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Inside

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Table of Contents

Vol. 38, No. 1
Page

A View from the Outgoing Chair

It has been an honor to serve as the Chair of the Torts, Insurance & Compensation Law Section. I set an ambitious agenda when I began my term and I am happy to say that we accomplished many of these goals during the course of a year. Key among these items was a commitment to diversity, youth, membership and technology.

During my term as Chair, your Executive Committee met monthly and worked hard to enhance the benefits of Section membership. We embarked on a new quarterly newsletter and proposed legislative change. Recently the Section's Executive Committee took action to recommend an amendment to Insurance Law § 3420(d). In addition, the Section has sponsored many district events and CLE programs. The Section also continued its annual Law School for the Claim Professional program. Last year's program was a tremendous success with over 500 claim representatives in attendance. This annual program alone, and the networking opportunities it provides, makes membership in the Section worthwhile. If you missed this program, you missed an opportunity to discuss claims with the companies and representatives who are looking for counsel or who are adjusting the claims you are attempting to resolve.

We continued to look for ways to reinvest in membership. Some examples include the creation of diversity scholarships and the law student writing contest. The scholarships cover one year's membership in the Section for new members who meet diversity guidelines. The law school writing contest is intended to interest soon-to-be young lawyers in the areas of Torts, Insurance and Compensation Law. Our leadership also reached out to various law schools and held several on-campus recruiting events to interest new lawyers in the New York State Bar Association and the Section.

The Section has been acknowledged for its use of technology. It recently received national acclaim for the first ever web cast of an Executive Committee meeting, and the Section Blog has been recognized with top honors as well. In addition, we now have podcast messages on the Section webpage from various leaders in the Section. I am proud to say that the Section website is the most current and expansive of any Section. The Section also now has a discussion group on Linkedin.com.

Of course, the Section continued its tradition of offering this first-rate publication—the *Torts, Insurance & Compensation Law Section Journal*. In addition, we commented and participated on over 50 pieces of legislation. We also participated in the newly formed Federal Legislative Priorities Committee established by New York State Bar Association President, Bernice Leber.

The Section's Committees and Divisions have been reenergized with new proactive leadership. Each is sponsoring a CLE program or working on a project of significance. I encourage you to contact the Chairs of these committees and get involved. There are always new opportunities for involvement. The best source for information on how to get involved is exploring the Section website at www.nysba.org/TICL and reading its newsletter.

We began 2008 with a modest surplus, and I am glad to report that we ended the fiscal year with a surplus that will ensure stability for the Section in these troubling financial times. Many thanks to Brendan F. Baynes, the Section's Treasurer and unsung hero, for steering the financial ship and working closely with the NYSBA and me.

I would be remiss if I did not acknowledge and thank Charlie Siegel and Laurie Giordano, the now Chair and Vice-Chair of your Section. When I began my term, I discussed with both of them ideas to make the Section more interactive with its members and how to raise its profile. Charlie and Laurie were the perfect teammates, as were the rest of the Executive Committee. Charlie and Laurie, probably wanted to block my e-mails at times, but I thank them for not doing so. I am truly grateful to them, and the Executive Committee. The Section will no doubt continue to grow and succeed under Charlie's and Laurie's leadership.

Serving as Chair was a very rewarding experience. I had the opportunity to meet with and interact with so many people I would have never have otherwise met. I dealt with issues I would not otherwise have had exposure to, and I learned that our time on this planet is really about making it better. I hope we did some of that during my term, but will let others be the judge. I thank everyone who I interacted with as Chair for making it a truly remarkable experience.

Daniel W. Gerber

A View from the Incoming Chair

As I begin my year as Chair of the Torts Insurance & Compensation Law Section, I would like to take this opportunity to thank our immediate past Chair, **Dan Gerber,** for his hard work and dedication to our Section. I am sure that our Executive Committee and entire Section join me in wishing Dan the best and thanking him for his hard work and effort last year. Through Dan's leadership and effort, our Section continued to grow and move forward. I believe with the hard work and effort of our dedicated Executive Committee we will continue to succeed. I look forward to sharing in the challenge of leading this great Section with **Laurie Giordano**, our Vice Chair; **Tom Maroney**, our Secretary; and **Brendan Baynes**, our Treasurer.

Your Executive Committee will continue to energize our substantive committees and create opportunities for involvement in the Section. We are continuing to focus on growing our membership through young and diverse members.

As attorneys, we are well aware that the law is constantly evolving and growing to meet the challenges of our changing environment and society. Whether due to new legislation or appellate decisions, our need to be kept aware and current is critical to our profession. That is why our Section is dedicated to meeting this challenge by offering our membership easy access to updated case law, proposed legislation that impacts our area and a forum to discuss ideas among our peers throughout the state. Our website, blog, journals, electronic newsletters, web casting and of course, our old-fashioned meetings, make our Section one of the most progressive and informative Sections within the New York State Bar Association. I encourage all our members to take advantage of all that our Section has to offer.

Our Section has long been known for substantive and outstanding CLE courses given throughout the state. This year will be no exception. We have planned a number of programs for throughout 2009. We again will sponsor our "Law School for the Insurance Professionals," where our members conduct a one- day seminar for insurance company professionals throughout the state. We are planning to conduct this program in October. **Lisa Berrittella** will chair our program this year. If you are interested in speaking or being a local chair, please contact her at 585.454.2181 or email her at lberrittella@trevettlaw.com.

We would ask that if you have an interest in speaking, publishing, joining the Executive Committee or just networking with attorneys across the state, we can help. Please feel free to call me at 212.440.2345 or email me at charles.siegel@cna.com.

Finally, as we enter into the challenges of 2009, I ask you all to "Save the Date" for our Annual Meeting that will be held at the Mohegan Sun. The annual **Tort, Insurance and Compensation Law Section's 2009** meeting will be held **August 9th–12th**. Don't miss out on a wonderful opportunity to socialize and have fun with friends and family and earn CLE credit as well. Not only can you enjoy the company of your friends and family, but also meet and network with attorneys from across the state. As in the past we also expect that insurance professionals and judges will be attending. So join us at our Annual Meeting at the Mohegan Sun. This five-star resort is more than just a casino. The Mohegan Sun is at the heart of New England's most popular activities and attractions, from its scenic countryside and covered bridges to local vineyards and yachting on Long Island Sound. Hunt for antiques, visit the past at Mystic Seaport, enjoy a show at a historic theater, hone your golf or tennis game or just relax by shopping and dining. So save the date. More details will follow in the coming months.

I will continue to update the membership during the year with information of importance to the Section. I look forward to sharing in the challenge of leading this great Section and with your help, we will succeed.

Charles J. Siegel

Biomechanical Science Challenges Old Assumptions About Causation

By Richard M. Sands

In New York personal injury trials, the task of proving the essential element of causation—the required "cause and effect" relationship between accident and injury—ordinarily falls to the plaintiff's doctor, whose testimony advises that the accident was "the competent producing cause of the injury." Usually this causal connection is stated with "a reasonable degree of medical certainty." However, the doctor's "certainty" of the causal link may often be based on incomplete data or subjective beliefs not necessarily supported by an objective analysis of the facts and circumstances of the accident. Physicians are primarily concerned not with the cause of an injury but rather the diagnosis and treatment of their patients' conditions, and their in-court testimony concerning matters of health and injuries will customarily include detailed descriptions of medical examinations, tests and procedures to demonstrate the basis for objective scientific validity.

Medicine is correctly regarded as an imprecise and inexact science. While medical testimony concerning diagnosis and treatment would likely be inadmissible if not based on the doctor's objective examinations, tests and procedures, medical experts routinely base their opinions of the causal nexus between the accident and injury solely on the plaintiff's subjective verbal description of the event, usually provided at the initial visit.

Advances in science and technology over the past decades have produced the tools for a more objective assessment of the causation issue in litigation. For example, with the advent of MRI and CT scan technology a verifiable determination can be made by the competent radiologist as to whether the film shows evidence of acute trauma or, rather, reveals a chronic, pre-existing degenerative condition. Moreover, the development of biomechanical engineering has provided the basis for a scientific analysis of causation in appropriate cases.

"Reliability" is the chief criterion for admissibility of the doctor's testimony on causation. In certain litigated cases, as discussed below, the science of biomechanical engineering calls into question the reliability of medical testimony on this essential element of the personal injury lawsuit.

The New York plaintiff has the burden of proving that the accident in question caused the claimed injuries. In order to establish a *prima facie* case of causation, a plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury.[1] Ordinarily, the required proof comes from plaintiff's medical expert witness, often a treating doctor, who will opine that "to a reasonable degree of medical [or scientific] certainty" the accident caused the injury.

In some cases, the causal connection between an accident and injury is obvious or indisputable. Where the results of negligence are within the experience and observation of ordinary laymen, expert testimony is not needed to prove causation.[2] For example, where a car accident victim complains of a bone fracture, the causal connection can readily be made in the absence of medical testimony by the plaintiff's in-court descriptions of the accident and aftermath and the fact-finders' common-sense lay appraisal of the evidence, including hospital and diagnostic records, particularly where there is no proof of a pre-existing fracture.[3]

"Advances in science and technology over the past decades have produced the tools for a more objective assessment of the causation issue in litigation."

Nonetheless, in many cases, injury causation is not as readily apparent. Often, claimed injuries are of the "soft tissue" variety—damage not to bony structures, but to muscles, tendons, discs. Although soft tissue injury certainly can have an acute, traumatic cause, typically such injuries result from chronic deterioration or repetitive use. They exist asymptomatically in the individual, waiting to be discovered by a treating physician when the individual becomes a patient following an accident.

Where injury causation is not readily apparent, plaintiffs will seek to establish the causation element by medical testimony. The "magical words" of "reasonable degree of medical certainty" are not required to show causation; in order to be admissible the medical expert's testimony must reflect "an acceptable level of certainty" from which it should be "reasonably apparent" that "the doctor intends to signify a probability supported by some rational basis."[4] It has been held that a *prima facie* case of causation will be made by the medical expert's testimony that "satisfies accepted standards of reliability."[5] However, in the absence of an explanation of the basis for the conclusion that the injury was caused by the subject accident, and not by other possible causes evidenced in the record, the doctor's testimony is "mere speculation" insufficient to establish a causal relationship.[6]

The Court of Appeals has ruled that where the doctor's conclusions as to causation are "contingent, speculative, or merely possible," that medical opinion evidence lacks probative force.[7] Non-medical experts are competent to testify on the causation issue, so long as the expert's testimony is based on an expertise directly related to the disputed issues at trial.[8]

Are physicians the most qualified scientific experts to render opinions concerning causation? Physicians are medical experts who are trained to determine the nature and extent of the injury or condition (i.e., diagnosis), the medically indicated treatment to cure or ameliorate the injury or condition, and the projected course of plaintiff's health with or without treatment (i.e., prognosis). However, the question of whether a particular accident caused (or could have caused) a discrete bodily injury is not merely a subject of medical expertise, but rather must involve an analysis of the following factors:

1. The identification of the instrumentalities involved and the mechanism of the accident;
2. The kinematics of the individuals involved, i.e., the motion of persons affected by the accident;
3. The injury mechanisms created (or not created) by the accident, and the nature and magnitude of forces generated; and
4. The tolerance of a particular body part to particular forces applied by a particular mechanism.

The study and analysis of physical objects in motion, the mass, forces and energies associated with objects in motion, and the physical laws governing objects in motion are properly the subjects of physics and mechanical engineering. As discussed below, a detailed scientific analysis of a discrete physical event, such as a traffic accident, can determine whether the mechanism of the accident, and the forces associated with it, could have produced a specific injury to an accident participant. The scientist qualified to perform this analysis is the biomechanical engineer.

* * *

In its 1960 decision, the Court of Appeals in *Miller v. National Cabinet Company*, *supra*, acknowledged that a somewhat relaxed approach to the standard for medical opinion on causation was acceptable at trial. The Miller Court recognized "that the scientific repugnance to the principle of 'post hoc, ergo proper hoc' cannot fully extend to the law, and that, as in cases of circumstantial evidence, we regard as proof that which would be rejected by the scientist."[9] *Post Hoc, ergo proper hoc* ("after this, therefore, as a result of this") reasoning is rejected by the scientific community as a logical fallacy in thinking, in that it posits that what immediately preceded an event must have caused it.

The Court of Appeals in *Matott v. Ward*, *supra*, recognized the inherent tension that exists between the primary function of the average physician, on the one hand, and the obligation of the civil justice system to ascribe legal responsibility based on a causal connection between tort and injury, on the other:

> Training in the inexact and continually expanding science of medical investigation implants in its initiates a reluctance to quantify their judgments as to cause and effect. Except insofar as one inescapably affects the other, the primary function of the average physician is to diagnose and treat the condition at hand rather than to determine precisely what extraneous factors influenced it. The emphasis is on the effect on antecedent physiological and psychological conditions; medical histories are almost always chronicles of the patient rather than the accident.
>
> On the other hand, the approach of the lawyer, tutored in the art of resolving social problems and focusing on "proximate cause," "fault distribution" and the like, is quite different. In the identification of influences toward legal responsibility, his concern is whether tort and injury bear a close enough relationship to make it equitable to impose financial responsibility upon a defendant. Not only is this a matter usually dehors the medical profession's interest, but the type of prognostication that enters into it is out of tune with its far more scientific orientation.[10]

In the *Matott* Court's view, this "problem" can be overcome by eschewing "dictionary dilettantism" and the strict requirement of using the "magical words" represented by the phrase "reasonable degree of medical certainty," and, rather, by focusing on whether it is "reasonably apparent" from the physician's testimony that "the doctor intends to signify a probability supported by some rational basis" for a conclusion concerning causation.[11]

In *Matott*, the plaintiff claimed to have sustained injuries in a 1973 car crash. After the accident, Matott was treated by osteopathic physician Dr. Lester Millard for several months, but although he continued to experience pain and discomfort up to the time of trial in 1977, plaintiff visited the doctor only intermittently in the intervening years. Significantly, there was proof that approximately two years after the 1973 accident, Matott began to complain to Dr. Millard of new injuries to parts of his body affected by the original accident, apparently

sustained in "later occurrences." At trial, Dr. Millard testified that the plaintiff's condition was related to the original accident "with a degree of medical certainty," not a "*reasonable* degree of medical certainty." The *Matott* Court of Appeals found that the doctor's testimony was sufficient to establish causation, in that it conveyed sufficient assurance that it was not based on either supposition or speculation; it was "consonant with a principle insistent only on substantive indication of reasonable reliability."[12]

It is questionable whether the relatively relaxed approach to the evidentiary standard of causation discussed in *Miller* and *Matott* should be followed today, nearly 30 years after *Matott* was decided and nearly 50 years after *Miller*. While the "problem" recognized by the *Matott* Court—i.e., the tension between the doctor's emphasis on diagnosis and treatment of the plaintiff's condition regardless of the precise "extraneous factors" which "influenced it," and the lawyer's concerns regarding legal causation of the condition—continues to exist, recent scientific and technological advances now permit the rejection of the *post hoc, ergo proper hoc* fallacy by the courts, as well as by science.

Today, in the appropriate case the defense lawyer may employ the tools furnished by the biomechanical engineer, to scientifically demonstrate that the opinion of the plaintiff's medical expert concerning causation is not, in fact, "reasonably reliable" at all.

The scientific discipline of accident reconstruction is primarily concerned with analyzing all relevant available data to clearly determine the mechanisms involved in an accident. The related field of biomechanical analysis is a subset of accident reconstruction, using many of the same principles and methodologies. However, the biomechanical engineer goes a step further: not only does he or she determine and identify the mechanisms involved in the accident, and the types and extent of the physical forces associated therein; the biomechanical engineer is qualified to determine whether the accident exposed the plaintiff to the specific accident mechanism and forces known to cause the specific injury claimed.[13] In other words, the field of biomechanical engineering applies mechanical engineering principles to human anatomy and physiology.

Although not usually a medical doctor, and therefore unable to render an opinion on diagnosis or prognosis, the biomechanical engineer is also an expert on human anatomy and physiology, including the functioning of various body parts and the types of stresses and forces which will cause them to fail, i.e., exceed their natural physiologic ranges of motion.

The biomechanical expert will review the plaintiff's available medical records and reports to determine the nature and extent of the claimed injuries. The reviewing engineer relies on the treating physicians to define and describe the injury diagnoses. Once the nature of the claimed injuries is understood, the engineer can define the mechanisms by which such injuries are sustained. The expert will then scientifically "reconstruct" the accident using principles and methods which are generally accepted by the pertinent scientific community. This analysis must be based not only on subjective accident descriptions (as contained in deposition transcripts, signed statements and accident reports) but (most importantly) on objective evidence relevant to the accident, including the makes and models of the involved vehicles and the actual nature and extent of the vehicular damage. If extant, repair records and post-accident photographs are reviewed.

Using the information concerning the vehicles' respective makes and models, the engineer will determine the vehicles' weights, mass and stiffness. The expert will consider the directions and speeds of the vehicles and whether one or more vehicles braked before impact. This data will assist the engineer in calculating the amount of time prior to braking and the distance of the vehicle(s) from the place of contact when braking occurred. The points of impact to the vehicles will be determined as well as the extent of damage, i.e., crush, to each vehicle.

The biomechanical engineer will also determine what happened to the plaintiff seated inside a vehicle during the accident by assessing where the plaintiff was seated, whether a seatbelt was worn and restrained the plaintiff on impact, the movements of plaintiff upon impact and whether contact was made with the interior of the vehicle. If contact was made, the expert will ascertain the body part(s) and the precise location of the vehicle's interior which were in contact.

Further, the engineer will determine the change of speed of the vehicles upon impact. In the accident reconstruction community, describing the severity of a vehicular crash means quantifying the change in velocity for a struck vehicle ("delta-v"). When energy is transferred in a traffic accident, the vehicles will change speeds to reflect the gain or loss of energy—but the occupants inside the vehicle will continue to move at their pre-impact speeds. Thus, a discrepancy is created between the velocities of the vehicles and the velocities of the occupants inside, which causes relative movement of occupants within the vehicles.

The engineer can determine if the plaintiff moved in such a way that would cause injury to the body part(s) complained of. Put another way, the expert ascertains whether the accident provided an injury-causing mechanism. If so, a determination can be made as to whether the injured body part(s) sustained a force or load that would cause tissue damage (injury) to the body part(s). Essentially, if the expert establishes that the accident did not furnish the mechanism for the specific injury or pro-

vide the force (loading) of sufficient magnitude to cause it—or both—the expert will conclude that the specific injury could not have been caused by the accident.

The methods used to quantify the impact severities are based on fundamental engineering principles which are well documented and accepted in the accident reconstruction engineering community. These methods recognize that there is a direct relationship between the amount of crush damage sustained by a vehicle in a crash and the energy applied to the vehicle during the impact. If the vehicles identified in the accident were identically manufactured to specification, they will deform to the same extent if they are struck with an identical force in an identical location. The engineer analyzes the crush to a vehicle following an impact and determines the amount of energy transferred by reviewing crash tests involving the same or similar vehicle types.

The body of knowledge related to the levels of force the "normal" human body can tolerate without damage is extensive. The engineer will consider the height and weight of the plaintiff at the time of accident. If, *arguendo*, the plaintiff was suffering from a pre-existing condition which is claimed to have been aggravated by the accident, New York law obligates the plaintiff to plead such an aggravation and identify the nature and extent of the pre-existing condition prior to trial.[14] If no such aggravation is pleaded, it may be presumed that the lawsuit claims that the accident caused plaintiff's injuries. If the pre-existing condition is identified, the biomechanical expert can factor it into the analysis.

Consider the case where plaintiff claims to have sustained serious injuries in a low-speed motor vehicle accident where the accident victim was restrained by a seatbelt. The courts are filled with litigated cases involving a variation of the following scenario: The plaintiff motorist (or passenger) claims a serious injury which may have been or will be surgically treated (e.g., rotator cuff tear, meniscal or knee ligament tear, spinal disc herniation with pain radiation) which allegedly stems from a low-speed motor vehicle accident with minor resultant property damage. The plaintiff's treating or examining physician may pronounce that the subject accident (usually verbally described by the plaintiff) was the competent producing cause of the serious injury, without a review of any documentary material such as accident reports prepared by investigating police officers or accident participants, deposition testimony of the parties, property damage photographs or repair documents. The jury is confronted with evidence of a low-speed impact and minor collision damage (and has, perhaps, a sense of skepticism that the minor accident caused the injuries), on the one hand, and the plaintiff's doctor's testimony of a causal connection (i.e., proof the minor accident caused the injury), on the other, usually based only on plaintiff's subjective accident description.

It is, of course, not surprising that the treating physician will not have reviewed pre-trial disclosure material concerning the happening of the accident; such a review is not usually part of the doctor's "job description" since it is not relevant to the primary functions of diagnosis and treatment. Nonetheless, where the plaintiff's medical expert has not reviewed critical material concerning the happening and mechanics of the accident and is (presumably) not qualified as a physical engineer to analyze the motions and forces involved in the accident, it can be argued that a doctor is not the most competent expert to express an opinion on causation. Indeed, an argument can be made that, under the circumstances, the doctor's opinion lacks probative force where the conclusions are "speculative" or "merely possible." At worst, the medical witness' unfamiliarity with the details of the accident and with scientific biomechanical principles used to analyze accidents may be fruitful areas of cross-examination pertaining to the weight of the evidence.

New York Courts have recognized the competency of biomechanical engineers to testify on causation issues. In *Plate v. Palisade Film Delivery Corp.*, the Appellate Division, Second Department recently reversed the judgment of the Supreme Court, Queens County and found that the trial court had erred in its determination that the defendants' biomechanical engineering expert was not qualified to testify regarding whether the force of the accident impact could have caused a serious injury or exacerbated a preexisting injury to the plaintiff's cervical spine and in precluding that testimony.[15] The Appellate Division, First Department affirmed the Supreme Court, New York County judgment in favor of the defendants following a jury trial in *Mathis v. New York Health Club, Inc.*, where defendant's biomechanical expert was properly qualified to testify on whether plaintiff's performance of the exercises in question could have caused the types of injuries alleged.[16] In *Cocca v. Conway*, the Appellate Division, Third Department affirmed a judgment upon a jury verdict rendered in defendants' favor where a biomechanical engineer testified that, *inter alia*, plaintiff's description of the accident was not supported by the proof and that the force generated by the two-vehicle impact was not sufficient to cause plaintiff's injuries.[17] In *Mohamed v. Cellino & Barnes, P.C.*, the Appellate Division, Fourth Department affirmed the lower court's decision to admit the testimony of an engineering expert concerning the physics of plaintiff's fall from a passenger door of a bus.[18]

Particularly in those cases where diagnostic films reveal the presence of chronic, pre-existing degenerative conditions affecting the body part(s) claimed to have been injured, biomechanical expert testimony can provide persuasive scientific evidence to dispute the causal link between accident and injury. In order to add this powerful tool to the defense arsenal, the lawyer must become conversant with biomechanical engineering principles and those trial techniques needed to maximize their effectiveness in court.

Endnotes

1. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666, 670 (1980). *See also Pommells v. Perez*, 4 N.Y.3d 566, 579, 797 N.Y.S.2d 380, 830 N.E.2d 278 (2005); *Laidlaw v. Sage*, 44 L.R.A. 216, 12 E.H. Smith 73, 158 N.Y. 73, 101, 52 N.E. 679 (1899) ("The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible, and where the proof is by circumstances, the circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts [citation omitted]").
2. *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389, 34 N.E.2d 367 (1941); *Shaw v. Tague*, 257 N.Y. 193, 177 N.E. 417 (1931); *Mitchell v. Coca-Cola Bottling Co.*, 11 A.D.2d 579, 200 N.Y.S.2d 478 (3d Dep't 1960).
3. *Lanpont v. Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 664 N.Y.S.2d 285, 288 (1st Dep't 1997) ("Causation was also proven, even in the absence of expert medical testimony, since the results of this alleged act of negligence are 'within the experience and observation of an ordinary layman' [citations omitted]").
4. *Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 645 (1979); *People v. Bethune*, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dep't 1984); *Miller v. National Cabinet Company*, 8 N.Y.2d 277, 168 N.E.2d 811, 204 N.Y.S.2d 129 (1960).
5. *Andre v. Seem*, 234 A.D.2d 325, 650 N.Y.S.2d 794 (1st Dep't 1996), citing *Matott*. In *Andre*, the testimony of plaintiff's medical expert was insufficient to establish that the subject accident caused plaintiff's herniated disc injury, since the expert was unfamiliar with plaintiff's history of prior and subsequent accidents and back pain.
6. *Carter v. Full Service, Inc.*, 29 A.D.3d 342, 815 N.Y.S.2d 41 (1st Dep't 2006); *lv. to appeal denied*, 7 N.Y.3d 709, 822 N.Y.S.2d 757 (Table), 855 N.E.2d 1172 (2006). The *Carter* Court reversed a Supreme Court, Bronx County judgment for plaintiff, entered after a jury verdict, where plaintiff's medical expert failed to explain how the alleged knee injury was caused by the subject accident and not by a prior accident that occurred eight days before.
7. *Burris v. Lewis*, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853, 856 (1957); *Riehl v. Town of Amherst*, 308 N.Y. 212, 216, 124 N.E.2d 287, 289 (1954).
8. *Sumowicz v. Gimbel Brothers, Inc.*, 161 A.D.2d 314, 555 N.Y.S.2d 306 (1st Dep't 1990); *Edgewater Apartments, Inc. v. Flynn*, 216 A.D.2d 53, 627 N.Y.S.2d 385 (1st Dep't 1995); *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 271 N.E.2d 515, 322 N.Y.S.2d 665 (1971).
9. *Miller*, *supra*, 204 N.Y.S.2d at 137.
10. *Matott*, *supra*, 423 N.Y.S.2d at 647.
11. *Matott*, *supra*, 423 N.Y.S.2d at 648, citing *Miller v. National Cabinet Company*, *supra*.
12. *Matott*, *supra*, 423 N.Y.S.2d at 649.
13. Although biomechanical analysis can be applied to any physical event said to cause bodily injury, for the purpose of this article we shall focus on motor vehicle collisions as the "accident" in question.
14. New York adheres to the principle that to recover damages based upon the aggravation of a pre-existing condition, the condition must be specifically pleaded and proved. *DeMento v. Nehi Beverages, Inc.*, 55 A.D.2d 794, 389 N.Y.S.2d 909 (2d Dep't 1976), *citing Von Sydow v. Long Beach Bus Co.*, 249 App. Div. 838, 292 N.Y.S. 662 (2d Dep't 1938); *Roth v. Hudson Transit Lines, Inc.*, 72 Misc. 2d 999, 340 N.Y.S.2d 224 (Sup. Ct., N.Y. Co. 1972). If a plaintiff fails to allege the aggravation of a pre-existing condition in the complaint or bill of particulars, it constitutes reversible error to permit recovery for such damages. *Behan v. Data Probe International, Inc.*, 213 A.D.2d 439, 623 N.Y.S.2d 886 (2d Dep't 1995); *Ruggiero v. Banner Glass & Mirror Corp.*, 232 A.D.2d 395, 648 N.Y.S.2d 395 (2d Dep't 1996).
15. *Plate v. Palisade Film Delivery Corp.*, 39 A.D.3d 835, 835 N.Y.S.2d 324 (2d Dep't 2007). *See also Valentine v. Grossman*, 283 A.D.2d 571 (2d Dep't 2001), where the Second Department reversed a verdict for plaintiff of approximately nine million dollars due to the trial court's improper exclusion of defendant's biomechanical expert testimony.
16. *Mathis v. New York Health Club, Inc.*, 288 A.D.2d 56, 732 N.Y.S.2d 341 (1st Dep't 2001); *lv. to appeal denied,* 98 N.Y.2d 610, 749 N.Y.S.2d 2, 778 N.E.2d 553 (2002).
17. *Cocca v. Conway*, 283 A.D.2d 787, 725 N.Y.S.2d 125 (3d Dep't 2001). *See also Anderson v. Persell*, 272 A.D.2d 733, 708 N.Y.S.2d 499 (3rd Dep't 2000).
18. *Mohamed v. Cellino & Barnes, P.C.*, 300 A.D.2d 1116, 752 N.Y.S.2d 465 (4th Dep't 2002).

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Underwriting Property and Business Loss Just Got More Expensive in New York

By Salvatore J. DeSantis

In February 2008, New York's highest Court, in two cases it issued on the same day, ruled that an insurer may be found responsible for extra-contractual liability if it improperly disclaims coverage or improperly delayed full payment. One case involved a business interruption claim under a "Deluxe Business Owner's" policy and the second involved the "Builders Risk Coverage" portion of a commercial property insurance policy. Although the Court indicated that it limited its holding to the facts before it, the decisions could have far-reaching implications, impacting every commercial general liability insurance carrier who writes policies in New York.

The Court split 5-2 in both these cases, *Bi-Economy Market, Inc. v. Harleysville Insurance Company*[1] and *Panasia Estates, Inc. v. Hudson Insurance Company*,[2] holding that consequential damages can be awarded to insureds even where their insurance policies contain explicit exclusions for consequential damages.

In *Bi-Economy*, the lead case, the insured retail meat market suffered a major fire resulting in considerable lost business income. The insurer, Harleysville, disputed the extent of Bi-Economy's claim for damages and paid only seven months of lost business income even though the "Deluxe Business Owner's" policy provided for one year of coverage. Bi-Economy never resumed business operations, contending in the suit that the insurer's failure to pay the claim promptly and in full resulted in the total ruin of its business operations.

In the companion *Panasia Estates* case, the insured owner of commercial real estate property sustained extensive property damage when rainwater entered the building through the roof. The carrier disclaimed coverage under the "Builders Risk Coverage" policy, indicating that its investigation revealed that the loss was the result of repeated water infiltration over time, and wear and tear, rather than from a covered risk.

Finding implicit in all contracts a covenant of good faith and fair dealing, the Court of Appeals for the first time invoked this covenant to allow consequential damages claims in excess of the policy limits to proceed to trial upon proof that the damages were reasonably foreseeable and proximately caused by the breach of the covenant. The Court reasoned that only by allowing consequential damages would insureds be placed in the positions they would have been in had the contracts been performed as contemplated by the parties.

The Court's majority indicated that like all contracts, insurance policies must be viewed in terms of what the parties contemplated and then bargained for. A family business owner purchasing business interruption insurance, for example, is purchasing peace of mind and the carrier is presumed aware of this when it issues such policies. Hence Harleysville was deemed to have contemplated that it would have to respond in damages to Bi-Economy for the loss of business as a result of a breach of its obligations under the policy.

*"Although the Court indicated that it limited its holding to the facts before it, [*Bi-Economy *and* Panasia Estates*] could have far-reaching implications, impacting every commercial general liability insurance carrier who writes policies in New York."*

Expanding upon the earlier *Kenford v. County of Erie*[3] analysis, that damages which are recoverable must have been reasonably foreseeable, the majority found it was within the contemplation of the parties that Harleysville would be liable for consequential damages, notwithstanding the explicit exclusion, if they failed to timely pay the full business interruption loss and as a result the business collapsed. Protecting against such an occurrence, the majority noted, was the reason Bi-Economy paid for a Deluxe Business Owner's policy in the first place. The Court stressed that their rationale was not to punish insurance carriers, but simply to give insureds their bargained-for benefits.

In the identical dissent appended to both decisions, Judge Smith argues that consequential damages are not appropriate in cases where the obligation breached is the payment of money, as in *Bi-Economy* and *Panasia*, because in payment-for-money cases, the parties have already established what damages they contemplated. The linchpin of the majority's view is that the purpose of the *Bi-Economy* contract was not "just" to receive money, but also to receive it promptly so that an insured's business could avoid collapse.

The dissent decries that the majority abandoned the long-standing rule in New York that punitive damages are not available absent egregious tortuous conduct directed

at the insured claimant and a pattern of similar conduct directed at the public generally.[4] They submit that simply calling damages consequential instead of punitive, as the majority has done, is merely changing labels. They also argue that *Kenford* was misapplied because *Kenford* effectuated the parties' presumed intentions at the time a contract was made and it is difficult to imagine an insurance company "consider[ing] the subject" of exposing itself beyond its policy limits.

But the majority rules the day, so post *Bi-Economy* insurance carriers on first party claims are on notice that if they are found to have acted in bad faith they are exposed to awards in excess of policy limits. This is so regardless of whether such damages are labeled consequential, punitive, or something in between, and notwithstanding a specific exclusion to the contrary or the failure to meet the much tougher "egregious tortuous conduct/pattern of similar conduct against the public" punitive damages rule.

The dissenters fear that juries, despite being given narrow instructions, will not be able to appreciate the difference between awarding damages which were foreseeable and contemplated at the time the contract was made and punishing an insurer. To prevent runaway verdicts if the dissenters are correct, insurance companies may consider developing new guidelines and practices for prompt processing of business interruption claims. Perhaps a schedule of agreed and bargained-for deadlines should be written into such policies. Certainly these decisions cannot be ignored, because underwriting property and business loss just got more expensive in New York.

Endnotes

1. 2008 N.Y. Slip Op. 01418.
2. 2008 N.Y. Slip Op. 01419.
3. 73 N.Y.2d 312, 540 N.Y.S.2d 1 (1989).
4. *Rocanova v. Equitable Life Assur. Socy. of U.S.* 83 N.Y.2d 308 (1994).

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Tort Appeals: Three Cases Illustrate Recurring Problems and Solutions

By Cynthia Feathers

Appeals in tort cases involve unique challenges, including how to effectively present proof about events underlying the torts, whether the proof emerged at trial or in a summary judgment motion. Three appellate decision—a recent Labor Law § 240(1)[1] case against the state, a medical malpractice case with a pro se plaintiff,[2] and a motor vehicle accident case involving three defendants and the emergency doctrine[3]—help illustrate some recurring themes in tort appeals.

Labor Law § 240 Case: Reshaping Trial Proof

The "Scaffold Law" case went to a trial on liability, and the claimant's version of events surrounding his fall varied markedly from that of other witnesses. But there was no dispute that the fall occurred from a makeshift plywood platform over an unfinished stairwell. The platform was itself a safety device, but no other apparatus protected the claimant from elevation-related risks. He presented no proof, expert or otherwise, about what other safety device should have been provided, and the state contended that such lack of proof was fatal to his claim. The Court of Claims agreed.

As is often the case with tort claims, the appeal was not about reciting how things unfolded at trial. Instead, there is often ample room to reshape the story of the case to advance your argument and re-frame the issues as presented at trial. Upon appeal, we ignored the factual conflicts and even much of our own client's version of events. Instead, the goal was to present a compelling chronological narrative about the *undisputed* facts as they emerged at trial.

This approach was viable since what the claimant was doing in the moments leading up to the accident was not germane. It was undisputed that he tumbled from an unprotected platform, and there was no proof of any egregious behavior on his part that should have shifted the liability.[4] Moreover, if we tried to defend our position in a credibility contest, we might well lose— even though the Appellate Division's powers to independently review the evidence are broader in a non-jury case than in a jury case.[5]

Upon appeal, there is often room to reshape not only the facts, but also the law. While trial counsel may have presented some law, it is often appellate counsel's job to delve more deeply into relevant cases. The legal discussion should often range from the very general to the very specific. The general discussion could convey concepts that advance your client's cause. In Labor Law § 240(1) cases, that includes the liberal interpretation historically given to the absolute liability statute designed to provide broad protection to workers.[6]

As to the specific, we wanted to fully explore a discrete body of cases finding liability where a claimant fell while building or dismantling a platform for which no protection was provided.[7] We also sought to identify cases indicating that the claimant does not bear the burden of proving what expert devices could have been provided. While such proof is often presented, it is sometimes lacking.[8]

After you have identified the best cases on your salient issues, do not stop there. Rather than providing a long string cite, choose the most apt and favorable cases and discuss them at great length, analogizing them to your case. In that way, you can convincingly advance your contention that the court below has misapprehended or misapplied the law.

In the Scaffold Law case, concluding that the Court of Claims had indeed misapprehended and misapplied the law, the Third Department reversed, found in favor of the claimant as a matter of law, and remanded for a trial on damages. Finally, it may not be enough to discuss analogous cases, since torts are often so fact specific and sui generis. An analytical discussion relating general principles set forth in the applicable Restatement or treatise as to the dynamics at play in your case can be extremely illuminating and persuasive.

The Labor Law case demonstrated another issue that often arises in tort appeals: what to do when you lose a motion for summary judgment. While in most negligence scenarios, it is uncommon for the plaintiff to prevail on liability as a matter of law, that is not the case under the Scaffold Law.

If your motion for summary judgment is denied, as our claimant's was, there is a strategic choice to be made. You can take an interlocutory appeal[9]—after weighing the costs of appealing immediately versus going to trial and after considering whether you can likely win a stay of the trial.[10] In the alternative, if you go to trial and lose, the appeal from the final order will bring up for review every non-final order that necessarily affected the final judgment[11]—including the order denying the motion for summary judgment.

Be sure not to limit the scope of the notice of appeal. Instead, appeal from each and every part of the challenged order. There is rarely a sound reason to do otherwise, since you can narrow, but not broaden, the appeal issues later.[12] It may seem counterintuitive to think that

you could argue that there should never have been a trial when one has in fact occurred, but you can indeed make such an argument and it may advance your appeal or settlement prospects.

Medical Malpractice Action: Finding the Meaning of a Key Case

A recent medical malpractice case demonstrates the maxim that, even in summary judgment appeals, you can tell the story in a new way to achieve a new result. In the nick of time, trial counsel had commenced the action, but then declined to prosecute the appeal. The tenacious client proceeded alone against an aggressive law firm representing the surgeon and hospital.

She did not know how hard it can be to prevail in medical malpractice cases based on claims of negligent surgery and lack of informed consent. She only knew that she had had two surgeries to correct an inward turning eye, did not realize the risks involved, and now had double vision and a host of other intractable problems. While the plaintiff did extract many salient documents during an arduous discovery process, the expert affidavit she submitted did not include the kind of detail on negligence and causation usually needed to survive summary judgment. The defendants' motion was granted, not only regarding her claim as to surgery, but also—in a perfunctory ruling—as to her lack of informed consent.

The appeal presented a frequent situation in tort appeals. If there are two issues, one weaker and one stronger, should you abandon the weaker one or present it second in the argument section of your brief? Sometimes to provide context, you may present the weaker issue at the outset of your argument. That was the case here, where the claim as to the surgery provided a context for the lack of informed consent claim.

Often embedded in summary judgment papers are the raw materials for a cogent version of your client's story demonstrating that there are indeed material issues of fact warranting a trial. If you simply list and characterize the pleadings and summarize who said what in each affidavit, you are forgoing a critical opportunity to fully engage and convince the appellate court.

Dig into the record to find favorable facts and then highlight them. For example, in the medical malpractice case, where there was a sharp dispute about whether the doctor really spent 20 minutes discussing risks, we thought it might be helpful to draw attention to certain facts: the only written record of his claim was a terse jotted note, the blanket consent forms did not list one of the eye muscles operated on, and on the day of alleged lengthy disclosure, records showed that the doctor actually saw the plaintiff (for an exam) and another patient during a double-booked 15-minute time slot.

If there is a dispute about how to interpret an applicable statute, and a key case is cryptic, do not guess at what the decision means. In the medical malpractice matter, there was a terse, not entirely clear, decision on the question of what expert proof was required and when, as to the qualitative sufficiency of the disclosure of risks.[13]

You can read the briefs underlying such a case to find out what is behind the decision. If the results of your investigation help your case, then ask whether the Appellate Division will permit you to annex to your brief a copy of the briefs filed in that significant case.[14] The court's written rules of practice may not cover the question, but there may be unwritten rules of practice, too. In our medical malpractice case, the appellate court cited the key case[15] when it reinstated the lack of informed consent claim.

Emergency Doctrine Case: Contrasting Cases and a New Spin

Never underestimate the power of a cogent narrative and specific case authority to salvage a situation, nor the liberality with which the preservation requirements are applied when it comes to summary judgment motions. Those were among the lessons of *Schlanger v. Doe*.[16]

In that personal injury action, an employee of defendant one secured onto a tractor trailer for transport a backhoe manufactured by defendant two. As the tractor trailer traveled beneath a highway overpass, a window in the backhoe shattered, sending glass flying toward defendant three, who swerved to the left and struck the plaintiff's vehicle, causing serious injury.

Supreme Court had denied the motion by defendant one for summary judgment dismissing the complaint, based on the doctrine of *res ipsa loquitur*, in that a backhoe on a tractor trailer exclusively controlled by a defendant would not ordinarily shift in position in the absence of the negligence of such defendant.

Also kept alive was the claim against defendant two, based on circumstantial evidence of a manufacturing defect, in that the window did not perform in its intended manner due to some apparent flaw in the fabrication process. However, the motion court had exonerated defendant three as a matter of law based on the emergency doctrine.

On appeal, for the first time, we used the deposition testimony presented by the plaintiff and all three defendants to weave a cogent narrative of the events leading up to and including the accident. On appeal, for the first time, we pointed out that defendant three could apparently have moved safely to the right shoulder, but instead had moved into the left lane in a manner that ostensibly violated Vehicle and Traffic Law § 1128(a). That section states that a vehicle must not be moved from its lane until

the driver has first ascertained that such movement can be made with safety.

On appeal, for the first time, we pointed out that the danger posed by shattered glass paled in comparison to many situations involving objects to be avoided in the road, such as an oncoming vehicle crossing over lanes or a darting child, as reported in several telling appellate decisions declining to absolve a defendant as a matter of law. As long as there are facts in the record to support such arguments, upon appeal, in cases involving grants of summary judgment, a new spin on the facts is permitted and can be persuasive in winning your client his day in court.

Recurring Tort Appeal Issues

No matter what type of tort case you are handling, the sooner you can find time for thorough legal research and analysis the better. Often the fatal flaws in cases are discovered only after vast resources are invested. Often meritorious motions are lost because insufficient time is found to shape a compelling narrative and cite apt authority. You may discover too late the facts you should have gathered and arguments you could have made. Any experienced appellate attorney can relate frustrating tales about viable issues that were not well preserved for appellate review.

When the time comes to go to appeal, consider doing it yourself if you feel comfortable in that role. If not, you may wish to turn to an appellate attorney in your firm or outside counsel who can provide the requisite objectivity, time, and experience. You may want to avoid delegating the job to a junior associate, since only a seasoned attorney may possess the sound and sophisticated legal judgment needed for the job.

If you do work with appellate counsel, collaborating can yield excellent results. Appellate counsel will appreciate the insights you offer both at the outset of the case and upon reviewing the brief. If you are happy with the brief, consider rewarding appellate counsel with the chance to orally present his or her arguments. For experienced appellate counsel, oral argument can be a rewarding experience and a skill they have honed before judges who know them well.

As to fees, many appellate attorneys will do appeals for other firms on a flat-fee basis—perhaps one fee for the record, brief, and review of opposing counsel's paper, and a second fee if a reply brief and/or oral argument are warranted in a particular case. Tort appeals can provide special fee issues, since often the plaintiff's trial counsel is working on a contingency fee basis and must absorb the cost of the appeal until ultimate success, if any.

The appellate attorney will work just as hard on the tort appeal as on ones for which the litigant pays, so he or she may not be receptive to a discounted fee. However, some appellate attorneys may be willing to work on a contingency fee or a blended-fee arrangement.

Trial and appellate counsel who want to collaborate can find a way, so that they can win more decisions, help their clients, and make their mark on the law. Consider beginning that collaboration sooner, rather than later, when you are drafting your pleadings or responding to a motion for summary judgment designed to put a quick end to your case.

After all, while the aforementioned cases remind us of the hope appeals can give a losing litigant, surely everyone would agree that it is always better to enter an appeal as a respondent than an appellant.

Endnotes

1. *Cody v. State*, 859 N.Y. Supp. 2d 316 (3d Dep't 2008).
2. *Snyder v. Simon*, 49 A.D.3d 954 (3d Dep't 2008).
3. *Schlanger v. Doe*, ___ A.D.3d ___, 2008 WL 2682309 (3d Dep't July 10, 2008).
4. *See, e.g., Blake v. Neighborhood Housing Serv. of N.Y.C., Inc.*, 1 N.Y.3d 280 (2003).
5. *See, e.g., Martin v. State*, 39 A.D.3d 905 (3d Dep't 2007), *lv. den.*, 9 N.Y.3d 804 (2007).
6. *See, e.g., Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555 (1993).
7. *See, e.g., Kyle v. City of N.Y.*, 268 A.D.2d 192 (1st Dep't 2000), *lv. den.*, 97 N.Y.2d 608 (2002).
8. *See, e.g.,* sui generis, *Figueiredo v. New Palace Painters Supply Co., Inc.*, 39 A.D.3d 363 (1st Dep't 2007).
9. *See* CPLR 5701.
10. *See* CPLR 5519.
11. *See* CPLR 5501.
12. *See* CPLR 5515; *Royal v. Brooklyn Union Gas. Co.*, 122 A.D.2d 132 (2d Dep't 1986).
13. *See* CPLR 4401-a.
14. *See* CPLR 4511.
15. *See Snyder v. Simon*, n. 2 *supra, citing Lowery v. Hise*, 202 A.D.2d 948 (1994).
16. ___ A.D.3d ___, 2008 WL 2682309 (3d Dep't July 19, 2008).

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The following is a speech given at the TICL Section Program during the NYSBA Annual Meeting on January 31, 2008.

"In the Interest of Justice" Lecture

By Joel J. Seidemann

Thank you for your kind introduction. Next to my resume, that's the closest I'll ever come to perfection. Now I understand that it is my job to speak to you and it is your job to listen. If you finish listening before I am done speaking, please let me know.

I was born in 1954 and grew up with a vision of lawyers that was created in large part from television. Perry Mason and E.G. Marshall in the *Defenders* were my models and it is no great wonder that I came to believe that the trial lawyer fighting for his client's freedom was the only lawyer that existed in the real world.

Today it is no different. I will bet it is the TV version of what lawyers do that draws you to this institution. It is the lawyer in the movies *Twelve Angry Men*, *The Verdict* and *Law and Order* that captures the public's fascination.

It is the media hero—Johnny Cochran in the O.J. Simpson, big name lawyers who do the news conferences that may draw you to the practice of law.

The TV version of The Sexiness of Being a Lawyer ignores an interesting fact: There are over one million lawyers in the U.S. but the American Association of Justice, an organization of trial lawyers, only has 56,000 members. The first thing we learn is that most lawyers are not trial lawyers.

As a prosecutor for 26 plus years, I may have done different things than many of you in this room. However, there are a lot of similarities across the board where it comet to trial work, whether it is criminal, medical malpractice, commercial litigation or real estate.

What is so hard about being a trial attorney? You are always on the stage. You are always in the arena. You are like a relief pitcher in a tie game in the World Series or a kicker about to kick what may be a winning field goal.

When I think of the intestinal fortitude that it takes to succeed as a trial lawyer, I am reminded of words spoken by Teddy Roosevelt many years ago:

> It is not the critic who counts; not the one who points out how the strong stumbled, or where the doer of deeds could have done better. The credit belongs to those in the arena; who strive valiantly; who fail and come up short again and again; who know great enthusiasm and great devotion; who at the best know in the end the triumph of high achievement; and who, at the worst, if they fail, at least fail while daring greatly, so that their place shall never be with those timid souls who know neither victory nor defeat.

Teddy Roosevelt spoke eloquently about the courage it takes to enter the arena. But it was another famous person who really sums up the courage it takes to address a roomful of strangers when your words can affect the life and freedom of your client. That person was none other than Jerry Seinfeld.

Seinfeld stated: "The number one fear in life is public speaking and the number two fear is death. This means that if you go to a funeral, you're better off in the casket than giving the eulogy."

"What is so hard about being a trial attorney? You are always on the stage. You are always in the arena. You are like a relief pitcher in a tie game in the World Series or a kicker about to kick what may be a winning field goal."

This brief talk is about the people who would rather be giving the eulogy. My talk today will focus on some interesting speeches in history that focus on four particular skills: Emotion and the heart, trying a case where the cultural currents makes it an uphill battle, The Gift of Storytelling and Analogies and the use of humor.

Emotion and Heart

People think with their heart, not only their mind. A case with a sympathetic victim is easier to prove than a case with a drug dealer victim. Cops in New York sometimes call a drug dealer homicide victim a "Public Service Homicide" or a "Misdemeanor Homicide." The opposite is true: the more sympathetic the victim, the easier the burden of proof. I have learned that it is easier to prove murder than shoplifting. The murder case is more sympathetic.

Rule one that should be followed as a trial lawyer: Use emotion to prepare the jury to find for your side. Appeal to the jurors' hearts.

A great example of the use of emotion was in the internationally famous trial of Adolf Eichmann.

Adolf Eichmann was a Gestapo member and chief of operation of the Department of Jewish Affairs from 1941 to 1945. He was in charge of deportation to the concentration camps and genocide of the Jews. In 1960, the Mossad

captured Eichmann in Argentina and returned him to Israel. He was tried between April and August 1961. His capture was the subject of a best selling book by Isser Harel, called *The House on Garibaldi Street*.

The court case itself was an impossible case for a defense attorney. The evidence against Eichmann was overwhelming. The Nazis loved to keep records, even records of their killing ways.

State of Israel against Adolf Eichmann

Excerpts of Opening Statement of Prosecutor Gideon Hausner—April 1961

> When I stand before you here, Judges of Israel, to lead the prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: "I accuse." For their ashes are piled up on the hills of Auschwitz and the fields of Treblinka, and are strewn in the forests of Poland. Their graves are scattered throughout the length and breadth of Europe. Their blood cries out, but their voice is not heard. Therefore I will be their spokesman and in their name I will unfold the awesome indictment.
>
> The history of the Jewish people is steeped in suffering and tears. Pharaoh in Egypt decided to "afflict them with their burdens" and to cast their sons into the river; Haman's decree was "to destroy, to slay, and to cause them to perish";
>
> Yet never, down in the entire blood-stained road traveled by this people, never since the first days of its nationhood, has any man arisen who succeeded in dealing it such grievous blows as did Hitler's iniquitous regime, and Adolf Eichmann as its executive arm for the extermination of the Jewish people. In all human history there is no other example of a man against whom it would be possible to draw up such a bill of indictment as has been read here.
>
> At the dawn of history, there were examples of wars of extermination, when one nation assaulted another with intent to destroy, when, in the storm of passion and battle, peoples were slaughtered, massacred or exiled. But only in our generation has a nation attacked an entire defenseless and peaceful population, men and women, gray-beards, children and infants, incarcerated them behind electrified fences, imprisoned them in concentration camps, and resolved to destroy them utterly.
>
> Murder has been with the human race since the days when Cain killed Abel; it is no novel phenomenon. But we have had to wait till this twentieth century to witness with our own eyes a new kind of murder: not the result of the momentary ebullition of passion or the darkening of the soul, but of a calculated decision and painstaking planning; not through the evil design of an individual, but through a mighty criminal conspiracy involving thousands; not against one victim whom an assassin may have decided to destroy, but against an entire nation.
>
> In this trial, we shall also encounter a new kind of killer, the kind that exercises his bloody craft behind a desk, and only occasionally does the deed with his own hands. True, we have certain knowledge of only one incident in which Adolf Eichmann actually beat to death a Jewish boy, who had dared to steal fruit from a peach tree in the yard of his Budapest home. But it was his word that put gas chambers into action; he lifted the telephone, and railroad cars left for the extermination centers; his signature it was that sealed the doom of thousands and tens of thousands. He had but to give the order, and at his command the troopers took the field to rout Jews out of their neighborhoods, to beat and torture them and chase them into ghettoes, to pin the badges of shame on their breasts, to steal their property—till finally, after torture and pillage, after everything had been wrung out of them, when even their hair had been taken, they were transported, en masse to the slaughter. Even the corpses were still of value: the gold teeth were extracted and the wedding rings removed.
>
> We shall find Eichmann describing himself as a "white-collar" worker. To him, the decree of extermination was just another written order to be executed; yet he was the one who planned, initiated and organized, who instructed others to spill this ocean of blood, and to use all the means of murder, theft, and torture.

He must bear the responsibility therefore, as if it was he who with his own hands knotted the hangman's noose, who lashed the victims into the gas chambers, who shot in the back and pushed into the open pit every single one of the millions who were slaughtered. His accomplices in the crime were neither gangsters nor men of the underworld, but the leaders of the nation—including professors and scholars, robed dignitaries with academic degrees, linguists, men of enlightenment, the "intelligentsia."

This murderous decision, taken deliberately and in cold blood, to annihilate a nation and blot it out from the face of the earth, is so shocking that one is at a loss for words to describe it. Words were created to express what man's reason can conceive and his heart can contain, and here we are dealing with actions that transcend our human grasp. Yet this is what did happen: millions were condemned to death, not for any crime, not for anything they had done, but only because they belonged to the Jewish people.

In March 1938, Eichmann was sent back to the country of his childhood. At that time Nazi policy concentrated on compelling Jews to emigrate, and Eichmann devoted himself to furthering this policy with great zeal. In Vienna the process was organized on the assembly-line principle: a man came into the office still a citizen, with a status in society, a job, a home and property. After being thoroughly processed, he came out an emigrant, his property gone—in part confiscated and in part invested by government order in frozen currency of little value—his apartment registered for confiscation, no longer employed, his children no longer pupils in school, the only thing in his possession a travel certificate marked Jude (Jew), which granted him permission to leave Austria by a certain date, never to return.

Eichmann engaged in the work of slaughter not in apathy but with a clear mind, was fully conscious and aware of what he was doing, and believing that it was the right and proper thing to do; that was why he acted with all his heart and soul. Even after the downfall of the Nazi monster, when the entire world had expressed its shock and horror at what had happened, when a number of the Nazi leaders themselves had begun, in panic-stricken haste and ostensible penitence, to expose and accuse one another—even then Adolf Eichmann, remained faithful to his ideas and principles. He did not repent. He still believes that he did what was right and proper in destroying millions.

He knows that today it is regarded as a crime, and he will therefore be ready to give verbal and insincere expression to this view; at times he may even clothe it with a mantle of grandiloquent phrases. But we have every reason to believe, that if the swastika flag were again to be raised with shouts of "Sieg Heil!," if there were again to resound the hysterical screams of a Fuhrer, if again the high-tension barbed wires of extermination centers were set up—Adolf Eichmann would rise, salute, and go back to his work of oppression and butchery.

All the prophesies of that evil man (Hitler) proved baseless. The Reich that was to have lasted a thousand years, collapsed like a house of cards. The "New Order" that was to have served as the basis for human civilization has become a historical byword for atrocity. Only one single promise, the most dreadful of Germany's terrible deeds which has brought upon her eternal disgrace, was kept by Adolf Hitler. And for the execution of that promise to destroy European Jewry he used another Adolf—Adolf Eichmann, who is on trial before you today.

It is hardly necessary to mention that this "Jewish enemy" was a defenseless civil population, including infants, children, women and old men. But no part of all this bloody work is so shocking and terrible as that of the million Jewish children whose blood was spilt like water throughout Europe. How they were separated by force from their mothers who tried to hide them, murdered and thrown out of trucks in the camps, torn to pieces before their mothers' eyes, their little heads smashed on the ground—these are the most terrible passages of the tale of slaughter. You will hear evidence of actions which the mind of man does not want to believe.

Those unhappy children who lived for years in fear of the beating of a rifle butt on their door; who had been sent by their parents to the woods in an attempt to save them; who had been taught to choke their tears and sighs because a weeping child would be shot on the spot; who had been ordered to deny their origins and pretend to be Christian; who saw their fathers being lashed with whips before their eyes; in front of whom "discussions" would be carried on by the German executioners as to who should be killed first—the father or the son; these children and youths, who despite all the desperate measures and concealments would finally fall into the hands of their hunters, they are the very soul and innermost core of the indictment. Those Anne Franks and a million others, those unplumbed treasures of radiant youth and hope for life and achievement—they were the future of the Jewish people. He that destroyed them was seeking to destroy the Jewish people.

There were heart-rending scenes. They would catch a Jew who had a labor card but take his children away from him, while he pleaded for permission to go with his children—but to no avail. There were SS men who caught little children and smashed their heads on the paving stones.

You will hear evidence of dogs being set onto human beings who were bitten and torn to pieces; of SS men who would go up to people and shoot them just because they felt like doing so at the moment; of selection parades in which the weak, the old and the children were dispatched to the extermination camps while cradle songs were played over the loudspeakers. And to move was forbidden. The slightest movement set the machine guns working.

One asks oneself again and again: "How could it ever have happened?" It is almost impossible to believe that for many months, thousands of people daily, in cold blood, deliberately and of set purpose, murdered multitudes of human beings with their own hands, the numbers rising steadily until they totaled three-quarters of a million. It is difficult to accustom oneself to the idea that such beasts ever walked the face of this earth.

Murder was committed here as a matter of daily routine: after every such bloodbath, the murderers would eat a hearty meal, and have a smoke and a chat about this and that, and then they were ready for the next group of victims, who had meanwhile been placed in line.

A man would be faced with the choice of obtaining a work-card either for his wife or for his mother. He would return home, cursing the day he married and tell his mother that he no longer had a work-card for her. This meant that she was doomed to immediate death. The mother would bless her son for his choice, present her Yiddish prayer book to her daughter-in-law, embrace her, and wish her the bliss of being spared to witness the end of the terror.

* * *

Adolf Eichmann was convicted of crimes against humanity. Eichmann was sentenced to death and executed in Ramleh Prison on May 31, 1962.

Israel does not have a jury system. A panel of judges heard this case. If this is the case, then why was it that Gideon Hausner, the prosecutor in the Eichmann trial, gave an emotional opening which while it was full of thousands of cold, hard facts had a strong appeal to emotion? Why was it necessary for Mr. Hausner to appeal to the judges' emotion? This was not a jury trial.

The answer can be found in the purpose of the Eichmann trial. The Eichmann trial's purpose was not only to convict one of the most evil men who walked the face of the earth, but it was to be a national education project for the citizens of the State of Israel "that would echo through the generations." (*The Seventh Million*, by Tom Segev). He wanted to educate the young of Israel as to what had happened to their grandmothers and grandfathers. As Gideon Hausner put it "Proving guilt and exacting punishment were not the only objects, there was also the need to teach."

Mr. Hausner had to put a human face on the murder of 6 million Jews. He did so through moving rhetoric interspersed with stories of man's inhumanity to man as told by the survivors themselves.

In every case, even in the case of genocide, lawyers seem to see the crime as less or more heinous depending upon the nature of the victim. Even Mr. Hausner does this, pointing out that the Nazis destroyed the most outstanding Jews in terms of their creativity, devotion to Jewish values and national consciousness. While this is

undoubtedly true and tragic, the crime of killing six million people is so enormous that it is simply not meaningful to say that it is all the more awful because it included the spiritual and intellectual guides of the Jewish people. Mr. Hausner is merely tapping into a truism of trial work: An advocate finds it easier to win when the victim is blameless and worthy while the defense finds it easier to prevail when the victim is unsavory or unlikable.

The use of emotion in a case involving mass murder arose in the case of Timothy McVeigh, the Oklahoma City bomber. Joe Hartzler, an Assistant U.S. Attorney, brought home what happens when someone is killed. He humanized what McVeigh did by blowing up the Murrah Office Building. Where it comes to deaths caused by evil, it is difficult to understand a number of casualties, whether it was 268 in Oklahoma City or 6 million in the Holocaust. Hartzler, like Hausner, put a human face on the tragedy. You should take particular note to the fact that Hartzler emphasized a child victim, just as Hausner made reference to the million children killed.

> April 19th, 1995, was a beautiful day in Oklahoma City—at least it started out as a beautiful day. The sun was shining. Flowers were blooming. It was springtime in Oklahoma City. Sometime after six o'clock that morning, Tevin Garrett's mother woke him up to get him ready for the day. He was only 16 months old. He was a toddler; and as some of you know that have experience with toddlers, he had a keen eye for mischief. He would often pull on the cord of her curling iron in the morning, pull it off the counter top until it fell down on him.
>
> That morning, she picked him up and wrestled with him on her bed before she got him dressed. She remembers this morning because that was the last morning of his life.
>
> That morning, Mrs. Garrett got Tevin and her daughter ready for school and they left the house at about 7:15 to go downtown to Oklahoma City. Tevin's sister went to kindergarten, and they dropped the little girl off at kindergarten first; and Helena Garrett and Tevin proceeded to downtown Oklahoma City.
>
> This day Ms. Garrett decided that she would park in the Murrah Federal Building. She did not work in the Murrah Building. She wasn't even a federal employee. She worked across the street in the General Records Building. She pulled into the parking lot of the federal building and went upstairs with Tevin, because Tevin attended the day-care center on the second floor of the federal building. When she went in, she saw that Chase and Colton Smith were already there, two year old and three year old. Dominique London was there already. He was just shy of his third birthday. So was Zack Chavez. He had already turned three.
>
> When she turned to leave to go to her work, Tevin, cried and clung to her; and then, as you see with children so frequently, they try to help each other. One of the little Coverdale boys, Elijah, came up to Tevin and patted him on the back and comforted him as his mother left.
>
> As Helena Garrett left the Murrah Federal Building to go to work across the street, she could look back up at the building; and there was a wall of plate glass windows on the second floor. You can look through those windows and see into the day-care center; and the children would run up to those windows and press their hands and faces to those windows to say goodbye to their parents. And standing on the sidewalk, it was almost as though you can reach up and touch the children there on the second floor. But none of the parents of any of the children that I just mentioned ever touched those children again while they were still alive.
>
> At 9:02 that morning, a catastrophic explosion ripped the air in downtown Oklahoma City. It instantaneously demolished the entire front of the Murrah Building, brought down tons and tons of concrete and metal, dismembered people inside, and it destroyed, forever, scores and scores and scores of lives, lives of innocent Americans: clerks, secretaries, law enforcement officers, credit union employees, citizens applying for Social Security, and little kids.
>
> All the children I mentioned earlier, all of them died, and more; dozens and dozens of other men, women, children, cousins, loved ones, grandparents, grandchildren, ordinary Americans going about their business. And the only reason they died, the only reason that they are no longer with us, no longer with their loved ones, is that they were in a building owned by a government that Timothy McVeigh so

hated that with premeditated intent and a well-designed plan that he had developed over months and months before the bombing, he chose to take their innocent lives to serve his twisted purpose.

In plain, simple language, it was an act of terror, violence, intended to serve selfish political purpose. The man who committed this act is sitting in this courtroom behind me, and he's the one that committed those murders. After he did so, he fled the scene; and he avoided even damaging his eardrums, because he had earplugs with him.

That morning, Mike Weaver had driven his wife's car down to work. It had needed service, and the service station was closer to his office than to his wife's; so as a favor, he drove her car and she drove his. He dropped their son off at junior high on his way to work; and after dropping his son off, Mike drove downtown to the service station with his wife's car. Mike's workday started at 9:00; and when his wife, Donna, heard the blast and then got the news that it was the Murrah Building, which was Mike's building, she rushed from her office, made her way quickly to the Murrah Building. And on her way, she hoped against hope that maybe Mike had gotten delayed in dropping their son off, maybe he had gotten delayed at the service station, maybe he hadn't made it to work at 9:00. And she stopped in front of the Murrah Building and looked up. His office was gone, and she knew so was he. She was right: He was killed. She didn't have earplugs in her pocket. None of our witnesses had earplugs in their pockets that day.

When Helena Garrett heard the blast, she rushed outside and saw that the entire front face of the Murrah Building was missing. The plate glass windows that the children pressed their hands and faces against were gone. The entire side of the building was gone. She ran to the scene and frantically searched the area for her son. She watched as rescue workers arrived and carried bodies of small children from the building, and she looked to see if any of them were Tevin. At one point, she climbed on a pile of debris in front of the building until the rescue workers begged her to leave; and then she went home and waited. She waited for days; and when Tevin's body was found, it was taken to a funeral home. And at the funeral home, she asked to see her son; but the funeral director persuaded her not to: The body was too badly mangled. So she never saw her son again.

This is a terrific example of what all trial lawyers know: it is not enough to have enough evidence. You must give the jury the reason to convict.

Joe Hartzler painted a picture of two sympathetic victims, Tevin Garrett, only 16 months old, killed while in a day care center and Mike Weaver, husband and father. His last act on this earth was to drop his son off at Junior High School. He and Tevin did not deserve to leave this earth at such a time and under such circumstances. Their heart rending stories make it much easier for the jury to convict, regardless of the nature of the evidence.

Add to this emotional picture the aggravating factor that McVeigh wore earplugs so as not to hurt his eardrums and you are well on the way to an easy conviction. Not every case is the Eichmann case or Oklahoma City. However, you must find a way to create an emotional pull on every case in order to win your case.

The use of emotion is one trial skill. The ability to tell a story is surely another important skill. Good lawyers tell good stories. Listen to Daniel Petrocelli, the civil attorney representing the Estate of Ronald Goldman in the O.J. Simpson civil case.

> On a June evening, the 12th of June, 1994, Nicole Brown Simpson just finished putting her ten-year-old daughter, Sydney, and her six-year-old son, Justin, down to bed.
>
> She filled her bathtub with water. She lit some candles, began to get ready to take a bath and relax for the evening.
>
> The phone rang. It was 9:40 p.m. Nicole answered. And it was her mother, saying that she had left her glasses at the restaurant nearby in Brentwood, where the family had all celebrated Sydney's dance recital over dinner, just an hour before.
>
> Nicole's mother asked if Nicole could please pick up her glasses from the restaurant the next day. Nicole said, of course, good-bye, and hung up.
>
> Nicole then called the restaurant and asked to speak to a friendly young waiter there. Nicole asked this young waiter if he would be kind enough to drop her mother's glasses off.

> The young man obliged and said he would drop the glasses off shortly after work, on his way to meet his friend in Marina Del Rey. The young man's name was Ron Goldman. He was 25 years old.
>
> With the glasses in hand, Ron walked out of the restaurant, walked the few minutes to his apartment nearby, to change. He left the restaurant at 9:50 p.m.
>
> After Ron changed, he got into his girlfriend's car parked in his garage, and drove the short distance to Nicole Brown Simpson's home at 875 South Bundy Drive in Brentwood.
>
> Ron parked the car on the side street, walked to the front of Nicole's condominium, and turned up the walkway to the front gate. Just past the front gate were steps leading to Nicole's condominium.
>
> Ronald Goldman never made it past those steps. It was at that front gate that Ron spent the last few savage minutes of his life. It was there that his brutalized body was found next to Nicole Brown Simpson's slain body, with her mother's glasses lying next to him on the ground in an envelope.
>
> Ron Goldman's young life ended because he agreed to do a friend a favor, only to come upon her rageful killer and his. He might have run from danger, but he did not. Ron Goldman died with his eyes open. And in the last furious moment of his life, Ron saw through those open eyes the person who killed his friend Nicole. And for that reason, he too had to die.
>
> And the last person Ron Goldman saw through his open eyes was the man who took his young life away: The man who now sits in this courtroom, the defendant, Orenthal James Simpson. Ladies and gentlemen, we will prove to you that Ronald Lyle Goldman and Nicole Brown Simpson died at the hands of the defendant, Orenthal Simpson.

Three things emerge from Petrocelli's opening: He is a good story teller who makes the facts seem interesting. He leaves the jury curious about certain aspects of what happened. He succeeds in the first minutes of his opening in creating a winning theme, the guy who went to do a favor for a friend and got killed. Ronald Goldman is the innocent victim who did not run from danger.

A third facet of a great trial lawyer is the ability to use a good analogy to prove your case. Trial great Gerry Spence displays this trait in representing Karen Silkwood.

Silkwood worked at Kerr-McGee plutonium plant in Crescent, Oklahoma. She was active in the union and claimed that the plant was a disaster in terms of safety. Silkwood had testifed against her employer at the Atomic Energy Commission. In November, 1974, Silkwood became contaminated with plutonium. Her body had it and so did her apartment. Silkwood was allegedly on her way to delivering papers concerning Kerr-McGee to a *New York Times* reporter showing Kerr-McGee to be guilty of all sorts of safety infractions. Her car was involved in a one-car accident and she was killed.

Her estate sued Kerr-McGee because she was contaminated with plutonium and so was her apartment. At autopsy, she had a very high level of plutonium in her. One serious issue at her trial involved the plutonium. Oddly enough, it was located in her gastrointestinal tract. There was evidence that Silkwood ate the plutonium. Kerr-McGee claimed she ingested plutonium to embarrass them. Silkwood's union said she was tricked into eating plutonium. Silkwood's supporters claimed that the corporation was behind her vehicular death. The sheriff who investigated the fatal car crash found quaaludes in Silkwood's blood

Gerry Spence succeeded at the trial of putting Kerr-McGee on trial. He brilliantly suggested through analogy that the plutonium that Kerr-McGee's workers were exposed to would cause cancer to all workers in several years.

> If you fly over Wyoming and look down, you'll see big round spots all over the landscape like big polka dots all over the prairies. Those are the homes of the harvester ants. Architects study the structure of the harvester ant. They are perhaps the most interestingly wise and intelligent insect that we know of. They tried to get rid of the harvester ants because they claim that those ant hills take up a third of the State—and if they could just get rid of the harvester ant, there would be more land for grazing of the sheep. They have been trying to kill the harvester ant for a long time.
>
> They developed an extraordinary poison, and put it on bait—ants, like us, have to eat—and the ants would eat the bait. Then in three or four days, they would stop eating. They found out what was causing them to die—and they wouldn't go near the bait.

> One very enterprising young scientist made a poison that would get on their feet and would be absorbed up their legs, and they would put the poison in a round circle around the anthill and the ant would walk across the poison and then die. Guess what the ants did? Hill after hill, without exception, they built bridges across the poison.
>
> The next thing they did with the harvester ant to kill him, was to make the male impotent and so they put some poison on some bait, that when the male ate it, he was no longer able to reproduce. Pretty soon, the harvester ant found that out and also quit eating the poison—just in the nick of time.
>
> But they finally found a poison that would kill the harvester ant. It was a poison that did not kill him for four or five weeks after they ate it—and then one day four or five weeks after they had all eaten it, they all died. And that is how we kill the harvester ant in Wyoming today.
>
> And in a way, ladies and gentlemen of the jury, the damages in this case are those kind of damages. [Kerr-McGee has a sign that reads] "A million hours without an off-site accident." It covers up the facts that in 20 or 30 years we will be dealing with the harvester ant syndrome.

A third facet of persuasion is through the use of humor. After all, laughing jurors are generally acquitting jurors. Famous criminal defense attorney shows this during the trial of club owner Peter Gatien, accused of hiring drug dealers to sell drugs to his customers. In the first analogy, he makes fun of the prosecutor's claim that there is corroboration of Gatien's guilt:

> This hysterical lady calls the police one day. Unbeknownst to the police she's been in love with Robert Redford since she's a kid, she loves him so much.
>
> Robert Redford has ignored the 5,000 letters she's written. One day she gets tired of this, calls the police, says Robert Redford came to my house, took me out into the backyard, beat me up, tied me to a tree. The cops come to the house. They say "lady, you mean Robert Redford the actor"? She said "yes, he tied me up, beat me up, stole my money and tied me to a tree." They said "do you have any corroboration for this"? She says "there's the tree."

In another story in the same case, Brafman illustrates the importance of cross examination:

> Ladies and gentlemen, I've got to tell you a humorous story. The story is an old town long ago. There's a busy intersection. The man is driving a horse drawn wagon through the intersection. The dog runs out and scares the horse. The horse rears up, falls on the dog, turns over the wagon and the wagon falls on the man. Ten years later there's a court case. The people who are being sued are trying to show that the wagon driver really wasn't injured. They call the policeman who is first on the scene. The lawyer gets up, says "Sir, when you came on the scene, what did the wagon driver say to you" and the police officer dutifully responds, "I'm okay, I'm okay."
>
> Seems pretty solid evidence there's nothing wrong with that guy, right? Then I get up to do cross-examination, a search for the truth. I say "Officer, tell this jury everything you saw and everything you did from the moment you came upon the scene." The cop says, "You know, I came there, it was terrible. The dog was howling in pain, had three broken legs, I took out my gun, I shot the dog. I went up to the horse, the horse had three broken legs and was whining in pain. I took out the gun, shot the horse, I turned to the wagon driver; he said 'I'm okay.'"

A fourth skill is the ability to confront biases against your case. How do you fight the current in a case that is unpopular with the public: This does not only occur in movies such as *To Kill a Mockingbird*. Listen to Assistant DA Gregory Waples, speaking in the opening in the Bernhard Goetz case, a controversial case which divided the media and the public at large:

> Although you have not yet heard a single witness testify in this case, each of you has some opinion as to the root causes of this tragedy. We know from the *voir dire* that you folks have not been living on Mars for the last two years (and) that each of you has seen, read or heard accounts of this case from friends, from the media, from the people you work with. For whatever reason, be it right or wrong, this case has touched a raw nerve of the American anatomy.

For whatever reason, this case has not become simply a media sensation, but something of a cultural phenomenon.

Now it's not my aim or purpose to debunk myths that cling to the branches like moss to the branches of a tree, this is, after all, a court of law, not a court of public opinion.

But it surely is my responsibility as the prosecutor representing the State in this case, to peel away the layers of misconception that may tend to obscure the truth, so that the jury, the sole and exclusive judges of the facts in this case, can really understand what happened in this subway car on December 22.

The public at large need not be concerned with nice things like the truth. The public at large can believe whatever it wishes, whatever is expedient, whatever conforms to its preconceived attitudes about the shootings.

The facts that will be presented are your raw materials. Logic, the law, and your common sense, are the tools that you will use to shape the evidence into a fair and just verdict.

Concentrate on the facts in this case. Forget about the headlines that scream from our tabloids. Ignore the noisy and dogmatic opinions of those persons who simply have not troubled to learn or do not care where the truth lies.

> Pay no heed to those persons who through appeals to your heart, rather than your heads, seek to divert your attention from the central issue in this case, the issue of whether the law will exonerate the defendant, who, in the name of self-defense, shoots people in the back who are trying to run away and fires "You look okay, here's another" fifth shot at the seated and helpless Darrel Cabey.

Mr. Waples did not get his attempted murder conviction but his opening was nonetheless brilliant, brilliant in its efforts to confront possible bias and acknowledge that he was swimming against the current.

Do these skills, emotion, analogies, humor, fighting the current, make a difference in winning a case? On some occasions they do and on others they make certain that cases that you should win actually end up in the winning column. These skills are all different facets of the picture that makes a great trial lawyer.

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An Insurer's or a Reinsurer's Access to the Policyholder's Privileged Information Pursuant to a Cooperation Clause, an Inspection Clause, or an Access-to-Records Clause

By Christopher Mickus and Patrick Frye

The typical insurance policy imposes cooperation duties on its policyholder pursuant to a "cooperation clause." The policyholder's cooperation duties to its insurer ultimately make the policyholder's claim for coverage more transparent. The policyholder's cooperation duties thus have a significant role in insurance claims adjustment, one that justifiably supersedes other of the policyholder's legal entitlements. This article briefly explains the typical mechanics and scope of the policyholder's cooperation duty. Reinsurance policies often contain cooperation clauses and similarly functioning inspection clauses and access-to-records clauses. What information the reinsurer is entitled to pursuant to these clauses is sometimes disputed. The article then focuses on one area where two courts have dubiously let other concerns stop a cooperation clause from enforcing transparency in the reinsurance policyholder's claim.

Precisely what cooperation the policy requires varies significantly, depending on the language of the policy's cooperation clause.[1] Generally, cooperation means that "there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense"[2] and includes "an obligation on the [policyholder] to provide correct information."[3] The purpose of this duty is to afford the insurer complete and timely information concerning the loss for which the policyholder seeks the insurer to pay.[4] Most importantly, the policyholder's satisfaction of this duty "protect[s] [an insurer] against false claims."[5] The policyholder's cooperation duty is a condition precedent to coverage, meaning that the policyholder must satisfy this duty before the insurer must perform on the insurance contract.[6] Thus, breach of this duty could relieve the insurer of its obligation to cover the policyholder's losses or defense,[7] regardless of whether the breach prejudiced the insurer.[8]

The process of analyzing a cooperation clause includes a difficult standard required of the insurer undercut by shifting burdens. An insurer can avoid its coverage obligation should the policyholder fail to provide information that the cooperation clause requires it to provide. To avoid its coverage obligation this way, an insurer bears the "heavy burden"[9] of establishing a breach by showing that the policyholder willfully refused to cooperate.[10] However, an insurer may meet this "heavy burden" by a preponderance of the evidence[11] and can use circumstantial evidence.[12] If the insurer shows a breach of the cooperation clause, then the burden shifts to the policyholder to show a cognizable excuse for its non-cooperation. Such an excuse could save the policyholder from losing coverage for its claim.[13] In sum, the insurer need only show that it is more likely than not that the policyholder willfully failed to cooperate; and in response the policyholder may offer an excuse that negates its willful non-cooperation.

Even where the policyholder has breached the cooperation clause, courts may compel the policyholder to cooperate before allowing the insurer to avoid coverage. Where this breach is not willful and unexcused, the policyholder may have a last opportunity to satisfy its cooperation duty instead of the breach preventing coverage.[14] Where the policyholder refuses to satisfy its duty despite the court-ordered last opportunity, then the insurer is not liable to the policyholder for coverage.[15]

The analysis of the cooperation duty's substance vacillates between a hard line and accommodation. The policyholder must fulfill its cooperation duties by supplying all relevant and material information required of it.[16] Such fulfillment is required even if the cooperation clause is broadly worded rather than enumerates all the ways in which the policyholder must cooperate.[17] Take for example a clause requiring the policyholder to "[g]ive [the insurer] all accounting records . . . and other vouchers . . . which [the insurer] may reasonably request to examine." To fulfill its duty pursuant to this clause, the policyholder must provide income tax returns even though such returns are not specifically listed.[18] Further, the policyholder's literal compliance with the cooperation is not enough; the policyholder must cooperate in a meaningful fashion.[19] For example, the cooperation clause often requires the policyholder to submit to an examination under oath. The policyholder cannot refuse to supply affidavits and produce documents on the grounds that it is only obliged to show up and swear in. Otherwise, the examination is "incomplete and virtually useless."[20] Still, the policyholder need not provide literally everything asked of it by its insurer—if a court agrees that the policyholder has substantially complied with its cooperation duty and that the insurer's remaining demands are not for material information.[21] So a policyholder must cooperate in all relevant regards, unless it has substantially cooperated. Perhaps these standards are best understood as two ways of saying the same thing.[22]

As this cooperation duty is a matter of contract, the parties are normally held to their bargain regardless of their non-contractual rights, privileges, immunities, and other entitlements. Thus the cooperation clause affords the

insurer more discovery than New York civil procedure allows litigants who do not have contractual cooperation duties.[23] Likewise, a policyholder cannot avoid its contractual cooperation duty to provide information to its insurer by invoking its Fifth Amendment rights[24] or the law's disfavor of forfeiture.[25]

To recap:

1. The purpose of the cooperation clause is to protect the insurer against false claims.
2. Thus it is a condition precedent that the policyholder must satisfy before the insurer must provide coverage for the policyholder's claim.
3. By a mere preponderance of the evidence, the insurer must show that the policyholder failed to cooperate and did so willfully. It is then the policyholder who must show an excuse (and not the insurer who must show that the non-cooperation was inexcusable as well as willful).
4. Owing to a reluctance to let the insurer avoid its obligations entirely, courts would permit the policyholder one last chance to satisfy its cooperation duty.
5. That cooperation must be meaningful and must satisfy all of the insurer's relevant and material requests. These requirements are in spite of the generality of the clause's wording.
6. The contractual duty to cooperate typically supersedes the policyholder's other legal entitlements.

At least two courts have ruled that a cooperation clause did not reach the policyholder's otherwise privileged materials. In light of the principles listed, the grounds invoked by these courts to justify their rulings are surprising.[26]

In *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*, an insurer (which is also the cedent) settled with its policyholder for $226 million, then sought some coverage from its reinsurer on the settlement.[27] The reinsurance contract contained a provision providing that "the Reinsurers . . . will have the right to inspect . . . all records of the Company [i.e., plaintiff] that pertain in any way to this Agreement."[28] Pursuant to this provision, the reinsurer demanded to inspect the cedent's files, including the files of the cedent's counsel.[29] The cedent produced about two dozen boxes of documents but refused to produce its counsel's files.[30] The policy allowed the reinsurer inspection of "all records . . . that pertain in any way to this Agreement"; but the cedent contended that this provision allowing the inspection did not extend to privileged communications.[31] In the ensuing litigation, the trial court granted the reinsurer's motion to compel discovery of these privileged and/or work-product protected files.[32] The Appellate Division reversed. According to the Appellate Division, this provision, "no matter how broadly phrased, [is] not intended to act as a per se waiver of the attorney client or attorney work product privileges."[33] The Appellate Division further reasoned that to "hold otherwise would render these privileges meaningless."[34]

This opinion is susceptible to serious criticism. First, the Appellate Division asserted that the clause is "not intended to act as a per se waiver"; but the court did not cite any grounds showing the parties' intentions for the clause. Further, the Appellate Division's reasoning appears out of step with the mainstream of New York precedent interpreting cooperation clauses. Precedent allows the reinsurer access to the cedent's information despite the limits of typical civil discovery. Precedent also allows such access despite the danger that the cedent may incriminate itself to satisfy its contractual cooperation duty. It makes little sense that the attorney-client privilege overrides the clause while those other concerns do not.

Most significantly, the Appellate Division frustrated the purpose of the clause. The purpose of the clause is to let the insurer (or reinsurer) protect itself against false claims; indeed, this reinsurer sought to rescind the policy on the grounds that the settlement was unwarranted and unreasonable and was agreed to in bad faith.[35] Permitting access to the files of the cedent's counsel could have shed light on the bona fides of the settlement and resolved any doubts about the cedent's sincerity. The Appellate Division let the policyholding cedent withhold relevant information even though the contract let the reinsurer have access to "all records" of the policyholder's.

In *U.S. Fire Insurance Co. v. Phoenix Assurance Co. of N.Y.*, an insurer (which is also the cedent) lost an arbitration for coverage of massive asbestos losses, then sought reinsurance coverage in the amount of $1.5 million.[36] The reinsurer denied coverage.[37] The reinsurance contract required the cedent to "make available for inspection and place at the disposal of the Reinsurer at reasonable times any of its records relating to this reinsurance or claims in connection therewith."[38] The reinsurer sought discovery of the cedent's privileged files pursuant to this clause. The cedent resisted this discovery on the grounds that this clause did not apply to those files.[39] The court agreed that the cedent was excused from providing access to its privileged files. The court reasoned that the cedent was excused because the reinsurer may have anticipatorily breached the reinsurance contract by denying coverage. According to the court, the purported anticipatory breach freed the cedent from its duties "to the extent necessary to reasonably protect itself against the breach."[40]

The *Phoenix* court did not completely analyze whether the cedent's refusal to produce privileged information was a reasonable protection against the reinsurer's denial of coverage. Relief from a reinsurer's purported anticipatory breach is not boundless. As stated, the cedent can only avoid its cooperation duty "to the extent necessary to rea-

sonably protect itself against the breach." In the event of a reinsurer's purported anticipatory breach, the cedent must substantially perform on its condition precedents or have a legal excuse to not perform.[41] But the cedent also must act to mitigate its injury.[42] The cedent is freed of some of its cooperation duties only to the extent that the cedent acts to mitigate its injury. As explained elsewhere:

> We do not hold that the insurer's anticipatory repudiation eliminates the [policyholder's] duty of cooperation so that the [policyholder] may enter into *any* type of agreement or take *any* type of action that may protect him from financial ruin. We hold only that once the insurer commits an anticipatory breach of its policy obligations, the [policyholder] need not wait for the sword to fall and financial disaster to overtake. The insurer's breach narrows the [policyholder's] obligations under the cooperation clause and permits him to take reasonable steps to save himself.[43]

Without an explanation of the reasonableness of refusing to provide contracted-for records, the anticipatory breach doctrine is not a satisfactory basis for sustaining this refusal. Pointing at the denial of coverage is an unreasonable basis for justifying the cedent's refusal to fulfill this particular cooperation duty. The cedent wants its reinsurer to pay for the cedent's liability or defense costs. In turn, the reinsurer is entitled, if the contract says so, to see that for which it is asked to pay. Providing the information harms the cedent only in the event that the information disproves coverage. In that case, the cedent is not saving itself by withholding information; it is trying to get coverage for which it did not pay.[44]

The privileged information could have been useful to the *Phoenix* reinsurer. The reinsurer argued that the notice of the claims was insufficient and that the cedent mishandled the arbitration such that the cedent paid more than it should have.[45] The privileged files would have revealed what the cedent knew and when, which would be material to the reinsurer's argument that notice was insufficient. Further, the privileged information was material to the issue of whether the policyholder caused itself unwarranted liability by mishandling the arbitration.

In sum, these two courts failed to grant the reinsurer meaningful cooperation as required of the cedent by an express cooperation clause. The reinsurer merely sought the cedent's cooperation, which would not in itself let the reinsurer avoid its coverage obligation; yet these courts forced on the reinsurer a greater risk of paying on a dodgy claim. The better course was for the courts to follow the precedent on cooperation clause disputes by analyzing whether withholding privileged information amounted to meaningful cooperation.

Endnotes

1. For example, a fire insurance policy typically has a clause that reads something like this:

   > The [policyholder], as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

   2423 Mermaid Realty Corp. v. N.Y. Prop. Ins., 142 A.D.2d 124, 534 N.Y.S.2d 999, 1001 (2d Dep't 1988); *see Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 96 n.2 (E.D.N.Y. 1997) (requiring further that the policyholder "show [the insurer] the damaged property" "as often as [the insurer] reasonably require[s]").

   Other examples are:

   - "The [policyholder] shall cooperate with the company and, upon the company's request shall attend hearings and trials and shall assist in * * * securing and giving evidence * * * and in the conduct of suits.'" *Nat'l Grange Mut. Liab. Co. v. Fino*, 13 A.D.2d 10, 212 N.Y.S.2d 684, 685-86 (3d Dep't 1961).
   - "'The policyholder or other person entitled to protection or someone on his behalf shall * * * '(4) Assist the Company in all respects in connection with any claim or suit, including examination under oath concerning any claim.'" *Nationwide Mut. Ins. Co. v. Cypher*, 13 A.D.2d 888, 215 N.Y.S.2d 168, 169 (3d Dep't 1961).

2. *Car & Gen. Ins. Corp. v. Goldstein*, 179 F. Supp. 888, 891 (S.D.N.Y. 1959) (citation and punctuation omitted).
3. *Federated Dep't Stores v. Twin City Fire Ins. Co.*, 28 A.D.3d 32, 807 N.Y.S.2d 62, 66-67 (1st Dep't 2007) (citation omitted), *accord Goldstein*, 179 F. Supp. at 891.
4. *Weissberg v. Royal Ins. Co.*, 240 A.D.2d 733, 659 N.Y.S.2d 505, 506 (2d Dep't 1997); *2423 Mermaid*, 534 N.Y.S.2d at 1003; *Dyno-Bite v. Travelers Cos.*, 80 A.D.2d 471, 439 N.Y.S.2d 558, 560 (4th Dep't 1981).
5. *Dyno-Bite*, 439 N.Y.S.2d at 560; *see also 2423 Mermaid*, 534 N.Y.S.2d at 1002 ("Generally, the underlying purpose of a cooperation clause in a fire insurance policy is to permit the insurer to exercise its right under the policy to investigate the legitimacy of a claim by a policy holder.").
6. *N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 840 N.Y.S.2d 358, 360 (2d Dep't 2007); *In re USA Elec.*, 120 B.R. 637, 643 (Bankr. E.D.N.Y. 1990); *2423 Mermaid Realty Corp. v. N.Y. Prop. Ins.*, 142 A.D.2d 124, 534 N.Y.S.2d 999, 1002-03 (2d Dep't 1988).
7. *In re USA Elec.*, 120 B.R. at 643; *2423 Mermaid*, 534 N.Y.S.2d at 1002-03; *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 43, 511 N.Y.S.2d 919, 925 (2d Dep't 1987). Examples of the insurer avoiding its coverage obligation due to the policyholder's breach of its cooperation duty include: *Latha Rest. Corp. v. Tower Ins. Co.*, 38 A.D.3d 321, 831 N.Y.S.2d 411, 412 (1st Dep't 2007); *Rafailov*, 840 N.Y.S.2d at 361; *Nationwide Mut. Ins. Co. v. Graham*, 275 A.D.2d 1012, 713 N.Y.S.2d 602, 603 (4th Dep't 2000); *Somerstein Caterers v. Ins. Co.*, 262 A.D.2d 252, 692 N.Y.S.2d 369, 369 (1st Dep't 1999); *Weissberg*, 659 N.Y.S.2d at 506-07; *Evans v. Int'l Ins. Co.*, 168 A.D.2d 374, 562 N.Y.S.2d 692, 694 (1st Dep't 1990); *Ausch*, 511 N.Y.S.2d at 925; *GEICO v. Fisher*, 54 A.D.2d 1087, 388 N.Y.S.2d 747, 748 (4th Dep't 1976).
8. *Graham*, 713 N.Y.S.2d at 603; *Nat'l Grange Mut. Liab. Co. v. Fino*, 13 A.D.2d 10, 212 N.Y.S.2d 684, 687 (3d Dep't 1961); *Car & Gen. Ins. Corp. v. Goldstein*, 179 F. Supp. 888, 891 (S.D.N.Y. 1959).
9. *E.g., Turkow v. Erie Ins. Co.*, 20 A.D.3d 649, 798 N.Y.S.2d 768, 770 (3d Dep't 2005); *Ingarra v. Gen. Accident*, 273 A.D.2d 766, 710 N.Y.S.2d

168, 170 (3d Dep't 2000); *Graham*, 713 N.Y.S.2d at 603; *Mt. Vernon Fire Ins. Co. v. 170 E. 106th St. Realty Corp.*, 212 A.D.2d 419, 622 N.Y.S.2d 758, 759 (1st Dep't 1995); *Allstate Ins. Co. v. Loester*, 177 Misc. 2d 372, 675 N.Y.S.2d 832, 834 (Sup. Ct., Queens Co. 1998).

10. *Zizzo v. Liberty Mut. Ins. Co.*, 188 Misc. 2d 293, 728 N.Y.S.2d 343, 344 (App. Term 2001); *Ingarra*, 710 N.Y.S.2d at 170; *170 E. 106th St.*, 622 N.Y.S.2d at 759; *Loester*, 675 N.Y.S.2d at 834; *see 170 E. 106th St.*, 622 N.Y.S.2d at 760 (finding no willful non-cooperation partly because, "[c]learly, the [policyholder]'s initial attitude was one of basic, if rather haphazard, cooperation").

11. *See Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 43, 511 N.Y.S.2d 919, 922 (2d Dep't 1987). *Ausch* specifically limited its pronunciation of the preponderance standard to a fire insurance policy. *Id.* Other cases have described proving breach of the cooperation duty for third-party insurance as more difficult than for first-party insurance. *See Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 102-03 (E.D.N.Y. 1997); *Dyno-Bite v. Travelers Cos.*, 80 A.D.2d 471, 439 N.Y.S.2d 558, 561 (4th Dep't 1981); *but see GEICO v. Fisher*, 54 A.D.2d 1087, 388 N.Y.S.2d 747, 748-49 (4th Dep't 1976) ("Appellants, as plaintiffs in the wrongful death actions against the [policyholder], are in no better position than the [policyholder] in maintaining the obligation of the insurer to respond in damages for the [policyholder's] negligence and Special Term properly granted summary judgment against them" (citations omitted).). It is the preponderance burden that distinguishes a breach of cooperation defense from a willful misrepresentation or concealment of material facts defense. *See Ashline v. Genesee Patrons Co-Op Ins. Co.*, 224 A.D.2d 847, 638 N.Y.S.2d 217, 219 (3d Dep't 1996); *Harary*, 988 F. Supp. at 106 n.13.

12. *See Rosenthal v. Prudential Prop. & Cas. Co.*, 928 F.2d 493, 494-95 (2d Cir. 1991) ("The willfulness of Rosenthal's breach seems clear. Purported 'scheduling conflicts' simply cannot justify a thirteen-month delay that included six adjournments.").

13. *In re USA Elec.*, 120 B.R. 637, 644 (Bankr. E.D.N.Y. 1990); *see N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 840 N.Y.S.2d 358, 360-61 (2d Dep't 2007).

14. *See Harary*, 988 F. Supp. at 104; *Rosenthal*, 928 F.2d at 495 (citing numerous New York state opinions for the proposition that "New York courts have recently retreated from affording an insured a 'last opportunity' when the insured's refusal to cooperate is willful"); *compare Mistretta v. Hartford Accident & Indem. Co.*, 275 A.D.2d 356, 712 N.Y.S.2d 167, 168 (2d Dep't 2000) (allowing last opportunity), *and DePicciotto Corp. v. Wallis*, 177 A.D.2d 327, 575 N.Y.S.2d 881, 882 (1st Dep't 1991) (same), *and Avarello v. State Farm Fire & Cas. Co.*, 208 A.D.2d 483, 616 N.Y.S.2d 796, 797 (2d Dep't 1994) (same), *and Harary*, 988 F. Supp. at 105 n.11 (same), *and C-Suzanne Beauty Salon v. Gen. Ins. Co.*, 574 F.2d 106, 110-11 (2d Cir. 1978) (same) *with Stradford v. Zurich Ins. Co.*, No. 02-3628, 2002 WL 31819215, at *5 & *6 n.16 (S.D.N.Y. Dec. 13, 2002) (denying last opportunity), *and In re USA Elec.*, 120 B.R. at 647-48 (same).

15. *Harary*, 988 F. Supp. at 105 n.11; *Rosenthal*, 928 F.2d at 495; *Evans v. Int'l Ins. Co.*, 168 A.D.2d 374, 562 N.Y.S.2d 692, 694 (1st Dep't 1990).

16. *In re USA Elec.*, 120 B.R. at 645-46.

17. *Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 103-04 (E.D.N.Y. 1997); *see In re USA Elec.*, 120 B.R. at 645-46. Generally, a contract is enforced according to its plain meaning. *E.g., Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996); *Bauersfeld v. Board of Educ.*, 846 N.Y.S.2d 809, 811 (App. Div. 2007). A contract itself, an insurance policy, too, is enforced according to its plain meaning. *E.g., Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 51 N.Y.2d 651, 655 (1980); *Reynolds v. Standard Fire Ins. Co.*, 634 N.Y.S.2d 163, 164 (App. Div. 1995); *American Home Assur. Co. v. Levy*, 686 N.Y.S.2d 639, 649 (N.Y. Sup. Ct. 1999); *Gregg ex rel. Gregg v. IDS Life Ins. Co. of N.Y.*, 681 N.Y.S.2d 451, 453 (N.Y. Sup. Ct. 1998).

18. *Harary*, 988 F. Supp. at 103-04.

19. *In re USA Elec.*, 120 B.R. 637, 645-46 (Bankr. E.D.N.Y. 1990).

20. *Id.* at 645.

21. *N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 840 N.Y.S.2d 358, 360-61 (2d Dep't 2007); *VMV Mgmt. Co. v. Peerless Ins.*, 15 A.D.3d 647, 791 N.Y.S.2d 136, 137 (2d Dep't 2005); *DePicciotto Corp. v. Wallis*, 177 A.D.2d 327, 575 N.Y.S.2d 881, 882 (1st Dep't 1991). Materiality is determined by the relevance of the information at the time the insurer requests it. *Harary*, 988 F. Supp. at 106.

22. That is, a court finding that the policyholder substantially complied also finds that the insurer failed to show that the information it seeks is relevant. *E.g., VMV Mgmt.*, 791 N.Y.S.2d at 137.

23. *Evans v. Int'l Ins. Co.*, 168 A.D.2d 374, 562 N.Y.S.2d 692, 694 (1st Dep't 1990); *Dyno-Bite v. Travelers Cos.*, 80 A.D.2d 471, 439 N.Y.S.2d 558, 560-61 (4th Dep't 1981).

24. *2423 Mermaid Realty Corp. v. N.Y. Prop. Ins.*, 142 A.D.2d 124, 534 N.Y.S.2d 999, 1003 (2d Dep't 1988); *see Hudson Tire Mart v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975) (holding that requiring a policyholder to appear for an examination under oath alone does not violate any due process right).

25. *Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 103-04 (E.D.N.Y. 1997).

26. These two cases involve a reinsurer and its reinsured insurer. For the purposes of discussing those cases, the reinsured insurer (normally known as a cedent) functions as the policyholder, while the reinsurer functions as the insurer. Generally, insurance and reinsurance contracts are interpreted by the same methods. *See Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's*, 263 A.D.2d 368, 692 N.Y.S.2d 379, 380 (1st Dep't 1999) (affirming trial court's interpretation of reinsurance contract by relying on direct insurance case law interpreting similar contract language as that which was at issue, as there was no controlling reinsurance case law on point); *Curiale v. DR Ins. Co.*, 159 Misc. 2d 208, 593 N.Y.S.2d 157, 160 (Sup. Ct., N.Y. Co. 1992) (concluding "that the marine [reinsurance] policy is a New York policy to be enforced consistent with its terms in the same manner as any New York insurance policy").

27. 13 A.D.3d 278, 788 N.Y.S.2d 44, 45 (1st Dep't 2004).

28. *Id.* (alteration and omissions in original). This clause, along with the clause at issue in the next case discussed, may be commonly known as an inspection clause or as an access-to-records clause rather than as a cooperation clause. However, the same caselaw applies, as evidenced by both courts' reliance on cooperation-clause precedents. And caselaw concerning a cooperation clause should apply in principle to all inspection and access-to-records clauses, as these clauses have essentially the same purpose as any other cooperation clause:

> A reinsurer's claims department that does a proper job will detect . . . the handling of claims in such a way that the reinsurer is exposed to more than its rightful share of losses. . . . This clause permits the re-insurer to examine the records in detail to determine whether it is being treated fairly in accordance with the reinsurance provided.

Robert W. Hammesfahr & Scott W. Wright, *The Law of Reinsurance Claims* 136 (2d ed. 1998) (citation omitted); *see also id.* (noting that "many reinsurers conduct reviews of a cedent's claim files to assess the reinsurer's true exposure" and describing the cooperation clause as "[r]elated to the right of inspection").

29. 788 N.Y.S.2d at 45.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 45-46.

34. *Id.* at 46.

35. *Id.* at 45. Further, the *Gulf Insurance* court largely adopted the reasoning of the federal District of New Jersey's opinion in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992), which the Appellate Division described thusly:

> The court in *North River* was presented with a cooperation clause which provided that the insurer would provide to the reinsurer "any of its records relating to this reinsurance or claims in connection therewith". When the insurer refused to provide documents

> which it argued were within the purview of the attorney-client privilege, the reinsurer made a motion to compel production of those documents. The court held that so long as the insurer produced all documents in its possession relevant to the underlying claim, its duty under the cooperation clause was fulfilled. It further held that the reinsurer is not entitled under a cooperation clause to learn of any and all legal advice that may have been obtained "with a reasonable expectation of confidentiality." In short, the court determined that a standard document production clause, does not, without more, constitute a waiver of the attorney-client privilege.

788 N.Y.S.2d at 46 (citations omitted). This passage has two critical flaws.

First, it appears to separate "all documents . . . relevant to the underlying claim" from "documents . . . within the purview of the attorney-client privilege," as if they are mutually exclusive categories. They are not. Relevancy is a separate kind of concern from privilege, such that being privileged does not make a document any more or less relevant. If the otherwise privileged document makes the claim for coverage more or less probable, then it is relevant. Yet it may be privileged and therefore withheld from an adverse party despite its relevance. The issue, which this passage does not address, is whether the policyholder (or cedent) has agreed to share that document with its insurer (or reinsurer). If he has, then the document is not privileged. If he has not, then it is.

Second, this passage assumes that the policyholder (or cedent) had the "reasonable expectation of confidentiality" that is a requisite of the privilege. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989); *Kraus v. Brandstetter*, 586 N.Y.S.2d 270, 272 (App. Div. 1992); *Bolton v. Weil, Gotshal & Manges LLP*, No. 602341/03, 2005 WL 5118189, at *6 (N.Y. Sup. Ct. Sept. 16, 2005). The theory as to why a policyholder must share its otherwise privileged information with its insurer pursuant to certain cooperation clauses is that such a clause prevented the privilege from attaching in the first place, as the policyholder lacked this reasonable expectation of confidentiality. That is, because the policyholder agreed to share "all records" with its insurer, it could not document its communications with its attorneys with a reasonable expectation of confidentiality from its insurer. *See Waste Mgmt. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 328 (Ill. 1991).

36. 7712/91 (N.Y. Sup. Ct., N.Y. Co. Aug. 18, 1992), reprinted in 4 Mealey's Litig. Rpts.: Reins., No. 4, at F-2 (June 23, 1993), *aff'd*, 598 N.Y.S.2d 938 (1st Dep't 1993).

37. *See id.* at F-3.

38. *Id.* The court called this provision "[t]his so-called 'cooperation clause.'" *Id.*

39. *Id.* at F-3 to -4.

40. *Id.* at F-4 (quoting 8 Appleman, *Insurance Law and Practice* § 4786 (Supp. 1991)). The *Phoenix* court concludes: "Thus, attorney-client privilege was not waived by the promise of 'open' records alone, *given the parties' present contractual dispute.*" *Id.* (emphasis added). Put aside that the doctrinal issue is a reasonable expectation of confidentiality and not waiver. *See supra* note 35. Significantly, this reasoning suggests that, but for the litigation, the clause would oblige the policyholder to share its records.

First, a contract is largely worthless without judicial enforcement of the terms. The court's thinking presents a Catch-22: On the one hand, in the absence of litigation, this clause extends to privileged documents. On the other hand, the insurer (or reinsurer) cannot enforce the reach of this clause against a recalcitrant policyholder (or cedent) without litigation. If this reasoning prevails, then the clause is never truly useful to the insurer, namely in circumstances where the insurer does not trust its policyholder's presentment of the claim.

Second, it leads one to wonder what this Supreme Court would have done in the circumstances at issue before the *Gulf Insurance* court, where the reinsurer sought the cedent's privileged files prior to any litigation. Would the *Phoenix* court enforce the request because it was made—and resisted— in the absence of litigation? Or would the *Phoenix* court rule that the subsequent litigation negated the pre-litigation request?

41. *Cohn-Hall-Marx Co. v. Gutman*, 185 N.Y.S. 182, 184 (1920).

42. *See Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463-64 (1998).

43. *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 459 (Ariz. 1987). The Appellate Division once said something similar:

> An anticipatory breach, in a proper case, may excuse one from performing a useless act, but it does not excuse one from the obligation of proving readiness, willingness, and ability to have performed the conditions precedent. Nor should one confuse an anticipatory breach by repudiation with an act by the promisor which makes impossible, by frustration, any effort to perform a condition precedent. Neither of these rules are applicable to the holder who was probably as incapable of performing the conditions precedent in December, or any other month, as it was in June.

Ufitec, S.A. v. Trade Bank & Trust Co., 249 N.Y.S.2d 557, 560-61 (App. Div. 1964) (citations omitted); *compare id. with Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty*, 522 N.Y.S.2d 292, 293 (App. Div. 1987) (forgiving party from fulfilling condition precedent where fulfillment would have been futile due to other party's anticipatory breach). Thus the holder's non-compliance (demonstrated by his proven inability to comply) with a condition precedent forgave a bank's anticipatory breach on a note, and the Appellate Division reversed judgment for the holder to order judgment instead for the bank. Likewise, the cedent's refusal to hand over otherwise privileged information is not a refusal to do a useless act—the information may affect the claim's adjustment by the reinsurer or judgment by the court. The information is useful, so the cedent's refusal to provide bargained-for information may forgive the reinsurer's potentially incorrect denial of coverage.

44. Think of the issue like this: Why would the anticipatory breach doctrine distinguish between privileged and non-privileged information? Apparently, an anticipatory breach allows the policyholder (or cedent) to withhold privileged information. However, the same breach does not allow the policyholder to withhold non-privileged information as well. If it is unreasonable for the policyholder to share privileged information if that information disproves coverage, then would it not also be unreasonable to force the policyholder to share non-privileged, factual information that would disprove coverage? This same factual information should be obtainable in normal discovery and is admissible against the policyholder despite the "prejudice" of tending to disprove the policyholder's claim and denying the policyholder coverage for which it did not pay. It follows that it is neither unreasonable nor prejudicial in the event of the insurer's (or reinsurer's) denial for the policyholder to share harmful information with its insurer even if that information is privileged.

45. 4 Mealey's Litig. Rpts.: Reins., No. 4, at F-3.

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Long-Arm Jurisdiction and the Global Economy

By Nelson E. Timken

"[T]he growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it."[1] This pronouncement by our state's highest court recognized that, given advances in communications technology, personal jurisdiction pursuant to the CPLR, Sections 301 and 302(a)(1), may be established electronically, through e-mail, instant messaging, and interactive websites, which enable voluminous amounts of business to be transacted without physical entry into the state.

Jurisdiction over non-domiciliaries can be established in New York under our general jurisdiction statute, CPLR 301, or under 302(a), commonly referred to as our "Long Arm" Statute.

CPLR 301 provides that "[a] court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore."[2] Under Section 301, a foreign corporation is amenable to suit in New York under CPLR 301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted.[3] In order to establish jurisdiction under CPLR 301, the "doing business" statute, the relevant inquiry is whether "the aggregate of the corporation's activities in the State" demonstrate defendant's presence in the State "not occasionally or casually, but with a fair measure of permanence and continuity. "[4] Under CPLR 301, factors the court looks to in determining whether jurisdiction has been established include whether the corporation has employees, offices or property within the state, whether the corporation is authorized to do business within the state, and the volume of business that the corporation conducts with New York residents. Conduct must be specifically targeted at New York rather than the mere fact of the sale of products or solicitation of business in the state.

CPLR 302(a), New York's "Long Arm" Statute, permits personal jurisdiction premised upon the acts of a non-domiciliary or its agent, executor or administrator, who:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

"[G]iven advances in communications technology, personal jurisdiction pursuant to the CPLR, Sections 301 and 302(a)(1), may be established electronically, through e-mail, instant messaging, and interactive websites, which enable voluminous amounts of business to be transacted without physical entry into the state."

The purpose of CPLR 302 is to jurisdictionally encompass those non-domiciliary defendants who have contacts within the state that fall short of the continuous and systematic level that would bring them within CPLR 301's general jurisdiction umbrella.[5] However, one of the critical requirements for CPLR 302 jurisdiction is that the cause of action must arise out of the acts that establish the jurisdictional prerequisite. Courts will not find jurisdiction where that relationship is attenuated or insubstantial.[6]

Recent New York Court of Appeals Cases

The interpretation of these statutes has required New York's highest court to make some extremely subtle qualitative and quantitative assessments as to when a non-domiciliary is amenable to jurisdiction in the state. In its two most recent pronouncements, New York's Court of Appeals has reached different conclusions in scenarios involving a New York attorney who performs legal work in New York on behalf of a client located in another state, and sued in a third venue, and a New York party who resists the efforts of a domiciliary of another country to enforce the judgment of the court of a foreign country. It cannot be emphasized strongly enough that both cases

are fact determinative, and thus the facts are noted below with almost painstaking particularity.

The *Fischbarg* Decision

In *Fischbarg v. Doucet*,[7] the individual defendant, a California resident and president of California corporate defendant, engaged the plaintiff, a member of the New York bar, at his New York office to represent them in a breach of contract and copyright infringement lawsuit brought in the United States District Court for the District of Oregon. Plaintiff was never physically present in Oregon during the pendency of the Oregon action, nor did he ever meet with his clients in California. Instead, plaintiff conducted his work pertaining to the Oregon action—allegedly 238.4 hours worth—from New York. He appeared at depositions and court conferences, and argued a motion for summary judgment via telephone from New York. In addition, defendants repeatedly communicated with plaintiff in New York. According to plaintiff, over the course of approximately nine months (May 2001 through January 2002) during his representation of the client in the Oregon action, he spoke with defendants by telephone at least twice per week regarding their case. Plaintiff's time records also showed that on at least 31 occasions defendants sent e-mails regarding the Oregon case to plaintiff, that on three occasions they faxed materials to him, and that defendants sent plaintiff documents, by either mail or e-mail, seven times. The *Fischbarg* action arose when a dispute between the parties arose regarding the term of the retainer agreement, resulting in the plaintiff tendering his resignation and defendants accepting it. Plaintiff moved the Oregon court for an award of attorneys' fees for services rendered prior to his resignation while that action was still pending. The Oregon court denied plaintiff's motion on the ground that it lacked personal and subject matter jurisdiction over the fee dispute, albeit noting that a series of e-mails between the parties prior to plaintiff's resignation established his right to a legal fee at the conclusion of the Oregon action. Based upon the Oregon court's decision, had New York refused to entertain personal jurisdiction over this matter, the result would have left the plaintiff New York attorney without a forum in which to seek redress for his recovery of legal fees. While notably absent from the Court of Appeals' legal analysis and reasoning, this author feels that the foregoing was a compelling reason for the New York court to entertain jurisdiction in this matter. To hold otherwise would be to leave similarly situated attorneys performing work from a New York venue for clients located in other states without recourse for the recovery of legal fees, which would be a harsh result indeed.

The Appellate Division, in affirming the trial court's finding of jurisdiction, reiterated that CPLR 302(a)(1) permits jurisdiction, even though the defendant never physically enters New York, as long as defendant's activities (a) demonstrate a purposeful transaction of business in the state and (b) so long as there is a substantial relationship between the transaction and the claim asserted.[8] Purposeful activities are those in which a defendant voluntary acts to avail itself of the privilege of conducting activities within the forum state, thus invoking the privileges (protections) and benefits of its laws. In seeking to identify the specific activities that establish the defendant's transaction, which can be a daunting task, the primary consideration is the quality of the defendant's contacts.[9]

In *Fischbarg*, the Court of Appeals was satisfied that the quality of the defendant's contacts established a transaction of business in New York State, that there was a substantial relationship between the transaction of business and the plaintiff's claim, and that an exercise of *in personam* jurisdiction would not offend constitutional due process standards. It pointed to the fact that the defendants sought out the plaintiff in New York and established an ongoing attorney-client relationship with him. The continuing nature of the relationship was exemplified by the plaintiff's evidence, including time records, indicating regular communications with the plaintiff in this state during the course of his representation of the defendants by mail, telephone, e-mail and facsimile.[10] By retaining the plaintiff attorney in the State of New York, continuing their communications with him, and utilizing his services, the Court held that the defendants had engaged in sustained and substantial transaction of business by projecting themselves into the state's legal services market, thereby invoking the benefits and protections of the state's laws governing the attorney-client relationship. For example, they were the beneficiaries of N.Y.C.R.R. 1210.1, New York's "Client Bill of Rights," which requires that fees charged to clients be explained at the outset as to computation, manner and frequency of billing, and be "reasonable."[11] The nature and quality of the contacts between the parties demonstrated what the Court characterized as "a substantial on-going professional commitment between themselves and plaintiff, governed by the laws of our state."[12] The nature of the contact was not unilateral, as evidenced by the defendants' frequent communications with the plaintiff in New York.[13] Moreover, there was a substantial relationship between the plaintiff's action for fees accrued during his representation of the defendants in the Oregon action, defendants' solicitation of the plaintiff in New York to represent them in that action, and the series of communications with the plaintiff in New York during the course of said representation. Plaintiff's claim for legal fees was directly predicated upon those contacts, which formed the basis of his representation and corresponding claim for fees thereupon. The exercise of personal jurisdiction in this case was not violative of due process notions of fair play and substantial justice because the defendants had purposefully availed themselves of benefits and protections of New York's legal services market, had maintained

contact with the forum state through their continued communications with the plaintiff, and should therefore reasonably expect to defend an action in New York based upon their relationship with the plaintiff in this state.

The thrust of the decision is that in determining when an out-of-state party can be haled into New York courts where it has not physically entered the state, courts should look to the substantive quality of an out-of-state party's contacts with New York, in determining whether the party's activities were sustained and substantial enough to evince a purposeful invocation of the benefits and protections of the state so as to justify a New York court's jurisdiction over that party.

The *Ehrenfeld* Decision

In marked contrast to *Fischbarg*, in *Ehrenfeld v. Bin Mahfouz*,[14] the Court of Appeals found that the unilateral acts of the plaintiff in New York, coupled with the defendant's attempts to enforce a judgment issued by an English court, were insufficient to establish a transaction of business in New York State by the defendant.

Plaintiff Rachel Ehrenfeld is an author whose writing focuses on international terrorism. In 2003, Chicago-based Bonus Books published her book *Funding Evil: How Terrorism Is Financed—and How to Stop It*. In that book, plaintiff asserted that defendant, Khalid Salim A Bin Mahfouz—a Saudi Arabian businessman, financier and former head of the National Commercial Bank—and his family have provided direct and indirect monetary support to al Qaeda and other "Islamist terror groups." *Funding Evil* was published in the United States; however, 23 copies were purchased in the United Kingdom via the internet and a chapter of the book, accessible from the ABCNews.com website, was also available in England.

Defendant maintained that plaintiff's claims regarding his ties to terrorism were false. Defendant's English counsel wrote to plaintiff and sought to have her: (i) promise the "High Court in England" that she would refrain from repeating similar allegations, (ii) destroy or deliver to him all copies of *Funding Evil*, (iii) issue a letter of apology (to be published at plaintiff's expense), (iv) make a charitable donation and (v) pay his legal costs in exchange for defendant's agreement not to bring a defamation action against her. When plaintiff did not accept this offer, defendant sued her, seeking damages and injunctive relief under the English Defamation Act of 1996, in the High Court of Justice, Queens Bench Division, in London. Pursuant to an order of the English court, defendant served papers upon plaintiff at her New York City apartment. In addition to serving litigation papers, defendant's English lawyers contacted plaintiff at her home in New York via mail and e-mail. These communications all concerned the English action. In these letters and e-mails, defendant's English counsel provided plaintiff with the claim in the English action, witness statements, documents supporting defendant's alleged damages and court orders. Plaintiff elected not to appear in the English action because of the cost of litigating in England, the procedural barriers facing a libel defendant under English law and her disagreement in principle with defendant's alleged attempt to chill her speech in New York by suing in a claimant-friendly libel jurisdiction to which she lacked any tangible connection. As a result, the English court entered a default judgment against plaintiff and Bonus Books, providing for an award of damages and enjoining the further publication of the allegedly defamatory statements in England and Wales. The English court also entered a second order declaring the allegedly defamatory statements false, setting damages owed to defendant and his sons at £10,000 each, requiring plaintiff and Bonus Books to publish an apology in accordance with section 9(2) of England's Defamation Law, and awarded defendant his costs in prosecuting the English action. Defendant reported the contents of the English court's order on his website.[15]

Plaintiff filed suit against defendant in the United States District Court for the Southern District of New York seeking a declaratory judgment that, under federal and New York law, defendant could not prevail on a libel claim against her based upon the statements at issue in the English action and that the default judgment was unenforceable in the United States and, particularly, in New York State. Defendant moved to dismiss, arguing that the court lacked subject matter and personal jurisdiction. The district court held that it lacked personal jurisdiction under CPLR 302(a)(1) because defendant's communications to plaintiff in New York regarding the English action and his website posting, "however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective." On appeal, the Second Circuit asked defendant whether he would agree not to seek enforcement of the English court's orders in the United States, which he declined to do. The question of jurisdiction over the defendant was certified to the New York Court of Appeals. Plaintiff in *Ehrenfeld* asked the Court to adopt the holding of the Ninth Circuit in *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*,[16] a case involving similar facts. The Court of Appeals declined to do so, since the California Long-Arm Statute applicable in *Yahoo!* was "coextensive with federal due process requirements," whereas New York's long-arm statute "does not confer jurisdiction in every case where it is constitutionally permissible . . . Thus, a situation can occur in which the necessary contacts to satisfy due process are present, but *in personam* jurisdiction will not be obtained in this State because the statute does not authorize it."[17] New York's Long Arm Statute, unlike California's, confers jurisdiction in a limited subset of cases concerning non-domiciliaries.

The Court of Appeals found that none of defendant's relevant New York contacts have invoked the privileges or protections of New York State's laws. His communica-

tions in this State were intended to further his assertion of rights under the laws of England,[18] and the defendant did not seek to consummate a New York transaction or to invoke our State's laws.[19] Thus jurisdiction did not lie.

The *Deutsche Bank* Case

Deutsche Bank Securities, Inc. was a Delaware Corporation headquartered in New York engaged in trading for its own account and for clients, and acted as the "market-maker" for the deal in question. Defendant Montana Board of Investments is a Montana state agency charged with managing an investment program for public funds, the public retirement system and state compensation insurance fund assets. The transaction at issue in the case was the sale of $15 million in corporate bonds of the Pennzoil-Quaker State Company, which the defendant unilaterally cancelled when the value of the bonds suddenly increased overnight due to the acquisition of the underlying corporation by Shell Oil. In the 13 months prior to the transaction at issue in the case, the parties had engaged in approximately eight other bond transactions with a face value totaling over $100 million.

Based upon the foregoing, in *Deutsche Bank v. Montana Board of Investors*,[20] the Court of Appeals declared that there was personal jurisdiction in New York over a sophisticated institutional trader from Montana who knowingly initiated and pursued a $15 million bond sale via an "instant messaging system,"[21] thus "entering New York to transact business." Judge Kaye, writing for the majority, explained that the defendant should reasonably have expected to defend its actions in New York, since, as a sophisticated institutional investor, part of its purpose for being is to negotiate and enter into multi-million-dollar financial transactions in New York (such as the one which was the subject of the lawsuit), thereby availing itself of the benefits of conducting business here, and in return, authorizing our courts to exercise personal jurisdiction over it.[22]

Jurisdiction by "Online Presence"—Federal Cases

Due to diversity jurisdiction, federal courts[23] have more frequently had occasion to address the issue of website jurisdiction in the past, with the weight of decisional authority either explicitly adopting or favoring the approach outlined by Judge Sean G. McLoughlin of the United States District Court for the Western District of Pennsylvania in *Zippo Manufacturing v. Zippo Dot Com, Inc*.[24]

In *Zippo*, the Court characterized internet use for jurisdictional analyses into a spectrum of three categories: (1) where the defendant clearly transacts business over the internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the internet (in which case, jurisdiction lies);[25] (2) where the defendant merely operates a passive website that does nothing more than advertise its products or services on the internet (in which case, jurisdiction does not lie); and (3) between these two extremes, where the defendant operates a website that allows a user to exchange information, where the exercise of jurisdiction is determined by the level of interactivity, and the commercial nature of the exchange of information that occurs on the website.[26] For instance, the Fifth Circuit Court of Appeals held that the provision on a website of a printable mail-in form, toll-free number, mailing address, e-mail address, but no provision for orders to be taken on the website (i.e., no shopping-cart or similar software), did not qualify as other than a passive website/electronic advertisement which did not confer jurisdiction over the defendant.[27]

Federal circuits that have not explicitly adopted the *Zippo* standard have found it persuasive, and used it to determine the parameters of exercisable jurisdiction, as have New York State Courts. While not adopting the *Zippo* analysis as a separate framework from traditional statutory and constitutional principles for analyzing internet-based jurisdiction, the Second Circuit in *Best Van Lines, Inc. v. Walker*[28] analyzed personal jurisdiction based upon alleged internet defamation under *Zippo*.[29] In *Best*, the defendant, a resident of Iowa, operated a not-for-profit website that published information and opinions about household movers. Plaintiff sued the defendant for posting negative comments about it on defendant's website, alleging that they were false and defamatory, and made with intent to harm the plaintiff. The Court used the *Zippo* "interactivity" analysis to help it to determine whether, through the website, defendant purposefully availed himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws. Under this analysis, the defendant's internet postings, which contained disparaging comments regarding the plaintiff's business services, which happened to be accessible to New York readers, but not purposefully directed to New Yorkers rather than a nationwide audience, did not, without more, provide a basis for jurisdiction. In addition, while the ability of the public to make donations to the defendant from a portion of the defendant's website appeared to place it within the definition of an "interactive" website, there was no logical nexus between plaintiff's claim and the website's acceptance of donations for purposes of CPLR 302(a)(1) long-arm jurisdiction. Since the plaintiff had not made out a *prima facie* case of personal jurisdiction, the Second Circuit upheld the district court's decision not be permit jurisdictional discovery in this case.

Similarly, in *Chloe v. Queen Bee of Beverly Hills, LLC.*,[30] in which the plaintiff alleged, *inter alia*, that the defendants sold counterfeit Chloe handbags on the internet, the Southern District held that the maintenance of an interac-

tive website alone did not support jurisdiction.[31] While the website in question was "interactive," insofar as it allowed users to view allegedly counterfeit or copyright infringing products, and to place orders for such products, the defendant had made no sales of the products to New York residents, other than a sale arranged by the plaintiff's counsel. After attempting to synthesize various district court holdings in the circuit, the Second Circuit held that a website, while "interactive," which did not target New York residents specifically, but rather, made products generally available to consumers worldwide, where there were no sales made through the website to New York residents, did not support the exercise of personal jurisdiction over the defendant website owner.[32]

Jurisdiction by "Online Presence"—New York Cases

With respect to a defendant who operates an "interactive" website in New York, New York State courts have held that there is no inequity in subjecting that defendant to personal jurisdiction in New York when the underlying facts compel such jurisdiction.

Courts of original jurisdiction in New York have struggled to define what an "interactive website" within this context is. For example, in *Baggs v. Little League Baseball, Inc.*,[33] a case involving a child injured when struck by a baseball hit by an aluminum baseball bat, the Court held that the corporate defendant

> generates substantial revenue from its "highly interactive" web site, www.littleleague.org . On this site, Internet users may visit and shop for merchandise and purchase products that are officially licensed by Little League Baseball, Inc.

This demonstrated that the defendant, who had no particular state of citizenship, had engaged in commerce sufficient to permit New York's "long-arm" jurisdiction[34] to apply to this action. It bears mentioning that, in addition to the website, there were other factors that buttressed the Court's finding that the defendant had engaged in a long and continuous course of doing business in the state, justifying the exercise of personal jurisdiction over it. Notably, the fact that the most important structural component of the defendant Little League Baseball was the local Little League, through which all of the defendant's services and resources were provided to the children. Moreover, the local Little Leagues followed strict rules and regulations promulgated by the defendant.

In *Chestnut Ridge Air, Ltd. v. 1260269 Ontario Inc.*,[35] defendant, a Canadian corporation, was retained to strip, paint and refinish an aircraft. Defendant challenged personal jurisdiction based upon an alleged lack of minimum contacts with the State of New York. Rejecting that contention, the Court cited the fact that the Canadian defendant substantially solicited business through its interactive website. Specifically, the website was, in essence, a virtual community that permitted internet users to obtain a quote on aircraft maintenance services. It noted that the defendant would e-mail or send computer drawings to the customer for proposed painting projects, it maintained a forum that enabled prospective customers to post questions directly to defendant's employees and to receive replies regarding the company's services, and it provided a private website which permitted the customer to monitor the daily progress of their project. In addition, the defendant performed work on an average of seven projects per year from New York customers, each project taking an average of 14 days to complete, for a total of 14 weeks per year expended by the defendant on New York projects, comprising 4% of its annual revenue.

Contrasting this type of interactive website is the so-called "passive" website, in which the internet site does nothing more than to advertise its operator's products. This type of internet website has been almost universally held by New York Courts to be insufficient evidence of commercial activity in the state to support personal jurisdiction.[36]

Similarly, in *Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*,[37] a company endorsed itself on its website as "the leading internationally accredited food testing and consulting network" with over 25 locations in 20 countries able to serve its clients "around the clock, around the globe" as a "worldwide network." The Court therein found that this web presence, along with a professional course on food processing it offered in New York City, and one audit per year for five years of plaintiff's premises in New York City, did not amount to a continuous and systematic course of doing business sufficient to sustain personal jurisdiction under CPLR 301. However, the Court found that this was sufficient to support jurisdiction under CPLR 302(a)(1), since the defendant had engaged in sufficient purposeful activities in the state with respect to its ongoing business relationship with the plaintiff, and since the plaintiff's claim arose from those activities.

Contrasting *Atlantic Veal*[38] is *New World Sourcing Group, Inc. v. SGS SA*,[39] in which the plaintiff attempted to predicate jurisdiction over a parent company upon the activities of its two subsidiaries, but the Court found those activities well below the benchmark set by *Fischbarg v. Doucet*.[40] The case arose out of the allegedly negligent inspection of textile fabric manufactured in China, inspected by SGS Shanghai, a subsidiary of the defendant SGS SA. SGS SA had no offices or employees in New York. SGS SA owned a nonparty corporation, the latter owned 99% of SGS Testcom, and also owned SGS US Testing. As to SGS SA, as mentioned, plaintiff sought to bind the parent jurisdictionally by the acts of its subsidiaries. However, in order to find jurisdiction over the foreign

parent on this theory, the plaintiff had to demonstrate that the two subsidiaries did all the business the parent corporation could do were it in New York by its own officials, that is that the subsidiaries were acting as the mere agent or department of the parent corporation, and that the parent corporation controlled them.[41] Plaintiff could not sustain this burden, since it failed to prove that the parent had substantial control over the subsidiaries. In addition, while the SGS Group had a worldwide website, there was no evidence that it either specifically targeted New York customers or that it was interactive. As to SGS Shanghai, the facts underlying the claim of jurisdiction were that three fabric inspection reports prepared by SGS Shanghai were e-mailed to the intended buyer of the fabric, a clothing manufacturer in New York. There were a few invoices mailed by the plaintiff, but not on a consistent basis as in *Fischbarg*. SGS Shanghai's revenues from New York were but .0065% of SGS Shanghai's total sales. Thus, the evidence indicated that SGS Shanghai did not conduct or solicit business in New York, or engage in any other persistent course of conduct in New York.

In *Boris v. Bock Water Heaters*,[42] the prime defendant, Bock, had a website which provided visitors with a map of all 50 states and enabled them to click on any state, including New York, to purchase a Bock water heater in that state. Thus, as to Bock, the Court found the record sufficient to determine that its website specifically solicited business from a New York audience and then directed sales inquiries to its distributor. However, as to co-defendant Perfection, a component-part manufacturer, the record was insufficient to demonstrate that it was amenable to long-arm jurisdiction in New York since there was no evidence that Perfection directly solicited sales for its product on its internet site, although the site did tout that "[i]f you purchase a water heater in the United States or Canada, it will probably contain Perfection components." Since discovery was not complete at the time the defendants moved for dismissal on the issue of jurisdiction, and since the plaintiff had established through its responsive papers that facts might exist to establish jurisdiction and defeat the defendants' motion, the Court held that the plaintiff was entitled to further discovery on that issue.

In a similar vein, the Fourth Department reversed and remanded a matter for an immediate trial on the issue of whether the defendant's creation and maintenance of a website constituted the transaction of business sufficient to confer personal jurisdiction over the defendant under CPLR 302(a)(1) (the "long-arm" statute).[43] The Court noted therein that the issue "turns on whether the website has sufficient commercial elements, which typically are found to constitute the transaction of business."[44]

In *Bankrate, Inc. v. Mainline Tavistock, Inc.*,[45] the defendants moved to dismiss a commercial dispute involving payments allegedly due plaintiff for the publication of a rate directory in Michigan, New Jersey and Pennsylvania. Defendant's submissions averred that it did absolutely no business in New York, that the contracts at issue were for services to be performed outside New York, that plaintiff's sporadic telephone calls to it did not amount to the transaction of business, and that its website did not specifically mention New York. Plaintiff's response was that the defendants were "doing business" in New York under CPLR 301 based upon their electronic presence in the state via their interactive website. Plaintiff also claimed that long-arm jurisdiction was available under CPLR 302(a)(1) based upon the defendant's transaction of business through its interactive website, along with the fact that the dispute regarding the parties' agreement was linked to the defendant's solicitation of business over its website. The Court found that the plaintiff had made a sufficient *prima facie* showing of jurisdiction to warrant the granting of limited discovery on that issue. Reiterating the *Chestnut Ridge* standard for determining whether the solicitation of business from a website suffices to confer jurisdiction in New York,[46] the Court set a discovery schedule to enable the plaintiff to expand the record on the issue of personal jurisdiction.

When grounding a jurisdictional basis over the defendant, a plaintiff that restricts himself or herself to just one statutory jurisdictional predicate risks dismissal should the Court find that basis lacking, even where other bases may exist. Precisely that scenario occurred in *Bossey v. Camelback Ski Corporation*,[47] wherein plaintiff alleged personal injuries while skiing on a beginner's trail, when he struck an unpadded pole on the trail. Plaintiff was nonsuited because it limited its claim if jurisdiction to the Pennsylvania defendant's constructive presence in the state under the "doing business" rule of CPLR 301. As you will recall, the test for jurisdiction under that section is the "solicitation plus" rule, requiring not only substantial solicitation of business directed at New Yorkers by the foreign defendant, but also actual financial or commercial dealings by the defendant in the State of New York. The defendant in *Bossey* was indisputably a foreign domiciliary that had no offices in New York, no employees, only occasional contact with the state based upon employees travelling to New York to attend trade shows. Plaintiff's claim of jurisdiction under CPLR 301 was that the defendant was "doing business" in New York by virtue of its electronic presence in New York in the form of an interactive website which allowed customers, including New Yorkers, to book reservations for accommodations and to purchase ski-lift tickets and tickets for other recreational events at the defendant's ski resort in Pennsylvania on the internet, along with solicitation of New York customers by placing its advertising flyers in New York retail ski shops. The *Bossey* Court limited its analysis to the "doing business" standard of CPLR 301, and distinguished other New York cases finding jurisdiction based upon a "highly

interactive" website, finding that those cases predicated their analyses upon CPLR 302(a)(1), rather than CPLR 301.[48] Citing a line of federal court cases which hold that the mere presence of an interactive website accessible to New Yorkers is alone insufficient to confer jurisdiction under CPLR 301, the Court in *Bossey* dismissed the plaintiff's complaint.[49]

A strongly contrasting view on very similar facts is expressed by the Civil Court, Kings County in *Kaloyeva v. Apple Vacations*.[50] Plaintiff contended that the defendant misrepresented a resort in the Dominican Republic as having "white sandy beaches, crystal clear water, fresh fish and a superb international cuisine," when, in fact, the waters were murky, the beach was swarming with insects, the hotel rooms were infested with bed bugs, and the restaurant's food made her ill with intestinal poisoning. The Court found that the defendant's internet website activities were sufficient to invoke personal jurisdiction based upon New York's Long Arm Statute[51] since they were highly interactive, commercial in nature, and enhanced the defendant's business in New York, and since there was a substantial nexus between the transaction and plaintiff's claim. Defendant's website allowed New York residents not only to research various vacation packages, but to select and book a specific vacation package, either directly through the defendant or through one of its representatives. The website also solicited business in New York by recommending travel agencies in specific New York areas who were touted as highly qualified to book vacations on the defendant's behalf, and who were trained by the defendant. On these facts, Court held that

> [a] Company should not be able to benefit from the rewards of the goods and services advertised on its internet website and then deny liability on the basis that it is not domiciled in the State where such goods and services were advertised. Defendants who reach out beyond one State and create continuing relationships and obligations with the citizens of another State are subject to regulation and sanctions in the other State for consequences of their actions.

A defendant's contacts with New York did not pass jurisdictional muster even under CPLR 302(a)(1) in *Ned B. Feinstein & Assocs. Inc. v. Gillen.*[52] Plaintiff, an accident reconstructionist domiciled in New York, was hired by the defendant, a California attorney, to provide expert analysis in a California products liability action in which defendant attorney represented several passengers injured in a bus accident. Plaintiff filed suit for breach of contract in Civil Court, New York County, alleging that the defendant failed to pay for expert services rendered. Defendant countered that he found plaintiff's expert services through a Google search on the internet. He visited the plaintiff's website, and learned that the plaintiff conducted business in California and had a California telephone number. Plaintiff e-mailed his *curriculum vitae* to defendant, but only met the defendant once at the defendant's office in California. Plaintiff forwarded a retainer agreement to the defendant, which the defendant declined to sign because certain terms, particularly the designation of New York as the venue of dispute, were not agreeable to him. Plaintiff countered that it was headquartered in New York City, which the defendant knew, that it maintained local telephone numbers in other states for marketing purposes, that the defendant reached out to the plaintiff in New York in order to retain him, frequently spoke to the plaintiff in New York, and sent documents to the plaintiff in New York. Plaintiff denied that it even had a website after he had relocated to New York, and that his *curriculum vitae* noted that he was formerly of Van Nuys, California. Plaintiff sought to fit the facts of *Feinstein* within the four corners of the First Department's decision in *Fischbarg*.[53] However, the Court found the facts of *Fischbarg* distinguishable insofar as that case involved itemized billing records for 238.4 hours of work, as opposed to only a few hours of work performed by plaintiff Feinstein. In addition, unlike *Feinstein,* the defendants in *Fischbarg* sent the plaintiff voluminous documents projecting themselves into New York; in *Feinstein*, plaintiff had travelled to California, whereas in *Fischbarg*, all of the plaintiff's activities on behalf of the California clients took place in New York. In addition, *Feinstein* involved a single, isolated transaction between the parties. Thus, the *Feinstein* Court concluded that this activity did not arise from any New York City-related act of the defendant for purposes of CPLR 302(a)(1) jurisdiction.

Lawsuits brought against auctioneers by those participating remotely pose another type of commercial situation in which jurisdiction becomes a pivotal issue. In *Russeck Fine Art Group, Inc. v. Theodore B. Donson, Ltd.*,[54] the defendant, acting as agent for the plaintiff, purchased a Renoir pastel through an auction held in Switzerland by the third-party defendant gallery. The defendant participated in the Swiss auction by telephone from its London, England office. The gallery's auction conditions contained a Swiss choice of law and forum selection clause. The gallery allegedly failed to comply with the defendant's packaging and shipping conditions, as a result of which the drawing was damaged and lost 50% of its value, and there was no insurance in place to provide compensation. The gallery was not licensed to do business in New York, nor did it have any employees, a telephone listing, office or bank account in New York, although it was a member of a partnership of European and American auction houses which had its own website and published a magazine. The gallery moved to dismiss for want of jurisdiction pursuant to CPLR 301 and 302, as well as based upon the forum selection clause in its auction and conditions. While the facts demonstrated some disjointed

contacts with New York,[55] the Court held that these activities, without more, are insufficient to confer jurisdiction pursuant to CPLR 302(a)(1). For example, there was no indication of an ongoing contractual relationship between the parties, or a claim that the gallery solicited business in New York or conducted other commercial activities in New York. Thus, the totality of the circumstances did not demonstrate sufficient purposeful contact with New York to justify jurisdiction, or even to warrant limited discovery on the issue, and the case against the Swiss gallery was dismissed.

"[D]oes it really offend traditional notions of fair play and substantial justice to hold . . . [online] businesses accountable in the state or states in which they actively solicit business for liability arising from these products or services?"

eBay (Online) Auctions

This author has not found many reported state court cases addressing the issue of jurisdiction based upon online or eBay auctions. However, it is important when analyzing such jurisdictional issues to keep the *modus operandi* of online auctions in mind. The typical logistics of an online auction is to sell to the highest bidder irrespective of the state in which the bidder resides, with the choice of the winning bidder beyond the control of the seller.[56] Where the seller has no control over the audience to which the listing of the goods is disseminated, such business contacts are considered "random and attenuated," and do not rise to the level of purposeful availment required to sustain personal jurisdiction under principles of due process.

For example, in *Sayeedi v. Walser*,[57] one of few cases to address this issue, Judge Straniere held that

> [a] single transaction conducted online via EBay between members where one member is a resident of a state other than New York, without more, does not constitute sufficient purposeful availment to satisfy the minimum contacts necessary to justify summoning across state lines, to a New York court, the seller of an allegedly nonconforming good.

Query: would the result be any different if the online auction was limited to buyers in certain states, or one state in particular? No cases have been found that have addressed that issue; however, it is this author's view that, the more control the seller has over the location of the buyer, and the more focused the auction upon a particular state, the greater ease with which a court may find equity in subjecting the seller to the jurisdiction of the host state.

Forum Selection Clauses—A Possible Solution?

The cost of doing business globally through electronic media increases substantially when a seller becomes jurisdictionally amenable to suit in multiple states in which it has no physical presence. As "e-commence" becomes more prevalent, resulting in more lawsuits in foreign states, foreign sellers and service providers must retain local counsel, if only to contest jurisdiction based upon minimum contacts. These costs get passed on to the consumers of these products and services in terms of increased prices, making it less economical to transact business in this manner over the internet.

Forum selection clauses are enforceable as part of standard business agreements. As the Court of Appeals aptly put it, "[f]orum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes."[58] On the internet, during the "checkout" process prior to consummating a transaction, an interactive web site could display a screen in which the buyer or consumer agrees that the seller's state of domicile is the forum of recourse for any disputes between the parties arising from the sale of goods or services, before the sale of goods or services may be finalized. This might discourage some buyers, in which case, the issue becomes one of cost-benefit analysis between the costs of potential lost sales versus the cost of defending lawsuits in foreign jurisdictions. One caveat is that courts have admonished drafters of such forum and choice of law clauses that "there must be an expressed mandate to litigate disputes only in the designated forum," rather than a permissive agreement to submit to the authority of the forum if served with process to appear there.[59]

Conclusion

The advent of the computer and the internet allows individuals and businesses alike to conduct commercial transactions of every nature possible from the comfort of a desktop in their homes and offices. Companies have set up internet websites to permit prospective customers, both domestic and foreign, to transact business with them directly, to engage in contracts for services of every nature, including engaging the services of an attorney or forensic expert, with the goal in mind of increasing their customer base and profit margins. Under these circumstances, does it really offend traditional notions of fair play and substantial justice to hold these businesses accountable in the state or states in which they actively solicit business for liability arising from these products or services? The trend appears to be increasingly receptive to exercising jurisdiction over foreign entities that operate interactive websites that extend their presence into foreign venues by specifically targeting purchasers in a

particular venue. Courts must factor into the equation the practical difficulties inherent for plaintiffs seeking to sue these foreign domiciliaries in their home states. In doing so, the Court is left with a difficult outcome for aggrieved plaintiffs should it seek to forgo the exercise of jurisdiction. The exercise of jurisdiction is an elastic precept, which stretches and contracts based upon the notion of fairness under a particular factual scenario. Where the economic boundaries in which companies can pursue their quest for profits expand, so too, fairness would seem to demand that the boundaries where these same companies may be held accountable to consumers must also expand correspondingly. On the other hand, where companies merely advertise their presence on the internet, without soliciting sales to a particular target audience or facilitating the purchase of their products of services through interactive means, courts are far less willing to render that entity amenable to suit in their venue. The success of various business paradigms of online commerce ("e-commerce"), even in today's struggling global economic environment, brings promise that the issue of jurisdiction based upon less than actual physical presence in a state will be frequently revisited by state and federal courts in the future.

Endnotes

1. *Deutsche Bank Sec., Inc. v. Montana Bd. of Investors*, 7 N.Y.3d 65, 71 (2006).
2. The Expert Analysis in the Advisory Committee Notes to CPLR 301 by Justice James P. Dollard notes that

   > The purpose of section 301 is to make clear that none of the other sections of Article 3 such as section 302—the "Long Arm Statute" supercede or place a limitation upon the exercise of such traditional bases of jurisdiction over persons, property or status as was permitted by law or judicial decision prior to the enactment of the CPLR.

3. *Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 77 N.Y.2d 28 (1990). The court must be able to conclude that the facts that the corporation is "present" in the state, not occasionally or casually, but with a fair measure of permanence and continuity. *Landoil, supra*; *see also Laufer v. Ostrow*, 55 N.Y.2d 305, 209-310 (1982).
4. *Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 2006 N.Y. Slip Op. 50527U at 5 (Sup Ct., Kings Co. March 29, 2006 Demarest, J.).
5. *See Practice Insights to CPLR 302* by David L. Ferstendig.
6. *Id*.
7. 9 N.Y.3d 375 (2007).
8. *Deutsche Bank Sec., Inc. supra* at 71 (2006); *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988).
9. *McKee Elec. Co. v. Rowland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967); *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 471 (1973).
10. *See also Reiner & Co. v. Schwartz*, 41 N.Y.2d 648 (1977); *Deutsche Bank Sec., Inc., supra; Parke-Bernet Galleries Inc. v. Franklyn*, 26 N.Y.2d 903 (1967).
11. N.Y.C.R.R. 1210.1 provides:

    > You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

12. However, the Court of Appeals cautioned that not every "purposeful activity" constitutes a "transaction of business" for purposes of CPLR 302(a)(1). For example "merely telephon[ing] a single order" to New York requesting a shipment of goods to another state will not suffice (*see Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17, citing *Katz & Son Billiard Prods. v. Correale & Sons*, 20 N.Y.2d 903 (1967)), nor will the transitory presence of a corporate official here, (*see McKee, supra* at 382), and communications and shipments sent here by an out-of-state doctor serving as a "consultant" to plaintiff's New York physician (*see Etra v. Matta*, 61 N.Y.2d 455, 458-59 (1984)) do not support CPLR 302(a)(1) jurisdiction.
13. In *Haar v. Armendaris Corp.*, 31 N.Y.2d 1040 (1973), the defendant had no New York contacts in connection with the plaintiff's representation of it. This is in contrast to the instant matter in which it is not the unilateral activities of the defendant upon which jurisdiction is predicated, but a series of continuing and sustained contacts by the defendants.
14. *Supra*.
15. http://www.binmahfouz.info/news20050503.html? (last visited January 5, 2009).
16. 433 F.3d 1199 (9th Cir 2006). In *Yahoo!*, two French civil rights groups obtained French court orders that required a California-based internet service provider to prevent users of its French website from accessing certain web pages associated with Nazism. By the terms of those orders, Yahoo! was required to alter its servers, located in California, under threat of a substantial monetary penalty. Yahoo! then sued the French groups in federal court in California, seeking a declaratory judgment that the French orders were not enforceable or recognizable in the United States based, in part, upon their interference with Yahoo!'s First Amendment rights. A majority of the panel ruled that *in personam* jurisdiction could be exercised over the French groups.
17. *Ehrenfeld v. Bin Mahfouz, supra.*
18. Defendant's pre-filing demand letter and his service of documents were required under English procedural rules governing the prosecution of defamation actions.
19. *See Ferrante Equipment Co. v. Lasker-Goldman Corp.*, 26 N.Y.2d 280 (1970).
20. 7 N.Y.3d 71, 72 (2006).
21. They used the Bloomberg Messaging System, an instant messaging system provided to Bloomberg subscribers.
22. *Id*. at 72.
23. For an excellent summary of federal case law in this area *see Cyberjurisdiction: When Does the Use of the Internet Establish Personal Jurisdiction?*, 63 Ala. Law. 36 (January 2002); *see also A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 Berkely Tech L.J. 519 (2004).
24. 952 F. Supp 1119 (U.S.D.C. W.D. Pa. 1997).
25. *Supra* at 1124.
26. *Id*.
27. *Mink v. AAAA Development, LLC*, 190 F3d 333 (5th Cir. 1999).
28. 490 F.3d 239 (2d Cir. 2007).
29. *Best Van Lines*, *supra* at 253.

30. 571 F. Supp. 2d 518 (S.D.N.Y. 2008).
31. *Id*. at 530.
32. *Id.*
33. 17 Misc. 3d 212 (Sup. Ct., Richmond Co. 2007).
34. CPLR 302(a)(1).
35. 13 Misc. 3d 807 (Sup. Ct., N.Y. Co. 2006).
36. *Andrew Greenberg, Inc. v. Sir-Tech Software, Inc.*, 297 A.D.2d 834 (3d Dep't 2002), *reversed on other groun*ds, 4 N.Y.3d 185 (2005); *Mink v. AAAA Dev. LLC*, *supra* at 336-337.
37. 2006 Slip Op. 50527U; 11 Misc. 3d 1072A, 235 N.Y.L.J. 83 (Sup. Ct., Kings Co. 2006).
38. *Supra* note 31.
39. 2008 N.Y. Slip Op. 51517U; 20 Misc. 3d 1122A; 2008 N.Y. Misc. LEXIS 4393 (Sup. Ct., N.Y. Co. 2008).
40. *Fischbarg*, *supra* at 273-275.
41. *New World Sourcing Group, Inc.*, *supra* at 5.
42. 3 Misc. 3d 835 (Sup. Ct., Suffolk Co. 2004).
43. *Vandermark v. Jotomo Corp*., 42 A.D.3d 931 (4th Dep't 2007).
44. *Id*. at 932.
45. 18 Misc. 3d 1127A, 2008 N.Y. Misc. LEXIS 351 (Sup. Ct., Kings Co. 2008).
46. For example, the extent of the website's interactive nature, whether the defendant "substantially solicited" New York business through its website, and whether the defendant's servicing of New York customers has been "systematic and continuous."
47. 2008 N.Y. Slip Op. 52080U, 2008 N.Y. Misc. LEXIS 6053 (Sup. Ct., Suffolk Co. 2008).
48. *See Bankrate; Baggs; Chestnut Ridge Air, supra*.
49. *See Aqua Prods. Inc. v. Smartpool, Inc*., 2005 U.S. Dist LEXIS 17246 (S.D.N.Y. 2005); *Heidle v. Prospect Reef Resort, Ltd*., 364 F. Supp. 2d 312 (W.D.N.Y. 2005); *Schultz v. Ocean Classroom Found., Inc*., 2004 U.S. Dist. LEXIS 3903 (S.D.N.Y. 2004); *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 230 F. Supp. 2d 376 (S.D.N.Y. 2002); *Spencer Trask Ventures v. Archos, S.A*., 2002 U.S. Dist. LEXIS 4396 (S.D.N.Y. 2002); *Tese-Milner v. Ad Efx Promotions, Inc*., 2007 U.S. Dist. LEXIS 5397 (S.D.N.Y. 2007); *CBC Wood Prods., Inc. v. LMD Integrated Logistics, Servs., Inc*., 455 F. Supp. 2d 218 (E.D.N.Y. 2006); *Cornell v. Assicurazioni Generali S.p.A*., 200 U.S. Dist. LEXIS 2922 (S.D.N.Y. 2000); *Cicalo v. Harrah's Operating Co., Inc*., 2008 U.S. Dist. LEXIS 333806 (S.D.N.Y. 2008); *Thomas Publ. Co. v. Industrial Quick Search, Inc*., 237 F. Supp. 2d 489 (S.D.N.Y. 2002); *Body Beautiful, Inc. v. Fred Hayman Beverly Hills, Inc*., 1997 U.S. Dist. LEXIS 12666 (S.D.N.Y. 1997); *Landoil Resources Corp. v. Alexander & Alexander Servs. Inc*., 918 F. 2d 1039 (2d Cir 1990); *Aquascutum of London, Inc., v. SS American Champion*, 426 F.2d 205 (2d Cir 1970).
50. 2008 N.Y. Slip Op. 28384; 2008 N.Y. Misc LEXIS 5874; 240 N.Y.L.J. 78; 866 N.Y.S.2d 488 (Civ Ct., Kings Co. 2008 Ash, J).
51. CPLR 302(a)(1).
52. 17 Misc. 3d 491 (Civ. Ct., N.Y. Co. 2007).
53. 38 A.D.3d 270 (1st Dep't 2007).
54. 2008 N.Y. Slip Op. 51476U; 20 Misc. 3d 1119A; 2008 N.Y. Misc. LEXIS 4259 (Sup. Ct., N.Y. Co. 2008).
55. The gallery issued an invoice addressed to the defendant's New York office, the plaintiff paid by transferring funds from a New York bank to the gallery's Swiss account, and the defendant faxed a letter with packaging and insurance instructions to the gallery from its New York office.
56. *See, e.g., Winfield Collection, Ltd. v. McCauley*, 105 F. Supp 746, 749 (E.D. Mich, S.D. 2000); *United Cutlery Corp*., 2003 U.S. Dist. LEXIS 21664, 13 (D. Md. 2003).
57. 15 Misc. 3d 621, 632 (Civil Ct., Richmond Co. 2007).
58. *Boss v. American Express Financial Advisors, Inc*., 6 N.Y.3d 242 (2006); *see also Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996).
59. *See, e.g,. New York Trans Harbor, LLC v. Derektor Shipyards Conn., LLC*, 2008 N.Y. Slip Op 50998U; 19 Misc. 3d 1134A; 2008 N.Y. Misc. LEXIS 2852 (Sup Ct., Kings Co. 2008).

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Ouch, That Hurts

The Difference Between *Intentional Injury* Exclusions and *Assault* Exclusions

By Dan D. Kohane

The injured party has been hit by the insured with a beer bottle. The bottle is now permanently embedded in his head and he's now known by the nickname "Molson." Your insured has timely advised you of the incident and he is being sued for his conduct. Do you have an obligation to defend and indemnify?

With regularity, coverage inquiries are made with respect to injuries sustained in fights and assaults. The questions come up with both personal lines and commercial lines policies.

The first question always to be asked is whether or not the incident is an accident or occurrence under the policy or whether one is alleged. Without the event constituting an accident or occurrence, the policy does not attach and an insurer has neither an obligation to defend nor indemnify its insured.

That's the first response to the insured, if that is what the investigation reveals. However, there may be less clarity than you wish in the facts or the allegations, and it may well be necessary to consider policy exclusions.

We see exclusions focus on the intent to cause injury:

1. **Coverage E—Personal Liability and Coverage F—Medical Payments to Others** do not apply to "bodily injury" or "property damage":

a. Which is expected or intended by one or more "insureds" . . .

And this:

This insurance does not apply to:

b. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

The most recent Court of Appeals case analyzing this exclusion was decided in 2006. In *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131 (2006), one Alfred Cook shot and killed Richard Barber inside his home. Barber weighed about 360 pounds, was approximately three times Cook's size and had previously attacked the smaller man, causing injury to his leg. The facts—as taken from the decision—are quite compelling:

> On the morning of February 20, Barber and another man were outside of Cook's home, hurling objects at the house. They left without further incident, but Barber returned later that day with two other companions. When Cook, who was standing outside his door, saw them approaching, he asked a person visiting him to leave because he expected trouble. He returned inside, locked the door and, anticipating a confrontation, retrieved a .25 caliber handgun from his bedroom.
>
> There was further testimony that the group burst into Cook's home. The four individuals gathered in the kitchen where Barber began demanding money from Cook while pounding his fists on the kitchen table. Cook, alarmed, drew his gun and demanded that they leave his house. Barber apparently laughed at the small size of the pistol, at which point Cook withdrew to his bedroom for a larger weapon. He picked up a loaded, 12 gauge shotgun and stood in his living room at the far end of his pool table. Cook again ordered them to leave the house. Although Barber started to head toward the door with his companions, he stopped at the opposite end of the pool table, turned to face Cook and told his companions to take anything of value, and that he would meet them outside because he had some business to attend to. When Barber menacingly started advancing toward Cook, Cook warned him that he would shoot if he came any closer. Cook aimed his gun toward the lowest part of Barber's body that was not obscured by the pool table--his navel. When Barber was about one step away from the barrel of the gun, Cook fired a shot into Barber's abdomen. Barber died later that day at a hospital.

A wrongful death action was commenced against Cook. The first cause of action alleged that "[i]njury to the decedent and the decedent's death were caused by the negligence of the defendant, Alfred S. Cook." Specifically,

the complaint alleges that Cook's behavior "consisted of negligently playing with a loaded shotgun; negligently pointing that shotgun at the abdomen of the decedent; negligently discharging that shotgun into the decedent's abdomen; and engaging in unruly behavior at the Defendant's residence on February 20, 2002." In a second cause of action, the complaint alleges that Cook intentionally shot Barber, causing Barber's death. At his examination before trial, Cook testified, "I knew the [shot from the] shotgun would injure Mr. Barber because I had to stop him, but I did not anticipate it killing him."

The Appellate Division held that since Cook intentionally shot Barber, his actions could not be considered an accident or "occurrence" and, thus, were not covered by the policy and that the acts came within the policy exclusion for bodily injury "expected or intended" by the insured. The Court of Appeals reversed, and held that the insurer had a duty to defend:

> It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest . . . a reasonable possibility of coverage . . . If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be . . ."
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> * * *
>
> When an insurer seeks to disclaim coverage on the further basis of an exclusion, as it does here, the insurer will be required to "provide a defense unless it can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation' . . . In addition, exclusions are subject to strict construction and must be read narrowly . . ."

The Court then held:

> . . . that "an examination of the wrongful death complaint leads to the conclusion that Cook's claim is covered by the policy. Among other things, the complaint alleges that Cook negligently caused Barber's death. If such allegations can be proven, they would fall within the scope of the policy as a covered occurrence. . . . Thus, if Cook accidentally or negligently caused Barber's death, such event may be considered an 'occurrence' within the meaning of the policy and coverage would apply." . . . Turning to the exclusion—as an allegation of negligence implies an unintentional or unexpected event, Hartford necessarily has failed to demonstrate that the allegations of the complaint are subject to no other interpretation than that Cook "expected or intended" the harm to Barber.
>
> In light of this disposition, it is unnecessary to address the remaining arguments—specifically, whether acts of self-defense are intentional acts precluding coverage under a homeowner's policy. Suffice it to say that a reasonable insured under these circumstances would have expected coverage under the policy. As to a duty to indemnify, that determination will abide the trial.

The New York courts look at these *intentional injury* exclusions differently from "assault" exclusions. The latter focuses on the **act of assault** rather than on the intended results. Compare the exclusions above with the one considered by the Court of Appeals in the *Mount Vernon* case:

> It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery, and Assault and Battery shall not be deemed an accident whether or not committed by or at the direction of the insured.

Mount Vernon Fire Ins. Co. v. Creative Hous., 88 N.Y.2d 347, 350 (1996)

Or this:

> . . . arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery.

Mark McNichol Enters. v. First Fin. Ins. Co., 284 A.D.2d 964, 965 (4th Dep't 2001)

Self-Defense Cases

In *Firemen's Ins. Co. v. 860 West Tower*, 246 A.D.2d 401, 401-402 (1st Dep't 1998), the insured argued that his conduct was an exercise of reasonable force to protect him in an unprovoked assault. The lower court declared that the insurer had an obligation to defend and the First Department affirmed:

> **The IAS Court correctly held that plaintiff is required to defend defendant building, owners, managing agent and their employee in an underlying action brought by two former employees alleging an unprovoked assault by defendant employee**. While the policy specifically excludes coverage for bodily injury "expected or intended from the standpoint of the insured," it also specifically excepts from this exclusion bodily injury "resulting from the use of reasonable force to protect persons or property," i.e., acts of self-defense.

How did the court know that this was supposedly an act of self-defense when the complaint only alleged intentional conduct? It was, if you will, push-back from the insured:

> Both the answer to the underlying complaint, and a letter from defendants to plaintiff asking it to reconsider its denial of their request for a defense in light of the dismissal of criminal charges that had been brought against defendant employee, and offering to provide it with additional witness statements, gave plaintiff actual knowledge of facts establishing a reasonable possibility that defendant employee was acting in self-defense against the plaintiffs in the underlying action (see, Fitzpatrick v American Honda Motor Co., 78 NY2d 61).

The Appellate Division cites to the famous *Fitzpatrick* case which holds that an insurer must expand its obligation to defend based on its knowledge of the facts, even outside of the complaint.

In *M.J. Frenzy, LLC v. Utica Nat'l Ins. Group*, 309 A.D.2d 566, 567 (1st Dep't 2003), the plaintiff, a jazz club, was insured under a policy issued by Utica that contains an exclusion for "bodily injury * * * intended from the standpoint of the insured" but which exempts from such exclusion "bodily injury resulting from the use of reasonable force to protect persons or property." Plaintiff's bartender was involved in an altercation after a drunk, disorderly and abusive patron grabbed him. Police responded and the patron was eventually removed from the premises complaining of an injury to his ankle.

Plaintiff was served with a summons and complaint by the patron alleging assault and battery, negligent hiring and supervision and violation of the Dram Shop Act (General Obligations Law § 11-101[1]). As relevant here, Utica disclaimed coverage, relying on the exclusion for intentional acts.

The court noted that the policy did not include an "assault" exclusion and directed the carrier to defend:

> The cases cited by defendant in support of its contention that the policy's intentional acts exclusion relieved it of any duty to defend or indemnify plaintiff for the acts of its employee are inapposite, since the governing policies in those cases expressly provide for the exclusion of any claims arising out of assault and battery (see U.S. Underwriters v Val-Blue Corp., 85 N.Y.2d 821, 823, 623 N.Y.S.2d 834, 647 N.E.2d 1342 [1995]; Perez-Mendez v Roseland Amusement & Dev. Corp., 305 A.D.2d 166, 757 N.Y.S.2d 848 [2003]; [***3] Handlebar Inc. v Utica First Ins. Co., 290 A.D.2d 633, 735 N.Y.S.2d 249 [2002], lv denied 98 N.Y.2d 601, 744 N.Y.S.2d 761, 771 N.E.2d 834 [2002]).

M.J. Frenzy, LLC v. Utica Nat'l Ins. Group, 309 A.D.2d 566, 567 (1st Dep't 2003)

Compare those cases to the *Handlebar* case cited in the *M.J. Frenzy, Inc.* decision. In that case, there was an intentional injury exclusion like yours but, in addition, an *assault exclusion*. Note how that led to a different result, because the "reasonable force" exception did NOT apply to the assault exclusion:

> Defendant disclaimed any responsibility to defend or indemnify plaintiffs based on two provisions found in the insurance policy or endorsements or attachments. The first of these endorsements (hereinafter referred to as the assault exclusion) provides as follows: **"Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes any and all claims arising out of any assault, battery, fight, altercation, misconduct or any other similar incident or act of violence, whether caused by or at the instigation of, or at the direction of the insured, his employees, customers, patrons, guests or any cause whatsoever, including but not limited to claims of negligence or improper hiring practices, negligent, improper or non-existent supervision of employees, patrons or guests and negligence in failing to protect customers, patrons or guests**."
>
> * * *

Defendant moved for summary judgment, contending that the assault exclusion relieved it of all liability to defend and indemnify plaintiffs for the negligence and assault causes of action . . . **In addition to opposing defendant's motion for summary judgment, plaintiffs cross-moved for partial summary judgment, contending that the following policy language creates an ambiguity in the policy entitling them to a defense, if not indemnification:**

"WE DO NOT PAY FOR:

"a) bodily injury or property damage expected or intended from the standpoint of the insured. This exclusion does not apply to bodily injury resulting from the use of reasonable force to protect persons or property"

Plaintiffs argued that the assault exclusion applied to offensive conduct, whereas this policy provision applied to defensive conduct and that Greaves engaged in only defensive conduct by using reasonable force to protect himself and his patrons. Plaintiffs also cross-moved for additional discovery asserting that they were unable to factually determine if the assault exclusion was actually part of their policy. Supreme Court denied defendant's motion for summary judgment and partially granted plaintiffs' cross motion for partial summary judgment by directing that defendant has a duty to defend plaintiffs in the underlying action. Supreme Court's decision is silent with respect to the cross motion for additional discovery. Defendant appeals.

. . . Plaintiffs, as limited by their brief, argue . . . that the basic policy provisions and the assault exclusion, "read together," create a duty to defend where the insured allegedly injured Myroniuk while acting in self-defense or in defense of others. As an alternative argument, plaintiffs only argue that an ambiguity is created by the two policy provisions. . . . This exclusion must be read with the policy, "and the words of the policy remain in full force and effect except as altered by the words of the endorsement" (County of Columbia v Continental Ins. Co., 83 N.Y.2d 618, 628). The assault exclusion begins, "Notwithstanding anything contained herein to the contrary." Clearly, the language of the exclusion then controls over any contrary language in the policy.

Each of Myroniuk's negligence theories is dependent on the assault and battery and, as they are solely and entirely within the exclusionary provisions of the assault exclusion, defendant has no duty to defend or indemnify plaintiffs (see, Mount Vernon Fire Ins. Co. v Creative Hous., 88 N.Y.2d 347, 351; U.S. Underwriters Ins. Co. v Val-Blue Corp., 85 N.Y.2d 821, 823).

*Handlebar Inc. v. Utica First Ins. Co***.,** 290 A.D.2d 633, 634-635 (3d Dep't 2002)

The analysis of cases that suggest assault is always the same. First, determine whether the incident constitutes an accident or occurrence as defined in the policy. Second, as the claim is presented, examine the exclusions and see (a) which one you have and (b) whether the conduct falls completely within the exclusion. Only then can you determine how to properly respond to the insured.

P.S.—Do it promptly!

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Limits on Attorney Liability for Client Misconduct in Failing to Disclose Risk of Collateralized Debt Obligations

By Alan C. Kelhoffer

New York's First Judicial Department recently took an important step in limiting the liability that attorneys will bear for their part in assisting clients in conveying overvalued collateralized debt obligations. This reprieve came about in the unlikely context of an appeal from a summary judgment granting excess attorney liability insurers declaratory judgment in the case of *Executive Risk Indemnity Inc. v. Pepper Hamilton LLP*.[1]

The underlying claims against Pepper Hamilton arose in the context of alleged misdeeds by one of its former clients. As summarized by the Court, the client was allegedly engaged in a securities "scheme" wherein it financed loans to students, which it "pooled into securities" that it sold to investors, "using private placement memoranda prepared by the law firm." According to the decision, another of Pepper Hamilton's clients provided "credit risk insurance" for the pooled loans. The debacle for Pepper Hamilton is that that the lender allegedly "understated its default rates," thereby misleading investors, underwriters and credit risk insurers, including another of Pepper Hamilton's clients.[2]

In *Executive Risk Indemnity Inc. v. Pepper Hamilton LLP*, the excess professional liability insurers of the law firm Pepper Hamilton sought a declaration that they had no obligation to indemnify the firm and one of its partners in connection with malpractice and other more serious claims against them.[3] The excess carriers relied upon numerous theories, but principally upon the "prior knowledge exclusion." The "prior knowledge" exclusion provides that the policies do not apply to any claim "arising out of any act, error, or omission committed prior to the inception date of the policy which the insured knew or reasonably should have known could result in a claim, but failed to disclose to the Company at inception."[4]

The excess insurers were granted summary judgment by the lower court on grounds that the "prior knowledge" exclusion barred coverage as a matter of law. The First Department reversed, rejecting the excess carriers' reliance on the applicable policies' "prior knowledge" exclusion, to which it gave a very narrow construction. Significantly, the court opined that "we cannot read the exclusion as the insurers suggest, that is, to apply whenever the insured has knowledge of a *client's* misconduct and represented the client while the misconduct occurred."[5] The Court went on to say that "[w]e reject the suggestion that the prior knowledge exclusion applies when the knowledge possessed by the insured is that it drafted documents that the client then used to further its scheme."[6]

In rendering its decision, the First Department reached for guidance from the Third Circuit's decision in *Coregis Insurance Co. v. Baratta & Fenerty, Ltd.*,[7] which prescribed a two-prong test to determine whether a similarly worded "prior knowledge" exclusion barred attorney malpractice coverage for a claim against the firm for failing to timely file a medical malpractice action within the statute of limitations. The Third Circuit applied a "mixed subjective/objective standard" in upholding the lower court's determination that coverage was properly denied.[8] The *Coregis* court's harshly worded decision in favor of the law firm's insurers pointed out that the law firm clearly knew that it had made a mistake in failing to timely file its client's case and should objectively have anticipated a lawsuit by this dissatisfied client.[9]

In applying *Coregis* to the facts at hand, the First Department conceded that Pepper Hamilton also "subjectively either believed or feared that the firm might be subjected to professional liability claims by entities claiming injury as a result" of its financial service client's conduct and knew that "its own legal work" assisted that client's operations.[10] However, the First Department focused its inquiry on the second, objective tier of the analysis, scrutinizing whether the established facts were so egregious as to satisfy the objective requirement that there be a basis upon which to reasonably expect a claim against the law firm.[11] The Court observed that there was "certainly no wrongful conduct on Pepper Hamilton's part" so far established.[12]

Embracing a strict and narrow construction of the "prior knowledge" exclusion, the First Department concluded that, "the 'known of act', error or omission at the heart of such a potential claim must be that of the insured, not that of its client."[13] The Court stated, "Furthermore, such act, error or omission must constitute wrongful conduct on the part of the insured; the firm's mere representation of a client while the client itself—unknown to the firm—engages in wrongful conduct cannot suffice."[14]

Expanding on its decision, the First Department further stated that the "prior knowledge" exclusion cannot be triggered by the "mere act of providing professional services."[15] The Court thus rejected any "suggestion that the prior knowledge exclusion applies when the knowledge possessed by the insured is that it drafted documents that the client then used to further its scheme."[16] Significantly, the First Department decried the chilling effect that could be engendered by requiring law firms to disclose client confidences to their insurance carriers

out of self-interest in procuring insurance coverage: "In our view, the policy cannot be properly read to require Pepper Hamilton to notify its potential insurers of its client's misconduct and its own recognition that it may be subjected to legal claims brought by those injured as a result of its client's misconduct."[17]

Thus, having information averse to a client is not alone sufficient to trigger the "prior knowledge" exclusion, but rather, "the firm must have itself acted improperly, so as to have itself created the possibility of a professional liability claim against it."[18] Pepper Hamilton was therefore spared the immediate rescission of its excess policies for having allegedly drafted documents that its client then allegedly misused, at least for the time being. It will certainly be necessary to follow this decision and its effects on emerging litigation. However, it appears clear for now that attorneys are not complicit in a client's scheme by merely having engaged in the practice of law for that client.

Endnotes

1. 2008 WL 4308148 (1st Dep't 2008).
2. *Executive Risk Indem. Inc. v. Pepper Hamilton LLP,* at *1.
3. *Id.* at *1–2.
4. *Id.* at *3.
5. *Id.* at *4.
6. *Id.* at *5.
7. 264 F.3d 302 (3d Cir. 2001).
8. *Id.* at 306–7.
9. *Id.* at 307.
10. *Executive Risk Indem. Inc. v. Pepper Hamilton LLP,* at *3–4.
11. *Id.* at *3–4.
12. *Id.* at *4.
13. *Id.* at *5.
14. *Id.* at *4.
15. *Id.* at *5.
16. *Id.*
17. *Id.*
18. *Id.*

The Case for Diversity

By Mirna Martinez Santiago

You may have noticed the term "diversity and inclusion" cropping up all over. Companies devote training to it; books promote it; and sites are proliferating on the Internet promising to increase companies' diversity numbers. So why the sudden interest in Diversity and Inclusion?

For starters, the country's makeup is changing. In July of 2007, *USA Today* reported that minorities totaled 100 million of the 297 million people living in the country at the time. That is over one-third of the total U.S. population. At the same time (July 2007), the U.S. Census Bureau forecasted that by the year 2050, 53% of the population would be white (of non-Hispanic origin). Thus, whites would retain their majority status for almost another half century.

"Having a workforce that reflects the pool of customers can only give a company a competitive advantage in the global marketplace."

In August 2008, however, the U.S. Census Bureau revealed that its previous projections were erroneous: in actuality, white Americans would no longer be a majority in this country by 2042. By 2050, whites will make up only 46 percent of the population. African Americans are expected to make up 15 percent; Latinos will account for 30 percent; and Asians are anticipated to increase to 9 percent of the United States' population.[1]

These changes impact business directly. Psychological studies have shown that people prefer to interact with others whom they perceive to be similar to themselves. If you are a business with a product to sell—and which business isn't?—the entire population is your potential customer base. A progressive company will recognize the implications of these population changes and will shift accordingly in customer focus and in the composition of its workforce in order to better accommodate its current customers and to attract future patrons. Where at least one-third of the potential customer base is comprised of minorities, it makes sense to have a representative number of minorities on the workforce.

Further, as the customer base changes, the customer needs also change. The products that were satisfactory to one base of customers may not be what other customers desire. For instance, Proctor & Gamble realized that with larger minority numbers, there was now a market for products designed for ethnic hair and launched Pantene's Relaxed and Natural hair-care line in 2002.[2] If your workforce is reflective of only one segment of the population, how can you tap into and meet the needs of the rest? A company that is in tune with the needs of *all* its customers stands to make the most profit. A diverse workforce brings with it a diversity of experiences, abilities and ideas.

Additionally, where a business requires a lot of face-to-face time, the customer may prefer to conduct business with people he believes understand his perspective on life. Most often, those people look like him or her. Thus, diversity is a must from a customer service perspective.

Consider also the financial incentives for diversification. In 2007, the Selig Center for Economic Growth in Georgia published a report indicating that the buying power of Latinos in the United States would exceed $860 billion in 2007 and is expected to be more than $1.2 trillion by 2012. African American buying power totaled $845 billion in 2007 and is expected to rise by 34 percent by 2012. Asian Americans have buying power of $459 billion, increasing to $670 billion by 2012.

The world's largest companies have long been trying to harness the amazing spending power possessed by minorities in this country. One way that they have been able to do that is by hiring the finest minority minds to help them tap into the collective. Proctor & Gamble, Co., for instance, hired two African American–helmed advertising agencies to assist the companies' efforts in reaching African American consumers. The company also developed products directed at the minority market—which has increased sales for the company as a whole.

On the opposite end, Toyota was the target of complaints in 1999, when it was deemed to have published advertisements offensive to the minority community. Fearing a loss of business, Toyota quickly issued apologies. In 2003, Toyota's spokesperson, Xavier Dominicis, was quoted as saying that the advertising snafus served as a "wake-up call" for the company.[3] Toyota has since increased its relationships with minority vendors and retained a minority advertising agency to assist it.

Still not convinced? Diversity is invaluable for public relations purposes. Ponder this: one of the criteria for inclusion in *Fortune Magazine*'s annual "100 Best Companies to Work For" list is diversity. In fact, when Fortune added the Bingham McCutchen law firm to the list for the fourth consecutive year in 2008, it specifically noted the firm's commitment to diversity as a key factor in its selection.

Last, companies are going global and the global market is the epitome of diversity. Having a workforce that reflects the pool of customers can only give a company a competitive advantage in the global marketplace.

"As minorities become the majority in this country, it makes excellent business sense to put into place a diversity plan and fully embrace the contributions that a diverse workforce can provide. "

Increasing diversity is certainly the politically correct and socially conscious thing to do, but, as noted above, diversity also confers certain financial benefits upon a company. As minorities become the majority in this country, it makes excellent business sense to put into place a diversity plan and fully embrace the contributions that a diverse workforce can provide.

Endnotes

1. The Associated Press, *White Americans no longer a majority by 2042, Immigration, higher birth rates among minorities to speed up diversity*, MSNBC.com, August 13, 2008.
2. Dan Monk, Lucy May, *Minority Spending Rate Soars*, Business Courier, August 15, 2003.
3. *Id.*

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Excuses, Excuses, Excuses

A Primer and Checklist on Late Notice Excuses

By Dan D. Kohane

There are two very popular explanations given by insureds for failing to give timely notice of an accident. One is that there was no reasonable ground to believe that at the time of the accident, bodily injury would follow. The related offering was no reasonable ground to believe that the insured would be held liable for the accident or claim. Under what circumstances will the courts give the insured a pass for breaching a notice provision when one of these excuses is offered?

- "Bad excuses are worse than none." **Thomas Fuller**
- "He that is good for making excuses is seldom good for anything else." **Ben Franklin**

Flash back to January 20, 1913, a Monday. Famous for the day that concert pianist Ethel Leginska[1] made her debut in NYC at Aeolian Hall,[2] it is less famous for a car accident involving a vehicle owned by the Hass Tobacco Company.[3] As the Court of Appeals wrote, on that day *one of its machines*[4] *ran into and struck Joseph Bolger, causing him injuries which subsequently resulted in a judgment in his favor for over four thousand dollars.*" The auto policy issued to Hass required immediate notice. Alas, notice was not given for a breathtakingingly long **10 days** and the insurer denied coverage based on a breach of the policy condition.

- "Hold yourself responsible for a higher standard than anybody else expects of you, never excuse yourself." **Henry Ward Beecher**
- "If you don't want to do something, one excuse is as good as another." **Yiddish Proverb**
- "Excuses are lies we tell ourselves to avoid dealing with unpleasant truths." **Steve Palina**[5]

Nobody known recorded what happened on January 20 except on the following day, there was a story in the newspaper about the accident. A manager at Hass asked the driver what occurred and the driver indicated:

> "It didn't amount to anything." He was driving into a garage and the boy ran out from the curb and struck the machine and he was knocked down. The manager asked if the boy was hurt. The driver replied, "Only slightly, for I brushed off his clothes and he went away. There was a policeman right there. It wasn't necessary to report any accident. I don't think it amounts to much."

The manager accepted that report and did not advise the insurer.

Under these circumstances, the Court held, the insured was not absolved from making the report required by its policy. The Court of Appeals was bothered that:

> . . . no investigation was made. There was no assurance by the person struck that he was uninjured. There was no opportunity by later observations of determining that he was not in fact injured. The plaintiff relied wholly upon the driver's opinion, an opinion which as subsequent events showed was a mistaken one.

Hass Tobacco Co. v. Am. Fid. Co., 226 N.Y. 343, 346-347 (N.Y. 1919)

The high court, relying on the precedent set forth in *Hass*, has revisited this excuse of "non-liability" in a number of key cases thereafter. In one on the most often cited, *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436 (1972) is worth reviewing.

On May 23, 1965 and October 4, 1965, fires occurred at the same premises in New York City. On December 19, the *Sunday News* reported that two firemen had filed claims against the City of New York for injuries allegedly sustained in the October 4 fire. Mention was also made in the article of the possible liability of the owners and operators of the premises. This article was brought to the attention of the insureds, Levy and Acker-Fitzsimons, the owner and managing agents of the building, respectively.

The owner was concerned enough to notify his broker but *the broker took no action, apparently believing that, absent some more substantial basis; there was nothing to report to the carrier.* The Court of Appeals disagreed:

> While this information was, in our view, sufficient to apprise the insureds of the occurrence, of itself, it probably was not a sufficient predicate for giving immediate notice. **However, it seems to us that such information would cause a reasonable and prudent person to investigate the circumstances, ascertain the facts, and evaluate his potential liability** (see *Hass Tobacco Co. v. American Fid. Co.*, 226 N.Y., at p. 345), particularly where there were, at the time of the alleged injuries,

> existent violations against the premises involving structural deficiencies caused by the first fire (May 23, 1965). Similarly, although the belief that firemen go at their own risk generally accords with the law . . . under these circumstances, and **absent an investigation of the facts, the insured's bare reliance on that belief would appear to be unreasonable.**

Accordingly, the focus of the Court was clear: would a reasonably prudent person, receiving information about an accident, investigate the facts and evaluate his potential *liability*. Absent an investigation, a reliance on a "good faith belief" will generally be considered "unreasonable."

In 1974, the Court of Appeals had the chance to revisit the question again. In *Empire City Subway Co. v. Greater New York Mut. Ins. Co.*, 35 N.Y.2d 8 (1974), Empire was the named insured under a policy issued by Greater New York covering highway excavation liability. On October 21, 1968, several months after the work was completed, a man sustained injuries when he fell in an area where the contractor had worked. The injured person brought suit against the city of New York and on June 29, 1970 the city served third-party complaint against Empire alleging that the work was not properly completed. It was not until after a deposition some 16 months after the lawsuit that Empire notified the insurer of the accident and a prompt disclaimer was sent.

The Court held that when the insured received the third party pleading, it was required to *exercise reasonable care to ascertain facts about the accident*:

> While a good-faith belief of non-liability may excuse or explain a seeming failure to give timely notice *(Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimmons Corp., supra, at p. 441). . . A reasonably prudent person, faced with a complaint alleging injuries sustained because of defects in a highway at a place described only generally but still within "five to ten feet" from where that person had recently completed excavation work, would at least have taken measures to ascertain whether the situs of the accident was within the area where the work was performed before concluding that there was no basis for liability.* **Where, as here, an accident occurs which may fall within the coverage of an insurance policy the insured may not, without investigation, gratuitously conclude that coverage does not exist**. (Hass Tobacco Co. v. American Fid. Co., 226 N.Y. 343, 347)

Accordingly, it seems quite clear that a failure to conduct an investigation about the facts and circumstances of an accident, once placed on notice, is by its nature sufficient to prohibit an insured from relying on that excuse.

That takes us to the next question:

What if the insured conducts an investigation and concludes that liability does not exist? Is that a sufficient excuse not to notify an insurer?

In *AMRO Carting Corp. v. Allcity Ins. Co.*, 170 A.D.2d 394 (1st Dep't 1991), one Raul Torres, an AMRO employee, brought his 20-year-old son Paul to his job on September 20, 1986. While operating an AMRO truck, Paul sustained an injury to his face which required stitches. AMRO's president, Emile, learned of the accident the day it occurred. Two years later, Paul sued AMRO, seeking $3 million in damage and when notified of the suit, Emile gave Allcity immediate notice. It was Allcity's first notice of the accident as well and a late notice disclaimer followed.

Emile argued that he conducted an investigation surrounding the accident but concluded that Paul had no intention of suing AMRO for damages. **The court held that whether the insured reasonably believed that a claim would not be made would be an issue of fact.**

More recently, the courts—using the *AMRO* analysis—have focused on the insured's reasonable recognition of the possibility of a **claim being made even if the insured did not believe it was liable for the accident**. For example, in *SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 584 (1st Dep't 1998), notice to the insurer did not come until 91 days after the accident. The court noted that the insured was aware of the accident, aware that someone was injured (in a fall down) and it could have easily located and noticed a defect in the sidewalk.

> A reasonable belief in non-liability may excuse an insured's failure to give timely notice, but the insured has the burden of showing the reasonableness of such excuse, given all the circumstances (*Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, (citation omitted). **At issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him** (see, AMRO Carting Corp. v Allcity Ins. Co., 170 AD2d 394 . . . Security Mut. Ins. Co. v Acker-Fitzsimons Corp. . . .)

Another recent affirmation of this approach can be found in *Philadelphia Indem. Ins. Co. v. Genesee Val. Improve-*

ment Corp., 41 A.D.3d 44 (4th Dep't 2007). A roofer, while working for a construction company hired by the insured to repair the insured's roof, was injured when he fell from the insured's building. It was not until the roofer filed suit, pursuant to Labor Law §§ 200, 240(1), and 241(6), against the insured some nine months later that the insured informed the insurer about the incident and the insurer denied coverage on late notice. The insured claimed that it did not notify the insurer of the accident because the insured expected that a subcontractor's insurer would cover the roofer's claims. The court did not believe that a "reasonably prudent person would not have believed himself to be immune from potential civil liability under the circumstances." Even though the worker said he was "okay" and did not threaten suit against the insured, there was an obligation to give notice. Why? Because a claim could be made:

> "Although a good-faith belief in non-liability may excuse a failure to give timely notice (citations omitted) at issue under the policy provision [in this case] is not whether [GVIC had] a good-faith belief in non-liability, but whether [it] should have anticipated a claim" (citation omitted). "[T]he insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (*Security Mut. Ins. Co. of N.Y.*, supra. . . . ,) **In sum, "[a]t issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him.**" (*SSBSS Realty Corp*, *supra*.)

What if the claimant affirmatively states that he or she is not going to bring claim?

The courts are still struggling with this one, but at best, it appears that an affirmative statement by the insured that there is no significant injury or that a claim will not be brought may raise a question of fact about the reasonableness of the delay. In *Surgical Sock Shop II, Inc. v. U.S. Underwriters Insurance Co.*, 2008 N.Y. Slip Op. 2827, 1 (2d Dep't March 25, 2008), the injured party and the insured disagreed on what was said at the time of the accident. However, with sworn proof by the insured (subject to a later fact-finder's consideration) that the insured said she was not hurt and walked away, the court found that a question of fact existed about the reasonableness of the delay. Similarly, in *D'Aloia v. Travelers Ins. Co.*, 85 N.Y.2d 825, 826 (1995), the Court of Appeals affirmed an Appellate Division finding of reasonable excuse where the injured party's parents declined the insureds' offer to pay medical expenses and indicated no intention to sue. See also *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748 (1995), where late notice was excused when the injury did not appear permanent and the fact-finder believed that because of the familial relationship between the injured and the insured, the insured would have known if there were the likelihood of a claim to be made.

Check List

When conducting a late notice investigation, follow the lead provided by the case law. Find out:

- When did the insured first receive notice of the accident?
- What investigation did it conduct?
- When did it learn where the accident took place?
- Did it conduct an investigation to determine:
  - When did the accident take place?
  - Where did the accident take place?
  - How did the accident occur?
  - Was someone injured or did someone complain of pain?
  - What was the extent of the injuries?
  - Did the insured consider the possibility that something it did caused or contributed to the accident?
  - Even if it did not so consider the possibility that it did something wrong, did it consider the possibility of it being sued?
  - Even if it did not consider the possibility of it being sued, did it conduct an investigation to determine if it could be sued for the accident?
  - What was said then, or thereafter, about the possibility of a claim being made?
- Are there witnesses who dispute what the insured indicates its excuse to be?
- How does the claimant respond to the same questions?
- How do witnesses, both party and non-party, respond to the same questions?

Having this information at hand will go a long way in assisting an insurer in making a sustainable determination on the possibility of a late notice disclaimer.

Endnotes

1. According to her legacy website, www.leginska.org:

   > Ethel Leginska, one of the most talented musicians of the 20th century. After making her London debut at Queen's Hall at the age of ten, she studied in Frankfurt and later with the great Leschetizky in Vienna. She then made successful tours of Europe as a concert pianist before going to the USA where she immediately enjoyed huge success and was dubbed 'The Paderewski of Women Pianists'. Later she composed music, and then established for herself a pioneering role as a conductor in an era when women conductors were a rarity. This culminated in the founding by Leginska in the late 1920s of her own women's orchestras. She also composed three operas and in 1935 was the first woman to conduct her own opera in a major opera house, one of several notable 'firsts' achieved by this indomitable, pioneering musician. In 1939 Leginska settled in Los Angeles where, as a piano teacher, she built up a large circle of talented students, continuing in this role right up to her death in 1970.

2. **Aeolian Hall** was a concert hall near Times Square, across the street from Bryant Park. The Aeolian Building was constructed in 1912 for the Aeolian Company, which manufactured pianos and piano rolls. In August 1924. the Aeolian Company sold the building to Schulte Cigar Stores Company for over $5 million, and it has not been used as a concert hall since. Schulte leased the property to Woolworths for a term of 63 years. Today it houses the State University of New York's State College of Optometry. The Aeolian Company's successor was dissolved in bankruptcy in 1985.

3. We have undertaken all kinds of searches to learn what happened to the Hass Tobacco Company, without definitive result. There was an L.B. Hass, a famous tobacconist from Hartford, who demonstrated Connecticut tobacco in the 1889 Paris Exposition. We have also found Haas & Derst Zigarrenfabriken GmbH, an independent tobacco company in Germany. As far as we know, neither the Haas tobacco companies nor L.B. Hass have any relationship to the late Frederick Peter Haas, who was General Counsel of Liggett & Myers from 1965 to 1976, but the coincidence is eerie. As for other Haas, in 1927, Eduard Haas, an Austrian candy executive invented Pez and marketed it as a stop-smoking device. The Pez-Haas. Inc. was founded in the U.S. in 1953 to sell the sweet rectangular candy in the U.S. and took the Haas out of its name in the 1980s.

4. Don't you love the term "machine" being used for a truck?

5. Don't feel badly, I don't know who he is either.

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Appellate Rulings on Collateral Source Reduction of Jury Verdicts

By Brian W. McElhenny

In 1986, the legislature enacted CPLR 4545c, allowing a defendant to reduce a jury verdict for economic damages such as medical expenses or loss of earnings, if the cost or expense was or will be replaced or indemnified by a collateral source.

The Court of Appeals has held that the statute is to be strictly construed since it is in derogation of common law.[1]

After a jury renders a verdict awarding plaintiff medical expenses, rehabilitation expenses, loss of earnings or other economic loss, a defendant can seek a collateral source hearing and offer evidence that a portion of the jury verdict will be replaced or indemnified by a collateral source. A defendant must request a collateral source hearing or else it is waived.[2]

Social Security Benefits as a Collateral Source

In *Young v. Knickerbocker Arena*,[3] a jury awarded plaintiff past and future loss of earnings. Plaintiff had received Social Security disability benefits and her minor children received their own Social Security benefits due to their mother's disability. The trial court reduced plaintiff's past loss of earnings verdict by all the Social Security benefits received by plaintiff and her children. On appeal, the Appellate Division, Third Department held that it was improper to offset the past loss of earnings award by the benefits received by plaintiff's children because the entitlement to those benefits belonged to the children, not the plaintiff.[4]

The trial court in *Young* rejected defendant's request to reduce the future loss of earnings award of $450,000, by plaintiff's potential future Social Security benefits. The evidence at the trial and collateral source hearing established that plaintiff was partially disabled but capable of sedentary work. The Court held that defendants failed to meet the burden of showing by clear and convincing proof that plaintiff will continue to be eligible for the benefits in the future. The Appellate Division affirmed that ruling.[5]

In *Caruso v. Lefrois Builders*[6] plaintiff was awarded loss of earnings. He also had been awarded Social Security disability benefits prior to trial. The trial court denied defendants collateral source reduction, but the Appellate Division, Fourth Department modified the judgment remitting the matter to the trial court to recalculate the damage award after reducing the loss of earnings by the amount of plaintiff's Social Security disability benefits.[7] The Fourth Department held that the evidence supported the conclusion that plaintiff was totally disabled and with reasonable certainty would continue to receive Social Security benefits. The Court rejected plaintiff's argument that he might improve as speculative.

"After a jury renders a verdict awarding plaintiff medical expenses, rehabilitation expenses, loss of earnings or other economic loss, a defendant can seek a collateral source hearing and offer evidence that a portion of the jury verdict will be replaced or indemnified by a collateral source."

In *Ruby v. Budget Rent A Car Corporation*,[8] plaintiff was a 25-year-old man who was rendered paraplegic as a result of a motor vehicle accident. The jury awarded $3,840,000 for future loss of earnings. Despite his injuries, plaintiff worked after the accident and received earnings that were $50,000 less per year on average than his prior earnings. The Appellate Division, First Department vacated the Social Security benefit offset against plaintiff's future loss of earnings because expert testimony showed plaintiff was capable of working in the future in a reduced capacity. As such, defendant failed to show it was highly probable plaintiff would continue to be eligible for Social Security disability benefits.[9]

On December 18, 2007, the Second Department decided *Terranova v. New York City Transit Authority*.[10] Plaintiff firefighter was injured in a fall and was unable to continue working. The jury awarded future loss of earnings of $700,000, representing 10 years of loss of wages. Plaintiff was awarded a line-of-duty disability retirement and then retired. He then received pension benefits consisting of a percentage of prior earnings. Since plaintiff was not eligible for a pension but for the injury, the Appellate Division, Second Department held that the disability pension corresponded directly with the loss of earnings award.[11]

The evidence satisfied the clear and convincing standard of proof that plaintiff was entitled to continue to receive his benefits. The Court held that the mere possibility plaintiff would improve was too speculative to preclude application of the collateral source rule.[12]

Medical Insurance as a Collateral Source

On November 27, 2007, the Appellate Division, Second Department decided *Kihl v. Pfeffer.*[13]

The plaintiff was a passenger in a one-car accident. She was awarded significant damages for past and future medical expenses, loss of earnings, pain and suffering and $7,416,045 for future medication expenses. Plaintiff was married and had medical insurance with United Healthcare as a dependent on her husband's policy. After the accident, United paid a portion of the past medical expenses. The only witness at the collateral source hearing was plaintiff's spouse. He testified his job prospects at his employer were questionable, he intended to relocate to a warmer climate and his marriage was difficult due to his wife's massive injuries.

He further testified that if he left his job he would receive healthcare coverage through COBRA but his wife was uninsurable.

After the jury verdict the parties stipulated to reductions for certain economic losses, but the trial court denied the county's request to offset the future $7 million award for future medication expenses. The Second Department affirmed in a lengthy decision discussing the collateral source offset under CPLR 4545(c).[14]

The purpose of the statute is to prevent plaintiffs from receiving double recoveries for economic loss. The Second Department confirmed that a defendant seeking a collateral source offset must establish entitlement by clear and convincing evidence.[15]

The Court explained that:

> The reasonable certainty test necessarily implicates a two-tiered evaluation of defendants' collateral source proof. First, defendants must establish with reasonable certainty that the plaintiff has received, or will receive, payments from a collateral source.[16]
>
> Reasonable certainty for future collateral source payments also requires an affirmative finding by the Court that a contract or other enforceable agreement entitles the plaintiff to the ongoing receipt of such benefits conditioned only upon the continued future payment of premiums and other financial obligations required by the agreement (See CPLR 4545(c)).[17]

The Court held that the health insurance coverage with United which paid for past medication expenses was a collateral source. It did support a reduction for *past* expenses, but the trial court and Appellate Division held the defendant failed to carry its burden showing with reasonable certainty that the *future* medication expenses would be replaced or indemnified by health insurance.

The Court decision was based on several factors including:

> The lack of reasonable certainty plaintiff's spouse would remain with his employer which was the source of the health insurance;
>
> Uncertainty of whether the health benefits would indefinitely cover the particular medication expense;
>
> Uncertainty of whether plaintiff would remain married to her husband jeopardizing her coverage with United as a dependent beneficiary; and
>
> The argument that plaintiff was otherwise uninsurable.[18]

The Second Department said that no one factor standing alone would necessarily support the grant or denial of a collateral source reduction and the total circumstances of each case must be judged on its own unique facts.

The Court held that strict construction of the reasonable certainty standard of proof is consistent with the purpose of the statute by assuring that awards for economic loss not be reduced absent a highly probable evidentiary showing.

In 1986, Congress passed the Consolidated Budget Reconciliation Act (COBRA).[19]

Under COBRA, an employee who loses his or her job or leaves employment is eligible for continued coverage for at least 18 months.[20] A spouse or child of such an employee is a qualified beneficiary and is entitled to COBRA benefits.[21]

COBRA applies to employer-sponsored plans with at least 20 or more employees in the plan. The plan can also provide for coverage beyond the minimum 18-month period.

With a seriously injured plaintiff, defendants may need to retain a consultant to provide information or evidence at a collateral source hearing to rebut plaintiff's claim that an individual with pre-existing conditions is uninsurable.

Conclusion

Defendants can offset *past* economic losses by offering evidence showing a collateral source such as Social Security benefits or medical insurance paid for part or all of the loss.

It is more difficult to offset future economic losses, particularly those that are substantial and cover lengthy periods of time. Defendants need to obtain evidence showing with reasonable certainty that the future loss will be replaced or indemnified by a collateral source.

Endnotes

1. *Oden v. Chemung County Industrial Development Agency*, 87 N.Y.2d 81, 81, 637 N.Y.S.2d 670 (1995).
2. *Ventriglio v. Active Airport Service Inc.*, 257 A.D.2d 657, 682 N.Y.S.2d 915 (2d Dep't 1999).
3. 281 A.D.2d 761, 722 N.Y.S.2d 596 (3d Dep't 2001).
4. *Id.* at 764-65.
5. *Id.* at 764.
6. 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dep't 1995).
7. *Id.* at 260.
8. 23 A.D.2d 256, 806 N.Y.S.2d 12 (1st Dep't 2005), *lv. to app. den.*, 6 N.Y.3d 712, 816 N.Y.S2d 747.
9. *Id.* at 258.
10. __ N.Y.S.2d __, 2007 WL 446 2591 (2d Dep't 2007).
11. *Id.*
12. *Id.*
13. 848 N.Y.S.2d 200 (2d Dep't 2007).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 29 U.S.C.A. § 1161.
20. 29 U.S.C.A. § 1162(2)(A); 29 U.S.CA 1163. *See also Local 217 Hotel & Restaurant Employers Union v. MHM Inc.*, 976 F.2d 805 at 809 (2d Circuit 1992).
21. 29 U.S.C.A. § 1167.

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TICL Section

Annual Meeting

January 31, 2008 • New York Marriott Marquis

TICL member with Hon. Judith Kaye, Chief Judge of the N.Y. Court of Appeals

Daniel W. Gerber, Chair, with Jean F. Gerbini, Newsletter Editor, with a presentation

Hon. Theodore Jones, N.Y. Court of Appeals Judge and Hon. Semour Boyers, now in private practice

Gary Cusano and Sharon Stern Gerstman with a presentation

Hon. Thomas Dickerson, Appellate Division, Second Department and Chair of the Class Action Committee, a subject on which he has written extensively

TICL Board Meeting (l-r) Eileen E. Buholtz, former Chair; Charles J. Siegel, then Vice-Chair; Gary Cusano, former Chair; and Daniel W. Gerber, then Chair

Table of Contents

TICL Section

Spring Meeting

April 10-13, 2008 • Hotel del Coronado • San Diego, CA

The Hotel del Coronado, San Diego, CA

Program Chair Bob McCarthy and his wife, Chris

Discussing "Subrogation and Recovery Actions" (l-r): Teresa Klaum, New York City; Mirna E. Martinez, Nationwide Insurance Co.; and John Snyder, New Hartford, NY (at the podium)

(l-r): Deborah Boucher, New York City; Scott Ernst, New York City; Anthony Bonfa, Hamilton, Bermuda; Marguerite D. Peck, New York City; Mirna E. Martinez, Nationwide Insurance Co.; and Daniel W. Gerber, TICL Chair (at the podium)

(l-r): Hon. Joseph P. Spinola, Supreme Court, Nassau Co.; Hon. Lucindo Suarez, Supreme Court, Bronx; and Robert F. McCarthy and Brian J. Rayhill, Program Co-Chairs (at the podium)

(l-r): Hon. Joseph P. Spinola, Supreme Court, Nassau Co.; Daniel W. Gerber, TICL Section Chair; Brian J. Rayhill, Program Co-Chair; Robert F. McCarthy, Program Co-Chair; and Hon. Lucindo Suarez, Supreme Court, Bronx

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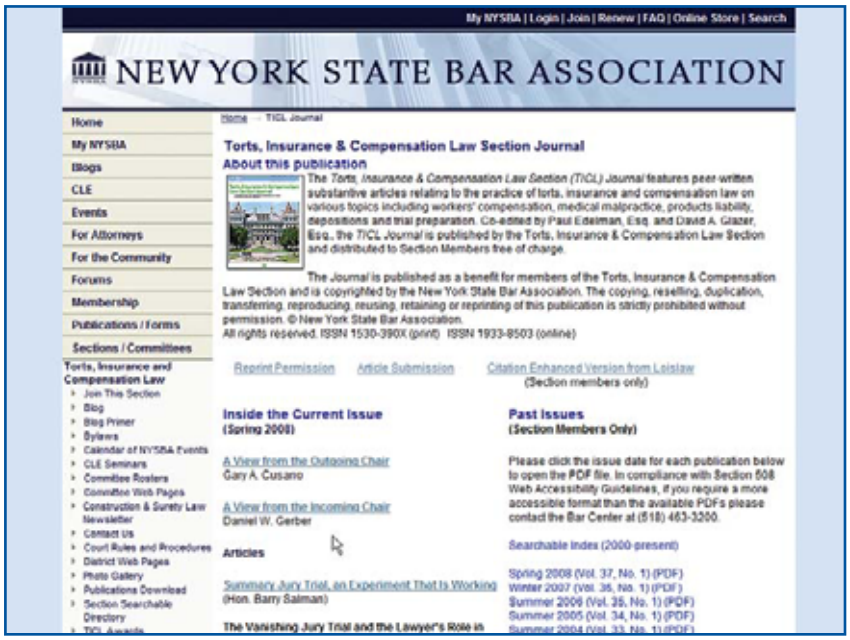

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