VOL. 1 NO. 1 SPRING 1998

# DEFENDANT

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

**FEATURING:**

COMMON LAW & CONTRACTUAL INDEMNIFICATION
*In The Wake of North Star*

GL CARRIER vs 1B CARRIER –
*"The Never-Ending Battle"*

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# PRESIDENT'S MESSAGE

*by John J. McDonough**

In my last column I summarized the essential elements of so-called Auto-Choice legislation now pending in both Houses of the United States Congress. It is the promise of this legislation to provide up to twenty-five percent discounts to insureds by offering an automobile insurance policy in which the insured, regardless of how seriously injured, forever relinquishes the right to sue the offending driver. We have written to Daniel P. Moynihan, one of the Act's sponsors to request an opportunity to discuss this important piece of legislation. In the interim, a similar piece of legislation has been introduced in the New Jersey legislature. The New Jersey Senate approved this legislation on April 2, 1998 and the Act has now been sent to the General Assembly for consideration. This Act "guarantees" a 15 percent reduction in premiums for most drivers.

Since the only state that leads New York in auto rates is New Jersey, their "solution" to the problem may be a harbinger of things to come in New York.

Meanwhile, largely due to the efforts of "tort reform" coalition which is called "New Yorkers for Civil Justice Reform" ("NYCJR"), legislation has been proposed in Albany, known as the "Civil Justice Reform Act of 1998, " which is a broad-spectrum attempt to change tort law in New York.

Perhaps most significant among the many proposals in this legislation is that portion of the Act that would abolish joint and several liability in negligence cases. Although this area of our law was recently revised by the addition of Article 16 to the CPLR, it is still the feeling of NYCJR that there is a hostile business environment in New York as a result of the present joint and several liability rules.

The new Act adds statutes of repose for product liability actions and suits against engineers and architects. Section nine of the Act seeks to lower the CPLR 5301 threshold on periodic payment of judgments from $250,000.00 to $50,000.00. Section eleven of the legislation seeks to cap pain and suffering awards in negligence actions at $25,000.00. The Act would amend

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# SCAFFOLD AND INDEMNIFICATION UPDATE

*by Kevin G. Horbatiuk**

The Appellate Division, First Department, recently analyzed the circumstances under which a subcontractor could be held responsible for common law and contractual indemnification in a lawsuit arising under the Labor Law. In Velez v. Tishman Foley Partners, 666 N.Y.S.2d 591 (1st Dept. 1997) the plaintiff was an ironworker employed by Diamond International Inc. ("Diamond"'). While attempting to climb down a hoist-tower from the elevated beams upon which he was working the cross-bracing gave way beneath him. The Owner and General Contractor at the job site was Tishman Foley Partners ("Tishman"). Tishman entered into a subcontract with Universal Builders Supply ("Universal"), to construct the hoist-tower and scaffolding. Tishman also subcontracted with Glassalum International Corporation ("Glassalum") to erect the exterior walls of the building. Glassalum subcontracted its work to plaintiff's employer, Diamond, and maintained no laborers or supervisory employees at the jobsite.

Tishman moved for summary judgment against Universal for contractual and common law indemnification. Glassalum cross moved for summary judgment against Universal seeking common law indemnification. Universal cross moved for summary judgment dismissing the complaint insofar as it claimed Universal violated Section 240(1) of the Labor Law.

The Supreme Court, New York County issued an Order denying Universal's motion for summary judgment, granting Tishman's motion for summary judgment against Universal for contractual and common law indemnification and granting Glassalum's motion for summary judgment against Universal for common law indemnification. The Appellate Division modified this Order. It granted

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# COMMON LAW & CONTRACTUAL INDEMNIFICATION IN THE WAKE OF NORTH STAR

*by Dennis Breen**

Indemnification is, above all, an equitable doctrine which seeks to place blame where blame belongs—on the wrongdoer. A party might seek indemnification on common-law grounds, contractual grounds or a combination of both.

North Star v. Continental, 82 N.Y.2d 281, 604 N.Y.S.2d 510, 624 N.E.2d 647 (1993) has tended to merge questions of indemnification and questions of insurance coverage. The lines between these issues have become so blurred that they are often indistinguishable.

This article is an attempt to clarify those lines. Due, however, to the limited amount of space, only the lead cases and more recent decisions will be discussed.

**CONTRACTUAL INDEMNIFICATION:**

PJI 2:275, Commentaries, points out that a contractual claim for indemnification must arise out of an agreement to indemnify, not out of an agreement to do work. Id. page 1046, (citations omitted). The agreement to indemnify must be clear and unequivocal. Id. at 1047, citing, Hogiland v. Sibley, Lindsey & Curr, Co., 42 N.Y.2d 153, 397 N.Y.S.2d 602, 366 N.E.2d 263.

Brown v. Two Exchange Plaza Partners, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430 (1990) involved a very broad indemnification clause and a trial which resulted in there being no showing as to the reason a scaffold collapsed. There was no showing of actual negligence upon the owner/general contractor and no showing of negligence upon the subcontractor/third-party defendant.

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# GENERAL LIABILITY CARRIER VS. 1B CARRIER "THE NEVER ENDING BATTLE"

*by Joel M. Simon**

Much has been written about the antisubrogation rule, coinsurance and additional insured coverage as it relates to the general liability carrier and its oft time nemesis, the 1B carrier (Workers' Compensation).

The basis behind the inherent conflict between the general liability carrier and the 1B Compensation carrier is that often one or both these carriers are sharing defense costs in a situation where the employer's employee has brought a primary action against an entity such as a general contractor who then, through a third-party action, impleads the employer.

For purposes of settlement or judgment, much debate goes on between the two carriers pertaining to the percentage of payment for indemnification. While this is a difficult enough problem following a judgment, it is often impossible to resolve prior to judgment for settlement purposes. The primary function of this article will be to pinpoint certain specific areas of conflict between the two carriers and then set forth the current status of the law in the hope of resolving these conflicts. For the purpose of this discussion, it will be assumed that the basic concepts behind the anti-subrogation rule, i.e. North Star V. Continental Insurance Company, 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993) is known to the reader as is the general principles behind co-insurance and additional insured coverage.

It should be noted that we are dealing with a situation in which the plaintiff employee brings an action against the general contractor or lessor who then impleads the subcontractor or lessee. An indemnification provision runs between the two parties in favor of the third-party plaintiff. It should be kept in mind that there are

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# WORTHY OF NOTE

*Compiled by John J. Moore**

**EVIDENCE - EXPERT OPINION - EXCLUDED:** In Kamhi v. Tay, (____ A.D.2d____, 664 N.Y.S.2d 288), the First Department concluded that the proffered expert opinion of a therapist was incompetent to establish the standard of care applicable to physicians in a medical malpractice matter, not only because the therapist was not a member of the same profession, but because his opinion intruded on the exclusive prerogative of the court.

**INDEMNIFICATION - CONTRACTUAL - ELEMENTS:** The Second Department recently concluded in Stein v. Yonkers Contracting, Inc. (____A.D.2d____, 664 N,Y.S.2d 328), that even where the contractual agreement provides for indemnification of the general contractor by the subcontractor, said provision will not be enforced so as to indemnify the party for its own negligence.

**INSURANCE - OCCURRENCE - ELEMENTS:** In Green Chimney's School for Little Folks v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania (____A.D.2d____, 664 N.Y.S.2d 320, the Second Department held that claims brought by former employees of the insured that sounded in sexual harassment, retaliatory discharge and assault were intentional acts, and thus did not constitute an 'occurrence' within the meaning of the insureds employees general liability policies, which defined occurrence as an accident including continuous or repeated exposure to substantially the same general harmful conditions.

**GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - ELEMENTS**: It was recently held by the Second Department that the key factors in determining whether leave to serve late notice of claim against the City should be granted, are whether the petitioner has demonstrated a reasonable excuse for failure to serve a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts

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# DRI CORNER

*By Gail L. Ritzert**

In March, I attended the DRI State Representative's meeting in New Orleans. This being my first meeting, I was interested in finding out what DRI is doing for the membership of the local associations. Often times when the members of DANY inquire about DRI, the question that is always asked is, "what does DRI do for us?" With this in mind, I went to the meeting as a skeptic. We very rarely hear what is going on nationally with DRI, no less what DRI is doing to promote the defense industry and assist the membership of the local organizations, such as DANY. To my surprise, I learned quite a bit.

The most widely recognized benefit of DRI, is it's publication, *For The Defense*. *For The Defense* is published monthly, and provides the reader with informative articles on current trends, developments in the law and trial techniques. During the course of the year, *For The Defense* dedicates issues to various Substantive Law Committees. These issues are designed to provide the reader with articles specifically tailored to issues and trends in that particular area of practice. In all thee are twenty-two Substantive Law Committees. These Committees include:

- Alternative Dispute Resolution
- Appellate Advocacy
- Business Litigation
- Construction Law
- Drug & Medical Device
- Economics & Management of Law Practice
- Employment Law
- Fidelity & Surety
- Governmental Liability
- Industrywide Litigation
- Insurance Law
- International Law
- Lawyers' Professionalism & Ethics
- Life, Health & Disability
- Medical Liability
- Product Liability
- Professional Liability
- Transportation Law
- Toxic Torts & Environmental Law
- Trial Tactics & Techniques
- Workers Compensation
- Young Lawyers

In addition to DRI's flagship magazine, as part of the continuing service to the membership, each Committee publishes newsletters and conducts seminars. The newsletters and seminars address current trends in each area of practice, noteworthy decisions in each jurisdiction, and provide a forum for members of

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# THE PRESENTATION


*Judge Mangano Accepts Award from President McDonough*

Mr. Justice Guy James Mangano received the Defense Association of New York's most prestigious award, the Charles C. Pinckney Award on the 3rd of March 1998. The award was conferred at the Downtown Athletic Club in Manhattan by the Association's President, Mr. John McDonough.

The Justice presides at the Appellate Division, Second Department and has done so since March of 1990. He was appointed to the Appellate Division in 1979. His election to the Supreme Court, County of Kings was initially in 1969 and he was subsequently reelected in 1982.

The award created in 1976 was given to individuals who contribute significantly either to the Defense Association or to an individual making outstanding contributions to the practicing bar. Judge Mangano was eligible for the award pursuant to both criteria.

Some 265 people attended the dinner and presentation ceremony. Judges too numerous to identify were in attendance to share congratulations to Justice Mangano. The evening was deemed a success by every standard.

# SIGNING REQUIREMENT

For anyone who does not read the Law Journal on a regular basis, does not receive periodicals pertaining to law changes, has not spoken to other members of the bar regarding law changes, be advised!

Effective March 1st of this year, Section 130-1.1-A of the Rules of the Chief Administrator (22 NYCRR) now requires that all papers served, filed or submitted in most civil cases be signed by an attorney or if said individual is not represented by an attorney by the party him or herself.

Professor David D. Siegel recently stated "Probably the best rule of thumb to follow is that all papers that hitherto carried the printed or typed name of the lawyer or law firm must now be signed by an attorney."

Another easy way to determine whether to sign or not....when in doubt...sign it.

***If you wish strict interpretation of this new change, you may obtain further clarification by calling the court at the Office of Court Administration (800-334-6442).***


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# EDITOR'S NOTE

This will be my last issue of The Defendant as Editor, I thought it appropriate before turning the editorship back to Mr. McDonough that I give you a brief update regarding the publication. The format has changed! What you see before you is a new type of publication, instead of a newsletter or newspaper, I tried to put together a publication in the form of a magazine. The cover is specifically designed for our association. More copies are published for greater distribution and the magazine will be from 16 to 20 pages at set price.

At the beginning of the year, I changed the printer and for this addition, I have again changed the printer. The costs for these innovations throughout the year resulted in a 40 percent reduction in the printing charges. In place is a plan to insert sophisticated advertisements which will significantly reduce the cost of the magazine. I have been advised that zero cost is probable. Profits are not unreasonable expectations as the program proceeds.

The objective of four issues per annum has been achieved. Hopefully the articles appearing have met the level of anticipation of the reader. Photographs have appeared in greater number and with improved quality.

I wish to thank the many contributors for their unselfish efforts, the Association for allowing me to serve and the many others who have assisted in indirect ways. I appreciated the comments received from the membership at large. Lastly, I would be remiss were I not to thank our President John McDonough who has unequivocally supported me and the publication in every respect.

*John J. Moore*





# PRESIDENT'S MESSAGE

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§240 of the Labor Law to allow an owner or general contractor to present evidence showing compliance with applicable state and federal health and safety regulations, and same would be *premia facie* proof of compliance with subsection 1.

If enacted this legislation would restore a form of contributory negligence to New York by banning recovery by a plaintiff who is 51% or more comparatively at fault for his/her own injury.

Additional provisions of this broad legislation seek to exempt volunteers performing services for not-for-profit organizations from tort liability; add school districts and municipalities to the jurisdiction of the Court of Claims; add written notice provisions as respects municipal liability; and reduce counter agency fees in all personal injury actions.

The legislation which has been introduced is in the early stages of the legislative process. As the "Civil Justice Reform Act of 1998" is considered by the Senate, and a similar Act is ultimately introduced in the Assembly, your Association will deploy all the necessary resources to develop an appropriate response thereto.

# CHARLES C. PINCKNEY AWARD PRESENTATION

*Friends of the honoree*

*Who's not the judge?*

*He didn't stay for the picture*


*Can you identify #21?*

*Hey! We weren't served!*

*We were served early.*

# SCAFFOLD AND INDEMNIFICATION UPDATE

*Continued from page 1*

Universal's motion for summary judgment and denied Tishman's and Glassalum's motions for common law indemnification against Universal. The Court held that Universal was not an "agent" within the meaning of Section 240(1) of the Labor Law and thus not required to provide common law indemnification to either Tishman or Glassalum. In its analysis the Court focused on two distinct points. The first point was that Universal did not have any "actual or contractually-delegated control over the work that plaintiff was performing at the time of the accident". 666 N.Y.S. 2d at 592. The Court based its finding in this regard on the seminal decision in the law of statutory "agent", Russin v. Picciano 54 N.Y.2d 311 (1981).

In Russin the plaintiff was an employee of the General Contractor, Cesaro. All contracts relative to the jobsite were between the owner and each individual contractor. In essence each contract was a separate prime contract. The electrical contractor was Matco Electric Co., Inc. ("Matco"). The plumbing contractor was Louis Picciano & Son ("Picciano"). The heating, ventilation and air conditioning contractor was Stellmark.

Cesaro was responsible for co-ordination and execution of all the work under the contracts. It was also in full control of the plaintiff and the area in which he was working at the time of his injury. The plaintiff was descending a scaffold he was dismantling at the direction of Cesaro. He stepped onto a ladder leaning against the scaffold which turned and gave way beneath him. The ladder was owned by Picciano.

Plaintiff sued Matco, Picciano and Stellmark for violations of Sections 200, 240 and 241 of the Labor Law. Neither the Owner, nor Cesaro, the General Contractor were direct defendants. The Appellate Division, Third Department, dismissed the Labor Law claims against the direct defendants. Its rationale was that as individual prime contractors the defendants had no contractual arrangements with the General Contractor. Thus they were not in a position to control the activity which generated the plaintiff's injury. The Court of Appeals agreed.

In its analysis the Court of Appeals initially considered the common law duty, now codified in Section 200 of the Labor Law, imposed upon owners and subcontractors to provide a safe place to work:

> An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.

54 N.Y.2d at 317 citing Reynolds v. John T. Brady & Co., Inc.,38 A.D.2d 746 (2d Dept. 1972). None of the defendants had the ability to control the activity of the plaintiff nor the process whereby the scaffold was being dismantled.

The Court of Appeals then considered Sections 240 and 241 of the Labor Law which imposed liability on all contractors and owners and their agents. The Court specifically looked to the Legislative History and found a clear intent to shift responsibility from parties without control of the injury producing activity to the General Contractor or Owner. Furthermore the Court reasoned that even though the Owner's and General Contractor's duties to conform to the requirements of Section 240 and 241 are non delegable, the duties themselves may be delegated:

> When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under Sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.

54 N.Y. 2d at 318.

The Russin Court's interpretation of the statutory agent language limits the agent's liability to activities with the scope of the work delegated. Thus each prime contractor is limited to the scope of the work delegated via their specific contract. None of the direct defendants were thus "agents" for the purpose of the general construction activity which produced the plaintiff's injury.

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Returning to our analysis in Velez, the scope of the ork delegated to Universal was contained in its ontract with Tishman to construct the hoist-tower and affolding. Universal was not an agent for the purpose the iron work being done on the hoist-tower by aintiff's employer, Diamond, pursuant to its sub-ontract with Glassalum. Thus under the Russin test niversal was not an agent within the meaning of ection 240 and 241 of the Labor Law.

The second point upon which the Velez Court cused was that Universal was not made an agent by ason of its ownership and control over the injury-oducing hoist. In this regard the Court focused on arker v. Menard 237 A.D.2d 839, 655 N.Y.S.2d 186 d Dept.), lv. denied, 90 N.Y.2d 804, 661 N.Y.S.2d 31. (1997).

In Barker the plaintiff was a laborer employed by ebert Development Corporation ("Hebert"). Hebert ntered into a contract with an individual named ennis Gadway who would excavate and backfill at a ondominium project Hebert was developing. Gadway ltimately divided responsibilities with his brother. adway performed the excavation and his brother erformed the backfilling. The accident occurred when ie plaintiff and his co-worker were standing in a ench while holding Styrofoam insulation. The ackfiller was pouring sand into the trench with a ont-end loader. After each delivery of sand the laintiff and his co-worker would distribute the sand nd tamp it down. Several loads were delivered in this anner without incident until during one load a large ock fell from the front-end loader and struck the laintiff's foot.

At the close of the plaintiff's case, the Court ismissed the claims brought against the backfiller ased on Sections 241(6) and 240(1) because plaintiff iled to establish that the backfiller was an owner, ontractor or agent. On appeal the Appellate Division, hird Department affirmed the dismissal.

The court summarily found that the backfiller was ot a contractor under the terms of the Labor Law since e was not a signatory to the contract between his rother and Hebert. In addition even though the two rothers worked together in various jobs, there was no vidence that they worked in a partnership or joint enture.

The Court then questioned whether the backfiller as a statutory agent under the Labor Law. It answered s query in the negative since there was no evidence that he had authority to supervise and control the work that gave rise to the plaintiff's injuries. Though they were both present at the trench when the accident occurred, they each were involved in separate operations. The plaintiff was insulating and the backfiller was unloading sand. Thus he had no discussions with the plaintiff regarding the installation of the insulation and did not provide any orders or instructions to the plaintiff regarding the manner in which he was to insulate. The fact that the backfiller owned and operated the front-end loader which dropped the injury-producing stone did not enter into the Court's analysis.

In Velez the Court expressly stated that Universal's ownership and control over the hoist upon which the plaintiff was working when he was injured did not make Universal an agent under the Labor Law. Accordingly the Court dismissed the Labor Law claims against Universal and dismissed the motions seeking common law indemnification claiming that Universal was a statutory agent.

Universal was not as successful with regard to Tishman's cross-claim for contractual indemnification. Universal's contract with Tishman contained broadly worded language of indemnification. Universal was liable to Tishman for "all damages of any kind or nature, including without limitation, damages to persons or property.caused by or in connection with its work to the extent permitted by law". 666 N.Y.S. 2d at 593. Universal similarly indemnified Tishman from "any and all loss, damages, injury or liability ..., however, caused and of whatever nature, arising directly or indirectly from the acts or omissions of [Universal], its agents, employees, vendors or lower-tier subcontractors and their agents or employees, in the performance of the work under this subcontract." Id.

The irrefutable facts were that the plaintiff's accident occurred when the cross-bracing of the hoist-tower gave way and that Universal was erecting the hoist-tower at the time. Clearly the accident was "caused by or in connection with" Universal's work as defined by its contract with Tishman. Thus the indemnification clauses were triggered regardless of whether there was a factual finding that Universal was negligent.

The lesson of Velez for defense attorneys litigating suits based on the Labor Law is that the First Department strictly follows the analysis of Russin and its progeny when trying to determine if a subcontractor is an agent within the meaning of the Labor Law. First

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# SCAFFOLD AND INDEMNIFICATION UPDATE

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Department Courts will analyze whether the subcontractor had "actual or contractually-delegated control over the work that the plaintiff was performing at the time of the accident". The Court will look to the scope of the work contained in the subcontractor's agreement with either the Owner or General Contractor and then compare it to the actual activity in which the plaintiff is engaged. Similarly when considering a claim for contractual indemnification the Court will review the indemnification clauses, look for the specific language that triggers the obligation to indemnify and consider the activity in which the plaintiff is engaging at the time of the accident to determine whether a party is entitled to contractual indemnification from the subcontractor.

# COMMON LAW & CONTRACTUAL INDEMNIFICATION IN THE WAKE OF NORTH STAR

*Continued from page 2*

The Brown Court reasoned that a finding of statutory liability alone was not sufficient to stop the contractual pass through to the contractor/third-party defendant. The Court passed the indemnification through to the third-party defendant/contractor despite no showing of negligence on behalf of the third-party defendant/contractor and a broad indemnification clause.

The Court of Appeals grappled with the indemnification in Itri Brick & Concrete Corp. v. Aetna, 89 N.Y.2d 786, ___ N.E.2d ) ___, 658 N.Y.S.2d 903 (1997). Itri joined two separate cases that involved questions of both common law and contractual indemnification.

In both cases, the general liability carrier picked up the defense under a reservation of rights on the contractual claim. The State Insurance Fund assumed the defense of the common law claims.

Both cases involved broad indemnification clauses in the respective construction contracts. One case resulted in a jury finding of negligence on behalf of the general contractor and one case involved a stipulation where the general contractor agreed that he was partially at fault for the accident.

The Court of Appeals voided both contractual indemnification clauses finding that both clauses violated General Obligation Law §5-322.1. The Itri Court reasoned that any finding, or agreement, that find fault on behalf of the party seeking indemnification on contractual grounds voids the entire clause. The Court found that there was no partial indemnification. A finding of negligence on behalf of the owner/general contractor voids the entire agreement.

It should be noted that a claim for contractual indemnification does not end with production of the contract. It is incumbent upon the party seeking to press indemnification that he/she prove those claims.

Kanney v. Goodyear, ___ AD2d ___, 667 NYS2d 163 (4th Dept., Dec. 31, 1997) involved Goodyear's claim for indemnification under two separate clauses within their contract. The Court ruled that Goodyear had to prove that the accident happened or arose from the work defined in the contract. The Court also held that Goodyear had to prove that the third-party defendant was in whole or part responsible for the incident. In both instances, Goodyear had failed.

It can, therefore, be safely assumed that if there is any question as to the existence of any actual negligence on behalf of the owner/general contractor pressing the indemnification claim, than that claim will not be granted as a matter of law. If there is any finding of actual negligence on behalf of the owner/general contractor, then the clause will be voided as a violation of General obligation Law §5-322.1

A contractual claim for indemnification will only stand if there is no negligence on behalf of the owner/general contractor pressing the claim and some partial or actual negligence on behalf of the subcontractor. See, Zeigler-Bonds v. Structure Tone, Inc., ___ A.D.2d ___, 664 N.Y.S.2d ___. Only in those cases where the owner/general contractor is only statutorily held responsible, will the courts allow a contractual claim to pass to the subcontractor without a showing of the subcontractor's negligence.

**CONTRACTUAL INSURANCE:**

As PJI 2:275 points out, "[a]n agreement to procure insurance for the benefit of another is to be distinguished from an indemnity agreement" Id. at 1050, citing, Murray v. Wilbur Curtis Co., Inc., 189 A.D.2d 980, 592 N.Y.S.2d 837 (3rd Dept., 1993). A party who fails to purchase insurance, despite an agreement to do so, is responsible up to the extent of

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the policy limits plus costs and attorneys' fees. See, Roblee v. Corning Community College, 124 A.D.2d 803, 521 N.Y.S.2d 861 (3rd Dept., 1987).

An agreement to purchase insurance does not fall within the dictates of the General Obligation Law. Kinney v. G.W. Lisk, 76 N.Y.2d 215, 557 N.Y.S.2d 283, 556 N.E.2d 1090 (1990), see, PJI 2:275, supra, see, also, Roblee, supra. The agreement to purchase insurance contemplates that the subcontractor will purchase insurance for the owner/general contractor to cover even the owner/general contractor's own negligence.

The purchase of insurance by the contractor/subcontractor for the owner/general contractor effectively calls into question the guidelines of North Star, supra.

North Star struck down the concept of "preindemnification" and specifically held that the purchase of insurance by the subcontractor did not act as a waiver of the owner's/general contractor's common law indemnification right. The Court did, however, adopt an "antisubrogation" rule.

The "antisubrogation" rule was originally founded in Pennsylvania General Insurance Co. v. Austin Powder Co., 68 N.Y.2d 465, 510 N.Y.S.2d 67, 502 N.E.2d 982 (1986) where the Court held that the insurance company could not step into the shoes of their insured to seek indemnification from the party who purchased insurance in the first instance—their insured.

The North Star Court followed this dictate and held that where a contractor/subcontractor purchases insurance for the owner/general contractor and the policies are, essentially, identical, the insurer cannot seek indemnification from its own insured. The Court felt that allowing an insurer to seek indemnification from its own insured (itself) created an inherent conflict and allowed the carrier to fashion third-party actions in such a way as to avoid their own responsibility.

**COMMON LAW INDEMNIFICATION:**

The principles of common law indemnification have remained unchanged through recent court decisions. "A party strictly liable under Labor Law § 240 may seek common-law indemnification from the party or parties actually responsible" . . . "provided that the one seeking indemnity is not itself guilty of some negligence beyond the strict statutory liability" Gulotta v. Bechtel Corp., ___ A.D.2d ___, 664 N.Y.S.2d 801 (1st Dept., 1997), citing, Kelly v. Diesel Cont. Div., 35 N.Y.2d 1, 358 N.Y.S.2d 685, 315 N.E.2d 751 (1974).

The Courts have consistently held that if the owner did not supervise or direct or control the subcontractor's work, then the owner would be entitled to full common-law indemnification. Lo Bosso v. NYNEX, ___ A.D.2d ___, 665 N.Y.S.2d 945 (2nd Dept., 1997), Clark v. 345 East 52nd Street, W.L. 779051 (2nd Dept., 1997).

"Common-law indemnification is appropriate where [a] defendant's role in causing [a] plaintiff's injury is strictly passive and, consequently, its liability purely vicarious Borowicz v. International Paper Co., ___ A.D.2d ___, 664 N.Y.S.2d 893, 896, citing, Grant v. Gutchess Timberlands, 214 A.D.2d 909, 911, 625 N.Y.S.2d 716 (3rd Dept. 1997).

It, therefore, can safely be said that absent a showing of supervision or control, an owner/general contractor would be entitled to common-law indemnification for the actively negligent contractor/subcontractor who did the work.

**INDEMNIFICATION AND INSURANCE:**

Hawthorns v. South Bronx Community Corp., 78 N.Y.2d 433, 576 N.Y.S.2d 203, 582 N.E.2d 586 (1991) has long established that a party may seek both contractual and common law indemnification in a case. As Hawthorne points out, "[p]lacing an indemnity provision in the contract did not alter the common law duty, for the mere existence of an indemnity provision does not indicate an intent to replace common-law liability with contractual liability". Id. at 437.

It is not unusual for today's construction cases to involve contractual indemnification claims and insurance claims coupled with common-law cross claims and third-party claims. Which clause takes precedence?

The simple answer is: the insurance clause. If there is insurance, the courts will go to great lengths to ensure that comes first!

The Second Department was recently faced with this dilemma in two separate cases that seem to have arisen from the same construction site. The first was Small v. Yonkers Contracting, ___ A.D.2d ___, 662 N.Y.S.2d 67 (2nd Dept., August 25, 1997).

In Small, the Court found that Yonkers claim as against its third-party defendant Rice-Mohawk was barred by virtue of the antisubrogation rule. However,

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the Court went on to hold that since a right to subrogation only attaches upon payment of a loss, the proper procedure, to protect the defendant's rights, is to dismiss the common-law indemnification claim and contribution claims pro tanto (up to the amount of) to the extent of payments actually made by the insurer to the defendant. Id. at 69, citing, Winkelmann v. Excelsior Insurance Co., 85 N.Y.2d 577, 582, 626 N.Y.S.2d 994, 650 N.E.2d 841.

The Second Department followed this prescription again in Pierce v. City of New York, ___ A.D.2d ___, 663 N.Y.S.2d 282 (2nd Dept., Oct. 27, 1997), and in Morales v. City of New York, ___ A.D.2d ___, 657 N.Y.S.2d 766 (2nd Dept., May, 1997), as it related to a contractual claim for indemnification.

The Fourth Department has also reached the same result in Pierce v. Syracuse University, ___ A.D.2d ___, 653 N.Y.S.2d 753 (4th Dept., 1997) and Kuandal v. Westminister Presbyterian Society of Buffalo, ___ A.D.2d ___, 660 N.Y.S.2d 774 (4th Dept., April 25, 1997). Both these cases involved contractual claims for indemnification.

**SUMMARY:**

It would appear that the contractual call for insurance takes precedence over claims for indemnity and both contractual and common-law claims seeking indemnification will take a back seat to a claim for coverage. However, barring coverage, the rules remain and continue to hold true over and above any coverage provided.

# GENERAL LIABILITY CARRIER VS. 1B CARRIER "THE NEVER ENDING BATTLE"

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numerous additional insured endorsements subject to various interpretations. However, for our purposes, we will utilize the infamous CG 20 10 (Form B) which has been clearly interpreted in New York to include the active as well as passive negligence of the additional insured, see Charter Oak Fire Insurance v. Trustees of Columbia University In The City of New York, 604 N.Y.S.2d 555 (AD 1st Dept., 1983), see also Consolidated Edison Company of New York v. Hartford Insurance Company, 610 N.Y.S.2d 219 (AD 1st Dept., 1994).

General Obligations Law §5-322.1 prohibits any promise to hold harmless and indemnify a promisee in which the promisee is a construction contractor, as against its own negligence. For many years, this provision has been utilized by attorneys and insurance carriers to insulate the general liability carrier from any exposure in situations where the general contractor or landowner is even 1% responsible for an accident. Until recently, the position was taken that under such a situation where third-party plaintiff was even 1% negligent, that the general liability carrier would escape any responsibility and 100% would be passed through to the Workers' Compensation carrier. This is notwithstanding such decisions as Kilfeather v. Astoria 31st Street Associates. et al., 156 A.D.2d 428, 548 N.Y.S.2d 545 (2nd Dept., 1989). In Kilfeather, the third-party plaintiff and third-party defendant were found to have 70% and 30% liability, respectively. The Court in Kilfeather permitted the indemnification to occur regardless of the negligence of the third-party plaintiff. This was considered a ruling of little precedent as the third-party plaintiff was not the promisee nor a construction contractor or landlord. As such, 100% indemnification was obtainable. However, this issue was more clearly and succinctly set forth in the recent decision of Stottlar v. Ginsburg Development Corp., et al., 229 A.D. 483, 645 N.Y.S. 2d 833 (2nd Dept.1996).

In Stottlar, the third-party plaintiff general contractor brought an action against the employee of the plaintiff, a subcontractor. The jury determined that the plaintiff himself was 15% at fault while the third-party plaintiff was 35% and the third-party defendant and subcontractor was 50%. The Court, in this decision, set forth the general principle under which General obligations Law §5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee who is also a construction contractor or landowner for his or her own negligence. For this proposition the Court cited the well known cases of Brown v. Two Exchange Plaza Partners, 76 N.Y.2d 172, as well as the Kilfeather case previously noted,supra. However, Stottlar distinguished these decisions noting that it is not the intent to "preclude a promisee [from] requiring indemnification for damages... caused by or resulting from the negligence of a party other than the promisee". The Court noted that the general contractor,

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the promisee, could not recover for its own gligence, but that nothing within the statute would ohibit it from recovering for negligence of a party other an a promisee. That negligence which belonged either the third-party defendant or some other entity, could recoverable pursuant to the indemnification provision. such, instead of a total prohibition of such an demnification claim, it would instead be permitted oportionally to the extent that the promisee itself was ot negligent. The First Department, as recently monstrated in ITRI Brick & Concrete Corp. v. Aetna, 3 N.Y.S.2d 544 (1996), continues to espouse the less uitable rule wherein recovery is prohibited if even 1% gligence is found. ITRI, supra, recently went to the ourt of Appeals wherein the Court was posed the uestion as to what extent can an indemnification greement between a general contractor and bcontractor be enforced where the general contractor is been found partially negligent in an action brought an employee of the subcontractor against the general ntractor? In answering this question, the Court of peals left plenty of room for division in determining at

> [Where] the agreements in question contemplate full, rather than partial indemnification, the agreements are unenforceable under General Obligations Law §5-322.1 in the circumstances of these cases. 658 N.Y.S. 2d 903,89 N.Y.2d 786

Left unclear by the Court of Appeals, in this narrow cision, is the outcome where the indemnification greement is less broad and all encompassing. While the rst Department has demonstrated its leanings towards a ict interpretation, the Second Department, has shown eater flexibility. It is however unclear, how the First epartment will respond to what appears to be, at least plicitly, a tacit approval towards apportionment where rtial indemnification agreements are utilized. Equally portant, practitioners in the second department must w realize that where broad indemnification greements, such as in ITRI are utilized, the agreements e void and only commonlaw indemnification survives eeing the general liability carrier from exposure.

The concept, set forth above by the Second epartment, (in non ITRI situations) can be demonstrated three different scenarios in which a third-party action brought and additional insured coverage is owed to the ird-party plaintiff. For our purposes, we will assume at the indemnification agreement in question permits rtial indemnification and as such survives.

In the first scenario, the third-party plaintiff is 100% negligent. In such a situation, clearly the common law claim against the third-party defendant falls due to the lack of active negligence. None of the liability for which the general contractor is found negligent can be passed through in the contractual claim between the general contractor's own carrier and the subcontractor's general liability carrier. It should be noted that if the general contractor is self-insured, and as such, there is no co-insurance, then the subcontractor's carrier will have to pick up 100% of the general contractor's liability pursuant to the additional insured provision. The rationale being that there is then no insurance that the subcontractor's carrier can then treat as co-insurance.

The next common scenario is that in which the general contractor, owner or lessor, who is the third-party plaintiff, has no negligence (such as in a statutory violation under the Labor Law) . In such a scenario, the subcontractor Is general liability carrier will end up with 75% of liability with the Workers' Compensation carrier having 25%. This occurs because under the additional insured endorsement as well as principles of coinsurance (assuming a standard equal sharing co-insurance clause is in place), the subcontractor's policy of insurance and that of the general contractor act as co-insurance and share equally. As such, each carrier assumes 50% responsibility. However, under the antisubrogation rule, the subcontractor's carrier cannot then seek indemnification against the Workers' Compensation carrier. As previously noted, this would violate the anti-subrogation rule due to the coverage provided to the subcontractor under the indemnification agreement. There is no such prohibition against the general contractor's own carrier. That carrier may seek indemnification against the third-party defendant. Remember however, that the carrier is seeking only to pass down the 50% of the total liability it retained after splitting with the subcontractor's carrier. That 50% flows down into the third-party action where it is split equally between the subcontractor's carrier and the 1B carrier. As such, the 1B carrier ends up with 25% and the subcontractor's general liability carrier also ends up with the 25% pass down as well as the 50% it retained under the initial additional insured split. This is how it ends up with 75%.

While this may be confusing, the third scenario is even more so. The third scenario to be discussed under the co-insurance situations is where third-party plaintiff is found to be partially negligent as is the third-party defendant. For ease of use, we will state that the general contractor/third-party plaintiff is found to be 35%

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negligent and the subcontractor is found to be 65% negligent. The first step to recall is that under the additional insured endorsement, the carrier for the third-party defendant and the carrier for the general contractor split the liability of the third-party plaintiff 50-50. This amounts to an initial split of 17.5% and 17.5%. The carrier for the general contractor then attempts to pass down its proportional share to the third-party defendant unburdened by the anti-subrogation rule. Under normal situations, the carrier for the subcontractor would split this amount equally with the workers' compensation carrier. However, under the rule set forth in Stottlar, supra, the general liability carrier is restricted from assuming any of the negligence of the promisee-general contractor. Further, the workers' compensation carrier has already been assigned the share for which it must indemnify the third-party plaintiff under common law. As such, none of the third-party plaintiff's general liability carrier's share can be passed down. The subcontractor's two carriers split equally the percentage assigned to them by the Court, which is both the common law negligence attributable to their insured as well as the maximum amount which can be assumed by the insured pursuant.to the General Obligations Law. The two carriers split the 65% in half each assuming 32.5% However, the subcontractor's general liability carrier also assumed half the third-party plaintiff s share due to its status as an additional insured. The final percentages in our example are 50% for the subcontractor"s general liability carrier, 32.5% for the workers' compensation carrier and 17.5% for the general contractor's\lessor's carrier. Utilizing different percentages, result in a very different result. If, for example, the general contractor was found to be 90% negligent with the subcontractor 10%, then we again see the first step 50-50 split between the general contractor's carriers and that of the subcontractor.

In the second step, when the general contractor's carrier attempts to pass down its percentage to the subcontractor, it should be noted that both the general liability carrier and the workers' compensation carrier of the subcontractor cannot assume any of the negligence attributed to the general contractor nor negligence beyond that assigned to its own insured, respectively. As such, it is restricted in this circumstance to 10%. The subcontractor's general liability carrier and the workers' compensation carrier equally share the 10% liability. The remaining 90% being retained by the general liability carrier for the general contractor and split with the subcontractor's general liability carrier due to the additional insured status given to the third-party plaintiff. The end result being a 50%-5% split between the general liability carrier for the subcontractor and the workers' compensation carrier with the general contractor's carrier retaining 45%. Do not forget the initial 50-50 split under which the general liability carrier for the subcontractor assumed 50% of the general contractor's liability. Put another way, the subcontractor's general liability carrier is responsible for that amount required by contract to indemnify the negligence of a party other than the promisee. Under co-insurance provisions, it can then split that amount with the 1B carrier. Unfortunately, for the general liability carrier, the days appear to be passing where negligence of the third-party plaintiff would have completely exonerated them from any responsibility. Argument can be raised that cases such as ITRI Brick & Concrete Corp. V. Aetna Casualty & Surety Company, (1st Dept.) contradicts this rule. While general liability carriers may still attempt to utilize the total exoneration rule under ITRI Brick and other similar cases, it should be noted that such a rule, even after the Court of Appeals holding, is quite narrow and limited to agreements meeting the broad specifications noted in ITRI BRICK, supra. It appears that the Second Department rule, which examined this issue in much greater detail, carries with it the weight of common sense denying indemnification for a promisee's own negligence but permitting indemnification for the negligence of others. It may be only a short time before this interpretation is deemed the accepted order of business.

Finally, some consideration must be given to scenarios where there was no additional insured endorsement in play and we are merely dealing with an indemnification provision. In such situations, where the general contractor-third-party plaintiff has no negligence, the liability of that general contractor is passed down to be shared equally between the subcontractor's general liability carrier and the workers' compensation carrier. Obviously, where the general contractor is 100% responsible, neither of the subcontractor's carrier have any responsibility due to dismissal of the third-party action and the lack of any additional insured coverage. In such situations where the general contractor is found to be partially negligent, its own carrier retains that percentage for which it is responsible with the remaining percentage passed down to be split between the subcontractor's general liability carrier and the workers'

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compensation carrier with the percentage assigned to the subcontractor controlling both the contractual indemnification as well as the common law indemnification.

## CONCLUSION

The recent Court cases seem to be following the flavor of the day which is to prevent the 1B policy from being overburdened and reducing costs to employers. Given both the equitable rationale behind these decisions as well as the public policy which is being set forth to help protect employers from overburdensome costs, it can be expected that the decisions which promote a greater share of the burden being carried by the general liability carrier will become more common. Cases such as ITRA BRICK,while seemingly flying in the face of these developments, are actually narrow holdings in a well developing body of law.

# WORTHY OF NOTE

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constituting the claim within ninety (90) days of its accrual, or a reasonably time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits Morrison v. New York City Health and Hospitals Corp. ____ A.D.2d____, 664 N.Y.S.2d 342).

**NEGLIGENCE - SNOW AND ICE - DUTY:** In Jiuz V. City of New York, (____AD.2d____, 664 N.Y.S.2d 303) the First Department indicated that an owner or lessee of property owes no duty to pedestrians to remove ice and snow that naturally accumulates upon a sidewalk in front of its premises, but if it undertakes to do so, it can be held liable in negligence where its acts create or increase hazards inherent in the ice and snow on the sidewalks.

**STIPULATIONS OF SETTLEMENT - VALIDITY:** In Katz v. Village of South Hampton (____AD.2d____, 664 N.Y.S.2d 457) the Second Department ruled that stipulations of settlement are judicially favored and will not be set aside unless there is a cause sufficient to invalidate the contract, such as fraud, collision, mistake or accident.

**INSURANCE - CANCELLATION - ELEMENTS:** The Second Department recently indicated that an insurer may effectively cancel its policy by mailing the notice of cancellation to the address shown on the policy, provided that it submits sufficient proof of mailing, regardless of whether the notice is actually received by the insured. The insurer proved the policy cancellation was evidence of its ordinary procedures for mailing cancellation notices, together with evidence of actual mailing to the insureds correct address (Makawi v. Commercial Union Ins. Co., (_____A.D.2d____, 664, N.Y.S.2d 470).

**STRIKING FROM CALENDAR - RESTORATION - ELEMENTS:** Since a matter is generally marked off the calendar as a consequence of omission or default, the standard for restoring the action is essentially the same as that for setting aside a default judgment, including the submission of an affidavit of merit; so indicated the First Department in Bonoff v. Troy, (____A.D.2d____, 664 N.Y.S.2d, 442).

No affidavit was necessary in conjunction with a motion to restore the matter to the trial calendar in the case under consideration after it had been marked off where the action was not marked off because of any default by the plaintiff, the motion to restore was not untimely and there was never an intent to abandon the action.

**DISCOVERY - DEPOSITION OF PRISONER:** In Nalbach v. McDonald (____A.D.2d____, 664 N.Y.S.2d 476) the Second Department indicated the purpose of the rule under which depositions of a person confined to prison may only be taken by leave of court is to prevent disruption of the prison routine and to provide a mechanism of court oversight before the Correctional Facility may be compelled to open its doors for the deposition of one of its prisoners. The rule is not intended to supply a party to the action with a procedural ploy to gain a last minute adjournment of a scheduled examination before trial.

**NEGLIGENCE - BURDEN OF PROOF - DEFENDANTS:** In Richardson v. John Danna & Sons (____A.D.2d____, 664 N.Y.S.2d 780) the First Department submitted that a general verdict for defendants in an automobile and negligence action was not defective based upon the allegation that some of the defendants theories of proximate cause were not supported by the evidence. The defendants did not have the burden of proof on the issue of proximate cause, they advanced no affirmative defenses on which they did have the burden of proof, and their "theories" did not more than challenge the credibility of plaintiffs case.

**INSURANCE - PROCUREMENT - FAILURE:** It was recently indicated by the Appellate Division, First Department that an elevators firm's breach of its contract with the City Housing Authority, pursuant to which the firm was obligated to provide the owner's

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liability insurance, entitled the authority to indemnification in an action arising from the death of an individual in the elevator shaft, and to its defense cost, which should have been undertaken by an insurer, Figueroa v. New York City Housing Authority (____A.D.2d.____, 664 N.Y.S.2d 802).

**INSURANCE - NON-OWNED - AUTOMOBILE:** In Westchester Fire Ins. Co. v. Canceleno (____A.D.2d____, 664 N.Y.S.2d 829), the second Department ruled that a driver was not entitled to liability coverage under her "parents' automobile policy" as an authorized driver of a "non-owned" automobile for an accident occurring while she was driving the vehicle titled in her name.

**NEGLIGENCE - FALL FROM ROOF - SCAFFOLD - SECTION 240:** It was recently submitted by the First Department that a worker's allegation that he fell off a sloped portion of a roof while attempting to secure scaffolding and without any safety devices in place stated a cause of action pursuant to the Scaffolding Law against the construction site owner (Pantelaros v. 75th St. Tenant's Corp., _____AD.2d____, 644 N.Y.S.2d 789).

**SUBPOENA - ELEMENTS:** In Brussels Leasing, Ltd. Partnership v. Henne (_____Misc._____, 664 N.Y.S.2d 905) it was ruled that subpoena is not a discovery device, nor may it be used as a substitute for pretrial disclosure. The use of a subpoena to attempt to compel disclosure from one not a party to a proceeding, without adherence to the legislative scheme is both improper and abusive.

**APPEAL - ERROR - INSURANCE - BAD FAITH:** The Second Department recently indicated in Smith v. General Accident Ins. Co., (_____AD.2d_____, 664 N.Y.S.2d 605) that error in instructing the jury that the liability insurer had an obligation to advise its insured as to the progress of settlement negotiations regarding the underlying personal injury action was not harmless in the insureds action for bad faith refusing to settle. The jury may have found bad faith based upon the insurer's failure to keep the insured advised of the progress of the negotiations.

**EVIDENCE - MALPRACTICE - OFFER OF RECORDS:** The Second Department recently concluded that the physicians office records or hospital records including medical opinions are ordinarily admissible in a malpractice action to the extent that they are to remain to the diagnosis and treatment.

Three physicians who treated the patient after the defendant had allegedly committed the malpractice could not testify regarding the operative reports they have received from the other physicians in the patients medical malpractice action, even though the reports from the other physicians were in each physicians' records and would ordinarily have been admissible, where each physician testified at the trial and related the procedures done and the reports prepared, so that the admission of the testimony regarding the reports from the other physicians would have constituted improper bolstering. (Cohn v. Haddad, _____A.D.2d____, 664 N.Y.S.2d 621).

**SCHOOL'S DUTY OF CARE:** In Hilf v. Massapegua Union Free School Dist. (_____ A.D.2d_____, 664 N.Y.S.2d 624) it was held by the Second Department that the school fulfilled its duty of exercising reasonable care toward the student by clearing the parking lot of snow and thereby providing a means of safe passage to the bus. The school district was not liable for injuries sustained by the student in a fall on snow covered grassy area as she walked toward the bus.

**LIMITATIONS - BORROWING - STATUTE:** In Smith Barney Harris Upham & Co. Inc. v. Luckie (_____A.D.2d_____, 665 N.Y.S.2d 74) the First Department ruled that pursuant to New York's borrowing statute, as between limitation, applicable under New York Law and that of foreign jurisdiction, it is the shorter period that governs.

**PROXIMATE CAUSE - MATTER OF LAW:** In Bell v. Board of Educ. of The City of New York, (90 N.Y.S.2d 944, 665 N.Y.S.2d 42) the Court of Appeals indicated that while foreseeability is. generally a issue for fact finder, where only one conclusion can be drawn, the proximate cause may be decided as matter of law.

**DUTY OF CARE - PHYSICIAN - THIRD PERSON:** The Court of Appeals recently submitted that a pediatrician owed the infant's parents a duty of care, based upon common-law principals of ordinary negligence and malpractice, of complying with recommendations of polio vaccine manufacturer to warn the parents of their personal health risk from vaccination of their infant, despite absence of direct doctor/patient treatment relationship between parent and pediatrician if the administration of the vaccine to the infant created a well recognized danger to the parents of incurring contact polio (Tenuto v. Lederle Laboratories, Div. of American Cyanamid Co., 90 N.Y.2d 606, 665 N.Y.S.2d 17).

**DISCLOSURE - STRIKING OF PLEADINGS - FAILURE**

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**) PRODUCT WITNESS:** In Mohammed v. 919 Park ace Owners Corp., (_____A.D.2d_____, 665 N.Y.S.2d 5), the Second Department ruled that the trial court used its discretion by striking the defendant's answer r failure to produce a knowledgeable witness for position. It was not demonstrated that the failure to oduce a witness who was no longer employed by the fendants, was willful and contumacious.

**ENERAL MUNICIPAL LAW - PROPRIETARY DUTIES:** Balsam v. Delmar Engineering Corp., (90 N.Y.2d 966, 5 N.Y.S.2d 613), the Court ruled that a failure of olice to close a roadway, redirect traffic or place arning flares or cones in an area of icy patch where a n had rear ended plaintiff's vehicle fell within the ea of governmental functions, rather than proprietary ities. Thusly, the City was immune from liability for juries to plaintiff when a third vehicle hit the same ice itch and caused the van to pin the plaintiff between e van and her car.

**DEWALK ELEVATION - LIABILITY:** In Trincere v. ounty of Suffolk (90 N.Y.2d 976, 665 N.Y.S.2d 615), e Court of Appeals submitted that a pedestrian who stained an injury in a trip and fall over a half inch ise of slap outside the County building during daylight ours were not actionable, given the width, depth, evation, irregularity, and appearance of the defect ong with time, place, and circumstance of injury.

**NSURANCE - INTENDED ACT:** The Second epartment recently held that in general, it is contrary public policy to insure against liability arising directly gainst an insured from his violation of a criminal atute.

The exclusion in a homeowners insurance policy oviding that its coverage for personal liability to edical payments to others did not apply to bodily jury or property damage that is expected or intended / the insurance precluding coverage inflicted upon a ctim by the insured who is subsequently convicted of second degree assault (Litrenta v. Republic Insurance c. (_____AD.2d_____, 665 N.Y.S.2d 679).

**EGLIGENCE - SLIP AND FALL - PRIMA FACIA:** The econd Department recently held that to establish a rima facia case of negligence in a "Slip and Fall" case, laintiffs must demonstrate that defendant either reated the condition which caused the accident, or ad actual or constructive notice of the condition and a easonable time within which to correct it or warn bout its existence, (Maguire v. Southland Corp., ____A.D.2d_____, 665 N.Y.S.2d 680).

General awareness that the dangerous condition may e present is legally insufficient to constitute notice of a particular condition that caused the injury. In the absence of evidence that rain water had accumulated on the floor of the defendant's store for a sufficient length of time prior to the accident, so as to charge the defendant with constructive notice of a dangerous condition, defendant would not be held liable for failure to warn others or to remedy the defect.

**CONSTRUCTION - INDEMNIFICATION - COMMON LAW:** The Second Department recently submitted that a owner and a building manager were entitled to conditional judgments on common law indemnification and a personal injury action under the scaffolding law, where they neither controlled nor directed the injured cable installer's work, Clark v. 345 E. 52nd Street Owners, Inc., (_____A.D.2d_____, 666 N.Y.S.2d 207).

**INSURANCE - LIABILITY OF BROKER - THIRD PERSONS:** In Halali v. Vista Environments, Inc., (_____A.D.2d_____, 666 N.Y.S.2d 196), the Second Department ruled that where an insurance agent's negligence causes an insured to be without coverage, the agent cannot be held liable to the injured third person as a consequence. Since the personal injury victims did not have a viable cause of action against the insurance brokers for the alleged negligence in procuring insurance for the tortfeasors, the broker had no claim for indemnity or contribution against the underwriting manager for the insurer.

**LIMITATIONS - MEDICAL MALPRACTICE - ACCRUAL:** In Michaels-Dailey v. Shamoian, (_____AD.2d_____, 666 N.Y.S.2d 199), the Second Department ruled that the Statute of Limitations applicable to medical malpractice actions is tolled until after plaintiffs last treatment when the course of treatment, including wrongful acts or omissions has run continuously and is related to the original condition or complaint.

Where a gap in the treatment exceeded the applicable Statute of Limitations, the continuity of the treatment was broken such that the statute had run on the claim, relating to treatment prior to the gap, that was filed more than four years after the last treatment prior to the gap.

**CONSTRUCTION - SCAFFOLD LAW - ELEMENT**: The Second Department recently held in Morales v. City of New York, (_____A.D.2d _____, 666 N.Y.S.2d 200), that the scaffold law imposes absolute liability on owners, contractors and their agents for any breach of any statutory duty. A removal of an old video screen in a school auditorium prior to the installation of a new screen constituted an alteration of the auditorium

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structure and thus came within the scope of the scaffold law.

**DISCLOSURE - POST ACCIDENT REPAIRS:** In Gordon v. City of New York (____A.D.2d_____, 666 N.Y.S.2d 186), the First Department indicated that the a pedestrian was entitled to discovery post-accident repair estimates for a sidewalk where a pedestrian fell, even if ultimately, the court ruled inadmissible the repair report since they could shed light on the issue of who controlled or who maintained the area of the sidewalk where the accident occurred.

**PROCESS - LEAVING PAPERS:** The National Union Fire Co. of Pittsburgh, Pa. v. Montgomery, (_____A.D.2d_____, 665 N.Y.S.2d 665), the First Department ruled that the defendants affidavit that he did not open the door to his home for a man who knocked on the door and said he had "some papers", but who neither identified himself nor the papers he had, and that after the man left, the plaintiff found the summons and complaint at the door step, were sufficient to rebut the process service affidavit that he personally delivered the summons and complaint to the defendant and raised issues of fact as to jurisdiction.

**JUROR'S DUTY:** In Matter of State of Brook Buchanan, (_____A.D.2d_____, 665 N.Y.S.2d 908), the Third Department submitted that a prospective juror is not only duty bound to truthfully answer all questions posed during voir dire, but obligated to volunteer information which he or she has reason to believe would render him unacceptable to the litigants.

**APPEAL - FAILURE TO EXCEPT:** In Frumusa v. P.J. Wever Const., Inc., -(_____A.D.2d_____, 665 N.Y.S.2d 210), the Second Department held that contention by a personal injury plaintiff, that the Supreme Court erroneously failed to charge the jury with regard to the general contractor and subcontractor, was unreserved for Appellate review, where the plaintiff failed to request the charge in that regard or take exception to the charge as delivered.

**APPEAL - SANCTIONS - REVERSAL** - The First Department recently held that the City Transit Authority was required to pay a personal injury plaintiff's attorney $30,000 (Thirty Thousand Dollars) as a condition for the Appellate Court's reversal of an order which struck the Authority's answer as a sanction for failure to timely comply with discovery and for a reversal of a judgment awarding the plaintiff $3,526,640.56 (Three Million Five Hundred Twenty Six Thousand Six Hundred Forty Dollars and Fifty Six Cents) where the plaintiff expended considerable sums in preparation and trial of the matter (Spellman v. New York City Transit Authority, _____A.D.2d_____, 666 N.Y.S.2d 600).

**INSURANCE - BENEFICIARY - RIGHT OF ACTION** - In Halali v. Edanston Ins. Co., (_____A.D.2d_____, 666 N.Y.S.2d 676) the Second Department ruled that a party who is not privy to an insurance contract but would benefit from it, may bring a declaratory action to determine whether the insurer owes a defense and/or coverage under a policy and thus the action was permitted prior to the entry of judgment in an underlying action.

**INDEMNIFICATION - CONTRACTUAL** - In Velez v. Tishman-Foley Partners, (_____A.D.2d_____, 666 N.Y.S.2d 591) the First Department ruled that a general contractor was entitled to contractual indemnity from a company that built a hoist tower on which the subcontractor's employee was injured when a cross-bracing gave way, regardless of whether the builder was negligent, where the contract imposed liability on the builder for all the damages in connection with its work and obligated the builder to indemnify the general contractor from liability arising from the builder's acts or omissions in performance of the work, and the employee's accident occurred when the hoist tower was being erected. The finding of the general contractor's liability to the employee under the scaffolding law was not the equivalent of finding of negligence.

Where an entity is held strictly liable based solely on its status as owner of the premises pursuant to the Scaffolding Law, the owner is entitled to contractual indemnification where such has been agreed to between the parties.

**INSURANCE - DISCLAIMER - LATE NOTICE OF CLAIM** - It was recently indicated by the Second Department that a disclaimer of coverage for injuries to insured's employee based on insured's failure to provide prompt notice of claim in violation of its obligation under the policy was proper even if the delay resulted in no prejudice to the insurer and even if the insurer had learned of the underlying occurrence and subsequent claim from another source (Outlaw v. City of New York, _____A.D.2d_____, 666 N.Y.S.2d 700).

**INSURANCE - DISCLAIMER - NOTICE OF CLAIM** - In Rosen v. City of New York, (_____A.D.2d _____, 666 N.Y.S.2d 594) the First Department ruled that a notice given by a primary insured to a liability insurer was

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applicable to the additional insureds. Asserting a lack of timely notice, the insured disclaimed coverage of the additional insureds before they had asserted any claims against the primary insurer and it failed to demonstrate any prejudice attributable to the additional insured's late notice for other sound reasons for excluding performance.

**LIMITATIONS - ELEMENTS** - The Statutes of Limitation are designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Other considerations include promoting repose by giving security and stability to human affairs, judicial economy, discouraging courts from reaching dubious results, recognition of self-reformation by defendants and perceived unfairness to defendants of having to defend claims long past (Blanco v. American Tel and Tel Co., 90 N.Y.2d 757, 666 N.Y.S.2d 536).

**LIMITATIONS - BREACH OF IMPLIED CONTRACT** - In Gold Sun Shipping Ltd. v. Ionian Transport, Inc., (_____A.D.2d_____, 666 N.Y.S.2d 677) the Second Department ruled that an action to recover damages for breach of an implied contract is subject to a six year Statute of Limitations.

**NEGLIGENCE - SLIP AND FALL - ELEMENTS - INDEPENDENT CONTRACTOR** - In Young v. XYZ Corp., (_____A.D.2d_____, 666 N.Y.S.2d 708) the Second Department ruled that to establish a prima facie case of negligence in a slip and fall matter, the plaintiff must demonstrate that the defendant either created the condition which caused the plaintiff s fall or had actual or constructive notice of it.

A building management company was not liable for the plaintiffs injuries suffered when she slipped on water that had accumulated on the floor of her bathroom where another company had provided janitorial services, management company lack actual or constructive notice but there was water on the floor and management company did not create the condition.

**MOTION TO DISMISS - FAILURE TO PROSECUTE - DEFEATING MOTION** - In Wappker v. Pretium Associates, (_____A.D.2d_____, 666 N.Y.S.2d 643) the Appellate Division, First Department ruled that to defeat a motion for dismissal for failure to prosecute, the party must demonstrate both a justifiable excuse for the delay and the merit of the action.

**NEGLIGENCE - WINDOW WASHER - DUTY OF OWNER** - The Second Department recently concluded that a window washer who was injured in a fall from a ladder while washing an exterior surface of upstairs windows of a residence failed to establish that the owners of the residence either created or had actual or constructive knowledge of, the defective condition of the storm window which allegedly caused the fall. Even assuming that the window which allegedly gave way when the washer attempted to use it to steady himself, was in a defective condition, the owners supplied documentary evidence that the storm window was installed by a third person and testified they had never experienced any problem or observed any defect.

**EVIDENCE - PREPONDERANCE** - The First Department recently submitted in 300 East 34th Street Co. v. Habeeb, (_____A.D.2d_____, 667 N.Y.S.2d 16) that went the preponderance of the evidence standard is used, if a witness' testimony is evenly balanced, the judgment must be rendered against the party bearing the burden of proof.

**NEGLIGENT - RES IPSA LOQUITUR - ELEMENTS** - The refusal to instruct a jury Res Ipsa Loquitur was error in a customer's negligence action against a restaurant to recover for injuries sustained when a ceiling fell upon him, so indicated the Second Department in Kaplan v. New Floridian Dinner, (_____A.D.2d_____, 667 N.Y.S.2d 65).

**PLEADINGS - VERIFICATION - ELEMENTS** - In Miller v. Board of Assessors, (91 N.Y.2d 82, 666 N.Y.S.2d 1012) the Court of Appeals submitted that when a pleading is required to be verified, the recipient or unverified or defectively verified pleading may treat it as a nullity, provided that the recipient with due diligence returns the petition with notification of the reason(s) for deeming the verification defective.

**DISCLOSURE - CLIENT'S RIGHT OF** - In Stage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn, LLP, (91 N.Y.S.2d 30 666 N.Y.S.2d 985) the court ruled that baring a substantial showing by a law firm of good cause to refuse assets, former clients would be entitled to inspect and copy the work product materials for the creation of which they paid during the course of the firm's representation.

The law firm would not be required to disclose to the former clients documents which might violate the duty of non-disclosure owed to third parties or otherwise imposed by law, law firm documents intended for internal law office review and use.

**AUTOMOBILE - KEY IN IGNITION - PRESUMPTION OF PERMISSION** - In Manning by Manning v. Brown, (91 N.Y.2d 116, 667 N.Y.S.2d 336) the Court of Appeals indicated that vehicle owners did not violate the statute prohibiting any person in charge of a motor vehicle

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# NORTHY OF NOTE

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rom permitting it to stand unattended without stopping he engine and removing the key and thusly, were not iable for the injuries the passenger sustained in an ccident while riding in a stolen vehicle, where the lriver of the stolen vehicle testified that she found the eys in the car under a set of papers out of plain view.

The owners of the vehicle negated the presumption hat their car was being driven with their consent and hus the owners were not liable for the injuries ustained by the passenger where the driver pleaded uilty to the theft of the vehicle and the passenger dmitted the she knew the car was stolen.

**)AMAGES - FACIAL LACERATIONS - TWO INCH CAR** - The Second Department recently submitted that n award of $40,000 (Forty Thousand Dollars) to an utomobile passenger who sustained several facial acerations and who was left with a two inch scar on ier cheek did not deviate materially from what was a easonable compensation under the circumstances eidner v. Unger, (_____A.D.2d_____, 667 N.Y.S.2d 84).

**)AMAGE FRACTURE - PATELLA** - In Salop v. City of lew York, (_____A.D.2d_____, 667 N.Y.S.2d 345) the irst Department ruled that an award of $230,000 (Two lundred Thirty Thousand Dollars) for past pain and uffering and $490,000 (Four Hundred Ninety housand Dollars) for future pain and suffering did not leviate materially from what would be a reasonable ompensation for a plaintiff who suffered a omminuted fracture of the left patella, which required n open reduction/internal fixation procedure, resulted n much pain and atrophy, and would continue to do so n the future.

**CONTRACT INDEMNIFICATION - DISALLOWED** - It vas recently held by the Second Department in Nivens . New York Authority, (_____A.D.2d_____, 667 N.Y.S.2d 415) that the City Housing Authority could not ee contractual indemnification from an elevator ompany which contracted to service and repair an levator in an action by a resident whose hand was aught in the door of the elevator, as the ndemnification provision did not call for the elevator ompany to indemnify the authority for liability arising om fault attributed to the Authority by the jury, and a rovision purporting to indemnify the Authority for its egligence would in any event violate the statute.

**NEGLIGENCE - SLIP AND FALL - TRIVIAL DEFECTS** - In Narinaccio v. LeChambord Restaurant, (_____A.D.2d_____, 667 N.Y.S.2d 395) The Second Department ruled that a property owner may not be held liable in damages for trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection.

**NEGLIGENCE - DANGER INVITES RESCUE - SCAFFOLD LAW** - It was recently submitted by the Second Department that the "Danger Invites Rescue" doctrine is not applicable to a claim asserted under the Scaffold Law by an injured worker. To do so would extend the owner's non-delectable duty under the Scaffold Law to a person who is not injured by a particular hazard the law is designed to guard against (DelVecchio v. The State, _____A.D.2d_____, 667 N.Y.S.2d 401).

**INSURANCE - DELAYED NOTICE** - In American Mfrs. Mut. Ins. Co. v. C.M.A. Enterprises, Ltd., (_____A.D.2d_____, 667 N.Y.S.2d 724) the First Department indicated that an insured's delay in giving a liability insurer notice of an underlying claim was unreasonable as a matter of law, relieving the insurer of any obligation to defend and indemnify them, where notice was first given in a summons and complaint served in the insured's declaratory judgment action against the insurer nine months after commencement of an underlying action and two years after the insured first learned of the property damage asserted in the underlying action.

**NEGLIGENCE - SLIPPERY CONDITION - ELEMENTS** - It was recently indicated by the First Department that in order for a property owner to have constructive notice of a hazardous condition on premises, as will allow recovery in a premises liability action, the condition must be visible and apparent and must have existed for a sufficient period of time prior to the accident to permit the defendant's employees to discover and remedy the condition.

The plaintiff must come forward with evidence establishing the constructive notice of the condition that caused the fall, rather than only a general awareness of the condition, in order to recover in the action (Megally v. 440 West 34th Street Co., _____A.D.2d_____, 667 N.Y.S.2d 716).

**DISMISSAL - RESTORATION - ELEMENTS** - The First Department recently indicated that to overcome the presumption that a case which has been marked off the calendar and not restored within one year is abandoned, the plaintiff must demonstrate a

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meritorious cause of action, a reasonable excuse for the delay, and absence of prejudice to the opposing party and the lack of intent to abandon the action.

The plaintiff rebutted the presumption that the case was abandoned by failure to restore the action within one year and was entitled to have the action restored on the condition that the attorney pay $5,000 to the defendant even though plaintiff negligently failed to appear at pretrial conferences. The attorney was not willfully in default, plaintiff engaged in sufficient discovery and motion practice after the matter was marked off the calendar to demonstrate an intent to pursue the litigation and the defendant was not significantly prejudice by the delay (Sanchez v. Javind, Apartment Corp., _____A.D.2d_____, 667 N.Y.S.2d 708).

# DRI CORNER

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the bar to share ideas, concerns on legislation, and trial techniques. These newsletters and magazines go a long way to assist the local practitioner to understand the issues impacting their clients, and provides resource specifically geared to the defense industry.

Another substantial benefit is DRI's Seminar programs, which are second to none. Each Committee holds at least one seminar each year. For these seminars, DRI provides renowned speakers and excellent materials that serve as a wonderful resource tool. In New York, we are fortunate to host DRI's Annual Insurance Coverage and Practice Symposium. This program is DRI's largest and brings claims professionals and attorneys together to learn and share ideas on coverage issues and defense strategies.

You may be thinking, this is all well and good, but what is DRI doing to assist me in addressing the issues that affect my practice. How is DRI helping me with the continuing struggle to balance the tri-parte relationship between the client, the insured and the insurer? To address many of the issues and conflicts that arise between lawyers and the insurance companies, DRI conducts Round Table discussions with the leaders of the various insurance companies. In these Round Tables discussions, the litigation and economic issues are addressed. In May, DRI will host another Round Table discussion. In this meeting, the participants will continue to address the two extremely important topics — Billing Guidelines and the use of Auditing Agencies.

These two issues were discussed at great lengths at the State representatives meeting. DRI, like DANY, is in a unique position, as our membership includes attorney's and claims professionals. This provides a unique opportunity to discuss and develop lines of constructive communication between the two. We are all faced with the economic realities of the industry, the practice of law, and the ever flowing ebb of the economy. DRI is providing the membership of the local organizations with a voice and bringing forth its message to individuals who have the ability to make decisions and shape policy. This may very well be the most important thing DRI does for us.

Each year DRI holds an Annual Meeting. This year's meeting will be held in San Francisco, October 7-11, 1998. The theme is "A Bridge to Growth." The meeting will feature 12 scheduled programs for CLE credit, Committee business meetings, and the opportunity to share ideas with other local organization, and more importantly clients. To support the theme and bridge the growth between the insurance industry, defense counsel and the insured, Substantive Law Committee have been requested to invite clients to attend the meeting. To date, a number of clients have accepted the invitation and will join in the Committee discussions to address the issues that impact their industry, the current trends, and the impact on litigation.

The success of this program sets the stage for the 1999 Annual Meeting which will be held in New York. We anticipate that the 1999 Annual Meeting will by far be the most successful, and we are looking forward to a tremendous participation by DANY's membership. DANY, through its President, and DRI Board Member, John McDonough, is part of the organizing committee John is working hard to make the 1999 Annual Meeting the bench mark for all others to follow.

## WATCH FOR NOTICES OF UPCOMING MEETINGS:

- **Election of New Officers**
- **Summer Outing**
- **Website Listings**
- **CLE Programs**
- **Membership Drives**

# APPLICATION FOR MEMBERSHIP*

**THE DEFENSE ASSOCIATION OF NEW YORK**
Executive Office
25 Broadway - 7th Floor
New York, New York 10004
(212) 509-8999

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $125.00 for individuals admitted to practice more than five years; and $300.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

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

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