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Inside

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A View from the Chair

Welcome to another great issue of the *Torts, Insurance and Compensation Law ("TICL") Journal*. At the outset, let me offer the TICL Section's heartfelt thanks to *TICL Journal* Editor, David Glazer; *TICL Journal* Editor Emeritus, Paul Edelman; and to all the contributors to this issue.

As a general rule, the *TICL Journal* is always interesting, current and topical, and this issue is no exception to that rule. This issue has a special lifestyles article authored by Cathy Syhre, titled "Life After Insurance—Giving Back and Getting Back: Have You Visited Your Legal Aid Society Lately?" Cathy's article provides us with a look at her moving experiences as a volunteer at the Hiscock Legal Aid Society in Syracuse, New York. It is thought-provoking and inspiring. It is one of many excellent articles you will find in this issue.

The TICL Section has been busy this year all over New York State. A number of diversity outreach receptions have been held on Staten Island, Albany and Buffalo. Each of those receptions involved outreach to law students, young lawyers and NYSBA members who have identified themselves as diverse and practice in one of the TICL practice areas.

Our future leaders of the Bar are our young lawyers and law students. As part of the TICL Section's Law Student outreach, members of TICL's Executive Committee have attended Law School events at Albany Law School, Brooklyn Law School, New York Law School, Cardozo School of Law, SUNY Buffalo School of Law, Pace University School of Law and Syracuse University School of Law.

The TICL Section has just completed its annual program entitled "Law School for Insurance Professionals," which included a series of very well-attended regional state-wide panels offered to insurance professionals as a way for them to keep current with the latest legal trends.

The TICL Section held its 2011 Summer Meeting in August in Bar Harbor, Maine. We had 60 attorneys attend for 7 hours of CLE panels over two days. There were plenty of TICL Kids that had not seen each other since our 2010 Disney meeting. They greeted each other like old friends, and I suspect many may have been texting since Disney! A fun time was had by all!

Planning has already begun for the 2012 TICL Summer Meeting in Montreal August 16th to 19th. It is sure to be the best TICL Summer Meeting ever!

Your TICL Section held a very special event this past November at the Sheraton in Downtown Brooklyn. On November 17th, your TICL Executive Committee hosted the first ever **Open** TICL Executive Committee Meeting. The Open TICL Executive Meeting was an opportunity for all, including diverse law students and young lawyers, to get involved with the TICL Section.

After the Open Executive Committee Meeting, the TICL Section hosted a CLE panel led by several diverse members of the Judiciary and presented 1.5 hours of free CLE with a floor discussion titled, "Strength by Association—Mentoring and the Power of Diversity."

The November 17th panel "Strength by Association—Mentoring and the Power of Diversity" panel was the second in a series of a continuing TICL conversation on diversity and mentoring.

The Strength by Association Series started in Bar Harbor at the Summer Meeting with a panel titled "Strength by Association: The Benefits of Bar Association and Professional Memberships, Diversity and Mentoring." That panel was led by NYSBA President Vincent Doyle and NYSBA Immediate Past President Stephen Younger. The panel included several other significant Bar leaders. The panel spoke eloquently on the strength of professional associations, diversity, mentoring, and how the three are inter-related.

The "Strength by Association" Series will continue on January 26th at the NYSBA Annual Meeting with a third panel in the series, "Strength by Association—Recruitment and Retention of the Diverse Associate and Partner." That panel and floor discussion will feature several prominent minority/diverse attorneys and managing partners.

Save the date and make your plans to attend the TICL/Trial Lawyers Dinner Wednesday, January 25th at Ciprani's Downtown, Wall Street and the all-day TICL CLE presented jointly with the Trial Lawyers Section on Thursday, January 26th at the NYSBA Annual Meeting.

The opportunity is there for you to become a leader within the TICL Section. Think about joining a TICL Substantive Committee; or maybe you want to write an article for the *TICL Journal*; or become a speaker on one of the many TICL CLE panels. We welcome your participation and WE NEED YOU! Have a question, comment or a suggestion on how you can get more involved? Email me anytime at tmaroney@maroneyoconnorllp.com.

Put a little TICL in your practice. Come lead with us today.

Regards—Tom

Thomas J. Maroney
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Visions of the *Presbyterian* Dissent: Encouraging Fraud by Shouting "Gotcha"

By Craig J. Bruno, Michael A. Callinan and Dan D. Kohane

The old adage that "today's dissent is tomorrow's majority" is a powerful concept—one that sometimes comes to fruition. However, very often a dissent, while not becoming tomorrow's majority, makes bold predictions of what may become of a majority's holding. One not too distant dissent—a dissent whose predictions were dismissed by the majority—casts an eerie shadow on the arena of first-party no-fault insurance claims.

Karen DeGuisto was hurt in a one-car accident on December 26, 1993, when she drove her car into a utility pole. Maryland Casualty Company ("Maryland") was her no-fault insurer. She was admitted to Presbyterian Hospital ("Presbyterian") on two separate occasions for treatment of her injuries, including the period June 7-10, 1994. On August 5, Presbyterian, as assignee, sent Maryland a no-fault claim form, received by the insurer on August 9. On September 15, 1994, a mere 37 days after the insurer received the form, the $26,000 in no-fault medical payments had not yet been paid and Presbyterian sued Maryland to recover the benefits. Maryland raised a defense that its insured was intoxicated and that the "intoxication exclusion" in the no-fault policy precluded coverage.

Under the no-fault regulations, Maryland had been required to pay or deny benefits within 30 days. The insurer argued that the claim was not overdue because it had not yet received all of the available information relating to the incident, such as a police report on the insured's blood-alcohol test results.

Maryland had applied to the police department for public access to the insured's blood-alcohol test results on April 19, 1994, after receiving a police accident report noting alcohol on DeGuisto's breath and that a blood specimen had been taken. On October 13, 1994, Maryland requested verification of the insured's alleged intoxication from Presbyterian in the form of interrogatories. Subsequently, on November 3, 1994, the insurer requested the blood-alcohol test results from the local District Attorney's office.

On November 7, 1994, Presbyterian moved for summary judgment, asserting that Maryland's failure to timely deny the claim barred interposition of the intoxication defense in the action. Thereafter, on December 5, 1994, Maryland received the test results, which indicated a blood-alcohol level of 0.13% at the time of the insured's accident. Maryland issued a denial of the claim that same day.

The Appellate Division held that "preclusion of the insurance company's ability to deny the claim is the appropriate remedy" where, as here, "the insurance company neither denies a claim within 30 days after receiving it nor seeks to extend that time by requesting verification in the prescribed forms"[1]

Leave was granted to the Court of Appeals.

"[V]ery often a dissent, while not becoming tomorrow's majority, makes bold predictions of what may become of a majority's holding."

In *Presbyterian Hospital v. Maryland Casualty Company*,[2] the Court first noted that the no-fault statute and regulations include various penalties for late payment of claims. An insurer is required to either pay or deny a claim for no-fault automobile insurance benefits within 30 days from the date an applicant supplies proof of claim.[3] Failure to pay benefits within the 30-day requirement renders benefits "overdue," and all overdue payments bear interest at a rate of 2% per month.[4] Additionally, a claimant is entitled to recover attorney's fees where a "valid claim or portion" was denied or overdue.[5]

The Court of Appeals held that since Maryland neither denied the claim within 30 days after receiving it nor properly sought to extend that time frame by requesting verification, using the prescribed forms, within 10 days after receipt of the hospital's completed application, it failed to comply with its obligation to timely deny or disclaim Presbyterian's no-fault claim.

The Appellate Division had held that the penalty for the late denial was preclusion of the insurer's ability to raise the intoxication exclusion. Maryland argued that preclusion is an "unavailable remedy" under the statute and regulations because (1) the common law does not preclude defenses, (2) neither the Insurance Law nor the Superintendent's regulations expressly provide for such preclusion, and (3) the Legislature's prescribed penalties for overdue payments (statutory interest and attorney's fees) are exclusive remedies and impliedly exclude the more effective incentive and sanction of ultimate preclusion.

However, the Court disagreed. It compared the no-fault statute to Insurance Law § 3420(d), a provision that requires liability insurers to deny coverage in certain circumstances as soon as reasonably possible. A body of common law has developed around that statute which has precluded insurers from relying on policy exclusions and breaches if a disclaimer/denial governed by that section is untimely.

The Court announced that it was:

> …persuaded that, until and unless the Legislature clearly declares otherwise, the preclusion analysis that we have employed in this other branch of the Insurance Law should also be discretely applicable with respect to the 30-day requirement in the no-fault context of the instant case. In fact, in addition to consistency and a fair, reasonable and logical policy fit, the no-fault situations also benefit from the availability of preclusion against insurers in situations such as the instant one.

An articulate dissent by Judge Wesley, writing for a three judge minority, joined in the majority's request for the Legislature and the Insurance Superintendent to study this issue and craft a solution.

Judge Wesley looked into the future and saw the injustice and mischief that the majority's opinion would likely cause. The decision "could result in insurers' having to pay claims that would otherwise not be covered."[6] The majority's holding in *Presbyterian* created a system in which, for the most part, an insurer who fails to pay or deny a no-fault claim within 30 days of receipt of same is precluded from asserting any defense against the claim in arbitration or litigation.[7] The preclusive effects of *Presbyterian* are far reaching, and Judge Wesley's dire prediction of an insurer paying claims that it would otherwise not be paying has come true.[8] As stated by Judge Wesley, the preclusion rule is not even contemplated by the Regulation:

> Had the Legislature chosen to include preclusion within the available enforcement mechanism it provided for claimants (be they injured persons or care providers) it would have done so.[9]

For those not familiar with no-fault, it is an area of the law that has become a burgeoning business for medical providers, no-fault mills, and those seeking to game the system. Long ago, the State of New York implemented a no-fault system for covered automobile accidents that paid for an injured party's medical treatment, regardless of fault. In exchange, limitations were placed on the ability of an injured party to commence an action for personal injuries except in those circumstances where the injured person sustained a serious injury as defined by Insurance Law § 5102(d).

Up until the decision in *Presbyterian*, the no-fault system operated, for the most part, as intended. However, after *Presbyterian*, the no-fault system was changed into a money-making system with the interests of the claimants coming second. The No-Fault Regulation as enacted in the 1970s was fundamentally flawed because it assumed that those involved in the process had the welfare of the claimants in mind. As a result, there has been—and continues to be—a dramatic increase in the submission of fraudulent and suspect claims. The drastic increase in fraudulent and suspect no-fault claims ultimately led to the Insurance Department implementing a "new" No-Fault Regulation.[10] The validity of the "new" No-Fault Regulation was sustained by the Court of Appeals in *Matter of Medical Society of New York v. Serio*.[11] In sustaining the need for reform in the no-fault system, the Court in *Serio* took notice of the growing epidemic of fraud in no-fault claims:

> Between 1992 and 2001, reports of suspected automobile insurance fraud increased by 275%, the bulk of the increase occurring in no-fault insurance fraud. Reports of no-fault fraud rose from 489 cases in 1992 to 9,191 in 2000, a rise of more than 1700%. No-fault fraud accounted for three quarters of the 16,902 reports of automobile-related fraud received by the Insurance Department's Frauds Bureau in 2000, and more than 55% of the 22,247 reports involving all types of insurance fraud. In 1999, the Superintendent established a No-Fault Unit within the Frauds Bureau to focus specifically on no-fault fraud and abuse. By one estimate, the combined effect of no-fault insurance fraud has been an increase of over $100 per year in annual insurance premium costs for the average New York motorist.[12]

The No-Fault arena remains replete with fraud and the Insurance Department is again exploring the need for another "new" No-Fault Regulation to better serve the citizens of New York. The growth in fraud can be attributed, in part, to *Presbyterian*, which ultimately led to a decrease in the ability of insurers to combat fraudulent and suspect claims.

It should be every New Yorker's goal—insureds, insurers, medical providers, and certainly the Legislature and the regulatory agency—to reduce no-fault fraud, to lower the cost of insurance premiums, to deny coverage to those who simply do not deserve it. Instead, the Court of Appeals has unwittingly encouraged no-fault fraud under a "gotcha" rule.

A few recent examples underscore the clarity of Judge Wesley's predictions.

In *Nyack Hosp. v. Allstate Ins. Co.*[13] the insurer untimely denied a claim for benefits, asserting that the insured, Ferguson, intentionally caused her injuries in an attempt to commit suicide. Intentionally caused injuries are excluded. The court acknowledged the vitality of the defense; however, *the failure to establish timely denial of the claim results in the preclusion of the defense that Ferguson's allegedly intentional act was the cause of the accident and subject to exclusion under the insurance contract.*

Of course, the insurer would be required to pay attorneys' fees and two percent per month interest for late denials. Is the public served by allowing a person who intentionally caused her own injuries to recover no-fault benefits?

In two recent cases, the insurer, as in *Presbyterian*, raised an intoxication defense in response to a claim for benefits. Again, the proof was to show that a driver would be ineligible for no-fault benefits because the driver, in violation of statutory, regulatory and policy provisions, was intoxicated and the intoxication caused the accident and injuries. In both cases, the court held that failure to establish timely denial of the claim results in preclusion of the defense that the intoxication of the insured was a contributing cause of the accident and subject to exclusion under the policy.[14]

Should the "*gotcha* because you missed the deadline" approach to no-fault claims be used to overlook and sanction fraud? Yes, said the Third Department in *Valley Psychological, P.C. v. Liberty Mut. Ins. Co.*:[15]

> Because the defense raised here was analogous to an argument that the treatment was excessive or unnecessary, it does not implicate coverage and therefore required a timely denial. Since defendant's fraud defense was precluded, substantial justice was not meted out according to the substantive law, requiring reversal and remittal for City Court to determine the amount of judgment to be entered in plaintiff's favor.
>
> Defendant successfully argued in City Court and County Court that its **fraud defense** asserted a lack of coverage thereby rendering its untimely denials irrelevant. We disagree. In contrast to fraudulent conduct such as staging an automobile accident, which results in no coverage at all—thus not requiring a timely denial—**coverage is not extinguished by allegations, or even proof, that a medical services provider unilaterally schemed to defraud the insurer by providing unnecessary or excessive treatment—thus requiring a timely denial to avoid preclusion of the defense** [citations omitted]. In fact, the Court of Appeals expressly noted that the fraud exception from preclusion for untimely denials does not apply to a defense that the provider's treatment was excessive, as that defense does "not ordinarily implicate a coverage matter."[16]

Does it serve a public purpose to allow medical providers to be paid more than the law permits? "Yes," held the Second Department in *Westchester Med. Ctr. v. Am. Transit Ins. Co.*:[17]

> The Supreme Court erred in denying that branch of the plaintiffs' motion which was for summary judgment on the second cause of action, which arises from the treatment rendered by St. Vincent's Hospital & Medical Center (hereinafter St. Vincent's) to Brian Cardimone, on the ground that "an issue of fact exists as to whether there was payment by the defendant in accordance with the DRG schedule." It is undisputed that the defendant failed to pay or deny the claim for Cardimone's treatment within 30 days after proof of such claim was submitted, nor did the defendant seek any further verification of this claim. Instead, the defendant merely tendered a belated partial payment of the claim. The defendant alleges that St. Vincent's billed under the wrong "DRG" code, and that it paid in accordance with the correct code. However, since the defendant never sought any verification of the claim, it is precluded from raising this statutory exclusion defense based upon its failure to issue a denial of claim form within 30 days of its receipt of the claim as required by 11 NYCRR 65.15 (g) (3).

The courts have, as well, sanctioned payments to medical providers for unnecessary treatment because of a late denial.[18]

The *Presbyterian* preclusion rule has since been expanded as a result of the Court of Appeals' decision in *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*[19] A divided Court in *Fair Price* held that the insurer was precluded from defending against a claim submitted by a medical equipment provider even though the insurer established that the equipment at issue was *never* provided to the alleged injured person. The basis of the insurer's

preclusion—the insurer failed to deny the submitted charge within 30 days of receipt of same notwithstanding the fact that the submitted charge was clearly fraudulent.

The Court's decision in *Fair Price* was monumental in that it firmly established that an insurer who fails to pay or deny a claim within 30 days, **even a fraudulent claim**, is generally precluded from asserting **any defense against the claim**. Judge Smith, writing for the dissent in *Fair Price*, opined, as did Judge Wesley, that a strict adherence to the 30-day pay or deny rule will result in insurers paying claims that they should not otherwise be paying. The majority in *Fair Price* seems to ignore the far reaching implications of the further expansion of the *Presbyterian* preclusion rule; however, Judge Smith's dissent is educational in that he clearly states that the growth of fraudulent no-fault claims was explicitly noted by the underlying appellate courts.[20]

Judge Wesley's dissent ends with what appears to be an ominous warning:

> It is hard for us to understand how preclusion serves the goals of speedy payment when the statutory and regulatory framework on which it is now engrafted by this Court is fraught with ambiguities and inconsistencies.[21]

The "ambiguities and inconsistencies" contemplated by Judge Wesley have culminated in the Court's decision in *Fair Price* and many other decisions which, by their holding—although perhaps not by their intent—encourage unnecessary medical treatment, sanction no-fault fraud and give comfort and support to those who seek benefits for excluded activities and conduct.

Even though Judge Wesley's dissent is not today's law, his realization and vision that precluding an insurer from defending a claim that it would not otherwise cover has resulted in a dramatic increase in the submission of fraudulent and suspect claims—so much so that the Court of Appeals itself has held that an insurer is precluded from defending itself from a claim that is knowingly fraudulent.

The time has come for the Legislature and the regulatory authority to accept the kind invitation by both the majority and dissenting judges in *Presbyterian* and discourage no-fault fraud. With the prime rate of interest hovering at 3.5% per year, an insurer's assessment of 2% per month (24% annually) together with attorney fees and filing costs is penalty enough for missing a 30-day deadline. That was clearly the intention of the Legislature and the Superintendent and that intention should be underscored and clarified. *Presbyterian* preclusion is Draconian indeed, and encourages and supports increased no-fault fraud which adversely impacts all of us.

Endnotes

1. 226 A.D.2d 260, 261.
2. 90 N.Y.2d 274 (N.Y. 1997).
3. *See* Insurance Law § 5106(a); 11 NYCRR 65.15(g)(3).
4. Insurance Law § 5106(a); 11 NYCRR 65.15(h).
5. Insurance Law § 5106(a); 11 NYCRR 65.15(i).
6. *Presbyterian*, 90 N.Y.2d at 289.
7. It is noted that the No-Fault Regulation itself does not impose the penalty of preclusion on an insurer who fails to pay or deny a claim within 30 days. Rather, the Regulation contemplates an insurer's failure to pay or deny within 30 days and imposes an interest penalty on overdue claims as well as a requirement to pay a claimant's attorney's fees.
8. Much of the dissent in *Presbyterian* centers on statutory and regulatory interpretation and the position that the sanctions imposed by the Regulation for an insurer's failure to timely pay or deny a claim, i.e., interest penalty and attorney's fees, is the only penalty that can be imposed upon an insurer. The minority opinion concludes that the implementation of a preclusion rule must be left to the Legislature:

   > A policy shift such as this should be left to the Legislature that balanced the various competing concerns in creating this system that appears to have functioned well in providing benefits to those injured in automobile accidents.

   Presbyterian, 90 N.Y.2d at 289.
9. *Id.* at 288.
10. The current No-Fault Regulation is promulgated at 11 NYCRR 65-1.1, et seq.
11. 100 N.Y.2d 854 (N.Y. 2003).
12. *Serio*, 100 N.Y.2d at 860.
13. 84 A.D.3d 1331 (N.Y. App. Div. 2d Dep't 2011).
14. *See, NYU-Hospital for Joint Diseases v. American Intl. Group, Inc.,* 84 A.D.3d 1192 (N.Y. App. Div. 2d Dep't 2011); *Westchester Med. Ctr. v. New York Cent. Mut. Fire Ins. Co.*, 81 A.D.3d 929 (N.Y. App. Div. 2d Dep't 2011).
15. 30 A.D.3d 718 (N.Y. App. Div. 3d Dep't 2006).
16. *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195 (1997).
17. 17 A.D.3d 581, 582 (N.Y. App. Div. 2d Dep't 2005).
18. *See, A & S Med. P.C. v. Allstate Ins. Co.,* 15 A.D.3d 170, 171 (N.Y. App. Div. 1st Dep't 2005).
19. 10 N.Y.3d 556 (N.Y. 2008).
20. *Fair Price*, 10 N.Y.3d at 568; *see also*, *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 803 N.Y.S.2d 337 (N.Y. App. Term 2d Dept. 2005) *affirmed* 42 A.D.3d 277 (N.Y. App. Div. 2d Dep't 2007).
21. *Presbyterian*, 90 N.Y.2d at 291.

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Court of Appeals Holds That Conditions Involving Snow or Ice Need Not Be Immediately Created in Order to Hold a Municipality Liable Under the Affirmative Creation Exception to the Prior Written Notice Rule

By Kevin G. Faley and Kenneth E. Pitcoff

It is well established under the "prior written notice rule" that municipalities cannot be liable for injuries stemming from an allegedly dangerous and/or defective street or sidewalk condition, even where negligent, if it does not have prior written notice of the condition which allegedly caused plaintiff's injuries.[1] Equally well established are the two exceptions to this rule: (1) where the municipality receives a special use or confers or receives a special benefit from the area where the defect exists ("special use" exception), or, more commonly, (2) where the municipality created the defect or hazard through an affirmative act of negligence ("affirmative creation" exception). In the recent case of *San Marco v. Village of Mount Kisco*, the Court of Appeals chipped away at the latter exception.[2]

"[W]hile the Court of Appeals reaffirmed that the prior written notice rules function to shield municipalities from limitless liability for slip and falls where there is no prior written notice of the injury-producing condition, it then proceeded to place a new limit on the affirmative creation exception to prior written notice rules."

In *San Marco*, the plaintiff slipped and fell on an accumulation of black ice in a parking lot owned by the Village/Town of Mount Kisco ("the Village") while on her way to work on Saturday morning. While the Village treated the parking lot for snow and icy conditions Monday through Friday, the lot was not maintained or monitored on the weekends. At an unspecified time before the plaintiff's accident, the Village plowed snow in the parking lot into a large pile, which was adjacent to the parking spaces where plaintiff fell. While it was undisputed that the very day before plaintiff's accident (a Friday), the Village had salted the lot and inspected it for icy conditions, it was also undisputed that the temperature had risen above and then fell below freezing between the Village's last inspection on Friday and plaintiff's fall early Saturday.

In response to plaintiff's claim that the Village was negligent in piling the snow so close to patron parking spaces and failing to remedy any icy conditions that developed as a result, the Village sought protection under its Local Law which required prior written notice of a dangerous and/or defective condition as a prerequisite to its liability. The trial Court rejected this argument and found a question of fact as to whether the Village's act of piling the snow near the parking lot put it within the "affirmative creation exception" to the prior written notice rule. The Appellate Division for the Second Department reversed and granted summary judgment for the Village. The Court of Appeals then reversed in a 5-4 decision delivered by Justice Lippman.

As discussed herein, while the Court of Appeals reaffirmed that the prior written notice rules function to shield municipalities from limitless liability for slip and falls where there is no prior written notice of the injury-producing condition, it then proceeded to place a new limit on the affirmative creation exception to prior written notice rules.

The Appellate Division decisions of *Yarborough* and *Oboler* establish that where a plaintiff seeks to rely on the "affirmative creation" exception to negate the prior written notice rule and hold a municipality liable, the plaintiff must show both that the municipality *affirmatively* created the condition that caused plaintiff's injuries and that this defective and/or dangerous condition was *immediately* created and not the mere result of gradual wear and tear (commonly known as the "immediacy requirement").[3] The First Department held in *Yarborough* that the "mere *eventual* emergence of a dangerous condition as a result of wear and tear and environmental factors…does not constitute an affirmative act of negligence that abrogates the need to comply with prior written notice requirements."

Typically, the "immediacy requirement" has been applied to claims involving potholes, loosened drain covers and various sidewalk conditions. In most of these cases, the immediacy requirement has shielded municipalities from liability because the condition that caused plaintiff's injury was the result of a gradual culmination of environmental factors and/or basic wear and tear from pedestrian and/or motor vehicle traffic. However, the Courts have not so often gauged whether the immediacy requirement applies where the injury-producing condition is snow or ice. This was the very issue that the Court dealt with in *San Marco*.

The Second Department found in *San Marco* that while the Village's had created the large pile of snow adjacent to the area where plaintiff fell, it did not "immediately" create the injury-producing hazard; rather, it was the eventual interplay of environmental factors such as time and temperature which caused the black ice at issue. The Second Department thus held that because the black ice was not present immediately after the Village's plowing, the affirmative creation exception to the prior written notice rule did not apply.

However, the Court of Appeals opined that the typical requirement that an affirmatively created condition be "immediately" created does *not* apply to conditions involving snow and/or ice. In limiting the creation exception to the prior written notice statutes in this way, the Court drew the following distinction between street and sidewalk conditions as compared to conditions involving snow and ice:

> [U]nlike a pothole, which is ordinarily a product of wear and tear of traffic or long-term melting and freezing on pavement that at one time was safe and served an important purpose, a pile of plowed snow in a parking lot is a cost-saving, pragmatic solution to the problem of an accumulation of snow that presents the foreseeable, indeed known, risk of melting and refreezing.

The Court went on:

> [A] patch of pavement may gradually and unpredictably deteriorate, making the point at which the efficacy of the initial repair ceases, unknown to the municipality. It is therefore, understandable that the hazard may escape detection until the municipality receives prior written notice of the problem. However, in the case of black ice that forms from plowing snow…a municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.

In other words, the Court held that the purpose of the immediacy requirement is to shield municipalities from liability where a once safe condition becomes unsafe because of slow, gradual and/or uncontrollable factors which are either outside of the municipality's control or which could easily go undetected for a prolonged period of time. The Court indicated that a pothole, sidewalk defect or loosed drain cover fits squarely within this scenario, but that snow and ice are *not* typically the types of conditions which go easily undetected or arise only after gradual passage of time. The Court seems to be classifying the dangers associated with snow and ice as open and obvious, not needing to be immediately created to raise a red flag for municipalities. Therefore, the Court held that while dangerous conditions involving potholes, man covers, sidewalks and the like must be *immediately* created in order to impose liability upon municipalities under the affirmative creation exception to the prior written notice rule, snow and ice conditions are an entirely different animal which need not be immediately created.

In support of this proposition, the Court referred to a 1949 case where the Court of Appeals held that a municipality could be liable for a slip and fall on ice in its parking lot without prior written notice.[4] Further, the Court pointed to a 2008 decision from the Second Department where the Court found a triable issue of fact as to whether the County's snow removal methods created the ice on which plaintiff fell.[5]

"In light of a strong dissent, the majority attempted to justify its decision by opining that it was not *creating a new burden on municipalities with respect to snow and ice removal and that it was* not *deeming municipalities to be insurers of pedestrians."*

Applying its freshly carved out exception to the exception to the *San Marco* facts, the Court found that because the Village had salted and inspected the lot on the eve of plaintiff's accident to eliminate black ice, the determinative factor of the Village's liability was whether its snow removal efforts created the icy condition on which plaintiff fell. The Court found that there was an issue of fact as to whether the Village exercised its duty in a reasonably safe manner by plowing high piles of snow adjacent to an active parking lot. In reversing the Second Department and denying the Village's motion for summary judgment, the Court emphasized that the Village neglected to employ snow and ice removal services on the weekend (when plaintiff's accident occurred), despite the fact that the parking lot remained open seven days a week.

In light of a strong dissent, the majority attempted to justify its decision by opining that it was *not* creating a new burden on municipalities with respect to snow and ice removal and that it was *not* deeming municipalities to be insurers of pedestrians.

The dissenting opinion by Justice Smith disagreed. Justice Smith noted that the majority's decision was tantamount to holding that "no written notice is required

because the municipality was negligent." According to Justice Smith, the majority's decision is at odds with the very purpose of the prior written notice requirement, namely to protect municipalities, even when they *are* negligent, unless they have written notice of the defective and/or dangerous condition at issue.

In addressing the majority's contention that dangerous potholes and pavement conditions are more likely to go undetected and/or result from gradual or environmental changes, the dissent held that a municipality would not need to rely on the prior written notice rule if a danger was truly *unforeseeable* and *unknown*. Rather, as the dissent opined, it is where the risk *is* foreseeable, and the municipality is negligent in *failing to foresee* the danger, that the prior written notice rule takes effect and shields municipalities from perpetual slip and fall lawsuits.

The dissent found that neither the terms of the prior written notice rule nor the legislative intent behind it leave room for a distinction between snow and ice cases as compared to pavement and sidewalk cases. Further, the dissent forewarned that extending the affirmative creation exception to snow and ice cases such as the present one would serve to swallow up the protection afforded to municipalities by the prior written notice rule and effectively defeat the rule's purpose.

Endnotes

1. Village Law §6-628; Town Law §65(a); Second Class City Law §244; New York City Admin. Code §7-201(c)(2).
2. *San Marco v. Village of Mount Kisco*, 2010 N.Y. Slip Op. 09197.
3. *Yarborough v. City of N.Y.*, 813 N.Y.S.2d 511 (2d Dept. 2003); *Oboler v. City of N.Y.*, 8 N.Y.3d 888 (2d Dept. 2007).
4. *Zahn v. City of N.Y.*, 299 N.Y. 581 (1949).
5. *Smith v. County of Orange*, 858 N.Y.S.2d 385 (2d Dept. 2008).

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Condition Precedents to Suing Governmental Agencies: Avoiding Potholes and Protecting Claimants' Rights

By Marc Miner

Lawsuits against municipalities, governments, or quasi government agencies can be a minefield for the attorney unaccustomed to such litigation. Many agencies have specific rules which regulate when, where, and how they can be sued, and what conditions precedents must be met. It is always important to read the enabling statutes, for the specific government agency you are bringing a claim against, to determine the pre-suit requirements. An attorney may be liable for ignorance of the rules of practice, for failure to comply with the conditions precedent to suit, or for failure to conduct adequate legal research .[1] Failure to meet the conditions precedent to bringing a lawsuit may very well result in the dismissal of the case.[2] Because of the dire consequences of failing to comply with conditions precedents, attorneys representing claimants are sometimes too quick to accede to spurious pre-action discovery. The purpose of this article is to give the claimant's attorney the tools to evaluate pre-action discovery demands. By no means will this article attempt to cover the rules for every type of governmental entity. Rather, this article should be used as a jumping off point for further research.

Investigation: It is imperative that an investigation be conducted as early as possible to determine the possible defendants in the potential lawsuit. The time to sue most government agencies is significantly shorter than the time to sue private entities, and the time to file notices of claims and complete other conditions precedents is even shorter. Take the following hypothetical scenario: A pedestrian trips and falls on a defective sidewalk grating. The sidewalk grating acted as ventilations for underground trains, including those run by the New York City Transit Authority (NYCTA) and the Long Island Railroad (LIRR). The sidewalk is owned by a city, county, town or village in the State of New York (hereinafter referred to as "City"). The adjoining land was owned by the New York State Urban Development Corp. d/b/a Empire State Development Fund. The injured plaintiff was taken to a New York City public hospital where it is alleged malpractice occurs. Each of the foregoing is potentially liable for the injured party's damages, and each has conditions precedents that must be met before filing a lawsuit.

Notices of Claim: A notice of claim must be timely filed and appropriately served upon the City, meeting all of the requirements of General Municipal Law § 50–e.

No action shall proceed against any "city, county, town, village, fire district or school district" for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of same without first filing a notice of claim.[3] The notice of claim must be properly filed within ninety days of the incident.[4] At least thirty days must pass from the filing of the notice of claim, and the adjustment of the claim must have been neglected or refused, before the commencement of the lawsuit.[5]

"Lawsuits against municipalities, governments, or quasi government agencies can be a minefield for the attorney unaccustomed to such litigation."

A claimant must also file Notices of Claim against the LIRR,[6] the NYCTA,[7] The New York State Urban Development Corp,[8] and the New York City Health and Hospital Corporations (NYCHH)[9] meeting the same requirements as above. These filings are mandatory because each of the enabling statutes for the various entities require it.

Pre Action Examinations: After a claimant files a Notice of Claim a demand for an oral and/or physical examination is usually served by the public corporation upon the claimant or her attorney. The demand is usually referred to as a 50-H examination, a shorthand for General Municipal Law § 50-h. The purported purpose behind the entitlement of the 50-h examinations is to allow the entity against whom the claim is made to investigate the circumstances surrounding the incident and to explore the merits of the claim, while information is still readily available, with a view towards settlement.[10] However, the examinations are a powerful tool for the future defendant to obtain evidence to defend the subsequent lawsuit. The 50-h oral examination is sworn testimony which can be used against a claimant,[11] and when combined with an examination before trial, a defendant will have two bites of the apple to obtain damaging testimony from a claimant to be used in motion practice or at the time of trial.[12] However, when a hearing is held, the claimant need not answer palpably improper questions at a pre-action hearing.[13] Demands for a pre-action hearing should be scrutinized closely to determine their validity.

Whenever a notice of claim is filed upon a "city, county, town, village, fire district, ambulance district or school district" such entity is entitled to an oral and/or physical examination of the claimant pursuant to General

Municipal Law § 50-h. The demand for the 50-h examination must be made in writing by the respondent within 90 days of the filing of the notice of claim.[14] The location of the exam shall be set by the municipality.[15] The failure of the requesting party to make a timely demand for an examination will result in a waiver of the exam.[16] Thus, if more than ninety days have passed after the filing of a complaint against the City, one may proceed to file a summons and complaint. But, once the demand for the examination is timely made, the action cannot be commenced until the condition precedent of the examination is completed: "...no action shall be commenced against the city, county, town, village, fire district or school district against which the claim is made unless the claimant has duly complied with such demand for examination..."[17] Thus, in our hypothetical, the City is entitled to pre-action examinations when timely requested, but what about the other defendants?

The NYCHH is entitled to both an oral and physical examination, as the statute governing actions by and against the corporation specifically states that "The corporation may require any claimant hereunder to be examined as provided in section 50-h of the general municipal law, and all the provisions of such section shall apply to such examinations."[18]

However, there is no reference to General Municipal § 50-h in the sections governing suits against the LIRR or the NYCTA. (The Public Authorities Law contains the authorization statutes for most public transportation companies.) The sections regarding lawsuits against the LIRR[19] and the NYCTA[20] contain identical language as follows:

> The Authority may require any person, presenting for settlement an account or claim for any cause whatever against the authority, to be sworn before a member, counsel or an attorney, officer or employee of the authority designated for such purpose, touching such account or claim and when so sworn to answer orally as to any facts relative so such account or claim. The authority shall have power to settle or adjust all claims in favor of or against the authority.

There is nothing stated in the above paragraph about the oral examination being a condition precedent to a lawsuit. There is nothing in the section mentioning a physical examination. So are the LIRR and the NYCTA entitled to a pre-action examination as a condition precedent to a lawsuit? The First and Second Appellant Departments disagree, while the Third and Fourth Departments are silent on the matter.

In the First Department a pre-action examination is not a condition precedent to the commencement of a lawsuit against the Authority. The First Department has stated in a case where the lower court granted a motion to dismiss the action for failure to appear for a pre-action hearing that "Since there is no prohibition in the Public Authorities Law to the commencement of an action until compliance with a demand for an examination the IAS court should not have dismissed this action."[21] Thus, where cases are venued in the First Department against defendants such as the LIRR, NYCTA (and for that matter the MTA, and MABSTOA and other entities whose authority comes under the Public Authorities Law) a claimant need not appear for a pre-action hearing prior to commencing a lawsuit against these defendants.[22]

The Second Department, however, has determined that the same defendants are entitled to a hearing as a condition precedent to commencing a lawsuit against them.[23] The Second Department's rationale is that:

> Subdivisions 4 and 5 of [Public Authorities Law] section 1212 must be read together. So read, it must manifest that the defendant Authority has, incident to the power to adjust and settle claims, the right to examine claimants to ascertain whether or not adjustment or settlement is warranted (subd. 5). Further, the statutes prescribe: "No action shall be maintained against the authority * * * unless it shall appear by and as an allegation in the complaint * * * that the authority has neglected or refused to make an adjustment or payment of the claim" (subd 4).
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> Such a determination cannot be intelligently made until the Authority has exhausted all the available means of information respecting the justness of the claim it deems necessary, including oral examinations. The requirement that no suit be commenced unless and until the Authority has determined not to settle the claim "would soon become a dead letter if every claimant could with impunity refuse to be examined" and yet treat the Authority's consequent failure to pay as satisfying the statutory imposed condition precedent (*Tolchinsky v. City of New York* [164 A.D. 636, 149 N.Y.S. 1016 aff'd 220 N.Y. 633].

The *Tolchinsky* case (ironically a First Department case) was a case against the City of New York that predated General Municipal Law § 50-h, and involved an interpretation of the Charter of the City of New York. The Second Department has followed the holding in *Tolchinsky* because of the similarity between the now

defunct City Charter sections and the current relevant Public Authority Law sections.

Thus today, when a claimant has a claim against an Authority (e.g. MTA, LIRR, Metro North, NYCHA, NYCHHC) whether or not he must appear for a pre-action hearing as a condition precedent of the lawsuit depends on the department in which the case is venued.

Keep in mind, though, that not every government entity which is entitled to a notice of claim is also entitled to a hearing. For example, there is no mention in the Unconsolidated Laws of any type of hearing for the benefit of the New York State Public Development Corporation, and it is not entitled to one.[24] However, that does not prevent the attorneys for same from demanding mislabeled 50-h hearings and obtaining pre-action sworn testimony from claimants with unwary attorneys.

Other Pre-Action Discovery: The claimant's attorney must be careful to understand that the right to pre-action discovery is limited. At many times the attorney conducting the pre-trial 50-h hearing will ask for additional documents such as photographs or medical authorizations, or a notice for discovery inspection will be served. Often a pre-action discovery demand will have a heading such as "Discovery Pursuant to Municipal Law § 50-h." However, General Municipal Law § 50-h must be strictly construed, and an entity which is entitled to an oral and/or physical examination is not entitled to further discovery under the section. Neither General Municipal Law § 50-h, nor the various statutes of the Public Authorities Laws, make any mention of any discovery outside of examinations, and the CPLR does not apply to pre-action municipal hearings.[25]

Thus it has been held that while "the Comptroller [of the City of New York] has the power to issue subpoenas duces tecum when investigating the finances of the city, arising from his powers to audit claims arising under contracts...[there is] no authority, however, for the extension of this power to audit and subpoena records to situations where the comptroller is investigating a negligence claim in tort against the city."[26]

More clearly it has been held that:

> We find that such broad and extensive requests for documentation are not properly included in a comptroller's demand for examination. Administrative Code of the City of New York (sec) 93d-1.0 authorizes the Comptroller to investigate claims by examining the person presenting the claim upon oral questions only. General Municipal Law (sec) 50-h (1) similarly provides that such "examination shall be upon oral questions unless the parties otherwise stipulate and may include a physical examination of the claimant". This language is an effective limitation on disclosure. The statute must be strictly construed to limit disclosure, at this stage, to the types of examinations enumerated therein and a wide-ranging request for production of documents, such as was here made, is outside the contemplation of the statute and cannot stand. *(Matter of Ferris v. Johnson*, Sup Ct, Onondaga County, Dec. 8 1984, Lynch J. aff'd on opn below 115 A.D.2d 309 [4th Dept. 1985].) As was aptly noted in *Matter of Ferris*, "Section 50-h has been strictly construed to not incorporate the discovery provisions of the Civil Practice Law and Rules."[27]

Conclusion: Once the conditions precedents have been met, the lawsuit may be commenced. A careful review of the applicable statutes and case law will allow plaintiffs' attorneys to navigate all the conditions precedents to commencing a lawsuit against municipalities and governmental agencies, while protecting their clients.

Endnotes

1. *Conklin v. Owen*, 72 A.D.3d 1006, 900 N.Y.S.2d 118 (2d Dept. 2010); *Jones v. Regional Transit Service, Inc*. 13 A.D.3d 1225, 787 N.Y.S.2d 578 (4th Dept. 2004).
2. *Vatanian v. City of New York*, 48 A.D.3d 673, 852 N.Y.S.2d 282 (2d Dept. 2008).
3. General Municipal Law § 50-i(1).
4. General Municipal Law § 50-e(1)(a) (except in a wrongful death case, then 90 days from the appointment of the representative of the estate).
5. General Municipal Law § 50-i(1).
6. Public Authority Law § 1276(2).
7. Public Authorities Law § 1212.
8. NY Unconsolidated Laws § 6255.
9. NY Unconsolidated Laws § 7401.
10. *Alouette Fashions, Inc. v. Consolidated Edison Company of New York, Inc*., 119 A.D.2d 481, 501 N.Y.S.2d 23 (1st Dept. 1986) aff'd by 69 N.Y.2d 786, 513 N.Y.S.2d 114 (1987) and 513 N.Y.S.2d 114 (1987).
11. General Municipal Law § 50-h(4).
12. *Alouette Fashions, Inc. v. Consolidated Edison Company of New York, Inc*., supra (the "hearing [is] separate and distinct from any rights to discovery under the CPLR").
13. *Tardibuno v. County of Nassau,* 181 A.D.2d 879, 681 N.Y.S.2d 443 (2d Dept. 1992) ("We agree with the plaintiffs that the...question improperly called upon the witness to explain her own view of the legal theories asserted...").
14. General Municipal Law § 50-h(2).
15. *Id*.
16. *Bythewood v. Hempstead Public Schools*, 46 A.D.3d 731, 849 N.Y.S.2d 581 (2d Dept. 2007).

17. General Municipal Law § 50-h(5).
18. Unconsolidated Laws § 7401(2); General Municipal Law § 50-h.
19. Public Authorities Law § 1276(4).
20. Public Authorities Law § 1212(5).
21. *Cespedes v. City of New York*, 301 A.D.2d 404, 752 N.Y.S.2d 863 (1st Dept. 2003).
22. *See also Hernandez v. NYCTA*, 41 Misc.2d 123, 245 N.Y.S.2d 43 (New York Co. 1963) aff'd 20 A.D.2d 968, 251 N.Y.S.2d 415 (1st Dept. 1964); *Vives v. NYCHA*, 11 Misc.3d 1083(A), 819 N.Y.S.2d 852 (Sup Bx 2006) (unreported decision at 2006 WL 1044261); *Williams v. NYCHA*, 188 Misc.2d 18, 724 N.Y.S.2d 830 (Civ. NY 2001).
23. *Lo Guercio v. NYCTA*, 31 A.D.2d 759, 297 N.Y.S.2d 646 (2d Dept. 1969). *See also Vartanian v. City of New York*, 48 A.D.3d 673, 852 N.Y.S.2d 282 (2d Dept. 2008); *Knotts v. City of New York*, 6 A.D.3d 664, 775 N.Y.S.2d 188 (2d Dept. 2004). But compare *Lynch v. NYCTA*, 12 A.D.3d 644, 784 N.Y.S.2d 900 (2d Dept. 2004) (NYCTA did not establish that the plaintiff failed to comply with the statute because it submitted no proof that it served a demand for an oral examination).
24. *See e.g* Unconsolidated Laws §§ 6255, 6281, 6281-a.
25. *Alouette Fashions, Inc. v. Consolidated Edison Company of New York, Inc.*, supra; *Matter of Murphy v. Board of Educ.*, 74 A.D.2d 874, 426 N.Y.S.2d 34 (2d Dept. 1980); *Mitchell v. County of Dutchess*, 66 Misc.2d 522, 321 N.Y.S.2d 715 (Dutchess Co. 1971); *Berkowitz v. City of Long Beach*, 33 Misc.2d 449, 225 N.Y.S.2d 1002 (Nassau Co. 1962).
26. *Alouette Fashions, Inc. v. Consolidated Edison Company of New York, Inc.*, supra.
27. *Id.*

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The Preclusion of Expert Affidavits in Summary Judgment Motions: A Comparison of the First and Second Departments

By David A. Glazer and Karen Schnur

It has often been argued by lawyers in summary judgment motions that the use of expert affidavits to either support or oppose the motion are improper if the experts were not exchanged prior to the motion as long as a note of issue has been filed. Until recently, that argument had fallen on deaf ears.

The Second Department has begun to accept that argument. Where previously expert disclosure after the note of issue was allowed, the Second Department has started to require that expert information be exchanged prior to the filing of the note of issue if the party wishes to use the expert in a summary judgment motion.[1] However, whether the Second Department is a trendsetter or floating alone in this matter has not yet been fully determined. Thus far, only the First and Second Departments have dealt with this issue at any length recently.

Second Department Cases

As early as 1996, in *Mankowski v. Two Park Co.*, the Second Department held that it was proper for the Supreme Court to preclude the use of an expert or the expert's affidavit to oppose a motion for summary judgment since the plaintiff failed to timely respond to the defendant's discovery demands.[2] Throughout the years, the Second Department made similar rulings.[3]

In 2011 alone, there were at least four decisions where the Second Department has held that the expert affidavit should have been precluded because the expert was not disclosed to the other party prior to the note of issue being filed.

In *Pellechia v. Partner Aviation Enterprises, Inc.*, the plaintiff allegedly sustained injuries when he slipped and fell while disembarking from defendant's charter jet.[4] The Second Department affirmed the Supreme Court's granting of summary judgment for the defendant on the grounds that the defendant made out a prima facie showing for summary judgment and the plaintiff was unable to raise a triable issue of fact.[5] The Second Department upheld the Supreme Court's decision to disallow the plaintiff's expert affidavit "because the plaintiff never complied with any of the disclosure requirement of CPLR 3101 (d) (1) (i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness."[6] The Court also held that: (1) the expert did not demonstrate that he was qualified to render an opinion and (2) the affidavit was "speculative and conclusory, and was not based on accepted industry standards.…"[7]

In *Ehrenberg v. Starbucks Coffee Company*,[8] the plaintiff sued Starbucks Coffee Company when a cup of hot tea spilled on him, claiming that the accident was the result of a dangerous and defective condition on the premises. Starbucks moved for summary judgment, which was denied by the Supreme Court.[9] On appeal, the Second Department reversed on the grounds that the Supreme Court improperly considered the affidavit of the plaintiff's expert that was submitted in opposition to the motion.[10] The Second Department held that the Supreme Court should not have considered the affidavit "since that expert witness was not identified by the plaintiffs until after the note of issue and certificate of readiness were filed, attesting to the completion of discovery, and the plaintiffs offered no valid excuse for the delay."[11] As a result, the Court granted summary judgment to Starbucks.[12]

In *Stolarski v. DeSimone*,[13] Stolarski attempted to commit suicide when her boyfriend DeSimone, whom she was living with, broke up with her and told her to move out.[14] She was hospitalized after the attempt and upon discharge was referred to the defendant Family Services of Westchester, Inc.[15] After two consultations with a Family Services social worker, Stolarski successfully killed herself using DeSimone's gun.[16] Her parents sued both DeSimone and Family Services for wrongful death and conscious pain and suffering.[17] Both defendants moved for summary judgment and the Supreme Court denied both motions.[18] On appeal, the Second Department reversed and granted summary judgment for DeSimone but affirmed the denial of summary judgment for Family Services because it "failed to establish its prima facie entitlement to such relief."[19] The Second Department held that the Supreme Court "properly declined to consider the expert affidavits proffered by Family Services in support of its motion[]" because "[t]he experts were not identified by Family Services until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and [it] offered no valid excuse for the delay."[20] The court further explained that because Family Services did not establish its prima facie entitlement to summary judgment, the motion was denied "regardless of the sufficiency of the opposing papers."[21]

Most recently, the Second Department decided *Kopeloff v. Arctic Cat, Inc*.[22] In this case, the plaintiff sued the manufacturer of the snowmobile that he was driving, alleging that an overcentered sway bar caused him to turn over and be thrown off the snowmobile and thus sustain injuries.[23] The defendant moved for summary judgment in August of 2009, over three months after the note of issue and certificate of readiness were filed.[24] In opposition to the summary judgment motion, the plaintiff submitted an affidavit of an expert who was never previously identified to the defendant.[25] The Supreme Court granted the defendant's motion and the plaintiff appealed.[26] The Second Department affirmed the Supreme Court, finding that the court did not abuse its discretion when rejecting the expert affidavit as untimely since the "plaintiff did not provide any excuse for failing to identify the expert in response to the defendant's discovery demands" and also because the plaintiff had retained the expert in question over 18 months prior to the submission of the affidavit yet the defendant was not aware of the expert.[27] Furthermore, the court pointed to a secondary reason to grant defendant's motion for summary judgment: the plaintiff's expert's affidavit was "speculative, conclusory, and partially based on evidence which is not in the record."[28]

First Department Cases

The First Department has also recently addressed this issue, although not with the same frequency, or consistency, as the Second Department. Since April of 2010, the First Department has decided three cases with respect to the preclusion of expert affidavits in summary judgment motions where the expert was not disclosed prior to the note of issue being filed.

In the first case, *Tomaino v. 209 E. 84th Street Corporation*, the plaintiff slipped and fell down a flight of steps and sued the owner of the premises.[29] The defendant moved for summary judgment on the grounds that the plaintiff was unable to state exactly where she fell and the exact cause of her fall, but the Supreme Court denied the motion.[30] On appeal, the First Department affirmed the denial of the defendant's motion for summary judgment and to preclude plaintiffs' expert testimony. It held that the Supreme Court properly did not exclude the plaintiff's expert's affidavit and testimony because "[p]laintiffs established good cause for the untimely disclosure, which does not appear to have surprised or prejudiced defendant."[31]

In *Harrington v. City of New York*, the First Department affirmed the Supreme Court's order which granted defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.[32] The First Department held that even if the defendants were negligent, "such negligence was not a substantial cause of the events producing the injury" and that the plaintiff "failed to establish prima facie entitlement to summary judgment in her favor on liability."[33] However, the court also stated that "the motion court properly declined to consider the [plaintiff's] expert's affirmation because plaintiff failed to timely disclose his identity."[34] In making this statement, the court cited to a Second Department case, *Wartski v. C.W. Post Campus of Long Is. Univ.*, which held that "[t]he plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert."[35] However, the First Department also made clear that even if the expert's affidavit were allowed, that it was insufficient to raise an issue of fact.[36]

The most recent case with respect to this issue was decided in June 2011. In *Baulieu v. Ardsley Associates, L.P.,*[37] the First Department reversed the Supreme Court's granting of summary judgment to the defendant, Powerhouse Maintenance Inc. (Powerhouse) because Powerhouse did not establish prima facie entitlement to summary judgment, and even if it did, evidence offered by the other parties raised triable issues of fact.[38] The Court went further and stated that the plaintiff's expert engineer's affidavit should have been considered on the motion, "notwithstanding that the plaintiffs failed to timely disclose information about the expert before filing their note of issue."[39] It reasoned that the record showed "no evidence that the plaintiffs' belated disclosure…was willful, or that it prejudiced Powerhouse, inasmuch as the specifics of the alleged macadam defect, and the codes and regulations claimed to be violated, were previously set forth in plaintiffs' bill of particulars and deposition testimony."[40]

Comparison of First and Second Departments

The First and Second Departments approach the question of preclusion of expert affidavits, introduced for the first time during a summary judgment motion and after the note of issue has been filed, differently. Looking at the four Second Department cases discussed above, the Second Department will preclude an expert affidavit without a showing of willfulness or prejudice, although it tends to provide at least one secondary reason for either precluding the expert affidavit or its decision to grant or to deny summary judgment. These secondary reasons appear to be a safety net to protect against an appeal. However, as evidenced by *Ehrenberg*, the Second Department will still preclude an expert affidavit solely on the grounds that expert disclosure was not exchanged prior to the note of issue being filed even without a secondary reason for its decision.

The First Department, on the other hand, generally asks whether the late disclosure of the expert was willful or prejudicial to the opposing party and whether the party offering the affidavit had a good cause reason for the delay.[41] *Tomaino* suggests that if the plaintiff presents good cause for the untimely disclosure, that it is not willful, and does not prejudice the other party, preclusion of the expert affidavit is unwarranted. Furthermore, *Baulieu* stands for the proposition that if the information or opinions offered by the expert in the affidavit were disclosed prior to the note of issue being filed, then the opposing party could not have been prejudiced. Therefore, unless the untimely disclosure was willful, the Court should not preclude the expert's affidavit.

Conclusion

The real question is how attorneys should handle expert disclosure moving forward. In any case where a motion for summary judgment is likely, expert disclosure should be made either before the filing of the note of issue, or promptly after its filing. As long as the opposing party has had a viable opportunity to review the disclosure and obtain its own expert for rebuttal purposes, then there should be no issue with the use of an expert affidavit. However, failure to disclose an expert, particularly if that expert was retained well before the filing of the note of issue, will likely result in the preclusion of that expert in a motion for summary judgment.

Endnotes

1. Richard E. Lerner & Judy C. Selmeci, *Timing of Expert Disclosures: A Preemptive Approach*, N.Y. L.J., Aug. 5, 2011, available at http://www.njlj.com.
2. *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 639 N.Y.S.2d 847 (2d Dept. 1996).
3. *See Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit*, 72 A.D.3d 804 (2d Dept. 2010); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (3d Dept. 2009); *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916 (2d Dept. 2009); *King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851 (2d Dept. 2008); *McArthur v. Muhammad*, 16 A.D.3d 630 (2d Dept. 2005); *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470 (2d Dept. 1999).
4. 80 A.D.3d 740, 916 N.Y.S.2d 130 (2d Dept. 2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. 82 A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 83 A.D.3d 1042, 922 N.Y.S.2d 151 (2d Dept. 2011).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 84 A.D.3d 890, 923 N.Y.S.2d 168 (2d Dept. 2011).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 72 A.D.3d 460, 900 N.Y.S.2d 245 (1st Dept. 2010).
30. *Id.*
31. *Id.* (internal citations omitted).
32. 79 A.D.3d 545, 913 N.Y.S.2d 81 (1st Dept. 2010).
33. *Id.*
34. *Id.*
35. 63 A.D.3d 916, 917, 882 N.Y.S.2d 192 (2d Dept. 2009).
36. *Harrington*, 79 A.D.3d 545.
37. 85 A.D.3d 554, 925 N.Y.S.2d 466 (1st Dept. 2011).
38. *Id.*
39. *Id.*
40. *Id.*
41. The one First Department case that did not apply this analysis relied on a Second Department case for its holding.

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A Divided Court Limits Reckless Disregard Protection for Emergency Vehicles

By John M. Shields

Vehicle and Traffic Law (VTL) § 1104 recognizes that emergency personnel are frequently confronted with exigent circumstances, where they must act decisively to protect human life. Enabling emergency personnel to conduct their essential responsibilities inevitably increases the risk of harm to innocent bystanders. Pursuant to VTL § 1104, a driver of an authorized emergency vehicle is exempt from certain rules of the road, when engaged in emergency operation. However, VTL § 1104 does not protect emergency operators from the consequences of reckless disregard for the safety of others.

The protection provided to emergency vehicles under VTL § 1104 represents the recognition that the duties of emergency personnel often bring them into conflict with the rules that are intended to regulate general conduct. *Riley v. County of Broome*.[1] The Court recognized that the importance of public safety and law enforcement justifies a qualified privilege afforded to emergency personnel, where necessary to conduct their vital responsibilities, that will inevitably increase the risk of harm to innocent motorists and pedestrians.[2] Courts have held that VTL § 1104 strikes a balance that permits police officers to perform their important responsibilities, while still protecting against disproportionate and over-reactive conduct.

In a sharply divided decision, *Kabir v. County of Monroe*,[3] the Court of Appeals has further interpreted the application and breadth of VTL § 1104 "reckless disregard" protection for emergency operators. The majority held that the protection afforded to emergency vehicles under VTL § 1104 is limited to a unique set of circumstances, specifically articulated in the statute. Conversely, the dissent argued that the heightened "reckless disregard" standard should remain unconditional, encompassing every aspect of emergency operation. The majority stated that the narrow interpretation of the statute is consistent with the legislative intent. The dissent maintained that the restricted interpretation is inconsistent with public policy and prior rulings and otherwise unworkable. Ultimately, the Legislature may have to clarify the true objective of the statute.

Vehicle and Traffic Law § 1104 Protects Operators of Emergency Vehicles

Vehicle and Traffic Law § 1104 was created in 1957 as part of an attempt to create an updated and uniform set of traffic regulations.[4] It is well settled that the driver of an authorized emergency vehicle, engaged in an emergency operation, is exempt from certain rules of the road under VTL § 1104.[5] This qualified privilege, however, does not protect the driver from the consequences of "reckless disregard for the safety of others."[6] The reckless disregard standard is an exacting standard, requiring a deliberate decision to ignore a likely harm. It is well defined that to establish a breach of the reckless disregard standard of care, the plaintiff must show that the driver has intentionally done an act of an unreasonable character in disregard of an obvious risk that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome.[7] The reasonableness of the driver's conduct must be judged as of the time and in light of the circumstances in which he acted, not with the benefit of hindsight.[8] More than a momentary lapse of judgment is necessary to meet the reckless disregard test.[9]

In *Saarinen v. Kerr*,[10] the Court reasoned that any standard other than a recklessness standard would result in judicial second-guessing of split-second decisions made by emergency personnel in the midst of highly pressurized situations.[11] Such retrospection could have the unintended and undesirable result of deterring trained emergency personnel from acting decisively to protect or save human life or property.

Recently, there have been varying results involving the interpretation and application of the standards of VTL § 1104. Some decisions have affirmed that police officers were engaged in emergency operation, while other Courts have ruled that the emergency driver's conduct rose to the level of recklessness, thus removing the actions from the protection of VTL § 1104.[12]

A number of the decisions have focused on the specific conduct of the driver, as well as the issue of whether the emergency operator violated established departmental guidelines, procedure or training.[13] In *Simmons*, the Court reiterated that in determining whether a police officer acted recklessly, in addition to speed, the Court should consider the totality of the circumstances, including the nature of the original offense, length and duration of the chase, weather conditions, road conditions, traffic, neighborhood characteristics and visibility.[14]

Reckless Disregard Protection Even During Non-Emergency Operation

In *Criscione v. City of New York*,[15] the Court of Appeals held that a police officer who was driving a patrol car in response to a *non-emergency*, *non-criminal* family dispute call was engaged in the "emergency operation" of a vehicle, as defined in VTL § 114-b.[16] As a result, his actions

should not be measured by ordinary negligence standards, but rather by the "reckless disregard" standard of VTL § 1104(e).

Vehicle and Traffic Law § 101 specifically designates a police vehicle as an "authorized emergency vehicle."[17] Among the particular circumstances that the Legislature specified in section 114-b as qualifying as an "emergency operation" of a vehicle is the operation of an authorized emergency vehicle, while responding to a police call.[18] Although section 114-b does not define the phrase "police call," the Court in *Criscione* determined that a radio call to officers on patrol, by a police dispatcher regarding a 911 call, falls squarely within the plain meaning of the term "police call."[19] There is no evidence of any legislative intent to vary the definition of "emergency operation" based on individual police department incident classifications, including, but not limited to, criminal, non-criminal or emergency.[20] Emergency vehicles operating as police vehicles, *even without activating their siren or red lights*, continue to fall within the statutory exemptions.[21]

In *Soto*, the Court expressed that VTL § 114-b specifies *two* distinct police operations as within the definition of emergency: "pursuing an actual or suspected violator of the law," and "responding to" a "police call." In *Rusho v. State of New York*,[22] involving parole officers pursuing a suspected parole absconder, the Court of Claims discussed the fact that the term "pursuit" should *not* be narrowly interpreted. One category of VTL § 114-b exemplifies the need to act with urgency, while the other encompasses responses to the remaining gamut of "police calls."[23] In fact, the police officer's perception of whether a situation is an emergency is irrelevant to the determination as to emergency operation.

No Reckless Disregard Protection for Emergency Operators as Plaintiffs

The Court of Appeals, in *Ayers v. O'Brien*,[24] clarified that emergency operators cannot benefit from the protection of the reckless disregard standard when they proactively initiate personal injury lawsuits as plaintiffs, or attempt to use the heightened standard to ward off a comparative fault defense. The protection afforded by VTL § 1104 is to be applied solely in circumstances when the emergency operator is sued or countersued.

Applying ordinary comparative negligence principles to an operator's own claim for damages against a bystander does not hinder the stated purpose of VTL § 1104, to recognize the importance of operators of emergency vehicles to respond quickly.[25] More importantly, permitting the protection of the reckless disregard standard to assist an operator's own claim for damages "could result in potential financial windfalls to negligent operators of emergency vehicles," and an unfair and unintended disproportionate share of liability upon innocent or partially negligent bystanders.[26]

Emergency Vehicle Protection Limited to Specific Circumstances Listed in Statute

In *Kabir*, the defendant was a deputy sheriff on routine patrol in a marked police vehicle. He received a radio dispatch to back up another officer, who was responding to a burglary alarm, which is characterized as a "serious call" that warrants "immediate attention." The dispatcher transmitted the information concerning the burglary call, including the address, to the mobile data terminal inside the deputy's vehicle.

The deputy did not immediately activate his vehicle's emergency lights or siren. He briefly glanced down at the computer screen to confirm the exact location of the call. During that brief moment, traffic in front of the deputy had stopped. Although he was within the speed limit and immediately applied his brakes, he was unable to stop before rear-ending the vehicle in front of him, which was driven by the plaintiff.

Pursuant to VTL § 1104, the Supreme Court awarded summary judgment to defendants.[27] The Appellate Division reversed, with two Justices dissenting, holding that the reckless disregard standard in VTL § 1104 is limited to accidents caused by specific conduct listed under section 1104 (b).[28] Because the deputy sheriff's injury-causing conduct was not one of the activities specifically listed under this provision, the majority concluded that the applicable standard for determining liability was the standard of ordinary negligence. Simply, VTL § 1104 limits its emergency vehicle protection to circumstances where the driver is speeding, runs a red light or stop sign or is traveling the wrong direction on a one-way street.

The Court held that the legislative history supports the view that, pursuant to VTL § 1104 (c), the reckless disregard standard of care in VTL § 1104 (e) is limited to accidents or incidents caused by exercise of a privilege specifically identified in VTL § 1104 (b).[29] Subdivision (e) links the reckless disregard standard of care solely to the "foregoing provisions," which only privileges the conduct identified in subdivision (b), *not* any and all conduct of a driver.[30]

The relevant provisions are interrelated such that subdivision (e) does not create a reckless disregard standard of care independent of the privileges enumerated in subdivision (b).[31] The majority added that this is not entirely surprising because subdivision (b) exempts the conduct most likely to lead to a motor vehicle accident severe enough to prompt a lawsuit.[32]

Additionally, the Court noted that this was the first time it has been asked to decide the precise issue presented by this appeal.[33] Previous decisions in the *Saarinen*

and *Szczerbiak* cases did not address applicability of the limited circumstances under which VTL § 1104 actually applied.[34] The disputes in those two cases were limited to defining the relevant standard and whether the police officers' conduct rose to the level of reckless disregard.[35] The plaintiffs in *Szczerbiak* never challenged the application of the reckless disregard standard because the fatality did not result from conduct listed in the statute, so the Court of Appeals did not address the issue.[36] Vehicle and Traffic Law § 1104 *qualifiedly* exempts drivers of authorized emergency vehicles from certain traffic laws when they are involved in an emergency operation.[37]

The dissent in *Kabir* criticizes that the majority's limitation of section 1104 (e) protection is unworkable, incompatible with prior precedent and unwarranted.[38] The dissent claims that the majority's new rule is also inconsistent with the public policy underlying section 1104, because it creates an unjustifiable distinction that extends the protection of qualified immunity only to emergency personnel who actually violate select laws.[39] The dissent states that the majority holding has the perverse effect of encouraging conduct directly adverse to the public policy of requiring emergency responders to exercise the utmost care during emergency operations.[40]

The dissent urges that the relevant standard was *unconditional* and encompassed *every aspect* of a police officer's "conduct."[41] According to the dissent, in previous decisions, the Court did *not* suggest that an emergency responder's actions are to be assessed under the reckless disregard standard *only* if, at the time of the accident, he or she was engaged in the precise conduct privileged under section 1104 (b).[42]

According to the dissent, the previous public policy analysis is inconsistent with the majority's holding here, which apparently requires parsing the specific conduct that a police officer was engaged in during an emergency operation to distinguish privileged acts from nonprivileged acts for the purpose of altering the standard of liability, depending on which immediate conduct caused the accident.[43] This approach is incompatible with the concern that emergency responders be given appropriate latitude to make the quick decisions that are necessary when responding to police calls and other emergency situations.[44]

In a case similar to this case, the Court held, even assuming an officer was arguably negligent in briefly glancing down, conduct not enumerated in section VTL § 1104 (b), such a momentary lapse of judgment "does not alone" rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach.[45] The deputy sheriff's momentary glance down at his data terminal, at worst, would amount to nothing more than a lapse in judgment under previous decisions.[46]

The dissent argues that the evident intent in beginning section 1104 (e), with a reference to the "foregoing provisions," was to ensure that the creation of the privileges earlier in the statute would not be misinterpreted as precluding an emergency responder from being held accountable when he or she caused an accident while engaged in privileged conduct.[47] Arguably, none of the legislative history cited reflects an intent to restrict the applicability of VTL § 1104 (e) reckless disregard standard to the conduct specified in the section 1104 (b) privileges.[48] The dissent claims that the legislative history does not say that the reckless disregard standard was intended to be applicable *only* when an emergency responder is engaged in privileged conduct.[49]

In 1974, the Legislature concluded that the liability of highway workers, in hazard vehicles, should be assessed in the same manner as emergency responders and added "reckless disregard" language to section 1103 (b).[50] Ironically, the majority accepts a view of section 1104 (e) that grants highway workers protection in virtually all accidents when engaged in work on the highway, substantially broader protection from civil liability than is enjoyed by emergency responders.[51]

Under the majority's new rule, the liability standard would fluctuate within the course of an emergency route, depending on the particular moment.[52] The dissent criticizes that juries would have to parse through the different acts of a driver that might have contributed to the accident, applying the reckless disregard standard to the conduct privileged under section 1104 (b) and the ordinary negligence standard to the remainder, especially when the accident is attributed to multiple causes.[53]

The dissent fears that the majority's new rule will engender much confusion, resulting in the counterintuitive, unintended and unusual shifting of positions and strategies employed by the parties.[54] It has created a situation where traffic violators are potentially rewarded with greater protection than is available to those who conform to the rules of the road.

Conclusion

The reckless disregard standard balances the importance of enabling law enforcement to successfully perform their essential responsibilities, while still protecting against unnecessary risk of danger to the public. Even a police officer responding to a non-emergency call, without emergency lights and sirens, is to be evaluated by the reckless disregard standard contained in VTL § 1104. The protection of the reckless disregard standard, however, does not extend to benefit emergency operators when they become plaintiffs in personal injury lawsuits or attempt to use VTL § 1104 to ward off a comparative fault defense.

A closely divided Court of Appeals recently established that the protection afforded to emergency vehicles under VTL § 1104 is limited to a unique set of circumstances, specifically listed in the statute. The dissent argued that "reckless disregard" protection should remain unconditional for every aspect of emergency operation. Although the majority held that the narrow application is consistent with the legislative intent, the dissent maintained that the restricted interpretation is inconsistent and unworkable. Both the majority and dissent suggest that the current uncertainty may provide the Legislature an opportunity to assess whether revision is necessary to clarify the true intent of the statute.

Endnote

1. 95 N.Y.2d 455, 467, 719 N.Y.S.2d 623 (2000).
2. *Id* at 467-68.
3. 16 N.Y.3d 217 (2011).
4. *Kabir*, citing *Riley* at 462.
5. *See Kabir v. County of Monroe*, 16 N.Y.3d 217 (2011); *Criscione v. City of New York*, 97 N.Y.2d 152, 736 N.Y.S.2d 656 (2001) at 156, citing *Riley v. County of Broome*, 95 N.Y.2d 455, 462, 719 N.Y.S.2d 623 (2000); *Saarinen v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994); *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556-557, 664 N.Y.S.2d 252 (1997); *Campbell v. City of Elmira*, 84 N.Y.2d 505, 510-511, 620 N.Y.S.2d 302 (1994); *Woodward v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2nd Dept. 2010); *Hemingway v. City of New York*, 2011 WL 338126 (N.Y.A.D 2nd Dept. 2011), 2011 N.Y. Slip Op. 00646; *Perez v. City of New York*, 80 A.D.3d 453, 915 N.Y.S.2d 77 (1st Dept. 2011); *Meade v. City of Mount Vernon*, 53 A.D.3d 645, 863 N.Y.S.2d 446 (2d Dept. 2008); *Carallo v. Martino*, 58 A.D.3d 792, 873 N.Y.S.2d 102 (2nd Dept. 2009); *Lubecki v. City of New York*, 304 A.D.2d 224, 758 N.Y.S.2d 610 (1st Dept. 2003); *Johnson v. State of New York* (Ct. Cl., Claim No. 99250, 2006); *Lynch v. State of New York* (Ct. Cl., M-73831, 2007); *Fleisher v. State of New York* (Ct. Cl., Claim No. 109685, 2007); *Pacheco v. State of New York* (Ct. Cl., Claim No. 113861, 2008); *State Farm v. State of New York* (Ct. Cl., Claim No. 116513, 2010).
6. *Id*; *Ayers v. O'Brien*, 13 N.Y.3d 456, 196 N.Y.S.2d 295 (2009).
7. *Id*; *Greenawalt v. Village of Cambridge*, 888 N.Y.S.2d 295 (3d Dept. 2009).
8. *Id.*
9. *Id*; *Green v. State of New York*, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3d Dept. 2010).
10. 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994).
11. *Saarinen* at 502.
12. *See Green v. State of New York*, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3d Dept. 2010); *Tutrani v. County of Suffolk*, 64 A.D.3d 53, 878 N.Y.S.2d 412 (2d Dept. 2009); *Britt v. Bustamante*, 55 A.D.3d 858, 866 N.Y.S.2d 740 (2d Dept. 2008).
13. *Alvarado v. Dillon*, 888 N.Y.S.2d 673 (3rd Dept. 2009); *Greenawalt v. Village of Cambridge*, 888 N.Y.S.2d 295 (3rd Dept. 2009); *Demers v. State of New York*, 25 Misc.3d 1224(A), 906 N.Y.S.2d 779 (Ct. Cl., Claim No. 109168, 2009); *Simmons v. State of New York* (Ct. Cl., Claim No. 113125, 2009).
14. *Simmons*.
15. 97 N.Y.2d 152, 736 N.Y.S.2d 656 (2001).
16. *Criscione* at 154-55.
17. *Criscione* at 156-57.
18. *Id*.
19. *Id*.
20. *Criscione* at 157.
21. *Steinhilper v. State of New York* (Ct. Cl., Claim No. 108993, 2009); *Soto v. State of New York*, 21 Misc. 3d 1107A, 873 N.Y.S.2d 237 (Ct. Cl., Claim No. 111499, 2008).
22. 24 Misc.3d 752, 878 N.Y.S.2d 855 (Ct. Cl., Claim No. 109168, 2009).
23. *Soto.*
24. 13 N.Y.3d 456, 196 N.Y.S.2d 295 (2009).
25. *Ayers* at 458-59.
26. *Id.*
27. *Kabir v. County of Monroe*, 21 Misc.3d 1107(A), 873 N.Y.S.2d 234 (Sup. Ct. Monroe Cty 2008).
28. *Kabir v. County of Monroe*, 68 A.D.2d 1628, 89 N.Y.S.2d 714 (4th Dept. 2009).
29. *Kabir.*
30. *Id.*
31. *Id..*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Kabir*, citing *Saarinen* at 499-501 and *Szczerbiak*, at 554-555.
36. *Kabir*, citing *Szczerbiak*, at 554-555, 557.
37. *Kabir,* quoting *Saarinen* at 497.
38. *Kabir*.
39. *Id.*
40. *Id.*
41. *Kabir*, citing *Saarinen*.
42. *Id.*
43. *Kabir*, citing *Saarinen*.
44. *Id.*
45. *Kabir*, citing *Szczerbiak* at 557.
46. *Id.*
47. *Kabir.*
48. *Id.*
49. *Id.*
50. *Kabir*, citing *Riley.*
51. *Id.*
52. *Kabir.*
53. *Id.*
54. *Id.*

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What Practitioners Need to Know About Reinsurance

By James A. Johnson

To cede, or not to cede; that is the question;
Whether tis better in the end to suffer
The casualties and claims of hazard and catastrophe
Or take precaution gainst their sea of troubles
And by reinsuring ease them?

—Author Unknown

Introduction

Reinsurance is a contract of indemnity between insurance companies defined by a historical relationship. One company, the reinsurer, agrees with another, the cedent, to indemnify it against a loss, which the cedent has assumed under a separate and distinct contract of insurance. There are two basic types of reinsurance, facultative and treaty. Facultative involves ceding part or all of an individual policy to a reinsurer as distinguished from treaty, which covers all, or specified classes of a reinsured's policies, at a specified percentage. A facultative reinsurance policy offers individual risks to the reinsurer, who has the right (faculty) to accept or reject it. A treaty reinsurance policy is automatic and binds the reinsurer to accept all risks ceded to it of a certain type or category.

The purpose of this article is to provide guidance to general practitioners, corporate counsel, risk managers and insurance professionals on reinsurance. A fundamental purpose of reinsurance is to permit an insurer to reduce its reserve requirement. By utilizing reinsurance, an insurer can spread the risk it undertakes over a larger number of policies reducing the amount of reserves required to maintain its business and increase its profitability. The reinsurance relationship is characterized by the mutual duty of **"utmost good faith"** and **"follow the fortunes"** which obligate the reinsurer to indemnify the ceding insurer for all losses paid by the ceding insurer on the reinsured policy. Utmost good faith is the guiding principal of reinsurance. In short, it is a commercial transaction between sophisticated companies governed by equity and utmost good faith.

Follow the Fortunes

"Follow the fortunes" or "loss settlements" means that within the terms and conditions set forth in the reinsurance agreement, the reinsurer assumes the original risk in the same way as the cedent. Pursuant to the doctrine a reinsurer is obligated to accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured. The decisions may include coverage, compromise, tactics or capitulation. Thus, reinsurers are responsible for the payment of a loss insured under the original policy. A reinsurer cannot second guess the good faith reinsured's decision to waive defenses to which it may be entitled.[1] However, **"follow the fortunes"** or **"follow the settlements"** do not obligate the reinsurer to follow the settlements that are categorically outside the scope of the original policy between the cedent and its insured.[2] Reinsurance contracts are considered gentlemen's agreements or honorable engagements built on trust and confidence. Notwithstanding that the cases unequivocally hold that the doctrine extends to pre-settlement and post-settlement loss allocations, it applies only if the allocation meets the "follow the fortunes" requirements of good faith, reasonableness and within the applicable policies. A reinsurer is not bound by the "follow the fortunes" doctrine where the reinsured's pre-settlement and post-settlement allocations are materially inconsistent, manipulative and not in good faith.

A case demonstrating this principle is *Allstate Insurance Co. v. American Home Assurance Co.*[3] Honorable Joseph P. Sullivan authored the declaratory judgment opinion reversing the order of the Supreme Court of New York. This case reaffirms the fundamental tenet of reinsurance law that follow-the-fortunes doctrine requires the cedent to act in good faith. The Court held that Allstate, the reinsurer, is not liable for its cedent's settlement of pollution losses because the post-settlement allocation at various sites was neither reasonable nor reflective of good faith. The follow-the-fortunes doctrine was intended to foster consistency in the treatment of losses at both the pre-settlement and post-settlement allocation of the loss and not to allow an insurer to use a different set of rules at each level. Moreover, the follow-the-fortunes doctrine does not require the court to turn a blind eye to such manifest manipulation of the allocation process in total disregard of the insured's obligation to act in good faith.

Because of the unique relationship between the parties and the paucity of decisional law, traditional contract interpretation and analysis is not always followed to resolve disputes. Evidence of custom and practice in the reinsurance industry is used by the courts to determine rights and obligations of the parties and to impose follow the settlements, as a matter of law. *North River Ins. Co. v. CIGNA Re* involved a dispute for reimbursement of defense cost paid in excess of policy limits. The court held that it is an implicit agreement in every reinsurance contract, as a matter of law.[4] However, in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, the court held that the reinsurer's obligation to follow the fortunes of the cedent did not extend beyond the stated amount in the facultative certificates.[5] This decision was premised on the uncontroverted evidence of the parties past conduct and course of dealings. Indemnity, cost and expenses were subject to the express cap in each certificate.

Regardless of custom and practice, the Michigan Court of Appeals reversed the trial court and opined that follow-the-fortunes doctrine may not be read into a reinsurance contract. Absent an express provision to follow the fortunes, liability of the reinsurer can only be imposed by the terms of the reinsurance contract.[6] Relying on *Michigan Millers Mutual Ins. Co. v. North Am. Reinsurance Corp.*,[7] the court stated, liability for reimbursement or indemnity depends on the language in the reinsurance contract and not that the underlying insurer may have made payment to an insured. In Michigan, indemnity in a reinsurance contract, without a follow-the-fortunes clause, is not what the reinsured paid, but what he was legally bound under his policy to pay, by reason of the loss.

Moreover, U.S. District Judge Elizabeth Kovachevich of the Middle District of Florida, Tampa Division on June 25, 2007 ruled that a follow the fortunes provision should not be implied in an unambiguous reinsurance contract. She held that the court cannot go outside the laws of construction and outside the four corners of an unambiguous contract to add a clause that was not bargained for. Judge Kovachevich opined:

> While there are certainly benefits and numerous public policy considerations supporting enforcement of the follow the fortunes doctrine in the world of reinsurance, it is not even suggested that it has to be implied into all reinsurance contracts, even those that do not even appear to contemplate one. The parties negotiating reinsurance contracts are both sophisticated entities dealing at arm's length and familiar with drafting contracts. There is nothing to prevent Laurier, or any other potential reinsured, from including an express follow the fortunes clause at the time of the contract formation should that clause be particularly important or desirable to them.[8]

Declaratory Judgment Expenses

In a reinsurance contract, are declaratory judgment expenses recoverable by the cedent? The cedent will assert that the doctrine of "follow the fortunes" requires the reinsurer to indemnify for this expense. The reinsurer will maintain that liability for declaratory judgment expense is not part of the insurance liability ceded to the reinsurance contract. Also, it is not incurred as part of the claims handling process, but arises from an adversarial proceeding and it is extracontractual. In the context in which the question is raised, the answer is a resounding "No." Declaratory judgment expense is not a risk inherently or customarily the subject of reinsurance and is incurred by a cedent as part of the administration of its own business.

However, if an ambiguity exists in the express terms of a reinsurance contract, extrinsic evidence of the parties' intent, course of performance and custom and practice will be considered.[9] *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.* was remanded from the Massachusetts Supreme Judicial Court (No. 89-24111) to the trial court. A Superior Court jury sitting in Dedham found on special questions that Affiliated is entitled to recover declaratory judgment expenses. A facultative reinsurance certificate was issued by Constitution Re in 1976 in which the jury answered "yes" to a question if the parties had a common understanding that declaratory judgment expenses would be covered under the agreement.

Affiliated is not instructive outside of Massachusetts because of today's legal climate and significant changes in the reinsurance industry. Absent a specific grant of coverage for declaratory judgment expenses the concept of "follow the fortunes" cannot create coverage where none exist.[10] The traditional reinsurance relationship is changing and many disputes previously arbitrated are being litigated. The venerable concepts of "utmost good faith" and "follow the fortunes" between the parties have deteriorated. One big reason is the astronomical losses engendered by toxic tort, environmental, asbestos, breast implant and terrorism claims. Also escalating risks arising from climate change and weather-related disasters have significantly impacted underwriting decisions. These so-called gentlemen's agreements secured by a handshake are a thing of the past. For example, a dispute over whether a reinsurer is liable to a cedent for approximately $1 million in expenses over the $150,000 limits of the facultative certificate was the subject of forum shopping under the guise of a motion to transfer from U.S. District Court in New York to California. U.S. District Judge Jed Rakoff in New York denied the transfer motion based on judicial economy and on the fact the dispute will be resolved by interpretation of the underlying contract.[11]

Arbitration

Whether a reinsurer can compel a liquidator to arbitrate, rather than litigate, in the insolvent insurer context, *U.S. v. Fabe* provides some guidance.[12] The primary issue was whether a state law enacted for the purpose of regulating the business of insurance is preempted by federal law. The McCarran-Ferguson Act provides, in relevant part, "No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating, the business of insurance, unless such act specifically relates to the business of insurance."[13]

The answer under McCarran turns on whether the state statute was enacted for the purpose of regulating the business of insurance and would enforcing arbitration invalidate, impair or supersede a state insurance law? The Sixth Circuit in *Fabe* held that insolvency provisions of a state insurance code regulate the business of insurance and prevail over the inconsistent federal statute. The U.S. Supreme Court affirmed in part and reversed in part, opining that the McCarran-Ferguson Act partially precludes application of the federal priority statute, but only to the extent that the state priority statute affects the rights and interests of policyholders.

Finally, the question of the enforcement of an arbitration provision depends on the particular state statute at issue. Moreover, if there is no federal-state conflict McCarran issues do not arise and arbitration will generally be required under the Federal Arbitration Act.[14] Neither New York,[15] Michigan,[16] Massachusetts,[17] Texas[18] nor New Hampshire[19] preclude arbitration in their liquidation statutes. Moreover, in New Hampshire, Section 402-C:25 Powers of Liquidator Subsection XX11 states:

> The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.[20]

Although reinsurance practice may be unfamiliar to most lawyers, it is premised on insurance contract law and the historical relationship discussed above. Reinsurance policies are legal instruments, the result of an arm's length commercial transaction between negotiating equals. Contract wording is the key. Leave ambiguity in the conference room and draft your indemnity provisions with clarity. It is imperative that you set out attachment points, expenses, caps, "follow the fortunes," forum selection, arbitration and consolidation clauses[21] with specificity.

For example:

> **Arbitration Clause**
>
> As a condition precedent to any right of action in this Agreement, any dispute arising out of the interpretation, performance or breach of Contract, including the formation or validity thereof, shall be submitted for decision to a panel of three Arbitrators. Notice requesting arbitration……

However, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[22] that parties cannot expand by agreement the statutory grounds for expedited judicial review of arbitration awards that are in the Federal Arbitration Act. Section 10 sets forth the grounds for vacating an award and Section 11 sets forth the grounds for modifying and correcting an award. Thus, the parties' provision for judicial review based on legal error by the arbitrator was unenforceable. The decision acknowledged that FAA does not preclude the parties from tailoring many features of arbitration by contract but judicial review of an arbitration award under Sections 10 and 11 of the FAA are exclusive. *Hall Street* should now resolve the conflicting decisions on this issue among the U.S. Court of Appeals.

Congruent with *Hall Street*[23] is *Allstate Ins. Co. v Duffy*[24] in which the court noted,

> CPLR 7511 provides that an application to vacate an arbitration award by a party who has participated in the arbitration may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud, or misconduct in procuring the award, partiality of the arbitrator, the arbitrator exceeded his powers or failed to make a final and definite award, or procedural failure that was not waived.
>
> Consistent with public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating an arbitration award are few in number and narrowly applied, with the list of potential objections being exclusive.[25]

The Fifth Circuit in *Citigroup Global Markets Inc. v Bacon*[26] followed *Hall Street* and reversed a U.S. District Court in Houston that vacated an arbitration award in finding that the award was made in manifest disregard of the law. The Fifth Circuit held that the FAA statutory provisions are the exclusive ground for vacating or modifying an arbitration award and that parties cannot go beyond the act by contracting to expand the grounds for modification or vacatur. The Fifth Circuit went on to say that manifest disregard of the law as an independent, non-statutory ground for setting aside an award must be abandoned and rejected.

The First Circuit in *Ramos-Santiago v. United Parcel Service*[27] opined that "manifest disregard of the law" under Hall Street is precluded and not a viable ground for vacating or modifying an arbitration award independent of the statutory grounds set out above.

Notwithstanding the above *Hall Street* left open the possibility that state law, statutory or common law might provide a basis for expanded review. The Supreme Court

of California was listening. Six months after *Hall Street*, the Supreme Court of California rendered an opinion in *Connection, Inc. v. DIRECTTV, Inc.*,[28] affirming a party's contractual right to expand judicial review of arbitration awards under the California Arbitration Act.

Also, the Sixth and Ninth Circuits held that "manifest disregard" survives *Hall Street* as an independent ground for vacatur of an arbitration award in *Coffee Beanery Ltd. v. WW LLC* and *Comedy Club Inc. v. Improv West Assocs.*[29]

The U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*[30] held that an agreement to delegate to an arbitrator authority to decide the validity of an agreement requiring arbitration is valid. This ruling is subject to satisfying state law requirements governing contract formation with respect to the delegation provision.

The majority decision relied heavily on the Court's long-standing precedent in *Prima Paint Corp. v. Flood & Conklin Mfg.*[31] in which a party to a commercial contract had opposed arbitration claiming that it had been fraudulently induced into the underlying agreement. In *Prima Painting*, the Court ruled that a challenge to the validity of the contract did not automatically impair the separate agreement to arbitrate that was included in the contract as one of its provisions. Therefore, it held that when a contract contains an agreement to arbitrate, a party's challenge to the validity of the underlying contract does not affect the agreement to arbitrate. And it is the arbitrator, rather than a court, that must resolve the entire dispute, including both the claim that the contract was breached and the defense that the contract was unenforceable for having been fraudulently obtained.

Duty to Defend

In a case of first impression, the Wisconsin Supreme Court on June 24, 2010 held that an excess insurer has a duty to defend the insured where the excess policy's "follow form" provision creates a duty to defend.[32] London Market issued an umbrella excess commercial general liability (CGL) policy to Johnson Controls, which was identified as a potentially responsible party (PRP) under the Comprehensive Environmental Response Compensation & Liability Act (CERCLA).

Johnson Control's insurers, including London Market refused to defend or indemnify cost asserting that CGL policies do not extend to PRP's environmental remediation costs under CERCLA following *City of Edgerton v. General Casualty Co of Wisconsin*.[33] However, the Supreme Court in 2003 overturned *Edgerton*, holding that PRP remediation costs are considered damages covered under CGL policies, provided other policy exclusions do not apply.[34] Moreover, the Court also concluded that a PRP letter triggers an insurance company's duty to defend.

In answer to certified questions the Wisconsin Supreme Court held that the follow form provision in the London Market policy imposed a duty to defend because the policy did not expressly disclaim the duty to defend imposed by the underlying Travelers Insurance policy. In addition, the court held the London Market policy does not expressly require an underlying issurer to exhaust liability limits in order to trigger its duty to defend.

Dodd-Frank Act

On July 21, 2010 President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act,[35] creating a Federal Insurance Office. The key reinsurance provisions of the Act are set out in Title V and are summarized as follows:

1. The Act creates the Federal Insurance Office (FIO) within the Dept. of Treasury with authority to reach all lines of insurance except health insurance, most long-term care insurance and crop insurance. The FIO will collect, monitor the insurance industry and make recommendations on modernizing and improving insurance regulation in the United States. Also, the FIO is authorized to preempt state laws if such laws conflict with objectives of certain international insurance agreements.
2. The Act attempts to establish national uniformity in two areas of insurance regulation, the non-admitted (less regulated) insurance market and reinsurance.
3. The Act requires credit for reinsurance to be recognized for a ceding company if it is allowed by the ceding company's state of domicile, preempts the extraterritorial application of most laws regarding reinsurance from states that are not the ceding company's domicile, and places the power to regulate reinsurer financial solvency primarily with the reinsurer's state of domicile.
4. In addition, the Act requires the FIO to prepare a series of reports, as follows:
    a. Commencing on Sept. 30, 2011, an annual report to the Congress on the insurance industry.
    b. Commencing Sept 30, 2012, a report to Congress on the impact of the breadth and scope of the global reinsurance market and to update that report on January 1, 2013.
    c. On January 1, 2015, a report to Congress on the impact of the reinsurance provisions of the Non-Admitted Reinsurance and Reform Act of 2010 (NARRA) and on the ability of state regulators to assess reinsurance

information for regulated companies in their jurisdiction.

Title V—Part II—Reinsurance

The Act contains several provisions that preempt state law governing reinsurance arrangements. The Act provides that if the state of domicile of a ceding insurer is NAIC-accredited or has financial solvency standards substantially similar to those mandated by the NAIC and recognizes credit for reinsurance for the insurer's ceded risk, then no other state may deny such credit for reinsurance. In addition, all laws, regulations or actions on the part of a state that is not the domiciliary state of a ceding insurer, except those having to do with taxes, are preempted under Title V of the Dodd-Frank Act, if they:

- restrict or eliminate the rights of the ceding insurer or the assuming insurer to resolve disputes pursuant to contractual arbitration clauses to the extent such clauses are not inconsistent with the provisions of Title 9, United States Code;
- require that a certain state's law is to govern the reinsurance contract, disputes arising under the reinsurance contract, or requirements of the reinsurance contract;
- attempt to enforce a reinsurance contract on terms different than those set forth in the contract itself; or
- otherwise apply the laws of the state to reinsurance agreements of ceding insurers not domiciled in that state.

With respect to insolvency, the Act provides that states that are NAIC accredited or have financial solvency requirements substantially similar to those imposed by the NAIC are solely responsible for regulating the financial solvency of reinsurers domiciled in their state. In addition, no state may require a reinsurer to file financial information beyond that which the reinsurer is required to file with its domiciliary state. Non-domiciliary regulators are permitted to receive copies of information filed with domiciliary state regulators.

The Act general preserves the regulatory authority of the state insurance regulators over the insurance business. However, it authorizes the FIFO to preempt state measures that, in the FIO's judgment, are inconsistent with covered agreements or otherwise result in less favorable treatment of insurers domiciled in foreign jurisdictions that are subject to covered agreements than the treatment accorded to United States insurers that are admitted in the state. The FIO's preemptive authority does not extend to the preemption of any state insurance measure that governs an insurer's rates, premiums, underwriting or sales practices.

Conclusion

Keep in mind typical or common language in the underlying Commercial General Liability policy, provides, in pertinent part, "legally obligated to pay as damages because of bodily injury or property damage…" and "this insurance applies to bodily injury and property damage only if: the bodily injury and property damage is caused by an occurrence that takes place in the coverage territory." For those of you who are reasonably experienced trial lawyers together with good negotiation and mediation skills, open a new page in your trial notebook.

Because there is not much uniformity between jurisdictions or circuits on reinsurance coverage it is absolutely necessary for counsel to read and understand the case law of the jurisdiction that will be applied by the Court in deciding the reinsurance coverage dispute. With the information on these pages practitioners and insurance professionals who reread this article will have an advance starting point.

Endnotes

1. *Christiana Gen. Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992)**;** *International Surplus Lines Insurance v. Certain Underwriters at Lloyd's*, 868 F. Supp. 917, 920 (S.D. Ohio 1994); *British Intl. Ins. Co. v. Seguros La Republica*, 342 F. 3d 78,85 (2d Cir. 2003). *See also, Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F. 3d 33 (1st Cir. 2000)—follow the fortunes doctrine also applies to a cedent's good faith decision on how to allocate a settlement involving multiple policies.
2. *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 831 F. Supp. 1132, 1142 (D.N.J. 1993); *Michigan Millers Mutual Ins. Co. v. North American Reinsurance Corp.*, 182 Mich. App. 410, 452 N.W. 2d 841 (1990); *American Employers Insurance Co. v. Swiss Reinsurance American Corp.*, 275 F. Supp 2d 29 (D. Mass 2003); *Affiliated F.M. Ins. Co. v. Employers Rein. Group*, 369 F. Supp 2d 217, 227 (DRI 2005). *See also, Hartford Accident & Indemnity Co. v. Columbia Cas. Co.*, 98 F Supp 2d 251, 259 (D. Conn 2000).
3. 837 N.Y.S. 2d 138 (2007).
4. *North River Ins. Co. v. CIGNA Re.*, 52 F.3d 1194 (3d Cir. 1995).
5. 903 F.2d 910 (2d Cir. 1990*); Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 970 F. Supp. 265 (S.D.N.Y. 1997).
6. *Michigan Township Participating Plan v. Federal Insurance Co.*; 233 Mich. App. 422, 592 N.W. 2d 760 (1999); *Rory v. Continental Ins. Co.*, 473 Mich 457 (2005)—a fundamental tenent of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written; *Devillers v. Auto Club Ins. Ass'n*, 473 Mich 562 (2005)—contractual language must be enforced according to its plain meaning and cannot be judicially revised or amended to harmonize with the prevailing whims of the court; *Employer Rein. Corp. v. Laurier Indemnity Co.*, 2006WL 532113 (M.D. Fla. Tampa Div.)—follow-the-fortunes provision should not be implied in an unambiguous reinsurance contract. *See also, Travelers Casualty & Surety Co. v. Certain Underwriters at Lloyds of London*, 96 N.Y. 2d 583 (2001), 760 N.E. 2d 319 (N.Y. 2001)—New York's highest court rejected a reinsurance recovery theory of aggregating environmental contamination at 160 different sites. The N.Y. Ct. of Appeals held as a matter of law that a follow-the-fortunes clause cannot override the terms of the policy.
7. Supra, note 2.
8. Mealey's Litigation Reports: Reinsurance, Vol. 18, No. 6, July 20, 2007.

9. *Affiliated FM Ins. Co. v. Constitution Reinsurance Co.*, 416 Mass. 839, 626 N.E. 2d 878 (1994).
10. *See* John S. Butler & Robert M. Merkin, REINSURANCE LAW (rev. ed. 1993); Otmar Schmidlin, The Scope of Reinsurance Coverage: The Costs of Declaratory Judgments and the Problem of Punitive Damages in International Reinsurance: Asbestos Claims 90 (1988).
11. Mealey's Litigation Reports: Reinsurance, Vol. 8, No. 22, March 25, 1998.
12. 508 U.S. 491 (1993). *See, e.g., Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778 (E.D.KY. 1999) reh'q denied; *Suter v. Munich Reinsurance Co.*, 223 F. 3d 150 (3d Cir. 2000).
13. 15 U.S.C. §1012 (b).
14. 9 U.S.C. §2. *See, American National Insurance Co. v. Everest Reinsurance Co.*, 180 F. Supp. 2d 884 (S.D. Tex. 2002)—demonstrating substantial deference to panel decisions in confirming the arbitral award; *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F. 3d 476 (5th Cir. 2002)—reversing a district court order removing one of the arbitrators before the arbitration hearing on the merits.
15. NY CLS Ins §7405.
16. MCL §500.8101 et seq.
17. MGL Ch. 175 §180A et seq.
18. Tx. Ins. Code, Ch.442 §442.001 et seq.
19. New Hampshire Statutes—Title XXXV11: Insurance Ch. 400 et seq.
20. *Id*. Subsection XX11.
21. *Dorinco Rein. Co v. Ace Am. Ins. Co.*, No. 07-12622.2008 U.S. Dist. LEXIS 4593 (E.D. Mich. Jan. 23, 2008).
22. 128 S. Ct. 1396 (2008).
23. *Id*.
24. 15 Misc. 3d 1116 (A), 839 N.Y.S.2d 431 (Sup. Ct., Queens Co. 2007).
25. *Id.* at *3 (citations omitted).
26. 2009 WL 542780 (5th Cir. Mar. 5, 2009).
27. 524 F. 3d 120, 124 (1st Cir. 2008).
28. 44 Cal. 4th 1334, 190 P. 3d 586 (2008).
29. 300 F. Appx. 415, 2008 U.S. App. Lexis 23645 (6th Cir. Nov. 14, 2008) unpublished; 553 F. 3d 1277, 1290 (9th Cir. 2009).
30. 130 S. Ct. 2772 (2010).
31. 388 U.S. 395 (1967)
32. *Johnson Controls Inc. v. London Market*, 2010 WI 52 (June 24, 2010).
33. 184 Wis. 2d 750, 517 N.W. 2d 463 (1996).
34. *Johnson Controls v. Employers Ins. of Wausau (Johnson Controls III)*, 264 Wis. 2d 60; 665 N.W. 2d 257 (2003).
35. Pub. L. 111-203.

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Recent Developments in the Primary Assumption of Risk Defense

By Brian W. McElhenny

In *Trupia v. Lake George Central School District*,[1] the Appellate Division, Third Department rejected defendant's attempt to argue primary assumption of risk in a case where an 11-year-old boy fell while sliding down a banister at summer camp.

The trial court had granted the motion by defendant to assert assumption of risk as a complete defense. The Appellate Division, Third Department reversed because the activity leading to the injury was not part of a sporting or athletic program.

The Court of Appeals affirmed, holding that complete assumption of risk was not available in circumstances properly characterized as horseplay.[2] Plaintiff was not engaged in an athletic or recreational activity and plaintiff's claim was based on negligent supervision by the School District. In *Dictum*, the court limited primary assumption of risk to cases involving athletic or recreational activities sponsored or enabled by defendants.[3]

In *Cotty v. Town of Southampton*,[4] the Appellate Division, Second Department rejected assumption of risk as a defense in a case involving a bicyclist injured due to negligent maintenance of a roadway. Plaintiff was riding his bicycle as part of a bicycle club outing when a rider in front fell going over a defect in the road created by road maintenance. Plaintiff swerved to avoid the bicyclist and was struck by an oncoming car, sustaining injuries.

The municipal and contractor defendants sought summary judgment, arguing plaintiff was aware of the road condition and voluntarily assumed the risk of injury by participating in the bicycle club outing. The court held that the doctrine of primary assumption of risk is designed to encourage participation in athletic activities, not to relieve municipalities of their duty to maintain roadways in a safe condition.[5]

Merely because a person uses the road as a jogger or a bicycle rider engaged in leisure activities does not eliminate the duty to maintain the road. Riding a bicycle on a paved public roadway does not constitute a "sporting activity" for purposes of applying the primary assumption of risk doctrine. The defense, however, has been applied to bicycle riders injured due to a defect or a hole in unpaved areas while mountain biking on a dirt trail.[6]

In a case involving serious injuries sustained by a rider of an all terrain vehicle (ATV) the Second Department dismissed plaintiff's complaint in *Morales v. Coram Materials Corp*.[7] Plaintiff was an experienced ATV rider who was injured while riding the ATV up a 40 foot hill of sand and gravel. After he reached the top he observed that the center of the hill on the other side was missing and he fell 40 feet. The Court held that the assumption of risk defense is applicable to the recreational activity of ATV riding at a sand and gravel mine. Irregular terrain is inherent in the recreational activity of ATV riding. The Court rejected plaintiff's claim that the excavation of the side of the hill created a unique danger over and above the usual dangers in the sport of ATV riding.

In *Demelio v. Playmakers Inc.*[8] the Appellate Division Second Department affirmed denial of summary judgment in a case where plaintiff was injured at a batting cage when a ball ricocheted off a metal pole and struck plaintiff in the eye.

Defendant moved for summary judgment pursuant to the primary assumption of risk doctrine. The trial court denied the motion and the Second Department affirmed because defendant failed to show that the increased risk of ricocheting baseballs caused by an unpadded pole was an inherent risk of the sport. Although plaintiff was clearly engaged in a sporting activity, the Court held that the unpadded pole may have created an increased risk that was not assumed by plaintiff.

In *Anand v. Kapoor*,[9] the Appellate Division, Second Department affirmed dismissal of plaintiff's complaint against a fellow golfer based on primary assumption of risk. Plaintiff and defendant Kapoor were friends and were playing golf together on the first hole when the accident happened. Kapoor was in the rough preparing to hit his ball and plaintiff was closer to the hole, but at a significant angle from defendant's intended line of flight.

Plaintiff claimed that Kapoor failed to yell "fore," which defendant disputed. Plaintiff was struck in the eye and suffered a detached retina and permanent loss of vision. The majority opinion of the Second Department held that defendant was entitled to summary judgment because there was no duty to warn as plaintiff was not in a foreseeable area of danger and plaintiff assumed the risk of being struck by a poor shot.

The dissenting judge felt there was a question of fact as to whether defendant yelled "fore" and whether that failure unreasonably increased the inherent risk of being struck by a shot.[10]

The Court of Appeals affirmed dismissal of the case, holding that a voluntary participant in a sport consents to certain risks that arise out of the nature of the sport. A participant does not assume the risk of reckless or intentional conduct, or concealed risks.[11] Kapoor's failure to yell "fore" did not amount to reckless or intentional conduct, and did not unreasonably increase the inherent risks of playing golf. Being struck by a "shanked" golf shot is a commonly appreciated risk of golf.[12]

"The Court of Appeals has reaffirmed the validity of primary assumption of risk in cases involving sporting activity."

Conclusion

The Court of Appeals has reaffirmed the validity of primary assumption of risk in cases involving sporting activity. The court in *Trupia*, *supra*, has signaled its intent, however, not to allow broad application of the defense to activities other than sporting or recreational ones. Further cases defining what constitutes recreational as opposed to leisure activities within the scope of this defense should be expected.

Endnotes

1. *Trupia v. Lake George Central School District*, 62 AD3d 67, 875 NYS2d 298 (3d Dept. 2009).
2. *Trupia v. Lake George Central School District*, 14 NY3d 392, 901 NYS2d 127 (2010).
3. *Id.* at 396.
4. *Cotty v. Town of Southampton*, 64 AD3d 251, 880 NYS2d 656 (2d Dept. 2009).
5. *Id.* at 255.
6. *Calise v. City of New York*, 239 AD2d 378, 657 NYS2d 430 (2d Dept. 1997).
7. *Morales v. Coram Materials Corp.*, 64 AD3d 756, 883 NYS2d 311 (2d Dept. 2009), *lv. den.*, 14 NY3d 728, 900 NYS2d 730 (2010).
8. *Demelio v. Playmakers Inc.*, 63 AD3d 777, 880 NYS2d 710 (2d Dept. 2009).
9. *Anand v. Kapoor*, 61 AD3d 787, 877 NYS2d 425 (2d Dept. 2009).
10. *Id.* at 793
11. *Anand v. Kapoor*, __ NY3d __, 2010 NY Slip Op. 9380, 2010 NY Lexis 3730.
12. *Id.*

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Groninger v. Village of Mamaroneck: Prior Written Notice Laws Are Applicable to Municipal Parking Lots

By Kenneth E. Pitcoff and Anna J. Ervolina

In a significant win for every municipality in New York State, the Court of Appeals held that municipalities are entitled to prior written notice of defects located within municipally owned parking lots.

New York's Prior Written Notice Laws

Prior written notice laws have been enacted by virtually every municipality in the State of New York and provide that a municipality cannot be held liable for injuries caused by a hazard located on a "street, highway, bridge, culvert, sidewalk or crosswalk" unless the municipality has been notified in writing of the hazardous condition and has had a reasonable time to cure the condition.

The Court of Appeals has long recognized that prior written notice laws are "a valid exercise of legislative authority" and that such laws "[comport] with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet [impose] responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be."[1]

Only two exceptions to the prior written notification laws have been recognized by the Court of Appeals, namely, where the municipality created the defect through an affirmative act of negligence, and, where a "special use" confers a special benefit upon the municipality.[2]

Background of *Groninger v. Village of Mamaroneck*

In *Groninger v. Village of Mamaroneck*, the Court of Appeals had to decide whether prior written notice laws applied to parking lots owned by municipalities. Plaintiff, Margaret Groninger, sued the Village of Mamaroneck for personal injuries she allegedly sustained after slipping and falling on ice located in a parking lot owned by the Village.

The Village moved to dismiss Groninger's Complaint on the ground that it never received written notice of the ice condition prior to Groninger's accident as required by Village Law § 6-628.[3]

Groninger opposed the Village's motion arguing that prior written notice was not required when the defective condition exists in a parking lot because a parking lot is not one of the six locations enumerated in Village Law § 6-628, namely, a street, highway, bridge, culvert, sidewalk or crosswalk.

The Supreme Court, Westchester County, found that prior written notice was required and granted the Village's motion and dismissed the Complaint.[4]

Groninger appealed to the Appellate Division, Second Department which affirmed the dismissal of the Complaint but certified to the Court of Appeals the question of whether its decision and order was properly made.[5]

"In a significant win for every municipality in New York State, the Court of Appeals held that municipalities are entitled to prior written notice of defects located within municipally owned parking lots."

The Parties' Arguments Before the Court of Appeals

In support of her position that Village Law § 6-628 was not applicable to parking lots, Groninger relied on the Court of Appeals case *Walker v. Town of Hempstead*,[6] which involved a plaintiff who was injured on a defect at a paddleball court and held that the Town could not require prior written notice of a defect in a paddleball court because a paddleball court was not a location that was specifically enumerated in the prior written notice statute. Groninger argued that since the Court of Appeals struck down the municipal ordinance at issue in *Walker* which attempted to require prior written notice not only at paddleball courts but also at parking fields, that prior written notice cannot be required for municipal parking lots because there is no difference between a parking field and a parking lot.

Although Groninger acknowledged that every appellate department in New York had consistently concluded that prior written notice laws applied to parking lots, Groninger argued that the lower appellate court decisions were inconsistent with the Court of Appeals' decision in *Walker*.

The Village countered that Groninger's analysis was without merit because it ignored the Court of Appeals' decision in *Woodson v. City of New York*,[7] which was decided five years after *Walker* and rejected the very same arguments advanced by Groninger.

In *Woodson*, the plaintiff fell on a defective concrete stairway leading from a sidewalk up to a municipal park. Like Groninger, the plaintiff in *Woodson* argued that prior written notice was not required because the stairway was not specifically enumerated in the notice statute which was explicitly limited to "streets, highways, bridges, culverts, sidewalks and crosswalks" and that the stairway was categorically different from a sidewalk. The Court of Appeals, however, rejected Woodson's argument and held that prior written notice was required.

"[T]he Court of Appeals in Groninger *recognized that a 'municipality is not expected to be cognizant of every crack or defect within its borders' and reaffirmed its commitment to upholding the legislative purpose of prior written notice statutes…"*

In so ruling, the Court of Appeals explained that its decision was not inconsistent with its decision in *Walker* "because [the] paddleball court [in *Walker*] is functionally different from each of the six locations enumerated in General Municipal Law 50-e (4). The stairway in this case functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal." Thus, the Village argued that the Court of Appeals, post-*Walker*, intentionally expanded the scope of prior written notice laws to include the "functional equivalents" of the locations specifically enumerated in the statute.

The Village further argued that a "parking lot" is the functional equivalent of a "highway" because it falls within the definition of a "highway," which Vehicle and Traffic Law § 118 defines as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." Since a highway is specifically listed in the prior notice laws, such law extends to parking lots.

Court of Appeals' Decision

In a 4-3 decision,[8] the Court of Appeals expressly rejected Plaintiff's argument and affirmed the dismissal of Plaintiff's Complaint. As argued by the Village, the Court of Appeals held that Plaintiff could not ignore its *Woodson* decision which was decided after *Walker* and required prior written notice be given of a defect found at a location that functionally fulfilled the same purpose as a location named in the statute.

The Court of Appeals further adopted the Village's argument that a "parking lot serves the 'functional purpose' of a 'highway,' [and that] [a]s a result, the Village was entitled to notice and an opportunity to correct any defect before being required to respond to any claim of negligence with respect thereto."

Groninger's Considerable Significance

Virtually every municipality in the State of New York has enacted a prior written notice law. Likewise, virtually every municipality in the State of New York owns parking lots. Thus, being entitled to prior written notice of defects in parking lots before liability can be imposed for injuries resulting from said defects is a tremendous benefit for municipalities.

Municipally owned parking lots serve the public good in a variety of ways. For instance, by providing potential customers with parking spaces, publicly owned parking lots support local businesses and attractions which in turn provide localities with revenue and help promote local economies by attracting customers and tourists to their locales. Also, publicly owned parking lots are a source of revenue in the case of metered parking lots. Without prior notice, municipalities would be forced to bear a crushing economic and logistical burden of monitoring public parking lots and defending against resultant litigation which would negatively impact local economies and be ultimately borne by already overburdened taxpayers.

Groninger is also noteworthy in light of the Court of Appeals December 2010 decision *San Marco v. Village/Town of Mount Kisco*[9] which chipped away at the protections afforded municipalities under the prior written notice law. The Court of Appeals long recognized that prior written notice laws do not shield a municipality from liability if the municipality created the defect through an affirmative act of negligence. Prior *to San Marco*, however, the "affirmative act of negligence" exception only applied if the municipality's affirmative act immediately resulted in the existence of a dangerous condition.[10] *In San Marco*, the Court of Appeals limited the protection afforded to municipalities and held that the "immediacy test" did not extend to hazards which are alleged to have been created by a municipality's negligent snow removal activities.

In contrast to *San Marco*, the Court of Appeals in *Groninger* recognized that a "municipality is not expected to be cognizant of every crack or defect within its borders"[11] and reaffirmed its commitment to upholding the legislative purpose of prior written notice statutes which is to shield municipalities from liability unless they are given an opportunity to cure known defects.

Endnotes

1. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474-474, 693 N.Y.S.2d 77, 79 (1999).
2. *Id. See also Yarborough v. City of New York*, 10 N.Y.3d 726, 728, 853 N.Y.S.2d 261, 262 (2008) (once municipality establishes lack of prior written notice, plaintiff bears burden of demonstrating that either exception to prior written notice statutes applies).
3. Village Law § 6-628 and C.P.L.R. 9804 provide:

   > No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructive condition, or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

4. *Groninger v. Village of Mamaroneck*, 2008 WL 7907374 (Trial Order) (N.Y. Sup. Jul 22, 2008).
5. *Groninger v. Village of Mamaroneck*, 67 A.D.3d 733, 888 N.Y.S.2d 205 (2d Dept. 2009).
6. 84 N.Y.2d 360, 618 N.Y.S.2d 758 (1994).
7. 93 N.Y.2d 936, 693 N.Y.S.2d 69 (1999).
8. *Groninger v. Village of Mamaroneck*, __ N.Y.2d __, 2011 WL 2149504, 2011 N.Y. Slip Op. 04544 (June 2, 2011) (Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents in an opinion in which Judges Ciparick and Jones concur).
9. *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 919 N.Y.S.2d 459 (2010).
10. *See Yarborough v. City of New York*, 10 N.Y.3d 726, 853 N.Y.S.2d 261 (2008); *Oboler v. City of New York*, 8 N.Y.3d 888, 832 N.Y.S.2d 871 (2007).
11. *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 279, 879 N.Y.S.2d 379, 381 (2009).

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Life After Insurance—Giving Back and Getting Back: Have You Visited Your Legal Aid Society Lately?

By Cathy Syhre

After 38 years of managing claims as an adjuster, manager or consultant, I finally retired. Now what do I do to fill my time? Dr. Phil, Oprah and Ellen were telling me every day that I wasn't too old to be a productive member of society, but what skills could I bring to the table? I had been deposed, arbitrated, mediated, tried and won, tried and lost and shepherded my favorite case, *Hooker v. The State of California*, to a victory in the California Supreme Court.

Paging through volunteer opportunities, I found the Hiscock Legal Aid Society in Syracuse, N.Y. My son had spent time early in his legal career as a public defender, so I thought I knew what I would find. I had some legal knowledge, I knew some attorneys, and I had spent years reading contracts, writing looong letters on coverage, and arguing with mediators and judges. I felt I could help somehow. This is the story of my visit to the Hiscock Legal Aid Society (HLAS) and why I stayed.

After an interview with Assistant Director, Joanne Sawmiller, I was asked to report the next Tuesday. They hadn't decided how to utilize me so I came in blind.

My first experience was in the reception area. I could have been in any of the law firms across the United States that I had frequented during my career. Not because of the décor, but the attitude and professionalism of the receptionists, Joan Tauro and Nikia Trice. Joan has been here 27 years and Nikia, a former HLAS client, joined the staff permanently after working here temporarily through the Jobs Plus program. They both speak of what they do with such enthusiasm and passion that I got chills. Nikia told me that when people come in the door, oftentimes their self-worth is broken, but she can see the change in their stature from the moment she calls them "Sir" or "Ma'am."

Their goal is to let clients know from the very beginning that although they are not paying for counsel, they will not get second-rate representation and that they will be treated with concern and respect. Joan and Nikia stress that everyone at HLAS works as a team, and has a dedication to justice that is not constrained by a client's social station, mental health, ethnic background, or financial means.

Their pride in the HLAS team and the services provided is clearly evident from the success stories that they share. Joan and Nikia both wanted to make it clear that no one leaves without some type of assistance. If someone seeking help does not fit within the parameters of the services of HLAS, they are directed to some agency or organization that can assist them.

I urge you to stop in sometime and hear their stories.

"Dr. Phil, Oprah and Ellen were telling me every day that I wasn't too old to be a productive member of society, but what skills could I bring to the table?"

I started my volunteer work in the administrative offices assisting Director of Development, Helen Kelley. HLAS is a 501 (c) 3 and relies on support from government sources, corporations, foundation grants and individual donations. Too many people misunderstand the purpose and scope of a legal aid society just as I did. Helen's job is to raise the profile of HLAS and make sure people understand its value.

We all learn the Pledge of Allegiance as little children and repeat it throughout our lives. HLAS is about the phrase, "…and justice for all.…" Too often we forget that this is one of the basic promises of our democracy and that we, as a nation and individuals, are responsible to uphold that pledge.

As I reviewed the list of names of individual donors I was struck by the low percentage of local firms and lawyers who support HLAS. Who better to understand these advocates of "Justice for ALL"? The lawyers I had worked with in the past had been very charitable and I was sure there was no difference in Syracuse, so I made it one of my goals to work with Helen to increase the participation by local attorneys to help maintain the equilibrium of the scales of Lady Justice. First, though, I needed to learn more about the professionals who make up the legal team of HLAS and the work that they do.

The attorneys at Hiscock Legal Aid Society (HLAS) are known as strong advocates for clients dealing with issues involving domestic abuse and violence, foreclosure, and evictions, and as dedicated legal advocates for cancer patients, immigrants, and refugees.

Linda Gehron, a prominent local attorney, says, "As an assigned counsel attorney who has represented parties and children in the Onondaga County Family Court just short of thirty years, I would like to say that I have noticed

over the past few years the remarkable dedication and professionalism of the Legal Aid attorneys assigned to family court. When we are working together towards the outcome of a case, whether as opposing counsel, or not, I am very glad when they are "on my side," and know that I had better prepare my case well when their client's position opposes mine!"

They are the **VOICE** of the under-served who have nowhere else to turn for assistance in escaping abusive situations, finding financial support and resolving custodial issues. **This was not at all what I expected**. Their clients are mostly working poor who are trying to avoid becoming dependent on social services.

I first met with Philip Rothschild, a Senior Attorney in the Appeals Program. He handles criminal and family court appeals for clients who meet HLAS' financial guidelines. Phil has been with HLAS for 21 years. Talking to Phil is fascinating. Beyond all the "lawyer speak" is a man who believes, "If we are successful for our clients, we are successful for society."

I learned so much about criminal and family court appeals that my retired mind was spinning. Most importantly, Phil says that his job and that of the other appellate lawyers, Christine Cook, Kristen McDermott and Piotr Banasiak, is to insure that the system runs honestly, corners aren't cut, and a person's right to a fair trial is preserved. In other words, they strive to ensure that everyone along the path of the justice system does his or her job in order to feel as if they have successfully done theirs.

Appellate lawyers in private practice make a lot of money, so why is Phil here? He admits that as a private attorney, he didn't like the billing process. But more importantly, at HLAS he has an opportunity to work on very interesting cases with colleagues who believe in the mission of the organization and for clients who are, by and large, grateful. To read Fourth Department case summaries see Piotr's blog at: http://hiscockappeals.blogspot.com/.

Greg Dewan and Leah Witmer, two newer attorneys with the Civil Program, filled me in on the intricacies of evictions and foreclosures. These cases sometimes involve volatile situations when landlord and tenant face off in disputes. Clients faced with the prospect of losing their home are not really interested in the intricacies of the law. Greg and Leah and the other civil attorneys have to work within the legal system to search for the best resolution for their desperate clients, and this is often very challenging.

Despite holding open interviews for potential new clients three days a week, Greg and Leah and the other staff attorneys are often called upon at the last minute by those who seek help for the first time after receiving a 72-hour eviction notice.... Preparing all of the paperwork for an eviction hearing takes more than half a day. It is often frustrating for these dedicated lawyers who realize that if they turn their backs on these people, they have nowhere else to go.

Yet how can they service all of these people? The organization's staffing is largely dependent on grants and public funding. Some of their cases can last for years with continuous updated paperwork and appearances.

The Hiscock Legal Aid Society is also the only organization in Onondaga County that provides legal representation for victims of domestic violence. What some of these clients (mostly women) have experienced and endured is for many of us unimaginable. They often have children to support and protect yet face leaving perhaps the only financial security that they have known. The attorneys involved with HLAS' Domestic Violence Project are able to assist with a full range of legal matters such as divorces, orders of protection, and custody agreements.

It is perhaps best to let one of their clients describe her experiences with HLAS. Elaina Leonardo tells her story at this link http://www.everson.org/visit/tickets.php?id=45. Elaina says with the Society's assistance, she is finally able to enjoy a "safe, happy home filled with love and not fear."

Hiscock Legal Aid Society is staffed by 25 full-time attorneys who handle close to 5,000 cases a year. They are the primary provider of mandated representation of adults in Onondaga Family Court and handle more than 2,000 of these cases a year. In a private practice, an increase in clients is an increase in revenue. At the Legal Aid Society, an increase in clients means a scramble for funding.

So I visited Hiscock Legal Aid Society in June and I stayed. I suppose I will be here as long as they will have me. I would encourage you to visit your legal aid society and donate or help in any way.

The halls of justice have many pillars and each supports the other. This pillar needs your support. Please help.

Cathy Syhre can be contacted at CSyhre@aol.com, and Helen Kelley, Director of Development, Hiscock Legal Aid Society, can be contacted at Hkelley@wnylc.com, http://www.hiscocklegalaid.org.

Book Review

Commercial Litigation in New York State Courts, 3rd edition

Reviewed by Kenneth Manning

Ever since the Third Edition of *Commercial Litigation in New York State Courts* was published in 2010, it has received numerous favorable reviews from litigators throughout New York State. Nineteen new chapters were added to the 88 chapters in the Second Edition. They were written by 144 authors, who either are experienced commercial litigators or distinguished New York judges. For commercial litigators at all levels, whether experienced or a newly admitted attorney, this treatise will be a valuable resource.

The emphasis throughout the treatise is on user-friendliness; this edition includes a separate appendix containing a table of Laws, Rules and Cases, and the well-organized Topical Index (included in the Appendix) is a great starting point for legal research. All of the essential, basic elements of Civil Procedure, such as jurisdiction, venue, and pleadings, are covered. The details of effective discovery are thoroughly incorporated into the substantive law chapters.

Of particular benefit to a less experienced attorney is the use of "Practice Aids," which provide efficient check lists for both causes of action and defenses, and outline their essential elements. "Practice Aids" also provide sample pleadings, sample letters, and jury instructions.

Even though all of the chapters contained in the Third Edition deserve recognition, some of them merit a more in-depth review for those whose practices focus on tort, insurance, or compensation law. These include the chapters on insurance, construction litigation, and product liability.

Insurance

Kevin J. Walsh's chapter on insurance (No. 67) is a welcome resource for time-pressed attorneys seeking to understand primary issues in New York's commercial insurance law, without wading through more complex case law or insurance-only treatises. While the author acknowledges that a single chapter cannot provide a complete summary of substantive New York insurance law, his concise presentation in the chapter allows for a clear picture of key issues, such as proof of coverage, notice of claim, potential defenses, and key issues in mass tort claims, primarily from the point of view of the insured.

Rather than diving directly into a discussion of New York case law, the author begins with pre-litigation concerns that are particularly helpful to corporate counsel. For example, there is a detailed discussion of how to track down and organize various policies that might be triggered by a particular claim. There is also an excellent discussion of the differences between "claims made" and "occurrence" policies. Significant recent statutory changes are also highlighted. For example, he discusses recent amendments to the insurance law that sharply curtail the "no prejudice" rule (whereby insurers could deny coverage based upon late notice of a claim —even where the carrier had suffered no prejudice from that delay). Under these amendments (which apply to policies issued after January 16, 2009), an insurer must show it suffered actual prejudice if notice was given within two years of the claim or occurrence, while the insured must demonstrate the insurer suffered no prejudice if the notice is given later. Similarly, the author also analyzes carefully the situation where an insured fails to disclose prior claims when placing a subsequent policy, and the risk that the insured may not obtain coverage because of that material omission.

In addition, the author provides a useful overview of the key distinctions of coverage issues in mass torts. Specifically, the chapter provides an easy-to-read primer on the meaning of critical policy terms, such as "accident" or "occurrence" with respect to property damage arising from environmental contamination or hazardous waste. For example, the author notes that, while damage must be unintended by the insured for coverage, in the case of pollution damages, the insured additionally must show that initial polluting activity was sudden and unexpected. In addition to providing a summary of coverage tests specific to New York Courts, the discussion of mass torts is a helpful starting point for counsel looking for both an overview of the law and authorities that are both recent and relevant.

The chapter's best features are its clear and concise explanations of the relevant case law and statutory authorities, and the author's well-placed thoughts on how New York courts will approach key issues.

Construction Litigation

Gary L. Rubin and Sayward Mazur author the chapter (No. 104) on construction litigation. Rather than simply collecting information and citing cases, they write with an eye toward utility, strategy, and analysis, making their work a valuable companion throughout the litigation process.

The chapter's organization is superb, permitting the reader to promptly acquire desired information. Within each section, the authors first present generally settled law and legal principles, often discussing particularly important cases, before moving on to the practical aspects of the material presented. The Practice Aids move from claims and defenses to model pleadings, proof, and jury instructions. In this way, the treatise serves as a trusted advisor walking a practitioner through each step of construction litigation.

The authors comprehensively cover construction litigation. Extensive citations to case law focus research efforts, saving time and money. The chapter builds upon the substantive information by adding analysis and strategy. The authors' experience informs the novice and reminds the seasoned litigator of the potential pitfalls and opportunities that might be lost for lack of prompt attention. The discussions of, to name a few, investigation of the scene and equipment, essential notice requirements, shortened statutes of limitation, and inadvertent waivers, reveal traps for the unwary.

Particular attention is paid to subjects unique to construction litigation. The authors discuss public construction contracts—now almost a self-contained subcategory of construction contracts—with depth and care through multiple sections, pointing out the different features that separate public construction from its private counterpart. They also discuss nuances that separate design professionals and construction managers from general or subcontractors. Recognizing that construction litigation often involves multiple theories on the proper calculation of damages, the authors devote an entire sub-part to that subject.

Finally, the Practice Aids display the treatise's remarkable utility. Causes of action and defenses checklists alert the litigator to perhaps unconsidered options. Model pleadings and jury instructions are also of particular usefulness. With its organization, breadth of coverage, and depth of insight, even the most adroit commercial litigator will find this treatise worthy.

Product Liability

James Kearney authors the Product Liability chapter (No. 79), and he provides both breadth and depth to the subject. With decades of experience in high-profile product liability cases, the author provides a roadmap to attorneys, beginning with investigations, and concluding with jury instructions.

The chapter offers readers detailed instruction in an extensive array of topics that emerge in product liability actions. The author provides direction for plaintiff's attorneys making claims based on product defects, negligence, and breach of warranty. He offers defense counsel guidance on the more subtle issues of proximate cause and plaintiffs' culpable conduct, offering practical strategies for success.

This chapter gives practitioners a view of very specific issues arising in product liability cases, particularly those related to the plaintiffs' medical conditions, and expert testimony. Bridging the gap between medical practice and trial testimony is vital in prosecuting or defending product liability actions. This chapter is a helpful guide through the process. The author explains, in a useful manner, New York's standard for the admission of expert testimony—*Frye v. United States.*

Kenneth A. Manning is a partner in the Trial Practice Group at Phillips Lytle, LLP, a full service law firm with offices located throughout New York State.

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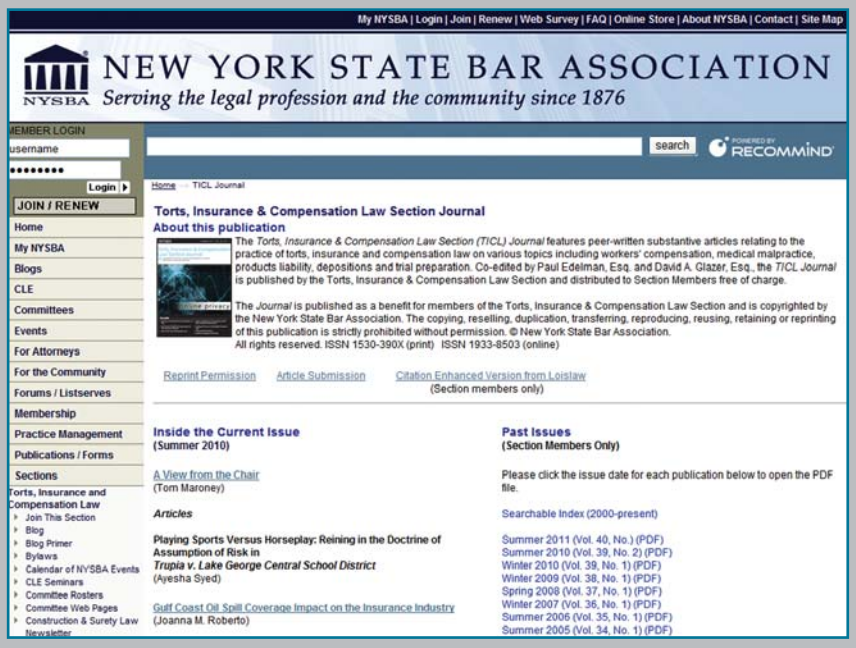

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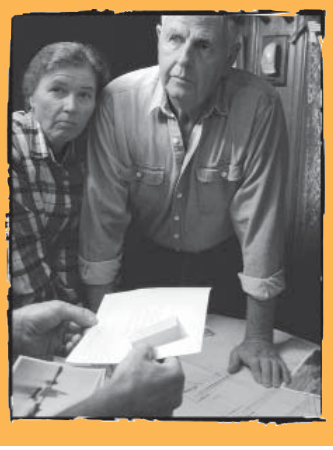

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