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Paul M. Duffy *

President's Column

Our Association has completed another ambitious and successful year.

Educationally, our Continuing Legal Education Committee, co-chaired by Jeanne Cygan and Kristin Shea, presented five outstanding seminars on significant issues involving the defense industry: defending traumatic brain injury claims; the ethical implications of surveillance videotaping; analysis of the Dutton case and its impact on indemnity claims in the Workers' Compensation setting; toxic tort mold litigation; and analysis of significant issues for defense attorneys.

Our annual golf outing at Leewood Country Club was once again, an unqualified success with the introduction of several new sponsors and a wonderful and relaxing day of golf.

The year was highlighted by the Pinckney Award Dinner at which posthumous recognition was given to three court officers who rushed to assist at the World Trade Center on 9/11: Capt. Harry Thompson and Senior Court Officers Mitchell Wallace and Thomas Jurgens. The award was presented to the families by Associate Justice Luis Gonzalez, Appellate Division, First Department.

2002 concluded with the Past Presidents Dinner at which many past presidents attended and were honored and our annual scholarship was presented to Temple University acknowledging its nationally recognized trial advocacy program.

As we look to the future, we remain sincere in our conviction to advance personally as defense trial attorneys and as a profession as a whole.

** Paul M. Duffy is a partner in the law firm of Mulholland, Minion & Roe.*

John J. McDonough, Esq.*

EMERGING ISSUES: Coverage for Mold Contamination Claims under Commercial General Liability Policies

Any litigator with his or her pulse on litigation trends has noticed a surge in mold contamination claims over the past several years. Today, the frequency of complaints by building occupants has resulted in a rapid rise in mold litigation centering on indoor air quality. Various media reports have informed people of the issues and danger of toxic mold. Furthermore, the internet is also a significant source of information regarding mold, mold contamination and mold claims and lawsuits. Consider the following cases just reported over the last several months:

- Michigan homeowners seek class certification in a case in which a building company allegedly installed a faulty ventilation system that led to mold growth.
- Teachers and students in a Washington school district seek class certification of their suit that mold spores in the high school effected indoor air quality and cause illness.
- California federal jury awarded policyholder $18 million in punitive damages arising out of a mold coverage action. The judge later reduced the award to $2,500,000.

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Coverage for Mold Contamination

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- California homeowners reached a $1,320,000 settlement with developers and contractors for faulty workmanship resulting in toxic mold exposure.

As demonstrated by the cases above, mold contamination lawsuits involve a wide variety of claimants ranging from office workers, residential tenants, homeowners, municipalities and local governments. Defendants in these actions are equally diverse and include builders, architects, subcontractors and system designers.

Of course, as mold litigation increases, liability insurers will be continually faced with demands from their policyholders to defend and indemnify them in the underlying litigation. This article will address issues of trigger of coverage and the application of the pollution exclusion in liability policies for mold exposure/contamination claims. A future article will address coverage issues for mold contamination under first party property policies.

I. TRIGGER OF COVERAGE

Prior to determining whether any exclusions or policy conditions are potentially applicable to a mold contamination/exposure lawsuit, an insurer must first determine whether its policy is even implicated by the assertion of a claim or the filing of a lawsuit against its insured. A commercial general liability coverage form typically provides, in the policy's insuring agreement, that the insurance applies to bodily injury or property damage only if it "occurs during the policy period."

Thus, one of the predicate issues under third party liability policies is a determination of when the injury or damage took place. In cases of latent injury or disease, such as the typical mold case, courts will likely apply one of several different theories to determine when the injury or damage took place and, therefore, what policies may be triggered.

Under the "exposure" theory, each policy on the risk during the period the plaintiff is exposed to the injury-causing substance is triggered. In a mold contamination case, this period would begin upon exposure to the mold and terminate once the exposure ceased. Another theory is the "installation" trigger, which provides that the policies in effect when the insured sold or installed the product are triggered. The date of loss in mold cases may be when the building materials promoting the mold growth were installed.

The third theory is the "manifestation" theory, which implicates the policy on the risk the date the injury or damage becomes apparent. This trigger theory would be relatively easy to apply in mold cases, i.e., when the plaintiff had symptoms of an illness or when a doctor detected the mold exposure.

Under the "injury in fact" theory, the policy on the risk on the date injury or damage is established through actual proof is triggered. The date of loss in mold cases will be when some injury or damage takes place, even though the injury or damage is unknown or not yet diagnosed. The last theory is the "continuous" theory, triggering policies on the risk from the time of first exposure through the date of manifestation, diagnosis or suit.

When "bodily injury" occurs will likely involve disputes similar to those raised in asbestos cases as to whether sub-clinical changes, prior to a diagnosis of injury, constitute "bodily injury." Because the nature of mold injuries is not fully known, some may argue that until injuries are capable of being medically diagnosed, "bodily injury" has not occurred. However, the uncertain nature of the mold injury process may provide arguments that coverage is triggered from the initial exposure to mold because the potential for injury has occurred. As with many insurance coverage disputes, however, resolving when a liability policy is triggered may differ from jurisdiction to jurisdiction, depending on the trigger theory courts apply in each state.

II. POLLUTION EXCLUSION

The most prevalent coverage dispute in mold contamination/exposure cases will likely be whether the pollution exclusion bars coverage for mold claims under liability policies. The scope of the pollution exclusion has been argued extensively in the context of indoor air quality lawsuits similar to the typical mold contamination/exposure case.

Whether the pollution exclusion bars coverage for indoor air quality lawsuits may depend on the specific nature of the lawsuit. Indoor air quality lawsuits can be based on a variety of exposures, as specific as fumes emanating from a carpet or high concentration of carbon monixide exposure, or as general as "sick building" lawsuits that involve unknown or undetermined combinations of volatile or organic compounds.

The most prevalent form of the pollution exclusion bars coverage for "bodily injury" or "property damage" arising out of the "actual, alleged or threaten discharge, dispersal, release or escape of pollution: (a) at or from

premises you own, rent or occupy". Pollutant is defined to mean "any solid, liquid, gas, or thermal irate or contaminate, including smoke, vapor, soot, fumes, acids, alkalis chemicals and waste. Waste includes materials to be recycled, recondition or reclaimed."

A. Evidence of a "Discharge"

One of the coverage issues involving mold claims and the pollution exclusion will involve whether there has been "discharge, dispersal, seepage, mitigation, release or escape" of the mold. In some circumstances, policyholders have argued that the release must be into the environment generally, or at least to an area outside of the substance's intended use, because the terms are used within the contents of a "pollution" exclusion. In a similar vein, policyholders argue that the terms "discharge, dispersal, seepage, migration, release or escape" are terms of art applicable only to discharges into the environment. See, American State Insurance Co. v. Kolmos, 666 N.E.2d 699 (Ill. App. 1996); *Atlantic Mutual Insurance Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1995); *West American Insurance Co. v. Tufco Flooring*, 409 S.E.2d 692 (N.C.App. 1991).

For example, the pollution exclusion was held not to apply in *Leverence v. United States Fire & Guarantee Co.*, 462 N.W.2d 218 (Wis. App. 1990). In that case, a building contractor was sued by homeowners who alleged that his negligent construction of their home had permitted excessive moisture to build up, which in turn promoted the development of mold spores that had caused the homeowners to suffer health problems. The Wisconsin Court of Appeals rejected USF&G's assertion that the pollution exclusion applied, holding that the growth of spores from excessive moisture was not caused by any "discharge" of contaminates.

In *Meridian Mutual Insurance Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 2000), a painting contractor sought coverage under its CGL policy for bodily injuries caused by the inhalation of sealant fumes. The Sixth Circuit addressed whether the movement of toxic fumes was a discharge, dispersal, seepage, migration, release or escape of pollutants within the pollution exclusion. The court held that the pollution exclusion "does not shield the insurer from liability for injuries caused by toxic substances that are still confined within the general area of their intended use." *Kellman*, 197 F.3d at 1183. See also Byrd v. Blumenreich, 317 N.J. Super. 496, 722 A.2d 598 (App. Div. 1999); *Roofers' Joint Training, Apprentice and Educational Committee of Western New York v. General Accident Insurance Company of America*, 275 A.D.2d 90, 713 N.Y.S.2d 615 (4th Dept. 2000) (injuries resulting from exposure to toxic fumes during insured's construction safety course do not fall within pollution exclusion because there was no "discharge" because the fumes were inhaled in the immediate vicinity of where the normal roofing process was being conducted).

In contrast, some jurisdictions hold that a discharge, release or escape can occur in the context of indoor exposure cases. See, *Employers Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 52 Cal. Rptr.2d 17 (Cal. App. 1996) (movement of sulfur dioxide a discharge when released as electrician burned holes in floor of office building under construction to install conduit); *Madison Construction Co. v. The Harleysville Mutual Insurance Co.*, 678 A.2d 802 (Pa. Super. 1996) (toxic vapors were discharged when released from curing agent added to concrete floor upon installation inside building); State Farm Fire & Casualty Insurance Co. v. Deni Associates of Florida Inc., 678 So.2d 397 (Fla. App. 1996) (ammonia fumes were discharged when spilled from blueprint machine within office building); *American State Insurance Co. v. Zippro Construction Co.*, 455 S.E.2d 133 (Ga. App. 1995) (asbestos fibers released during sanding of home kitchen floor constituted a discharge).

In *Employers Casualty, supra*, a court rejected the claim that the pollution exclusion is only applicable to discharges into the environment. The court reasoned as follows: "The plain language of the exclusion, however, contains no such requirement and clearly refers to any

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discharge, dispersal, release or escape. In fact, the plain language or the exclusion militates against any such restrictive environmental construction: The exclusion expressly refers to discharge, dispersal, release or escape 'at' a site." *Employers Casualty*, 52 Cal. Rptr.2d at 23.

One of the distinguishing factors between these contrary decisions is found in the language of the pollution exclusion. Earlier versions of the exclusion often contained language referring to the discharge, dispersal, release or escape of pollutants "into or upon land, the atmosphere or any watercourse or body of water." Courts relied upon this language as an indicator that the exclusion was intended to be limited to situations in which there was a discharge into the environment. For example, in *Reliance Insurance Co. v. Moessner*, 1997 WL 434866 (3d Cir. 1997), the court held that the pollution exclusion precluded coverage for work-place carbon monoxide poisoning. This result was supported by the absence of the "into or upon land, the atmosphere or any watercourse or body of water" phrase, the principal factor used by the court to distinguish earlier caselaw. See also *West American Insurance Co. v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996). But see *Sullins v. Allstate Insurance Co.*, 667 A.2d 617 (Md. 1995) (since the terms "discharge, dispersal, release or escape" are environmental terms of art, the "into or upon land, the atmosphere or any watercourse or body of water" language in the former exclusion was merely redundant).

Similar to the judicial treatment of asbestos and toxic fumes, courts will likely be split on whether exposure to mold resulted from a "discharge" of a pollutant. Courts tending to find coverage will attempt to analyze the intent behind the exclusion, rather than relying upon the clear language of the policy. Insurers must advocate a simple contract interpretation approach: applying the plain language of the policy to the facts at hand. This will maximize the carrier's chances of prevailing in the coverage dispute.

B. Mold as a "Pollutant"

Coverage for mold contamination claims under general liability policies will also focus on whether the mold would constitute "pollution" within the meaning of the pollution exclusion. In *Fayette County Housing Authority v. Housing and Redevelopment Insurance Exchange*, 2001 Pa. Super. 83, 2001 WL 238436 (March 12, 2001), the Pennsylvania Superior Court held that lead-base paint was a "pollutant" within the meaning of the pollution exclusion and that the paint, separating from a painted surface, fell within the exclusion's meaning of "discharge, dispersal, seepage, migration, release or escape of pollutants." The court rejected the argument that the pollution exclusion only applies to environmental contamination and that the language is ambiguous as to a residential setting. See also *Taletto v. Vanmornters & Rogers, Inc.*, 92 F. Supp.2d 44 (D. R.I. 2000).

Similarly, in *West American Insurance Co. v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), various employees of a commercial tenant sued the building owner alleging that contaminates in the building's air was causing them to suffer various symptoms attributable to "sick building syndrome." The employees alleged that their injuries resulted from a poorly designed air condition system that was allowing airborne contaminates to be dispersed throughout the building. The court granted summary judgement for the insurer, holding that the absolute pollution exclusion was not ambiguous and was not restricted to "actual polluters." Further, the court rejected the insurer's contention that such exclusions were only applicable to discharges "into the environment."

Apart from "sick building" cases, courts have applied the exclusion in several analogous areas involving indoor exposures. See, *American State Insurance Co. v. F.H.S., Inc.*, 843 F. Supp. 187 (S.D. Miss. 1994) (release of fumes from insurer's refrigeration facility); *Bernhardt v. Hartford Fire Insurance Co.*, 648 A.2d 1047 (Md. App. 1994) (carbon monoxide poisoning from defective space heater); *American Country Insurance Co. v. Planned Realty Group, Inc.*, No. 95 CH 6956 (Ill. Cir. Ct. April 10, 1996) (lead dust from sanding operations); Lyman v. Travelers Insurance Co., 1996 Minn. App. LEXIS 459 (Minn. App. May 7, 1996) (paint fumes); *Anderson v. Highland House Company*, No. 75769, 2000 WL 574364, (Ohio App. May 11, 2000)(court held that pollution exclusion applied to injuries caused by the inhalation of carbon monoxide fumes emanating from a defective heating unit); *Zell v. Aetna Casualty & Surety Insurance Co.*, 11 Ohio App.3d 677 (1996) (noxious fumes from weatherproofing material applied to parking lot surface, which seeped into adjacent building basement, determined to be "pollutants" under pollution exclusion).

In *South Dakota State Cement Plant Commission v. Wausau Underwriters Insurance Co.*, 616 N.W.2d 397, 2000 SD 116 (2000), the court held that liability for alleged emission of excessive cement dust fell within the absolute pollution exclusion. The court relied, in part, on the fact that the government regulated cement dust as a harmful material or pollutant if emitted into the air. "To argue that cement dust is not a pollutant faced with government regulation on the substance appears to be a specious argument at best." *South Dakota State Cement Plant Commission*, 616 N.W.2d 397 at p. 23.

In contrast, the Arizona Court of Appeals held that fecal coliform bacteria is not a pollutant subject to the absolute pollution exclusion. *Keggi v. Northbrook Property and Casualty Insurance Co.*, 13 P.3d 785 (Ariz. Ct. App. 2000). The City of Scottsdale supplied tap water which was contaminated with fecal coliform. The court concluded that the exclusion's plain language did not include "bacteria." The court also held that even if the policy language could be read broadly enough to exclude bacteria, public policy would reject such a broad reading absent evidence that contamination arose from "traditional environmental pollution." The court premised its rationale, in part, on the view that public policy supports a narrow interpretation of the exclusion so it does not bar coverage otherwise reasonably expected by the insured.

Similarly, the Washington Supreme Court in *Kent Farms, Inc. v. Zurich Insurance Co.*, 140 Wash.2d 396, 998 P.2d 292 (2000), held at the absolute pollution exclusion was intended to apply to injury caused by environmental damage. Therefore, the court held the exclusion did not apply where a fuel delivery driver suffered injury after diesel fuel back-flowed over him because of a faulty intake valve on the fuel storage tank. In the words of the court:

> Zurich Insurance argues the pollution exclusion clause applies because diesel fuel is a pollutant. However, this reasoning misunderstands the nature of the claim. [The driver] was not polluted by diesel fuel. It struck him; it engulfed him; it choked him. It did not pollute him. Most importantly, the fuel was not acting as a "pollutant" when it struck him any more than it would have been acting as a "pollutant" if it had been in a barrel that rolled over him, or if it had been lying quietly on the steps waiting to trip him. To adopt Zurich insurance's interpretation would unjustly broaden the application of the exclusion far beyond its intended purpose.

Kent Farms, 998 P.2d at 295.

In *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506, 593 N.Y.S.2d 966 (1993), the New York Court of Appeals held that the pollution exclusion clause did not apply to injuries arising from the inhalation of asbestos fibers, on the grounds it was ambiguous whether the clause applied to the release of asbestos fibers indoors. See also *Eastern Mutual Insurance Co. v. Kleinke, et al.*, No. 2123 (N.Y. Sup. Ct. January 17, 2001), reprinted in 15 *Mealey's Litigation Reporter: Insurance*, 13 at b-1 (February 6, 2001) (court declares that absolute pollution exclusion does not bar claim arising from e-coli bacteria injuries, thus carrier must defend claim).

The application of the pollution exclusion to mold contamination/exposure cases will produce varying judicial results similar to other environmental occurrences. It is over-simplistic to view the pollution exclusion only with respect to "traditional" environmental pollution. Insurance terms, like any other written contract, must be interpreted in light of their plain and ordinary meaning. In turn, the more reasoned view is that mold is a "pollutant" within the meaning of the pollution exclusion.

III. CONCLUSION

The foregoing are just several of the more prevalent coverage issues facing insurers addressing coverage for mold contamination claims. As demonstrated by the recent cases discussed above, jurisdictions will likely differentiate types of indoor air quality claims as courts continue to be confronted with such claims. Assuming that insureds can get past the trigger of coverage issues, insurers must rely on the broad and plain language of the pollution exclusion. Insureds will likely argue that the historic scope and purpose of the exclusion favors coverage. As precedent develops, one side will likely gain momentum in what is certain to be a highly contested area of insurance coverage law.

PROFESSOR DROST WITH TRIAL ADVOCACY TEAM MEMBERS

ROGER P. MCTIERNAN PRESENTING PROFESSOR JOHN DROST WITH TRIAL ADVOCACY STIPEND

PROFESSOR JOHN DROST WITH TRIAL ADVOCACY TEAM MEMBERS (L-R) BRIAN KENT, SAMANTHA CAUFFMAN, MATT LOCKMAN, JULIA LEE AND PROFESSOR CARY BRICKER

(L-R) ROGER P. MCTIERNAN, PROFESSOR JOHN DROST, ANTHONY CELENTANO AND PAUL M. DUFFY

PROFESSOR JOHN DROST (R) WITH BRIAN KENT, MATT LECKMAN, JULIA LEE AND SAMANTHA CAUFFMAN

Roger P. McTiernan*

TRIAL ADVOCACY PROGRAM

I am taking this opportunity to report to the General Membership the presentation of the Trial Advocacy Stipend to the James L. Beasley School of Law of Temple University on the 12th day of November at the Past President's Dinner.

As you are aware each year the stipend is given to a school of law that is selected by the President, Board of Directors and Officers of the Organization to encourage the development and training of future lawyers to become quality litigators. Over the years we have had many law schools receive this stipend, all of whom expressed their gratitude by having the professors in charge of their trial advocacy program and the participants themselves appear at our dinner.

By far, the most prestigious school of law, ever to receive an award, based on accomplishments, is the James E. Beasley School of Law of Temple University.

Temple University's James E. Beasley School of Law is one of the largest and most comprehensive trial advocacy programs in the country. Temple offers an intensive trial training curriculum that includes two introductory trial advocacy programs - one basic, the other integrated with courses in evidence and ethics - and an advanced trial advocacy tract which includes courses in civil and criminal trial advocacy. Each class is capped at twelve students and taught by full-time professors and practicing trial lawyers all of whom have successfully completed Temple's own teacher training program. Third year Temple students take advantage of a clinical program which permits them to try cases as assistant district attorneys, public defenders, city solicitors, and legal aid lawyers.

The dinner was attended by Professor Cary Bricker (Director of Trial Advocacy Programs), Professor John Drost (Director of the LLM in Trial Advocacy Program) and the following team members: Samantha Cauffman, Brian Kent, Matt Leckman and Julia Lee. An example of the dedication of the faculty to the program and its team members, Professor Cary Bricker arrived after the dinner had started in view of the fact that it took her four hours to travel by car from Philadelphia, due to inclement weather, etc., to attend this function. Professor John Drost accepted the stipend on behalf of the school of law and expressed in eloquent terms the purpose of their program and what it meant to receive this award.

Aside from the team members being enthusiastic, poised, obviously grateful to be the recipients of the honorarium, of greater significance, however, is the accomplishments of Temple's mock trial team, which is comprised of sixteen students, four of whom attended the dinner. Their record of excellence is as follows:

> Temple Law School is the only two-time winner (1989 and 2002) of the American College of Trial Lawyers Emil Gumpert Award for Excellence in Teaching Trial Advocacy;
>
> 5 national championships since 1995;
>
> Highest scoring team in mock trial competitions since 1995;
>
> Only school to have won a national invitation tournament three years in a row;
>
> Only school to have two teams tie for first place in the Association of Trial Lawyers of America Competition;
>
> Ranked #1 in trial advocacy by U.S. News & World Report since 1999.

These wonderful accomplishments could only have been brought about as a result of the program in place at the university.

There seems to be little doubt that the trial bar throughout the country will benefit from the future trial lawyers being developed at this school.

In conclusion, we know that the stipend will be used to support the program and indeed improve it if possible. The presence of the professors and team members from the school enhanced the program of the dinner and we must acknowledge that this was as a result of selection process of the President, Officers and Board of Directors of the Defense Association of New York.

** Roger P. McTiernan is a member of the firm of Barry, McTiernan, and Moore located in Manhattan.*

Lisa Shreiber, Esq.*

CURRENT DEBATE OVER TERRORISM COVERAGE

Brian Walsh, Esq.*

I. HISTORY OF TERRORISM IN NORTH AMERICA PRIOR TO SEPTEMBER 11, 2001

While the terrorist acts committed on September 11, 2001 proved to be a major shock to the consciousness of the American people, they were not unique either in the global community or, in fact, on the home front. In fact, the U.S. Department of State reports that from 1996 to 2001 there have been 2,043 international terrorist attacks, with 19 such attacks occurring in North America.[1] What was unique about the September 11, 2001 terrorist attacks, however, was the breadth and scope of the damages caused by the attacks and the commensurate loss suffered by policy holders. Estimates of the total loss caused by the September 11, 2001 terrorist acts range from $30 billion to $70 billion. The next largest insured disaster was Hurricane Andrew, which resulted in $19 billion in losses.[2]

A. RATE OF OCCURRENCE IN NORTH AMERICA vs. OTHER COUNTRIES

Terrorism is not a new threat, nor is it uniquely limited to any area of the world. However, the threat of terrorist activity, and the potential risk to insurers, has historically been significantly lower in North America than in other regions of the world. According to the U.S. Department of State, there were 13 terrorist acts in North America in 1997, 2 in 1999, and 4 in 2001. By contrast, a reported 344 international terrorist attacks occurred outside of North America in 2001 alone.[3]

B. COST OF OCCURRENCES IN THE UNITED STATES vs. OTHER COUNTRIES

One of the greatest tragedies of September 11, 2001 was the catastrophic loss of life. While some estimates of the total casualties from the attacks have fallen below 3,000, the magnitude of the loss of human life is still at a number that had never previously been contemplated. Moreover, the total losses to the insurance market of between $50 and $70 billion are in an amount never before thought possible.[4] Prior to September 11, 2001, the insurance industry treated terrorism exposures as manageable risks with respect to the United States Market, and thus provided coverage for such risk under all types of policies. By contrast, terrorism coverage was not provided by insurers in markets where the highest incidence of terrorist attacks have historically occurred, i.e. the United Kingdom, Spain, South Africa, Israel, Northern Ireland and Sri Lanka. Rather, the policies issued in those countries explicitly excludes terrorism coverage as the need for such coverage has been replaced by government programs specifically designed to respond to terrorism losses.[5] Needless to say, the gravity and breadth of the losses caused by the September 11, 2001 terrorist attacks has forced the insurance industry to re-examine its policies toward terrorism coverage in the United States.

II. SEPTEMBER 11, 2001 REACTIONS

One of the first responses by the insurance industry to the September 11, 2001 attacks was to announce that the war exclusion contained in property and CGL policies would not apply to preclude coverage for losses sustained as a result of the September 11, 2001 terrorist attacks.[6] Almost immediately after the insurance industry made this announcement insurers immediately began drafting proposed terrorism exclusions for inclusion in future policies as many of the insurance and reinsurance treaties were due for renewal on January 1, 2002.

The United States government likewise reacted to the immense losses sustained by the insurance industry as a result of the September 11, 2001 terrorist attacks by introducing new legislation in both the House and the Senate; HR 3210 and S 2600, respectively. Each piece of proposed legislation seeks to create a Federal "backstop" program designed to ease the risk borne by insurers for future terrorism losses.

A. INSURERS

In direct response to the September 11, 2001 terrorist attacks, insurers began drafting numerous proposed terrorism exclusions for inclusion in CGL and Property policies. Many of these draft exclusions were so broad as to encompass activities not normally associated with terrorism, such as acts of vandalism. Due to their overly

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Current Debate Over Terrorism Coverage

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broad nature, the proposed exclusions were uniformly rejected by state regulatory boards.[7] As a result, the Insurance Services Office, Inc. ("ISO") stepped in and worked with the National Association of Insurance Commissioners ("NAIC") to develop more limited exclusions for use in commercial property and casualty insurance policies.[8] These exclusion are discussed in further detail below.

B. GOVERNMENT

While the insurance industry was attempting to compose terrorism exclusions acceptable to the state insurance departments, the House and the Senate were attempting to create legislation which would assist the insurance industry in dealing with future cataclysmic terrorist attacks. Legislation introduced in both the House and the Senate seeks to limit the future terrorism exposure faced by insurers by providing for risk-sharing between insurers and the government for up to $100 billion in terrorism losses.[9] The proposed risk-sharing program is to be supervised by the Secretary of the Treasury.[10]

Both proposed pieces of legislation, for the most part, only apply to losses incurred within the United States of America. Moreover, both proposals only concern property damage, business interruption or extra expenses, losses and are silent as to rates for terrorism insurance.[11]

Aside from these common features, however, the House resolution (HR 3210) and the Senate Proposal (S 2000) aim to protect insurers from terrorism losses in rather different ways.

1. House Resolution 3210

The House passed HR 3210 in November 2001. In pertinent part, HR 3210 calls for the Federal government to be a "lender of first resort" to insurers in the event of a terrorist attack. Under HR 3210, the Federal Government would provide interim funding to insurers to allow the insurers to pay out insured claims. Thereafter, however, the insurers would be required to repay the government through a surcharge imposed on policy-holders.[12] Further, HR 3210 limits recovery for non-economic damages caused by terrorist attacks and bars recovery for punitive damages.[13]

HR 3210 states that in order for an event to classify as a terrorist attack, the Secretary of the Treasury must certify it as such:

> (1) ACT OF TERRORISM
>
> (A) IN GENERAL- The term 'act of terrorism' means any act that the Secretary determines meets the requirements under subparagraph (B), as such requirements are further defined and specified by the Secretary in consultation with the NAIC.[14]

HR 3210 also requires that an act be "committed by a person or group of persons or associations who are recognized, ...as an international terrorist group..." in order to qualify as "an act of terrorism."[15] This language effectively resolves any ambiguities over whether certain domestic events such as vandalism, robbery, or even riots would be considered acts of terrorism.

In order to further clarify the types of situations to which the Federal sharing program will apply, the House Resolution also specifically states that for an event to be considered an "act of terrorism" it must not be "considered an act of war."[16]

2. Senate Proposal 2600

The Senate Proposal passed the Senate in June 2002. The primary difference between it and the House resolution is that the Senate Proposal does not suggest the implementation of a loan program, as does the House Resolution. Rather, the Senate Proposal seeks to create government insurance coverage for terrorism losses in excess of $10 billion, subject to a $100 billion cap. As such, in contrast to the House Resolution, the Senate Proposal does not contemplate payback from either insurers or policyholders of any government aid. Moreover, the Senate Proposal unlike the House Resolution neither bars punitive damages nor limits recovery of non-economic damages.[17] It does, however, relieve the government from potential liabilities caused as a result of terrorist attacks.[18]

The Senate Proposal calls for the Federal Government to pay 80% of the first $10 billion in terrorism losses and 90% of all further terrorism losses up to $100 billion.[19] Notably, under the Senate Proposal, not only would there be no governmental liability after the $100 billion threshold was reached, but there would also be no liability for insurers above $100 billion.[20] Further, Senate Proposal 2600 provides protection for certain insurers before the $10 billion threshold is reached. Specifically, under the Senate Proposal, an individual insurer whose share of losses caused by a terrorism is greater than its overall market share, would be entitled to governmental assistance even if the total losses caused by the terrorist attack did not meet the $10 billion threshold.[21]

Much like HR 3210, S 2600 requires that an "act of terrorism" be certified as such by the Secretary of the

Treasury before the bill applies. However, unlike HR 3210, S 2600 requires that the certification of the Secretary of the Treasury be made in concurrence with the Secretary of State and the Attorney General:

> (1) ACT OF TERRORISM-
>
> (A) Certification- The term 'act of terrorism' means any act that is certified by the Secretary, in concurrence with the Secretary of State, and the attorney General of the United States-
>
> (i) to be a violent act or an act that is dangerous to-
>
> (I) human life;
>
> (II) property; or
>
> (III) infrastructure;
>
> (ii) to have resulted in damage within the United States, or outside the United States in the case of an air carrier or vessel described in paragraph (3)(A)(ii); and
>
> (iii) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States...[22]

S 2600 specifically makes any determination of certification by the Secretary of the Treasury final and not subject to judicial review.[23]

Interestingly, like HR 3210, S 2600 limits its definition of terrorist attacks to those attacks perpetrated by foreign groups. Therefore, ostensibly, any such act committed by a domestic group, such as a militia group, would not implicate either of the proposed federal sharing programs. Specifically, it seems that neither proposal would respond to a situation such as the Oklahoma City bombing.[24]

3. Present Attempts at Compromise

At present both proposals are being reviewed by the House and Senate. While there is confidence that there will be some type of compromise, what shape that compromise will take remains uncertain. Specifically, there are some major sticking points that will make compromise exceedingly difficult.

The House is getting pressure from consumer groups, among others, to reject any compromise that does not include a consumer payback requirement.[25] The concern is that any program that does not call for a payback will be borne by the taxpayer.

Another point of contention is the *de facto* tort reform provisions contained in the House Resolution. Specifically, the Senate has expressed concern over those portions of HR 3210 that bar punitive damages and limit recovery for non-economic damages.[26]

While the House and Senate work to reach a compromise for a federal sharing program, ISO has proposed a terrorism exclusion for CGL and Property policies that has been broadly accepted by the majority of state regulatory boards.

III. TERRORISM EXCLUSIONS

While the Federal Government works to provide a backstop sharing program for covered terrorism losses, ISO drafted exclusionary language specifically tailored to limit the insurance industry's exposure to loss caused by terrorist acts. On December 21, 2001 the NAIC endorsed the ISO's language for limited terrorism exclusions applicable to commercial property and casualty policies. To date, the ISO language has been approved in 45 States, as well as Puerto Rico, the District of Columbia and Guam. It has not however, been approved for use in New York, California, Florida, Texas and Georgia.[27]

A. General Form (ISO Exclusion)

Initially ISO merely modified the currently existing language of the war exclusion found in CGL and Property policies to likewise exclude acts of terrorism. In the ISO's initial attempt terrorism was defined as follows:

> "Terrorism" means activities against persons, organizations or property of any nature:
>
> 1. That involve the following or preparation for the following:
>
> a. Use or threat of force or violence
>
> b. Commission or threat of a dangerous act;
>
> or
>
> c. Commission or threat of an act that interferes with or disrupts an electronic communication, information, or mechanical system; and
>
> 2. When one or both of the following applies:
>
> a. The effect is to intimidate or coerce a government, or to cause chaos among the civilian population or any segment thereof, or to disrupt any segment of the economy; or
>
> b. It is reasonable to believe the intent is to intimidate or coerce a government, or to seek revenge or retaliate, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

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Current Debate Over Terrorism Coverage

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Much like the attempts made by individual insurers, the ISO's initial language was exceedingly broad.[28] The overly broad nature posed obvious problems, as acts that were not normally considered terrorism would be treated as such by the proposed language. Therefore, ISO amended the language.

Most significantly, ISO added threshold language. Whereas, initially, ISO proposed a blanket exclusion for terrorism, the subsequent, approved exclusion contains thresholds for triggering the exclusion. The property threshold is $25 million, which amount includes both direct damage and business interruption loss for insured damage incurred in the United States, its territories and possessions, Puerto Rico and/or Canada. The bodily injury threshold is 50 or more persons killed or seriously injured.

These thresholds are measured on a "per incident" basis. As a result of the suits filed regarding whether the September 11th attacks on the Trade Center buildings constituted one or two "occurrences", ISO exclusion purposely defined "an incident of terrorism" to avoid such ambiguity in the future, as follows:

> Multiple incidents of 'terrorism' which occur within a seventy-two hour period and appear to be carried out in concert or to have a related purpose or common leadership shall be considered to be one incident.[29]

The ISO exclusions likewise define "terrorism" as follows:

> "Terrorism means activities against persons, organizations or property of any nature:
>
> 1. That involve the following or preparation for the following:
>   a. Use or threat of force or violence; or
>   b. Commission or threat of a dangerous act; or
>   c. Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
> 2. When one or both of the following applies:
>   a. The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
>   b. It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.[30]

The purpose of the definition was to both reduce ambiguity and to limit the scope of activities which could be considered as "terrorism." Moreover, specific exclusionary language regarding nuclear, chemical and biological weapons was also added. Specifically, any loss caused by an intended nuclear, chemical or biological weapon or release is excluded regardless of whether the loss would have otherwise met the threshold limits, as follows:

> 2. Regardless of the amount of damage and losses, the Terrorism Exclusion applies to any incident of terrorism:
>   a. That involves the use, release or escape of nuclear materials, or that directly or indirectly results in nuclear reaction or radiation or radioactive contamination; or
>   b. That is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
>   c. In which pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.[31]
>
> In its final form the terrorism exclusion is known as the "Exclusion of War, Military Action and Terrorism"[32] for property policies, and the "War or Terrorism Exclusion" for CGL policies.[33]

B. Fire Policies

In those states that do not require a Standard Fire Policy, the ISO terrorism exclusion applies to all property loss.[34] In Standard Fire Policy states, the terrorism exclusion may not be more restrictive than the standards of the Standard Fire Policy recognized in that state.[35] Therefore, in Standard Five Policy states, the exclusion contains the following exception which provides that the exclusion does not apply if property damage is caused by fire which resulted from a terrorist attack:

> But if terrorism results in fire, "we" will pay for the loss or damage caused by that fire. However, this exception for fire applies only to direct loss or damage by fire to covered property. Therefore, for example, the exception does not apply to any Income Coverage, Earnings Coverage, Extra Expense Coverage which may be provided by this policy.[36]

C. Dissenting States

Of the five dissenting states; Texas, Florida and Georgia are reportedly close to ratifying the ISO language.[37] New York and California, on the other hand, have yet to take any steps in that direction. New York has, however, indicated that a terrorism exclusion that is otherwise consistent with its laws would be acceptable.[38]

CONCLUSION

The debate over what "terrorism" means, and whether and to what extent insurers should be liable for the damage that terrorism causes, is likely to continue for some time to come. The stakes riding on the debate's outcome are significant, as, unfortunately, it is likely that terrorist attacks will continue to occur. A significant part of that debate will depend on the positions taken by the presently undecided states to the adoption of proposed exclusionary language, and it will be interesting to see where the outcome of this debate leaves the industry.

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[1] Willis Limited, Terrorism Market Review at 5 (August 2002).

[2] Jeff Woodward, IRMI Insights: The ISO Terrorism Exclusions: Background and Analysis, at 1 (February, 2002).

[3] Terrorism Market Review at 4.

[4] Id at 5.

[5] Id at 8.

[6] Jack P. Gibson et al., INSIGHTS: The Insurance Coverage Issues Part 1: War Risk Exclusions (September 2001).

[7] Newsletter of the Willis Risk Solutions Practice, Perspectives Terrorism Update - Revised September 2002 at 1-2 (September 2002).

[8] National Association of Insurance Commissioners, News Release, NAIC Members Come to Agreement Regarding Exclusions for Acts of Terrorism (December 21, 2001).

[9] See, HR 3210 7(C); S 2600 § 4(e)(2).

[10] Perspectives Terrorism Update - Revised September 2002 at 2.

[11] Id at 2-4.

[12] HR 3210 §§ 7, 8.

[13] HR 3210 § 14(b)

[14] HR 3210 § 16(1)

[15] HR 3210 § 16(1)(B)(iii)

[16] HR 3210 16(1)(B)(v)

[17] Terrorism Market Review at 9.

[18] Perspectives Terrorism Update - Revised September 2002 at 3.

[19] S 2600 § 4.

[20] S 2600 § 4(e)(1)(2)(B).

[21] Perspectives Terrorism Update - Revised September 2002 at 4.

[22] S 2600 § 3(1).

[23] S 2600 § 3(1)(C).

[24] Perspectives Terrorism Update - Revised September 2002 at 4.

[25] J. Robert Hunter and Travis Plunkett, Consumer Federation of America Final Terror Insurance Legislation Takes Shape: Taxpayers on the Hook for Billions; Insurer Payback is Miniscule (October 15 2002); See also Steven P. Lowe, Tillinghast-Towers Perrin, Estimating the Budgeting Impacts of the Proposed Federal Terrorism Risk Insurance Program; HR 3210 and 52600 (July 12, 2002).

[26] Perspectives Terrorism Update - Revised September 2002 at 5.

[27] IRMI Insights: The ISO Terrorism Exclusions: Background and Analysis at 2.

[28] Id at 3.

[29] AAIS FL 0451 03 02 "War, Military Action, and Terrorism Exclusions (With Limited Terrorism Exception)"; AAIS FL 0450 03 02 "War, Military Action, and Terrorism Exclusions"; CG 31 42 01 02 "War or Terrorism Exclusion".

[30] Id.

[31] AAIS FL 0451 03 02 "War, Military Action, and Terrorism Exclusions (With Limited Terrorism Exception)"; AAIS FL 0450 03 02 "War, Military Action, and Terrorism Exclusions."

[32] Id.

[33] CG 31 42 01 02 "War or Terrorism Exclusion".

[34] AAIS FL 0450 03 02 "War, Military Action, and Terrorism Exclusions."

[35] IRMI Insights: The ISO Terrorism Exclusions: Background and Analysis at 6.

[36] AAIS FL 0451 03 02 "War, Military Action, and Terrorism Exclusions (With Limited Terrorism Exception)."

[37] IRMI Insights: The ISO Terrorism Exclusions: Background and Analysis at 8.

[38] See State of New York Department of Insurance, Informal Opinion dated April 19, 2002; See also State of New York Department of Insurance, Informal Opinion dated May 17, 2002; See also State of New York Department of Insurance, Informal Opinion dated July 19, 2002.

John J. Moore*

WORTHY OF NOTE

Christine Moore**

EVIDENCE - STATEMENT OF EMPLOYEE - SLIP AND FALL

The Court of Appeals recently submitted in Tyrrell v. Wal-Mart Stores, Inc., (97 N.Y.2d 650, 737 N.Y.S.2d 43), that a store customer who was injured in a fall allegedly caused by white, jelly-like liquid on the store's floor failed to show that the store's employee's statement immediately after the fall that "I told somebody to clean that mess up" was made under the stress of excitement caused by an external event sufficient to still her reflective faculties, and that the employee had no time for deliberation, as required for a statement to be admissible under res gestate exception to the hearsay rule in the customer's personal injury action.

The trial court improperly shifted the burden of establishing an exception to the hearsay rule during the premises liability action brought by a store employee, who was injured in a fall allegedly caused by substance on the floor, when it admitted testimony regarding a statement made by store employee immediately after the fall, there was no evidence to suggest that the statement was anything other than a spontaneous declaration.

A proponent of hearsay evidence must establish the applicability of an exception to the hearsay rule.

SUMMARY JUDGMENT - OPPOSITION

A report by a medical malpractice plaintiffs medical expert, which was neither sworn to or affirmed to be true under the penalties of perjury, was not competent evidence sufficient to defeat a summary judgment motion, so indicated the Second Department in Bourgeois v. North Shore University Hospital at Forest Hills, (___ A.D.2d ___ 737 N.Y.S.2d 101.

IMMUNITY - MUNICIPALITY

The Court of Appeals recently submitted in Alston v. State, (97 N.Y.2d 159, 737 N.Y.S.2d 45), that unlike states, municipal corporations are not entitled to sovereign immunity.

NEGLIGENT - CONSTRUCTIVE NOTICE - BURDEN

The Second Department recently held that since the plaintiff failed to submit any proof as to how long the damp condition had existed on the floor, and whether it was visible or apparent for a sufficient amount of time to have allowed the defendant's employees to have discovered the condition and remedied it, plaintiff, who slipped and fell on a damp floor, failed to show that the defendants had constructive notice of the allegedly defective condition. (Matthews v. County of Orange, ___ A.D.2d ___, 739 N.Y.S.2d 201).

EVIDENCE - INTERPRETATION OF DIAGNOSTIC MATERIALS - ELEMENTS

In Wagman v. Bradshaw, (___ A.D.2d ___, 739 N.Y.S.2d 421), the Second Department submitted that in a personal injury action, it was reversible error to permit the treating chiropractor to testify as to the interpretation of magnetic resonance imaging (MRI) films, as set forth in a written report of a non-testifying healthcare professional, for the truth of the matter asserted in the report, and to permit that expert to state his diagnosis which was at least partially based upon the written MRI report, without first-establishing the reliability of the report.

It is reversible error to permit an expert witness to offer testimony interpreting the diagnostic films such as X-rays, CATscans or PETscans, or magnetic resonance imaging (MRI films) without the production and receipt in evidence of the original films thereof or properly authenticated counterparts.

EXPERT - PHYSICIAN - QUALIFICATIONS

In Bodensiek v. Schwartz, (___A.D.2d ___, 739 N.Y.S.2d 405), the Second Department ruled that a Physician need not-be a specialist in a particular field in order to qualify as a medical expert. Any alleged lack of knowledge in a particular area of expertise is a factor to be weighed by the trier of the fact that goes to the weight of the testimony, not its admissibility.

The testimony of plaintiffs expert, a medical oncologist should have been allowed at the trial of a medical malpractice matter against a gynecological surgeon, and therefore a new trial was required even though the witness was not a specialist in the field of gynecological surgery. The witness was going to testify, based upon his past experience in diagnosing and treating gynecological cancers, regarding the necessity of performing a complete hysterectomy as opposed to a more conservative approach.

EXPERT TESTIMONY - ELEMENTS

In Wagman v.-Bradshaw, (___ A.D.2d ___, 739 N.Y.S.2d 421, the Second Department set forth guidelines for the admissibility of expert opinion evidence. The court submitted that the evidence offered must be based on one of the following: (1) personal knowledge of the facts upon which the opinion rests; (2) facts and material in evidence,

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real or testimonial; (3) material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and (4) material not in evidence provided the out of court material is of the kind accepted in the profession as a basis in forming an opinion and the out of court material is accompanied by evidence establishing its reliability.

MALPRACTICE - FAILURE TO ORDER TESTS - STANDARD OF CARE

In Pace v. Jakus, (___ A.D.2d ___ 73 N.Y.S.2d 123), the Second Department ruled that a medical malpractice plaintiff failed to establish a prima facie case of medical malpractice arising from a physician's failure to order a target sonogram, even if the failure to order the target sonogram was the breach of an accepted standard of care, as the plaintiffs failed to establish that the breach was a proximate cause of the infant plaintiffs injuries.

To establish a prima facie case of liability the plaintiff must establish the standard of care and the locality where the treatment occurred, that the defendant breached that standard of care, and that the breach was the proximate cause of the injury. To sustain this burden, the plaintiff must present expert opinion testimony that the defendant's conduct constituted a deviation from the requisite standard of care.

NEGLIGENCE - OWNER - OUT OF POSSESSION

In Brady v. 5644 Avenue U Associates, L.P., (___ A.D.2d ___, 737 N.Y.S.2d 640), the Second Department indicated that where an owner of property is no longer in possession and control of the property, and retains no right to re-enter for purposes of inspection and repair, the owner cannot be held liable for defects in the property.

A parking lot owner was not liable for injuries sustained by a pedestrian who allegedly tripped and fell due to a defective condition in the parking lot, where at the time of the accident, a receiver had been court-appointed to manage the parking lot for about one year, and the owner had been divested of possession and barred from taking any role in the management of the property.

FAILURE TO COMPLY WITH COURT ORDER - DISMISSING COMPLAINT

The Second Department recently ruled that the Supreme Court providently exercised its discretion in denying the plaintiffs motion to extend the time to comply with the prior court order, and dismissing the complaint where the plaintiff did not seek a stay of the direction to comply within a 21 day period set forth in last disclosure order and failed to present a valid excuse for his failure to abide by the court's previous disclosure orders. Abouzeid v. Cadogan, ___ A.D.2d ___, 737 N.Y.S.2d 634).

HOSPITALS - VICARIOUS - LIABILITY

The Second Department recently submitted that hospitals are vicariously liable for the negligence of an independent contractor emergency-room physician where the patient enters the emergency room seeking treatment from the hospital rather than a specific physician of the patient's own choosing. (Schiavone v. Victory Memorial Hospital, ___ A.D.2d ___, 738 N.Y.S.2d 87).

INSURANCE - GENERAL LIABILITY - SCOPE OF COVERAGE

It was recently held that a roofing contractor's commercial general liability policy did not afford coverage for breach of contract and negligence claims based on allegedly faulty roofing job. ~ The claims did not arise out of a covered "accident."

Generally, said the Second Department, a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury J and/or property damage (Mid-Hudson Castle Ltd. v. P.J. Exteriors, Inc., ___ A.D.2d ___, 738 N.Y.S.2d 96).

INSURANCE - SEXUAL ASSAULT

In Physicians Reciprocal Insurer v. Loeb, ___ A.D.2d ___, 738 N.Y.S.2d 68), the Second Department ruled that alleged sexual assaults by an insured doctor against a former patient and employee did not fall within the professional liability policy that covered claims arising from rendering or failing to render professional services, but clearly excluded coverage for any claim that resulted from sexual intimacy, sexual molestation, sexual harassment, sexual exploitation, or sexual assault, as well as willful, fraudulent, or malicious, civil or criminal acts, and claims of false imprisonment.

FULL FAITH AND CREDIT - FOREIGN JUDGMENT

In Luna v. Dobson, (97 N.Y.2d 178, 738 N.Y.S.2d 5), the Court of Appeals stated that in a practical sense, full faith and credit clause of the Federal Constitution establishes a rule of evidence requiring recognition of a prior out-of-state judgment, giving it res judicata effect and thus avoiding re-litigation of issues in one state which has already been decided in another.

Pursuant to the full faith and credit clause of the Federal Constitution, a judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced.

RELATION BACK - ELEMENTS - CPLR 203

The First Department recently held to revoke the relation back doctrine applicable when a new defendant is united in interest with a defendant named in the original complaint, the plaintiff must show that: (1) both claims arise out the same transaction; (2) the new party is united in interest with the original defendant such that the respective defenses are the same and they stand or fall together; (3) the new party knew or should have known that but for the mistake of the plaintiff in failing to identify all proper parties, the action would have been brought against him. (Tucker v. Lorieo, ___ A.D.2d ___, 738 N.Y.S.2d 33). (See, also, Schiavone v. Victory).

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STRICT PRODUCTS LIABILITY- ELEMENTS

In Cervone v. Tuzzolo, (__A.D.2d ___, 738 N.Y.S.2d 60), the Second Department held that evidence was insufficient to establish a prima facie strict products liability case against the manufacturers who placed a dinette table in the stream of commerce, as claimed by plaintiff who allegedly tripped over a dinette table leg and was injured. Punitive expert had no practical or personal knowledge in the design of dining room furniture, the expert did not testify regarding deviation from industry standards or statistics showing the frequency of injuries caused by such design, and no evidence indicated that the dinette table was not reasonably safe for its intended purpose.

PUNITIVE DAMAGES - ELEMENTS

In Hernandez v. Wyeth Ayerst Laboratories, (___ A.D.2d ___, 738 N.Y.S.2d 336). The First Department concluded that the common-law standard for an award of punitive damages is the showing of morally culpable conduct or conduct actuated by evil or reprehensible motives.

The showing of malice is not required to support an award of punitive damages under the statute allowing a jury to award them at its discretion "if the defendant shall have knowingly used such person's name, portrait, picture or voice in such a manner as is forbidden or declared to be unlawful"; no more need be shown than knowing use.

Models were not entitled to punitive damages, in their action against the drug manufacture under the Civil Rights Law for unauthorized use of photographs on vitamin packaging after one year time period specified in vouchers signed by the models and had expired. The manufacturer's request that the photographer's invoice be revised to include specific language requiring the photographer to indemnify it against copyright infringements and violations of rights of publicity did not support a claim that -the manufacturer tailored the language to a foreseeable usage problem resulting from a failure to be provided with valid voucher, and although the manufacturer failed to order immediate recall of the products bearing the models images, there was no showing that the manufacturer itself sold the product or made any other use of the model's images after that time.

DEAD BODY - CIVIL ACTION

The Second Department recently submitted that although a cause of action involving mishandling of a corpse generally requires a showing of interference with the right of next-of-kin to dispose of the body, the next-of-kin may also recover where one improperly deals with the decedents body. A decedent's son stated a cause of action against a funeral home, the casket company and the cemetery for the negligent infliction of emotional distress, based on a discovery that decedent's casket was cracked and its contents leaking. The son's failure to seek medical treatment or psychological counseling for his alleged injuries, while relevant to the issue of damages, did not necessarily preclude a recovery. The decedent's grandchildren were not next-of-kin and thus could not recover damages. Massaro v. Charles J. O'Shea Funeral Home, ___ A.D.2d ___, 738 N.Y.S.2d 384).

NEGLIGENCE TRIP ON RUG

In. Massucci v. Amoco Oil Co., (__AD.2d __, 738 N.Y.S.2d 386), the Second Department held evidence that a frayed condition of a vestibule rug was readily apparent, raised questions of fact as to the tripping visitors possible comparative negligence, but did not negate the property owner's duty to maintain its premises in a safe condition.

RES IPSA LOQUITUR - PRIMA FACIE

The Second Department recently submitted that the res ipsa loquitur doctrine has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may, but is not required to, draw permissible inference of negligence. (Martinez v. City of New York, ___ A.D.2d ___, 738 N.Y.S.2d 383)

SUBSTITUTED SERVICE - ELEMENTS

In Johnson v. Waters, ___A.D.2d ___, 738 N.Y.S.2d 369), the Second Department ruled that three attempts to make service of a summons and complaint upon a defendant at his residence at different times and on different days, including a Saturday, were sufficient to constitute due diligence, and thus, process server properly resorted to service of process by affixing a copy of the summons and complaint to the defendant's apartment and mailing another copy to the same address. There was no indication that the defendant worked on Saturday, and thus, no showing of any other reasonable means whereby the chances of successful personal service could have been significantly increased.

ANIMALS - VICIOUS PROPENSITIES LIABILITY OF OWNER

In Madaia v. Petro, ___ A.D.2d 738 N.Y.S.2d 676), the Second Department submitted that an out-of-possession landlord could not be strictly liable for a child's injuries allegedly occurring when the tenant's dog bit a child, absent evidence that the landlord had knowledge that the dog was being harbored on the premises and that the landlord knew or should have known that the dog had vicious propensities.

AMBIGUITY - ELEMENTS

The Court of Appeals recently submitted that an omission or mistake in a contract does not constitute an ambiguity; rather, the question of whether ambiguity exist must be ascertained in the face of an agreement without regard to extrinsic of evidence. Extrinsic and parole evidence is not admissible to create an ambiguity -in a written agreement which is complete, clear and unambiguous on its face. (Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 738 N.Y.S.2d 658).

MALPRACTICE - RESPONDENT SUPERIOR - INSURANCE

In Megrelishvili v. Our Lady of Mercy Medical Center ___ A.D.2d ___, 739 N.Y.S.2d 2), the First Department ruled that the doctrine of respondent superior did not apply to a patient's action against the hospital for negligently allowing a doctor to maintain privileges there, despite the fact that, in violation of the hospitals bi-laws, the doctor failed to obtain malpractice insurance for approximately three years prior to the patient's negligently performed breast surgery. The doctor was an independent physician retained by the patient, who operated on the patient at the hospital, but was not a hospital employee, and patient did not base the claim on the hospital's direct participation in or supervision over the medical care the patient received.

While a hospital is not responsible for the actual treatment of a patient by a private physician with staff privileges, the failure of a hospital to develop and adhere to reasonable procedures for reviewing a physician's qualifications creates a foreseeable, risk of harm in establishing an independent duty to such patients.

The fact that the doctor was unable to obtain coverage would have put the hospital on notice that the doctor had lost privileges at other hospitals, and that he had a history of malpractice claims against him.

NEGLIGENCE - SUPERSEDING CAUSE - ELEMENTS

The Second Department recently indicated an independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that the responsibility for the injury could not be reasonably attributed to them (Alomia v. New York City Transit Authority, ___ A.D.2d ___, 738 N.Y.S.2d 695).

DISMISSAL - RESTORATION - ELEMENTS

In Costabile v. Hilton Hotel Corp., ___A.D.2 ___, 739 N.Y.S.2d 31), the First Department held that a case would not be restored after being struck from the trial calendar, and subsequently dismissed since plaintiff did not explain the delays for which prior counsel was sanctioned, offered no explanation of his own delays after the case was dismissed, and did not disprove that the defendants were prejudiced by the delay, or that the current counsel took no action whatsoever to move the action toward resolution during the one year period after the action was marked off the calendar.

MENTAL - TRAUMA - ELEMENTS

The First Department recently indicated that a plaintiff may state a cause of action for mental trauma sustained as a result of negligence even without a physical impact. (Pizarro v. 421 Port Associates, ___ A.D.2d ___, 739 N.Y.S.2d 152).

Similarly, an elevator passenger who witnessed an elevator malfunction that resulted in the decapitation of a third party could not recover for mental trauma where the passenger was not closely related to the third party.

Where the recovery sought by an uninjured third person is predicated on witnessing the injury sustained by another person, three criteria must be established: (1) the defendant's conduct must be a substantial factor in causing the serious injury or death to the third person; (2) the plaintiff must be within the zone of danger; and (3) the injured person must be an immediate family member of the plaintiff.

NEGLIGENT - CONSTRUCTIVE NOTICE - BURDEN

The Second Department recently held that since the plaintiff failed to submit any proof as to how long the damp condition had existed on the floor, and whether it was visible or apparent for a sufficient amount of time to have allowed the defendant's employees to have discovered the condition and remedied it, plaintiff, who slipped and fell on a damp floor, failed to show that the defendants had constructive notice of the allegedly defective condition. (Matthews v. County of Orange, ___ A.D.2d ___,739 N.Y.S.2d 201).

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EXPERT - PHYSICIAN - QUALIFICATIONS

In Bodensiek v. Schwartz, ___A.D.2d ___, 739 N.Y.S.2d 405), the Second Department ruled that a physician need not be a specialist in a particular field in order to qualify as a medical expert. Any alleged lack of knowledge in a particular area of expertise is a factor to be weighed by the trier of the fact that goes to the testimony, not its admissibility.

The testimony of plaintiff's expert, a medical oncologist should have been allowed at the trial of a medical malpractice matter against a gynecological surgeon, and therefore a new trial was required even though the witness was hot a specialist in the field of gynecological surgery. The witness was going to testify, based upon his past experience in diagnosing and treating gynecological cancers, regarding the necessity of performing a complete hysterectomy as opposed to a more conservative approach.

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EXPERT TESTIMONY - ELEMENTS

In Wagman v. Bradshaw, ___ A.D.2d ___, 739 N.Y.S.2d 421, the Second Department set forth guidelines for the admissibility of expert opinion evidence. The court submitted that the evidence offered must be based on one of the following: (1) personal knowledge of the facts upon which the opinion rests; (2) facts and material in evidence, real or testimonial; (3) material not in evidence provided that the out-of court material is derived from a witness subject to full cross-examination; and (4) material not in evidence provided the out of court material is of the kind accepted in the profession as a basis in forming an opinion and the out of court material is accompanied by evidence establishing its reliability

HOSPITALS - RESPONDENT SUPERIOR - SEXUAL ASSAULT

It was recently indicated by the Court of Appeals that the actions of a physician who recently indicated by the Court of Appeals that the act properly touched a patient, for purposes of his own sexual gratification, while the patient was recovering from surgery, were not in furtherance of the business of the hospital which employed the physician, or within the scope of his employment, and thus could not form the basis for recovery by the patient against the hospital pursuant to the doctrine of respondent superior. The physician was not charged with the patient's care, and his action could not be characterized as an "examination" as an internal pelvic examination as contraindicated in light of the nature of the surgery the patient had undergone. (N.X. v. Cabrini Medical Center, (97 N.Y.2d 247, 739 N.Y.S.2d 348).

The sexual assault perpetrated by a hospital employee is not in the furtherance of the hospital's business and is a clear departure from the scope of employment, having been committed for wholly personal motives, and thus may not form the basis for imposition of liability against the hospital under the doctrine of respondent superior.

DAMAGES - INSURANCE - FAILURE TO PROCURE

In Taylor v. Doral Inn, ___ A.D.2d ___, 749 N.Y.S.2d 748), the Second Department held that subcontractor who failed to fulfill his contractual obligation to procure liability insurance naming a property owner and general contractor as additional insureds, and thus, the subcontractor was liable to the property owner and general contractor for all out of pocket damages caused in the breach.

NEGLIGENCE SCAFFOLDING LAWS ELEMENTS

In Kane v. Coundorous, ___ A.D.2d ___, 739 N.Y.S.2d 711), the First Department ruled that the scaffold law imposes a non-delegable duty upon building owners and their agents to provide reasonable and adequate protection and safety to persons employed in or lawfully frequenting all areas in which construction, excavation or demolition work is being performed. The history of the scaffold law clearly manifests the legislative intent to place the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.

The liability for injuries resulting from a violation of the scaffold law is absolute.

Property owners and their agents are vicariously liable under the scaffold law for injuries sustained by a construction workers due to the negligence of a subcontractor in failing to maintain the worksite in a reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor.

A lessee of the property under construction is deemed to be the owner for purposes of liability. The term "owners" within the meaning of the scaffold law is not limited to the titleholder, it encompasses a person who has an interest in the property and who fulfills the role of owner by contracting to have work performed for his benefit.

The areas involved must be kept in a safe condition including not only the actual construction sites, but the passageways the workers must travel through to get to and from those areas.

INSURANCE - NOTICE BY INJURED PARTY

The Second Department recently submitted that pursuant to the insurance law, an injured party has an independent right to give notice of an accident and satisfy the notice requirement of a policy and where the notice is provided directly by the injured party, the disclaimer of coverage by the carrier must address with specificity the grounds for disclaiming coverage applicable to both the injured party as well as the insured, (Ringel v. Blue Ridge Ins. Co., ___ A.D.2d ___, 740 N.Y.S.2d 109).

PRODUCTS LIABILITY - DUTY OF MANUFACTURER

In Alami v. Volkswagen of America, Inc., (97 N.Y.2d 281, 739 N-Y.S.2d 867), the Court of Appeals submitted that a manufacturer has a duty to produce a product that does not unreasonably enhance or aggravate a user's injuries.

The fact that a motorist was legally intoxicated at the time of a single vehicle accident in which he suffered fatal injuries did not operate on grounds of public policy to bar the administrator of the motorist's estate from asserting products liability crashworthiness claim against vehicle's manufacturer, alleging that the vehicle's defective design had enhanced motorist's injuries.

TRIAL - EXPERT - ERROR

It was recently indicated by the Second Department that there was error by the trial court in allowing a non-treating physician retained by a personal injury plaintiff as an expert witness to testify regarding the plaintiff's medical complaints, and to summarize and read statements and findings contained in the reports and records of plaintiff's

treating physicians. These actions could not be deemed harmless, and required a new trial, (Adkins v. Queens Van-Plan, Inc., ___ A.D.2d ___, 740 N.Y.S.2d 389).

AUTOMOBILE - LOADING AND UNLOADING - WHEELCHAIR

In Elite Ambulette Corp. v. All. City Ins. Co., (___ A.D.2d ___, 740 N.Y.S.2d 442), the Second Department ruled that an accident, which occurred when a temporary wheelchair in which an ambulette transportee had been placed rolled down a flight of stairs, did not arise from "the ownership, maintenance or use" of an ambulette and thus, the ambulette insurer had no duty to defend or indemnify the insured, an ambulette corporation, in an underlying suit, brought by the transportee; the transportee's injuries occurred inside his home, as a result of a defective wheelchair and careless attendant, and while the terms "use in operation" did include acts of loading and unloading, this accident occurred away from, and incidental to, the covered ambulette.

AUTOMOBILE - NO-FAULT - FRAUDULENT CLAIM

In Utica Mutual Ins. Co. v. Timms, (___ A.D.2d ___, 740 N.Y.S.2d 455)1 the Second Department ruled that an insured's submission of a fraudulent insurance claim did not vitiate the no-fault portion of an automobile liability policy. The no-fault endorsement was internally complete and a distinct part of the insurance policy, and the coverage provided for in the no-fault endorsement could not be qualified by the inapplicable conditions and exclusions of the liability portions of the policy.

SCHOOLS - DUTY OF SUPERVISION - ELEMENTS

In Velez v. Freeport Union Free School Dist., (___ A.D.2d ___, 740 N.Y.S.2d 364), the Second Department held that to find that a school breached its duty to provide adequate supervision of students, in the context of injuries caused by acts of fellow students, plaintiff must show that the school had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury, that is, that the third party acts could reasonably have been anticipated.

An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence by a school, absent proof of prior conduct that would have put a reasonable person on notice to protect the injury-causing act.

The school's purported negligence, in failing to supervise the student so as to prevent his assault on a fellow student, was not a proximate cause of the victim's injuries. The assault occurred so quickly that it could not have been prevented by more intense supervision.

DEPOSITIONS - INADMISSIBILITY

The First Department recently ruled that a video tape of depositions of plaintiff's medical expert witness, in which the oath was administered to the expert by plaintiff's counsel, was not admissible during a personal injury action, (Wilkinson v. British Airways, A.D.2d 740 N.Y.S.2d 294).

TRIAL - MISSING WITNESS CHARGE - IMPROPER DISCRETION

In Adkins v. Queens Van-Plan, Inc., (___ A.D.2d ___, 740 N.Y.S.2d 389), the Second Department ruled that trial court improvidently exercised its discretion in denying defendants' request for a missing witness charge with respect to two of the personal injury plaintiffs treating physicians, where the request was timely made before the close of testimony, and plaintiff failed to demonstrate that the physicians were unavailable, not under his control, or that their testimony would be cumulative.

INDEMNIFICATION - CONTRACTUAL - INAPPLICABLE

The Second Department held that a slip and fall by a janitor on a wet bathroom floor, was not an action that triggered the indemnification clause in a contract between the building owner and the cleaning contractor which employed the janitor, (Haidari v. 437 Madison-Avenue Fee Assoc., (___ A.D.2d ___ 740 N.Y.S.2d 328).

EVIDENCE - BUSINESS ENTRY - INADMISSIBLE

The First Department ruled in Rivera v. City of New York, (___ A.D.2d ___, 741 N.Y.S.2d 30), that in a suit for personal injury allegedly suffered by an infant in a fall on school property, statements attributed to the mother in the hospital records, to the effect that her child was hit by a rock, were not admissible as business records absent any evidence showing that the statements were germane to the treatment or diagnosis.

NEGLIGENCE - OBSTRUCTION - ON SIDEWALK

In Martinez v. City of New York, (___ A.D.2d ___, 741 N.Y.S.2d 32), the Court stated that an apartment building owner was not liable to a pedestrian who tripped and fell over bolts that had remained imbedded in a public sidewalk abutting the premises following the removal of a pay telephone that had been installed against the wall of a building, absent evidence that the owner had authorized either the installation or the removal of the phone, or that it had derived any benefit from its use.

NEGLIGENCE - SCAFFOLD - PROXIMATE CAUSE ELEMENTS

In Shirkoski v. Watch Case Factory Associates, (___ A.D.2d ___, 741 N.Y.S.2d 55), the Second Department ruled that to establish a prima facie case pursuant to the Scaffold Law, the plaintiff must demonstrate that the risk of injury from an elevated related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged.

INSURANCE— CERTIFICATE OF

The First Department recently indicated that a certificate of insurance by itself, is insufficient to raise a factual issue as to the existence of coverage, particularly where the policy itself makes no provision for coverage, (Glynn v. United House of Pray, ___ A.D.2d ___, 741 N.Y.S.2d 499).

Unrefuted evidence demonstrating that the premises owner was not named as an additional insured on general

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and excess liability insurance policies issued to the owner's general contractor precluded the insureds' obligation to defend and indemnify the owner in an underlying action arising from fire, even though the owner was presented with a certificate of insurance by the general contractor.

Although the owner was named as an additional insured in a liability policy, coverage was not available with respect to the underlying action seeking recovery for injury sustained in a fire, inasmuch as the policy's additional insured endorsement limited coverage afforded the premises owner to liability arising from work performed by the named insured on the owner's behalf and renovation work from which the owner's liability was alleged to have arisen was performed on behalf of the named insured, rather than on behalf of the owner.

GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - ELEMENTS

The Second Department recently ruled that in determining whether to grant an application for leave to serve a late notice of claim, the court is statutorily instructed to consider certain factors, including whether (1) the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter, (2) the claimant was an infant or was mentally or physically incapacitated, (3) the movant had demonstrated a reasonable excuse for the delay in serving a notice of claim, and (4) the delay would substantially prejudice the municipality in maintaining its defense on the merits (Brown v. County of Westchester, ___ A.D.2d ___, 741 N.Y.S.2d 281).

The infancy of an injured petitioner, standing alone, does not compel the granting of an application for leave to serve a late notice of claim. If the reason for the failure to timely serve the notice of claim is infancy then it is incumbent upon the movant to demonstrate a nexus between the delay in serving the claim and the infancy.

DISCLOSURE - FAILURE TO COMPLY - STRIKING PLEADING

In Emanuel v. Broadway Mall Properties Inc., (___ A.D.2d ___, 741 N.Y.S.2d 278), the Second Department directed that where a party disobeys a court order and by its conduct frustrates the statutory disclosure scheme, dismissal of a pleading is within the broad discretion of the trial court.

The defendant's failure to comply with two court orders directing disclosure, and its protracted delay in providing a partial response to plaintiffs discovery demands, which were not adequately explained by the additional facts submitted on renewal, supported an inference that its failure to provide disclosure was willful and contumacious and thus, the trial court providently exercised its discretion by striking the defendant's answer.

NEGLIGENCE VIOLATION OF TRAFFIC LAWS

In Batal v. Associated Universities, Inc., (___ A.D.2d ___, 741 N.Y.S.2d 551), the Second Department submitted that violations of traffic laws constitutes negligence as a matter of law and can not be disregarded by the jury.

A driver's action of proceeding into an intersection without yielding the right-of-way to a motorcyclist violated the statute and therefore constituted negligence as a matter of law, such that the Jury's verdict for the driver should have been set aside, even though the motorcyclist may have contributed to the accident by exceeding the speed limit or proceeding in the wrong lane. The driver should have seen the motorcyclist and a motorcyclist had a right of way and was entitled to anticipate that the driver would obey the traffic laws which required him to yield.

MALPRACTICE - ELEMENTS - BEST JUDGMENT

The Court of Appeals recently indicated in Nestorwich v. Ricotta, (97 N.Y.2d 393, 740 N.Y.S.2d 668), that under the reasonably prudent doctor standard, a doctor is charged with the duty to exercise due care, as measured against the conduct of his or her own peers, and implicit within the concept of due care is the principle that doctors must employ their best judgment exercising skill and applying their knowledge.

The prevailing standard of care governing the conduct of the medical professionals demands that a doctor exercise that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where the doctor practices.

For purposes of a claim against a doctor, the "best judgment" rule assures conformance with the prevailing standard of care and accepted medical practice. However, a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective or a diagnosis proves inaccurate, since not every instance of failed treatment or diagnosis may be attributed to a doctor's failure to exercise due care.

The "best judgment" rule does not hold a doctor liable for a mere error of judgment, provided he does what he thinks is best after careful examination. The doctors implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise a reasonable care, and exert his best judgment in the effort to bring about a good result.

"Error in judgment" jury instruction was not warranted in a medical malpractice action after the patient's renal artery had inadvertently been ligated during the performance of adrenalectomy, where the ligation of the renal artery was not an acceptable alternative means of treatment. The evidence simply raised in issue of whether the surgeon who performed the adrenalectomy deviated from the degree of care a reasonably prudent physician would have exercised under the same circumstances.

INDEMNIFICATION - CONTRACTUAL - GENERAL CONTRACTOR

In Lipshultz v. K&G Industries, Inc., (___ A.D.2d. 742 N.Y.S.2d 90), the Second Department submitted that an indemnification provision in a contract between a third party and a contractor, which specifically referred to the "contractor" but did not refer to the general contractor of the project, did not apply to the general contractor. The parties could easily have included the general contractor in the contractual provision relating to indemnification and/or contribution, but chose not to do so.

INSURANCE - BROKER - EXPERTISE

The First Department recently ruled that an insured has a right to look at the expertise of its insurance broker with respect to insurance matters, and it is no answer in a malpractice action for the broker to argue, as an insurer might, that the insured has an obligation to read the policy, since it is precisely to perform this service as well as others that the insured pays a commission to the broker.

While an insured's failure to read or understand an insurance policy or to comply with its requirements make give rise to the defense of comparative negligence in a malpractice suit against the insured's insurance broker, the insured's conduct does not bar such an action. (Baseball office of Com'r v. Marsch & McLennan, Inc., (___ A.D.2d. ___, 742 N.Y.S.2d 40).

LIMITATIONS - LEGAL MALPRACTICE

In Carnevali v. Herman, (___ A.D.2d ___, 742 N.Y.S.2d 85), the Second Department indicated that a claim to recover damages for legal malpractice accrues when the malpractice is committed, not when it is discovered.

NEGLIGENCE - LACK OF SECURITY

The First Department recently held that defendants could not be held liable for personal injuries allegedly caused by inadequate building security, given the lack of evidence of prior criminal activity in or around the vestibule where the attack took place, the attack was not a foreseeable event. (Nelson v. Osborn Realty Corp., (___ A.D.2d ___, 742 N.Y.S.2d 31).

SETTING ASIDE VERDICT - IMPROPER DISCRETION - SNOW AND ICE

In Strauss v. New York City Transit Authority, (___ A.D.2d ___, 742 N.Y.S.2d 38), the First Department indicated that a jury's determination that a pedestrian who slipped and fell on a patch of ice was 40% comparatively negligent, could have been reached on a fair interpretation of the evidence, and thus the trial court exercised its discretion improvidently when its set aside a jury verdict, where there was evidence at trial of a four or five inches of snow left on the ground from a snowfall two days before the pedestrian's accident, a large and visible ice patch and a clear section of sidewalk on which it was possible to walk around the ice patch.

PRODUCTS LIABILITY - PRIMA FACIA CASE

The Second Department recently indicated that a products liability case can be proven without evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to the defendant's product, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product. (Speller v. Sears Roebuck & Co.,___ A.D.2d ___, 742 N.Y.S.2d 96).

EVIDENCE - STATEMENT OF EMPLOYEE

In Grant v. Radamar Meat, (___ A.D.2d ___, 742 N.Y.S.2d 349), the Second Department ruled that statements made by a supermarket employee were not admissions binding on the supermarket in a slip and fall matter absent evidence that the employee was authorized to speak on behalf of the supermarket.

HOSPITAL'S LIABILITY - VICARIOUS - ELEMENTS

It was recently held by the First Department in McNulty v. City of New York, (___ A.D.2d ___, 742 N.Y.S.2d 242), that a hospital is not vicariously liable for the acts of an attending physician absent certain circumstances. The hospital was not liable for the acts of its nurse, who after being informed by a Meningitis patient of her contact with her close friend, failed to notify the patient's friend of the fact that she had been exposed to a highly contagious form of Meningitis. The hospital Undertook to voluntarily perform a good deed as a matter of internal policy and consequently, a cause of action would not accrue to the patient's friend who was inadvertently overlooked and to whom no misrepresentation was made.

INSURANCE - NOTICE OF CLAIM OF UNINSURANCE - PROMPTNESS

In Nationwide Ins, Co. v. Empire Insurance Group, ___ A.D.2d ___ 742 N.Y.S.2d 387), the Second Department ruled that where an insurance policy requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all the facts and circumstances. The providing of timely notice to an insurer is a condition precedent to a recovery and, absent of valid excuse for the failure to satisfy the notice requirement, vitiates the policy.

Where an insured was required to provide a notice of his claim for uninsured motorists benefits, he was required to demonstrate that he acted with due diligence in ascertaining the insurance status of the other vehicle involved in the accident or to provide a reasonable excuse for the delay in ascertaining the insurance status.

The vehicle registration documents which were provided by an agency in response to a request from the insured's attorney indicated that the other vehicle was insured when registered approximately one year prior to the accident, and the record established the insured promptly notified the company of his claim upon learning that the other driver could not be located and that the other vehicle might not have insurance coverage.

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NEGLIGENCE - DUTY - QUESTION OF LAW

It was recently held by the First Department in McNulty v. The City of New York, (___ A.D.2d ___, 742 N.Y.S.2d 242), that unlike foreseeability and causation, which are generally factual issues to be resolved by the trier of fact, the existence and scope of an alleged tortfeasor's duty is a legal issue for the courts to determine and it is the responsibility of the courts in fixing the orbit of duty, to limit the legal consequences of the wrongs to a controllable degree.

INSURANCE - ADDITIONAL INSURED - AMBIGUITY

In Bedford Cent., School Dist, v. Commercial Union Insurance Co., (___ A.D.2d ___, 742 N.Y.S.2d 671), the Second Department ruled that an additional insured endorsement in a school's liability policy, which named the school district as an additional insured only with respect to liability arising out of the school's operations on the premises owned by or rented to it, extended coverage to the district for claims against it in an infant's underlying personal injury action seeking damages for injuries sustained during a school field trip on the district property. The underlying plaintiff's injuries arose out of the school's "operations" on the district property. The court indicated that the policy contained ambiguous provisions such that the provisions had to be construed against the insurer, the drafter of the document.

NEGLIGENCE - DUTY OF OWNER - ELEMENTS

It was recently indicated by the First Department that while property owners and business proprietors have a duty to maintain their premises in a reasonably safe condition, which duty includes eliminating, protecting against, or warning of dangerous, defective or otherwise hazardous conditions, there is not duty to protect or warn against conditions that are in plain view, opened, obvious, and readily observable by those employing the reasonable use of their senses (Pinero v. Rite Aid of New York, Inc., ___ A.D.2d ___, 743 N.Y.S.2d 21).

CLIENT'S RIGHTS - FILE

In Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP, (___ A.D.2d ___, 743 N.Y.S.2d 72), the First Department ruled that a former client's interests in files generated or collected in connection with law firm's representation was a property right and the firm had a general duty to provide that material to the former client upon its request absent a substantial showing of good cause to refuse client access.

The law firm failed to show "good cause" to deny the former client access to the missing files that had been generated or collected in connection with the firm's representation, even though the search and retrieval of the missing files would be costly and burdensome, and even though the missing files may have been co-mingled with other client's case records and the firm had the duty not to expose other client's privileged information to the client'. The firm could inspect back-up data tapes from its earlier computer system for any of the missing files.

EVIDENCE - SPOLIATION - ELEMENTS

The Second Department recently indicated that lessors of commercial property who did not know of a trip and fall accident violated a lessees employee before they permitted subsequent lessee to replace the flooring in the premises did not engage in spoliation of evidence (Eckers v. Suede, ___ A.D.2d ___, 743 N.Y.S.2d 129).

ARBITRATION - WAIVER ELEMENTS

In Les Constructions Beauce-Atlas. Inc. v. Tocci Bldg., Corp. of New York. Inc., (__ A.D.2d ___, 742 N.Y.S.2d 356), the Second Department ruled that the right to arbitrate, like any other contractual right may be modified, waived, or abandoned.

A determination that a party. had waived the right to arbitrate required a finding that the party engaged in litigation to such an extent as to manifest a preference clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration and thereby elected to litigate rather than arbitrate.

The fact that the defendants in an action for breach of contract in response to the complaint requested an extension of time to serve an answer, and subsequently served an answer containing among other things, counterclaims and affirmative defenses was insufficient to warrant the conclusion that they waived their right to arbitrate, particularly where the defendants asserted the right to arbitrate as an affirmative defense.

INSURANCE - NOTICE OF CLAIM - UNTIMELY

In Paramount Ins. Co. v. Rosedale Gardens, Inc., (___ A.D.2d ___, 743 N.Y.S.2d 59), the First Department submitted that a building owner failed to satisfy the insurance policy's condition of coverage of prompt notice, of potential liability following a fall by a building resident in a stairwell, and therefore, the insurer was entitled to disclaim coverage. The owner never reported the accident and the injury to the insurer despite having had immediate notice and the fact that the owner and its agent may have believed that the claim would not result after the accident did not relieve the insured. of the duty to advise the insurer of the event.

The insured bears the burden of proving, under all circumstances, the reasonableness of any delay in giving notice to the insurance company.

Past President's Dinner

PAUL M. DUFFY (L) AND ROGER P. McTIERNAN (R)

JOHN J. MCDONOUGH CONGRATULATES STEVEN KRAMER WHO WAS RECOGNIZED FOR EXCELLENCE IN WRITING. MR. KRAMER IS THE AUTHOR OF THE ARTICLE "SUMMARY JUDGMENT AND THE FEIGNED ISSUE OF FACT DOCTRINE" THAT APPEARED IN THE SPRING 2002 ISSUE.

(L-R) MICHAEL CAULFIELD, ROGER P. McTIERNAN, PAUL DUFFY AND JOHN J. McDONOUGH

(L-R) GAIL RITZERT, KRISTIN SHEA AND JEANNE CYGAN

(L-R) ANDREW ZAJAC, JAMES K. O'SULLIVAN AND JEANNE CYGAN

Edward Hayes, Esq.*

OFFENSES OF THE DEFENSE COUNSEL

As a defense attorney who has "crossed over" to the Claim side, I've gained heightened sensitivity to things that some defense lawyers do that really trouble claim professionals. I do not mean this to be a harsh indictment and only offer it as constructive criticism. Some of the most common offenses of defense counsel include:

LAST MINUTE CALL FROM COURT

One of the most annoying sins of defense counsel is the last minute call from Court - with no prior warning - by a lawyer suddenly telling the claim handler that he or she is being sent out to pick a jury. Often there was no previous indication that the case was even on the trial calendar (which is in itself a violation). This offense is aggravated to the first degree when the call has to go to the handling claim handler's supervisor or claim manager because the claim handler is not available to take the emergency call. Of course, occasionally, a Judge, in a fit of pique, may suddenly and unpredictably send attorneys out to pick a jury, but experience has shown that this is rather unusual. Typically, the surprise is due to counsel's failure to keep the claim handler informed of court events. Attorneys should always give advance notice to the claim handler of all trials or meaningful conference dates so as to permit proper review.

LAST MINUTE ABOUT FACE

A related offense, and sometimes another aggravating factor, is the last minute change of position. Many attorneys, especially outside counsel, initially paint a rosy picture of a case, perhaps thinking that is what the claim handler wants to hear: "No liability" or "nuisance value". Too often, however, the attorney who will actually try the case (usually someone else, but not always) suddenly "pulls a 180" and asks for $250,000 on the case that was supposed to be "no liability" or "nuisance value".

When this last minute change is communicated via the infamous last minute call from Court, it becomes a capital offense.

Defense counsel should communicate their honest appraisals of liability and case value early and often. Any changes in position should be highlighted and rushed to the claim handler to permit committee review, reserve adjustment, and timely notice to other carriers as well as reinsurers.

A PATTERN OF DELAY

There is a widely accepted and fundamental principle in the insurance industry that, generally, cases do not get better. The longer a claim is open, the more it will cost in claim expense, attorneys fees, and ultimately indemnity. Nevertheless, some defense counsel use a reactive approach to litigation. They do not push for a bill of particulars or discovery. They do not seek out settlement opportunities. They do not make motions. Some do not even provide status reports. They are in a "react" mode and only respond to demands by the adversary, the court, or the claim handler.

It is essential for defense counsel to provide timely, accurate information and advice to the claim handler who can then make a timely and educated decision about a settlement strategy.

Occasionally, it is an acceptable strategy to "let sleeping dogs lie", but this should be the exception, not the rule. Files should generally not be allowed to sit idle. Claimant's backs and necks do not usually get better with age. Many injury values have gone up at a higher pace than inflation. Interest may also be accruing. Those attorneys that tend to move cases quickly and favorably also tend to get the most new assignments.

Finally, failing to address files at critical intervals can have dire consequences, including missed settlement opportunities, loss of witnesses, waiver of IME, loss of excess/umbrella coverage, and denial of summary judgment.

Don't delay. Don't put things off unless there is a good reason which is shared with the claim handler.

NOT MAKING MOTIONS

Some lawyers hate motion practice. Just as some of us hated to do book reports in grammar school, some attorneys seem to be unwilling or unable to write a simple motion, no matter how appropriate. Regrettably, because the motion was not made, claim expenses continue, and the claim handler is sometimes asked to "sweeten the pot" in an absolutely no pay case. Of course, it is worse when that call comes in at the last minute and the motion is time-barred. The worst scenario arises when a jury then holds the "non-liable" defendant liable, thereby necessitating a costly appeal or an unfair settlement to avoid the appeal. There is rarely an excuse for not making a timely motion for

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summary judgment, especially in rear-end auto cases, many sidewalk cases, and questionable threshold claims. Defense counsel should also cross-move whenever feasible. It is painful to come across a case in which a co-defendant, who might have been more liable, was let out on a motion that was not joined by our own defense counsel.

Cases that turn on the law must be tested by motion - especially those that might engender so much jury sympathy as to affect a jury's determination, e.g. a sexual assault claim against a landlord or various other tragic injury cases.

Frankly, some defense counsel may think they will make more money if they do not make the motion. I was actually told this by a defense attorney. Perhaps it is true in the short run - at least for that particular case. It is wrong and unprofessional, however, to subject a client to potential liability as well as continued expenses just to enhance the attorney's fees. Moreover, in the long run, the lawyers who make the most appropriate motions will inevitably be rewarded with the most new assignments by grateful and self-interested claim professionals. It does not take too many cases in which the claim handler has to unfairly "sweeten" the pot in a no liability case to develop a bad reputation among claim handlers and litigation managers. The long term effects will be less trust and fewer referrals.

NOT BEING AN ADVOCATE

Another offensive practice may be called "a failure of advocacy" when defense counsel is more concerned about maintaining good relations with the Judge or opposing counsel than achieving the best result for the client. Some lawyers seem to be neutral about settlement negotiations. Others don't want to be the bad guy and find it more convenient to blame the claim handler rather than defend the settlement position.

Another manifestation occurs when defense counsel makes no effort to actually negotiate, but instead simply "turns over" their settlement authority to the plaintiff's attorney. It is surprising how often a defense attorney, who is given an amount of money with which to negotiate, calls back only minutes later and says, "the plaintiff won't take it". Many claim handlers, from many different insurers, have had this depressing experience. For example, a claim handler may give an attorney up to $90,000 to try to settle (which we will assume is in the reasonable settlement range). Instead of opening with a $45,000 or $50,000 offer in order to try to frame the negotiations, the hapless defense counsel simply tenders the full amount - all $90,000. The plaintiff's attorney may not reduce the demand and instead thinks, perhaps erroneously, that there is more money to be offered. A case that should have settled may be unnecessarily prolonged. Some people are simply not good negotiators. Others just don't like the "dance" or the give and take of negotiations, but it is a fact of life for insurance defense attorneys. If you are not inclined to negotiate, at least let claim handler know. Claim handlers will negotiate themselves if they know the defense counsel will not be making a genuine effort.

Parenthetically, more than 90% of negligence cases are going to settle. Defense counsel who cannot or will not provide valuable negotiation assistance fail to provide an important service to their clients and will not find themselves very much in demand.

Sometimes a defense attorney will actually advise the court that they agree that plaintiff's demand is reasonable or that their own offer is unreasonably low or merely nuisance value — and then blame the claim handler. This practice is particularly galling when their prior communications from the attorney support the claim handler's evaluation. Of course, it is important to maintain good relations - but not at the expense of the client or the claim handler. Disagreements with claim evaluations should first be explored with the claim handler and/or supervisor - not with adversaries or the Court. Occasionally, it may even be necessary to make a "bad faith" record, but never by ambush without first advising the claim handler.

Finally, it is especially annoying when a defense counsel declines to assist in negotiations or even give an opinion on settlement value, but then second guesses the claim handler after a settlement is reached to assert that they could have gotten a better number.

Before a settlement is reached, alternative opinions are desirable, if not mandatory, but Monday morning quarterbacking after a settlement is both cowardly and unprofessional. Speak up when you can be helpful or hold your peace.

TOO MUCH WORK ON TOO LITTLE CASE

This is a less serious but still annoying offense that can usually be avoided by simply using common sense. Ordinarily, we should not generate $10,000 in attorney fees on a simple $4,000 property damage case. There are exceptions, such as real excess exposure of the insured's assets. Another might be "out and out fraud" cases or where it is strategically important to send a message, but that should be determined by the person paying for the defense, not the person running up the tab. I remember one D & O case in which the only issue was how much of an $8,000 defense bill should be paid by the insurer. The coverage law firm retained to review the bill, themselves billed $12,000 and never even made a final recommendation. It would have been cheaper to just pay the full amount! The more at stake, the more work is necessary. Some lawyers only know one way to defend and use the same battle plan on every case, regardless of the claim. Some claims, however, are so small they may not warrant using all the weapons in the arsenal.

A lawyer may make a "killing" on that small case, but sooner or later the claim handlers or the litigation manager will identify that lawyer as a big biller. This could lead to the loss of many future referrals or even removal from the panel.

Conversely, some lawyers presume that a case will settle so they don't do anything -even the basics. This could

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Offenses of the Defense Counsel

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actually undermine settlement negotiations because the plaintiff's attorney may recognize that the claim handler has no leverage.

The best practice is to hold an early strategy session including a cost-benefit analysis with the claim handler either in person or over the phone.

Parenthetically, low policy limits are not an excuse for failing to do basic legal defense work, e.g. IMEs, EBTs, motions etc. Sometimes a claim handler may ask counsel to hold off on fee generating activities while they attempt to negotiate a minor case. The claim handler should be given reasonable opportunity to negotiate, but counsel should never delay so much as to effect a waiver, if the result would be real exposure of the insured's personal assets.

REFUSAL TO GIVE OPINION ON LIABILITY OR VALUE

Some lawyers are so cautious that they are reluctant to give an opinion on liability apportionment or settlement value. This is a terrible flaw. The essence of our profession is making predictions about what the Courts will do based on the facts and circumstances of each case. Lawyers take into consideration the likability and believability of the parties, the witnesses, the opposing lawyers, as well as the character of the Judge, Jury, and Appellate Court in order to make predictions about what the Court will ultimately do with a particular case.

A fair argument can be made that claim handlers negotiate far more cases than attorneys and thus are better at evaluating a case. My experience has shown that this may be more true for some than others, but it is generally limited to cases that settle long before trial. At the early stages of litigation, cases can often settle for "claim value". At the trial stage, however, cases may have to settle for "court value" and lawyers are often in a far better position to make that "prediction" because they have seen the witnesses, the other lawyers, the jury and the judge, and are also most familiar with the appellate record of the particular venue.

The lawyer who does not give predictions on liability and damages is failing to provide a critical legal service. Lawyers are not expected to be fortune tellers, and their predictions are not etched in stone, but they can provide an essential ingredient to the decision whether or not to settle and, if so, for how much. Make the best predictions you can and update them if and when circumstances change.

FAILING TO REPORT SIGNIFICANT ACTIVITY

Another offense that deserves separate mention is the failure of defense counsel to report significant activity such as the case being placed on the trial calendar or the filing of a dispositive motion.

The claim handler should always be advised when the case is placed on the trial calendar.

This is the final stage of litigation, and the claim handler will have to determine whether this case should be settled or go to verdict. Supposedly, the Note of Issue is served after discovery is complete. Even if it is not actually complete, it is important to let the claim handler know that the plaintiff's attorney has advised the Court that discovery is complete and now wants a trial. It is also important to advise the claim handler whether a motion to strike the case from the trial calendar is being made. If the matter remains on the trial calendar, typically discovery is complete or will be deemed complete. It is important for the claim handler to know this because they may be anticipating further discovery.

Very often, we know as much about the case after an appropriate Note of Issue is served as we are ever going to know about it - unless we actually try it. At this point, we should be able to make our final prediction about liability and damages and determine whether this is a case to try or to settle. Ideally, there would be a strategy session between the claim handler and defense counsel on every case right after it is placed on the trial calendar. It could even be conducted by phone.

Moreover, there is now a limited period of time to make a motion for summary judgment following the Note of Issue. A claim handler who assumes that such a motion will be made would be very disappointed to learn much later that no motion was ever made and that it is now too late.

It is also important to advise the claim handler of any dispositive motion, whether it is made by you or your adversary. It is critical to inform the claim handler as soon as defense counsel receives a motion by plaintiff or co-defendant which would determine the liability of the insured and/or affect the claim handler's evaluation. Timely information at this stage could enable the claim handler to negotiate a compromise. At the very least, it can permit re-evaluation of the claim as well as notice to other carriers and reinsurers.

It is also very important to advise the claim handler when you are preparing a summary judgment motion on behalf of their insured. Your efforts could be wasted if the claim handler settled the case without knowing about your motion. It could be the best motion ever written, but it will have been for naught if the claim handler doesn't know about it - even to use as leverage. It would be snatching defeat from the jaws of victory.

Many plaintiff's attorneys will call the claim handler after they receive a worthy motion to dismiss their case. They may not want to put the time, effort, and expense into opposing your motion, and they may also fear that they will lose. They call up the claim handler, without acknowledging your motion, and settle the case. The uninformed claim handler may think it was a bargain! Ideally, the claim handler would first call defense counsel,

but that may not be practical in every case. It is important for defense counsel to advise the claim handler whenever a favorable motion is being drafted. The claim handler will then be able to make an educated decision about the case and its value. At the very least, the claim handler could use the motion as leverage in settlement discussions.

NOT RAISING ISSUE TO HIGHER LEVEL

A somewhat different offense occurs when the attorney actually does include a prediction on value, but merely leaves it with the claim handler at the lowest level and never brings it to a higher level. For example, if you have a case with a brand new claim handler that initially looks like a minor matter, but then develops into a very serious claim, it would be unwise to simply note in a memo to that novice claim handler that the case has a settlement value over $1,000,000. This is the kind of information that must be presented to a supervisor and preferably an assistant manager, so that the claim can be appropriately reassigned. It is not enough to provide a report with one sentence indicating the potential value of a case. When there is a significant development, it should get significant treatment - perhaps even a personal visit or at least a phone call.

The better attorneys not only highlight significant information, they also recommend to the claim handler that the matter be reported to the claim supervisor or a manager for further review.

Of course, the claim handler and supervisor bear primary responsibility for bringing important matters to the right level, but astute defense counsel can save the novice claim handler who may not recognize the severity of the claim. We sometimes expect more from our wise and esteemed defense counsel.

Parenthetically, if a novice lawyer is working on such a case, it would also behoove the managing partner to reassign the case to a more experienced attorney.

NOT RETURNING CALLS, LETTERS, E-MAILS, ETC.

It is amazing how often both staff counsel and outside counsel, fail to return telephone calls, e-mails, and letters. For some attorneys, it may be a matter of time management - or mismanagement. They intend to prepare an elaborate response, but just don't get around to it. To paraphrase General Patton, "a good response now is better than a perfect response two weeks from now". Lawyers should always respond to claim inquiries, even if it is only to acknowledge them and to say that a response will be provided shortly.

In this day of e-mail and voice mail, there is no excuse for not returning a message.

By failing to respond within a reasonable time, defense counsel provides an impression that they either don't care about the claim handler, or that they have too many other cases to work on that are more important. Either message does not bode well for future relations or future assignments. Most inquiries do not require elaborate or lengthy responses. It is not too hard to leave a voice mail acknowledging that you received the call, advising that you are currently engaged on another matter, but have forwarded the issue to a law clerk for review and will follow up shortly. It is often that easy.

Frankly, we are not working on rocket science or the rule against perpetuities. Most of the questions addressed to us do not require days or even hours of legal research. In fact, most of the inquiries are simply about the status of a case. Perhaps the thing that makes this offense so annoying, is that it is so avoidable.

A minor, but related offense occurs when defense counsel does not bother to know the correct name and address of the claim handler. This happens to everyone. Occasionally. Sometimes it is simply the result of not caring. Letters sent to the wrong claim handler, or the wrong location, or even misspelling the claim handler's name, suggest a lack of regard, if not respect, for the claim handler. Understandably, many claim handlers take offense. If you can't remember their name, they are likely to remember someone else's name the next time they need to engage outside counsel. This can be easily remedied by emphasizing its importance to the secretarial and clerical staff. Take an extra second or two to check the name and address before you send out correspondence.

CLAIM OFFENSES

Of course, claim handlers are also guilty of many other sins besides failing to bring a matter to the right level. We alluded to one in which they make a final settlement decision without seeking input from counsel. This is especially troubling when counsel has spent the weekend preparing for trial, or drafting a summary judgment motion or opposition papers. They sometimes base an entire claim evaluation on one bit of inadmissible evidence. In fact, many of the above mentioned sins of defense are also committed by claim handlers in various forms, but these are matters for a different article in a different forum.

SUMMATION

Ideally, defense counsel and claims professionals will work together as partners. The defense of most claims is a joint enterprise. Each partner should keep the other informed of all major developments so that each can make timely educated decisions about their common cause. Each can sometimes "save" the other by a well-timed communication, if only a reminder. Each should have a goal in mind and a shared strategy for reaching that goal. Ideally, they will reach their goals not by blaming each other, but rather by complementing each other.

Kevin G. Faley *

Yolanda L. Himmelberger, Esq.**

COURT OF APPEALS GIVES THUMBS UP TO RESTRICTIVE INTERPRETATION OF "GRAVE INJURY" STATUTE

In 1996, Section 11 of the Workers' Compensation Law was amended to preclude common law indemnification claims against employers, unless the person seeking indemnification proves, through competent medical evidence, that the employee sustained a "grave injury."[1] A "grave injury" is defined as:

> death; permanent and total loss of use or amputation of an arm, leg, hand or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of ear; permanent and severe facial disfigurement; loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.[2]

The purpose of the statute is to "abolish most third-party actions so as to enhance the exclusivity of the Workers" Compensation Law, thereby reducing insurance premiums and decreasing the cost of doing business in New York."[3]

Consistent with this purpose, the Appellate Division for the Second Department interpreted the statute in a restrictive manner. For example, in Ibarra v. Equipment Control,[4] the plaintiff sustained a total loss of vision in his right eye. However, his left eye was not injured. The Appellate Division for the Second Department held that "the plaintiff's loss of vision in only one eye, even if total, does not constitute "total and permanent blindness.""[5] In so holding, the Court emphasized that "the term "grave injury" has been defined as a "statutorily defined threshold for catastrophic injuries.""[6]

Similarly, in Castro v. United Container Machinery Group,[7] the Second Department concluded that the loss of five finger-tips did not constitute a "loss of multiple fingers" included in the statute. This decision was affirmed by the Court of Appeals.[8]

Initially, the Appellate Division for the First Department also adopted a restrictive view of the statute. For instance, in Barbieri v. Mt. Sinai Hosp,[9] the plaintiff sustained facial scars and neurological injuries. In his Bill of Particulars, the plaintiff alleged that these injuries were permanent, but did not allege that his injuries were total. Given this omission coupled by the plain language of the statute, the Court found that the plaintiff's injuries did not qualify as "grave injuries."

Likewise, in Hussein v. Pacific Handy Cutter, Inc.,[10] the First Department held that partial blindness in one eye did not constitute a "grave injury."

However, in Meis v. ELO Organization,[11] the First Department reversed this trend. In that case, the plaintiff, a plumber, sustained a total amputation of his thumb. On behalf of the third-party defendant/employer, our firm argued, as other third-party defendants had before, that the plain language of the statute and well established rules of statutory construction mandated a reversal of the trial court's denial of the third-party defendant's motion for summary judgment. We also noted that although it seemed odd that the loss of an index finger was included in the statute, but a loss of a thumb was not, "it [was] for the Legislature and not the courts to remedy the omission."[12]

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Court of Appeals Gives Thumbs Up to Restrictive Interpretation of "Grave Injury" Statute

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Despite the fact that the plaintiff did not allege a total or permanent loss of use of his hand in his Bill of Particulars, the Appellate Division for the First Department found that the loss of plaintiff's thumb "may" constitute a grave injury under that category of the statute. The Court reasoned that "the statute does not require the total loss of a hand; it requires instead the loss of the hand's use."[13] Since the plaintiff asserted that because of the loss of his prehensile ability, he could no longer grasp items with his dominant hand or engage in his usual occupation, the Court concluded that a jury could find that this was sufficient to constitute a "grave injury." In so holding, the court noted that "one of the more interesting and useful anatomical features of man and other primates is the opposable thumb, which allows objects to be grasped and picked up. Except for primates, no other animals have this ability."[14] The Court further opined that the amendment of Section 11 was not intended to change the overall remedial nature of the workers' compensation law.

The sole dissenter, Justice Tom, wrote that the majority's decision turned the "exclusive legislative delineation into an illustrative and merely descriptive listing" and improperly expanded "the scope of recoverable injuries into the very domain the Legislature wanted to seal off."[15] In Justice Tom's view, the majority exceeded its power by re-writing the statute to include an injury that the Legislature deliberately intended to exclude.

On our application, the Appellate Division for the First Department granted leave to the Court of Appeals.

On February 13, 2002, the Court of Appeals in a Memorandum decision reversed the First Department.[16] The court initially noted that the thumb is not listed as a "grave injury." The Court also found that the "plaintiff's argument that the loss of his thumb automatically rendered his hand totally useless is unavailing."[17] The Court emphasized that "injuries qualifying as grave are narrowly defined and the words in the statute are to be given their plain meaning without resort to forced or unnatural interpretations."[18]

Thus, the Meis case along with the Castro decision makes it unequivocally clear that a third-party action against an employer will not stand unless the plaintiff's injuries coincide with the plain language of the statute. Indeed, the brevity of the Meis decision (two paragraphs) and the strong language employed by the Court indicates that judicial interpretation of the statute is not even needed. Rather, the plain language of the statute should be accorded total deference.

The Meis decision also makes clear that a determination as to whether a plaintiff has sustained a "grave injury" should be determined as a matter of law.

In light of the foregoing, third-party defendants/employers should interpose motions for summary judgment in any case where there are no contractual indemnification claims and the plaintiffs have not sustained injuries specifically referred to in the statute. Conversely, general contractors and owners should ensure that they obtain a written contract with the plaintiff's employer, which contains a specific and express indemnification and hold harmless clause so as to avoid the sometimes harsh application of the statute.

[1] The amendment has no effect on contractual indemnification claims.

[2] L. 1996, ch. 635, para. 2

[3] Morales v. Gross, 657 N.Y.S.2d 711 (2d Dep't 1997).

[4] 707 N.Y.S.2d 208 (2d Dep't 2000).

[5] Id. at 211-212.

[6] Id. at 211.

[7] 710 N.Y.S.2d 90 (2d Dep't 2000)

[8] 96 N.Y.2d 398 (2001)

[9] 706 N.Y.S.2d 8 (1st Dep't 2000)

[10] 708 N.Y.S.2d 74 (1st Dep't 2000)

[11] 723 N.Y.S.2d 170 (1st Dep't 2001)

[12] Preferred Mutual Ins. Co. v. State of NY, 609 N.Y.S.2d 701, 703 (3rd Dep't 1994)

[13] Meis, supra, at 171.

[14] Id. at 173 (citing Encyclopedia Americana).

[15] Id. at 174-175.

[16] 2002 N.Y. LEXIS 156 (February 13, 2002).

[17] Id.

[18] Id.

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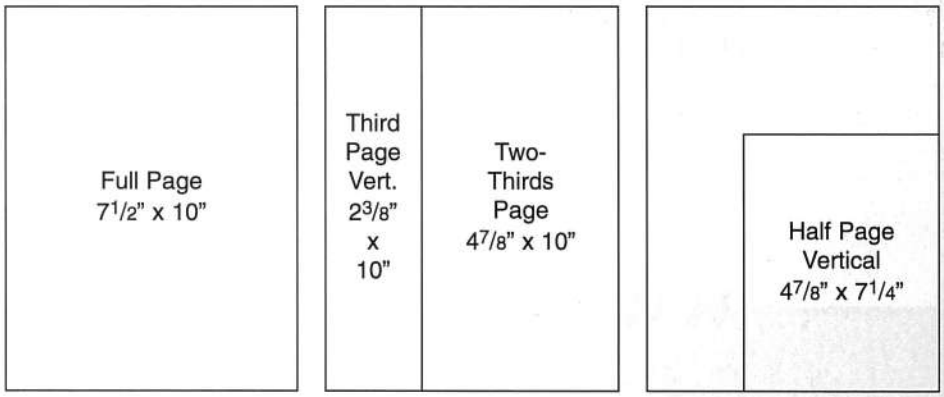

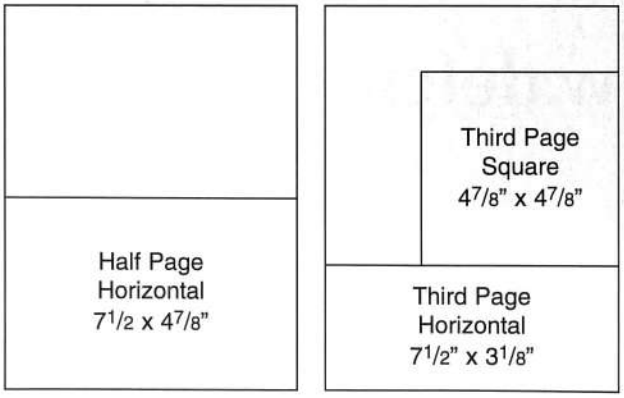

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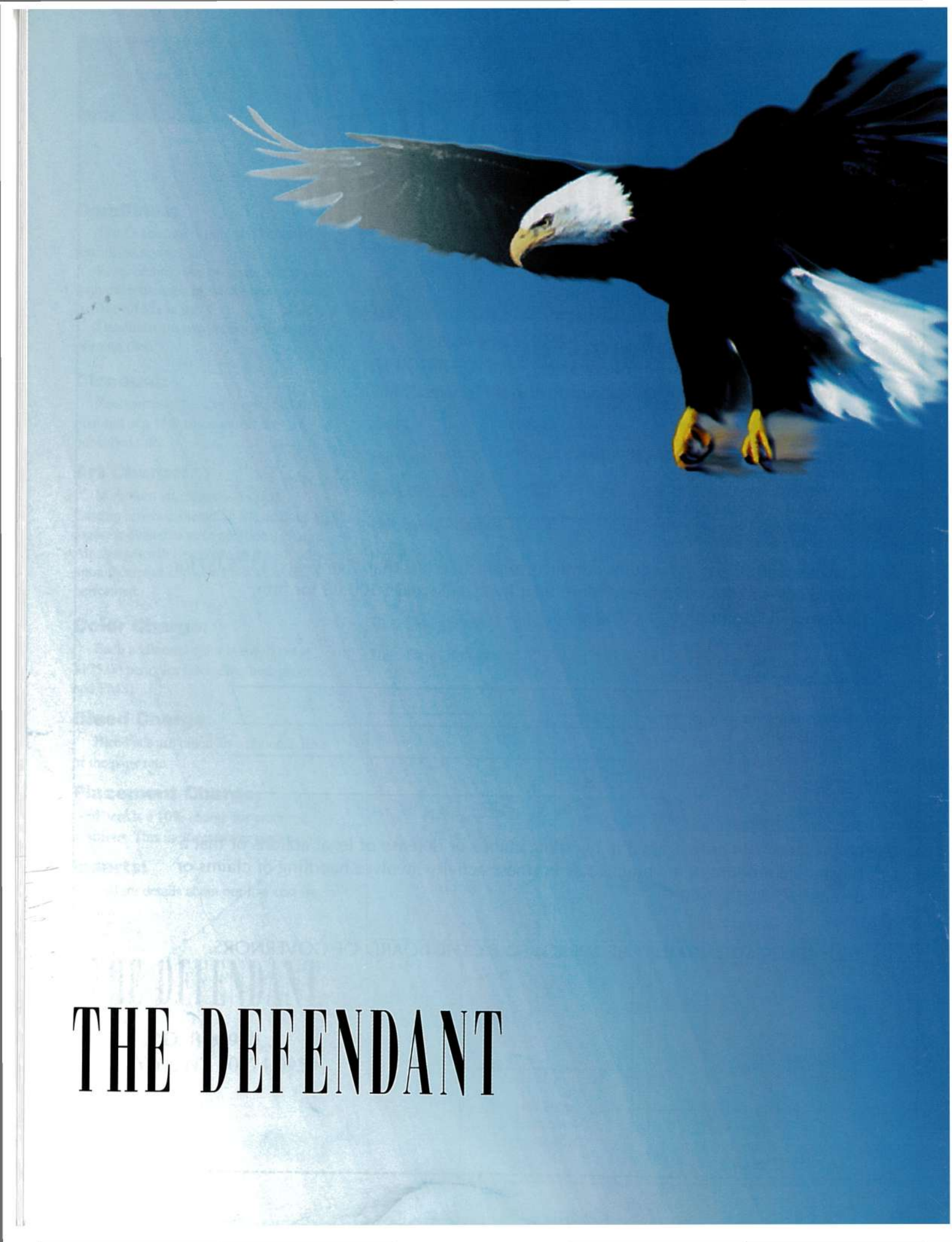

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