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DEFENDANT

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

FEATURING:

DISCOVERING ELECTRONIC EVIDENCE

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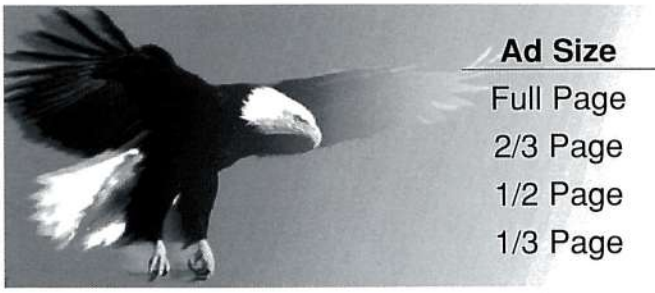

Ad Size	Per Insertion
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1/2 Page	275
1/3 Page	175

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Deadlines are two weeks prior to the printing date.

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Call for details about our low cost insert service.

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Third Page (Vertical)	2 3/8"		10"
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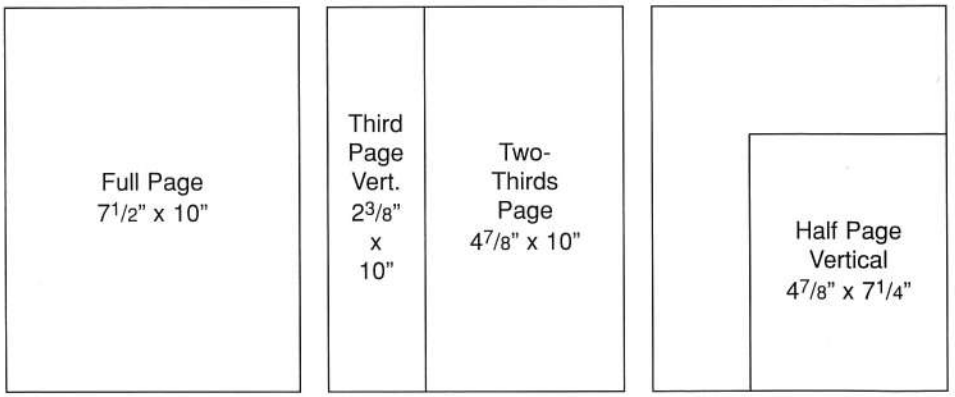

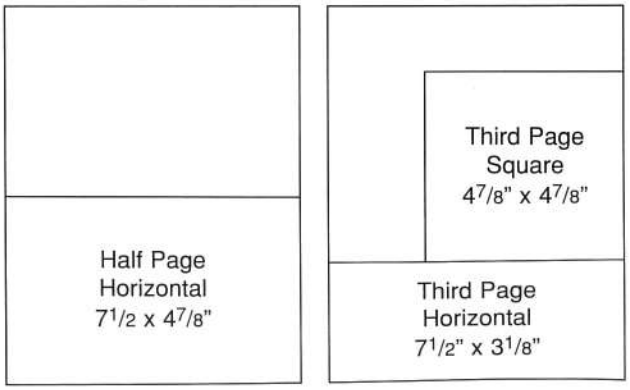

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EDITOR'S MESSAGE

by John J. McDonough

During the summer of 2000 DANY held a highly successful Breast Cancer fundraising social which raised in excess of $10,000.00 for breast cancer research efforts.

This issue of THE DEFENDANT will include a special commemorative section saluting the honorees at the event: Hon. Michael A. L. Balboni, Milo Riverso, President and CEO, New York City School Construction Authority and William R. Jacobi, Divisional President, AIGTS for their unending support and personal commitment to breast cancer research. Due to the extraordinary efforts of the Committee members, Gail L. Ritzert, Kevin F. McCormick, Peter J. Madison and Jeanne A. Cygan and the great response of the membership, this fundraiser will provide much needed dollars to combat this illness.

This Journal has been in continuous publication for well over twenty years without any advertising. Production costs have compelled us to begin to accept advertisements, but we will do so only on a highly discriminatory basis.

I would like to welcome Nannery Investigations to The Defendant. Nannery Investigations has been serving the legal community for over a decade. Their reliability has earned them an impeccable reputation in all areas of investigation from surveillance to trial preparation. We are proud to have them among the premiere advertisers in The Defendant and look forward to a long and mutually beneficial association with them.

DISCOVERING ELECTRONIC EVIDENCE - PART I

*by John J. McDonough **

I. INTRODUCTION

Twenty five years ago, computers were used as oversized calculators, to quickly perform complex mathematical analysis, and as glorified filing cabinets, given their ability to store vast amounts of data. Over time, the business world's use of and reliance upon computers has dramatically increased.

Today, computers are used in almost all record analysis and retention, word-processing, and communication functions. Computers also serve as mail carriers, with the use of electronic mail and the Internet. Some companies even have moved to "paperless" offices, thereby entrusting all document creation and record retention to computer technology.

Given the ever-expanding reliance upon computer technology, parties have begun to recognize the value of seeking discovery of computerized or electronic data. While the parameters of permissible discovery and the responsibility for the costs that result from discovery requests for electronic data still are being defined, "today it is black letter law that computerized data is discoverable." **Anti-Monopoly, Inc. v. Hasbro, Inc.**,1995 WL 649934 (S.D.N.Y.)

Parties must recognize both the extent of information that may be discovered through electronic data requests and the potential issues created by requests for their electronic data.

It would be difficult to overstate the detriment suffered by some Americans, (e.g. Oliver North, Bill Clinton and Bill Gates) who have been obliged to produce their electronic data in civil discovery proceedings.

"The electronic information revolution is...as profound as the printing press revolution in its potential impact on cultural and social patterns for creating and using information." H. Perritt, Jr. **Electronic Records Management and Archives**, 53 U. Pitt. L. Rev. 963, 980-81 (1002).

One explanation for the increasing attention now being given to the discovery of electronic data may lie with the fact that until relative recently, few people and

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DISCOVERING ELECTRONIC EVIDENCE

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certainly very few lawyer or judges had acquired any meaningful experience or skill in using computers. This shared ignorance might easily have discouraged all but the most adventurous and their counsel from exploring the foreboding frontier of electronic data discovery. However, today as one court observed: "From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development." **Bills v. Kennecott Corp.**, 108 F.R.D. 459, *Practitioner's Overview of Digital Discovery*, 33 Gonz. L. Rev. 347, 348 (1997).

In the past ten years, virtually everyone, including members of the corporate and legal communities have become more sophisticated in their understanding and use of computer and computer data. Still, for the most part, the restraint among litigants regarding the discovery of an adversary's electronic records has long continued. Perhaps initial intimidation engendered by ignorance has been supplanted more recently by reluctance spawned from a common sense of "mutual assured destruction", considering the potentially enormous expense of engaging in reciprocal electronic data discovery.[1] Yet, despite the chill of reciprocation, a growing number of litigants are emboldened to engage in electronic data discovery by an increasingly irresistible allure: **electronic mail.**[2]

Judicial opinions, news reports and, for that matter, internet chat rooms regularly discuss examples of long forgotten and presumably destroyed electronic mail that was subsequently uncovered in litigation by an adversary through discovery and admitted into evidence with devastating effect at trial.[3] As one civil litigator observed: "Most sophisticated business persons have been trained not to put damaging things on paper, but I don't think the culture's gotten there on e-mail, because people don't think of them as documents. People think of them a lot like telephone conversations." John Willems, litigation partner at White & Case, New York City, as quoted in *Electronic Discovery Proves Effective Legal Weapon*, The New York Times, March 31, 1997. In part, the recurring circumstance in which compromising electronic data is exposed through civil discovery proceedings results from a widely shared naivete among executives, managers and employees of most public and private organizations regarding basic computer operating systems and applications. Foremost among common misconceptions is the belief that an electronic message or "email", once deleted by the sender or recipient , is destroyed and unrecoverable, hence undiscoverable. This is, of course, simply untrue.

A simplified explanation of the basic computer technology underlying the "delete" mechanism exposes the myth[4] Generally, a computer's operating system keeps a record of every data file present on its storage device (e.g., its hard disk drive). Depending on the system, the record is maintained in an electronic directly called a file allocation table, a master file table, or less frequently a VTOC (volume table of contents). This directory tracks all of the space on the storage device that's available to record data at any given time.[5]

Typically, a computer's storage device is comprised of several round platters, which are coated with a magnetic medium. The platters are electronically formatted with circular tracks that run from the outside edge of the platter toward its center. Each trace is further divided electronically into sectors.[6] A sector is capable of holding 512 bytes of information, each of which in turn can hold 8 bits of information. A bit has been described as "the quintessential data element: it exists in only two states - binary 1 or 0, on or off".[7]

Because few documents are comprised of a mere 512 bytes of information, more than one sector is usually required to record a document. Thus, when a computer's hard drive is originally formatted, the operating system automatically collects the sectors into groups and assigns each group a unique address. These groups, ranging in size from a few sectors in number to more than 128 sectors, are called allocation units, blocks or clusters.[8] The sectors comprising a specific cluster may be located in a variety of different areas on the platter. However, a cluster's sectors are usually situated contiguously, to maximize the computer's search and retrieval speed. As a rule, only one file is recorded on a cluster of sectors. By rapidly distinguishing between used and available clusters on the platter, the computer's directory allocates an available cluster onto which a document's data can be recorded.[9]

Given this background, it's perhaps easier to understand the computer process of "deleting" a recorded document (a "file"). As previously noted, when "deleted", a file is not instantaneously eradicated. Instead, the file's directory entry is marked "invalid", effectively severing the link between the file's directory entry and its actual data. Consequently, the sectors storing the "deleted" file data are released and, thus, made available to be overwritten with new data.[10]

It's difficult, however, to predict if, when or how much of any released sector will actually be overwritten with new data. Certainly, a computer system's data storage capacity and amount of activity affects the chances that deleted data will be overwritten on a released sector within a specific time period. The chances that data will

be overwritten are further influenced by the operation of some common computer processes, which tend either to reserve data or destroy it.[11] In any event, so long as it's not overwritten, the recorded data of a "deleted" file, or at least some portion of that data, can remain intact on a computer's storage device indefinitely and may, therefore, be recoverable. In this regard, it's important to remember that blocks or clusters of sectors bearing data of a "deleted" file will be overwritten only by data of a single "new" file. Thus, if the "new" file contains less data than the "deleted" file, then a fragment of the "deleted" data will not be overwritten with "new" data. Consequently, the surviving data fragment of the deleted file will be preserved for as long as the "new" file continues to occupy that block of sectors[12]

Concededly, the foregoing discussion does not adequately reflect the complexity of current technology. It should, however, serve to dispel the myth that deleted data cannot be discovered. It should also discourage any notion of diverting adversaries from discovering relevant electronic data with bald representations that the requested information is lost or deleted.[13] No sophisticated adversary will be put off by such contentions. And any organization that resorts to these excuses assumes a serious risk. According to one commentator:

> Few organizations actually know the full extent of the information they possess...It is not unusual to find even a relatively small organization possessing then of gigabytes[14] of data accumulated over the years - and not even remotely aware of the actual contents of all that data. Institutional databases spanning terabytes[15]...are becoming more common - and will proliferate in the future.[16] The simple fact is that most organizations simply don't have a clue as to what is in all that data. Or at least they don't until they are forced to produce it and then they wish they had been a bit more careful in their data acquisitions patterns.[17]

If the commentator is correct in his conclusions, then your own organization may be awash in an unnecessarily vast universe of potentially discoverable and possibly harmful electronic information. It is this universe of data that, sooner rather than later, an adverse litigant will try to recover from your organization through civil discovery.[18]

II. WHAT CAN BE DISCOVERED

A. Types of Electronic Data

1. E-mail

Discovery of electronic mail, or e-mail, is one of the most contentious areas of modern litigation. A recent survey has 98.7% of businesses reporting, the use of e-mail, representing a larger number than those using the telephone.[19] The Yankee Group, a market research firm, estimates 263,000 e-mail addresses exist worldwide, and the average white collar worker sends 30 e-mails per day. In 1998, 3.4 trillion e-mail messages were sent worldwide, compared with just 107 billion pieces of first class mail.[20] Thirty two million American workers can now access the Internet from work and thirty seven million American adults access the Internet from home.[21] The result is a deep well of electronic information just waiting to be discovered.

This well is not only deep, it is also wide. Despite evidence to the contrary, most employees still use e-mail under the mistaken assumptions that e-mail can be permanently deleted, and that e-mail is private. To the contrary, e-mail is rarely effectively deleted.[22] E-mail is not subject to an independent privilege,[23] and is also not private if sent over an employer's e-mail system.[24] One court has gone as far as to say that there is no reasonable expectation of privacy in e-mail transmitted over an employer's computer system, even where the employer has told its employees that e-mail communications will remain confidential.[25]

Given these commonly held misconceptions, the content and grammar of e-mail communications is usually very different from paper documents. E-mails area not signed and are rarely reviewed before being sent.[26] They often contain comments or messages that one would not typically memorialize in written correspondence.[27] As a result, e-mails often contain conversations that would previously have been left at the office water-fountain.

E-mails can also be easily taken out of context. As words appearing on a flat screen, without accompanying facial expressions, vocal inflections and body language, they can often lead to misinterpretation. In an e-mail it is very easy for baseless opinion to appear like fact.[28] Unnecessary e-mail communications have become the bane of modern attorneys.

2. Network Logging Records

The last decade has seen the exponential growth of the Internet, and business networks. Proxy servers, attached to the networks, generate detailed logs showing which machine and user accessed which sites and what data was returned to them. Access to these logging records can prove fertile information, particularly in sex discrimination cases where, for instance, discovery can lead to evidence that a party regularly visited pornographic web sites.

Networks may also contain very personal and candid profiles on users. It is dangerous to assume what sorts of relevant information may be stored on a network. Unfortunately, network-logging records can become quite large and are routinely discarded by network administrators. Therefore, you should attempt discovery early and often.

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3. Application Data

When running a typical application, including human resource applications, such as Word, Access and Excel, the computer will store much more information than what you see on the screen, or in a printout. This information can include evidence of earlier versions or revisions of a document, or even previous authors and recipients - which can prove invaluable when attempting to prove spoliation[29] or impute knowledge upon a particular party.

B. Sources of Hidden Data

1. Hard Drives

Federal Rule of Civil Procedure 34(b) permits a party to inspect documents "as they are kept in the usual course of business." This includes the inspection of documents in their electronic source. Often counsel, and sometimes their clients, will not know the full extent of their organization's technology resources. Researching the extent of such resources, however, is the responsibility of all careful litigants. It is important to make sure all responses to production requests include every place the information you seek may be found, including the electronic copy of information. Unlike paper discovery, a party wants the "dump truck" response wherever possible - this is often the best way to find the 'smoking gun'.

So far, courts have been willing to allow broad discovery of electronic data. In *Gates Rubber Co. v. Bando Chemical Industries Ltd.*,[30] the court ordered a site inspection and directed that no records be destroyed. The court permitted discovery of all computerized files, and access was granted to the opponent's entire hard drive. The court later criticized the plaintiff's computer expert for not cloning[31] the drive, noting that a party has "a duty to utilize the method which would yield the most complete and accurate results."[32]

2. Backups and Archives

Ensuring the safety of electronic data by making regular backups of all, or significant parts, of the computer system is now standard business practice. Generally speaking, most organizations backing up to tape use between three or ten tapes that are rotated on a regular, scheduled basis, with a few offsite copies for disaster recovery. Immediate discovery, or a protective order, may prove vital as the oldest backup you may hope to recover may only be between ten and twenty-one days old.

Sometimes an organization may only back up the new files in its system, therefore old files may remain untouched for years. With tape backups, the ends of tapes may remain uncovered for significant periods of time and this "off the end" data may prove invaluable.[33] The possibility of old, yet still valuable, information being stored on an old or supposedly damaged computer should not be overlooked. If there is a problem with a computer's drive reading mechanism, the drive itself, and the information on it, may still be viable.

3. Desktop Computers and Workstations

An employee's personal computer, or standalone workstation, may store information that has been deleted off the network. Employees tend to develop a habit of copying files onto their personal hard drives, or onto floppy disks for transportation. This can provide a useful source for information that has been deleted, as often employers will remain completely unaware of its existence.

4. Laptops, Palm Tops and Home Computers

In *Northwest Airlines, Inc. v. Local 2000, International Brotherhood of Teamsters, et al.*,[34] a Minnesota court ordered the search of NWA employees home computers to find evidence of an organized 'sick out.' Other courts have also accepted that even personal hard drives may be the subject of discovery orders.[35] Home computers, laptops and palmtops are all potential storage devices for information that may have been purged from an organization's network. Laptops and palmtops can be, and frequently are, used to send and receive potentially damaging e-mails.

5. Telephone (Voice Messaging) Systems

Modern telephone systems are computer based. In many cases, messages may remain undeleted for months, or years, even though the intended recipient has 'deleted' the message. However, the process of recovery can be labor intensive and quite expensive. In some cases, employees working from home, or temporary offices, have created their own messaging systems.

6. Internet, WAN's, LAN's,Third-Party Repositories, Service Providers

A WAN, wide area network, or LAN, local area network, is essentially any network of interconnected computers, of which the Internet is probably the largest example. Understanding the topography of a network may lead to discovery of information that an adversary claims to have deleted long ago. Recently, there has been an

increase in storage of files offsite on the world wide web [WWW], or in third party repositories. Organizations will rarely volunteer the existence of these offsite storage facilities unless specifically requested.

Information may be inadvertently stored in offsite repositories. For instance, e-mails are often copied as they pass through service providers. Offsite newsgroups or chat rooms can be ripe with relevant information,[36] and conducting a quick search is relatively inexpensive. Service providers and mail carriers, such as America On Line [AOL], can be subpoenaed to produce copies of emails, or discussions conducted through its service. AOL, in particular, keeps backups of activities on its system and is known for prompt compliance with process.[37]

III. DISCOVERY OF ELECTRONIC DATA

C. Discoverability of Electronic Data

The Federal Rules of Civil Procedure 34(a) states that "[a]ny party may serve on any other party a request (1) to produce...any designated documents (including...data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form)..."[38]

1. "Documents"

The Federal Rules of Civil Procedure were revised in 1970. The Advisory Committee's Note to the changes explains that the "inclusive description of 'documents' [was] revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices..." Courts have held that discovery of electronic information is both necessary and proper, even if the data is not as easily accessible as traditional forms of information, such as paper documents.[39] In1993, the Seventh Circuit finally laid to rest the question of whether "document" included electronic data.[40] "Today it is black letter law that computerized data is discoverable if relevant."[41]

2. "Reasonably Usable Form"

The Federal Rule of Civil Procedure 34(a) provides that discoverable data must be produced in a "reasonably usable form", and courts will therefore ensure that the party requesting the information is able to access the data. As early as 1978, the Supreme Court ordered a litigant to extract and produce relevant data from its own databases, even though this may have required the respondent to create a new program to retrieve the data.42 Two years later, a Pennsylvania court followed suit by ordering a party to cause its computer experts to create a computer-readable tape containing data furnished by them in answer to interrogatories. 43 The Court reasoned that this would be no different from ordering the party to make a photocopy. Subsequent courts have held that, absent a showing of extraordinary hardship, "[t]he normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent."44

▲

[1] "Yes, I know we shipped 100 barrels of [deleted], but on our end, steps have been taken to ensure that no record exists. Therefore, it doesn't exist. If you know what I mean. Remember, you owe me a golf game next time I'm in town."

[2] "Did you see what Dr.[deleted] did today? If that patient survives it will be a miracle."

[3] "HI DAVID, PLEASE DESTROY THE EVIDENCE OF THE [litigation] YOU AND I TALKED ABOUT TODAY. THX
LAURA"
(**Response**) "***EVIDENCE DESTROYED*** HI LAURA ACK YR MSG. AND TAKEN CARE OF. ALOHA
DAVID"

And another example from Jessen, as quoted during his interview on CBS Television's 60 Minutes broadcast of June 16, 1996 in a segment entitled *For Your Eyes Only*?:

> "Eric, the papers have been signed and [deleted] bank is now the owner of Parcel 15. We've made it through the whole process without alerting them to the old waste site on the Northwest Side"

[4] This author does not presume to have the expertise required for the explanation provided in the text. The succeeding discussion is based on J. Saperstein, *Uncovering Electronic Evidence: The Use and Abuse of Discovery in the Age of Technology*, (1999-2000), an article privately published and distributed by the commentator. Additionally, this author he relied on information generally provided by Ken Shears of Electronic Evidence Discovery, Inc., which is gratefully acknowledged.

[5] Saperstein, at 42.

[6] Saperstein , *Id.*

[7] Saperstein, *Id.*

[8] Saperstein, *Id.*

[9] Shear explains that a computer's operating system only deals with allocation units (clusters) to store data files. In assigning addresses via its register or tracking available storage space through its directory, a computer does not monitor sector-level information. See n. 6, supra.

[10] *Id.* According to Shear, several consequences may result from severing the link between the "deleted" data and its directory entry. For example, once the deleted data has been overwritten, a file name may remain in the directory without any associated data. Or the directory entry's space may be reused, leaving fragmentary data on the storage device that lacks a file name. Or both the directory entry of the "deleted" file and the file's "deleted" data may remain intact, and therefore, subject to being "undeleted". Or, of course, both the "deleted" data and its directory entry may

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be overwritten, and for all practical purposes unrecoverable.

[11] Shear cites "swap files" as an example of a process that tends to destroy data. "Swap files" are defined as hidden files on the computer hard drive that hold parts of programs and data files that don't fit on the computer's memory, thereby temporarily enhancing the computer's memory capacity. "The operating system moves data from the swap file to memory as needed and moves data out of memory to the swap file to make room for new data." The Computer Dictionary (Fourth Edition); Microsoft Press 1999. As a consequence of this function, large segments of "deleted" data are overwritten at one time. Program features that automatically save open files to a storage device at specific intervals, thereby assuring that current changes to a document are preserved ("autosave"), obviously exemplify processes that tend to preserve data.

[12] For this reason, special permanent deletion software is available that "wipes" the storage device of all data from a "deleted" document, when it's deleted. However, Saperstein warns, routinely overwritten and even wiped data may still be recoverable through chemical and electron microscopy techniques.

[13] *Id.* In circumstances involving the alleged deletion of relevant data by a discovery respondent's employee, a requesting party has been permitted to enter the respondent's premises and copy the respondent's computer hard drives in order to obtain all deleted data not yet overwritten by the respondent's computer operations. See Gates Rubber Co. v. Bando Chemical Industries, Ltd., 167 F.R.D. 90, 100 (D. Colo. 1996) (regarding the "Site Inspection Order"). See also J. Howie, Jr. *Electronic Media Discovery: What You Can't See Can Help (or Hurt) You*, Trial (January 1993) at 70. The availability of this recourse to an adversary is particularly important to keep in mind, should your organization confront discovery requests for the production of electronic records that have been deleted.

[14] A gigabyte is defined as 1024 megabytes (1024 x 1,048, 576 bytes)[or commonly, one billion bytes]. The Computer Dictionary (Fourth Edition); Microsoft Press 1999. Saperstein equates a gigabyte to approximately 488,000 typewritten pages of information. See n. 18, infra.

[15] A terabyte, a measurement used for high capacity data storage, is defined as 1,099, 511, 627, 776 bytes [or commonly, one trillion bytes]. The Computer Dictionary (Fourth Edition); Microsoft Press 1999. Saperstein equates a terabyte to 500,000,000 typewritten pages of information. See n. 18, infra.

[16] Shear warns that Saperstein's estimates are dated. Noting that it's currently difficult to find a hard drive with less than ten gigabyte capacity and that typical operating systems alone require over one gigabyte of capacity, Shear advises that some small organizations already maintain terabytes of data. Substantial portions of this data are not user-created, however, and presumably would not be relevant in civil discovery.

[17] Saperstein, at 44.

[18] Based on the operation of this technology, Saperstein predicts that a litigant should be able to recover all or part of an adversary's reportedly deleted electronic records, provided that: a) the litigant's discovery request and search of the adversary's storage devices are timely; b.) the adversary's computer system is not overly active; and c.)special software hasn't been used to scrub the adversary's computer storage devices clean.

[19] Saperstein, *supra n.* 6, at 23.

[20] EMarkerter, Internet marketing group, see also Saperstein, *supra n.* 6 at 24.

[21] The Strategis Group, *see also* Saperstein, *supra* n. 6 at 24.

[22] *See infra*, at p.7.

[23] *See* In Re Brand Name Prescription Drugs Antitrust Litigation, 1995 WL 360526 (N.D. Ill. 1995).

[24] *See* Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996)

[25] Restuccia v. Burk Tech., Inc., 1996 WL 1329386 (Mass. Super 1996).

[26] *See* B.A. Olmsted, Electronic Media Management and Litigation Issues When Delete Doesn't Mean Delete, 63 DEF. COUNS. J. 523-524 (Oct. 1996).

[27] *Id.*

[28]

[29] *See infra* at p.30.

[30] 167 F.R.D. 90 (D.C. Cir. 1996).

[31] i.e., providing an exact replica.

[32] 167 F.R.D. 90 (D.C. Cir. 1996).

[33] Pooley and Shaw, *supra* n.27.

[34] 2000 WL 20881 (D.Minn. 2000).

[35] *See* Playboy Enterprise v. Welles, 60 F. Supp.2d 1050 (S.D. Cal. 1999).

[36] <www.deja.com>: maintains archives of thousands of news groups, going back several years.

[37] Saperstein, *supra* n.6.

[38] FED. R. CIV. PRO. 34(a).

[39] Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (W.D. Va. 1972).

[40] Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993), *reh'g denied*, 1993 U.S. App. LEXIS 15995 (7th Cir. 1993).

[41] Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 WL 649934 (S.D.N.Y. 1995)

[42] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

[43] National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980).

[44] Daewoo Elec. Co. v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986), *aff'd in part, rev'd in part*, 6 F.3d 1511 (1993).

WORTHY OF NOTE

*by John J. Moore **

*Christine Moore ***

JUROR - CONVERSATION

In **Garcia vs. Brooklyn Hospital** (___A.D.2d___) 704 N.Y.S. 2d 635), the Second Department indicated that an alleged conversation between a juror and defense counsel, in which the juror expressed condolences for the death of the defense council's mother, was not prejudicial to the plaintiff's medical malpractice case and did not warrant a new trial.

A jury verdict may be impeached upon a showing of improper influence, including well intentional conduct, which tends to put the jury in possession of evidence not introduced at time of trial.

DISCLOSURE - NAME AND ADDRESS OF WITNESS

A plaintiff's failure to produce the full addresses of certain witnesses did not require the preclusion of their testimony. The plaintiff made some effort to comply with the previous discovery order, and thus, it was not clear that the plaintiff's failure was willful.

The penalty of preclusion of evidence due to noncompliance with a discovery order is extreme and should be imposed only when the failure to comply is a result of willful, deliberate, and contumacious conduct or its equivalent, so indicated the Second Department in **Brown vs. United Christian Evangelistic Ass'n.** (___A.D.2d__), 704 N.Y.S.2d621).

APPEAL - IMPROPER SUMMATION - WAIVER

In **Lind vs. City of New York** (___ A.D.2d___, 705 N.Y.S.2d 59), the Second Department ruled that a defendants' claim that codefendant's attorney made several improper remarks during summation was unpreserved for appellate review. The defendants made only a general objections to those comments, and did not move for a mistrial.

ARBITRATION - JURISDICTION OF COURT - ELEMENTS

The Court of Appeals recently indicated that even in circumstances where a arbitrator makes errors of law or fact, the courts will not assume the role of overseers to conform the award to their sense of justice.

The Court may not vacate an award on the grounds of public policy when vague or attenuated considerations of a general public interest are at stake.

The Court may vacate an aware when it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on an arbitrator's statutory power. (**New York State Correctional Officers and Police Benev. Ass'n. Inc. vs. State of New York**, 94 NY2d 321, 704 N.Y.S.2d 910).

90-DAY NOTICE - ELEMENTS

The First Department recently ruled that a defendant's alleged failure to use registered or certified mail to send a 90-day notice of motion to dismiss for failure to prosecute a medical malpractice matter did not prejudice the plaintiff, and therefore did not constitute a jurisdictional impediment to the motion, where the plaintiff received the notice. (**Cecere vs. Peters**, ___A.D.2d___, 704 N.Y.S.2d 223).

EVIDENCE - INTERPRETATION OF AGREEMENT

It was recently indicated by the First Department that an interpretation of an unambiguous agreement presented a question of law for the court, without the need to resort to extrinsic evidence. (**Wald vs. Marine Midland Business Loans Inc.**, ___A.D.2d)___, 704 N.Y.S.2d564).

INDEMNIFICATION - PROCUREMENT OF INSURANCE - ELEMENTS

In **Reynolds vs. County of Westchester**, (___A.D.2d___,704 N.Y.S.2d651), the Second Department ruled that any construction contract purporting to indemnify a party for its own negligence is void and unenforceable, although the contracts requiring the parties to procure insurance are not similarly void.

SUMMARY JUDGEMENT - HOPE OF FUTURE EVIDENCE

The mere hope that evidence will be uncovered that will prove the plaintiff's case provides no basis for postponing a decision on a cross motion for summary judgment, so indicated the Second Department in **Sellars vs. Redondo**. (___A.D.2d___,704 N.Y.S.2d 643).

CONSTRUCTION - SCAFFOLD - ELEMENTS

The Second Department recently held that to prevail on a cause of action pursuant to scaffolding law the plaintiff must establish a violation of the statute and show that the violation was a proximate cause of his injures. (**Bahrman vs.**

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Holtsville Fire Dist., ___A.D.2d___, 704 N.Y.S.2d 660).**INSURANCE - OCCURRENCE - DEFINITION**

The Second Department recently submitted that an injury results from an "accident" when, from the point of view of the insured, the event was unexpected, unusual, or unforeseen. An unintended event is considered accidental for insurance purposes. (**American Ref-Fuel Co. of Hempstead vs. Employers Ins. Co. of Wausau**, ___A.D.2d___, 705 N.Y.S.2d 67).

INSURANCE - CANNOT CREATE - TIMELY DISCLAIMER

In **American Ref-Fuel Co. of Hempstead vs. Employers Ins. Co of Wausau**, (___A.D.2d___,705 N.Y.S.2d67), the Second Department ruled that the failure to timely disclaim coverage cannot create insurance which was never in effect or which could not have covered the liability in question under any circumstances.

Where a policy would otherwise cover a particular occurrence, but for an exclusion in the policy, the Insurance Law mandates that, under certain circumstances, the insurance carrier give written notice as soon as reasonably possible of the denial of liability predicated upon said exclusion. The delay of over four months in sending the notice of disclaimer was insufficient to satisfy the insurer's statutory obligation to give prompt written notice of disclaimer.

INSURANCE - LIABILITY OF BROKER - ADDITIONAL INSURED

In **St. George vs. W.J. Barney Corp.**, (___A.D.2d___), 706 N.Y.S.2d 24), the First Department ruled that while an insurance broker may have arguably breached its duty to its client, it was not liable to defend or indemnify the additional insured, to whom it owed no duty. The certificate of insurance contained a disclaimer stating that it was issued for information only, that it did not confer any rights on the certificate holder, and that it did not extend or amend the policy's coverage.

The certificate of insurance naming the subcontractor as an additional insured was not conclusive proof, standing alone, that such a contract existed.

INSURANCE - ASSAULT - EXCLUSION

The Second Department recently indicated in **Sphere Drake Ins. Co. PLC vs. Block 7206 Corp.**, (___A.D.2d___, 705 N.Y.S. 2d 623), that liability policies' assault and battery exclusions, encompassing claims "arising out of" an assault and battery caused by either the intentional conduct or negligence of the insured nightclub patron was allegedly assaulted in the club's parking lot by another patron who had allegedly been served alcoholic beverages by the insured after he was visibly intoxicated, and supported a disclaimer of coverage based on the exclusions.

DISCLAIMER - BURDEN OF PROOF

It is the responsibility of the insurer to explain a delay in giving notice of disclaimer, so indicated the Second Department in **Wasserheit vs. New York Cent. Mut. Fire Ins. Co.**, (___A.D.2d____, 705 N.Y.S.2d 638).

The failure by the insurer to give notice of disclaimer as soon as reasonably possible after he first learns of the accident or of the grounds for disclaimer of liability or denial of coverage, precludes an effective disclaimer or denial, even where the insured failed to provide the carrier with timely notice of claim in the first instance.

INSURANCE - EXCESS INSURER - NOTICE OF CLAIM - ELEMENTS

In **AAA SPRINKLER CORP. vs. General Star Nat'l. Inc. Co.**, (___A.D.2d___,705 N.Y.S.2d 582), the First Department submitted that a general liability insurer did not act in bad faith when it failed to notify its insured or the insured's excess liability carrier of the possibility of a judgment in excess of the primary policy limits; the insured was contractually obligated to notify its excess carrier of the likelihood of such a judgment and, although aware of such likelihood, failed to give its excess carrier the required notice.

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SUMMARY JUDGMENT - 3 1/2 INCH ELEVATION - QUESTION OF FACT

In **Holl vs. Holl**, (___A.D.2d___),705 N.Y.S.2d 783, the Fourth Department submitted that an elevation of a 3 1/2 inch high threshold in a doorway leading from a garage into the house constituted a dangerous or defective condition precluding summary judgment and presented a question of fact for the jury even though the condition was open and obvious.

GENERAL MUNICIPAL LAW - INSUFFICIENT NOTICE OF CLAIM

The Second Department recently indicated that a notice of claim that did not correctly of sufficiently describe the location of the roadway defect that allegedly caused the pedestrian to trip and fall prejudiced the village in its ability to conduct a meaningful investigation and thus precluded recovery, where the village did not learn of the correct location until 12 months after the accident when it received the amended notice of claim, so indicated the Second Department in **Ryan vs. County of Nassau**, (___A.D.2d___,705 N.Y.S.2d 398).

DAMAGES - RIGHT ARM AND ULNAR NERVES

In **Yanez vs. Kasenetz**, (___A.D.2d___, 705 N.Y.S.2d 588), the First Department indicated that an allegedly excessive damage award of 87,500 and $250,000 (over 35 years) for past and future pain and suffering, respectively, did not deviate materially from what was a reasonable compensation for a 35 year-old laborer who suffered and would continue to suffer pain and fatigue whenever he used that arm for a prolonged period of time, he could no longer lift heavy objects and often dropped things from his right hand, and he could no longer enjoy any activities he engaged in prior to the accident.

LIMITATIONS - WAIVER

In **Lefkowitz vs. Kaye, Scholer, Fierman, Hays & Handler** (___A.D.2d___, 706 N.Y.S.2d 176), the Second Department submitted that a defendant waived the statute of limitations defense by failing to plead it in the answer or in a preanswer motion.

A motion to dismiss does not qualify as a pre-answer motion in which the defense of statute of limitations could be raised, or was made after the time for service of the responsive pleading which had expired.

NEGLIGENCE - TRIVIAL DEFECT - ELEMENTS

The Second Department recently concluded that although the injuries resulting from trivial defects on a premises are generally not actionable, in determining the issue of triviality, one must examine all the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with a time, place and circumstances of the injury (**Sanna vs. Wal-Mart Stores, Inc.**, (___A.D.2d___, 706 N.Y.S.2d 156).

DISCLOSURE - PRECLUSION ORDER - ELEMENTS

In **Caccioppoli vs. Long Island Jewish Medical Center**, (___A.D.2d___, 706 N.Y.S.2d 145). The Second Department submitted that the trial court acted within its discretion in issuing a preclusion order for defendant's discovery violations. The defendant continued its adjournment of deposition over the course of several years, repeatedly failed to comply with stipulations and orders directing the deposition be completed by a date certain, and defendant offered inadequate excuses to explain its non-compliance.

DISCLOSURE - FAILURE TO PRESERVE - PRECLUSION

The Second Department recently held that sanctions were warranted for defendant's failure to preserve a ladder which the plaintiff allegedly fell and thus the defendant would be precluded from offering evidence with respect to the condition of the ladder, even if the loss of the ladder was negligence rather than intentional.

Where a crucial item of evidence is lost, either intentionally or negligently, the party responsible should be precluded from offering evidence as to its condition (**Yi Min Ren vs. Professional Steam Cleaning, Inc.**, ___A.D.2d___, 706 N.Y.S.2d 169).

PRODUCTS LIABILITY - DEFECTIVE DESIGN - ELEMENTS

In **Merritt vs. Raven Co.** (___A.D.2d___, 706 N.Y.S.2d 233) the Third Department recently put forth the elements necessary to establish a prima facie case of strict products liability alleging a design defect. It stated the plaintiff must show the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing the injury.

The action asserting strict liability requires an assessment of whether, if the defective design were known at the time of manufacturer, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.

SCHOOLS - DUTY OF CARE

In **Billinger vs. Board of Educ. Of Amityville Union School Free Dist.** (___A.D.2d____, 706 N.Y.S.2d 178), the Second Department submitted that while schools are under a duty to adequately supervise the students in their care, they are not insurers of the student's safety.

To establish a cause of action, a plaintiff must demonstrate that the school authorities had sufficient specific knowledge of notice of the dangerous conduct, which caused the injury, that is, that the third party acts could reasonably have been anticipated. There must be a showing that the breach of duty to provide adequate supervision was a proximate cause of the injury sustained.

An action would not lie against the city school board based upon an incident in which one student shot two other

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students in a school cafeteria injuring one and killing the other, where the school board established as a matter of law that it lacked notice of prior similar acts.

AUTOMOBILES - PROXIMATE CAUSE

The First Department recently indicated that a jury could conclude in a negligence action against the city, that the traffic enforcement agent was negligent in allegedly yelling and banging on a car in an effort to get the person seated in the driver's seat to move the car from a no-standing zone. The agent's order did not proximately cause injuries to the individual struck by that car when the person in the driver's seat, who had no knowledge of how to operate a car, attempted to move it. The evidence permitted the conclusion that the actions of the person inside the car were the sole proximate cause of the injury (**Ohdan vs. City of New York**), ___A.D.2d___, 706 N.Y.S.2d 419).

ACTION - COMMENCEMENT

The First Department recently indicated that an action is commenced upon the filing of the summons and complaint and not upon the service thereof upon a party (**Security Mut. Life Ins. Co. of New York vs. DePasquale**, ___A.D.2d___, 707 N.Y.S.2d 39).

LAW OF THE CASE - ELEMENTS

In People vs. Evans (94 N.Y.2d 499, 706 N.Y.S.2d 678), the Court of Appeals ruled that the law of the case doctrine is part of a larger family of kindred concepts, including res judicata or claim preclusion or collateral estoppel or issue preclusion which broadly speaking are designed to limit relitigation of issues.

Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair opportunity to litigate the initial determination. It addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment. It is aptly characterized as a find of intra-action res judicata.

While the doctrines of res judicata, claim preclusion and collateral estoppel or issue preclusion entail rigid rules of limitation, the doctrine of the law of the case is a judicially crafted policy that expresses the practice of the courts generally to refuse to reopen what has been decided and is not a limit to their power.

It can not apply in a court reviewing an order on appeal, it is designed to eliminate the inefficiency and disorder that would follow if courts of co-ordinate jurisdiction were free to over rule one another in an ongoing case and lastly, the doctrine is equally applicable in both criminal and civil cases.

DEFAULT - VACATING - ELEMENTS

The trial court acted within its discretion in excusing defendant's default in answering. The defendant demonstrated that although the default was due to a law office failure, it was clearly not willful or deliberate, so indicated the Second Department in **Lefkowitz vs. Kaye, Scholer, Fierman, Hays & Handler**, (___A.D.2d___, 706 N.Y.S.2d 176).

SUMMARY JUDGMENT - NECESSARY PAPERS

In **Heifets vs. Lefkowitz** (___A.D.2d___, 706 N.Y.S.2d 438) the Second Department held that papers opposing summary judgment consisting solely of an affirmation by plaintiff's attorney together with inadmissible hearsay documents, were insufficient to warrant a denial of the motion after a prima facie showing of entitlement.

TRIAL - WITNESS - IMPEACHMENT

In **Lind vs. City of New York**, (___A.D.2d___, 705 N.Y.S.2d 59), the Second Department ruled that in a personal injury action, a defendant was entitled to impeach the credibility of one of plaintiff's witnesses by admitting evidence of a prior inconsistent statement that the witness had made to an investigator.

RES JUDICATA - ELEMENTS

The Second Department recently indicated that pursuant to the doctrine of res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or if seeking a different remedy (**Eagle Ins. Co. vs. Facey**,___A.D.2d___, 707 N.Y.S.2d 238).

MALPRACTICE - ELEMENTS

In **Perrone vs. Grover** (___A.D.2d___, 707 N.Y.S.2d 196), the Second Department ruled that to establish a prima facie case of liability in a medical malpractice matter, a plaintiff must prove; (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of the injury.

The testimony of the patient's treating cardiologist was insufficient to demonstrate that the physician deviated from the accepted standards of care from failing to diagnose if the patient was suffering from pericardial effusion when he treated her at the hospital emergency room. To sustain the burden of proof, the plaintiff must establish expert opinion testimony that the defendant's conduct, deviated from the requisite standard of care.

PRE-ACTION DISCOVERY - ELEMENTS

In **Holzman vs. Manhattan & Bronx Surface Transit Operating Authority**, (___A.D.2d___,707 N.Y.S.2d 159),

the First Department ruled that a pre-action discovery may be appropriate to preserve evidence or to identify potential defendants. It cannot be used by a prospective plaintiff to ascertain whether there is a cause of action at all. The petition for pre-action discovery should be granted only where the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong.

A passenger who alleged, through counsel's pre-action affidavit, that he fell when existing a bus because of the negligent operation of the bus could not use pre-action discovery to determine whether the facts supported alternative theories of liability, such as a defect in the bus.

STRIKING FROM CALENDAR - DISMISSAL - ELEMENTS

In **Reynolds vs. 130 West 78th Street Associates, L.P.**, (___A.D.2d___,707 N.Y.S.2d82). the First Department ruled that a plaintiff failed to rebut the presumption of intentional abandonment arising from her failure to move to restore the base to the calendar for more than one year after it was marked off following a failure to appear at a conference, and thus, her motion to restore her action to the calendar was properly denied. Plaintiff took no action whatsoever to move the action toward resolution during the one year period during which she was in default and replying to defendant's counterclaims, and had not responded to defendant's outstanding discovery request.

SEVERANCE - ELEMENTS

In **Hopper vs. Regional Scaffolding & Hoisting Co. Inc.**, (___A.D.2d___, 707 N.Y.S.2d 633), the First Department indicated that a denial of a severance was a proper exercise of discretion even though the plaintiff was injured in two separate incidents. The two accidents, as alleged, shared a common injury-producing instrumentality, i.e., an elevator, and several common witnesses, there may have been an issue as to whether the injuries allegedly sustained in the second incident were exacerbations of injuries sustained in the first incident, and the potential prejudice identified by the defendant could be prevented by jury instructions.

EVIDENCE - EXPERT - BURDEN OF PROOF

The Second Department recently indicated that in order to establish the reliability of an expert's opinion, the party offering that opinion must show that the expert possess the requisite, skill, training, education, knowledge, or experience to render the opinion. The mere recitation that the expert was a licensed engineer was insufficient to establish that he was qualified to render the expert opinion regarding the safety of the retail store's shelving and shelf stocking practices in opposition to a summary judgment motion in a personal injury matter by a customer who was struck by a diaper box she was attempting to remove from the top shelf (**Hofmann vs. Toys - "R" -US-NY Limited Partnership** (___A.D.2d___, 707 N.Y.S.2d711).

LIMITATIONS - LEGAL MALPRACTICE

A claim to recover damages for legal malpractice accrues when the malpractice is committed and must be interposed within three years thereafter. In order to invoke the continuous representation rule for purposes of tolling the statute of limitations there must be clear indicia of an ongoing continuous, developing and defendant relationship between the client and the attorney, so indicated the Third Department in **Aaron vs. Roemer, Wallens & Mineaux, LLP**, (___A.D.2d___, 707 N.Y.S.2d 711).

INSURANCE - PROCUREMENTS - MAINTENANCE CONTRACTOR

In Keeley vs. Berley Realty Corp., (___A.D.2d___, 707 N.Y.S.2d 68), the First Department ruled that maintenance contractor that agreed in a contract to procure liability insurance naming the premise owner as additional insured but failed to do so, was responsible for all of the owner's damages, resulting from injuries to a pedestrian who tripped and fell in a pot hole in a parking lot, regardless of whose negligence, if anyone, caused the injuries.

INSURANCE - LOADING AND UNLOADING - ELEMENTS

The Second Department recently held that where an accident in question occurs during the loading and unloading of property from a vehicle covered by an automobile policy, the test as to whether the coverage is triggered under the policy does not require a showing that the vehicle itself produced the injury. It is however insufficient to merely show that the accident occurred during the period of loading or unloading and rather, the accident must be the result of some act or omission related to the use of the vehicle (**Eagle Insurance Ins. Co. vs. Butts**, ___A.D.2d___, 707 N.Y.S.2d 115).

DISCLOSURE - AFTER NOTE OF ISSUE - SECOND PHYSICAL EXAMINATION

In **Romero vs. City of New York** (___A.D.2d___, 708 N.Y.S.2d 156), the Second Department indicated that defendants in a personal injury action who requested prior to a retrial that plaintiff appear for an examination by a new physician because the prior physician was on a teaching sabbatical overseas, failed to demonstration unusual or anticipated circumstances warranting discovery after the filing of a note of issue, and could not conduct a further examination. The proper resolution was to adjourn the matter until the physician returned and any prejudice caused by the expense of securing the physician for trial was due to defendant" own failure to initially establish a reasonable fee and secure the physician's availability. The failure of the defendants to secure the availability of the physician who previously examined the plaintiff did not warrant the imposition of sanctions.

DAMAGES - WRONGFUL DEATH - 15 YEAR OLD

The Second Department recently stated that awards of $50,000 to a mother and $20,000 to a father for the wrongful death of their child, a 15 year old student who did not contribute monetarily to the household of either parent

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were adequate (**Johnson vs. Kings Long Island Medical Group, P.C.**, (___A.D.2d___,708 N.Y.S.2d 134).

Insurance - Exclusions - Elements - In Sampson vs. Johnston (___A.D.2d___,708 N.Y.S.2d 210), the Fourth Department ruled that exclusions from coverage under an insurance policy are to be read seriatim, and, if anyone exclusion applies, there is no coverage, since no one exclusion can be regarded as inconsistent with anther.

PLEADINGS - BILL OF PARTICULARS - AMENDMENT - ELEMENTS

In DeNicola vs. Mary Immaculate Hospital, (___A.D.2d___, 708 N.Y.S.2d 152), the Second Department ruled that a defendant medical malpractice plaintiff denominated a "supplemental verified bill of particulars" when in fact it was an amended bill of particulars, as it sought to add new injuries. While leave to amend a bill of particulars, is ordinarily to be freely given in the absence of prejudice or surprise, when leave to amend a bill of particulars is sought on the eve of trial, judicial discretion should be exercised in a discreet, circumspect, prudent and cautious manner.

Where there has been an inordinate delay in seeking leave to amend, the plaintiffs must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment.

Allowing the patient to serve an amended bill of particulars in 1998, alleging additional injuries including the amputation of his leg, was an improvident exercise of discretion. The alleged malpractice occurred in 1991, the action was commenced in 1993, and while the amputation occurred in 1994, no reasonable excuse was offered in seeking to add it as a new injury, nor did the patient submit a medical affidavit establishing a nexus between the new injury and the alleged malpractice.

BUILDING CODE PROVISIONS - INAPPLICABILITY - ELEMENTS

In **Griffin vs. High Fives Restaurant, Inc.**, et. al. (___A.D.2d___, 706 N.Y.S.2d 718) the Second Department ruled that a plaintiff who fell because of a failure to notice a single step riser situated in the lobby of a restaurant brought suit did not involve error. The court did not err in refusing to instruct the jury with regard to the building code. The provision of the code which governs exist stairways did not apply to a single step riser.

DISCOVERY - UNTIMELY CORRECTION OF DEPOSITION

The Second Department recently held that an attempt by the plaintiff to amend the transcript of his deposition some 18 months after any changes were required to be served on the defendant was untimely (**Sheikh vs. Sinha**, ___A.D.2d___, 707 N.Y.S.2d 241).

The plaintiff's failure to object to the deposition proceeding in the absence of an interpreter operated as a waiver of his claim that he did not understand the question he was asked.

DISMISSAL - OPPOSITION

It was recently held by the Second Department that an asserted law office failure, the neglect of the file and misrepresentations as to its status by a young associate in a law firm of the plaintiff's attorney, was not a reasonable excuse for complete inactivity in a case over a period of more than two years between a preliminary conference and the defendants' motion to dismiss the action as abandoned (**Nettleship vs. Wallin**, ___A.D.2d___, 708 N.Y.S.2d 85).

NEGLIGENCE - NOTICE - CONCERT HALL

In **Godino vs. Madison Square Garden, L.P.** (___A.D.2d___, 708 N.Y.S.2d 102), the First Department held that concert hall and concert producer did not have notice of the champagne and strawberries on aisle stairs on which a patron claims she slipped and fell as she exited her row of seats at the concert hall, and thus were not liable for the patron's injuries.

The complaint by the concert patron's son to security personnel about rowdy behavior of two young women sitting in her row drinking champagne and eating strawberries was insufficient to impute notice to the concert hall regarding the champagne and strawberries on the aisle stairs on which the patron claimed she slipped and fell as she exited her row of seats at hall; the son's complaints were about rowdiness and not spillage.

TRIAL - EVIDENCE - TOUCHING OF PARTY

In **Ateser vs. Becker**, (___A.D.2d___, 708 N.Y.S.2d 76), the First Department ruled that the trial court properly refuse to allow the jurors to touch a personal injury plaintiff's leg to feel the temperature differential that the plaintiff claimed was evidence of reflex sympathetic dystrophy. The court indicated that such contact was inappropriate.

NOTICE TO ADMIT - ELEMENTS

The First Department recently submitted that a plaintiff's notice to admit improperly demanded that the defendant concede matters that were in dispute, including that she received and did not return excess commission payments. The defendant had no obligation to furnish admissions in response to plaintiff's notice.

A notice to admit is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admissions of fundamental and material issues or ultimate facts that can only be resolved after a full trial. (**Meadowbrook-Richman,**

Inc. vs. Cicchiello, ____A.D.2d___, 709 N.Y.S.2d 521).

INDEMNIFICATION - 12 POINT PRINT - RESTRICTIONS

The Second Department recently held in **American Home Assur. Co. vs. ELRAC, INC.**, (___A.D.2d___, 709 N.Y.S.2d 593), that an insurer failed to prove that the insured rented a vehicle primarily for personal, family or household purposes, as required for the application of the statute allegedly requiring indemnification provisions of the rental agreement to be of a certain size print to be enforceable.

NEGLIGENCE - LAND OWNERS - DUTY OF CARE - ELEMENTS

In **Meyer vs. Tyner** (___A.D.2d___, 709 N.Y.S.2d 618), the Second Department indicated that the landowners who hold their property open to the public have a general duty to maintain it in a reasonable safe condition so as to prevent the occurrence of foreseeable injuries, which encompasses a duty to warn of potential dangerous conditions existing thereon, whether natural or artificial. This duty extends only to those conditions not readily observable.

Landowners have no duty to warn of the conditions that are in plain view and easily discoverable by those employing the reasonable use of their senses. Owners of the house that was for sale owed no duty to warn prospective purchasers of the dangerous condition of an attic through which the purchasers fell, despite poor illumination and the similarity of color between the insulation and the attic floor. The unfinished floor was readily observable, in plain view, and easily discoverable by those employing the reasonable use of their senses.

CPLR 3215 - DEFAULT- TIME OF

In **Saunders vs. Central Brooklyn Coordinating Counsel, Inc.**, (____A.D.2d____, 708 N.Y.S.2d 709), the Second Department ruled that the plaintiff's mere service of a summons and complaint, without purchasing an index number, did not default in the year the summons and complaint were filed, so as to warrant a dismissal on the ground that the plaintiff failed to take proceedings for the entry of judgment within one year after the defendant's default.

ASSUMPTION OF RISK - ELEMENTS

The Second Department recently held in **Convey vs. City of Rye School Dist.** (___A.D.3d___, 710 N.Y.S.2d 641), that for the assumption of risk doctrine to apply, it is not necessary that the injured plaintiff foresee the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.

Voluntary participants in a sport or recreational activity consent to those commonly appreciated risks, which are inherent in and arise out of the nature of the sport generally and flow from such participation.

Recreational activities encompassed by the doctrine of the assumption of risk include games as well as frolic. A participant in a recreational activity is held to have consented to those injury-causing events, which are known, apparent, or reasonably foreseeable consequences of participation. The participants do not assume the risk of reckless or intentional conduct or concealed or unreasonably increased risks. The participant equally does not assume the risk of another participant's negligent play, which enhances the risk.

NEGLIGENCE - ASSAULT - STORE OWNER

In **Scalice vs. Kullen**; (___A.D.2d___, 710 N.Y.S.2d 632), the Second Department stated that an assault on a supermarket patron by another customer was a spontaneous and unexpected criminal act of a third party for which the supermarket owner could not be held liable. The assault was sudden and unexpected, as it followed an argument between the customer and the clerk, not the patron.

INSURANCE - AUTOMOBILE - CANCELLATION - ELEMENTS

The Second Department recently indicated that a notice of cancellation of an automobile policy is ineffective unless in strict compliance with the requirements of the statute establishing the requirement of such a notice and of the regulations of the Commissioner of Insurance if properly filed and not inconsistent with specific statutory provisions.

The statute which governs when an insurer may cancel or refuse to renew certain insurance policies does not provide what a notice of termination must contain.

The insurer's notice of cancellation which incorrectly stated that the civil penalty was four dollars for each day that the insurance was not in effect, rather than six dollars per day; as indicated in the statute, was ineffective, causing the policy to remain in effect at least until its stated expiration date, although the policy was not a "covered policy", for purposes of a statute governing when an insurer may cancel or refuse to renew (**American Home Assur. Co. vs. Chin**, ___A.D.2d___, 708 N.Y.S. 453).

MALPRACTICE - INJURY TO THIRD PERSON

The Court of Appeals recently indicated that a physician who performed a procedure to increase the male patient's fertility did not owe a duty of care tot he patient's wife, who alleged that the negligent performance of the procedure caused her to suffer psychological harm from losing an opportunity to achieve normal conception by her husband, as well as physical and psychological harm and pecuniary loss from undergoing in vitro fertilization procedures in order to conceive (**Cohen vs. Cabrini Medical Center** (94 N.Y.2d 639, 709 N.Y.S.2d 151).

INSURANCE - FAILURE TO COOPERATE

The Third Department recently submitted in **Ingarra vs. General Accident/PG Ins. Co. of New York**,

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(___A.D.2d___, 710 N.Y.S.2d 168), that an insurer's burden of proving that the insured willfully violated the cooperation clause of the policy, and thus was not entitled to a recovery, required a showing that the insured attitude is one of willful and avowed obstruction involving a pattern of non-cooperation for which no reasonable excuse was offered.

EVIDENCE - EXPERT - QUALIFICATIONS

In **Erbstein vs. Savasatit**, (___A.D.2d___, 711 N.Y.S.2d 458), the Second Department ruled that a witness was qualified to give an expert opinion on the standard of care of a general surgeon, even though the witness was a pathologist. A supplemental affidavit submitted by the witness sufficiently established his qualifications as a medical expert and his familiarity with the standards of care applicable to surgeons, and any purported shortcomings in the affidavit went merely to the weight of the opinion.

Once a medical expert has established his or her knowledge of the relevant standards of care, he need not be a specialist in that particular area at issue to offer an opinion. Any lack of skill or expertise goes to the weight of his or her opinion as evidence, not its admissibility.

INSURANCE - PRIMARY/EXCESS

The Third Department recently held that a comprehensive general liability (CGL) policy issued to a subcontractor on a construction project did not provide primary coverage for a personal injury claim arising from a construction accident, and thus did not provide concurrent coverage along with a general contractor's liability policy, but rather, only excess coverage where the subcontractor's policy stated that any coverage provided would be excess unless a contract "specifically requires" that the insurance be primary, and the subcontract, while requiring the subcontractor to obtain insurance, and containing a list of additional insureds which included the general contractor, did not specifically require primary coverage for the general contractor, (**Hartford Fire Ins. Co. vs. Lo Brutto**, ___A.D.2d___, 711 N.Y.S.2d 639).

EVIDENCE - EXPERT OPINION - DISALLOWED

It was recently indicated by the First Department in Cohen vs. Interlaken Owners, Inc. (____A.D.2d___,. 712 N.Y.S.2d 513), That an expert mechanical engineer's testimony as to cause of accident which occurred when an apartment building's cluster mailbox fell out of a wall and struck the letter carrier was inadmissible in the negligence action against the building owner, where the engineer formed his opinion without inspecting the mailbox, making any calculations or measurements concerning a similar mailbox he examined, or interviewing any witnesses.

INSURANCE - VICARIOUS LIABILITY - SCOPE OF COVERAGE

It was recently held by the First Department that sexual misconduct limitation in a social worker's professional liability policy, which limited the insurer's duty to defend and indemnify the insured to an aggregate of $25,000, did not apply to limit the insurer's obligations to a named insured with respect to allegations that she was vicariously liable for sexual misconduct of another social worker, who was her part-time partner in a clinic, with respect to acts committed against the partner's private patient, and that she was negligent in failing to supervise the partner (**American Home Assur. Co. vs. McDonald**, ___A.D.2d____, 712 N.Y.S.2d 507).

NEGLIGENCE - INTERRUPTION OF BUSINESS

It was recently held by the First Department in **5th Avenue Chocolatiere, Ltd. vs. 540 Acquisition Co., L.L.C.**, (___A.D.2d___, 712 N.Y.S.2d 8), that businesses a short distance away from a skyscraper whose south wall collapsed during renovation, resulting in the City's closure of a 15-block section of the street, could seek recovery of lost profits from the skyscraper's owners despite the absence of property damage to the businesses. The allegations that the owners of the skyscraper undertook to punch 94 holes in a formerly windowless section despite longstanding structural problems and deficiencies in the wall demonstrated that the businesses in question were particularly foreseeable victims of the type of harm caused by the building collapse.

INSURANCE - MURDER - OCCURRENCE

In **Agoado Realty Corp. vs. United International Ins. Co.**, (95 N.Y.S.2d 141, 711 N.Y.S.2d 141), the Court of Appeals submitted that the murder of a tenant by an unknown assailant was an "accident" and hence a covered occurrence under the landlord's liability insurance policy. The murder was unexpected, unusual, and unforeseeable from the landlord's standpoint.

A provision in landlord's liability insurance policy, excluding coverage for bodily injuries "expected or intended from the standpoint of the insured," did not apply to the murder of a tenant by an unknown assailant. The murder was intentional only from the assailant's standpoint.

PLEADINGS - AMENDMENT - LACHES

While delay alone will not be a sufficient cause to deny a party's motion for leave to amend the complaint, when an action has long been certified as ready for trial and the moving party had full knowledge of the amendment sought, in the absence of good cause for the failure to move for leave to amend at an earlier date, the motion to amend should be denied on the ground of gross laches along, so indicated the

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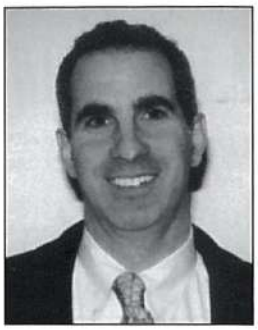

CPLR § 5003-A AND ITS EFFECT ON INSURED DEFENDANTS

*by Steven R. Harris**

*Joseph A. DeMauro**

Defense counsel should be cognizant of the statutory prompt payment requirements which are triggered upon settlement of a claim. CPLR §5003-a imposes an obligation upon an insurer to pay the settlement amount within 21 days of plaintiff's tender of a release and stipulation of discontinuance. If payment is not made within the prescribed period, a judgment may be entered directly against an insured for the full settlement amount, plus interests, costs and disbursements. CPLR §5003-a (e). Difficulty in averting such judgments arises because of defense counsel's lack of control over the payment process. Depending on the practices of the particular insurer or the plaintiff's counsel, settlement documents may be forwarded to the insurer directly or to the defense counsel who then must forward them to the carrier.

The consequences to the defendant for non-payment or late payment of the settlement amount are direct and substantial. As is the case with any judgment, entry may damage the defendant's credit rating resulting in the inability to secure financing for home mortgages and auto loans; may affect the defendant's ability to obtain or maintain affordable insurance; and may impair the defendant's ability to sell or otherwise dispose of his property. See, **O'Meara v. A & P, Inc.**, 169 Misc.2d 697, 647 N.Y.S.2d, 424, 426 (Sup. Ct. Westchester Co., 1996).

While CPLR §5003-a was clearly intended to assure the expeditious payment of the settlement amount to the plaintiff, the legislative history of the statute seems to give little consideration of the statute's ramifications to the insured defendant. The Budget Report on Bills stated that the bill would require payment within a prescribed period subsequent to settlement as an incentive to prompt payment, and would impose interest penalties and related costs if prompt payment was not made. Various trial lawyers associations filed letters in support of the bill stating that the legislation sought to balance the interests of insurance companies and the plaintiffs who have settled their cases. Various insurers and insurance associations opposed the legislation in whole and in part on various grounds, including the failure of the statute to address the problems of liens. Conspicuously absent from these memoranda was any mention of the adverse consequences the statute may have against insured defendants who are the subject of the judgments but who control neither the settlement of the case nor the timing of the settlement payment by their insurer. Given the consequences to the insured defendant, this article will discuss some of the defenses that have been asserted - and that may be asserted - in responding to a judgment entered against an insured defendant based on the insurer's failure to pay promptly the settlement amount.

Insurer as settling defendant - When a case is being defended by an insurer and the insurer is paying the claim pursuant to its obligations under the policy without direct participation of the defendant, it can be argued that the defendant is not the settling party and should not suffer the consequences of the insurer's failure to comply with CPLR §5003-a. Two cases decided before the enactment of CPLR §5003-a support such an argument. In **Cobrin v. DeLuna**, 143 A.D.2d 723, 533 N.Y.S.2d 389 (2nd Dept. 1988), the New Jersey Guaranty Association settled the case on behalf of its insured without the insured actively participating in the settlement. The lower court granted plaintiff's motion to enter judgment against the insured defendant based on the settlement agreement. In reversing the lower court, the Appellate Division found that it was the intent and understanding of the parties that the insurer and not the defendant would pay the settlement, and that the settlement was not binding against the defendant. Similarly, in **Countryman v. Breen**, 241 A.D. 392, 271 N.Y.S.2d 744 (4th Dept. 1934), aff'd, 268 N.Y. 643, 198 N.E. 536 (1935), a settlement in open court had been reached between the plaintiff and the defendant's counsel retained by the insurer. The particular insurance policy at issue in **Countryman** provided that the insurer would conduct settlement negotiations, and that the defendant would not interfere with such negotiations. The trial court allowed plaintiff to enter judgment against the defendant based on the settlement. The Appellate

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Division reversed based on the insured defendant's lack of involvement in the settlement and the absence of the defendant's consent to its terms. In affirming the Appellate Division, the Court of Appeals answered in the negative the following certified question: Was the settlement agreement binding on the insured defendant?

Despite the subsequent enactment of CPLR §5003-a, these cases still appear to be good law. Indeed, these cases were relied upon by Justice Victor Barron in **Helrich v. Aries**, N.Y.L.J., 1/29/98 (Sup. Kings), p. 32, col. 2, in a post-CPLR §5003-a case. In **Helrich**, the plaintiff's attorney and the defendants' attorney, retained by the defendants' insurer, settled the case. The plaintiff executed and tendered the appropriate settlement documents. Upon the insurer's failure to pay as required under CPLR §5003-a, plaintiff entered judgment against the defendants. In moving to vacate, the defendants contended that they had no notice of the case until a letter from counsel, retained by the insurer, advised the defendants of a judgment entered against them and that their carrier had been placed into liquidation. In reasoning along the lines of **Cobrin** and **Countryman**, the court found that the defendants never gave their actual authority to be personally bound by the settlement amount. The lack of authority and participation in the settlement provided sufficient grounds for the court to vacate the judgment.

Violation of due process - Although not decided by any reported case, an argument can be made that defendant's right to procedural due process is violated if a plaintiff is allowed to enter a judgment against a defendant without prior notice. Entry of judgment where the defendant has no notice of the settlement or of its terms appears to violate fundamental constitutional safeguards. **Fuentes v. Chevin**, 407 U.S. 67 92 S.Ct. 1983 (1972) (court found that procedural due process was violated when vendors could have goods seized through ex parte application to a court clerk). As previously noted, an insured defendant's interests may be prejudiced substantially by the entry of judgment particularly when the insurance company settles a claim without notice to the insured defendant and then fails to timely remit payment of the settlement amount. A constitutional argument based on lack of notice also dovetails with the pre-existing law in the foregoing cases which relied on the insured's lack of participation in the settlement process to vacate the judgment.

Lack of compliance with CPLR §5003-a - CPLR §5003-a requires that the defendant pay the settlement amount within 21 days of plaintiff's service of a duly executed release and stipulation of discontinuance by personal delivery or by certified or registered mail. Courts have strictly construed these requirements to ensure that the plaintiff complies with the statute and the defendant receives proper settlement documents in accordance with the procedures set forth in the statute. In **Liss v. Brigham Park Cooperative Apts.**, 264 A.D.2d 717, 694 N.Y.S.2d 742 (2nd Dept. 1999), plaintiff sent to the defendants a general release and stipulation of settlement that did not include a provision concerning the plaintiff's Medicare lien. Nonetheless, the trial court granted plaintiff's motion for costs, disbursements and interest for failure to make timely payment. The Appellate Division reversed based on defendant's argument that the release was defective for failure to provide for release of the lien. In **Arevalo v. Star Taxi, Inc.**, N.Y.L.J., 10/9/97 (Kings Civ. Ct.), p. 30, col. 4, Judge Greenbaum denied plaintiff's motion for a judgment based upon defendant's failure to pay promptly the settlement when the plaintiff failed to demonstrate that he had properly tendered to the defendant the duly executed release and stipulation, in accordance with the statute. In **Errico v. Davidoff**, 478 Misc.2d 378, 679 N.Y.S.2d 530 N.Y. (N.Y. Civ. Ct. 1998), the plaintiff entered judgment on the same day that the court signed the order of settlement without giving the defendant 21 days from the date of settlement to pay the amount due. Based on plaintiff's failure to wait the statutorily required period prior to entry, the court vacated the improperly obtained judgment.

Accord and satisfaction is not a defense - In **Pothos v. Arverne Houses, Inc.**, 269 N.Y.S.2d 377, 702 A.D.2d 392 (2nd Dept., 2000), the defendant's insurer failed to pay the settlement amount within 21 days and judgment was entered against the defendant. After judgment was entered, the defendant's insurer forwarded settlement checks in the settlement amount, only without inclusion of interest and costs which were payable pursuant to the terms of the judgment. The non-party insurer moved to vacate the judgment on the ground that plaintiff's acceptance of the settlement checks constituted an accord and satisfaction. The lower court granted the motion and vacated the judgment. On appeal, the Appellate Division held that acceptance of checks was not an accord and satisfaction because there was no disputed or unliquidated claim. The Appellate Division reinstated the judgment.

Insurer in Receivership - There is an exception to the prompt payment requirement for insurers in receivership. In apparent recognition of the special circumstances arising in insurance receivership, CPLR Section 5003-a (f) states that settlements subject to Article 74 of the Insurance Law do not apply to this section. Article 74 of

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CPLR § 5003-A AND ITS EFFECT ON INSURED DEFENDANTS

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the Insurance Law governs the rehabilitation, liquidation, conservation and receivership of insurers. Despite this unequivocal language, plaintiffs have persisted in their efforts to enter judgment against defendants insured by carriers in receivership. These attempts have been consistently rebuffed by the courts.

In **Asseng v. Arbacas**, 181 Misc.2d 816, 695 N.Y.S.2d 506 (Sup. Ct. Suffolk Co. 1999), the defendant's insurer, Home Mutual Insurance Company, was in liquidation and the New York State Liquidation Bureau, the entity that carries out the duties of the Superintendent as Liquidator, settled the action with plaintiff's counsel. Payment was not made within 21 days of tender of the settlement documents. The plaintiff moved for a judgment against the defendant under CPLR ß5003-a on the ground that the delay in the receipt of settlement funds was excessive and the Liquidator was obligated to use reasonable promptness in processing necessary papers to obtain the release of the settlement funds from the New York Security Funds. The defendant argued that the settlement involved Article 74 of the Insurance Law and was therefore exempt from the prompt payment rule. In support of the argument, the defendant also submitted a letter from Joseph Termini, Special Deputy Superintendent of Insurance. The Special Deputy explained that New York Security Funds were created to pay claims covered by policies issued by New York licensed insolvent insurers and that, unlike ordinary insurance claims, claims covered by the Security Funds could not be paid until the claim was allowed by the court supervising the liquidation of the insolvent insurer. Following the entry of the order allowing the claim, the funds for payment must then be requested from the Commissioner of Taxation and Finance. The Special Deputy concluded by stating that §5003-a (f) was a recognition of the mandatory statutory procedure for payment of claims covered by the Security Funds.

Justice Doyle held that because of the delays inherent in the liquidation process, CPLR Section 5003-a (f) specifically excludes settlements subject to Article 74 of the Insurance Law from the operation of CPLR Section 5003-a, and denied plaintiff's motion to enter judgment against the defendant.

Under similar circumstances, Justice Spodek, in **Vargas v. Seafarer's Welfare Plan**, Index No. 16047188, slip op. (Sup. Ct. Kings Co. 1998), reached the same result. In **Vargas**, judgment was entered against the defendant even though the defendant's insurer was in liquidation and the settlement was made between the plaintiff's attorney and the New York State Insurance Department - Liquidation Bureau, without the defendant's involvement. The Court vacated the judgment and found that the plaintiff was not entitled to any judgment against the defendant because of CPLR Section 5003-a (f). Other courts have similarly ruled. **Santiago v. Marion 2405 Limited Partnership**, Index Number 914 TSN/98, slip op. (N.Y. Civ. Ct. 1999); **Orellana v. Wroth**, Index Number 03984/96, slip op. (Sup. Ct. Queens Co. 1999); **Ramos v. Caldwell Housing**, Index Number 25753/94, slip op. (Sup. Ct. Bronx Co. 1999).

CONCLUSION

Defense counsel may wish to diary their files and follow up with the insurer to ensure that the defendant's insurer promptly pays the settlement amount. To the extent practicable, consideration may also be given to modifying the settlement documents to provide additional time for payment. In the event litigation ensues based on the insurer's failure to pay promptly the settlement amount, various arguments are available to defense counsel to oppose a motion for judgment or to support a motion to vacate a judgment entered by plaintiff.

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PARENTAL RESPONSIBILITY FOR CHILDREN'S MOTOR VEHICLE ACCIDENTS

*by Kevin G. Faley**

*Andrea M. Alonso***

Some of the questions most frequently asked by insurance claim professionals involve scenarios where an insured's vehicle is driven by their children or their children's friends and an accident occurs. These scenarios are based upon convoluted fact patterns and involve a claim by the parent of alleged unauthorized use of a motor vehicle. For personal lines carriers, especially out of state, it is difficult to comprehend the broad interpretation of permissive use in New York and its far reaching implications.

Permissive Use - Vehicle and Traffic Law § 388(1)

VTL § 388 imputes to the owner of the car the negligence of one who uses it or operates it with the owner's permission express or implied.[1] This section creates a very strong presumption that the vehicle is being operated with the owner's consent. That presumption must be rebutted by substantial evidence to the contrary. A plaintiff must only prove that the negligently operated vehicle was owned by the defendant to get the case before a jury.[2] Statutes based on VTL § 388 have been enacted for snowmobiles[3], all-terrain vehicles[4] and boats[5].

In weighing whether to move for dismissal based on non-permissive use, the legislative intent behind this historical statute[6] must be considered. The legislature's goal was to ensure that vehicle owners act responsibly with regard to their vehicles. Vicarious liability is linked to the owner's obligation to maintain adequate insurance.[7] The courts, in weighing a dismissal motion, will consider that the purpose of the statute is to allow access by the injured party to the financially responsible defendant.[8]

The defendant's burden of rebutting the presumption of permissive use with substantial evidence is not an easy one. In **Rodak v. Longnecker**,[9] the defendant father allowed his son to take his car to college in New York State where he was enrolled as a student. While at college the son allowed a friend and fellow student to use the car for local trips, one, at least, to a local ski resort. The friend was driving the father's vehicle when an accident occurred. The defendant father in his affidavit stated that his son was advised that he, and only he, had permission to drive the car. The father moved to dismiss based on the ground that the friend did not have permission to operate the car and that he was not vicariously liable for his negligence.

The Court denied the motion reasoning that clearly no express permission was claimed but that the issue of implied permission must go to the jury. The Court weighed the circumstantial facts and held:

> "Given the climate of the times, a jury might conclude, a parent should be held to the knowledge that so generous an entrustment, so far from home and for such a protracted period, is not reasonably susceptible to a limitation of the kind relied upon by the father. Hence, the jury might find, the entrustment to the son implied a consent that a friend might be allowed an occasional use of the car for local errands."

In **Schrader v. Carney**,[11] the issue of permissive use went to the jury. Therein it was uncontroverted that the defendant father had given express permission only to his son. While on a drinking spree in motel with the son, a non-party to the action handed the keys to the defendant's vehicle to the defendant driver, a friend of the son. He, in turn, lost control of the automobile hitting a utility pole causing plaintiff to suffer severe brain injuries. The jury found that although express permission was not given there was some vague testimony that the son may have given his friend permission to drive the vehicle. On those facts the statute's presumption was not overcome and the jury's finding of permissive use was not unreasonable.

In comparing **Rodak** and **Schrader** it is significant to note the extent to which a Court will find that permissive use was given. In Rodak the car keys went from the father to the son with permission and then to the son's friend again with permission. The presumption of permissive use went to the jury as there wa permission down the chain. In **Schrader** the keys went from father to son to a non-party, apparently without permission, however, who

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in turn gave the keys to the defendant driver and still the presumption of permissive use was not rebutted to the satisfaction of the jury or the reviewing Appellate Court.

The limitation of time upon the permission does not overcome the presumption. In **Lawrence v. Myles**,[12] the defendant driver submitted an affidavit of his mother along with her deposition. In both she claimed that she gave him express permission to operate the vehicle on the day before the accident but did not give him permission to operate it on the day of the accident. Summary judgment was denied and the issue of permissive use was again allowed to go to the jury.

In rare instances owners have rebutted the presumption that a defendant driver was operating the vehicle with owner's consent. In **Jimenez v. Regan**,[13] the vehicle owner rebutted the presumption that the defendant Regan, his daughter's boyfriend, had been driving with his consent. At a framed issue hearing the owner presented uncontroverted evidence that he explicitly told Regan that he was not permitted to drive his vehicle and that his daughter allowed the boyfriend to drive the car after she arrived at his home on the date of the accident. Obviously, the fact that the owner of the car expressly told the driver that the driver did not have permission to drive the car weighed heavily with the Court. This element was lacking in **Rodak** and **Schrader**.

If an owner establishes a theft of the vehicle by a family member the presumption of permissive use is rebutted. In **Manning v. Brown**,[14] the defendant driver and her high school friend were involved in a one car accident involving a car owned by her grandparents. The granddaughter had found the keys under loose papers in the car's console while it was parked at a local community college. The granddaughter and her plaintiff friend, both unlicensed, took turns operating the vehicle.

The defendant granddaughter testified that she was not given permission to use the car and had, in fact, pleaded guilty to its theft. The grandfather testified and submitted an affidavit that he never allowed the defendant to operate his cars. Lastly, plaintiff testified she knew the car was stolen. Under those circumstances the defendant owner's motion for summary judgment dismissing the complaint was granted.

The Court also found that the defendant owner bore no responsibility under Vehicle and Traffic Law § 1210(a)[15]. That statute holds the owner of a stolen vehicle liable for proximately caused injuries if the car keys were negligently left in the ignition switch. This statute only applies to vehicles upon public highways, private roads open to public motor vehicle traffic, and any other parking lot.[16] Thus, if a vehicle is stolen from a private garage liability does not attach.[17] In **Manning**, Id., the statute did not apply since it specifically states that the ignition key may be left in or on the vehicle, provided it is not in plain view.[18] The defendant had testified that the keys were located in the console covered by loose papers, such that they were hidden from sight.

Negligent Entrustment of a Motor Vehicle

Plaintiffs have contrived a negligent entrustment theory of liability in situations where the defendant child's motor vehicle policy has minimum limits and the parents' motor vehicle policy is clearly unavailable. Plaintiffs will assert a negligent entrustment cause of action in an attempt to bring into the lawsuit the parents' homeowners, excess or other personal policies and thus artificially create sufficient coverage.

In a situation related to Manning, Id., the defendant's infant son a 15 year-old took his mother's car keys from her and gave them to a friend who was involved in an accident. The Court in **Sherri v. Gerwell**,[19] found no evidence that the son had a propensity to utilize automobiles without permission or to steal or borrow items he was not authorized to use. The cause of action for negligent entrustment was dismissed.

In other cases involving infants and the issue of negligent entrustment the Courts have found that when an infant bought his own automobile, had successfully completed a driver's education course and possessed a junior operator's license his parents were not charged with negligent entrustment.[20] This despite the fact that there was some evidence the infant plaintiff had caused damage on two separate incidents by spinning the tires of his automobile.

In **Alfano v. Marlboro Airport**,[21] the mother of the decedent sued his father for negligent entrustment of a snowmobile. The Court found the 17 year-old son was properly trained in the operation of a snowmobile 6 years prior. Additionally, the father had legally separated from his wife and had no custody over the son or the snowmobile. Under these circumstances, the Court dismissed the cause of action based on negligent entrustment.

If negligent entrustment is difficult to prove with infant children, it is virtually impossible with adult children. This is true despite a history of prior traffic accidents, criminal convictions and other histories. The adult son in **Weinstein v. Cohen**,[22] had two previous accidents. The Court found that this did not support a finding of negligent entrustment. A stronger argument for negligent entrustment was rejected in **Mimoun v. Bartlett**,[23] where the adult son had previous convictions for excessive speeding. The Court did not find it constituted a propensity sufficient to sustain a claim of negligent entrustment. Co-signing a loan for the vehicle's purchase knowing the

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PARENTAL RESPONSIBILITY FOR CHILDREN'S MOTOR VEHICLE ACCIDENTS

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son's license had been suspended was also found not to be a basis to cast the father in liability.

Generally, once a vehicle is registered in an adult child's name, he is the insured under the policy, he holds a valid New York State operator's license and only he possesses the key to the vehicle a theory of negligent entrustment will be dismissed.[24]

Negligent entrustment of a motor vehicle to children of an insured is virtually impossible to prove in New York. The attempt to attach a parental policy of insurance is usually unsuccessful.

The Family Automobile Doctrine

In another attempt to bring into the realm of available insurance coverage a parents' homeowner's policy, excess/umbrella policy or other assets plaintiffs have relied upon the "family automobile doctrine". This is an indemnification cause of action based upon a principal-agent relationship. It is widely subscribed to throughout the United States.[25] Basically a parent is vicariously liable for damages which occur if a vehicle is owned and used for family purposes, by a member of the household with a parents' authorization or in a parent's business.

In **Laiacona v. Ten Eyck**, the Court of Appeals, in applying New Jersey law, addressed the family automobile doctrine, apparently for the first time, and determined that a father was liable for the actions of his daughter in an automobile collision accident.[26] At the time of the accident, defendant's daughter was twenty years old and driving home from college where she was a student. The father conceded that he paid the tuition charges for his daughter, and paid for all automobile maintenance and repairs. At the time of the collision, the automobile was available for use of any member of his family who cared to use it.

Justice Steuer, dissenting, stated that in New Jersey, by case law, an absent owner is liable if the automobile is used in his business, and that in case of an automobile owned by the head of the family and driven by a member of the family, there is a rebuttable presumption that the driver is the agent of the owner. Under New Jersey law, where an automobile is being used by one member of the family for his own purpose the presumption is rebutted.[27]

In 1993, the Second Department adopted the family automobile doctrine in New York State. In **Maurillo v. Park Slope U-Haul** a father instructed his son to rent a U-Haul vehicle in the father's name with the father's credit card and instructed him to transport furniture to the family's summer home.[28] After delivering the furniture from the family home to the summer residence the son along with his brothers were returning home when they stopped at a nightclub. While in the nightclub parking lot the van came to a sudden and abrupt stop. One of the sons standing in the cargo area was thrown to the floor of the van and sustained severe cervical injuries which rendered him paraplegic.

A motion to dismiss the counterclaim for indemnification against the father was denied. The Court, applying the widely accepted family automobile doctrine, reasoned that the son was acting upon the request of his father, at the father's direction and for the father's benefit. Under these circumstances a triable issue of fact regarding agency defeated the plaintiff's motion to dismiss. The doctrine of the "family automobile" is recognized in New York as a viable means to attach intra-familial insurance policies or assets in a motor vehicle case.

In sum, parental responsibility for their children's motor vehicle accidents is broadly based under the theory of vicarious liability pursuant to VTL § 388. It is difficult to establish under the theory of negligent entrustment yet possible under the not widely used theory of the "family automobile doctrine". Parents must think twice before they answer the question: "Can I have the car keys?".

▲

[1] Vehicle and Traffic Law § 388(1) provide as follows:

> "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder."

[2] Horvath v. Lindenhurst Auto Salvage, Inc., 104 F.3d 540 (2d Cir. 1997).

[3] Parks, Recreation and Historic Preservation Law § 25.23.

[4] Vehicle and Traffic Law § 2411.

[5] Navigation Law § 48.

[6] § 388 traces its origin to § 282-e of the Highway Law of 1909.

[7] Fried v. Seippel, 80 N.Y.2d 32, 587 N.Y.S.2d 247 (1992).

[8] Griffin v. Fung Jung La, 229 A.D.2d 468, 645 N.Y.S.2d 528 (1996).

[9] Rodak v. Longnecker, 176 Misc.2d 833, 673 N.Y.S.2d 998 (Tompkins Cty Sup.Ct. 1998).

[10] Id. at 999.

[11] Schrader v. Carney, 180 A.D.2d 200, 586 N.Y.S.2d 687 (4th Dept. 1992).

[12] Lawrence v. Myles, 221 A.D.2d 913, 634 N.Y.S.2d 316 (4th Dept. 1995).

[13] Jimenez v. Regan, 248 A.D.2d 510, 669 N.Y.S.2d 968 (2d Dept. 1998).

[14] Manning by Manning v. Brown, 232 A.D.2d 849, 649 N.Y.S.2d 202 (3d Dept. 1996).

[15] § 1210 of the Vehicle and Traffic Law provides:
"Unattended Motor Vehicle.
(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle...provided, however, the provisions for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."

[16] Vehicle and Traffic Law § 1199(a).

[17] Albouyeh v. County of Suffolk, 62 N.Y.2d 681, 476 N.Y.S.2d 522 (1984).

[18] See also, Banellis v. Yackel, 49 N.Y.2d 882, 427 N.Y.S.2d 941 (1980).

[19] Sherri v. Gerwell, 262 A.D.2d 394, 691 N.Y.S.2d 144 (2d Dept. 1999).

[20] Larsen v. Heitman, 133 A.D.2d 533, 519 N.Y.S.2d 904 (4th Dept. 1997).

[21] Alfano v. Marlboro Airport, Inc., 85 A.D.2d 674, 445 N.Y.S.2d 517 (2d Dept. 1981).

[22] Weinstein v. Cohen, 179 A.D.2d 806, 579 N.Y.S.2d 693 (2d Dept. 1992).

[23] Mimoun v. Bartlett, 162 A.D.2d 506, 556 N.Y.S.2d 705 (2d Dept. 1990).

[24] See, Fischer v. Lunt, 162 A.D.2d 1016, 557 N.Y.S.2d 220 (4th Dept. 1990).

[25] Marshall v. Whaley, 238 Ga.App. 776, 520 S.E.2d 271 (1999); Willett v. Ifrah, 298 N.J. Super. 218, 689 A.2d 195 (1997); Hunt v. Richter, 163 Conn. 84, 302 A.2d 117 (1972); Murphy v. Barron, 236 N.Y.S.2d 770 (1962).

[26] Laiacona v. Ten Eyck, 21 N.Y.2d 980, 290 N.Y.S.2d 570 (1968).

[27] The collision took place in New Jersey.

[28] Maurillo v. Park Slope U-Haul, 194 A.D.2d 142, 606 N.Y.2d 243 (2d Dept. 1993).

WORTHY OF NOTE

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Second Department in **Smith vs. Hercules Construction Corp.**, ___A.D.2d___, 711 N.Y.S.2d 453).

NEGLIGENCE - SCAFFOLD - LABOR LAW §240

In **Jamison vs. GSL Enterprises, Inc.**, (___A.D.2d___, 711 N.Y.S.2d 413), the First Department ruled that the very fact that the scaffold tilted without an apparent reason was prima facie evidence of statutory violation, for purposes of an action to recover and under the scaffold law for a window washer's fall to his death as he attempted to escape a tilting scaffold.

RES IPSA LOQUITUR - ELEMENTS

It was recently indicated by the Second Department that the doctrine of Res Ipsa Loquitur was inapplicable in an action brought by an infant who suffered a broken leg while on an amusement ride at a fair, as it was not shown with any certainty what caused the infant's injures, nor were all possible causes of the accident other than the negligence of the ride owner and fair organizer eliminated within reason. (**Harvey vs. Silver Dollar Shows, Inc.**, ___A.D.2d___, 710 N.Y.S.2d 398).

Report from the Committee on the Development of The Law: ANDON v. 302-304 MOTT STREET ASSOCIATES (I.Q. TEST OF MOTHERS IN LEAD PAINT CASES) and BUCKLY v. SUN AND SURF BEACH CLUB (NOTICE AND FORESEEABILITY)

*by Andrew Zajac, Esq.**

*Dawn C. DeSimone, Esq***

UPDATE ON ANDON

As reported in the prior issue of The Defendant, the Committee submitted an *amicus curiae* brief on behalf of DANY to the Court of Appeals in **Andon v. 302-304 Mott Street Associates**. That action was predicated on lead-based paint ingestion where it was claimed that the infant plaintiff sustained cognitive impairments, including learning and developmental disabilities. At issue was whether the Appellate Division, First Department erred in reversing the trial court's order which granted the defendant's motion to compel the infant plaintiffs mother, the plaintiff Prudencia Andon, to appear for an Intelligence Quotient (I.Q.) Evaluation. The Appellate Division's decision, which was reported at 257 A.D.2d 370, 690 N.Y.S.2d 241 read as though it imposed, as a matter of law, a blanket prohibition against such disclosure.

Deeply concerned about the language of the opinion and its possible ramifications, the Committee filed an amicus curiae brief in the Court of Appeals, where it was argued that a blanket prohibition of such tests was highly prejudicial to defendants and contrary to New York's liberal disclosure scheme. In addition, our brief pointed to the Second Department decisions in **Anderson v. Seigel**, 225 A.D.2d 409, 680 N.Y.S.2d 587 (2nd Dep't 1998) and **Salkey v. Mott**, 237 A.D.2d 504, 656 N.Y.S.2d 886 (2nd Dep't 1997), which permitted such testing.

Significantly, in a decision reported at 94 N.Y.2d 740, 709 N.Y.S.2d 873 and which noted our appearance on behalf of DANY, the Court of Appeals held that there was no blanket prohibition against the defendant obtaining an I.Q. test of the mother in a lead paint case. Curiously, however, the Court of Appeals affirmed the result reached by the First Department *i.e.*, that the defendant in **Andon** was not allowed to conduct such a test. To reach that result, the Court of Appeals engaged in some interesting legal maneuvering. The Court noted that the Appellate Division characterized its holding as being on the law. However, the Court of Appeals stated that it was not bound by that characterization. The Court held that it viewed the Appellate Division's decision as being the product of exercise of discretion, which was done in an appropriate manner. The Court of Appeals stated that the Appellate Division did not abuse its discretion in rejecting the affidavit of the defendant's expert, Andrew Adesman, M.D., the Chief of the Division of Developmental and Behavioral Pediatrics, Department of Pediatrics of Schneider Children's Hospital. The Court of Appeals noted that while Dr. Adesman stated that he was familiar with scientific literature regarding the link between paternal intelligence and a child's cognitive development, such studies were not attached to his affidavit or otherwise identified. The Court labeled as conclusory Dr. Adesman's assertion that the I.Q. testing was relevant since cognitive deficiencies are not unique to lead exposure, but may be attributed to other factors, including a child's genetic history.

The Court of Appeals also held that the Appellate Division properly exercised its discretion in holding that the requested information was too speculative, and that it impinged on the mother's privacy interests.

Finally, the Court of Appeals took note of the Second Department decisions in **Anderson v. Seigel, supra.** and **Salkey v. Mott, supra**, which allow such testing. The Court stated that such determinations are evaluated on a case-

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by-case basis in light of this State's liberal disclosure scheme, and absent an abuse of discretion as a matter of law, they will not be disturbed by the Court of Appeals.

Certainly, the Committee is pleased that the Court of Appeals held that there is no blanket prohibition against material I.Q. testing in lead paint cases. Nevertheless, the Court's decision did nothing to resolve the split between the First and Second Departments on this issue. While a defendant in the First Department may consider attaching scientific literature to its expert's affidavit to bolster its application, the defendant would still be faced with the First Department's hostility to such tests on the grounds of speculativeness and offense to privacy interests. The Court of Appeals in **Andon** made clear that it would not disturb such determinations.

BUCKLEY V. SUN AND SURF BEACH CLUB

In October of 2000, the Court of Appeals heard argument in the case of **Buckley v. Sun and Surf Beach Club, Inc.** An *amicus curiae* brief was submitted on behalf of the Defense Association of New York, advancing DANY's position.

Briefly, the underlying action in **Buckley** is one for damages for personal injuries sustained by plaintiff-appellant Alexandra Buckley, a 14 year old, when she jumped off a lifeguard stand at the defendant-respondent Sun and Surf Beach Club. More specifically, when the plaintiff went to jump off the left side of the lifeguard stand, a ring she was wearing on her left ring finger got caught on a nail protruding from the stand, causing the plaintiff's finger to be severed.

The facts in **Buckley** are not in dispute. At the end of the summer season in September of 1998, plaintiff and a group of friends walked down to the beach, and immediately climbed atop a lifeguard stand. The defendant had only one such stand on the beach. The lifeguard stand was placed on the beach at the beginning of the summer season (immediately before Memorial Day) and remained on the beach through Labor Day Weekend. The only reason the stand would be moved was if there was a serious storm warning. When not in use, the lifeguard stand would be left in an upright position.

The beach itself was open for swimming between 10:00 a.m. and 6:00 or 7:00 p.m. On the date of the accident, plaintiff and her friends arrived at the beach at approximately 10:30 p.m., a minimum of 3 1/2hours after it had closed. No lifeguards were on duty at that time.

Prior to September 1, 1995, plaintiff had climbed the lifeguard stand to sit and talk up there between 10-20 times. She would "enter" the stand by climbing up the lifeguard stand on either the right or left side. Typically she exited the stand by jumping off the front. On September 1, 1995 plaintiff climbed the stand and jumped down from it twice. After climbing the stand for the third time, one of her friends asked her to return to a party. Plaintiff went to jump off the left side of the lifeguard stand, when a ring she was wearing on her right ring finger got caught on a nail. As a result, plaintiff s finger was severed.

Despite the plaintiff s repeated use of the stand, she never noticed, prior to the happening of the accident, the purportedly defective nail.

After the completion of discovery, the defendant moved before the Supreme Court, Nassau County, for an order of summary judgment and dismissal of the complaint. In so doing, the defendant argued that even if the plaintiff could show that a non-trivial defect actually existed, there was no evidence that the defendant created the alleged defect or that it had actual or constructive notice of it.

As to actual notice, the defendant relied on the sworn deposition testimony of its manager, who testified that the had neither observed the protruding nail, nor had he received any complaints regarding this condition prior to the plaintiff s accident. Relying on the affidavit of its head lifeguard, the defendant established that after the accident, the lifeguard stand was inspected and no protruding nails were found; that there were never repairs needed to the stand regarding banging in nails that had come out too far; that there were no complaints regarding the stand; and that the plaintiffs accident was the only accident involving the stand that he was aware of.

With respect to constructive notice, the defendant pointed to the plaintiff s own testimony, i.e. that the plaintiff used the stand 10-20 times prior to the date of the incident, and three times on the evening of the incident, without noticing the nail, as evidence that any defect was not easily visible or apparent.

The plaintiffs opposed defendant's motion, arguing that the defendant's arguments regarding notice were not dispositive. Specifically, the plaintiffs argued that various witnesses existed both as to the accident and the condition which caused the accident. The plaintiffs contended that the condition existed for a period of time, speculated to be three months, which allegedly was more than adequate time for the defendant to have discovered the condition. It was further argued that a jury might conclude that the defendant caused or created the condition thereby obviating the need to prove notice, since the defendant did all the repairs and maintenance on the lifeguard stand, or that it should have observed the deteriorated condition of the arm of the lifeguard stand and inspected it and found the nail that was protruding above the level of the arm of the stand.

Finally, the plaintiffs averred that the defendant knew or should have known that children were going down to and climbing on and playing on the lifeguard stand, "the

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most attractive sight on the entire premises" after the lifeguards went off duty, and that it did nothing to safeguard the stand when it was not in use. The plaintiff went on to argue that it was thus absolutely foreseeable that a child would jump off the stand and be injured, and concluded that the precise manner in which the accident occurred need not be foreseeable so long as it was foreseeable that any accident or injury may occur.

The affidavits which have proved most interesting on this appeal are those submitted by the infant plaintiff s father and a friend, Eric Benvin.

With respect to his observations regarding the lifeguard stand after the accident, plaintiff STEPHEN BUCKLEY noted that:

> Approximately one week after the accident, I went back to the beach club [and] took photographs of the lifeguard stand at the beach club. Those photographs confirm that a nail towards the front of the armrest portion on the left side of the lifeguard stand . . . extended up approximately one-quarter (1/4) of an inch to a half an inch (1/2) above the level of the arm.

ERIC BENVIN, the infant plaintiff s friend, detailed that:

> Sometime after the accident, probably the next day or the day after that, I looked at the lifeguard stand and saw that there was a nail protruding on the front of the left arm. The nail was protruding from the flat part of the left arm on the top of the arm. I had climbed on that lifeguard chair many times during the Summer of 1995 and had observed nails sticking up out of the wood, including the nail in the front of the arm where Alexandra's finger got caught.

The trial court granted the defendant's motion, finding that the defendant met its burden of establishing that it neither created the condition or had notice of it. The trial court dismissed plaintiff s reliance on the Benvin affidavit stating that it was wholly devoid of any definitive period of time of his observations.

That order was affirmed by the Appellate Division, Second Department in a decision which held that there "is no basis to disturb the award of summary judgment to the defendant on the ground that it did not have actual or constructive notice of the alleged defective condition and that it did not create the condition." 268 A.D.2d 496, 701 N.Y.S.2d 668

Surprisingly, the Court of Appeals granted leave to appeal in this case.

In submitting an *amicus* brief on behalf of DANY, the Committee argued that the defendant, as a party in possession of property, was not an insurer of the safety of those who come upon its property. Rather, its duty was to maintain the property in a reasonably safe condition. To this end, the defendant could only be liable for accidents caused by a dangerous condition on its property only if it created the condition complained of or had actual or constructive notice of same.

Plaintiff s primary argument before the Court of Appeals was that it was reasonably foreseeable to the defendant that children would play on the lifeguard stand and subsequently be injured, regardless of the manner that any accident might have occurred or the extent of the injury. We maintained that this argument is contrary to well-established case law in this State. The mere fact that an accident occurs does not and should not give rise to liability. With the benefit of hindsight, nearly every accident is "foreseeable" in some manner. However, imposing damages upon a property owner based upon hindsight stretches the bounds of tort liability far beyond a reasonable and controllable degree.

Finally, the plaintiffs maintained that there was adequate notice of the condition which a jury could infer that the defendant had constructive notice of the condition that led to her injuries. In response, our brief noted that the allegedly defective nail, according to plaintiffs own accounts, protruded no more than 1/4 to 1/2 inch from the lifeguard stand and should not, as a matter of law, be actionable. Such a minimal protrusion of the nail was not visible or apparent, as evidenced by the fact that the plaintiff herself never saw it, despite the fact that she climbed the lifeguard stand three times on the day of the accident, and some 10-20 occasions prior to the day of the accident. Further, despite the affidavit of plaintiff s friend, he never sets forth the degree of the protrusion or when he saw same. In any event, imposing liability upon a defendant in a case like this would abrogate existing law, forcing the landowner to, in fact, be an insurer. This unjustified burden is both onerous and unwarranted.

As previously stated, argument was held in October of this matter. It appears that the focus at oral argument was on foreseeability and constructive notice. We eagerly await a decision and, of course, will keep you updated.

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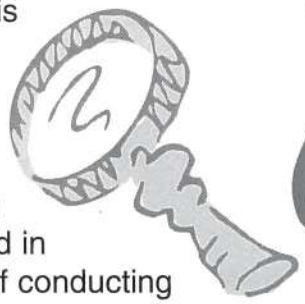

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