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REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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AGREEMENT WHEREBY SUBCONTRACTOR/EMPLOYER AGREES TO INDEMNIFY CONTRACTOR FOR EMPLOYEE'S INJURIES CAN BE IN GENERAL TERMS

When the employee of a subcontractor is injured on the job because of his employer's fault, and can't sue the employer because of the exclusivity of the workers' compensation remedy, he can nevertheless sue any other person who bears liability for the injury – even if only derivatively, such as the general contractor (who bears liability for the acts of all its subcontractors and is often the defendant in these scenarios). In a well known but deeply imbedded anomaly in New York law, however, that defendant can then implead the employer for indemnity and/or contribution, indirectly subjecting the employer to the very exposure from which the Workers' Compensation Law was supposed to insulate it.

The principal purpose of the Omnibus Workers' Compensation Reform Act of 1996 (L.1996, c.635), which took effect on September 10, 1996, was to limit the tort liability of employers through this indirect route. In an amendment of § 11, one of the things the act did was bar the impleader of an employer unless either of two things could be shown: (1) that the employee sustained a "grave injury" as defined by § 11 of the Workers' Compensation Law or (2) that there was a written contract between the contractors

> entered into prior to the accident ... by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

We've had several bouts with the first item, the grave injury showing. See, for example, the lead notes in Digests 461 (the *Majewski* case), 509 (the *Bauer* case), and 543 (the *Boles* case). But we've had fewer contacts with the second item, the contract. *Flores* (Digest 544) was one such Court of Appeals case, but it was more concerned with contract principles in general

than with the § 11 contract arena specifically. We now have another case from the Court of Appeals, and this one enters the arena head on. *Rodrigues v. N & S Bldg. Contractors, Inc.,* 5 N.Y.3d 427, ... N.Y.S.2d .... (Oct 20, 2005; 6-1 decision).

The context was perhaps the most common one: a construction project on which employee E was injured while working for his employer, subcontractor R, who was retained on the project by general contractor G, in this case for concrete work. R signed a contract with G, prior to the accident (as the statute requires), stating that R would hold G harmless "[t]o the fullest extent permitted by law" for claims arising out of or resulting from performance of subcontracted work to the extent caused ... by the Subcontractor".

When E sued G, G impleaded R in what would seem to be a textbook example of the contract segment of the statute in operation. Yet both lower courts found it inapplicable and barred the impleader. To them this contract did not "expressly" cover the case. To do that, in their view (and that of Judge Read, the dissenter in the Court of Appeals), the contract would have had to specify the particular project, and didn't.

The majority's answer to that, in an opinion by Chief Judge Kaye, is that the contract does not have to specify the particular project. It will cover all projects undertaken by the subcontractor at the hiring of the general contractor if the terms of the contract indicate an omnibus undertaking, which is what the Court finds this one to indicate. The argument that it doesn't apply because it doesn't specifically mention this particular project "would render it inapplicable to any site or job [G] subcontracted to [R]". And that, says the Court – since no particular project at all is specified in the agreement – would make this kind of commitment meaningless.

The contract also called for R to arrange for insurance to cover G's potential exposure traceable to R's fault, and R secured that insurance. That R did so, the Court concludes, "is further evidence that [R] itself recognized that it had undertaken that obligation". The lower courts' view that in order to satisfy the "expressly" requirement the indemnification provision would have to designate the particular "sites, persons and ... losses covered" would "impose specificity requirements not in the statute".

OTHER DECISIONS

NOTICE OF CLAIM

Notice of Claim, Timely for Dispute Now in Suit, Can't Serve for Additional Payments That Come Due After Suit Was Begun; New Notices Are Needed

Only two months ago, in the *C.S.A.* case that we did as a lead note in Digest 550, the Court of Appeals treated a notice of claim provision – § 1744(2) of the Public Authorities Law – which required that the notice of claim in

contract cases against the authority involved be served "within three months after the accrual" of the claim. This was construed to mean that the time began when the contractor finished its services, and that a notice of claim had to be served within three months after that even though no dispute had yet arisen. As we noted in the cited lead note, those who deal with governmental units, when a notice of claim provision like this is involved, had best make it a habit, as soon as they complete their work, to serve a formal notice of claim on the unit. They might accompany it with a polite memo advising that they do this, not in contemplation of a dispute and an action, but only as a precaution.

This was a rigid construction of the statute concerned. In another recent case, *Varsity Transit, Inc. v. Board of Education,* .... N.Y.3d ...., ... N.Y.S.2d .... (Nov. 17, 2005), the Court of Appeals manifests an equally strict approach to another notice of claim statute, this one in § 3813(1) of the Education Law. The issue was different, but parallel to the *C.S.A.* case in the warning it sounds.

Varsity concerned a dispute between bus companies (collectively P) and the city (D) over how certain cost increases are to be figured under their contract for busing students. P timely served notices of claim and then brought timely suit for what they alleged were overdue payments under their interpretation of the formula involved (an interpretation with which D disagreed).

P continued to perform the busing services and now, during the pendency of the action, additional payments fell due. D conceded that the courts' construction of the formula, however resolved, would be just as applicable to the new payment periods as to the periods already in suit. The Court of Appeals agreed with this, describing the application of the formula, once judicially determined, as a merely "ministerial" extension of it to the newly accrued claims – "a matter of arithmetic".

Nevertheless, the Court holds, a new notice of claim had to be served as each such new claim accrued during the pendency of the lawsuit. The original notice of claim could not be held to suffice for the new accruals.

More to the point, the new lawsuit itself, whatever equivalent notice it might supply – i.e., equivalent to what a notice of claim would offer – could not supplant the need for new notices of claim for the new accruals. Still more to the point, not even the injunction that P had also included in the original lawsuit, designed as it was to require D to accept P's construction of the formula permanently, could be taken as substituting for the formal notice of claim that the Court finds D entitled to for each newly accruing claim.

In an opinion by Judge Rosenblatt, the Court holds that imposing this responsibility on P "is not overly burdensome" and suggests that if plaintiffs deem it so, their entreaty must be to the legislature, not the courts.

The lesson of the case, in the Court's own words, is that until the legislature acts "future plaintiffs need only continue to file the notices of claim after starting a lawsuit that they already file before the lawsuit".

Forewarned is forewarned, is the real lesson of the case. Deem the additional notices superfluous if you will, but spew them out generously. And remember that we are dealing here with contract cases, as we noted in our Digest 550 treatment of the *C.S.A.* case. In contrast to tort cases, for which General Municipal Law § 50-e usually supplies a central and uniform (and reasonably logical) notice of claim requirement, the contract notices of claim meander in and out of the consolidated and unconsolidated laws, bereft of uniformity and frequently differing from one governmental unit to another. While they of course do protective work for the government, they can just as often oust meritorious cases needlessly in instances in which the protection they're designed to offer is not needed by the governmental unit in the particular case because the unit has gotten the notice, directly, from other sources.

WILL CONSTRUCTION

When Natural Mother Names Her Natural But Adopted-Out Son as Beneficiary in Her Will, His Issue Take in His Place When He Predeceases His Mother

If the son's issue did not take in his place, the property that was left to him in this case – some land and money and half the residuary estate – would have ended up entirely in the residuary estate, giving whoever was named as beneficiary of the other half of the residuary estate everything. That other person was the testatrix's sister-in-law, and she it was (surprise!) who stepped forward with the claim that when the son predeceased his mother, the bequests to him lapsed, everything got dumped into the residuary clause, his children got nothing, and the remaining residuary legatee – herself (by pure coincidence) – took all.

Did the bequests lapse? They did not, rules the Court of Appeals; it awards to the son's children what the son would have gotten had he survived his mother. *Estate of Murphy,* .... N.Y.3d ...., ... N.Y.S.2d .... (Oct. 27, 2005; 6-1 decision)

The dispute centered on two statutes: EPTL 3-3.3, the so-called anti-lapse statute, and Dom.Rel.L. § 117(2)(a). The latter says that once an adoption is made, the adopted child and his issue become strangers to their natural relatives for purposes of will construction. There's an exception, however, when the natural (the adopted-out) child is "expressly" named in the will.

Since he was so named here, what's the gripe? The crux of the case boils down to whether the children of the son qualified as "issue". Or, as Judge Rosenblatt phrased it in the Court's opinion, "the issue is 'issue'".

While the EPTL provision says issue takes in the named beneficiary's place, the DRL provision says that adopted-out children and their "issue" are strangers for will construction purposes, which, as the sister-in-law (and her issue?) see it, trumps the EPTL.

As noted, however, the trump is trumped by the exception contained in the DRL provision itself, thus giving the EPTL in final analysis the upper hand. So, with trumpets blaring, the sister-in-law gets half the residuary estate and the children of the predeceased adopted-out but expressly-named son get what the son would have gotten.

It seems a pretty clear-cut case, but it didn't to the lower courts or to Judge Read, the dissenting judge in the Court of Appeals. They trace the statutes back, see the interplay of these two statutes differently, and would make the DRL the trumpor and the EPTL the trumpee.

If all statutes and their history were off the scene, and everything were to be gauged by the testator's likely intent – which, as law school teaches us, is what the courts are supposed to be seeking in every will-construction case – the result would have been exactly as the Court of Appeals majority holds. It would appear that implicit in the testatrix's naming of her son as beneficiary is an intent to let his offspring step in when the son steps out prematurely.

ASBESTOS LIABILITY

Employer Has No Duty to Wife for Asbestos Exposure of Her Husband at Employer's Work Sites

The allegation was that the wife was exposed to asbestos dust when she laundered her husband's asbestos-infected clothing. He worked for the Port Authority at various sites that exposed him to asbestos dust. The plaintiff/wife argued that the Authority (the employer) could foresee the possibility of her exposure through the laundering process. The Court of Appeals observes that the wife began her "analysis of duty with a discussion of foreseeability", but admonishes that that's not the starting point. "[F]oreseeability", it says, "bears on the scope of a duty, not whether a duty exists in the first place". It rejects the wife's claim because it finds no duty – such as a duty to warn – running from the employer to the wife. *Holdampf v. A.C. & S., Inc.,* .... N.Y.3d ...., ... N.Y.S.2d .... (Oct. 27, 2005).

There being no duty, as the Court sees it, there is no occasion to discuss its scope. As the Court explained in its 2001 *Hamilton* case (Digest 498), the foreseeability of harm may be present, but foreseeability alone does not bring liability. In determining whether a duty existed here in *Holdampf,* and

whether it was breached, the Court stresses that taking the contaminated work clothes home for laundering was the employee/husband's own decision; the employer offered a laundering service which was available to the employee at all times.

Apprehensive of "the specter of limitless liability", as it said in *Hamilton,* the Court notes that the specter is not present when "the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship". Such a relationship between employer and employee's wife not being shown in *Holdampf,* the desired circumscription has not been attained.

The Court cites with approval the appellate division decision in *Widera v. Ettco Wire & Cable Corp.,* 204 A.D.2d 306 611 N.Y.S.2d 569 (2d Dep't 1994), observing that

> [i]n *Widera,* the Appellate Division properly refused to recognize a cause of action for common-law negligence against an employer for injuries suffered by its employee's family member, allegedly as a result of exposure to toxins brought home from the workplace on the employee's work clothes.

As in *Widera,* so here as well: the Court sees no relationship between the defendant employer and the plaintiff such as to generate a duty of care.

All of this relates to the Port Authority's duty as an employer. The Court also rejects an alternative ground tendered by the plaintiff – the Authority's obligations as a landowner. Adopting either ground, the Court says, would "upset our long-settled common-law notions of an employer's and landowner's duties".

The plaintiff tried to reassure the Court that there would not be the "specter of limitless liability" with respect to either ground that she alleged for liability. The Court was not reassured, ending its opinion with examples of how easily liability could spread beyond the realm that the plaintiff considered finite. It could extend, for example, to "members of the household of the employer's employee, or to members of the household of those who come onto the landlord's premises". The line is "not so easy to draw", concludes the Court. It refuses the plaintiff's invitation to draw it here.

FREEDOM OF INFORMATION LAW

Records Sought of Agency Must Be of "Significant Interest" to Public Before Attorneys' Fees Are Awardable

It is not sufficient that the controversy itself, here the closing of a nursing home facility, be of interest to the general public. The records sought from the agency that closed the facility – here the Department of Health – must

themselves be shown to be of "clearly significant interest to the general public" in order to support an award of attorneys' fees. That's one of the requirements of the FOIL statute in point, Pub.Off.L. § 89(4)(c), and it wasn't met in this case. Hence attorneys' fees are denied to the nursing home even though the facility prevailed on a number of document requests that it made of the agency and which the agency had to be forced to disgorge in an Article 78 proceeding. *Beechwood Restorative Care Center v. Signor,* 5 N.Y.3d 435, ... N.Y.S.2d .... (Oct. 25, 2005).

While some of the records sought would fit the public interest standard, the Court of Appeals enumerates other categories of records that it finds would not, such as records relating to job descriptions, employee training, and listings of patient admissions, among others. The petitioner on its application for attorneys' fees "offered no reason why the general public would have a significant interest in any of these documents". On the whole, therefore, the Court concludes that even assuming that the agency "did not have a reasonable basis for withholding the records" – another requirement of the statute – attorneys' fees could not be awarded under FOIL.

Nor could they be awarded under CPLR 8601, the state's Equal Access to Justice Act. That act applies to proceedings against the state "except as otherwise specifically provided by statute". In the opinion by Judge Graffeo, the Court finds FOIL to fall into the "otherwise specifically provided" category, preempting CPLR 8601 and making attorneys' fees unavailable under that statute for that reason alone.

LIABILITY INSURANCE LIMITS

Annually Renewed Insurance Policies, Each with $300,000 Limit, Doesn't Entitle Insured to $900,000 Coverage Based on Continued Injury During Each of Three Annual Periods

This would have been a close case, the Court of Appeals acknowledges, but for the "non-cumulation clause" in the policy.

The policy covered a landlord for liability to tenants. Liability was limited to $300,000 and each policy covered only one year. The tenant who sued the landlord in this case, an infant exposed to lead paint, was exposed during each of three consecutive years: during the term of the first policy and the during the respective terms of the two annually renewed policies. All three policies were in all respects identical except for the period covered.

The infant got a damages judgment of $700,000 against the landlord. Is the landlord entitled to have its insurer pay it all, on the theory that it was within the figure of $900,000, which would be the figure applicable if the policies could be added up? The Court's answer is no. *Hiraldo v. Allstate Ins. Co.,* .... N.Y.3d ...., ... N.Y.S.2d .... (Oct. 25, 2005).

This was a tougher case than appears on the surface. In an opinion by Judge R.S. Smith, the Court describes the result as "counterintuitive" in that

> [i]f each of the successive policies had been written by a different insurance company, presumably each insurer would be liable up to the limits of its policy.

But here each of the three annual policies was written by the same insurer. Why, asks the Court, should there be any less recovery because of that? The answer, on which the Court entirely grounds its conclusion, is the "non-cumulation" clause included in the policy, which reads that

> [r]egardless of the number of insured persons, injured persons, claims, claimants or policies involved [the Court emphasizes "policies"], our total liability ... for damages resulting from one loss will not exceed the [$300,000] limit of liability.

This clause is by itself fatal to the plaintiffs' claim, the Court concludes.

The insurer paid $300,000 towards the $700,000 judgment. This was a direct action by the plaintiffs against the insurer to recover the balance of $400,000 not yet paid on the judgment secured against the landlord.

It fails, but it would seem that it's still a good judgment against the landlord, insured or not for the balance, with the landlord exposed now to $400,000 of uninsured liability.

If the Court is correct in its "presumably" statement – that the landlord would have been covered for everything by having each year placed its insurance with different a company – then the case is quite a lesson for landlords and other insureds in this liability realm. Other things being equal, and other insurers being available, try not to renew with the same insurer. Try to take out a new policy each year with a different insurer. If insureds like this landlord did not divine that lesson from lower court caselaw, including some federal cases applying New York law, then surely the lesson is brought home by *Hiraldo*.

But is the Court correct that the $900,000 would have been available through an aggregation process if there were three insurers on separate policies instead of one insurer on three separate annual policies? Only the Court itself can judge that when a future case squarely presents the issue.

RENT STABILIZATION

Husband and Wife in Ongoing Marriage Can Maintain "Primary" Residences in Different States So as to Obtain Special Benefits Offered by Each

Perhaps we should have a regular department for New York City rent stabilization cases. We had one last month (the *Thornton* case) and we have another now, *Glenbriar Co. v. Lipsman,* 5 N.Y.3d 388, ... N.Y.S.2d .... (Oct. 20, 2005).

The stabilization law limits the rents of apartments that fall within its purview. It's a bonanza to tenants and a bane to landlords. In the *Thornton* case we saw an example of how far a landlord will go – i.e., try to go (he didn't succeed) – to escape the law and secure a market rent for the apartment. This month we have *Glenbriar,* in which we see how far tenants will go to keep the law's benefits and escape market values, and here the tenants succeed.

Husband H and wife W had a conventional and apparently successful marriage. They lived together (they were "rarely physically separated") and had apartments in both New York City (an apartment in the Bronx) and an apartment in West Palm Beach, Florida. Nothing wrong with that, of course. But the stabilization law offers its benefits only where the New York apartment is used as a "primary" residence. Nothing wrong with that either. But here the couple claimed *both* apartments as their "primary" residence, enabling themselves to secure the stabilization law's benefits in New York *and* the special homestead exemption benefits that Florida confers on a primary residence down there.

But how can that be? "Primary" implies one or the other. How did this imaginative (or just well-counseled?) couple manage to pull off both? Easy. H claimed Florida as his primary residence, and was upheld, while W claimed New York as her primary residence, and was also upheld. The burden was on the landlord (L) to disprove her claim of a New York primary residence. L was held to have failed to.

Not by the civil court, where this eviction proceeding by L began. The civil court found for L. But an appeal then went to the appellate term, which reversed and found against L, and a further appeal then went to the appellate division, which affirmed the finding against L. Now, in the Court of Appeals, the Court had to act on a record that it perceived as depending entirely on the facts. In that context the Court is bound, as a law court, to accept the facts if there is any room in the record to support them. The Court found the room, and felt constrained to affirm.

It didn't reach its conclusion happily. The opinion by Judge G.B. Smith depends heavily on the affirmed-findings principle. Judge Rosenblatt, for himself and Judge R.S. Smith, also relies on that but then writes a separate concurrence

> to highlight the unseemly prospect of spouses living together yet claiming two separate primary residences ... in order to take advantage of the mutually exclusive benefits of two jurisdictions.

The law is apparently that each of two spouses can claim such separate "primary" residences even though the couple in this case were "rarely physically separated" (the Court's own description). That's a lot to ask of a court. The spouses live together all the time but have separate "primary" residences in two states?

If the law has up to now been held to allow that, as the appellate division indicates in its opinion below, could the Court of Appeals, accepting the affirmed facts, have then merely treated the case as posing an issue of law, and reviewed it as such? The *Thornton* case in last month's Digest rejected the landlord's scheme to evade the stabilization laws as a fraud. Reduced to lowest terms, and based only on the facts affirmed by the appellate division, isn't the *Glenbriar* case in the same category: a legal issue of whether the conduct of the tenants amounts to a fraud?