VOL. 2 NO. 2 FALL 1998

DEFENDANT

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

FEATURING:

NEW YORK LAW IS UNFAIR TO SUBCONTRACTORS

ALSO IN THIS ISSUE:

PRESIDENT'S MESSAGE

*by Edward A. Hayes **

I am proud to be the President of The Defense Association of New York and follow in the footsteps of so many great past presidents such as Bob Quirk, Roger McTiernan, Jim McLaughlin and so many others. I expect to continue the programs began by my predecessor John McDonough, who left the organization in sound financial condition.

Our most critical agenda is to obtain CLE approval of our training program. Last month I signed off on our application which was prepared by Kevin Kelly and Kristin Shea of Conway, Farrell, Curtin & Kelly. We hope to get approval by January.

We have an exciting training calendar planned for the first six months of 1999 which will include an update on New York Practice, products liability, insurance coverage, and finally a discussion of ethical issues from the perspective of defense counsel.

We want to continue to improve our organization and make it more responsive. We welcome your comments and suggestions.

Best Regards,

Edward A. Hayes

EDWARD A. HAYES

President

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

PAST PRESIDENT'S COLUMN

*by John J. McDonough **

It was a great personal and professional honor to serve as President of DANY for the past year. The relationships that have been forged by service in the Association while confronting challenges to our profession, providing quality continuing legal education and in the publication of our quarterly journal, *The Defendant*, will continue to be tremendously gratifying.

None of the accomplishments that were made over the past twelve months would have been possible but for the significant contributions of many people who freely gave of their valuable time to create a better and more vibrant DANY. Past President, John Moore, helped move our quarterly journal to a new plateau of professionalism, and profitability, by converting to a new format that will incorporate advertisements. Gail Ritzert deserves a big thanks for completing the work begun by Past President, Peter Madison on our web page. You may now find out about upcoming DANY events on our web page (www.DANY.org) or obtain copies of briefs developed by our Amicus Committee on a variety of topics. Kevin Kelly and Jean Cygan continued to make progress with our Association's application for Continuing Legal Education certification.

Kevin McCormack contributed greatly to the strategic planning for the Association and,

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WORTHY OF NOTE

*by John J. Moore **

ARBITRATION - SETTING ASIDE ELEMENTS

In ***Sims v. Siegelson***, (_____A.D.2d_____, 668 N.Y.S.2d 20) the First Department ruled that a judicial review of an arbitration proceeding is so circumspect that the arbitor's award will not be set aside even though the arbitor misconstrues or disregards the agreement, or misapplies substances rules of law, unless it violates strong public policy or is totally irrational.

INSURANCE - DUTY TO DEFEND - ELEMENTS

To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears a heavy burden of demonstrating that the allegations of the complaint constituting wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, that there is no possible, factual or legal basis upon which an insurer may eventually be held obligated to indemnify the insured under any policy provision (***Frontier Installation Contractors, Inc. v. Merchants Mut. Ins. Co.***, 91 N.Y.S.169, 667 N.Y.S.2d 982).

EVIDENCE - PRIOR SIMILAR ACCIDENTS

The Second Department recently indicated that records of prior similar accidents are admissible and discoverable in a negligence action since they are relevant in establishing that the particular condition was dangerous and that the defendant had notice of that claim (***Coan v. Long Island R.R.***, _____A. D. 2d._____, 668 N.Y.S.2d 44).

The railroad reports of prior similar accidents on diesel trains were discoverable in a passenger's action for injuries sustained when he fell out of an open door as the train accelerated suddenly. The records were relevant to establish that leaving train doors open while pulling out of a station was a dangerous condition and the railroad's notice thereof.

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** Mr. Moore is an associate with the firm of Barry, McTiernan and Moore, located in Manhattan.*

NEW YORK LAW IS UNFAIR TO SUBCONTRACTORS

by Edward A. Hayes

As difficult as it is for subcontractors to compete in the dynamic construction business, recent case law and contractual insurance requirements are making it even harder. In the interest of fairness and public policy, the courts and the legislature should reconsider the legal authority that permits general contractors to indirectly impose their liability onto their subcontractors through the vehicle of additional insurance.

Obviously, subcontractors are in a disadvantageous bargaining position in New York. They generally have to take their work wherever they can find it and accept whatever contractual terms are dictated – or lose the job opportunity. The New York legislature long ago recognized this imbalance in bargaining position and enacted GOL 5-322.1 which makes unenforceable any construction contract that provides for a party to be indemnified for its own negligence. The purpose of this law was noted by the Court of Appeals in ***Quevedo v. City of New York***, 156 NY2d 150,:

> "The Legislature sought to prevent the practice of requiring contractors or subcontractors to assume liability for the negligence of others, thereby increasing their insurance costs and thus the costs of construction (see NY legis Ann, 1975, p 311)". (See ***Quevedo***, pages 155 and 156).

Yet what can not be done directly because of the statute, is actually being done indirectly because of case law. Paradoxically, while the contract that requires a subcontractor to indemnify a negligent general contractor remains unenforceable, the same contract can and usually does also require the sub to procure additional insurance coverage for the GC, and the courts will enforce this requirement transferring the loss out of the GC's insurance program and loss experience and into the sub's insurance program and experience.

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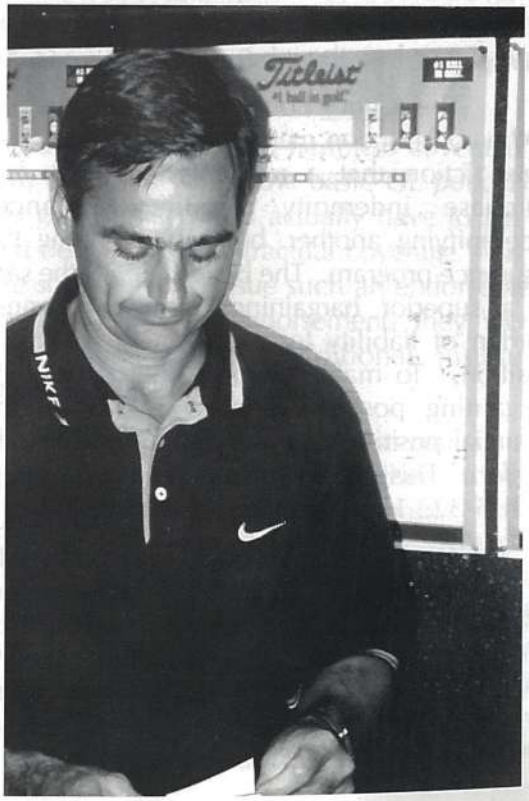
1998 DANY GOLF OUTING

WESTCHESTER HILLS COUNTRY CLUB



NEW YORK LAW IS UNFAIR TO SUBCONTRACTORS

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The New York Court of Appeals approved this distinction when it held in ***Kinney v. Lisk***, 76 NY2d 215 that "an agreement to procure insurance is not an agreement to indemnify or hold harmless" and does not violate GOL 5-322.1. With somewhat obtuse reasoning it stated:

> "The Legislature's particular purpose in enacting the statute was to invalidate "socalled 'broad form hold-harmless' clauses", then prevalent in the construction industry, which "caus[ed] contractors and subcontractors to assume liability for the negligence of others" (Assembly sponsor's supporting Mem, Assembly Bill A. 862-B, Bill Jacket, L 1975, ch 408 [emphasis added]. The Legislature anticipated that the statute would effect substantial savings in the cost of construction projects specifically because it had found that liability protection insurance, which contractors and subcontractors could still be required to procure, was considerably less expensive then hold-harmless coverage, which they would no longer need to purchase (id.; Senate sponsor's supporting Mem, Senate Bill S. 946-B [A. 862-B]." (Citation omitted).

General contractors can therefore effectively transfer their burden of liability to their subcontractors, who often have no alternative but to absorb the exposure or lose the job.

The ***Kinney*** court failed to recognize the reality of the construction marketplace and instead accepted a legal fiction that a subcontractor who is forced to purchase indemnity liability insurance is not indemnifying another, but just including them in his insurance program. The bottom line is the same: a party in a superior bargaining position is transferring its burden of liability to a party in a weaker bargaining position. To make it worse, the party in the weaker bargaining position is also usually in the weaker financial position and can ill afford to absorb the extra burden. This practice not only offends the purpose of GOL 5-322.1, but also the Labor Law.

The courts have often observed that the purpose of Labor Law 240 and 241 is to place the ultimate responsibility where it belongs, with the owner and general contractor. Nonetheless, the "ultimate" responsibility is often passed over to subcontractors through contractual insurance requirements. As a consequence, many subcontractors are finding it more difficult to obtain general liability insurance, while others are facing substantially higher premiums.

Parenthetically, the ***Kinney*** case also holds that if a subcontractor fails to procure the insurance required by contract, the sub is liable for all resulting damages including the GC's liability to a plaintiff, if any, even when the GC was partially negligent. Worse, because this is in effect a breach of contract rather than a contractual assumption of the tort liability of another, it is not covered by the subcontractors' insurance.

Important factual and insurance coverage issues in the Kinney case were not fully developed, and the Court may not have appreciated the ramifications of its decision. It actually provides a windfall for the GC's insurer that otherwise might have had to provide concurrent coverage for its GC insured's share of liability.

Ironically, rather than spreading the risk of loss among insurers, the Kinney rule thus actually puts some losses outside of insurance altogether. This has created many problems for insurers, subcontractors, and their attorneys, and more than a little mischief and conflicts of interest. (See ***Nelson v. Transcontinental***, 660 N.Y.S.2d 220 (3d Dept. 1997). In ***Nelson*** the Appellate Division,

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DEFENDANT

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Third Department ostensibly approved the conduct of a defense attorney who permitted a default against his own client on a motion for summary judgment based on a hold harmless claim which is covered by insurance, in order to avoid a potential judgment on a breach of procurement claim that would not have been covered.

The ***Kinney*** case was ill-considered and should be abandoned by the Court of appeals.

The ***Kinney*** Court noted that the legislature's particular purpose in enacting the statute was to invalidate "so-called" 'broad form hold-harmless' clauses", then prevalent in the construction industry, which "caus[ed] contractors and subcontractors to assume liability for the negligence of others". Nevertheless, the Court of Appeals defeated this very purpose by sanctioning the insurance clauses.

Blacks' Law Dictionary defines assume as "to take to or upon one's self." In ***Kinney*** a jury actually apportioned 12% negligence against the GC which negligence was effectively "taken to or upon" the subcontractor through the insurance procurement clause. The form of the transfer may have been slightly different, but its substance and result are the same.

The ***Kinney*** Court undermined the legislative purpose of GOL 5-322.1, and based its decision on a flawed premise about insurance.Note The Court stated, again in context:

> "The Legislature's particular purpose in enacting the statute was to invalidate "socalled 'broad form hold-harmless' clauses", then prevalent in the construction industry, which "caus[ed] contractors and subcontractors to *assume liability* for the negligence of others" (Assembly sponsor's supporting Mem, Assembly Bill A. 862-B, Bill Jacket, L 1975, ch 408 [emphasis added]. The Legislature anticipated that the statute would effect substantial savings in the cost of construction projects specifically because it had found that liability protection insurance, which contractors and subcontractors could still be required to procure, was considerably less expensive then hold-harmless coverage, which they would no longer need to purchase (id.; Senate sponsor's supporting Mem, Senate Bill S. 946-B [A. 862-B]," (Emphasis added).

First, the so-called "hold harmless coverage" is automatically included within the basic GL policy. In order not to get it, one would actually have to get an endorsement deleting the contractual coverage — if an insurer were so inclined to issue such an endorsement. If they did issue such an endorsement, they would probably be reluctant grant additional insurance coverage as readily as they do today.

Second, there have been no substantial savings in the cost of construction projects, and the cost of the subcontractor's "liability protection insurance" could hardly be expected to go down by increasing the subcontractor's insurable loss to include the negligence of others. The GC's insurance costs might be expected to decrease, but surely the subcontractor's premiums would rise commensurately with their increased exposure.

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It is hard to believe that the Court could have been so naive as to assume that an insurer paying out more money for a loss would reduce premiums because the loss was within the liability protection rather than the contractual coverage. Most, if not all, insurers would not even be aware of this distinction, and their actuaries base their predictions on the bottom line total payments for their insureds.

Furthermore, it is one thing for a GC to require a subcontractor to have insurance for itself, but quite another to require the subcontractor to also cover the GC. The practice of requiring additional insurance protection was quite rare in the 1970's and did not even begin to become prevalent until the late 1980's, long after GOL 5-322.1 was enacted. It was not contemplated, much less acknowledged, by the statute. In fact, the practice developed as an "end run" around the anti-indemnity statute.

The ***Kinney*** court failed to recognize the different language and public policy considerations behind the different sections of the General Obligations Law.

While a landlord cannot exempt itself from liability for its own negligence such that a victim would have no recourse, a landlord can under certain circumstances re-allocate its liability to a third party onto its tenant, (See ***Hogeland***). This can be done in the absence of a statute announcing a public policy against this type of allocation. Construction contracts, on the other hand, are governed by just such a statute: (GOL 5 -3 22.1, ***Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases***). This statute is quite different from that governing landlord-tenant leases and goes beyond a mere proscription of exemption agreements to also invalidate contracts purporting to allocate liability for one's negligence onto another.

Generally, such agreements are permissible unless there is a specific statute prohibiting them, and GOL 5-322.1 is precisely such a statute. It was intended to militate against rising insurance costs that lead to rising construction costs and should apply to indirect transfers of liability through additional insurance requirements.

Finally, notwithstanding some press to the contrary, the recent Worker's Compensation reform will not really benefit subcontractors. The WC reform restricts common law third party impleaders of employers and now permits them only when the employee has suffered a "grave injury" as defined by statute. Third party impleaders based on contract, however, remain permissible even without a grave injury. Moreover, the same contract that includes a hold harmless typically also includes an insurance procurement provision requiring the subcontractor to name the GC as an additional insured on the subcontractors' insurance policy. When this is done, the GC can accomplish its transfer, even without a third party impleader. The GC's liability is absorbed into the subs' general liability insurance program — even if the employer is not negligent, as long as the liability arises out of the employer's work. See ***Dayton Beach Park v. National Union***, 175 A.D. 2d 854 (2d Dep't 1991); ***Charter Oaks Fire Insurance Company. The Trustee of Columbia University in the City of New York***, 604 N.Y.S.2d 555 (App. Div., 1st Dept. 1993); ***Consolidated Edison Company of New York, Inc. v. Hartford Insurance Co.***, 610 N.Y.S.2d 219 (App. Div., 1st Dept. 1994); ***Nuzzo v. Griffin Technology***, 222 A.D.2d 184 (4th Dep't 1996) and ***Lim v. Atlas Gem Erectors Co.***, 225 A.D.2d 304 (1st Dep't 1996). In the past, the subcontractor/employers' liability was usually split 50/50 between the GL carrier and the Worker's Compensation/Employer's Liability carrier. Now the GL carrier will often have to pay 100%, and presumably this will soon translate into higher GL premiums.

While it is possible that WC premiums will somewhat decrease because of this recent statutory restriction on third party impleaders, the savings, if any, may be less than the probable concomitant increase in GL premiums. The subcontractors' GL policy will simply absorb the risk of the employer's liability that had previously been covered by Part Two (formerly known as 1B) of the WC/EL policy. The total insurance costs for many subcontractors might actually increase.

Subcontractors need fair treatment in order to compete. The same public policy considerations that are offended by heavy handed contractual indemnity agreements are also offended by heavy handed contractual risk transfer through additional insurance. In both situations, a party with superior bargaining position exploits its leverage through a contract of adhesion, and in both cases, the losses are paid out of the subcontractors' insurance.

Public policy would be better served by preventing GC's from transferring their liability for their own negligence whether the transfer is direct or indirect. To the extent a GC is negligent, the GC should cover its loss through its own insurance. This will improve accountability and increase the spread of risk, both important functions of the tort system. It will also be fair

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PAST PRESIDENT'S COLUMN

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along with Gail Ritzert, continues to explore expanding the membership base of DANY beyond its traditional downstate boundaries. Patricia Magid and Mike Caulfield made significant contributions to the professional development and vitality of the Board. Each of the above people gave unselfishly of their time and talent to improve your Association and are due our thanks.

Finally, I would like to thank Past President and Past DRI Board Member, Ralph V. Alio for challenging me to get involved with DANY almost fifteen years ago. I in turn reiterate that challenge to the young attorneys among us to get involved with DANY to aid in the betterment of our profession and the preservation of the civil jury system.

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o subcontractors and make their insurance burden more manageable, both important matters of public policy.

WHAT CAN BE DONE

Specifically, the Courts could, in accordance with public policy, interpret the insurance procurement provisions and the resulting additional insurance to apply only for vicarious liability and not for the promisee's own negligence. Alternatively, the Court of Appeals could overrule its ***Kinney*** decision and declare that insurance procurement provisions violate GOL 5-322.1 when the promisee is actually negligent.

If the Court of Appeals will not recognize the economic and legal realities of construction contracts, the legislature should amend GOL 5-322.1 to make it clear that it also proscribes to insurance procurement requirements in construction contracts.

Note The ***Kinney*** Court also erroneously relied on ***Hogeland v. Sibley*** 42 NY2d 153 and ***Board of Ed v. Walden Assoc***, 46 NY2d 653. Both cases involved agreements that were not covered by GOL 5-322.1, the anti-indemnity statute, but rather by GOL 5-323 and GOL 5-321 respectively, both anti-exemption statutes. The anti-exemption statutes are not concerned with over-reaching agreements in the construction industry but are instead intended to ensure that an injured party not be denied recourse for another's negligence simply because a clause is inserted in certain agreements. Generally speaking, as long as the injured party can obtain recovery, neither the legislature nor the courts are concerned that a liable party might then allocate its liability to another. They do not care which party ultimately pays, as long as the injured party has redress. In ***Hogeland***, the court found that the landlord was

> "not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance. Courts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public."

With respect to the anti-exemption statute, GOL 5-321, the ***Hogeland*** Court noted:

> "The legislative history and the statute's express invalidation of any agreement "exempting the lessor from liability for damages for injuries * * * resulting from the negligence of the lessor" (emphasis added) strongly suggests that is was directed primarily to exculpatory clauses in leases whereby lessors are excused from direct liability for otherwise valid claims which might be brought against them by others."

Anti-indemnity statutes, on the other hand, serve a very different purpose and directly reflect the legislature's concern that certain parties to certain agreements can exploit their advantage and allocate away their liability for negligence. GOL 5-322.1 reflects New York's public policy with respect to construction agreements and makes them unenforceable if the party seeking indemnity was at fault to any degree.

The ***Hogeland*** case does not provide any support for ***Kinney***. ***Hogeland*** held that the anti-exemption statute, GOL 5-321 (***Agreements exempting lessors from liability for negligence void and unenforceable***) did not invalidate a commercial tenant's agreement to indemnify its landlord, particularly through the vehicle of insurance. ***Hogeland***, however, applied a statute which provides that a landlord cannot exempt itself from liability. The Court observed that statute did not prevent a landlord from allocating it. General contractors and subcontractors, however, are not parties to leases, but rather construction contracts which are governed by a different statute (GOL 5-322.1) that specifically proscribes the allocation of fault from the promisee to the promisor. (Itri Brick v. Aetna, 89 N.Y.2d 786, 680 N.E.2d 1200).

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REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW FOR DANY

*by Frank V, Kelly **

*Andrew Zajac **

We are pleased to report that the Court of Appeals' decision in ***Trincere v. County of Suffolk***, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997) has proven to be a case of extreme significance to the defense community. As previously reported, the committee submitted an amicus curiae brief in that case, and the Court of Appeals' decision acknowledged DANY's amicus submission.

In ***Trincere***, the plaintiff fell due to a raised cement slab on a walkway. The slab was elevated at an angle more than a half-inch above the surrounding slabs. The trial court directed a verdict in the defendant's favor, and, in a 3-2 decision, the Appellate Division, Second Department affirmed. The Appellate Division held that differences in elevation of approximately one inch, without more, are not actionable.

The Court of Appeals affirmed in a unanimous decision. The Court held that not every injury resulting from an elevated brick or slab should be submitted to a jury. The Court stated that the trial court and Appellate Division were both correct in holding that the defect which caused Ms. Trincere to fall was not actionable, since the trivial nature of the defect overshadowed all other elements.

On behalf of DANY, the committee submitted a comprehensive brief in support of the defendant's position. In addition to effectively refuting arguments raised in the plaintiffs brief and the amicus curiae brief of the New York State Trial Lawyers Association, DANY's brief discussed numerous Court of Appeals decisions concerning trivial defects dating back to 1948. DANY's brief concluded that a review of the prior Court of Appeals cases on this subject lead to the conclusion that trivial height differentials in a walkway or a passageway that possess none of the characteristics of a trap or snare are non-actionable as a matter of law. In addition, DANY's brief set forth an illustration of what constitutes an actionable trap or snare. In ***Taylor v. New York City Transit Authority***, 63 A.D.2d 630, 405 N.Y.S.2d 95 (1st Dep't 1978), aff'd, 48 N.Y.2d 903, 424 N.Y.S.2d 888 (1979), the plaintiff fell when her heel was caught in a crevice on a stairway. In its opinion, the Appellate Division's majority stated the following with respect to the condition: "Moreover, we believe that the nature and location of the crevice - obscured from view by the riser of the step above - make it a trap." Id. 63 A.D.2d at 630, 405 N.Y.S.2d at 96.

As indicated above, ***Trincere*** has proven to be a huge victory for defendants in tort cases. In the short time since it was rendered, the Court of Appeals' opinion has been used by the Appellate Divisions in at least seven reported cases to justify the dismissal of claims involving small defects in walkways or passageways: ***Zaritsky v. City of New York***, ___A.D.2d___, 669 N.Y.S.2d 818 (1st Dep't 1998) (The First Department's opinion used the trap or snare language that was emphasized in DANY's brief; ***Schechter v. City of New York***, ___A.D.2d___, 669 N.Y.S.2d 843 (2d Dep't 1998); ***Figueroa v. Haven Plaza Housing Development Fund Co., Inc.***, ___A.D.2d___, 668 N.Y.S.2d 203 (1st Dep't 1998) (First Department relied upon ***Trincere*** to dismiss a claim involving an inch and one-half depression in a walkway; trap or snare language was used by the court); ***Marinaccio v. LeChambord Restaurant,*** ___A.D.2d___, 667 N.Y.S.2d 395 (2d Dep't 1998) (Second Department used the trap or snare concept that was stressed in DANY's brief; ***McQuade v. City of Poughkeepsie***, ___A.D.2d___,666 N.Y.S.2d 505 (2d Dep't 1997); ***Perrotta v. Jamel***, ___A.D.2d___, 666 N.Y.S.2d 436 (2d Dep't 1997); ***Lopez v. New York City Housing Authority***, ___A.D.2d___, 666 N.Y.S.2d 21 (2d Dep't 1997).

Clearly, the committee's submission in Trincere put DANY on the appellate map.

Since ***Trincere***, the committee has worked on *amicus* submissions to the Court of Appeals on two cases which, unfortunately, have settled before they were heard by the Court. The first was ***Borrero v. New York City Housing Authority***, 236 A.D.2d 262, 653

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ORTHY OF NOTE

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VENUE - WAIVER

In ***Cottone v. Real Estate Industrials, Inc.*** ___A.D.2d_____, 668 N.Y.S.2d 38) the Second partment held that in an action to recover damages personal injuries, the plaintiffs forfeited their right to ect the place of venue by selecting an improper unty in which neither plaintiff nor the codefendant ided and thus, the corporate defendant was entitled change the venue to the county designated in its tificate of, incorporation in which the corporation's ncipal office was to be located.

EVIDENCE - ADMISSION OF MEDICAL REPORT

It was recently held by the Second Department it the trial court committed reversible error in mitting into evidence in a personal injury action a ort prepared by a physician who examined the intiff for his insurance carrier, who did not testify at il. Even assuming that the report was subject to ofessional reliability exception to rule that the inion evidence must be based on facts in the record re personally known to the witness, and that the intiffs expert was properly allowed to testify that he iewed the report, the report constituted an pression of opinion on a crucial issue of severity of ury by the witness who never testified, and the ort was admitted and read to the jury without risk of ss examination (***Schwartz v. Gerson***, _____A.D.2d, 3 N.Y.S.2d 223).

RES JUDICATA - CONFLICTS OF LAW - ELEMENTS

In ***Inescu v. Brancoveanu*** (_____A.D.2d_____, 3 N.Y.S.2d 164) the First Department stated that suant to New York and New Jersey law, judgment in e action is conclusive in a later one not only as to matters actually litigated therein, but also as to any t might have been so litigated when the two causes action have some measure of identity that a different gment in the second would destroy or impair the nts or interest established by the first.

"Full faith and credit doctrine" requires ognition of foreign judgment as proof of out-of-state gation and gives it a res judicata effect, thus avoiding tigation of the issues in one state which have eady been decided in another.

NEGLIGENCE - SIDEWALK - TRIVIAL DEFECTS

The First Department recently stated that in a nmary judgment proceeding of an action for nages arising out of a trip and fall over a depression a walkway, evidence including photographs picting a shallow, gradual character of depression was sufficient to support the determination that the alleged defect in the walkway was trivial and possessed none of the characteristics of a trap or snare (***Figerueroa v. Haven Plaza Housing Development Fund Co., Inc.***, _____A.D.2d_____, 668 N.Y.S.2d 203).

EVIDENCE - PRIOR CONDITION - SUMMARY JUDGMENT

The First Department recently indicated that a statement by department store's employee indicating that the store had prior actual notice of flower petals on the floor was inadmissible hearsay for the purpose of defeating the store's motion for summary judgment in a customers slip and fall action where there was no evidence that the employee possessed authority to speak on behalf of the store (***Fontana v. Fortunoff***, _____A.D.2d_____, 668 N.Y.S.2d 394).

LIMITATIONS - REPETITIVE STRESS INJURY

In ***Kelly v. NEC Technologies, Inc.*** (_____A.D.2d_____, 668 N.Y.S.2d 380) the First Department ruled that a cause of action for repetitive stress injury (RSI) allegedly suffered in a workplace by a computer keyboard users accrues for limitation purposes at the outset of the symptoms, or upon the last use of the keyboard, which ever is earlier. The action does not accrue upon the first use of the allegedly defective keyboard.

Workers who were diagnosed with bilateral carpel tunnel syndrome had three years from the onset of the symptoms of repetitive stress injury (RSI), not three years from the first use of the allegedly defective computer keyboards, to commence the products liability action.

DISCLOSURE - DISAPPEARANCE OF DEFENDANT

The First Department recently indicated that a disappearance of a defendant is not a bar to striking his answer as a sanction for disobeying a discovery order (***Flores v. Bueno***, _____A.D.2d_____, 668 N.Y.S.2d 383).

The trial court improvidently exercised its discretion in refusing to strike the answer of a defendant where the defendant had disobeyed the discovery order directing him to appear for a deposition. Defense counsel's effort to locate the defendant had been less than diligent and defendant was clearly disinterested in defending the action.

AUTOMOBILE - PROXIMATE CAUSE

It was recently submitted by the Second Department that a motorist who was injured when his vehicle allegedly skidded on a wet road and collided with a parked trailer, but who had no recollection of the accident, failed to establish that the accident proximately caused by the accumulation of water on

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the roadway, as required to recover against the City based on alleged failure to maintain proper drainage. No eyewitness testimony was presented, testimony of the motorist experts was nothing more than guess work and conjecture, and there were many other just as plausible, variables and factors which could have caused the accident (***Gayle v. City of New York***, _____A.D.2d._____, 668 N.Y.S.2d 693).

GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - ELEMENTS

The Second Department recently concluded that in deciding whether to grant leave to serve amended notice of claim, the court must determine whether the mistakes, omissions, irregularities or defects in the original description of the place, where and manner in which the claim arose were made in good faith and whether defendant had been prejudiced (***Earle v. Town of Oyster Bay***, _____A.D.2d_____, 668 N.Y.S.2d 630).

RES IPSA LOQUITUR - ELEMENTS

In ***Feuer v. HASC Summer Program, Inc.*** (_____A.D.2d_____, 668 N.Y.S.2d 700) the Second Department ruled that the doctrine of res ipsa loquitur is a rule of evidence, which generally provides a permissible inference of negligence rather than a presumption. The doctrine has the effect of creating a prima face case of negligence sufficient for submission to the jury and the jury may, but is not required to draw a permissible inference of negligence.

MEDICAL MALPRACTICE - ELEMENTS

The Second Department recently ruled that the distinction between ordinary negligence and medical malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring "special skills" not ordinarily possessed by lay persons or whether the conduct complained of can be assessed on the basis of common every day experience (***Petrillo v. Leather***, _____A.D.2d._____, 668 N.Y. S.2d 637).

When the duty allegedly breached arises from the physician-patient relationship or is substantially related to medical treatment resulting, the resulting cause of action sounds in "medical malpractice" as opposed to negligence.

If failure on the part of the first surgeon to advise the second surgeon who was about to operate in the same area of the patient's body, that certain nerves, blood vessels in the area were in anomalous physical positions, was an act of malpractice and subject to the two year six month Statute of Limitations rather than the negligence Statute of Limitations.

JURISDICTION - IMPERSONAM - FAILURE TO MOVE

In ***Fleet Bank N.A. v. Riese***, _____A.D.2d_____ 668 N.Y.S.2d 611) the First Department indicated that an absence of showing of "undue hardship," mandated that the defendant waived the defense of improper service by failing to move to dismiss the complaint based on that defense within sixty (60) days of the effective date of the amendment requiring such a motion to be filed within sixty days after service of the pleading asserting such a defense. The court ruled a waiver came into effect.

APPEAL - AUTHORITY OF APPELLATE DIVISION

In ***BGW Development Corp. v. Mount Kisco Lodge No.1552 of the Benevolent Protective Order of Elks of the U.S. of America, Inc.***, (_____A.D.2d_____, 669 N.Y.S.2d 56), the Second Department held that the power of the Appellate Division to review evidence in cases tried without a jury is as broad as that of a trial court, bearing in mind that do regard must be given to the decision of the trial judge, and the trial court's determination will generally not be disturbed on appeal unless it is obvious that its conclusions could not be reached under any fair interpretation evidence.

AUTOMOBILE - SKIDDING

In ***Nitz Steel vs. Mui***, (_____A.D.2d_____, 669 N.Y.S.2d 326) the Second Department concluded that evidence of skidding out of control is only prima facie evidence of negligence on the part of the driver and does not mandate a finding of negligence. Such evidence together with an explanation given by the driver presents factual questions for determination by a jury.

INSURANCE - AMBIGUITY - QUESTION OF LAW

In ***Board of Managers of Yardarm Condominium II vs. Federal Insurance Co.***, (_____A.D.2d_____, 669 N.Y.S.2d 332) the Second Department ruled that whether an insurance policy is ambiguous is a matter of law to be determined by the court. The terms of an insurance contract are not ambiguous merely because the parties interpret them differently.

INSURANCE - SETTLEMENT BY INSURED

The Second Department recently indicated that a liability insurer was not obligated to indemnify its insured in an underlying action where the insured settled the action without the insurers consent, executed an unlimited and unreserved release that

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destroyed the insurer's subrogation rights and failed to show that the insurer was not prejudice (***Aetna Cas. & Surety Co. vs. Longo Production, Inc.***, (_____A.D.2d_____, 669 N.Y.S.2d 336).

NEGLIGENCE - CONSTRUCTION - LABOR LAW SECTION 240 - LIABILITY OF OWNER - LIABILITY OF OTHERS

In ***Campanella vs. St. Luke's Roosevelt Hosp.,*** (_____A.D.2d_____, 669 N.Y.S. 287) the First Department ruled that irrespective of the degree of supervision it exercised over the work, an owner of a construction site was liable under the Scaffolding Law to a worker who was injured while helping to load into a dumpster timbers which were handed down to him from the first floor roof, eight to twelve feet above the injured party. The lowering of timbers from an eight to twelve foot elevation without the aid of any safety device was a hazard implicating the statute, which provides special protections for workers involved in jobs that "entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured."

A party other than the owner or general contractor may be held liable under the Scaffolding Law as the owner's agent by virtue of having the authority to supervise and control the work being performed at the time of the injury.

A subcontractor could not be held liable under the Scaffolding Law to the injured employee of another subcontractor, absence evidence that it supervised the injured employee's task.

NEGLIGENCE - CONSTRUCTION - SCAFFOLDING - LABOR LAW SECTION 240

The First Department recently submitted that work being performed by an elevator repair person on a day when he fell from a ladder affixed to an outside wall of a hotel was repair work, as opposed to routine maintenance and thus fell within the purview of the Scaffold Law for purposes of an action against the hotel owner. The repairman was climbing the ladder to reach the elevator room and fix the elevator that had stopped working.

The fact that the ladder from which the repairman fell was affixed to the outside wall of the building did not preclude the application of the Scaffolding Law against the owner of the hotel.

Since the duty imposed by the Scaffolding Law is non-deligable, the owner or agent who breaches that duty may be held liable regardless of whether it actually exercised supervision or control over the work or whether the negligence by the worker contributed to the mishap (***Spiteri vs. Chatwal Hotels***, _____ A.D.2d_____, 699 N.Y.S.2d 282).

PLEADING - BILL OF PARTICULARS - LIMITATION

The First Department recently submitted that an elevator repairman who brought a personal injury action against the hotel owner could not assert alleged violations of building code for the first time in a supplemental bill of particulars (***Spiteri vs. Chatwal Hotels***, _____A.D.2d_____, 669 N.Y.S.282).

ASSUMPTION OF RISK - SPORTING ACTIVITY - ELEMENTS

The Second Department recently indicated in ***Rubin vs. Hicksville Union Free School Dist.*** (_____A.D.2d_____, 669 N.Y.S.2d 359) that in general, a person who is injured while voluntarily participating in a sporting event has no legal recourse if his injuries were caused by an occurrence or condition which was known, apparent or a reasonably foreseeable consequence of participation.

Relieving the owner or operator of the sporting venue of liability for the inherent risk of engaging in a sport is justified when the consenting participant is aware of the risk, has an appreciation of the nature of the risk, and voluntarily assumes the risk.

SMALL CLAIMS - RIGHT OF CROSS EXAMINATION

The Appellate Term recently held that cross examination of adverse witness is a matter of right in every trial of a disputed issue of fact.

The small claims court erred in prohibiting a defendant from cross examining a plaintiff on the ground that defendant had no witness available for plaintiff to cross examine, thus violating defendants due process of rights. Defendants ability to cross examine was not contingent upon defendants presenting a witness for plaintiff to cross examine (***Graves vs. American Exp.***, _____Misc.2d_____, 669 N.Y.S.2d 463).

EMOTIONAL DISTRESS - AIDS - ELEMENTS

The First Department recently held that an emotional distress claim based on a fear of contracting acquired immuno deficiency syndrome (AIDS) as a result of being cut by a sharp object in a plastic bag which fell off a hospital's loading dock was too remote and speculative to be compensable. Plaintiff tested negative for human immuno deficiency virus (HIV) thirteen months after the accident, the garbage in question was from a kitchen and it was unlikely that medical waste would have been in the bag, and the hospital's waste disposal procedures requiring that sharp objects be placed in a punctured resistant container made it unlikely that the sharp, infectious object would have been in the bag (***Bishop vs. Mt. Sinai Medical Center***, _____A.D.2d_____, 669 N.Y.S.2d 530).

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INDEMNIFICATION - OWNER - LACK OF CONTROL

In ***Jellema vs. 66 West 84th Street Owners rp.***, (_____A.D.2d._____, 669 N.Y.S.2d 550) the st Department ruled that in an action brought by an ured employee of a contractor against the building ner under the Scaffolding Law, findings that the ntractor exercised complete control over the work and that the building owner did not contribute in way to the employee's accident warranted an entry a directed verdict in favor of the building owner on third party claim against the contractor for lemnification.

DISCLOSURE - LOSS OR DESTRUCTION OF PRODUCT

It was recently indicated by the First partment that when a party to a products liability ion falters, loses, or destroys key evidence before it be examined by the other parties expert, the court ould dismiss the pleadings of the party responsible the spoliation, or at the very least preclude that ty from offering evidence as to the destroyed oduct (***Squitieri vs. City of New York***, __A.D.2d_____, 669, N.Y.S.2d 589).

Sanctions for spoliation of evidence are not ited to cases where the evidence was destroyed lfully or in bad faith, since the party's negligence s of the evidence can be just as fatal to other parties lity to present the defense.

EVIDENCE - RATE OF SPEED

In ***Shpritzman vs. Strong*** (_____A.D.2d_____, 0 N.Y.S.2d 50) the Second Department ruled that lay tness could testify concerning speed of an omobile involved in a traffic accident.

EVIDENCE - PHOTOGRAPHS

The Third Department recently held that the timony of an insurance agent that he took otographs of the intersection at which the omobile occurred some eleven hours after the cident and that the photographs accurately depicted intersection as he observed it were sufficient to henticate photographs and allow their admission o evidence (***Bornt vs. Town of Pittstown***, __A.D.2d_____, 669 N.Y.S.2d 979).

CONTRACTS - EXCULPATORY PROVISION

In ***Uribe vs. Merchants Bank of New York***, (91 Y.2d 336, 670 N.Y.S.2d 393) the Court of Appeals ed that an Exculpatory Provision in a contract rporting to receive a parties liability for negligence linarily will be enforced when its language expresses parties intent in unequivocal terms.

Test applied in determining the intent of the parties to an ordinary business contract or common speech and the reasonable expectation and purpose of the ordinary business person in the factual context in which the terms of art and understanding are used, often also keyed to the level of business sophistication and acumen of the particular parties.

EVIDENCE - BEST EVIDENCE

The First Department recently ruled that "Best Evidence Rule" requires the production of an original writing where its contents are in dispute, and prohibits the introduction of secondary evidence unless the proponent of the substitute can sufficiently explain the unavailability of the original and has not procured its loss or destruction in bad faith (***NW Liquidating Corp. vs. Helmsley Spear, Inc.***, _____A.D.2d_____, 670 N.Y.S.2d 488).

CONFLICTS - INSURANCE - LAW OF STATE

The First Department recently held that the "Center of Gravity" or "Grouping of Contacts" theory for determining which state law governs an insurance policy looks to such factors as the place of contracting, negotiation and performance; location of the subject matter of the contract; and the domicile of the contracting parties (***Allstate Ins. Co. vs. Conigliaro***, _____A.D.2d_____ 670 N.Y.S.2d 469).

MALPRACTICE - LIMITATIONS - FOREIGN OBJECT - ELEMENTS

In ***Newman vs. Keuhnelian*** (_____A.D.2d_____, 670 N.Y.S.2d 431), the First Department directed that the distinction between a "Foreign Object" in a patient's body which will toll the Statute of Limitations in a malpractice matter arising from the insertion of a device until it is or should be discovered and "Fixation Device" for which an action accrues with the last act of negligence or malpractice, is that the fixation device is intentionally implanted, even if negligently left inside, whereas the foreign object is negligently left inside the patient during the surgery and its continued presence serves no medical purpose.

A portion of a catheter which had broken off and remained in the patient's body was not a "Foreign Object" inadvertently left in the plaintiff's body as would delay the operation of the Statute of Limitations in a medical malpractice action until the object was or should have been discovered but was a "Fixation Device."

PHYSICAL EXAMINATION WAIVER

In ***Gill vs. United Parcel Service, Inc.***, (_____A.D.2d_____, 670 N.Y.S.2d 890), the Second Department ruled that a defendant waived the right to conduct a physical examination of the plaintiff when they failed to arrange for the examinations to be

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conducted during the time period set by the trial court in its preliminary conference order and, thereafter when they again failed to conduct the examination within the time period set in the court's subsequent order.

EVIDENCE - ADMISSION AGAINST INTEREST

A personal injury plaintiffs statement to her treating psychiatrist concerning what caused her to slip and fall was admissible as an admission by a party opponent, so indicated the First Department in ***Schroder vs. Consolidated Edison Co. of New York, Inc.***, _____A.D.2d_____, 670 N.Y.S.2d 856).

EVIDENCE - HEARSAY - INADMISSIBLE

In ***Merenda vs. Consolidated Rail Corp.***,(_____A.D.2d_____, 670 N.Y.S.2d 869), the Second Department ruled that the hearsay statement of a train crew member should not have been admitted as an admission in a personal injury case against the railroad arising out of a trainautomobile collision. The crew member was not authorized to speak on behalf of the railroad.

LIMITATIONS - FRAUD

The Second Department recently submitted that the Statute of Limitations for a fraud claim is six years from the date of the commission of the fraud or two years after its actual or imputed discovery which ever is longer. (***Shannon vs. Gordon***, _____A.D.2d_____, 670 N.Y.S. 887).

The court further submitted that a plaintiff may not shut his or her eyes to the facts which calls for investigation.

CONSTRUCTION - DUTY OF OWNER AND GENERAL CONTRACTOR - LABOR LAW §241

In ***Rizzuto vs. L.A. Wenger Contracting Co., Inc.***, (91 N.Y.2d 343, 670 N.Y.S.2d 816), the Court of Appeals indicated that to recover damages under the statute requiring owners and contractors to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations, an injured worker need not show that the owner or contractor exercised supervisory control over the work site. Once it is alleged that the concrete specification of the State Industrial Code has been violated, the general contractor or owner is vicariously liable without regard to his or her fault if the worker proves that the negligence of some party to the construction project caused the injuries.

The allegation by a plumbing contractor's employee that diesel fuel accidentally sprayed on the floor of the construction site by the landowner's workers created a slippery condition in violation of several State Industrial Code provisions, was sufficient to state a claim against the contractor or injuries sustained as a result of a slip and fall on the fuel.

PROCESS - FAILURE TO FILE

The First Department recently submitted that under the commencement by filing system, the failure to serve a summons and complaint on the defendant within 120 days from the filing of the summons means that the action will be deemed dismissed. (***Louden vs. Rockefeller North, Inc.***, _____A.D.2d_____, 670 N.Y.S.2d 850)

The plaintiff did not properly recommence the action where plaintiff failed to serve the original papers which named the wrong entity as a defendant, failed to obtain judicial permission to file the amended papers and failed to purchase a new index number well as misrepresenting the true filing date of the amended papers.

The trial court lacked the jurisdiction to grant plaintiffs motion to amend the summons and complaint non pro tunc since the amended papers filed with the court were a nullity due to the plaintiffs failure to serve the original papers and the further failing to purchase a new index number for the amended papers.

PROCESS - FAILURE TO FILE - DISMISSAL

In ***Floyd v. Brothers*** (_____A.D.2d_____, 672 N.Y.S.2d 30) the First Department indicated that a trial court lacked jurisdiction to enter a default judgment where the action was automatically dismissed due to the plaintiffs admitted failure to timely file proof of service, and no new action was commenced within 120 days thereafter. The defendant's service of a demand for a complaint before the automatic dismissal was not an appearance, and its activities after the automatic dismissal, serving an answer and opposition papers to plaintiff's motion for a default judgment, were nullities as there was no action pending in which the defendant could have appeared.

INSURANCE - DISCLAIMER - NOTICE 38 DAYS

It was recently held by the Appellate Division, First Department that the insurer's disclaimer of coverage, issued 30 days after the insured's untimely notice of claim was not unreasonable, where the insurer made a prompt, diligent and good faith investigation of the claim (***Structure Tone, Inc. v. Burgess Steel Products Corp.***, _____A.D.2d_____, 672 N.Y.S.2d 33).

Prior notice of claim of the underlying action given to a liability insurer by the insured did not constitute notice from the additional insured where the additional insured took the position in the action adverse to the named insured.

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LIMITATIONS - PROCUREMENT OF INSURANCE

It was recently held the Appellate Division, irst Department that a cause of action for breach of an greement to procure insurance accrued at the time the ontractor failed to procure the insurance and was, herefore, time barred (***Polat v. Fifty CPW Tenants Corp.***, _____A.D.2d_____, 672 N.Y.S.2d 56).

TRIAL - JUROR'S CONDUCT

In ***Kraemer v. Zimmerman***, (_____A.D.2d_____ 72 N.Y.S.2d 58), the First Department ruled that a uror's conduct in looking up a medical term in a ictionary did not warrant setting aside the verdict for he defendants in a medical malpractice matter where he juror stated there was no inappropriate discussion f the case.

DISCLOSURE - DEPOSITION - CHANGE OF TESTIMONY

In ***Boyce v. Vazquez***, (_____A.D.2d_____, 671 I.Y.S.2d 815), the Third Department ruled that /itnesses have the explicit right to change deposition estimony provided that they do so in accordance with he statutory requirements.

INSURANCE - PRIORITY OF CLAIM

In ***Boris v. Flaherty*** (_____A.D.2d_____, 672 I.Y.S.2d 177), the Fourth Department indicated that he rule of "First in Time, First in Right" normally etermines that priority to insurance proceeds among ompeting claimants. The rule does not prevent a ourt presiding over an interpleader action from xercising its equitable power to pro-rate the insurance roceeds among the claimants.

DISMISSAL - VACATING - ELEMENTS

It was recently indicated by the First epartment that a party seeking to restore a case ismissed pursuant to the rule treating the matter as ruck from the calendar and not restored within one ear as abandoned must demonstrate that the case has erit, that a reasonable excuse for the delay existed, he absence of an intent to abandon the matter, and a ck of prejudice to the non-moving party in the event he case is restored to the trial calendar.

The restoration of the action was warranted. he delay in failing to restore the matter was excusable ven the family tragedy suffered by plaintiffs counsel, at defendants contributed to the delay by repeatedly iling to comply with discovery orders, that plaintiff omptly responded to the defendant's dismissal otion, that the pleadings demonstrated a potential merit of assault and battery and false arrest claims and the delay prejudiced the plaintiff more than the defendants (***Nicholas v. Cashelard Restaurant, Inc.***, _____A.D.2d_____, 672 N.Y.S.2d 98).

AUTOMOBILE - SUMMARY JUDGMENT - VICARIOUS LIABILITY - VEHICLE & TRAFFIC LAW 388

In ***Marchetti, et al v. Avis Rent A Car System, Inc., et al*** (_____A.D.2d_____, 672 N.Y.S.2d 368), the Second Department ruled that the defendant Avis demonstrated it did not own the vehicle that struck the plaintiffs decedent and, therefore, no basis existed to hold it vicariously liable pursuant to the Vehicle & Traffic Law. The defendant, Drive & Park, Inc. admitted ownership of the vehicle but is equally free from vicarious liability inasmuch as it was able to establish that the driver of the vehicle was subsequently convicted of second degree murder because of an intentional running down of plaintiffs decedent. Section 388 provided that an owner of a vehicle will be vicariously liable only for the negligence of the permissive user and not for intentional acts of the driver.

AIDS - PHOBIA - ELEMENTS

It was recently held by the Second Department in ***Schott v. St. Charles Hosp.*** (_____A.D.2d_____, 672 N.Y.S.2d 393), that in order to maintain a cause of action for negligence resulting in fear of contracting Acquired Immune Deficiency Syndrome (AIDS); or "Aids Phobia" the plaintiff must demonstrate (1) the actual or probable presence of human immunodeficiency virus (HIV) when the alleged transmission occurred and (2) that there was some injury, impact, or other plausible mode of transmission wherein HIV contamination could with reasonable likelihood have entered the plaintiffs blood stream.

MALPRACTICE - MISDIAGNOSIS

It was recently indicated by the First Department in ***Jaffe v. New York Hospital***, (_____A.D.2d____, 672 N.Y.S.2d 94), that a hospital stay to conduct a brain scan, audiological evaluation, and other tests during an orthopedic examination of the infant patient's knee did not cause a misdiagnosis contributing to the patient's deafness, brain damage and other maladies where the limited purpose of the patient's visit was for an examination of the knee, and there was no evidence of misdiagnosis in that regard.

GENERAL MUNICIPAL LAW - LATE NOTICE - DEFECT LISTED

In ***Gomez vs. City of New York***, (_____A.D.2d_____, 673 N.Y.S.2d 109), the First Department concluded that allowing a pedestrian to serve a municipality with a late notice of claim, six

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months after the accident allegedly caused by the defect in the sidewalk would substantially prejudice the municipalities ability to investigate the alleged defect and other circumstances surrounding the accident. The fact that the defect was listed on a map filed by a sidewalk protection committee did not give the municipality actual notice of the essential facts constituting the pedestrian's claim or otherwise alleviate the prejudice caused by the delay.

A late notice filed by the pedestrian was not excused even though the pedestrian claimed not to have known of the extent of the injuries sustained in the accident allegedly caused by the defective sidewalk until four months later, where the medical evidence did not support this assertion.

GENERAL MUNICIPAL LAW - LAW NOTICE - IGNORANCE

In ***Gilliam vs. City of New York***, (_____A.D.2d_____, 673 N.Y.S.2d 172), the Second Department submitted that ignorance of a statutory requirement for serving a timely notice of claim against the municipality is an unacceptable excuse, which will not justify the granting of leave to serve a late notice of claim.

PRECLUSION ORDER - SCOPE

In ***Barriga vs. Sapo***, (_____A.D.2d_____, 673 N.Y.S.2d 211), the Second Department concluded a sixty (60) day conditional order precluding a personal injury plaintiff from offering any evidence at the time of trial as to damages unless they provided responses to the defendants discovery demands became absolute when plaintiff did not timely serve the responses.

The plaintiff was not entitled to relief from the default as a result of their failure to respond to the defendants discovery demand pursuant to a sixty (60) day conditional order precluding the plaintiff from offering any evidence unless they timely served the response where they failed to demonstrate both a reasonable excuse for the failure to respond, as well as a meritorious cause of action.

DISCOVERY - DEPOSITION - FAILURE TO APPEAR

The Second Department recently held that a failure of a defendant in a personal injury action to appear for a deposition warranted an order providing that the defendants answer would be stricken if he did not submit to a deposition at a time and place to be specified, in a notice of not less than thirty (30) days to be given even though defendant's counsel alleged that defendant's whereabouts were unknown and that he tried to locate him.

The fact that a defendant has disappeared or made himself unavailable provides no basis for denying a motion to strike his answer for failure to appear at a deposition. (***Torres vs. Martinez***, _____A.D.2d_____, 673 N.Y.S.2d 182).

AUTOMOBILE - NO-FAULT - SERIOUS INJURY - ELEMENTS

It was recently indicated by the Second Department that a motorists self-serving, unsubstantiated allegation that it was totally incapacitated from running his business for a period of approximately six months following an accident was insufficient to establish that he had suffered a "serious injury" for the purpose of the No-Fault Law. (***Rum vs. Pam Transport, Inc.***, _____A.D.2d_____, 673 N.Y.S.2d 178).

INDEMNIFICATION - AUTOMOBILE LESSOR

It was recently held by the Second Department that clause in a vehicle rental agreement obligating the lessee to indemnity the lessor for all claims arising out of the use of the vehicle was enforceable under the Vehicle and Traffic Law, where the lessor was seeking to recoup sums it had paid to a third party injured by the lessee and was not trying to use the clause against an injured lessee. (***ELRAC, INC. vs. Beckford***, _____A.D.2d_____, 672 N.Y.S.2d 192).

Pursuant to the common-law, a vehicle owner is entitled to indemnification from a negligent user.

CONSTRUCTION SCAFFOLD LAW SCOPE

In ***Weininger v. Hagedorn & Co.***, (91 N.Y.2d 958, 672 N.Y.S.2d 840), the Court ruled that a worker was making a significant physical change to the configuration or composition of a building, and thus was engaged in "altering" a building or structure within the meaning of the scaffolding law when he fell from a ladder while running a computer and telephone cable through the ceiling, which involved standing on a ladder to access the series of holes punched in the ceiling and pulling the wire through canals that had been made in chicken wire in the ceiling.

PRODUCTS LIABILITY - MANUFACTURERS LIABILITY - MODIFICATION

In ***Makney vs. Ford Motor Co.***, (_____A.D.2d_____, 673 N.Y.S.2d 718), the Second Department indicated that a manufacturer of a product may not be held liable for strict products liability or negligence where after the product leaves the possession or control of the manufacturer, there is a subsequent modification which substantially alters the product and where it is shown that the accident would not have occurred but for the subsequent modification.

Material alterations by a third person which result in a substantial change in the condition in which

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the product was sold by destroying the functional utility of a key safety feature, however, foreseeable that modification may have been, are not within the ambit of the manufacturer's responsibility for the purposes of a products liability claim.

AUTOMOBILES - ILLEGALLY PARKED

The Second Department recently held that the owner of a truck parked in a bus stop was not liable for injuries sustained by the passengers on a bus when it stopped to discharge passengers in a traffic lane and was struck from behind from another truck. In view of the long period the driver of the truck had the bus in view, the presence of the truck in the bus stop, furnished the condition or occasion for the occurrence of the accident, rather than being its cause (***Haylett vs. New York City Transit Authority***, (_____A.D.2d_____, 674 N.Y.S.2d 75).

INSURANCE EXCLUSIONS - SCOPE

In ***Montelone vs. Crow Construction Co.***,(_____A.D.2d_____, 673 N.Y.S. 408) the First Department held that any ambiguity in a policy exclusion will be construed against the insurer. However, where one exclusion in an insurance policy may at first appear to contradict another or to create an ambiguity, exclusions must be read seriatim, not cumulatively. If any one exclusion applies there can be no coverage, since one exclusion can be regarded as inconsistent with another.

The insurer bears the burden of demonstrating that a policy exclusion defeats an insured's claim by establishing that the exclusion is dated in clear and unmistakable language, the subject to no other reasonable interpretation, and applies in the particular case.

"Employee Bodily Injury Exclusions added by endorsement to a subcontractor's liability policy, which clearly barred coverage for all claims arising out of employee's injuries, even if they took the form of a third party claim for contractual contribution or indemnity, was not rendered ambiguous when read in conjunction with the policy's contract liability exclusion, which contained an exception for an "insured contract."

STIPULATION OF DISCONTINUANCE - RES JUDICATA - ELEMENTS

In ***Singleton Management, Inc. vs. Compere***, (_____A.D.2d_____ 673 N.Y.S.2d 381), the First Department indicated that a stipulation of discontinuance that specifies that it is with prejudice may, under the proper circumstances, have a res judicata effect in future litigation on the same cause.

COLLATERAL ESTOPPEL - ELEMENTS

The First Department recently submitted that there are two requirements that must be satisfied before the doctrine of collateral estoppel may be evoked. The identical issue necessarily must have been decided in the prior action and be decisive in the present action and the party to be precluded from relitigating must have had a full and fair opportunity to contest the prior determination, ***Singleton Management, Inc. vs. Compere***, (_____A.D.2d_____, 673 N.Y.S.2d 381).

NEGLIGENCE - ASSUMPTION OF RISK - ELEMENTS

It was recently held by the Second Department that generally sports participants properly may be held to have consented by their participation to those injury causing events which are known, apparent or reasonably foreseeable consequences of the participation. The risk assumed by a voluntary participant include those associated with the playing field, and any open and obvious condition on it.

A basketball player who allegedly suffered injuries when he slipped and fell in a wet area of a municipal basketball court assumed the obvious risk of injury inherent in playing basketball on a court he knew to be slippery, (***Levinson vs. The Corporated Village of Bayville***, _____A.D.2d_____, 673 N.Y.S.2d 469).

STATUES - INTERPRETATION - ELEMENTS

In ***Majewski vs. Brodalbin-Perth Cent. School District***, (91 N.Y.2d 577, 673 N.Y.S.2d 966) the Court of Appeals indicated that it is fundamental that a court interpreting a statute should attempt to effectuate the intent of the legislature. As the clearest Indicator of the legislative intent is the statutory text, the starting point in any case of statutory interpretation must be the language itself given its effect to the plain meaning thereof.

INSURANCE - DUTY TO DEFEND - ASSAULT

The Second Department recently indicated in ***Mattress Discounters of New York, Inc., vs. U.S. Fire Insurance Ins. Co.***, (_____A.D.2d_____, 674 N.Y.S.2d 106), that a liability insurer had no duty to defend and indemnify insured's business in an underlying action for assault, battery and negligent hiring and supervision brought by a plaintiff who was injured as a result of an assault committed by the insured's employees. The policy excluded coverage for bodily injury expected or intended from the standpoint of the insured and the inclusion of claim for negligent hiring and supervision did not alter the fact that the operative act giving rise to recovery was the assault.

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1998 DANY'S NEW OFFICERS INSTALLATION DINNER

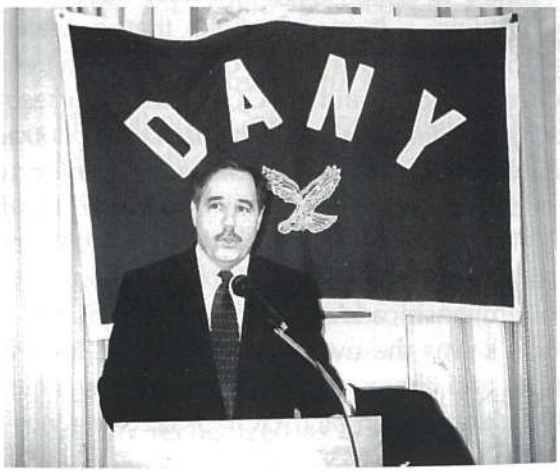
DOWNTOWN ATHLETIC CLUB

Past President James Conway swearing in DANY's new officers.

(bottom left hand corner) James Conway swears in new officers including President-Elect Gail Ritzert, Paul Duffy, Gene Young and Andrew Zajac.

Seminar Speaker Ken Mauro addressing the dinner attendees.

(r to l): Past President John H. McDonough, Justice Thomas R. Sullivan of the Appellate Division 2nd Dept. and newly installed President Edward Hayes.



Newly installed DANY President Edward Hayes speaking at the podium.

VORTHY OF NOTE

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INSURANCE - ADDITIONAL INSURED - ELEMENTS

The Second Department recently held that a wimming instructor's liability policy covered a college s an "additional insured," against a suit brought after n infant was injured near a pool which the college ad leased to the instructor, where the policy protected he college against liability arising out of the ownership, maintenance or use of that part of the remises...leased to the named insured" (***Catchpole vs. J.S. Underwriters, Inc., Co.***, _____A.D.2d_____, 674 N.Y.S.2d 50).

EW YORK LAW IS UNFAIR TO UBCONTRACTORS

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Hogeland actually undermines ***Kinney*** because he ***Hogeland*** court recognized the distinction between n anti-exemption statute and an anti-indemnity statute nd also held that it is not against public policy for a andlord to allocate liability for its own negligence in a ease. This distinction was also recently made by the Court of Appeals in ***Itri Brick v. Aetna*** which held that it vas against public policy for a contractor to obtain ndemnity for its own negligence in a construction greement.

Board of Ed v. Valden also does not support the ***Kinney*** holding. It merely held that a waiver of ubrogation clause in a 1969 construction agreement vas not rendered invalid by GOL 5-323, (***Agreements exempting building service or maintenance contractors from liability for negligence void and unenforceable***) anti-exemption statute). The Appellate Division, econd Dept. had observed that it was "not a ontracting away of liability, but only of subrogation ights." (emphasis added) (60 AD2d 617, at 618). Moreover, it was the owner who provided for its own nsurance, and there was no claim of any failure to rocure insurance. In fact, GOL 5-322.1was not even mplicated.

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N.Y.S.2d 581 (1st Dep't 1997). In that case, the plaintiff was injured by an assailant on premises owned by the Housing Authority as a result of the alleged lack of security. The Supreme Court, Bronx County denied the Housing Authority's motion for summary judgment. The Appellate Division, First Department reversed and dismissed the complaint. The Appellate Division held that the plaintiff failed to establish that the alleged lack of security was the proximate cause of the occurrence, since it was not demonstrated that the assailant gained access to the premises through the unsecured front door, or that the assailant was not a resident of the building or the guest of a resident. The committee worked towards submitting an amicus brief in Borrero since the rule applied in that case has been used to support dismissals of numerous cases brought under the theory of inadequate security. It was felt that a decision by the Court of Appeals on this issue would be of critical importance to the defense industry.

The second case on which the committee worked that ultimately settled was ***Bennion v. Goodyear Tire & Rubber Co.***, 229 A.D.2d 1003, 645 N.Y.S.2d 195 (4th Dep't 1996). ***Bennion*** was a 3-2 decision of the Appellate Division, Fourth Department. At issue was whether Labor Law §240(1) applies to a worker who falls and lands on the same elevated surface. The plaintiff was injured while performing duct work on elevated rafters. The rafters were spaced 16 inches apart. The plaintiff slipped and fell onto a rafter landing on his groin with his right leg extending below the rafter. The Supreme Court granted the plaintiffs motion for partial summary judgment pursuant to Labor Law §240 and the Appellate Division affirmed.

In working towards an amicus submission in ***Bennion***, the committee's concern was that claims under Labor Law §240(l) are proliferating, and the Appellate Divisions, especially the First Department, have unduly expanded the scope of the statute. For example, in ***Dominguez v. Lafayette-Boynton Housing Corp.***, 240 A.D.2d 310, 659 N.Y.S.2d 21 (1st Dep't 1997), the court stated that "an injured person need not

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fall completely off of a scaffold to recover under Labor Law 240(1) so long as the injury resulted from an elevation related hazard." Id. 240 A.D.2d at 312, 659 N.Y.S.2d at 23 (citations omitted). Also, in ***Carpio v. Tishman Construction Corp.***, 240 A.D.2d 234, 658 N.Y.S.2d 919 (1st Dep't 1997), it was held that the statute applied to an accident which the court described as follows:

> On September 24, 1992, plaintiff was given the task of painting the ceiling of the third floor, which he began performing by walking along the concrete floor while extending a paint roller up to the ceiling. As he was looking up at the ceiling using the roller, plaintiffs foot backed into a hole in the floor, causing his leg to fall three feet below the surface to his groin area.

240 A.D.2d at 234, 658 N.Y.S.2d at 921.

In ***Bennion***, we intended to point to those and other cases showing that the Appellate Divisions have been giving the statute unwarranted and expansive application. We planned to argue that, although Labor Law §240 is to be liberally construed, its scope should not be enlarged so as to apply to situations which are outside of the plain meaning of the statute. We also intended to argue that the expansive application of the statute is of particular concern to the defense community since defendants are liable under the statute without regard to fault and the right of impleader has been severely restricted by the Omnibus Workers' Compensation Reform Act of 1996.

On April 27, 1998, while ***Bennion*** was pending in the Court of Appeals, the committee was notified that the case settled. Coincidentally, during his inaugural address to DANY on June 23, 1998, President Edward A. Hayes spoke eloquently regarding how, in many cases, Labor Law §240(1) is an unjustified source of recovery for plaintiffs. The committee wholeheartedly agrees with our President's position, and it will continue to follow for cases under that statute which will be before the Court of Appeals so that appropriate amicus submissions can be made. Indeed, we are extremely pleased that our new President has expressed the same enthusiastic support for our committee as did Past President John J. McDonough, who showed considerable foresight and innovation in founding our committee.

The next project that the committee intends to address is ***Burgos v. Aqueduct Realty Corp.***, ___A.D.2d___, 666 N.Y.S.2d 640 (1st Dep't 1997), which is pending in the Court of Appeals. The issue in that case is the same as in ***Borrero v. New York City Housing Authority***, discussed above, namely, in an action for damages for injuries against a landlord based upon inadequate security, whether a plaintiffs action is fatally deficient if the plaintiff cannot demonstrate that the assailant was an unauthorized intruder who gained access to the premises via an unsecured outer door. As indicated above, this issue is of extreme significance to the defense community.

However, we also regret to report that our committee's efforts have been hampered by a lack of funding. Several insurers have provided initial contributions towards the committee's expenses but subsequent requests have been far less fruitful. We wish to stress that the committee's entire operating budget consists solely of printing costs and travel expenses. The committee members or their firms do not seek compensation for the considerable time that the committee members spend in research and writing. The committee is composed of the following:

*Frank V. Kelly is associated with the firm of Magid & Slattery, 120 Broadway, New York, New York 10271, of counsel to Zurich American Insurance Co. Mr. Kelly has over ten years of trial, appellate and litigation experience. Mr. Kelly serves on the litigation committee of the Federalist Society.

*Andrew Zajac is associated with the office of Fiedelman & McGaw, Two Jericho Plaza, Jericho, New York 11753. For the past eight years, Mr. Zajac has been in charge of the appeals team at Fiedelman & McGaw, which is a staff counsel office of the American International Group, Inc. (AIG). That appeals team, which is currently comprised of five members, handles all of the appellate work generated by the four AIG staff counsel offices in New York State.

Carol R. Finocchio is a solo practitioner with offices at 950 Third Avenue, 26th Floor, New York, New York 10022. Ms. Finocchio is widely recognized as one of the top appellate practitioners in New York.

Elizabeth A. Fitzpatrick is a partner in the firm of Feeney, Gayoso & Fitzpatrick, 181 Smithtown Boulevard, Nesconset, New York

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10272. Ms. Fitzpatrick is an attorney with eight years experience in the defense of general liability matters. She now concentrates on the litigation of insurance coverage disputes.

Elizabeth Anne Bannon is associated with the law office of Michael J. Ross and Robert J. Samabrato, Esqs., 199 Water Street, New York, New York 10272. Ms. Bannon is an accomplished appellate litigator with over twelve years experience.

Dawn C. DeSimone, is associated with the law offices of Alio, Ronan, McDonnell & Kehoe, P.O. Box 948, Melville, New York 11747. Ms. DeSimone is a talented appellate attorney with five years experience.

The committee expresses its profound thanks to ıe above individuals and their firms for providing ıtstanding appellate work free of charge.

Nevertheless, as indicated above, the ɔmmittee has been hampered by a lack of funds for ɔerating expenses. We will be approaching insurers ıd other interested parties for contributions in this ɜspect. The committee strongly feels that its work is ‹tremely beneficial to the defense bar and the ısurance industry.

The New York State Trial Lawyers Association ɔntinues to regularly submit amicus curiae briefs to ıe Court of Appeals. See, for example, Majewski v. roadalbin-Perth Central School District, 91 N.Y.2d 77, ___N.Y.S.2d ___, 1998 WL 248915 (1998) Omnibus Workers' Compensation Reform Act of 1996 not retroactive) and Drattel v. Toyota Motor Corp., _ N.Y.2d ___, ___ N.Y.S.2d ___, 1998 WL 314236 998) (Products liability claim based upon absence of r bag is not pre-empted by Federal Law). The ɔmmittee does not wish to see the defense ɔmmunity left behind the plaintiffs bar in this regard.

Mr. Kelly and Mr. Zajac co-chair the committee.

DRI CORNER

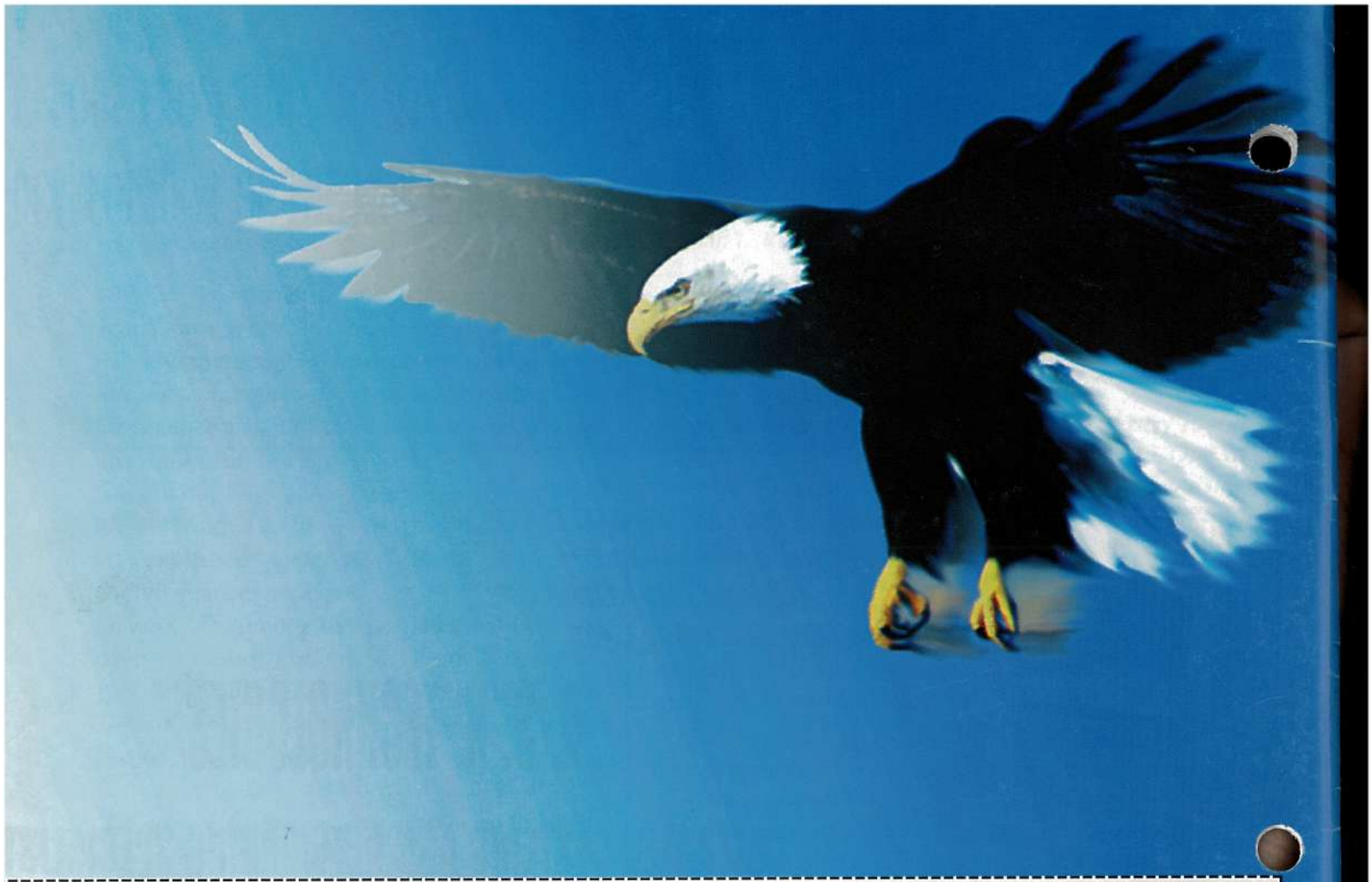
by Gail L. Ritzert

On October 1, 1998, I attended the DRI Atlantic Regional Meeting in Hershey, PA. AT the meeting, I had an opportunity to follow up on Insurance Industry round table discussions DRI held this past summer. One of the topics discussed is the use and effect of outside billing auditing agencies. During this discussion, DRI opened the dialogue with some of the insurance industry's leaders to see if they can reach a common ground. This discussion reinforced the commitment of both sides to continue to work and develop avenues of communication to enhance the relationship between the insurance carriers and their counsel.

We also discussed the coordination of DRI's CLE programs with the local defense associations. As you are aware, DANY has lead the way in New York by offering seminars with an emphasis on the defense bar. DANY is continuing this tradition, and has submitted its application for Accredited Provider Status. To supplement DANY's upcoming seminar programs, we have enlisted the aid of DRI to offer more programs in New York. DANY is presently working with DRI to develop programs for 1999.

On October 7-10, DRI held its Annual Meeting in San Fransisco. More than 1,200 people attended, with tremendous participation from clients. The Transportation Committee led the way by offering programs, seminars and open sessions for clients and counsel to share ideas, concerns and trends in the industry. New York will be hosting the 1999 Annual Meeting. We encourage all of our members to plan to attend and make next year's Annual Meeting an even greater success.

**Ms. Ritzert is a member of the Manhattan firm of Ohrenstein & Brown.*



APPLICATION FOR MEMBERSHIP*

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

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $150.00 for individuals admitted to practice more than five years; and $400.00 for firm, professional corporation or company.

Name _____

Address _____

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Tel. No. _____

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

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