must relate to the underlying fraudulent scheme. Section 1964(c) requires proof that the pattern of mail fraud violations caused the plaintiff's injury to business or property and not some other act.[22]

Because of RICO's broad definition of racketeering activity and the act's reference to mail and wire fraud as predicate offenses begs the question: Why not RICO? Or, should the plaintiff consider adding a RICO count to an existing state cause of action? Moreover, since an action under RICO arises under Federal law, a plaintiff can elect to have access to federal court. Civil RICO is so broad and liberal that a defendant or plaintiff can take almost any given set of facts and fashion his or her pleadings and create a viable civil racketeering claim. The key is to make certain that each of the four critical elements previously set out are in place.

Damages

To recover damages requires proof of concrete financial loss and not injury to a valuable intangible property interest. The measure of damages is the harm caused by the predicate acts constituting the pattern of racketeering activity. A compensable injury is the harm caused by predicate acts sufficiently related to constitute a pattern. Plaintiffs are required to set out a reasonable basis of recovery by competent proof and not mere speculation.[23] Only damages to *"business or property" occurring "by reason of"* and proximately caused by the RICO violations are compensable under section 1964(c). Personal and emotional injuries are not compensable under section 1964(c). Under *Sedima,* the plaintiff's compensable injury is the harm caused by the predicate acts.[24] Future damages may be appropriate to the extent that the plaintiff can establish with reasonable certainty that future damages will occur as a result of the defendant's RICO violation.

Section 1964(c) dictates the award of treble damages for civil RICO violations. It provides that the plaintiff *"shall recover threefold the damages he sustains"* in addition to costs and attorney's fees. Imposition of treble damages is required by RICO.[25]

Defenses

In order to state a case in RICO the plaintiff must allege the substantive components of an *"enterprise"* and *"pattern"* with specificity.[26] The plaintiff must also allege facts sufficient to support each of the statutory elements

for at least two of the pleaded predicate acts and that each defendant knowingly agreed to participate in the conspiracy. However, the court must read the facts alleged in the complaint in the light most favorable to the plaintiff.[27] Where the plaintiff cannot identify the enterprise, satisfy the pattern requirement or other statutory elements with specificity—*enter Federal Rule Civil Procedure 12(b)(6): motion to dismiss for failure to state a claim upon which relief can be granted.* To the extent that any predicate acts sound in fraud the pleading of those acts must satisfy the particularity requirements of *Rule 9(b)* of the Federal Rules of Civil Procedure. Federal Rule Civ. P. 9(b) provides:

> Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge and other conditions of a person's mind may be alleged generally.

The complaint must describe the predicate acts with specificity and state the time, place and content of the alleged communications perpetrating the fraud.[28] All elements of the RICO cause of action must be set out factually and with sufficient specificity to permit the court to ascertain whether a viable claim exists and whether the plaintiff has standing to pursue it. Moreover, section 1961 requires that a RICO Plaintiff establish that a defendant could be convicted for violating any of its predicate statutes. RICO is fundamentally a criminal statute and civil RICO is dependent upon a defendant committing criminal RICO acts as set out in section 1962.[29] To be criminal, the defendant's conduct must be committed with the mens rea appropriate to the offense. The defendant must possess the specific intent associated with the various underlying predicate offenses.[30] The plaintiff must prove that the defendant acted with the appropriate mens rea.

Aider and Abettor Liability

There remains a question whether one who aids and abets a violation of 1962 has personally violated the statute and is a defendant in a civil RICO claim under section 1964(c). In order to establish aiding and abetting for civil RICO purposes, the plaintiff must prove that the:

1. defendant was associated with wrongful conduct;
2. participated in it with the intent to bring it about; and
3. demonstrated by conduct to make it succeed.[31]

There must be evidence of an overt act by the defendant designed to aid in the success of the venture.[32] In addition, the defendant must have aided and abetted in at least two acts forming a pattern of racketeering activity.[33]

Conclusion

Where the facts reasonably support a RICO claim there is generally no significant obstacle if you follow the required dictates set out herein. Because of RICO's broad definition of racketeering activity and the act's reference to mail and wire fraud as predicate offenses the plaintiff is only limited by his or her creativity, articulate and specific pleadings and Federal Rules of Civil Procedure, Rule 11. This rule imposes an obligation on a lawyer not to assert a claim unless he or she has a good faith belief in the validity of the claim.

The civil RICO claim, if successful, requires the imposition of treble damages and the recovery of attorney fees and costs. Another benefit is the four-year statute of limitations. Moreover, the assertion of a civil racketeering claim is the key to the door of a federal court.

The defendant has a bevy of weapons to combat a RICO claim, at the beginning, by Federal Rules of Civil Procedure, *Rule 12(b) (6): motion to dismiss.* If that fails, the defense can fashion a RICO-based counterclaim against the plaintiffs out of the same facts that the plaintiffs initially advanced against them. And, after discovery is complete, a Federal Rules of Civil Procedure, Rule 56: motion for summary judgment may be appropriate.

This weapon of choice is analogous to "A Tale of Two Cities"—it can be the best of times or the worst of times. Therefore, civil RICO should be a tool of advocacy in every trial lawyer's kit, both plaintiff and defendant.

Endnotes

1. Pub. L. No.91-452, 84 stat.922, 941 (1970) codified at 18 U.S.C. §§ 1961 et seq.
2. 18 U.S.C. § 1964(c).
3. *Rotella v. Wood,* 528 U.S. 549 (2000).
4. *County of Oakland v. City of Detroit,* 866 F. 2d 839 (6th Cir. 1989).
5. *Patterson v. Mobil Oil Corp.,* 335 F. 3d 476, 492 (5th Cir. 2003).
6. *Bridge v. Phoenix Bond & Indem. Co.,* 128 S. Ct. 2131, 2134 (2008).
7. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 342 (1979), *Canyon County v Syngenta Seeds, Inc.,* 519 F. 3d 969, 976 (9th Cir.) *cert denied,* 129 S. Ct. 458 (2008).
8. *Sedima, S.P. R. L. v. Imrex Co., Inc.,* 473 U.S. 479, 105 S. Ct. 3275.
9. *United States v. Robinson,* 763 F. 2d 778 (6th Cir. 1985).
10. *United States v. Beasley,* 72 F. 3d 1518 (11th Cir.), *cert. denied,* 518 U.S. 1027 (1996), *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F. 2d 1350 (1985).
11. *Bennett v United States Trust Co.,* 770 F.2d 308 (2nd Cir. 1985), *cert. denied,* 474 U.S. 1058 (1986), *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F. 3d 70, 72-73 (3d Cir. 1994).
12. *United States v. Turkette,* 452 U.S. 576, 583, 101 S. Ct. 2523, 2529 (1981), *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.,* 30 F. 3d 339, 344 (2d Cir. 1994), *Old Time Enters, Inc. v. International Coffee Corp.,* 862 F. 2d 1213 (5th Cir. 1989).
13. *Supra*, n.11
14. *Supra,* n.12
15. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

16. *Cox v. Administrator,* 17 F. 3d 1386 (11th Cir. 1994).
17. *Yellow Bus Lines, Inc. v. Drivers Chaffeurs & Helpers Local Union,* 639, 913 F.2d 948 (D.C. Cir. 1990) *(en banc), cert. denied,* 501 U.S. 1222 (1991).
18. *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.,* 819 F. 2d 1279 (4th Cir. 1987).
19. *Supra,* n.15.
20. *Atlas Pile Driving Co. v. DiCon Fin. Co.,* 886 F. 2d 986 (8th Cir. 1989).
21. 18 U.S. C. § 1341 (2012).
22. *Bridge v. Phoenix Bond & Indem. Co.,* 128 S. Ct. 2131, 2138, *Beard v. Sachnoff & Weaver, Ltd.,* 941 F. 2d 142 (2d Cir. 1991).
23. *Fleischhauer v. Feltner,* 879 F. 2d 1290, 1299 (6th Cir. 1989), *cert. denied,* 493 U. S. 1074 (1990).
24. *Supra,* n. 8.
25. *Abell v. Potomac Ins. Co.,* 858 F. 2d 1104 (5th Cir. 1998).
26. *Montesano v. Seafirst Commercial Corp.,* 818 F. 2d 423 (5th Cir. 1987).
27. *H. J. Ins. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 245 (1989).
28. *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.,* 940 F. Supp. 110 (W.D. Mich. 1996), *Schmidt v Fleet Bank,* 16 F. Supp. 2d 340 (S.D.N.Y. 1998).
29. *Snowden v. Lexmark,* 237 F. 3d 620, 624 (6th Cir. 2001).
30. *Gentry v. Resolution Trust Corp.,* 937 F. 2d 899, 908 (3d Cir. 1991), *United States v. Biasucci,* 786 F. 2d 504 (2nd Cir), *cert. denied,* 479 U.S. 82 (1986).
31. *Armco Indust. Credit Corp. v. SLT Warehouse Co.,* 282 F. 2d 475 (5th Cir. 1986).
32. *In re Sahlen & Assocs., Inc. Sec. Litig.,* 773 F. Supp. 342 (S.D. Fla. 1991); *Schultz v. Rhode Island Hosp. Trust Nat'L Bank, N. A.,* 94 F. 3d 721, 731 (1st Cir. 1996).
33. *Banks v. Wolk,* 918 F. 2d 418 (3d Cir. 1990).

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Will Data from Vehicular Electronic Device Recorders Find a Common Place in Litigation?

By Erica M. DiRenzo

The growth of technology has provided valuable new resources for obtaining information which can potentially be used in the litigation process. From the disclosure of a business' electronic files to the disclosure of an individual's Facebook posts, the use of mainstream technology seems to eventually trickle down to an issue which has to be addressed by the courts. One piece of technology that seems to be extremely slow to trickle down into the courts is the use of data obtained from electronic data recorders ("EDR") in automobiles. However, with Federal legislation regarding the accessibility of EDR data, which came into effect on September 1, 2012 and additional legislation going into effect on September 1, 2013, will we see this trickle develop into a flood?

For our purposes we will use the term EDR, which can be used to describe many different devices, including Sensing and Diagnostic modules ("SDM"), or commonly known as "black boxes." In fact, in any one vehicle there may be multiple different EDRs. The National Highway Traffic Safety Administration ("NHTSA") defines EDR as "a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during and after a crash."[1] Thus, the term EDR can be used to describe different devices that record information such as pre-crash vehicle dynamics, driver inputs, vehicle crash signatures, restraint usage/deployment status and post-crash data.

While this may all sound high-tech and revolutionary, the fact is EDRs have been in use since the early 1970s.[2]

Electronic Data Recorders

If your vehicle has airbags, you have at least one EDR. EDRs originated with the airbag, which was introduced by the automotive industry in the early 1970s.[3] Airbag computers found in all vehicles store the following data parameters: fault codes, deployment timing, deployment logic, seat belt status, airbag warning light status, airbag warning light history and delta-v (the change in the vehicle's velocity over time).[4] Other computerized systems within a vehicle that may contain crash-related data are the Anti-Lock Braking Unit, Powertrain Control Module, Electronic Brake Traction Control Module and the Body Control Module.

It makes sense that in order for an airbag to deploy at the appropriate time, the data used to initiate the airbag deployment needs to be constantly monitored. This data is not only monitored, but it is stored and capable of being retrieved. Therefore, it comes as no surprise that the wealth of information that can be retrieved from any one EDR has found its way into the litigation process.

Admissibility in Trial

Courts have been rather quiet on the introduction of EDR data at trial. However, the few appellate courts that have addressed the admissibility of EDR data have upheld trial court decisions allowing the data to be introduced into evidence.[5] Various issues have arisen regarding the use of EDR data in both criminal and civil cases, including reliability, accuracy and constitutionality. Despite those issues, most courts, including those in New York, still allow the admission of EDR data into evidence at trial.[6]

In the only published New York appellate case on this subject, the Appellate Division, Fourth Department upheld the lower court's decision denying defendant's motion for a *Frye* hearing with respect to the admissibility of EDR data from defendant's automobile.[7] *See People v. Hopkins*, 46 A.D.3d 1449 (4th Dep't 2007). According to the Fourth Department, a *Frye* hearing is not necessary, as a court can rely on previous court rulings wherein a scientific procedure has been proven to be reliable. The Fourth Department determined that the lower court's reliance on previous decisions, which admitted EDR data into evidence "as generally accepted as reliable and accurate by the automobile industry and the [National Highway and Traffic Safety Administration]," was not an error.[8]

If EDR technology has been around for over 40 years and the EDR data can provide reliable information on an automobile crash that the courts are allowing at trial, why haven't we seen a proliferation of civil cases involving the use of EDR data? The reason may be related to the accessibility or lack thereof of EDR data.

Data Retrieval

The format in which the EDR data is saved depends on the manufacturer of the vehicle. In 2000, General Motors, followed by Ford, publicly released their EDR formats, which led to data retrieval software being developed and made available for sale to the public.[9] An investigator with this software could read the data from the EDR at the scene of the accident using a laptop computer or by downloading the information to be reviewed at a later time. The data appears in a graphical format.

Most automakers viewed their EDR formats as proprietary and refused to release this information.[10] Conse-

quently, only the vehicle manufacturers could access the EDR data for their vehicles. In these cases, an attorney for both the plaintiffs and/or the defendants would need to request the raw data directly from the manufacturer and hire an expert to review and interpret the data.

Therefore, while there might be masses of information available on a car crash, accessing the information has been extremely difficult, if not impossible. However, this is due to change under Federal regulation 49 C.F.R. Part 563, which is entitled "Event Data Recorders."

49 C.F.R. 563

In June 2004, NHTSA published proposed rules on EDRs.[11] The final regulations were later adopted in August 2006 as 49 C.F.R. 563.[12] All vehicles, with some very limited exceptions, manufactured on or after September 1, 2012 (vehicles manufactured in two or more stages have until September 1, 2013) must be in compliance with 49 C.F.R. 563.[13]

Notably absent from the regulations is any requirement that vehicles actually be equipped with any EDRs. Given the fact that virtually every vehicle currently being manufactured has some type of EDR, a mandate requiring EDRs was likely determined to be unnecessary.

What the regulation does mandate is adherence to uniform, national requirements for EDRs concerning the collection, storage and retrievability of data. Additionally, the regulation also "…specifies requirements for vehicle manufacturers to make tools and/or methods commercially available so that crash investigators and researchers are able to retrieve data from EDRs."[14] 49 C.F.R. 563 is meant to allow, in part, easy accessibility to EDR data regardless of the make and model of the vehicle.

49 C.F.R. 563 requires manufacturers to ensure, by licensing agreements or other means, that a tool that is capable of accessing and retrieving the data stored in the EDR is made commercially available.[15] Furthermore, this tool is to be made available to the public no later than 90 days after the first sale of the vehicle.[16]

There are no provisions regarding the price of this software, however, but it appears that by 2013, anyone who has purchased the tool made available by the manufacturer will be able to retrieve and read the data from EDRs without the help of the manufacturer or possibly even an expert.

Conclusion

With EDR data set to be easily accessible and retrievable pursuant to 49 C.F.R. 563, EDRs will likely become a regular source of information to be used in litigation. The ease of retrievability, coupled with the fact that EDRs provide valuable crash information which is deemed reliable and admissible by the courts, will likely cause a flood of this type of evidence in the very near future.

Endnotes

1. Event Data Recorders, 69 Fed. Reg. 32,942 (proposed June 14, 2004) (to be codified at 49 C.F.R. pt. 563).
2. Karl A. Menninger, II, *Data and Voice Recorders in Airplanes, Motor Vehicles and Trains*, 84 Am. Jur. Proof of Facts 3d 1, at § 10 (Originally published in 2005).
3. John Buhrman, *Riding with Little Brother: Striking A Better Balance Between the Benefits of Automobile Event Data Recorders and Their Drawbacks*, 17 Cornell JL & Pub Pol'y 201 (2007) at p. 5.
4. *See* Menninger, *supra* note 2.
5. *See* Buhrman, supra note 3.
6. *See* Menninger, *supra* note 2, at § 10; Marjorie A. Shields, *Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes,"* 40 A.L.R.6th 595 (originally published in 2008).
7. *People v. Hopkins*, 46 A.D.3d 1449, 1450, 848 N.Y.S.2d 460 (4th Dep't 2007).
8. *Id., citing People v Christmann*, 3 Misc. 3d. 309, 315, 776 N.Y.S.2d 437 (Justice Court of Village of Newark, Wayne County 2004), *citing Bachman v. General Motors Corp.*, 332 Ill. App. 3d. 760, 768, 766 NE2d 262, 272 (4th Dist. 2002).
9. *See* Event Data Recorders, *supra* note 1; in 2000 Vetronix released its Crash Data Retrieval ("CDR") tool for sale to the public. The CDR tool is a software and hardware device that allows someone with a computer to communicate directly with certain EDRs and download the stored data.
10. Transportation Research Board of the National Academies, *Use of Event Data Recorder (EDR) Technology for Highway Crash Data Analysis*, December 2004.
11. Event Data Recorders, 69 Fed. Reg. 32,942-32,943 (proposed June 14, 2004) (to be codified at 49 C.F.R. pt. 563).
12. 49 C.F.R. pt. 563 was later amended in January 2008 and then again in August 2011.
13. 49 C.F.R. pt. 563.3.
14. 49 C.F.R. pt. 563.1.
15. 49 C.F.R. pt. 563.12.
16. *Id*.

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Changes to Federal Removal and Venue Statutes Under the "Federal Courts Jurisdiction and Venue Clarification Act of 2011"

By Jason D. Hughes and Thomas J. O'Connor

Introduction

The "Federal Courts Jurisdiction and Venue Clarification Act" (the "Act") was signed into law on December 7, 2011, and became effective on January 6, 2012.[1] The Act, which makes significant changes to the federal jurisdictional statutes, is aimed at bringing clarity to the operation of those statutes, facilitating the identification of the appropriate State or Federal court where actions should be brought, and promoting judicial efficiency in the resolution of jurisdictional issues.[2] According to the House Judiciary Committee Report, "[j]udges believe[d] the [old] rules force[d] them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation."[3] Recognizing these concerns, and aiming to streamline and simplify the federal jurisdictional inquiry, the Act took primary aim at issues relating to removal and venue, which were often the source of conflicting judicial opinion and interpretation. This article provides a summary and brief discussion of the more significant removal- and venue-related changes made by the Act. A detailed discussion of *all* the clarifications and amendments made by the Act, including a section-by-section analysis, can be found in the House Judiciary Committee's February 11, 2011 Report.[4]

Removal

Removal disputes occupy a central place in modern civil litigation.[5] Thus, from a litigator's perspective, the most substantial changes made by the Act are to 28 U.S.C. §§ 1441 and 1446, the federal removal statutes. One of the most significant of those changes relates to the removal of cases in which a federal question claim has been joined with one or more unrelated state law claims pursuant to § 1441(c). Under prior law, a defendant was permitted to remove the entire case whenever a "separate and independent" federal question claim was joined with one or more non-removable state law claims.[6] Then, once the case was removed, the district court had the discretion to either retain the entire case or remand the non-removable claims.[7] Under that framework, much litigation arose over the interpretation and application of the amorphous and imprecise "separate and independent" standard.[8] In addition, federal district courts and commentators frequently criticized § 1441(c), declaring that the provision was unconstitutional or raised constitutional concerns since it purported to vest in federal courts the authority to adjudicate state law claims for which no federal jurisdiction existed.[9]

Prompted by these issues, the Act amends § 1441(c) in two main ways. First, it eliminates the troublesome "separate and independent" language, and permits removal of any case involving a federal question claim.[10] And second, once the case is removed, the district court is *required* to sever and remand any unrelated state law claims not within the courts original or supplemental jurisdiction to the state court.[11] According to the House Judiciary Committee, these changes were intended to better serve the statute's original purpose, "namely to provide a Federal forum for the resolution of Federal claims that fall within the original jurisdiction of the Federal courts," and to "cure any constitutional problems while preserving the defendant's right to remove claims arising under Federal law."[12]

The Act also codifies the well-established "rule of unanimity" for multiple-defendant cases. Under this rule, and now pursuant to § 1446(b)(2)(A), where removal is based on § 1441(a), all defendants who have been properly joined and served must join in or consent to a removal based on § 1446(b)(2)(A).[13] However, for removal of a federal claim that has been joined with one or more state law claims, only those defendants against whom the federal claim is asserted are required to join in or consent to the removal.[14]

A more significant change to § 1446 relates to the time in which defendants in multiple-defendant cases must seek removal. While prior law made clear that a defendant had thirty days from the date of service or the determination of removability to remove a case, "it did not address situations with multiple defendants, particularly where they [were] served over an extended period of time during and after the expiration of the first served defendant's 30-day period for removal."[15] As a result, federal courts faced with those circumstances adopted differing standards for determining when the thirty-day period began to run. Some courts, for example, held that the period began to run as soon as the first defendant was served, meaning that "if the first served defendant abstains from seeking removal or does not affect a timely removal, subsequently served defendants [could] not remove."[16] Other courts, however, adopted more flexible standards, including the "earlier-served defendant" standard. Under that standard, "each defendant, upon formal service of process, [had] thirty days to file a notice of removal," thereby permitting earlier-served defendants to join in later-served defendants' removal motions.[17] Adopting this latter approach, the Act amends §§ 1446(b)

(2)(B) and (C) to afford *each* defendant thirty days from *his or her own* date of service or receipt of initial pleading to seek removal, and to allow earlier served defendants to join in or consent to removal by a later-served defendant.[18] In the Congress's view, "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially."[19]

Another significant change to removal procedure under § 1446 relates to determining the amount in controversy for removal based on diversity jurisdiction. As New York State practitioners are keenly aware, § 3017(c) of the New York Civil Practice Law and Rules ("CPLR") was amended in 2003 to prohibit personal injury complaints from specifying a monetary amount in the *ad damnum* clause.[20] As a result, defendants wishing to remove a case to federal court based on diversity were faced with the challenge of demonstrating satisfaction of the amount in controversy requirement without any specific allegations as to damages in the complaint.[21]

To address this and similar dilemmas, the Act amends § 1446(c)(2) to give special consideration to defendants in those cases. Under the amended provision, a defendant "may assert the amount in controversy [in the notice of removal] if the initial pleading seeks [either]… non-monetary relief or a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded."[22] If the district court finds, by a preponderance of the evidence, that the amount in controversy requirement is satisfied, removal will succeed.[23]

Under this "preponderance standard," defendants are not required to prove satisfaction of the amount in controversy requirement to a legal certainty. Rather, unless disputed, the amount in controversy requirement will be deemed satisfied where a defendant simply alleges or asserts that the jurisdictional threshold is satisfied.[24] In the event of a dispute, the district court must make findings of jurisdictional fact. If the defendant establishes, by a preponderance of the evidence, that the amount in controversy requirement is met, the defendant will have met its burden of establishing the necessary jurisdictional facts and removal will succeed.[25] It is not clear, however, whether and to what extent federal courts will permit defendants to engage in post-removal discovery for purposes of satisfying their burden in the event of a dispute. While the opportunity to conduct at least limited discovery would appear appropriate under this new framework, some federal courts that applied preponderance standard prior to the Act have held otherwise.[26] Notably, however, Second Circuit precedent suggests that post-removal discovery would be permitted in district courts in New York,[27] and at least one district court in the Second Circuit has criticized alternative approaches.[28]

The Act also amends § 1446 through the addition of subparagraph 1446(c)(3)(A). Where a case, as initially pleaded, is not removable because the amount in controversy does not meet the statutory threshold, this addition to § 1446 "clarif[ies] that the defendant's right to take discovery in the state court can be used to help determine the amount in controversy."[29] Specifically, § 1446(c)(3)(A) provides that statements or information appearing in discovery responses or in the record of the state proceedings suggesting that the amount in controversy threshold is satisfied will be deemed "other paper" within the meaning of § 1446(b)(3), thereby triggering the thirty-day removal period.[30] Thus, in cases where the amount in controversy is not clear and removal is otherwise available, defense counsel should remain diligent in carefully scrutinizing the record as it develops or risk forfeiting the often valuable opportunity to defend the case in a federal forum.

Another removal-related change worth noting deals with a "bad faith" exception to the one-year limitation on diversity removals. Under the one-year limitation, defendants are prohibited from removing a case more than one year after commencement of the action. However, because this rule has lent itself to gamesmanship-related abuses,[31] the Act amends § 1446(c) to provide that the one-year period will not apply if "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action."[32] Under the Act, "bad faith" is defined to include "the plaintiff deliberately fail[ing] to disclose the actual amount in controversy to prevent removal."[33] Prior to amendment, some courts recognized an "equitable exception" to the one-year rule, while others interpreted the rule's limitation as absolute.[34] The Act resolves this conflict, but the scope of this amendment is not entirely clear.[35]

Venue

The Act also makes several changes to the federal venue statutes. While these changes may prove less significant than those made to the removal statutes, a general awareness and understanding of the basic and more significant amendments is important.

Initially, the Act clarifies existing law in a number of ways. Most broadly, the Act adds § 1390(a) (Venue Defined), which provides a general definition that distinguishes venue from other provisions of federal law that operate as restrictions on subject-matter jurisdiction.[36] As this clarification aims to underscore, while subject-matter restrictions may include geographic terms, they differ significantly from venue rules since subject-matter restrictions may not be waived by the parties.[37]

Existing law is also clarified through the addition of § 1390(c), which is titled "Clarification Regarding Cases Removed from State Courts."[38] This provision makes clear that venue statutes do not determine the proper venue

in cases removed from state to federal district court.[39] Rather, in line with current case law, venue in those cases is controlled by the removal statute, not the general venue statute.[40]

The Act also makes a number of changes to existing law. For example, the Act eliminates the distinction between local and transitory actions.[41] Under the old "local action" rule, certain kinds of actions pertaining to real property could only be brought in the district in which the property was located.[42] The Act changes this in new paragraph § 1391(a)(2), which provides that the nature of the action is no longer determinative of proper venue.[43] Note, however, that this change does not affect statutory restrictions based on subject-matter jurisdiction, as those restrictions will continue to apply.[44]

More significantly, the Act also amends the venue statutes to establish a single, unitary approach to venue for both federal question and diversity cases. Venue in those cases is now appropriate where all defendants reside or where a substantial part of the claim arose.[45] As to residence, the Act amends § 1391 to clarify that if all defendants reside in one state, venue can be laid in a district where any of them resides.[46] The Act also provides a single "fallback venue" provision applicable where "there is no other district in which the action may otherwise be brought."[47] In those cases, venue is proper in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."[48] Under prior law, fallback venue varied based on whether the action was rooted in diversity or federal question jurisdiction.[49] The Act does away with that distinction.

The rules governing change of venue are also amended by the Act. Prior to the Act, venue could be changed only to a district in which the action could have originally been brought, i.e., the one where venue and personal jurisdiction were proper.[50] As the House Committee observed, this framework significantly "narrow[ed] the range of possible transferee districts and preclude[ed] a transfer of the case to a district where it might be more convenient to the litigants."[51] Amended § 1404 expands this range, permitting venue to be changed to any district to which all the parties consent, even if the action could not originally have been brought there.[52]

The Act also modifies a number of other venue rules. First, as a codification of existing case law, the Act provides that natural persons are considered residents of where they are domiciled.[53] Second, persons lawfully admitted as resident aliens are deemed to reside in their state of domicile, and former § 1391, which allowed suit against an alien in any district, is repealed.[54] Third, under the Act, any entities that may sue or be sued in their own name are treated like corporations, making venue proper in any district in which the entity is subject to personal jurisdiction.[55] And fourth, the Act provides that non-resident citizens or aliens may be sued in any district, and such defendants are not considered in determining the propriety of venue.[56] For a more in-depth summary of these and some other venue-related changes, see the House Judiciary Committee Report.[57]

Conclusion

As this discussion aimed to illustrate, the Federal Courts Jurisdiction and Venue Clarification Act, which has been described as "the most far-reaching package of revisions to the Judicial Code since the Judicial Improvements Act of 1990,"[58] makes several significant changes to the statutes governing critical issues of federal court jurisdiction and venue. Only time will reveal precisely how the application of these new provisions and clarifications may impact everyday practice and litigation strategy. In the meantime, litigators, both state and federal, should review the amended rules and develop a general knowledge of how the changes may affect their practice, especially with respect to removal and venue.

Endnotes

1. *See* The Federal Courts Jurisdiction and Venue Clarification Act, Pub. L. No. 112-63, 125 Stat. 758, at §§ 105, 205 (2011) [hereinafter "The Act"].
2. *See* H.R. 394 House Judiciary Committee Report, at 1-2 (Feb. 9, 2011) [hereinafter Report].
3. *Id.*
4. *See generally* Report, *supra* note 2.
5. *See* Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act is Now Law*, JURIST—Forum, Dec. 30, 2011, http://jurist.org/forum/2011/12/arthur-hellman-jvca.php. (observing that "removal legislation…affects every day practice in state as well as federal courts," since "battles over removal" occupy such a "central place" in modern civil litigation). Arthur Hellman is a Professor of Law at the University of Pittsburgh School of Law. He worked with Congress and the judiciary on the Jurisdiction and Venue Clarification Act at several stages. *Id.*
6. *See* Report, *supra* note 2, at 12.
7. *See id.*
8. *See, e.g.*, *Bartow v. State Farm Mut. Auto. Ins. Co.*, 531 F. Supp. 20, 23 (W.D. Mo. 1981) (observing that "the concept of 'separate and independent,'…means many things to many courts").
9. *See* Report, *supra* note 2, at 12 (highlighting that "a leading treatise on the subject declares that the present statute is useless and ought to have been repealed," and that "[s]ome Federal district courts have declared the provision unconstitutional or raised constitutional claims because, on its face, subsection 1441(c) purports to give courts authority to decide state law claims for which the Federal courts do not have original jurisdiction…[while] [o]ther courts have chosen simply to remand the entire case to state court, thereby defeating access to federal court ").
10. *See* The Act § 103(a)(4).
11. *See id.*
12. *See* Report, *supra* note 2, at 12.
13. *See* The Act § 103(b)(3).
14. *See id.* § 103(a)(4) (amending 28 U.S.C. § 1441(c)(2)).
15. *See* Report, *supra* note 2, at 13.

16. *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986); *see also, e.g.*, *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988) (holding that *all* defendants must join in the notice of removal within thirty days after service upon the first-served defendant).
17. *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008); *see also, e.g.*, *Marano Enter. v. Z-Teca Rest., LP*, 254 F.3d 753 (8th Cir. 2001) (holding that *each* defendant has thirty days to remove, regardless of whether or when other defendants had sought to remove).
18. *See* The Act § 103(b)(3).
19. *See* REPORT, *supra* note 2, at 14.
20. *See* N.Y. C.P.L.R. 3017(c) ("In an action to recover damages for personal injuries or wrongful death, the complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but *shall not state* the amount of damages to which the pleader deems himself entitled." (emphasis added)).
21. *See* Robert Barrer, *Removal of Personal Injury Actions to New York Federal District Courts*, N.Y. St. B.J., vol. 78, no. 8, at 34-41 (October 2006) (discussing challenges associated with removal based on diveristy in light of amendment to N.Y. C.P.L.R. 3017(c)).
22. *See* The Act § 103(b)(3)(C).
23. *See id.*
24. *See id*; *see also* REPORT, *supra* note 2, at 16 (discussing that the amendment followed the lead of recent cases, such as *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008), and *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006), which recognize that "defendants do not need to prove to a legal certainty that that the amount in controversy requirement has been met" and "may simply allege or assert that the jurisdictional threshold has been met").
25. *See* REPORT, *supra* note 2, at 16 (discussing defendant's burden to establish jurisdictional facts in the event of dispute over amount in controversy).
26. *See, e.g.*, *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1215-1216 (11th 2007) ("Post-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rules of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them. Certainly, the power to grant discovery generally is conferred to the sound discretion of the district court, and post-removal jurisdictional discovery may appear to present a viable option for a court examining its jurisdiction. Jurisdictional discovery could avoid the problem of speculation by the court. Sound policy and notions of judicial economy and fairness, however, dictate that we not follow this course." (citations omitted)).
27. *See, e.g.*, *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999) ("[W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits."); *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003) ("A district court retains considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." (citation and internal quotation marks omitted)).
28. *Anwar v. Fairfield Greenwich, Ltd.*, No. 09 Civ. 0118, 2009 U.S. Dist. LEXIS 37077, at *10-17 (S.D.N.Y. May 1, 2009) (criticizing *Lowery*, recognizing that post-removal discovery may be warranted, and granting defendants' request for discovery in deciding a motion to remand following removal based on diversity).
29. *See* The Act, *supra* note 1, at § 103(b)(3)(C).
30. *See id.*
31. *See* REPORT, *supra* note 2, at 15.
32. *See* The Act § 103(b)(3)(c).
33. *See id.*
34. *See* REPORT, *supra* note 2, at 15 (discussing differing approach and comparing *Bowles v. Russell*, 551 U.S. 205 (2007), which rejected equitable tolling, with *Holland v. Florida*, 130 S. Ct. 2549 (2010), which accepted such tolling).
35. *See Hellman*, supra note 5 (observing that while the "exception is, as the House Report states, 'limited in scope[,]' [h]ow 'limited' remains to be seen").
36. *See* The Act § 201(a).
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*; *see also* REPORT, *supra* note 2, at 17-18.
41. *See* The Act § 202.
42. *See* REPORT, *supra* note 2, at 18 (discussing "local action" rule).
43. *See* The Act § 202.
44. *See* REPORT, *supra* note 2, at 18-19 (observing that, "[i]n light of the definition in subsection 1390(a), the phrasing of paragraph (a)(2), with its specific reference to 'venue,' makes it clear that statutory restrictions based on subject-matter jurisdiction…continue to apply").
45. *See* The Act § 202.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See* REPORT, *supra* note 2, at 19.
50. *See* REPORT, *supra* note 2, at 23-24 (discussing *Hoffman v. Blaski*, 363 U.S. 335 (1960), which interpreted districts "where [the action] might have been brought" as districts in which both venue and personal jurisdiction are proper).
51. *See* REPORT, *supra* note 2, at 24.
52. *See* The Act § 204.
53. *See id.* § 202.
54. *See id.*
55. *See id.*
56. *See id.*
57. *See* REPORT, *supra* note 2, at 17-24.
58. *Hellman*, *supra* note 5.

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Lead Litigation: Recent Trends and Key Strategies for Defense Counsel

By Thomas F. Segalla, William J. Greagan, and Matthew D. Cabral

The only consistent injury that can be reliably attributed to lead exposure is the stick of the needle when a blood lead level test is taken. There is no signature condition caused by lead, which makes the litigation surrounding lead exposure as complex as it is frequent and widespread. And it is likely to increase. But a number of fundamental shifts occurring in this realm point to an evolution in how lead cases play out in the courts—and with that evolution comes a greater ability to defend against claims alleging liability for a wide range of injuries and conditions when the plaintiff has, at some point, been exposed to lead.

On the regulatory side, the Centers for Disease Control are eliminating the use of the term "blood level of concern" and replacing it with the term "reference value" due to a belief that there is no blood lead level without deleterious effects. In fact, there is statistical evidence correlating even low blood lead levels with IQ deficits, attention-related behaviors, and poor academic achievement. To identify children with elevated blood lead levels, the CDC has adopted a "reference value" based on the 97.5th percentile of the blood lead level distribution among children 1-5 years of age, which is currently 5ug/dL. This reduction from the previous "blood lead level" standard of 10 ug/dL will likely encourage the plaintiff's bar to pursue lead exposure cases at lower levels of exposure.

Fortunately, in recent years the defense bar has been successful in educating the judiciary on lead issues. There is a growing recognition among courts that other factors (*e.g.*, socioeconomic factors, family history, and heredity) play a role in a child's neuropsychological development and that evidence of these factors is relevant and admissible. As a result, courts are beginning to allow discovery of health, IQ, and education information from non-party family members—material that can prove critical to the successful defense of a lead exposure claim.

Landlord Liability and Questioning Causation

Absent a statute to the contrary, the standard for landlord liability for injuries caused by lead paint is the same as for any other type of premises liability. The plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected.[1] Constructive notice of a hazardous lead-based paint condition may be established by proof that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs; (2) knew that the apartment was constructed at a time before lead-based interior paint was banned; (3) was aware that paint was peeling on the premises; (4) knew of the hazards of lead-based paint to young children; and (5) knew that a young child between the ages of six months and six years lived in the apartment.[2] Mere potential for chipping or peeling paint is not enough. This burden is not met by merely showing a possibility of chipping or peeling paint based upon prior instances of chipping paint which had been abated but which might reoccur. The plaintiff is required to show actual knowledge of the current condition of chipping or peeling paint, even where there has been prior notice of a lead-paint hazard with approved abatement.[3]

"There is no signature condition caused by lead, which makes the litigation surrounding lead exposure as complex as it is frequent and widespread.… But a number of fundamental shifts occurring in this realm point to an evolution in how lead cases play out in the courts—and with that evolution comes a greater ability to defend against claims…"

Even where there is evidence of exposure and notice to the landlord, courts have begun to recognize that the defendant landlord still has the right to question causation and thereby escape liability or mitigate its damages. While a parent's negligent failure to supervise a child is generally unavailable to defendants as a basis for seeking contribution,[4] parental negligence may be used where the specific danger is eminent and patently foreseeable—where the parent is made aware of the danger that his or her infant faces but take steps to expose the child anyway.[5] Landlords can defend themselves by showing that the injuries the infant plaintiff allegedly suffered were caused by his or her parents affirmatively creating or exacerbating the conditions that caused harm.[6] Thus, where lead paint is alleged to be the source of an injury, a landlord is also entitled to show that the parent changed or otherwise damaged the paint; exposed the infant plaintiff to lead paint conditions elsewhere; exposed the infant plaintiff to other sources of lead, such as newsprint or cigarette butts; and/or negligently attempted to remediate, remove, and/or maintain the premises.[7] Landowners may also show that a parent was warned that the child had dangerously high lead levels, was informed about

the potential sources of lead poisoning in the plaintiff's dwelling and that preventive steps should be taken to stop the lead poisoning, and failed to take the necessary preventative steps and obstructed the defendant from remedying the hazard.[8]

While a parent's negligence may not be imputed to the child, and very young children are not responsible for their own negligence, a landlord who has been negligent in dealing with lead hazards presented by paint is clearly entitled to challenge causation by showing that the infant plaintiff ingested other lead-containing substances during the relevant time periods, even though the alternative lead sources were ingested in the parent's presence.[9] Furthermore, defendants can assert the affirmative defense of failure to mitigate damages. While the infant plaintiff is usually *non sui generis* at the time he consumes the lead paint, he is not absolved from all responsibility simply because he was once very young. The plaintiff can be held accountable for pre-teen and teenage misconduct, such as discontinuing prescribed medication or failing to attend school, where such misconduct constitutes a failure to mitigate damages at a time when the plaintiff could be held legally responsible for his or her actions.[10]

But Is Lead the Proximate Cause?

Where there is proof of an elevated lead level, a defective lead condition in the premises, and actual or constructive notice on the part of the landlord, the landlord still may have a viable defense to the plaintiff's action because in addition to these elements there must also be proof that the lead exposure was a proximate cause of the plaintiff's injuries. Proximate cause means that the exposure must be a substantial factor in bringing about the injury, not a slight or trivial one. This is particularly fertile ground for the defense attorney.

It has been reported that elevated blood lead levels have an adverse impact on cognitive and behavioral functioning of children. However, no specific pattern or neurobehavioral signature of a "lead injury" has been identified. The only consistent finding across studies is that the relationship between elevated blood lead levels and cognitive and behavioral outcome is small. Plaintiffs frequently allege that the infant plaintiff suffers from a lower IQ or neurological, cognitive, and behavioral disorders due to exposure to lead. However, a multitude of variables in a child's medical, family, social, and environmental history are known to have a far greater negative effect on cognitive and behavioral development than elevated blood lead levels. Known risk factors that negatively impact a child's bio-psychosocial development include family history of learning disorders, speech- and language-related difficulties, attention deficit/hyperactivity disorder (ADHD) behavioral difficulties, and many psychological disorders including depression, anxiety, conduct disorder, and oppositional defiant disorder. These disorders are often attributable to family genetics. Other variables that increase a child's risk for poor cognitive, behavioral, or psychological outcomes include maternal drug, alcohol, or tobacco use during pregnancy; chronic medical illness during pregnancy; premature and low birth weight; and maternal age.

Another important and scientifically recognized neuron-developmental risk factor is socioeconomic status. Children from poor socioeconomic backgrounds have higher mortality rates and are at increased risk for several chronic medical, behavioral, and emotional disorders impacting intelligence, language function, and overall academic achievement. The home environment also impacts a child's cognitive, intellectual, and behavioral development, as those home environments characterized by poor parenting practices, low parental responsiveness, and minimal cognitive stimulation increase a child's risk for poor cognitive, behavioral, and academic outcomes. Home settings in which children are threatened and/or witness domestic violence have a negative effect on a child's overall functioning as well.

Evolving Scope of Discovery

Courts have begun to recognize that lead exposure does not equal injury. When supported by scientific studies and articles to show a link, expert testimony can be utilized to show that the plaintiff's disorder and disabilities were caused by other factors including the social and environmental circumstances of his upbringing and family history.[11] Once a court acknowledges that other factors besides lead exposure are material and relevant, the defendant should be allowed to conduct discovery into these areas. This invariably leads to disputes as to the scope of discovery. There is a difference between what is privileged and what is confidential. Privileged information, unless waived, is not discoverable. Confidential information, if relevant, is discoverable but may be subject to limitations on its dissemination. Since evidentiary privileges impede the search for truth, they are disfavored and are construed narrowly.[12]

There are limitations on the scope and purpose of discovery. Discovery is permitted with respect to evidence material and necessary in the prosecution or the defense of the action. The words "material" and "necessary" are to be interpreted liberally to require the disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing the delay and prolixity. The test is one of usefulness and reasoning. Discovery should be permitted if the information is sought in good faith for possible use as evidence-in-chief, on rebuttal, or for cross-examination.[13] Put another way, discovery demands must be reasonably calculated to lead to the discovery of admissible evidence.[14]

The scope of discovery in lead paint cases is an evolving area of the law. Claims are usually brought by a parent, in their representative capacity only, on behalf of an infant plaintiff. Thus, since only the infant plaintiff is a party, plaintiffs take the position that defendants are only entitled to discovery from the infant plaintiff and that all other records are privileged. Since the mother is not a party in her own right, and she has not put her own medical condition into issue, her medical history remains privileged. However, because a child's in utero development is inextricably intertwined with the health of his mother, courts do permit discovery of prenatal health records for the mother of the infant plaintiff. Nevertheless, plaintiff's counsel routinely attempt to foreclose inquiry into the health and academic performance of siblings and parents. Considering that social, behavioral, cognitive, and intelligence deficiencies may be attributed to heredity, prenatal conditions, and psychological factors, courts should permit discovery from non-party family members.

In determining whether to compel production of information from non-parties, courts must engage in a discretionary balancing of factors, such as the strong policy favoring open disclosure, the defendant's need for the information, the burden imposed on the non-party, the potential for confusion and delay, and the personal nature of the information sought. Where these factors are shown to be material and relevant to the plaintiff's claim of injuries, discovery of the education and medical records, including drug treatment records and IQ testing results of the plaintiff's immediate family, ought to be permitted.[15]

In a recent New York opinion, the Supreme Court of Schenectady County permitted defendants to show that the mother's prenatal medical records demonstrated that she only achieved a tenth grade education, had used alcohol and crack cocaine while she was pregnant, the infant plaintiffs were born with crack cocaine in their systems, the father had an ongoing drug abuse problem, and the plaintiff's younger brother (who presumably had not been exposed to lead) had a learning disability.[16] The court found that this medical evidence was sufficient to sustain the defendant's burden to seek medical record discovery and IQ testing from the non-party family members.

This logic presents a Catch-22 because, while parental and sibling histories are material and relevant to determine whether other factors besides the exposure to lead paint are causing or contributing to injuries claimed by the infant plaintiff, the court has indicated that such discovery is only warranted where the evidence of the conditions is known to exist. Arguably, the inquiry should be permitted in the first instance to determine whether the conditions exist. Many courts, probably the vast majority, hold that the medical records of the plaintiff's siblings and parents are privileged and cannot be disclosed except by way of waiver.[17] In these jurisdictions, defense counsel can still effectively cross-examine plaintiff's experts with respect to those material and relevant factors they have to recognize but did not consider.

In sum, along with increased awareness of the deleterious effects of lead in the blood, courts are also taking note of other environmental, hereditary, genetic, and socioeconomic factors that tend to cause or contribute to those same deleterious effects. Defense counsel must be aware of these factors and should make every effort to pursue discovery of all material and relevant information bearing on these factors.

Endnotes

1. *Juarez v. Wavecrest Mgmt. Team*, 88 N.Y.2d 628 (1996).
2. *Chapman v. Silber*, 97 N.Y.2d 9 (2001); *Cunningham v. Anderson*, 85 A.D.3d 1370, 925 N.Y.S.2d 693, lv dismissed and denied; 17 N.Y.3d 948, 936 N.Y.S.2d 71 (2011).
3. *Charett v. Santsrpree*, 68 A.D.3d 1583, 893 N.Y.S.2d 315; *Robinson v. Scafidi*, 23 A.D.3d 827, 828, 803 N.Y.S.2d 789 (3d Dept., 2005); *Williams v. Singh*, 2010 N.Y. slip op. at 33191U; 2010 N.Y. Misc. LEXIS 5587 (Albany Co., N.Y. 2010).
4. *Franklin v. Krumanocker*, 114 A.D.2d 611 (3rd Dep't 1985) (dismissal of the landlord's counterclaim against tenant whose infant was the victim of lead paint poisoning on the landlord's premises on basis that a counterclaim based on the tenant's negligent supervision of the infant was invalid).
5. *Cooper v. County of Rensselaer*, 182 Misc.2d 487 (Rensselaer Co., N.Y. 1999).
6. *Cunningham v. Anderson*, 66 A.D.2d 1207 (3d Dept. 2009); *M.F. v. Delaney*, 37 A.D.3d 1103 (4th Dept. 2007); *see also Ankiewicz v. Kinder*, 408 Mass. 792, 793, 563 N.E.2d 684 (1990) (permitting landlord's third party complaint for contribution against parent in strict liability action for lead paint poisoning of child); *Weaver v. Arthur A. Schneider Realty Co*., 381 S.W.2d 866 (Mo. 1964) (landlord not liable for injuries to a tenant's infant from eating peeling plaster from a common hallway because the tenant did not allege that such small children were ever in the common hallway alone or that the landlord had any notice of the presence of children there or any reason to expect them to be in the hallway without an older person in charge).
7. *M.F. Delaney*; *Ward v. Bianco*, 16 A.D.3d 1155 (4th Dept. 2005); *Van Wert v. Randall*, 2012 N.Y. slip op. at 50534U; 2012 N.Y. Misc. LEXIS 1299 (County of New York 2012).
8. *Cooper v. County of Rensselaer*, 182 Misc.2d 487.
9. *Cunningham v. Anderson*, 85 A.D.3d 1370 (3d Dept. 2011); *Van Wert, id.*
10. *Cunningham v. Anderson*, 84 A.D.3d 1370, 1372 (3d Dept. 2011); *Watson v. Priore* (Oneida Co., N.Y. 2011).
11. *Cunningham v. Anderson*, 85 A.D.3d 1370.
12. *Trammel v. U.S.*, 445 U.S. 40 (1980); *Catone v. The Honorable Robert E. Miles*, 215 Ariz. 446; 160 P. 3d 1204 (2007).
13. *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430 (1968).
14. Fed. R. Civ. P. 26(b)(1).
15. The issue of non-party discovery has arisen frequently in the context of scope of discovery. Some courts, citing the broad discovery provision contained in Rule 26(b)(1), have permitted discovery of non-party information because they found it relevant or reasonably calculated to lead to the discovery of admissible evidence. *E.g., Stewart v. Nassau*, No. 89-8214 (Civ. Dist. Ct. Orleans

Par. Jan. 19, 1996) (court-ordered neuropsychlogical testing of plaintiff's non-party sister relevant in lead paint exposure case); *Anderson v. Seigel*, 255 A.D.2d 409, 680 N.Y.S.2d 587 (App. Div. 1998) (academic records of plaintiff's siblings, IQ testing of plaintiff's mother relevant to cause of plaintiff's cognitive defects in lead paint exposure case); *Salkey v. Mott*, 237 A.D.2d 504, 656 N.Y.S.2d 886 (App. Div. 1997) (trial court's decision ordering plaintiff's mother to take IQ test within court's discretion in lead paint exposure case). Other courts have rejected discovery of non-party siblings and parents as beyond the scope of Rule 26. *E.g., Monica W. v. Milevoi*, 252 A.D.2d 260, 685 N.Y.S.2d 231, 234 (App. Div. 1999) (rejecting requested discovery in lead paint case because mental condition of non-party siblings irrelevant to any claim or defense in case); *Andon v. 302-304 Mott Street Assocs.*, 257 A.D.2d 37, 690 N.Y.S.2d 241 (1st Dep't 1999) (IQ testing of plaintiff's mother not permitted because such information would not resolve issue of causation in lead paint exposure case); *Van Epps v. County of Albany*, 184 Misc. 2d 159, 706 N.Y.S.2d 855, 864-65 (Sup. Ct., Albany Co. 2000) (defendants in lead paint exposure case failed to show relevance of academic and medical records of Plaintiff's mother and sibling).

16. *Scott v. Carson*, 2010 N.Y. slip op. 50731U; 2010 N.Y. Misc. LEXIS 869 (Schenectady Co., N.Y. 2010).

17. *See Ryan v. Simma* (Rensselaer Co. 2011). Notably, the court did hold that parent and sibling school records are discoverable, but are subject to *in camera* inspection to prevent the disclosure of medical information.

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Litigating International Torts in U.S. Courts
Travel Torts; Dispositive Motions on the Merits

By Hon. Thomas A. Dickerson and Rodney E. Gould

§ 1: On the Merits

Once personal jurisdiction over the parties has been established and any forum non conveniens motion has been addressed, the defendant may file motions to dismiss for failure to state a claim and/or for summary judgment. These dispositive motions are important litigation tools, the outcomes of which may cause the parties to re-evaluate the viability of their positions. Plaintiffs' counsel are well advised to carefully review this area of the law in preparing complaints that can survive the defendants' early substantive motions.[1]

§ 2: Types of Issues Raised

This section reviews cases in which a variety of dispositive motions have been made at the commencement of the litigation in an effort to narrow the issues and determine the realistic value of a case.

§ 3: Early Choice-of-Law Determinations—Liability

The parties will attempt to establish the parameters of a given case by seeking to determine what legal theories may be utilized to establish liability.[2] For example, in *Naghiu v. Inter-Continental Hotels Group, Inc.*,[3] the defendants were able to apply the law of two states to extinguish their liability for a tourist's property loss and physical injuries. The court held that during the plaintiff's "stay as a guest of defendant's hotel in Zaire, Africa in March 1993, he was attacked in his room, causing him to suffer personal bodily injury and a loss of $146,000 in property. "Virginia law was applied to the plaintiff's property loss claim, the result being a finding that the guest was not a bailee. Zaire law was deemed to apply to the plaintiff's personal injury claim, but since neither party supplied the court with Zaire law, Delaware law was applied instead, and the hotel was found not liable for the plaintiff's physical injuries.

In *Carris v. Marriott Int'l., Inc.*,[4] a hotel patron was injured in a personal watercraft accident. He sought an early determination that "Illinois tort law [would] govern his case because that law includes an extension of the agency doctrine of respondeat superior that would enable him to fasten vicarious liability on Marriott for negligence by employees of NMR. Had Marriott owned the resort, the negligence of the employees…would be Marriott's responsibility under the doctrine. Marriott was not their employer, however—NMR, a separate, indeed unaffiliated…corporation was—and so NMR's employees were not Marriott's employees and their negligence would not be imputed to Marriott as a matter of respondeat superior. But if Marriott created the appearance that NMR was owned by Marriott and Carris was led by that appearance to believe that it was owned by Marriott and he relied to his detriment on that belief, then the doctrine of apparent authority…would allow him to treat Marriott as if it were the employer of NMR's employees.... The parties agree, however, that under Bahamian law…apparent authority is not a ground for tort liability. This probably is incorrect.... But we leave the parties to their agreement and so if Bahamian law applies, Carris's only recourse is against NMR and presumably he would have to sue it in the Bahamas. So we must determine whether under Illinois conflict of law principles…Illinois or Bahamian tort law governs this case."

In *Heinz v. Grand Circle Travel*,[5] a U.S. tour participant was injured when she was caught between hydraulic sliding doors on a cruise boat in Germany. The cruise boat was provided by a Swiss tour operator. The court relied on U.S. maritime law and held that a Basel, Switzerland forum-selection clause would be enforced and that the Strasbourg Convention on the Limitation of Liability would most likely be the governing law.

In *Sachs v. TWA Getaway Vacations, Inc.*,[6] a tour participant was injured while disembarking a tour bus in Egypt. The U.S.-based tour operator asserted that it "has never owned, operated, managed or controlled the motorcoach." The court held that under Missouri and Florida laws, the U.S.-based tour operator generally was not liable for misconduct or selection of foreign ground handlers.

In *Oran v. Fair Wind Sailing, Inc.*,[7] the plaintiff was injured while taking part in an "Instant Bareboater and Catamaran Course" in the United States Virgin Islands. At issue was the enforceability of a signed release. The court noted that it must determine "(a) what law to apply to evaluate the validity of the Release, (2) under what law, whether the Release is valid and (3) if the Release is valid, what is its effect on Plaintiff's negligence and unseaworthiness claims." The court found that federal admiralty law applied and, further, that regarding the validity of the release, Michigan law would be applied because the choice-of-law clause was enforceable and "does not offend the public policy of the Virgin Islands or courts

sitting in admiralty jurisdiction as such clauses are routinely enforced" The court granted summary judgment to the defendants.

Also, in *Neely v. Club Med Management Services, Inc.*,[8] a U.S. citizen employed as a scuba instructor at the St. Lucia Club Med resort was sucked into the propellers of a dive boat. The court held that it had subject-matter jurisdiction and that maritime law governed and preempted St. Lucian law on the issues of liability and damages.

§ 4: Early Choice-of-Law Determinations—Damages

The parties will also attempt to establish the value of a case by seeking to determine what, if any, limitations exist on the recovery of damages.[9] For example, in *Barkanic v. General Administrator of Civil Aviation*,[10] the defendant was able to limit recoverable damages to near de minimus amounts. The court held, "On January 18, 1985, Peter Barkanic and Donald Fox, citizens of the District of Columbia and New Hampshire, respectively, were killed in the crash of a Chinese plane en route from Nanking to Beijing, China. Representatives of their estates brought this wrongful death action against CAAC, an agency of the Chinese government that provides domestic and international air services to passengers traveling to or from airports within China.... CAAC moved for partial summary judgment limiting its liability to $20,000. It based this motion on Chinese law, which limits an airline's liability for the wrongful death of a non-citizen to $20,000.... Because we believe that…New York's choice of law rules would lead to the application of Chinese law, we affirm the entry of partial summary judgment in CAAC's favor."

In *Gund v. Pilatus Aircraft, Ltd.*,[11] a case involving the death of six passengers in the crash of a sightseeing aircraft in Costa Rica, "[t]he court finds that the Death on the High Seas Act (DOHSA) and its provisions regarding 'commercial aviation accidents' apply here, and that both pecuniary and nonpecuniary damages as defined in DOHSA, may be recoverable for the wrongful death causes of action."

Also, in *Reers v. Deutsche Bahn AG*,[12] 12 passengers, some U.S. citizens, died in a German-owned railcar on a French train because an attendant "started a fire [in the rail car] and[,] failing to extinguish it, abandoned his post without warning the sleeping passengers." The court held that it did not have personal or subject-matter jurisdiction over the French or German rail companies involved and that the case would be dismissed on the grounds of forum non conveniens because France provided an adequate alternative forum. The court so held despite the fact that "the maximum compensation that would be available to each estate in a French Court would be approximately $100,000."

§ 5: Supplier Liability—Accidents on Hotel/Resort Premises

Many travel accidents occur on the premises of a hotel/resort or its beach area. Whether and to what extent a hotel or resort may be held liable will depend upon the applicable law and which defendant is being hauled into court.[13] Dispositive motions, often detailing complex business relationships between foreign and domestic concerns, are frequently addressed by the courts.[14]

There is no shortage of examples of guests injured while at hotels/resorts.[15] For example, in *Leinhart v. Caribbean Hospitality Services, Inc.*,[16] the plaintiff "was vacationing at the Aruba Grand [which] is located next to the public beach and…provides lounge chairs and tiki huts on the beach exclusively for use of its guests. Leinhart and a friend were spending the day relaxing and had been led to chairs by an Aruba Grand employee who placed the chairs under a tiki hut for their use.... Leinhart was asleep in a lounge chair when…she was struck by a pickup truck and boat trailer operated by an employee of Unique Sports of Aruba. The boat and trailer were backing up along the beach."

In *Kaden v. Wyndham Conquistador Resort & Country Club*,[17] a guest slipped and fell on the Jacuzzi platform at Wyndham El Conquistador Resort & Country Club in Puerto Rico. The court wrote: "A guest staying at a hotel expects the latter to take all necessary security measures to [prevent] foreseeable risks. It is reasonably foreseeable that the areas surrounding or nearby a pool or Jacuzzi in a hotel will become wet by the people going in and out of both the pool and the Jacuzzi.... One would expect the hotel to take all available precautionary measures to reduce the likelihood of slips and falls in said area."

In *Knoell v. Cerkvenik-Anderson Travel, Inc.*,[18] an 18-year-old student and his parents purchased a student tour to Mazatlan, Mexico. While there, he spent three days drinking alcoholic beverages served by the tour operator. The student then decided to jump from the balcony of his hotel and was killed. The court held that the tour operator could be charged with negligence in failing to properly supervise the student and negligent and fraudulent misrepresentation in promising to adequately supervise the student participants. The court also held that the tour operator could not be charged with having violated the Arizona dramshop law prohibiting the sale of alcohol to persons under the age of 21. Because the tour operator was not a licensee in the bar business in Arizona, it was not liable for serving an 18-year-old in Mexico where the legal drinking age was 18.

Also, in *Deacy v. StudentCity.Com, LLC*,[19] a case involving a young woman on spring break in Cancun, Mexico, who after consuming alcoholic beverages was raped in the swimming pool of her hotel, the court "decline(d) to extend dram shop liability to tour organiz-

ers that neither own or control the alcohol served. In the circumstances present here, where the defendant had no authority to cut the plaintiff off from voluntary alcohol consumption and did not own or furnish the alcohol consumed by the plaintiff, the defendant cannot be said to have a duty of care."

§ 6: Supplier Liability—Torts of Beach Vendors, Concessionaires, and Local Service Providers

Concessionaires offering parasailing, scuba diving, snorkeling, waterskiing, horseback riding, and personal watercraft services are often promoted by hotels and resorts, which usually receive a percentage of the vendor's earnings. These entities are, however, typically unrelated to the hotel or resort and, more often than not, are uninsured and unlicensed. The same may also be true of other local service providers like tour bus companies, taxi services, air carriers, and rental car companies. Defendants frequently seek early determinations of the liability of travel suppliers such as hotels and resorts, cruise lines, U.S.-based rental car companies, and tour operators[20] for the torts of foreign beach vendors, concessionaires, and local travel service providers.[21]

Walker v. Wedge Hotel provides a good example.[22] There, "Walker, twenty seven, went parasailing during a trip to the Bahamas. She and a friend were required to ride together [because of] inclement weather. During the ride the frayed towrope failed, causing Walker to be dragged through the water for several minutes. Walker drowned..... Walker's mother sued the management company of the hotel located on the stretch of beach on which the vendor operated its parasailing business. Plaintiff alleged the vendor, which had an office in the hotel, was an agent of the hotel, and asserted that the hotel was liable for the vendor's negligence in failing to maintain the towrope and failing to give Walker instructions on how to unclip herself in the event of an emergency."

In *Hernandez v. Quality Inns, Inc.*,[23] a tourist was fatally injured while using parasailing equipment rented from a local Mexican company, which had no legal connection to the hotel where the tourist was a guest. To establish the liability of the hotel, the plaintiff sought "to hold Quality Inns vicariously liable for Hotel Calinda's failure to hire a competent parasailing concessionaire with sufficient training in parasailing and/or lifesaving, for advertising parasailing on its grounds and creating an illusion of safety without first checking on the competency of the operators of the parasailing concessionaire, and for failing to properly supervise and observe the parasailing activity. The record indicates Hotel Calinda contracted with the parasailing concessionaire 'Deportee Aquaticos' received a monthly fee pursuant to the contract, and that employees of the hotel were responsible for regularly inspecting the activity and equipment of the parasailing concessionaire. The parasailing activity was conducted along the Hotel Calinda beach and signs were posted on the grounds of the hotel directing guests to the parasailing facility.... In fact, plaintiff's husband was instructed by a clerk of the hotel's front desk to go the beach area to sign-up for parasailing."

In *McCollum v. Friendly Hills Travel Center*,[24] a travel agent was able to escape liability for injuries that a tourist incurred while waterskiing at a hotel. "[T]he driver then made too fast a turn for prevailing water conditions which caused [the plaintiff] to fall hitting 'the water hard and twisted [his] head.' Twenty two days after the accident he suffered a stroke as a result of that fall and is now paralyzed on the left side of his body from the stroke."

In *May v. Club Med Sales, Inc.*,[25] the resort owner and tour operator escaped liability when "Plaintiff made a reservation at the Sonora Bay Resort. As part of her activities, Plaintiff went horseback riding. Plaintiff claims that while she was horseback riding, the saddle slipped because it was improperly adjusted, causing her to fall and sustain various injuries." Also, in *Ashkenazi v. Hertz Rent A Car*,[26] involving a rental car accident in Mexico, and *Weiner v. B.O.A.C.*,[27] involving a rental car accident in England, a domestic rental car company and international airline were held not liable for rental car accidents.

In *Philippe v. Lloyd's Aero Boliviano*,[28] the defendant obtained judgment dismissing the complaint brought by a tour participant who suffered bilateral cerebral hemorrhages, rupture of blood vessels in the brain, and edema when he was exposed to inadequate oxygen levels at high altitude and rapid decompression during a flight in Bolivia. Also, in *Taylor v. Costa Lines, Inc.*,[29] a cruise passenger purchased a shore excursion tour of Trinidad aboard a cruise ship during which a taxicab struck a tree causing severe injuries. "Costa's advertising of 'well planned shore excursions' with no specification of who planned them, permits the inference that Costa did."

Endnotes

1. For example, in MacLachlin v. Marriott Corp., Inc., New York Law Journal, January 18, 1994, p. 29, col. 2 (N.Y. Sup. Ct. 1994), the plaintiff's counsel carefully crafted a complaint to recast the Marriott Honored Guest Awards Program as a U.S.-based tour operator taking advantage of New York State law imposing fiduciary duties on tour operators. The court held that " "Plaintiff and a friend...Yorke booked the Q8 Marriott Vacation Tour under Marriott's Honored Guest's Awards Program (HGA) which, inter alia, included air-fare to Egypt and a stay at the Cairo Marriott Hotel & Casino (the Cairo Marriott). Plaintiff and Yorke claim that upon arriving at the Cairo Marriott, they arranged to take various tours through the Marriott tour desk. Plaintiff alleges that on the morning of August 25, 1991, Abou Aziza (Aziza), the Cairo Marriott bell captain, stated that he could arrange a tour of the Sound and Light Show at the Pyramids that evening, to which the plaintiff and her companion agreed. Plaintiff contends that Aziza subsequently drove her and Yorke to a stable and informed them that a horse or camel were the only means available to reach the Pyramids. Plaintiff maintains that she explained to Aziza that she was afraid to ride a camel but was assured by Aziza that the camel and the camel path were 'perfectly' and that a trained handler

would guide the camel along the route. Plaintiff alleges that her camel was subsequently tied to Yorke's camel and they were led down the trail by a young boy (the Camel Guide), a practice plaintiff avers was not in keeping with Egyptian law which requires one adult handler per camel. Plaintiff's claim that the path she was taken on was rocky, unlevel and strewn with debris, and that the Camel Guide continually beat the legs of both camels to prod them along. At some point, plaintiff avers that her camel stumbled and tripped, 'probably on some rocks or debris' and with a loud cry the camel threw her into the air. Plaintiff landed on the rocky road where she remained until Aziza assisted her into his car and drove to the Pyramid Hospital. The fall allegedly caused plaintiff to break six ribs and fracture her pelvis.... Even assuming that Aziza arranged the Pyramid Tour on his own accord, the allegations of plaintiff concerning how she was offered and subsequently booked the camel trip by the Bell Captain in the lobby of the Caro Marriott and subsequently driven to the camel stable in what appears to a an official Cairo Marriott car, in addition to Marriott's brochures which promoted the Q8 vacation and lauded the preferential treatment plaintiff and her companion would receive, raise factual issues as to whether defendant should be estopped from disclaiming liability for the negligence of an independent contractor...and as to whether that contractor's negligence was the proximate cause of plaintiff's injuries. Contrary to defendant's contention, the question is not whether plaintiff was a sophisticated traveler and was at fault, but, rather was the employee of Marriott's subsidiary negligent in the performance of his official duties and whether such duties included the planning, arranging and booking of the ill-fated camel ride to the Pyramids."

2. *See, e.g., U.S. Supreme Court:* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578, 1996 A.M.C. 305 (1996) (12-year-old infant killed in a collision in Puerto Rico while riding Jet Ski; Supreme Court held that state remedies remain applicable in wrongful death and survival actions arising from accident to nonseaman in territorial waters).

   First Circuit: Barrett v. Ambient Pressure Diving, Ltd., 2008 DNH 172, 2008 WL 4280360 (D.N.H. 2008) (diving accident in Bermuda; defective rebreather; defendants' motions to apply English law and for a default denied).

   Second Circuit: Mayer v. Cornell University, 107 F.3d 3 (2d Cir. 1997) (bird watcher on Cornell University-sponsored 28-day tour of Costa Rica drowns while snorkeling off Il DeCano in the Pacific Ocean; defendants owed no duty to drowning victim; "the evidence amply demonstrates that neither Cornell nor Brown was in a position to ensure the safety of the snorkeling activity because neither had any particular expertise in snorkeling… and more significantly neither had any authority over the actions of Marenco or its employees.... Indeed, there was no realistic opportunity for Brown or Cornell in particular to control the circumstances of the snorkeling because in planning its sponsorship of the tour, Cornell could not have anticipated Marenco's unexpected offer for the group to join the del Cano day trip.... We see no reason for extending New York law to impose a duty of care on the basis of what appellant characterizes as the 'special relationship' between a sponsor and the third party controlling an event or between a sponsor and the event participants."); Szollosy v. Hyatt Corp., 396 F. Supp. 2d 147, 2005 A.M.C. 2501 (D. Conn. 2005); ("The Szollosys took a day trip to the nearby Rum Point recreation area. Rum Point offered a swimming beach and several restaurants and snack bars. Defendant Red Sail also operated a concession stand at Rum Point where sailboats, paddleboats, windsurfers and wave runners and other equipment were available for rental.... The wave runner carried Dean across the Rum Point harbor and crashed directly into a stone jetty or break wall…as a result of the crash, he suffered injuries including come and brain hemorrhage .... Considered collectively Red Sail's procedures in mooring and monitoring the wave runners 'set into motion a chain of circumstances which may be contributing cause' of Dean Szollosy's injuries.... For that reason the Court finds that defendant Red Sail may not limit its liability under 46 U.S.C. § 181; admiralty law applies"); Lubick v. Travel Services, Inc., 573 F. Supp. 904, 1986 A.M.C. 132 (D.V.I. 1983) (cruise passenger injured in tour bus accident during shore excursion of St. Thomas; one-year time limitation in passenger contract applies to shore excursions; complaint dismissed as time-barred).

   Fifth Circuit: Sacks v. Four Seasons Hotel Ltd., 2006 WL 783441 (E.D. Tex. 2006) (guest dies at Mexican hotel; Texas law applies to liability and damages).

   Ninth Circuit: Carney v. Singapore Airlines, 940 F. Supp. 1496 (D. Ariz. 1996) (tourist falls into steaming hot liquid in volcanic sulfur pit in Indonesia; Indonesian law applies, not that of Arizona).

3. Naghiu v. Inter-Continental Hotels Group, Inc., 165 F.R.D. 413 (D. Del. 1996).

4. Carris v. Marriott Intern., Inc., 466 F.3d 558, 560 (7th Cir. 2006).

5. Heinz v. Grand Circle Travel, 329 F. Supp. 2d 896, 2004 A.M.C. 2020 (W.D. Ky. 2004).

6. Sachs v. TWA Getaway Vacations, Inc., 125 F. Supp. 2d 1368 (S.D. Fla. 2000).

7. Oran v. Fair Wind Sailing, Inc., 2009 WL 4349321 (D.V.I. 2009).

8. Neely v. Club Med Management Services, Inc., 63 F.3d 166, 1996 A.M.C. 776 (3d Cir. 1995).

9. *See, e.g.,* Fifth Circuit: Sacks v. Four Seasons Hotel Ltd., 2006 WL 783441 (E.D. Tex. 2006) (guest dies at Mexican hotel; Texas law applies to liability and damages).

   State Law:

   Arizona: Wendelken v. Superior Court In and For Pima County, 137 Ariz. 455, 671 P.2d 896 (1983) (Arizona resident attends "Arizona Singles Who's Who" weekend party at private residence in Senora, Mexico, and falls and breaks hip; Arizona law and not the law of Mexico applied).

   New Jersey: Mastondrea v. Occidental Hotels Management S.A., 391 N.J. Super. 261, 918 A.2d 27 (App. Div. 2007) (tourist purchased package tour featuring accommodations "at an all inclusive resort known as Royal Hideaway Playacar located in Quintana Roo, Mexico.... While at the resort plaintiff slipped and fell on a wet exterior staircase breaking her ankle." Mexican law applied).

10. Barkanic v. General Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957 (2d Cir. 1991).

11. Gund v. Pilatus Aircraft, Ltd., 2010 WL 887376 (N.D. Cal. 2010).

12. Reers v. Deutsche Bahn, AG, 320 F. Supp. 2d 140 (S.D. N.Y. 2004).

13. *See* § 11:9, infra.

14. *See, e.g.,* First Circuit: Santos v. Posadas De Puerto Rico Associates, Inc., 452 F.3d 59, 70 Fed. R. Evid. Serv. 617 (1st Cir. 2006) (guest at Wyndham Condado Plaza Hotel and Casino in Puerto Rico injured entering hotel pool; jury verdict for vacationers in the amount of $1 million for injured guest and $250,000 to wife for loss consortium affirmed; "Knowing that guests used the steps to enter and exit the pool, the Hotel neither made them safe for this readily foreseeable use nor warned of the inherent danger. These failures, the jury plausibly could have found, caused the accident"); Fiorentino v. Rio Mar Associates, LP, SE, 381 F. Supp. 2d 43 (D.P.R. 2005) (guest at Westin Rio Mar Beach Resort & Casino in Puerto Rico rendered quadriplegic after "body whomping" in surf at Rio Mar beach "when he was suddenly hit by a wave which caused him to topple over and strike his head and neck on the ocean bottom rendering him partly unconscious.… Both experts conclude that the injuries [guest] sustained resulted from activities such as body surfing or body whomping"; medical malpractice claim against Hospital San Pablo del Este settled; motion in limine to exclude some expert testimony at trial granted); Raybourn v. San Juan Marriott Resort & Stellaris Casino, 259 F. Supp. 2d 110 (D.P.R. 2003) (guest falls in bathtub; award of $500,000

compensatory damages grossly excessive and award of $150,000 in lost earnings unsupported by evidence; discussion of liability and damages theories); *See* In re San Juan Dupont Plaza Hotel Fire Litigation, 768 F. Supp. 912 (D.P.R. 1991), order vacated, 982 F.2d 603 (1st Cir. 1992) (attorney's fees); In re San Juan Dupont Plaza Hotel Fire Litigation, 117 F.R.D. 30, 9 Fed. R. Serv. 3d 172 (D.P.R. 1987) (discovery).

Second Circuit: Welch-Rubin v. Sandals Corp., 2004 WL 2472280 (D. Conn. 2004) ("The central issue in this case is whether Defendants, a resort company and a tour-operator owned, operated or controlled the Beaches Resort which Plaintiff…injured her shoulder while attempting to board a boat; defendants' summary judgment motion granted; discussion of liability theories); Carley v. Theater Development Fund, 22 F. Supp. 2d 224 (S.D. N.Y. 1998) (tourists purchase tour of Russia and during a stay at Hotel Pulkovskaya in St. Petersburg "Anne Marie Carley sustained serious injuries while trying to open her hotel window.... Mrs. Carley fell approximately six floors when the window swung into the room unexpectedly and she fell out"; hotel and tour operator not liable; discussion of liability theories).

Third Circuit: Schwartz v. Hilton Hotels Corp., 639 F. Supp. 2d 467 (D.N.J. 2009) ("Schwartz alleges that…she entered the bathroom of her (Greek) hotel room, slipped on a puddle of water on the floor and broke her leg; "defendants' summary judgment motions granted; discussion of liability theories including travel agent's liability).

Eleventh Circuit: Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc., 1999 A.M.C. 1377, 1999 WL 33232277 (S.D. Fla. 1999) (guest at Habitat Curacao in Netherlands Antilles suffers decompression sickness during scuba dive; complaint alleged that Habitat negligently failed to conduct dive properly and failed to administer necessary medical treatment; disclaimer of liability enforced; discussion of liability theories).

State Law:

Illinois: Behr v. Club Med, Inc., 190 Ill. App. 3d 396, 137 Ill. Dec. 806, 546 N.E.2d 751 (1st Dist. 1989) (guest at Club Med facility in Cancun, Mexico, ingested toothpick that lodged in her liver; complaint dismissed; discussion of liability theories).

Minnesota: Powell v. Trans Global Tours, Inc., 594 N.W.2d 252 (Minn. Ct. App. 1999) (tour participant falls from Mexican hotel balcony; tour operator not liable; discussion of liability theories).

New York: Meshel v. Resorts Intern. of New York, Inc., 160 A.D.2d 211, 553 N.Y.S.2d 342 (1st Dep't 1990) (guest at Britannia Tower suffers heart attack; complaint alleges that hotel was negligent in providing defective oxygen equipment including spent or inadequate oxygen cylinders; complaint dismissed against parent corporation; discussion of liability theories); Jacobson v. Princess Hotels Intern., Inc., 101 A.D.2d 757, 475 N.Y.S.2d 846 (1st Dep't 1984) (guest at Hotel Marques in Acapulco, Mexico, owned by a Mexican corporation, Impulsora de Revolcadero S.A., "falls 14 feet from a wall adjacent to the pool deck"; discussion of jurisdiction and liability theories); MacLachlin v. Marriott Corp., New York Law Journal, January 18, 1994, p. 29, col. 2 (N.Y. Sup. 1994) ("Plaintiff and a friend…Yorke booked the Q8 Marriott Vacation Tour under Marriott's Honored Guest's Awards Program (HGA) which, inter alia, included air-fare to Egypt and a stay at the Cairo Marriott Hotel & Casino"; plaintiff suffered serious injuries after being thrown from a camel on a tour of the Pyramids).

North Mariana Islands: Furuoka v. Dai-Ichi Hotel (Saipan), Inc., 2002 MP 5, 6 N.M.I. 374, 2002 WL 32984615 (N. Mar. Isl. 2002) (swimming pool accident at hotel in the Mariana Islands: "It is undisputed that the hotel did not have a lifeguard on duty and that [local law] required a lifeguard to be provided by the hotel").

15. Carris v. Marriott Intern., Inc., 466 F.3d 558 (7th Cir. 2006).
16. Leinhart v. Caribbean Hospitality Services, Inc., 426 F.3d 1337 (11th Cir. 2005).
17. Kaden v. Wyndham El Conquistador Resort & Country Club, 2005 WL 1949694 (D.P.R. 2005).
18. Knoell v. Cerkvenik-Anderson Travel, Inc., 181 Ariz. 394, 891 P.2d 861 (Ct. App. Div. 1 1994), vacated, 185 Ariz. 546, 917 P.2d 689 (1996).
19. Deacy v. Studentcity.com, LLC, 75 Mass. App. Ct. 1110, 916 N.E.2d 422 (2009).
20. *See* § 1:6, infra.
21. *See, e.g., First Circuit:* Rams v. Royal Caribbean Cruise Lines, Inc., 17 F.3d 11, 1994 A.M.C. 1573 (1st Cir. 1994) (cruise passenger on shore excursion in Haiti slips and falls in hotel owned by cruise line; one-year statute of limitations for filing of lawsuit in passenger ticket only applies to accidents aboard ship, not on shore).

    Second Circuit: Oleksiuk ex rel. Oleksiuk v. Caribbean Watersports and Tours, LLC, 2005 WL 1668906 (D.V.I. 2005) (guest at Elysian Beach Resort on St. Thomas owned and operated by Equivest broke leg in accident with Jet Ski provided by concessionaire Caribbean Watersports and Tours LLC; cross-claim against Equivest dismissed); Szollosy v. Hyatt Corp., 396 F. Supp. 2d 147, 2005 A.M.C. 2501 (D. Conn. 2005) ("the Szollosys took a day trip to the nearby Rum Point recreation area. Rum Point offered a swimming beach and several restaurants and snack bars. Defendant Red Sail also operated a concession stand at Rum Point where sailboats, paddleboats, windsurfers and wave runners and other equipment were available for rental.... The wave runner carried Dean across the Rum Point harbor and crashed directly into a stone jetty or break wall.... As a result of the crash; he suffered injuries including coma and brain hemorrhage.... Considered collectively Red Sail's procedures in mooring and monitoring the wave runners 'set into motion a chain of circumstances which may be contributing cause' of Dean Szollosy's injuries.... For that reason the Court finds that defendant Red Sail may not limit its liability under 46 U.S.C. § 181; admiralty law applies.").

    Seventh Circuit: Carris v. Marriott Intern., Inc., 466 F.3d 558 (7th Cir. 2006) (hotel patron injured in personal watercraft accident).

    Eighth Circuit: Rawlins v. Clipper Cruise Lines, 1998 A.M.C. 1260, 1996 WL 933862 (E.D. Mo. 1996) (accident during whale-watching excursion from Victoria Harbor, British Columbia, Canada; cruise ship not liable).

    Ninth Circuit: Isham v. Pacific Far East Line, Inc., 476 F.2d 835, 1973 A.M.C. 1138 (9th Cir. 1973) (passenger broke both wrists in accident while being transported ashore to Wake Island; shipping company not liable); Dubret v. Holland America Line Westours, Inc., 25 F. Supp. 2d 1151, 1999 A.M.C. 859 (W.D. Wash. 1998) (cruise passengers purchased a shore excursion in Acapulco and while being transported by tour bus were severely injured in accident; bus chaperones having identified themselves as cruise line's "representatives" was "insufficient to establish apparent authority"; cruise line not liable).

    Eleventh Circuit: Fojtasek v. NCL (Bahamas) Ltd., 613 F. Supp. 2d 1351 (S.D. Fla. 2009) ("this action arises out of the death of Plaintiff's spouse during a zip-line excursion (provided by a Honduran shore excursion operator and independent contractor Tabyana Tours), which was sold to her on-board the Defendant's vessel, in Honduras"; plaintiffs asserted a variety of causes of action against the defendant cruise line seeking to hold it directly responsible and/or vicariously liable for the misconduct and/or negligence of Tabyana Tours including (1) negligent selection or monitoring of Tabyana Tours, (2) negligent misrepresentation, (3) violations of Florida Deceptive and Unfair Trade Practices Act (FDUPTA), (4) apparent agency, (5) actual agency, (6) joint venture; each cause of action including defendant's disclaimer defense reviewed by the court); Isbell v. Carnival Corp., 462 F. Supp. 2d 1232, 2007 A.M.C. 677 (S.D. Fla. 2006) ("The excursion consisted of floating down a river in the rain forest in Belize, in and out of caves, while on an inner tube.... During the course

of the excursion, Plaintiff began to feel ill. Plaintiff's husband removed her life vest and noticed two small puncture wounds on her left upper arm.... It was determined that Plaintiff had been bitten by a snake.... On October 29, 2004 Plaintiff allegedly suffered a heart attack. Subsequently Plaintiff underwent a successful cardiac surgery.... Plaintiff alleges that the snake bite and the treatment that she received as a result thereof have caused a 'myriad of long term physical and psychological effects that are compensable in this action'"; cruise line not liable); Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc., 1999 A.M.C. 1377, 1999 WL 33232277 (S.D. Fla. 1999) (guest at Habitat Curacao in Netherlands Antilles suffers decompression sickness during scuba dive; complaint asserts that Habitat was negligent in failing to properly conduct dive and in failing to administer necessary medical treatment; disclaimer of liability enforced); In re Royal Caribbean Cruises, Ltd., 55 F. Supp. 2d 1367, 1999 A.M.C. 2475 (S.D. Fla. 1999), *aff'd,* 214 F.3d 1356 (11th Cir. 2000) (cruise passenger disembarks at Coco Cay Island, Bahamas, an island owned by cruise line; rents a Jet Ski owned by cruise line; and is injured in an accident; cruise line was not negligent in operating Jet Ski rental facility on Coco Cay Island).

State Law:

California: Fiduccia v. Princess Cruise Lines, Ltd., 2007 WL 2181888 (Cal. App. 2d Dist. 2007), unpublished/noncitable (cruise passenger "alleged that while onboard, [he] purchased a ticket for an onshore excursion to the Crooked Tree Wildlife Sanctuary near Belize City; during the excursion, [he] fell through a rotten, broken and defective boardwalk, causing him to suffer serious personal injuries"; travel agent and cruise line not liable); Caplan v. Boyce, 2003 WL 22495836 (Cal. App. 6th Dist. 2003), unpublished/noncitable (tourist participating in boat tour of Galapagos Islands falls off cliff during soccer game; operators not liable); DeRoche v. Commodore Cruise Line, Ltd., 31 Cal. Rptr. 2d 278, 1994 A.M.C. 2347 (App. 1st Dist. 1994), republished at 31 Cal. App. 4th 802, 46 Cal. Rptr. 2d 468 (1st Dist. 1994) and review granted and opinion superseded, 33 Cal. Rptr. 2d 567, 880 P.2d 111 (Cal. 1994) and dismissed, remanded and ordered published, 40 Cal. Rptr. 2d 838, 893 P.2d 1159 (Cal. 1995) (cruise passenger on shore excursion injured in motor scooter accident in Cozumel, Mexico; cruise ship not liable).

Florida: Carnival Cruise Lines, Inc. v. Levalley, 786 So. 2d 18 (Fla. Dist. Ct. App. 3d Dist. 2001) (jury verdict for cruise passenger injured during shore excursion scuba dive in Grand Cayman Island reversed for failure of trial court to allow introduction of evidence of diver's asthmatic condition as a causative factor in accident).

New York: Travalja v. Maieliano Tours, 213 A.D.2d 155, 622 N.Y.S.2d 961 (1st Dep't 1995) (rental car accident in Italy; U.S.-based tour operator not liable for torts of European rental car company; discussion of liability theories); Aronson v. Hyatt Intern. Corp., 202 A.D.2d 153, 608 N.Y.S.2d 187 (1st Dep't 1994) (guest at Hyatt Regency Cancun Hotel in Mexico purchases a "wilderness snorkeling boat trip" and is severely injured when her boat is struck by another boat; default judgment for defendants); Fogel v. Hertz Intern., Ltd., 141 A.D.2d 375, 529 N.Y.S.2d 484 (1st Dep't 1988) (rental car accident in Florence, Italy; domestic rental car company may be liable under apparent authority and agency by estoppel); Barber v. Princess Hotels Intern., Inc., 134 A.D.2d 312, 520 N.Y.S.2d 789 (2d Dep't 1987) (guest of Acapulco Princess Hotel thrown from horse and seriously injured for which hotel not liable because horse riding incident "arranged by local Mexican residents having no affiliation with the hotel and since the accident occurred on property owned by the Mexican government defendants owed no duty to plaintiff").

22. Walker v. Wedge Hotel Management (Bahamas) Ltd., 2003 WL 23218085 (S.D. Fla. 2003) (jury awarded $1.5 million to estate of decedent). *See also* 27 A.T.L.A. Law Reporter 127 (Sept. 3, 2002).
23. Hernandez v. Quality Inns, Inc., New York Law Journal, March 23, 1993, p. 21, col. 6 (N.Y. Sup.) (forum non conveniens motion denied).
24. McCollum v. Friendly Hills Travel Center, 172 Cal. App. 3d 83, 217 Cal. Rptr. 919 (2d Dist. 1985).
25. May v. Club Med Sales, Inc., 832 F. Supp. 937 (E.D. Pa. 1993).
26. Ashkenazi v. Hertz Rent A Car, 18 A.D.3d 584, 795 N.Y.S.2d 624 (2d Dep't 2005).
27. Weiner v. British Overseas Airways Corp., 60 A.D.2d 427, 401 N.Y.S.2d 91 (2d Dep't 1978).
28. Philippe v. Lloyd's Aero Boliviano, 589 So. 2d 536 (La. Ct. App. 1st Cir. 1991), writ denied, 590 So. 2d 594 (La. 1992).
29. Taylor v. Costa Lines, Inc., 441 F. Supp. 783, 1978 A.M.C. 1254 (E.D. Pa. 1977).

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Maintaining an Ethical Practice

By Eileen E. Buholtz

NB: In the discussion below, "L" refers to lawyer, "Law Firm" the lawyer's firm, "C" the Lawyer's or Law Firm's client, and "Inquirer" a prospective client. "Adverse party" and "Adverse Attorney" are self-explanatory.

I. Conflicts of Interest

A. Representing Adverse Interests

Prohibiting conflicts of interest is the crux of L's duty to exercise independent judgment on behalf of L's clients, and the next most important activity L must attend to after properly establishing and maintaining an escrow account. Conflicts can arise from L's responsibilities to another current client, a former client, or a third person, or from L's own interests. Rule 1.7 governs conflicts involving current clients. Rule 1.8 governs specific situations involving concurrent conflicts with current clients. Rule 1.9 governs former-client conflicts. Rule 1.18 governs conflicts involving prospective clients.

Rule 1.0 defines terms used in the Rules. A differing interest is "every interest of a client that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest." Rule 1.0(f).

L must act reasonably to

- identify clearly the client or clients who have differing interests and/or whose representation may be affected;
- determine whether a conflict of interest exists (that is, whether L's judgment may be impaired or L's loyalty may be divided);
- decide whether the conflict is consent-able (that is, waivable by C(s); and if so,
- consult with all affected C(s) and obtain C's (Cs') informed consent confirmed in writing.

Rule 1.7, Comment 2.

Law firms must check each new matter for possible conflicts, to comply with Rule 1.10(a). To that end Law firms must keep contemporaneous records of prior engagements, and must implement a policy for detecting conflicts between new matters and current or previous engagements. Rule 1.10(e). Failing to keep records or to have a policy to detect conflicts is *in and of itself a violation even if no actual conflict occurs*. Rule 1.10(f). If a law firm's violation of this subdivision *does* cause an actual conflict to occur, then both L and the Law Firm are responsible. Rule 1.10(g).

The conflicts database must contain all clients whom the firm represents and has represented. Rule 1.10(e). In addition to actual clients, "phantom" clients may also create conflicts. Phantom clients are individuals and entities that L may not think that L has represented, but in fact has. For example, *members of a trade association* who give the trade association's lawyer confidential information may be L's client. *See, e.g., Glueck v. Jonathan Logan, Inc.*, 653 F.Supp. 746 (2d 1981). If a *prospective client* gives L confidential information during the initial interview, the prospective client may be considered a client for purposes of conflicts checks even though she did not retain that attorney. *See, e.g., Dasebins v. Ford Motor Co.*, 81 A.D.2d 707, 439 N.Y.S.2d 452 (3d Dep't 1981). Where L is long-standing insurance defense counsel for an *insurance company*, the company may be considered a client for the purposes of conflicts checks where L seeks to accept a case against one of the company's insureds. *See, e.g., Atrotos Shipping Co., S.A. v. The Swedish Club*, 2002 WL 1041221 (S.D.N.Y. 2002). *Beneficiaries of a will or trust*, however, are explicitly *not* clients of the lawyer who represents the fiduciary of a will or trust. CPLR 4503(a)(2).

Because a conflict may exist before L undertakes to represent C, L or the Law Firm must maintain a conflict-checking system. Rule 1.7, Comment 3; Rule 1.10(e).

- *Conflict with L's personal interest.* The new client may have an interest adverse to L's own personal, financial, business, or property interests, in which case L shall not accept or continue employment, unless a disinterested lawyer would believe that representation will not be adversely affected thereby *and* the client consents. Rule 1.7(a)(2); Rule 1.8(a). Be aware, however, nothing in the Rules requires that that L's own interests be maintained in the conflicts database or be subject to checking under Rule 1.10(f).
- *Conflict with a current client.* L may not represent a new client in a suit against one of L's current clients (Rule 1.7(a)(1)) *unless* a disinterested lawyer would think that the attorney could represent each client competently, the representation is not prohibited by law, the representation does not involve one client's asserting a claim against another client represented by L in the same litigation, and each affected client gives informed consent confirmed in writing. Rule 1.7(a) and (b).

  L must likewise decline a new matter where his judgment on behalf of an existing client will be adversely affected by the new matter, or where his judgment is likely to be adversely affected by the new matter, or the new matter is likely to involve the lawyer in representing differing interests. Rule 1.7(a)(2).

- *Conflict among multiple clients in the same matter.* L shall not represent C if a reasonable lawyer would conclude that either the representation will involve L in representing differing interests, or there is a significant risk that L's professional judgment on behalf of C will be adversely affected by L's own financial, business, property or other personal interest. Rule 1.7(a). L may nevertheless represent C if (1) L reasonably believes that L will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve one client's affirmative claim against another in the same litigation, and each affected client gives informed consent confirmed in writing. Rule 1.7(b). For example, L may not represent two different plaintiffs in two separate actions against the same defendant who has insufficient assets to satisfy both judgments, unless it is obvious that L can adequately represent both clients, and both clients consent after full disclosure. NYSBA Eth. Op. 639 (1992).

In undertaking to represent two clients jointly, L must do more than interview the two clients together and get a "thumbnail sketch" of the facts they have to offer before deciding that no conflict exists in representing them jointly. *Felix v. Balkin*, 49 F.Supp. 2d 266 (S.D.N.Y. 1999). In *Felix*, L was hired to defend a corporate defendant and the corporate defendant's employee jointly in an employment discrimination case alleging sexual harassment. L met jointly with the employee and the human resources manager for the employer corporation's *parent* corporation. L got a "thumbnail sketch" of the facts from the HR manager. Although L told the employee she could get her own attorney if she wanted, L never spoke to the employee individually, did not question her regarding facts, and did not explain the consequences of dual representation. L served a joint answer and joint responses to discovery demands. The employee then secretly retained her own attorney for her own employment discrimination case for sexual harassment against her employer (her co-defendant in this suit). She filed her own complaint against the employer without telling L or the parent corporation who was paying L's fees. L found out about the employee's case from a third party. When L asked the employee for the name of her attorney, she refused to give it. Held: the employee's breach of her duty of candor to L did not excuse L from his failure to exercise his own professional responsibility in making sure there was no conflict in representing both clients.

B. Conflicts of Interest That Arise After Client Retains Lawyer

Neither shall L *continue* representation of multiple clients after he *discovers* an actual or likely conflict between current clients that develops after commencement of the representative, unless a disinterested lawyer would think that L can represent the multiple clients competently *and* each client consents after full disclosure. Rule 1.7(a)(1) and (5). This type of conflict may arise when new parties are added to the lawsuit, when new issues arise, when new witnesses come onto the scene, when parties to pending litigation take new positions, when new risks within a corporate client occur, or when new facts come to light.

If a conflict arises after representation has started, L must withdraw unless L obtains the informed consent of any and all clients affected. Rule 1.7, Comment 4; Rule 1.16(b)(1). Where more than one Client is involved, L must be able to comply with duties owed to any Former Client who may be involved (for example, to protect confidences) and to represent adequately the remaining Client(s), given L's duties to the Former Client. Rule 1.7, Comments 4, 5, and 29A; Rule 1.9. Changes in corporate or organizational affiliations or the addition or realignment of parties in litigation may create conflicts. Rule 1.7, Comment 5. L may have the option to withdraw from one of the representations (with court approval where required) and must protect the now Former Client's confidences. Rule 1.7, Comment 5; Rule 1.9(c).

C. Conflicts of Interest with Former Clients—Defining "Substantially Related" Matters

The test as to whether L has a conflict of interest in suing a *former* client is whether there is a "substantial relationship between the current action and the former action"; that is, whether the proposed litigation is "substantially related" to the former litigation. See, e.g. *Crawford v. Antonacci*, 297 A.D.2d 419, 746 N.Y.S.2d 94 (3d Dep't 2002), a personal injury action involving a slip and fall at defendant's property where the plaintiff had injured her *rotator cuff*. L represented the defendant property owner but L had represented plaintiff thirteen years before in a Workers' Compensation case involving a *back* injury. Plaintiff moved to disqualify L from representing the defendant property owner in plaintiff's action against the property owner. Held: no disqualification because there was no substantial relationship between the previous matter and the current matter.

What constitutes "representation" and "substantial relationship" between current and previous litigation involving a former client were discussed in more detail in NYSBA Eth. Op. 723 (1999). Representation means more than a subordinate attorney researching a point of law without knowing any of the underlying facts and without the possibility of learning any secrets or confidences of the client, but *any* information about the client (sometimes even the name) is a confidence or secret. And whether two matters are "substantially related" is a question of fact. To determine whether matters are "substantially related," there must be (1) an identity of issues or at least a significant overlap of contested facts, (2) the issue and controversy arose out of a transaction in which L represented the former client and (3) whether L did or could have obtained confidences or secrets.

For disqualification to be appropriate, the former client must also be *adverse to* the current client. *Rocchigiani v. World Boxing Council*, 82 F.Supp. 2d 182 (S.D.N.Y. 2000). In *Rocchigiani*, plaintiff boxer and his exclusive promotional agent sued the World Boxing Council (WBC) for a declaration that the boxer was the undisputed light heavyweight champion of the WBC. During the course of L's joint representation of the boxer and the promoter against the WBC, the boxer and the promoter had a falling out, and the boxer started using another promoter. L, on behalf of the promoter, wrote the boxer complaining of this, to which the boxer responded by terminating the promotion agreement with the promoter. L responded with a "final warning" to the boxer after which there was more verbal sparring between the boxer and L. The boxer tried to fire L as the attorney for both himself and the promoter in the litigation, but L refused to withdraw unconditionally, so the court substituted new counsel for the boxer. L continued to represent the promoter in the suit against the WBC. The boxer moved to disqualify L as the attorney for the promoter, but the disqualification motion failed. The court annunciated a three-part "substantial relationship test": (1) the moving party is a former client of an *adverse* party's attorney; (2) there is a substantial relationship between the subject matter of the attorney's previous representation of the moving party and the issues in the present lawsuit; and (3) the attorney being disqualified had access to relevant privileged information during the prior representation that may be used to the *disadvantage* of the former client. Since the boxer stayed on the same side as the promoter in the underlying litigation, the test was not met and L had no conflict with the boxer even though the boxer had his own counsel by that point.

Also failing the *Rocchigiani* test is *Allegaert v. Pero*, 565 F.Supp. 246 (2d 1997), where L's prior representation was in the context of a joint representation of a former but now adverse client and a present, long-standing client. L was not disqualified from continuing to represent the long-standing client because the former-now-adverse client had no reason to believe that the confidences he gave to L in the prior litigation would ever be withheld from the long-standing client because both were on the same side of the prior litigation.

Recency in having represented the former client does not matter as long as the subject matters are substantially unrelated. NYSBA Eth. Op. 621 (1992). The inquiring attorney had recently defended a restaurant in a small claims case regarding the *theft* of a patron's property from the patron's car parked in *the restaurant's parking lot*. The small claims case was concluded. L may now file suit against that same restaurant for a client who fell inside. The Ethics Committee concluded that the attorney could do so because the subject matters were not substantially related.

In another case dealing with the "substantially related" test, the court also found no substantial relationship. *Jamaica Public Service Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 707 N.E.2d 414, 684 N.Y.S.2d 459 (1998). *Jamaica Public Service* was a property damage case in which the property owner sued AIU Insurance Company as insurance carrier for payment for property damage under certain policies. It turned out that AIU was only the underwriting subsidiary, and that other subsidiaries were the actual insurers. Plaintiff moved to amend the complaint to add the additional subsidiaries and to obtain a ruling that notice of the suit to the underwriter was notice to the other pertinent subsidiaries. The defendant opposed and said that plaintiff should have known of its corporate structure. In opposition to that contention, plaintiff submitted an affidavit of an attorney at plaintiff's Law Firm who was former in-house counsel in a *Canadian* subsidiary of the carrier that issued legal malpractice insurance to Canadian law societies for the latter's members. The former in-house counsel averred that the confusing nature of AIU's corporate structure was a well-known fact in the industry. The defendant became irate and moved to disqualify plaintiff's Law Firm because of the presence of the former in-house counsel. In opposing the motion to disqualify, plaintiff's Law Firm submitted a further affidavit from the former in-house attorney stating that he was not involved in any coverage issue or disputes regarding the subsidiary in the current dispute; he had handled only legal malpractice defense cases insured by the subsidiary in Canada; and he learned no secrets or conflicts regarding the subsidiary in question. The court held that there was no conflict. The matters in which the former in-house counsel had been involved were not "substantially related" to the current litigation and there were no materially adverse interests between present and former clients. In fact, the court was not convinced that there was even a former attorney-client relationship between the subsidiary in question here and the former in-house counsel. Furthermore, the information that the former in-house counsel had proffered about the defendant's corporate structure was generally known information.

D. Principles of Imputed Disqualification

Lawyers in a firm together cannot do what a lawyer alone is proscribed from doing, and that disqualification of one lawyer "associated" in the firm disqualifies the entire firm. Rule 1.10(a). The term "associated with" includes lawyers who are of counsel in addition to those lawyers who are partners and associates.

The terms "Firm" and "Law Firm" include but are not limited to a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law, a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization. Rule 1.0(h).

Vicarious or imputed disqualification and "Chinese walls." As already stated, where one lawyer in a firm would be disqualified from representing a client, all lawyers associated with L's law firm are prohibited from "knowingly accepting or continuing employment for that client or in that case." Rule 1.10(a). This concept is called vicarious or imputed

disqualification. Even lawyers who share office space with a law firm may be disqualified if they have or have had ready access to confidential information of clients of the firm with which they share space. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), p. 571. But, although an individual attorney who is disqualified disqualifies the entire firm, once that disqualified attorney moves on, the taint is lifted from the firm provided that the departing attorney takes all the files from the firm, and the remaining firm has nothing left regarding the representation of the client in question, including having destroyed all electronic versions of any information. Rule 1.10((b); *see Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994).

Where the disqualified attorney remains with the firm, however, "Chinese walls" built around the disqualified individual attorney are permitted only in limited circumstances: only larger firms that set up Chinese walls at the beginning of the conflict are likely to win a disqualification motion. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), p. 572. Where L (the new lawyer to the firm) was not involved in the representation of the former-now-adverse client while L was at the old firm, a Chinese wall is mandated to be installed around L at the new firm and suffices to prevent disqualification. *Kassis v. Teachers Ins. and Annuity Ass'n*, 93 N.Y.2d 611, 717 N.E.2d 674, 695 N.Y.S.2d 515 (1999). Where the old firm demonstrates that there is a risk that the lateral hire acquired confidential information while at the old firm, or where the new firm fails to prove L's lack of access to confidential information about the former adverse party while at the old firm, then the new firm must show that any information that L acquired about the former-now-adverse party while L was at the old firm is unlikely to be significant or material. A Chinese wall built around L would in that case be sufficient to avoid firm disqualification in this type of situation.

But the result in the small-firm context is the opposite. Disqualification is the rule for small firms because their atmosphere is informal with constant cross-pollination and cross-current of discussion and ideas among attorneys on matters that the firm handles, where the conference room and all firm files are open and available to all lawyers in the firm, and where any lawyer in the firm has access to confidential information with regard to any client. *Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1997). In *Cardinale*, disqualification was required even though there was no direct proof that the new firm, which had hired L from the small "adverse" firm, had received any improper disclosures or breaches of confidence regarding L's former association with the old "adverse" firm.

And disqualification is required in any size firm where the lateral-hire L was closely involved in the former-now-adverse client's affairs while L was at the old firm. Where L, who had handled the bank's side as plaintiff in a particular lawsuit, moved to the law firm representing the defendant in that suit, building a Chinese wall around L at the new firm was rejected. The court disqualified the new firm from representing the defendant. The court stated that there was no "trust me" rule. Chinese walls were similarly rejected in *Decora Inc. v. DW Wall Covering, Inc.*, 899 F.Supp. 131 (S.D.N.Y. 1995) and *Cheng v. GAF Corp.*, 631 F.Supp. 1052 (2d 1980).

Similarly, a contract lawyer hired by a firm on a temporary basis may not work for both firm A and firm B if those two firms represent opposites sides of a particular matter, especially if either one of those firms is a small firm. NYSBA Eth. Op. 715 (1999).

E. Lateral Moves

Lateral moves by lawyers between private law firms. Although Rule 1.10(c) does not expressly require firms to check for conflicts when hiring attorneys laterally, the former clients of the laterally hired attorney must be added to the database of the hiring firm. NYSBA Eth. Op. 720 (1999) (which discusses the information that the hiring law firm must get from the laterally hired attorney with regard to the clients that the newly hired attorney worked for at the former firm).

Moving laterally between public service and private practice, and avoiding the appearance of impropriety. Lawyers move not only between private law firms but also between public service and private practice. With regard to the latter (lawyers' moving between private practice and public service), the Rules require there to be no circumstances in the particular representation that create an appearance of impropriety. Rule 1.11(b)(2). The appearance of impropriety is an important concept as to lawyers who are or formerly were in public service because the proscription on "creat[ing] an appearance of impropriety" is found only in Rule 1.11, which is entitled "Special Conflict of Interest for Former and Current Government Officers and Employees." L, who has been a public officer or employee, is prohibited from representing a private client in a matter in which L participated in his former public capacity; and no lawyer in the disqualified lawyer's firm may knowingly undertake or continue representation in that matter unless (a) L is effectively screened from any participation directly or indirectly from the case including any discussions in the matter, (b) L receives no part of the fee from it, and (c) there are no other circumstances in the particular representation creating an appearance of impropriety. Rule 1.11(a). A lawyer who has formerly served as a public officer or governmental employee shall not disclose confidential information obtained in that capacity and shall not represent a client in any matter in which the lawyer participated in his/her former capacity. Rule 1.11(c).

Where L was a former judge or other third-party neutral, Rule 1.12(a) applies. L shall not accept private employment in a matter in which L has acted in a judicial capacity vis-à-vis the merits thereof.

F. Resolving Conflicts of Interest

In some circumstances, C may waive the conflict. There are four requirements to a valid consent to a conflict of interest: (a) L reasonably believes that L will be able to provide competent and diligent representation to each affected client; (b) the representation is not prohibited by law; (c) the representation does not involve one client's claim against another client; and (d) each affected client gives informed consent confirmed in writing. Rule 1.7(b). Disclosure to the client should be in writing; it should explain the likelihood that the conflict will become so serious that the lawyer can no longer continue representation and the consequences to the client if that happens, such as withdrawal from representation perhaps on short notice, and the need to pay a new lawyer to familiarize herself with the matter; and it should explain the effect the conflict may have on the lawyer's professional judgment on behalf of the client. The disclosure must be appropriate to the level of sophistication of the client. The disclosure should be made at the time the conflict arises, not just at the beginning of the lawsuit. The lawyer needs to be diligent about keeping other clients' secrets, and be aware of consentable as opposed to non-consentable items. Lastly, the lawyer should be aware of conflicts-of-laws provisions, because New York law may not apply. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), pp.558-561. The courts have some latitude in rejecting a client's waiver of conflict. *See, e.g., Wheat v. U.S.*, 486 U.S. 153 (1988).

Rule 1.0 defines "informed consent," "confirmed in writing," "firm" or "law firm," "writing" or "written," and "reasonable," which are frequently used with regard to consent.

- "Informed consent" means C's agreement to a proposed course of conduct after L has communicated adequate information for C to make an informed decision and after L has adequately explained to C the material risks of the proposed course of conduct and reasonably available alternatives. Rule 1.0(j). Adequate information includes disclosure of the facts and circumstances giving rise to the situation, an explanation reasonably necessary to inform C of the material advantages and disadvantages of the proposed course of conduct, and a discussion of C's options and alternatives. Rule 1.0, Comment 6. In some circumstances, L should advise C to seek the advice of other counsel. *Id.* L need not, however, inform C of facts or implications that C already knows, but where L does not personally inform C thereof, L assumes the risk that C is inadequately informed and that the consent is invalid. *Id.*

  "Confirmed in writing" means (a) a writing from C to L confirming C's consent; (ii) a prompt writing from L to C confirming C's oral consent (sent at the time of C's oral consent or if impossible to do so, then within a reasonable time thereafter); *or* (iii) C's statement made on the record of any proceeding before a tribunal. Rule 1.0(e).

- "Writing" or "written" means a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, and email. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Rule 1.0(x).

- "Reasonable" or "reasonably," when describing L's conduct, means the conduct of a reasonably prudent and competent lawyer. Regarding conflicts of interest, a "reasonable lawyer" is one with the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation. Rule 1.0(q).

II. Consultation, Letters of Engagement, and Retainer Agreements

A. Consultation—Non-engagement Letters

With regard to any prospective client ("Inquirer") with whom L has met face to face whose matter L decides to decline, L should write a non-engagement letter and send it certified return receipt requested. In it, L should tell the Inquirer in advance that L is going to do so. The letter should decline the matter using plain language without giving reasons and without addressing the merits.

- *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe and Jerre Miller*, 291 N.W.2d 686 (Minn. 1980). Without reviewing any medical records, Law Firm had told the Inquirers that the Inquirers had no medical malpractice case for paralysis that developed unexpectedly during a hospitalization. The jury rendered a $650,000 verdict against the Law Firm for legal malpractice, which was upheld by Minnesota's highest court.

L should advise the Inquirer of the statute of limitation, especially if it is about to run, because failure to do so may result in liability for malpractice.

- *See, e.g., Burke v. Landau, Miller and Moran*, 289 A.D.2d 16, 733 N.Y.S.2d 416 (1st Dep't 2001) (Law Firm's motion for summary judgment was properly denied where it notified plaintiff merely 33 days before expiration of the statutory period that the Law Firm was declining to represent plaintiff in her contemplated medical malpractice action, and further failed to specifically call her attention to the number of days remaining before the Statute of Limitations expired.)

B. Accepting Proffered Employment—Letters of Engagement and Retainer Agreements

A written letter of engagement is required under 22 NYCRR part 1215. Part 22 of the New York Code of Rules and Regulations went into effect March 4, 2002. A written letter of engagement is required:

- whenever L expects the fee to be more than $3,000
- for every fee-paying client
- at or near the beginning of the representation (and an updated letter if significant changes in the services or fee occur). 22 NYCRR §1215.1(a).

The letter of engagement is signed by the attorney but *not* the client. It must contain:

- the scope of the legal services to be provided,
- the attorney's fees and expenses to be charged,
- L's billing practices, and
- C's possible right to arbitrate fee disputes pursuant to 22 NYCRR Part 137 [as to which see "Fee disputes" below]. 22 NYCRR §1215.1(b).

An insurance company that engages L to represent an insured is the Client, for purposes of letters of engagement. 22 NYCRR §1215.1(a). Unless the client-insured has the right to choose counsel, L need not send a letter of engagement to the insured. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), p. 1276-1279. But for new carriers, L owes a letter of engagement to a carrier for whom L has not previously done any work. And for carrier where L handles a matter falling outside the scope of previous work, L owes a written letter of engagement. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), p. 1277.

No letter of engagement is required where:

- L expects the fee to be less than $3,000,
- C has paid L for services of the same general kind before, or
- L is admitted to practice elsewhere, has no office in New York and will not be performing any material portion of the services here. 22 NYCRR §1215.2.

A written *retainer* agreement with C that covers those topics will suffice for the letter of engagement. 22 NYCRR §1215.1(c).

III. Confidentiality

The Rules speak in terms of "confidential information," which is defined in Rule 1.6: "confidential information" is information gained during or relating to the representation of client no matter the source that is

(a) protected by the attorney-client privilege,

(b) likely to be embarrassing or detrimental to the client if disclosed, *or*

(c) information that the client has requested be kept confidential.

"Confidential information" does *not* ordinarily including (a) L's legal knowledge or legal research or (b) information that is generally known in the local community or in the trade, field or profession to which the information relates. Rule 1.6(a).

The Rules no longer distinguish between confidential information and secrets, as the former Code did.

L is prohibited from disclosing confidential information unless C consents, or the disclosure is impliedly authorized to advance the best interests of C and is reasonable or customary in the professional community, or is permitted by certain exceptions to this rule. Rule 1.6(a).

The exceptions to the prohibition are as follows. L may (but is not required to) disclose confidential information to the extent that L reasonably believes necessary to

- prevent certain death or substantial bodily harm;
- prevent C from committing a crime;
- withdraw a written or oral opinion or representation where L has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- seek an ethics opinion;
- defend against malpractice or accusations of wrongful conduct, or to establish or collect a fee;
- comply with another law or court order.

When L who has been employed or retained by an organization is dealing with the organization's principals and it appears that the organization's interests may differ from the principals' the lawyer shall explain that the lawyer represents the organization, not the individuals. Rule 1.13(a). If L, in representing the organization, learns that an officer, employee, or other person associated with organization is acting or planning to act in violation of a legal obligation to the organization or in a violation of law that may be imputed to the organization, L must act in the best interest of the organization. Rule 1.13(b). If the individual is the highest authority in the organization and insists on acting illegally (or refuses to act legally), L may reveal confidential information as permitted by Rule 1.6 or resign in accordance with Rule 1.16.

Attorney-client privilege. The attorney client privilege extends only to the communication with L, not to the facts themselves, and the party asserting the privilege must show

that the information sought to be protected was a confidential communication made to L for purposes of *obtaining legal advice or services*. *See, e.g., Stanwick v. A.R.A. Services, Inc.*, 124 A.D.2d 1041, 508 N.Y.S.2d 755 (4th Dep't 1986), in which the defendant sheriff, who was being sued for wrongfully terminating plaintiff, was required to disclose whether plaintiff was a topic discussed at a meeting between the sheriff and his counsel. Accord: *Rattner v. Netburn*, 1989 WL 223059, pp.6-8 (S.D.N.Y. 1989).

Insurance defense issues: brief bank. Where an insurance company places briefs prepared by the attorneys it retains to represent its insureds into a brief bank for use by other counsel retained in other cases, whether this practice is permissible depends on whether the particular brief discloses any confidences or secrets of the particular client/insured. NYSBA Eth. Op. 721 (1999).

Impeachment use of L's affidavit reciting facts that C told L. L's statement in an affidavit was properly used to impeach C, after C testified to a different version of the fact from the version in L's affidavit. *People v. Rivera*, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dep't 1977); 35 Carmody-Wait 2d §172:3133.

Inadvertent disclosure of documents. In complex commercial litigation, the parties should use a stipulated procedure for dealing with inadvertent disclosure of privileged documents. The question of whether inadvertent disclosure of privileged documents waives the privilege encompasses a large body of case law that is beyond the scope of this chapter. But several recent cases deserve comment. For example, in *U.S. Fid. and Guar. Co. v. Braspetro Oil Services Co.*, 2000 WL 744369 (S.D.N.Y. 2000), the parties had entered into a stipulated confidentiality agreement which provided among other things that privileged documents inadvertently produced would be returned by the receiving party within two days of a written request therefor. On a Friday, 400,000 pages of documents, mostly in Portuguese, were delivered to opposing counsel. On the following Monday, the attorneys for the disclosing party advised opposing counsel that two documents were protected by the attorney-client privilege and requested their return. Opposing counsel refused to return them. Held: the documents were protected and the privilege was not waived. The decision contains a good discussion of the federal law on this issue.

See also Spectrum Systems Internat'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 581 N.E.2d 1055, 575 N.Y.S.2d 809 (1991) for a thorough discussion of the analysis to be applied in determining discoverability of documents when these claims of privilege (attorney-client, attorney-work-product, or material prepared for litigation) are made. See also *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (4th Dep't 1987); *Baliva v. State Farm Mut. Auto. Ins. Co.*, 275 A.D.2d 1030, 713 N.Y.S.2d 376 (4th Dep't 2000); *Bras v. Atlas Constr. Corp.*, 153 A.D.2d 914, 545 N.Y.S.2d 723 (2d Dep't 1989); *Lois Sportswear USA, Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), *Aff'd*, 799 F.Supp. 867 (2d 1986).

L's duty to maintain secrets and confidences runs only to C, not to the adverse party. L's duty to keep confidences and secrets runs only to C (L's own client). Information about the business or operations of an adverse party is not confidential and may be used in later cases without the adverse party's consent. NYSBA Eth. Op. 730 (2000).

Exceptions to the duty to maintain secrets and confidences. L *may* reveal confidences and secrets (1) with C's consent after full disclosure, (2) when permitted by the Rules or required by law, (3) C's intention to commit a crime, together with the information necessary to prevent the crime, and (4) to the extent necessary to establish or collect a fee or defend against accusations of wrongful conduct. Rule 1.6(b).

Establishment or collections of attorneys' fees. A client's unpaid account with his attorney and the status thereof is a secret. NYSBA Eth. Op. 684 (1996). But L may reveal confidences and secrets to the extent necessary to establish or collect L's fee or to defend against accusations of wrongdoing. Rule 1.6(b)(5)(ii). In a collection suit where L (or someone else such as an insurance company or a winning party who is entitled to payment of L's fees) sues the party liable for the fees, L may reveal confidences necessary to collect those fees. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2003), p. 437.

Insurance defense issues: third-party audit of defense counsel's legal bills. L representing an insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure. NYSBA Eth. Op. 716 (1999).

IV. When a Lawyer May Testify (the Dangers of Combining the Roles of Advocate and Witness)

The Lawyer as witness is governed by Rule 3.7. L may not advocate and testify in the same matter unless the testimony relates solely to an uncontested issue or the nature and value of legal services rendered in the matter, disqualification of L would work a substantial hardship on C, the testimony relates solely to a matter of formality to which no opposition will be offered, or the tribunal authorizes the testimony. Rule 3.7(a). L may not advocate before a tribunal in a matter in which L's firm may be called as a witness on a substantial issue adverse to C. Rule 3.7(b).

V. Communicating with Unrepresented Parties

Dealing with pro se litigants is fraught with difficulty. Rule 4.3 states when L communicates with a pro se litigant, L shall not state or imply that L is disinterested. When L knows or reasonably should know that the pro se litigant misunderstands L's role in the matter, L shall make reasonable efforts to correct the misunderstanding. The only

legal advice L can give to a pro se litigant whose position is adverse to L's client is to secure his/her own attorney. Rule 4.3. But L's statement to a pro se litigant of L's client's position on the law is not giving legal advice to the pro se litigant. Rule 4.3, Comment 2.

As a practical matter, L should communicate only in writing with the unrepresented party and should confirm any and all oral communications in writing.

VI. Abusive Litigation Tactics and Their Remedies

A. Make a Thorough Record of the Tactics

Keep your opponent on a short leash. Be neutral and cooperative yourself. Never take your opponent's bait and respond in kind, ever. Confirm everything in writing. If things get bad enough, communicate only in writing. Resort to the court only as a last resort and only when you've made your record. Never copy in the judge on your back-and-forth correspondence with the opposing attorney. If your opponent copies in the judge, don't copy in the judge on your response; instead, write the judge (with copy to your opponent) apologizing for your opponent's inappropriate copy to the judge and tell the judge that if/when the parties need to resort to the judge, they will do so via a formal application.

B. Relief from Abuses in Discovery

1. Protective Orders

CPLR 3103 Protective orders

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

2. Supervision of Disclosure

CPLR 3104 Supervision of disclosure

(a) Motion for, and extent of, supervision of disclosure. Upon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure.

(b) Selection of referee. A judicial hearing officer may be designated as a referee under this section, or the court may permit all of the parties in an action to stipulate that a named attorney may act as referee. In such latter event, the stipulation shall provide for payment of his fees which shall, unless otherwise agreed, be taxed as disbursements.

(c) Powers of referee; motions referred to person supervising disclosure. A referee under this section shall have all the powers of the court under this article except the power to relieve himself of his duties, to appoint a successor, or to adjudge any person guilty of contempt. All motions or applications made under this article shall be returnable before the judge or referee, designated under this section and after disposition, if requested by any party, his order shall be filed in the office of the clerk.

(d) Review of order of referee. Any party or witness may apply for review of an order made under this section by a referee. The application shall be by motion made in the court in which the action is pending within five days after the order is made. Service of a notice of motion for review shall suspend disclosure of the particular matter in dispute. If the question raised by the motion may affect the rights of a witness, notice shall be served on him personally or by mail at his last known address. It shall set forth succinctly the order complained of, the reason it is objectionable and the relief demanded.

(e) Payment of expenses of referee. Except where a judicial hearing officer has been designated a referee hereunder, the court may make an appropriate order for the payment of the reasonable expenses of the referee.

3. Motion to Compel

CPLR 3124 Motion to compel

> If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

4. Motion to Deem an Issue Resolved, to Preclude, or to Strike a Pleading

CPLR 3126 Motion to deeming issue resolved, precluding proof on an issue, or striking a pleading

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

5. Discovery Motions

Motions to strike answers are rarely if ever granted. *See, e.g., Hoi Wah Lai v. Mack*, 89 A.D.3d 990, 991 (2d Dep't 2011). Motions to compel are usually granted, with a time limit for compliance specified. Motions to preclude are usually granted conditionally, with a time limit for compliance and if the time limit is not met, the issue will be determined against the recalcitrant party.

On all discovery motions, the movant's attorney must supply a good-faith affirmation is required on all discovery motions and the affirmation must state the time, place and nature of the consultation, the issues discussed and the resolution, or good cause why no conferral was held. 22 NYCRR §202.7(c). Letters back and forth are not enough. *Amherst Synagogue v. Schuele Paint Co., Inc.*, 30 A.D.3d 1055, 1056-1057 (4th Dep't 2006) (moving defendants failed to use good-faith efforts). After plaintiff objected to the interrogatories and responded in part and objected in part to the discovery demands, defendants made no effort to modify or simplify the demands. Instead, they informed plaintiff in two letters that plaintiff's rejection of their discovery demands was improper, and they demanded responses to their requests. But in rare instances, the court will dispense with the movant's good-faith effort where the effort would have been futile. See, for example, *Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334 (1st Dep't 2001); *Diamond State Ins. Co. v. Utica First Ins. Co.*, 67 A.D.3d 613, 613-614 (1st Dep't 2009): in light of defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior, the motion court, under the unique facts of this case, appropriately found it would have been futile to compel plaintiff to confer once more with defendant as a condition for moving to strike its pleadings. But no good-faith effort or affirmation re same is required to enforce a subpoena duces tecum served on the opposing party. *Matter of McNair v. Bennett*, 32 A.D.3d 540 (2d Dep't 2006).

C. Speaking Objections and Colloquy at Depositions

This conduct is forbidden. The rule is: No objections shall be made at a deposition except those that would be waived if not interposed (i.e., to the form of question, the disqualification of the reporter, or the competency of witness). All objections made at a deposition shall be noted by the court reporter and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to CPLR Article 31. Speaking objections are restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning. 22 NYCRR § 221.1. Moreover, the witness must answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order

of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition. 22 NYCRR §221.2. Lastly, An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly. 22 NYCRR § 221.3.

Certifying unanswered questions at a deposition. Should opposing counsel disobey 22 NYCRR part 221, you can call the judge on the phone or you can ask the court reporter to "certify the question." The court reporter will type up the question on a separate page in the transcripts, from which you can then move for an order directing the witness to answer and to answer any reasonable follow-up questions.

D. Other Strategies

- Preliminary conferences: 22 NYCRR §202.6.
- Special masters: 22 NYCRR §202.14.

Do Not Settle for More: Settling a Case Involving a Medicare Beneficiary

By Timothy D. DeMore and Kevin M. Hayden

When settling a case, most attorneys begin by analyzing their client's liability and the potential damages before determining the amount of recoverable liens. This practice is likely to cause substantial headaches if the attorney does not first consider Medicare's right to recover conditional payments. The best practice is to immediately examine each case to determine if the plaintiff is Medicare eligible. If you determine that the plaintiff is eligible in the initial stages, then you are ahead of the game and can take appropriate measures to protect your client and yourself.

I. The Medicare Secondary Payer Act

Established in 1966, Medicare is a federally administered health insurance program that covers medical expenses for (1) people over the age of 65; (2) disabled people who qualify for Social Security Disability Insurance (SSDI); and (3) people with end-stage renal disease. The program is administered by the Center for Medicare and Medicaid Services (CMS). The Medicare Secondary Payer (MSP) statute was enacted in 1980 in an effort to control the costs of Medicare. Its purpose was to ensure that Medicare is reimbursed for medical payments it makes when a third-party primary payer is involved. Under the original MSP statute, Medicare could only seek reimbursement from group health insurance plans and insurance carriers. As a result, many companies chose to remain self-insured.

The MSP was amended in 2003 after the Eleventh Circuit permitted the recovery of a Medicare lien from a settling defendant in *United States v. Baxter Int'l*, 345 F.3d 866 (11th Cir. 2003).[1] This amendment expanded the entities that Medicare could seek reimbursement from, including creating a private right of action against self-insured parties that receive payment from a primary plan. Under the MSP, Medicare beneficiaries are required to exhaust all other available means of coverage before relying upon Medicare to pay their medical bills. Medicare accomplishes this by seeking reimbursement from the primary payer, such as insurance companies and self-insured parties who resolve a lawsuit or claim involving a Medicare beneficiary. Payment is due within sixty days of a settlement, judgment, or verdict. This is true even if the primary payer already paid the Medicare beneficiary.[2]

II. Medicare Reporting Requirements

Section 111 of the Medicare, Medicaid and State Child Health Insurance Program Extension Act of 2007 (MMSEA) imposes penalties for failure to report. Implemented in 2011, the MMSEA created an opportunity for the federal government to better monitor cases where a primary payer is available to reimburse Medicare for conditional payments. Failure to report in accordance with the MMSEA results in harsh penalties, and it is the threat of such significant penalties that has drawn so much attention to the MSP in recent years. This statute targets all insurers, including liability carriers, no-fault carriers, workers' compensation carriers, and self-insureds. The entities are collectively referred to as "Responsible Reporting Entities" (RRE). An RRE is a party that funds or pays, whether in whole or in part, a settlement, judgment, or verdict to a Medicare beneficiary. Thus, if your client pays settlements directly, then the client is the RRE. On the other hand, if your client pays the settlement but is reimbursed by the carrier, then the insurance carrier is the RRE.[3]

Under the MMSEA, Medicare reserves the right to remain a secondary payer in a civil claim where a primary health plan exists. As a result, the Medicare beneficiary or RRE must make a repayment to Medicare after the settlement, judgment, or award for all payments made by Medicare for related past medical expenses. These payments are due within sixty days of a demand letter issued by Medicare.

Medicare has a right of action to recover its payments from a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer that has received a primary payment.[4] The law is still relatively new, and the liability of attorneys remains uncertain. In fact, one court recently stated that Congress never intended to make attorneys responsible for Medicare reimbursements,[5] while another court held a plaintiff's attorney personally liable after he failed to issue payment to Medicare and paid settlement funds to his client.[6]

III. Penalties

Make no mistake, the penalties for noncompliance with Medicare's guidelines are severe. Pursuant to 42 U.S.C. § 1395y(b)(8)(E)(1), failure to report a settlement to Medicare will result in a civil penalty of $1,000 per day. Under, 42 U.S.C. § 1395y(b)(3)(A), if the government files a lawsuit under the MSP, then it is entitled to double damages plus interest. Thus, all attorneys should educate their clients at the start of a case to ensure that the client is aware of the penalties associated with noncompliance. This should help when explaining the delay in resolving a case when an eventual settlement is reached.

IV. Protect Your Clients and Yourself

There is no absolute formula for handling a claim involving a Medicare beneficiary. Instead, the best practice is to be attentive and vigilant from an early stage. The following constitutes a recommended checklist for resolving a claim involving a Medicare beneficiary. This checklist is to be followed by plaintiffs and defense attorneys alike because Medicare treats all attorneys the same when enforcing compliance. Do not simply rely on opposing counsel to follow these steps.

(1) *Determine if the plaintiff is a Medicare beneficiary*. Verify the plaintiff's Social Security eligibility by requesting a benefit statement from the Social Security Administration. You will need the name of the plaintiff, her date of birth, and Social Security number. If you represent the plaintiff, then you can obtain this information directly from your client. If you represent a defendant, provide this statement to opposing counsel as soon as you open a new matter.

If you learn that the plaintiff is a Medicare beneficiary, then obtain a Consent to Release form. This will allow the attorneys to obtain a Conditional Payment Letter, which is vital to handling such a matter.

If you are unable to obtain a Consent to Release, you can also submit a query to CMS along with the Social Security Number, name, date of birth and gender of the plaintiff. You will then receive a response from CMS advising as to whether the plaintiff is or is not a beneficiary. If you receive a negative response from CMS, there is no guarantee that the plaintiff is not a beneficiary. In fact, a negative response from CMS is only considered to be a confirmation that the Medicare status could not be confirmed.[7] Thus, you should not rely on this negative response from CMS.

If you learn that the plaintiff is not a Medicare beneficiary, it is important to follow up with opposing counsel during the course of a litigated matter to determine if this status changes. This is especially true if the plaintiff is approaching 65 years of age or applies for SSDI. Remember, the RRE will be responsible for fines and penalties even if it is unaware that it is dealing with a Medicare beneficiary. Further, the question is whether the plaintiff is a beneficiary at the time of settlement, not when the claim or suit was initiated.[8] Thus, following up on the plaintiff's Medicare status is essential.

(2) *Open a file with the Medicare Coordination of Benefits Coordinator (COBC)*, which is the administrative arm of the CMS. An RRE does not need approval from the plaintiff to make this notice. Make sure that all communications include the beneficiary's name, Medicare identification number, date of birth, address, date of loss, and information relating to primary payers (i.e., liability insurance carriers).

(3) *Request a Conditional Payment Letter* from the Medicare Secondary Payer Recovery Contractor (MSPRC). The initial Conditional Payment Letter will most likely contain errors that will require sending a corrective letter to the MSPRC.[9] This is because Medicare does not filter through its conditional payments to determine if they are related to the plaintiff's claimed injuries. Therefore, review the letter carefully and identify all unrelated payments. If the payments are not related, then advise the MSPRC in writing.

In addition, defense counsel should use discovery tools to ensure that the alleged injuries set forth by the plaintiff encompass all the injuries related to the plaintiff's accident. For example, if a plaintiff claims a neck injury in a lawsuit but does not claim a related lower back injury, Medicare may still require reimbursement for the lower back injury. Thus, the parties must have an understanding of what Medicare expects to be reimbursed for before reaching the resolution of a case.

Expect delays, but continue to request updated Conditional Payment Letters every ninety days and review each letter to determine if the continued payments are related to the plaintiff's claims. Recently, the MSPRC started posting this information at <www.mymedicare.gov>.

(4) *Report settlement immediately to the MSPRC and request a formal demand letter*. The settlement agreement must include a release of the plaintiff's Medicare lien. If not, the settlement is defective, and the plaintiff cannot enter judgment if the release does not contain language resolving the Medicare lien and how it will be satisfied.[10]

You must ensure Medicare is protected when drafting the settlement documents. The settlement agreement must contain a condition precedent that the parties notify Medicare of the settlement and that they will satisfy Medicare's interest prior to the disbursement of proceeds.[11] To ensure that Medicare is being properly protected, a defendant's attorney may (a) withhold all settlement funds until the final demand letter is issued by Medicare; (b) withhold a portion of the settlement funds that she anticipates being owed to Medicare until a final demand letter is issued by Medicare;[12] (c) include Medicare as a payee on the check;[13] or

(d) pay Medicare directly. Recently, a more common practice has been to create an agreement wherein the plaintiff's attorney agrees to hold all the settlement funds in a trust account until Medicare issues a final demand letter.

Indemnification language in a general release is not guaranteed to protect the RRE. This is because 42 C.F.R. § 411.24(i) requires the RRE to pay Medicare even if it has already paid the plaintiff. Thus, if the plaintiff has no money to pay Medicare directly, then the plaintiff will also be unable to pay the RRE. Further, although the plaintiff's attorney may have the funds to indemnify a defendant if Medicare is not reimbursed, the New York State Bar Association Committee on Professional Ethics issued an advisory opinion finding that New York Rules of Professional Conduct prohibit an attorney from agreeing to indemnify a client's obligations to a third party as part of a settlement of the client's claim. The opinion also stated that the Rules prohibit another attorney's participation in a settlement that requires such an indemnification.[14] Therefore, it is recommended that attorneys avoid indemnification provisions. Instead, they should protect themselves by adequately identifying the terms of the settlement and creating a contractual agreement wherein one of the parties agrees to hold settlement funds until a final demand letter is issued.

A defense attorney should avoid approving a general release that is for "pain and suffering only" because Medicare may interpret this language to indicate that the claim for medical expenses has not been resolved.[15] If that occurs, Medicare could potentially bring an action against the defendant, which would seek double damages. Instead, a defense attorney should include language that the plaintiff is responsible for reimbursing Medicare—spelling out the terms in which the plaintiff will do so. It is recommended that the language include a provision that the settlement will not be funded until a final demand letter is issued, together with a provision that any statutory deadlines relating to the payment of settlement funds be suspended.

(5) *Obtain and review Medicare's final demand letter*, which will include the lien itemization and the amount owed to Medicare (less deduction for procurement costs).[16] Review the final demand letter to ensure the payments are related. Again, if the payments are not related, then advise the MSPRC in writing.

(6) *Pay final demand* within sixty days from the date of the demand letter to avoid penalties.

V. What About Set Asides?

Although set asides are required in workers' compensation claims, there are no specific laws that govern Medicare set asides in personal injury claims. Nevertheless, Medicare has advised that its interests must be considered in every settlement where the plaintiff reasonably anticipates receiving Medicare-covered treatment after the date of settlement.[17] In fact, Medicare issued a memorandum indicating that a set aside "is our method of choice" because "it provides the best protection for the program and the Medicare beneficiary."[18] Thus, all attorneys must fully understand the medical condition and prognosis of a settling Medicare beneficiary in order to determine the necessity of a set aside. According to Medicare, some factors to consider are whether a catastrophic injury or a Life Care Plan is involved.[19]

It is not recommended that the parties select an arbitrary and inadequate set aside amount without obtaining a full analysis.[20] This could potentially expose the plaintiff and the attorneys if Medicare refuses to pay for future related medical care. If you are unsure as to whether a set aside is needed, or what the value of the set aside should be, then you should contact a third-party vendor that specializes in this area. You should also document all efforts as proof that you reasonably considered Medicare's future interests.

Plaintiffs' attorneys who face this uncertainty should take the time to advise their clients in writing of the risks involved with not funding a set aside, including the fact that Medicare may eventually deny coverage of related medical care. Educating your client about the uncertainty of the law and getting your client to acknowledge this risk is strongly recommended.

Finally, if your client does not want a set aside, it is a good idea to obtain proof that the client does not require future related treatment. This is because Medicare issued an alert indicating that its interests are fully considered when the beneficiary's treating physician certifies in writing that the future related treatment is not required.[21]

VI. Conclusion

Medicare's right to reimbursement does not accrue until a settlement, verdict, or judgment is reached. That, however, does not mean that you should wait until the end of a case to consider Medicare's involvement. Settling a case involving a Medicare beneficiary can be tedious and time consuming. This is why all attorneys should make their lives easier by quickly filing a notice with Medicare and keeping up to date on the status of related conditional payments. This will help all parties understand where they stand long before settlement negotiations. Following the above-mentioned suggestions will prevent a more expensive settlement and reduce the element of surprise once a resolution is reached.

Endnotes

1. Thomas C. Regan and Seamus M. Morley, *The Revised Medicare Secondary Payer Act*, For The Defense, Jan. 2005, p. 50.
2. *See* 42 C.F.R. § 411.24(i).
3. Roy A. Franco, Jeffrey J. Signor, and Thomas S. Thornton, III, *Resolution of a Case with a Medicare Claimant*, For The Defense, May 2009, p. 9; John J. Campbell, *Mandatory Insurance Reporting Under the MMSEA*, Medicare Set Aside Bulletin, May 18, 2009, Issue No. 54, http://www.jjcelderlaw.com/MMSEA2MSABull.htm.
4. *See* 42 C.F.R. § 411.24(g); *see* also 42 C.F.R. § 411.26(a).
5. *Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1192 (D. Ariz. 2011).
6. *United States of America v. Harris*, 08 CV 102, 2009 U.S. Dist. LEXIS 23956 (N.D. W. Va. Mar. 26, 2009).
7. John J. Campbell, *Mandatory Insurance Reporting Under the MMSEA*, Medicare Set Aside Bulletin, May 18, 2009, Issue No. 54, available at http://www.jjcelderlaw.com/MMSEA2MSABull.htm.
8. David M. Melancon, *Mediating a Case Involving a Medicare Beneficiary*, For The Defense, June 2012, p. 32.
9. *Id*. at p. 11.
10. *Torres v. Hirsh Park, LLC*, 91 A.D.3d 942, 943, 938 N.Y.S.2d 145, 146 (2d Dep't 2012); *Liss v. Bringham Park Coop. Apartments Sec. No. 3, Inc*., 264 A.D.2d 717, 718, 694 N.Y.S.2d 742, 742743 (2d Dep't 1999).
11. Roy A. Franco, Jeffrey J. Signor, and Thomas S. Thornton, III, *Resolution of a Case with a Medicare Claimant*, For The Defense, May 2009, p. 12.
12. David M. Melancon, *Mediating a Case Involving a Medicare Beneficiary*, For The Defense, June 2012, p. 34.
13. *Id*.; Thomas C. Regan and Seamus M. Morley, *The Revised Medicare Secondary Payer Act*, For The Defense, Jan. 2005, p. 50.
14. NYSBA, Committee on Professional Ethics, Formal Op. [852, Feb. 10, 2011].
15. Thomas C. Regan and Seamus M. Morley, *The Revised Medicare Secondary Payer Act*, For The Defense, Jan. 2005, p. 51.
16. *See* 42 C.F.R. ¶ 411.37(c)(3).
17. John V. Cattie, Jr., *Medicare Secondary Payer and "Future Medicals": A Movement Toward a Standardized Process*, June 14, 2012, available at http://www.dritoday.org./post/Medicare-Secondary-Payer-and-e2809cFuture-Medicalse2809d-A-Movement-Toward-a-Standardized-Process.aspx.
18. Department of Health & Human Services, Centers for Medicare & Medicaid Services, Division of Financial Management and Fee for Service Operations, Region VI, May 25, 2011, p. 2.
19. *Id*.
20. *CMS Region 6 Memo on Liability Medicare Set Asides – A Must Read!*, July 24, 2011, available at http://www.settlementlawfirm.com/post-detail.php?id=185.
21. David M. Melancon, *Mediating a Case Involving a Medicare Beneficiary*, For The Defense, June 2012, p. 33.

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10 Tips for Successful Mediation

By Earl Cantwell

1 Mediation is a good vehicle to resolve a complicated, intense, and perhaps multi-party case. If some parties are reluctant to participate, have the mediator or mediation organization request their participation in the mediation.

2 **Early mediation** can be productive, and avoid lengthy proceedings, costly discovery, court appearances, multiple case filings, depositions, etc. Avoid costs, attorneys' fees, interest, and delay being drivers resisting settlement.

3 Approach mediation in good faith, with an open mind, and with respect for the other parties and their attorneys. **Mediation has a good success rate**, and parties' positions are frequently more flexible than perceived.

4 Prepare an effective, concise, detailed **mediation statement** for the mediator, focusing on the key issues, facts, claims and damages in dispute. A good mediation statement may attach pertinent accident reports, photographs, significant medical records, IME reports, wage records, Voc-Rehab reports, and controlling or key legal cases, statutes or regulations.

5 **Prepare the client** for the mediation session, and designate one client spokesman. A well-prepared and well-versed client can impart positions firmly and with authority to the mediator.

6 Prepare and **copy documents, reports and exhibits** to support claims or diminish allegations. Bring along client representatives to explain company policies, documents, and other practices.

7 Prepare to challenge the opposition's main points and contentions via documents, testimony or expert rebuttal. Have 1-3 factual, legal or technical points ready to **refute the other side's primary points.**

8 **Document any settlement immediately**. Use the mediator to settle terms and conditions, supervise settlement details, and coordinate any settlement process involving taxes, liens, MSA, structured settlements, etc. The mediator may have developed a sufficient rapport with the parties to assist in preparing settlement documents and guide a settlement over any rough spots.

Most Important Points

9 **Select the right mediator**—someone with litigation and case experience, who is known and respected, and who will relentlessly work the room and the parties to settle, or get as close to a settlement as possible.

10 Client, and insurer representatives with **full and final settlement authority must attend for all parties**. The mediator must also insist on this pre-condition as part of the scheduling and pre-mediation dialogue.

Mr. Cantwell is an accomplished civil litigation attorney with 30 years of litigation experience in state and federal courts. He focuses his practice in commercial litigation including business contract matters, business disputes, real estate claims, securities litigation, business and partnership dissolution, as well as construction litigation. Mr. Cantwell's practice also includes the defense of claimed errors and omissions by attorneys, accountants, architects, engineers, brokers and other professionals. He has also handled the defense of corporate officers and directors accused of errors, negligence and other misfeasance.

Top 10 (or so) New York Insurance Coverage Decisions in the Past 12 Months

By Dan D. Kohane

Selecting the most important New York coverage decisions in the past year is surely subjective. This list reflects a meaningful collection of decisions worth reading and appreciating.

Admiral Ins. Co. v. Joy Contractors, Inc. (06/12/12)

Court of Appeals

Innocent Additional Insured? Hogwash! Misrepresentations by the Named Insured That May Lead to Rescission Would Equally Impact Coverage for Additional Insureds, Despite "Separation of Insured" Provisions

By way of a brief background: On March 15, 2008, a tower crane collapse during the construction of a high-rise condominium building in Manhattan. Seven people were killed, dozens were injured and major damage resulted.

Admiral insured Joy (the crane operator and a subcontractor of RCG, the general contractor) under a follow-form excess policy with limits of $9 million for each loss and in the aggregate.

In its letter to Joy, Admiral reserved its right to deny coverage based on the "residential construction activities" exclusion in the excess policy. "Residential construction activities" are defined as "any work or operations related to the construction of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, cooperatives and/or apartments."

Admiral also stated that it might deny coverage based on inaccuracies identified in Joy's underwriting submission wherein Joy allegedly represented that it specialized in drywall installation and that it did not perform exterior work. Joy also allegedly represented that it did not perform work at a level above two stories in height other than interior drywall. Admiral alleged that Joy actually was the structural concrete contractor and performed work on the entire building's exterior with the tower crane.

The Court, accepting Admiral's allegations regarding Joy's misrepresentations as true, found that the risk in exterior construction was much greater than the risk paid for by Joy and assumed by Admiral. As such, the only additional insureds Admiral could have contemplated when it issued the excess policy would have been those entities associated with Joy's work performing interior drywall.

The Court agreed with Admiral that if the policy is void *ab initio* due to the named insured's misrepresentations in the application process, the fact that parties demonstrate that they are additional insured under the policy is unavailing. The Court noted with approval that

> As Admiral points out, the lower courts' decisions dismissing its sixth cause of action seeking rescission as against all defendants except Joy illogically "leaves in place [the excess policy] to be enforced by other parties even if [this policy] ultimately is rescinded. In effect, these other parties [would be] permitted to rely on the terms of a policy that…may be deemed never to have existed to create coverage" in the first place. In short, "additional" insureds, by definition, must exist in addition to *something*; namely, the named insured in a valid existing policy.

The Court additionally determined that the authority cited by the lower courts did not preclude, or even address, claims such as those asserted by Admiral for reformation or for declarations based on an express policy condition regarding fraud or misrepresentations, or the scope of coverage afforded under a policy. As such, the Court found that Admiral's claims relating to Joy's alleged misrepresentations in the underwriting submission were properly interposed against RCG and East 51st Street.

Dzielski v. Essex Insurance Company (06/05/12)

Court of Appeals

Ahh. Justice. New York High Court Agrees That Injury That Occurs When Removing Sound Equipment from Band Performance "Arises Out of" That Performance

Plaintiffs commenced this action seeking judgment declaring that Essex was obligated to indemnify its insured in an underlying personal injury action commenced by plaintiffs, in which insured had defaulted. Dzielski fell from the loading dock after exiting the rear door of a nightclub owned and operated by defendant's insured. He had provided sound equipment for a band that performed at the nightclub, and the accident occurred while plaintiff was carrying equipment from the nightclub to his truck after the concert had concluded. He claimed that defects in the loading dock led to his injuries.

Essex denied coverage based on a "stage hand" exclusion in the policy's "Restaurant, Bar, Tavern, Night

Clubs, Fraternal and Social Clubs Endorsement." That exclusion provided that "the coverage under this policy does not apply to bodily injury…or any injury, loss or damage arising out of…[i]njury to any entertainer, stage hand, crew, independent contractor, or spectator, patron or customer who participates in or is a part of any athletic event, demonstration, show, competition or contest."

At the Appellate Division, a three-judge majority agreed with the lower court and the plaintiff that the language "participates in or is a part of any…show" is ambiguous because it could be read two different ways. Essex argued, and the Court acknowledged, that the language could encompass all persons who performed any tasks in connection with the show, including loading and unloading sound equipment. However, the majority found that it could be read narrowly to encompass only those persons who actually performed in the show or were injured as a result of activities occurring during the show.

The two-judge dissent, now adopted by the Court of Appeals as the opinion of that Court, found no ambiguity in the endorsement, agreeing with Essex that the exclusionary language is clear, subject to no other reasonable interpretation, and applies in this particular case.

The exclusion thus applies where two conditions are met: (1) the injured party is an entertainer, stage hand, crew member, independent contractor, spectator, patron or customer who "participates in or is a part of" an athletic event, demonstration, show, competition or contest; and (2) the injury "arises out of" such participation.

If the exclusion was intended to apply only to those persons who "actually performed" in a show, then the language "spectator, patron or customer" in the exclusion would be superfluous. Second, such an interpretation imposes a temporal limitation on the exclusion where no such limitation appears therein. Other exclusions are more limiting. For example, the medical payments coverage provision specifically excludes expenses for bodily injury "[t]o a person injured *while taking part in* athletics." Here, by contrast, the absence of such limiting language in the exclusion in question reflects an intent to provide a broad exclusion for all injuries arising from participation in shows or other special events. Moreover the term "arising out of" language is broadly read to mean "originating from, incident to, or having connection with."

Bissel v. Town of Amherst (03/27/12)

Court of Appeals

New York Court of Appeals Refuses to Apply a *Kelly* Analysis to Future Medical Bills

On March 27, 2012, the Court of Appeals further restricted the ability of plaintiffs to obtain present value recovery from Workers' Compensation carriers at the time of a verdict or settlement of a personal injury lawsuit. For those who may not be familiar, I offer the following background.

In 1983, the Court of Appeals in the *Matter of Kelly* (60 N.Y.2d 131) held that Workers' Compensation Law § 29, which required the compensation carrier to reimburse the injured worker its equitable share of the "cost of litigation" for any benefit the compensation carrier received, either by way of a lien recovery or offset of future benefits (known as the holiday), could be adjudicated at the time of the verdict by quantifying the amount of the lien and holiday and reducing the future benefit to present value. The cost of litigation, reimbursed by the carrier, would be deducted from its lien and, in the event there were additional monies owed, those would be paid directly to the plaintiff.

The money was the plaintiff's alone since the plaintiff had incurred the cost of recovery by paying his attorney fee from the recovery. The Court in *Kelly* noted that, at least in the *Kelly* case itself, "The value of future compensation payments that a carrier has been relieved of paying due to a third-party recovery, is not so speculative that it would be improper to estimate and to assess litigation costs against this benefit to the carrier."

For years thereafter, Workers' Compensation carriers either negotiated or litigated the so called "*Kelly* calculations" with plaintiff's counsel at the conclusion of personal injury cases. In fact, a cottage industry, of which I was a part, sprung up around the *Kelly* issues upon the settlement or verdict in personal injury cases. These calculations would regularly involve future medical expenses, as well as payments for permanent total disability and permanent partial disability.

The benefit to the plaintiff was an immediate influx of cash or, at the very least, a reduction in the Workers' Compensation lien. There was also a benefit to the Compensation Carrier which could often close its file.

In 2007, however, the landscape changed considerably when the Court of Appeals considered whether or not *Kelly* would apply to a case involving the classification of a plaintiff as having a permanent partial disability. In *Burns v. Varriale* (9 N.Y.3d 207) the Court held that it was impossible to reduce the permanent partial disability classification to present value since the level of disability could fluctuate. Thus, the Court in *Burns* held that where the benefit "cannot be quantified or reliably predicted" it was improper for the Court to apportion the cost of the benefit at the time the case is disposed of. (9 N.Y.3d at 215).

The *Burns* Court preserved the injured worker's right to recover this benefit but only as it would be incurred and, instructing the trial court to "fashion a means of apportioning litigation costs as they accrue and moni-

toring…how the carrier's payments to the claimant are made." (9 N.Y.3d 217).

Against this backdrop, the Court of Appeals decided the *Matter of Bissell v. Town of Amherst* (2012 N.Y. Slip Op. 2250), addressing the issue of future medical expenses. In *Bissell*, a jury awarded the plaintiff Bissell $4,650,000 in future medical expenses at a trial as part of a $30,000,000 verdict. At the time of the disposition, the Workers' Compensation lien amounted to $219,760. Also, at the time of the verdict, the plaintiff was classified with a permanent and total disability entitling him to $400 per week in Workers' Compensation payments. The plaintiff's attorneys sought to obtain approximately $1.4 million in payments from the Workers' Compensation carrier, in addition to the lien, based upon the jury's award of the medical bills, which the trial court had reduced from its original award of $4,650,000 to $4,259,536. The issue before the Court of Appeals was whether or not the jury's verdict sufficiently quantified the medical bills for purposes of a calculation under *Kelly* and the Court determined that it did not.

In determining that, the plaintiff did not have an immediate right to the benefit obtained by the Workers' Compensation carrier with regard to medical expenses. It held that future medical expenses "cannot reliably be calculated in a manner similar to [benefits for death, total disability or scheduled loss of use]." Once again, the *Bissell* Court referred the matter back to the trial court to "fashion a means as outlined in the *Burns* case."

Federal Ins. Co. v. International Business Machines Corp. (02/21/12)

Court of Appeals

A Fiduciary Policy Provides Coverage ONLY for Breaches of Fiduciary (Not Ordinary Business) Duties

The Court of Appeals agreed with the Second Department's decision, reported in Volume XII, No. 11 of this publication:

Federal issued an Executive Protection Excess Insurance Policy ("Federal Policy") to the IBM Corp. ("IBM"). IBM sponsored defendant IBM Personal Pension Plan ("Plan"), a defined benefit plan within the meaning of the ERISA. The Federal Policy followed form providing coverage in excess of an underlying fiduciary liability policy issued by Zurich.

The Zurich policy provided "wrongful act" coverage, defined as "any breach of the responsibilities, obligations or duties by an Insured which are imposed upon a fiduciary of a Benefit Program by" ERISA.

Cooper filed a class action against IBM and the Plan, alleging that amendments to the Plan made by IBM in 1995 and 1999 violated various provisions of ERISA. The case eventually settled and the settlement included payment of Cooper's attorney's fees.

The Court concluded that the violations of the age discrimination provisions of ERISA, which were at the heart of the lawsuit, were not duties imposed upon a fiduciary, but duties of a settlor of a plan.

Author's Note: Not every function related to ERISA plans is a fiduciary duty. Violations of rules which are basically business judgments do not qualify as breaches of fiduciary duties. For a good discussion about the basic differences, go to http://www.hgexperts.com/article.asp?id=5138. This case provides an important reminder to look closely at duties being challenged when considering the breadth of coverage under a fiduciary policy.

VBH Luxury, Inc. v. 940 Madison Associates LLC (02/14/11)

Court of Appeals

No Coverage for Co-Insured's Property Damage

950 Madison Associations was an AI under a CGL policy secured by Excelsior for its named insured, the tenant, VGH Luxury, only with respect to liability arising "out of the ownership, maintenance and use of that part of the premises leased to the tenant." The high Court found that the landlord would be entitled to a defense in an action commenced against it by a third party for an injury that occurred on the leased premises. However, there is no coverage for liability to its co-insured for damage to property owned, rented or occupied by the insured.

In the Matter of Elrac, Inc. v. Exum (12/13/11)

Court of Appeals

Ban on Suing Employer Due to Receipt of Workers' Compensation Benefits Does Not Preclude Claim Against Self-Insured Employer for Uninsured Motorists Benefits

A self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provision of the Workers' Compensation Law.

When Exum, an employee of Elrac, was involved in an auto accident with an uninsured motorist, he filed a notice of intention to arbitrate on Elrac, since Elrac (Enterprise Rentals) is self-insured for those benefits.

Uninsured Motorist Benefits are required in every policy of automobile insurance sold in New York. A self-insurer had the same liability for uninsured motorist coverage that an insurance company would have.

The high Court found that there is no policy reason why Exum's uninsured motorist protection should decrease because he happened to be driving the car of a self-insurer, even if that self-insurer was his employer.

Author's Note: Another Elrac defeat. The decision makes sense to me.

Perl v. Meher (11/22/11)

Court of Appeals

There Is No Requirement That Contemporaneous Reports Must Contain Quantitative Measurements

Results: In *Perl* and *Adler* the appellate decisions granting summary judgment to the defendants are reversed. In *Travis* it is affirmed because the Court finds no evidence of serious injury in the record.

The Court agreed with the two-judge dissent in *Perl* and, quoting its decision in *Toure*, states:

> In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury.… An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Both *Perl* and *Adler* relied on the testimony of the same medical expert, Dr. Bleicher. Although the Court specifically notes that it is debatable whether the expert's observations during the initial examinations had an "objective basis" or simply recorded the patients' subjective complaints, the Court makes clear that "[w]e need not decide here whether Bleicher's testimony would furnish legally sufficient proof of serious injury under the "qualitative" prong of *Toure*." It finds Dr. Bleicher's later, numerical measurements sufficient to meet the "quantitative" prong of *Toure*.

The Court further agreed with the *Perl* dissent that, although the "quantitative" findings were not contemporaneously made, *Toure* did not impose any such requirement "and we see no justification for it." "There is nothing obviously wrong or illogical about following the practice that Bleicher followed here—observing and recording a patient's symptoms in qualitative terms shortly after the accident, and later doing more specific, quantitative measurements in preparation for litigation."

Thus, the Court held:

> We agree with the Appellate Division dissenters in *Perl* that a rule requiring "contemporaneous" numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

Author's Note: It appears that, going forward, the issue will be whether or not the qualitative assessments in the contemporaneous report(s) "furnish legally sufficient proof of serious injury" or merely record "the patients' subjective complaints."

New York & Presbyterian Hosp. v. Country Wide Ins. Co. (10/13/11)

Court of Appeals

Court of Appeals Adheres to the Letter of the No-Fault Regulation: The Medical Provider's Submission of Proof of Claim within 45 Days Does Not Satisfy the 30-Day Notice of Accident Requirement

The question before the Court was whether a medical provider can recover no-fault benefits by submitting a timely proof of claim where its assignor failed to provide written notice of the accident within 30 days as required. The Court unanimously answers "No."

Joaquin Benitez was involved in an accident on July 19, 2008 and was treated in New York and Presbyterian until July 26, 2008. He and Presbyterian completed an Assignment of Benefits and the NF-5 (hospital facility form), but neither provided written notice of the accident to the No-Fault carrier, Country Wide Insurance, within the 30 days as required under 11 NYCRR 65-1.1.

On August 25, 2008, Presbyterian, as assignee of Benitez, submitted a bill for its services to Country Wide and included the required NF-5. Country Wide denied the claim because it had not received timely written notice of the accident. Presbyterian then commenced an action asserting that its billing was timely submitted within the 45 days after services were rendered. Both the trial court and the Appellate Division, Second Department, granted Presbyterian's motion for summary judgment, holding that Presbyterian's submission of the hospital facility form within the 45 days complied with the notice requirements in 11 NYCRR 65-1.1. The Court of Appeals granted leave to Country Wide to appeal and reversed the lower courts.

Country Wide argued nothing in the regulations allows a health care provider to submit a proof of claim

within 45 days, and allowing that to excuse the failure to provide the threshold notice within 30 days in effect "eviscerates" the 30-day written notice requirement. In opposition, Presbyterian construed the regulation as exempting health care providers from the 30-day requirement and that by submitting the NF-5 within 45 days of the date of service, the facility complied with the "proof of claim" and "notice of the accident." The Court disagreed with Presbyterian.

Section 65-1.1 provides that written notice with the particulars of the accident must be given by, or on behalf of, each eligible injured person "in no event more than 30 days after the date of the accident."

Written proof of claim for health service expenses, providing details of the extent of the injuries and treatment, however, must be submitted "in no event later than 45 days after the date services are rendered." "Notice" and "proof of claim" are separate and independent conditions precedent to the carrier's liability. The regulations first require written notice of the accident. After notice of the accident, then proof of the claim for treatment is submitted. The Court found that the Appellate Division disregarded the separate and distinct nature and purpose of the two requirements. Moreover, the Court stated that "[e]ven more troubling, such a construction effectively reads the 30-day written notice of accident requirement out of the no-fault regulations."

Presbyterian, as assignee of Benitez, was entitled only to those rights, privileges and remedies to which Benitez was entitled under the No-Fault law. Presbyterian cannot have greater rights than its assignor. Because no written notice of the accident was provided, the policy was breached, and the assignment became worthless as Benitez had no right to benefits to assign.

The Court reversed the Appellate Division and held that "the submission of the proof of claim within 45 days of the date health care services are rendered may not serve as timely written notice of accident after the 30-day period for providing such written notice has expired."

McCarthy v. Turner (06/28/11)

Court of Appeals

Court of Appeals Rules That Vicariously Liable Owner Is Not Entitled to Common Law Indemnification from Non-Negligent Vicariously Liable General Contractor Which Did Not Actually Supervise Work

An owner leased a retail storefront to a lessee, which hired a general contractor to build out the space. The contract between the lessee and the general contractor contained an indemnification clause which required the general contractor to indemnify the lessee but not the owner. The general contractor subcontracted the installation of telephone and data cables to a subcontractor which itself subcontracted the actual installation to a sub-subcontractor. The injured plaintiff McCarthy was an employee of the sub-subcontractor.

The plaintiff obtained summary judgment on his Labor Law §240 claims against the owner and general contractor. In that same decision, the Court found that there was no evidence that the general contractor was negligent. These findings were upheld on appeal. (*McCarthy v. Turner Const., Inc.*, 72 A.D.3d 539, 898 N.Y.S.2d 836 (1st Dep't 2010)).

At trial, the sub-subcontractor was found not negligent. The question then became whether the owner, who was vicariously liable but not negligent, could obtain common law indemnification from the general contractor, who also was not negligent. In other words, could the owner obtain through implied indemnity principles that which it failed to ensure via the contract?

The owner argued it was entitled to common law indemnification because the contract between the general contractor and the lessee obligated the general contractor to "assume sole responsibility and control" of the entire project. Ergo, as between the owner and the general contractor, the general contractor was in the best position to prevent the accident. Thus, the owner requested that the Court rule that common law indemnification exists not only where the proposed indemnitor was actually negligent, but also where the proposed indemnitor "had the authority to direct, control or supervise the injury producing work."

The Court of Appeals rejected the owner's argument in a lengthy decision in which it summarized a variety of less-than-clear Appellate Division decisions regarding exactly what must be established for common law indemnification to be awarded. The Court recognized that if it were to adopt the owner's position, "every party engaged as a general contractor or construction manager, whether by the owner or not, would owe a common law duty to indemnify the owner regardless of whether such party was actively at fault in bringing about the injury." Finding that such a rule was inconsistent "with the equitable purpose underlying common law indemnification," the Court held:

> a party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common law] indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision…Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actu-

ally directed and supervised the work, a common law indemnification claim will not lie against that party on the basis of its contractual authority alone.

The Court thus found that the general contractor had no obligation to indemnify the owner.

Author's Note: As in past decisions issued by the Court of Appeals, the Court was particularly swayed by the equities, going so far as to conclude that its decision was "in keeping with the law's notion of what is fair and proper."

Cragg v. Allstate Indemnity Corporation (06/09/11)

Court of Appeals

Intra-Insured Exclusion Does Not Bar Coverage for Wrongful Death Claim Brought by Non-Resident Father of Deceased

Eric Cragg is the father of three-year-old Kayla. Kayla and her mother, Marina Ward, lived with Kayla's grandparents, the Kleins. Kayla drowned accidentally in the Kleins' swimming pool.

The Kleins had a homeowner's insurance policy issued by Allstate. Kayla and her mother were insured persons, as residents of the household who were related to the policyholders. Cragg maintained a separate residence and was not an insured under the Kleins' homeowner's insurance policy.

Allstate disclaimed coverage based on the policy exclusion at issue here. Under "Coverage X [-] Family Liability Protection," the policy states that "[w]e do not cover bodily injury to an insured person…whenever any benefit of this coverage would accrue directly or indirectly to an insured person." The policy does not define the term "benefit."

Plaintiff, as the administrator of Kayla's estate, commenced an action seeking to recover against defendants for Kayla's wrongful death and for her conscious pain and suffering. Marinia Ward defaulted and judgment was entered against her in the amount of $300,000–$150,000 for wrongful death and $150,000 for pain and suffering.

Plaintiff brought this declaratory judgment action against Allstate for a declaration that Allstate was required to defend and indemnify its insureds. Supreme Court granted Allstate's motion for summary judgment, declaring that Allstate had no obligation to defend or indemnify Ward or the Kleins in relation to the wrongful death or conscious pain and suffering claims.

The Fourth Department found that the exclusion applied and we reported on that decision in our May 14, 2010 edition.

On appeal, the high Court acknowledged that the pain and suffering claim belonged to the estate of the deceased, and therefore was subject to the policy exclusion. However, the wrongful death claims belonged, not to the estate, but to the distributee's themselves. This was Cragg's loss and not derivative of any claim on behalf of his insured daughter.

The Court of Appeals found that Allstate had not met that burden of providing the policy language unambiguous.

The language of the policy exclusion—excluding coverage "whenever any benefit of this coverage would accrue directly or indirectly to an insured"—could be interpreted, as Allstate urged, to mean that bodily injury to an insured is not covered whenever any benefit—including coverage itself in the form of defense and indemnification—would accrue to an insured. However, this interpretation ascribes meaning only to the first clause of the exclusion—"[w]e do not cover bodily injury to an insured person."

Since the right to defense and indemnification universally accrues to an insured, under Allstate's interpretation the condition of the second clause of the exclusion would always be met. However, the second part of the exclusion must somehow modify the first part of the clause in order to have any meaning. In this context, a benefit must mean something other than coverage itself and is more naturally read to mean proceeds paid under the policy.

The exclusion fails to bar unambiguously payment to a noninsured plaintiff, that is to say it does not clearly cut off the nonresident distributee's wrongful death claims arising from the fatal injury to an insured.

Matter of Miraglia v. Essex Insurance Company (06/20/12)

Appellate Division, Second Department

Leak Springs in Attempt to Create Bucket Brigade. Plaintiff Has No Interest in Monies Defendant's Insurer Obtains in Third Party Action Against Employer's Carrier

Miraglia obtained a judgment in a Labor Law §240(a) case against a property owner (H&L) that was eventually reduced to about $30 million with interest. The owner's insurer, Essex, unequivocally offered its $1,000,000 policy limits, with interest (which included post-judgment interest on the entire verdict) which the Court determined to be $6.1 million. Plaintiff acknowledged that payment of the $6.1 million would exhaust the Essex policy.

H&L had obtained common law and contractual indemnity from the plaintiff's employer (Lane) in the underlying lawsuit. So, the same day that Essex paid the

$6.1 million to the plaintiff, the State Insurance Fund, using its funds and those from Lane's contractual liability (CGL) carrier, reimbursed Essex the $6.1 million.

So essentially, Essex was fully reimbursed for all of its indemnity expenses.

The plaintiff brought a "turnover" proceeding, arguing that he had a judgment of $30 million, he only received $6.1 million from H&L and its carrier, Essex, and therefore, he was still owned $23.9 million by the defendant. Miraglia argued that he had a greater interest in the $6.1 million that Essex received from the State Insurance Fund than Essex did and wanted THAT $6.1 million. He argued that when Essex made that payment and then was subsequently reimbursed by the Fund, Miraglia would want THAT $6.1 million also and this process—this "bucket brigade"—should continue until the entire judgment was satisfied.

Essex argued that the $6.1 million that it received from the State Insurance Fund was not the property of the owner-insured and that the owner-insured had no interest whatsoever in those monies. The Second Department agreed.

Pursuant to the terms of an insurance agreement between H&L and Essex, any right of indemnification that H&L possessed was "transferred" to Essex once Essex paid out the policy limits on behalf of H&L to [Miraglia], and H&L no longer possessed an interest in that right. The obligation of Essex ran only to H&L as its insured, and only to the extent of the policy limits.

Day v. OneBeacon Insurance Company (06/29/12)

Appellate Division, First Department

In Case of First Impression, Insured Loses Claim for SUM Benefits Based on Non-Consent Settlement with Products Liability Defendant and Loss of Carrier's Subrogation Rights

Stick with us on this one. It's an important decision and requires a close reading.

Day was injured in a car accident while a passenger in a Ford Windstar. The Ford was struck by another car driven by a State Farm insured ("Other Driver"). Day was insured by OneBeacon and had a policy of underinsured motorist's coverage with limits of $500,000. Other Driver's policy with State Farm carried liability limits of $100,000. Accordingly, if this was a simple UIM claim, Day would be entitled to up to $400,000 in SUM benefits ($500,000–$100,000).

Day also brought a claim against Ford, asserting that the seat in which she was sitting in the Windstar detached from the floor of the minivan and became airborne, enhancing her injuries. Ford eventually offered $475,000 in settlement and State Farm offered its $100,000 in liability limits.

OneBeacon was asked to consent to the settlement with the Other Driver. OneBeacon advised that it would not consent but would exercise its rights under Condition 10 of the SUM policy to advance the funds in exchange for Day cooperating in a claim against the Other Driver AND Ford. Day claimed that OneBeacon had no subrogation rights against a non-motor vehicle defendant such as Ford and refused to cooperate.

OneBeacon warned Day that if she settled with Ford and/or Other Driver and gave either a release, she would lose her rights to SUM benefits by virtue of the condition in the SUM policy that forbids an insured from destroying the SUM carrier's subrogation rights. Since Day claimed that OneBeacon had no subrogation rights, she could settle with Ford. Day also claimed that since 30 days had transpired since she advised of her intention to settle and since OneBeacon had not advanced the $100,000, she could settle with the Other Driver and issue a release.

She did both: issued a release to Ford for $475,000 and to Other Driver for $100,000. She claimed that the injuries involved were worth seven figures so there was no duplication of benefits received.

OneBeacon took the position that issuing the releases and destroying the carrier's subrogation rights was a breach of the SUM policy and therefore Day lost her rights to SUM benefits. The Fourth Department agreed.

It held that the plain language of the SUM policy gave the UIM insurer a right of subrogation against any responsible party, not just motor vehicle defendants. OneBeacon had a right to pursue the claim against Ford to recover dollars paid under the SUM policy and the issuance of the release to both the Other Driver and Ford destroyed those subrogation rights. SUM coverage was lost.

Dan D. Kohane is a senior member at Hurwitz & Fine, P.C. in Buffalo, N.Y., where he heads the firm's Insurance Coverage and Extra Contractual Liability, Class Actions/Mass Torts and ADR practice groups. Mr. Kohane has distinguished himself in managing the ever-evolving area of insurance coverage serving regional, national and international clients. An accomplished trial lawyer and litigator, he also has extensive experience in mediating complex casualty and insurance coverage disputes. Mr. Kohane is a graduate of the University at Buffalo Law School and the State University of New York at New Paltz. The first recipient of the Young Lawyer's Award from the Insurance, Negligence and Compensation Law Section of the New York State Bar Association, he served as legislative assistant to the New York State Assembly Judiciary Committee.

Workers' Compensation: Due Process on the Edge

By John H. Snyder

Due process of law is a fundamental constitutional guarantee. At its heart, due process guarantees that legal proceedings involving life, liberty or property will be fair and conducted with notice of the proceedings and an opportunity to be heard. This basic right is fundamental to our system of government much like free speech and other rights guaranteed by the constitution. Unfortunately, for several years, the New York State Workers' Compensation Board has been consistently attempting to limit the due process rights of all participants in its system.

The courts have long confirmed that administrative proceedings do not eliminate the right of citizens to due process. The Court of Appeals has stated "technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." *Hecht v. Monaghan*, 307 N.Y.461, 470 (1954). Despite the constitutional guarantee to due process and the clear application of that right to administrative proceedings, the Workers' Compensation Board appears to have forgotten its importance.

Section 20 of the New York State Workers' Compensation Law requires that the Workers' Compensation Board conduct a hearing upon the request of an injured employee or his/her employer stating "the Chair or Board shall make or cause to be made, such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within 30 days after a claim for compensation is submitted under this section, or such hearing close, shall make or deny an award determining such claim for compensation." W.C.L. Section 20(1). One would think that this statutory section and its plain meaning resolves any issues and clearly confirms that a hearing should be scheduled upon the request of any party. Unfortunately, the Workers' Compensation Board would disagree.

In 1990, the New York State legislature enacted Section 25(2-b) to the Workers' Compensation Law. This section of the law is referred to as conciliation and was used for a number of years as a method of resolving minor claims. Initially, the conciliation process was limited to claims of eight weeks or less but was amended to include claims with an "expected duration" of 52 weeks or less. (WCL Section 25[2-b]). Under what many would argue as a strained interpretation of the bounds of the conciliation statute, the Board has pursued a streamlined conciliation process which had many names over the last several years including the "informal resolution initiative" and the manage adjudication path (MAP). Although the statute anticipates a meeting to resolve issues between the parties (Section 25[2-b][c]), the Board suddenly suspended regular conciliation meetings in September of 2009. Upon information and belief, the Workers' Compensation Board conducted no conciliation meetings between September 1, 2009 and January 31, 2011. Although conciliation meetings are allegedly being held once again, one would need to search long and hard even amongst regular workers' compensation practitioners to find an individual involved in an actual conciliation meeting over the last several years. Replacing the traditional conciliation meeting are Administrative Decisions. Numerous procedural concerns have arisen from the Board's MAP program. Unfortunately, the Board's Administrative Decision process seems to ignore the procedural safeguards included in the original conciliation statute.

Under the Board's new procedure, Administrative Decisions are being issued in what would appear to be all cases. The limitation of cases with an "expected duration" of benefits less than 52 weeks has been ignored. However, permanent partial disability cases with long-term payment of benefits are regularly the subject of Administrative Decisions. Schedule loss of use permanency awards for extremity injuries exceeding 52 weeks of benefits are also the subject of Administrative Decisions. These permanent awards would seem to be outside the scope and intent of the original legislation.

Additional concerns with the Board's MAP program involve the issuance and review of Administrative Decisions. Under the original conciliation process, Law Judges played the role of a higher level review over proposed decisions from senior attorneys or conciliators. Under the new MAP process, Law Judges are issuing decisions in the first instance which would appear to lack any support under the Workers' Compensation Law. The conciliation process also contemplated that objections to Proposed Decisions would lead to hearings before the Workers' Compensation Board. However, current objections to Administrative Decisions are leading to Amended Decisions rather than hearings before the Board. Once again, this policy is without apparent authority in the statute. Most disconcerting is the fact that objections to proposed decisions are met with the responding decision indicating that the case will be continued for "consideration of a penalty under Section 114-a(3) of the Workers' Compensation Law." Section 114-a(3) allows for penalties

against the parties which can certainly serve as a chilling effect on the pursuit of due process rights.

One of the major concerns under the Board's new procedures is the rights of unrepresented claimants. While major concerns exist for the rights of parties with legal representation who are familiar with the language and terms utilized by the Workers' Compensation Board, the due process concerns multiply when Administrative Decisions having the force of law are issued to individuals with no legal experience and little understanding of the workers' compensation system. The conciliation statute helped to protect the rights of unrepresented individuals requiring written consent of the unrepresented to participate in the process. WCL Section 25(2-b)(e). Upon information and belief, this protection requiring written consent to the conciliation process is no longer being utilized by the Workers' Compensation Board as part of its Administrative Decision MAP program.

Ironically, the Workers' Compensation Board's new policies would seem to stand in the way of workers' compensation hearings when the parties request one, yet force a hearing when the parties have no desire for one. Recently, I have personally been involved in litigation involving issues of permanent disability and loss of wage earning capacity before the Workers' Compensation Board. The Workers' Compensation Board is now issuing Scheduling Orders to resolve questions of permanency during a reduced period of time. In this particular case, a negotiated resolution had been reached to resolve permanent indemnity and medical benefits contingent on the ability to obtain an approved Medicare Set-Aside for the case. Unfortunately, Medicare Set-Aside approval is a rather slow process, taking more than six months on most occasions at this point. The parties to the claim issued a joint letter to the Workers' Compensation Board indicating that a resolution was being negotiated and that the Scheduling Order for depositions on permanency was unnecessary at this time. Unfortunately, the Workers' Compensation Board responded that depositions must continue or the case must be settled within the time frame set or else a decision on permanency would be rendered by the Board based upon the evidence in the record. Unfortunately, the Medicare Set-Aside will not be able to be completed within the Scheduling Order time period allowed by the Board and, as a result, litigation and hearings will now move forward on a case where the parties made no such request. It is ironic that the allegations behind the Board's need for the manage adjudication program is calendar time. It would seem that if calendar time is the true concern, the Board would not be forcing litigation in cases where the parties were pursuing a negotiated resolution on their own.

The Board's action in regard to cases involving permanency once again limits the parties' due process rights. Under the Board's permanency Scheduling Orders, hearings are only scheduled at the end of a deposition process rather than at the beginning. The Board is determining the witnesses that should be deposed and the issues to be resolved without input from either the claimant or the employer. Furthermore, if the Board's process is followed to the letter, litigation could actually be required with depositions from the same physicians on two different occasions to resolve the issue of permanency. The Board is breaking the issue of permanency into two separate issues, including a question of whether maximum medical improvement has been reached and, secondarily, the degree of permanency once a determination of maximum medical improvement is rendered. This duplicative litigation plan, if followed, would waste both time and resources. Most importantly, as experience has demonstrated, litigation on many issues before the Board can be avoided when the parties are brought together. The Board's intent to pursue and resolve issues without hearings and without input from the parties pushes unnecessary litigation to artificially impose time constraints.

Due process is not always easy. Due process is not always efficient. Due process is not something which can be implemented in cookie cutter fashion. As one of my partners likes to note, the Workers' Compensation Board is not issuing fishing licenses. Fishing licenses can be issued subject to an organizational flow chart. Workers' compensation is a system dealing with a variety of issues and a multitude of parties that are far from cookie cutter. The rights of parties to be heard should not be ignored. Furthermore, the fact that a party may eventually lose is no excuse to eliminate due process rights. The Supreme Court of the United States confirmed many years ago "to one who protests again [a violation of] due process of law, is it no answer to say that in this particular case, due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). The Workers' Compensation Division of the Torts, Insurance and Compensation Law Section meets regularly to discuss these concerns and share our concerns with the Workers' Compensation Board. Those interested in more information on this topic or who would like to provide input should feel free to reach out to our division and me personally.

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