VOL. 2 NO. 2 SUMMER 1999

DEFENDANT

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

FEATURING:

COLLATERAL SOURCE SET-OFFS AND THE APPLICATION OF CPLR ARTICLE 50A AND 50B

EIFS (EXTERIOR INSULATION AND FINISH SYSTEM) AND CONSTRUCTION DEFECTS CLAIMS

ALSO IN THIS ISSUE:

CASES WORTHY OF NOTE

THE SLIPPERY MATTER OF DEFENSES TO LABOR LAW §241 (6)

DANY AWARDS THE 1999 PINCKNEY AWARD TO RALPH V. ALIO AND LT. GOVERNOR MARY O. DONOHUE

DEFENDANT

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1/3 Page	175

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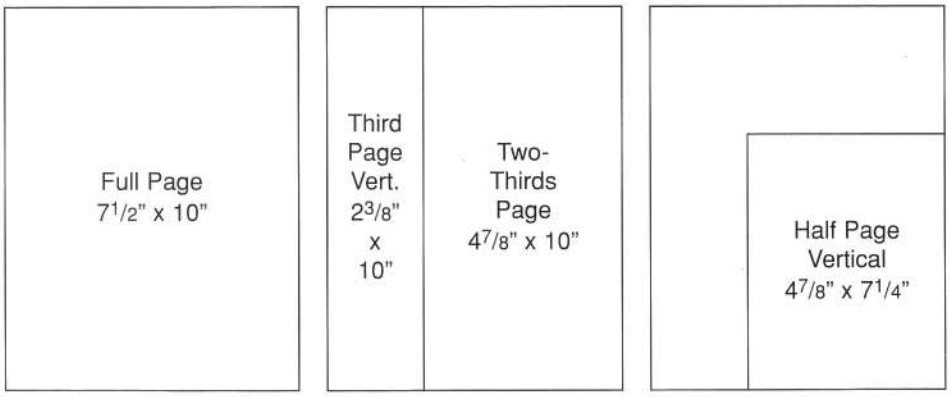

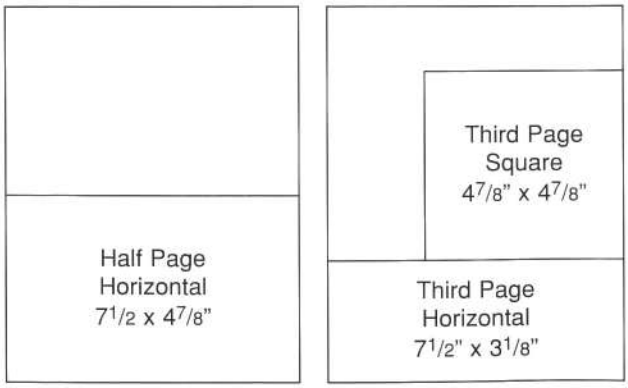

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PRESIDENT'S MESSAGE

*by Edward A. Hayes **

Now that we have CLE accreditation, we hope to further develop our educational programs to provide regular, relevant, and beneficial seminars geared towards defense attorneys.

We have already had three seminars (Ethics, Products Liability, and Labor Law). We will resume the program with monthly seminars in the fall.

Please let us know what seminar topics you want us to present.

I know that we have many talented members who would be willing to coordinate or even give presentations. I invite your suggestions and participation. Call Tony Celentano at (212) 509-8999.

We have priced the seminars to promote maximum attendance and minimum profit. Still, we took in more than our cost and were able to make charitable contributions to Save the Children, Feed The Poor, Coalition for the Homeless, Bowery Missions, and Kosovo Relief Fund. It would be a great tradition if all of our seminars produced similar benefits to worthwhile charities.

I extend my best wishes to the incoming President, Gail Ritzert and my appreciation to our Chairman of the Board John McDonough.

Edward A. Hayes

EDWARD A. HAYES
President

** Mr. Hayes is a partner in the Manhattan office of Hawkins, Feretic, Daly, Maroney & Hayes, P.C.*

EIFS (EXTERIOR INSULATION AND FINISHING SYSTEMS) AND CONSTRUCTION DEFECTS CLAIMS

*by John J. McDonough **

Designed originally in Europe to repair bomb-damaged buildings in World War II, synthetic stucco has recently become the newest trend in modern home building. Synthetic stucco's popularity and success is due in large part to the fact that it represents an alternative to the traditional wood or brick home. Moreover, stucco is unique in that it allows architects and home builders to produce more creative and versatile designs. Synthetic stucco, itself, however, is more than a singular substance like brick or wood. Rather, synthetic stucco is the sum of many parts, a system. This system is known as Exterior Insulation and Finishing Systems (EIFS).

EIFS consists of three major components. First, there is an insulation board, made of foam, that is secured to the exterior of the house through a specially designed adhesive. Second, a water resistant base coat is applied on top of the insulation, which is then reinforced by a fiberglass mesh for extra strength and support. Finally, an acrylic coat (stucco) is employed that is essentially crack-resistant and gives the stucco its colorful and aesthetic touch. The result is a stone-like finish that looks quite formidable and strong.

In reality, however, water can still enter a stucco home either through possible cracks in the exterior or exposed joints around windows, doors or other openings. Once the water enters, EIFS homes retain it more so than other building systems. The slow evaporation process allows significant moisture to build-up within the house.

In short, EIFS is designed to keep water out, but if water should get in, it becomes essentially trapped and cannot drain or otherwise be transferred from inside the wall. The end result is a rotted and weakened infrastructure that ultimately serves as a launching pad for termites, molds and mildew. It is these features that create the problem.

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**Mr. McDonough is Editor-in-Chief of the Defendant and a partner in the Manhattan office of the international law firm of Cozen and O'Connor.*

EIFS (EXTERIOR INSULATION AND FINISHING SYSTEMS) AND CONSTRUCTION DEFECTS CLAIMS

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And what a problem it is. Lawsuits have sprung forth throughout the country including South Carolina, North Carolina, Georgia, Florida, Washington, Massachusetts and Montana. Because of liability concerns, one of the nation's largest construction liability insurers, Maryland Casualty Company of Baltimore, no longer offers coverage for EIFS-installed homes. Likewise, some banks are refusing to approve loans for EIFS houses. The problem was so bad in North Carolina that the state's Attorney General requested that builders provide potential EIFS customers with a full disclosure identifying and warning of the moisture problems.

Homeowners have commenced the vast majority of claims and lawsuits involving EIFS. To a lesser extent, owners of commercial or public buildings such as schools, nursing homes, and office buildings have also claimed property damage. The principal targets of these varied claims generally include the product manufacturers and installers, as well as intermediate distributors and architects.

EIFS wall cladding products are beginning to be involved more and more in construction defect claims, sometimes filed as a class action. The whole process of evaluating and resolving EIFS-related disputes, and in determining and apportioning liability, will be facilitated by an understanding of what actually comprises "EIFS", or a given EIFS system, or how EIFS works with other components in a given exterior wall assembly to achieve weatherproof integrity.

EIFS products are marketed as proprietary "systems" by individual manufacturers. This system alone is not a complete weather envelope for buildings. The EIFS system is a component of a weather envelope, that must be joined together into a complete envelope with other non-proprietary components that together, if done correctly, can provide weatherproof integrity for the structure.

A designer's or builder's responsibilities in creating the wall assembly may not be clear without a clear definition of what comprises the system. In defect claims, a clear definition of the system underlies the determination of responsibility for any defects and resulting damages.

As can be seen from the above, for any given breach in the weather envelope of a building clad in EIFS, there are many possible reasons for the breach or failure, and many parties who may bear responsibility for the failure. In evaluating problems in such buildings and, particularly in defect claims, each possibility must be examined.

Every homeowner knows water damage is one of the most devastating injuries a structure can suffer. Like a cancer, water invades the house, breaking down defense barriers as it seeps its way into the infrastructure and, ultimately, into the interior.

In its wake, the water leaves behind rotted wood, spongy sheet-rock and other damage. In this weakened state, the house is vulnerable to a variety of external attacks, most notably termites. Termite infestation signals the inevitable demise of the house as a shelter and as a valuable asset.

EIFS lawsuits are proceeding on essentially three theories.

One theory involves the application process and the supervision thereof. Here, attention is primarily focused on the actual installer. These actions are predicated on traditional principles of negligence, breach of contract and implied warranties of workmanlike quality and habitability (if the contractor is also the seller of the home) , and they center around the installer's failure to correctly install the EIFS by inadequately sealing exposed joints such as windows and doors.

A second theory involves the concepts of express warranty and negligent misrepresentation. An express warranty is created where an affirmation of fact is made concerning the workmanship and quality of the EIFS.

The third and final theory looks to the EIFS itself and therefore contemplates a traditional products liability approach. This theory asserts that EIFS constitutes a product by virtue of the fact that EIFS is marketed and functions as a complete and integrated unit. In this regard, it is the inherent qualities of EIFS, of the lack of adequate instructions for its use, that ultimately allows water to be trapped within the home, causing moisture build-up and subsequent damages. EIFS is defective because it is "unreasonably dangerous" to the home.

EIFS manufacturers have hotly contested the products liability theory by arguing that the system works fine if installed correctly. They contend that EIFS only becomes defective when the contractor or subcontractor fails to adequately seal exposed joints such as windows or doors.

The fact remains, however, that EIFS is continually and consistently being installed incorrectly. One possible answer is the instructions themselves provided by the manufacturer are not adequate so as to permit proper installation..

Another is that EIFS is inherently incapable of being installed correctly. Either way, property owners argue that EIFS is defective as to instructions or as to design.

Because of the relatively recent nature of the EIFS litigation, very few reported opinions have been rendered that can provide guidance to the current or prospective EIFS claims handler. These cases have, however, evinced an early but discernible trend. Thus far, the builders and applicators are shouldering the blame.

Contractors and their subcontractors have been held liable primarily for negligent supervision, negligent construction and negligent application in three EIFS cases from three separate jurisdictions, including South Carolina, Florida and Pennsylvania. See **Centex-Rooney Constr. Co., Inc. v. Martin County**, 706 So.2d 20 (Fla. App. 1997); **Long v. Insul/Crete Co., Inc.**, 1993 U.S. Dist. LEXIS 8330 (E.D. Pa. June 18, 1993); **Sauers v. Poulin Bros. Homes, Inc.**, 493 S.E.2d 503 (S.C. App. 1997).

Manufacturers, on the other hand, have managed to escape the executioner's sword. In fact, a jury in the state of Washington recently returned a verdict in favor of a defendant EIFS manufacturer, being unpersuaded by plaintiffs' argument that the EIFS system was, in one form or another, inherently defective. Instead, the jury found that the stucco product was reasonably effective as designed, that it was accompanied by adequate instructions and warnings, and that it did not violate the state's consumer protection law. A recent opinion in Montana specifically found the synthetic stucco was not a defective product.

Faced with construction defect claims, contractors and other parties involved in real property construction projects often seek coverage under general liability policies. Generally, in the significant body of case law that has developed regarding such coverage, courts are reluctant to find coverage under liability policies in circumstances where the loss falls within the control of the insured. As explained by one California appellate court:

> The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer. Rather, liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products.

The reasoning is, of course, based on the provisions of the general liability policy.

The first step in coverage analysis of a construction defect claim is determining whether the claim falls within the coverage grant of the policy.

Coverage under a CGL policy is generally limited to claims against the insured for "property damage" resulting from an "occurrence." In turn, "property damage" is generally defined as "[p]hysical injury to tangible property." Moreover, coverage under a CGL policy is generally not "triggered" unless the property damage results "during the policy period." An "occurrence" is generally defined as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Where the construction claim against the insured contractor does not involve tangible, physical injury, courts have found no covered "property damage." Such situations arise where, for example, the claims against the contractor are limited to misrepresentation, breach of contract or indemnity without tangible, physical injury to property.

Courts have also held that claims limited to fixing or replacing all or part of defective construction and/or claims of diminution in value because of defective construction work or materials with no physical injury are not claims for "property damage." Defective work or materials in and of itself does not constitute "property damage."

As explained by the California Court of Appeals in **Maryland Maryland Casualty Company v. George Wayn Reeder**, 221 Cal. App. 961, 270 Cal. Rptr. 719:

> Generally liability policies, such as the ones in dispute here, are not designed to provide contractors and developers with coverage against claims if their work is inferior or defective. The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer. Rather, liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products.

However, six years later California's highest court found that the mere incorporation of defective work product into a structure constitutes an "injury" to the larger property and that such injury qualifies as a "physical" injury in **Armstrong World Industries v. Aetna Cas. & Sur. Co.**, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690.

> We agree with the formulation put forth by the Seventh Circuit Court of Appeals that the term "physical injury" covers a loss that results from physical contact, physical linkage, as when a potentially dangerous product is incorporated into

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WORTHY OF NOTE

*by John J. Moore **
*Christine Moore ***

MALPRACTICE - PATHOLOGIST - LIABILITY OF

In **Megally vs. LaPorta** (_____A.D.2d._____, 679 N,Y.S.2d 649), the Second Department ruled that a surgeon who, in relying upon a pathologist's conclusion that tissue biopsied from a patient's breast was malignant, performed a mastectomy only to subsequently learn that the tumor was benign was not entitled to recover from the pathologist and hospital that employed him under a medical malpractice theory.

The pathologist owed no duty of care to the surgeon with respect to their analysis to the tissue biopsy from the patient which was incorrectly diagnosed as malignant. Notwithstanding the surgeon's foreseeable reliance on the diagnosis which caused him to perform the unnecessary surgery.

The misdiagnosis of the pathologist was not the proximate cause of the alleged financial and emotional harm suffered by the surgeon as a result of the patient and her husband's launching extensive media campaign following the surgeon's performance of the unnecessary mastectomy in reliance on the pathologist's conclusions.

Liability for medical malpractice may not be imposed in the absence of a physician-patient relationship.

This obviously does not preclude the surgeon from proceeding with other theories of other actionable wrongdoing.

DEFAULT - VACATING - ELEMENTS

In **Baldini vs. New York City Employees Retirement System**, (_____AD.2d_____, 680 N.Y.S.2d 3) the First Department ruled that in order to vacate a default, the moving party must demonstrate a meritorious and a reasonable excuse for the delay. The courts have the discretion to consider law office failure as a reasonable excuse for the delay for purposes of vacating the default.

NEGLIGENCE - SCAFFOLD LAW - LABOR LAW 240 - ELEMENTS

The Court of Appeals recently submitted in **Melo vs. Consolidated Edison Co of New York, Inc.**, (92 N.Y.2d 909, 680 N.Y.S.2d 47), that the protections of the Scaffold Law are not implicated simply because injury is caused by the effects of gravity upon an object. It is in recognition of exceptionally dangerous conditions posed by an elevation differentials at work cites that the Scaffold Law prescribe safety precautions for workers laboring under unique gravity-related hazards.

An incident in which a steel plate used to cover an unfilled trench, which was being moved into place by means of a backhoe to which it was attached by chain fell and struck a worker, did not implicate special elevated risk encompassed by the Scaffold Law. While the force of gravity may have caused the plate to fall as ground as it was being moved, the plate was resting on the ground or hovering slightly above it and was not elevated above the work site.

ANIMALS - VICIOUS -PROPENSITIES - ELEMENTS

The First Department recently submitted that before a pet owner; or the landlord of a building in which the pet lives may be held strictly liable for an injury inflicted by the animal, the plaintiff must establish both (1) that the animal has vicious propensities and (2) that the defendant knew or should have known of the animal's vicious propensities.

Landlords of a building in which a pit bull lived were not strictly liable for injuries that a tenant sustained when

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he was bitten on the face by the dog where there was no evidence that it had ever attacked any other individual or previously displayed any vicious behavior, and there was no evidence that the landlords had, or should have had, knowledge of any vicious propensities the animal may have possessed (**Carter vs. Metro North Associates**, _____A.D.2d_____, 680 N.Y.S.2d 239).

LIMITATIONS - NEGLIGENCE

In **Playford vs. Phelps Memorial Hosp. Center** (_____A.D.2d_____, 680 N.Y.S.2d 267), the Second Department ruled that the three year Statute of Limitations applicable to a negligence action, which does not involve exposure to toxic substances, commences to run on the date of the occurrence of the injury, not on the date when it was discovered.

PROCESS - PROCESS SERVER'S AFFIDAVIT

In **Nazarian vs. Monaco Imports, Ltd.**, (_____A.D.2d_____, 680 N.Y.S.2d 652) the First Department ruled that a process server's affidavit is prima facie evidence of proper service sufficient to withstand a naked denial of receipt of service.

DISCLOSURE - DEPOSITION - REFUSAL TO PROCEED

It was recently indicated by the First Department that a defense counsel's refusal to conduct a formal cross examination of the tort plaintiff at her deposition, on the ground that considerable discovery was still outstanding, did not constitute a waiver of defendant's right to test the credibility of this adverse witness with regard to all the disputed evidence upon completion of discovery (**Oppenheim vs. United Charities of New York**, _____A.D.2d_____, 680 N.Y.S.2d 232).

SETTLEMENT - OFFSET - ELEMENTS - REPARATION BY WRONGDOER AFFIRMATIVE DEFENSE

In **Whalen vs. Kawaski Motors Corp.**, (92 N.Y.S.2d 288, 680 N.Y.S.2d 435), the Court of Appeals stated that the purpose of the statute under which a non-settling defendant in a tort action involving multiple defendants is entitled to offset against the amount of the verdict is to encourage settlement, although the statute is also concerned with insuring equity. Plaintiffs should be fairly compensated, but non-settling defendants should not bear more than their fair share of a plaintiffs loss, and moreover, the possibility of double recovery should be avoided.

In a tort action with multiple defendants which involves comparative fault, and in which a non-settling defendant is entitled to offset against the amount of the verdict, the proper approach in determining the non-settling defendant's liability is to first deduct the amount of the settlement from the gross verdict, and then apply the comparative fault statute to discount the remaining uncompensated damages by the amount of plaintiffs comparative fault.

As an affirmative defense, the right of the non-settling defendant in the action in order to offset against the amount of the verdict, entails the pleading of that factor as an affirmative defense.

NEGLIGENCE - SLIP AND FALL - INCIDENTAL BENEFICIARY

The Second Department recently indicated in **Green vs. Fox Island Park Auto Body, Inc.**, (_____A.D.2d_____, 680 N.Y.S.2d 560, that a pedestrian who slipped and fell on a public sidewalk abutting lease premises was at most an incidental beneficiary of a provision of a lease agreement requiring the lessee to obtain liability insurance and name the lessor as additional insured, and thus, could not recover against the lessor as a third party beneficiary of a lease agreement.

DAMAGES - BACK INJURY

The Second Department recently held that although a back injury suffered by a taxi cab driver in a rear end collision was a "serious injury" under the Insurance Law provision governing comprehensive motor vehicle insurance reparations, awards of Four Hundred Twenty Six Thousand ($426,000) Dollars for pain and suffering was unreasonable to the extent that it exceeded One Hundred Thousand ($100,000) Dollars for pain and suffering was unreasonable to the extent that it exceeded One Hundred Thousand ($100,000) Dollars for past pain and suffering and Seventy Five Thousand ($75,000) Dollars for future pain and suffering (**Maison Naves vs. Friedman**, _____A.D.2d_____, 680 N.Y.S.2d 619).

DISCLOSURE - FAILURE TO ATTEND - STRIKING OF ANSWER

In **Bushansky vs. Equity Transp. Co., Inc.** (_____A.D._____, 680 N.Y.S.2d 641), the Second Department indicated that plaintiffs in a personal injury action were not entitled to an order striking defendant's answer based upon a failure of the individual defendant to submit to an examination before trial, where the parties have previously stipulated that such failure would result in the individual defendant being precluded from testifying at time of trial.

COLLATERAL ESTOPPEL - ELEMENTS

In **David vs. Biondo** (92 N.Y.2d 318, 680 N.Y.S.2d 450), the Court of Appeals submitted that collateral estoppel rests on the interest of reducing needless litigation and conserving the resources of the courts and litigants.

The courts in determining whether the parties are in privity for the purpose of the doctrine should consider the

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WORTHY OF NOTE

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character, right, and extent of a parties role in one proceeding as it bears on the intervention of the collateral estoppel doctrine in another.

To block the use of the doctrine, a contestant can show the absence of a full and fair opportunity to present relevant views in the prior contest. The party seeking the benefit must demonstrate that the identical issue was necessarily decided in the prior adjudication and is decisive in the newly presented circumstances and forum.

NEGLIGENCE - RESPONDEAT SUPERIOR - ELEMENTS

In **Dykes vs. McRoberts Protective Agency, Inc.**, (_____A.D.2d_____, 680 N.Y.S.2d 513), the First Department indicated that among the factors to be considered in determining whether an employee's tort, whether intentional or negligent, was sufficiently in the scope of the employment to render the employer liable under the doctrine of Respondeat Superior are the connection between the time, place and occasion for the act. The history of relationship between employer and employee are spelled out in actual practice whether the act is one commonly done by such an employee, the extent of departure from the normal methods of performance, and whether the specific act was one that the employer could reasonably have anticipated.

A security guard, who had been working at a bank which had contracted with his employer to provide security services, was not acting in the scope of his employment when he assaulted a bank supervisory employee and therefore the guard's employer was not liable for the bank employee's injury under the doctrine of Respondeat Superior. The conduct of the security guard who acted on a long standing personal grudge and against specific orders to remain at his post in the bank lobby, was not remotely related to any conduct that his employer could have foreseen he would engage in as part of his duties.

NEGLIGENCE - LABOR LAW - SCAFFOLD - SECTION 240 - ELEMENTS

A corporation was liable pursuant to the Scaffolding Law for an injury that was the direct result of a gravity-related accident in which an unsecured metal beam fell onto a scaffold that was inadequate to protect the worker from harm (**Franciosa vs. 145 South Fifth Corp.**, _____A.D.2d_____, 680 N.Y.S.2d 512).

DISCLOSURE - LEAD PAINT - SCOPE

In **Anderson vs. Seigel**, (_____A.D.2d_____, 680 N.Y.S.2d 587), the Second Department ruled that the Supreme Court erred in an action claiming that exposure to lead paint on the premises caused the infant's learning disabilities, when it denied defense discovery requests for the academic records of the infant plaintiffs siblings and her mother, also a plaintiff, the mother's employme records, an IQ testing of the mother, as they were likely to lead to the discovery of admissible or relevant evidence.

MISSING WITNESS CHARGE - ELEMENTS

The First Department recently submitted that the trial court properly refused plaintiffs request for a missing witness charge where the testimony by the emergency medical service technician who refused to testify would have been cumulative of the testimony of his partner on the material issue of where plaintiff was found, defense counsel adequately explained the witness's lack of availability and plaintiff was allowed to mention the witness's absence in summation (**Padilla vs. City of New York**, _____A.D.2_____, 680 N.Y.S.2d 503).

AUTO MOBILES - DOUBLE PARKED VEHICLE - PROXIMATE CAUSE

The First Department recently concluded that even assuming a double parked delivery van that blocked a motorist's curb side parking spot was parked illegally, the hazard it created was not the proximate cause of personal injuries sustained by a cab driver when a motorist struck the cab while attempting to move around the van, then, when the cab driver exited the cab to inspect the damag moved forward and struck the cab driver (**Sidra vs. Burpoe**, _____A.D.2d_____, 681 N.Y.S.2d 25).

AUTOMOBILES - PROXIMATE CAUSE

The Court of Appeals recently indicated in **Gayle vs. City of New York** (92 N.Y.S.2d 932, 680 N.Y.S.2d 900), that a motorist who sued the City for negligence, alleging that a large puddle caused by poor drainage caused the car to skid off the roadway into a parked trailer, was not required to positively exclude every other possible cause of the accident. The plaintiff was required to render those other causes sufficiently remote or technical to enable the jury to reach a verdict based not upon speculation, but upon logical inferences to be drawn from the evidence.

AMENDMENT - RELATION BACK - LIMITATIONS - ELEMENTS

In **Moller vs. Taliuaga** A.D.2d (_____A.D.2d, _____, 681 N.Y.S.2d 90), the Second Department stated that an application for leave to amend the complaint and add a party defendant, made after the limitations had expired, was timed barred and thus, the burden shifted to the plaintiff to establish the applicability of the "relation back" doctrine.

For the rule to be operative in an action which the party added beyond the applicable limitations. The plaintiff must prove that: (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of institution of action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise, stale, commencement, and (3) the new party, knew or should have known that, but for the mistake by the plaintiff as to the identity of property parties, the action would have been brought against that party as well.

The interest will be united for the purposes of the rule allowing relation back to the original date of filing when the party is added beyond the applicable limitations, only where one is vicariously liable for the acts of the other.

DISCLOSURE - FAILURE TO IDENTIFY WITNESS - DISCRETION OF COURT

In **Halley vs. Winnicki**, (_____A.D.2d_____, 681 N.Y.S.2d 60), the Second Department submitted that the defendant's failure to list the identity of two of their witnesses was neither willful or contumacious, and thus, the Supreme Court did not abuse its discretion in denying the plaintiffs application to preclude the testimony of those witnesses.

CONSOLIDATION - ELEMENTS

It was recently held by the Second Department that a motorist was entitled to consolidate three personal injury actions against her, all of which arose out of the same multi-vehicle collision, even though the discovery in two of the actions had not yet been completed and the note of issue had already been filed in the third action. The potential delay in the trial of the third action pending completion of discovery in the other two would not caused prejudice sufficient to justify a denial of the motorist's motion (**Fransen vs. Maniscalco**, _____A.D.2d_____, 681 N.Y. S.2d 310).

INSURANCE - ADDITIONAL INSURED - DUTY

In **Binasco vs. Break-Away Demolition Corp**., (_____A.D.2d_____, 681 N.Y.S.2d. 309), the Second Department ruled that a subcontractor that undertook to name an owner as an additional insured in his comprehensive general liability policy was obligated to defend and indemnify the owner in a personal injury suit by an employee of the general contractor after the subcontractor's insurer declined coverage, even though the subcontractor did not expressly require this subcontractor to name the owner as an additional insured.

INSURANCE - EXCESS COVERAGE - ELEMENTS

The Court of Appeals recently stated that a policy that explicitly provides that it is to be excess over other excess coverage can be specifically enforced by the Court. Where other insurance clauses in two or more policies conflict as to the two policies that purport to be excess over each other, the insurers must contribute in proportion their policy bears to the limits of coverage at that level (**Jefferson Ins. Co. of New York vs. Travelers Indem. Co**., 92 N.Y.2d 363, 681 N.Y.S.2d 208).

INSURANCE - NOTICE OF OCCURRENCE - OBLIGATION OF INSURED ELEMENTS

In **State Farm Ins. Co. vs. Archer** (_____A.D.2d_____, 681 N.Y.S.2d 338), the Second Department submitted that an insured must give notice of an occurrence to his or her insurer within the time provided in the insurance policy or within a reasonable time under all the circumstances.

Absent a valid excuse, a failure to promptly notify the carrier vitiates the coverage. A unexcused delay of one year in notifying the insurer of the accident foreclosed liability coverage where the insurer disclaimed coverage within ten days of the notice. The burden is on the insured to show that there was a reasonable excuse for the delay in giving notice of the occurrence to the insurer.

INSURANCE - CANNOT CREATE COVERAGE - AMBIGUITY - EXCLUSIONS

In **Jefferson Ins. Co. of New York vs. Travelers Indem. Co**. (92 N.Y.2d 363, 681 N.Y.S.2d 208), the Court reannunicated the position that a estoppel cannot create coverage where none existed under the policy terms. A delay of four and one half years before the insurer disclaimed liability coverage for the lessor was unreasonable and estopped it from disclaiming coverage. It should be noted, however, that where there is the presence of ambiguity regarding the extent of coverage or any possible exclusion, the insurer must timely disclaim coverage in order to avoid estoppel to disclaim. In the case under consideration, there was an apparent conclusion that while one of the parties advocated estoppel cannot create coverage, the presence of an ambiguity and/or violation of a condition of policy mandated the court adopting the position of untimely disclaimer.

PRODUCTS LIABILITY - PRIOR OWNER - DUTY OF

In **Gebo vs. Black Clawson Co**. (92 N.Y.S.2d 387, 681 N.Y.S.2d 221), the Court of Appeals submitted that at most, a prior owner of an embossing machine, who had designed, assembled, installed, and sold the modified machine was subject to the same limited duty as a casual seller. The owner's single act of design and assembly did

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not, without more, make it equivalent to a product manufacturer.

The prior owner who performed as indicated was not liable to the buyer's injured employee under the theory of negligence. The owner did not derive significant, commercial or economic benefit from the one time bulk sale of its paper mill and embossing unit, the buyer did not hold expectations that the prior owner would continue to stand behind its goods, and the employee's injuries did not arise from the prior owner's activities within the paper mill. The buyer was aware of the very problems that lead to the employee's injuries, the buyer's awareness of the problems was widespread among its supervisors and employees and the buyer failed to take any additional defensive actions.

NEGLIGENCE - GROSS ELEMENTS

In **Aphrodite Jewelry, Inc. vs. D & W Cent. Station Alarm Co., Inc**. (_____A.D.2d_____, 681 N.Y.S.2d 305), the Second Department recently indicated that "gross negligence" differs in kind, not only in degree from claims of ordinary negligence. It is a conduct that evinces a reckless disregard for the right of others or smacks of intentional wrongdoing.

CHOICE OF LAW - ELEMENTS

It was recently held by the Third Department that pursuant to New York's Choice of Law Principles, the Court must determine which jurisdiction has the greater interest in having its law applied, and the essential considerations in reaching this determination are (1) In what jurisdiction did any significant contacts occur, and 2) Whether the statute at issue regulates the conduct or allocates the laws (**Gleason vs. Holdman Contract Warehouse Inc**., _____A.D.2d_____, 681 N.Y.S.2d 664).

Where the parties have Separate domiciles and the injury occurs in another jurisdiction, the local jurisdiction's law will generally be applied, but another jurisdiction's law may apply when it would advance the substantive law purposes without impairing the multi-state system or producing great uncertainty.

ADMINISTRATIVE LAW - HEARSAY

In **Curto vs. Cosgrove** (_____A.D.2d_____, 681 N.Y.S.2d 584), the Second Department ruled that hearsay evidence is admissible in an administrative hearing and, if sufficiently relevant and probative may constitute substantive evidence. It is the function of the administrative agency, not the reviewing court, to weigh the evidence and assess the credibility of the witnesses.

APPEAL - WITNESS - FAILURE TO OBJECT

The Court of Appeals recently indicated that a party who failed to object to a witness's qualifications to testify as an expert could not argue on appeal that the witness's testimony was inadmissible as a matter of law (**Adamy vs. Ziriakus**, 92 N.Y S. 396, 681 N.Y.S.2d 460).

INSURANCE EXCLUSION - INTERPRETATION

In **West 52nd Street Associates vs. Greater New York Mut. Ins. Co**. (_____A.D.2d_____, 681 N.Y.S.2d 523), the First Department held that an insurance policy exclusions must be stated in clear and unmistakable terms so that no one could be mislead. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.

APPEAL - RECORD - RESTRICTIONS

In **Mount Lucas Associates, Inc. vs. MG Refining and Marketing, Inc**. (_____A.D.2d_____, 682 N.Y.S.2d 14), the First Department ruled that however well intentioned, conclusion of non-record material in a printed record on appeal or reference to such materials or briefs, on the possibility that a pending motion for enlargement of the record on appeal might be granted is improper.

AUTOMOBILE - FALLING ASLEEP - NEGLIGENCE

The Second Department recently ruled that a driver's admission that he had fallen asleep or lost control of the car established that the driver was at fault for an accident and liable for injuries the passenger sustained in said accident (**Dillon vs. Kaminsky**, _____A.D.2d_____, 682, N.Y.S.2d 104).

INSURANCE - PROCUREMENT - LIABILITY OF BROKER

In **DeLorenzo vs. Bac Agency, Inc**. (_____A.D.2d_____, 681 N.Y.S.2d 846), the Third Department indicated that although an insurance broker may be liable for any loss attributable to its failure to procure insurance, the broker stands in the shoes of the insurer, and liability to an insured is limited to that which the insurer would have had to pay had coverage been in effect.

Any negligence of the broker in failing to procure comparable coverage for the insured from another carrier did not damage the insured who failed to satisfy the condition precedent of rebuilding in order to recover replacement costs in excess of the policy limits.

INSURANCE - NOTICE TO INSURER - DISCLAIMER

The Second Department recently concluded that the insured had the burden of demonstrating a reasonable excuse for delaying more than six months in notifying the

liability carrier of the accident which gave rise to the underlying personal injury action, and where the insured's belief that liability would not result is unreasonable, as a matter of law, the insurer had no duty to defend and indemnify the insured (**1700 Associates vs. Public Service Mut. Ins. Co**. (_____A.D.2d_____, 681 N.Y.S.2d 795).

DISMISSAL - 90 DAY NOTICE - ELEMENTS

In **Levin vs. Levin** (_____A.D.2d_____, 682 N.Y.S.2d 92), the Second Department ruled that having been served with a 90 day notice to dismiss for failure to prosecute, it was incumbent upon the plaintiff to comply therewith by filing a note of issue or by moving before the default date to either vacate the notice or extend the 90 period, and upon a failure to do so, plaintiff was required to demonstrate both a justifiable excuse for the delay in properly responding to the notice and the existence of a meritorious cause of action.

Absent an explanation as to the plaintiffs own neglect in complying with his outstanding discovery obligations, his proffered excuse that discovery was not complete was not a justifiable excuse for his failure to prosecute.

NEGLIGENCE - AUTOMOBILE - PRIMA FACIE

The First Department recently indicated that the testimony that a driver was stopped in the parking lane when an ambulance struck the rear of her vehicle, established a prima facie case of negligence against the City (**Gonzalez vs. City of New York**, _____A.D.2d_____, 682 N.Y.S.2d 178).

NEGLIGENCE - SLIP AND FALL - PRIMA FACIE CASE

In **Segretti vs. Shorenstein Co., East, L.P.** (_____A.D.2d_____, 682 N.Y.S.2d 176), the First Department ruled that to establish a prima facie case of negligence in connection with a slip and fall matter, the plaintiff must show that the defendant either created a dangerous condition or had actual or constructive notice of the condition.

To constitute "constructive notice" as would enable the plaintiff to establish the prima facie case of negligence, the defect must be visible and apparent, and it must exist for a sufficient period of time prior to the accident so as to permit the defendant to discover and remedy it. A mere general awareness on the part of the defendant of some dangerous condition on his premises is legally insufficient to establish that the defendant had constructive notice of the condition for the purpose of establishing a negligence action. The mere existence of a foreign substance at the site without more is insufficient to support the claim.

CONSOLIDATION - ELEMENTS

In **Sichel vs. Community Synagogue** (_____A.D.2d_____, 682, N.Y.S.2d 382), the First Department ruled that to avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together, such as a tort case where the issue is the respective liability of the defendant and the third party defendant for the plaintiffs injuries.

The severance of a third party action by the general contractor against the subcontractor from the underlying slip and fall action brought by a pedestrian against the property owner and general contractor was an abuse of discretion even though the discovery in the third party action had not been completed at the time the pedestrian was directed to file a note of issue in the underlying action.

INSURANCE - ASSAULT - UNINTENTIONAL

In **Prudential Property Cas. Ins. vs. Persaud**, (_____A.D.2d_____, 682, N.Y.S.2d 412), the Second Department indicated that a liability insurer was obligated to provide a defense to its insured in a personal injury matter arising from a shooting incident based upon the allegation of the complaint that the shooting was accidental, even though the policy contained an exclusion for intentional conduct.

INSURANCE - LESSOR'S POLICY - LESSEE'S POLICY - COVERAGE

The Fourth Department recently held that the provision of a car lessor's policy that defined an "insured" to exclude the lessee of a covered auto under a written rental agreement conflicted with the statute requiring the owner's policy of liability insurance to cover a permissive user and was thus unenforceable.

The lessee's policy provided excess liability coverage for the lessee over the statutory minimum provided by the lessor's insurer. The lessee's policy was excess for a non-owned vehicle (**Government Employees Ins. Co. vs. Chrysler Ins. Co**., _____A.D.2d_____, 682 N.Y.S.2d 508).

ARBITRATION - VOLUNTARY

The First Department recently submitted that to be enforceable, an agreement to arbitrate must be clear, explicit and unequivocal and must not depend upon implications or subtleties. An arbitration clause on a reverse side of the seller's written confirmation of the buyer's verbal orders was not enforceable. (**Marek vs. Alexander Laufer & Son, Inc**., _____A.D.2d_____, 683 N.Y.S.2d 50).

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ATTORNEY FEES - DISALLOWED

In **Golden vs. Multi Gas Distributors Ltd.**, _____A.D.2d_____, 683 N.Y.S.2d 16). The First Department held that a plaintiff in a breach of contract action was not entitled to attorney fees as provided for in the contract since plaintiff did not make an application to the trial court for a determination of attorneys fees at any time prior to the entry of judgment and the trial court did not make any ruling precluding plaintiff from making such an application.

INSURANCE - COVERAGE - PREMIUM

In **Ezrasons, Inc. vs. American Credit Indem. Co.** _____A.D.2d_____, 643 N.Y.S.2d 264), the First Department concluded that the insured business that did not tender a check in payment of a premium on credit insurance policy until two months after the loss occurred was not entitled to coverage under the policy that specifically provided that it afforded no coverage for losses occurring prior to the payment of the premiums. The insurer's practice of accepting and requesting a late payment of premiums on the policy for preceding years did not give rise to an estoppel with respect to the loss occurring before the premium payment, particularly where the policy sued upon was delivered with a letter to the insured warning the insured that the policy would not cover until receipt of full premium.

INSURANCE - LATE NOTICE - FIRE POLICY

The Second Department recently held that an insureds forty-eight (48) day delay in notifying the homeowner's insurer of a fire loss was unreasonable as a matter of law and entitled the insurer to disclaim coverage based upon the insureds failure to submit notice of loss as soon as practicable in accordance with the terms of the policy, where the only excuse offered for the delay was alleged ignorance of identity of insurer and of agent that procured the insurance and the inability to discover this information as a result of the destruction of the pertinent documents in the file (**Horowitz vs. Transamerican Insurance Co.**, _____A.D.2d_____, 683 N.Y.S.2d 290).

DEFAULT - OPENING - EXCUSE - MERITORIOUS DEFENSE

In **Metropolitan Steel Industries, Inc. vs. Rush Rosenshein Hub Development Corp.**, _____A.D.2d_____, 683 N.Y.S.2d 240), the First Department ruled that a Corporation's inadvertent failure to inform the Secretary of State of its change of address did not constitute a reasonable excuse for a default, for purposes of the statute authorizing relief from the judgment.

The Corporation failed to show a meritorious defense thereby supporting the premise of failure to vacate the default.

NEGLIGENCE - DEFECT - SCOPE - DEFINITION

It was recently held by the First Department that the precise dimensions of an alleged premise defect, be they in feet or inches, are not dispositive of whether the defect constitutes a dangerous condition which will support a premise liability claim.

While in some cases, instances of a trivial nature of an alleged defect in a premise may loom larger than another element, the court must examine all the facts presented including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury caused by the condition to determine whether the defects constitutes an actionable and dangerous condition (**Nin vs. Bernard**, _____A.D.2d_____, 683 N.Y.S.2d 237).

NEGLIGENCE - PROXIMATE CAUSE - ELEMENTS

A patron who sustained injuries when glass shards propelled when a glass picture frame leaning against a wall in a restaurant was shattered by a fire cracker thrown into the restaurant by an unknown person, did not establish a negligence claim against the restaurant. The patron's injuries were not proximately caused by any negligence on the part of the restaurant in leaning the picture frame against the wall, but rather by the unforeseeable act of the throwing of the fire cracker which the restaurant had no reason to anticipate, so indicated the First Department in **Mee-Hsing Lee vs. 69th Mott Street Corp.**, (_____A.D.2d_____, 683 N.Y.S.2d 261).

DISCLOSURE - SCOPE

While the scope of discovery statutes are broad, litigants are not without protections against their unnecessarily onerous application. Competing interests must always be balanced, and the need for discovery must be weighed against any special burden to be borne by the opposing party. (**Kavanagh vs. Ogden Allied Maintenance Corp.**, 92 N.Y.2d 952, 683 N.Y.S.2d 156).

EVIDENCE - STATEMENT AGAINST INTEREST - WITHDRAWAL OF PLEA

In **Cohens vs. Hess** (92 N.Y.2d 511, 683 N.Y.S.2d 162), the Court of Appeals stated that a motorist's withdrawn guilty plea to a failure to obey a traffic control device was

dmissible in a personal injury action to impeach his stimony that he had stopped at a stop sign prior to the ollision, where the motorist was permitted to withdraw ıe plea because it was entered without advice of counsel, ot because of any due process violation. The motorists owever was entitled to a full and fair opportunity to offer ıe jury his reasons for the withdrawal of the plea.

INSURANCE - DISCLAIMER - UNTIMELY

In **Prudential Property and Cas. Ins. Co. vs. Persaud**, _____A.D.2d_____, 682 N.Y.S.2d 412), the Second epartment indicated that a liability insurer's unexplained elay over two months in disclaiming coverage as to a laim made by a personal injury victim of its insured on ıe ground of claimant's untimely notice of claim was nreasonable as a matter of law where the insurer was ılly aware of the facts underlying its disclaimer from the ay that it received notice of the claim. Thus the insurer ad a duty to defend its insured against the claimants nderlying negligence suit based on its untimely isclaimer.

The Court further indicated that the insurer's duty xisted even if the insured or injured claimant in the first ıstance failed to provide the insurer with timely notice of ccident or claim.

ATTORNEY - IMPROPER CONDUCT - SANCTIONS

In **Heller vs. Louis Provenzano, Inc.**, _____A.D.2d_____, 683 N.Y.S.2d 92), the First epartment held that a new trial was required in a ersonal injury matter due to the serious misconduct efore and during trial of the plaintiff and his attorney, hich included conduct of plaintiff in entering the jury lection room prior to trial and speaking to the jurors ithout either counsel present, wandering around the ourtroom during court, ignoring warnings to refrain from stifying about an unrelated fatal accident, and attempting curry favor with Hispanic members of the jury, and torneys actions in asking defendant's medical expert if he ad been thrown out of a medical center with no basis for ıe question and derisively referring to the length of an xamination performed by an expert. Sanction of $10,000 as appropriate in light of plaintiffs serious misconduct.

INSURANCE - EXCESS CARRIER LEGAL FEES

In **Hertz Corp. vs. Government Employees Ins. Co.**, _____A.D.2d_____, 683, N.Y.S.2d 483), the First epartment ruled that where an excess insurer is liable to ıdemnity in part because the amount of the judgment or ettlement exceeded the limits of the primary policy, the xcess insurer may be liable for a portion of the legal fees.

NEGLIGENCE - SLIP AND FALL - ELEMENTS

In **Russo vs. Eveco Development Corp.**, (_____A.D.2d_____, 683 N.Y.S.2d 566), the Second Department held 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 accident, or had actual or constructive notice of it. A landowner can not be held responsible for alleged defects which do not constitute a trap or snare or where the alleged defect is clearly visible.

STATUTES - INTERPRETATION

In **Williamson vs. 16th West 57th Street Co.**, (_____A.D.2d_____, 683 N.Y.S.2d 548), the Second Department held that where a general statute and a specific statute pertaining to the same subject appear to be in conflict, the specific statute should govern over the general.

DISCLOSURE - FILING OF STATEMENT OF READINESS

The First Department recently submitted that a worker was not entitled to additional discovery as to the certain information sought in a personal injury action, inasmuch as his Certificate of Readiness stated that there were no outstanding discovery requests, and he failed to demonstrate that he took measures to obtain the information during the three years the action was pending (**LaVigna vs. Capital Cities/ABC Inc.**, _____A.D.2d_____, 683 N.Y.S.2d 536).

ANIMALS - VICIOUS PROPENSITIES

In Nichols vs. Cardone, (_____A.D.2d_____, 684 N.Y.S.2d 257), the Second Department ruled that a plaintiff failed to establish that landlords were aware that the tenant's dog which allegedly pulled on plaintiffs coat, causing her to fall, had vicious propensities or had ever displayed such propensities in the past, as was required to impose liability against the landlords.

EXPERT - SCOPE - QUALIFICATION

In **Price Xex Rel. Price vs. New York City Housing Authority** (92 N.Y.2d 553, 682 N.Y.S.2d 143), the Court of Appeals submitted that the admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court, and a review beyond the intermediate Appellate level is generally unwarranted.

The Court further indicated that an expert may be qualified without specialized academic training through long observation and actual experience.

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NEGLIGENCE - AUTOMOBILE - REAR END

A rear ending motorist had a duty to maintain a safe distance between her vehicle and the vehicle which she struck in the rear and her failure to do so, in the absence of adequate explanation, constituted negligence as a matter of law, so indicated the Second Department in **Enzano vs. Brucculeri** (_____A.D.2d_____, 684 N.Y.S.2d 260).

DISCLOSURE - SUBSEQUENT REPAIRS

In **Watson vs. FHE Services. Inc.**, (_____A.D.2d_____, 684 N.Y.S.2d 283), the Second Department ruled that evidence of subsequent repairs is not discoverable or admissible in a negligence case unless there is an issue of maintenance or control.

LIMITATIONS - LIFE INSURANCE

In **Gallo vs. Savings Bank Life Ins. Fund** (_____A.D.2d_____, 684 N.Y.S.2d 278), the Second Department ruled that in an action to recover the proceeds of a life insurance policy, the Statute of Limitations begins to run upon the death of the insured.

NEGLIGENCE - SIDEWALK - LIABILITY OF LANDOWNER

The Second Department recently ruled that an abutting landowner will not be liable to a pedestrian passing by on a public sidewalk unless the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon the landlord and expressly made the landowner liable for the injuries occasioned by the failure to perform that duty (**Windberry vs. City of New York**, _____A.D.2d_____, 684 N.Y.S.2d 290).

NEGLIGENCE - SIDEWALK - SNOW AND ICE

In **Drevis vs. City of New York** (_____A.D.2d_____2d, 684 N.Y.S.2d 271), the Second Department held that a pedestrian injured in a fall on a sidewalk which was allegedly caused by an icy condition due to a snow storm leaving accumulations of up to fifteen inches failed to show that the City had actual or constructive notice of the icy condition, or that sufficient time had passed since the cessation of snow to remedy the condition as required to recover for injuries sustained in the fall.

NEGLIGENCE - LANDLORD - OUT-OF-POSSESSION

It was recently submitted by the First Department that while it is well settled that an out-of-possession owner is not liable for dangerous conditions on real property, it is equally clear that an owner escapes liability only if he has completely alienated the property. Thusly, where a lease reserves the right to enter and make repairs, the owner does not, by way of that lease, escape liability for dangerous conditions, **Federal Ins. Co. vs. Evans Const. of New York Corp**. (_____A.D.2d_____, 684 N.Y.S.2d 223).

NEGLIGENCE - PROXIMATE CAUSE - ELEMENTS

In **Burgos vs. Acquaduct Realty Corp.**, (92 N.Y.2d 544, 684 N.Y.S.2d 139), the Court of Appeals submitted that to establish at trial in a negligence matter that the defendant's negligence was a proximate cause of plaintiffs injuries, the plaintiff is not required to exclude every other possible cause, but need only offer evidence from which the proximate cause may be reasonably inferred. The plaintiffs burden of proof is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict not on speculation, but on a logical inference to be drawn from the evidence.

VENUE - RESIDENCE - ELEMENTS

It was recently indicated by the Second Department that for venue purposes, a "residence" is where a party stays for sometime with a bonafide intent to retain the place as a residence for some length of time and with some degree of permanency (**Daley vs. Daley**, _____A.D.2d_____, 684 N.Y.S.2d 272).

APPEALS SUMMARY JUDGMENT

The Second Department recently concluded an appeal from an intermediate summary judgment order was required to be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (**White Rose Food vs. Apple Orchid Farms**, _____A.D.2d_____, 684 N.Y.S.2d 599).

GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - ELEMENTS

In **Herd vs. County of Nassau**, (_____A.D.2d_____, 684 N.Y.S.2d 636) the Second Department indicated that the Court did not improvidently exercise its discretion in denying the petition for leave to serve a late notice of claim against the County since the petitioner failed to demonstrate a reasonable excuse for his delay in serving the notice of claim upon the respondent or that the respondent required actual knowledge of the essential facts constituting his claim within ninety (90) days of its accrual or a reasonable time thereafter.

EVIDENCE - ADMISSION - INADMISSIBILITY

The Second Department recently concluded that a seafood clerk's statement to a customer that the clerk has prior notice of a cola-colored puddle on the floor was inadmissible in a slip and fall action against the store where the seafood clerk did not have authority to speak on behalf of the store (**George vs. Big V Supermarkets, Inc**. (_____A.D.2d_____, 684 N.Y.S.2d 609).

EVIDENCE - PHOTOGRAPHS - INADMISSIBILITY

In **Saks vs. Yeshiva of Spring Valley, Inc**., (_____A.D.2d_____, 684 N.Y.S.2d 560), the Second Department ruled that photographs of a sidewalk taken one and a half (1 -1 /2) years after the accident were not competent proof that the alleged defective condition existed either as of the date of the accident or any dates sufficiently in advance of the accident as to justify the inference that the property owner had constructive notice of the defect. Although the pedestrian testified that the photographs depicted the scene of the accident, he did not testify that the condition of the sidewalk as shown in the photographs were substantially the same as the condition at the time of the fall.

INSURANCE - NON-VALID EXCLUSION

In **Royal Indem. Co. vs. Providence Washington Insurance Ins. Co**. (92 N.Y.2d 653, 684 N.Y.S.2d 470), the Court of Appeals submitted that where the non-trucking use exclusion in a truck owner's liability insurance policy was void as against public policy, the policy had to be read as if the exclusion did not exist. Thusly, where the policy did not contain a term stating that coverage was limited to the statutory minimums if the exclusion was found to be invalid, no such limitation would be read into the policy and the exclusion was not valid to limit the insurer's liability to the financial security minimums required by State Law.

The exclusion had to do with "Bobtail Insurance," which is a non-trucking insurance for the tractor without the attached trailer.

FAILURE TO NOTICE PLAINTIFF OF DISCLAIMER

In **Agway Ins. vs. Alevarez** (_____A.D.2d_____, 684 N.Y.2d 635), the Second Department indicated that accident victims failure to give timely notice to the other parties automobile insurer of their counterclaim against its insured vitiated the insurer's responsibility to give timely notice to the accident victims of its disclaimer of coverage.

The obligation of the injured party to protect his interest by seeing that proper notification is given to the wrongdoers insurer is independent of the contractual duties of the insured and need not be addressed in a notice of disclaimer where the notice was provided to the insurer by the insured.

CONSTRUCTION - LABOR LAW §240 - FALL FROM LADDER

The First Department recently held that even assuming a worker's fall from a ladder was the result of heat causing him to faint, rather than, of the unsteadiness of the ladder, a building corporation was liable under the Scaffolding Law because it failed to provide proper protection such as a scaffold to prevent the worker in the event he became overcome by the heat which was foreseeable under the circumstances (**Arce vs. 1133 Bldg. Corp**., _____A.D.2d_____, 684 N.Y.S.2d 523)

DISCLOSURE - STRIKING OF ANSWER - IMPROPER

The Second Department recently indicated that the drastic remedy of striking an answer is inappropriate, absent a clear showing that the failure to comply with the discovery is willful, contumacious, or in bad faith (**Selamai vs. City of New York**, _____A.D.2d_____, 684 N.Y.S.2d 559).

The delay in complying with the pre-calendar order was relatively minor and did not cause the plaintiffs to suffer any prejudice, and thus, did not justify the striking of the answer in a personal injury matter.

DISCLOSURE - FAILURE TO EXCHANGE - EXPERT

In **Martin vs. NYRAC. Inc**. (_____A.D.2d_____, 684 N.Y.S.2d 605), the Second Department concluded that a plaintiff who failed to demonstrate a good cause for failing to disclose expert information regarding his two expert witnesses until the eve of trial was properly precluded by a previous court order from offering testimony of those witnesses.

ARBITRATION - AWARD - SETTING ASIDE - ELEMENTS

The First Department recently indicated that an arbitration award will not be set aside unless the party seeking vacatur demonstrates that the award is irrational, violates public policy, or exceeds a specifically enumerated imitation on the arbiter's power (**Local 375 vs. New York City Health and Hospitals Corp**., _____A.D.2d_____, 685 N.Y.S.2d 29).

PLEADINGS - BILL OF PARTICULARS - SUPPLEMENTAL - ELEMENTS EXCHANGE OF MEDICAL INFORMATION - DELAY

In **Kassis vs. Teacher's Ins. and Annuity Ass'n**., (_____A.D.2d_____, 685 N.Y.S.2d 44), the First Department ruled that a "supplemental" bill of particulars was a nullity, where it was in fact, an amended bill and was served subsequent to the note of issue and without leave of court.

Testimony of the plaintiffs expert witness was properly limited with respect to matters exchanged with defendant

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prior to a certain date, where the plaintiffs failed to demonstrate a good cause for their delay in disclosing the expert witness's information belatedly furnished only in their supplemental response, nor did plaintiffs demonstrate that their failure to disclose the subject information until three weeks before trial was not intentional.

DISMISSAL - VACATING - ELEMENTS

In **Lebron vs. New York City Housing Authority**, (_____A.D.2d 685 N.Y.S.2d 25), the First Department ruled that a motion to vacate an automatic dismissal of an action as abandoned was properly granted on a showing of merit made in the verified complaint, a reasonable excuse for the fifteen (15) months it took plaintiff to serve the bill of particulars anticipated in the parties stipulation, including extensive medical treatment during that period of difficulties in procuring medical records pertaining to that treatment and in the absent of prejudice to the Housing Authority attributable to the delay.

AUTOMOBILE - EMERGENCY SITUATION

In **Borst vs. Sunnydale Farms, Inc**. (_____A.D.2d_____, 685 N.Y.S.2d 269), the Second Department ruled that the operator of a tractor-trailer, who was faced with an emergency situation which arose when the second vehicle on the highway, after coming into contact with a third vehicle, struck the concrete highway divider, bounced off the divider, and came back across the highway toward the tractor-trailer, acted reasonably as a matter of law when he applied his brake and pulled the tractor-trailer over to the right shoulder in an ultimately unsuccessful attempt to avoid a collision with the second vehicle.

BAILMENT - ELEMENTS

The First Department recently held that a parking transaction in which a defendant-employee parked the owner's vehicle on a public street constituted a bailment, where the employee took the key and defendant employed a mandatory procedure to insure the key's return (**Chubb & Son, Inc. vs. Edelweiss, Inc**., _____A.D.2d_____, 685 N.Y.S.2d 221).

NEGLIGENCE - CONSTRUCTIONS - SCAFFOLDING - ELEMENTS

It was recently held by the Second Department that in order to prevail on a claim pursuant to the scaffolding law, the plaintiff must show a violation of the statute and that the violation was the proximate cause of his injuries (**Chacon vs. New York University**, _____A.D.2d_____, 685 N.Y.S.2d 96).

EIFS (EXTERIOR INSULATION AND FINISHING SYSTEMS) AND CONSTRUCTION DEFECTS CLAIMS

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> another and, because it is incorporated and not merely contained...must be removed, at some cost, in order to prevent the damage from materializing.

Based on the Armstrong opinion, which may represent an emerging trend, the incorporation of arguably defective EIFS into a structure qualifies as property damage so as to bring removal costs and resulting damage within the CGL policy.

There is no coverage under a CGL policy unless the property damage results "during the policy period." Courts, therefore, have agreed that resulting property damage, not the preceding negligent or causative act, "triggers" coverage under a CGL policy.

In resolving when property damage occurs for purposes of triggering coverage for such long-tail claims, courts throughout the country have not been consistent. However, the approaches they have taken may be categorized into four general "trigger" theories, as follows:

- **The"Exposure" Theory**. Courts in certain jurisdictions have opined that property damage occurs upon exposure and have therefore triggered the policy or policies in effect upon exposure to the damaging condition.
- **The "Damage-in-Fact" Theory**. Other courts have triggered the policy or policies on the risk when the injury or damage, in fact, occurs. This is also referred to as the "actual injury or damage" theory.
- **The "Manifestation" Theory**. Courts adopting a "manifestation" trigger have held that the only policy that must respond is the one in effect when the damage is discovered or manifests.
- **The "Continuous " Trigger Theory**. Still other courts have used a "continuous" trigger, holding that all policies on the risk from "exposure" through "manifestation" are triggered.

Courts have applied these trigger theories in the context of construction defect claims yielding different results, depending upon the particular jurisdiction's trigger law and the particular factual scenarios at issue. For example, in **Maryland Casualty Co. v. W.R. Grace &**

Co., 128 F3d 794 (2d Cir. NY) the Second Circuit, interpreting New York law, applied a "damage-in-fact" trigger to claims involving the installation of asbestos products which needed to be removed. The court held that "damage-in-fact," or actual damage, occurred upon installation, triggering only those policies in effect at the time of installation. In so doing, the court rejected "manifestation" and "continuous" trigger theories under the circumstances.

There is no coverage under a CGL policy without an "occurrence," which is generally defined as an accident resulting in property damage "neither expected nor intended" by the insured. If the insured contractor reasonably should have expected or intended the property damage, there is no coverage. Stated differently, CGL policies cover only fortuitous events.

The "occurrence" issue is necessarily dependent upon the particular facts and circumstances of a construction defect claim. Where the facts demonstrate that there was no accident or that the insured should have reasonably expected damage, courts have found that coverage is precluded. Given the volume of claims and lawsuits regarding EIFS, manufacturers cannot claim they are unaware of problems with their EIFS system or the installation thereof.

Although the "Insured's products" exclusion in the 1986 CGL form carves out an exception for damage to "real property," and the "work performed" exclusion in the 1986 form is limited to claims falling within the products-completed operations hazard, the 1986 CGL form goes on to add a number of construction-related exclusions that are sometimes referred to as the "faulty workmanship" exclusions. These exclusions clearly apply to "real property" and include ongoing operations. Specifically, exclusion "j" of the 1986 form precludes coverage for property damage to:

(5). That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6). That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to property damage included in the "products-completed operations hazard."

Generally speaking, therefore, the "faulty workmanship" exclusion precludes coverage for damage to real property on which the contractor or its subcontractor is performing operations, or the particular part of any property requiring restoration, repair or replacement because of the work of the contractor or its subcontractor was incorrectly performed on it. Subsection "5" specifically applies to "subcontractors," and subsection "6" similarly applies through its reference to "your work" which is defined as including work "performed by you or on your behalf."

A California appellate court examined the faulty workmanship exclusions in connection with a claim arising from the insured's supplying of defective siding for houses which resulted in loss of value of the houses. The court held that the exclusions were inapplicable because they differentiated between damage to the product of the insured, and damage to other property caused by that product. The court further explained that, as the supplier of the siding, the exclusion would have operated to preclude coverage for damage to the siding, but it did not apply to damage to the houses. Inasmuch as the insured did not perform any faulty workmanship in the houses.

Pre-1986 CGL policies generally exclude coverage for "property damage to the named insured's products arising out of such products or any part of such products." Along these same lines, the 1986 CGL form excludes coverage for "'[p]roperty damage' to 'your products' arising out of or any part of it[,]" but the definition of "your product" does not include "real property."

Thus, the "insured's product" exclusion may bar coverage to a contractor seeking coverage for an EIFS claim depending on whether the policy is a pre-1986 CGL and the particular jurisdiction's review of whether a structure is a product.

Another so-called "business risk exclusion" is the "work performed" exclusion. Under the 1973 CGL form, this exclusion bars coverage for "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." By its plain terms, therefore, this exclusion precludes coverage for claims against contractors alleging defective workmanship by the contractor without damage to work or property of others.

This exclusion has been applied to deny coverage to contractors for claims arising from a wide array of alleged defective construction work. Indeed, the New York Court of Appeals recently described the breadth of the work performed exclusion, especially when read in conjunction with the insured's products exclusion, as follows:

> The insurance policy contains an exclusion for "property damage *** arising out of [the insured's] products" or out of the "work performed by or on

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EIFS (EXTERIOR INSULATION AND FINISHING SYSTEMS) AND CONSTRUCTION DEFECTS CLAIMS

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behalf of the named insured." That exclusion, commonly termed a "work product" exclusion, exists to exclude coverage for business risks, including claims that the insured's "product or completed work [was] not that for which the damaged person bargained."

The "work product" of a residential land developer such as plaintiff includes not only the mortar, bricks, wiring and pipes that comprise its houses, but also the numerous discretionary choices that must be made in the course of erecting those houses. The builder's site choice, a choice that necessarily includes consideration of its access to a water supply, is clearly part of that work product.

Thus, under the terms of plaintiff s insurance policy, liability arising from siting this development so as to be dependent upon a contaminated water supply is excluded from coverage.

Basil Development Corporation v. General Accident Insurance Company, 89 NY2d 1057.

The 1986 CGL form deleted the words "on behalf of" within the "work performed" exclusion making clear that it will no longer generally apply to the work of the insured's subcontractor. Specifically, the 1986 exclusion precludes coverage for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-competed operations hazard.'" This exclusion further provides, however, that it "does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." Thus allowing coverage to the named insured for defects created by a subcontractor.

Case law regarding EIFS construction defect coverage issues can be expected to significantly increase. A variety of other exclusions, such as those based on the insured's "care, custody, or control" of the property, impaired property, and certain contractual liabilities might provide further bases for limiting coverage in these cases. A careful examination of the policies at issue is essential to determine the extent, if any, of coverage that may be available to respond to EIFS construction defect claims.

REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW– Collateral Source Set-Offs and the Application of CPLR Article 50a and 50b

*by Frank V. Kelly**

*Andrew Zajac***

Dear Sirs:

ARTICLE

It has long been a throw-away phrase amongst the community of attorneys that we became lawyers because of an innate inability to perform mathematical calculations.

Despite our best efforts to avoid mathematics we have; nonetheless, had mathematics thrust upon us.

The committee was asked to evaluate the case of **Troy Bryant v. New York City Health & Hospitals Corporation**, ____ N.Y.2d ____, 673 N.Y.S.2d 471 (2nd Dept. 1998) for purposes of determining the defense community's position on the application of CPLR Article 50a and 50b and collateral source set-off.

The committee undertook the project and sought permission by motion from the Court of Appeals to offer an amicus brief which was fully granted despite the plaintiff's opposition to the motion. Other amicus have appeared in this action, which has wide implication for all defendants, insurers, annuity companies and municipal authorities.

Bryant case arises out of the death of Dorothy Roberts, a 22 year old woman pregnant with her first child and one week past her due date. On the afternoon of March 6, 1989 she was taken by ambulance to Woodhull Hospital, a division of New York City Health & Hospitals Corporation, with ruptured membranes and no progress in labor. She was placed on bedrest at Woodhull Hospital and given Petocin to augment her labor. One day later labor had still not progressed and a Caesarean section was ordered due to cephalopelvic disproportion.

Ms. Roberts had antibodies in her blood and the unavailability of appropriate blood prevented surgery at 7:30 p.m. It was not until the next morning that a hospital administrator ordered that plaintiff be given fresh frozen plasma and the Caesarean section performed. Dorothy Roberts gave birth to Taisa Bryant at 6:02 a.m. on March 8, 1989.

Four hours later Ms. Roberts was found bleeding from her mouth and ten minutes after that she went into cardiac arrest. She was resuscitated and became alert and responsive; however, that evening she suffered another cardiac arrest and resuscitation efforts failed. She was pronounced dead at 7:35 p.m. on March 8, 1989. Upon autopsy it was determined that Ms. Roberts drowned in her own blood over a period of time due to pulmonary emboli.

At trial in June of 1995, a jury found for Ms. Roberts assessing seven departures from accepted medical practice by the defendant and its employees.

The jury awarded $5,100,000.00 for Roberts' conscious pain and suffering, $50,000.00 for past lost earnings, $2,100,000.00 for lost earnings for 37 years into the future, $900,000.00 for loss of household services for 23 years into the future, $4,000,000.00 for past loss of maternal care and guidance and $9,000,000.00 for loss of maternal care and guidance for 30 years into the future.

Pursuant to the defendant's post-trial motions, a new trial was ordered unless the plaintiff would stipulate to reduce all items of the jury's damages verdict, except the $50,000.00 awarded for past lost earnings:

	From	To
Pain & Suffering	$5,100,000.00	$1,000,000.00.
Loss of Future Earnings for 37 years	$2,100,000.00	$308,333.00.
Loss of Household Services for 23 years	$900,000.00	$450,000.00.
Maternal Care & Guidance to date	$4,0007000.00	$360,000.00.
Future Loss of Maternal Care and Guidance for 30 years	$9,000,000.00	$1,800,000.00

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Plaintiff stipulated to the entry of judgment on the undiscounted figures as reduced by the Trial Court. The total undiscounted award was thus reduced from $21,150,000.00 to $3,968,333.00. From that amount, the Court set about its work concerning structuring a judgment under CPLR Articles 50a and 50b.

The appeal raised four issues of concern to tort defendants and practitioners at the bar.

The committee's position is that the annuity defendants are required to procure under CPLR Articles 50a and 50b for future damages in excess of $250,000.00 should be premised upon the present value of such damages as opposed to the full, undiscounted amount of those damages. Plaintiff argues that reducing such damages to present value amounts to an impermissible double discounting — The first when reduced to present value, the second upon payment over time.

It is the position of the Defense Association that the entire legislative intent by the enactment of CPLR Article 50a and 50b was to ameliorate a liability crisis. Specifically, the crisis perceived was that in the medical malpractice insurance arena upon the drafting of 50(a) and more generally in 50(b).

The Governor's bill jacket memorandum (Mem. of State Exec. Dept. reprinted in 1985 McKinney's Session Laws of New York, p. 3022 and Governor's bill jacket pgs. 7 and 8) states as follows:

> The bill would require the payment of large awards of future damages in medical practice actions in periodic installments, rather than in a single lump sum. The injured party is thereby guaranteed that compensation for future health care costs, lost earnings and other needs will be available to meet those expenses as they arise...Benefits accrue, as well, to the defendant/insurer; paying a judgment in periodic installments reduces the overall costs of the judgment by permitting the insurer to retain and invest the balance of the award before the installments come due. Some additional savings result from relieving the defendant from the obligation to make payment towards the plaintiff's future health care and other non-economic expenses in the event of the plaintiff's death."

We argued that the value of the annuity for future damages should be based upon the present value of those future damages. The present value calculation is not a double discounting in light of the inflation factors built into the calculation. The only result of Articles 50a and 50b calculations which affect the plaintiff are that the plaintiff receives his verdict over a period of time.

The sections at Articles 50a and 50b (5031 and 5041 respectively) state as follows:

> (e) With respect to awards of future damages in excess of $250,000.00 in an action to recover damages for personal injury, injury to property or wrongful death, the Court shall enter judgment as follows:
>
> After making any adjustment proscribed by Subdivision (b), (c) and (d) of this section, the Court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with the generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages as calculated pursuant to this subdivision.

On April 7, 1986, the Governor's Advisory Commission on Liability Insurance issued a report: **Insuring our Future**. The report discussed the nature and evolution of the tort law and the "Insurance Crisis". The committee stated:

> ... the compensatory philosophy of contemporary tort law assumes the ready availability of affordable liability insurance. Yet, the paradox of the current liability insurance crisis is that the expansions of liability created by contemporary doctrine may create insurance prices that are greater than even institutional insureds can bear.
>
> ... the liability insurance crisis that now afflicts New York and the rest of the nation reminds us that the effects of tort principle must now be considered as an integral part of the same complex of social and commercial trends that include the liability insurance industry. For it is the tort law that largely determines whether the cost of liability protection is within the means of the parties — insurers and insureds alike — among whom the cost is designed to be spread. (Report at pages 125-126).

It is widely recognized that Articles 50a and 50b were intended to provide benefits to both plaintiffs and defendants in that the defendants are relieved of the burden of lump sum payment and the plaintiffs are given some measure of financial stability and security into the future.

The Governor's Advisory Commission on Liability Insurance Report, **Insuring Our Future**, states that:

> "For an award that falls within Article 50a, to the extent that future damages exceed $250,000.00, this excess is discounted to present value and a judgment is then entered for this discounted amount in the form of an annuity contract which provides payment in monthly installments, with a 4% annual increment designed to account for inflation." (Report at page 156).

The report countenances only CPLR Article 50a; however, the legislature authored CPLR 50b shortly thereafter applying the protections to all tort actions.

The First Department in **Bermeo v. Atakent**, 241 A.D.2d 23 5, 671 N.Y.S.2d 727 (1st Dept. 1998) set out its interpretation of language providing for periodic payments. The Court noted that CPLR 5041(e) provided for a multiplier of 4% to be "added on to the payment made in year 1; at the end of year 3, 4% is added to the payment made in year 2; and so on." In noting that the statute did not explain the original multiplier, the Court did recognize some legislative memoranda and early commentary indicating that the 4% multiplier was in contemplation of presumed inflation. Of course, the 4% multiplier was subject to criticism, in that it is in effect protecting against what needs no protection. The 4% is a redundant inflationary multiplier, in that the fact finder usually hears and accepts testimony of an economist witness that incorporates an inflation value into future damages. Thus, far from effecting a double discount by reduction of present value, the present value reduction simply removes one of the double accelerating factors.

The Court of Appeals in 1997 decided **Schultz v. Harrison Radiator Division of General Motors Corporation**, 90 N.Y.2d 311, 660 N.Y.S.2d 685 (1997). The **Schultz** case specifically allowed juries to account for inflation in reaching their future damage awards. The Court states: "Prior to the enactment of Article 50b, juries were permitted to consider expert testimony relating to inflation in reaching their verdicts." In so holding, the Court of Appeals looked to the "statements made by Melvin Miller (a New York State Assembly Member) shortly before both occurred on an Omnibus bill which included provisions subsequently enacted as Article, 50a (the 50b predecessor), suggests the contrary." That is to say, the 4% increase is not exclusive and expert testimony as to inflation is permissible for the jury's consideration. While permitting juries to account for inflation, the Court reasoned: "As stated by Mr. Miller, after a "gross verdict" is rendered, the jury award would be reduced to present value by the Court, then structured and the 4% rate added to the periodic payment from the annuity purchase by the defendant."

The portion of the transcript cited in **Schultz** goes on to discuss debate between Mr. Wertz and Mr. Miller in which Mr. Miller states: "The verdict is gross, and then the Court structured it. The first step that the Court does is reduce it to present value." Unfortunately, Miller goes on to say, "then the Court tells you you have to purchase an annuity to reach what the jury said plus, added to that annuity will be the 4% rate,...".

Miller further explains "the plaintiff is going to get present value, and that present value will be bought by an annuity with the 4% number to pay out what the jury said he should get at the end of 20 years, plus the increase each year of 4%. The committee argued that the Court must, upon statutory interpretation, give effect to the intention of the legislature. While the defense community believes it is clear what Miller's intent and consequently, the legislature's intent was by the quoted passages in the **Schultz** case, the plaintiffs used virtually the same language to stand for very different propositions.

Nonetheless, the injured party did not lose any monetary value from a structured award, other than the windfall of claiming the award all at once.

The Appellate Division, First Department in **Bermeo v. Atakent**, stated the purpose of the legislation as:

> "Article 50a (L. 1985, Ch. 4), the first legislature foray into structuring judgments, was enacted to address crisis posed by increasing medical malpractice insurance premiums during the early 1980's. It was enacted primarily as a benefit to insurers, and, secondarily, to stave off a potential slow down by medical professionals. The Article 50b legislation (L. 1986, Ch. 682), modeled on the prior 50a legislation, originated with the Governor's Advisory Commission on Liability Insurance, cheered by a former Court of Appeals Judge Hugh R. Jones, which had examined several aspects of proposed tort reform (see, Governor's Memorandum of Approval for L. 1986, Ch. 682, July 30, 1986) in the midst of what several institutional commentators concluded was a rapidly escalating liability insurance crisis. This aspect of a larger package of tort reform legislation also was enacted as a benefit

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for the insurance industry, which assumed the responsibility for most tort defense costs, rather than as a benefit to plaintiffs. (See Memorandum in Opposition by State Consumer Protection Board: "A system mandating periodic payments of judgments poses serious problems for plaintiffs in personal injury cases..."), and was devised to reduce insurance costs to government, as well as private businesses.

Thus, the annuity for future damages should be based upon the present value of those future damages.

The second issue concerning the CPLR Article 50a and 50b calculations is whether the annual 4% addition should be added to the remaining future damages before those damages are reduced to their present value for the purposes of calculating the attorneys' fees. We argued that the annual 4% addition should not be added to the attorneys' fees. The attorneys receive a lump sum payment of those fees and the aggravating action of inflation will not work against the lump sum payment to them.

Subsection (c) of Articles 50a and 50b of the CPLR state:

"Payment of litigation expenses and that portion of the attorneys' fees related to past damages shall be payable in a lump sum. Payment of that portion of attorneys' fees related to future damages for which, pursuant to this article, the claimant is entitled to a lump sum payment shall also be payable in a lump sum. Payment of all that portion of attorneys' fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to Subdivision (e) of this section."

Subsection (e) of the respective statutes provides that, after making the necessary adjustments, including that of attorneys' fees, the payment of the remaining amounts of future damages shall be made in installments pursuant to an annuity contract. Obviously, it is the installments payable over time which are subject to the annual addition of 4%.

The plaintiffs argue that the 4% annual increases are part of the annuity which the attorney has obtained for the plaintiff and must therefore be included when determining the present value of the annuity contract upon which the attorneys' fees are based. In actual practice, the mathematical calculations are relatively simple. However, the premises upon which the calculation is made are problematic. The jury makes a gross finding upon which the Court is charged to make certain calculations in the nature of reductions to present value. It is the Defense Association's position that the initial reduced to present value amount is the basic figure upon which the attorneys' fees calculation is undertaken. The plaintiff's bar argues that the application of Articles 50a and 50b entitle the attorneys to take their fee based upon 4% increases over time. The case of **Karagiannis v. New York State Thruway Authority**, 209 A.D.2d 993, (4th Dept. 1994) stated:

"The Court (below) further erred in failing to include the annual 4% increase...in computing attorneys' fees. CPLR 5041(c) provides that the "portion of the attorneys' fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages ... The annuity contract purchased pursuant to CPLR 5041(e) must include a 4% annual increase in each year of the annuity."

Undoubtedly, the 4% inflationary guard is designed to account for the projection of losses over time. The attorneys' fees being calculated and granted on a lump sum basis logically require no such future protections. Furthermore, the remedial nature of the statute being a design to alleviate a growing onerous burden on defendants and insurers would not logically accept further weight to be born on the shoulders of such insurers and defendants.

The Court of Appeals has addressed the issue of attorneys' fees as calculated under Articles 50a and 50b in the case of **Rohring v. City of Niagara Falls**, 84 N.Y.2d 60, 614 N.Y.S.2d 714 (1994). The Court of Appeals noted that Articles 50a and 50b are "patently ambiguous." The Court then looked to the statutory scheme of the articles and acknowledged the purpose of the legislation as "tort reform." The Court interpreted the provisions stating:

"Articles 50a and 50b are technical administrative schemes intended to regulate and structure payment, and they should not be construed in such a way as to increase the underlying liability owed by defendants. Plaintiffs are entitled to be made whole, as determined by the trier of fact, but have no right to overcompensation."

Similarly, attorneys have no right to overcompensation pursuant to the technical scheme.

The calculations as provided by the Court in **Rohring** are called easy in operation. "Past damages are paid in a lump sum (CPLR 5041(b)). Future damages, which are awarded by the jury without reduction to present value (CPLR 4111(f)) are bifurcated for purposes of Article 50b. The first $250,000.00 is paid as a lump sum (CPLR 5041(b)) the remainder, **after subtraction of attorneys' fees** and other adjustments, is to be paid in periodic installments (CPLR 5041(e)). To provide for these payments, subdivision (e) further specifies that defendants are to purchase an annuity contract.

Thus, the 4% inflation guard should be added to the annual payments after the attorneys' fees have been calculated. The Court approved the **Rohring**, supra calculation, stating that the present value of attorneys' fees should be subtracted from the present value of the future damages awarded to the plaintiff. The Appellate Division approach properly recognized "the full amount defendants have to pay - that is, the combined sum owed to plaintiffs and plaintiffs' legal counsel - is the amount awarded by the jury...under Supreme Court's approach, on the other hand, defendants' combined payment to plaintiff and plaintiff's counsel would actually exceed the amount awarded by the jury." Id. Therefore, the proper method should be to deduct the attorneys' fees from the present value of the future damages and to use this net sum as the starting point for computing the annuity. That appropriate method was utilized in **Silvestri v. Smallberg**, 165 Misc.2d 827, 630 N.Y.S.2d 639 (Supreme Court, NY 1995), aff'd on other grounds, 224 A.D.2d 172, 637 N.Y.S.2d 115 (1st Dept. 1996), aff'd 88 N.Y.2d 1004 (1996). The foregoing methodology is consistent with the Court's interpretation of the statutes that the 4% increase is added to annual payments only after they have been calculated and reduced to present value. See, **Schultz v. Harrison Radiator**, 90 N.Y.2d 311, 660 N.Y.S.2d 685. The net result of payments, etc. is consistent with the purposes of the article. See, **Rohring**, 84 N.Y.2d at 65, 67, 614 N.Y.S.2d at 715, 716.

There is no statutory language requiring a "gross-up" of plaintiff's damages at the end of the present value calculations which accrues to the benefit of plaintiff s counsel. Notably, subsection (e) provides that only after making the necessary adjustments, including the provision of attorneys' fees as set forth in subdivision (c), "the Court shall enter judgment for the amount of the present value of the annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments." The statute requires the 4% accelerator to be added to successive payments and not "grossed up" at the front end. The practical effect is that the 4% accelerators are to be added only after the award is reduced to the present value and the attorneys' fees calculated.

Bermeo, supra gave the First Department an opportunity to address the issue of litigation expenses and attorneys' fees, The First Department noted that the litigation expense and attorneys' fees are not based on actual periodic payments to the plaintiff, but rather are paid in a lump sum upon the entry of judgment as based upon the reduced present value of the annuity. As everybody seems to agree, including the First Department, Articles 50a and 50b are confusing. Nonetheless, in resolving the ambiguity, the First Department quotes the Court of Appeals, which states that "the proper methodology is to determine the present value of future damages before attorneys' fees and then reduce the amount by the present value of attorneys' fees."

The case of **Fisk v. City of New York**, ____ A.D.2d ____, 682 N.Y.S.2d 164 (1st Dept. 1998) is instructive, stating thus:

> "The present value of the annuity contract to be purchased (is) determined based on "the full amount of the remaining future damages, as calculated pursuant to this subdivision" and then subsequently requires the periodic payments of the remaining future damages include the 4% annual increase...the attorneys' fees "related to the future periodically paid damages shall...be payable in lump sum, based upon the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e) of this section. Again, subdivision (e) requires that the future periodically paid damages include the 4% annual increases."

The **Fisk** approach acknowledges the Court of Appeals approach in **Rohring**, which, in turn, relied upon the statutory intent in rendering its decision. Nowhere is a "gross up" contemplated, much less stated.

A further point to consider before the State's highest Court is the collateral effect of the Social Security Survivors Benefit payment to the plaintiffs decedent's daughter.

The very wording of CPLR 4545(c) states that it is applicable to wrongful death actions. Wrongful death actions, of course, seek recovery for lost earnings and other economic loss. The Court must consider the extent to which such economic loss will be or was replaced or indemnified in whole or in part from any collateral source. The statutory pronouncement was in abolition of the common law rule. The statute is plain and distinct and unambiguously provides for the reduction of an award to

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laintiff from any collateral source. Unfortunately, the tatute includes qualifications and exceptions. The ualifications at 4545(c) are exceptions to the reductions gainst plaintiff's award and consist of life insurance, title VIII benefits under Social Security and collateral sources ntitled by law to liens against any recovery of the laintiff.

The legislative intent of the statute evinces a specific lesign to attack rising medical malpractice liability remiums and as a tort reform measure and business riendly initiative. The manifest legislative intent did not change from the first modification of the common law rule n 1975 through the latest enlargement of the application n 1986. Clearly, the collateral source rule acts as a set-off o plaintiff's recovery. The collateral source rule is not discretionary, in that the language states that "the Court shall reduce the plaintiff's award by such collateral source findings.

The very language of CPLR 4545(c) contains the general word "any", despite the expressly drawn exceptions. "Any" applies to past or future costs or expense, which was or will be replaced from a collateral source. Other than the express qualifications, there are no other limitations. The term "any" is a term of general import, which is to receive full significance under normal statutory interpretation. Thus, all Social Security benefits (other than title XVIII) shall be applied as a set-off under the mandatory language "shall" of CPLR 4545(c). The Appellate Division, Fourth Department in **Caruso v. Russell P. LeFrois Builders**, 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dept. 1995) reviewed the legislative history and issued a decision which comports with the foregoing analysis. **Caruso** states that as a matter of statutory construction, all Social Security benefits shall be applied as a set-off (excepting title XVIII). The Defense Association urged the Court of Appeals to adopt the sound reasoning of **Caruso**.

As a practical matter, Social Security Survivor Benefits are available to every child pursuant to 42 U.S.C. 402(b) and (e) where such child is of an individual who dies, if such child has not obtained 18 years, is still in elementary or secondary school to 19 years, or under a disability which began before the age of 22. The only prerequisite is the submission of an application by, or on behalf of, the child. In any such case the child is "entitled" to such benefits each month, beginning with the first month in which the child meets the above-described conditions.

The case of **Tsosie v. Califano**, 630 F.2d 1328 (9th Cir. 1980), cert. den. 451 U.S. 940, 101 S. Ct. 2022 (1981) held that the principle purpose of the Social Security Survivors Benefit is to replace support lost to claimants by the death of the wage earner. The principle inquiry concerning eligibility for benefits must focus on the claimant's dependency on the wage earner prior to the wage earner's death and not any other event. The amicus committee urged the Court that there is a direct correspondence between items of loss occasioned by the death of the decedent and the collateral indemnity by means of the survivor benefits.

The practical effect of which should have been that the jury at the trial level would have its gross verdict for lost future earnings reduced at the collateral source hearing post-trial by the Social Security Survivor Benefits directly applicable for indemnifying the decedent's beneficiary for lost future earnings of the decedent.

Moreover, the defendants should have been entitled to a credit for the gross projected future total of the Social Security Survivor Benefits against the future lost earnings of the decedent.

The Defense Association urged that defendants must be allowed to offer proof of the correlation between Social Security benefit and the award for future lost earnings and the amounts involved. The Trial Court in the case before the Court of Appeals ruled that the Social Security survivor benefit could not be used as an off-set against the award as a collateral source.

The Ninth Circuit has held that the purpose of the survivor benefit under Social Security is to protect the child from loss of income due to the wage earner's old age, death or disability. **Delno v. Celebrezzo**, 342 F.2d 152, 161 (9th Circuit 1965). The Court in **Davis v. Richardson**, 342 F Supp. 588 (D. Con. 1972) favorably quoted the **Delno** case and stated that "the purpose of the Children's Survivor Benefit is to provide some measure of income and security to those who had lost a wage earner on or upon whom they depended."

While **Oden v. Chemung County Industrial Development Agency**, 87 N.Y.2d 81, 637 N.Y.S.2d 670 (1995) stands for a narrow interpretation of collateral set-off authorized by CPLR 4545(c), it is clear that the Social Security Survivor Benefit is within that narrow course of

lost future earnings for which the plaintiff receives an award for lost future earnings.

Moreover, it is reasonably certain that an infant plaintiff having made out the qualifications above stated will continue to receive Social Security Survivor Benefits and that those benefits are direct recompense for the loss of income produced by the decedent. Thus, there is a direct correlation between lost future earnings and a set-off proposed under the Social Security Survivor Benefit scheme.

The **Oden** case, in a decision by Judge Titone, dealt with a collateral source setoff sought for a disability annuity which was determined to be a replacement for out-ofpocket medical expenses which plaintiff incurred as a result of the accident. Judge Titone found that, in the **Oden** case, the collateral source set-off sought and the item of damages awarded by the jury were facially different categories.

The Second Circuit Court of Appeals recently decided **Turnbull v. U.S. Air, Inc**., 133 F.3d 184 (2nd Circuit 1998), a case closely analogous to the **Bryant** case. The Court in **Turnbull** held that Social Security Survivor Benefits were an indemnification for lost future earnings and thus a collateral source set-off. The Second Circuit concluded that **Oden**, **supra**, did not require defendants to demonstrate a direct correspondence between the specific items upon which the jury based its award of lost earnings and the collateral set-off. Rather, the collateral source payments were reimbursements for a "corresponding category" of loss. The committee urged our State's highest Court to adopt the Second Circuit's reasoning in **Turnbull**.

The last item urged before the Court of Appeals concerned collateral source offsets for Social Security taxes, personal consumption and other work related expenses. The Estate's Powers and Trust Law Section 5-4.3(a), sets out that damages may be sought and recovered in wrongful death actions for pecuniary harm as a result of the decedent's death. The EPTL formula is based solely upon economic evaluations. Unfortunately, in cases of wrongful death and personal injury, people are naturally reluctant to define human life experience, including career and earnings, in human capital utilization terms. Nonetheless, the statute provides for just such an analysis.

EPTL 5-4.3(c) states that as of 1986, any action under that section where wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish Federal, State and Local personal income taxes to which the decedent would have been obligated by law to pay. Thus, appropriate testimony concerning decedent's income tax liability over time should be introduced and considered by the Trial Court in reduction of a gross award. The operation of this section should afford the jury an opportunity to consider Federal, State and Local taxes in determining their gross award.

The reduction of an award by the tax on future earnings is consistent with Section 104(a)(2) of the Internal Revenue Code, originally enacted in 1919, which excludes from taxable income "the amount of any damages (whether by suit or agreement and whether as lump sum or periodic payment) on account of personal injuries or sickness." Thus, economic damages awarded for wrongful death are not subject to Federal Income tax and an award in Court which does not assess the projection for income tax for future earnings which would represent a boon and windfall for plaintiffs. An interesting case on the issue is **Norfolk and Western Railway Co. v. Liepelt**, 444 U.S.490, 100 S. Ct. 755 (1980). In **Norfolk**, a case arising under the Federal Employers Liability Act, the United States Supreme Court held that after tax wages were the relevant measure of loss: "the amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of tax he must pay to the Federal government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family."

Similarly, in **Jones & Loughlin Steel Corp. v. Pfeifer**, 462 U.S.523, 103 S. Ct. 2541 (1983) a case arising under the Federal Longshoreman Harbor Workers' Act, the United States Supreme Court held that since the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax return to the injured worker.

It is inappropriate to impart an additional economic benefit to the plaintiffs upon the decedent's demise. The net of lost income projections and credible economic expert testimony concerning personal consumption and the unavoidable tax burden, including rated variables of each over time, is the proper measure of pecuniary harm.

Simply stated, the costs avoided in the production of future income are not logically a credit due plaintiffs at the expense of the defendants.

The case is scheduled to be heard before the Court of Appeals in early June.

We shall, of course, report on the outcome and its effect on the Defense community.

Sincerely,

Frank V. Kelly

Andrew Zajac

THE SLIPPERY MATTER OF DEFENSES TO LABOR LAW §241 (6)

*by Julian D. Ehrlich**

With amendments in the Workers' Compensation Law[1] and the increasing use of wrap-up insurance drastically reducing the ability to implead actively negligent employers[2], the evolving and elusive defenses to the commonly pled Labor Law §§241(6)[3] and 240(1)[4] are becoming increasingly important to both plaintiffs and defendants in construction site personal injury suits.

Both statutes imposed vicarious liability on owners, general contractors and their agents who are free from negligence for prescribed acts of subcontractors "instead on workers, who 'are scarcely in a position to protect themselves from accident.'"[5]

The legislative purpose of vicarious liability under Labor Law §241(6) is to "give [workers] in the hazardous employment of construction, demolition and excavation added protection, other than workman's compensation, in the form of nondelegable duties upon the owner and general contractor."[6] and to encourage "owners and contractors to assure that only financially responsible and safety-conscious subcontractors are engaged so that a high standard of care might be maintained throughout the entire construction site."[7]

While Labor Law §240 provides the "exceptional protection" of absolute liability to workers performing enumerated activities whose injuries are proximately caused by the special hazards of gravity-related accidents that arise from elevation-involved risks,[8] under Labor Law §241(6), the owner or general contractor is "allowed to raise any defense to the imposition of liability."[9]

The following discussion examines trends in interpreting and applying Labor Law §241(6), and highlights defenses that may be available to owners, general contractors, and their agents free of fault - defenses that become especially important where there is no viable impleader for apportionment or indemnity against the party actually responsible for the accident, the actively negligent subcontractor. Particular attention is paid to the conceptual challenge of applying the statute's hybrid duty between the common law standard of care and the specific standard of care in the N.Y. COMP. CODES R. & REGS. tit. 12, §23 (1972) commonly known as the Industrial Code, as well as the question of whether there is any place for the traditional notice requirement.

As is well known, plaintiffs failure to establish the violation of a rule of the Industrial Code (12 NYCRR 23) containing a specific, positive command, requirement, or standard of conduct instead of a routine incorporation of the ordinary tort duty of care or general safety standards is a defense to Labor Law §241(6).[10] Allegations of OSHA violations will not support a §241(6) claim.[11] Since this requirement was set forth by the Court of Appeals in **Ross v. Curtis-Palmer Hydro-Electric Co.**,[12] there has been a steady emergence of case law interpreting the various sections of the Industrial Code for the specificity required in Labor Law §241(6). An excellent guide can be found in the commentaries to PJI 2:216A.[13]

Another defense that may be available on a case-by-case basis is that the Industrial Code section pled by the plaintiff does not apply to the particular facts of plaintiffs accident.[14]

Since defendant's violation of the Industrial Code is not conclusive of defendant's breach of duty but "is merely some evidence of negligence,"[15] in theory a defense exists that despite a code violation, the subcontractor's behavior nonetheless constituted reasonable care. Indeed, parties may and do battle experts over both the applicability of the Code and "circumstantial reasonableness"[16] within the context of custom and practice in the industry. However, the distinction between some evidence of negligence and conclusive evidence of negligence may be too subtle to impress a jury.

Another defense is lack of proximate cause between

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he defendant's violation of the code and failure to use easonable care, and the plaintiffs injuries. Since "legal causation turns on foreseeability of the injury attributed o the defendant's conduct and 'questions concerning what is foreseeable and what is normal may be subject o varying inferences as is the question of negligence tself, these issues generally are for the fact finder to esolve.'"[17] Nonetheless, there is no shortage of cases where the court has found no causation as a matter of aw in the §241(6) context.[18]

Another defense is that plaintiff is not a protected person within the meaning of §241(6). The statute provides that it applies to persons employed in construction, excavation, or demolition "or lawfully frequenting such places."[19] Case law reveals that critical o this defense are the following factors: (1) plaintiff's ob responsibilities; (2) the type of activity that causes plaintiffs injuries; and the (3) time; and (4) place of plaintiffs injury with respect to the prescribed activity. There appears to be a trend toward narrowing the definition of "protected person" in recent case law.

For example, in the area of plaintiffs own job esponsibilities, in 1993, the First Department held in **Williamson v. Borg Florman Development Corporation**[20] that Labor Law §241(6) applied to protect a dietary aide employed by a hospital undergoing enovation where the injury was caused by construction elated condition. However, in 1998, the same court noted in **Agli v. Turner Construction Corporation, Inc.**,[21] that it had not followed Williamson. In addition, the court in Agli ruled that a 241(6) claim was properly dismissed for a building operating engineer responsible for reading water meters among other maintenance duties even though his injury was caused by construction-related activity.[22]

In fact, Labor Law §241(6) has also been held not to apply to many other plaintiffs who seem to be lawfully frequenting construction sites. Examples include a passenger stepping off a city bus onto gravel in a roadway replacement project,[23] and a corrections officer stepping into a hole created for a security fence installation at the prison where he worked.[24] More recent examples include an employee of a tenant tripping on a substance left by contractors working at another office on the same floor,[25] a UPS worker who tripped on construction related to an overhaul of UPS conveyor belts at his workplace,[26] and a salvager dismantling a tractor trailer that he had purchased still located on the owner's premises.[27]

Accordingly, it now appears that plaintiffs who are lawfully frequenting construction sites must actually have construction related duties.

Similarly, with regard to the type of activity causing plaintiffs injury, there may also be a trend toward limiting the scope of §241(6). While highway repair[28] and tree removal[29] have been held covered activities, more recent cases hold that tree removal under similar facts,[30] repairing a loader at a landfill,[31] repairing an overland conveyor,[32] constructing a septic tank at a factory,[33] and tightening and tying loose wire and changing light bulbs,[34] are not covered activities.

Also, if the plaintiff s accident occurs just before or just after prescribed activity, no §241(6) action will lie (although a common law negligence claim may still be appropriate.) For example, injury while inspecting a roof to submit a repair bid[35] and injury while inspecting a construction area for feasibility of a hoist for a mason subcontractor[36] have been held not protected. Similarly, §241(6) did not create vicarious liability against the owner where an excavation subcontractor which left two or three days before an inner foundation wall it had braced collapsed on the plaintiff,[37] or where a roofing contractor employed plaintiffs co-worker whose cigarette ignited gasoline on the plaintiff s hands and pants where the plaintiff had used the gas to clean off tar after materials and tools were put back into their van.[38]

On the issue of the place of plaintiff's injury with respect to the construction activity, there may again be a trend towards narrowing the scope of §241(6). In **Brogan v. International Business Machines**,[39] the plaintiff was afforded §241(6) protection where he was injured by a shifting load on a truck driving within the campus-like property of the owner but some distance from the building construction site. Several other decisions in the 1980's had extended §241(6) protection beyond the area where the contractor was performing prescribed activity.[40]

More recently, however, in **Baurer v. Niagra Mohawk Power Corp.**,[41] §241(6) protection was denied to a contractor's employee who tripped and fell in a common area off a perimeter road at the defendant's power plant. Also, in **Scarps v. Lockport Energy Associates**,[42] §241(6) was held not to apply where a subcontractor's employee slipped in an open yard between buildings at defendant's cogeneration plant.

Several cases have dealt with accidents involving trips or slips on truck beds.

In **Kemp v. Lakelands Precast, Inc.**,[43] §241(6) protection was afforded to a plaintiff injured while standing on a vault supplier's truck. Also, in **Carafella v. Harrison Radiator Division of General Motors**,[44] §241(6) protected a laborer who slipped on oil and mud

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on a damp truck bed. However, protection was denied to an iron worker who slipped while stepping on the rear bumper of his employer's van in **Greenburg v. MTA**.[45]

A related defense is that §241(6) does not apply to the particular type of defendant. The statute excepts owners of one and two family dwellings who contract for but do not direct or control the work. Also the defendant must be within the construction (contractual) chain.[46] In addition, Labor Law §241(6) does not expressly apply to subcontractors[47] since its purpose is to create vicarious liability. Given vicarious liability language in PJI 2:216A, the statute appears to be exclusively vicarious and thus would not serve as the basis for a separate theory of liability against a general contractor alleged to be negligent.

The "integral part" defense has been increasingly successful in defeating allegations of the commonly pled Industrial Code §23-1.7(d) and (e). As its name implies, this defense applies where the casualty of the injury is an integral part of the work being performed. These code sections pertain to slippery footing from ice, snow, water, grease and "any other foreign substances" and tripping hazards.[48] Both have been held sufficiently specific to support a claim under §241(6).[49]

Case law has firmly cemented the integral part defense in recent years to defeat claims typically by plaintiffs who fall on slippery materials they have applied themselves such as paint remover,[50] carpet paste,[51] floor cleaner,[52] and roof sealant,[53] which under such circumstances are not considered "foreign substances." However, this defense has also been applied to defeat §241(6) claims in other contexts such as a fall from a stack of lubricated pipes,[54] a fall in a weed covered hole in the ground,[55] a trip on a Genie hoist plaintiff was lifting,[56] a trip on a wire mesh placed where concrete was to be provided,[57] and injury from a falling permanent brace of a building.[58]

Remarkably the integral part defense has defeated a §241(6) claim for a slip on muddy ground,[59] but in one reported case did not defeat the same claim for a slip on plywood used to cover muddy ground, since rainwater on earth was not considered a foreign substance but plywood was.[60]

Also of note is **Lenard v. 1251 Americas Associates**,[61] where the court found that the integral part defense d[illegible] not apply to a plaintiff who tripped on a half moon shaped, one and a half inch high door stop that had been left in the floor during prior dismantling. In reinstating the §241(6) claim, the court held "because the floor itself was not under construction, the door stop did not constitute an integral part of the work being performed."[62]

Despite the Court of Appeals holding that workers are "scarcely in a position to help themselves,"[63] plaintiff's comparative negligence is a defense to Labor Law §241(6).[64] This will generally defeat a plaintiff s motion for summary judgment,[65] unless the defendant fails to plead this affirmative defense[66] or fails to submit proof in opposition papers.[67] Although the amount of plaintiff's comparative negligence is usually a jury question, in at least one reported decision the court found the plaintiff 15% negligent as a matter of law after a jury found no comparative negligence.[68]

Finally, there is the issue of whether the traditional requirement of notice has any place in the application of Labor Law §241(6). Clearly, the owner or general contractor's lack of supervision, control, or direction of the work site is not a defense.[69] As the Court of Appeal[illegible] recently held in **Rizzuto v. L.A. Wenger Contracting Co., Inc.**,[70] lack of notice **to the owner or general contractor** is similarly not a defense.

But does the **Rizzuto** case leave open or even support the requirement of notice when considering the subcontractor's negligence?

In **Rizzuto**, the plaintiff, an employee of a subcontractor, slipped on diesel fuel that suddenly sprayed from a tank being tested by the owner's workers.[71] Plaintiff sued the general contractor claiming vicarious liability for the owner's workers under §241(6) and Industrial Code §23-1.7(d).[72] The lower court dismissed §241(6) finding the general contractor lacked control or notice.[73]

In reversing, the Court of Appeals appeared to use traditional notice language with regard to the actively negligent subcontractor. The court reinstated the plaintiff's §241(6) claim, holding that "the jury could, thus, have rationally concluded that **someone** within the chain of the construction project was negligent in not exercising reasonable care, or **acting within a reasonable time**, to prevent or remediate the hazard ... Once the negligence of some party was established at trial, defendant would b[illegible] vicariously liable (emphasis added)."[74]

If notice to the subcontractor is a requirement, how is it to be applied?

In **Ross v. Curtis-Palmer Hydro-Electric Co.**, the court defined the duty under Labor Law §241(6) as "in a sense, a hybrid, since it reiterates the common-law standard of care and then contemplates the establishment of specific detailed rules...."[75] Violation of the rule alone does not rise to the level of negligence as a matter of law but rather is merely some evidence of negligence.[76]

PJI 2:216A addresses the code violation first and makes it a **sine qua non** in the hybrid. This charge requires a jury first to consider only evidence of the subcontractor's alleged rule violation in considering the subcontractor's alleged failure to use reasonable care. Next the jury is instructed that the rule violation is some evidence of negligence. Then the jury must consider, if the rule was violated, whether the violation constituted a failure to use reasonable care. Finally, the breach must be the cause of the injury.

Since §241(6) holds an owner or general contractor liable for the subcontractor's code violation if there is also negligence, notice might naturally be a factor in considering the subcontractor's alleged failings after considering the code violation and before determining causation.

To consider notice while applying the second part of the hybrid i.e., the common law standard of care after determining the code violation, would also be consistent with the legislative purpose of the statute. As defined in **Ross**, the purpose of §241(6) is to provide special protection for construction, demolition, and excavation hazards. But some accidents at construction sites arise out of ordinary risks no different than risks in garden-variety premises or other tort cases such as slips and falls on food, snow, ice, garbage, or paper or due to a burnt-out light bulb, or even motor vehicle accidents. While there are specific Industrial Code Sections that would apply to such falls, (12 NYCRR 23-1.7(d)) or the light-out scenario (12 NYCRR 23-1.30), these risks can hardly be considered hazards special to construction.

Do office workers who track snow, rain, or mud into an office building lobby pose any different risk than construction workers who track the same substances into an unfinished lobby? Does a supermarket shopper who drops a piece of lettuce in an aisle moments before another shopper slips pose any different risk than a worker who drops lettuce from his lunch moments before a co-worker slips? Violation of the Code notwithstanding, isn't it reasonable for the contractor with a primary responsibility in those situations to have a sufficient opportunity to discover and cure such conditions? Shouldn't ordinary notice requirements apply to ordinary risks?

In an analogous context, a plethora of cases hold that motor vehicle accidents at construction sites do not trigger liability under §241(6) (or Industrial Code).[77] Arguably, the risk of serious injury from heavy construction vehicle accidents is among the more dangerous hazards at a construction site.

Support for including the notice requirement while considering the subcontractor's conduct beyond the Code violation can be found in two cases decided before **Rizzuto**.

In **McCague v. Walsh Construction**,[78] an ironworker slipped and fell on sand on a ramp. According to the plaintiff, he had not noticed sand on the ramp fifteen minutes earlier.[79] Citing the seminal case of **Gordon v. American Museum of Natural History**,[80] the court dismissed the §241(6) claim concluding that "there must be some evidence that the slippery condition existed for a sufficient length of time for it to be discovered and remedied, as is the rule in any negligence action based on a slip and fall."[81]

In **McLoud v. State**,[82] an apprentice carpenter hammering nails removed his safety goggles in order to clean them but continued working. Within minutes thereafter, a masonry nail shattered his eye.[83] The court held the plaintiffs §241(6) claim properly dismissed against the owner on the ground that there was no notice to the employer subcontractor that the claimant's goggles became dirty "and, therefore, they never had the opportunity to instruct claimant to stop working until he could replace his goggles."[84] In addition, the court based its decision on a lack of evidence that the employer subcontractor directed or even encouraged the claimant to continue work without first cleaning off his safety goggles.[85]

However in **Rothchild v. Faber Homes, Inc.**,[86] the court noted that there was no common law duty to remove snow during a snowstorm but refused to apply that standard. The court also referred to the hybrid duty between common law and the Industrial Code rules but held "[i]n effect the rules set forth in the Industrial Code establish concrete rules that, in some instances, supersede common-law principles."[87] Without defining what those instances would be, the court held that there were factual issues as to whether the owner had constructive notice of the snow and a reasonable opportunity to address it.[88] The latter part of this decision clearly does not survive **Rizzuto**.

If notice to someone in the chain of construction is a

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requirement, can the plaintiff rely on a res ipsa loquitur type argument in the typical construction site accident scenario where it is unknown exactly who left the food, mud, wood, grease, etc., at the place of the accident? Can a plaintiff argue that a construction area is accessed only by workers directly or indirectly employed by the owner of the site, thus 1) the instrumentality causing the injuries is in the exclusive custody and control of the owner 2) the accident would not have occurred without negligence and 3) the facts are sufficient to justify an inference of negligence?[89]

The plaintiff made such an argument in one reported case that pre-dates **Ross** and **Rizzuto**. In **Monroe v. City of New York**,[90] the court rejected plaintiff's res ipsa argument noting it only gives rise to inference of defendant's culpability anyway but since the plaintiff presented specific and overwhelming proof establishing the cause of the accident, res ipsa disappeared.

Of course in many construction accidents, notice is a moot issue. Where the danger that caused the plaintiffs accident was created by the negligent act of a particular subcontractor, the created condition is actual notice. In other situations, the general contractor may have general site safety responsibilities that give rise to independent common law duties.

After **Rizzuto** the First Department held in **Crystal v. Japan Airlines**[91] that summary judgment motion dismissing plaintiff's §241(6) claim was not warranted where "it is unclear how or when the piece of metal that caused plaintiff's fall appeared on the stairwell in his work area." Would directed verdict also be unwarranted if the mystery remained at the close of evidence?

Another scenario where notice might remain an issue is the product liability claim arising out of a construction site accident. Is a product manufacturer considered in the chain of construction within the meaning of **Rizzuto**? Will notice play a part is where the actively negligent entity is a product manufacturer who can not be identified or is uninsured or is for some other reason not a viable party? Can an owner be liable under Labor Law §241(6) if there is a latent defect in the construction tool or machine that results in a code violation? Who, if anyone, is liable where a perfectly well designed, manufactured and maintained machine or tool wears out and spills oil on the ground the moment before the plaintiff steps there?

No doubt these questions and others will test §241(6) defenses in future decisions. In the meantime, while not intended to be exhaustive, this review supports the notion that there is ample room for creative argument by aggressive practitioners on both sides of construction injury suits.

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FOOTNOTES

1. See Workers' Compensation Law Section II (McKinney 1992 & Supp 1998) as amended by the Omnibus Workers' Compensation Reform Act of 1996 (L. 1996, ch. 635, § 2).
2. **Allen v. Cloutier Construction Corp.**, 44 N.Y.2d 290, 405 N.Y.S.2d 630 (1978). **See also Russin v. Louis Picciano & Son**, 54 N.Y.2d 311, 319, 445 N.Y.S.2d 127, 130 (1981) which held that the owner and general contractor may implead the actively negligent subcontractor and stated "although Sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform the requirements of those sections, the duties themselves may in fact be delegated."
3. Labor Law §241(6) states: **Construction, excavation, demolition work** All contractors and owners and their agents, except the owners of one and two family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: 6. All areas in which construction, excavation or demolition work are being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control work, shall comply therewith.
4. Labor Law §240 states: **Scaffolding and other devices for use of employees** 1. All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed

on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provisional law.

5. **Zimmer v. Chemung County Performing Arts, Inc.**, 65 N.Y.2d 513, 520, 493 N.Y.S.2d 102, 105 (1985) (citation omitted).
6. **Allen**, 44 N.Y.2d at 299, 405 N.Y.S.2d at 633.
7. **Id.** at 301, 405 N.Y.S.2d at 634.
8. **Rocovich v. Consolidated Edison Co.**, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 222 (1991).
9. **Long v. Forest-Fehlhaber**, 55 N.Y.2d 154, 159-160, 448 N.Y.S.2d 132, 134 (1982), **Zimmer**, at 521-522, 493 N.Y.S.2d at 105.
10. **Ross v. Curtis-Palmer Hydro-Electric Co.**, 81 N.Y.2d 494, 504-5, 601 N.Y.S.2d 49, 55 (1993).
11. **Pellescki v. City of Rochester**, 198 A.D.2d 762, 605 N.Y.S.2d 692 (4th Dept. 1993).
12. 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
13. 1A N.Y. PJI 3d, page 839.
14. **Francis v. Aluminum Co. of America**, 240 A.D.2d 985, 659 N.Y.S.2d 903, 905 (3rd Dept. 1997).
15. **Ross**, 81 N.Y.2d at 502, 601 N.Y.S.2d at 53, ftnt 4, **Zimmer**, 65 N.Y.2d at 522, 493 N.Y.S.2d at 106.
16. **Zimmer** at 523, 493 N.Y.S.2d at 107.
17. **Leon v. J&M Pepe Realty Corp.**, 190 A.D.2d, 400, 413, 596 N.Y.S.2d 380, 387 (1st Dept. 1993) (citation omitted).
18. **Ares v. State**, 80 N.Y.2d 959, 590 N.Y.S.2d 874 (1992); **Haghighi v. Bailer**, 240 A.D.2d 368, 657 N.Y.S.2d 774 (2nd Dept. 1997); **Carrion v. Lewmara Realty Corporation**, 22 A.D.2d 205, 635 N.Y.S.2d 4 (1st Dept. 1995); **McCullum v. Barrington Company**, 192 A.D.2d 489, 597 N.Y.S.2d 295 (1st Dept. 1993); **Calomino v. Lincoln Plaza Tenants Corp.**, 173 A.D.2d 368, 569, N.Y.S.2d 738 (1st Dept. 1991); **McGovern v. Fordham Hill Owners Corp.**, 173 A.D.2d 162, 569 N.Y.S.2d 71 (1st Dept. 1991); **Amedure v. Standard Furniture**, 125 A.D.2d 170, 512 N.Y.S.2d 912 (3rd Dept. 1987).
19. **Cf.** Labor Law §240 which applies to erection, demolition, repairing, altering, painting, cleaning or pointing.
20. 191 A.D.2d 335, 594 N.Y.S.2d 778 (1st Dept. 1993).
21. 246 A.D.2d 16, 676 N.Y.S.2d 54, 59 (1st Dept. 1998).
22. **Id.**
23. **Neely v. City of Buffalo**, 171 A.D.2d 1078, 569 N.Y.S.2d 252 (4th Dept. 1991).
24. **Farrell v. Dick Enterprises**, 227 A.D.2d 956, 643 N.Y.S.2d 852 (4th Dept. 1996).
25. **Plung v. Cohen**, 250 A.D.2d 430, 673 N.Y.S.2d 114 (1st Dept. 1998).
26. **Valinoti v. Sandvik Seamco, Inc.**, __ A.D.2d __, 677 N.Y.S.2d 311 (1st Dept. 1998).
27. **Strunk v. Buckley**, __A.D.2d__, 674 N.Y.S.2d 420 (2nd Dept. 1998).
28. Mosher v. State, 80 N.Y.2d 286, 590 N.Y.S.2d 53 (1992); Ares v. State, 80 N.Y.2d 959, 590 N.Y.S.2d 874 (1992).
29. **Seaman v. A.B. Chance Co.**, 197 A.D.2d 612, 602 N.Y.S.2d 693 (2nd Dept. 1993) **appeal dismissed, lv. dismissed** 83 N.Y.2d 847, 612 N.Y.S.2d 110; **Nagel v. Metzger**, 103 A.D.2d 1, 478 N.Y.S.2d 737 (4th Dept. 1984).
30. **Walton v. Devi Corporation**, 215 A.D.2d 60, 632 N.Y.S.2d 898 (3rd Dept. 1995). See also **Dumoulin v. Oval Wood Dish Corp.**, 211 A.D.2d 883, 621 N.Y.S.2d 705 (3rd Dept. 1995).
31. **Phillips v. City of New York**, 228 A.D.2d 570, 644 N.Y.S.2d 764 (2nd Dept. 1996).
32. **Houde v. Barton**, 202 A.D.2d 890, 609 N.Y.S.2d 411, **lv. dismissed** 84 N.Y.2d 977, 609 N.Y.S.2d 411 (3rd Dept. 1994).
33. **Jock v. Fein**, 176 A.D.2d 6, 579 N.Y.S.2d 293 (4th Dept. 1992).
34. **Highighi v. Bailer**, 240 A.D.2d 368, 657 N.Y.S.2d 774 (2d Dept. 1997).
35. **Gibson v. Worthington Division-of McGraw-Edison Company**, 78 N.Y.2d 1108, 578 N.Y.S.2d 127 (1991).
36. **Harrison v. City of New York**, 248 A.D.2d 592, 670 N.Y.S.2d 527 (2nd Dept. 1998).
37. **Hooper v. Anderson**, 157 A.D.2d 939, 550 N.Y.S.2d 196 (3rd Dept. 1990).
38. **Esposito v. D'Orsagna**, 240 A.D.2d 195, 658 N.Y.S.2d 277 (1st Dept. 1997).
39. 157 A.D.2d 76, 555 N.Y.S.2d 895 (3rd Dept. 1990).
40. **DaBolt v. Bethlahem Steel Corp.**, 459 N.Y.S.2d 503 (4th Dept. 1983); **Reinitz v. Arc Electric Co., Inc.**, 104 A.D.2d 247, 483 N.Y.S.2d 821 (3rd Dept. 1984); **Rosenbaum v. Lefrak Corp.**, 80 A.D.2d 337, 438 N.Y.S.2d 794 (1st Dept. 1981).
41. 249 A.D.2d 948, 672 N.Y.S.2d 567 (4th Dept. 1998).
42. 245 A.D.2d 1038, 667 N.Y.S.2d 561 (4th Dept. 1997).
43. 84 A.D.2d 630, 444 N.Y.S.2d 274 (3rd Dept. 1981), **modified on other grounds**, 55 N.Y.2d 1032, 449 N.Y.S.2d 710 (1981).
44. 237 A.D.2d 936, 654 N.Y.S.2d 910 (4th Dept. 1997).
45. NYTJ 5/2/95, page 28 col 5 (Goldstein J., Queens County).
46. **Russin** at 318, 445 N.Y.S.2d at 130.
47. **Leon v. J&M Peppe Realty**, 190 A.D.2d 400, 408, 596 N.Y.S.2d 380, 384 (1st Dept. 1993).

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HE SLIPPERY MATTER OF EFENSES TO LABOR LAW 241 (6)

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3. Industrial Code §23-1.7(d) entitled **Shipping Hazards** provides: Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

dustrial Code §23-1.7(e) entitled **Tripping and Other azards** provides: (1) Passageways. All passageways shall be ept free from accumulation of dirt and debris and from any ther obstruction or conditions which could cause tripping. nop projections which could cut or puncture any person nall be removed and covered. (2) Working Areas. The parts f floors, platforms or similar areas where persons work or ass shall be kept free from accumulations of dirt and debris nd from scattered tools and materials from shop projections s may be consistent with the work being performed.

9. **Akins v. Baker**, 247 A.D.2d 562, 669 N.Y.S.2d 63 (2nd Dept. 1998); **Farina v. Plaza Construction**, 238 A.D.2d 158, 655 N.Y.S.2d 952 (1st Dept. 1996) and **Fox v. Westchester Resco**, 229 A.D.2d 466, 644 N.Y.S.2d 998 (2nd Dept. 1996) for §23-1.7(d) and **Colucci v. Equitable Life Assurance Company of United States**, 218 A.D.2d 513, 630 N.Y.S.2d 515 (1st Dept. 1995) for §23-1.7(e).

0. **Dugandzic v. NYC School Construction Authority**, NYLJ 11/14/97, page 28 column 6 (Goldberg J., Kings County).

1. **Walsh v. Kidder Peabody**, NYLJ 8/15/97, page 21, column 3 (Miller J, New York County).

2. **Soukup v. Herbert Construction Co.**, NYLJ 12/5/95, page 25 column 4 (Miller J, New York County).

3. **Gist v. Central School District No. 1**, 234 A.D.2d 976, 651 N.Y.S.2d 818 (4th Dept. 1996).

4. **Basile v. ICF Kaiser Engineer Corp. LTV**, 227 A.D.2d 959, 643 N.Y.S.2d 854 (4th Dept. 1996).

5. **Finch v. Conrail**, 241 A.D.2d 952, 661 N.Y.S.2d 327 (4th Dept. 1997).

6. **Sharrow v. Dick Corporation**, 233 A.D.2d 858, 649 N.Y.S.2d 281 (4th Dept. 1996).

7. **Adams v. Glass Fab, Inc.**, 212 A.D.2d 972, 624 N.Y.S.2d 583 (1st Dept. 1998).

8. **Amato v. State**, 241 A.D.2d 400, 660 N.Y.S.2d 576 (1st Dept. 1997).

9. **Gielow v. Rosa Coplon Home**, 245 A.D.2d 1038, 674 N.Y.S.2d 551 (4th Dept. 1998); **Scarpa v. Lockport Energy Associates**, 245 A.D.2d 1038, 667 N.Y.S.2d 561 (4th Dept. 1997).

60. **Cottone v. Dormitory Authority of State of New York**, 225 A.D.2d 1032, 639 N.Y.S.2d 631 (4th Dept. 1996).

61. 241 A.D.2d 391, 660 N.Y.S.2d 416 (1st Dept. 1997).

62. **Id**. at 392, 660 N.Y.S.2d at 417-418.

63. **Zimmer** at 520, 493 N.Y.S.2d at 105.

64. **Id**. at 522, 493 N.Y.S.2d at 105.

65. **Irwin v. St. Joseph's Inter Community Hospital**, 236 A.D.2d 123, 665 N.Y.S.2d 773, 779-780 (4th Dept. 1997).

66. **Keleher v. First Presbyterian Church of Lockport**, 158 A.D.2d 946, 551 N.Y.S.2d 708 (4th Dept. 1990).

67. **Rodriguez v. City of New York**, 232 A.D.2d 621, 648 N.Y.S.2d 989 (2nd Dept. 1996).

68. **Leon** at 412, 596 N.Y.S.2d at 387.

69. **Ross** at 502, 601 N.Y.S.2d at 53.

70. 91 N.Y.2d 343, 351-352, 670 N.Y.S.2d 816, 820-821 (1998).

71. **Id**. at 347, 670 N.Y.S.2d at 817.

72. **Id**., 670 N.Y.S.2d at 818.

73. **Id**. at 350, 670 N.Y.S.2d at 819.

74. **Id**. at 351, 670 N.Y.S.2d at 820.

75. **Ross** at 503, 601 N.Y.S.2d at 54.

76. **Zimmer** at 522, 493 N.Y.S.2d at 105-106.

77. **McGurran v. DiLanio Planned Development Corp.**, __A.D.2d__, 674 N.Y.S.2d 706 (2nd Dept. 1998); see also **Strunk**, __A.D.2d__, 674 N.Y.S.2d 420 (2nd Dept. 1998); **Finch**, 241 A.D.2d 952, 661 N.Y.S.2d 327 (4th Dept. 1997); **Vincent v. Dresser Industries**, 172 A.D.2d 1033, 569 N.Y.S.2d 296 (4th Dept. 1991); **Brooks v. Ogden Projects, Inc.**, NYLJ 7/14/94, page 29, column 5 (Oshrin, J., Suffolk County).

78. 225 A.D.2d 530, 638 N.Y.S.2d 752, 753 (2nd Dept. 1996).

79. **Id**.

80. 61 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).

81. **Id**. 638 N.Y.S.2d at 754.

82. 237 A.D.2d 783, 654 N.Y.S.2d 860 (3rd Dept. 1997).

83. **Id**. at 785, 654 N.Y.S.2d at 862.

84. **Id**.

85. **Id**.

86. 247 A.D.2d 889, 668 N.Y.S.2d 793, 795 (4th Dept. 1998).

87. **Id**.

88. **Id**.

89. JEROME PRINCE, RICHARDSON ON EVIDENCE, 10th Edition §93 at 60 (10th Ed. 1973).

90. 67 A.D.2d 89, 97-98, 414 N.Y.S.2d 718, 723 (2nd Dept. 1979).

91. ___A.D.2d___, 679 N.Y.S.2d 583 (1st Dept. 1998).

DANY AWARDS 1999 PINCKNEY AWARD TO RALPH V. ALIO AND LIEUTENANT GOVERNOR MARY O. DONOHUE

Ralph V. Alio

Lieutenant Governor Mary O. Donohue

On March 25, 1999, the Defense Association of New York presented the Charles C. Pinckney Award to Ralph V. Alio and to Mary O. Donahue, Lieutenant Governor, State of New York.

DANY 1999 winner Ralph V. Alio, Lt. Governor Mary O. Donohue with DANY President Ed Hayes.

Ralph V. Alio received his JD from St. John's University in 1966. He has dedicated his entire career to insurance defense work. During his thirty year career he served as attorney of record and AVP of litigation for Continental Insurance and CNA. He has been an avid supporter of the defense community, serving as editor of the "Defendant," President and Chairman of the Board of DANY 1978-79. He continues to serve as a member of DANY's Board of Directors. Among his significant contributions to DANY was the establishment of the monthly seminar series, which is now in its 20th year.

He has been an active member of the Defense Research Institute serving as areas chairman, State chairman, regional vice president and Director. He has been the recipient of DRI's Outstanding Service Award and Exceptional Performance Award.

Mr. Alio was the former Chairman of the Insurance and Negligence section of the Suffolk County Bar and a member of the Insurance Compensation committee of the New York State Bar. He has lectured before numerous groups including Defense Research Institute, the Defense Association of N.Y., the Defense Association of N.J., Suffolk County Bar Association and Insurance Industry groups.

Mary O. Donahue was elected to serve as Lieutenant Governor of the State of New York on November 4, 1998, Mary Donahue was an integral part of Governor Pataki's reelection team. She traveled the state campaigning on the Governor's record of cutting taxes, reducing crime, cleaning up the environment and creating opportunities for individuals trapped on welfare.

In 1996, Lieutenant Governor Donahue was elected to the State Supreme Court for the Third Judicial District by an impressive 20,000 vote margin in a six-way race. Prior to her service as the first female State Supreme Court Justice from Rensselaer County, the Lieutenant Governor was

Lt. Governor Mary O. Donohue

elected as Rensselaer County's first female District Attorney in 1992, and was reelected in 1995 with 70 percent of the vote.

During her tenure as District Attorney, she compiled an impressive crime-fighting record and ran for reelection with a 98 percent felony conviction rate. As District Attorney, Donahue attained wide-ranging respect for her expertise in many criminal justice areas, including domestic violence, child abuse, the death penalty and juvenile justice. She personally tried cases ranging from murder and attempted murder to sexual abuse, all of which resulted in convictions, and she also oversaw nearly 5,000 criminal prosecutions each year.

In 1996, Governor George E. Pataki appointed Donahue chair of the Capital District Women's Advisory Council. This appointment followed her 1994 service to then Governor elect Pataki's Transition Team for Criminal Justice.

Prior to her service as Judge and District Attorney, the Lieutenant Governor was a teacher and an attorney. A graduate of the College of New Rochelle, Donahue taught elementary and junior high school in Rensselaer and Albany County school districts. During her 10-year teaching career, Lieutenant Governor Donahue earned a Master's of Science in Education from Russell Sage College.

DANY Board Members Angela Pantony, Lieutenant Governor Donohue, Board member Sha and President Ed Hayes.

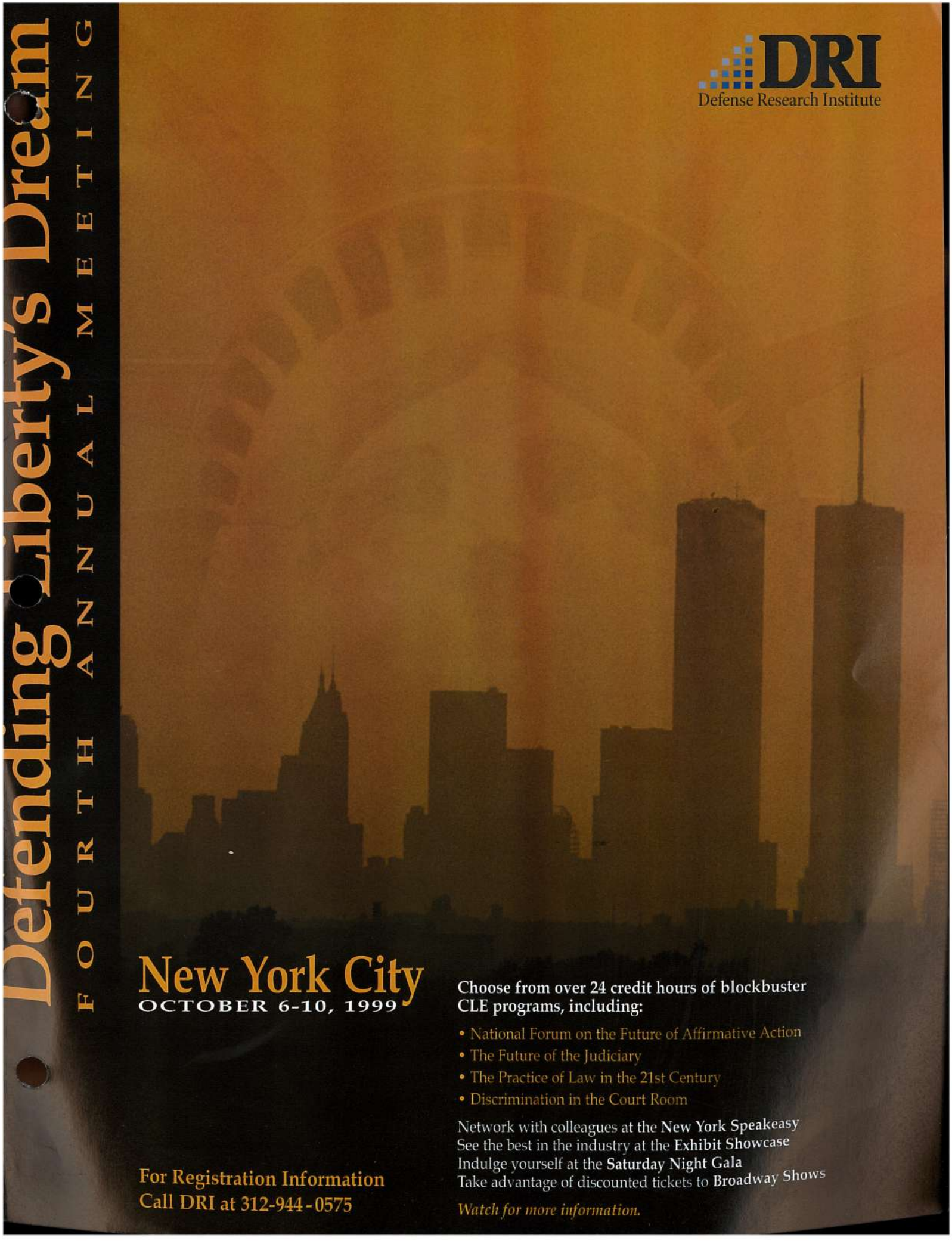
In 1980, the Lieutenant Governor entered law school at Albany Law School of Union University, where she earned a Juris Doctor degree in 1983. During law school, she served as a law clerk and intern in the U.S. Attorney's Office in Albany and worked on the staff of Senator Joseph L. Bruno.

After graduating from school, Lieutenant Governor Donahue was admitted to the New York State bar and worked as an associated attorney with O'Connell and Aronowitz, P.C. in Albany until 1988. From 1988 to 199[illegible] she ran her own law practice in Troy. From 1990 to 199[illegible] the Lieutenant Governor also served as Assistant Rensselaer County Attorney, representing the county in litigation matters and in Family Court, thereby gaining invaluable experience in areas including juvenile justice and other issues affecting children.

The Lieutenant Governor was born and raised in Rensselaer County. She is the mother of two children, Sara, 20 and Justin, 10.

DANY Board Chairman John J. McDonough, Dick O'Keefe, and President Ed Hayes congratulate the 1999 Pinckney Award winners, Ralph V. Alio and Lieutenant Governor, Mary O. Donohue.

Ralph V. Alio being congratulated by past Pinckney Award winner John J. Moore,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