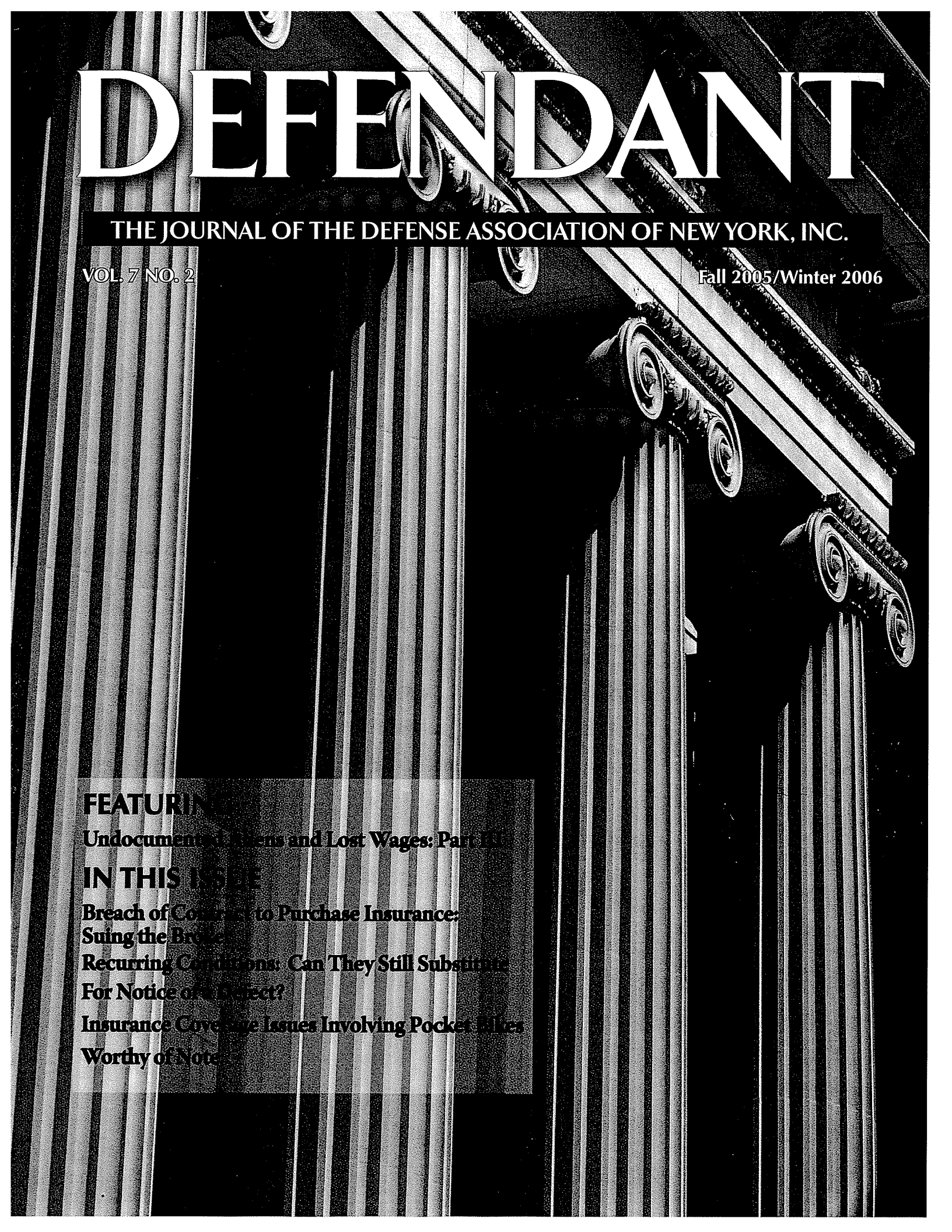


DEFENDANT

THE JOURNAL OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

VOL. 7 NO. 2 Fall 2005/Winter 2006

FEATURING

Undocumented Aliens and Lost Wages: Part II

IN THIS ISSUE

David J. Zaumeyer & Associates, Ltd.

An Economic and Financial Consulting Firm Committed to Helping Attorneys Resolve Damage Claims

ECONOMIC ANALYSIS

FORENSIC ACCOUNTING

LIABILITY ASSESSMENT

LITIGATION CONSULTING

EXPERT TESTIMONY

DJZ Provides Specialized Consulting Services to Attorneys who need:

- **INSURANCE CLAIM REVIEW**
- **PERSONAL INJURY/WRONGFUL DEATH DAMAGES ANALYSIS**
- **LIFE CARE PLAN REVIEW**
- **50-A OR 50-B REVIEW OR PREPARATION**
- **FRAUD OR THEFT AUDITS**
- **BUSINESS INTERRUPTION CLAIMS REVIEW**
- **COMMERCIAL DAMAGES ANALYSIS**

David J. Zaumeyer & Associates, Ltd.
1303 Clove Road
Staten Island, New York 10301
Tel 718-980-9639
Fax 718-980-9641
DZaumeyer@aol.com
1-877-FORENSIC

Other Office Locations: Houston, Newark, and Naples

President's Column

ANDREW ZAJAC*

In my first column as new president, I would like to thank you for the opportunity to serve the Defense Association of New York, Inc. I am proud of the many services our Association provides to its membership, as well as the defense community as a whole. We have a distinguished history of providing outstanding continuing legal education, long before mandatory CLE. Since 1997, our Committee on the Development of the Law, which was founded by John McDonough, has submitted 12 amicus curiae briefs to the New York Court of Appeals on cases involving issues of concern to the defense bar. By way of our annual Charles C. Pinckney Award, we recognize those who impact favorably on the defense community. I am also proud of the scholarships awarded by the Association.

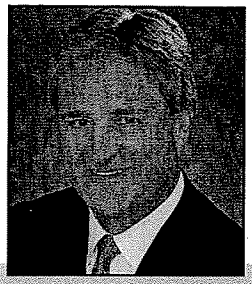
None of this could be accomplished without a strong, vibrant and dedicated leadership. Many thanks to our past presidents and veteran members of the board of directors for their tireless service to our Association. We are also fortunate to welcome the following new board members: Brian Rayhill, Lawton Squires, Thomas Moore, James Feretic and Kevin Faley. I am certain that they will all provide valuable contributions to our Association.

I would also like to congratulate Timothy Keane on his election as an officer. Tim's role in the Association will be an active one since he has been appointed as chair of our CLE Committee, as well as our liaison to DRI. Tim advises that several excellent CLE programs are in their planning stages. I would strongly urge both members and non-members alike to take advantage of all of our CLE programs.

I look forward to working with everyone associated with DANY. I am sure that it will be a productive year.

* *Andrew Zajac is the head of the appeals unit at Fiedelman & McGaw, Jericho, New York*

Undocumented Aliens and Lost Wages: Part III*



JOHN J. MCDONOUGH, ESQ.*

Prior articles in this column analyzed the status of New York decisional law as regards the ability of undocumented aliens to assert lost wage claims.

State courts have been forced to grapple with that issue in the wake of the United States Supreme Court's decision in Hoffman Plastic Compounds v. National Labor Relations Board, 535 U.S. 137, (2002). In Hoffman, the Supreme Court reviewed a National Labor Relations Board award on back pay to an undocumented worker who was terminated by his employer, in violation of §8(a)(3) of the National Labor Relations Act, when the employer suspected the worker of engaging in union organization activities. The NLRB had ordered the employer to pay back wages for a period of time the undocumented alien had not worked following his termination. *Id.*

In determining the NLRB did not have the authority to grant past lost wages to an undocumented alien for work he never performed the Court cited to the congressional interest behind federal immigration policy, as expressed in the Immigration Reform and Central Act of 1986 (*Id.*). In interpreting that intent the Court stated:

> In 1986, Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States. §101(a)(1), 100 Stat. 3360, 8 U.S.C. §1324a. As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." *Ins v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 and n.8 (1991). It did so by establishing an extensive "employment verification system, "§1324(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully, authorized to work in the United States, §1324a(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates the employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. §1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. §1324a(a)(1).

* *Mr. McDonough is a shareholder and partner of Cozen O'Connor and chairs the firm's Complex Tort Practice Group.*

Undocumented Aliens and Lost Wages: Part III*

Continued from page 1

> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. §1324a(a)(2). Employers who violate IRCA are punished by civil fines, §1324a(e)(4)(A), and may be subject to criminal prosecution, §1324A(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. §1324(c)(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution 18 U.S. C. §1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions.
>
> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The Board asks that we overlook this fact and allow it to award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.

535 U.S. 137 2002 at 147-149, footnotes omitted. The IRCA requires that every employer, before hiring any person, verify that the person is not an unauthorized alien by examining documents that establish the person's identity and eligibility for employment in the United States. The IRCA also makes it unlawful to submit false or fraudulent documents to a prospective employer in order to satisfy the verification requirements and an individual who does so is subject to criminal prosecution. An undocumented alien's submission of a false document to satisfy the IRCA's verification requirements is punishable by a fine and imprisonment for up to five years. (See 18 U.S.C. §1546(6).

The First Department in late 2004 addressed this issue in Sanango v. 200 East 16th Street Hous. Corp., 788 N.Y.S.2d 314 (1st Dep't 2004) and Balbuena v. 1 DR Realty, 787 N.Y.S 2d 35 (1st Dep't 2004). Judge Friedman, writing for the majority in Sanango stated "we are not aware of any other context in which a person who has derived income from an illegal activity is permitted, after a personal injury forces him to abandon that activity, to recover damages based on the last stream of illegal income through judicial proceedings in a court of law." (Sanango, 788 N.Y.S.2d at 320). Judge Friedman further stated that "an award of damages herein based on the United States wages plaintiff might have earned unlawfully, but for his injury, would 'unduly trench upon' IRCA's federal immigration policy in substantially the same manner as did the NLRB back pay award in Hoffman". (*Id.* at 319). To further the goals of IRCA the First Department held in Balbuena and Sanango that the lost wage claims of undocumented aliens should not be dismissed outright but plaintiff's recovery should be limited to those wages the plaintiff would have been able to earn in his/her home country. Leave to appeal to the Court of Appeals has been granted in these matters. Judge Mega of the Supreme Court of Richmond County addressed the Hoffman decision in 2003 in Majlinger v. Cassino Contracting Corp., 766 N.Y.S.2d 332 (Sup. Ct. Richmond County 2003). In granting partial summary judgment for the defendants on the issue of the plaintiff's lost wage claim Judge Mega noted, "The Supreme Court observed that the IRCA was conceived as a 'comprehensive scheme' to combat the employment of illegal aliens in the United States which 'forcefully' elevated the prohibition of such employment to a 'central' position in the implementation of federal immigration policy by attempting to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States." *Id.* at 334.

The Appellate Division, Second Department, has now addressed the validity of lost wage claims of undocumented aliens in Majlinger v. Cassino Contracting Corp., 2005 N.Y. Slip Op. 6785 2005 N.Y. App. Div. LEXIS 4235.

Presiding Judge Gail Prudenti authored the unanimous opinion of the Court. (Gubernatorial candidate Eliot Spitzer submitted an amicus brief supporting the injured plaintiff's right to assert and collect full lost wages in dollars).

Mr. Majlinger admitted during discovery that he was not in possession of any documents enumerated in the federal immigration statutes or regulations (see 8 U.S.C. §1324 a [b][1][B][C] [D]; 8 C.F.R. 274a 2[b][v] that would qualify him for employment in the United States. While working as an employee for J & C Home Improvement, the plaintiff fell from a scaffold and was injured.

Judge Prudenti posed the issue confronting the court

Continued on page 18

FOR INVESTIGATIVE RESULTS YOU CAN COUNT ON.

TOTAL PROTECTIVE SECURITY, INC.

Providing All Forms
Of Investigative Services
Since 1990

Trial Preparations
Surveillance
Interviews
Subpoena Preparation & Service
Background Checks
Data Base
Plus Much More

Employing experienced investigators
who are former New York City
Police Detectives.
Total Protective Security is owned
and operated by two highly respected,
former New York City Detectives
with combined experience
of over 60 Years

Member:
The National Association of Legal Investigators
The National Association of Professional Servers
The World Association of Detectives

Licensed:
NY, NJ, FL, PA, MD

Bonded / Insured

Phone: 516-882-0236
Fax: 516-882-0238
4219 Merrick Road, Massapequa, NY 11758

Breach of Contract to Purchase Insurance: Suing the Broker

JULIAN D. EHRLICH*

When a contract provision to procure insurance is breached, suing the negligent broker may prove challenging.

Parties entering into commercial leases, construction contracts and other agreements[2] will commonly allocate the risk of future tort liability by agreeing to an insurance procurement provision.[3] The Court of Appeals has described this practice as "a perfectly common and acceptable business practice."[4]

Specific language can vary but typically the terms of such of a provision will require a tenant or subcontractor to name the owner or general contractor respectively as an additional insured on a comprehensive general liability (CGL) insurance policy with prescribed minimum limits.[5]

Often the owner or general contractor is provided with, and relies upon, an insurance certificate issued by a broker indicating that the owner is named on the subcontractor or tenants' CGL policy. However, when the certificate is inaccurate, the owner may not know of the breach until it is sued and its' tender to the CGL carrier named in the certificate is denied.

The measure of damages for breach of this type of provision has frustrated non-breaching parties especially those facing vicarious liability claims.

In the 1990 case of *Kinney v. G.W. Lisk Co. Inc.*, the Court of Appeals held that a party breaching an agreement to procure insurance was liable for all resulting damages to the non-breaching party including liability to an injured plaintiff.[6] Claims for breach of contract to purchase insurance continue to be referred to as *Kinney* claims.

However, in the 2001 case of *Inchaustegui v. 666 5th Avenue Limited Partnership*, the Court of Appeals clarified that unless an owner is otherwise uninsured, the owner's remedy for damages against the breaching subcontractor is limited "to it's out of pocket expenses (notably, the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums)."[7]

The holding in *Inchaustegui* has been applied to construction contracts as well as commercial leases.[8]

The measure of damages set forth in *Inchaustegui* may be difficult to ascertain[9] and may amount to a fraction of the value of the underlying tort claim.[10] Moreover, claims for breach of contract to purchase insurance are typically not covered by subcontractors and tenants' general liability policies. Thus, owners and general contractors are left with practical difficulties collecting and enforcing judgments.

In addition, further inquiry often reveals that the real fault for the failure to comply with the insurance requirement lies with the breaching party's insurance broker. For example, the broker may have never requested that the carrier listed on the certificate add the owner or general contractor to the CGL policy. In such an instance, the CGL carrier does not owe coverage to any entity that is not named on the face of the policy.[11]

Thus, aggrieved owners and general contractors will eventually consider suing the broker.

Broker or Agent?

Parties seeking to recover against brokers in such cases should be mindful of the nature of the firm issuing the certificate.

The terms "broker" and "agent" are sometimes loosely and interchangeably used. However, the Court of Appeals stated in *Guardian Life Insurance Company of America v. Chemical Bank* that whether an insurance broker acts as an agent is not determined by what he or she is called but "is to be determined from what he or she does."[12] Such actions are "controlling even where formal documents may specify whether a person is an agent."[13]

To further confuse matters, "an insurance broker can act as agent for both the policyholder and the insurer if doing so creates no conflict."[14]

Nonetheless, courts do consider the relationship between the entity issuing the certificate and the carrier important.

For example, in *Lenox Realty v. Excelsior Insurance Company*, the Third Department found that a certificate issued by an insurance agent bound the carrier where 1) the two had an agency agreement authorizing the agent to bind the carrier 2) the agent had apparent authority and 3) the named parties' relied on the certificate.[15] The carriers' arguments that the agent exceeded its authority and failed to follow proper procedure were referred to arbitration as per the agency agreement.[16]

The Fourth Department reached a similar result in *Niagara Mohawk Power Corp. v. Skibeck Pipeline, Co., Inc.*.[17] However, the First and Second Departments have repeatedly rejected arguments that certificates issued by brokers or agents bind the named carriers.[18]

Continued on page 14

* *Julian D. Ehrlich is a member of the Law Offices of Alan I. Lamer in Elmsford, NY.*[1]

Court Reporting Services

Legal Video Services

Litigation Support Services

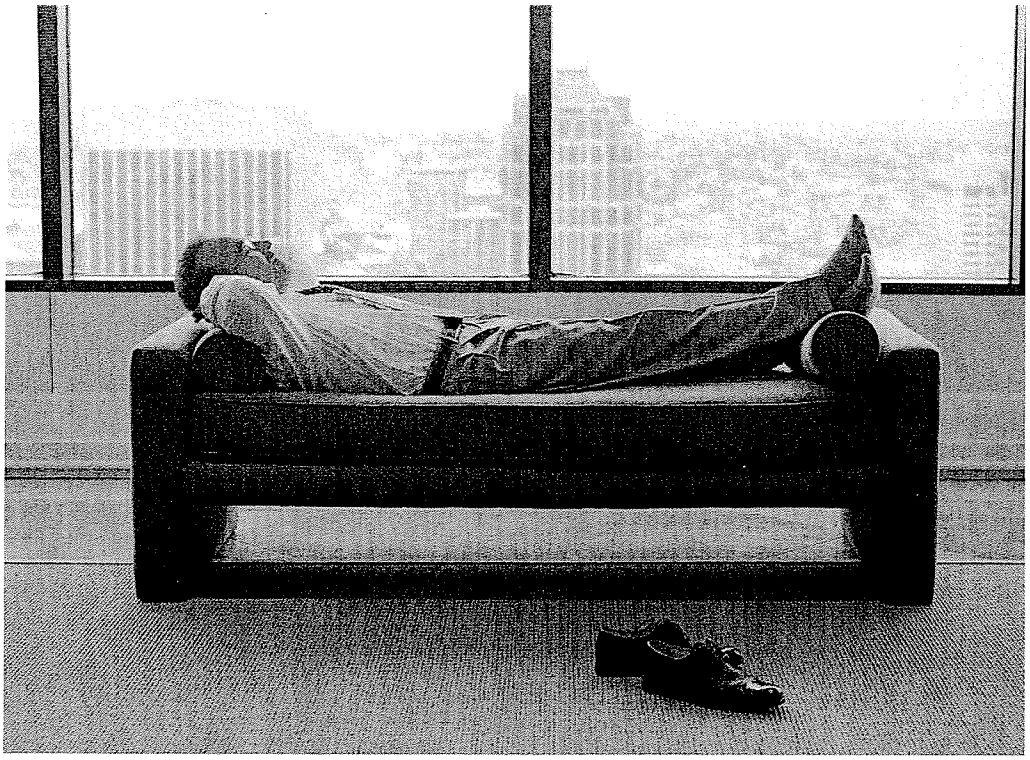
On-line Document Repositories

Videoconferencing

Document Retrieval

Process Service

Interpretation/Translation



REST EASY

There's a Local Pro You Can Rely On

When you need comprehensive legal support services, rely on the proven local professionals: Esquire Deposition Services. Our tradition of excellence in court reporting extends to the industry's broadest range of legal support services. We are there when you need us, where you need us, from coast-to-coast.

Local or national, for your next legal support services need, look no further than Esquire.

ESQUIRE
DEPOSITION SERVICES®
A HOBART WEST COMPANY

LINKING TESTIMONY, TRADITION AND TECHNOLOGY

www.esquiredeposition.com

216 East 45th St. • 8th Floor • New York, NY 10017
Telephone: 212.687.8010

1880 John F. Kennedy Blvd. • 15th Floor • Philadelphia, PA 19103
Telephone: 215.988.9191

Recurring Conditions: Can They Still Substitute For Notice of a Defect?

DAWN C. DESIMONE AND JAMES K. O'SULLIVAN*

With little fanfare, the Court of Appeals recently struck down a line of cases from the Appellate Divisions that hold a certain type of "recurrent condition" can provide a substitute for constructive notice in personal injury actions on a defendant's property.

The first thing every attorney entering the personal injury field learns is that to hold the owner or operator of property liable for a defective condition that the defendant did not create, actual or constructive notice on the part of the defendant must be demonstrated. "Actual notice," means, as the name implies, that the defendant or its agents knew the existence of the defect prior to the occurrence of the accident. "Constructive notice," on the other hand, is a principle of law which holds that the defendant will be liable for the condition as if actual notice existed, if it was visible, apparent, and existed for a sufficient length of time before the accident that the defendant may be charged with notice of it.[1]

That one of these two types of notice is required was reaffirmed by the Court of Appeals in 1986. In *Gordon v. American Museum of Natural History*[2] the Court rejected the claim by the plaintiff who was injured when he slipped on a piece of wax paper on the steps of the defendant's building. The paper seemed to have come from the food concession stand operated near the step. Not only did the defendant permit the public to eat in the area, the defendant sent its cleaning personnel to lunch at the very time that the most people congregated. Nevertheless, the high court ruled that the defendant could not be held liable for the condition. "Contrary to plaintiff's contentions, neither a general awareness that litter or a dangerous condition may be present . . . nor the fact that plaintiff observed other papers on another portion of the steps approximately 10 minutes before his fall is legally sufficient to charge defendants with the constructive notice of the paper he fell on."[3]

The Court of Appeals reiterated that rule in *Piacquadio v. Recine Realty Corp.*,[4] where, reversing the First Department, the Court rejected the contention that a defendant could be held liable for liquid on a stairway without proof of actual or constructive notice, based on a theory that it failed to regularly maintain and clean the stairs.

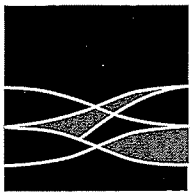
Since Gordon, however, the four branches of the Appellate Division have perceived an exception to what appeared to have been a clearly-stated rule. In a number of cases, the Appellate Divisions have held that plaintiffs may satisfy their burden of demonstrating notice by showing that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the defendant.

For example, in *Lopez v. New York City Housing Auth,*[5] the plaintiff, a tenant in defendant's building, slipped and fell on debris on the stairs of the building. He claimed that garbage frequently accumulated in the stairwells, the result of others "hanging out" on the stairs, combined with a gap in the maintenance crew's cleaning schedule. The First Department rejected the defendant's argument that it had only a general awareness of the debris, seemingly substituting notice of the use of the stairwell for notice of the condition. Similarly, in *O'Connor-Miele v. Barhite & Holyinger,*[6] the First Department held that the plaintiff satisfied her burden on the notice issue since she established that an ongoing and recurring dangerous condition existed which was routinely left unaddressed, i.e. soap powder on the stairs due to spillage by tenants moving from floor to floor to find an available washing machine. The First Department is not alone. In *Camizzi v. Tops, Inc.,*[7] the plaintiff tripped and fell on a mat while entering the defendant's supermarket. Evidence existed that the mat buckled on several occasions each day as customers entered the store and employees pushed shopping carts. This evidence, the Fourth Department held, was sufficient to establish the existence of a recurrent dangerous condition and that the defendant had constructive notice of it.

The Third Department signed on to the recurring condition theory in *Lowe v. Spada.*[8] That was a legal malpractice case where the defendant claimed that the plaintiff could not have won her underlying slip–and-fall action against a maintenance company because of the lack of notice of the condition. The plaintiff's proof that paper towel dispensers located in the bathroom were several feet away from a bank of sinks, requiring users to walk that distance to dry their hands, was sufficient evidence of a chronic and recurring condition to make her underlying case viable. The Second Department has also embraced the theory, most recently in *Roussos v. Ciccowoto,*[9] where the plaintiff tripped over newspapers enclosed

Continued on page 17

* *James K. O'Sullivan and Dawn C. DeSimone are members of the appeals unit at Fiedelman & McGaw, Jericho, New York. Ms. DeSimone, who successfully handled Rivera in the Court of Appeals, is also a member of DANY's Committee on the Development of the Law.*



WACHOVIA

The Defense Association of New York
And
Wachovia Insurance Services Agency, Inc.

Wachovia Insurance Services is very proud to have been chosen by the Defense Association of New York to offer a wide variety of commercial insurance protection to its Members.

We are grateful for the opportunity to let you know about this specifically designed program available exclusively to DANY members.

COVERAGE AVAILABLE

➢ *Lawyers Professional* ➢
(Including Employment Practices Liability)
➢ *Package (Property, General Liability, Auto & Crime)* ➢
➢ *Umbrella* ➢
➢ *NY Workers Compensation* ➢
➢ *NY Statutory Disability* ➢
➢ *Group Health Benefits* ➢

To take advantage of this new benefit call us and watch for future mailings which will give you additional information.

CONTACT

Michael Chrystal, Sr.
732.632.6162
Wachovia Insurance Services
499 Thornall Street
Edison, NJ 08818

Michael Chrystal, Jr.
973.837.2583
Wachovia Insurance Services
65 Willowbrook Blvd.
Wayne, NJ 07470

Insurance Coverage Issues Involving Pocket Bikes

KEVIN G. FALEY* AND PAULINE E. GLASER**

New Yorkers cannot help but notice the recent intrusion of the ubiquitous and noisy "pocket bikes" also known as "rice bikes" or "ninja bikes" and "pocket rockets". These unique bikes are attractive, chrome covered, mini replicas of racing bicycles. The insurance coverage for these vehicles is complex and at times unsettled.

The New York State Vehicle and Traffic Law ("VTL") has been amended to respond to the ever-expanding types of vehicles available. The statute addresses these pocket bikes in VTL Section 121-b, which defines "Limited Use Motorcycles" as Limited Use Vehicles which have two or three wheels, a seat or saddle for the operator and a certain maximum performance speed.

The Limited Use Motorcycles are classified into three categories by their maximum speeds as follows: Class A limited use motorcycles have a maximum speed of 30 to 40 MPH; Class B limited use motorcycles have a maximum performance speed of 20 to 30 MPH; and Class C motorcycles have a top speed of not greater than 20 MPH[1].

Examples of Class A limited use motorcycles are the Jet HK-50 Pocket Bike or Ninja Pocket Bike V2. The Ninja Pocket Bike is equipped with a 4.2 HP engine, two wheels, a seat, weighs 36 pounds, can carry 250 pounds and has a maximum speed range of 40 to 45 MPH. The Jet HK-50 Pocket Bike is equipped with a power motor, two wheels, a seat and has a speed range of 30 to 35 MPH. Mopeds, which have two wheels and are larger, weighing in the range of 185 to 198 pounds, and generally have a maximum speed of 40 MPH, fall into the Class A limited use motorcycles. Reilley v. Department of Motor Vehicles of the State of New York, 240 AD2d 296 (1st Dept. 1997).

Title XI, Article 48-A of the VTL, and Title 15 of the New York Administrative Code, Part 102, address the applicable registration, insurance, equipment and other requirements of the limited use vehicles. Article 48-A of the VTL is entitled, "Registration of Limited Use Vehicles", which is comprised of Sections 2260 through 2270 of the VTL.

Equipment

Pursuant to VTL Section 2265, and 15 NYCRR Section 102.4 (a)(2) and (a)(3), Class A Limited Use Motorcycles are required to be equipped in the same manner as motorcycles, so that VTL Sections 381 (6) and 381 (7) are applicable. Section 381 obligates an operator to wear a "protective helmet" (Subsection 6), as well as "goggles or a face shield" (subsection 7).

Class B and Class C Limited Use Motorcycles are subject to the goggle and helmet requirements as well, but are not required to comply with the motorcycle lighting equipment requirement.

Registration, Inspection and Liability Insurance

According to VTL Section 2261(1), and 15 NYCRR Section 102.2(b)(2), Class A Limited Use Motorcycles, which includes pocket bikes, may be operated upon public highways and streets, so long as the vehicles are properly registered in accordance with the provisions of VTL Section 410.

Class B and Class C Limited Use Motorcycles must be properly registered and may only be operated in the right hand lane or usable right hand shoulder of public highways (VTL Section 2262). There is no such restriction for Class A Limited Use Motorcycles, which may be used in any traffic lane. (See, 15 NYCRR Section 102.2(b)(3) and 102.2(b)(4)).

Only Class A Limited Use Motorcycles are subject to the periodic inspection requirements contained in VTL Section 301, pursuant to 15 NYCRR Section 102.3(a).

Further, Class A and Class B Limited Use Motorcycle must maintain an owner's policy of liability insurance having limits of $25,000/50,000. There is no obligation that Class C Limited Use Motorcycles be covered under such a liability policy (See, VTL Section 2265(3), which discusses the applicability of VTL Section 345, and 15 NYCRR Section 102.3(b)(1)).

Moreover, the provisions of VTL Article 6 (Motor Vehicle Financial Security Act), Article 7 (Motor Vehicle Safety Responsibility Act) and Article 8 (insurance policies on vehicles transporting passengers for hire) are applicable to Classes A, B and C Limited Use Motorcycles, except that Article 6 is not applicable to Class C. *Id.*, and In re Vincent H., 3 Misc.3d 900 (NY Fam. Ct. 2004).

Additionally, the liability policies for Classes A and B must contain a no-fault endorsement, pursuant to Insurance Law Section 5103 (f).

Also, the Website of the Department of Motor

Continued on page 10

* *Kevin G. Faley is a partner in the law firm of Morris Duffy Alonso & Faley located in Manhattan*

** *Pauline E. Glaser is an associate of Morris Duffy Alonso & Faley located in Manhattan*

Reliable IMEs That Meet Your Needs

For the most efficient, reliable Independent Medical Evaluations possible, look to U.S. Medical Consultants.

At U.S. Medical Consultants you enjoy a proven combination of IME advantages:

- **Customized Service**
  Tailored to meet your needs
- **One Call Scheduling**
  Most appointments made and confirmed in just minutes
- **Extensive Physician Network**
  Covering New York, New Jersey, Connecticut, Pennsylvania, Illinois, and South Florida.
- **Timely Reports**
  We consistently beat industry standards
- **Total Commitment**
  Physicians who are available for legal services
- **Dedicated Staff**
  Committed to Exceeding Expectations

U.S. Medical Consultants, LLC

"Medical Evaluation Professionals"

No IME provider works harder than U.S. Medical to develop a program that's right for you. A program that's convenient, responsive and thorough. A program that meets your standards for quality, reliability and cost-effectiveness.

For more information on what we can do for you please contact Art Hoath at

800-620-7720 ext. 104.

Please visit us at our booth # 1352

Insurance Coverage Issues Involving Pocket Bikes

Continued from page 8

Vehicles, www.nydmv.state.ny.us, contains a "Guide to Limited-Use Motorcycle Requirements", which is a chart that is helpful for information-at-a-glance.

PIP Coverage Under an Automobile Liability Insurance Policy

Occupants[2] of a motorcycle are not entitled to first party benefits, also known as no-fault or Personal Injury Protection (PIP) benefits, under an automobile liability policy, pursuant to Insurance Law Section 5103(a)(1).

Similarly, occupants of Class A and Class B Limited Use Motorcycles are also not entitled to no-fault benefits under an automobile liability policy. Interestingly, however, it appears that occupants of Class C Limited Use Motorcycles may be entitled to such benefits under an automobile liability policy.

Insurance Law Section 5103(a)(1), provides, in pertinent part, as follows:

> Section 5103. Entitlement to First Party Benefits; additional financial security required
>
> (a) Every owner's policy of liability insurance issued on a motor vehicle...shall be liable for the payment of first party benefits to:
>
> (1) persons, other than occupants of another motor vehicle or a motorcycle, for loss arising out of the use or operation in this state of such motor vehicle....(Emphasis added.)

By the plain meaning of the terms of the above statute, occupants of motorcycles are excluded from receiving no-fault benefits under an automobile liability policy. Nationwide Mutual Insurance Company v. Riccadulli, 183 AD2d 111 (2nd Dept. 1992)(where the Court, in ruling on an uninsured motorist claim made by a passenger of an all-terrain-vehicle ("ATV"), declared that motorcycles were expressly excluded from no-fault benefits; Innes v. Public Service Mutual Insurance Company, 106 AD2d 899 (4th Dept. 1984); Nami v. Tingaris, 127 Misc.2d 312 (Onondaga County, 1985).

The term "motorcycle" as used in the Insurance Law, encompasses Class A and Class B Limited Use Motorcycles but not Class C. This is because the definition of the term "motorcycle" as set forth in Section 5102 (m) of the Insurance Law, includes "any motorcycle", as defined in Section 123 of the VTL, and which is required to carry financial security pursuant to VTL Article 6, 8 or Article 48-A. Article 6 is the Motor Vehicle Financial Security Act, Article 8 relates to vehicles transporting passengers for hire, and Article 48-A provides for Registration of Limited Use Vehicles.

VTL Section 123 defines a motorcycle as a "motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels...". This definition encompasses the Limited Use Motorcycles defined in Section 121-b; Section 121-b is simply a further sub-classification of a motorcycle, by speed, that is, if a motorcycle falls into Section 123, it also falls into 121-b, if the speed is limited.

However, Class C Limited Use Motorcycles are not required to maintain liability insurance (as indicated above, pursuant to Article 6, 8 or 48-A). As such, Class C Limited Use Motorcycles are not excluded from entitlement to PIP benefits under an automobile liability policy, pursuant to Insurance Law Section 5103.

Uninsured Motorist Coverage Under an Automobile Policy

A motorcycle is afforded coverage under the uninsured motorist ("UM") endorsement of an automobile policy. Lalomia v. Bankers & Shippers Insurance Company, 31 NY2d 830 (1972) (where the Court of Appeals held that an uninsured motorized bicycle qualified for UM coverage under an automobile policy); Country-Wide Ins. Co. v. Wagoner, 45 NY2d 581 (1978); (where the Court of Appeals determined that a motorcycle operator, who was a resident of his father's home, was an insured under his father's auto policy for purposes of UM benefits); Nationwide Mutual Insurance Company v. Riccadulli, 183 AD2d 111 (2nd Dept. 1992); Matter of Home Mut. Ins. Co. of Binghamton N. Y. v. Marlin, 82 AD2d 807 (2nd Dept. 1981); Matter of St. John, 105 AD2d 530 (3rd Dept, 1984); Len v. Lumbermens Mut. Cas. Co., 80 AD2d 682 (3rd Dept. 1981); Geiger v. Insurance Co. of North America, 41 AD2d 796 (3rd Dept. 1973).

As such, since the definition of "motorcycle" (VTL Section 123) encompasses Limited Use Motorcycles (VTL Section 121-b), as stated above, an insurer that issues an automobile liability policy will be liable to pay uninsured motorist benefits to the occupants of a Limited Use Motorcycle, in the event it were uninsured.

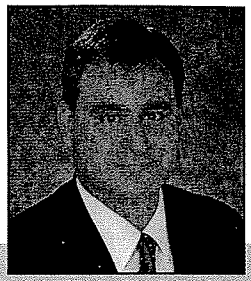
Conclusion

The insurance coverage available, registration and inspection requirements applicable to pocket bikes is determined by the class of motorcycle, as defined by VTL 121-b (Class A, B or C). Maximum speed performance is the determinative factor. Once the class of the vehicle has been established, the applicable statutes must be viewed on a case by case basis to determine what defenses are available to any carrier defending litigation involving pocket bikes.

[1] A "motorcycle" is defined in Section 123 of the VTL, as "every motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground...".

[2] The courts have held that the word "occupant" as used in the foregoing statute, encompasses an operator as well as a passenger, so that an operator and passenger of a motorcycle are both excluded from an automobile's no-fault benefits.

Worthy Of Note



VINCENT P. POZZUTO*

1. Insurance Coverage

Fact question existed as to whether injured plaintiff acted diligently in ascertaining identity of tort-feasor's insurer for purposes of direct action.

Appel v. Allstate Insurance Company

799 N.Y.S. 2d 467 (1st Dept 2005)

In an action pursuant to Insurance Law Section 3420(b) to collect on a default judgment entered in an underlying personal injury case, defendant Allstate sent a letter to its insureds more than a year after the default judgment was entered, disclaiming coverage based on late notice. The letter was copied to plaintiff's attorney. A week later, plaintiff commenced the direct action against Allstate. Allstate was granted summary judgment in the lower court. On appeal, the appellate division held that in determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that of the insureds. It is measured not by mere passage of time but by the means available for notice. Plaintiff's counsel's affirmation that he first became aware that Allstate was the tortfeasor's insurer only two days before Allstate's disclaimer letter created an issue of fact as to whether plaintiff acted diligently in ascertaining the identity of the tortfeasor's insurer.

2. Proximate Cause

Jury's finding that plaintiff was at fault but that such fault was not proximate cause of accident was against the weight of the evidence.

Karsden v. Barringer – 799 N.Y.S. 2d 548 (2nd Dept 2005)

Plaintiff was injured in a fall down open exterior cellar door at defendant's premises. Plaintiff was visiting a friend who was leasing the premises from defendants. Plaintiff became locked outside and began to feel her way around the house in the dark when she fell into an open exterior cellar door. The jury found the plaintiff to be contributorily negligent, but found that her negligence was not a substantial factor in causing the accident. The court held that this finding could not have been reached upon a fair interpretation of the evidence. The issues were so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause.

3. Labor Law

Plaintiff's injury did not result from an elevation related risk.

Lopez v. City of New York Transit Authority – 799 N.Y.S.2d 495 (1st Dept. 2005)

Plaintiff, an electrician, was standing with both feet on the ground while closing an extension ladder. He slipped on debris around the bottom of the ladder, and his right hand fell between the closing half and the stationary part of the ladder. The Court held that Labor Law Section 240(1) did not apply as the injury did not result from an elevation related risk. The Court further held that Industrial Code Sections 23-1.7(d) and (e)(2) (slipping and tripping hazards) were sufficient to support a claim under Labor Law Section 241(6) since the extensive debris in the work area at least contributed to the occurrence.

4. Insurance Coverage

Excess Carrier's disclaimer was not late.

Metropolitan Casualty Insurance Company v. Travelers Insurance Company – 800 N.Y.S. 2d 448 (2nd Dept. 2005)

An underlying automobile accident occurred in February 1999. In February 2000, the underlying personal injury action was commenced. The ad damnum clause sought damages in excess of both the primary and excess policies. The primary carrier sent a fax to the excess carrier on October 4, 2001, which only set forth the accident date and that an excess policy existed. The summons and complaint was sent to the excess carrier on October 29, 2001. The excess carrier disclaimed on late notice grounds on November 6, 2001. The court held that pursuant to the policy terms, the excess carrier was entitled to notice as soon as reasonably practicable after the insured became aware that the accident was likely to be a covered occurrence under Travelers policy. The insured became so aware in February, 2000 when it received the complaint seeking damages in excess of both policies. The excess carrier was not apprised of the date that the insured became aware of damages in excess of both policies until it received the summons and complaint on October 29, 2001, thus the disclaimer on November 6, 2001 was not untimely as a matter of law.

Continued on next page

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

Continued from page 11

5. Duty

Owner of premises housing a homeless shelter had no duty to protect infant abused by lawful resident of the shelter.

Rivera v. 760-770 East Tremont Avenue Housing Development Fund Corp. – 800 N.Y.S. 2d 389 (1st Dept. 2005)

Defendants, the owner and managing agent of a premises occupied by a homeless shelter were named in a lawsuit alleging negligence arising out of the alleged abuse of the infant-plaintiff by a lawful resident of the shelter. The Appellate Division reversed a lower court order denying summary judgment to the moving defendants, holding that a subcontract that defendants had with the shelter operator and the deposition testimony established that all relevant aspects of the operation of the shelter were performed by the operator over whom defendants had no control. The Court concluded that under such circumstances, defendants had no duty to the infant-plaintiff.

6. Negligence

Driver's speed and familiarity with ramp upon which accident occurred eliminated alleged negligence of State as proximate cause.

Rose v. State of New York 800 N.Y.S. 2d 26 (2nd Dept. 2005)

The estate of a deceased truck driver brought an action against the State alleging negligence in the design and maintenance of an entrance ramp to the BQE expressway which the accident occurred. Plaintiff relied upon photographs showing that lane markings had faded, there were no stop signs and no signs indicating that the ramp curved. The State proffered evidence establishing that the decedent drove on the ramp several times per day, and that he was traveling between 40 and 45 m.p.h. The Court held that the trial court properly found that the defendant's familiarity with the ramp and his excessive speed eliminated any alleged negligence on the part of the State as the proximate cause of the accident.

7. Procedure

Failure to deem a late notice of claim timely was an abuse of discretion due to hospital's actual notice of events within notice of claim period.

Caminero v. New York City Health and Hospital Corp. – 800 N.Y.S. 2d 173 (1st Dept. 2005)

The infant-plaintiff was born on February 8, 1994 at Bronx Municipal Hospital Center. She was diagnosed with respiratory distress syndrome and transferred to NICU. A pulse oximeter was attached to her foot to monitor the oxygen saturation level in her blood. Various notes in the chart indicated that her right 5th toe became necrotic due to the pulse oximeter being placed on too tightly. The toe auto-amputated. Plaintiff filed a notice of claim on March 3, 1998. Plaintiff made a motion for an order deeming the late notice of claim timely served. The Supreme Court denied the motion. The Appellate Division held that by virtue of the hospital records made contemporaneously with the events giving rise to the claim, defendant had actual knowledge of the facts constituting the claim, and thus, it was an abuse of discretion to not deem the notice of claim timely.

8. Negligence

Where evidence as to cause of action is undisputed, question as to whether any act or omission of defendant was proximate cause thereof is one for Court.

Moncion v. Infra-Metals Corp. 800 N.Y.S. 2d 381 (1st Dept. 2005)

Defendant Infra-Metals, a steel distributor, loaded steel onto a tractor trailer to be delivered to defendant Hunterspoint Steel Company and then to a company called Koenig Iron Works and two non-parties. The steel was loaded out of sequence and the delivery going to Hunterspoint was not at the top of the load. Angel Figuero, a driver for Fenton Trucking, the operator of the trailer, checked the steel after it was loaded by Infra-Metals. The steel was unloaded at Hunterspoint, and the non Hunterspoint Steel was reloaded and checked by Figuero. Plaintiff was employed by Koenig. He was injured when steel beams rolled off the truck as it was being unloaded at Koening. The Court held that there was no evidence of negligence by Infra-Metals. Nothing in the record indicated that the original loading was done negligently. Loading the steel out of sequence did not violate any rule, law or regulation. The Court held that Infra's failing to stack the beams in order merely furnished the condition or occasion for the occurrence. It did not cause or create a dangerous condition and was thus not the proximate cause.

9. Summary Judgment

Plaintiff could not rely on testimony of one defendant to create an issue of fact as to other defendant's liability when that testimony squarely contradicted plaintiff's testimony.

Serla v. Jacobson – 800 N.Y.S. 2d 565 (2nd Dept. 2005)

In an automobile accident case, plaintiff testified that a short time before her collision with the defendant Jacobson vehicle, a mini-school bus operated by defendant Georges left the east bound lane and skidded across the west bound lane of travel in front of her. Plaintiff testified that the mini-bus did not cause her to lose control of her vehicle or alter her direction of travel. She further testified that she had already passed the mini-school bus and

Continued on next page

Continued from page 12

was traveling west bound when she first observed the Jacobson vehicle cross into her lane of travel and come directly towards her. The Court held that accepting plaintiff's testimony as true, it was clear that the Georges vehicle was not the proximate cause of the accident. Further, the Court held that plaintiff could not rely on Jacobson's version of the accident as it squarely contradicted her testimony.

10. Medical Malpractice

Plaintiff made out a prima facie case of a departure from the acceptable standard of care based on allegedly inadequate discharge instructions.

Johnson v. Jamaica Hospital Medical Center 800 N.Y.S. 2d 609 (2nd Dept. 2005)

Plaintiff presented to defendant hospital emergency room with a gun shot wound to his leg, which had caused a severely fractured tibia. Defendant doctor removed the bullet and attached an external fixator to the leg. Plaintiff was discharged with instructions to stay off the leg, to keep it dry and not to touch the pins. Approximately two months later, it developed a severe infection requiring seven surgeries and 63 days of hospitalization. At trial, at the close of plaintiff's proof, the trial court directed verdicts in favor of defendants.

On appeal, the Second Department held that plaintiff's expert's testimony that an infection at the pin site was increased four fold in the absence of a daily cleansing of the pin site wounds was sufficient to allow the issue of proximate cause to go to the jury. Plaintiff's testimony that he failed to clean the pin site wounds due to inadequate discharge instructions, was enough to establish, prima facie, that his infection was caused by defendant's negligence.

11. Labor Law

Worker's actions were "sole proximate cause" of injury.

Thomas v. Fall Creek Contractors, Inc. 800 N.Y.S. 2d 559 (1st Dept. 2005)

In a Labor Law 240(1) action, plaintiff fell from temporary wooden stairs that were still in the process of being constructed. The Court held that plaintiff was aware that the stairs had not been bolted to the parapet wall when he decided to use them, that another nearby set of temporary stairs had been completed and that the stairs did not break when plaintiff fell. The Court concluded that accordingly, plaintiff's actions were the sole proximate cause of his injury.

12. Insurance

Vendor's endorsement only covered vendor for defects in manufacturers products, not for vendor's independent acts of negligence.

Raymond Corp. v. National Union Fire Insurance Co. 800 N.Y.S.2d 89 (2nd Dept. 2005)

Plaintiff is the manufacturer of side loader forklifts. Defendant National Union is plaintiff Raymond primary liability insurer. Plaintiff Arbor was a Raymond vendor. Arbor sold two Raymond side loaders to a steel distributor, Reyerson, for its facility in Philadelphia. Because Reyerson's new rack system was put into place months before the anticipated delivery date of the side loader, Ryerson asked Arbor to secure two rental side loaders. Arbor did so and reassembled and adjusted the rental units at Reyerson's facility. Arbor technicians did not properly fit one of the side loaders, and one technician essentially admitted that he knew it was unsafe. A Reyerson employee sustained head and brain injuries while operating it. Raymond settled the underlying case and looked to National Union for coverage.

The Court held that the National Union policy covers vendors such as Arbor only with respect to bodily injury "arising out of [Raymond's products]". The Court concluded that this phrase means injuries arising out of defects in the products, rather than arising out of the vendor's negligence, and denied coverage to Raymond.

13. Procedure

Defendant did not waive defense of lack of personal jurisdiction when it was first raised in amended pleading permissible under CPLR Section 3025(a)

Iacovangelo v. Shepherd 800 N.Y.S. 2d 916 (2005)

The action arose out of an accident that occurred in Georgia. The decedent, a New York resident, was injured when she was walking on a highway in Georgia and was hit by a truck owned and driven by residents of Georgia. She died several months later, and the administrator brought suit in New York. On November 8, 2002, defendants served an answer that did not challenge personal jurisdiction. On November 14, 2002, plaintiff served an amended complaint. On November 21, 2002 defendants served an "amended verified answer" raising a personal jurisdiction affirmative defense. Defendants moved to dismiss on personal jurisdiction grounds. Plaintiff argued that defendants had waived the defense by failing to assert it in their original answer. The Supreme Court granted the motion. The Appellate Division affirmed.

The Court of Appeals affirmed holding that permitting a defendant to add a personal jurisdiction defense to an answer by an amendment as of right is consistent with CPLR Section 3211(e) and advances the purposes of 3025(a).

14. Spoliation

Preclusion of evidence was proper sanction.

DeLos Santos v. Polanco, 799 N.Y.S.2d 776 (2nd Dept. 2005)

In accident involving a police vehicle, plaintiffs sought to strike answer of city, NYPD, and individual offices on the grounds that the subject police vehicle had been discarded prior to plaintiff's opportunity to inspect. The Court held that the proper remedy was precluding the city from offering evidence of the speed of the NYPD vehicle because the missing

Continued on page 18

Breach of Contract to Purchase Insurance: Suing the Broker

Continued from page 4

Moreover, in 2003, five years after it decided *Lenox*, the Third Department found that a certificate issued by an agent did not bind the carrier in *Wainwright v. Charlew Construction Company Inc.*[19] The Court held that the fact distinguishing *Wainwright* from *Lenox* was that the carrier in *Wainwright,* which claimed that it never received any request to add the general contractor to an additional insured endorsement, cancelled the named insured subcontractor's policy *prior* to the loss date.[20] Thus, detrimental reliance could not create coverage where was no insurance policy in existence.[21] The Court in *Wainwright* also noted that there is no statutory requirement that the carrier send the notice of cancellation to additional insureds.[22]

In addition, in 2004 in *Linarello v. City University of New York*, the First Department clarified that detrimental reliance can only estop a carrier where the certificate was issued "with the intent of influencing" the additional insured.[23]

Accordingly, owners and general contractors who rely on a certificate alone do so at their risk.[24] A safer practice, though seldom followed, is to insist on a copy of the actual policy's additional insured endorsement.

Nonetheless, where there is a discrepancy between the certificate and the policy, agency agreements are properly a part of discovery since "a broker can only be viewed as being the insurer's agent when there is evidence that a broker acted with authority granted by the insurer."[25]

Indeed, it is essential to understand the document at the center of these controversies, the certificate itself.

The Certificate

The general rule is that "the certificate of insurance is not a contract to insure and not conclusive proof standing alone, that such a contract exists."[26] Moreover, an insurance certificate cannot extend coverage to any greater extent than that provided in the insurance policy.[27] Also, a certificate exchanged along with certified policies in a discovery response does not raise a factual issue as to the existence of coverage.[28]

In addition, where certificates contain disclaimers such as "for information only," "confer no rights on the holder" or "insurance afforded by the policies listed on the certificate is subject to all the terms, exclusions and conditions of such policies," then the terms of the policy govern.[29] Such certificates cannot support negligence claims against brokers.[30]

However, the certificate that differs from the policy coupled with additional evidence favoring coverage may raise fact issues precluding summary judgment for the carrier.

For example, in *Rosalie Estates, Inc. v. Colonia Insurance Co.,*[31] the First Department found that since there was evidence that the carrier knew of the discrepancy and intended to add the plaintiff as an additional insured, the certificate showing coverage was "not totally without relevance." Thus, the summary judgment motion by the carrier was properly denied.

Brokers' Duty

Perhaps the greatest impediment to suing the broker in these cases is that generally, the insurance brokers' duty "runs only to their customers and not to any additional insureds since there is no privity of contract for the imposition of liability."[32]

Thus, owners and general contractors claiming additional insured status may not have a legal basis to sue the broker under theories of negligence or negligent misrepresentation.[33] Negligent representation claims do require privity missing in the additional insureds relationships with brokers.[34]

Moreover, the breaching party would not have much incentive to pursue its broker on behalf of the owner given the limited damage exposure under *Inchaustegui* and ongoing business relationship.[35]

In addition, the exceptions to the general rule regarding the broker's duty of privity of contract, i.e. "fraud, collusion and special circumstance"[36] are difficult to prove.

Claims for fraud do not "require the existence of a relationship of privity."[37] However, CPLR 3016(b) requires that in actions for fraud, "the circumstances constituting the wrong shall be stated in detail." Moreover, the issuance of a certificate with disclaimer language cannot serve as the basis for a cause of action alleging fraud[38] or misrepresentation.[39]

In addition, where an insured is sent a copy of the CGL policy prior to the accident and makes no complaint, receipt of policy may be deemed "conclusive presumptive knowledge" and assent to its terms and limits.[40]

It has long been true in the Courts of the State of New York, that a party who executes a contract is presumed to know its contents and to assent to them.[41] This principle has been applied to insurance policies frequently by the Appellate Divisions,[42] although arguably the additional insured did not execute the insurance policy issued to the breaching party.

However, in *Reilly v. Progressive Insurance Co.,*[43] the Second Department found in the context of an automobile policy that the "mere fact that the plaintiff's had ample time to read the policy ... is not a superseding cause precluding liability as a matter of law."

If the failure to have the owner or general contractor named as an additional insure was in fact, the fault of the tenant or subcontractor, it should be noted that absent a specific request for coverage, the agent is under no common law duty to guide, advise or direct an insured to obtain coverage beyond that requested.[44]

Finally, it should be noted that for purposes of the statute of limitations set forth in CPLR 214(6), misfeasance claims against insurance brokers and

agents is not considered "malpractice other than medical, dental or podiatric" thus the six years statutory period applies.[45]

Conclusion

Pursing the negligent broker for *Kinney* claims may be tempting but ultimately unavailing. As the above discussion is intended to highlight, these types of cases are fact sensitive and thus it is essential for all sides to be aware of the current state of case law and to establish the proper foundation for their arguments by obtaining the appropriate documents through investigation and discovery.

(Endnotes)

[1] Julian D. Ehrlich is a member of the Law Offices of Alan I. Lamer in Elmsford, NY.

[2] Insurance procurement provisions can also be found in motor vehicle leases. *See e.g. Jefferson Insurance Company of New York v. Travelers Indemnity Company*, 92 N.Y.2d 353, 681 N.Y.S.2d 208 (1998).

[3] This risk can also be addressed alternatively or concurrently with a contractual indemnity provision. See "Reviewing Indemnification and Insurance Procurement Pacts" by Salavotre J. Desantis, *New York Law Journal*, February 20, 2002 and "Contracting Away Negligence" by Julian D. Ehrlich, *New York Law Journal*, July 1, 2002.

[4] *Hogeland v. Sibley, Lindsay & Curr, Co.*, 42 N.Y.2d 153, 160, 397 N.Y.S.2d 602, 607 (1977).

[5] A variation of this type of provision is a requirement that the additional insured coverage be primary to the owner or general contractors' own coverage. This form seeks to avoid concurrent coverage shared between the tenant/subcontractors' carrier and the owner/general contractors' carrier. See "Excess Endorsements for Additional Insureds Rise" by Fredrick B. Simpson and Glenn A. Kaminska, *New York Law Journal*, December 18, 2000 and "The Use of Excess Clauses in Additional Insured Endorsements" by Glenn A. Kaminska and Brendan T. Fitzpatrick, *New York Law Journal* May 9, 2003. Another variation of this procurement requirement is a provision that the owner be named on a separately purchased owners' contractors' protective policy (OCP) although an additional insured endorsement on a CGL policy and an OCP policy have the same effect for anti-subrogation purposes. *North Star Reinsurance Companies v. Continental Insurance Company*, 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993).

[6] 76 N.Y.2d 215, 219, 557 N.Y.S.2d 283, 285 (1990).

[7] 96 N.Y.2d 111, 114, 725 N.Y.S.2d 627, 630 (2001).

[8] *Wang v. New York Times Co.*, 297 A.D.2d 544, 747 N.Y.S.2d 213 (1st Dept. 2002).

[9] "Court of Appeals Grows Less Fond of 'Kinney'" by Fredrick B. Simpson and Glenn A. Kaminska *New York Law Journal* May 29, 2001 stating "The measure of damages may be the subject of confusion...." See also *Amato v. Rock-McGraw, Inc.*, 297 A.D.2d 127, 746 N.Y.S.2d 150 (1st Dept. 2002); *Hajdari v. 437 Madison Avenue Fee Associates*, 293 A.D.2d 360, 740 N.Y.S.2d 328 (1st Dept. 2002).

[10] "Court of Appeals Grows Less Fond of 'Kinney' by Fredrick B. Simpson and Glenn A. Kaminska *New York Law Journal* May 29, 2001 stating "[a]nd while it is possible that damages' hearings with expert testimony may become prevalent, with a cottage industry developing to litigate these matters, it is more likely that the bulk of these claims will simply whither on the vine as it will not be cost effective to pursue them." Note, however, that an owner may recover its costs in defending a third party claim against its tenant. *Diaz v. City of New York*, 5 A.D.3d 195, 772 N.Y.S.2d 811 (1st Dept. 2004).

[11] *Binyan Shel Chessed, Inc. v. Goldberger Insurance Brokerage, Inc.*, 795 N.Y.S.2d 619, 623 (2d Dept. 2005). *Moleon v. Kreisler Borg Florman General Construction Company, Inc.*, 304 A.D.2d 337, 758 N.Y.S.2d 621 (1st Dept. 2003).

[12] 94 N.Y.2d 418, 424, 705 N.Y.S.2d 553, 558 (2000).

[13] *Id.* at 425, 705 N.Y.S.2d at 558.

[14] *Id.* at 424, 705 N.Y.S.2d at 557.

[15] 255 A.D.2d 644, 645-646, 679 N.Y.S.2d 749, 750-751 (3d Dept. 1998)

[16] *Id.*

[17] 270 A.D.2d 867, 868, 705 N.Y.S.2d 459, 461 (4th Dept. 2000).

[18] *Binyan Shel Chessed, Inc. v. Goldberger Insurance Brokerage, Inc.*, 18 A.D.3d 590, 795 N.Y.S.2d 619 (2d Dept. 2005); *Tribeca Broadway Associates v. Mount Vernon Fire Insurance Company*, 5 A.D.3d 198, 774 N.Y.S.2d 11 (1st Dept. 2004); *Moleon v. Kreisler Borg Florman General Construction Company, Inc.*, 304 A.D.2d 337, 758 N.Y.S.2d 621 (1st Dept. 2003); *American Ref-Fuel Company of Hempstead v. Resource Recycling, Inc.*, 671 N.Y.S.2d 93 (2d Dept. 1998).

[19] 302 A.D.2d 784, 755 N.Y.S.2d 751 (3d Dept. 2003).

[20] *Id.* at 785, 755 N.Y.S.2d 753.

[21] *Id.*

[22] Id. at 785-6, 755 N.Y.S.2d at 753-754.

[23] 6 A.D.3d 192, 195, 774 N.Y.S.2d 517, 520 (1st Dept. 2004).

[24] *Id.* at 753-754, 755 N.Y.S.2d at 786.

[25] *Citigroup, Inc. v. Industrial Risk Insurers*, 336 F.Supp. 282, 291 (SDNY 2004).

[26] *St. George v. W.J. Barney Corporation*, 270 A.D.2d 171, 706 N.Y.S.2d 24 (1st Dept. 2000).

[27] *Kaufman v. Puritan Insurance*, 126 A.D.2d 702, 511 N.Y.S.2d 307 (2d Dept. 1987).

[28] *Insurance Corporation of New York v. U.S. Underwriters Insurance Company*, 11 A.D.3d 235, 782 N.Y.S.2d 432 (1st Dept. 2004).

[29] *Lerer v. City of New York*, 301 A.D.2d 577, 756 N.Y.S.2d 217 (2d Dept. 2003).

[30] *Benjamin Shapiro Realty Company LLC v. Kemper National Insurance Companies*, 303 A.D.2d 245, 756 N.Y.S.2d 45 (1st Dept. 2003).

Continued on page 20

DEFENDANT

P.O. Box 950
New York, NY 10274-0950

2006 Display Advertising Rates

(Prices are per insertion)

Ad Size	Per Insertion
Full Page	$400
2/3 Page	350
1/2 Page	275
1/3 Page	175

Production Information

Deadlines:
The Defendant is published quarterly, four times a year.
Reservations may be given at any time with the indication of what issue you would like the ad to run in.
Deadlines are two weeks prior to the printing date.

Discount:
Recognized advertising agencies are honored at a 15% discount off the published rate.

Art Charge:
Minimum art charge is $125.00.
Custom artwork, including illustrations and logos, is available at an additional charge. All charges will be quoted to the advertiser upon receipt of copy, and before work is performed.

Color Charge:
Each additional color is billed net at $175.00 per color (including both process and PMS).

Bleed Charge:
Bleed ads are billed an additional 10% of the page rate.

Placement Charge:
There is a 10% charge for preferred positions. This includes cover placement.

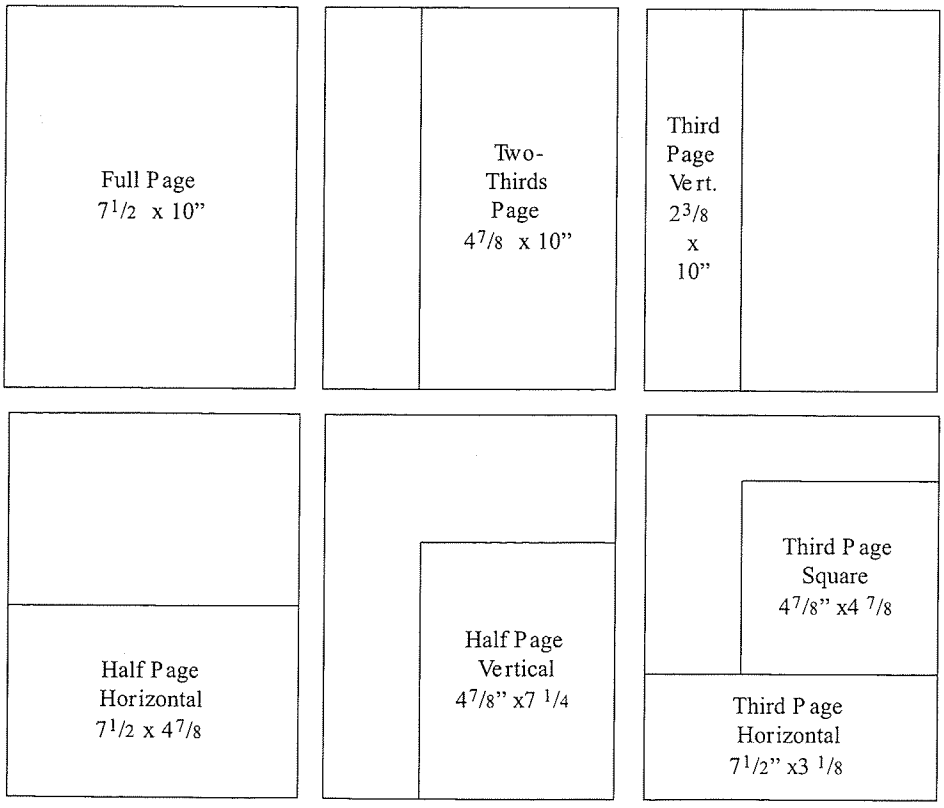
Inserts:
Call for details about our low cost insert service.

Mechanical Requirements:

Ad Size	Width x Height
Full Page	7 1/2 10"
Two-Thirds Page	4 7/8 10"
Half Page (Vertical)	4 7/8 7 1/4
Half Page (Horizontal)	7 1/2 4 7/8
Third Page (Vertical)	2 3/8 10"
Third Page (Square)	4 7/8 4 7/8
Third Page (Horizontal)	7 1/2 3 1/8

Advertising Materials:
EPS files of advertisements, press optimized, ALL FONTS embedded can be emailed to; fmoreira@suffolk.lib.ny.us; Negatives, 133 line screen, right reading, emulsion side down-offfset negatives, only. ALL COLOR MUST BE BROKEN DOWN INTO CMYK, For 4-color ads, progressive proofs or engraver's proofs must be furnished. Please call 631-348-3769 if other accommodations need to be met. FAXED COPIES NOT ACCEPTED.

Bleed:
The trim size of the publication is 8 1/2 x 11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.



Recurring Conditions: Can They Still Substitute For Notice Of A Defect?

Continued from page 6

in plastic bags on a staircase in the building where he lived. The plaintiff testified that the papers had been on the stairwell for about 24 hours prior to the accident. But even without that proof, the Second Department noted, the plaintiff raised a triable issue of fact as to whether or not the defendant had "actual notice of a recurrent condition of newspapers accumulating on the staircase, and thus may be charged with construction notice of each specific recurrence of that condition."

One problem with the recurring condition theory has been its inconsistent application by the Appellate Division. One can also find in each of the four departments rejecting the theory in cases presenting similar facts. For example, in *Durney v. NYCTA,*[10] the fact that homeless people regularly congregated in the area of the plaintiff's accident provided only a "general awareness" of the puddle of urine in which plaintiff slipped. *See also, Gloria v. MGM Emerald Enterprises Inc.,*[11] [prior spilling of drinks on dance floor did not create liability for recurring condition]; *Richardson-Dawn v. Golub Corp.,*[12] [general awareness that floor mats occasionally "bunch up" insufficient to constitute notice of an ongoing dangerous condition]; *Winecki v. West Seneca Post 1183 Inc.,*[13] [configuration of banquet room requiring patrons to carry drinks across dance floor insufficient to impose liability].

A larger problem, however, with the cases supporting this theory is their seeming inconsistencies with *Gordon* itself. After all, the congregation of members of the public eating lunch on the stairs, coupled with the departure of maintenance personnel during lunch hour, would certainly seem to be an apt occasion for the exercise of the recurring condition doctrine. It is difficult, indeed, to distinguish these facts from notice that tenants tend to leave debris in a stairwell, or that newspaper deliverers tend to throw their papers on stairs.

That was the situation when the First Department heard defendant's appeal in *Rivera v. 2160 Realty Company LLC*[14]. There, the plaintiff slipped on refuse consisting of beer bottles, soda cans, urine and other liquids which had been left on the flight of stairs in an apartment building operated by the defendant. The plaintiff, a tenant, testified at a deposition that the stairway had been clear the evening before. However, he asserted that refuse would often be left on the stairs by other tenants who used the stairwell as a party area. The defendant's superintendent admitted that he knew of that use. Based on these facts, the First Department held, this was not a case of mere general awareness, but a recurring dangerous condition regularly left unaddressed by defendant.

The Court of Appeals reversed in a brief memorandum[15]. The high Court noted that no evidence was offered indicating that the landlord was notified of the debris that night or that the bottle was present for a sufficient period of time that the defendant's employees had the opportunity to discover and remove it. In so doing, the Court rejected the argument advanced by the plaintiff, and adopted by the First Department, that since the defendant had actual notice that individual tenants left refuse on the stairs, liability may exist based on a recurring condition and that such facts removed the scenario from one of a general awareness. Rather, the Court of Appeals stated clearly that the plaintiff failed to raise a triable issue of fact as to whether the defendant had constructive notice on "any theory" of a dangerous condition in the stairwell.

Conclusion

Does *Rivera* signal the end of the recurring condition theory as a basis for liability? Or will the Appellate Divisions continue to attempt to carve out this exception to the rule requiring actual or constructive notice? In any event, defense attorneys who seek summary judgment from the Appellate Divisions in cases like these should make it their business to be familiar with both the Appellate Division and Court of Appeals decisions in *Rivera* and argue that the theory no longer applies to cases where the transient condition was caused by others, even though the defendant may have known that others had caused similar conditions in the past.

But even if the Appellate Divisions take the ruling in *Rivera* to heart, there is still at least one type of case where the recurring condition exception may remain viable. The cases we have addressed so far concern awareness by a defendant that others – co-tenants, careless dancers, the homeless – can continually create dangerous conditions on real property. But there is a different type of "recurring condition" that the Court of Appeals has not yet addressed: those caused by a defect in the premises itself. For example, in *Knight v. Sawyer,*[16] ice regularly formed on a stairway as a result of a leak in a roof and the absence of gutters in the front of the defendant's building.

The defendant had actual knowledge of the condition but took no steps to remedy it. Therefore, the Fourth Department held, the defendant could be charged with constructive notice of each specific reoccurrence of the icy condition. That form of recurring condition may well survive *Gordon, Piacquadio,* and, now, *Rivera.*

[1] *Anderson v. Central Valley Realty Company,* 300 A.D2d 422, 751 N.Y.S.2d 586 (2d Dep't 2002

[2] 113 A.D.2d 701, 493 N.Y.S.2d 464, 1st Dep't 1995, *reversed,* 67 N.Y.2d 836, 501 N.Y.S.2d 646

[3] *Gordon, supra,* 67 N.Y.2d at 838, 501 N.Y.S.2d at 647 (citations omitted)

[4] 201 A.D.2d 338, 607 N.Y.S.2d 313 (1st Dep't 1994), *reversed,* 84 N.Y.2d 967, 622 N.Y.S.2d 493 (1994)

[5] 255 A.D.2d 160, 679 N.Y.S.2d 398 (1st Dep't 1998)

[6] 234 A.D.2d 106, 650 N.Y.S.2d 717 (1st Dep't 1996)

[7] 244 A.D.2d 1002, 664 N.Y.S.2d 964 (4th Dep't 1997)

[8] 282 A.D.2d 815, 722 N.Y.S.2d 820 (3d Dep't 2001)

[9] 15 A.D.3d 641, 792 N.Y.S.2d 501 (2d Dep't 2005)

[10] 249 A.D.2d 213, 671 N.Y.S.2d 262 (1st Dep't 1998)

Continued on next page

Undocumented Aliens and Lost Wages: Part III*

Continued from page 2

as follows: Thus, the principal question presented in this case is whether an award of lost wages to an undocumented alien presents an obstacle to the Congressional objections underlying. Majlinger, N.Y. Slip Op. at 5. Phrased differently, would allowing an undocumented alien to assert a future lost wage in U.S. dollars deter immigration of illegal aliens, have no impact on such immigration or, if an illegal alien knows he will collect wages in United States dollars, injured or not, would, this promote illegal immigration to the unanimous opinion of the court held: 1) Hoffman does not apply to awards of damages in personal injury actions; 2) disallowing a claim for lost wages by an undocumented alien "would, in effect, grant partial immunity from duties such as those imposed by Labor Law §§240(1) and 241(6) to employers and other defendants"; 3) withholding lost wages from undocumented aliens "would create a perverse incentive for employers to hire such aliens; and 4) the plaintiff may pursue his full lost wage claim in United States dollars.

To fully understand this decision, particularly those portions of the opinion which repeatedly express the goal of deincentivizing the plaintiff's employer from hiring illegal aliens it is important to note that the plaintiff's employer, the entity to whom the court wanted to send a message about its hiring practices was not a party to the action. Indeed, in New York, as in many other states, an employee is precluded from asserting a direct action against his/her employer by virtue of the Workmans Compensation statutes. Additionally, those instances in which the employer can be impleaded into an action in New York have been considerably narrowed by the antisubrogation Rule (Northstar v. Continental 82 N.Y.2d 2d, 604 N.Y.S. 2d 510 (1993). and by the adoption of the "Grave Injury Rule" to section eleven of the Workers Compensation Laws several years ago. Thus, although the Chief rationale for the Second Department's decision ostensibly to dissuade the employer from hiring illegal aliens, the decision is not clear on how this is to be accomplished in the vast majority of cases in New York as the employer can never be brought into the lawsuit. Furthermore, in those limited instances in which the AntiSubrogration Rule or the Grave injury rule do not apply so as to permit impleader of the employer, the employers liability portion of the mandatory workers compensation policy will respond to a claim for pain and suffering and lost wages thus making the insurer the real party in interest. Indeed, how is the employer to be dissuaded from hiring illegal aliens by this decision if, in the vast majority of cases, they cannot be impleaded into the employer's lawsuit and, when they are impleaded, they are not the financially responsible entity to pay the plaintiff's lost wage claim.

Recurring Conditions: Can They Still Substitute For Notice Of A Defect?

Continued from page 17

[11] 298 A.D.2d 355, 751 N.Y.S.2d 213 (2d Dep't 2002)
[12] 252 A.D.2d 790, 676 N.Y.S.2d 260 (3d Dep't 1998)
[13] 227 A.D.2d 798, 643 N.Y.S.2d 292 (4th Dep't 1996)
[14] 10 A.D.2d 503, 781 N.Y.S.2d 645 (1st Dep't 2004)
[15] 4 N.Y.3d 837, 797 N.Y.S.2d 369 (2005)
[16] 306 A.D.2d 849, 762 N.Y.S.2d 458 (4th Dep't 1993)

Worthy Of Note

Continued from page 13

evidence did not deprive plaintiffs from proving their case. Plaintiffs failed to establish that their own car could not be examined to determine point of collision and the speed of the police vehicle at the point of impact. In addition, the court held that if the police vehicle was the only source of such information both parties were equally prejudiced, and thus, it would be improper to dismiss a pleading on the basis of spoliation.

DEFENDANT

VOL. 7 NO. 2 **Fall 2005/Winter 2006**

John J. McDonough
EDITOR IN CHIEF

STAFF
Anthony Celentano
Denise LaGrua
Alexandra M. McDonough
Dawn C. DeSimone, Julian D. Ehrlich, Kevin G. Faley, Pauline E. Glaser, James K. O'Sullivan, Vincent P. Pozzuto, and Andrew Zajac

Published quarterly by the Defense Association of New York, Inc., a not-for-profit corporation.

Save The Date

March 29, 2006
Pinckney Award Dinner

The Award
will be presented this year
to

Hon. Justice Barry Salman

Now
Administrative Judge
Supreme Court
Bronx County

CLE Topic

"Lead Paint Poisoning Liability"
by Steven Kramer, Esq, 1.0 Credit

Price: $125.00 for Lecture, Cocktails and Dinner.

DEFENDANT

Application for Membership

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $175.00 for individuals admitted to practice more than five years; and $500.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

*ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.

Breach of Contract to Purchase Insurance: Suing the Broker

Continued from page 15

[31] 227 A.D.2d 335, 643 N.Y.S.2d 59, 62 (1st Dept. 1996).

[32] *Arredono v.City of New York*, 6 A.D.2d 328, 775 N.Y.S.2d 150 (1st Dept. 2004).

[33] *Benjamin Shapiro Realty Company, LLC v. Kemper National Insurance Companies*, 303 A.D.2d 245, 756 N.Y.S.2d 45, (1st Dept. 2003).

[34] *Metral v. Horn*, 213 A.D.2d 524, 624 N.Y.S.2d 177 (2d Dept. 1995; *Benjamin Shapiro Realty Company LLC v. Kemper National Insurance Companies*, 303 A.D.2d 245, 756 N.Y.S.2d 45 (1st Dept. 2003).

[35] See, for example, *Federal Insurance Company v. Spectrum Insurance Brokerage Services, Inc.*, 304 A.D.2d 316, 317, 758 N.Y.S.2d 21, 23 (1st Dept. 2003) where the court dismissed a purported subrogation claim brought by a plaintiff carrier against a broker which failed to procure sufficient insurance for its subrogors as additional insureds finding "plaintiff's insureds suffered no loss.".

[36] *Binyan Shel Chessed, Inc. v. Goldberger Insurance Brokerage, Inc.*, 18 A.D.3d 590, 795 N.Y.S.2d 619 (2d Dept. 2005);

[37] *Binyan Shel Chessed, Inc.*, 795 N.Y.S.2d at 621.

[38] *Greater New York Mutual Insurance Company v. White Knight Restoration, Ltd.*, 7 A.D.3d 292, 776 N.Y.S.2d 257 (1st Dept. 2004).

[39] *Benjamin Shapiro Realty Company, LLC v. Kemper National Insurance Companies*, 303 A.D.2d 245, 246, 756 N.Y.S.2d 45, 46 (1st Dept. 2003).

[40] *Norian v. Cohen*, 7 A.D.3d 288, 776 N.Y.S.2d 787 (1st Dept. 2004); *Madhvani v. Sheehan*, 234 A.D.2d 652, 650 N.Y.S.2d 490 (3rd Dept. 1996).

[41] *Metzger v. AETNA Insurance Company*, 227 N.Y. 411 (1920).

[42] See *Choung v. Allstate Insurance Company*, 283 A.D.2d 468, 724 N.Y.S.2d 882 (2nd Dept. 2001); *Busker On the Roof Limited Partnership Co. v. M.E. Warrington*, 725 N.Y.S.2d 45 (1st Dept. 2001); *Chase's Cigar Store Inc. v. Stem Agency Inc.*, 722 N.Y.S.2d 320 (4th Dept. 2001); *Renee Knitwear Corp. v. ADT Security Systems*, 277 A.D.2d 215, 715 N.Y.S.2d 341 (2d Dept. 2000); *Nicholas J. Masterpol, Inc. v. Traveler's Insurance Companies*, 711 N.Y.S.2d 88 (4th Dept. 2000); *Feinblum v. Liberty Mutual Insurance Company* WL21673620 (SDNY 2003).

[43] 288 A.D.2d 365,366, 733 N.Y.S.2d 220, 221 (2d Dept. 2001).

[44] *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371 (1997); See also *Insurance Broker: Order Taker or Professional*, by Robert M. Sullivan and David H. Paige, *Tort Source* Spring 2004.

[45] *Federal Insurance Company v. Spectrum Insurance Brokerage Services, Inc.*, 304 A.D.2d 316, 318, 758 N.Y.S.2d 21, 23 (1st Dept. 2003)

ATTENTION MEMBERS

DANY HAS A WEBSITE

- View CLE & Dinner Announcements on Line •

- Read Recent Articles on Legal Issues •

- Search for other members •

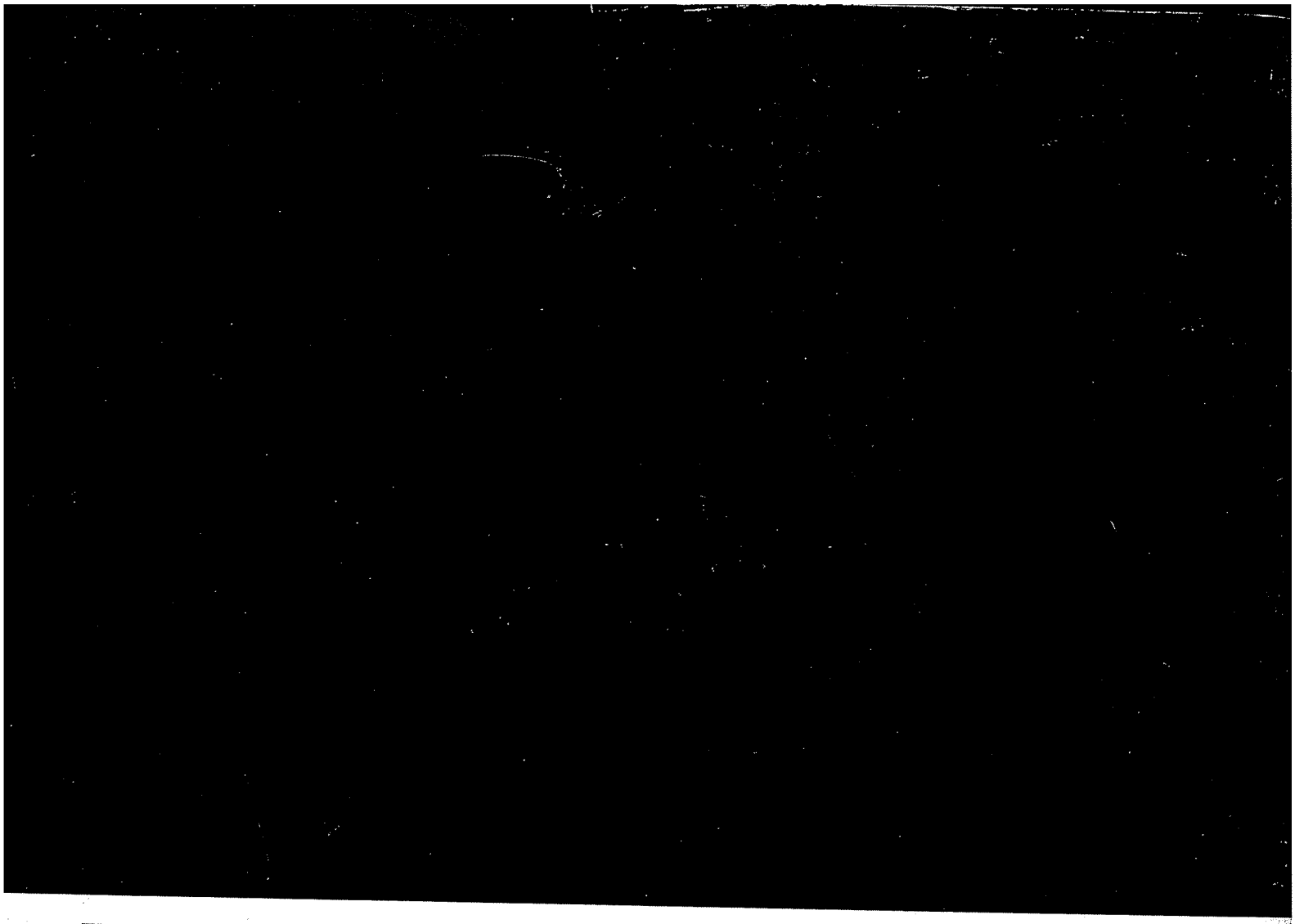
- Confirm the Accuracy of your membership listing and add your telephone, fax numbers and your e-mail address •

View our site at

www.dany.cc or www.dany.ws

or

www.defenseassociationofnewyork.com



THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

Presort Standard
U.S. Postage
PAID
Permit # 255
Hicksville NY