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MORRIS DUFFY ALONSO & FALEY
MUNICIPAL LAW UPDATE (FEDERAL & STATE)

In an effort to keep our municipal clients apprised of changes in the law we have summarized upcoming changes in the **Federal Rules of Civil Procedure** and described how they apply to you. In addition, we have summarized a recent New York State case concerning the ability of a municipality to recover funds paid to a police officer injured in the line of duty.

FEDERAL

New rules concerning the discovery of electronically stored information ("ESI") during federal lawsuits will take effect on December 1, 2006. ESI can include, but is not limited to, data and documents stored on computer hard drives, compact disks, LAN servers and any other storage device; email (including private email if used for business purposes); voice mail; and information stored on portable storage devices such as PDA's and Blackberrys. As a client, of course, you need not concern yourself with the intricacies of ESI discovery while in the throws of a lawsuit. However, there are important pre-lawsuit factors of which you should be aware:

LITIGATION HOLD - As with paper documents, all relevant ESI must be preserved as soon as a potential party *reasonably anticipates that there will be litigation.* This period of time can occur before you are served with a summons and complaint. You can be held to have anticipated litigation when you are served with a Notice of Claim, a complaint to the Equal Employment Opportunity Commission or State Division of Human Rights or other documents that could alert you to a pending lawsuit.

The failure to preserve documents and ESI can be costly. It can result in court-ordered sanctions for spoliation (intentionally destroying potential evidence) or a negative jury instruction (the court can inform a jury that the jury can conclude that a party destroyed evidence intentionally because it was harmful to that party). Municipalities are not immune from such sanctions.

RETENTION POLICY – The courts understand that it is not reasonable for an entity to have to store ESI forever. Municipalities need to have an ESI retention policy that can be articulated in court should litigation arise. Also, the policy must be able to pass a "straight fact test." In other words, the policy cannot be adopted to destroy discoverable information with a specific category of lawsuits in mind. Therefore, if ESI is destroyed pursuant to a reasonable data retention policy that complies with legal or regulatory requirements, and there is no reason to anticipate litigation in which the ESI would be relevant, you do not risk sanctions for spoliation or a negative jury charge.

CONCLUSION – The details of electronic discovery are too numerous and complex to be covered in a newsletter. In each lawsuit, issues such as the scope of ESI discovery, the search for relevant discovery, the restoration and search of back-up data, and who bares the cost of discovery (which can be substantial) come into play. At the very least, you should ensure that you have an established retention policy and that your retention policy has a provision for preserving relevant data as soon as litigation is anticipated. If you are not sure what is relevant, consult with legal counsel before destroying or deleting anything. In addition, ESI kept under a retention policy should remain

accessible so as to limit the cost of restoration of back-up data. Finally, consult with counsel to develop a data retention policy which will be legally acceptable.

NEW YORK STATE

A MUNICIPALITY'S RECOVERY OF ITS PAYMENTS TO AN INJURED POLICE OFFICER MIGHT BE LIMITED

Musgrove v. American Protection Ins. Co., 2006 WL 2691075 (N.Y.A.D. 2 Dept. 2006)

A police officer was injured in the line-of-duty when an underinsured motorist collided with his police vehicle. As is required under General Municipal Law § 207-c, the municipal employer, the Village of Lake Success, paid the officer his salary and medical expenses during the period of disability. The officer received a settlement from the underinsured motorist's liability insurer and then filed a claim for underinsured motorist benefits (UMI) against the insurer of the police vehicle. The officer's claim was to be arbitrated.

When the officer's claim was set down for arbitration, the village sought to assert a lien against any amount the officer might recover from his claim against UMI through arbitration in the amount the village had paid. The municipality acted pursuant to General Municipal Law § 207 – c (6), which provides a cause of action to a municipality for reimbursement of funds expended for salary and for medical treatment against any third party against whom a police officer shall have a cause of action for the injury sustained. In a declaratory action, the officer sought to preclude his employer from asserting such lien. In *Musgrove*, the Appellate Division, Second Department ruled in favor of the officer.

The no-fault provisions of the law, Insurance Law § 5104, limit the damages that might be recovered through a lawsuit by a person injured in a motor vehicle accident to non-economic loss, i.e. pain and suffering and economic loss that exceeds $50,000. Therefore, the municipality could not assert a lien on any award the officer received for his pain and suffering because it is only damages for economic loss that the municipality may recover. Thus, the municipality's recovery of payments made to its officer is limited by the no-fault provisions to payment of economic damages over the basic economic loss of $50,000. "[A]n insured who has sustained personal injury should not be required to pay for his no-fault benefits out of his recovery for pain and suffering." Aetna Cas. & Sur. Co. v. Jackowe, 96 AD2d 37, 42 (N.Y.A.D. 1983).

The Court then considered whether the village could recover for payments to the officer that exceeded $50,000, the maximum amount payable under no-fault. Generally, a municipality is able to recover for funds expended for sick pay and medical treatment in excess of $50,000. This recovery would be pursuant to General Municipal Law § 207 – c (6). However, because the motorist who caused the injuries to the officer was underinsured, a lawsuit against the motorist would prove fruitless. Accordingly, the municipality sought to recover its payments to its officer through a lien against any payment the officer received through his UMI claim. However, because the officer was seeking arbitration of a claim against UMI and was not commencing an "action," the municipality could not assert a lien. The Court held that the lien created by Insurance Law § 5104(b) applies only to a recovery obtained by an injured person "in any action." The Court held that the officer was not

commencing an "action," but was "seeking to enforce a contractual right he has pursuant to statute. Accordingly, the limitations imposed by the no-fault law superseded the General Municipal Law.

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