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President's Column

MARGARET G. KLEIN*

Dear DANY Members, Colleagues, and Sponsors:

It is such an honor to serve as President of DANY for our 2015-2016 term, DANY'S 50th year. All 49 Presidents before me have each dedicated their time and effort to this organization and each has left his/her personal touch. I am very fortunate to begin my term at a time of great growth and recognition of our organization and I pledge to work hard and build on this.

We are so fortunate to have had such dedicated past presidents, many who still sit on the Board. We are also grateful to our Board members and committee chairs and members who all work hard in making a contribution to DANY. We are especially grateful to our sponsors who make so many of our programs possible. DANY will always be grateful to Tony Celentano, who served as our executive director until his retirement in June 2015 and we wish him a happy retirement and many years of good health. We welcome Connie McClenin, who worked alongside Tony for the past 10 years, as our new executive director, and we are inspired by her hard work, enthusiasm and dedication.

We are so proud to now call DANY a statewide Defense Bar Association where we can now connect with defense attorneys in all parts of New York State. I thank all those board members who worked hard to make this happen. In October, we welcomed our first two directors from the 2nd and 3rd Department, Aileen Bucholtz and Thomas Liptag, onto the board and in the past month, we have many new members from these Departments enroll as DANY members and who are already active on our committees.

As President, my primary focus will be on engaging young lawyers throughout the state and introducing them to DANY. We owe it to our young professionals to lead the way, to assist and work with the next generation to make our practice of law more meaningful. We must assist in mentoring and providing whatever support we can. Through its committees, DANY not only offers excellent writing and speaking opportunities but also experience in leadership. These Lawyers can have their work published in the Defendant or be part of the Amicus Committee. Being a member of a committee can lead to being Chair of that committee and/or a seat on DANY's Board of Directors. We need to reach out to young lawyers to help them connect with one another and with the legal community and help them grow. They need to know what we can offer them and this why DANY has offered free membership to those admitted to practice 2 years or less and $50 for a year's membership to those admitted 2-5 years. I need your assistance which is why I ask you now to pass on a copy of this DEFENDANT to a young lawyer so that he/she can get a glimpse of what DANY can do for him/her.

For the second year, DANY is sponsoring the diversity initiative program which aims to teach women and diverse attorneys how to effectively compete for leadership positions in their firms, negotiate work arrangements and successfully pursue professional opportunities. Last year, not only was there extraordinary feedback from the participants as to how this program benefited them but the program was recognized by The New York Law Journal and by DRI (The Voice of the Defense Bar). The New York Law Journal, in selecting this program as one of its 2015 Diversity Honorees, noted that by offering different groups of lawyers the chance to contribute and share their backgrounds and ideas with the larger community and with clients, it is moving the legal community closer to inclusion, one lawyer at a time. DRI, in recognition of DANY's strong diversity efforts, awarded DANY the 2015 State and Local Defense Organization

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* *Margaret G. Klein is an attorney with Margaret G. Klein and Associates.*

President's Column

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Diversity Award at its annual meeting in October. In awarding this honor, DRI noted that DANY has demonstrated a commitment to achieve sensitivity and receptivity to diversity issues and promote the advancement and inclusion of minority and women attorneys. A number of DANY members attended DRI's annual meeting in Washington to receive this award. This was a very proud moment for DANY and for Claire Rush, who was one of the founding members of this program, and Claire now sits on DANY's Board of Directors.

I would like to see all our members become more involved in our organization. Please visit our website www.defenseassociationofnewyork.org where you can get a glimpse of what's going on at DANY. Check out our 23 committees and contact the Chair and find out how you can be involved. Check out the publications tab and not only will you find articles of educational and professional interest but you may discover what you can offer DANY in terms of writing and avail of an opportunity to be published. Check the Amicus briefs and you'll see that that DANY's Amicus Committee has contributed to some of the most important decisions of interest to the defense bar. Check out the CLE materials and you will find that DANY 's programs are among the best offered by any bar organization. These are just a few of the many committees on which you can work with others in the exchange of ideas, techniques, procedures and discussion of court rulings, all calculated to enhance the knowledge and improve the skills of defense lawyers.

I sincerely hope that 2015-2016 will be a year in which we see many new faces in DANY and I can assure you all defense attorneys can benefit significantly from what DANY has to offer. Thank you so much for your continued support.

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The Vanishing Jury Trial

JOHN J. MCDONOUGH, ESQ. *

This is the first in what will be a series of articles regarding the marked decline in the disposition of civil cases via jury trials at both the state and federal level, what factors may be contributing to this decline, and what this phenomenon might mean for the practice of law going forward.

Over the past several decades, the legal world as we know it has vastly changed in almost every regard. The number of lawyers practicing in the U.S. has almost tripled since 1960, the total amount spent on litigation and the cost per case has inflated, the number of new case openings has increased, and more authoritative legal materials are available and readily accessible now than ever before, all while the practice of law continues to gain prominence in the public eye. However, despite these changes, recent years have also borne witness to a sharp decline in the number of jury trials[1] that come before our courts on both the state and federal levels. Indeed, as noted by one scholar on this topic,

> Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy. The consequences of this decline for the functioning of the legal system and for the larger society remain to be explored.[2]

Chief Judge William G. Young of the District of Massachusetts expressed his concern with this development in his 2003 Open Letter to United States District Judges: "The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic."[3]

A greater understanding of the statistics incorporated in this continuing phenomenon may be helpful in determining its causes and consequences. Since 1960, the number of lawyers in the United States has grown at a rate more than twice that of the general population, with the total number of U.S. lawyers increasing from 385,933 in 1960 to 1,281,432 in 2014.[4] Today, there is one lawyer for every 249 Americans, as opposed to one for every 627 Americans in 1960.[5] This sharp increase in the number of lawyers per capita, together with the overall increase in civil case openings, renders the decline in jury trials even more perplexing.

In federal court, the number of civil cases disposed of by jury trials has drastically fallen, both as a percentage of filings and in absolute numbers. From 1985 to 2014, the total number of civil cases disposed of by jury trial in the U.S. District Courts dropped from 6,253 to 1,994. With the exception of 2007, a year in which this number inexplicably and uncharacteristically spiked to 8,739 (or 6,324 more than the prior year), the numbers reflect a steady trend in the decline of jury trials at the federal level.[6] Undoubtedly, these findings clearly demonstrate that civil jury trials are on a downward spiral.

At the state level, the statistics demonstrate that this phenomenon is not unique to the federal system. Historically, there were 50 different state collection and reporting systems in place to collect statistical data on state court filings and dispositions. More recently, the National Center for State Courts has tried to encourage the use of a uniform reporting system in each state, but

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Mr. McDonough acknowledges with gratitude the assistance of Ryan T. Kearney, Esq. and Richard Zuckerman in the preparation of this article. Mr. Kearney is an associate with Cozen O'Connor's Commercial Litigation Department, also practicing out of the firm's New York office. Mr. Zuckerman is a senior paralegal also resident in the firm's Manhattan office.

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The Vanishing Jury Trial

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the availability of statistical data in state courts is still lacking due to the past use of non-uniform data collection practices. However, the available statistics (comprised from an amalgamation of data from 20 states that responded to the survey) indicate that both the number and rate of civil jury trials have continued to decline at the state level.[7]

In New York, the Unified Court System maintains detailed statistics regarding the amount and type of case filings, appeals and dispositions, and has published annual reports from 1997 to 2013.[8] These statistics are categorized by the court in which the cases were filed, and are further broken down by subject matter. In 1997, the first year for which the UCS reported such data, there were 203,344 total civil dispositions of cases filed statewide in the Supreme Court, 7,870 of which were disposed of by jury verdicts and trial decisions. This amounts to a rate of approximately 4% of all civil dispositions in the Supreme Court. By 2013, that rate dropped to 3% of a total of 497,765 such dispositions. Considering that the total amount of civil dispositions in the Supreme Court had nearly doubled since 1997, this drop of one percentage point in the rate of jury trials leads to approximately 5,000 fewer trials per year.

While there is no simple explanation for what's causing this decline, there is no doubt that the number of civil jury trials is rapidly diminishing in both state and federal courts. Subsequent articles in this series will attempt to identify and explore some of the factors contributing to this decline, as well as what this phenomenon might mean for the practice of law going forward.

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[1] For the purposes of our analysis, a case disposed of by jury trial is defined as a case in which the jury has been impaneled and a witness has been sworn in prior to the disposition of the case.

[2] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 Journal Of Empirical Legal Studies 459-570 (November, 2004).

[3] Hon. William G. Young, *An Open Letter to U.S. District Court Judges,* THE FEDERAL LAWYER, 30, 31 (July 2003).

[4] National Lawyers Population Survey, AMERICAN BAR ASSOCIATION (2014).

[5] *Id*

[6] This aberration was short-lived, and likely due to an unforeseen variable such as the termination of a mass tort action or multi-district litigation.

[7] Court Statistics Project, NATIONAL CENTER FOR STATE COURTS, www.courtstatistics.org.

[8] Annual Reports of the Chief Administrator, NY COURTS, *available at* www.nycourts.gov/reports/annual/index.html.

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A Pocket Park is Not a Sidewalk Within the Meaning of §7-210

JEFFREY D. FIPPINGER, ESQ.*

A relative newcomer to urban open space is the "pocket park." Functions of pocket parks can include play areas for children, spaces for relaxing or meeting friends, and taking lunch breaks. They can be a refuge from the bustle of surrounding urban life and offer opportunities for rest and relaxation.[1]

One of the unique characteristics of pocket parks is that they are reclaimed spaces that are created out of vacant lots, forgotten spaces, or, most pertinent of all, underutilized roadways abutting existing sidewalks.[2] The pocket park may be referred to by many names, including "promenade," "plaza," or "public squares," but, by any name, the salient point is that the area is created from a reclaimed space and intended for public use.

Unfortunately, once these pocket parks are constructed, their maintenance and resulting liability fall into question.[3] One particular problem created for an abutting landowner is when the pocket park occupies what was once a street controlled by the City's Transportation Department. This presents a question regarding whether the former street now made into a pocket park should be considered a sidewalk, thus creating a new duty upon the abutting landowner to maintain and repair the area under §7-10 of the Administrative Code.

The answer is "no." From the perspective of law and logic, it is irrelevant to the building owner whether the City is delegating its maintenance and operational responsibilities for the street and the pocket park to a third-party operator of the park (usually, a not-for-profit corporation), or, alternatively, is statutorily substituting the park operator for itself as the party exclusively responsible for maintaining and operating the street and the pocket part, because the abutting building owner was not a party to the transaction. And since it is not a third-party beneficiary of the transaction it should not be a third-party casualty of the transaction through the imposition of a sidewalk liability that did not exist before the transaction.

The City of New York's website, entitled "NYC Plaza Program,"[4] certainly suggests that the liability and responsibility for the street and the pocket park reside exclusively with the not-for-profit operating the park. The City's website indicates that the "DOT works with selected not-for-profit organizations to create neighborhood plazas throughout the City to transform underused streets into vibrant, social public spaces." The City's website goes on to state that the DOT "partners with community groups that commit to operate, maintain, and manage these spaces" and, importantly, "before construction is complete, the not-for-profit organization will enter into an agreement with DOT for the maintenance of the plaza [by the not-for-profit] so that the site is kept clean and in a state of good repair. The specific maintenance services to be provided may include daily sweeping . . . and shoveling snow" and "as needed, DOT will monitor and inspect the plazas to assess and confirm that the not-for-profit partner organizations are fulfilling their responsibility as set forth in an Agreement with DOT."

Accordingly, it would appear that insofar as the City is concerned, the abutting building owner is not, and never will be, responsible for maintaining and repairing the street or the pocket park while the not-for-profit operates the park. The DOT appears to be good-intentioned in its goal to "transform underused streets" in an effort to add open space, and the City seems to reassure the abutting building owner that the not-for-profit organization is to maintain the area. The problem is that the City never states that when its agreement with the not-for-profit expires, the City will attempt to impose the duty to maintain and repair the street (that it had before the not-for-profit stepped in), upon the

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abutting building owner.

Following the expiration of the DOT's agreement with the not-for-profit, one argument available to the defendant is that the duty to maintain the area reverts back to the entity from which it sprung in the first place, namely, the DOT. One argument for the defendant to consider is whether the City continued to exercise control over the area following the enactment of Administrative Code §7-210. For example, §7-210 was enacted in 2003, however, the City may have hired contractors to repair the area after 2003.

Another argument available to the defendant is the interpretation of Administrative Code §§1-112, 19-101 and 7-201(c). Section 1-112 of the Administrative Code, which sets forth the general rules of construction of various terms used in the Code, provides, in pertinent part: "Unless expressly otherwise provided, whenever used in the code, the following terms shall mean or include: ... 13. 'Street'. Any public street, avenue, road, alley, lane, highway, boulevard, concourse, parkway, driveway, culvert, sidewalk, crosswalk, boardwalk, viaduct, square or place, except marginal streets."

Section 19-101, concerning the construction, maintenance, repair obstruction and closure of streets and sidewalks provides, in pertinent part, "Definitions. Whenever used in this title: ... d. 'Sidewalk' shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians."

Section 7-201 provides, in relevant part, that "the term 'street' shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area" and that "the term 'sidewalk' shall include a boardwalk, underpass, pedestrian walk or path, step and stairway."

Defendants should argue that a plain reading of the Administrative Code requires that the term "sidewalk" be given its commonly understood meaning, as comprising a pedestrian walk between the curb lines and the adjacent property lines; in contrast to a "public square" and "public place," which are part of the street. To hold otherwise would produce an absurd result, both legally and practically, because these spaces can encompass vast areas, for which reason it would be unreasonable to interpret §7-210 as qualifying squares and plazas as sidewalks for liability purposes.[5]

Of importance, the Queens County case of Moore v. The City of New York, 2015 NY Slip. Op. 30213, decided on February 5, 2015, specifically noted that "the issue of whether a public square or plaza is a sidewalk within the contemplation of §7-210 appears to be one of first impression." Moore concluded that Fox Square Plaza is not a sidewalk within the meaning of §7-210, and that the abutting property owner may not be held statutorily liable to plaintiff for failing to maintain and repair it.

In Moore, the plaintiff allegedly tripped and fell while walking on "Fox Square Plaza" in front of 1 Flatbush Avenue, Brooklyn, New York. Fox Square Plaza, paved with decorative square concrete pavers, was a pedestrian square with public seating. The DOT constructed the plaza abutting the defendant's premises. The defendant argued that this area was not a sidewalk and therefore that it was not required to maintain it under §7-210. In opposition, the plaintiff and the City argued that Fox Square is a sidewalk and that the property owner is statutorily liable for failing to maintain it.

Moore, analyzing Sections 1-112, 19-101 and 7-201 of the Administrative Code, determined that a plain reading of the language of these Administrative Code provisions requires that the term "sidewalk" as used in §7-210 be given its commonly understood meaning, that is to say, as comprising those areas of "a boardwalk, underpass, pedestrian walk or path, step and stairway" "between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb." In contrast, a "public square" and "public place" are part of the street. The Court held that this is the only rational interpretation of the meaning of the term "sidewalk" in §7-210, in light of a plain reading of the foregoing sections of the Administrative Code and the intent of the Legislature as gleaned in its Report of the Committee on Transportation.

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Moore, guided by the general principle of statutory construction, held that a statute should not be interpreted in a manner that would produce absurd results. The Court dismissed as absurd any suggestion that the Legislature intended §7-210 to require an adjacent property owner to be the custodian of a public square, a major architectural feature that may be hundreds of feet in diameter, that contains public seating, and that was constructed by the City for the use of the public to mill about and congregate.

Again, Moore was a case of first impression. There is one earlier case that, read too broadly, could be mistakenly thought to be relevant to pocket parks, James v. 1620 Westchester Ave., LLC, 105 A.D.3d 1 (1st Dep't 2013). In James, the defendants owned a triangular-shaped building. The irregular shape of the defendants' building created a large triangular-shaped sidewalk area. The irregular shape created two paved sections of sidewalk with a smaller, unpaved, triangular area with grass and trees between these two paved sections. The plaintiff's accident occurred on the portion of the paved sidewalk adjacent to the unpaved grassy area. The Court held that the defendant building owner was responsible to maintain this portion of the sidewalk.

The pocket parks in Moore bear no resemblance to the grassy triangular area in James, because, among other things, pocket parks are reclaimed from former roadways and contain park-like amenities. Unlike a grassy triangular area, pocket parks have the characteristics of a public square or of a public space. It has none of the characteristics of an ordinary sidewalk. As such, a pocket park is not a sidewalk within the meaning of §7-210 and therefore the abutting property owner should not be held statutorily liable to plaintiff for failing to maintain and repair it.

[1] Pocket Parks by Alison Blake

[2] Id.

[3] Id.

[4] http://www.nyc.gov/html/dot/html/pedestrians/nyc-plaza-program.shtml

[5] See Moore v. The City of New York, 2015 NY Slip. Op. 30213.

Obtaining Social Media Evidence During Discovery

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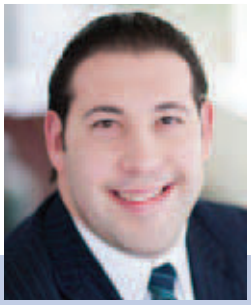
quickly to obtain any and all publicly available posts that may contradict plaintiffs' claims in order to meet their burden of showing that the private portions of plaintiffs' social media accounts are likely to contain relevant materials. To that end, it is vital that litigators be thoroughly versed in the use, availability and discoverability of social media evidence and keep apprised of developments surrounding same.

Obtaining Social Media Evidence During Discovery



PAUL ZOLA*

With the ever increasing prevalence of social media in our everyday lives, it's no surprise that the discovery of social media evidence has become such an integral aspect of trial preparation. Savvy litigators know that the skillful use of social media evidence both in and out of the courtroom can provide tactical advantages, and lead to favorable liability apportionments, reductions in damage assessments, and even defense verdicts.

In June, 2015, Facebook had 968 million daily active users on average and 1.49 billion monthly active users as of June 30, 2015. *See* Newsroom, Key Facts, Facebook.com, (last visited September 22, 2015). As of April 1, 2015, Twitter received upwards of 500 million tweets per day. *See* Craig Smith, "By the Numbers: 150+ Amazing Twitter Statistics," *Digital Marketing Ramblings*, (last visited September 22, 2015). People not only use social networking sites to connect with old friends, but also for sharing things such as developments and milestones in their lives, memories, political views, shopping experiences, photos of themselves in various locations (often showing or describing the activity that the photo is depicting), and their current location or mood. A person's social networking page can also show events they are attending/have attended, activities they enjoy, videos they took or were tagged in, people they are friends with, and so much more. This all-encompassing involvement of social media in our lives creates a treasure trove of discoverable and admissible material/data for the defense in litigation.

Social media evidence, if properly obtained and utilized, can strike a fatal blow to a plaintiff's quest for riches, as it can be a powerful tool in contradicting plaintiffs' claims, such as those for: the degree of disability plaintiff has sustained, if any; their inability to do certain things; or the quality of their lives. For example, in 2014, social media evidence led to the arrest of over 100 retired New York City municipal workers for alleged Social Security fraud based on allegedly fabricated claims that they were completely incapacitated by serious mental/psychiatric disabilities. *See* William K. Rashbaum and James C. McKinley Jr., "Charges for 106 in Huge Fraud Over Disability," *The New York Times*, (January 7, 2014). One of those workers, who claimed he was too disabled to even leave his home, had a Facebook page that contained photos of him holding a large swordfish while deep-sea fishing. *Id*. Other photos showed a retired worker riding a jet ski, and others working in jobs such as helicopter pilot and martial arts instructor. *Id*. Thus, it is not unlikely that plaintiffs in personal injury matters will post photos of themselves engaging in activities that they claim they cannot perform.

However, coinciding with the increased prevalence of social networking usage, is an increase in the privacy settings available to social media users and the effect those privacy settings may have on the ability of the defense to compel the production of certain data, which, if not properly addressed, can frustrate the discovery process. The following discusses strategies for obtaining social media evidence during discovery.

At the outset of discovery, it is important to search for any online content that may have been posted by the claimant/plaintiff in your action. You need to determine what content is out there. This includes blogs, Facebook, Myspace, Twitter, YouTube, Instagram, and anything else that may have been posted by your adversary online. You should also search for the social media accounts of any known friends or relatives of the claimant/plaintiff in your action as those accounts may contain posts about your adversary or photos of your adversary that may not have been visible on your adversary's account or profile. It should be noted, however, that it is important to avoid doing anything that may be considered unethical

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conduct, such as "friending" a litigant who is represented by counsel. If you are not careful, you can even inadvertently make unethical contact with a litigant who is represented by counsel. For example, LinkedIn notifies users when someone views their profile, and this could be viewed as an improper communication with a represented party. *See* New York State Bar Association, "Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association," at Guideline No. 4.A, (updated June 9, 2015).

If you come across any relevant or useful Internet posts during your initial search, it is imperative that you print, screen shot, or otherwise save them. While this material may be difficult to authenticate and may receive a high degree of judicial scrutiny, it will be useful in support of motions to compel in the event that plaintiff subsequently removes those posts or changes his/her privacy settings and/or refuses to produce them. The material you obtain during your initial search will be used to demonstrate relevancy and a basis for the discovery you later seek to compel.

Unless you find something useful during your initial search, it is recommended that you hold off on making any discovery demands for social media evidence until after taking plaintiffs' deposition. And even if you do find something useful, in most instances, it is still best to wait until plaintiffs' deposition to disclose what you found as you may receive a more candid response from plaintiffs if they do not have an opportunity to prepare for your questioning.

During the deposition you should ask plaintiffs: whether they have profiles on any social networking sites; if they have ever posted or published anything related to the subject incident; if have ever discussed the subject litigation or their incident with anyone via Facebook messenger or on any other social networking site; whether they have a resume with their current work history posted anywhere on the Internet; or, if they have posted any photos showing them conducting activities they are now claiming they cannot engage in, photos of them on vacation, or any photos at all since the time of the subject incident. Plaintiffs' answers to these questions along with any materials you found during your initial search will provide the grounds for you to overcome plaintiffs' later objections to your discovery demands.

After the deposition, you should serve discovery demands on plaintiffs for the public and non-public portions of their social networking accounts. The demand may ask them to identify all websites, blogs, social network accounts, or other electronic media platforms they have used since the time of the subject incident, along with the user names and passwords they use to access those accounts and the names of any other individuals who have access to those accounts. You may also demand that they produce all documents comprising or referencing the content that has been posted by plaintiffs or at plaintiffs' direction to any of the above named social networking sites or other media platforms, since the time of the subject incident. However, as discussed in more detail below, it would be prudent to narrowly tailor these discovery requests so that they only seek materials that relate to the subject incident or plaintiffs' claims arising from same.

While you can also demand that plaintiffs provide authorizations allowing the social networking sites to release their data, most sites are reluctant to release this information and will reject the request, they will also most likely move to quash any subpoena served for this information. That is not to say you will never be successful in processing an authorization or overcoming a motion to quash your subpoena for records from a social networking site. In *People v. Harris*, 36 Misc. 3d 613, 945 N.Y.S.2d 505 (N.Y. City Crim. Ct. 2012), the ADA issued a subpoena on twitter for the account of a defendant arrested during an Occupy Wall Street demonstration. In upholding the subpoena, the court held that "you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world." *Id.* However, while you may be successful in processing an authorization or upholding a subpoena, there are easier and more cost effective ways to obtain social networking data. For example, sites like Facebook have created an option that allows users to download a "data file" containing all of their account history in a single document, including all account activity, such as

posts, photos, communications, and even things they have deleted.

Even private posts are discoverable. It is well established in New York that the production of private social media discovery will be compelled when the legal and factual predicate for the production of same is demonstrated through inconsistencies in plaintiffs' deposition testimony and/or the public portions of their social networking accounts. The contents of a social media account are material and necessary where the information "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." *See Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311 (1st Dep't 2011). New York Courts have recognized that social media postings, if relevant, are not shielded from discovery merely because a party used privacy settings to restrict access. *Id.*

In *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010), the defense sought the discovery of the non-public portions of a personal injury plaintiff's social media pages on the grounds that they would contradict plaintiff's claim that she suffered injuries that lessoned her enjoyment of life and limited her participation in certain physical activities, such as horseback riding and running. In rejecting plaintiff's privacy arguments, the court found that plaintiff could have no reasonable expectation of privacy in her participation in social media sites whose very purpose is sharing information with others and whose terms of use state that even private content may become publicly available. *Id.* at 656. Furthermore, the court stated that to allow a plaintiff who is claiming severe physical and emotional injury to hide behind self-set privacy controls on a site, "the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial." *Id.* at 655.

However, to avoid the implication that defendants are engaging in a "fishing expedition" for relevant material, and ensure the greatest likelihood of success on a motion to compel social media discovery over plaintiffs' objections, demands for this content should be as narrowly tailored as possible. *See Fawcett v. Altieri*, 38 Misc. 3d 1022, 1027, 960 N.Y.S.2d 592 (N.Y. Sup. Ct. 2013)("granting carte blanche discovery of every litigant's social media records is tantamount to a costly, time consuming 'fishing expedition,' which the courts ought not condone"). *See also, Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *Patterson*, 88 A.D.3d at 618. Essentially, you must demonstrate a good faith basis for your discovery request, rather than rely on the mere hope of finding relevant evidence on social media accounts. *Fawcett*, at 1028. This is where the results of your initial search at the outset of discovery and plaintiffs' responses to your questioning at their deposition will be most useful as they will allow you to establish a good faith basis for your discovery demand and make a threshold showing that the material sought is likely to be relevant to the case. You will need to argue that the publicly available materials contradict plaintiffs' claims or testimony, and therefore, it is more than likely that there are relevant materials on the private portion of plaintiffs' social media accounts. For example, in reaching its decision in *Romano, supra*, the Supreme Court found that "[i]n light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action." *Id.* at 654. Whether a threshold showing is required or not, to maximize the likelihood of success on your motion to compel, you should attempt to narrow your requests to specific time frames and subject matters. If your requests are limited to relevant time frames and/or subject matter, you will decrease the likelihood that a court will find your request to be an unwarranted "fishing expedition."

While it is well established that social media evidence is discoverable, New York Courts have taken various approaches towards the way in which social media evidence is disclosed. In *Romano*, *supra*, the Suffolk County Supreme Court directed plaintiff to provide defendants with a consent and authorization permitting them to access plaintiff's social media records, including any records previously deleted or archived. In *Jennings v TD Bank*, 2013 N.Y. Misc. LEXIS 5085, 2013 NY Slip Op 32783[U]

(N.Y. Sup. Ct. 2013), the Nassau County Supreme Court directed plaintiff to provide all current and historical Facebook pictures, videos, or relevant status posts from her account from the date of the alleged incident, including previously deleted or archived records. More recently, New York Courts have ordered that *in camera* inspections of plaintiffs' private social media postings be conducted to avoid the production of irrelevant or privileged private data. This seems to have become the standard in New York with respect to the production of private social networking data, once defendants have established a factual predicate for said production. For example, in *Spearin v. Linmar*, L.P., 129 AD3d 528, 11 N.Y.S.3d 156 (1st Dep't 2015), the Appellate Division reversed an order directing plaintiff to provide access to his Facebook account from the date of his incident to present on the grounds that it was "overbroad," and remanded the case for an *in camera* review of plaintiff's post-incident postings for identification of materials relevant to plaintiff's alleged injuries. Additionally, in *Gonzalez v. City of New York*, 47 Misc. 3d 1220(A), 2015 NY Slip Op 50712 (U) (N.Y. Sup. Ct. 2015), plaintiff objected to the discovery of his social media accounts on the grounds that defendants failed to establish that those accounts contained relevant materials. Plaintiff testified that he only posted one photo of his knee on Facebook that corroborated his claim that his knee was injured, and he did not post any comments about the subject accident or his injuries. *Id*. Defendants contradicted this testimony with Internet search results that showed that plaintiff made several comments about his incident, how it happened, his injuries and his recovery. *Id*. Although the court found that this was sufficient to establish that the discovery of plaintiff's social media account was likely to lead to relevant evidence, the court ordered an *in camera* inspection of "all status reports, e-mails, photographs, and videos" posted on plaintiff's social networking accounts since the date of the incident to determine which materials, if any, were relevant to plaintiff's claims. *Id. See also, Richards v. Hertz Corp.*, 100 A.D.3d 728, 730, 953 N.Y.S.2d 654 (2d Dep't 2012)(lower Court should conduct an *in camera* inspection of all status reports, emails, photos, and videos posted on plaintiff's Facebook profile since the date of the incident to determine which of those materials, if any, are relevant to plaintiff's injuries); *Nieves v 30 Ellwood Realty LLC*, 39 Misc. 3d 63, 966 N.Y.S.2d 808 (1st Dep't 2013)(same). Alternatively, in *Melissa G v North Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389, 6 N.Y.S.3d 445 (N.Y. Sup. Ct. 2015), the Suffolk County Supreme Court discussed the appropriateness of an in camera inspection to determine the discoverability of material on plaintiff's Facebook account and held that "[i]n discovery matters, counsel for the producing party is the judge of relevance in the first instance" and "there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function." As such, the court directed plaintiff's counsel to review the Facebook postings and disclose all posts that were relevant to plaintiff's damages claim. *Id*.

One thing is clear from the various decisions made by New York Courts. The most persuasive support for a motion to compel social media discovery is material from public posts that contradict plaintiffs' claims. Thus, another option to consider at the outset of discovery is retaining the assistance of an e-discovery company or private investigator who specializes in the collection and preservation of social media postings. While this method may be costly, these companies/investigators can conduct broad and in-depth searches for any Internet posts made by your adversary. They can collect all of the metadata associated with a user's social networking profile, and with that, they can establish an iron clad chain of custody and compile all the search results in a concise report. Metadata is data contained within an Internet post, photo or document that can tell you when a photo or text was authored/edited, who the author was, the device used to post the photo or text (i.e. phone, iPad, computer), and the media's hash value (the digital equivalent of a Bates stamp). Again, although this option may be costly, depending on what they find, this information can be invaluable, not only in support of a motion to compel, but also in getting this evidence admitted at trial.

In conclusion, the discovery of social media merely requires the application of traditional discovery principles in a somewhat novel context. Relevancy is the focus of whether social media evidence is discoverable. Thus, litigators must act

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Modern Day Discovery Disputes - Cases and Principles

BRADLEY J. CORSAIR*

Among the menu of subjects in personal injury litigation, discovery issues are akin to fast food -- not novel or spectacular, but often consumed and with varying satisfaction. As a visitor to venues where these meals are served, I've thought that a digest of recent discovery disputes and outcomes would be useful. That is how this article came to be, and sequels may follow given the breadth and fluid nature of this area.

The research discussed here is principally contemporary reported cases that have decided discovery contests. I have categorized these cases into a number of topics that are presented generally in alphabetical order, so readers can readily return to a topic of interest as necessary. Included is a mix of discovery items, disclosure devices, and procedural issues.

Basic Discovery Standards

CPLR 3101(a) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[1] Moreover, CPLR 3120 is the statutory source for production of a document or thing: "After commencement of an action, any party may serve on any other party a notice ... to produce and permit the party seeking discovery ... to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served."[2] The obligation to search for responsive items is not limitless, however: "a party cannot be compelled to produce records, documents, or information that were not in its possession, or did not exist."[3]

The First Department in late October 2015 stated a general standard to justify production of discovery to potentially support a defense. The defendant should demonstrate two things. First, that there is a factual basis for the defense;[4] second, that "the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the defense."[5]

Typically exchanged discovery in personal injury cases includes insurance coverage information; authorizations to obtain records concerning the plaintiff from health care providers, employers, and collateral sources; eyewitnesses; notice witnesses; opposing party statements; photographs and video of an incident scene; and incident reports prepared in the regular course of a party's business. Other popular discovery devices include depositions of parties and non-party witnesses, and defense medical examinations ("IMEs"). This is self-evident from pre-printed language in form preliminary conference orders.[6]

Be wary that a casual denial of possession of discovery, followed by a later disclosure that ought to have made earlier, can have serious judicial consequences.[7] Lack of formal disclosure is sometimes forgiven where the information was made available or known at a deposition, as with notice witnesses for example.[8] A broader review of discovery failure is provided later in this article.

Authorizations

A wealth of disputes focuses on types of a plaintiff's records or information that should be authorized, and corresponding time frames. Concerning medical records, the general rule is that authorizations are due with relation to conditions affirmatively placed in controversy.[9] It has thus been held that "a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental

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condition in issue."[10] A purported need to take prescription narcotic medications implicates a plaintiff's mental condition.[11]

To justify authorizations for records not relating to treatment or testing of injuries specified in bills of particulars, a defendant may need to demonstrate that the information sought is material and necessary to a claim or defense. The showing should be made with the original motion rather than awaiting reply papers, when seeking authorizations as to a primary care physician or cardiologist for example.[12] Where a plaintiff has claimed **loss of enjoyment of life**, authorizations for release of **alcohol** and **drug abuse** records have been directed, as well as for **pharmacy** and **health insurance** records,[13] for **social security disability** records,[14] and for records concerning serious medical conditions that are unrelated to the subject accident, such as **diabetes**.[15]

It is commonly appropriate to pursue authorizations to access information relating to a plaintiff's **prior** or **subsequent** traumatic event. In a case involving multiple bodily injury, i.e. neck, back and right knee, the Second Department has directed authorizations for the plaintiff's records reflecting her "medical history" and "preexisting physical conditions" including records of a non-medical custodian (Witness Security Office pertaining Witness Protection Program) reflecting her physical condition.[16]

An allegation of an exacerbation of a **pre-existing condition** or the like opens the door in a similar way. In a First Department case, the defendant was accused of causing "aggravation of a pre-existing latent and asymptomatic degenerative condition. Accordingly, defendants sought authorizations for those portions of plaintiff's dental records that discuss her medical history. Inasmuch as plaintiff has clearly voluntarily put her prior medical condition at issue, such disclosure is material and necessary for the defense of this action so that defendants may ascertain her condition."[17] In this scenario, the Second Department has directed release of all medical records for the five years preceding the subject accident.[18] And where the plaintiff has **congenital** conditions of relevance, there may be cause for authorizations relative to an extended or even life-long medical history.[19]

Regarding **employment** records, it is well understood that authorizations as to work attendance are appropriate, especially where the plaintiff claims disability or the like. And it is also standard for a plaintiff to authorize wage records where loss of earnings is claimed. However, sometimes a plaintiff should permit a broader range of records from an employer. For example, an "authorization for any medical records related to the claimed injuries in his employment file from one year prior to the motor vehicle accident at issue to the present" has been required.[20]

A plaintiff might decline to provide an authorization for information from a **social networking** service, or the service might fail to respond to such an authorization. There is, however, judicial precedent for obtaining social networking user information directly from a plaintiff. The First Department has directed an *in camera* review of a plaintiff's post-accident Facebook postings for identification of information relevant to that plaintiff's injuries.[21] To justify such relief, one must establish a factual predicate; an example would be a showing that a photograph or a text post, that is publicly available on **Facebook**, tends to contradict a material contention that the plaintiff has made by way of deposition testimony, an affidavit, or a verified pleading.[22]

Custodian of Evidence is Defunct (MRI Films)

It is routine practice to demand and receive authorizations to obtain medical records, films, and other kinds of evidence. But it occasionally happens that a third party source of such information ceases operations, and the information cannot be obtained elsewhere. What is a defendant to do?

One possibility is a motion under CPLR 3124 and 3126 to compel the plaintiff to make the information available for inspection, and to preclude the plaintiff from introducing such as evidence if it is not produced. This was done in a case where a custodian of MRI films was ultimately no longer in business.[23] There, it was proper "to compel the plaintiffs to make the MRI films available for duplication or, pursuant to CPLR 3126, be precluded from offering the films and/or the reports related to the films into evidence at the time of trial."[24] Such plaintiffs may be relieved of any burden, however, where the subject medical records or things are "not in their

possession or control or the possession and control of their counsel, treating physicians, experts, or anyone under their control."[25]

Depositions - Adjournments

Adjourning a court-ordered deposition without advance judicial permission can result in a sanction. And courts frequently stress that "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[26] However, there is still authority to support forgiveness in some circumstances, at least if some legitimate excuses can be provided; "multiple adjournments of a party's deposition are generally not grounds for dismissal" or for a stricken pleading.[27]

Depositions - Business Entity Party

"A corporate entity has the right to designate, in the first instance, the employee who shall be examined."[28] A party's officer, director, member, agent or employee is a potential candidate for a mandatory deposition.[29] However, the party need not necessarily produce such persons of a parent or sibling business, especially where control over the witness is lacking.[30]

Depositions - Former Employee

Perhaps you have attended a business client's deposition revealing that a former employee has key knowledge, and then heard disappointment that the person hadn't already been produced. But it is a "well-established principle that a party may not be compelled to produce a former employee for a deposition."[31] Be wary though that an attorney's course of conduct, such as volunteering to produce a former employee or appearing to represent him, can translate to an obligation to make the witness available.[32]

Depositions - Inadequate Witness / Further Deposition

"A further deposition may be allowed where the movant has demonstrated that (1) the employee already deposed had insufficient knowledge, or was otherwise inadequate, and (2) the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case."[33] Where a party's deposed witness was generally unknowledgeable, or lacked knowledge on just one critical issue, that can be grounds for preclusion where that party then breached an order requiring a further deposition.[34]

Depositions - Non-Party - Misconduct

Where one party's attorney deposes a non-party, and then the non-party terminates the deposition before other counsel can question him, one can expect a court to refuse to consider any of the deposition testimony.[35] Trial testimony of such a witness might well be precluded as well.

Expert Witnesses - Timing of Disclosure

"CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party."[36] Thus, "the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely."[37] This is true even where an adverse party had demanded expert disclosure during the discovery phase.[38]

As this illustrates, there is generally no bright line standard for evaluating timeliness of a post-note of issue expert exchange. There is however the possibility that a local court-wide rule, a court part or judge rule, and/or a discovery phase order will speak to this.[39] Further, with relation to a plaintiff's treating physicians / medical experts, note that 22 NYCRR 202.17(g) contemplates that any supplemental medical report shall be served "not later than 30 days before trial" so long as the plaintiff is available for an additional defense medical examination.[40]

Of course, there comes a point where a disclosure is arguably or obviously late. In that situation, whether there is "good cause" for the delay is an important factor as to whether the expert will be permitted.[41] On a related note, beware that a delayed motion in limine to exclude an expert can itself be rejected due to lateness, especially where

the belated motion timing is deliberate. That tactic has been described as "an intentional avoidance of the strictures of the CPLR's notice provisions" and "something akin to an ambush."[42]

Post-note expert disclosure timeliness in a summary judgment context is something of a sub-category. According to the Second Department these days, "a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment."[43] Where expert disclosure is submitted in opposition and is not willfully late, and where the movant has an opportunity to refute it via reply papers and is not otherwise prejudiced, all of the expert disclosure may be allowed.[44] This represents a departure from some earlier Second Department cases that seemingly required exclusion of an affidavit from an expert not disclosed before the note of issue filing, absent a valid excuse for the delay.[45] However, willful delay without excuse remains a potential basis for excluding an expert's affidavit.[46]

That a late expert disclosure was a violation of an explicit court directive, especially a willful violation, is a factor in favor of excluding it.[47] Potential prejudice to an adverse party from allegedly late expert disclosure can sometimes be ameliorated by a trial adjournment of e.g. several weeks, to thereby allow time for responsive trial preparation.[48] A lack of prejudice has also been found where all parties' experts had been present concurrently at an inspection.[49]

"IME" (Defense Medical Examination) - Emotional Distress

A claim of emotional distress can warrant an IME in some circumstances. A plaintiff in a wrongful termination case[50] pled causes of action for, among other things, intentional infliction of emotional distress. Her allegations included "extreme mental and physical anguish" and "severe anxiety" and she sought $15 million for emotional distress damages. Though the plaintiff did not blame the defendant for any diagnosed psychiatric condition and hadn't retained a medical expert as to emotional distress, her deposition did indicate manifestations such as eczema, hair pulling, anxiety, depression, and suicidal feelings. This amounted to unusually severe emotional distress allegations such that the plaintiff had placed her mental condition "in controversy." Consequently, a mental examination by a psychiatrist was warranted to enable the defendant to rebut the emotional distress claims.

"IME" (Defense Medical Examination) - Further IME

A further IME is permissible provided the party seeking the examination demonstrates the necessity for it.[51] A potential example is where the plaintiff, after the original IME, has served a supplemental bill of particulars alleging injury to a part of the body not previously known to be implicated. In that scenario, a defendant is typically "entitled to newly exercise any and all rights of discovery with respect to such newly alleged continuing disabilities. Defendant's discovery rights include the right to take a further deposition, and to notice a physical examination."[52] Moreover, the defendant has the option of designating a defense medical examiner who is different than the original IME doctor.[53]

A further defense medical examination may also be indicated where a plaintiff has been examined by his medical expert long after the original IME, especially where a child is involved. Accordingly, in such circumstances, it was held that "fairness demands that defendant be permitted to have additional IMEs performed at this later stage of the infant plaintiff's development and not be relegated to reliance on IMEs conducted years before. Logically, plaintiffs cannot propose to present expert evidence based on the later examinations and, at the same time, assert that the expert evidence based on the later examinations will not materially change the nature of the injuries for which recovery is sought."[54]

"IME" (Defense Medical Examination) - Multiple Exams with Same Specialty

The notion of having multiple defense medical examinations to reflect all specialties of a plaintiff's treating physicians is well familiar to legal practitioners. Indeed, it is long settled that CPLR 3121(a) has no limitation on the number of medical examinations to which a plaintiff may be subjected.[55] Perhaps lesser known, though, is the potential for entitlement to defense medical examinations by

separate physicians of the same specialty, who concentrate in different bodily areas.

In a recent Second Department case,[56] the defendant designated one orthopedist to examine the plaintiff's spine and another orthopedist to examine the plaintiff's knee. After the first orthopedist did his exam, which was limited to the spine, the plaintiff refused to attend the other exam. The lower court then declined to compel the plaintiff to visit the second defense orthopedist, but did direct the plaintiff to be examined again by the first orthopedist. The defendant then obtained an affidavit from the first orthopedist stating that he didn't feel qualified to examine as to the knee. In view of that affidavit, it was held on appeal that an examination by the second orthopedist as to the knee was warranted.

Although not involving literally one specialty, I also note here that there is precedent indicating that with a claim of traumatic brain injury (TBI), a defendant should be entitled to both neuropsychiatric and neuropsychological IMEs.[57]

"IME" (Defense Medical Examination) - Video of Examination

In a November 2015 decision, the Appellate Division / Second Department opined that an IME should not be videotaped -- surreptitiously or otherwise -- without advance judicial permission upon a showing of "special and unusual circumstances.[58] The Court noted that there is no explicit authority for the videotaping of medical examinations in CPLR 3121 or 22 NYCRR 202.17. The absence of express statutory authority for videotaping an IME has been emphasized in other appellate opinions on this subject.[59] In the Third Department, requests to videotape IMEs have been adjudicated case-by-case, and video has not been allowed absent special and unusual circumstances.[60] A potential example of such circumstances is where the plaintiff is seemingly unaware of his environment and unresponsive to the actions of individuals in his presence.[61]

As for the role of a plaintiff attorney, presence at an IME remains permissible, but "'limited to the protection of the legal interests of his client' and in regard to the 'actual physical examination ... he has no role.'"[62] Moreover, "[w]hat the law of this state does not contemplate is plaintiffs' attorneys taking it upon themselves to surreptitiously videotape an IME, without the knowledge of the examining physician, without notice to the defendants' counsel, and without seeking permission from the court."[63]

The Second Department also held on this occasion that a video recording of an IME of a party should be timely disclosed to opposing counsel pursuant to CPLR 3101(i).[64] The Court explained that while CPLR 3101(i) was enacted primarily to prevent unfair surprise where a defendant has obtained surveillance video to potentially challenge claims of injury severity, the statute is not limited to that scenario and "requires disclosure of any films, photographs, video tapes or audio tapes of a party, regardless of who created the recording or for what purpose."[65] This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."[66]

"IME" (Defense Medical Examination) - Waiver, or Not

A right to conduct an IME may be considered waived especially where the defendant both failed to designate a physician or to hold the examination by a court-ordered deadline, and also failed to move to vacate an ensuing note of issue within 20 days after its service.[67] A motion seeking discovery that is made at a later time generally requires a demonstration that "unusual or unanticipated circumstances" developed subsequent to the note of issue filing, requiring additional pretrial proceedings to prevent substantial prejudice.[68] Without such a showing, one should not expect a belated IME to be granted.

In contrast, a late IME may be allowed where a note of issue filing was on the heels of an expired IME exam deadline, and the defendant then promptly designated the IME and moved to compel it. In this context, the defendant's motion can be granted upon considerations that only a short delay was involved, and the plaintiff is not prejudiced because the case is staying on the trial calendar.[69]

Motion to Compel Discovery - Good Faith Effort Requirement

The Appellate Division continues to espouse the general rule that a motion to compel discovery shall include an affirmation of good faith, i.e., an affirmation representing that the movant made good faith effort to resolve the discovery problem,

before resorting to motion practice.[70] If such an affirmation is absent from the motion papers, the motion is supposed to be denied, without regard to its merit.[71] This is also true for motions that seek to vacate a note of issue because discovery is purportedly not complete.[72] As for the content of the affirmation, it is to comply with the requirements of 22 NYCRR 202.7.[73]

Non-Party as Source of Discovery

"Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure."[74] A subpoena or accompanying disclosure notice should literally state these circumstances or reasons, and the discovery will be due if it is relevant to the prosecution or defense of the action.[75] Where deposition testimony is sought, a party or non-party seeking to avoid the testimony must show that it would be "utterly irrelevant" or that "the futility of the process to uncover anything legitimate is inevitable or obvious."[76]

Note of Issue Extensions

A plaintiff who needs additional discovery but who faces a note of issue filing deadline may move for an extension of that deadline pursuant to CPLR § 2004.[77] A defendant wanting to oppose this outcome would be better positioned by having made a 90-day demand under CPLR 3216.[78] Absent a failure to comply with such a demand, a court has discretion to grant this extension upon a reasonable excuse for the delay and a lack of prejudice to the defendant.[79]

Sanctions for Discovery Failure - Basis for Sanction

CPLR 3126 gives a court discretion to impose a sanction for discovery failure. The classic foundation for a sanction in this realm is willful and contumacious conduct. What constitutes willful and contumacious conduct is somewhat of a case by case inquiry. It "may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time."[80] It has been found to exist where, for example, the discovery failure continued despite court conferences, hearings, and issuance of multiple disclosure orders, including a conditional order of preclusion, together with contradictory excuses.[81]

The papers comprising a motion for a sanction for discovery failure should include, as applicable, any discovery notices, deposition notices, correspondence, and disclosure orders that collectively demonstrate the movant's efforts to obtain the discovery and the adverse party's failure to comply.[82] On the other hand, an adverse party's good-faith effort to locate items is a factor weighing against a sanction, even though the items were not found.[83] A moving party's own discovery delay can be a factor for consideration as well.[84]

As for what relief should be requested or expected, that naturally depends on the extent of the discovery failure and its effect on the movant's ability to prove a claim or defense. A discussion of potential outcomes now follows.

Sanctions for Discovery Failure - Preclusion

It has been said that public policy strongly favors the resolution of actions on the merits whenever possible.[85] This is not a license to flout discovery obligations, however, and thus the conditional order of preclusion is a common judicial response to a repeated failure of disclosure. "As a sanction against a party who 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed,' a court may issue an order 'prohibiting the disobedient party ... from producing in evidence designated things or items of testimony.'"[86] Such an order "requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order."[87]

A plaintiff who is obligated by a conditional order of preclusion, and who cannot produce the discovery, faces a two-fold burden to be relieved of the discovery mandate and the preclusion: "the plaintiff was required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action."[88] And the burden on any variety of party wanting relief from a disclosure obligation or preclusion has been similarly stated: a reasonable excuse for the failure to produce the requested items, and the existence of a meritorious claim or defense.[89]

When a party in this situation neither produces the discovery nor demonstrates cause for relief, the conditional order becomes absolute. At that point, the order should preclude proof as to matters not furnished[90] and/or preclude a party from testifying at a trial.[91] Problematically for a plaintiff, this sometimes proves to be a predicate for a dismissal of the entire action: "Since the plaintiff is precluded from offering evidence at trial with respect to information sought in discovery and will be unable, without that evidence, to establish a prima facie case, the Supreme Court properly directed the dismissal of the complaint."[92]

Sanctions - Preclusion for Unavailable Discovery - Dogs Included

As seen from the foregoing discussion and cited cases, if a party is unable to produce court-ordered discovery and risks a sanction as a consequence, a motion to vacate that order may well be indicated,[93] with a showing of a reasonable excuse for failure to produce items, and existence of a meritorious claim or defense.[94] Moreover, that the evidence has moved elsewhere, even if seemingly for a good reason, will not necessarily excuse an obligation of production. In one recent case, the "item" was actually a dog that the plaintiffs had adopted from the defendant animal control center, and returned to the defendant after multiple attacks.[95] After suing for e.g. negligent misrepresentation, the plaintiffs obtained a conditional order of preclusion that required the defendant to produce the dog for a "behavioral examination." The defendant had already sent the dog to an animal rescue in another state. Regardless, since the defendant had not challenged the plaintiffs' showing of need for the production, a motion to vacate was required to seek forgiveness from that obligation.

Sanctions for Discovery Failure - Stricken Pleading

A stricken pleading is a plausible sanction for egregious discovery failure, but is viewed as a drastic remedy.[96] A pleading may be stricken, however, where there has been a willful and contumacious failure to comply with court-ordered disclosure, or to disclose information which ought to have been disclosed.[97] One defendant's stricken answer can benefit another defendant, whose cross claims can thereby be admitted, warranting summary judgment on those cross claims.[98] The penalty of a stricken pleading is typically prescribed in an order which decides a motion that requested such a result. There is, however, precedent for a self-executing compliance conference order by which a pleading is deemed stricken upon a failure to meet a discovery requirement.[99] Also significant, a plaintiff who files a note of issue waives any objection to the adequacy of a defendant's disclosures.[100]

Sanctions for Spoliation

"When a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party from being able to prove a claim or defense, the court may impose the sanction of striking the responsible party's pleading."[101] However, a court may impose a less severe sanction, or no sanction, where the missing evidence does not deprive the moving party of the ability to establish the case or defense.[102] In that scenario, an adverse inference charge may be appropriate.[103] There are also circumstances where no penalty is indicated at all. For example, "where a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate."[104] Another example is where the ostensibly aggrieved party is not prejudiced because alternative evidence is or can be made available, such as photographs of the lost item and a deposition of an expert who had inspected it.[105]

CONCLUSION

As now seen, there continues to be a steady flow of appeals involving both common and uncommon discovery disputes. It is my hope that the foregoing review has been informative and will enhance your practices.

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1 *Eremina v. Scparta*, 120 A.D.3d 616, 618, 991 N.Y.S.2d 438 (2d Dept 2014).

2 *Deer Park Associates v. Town of Babylon*, 121 A.D.3d 738, 740, 993 N.Y.S.2d 761 (2d Dept 2014), quoting from CPLR 3120[1][i].

3 *Id.*

4 See *SNI / SI Networks LLC v. DIRECTV, LLC*, 132 A.D.3d 616, 18 N.Y.S.3d 342 (1st Dept 2015).

5 *Id.*

6 Additionally, preliminary conference orders usually enable parties to indicate if any bills of particulars as to claims

or defenses have been served, or will be. The statutory authority regarding bills of particulars is CPLR 3041, 3042, 3043 and 3044. It is technically an amplification of a pleading, and, accordingly, is not among the disclosure devices set forth within CPLR Article 31. However, like a discovery device, it can serve as a means for disclosure of information on select subjects, e.g., in personal injury actions, the subjects listed under CPLR 3043.

7 See e.g. *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept 2012) (eyewitnesses and photographs), and *Dunson v. Riverbay Corp.*, 103 A.D.3d 578, 960 N.Y.S.2d 40 (1st Dept 2013) (notice witness).

8 See *Brown v. Howson*, 129 A.D.3d 570, 12 N.Y.S.2d 54 (1st Dept 2015).

9 *Gumbs v. Flushing Town Center III, L.P.*, 114 A.D.3d 573, 981 N.Y.S.2d 394 (1st Dept 2014); see also *Kenneh v. Jey Livery Service*, 131 A.D.3d 902, 16 N.Y.S.3d 726 (1st Dept 2015).

10 *Graziano v. Cagan*, 105 A.D.3d 701, 702, 962 N.Y.S.2d 643 (2d Dept 2013); see also *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).

11 *Id.*

12 *Gumbs*, 114 A.D.3d 573.

13 See *Azznara v. Strauss*, 81 A.D.3d 578, 915 N.Y.S.2d 868 (2d Dept 2011).

14 See *Graziano v. Cagan*, 105 A.D.3d 701.

15 See *Vodoff v. Mehmood*, 92 A.D.3d 773, 938 N.Y.S.2d 472 (2d Dept 2012), and *Abdalla v. Mazl Taxi, Inc.*, 66 A.D.3d 803, 887 N.Y.S.2d 250 (2d Dept 2009).

16 *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 679.

17 *Colwin v. Katz*, 102 A.D.3d 449, 961 N.Y.S.2d 2 (1st Dept 2013).

18 See *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, 974 N.Y.S.2d 563 (2d Dept 2013).11

19 See *Shamicka R. v. City of New York*, 117 A.D.3d 574, 985 N.Y.S.2d 569 (1st Dept 2014).

20 *Almonte v. Mancuso*, 132 A.D.3d 529, 17 N.Y.S.3d 857 (1st Dept 2015).

21 *Spearin v. Linmar, L.P.*, 129 A.D.3d 528, 11 N.Y.S.3d 156 (1st Dept 2015).

22 See *Spearin*, 129 A.D.3d at 528.

23 *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).

24 *Eremina*, 120 A.D.3d at 618.

25 *Id.*

26 *Sealy v. Uy*, 132 A.D.3d 839, 18 N.Y.S.3d 160 (2d Dept 2015), quoting *Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 81, 917 N.Y.S.2d 68.

27 *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 752, 5 N.Y.S.3d 277 (2d Dept 2015), which notes that striking a pleading is a "drastic remedy."

28 *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d 916, 917, 933 N.Y.S.2d 310 (2d Dept 2011).

29 See *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 363, 841 N.Y.S.2d 225 (1st Dept 2007), citing CPLR 3101(a)(1).

30 *Id.*

31 *Hann v. Black*, 96 A.D.3d 1503, 946 N.Y.S.2d 722 (4th Dept 2012), citing *McGowan v. Eastman*, 291 N.Y. 195, 198, 2 N.E.2d 625 (1936).

32 See *Hann v. Black*, supra.

33 *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d at 917.

34 See *Dominguez v. OCG, IV, LLC*, 82 A.D.3d 434, 918 N.Y.S.2d 406 (1st Dept 2011).

35 See *Gonzalez v. 231 Ocean Associates*, 131 A.D.3d 871, 16 N.Y.S.3d 542 (1st Dept 2015).

36 *Burbige v. Siben & Ferber*, 115 A.D.3d 632, 633, 981 N.Y.S.2d 537 (2d Dept 2014); *Arcamone-Makinano v. Britton Property, Inc.*, 117 A.D.3d 889, 891, 986 N.Y.S.2d 372 (2d Dept 2014).

37 *Rivers v. Birnbaum*, 102 A.D.3d 26, 41, 953 N.Y.S.2d 232 (2d Dept 2012).

38 See *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 976 N.Y.S.2d 73 (1st Dept 2013).

39 See e.g. *Kane v. Utica First Ins. Co.*, 68 A.D.3d 1667, 890 N.Y.S.2d 878 (4th Dept 2009).

40 See also *Giles v. A. Gi Yi*, 105 A.D.3d 1313, 964 N.Y.S.2d 319 (4th Dept 2013).

41 *Newark v. Pimental*, 117 A.D.3d 581, 986 N.Y.S.2d 89 (1st Dept 2014).

42 *Sadek v. Wesley*, 117 A.D.3d 193, 986 N.Y.S.2d 25 (1st Dept 2014), an interesting read on several issues relative to expert witnesses.

43 *Abreu v. Metropolitan Transp. Authority*, 117 A.D.3d 972, 974, 986 N.Y.S.2d 557 (2d Dept 2014).

44 *Id.*

45 This history is discussed in *Rivers v. Birnbaum*, supra, 102 A.D.3d at 41.

46 See *Kozlowski v. Oana*, 102 A.D.3d 751, 959 N.Y.S.2d 500 (2d Dept 2013).

47 See *Arcamone-Makinano*, 117 A.D.3d at 891.

48 See *Burbige v. Siben & Ferber*, 115 A.D.3d at 633. See also *Arcamone-Makinano.*, 117 A.D.3d at 891.

49 See *Arcamone-Makinano v. Britton Property, Inc.*, 117 A.D.3d at 891.

50 See *Clark v. Allen & Overy, LLP*, 125 A.D.2d 497, 4 N.Y.S.3d 20 (1st Dept 2015).

51 *Bermejo v. New York City Health and Hospitals Corp.*, 2015 N.Y. Slip Op. 08374, 2015 WL 7270707 at *14 (2d Dept 2015).

52 *Brown v. Brink Elevator Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dept 2015).

53 *Id.* See also *Lewis v. John*, 87 A.D.3d 564, 928 N.Y.S.2d 78 (2d Dept 2011).

54 *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 440, 976 N.Y.S.2d 73 (1st Dept 2013).

55 See *Bermejo v. New York City Health and Hospitals Corp.*, supra, 2015 WL 7270707 at *14; *Giorgano v. Wei Zian Zhen*, 103 A.D.3d 774, 959 N.Y.S.2d 545 (2d Dept 2013).

[56] *Marashaj v. Rubin*, 132 A.D.3d 641, 18 N.Y.S.3d 79 (2d Dept 2015).

[57] *Chaudhary v. Gold*, 83 A.D.3d 477, 921 N.Y.S.2d 219 (1st Dept 2011).

[58] *Bermejo v. New York City Health and Hospitals Corp.*, supra, 2015 WL 7270707 at *1 and *16.

[59] The *Bermejo* Court noted its review of precedent in other appellate departments and cited *Flores v. Vescera,* 105 A.D.3d 1340, 963 N.Y.S.2d 884 (4th Dept 2013), *Lamendola v. Slocum,* 148 A.D.2d 781, 538 N.Y.S.2d 116 (3d Dept 1989), *Cooper v. McInnes,* 112 A.D.3d 1120, 977 N.Y.S.2d 767 (3d Dept 2013), and *Savarese v. Yonkers Motors Corp.,* 205 A.D.2d 463, 614 N.Y.S.2d 4 (1st Dept 1994).

[60] *Flores v. Vescera,* 105 A.D.3d at 1340, quoting *Lamendola v. Slocum,* 148 A.D.2d at 781.

[61] *Mosel v. Brookhaven Mem. Hosp.*, 134 Misc.2d 73, 509 N.Y.S.2d 754 (Sup Ct / Suffolk Cty 1986).12

[62] *Bermejo*, 2015 WL 7270707 at *15, quoting *Lamendola v. Slocum,* 148 A.D.2d at 782, and *Jakubowski v. Lengen,* 86 A.D.2d 398, 401, 450 N.Y.S.2d 612 (4th Dept 1982).

[63] *Bermejo*, 2015 WL 7270707 at *16.

[64] See *Bermejo*, 2015 WL 7270707 at *1 and *17.

[65] *Bermejo*, 2015 WL 7270707 at *17.

[66] *Id.*, citing *Tai Tran v. New Rochelle Hosp. Medical Center,* 99 N.Y.2d 383, 388.

[67] See *Gianacopoulos v. Corona*, 2015 N.Y. Slip Op. 07948, 18 N.Y.S.3d 558 (2d Dept 2015).

[68] *Id., citing* 22 NYCRR 202.21[d].

[69] See *Jones v. Grand Opal Constr. Corp.*, 64 A.D.3d 543, 883 N.Y.S.2d 253 (2d Dept 2009).

[70] See *Pardo v. O'Halleran Family Chiropractic*, 131 A.D.3d 1214, 16 N.Y.S.3d 781 (2d Dept 2015).

[71] *Id.*, citing *22 NYCRR 202.7[a][2].*

[72] See *Martinez v. 1261 Realty Co., LLC*, 121 A.D.3d 955, 995 N.Y.S.2d 581 (2d Dept 2014).

[73] See *Ovcharenko v. 65th Booth Associates*, 131 A.D.3d 1144, 16 N.Y.S.3d 763 (2d Dept 2015).

[74] *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 559, 15 N.Y.S.2d 189 (2d Dept 2015).

[75] *Id.*

[76] *Id.*

[77] See *New York Timber, LLC v. Seneca Companies*, 2015 N.Y. Slip Op. 07956, 2015 WL 6702878 (2d Dept 2015).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] See *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015).

[82] See *Krause v. Lobacz*, 131 A.D.3d 1128, 16 N.Y.S.3d 601 (2d Dept 2015).

[83] See *New York Timber, LLC v. Seneca Companies*, supra, 2015 N.Y. Slip Op. 07956.

[84] See *Tantaro v. All My Children, Inc.*, 2015 WL 7203030 (1st Dept 2015) (affirming outcome of marking deposition dates as final rather than striking the defendants' answer).

[85] *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 210, 959 N.Y.S.2d 74 (2d Dept 2012).

[86] *Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept 2014), quoting from CPLR 3126[2].

[87] *Hughes v. Brooklyn Skating, LLC*, 120 A.D.3d 758, 991 N.Y.S. 326 (2d Dept 2014).

[88] *Mona and Jack's Clothing, Inc. v. Ola, Inc.*, 2015 N.Y. Slip Op. 08151, 2015 WL 6992151 (2d Dept 2015); see also *Hughes v. Brooklyn Skating, LLC*, supra, 120 A.D.3d 758.

[89] *Id.* For a case addressed specifically to a defendant seeking such relief, see *Carillon Nursing and Rehabilitation Center, LLP v. Fox*, 118 A.D.3d 933, 989 N.Y.S.2d 68 (2d Dept 2014).

[90] See *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, quoting from *Weinstein-Korn-Miller*, N.Y. Civ Prac ¦ 3126.03.

[91] See *Harrison v. Bailey*, 79 A.D.3d 811, 914 N.Y.S.2d 187 (2d Dept 2010).

[92] *SRN Realty, LLC v. Scarano Architect, PLLC*, 116 A.D.3d 693, 694, 983 N.Y.S.2d 276 (2d Dept 2014). See also *Sealy v. Uy*, 132 A.D.3d 839, 2015 WL 6160244 (2d Dept 2015); *Vitolo v. Suarez*, 130 A.D.3d 610, 13 N.Y.S.3d 177 (2d Dept 2015).

[93] See *Lawrence v. North Country Animal Control Center*, 2015 N.Y. Slip Op. 08014, 2015 WL 6741458 (3d Dept 2015).

[94] *Id.*

[95] *Id.*

[96] See *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015). See also *New York Timber, LLC*, supra, 2015 N.Y. Slip Op. 07956.

[97] *Id.* See also *Lazar, Sanders, Thaler & Associates, LLP v. Lazar*, 131 A.D.3d 1133, 16 N.Y.S.3d 326 (2d Dept 2015), and *Anron Heating and Air Conditioning, Inc. v. AMCC Corp.*, 2015 WL 7432821 (1st Dept 2015) (three violated discovery orders).

[98] See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595, 2015 WL 6511172 (1st Dept 2015).

[99] *Id.*

[100] See *K–F/X Rentals & Equipment, LLC v. FC Yonkers Associates, LLC*, 15 N.Y.S.3d 891, 2015 N.Y. Slip Op. 06712 (2d Dept 2015)

[101] *Hughes v. Covey*, 131 A.D.3d 581, 582, 15 N.Y.S.3d 195 (2d Dept 2015). See also *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).

[102] *Hughes v. Covey*, 131 A.D.3d at 583.13

[103] *Id.*

[104] *Eremina v. Scparta*, 120 A.D.3d at 617.

[105] See *Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 (2d Dept 2014). 79 Id.

Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

Risk Transfer In Personal Injury Actions: An Overview

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INTRODUCTION

Consideration of risk transfer is an integral part of defending personal injury cases. Accordingly, this article will provide an overview of the two principal avenues of risk transfer. The first is shifting the loss to other parties in the bodily injury litigation by means of contribution and indemnification. The second is by obtaining additional coverage for your client from other insurers.

This article will also discuss the effect of anti-subrogation, a doctrine rooted in insurance coverage, on the potential to obtain risk transfer.

In addition to our discussion of obtaining additional insured coverage for your client, we will also address excess insurance and defense counsel's role in giving notice to excess and additional insurers throughout the course of the litigation.

Additionally, we will discuss the significance of tender letters, as well as defense counsels' responsibilities regarding both the issuance and receipt of such letters.

Finally, we will provide an overview of declaratory judgment actions.

RISK TRANSFER VIA CONTRIBUTION AND INDEMNITY

The following is an overview of the first avenue of risk transfer, which is obtained from other parties to the bodily injury action. This first avenue of risk transfer is comprised of three categories, namely contribution, common law indemnity and contractual indemnification. We will now address them all.

Contribution - General Principles

Contribution is a common law concept that applies where more than one party bears some liability for damages to plaintiff by virtue of its own negligence. When there is more than one party potentially liable for a plaintiff's damages, those parties are commonly referred to as joint tortfeasors. Under the doctrine of contribution, one joint tortfeasor may assert a claim against another such tortfeasor seeking an apportionment of liability. By so doing, the party asserting the claim for contribution seeks to limit its liability to its proportionate share of fault. This doctrine, which contemplates a partial shifting of loss, has been codified in Article 14 of the CPLR as follows:

> §1401. Claim for contribution
>
> Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.
>
> §1402. Amount of contribution
>
> The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.
>
> §1403. How contribution claimed
>
> A cause of action for contribution may be asserted in a separate action

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or by cross-claim, counterclaim or third-party claim in a pending action.

General Obligation Law §15-108: Settlement Extinguishes Right To Contribution, But Not Indemnity

An important statute impacting contribution is General Obligations Law §15-108, which concerns settlement by one of several joint tortfeasors. It sets forth that a settlement by one tortfeasor does not discharge any of the others for liability (as had been the case at common law). Instead, it reduces plaintiff's claim against the other tortfeasors in the amount of the settlement, or the amount of the released tortfeasor's equitable share of damages for contribution, whichever is larger. It also relieves the settling tortfeasor from any claim for contribution and bars the settlor from seeking contribution. It applies only to pre-judgment settlements.

It is important to note that this statute applies only to contribution, and not to indemnity. See, Glaser v. M. Fortunoff of Westbury Corp.[1] In other words, a party owed common law or contractual indemnification can make a reasonable, good-faith settlement with plaintiff without jeopardizing its rights against others if the indemnitor has notice of the claim. Coleman v. J.R.'s Tavern,[2] and an indemnitor cannot free itself of its obligation to its indemnitee by settling with plaintiff.

A party which has obtained a release in good faith may successfully move to dismiss, pursuant to CPLR 3211(a)(5), contribution claims asserted by other defendants. Ziviello v. O'Boyle.[3]

Common Law Indemnification

Distinct from "contribution" is the concept of common law indemnity. This is a longstanding concept which has allowed one who was compelled to pay for the wrong of another to recover from the wrongdoer the damages it is required to pay. It contemplates a complete shifting of the damages from a party who, although not negligent itself, was required by some principle of law to pay for the negligence of the other.

Simply put, the rights of a vicariously liable party against the negligent person for whom it is held so liable sound in common law indemnification. McCarthy v. Turner Construction, Inc.;[4] Riviello v. Waldron.[5]

McCarthy v. Turner Construction, Inc., supra, was a significant recent pronouncement by the Court of Appeals on the issue of common law indemnity. There, the Court states the following:

> Consistent with the equitable underpinnings of common-law indemnification, our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity (see e.g. Rogers v. Dorchester Assoc., 32 N.Y.2d 553, 347 N.Y.S.2d 22, 300 N.E.2d 403 (1973); Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc., 35 N.Y.2d 1, 358 N.Y.S.2d 685, 315 N.E.2d 751 (1974); Felker v. Corning Inc., 90 N.Y.2d 219, 660 N.Y.S.2d 349, 682 N.E.2d 950 (1997) The Rogers Court concluded that common-law indemnification was available to the owner and manager of an apartment building, held statutorily liable under Multiple Dwelling Law §78-which imposes a nondelegable duty on owners to maintain their premises in a reasonably safe condition-for plaintiffs injuries resulting from an elevator accident, against Otis Elevator Company because Otis, under a maintenance contract, assumed "the exclusive duty to maintain the elevators" and "the owner and manager had the right . . . to look to Otis to perform their entire duty to plaintiff" (Rogers; 32 N.Y.2d at 563, 347 N.Y.S.2d 22, 300 N.E.2d 403; see, Mas, 75 N.Y.2d 680, 555 N.Y.S.2d 669, 554 N.E.2d 1257 [same]). In Kelly, the Court held that a general contractor was entitled to full indemnity from subcontractor hoist company whose negligence was the sole cause of plaintiff's (who was subcontractor's employee) accident. Although the general contractor "undertook to furnish, maintain and operate the hoist," it, through various subcontracts, delegated responsibility for supply and maintenance of the hoist "particularly its brakes and other safety devices" to the hoist company, which inspected the equipment before and after installation (Kelly, 35 N.Y.2d at 4-5, 358 N.Y.S.2d 685, 315 N.E.2d 751). Felker involved a plaintiff who was injured when he fell over an eight-foot alcove wall and through a suspended ceiling to the floor nine feet below.

> This Court held that the general contractor was entitled to common-law indemnification from the subcontractor (plaintiff's employer) notwithstanding the absence of a showing of negligence on the part of the subcontractor and the existence of a contractual agreement to indemnify the general contractor only if the subcontractor is negligent (See, Felker, 90 N.Y.S.2d at 226, 660 N.Y.S.2d 349, 682 N.E.2d 950). The Court based its holding on the fact the subcontractor supervised and controlled the work of the injured plaintiff (Id.).

In McCarthy, the Court also answered an important question which had not been settled to that point: Whether a party's authority to supervise the accident-producing work is sufficient to impose the duty to indemnify or if actual exercise of such authority is necessary before a duty to indemnify under the common law is triggered. The Court held that actual exercise of such authority is necessary:

> Based on the foregoing, a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. But a party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemitors) who exercise actual supervision (See, Felker, 90 N.Y.2d at 226, 669 N.Y.S.2d 349, 682 N.E.2d 950; See, also Colyer v. K Mart Corp., 273 A.D.2d 809, 810, 709 N.Y.S.2d 758 (4th Dep't 2000) [for standard]). Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone.

It is also important to note that, in a products liability action, "a party/distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product." Lowe v. Dollar Tree Stores, Inc.[6] The Court added that the right to such common-law indemnification "includes the right to recover attorneys fees, costs and disbursements for defending against plaintiff's action." The court also held that conditional summary judgment during the course of the litigation was warranted "since it serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination to the extent to which he may be reimbursed."

Limitation On Contribution And Common Law Indemnification - New York's Grave Injury Statute

New York attorneys examining loss transfer issues involving employees injured in work accidents should be familiar with Workers' Compensation Law §11, enacted by the New York State Legislature in 1996. It was intended as a partial abrogation of Dole v. Dow Chemical Co.,[7] the Court of Appeals case that, in effect, permitted common law third-party claims for contribution or indemnification against employers immune from direct suit because of their provision of Workers' Compensation protection to the injured employee.

The statute holds, in no uncertain terms, that an employer may not be held liable for contribution or common law indemnity to any third-party plaintiff for injuries sustained within the scope of the plaintiff's employment, unless the third-party plaintiff proves through competent medical evidence that the employee has sustained a "grave injury."

The statute sets forth that a "grave injury" shall mean only one or more of the following:

> Death, permanent and total loss of use or amputation of an arm, leg, hand, or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Five years after its enactment, the Court of Appeals held that the statute means exactly what it purports to mean: That list of injuries is exhaustive, not illustrative, and an injury of a different sort, no

matter how debilitating, does not permit a common law contribution or indemnification action against an insured employer. Castro v. United Container Machinery Group.[8] In that case, the Court held that the loss of five fingertips (two from one hand, three from the other) in an accident involving a cutting dye machine did not constitute a "grave injury" because plaintiff did not lose effectively all of the affected fingers and that, therefore, he did not suffer the "loss of multiple fingers." Soon thereafter, in Meis v. ELO Organization, LLC,[9] the Court summarily rejected the position of an intermediate appellate court which had held that the loss of a thumb should be considered a "grave injury," simply because the loss of that digit is more debilitating than the loss of the index finger (a designated grave injury). The brief memorandum decision of the Court of Appeals noted that the grave injuries are narrowly defined and that the courts are powerless to expand them.

What room the courts have found for interpretation of the statute has been limited. In Rubeis v. The Aqua Club, Inc.,[10] the Court held that a "brain injury resulting in permanent total disability" contained within the list must disable a worker from any employment whatsoever. The Court noted that a "plausible" reading of the statute could require that plaintiff to be in a vegetative state, but rejected that contention.

Note that even if the plaintiff has sustained a traumatic brain injury, it must be the brain injury, and only the brain injury, that disables the plaintiff from employment for the injury to be considered "grave." If other conditions, such as orthopedic injuries, cause the disability, the injuries are not deemed "grave" even if a brain injury is sustained. Anton v. West Manor Construction Corp.[11]

In Fleming v. Graham,[12] the Court of Appeals interpreted "severe facial disfigurement" to constitute "that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner." A disfigurement is severe "if a reasonable person viewing the plaintiff's face in its altered state would regard the condition as "abhorrently distressing, highly objectionable, shocking or extremely unsightly."

Third-party actions alleging grave injuries pursuant to the statute have their own unique set of summary judgment issues. In Fitzpatrick v. Chase Manhattan Bank,[13] the Court held that a third-party defendant/employer has the burden to demonstrate the absence of "grave injury" in the first instance in moving to dismiss on those grounds.

Since then, the Second Department has held that a third-party defendant may meet this burden merely by pointing to the injuries alleged in plaintiff's bill of particulars. Marshall v. Arias.[14] Recently the First Department has adopted that view. See, National Union Fire Insurance Company of Pittsburgh, PA v. 221-223 West 82 Owners Corp.[15]

Of course, an employer who has failed to obtain Workers' Compensation Insurance for an injured plaintiff may not rely on the grave injury statute to avoid common law contribution or indemnification. Boles v. Dormer Giants Inc.[16] However, an employer which has purchased the appropriate insurance may assert the grave injury defense, notwithstanding that the employer hired an undocumented alien. New York Hospital Medical Center of Queens v. Microtech Contracting Corp.[17]

Note that the grave injury statute does not prohibit a third-party plaintiff from seeking contractual indemnity from an employer, as we shall further discuss below. Such agreements are judged in accordance with the law applicable to any contract.

CONTRACTUAL INDEMNIFICATION

General Principles - Strict Construction Of Indemnity Provisions

As a general rule, one party may contract in advance of a risk to indemnify another party for damages it may be forced to pay as the result of an injury. On a basic level, the agreement must contain language whereby one party agrees to indemnify another. Absent such language, the indemnity claim will be dismissed. Torres v. 63 Perry Realty, LLC.[18] Moreover, it is important to note that where an agreement contains indemnity language, such a contract is strictly construed. In Hooper Assoc. Ltd. v. AGS Computers Inc.,[19] the Court of Appeals set forth the "black letter" rule:

> When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the

language and purpose of the entire agreement and the surrounding facts and circumstances.

In Niagara Frontier Trans. Auth. v. Tri-Delta Construction Corp.,[20] the Court approved this language in the Appellate Division decision:

> The language of an indemnity provision should be construed to encompass only that loss and damage which reasonably appeared to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract.

An example of strict construction that has been applied to indemnity clauses is Tonking v. Port Authority of New York and New Jersey,[21] where an indemnification clause required the indemnitor to cover the "agents" of the other party to the contract. But because the contract used the terms "agent" and "construction manager" separately, the Court held that the indemnitor owed no duty to the manager. Nor will courts tolerate an indemnity agreement imposed by an "incorporation" clause. That is to say, if the contract between the indemnitor and another party says it incorporates the terms of another contract that would purport to impose contractual indemnity, it is invalid. "Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference . . . bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor." Waitkus v. Metropolitan Housing Partners.[22]

This strict construction always operates in favor of the alleged indemnitor. For example, in Gutierrez v. State of New York,[23] a food service provider for a New York State cafeteria was entitled by its indemnification provision to notification of an event that could possibly invoke the clause within thirty days of receiving the claim, and stated that its duty was "expressly subject to and conditioned upon compliance with [that provision]." The State which, unlike most defendants, is entitled to a "notice of claim" before suit has begun, failed to notify the indemnitor of its receipt of that document. Thus, delay of notification after the suit began abrogated the duty.

Language Of Indemnity Agreement - Has The Obligation To Indemnify Been Triggered?

In keeping with the strict construction of indemnity clauses, careful attention must be paid to the exact wording of an indemnity clause to determine whether it has been triggered by a particular event.

In cases arising from construction accidents, the broadest language we typically see are clauses which impose a duty of indemnity without a showing of negligence on the part of the indemnitor, or any other party. For example, in DiPerna v. American Broadcasting Companies, Inc.,[24] we see an indemnity clause for a "loss . . . which arises or is claimed to arise out of . . . any accident or occurrence which . . . is alleged to have happened." (emphasis added.) This imposed a duty to indemnify because the plaintiff merely alleged that the accident arose out of the subcontractor's work regardless of whether it was negligently performed.

Also imposing a broad duty is language which requires a subcontractor to assume liability for personal injuries "or any other claim arising out of, in connection with, or as a . . . consequence of the performance of the work and/or any act or omission of the subcontractor or any of its . . . subcontractors." Brown v. Two Exchange Plaza Partners.[25]

Note that an agreement which requires an employer to indemnify an owner "for injuries arising out of or resulting from performance of the Work" obligates the employer to indemnify the owner for claims stemming from injuries to an employee of such employer sustained while performing the employer's work. Flores v. Lower East Side Service Center, Inc.[26] [However, if the employee is injured while performing work outside of the employer's contract, such a provision is not triggered. Lombardo v. Tag Court Square, LLC.][27]

Much better for a subcontractor attempting to avoid the duty to indemnify is language such as appears in Bryde v. CVS Pharmacy.[28] The clause in that case required the subcontractor to "defend, indemnify and hold harmless [the direct defendant] . . . from and against all claims, damages, and losses expenses . . . arising out of or resulting from . . . any negligence or a tortious act or omission" on its part

during the construction process (emphasis added). Clauses of this nature require the indemnitee to establish as a matter of law that plaintiff's accident resulted from the indemnitor's negligence. See, also, Tolpa v. One Astoria Square, LLC.[29]

D'Alto v. 22-24 129th Street, LLC,[30] provides perhaps the quintessential example of the strict construction of the triggering language of an indemnity agreement against the proposed indemnitee. In that case, plaintiff, in furtherance of the work at a construction site, was mixing cement in a truck one hundred feet away when he fell from the top of the truck, a circumstance which entitled him to summary judgment under Labor Law §240 against the owner. Work was being performed on the behalf of a tenant which, pursuant to its lease, owed indemnity to the owner for "injury to . . . any . . . person on the demised premises." The court held that because the plaintiff was injured off-premises, the clause was not triggered. The court remarked that there was no conflict between the imposition of liability on the owner, without transfer of indemnity to the tenants, because Labor Law §240 is liberally construed and, of course, indemnity clauses are not.

One last important point on this topic, where contractual indemnification is sought from plaintiff's employer, the plaintiff's negligence may be imputed to the employer for purposes of triggering the employer's duty to indemnify. Ginter v. Flushing Terrace, LLC,[31] (Plaintiff's failure to wear a hard hat).

Indemnification For A Party's Own Negligence

It is a common misconception that a contract cannot require that a party be indemnified for its own negligence. Common law indemnity, as we have seen, requires a showing of an absence of negligence on the part of the intended indemnitee. But, as a general rule, unless prohibited by statute or public policy, parties entering into an arms-length transaction are free to agree that one will indemnify the other for damages resulting from the negligence of that other.

Under a rule that stood for a long time, contracts would not be construed by the courts to indemnify a person against his own act of negligence unless that intention was explicitly set forth in unequivocal terms. But that rule was abrogated by the Court of Appeals a generation ago. In Levine v. Shell Oil Company,[32] the Court found that, because its task was to enforce contracts as they were written, a duty to indemnify a negligent party would not be read out of a contract that under, a reasonable interpretation of its terms, said otherwise. Thus, in that case, where both the lessor and the lessee of a gas station contributed to a fire causing injuries, the lessee was required to indemnify the lessor under a clause that held the lessee liable for anything "caused by or happening in connection with the premises . . . or the condition, maintenance, possession or use thereof where the operation thereon." Since no reasonable interpretation of that clause would have excluded the lessor's own negligence, the lessor was held entitled to full indemnity.

Anti-Indemnity Statutes - New York's General Obligations Law

While the above general rule is undeniably the case, the New York Legislature has designated certain types of contracts as ones in which at least one party to the contract may not insist on indemnity for its own negligence. For these particular types of contracts, listed in General Obligations Law (GOL) §5, Title 3, the indemnity clause will be deemed to be void, unless special circumstances apply. These include, for example, agreements exempting pools, gymnasiums and places of public amusement from liability. But the two most frequently encountered are GOL §5-321, which concerns agreements purporting to exempt lessors from liability, and GOL §5-322.1 which is applicable to construction and maintenance contractors and concerns indemnity agreements in favor of owners and contractors from liability for their own negligence in their agreements with subcontractors. We will examine these two in detail.

General Obligations Law §5-321

This statute states that any clause in, or associated with, a lease "exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor . . . in the operation or maintenance of the . . . premises . . . shall be deemed to be void against public policy and wholly unenforceable." Thus, any clause that is broad enough to shift the entire responsibility for damages to a lessee, even for damages to the

lessee's employee, will be stricken by the courts. Rego v. 55 Leone Lane, LLC.[33]

Note that the statute is worded so that the landlord may not get around its provisions by entering into a separate agreement outside of the lease with its tenant. Mendieta v . 333 Fifth Avenue Ass'n.[34]

However, an appropriately-worded indemnity clause, combined with an insurance provision clause in a lease, can afford the landlord protection, as we shall see below. But, a simple requirement in a lease that a tenant obtain its own insurance will not be enough to circumvent the statute. Ben-Lee Distributors, Inc. v. Halstead Harrison Partnership.[35]

General Obligations Law §5-322.1

This statute declares void as against public policy any clause in a building construction or maintenance contract purporting to indemnify a promisee for damages caused by the negligence of the promisee, his agents, employees, or indemnitees, whether that negligence be in whole or in part. This is perhaps the most frequently litigated anti-indemnity statute in New York, and, like several of our topics, would be worthy of its own separate article. This statute was enacted in 1981, in response to the perception that owners and general contractors were using their greater bargaining power to foist such provisions on construction subcontractors. Any such provision which, by its language, purports to indemnify a negligent owner or contractor is void ab *initio*. Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.[36] However, as footnote 5 in that decision indicates, an invalid clause will not destroy the right of an owner or contractor to indemnity if, as a matter of fact, it was not negligent.

Effect Of Insurance Procurement Clauses On Application Of General Obligations Law §5-321 And 5-322.1

With respect to leases of real property, the prohibition of indemnity provided for by GOL §5-321 can be ameliorated by an appropriate provision for insurance procurement. Castano v. Zee-Jay Realty Co.,[37] is an illustrative example. In that action, a pedestrian brought a personal injury action against both a landlord and a tenant for a trip on a defective sidewalk over which both defendants were charged with the control. The landlord cross-claimed against the tenant for contractual indemnification pursuant to the lease. After a liability trial where a jury assigned 50% fault to each defendant, they settled the action with the understanding that the cross-claim for indemnification would be decided by the court, which held the provision unenforceable pursuant to GOL §5-321.

The trial court apportioned 100% of the fault to the landlord, but the Appellate Division reversed. The court held that in the case of liability to a third-party, the statute does not preclude enforcement of an indemnification provision when coupled with an insurance procurement requirement.

> In such circumstances, the landlord is not exempting itself from liability to the victim for its own negligence. Rather the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance, and the courts do not, as a general matter, look unfavorably upon agreements which, by requiring parties to carry insurance, afford protection to the public.

The Court saw no violation of public policy in the intent of the parties, as clearly set forth in the contract, that plaintiff's damages would ultimately be paid for by insurance. Thus, it was error to hold the indemnification provision void, despite the fact that it purported to indemnify for the landlord's negligence. The Court ruled that the tenant's insurer was ultimately liable for all damages.

Thus, to sum up, a broad indemnification provision in a lease will not be held invalid even if it does not limit itself to the lessee's acts or omissions, and fails to make exceptions for the lessor's own negligence. As the Court of Appeals stated, an indemnification clause coupled with an insurance procurement provision "obligates the tenant to indemnify the landlord for its share of the liability" and does not violate the statute. Great Northern Insurance Company v. Interior Construction Corp.[38]

The rule with respect to GOL §5-322.1 is different. The existence of an insurance procurement clause will not validate an indemnity provision which is unenforceable by reason of the statute. Cavanaugh v. 4518 Associates.[39]

Partial Indemnification And General Obligations Law §5-322.1

The statute barring indemnity clauses in favor of

negligent indemnitees is not rendered void by the statute if it contains saving language indicating that the indemnity excludes liability for the negligence of the owner or contractor seeking to enforce it. Brooks v. Judlau Contracting, Inc.,[40] is an example of a contract with the typical savings language, limiting the indemnity "to the fullest extent permitted by law," which the courts have interpreted as adequately accounting for the prohibition of the statute. That language "contemplates partial indemnification and is intended to limit [the indemnitee's] contractual indemnity obligation to [its] own negligence."

Interestingly, the courts have granted summary judgment for partial indemnification based upon clauses of this nature. Johnson v. Chelsea Grand East, LLC.[41]

Summary Judgment Issues In Indemnity Claims

Since, under common law indemnity, a would-be indemnitee must be free of negligence, it must make a prima facie showing "that it was not negligent" in order to obtain summary judgment. Lodato v. Greyhawk North America, LLC.[42]

Sometimes, this concept can place an indemnitee in a paradoxical position. For instance, in O'Keefe v. Tishman Westside Construction of New York,[43] a defendant, seeking common law indemnification, impleaded the proposed indemnitor before seeking summary judgment itself on plaintiff's claim. On the main claim, defendant sought to establish that it was free from negligence (and therefore free from liability under Labor Law §200, which codifies negligence claims against landowners), as well as plaintiff's Labor Law §241(6) claim (that statute imposes liability without a necessary finding of negligence on the part of the direct defendant). Third-party defendant, hoping to dispose of the case in its entirety, and render the indemnity claim moot, not only supported the main defendant's motion, but moved itself on the same grounds. Defendant succeeded on dismissing the common law negligence and Labor Law §200 claims, but the §241(6) claim survived. As a result, the third-party indemnitor was estopped from arguing that questions of fact existed as to the indemnitee's negligence and, therefore, lost the motion for common law indemnification against it.

Conversely, in construction claims where a Labor Law §200 claim is asserted against the direct defendant, the direct defendant must successfully move to dismiss that claim before full indemnification. Hurley v. Best Buy Stores LP.[44] If the Labor Law §200 claim is not dismissed, a court would be constrained to deny a motion for full indemnity because of the possibility of an inconsistent verdict in which an indemnitee is found to have been at least partly at fault.

Summary judgment for common law indemnity is frequently seen in products liability cases. Where a retailer merely sells a product in which it had no role in the manufacture, design, or modification, it may be liable to an injured plaintiff under the principles of strict product liability. However, in such a case, the retailer is entitled to common law indemnification against the distributor of the product on the theory that the distributor has a closer relationship with the manufacturer and is in a superior position to exert pressure to improve the safety of the product. And, of course, a similar rule applies on a retailer's common law indemnity claim against the manufacturer itself, based on a similar rationale. See, e.g., Lowe v. Dollar Tree Stores, Inc.,[45] and Hunter v. Ford Motor Co.[46]

Attorney Fees - Contractual And Common Law Indemnity

In addition to indemnity payments for any amounts due plaintiff, a common law indemnitee is also entitled to recover attorneys' fees expended in the defense of plaintiff's action. Lowe v. Dollar Tree Stores, Inc.[47] However, while a common law indemnitee may recover the legal expenses incurred in defending a direct action by plaintiff, those fees expended in prosecution of a third-party action may not be recovered. The rationale for this holding is the existence of the so-called "American" rule (as opposed to the "British" rule, which requires an unsuccessful litigant to pay legal expenses for both sides). The American rule "encourages the submission of grievances to judicial determination that provides free and equal access to the courts, promoting democratic and libertarian principles," according to New York's highest tribunal. Chapel v. Mitchell.[48] In addition, unless the agreement says otherwise, a contractual indemnitee cannot receive attorneys' fees for that legal work attributable to its pursuit of claims for indemnification. Fuller-Mosley v. Union Theological Seminary.[49]

Where the contract does not provide for them, attorneys' fees will be denied. Roddy v. Nederlander Producing Company of America, Inc.[50]

Of course, under either common law or contractual indemnity, the amounts of attorneys' fees to be recovered must be reasonable. Rodriguez v. Metropolitan Life Ins. Co.[51] Where the reasonableness of the fees is disputed, the indemnitor is entitled to a hearing on the issue.

ANTI-SUBROGATION - A BAR TO INDEMNITY AND CONTRIBUTION BUT ONLY TO THE EXTENT OF COMMON INSURANCE COVERAGE

The anti-subrogation rule combines liability and coverage concepts. The significance of the rule is that under certain circumstances, it could apply to preclude claims on behalf of your client or, under other circumstances, it could be a valid defense to claims against your client. Accordingly, in order to determine whether the anti-subrogation rule will apply, counsel needs to be attuned to the identity of the carriers providing coverage to all defendants and third-party defendants in the case, as well as the coverage position of those insurers and the limits of the applicable policies.

Generally speaking, the anti-subrogation rule applies where an insurer is obligated to defend two or more insured-defendants on a single policy or related policies issued to cover the same risk and where one of those defendant-insureds has a right of indemnity or contribution against another one of those defendant-insureds. Under those circumstances, the anti-subrogation rule will bar that claim for indemnity or contribution. North Star Reinsurance Corp. v. Continental Insurance Co.[52]

The anti-subrogation doctrine does not apply where an insurer has issued separate and unrelated policies to two or more defendants in a lawsuit. For example, the doctrine has no application where the same insurer issues unrelated automobile liability policies to unrelated motorists whose cars just happened to collide. North Star Reinsurance Corp. v. Continental Insurance Co., supra.

In North Star Reinsurance Corp. v. Continental Insurance Corp., supra, the Court of Appeals applied the anti-subrogation rule to construction accident cases, an area of the law where the doctrine is frequently encountered. The Court also held that the doctrine applies to preclude contribution and indemnity where the third-party plaintiff and the third-party defendant are insured by separate policies covering the same risk, issued simultaneously by the same insurer. In North Star, the Court was confronted with a fairly typical scenario in construction accident cases: The plaintiff, an employee of the third-party defendant, sued the third-party plaintiff-owner of a construction site for injuries sustained while working on the project. Pursuant to its contractual obligations, the third-party defendant-employer purchased insurance for itself and the owner from the same insurer. Under such circumstances, the owner's third-party claim for contribution and indemnification against the employer implicates the anti-subrogation rule. In North Star, the Court stated that the doctrine should apply under such circumstances because of public policy concerns raised by the potential conflict of interest that may cause the owner's insurer to fashion the litigation to the detriment of the third-party defendant-employer.

It is important to remember that the anti-subrogation rule is not limited to construction accident cases. For example, in Jefferson Insurance Company of New York v. Travelers Indemnity Co.[53] a case which arose out of an automobile accident, the anti-subrogation rule barred a claim for indemnity by an excess and primary carrier of insurance purchased by the owner of a leased van against the lessee's driver.

Please note the following important point with respect to the application of the doctrine: The anti-subrogation rule bars a claim for contribution and indemnification up to the amount of the applicable insurance policy limits. Thus, claims for amounts over and above those limits can be maintained. Bruno v. Price Enterprises, Inc.,[54] Curran v. City of New York.[55]

EXCESS INSURANCE

We will now address the important topic of excess coverage.

Typically, defense counsel in a personal injury action will appear by way of a policy of primary insurance issued by an insurer. In attempting to maximize insurance coverage, defense counsel turns

to excess insurance issued to his or her client or policies issued to other entities under which the client may have the status of an additional insured. Such policies may be issued by any carrier. (See discussion of Additional Insured Coverage below.)

Excess insurance is coverage that an insured arranges over and above the primary insurance contract. Since this is coverage arranged for by the client, defense counsel generally obtains excess insurance information directly from the client, and then promptly notifies excess carriers of the loss and the lawsuit (See below for a discussion of our obligation to notify excess insurers).

Once the information concerning other insurance is received from the client, the other insurers must promptly be notified of the accident and the lawsuit. The process of identifying and notifying other insurers who may be responsible to cover the client should be revisited on an as needed basis during the course of the litigation. (See discussion of notifying other insurers, below).

Even though defense counsel has requested excess insurance information from the client, counsel should also review certificates of insurance for excess information. (See discussion of certificates of insurance below.)

THE SECOND AVENUE OF RISK TRANSFER – ADDITIONAL INSURED COVERAGE

The subject of additional insured coverage is, like many of the topics addressed in this article, one worthy of its own in-depth coverage. It comes as no surprise to defense counsel that other parties to an action may have insurance policies that supplement or even displace a policy under which coverage is being provided in the first instance.

Additional insured coverage stems from policies purchased by entities other than defense counsel's client. That being the case, while additional insured information may sometimes be obtained from the client, it is also obtained through the course of discovery in the tort action.

Once defense counsel obtains other insurance information from his or her client or the co-defendants, he or she must examine the policy to determine if the client enjoys the status of an additional insured. Sometimes this is fairly straightforward, such as where the policy actually lists the client's name as an additional insured. See, New York University v. Royal Insurance Co.[56]

In other instances, counsel has to dig deeper. Some additional insured endorsements do not actually list the additional insureds by name. Rather, they afford such status to any entity "for whom the named insured has specifically agreed by written contract to procure . . . liability insurance." 140 Broadway Property v. Schindler Elevator Co.[57]

An example of a scenario where such an endorsement comes into play is where defense counsel has been assigned to defend a general contractor under a general liability policy issued by a carrier. The client may have, however, contractually required other contractors and/or subcontractors to name it as an additional insured under the other entities' liability policies. Therefore, the client should provide copies of any contracts it entered into with any other entities with respect to the job/project at issue and/or any certificates of insurance issued to it identifying it as an additional insured under any policies issued to other entities. Once the entities that were contractually required to procure insurance for the client are identified, defense counsel should consider serving discovery demands asking for the identity of their liability insurers. Once the carriers are identified, defense counsel should consider a tender of the client's defense and indemnity to these carriers. (See discussion of tenders below).

A "vendor's endorsement" is frequently provided to protect against product liability claims. It protects vendors who would be strictly liable for defects in products manufactured or distributed by the purchaser of the endorsement. Raymond Corp. v. National Union Fire Insurance Company of Pittsburgh, PA.[58]

Once the information concerning other insurance is received from the client, defense counsel should consider promptly notifying such insurers of the accident and lawsuit. The process of identifying and notifying other insurers who may be responsible to cover the client should continue throughout the course of the litigation. (See discussion of notifying other insurers, below.)

Certificates of insurance are important in the quest for additional insured coverage. Requests for applicable policies and certificates of insurance

should be made to the client, as well as to other parties to the litigation by way of discovery demands. A review of a certificate of insurance may reveal that your client is a certificate holder. Certificates of insurance are frequently issued to a designated certificate holder as evidence that the named insured has insurance to cover the work or operations being performed for the certificate holder and that the named insured has had the certificate holder named as an entity insured on its policy. A certificate of insurance, standing alone, does not create coverage for the certificate holder. A certificate of insurance is not part of the policy; it is merely evidence of the insurance. Only the policy itself can create a contractual relationship between the insurer and an additional insured. American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.[59]

Nevertheless, certificates of insurance generally contain valuable information, such as the identities of the insurer, the named insured and the producer, the type of insurance, the policy number, the effective dates of coverage, and the limits of the various types of coverage provided. The information on a certificate of insurance is sufficient to make a meaningful tender on behalf of the client to the insurer listed on the certificate (See discussion of tenders, below).

THE IMPORTANCE OF NOTIFYING EXCESS AND ADDITIONAL INSURERS THROUGHOUT THE COURSE OF THE LITIGATION

An important development in the law concerning defense counsel's obligations concerning coverage made its first appearance in New York in the case of Shaya B. Pacific, LLC v. Wilson Elser Moskowitz Edelman & Dicker, LLP.[60] In that case, where a defendant was subject to a judgment in excess of the coverage of the policy under which defense counsel was assigned to defend it, the court refused to dismiss on the grounds of failure to state a cause of action a subsequent malpractice action against the defendant's attorneys for their failure to investigate the client's insurance coverage, or to notify excess carriers. The court rejected the attorneys' assertion on the motion that its representation was merely limited to defense of the action, and did not concern insurance issues, as that assertion was not supported by documentary evidence, such as an insurer's letter limiting the scope of the representation.

Moreover, as to additional insured coverage, the additional insured has its own distinct obligation to notify the insurer from which such coverage is sought. Turner Construction Co. v. Harleysville Worcester Ins. Co.[61]

Accordingly, it is recommended that defense counsel determine the existence of other coverage applicable to their client - be it excess or additional insured - as soon as they are assigned the defense of an action, and to search for such other insurance coverage as part of their ongoing discovery during the course of that defense.

It bears emphasis that efforts to ascertain and notify other insurers should, when appropriate, continue throughout the course of the litigation, since the ability to procure coverage from excess or additional insurers has been aided by a significant change to the statute governing disclaimers of liability in New York. Formerly, New York had been a "no prejudice" state on the issue of an insurer's right to disclaim based on an insurer's failure to provide timely notice of an occurrence giving rise to a potential claim under the policy. An insurer could disclaim for untimely notice per se. But, effective January, 2009, Insurance Law §3420(a)(5) requires that every insurance policy issued in New York State contain a clause that the failure to give notice required to be given by the policy within the time prescribed therein shall not invalidate a claim made by an insured or an injured person unless the untimeliness prejudices the insurer.

A related section of the statute places the burden of proof on the insurer to demonstrate prejudice as the result of late notice, if notice was provided within two years of the time required under the policy; otherwise, it is the injured person or other claimant who is given the burden of proving the insurer was not prejudiced. An insurance company is automatically prejudiced, the statute goes on to state, if the insured's liability was determined by a court of competent jurisdiction or by binding arbitration or if the insured resolved the claim or suit by settlement, prior to the issuance of notice. Prejudice is defined by the statute as something that "materially impairs the ability of the insurer to investigate or defend the claim."

The effect of this statute may very well facilitate

obtaining other insurance coverage for the client, since insurers' ability to disclaim for late notice has been significantly curtailed.

Moreover, irrespective of whether the policy was issued before or after the change in the law, a carrier must still promptly disclaim for late notice. Courts have suggested in some cases that 30 days is a reasonable time to disclaim. See, e.g., Mayo v. Metropolitan Opera Ass'n., Inc.,[62] Nabutovsky v. Burlington Ins. Co.[63] Accordingly, a carrier's failure to issue a prompt disclaimer can deprive the insurer of the defense of late notice, thus potentially resulting in insurance coverage for your client.

Further, not only must the additional insurer disclaim timely, it must do so properly. See, Sierra v. 4401 Sunset Park, LLC.[64] There, the Court of Appeals held that the insurer for the additional insured must issue its disclaimer to the insured itself, not to another insurer demanding that it provide additional coverage.

TENDER LETTERS

When appropriate, both the claims representative, on behalf of an indemnitee as its insurer, and defense counsel, as its client, should demand, in writing, by certified mail, the take-over of a defense at the earliest opportunity. Of course, once an action is in suit, a defense counsel may not contact the indemnifying party directly, but should communicate with both the attorneys for the indemnitor, and its insurer. A claims representative should when needed, in addition, contact the insurer for the indemnitor. This, of course, should be considered at the earliest opportunity.

Tender Letter Should Be Addressed And Written For The Appropriate Avenue Of Risk Transfer Or Risk Coverage

The tender letter should be addressed to the appropriate entity from which a defense and indemnity is sought. If additional insured coverage is sought, the letter should be addressed to the additional insurer, identifying the policy under which coverage is sought. If a defense and indemnity is sought by virtue of an indemnification obligation, the tender letter should be sent to counsel for the indemnitor.

In the appropriate circumstance, this can be done by way of one letter, but care must be taken that the letter be appropriately addressed and written to identify each avenue of risk transfer involved.

Defense counsel may receive copies of claims from co-defendants and/or other parties in the course of defending a client which seek: a) indemnification from the insured/client and/or b) coverage as an additional insured under a liability policy issued to the insured/client. It is not uncommon for an insured/client to receive demands for indemnity and a claim for additional insured coverage from the same party. Defense counsel should promptly forward all such demands and tenders to the claims professional for evaluation and determination. Some of the consequences of untimely submissions include a declination of coverage based on untimely notification and/or prejudice associated therewith, and the resulting claim against the insured/client for breach of a contractual obligation to procure insurance.

DECLARATORY JUDGMENT ACTIONS

INTRODUCTION

Where your tender to either an excess carrier or additional insurer has been denied or ignored, it is then time to consider starting a declaratory judgment action.

A declaratory judgment action is an effective procedural tool available to insurers and policyholders who seek to proactively establish the rights of the parties with respect to a specific controversy. The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligations. Chanos v. MADAC, LLC.[65]

The right to commence a declaratory judgment is codified in CPLR § 3001, which provides as follows: "The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties . . ."

In contrast to all other actions, a declaratory judgment action does not result in a judgment enforceable through some kind of coercive relief. As pointed out in the Practice Commentary to CPLR § 3001, the purpose of a declaratory judgment action is to declare the rights of the parties. For example – this marriage is valid; this insurer must defend the negligence action; or, this contract is void.

Declaratory judgment actions are commonly used to resolve a variety of insurance coverage issues. Among such issues are whether an insurer

has a duty to defend, the existence of coverage for a particular claim, whether a policy exclusion is applicable, or the priority of coverage between two or more insurers.

NECESSARY PARTIES

One question that needs to be addressed at the outset is which parties are to be named as defendants in the declaratory judgment action. The simple answer to that question is that all parties having an interest in the outcome of the declaratory judgment action must be named as defendants.

The necessity to join all interested parties is addressed in CPLR §1001, entitled "Necessary Joinder of Parties," which provides as follows:

> (a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

Thus, for example, an insurer seeking to determine whether it has an obligation to provide a defense and indemnification in an underlying bodily injury lawsuit would certainly name its insured as well as the plaintiff in the underlying bodily injury case.

What about naming the other defendants appearing in the underlying action? What about naming the carrier's of those parties?

There is no definitive answer to these questions. It would seem, however, that the best course would be to name all the parties appearing in the underlying action as well as their respective carriers.

Supporting this approach is the Court of Appeals ruling in Wood v. City of Salamanca,[66] which explained the need to join necessary parties to a declaratory judgment action as follows:

> We are mindful, however, that a judgment is a determination of the rights of the parties to an action and that a declaratory judgment, which has the force of a final judgment, serves a legitimate purpose where **all persons who are interested in or might be affected** by the enforcement of rights and legal relations and who might question in a court the existence and scope of such rights, are parties to the action and have opportunity to be heard. As to persons who are not parties, a declaratory judgment would be a mere academic pronouncement without juridical consequence, but which might be embarrassing if attempt is made thereafter to enforce these rights in legal proceedings to which they are parties. A court may, and ordinarily must, refuse to render a declaratory judgment in such case. (emphasis added)

Id. at 282-283

Recent rulings from the Appellate Division indicate that a declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and legal relations are parties, but not otherwise. J-T Associates v. Hudson River–Black River Regulating District.[67] See, also, Camdan Memorial Congregational Society of Brooklyn v. Kenyon,[68] (Action for declaratory judgment serves legitimate purpose only when all persons who may be affected thereby are parties to the action and have opportunity to be heard. Court must refuse to render a declaratory judgment in the absence of such parties.)

Therefore, when commencing the declaratory judgment proceeding, counsel may need to identify the other insurance carriers who could potentially be impacted by the coverage determination in the declaratory judgment action. Those other carriers should then be named as defendants in the declaratory judgment action. The New York State Department of Financial Services maintains an updated database containing the addresses of all insurers licensed to write insurance in New York State. The database is accessible to the public and can be accessed at: https://myportal.dfs.ny.gov/web/guest-applications/ins.-company-search.

Information concerning corporate defendants can easily be obtained through the New York State Department of State website, available at: http://www.dos.ny.gov/corps/bus_entity_search.html.

MECHANICS OF COMMENCING AND LITIGATING A DECLARATORY JUDGEMNT ACTION

Regarding the mechanics of commencing the declaratory judgment action, a process server should be retained to effectuate service on all defendants. Service can be made either in person, through the Secretary of State for corporate defendants or through

the Department of Financial Services in the case of an insurer. In a number of counties (such as New York and Westchester, for example), all insurance coverage cases must be electronically filed.

Prosecuting a declaratory judgment action for a defense attorney could be counterintuitive – you are the plaintiff and not the defendant. It is worth noting in that context that under CPLR 306-b, a plaintiff has 120 days from the filing of the summons and complaint to effectuate service. That timeframe can be extended by submitting a motion indicating the reason why service has not been completed. Typically, many of the named defendants in the declaratory judgment action are parties to a related personal injury action. Where there are challenges locating a particular defendant for service of the summons and complaint in the declaratory judgment action, counsel for that difficult to locate party in the underlying action may consent to accept service on behalf of his or her client. Alternatively, the motion seeking additional time to complete service can request that the court direct the attorneys appearing for the hard to locate defendant accept service in the declaratory judgment action. Franklin v. Winard.[69] Plaintiff must move for a default under CPLR 3215 within 1 year of the default. Any motion seeking a default requires proof by affidavit made by the party of the facts constituting the claim and the default. CPLR 3215(f).

CONCLUSION

This article has endeavored to provide an overview of the issues that should be considered when prosecuting or defending a claim for risk transfer in the context of a personal injury case.

[1] 71 N.Y.2d 643, 529 N.Y.S.2d 59 (1988)
[2] 212 A.D.2d 568, 622 N.Y.S.2d 334 (2nd Dep't 1995)
[3] 90 A.D.3d 916, 935 N.Y.S.2d 89 (2nd Dep't 2011)
[4] 17 N.Y.3d 369, 929 N.Y.S.2d 556 (2011)
[5] 47 N.Y.2d 297, 418 N.Y.S.2d 300 (1979)
[6] 40 A.D.3d 264, 835 N.Y.S.2d 161 (1st Dep't 2007)
[7] 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972)
[8] 96 N.Y.2d 398, 736 N.Y.S.2d 287 (2001)
[9] 97 N.Y.2d 714, 740 N.Y.S.2d 689 (2002)
[10] 3 N.Y.3d 408, 788 N.Y.S.2d 292 (2004)
[11] 100 A.D.3d 523, 954 N.Y.S.2d 76 (1st Dep't 2012)
[12] 10 N.Y.3d 296, 857 N.Y.S.2d 8 (2008)
[13] 285 A.D.2d 487, 728 N.Y.S.2d 484 (2nd Dep't 2001)
[14] 12 A.D.3d 423, 784 N.Y.S.2d 589 (2d Dep't 2004)
[15] 120 A.D.3d 1140, 992 N.Y.S.2d 432 (1st Dep't 2014)
[16] 4 N.Y.3d 235, 792 N.Y.S.2d 375 (2005)
[17] 22 N.Y.3d 501, 982 N.Y.S.2d 830 (2014)
[18] 123 A.D.3d 911, 1 N.Y.S.3d 142 (2nd Dep't 2014)
[19] 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989)
[20] 107 A.D.2d 450, 487 N.Y.S.2d 428 (4th Dep't 1985), aff'd on opinion below, 65 N.Y.2d 1038, 494 N.Y.S.2d 695 (1985)
[21] 3 N.Y.3d 486, 787 N.Y.S.2d 708 (2004)
[22] 50 A.D.3d 260, 854 N.Y.S.2d 388 (1st Dep't 2008)
[23] 58 A.D.3d 805, 871 N.Y.S.2d 729 (2nd Dep't 2009)
[24] 200 A.D.2d 267, 612 N.Y.S.2d 564 (1st Dep't 1994)
[25] 76 N.Y.2d 172, 556 N.Y.S.2d 991 (1990)
[26] 4 N.Y.3d 363, 795 N.Y.S.2d 491 (2005)
[27] 126 A.D.3d 949, 7 N.Y.S.3d 187 (2nd Dep't 2015)
[28] 61 A.D.3d 907, 878 N.Y.S.2d 152 (2nd Dep't 2009)
[29] 125 A.D.3d 755, 4 N.Y.S.3d 230 (2nd Dep't 2015)
[30] 76 A.D.3d 503, 906 N.Y.S.2d 79 (2nd Dep't 2010)
[31] 121 A.D.3d 840, 995 N.Y.S.2d 95 (2nd Dep't 2014)
[32] 28 N.Y.2d 205, 321 N.Y.S.2d 81 (1971)
[33] 56 A.D.3d 748, 871 N.Y.S.2d 169 (2nd Dep't 2008)
[34] 65 A.D.3d 1097, 885 N.Y.S.2d 350 (2nd Dep't 2009)
[35] 72 A.D.3d 715, 899 N.Y.S.2d 301 (2nd Dep't 2010)
[36] 89 N.Y.2d 786, 658 N.Y.S.2d. 903 (1997)
[37] 55 A.D.3d 770, 866 N.Y.S.2d 700 (2nd Dep't 2008)
[38] 7 N.Y.3d 412, 823 N.Y.S.2d 765 (2006)
[39] 9 A.D.3d 14, 776 N.Y.S.2d 260 (1st Dep't 2004)
[40] 11 N.Y.3d 204, 869 N.Y.S.2d 366 (2008)
[41] 124 A.D.3d 542, 2 N.Y.S.3d 446 (1st Dep't 2015)
[42] 71 A.D.3d 839, 896 N.Y.S.2d 457 (2nd Dep't 2010)
[43] 55 A.D.3d 368, 865 N.Y.S.2d 84 (1st Dep't 2008)
[44] 57 A.D.3d 239, 868 N.Y.S.2d 657 (1st Dep't 2008)
[45] 40 A.D.3d 264, 835 N.Y.S.2d 161 (1st Dep't 2007)
[46] 37 A.D.2d 335, 325 N.Y.S.2d 469 (3rd Dep't 1971)
[47] 40 A.D.3d 264, 835 N.Y.S.2d 161 (1st Dep't 2007)
[48] 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994)
[49] 47 A.D.3d 487, 851 N.Y.S.2d 401 (1st Dep't 2008)
[50] 44 A.D.3d 556, 844 N.Y.S.2d 231 (1st Dep't 2007)
[51] 234 A.D.2d 156, 651 N.Y.S.2d 475 (1st Dep't 1996)
[52] 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993)
[53] 92 N.Y.2d 363, 681 N.Y.S.2d 208 (1998)
[54] 299 A.D.2d 846, 752 N.Y.S.2d 180 (4th Dep't 2002)
[55] 234 A.D.2d 254, 651 N.Y.S.2d 54 (2nd Dep't 1996)
[56] 200 A.D.2d 527, 607 N.Y.S.2d 12 (1st Dep't 1994)
[57] 73 A.D.3d 717, 901 N.Y.S.2d 292 (2nd Dep't 2010)
[58] 5 N.Y.3d 157, 800 N.Y.S.2d 89 (2005)
[59] 248 A.D.2d 420, 671 N.Y.S.2d 93 (2nd Dep't 1998)
[60] 38 A.D.3d 34, 827 N.Y.S.2d 231 (2nd Dep't 2006)
[61] 126 A.D.3d 524, 5 N.Y.S.3d 422 (1st Dep't 2015)
[62] 108 A.D.3d 422, 969 N.Y.S.2d 39 (1st Dep't 2013)
[63] 81 A.D.3d 615, 916 N.Y.S.2d 132 (2nd Dep't 2011)
[64] 24 N.Y.3d 514, 2 N.Y.S.3d 8 (2014)
[65] 74 A.D.3d 1007, 903 N.Y.S.2d 506 (2nd Dep't 2010)
[66] 289 N.Y. 279 (1942)
[67] 175 A.D.2d 438, 572 N.Y.S.2d 122 (3rd Dep't 1991)
[68] 279 A.D. 1015, 111 N.Y.S.2d 808 (2nd Dep't 1952)
[69] 189 A.D.2d 717, 592 N.Y.S.2d 726 (1st Dep't 1993)

Any views and opinions expressed in this article are solely those of its authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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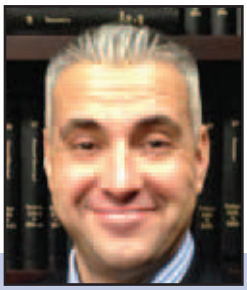
No Injury Needed - Medical Monitoring as a Remedy



LEON R. KOWALSKI*

In traditional tort law, one of the basic elements of any tort is the requirement that a plaintiff prove that the act or omission of the defendant cause an injury, whether that be a physical one, a psychological one or damage to property. However, in one relatively recently developed area of tort law, the plaintiff is relieved of this burden. Because of its departure from traditional tort law principles, the remedy of "medical monitoring" has become a highly debated and controversial topic in the legal community over the last several years. It is a somewhat new theory of recovery in which persons with no ascertainable injuries or symptoms seek to recover the costs of screening for health problems caused by exposure to hazardous elements. The aim of the remedy can be said to be the detection of an illness or illnesses not present at the time of a lawsuit. It is an unsettled point of law as to whether it exists as an independent tort cause of action or an element of damages. It has been accepted in some states, rejected in others and remains unresolved in many.

Please keep in mind that there are two distinguishing types of medical monitoring claims. The first is where the remedy is sought when the plaintiff is alleging a present physical injury within a reasonable degree of medical certainty. This is often seen in claims for future medical expenses in personal injury actions. The second is where there is an absence of a present physical injury (known as "no injury" medical monitoring). This article will focus on the latter as opposed to the former.

As currently framed by the courts that do recognize the claim, tort liability arises when a person is involuntarily exposed to a hazardous substance due to a defendant's negligence, thereby creating an increased risk of the person developing some future disease for which there is a screening test that will assist in the detection and treatment of the disease. The so-called "injury" in medical monitoring lawsuits is generally characterized as the increased risk of disease. The measure of damages is the costs of monitoring for the disease.

Due to the excessive cost of paying for the medical testing that monitoring consists of and the risk of the development of serious illness, these cases can be "high stakes" on both sides, however much surrounding the theory is unsettled. Not only do the courts vary from jurisdiction to jurisdiction on the recognition of the claim, the courts also vary in opinion as to whether the claim is an independent cause of action or an element of damages. There is also an issue as to how compensation for the monitoring should be accomplished. While monetary damages for the cost of the monitoring are often sought, there are occasions when instead of monetary damages, the plaintiffs will seek what they term to be equitable relief in the form of a medical monitoring program.

The Controversy - Whether to Grant a Remedy even without a Physical Injury or Illness

In the typical tort claim, a plaintiff is required to prove the existence of a present (or past) physical injury in order set forth a claim of negligence. Note the basic elements of a traditional claim for negligence – duty, breach of duty, injury (damages), and proximate cause. Traditionally, compensation for the screening of asymptomatic individuals with no existing injury or disease, but rather an increased risk of disease, was not recoverable because of the traditional tort law requirement that the plaintiff must show a present physical injury (or impact). However, in a "no injury" medical monitoring claim, a plaintiff is typically seeking damages when there is no proof of present (or past) physical injury or illness. Therein lays the controversy. "No injury" medical monitoring claims defy the traditional principles of tort law. The asymptomatic nature of the plaintiffs

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in these cases understandably leads to arguments of uncertainty and speculation. Where recognized, the court is, essentially, substituting the risk of injury for an actual injury. In those jurisdictions that do recognize the claim, the rationale for this so-called "substitution" is based upon their reading of the definition of "injury" to include the enhanced risk of disease caused by exposure.[1] A claim for medical monitoring can be viewed as altering the basic elements of a tort claim for negligence. As will be shown, the absence of an injury seems create difficulty in the courts' recognition of the claim. The ultimate issue is the interpretation of the term "injury" (i.e. whether it includes the increased risk of disease), thus the controversy truly boils down symptomatic versus asymptomatic.

Current Views of the Courts

The states are currently split over whether or not to recognize a claim for medical monitoring. Currently, fewer than 15 states, and the District of Colombia, recognize a cause of action for medical monitoring or allow damages for medical monitoring absent proof of present injury. Less than half of the states have either not yet addressed the issue or have already rejected claims for medical monitoring. The states that recognize medical monitoring as a valid claim are divided between those that recognize a medical monitoring claim if there is no present physical injury, and those that require present physical injury to sustain a claim.

Jurisdictions that allow medical monitoring claims where there is no present physical injury: AZ, CA, CO, DC, FL, MA, MD, MO, NJ, OH, PA, UT, VT, WV.

Jurisdictions that do not allow medical monitoring claims where there is no present physical injury: Federal, AL, AR, CT, GA, KS, KY, LA, MI, MN, MS, NE, NV, NC, ND, NY, OK, OR, RI, SC, TN, TX, VA, VI, WA.

Jurisdictions with no law on medical monitoring claims: AK, HI, ID, IA, ME, MT, NH, NM, PR, SD, WI, WY.

Jurisdictions with divided law on medical monitoring claims: DE, IL, IN.

The Basics of a Medical Monitoring Claim

What is medical monitoring and what is it not from a medical perspective?

Medical monitoring is the performance of medical tests and physical examinations to evaluate an individual's ongoing exposure to a factor that could negatively impact that person's health. In medical terms, the type of testing used for monitoring is generally referred to as "screening". Screening is the medical testing of an asymptomatic individual to check for the presence of disease. Medical monitoring should not be confused with diagnostic testing, which is medical testing that is used to determine the extent of a known injury (or to confirm symptoms). Victims of an "accident" that is claimed to have caused an injury as a result of traumatic physical impact would need diagnostic testing to evaluate the extent of those physical injuries. Examples of diagnostic testing would include x-rays where there is a suspected fracture and MRIs when a herniated disc is believed to exist in the spine. Medical monitoring is also different from what is known as surveillance testing, which is medical testing to monitor the status of a known, existing disease or injury or to test for a re-emerging disease. The most obvious of these is a cancer patient who is in remission and requires periodic testing or scanning. Another example would be in a situation with a cervical fusion or a joint replacement where typical future medical care would likely consist of future MRI testing at a set interval over the future life of the plaintiff to follow for any changes.

What is a "claim" for medical monitoring?

A claim for medical monitoring is a developing theory of liability in which a plaintiff who is asymptomatic and who does not yet have an existing physical injury or disease, but merely has an "increased risk" of injury or disease, will seek the recovery of the costs of the medical tests and physical examinations used to screen for the disease. In the parlance above, the claim seeks the recovery of the screening.

Is it a cause of action or an element of damages?

When the claim for medical monitoring is asserted by a plaintiff, depending on the jurisdiction, it may be set forth as either an independent tort claim or as an element of damages. There is a very clear distinction between the two. As a cause of action it would be viewed as an independent tort that would support a suit that seeks recovery under that theory alone. Therefore, in a case where an asymptomatic plaintiff fails to meet their burden in proving a tort, the recognition of medical monitoring as an independent

cause of action would allow the plaintiff to recover. As an element of damages it would be a remedy for an existing tort and part of consequential damages where the plaintiff met his or her burden of proof under a traditional theory of liability. As will be seen, there is a lack of uniformity in recognizing medical monitoring as either an independent tort claim or as an element of damages. For example, the California Supreme Court has recognized medical monitoring as an element of damages finding that it is a remedy "when liability is established under traditional tort theories of recovery"[2] while Pennsylvania law allows and independent tort claim for medical monitoring in negligence, but not in strict liability.[3]

In what types of cases is the claim typically asserted?

Regardless of whether it is recognized as either an independent claim or as an element of damages, the claim is generally asserted or attempted to be asserted in cases dealing with alleged tortious exposure to hazardous substances. Typically, the claim is seen in cases dealing with exposure to substances such as such as asbestos, chemicals, pesticides, toxic waste and other pollutants. The claim is also seen in pharmaceutical cases such as Fen-Phen litigation, as well as cases involving defects in medical devices as well as products liability cases such as cigarettes and Chinese drywall, however as will be shown, there is less recognition of the claim in strict liability and products liability cases, which is usually due to most jurisdictions requiring that the exposure be caused by the defendant's negligence.

The claim can be set forth on behalf of an individual plaintiff or as part of a class action, however very often the claim is made in class action suits. Medical monitoring claims are expensive to litigate and they typically depend on complex scientific proof and expert testimony. The medical testing costs that a single plaintiff can recover typically are not much as compared with the testing costs that could be awarded for an entire class. As a result, it usually only makes economic sense for those plaintiffs who are not otherwise injured to pursue aggregated medical monitoring claims on behalf of a class. In aggregate, medical monitoring claims can have enormous benefits for plaintiffs as settlements and verdicts in medical monitoring cases brought by large classes have reached into the hundreds of millions of dollars. However, it should be noted that most of the cases where there has been successful class certification have come in those actions where there are allegations of exposure to asbestos, chemicals, pesticides and toxic waste and other pollutants. While there have been some successful attempts, class certification asserting medical monitoring claims have been less successful in pharmaceuticals, medical devices and other products.

When does liability arise? What are the underlying tort theories?

As currently defined by the courts that recognize a claim for medical monitoring, tort liability for the claim arises when a person is exposed to a hazardous substance due to a defendant's negligence, thereby creating an increased risk of the plaintiff developing some future disease for which there is a screening test that will assist in the early detection and effective treatment of the disease. This is regardless of whether the court perceives medical monitoring as an independent Cause of Action or an element of damages.

The majority of jurisdictions where medical monitoring is recognized usually require that it be proved that the exposure must have been caused by the defendant's negligence as opposed to other theories of recovery. For example, the Utah Supreme Court recognizes independent claims for no-injury medical monitoring in cases involving negligence only.[4] Pennsylvania allows independent claims for medical monitoring in negligence, but not in strict liability,[5] and the exposure must be "caused by the defendant's negligence".[6] Similarly, medical monitoring without present injury is recognized under Florida law and is available in negligence, but not in strict liability.[7] And Missouri allows the cause of action in environmental actions, but not in product liability actions.[8] On the other hand, the West Virginia Supreme Court has recognized independent claims for medical monitoring not limited to negligence.[9]

Statute of Limitations? When Does the Cause of Action accrue?

In general, the courts have not applied a special statute of limitations thus far in medical monitoring claims. Instead, the few courts that have addressed the issue of statute of limitations for medical monitoring claims have applied a personal injury statute of limitations to those claims. Thus, if the

applicable state statute of limitations is governed by a discovery rule, then that discovery rule is applied to determine whether the medical monitoring claim was timely commenced.[10]

What are the Elements of the Cause of Action or Claim?

The following elements typically must be proven by the plaintiff(s) in order to be successful in recovering. Please note that these elements tend to vary from jurisdiction to jurisdiction. Elements required by specific jurisdictions are noted in this article wherever possible, especially in the discussion under the next bold subject heading below. Also, as a practical note, to establish these elements, plaintiffs must rely heavily on the use of expert testimony.[11]

A. Exposure greater than normal background levels. Most courts hold that the exposure must be "significant." Some courts have defined a "significant exposure" as one that is "greater than normal background levels."[12]

B. Exposure must be to a hazardous substance. The substance must have been proven hazardous to human health.[13]

C. The exposure must have been caused by the defendant's negligence. As discussed previously, some jurisdictions allow the claim to be asserted in cases involving other theories of recovery; however the majority seem to limit the claim to negligence actions as opposed to strict liability and/or products liability.

D. As a proximate result of the exposure, the plaintiff has a significantly increased risk of contracting a serious latent disease.

E. A monitoring procedure exists that makes the early detection of the disease possible.[14]

F. The prescribed monitoring regime is different from that normally recommended in the absence of the exposure.[15]

G. The prescribed monitoring regime is reasonably medically necessary, or, reasonably necessary according to contemporary scientific principles.[16]

What is the Nature of the Damages in a Claim for Medical Monitoring?

The plaintiffs will seek to recover the projected costs of long-term testing (screening) that would be necessary to detect hidden disease that may develop as a result of the alleged tortious exposure. As indicated, the prescribed monitoring regime must be proven by the plaintiff to be reasonably necessary according to contemporary scientific principles. Usually, the damages take the form of monetary damages, however instead of monetary damages; some plaintiffs seek so-called "equitable" relief in the form of a court-funded and court-established medical monitoring program. It is important to note that this "equitable" relief is often sought in order to meet the requirements for class certification which are discussed below. Defendants will commonly argue that this "equitable relief" is nothing more than monetary damages since the defendant is still paying for the cost of monitoring per plaintiff. The defendants argue that they remain monetary damages whether paid as a lump sum to the plaintiff directly or through a court-supervised monitoring fund.

Very often, the extent and severity of physical injuries may be the central controversy in a traditional tort case. The damages in a medical monitoring case may be contrasted with those in a traditional tort case. It is a very well-settled concept that a plaintiff who has been involved in an accident and is alleging an injury may recover the costs of diagnostic testing. Obviously a plaintiff with an existing physical injury may also recover the costs of surveillance testing assuming it is necessary within a reasonable degree of medical certainty. Both the surveillance testing and diagnostic testing are based upon symptomatic physical injuries. Recovery for screening tests is not based on a physical injury or impact; by definition, a medical monitoring plaintiff has no existing physical injury, disease, or symptom of disease. They are asymptomatic. Traditionally, compensation for the screening of asymptomatic individuals with no existing injury or disease was not recoverable because of the usual tort law requirement that the plaintiff must show a physical injury, however medical monitoring claims seek recovery for these types of screening tests even though there are no symptoms.

The Development of the Law in Jurisdictions that Recognize Medical Monitoring, and the Emergence of Elements of the Cause of Action or Claim

In what would turn out to be the foundation of medical monitoring claims, the D.C. Circuit held that

medical monitoring would be an acceptable cause of action in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*[17] In *Friends for All Children, Inc.,* a military plane used in rescuing Vietnamese orphans crashed due to the alleged defect in the manufacture of the plane and the court found that the defendant was liable for the cost of diagnostic examinations of the children, finding that approximately forty of the foreign surviving children faced irreparable injury unless they promptly obtained diagnostic examinations despite no physical injuries. Interestingly, the testing was ordered as preliminary injunctive relief due to the fact that the defendant had already been adjudicated liable but a trial to determine the amount of liability would have been so long delayed that, in the interim, the plaintiffs faced irreparable injury.

This case is often viewed as groundbreaking and is identified as the case in which the theory of medical monitoring as a claim first emerged. However, it should be noted that this case, unlike the cases of more recent vintage did involve plaintiffs who did suffer some injury, no matter how slight, from the aircraft crash, therefore, the question of liability in the absence of physical injury or a traumatic event was left open. It should be noted that subsequently, another court in the District of Columbia refused to extend medical monitoring to product liability actions there.[18]

With *Ayers v. Township of Jackson*[19], New Jersey was one of the first states to recognize a no-injury medical monitoring cause of action in an environmental action where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.[20] The *Ayers* case came only a few years after *Friends for All Children, Inc. v. Lockheed Aircraft Corp.* mentioned above. It should be noted that in *Mauro v. Raymark Industries, Inc.*,[21] which is a case that involved a claim of enhanced risk due to asbestos exposure, the same New Jersey court held that the prospective cancer component of the plaintiff's enhanced risk claim was properly withheld from the jury in the absence of evidence establishing the future occurrence of cancer as a reasonable medical probability.[22]

New Jersey also has a product liability statute that requires a present injury, therefore medical monitoring is not available in product liability actions in New Jersey that do not also qualify as environmental torts. In *Sinclair v. Merck & Co.,*[23] the Court held that plaintiffs cannot recover for medical monitoring under the New Jersey Product Liability Act (PLA) in the absence of a "manifest injury," nor can they seek the same relief under the New Jersey Consumer Fraud Act (CFA). This decision eliminated the costs of medical monitoring as an element of damages in cases alleging product defects where the defect has not caused a "manifest" physical injury.

Similar to New Jersey, the recognition of the claim in Louisiana also encountered statutory interference. After the Louisiana Supreme Court recognized no-injury medical monitoring claims in *Bourgeois v. A.P. Green Industries, Inc.*[24], the legislature passed a statute that prohibits such claims as it requires that damages be "directly related to a manifest physical or mental injury or disease."[25]

A Federal Court concluded that Colorado law would recognize an independent claim for medical monitoring for environmental torts in *Cook v. Rockwell International Corp.*[26] In *Cook,* the court listed four elements: (1) "significant exposure to a proven hazardous substance through the tortious actions of defendant"; (2) "an increased risk of contracting a serious latent disease"; (3) "increased risk makes periodic diagnostic medical examinations reasonably necessary"; and (4) "procedures exist which make the early detection and treatment of the disease possible and beneficial."[27]

As previously indicated, the California Supreme Court has recognized medical monitoring as a remedy "when liability is established under traditional tort theories of recovery."[28] In *Potter v. Firestone Tire & Rubber Co.,* the court determined that "allowing compensation for medical monitoring costs does not require courts to speculate about the probability of future injury; it merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate."[29] In *Potter*, the California Supreme Court identified five factors in determining the reasonableness and necessity of monitoring: (1) The significance and extent of the plaintiff's exposure to chemicals; (2) The toxicity of the chemicals; (3) The relative increase in the chance of onset of disease in

the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) The seriousness of the disease for which the plaintiff is at risk; and (5) The clinical value of early detection and diagnosis.

As indicated above, Pennsylvania allows independent claims for medical monitoring in negligence, but not in strict liability. The elements are: (1) exposure to "greater than normal background levels"; (2) the substance is "proven hazardous"; (3) exposure "caused by the defendant's negligence"; (4) exposure caused "a significantly increased risk of contracting a serious latent disease"; (5) "a monitoring procedure exists that makes the early detection of the disease possible"; (6) the monitoring "is different from that normally recommended in the absence of the exposure"; and (7) the monitoring "is reasonably necessary according to contemporary scientific principles."[30] Other Pennsylvania courts have confirmed that Pennsylvania law does not permit medical monitoring claims in strict liability cases.[31]

In 2000, the Maryland Court of Appeals, affirmatively declined to decide whether to recognize medical monitoring claims without actual injury.[32] However, in 2013, they did recognize a cause of action for medical monitoring by presently uninjured plaintiffs.[33] The court ruled that the plaintiff must prove the following: (1) an underlying cause of action (2) medical monitoring costs must be both "necessary and reasonable." "Necessity for medical monitoring . . . must be reasonably certain, rather than merely possible." (3) Plaintiff must "experience direct and hence discrete exposure." (4) The condition for which monitoring is allegedly needed must be "related specifically and tangibly to that exposure." (5) The risk must be "a direct and proximate result of that exposure."[34] Massachusetts adopted medical monitoring in *Donovan v. Philip Morris USA, Inc.*[35] There, the court ruled that the cost of medical monitoring may be recoverable in a tort suit under Massachusetts law under certain circumstances.

Recently, in *Sadler v. Pacificare of Nevada, Inc.*[36], the Nevada Supreme Court addressed a lower court decision holding that claims for medical monitoring in a proposed class action could not proceed absent a present physical injury. The underlying suit alleged that the defendant was negligent in failing to oversee the medical providers in its network, leading to an outbreak of Hepatitis C among their patients. The class plaintiffs sought medical monitoring as a remedy, even for individuals who had not yet been diagnosed with Hepatitis C. The trial court held that a present physical injury was required, but the Nevada Supreme Court reversed, holding that the action could be maintained for a medical monitoring remedy so long as some injury, though not necessarily a physical injury, was alleged. The court held that such an injury could include "unwillingly enduring an unsafe injection practice and the resulting increase in risk of contracting a latent disease and need to undergo medical testing that would not otherwise be required."

In Missouri, in permitting non-injury medical monitoring claims in environmental actions, the Missouri Supreme Court did not enunciate a specific list of elements, but determined that they would allow the claim where "the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure," and if "to a reasonable degree of medical certainty, it is necessary in order to diagnose properly the warning signs of a disease."[37]

Presented now are elements of the cause of action as discussed by courts in three other jurisdictions. In Utah, the elements are: (1) "exposure"; (2) to a "toxic substance;" (3) that was "caused by the defendant's negligence"; (4) and results in "increased risk"; (5) of "serious disease, illness, or injury"; (6) where "a medical test for early detection exists"; (7) "early detection is beneficial" in that "a treatment exists that can alter the course of the illness"; and (8) monitoring "has been prescribed by a qualified physician according to contemporary scientific principles."[38]

In Florida, the elements of the cause of action are: (1) exposure "greater than normal background levels"; (2) "to a proven hazardous substance"; (3) "caused by the defendant's negligence"; (4) the "plaintiff has a significantly increased risk of contracting a serious latent disease"; (5) "a monitoring procedure exists that makes the early detection of the disease possible"; (6) that monitoring "is different from that normally recommended in the absence of the exposure"; and (7) the monitoring "is reasonably necessary according to contemporary scientific principles."[39]

In West Virginia, the elements are: (1) plaintiff has been "significantly exposed" "relative to the general

population"; (2) to a "proven hazardous substance"; (3) by reason of "tortious conduct" (not just negligence) by the defendant; (4) which exposure has created "an increased risk of contracting a serious latent disease"; (5) which "makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure"; and (6) monitoring "exists that make the early detection of a disease possible."[40] As will be seen throughout this commentary, jurisdictions vary under which theories of liability the claim is recognized.

New York's View of Claims for Medical Monitoring

In 2013, the New York Court of Appeals with *Caronia v. Philip Morris USA, Inc.*[41] decided against creating a stand-alone cause of action for medical monitoring, finding that the risk of future injury cannot support a claim for medical monitoring. In *Caronia,* the United States Court of Appeals for the Second Circuit asked The Court of Appeals us to determine whether New York recognizes an independent equitable cause of action for medical monitoring and, if so, what the elements, appropriate statute of limitations and accrual date were for that particular cause of action. The plaintiffs were a group of smokers of Marlboro cigarettes all over the age of 50 with histories of 20 pack-years or more, none of whom had been diagnosed with lung cancer or were "under investigation by a physician for suspected lung cancer". The plaintiffs commenced a class action against Philip Morris USA, Inc. in federal court asserting claims sounding in negligence, strict liability and breach of the implied warranty of merchantability. The plaintiffs also sought equitable relief, specifically, the establishment of court supervised medical monitoring program at the defendants' expense that would assist in the early detection of lung cancer. Specifically, the plaintiffs sought Low Dose CT (LDCT) scanning of the chest, a test that can assist in the early detection of lung cancer. The plaintiffs did not claim to have suffered a physical injury, rather they asserted that they are at an "increased risk" for developing lung cancer and would benefit from LDCT monitoring, which they claim would allow them to discover the existence of cancers at an earlier stage, leading to earlier treatment.[42]

The plaintiffs' negligence and strict liability claims were dismissed on summary judgment, leaving only the medical monitoring claim.[43] The Court of Appeals determined that a risk of future injury cannot support a claim for medical monitoring.[44] The court concluded that they declined to recognize a "judicially-created" independent cause of action for medical monitoring.[45] The court opined that the allowance of such a claim absent any evidence of present physical injury or damage to property would constitute a significant deviation from the state's tort jurisprudence. They noted that their holding would not prevent plaintiffs who have sustained a physical injury from seeking the remedy of medical monitoring and such a remedy has been permitted in the state as consequential damages so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action.[46] The court clearly distinguished cases involving "no injury" from those with proven physical injuries.

The court found that a threat of future harm is insufficient to impose liability against a defendant in a tort context and the requirement that a plaintiff sustain physical harm before being able to recover in tort is "a fundamental principle of our state's tort system". They reasoned that the physical harm requirement serves a number of important purposes. The court held that "it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims."[47] The court noted that without having alleged a physical injury or damage to property in their complaint, the plaintiffs' "only potential pathway to relief would be for the court to recognize a new tort, an equitable medical monitoring cause of action."[48]

The court noted that the Appellate Divisions have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an existing tort.[49] The court cited to *Abusio v Consolidated Edison Co. of N.Y.*,[50] where the plaintiffs brought a negligence cause of action arising out of exposure to toxins and the court concluded that the trial court properly set aside the damage awards for emotional distress and medical monitoring, holding that although the plaintiffs established that they were exposed to toxins, they failed to establish

that they had a "rational basis" for their fear of contracting the disease, i.e., they failed to establish a "clinically demonstrable presence of [toxins] in the plaintiff's body, or some indication of [toxin]-induced disease, i.e., some physical manifestation of [toxin] contamination."[51] The court noted that the courts have followed the test enunciated in *Abusio* in a number of cases where medical monitoring was sought as an element of damages, however in each of those cases, the plaintiffs alleged either personal injury or property damage or both, whereas in *Caronia*, no such injury was alleged.[52]

Interestingly, the court in *Caronia* also noted that Federal courts sitting in New York have concluded the Court of Appeals would recognize an independent equitable medical monitoring cause of action where a plaintiff's only injury is the "financial burden associated with periodic medical monitoring" or where the plaintiff alleges absolutely no injury at all. However, the court disagreed with those predictions, noting that the prior cases decided by the appellate court upon which the federal courts were basing their predictions necessitated that the plaintiff sustain a physical injury before he or she could recover consequential damages for medical monitoring.[53]

In *Ivory v. International Business Machines Corp.*,[54] the Appellate Division expanded on *Caronia*. In *Ivory*, the defendant owned a machine manufacturing facility in the Village of Endicott, Broome County between 1924 and 2002. From 1935 through the mid-1980s, the defendant used the chemical trichloroethylene (TCE) to clean metal parts in degreasers and in the production of circuit cards and boards. The defendant discovered that solvents, including TCE, had pooled in the groundwater beneath the facility and found that the contaminated groundwater appeared to be migrating so remediation efforts were undertaken. In 2002, the defendant began investigating whether vapor intrusion[55] was taking place in Endicott as a result of contaminated groundwater that originated at the defendant's facility. In 2008, the defendant was the subject of a class action alleging causes of action for negligence, private nuisance and trespass and seeking, among other things, medical monitoring damages. Out of the seven plaintiffs, two (Thomas H. Ivory and Timothy Ivory) alleged that they developed cancer as a result of TCE exposure; the other five plaintiffs alleged that, although they were exposed to significant levels of TCE, they did not have any physical manifestations of injury related to TCE.[56] All of the plaintiffs except one (Thomas H. Ivory) sought medical monitoring damages in connection with their claims.[57]

The court determined that the Supreme Court properly dismissed the claims for medical monitoring damages except as to two of the plaintiffs, Timothy Ivory and Grace Odom,[58] reasoning that the mere exposure to the toxic substances failed to constitute a physical injury.[59] Under that rationale, only those who demonstrated physical manifestation of symptoms could maintain a medical monitoring claim.[60] The court emphasized that the Court of Appeals recently held in *Caronia* that New York does not recognize an independent cause of action for medical monitoring.[61] The plaintiffs in *Ivory* did not assert such a separate cause of action, but instead sought medical monitoring expenses as consequential damages in connection with some of their other claims.[62] The court found that despite this different context, they must be guided by the Court of Appeals' decision in *Caronia,* which noted "that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an existing tort."[63] The court relied on the holding in *Caronia* that "New York's current tort jurisprudence does not allow a claim for medical monitoring absent any evidence of present physical injury or damage to property."[64] With respect to Plaintiff Timothy Ivory, he alleged and presented some proof to establish that he suffered from actual physical injuries allegedly caused by TCE. That led to the conclusion that Timothy Ivory can proceed to seek medical monitoring as consequential damages in connection with his actual physical injury (cancer).[65]

However, the Third Department noted that in *Caronia* the court also found that medical monitoring can be recovered as consequential damages associated with a separate tort alleging property damage.[66] Plaintiff Grace Odom was found to have had a valid trespass cause of action and the trespass cause of action did allege property damage, therefore the court found that plaintiff Odom could pursue medical monitoring damages consequential to the trespass cause of action.[67] Similarly, when discussing the case of another plaintiff (Stevens), because that plaintiff could only pursue medical monitoring damages as consequential damages associated with a separate tort

alleging property damage and she had discontinued her property damage claims, the court determined that she waived her right to seek consequential medical monitoring damages.[68] New York has clearly resolved the issue of whether they recognize an independent tort for medical monitoring when there is no injury, and by their decisions in *Caronia* and *Ivory,* it is a resounding "no."

Federal Class Actions

A claim for medical monitoring that is set forth in a class action may be defended as you would any other class action suit, such as preventing the class from being certified. In order to obtain class certification, it must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), or the corresponding class action statute of the state in which suit is brought. Many state class action statutes are similar to FRCP 23. FRCP 23(a) provides that a party seeking class certification must establish each of the following criteria: The class is so numerous that joinder of all members is impracticable (known as "numerosity"); there are questions of law or fact common to the class (knowns as "commonality"); the claims and defenses of the representative parties are typical of the claims or defenses of the class (knowns as "typicality"); and the representative parties will fairly and adequately protect the interests of the class. If a party successfully establishes all four criteria, it must then demonstrate that at least one of the three requirements of FRCP Rule 23(b) is also present.

In the realm of Federal class actions, there is a relatively newly espoused theory that the case of *Dukes v. Wal-Mart Stores, Inc.*[69] may spell the end of certification of medical monitoring class actions on the federal level. *Dukes* may make it more difficult to certify medical monitoring claims under Rule 23(b)(2) of the Federal Rules of Civil Procedure ("FRCP"),[70] however it still leaves open the possibility of class certification under Rule 23(b)(3). In *Dukes*, which was not a medical monitoring suit, but rather an employment discrimination suit, the court nullified one of the largest attempted class certifications (1.6 million people) due to a lack of "commonality" under Rule 23(a)(2). The court found that claims for monetary relief may not be certified under Rule 23(b)(2) where the monetary relief is not incidental to the injunctive or declaratory relief required under that section. Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." There is a notion in the legal world that reads this to be the sounding of the death knell to medical monitoring claims under Rule 23(b)(2) because they take the position that the "equitable" relief sought in medical monitoring cases is nothing more than monetary relief and is not "injunctive" relief since it requires the defendants to pay money as opposed to relief which seeks to enjoin them from continuing a certain activity or compel them to perform an activity.

The argument seems sound, however it is not a newly espoused theory. Also, what about class certification under Rule 23(b)(3)? Proponents of *Dukes* as an ultimate weapon against class certification, fail to account for the fact that as long as Rule 23(a) is met, the plaintiffs can still proceed under Rule 23(b)(3) assuming they meet the criteria. Granted Rule 23(b)(3) is less desirable for attorneys representing plaintiffs because it is more expensive and more difficult to meet, however do not underestimate the Bar, especially when a potential client could consist of an individual plaintiff or instead, could consist of a larger class of people creating a more lucrative case, especially when cases prior to *Dukes* are examined.

Prior to *Dukes*, medical monitoring classes were already being knocked out on the Federal level in what seems like a developing trend. Multiple Federal appellate courts that had examined a proposed medical monitoring class had refused certification. In *Barnes v. Am. Tobacco Co.*,[71] which involved claims of intentional exposure to a hazardous substance, negligence, and strict products liability on behalf of a purported class of over one million Pennsylvania cigarette smokers, the court decertified a class under Rule 23(b)(2), not because the equitable relief sought was not "injunctive", but rather because the class lacked cohesiveness with too many individual issues of addiction and causation as well as defenses to permit certification.[72] In *Barnes*, the court noted that "while 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive."[73] While the court did not address the issue of injunctive relief directly, they did note that the District Court found that under certain circumstances medical monitoring could constitute the injunctive relief required by Rule

23(b)(2) and after initially holding that the plaintiffs could not be certified under Rule 23(b)(2) because most of the relief they sought was monetary in nature, the plaintiffs amended their complaint so it contained only a claim for medical monitoring and asked only for the establishment of a court-supervised medical monitoring program.[74] However, it should be noted that the underlying district court in *Barnes* decertified due to the cohesiveness issue, not the injunctive relief issue.

In *Ball v. Union Carbide Corp.*,[75] where the plaintiffs were a group of individuals that claimed that they had been harmed through exposure to radioactive and other toxic substances over a period when nuclear weapons were manufactured in their town, the district court was found to have analyzed the Rule 23(a) requirements correctly in concluding that the plaintiffs did not have claims common and typical to the class.[76]

In *In re St Jude Med., Inc.*,[77] recipients of a prosthetic heart valve sought class certification in a suit seeking medical monitoring. The defendants argued that seeking injunctive relief violated the Due Process Clause and that the class lacked cohesiveness. The court concluded that the class lacked cohesion and reversed on that ground. They did mention that bolstering their decision to reverse was the fact that the plaintiffs failed to make the court believe that they would have filed suit for the medical monitoring program even in the absence of a claim for damages, but they went no further.[78]

In *Zinser v. Accufix Research Inst., Inc.*,[79] a products liability action involving pacemakers 10 years prior to *Dukes*, the court did decline to certify the class under Rule 23(b)(2) finding that the plaintiffs did not seek a court-established medical monitoring program solely for the purposes of diagnosing disease and sharing information with class members, rather they sought the establishment of a "reserve fund to pay for the cost of the medical monitoring program," which included medical examinations of class members, as well as treatment of disease detected in class members, but additionally sought punitive and compensatory damages for the class. The court opined that the medical monitoring program did not seek appropriate injunctive relief under Rule 23(b)(2). The court also noted that the "courts have split on whether medical monitoring relief is primarily compensatory or injunctive."[80]

Finally, in *Boughton v. Cotter Corp.*,[81] a group of over 500 individuals alleging exposures of their persons and property to hazardous emissions of a uranium mill appealed the denial of certification of a class. The court stated that the district court noted that claims relating to medical monitoring, if brought by themselves, might constitute a proper basis for certifying under Rule 23(b)(2), however the district court found that certification was not proper because the relief was determined to be predominately money damages. The court noted that "the trial judge understood that injunctive relief was requested and that certification of a class under such circumstances was legally permissible under Rule 23(b)(2), but nevertheless decided that it was not appropriate to certify a class under that rule where the relief sought was primarily money damages. Further, the trial court's decision not to certify under Rule 23(b)(3) was not an abuse of discretion because there was a lack of cohesiveness.[82]

Conclusion

Medical monitoring is an area of law that is both evolving and contentious. The ultimate issue really appears to be how the courts construe the term "injury". Probing down through the holdings as well as the dicta of the various courts in the various jurisdictions reveals that a crucial underlying issue, and the source of controversy, is not so much the courts' willingness to relieve the plaintiffs of their burden to prove an actual present physical injury, but more an issue of interpretation. Those courts that have recognized the claim of medical monitoring without a present physical injury as either an independent cause of action or as an element of consequential damages ultimately seem to be making a finding that the increased risk of disease is, in fact, an injury and as such, a person suffering that injury should be entitled to seek recovery. Based upon the vast potential for financial exposure, the development or lack thereof of this claim in the future is a subject that bears watching.

1 See *Ayers,* 106 N.J. at 592

2 *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 863 P.2d 795, 25 Cal.Rptr.2d 550 (1993)

3 *Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 548 Pa. 178 (1997)

4 *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (1993)

5 See *Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 548 Pa. 178 (1997)

6 See *Redland Soccer Club v. Department of the Army*, 696 A.2d at 145.

7 See *Petito v. A.H. Robins Co.,* 750 So.2d 103 (Fla. 3d.

Dist. Ct. App. 1999) and *Zehel-Miller v. Astrazenaca Pharmaceuticals, LP,* 223 F.R.D. 659, 663-64 (M.D. Fla. 2004)

8 See *Meyer v. Fluor Corp.,* 220 S.W.3d 712, 717-718 (Mo. 2007)

9 See *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W.Va. 2003) and *Bower v. Westinghouse Electric Co.,* 522 S.E.2d 424 (W.Va. 1999)

10 See *Barnes v. American Tobacco Co, Inc.,* 984 F. Supp. 842 (E.D. Pa 1997), *aff'd*, 161 F.3d 127 (3d. Cir. 1998), where the plaintiffs' claims for medical monitoring accrued when the plaintiffs were placed at a significantly increased risk of contracting a serious latent disease. *See, Carey v. Kerr-McGee Chemical Corp.,* 999 F. Supp. 1109 (N.D. Ill. 1998), where the court predicted that Illinois would recognize a claim for medical monitoring, that two year limitations period under Illinois' discovery rule applied, and that the plaintiffs' claims were time-barred because they knew or reasonably should have known of the potential health hazards of the substance in question more than two years prior to the filing of suit.

11 *Sheridan v. NGK Metals Corp.,* 609 F.3d 239, 251 (3d Cir. 2010)

12 *Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287 (N.J. 1987) and *Redland Soccer Club v. Department of the Army,* 696 A.2d 137, 548 Pa. 178 (1997)

13 See *Ayers,* 106 N.J. at 59215

14 *Bourgeois v. A.P. Green Indus.*, 716 So. 2d 355, 360-61 (La. 1998)

15 *Bourgeois*, 716 So. 2d at 360-61

16 See *Petito,* 750 So.2d at 106 and *Redland Soccer Club,* 696 A 2d at 145-47

17 *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 837-38 (D.C. Cir. 1984).

18 See *Witherspoon v. Philip Morris Inc.,* 964 F. Supp. 455, 467 (D.D.C. 1997)

19 *Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287 (N.J. 1987)

20 *Ayers,* 525 A.2d at 312.

21 *Mauro v. Raymark Industries, Inc.,* 561 A.2d 257 (N.J. 1989)

22 See *Mauro v. Raymark Industries, Inc.,* 561 A.2d at 264

23 *Sinclair v. Merck & Co.,* 948 A.2d 587, 595 (N.J. 2008)

24 *Bourgeois v. A.P. Green Industries, Inc.,* 716 So.2d 355, 360 (La. 1998)

25 *La. Civ. Code Ann.*, Art. 2315 (1998)

26 *Cook v. Rockwell International Corp.,* 755 F.Supp. 1468, 1477 (D. Colo. 1991)

27 *Cook,* 755 F.Supp. at 1477

28 *Potter v. Firestone Tire & Rubber Co.,* 863 P.2d 795, 822-23 (Cal. 1993)

29 *Id*. at 1007-1008

30 *Redland Soccer Club*, 696 A.2d at 145-146

31 *Brown v. Dickinson*, 2000 WL 33342381, at 1 (Pa. C.P. March 9, 2000); *Barnes v. American Tobacco Co.*, 989 F. Supp. 661, 664 (E.D. Pa. 1997); (both requiring a "negligent" act); *see also In re Orthopedic Bone Screw Products Liability Litigation,* 1995 WL 273597, at *9-10 (E.D. Pa. Feb. 22, 1995) (finding medical monitoring inappropriate in a product liability action not involving exposure to a toxic substance). In *Brown, et al. v. C. R. Bard, Inc., et al.,* 942 F. Supp. 2d 549 (E.D. Pa. 2013), the federal district court held that the plaintiff's satisfy the injury-in-fact requirement to have standing where. In *Brown*, the plaintiff's brought a class action against the manufacturer of inferior vena cava (IVC) filters; the plaintiffs were not experiencing problems with their IVC filters, but they alleged the filters were at risk of fracturing, requiring them to undergo regular CT scans.

32 *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 251 (Md. 2000) (declining to determine whether a "novel tort theory" of medical monitoring would be adopted in Maryland).

33 *Exxon Mobil Corp. v. Albright*, 2013 WL 673738 (Md. Feb. 26, 2013)

34 *Exxon Mobil Corp. v. Albright*, 2013 WL 673738 (Md. Feb. 26, 2013)

35 *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009)

36 *Sadler v. Pacificare of Nevada, Inc.,* 340 P.3d 1264 (Nev. 2014)

37 See *Meyer v. Fluor Corp.,* 220 S.W.3d at 718

38 *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d at 978-980.

39 *Petito v. A.H. Robins Co.,* 750 So.2d at 106-07

40 See *Bower v. Westinghouse Electric Co.*, 522 S.E.2d at 426

41 *Caronia v. Philip Morris USA, Inc.,* 22 N.Y.3d 439, 982 N.Y.S.2d 40 (2013)

42 *Caronia,* 22 N.Y.3d at 446

43 At the completion of discovery, the District Court granted Philip Morris summary judgment with regard to the plaintiffs' negligence and strict liability claims, but ordered further briefing concerning the breach of implied warranty claim and on the issue whether our the New York Court of Appeals would recognize an independent cause of action for medical monitoring. In the interim, the plaintiffs served a fourth amended complaint asserting, in addition to their prior causes of action, a separate, equitable cause of action for medical monitoring, seeking the establishment of the medical monitoring program. The District Court dismissed the breach of implied warranty and medical monitoring claims, holding that although the New York Court of Appeals would likely recognize the latter claim, the plaintiffs "failed to plead that Philip Morris's allegedly tortious conduct is the reason that they must now secure a monitoring program that includes LDCT scans". The United States Court of Appeals for the Second Circuit affirmed the dismissal of the plaintiffs' negligence, strict liability and breach of implied warranty claims, but, acknowledging that this the Court of Appeals had not considered whether an independent cause of action for medical monitoring exists in New York, certified the following questions of law: (1) Under New York Law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for

such a disease? and (2) If New York recognizes such an independent cause of action for medical monitoring, (A) What are the elements of that cause of action? and (B) What is the applicable statute of limitations, and when does that cause of action accrue? The Court of Appeals answered the first certified question in the negative, and declined to answer the second certified question as academic. See *Caronia,* 22 N.Y.3d at 446.

[44] *Caronia*, 22 N.Y.3d at 446

[45] Caronia, 22 N.Y.3d at 452.

[46] *Id*.

[47] Caronia, 22 N.Y.3d at 446

[48] Caronia, 22 N.Y.3d at 447

[49] Caronia, 22 N.Y.3d at 448

[50] 238 A.D.2d 454 (2d Dept 1997), lv denied 90 NY2d 806 (1997)

[51] Caronia, 22 N.Y.3d at 449

[52] Caronia, 22 N.Y.3d at 449-450

[53] Caronia, 22 N.Y.3d at 450

[54] 116 A.D.3d 121, 983 N.Y.S.2d 110 (3d Dept 2014)

[55] Vapor intrusion is a process in which chemicals volatilize out of contaminated groundwater and then migrate as vapors through the pores in the subsurface and into structures on the surface.

[56] *Ivory*, 116 A.D.3d at 125-126

[57] The defendant separately moved for, among other things, summary judgment dismissing the claims for negligence, trespass, private nuisance, medical monitoring damages, and exposure to chemicals other than TCE and exposure to TCE at locations other than plaintiffs' homes. The Supreme Court fully granted defendant's motions regarding medical monitoring damages and other chemicals and locations, and partially denied each of the other three motions. The Supreme Court issued five orders and one judgment. The plaintiffs appealed to the Third Department from all five orders and the judgment and the defendant cross-appealed from three of the orders. *Ivory*, 116 A.D.3d at 126.

[58] Plaintiff Thomas Ivory did not seek medical monitoring damages; *Ivory*, 116 A.D.3d at 131.

[59] *Ivory*, 116 A.D.3d at 131

[60] See *Ivory*, 116 A.D.3d at 132

[61] *Ivory*, 116 A.D.3d at 130

[62] *Id*.

[63] *Ivory*, 116 A.D.3d at 130-131

[64] *Ivory*. 116 A.D.3d at 131

[65] See *Ivory*, 116 A.D.3d at 131

[66] *Id*.

[67] See Ivory, 116 A.D.3d at 132

[68] *Id*.

[69] 131 S. Ct. 2541 (2011)

[70] **Rule 23 - Class Actions**

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if: **(1)** the class is so numerous that joinder of all members is impracticable, **(2)** there are questions of law or fact common to the class, **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class, and **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of: **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or **(2)** the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or **(3)** the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: **(A)** the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **(D)** the difficulties likely to be encountered in the management of a class action.

[71] 161 F.3d 127 (3d Cir. 1998)

[72] See *Barnes*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999)

[73] See *Barnes*, 161 F.3d at 143

[74] See *Barnes*, 161 F.3d at 142

[75] 385 F.3d 713 (4th Cir. 2004)

[76] See *Ball*, 385 F.3d at 727

[77] 422 F.3d 1116 (8th Cir. 2005)

[78] *In re St Jude Med., Inc.*, 422 F.3d at 1122

[79] 253 F.3d 1180, 1196, amended, 273 F.3d 1266 (9th Cir. 2001)

[80] See *Zinser*, 253 F.3d at 1195-1196

[81] 65 F.3d 823 (10th Cir. 1995)

[82] See *Boughton*., 65 F.3d at 827-828

Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

Worthy Of Note

VINCENT P. POZZUTO *

1. TRIAL EVIDENCE

Cruz v. City of New York, 2015 NY Slip Op 07910 (First Dept. 10/29/15)

Plaintiff appealed a jury verdict in favor of Defendant on evidentiary grounds. The Appellate Division, First Department, held that the trial court properly allowed the testimony of a witness whose identity was not disclosed prior to trial. The witness was called for the purpose of laying the foundation for the admission of a statement of a nonparty witness. The Court also held that the trial court properly admitted the nonparty statement as a prior inconsistent statement, as the nonparty witness had ultimately denied signing the statement, thus Defendant was permitted to introduce proof to the contrary. The statement was also properly admitted even though it was not produced in discovery, as there was no indication in the record that the statement was sought by plaintiff in discovery and was refused. Finally, plaintiff did not request a jury charge that the nonparty statement was to be considered only for impeachment purposes, and thus failed to preserve her argument that the trial court erred in not giving such a charge.

2. MEDICAL MALPRACTICE

Imperati v. Lee, 2015 NY Slip Op 07907 (First Dept. 10/29/15)

The lower Court granted Plaintiff's motion to amend the complaint to include a cause of action for wrongful death. On appeal, the Appellate Division, First Department, reversed, holding that the proposed amendment was palpably insufficient. The Court held that a motion to amend a complaint to add a cause of action for wrongful death "must be supported by competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff." The record in the subject case demonstrated that Plaintiff's decedent suffered from numerous serious ailments prior to the alleged malpractice, followed by a number of other procedures performed by nondefendants and while in the care of other nondefendants for two years. The Court further held that Plaintiff's counsel's conclusory assertion of causation, contained in his affirmation in support of the motion, was insufficient to establish a causal connection between the decedent's death and the originally alleged malpractice.

3. PREMISES LIABILITY

Ashton v. EQR Riverside A, LLC, 2015 NY Slip Op 07916 (First Dept. 10/29/15)

The Appellate Division affirmed the lower Court's grant of summary judgment to the premises owners, holding that it was undisputed that Defendants did not have actual or constructive notice of the height differential between the recessed well, which was covered by carpeting, and the surrounding marble tile. Plaintiff's expert opined that Defendants affirmatively created the condition by gluing the carpet to the floor of the well, failing to install a drainage system under the well and improperly maintaining the carpeting causing it to become matted. The Court held that Plaintiff's expert's opinion was speculative since he did not examine the carpet that was present on the day of the accident and there was no evidence that the replacement carpet was identical. The Court further held that Plaintiff's expert failed to cite any industry standard or authoritative treatise supporting his opinion concerning proper maintenance and design of the area.

4. AUTOMOBILE LIABILITY

Davis v. Turner, 2015 NY Slip Op 07922 (First Dept. 10/29/15)

The Appellate Division, First Department, reversed the lower Court's denial of Plaintiff's motion for summary judgment. The Court held that Plaintiff made a prima facie showing of entitlement

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to partial summary judgment by submitting an affidavit demonstrating that the subject motor vehicle accident occurred when Defendant Turner pulled out of a parked position and into a lane of moving traffic (VTL Sections 1128(a) and 1162). The Court held that Defendant Turner's act of entering traffic before it was safe to do so violates the VTL provisions cited and constituted negligence per se. The Court further held that any potential issue of comparative negligence between Defendant Turner and the driver of the vehicle in which Plaintiff was a passenger does not restrict Plaintiff's right to partial summary judgment against Defendant Turner. Finally, the Court held that the assertion of a seat belt defense goes to the the determination of damages, as a potentially mitigating factor, and not to liability.

5. LEGAL MALPRACTICE

Aur v. Manhattan Greenpoint Ltd., 2015 NY Slip Op 07912 (First Dept. 10/29/15)

The Appellate Division, First Department, in a legal malpractice action, held that Defendants failed to establish their entitlement to summary judgment. The Court held that a Defendant seeking dismissal of a malpractice case against him has the burden of making a prima facie showing that the Plaintiff could not succeed on the claim below by establishing that Plaintiff would be unable to prove one of the essential elements of the claim. Conclusory self-serving assertions lacking any references to industry standards or practices did not satisfy Defendant's burden. Also of note is that the Court held that Defendant's motion was not defective as Defendant did not submit an affidavit of a person with knowledge, as "counsel's affirmation properly served as a vehicle for the submission of evidentiary proof in admissible form, such as Plaintiff's deposition testimony.

6. LABOR LAW

Podobedov v. East Coast Constr. Group, Inc., 2015 NY Slip Op 08399 (2nd Dept. 11/18/15)

Plaintiff was an employee of a subcontractor on a construction site. He was working outside on ground level, about five to eight feet away from a building, cleaning two-by-four wooden frames that had been used as forms into which wet cement had been poured. After being plucked out of the cement, the frames were lowered to Plaintiff on ropes by workers on the sixth floor. As he was performing this work, he was struck by an object that fell from above. Plaintiff testified that after he was struck by the object, he saw pieces of cement on the ground that had not been there before the accident. The Appellate Division, Second Department, held that neither Plaintiff nor the owner and general contractor Defendants were entitled to summary judgment on the Labor Law Section 240(1) cause of action. The Court held that Plaintiff's testimony was sufficient to create an issue of fact as to whether Plaintiff was hit by a piece of concrete that fell from the sixth floor, where cement was being poured, or from one of the frames that was being lowered to him. The Court further held that under the circumstances of the case, in which Plaintiff admitted that he did not see the falling object, how it fell or where it fell from, his mere belief that he was hit by cement that had fallen from the sixth floor or from one of the frames that was being lowered to him was insufficient to establish, prima facie, that his injuries were caused by the alleged violation of the Labor Law, namely the absence or inadequacy of a safety device. The Court further held that Defendants were not entitled to summary judgment dismissing the Labor Law Section 241(6) cause of action predicated upon 12 NYCRR 23-1.7(a)(1) as they failed to eliminate all issues of fact as to whether the area in which the Plaintiff was standing when he was struck was not normally exposed to falling material or objects, or whether suitable overhead protection could have been provided which would have prevented the accident. Finally, the Court held that the general contractor was not entitled to contractual indemnification against the subcontractor in light of the triable issues of fact that remained as to how the accident occurred, and a determination on indemnity must await a jury finding.

7. JUDICIAL ESTOPPEL

Cobenas v. Ginsburg Dev. Cos. LLC, 2015 NY Slip Op (Second Dept. 11/25/15)

Plaintiff was injured while working on a construction site when he was struck by a piece of plywood that had been blown by the wind. Plaintiff brought suit against the site owner, Ginsburg, as well as the framing contractor, Leopard. The complaint

alleged that Plaintiff was employed by a subcontractor named Juan F. Sarango. At his nonparty deposition, Sarango testified that he had been given paperwork by Leopard to operate a company under the name Mauricio Soares. Ginsburg and Leopard brought third-party actions against Sarango and Soares. After Soares repeatedly failed to appear for a deposition, his answer was stricken. On appeal, Soares argued that Sarango's deposition established that Sorango and Soares were the same person and Sarango had already been deposed twice. The Appellate Division held that Soares' answer should not be stricken but the appropriate remedy was to preclude Soares from testifying at trial. Soares then made a motion for summary judgment arguing that Sarango and Soares were not the same person and Soares could not have caused the accident because he was not present at the site when the accident occurred. The Appellate Division held that the Supreme Court had properly denied the motion under the doctrine of judicial estoppel which holds that "a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding." In the subject case, Soares' claim that he and Sarango were not the same person was manifestly at odds with his representations in his prior appeal that he and Sarango were the same person.

8. LABOR LAW

Cardenas v. BBM Constr. Corp., 2015 NY Slip Op. 08142 (2nd Dept. 11/12/15).

Plaintiff was injured while installing a 500-pound beam into the wall of a house. The Plaintiff his coworkers used a hoist to lift the beam 14 to 15 feet onto a scaffold upon which the Plaintiff was standing. The hoist was then removed from the beam, and one end of the beam was temporarily connected to the wall of the house, while the other end of the beam remained on top of the scaffold. The Plaintiff took the end of the beam that was resting on top of the scaffold and manually lifted it about 1.5 feet to connect it to the wall of the house. Plaintiff alleged that he suffered a back injury while lifting the beam. The Appellate Division, Second Department held that the Supreme Court correctly dismissed Plaintiff's Labor Law Section 240(1) claim stating that "[t]he fact that the plaintiff was injured while lifting a heavy object does not give rise to liability pursuant to Labor Law §240(1)." The Court further held that the lower Court improperly dismissed the Labor Law Section 241(6) cause of action predicated upon 12 NYCRR 23-2.3(a), which requires that loads shall not be released from hoisting ropes until the members are securely fastened. The Court held that Defendants failed to demonstrate, prima facie, that this section was factually inapplicable to the case, that the section was not violated or that the alleged violation of that section was not a proximate cause of Plaintiff's injuries.

9. EVIDENCE

Gucciardi v. New Chopsticks House, Inc., 2015 NY Slip Op 08146 (2nd Dept. 11/12/15)

Plaintiff was allegedly injured on Deember 23, 2010 when she slipped on ice in a parking lot outside of a restaurant owned by the defendant. On eight subsequent occasions between February 2011 and April 2011, an investigator performed surveillance of the parking lot and videotaped a defendant employee wheeling a mop bucket out of the restaurant and emptying the bucket in the parking lot. Plaintiff sought to introduce this video at trial and Defendant made a motion in limine to preclude such evidence. The trial Court granted Defendant's motion and precluded the videotape evidence. After a jury verdict in favor of Defendant, Plaintiff appealed, contending that the trial Court improperly precluded the videotape as the proffered evidence would have established the Defendant's habitual dumping of water into the parking lot, which would have amounted to circumstantial evidence that Defendant was responsible for the dangerous condition that caused her injuries. On appeal, the Appellate Division, Second Department, held that the lower Court properly granted the motion in limine, as the earliest proffered instance of the purported habit was more than two months after the date on which the appellant was injured and was observed on only seven occasions over the next six weeks. This did not establish a habit or regular usage relevant to what occurred on the date Plaintiff was allegedly injured.

10. PREMISES LIABILITY

McLaughlin v. 22 New Scotland Avenue, Inc., 2015 NY Slip Op 520148 (3rd Dept. 10/29/15)

Plaintiff was injured when she slipped and fell

on an access ramp outside Albany Medical Center Hospital ("AMCH") on February 21, 2011. The premises was owned by 22 New Scotland Avenue Inc. and leased to AMCH. Following joinder of issue, 22 New Scotland moved for summary judgment on the grounds that it was an out-of-possession landlord and the storm in progress doctrine applied. On June 16, 2014, Plaintiff cross-moved to amend the complaint to add AMCH as a defendant. The Supreme Court granted the Defendant's motion and denied Plaintiff's motion to amend. On appeal, the Appellate Division, Third Department, held that the storm in progress rule did not apply as Plaintiff was able to adequately demonstrate the possibility that the ice that had caused her to fall existed prior to the storm in progress. The Court held however that 22 New Scotland was an out-of-possession landlord and that none of the exceptions to the rule applied. 22 New Scotland transferred possession and control of the premises to AMCH, did not retain any contractual obligation to perform snow or ice maintenance, did not perform or hire another entity to perform such maintenance and was unaware of any dangerous condition that may have existed at the time of the accident. The Court noted that the lease provided that AMCH would be responsible for snow removal at its own expense and AMCH's witness testified that AMCH maintenance staff were trained to and performed snow and ice removal. The Court further held that the Supreme Court properly denied Plaintiff's motion to amend the complaint to add AMCH as a defendant subsequent to the expiration of the Statute of Limitations. The "relation back" doctrine did not apply as 22 New Scotland and AMCH did not share a unity of interest as they could not be said to "stand or fall together." The Court expressly held that "unless the original defendant and the new party are vicariously liable for the acts of the other, there is no unity of interest between them."

11. MEDICAL MALPRACTICE

Martuscello v. Jensen, 2015 NY Slip Op 518032 (3rd Dept. 10/22/15)

Plaintiff, 81 years old at the time of the accident, was injured when she fell from an examining table in her doctor's office. She brought suit naming the as Defendants Dr. Susan Jensen, her physician, as well as Horizon Medical Group, the owner of the premises and the employer of staff. During trial, the lower Court charged the jury with a hybrid charge combining both premises liability and negligent supervision. After a Defendant verdict, Plaintiff appealed. The Appellate Division, Third Department, held that the modified instruction was improper in that Plaintiff never alleged that Horizon's liability arose from its ownership of a dangerous or defective premises nor that any defects or dangerous conditions existed. Instead, the Plaintiff alleged that Horizon was liable for the acts or omissions of its employees in failing to recognize the need for, or provide decedent with adequate assistance or supervision, an analysis unrelated to the physical condition of the medical office or the legal principles underlying premises liability. The Court further held that the lower Court erred in not allowing Plaintiff, in this bifurcated trial, to elicit testimony on direct examination from Dr. Jensen regarding her medical condition to establish her risk of falling, and then allowing Defendant on cross-examination to elicit testimony that Plaintiff's medical conditions did not affect her risks of falling. The Court finally held that the lower Court improperly determined the case to be a case of negligence as opposed to medical malpractice. The Court stated that "[t]he assessment of a patient's risk of falling as a result of his or her medical condition, and the patient's consequent need for assistance, protective equipment or supervision are medical determinations that sound in malpractice."

12. PREMISES LIABILITY

Lucatelli v. Crescent Associates, 2015 NY Slip Op 520757 (3rd Dept. 10/29/15)

Plaintiff tripped and fell while descending a sloping tile floor while exiting Defendant's building. The Appellate Division, Third Department held that Defendant was not entitled to summary judgment as it could not establish that it maintained its property "in a reasonably safe condition and that it neither created nor had actual or constructive notice of the allegedly dangerous condition." The Court noted that Defendant conceded that there no handrails installed and the carpet runner on the sloping floor,

which was regularly replaced, was not secured to the sloping floor in any way. Defendant's witness also testified that he himself had observed the runner moved out of place and laying crookedly and that he at times readjusted the runner.

13. INSURANCE COVERAGE

Tower Ins. Co. of N.Y. v. Anderson, 2015 NY Slip Op 08633 (First Dept. 11/24/15)

In this declaratory judgment action, the Appellate Division, First Department held that the issue on appeal is as of what dated did the Plaintiff Insurance Carrier have "sufficient knowledge of potential material misrepresentations by its insureds". The Court held that Plaintiff's examiner conducted a recorded interview with the insured on February 24, 2012. On March 5, 2012, Plaintiff disclaimed coverage. Plaintiff commenced the declaratory judgment action on June 4, 2012, but it continued to accept premium payments and renewed the policy on December 8, 2012. The Court held that by accepting premium payments after learning of the insured's material misrepresentation, Plaintiff waived its right to rescind the policy.

14. NEGLIGENCE/PRODUCTS LIABILITY

Garnett v. Strike Holdings LLC, 131 A.D.3d 817 (First Dept. 9/1/15)

Plaintiff was a passenger in a two-seat go-kart driven by her boyfriend at an indoor recreation facility owned and operated by Defendant. While driving on the track, the go-kart was bumped twice by other go-kart drivers allegedly causing Plaintiff injury. Plaintiff brought suit against the owner/operator of the facility alleging negligence and products liability. The Defendant brought a motion for summary judgment at the close of discovery arguing that common-law assumption of the risk barred Plaintiff's recovery and that there was no evidence of a design defect. The lower Court denied the motion. The Appellate Division, First Department, reversed, holding that the activity in which Plaintiff was engaged is the type to which the assumption of the risk doctrine is appropriately applied. The Court held that in riding the go-kart, the Plaintiff assumed the risk inherent in the activity, including "that the go-kart would bump into objects" and that "that vehicles racing around the track may intentionally or unintentionally collide with or bump into other go-karts." The Court further held that Plaintiff's design defect claim failed. Plaintiff contended, based upon an expert affidavit, that the go-kart was designed defectively due to the presence of an unpadded metal hump on the floor over the front axle. The Court held that the ATSM standard and Industrial Code standard relied upon by Plaintiff's expert were inapplicable and did not apply to the metal hump on the floor over the front axle.

THE DEFENSE ASSOCIATION OF NEW YORK
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