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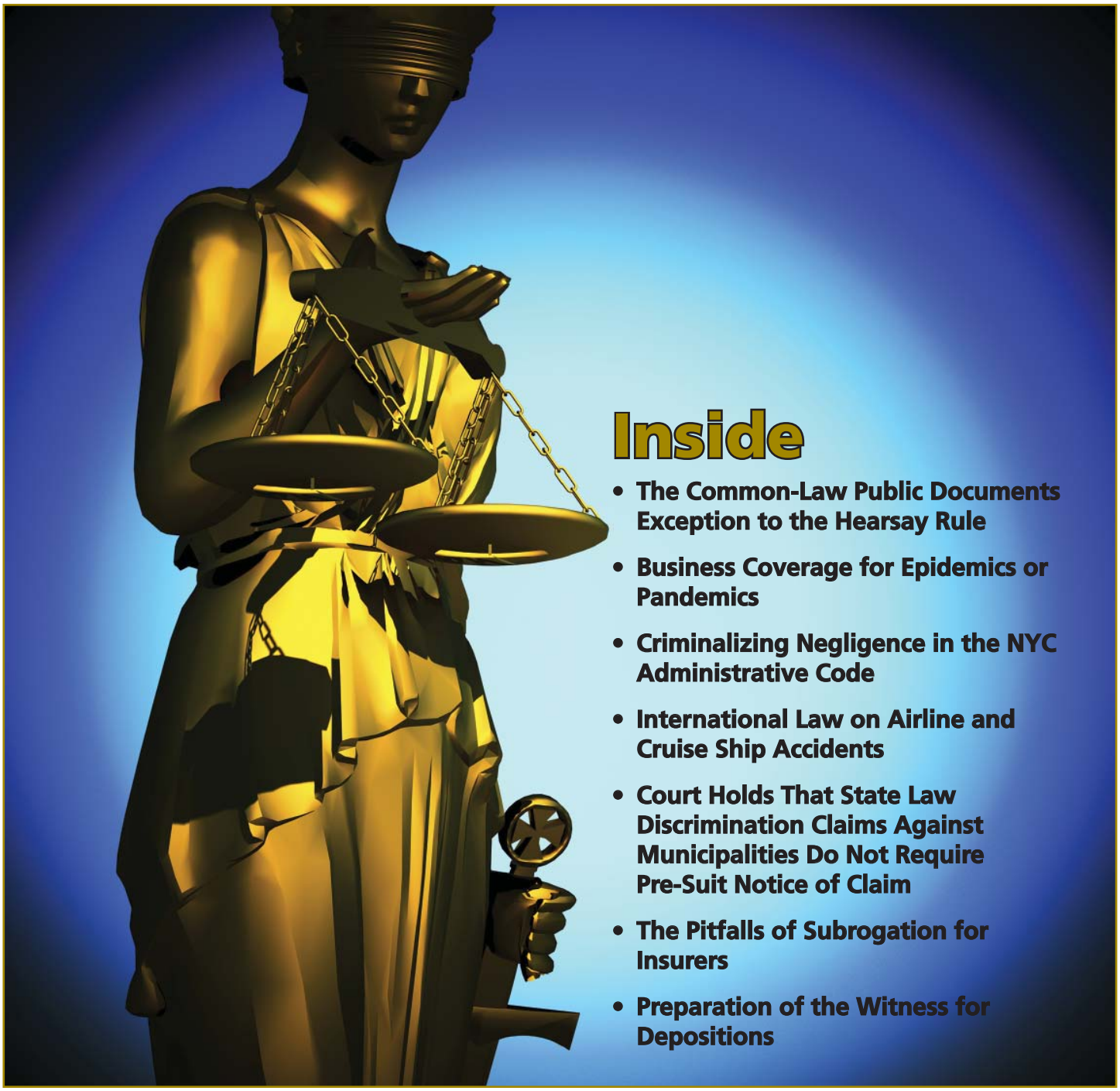
Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section
of the New York State Bar Association



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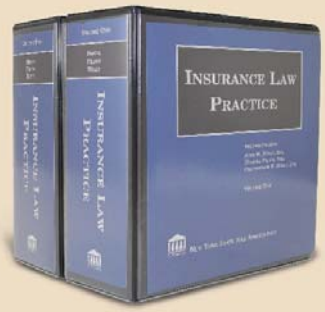

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A View from the Chair

It is my honor to Chair the Torts, Insurance and Compensation Law (TICL) Section for 2015. The TICL Section is one of the many great practice sections of the New York State Bar Association (NYSBA). However, if you imagine all the practice groups encompassed by NYSBA as a body, we believe TICL is the backbone. Think about it: how many transactions or cases have you seen that did not involve some insurance aspect? Even in non-tort cases (like real estate or commercial), insurance is still an important component that plays in the background. As such, we believe membership in TICL is key to many an attorney's practice.

The TICL Section includes attorneys who represent claimants, plaintiffs, petitioners, defendants, respondents and insurance companies in every possible civil forum. Further, our members are from plaintiffs', defendants' and general practice law firms. We also have staff counsel, assistant general counsel, risk management, third-party administrators and litigation management executives. Moreover, respected members of the Judiciary, Mediators and Arbitrators all play an active role in TICL.

Diversity

As diverse a Section as we are in our practice, the TICL Section is united in the relentless pursuit of fair and reasonable civil justice for all. The TICL Section is firmly committed to the Association's diversity and inclusion initiatives, as well as its call for outreach to young lawyers and law students.

At present, the TICL Section and its Executive Committee are the most diverse they have ever been. We have gotten it that way by co-sponsoring events with various Young Lawyers' and Diversity Bar associations and organizations throughout the State. Further, TICL is always on the lookout for talent, providing scholarships to candidates for the Young Lawyers' Trial Academy, working closely with NYSBA to coordinate relevant Pathways to the Profession events, and actively recruiting talented individuals.

In addition, for the first time (but, hopefully, not the last) TICL helped to sponsor a diverse student to SUNY Buffalo School of Law's flagship "Discover Law" program. The program helps to grease the diversity pipeline by helping diverse college students get exposed to the law by participating in a four-week law school immersion experience. TICL could not be prouder at being involved with this innovative program.

Outreach

In April of this year, the TICL Section traveled to Buffalo Law School to conduct an Open Executive Committee Meeting and reception for law students. The TICL Section is proud to recognize the power of diversity and inclusion for the betterment of ourselves and of our profession by getting in early and acting as guides and mentors to those who are coming behind.

TICL is also slated to participate and/or co-sponsor networking receptions at various other law schools throughout the State in the Fall.

In addition to our "in-person" events, TICL has kicked its on-line presence into high gear with the creation of our new "Community/Newsletter" Committee. The Committee is chaired by two new members to the TICL Executive Committee, A.G. Chancellor and Diana Neyman, who have already increased traffic to the TICL site with their innovative posts and discussions. Many thanks are also given to Charlie Siegel (who got our new co-chairs up and running) and Eileen Buholtz (who held the online fort since its inception and continues to contribute to the content of the site).

Fall 2015 Meeting

Lest you think the TICL Section is all work and no play, each year the TICL Section holds its Fall Meeting at a family-friendly venue that mixes CLE with networking and family fun. The TICL Section has traveled to Bar Harbor, Walt Disney World, Mohegan Sun, San Diego, Puerto Rico and Ireland. This year, we will travel to Universal Studios in Orlando, Florida, to the Loews Royal Pacific Hotel for Columbus Day Weekend, October 9th to the 12th. We will have many timely CLEs, including, but not limited to, cyber security and what effect it may have on the practice of law, emerging trends in bad faith litigation and a bird's eye view of a medical malpractice case.

Check out our website for more information and to register for the meeting.

Upcoming Programs

In September and October, we also have our flagship "Law School for the Insurance Professional" program. It is a great marketing tool (invite your clients!), as well as a refresher of the insurance law principles all attorneys should be familiar with.

Thanks

Congratulations to the *Torts, Insurance and Compensation Law Section Journal* Editor, David Glazer, for an incredible issue and thank you to the writers and contributors. The *Journal* is not just the Section's eponymous publication; it serves as an important resource to our members on trends and legal issues affecting our areas of practice.

I also want to thank our Planning Committee for the Fall Universal Studios, Orlando, meeting—Tom Maroney, Doug Hayden, Elizabeth Fitzpatrick and Charles Siegel, Robert Permutt and Maia Preval. Our Universal meeting promises to be the best TICL meeting ever!

In sum, join the TICL Section: get great CLE, network and have some fun. After all, every lawyer needs a little TICL!

All the best,

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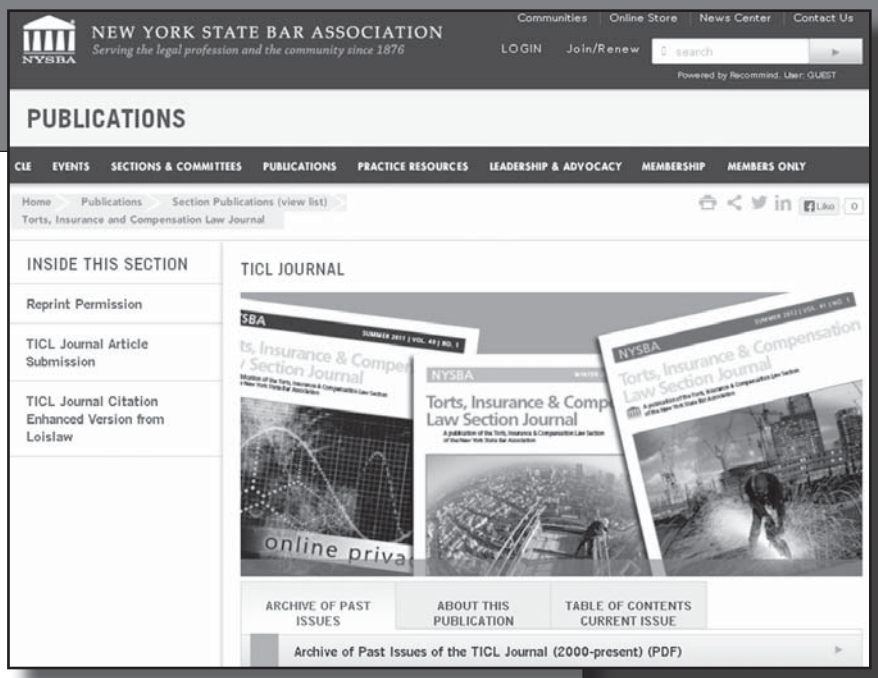

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The Common-Law Public Documents Exception to the Hearsay Rule, Although Helpful, Is Burdensome

By Terrence L. Tarver

At the time of trial, a personal injury practitioner may rely on various evidentiary methods to have copies of documents admitted in evidence to prove his or her *prima facie* case without having to subpoena a records custodian to court to testify. A frequent method utilized is the business records exception to the hearsay rule found in CPLR 4518. This article, however, will focus on an exception to the hearsay rule that is not as prevalent, which is the common-law public documents exception.

In some cases, a personal injury practitioner may seek to admit in evidence a governmental agency report or memorandum, and in order to accomplish this, the common-law public documents exception to the hearsay rule can be helpful, although, as will be demonstrated below, it can be quite burdensome to comply with all the prerequisites.

The Public Documents Hearsay Exception in Practice

The common-law public documents exception to the hearsay rule states that "when a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports are admissible in evidence."[1]

Vincent C. Alexander explains the justification behind this exception in his practice commentaries to McKinney's CPLR 4520, noting that "[t]he common law exception for public records is justified by the presumed reliability inherent in the recording of events by public employees acting in the regular course of public duty. Public employees make records pursuant to the sanction of public duty and have no motive to falsify."[2]

An example of the use of the common-law public documents exception to get a report admitted in evidence in a personal injury case includes *Kozlowski v. City of Amsterdam*.[3] *Kozlowski* was a wrongful death action whereby Plaintiff's decedent committed suicide in jail using his socks. Plaintiff made allegations of negligent supervision, and at trial, sought to enter a copy of a report of the Medical Review Commission of the State Commission of Corrections, which concluded defendant violated 9 NYCRR 7504.1 as it failed to maintain constant supervision of the decedent under the circumstances. Although the trial court denied admission of the report, the Third Department reversed, holding said report was admissible pursuant to the common-law public documents exception to the hearsay rule.[4]

The Second Department case of *Martin v. Ford Motor Co.* is further illustrative.[5] In *Martin*, Plaintiff sued Defendant contending that when he shifted gears of his 1990 Lincoln, the throttle control malfunctioned and stuck in an open position, thereby causing the vehicle to accelerate forward.[6] The Second Department held that a copy of a 1989 report prepared by the National Highway Traffic & Safety Administration pertaining to studies of sudden acceleration was admissible under the aforesaid exception.[7]

While the scope of this article is limited only to the common-law public documents exception to the hearsay rule, it should be noted that said exception does have a statutory companion, which is found in CPLR 4520.[8] However, the common-law public documents exception is not only broader in scope than CPLR 4520, but also has not been superseded by it.[9]

Authenticating Public Documents: A Two-Step Process

While a public document that meets the common-law public documents exception to the hearsay rule is admissible without testimony of the official who made it, its authenticity, nonetheless, must still be proven.[10] Even though authentication of certain public records may be accomplished by certification as provided in CPLR 4518(c), it still is a two-step process.[11] This two-step process involves CPLR 4540(a) and (b) or CPLR 4540 (a) and (c), depending upon jurisdiction.[12]

Utilizing CPLR 4540(b)—Certificate of Officer of the State

"If the document is attested as correct by the official or deputy having legal custody of it, then it becomes *prima facie* evidence of such record."[13] A proper attestation, however, includes three things: a comparison of the copy with the original, a statement of the accuracy of the copy, and compliance with one of the three allowable methods of certification pursuant to CPLR 4540(b).[14]

Addressing the necessary language of an attestation, the New York City Criminal Court in *People v. Watson* explained that it "is similar in import to the language of comparison found in common-law exemplifications and sworn copies."[15] Further, it held that there was not any particular language under CPLR 4518(c) or CPLR 4540 that an attestation was required to have, save for the language regarding a comparison and accuracy.

As for those allowable methods under CPLR 4540(b), entitled, "Certificate of officer of the state," they are as follows:

1) Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of court having legal custody of the record, and, [sic] except where the copy is used in the same court or before one of its officers, with the seal of the court affixed; or

2) [S]igned by, or with a facsimile of the signature of, the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed; or

3) [S]igned by, or with a facsimile of the signature of, the presiding officer, secretary or clerk of the public body or board and except where it is certified by the clerk or secretary of either house of the legislature, with the seal of the body or board affixed; and

4) If the certificate is made by a county clerk, the county seal shall be affixed.[16]

Utilizing CPLR 4540(c)—Certificate of Officer of Another Jurisdiction

When CPLR 4540(b) cannot be utilized, such as when the records sought to be authenticated are in another jurisdiction, a practitioner must turn to the even more oppressive requirements of CPLR 4540(c). Simply stated, CPLR 4540(c) essentially requires a certification of the certification.

Under this provision, the signature and seal of the attesting official will not be sufficient; instead, the attesting official's certification must be accompanied by a certificate from another authorized person, and the certificate must have and/or state the following:

1. The official seal affixed;

2. That the signature of the attestor of the certification is believed to be genuine; and

3. That the attestor of the certification has legal custody of the records in question.[17]

The other authorized person certifying the attesting official's certification can be either of the following:

1. A judge of a court of record of the district or political subdivision in which the record is kept with the seal of the court affixed; or

2. Any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record with such officer's seal affixed.[18]

Even After All Efforts, the Documents Still May Not Be Prima Facie Evidence

Amazingly, if the documents sought to be admitted in evidence are only admitted pursuant to the common-law public documents exception to the hearsay rule, then "they will not be prima facie [sic] evidence of the facts contained in them, but merely some evidence which the trier of facts is free to disbelieve even though the adverse party offers no evidence on the point."[19] Consider that for a moment. A jury, upon whim or whatever suits its fancy, is entirely within its right to completely disregard the evidence introduced, and opposing counsel does not even have to offer evidence on the topic. Thus, all of the practitioner's hard work and due diligence may be for naught.

Given all this, a practitioner is encouraged to avail him or herself to other methods of authentication, if at all possible, such as through a Notice to Admit under CPLR 3123 or even a stipulation. Moreover, using other exceptions to the hearsay rule to have his or her documents admitted in evidence, such as via the ancient documents exception, may be much easier and more beneficial.[20]

Obviously, not all documents are old enough for a practitioner to take advantage of the ancient documents exception. Therefore, the frequently utilized business records exception to the hearsay rule in CPLR 4518 can be another fantastic option. The business records exception cites to sections 2306 and 2307 of the CPLR. CPLR 2306 covers medical records of a department or bureau of a municipal corporation or of the state, and CPLR 2307 pertains to items of a library, department, or bureau of a municipal corporation or of a state. More importantly, if the documents are admissible pursuant to CPLR 4518, then they "are prima facie [sic] evidence of the facts contained" in them.[21]

Conclusion

Although the common-law public documents exception to the hearsay rule can be yet another arrow in the quiver of a personal injury attorney, the song and dance required by same using CPLR 4540 just to have a document admitted in evidence is onerous, especially in light of the fact that the jury is free to disbelieve the information contained within it. Accordingly, a personal injury practitioner should attempt to avoid it, using it only as a last resort, and if it is believed that the exception will be called upon, then it is best to permit oneself ample time prior to the commencement of trial to execute the mandated prerequisites.

Endnotes

1. *Miriam Osborn Mem. Home Assn. v. Assessor of City of Rye*, 9 Misc.3d 1019, 1027 (Sup. Ct., Westchester Co. 2005), citing *Prince, Richardson on Evidence* § 8-1101, at 688 [Farrell 11th ed]; *People v. Hudson*, 237 A.D.2d 943 (4th Dept. 1997). *See also Richards v. Robin*, 178 A.D. 535, 539 (1st Dept. 1917) (citations omitted).
2. Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C4520:2 (citations omitted). Mr. Alexander further explains, "[a]s with the hearsay exception for business records (CPLR 4518), the reliability of public records is assured by the routine and repetitive circumstances under which such records are made. An additional justification is public convenience: If government employees are continually required to testify in court with respect to matters they have witnessed or in which they have participated in the line of duty, the efficiency of public administration will suffer." *Id*. (citations omitted).
3. 111 A.D.2d 476 (3d Dept. 1985).
4. *Id*. at 478.
5. 36 A.D.3d 867 (2d Dept. 2007).
6. *Martin v. Ford Motor Co.*, 2004 WL 5916909 (Sup. Ct., Queens Co. 2004).
7. *Martin*, 36 A.D.3d at 867. S*ee also Martin, supra*, n. 6.
8. The scope of this article also does not include any analysis of the admissibility of reports from public agencies pursuant to the Federal Rules of Evidence, particularly Rule 803(8)(C), including any State Courts that may have cited said Rule. For guidance regarding same, a starting place includes the rule, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), *Cramer v. Kuhns*, 213 A.D.2d 131 (3d Dept. 1995), *Haggerty v. Moran Towing and Transportation Co., Inc.*, 162 A.D.2d 189 (1st Dept. 1990).
9. *Consolidated Midland Corp. v. Columbia Pharmaceutical Corp.*, 42 A.D.2d 601 (2d Dept. 1973); *Neuschotz v. Newsday Inc.*, 12 Misc.3d 1198(A) (Sup. Ct., Kings Co. 2006). S*ee also Flury v. Edwards,* 14 N.Y.2d 334 (1964) whereby the Common-Law Hearsay Exception for prior testimony was not superseded by §348 of the Civil Practice Act, which is the statutory predecessor to CPLR 4517, meaning such should be equally applicable for this Common-Law Exception; CPLR 4543 ("[n]othing in this article prevents the proof of a fact…by any method authorized…by the rules of evidence at Common-Law").
10. *Brown v. SMR Gateway 1, LLC*, 22 Misc.3d 1139(A) (Sup. Ct., Kings Co. 2009), citing *People v. Garneau*, 120 A.D.2d 112, 166 (4th Dept. 1976); *Sangiacomo v State*, 13 Misc.3d 1246(A) (Ct. Cl. 2006).
11. *Brown*, 22 Misc.3d at 3, *Miriam*, 9 Misc.3d at 1029, *People v. Baker*, 183 Misc.2d 650, 653 (Cty. Ct., Oneida Co. 2000).
12. *Miriam*, 9 Misc.3d at 1029; *Brown*, 22 Misc.3d at 3. This assumes the document is not an original and is a copy. The scope of this article is limited to subsections (a), (b), and (c) of CPLR 4540, not subsection (d), entitled, "Printed tariff or classification subject to public service commission, commissioner of transportation or interstate commerce commission." It is also limited to the use of CPLR 4540 for authentication and is not meant to address possible authentication via other methods, such as pursuant to CPLR 4543, or even other methods to get the documents in evidence.
13. *Brown*, 22 Misc.3d at 3, citing CPLR 4540(a).
14. *Id. See also Miriam, supra,* n. 1; *Baker, supra,* n. 11.
15. 167 Misc.2d 441, 448 (N.Y. Crim. Ct. 1995) (citing Richardson on Evidence (10th ed), §§ 649-650).
16. CPLR 4540(b).
17. CPLR 4540(c).
18. *Id*.
19. *Consolidated Midland Corp.*, 42 A.D.2d at 601 (citations omitted), *Martin*, 36 A.D.3d at 867.
20. The Second Department in *Essig v. 5670 58th Street Holding Corp.*, 50 A.D.3d 948, 949 (2d Dept. 2008), held that the ancient documents rule permits documents to be self-authenticating and are proof of the facts stated therein as long as they are "more than thirty years old, are free from any indication of fraud or invalidity, and were discovered [in its natural place of custody]."
21. CPLR 4518.

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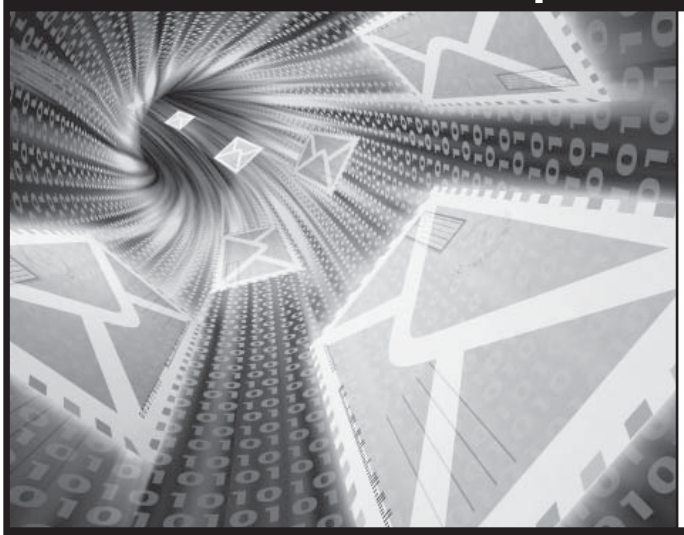

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Business Coverage for Epidemics or Pandemics: Will the Commercial Property and Liability Policy Respond?

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Introduction

If Widespread Disease Cripples Our Business, Are We Covered by Insurance? The Ebola crisis in West Africa, which gave rise to the first case diagnosed in the U.S. in the fall of 2014, was only the most recent of disease outbreaks to trigger this concern in the U.S. Avian flu, H1N1 and SARS all presented the specter of economic disaster, triggering a flood of speculative literature in the insurance field. While, fortunately, none of these plagues has realized its apocalyptic potential here to date, businesses would do well to prepare now against the next such threat.

Even without addressing the legal vulnerabilities of health care providers and municipalities, it is clear that an epidemic or, worse, a pandemic, presents myriad risks to ordinary businesses. To name just a few, a business may face third-party claims alleging bodily injury or property damage due to its negligent failure to maintain safeguards against, warn against or remedy contagion—in its premises, in its products, or in connection with its cleanup operations. A business may face third-party claims alleging that it has defamed persons or enterprises by associating them with the disease, or that it has discriminated against or wrongfully terminated or failed to make appropriate accommodations for employees affected by the disease. And a business may face shareholder claims for mismanagement of the disaster.

A business also faces significant direct costs when disease is in its midst. Among these are the costs of decontamination of a business premises affected by a disease that is transmissible by air or through contact with contaminated surfaces, the loss of contaminated merchandise and the loss of business income due to government-ordered quarantine, curfew, lock-out, embargo or cessation of transport impacting the business premises, or the premises of key suppliers.

This article treats the foregoing risks under a typical commercial liability and property policy. There are, of course, many other business risks that are beyond the scope of this article, but merit a good look. A key concern is with the safety of the business's employees—its key assets—and the loss of human capital when employees stay home due to sickness, fear or quarantine. Then there are the risks of utility interruption (for instance, by water supply contamination or a shortage of workers to maintain utility services); the cancellation, interruption or restriction of business travel, conventions, spectacles or other income-generating events; the damage to the enterprise's reputation, credit or stock value due to perceived mishandling of the disaster; and the impacts of an epidemic-generated demise of the local, state, national or world economy as a whole.[1] Specialty insurance products may respond to some, but not all, of these risks.

Will Traditional Commercial Insurance Respond?

Commercial General Liability Coverage: Bodily Injury and Property Damage Claims. When faced with a third-party claim alleging bodily injury or property damage due to its negligent failure to maintain safeguards against, warn against or remedy contagion—in its premises, in its products, or in connection with its cleanup operations—the business would turn first to its commercial general liability policy for coverage. The typical "occurrence-based" commercial general liability ("CGL") policy pays on behalf of the insured amounts the insured becomes legally obligated to pay on account of bodily injury or property damage during the policy period caused by an "occurrence" (defined as an accident, including continuous or repeated exposure to substantially the same general conditions).

"Bodily injury" is typically defined as bodily injury, sickness or disease or death resulting therefrom. In New York, emotional distress falls within the definition of "bodily injury." *Lavanant v. General Acc. Ins. Co. of America*, 79 N.Y.2d 623, 584 N.Y.S.2d 744 (1992). "Property damage" includes damage to and loss of use of tangible property. Damage to the insured's own product and costs of recall are excluded.

A CGL policy further provides that the insurer has the right and duty to defend suits seeking damages for bodily injury or property damage covered by the policy, even if any of the allegations of the complaint are groundless, false or fraudulent. Significantly, the duty to defend is broader than the duty to indemnify, and functions as a form of litigation insurance. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 486 N.Y.S.2d 873 (1984). This imposes a duty upon the insurer to defend a suit so long as the complaint contains any allegations that arguably or potentially fall within the coverage of the policy, even if the complaint also contains allegations that do not. *Id.*; *City of Kingston v. Harco Natl. Ins. Co.*, 46 A.D.3d 1320, 848 N.Y.S.2d 455 (3d Dep't 2007).

Special Issues with Delayed-Manifestation Claims. For diseases that take time to be noticed or diagnosed, a determination of whether the injury occurred during the policy's effective period will be key to finding coverage. The typical "occurrence-based" CGL policy responds only to claims arising from injury or damage that took place during the policy period, regardless of when the claim itself is made against the policyholder. New York courts reject "deemer" theories, under which a delayed-manifestation injury or disease is deemed to have occurred during the effective period of the insurance policy when the first exposure or first discovery occurred (or continuously between the two dates). Rather, the question of when injury occurred for purposes of triggering insurance is treated as a question of fact. New York uses an "injury-in-fact" trigger, meaning that the insurance policy in effect at the time that the injury actually took place is the responsive policy. *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 60 A.D.3d 128, 871 N.Y.S.2d 48 (1st Dep't 2008), *lv. den*., 2009 WL 3428552 (2009); *American Home Products Corp. v. Liberty Mut. Ins. Co*., 565 F.Supp. 1485 (1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) (asbestos); *Continental Cas. Co. v. Rapid-American Corp*., 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993) (noting that federal courts applying New York law have applied an "injury in fact" test, and applying such a test because the parties did not dispute its applicability).

How Is Liability Allocated Among Policy Years When an Insidious Disease Is Found to Trigger Multiple Policies*?* New York courts will allocate coverage liability *pro-rata* by time on the risk absent a more accurate formula. *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002); *see also Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh*, 21 N.Y.3d 139, 969 N.Y.S.2d 808 (2013). With respect to the duty to defend, however, the insurer whose policy is triggered must defend the entire action. *Continental Cas. Co. v. Rapid-American* Corp., *supra*.

Commercial General Liability Coverage: Personal and Advertising Injury Liability Claims. When faced with a claim alleging that the insured business harmed the plaintiff by publicly associating the plaintiff with spread of the disease, the business would look first to the personal and advertising injury coverage part of its CGL policy. Unlike the more general coverage for "bodily injury" and "property damage" caused by an "occurrence," this coverage part focuses on a strictly enumerated list of covered "offenses." One typical CGL policy (ISO 2013 CGL form) states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." "Personal and advertising injury" is, in turn, typically defined as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses." Among them are the offenses of "oral or written *publication*, in any manner, of material that violates a person's *right of privacy*;" and "oral or written *publication*, in any manner of material that slanders or libels a person or organization or *disparages* a person's or organizations' goods, products or services." *See* ISO 2013 Commercial General Liability Policy (emphasis added).

Likewise, the business would look to trigger coverage under the personal and advertising injury liability coverage part when faced with an allegation that the business evicted the plaintiff in connection with disease. This coverage part specifically includes "wrongful eviction" as a covered "offense." The term "eviction" is narrowly construed by New York courts, it should be noted. *See County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 627, 612 N.Y.S.2d 345 (1994).

The CGL policy extends the same broad duty-to-defend to the personal and advertising injury liability coverage part.

Commercial General Liability Coverage: Interpretation of Exclusions Generally. Certain exclusionary clauses common to both coverage parts may limit or bar coverage for a disease-related claim. Generally speaking, the policyholder has the benefit of the doubt when interpreting a policy exclusion. Under New York law, policy terms are to be construed from the perspective of common speech and the reasonable expectation and purpose of the ordinary policyholder. *Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655 (1983). Exclusions are not to be extended by interpretation or implication, but are to be construed strictly and narrowly. *Seaboard Sur. Co. v. Gillette Co*., 64 N.Y.2d 304 (1984). The insurance carrier has the burden to demonstrate that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. *Continental Cas. Co. v. Rapid-American Corp*., 80 N.Y.2d 640 (1993); *Seaboard Sur. Co., supra*. Finally, an ambiguity in an insurance policy exclusion must be resolved in favor of the policyholder and against the insurer. *Continental Cas. Co., supra; Lavanant v. General Accident Ins. Co. of America*, 79 N.Y.2d 623, 629 (1992).

Commercial General Liability Coverage: Specific Exclusions: Pollution. CGL policies typically contain exclusions purporting to exclude coverage for pollution. Such an exclusion, appearing only in the bodily injury/property damage coverage part of the policy, has been held to bar coverage under the personal injury liability coverage part as well, even if it is not specifically referenced there. *See County of Columbia v. Continental Ins. Co.*, *supra*.

Policyholders may successfully assert that the pollution exclusion does not apply to a claim for disease allegedly contracted indoors or by direct contact with a disease-causing agent without there first having been a release to the environment, as that term is classically understood. Pollution exclusions have been held to be ambiguous in the context of direct exposure to a toxic sub-

stance, which has not first been discharged or dispersed to air, soil or water. In *Continental Cas. Co. v. Rapid-American Corp., supra*, the Court of Appeals held that a pollution exclusion was ambiguous in the context of direct, indoor exposure to asbestos particles. The policy exclusion at issue there purported to apply to "personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants *into or upon land, the atmosphere or any water course or body of water*; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." 80 N.Y.2d at 646-47 (emphasis added).

In *Belt Painting Corp. v. TIG Insurance Company*, 100 N.Y.2d 377, 763 N.Y.S.2d 790 (2003), a purportedly absolute pollution exclusion, which lacked references to air, water or soil, likewise was found to be ambiguous in the context of direct toxic exposure indoors. The insured under a commercial general liability policy sought defense and indemnity in connection with an underlying personal injury action alleging injuries sustained as a result of inhaling paint or solvent fumes in an office building where the insured was performing stripping and painting work. The insurance carrier disclaimed coverage on the basis of a clause in the policy which purported to exclude coverage for "'bodily injury' or 'property damage' which would not have occurred in whole or in part but for the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." The insured brought a declaratory judgment action. The Court of Appeals held that the exclusion was ambiguous as applied in that case, and therefore would not be read to preclude coverage. The Court reasoned that the terms "discharge" and "dispersal" are terms of art in environmental law, and therefore the exclusion did not clearly and unequivocally exclude a personal injury claim arising from *indoor* exposure to the insured's "tools of its trade." *Id*. at 387, 763 N.Y.S.2d 790; *see also Tower Ins. Co. of New York v. Breyter*, 37 A.D.3d 309, 830 N.Y.S.2d 122 (1st Dep't 2007) (pollution exclusion ambiguous in the context of injury from inhalation of fumes from a nail salon); *URS Corp. v. Zurich American Ins. Co.*, 43 Misc.3d 391, 979 N.Y.S.2d 306 (Sup. Ct., N.Y. Cty., 2014) (pollution exclusion inapplicable to firefighters' injuries from fire); *see also Vigilant Ins. Co. v. V.I. Technologies, Inc.*, 253 A.D.2d 401, 676 N.Y.S.2d 596 (1st Dep't 1998) (in case involving first-party insurance claim, pollution exclusion inapplicable to contamination of insured's plasma by the seepage of ethylene glycol from cooling coils); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37-39 (2d Cir. 1995) (under New York law, pollution exclusion clauses apply only to environmental pollution and a reasonable policyholder might not characterize the release of carbon monoxide from a building's HVAC system as environmental).

Depending upon the exact nature of the disease vector, the policyholder may also assert that the disease-causing agent itself does not fall within the list of pollution sources found in the policy's pollution exclusion. Not every harmful substance is a "pollutant," as the Court of Appeals held in *Belt Painting, supra*. There, the Court rejected the insurer's argument that paint and solvent fumes, inhaled indoors, necessarily fell within the policy's definition of "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant including…fumes." 100 N.Y.2d at 387. The Court stated, in pertinent part:

> This argument…proves too much. Were we to adopt TIG's interpretation, under the language of this exclusion any "chemical," or indeed, any "material to be recycled," that could "irritate" person or property would be a "pollutant." We are reluctant to adopt an interpretation that would infinitely enlarge the scope of the term "pollutants," and seemingly contradict both a "common speech" understanding of the relevant terms and the reasonable expectations of a businessperson.

Id.; see also Westview Associates v. Guaranty National Insurance Company, 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000) (pollution exclusion did not apply to lead paint claim, where the insurance policy did not clearly and unmistakably include "lead paint" within its definition of "pollutant"); *Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co.,* 344 F.Supp.2d 915 (S.D.N.Y. 2004) (pollution exclusion inapplicable to lead paint injury); *Barney Greengrass, Inc. v. Lumbermans Mut. Cas. Co.*, 2010 WL 3069560 (S.D.N.Y. July 27, 2010) (pollution exclusion inapplicable to restaurant odors); *Eastern Mutual Ins. Co. v. Kleinke*, unreported (Sup. Ct., Albany Cty. Jan. 17, 2001) (pollution exclusion inapplicable to claims of bacterial infection (E. coli) allegedly contracted as a result of improper food handling or human contact rather than well water contamination; even if the exclusion were not limited to "environmental" exposures, the policy's definition of "pollutant" did not unambiguously apply to E. coli), *aff'd*, 293 A.D.2d 801 (3d Dep't 2002); *see also Westport Ins. Corp. v. VN Hotel Group, LLC*, 518 Fed.Appx. 927 (11th Cir. 2013) (under Florida law, legionella bacteria that caused Legionnaires' Disease was not a "pollutant" within the meaning of the pollution exclusion; if bacteria were considered a "pollutant," the policy's separate fungi-bacteria exclusion would be rendered meaningless, and the policy should be construed so as to give that provision meaning); *cf.*, *Markel Intern. Ins. Co. v. Florida West Covered RV & Boat Storage, LLC*, 437 Fed.Appx. 803 (11th Cir. 2011) (applying Florida law, and holding that the "absolute" pollution exclusion barred coverage for bacterial poisoning and severe bacterial infection contracted by insured's customer allegedly as

a result of insured's retained contaminated flood water, which the customer was forced to wade through in order to retrieve his property).

Where the policyholder is alleged to be liable, not for releasing the disease-causing agent itself, but merely for breaching a duty to protect the plaintiff from harm, the policyholder likewise may assert that the pollution exclusion does not bar coverage. *See, e.g., WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co.*, 549 F.Supp.2d 555, 563 (S.D.N.Y. 2008) (pollution exclusion inapplicable to claims against the City of New York by clean-up workers who were exposed to toxic chemicals and pollutants at the World Trade Center site following 9/11 when these claims did not accuse the City of causing pollution, but of failing to protect plaintiffs from the harms present at the site).

Commercial General Liability Coverage: Specific Exclusions: Fungus and Bacteria. Another typical policy exclusion of concern in the epidemic scenario is the exclusion for fungus and bacteria. One version of this exclusion (promulgated by ISO) reads, in pertinent part:

> This insurance does not apply to: … (a) "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria *on or within a building or structure*, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage. (b) Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity. This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a *good or product intended for consumption*.

(Emphasis added). The exclusion does not define "bacteria," but does define "fungi," as follows: "'Fungi' means any type of form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi."

The policyholder may assert that, based on general principles of construction, this type of "fungi or bacteria" exclusion language should not be held to apply in the case of claims arising out the transmission of viruses. As discussed above, policy terms are to be read in view of common speech and the reasonable expectation and purpose of the ordinary policyholder. *See Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655 (1983). "Fungi," "bacteria" and "virus" are generally understood to be mutually exclusive, as they each represent separate types of microorganisms. Further, exclusions are to be strictly and narrowly construed and are not to be extended by interpretation or implication. *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993). Accordingly, the "fungi or bacteria" exclusion may be contrasted with other policy exclusions which include the term "virus." *See Century Sur. Co. v. Casino West, Inc.*, 677 F.3d 903, 906 (9th Cir. 2012) (involving Century Surety Company's commercial general liability policies containing "Special Exclusions and Limitations Endorsements" excluding "Mold, Fungi, Virus, Bacteria, Air Quality, Contaminants, Minerals or Other Harmful Materials"); *Century Sur. Co. v. Blevins*, 2014 WL 3407098 (W.D. La. 2014), *amended on reconsideration*, 2014 WL 5808389 (W.D. La. 2014) (same); *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 2014 WL 1924106 (W.D. Ok. 2014), *remanded by* __F.3d__ (10th Cir. Mar. 31, 2015) (same); *Colony Ins. Co. v. Nicholson*, 2010 WL 3522138, *3 (S.D. Fla. Sept. 8, 2010), *reconsideration denied*, 2010 WL 3522138 (S.D. Fla., Sep. 8, 2010) (on motion to reconsider, holding that communicable disease exclusion did not apply to bacterial infections because such are covered under the fungi or bacteria exclusion and an expansive interpretation of the communicable disease exclusion would subsume the bacteria portion of the fungi or bacteria exclusion); *Colony Ins. Co. v. Nicholson*, 2010 WL 28448012, *3 n.1 [sic] (S.D. Fla. Jul. 19, 2010) (noting that definition of "communicable disease" in commercial general liability policy included viruses and excluded bacterial infections, "particularly when read in light of a separate Exclusion applying to bacteria and fungi (but not viruses)").

The policyholder may also assert that the exclusion's "within a building or structure" clause should be narrowly construed. *See Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F.Supp.2d 1337, 1346 (M.D. Fla. 2010), *affirmed*, 513 Fed.Appx. 927 (11th Cir. 2013) (insurer had duty to defend and indemnify wrongful death claims against insured arising from hotel guest contracting Legionnaires' Disease after inhaling and ingesting water from outdoor spa and guest-room showers because outdoor spa did not qualify as a "structure" for purposes of the fungi or bacteria exclusion); *Liberty Mut. Ins. Co. v. Juton Paints, Inc.*, 555 F. Supp.2d 686, 700 (E.D. La. 2008) (with respect to product liability claims alleging that the application of insured's product to barges caused an acceleration of the corrosion process, commercial general liability policy's "fungi or bacteria" exclusion did not apply to vessels or barges and insurer had a duty to defend claims that arose during coverage period).

A given disease claim may also fall within the exclusion's exception for a good or product intended for consumption. Note, however, that while the insurer has the burden of proof with respect to a policy exclusion, the burden shifts to the policyholder to prove the exception to the exclusion. *Borg-Warner Corp. v. Insurance Co. of North America*, 174 A.D.2d 24, 577 N.Y.S. 2d 953 (1992), *lv. denied,* 80 N.Y.2d 753, 587 N.Y.S.2d 905 (1992). In any event, this exception has been broadly construed in favor of coverage. *See Paternostro v. Choice Hotel International Services Corp*., 2014 WL 6460844 (E.D. La. 2014) (insurer had duty to defend allegation that underlying plaintiff contracted Legionnaire's disease through consumption of a good at the insured hotel); *Nationwide Mut. Fire Ins. Co. v. Dillard House, Inc*., 651 F.Supp.2d 1367 (N.D. Ga. 2009) (insurer had duty to defend allegation that underlying plaintiff contracted Legionnaire's Disease through exposure to water in a hot tub); *Westport Ins. Corp. v. VN Hotel Group, LLC*, *supra* (same; following *Dillard*); *cf. Heinecke v. Aurora Healthcare, Inc.*, 351 Wis.2d 463 (Wis. Ct. Apps. 2013) (disease contracted through contact with water in a decorative fountain did not fall within the "consumption" exception to the fungi and bacteria exclusion).

Commercial General Liability Coverage: Specific Exclusions: Communicable Disease. A typical ISO CGL form (2013) contains a "communicable disease" exclusion that provides, in pertinent part, that "[t]his insurance does not apply to 'bodily injury' or 'property damage' arising out of the actual or alleged transmission of a *communicable disease*." This language is mirrored in the case of "personal and advertising injury," and, in both cases, the communicable disease exclusion applies even if the claim against the insured alleges negligence or wrongdoing in monitoring others who are infected and spread a communicable disease, testing for a communicable disease, failing to prevent the spread of the disease, or failing to report the disease to authorities.

What Is a "Communicable Disease"? Some policies define the term; others do not. One form defines "communicable disease" as follows:

> "Communicable disease" means a disease or condition contracted through direct or indirect contact with or exposure to any form of "infectious agent" generally spread or passed through physical contact with the epidermis or body fluids including, but not limited to, blood, saliva, or semen of an infected host. "Communicable diseases" include, but are not limited to, Acquired Immune Deficiency Syndrome (AIDS), Ango-genital warts, Chancoid, Chlamydia, Garduералla Vaginitis, Genital Herpes Simplex, Gonorrhea, Human papilloma virus (HPV), Non-gonococcal Cervicitis, Non-gonococcal Urethiritis (NGU), Syphilis or Yeast Vaginitis.
>
> "Infectious agent" means any one or more pathogens such as, but not limited to, bacterium, fungus, marker, microbial agent, microorganism, organism, protozoa, virus, or any other source that can potentially infect, contaminate, cause, contribute or lead to the development of a "communicable disease."

Form No. L228 (06/06) (accessed on the internet; unknown insurance carrier). Another form, examined in *Colony Ins. Co. v. Nicholson*, 2010 WL 2844802, *1 (S.D. Fla. Jul. 19, 2010) defined "communicable disease" as "a contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products which is transmitted or spread, directly or indirectly, to a person from an infected person, plant, animal, or anthropoid, or through the agency of an intermediate animal, host or vector of the inanimate environment or transmitted or spread by instrument or any other method of transmission."

In the absence of a definition of the term in the policy itself, one must look to common parlance and the reasonable expectations of an ordinary business person. *Ace Wire & Cable Co., supra*. Merriam-Webster Online Dictionary defines "communicable," in pertinent part, as "capable of being communicated: transmittable <communicable diseases>" and, in turn, defines "disease" as "a condition of the living animal or plant body or of one of its parts that impairs normal functioning and is typically manifested by distinguishing signs and symptoms." Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary (last visited Mar. 28, 2015). Specialized dictionaries are a little more specific. For example, the Merriam-Webster Online Medical Dictionary defines "communicable disease" as: "an infectious disease transmissible (as from person to person) by direct contact with an infected individual or the individual's discharges or by indirect means (as by a vector)." Merriam-Webster Online Medical Dictionary, *available at* http://www.merriam-webster.com/medical (last visited Mar. 28, 2015). IRMI, a professional risk management online resource, defines "communicable disease" as follows:

> A disease that is spread from one person to another by either direct transmission of bacteria or viruses between the carrier and infected person, or through a vector, such as food contaminated by the carrier and consumed by the infected person.

The Glossary of Insurance and Risk Management Terms, available online at http://www.irmi.com/online/insurance-glossary/default.aspx (last visited Mar. 28, 2015).

Thus, the term is pretty broadly defined. However, even an unambiguous term can be held to be ambiguous in a specific context, in which case, the term will be construed in favor of coverage. *Continental Continental Cas. Co. v. Rapid-American Corp*., 80 N.Y.2d 640 (1993); *Lavanant v. General Accident Ins. Co. of America*, 79 N.Y.2d 623, 629 (1992).

Further, if the term is found to be ambiguous, the parol evidence rule may permit admission of extrinsic evidence of the insurance carrier's (or insurance industry group's) favorable representations to state insurance regulators regarding the intended meaning of the term. *See, e.g*., *Morton Int'l, Inc. v. General Acc. Ins. Co. of America*, 134 N.J. 1 (N.J. 1993) (rejecting, on "reasonable expectations" grounds, insurers' broad interpretation of a pollution exclusion clause, which interpretation conflicted with insurers' prior representations to state regulators).

It seems clear that a disease contracted by direct person-to-person exchange of bodily fluids falls within the exclusion. *See Plaza v. General Assurance Co.*, 244 A.D.2d 238, 239, 664 N.Y.S.2d 444, 444 (1997) (holding that the undefined term "communicable disease" was neither ambiguous nor unduly broad and homeowner's policy's communicable disease exclusion applied to claims arising from the transmission of HIV); *see also Clarke v. State Farm Florida Ins.*, 123 So.3d 583 (Fla. 4th Appellate District 2012) (holding that underlying tort claim that insured transmitted the herpes virus to plaintiff fell within the communicable disease exclusion in the insured's homeowner's policy, which was worded so as to exclude communicable diseases from "bodily injury").

On the other hand, the applicability of such exclusions to indirectly transmitted disease is unsettled. *Compare*, *Alexis v. Southwood Ltd. Partnership*, 792 So.2d 190 (Court of Appeal La.2001) (holding that plaintiffs' claims alleging illness due to exposure to contaminated soil, contaminated air, water and raw sewage fell within the communicable disease exclusion in defendant insured's commercial general liability policy, without providing any analysis regarding the undefined term "communicable disease"), *with Paternostro v. Choice Hotel Intern. Services Corp.,* 2014 WL 6460844, at *16 (E.D. La. Nov. 17, 2014) (denying insurer's Rule 12(b) motion to dismiss claims against it where there was a dispute as to whether the communicable disease exclusion pertained only to a disease directly transmitted from a person or whether it applied also to disease transmitted from an inanimate environment such as a hot tub, HVAC system, or air/waterway, as was the case in this suit involving contraction of Legionnaire's disease due to negligent maintenance of hotel hot tub/spa system); *see also* Choice Hotel International, Inc.'s Memorandum in Opposition Case No. 13-CV-0662 [Docket No. 311] (relying on definition of "communicable disease" in Merriam-Webster Online Medical Dictionary).

Where two or more of the foregoing exclusions appear on their face to apply, with conflicting results, arguably only the most specific applies. An unpublished letter-opinion in *Camden Fire Insurance Association v. Mincing Trading Corp., slip op.,* Index No. L-3955-10 (NJ Superior Ct., Middlesex Cty., June 21, 2011) is illustrative. The underlying suit against the insured sought recovery of losses incurred in the recall of salami products on suspicion that they contained salmonella-contaminated pepper. The defendant's insurer disclaimed coverage on the basis of a "fungi and bacteria" exclusion that contained an exception for fungi and bacteria "that are, are on, or are contained in, a good or product intended for consumption," and also disclaimed coverage on the basis of a "communicable disease" exclusion that did not contain such an exception. The court held in favor of coverage. It reasoned that the two exclusions conflicted, and therefore the more specific of the two exclusions, the "fungi and bacteria" exclusion, would be applied—along with its coverage-conferring exception. Salmonella, the court held, is both a communicable disease and a bacterium, but fungi and bacteria fall within delineated taxonomical domains or kingdoms, whereas communicable diseases refer to a wide variety of human conditions. Further, since the policy was specifically written for the food industry sector, it was objectively reasonable for an insured in that industry to read the fungi and bacteria exclusion to apply to foodborne illnesses caused by bacteria or molds, while the communicable disease exclusion applied to diseases that typically pass from human to human by direct contact rather than via contaminated food products. *Id*.

Commercial General Liability Coverage: Specific Exclusions: Exclusions Pertinent to Personal and Advertising Injury Coverage. While the personal and advertising injury coverage parts expressly extend coverage to enumerated intentional acts, such as defamation, coverage is excluded where the consequence of the intentional act is itself intended. This is a matter of public policy. *See Town of Massena v. Healthcare Underwriters Mut. Ins. Co*., 98 N.Y.2d 435, 749 N.Y.S.2d 456 (2002) ("[a]s a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance."). In *Town of Massena*, the insurer was held obligated to defend its insured against a defamation claim notwithstanding the intentional-acts exclusion, where the defamation claim could be proven by reckless behavior, rather than intentional acts. *Id*. In addition, the policy expressly sets forth certain exclusions from coverage. Specifically, the personal and advertising injury coverage part excludes coverage for publication of a defamatory statement with knowledge of its falsity. It also excludes coverage for knowing violations of the rights of another. An insurer may not avoid its duty to defend its insured, though, when the allegations in the complaint can be viewed as pleading an unknowing violation—at least in the alternative. *See, e.g.*, *TIG Ins. Co. v. Nobel Learning Communities, Inc.*, 2002 WL 1340332, at *8-10 (E.D. Pa. Jun. 18, 2002).

Commercial General Liability Coverage: Conditions to Coverage. While a given epidemic-related CGL claim may, on its face, trigger coverage, the insured may lose coverage by failing to comply with the policy's conditions of notice and cooperation. CGL policies typically require that the insured provide written notice to the insurer as soon as practicable after the occurrence, claim or suit. With its business crippled by a pandemic, an insured may have a difficult time giving notice quickly. Fortunately for the policyholder, "as soon as practicable" is interpreted in New York to mean within a reasonable time under the circumstances. *See, e.g.*, *Security Mutual Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972). Also fortunately for the policyholder, policies issued or delivered in New York on or after January 17, 2009 are subject to current Ins. L. § 3420(a), under which the insurer has the burden to prove that it has been prejudiced by the policyholder's delay in giving notice.[2]

The CGL policy further requires the policyholder to cooperate with the insurer's attempt to investigate and adjust the claim. With its workforce depleted by sickness, a business may have difficulty complying with its insurer's inquiries on what would be considered a prompt fashion under ordinary circumstances. In this regard, too, the policyholder has the advantage, however. To avoid coverage on the basis of breach of this condition, the insurer must prove the policyholder had an avowed intent to obstruct the insurer's investigation. *Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 168, 278 N.Y.S.2d 793 (1967).

Commercial General Liability Coverage: Waiver or Estoppel of a Disclaimer by the Insurer. Even when it is clear that the policyholder has breached a policy condition, the insurer may be barred from disclaiming coverage if it fails to disclaim coverage in the proper manner. With respect to bodily injury/wrongful death coverage matters, the insurer is barred from disclaiming coverage on the basis of a condition or exclusionary clause if the insurer fails to provide written notice of that disclaimer within a reasonable time after becoming aware of the basis for disclaiming coverage. Ins. L. § 3420(d)(2)*; First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 N.Y.3d 64, 769 N.Y.S.2d 459 (2003) (48-day delay by insurer in disclaiming coverage was not excusable and was unreasonable as a matter of law); *see also Koegler v. Liberty Mut. Ins. Co.*, 623 F.Supp.2d 481 (S.D.N.Y. 2009), amended 2009 WL 1110548 (40-day delay by insurer in disclaiming coverage for claims alleging negligent and intentional transmission of Herpes and HPV based on communicable disease exclusion was unreasonable because the basis of the disclaimer was readily apparent at the outset); *Alice J. v. Joseph B.*, 198 A.D.2d 846, 604 N.Y.S.2d 419 (4th Dep't 1993) (two-month delay by insurer in disclaiming coverage based on communicable disease exclusion was unreasonable as a matter of law). "An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay." *First Financial Ins. Co., supra* at 69, 769 N.Y.S.2d 459.

When the underlying claim does not involve bodily injury/wrongful death arising out of an accident occurring within New York State and thus falls outside the purview of Ins. L. § 3420(d), the effectiveness of an insurer's disclaimer is governed by common law, "under [which] prejudice must generally be established as a result of an unreasonable delay in disclaiming before an insurer will be estopped from asserting coverage." *Penn Millers Ins. Co. v. C.W. Cold Storage, Inc.*, 103 A.D.3d 1132, 1134, 959 N.Y.S.2d 315 (4th Dep't 2013) (quoting *Globe Indem. Co. v. Franklin Paving Co.*, 77 A.D.2d 581, 582, 403 N.Y.S.2d 109 (1980)), *reargument denied*, 105 A.D.3d 1467, 964 (4th Dep't 2013). However, the insurer may be held to have waived a policy *condition* by failing to raise it in a letter that disclaims coverage on another basis; in this case, prejudice to the insured need not be shown. *See Kokonis v. Hanover Ins. Co.*, 279 A.D.2d 868, 719 N.Y.S.2d 376 (3d Dep't 2001) (automobile insurer waived its right to disclaim coverage based on a policy exclusion when it failed to cite that exclusion in its initial disclaimer letter); *see also Village of Brewster v. Virginia Sur. Co., Inc.*, 70 A.D.1239 (3d Dep't 2010) (CGL insurer precluded from raising, in its opposition to plaintiff's motion for summary judgment, certain policy exclusions as a basis for denying coverage because insurer failed to invoke those grounds in its notice of disclaimer); *General Acc. Ins. Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979) (automobile insurer precluded from raising ground to disclaim coverage that was not raised in its letter of disclaimer).

Commercial Property Insurance Coverage: The Requirement of Direct Physical Loss or Damage. As noted in the introduction, an epidemic or pandemic may cause a business to incur direct losses due to contamination by a disease causing vector. For coverage, it would look to its commercial property insurance policy. Such policies are generally written either on an "all risk" or "named peril" basis. An "all risk" property insurance policy insures all risks of direct physical damage or loss unless the peril causing the damage or loss is specifically excluded. A "named peril" insurance policy, by contrast, covers only the perils that are affirmatively listed. An epidemic is unlikely to be a named peril; this article focuses on coverage under a typical "all risk" policy.

Whether the policyholder seeks coverage for its costs of decontaminating its real or personal business property, the value of its contaminated products, the business income lost due to shutdown of its premises—or the premises of its key supplier—for decontamination or as required by governmental quarantine, embargo or other order, the key issue presented under an "all risk" policy in the epidemic context is whether the presence of the infectious agent constitutes a direct physical loss or damage to insured property. Courts applying New York law

have held that it does, provided that the functionality or (in the case of products) merchantability of the property is impaired by the disease-causing agent. *See Pepsico, Inc. v. Winterthur Intern. America Ins. Co.*, 24 A.D.3d 743, 806 N.Y.S.2d 709 (2d Dep't 2005) (faulty ingredient in beverage products, affecting their taste—and therefore their merchantability—but not rendering them unfit for human consumption, met the policy's requirement for direct physical loss or damage); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 6 Misc.3d 1037 (A-Table only), 2005 WL 600021 (Sup. Ct., N.Y. Cty., March 4, 2005) (presence of noxious particles in air and on surfaces in insured premises from September 11, 2001 destruction of World Trade Towers met "property damage" requirement of business interruption policy, entitling insured to recover for lost business income and extra expense incurred due to the closure of lower Manhattan ordered by governmental authorities).

Courts in other states have similarly held in the context of disease-causing agents. *See, e.g., Netherlands Ins. Co. v. Main Street Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014) (dried milk product suffered physical damage within meaning of property policy when it was "manufactured in insanitary [sic] conditions," whether or not it actually contained salmonella); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280 (Minn. 1959) (impairment of value of raw eggs due to customer's refusal to accept them out of concern for presence of smoke from a fire on a neighboring property constituted direct physical loss of property); *United Sugars Corp. v. St. Paul Fire & Marine Ins. Co.*, 2007 WL 1816412 (Minn. Ct. App. June 26, 2007) (following *General Mills*, and holding that insured was entitled to new trial on issue of "property damage," where trial court's jury instructions did not allow the jury to find that cookie dough was physically damaged by means other than proof that it actually contained "foreign matter"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001) (function of cereal products seriously impaired by presence of a pesticide that was not FDA-approved, such that insured could recover for costs of withholding product from illegal distribution); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (function of apartment building seriously impaired by presence of asbestos fibers, although building itself did not suffer tangible injury); *Widder v. Louisiana Citizens Property Ins. Corp.*, 82 So.3d 294 (La. Ct. App. 4th Cir., 2011) (lead intrusion in insured's home, rendering it uninhabitable until remediated, constituted direct physical damage); *Yale University v. Cigna Ins. Co.*, 224 F.Supp.2d 402 (D. Conn. 2002) (under Connecticut law, presence of flaking lead and friable asbestos contamination in university's buildings constituted physical damage or loss to property within the meaning of the university's all-risk property insurance policy); *Mazner v. Seaco Ins. Co.*, 9 Mass.L.Rptr. 41, 1998 WL 566658 (Mass. Superior Ct. 1998) (carbon monoxide contamination constituted physical loss).

Such cases are consistent with holdings that non-disease-causing contamination may constitute direct physical loss or damage within the meaning of an all-risk property policy. *See, e.g., In re Chinese Manufactured Drywall Products Liability Litigation*, 759 F.Supp.2d 822 (E.D. La. 2010) (homeowners' losses caused by release of elemental sulfur gases from Chinese manufactured drywall, which corroded silver and copper elements in the homes, constituted physical loss for purposes of property coverage: "while the mere presence of a potentially injurious material in a home may not qualify as a covered physical loss for purposes of homeowners' insurance policies, when these types of materials are activated, for example by releasing gases or fibers,…there (is) a covered physical loss"); *Travco Insurance Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010) (same); *Ross v. C. Adams Const. & Design, L.L.C.*, 70 So.3d 949 (La. App. 5th Cir. 2011) (same); *see also Stoneridge Development Co., Inc. v. Essex Ins. Co.*, 382 Ill.App.3d 731, 888 N.E.2d. 633 (Ill. App. 2d. Dist. 2008) ("tangible property suffers a physical injury if the property is altered in appearance, shape, color or in other material dimension"), *appeal denied*, 229 Ill.2d 660, 897 N.E.2d 264 (2008); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. Aug. 4, 1999) (mildew contamination constituted physical loss); *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or.App.6, 858 P.2d 1332 (1993) (tenant's damages caused by odor from methamphetamine cooking by subtenant represented direct physical loss covered by property policy); *Abbey Co., LLC v. Lexington Ins. Co.*, 289 Fed.Appx. 161 (9th Cir. 2008) (presence of debris and silt in insured's canal, requiring dredging, constituted physical damage to insured property because it arose out of a physical event impairing the property's use).

By contrast, courts generally hold that there is no direct physical loss or damage to property where the contaminant has not impaired the functionality or merchantability of the insured property. *See, e.g., Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006) (plaintiff not insured for business income losses resulting from embargo on beef products due to "mad cow disease." Court rejected plaintiff's argument that inability to transport truckload of beef product across the U.S./Canadian border constituted product that was physically damaged); *Pentair, Inc. v. American Guar. and Liab. Ins. Co.*, 400 F.3d 613 (8th Cir. 2005) (no coverage under contingent business interruption coverage part for manufacturer's losses incurred when suppliers were unable to manufacture products for insured due to power outage following an earthquake); *Pirie v. Fed. Ins. Co.*, 45 Mass.App. 907, 696 N.E.2d 53 (Mass.App. 1998) (mere presence of lead paint in home, without peeling or chipping paint or paint dust, does not constitute physical damage); *Universal Image Productions, Inc. v. Chubb Corp.*, 703 F.Supp.2d 705 (E.D. Mich.

2010) (odor, mold and bacterial contamination that did not structurally or tangibly damage premises or render premises uninhabitable did not constitute physical loss or damage); *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co*., 245 F.Supp.2d 563 (D. N.J. 2001) (mere presence of asbestos fibers did not constitute direct physical loss or damage because the released asbestos levels at the insured premises did not approach or exceed OSHA standards); *Mastellone v. Lightning Rod Mut. Ins. Co*., 175 Ohio App.3d 23, 884 N.E.2d 1130 (8th Dist. Cuyahoga Cty., Ohio, 2008) (staining of exterior wood of house did not constitute property damage because it did not affect the structure of the wood and could be removed).

Commercial Property Insurance Coverage: Exclusions. As with CGL policies, commercial property policies may contain "pollution" and "mold, bacteria and fungi" exclusions, and the courts' approach to such exclusions in the context of an epidemic is likely to be similar here. Arguably, the pollution exclusion does not apply to damage to inventory or to damage due to the presence of a disease-causing agent that is not specifically listed in the pollution exclusion. *See*, *e.g.*, *Pepsico, Inc. v. Winterthur International America Ins. Co*., 13 A.D.3d 599 (2d Dep't 2004), *leave to appeal dismissed*, 4 N.Y.2d 882, 788 N.Y.S.2d 142 (2005), *later appeal*, 24 A.D.3d 743, 806 N.Y.S.2d 709 (2d Dep't 2005) (pollution exclusion did not bar coverage for losses incurred as a result of faulty supplies that resulted in the insured's beverage products being off-taste; following *Belt Painting*, *supra*, which held that the pollution exclusion in a general liability policy did not apply to contamination that was neither released to the outdoor environment nor specifically defined in the policy as a pollutant); *but see HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co*., 757 F.Supp.2d 738 (N.D. Ohio, 2010) (holding that contamination exclusion unambiguously excluded coverage for listeria contamination of insured's meat and poultry products, but certifying question in view of proof of insured's expectations, under "reasonable expectations" doctrine); *TravCo Ins. Co. v. Ward*, 284 Va. 547, 736 S.E.2d 321 (Va. 2012) (pollution exclusion applied to bar coverage for property damage claim arising from off-gassing of defective drywall, which corroded metals in property).

Commercial Property Insurance Coverage: Conditions. One typical condition of a property policy is that the insured make the damaged property available to the insurer for inspection prior to disposing of it. Local authorities may make this condition difficult to comply with where they order prompt disposal to control the spread of disease. In such emergency situations, insurance regulators have been known to issue emergency orders that relieve policyholders of the obligation to preserve physical evidence. This was done by the New York Department of Financial Services after Superstorm Sandy. *See* Circular Letter dated November 5, 2012 (www.dfs.ny.gov/insurance/circltr/2012/cl2012_08.pdf). On site-inspection by the carriers was not to be required. *Id*. The Superintendent specifically directed homeowners to inventory all damaged items, take individual color photographs of the damaged property, and if possible, videotape them, have the camera set to record the date and time, take samples or swatches of items where quality would be a claims factor, be sure the inventory reflected the corresponding picture, and keep all this information in a secured location to share when the adjuster arrived. *Id*.

Conclusion

Ultimately, a disease outbreak of epidemic, or even pandemic, proportion could expose businesses to interruptions, losses and third-party claims potentially beyond the scope of many standard commercial insurance policies. For the most part, commercial insurance coverage for epidemic-related risk remains untested. In response to this uncertainty, some insurers are now writing into their policies specific epidemic exclusions, and others are developing specialty insurance coverage for epidemics.[3]

Endnotes

1. More general treatments of insurance in the context of epidemics may be found in the following articles: White, Sheridan and Carmel, *Insurance Law: Industry Implications: The Impact of a Global Avian Flu Pandemic*, 49 No. 5 DRI For the Defense 39 (2007); Payne, *Ebola Outbreak: Risk Management and Insurance Considerations*, www.Locktonglobal.com (Lockton Global, 2014); *Lloyd's Emerging Risks Team Report: Pandemic Potential Insurance Impacts*, www.lloyds.com (2008); Weisbart, *Facts and Perspectives on the Ebola Pandemic: Insurance Industry Ramifications of the Spread of the Ebola Virus*, www.iii.com (Insurance Information Institute, Oct. 13, 2014).

2. The burden shifts for a delay of 2 years or more. Ins. L. § 3420(c)(2)(A). Additionally, "an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or binding arbitration; or the insured has resolved the claim or suit by settlement or other compromise." Ins. L. § 3420(c)(2)(B).

3. *See* Logan Payne, *Ebola Outbreak: Risk Management and Insurance Considerations,* Lockton Global, Aug. 2015, available at http://www.lockton.com/whitepapers/Ebola-Outbreak-Risk-Management-and-Insurance-Considerations.pdf; Carolyn Cohn, Richna Naidu, and Avik Das, *Some Insurers Exclude Ebola; Others Offer New Projects*, Insurance Journal, Oct. 23 2014, http://www.insurancejournal.com/news/national/2014/10/23/344515.htm; *William Gallagher, Miller Insurance Offer Ebola Business Interruption Coverage*, Insurance Journal, Oct. 17, 2014, http://www.insurancejournal.com/news/national/2014/10/17/343864.htm; *NAS Insurance Services Introduces Regulatory Business Interruption Ebola Coverage*, Insurance Journal, Oct. 20, 2014, http://www.insurancejournal.com/news/west/2014/10/20/343706.htm; Holly Valenty, *All Position Statements*, SquareMouth, Dec. 11, 2014, https://www.squaremouth.com/current-event-information-centers/2014/12/11/position-statements/; Mary Thompson and Dan Mangan, *Ebola: Insurance's New Way to Deal with an Outbreak,* CNBC, Oct. 17, 2014, http://www.cnbc.com/id/102098518; *Pandemic Insurance Program Options,* Marsh, Sept. 15, 2009, http://usa.marsh.com/ProductsServices/MarshSolutions/ID/12392/Pandemic-Insurance-Program-Options.aspx; Dr. Dave Wood and Alyssa Bouchard, Pandemic Insurance: The Future of Excess and Surplus Lines, *available at* http://www.aamga.org/files/whitepapers/2014wp/BouchardPaper_AppState.pdf.

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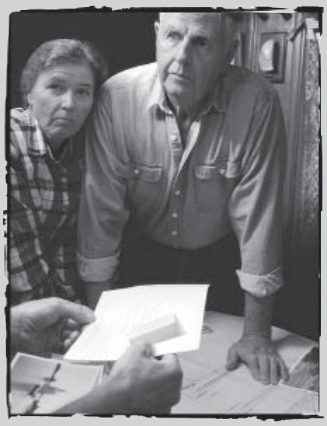

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Criminalizing Negligence in the New York City Administrative Code

By Mark S. Yagerman and Max Bookman

Fundamental to any negligence action is a showing that the defendant's conduct fell below the degree of care that a reasonable person would exercise under the circumstances.[1] For centuries, accident cases have been evaluated by juries and triers of fact as to whether a particular action was negligent, within the meaning of the long-established common law definition.[2]

Because negligence by its very definition amounts to unintentional conduct, the legal remedy for an accident victim is rarely, if ever, found in the criminal arena. To the contrary, an individual who has been injured by another's negligence is entitled to recover money damages against the wrongdoer in a civil proceeding.[3] For all the criticism of this system that has been levied, the undeniable truth is that the remedy of money damages for negligence victims is the bedrock of our civil justice system, having been carried over from British common law.[4]

The latest addition to the New York City Administrative Code promises to fundamentally upend these most basic and long-established concepts of negligence in an unprecedented manner.

Newly enacted Section 19-190 of the New York City Administrative Code, a critical element of the present mayoral administration's much-publicized policy vision of reducing traffic fatalities to zero, provides in pertinent part "any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way….and whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor."[5]

The penalty for a violation of Section 19-190 is a fine of no more than $250, imprisonment for no more than thirty days, or both.[6]

The standard for the imposition of Section 19-190's penalties does not turn on a showing of recklessness, wantonness, or any intentional conduct, nor does it require a showing of clear and convincing evidence that the driver failed to yield to the pedestrian or bicyclist in the crosswalk.[7] To the contrary, a criminal penalty is attached to the driver for merely acting without due care for failing to yield when the pedestrian or bicyclist was in the crosswalk and had the right of way.[8]

Laudable as the aspiration of eliminating pedestrian traffic injuries may be, Section 19-190 seeks to accomplish that goal through a draconian measure: the criminalization of negligence. This is unprecedented, as it blurs the line between tort and criminal law.

Distinction Between Negligence and Crime

Equally ancient and enduring as the elements of negligence is the basic common law threshold for criminal conduct. For time immemorial, courts have insisted that an individual's mental status, or *mens rea*, meet some level of intentionality in order to constitute criminally culpable conduct.[9]

As was written nearly a century ago, "there can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."[10] This principle is regularly reaffirmed by the United States Supreme Court, as it was as recently as June 2015.[11]

Although the level of required intentionality varies from crime to crime (e.g., purposely, knowingly, recklessly), the common thread that weaves all crime together is that there must be *some* intentional conduct.[12] Moreover, proof of criminal conduct must be "beyond a reasonable doubt," as opposed to the civil "preponderance of the evidence" standard.[13]

The *mens rea* requirement of some minimal level of intentionality is supported by any of the four traditionally recognized policy justifications for criminal punishment.[14] One well-recognized purpose for prosecuting crime is strictly punitive; levying "just punishment" of the actor in the spirit of Hammurabi's Code.[15] Deterrence is an additional goal; punishing those who commit crime discourages others from engaging in the same conduct in the future.[16] Third is incapacitation; removal of the criminal actor from society makes the public safer.[17] Fourth is rehabilitation; providing the criminal with an opportunity to make amends and reform himself.[18]

Whichever of the four traditional justifications, the trigger for criminal punishment is intentional conduct. None of these justifications makes any sense without intentionality. How can one be deterred from conduct she did not intend to do in the first instance? Is society truly safer if someone who had an accident is incarcerated? Will a monetary fine reform the driving of someone who drove carefully to begin with?

The criminalization of unintentional conduct is why Section 19-190 is incongruent with our most basic understanding of what crime is. Section 19-190 advances none of the goals of punishing crime. Instead, it merely criminalizes accidents.

Policy Concerns

Advocates of Section 19-190 claim that the statute will make pedestrians safer by acting as a deterrent.[19] But that view is misguided.

Any New Yorker is familiar with aggressive drivers who turn though crowded crosswalks in a manner that appears to invite injury. Yet advocates of Section 19-190 fail to recognize that existing criminal law already addresses drivers who operate their vehicle in a reckless (as opposed to merely negligent) manner.[20] Any driver who turns through a crosswalk while intentionally disregarding the safety of others can and should be punished under existing law prohibiting reckless driving.

Conversely, not all drivers who turn through crosswalks do so recklessly. Nevertheless, accidents in crosswalks may occur even though the operator of the vehicle was driving with all appropriate care. Those drivers who strike pedestrians accidentally, lacking any intentional disregard for the safety of others, will not be deterred, as they possess no intentionality in need of deterrence in the first place.

Further, Section 19-190 promises to complicate the civil litigation of auto accidents.

First is the vexing issue of the impact of the criminal violation on a subsequent civil proceeding. Built into Section 19-190 is an exception that the section is not violated if "the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care."[21] Unpacking the triple-negative in the ordinance's drafting, the language provides that only those drivers who did not exercise reasonable care are guilty of the violation.

It requires no stretch of the imagination to envision how this will play out in practice. A driver collides with a bicyclist in an intersection, and is cited by the police for a misdemeanor violation of Section 19-190. Invariably, the driver will plead guilty in return for merely paying the fine instead of risking jail time. By the time the subsequent civil personal injury proceeding commences, there may be a judicial admission by the defendant for violating Section 19-190 including the "failure to exercise due care" provision. Even the most cursory search of personal injury practitioners' websites reveals the excitement of the plaintiff's bar for this statute.

Simply put, in order to avoid jail time, the defendant will have already admitted to acting unreasonably under the circumstances, and will have done so in a judicial proceeding with stakes comparable to, if not higher than, the subsequent civil litigation.

The unanticipated consequences of these inevitable developments are as numerous as they are difficult to conceive. Perhaps a proliferation of motions for summary judgment on liability on the grounds of an admission of "failure to exercise due care" in a plea deal.[22] *In limine* motion practice as to the admissibility of the criminal record at the civil trial. Moreover, insurance coverage issues may be abound, as criminal conduct may be uninsurable as a matter of public policy.[23]

Additionally is the question of punitive damages. Punitive damages are generally reserved for conduct that is "wanton, recklessness, and grossly negligent."[24] For intentional torts such as battery, punitive damages are recoverable. Will punitive damages be standard in crosswalk negligence cases now? Like criminal conduct, punitive damages are uninsurable as a matter of public policy.[25]

Moreover, Section 19-190 also creates the potential for upsetting existing law pertaining to dispositive motion practice. Under present appellate authority, a plaintiff is not entitled to summary judgment unless she makes a showing of not only the defendant's negligence, but her own lack of fault.[26] Now, it will be no short leap for plaintiffs' counsel to argue that Section 19-190 entitles their clients to a presumption of their lack of fault.

Finally, enforcement of Section 19-190 places an unfair burden on public workers, such as sanitation drivers and MTA operators, who serve the public by driving on a daily basis, yet have already been dragged out of their vehicles and arrested for simple traffic accidents. Indeed, as recently as February 2015, a 24-year veteran MTA bus driver was arrested pursuant to Section 19-190, at the scene of an accident with a pedestrian in the crosswalk, without any allegation of reckless driving.[27]

Conclusion

Our civil justice system is well-equipped to make whole a pedestrian or bicyclist injured in a crosswalk by a driver's negligence. Moreover, our criminal justice system is already equipped to punish and deter those who drive recklessly. By placing mere negligence into the criminal arena, Section 19-190 opens the door to unprecedented havoc in the administration of civil justice, while simultaneously accomplishing none of the goals that criminal law seeks to achieve. Possibly well-intentioned as the Vision Zero initiative may be in theory, its codification is simply a misguided foray into the criminalization of negligence.

Endnotes

1. *See* NY Pattern Jury Instructions ("PJI") 2:10 ("Common Law Standard of Care—Negligence Defined: Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.").
2. *See*, *e.g.*, Weaver v. Ward, 80 Eng. Rep. 284 (King's Bench, 1616) (the accidental discharge of a musket properly gives rise to a cause of action in tort).
3. *See* BMW of North America v. Gore, 517 US 559 (1996).
4. Mark A. Geitsfeld, *Compensation as a Tort Norm*, New York University Law and Economics Working Papers, Paper 350 (2013).
5. *See* NYC Admin. Code Sec. 19-190(a), (b).
6. *Id*.
7. *Id*.
8. *Id*.
9. "*Mens rea*," from the Latin maxim "*actus reus non facit reum nisi mens sit rea*," translates, "an act does not make one guilty without a guilty mind." *See* Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 Am. Inst. Crim. L. & Criminology 627 (1938-1939).
10. Brown, *Criminal Law*, 9 ed., 287 (1930).
11. *See* Elonis v. United States, 575 US __ (2015) ("[A] reasonable person standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing…" because such a standard "reduces [criminal] culpability on the all-important element of the crime to negligence.") (internal quotations omitted); *see also* United States v. Balint, 258 US. 250 (1922) (as a general rule, a "guilty mind" is "a necessary element in the indictment and proof of every crime.").
12. *See*, *e.g.*, Model Penal Code § 2.02, General Requirements of Culpability.
13. *Compare* NY Criminal Jury Instructions ("CJI") 6:20 ("A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence") *with* PJI 1:60 ("preponderance means the greater part of the evidence.").
14. *See* United States v. Taveras, 424 F. Supp. 2d 446 (EDNY 2006) ("the four classic justifications for punishment are just deserts [just punishment], deterrence, incapacitation, and rehabilitation."), *citing* Federal Sentencing Guidelines, 18 U.S.C. § 3553(a)(2) (sentencing court shall consider need to "provide just punishment," "afford adequate deterrence," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training…").
15. *Id.*
16. *Id*.
17. *Id*.
18. *Id*.
19. *See* Office of the Mayor, Press Release, *Mayor de Blasio Signs Package of Life-Saving Traffic Safety Bills*, June 23, 2014, *available at* www1.nyc.gov/office-of-the-mayor/news/301-14/mayor-de-blasio-signs-package-life-saving-traffic-safety-bills ("'We have promised the people of this city that we will use every tool we have to make streets safer. Today is another step on our path to fulfilling that promise, and sparing more families the pain of losing a son, a daughter, or a parent in a senseless tragedy…' said Mayor Bill de Blasio.").
20. *See* NY Penal Law § 120.20 ("A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."). Reckless driving is regularly prosecuted under § 120.20 in New York courts high and low. *See*, *e.g.*, People v. Goldstein, 12 NY3d 295 (NY 2009) (driving vehicle in pedestrian area of a construction zone); In re Richard B., 111 AD2d 166 (2d Dept. 1985) (reversing vehicle from driveway across sidewalk in vicinity of pedestrian); People v. Chaney, 163 AD2d 617 (3d Dept. 1990) (reversing vehicle in the path of a pedestrian); People v. Simpson, 99 AD2d 555 (2d Dept. 1984) (recklessly driving a vehicle towards a pedestrian police officer); People v. Smith, 76 Misc 2d 867 (Just.Ct. Spring Valley 1973) (recklessly driving a vehicle towards a police officer).
21. *See* NYC Admin. Code § 19-190(c).
22. *See* Grayes v. DiStasio, 166 AD2d 261 (1st Dept. 1990) ("A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue."); Ucar International Inc. v. Union Carbide Corp., 2004 WL 137073 (SDNY 2004) (plea of guilty by a criminal defendant is an admission of guilt of the substantive crime, as well as an admission to each of the elements charged); People v. Thomas, 53 NY2d 338 (NY 1981) (plea of guilty is an admission of factual guilt).
23. *See* Litrenta v. Republic Ins., 245 AD2d 344 (2d Dept. 1997), *citing* Allstate Ins. Co. v. Mugavero, 79 NY2d 153 (NY 1992) ("in general, it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute.").
24. *See* PJI 2:278.
25. *See* Home Ins. Co. v. American Home Prods. Corp., 75 NY2d 196 (NY 1990) ("New York public policy precludes insurance indemnification for punitive damage awards.").
26. *See*, *e.g.*, Maniscalco v. New York City Tr. Auth., 95 AD3d 510 (1st Dept. 2012).
27. *See* ABC News, *MTA Bus Drivers Believe They are Unfairly Targeted by Vision Zero,* February 17, 2015, *available at* 7online.com/traffic/mta-bus-drivers-believe-they-are-unfairly-targeted-by-vision-zero/522369/.

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International Law on Airline Accidents and on International Cruise Line Accidents Where There Is No U.S. Port of Embarkation or Disembarkation

By Paul S. Edelman

What the international airline and the cruise line accidents we will discuss have in common is that the amounts payable for injury or death are expressed as Special Drawing Rights or SDRs. SDRs are a special currency set up by the International Monetary Fund, a basket of currencies including the dollar, the Euro, the Pound and the Japanese Yen. Its value is on the IMF web site each day. The Montreal Convention is the convention which most nations enforce. The Convention came into force when the U.S. signed on in 2003. At that time there was absolute liability for damages up to 100,000 SDRs which was increased to 113,100 SDRs on December 31, 2009. Since the Euro has declined in value recently, the SDR is now not worth as much as it was years ago. Where damages are sought over 113,100 SDRs, the airline must show that it did everything possible to avoid the accident, or that it was solely the fault of a third party. Such a burden is so onerous that in fact there is no defense. The defense is not available for claims under 113,100 SDRs.

The Convention also amended the jurisdictional provisions of the prior law. A plaintiff can sue in his country if the carrier provided service there directly or by a code share. One can sue in the U.S. if the ticket is bought here, or if there is a one-way ticket to the U.S. Also, one can sue here if there is a round-trip ticket to or from the U.S. There is comparative negligence but no punitive damages, and there is no recovery for emotional harm absent some physical injury.

In the recent Germanair crash which occurred on March 24, 2015, the initial payout based on an SDR value of $1.39 was $154,874.

The Athens Convention as Applied in the United States and Abroad to Cruise Line Accident Litigation

There is a new regime on the Athens Convention as of December 31, 2012, applicable to the European Union countries. Everyone who handles cruise line cases knows that the fine print in a cruise ticket now goes something like this: in the event of a voyage which does not touch a U.S. port and there is a personal injury or death, the Athens Convention shall apply, which limits recoveries to about $68,000 (or $70,000 in some cases). Although early on there was some confusion as to whether U.S. courts would enforce this provision, since the U.S. was not a party to it, more recent cases do enforce it as a matter of contract, the only caveat being a case like that from the Ninth Circuit, which held that it would not be enforced where the ticket mentioned only the Athens Convention without stating the limitation amount. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002). Other cases have followed Wallace, and some have held the information properly presented. Since this case, the tickets usually add the explanatory language. The only advantage of the old 1974 Convention is that it provides two years to sue which gives additional time to negotiate a settlement, whereas U.S. voyages usually have a one-year limitation. However, there is a U.S. case where despite finding coverage for the Convention, a one-year statute of limitations was applied by the Eleventh Circuit federal court. *Farris v. Celebrity Cruises*, 2012 WL3590727 (2012). The ticket referring to the one-year limitation stated: "NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY." The 2002 Protocol would probably not allow this result. Article 9 provides for a three-year limitation period from the time the claimant knew or should have known of the cause of his injury, loss or damages. The forum law can toll this period but no later than five years from the date of disembarkation or when disembarkation should have occurred. Article 18 voids any contractual provision purporting to relieve any person of liability. One other U.S. case said the Convention was inapplicable where there was an intent to cause damage, e.g., assault, rape or recklessness knowing the result.

The 2002 Protocol makes a radical change in the amount recoverable. On December 12th of 2011 the European Council, EC, promulgated an adherence to the 2002 Protocol. It was mandatory for each of the 27 EC countries to follow it and make it enforceable by December 31st of 2012 (28 countries in July 2013). EC Regulation (EC) No. 392/2009. As in the prior Protocol, amounts are expressed in Special Drawing Rights, the value of which is made by the International Monetary Fund, and day-to-day changes are on its web site. It is a basket of currencies, dollar, euro, pound and Japanese yen. As of December 28, 2012, the last posted date for 2012, the value was $1.536920, just over a dollar and one half. The new Protocol makes the cruise line liable up to 250,000 SDRs and for more damages the limit is 400,000 SDRs. But the cruise line must prove it was not at fault for amounts beyond the 250,000 SDRs. Cabin luggage is up to 2250 SDRs and other baggage at 3375 SDRs. Thus there is liability at the end of 2012 of up to $384,230, and for 400,000 SDRs $614,768. Even prior to the

EC Regulation the UK adopted the 2002 Protocol and in Canada damages were 175,000 SDRs for personal injury and death, and it is also domestic law. In the UK recovery is allowed for emotional distress where a ship caught fire and sank. Incidentally, Italy is not a signatory to the 1974 Protocol, but is bound by the Athens Convention of 2012 after December 31st of 2012. The international aviation conventions also provide a large amount with absolute liability up to 113,100 SDRs.

The new Protocol has a two-tier provision for liability. The first is strict liability for personal injury or death caused by a "shipping incident." A "shipping incident" is a "shipwreck, capsizing, collision or stranding of the ship, explosion or fire of the ship or a defect in the ship." A "defect in the ship" is "any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding or when used for the launching of life-saving appliances."

The second tier puts the burden of proof on the claimant for the carrier's "fault or neglect."

In the recent U.S. case of *Myhra v. Royal Caribbean, Ltd*., 695 F. 3d, 1233, 2012, WL 4207303, a Florida forum was denied in favor of an English forum clause. The cruise line may or may not be aware that the 2002 Protocol amount should apply in an English court prior to December 31, 2012 where passengers were English and bought their tickets there. Depending on the facts, there might be strict liability.

Other important provisions include a direct action against an insurer and compulsory insurance or a bank guarantee, etc. Interest and costs are not included in the recoverable limits. The parties can agree to higher limits but not lower limits. Periodic payments are allowed.

Punitive damages are not recoverable under Article 3.

Jurisdiction for suit includes (1) the residence or place of business of the defendant, (2) the place of departure or destination, (3) plaintiff's residence if the defendant is subject to jurisdiction and has a place of business, and (4) where the ticket was issued if defendant had a place of business there and is subject to the court's jurisdiction. It is conceivable that there is a U.S. forum, although the Convention may assume an EU forum only.

The Protocol applies if a flag state is involved or the contract is issued in a party state or the state of departure or destination is involved. The EC did not adopt the provisions of the 2002 Protocol dealing with jurisdiction and enforcement of judgments (Articles 10 and 11). The EC has its own law on these issues.

A vessel must have a $500 million insurance policy to cover a terrorist attack on the vessel.

The only defenses are acts of war, hostilities, civil war, insurrection, a natural phenomenon of an exceptional and irresistible nature, or wholly caused by a third party with an intent to harm. Ten countries must accede to the Protocol to put it in force and the EC countries do not count towards the ten countries. Belgium became the tenth so a new Athens Convention came into effect in 2014. It will replace the present Convention, presumably in the ten countries involved. The ten countries are Albania, Belgium, Belize, Denmark, Latvia, The Netherlands, Palau, St. Kitts and Nevis, Serbia and Syria.

How the cruise lines will react to the changes and how tickets will read after the Athens Convention of 2012 is anybody's guess. Will they stick to the $68,000 and will courts say the 1974 Protocol is no longer in effect and invalidate such language? Will the new limits be applied? What will the cruise line lobbies do about this major change? Will the courts allow enforcement of a 1974 Convention involving countries which have repudiated it in favor of the 2002 Protocol and the new Convention in 2014? What of the old two-year statute of limitations? The new Protocol requires a longer period. The Bahamas is the flag state for many cruise ships. It is a signatory to the 1974 Convention, and is not covered by the EC Directive. How will a new Convention affect this situation in a ticket?

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New York Court of Appeals Holds That State Law Discrimination Claims Against Municipalities Do Not Require a Pre-Suit Notice of Claim

By Kinsey A. O'Brien

Recently, the Court of Appeals decided *Margerum v. City of Buffalo*, an important case examining the intersection of New York's municipal and civil rights statutes. The case is about promotion eligibility determinations in the City of Buffalo Fire Department and has a long, complex litigation history. Ultimately, the Court of Appeals held that a Notice of Claim is not required for New York State Human Rights Law claims against municipalities. The Court also held that liability for employment discrimination should not have been determined on summary judgment on the facts of this case.

To understand the context of this decision, we must look back to 1974, when the United States sued the City of Buffalo in federal court alleging that the City's written civil service exams for entry-level police and firefighters had a discriminatory adverse impact on African Americans, Hispanics, and women. An adverse impact claim alleges that a facially neutral practice or policy negatively affects a protected group at a disproportionately high rate. In such cases, the plaintiff or plaintiffs are required to use statistical evidence to show the adverse impact. Adverse impact claims are distinguished from "disparate treatment" claims, which are more "traditional" discrimination cases where the plaintiff claims he or she was treated differently because of membership in a protected class.

The United States prevailed in the 1974 suit and the court issued a "'Remedial Decree' designed to remedy the effects of past discrimination" through hiring ratios and affirmative action-style recruitment. The Decree was largely affirmed by the Second Circuit. Nearly 15 years later, in 1998, a non-profit organization of African American firefighters, Men of Color Helping All (MOCHA), brought a class action against the City of Buffalo. MOCHA claimed that the 1998 civil service exam used by the City to determine promotion eligibility for firefighters had an unlawful adverse impact on African Americans. MOCHA then brought a second class action against the City in 2003, alleging that the 2002 civil service examination had the same discriminatory adverse impact.

In 2005 and 2006, while the MOCHA lawsuits were pending in federal court, City of Buffalo Human Resources Commissioner Leonard Matarese allowed the firefighter promotion eligibility lists to expire before the four-year maximum duration set by law for those lists. This prompted a group of white firefighters, including lead Plaintiff Eugene Margerum, to initiate their own "disparate treatment" class action suit against the City. Specifically, the firefighters alleged that they would have been promoted if the City had extended the eligibility lists to the maximum of four years, as the City had done in the past. They claimed that the City's decision to let the promotion eligibility lists expire early discriminated against them on the basis of race in violation of the New York State Human Rights Law (NYSHRL). The firefighters also claimed violations of the New York Civil Service Law and the New York State Constitution.

In the *Margerum* suit, the City moved to dismiss the claims because the firefighters failed to serve a Notice of Claim before filing the suit. In New York, a Notice of Claim is required by General Municipal Law Section 50-i as a precondition to a certain lawsuits. The intent is to require the claimant to alert the municipal defendant of a forthcoming lawsuit and allow the municipality time to investigate the claim.

In response to the City's motion, the firefighters cross-moved for partial summary judgment on the issue of liability. The court denied the City's motion to dismiss, finding that a Notice of Claim was not required on a NYSHRL claim, and granted the firefighters' motion for partial summary judgment. The court also stayed the *Margerum* suit to allow the two MOCHA lawsuits to be decided. The federal court ultimately dismissed both of the MOCHA lawsuits.

Once the *Margerum* litigation resumed, the Appellate Division affirmed the denial of the City's motion to dismiss, agreeing that Section 50-i of the New York General Municipal Law did not require a Notice of Claim in this type of case. The Appellate Division reversed the grant of partial summary judgment to the firefighters, however, finding "they had failed to establish as a matter of law that the City's actions were not narrowly tailored to meet a compelling interest."

Just three weeks later, in another turn of events, the United States Supreme Court decided *Ricci v. DeStefano* (557 US 557 (2009)). In *Ricci*, the Supreme Court held that under Title VII of the Civil Rights Act of 1964 (Title VII), an employer cannot take affirmative action steps "based on mere statistical disparity alone." Rather, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate

impact liability if it fails to take the race-conscious (intentional] discriminatory action." After the Supreme Court issued *Ricci*, the Appellate Division—recognizing that the standards for recover under NYSHRL and Title VII are "in nearly all instances identical"—directed the City and the firefighters to re-argue the issues at the New York Supreme Court (trial court).

Back at New York Supreme Court, both parties moved for summary judgment on liability under the standards of *Ricci*. The court granted the firefighters' motion and denied the City's motion, finding that "the City had failed to meet the strong basis in evidence standard set forth in *Ricci*." On a second appeal, the Appellate Division affirmed the Supreme Court's decision. Accordingly, the case was sent back to the Supreme Court (for a third time) to determine damages. After a bench trial, the court entered judgment for the firefighters for $2,610,007 in economic damages and $255,000 in emotional distress damages. The Appellate Division then took up the case again, reducing the damages to $1,621,007. The Appellate Division also granted the parties leave to appeal to the New York Court of Appeals.

The Court of Appeals rejected the City's argument that a Notice of Claim was required for a NYSHRL claim. The Court noted that General Municipal Law Section 50-e requires a notice of claim for cases "founded upon tort," and that Section 50-i prohibits commencement of a lawsuit "'for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city' unless a notice of claim has been served in compliance with section 50-e." Because "[h]uman rights claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i," the Court found that NYSHRL claims do not require a Notice of Claim as a precondition to suit.

However, the Court went on to disagree with the lower courts on the liability issues, holding that liability under the *Ricci* standards should not have been decided by the Court as a matter of law. The Court stated: "There must be a credibility assessment of the City's position as to the validity of the [Civil Service] examinations, the prospects in the [MOCHA] federal litigation, and the reasons for its decision to expire the promotion eligibility lists." However, because of vague and somewhat inconsistent testimony by Commissioner Matarese regarding why he allowed the promotion lists to expire, such an assessment was not feasible without a trial. As the Court put it, "We know that Matarese decided to let the promotion eligibility lists expire in 2005 and 2006. What we do not know is why." This question, the Court held, is for a jury to decide. Therefore, the Court of Appeals is sending the case back to the Supreme Court—for the fourth time for those of you keeping track—for a trial on liability.

The Court of Appeals decision was not unanimous. While agreeing that a Notice of Claim should not be required, Judge Read issued a concurring opinion "simply to highlight an inconsistency in New York law, which the Legislature might choose to address." She pointed out that the Court of Appeals and other courts have found that County Law Section 52(1) requires a Notice of Claim for NYSHRL claims brought against counties, despite the fact that Section 52(1) is similar to Section 50-i in the General Municipal Law. "[I]t is hard to believe that the Legislature ever intended to create a situation where an action brought against the County of Erie alleging violations of the Human Rights Law would require a notice of claim…while the same type of action brought against the City of Buffalo would not."

Judge Rivera also issued a separate opinion, concurring as to the reversal of summary judgment for the firefighters, but dissenting as to the remand, as she believed summary judgment should be entered for the City. Judge Rivera did not address the applicability of the Notice of Claim requirement. Rather, she wrote in objection to the *Ricci* standards, which she felt should not have been extended to the NYSHRL. Judge Rivera reviewed the history of the NYSHRL, including its status as "the first state statute to ban employment discrimination in the private sector." She also pointed out the ways the NYSHRL has been amended and interpreted to provide broader protections than Title VII. Thus, while Title VII standards are certainly instructive to NYSHRL claims, Judge Rivera felt the Court should more fully analyze whether *Ricci* "is best suited to further our State's law and policy."

In conducting this analysis, Judge Rivera found that the federal *Ricci* standards are contrary to the Legislative intent to provide broad protections against discrimination. She noted that the *Ricci* standards subordinate the interests of groups who are disenfranchised by policies and procedures that have an adverse impact to those of individuals claiming disparate treatment. She also argued that the standard discourages employers from voluntarily changing discriminatory policies and procedures "out of fear that the employer will be unable to establish 'the strong basis in evidence' necessary to avoid liability for disparate treatment claims." According to Judge Rivera, this incentive for inaction is well-illustrated in this case: the City of Buffalo took action to change practices which were held discriminatory in the 1974 case and which were challenged as discriminatory in the MOCHA litigation, but now faces liability against Margerum and his co-Plaintiffs for taking these appropriate steps.

Accordingly, Judge Rivera would have rejected the application of *Ricci* in favor of the principle that "an employer does not commit statutorily prescribed intentional discrimination when the employer seeks to reduce and eliminate the causes of inequality at the workplace."

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Under this principle, the firefighters' disparate treatment claims lacked merit and the Court should have granted summary judgment to the City.

The takeaway here is that, as a result of the majority's decision in *Margerum*, employees and former employees seeking to sue their municipal employers for alleged NYSHRL violations will not need to serve a Notice of Claim and can proceed directly to a lawsuit. Further, because a Notice of Claim is not required, municipal defendants will no longer have the opportunity to conduct a pre-lawsuit examination of the claimant (known as the 50-h exam) in NYSHRL cases.

However, as Judge Read pointed out, there are caveats to this, including that county employees are still required to serve a Notice of Claim under County Law Section 52. A similar requirement exists under Education Law Section 3813 for claims against schools and school districts "for any cause whatever…relating to district property or property of schools…or involving the rights or interests of any district or any such school." This statute requires, as a pre-condition to suit, "that a written verified claim" be served on the district or school within three months after the claim arises. Federal courts and state appellate courts have extended this requirement to NYSHRL claims, at least where the plaintiff seeks damages (*see, e.g.*, *Barbato v. Bowden*, 63 AD3d 1580, 1581 (4th Dept 2009); *Hoger v. Thomann*, 189 AD2d 1048, 1049 (1993); *Falchenberg v. New York City Dep't of Educ.*, 375 F Supp 2d 344, 349 (SDNY 2005)). Thus, school district employees must still serve a Notice of Claim before suing for employment discrimination and other NYSHRL claims.

One final caveat: municipal and other employers should keep in mind that federal claims under Title VII require the plaintiff to file a pre-suit charge with the United States Equal Employment Opportunity Commission (EEOC). In New York, filing a discrimination charge with the New York State Division of Human Rights would satisfy this prerequisite, as charges with this state fair employment practices agency are automatically cross-filed with the EEOC.

Margerum is an important case, as it alters the way NYSHRL claims against municipalities are sued and changes the procedural devices and defenses available to municipal defendants on NYSHRL claims. For those interested in reading the decision in greater detail, the citation is: *Margerum v. City of Buffalo*, __ NY3d__, 2015 NY Slip Op 01378 (2015).

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Subrogees Beware: The Pitfalls of Subrogation for Insurers

By Montgomery Effinger

An insurer's right to subrogate to the rights of its insured against a wrongdoer is one of its most important tools. However, the treacherous path faced by an insurer while pursuing this right to recover losses paid under a policy is fraught with hazards that must be carefully navigated at each step in order to avoid the grave consequences associated with failure to honor the procedural, substantive and timing requirements for subrogation. The rights of such a "subrogee" are subject to sometimes conflicting authority derived from principles of contract, equity and statutory law. Insurers are required to navigate the challenges posed by the underlying litigation as well as the additional substantive and procedural hurdles posed by the subrogation process. This article examines the pitfalls to be avoided by a subrogee insurer as well as the principles of law and equity that lend support to insurers who seek to employ subrogation. Available options for recovery of insurers' payments such as stand-alone actions, impleader, and intervention, which may depend on the procedural posture of the underlying action, are also explored.

(a) Insurer's Rights of Subrogation

Insurance policies routinely include explicit language providing for conventional (contractual) subrogation, which entitles the insurer-subrogee, upon payment of a loss, to be subrogated to the insured-subrogor's right of action against any person whose act or omission caused the loss, or who was legally responsible.[1] Even in the absence of a contractual right under a policy, an insurer is still entitled to the historically important legal or equitable right of subrogation which arises by operation of law and is effectuated by judicial determination.[2]

The courts of New York have long supported insurers' right to pursue equitable subrogation as a means of transferring losses to legally responsible parties and to prevent double recoveries by insureds.[3] This doctrine "entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse," [4] thus assuming its insured's rights and remedies against the wrongdoers.[5] Equitable subrogation is liberally applied for the protection of those who are its natural beneficiaries—insurers that have been compelled by contract to pay a loss caused by the negligence of another.[6]

While the right of subrogation is not dependent on contract but arises by operation of law when payment has been made, where the right of an insurer to subrogation is expressly provided for in the policy, its rights must be governed by the terms of the policy.[7] Regardless of whether a right of subrogation arises by operation of law, by statute or regulation, or by contractual agreement, the controlling features are the same: subrogation is not a matter of right and is wholly dependent on the subrogor's claim against the third party and they stand in one another's juridical shoes.[8]

Generally, contractual subrogation trumps equitable subrogation under New York law, as well as the made whole doctrine (below), so long as the contract language giving priority of recovery to the insurer is clear and explicit.[9] However, an insurer may simultaneously possess both contractual and equitable subrogation rights,[10] and both are essential doctrines to protect insurers' rights. Nevertheless, New York courts sometimes ignore contractual subrogation provisions in situations involving group health insurance, uninsured motorist insurance, no-fault insurance and workers' compensation, where the insured has little, if any, input regarding the content of the contract.[11]

(b) Insurers' Available Options for Pursuing Subrogation

Since an insurer that has paid out under the policy possesses the derivative and limited rights of the insured, it may of course proceed in a separate "stand alone" action in its own name against the negligent third party to recoup the amount paid and without joining the insured as a party.[12] This has been held so even though the insured's losses are not fully covered by the proceeds of the policy.[13]

Insurers may also exercise various other options depending on their involvement in pending litigation. As a defendant in an action, an insurer may implead a third party that is, or may be, liable for the alleged wrongdoing, absent a contractual limitation and subject to the court's discretion.[14] Intervention is also available as a device for insurers under CPLR 1012 and 1013. Notwithstanding the principle that the permissive intervention statute should be liberally construed for the insurer's benefit,[15] courts also recognize that its use can create an adversarial posture between a plaintiff/insured and its insurer. Thus, the appellate departments are in disagreement regarding the use of intervenor as a means of pursuing subrogation in health care situations.[16]

(c) Formalities and Proof Required to Preserve an Insurer's Subrogation Rights

As an equitable doctrine in the context of insurance, an insurance carrier, upon payment of a loss, becomes subrogated to the rights and remedies of its assured to pro-

ceed against a party primarily liable without the necessity of any formal assignment or stipulation.[17] However, insurers ignore at their peril the essential prerequisites of documentary proof as well as procedural and timing requirements. Neither equity nor the clearest contractual provisions will save a subrogation claim from dismissal without compliance with these legal requirements.[18] In the absence of assignment or other contractual provisions to the contrary,[19] payment to the insured is the sine qua non of the insurer's right of subrogation whether by operation of law or by the express terms of the contract of insurance.[20] Likewise, it has been held that imprecise subrogation pleadings relying on generic allegations that there was "fronting" of various unidentified sums of money to an insured does not suffice to preserve subrogation.[21]

New York courts impose numerous burdens on insurer-subrogees, and their failure to include the entire policy with the subrogation complaint may result in an insurer's loss of the benefits of contractual subrogation.[22] An insurer may also have the onus of obtaining cooperation from its insured as it seeks to secure a loan agreement, subrogation receipt, or some other arrangement evincing an intent to assign to the insurer all or part of the insured's claim.[23] This type of agreement may serve the dual purpose of providing evidence of payment, "coupled with a fictional implementation to permit the insurer to sue in the name of the insured."[24] The Courts look to various legal principles as well as the text and surrounding circumstances in construing the meaning of such agreements.[25]

(d) Insurers Face the Same Challenges as Their Insureds

The case law also imposes many restrictions on subrogation that are shared by insurer and insured alike. Thus, a stand-alone subrogation action brought directly by an insurer against a wrongdoer is governed by the same statute of limitations applicable to the action by the insured against the wrongdoer since a subrogation claim is derivative of the underlying claim, and the subrogee is subject to the same defenses and possesses only such rights as the subrogor with neither enlargement nor diminution.[26] For example, in subrogation actions involving personal injury claims, the cause of action accrues on the date of the insured's injury.[27] The statute of limitations for third-party (as with stand alone) subrogation actions is the same as the period applicable to the underlying suit.[28] However, an intervenor's subrogation claim may be deemed to have been interposed as of the filing date of the original action under appropriate circumstances.[29]

(e) Insurers' and Insureds' Conduct May Further Limit Subrogation

Insurers must be careful about how their conduct during the course of interaction with insureds and parties during litigation may influence a court's treatment of their subrogation rights. The insurer may be found to have waived its subrogation claims or otherwise be estopped from making such claims, either by contract or by conduct inconsistent with the right of subrogation.[30] It will be denied relief where the loss of subrogation rights is due to a problem of its own making.[31] The insurer's subrogation rights may also be lost where its conduct invokes the doctrine of unclean hands.[32] It has been held that "a subrogee must itself do equity [since] the doctrine of subrogation was formulated to dispense equity and justice among the parties."[33] Furthermore, an insured may destroy an insurer's subrogation rights by settling with or releasing a tortfeasor from liability.[34]

(f) The Perils of "Voluntary" Payments

Surprisingly, insurers sometimes pay claims without a contractual duty even when contrary to the insurer's legal and economic interests.[35] Courts and subrogation defendants may inaccurately apply the label of "voluntary payment" to the insurer's conduct as a basis for dismissal[36] and often interchange "contribution" and "subrogation" in this regard.[37] The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law."[38] While the rule appears inapplicable to conventional subrogation,[39] the "voluntary payment doctrine" is another qualification regarding the right of equitable subrogation.[40]

An insurer that assumes the defense and indemnification of an insured when there is no obligation to do so becomes a mere "intermeddler"or a volunteer with no right to recover any monies it paid on behalf of the insured.[41] One example of destruction of an insurer's subrogation rights by the voluntary payment doctrine occurred when on the eve of trial, the insurer discovered an applicable policy exclusion, but nevertheless settled the action.[42] However, a retender of the defense to the appropriate party voids this mistake unless that insurer is estopped from denying or disclaiming coverage.[43] Additionally, a party seeking subrogation can establish that its payments were not voluntary either by pointing to a contractual obligation or to the necessity of the payment in order to protect its own legal or economic interests.[44]

(g) Limits Imposed on Insurers Under the Antisubrogation and Made Whole Rules

The "antisubrogation" doctrine has been the subject of voluminous analysis and is beyond the limited scope of this article. In summary, the rule generally prevents an insurer from commencing a suit against its own insured arising out of the risk for which the insured was covered.[45] In other words, the antisubrogation rule limits the instances in which an insurer and its insured have adverse interests by preventing an insurer from stepping into the shoes of its insured to sue a third-party tortfeasor "if that third party also qualifies as an insured under the same policy

for damages arising from the same risk covered by the policy."[46]

For example, where an insurer fashioned the litigation to favor one of its insureds at the expense of its second insured, thereby creating a conflict between its interests and the interests of that second insured, the insurer was prevented by the anti-subrogation rule from shifting any potential liability for the second insured's loss to its additional insurer.[47] Furthermore, under the "made whole" rule as applied to equitable subrogation, the insurer has no right to share in the proceeds of the insured's recovery from the tortfeasor if the sources of recovery are inadequate to fully compensate the insured for its losses.[48]

(h) Other Statutory Authority That May Affect an Insurer's Rights

Even beyond the common law challenges posed to subrogation, insurers' obligations and rights may be profoundly affected by numerous statutes including: legislation regarding collateral source payments in tort actions;[49] personal injury claims;[50] workers' compensation;[51] and Medicaid[52] and Medicare[53] recoupment. The obvious message is that familiarity with all of the relevant statutory authority is a prerequisite to protecting an insurer's rights.

(i) Equity to the Rescue of Subrogation Claims

The controlling inquiry under an equitable analysis is whether one party is unjustly enriched at the expense of another—the law abhors unjust enrichment.[54] It has been advocated that courts should be inclined to extend rather than restrict the doctrine of equitable subrogation.[55] Principles of equity may also serve to protect an insurer from the consequences of conduct by its insured that undermines its subrogation rights. New York law softens the blow of an insured's non-approved release by placing the burden on the insured to prove that such release did not prejudice the subrogation rights of the insurer.[56] Where a release of liability given by the insured to a third party destroys the insurer's right to subrogation, such a release bars the insured's right of action on the policy, and the insurer has a right to recover from the insured any amount paid on the policy should the insured fail to meet its burden of proof.[57]

Furthermore, where the insured enters into an unapproved settlement with a third party tortfeasor who has knowledge of the insurer's rights, the insurer will not be precluded from enforcing its right of subrogation against the wrongdoer in order to prevent a fraud upon the insurer.[58] For example, a court denied an insured's demand under the "made whole" rule that its insurer "disgorge" funds obtained from a tortfeasor in a subrogation action because the insured had sat on its rights and had not sued the tortfeasor directly, thus allowing its claims against the tortfeasor to become time barred.[59] The insured had already received the maximum policy coverage, and the court relied upon fundamental fairness for its decision.

(j) Some Flexibility Provided to Insurers That Do Not Fully Pay

Although the absence of proof of payment may be fatal to an insurer's subrogation claim as explained above, the courts of New York have shown some leniency toward insurers' subrogation by allowing claims in the absence of full payment and under certain circumstances. "Judicial economy" was cited by the First Department as a basis for allowing an insurer to bring a stand alone subrogation action prior to payment.[60] Under the general rule, an insurer that has paid part of a loss may proceed *pro tanto* against a third person whose negligence or wrongful act caused the loss.[61]

Furthermore, a defendant insurer (other than automobile collision insurers) ordinarily may implead a third party for subrogation prior to making any payments to the insured unless the parties to the insurance contract have explicitly agreed that the insurer shall have no right to bring a subrogation action until the insurer's liability has been established or the claim paid in part or in full.[62] However, the insurer that brings in a third party in this manner will not be able to collect on the claim until payment is actually made.[63]

It has also been held that an insurer that has not paid all of its insured's losses before commencement of a timely subrogation action may still be able to include a "technically unripe" claim with the timely commenced action.[64] The court pointed out that the insurer "possessed an inchoate, or contingent right of subrogation" for costs which were timely noticed in the original subrogation complaint, but were not paid until after the Statute of Limitations had run.

Conclusion

The unwary insurer that does not cautiously address each of the procedural and substantive subrogation requirements may find itself denied the means to recover losses through subrogation. In addition to procedural, timing, and substantive impediments, insurers must avoid being deemed a "volunteer." Failure to avoid these many pitfalls could result in destruction of an insurer's rights. Despite formidable hazards, the New York courts continue to recognize the importance of allowing insurers to recoup payments. Historical principles of common law and equity (as well as contractual subrogation) are applied to protect these essential rights. Insurers that are aware of this authority and respect its requirements will have the best chance of being rewarded with an opportunity to employ the tools of subrogation as a means of shifting losses to responsible parties.

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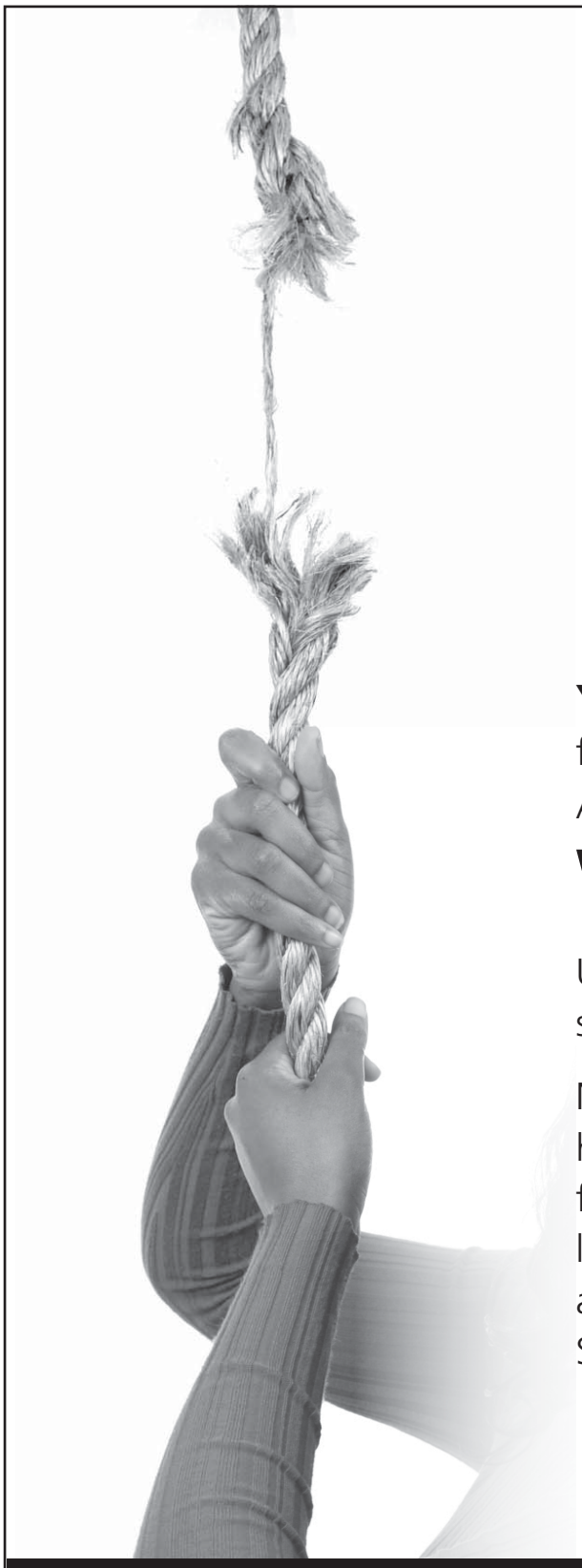

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Preparation of the Witness for Depositions

By Thomas P. Cunningham

The most critical part of a case prior to trial is the deposition of the parties. A case can be won or lost based on both the content and presentation of the testimony. It would be foolish to believe that you could make someone into a great witness. A party to an action is not generally a person who has had any experience testifying. It is not a natural setting, and is difficult to reproduce with the same stress that will be experienced during questioning at a deposition. Does this mean that witnesses should not be prepared before testifying? Of course not. The key to preparation is setting your goals for the deposition for the particular witness. With correct goals, the deposition preparation will lead to a successful deposition. The common goals for all depositions should be to provide testimony that is truthful, complete, accurate, and well thought out. Witnesses should be prepared so that they are not thinking about certain facts or issues for the first time during the questioning. They should be prepared so that they are comfortable with the facts and issues. This will lead to them providing the most accurate and complete account of the facts of the case.

A. Preparation by the Attorney

Preparation of a witness begins with preparation by the attorney. An attorney cannot begin to prepare for the deposition of the witness without first having a complete understanding of both the facts and the law of the particular case. You must know the facts of the case so that you know what the witness may need to testify to at the deposition. You need to be familiar with any accident reports, statements, photographs, contracts, etc. The attorney will also need to understand the prima facie case and the burdens of proof. You must know what is significant in the case, so that you know the potential topics for questioning and the critical components that the client will need to understand about the case. The witness will also see that you are prepared. This will give the witness confidence in you and make him or her more relaxed.

B. The Purpose of Preparing the Witness

Preparing a witness does not mean telling him or her everything he or she will need to say to establish the case. This has both ethical and practical problems. Ethically, we cannot tell a witness what he or she should say at a deposition—we cannot suborn perjury. Practically, a witness cannot remember everything he or she is told and say it the way it would need to be said to be both factually correct and credible. Why prepare? The function of the preparation is to make sure that a witness is not being asked to consider an issue or fact for the first time at the deposition. The witness should have an opportunity to think through his or her responses so that he or she can be both complete and accurate. The witness does not need to know every specific question that will be asked, but you should have had a discussion before the deposition of each of the critical facts and issues in the case. For example, if a witness needs to think at the deposition about the color of the light, the speed of the car, the distance to certain landmarks, then you have not done your job. Again, the purpose is not for you to provide the answers. The purpose of the preparation is to assist the witness with recall so that the testimony he or she provides is an accurate account of what he or she observed.

C. The Mechanics of Testifying

Timing

It is generally not ideal in a complex case to meet with a client the morning of the deposition to prepare for testimony. You should provide the witness with time to think about the issues you discussed. This may lead to additional questions by the witness or recall of events that he or she was unable to remember at your meeting. The meeting should take place a couple of days before the testimony so that the issues you have discussed are fresh in his or her mind. It should not be too long before so that the witness has forgotten your preparation.

General Information

The witness should be told the purpose of depositions. It has both a fact finding component and to lock in testimony if the case were to proceed to trial. The witness should be told that he or she will be taking the same oath that will be taken at trial. The proceedings are informal, but this does not mean that it should not be taken seriously. The witness should not let the informal nature of the proceeding lull him or her into a sense of false security. The witness should be told not to make the deposition a conversation. The testimony he or she provides cannot be easily undone if it is incorrect or only partially complete. You should discuss the following:

- Your role in the process
- The role of the other attorneys
- The role of the court reporter
- Where the deposition will be conducted and who will be present
- The type of questioner and personality of the attorney
- Attorney-client privilege—tell you everything
- Use of objections
- Opportunity to take breaks during questioning
- Possible length of the deposition
- The order of the proceedings

A witness who knows what to expect is generally less nervous about the process and will be more relaxed when he or she testifies.

General Advice

These are things to discuss with your witness about testifying in general. These are things that are not specific to the case.

- Dress appropriately
- Be likeable and keep your cool
- Always tell the truth
- Listen carefully to the *entire* question before answering
- Understand the question before answering
- Think about your answer before speaking
- Do not volunteer information
- Be accurate and complete in your responses
- Provide reasonable estimates
- Do not guess, speculate, or assume
- Correct inaccurate answers immediately
- Do not adopt the testimony of other witnesses who testified before you
- Do not accept the statements of counsel as facts
- It is okay to say you don't know or don't remember
- It is proper for you to have met with your attorney
- This is not the time to tell your side of the story
- Do not be intimidated by a bully
- Read the entire document before answering
- Do not try to provide the response you think your lawyer may want
- There is no "best" answer

D. To Review or Not to Review—That Is the Question

Some attorneys will tell you to have your client review nothing. The less he or she knows the better. I believe that this is the wrong approach. You should have every document or photograph that the witness may be asked to review at the time of the deposition present for the witness to review. These are documents that have been previously disclosed by the parties. There should not be any issues relating to confidentiality or disclosure. Do not show the witness documents that you do not intend to produce to other parties because they are not subject to disclosure. This would include the statement of a witness to an accident. A witness should not be reviewing a document for the first time at the deposition. This will often lead to incomplete or not well thought out testimony. It could be the downfall of your case if the witness testifies incorrectly concerning this evidence.

For example, the witness may be shown a photograph of the area where a fall down occurred. He or she has not been in the area in three years and had not reviewed any photographs. At the deposition, the witness is asked to show where he or she fell. He or she may be nervous and not take his or her time in examining the photograph. This could result in the witness marking the incorrect area because the photograph was not taken from a perspective that he or she had at the time of the accident. It would take the witness time and possibly an explanation of the perspective or other photographs to show the entire area. Preparation would be the key.

The witness should also review all statements that he or she has given that have been produced and any pleadings that he or she has verified. He or she should be consistent with what he or she has said previously or be prepared to testify as to why something was incorrect or inaccurate.

E. Review Background

Review the background of your witness. Tell him or her that he or she will be required to answer personal questions about his or her background. Some people are reluctant to discuss personal information. This may start the deposition on a bad note. The witness may become immediately agitated and not respond thoughtfully. Counsel may also take an immediate dislike to the witness. This will not help the case during questioning or after the deposition. Do not make your client's case a crusade for your opposing counsel.

You should review your client's education, criminal history, marital status, military service or any other aspect of his or her background that may be significant to the particular case. This part of the deposition should proceed smoothly.

F. Discuss Your Client's Recollection

- Review all of the facts in a chronological order
- Take notes of the your client's recollection
- Review in more detail the events and circumstances
- Discuss any potential exaggeration
- Review any documents that may assist his or her recollection
- Question whether the information is from his or her own knowledge or was obtained from another source

G. Refreshing Your Client's Recollection

This is a difficult decision to make during preparation. As discussed briefly above, there are dangers in not having your client review any documents. The primary concern is that the witness will not be prepared to respond with the best and most accurate answer at the time of the deposition. You must weigh the pluses and minus-

es of showing your client documents or photographs that may refresh his or her recollection of certain facts.

Pros

- Facts may be needed to satisfy your burden of proof at trial
- Failure to recall the fact may hurt your client's credibility
- The witness may be shown a document or photograph at deposition and recall the fact at that time
- His or her recollection may conflict with evidence in the case

Cons

- Documents used to refresh recollection are discoverable
- The witness may adopt the information as his or her own recollection
- Educate the witness on topics that he or she may not recall

H. Preparation for Questioning of the Witness

Advise your client that your purpose in preparing him or her for a deposition is not to ask every question he or she can expect to be asked at a deposition. Tell the witness that you hope to cover almost everything that he or she can expect to be questioned on. The witness may become nervous the first time they are asked a different question or in a different way. He or she should anticipate different questions. This also prevents the witness from attempting to prepare what he or she believes to be the perfect response to the question. Tell the witness that the only correct answer is the accurate, complete, and truthful answer. Tell him or her that a good lawyer will eventually be able to uncover and expose a lie. The entire case will fall on the lie. Don't lie.

You should ask the witness the questions that he or she can expect to be asked. Listen for incomplete responses and things that the witness is misunderstanding. You should ask your client questions to determine whether he or she is prone to guessing. Counsel the witness against guessing. This is the time for you to get a good feel as to how he or she will testify, his or her weaknesses as a witness, and whether his or her nerves will override the ability to think. The purpose is to make sure that your witness is able to present the facts in an accurate and complete manner. The testimony should not be clouded by the inability to present the case. For example, if your client saw the car cross over into his or her lane 10 feet from him or her, then he or she should be able to provide the same information at the deposition when asked the questions. This may be easier said than done with some witnesses.

A complete preparation will include discussing your client's responses to the questions you prepared. It is proper for you to discuss how he or she responded to the questions, whether the responses were complete, what he or she may be misunderstanding in the question, why the response may be misconstrued, etc. For example, a common question of a plaintiff is: "What activities are you unable to do as a result of the injuries you claim to have sustained in this accident?" The witness may answer in preparation: "I can't golf or bowl." You know from prior discussions that your client told you that she can no longer cut the lawn, clean the house, garden, and shovel the driveway. When you follow up on this issue with your client, she advises that she thought the question meant "recreational activities." You cannot assume that the client understands or appreciates the impact of an incomplete response. This simple example will show the client that she must be thinking broader when asked questions. She also should not assume that she knows what the questioner was looking for and limit the response. This question called for a very broad response.

The key is not to over-coach the witness. You are asking questions he or she can expect to hear at the deposition, but not providing him or her with the best answer. This is both an ethical and practical problem. Lawyers cannot tell a witness to perjure himself or herself. Even if the answer is truthful, the practical problem is that a witness will have difficulty saying something the way you may want it said. He or she is not a professional witness and will have a difficult time remembering exactly how something should be said. This will be more difficult if the question is not asked the exact way it had been asked during the preparation.

I. Remember Your Goals

The strategy for your case should be incorporated into the deposition. The deposition, like every other part of your case, should follow a strategy. List your goals prior to preparation. Your goal may be summary judgment, to establish the value of the injuries, solidify a defense, etc. You should consider:

- Burdens of proof
- Critical facts of your case
- Weakness in proof
- Presentation of the witness and testimony
- Theory of the case

The witness may not be testifying on all parts of your case; however, you must understand the role of the particular witness and how he or she fits into your case. A well thought out strategy and defined goals will assist in preparing the particular witness for the types of questions he or she will be expected to answer. It will also assist the witness in understanding his or her role in the process.

Thomas P. Cunningham is a partner at Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.

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SCHEDULE OF EVENTS

Friday, October 9

2:00 p.m. - 6:00 p.m. **Registration - Pre-Function West**

3:00 p.m. - 5:00 p.m. **Executive Committee Meeting - Philippine Sea**

5:30 p.m. - 6:30 p.m. **Opening Night Cocktail Reception - Palm Garden-Wantilan Area**
Sponsored by Vanson Investigations, Inc.

Dinner is on your own this evening

8:30 p.m. - 10:30 p.m. **Ice Cream Social for Children & Adults - Philippine Sea**

Saturday, October 10

7:30 a.m. **Registration - Pre-Function West**

7:30 a.m. - 8:30 a.m. **Executive Committee Breakfast Meeting - Philippine Sea**

8:45 a.m. - 12:35 p.m. **General Session - Coral Sea**

8:45 a.m. **Welcome and Introductory Remarks**
Mirna M. Santiago, Esq., Section Chair, White Fleischner & Fino, LLP
Charles J. Siegel, Esq., Program Chair, Law Offices of Charles J. Siegel
Claire P. Gutekunst, Esq., President-Elect, New York State Bar Association

9:00 a.m. - 9:50 a.m. **Effective and Persuasive Trial Advocacy: A View From the Bench**
(1.0 credit in Professional Practice)

Moderator: **Charles J. Siegel, Esq.**, Law Offices of Charles J. Siegel, New York City

Speakers: **Hon. Denis J. Butler**, New York Supreme Court Justice, Queens County
Hon. Douglas McKeon, New York Supreme Court Justice, Bronx County
Hon. George J. Silver, New York Supreme Court Justice, New York County
Hon. Helena Heath, Albany City Court, Albany County

9:50 a.m. - 10:40 a.m. **Cyber Risks and Cyber Insurance: What You Should Know**
(1.0 credit in Professional Practice)

Moderator: **Elizabeth A. Fitzpatrick, Esq.,** Hurwitz & Fine, PC, Melville, NY

Speakers: **Kelly S. Geary, Esq.**, Senior Vice President,
Lemme, a division of Integro USA, Inc., Arlington Heights, Illinois
Betsy Woudenberg, Founder and CEO, IntelligenceArts, Washington, DC

10:40 a.m. - 10:55 a.m. **Refreshment Break**

10:55 a.m. - 11:45 a.m. **Professional Liability/Ethics: Minimize Your Risk with Best Practices** **(1.0 credit in Ethics)**

Moderator: **Mirna M. Santiago, Esq.,** White Fleischner & Fino, LLP

Speakers: **Vincent E. Doyle, Esq.**, Connors & Vilardo, LLP, Buffalo, New York
A. Michael Furman, Esq., Furman Kornfeld & Brennan LLP, New York City
David Paul Horowitz, Esq., Geringer, McNamara & Horowitz, New York City
Deborah A. Scalise, Esq., Scalise Hamilton & Sheridan LLP, Scarsdale, NY
Sarah Jo Hamilton, Esq., Scalise Hamilton & Sheridan LLP, Scarsdale, NY

11:45 a.m. - 12:35 p.m.	**Damage Analysis: Medicare Liens and Wage Claims** **(1.0 credit in Professional Practice)**
Moderator:	**Michael C. Tromello, Esq.,** Tromello, McDonnell & Kehoe, Melville, NY
Speakers:	**Carmella Limongelli**, Ringler Associates, New York City **Martin Martinovic,** Martin Driscoll & Damico LLP, New York City
	Afternoon Free to Explore Universal Studios
5:30 p.m. - 6:30 p.m.	**Cocktail Reception - Promenade Deck** ***Dinner is on your own this evening***
8:30 p.m. - 10:30 p.m.	**Hospitality - Philippine Sea** ***Sponsored by*** ENRIGHT Court Reporting & Transcription

Sunday, October 11

7:30 a.m.	**Registration - Pre-Function West**
7:30 a.m. - 8:30 a.m.	**Executive Committee Breakfast Meeting - Philippine Sea**
8:45 a.m. - 12:20 p.m.	**General Session - Coral Sea**
8:45 a.m. - 9:35 a.m.	**How To Be A More Effective Negotiator: Views From A Number of Mediators and Arbitrators** **(1.0 credit in Professional Practice)**
Moderator:	**Charles J. Siegel, Esq.**, Law Offices of Charles J. Siegel, New York City
Speakers:	**Hon. Allen Hurkin-Torres (Ret.)**, JAMS, New York City **Hon. Ariel E. Belen (Ret.)**, JAMS, New York City **Claire P. Gutekunst, Esq.,** President-Elect, New York State Bar Association, Independent Mediator & Arbitrator, Gutekunst ADR, New York City
9:35 a.m. - 10:25 a.m.	**CPLR Update** **(1.0 credit in Professional Practice)**
Moderator:	**Thomas J. Maroney, Esq.,** Maroney O'Connor LLP, New York City
Speakers:	**Thomas Gleason, Esq.,** Gleason Dunn Walsh & O'Shea, Adjunct Professor of Law, Albany Law School **David Paul Horowitz, Esq.,** Geringer, McNamara & Horowitz, New York City
10:25 a.m. - 10:40 a.m.	**Refreshment Break**
10:40 a.m. - 11:30 a.m.	**Medical Malpractice in New York: A View From All Sides: The Bench, The Bar and OCA** **(1.0 credit in Professional Practice)**
Moderator:	**Michael C. Tromello, Esq.,** Tromello, McDonnell & Kehoe, Melville, NY
Speakers:	**Hon. George J. Silver**, New York Supreme Court Justice, New York County **Hon. Douglas McKeon**, New York Supreme Court Justice, Bronx County **Andrew J. Smiley, Esq.**, Smiley & Smiley LLP, New York City **Keith L. Kaplan, Esq.**, Kaufman Borgeest & Ryan LLP, Garden City, NY

SCHEDULE OF EVENTS

11:30 a.m. - 12:20 p.m.	**Bad Faith: New York v. Florida (1.0 credit in Professional Practice)**
Moderator:	**Douglas J. Hayden, Esq.,** Wright Risk Management, Uniondale, NY
Speakers:	**Jeffrey A. Block, Esq.,** Block O'Toole & Murphy, LLP, New York City **Richard Lydecker, Esq.,** Lydecker Diaz, Miami, Florida **Kevin McCarthy**, Florida Commissioner of Insurance Regulation, State of Florida **Robert J. Permutt, Esq.,** Nationwide Insurance, White Plains, NY
	Afternoon Free to Explore Universal Studios
6:30 p.m.	**Cocktail Reception - Pre-Function West** ***Sponsored by*** MDD FORENSIC ACCOUNTANTS
7:30 p.m.	**Dinner - Coral Sea** ***Sponsored by*** DEITZ COURT REPORTING 800-673-0166
8:30 p.m. - 10:30 p.m.	**Hospitality - Philippine Sea**

Monday, October 12

Departure

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of **7.0 MCLE credits in Professional Practice and 1.0 credits in Ethics.**

Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under that policy, any member of our Association or non-member who has a genuine basis of his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to Lori Nicoll at: New York State Bar Association, One Elk Street, Albany, New York 12207 or e-mail lnicoll@nysba.org.

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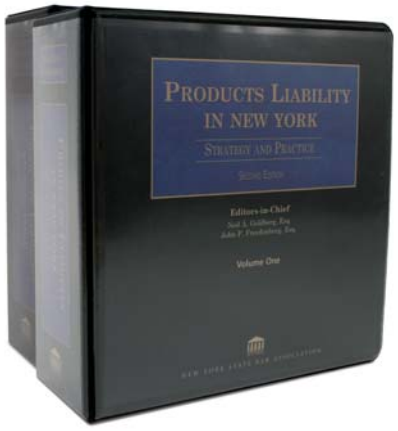

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