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Torts, Insurance & Compensation Law Section Journal

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

Misrepresentations, Mistakes and Omissions in the Insurance Application

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NEW YORK STATE BAR ASSOCIATION

Torts, Insurance & Compensation Law Section

Fall Meeting

October 7-10, 2010

Disney's Yacht & Beach Club Resort, Lake Buena Vista, Florida

Disney's Yacht Club Resort is near Epcot theme park, Disney's Hollywood Studios theme park and Disney's BoardWalk Area. Behind Disney's Yacht Club Resort lie Stormalong Bay and Crescent Lake. Stormalong Bay spans 3 acres, with water slides emerging from the life-size replica of a wrecked ship, lagoons, a slow river to float along in inner tubes and a sand-bottom pool. At the white sand-shored Crescent Lake, Guests can rent a variety of watercraft (such as pedal boats and pontoons) from the Bayside Marina, go on a fishing expedition or take a private cruise on the Breathless, where at night one might see fireworks.

Our meeting in Disney is a family and friends event. The CLE programs are in the morning, leaving you the rest of the day to play golf and/or visit all the great attractions that Disney has to offer.

This is such a great opportunity to plan a mini-vacation with your family around our meeting. We have a special group discount rate from the Disney Yacht & Beach Club Resort. Our hotel rates are good three days prior and three days following the meeting. Book your plane flight now and get your hotel reservations in early since space is limited. To make your hotel reservations, you can download hotel form at www.nysba.org/TICLFall2010.

The Schedule of Events appears on pp. 41-44.

NYSBA

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A View from the Chair

The Section is planning an exciting Annual Meeting in Orlando, Florida at **Walt Disney World from October 7–10, 2010**. Young lawyers admitted to practice less than 10 years will receive a half-price registration fee. For all of our lawyers and their families, there will be plenty to do with activities for the children and adults alike! If you have not been to Disney recently, this is the perfect time to go. Rates and airfare are extremely reasonable and we are a fun and welcoming group. You will not be disappointed.

We welcome to our Section's Executive Committee some newer members, including **Sareer Fazili**—a plaintiff's attorney with Cellino & Barnes who will co-represent our Seventh District. In addition, we have **Joanna Roberto** at the helm of our Insurance Coverage Committee. Joanna is an experienced coverage attorney with Goldberg Segalla LLP and will keep all of us up-to-date on the ever-changing matters in the area of insurance coverage. We welcome both of them and their input.

We also have other openings on the Executive Committee and I welcome anyone with interest to e-mail me at lgiordano@leclairkorona.com. The Executive Committee is the governing body of the Section, with both plaintiffs' and defense lawyers from across the State. We review and work not only on the activities of the Section, but legislative matters that are important to our members. For example, our Section has actively opposed the MAP Program being proposed by the Workers' Compensation Board through the hard work of our Workers' Compensation Division. I invite you to go to our website to review the press releases and articles on this topic.

Furthermore, our **Law School for Insurance Professionals** is set for another year and allows opportunities for all lawyers in our Section with interest to seek to participate in this innovative networking and educational program. In sum, the program is designed as a continuing education presentation for insurance professionals. It allows our members to directly interface with those professionals whom they come in contact with—or want to come in contact with—every day.

In addition, our Section has been active in organizing events for its members across the State. Most recently, **Heath Szymczak** of our Business Torts and Employment Litigation Committee worked collaboratively with other Sections of NYSBA to provide a reception for the outgoing and incoming Commercial Court Justices of the Eighth Judicial District, which was attended by approximately 120 attorneys. Be looking for another event to be organized in the near future. Further, check our website for other events that have been held and will be held in your area. Simply go to www.nysba.org and our Section's webpage.

If you have not found a reason to get involved yet, maybe we can interest you in participating in our groups looking at proposed legislative changes. There have been a number of proposed and drafted bills that will impact our practices everyday. For example, there have been at least two proposals seeking to reform the No-Fault and Serious Injury laws in New York State. Once again, we invite you to participate in these conversations through the Committees, Divisions, your local District Representatives and anyone on the Executive Committee. Hope to see you soon!

Very truly,
Laurie

CPLR Article 16—The Case for Meaningful Limitation of Liability

By Howard S. Shafer and Alicia A. Foy

At common law, a joint tortfeasor would be jointly liable for the plaintiff's full economic and non-economic damages. The New York State legislature, as part of its tort reform legislation, enacted CPLR Article 16 to "remedy the inequities created by common law joint and several liability on low fault, deep pockets defendants."[1] Essentially, Article 16 of the CPLR modifies common law joint and several liability.

Pursuant to CPLR 1601, a joint tortfeasor whose share of fault is 50% or less, is only liable to the extent of that tortfeasor's share of the plaintiff's total non-economic loss. Additionally, the joint tortfeasor whose liability share of fault is more than 50% is jointly liable for the plaintiff's total non-economic loss.[2] As per the distinguished David Siegal, "whatever its literary merit, it has in practical application engendered difficulty centered on section 1602(5)."[3]

Certain actions, such as those "requiring proof of intent," are exempt from the apportionment limitation delineated in CPLR 1601.[4] Therefore, a plaintiff who is injured by an intentional tortfeasor is able to recover the full amount of the plaintiff's economic and non-economic damages from that tortfeasor. However, the Appellate Divisions were divided as to whether this exemption is applicable to "hybrid situations." A typical hybrid situation involves joint tortfeasors, one of whom is a landowner, who exhibited some form of negligence, and the other a non-party who acted intentionally.

Nearly twenty years after the enactment of Article 16, the Court of Appeals, in *Chianese v. Meir,*[5] finally resolved the issue and concluded that apportionment is permissible between negligent tortfeasors and non-party tortfeasors because the 1602(5) exemption does not apply to an action as a whole but only to the tortfeasor who acted with intent.[6] In effect, a negligent tortfeasor in a negligence action is not precluded from seeking the benefits of CPLR 1601 apportionment of liability with a non-party intentional tortfeasor.[7]

In *Chianese*, the plaintiff brought a personal injury action against the building owner and management agency, alleging that inadequate building security led to her attack by a third party. The jury found that the attacker gained entry to the premises through a negligently maintained entrance, which was a substantial factor in causing the plaintiff's injuries. The jury apportioned liability 50-50 between the negligent defendant and non-party intentional tortfeasors. The trial court granted the plaintiff's motion to set aside the apportionment and the Appellate Division affirmed and found the negligent defendants liable for the entire amount of the plaintiff's non-economic loss pursuant to CPLR 1602(5). On appeal, the Court of Appeals affirmed the jury's apportionment and concluded that a pure negligence action does not fall within the scope of 1602(5). The Court notes that the neither the plain language nor the legislative history of 1602(5) "was intended to create what would amount to a broad exception to the apportionment at the expense of the low fault, merely negligent landowners and municipalities."[8]

Exploring Apportionment

The Appellate Divisions of the First and Second Departments have addressed the issue of apportionment five times since *Chianese*. With only one exception, the Appellate Divisions rejected a jury apportionment of liability of more than 50% on a negligent tortfeasor.

In *Cabrera v. Hirth*,[9] an apartment dweller assaulted a repairman. After trial the jury apportioned fault at 50% against the landlord and 50% against the perpetrator. The First Department affirmed the trial Justice's denial of a motion to reduce the apportionment against the landlord to one-third.

A review of two pre-*Chianese* cases revealed a similar result.[10] In fact, in one, the Appellate Division First Department substituted a 60%-40% apportionment in favor of the Transit Authority for that of 75%–25% against the Transit Authority rendered by the jury.

In *Roseboro v. New York City Transit Authority,*[11] the First Department firmly rejected the jury's apportionment of liability of 80% against negligent defendant and 20% against the non-party intentional tortfeasors, holding that such apportionment has ignored the weight of the evidence. In *Roseboro,* the plaintiff brought suit against the defendant, New York City Transit Authority, for personal injury and wrongful death stemming from an early morning attack on the decedent by drug addicts in the course of a robbery on the defendant's subway platform. During the attack, the decedent was thrown from the platform, chased onto the tracks, battered into a daze and eventually struck by an approaching train. These events occurred while the defendant's employee, a station token booth clerk, slept at his post with the attack displayed on a monitor in front of him. The jury found the defendant, New York City Transit Authority, negligent based on the fact that the station token booth clerk was asleep and failed to call the police for assistance. The plaintiff re-

quested, and the trial court granted, to refuse to allow the jury to apportion liability between the defendant and the non-party attackers.

On remand, pursuant to *Chianese*, the jury was charged to resolve the issue of apportionment. The defendants were allowed to argue that the attackers were largely responsible for the decedent's injury. The jury subsequently apportioned 80% against the defendant and 20% against the non-party attackers. On appeal, the First Department held that the jury's apportionment couldn't stand because it is against the weight of the evidence presented. The court reasoned that regardless of how culpable the sleeping clerk might have been, the defendant's share of responsibility cannot approach the degree of culpability of the perpetrators of the crime underlying the lawsuit.[12]

Similarly, in *Stevens v. New York City Transit Authority*,[13] the Second Department also concluded that a negligent tortfeasor could not approach the culpability of an intentional tortfeasor. The action stemmed from the injuries sustained by the plaintiff after being pushed by an assailant from the subway platform onto the subway tracks, where an oncoming train subsequently struck her. The train operator activated the emergency brake but was unable to stop in time to avoid striking the plaintiff. The issue at trial was whether the train operator could have averted the accident if he was traveling at a slower rate of speed. The jury returned a verdict apportioning 40% responsibility for the accident to the defendant, New York City Transit Authority, and 60% to the non-party intentional tortfeasor. On appeal, the court upheld the finding of liability against the defendant but found that the apportionment of 40% was against of the weight of the credible evidence. The court reasoned that any negligence by the train operator cannot approach the culpability of the perpetrators of the crime underlying the lawsuit. Furthermore, the court concluded that the circumstances warranted no more than a 20% allocation of responsibility.

In *Cintron v. New York City Transit Authority*,[14] an infant was hit by a subway train. After trial a jury apportioned 70% against the Transit Authority and 30% against the plaintiff and the trial Justice set aside the jury finding and dismissed the complaint. On appeal, the First Department reversed the dismissal and remanded for a new trial on apportionment unless the plaintiff agreed to a 50%–50% apportionment.

However, there is one instance where a court concluded that the negligent tortfeasor culpability might approach the culpability of the perpetrators of the crime underlying the lawsuit. In *Nash v. Port Authority of New York and New Jersey*,[15] the First Department, affirmed a jury's apportionment of 68% to the negligent defendant and 32% to the non-party intentional tortfeasor. The court acknowledged that the case is neither one of ordinary negligence nor a coincidental intentional act, thus distinguishing it from the average hybrid situation.[16] More specifically, the court considered the negligence of the station token booth clerk in *Roseboro*, or the train operator in *Stevens*, to be Lilliputian in scale.[17]

In *Nash*, terrorists drove a bright yellow rental van, loaded with explosives, into the underground public parking garage of the World Trade Center. The terrorists parked the van near vital utility and communications systems, lit a ten-minute fuse and safely left the premises. The existing security measures were inadequate; there was neither a gate nor any parking attendants to screen for explosives. The explosion killed six people, injured hundreds and cause significant damage, such as the severance of essential services to the tenants of the World Trade Center.[18] The jury found that the defendant had been negligent in failing to maintain the premises in a reasonable and safe manner, and that negligence was a substantial cause for the terrorist attack.

On appeal, the First Department concluded that the apportionment assigned to the negligent defendant was justified by the negligence and circumstances under which the negligence contributed to the terrorist attack.[19] The court further explained that the jury was entitled to conclude that the defendant's negligence was, if not gross, then dramatically out of the ordinary.[20] The evidence showed that, several years prior to the terrorist attack, the defendants were put on notice that the World Trade Center was vulnerable to terrorist attack, specifically through its public parking garage. Outside consultants and internal security consultants, warned the defendants, of the precise manner in which the vulnerability could be exploited,[21] specifically noting that the parking lots are highly susceptible to car bombings.[22] In one report, the consultant expressed the view that that it was not merely possible but probable that there would be an attempt to bomb the World Trade Center through the parking lot. The consultant recommended an immediate improvement of surveillance and screening measures at the parking garage.[23] In fact, the terrorists duplicated the exact scenario that had been foreseen by the security consultants.[24] As such, the evidence presented at trial supported the conclusion that this particular defendant was not the low fault defendant that the Legislature intended to benefit when it enacted CPLR article 16.[25]

Conclusion

It is well established that if a plaintiff is injured by joint tortfeasors, one who acted with intent and the other negligently, the intentional tortfeasor will be liable for the full amount of the plaintiff's economic and non-economic damages. However, the negligent tortfeasor may assert the apportionment benefits of CPLR Article 16. Although

release from joint and several liability is not automatic, a review of the recent First and Second Department Appellate Division cases suggests that the limited liability protections of CPLR Article 16 are real. In the one exception, the First Department went to great lengths to distinguish the Port Authority case from the earlier cases limiting the liability of negligent tortfeasors. That, coupled with the noting of the legislative history of 1602(5) and the intention to limit the liability of "the low fault, merely negligent landowners and municipalities" suggests that the limitation of liability was intended to be meaningful.

Endnotes

1. *Chianese v. Meir,* 98 N.Y.2d 270, 275 (2002).
2. N.Y. CPLR 1601.
3. *Chianese v. Meir,* 98 N.Y.2d 270, 275 (2002).
4. N.Y. CPLR 1602(5).
5. 98 N.Y.2d 270 (2002).
6. *Id*. at 275.
7. *Id*.
8. *Id*.
9. 8 A.D.3d 196 (1st Dep't 2004).
10. *Robinson v. New York City Transit Authority*, 105 A.D.2d 614 (1st Dep't 1984).; *Mena v. New York City Transit Authority*, 238 A.D.2d 159 (1st Dep't 1997).
11. 10 A.D.3d 524 (1st Dep't 2004).
12. *Id.*
13. 19 A.D.3d 583 (2d Dep't 2005).
14. *Cintron v. New York City Transit Authority*, 22 A.D.3d 248 (1st Dep't 2005).
15. 51 A.D.3d 337 (1st Dep't 2008).
16. *Id*. at 356.
17. *Id.*
18. *Id*. at 339.
19. *Id.*
20. *Id*. at 355.
21. *Id*. at 340.
22. *Id.*
23. *Id.*
24. *Id*. at 343.
25. *Id*. at 358.

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Enjoy the *Arons* Interviews While They Last

By Matthew J. McDermott

In *Arons v. Jutkowski*,[1] the New York Court of Appeals addressed the ability of defense counsel in a personal-injury action to conduct private interviews of a plaintiff's treating physicians. In its Memorandum Decision, issued on November 27, 2007, the Court held that such interviews may be conducted, consistent with certain guidelines. Further, while the Court did not directly address the issue, the opinion strongly suggests that such interviews may be conducted prior to the filing of a Note of Issue. Since the issuance of the decision, the plaintiff's personal-injury bar has unanimously voiced its displeasure with the ruling, and lacking any further avenue for judicial redress, has sought the assistance of the New York State Senate and Assembly to legislatively overturn the Court of Appeals' holding in *Arons*.

The Underlying Cases

As a context for the discussion, the Court of Appeals selected three cases that presented the issue: *Arons v. Jutkowski*;[2] *Webb v. New York Methodist Hospital*;[3] and *Kish v. Graham*.[4] All were medical malpractice actions. In all of them, the issue arose where a defendant requested executed authorizations, compliant with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), to conduct private interviews with one or more of the plaintiffs' treating physicians *after* the Notes of Issue were filed. In each case, the plaintiff's counsel refused to supply the authorizations and defense counsel moved to compel. The trial courts granted the defendants' motions in all three cases and directed the plaintiffs to supply the requested authorizations.

In each of these cases, the trial courts placed significant conditions and restrictions upon defendants' interviews of the treating physicians. In *Arons*, the trial court directed that the defendant must include a statement on the authorization itself, in bold type, that the interview is to assist the defendant in a lawsuit and is not at the request of the plaintiff/patient.[5] The court further directed that within 72 hours of the interview with a physician, defense counsel must turn over to plaintiff's counsel any written statements, records or other documents obtained from the physician, as well as copies of the defense attorney's own notes of the interview, excepting legal conclusions or impressions.[6] The trial court in *Webb* adopted a similar set of requirements, based primarily upon a prior agreement between counsel.[7]

In *Kish*, the trial court directed that defense counsel serve a trial subpoena upon the physician contemporaneous with the authorization and request for an interview.[8] The court also directed that the authorization and subpoena be accompanied by a cover letter explaining that while the subpoena does require the physician's attendance at trial, there is no requirement that the physician speak with counsel prior thereto; that the sole purpose of the pre-trial interview is to assist the defense; that a copy of the physician's records previously provided to defense counsel will be made available during the interview to assist the physician; and that the physician is not required to provide defense counsel with any additional records prior to trial.[9]

In each case, the plaintiffs appealed the Order of the trial court, and in each case, the Appellate Court reversed, holding that the plaintiffs may not be required to supply HIPAA-compliant authorizations to the defendants to permit private interviews with treating physicians. The Second Department reversed the decision of the lower court in *Arons*, and then in *Webb* based upon the same reasoning. Thereafter, the Fourth Department reversed the trial court's decision in *Kish*, following the reasoning in *Arons*, but with two Justices dissenting.

The Court of Appeals Decision

The Court of Appeals addressed similar certified questions from the Appellate Division: whether the Second Department in *Arons* and *Webb*, and the Fourth Department in *Kish*, properly reversed the decisions of the trial courts below, and denied the defendants' applications for authorizations to conduct private interviews of the plaintiffs' treating physicians.

In the opening of the opinion, authored by Judge Read, the Court of Appeals set forth the question presented, followed by its answer: "These appeals call upon us to decide whether an attorney may interview an adverse party's treating physician privately when the adverse party has affirmatively placed his or her medical condition in controversy. We conclude that an attorney may do so."[10]

The Court opened its analysis by stressing the importance of "informal discovery processes," such as witness interviews, in litigation. Relying upon its prior opinions in *Niesig v. Team I*,[11] and *Siebert & Co. v. Intuit Inc.*,[12] the Court lauded the efficiency of informal discovery in terms of expedience and cost-savings. While both *Niesig* and *Siebert* dealt with interviews of current and former corporate employees, the Court explained that no distinction was required with regard to the requested interviews of treating physicians in *Arons*, *Webb*, and *Kish*. This was so because a personal-injury plaintiff places his or her physical and/or mental condition in issue, and necessarily waives the physician-patient privilege. The Court explained:

> This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition

> in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim."[13]

Indeed, the Court of Appeals explicitly held that there is no basis for disparate treatment of non-party laypersons and non-party physicians in personal-injury actions, stating "We see no reason why a nonparty treating physician should be less available for an off-the-record interview than the corporate employees in Niesig or the former corporate executive in Siebert."[14]

Having eliminated any special treatment of physicians in personal-injury actions, due to the necessary waiver of the physician-patient privilege by the plaintiff, the Court turned to the plaintiffs' argument that an "informal interview" is not one of the discovery devices enumerated in the CPLR or Uniform Rules for the Trial Courts.

The Court of Appeals acknowledged that while there are no explicit statutory provisions which authorize *ex parte* interviews of non-parties, there are also no statutory provisions that prohibit such practice. The Court noted that attorneys "have always sought to talk with nonparties who are potential witnesses as part of their trial preparation."[15] Highlighting, once again, the efficiency of informal discovery, the Court held that "Article 31 does not 'close off' these 'avenues of informal discovery,' and relegate litigants to the costlier and more cumbersome formal discovery devices."[16]

Finding no prohibition against a defendant conducting *ex parte* interviews of a plaintiff's treating physicians, the Court turned to the conditions and requirements imposed upon defense counsel by the trial courts in *Arons*, *Webb*, and *Kish*. The Court held that there was no requirement in HIPAA or the supporting Privacy Rules promulgated by the Secretary of the Department of Health and Human Services ("HSS"), that a defense attorney, after conducting an interview of a treating physician, turn over copies of materials produced by that physician, or that attorney's own notes of the interview. Indeed, the Court held that such requirements were directly at odds with its holdings in *Niesig* and *Siebert*.[17]

What Did Defense Counsel Get?

Under the Court of Appeals decision in *Arons*, a defendant's entitlement to the following were confirmed, without question:

1. The right, after the filing of a Note of Issue and Certificate of Readiness for Trial, to solicit an *ex parte* conversation with a physician that treated the plaintiff, provided: a) the physician is furnished with a HIPAA-compliant authorization executed by the plaintiff, and b) the physician is clearly advised of the identity of the defense attorney's client and their interest in the litigation; that discussion with the defense attorney is entirely voluntary; and that the interview is limited to the injuries or conditions claimed in the lawsuit.
2. The right, after the filing of a Note of Issue and Certificate of Readiness for Trial, to apply to the Court for an Order compelling the plaintiff to provide defense counsel with HIPAA-compliant authorizations to conduct *ex parte* interviews of all treating physicians
3. The right to refuse disclosure of an attorney's own notes that are generated during an *ex parte* interview with plaintiff's treating physician

Did Defense Counsel Get Anything Else?

The three entitlements listed above are clear and unquestionable from the *Arons* opinion. There can be no reasonable argument on these items. Notably, the first two items are prefaced by the qualification "after the filing of a Note of Issue and Certificate of Readiness for Trial." This qualification is included because in each of the underlying actions, *Arons*, *Webb*, and *Kish*, defense counsel moved to compel the respective plaintiffs to provide authorizations for *ex parte* interviews with treating physicians *after* discovery was concluded and the Notes of Issue filed.

The Court of Appeals acknowledged the question of timing in the *Arons* opinion: "[W]e understand that, in fact, for many years trial attorneys in New York have engaged in the practice of interviewing an adverse party's treating physician *ex parte*, particularly in malpractice actions, although only after a note of issue was filed."[18] While the Court does not explicitly state that defense counsel may conduct these interviews prior to the filing of the Note of Issue, this entitlement is clearly implied.

In its Memorandum Decision, the Court of Appeals made clear that there are no special considerations for the interview of a treating physician within the context of a personal injury action. When plaintiff puts his or her physical condition at issue, the physician-patient privilege is waived. After removing this unique facet from consideration, the Court addressed the interview of a physician as it would an interview of any non-party witness. Clearly, there is no prohibition against an attorney seeking out a non-party witness and inquiring with them as to their recollection of relevant events before the Note of Issue is filed. Indeed, early investigation of an incident, including interviewing witnesses to the events that are the subject of the suit, may not only be good practice, but included in the ethical obligation that an attorney bears to seek out and present the best possible arguments on behalf of their clients.

Second, the Court of Appeals clearly implies that defense counsel need not wait for the filing of the Note

of Issue in order to obtain an authorization and conduct an *ex parte* interview of a treating physician. The Court comments that "it bears emphasizing that the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it."[19] The Court goes on to explain as follows:

> While interviews may still take place post-note of issue, at that juncture in the litigation there is no longer any basis for judicial intervention to allow further pretrial proceedings absent "unusual or unanticipated circumstances" and "substantial prejudice." As a result, if a treating physician refuses to talk with an attorney and the note of issue has already been filed, it will normally be too late to seek the physician's deposition or interrogatories as an alternative.[20]

The clear implication is that if an interview is sought prior to the close of discovery, and the physician refuses, then defense counsel may seek a deposition by way of subpoena. If the physician fails to submit to a deposition pursuant to a subpoena, defense counsel may resort to a motion to compel compliance. Certainly the Court of Appeals would not suggest such a procedure if it were impermissible.

Third, Justice Pigott in his dissenting opinion stated that "[u]nder our holding today, …defense counsel would be permitted to obtain court-ordered, HIPAA-compliant authorizations at any time and use them at any time both prior to and after the filing of the note of issue and certificate of readiness."[21] While a dissenting assessment of the majority opinion may not have the force of law, it should be noted that the majority does not disagree with Judge Pigott or even address the point. This is significant because the majority does take explicit issue with the dissent on a separate issue.

In footnote 5 of the majority opinion, the Court addresses the dissent's concern that defense counsel were permitted to seek an Order from the trial court compelling plaintiff to provide authorizations for interviews after discovery is closed and the Note of Issue is filed.[22] In the footnote, the Court identifies the issue and responds directly. Clearly, the majority considered the dissenting opinion, and was willing to explicitly dispute a position that it found to be erroneous. If the dissent was incorrect in stating that defense counsel may now conduct *ex parte* interviews of plaintiff's treating physicians before or after the filing of a Note of Issue, then there is strong indication that the majority would have addressed it.

Finally, there are bills pending in the New York State Senate and Assembly that will prohibit such interviews by defense counsel. The legislative memoranda accompanying both bills indicate that the holding in *Arons* "would now permit defense counsel to obtain court ordered HIPAA compliant authorizations at any time and use them at any time both prior to and after the filing of the Note of Issue and Certificate of Readiness."[23] Clearly, both houses of the State Legislature interpret *Arons* to authorize interviews of treating physicians before the filing of a Note of Issue.

Based upon the foregoing, defense counsel may seek HIPAA-compliant authorizations to conduct *ex parte* interviews of a plaintiff's treating physicians *before or after* the filing of a Note of Issue. If plaintiff's counsel refuses a request for such authorizations because the Note of Issue has not yet been filed, defense counsel should move to compel the authorizations based upon the four arguments above.

It is interesting to consider the potential response of plaintiffs and their counsel to a request for *Arons* authorizations. Putting aside the debate on timing, i.e., whether the request for authorizations is made before or after the filing of a Note of Issue, it is clear that the authorizations must be provided to defense counsel. It is also clear that defense counsel may conduct non-party depositions of a plaintiff's treating physicians. But what happens where a plaintiff, in order to resist such interviews or depositions, designates the physician as an expert and serves appropriate disclosure pursuant to CPLR 3101(d)? At that point, further discovery of the physician would seemingly be prohibited pursuant to CPLR 3101(d)(iii).[24] In the absence of a showing of "special circumstances" and a court order, disclosure would end at the written designation pursuant to 3101(d)(i).

Even if a plaintiff foils an interview or deposition of a treating physician by serving expert disclosure pursuant to CPLR 3101(d), such disclosure, in and of itself, may have significant value to the defense. In providing disclosure under CPLR 3101(d)(i), a plaintiff is required to set forth a specific list of every opinion that the physician will offer and the factual basis therefore. At trial, the physician may be held within the four corners of that written disclosure. Clearly, this is preferable to the all too common situation where a treating physician is permitted to testify in the absence of formal disclosure, and all conclusions and opinions are generally attributed to the physician's treatment records.[25]

It is certainly easier to defend the specific claims, opinions and conclusions set forth in a finite list, rather than digesting a voluminous treatment record and attempting to forecast the anticipated testimony of a treating physician. In the end, the service of a demand for *Arons* authorizations at the outset of a case will lead to either interviews or depositions of a plaintiff's treating physicians, or the service by plaintiff's counsel of expert disclosure pursuant to CPLR 3101(d) in order to shield a physician from further disclosure. If the former, defense counsel will have the opportunity to review treatment records with the authoring physician in detail, and to assess the personality and bearing of the physician. In this way, defense counsel will be in a position to assess the impression that the physician will make upon a jury. If plaintiff's counsel chooses to

designate a physician as an expert, and thereby bar further discovery, at least defense counsel will have a specific, itemized list of every opinion that the physician intends to offer at trial. This will better equip defense counsel to limit the testimony of the physician.

Pending Legislative Action

Bills are currently pending before both the New York State Senate and Assembly that would bar ex-parte interviews of treating physicians. The text of the proposed legislation in the Senate is as follows:

> Section 3102 of the civil practice law and rules is amended by adding a new subdivision (c-1) to read as follows:
>
> (C-1) EX-PARTE INTERVIEWS. IN ANY ACTION INVOLVING PERSONAL INJURY, MEDICAL, DENTAL, OR PODIATRIC MALPRACTICE OR WRONGFUL DEATH, NO PARTY OR ANYONE ACTING ON BEHALF OF A PARTY MAY EITHER DIRECTLY OR INDIRECTLY CONDUCT EX-PARTE INTERVIEWS WITH THE TREATING PHYSICIANS OR OTHER HEALTH CARE PROVIDERS OF ANY OTHER PARTY. NOTHING IN THIS SUBDIVISION SHALL PROHIBIT AN ATTORNEY OR THE AGENT OR EMPLOYEE OF AN ATTORNEY WHO REPRESENTS THE PARENT, THE ESTATE OF THE PATIENT, OR THE NATURAL OR DULY APPOINTED GUARDIAN OF THE PATIENT WHOSE CONDITION IS AT ISSUE IN THE ACTION FROM CONDUCTING EX-PARTE CONVERSATIONS WITH A TREATING PHYSICIAN OR OTHER HEALTH CARE PROVIDER OF THE PATIENT.[26]

In the State Senate, the Bill was referred to the Committee on Codes on January 6, 2010. In the Assembly, the synonymous Bill was referred to the Judiciary Committee on the same date.

In both Houses of the Legislature, the stated intention of the sponsors is to statutorily abrogate the holding of the Court of Appeals in *Arons* "and make it clear that in any action involving personal injury…the defendant is barred from conducting such *ex parte* interviews with the plaintiffs [sic] nonparty treating physicians."[27] While the sponsors acknowledge that a personal-injury plaintiff waives the physician-patient privilege as to those injuries or conditions that are put in issue, the proposed Bills purportedly limit a defendant's discovery to those devices that are specifically and explicitly enumerated in Article 31 of the CPLR and the Uniform Rules for the New York State Trial Courts, e.g., a deposition pursuant to CPLR 3106(b).[28] While the sponsors espouse an intent to protect the sanctity of Article 31, and the finality of a Note of Issue and Certificate of for Trial, one is left seeking a justification for the disparate treatment of non-party physicians versus non-party lay people.

Certainly, there is no prohibition against a defense attorney seeking out and privately interviewing an eyewitness to an accident. As noted above, counsel's ethical obligations may require it. A plaintiff puts his or her physical condition in issue when he or she brings a personal-injury action. As a result, the physician-patient privilege is waived. If there is no privacy interest, then why would a treating physician be treated differently than any other non-party witness? In the absence of a substantive justification, the survival or prohibition of what have come to be known as "*Arons* interviews" now lies in the hands of the Legislature.

Endnotes

1. 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007).
2. 37 A.D.3d 94, 825 N.Y.S.2d 738 (2d Dep't 2006).
3. 35 A.D.3d 457, 825 N.Y.S.2d 645 (2d Dep't 2006).
4. 40 A.D.3d 118, 833 N.Y.S.2d 313 (4th Dep't 2007).
5. 3 N.Y.3d at 402-3.
6. *Id*.
7. *Id*. at 404-5.
8. *Id*. at 405-6.
9. *Id*.
10. *Id*. at 401.
11. 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990).
12. 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007).
13. 9 N.Y.3d at 409 (*quoting Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707, 713 (1989)).
14. 9 N.Y.3d at 409.
15. *Id*.
16. 9 N.Y.3d at 409 (*quoting Niesig*, 76 N.Y.2d at 372).
17. 9 N.Y.3d at 410.
18. *Id*.
19. *Id*. at 411.
20. *Id*.
21. *Id*. at 419.
22. 9 N.Y.3d at 416, fn.5.
23. New York State Senate, Bill Number S3203, Memo, Justification; New York State Assembly, Bill Number A08964, Memo, Justification.
24. CPLR 3101(d)(iii) provides at follows:

    > Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.

25. Uniform Rules for the New York State Trial Courts § 202.17, 22 NYCRR 202.17.
26. New York State Senate, Bill Number S3203. *See also* New York State Assembly, Bill Number A08964.
27. New York State Senate, Bill Number S3203, Memo, Justification; New York State Assembly, Bill Number A08964, Memo, Justification.
28. *Id*.

Summary of New York State Class Actions in 2009: TICL Class Action Committee Report

By Thomas A. Dickerson and Kenneth A. Manning

Last year the Court of Appeals, the Appellate Divisions and numerous Trial Courts addressed a variety of class issues including post settlement discovery, deceptive price matching, cell phone plans, gift cards, fixed price contracts, employee gratuities, trespass and terminal boxes, cable TV converter boxes, demutualization, microprint equipment leases, lien law, brokerage account maintenance fees, backdating wholesale store renewal memberships, Macy's Rewards Certificates and attorneys fees.

Post Settlement Discovery

In *Wyly v. Milberg Weiss Bershad & Schulman, LLP*[1] the Court of Appeals limited discovery of class counsel dismissed by the Court.

> In a class action, however, an absent class member does not possess a "broad right" of access to the files of a class counsel dismissed by the trial court during the litigation's pendency…would create "the potential for class counsel to be unduly burdened, even after the end of litigation, by a multitude of requests from absent class members for counsel's entire file."

Deceptive Price Matching

In *Dank v. Sears Holding Management Corporation,*[2] a challenge to Sear's "price matching"[3] policy as being as deceptive the court observed that

> The complaint alleges that Sears published a policy promising…to match the "price on an identical branded item with the same features currently available for sale at another local retail store" (and) that the plaintiff requested at three different locations that Sears sell him a flat-screen television at the same price at which it was being offered by another retailer. His request was denied at the first two Sears locations on the basis that each store manager had the discretion to decide what retailers are considered local and what prices to match. Eventually he purchased the television at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the $400 lower price offered by a retailer located 8 miles from the store…the complaint states a cause of action under GBL 349 and 350.

The court subsequently denied class certification[4] finding that plaintiff failed to establish numerosity and his adequacy as class representative since serving as class representative and class counsel created a conflict of interest.

Employee Gratuities

In *Krebs v. The Canyon Club*[5] the court granted class action to an action brought by employees seeking retained gratuities. The court noted that plaintiff

> alleges that she has worked since July 2007 as a waitress or food server at the Club. The Club is a private golf and country club which is available to the general public as a site for catered events such as weddings, bar/bat mitzvahs and other functions…. She alleges that the Club imposed on customers a service charge which customers were led to believe was a gratuity intended for employees but which the Club retained for itself.

Certification granted.

CPLR § 901(b)

From time to time the U.S. Supreme Court has rendered decisions which have had a profound impact on the viability of state court class actions, including those brought pursuant to Article 9 of the CPLR. The U.S. Supreme Court's decision issued on March 31, 2010 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*[6] is no exception.

Notwithstanding the 1975 Judicial Conference proposal for a new class action statute designed to "set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions,"[7] there has been some reluctance over the years since CPLR Article 9 was enacted in 1975 in applying it to the full range of common claims warranting class action treatment [see e.g., *Globe Surgical Supply v. GEICO Insurance Company*[8] and *Friar v. Vanguard Holding Corporation*[9]]. That reluctance also appears in CPLR § 901(b) which provides that "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." As noted by the Court of Appeals in *Sperry v. Crompton Corp.*[10]

> While the Legislature considered the Judicial Conference report, various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when authorized in the pertinent statute… It is obvious that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available when individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages) unless a statute expressly authorized the option of class action status.

CPLR § 901(b) prohibition of class actions seeking a penalty or a minimum recovery has been applied by New York courts in antitrust actions under General Business Law § 340 [Donnelly Act] [see e.g., *Sperry v. Crompton Corp.*,[11] *Paltre v. General Motors Corp.*,[12] *Ho v. Visa USA, Inc.*,[13] *Cunningham v. Bayer, AG*,[14] *Asher v. Abbott Laboratories*[15]] and to claims brought under the federal Telephone Consumer Protection Act [see e.g., *Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*,[16] *Rudgazer & Gratt v. Cape Carnaveral Tour & Travel, Inc.*,[17] *Leyse v. Flagship Capital Services Corp.*[18]]. However, the CPLR § 901(b) prohibition has not been applied in class actions alleging a violation of General Business Law §§ 349, 350 [see e.g., *Cox v. Microsoft Corp.*,[19] *Ridge Meadows Homeowners's Association, Inc. v. Tara Development Co., Inc.*[20]], Labor Law § 220 [see e.g., *Pasantez v. Boyle Environmental Services, Inc.*,[21] *Galdamez v. Biordi Construction Corp.*[22]] and Labor Law § 196-d [see e.g., *Krebs v. The Canyon Club*[23]] as long as the penalty damages are waived and class members are given the opportunity to opt-out.

In an effort to avoid the impact of CPLR § 901(b) some class actions have been brought in federal court under FRCP 23 which has no such prohibition. Perhaps, on the basis of comity and to discourage forum shopping the federal courts have routinely referred to CPLR § 901(b). For example, in *Leider v. Ralfe*[24] a class action setting forth "federal and state claims based on De Beers alleged price-fixing, anticompetitive conduct and other nefarious business practices" the court held that "NY C.P.L.R. § 901(b) must apply in a federal forum because it would contravene both of these mandates to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court" and would encourage forum shopping.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*[25] the petitioner filed a class action in diversity against Allstate seeking interest allegedly due and owing. The District Court held that it was deprived of jurisdiction by "N.Y. (CPLR) § 901(b) which precludes a class action to recover a 'penalty' such as statutory interest. Affirming, the Second Circuit…held that § 901(b) must be applied by federal courts sitting in diversity because it is 'substantive' within the meaning of *Erie R. Co. v. Tompkins.*"[26]

In reversing Justice Scalia writing for the majority stated that

> The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23…creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his class as a class action… Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question-i.e., it states that Shady Grove's suit "may *not* be maintained as a class action" (emphasis added) because of the relief it seeks-it cannot apply in diversity suits unless Rule 23 is ultra-vires…Rule 23 automatically applies "in all civil actions and proceedings in the United States district courts."

There are several possible outcomes from the *Shady Grove* decision. First, there may be an increase in the number of class actions brought in federal court by New York State residents seeking to avoid the impact of CPLR § 901(b). Second, defendants in some class actions brought under CPLR Article 9 may be less anxious to remove such cases to federal court under the Class Action Fairness Act. Third, the Legislature may revisit the need for CPLR § 901(b).

Trespass and Terminal Boxes

In *Corsello v. Verizon New York Inc.*[27] the court denied class certification in a trespass action brought by property owners seeking compensation from Verizon.

> [I]n order to service high density neighborhoods in New York City, where buildings are attached and access to the street is limited, Verison extends its telephone lines from the public way or street to individual homes and businesses by implementing an "inside block architecture" which requires Verison to place terminal boxes on the rear-walls of privately owned buildings…Plaintiffs, as owners of property encumbered by one of the…rear wall terminals (are) seeking declaratory and injunctive relief and monetary damages for trespass upon their property, compensation pursuant to Transportation Corporations Law § 27…and pursuant to (GBL) § 349, for deceptive practices by which defendant avoid the payment of compensation.

Cell Phones

In *Ballas v. Virgin Media, Inc.*[28] dismissed a class action by cell phone users alleging breach of contract and violation of GBL §§ 349, 350

> with respect to "pay-as-you-go" cellular phone services. Specifically…that the defendant failed to disclose on the packaging of its cellular phone, or did not otherwise properly disclose, either the requirement that subscribers to its phone services periodically "top up" their accounts by paying additional sums of money to the defendants to increase the available balances on those accounts, or the consequences of failing to "top up."

And in *Morrissey v. Nextel Partners, Inc.*[29] the court denied class certification noting that

> According to plaintiffs' complaint…defendant, a provider of cellular telephone service, systematically overcharged many of its subscribers in violation of consumer protection statutes as well as principals of contract law. These alleged overcharges arose in two distinct areas: in the method of crediting so-called "bonus minutes" to customers' accounts, and in the assessment of additional fees from subscribers with poor credit ratings. Plaintiffs contend that the "bonus minutes" included in their contracts were in fact illusory, while those subscribers with low credit scores on "spending limit program" contracts were charged fees in excess of those for which that had bargained… Their contracts provide for a base level of 1,000 minutes on monthly usage as well as 200 so-called "bonus minutes."… When the first month's bill arrived, he discovered that his account had been credited with only 1,000 minutes.… Nowhere on the billing statement was there any credit, or even mention, of the 200 "bonus minutes."

Cable TV Converter Boxes

In *Brissenden v. Time Warner Cable of New York City*[30] conduct the court denied class certification to a class action by cable TV customers challenging the necessity of converter boxes.

> Plaintiff alleges that Time Warner is engaged in unfair and deceptive business practices in violation of (GBL) § 349…because it is charging its basic cable customers for converter boxes, which they do not need, because the customers subscribe only to channels that are not being converted and because Time Warner charges customers for unnecessary remote controls regardless of their level of service.

Class certification denied.

Demutualization Settlement

In *In re Metlife Demutualization Litigation*[31] (E.D.N.Y. 2009) the court approved a proposed settlement of a federal class action and a New York state class action, *Fiala v. Metropolitan Life Insurance Company*.[32]

> This class action challenges the accuracy of notice to voters in an insurance company demutualization…. A related class action titled Fiala v. Metropolitan Life Insurance Company…The settlement was subject to approval by this court in this action and by the state court in Fiala…The terms of the settlement are as follows: Defendants have agreed to pay $50,000,000 in money damages in a combined joint settlement of this and the Fiala action. Fees and expenses of class counsel allocated by the courts will be paid from the settlement amount. Damages will be distributed to the class by paying $2,500,00 to a non-profit health research organization or "charity" to be agreed upon by the parties under the cy press doctrine. Allocation of the remainder (after deduction of plaintiffs' attorneys' fees and expenses) shall be assigned to the "closed block" established in the demutualization of defendant Metropolitan Life Insurance Company for the benefit of insured persons. Both this action and the Fiala action will be dismissed with prejudice, with appropriate releases.

Microprint Equipment Leases

In *Pludeman v. Northern Leasing Systems, Inc.*[33] the court certified a class of small business owner who had entered to lease agreements for Point Of Sale (POS) equipment and who were challenging the enforceability of concealed microprint disclaimers and waivers. In an earlier decision,[34] the Court of Appeals noted that plaintiffs asserted that defendant used

> deceptive practices, hid material and onerous lease terms. According to plaintiffs, defendants' sales representatives presented them with what appeared to a one-page contract on a clip board, thereby concealing three other pages below…among such concealed items…(were a) no cancellation clause and no warranties clause, absolute liability for insurance obligations, a late

> charge clause, and provision for attorneys' fees and New York as the chosen forum

all of which were in "small print "or "microprint." In sustaining the fraud cause of action against the individually named corporate defendants the Court noted that

> it is the language, structure and format of the deceptive Lease Form and the systematic failure by the sales people to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacities and not the sales agents.

Lien Law

In *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Co., Inc.*,[35] the court declined to decertify a Lien Law class action on behalf of subcontractors.

> [T]he defendant…Osborne…borrowed the sum of approximately $57 million from the Dormitory Authority of the State of New York to finance a capital improvement project. Pursuant to article 3-A of the Lien Law, the proceeds of the building loan constituted a trust fund for the purpose of paying certain statutorily-defined costs of improvement… In 2006 Solar Electric… was certified as class representative of the class of beneficiaries of the trust fund…certain conduct on the part of Solar's counsel did not warrant disqualification of Solar's counsel or decertification of Solar as class representative.

Fixed Price Contracts

In *Emilio v. Robinson Oil Corp.*[36] a class of consumers of electricity asserted breach of contract, breach of the covenant of good faith and fair dealing and violation of GBL § 349 based on claims that defendant unilaterally increased the price of electricity after they entered into fixed price contracts. On plaintiff's motion to amend the complaint the Court held that

> plaintiff should also be allowed to assert his claim under (GBL § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract.[37] Subsequently,[38] the Court granted class certification noting that "the extent defendant may have issued three similar contract versions at different times…nothing would prevent the Supreme Court…from establishing subclasses based on the particular contract at issue.

Brokerage Account Maintenance Fees

In *Yeger v. E*Trade Securities LLC*[39] the court denied certification to a class action brought by brokerage customers challenging account maintenance fees.

> Whether E*Trade's conduct in assessing AMFs (account management fees) a day early caused an individual class member to suffer actual damages depends upon facts so individualized that it is impossible to prove them on a class-wide basis. The motion court concluded that class certification was appropriate because there was a common question as to whether E*Trade collected the AMF too early, i.e., before the date permitted in E*Trade's contracts. However, this is only half the question. A breach of contract claim only exists if E*Trade's common conduct actually damaged a customer. Therefore, to recover, each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time. There were several actions that customers could have taken to avoid the assessment (such as depositing additional funds or executing additional securities trades), as well as other conditions not under their control that could have prevented it, such as when E*Trade, as a courtesy, refunded those customers who paid the AMF. It is this aspect of the proof that would be subject to a host of factors peculiar to the individual. This aspect of proof is critical. To allow the Yegers, or any class member, to recover the fee merely because E*Trade collected it early-without proof that each member of the class would have taken steps to avoid the fee had collected occurred at its proper time-would result in a windfall to those plaintiffs who would not have taken corrective actions. In certain cases, it could also result in writing the AMF out of the agreement entirely, a fee the parties had agreed to freely. Accordingly, individualized issues, rather than common ones, predominate).

Backdating Renewal Memberships

In *Argento v. Wal-Mart Stores, Inc.*[40] the court granted certification to a class of customers who alleged

> that defendant engaged in deceptive business practices in violation of (GBL) § 349

> by routinely backdating renewal memberships at Sam's Club stores…as a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership.

Macy's Rewards Certificates

In *Held v. Macy's, Inc.*[41] the court dismissed several causes of action in a class action brought by customers asserting

> that while Macy's widely advertises the cost savings…to be gained by [Macy's] card holders if they purchase Defendant's merchandise, Defendant has systematically failed to disclose to customers that the Rewards Certificates they receive…are worth significantly less than customers are lead to believe… Plaintiff's claims under GBL §§ 349 and 350 cannot stand. Plaintiff does not dispute that the documents establish that she was a Red Star Rewards member and that based on the literature Macy's disseminated to her, she was not entitled to Rewards Certificates. Further, Plaintiff concedes that she used a coupon rather than a Rewards Certificate and that the coupon was never promoted as the functional equivalent of cash. Indeed, the language of the coupon at issue makes clear that it was a typical store coupon-akin to the free discount coupons disseminated to the general public in store flyers-and not the functional equivalent of cash.

Early Retirement Program

In *DeSimone v. New York City Employees' Retirement System*[42] Plaintiffs commenced a CPLR article 78 and a plenary class action against Defendants. Plaintiffs alleged that the New York City Employees' Retirement Systems ("NYCERS") denied their applications for enrollment in the early retirement program, which constituted a breach of their retirement contracts and constituted a breach of NYCERS' fiduciary duty to them. The Supreme Court denied Plaintiffs' petition, reasoning that NYCERS did not unlawfully, arbitrarily or capriciously preclude the Plaintiffs from enrolling in the early retirement program. The Appellate Division upheld the trial court's decision, by stating that the Defendants did not violate the NY Constitution, article V, § 7, "which deems membership in a pension or retirement system a 'contractual relationship, the benefits of which shall not be diminished or impaired.'" Accordingly, the Court found that neither the Defendants, nor the Legislature, impaired or diminished the Plaintiffs' rights in enrolling in early retirement.

Gratuities: Labor Law § 196-d

In *Connor v. Pier Sixty, LLC*[43] Plaintiffs alleged that the Defendants violated Labor Law § 196-d, providing that "[n]o employer…shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." Defendants moved to dismiss for failure to state a cause of action, arguing that Labor Law § 196-d applied only to employers and employees, and that Plaintiffs fell outside of the statute because they were merely workers assigned by a temporary agency. The Defendants cited *Bynog v. Cipriani Group*,[44] where the Plaintiffs, who were also servers assigned by a temporary agency, were considered to have worked at events as independent contractors, and not as employees of Defendants. In *Connor*, however, the Court found nothing in the *Bynog* decision that suggested a worker who was assigned by a temporary agency must be considered an independent contractor. Moreover, the Court indicated that the determination of whether a worker was an employee or an independent contractor was an issue based on the degree of control exercised by the purported employer, which required a factual assessment of each case. That being said, the Court denied Defendants' motion to dismiss, for failure to state a cause of action.

Disqualifying Counsel

In *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Company, Inc.*,[45] the Court addressed issues regarding the certified class representative ("Solar") of the Plaintiff class, as beneficiaries to a trust. The Appellate Division upheld the Supreme Court's denial of Defendants' motion to disqualify Solar's counsel and to decertify Solar as a class representative, despite Defendants' contentions that certain conduct on the part of Solar's counsel warranted disqualification and that Solar should have been decertified as class representative.

Street Vendors Unite

In *Ousmane v. City of New York*,[46] Plaintiffs commenced a class action, brought on behalf of street vendors fined by the New York City Environmental Control Board ("ECB") for code violations during the years 2003 and 2004. Specifically, Plaintiffs alleged that ECB increased fines for vendors' violations, without going through the required New York City Administrative Procedure Act's ("CAPA") rulemaking procedures.

Plaintiffs moved for summary judgment for final injunctive and declaratory relief on the above-referenced CAPA violation. The Plaintiffs also sought an order requiring the Defendant to refund checks that were previously mailed to vendors, who paid increased fines but whose checks were returned as undeliverable, and that Defendant provided for a cy pres distribution to a nonprofit organization for any refund that ultimately remained unclaimed. Finally, Plaintiffs sought an award for

attorneys' fees. The Defendants cross moved for partial summary judgment, limiting the class of vendors entitled to judgment and also objected to cy pres distribution of unclaimed funds. First, the Court found that because the time period lapsed in which the Defendant had to appeal the class certification, the order certifying the class was upheld. Next, the Court granted Plaintiffs' motion for summary judgment for final injunctive and declaratory relief, declaring that the City violated CAPA. The Court also granted Plaintiffs' motion that required Defendant to further attempt to locate vendors who are entitled to refund checks. The Court did not, however, grant Plaintiff's request to have cy pres distribution of funds not claimed within one year after the City's last attempt of reimbursement. Finally, the Court granted Plaintiffs' attorneys fees using the Lodestar method, determining that Plaintiff's were entitled to $160,877 for attorneys fees, and $1,408 for litigation expenses.

Fees

In *Nager v. Teachers' Retirement System*[47] (1st Dept. 2008), a class action on behalf of teachers and administrators seeking a ruling that "per session" pay is pensionable, the court approved a settlement but modified the Supreme Court's approval of the fee application. Initially, the court held that the "Supreme Court properly used the lodestar method in determining the reasonable value of plaintiffs' attorneys; services in instituting and settling this class action, rather than applying a percentage of the value of the settlement, in view of the enormous disparity in result between the two methods." However, the court held that the "Preminger firm failed to establish the reasonableness of its $610 per hour rate, the reasonableness of billing 76% of its hours at the top partner rate and the qualifications of its associates"and that "a multiplier was not warranted to enhance the lodestar amount."

Endnotes

1. 12 N.Y. 3d 400, 880 N.Y.S. 2d 898, 908 N.E. 2d 888 (2009).
2. 59 A.D. 3d 582, 874 N.Y.S. 2d 188 (2d Dept. 2009).
3. See e.g., *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D.N.Y. 2009) (certification granted to class action alleging deceptive price matching in violation of GBL § 349); Jay Norris, Inc., 91 F.T.C. 751 (1978) modified 598 F. 2d 1244 (2d Cir. 1979); Commodore Corp., 85 F.T.C. 472 (1975) (consent order).
4. *Dank v. Sears Holding Management Corporation*, 59 A.D. 3d 584, 872 N.Y.S. 2d 722 (2d Dept. 2009).
5. 22 Misc. 3d 1125 (N.Y. Sup. 2009).
6. 2010 WL 1222272 (U.S. Sup. 2010).
7. *Sperry v. Crompton Corp*. 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).
8. 59 A.D. 3d 129, 871 N.Y.S. 2d 262 (2d Dept. 2008).
9. 78 A.D. 2d 83, 434 N.Y.S. 2d 698 (2d Dept. 1986).
10. 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).
11. *Id*.
12. 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006).
13. 16 A.D. 3d 256, 793 N.Y.S. 2d 8 (1st Dept. 2005).
14. 24 A.D. 3d 216, 804 N.Y.S. 2d 924 (1st Dept. 2005).
15. 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002).
16. 29 A.D. 2d 737, 815 N.Y.S. 2d 248 (2d Dept. 2006).
17. 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).
18. 22 A.D. 2d 426, 803 N.Y.S. 2d 52 (1st Dept. 2005).
19. 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004).
20. 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997).
21. 251 A.D. 2d 11, 673 N.Y.S. 2d 659 (1st Dept. 1998).
22. 13 Misc. 3d 1224 (2006), aff'd 50 A.D. 3d 357, 855 N.Y.S. 2d 104 (2008).
23. 22 Misc. 3d 1125 (2009).
24. 387 F. Supp. 2d 283 (S.D.N.Y. 2005) .
25. 2010 WL 1222272 (U.S. Sup. 2010).
26. *Id*.
27. 25 Misc. 3d 1221 (N.Y. Sup. 2009).
28. 60 A.D. 3d 712, 875 N.Y.S. 2d 523 (2d Dept. 2009).
29. 22 Misc. 3d 1124(A)(Albany Sup. 2009).
30. 885 N.Y.S. 2d 879 (N.Y. Sup. 2009). See also: *Saunders v. AOL Time Warner, Inc*., 18 A.D. 3d 216, 794 N.Y.S. 2d 342 (1st Dept. 2005) (customers challenge cable converter box rentals; complaint dismissed; plaintiff "not aggrieved by the complained of conduct.").
31. 2009 WL 3633898.
32. 17 Misc. 3d 1102 (N.Y. Sup. 2007), modified 52 A.D. 3d 251 (1st Dept. 2008).
33. 2009 WL 1812532 (N.Y. Sup. 2009).
34. *Pludeman v. Northern Leasing Systems, Inc*., 10 N.Y. 3d 486, 489-490, 860 N.Y.S. 2d 422 (2008).
35. 2009 WL 1957270 (2d Dept. 2009).
36. 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006).
37. See also: *Matter of Wilco Energy Corp.*, 284 A.D. 2d 469, 728 N.Y.S. 2d 471 (2d Dept. 2001) (unilateral change of fixed price contract violation of GBL § 349).
38. *Emilio v. Robinson Oil Corp*., 63 A.D. 3d 667, 880 N.Y.S. 2d 177 (2d Dept. 2009).
39. 65 A.D. 3d 410, 884 N.Y.S. 2d 21 (1st Dept. 2009).
40. 2009 WL 3489222 (2d Dept. 2009). See also *Dupler v. Costco Wholesale Corp*., 249 F.R.D. 29 (E.D.N.Y. 2008) (customers asserts that membership renewal policy is deceptive trade practice and violates GBL § 349; class certification granted).
41. 2009 WL 3465945 (N.Y. Sup. 2009).
42. 60 A.D.3d 1053, 876 N.Y.S. 2d 467 (2d Dep't 2009).
43. 23 Misc. 3d 435, 870 N.Y.S. 2d 899 (Sup. Ct. N.Y. County 2009).
44. 1 N.Y.3d 193 (2003).
45. 64 A.D.3d 580, 883 N.Y.S. 2d 548 (2d Dep't 2009).
46. 22 Misc. 3d 1136(A), 880 N.Y.S. 2d 874 (Sup. Ct. N.Y. County 2009).
47. 2008 WL 5334322.

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The Use of the Biomechanical Expert: Fact or Friction?

By Robert A. Glick and Sean O'Loughlin

The use of the biomechanical expert in defending low impact automobile cases is, without surprise, a relatively new weapon in the arsenals of defense attorneys and the insurance industry alike. By and large, the biomechanical experts seek to determine whether plaintiffs involved in an automobile accident physically moved in such a manner that caused their body parts to exceed their natural physiological ranges of motion. Lately, the challenge mounted by plaintiffs to the biomechanical expert has been to attempt discredit their validity through challenging the very essence of biomechanical engineering as a whole. In this regard, certain Courts have not permitted the biomechanical expert to offer testimony at the time of trial. Defendants are now faced with the unique challenge of being required to convince the Courts as to the veracity of biomechanics as an established science and allowing the expert to proffer his or her opinion as to causal relationship at the time of trial.

What Is a Biomechanical Expert?

Biomechanical engineering is the application of mechanical engineering to the human anatomy and physiology. As such, a biomechanical engineering expert is an expert in both mechanical engineering and its application to the human anatomy and physiology. More specifically, a biomechanical expert is an expert in physics and the motions and forces of the human anatomy and physiology. But, a biomechanical expert is not a medical doctor and is not competent to render either a diagnosis or a prognosis.

Accident Reconstruction and Biomechanical Analysis

A biomechanical expert's analysis and findings relating to an automobile accident can be broken down into two parts—Accident Reconstruction and Biomechanical Analysis. The purpose of an Accident Reconstruction for a biomechanical expert is to figure out the changes in velocity of a vehicle and its occupants in both the longitudinal and lateral directions of travel. The purpose of a Biomechanical Analysis is to determine whether the changes in velocity of an occupant in both the longitudinal and lateral direction produced the forces and motions required for the alleged injured body parts to exceed their natural physiological ranges of motion. Velocity is a measurement in physics which includes both speed and direction. Acceleration is a change in velocity.

The significance of accident reconstruction for a biomechanical analysis is to determine the sudden changes in velocity of a vehicle, longitudinally and laterally, during a collision, so that its occupants' accelerations, longitudinally and laterally, can be figured out. More specifically, the sudden accelerations of a vehicle in either or both the longitudinal and lateral directions will cause the occupants inside the car to move in a direction opposite the vehicle's longitudinal and lateral accelerations. The explanation for this is addressed in the next paragraph.

In a car accident, what causes a vehicle to suddenly change its velocity in either or both the longitudinal or lateral directions of travel is the gain or loss of energy from making contact with another vehicle. For example, if two cars are travelling on a road one after another and the vehicle in the rear is travelling faster than the vehicle in the front. When the two cars make contact, the faster vehicle in the rear will transfer energy to the slower car in the front causing the slower car in the front to accelerate. When this happens, a discrepancy will be caused between the velocity of the front vehicle and its occupants because the occupants will initially continue to travel at their pre-impact velocity. So, when the vehicle suddenly accelerates, the occupants move toward the rear of the vehicle. The same logic applies to the rear car which lost energy during the collision. When the rear car decelerated, the occupants inside moved forward.

Moreover, the energy in a collision can be transferred laterally causing lateral accelerations of the vehicles and their occupants. For example, if a car that is travelling north makes contact with a car that is travelling west, both cars will decelerate on their respective longitudinal axis and each car will pick up energy on their respective lateral axis. The longitudinal deceleration is due to the fact that there is an obstacle blocking each vehicle's longitudinal path. The lateral acceleration is due to energy received from the other vehicle on the subject vehicle's lateral axis. More specifically, the north bound vehicle will pick up west bound energy causing that vehicle to accelerate west. The occupants inside this vehicle will accelerate east. The same logic applies to the west bound vehicle, which will accelerate north. Its occupants will accelerate south.

Calculating the Severity of the Impact

The magnitude of the accelerations of a vehicle and the loads sustained by their occupants can be figured out both mathematically and by analyzing the deformation to the accident vehicle. Mathematically, the engineer can figure out the accelerations of the vehicles and their occupants by figuring out unknown variables from known variables consistent with Newton's Laws, generally accepted principles of physics and generally accepted accident reconstruction formulas. In addition, the engineer can figure out how much energy was gained or lost in a

collision by analyzing and comparing the crush to the accident with the crush to a crash test vehicle that is similar in design and received the same type of impact. More specifically, if we have two cars built identically the same and we hit one vehicle in a certain manner with a certain force in a certain location and a dent is produced, then scientifically, the same dent should result, if we do the exact same thing to the other vehicle. This deformation is evidence of the amount of energy that the vehicle's material could not withstand. This deformation can be compared to similar crash test vehicles which sustained the same type of impact. The crash test vehicle was damaged under controlled conditions in which all of the necessary data was recorded.

Analyzing the Occupants

Let's now take a look at what is going on inside the vehicles with the occupants. Before we begin, we must understand that an engineer analyzes the human body the same way that he or she would analyze a machine. If something is broken, what type of force, stress or friction caused it to brake or tear. Was the material torn too far, did something hit it, did it rub against something else too hard? Since an engineer is not a medical doctor, our goal should be to prove at the very least that based upon the engineer's findings the alleged injured body parts were not compromised because they didn't stretch beyond their limits and nothing rubbed against them and nothing came into contact with them. Well if nothing caused a body part to break, then why is there a lawsuit? Did the medical doctors analyze the cause of the injuries in terms of the energy absorbed or lost by the host vehicle, the loads sustained by its occupants and the occupants' resulting motions inside the vehicle?

Overcoming the Junk Science Objection

Now that we have a basic understanding of what biomechanical experts do, let's now turn our focus on what do we need to prove to convince the courts to allow them to testify and what do we need to prove to convince the courts to give them the greatest latitude in their testimony.

In the State Courts in New York, the relevant hearing for determining the admissibility of a biomechanical experts is a Frye Hearing—see *Frye v. U.S.*, 293 F1013 (D.C. Cir. 1923) and *People v. Legrand*, 196 Misc. 2d 179. In order to satisfy the requirements of a Frye Hearing, the proponent of the expert must prove the following:

- that "the witness be competent in the field of expertise that he purports to address at trial" and
- that the "expert testimony [should] be based on scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs" and
- that "the processes and methods employed by the expert in formulating his or her opinion adhere to accepted standards of reliability within the field" and
- that "the proffered testimony is beyond the ken of the jury" and
- that the expert's testimony be "relevant to the issues and facts of the individual case." See *Borzacchiello v. Bousbaci* (Supreme Court, Queens County 2006) on the internet at http://decisions.courts.state.ny.us/fcas/fcas_docs/2006mar/40000487520041sciv.pdf.

In order to satisfy the aforesaid requirements, the following must be established:

- the expert's education, experience and publishing in biomechanical engineering is such that he or she will be recognized by the Court as an expert witness in biomechanical engineering and
- that the expert's testimony is rooted in scientific principles or procedures that general acceptance in the biomechanical engineering community as evidenced by publication and peer review and
- that the processes and methods employed by the expert in arriving at his or her conclusions are methods or processes which are deemed reliable in the biomechanical engineering community as evidenced by extensive testing, publication and peer review and
- that the expert's testimony is probative as to whether or not the accident at issue caused the claimant's alleged injuries and
- that biomechanical engineering is beyond the "ken of the jury."

No matter how you approach this process, your goal should always be to prove everything—from general principles such as Newton's Laws to specific crash test studies cited as support for the engineer's findings. If the engineer used mathematical formulas to arrive at his or her conclusions, be prepared to show that these formulas have been tested, written about, peer reviewed and are deemed reliable in the biomechanical engineering community for the task for which they were employed.

Going Forward

The biomechanical debate is taking place every day in the state courts in New York. Defense lawyers are scrambling to learn this defense while plaintiffs' attorneys are trying to find ways to counter this. New York's highly educated and respected judiciary is constantly weighing what should be allowed and what should be precluded. Since biomechanical experts are not medical doctors,

they are not competent to render either a diagnosis or a prognosis. Some judges will not allow them to address the injury causation issue. Other judges allow them to testify to the maximum allowable limits. In approaching a case with a biomechanical expert on your witness list, be prepared to first prove that the motions and forces involved in the accident could not have caused the claimant's alleged injured body parts to exceed their natural physiological ranges of motion. Next, be prepared to address the biomechanical engineer's testimony with your medical experts. Finally, if the judge will allow the engineer to rule out causation of the injuries, be prepared to re-explain the engineer's logic to the jury on closing arguments.

In closing, the use of biomechanical experts in the defense of a suspect bodily injury claim is adding a new level of precision to the litigation process. The argument that the claimant was fine before the accident and is now symptomatic following the accident is eroding as a basis for establishing causation of the injuries. Expect to see biomechanical experts coming into court and testifying about the motions and forces involved in the accident and whether those motions and forces were of the type or severity to have caused the alleged injured body parts to exceed their natural physiological ranges of motion. Expert to see medical doctors being confronted on cross examination with issues relating to the amount of energy absorbed or lost by the host vehicle, what were the loads sustained by the occupants and did the occupants move in a way that would have caused their alleged injuries and why they didn't take all this into account when formulating their opinions.

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Independent Livery Driver Benefit Fund: Open Road or Worsening Traffic Jam to Benefits

By Ronald Balter

The New York State Workers' Compensation Board does as much as it can to quickly handle the claims that are filed by injured workers from around the state and beyond. However, for years one of the issues that has bogged down the workers' compensation system as well as delayed the delivery of benefits to a class of injured workers was the perpetual lack of workers' compensation insurance coverage in the livery industry. In 2008 the legislature sought to resolve this problem. However, the steps taken by the legislature likely have made the problem worse and may be unconstitutional and did not in any way expedite the resolution of these claims.

In 2008 the legislature created Article 6-G of the Executive Law, the Independent Livery Driver Benefit Fund[1] (hereinafter, the Fund). The law is §§160-aaa through 160-iii of the Executive Law. The purpose of this law was to take most of the cases that had been filed by livery drivers in New York City and the surrounding suburbs out of the workers' compensation system. The result of the legislation limits those situations in which an injured driver can collect workers' compensation when injured while performing his job functions. However, if a driver files a claim with the Workers' Compensation Board, they are no better off and are probably worse off than before this law was enacted.

The law was amended to limit the ability of drivers to receive workers' compensation benefits because of the history of taxi and livery drivers before the Workers' Compensation Board for the last 20 years or so. Prior to the creation of the Fund drivers were determined to be employees of the owner of the vehicle they were driving. The Workers' Compensation Board adopted this interpretation of who the employer of the driver was based upon §2 of the Workers' Compensation Law. Under this interpretation the Workers' Compensation Board was finding that the owner of the vehicle was the employer and liable for all benefits due an injured worker under the Workers' Compensation Law as well as for penalties and possible criminal prosecution for failing to have workers' compensation insurance for their employees.[2]

In many instances the "employer" never met or even heard of the person that was driving the vehicle when they were injured. The vehicle owner would have another entity lease the car to a driver who would then affiliate themselves with a base. The driver would pay a flat fee for the use of the vehicle that would work its way back to the owner. Meanwhile all of their work was assigned and controlled by a livery base or car service. A person outside of the workers' compensation system would believe that the driver was working for the livery base or car service and not the owner of the vehicle.

Even in this situation many drivers would not want to go through the workers' compensation system. They would just want to collect No-Fault benefits. Attorneys who represent injured workers before the Workers' Compensation Board would be referred a claimant "to lose" the workers' compensation case so that they could collect benefits under the No-Fault policy. Some attorneys would refuse to represent the drivers in these cases because attorneys are normally retained to win cases. If the workers' compensation was "lost" and problems occurred in the No-Fault claim the driver could turn to the attorney in the workers' compensation case and ask why did they lose the case and leave the driver with no remedy. The potential problems were not worth it for a case in which the attorney in the workers' compensation case could not make any money.[3]

"[O]ne of the issues that has bogged down the workers' compensation system as well as delayed the delivery of benefits to a class of injured workers was the perpetual lack of workers' compensation insurance coverage in the livery industry."

Because of what seemed like an injustice being perpetrated against the vehicle owners the 2008 amendments to the Executive Law were enacted. The major feature of law was to set up the Fund to pay all claims and to limit the injuries that the Fund would be liable to pay benefits for. The Fund was also designated to be the employer in all of these cases. The creation of a unique fund for a specific group of workers is not a new concept in workers' compensation in New York. A fund had been set up to cover jockeys, apprentice jockeys and exercise riders at the thoroughbred race tracks run by the New York Racing Association in 1990.[4] An additional fund (similar to the Livery Drivers Benefit Fund) was also created for the drivers of limousines in New York City known as the Black Car Fund.[5]

The Black Car Fund could have been used as a model for the livery industry that sought to avoid the requirements of the Workers' Compensation Law. However, rather than just set up a new system of workers' compensation

insurance for the livery industry the legislature set the system up and limited to scope of its liability. The Livery Fund only covers those livery bases located in New York City, Nassau and Westchester counties.[6] The Fund will only be liable if the driver is injured performing covered services. The covered services are those that occur if the driver has been "dispatched" by a livery base.[7]

The Livery Fund bill requires all livery bases to either be a member of the Fund (which then becomes the driver's employer) or to obtain a policy of workers' compensation insurance. The failure of a base to comply with the law will require the appropriate Taxi and Limousine Commission to deny it a license to operate.[8] If a base is not a member of the Fund they will be deemed to be the driver's employer.[9]

Everything so far has been a plus for the drivers in the livery industry and the vehicle owners. A group employer was created that will be liable for workers' compensation coverage. However, the legislature went further and limited the liability of the Fund to certain covered injuries sustained that arise out of and in the course of employment (providing covered services). The covered injuries are:[10]

1. Death of the driver.
2. Injuries when the driver is the victim of a crime evidenced by a police report.
3. Defined serious injuries:
    a. Amputation or loss of an arm, leg, hand, foot, multiple fingers, index finger, multiple toes, ear or nose;
    b. Paraplegia or quadriplegia;
    c. Total and permanent blindness or deafness.

A driver that sustains a non-covered injury is entitled to collect No-Fault benefits.[11] Despite this apparently clear language determinations will still have to be made to see if a driver will be entitled to collect benefits under the Workers' Compensation Law. These determinations will have to be made by the Workers' Compensation Board.

The first issue that arises from the limitation of the covered injuries is what "covered services" means. In enacting the Livery Fund the legislature used language that is nearly identical to the language in the Black Car Fund legislation concerning "covered services." Fortunately for livery drivers the Appellate Division, Third Department has given that phrase a very broad interpretation. In *Aminov v. New York Black Car Operators Injury Fund, Inc.*,[12] the court indicated that covered services are to be interpreted broadly "considering the purpose of the act."

Once showing that there has been an injury in the performance of a covered service one must look to see if the driver has a covered injury. The first and third injuries will be relatively simple to determine. However, the third category of injuries can lead to major statute of limitations issue for the drivers.[13] What happens if the injury requires a listed amputation that takes place more than two years after the accident? Will the Workers' Compensation Board allow a driver to file a claim two and one half years after the accident if that is when they are required to have their index finger amputated at that point in time?[14]

The harder question for the Workers' Compensation Board to determine will be whether or not the driver has been the victim of a crime based upon a police report. A person who is hit by another car and sustains a physical injury can be said to be a victim of an Assault in the third degree.[15] A person who hits another car clearly must be acting recklessly as defined by the Penal Law, because otherwise they would not have hit the driver's car. A person acts recklessly when he or she is

> aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[16]

It will be up to the Workers' Compensation Board to determine if the drivers are the victims of a crime. The Workers' Compensation Board should not be able to hide behind the failure of the police to make an arrest to find that the Fund is not liable for an injury received as a victim of a crime. To do so would mean that if a driver were beaten up and robbed by a passenger and no arrest was made that the crime victim driver would be barred from collecting Workers' Compensation benefits.

Workers' Compensation Board Chair Robert Beloten has stated that this new law will protect livery drivers and their families when they sustained a covered injury.[17] However, what happens when they sustain an injury that would ordinarily be compensable for any other worker under the Workers' Compensation Law? What happens if the "minor" injury is not covered by No-Fault? Is the driver left without a remedy?

The statutory limitation of covered injuries created in the Fund is probably unconstitutional. After New York State's initial Workers' Compensation Law was declared unconstitutional in *Ives v. South Buffalo Railway Co*.[18] the Constitution of the State of New York was amended. It added what is now Article I §18 that made workers' compensation constitutional in New York State. That provision of the Constitution indicates that all injuries or deaths of employees are to be compensated without regard to fault with only limited exceptions. The only exceptions are enumerated in the Constitution as those injuries that are occasioned by:

1. The willful intention to injure or kill themselves or another
2. The injury was due solely to the intoxication of the employee

The New York State Constitution does not make any exceptions as to the type of injuries that are covered under the Workers' Compensation Law.

Although there is no requirement that there be a Workers' Compensation Law in New York, once enacted the legislature does not have the authority to limit the coverage of the law to certain types of injuries except as the Constitution granted the legislature to limit benefits for how injuries were caused. In fact the legislature placed the limits on compensable injuries contained in the constitution in §10(1) of Workers' Compensation Law.[19] The original language of §10(1) was almost identical to the language of Article I §18 of the Constitution.

The legislature was previously faced with an interpretation of the Workers' Compensation Law[20] that it felt made too many claims that were too hard to verify and defend. The *Black* case allowed for the establishment of a psychiatric claim based solely upon work related stress. To remedy this situation the legislature did not bar similar cases from being established as compensable. In 1990 Workers' Compensation Law §2(7) was amended to indicate that purely mental claims based upon legitimate personnel decisions were not an "injury" or a "personal injury" within the meaning of the Workers' Compensation Law. Since the Workers' Compensation Law only allowed for compensation for an injury or a personal injury the absence of having such a condition eliminated the claims from the system.

With the creation of the Livery Fund the legislature has taken a class of injuries that are not barred by Article I §18 of the New York State Constitution or by Workers' Compensation Law §10(1) and denied livery drivers benefits under the Workers' Compensation Law. The availability of No-Fault benefits is not an alternative for drivers envisioned under the New York State Constitution. A driver may sustain an injury that would entitle them to receive weekly workers' compensation benefits for the rest of their life if they were to be found to have permanent total disability as a result of an accident. However, they are now limited to the limited benefits provided by No-Fault benefits. One can only imagine a driver with a one car accident that leaves them confined to a long term facility as a result of traumatic brain injury that renders them totally disabled without being a para- or quadriplegic. Under the law creating the Livery Fund their injuries are not covered by the Workers' Compensation Law, which would have no limits on length of benefits nor on the amount of medical bills that the workers' compensation carrier would be liable to pay. Instead the driver now has the limited benefits of the No-Fault policy in effect for the vehicle involved in the work related accident.

Initially when these new claims were filed with the Workers' Compensation Board the Board was taking one of two paths with the claim. One path had the Workers' Compensation Board refusing to index a claim and sending the papers back to whoever filed the claim advising them that the claim was not covered under the Workers' Compensation Law. In other cases the Workers' Compensation Board would assign a case number and then send a letter to all parties involved that the claim was not covered and that they should seek No-Fault benefits. The Workers' Compensation Board did not indicate who was making the determination that a claim was not covered under the Workers' Compensation Law.

After being advised of the procedural problems with the way they were handling these claims, the General Counsel of the Workers' Compensation Board stated that if a police report that shows that the claimant was the victim of a crime a claim would be scheduled for a hearing in accordance with §20 of the Workers' Compensation Law.[21] Left unanswered by the General Counsel is who within the Workers' Compensation Board would be making the initial determination as to whether or not the driver was a crime victim and if that determination will be made in such a fashion to allow an appeal to a Board Panel of Commissioners and possibly to the Appellate Division under §23 of the Workers' Compensation Law.

The intention of the legislature in enacting Article 6-G of the Executive Law was to smooth the road to benefits for livery drivers in the New York City area. However, it appears that it has only made the ride bumpier by throwing large pot holes between the drivers and their desire to quickly receive the benefits that they need to live on and recover from their injuries.

Endnotes

1. N.Y. Session Laws 2008 N.Y. Laws ch. 392.
2. The penalties were imposed under §26-2 of the Workers' Compensation Law. The criminal sanctions are in Workers' Compensation Law §52.
3. Fees for representation in workers' compensation cases are contingent upon having an award of indemnity benefits awarded for the injured worker. If there is no award there can be no fee as the fee is awarded as a lien on the award. Workers' Compensation Law §24.
4. Crist, Steven, *On Horse Racing; Under New State Law, Bettors Come in Last* (*New York Times*, July 3, 1990).
5. New York State Executive Law Article 6-F §§160-CC through 160-OO. The law is officially called the New York Black Car Operators' Injury Compensation Fund, Inc.
6. Executive Law §160-AAA(10) and local Taxi and Livery Commissions.
7. Executive Law §160-AAA(3).
8. Executive Law §160-FFF.

9. Workers' Compensation Law §18-C(5).
10. Executive Law §160-DDD.
11. Workers' Compensation Law §18-C(8).
12. 2 A.D. 3d 1007 (3d Dep't 2003).
13. The basic statute of limitations in workers' compensation cases is two years. Workers' Compensation Law §28.
14. If the answer is yes, will the driver be entitled to collect workers' compensation benefits retroactively to the date of the accident or only as of the date of the amputation? Will the workers' compensation carrier be required to repay the No-Fault carrier for what they had previously paid?
15. Penal Law §120(2).
16. Penal Law §15.05(3).
17. *New York State Workers' Compensation Law Annotated 2009 Edition* (LexisNexis) Pages v – vi.
18. 201 N.Y. 271 (1911).
19. Section 10(1) of the Workers' Compensation Law was amended to include those injuries that were caused by intoxication from controlled substances after the courts interpreted intoxication to mean only intoxication from alcohol. The constitutionality of the amendment was not raised in *Thompson v. Wiltsie Construction Co. Inc.*, 72 A.D. 3d 1373 (2010) although the constitutionality of the amendment was questioned in *New York Injured Worker Tests Positive for Marijuana: High Level of Proof Needed to Overcome Presumption That Injury Not Caused Solely by Intoxication*, http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2010/04/26/new-york-injured-worker-tests-positive-for-marijuana-high-level-of-proof-needed-to-overcome-presumption-that-injury-not-caused-solely-by-intoxication.aspx.
20. *Black v. Metropolitan Tobacco*, 132 A.D. 2d 814 (1987).
21. Letter of June 16, 2010 from Kenneth J. Munnelly, General Counsel of the Workers' Compensation Board, to the author.

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Second Circuit Emphasizes Limits to Insurers' Obligations Under NYIL §3420(d)

By Marc A. Perrone

New York Insurance Law §3420(d) has long been a troublesome statute for insurers as it is the source of considerable litigation, most of which insurers lose. The New York statute requires that insurers provide written notice of coverage denials "as soon as is reasonably possible" for accident claims involving bodily injury and death.[1] Courts have long held that an insurer's failure to comply with the statute results in waiver of any defenses to coverage, even where there is no prejudice to the policyholder.[2] An insurer must raise in its notice all the grounds on which it bases its disclaimer.[3] When the insurer disclaims liability on some grounds but not others, it is deemed to intend to waive the other grounds.[4] Further, Courts have held notice delays as short as 30 days violate the statute's reasonableness standard.[5] Plainly, the statute stacks the chips against insurers and in favor of policyholders.

Recently, however, the Second Circuit Court of Appeals in *NGM Insurance Co. v. Blakely Pumping, Inc.* reemphasized the limited circumstances where the statute applies.[6] Relying on well settled case law handed down by the Court of Appeals of New York, the Second Circuit reiterated the distinction between disclaimers of coverage "by reason of exclusion" from disclaimers "by lack of inclusion."[7] In other words, §3420(d) applies to disclaimers based on defenses to coverage, but not to disclaimers that merely inform the policyholder that the policy never contemplated coverage for such a claim in the first instance.

The issue in *Blakely Pumping* was the availability of coverage under a Businessowners Liability Policy issued to Blakely Pumping for liability arising from an automobile accident. Brian Blakely, an officer and employee of Blakely Pumping, was involved in a traffic accident while operating his personal vehicle in the course of his work for Blakely Pumping. The other party to the accident filed suit against both Blakely and Blakely Pumping and Blakely sought coverage under Blakely Pumping's Businessowners Liability Policy issued by NGM Insurance Company ("NGM"). NGM promptly denied coverage for the claim based on the policy's automobile exclusion.

Thereafter, Blakely disputed the denial with NGM citing the policy's "Hired or Non-Owned Auto" endorsement. NGM again promptly disclaimed coverage, this time asserting that because Blakely was an executive officer of Blakely Pumping, his vehicle failed to qualify as either a Hired or Non-Owned Auto as defined by the endorsement. NGM also sought a declaratory judgment that it was under no obligation to defend or indemnify Blakely Pumping.

The U.S. District Court for the Southern District of New York agreed with NGM that because Blakely was an executive officer of Blakely Pumping, his vehicle failed to qualify as either a "Hired Auto" or "Non-Owned Auto" under the endorsement.[8] The court also found, however, that because the endorsement "generally covered auto accidents" NGM's basis for disclaiming coverage was essentially exclusions to that general coverage afforded by the endorsement. Consequently, the court held that pursuant to New York Insurance Law §3420(d), because NGM originally disclaimed coverage pursuant to the policy's auto exclusion, it waived its right to disclaim coverage on other grounds. This, the court reasoned, rendered NGM's subsequent disclaimer based on the Hired or Non-Owned Auto endorsement ineffective. Consequently, the District Court ruled that NGM was obligated to defend and indemnify Blakely Pumping with regard to the claim. NGM subsequently appealed.

The Second Circuit reversed emphasizing that the limits of §3420(d) rendered it inapplicable to the facts at hand. The court relied on the New York Court of Appeals seminal holding in *Zappone v. Home Insurance Co.* that interpreted §3420(d) as requiring notice only for a "denial of liability predicated on an exclusion set forth in the policy which, without the exclusion, would provide coverage for the coverage in question."[9] The Second Circuit added that §3420(d) is not applicable where "the policy as written could not have covered the liability in question under any circumstances,…that is notice is not required where there is no coverage by lack of inclusion."[10]

Admittedly, the Second Circuit conceded, "determining whether there is no coverage by reason of exclusion as opposed to lack of inclusion can be "problematic."[11] Nonetheless, the Appellate Court continued to interpret the Hired or Non-Owned Auto endorsement as never covering Blakely's vehicle in the first instance, rather than initially covering the vehicle then removing coverage by exclusion as held by the District Court. The court reasoned "[t]he Endorsement did not generally cover auto accidents; it covered only accidents arising from the use of a Hired Auto or Non-Owned Auto" and that "those terms were defined in such a way that…Blakely's [vehicle]… could never be covered."[12] Therefore, the Appellate Court reasoned, because there was no coverage "by reason of lack of inclusion" compliance with § 3420(d) was not required.[13] Accordingly, the Second Circuit reversed the District Court's decision and instead ruled that NGM is not obligated to defend or indemnify Blakely Pumping for the subject claim.

Clearly the Second Circuit's holding is instructive concerning the limits of §3420(d) as being limited to policy defenses to coverage and not creating coverage under a policy where none existed in the first instance. Nonetheless, as the court conceded, distinguishing between denials based on exclusions of coverage as opposed to denials based on "lack of inclusion" can be problematic. Although as a general rule the insuring agreement of a policy provides the general issuance of coverage from which the exclusions remove coverage, the nature of certain policy conditions and definitions can be ambiguous.[14] Depending on the language of the policy and courts have held some conditions and definitions to be providers of coverage and other such provisions exclusions of coverage.[15]

Accordingly, insurers should be sure to comply with §3420(d) in all New York bodily injury cases with an abundance of caution. Nonetheless, *Blakely Pumping* provides a valuable lesson that §3420(d) is not applicable to all disclaimers of coverage, and that careful attention should be paid to the potential application of *Blakely Pumping* and *Zappone* where §3420(d) is the basis for an action to invalidate a disclaimer of coverage.

Endnotes

1. New York Insurance Law §3420(d) provides "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."
2. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911, 432 N.E.2d 783 (1982) (if the insurance carrier fails to disclaim coverage in a timely manner, it is precluded from later successfully disclaiming coverage).
3. *Luria Bros. & Co., v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1090 (2d Cir. 1986).
4. *New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1432 (2d Cir. 1991).
5. *See e.g. West 16th St. Tenants Corp. v. Public Serv. Mut. Ins. Co.*, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dept. 2002), *lv. denied* 98 N.Y.2d 605, 746 N.Y.S.2d 279, 773 N.E.2d 1017 (2002) (30 days unreasonable as a matter of law where sole ground on which coverage was disclaimed was insured's delay in notifying insurer of occurrence); *Colonial Penn Ins. Co. v. Pevzner,* 266 A.D.2d 391, 698 N.Y.S.2d 310 (2d Dept. 1999) (same for 41-day delay); *Campos v. Sarro,* 309 A.D.2d 888, 767 N.Y.S.2d 442 (2d Dept. 2003) (39-day delay unreasonable after receipt of sufficient facts to disclaim on basis of homeowner's policy exclusions for injuries sustained in connection with insured's business and by individuals for whom insured was obligated to procure workers' compensation insurance; explanation for delay too vague); *Squires v. Marini Bldrs.,* 293 A.D.2d 808, 810, 739 N.Y.S.2d 777 (3d Dept. 2002), *lv. denied* 99 N.Y.2d 502, 752 N.Y.S.2d 589, 782 N.E.2d 567 (2002) (insurer waited 42 days after receiving plaintiff's complaint, which alleged his employment status, the sole factor in determining whether to deny coverage, and did not assert that it had any reason to doubt the allegations of the complaint); *Nationwide Mut. Ins. Co. v. Steiner,* 199 A.D.2d 507, 605 N.Y.S.2d 391 (2d Dept. 1993) (unexplained 41-day delay in disclaiming on ground of untimely notice of accident).
6. *NGM Insurance Co. v. Blakely Pumping, Inc.*, 593 F.3d 150 (2d Cir. 2010).
7. *Id.* at 153 *quoting Zappone, supra,* at 137.
8. 2009 WL 765042 (S.D.N.Y.).
9. *Id*.
10. *Id*. (internal quotations omitted).
11. *Blakely Pumping, supra* at 7; *quoting Worcester Ins. Co. v. Bettenhauser,* 95 N.Y.2d 185, 189, 712 N.Y.S.2d 433, 734 N.E.2d 745 (2000).
12. *Blakely Pumping, supra* at 154; *quoting Zappone, supra,* at 134 (internal quotations omitted).
13. *Id.* at 137 (internal quotations omitted).
14. *See* Leo Martinez et al., New Appleman Insurance Law Practice Guide § 30.05[3][a] (2008).
15. *See generally Planet Ins. Co. v. Bright Bay Classic Vehicles, Inc.*, 75 N.Y.2d 394 (1990) (definition of coverage "amounts to an exclusion"); *Greater New York Mutual Insurance Co. v. Miller,* 205 A.D.2d 857, 613 N.Y.S.2d 295 (1994) (an insurance policy's definition of an "insured" was an exclusion where it withheld coverage for drivers who used the auto in question without permission); *United Services Automobile Association v. Meier,* 89 A.D.2d 998, 454 N.Y.S.2d 319 (1982) (found that various definitions in an insurance policy were "negative definitions, which, in effect, are nothing more than exclusions" but other definitions were not exclusions).

Marc A. Perrone, Esq. practices in the areas of insurance coverage, insurance regulation, reinsurance and complex litigation in New York City. This article is intended to provide an overview of the legal subject matter. Due to the developing nature of the subject body of law, an updated and independent analysis of the case law applicable in a particular jurisdiction must be completed before any significant decisions are made. In providing this information, neither the author nor any affiliates thereof intend to provide legal advice. The author welcomes any comments and can be reached at Perrone.Marc@gmail.com.

The Workers' Compensation Law Division Update on the "Managed Adjudication Path" Program

By Christopher R. Lemire

The Workers' Compensation Law Division of TICL is comprised of 100 or so attorneys who represent injured workers, employers, insurance companies and other entities before the New York Workers' Compensation Board and New York Courts.

The Division has been very busy in 2009 and 2010. Last fall, the Division formed a subcommittee to interact with the Workers' Compensation Board on current issues, initiatives and programs which affect our clients and the practice of law before the Board. This subcommittee was originally contemplated in an October 2001 New York State Bar Association "Report of the Special Committee on the Workers' Compensation Board."

The bipartisan subcommittee is comprised of nine (9) attorneys: the Division Chair; Vice-Chair; and Secretary and six (6) other members of the Division (three (3) claimant attorneys and three (3) defense attorneys) representing the various Workers' Compensation Districts from across New York State.

Since its formation last fall, the subcommittee has met with Workers' Compensation Board Chairman Beloten and his staff on several occasions. Although numerous issues have been explored, the primary focus of those meetings has been the Board's proposed program to divert an unspecified number of cases from the Law Judge hearing calendar to desk decisions to be rendered without notice to, or appearance by, the parties (a/k/a—the "Managed Adjudication Path").

The "MAP" Program Became Public

While the Board had not made any official announcement, or done any outreach to any stakeholders within the system about its development of an informal resolution plan, the Board, when asked about this initiative last September, advised that such a plan was under consideration, and was named "the Informal Resolution Project a/k/a Business Process Improvement (BPI) Initiative."[1]

The Division and subcommittee initially became aware of the "BPI" Initiative through a series of e-mails generated within the Board between 9/15/09 and 9/17/09. An e-mail of 9/15/09 offered the following rationale for the "BPI" project:

> Ladies & Gentlemen: We need to increase referrals to conciliation for two reasons:
>
> 1) This is the new environment which we will be working in once the reclassification takes place;
>
> 2) In order to relieve some of the pressures from the current hearing calendars."

During the subcommittee's initial meetings with the Board, the Board offered no definitive explanation as to what these e-mails meant by the "new environment" after "re-classification." As discussed below, it appears that the quoted language envisioned cases being handled through the Conciliation process; (1) without Conciliation Counsel (Conciliators); (2) without Conciliation Meetings; and (3) without limitation as to expected duration of benefits.

Conciliation and "MAP"

WCL Section 25(2-b), the Conciliation statute, provides for Conciliators to hold meetings with the parties when necessary; with all concerned parties being present. However, the Board unilaterally, and without explanation, ceased holding Conciliation Meetings in August 2009. As a result, Conciliators were required to issue Proposed Decisions based upon their review of the Board's Electronic Case files only (without notice to the parties, without the presence of the parties at a meeting or without a negotiated agreement by the parties). During his testimony before the Joint Senate-Assembly Budget Hearings in Albany on February 10, 2010, Chairman Beloten stated that the Board has made a request to Civil Service to re-classify the 20 remaining Conciliators to the status of Administrative Law Judges (ALJ's).

In addition, during his testimony, Chairman Beloten stated that the Board had received the authority to hire eight (8) additional Law Judges. If Civil Service agrees to reclassify the 20 Conciliators, the Law Judge ranks would swell to over 100. Under the "MAP" program, all "100 plus" Law Judges would spend an unspecified part of their work week reviewing files and issuing desk decisions, in essence, acting as Conciliation Counsel.

The subcommittee has argued that the Board's reliance on WCL § 25-2(b), as authority for the "MAP" program, is legally flawed, and is inconsistent with the statute which calls for Proposed Decisions to be issued by Conciliation Counsel, not Law Judges, after a Conciliation Meeting, when necessary. Furthermore, the subcommittee submits that the Board's "MAP" Program would emascu-

late the Conciliation statute, as it arbitrarily accomplishes a wholesale and complete elimination of Conciliation Meetings (destroying the due process protections afforded by the Legislature in WCL sec. 25(2-b) and in Board Regulations 312.4 and 312.5), as well as the elimination of all Conciliator positions.

What Is "MAP"?

The "MAP" program and its initial incarnation, "BPI" was to provide a mechanism "…whereby contested issues in established or accepted claims can be handled on an expeditious and informal basis without the need for the parties to appear at a hearing or proceeding before the Board." The Chairman, without citing any legal authority, articulates that the right to a hearing under WCL Section 20 applies only to initial claims for compensation, and not for contested issues in established or accepted claims. The subcommittee has a fundamental disagreement with the Chairman as to this premise.

WCL Section 20, providing the right to a hearing, has been in our Workers' Compensation Law since its adoption in 1914. The seminal case addressing the Board's obligation to schedule hearings is *Arcangelo v. Gallo & Laguidara*, 177 A.D. 31, 163 NYS 727 (3d Dept. 1917). In *Arcangelo*, the Third Dept. squarely addressed the issue of whether Section 20 simply required the Board to schedule an initial hearing on a matter or whether this section required that the Board schedule multiple hearings to address issues in a claim that may arise over time. In finding that the Board has a statutory mandate to schedule hearings upon the request of a party to address an outstanding issue, the *Arcangelo* court stated:

> Under Section 20 of the Workmen's Compensation Law, either party upon application is entitled to a hearing. I do not think this provision of the law is complied with by the giving of one or more hearings, when additional hearings are necessary for the proper determination of the claim, but requires the giving at convenient times, upon request, of such hearings as may be necessary for the determination with reasonable certainty of the material matters involved.…

Id. at 35-36.

The clear holding of the court in *Arcangelo* is that Section 20 requires the Board schedule a hearing upon the request of the party and that the Board has no discretion to refuse to do so where the record demonstrates that a "material matter" is at issue. The state of the law with regard to Section 20 has remained fixed for almost 93 years in requiring that the Board schedule a hearing or hearings to address a party's request to determine an outstanding issue affecting a claim, even when a case had previously been before the Board.

Those who have been involved with the Workers' Compensation system for any period of time, agree that the vast majority of hearings held at the Board on an annual basis involve issues that arise in the months and years after the initial establishment or acceptance of cases. The Board's interpretation of Section 20 would ease the way to divert the vast majority of cases from the hearing forum to desk decisions without notice to, appearance by, or involvement of, any party. Remarkably, the Board has admitted in its several meetings with our subcommittee that it has done no analysis as to the number of cases that would be diverted from hearing calendars to desk decisions through the "MAP" Program.

What's Happened and Where Are We?

The subcommittee met with the Chairman and his staff in New York City on January 14, 2010. At that meeting the subcommittee expressed its unified opposition to the proposed "MAP" program. The "MAP" initiative would require a party to object to a Proposed Decision of the Workers' Compensation Board as a precondition to obtaining a hearing before a Law Judge. This is a change that, in the judgment of the subcommittee could deprive claimants and employers of due process rights. At this meeting, the subcommittee was assured that "the Board had not made a final decision about adopting this initiative" and that the Board "was not going forward with implementation of this initiative at that point in time."

On January 27, 2010, the Executive Committee of TICL adopted a Resolution opposing the Workers' Compensation Board's proposed Informal Resolution Program, "BPI"—n/k/a "MAP," and a day latter the Executive Committee of the New York State Bar Association adopted the decretal paragraph of the Resolution, noting:

> *IT IS THEREFORE RESOLVED, that the New York State Bar Association opposes the Workers' Compensation Board's Business Process Improvement Initiative, and hereby endorses the longstanding and historic principle that the due process rights of both injured workers and employers require and demand that the Workers' Compensation Board continue its charge in conducting hearings before a Law Judge to resolve substantive disputes between the parties, scheduled without delay upon the duly-supported request of a party, or otherwise upon the Board's receipt of any information indicating a substantive dispute.*[2]

Thereafter, Chairman Beloten and his staff attended the Workers' Compensation Law Division Winter Meeting at the Annual New York State Bar Association Meet-

ing in NYC on January 29, 2010. At that meeting, NYSBA President Michael Getnick advised the Board of the Bar Association's resolution in opposition to the "MAP" initiative. Despite the Resolution in Opposition, the Board advised that it was in fact moving forward with the "MAP" initiative as a "Pilot" program in the Board's Hauppauge District.

Remarkably, on February 3, 2010, a short five (5) days later, the Board issued its newsletter, *ACROSS THE BOARD* advising that training for Board staff on the "MAP" program would occur in February, and that the computer system to support "MAP" would "go live" on February 26th.

The New York State Senate Labor Committee, which has legislative oversight of the Workers ' Compensation Board, became aware of the Board's proposed initiative and the opposition thereto. The Senate Labor Committee scheduled a public hearing to address the "Managed Adjudication Path" program on February 24, 2010. At the hearing, the Senate Labor Committee heard unanimous opposition to the Board's proposed "MAP" initiative from present and former Workers' Compensation Law Judges, attorneys for injured workers and employers and other parties involved in the Workers' Compensation system.

In a February 25, 2010 Press Release, State Senator Onorato, Chairman of the State Senate Labor Committee stated:

> Witness after witness at yesterday's hearing called upon the Board to withdraw its plans to use the MAP program. I urge Chairman Beloten to reconsider his plans and, in the future, meet with the Labor Committee and other stakeholders in New York's workers' compensation system if he believes changes are needed to improve current procedures to protect injured workers and adjudicate their claims.

In response to the opposition from the Senate Labor Hearing, WCB Chairman Beloten issues the following statement:

> Given the scope of concern expressed by many stakeholders and by the Legislature, I think it is appropriate to delay the initiative so that there is time for more discussion and feedback. In the next several weeks, the Board will set up a forum in which the details of the Board's process changes can be set forth before interested parties in full detail, and where there can be a full and frank discussion about the conciliation process. After the briefing, I will consider all suggestions and proposals by stakeholders before a reform program is implemented.

Ironically, despite the Board's public comments, the subcommittee came to learn that the job description for Workers' Compensation Law Judges was amended two (2) days before the 2/24 Senate Labor Hearing to include, among the duties, "the issuance of proposed decisions" and "conducting meetings." The subcommittee also learned that the eight (8) newly hired, Workers' Compensation Law Judges had been instructed to issue proposed decisions (a/k/a—Conciliation Decisions pursuant to WCL §25-2(b)). Thus, it appeared to the subcommittee that the Board had in fact implemented a primary component of the "MAP" initiative which both the Bar and Senate Labor Committee found impermissible.

Presumably in response to the opposition voiced at the Senate Labor Hearing, the Board produced a Webinar setting forth its vision for the "Managed Adjudication Path" program. This Webinar, held on May 7th, was dubbed by the Board as an educational event, designed to inform stakeholders about the "MAP" program and elicit feedback. Written submissions and questions to the Board in response to the Webinar were encouraged. The Board advised that all questions and inquiries regarding the "MAP" program and the Board's responses thereto would be published on the Board's website in June 2010. Additionally, the Board advised that they would be publishing a "Whitepaper" setting forth the Board's legal authority and justification for the "MAP" program.

Several members of the subcommittee attended the Webinar in Albany. Additionally, numerous members of the Division and subcommittee have submitted written questions to the Board in response to the Webinar. To date the Board has not published either the questions submitted; the Board's responses thereto; or the "Whitepaper."

At the Workers' Compensation Law Division Summer Meeting in Albany on May 14th, the membership discussed the Board's Webinar and expressed its unanimous opposition to the "Managed Adjudication Path" Program. The Division's continuing opposition to the "MAP" initiative was conveyed to the Board's Executive Staff in attendance at the meeting with the following motion:

> The Workers' Compensation Division of TICL strongly rejects the "MAP" proposal, as well as the explanation and justification set forth in the May 7, 2010 Webinar as violative of the statute, rules and regulations and the due process rights of injured workers, employers and carriers.

Thereafter, the State Bar Association issued a Press Release on May 26, 2010 announcing its opposition to the "MAP" program; arguing that the initiative would

severely limit due process rights traditionally afforded to workers, employers and insurance companies in workers' compensation claims. State Bar President, Michael E. Getnick stated,

> The MAP program represents a major departure from the Board's longstanding practice of resolving disputed issues through adjudicatory hearings. Simply put, it would erode the due process rights of injured workers and employers.

Most recently, at the New York State Self Insurer's Conference in Lake Placid on June 10, 2010, Chairman Beloten announced that the name "MAP" would be dropped and he hoped to have a final decision on whether an "informal resolution process" would or would not be implemented by October 1, 2010.

As of the date of this article, there has been no further information forthcoming from the Board regarding the proposed "MAP" initiative, and its current status.

The subcommittee was scheduled to meet with Chairman Beloten and his staff on August 23rd at the Board offices in Albany. For more information, go to the Section's website at www.nysba.org/TICL.

If you have any questions or would like further information about the "Managed Adjudication Path" program; or if you are interested in becoming a member of the Workers' Compensation Law Division, please contact me at crl@lemirejohnsonlaw.com.

Endnotes

1. In a February 3, 2010 newsletter, the Board announced its new name for this initiative – the "Managed Adjudication Path" Program (a/k/a—"MAP").
2. The Division is greatly appreciative of the assistance and support provided by NYSBA past-President Michael Getnick and the TICL Executive Committee. The Division looks forward to working with newly elected President Stephen Younger and the Bar Association as a whole, to ensure that injured workers' and employers' access to justice and due process rights are protected in the Workers' Compensation system.

Christopher R. Lemire, Esq. is Chair of the WCL Division of the TICL Section.

The Defense Attorney's Guide to Effective Cross-Examination of the Plaintiff's Treating Physician

By Matthew J. Larkin and Michael Oropallo

The cross-examination of the plaintiff's treating physician is often the pivotal event in the damages phase of a personal injury trial. Although one must tread carefully to avoid the obvious perils, this cross-examination presents the best opportunity to test the *bona fides* of the plaintiff's claims and can serve as the foundation of the defense's alternative position. Preparedness, tone and scope are the keys to the successful cross-examination of any witness, and they are certainly of paramount importance when cross-examining a treating physician. The ideal cross-examination of a treating physician should yield substantive information favorable to the defense, expose vulnerabilities in the plaintiff's claims, and will frequently reveal weaknesses in the foundation or breadth of the physician's opinions.

Preparation

Young scouts and trial attorneys alike are well served if they adhere to the familiar maxim to "be prepared." The critical issue, however, is how best to prepare for the cross-examination of a treating physician. In general terms, preparing for such is no different than preparing for the cross-examination of any other witness. The goal is to gather, organize and digest as much relevant information as possible. Then, you must winnow that information, first into topics or themes, determine those that are helpful to the defense, limit the number of topics to an effective number, then reduce that information into question format so that it bolsters your theme.

Preparation for cross-examination of a treating physician, like any other expert, requires increased scrutiny, time, effort and thought. Unlike most lay witnesses, however, topical research materials and information regarding the treating physician's qualifications, such as his professional history, records, publications and prior testimony, are usually more readily available, and can provide a bounty of information when preparing for his or her cross-examination. The best resource available is often the defense's own examining physician, who should be consulted to guide you through the medical issues and opinions, and direct you to other appropriate resources.

Determine what the plaintiff's attorney is likely to elicit from the physician on direct examination. In federal district court, you will usually have the deposition transcript of the treating physician, and should start by reviewing the strengths and weaknesses of the testimony. In New York State courts, expert depositions are prohibited so the available materials require even greater scrutiny, thought and innovation. Whether or not the treating physician has been deposed, you must conduct an exacting review of his or her records. This activity serves a dual purpose: 1) to elucidate the potential direct testimony; and 2) to determine what records and information were missing from the treating physician's file during the plaintiff's treatment. In most cases, the physician will have prepared a narrative report containing his opinions pursuant to 22 N.Y.C.R.R. § 202.17(b)(1), and often the plaintiff's attorney will have prepared an expert witness disclosure statement setting forth those opinions even though a CPLR 3101(d) disclosure is not required for a treating physician. *See Logan v. Roman*, 58 A.D.3d 810 (2d Dep't 2009); *see also Stark v. Semeran*, 244 A.D.2d 894 (4th Dep't 1997). These documents must be studied carefully to plot out the cross-examination and to ensure the witness will be confined to the subject matter and opinions disclosed. Such disclosures should also be reviewed for potential *in limine* motions.

Meet with your examining physician. If the plaintiff has not been examined, but the records have been reviewed by a physician, meet with the physician who has conducted the records review. In the alternative, consider a non-testifying consulting physician to assist you. Regardless, such a meeting or series of meetings should focus on obtaining a good working knowledge of the precise medical issues present. The meetings should be conducted face-to-face, in a conference room in your office, and free from telephone calls or interruptions. It is worthwhile to conduct this meeting even if you and your client have decided not to call the physician as a witness at trial. A qualified medical expert in the same field as the treating physician will be able to focus the issues that you should address in cross-examination, will direct you to relevant research, and may even provide you with personal knowledge on the treating physician's background and reputation.

Become familiar with the medical literature relevant to the treatment at issue. This may start with basic materials such as an anatomy texts, on-line medical dictionaries, or books of medical illustrations. It must, however, proceed to a more thorough review of the treatments provided and the procedures performed, and get progressively narrower until you have a complete grasp of the precise issues likely to be addressed by the treating physician. While you need not be able to perform the procedures in question, you must be able to stand before a judge and jury, and most importantly, the treating physician, and speak with authority and knowledge on the narrow topics at issue, being careful not to overstep your bounds.

Gather potential impeachment materials. This may include any publications authored by the treating physician and transcripts of his prior testimony. Regarding publications, a good place to start is with the treating physician's resume or *curriculum vitae*, but that should only be the start—do not end there. Also, do not assume the physician has listed all of his publications, or that her resume is up to date. Do your own research. Contact attorneys in your firm who may have experience with the plaintiff's attorney or the treating physician, and reach out to your colleagues in the defense bar who may be willing to share their knowledge with you as well. Getting your hands on prior testimony can be invaluable for cross-examination.

Interview the treating physician if you can. This is perhaps the best method of preparing for cross-examination, but is often the most underutilized. There is a common law tradition of conducting *ex parte* interviews of a plaintiff's treating physicians. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") has not abrogated that custom, but has imposed some procedural restrictions. *See Arons v. Jutkowitz*, 9 N.Y.2d 393 (2007). Under *Arons*, a plaintiff can be compelled to provide an authorization permitting an *ex parte* interview of the treating physician. This does not mean, however, that the physician must speak to you. You may, however, be pleasantly surprised to find that the treating physician is willing to discuss his treatment with you and may offer insights that are not apparent from the medical records and reports.

Subpoena the treating physician's file to the courthouse. You may find that the physician has not disclosed his complete file pursuant to authorizations processed during the discovery phase of the case, or that may have been "scrubbed" in advance. You may also uncover correspondence between the physician and the plaintiff's attorney that provides good fodder for cross-examination. If the treating physician fails to abide the subpoena, you may even be able to cross-examine him before the jury on the fact that he sought to evade a legal obligation. In any case, having the treating physician's complete file in your hands before cross-examination is invaluable, and the best method to accomplish that goal is to issue a subpoena. Under HIPAA, you will be required to provide an updated authorization for service with the subpoena, which plaintiff's attorney should normally provide in advance of trial to allow you to obtain updated medical records.

Conducting the Cross-Examination

The basic cross-examination techniques should not be swayed by the type of witness in the chair. Like any other witness, you need to assert control over a treating physician by setting the tone, asking leading questions, confining the witness's answers and, if appropriate, impeaching the testimony through prior inconsistencies or extrinsic evidence. Yet, these techniques must be honed to deal with a knowledgeable and prepared professional, who has probably testified in the past and is committed to the propriety of his treatment and validity of his opinions.

Determine whether you want to cross-examine the witness. When it comes to a plaintiff's treating physician, the answer to that question is invariably "yes." You do not want to leave the jury with the impression that the medical issues are not subject to dispute. If, during trial preparation, you find yourself leaning toward not conducting a cross-examination of the plaintiff's treating physician, you should reconsider your settlement position or attempt to move the case into alternative dispute resolution. One instance in which you may not want to cross-examine the treating physician is when you have a strong liability defense and want to focus the jury on the liability issues. This a dangerous course, however, and should generally be avoided. Another scenario where you may not want to conduct cross-examination of a treating physician is when you have a strong cross-claim against a codefendant. In that case you want the jury to be focused on the dispute between the plaintiff and the codefendant. You should, nonetheless, prepare a cross-examination of the treating physician in the event the codefendant's attorney also decides not to cross-examine the physician.

Set the tone. In most cases, a treating physician should be treated differently than a hired expert who has had little contact with the plaintiff. Generally, a treating physician will not exceed the scope of his expertise and will concede points that should be conceded. Remember, it is your examining physician who will testify later during the defense case that has had minimal contact with the plaintiff and has been hired to provide an opinion. If you focus your cross-examination on issues such as compensation and patient contact, you are laying the foundation for the plaintiff's attorney's summation when he turns those points against your examining physician.

Avoid minutiae when addressing the physician's qualifications. If the treating physician has ventured too far from his field or has had disciplinary actions against his license, address his qualifications at the outset of the cross-examination. Other issues such as hospital privileges, malpractice settlements, board certifications and residencies in particular disciplines are appropriate to raise, but should be given limited attention and should not be mentioned at all if your own expert does not possess the qualifications that the treating physician is allegedly lacking. Most people who sit on juries like and respect the physicians they come in contact with during their daily lives and attempts to diminish a physician's testimony at trial by concentrating on trivial issues will usually be ineffective.

Elicit helpful testimony. As a general rule of cross-examination, you should try to extract testimony that supports the defense position or corroborates a disputed fact.

In many instances the treating physician's file will contain entries that are supportive of the defense arguments or are merely innocuous but will appear to support your arguments to the jury. For instance, most surgeons will testify that the surgery they performed was successful, at least in part. Unless mentioned in the surgical note, the surgeon should also testify that there were no complications during surgery. Where there has been extended treatment, the treating physician's records often show improvement in the plaintiff's condition over time. Plot those entries out chronologically before the jury. Focus on activities that the plaintiff can still perform despite the injury. For example, if the record does not contain any restrictions on driving, establish that the plaintiff is still able to drive a car. If there is an issue with the plaintiff's compliance with medical advice, bring out any missed appointments or failure to follow medical directives. The overall focus should be to lay the groundwork for your examining physician's testimony. Establish the points that the two physicians agree upon. For instance, if the treating physician has documented full range of motion in the plaintiff's back and your examining physician is going to testify to that same fact, bring it out during the cross-examination. If you do not have an examining physician to testify for the defense, you will still want the jury to hear the testimony that supports your summation arguments.

Expose the limits of the physician's knowledge. In most cases, the treating physician will be a specialist such as an orthopedic surgeon or neurologist who did not treat the plaintiff prior to the accident. Establishing the lack of a baseline may be a critical issue. For example, if the plaintiff is a laborer with limited range of motion in his shoulder, establish that the physician does not know the plaintiff's pre-accident range. If the plaintiff has had prior injuries to the same body part, and those records are not within the physician's file, establish that the treating physician was unaware of the prior complaints and treatment. Testimony that reveals the treating physician's lack of information is frequently the strongest evidence to discredit the plaintiff's claims.

Reveal the treating physician's reliance on the plaintiff's history, complaints and test responses. Virtually every treating physician will testify that a history was obtained from the plaintiff at the outset of the treatment and this history is based upon subjective complaints made by the plaintiff. You should be able to elicit testimony that the treating physician assumed that the plaintiff provided accurate information and disclosed all prior injuries and ailments. After taking a history, the treating physician should have performed a physical examination in which both objective and subjective tests were performed. You should be able to draw out testimony that the treating physician relied on the fact that the plaintiff was giving his full effort during testing. The treating physician should also acknowledge that his diagnoses were based on the history and physical examination. Upon taking a history and conducting a physical examination, the treating physician will have formulated a plan of action. After these facts have been established before the jury, the treating physician should admit that if the history is inaccurate or the plaintiff failed to perform to his full ability during testing, than the diagnoses and plan of action are not accurate as well.

Impeach the treating physician with prior inconsistencies and omissions. Although you may find that a softer touch is most effective when cross-examining a physician, there are times when a direct confrontation is appropriate and necessary. If the physician has affirmatively contradicted his own records, he should be confronted with the inconsistency. Similarly, if the treating physician has embellished or expanded his opinions, he should be challenged with omissions in his file. Unlike other witnesses, a treating physician is obliged to keep complete records and should acknowledge that all relevant information regarding the treatment of the plaintiff is recorded in his file. If the physician deemed the material important, it was recorded. If it is not recorded, that means it was not important to the care. Once these facts are confirmed, question the physician on the omissions. Finally, if the physician's opinions differ from diagnostic tests or opinions of other treating physicians, confront him with those discrepancies as well. Be careful, however, to keep control and do not to allow him to explain away the differences or expose your lesser knowledge of the medical issues.

Closing Thoughts

The testimony of the plaintiff's treating physician may be the seminal event in the trial. It is the plaintiff's opportunity to reconcile his complaints and claims with purportedly objective proof. A well prepared defense attorney with an organized and focused cross-examination can turn the physician's testimony to the advantage of the defense, using plaintiff's own treating physician to undermine some claims and neutralize others. Oftentimes this testimony, more than any other in the case, will determine who will prevail at trial.

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When First We Practice to Deceive: Misrepresentations, Mistakes and Omissions in the Insurance Application

By Reed Podell

Good faith and fair dealing are the bedrock of valid contracts, including insurance policies. As an inducement to issue a policy, the insurer relies upon the prospective insured's complete, accurate and truthful disclosure in its insurance application so that it can determine whether to accept the risk in consideration for a commensurate premium. In turn, the insured expects that the insurer will act in good faith when claims are presented. This is not to say that the respective parties will gladly undertake their contractually assumed duties when called upon to do so. When claims arise an insured may find that the insurer will scour not only the policy but also the insurance application in search of inaccuracies or omissions, whether intentional or not, to avoid coverage.

Insurance Law § 3105 permits insurers to void policies *ab initio* where there is a "material" misrepresentation in the insurance application.[1] The insurer's statutory right of rescission is based upon the contract law principle that a party who discovers that he has been induced to enter into a contract by fraud may elect to rescind the contract.[2]

An insured's misrepresentation in an insurance application is not to be confused with a breach of warranty. In contrast to a representation that an insured may make in an insurance application—a pre-contract event—a warranty is a condition precedent to coverage contained within the policy itself or is incorporated by reference into the policy.[3] Except for maritime policies which are held to a higher standard, a breach of warranty will only defeat coverage if it materially increases the risk of loss, damage or injury.[4]

Materiality of a different type is at issue when determining an insurer's right to void a policy *ab initio* under Insurance Law § 3105, i.e. whether the misstatements or omissions[5] in the insurance application are "material."[6] "A fact is material so as to avoid *ab initio* an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only issued it at a higher premium."[7]

Where there is some ambiguity as to whether a statement in an insurance application constitutes a misrepresentation, the insured is entitled to have its answers construed with the greatest liberality in its favor.[8] But even if there is no ambiguity and it is clear that the insured made a misrepresentation in the insurance application, this alone does not resolve whether the policy may be rescinded. Again, the misrepresentation must be "material."

Ordinarily, the materiality of a representation or omission is for the jury to determine. But where the evidence concerning the materiality is clear and substantially uncontradicted, the matter presents a question of law for the court.[9]

The insurer's burden of proof is not satisfied by conclusory self-serving affidavits of the insurer's employees that the policy would not have been issued.[10] "To establish materiality of misrepresentations as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application."[11] Additional evidence of materiality include: affidavits of underwriters stating that the carrier would not have issued a policy if the risk was accurately disclosed; copies of emails and correspondence declining coverage to similarly situated insurance applicants; and copies of disclaimer letters sent to similarly situated insureds making similar claims.[12]

The degree to which omissions rise to the level of a material misrepresentation sufficient to allow an insurer to void a policy varies depending upon the nature of the insurance and the reason for the omissions. For example, maritime insurance is subject to the doctrine of *uberrima fides* under which the parties to the insurance contract owe each other the highest degree of good faith. The doctrine requires the insured to disclose to the insurer all known circumstances materially affecting the risk to be insured. The standard for disclosure under this doctrine is an objective one. The relevant inquiry is whether a reasonable person in the insured's position would know that the particular fact is material, i.e. whether the fact is something that would have controlled the underwriter's decision to accept the risk.[13] Reinsurance is another area that has been held to require "utmost good faith" on the part of insurance applicants who must disclose all facts materially affecting the risk of which it is aware and the reinsurer has no reason to be aware.[14]

Generally, though, an applicant for insurance has no duty to voluntarily disclose information material to the risk about which the underwriters never asked.[15] The insurance applicant has the right to suppose that when an insurer inquires as to certain matters the insurer "considers all others to be immaterial, or that he assumes to know or waives information in regard to them."[16] Thus, if

the insurer never asks and the insured makes no representation as to a particular fact then the non-disclosure of the fact will not void the policy unless the concealment is fraudulent.[17] On the other hand, if the concealment of information is fraudulent then the omission may result in the policy being rescinded.[18]

For an insured's non-disclosure to be fraudulent the concealment must be in bad faith with intent to mislead the insurer. The concept of "concealment" applies to insurance applications generally and is similar to the higher standard of *uberrima fides* applicable to maritime policies, with the key distinction that it also has a *mens rea* element. "Concealment is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate to the underwriter."[19] If the insured knows of some fact that in good faith he knows would influence the underwriter's decision to issue the policy, the insured is obligated to disclose that fact even if not asked.[20] Mistake or oversight will not suffice; the insured's intent to deceive must be willful.[21] But if there is no fraud, the applicant can remain silent as to many matters about which the insurer never asked.[22]

To void the policy, concealment alone is not enough. The concealed fact must be "material." Meaning, the underwriter would have refused to accept the risk and issue the same policy for the same premium if the information had been disclosed.[23] Nevertheless, though a fact may be material an insured may have no obligation to reveal it, such as where the insurer can obtain certain information from sources other than the applicant or by inspection, or where conditions are so patent that no inquiry is necessary.[24]

If an insurer makes inquiry, an insured must provide a truthful response and has a duty to review the entire application and correct any incorrect or incomplete answers.[25] However, in at least one case the insurer was not permitted to rescind the policy where the insured left blank 20 questions in the application relating to the nature of its business and the insurer failed to investigate but instead accepted the application, issued the policy, and collected premiums.[26]

Omissions or misstatements in the insurance application do not have to be intentional to result in rescission; they can be innocent. [27] The insured does not even have to be the one who makes the misrepresentation. Misrepresentations by those acting on behalf of the insured, like insurance brokers, will be imputed to the insured.[28]

Misrepresentations in an insurance application are imputed to the insured because: the signer of a contract is bound to its terms regardless of whether he or she read them; the insured has a duty to read the entire application and correct any incorrect or incomplete answers;[29] and misstatements in the insurance application made by the broker will be imputed to the insured because the insurance broker is generally regarded as the insured's agent.[30] But even where the agent is the agent of the insurer and he knows the application contains false statements, the insurer may still avoid coverage because the insured certified the correctness of the application by signing it.[31]

Inasmuch as an applicant certifies the correctness of the application and has the duty to accurately complete it, neither the insured's failure to read nor inability to read the application is a defense.[32] Material misrepresentations made by non-English speaking insureds are not excused by their language barrier because they are expected to have someone read and explain the entire completed application to them.[33]

If a policy is void *ab initio* due to the insured's material misrepresentation, the insured cannot assert rights under the policy because the policy is treated as though it never came into existence.[34] And so it is no defense in an action for rescission to assert that the insurer failed to timely disclaim or prove willful misrepresentations (as may be required under certain policy terms) because such terms are in a voided, non-existent policy and coverage cannot be created where none existed.[35]

There is, however, an exception. Since a policy that has been rendered void is treated as though it never existed, it would seem logical that no coverage would then extend to additional insureds because the additional insured is an "insured" under a non-existent policy. Alas, this is not so. When a policy is rendered void because of the named insured's material misrepresentation in procuring it, insurers have to afford coverage to additional insureds because each additional insured must be treated as though they were issued their own policy.[36]

Just as an insurer cannot rescind as to all insureds, it cannot rescind as to all types of insurance policies in the face of an insured's material misrepresentation or concealment of a material fact. Automobile and workers' compensation policies cannot be cancelled *ab initio* because governing statutes require prospective notice of cancellation.[37] Public policy mandates that these policies can only be cancelled prospectively because the procurement of these policies is compelled by statute and the existence of this coverage is of concern to others beyond the insurer and insured[38] (though this latter rationale would seem applicable to all policies providing coverage for third party claims).

Even though these types of policies cannot be rescinded *ab initio,* this does not mean that an insurer is without recourse where it can be shown that the insured made a fraudulent misrepresentation in the insurance application (as opposed to an innocent material misrepresentation). For example, the insurer can raise as an affirmative defense the insured's fraud as a bar to recovery where

the insured makes a first party claim or seeks to establish coverage in a declaratory judgment action.[39] Also, an insurer that becomes obligated to pay an injured third party under a fraudulently obtained policy can bring suit against its insured for damages the insurer had to pay as a result of the insured's fraud.[40] To prevail on that fraud claim the insurer must establish the insured's *mens rea,* showing that the insured acted with a willful intent to deceive and did not merely make a mistake or oversight in filling out the insurance application.[41]

One familiar misrepresentation in commercial general liability insurance applications is an insured's inaccurate description of its business operations. Whether inadvertent or intentional (i.e., to secure coverage for a reduced premium), insureds engaging in a high risk business activity may instead represent to insurers that they engage in a different, less-risky enterprise or be vague in their descriptions, such as describing themselves as a "general contractor" rather than a "demolition contractor."[42]

This scenario tends not give rise to an insurer's attempt to void a policy, however. Generally, where an insured's actual activities differ from its identified "business classification" in the policy, the issue presented to the court is whether the activity falls within the scope of coverage and/or is excluded from coverage.[43]

Nevertheless, where the insurer seeks to void the policy because the insured may have misrepresented the nature of its business in its application, the insurer will have a duty to defend so long as there is a reasonable possibility that an underlying claim falls within the insured's identified business classification in the policy.[44] On the other hand, where claims arise from an insured's engagement in business activities that were not disclosed in the insurance application and the insurer proffers evidence that it does not write coverage for the type business that the insured actually engages in, the policy can be declared void *ab initio*.[45]

Insurers' attempts to void policies *ab initio* are subject to different time frames. Before a claim is made, an insurer can rescind a policy *ab initio* by notice, i.e., without a judicial determination.[46] After a claim is asserted, the parties' positions are changed and so rescission by notice will then only be effective prospectively. Once a claim is asserted an insurer must seek a judicial determination to accomplish a rescission *ab initio*.

The prospective cancellation and retroactive rescission of policies are expressly contemplated by the Insurance Law. For example, Section 3426 addresses commercial risk, professional liability and public entity insurance and it provides for prospective-only cancellation of policies for fraud or material misrepresentations in obtaining coverage. [47] However, a later provision of that same statute preserves an insurer's right to rescind on those same grounds.[48] This statutory scheme enables an insurer to prospectively cancel a policy after receiving a claim against a fraudulently obtained policy—thereby cutting off its exposure on any other claims that might arise during the remainder of the policy period—and then seek a judicial declaration to rescind the policy *ab initio* to avoid coverage for the claim already asserted.

It is of utmost importance that the insurer make claimants (and others interested in the outcome) parties to the declaratory judgment action for rescission, thereby ensuring that the judicial determination has collateral estoppel or *res judicata* effect upon third-parties as well as the insureds.[49] Equally important is that the insurer refunds the collected insurance premiums upon rescission.[50] If it doesn't, the insurer risks ratification.

Ratification may result and defeat even a valid claim of material misrepresentation or fraud if the insurer does not promptly act to rescind after learning of a basis to do so.[51] Under contract principles, it is settled that a contracting party may not rescind "if, after knowledge of the fraud, he affirms the contract by accepting a benefit under it."[52] Therefore, the insurer must rescind and refund premiums promptly after it learns of the material misrepresentation, otherwise the insurer will be deemed to have ratified the policy thereby affecting an estoppel and waiver of the right to rescind *ab initio*.

"When determining ratification, the key factors are whether the party silently acquiesced in the contract or rather promptly interposed his objections upon discovering the basis for the claim of rescission."[53] An insurer's ratification can result from its issuance of the policy, continued acceptance of premiums, or prolonged retention of premiums after learning of the facts necessary to declare the policy void.[54] Other factors to consider in determining whether an insurer's acceptance of the premium gives rise to a waiver or estoppel include:

> whether the insured was billed by the insurer or merely its general agent; whether the insurer had served notice of its election to rescind the policy at the time it accepted the premium; whether the insurer's receipt of the premium was inadvertent or intentional; whether retention of the premium was permanent or temporary; and whether the premium was returned within a reasonable time after the payment came to the attention of responsible officials of the insurer.[55]

Ratification is the death knell of rescission. An insurer cannot subsequently rescind once there has been a ratification of the policy no matter how misleading or fraudulent the insured was in completing the application for insurance.[56]

No doubt, some insureds may be intentionally deceptive in completing an insurance application so that they can get coverage at any price or at a reduced premium. Others may simply have misunderstood or been careless in completing the insurance application, or had misplaced confidence in the insurance broker to accurately prepare it. No matter. The dishonest and well intentioned alike may find themselves equally entangled in a battle for coverage with insurers that claim the insureds' material misrepresentations mislead them into issuing policies. "Oh! What a tangled web we weave when first we practise [sic] to deceive!" [57]

Endnotes

1. Insurance Law 3105(b) provides: "No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract."
2. *McNaught v. Equitable Life Assur. Socy. of US*, 136 A.D. 774 (2d Dep't 1910).
3. Under Ins. Law 3204, statements made by or on behalf of the insurance applicant in life, accident or health insurance, or annuity contracts are deemed representations and not warranties.
4. Ins. Law 3106; *Star City Sportswear, Inc. v. Yasuda Fire & Marine Ins. Co. of America,* 1 A.D.3d 58, 765 N.Y.S.2d 854 (1st Dep't 2003), *aff'd* 2 N.Y.3d 789, 781 N.Y.S.2d 255 (2004); *Continental Ins. Co. v. RLI Ins. Co.*, 161 A.D.2d 385, 555 N.Y.S.2d 325 (1st Dep't 1990).
5. *Vander Veer v. Continental Cas. Co*., 34 N.Y.2d 50, 356 N.Y.S.2d 13 (1974).
6. *Process Plants Corp. v. Beneficial National Life Ins. Co.*, 53 A.D.2d 214, 385 N.Y.S.2d 308, 310 (1st Dep't 1976), *aff'd* 42 N.Y.2d 928, 397 N.Y.S.2d 1007 (1977).
7. *Feldman v. Friedman*, 241 A.D.2d 433, 434, 661 N.Y.S.2d 9, 10 (1st Dep't 1997), *quoting Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*,979 F.2d 268 (2d Cir. 1992); *In re Pioneer Ins. Co. (Hallen),* 298 A.D.2d 725, 749 N.Y.S.2d 295 (3d Dep't 2002).
8. *Chase v. William Penn Life Ins. Co.*, 159 A.D.2d 965, 966 (4th Dep't), *aff'd* 76 N.Y.2d 999 (1990).
9. *Sebring v. Fidelity-Phenix Fire Ins. Co. of New York*, 255 N.Y. 382, 385 (1931); *Process Plants Corp.*, 53 A.D.2d 214; *Curanovic v. New York Central Mut. Fire Ins. Co,* 307 A.D.2d 435, 437 (3d Dep't 2003).
10. *Feldman*, 241 A.D.2d 433; *Barkan v. New York Schools Ins. Reciprocal*, 65 A.D.3d 1061, 886 N.Y.S.2d 414 (2d Dep't 2009).
11. *Curanovic,* 307 A.D.2d 435; *Church of Transfiguration v. New Hampshire Ins. Co*., 207 A.D.2d 1039, 616 N.Y.S.2d 843 (4th Dep't 1994), *lv. denied* 1994 WL 712777; *Barkan*, 65 A.D.3d 1061*; Rafi v. Rutgers Cas. Ins. Co.*, 59 A.D.3d 1057, 872 N.Y.S.2d 799 (4th Dep't 2009); *Falcon Crest Diamonds v. Dixon*, 173 Misc. 2d 450, 457, 655 N.Y.S.2d 232, 236 (Sup. Ct., N.Y. Co. 1996).
12. *Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co.,* 61 A.D.3d 412, 414-415, 877 N.Y.S.2d 253 (1st Dep't 2009); *Varshavskaya v. Metropolitan Life Ins. Co.*, __ A.D.3d __, 2009 NY Slip. Op. 09215, 890 N.Y.S.2d 643 (2d Dep't 2009); *North Atlantic Life Ins. Co. v. Katz,* 163 A.D.2d 283, 557 N.Y.S.2d 150 (2d Dep't 1990).
13. *Alaz Sportswear v. Public Serv. Mut. Ins. Co.*, 195 A.D.2d 357, 600 N.Y.S.2d 63 (1st Dep't 1993); *Stecker v. American Home Fire Assur. Co.,* 299 N.Y. 1 (1949) ["inland marine" coverage does not insure "marine" risks, and so the doctrine of *uberrima fides* does not apply to such policies].
14. *Christiana General Ins. Corp. of New York v. Great American Ins. Co.,* 979 F.2d 268, 278-280 (2d Cir. 1992).
15. *DiDonna v. State Farm Mut. Automobile Ins. Co.*, 259 A.D.2d 727, 687 N.Y.S.2d 175 (2d Dep't 1999).
16. *Browning v. The Home Ins. Co.*, 71 N.Y. 508, 512 (1877).
17. *Stecker v. American Home Fire Assur. Co.,* 299 N.Y. 1, 8 (1949).
18. *Sebring,* 255 N.Y. at 387.
19. *Sebring,* 255 N.Y. at 386; *Lighton v. Madison-Onondaga Mut. Fire Ins. Co.,* 106 A.D.2d 892, 483 N.Y.S.2d 515 (4th Dep't 1984).
20. *Sebring,* 255 N.Y. at 387; *Lighton*, 106 A.D.2d 892.
21. *Sebring,* 255 N.Y. at 387.
22. *Sebring,* 255 N.Y. at 386.
23. *Sebring,* 255 N.Y. at 385; *Feldman*, 241 A.D.2d 433; *In re Pioneer Ins. Co. (Hallen),* 298 A.D.2d 725.
24. *Sebring*, 255 N.Y. at 386.
25. *North Atlantic Life Ins. Co.*, 163 A.D.2d 283; *Curanovic,* 307 A.D.2d at 437.
26. *Sirius America Ins. Co. v. Burlington Ins. Co.*, 17 Misc.3d 1135(A), 851 N.Y.S.2d 74, 2007 WL 4234322, *4 (Sup. Ct., N.Y. Co. 2007).
27. *Precision Auto Accessories, Inc. v. Utica First Ins. Co.,* 52 A.D.3d 1198, 859 N.Y.S.2d 799 (4th Dep't), *lv. denied* 11 N.Y.3d 709, 868 N.Y.S.2d 601 (2008); *Process Plants Corp.*, 53 A.D.2d 214; *Vander Veer*, 34 N.Y.2d 50.
28. *Curanovic,* 307 A.D.2d at 437; *Falcon Crest Diamonds*, 173 Misc. 2d at 456; Ins. Law 3105(a).
29. *Lu v. Equitable Co., Inc.*, 6 A.D.3d 650, 775 N.Y.S.2d 554 (2d Dep't 2004).
30. *Precision Auto Accessories, Inc.,* 52 A.D.3d 1198; *see also Lu,* 6 A.D.3d 650.
31. *Axelroad v. Metropolitan Life Ins. Co.*, 267 N.Y. 437 (1935); *Boyd v. Allstate Life Ins. Co. of NY*, 267 A.D.2d 1038, 700 N.Y.S.2d 332 (4th Dep't. 1999).
32. *Axelroad,* 267 N.Y. 437*; Curanovic*, 307 A.D.2d at 437-438.
33. *Curanovic*, 307 A.D.2d at 437-438.
34. *Precision Auto Accessories, Inc.,* 52 A.D.3d 1198.
35. *Taradena v. Nationwide Mut. Ins. Co.,* 239 A.D.2d 876, 659 N.Y.S.2d 646 (4th Dep't 1997); *Morris v. Merchants Mut. Ins. Co.*, 229 A.D.2d 992, 645 N.Y.S.2d 207 (4th Dep't 1996); *Precision Auto Accessories, Inc.,* 52 A.D.3d 1198.
36. *Lufthansa Cargo, AG v. New York Marine and General Ins. Co.,* 40 A.D.3d 444, 834 N.Y.S.2d 659 (1st Dep't 2007); *BMW Financial Services NA, Inc. v. Hassan*, 273 A.D.2d 428, 710 N.Y.S.2d 607 (2d Dep't), *lv. denied* 95 N.Y.2d 767, 717 N.Y.S.2d 547 (2000).
37. Vehicle and Traffic Law § 313; *Insurance Co. of North America v. Kaplun,* 274 A.D.2d 293, 298, 713 N.Y.S.2d 214, 217 (2d Dep't 2000); *Liberty Mut. Ins. Co. v. McClellan*, 127 A.D.2d 767, 512 N.Y.S.2d 161 (2d Dep't 1987); Workers' Compensation Law § 54(5); *Cruz v. New Millennium Const. & Restoration Corp.*, 17 A.D.3d 19, 23, 793 N.Y.S.2d 548, 551 (3d Dep't 2005).
38. *Cruz*, 17 A.D.3d 19; *Liberty Mut. Ins. Co.*, 127 A.D.2d 767; VTL § 313.
39. *Insurance Co. of North America,* 274 A.D.2d 293 [misrepresentation of vehicle ownership and residency]; *Mooney v. Nationwide Mut. Ins. Co.*, 172 A.D.2d 144, 577 N.Y.S.2d 506 (3d Dep't 1991) [misrepresentation of history of violations]; *DiDonna*, 259 A.D.2d 727 [misrepresentation of vehicle ownership and driving record]; *cf. Taradena v. Nationwide Mut. Ins. Co.,* 239 A.D.2d 876, 659 N.Y.S.2d 646 (4th Dep't 1997) [policy can be void *ab initio* and underinsured/uninsured benefits denied under an auto policy where misrepresentations were made as to vehicle ownership and identity of principal operator in insurance application].

40. *Insurance Co. of North America*, 274 A.D.2d 293; *Mooney*, 172 A.D.2d 144.

41. *DiDonna*, 259 A.D.2d 727.

42. *See e.g. Sirius America Ins. Co.*, 17 Misc.3d 1135(A), 2007 WL 4234322, *4.

43. *Ruiz v. State Wide Insulation and Constr. Corp.*, 269 A.D.2d 518, 703 N.Y.S.2d 257 (2d Dep't 2000); *Jadwiga Realty Inc. v. General Accident Ins. Co. of America*, 232 A.D.2d 831, 648 N.Y.S.2d 758 (3d Dep't 1996); *Frey v. Aetna Life & Cas.*, 221 A.D.2d 841, 633 N.Y.S.2d 880 (3d Dep't 1995).

44. *Burlington Ins. Co. v. Guma Constr. Corp.*, 66 A.D.3d 622, 887 N.Y.S.2d 177 (2d Dep't 2009).

45. *Kiss Construction NY, Inc.*, 61 A.D.3d 412; *Morris*, 229 A.D.2d 992.

46. *See e.g.*, Ins. Law § 3426(c)[1](C).

47. Ins. Law § 3426(c)[1](C).

48. Ins. Law § 3426(m).

49. *Cruz*, 17 A.D.3d 19.

50. *Kiss Constr. NY, Inc.*, 61 A.D.3d 412; *Federal Ins. Co. v. Kozlowski*, 18 A.D.3d 33, 39-40, 792 N.Y.S.2d 397 (1st Dep't 2005).

51. *S.E.C. v. Credit Bancorp, Ltd*, 147 F. Supp. 2d 238, 256 (S.D.N.Y. 2001).

52. *McNaught*, 136 A.D. 774 .

53. *S.E.C.*, 147 F. Supp. 2d at 256; *see also Grubel v. Union Mut. Life Ins. Co*, 54 A.D.2d 686 (2d Dep't 1976) ["Having failed to act promptly, he is deemed to have affirmed the contract and waived any action sounding in economic duress." *Id.* at 686]; *Zeldman v. Mut. Life Ins. Co. of NY*, 269 A.D. 53 (1st Dep't 1945) ["Upon receipt of knowledge…of the insured breach of condition, the insurer, if it desires so to do, must promptly exercise its election to void the policy." *Id.* at 56].

54. *Security Mut. Life Ins. Co. v. Rodriguez*, 65 A.D.3d 1, 880 N.Y.S.2d 619 (1st Dep't 2009); *Zeldman v. Mut. Life Ins. Co. of N.Y.*, 269 A.D. 53 (1st Dep't 1945) [an insurer's issuance of policy and acceptance of premiums with knowledge of insured's breach of condition gives rise to waiver or estoppel]; *accord Sirius America Ins. Co.*, 17 Misc.3d 1135(A) [policy issued and premiums collected despite omissions by insured in a patently incomplete application]; *Bible v. John Hancock Mut. Life Ins. Co. of Boston*, 256 N.Y. 458 (1931); *Burdick*, 6 Misc. 3d 1030(A), *3 (Sup. Ct., Oneida Co. 2005) [premium not refunded for at least 2½ months], citing *McNaught*, 136 A.D. 774; *Scalia v. Equitable Life Assur. Socy. of the US*, 251 A.D.2d 315 (2d Dep't 1998); and *Ellis v. Columbian Nat. Life Ins. Co.*, 270 A.D. 143 (1st Dep't 1945).

55. *Sielski v. Commercial Ins. Co. of Newark, New Jersey*, 199 A.D.2d 974, 974, 605 N.Y.S.2d 599, 600 (4th Dep't 1993), *lv dismissed* 83 N.Y.2d 953, 615 N.Y.S.2d 877 (1994).

56. *McNaught*, 136 A.D. at 780.

57. This familiar quote is from *Marmion*, a poem written by 19th Century poet Sir Walter Scott. Canto VI, Stanza 17 reads:

> *Yet Clare's sharp questions must I shun,*
> *Must separate Constance from the nun*
> *Oh! what a tangled web we weave*
> *When first we practise to deceive!*
> *A Palmer too! No wonder why*
> *I felt rebuked beneath his eye;*

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NYSBA

Torts, Insurance and Compensation Law Section

Fall Meeting

Disney's Yacht & Beach Club Resort
Lake Buena Vista, Florida
October 7 – October 10, 2010

This program provides up to **6.5 MCLE credit hours**. Breakdown of credit hours per individual is dependent on choice of sessions that are attended. Only the Skills portions of this program are transitional and therefore suitable for newly admitted attorneys.

SCHEDULE OF EVENTS

Thursday, October 7

2:00 p.m. - 6:00 p.m. **Registration**

3:00 p.m. - 5:00 p.m. **Executive Committee Meeting**

5:30 p.m. - 6:30 p.m. **Opening Night Cocktail Reception**
(Hors d'oeuvres will be served)
Dinner is on your own this evening

8:30 p.m. - 10:30 p.m. **Hospitality Room and Ice Cream Social for Children**

Friday, October 8

7:00 a.m. **Registration**

7:30 a.m. - 8:15 am **Executive Committee Breakfast Meeting**

8:15 a.m. - 8:30 a.m.

Welcoming Remarks
LAURIE A. GIORDANO, ESQ.
Section Chair
Leclair Korona Giordano Cole LLP
Rochester, New York

Introductory Remarks
JEAN GERBINI, ESQ.
Program Chair
Whiteman Osterman & Hanna LLP
Albany, New York

8:30 a.m. - 9:45 a.m. **Legislative Update**
Important changes impacting rights of subrogation, Insurance Law 3420 and workers' compensation, as well as proposed no fault and bad faith legislation.

Panel Chair:
ELIZABETH A. FITZPATRICK, ESQ.
Lewis Johs Avallone Aviles, LLP
Melville, New York

Panelists:
MIRNA E. MARTINEZ SANTIAGO, ESQ.
Nationwide Mutual Insurance Company
Elmsford, NY

CHRISTOPHER R. LEMIRE, ESQ.
Lemire Johnson LLC
Malta, New York

9:45 a.m. - 9:55 a.m. **Refreshment Break**

9:55 a.m. - 11:10 a.m. **New Litigation Techniques: Leveraging Alternative Dispute Resolution and the Medicare Impact**

Panel Chair:
BRIAN RAYHILL, ESQ.
Epstein & Rayhill
Elmsford, New York

Panelists:

HON. ALLEN Z. HURKIN-TORRES
Former New York Supreme Court
Justice, Kings County
JAMS Mediator
New York City

HON. GEORGE J. SILVER
New York Supreme Court
Justice, New York County
Motor Vehicle Part
New York City

DANIEL JANSEN
The Jansen Group
New York City

11:15 a.m. - 12:05 p.m. **Repercussions of the Gulf Oil Spill**

Panelists:

HON. DOUGLAS J. HAYDEN
Wright Risk Management
Uniondale, New York

KENNETH A. KRAJEWSKI, ESQ.
Brown & Kelly, LLP
Buffalo, New York

1:00 p.m. **Disney's Palm Golf Course -** Fee is $116.09 per player (includes play and golf cart). Golf course is near Magic Kingdom which is a 10 to 15 minute ride by car. You can drive yourselves to course or obtain taxi vouchers from the Valet for complimentary transportation. Advanced sign up is required.
Golf Chair: Dennis J. Brady

5:30 p.m. - 6:30 p.m. **Cocktail Reception -** (Hors d'oeuvres will be served)
Sponsored by Matson Driscoll & Damico, Forensic Accountants

Dinner is on your own this evening

7:00 p.m. - Midnight **Mickey's Not-So-Scary Halloween Party**
This is an optional fun event for the whole family. Many families and their children from our group are planning to attend this event Friday, October 8th. To join in the fun, you will need to purchase your tickets and register for this event individually. ***Easy registration access to Mickey's Halloween Party has been set up at www.nysba.org/TICLFall2010.***

8:30 p.m. - 10:30 p.m. **Hospitality Room**
Time to socialize and relax with your colleagues.

Saturday, October 9

7:00 a.m. **Registration**

7:30 a.m. - 8:15 a.m. **Executive Committee Breakfast Meeting**

Session A (For Experienced Attorneys)

8:30 a.m. - 9:20 a.m. **Litigation and Law Practice in an Electronic World: Claims Investigation**

Speaker: **DANIEL W. GERBER, ESQ.**
Goldberg Segalla LLP
Buffalo

9:20 a.m. - 9:30 a.m. **Refreshment Break**
Sponsored by Terrier Claims Services

9:30 a.m. - 10:45 a.m. **Down the Road... in the Car**
Emerging Technologies in Auto Litigation: Biomechanical Experts in the Courtoom

Panel Chair: **JAMES P. O'CONNOR, ESQ.**
Maroney O'Connor LLP
New York City

Panelists:

HON. ALLEN Z. HURKIN-TORRES
Former New York State Supreme Court Justice, Kings County
JAMS Mediator
New York City

HON. GEORGE J. SILVER
New York State Supreme Court Justice, New York County
Motor Vehicle Part
New York City

SEAN M. CONNORS
Global BioMechanical Solutions
New York City

ROBERT S. FIJAN, Ph.D.
Global BioMechanical Solutions
West Chester, PA

JOHN MONTALBANO
Global BioMechanical Solutions
New York City

Session B (For New and Experienced Attorneys)

8:30 a.m. - 9:20 a.m. **Effective Litigation Techniques in Personal Injury and No-Fault Arbitrations**

Panel Chair: **THOMAS J. MARONEY, ESQ.**
Maroney O'Connor LLP
New York City

Panelists:

HON. ALLEN Z. HURKIN-TORRES
Former New York State Supreme Court Justice, Kings County
JAMS Mediator
New York City

HON. GEORGE J. SILVER
New York State Supreme Court Justice, New York County
Motor Vehicle Part
New York City

WALTER P. HIGGINS, ESQ.
AAA No-Fault Arbitrator
Walter P. Higgins, P.C.
Garden City, New York

RICHARD W. KOKEL, ESQ.
AAA No-Fault Arbitrator
Law Offices of Richard W. Kokel
New York City

9:20 a.m. - 9:30 a.m. **Refreshment Break**

9:30 a.m. - 10:45 a.m. **Negotiations 101: What Every Litigator Should Know (Interactive Workshop)**

Panelists:

MICHAEL O'BRIEN, ESQ.
O'Brien & Jacobs
New York City

JACQUELINE PHIPPS POLITO, ESQ.
Rochester City School District
Rochester

10:50 a.m. - 11:45 a.m. **What You Really Need to Know About Jurisdiction and Conflicts of Laws in Coverage Disputes**

Speaker: **JEAN F. GERBINI, ESQ.**
Whiteman Osterman & Hanna LLP
Albany, New York

1:00 p.m. **Golf Tournament - Magnolia Golf Course -** Fee is $116.09 per player (includes play and golf cart). Golf course is near Magic Kingdom which is a 10 to 15 minute ride by car. You can drive yourselves to course or obtain taxi vouchers from the Valet for complimentary transportation. Advanced sign up is required.
Golf Chair: Dennis J. Brady

1:00 p.m. **Optional Family Activity**

5:30 p.m. - 8:00 p.m. **Cocktail Reception with Dinner following**

Guest of Honor
JAMES J. WRYNN
Superintendent of the
New York State Insurance Department

8:30 p.m. - 10:30 p.m. **Hospitality (Children's Skit)**
My Mom/Dad is a Lawyer: How Much Fun is THAT?!

Sunday, October 10

Departure

From the NYSBA Book Store >

Post-Trial Practice and Procedures in New York

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

Table of Contents

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

Authors

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

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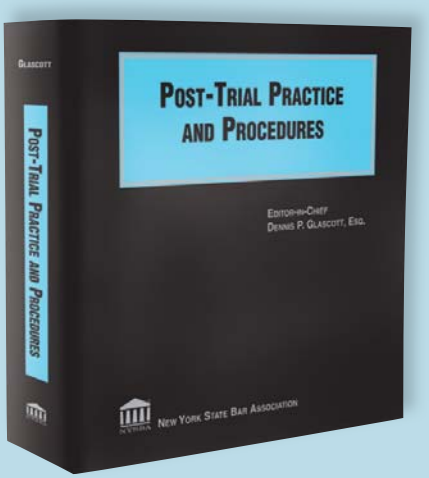

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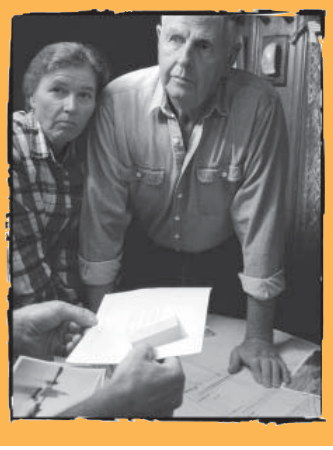

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