2022 | VOL. 49 | NO. 1

Torts, Insurance & Compensation Law Section Journal

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

The Civil Jury Trial in a COVID-19 World

Domestic Animal Liability Update

Sports and Recreational Activities: Game Over? Or, Let the Games Begin!

Phishing Scams: Do You Need a Bigger Boat?

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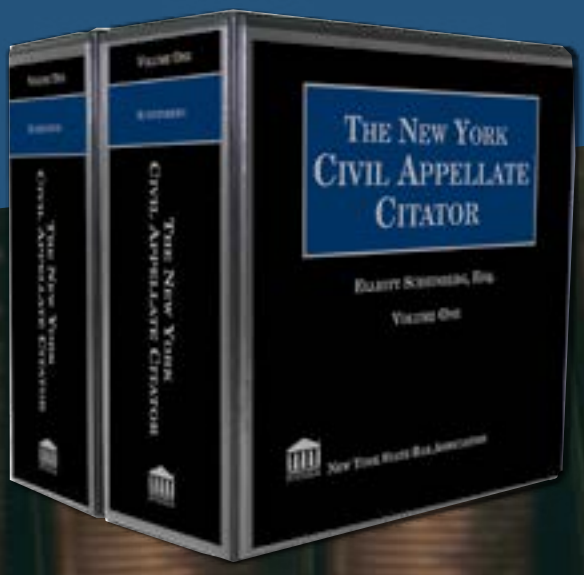

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Contents

NYSBA

Torts, Insurance & Compensation Law Section Journal

2022 | Vol. 49 | No. 1

Features

Regulars

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Publication Date: March 2022

ISSN 1530-390X (print) 1933-8503 (online)

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Message From the Chair

Dear Fellow Members,

Last month I was honored to be elected Chair, and I look forward to serving the Section this year. One of the many benefits of membership in the TICL Section is the ability to network with other attorneys in our unique practice area. Our Section's many events and activities provide us with the ability to create and foster dynamic and valuable professional relationships with colleagues from across the state. As we plan to return to in-person events this year, I encourage you all to keep a look out for upcoming opportunities to get together. We have some exciting things in store and will round out 2022 with our destination meeting at the Hammock Beach Golf Resort & Spa on Florida's Palm Coast. We are working on putting together a compelling CLE program for this meeting, so stay tuned for more details!

I look forward to working with my fellow officers: Vice-Chair Brian Rayhill; Secretary Amanda Kuryluk; and Treasurer Brendan Baynes, as well as the rest of our vibrant board, to bring Section members relevant and rousing educational programs, as well as the fun networking events that our Section is known for.

After nearly two years of interfacing primarily on computer screens, we can all derive great benefits from the in-person events and networking opportunities that TICL has to offer. For that reason, I would also like to take this opportunity to encourage each of you to recommend a TICL membership to any attorney in your office who has not yet joined. This year is a perfect chance to grow and expand our section by introducing new members to all that the TICL Section can provide.

I look forward to seeing you all in 2022.

Molly Casey

The Civil Jury Trial in a COVID-19 World

By Michael P. O'Brien

What would a jury trial look like in our new reality?

I think back to what feels like an eternity ago—early March 2020, when I was on trial in Supreme Court, Kings County. There were three lawyers on the case; I represented one of the defendants. The lawyers and I met in TAP (Trial Assignment Part) on the morning that jury selection was scheduled to begin—shaking hands; exchanging pleasantries. We shook plenty of other hands as well while we waited—lawyers we've tried cases against; lawyers we've worked with at prior firms; lawyers we know from bar associations—laughs, handshakes—all in close contact.

We were given our jury slip. After some quick text messages to our respective clients, we gathered in the Lawyers' Room for the old "hurry up and wait." Every downstate trial lawyer knows the Kings County Lawyers' Room—dimly lit; uncomfortable furniture; yellowing advertisements for office space clinging to the wall; a photograph from a bar association golf outing from sometime in the 1990s. The Kings County Lawyers' Room isn't pretty—but it's ours. It is our home-away-from-home; our "office" while we wait. More hand shaking. More talking. Some jokes about the coronavirus. Some lawyers using hand sanitizer. But all in all, business as usual.

Our case was finally called and we were given a panel of 20 jurors. The empaneling room was about 10 feet by 12 feet for 20 jurors and three lawyers. All told, jury selection was eight separate panels over five days—that's close contact with approximately 160 individuals for long stretches of time, in cramped rooms, with no ventilation. The jurors were in tightly packed rows of four—shoulder to shoulder; back to back. My co-counsel and I were at a table at the front; a six-foot table for three people. Simple math means we were shoulder-to-shoulder for hours a day, several days in a row, sharing breathing space and touching the same surfaces.

We finally had our jury; and now we waited for a trial judge—hurry up and wait, again. The lawyers were relatively isolated during this time—sitting on separate benches while reading deposition transcripts (hopefully not for the first time); reading yesterday's *New York Post*; scrolling through Twitter for the latest news. Where were the jurors? Certainly not spread out like the lawyers were. The jurors were still in tightly packed rooms with hundreds of other jurors—those assigned to other cases; those excused from other panels; those there for the first day.

Our case was called and we were assigned to a trial judge. Fortunately we were assigned to one of the larger courtrooms in Supreme Kings—fortunate not just for the extra space but also for the aesthetic . . . soaring ceilings; mahogany wood paneling; elevated bench and jury box—what a courtroom "should" look like.

Despite the size of the courtroom, the lawyers were still in close proximity: three lawyers at two six-foot tables. The jurors were even closer to each other: four to a row and back-to-back. The lawyers all got along well, but this was a rather contentious liability trial. This meant numerous objections and sidebars. The sidebars were out of the presence of the jury, in the hallway between the courtroom and the judge's chambers. In other words, a very tight space with several people in close proximity.

> "When those cases finally make it onto a trial calendar, what will that jury trial look like? "

The trial came to a temporary halt not because of a verdict or a settlement, but because of COVID-19. The jurors were given credit for their service. The transcript was ordered. A new jury will eventually be selected and the trial will be given priority by the same trial judge. Now here we are over a month later, and there are no cases on the trial calendar. There are cases in my office that are ready for trial, but there is no trial date.

When those cases finally make it onto a trial calendar, what will that jury trial look like? The answer is that no one really knows, but here are a few thoughts I would like to share:

We will simply need more room for civil jury trials. Larger and better-appointed rooms will be necessary for jury selection. Lawyers will still be able to adequately examine potential jurors for their clients' cases; it would just be in a much larger room than we are used to. Everyone will have to sanitize and wear a mask.

Courtrooms must be reconfigured for jury trials in a COVID-19 era. We all know that some courtrooms are larger than others. How many of us have been to a mo-

tion or conference day with 125 cases on the calendar, but room for only 15 lawyers in the courtroom? The courts should designate the larger courtrooms *solely* for jury trials. If conferences and motions transition to remote argument, then there will be many more courtrooms available to be designated as "trial courtrooms." Another downstate courtroom comes to mind—the Ceremonial Courtroom in Supreme New York at 60 Centre Street. This room is huge, with ample room for litigants, lawyers, judges and jurors.

Where should the jurors be placed during testimony? In a civil trial, the jury is typically eight individuals—six regular jurors and two alternates. In a large enough courtroom, each juror could be given their own, partitioned space. In the alternative, and if there is not adequate space, some jurors could be in the courtroom while others are on a live feed in a separate room. The same goes for when it is time for the jury to deliberate: adequate space, partitions, and possibly even jury deliberations and verdicts via video-conferencing. The jurors would be in the courthouse and in the same court "room" but just not next to each other. Supplemental jury instructions can be drafted to address concerns related to the partitions, videos, and even the wearing of face masks.

Speaking of face masks, What about personal protective equipment (PPE)? Will you try a case with a face covering on? Would you want your client to have their face covered? What about the jurors? Much of communication is non-verbal (see Albert Mehrabian's 7-38-55 Rule), but face coverings do not hide *all* body language, nor do they mask the tone of one's voice. Still, how will we know when someone is frowning, smirking, or smiling? Again, a supplemental instruction may be necessary regarding the wearing of facial covering(s).

The court system should retain a team of public health professionals to oversee court operations, to ensure (or at the very least encourage) the safety of everyone involved in a jury trial. This will require the input from the clerks and court officers, the vital backbone of a smoothly operating court system. This will require educating the public—informing the jury pool that their service is vital, that their service is truly valued, and that they will be safe.

This will not be easy; this will not feel normal; but jury trials will return. The civil justice system will continue. The civil justice system *must* continue, because society itself depends upon the judicial resolution of civil disputes. The New York State Constitution states (Article 1, §2) that there shall be a trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision, and that this shall remain "inviolate forever."

Recent reports and studies suggest that we may be engaging in some form of social distancing until 2022. The governor mentioned that our "new normal" could be a similar time frame: 12-18 months. This "sounds" like forever; but this is *not* forever. With a vaccine, much of these concerns vanish. Prior health crises eventually came to an end. This one will too. In the meantime, we must make plans to proceed with the civil justice system—especially trials. We cannot and will not be on pause indefinitely—not when liberties, livelihoods, reputations, and financial concerns are at stake.

The COVID-19 world is a time of crisis, but it is also a time of opportunity. It is a time to learn, to grow, and to be better. Just writing down my thoughts for this essay, I realize what a luxury and privilege it is to have the time to just sit, think, and write. To my fellow litigators, this is a time to truly bring the court system into the 21st century with innovation and technology. The jury trial may look different for the foreseeable future, but I know we are ready to meet that challenge and to exceed expectations.

Michael O'Brien of O'Brien Law Firm, PLLC is Immediate Past Chair of the TICL Section.

A Primer on COVID-19 and Insurance

By James A. Johnson

> "It is common for insurance policies to give with the right hand and then take away with the left."
>
> —Richard Posner, Chief Judge of the 7th Circuit Court of Appeals, *Curtis-Universal Incorp. v Sheboygan Emerg. Med, Services, Inc*., 43 F. 3d 1119, 1123 (7th Cir. 1994).

The ongoing coronavirus (COVID-19) pandemic and variants are the most devasting and disruptive forces in recent history. The COVID-19 pandemic will lead to numerous lawsuits involving insurance coverage and commercial disputes. In commercial cases, should a party be excused for its non-performance of its contractual obligations? The answer depends on the terms of the contract, the particular facts surrounding the non-performance and the law of the jurisdiction.

Commercial Cases

A party whose operations are compromised by the pandemic has potential defenses such as impossibility and force majeure. The impossibility doctrine excuses a party's performance when the destruction of the subject matter of the contract or the means of performance is objectively impossible. The impossibility must be the result of an unanticipated event that could not have been foreseen or guarded against in the contract. Section 2-615 (a) of the Uniform Commercial Code requires only commercial impracticability.[1] The commercial impossibility doctrine requires a party to show impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.[2]

Force Majeure

There is no single standard force majeure clause. The iterations of specific events of force majeure can vary widely, particularly between industries. The force majeure defense applies only if the contract contains a force majeure clause. A force majeure clause is a provision that excuses non-performance due to certain circumstances beyond the parties' control. What constitutes a force majeure event varies by contract but typically includes events such as riots, strikes, war, governmental orders and acts of God. Compliance with a governmental order has been held to be a sufficient excuse because the government has the power to compel compliance.[3] However, whether a force majeure clause that specifically references acts of God will apply to coronavirus cancellation or interruption is highly fact- and jurisdiction-specific. Most jurisdictions require the act of God to be unforeseeable.[4] In addition, courts construe force majeure cases narrowly. Generally, a party's performance will be excused only if the clause specifically contemplates the particular event which prevents performance.[5] Also, a party must comply with conditions attached to the exercise of that clause—for example, to notify affected parties within a specific time period following a force majeure event.

Business Interruption Claims

A typical business interruption clause or endorsement will provide coverage for certain business loses for a temporary closure. This coverage is subject to policy dollar limits and certain specific exclusions.[6] The typical Insurance Service Office (ISO) BI insurance requires a specific triggering event-direct physical loss or damage.[7] There are limitations on what scenarios trigger business interruption coverage, the duration, amount and type of coverage. In addition, there are often specific exclusions for damages caused by viruses, bacterium or other microorganism that induces physical distress, illness, pollutants or disease. It appears that these exclusions bar damage resulting from the COVID-19 virus.

Civil Authority

The civil authority clause provides limited coverage where operation of civil authority shuts down access to a business's premises. The access to the described premises must be due to particularized reasons as defined in the policy. Thus, a governor's order requiring businesses to close does not generally trigger the coverage because the specific conditions are not met.

Business Losses and Insurance

One of the most important questions to a business owner in this pandemic is: "Can I recover damages under the commercial general liability (CGL) or all risk insurance policy?" The answer depends on the language in the insurance policy. In most property liability policies, the loss or damage must be caused by or result from a covered loss that is not excluded under the policy. In addition, the loss or damage must be caused by a *direct and tangible physical injury to the insured property.* Therefore, in most jurisdictions physical loss does not cover a virus because a virus

does not result in tangible damage to property. Thus, if a business files a claim for a COVID-19 related interruption, insurers may dispute whether a physical loss has occurred.

The plaintiff in *Gavrilides Mang. Co. et al. v. Michigan Insurance Co*.[8] operated the Soup Spoon restaurant and sought loss profits from its insurer due to reduced business during the pandemic. The insurer cited *Universal Image Products, Inc. v. Chubb Corp*.,[9] stating that there was no coverage unless the insured premises was physically damaged. The plaintiff failed to allege that the physical integrity of the Soup Spoon was altered by the coronavirus. The plaintiff's civil authority claim also failed because of lack of any physical loss or damage.

Also, in *Ross 1, LLC v. Erie Ins. Exch*.,[10] the Superior Court in the District of Columbia found no coverage in a lawsuit by District of Columbia restaurants whose polices lacked a virus or pandemic exclusion. The court stated that the plaintiffs offered no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close.

Similarly, in the Western District of Texas in *Diesel Barbershop, LLC et al. v. State Farm Lloyds*[11] the court dismissed a claim by various barbershops. The plaintiff failed to allege that COVID-19 was actually within their properties or caused damage. Tangible injury to property must be established.

However, an argument can be made that the words physical loss could include businesses' inability to use their property during the pandemic. For example, in *Hughes v. Potomac Ins. Co*, the insurer denied coverage where erosion swept the earth from underneath a house and left it standing on the edge of a 30-foot cliff.[12] The insurer denied coverage because the house itself was not damaged and there was no physical loss or damage.[13] The California Court of Appeals disagreed, finding the insured's interpretation reasonable:

> To accept the insurer's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been damaged so long as its paint remains intact and its walls still adhere to one another. Despite the fact that property might be rendered completely useless to its owners, the insurer would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.[14]

Other state courts have rejected similar arguments by insurers where the insured was ordered to vacate a church because of gasoline in nearby soil[15] or where unstable rocks perched at the top of a hill induced a government evacuation order.[16] A case can be advanced that the term *physical loss* is not precise enough to bear the single meaning that insurers assign to it. Cases have held that the words physical loss are broad enough to encompass situations where the insured loses the use of a physical asset.[17]

All Risk Policies

All risk policies allow recovery for fortuitous loses unless the loss is excluded by a specific policy provision.[18] Insurers promise to pay for direct physical loss or damage to property caused by or resulting from any covered cause of loss or some variant of that language.[19] The Sixth Circuit espoused that one would struggle to think of damage not covered by this language.[20] The breadth of all risk polices are intended to insure against all fortuitous losses not specifically excluded.

The Coronavirus Aid, Relief and Economic Security Act

To help mitigate the financial crisis created by the COVID-19 pandemic, the federal government has issued guidance relating to employee benefit plan operation and administration.

The Coronavirus Aid, Relief and Economic Security (CARES) Act signed into law in March 2020 provides for substantive financial and administrative relief to participants, sponsors and administrators of certain employee benefits plans.[21] Subsequently, the Internal Revenue Service clarified and expanded upon the relief offered in the new law. The new guidance relaxes the generally rigid regulatory scheme in employee benefit plan operation and administration. For example, CARES Act, § 2202, together with IRS Notice 2020-50, provides relief from tax rules for *qualified individuals* who obtain a coronavirus-related distribution. The 10% additional penalty of the Code § 72(t)20 may be avoided.[22] The distribution may be reported in gross income ratably over three years. Or, the funds may be restored into a retirement fund within a three-year period beginning on the day after the date on which the distribution was received.[23] A coronavirus-related distribution (CRD) is any distribution or distributions not exceeding $100,00 from an eligible retirement plan to qualified individuals.

Duty To Defend

One of the first decisions concerning the duty to defend for COVID-19 claims under a CGL policy is *McDonald's Corp. et al. v. Austin Mutual Insurance Co*. A federal district court in Chicago recently held that a claim for

injunctive relief constituted a claim for damages because of bodily injury triggering a defense obligation. A claim for injunctive relief to require McDonald's to enact more stringent safety protocols and provide additional training for franchisees and their employees on preventive measures to avoid the spread of COVID-19 thus also constituted a claim for damages for bodily injury. This case has other implications and deserves watching.[24]

Conclusion

There is no conclusion because coronavirus cases and the resulting effects on businesses continue. Keep in mind many commercial property policies that contain business interruption coverage have hidden contractual limitation periods that purport to require insureds to bring suit much sooner than would otherwise be required under applicable law. For example: "No suit, action or proceeding for the recovery of any claim will be sustained in any court of law or equity unless legal action is started within two years after the loss." Other policies require that suit must be commenced within 12 months after the denial of the loss.

Also, a bevy of legal issues will arise in the wake of the global pandemic. Businesses may encounter tort claims from patrons and employees alleging that they contracted COVID-19 on their premises. This primer on COVID-19 is a guide as to what to expect and to provide basic information for consideration in civil disputes. The decisions involving insurance, commercial cases and tort claims will in large measure be jurisdictional.

James A. Johnson concentrates on serious personal injury, insurance coverage under the commercial general liability policy, entertainment and sports law and federal criminal defense. He is an active member of the Massachusetts, Michigan, Texas and federal court bars. He can be reached at www.JamesAJohnsonEsq.com.

Endnotes

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2. *Hemlock Semiconductor Operations, LLC v. Solar World Indus. Sachsen GmbH*, 867 F. 3d 692, 702 (6th Cir. 2017) (applying Michigan Law).
3. *Harriscom Svenska, AB v. Harris Corp.*, 3 F. 3d 576, 580 (2nd Cir. 1993).
4. *United States v. Winstar Corp.*, 518 US 839, 905-907 (1996).
5. *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y. 2d 900, 902-903 (1987).
6. *Dye Salon, LLC v. Chubb Indemnity Ins., Co.*, No 4:20-cv-11801 (E.D. Mich. Feb. 10, 2021).
7. *Salon XL Color & Design Group, LLC v West Bend Mut. Ins. Co.*, No 8:20-cv-11719 (E.D. Mich. Feb 4, 2021); *See e.g. Source Food Technology v. U.S. Fidelity & Guaranty Corp.*, 465 F. 3d 834 (8th Cir. 2006), *United Airlines Inc. v. Ins. Co. of State of Penn*, 385 F. Supp. 3d 343 (S.D.N.Y. 2005), *aff'd*, 439 F. 3d 128 (2nd Cir. 2006).
8. *Gavrilides Mang. Co et al. v. Michigan Ins. Co.*, No 20-258 CB (Ingham Cnty, Mich – July 2020); *Selane Products, Inc. v. Continental Casuality Co.*, No 2:20-cv-07834 (N.D. Cal. Feb 8, 2021); *Soundview Cinemas, Inc v. Great American Ins. Co*, No. 605985-20 (N.Y. Sup. Ct., Nassau Cnty. Feb. 8, 2020) – insurer's motion to dismiss granted based on the determination that there was not a physical loss.
9. *Universal Image Products, Inc v. Chubb Corp.*, 703 F. Supp. 2d, 705, 709-10 (E.D. Mich. 2010); *Soundview Cinemas, Inc v. Great American Ins. Co.*, No. 605985-20 (N.Y. Sup. Ct. Nassau Cnty, Feb. 8, 2020).
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12. *Hughes v. Potomac Ins. Co.*, Cal Rptr. 650, 651 (Cal Ct App 1962).
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14. *Id*. at 655; *see Goodwill Industr. of Orange Cnty, Calif. v. Phila Indmn. Ins. Co.*, No.30-2020-01169032-CU-IC-CXC (Cal. Super. Ct. Jan. 28, 2021), denied insurers motion to dismiss Goodwill's COVID-19 business interruption claim based on respiratory droplets on surface of property and in the air.
15. *W Fire Ins. Co. v. First Presbyterian Church*, 437 P. 2d 52, 55 (Colo. 1968).
16. *Murray v. State Farm Fire & Cas. Co.*, 509 SE 2d 1, 4-5, 16-17 (W. Va. 1998).
17. *Port Authority NY & NJ v. Affiliated FM Ins. Co.*, 311 F. 3d 226, 236 (3d Cir. 2002); *Mellin v. N. Sec Ins. Co.*, 115 A3d 799 (NH 2015); *Bdof Educ Township High School Dist. No 211 v. Int'l Ins. Co.*, 720 NE 2d 622, 601-02 (Ill.Ct. App. 1999); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co*, 1, 968 A2d 724 (N.J. Ct. App. 2009); *TRAVCO v. Ward*, 715 F. Supp. 2d 699, 701 (ED Va 2010); V*andelay Hospitality Grp., LP v. Cinn Ins. Co.*, court grants insured second chance to amend to allege covered COVID-19 claim.
18. *Frosch Holdco, Inc. v. Travelers Indemnity Co*, No. 4:20-cv-01478 (S.D. Tex. Feb. 11, 2021); *Redenburg v. Midvale Indmn., Co*, No 1: 20-cv-05818 (S.D.N.Y. Jan. 27, 2021), insurer's motion to dismiss granted based on policy's virus exclusion.
19. *K.V. G. Props, Inc v. Westfield Ins. Co.*, 900 F. 3d 818, 820 (6th Cir. 2018).
20. *Id*. at 821.
21. 15 U.S.C. 116.
22. 26 U.S.C. 72(t).
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Domestic Animal Liability Update

By Matthew J. Kaiser

When a domestic animal hurts someone, emotions can run high. The instrumentality of harm is not an inanimate thing like a loose step or a slippery driveway, but instead a family pet who is being called "vicious" in court papers. At the same time, the resulting injury can be devastating, often requiring stitches and even reconstructive surgery. It is no surprise lawsuits arising from domestic animal attacks can evoke strong reactions on both sides.

This article is a survey of appellate decisions recently handed down in this sometimes confounding but always fascinating area of law. The majority involved dog attacks.

Vicious Propensities

New York dog owners can be liable only if they knew or should have known of the canine's "vicious propensities," defined as a "propensity to do any act that might endanger the safety of the persons and property of others in a given situation."[1]

To the extent our strict liability regime is sometimes referred to as a "one-bite rule" that term is a misnomer. Vicious propensities can be proven by "something other than prior comparably vicious acts."[2] Tendency to growl, snap, or bare teeth can help support the claim, as will any "proclivity to act in a way that puts others at harm."[3] Other markers include "being territorial, aggressively barking when [his or her] area [is] invaded, attacking another animal, [and] growling and biting at another dog."[4] Even playful and seemingly friendly behavior can help establish liability where it "may endanger the safety of another."[5]

At the same time, normal canine behavior, such as barking and running around, will not establish vicious propensities.[6] Dogs will be dogs. We are reminded of this principle in *Bukhtiyaraova v. Cohen*, where the plaintiff was bitten by a dog residing in the defendant's apartment.[7] According to the Second Department, testimony that the dog "barked at [the plaintiff] and her dog" and "strained its leash toward her dog" failed to raise a triable issue of fact because it was considered normal canine behavior.[8]

In *M.B. v. Hanson*, another recent Second Department decision, the infant plaintiff was descending from a kitchen stool with a pancake in his hand when the defendant's dog jumped for the pancake and bit his face.[9] The evidence at trial established the dog would become excited in the presence of food, try to take food from people's hands, and jump to try to obtain food from tables and countertops, but this sort of behavior was regarded "as rambunctious and annoying, rather than vicious."[10] The dog had never bitten or attacked anyone or otherwise acted in a threatening, violent, or aggressive manner.[11] The jury found no vicious propensities and the trial court declined to set aside the verdict. On appeal, the Second Department affirmed, finding that the evidence at trial "was sufficient to permit the jury to conclude . . . that the defendant's dog was not vicious."[12] While the plaintiff had introduced evidence that would tend to lead to the "opposite conclusion," the appellate court "defer[red] to the jury's assessment of the witnesses' credibility."[13]

A different standard of review produced a different result in *Lina Thai v. Wong v. Largana*, where the plaintiff, a mail carrier employed by the United States Postal Service, was attacked by the defendants' dog within the exterior ground of the defendants' residence.[14] The motion court denied the defendants' motion for summary judgment and the Second Department affirmed based upon "conflicting testimony as to the nature of the contact between the plaintiff and the dog on the day of the incident and the parties' prior observation of the dog's behavior and disposition."[15]

Actual or Constructive Notice

Of course, it is not enough for a plaintiff to show the dog had vicious propensities. The plaintiff must also establish that the owner knew or should have known of them.[16] As a practical matter, this scienter requirement can be difficult to overcome.[17]

In *Jennifer M.C.-Y v. Boring* the defendant's dog bit the plaintiff and her infant daughter as they exited a vehicle.[18] According to the Fourth Department, the defendant met her initial burden by submitting deposition testimony "which established that [she] lacked actual or constructive knowledge that the dog had any vicious propensities."[19] In opposition, the plaintiffs failed to raise a triable issue of fact. One of the defendant's neighbors averred that on at least two prior occasions she had seen the dog "roaming the neighborhood" and that the dog had entered her backyard and barked at her in "an aggressive and angry way," thereby putting her in fear that she would be bitten.[20] The plaintiffs, however, submitted no evidence when these incidents occurred or whether they were ever communicated to the defendant, failing to address whether the defendant had actual knowledge of the dog's vicious propensities or whether such propensities had "existed for a sufficient period of time for a reasonable person to discover them."[21]

Few defendants will admit the family pet has dangerous tendencies abnormal to its class. For this reason, knowledge of vicious propensities is often established

inferentially through circumstantial evidence. One "potentially relevant" consideration is the manner in which the animal was restrained.[22]

In *King v. Hoffman* the infant asked to enter the defendants' second-floor apartment to use the restroom, but before he could gain entrance one of the defendants "ensured" the dog was "secured upstairs."[23] As the infant walked up the stairs, the dog ran down and bit the child on the leg and buttock area.[24] The Second Department determined the defendants failed to meet their initial burden because they, *inter alia*, "attempted to limit interaction between the dog and visitors."[25] Recognizing that proof of customary confinement can serve as a predicate for liability where the dog was confined because the owner "feared [it] would do . . . harm to . . . visitors," the Second Department specifically noted the defendants had acquired the dog to provide "security," tried to secure it before the attack, and the dog attempted to bite the plaintiff just two months earlier.[26] Under these circumstances, a reasonable factfinder could conclude the defendants had notice of vicious propensities.

Proof of confinement or restraint is often wielded as a sword for the plaintiff, but the absence of such evidence can be used as a shield for the defendant. In *Drakes v. Bakshi* the defendants' dog mauled a small dog owned by the plaintiff and bit her finger in the process.[27] The defendants established their entitlement to summary judgment based on testimony that their dog "was allowed to roam freely inside the house and in the backyard" and it resided with two small children and two other dogs without incident.[28]

A related consideration is whether the offending animal was kept as a guard dog, or the owner posted "Beware of Dog" signs on the property. For example, in *Opderbeck v. Bush* the plaintiff, a UPS delivery employee, was bitten on the wrist by the defendants' dog while delivering a package to their residence.[29] The Fourth Department concluded the defendants failed to meet their initial burden of "establishing that they neither knew nor should have known that the dog had any vicious propensities."[30] Three "Beware of Dog" signs were posted on the property, and the dog was purchased "for protection," its bark acting like an "alarm."[31] Indeed, one defendant admitted that she directed the plaintiff to "[s]tand still" while the canine was running toward him.[32]

Courts have often looked at the nature of the attack itself as a proxy for vicious propensities and, occasionally, notice thereof.[33] In *I.A. v. Mejia* the defendants' dog bit the face of the 11-year-old plaintiff while he was at the defendants' house with his older brother.[34] The plaintiff raised triable issues of fact by submitting evidence the dog was "kept, at least in part, as a guard dog" and the attack was "unprovoked," the animal biting the child's face and "not let[ting] go until another boy pried open the dog's mouth," causing him to suffer "multiple severe lacerations to his face which required emergency surgery and left him with multiple scars."[35]

Aggression toward other domestic pets can also help establish notice of vicious propensities which, as we know, is defined broadly to encompass "any act that might endanger the safety of the persons *and property* of others in a given situation."[36] "The prevailing law," whether we agree with it or not, is that domestic animals are personal property.[37] Thus, in *Modafferi v. DiMatteo* the plaintiff was walking her leashed small breed dog when it was attacked by one of two dogs owned by the defendant.[38] As the plaintiff tried to separate them, she was bitten by the dog.[39] The Fourth Department found triable issues of fact because after the attack the defendant said she "was aware of the risk that her dogs would attack small dogs," and "[i]t was foreseeable that if [the defendant's] dog attacked another dog, someone would attempt to pull the dogs apart and be injured in the process."[40]

Dogs are naturally pack animals and sometimes it can be difficult to determine which particular canine caused the injury. In *Christopher P. v. Kathleen M.B.* the infant plaintiff was injured during an interaction with the defendant's dogs.[41] The Fourth Department noted that the defendant's liability "would not be dependent upon . . . identification of the particular dog that bit the daughter" and it was sufficient for the defendant to know "that both dogs, or the dogs in concert, had vicious propensities."[42]

Landlord Liability

Often the property owner, acting as a landlord, is sued for injuries caused by a tenant's dog. When the tenant comes into possession of the animal after the premises have been leased, the landlord is not liable unless he or she knows the tenant is harboring an animal with vicious propensities and has control of the premises or is otherwise able to remove or confine the animal.[43]

The landlord defendant will often discharge this burden by simply establishing lack of familiarity with the offending canine. For example, in *Logie v. Lester* the plaintiff was bitten by a dog inside a home owned by the landlord defendant, who established entitlement to summary judgment through evidence "he was not aware that a dog with vicious propensities was being harbored on the premises."[44] In *Deloach v. Nicholson* the plaintiff, a UPS delivery person, was bitten by a dog at a two-family, two-story building owned by the defendant.[45] The defendant resided on the first floor and the dog was owned by the second-story tenant. Acknowledging that "[s]trict liability can . . . be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]," the Second Department found that the dog "did not have vicious propensities" and, even if it did, the defendant "neither knew nor should have

known that the dog had vicious propensities."[46] In *King v. Hoffman* the property owner and property manager defendants likewise established their entitlement to summary judgment.[47] While the property manager knew the tenant had a dog at the premises and such knowledge could be imputed to the property owner, both defendants established as a matter of law that they "had no specific information about the dog, and had never seen it."[48]

In *Toher v. Duchnycz* the plaintiff was bitten by a dog owned by tenants living on the defendant's property.[49] While the defendant was aware of the dog and could have required his tenants to remove or confine the dog, he nevertheless established "that he lacked actual or constructive knowledge that his tenants' dog had any vicious propensities."[50] According to the defendant's testimony, the dog barked when he would approach the porch area to collect monthly rent, but did not growl, jump, or snap.[51] The tenants had posted a "Beware of Dog" sign on the premises, but the defendant swore that he did not know when it was posted, did not recall whether he saw the sign before the attack, and did not inquire about it at any point in time.[52]

It can be difficult to establish notice of vicious propensities when, as is common with the landlord defendant, the person or entity does not deal with the dog on a day-to-day basis.[53] Shrewd document discovery will often make the difference. In *Aldomovar v. New York City Hous. Auth.* the plaintiff was bitten by an unleashed pit bull owned by someone who happened to live in the same building.[54] The First Department concluded the plaintiff raised triable issues of fact whether the building owner, the New York City Housing Authority, knew of the pit bull's presence on the property and its vicious propensities.[55] The building manager testified that the Authority "had no knowledge of prior dog bite incidents" but internal records showed that "a dog bite occurred at the building about three months prior to the attack on the plaintiff."[56] While the internal records did not specifically identify the dog involved in the prior attack, the plaintiff testified she had seen the pit bull and its owner on several occasions and "the dog acted aggressively."[57] That was enough to put the question before a jury.

As a general rule, a landlord can be liable for injuries caused by a tenant's dog only if the incident occurred on the premises.[58] In *Pauszek v. Waylett* the plaintiff tripped and fell on a "divot" on her own property after she was frightened by a dog owned by her neighbors, who were renting their home from the defendant.[59] Rejecting any claim that the defendant did not owe the plaintiff a duty of care because the injury materialized on her own property, the Fourth Department noted that "the conduct of the dog in question occurred on [the] defendant's property."[60] On the question of whether the dog had vicious propensities, the court noted the animal was previously observed "lunging at or jumping on people."[61] The defendant's property manager had received complaints about this very sort of behavior, which was imputed to the defendant so she was "deemed to have notice of those propensities."[62]

Where the landlord is aware that a prospective tenant owns a vicious dog and nevertheless leases the premises to the tenant without taking reasonable measures to protect third parties who may come onto the premises, that landlord may be held liable for failing to "exercise reasonable care not to expose third persons to an unreasonable risk of harm."[63] This theory of liability, articulated by the Court of Appeals in *Strunk v. Zoltanski*, is predicated on the principle that by knowingly leasing the premises to a tenant with a vicious dog the landlord "could be found affirmatively to have created the very risk which was reasonably foreseeable."[64]

Viability of the Negligence Cause of Action: Domestic Animal Owner

New York courts do not allow recovery for injuries caused by a dog that has not demonstrated vicious propensities, even when the injuries are proximately caused by the owner's negligent conduct in controlling or failing to control the canine.[65] Generally speaking, there can be no "companion common-law cause of action for negligence" against the owner of the animal.[66] We see this in *Meka v. Pufpaff*, a case involving a neighborhood dog attack, where the Fourth Department modified an order that failed to dismiss the negligence claim.[67] The court noted that "[a] claim sounding in ordinary negligence does not lie against the person responsible for a dog that causes injury."[68]

The only situation where a negligence cause of action will lie against the owner of a domestic animal, established recently by the Court of Appeals in *Hastings v. Sauve*, is that scenario where a farm animal is permitted to wander off the property through the negligence of the owner.[69] The Court of Appeals declined to extend a similar exception to owners of domestic pets, like cats and dogs.[70]

Even in the case of farm animals, the *Hastings* exception has relatively narrow application. *Bavifard v. Capretto*, where the plaintiff was trampled by the defendant's two horses after they broke free while he was hitching them to a cart, is one example.[71] The Fourth Department held that the negligence claim had to be dismissed because under the circumstances of the case—which did not involve a farm animal being allowed to stray from the property where it was kept—"the exception to the rule, as set forth in *Hastings* [] [did] not apply."[72] The plaintiff did, however, raise triable issues of fact with regard to the strict liability claim inasmuch as the defendant stated "once the horses are kept inside . . . they go crazy in the winter."[73] From this evidence a jury could infer vicious propensities.

Viability of the Negligence Cause of Action: Owner or Possessor of Property

In *Hewitt v. Palmer Veterinary Clinic P.C.* the plaintiff took her cat to be examined at a veterinary clinic operated by the defendant and she was attacked by a pit bull named Vanilla in the waiting area.[74] The dog was not owned by the clinic, but the plaintiff submitted proof that the clinic did not use reasonable care when it brought the agitated dog into the waiting area without a secured collar, anesthesia or proper pain medication. The plaintiff did not bring a strict liability claim against the clinic, asserting instead a claim "grounded in negligence and premises liability."[75] The Third Department, in a 3-1 decision, declined to recognize the negligence claim, joining the other departments which had recently and unanimously "applied the strict liability rule in cases where the plaintiff seeks to recover from a defendant who maintained the premises where the injury occurred, but did not own the dog."[76] Justice Presiding John C. Egan Jr., the lone dissenter, would have recognized the negligence claim and "set the matter down for a trial as to whether, under the circumstances, [the clinic] maintained its premises in a reasonably safe condition and/or adequately exercised control over the subject animal."[77]

The decision of the Third Department in *Hewitt* suggests an exception to the nondelegable duty to "maintain . . . property in a reasonably safe condition in view of all the circumstances" where the instrumentality of harm was the domestic animal of another.[78]

The Court of Appeals granted leave to appeal and, in an opinion released October 22, 2020, reinstated the negligence claim.[79] Judge Leslie E. Stein, writing for the four-judge majority, observed that "competing policies and contemporary social expectations may be at play in certain instances where domestic animals cause injuries" and it was undisputed the defendant "owed a duty of care to . . . a client in its waiting room":

> [The defendant] is a veterinary clinic, whose agents have specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed. An animal in a veterinary office may experience various stressors—in addition to illness or pain—including the potential absence of its owner and exposure to unfamiliar people, animals, and surroundings. Moreover, veterinarians or other agents of a veterinary practice may—either unavoidably in the course of treatment, or otherwise—create circumstances that give rise to a substantial risk of aggressive behavior. Indeed, here, a veterinarian introduced Vanilla into a purportedly crowded waiting room, where the dog was in close proximity to strangers and their pets—allegedly creating a volatile environment for an animal that had just undergone a medical procedure and may have been in pain. [The defendant] is in the business of treating animals and employs veterinarians equipped with specialized knowledge and experience concerning animal behavior—who, in turn, may be aware of, or may create, stressors giving rise to a substantial risk of aggressive behavior. With this knowledge, veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate this risk.[80]

Under these circumstances, the defendant "[did] not need the protection afforded by the vicious propensities notice requirement" and a negligence claim could lie.[81]

In a thoughtful concurrence, Judge Rowan D. Wilson wrote separately "to express why prudence and long-standing precedent" dictated that New York's strict liability theory limitation "should not be extended to persons who are not the owner of the domestic animal causing injury."[82]

Hewitt is an important decision. As long as they owe a duty of care, non-owners can be liable under the ordinary rules of negligence even though the instrument of harm is a domestic animal.

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Endnotes

1 *Collier v. Zambito*, 1 NY3d 444, 446 (2004) (citation omitted); *Bard v. Jahnke*, 6 NY3d 592, 599 (2006).

2 Bard, 6 N.Y.3d at 599.

3 *See Hodgson-Romain v Hunter*, 72 AD3d 741, 742 (2d Dep't 2010) (citations omitted).

4 *Morse v Colombo,* 8 AD3d 808, 809 (3d Dep't 2004).

5 *See, e.g., Marquardt v Milewski,* 288 A.D.2d 928, 928 (4th Dep't 2001); *Lewis v Lustan*, 72 A.D.3d 1486, 1486-1487 (4th Dep't 2010) ("overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[] liable for damages resulting from such an act.") (citation omitted).

6 *Collier*, 1 N.Y.3d at 447; accord *Dickinson v. Uschold*, 11 A.D.3d 1036, 1037 (4th Dep't 2004) ("'occasionally' the dog would jump in an effort to interact with people."); *Spinosa v. Beck*, 77 A.D.3d 1426, 1427 (4th Dep't 2010) ("barking and approaching the door in response to a stranger's knock" not sufficient).

7 172 A.D.3d 1153 (2d Dep't 2019). Throughout this article, factual recitations will refer to allegations in the subject lawsuits.

8 *Id.* at 1155.

9 68 A.D.3d 706, 707 (2d Dep't 2019).

10 *Id.* at 708.

11 *Id.*

12 *Id.*

13 *Id.*; *see also Ruffin v. Wood*, 2011 NY Slip Op. 51099(U), *5 (Sup. Ct., Kings County 2011) (surveying case law and "not [finding] any appellate court decision in a dog attack case in which a jury verdict for the defendant ha[d] been set aside, except where the court made prejudicial evidentiary errors, or where the court's instructions to the jury were incorrect or inadequate") (Battaglia, J.) *aff'd* 95 A.D.3d 1290 (2d Dep't 2012).

14 170 A.D.3d 700 (2d Dep't 2019).

15 *Id.* at 701.

16 *See generally Collier*, 1 NY3d at 446 ,citing, *e.g., Hosmer v. Carney,* 228 NY 73, 75 (1920).

17 *See* Marc Miner, *When Animals Attack in New York*, N.Y.L.J., Feb. 28, 2012, p. 4, col. 1 (observing that "often a plaintiff will have to rely on the animal owner's testimony" to prove the case).

18 174 A.D.3d 1475 (4th Dep't 2019).

19 *Id.* at 1476.

20 *Id.*

21 *Id.* at 1476-1477 (citations omitted).

22 *See Collier*, 1 N.Y.3d at 447 (citations omitted).

23 178 A.D.3d 906, 907 (2d Dep't 2019).

24 *Id*.

25 *Id*. at 908.

26 *Id*. at 909 (internal quotations and citations omitted).

27 175 A.D.3d 465 (2d Dep't 2019).

28 *Id*. at 466.

29 178 A.D.3d 1467 (4th Dep't 2019).

30 *Id*. at 1468 (citation omitted).

31 *Id*.

32 *Id*.

33 *See, e.g., Wilson v. Livingston*, 305 A.D.2d 585, 586 (2d Dep't 2003); *Brophy v. Columbia County Agric. Soc.*, 116 A.D.2d 873, 874 (1st Dep't 1986); *Carlisle v. Cassasa*, 234 AD 112 (1st Dep't 1931); cf. *Plennert v. Abel*, 269 AD2d 796, 796 (4th Dep't 2000) (the severity of the attack raised issues of fact regarding the dog's vicious propensities, but not the defendant's notice thereof).

34 174 A.D.3d 770 (2d Dep't 2019).

35 *Id*. at 771-772.

36 *Collier*, 1 N.Y.3d at 446 (emphasis added); *Cronin v. Chrosniak*, 145 A.D.2d 905 (4th Dep't 1988).

37 *See Travis v. Murray*, 2013 N.Y. Slip Op. 23405, *5 (Sup Ct, NY County 2013) (Cooper, J.) (collecting Court of Appeals and Appellate Division cases; quotation omitted).

38 177 A.D.3d 1413 (4th Dep't 2019).

39 *Id*. at 1414.

40 *Id*. (quotation omitted).

41 174 A.D.3d 1460, 1460 (4th Dep't 2019).

42 *Id*. at 1461 (citations omitted).

43 Cronin, 145 A.D.2d at 906 citing *Strunk v. Zoltanski*, 62 NY2d 572, 575 (1984).

44 170 AD3d 822, 823 (2d Dep't 2019) (citations omitted).

45 171 A.D.3d 700 (2d Dep't 2019).

46 *Id.* at 701 (citations omitted).

47 178 A.D.3d at 906.

48 *Id*. at 909.

49 172 A.D.3d 1894 (4th Dep't 2019) *lv. to app. denied* 34 N.Y.3d 908 (2020).

50 *Id.* at 1895.

51 *Toher v. Duchnycz Record* on Appeal at 186.

52 *Id.* at 208.

53 *See generally Hewitt v. Palmer Veterinary Clinic, PC*, 167 A.D.3d 1120, 1124 (3d Dep't 2018) (Egan Jr., J.P., dissenting) *lv. to app. granted* 32 N.Y.3d 918 (2019).

54 177 A.D.3d 424 (1st Dep't 2019).

55 *Id.* at 424.

56 *Id.*

57 *Id.* (citation omitted).

58 *Terrio v. Daggett*, 208 A.D.2d 1163, 1163 (3d Dep't 1994).

59 173 A.D.3d 1631 (4th Dep't 2019).

60 *Id.* at 1632.

61 *Id.*

62 *Id.*

63 *Strunk*, 62 N.Y.2d at 575-576 (citations omitted).

64 *Id.* at 575; *see also id*. at 578 ("liability, if any, of the landlord would be predicated on a jury finding that, at the time of the initial leasing of the premises to the tenant, the landlord knew both of the prospective presence of the dog and of its vicious propensities.").

65 *See Doerr*, 25 N.Y.3d at 1116.

66 *See Bard*, 6 N.Y.3d at 599; *see also Scavetta v. Wechsler*, 149 A.D.3d 202 (1st Dep't 2017) *app. withdrawn* 30 N.Y.3d 946 (2017).

67 167 A.D.3d 1547, 1548 (4th Dep't 2018).

68 *Id. citing Doerr*, 25 N.Y.3d at 1116.

69 21 N.Y.3d 122, 125 (2013).

70 *See Doerr*, 25 N.Y.3d at 1116.

71 169 A.D.3d 1402 (4th Dep't 2019).

72 *Id*. 1403; c*f. Thompson v. Brown*, 167 A.D.3d 1310, 1311 (3d Dep't 2018).

73 *Id*.

74 167 A.D.3d at 1120.

75 *Id*. at 1122.

76 *Id*. (citations omitted).

77 *Id*. at 1125 (Egan, J.P., dissenting in part).

78 *See generally Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). As discussed in the section about landlord liability, however, the Court of Appeals has recognized that a property owner who "affirmatively" "create[s]" a "risk which was reasonably foreseeable" by leasing premises to the owner of a vicious dog can be held liable for "[taking] no steps reasonably calculated to protect [a] plaintiff from the injuries which he [or she] suffered." *Strunk*, 62 N.Y.2d at 575. The Court of Appeals stated that, under those circumstances, the landlord would be required to take "reasonable care . . . to protect third persons from injury." *Id.* at 577. It is also notable that the *Hastings v. Sauve* exception for wandering farm animals applies to "a landowner or the owner of an animal," meaning that a negligence cause of action can be asserted against a landowner who allows a farm animal to stray from the property even though the landowner does not own the farm animal. 21 N.Y.3d at 125-126 (emphasis added).

79 *Hewitt v. Palmer Veterinary Clinic, PC*, 2020 NY Slip Op. 05975 (Oct. 22, 2020) was handed down long after the submission deadline for this article, and gratitude is extended to editor David A Glazer for accepting a very late addition to the article.

80 *Id*. at *1.

81 *Id*.

82 *Id*. at *2 ("The inequity of the Bard rule in the context of pet owner liability sharply cautions against extending that rule a whit.") (Wilson, J., concurring in result).

Equine Law and Insurance

By James A. Johnson

"A horse, a horse, my kingdom for a horse!" —Shakespeare's Richard III, 1594

Equine law covers all aspects of horses and horse-related activities and industries. Under the common law, liability for harm to persons by horses were determined based upon traditional tort law concepts such as assumption of risk and comparative negligence. Today nearly all states have adopted some form of the Equine Activity Liability Act (EALA) except for California and Maryland. Many states share common characteristics that qualifying defendants should not be liable if an equine-related participant sustains injury, damage or death from an inherent risk from equine-related activities, subject to exceptions. The purpose of the EALA is to encourage equine activities by limiting tort liability of individuals who organize or sponsor equine events and activities. Liability is determined on a state by state basis. Some states have two sets of equine laws: Activity Statutes and Recreational Use Statutes. For example, Alaska has two statutes that relate to the limitation of liability for equine activities.[1]

Inherent Risk

Horses present risks because they are powerful and unpredictable. An inherent risk is an integral part of equine activities such as horseback riding and includes but is not limited to:

1. The unpredictability of the animal's reaction to sounds, persons, sudden movements or other animals;
2. The propensity of the animal to behave in ways that result in injury or death to persons on or around them;
3. Collisions with objects or other animals.

Inherent risks mean the dangers or conditions which are an integral part of equine activities. An inherent risk will bar an injured person's claim of injury. However, the meaning of inherent risk can differ from state to state. In Kentucky, a horse spooking from the sound of an opening gate was deemed an inherent risk under Kentucky's EALA. In Texas a horse's violent reaction to the bite of a fire ant was deemed an inherent risk under Texas EALA. A dog that jumped at the horse's back legs that caused a horse's reaction was an inherent risk under Ohio's EALA.

Michigan Equine Activity Act (MEALA)

Signs bearing the statute information must be conspicuously posted around the equine activity area. For example:

> **WARNING:** Under the **MICHIGAN** equine activity act an equine professional is not liable for an injury to or death of a *participant in equine activities* resulting from inherent risks of equine activities, pursuant to Section 6 (691.1666) [2] (emphasis added)

Similarly, Massachusetts law follows Michigan:

> **WARNING**: Under **Massachusetts** law, an equine professional is not liable for an injury to or death of, a participant in equine activity resulting from the inherent risks of equine activities, pursuant to section 2D of chapter 128 of the Massachusetts General Laws.[3]

Each state is different and must be consulted for specific language. One excellent source is the American Equestrian Alliance.[4]

The Michigan Equine Activity Law is known as the Michigan Equine Activity Liability Act (MEALA). [5]

> Section 1
>
> This act shall be known and may be cited as the "equine activity liability act."
>
> 691.1662
>
> Section 2
>
> As used in this act:
>
> Engage in equine activity means riding, training, driving, breeding, being a passenger upon or providing or assisting in veterinary treatment of an equine, whether mounted or unmounted. Engage in an equine activity includes the breeding of equines, or assisting a participant or show management. Engage in equine activity does not include spectating at an equine activity, unless the spectator places himself or herself in an unauthorized area and in immediate proximity to the equine activity.
>
> 691.1663

Section 3

Except as otherwise provided in section 5, an equine activity sponsor, an equine professional, or another person *is not liable for an injury to or death of a participant or property damage resulting from an inherent risk of an equine activity.* Except as otherwise provided in section 5 a participant or participant's representative shall not make a claim for or recover civil damages from an equine activity, sponsor, an equine professional or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity. (Emphasis added)

691.1664

Section 4

This Act does not apply to horse race meeting that is regulated by the racing laws of 1980, Act No. 327 of Public Acts of 1980 being sections 431.61 to 431.88 of the Michigan Compiled Laws.

Two persons may agree in writing to a waiver of liability beyond the provisions of this Act and such waiver shall be valid and binding by its terms.

"New York laws are different in that they combine equine activities with numerous other activities such as farm tours and winery tours. "

Amendment of Michigan Equine Liability Act

Effective Sept. 21, 2015, Governor Rick Synder signed into law an amendment to Michigan's Equine Activity Act (EALA) to prescribe certain duties for equine professionals changing Michigan's last exception by modifying its terms into two sections and eliminating the negligence section for certain people, organization and businesses. The modification to § 5 (MCL § 691.1665) are:

> (d) If the person is an equine activity sponsor or equine professional, commits an act or omission that constitutes a willful or wanton disregard for the safety of the participant and that is a proximate cause of the injury, death or damage.
>
> (e) If the person is not an equine activity sponsor or equine professional, commits a negligent act or omission that constitutes a proximate cause of injury, death or damage.[6]

An equine activity sponsor means an individual, group, club, partnership or corporation whether or not operating for profit, that sponsors, organizes or provides the facilities for an equine activity; including but not limited to a pony club, riding club, school or college sponsored class, program, or activity, therapeutic riding program; stable or farm owner, and operator, instructor or promoter of an equine facility including but not limited to a stable, clubhouse, pony ride string, fair or arena at which the equine activity is held.

Equine professional means a person engaged in any of the following for compensation: (i) instructing a participant in an equine activity; (ii) renting an equine, equipment or tack to a participant; (iii) providing daily care of horses boarded at an equine facility; (iv) training an equine or (v) breeding of equines for resale or stock replenishment.

Case Law

Relevant case law under Michigan's Equine Liability Act is *Amburgey v. Sauder* where the plaintiff was bitten by a horse as she walked through an aisle in a stable. The Michigan Court of Appeals affirmed dismissal because the plaintiff was an equine activity participant and her injuries resulted from an inherent risk of equine activity.[7]

In *Cole v. Ladbroke Racing Michigan, Inc.,* plaintiff, a licensed horse exercise rider, sued the operator of a horse racing facility. He had been injured when he was thrown off a horse that he had been exercising. The horse became spooked by a kite on the defendant's premises. The court held that EALA did not offer protection of immunity to the defendant because the exercising was found to be an activity in preparation for a horse race. And the EALA does not apply to horse race meetings. However, the plaintiff previously signed a release that covered "all risk of injury that the undersigned may sustain while on the premises." Thus, the defendant was released from liability of negligence.[8]

In *Johnson v. Outback Lodge & Equestrian Center, LLC* the plaintiff, a Girl Scout was at a horseback riding camp when the horse she was on was "spooked" and ran away with her. She alleged that several individuals were negligent in providing her with the "equine, tack and equipment" but was not able to establish whether they worked for the ranch or the Girl Scouts. The court found a "special relationship" existed between the plaintiff and the Girl Scouts. However, it left it to the jury to decide if any of the counselors were negligent.[9]

New York Equine Activity Law

On October 23, 2017, Governor Andrew Cuomo signed into law and made effective immediately the state's version of an equine activity law. New York laws are different in that they combine equine activities with numerous other activities such as farm tours and winery tours.

New York law applies to "operators" of Agricultural Tourism" activities both indoor and outdoors.

New York law makes immunities conditional upon compliance with responsibilities as the law describes for "operators" and "visitors": [10]

> **Responsibilities of Operators,** § 18-303 (1) provides that operators of "agricultural tourism areas" shall have these responsibilities:
>
> To post and maintain way finding signage to delineate the paths, areas, & buildings that are open to the public. § 18-303(1)(A).
>
> To adequately train employees who are actively involved in agricultural tourism activities. § 18-303(1)(B).
>
> To take reasonable care to prevent reasonably foreseeable risks to visitors, consistent with the responsibility of a landowner to keep his or her premises reasonably safe for intended and reasonably foreseeable uses and users, and to post conspicuous notice to visitors of the right to a refund to the purchaser in the amount paid in the initial sale of any tickets returned to the operator of the agricultural tourism area, intact and unused, by such purchaser that he or she is unprepared or that he or she is unwilling to participate in the agricultural tourism actively due to the risks inherent in the activities or duties imposed upon him or her by this section.

The above is a partial listing of responsibilities. See New York State Horse Counsel at https://nyshc.org for a bevy of information on horses and horse-related activities including membership, event insurance and other matters.

Responsibilities of visitors are set out in § 18-303 (2). On Sept. 16, 2019, a 23-year-old woman was pronounced dead at the scene after a horse she was riding raised itself upright on its hind legs and fell on top of her. This unfortunate accident happened at the family farm in Dover, New York. It is unknown why the horse reared and fell. I am sad to report that this is an inherent risk due to unpredictability of horses.

Contracts

In equine law contracts may include breeding, boarding, buying, training, selling, leasing and of plethora of other activities. In equine law contracts may include breeding, boarding, buying, training, selling, leasing and a plethora of other activities. The "handshake agreement" is often used in equine-related activities because the relationship between barn owner, rider or horse owner is often a friendly relationship. However, this is an unreliable method of forming legal rights, responsibilities and potential liabilities. A bevy of forms to cover your situation can be found and purchased at Equine Legal Solutions.[11]

A signed written contract with a binding arbitration clause should be consummated setting out the rights and responsibilities of the parties. Arbitration allows a neutral third party to make the decision for the parties without involving the court system. If a party breaches the arbitration award the nonbreaching party can bring a lawsuit against the other party. The primary goal of agreeing to alternate dispute resolution procedure is to avoid the costs and time spent in a judicial proceeding. An additional purpose of agreeing to an alternative dispute resolution procedure is to preserve a business relationship in a continuing amicable manner.

Another alternative dispute resolution procedure is mediation. Mediation provides an informal environment in which the participants are guided by a neutral third party. Thus, arbitration and mediation clauses provide a procedure of resolving the dispute while maintaining an amicable relationship.

Equine-Related Insurance

If you own a horse, horse farm or stable you should consider it as an investment together with protecting yourself from personal liability. The key is to purchase insurance that provides coverage for theft, mortality, major medical, surgical only, loss of use, trip transit, general liability, equine event liability, equine commercial liability, independent trainer-instructor and other coverages relevant to your situation. Purchasing equine insurance also ensures that your horse is covered during its lifetime.

- **Commercial General Equine Liability** covers general liability equine matters such as boarding and training facilities.
- **Professional Liability** protects against negligence in training horses or giving horse lessons.`
- **Individual Horse Owner Liability** covers injury or damage that arises from your horse activities.

- **Horse Club Events** covers clubs or associations that organize shows or events.
- **Equine Mortality Insurance** covers the death of your horse from injury, disease, illness or accident. This type of insurance requires a veterinary certificate of good health. The amount payable at death depends on the policy language of agreed value or actual cash value of the horse at the time of death.

Trial Practice

One of the first tasks an attorney should do in starting a case for trial is to prepare the jury instructions. This step alone should prevent a directed verdict at trial. In preparing the jury instructions you will set out the elements of your cause of action or defense. The jury instructions will have all the substantive law essential to prove or defend your case. The jury instructions or court's charge should be your bible and road map. Now you will have the information for preparing the opening statement, direct examination, cross examination and final argument.

Trial Themes

When you develop a powerful case theme, you give the jurors a lens through which they will favorably view the evidence in your case. The theme of the case is a one-sentence explanation of your theory. A theory is a succinct statement as to why the plaintiff should win or criminal defendant is not guilty of the charged crime. The theme should flow logically from the facts and relate to the juror's life experiences. The theme of the case is the basic underlying idea which explains both the legal theory and factual background of the case. And, it ties them into a coherent and believable whole. Make your trial theme memorable. For example:

"This is a case about a broken promise."

"A horse is a thing of beauty but it is also unpredictable."

"Proper handling of a horse is no simple matter."

"The only constant thing in life is change. Things can change rapidly when you are dealing with horses."

The above are only examples as a guide. The best theme will be your own development that you should change or modify until you have found the best one.

Conclusion

Although the laws differ in different states, most of them share common characteristics that qualifying defendants should not be liable if an equine-related participant sustains injury, death or damage from an inherent risk. The purpose of the EALA is to encourage equine activities by limiting tort liability of individuals who organize or sponsor equine activities. If you own a horse, horse farm or stable you should purchase insurance to protect against theft, horse mortality, events, major medical and personal liability.

In equine transactions a signed written contract with a binding arbitration clause should be consummated setting out the rights and responsibilities of the parties.

If you are involved in litigation, first prepare the jury instructions and then your opening statement with a memorable theme.

James A. Johnson is a trial lawyer whose primary areas of concentration are serious personal injury, insurance coverage under the commercial general liability policy, sports and entertainment law and federal criminal defense. Mr. Johnson is an active member of the Massachusetts, Michigan, Texas and federal court bars. He can be reached at www.JamesAJohnsonEsq.com.

Endnotes

1. AS § 09.65.145; AS §09.65.290.
2. MCL § 6 (691.1666).
3. Section 2D of chapter 128 of the Massachusetts General Laws.
4. http://www.americanequestrian.com/equinelaws.
5. *MCL 691.1661-1667.*
6. Sec. 5 of 1991 PA 351 (MCL 691.1665).
7. 238 Mich. App 228, 233, 237, 246, 605 N. W. 2d 84 (Mich. 2000).
8. 614 N.W. 2d 169 (Mich. 2000).
9. *Johnson v. Outback Lodge & Equestrian Center, LLC*, unpublished opinion per cur of the Court of Appeals, issued March 10, 2016 (docket No. 323556).
10. https://legislation.nysenate.gov/pdf/bills/2017/S1152A (last visited 1-10-20).
11. http://www.equinelegalsolutions.com (last visited 1-10-20).
12. https://equineinsurancecenter.com/coverages (last visited 1-10-20).

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3. James Clark-Dawe, *Equine Liability: What Every Horse Owner Needs to Know*.
3. Robert L. Heleringer, Equine Regulatory Law http://equineregulatorylaw.com.
4. www.HG.org/equine.html.
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Sports and Recreational Activities—Game Over? Or, Let the Games Begin!

By Glenn A. Monk

"It's all fun and games until somebody loses an eye." (Unknown. A long time ago.)

The phrase is said to originate from ancient Rome, where the only rule to wrestling matches was no eye gouging. There was immediate disqualification if you poked your opponent's eye out. Today, it may be more accurate to say, "it's all fun and games until somebody gets sued."

Brief Overview of Premises Liability

In New York, it is well settled that landowners have a duty of care to maintain their property in a reasonably safe condition, whether the property is open to the public or not, and it does not matter if plaintiff was an invitee, licensee, or trespasser.[1] Reasonableness is determined by viewing all of the "circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[2] In the arena of sports or recreational activity, the property owner's duty of care is to make the conditions as safe as they appear to be.[3]

Primary Assumption of Risk

Numerous cases involving sporting or recreational activity have been decided regarding the application of the primary assumption of risk doctrine. The Court of Appeals has limited the expansion of the doctrine to those cases that present a social value and those that occur within a designated recreational venue. However, the courts still look to the inherent dangers of the sport, whether the plaintiff appreciated those risks, the skills of the plaintiff, and if the condition was open and obvious. If found to apply, the assumption of risk doctrine, provides a complete defense to property owners, overriding an application of plaintiff's comparative negligence. The Court of Appeals has drawn distinctions as to what type of activities will permit an application of the assumption of risk doctrine, and where those activities took place.

The assumption of risk doctrine arises when one is aware of and appreciates the risks inherent in the activity and "voluntarily assumes the risk" by participating.[4] The participant must have knowledge and appreciation of the risk. Awareness of the risk should be measured against the "background of the skill and experience of the particular plaintiff."[5] The assumption of risk doctrine has been applied to the layout and construction of a playing field,[6] as well as the activity. It has also been applied to where there is an open and obvious conditions where the sport is played.[7] Determining if a defendant violated a duty of care to participants in sports and activities "should include whether the conditions caused by defendants' negligence are 'unique' and created a dangerous condition over and above the usual dangers that are inherent in the sport."[8]

Assumption of risk is not justified for reckless or intentional conduct by property owners.[9] If a plaintiff can show the defendant acted negligently, or a defendant's inaction was a "substantial cause of events which produced the injury," plaintiff will not have assumed the risks of the sport.[10]

In *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392 (2010), the Court of Appeals held that while assumption of the risk protects the social value of athletic and recreative activities, it does not apply outside of this limited context.[11] Thus, in *Trupia*, an infant-plaintiff sliding down a banister was not an activity of the kind of social value that warranted the protection afforded under the assumption of the risk doctrine.[12] The Court found that if the plaintiff's harm was attributable to his own actions and not to negligence on behalf of the defendants, his actions would be taken into account under the comparative fault provision of the CPLR.[13]

In *Custodi v. Town of Amherst*, 20 N.Y.3d 83 (2012), the Court of Appeals declined to apply the assumption of risk doctrine to those cases where the activity did not take place within a "designated venue."[14] Therefore, the plaintiff, who fell while rollerblading across a height differential in the street, did not assume the risks inherent to rollerblading as she would have had she been in a rink, skating park or competition.[15]

Field of Play Participants

Courts look to plaintiff's skills and experience to evaluate an application of primary assumption of risk

The assumption of the risk doctrine will apply when a defendant can prove that the plaintiff's skill and experience afforded the plaintiff an appreciation of the risk involved in his or her sport.

In *Maddox v. City of New York*, plaintiff, New York Yankee outfielder, Elliot Maddox, suffered a career-ending injury when he slipped and fell on a wet and muddy field.[16] The Court of Appeals found that his experience of playing professional baseball coupled with his testimony that he was aware of the condition (he had complained to groundskeepers about the condition) and his playing

in the field constituted plaintiff assuming the risk of his injury.[17]

Similarly, in *Morgan v. State*, plaintiff was driving a two-person bobsled during a national championship race, when their bobsled tipped over and his teammate fell out of the bobsled. Plaintiff was an Olympic bobsledder who had over 20 years of experience and had raced down the very same run at issue numerous times.[18] The Court of Appeals held summary judgment was properly granted to defendants under the assumption of risk doctrine, based on plaintiff's over 20-year experience in bobsledding, and familiarity with the bobsled course at issue.[19]

stepped into a recessed drain while playing basketball, had assumed the risk as the condition of the court was open and obvious. Further, there was no evidence that the drain was defective or improperly maintained.

The plaintiff, in *Siegel v. City of New York*, 90 N.Y.2d 471 (1997), was injured when he caught his foot in the bottom of the net dividing the indoor tennis courts.[23] Plaintiff had been a member of the club for 10 years, and had been playing tennis there once a week.[24] Plaintiff testified that he knew the net had been ripped for over two years; although he never notified the facility's management about the issue, he knew others had.[25] Defendants were granted summary judgment on the grounds that plaintiff assumed his risk by electing to play on a tennis court that

"A defense will not be awarded when a property owner or facility operator was found to have neglected, or intentionally created, the condition, increasing the dangers over and above the usual dangers inherent to the sport."

In *Lomonico v. Massapequa Public Schools*, 84 A.D.3d 1033 (2nd Dep't 2011), plaintiff, an 11th-grade cheerleader, alleged she suffered from post-concussion syndrome when she was struck in the head by another student when practicing a stunt. The stunt involved one girl (the flyer) being lifted into the air by three other girls. The flyer is lifted on one foot and then to dismount, rotates 360 degrees and lands cradled in the arms of the bases and backstop. Plaintiff alleged a lack of instruction and supervision and failure to provide protective mats.[20] The Second Department found the cheerleader could not demonstrate the school district's liability due to the extent of her cheerleading experience and with this stunt in particular. She clearly knew of the risks inherent in the activity.[21]

The effects of conditions of the field or facility under assumption of risk

A property owner or facility operator can be awarded a defense under assumption of the risk when the condition is open and obvious. A defense will not be awarded when a property owner or facility operator was found to have neglected, or intentionally created, the condition, increasing the dangers over and above the usual dangers inherent to the sport.

The Court of Appeals held in *Turcotte v. Fells* that plaintiff assumed the risks of his injuries when he participated in three prior races on the same day, observed the conditions of the track prior to the eighth race, and his general knowledge of the possibility of "cupping" conditions on the track.[22]

In *Sykes v. County of Erie*, 94 N.Y.2d 912 (2000), the Court of Appeals held that plaintiff, injured when he

he knew had a torn net for a long time.[26] The Court of Appeals reversed the decision, finding that the torn net was not "inherent" to tennis, it was more of an "allegedly negligent condition occurring in the ordinary course of any property's maintenance . . . ."[27]

Plaintiff, in *Siegel v. Albertus Magnus High School*, 153 A.D.3d 572 (2d Dep't 2017) (*lv denied*, 30 N.Y.3d 906 (2017)), was assisting the coaches of his son's baseball team and alleges when he was running from third base into foul territory, he slipped and fell on a tile mat that was covering a drainage grate.[28] Plaintiff argued the tile was negligently placed by defendants, which caused a defect in the playing field as the tile was not a part of the playing field.[29] The Appellate Division, Second Department found that summary judgment was properly granted against the defendants as the 12" x 12" white/creamish-colored tile was an open and obvious condition and starkly contrasted the color of the grass.[30] Additionally, plaintiff could not show that the tile was defective. Further, the court relied upon plaintiff's testimony—that he had previously been to, and played/coached on the field; sat on the sideline near the tile; and had volunteered to be on the field at least three prior occasions—and found that plaintiff by volunteering "assumed the obvious risk of slipping on the grass or on the tile by electing to play baseball on that field."[31]

Bystanders and Spectators

In the past five years, publicity surrounding major league baseball (MLB) parks due to the number of serious injuries spectators have incurred while attending baseball games has led to increased scrutiny surrounding spectator

safety. According to a September 9, 2014 *Bloomberg* article, there were roughly 1,750 injuries to spectators from foul balls.[32] Further, in a June 1, 2019 *New York Times* article, there have been nearly 14,000 more foul balls hit in the 2018 season than there were in 1998.[33] The issue of bystander and spectator safety has been clearly addressed by the Court of Appeals, which has held "that an owner or operator of an athletic field or facility 'is not an insurer of the safety of its spectators.'"[34] While the assumption of risk doctrine extends to bystanders and spectators, there is still a duty by the landowners or occupiers to take reasonable measures to prevent injury to those present on the property.[35] The assumption of risk doctrine will not apply where there is a "reckless or intentional conduct, or concealed or unreasonably increased risks" to those spectators.[36]

Facilities need to provide protection to spectators where the risk of being hit is the greatest

All baseball parks include some sort of netting to protect spectators in certain parts of the stadium, mainly behind home plate and dugouts, but there has recently been public discussions to extend the netting to protect more spectators in the ballparks, with some MLB teams actually doing so. *In Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 (1981), plaintiff was hit by a foul ball, but the Court of Appeals found that because plaintiff chose to stand behind a three-foot fence along the third base line, instead of in the stands behind a 24-foot high fence, she assumed the risk of being hit by a foul ball.[37] Further, the Court of Appeals found that ballpark owners need only provide protection behind home plate where the danger of being hit by a ball is the greatest.[38]

In *Zlotnick v. New York Yankees Partnership*, 154 A.D.3d 588 (1st Dep't 2017), plaintiff was struck in the eye by a foul ball while attending a Yankees' game.[39] Plaintiff was sitting in his assigned seat about halfway down the first baseline and a few rows back. The First Department affirmed the decision granting the Yankees summary judgment, finding there was no breach of duty by the defendants, as there was appropriate netting behind home plate, and there were plenty of seats available in that section. Additionally, the disclaimers on tickets and regular announcements made over the PA system advised spectators to notify a stadium employee of any particular concerns during the course of watching a game, even to request a seat change![40]

Similarly, cases have generally held owners of hockey rinks have not breached their duty to spectators if they have provided "screening around the area behind the hockey goals, where the danger of being hit by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening."[41] However, summary judgment was denied to defendants in *Smero v. City of Saratoga Springs*, where the infant-plaintiff was struck in the head by a puck while watching a youth hockey team practice.[42] It was alleged that defendants were negligent in failing to install proper netting/barriers in the area where she was injured, failure to supervise, control and maintain the activities occurring on the ice, and failure to construct or maintain the ice rink in a safe manner.[43]

In *Smero*, the ice rink had 4'7" boards surrounding the rink, with 3' plexiglass panels on top of the dasher boards running along the sides of the rink, and 6' panels of plexiglass behind the goal nets.[44] Behind the goals there was also protective netting, but the netting did not extend along the sides of the rink.[45] On the date in question though, the goals were not set up lengthwise at the ends of the rink as usual; rather, the goals were set up width-wise to accommodate two different practices.[46] Plaintiff was walking along the side of the rink when a player took a shot at the goal net, launching the puck over the dasher board and plexiglass and hitting the plaintiff. The Third Department found there was an issue of fact as to whether defendants breached their duty to plaintiff because the goals were set up in an area where there was a significant gap in protective screening, thereby increasing the likelihood of spectators being placed in danger of a flying puck.[47]

The assumption of risk doctrine can extend to consenting bystanders and spectators even if they are not actively watching the sporting event or activity.[48] In *Thomas v. State*, 59 Misc.3d 1234(A) (N.Y. Ct. Cl. 2018), plaintiff, an inmate at a correctional facility, was struck in the eye by an errant softball.[49] Plaintiff had gone out to the recreation yard for a cigarette and walked to a bench behind the fenced off area behind home plate before the softball game was underway.[50] He had been at the bench for around 10 minutes, when someone yelled "heads up."[51] He looked up and was immediately struck in the eye by a softball. The Court of Claims found that the state fulfilled their duty to protect inmate bystanders from softballs by having a fence behind home plate.[52] Although plaintiff was a bystander, he still assumed the risks of his injuries by standing within close proximity to the softball field.[53] Additionally, the court found the state did not have to warn their inmates that the "readily observable softball field may become active if and when other inmates elected to use the field to play softball."[54]

Design/defects inherent to the facility

The condition of the outdoor basketball court came up in *Leitner v. The City of New York*, 60 Misc.3d 1209A (N.Y. Sup. Ct. 2013), where plaintiff was watching his kids play basketball at an outdoor basketball court when a basketball rebounded toward him.[55] He went to get the ball, twisting his ankle in a crack in the court.[56] The City of New York moved for summary judgment on the grounds that they did not breach a duty to plaintiff as he was a spectator to the basketball game.

The court in *Leitner* found that the cracks in the basketball court were not inherent to game of basketball, and the court was not designed with cracks in it.[57] The court found the City of New York was still liable for its failure to maintain the premises in a reasonably safe condition.[58]

Assumption of the risk can extend to bystanders and spectators if the conditions or risks are open and obvious

A plaintiff assumes the risk of injury arising from any open and obvious condition of the place where the activity is being carried out.[59] Mud in front of a dugout was found to be an open and obvious condition and not inherently dangerous when a grandmother who was watching her grandson's little league game fell while walking across the mud to say goodbye to her grandson.[60]

Further, in *Roberts v. Boys and Girls Republic, Inc.*, plaintiff was struck in a head by a bat being swung at her son's baseball practice.[61] The First Department found that bats being swung are inherent to the game of baseball, and knowledge of the sport of baseball is not required to appreciate the risk of an injury from a swung bat, as it is perfectly obvious.[62]

Playgrounds

It is well established that schools "are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances."[63] However, a school is not "an insurer of safety, and cannot be expected to continuously supervise and control all of the students' movements and activities."[64] Where playgrounds are involved, a school district has a duty to supervise students on how to safely use the playground equipment, the breach which can result in liability.[65]

The condition of the playground facility and equipment will be critically assessed by expert proof

In *A.C. by Fajardo v. Brentwood Union Free School Dist.*, 63 Misc.3d 1204(A), 1 (Nassau Sup. Ct. 2019), plaintiff, a second grade student, fell while using the zip line apparatus in the playground of his school.[66] Plaintiff asserted claims of negligent supervision, instruction, and the existence of a dangerous and defective conditions, (i.e., failing to provide proper padding beneath the zip line, and failing to have "proper non-slip material" on the zip line handle).[67] In deciding the unopposed summary judgment motion brought by defendants, the Nassau County Supreme Court found there was a triable question of fact as to whether the plaintiff was properly instructed as to how to use the zip line apparatus.[68] Discrepancies existed in the testimony of the plaintiff and the gym teacher who was on the playground with the students.[69] The plaintiff testified that he did not receive any instruction on how to use the zip line apparatus, and just followed how the other kids were using it.[70] The gym teacher testified that he instructed the students to hold the zip line handle with two hands, to make sure there were no students underneath them and no students standing on the landing dock.[71] According to affidavits provided by defendants' experts, the zip line apparatus was inspected and found to be in "excellent" condition; additionally, the "engineered wood fiber ground cover underneath the apparatus conformed to all applicable safety standards, and was to help prevent life-threatening head injuries, not to prevent all types of injuries.[72] As to the non-slip material on the handle, there were no safety specifications, standards or regulations saying that it was required.[73] The court concluded that the zip line apparatus was not dangerous or defective.[74]

Similarly, in *Valenzuela v. Metro Motel, LLC*, 170 A.D.3d 780 (2d Dep't 2019), an action alleging a defective condition was brought against the landowner on behalf of an infant-plaintiff whose leg became caught in a gap between two platforms on playground equipment.[75] Through an expert affidavit, defendants were able to show that there was no defective condition, the playground was maintained in a reasonably safe condition, and the gaps did not violate any applicable guidelines or standards.[76]

Summary judgment was denied to defendants in *Adriana G. v. Kipp Washington Heights Middle School*, 165 A.D.3d 469 (1st Dep't 2018), where infant-plaintiff's ring finger was amputated after it got caught in a playground fence.[77] A triable question of fact was found as to whether the fence was in a reasonably safe condition at the time of the accident.[78] Defendants' expert's affidavit asserted the fence was in compliance with the New York City School Construction Authority's (NYCSCA) standards, while plaintiff's expert's affidavit asserted that the fence was not in compliance with the NYCSCA's standards, as the fence had sharp edges that were present at the time of the accident.[79]

New York Statutes

New York General Obligation Law § 9-103 Recreational Use

The New York statute was enacted to limit liability of landowners that allows the use of their land without a fee. The statute provides where a user engages in one or more of a number of enumerated activities that protection can be afforded to a property owner if he can establish that:

1. The injured party was pursuing one of the enumerated activities[80] on the premises;
2. The property was physically conducive to the activity[81]; and
3. The property is of a type that is appropriate for pursuing the activity at issue.[82]

The intent of the statute was to encourage landowners to allow the public to use their land to engage in certain recreational activities without fear of liability for the injuries suffered by those participants.[83] In *Albright v. Metz*, 88 N.Y.2d 656 (1996), plaintiff was injured when he was motorbiking on defendant's property, which was being used as a gravel mine and landfill.[84] The Court of Appeals found that the property was used numerous times by motorbikers and, as such the land was physically conducive for the activity. The plaintiff tried to avoid the statutory bar by arguing that the landfill was hazardous and not appropriate for motorbiking. The Court declined to accept that argument and determined the land was suitable for motorbiking, therefore affording the landowner immunity under the statute.[85]

However, in *Sena v. Town of Greenfield*, plaintiff was injured when sliding down a hill that was supervised by the town for the purposes of sledding.[86] The Court of Appeals held that the statute did not provide immunity to municipalities who still had a duty in the operation and maintenance of a supervised public park and recreational facility.[87]

"The intent of the statute was to encourage landowners to allow the public to use their land to engage in certain recreational activities without fear of liability for the injuries suffered by those participants ."

New York General Obligation Law § 18 Skiing

New York has recognized that skiing is a voluntary activity that may be hazardous, regardless of all feasible safety measures that can be undertaken by ski area operators. New York has also recognized, in § 18-101, that there are inherent risks to skiing caused by "variations in terrain or weather conditions surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility."[88] Section 18-106 of the statute provides that ski area operators have additional duties to:

1. post at every point of sale or distribution of lift tickets, a "warning to skiers" about the inherent risks of skiing;
2. make ski instruction and education as to the inherent risks of skiing available at a reasonable price; and
3. post a notice to skiers as to the availability of a refund to those who feel unprepared or unwilling to ski due to the inherent risks.

Section 18-106 additionally states that skiers have a duty to seek out information to make an informed decision as to their participation in the sport.

In *Sytner v. State*, 223 A.D.2d 140 (3d Dep't 1996), snow-making was in progress on the right side of Mohican Trail, leaving only the left side of the trail open for skiers.[89] There were no signs at the start of the trail notifying skiers that snow-making was in progress.[90] The left side of the trail however contained an icy patch about 25 feet to 35 feet wide and 40 feet to 50 feet in length.[91] The ice patch also contained a bare spot.[92] Plaintiff, a novice skier, was following her neighbor down the left side of the trail,[93] when she lost control on the ice and was unable to avoid the bare spot, causing her skis to abruptly stop and send her flying into the air.[94] The Third Department noted that although icy patches similar to the one plaintiff skied over are deemed inherent to skiing under § 18-101, the section was not meant to encompass an icy patch as large as the one at issue. Additionally, the defendant did not comply with § 18-103, because it did not maintain the proper signage at the top of ski slopes and trails regarding trail maintenance including snow-making.

In *Fest v. Apel Capital, LLC*, 171 A.D.3d 1016 (2d Dep't 2019), the Second Department determined that the snow mound (commonly known as a snow whale), that infant-plaintiff used to "catch some air" was intentionally placed by the defendant for that purpose and to preserve artificial snow. The snow whale constituted an inherent risk to snowboarding.[95] Additionally, the crevice that plaintiff fell into after catching air was a natural occurrence of "variations surface and subsurface snow conditions," and considered an inherent risk under § 18-101.[96] For these reasons the Second Department granted the defendant's summary judgment motion.

New York General Obligation Law § 5-326 Waivers

Attending a baseball game is perhaps America's favorite pastime, but few patrons read the fine print on their ticket to a major league baseball game. All tickets include a disclaimer generally saying that spectators assume all risks of attending a baseball game. The disclaimers are intended to shield the MLB from liability.

New York's statute addressing waivers provides that a waiver will be deemed to be void as against public policy if:

1. the agreement entered into is between the owner or operator of a recreational facility and the participant;

2. it exempts the owner or operator from liability; and

3. that owner or operator receives a fee in exchange for use of the facility.

The New York General Obligation Law § 5-326 reads:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Under this section, a waiver can be upheld if the fee paid by a plaintiff was not paid to the owner/operator of the facility, and the language of the waiver must clearly spell out the intent to relieve the defendant of any liability for injuries incurred.[97]

Playgrounds

New York General Business Law § 399-dd

New York's playground statute sets forth the following pertaining to the installation, inspection and maintenance of playgrounds:

> The state shall promulgate rules and regulations for the design, installation, inspection and maintenance of playgrounds and playground equipment in substantial compliance with the handbook for public playground safety produced by the United States Consumer Products Safety Commission; and
>
> Play grounds shall be constructed or installed in accordance to the rules and regulations pursuant to this section. (One, two and three-family residential real property are exempt from the requirements of this section).

In *Boland v. North Bellmore Union Free School Dist*, 169 A.D.3d 632 (2d Dep't 2019), the court found that plaintiff raised a triable issue of fact through her expert's affidavit which opined that the ground cover underneath the apparatus from which infant-plaintiff fell did not meet the standards established by Consumer Product Safety Commission.

Other Issues Surrounding Student Athletes

Recent years of heighted attention to the risk of head injuries to NFL players, and the emergence of chronic traumatic encephalopathy (CTE), has now brought heightened attention surrounding the NCAA student athletes, even K-12 public schools,[98] and how to properly assess and treat head injuries before a player is allowed to return to play. Recently the NCAA has been faced with numerous class actions surrounding the concussions suffered by student athletes of all sports, not just football.

The NCAA governs the rules and regulations of players of over 24 different collegiate sports, including what kind of protective equipment can be worn by student-athletes. The rules may differ between male and female athletes for the same sport, like lacrosse. In 2015, the NCAA passed legislation amending Article 3 of their Constitution, requiring Division I Institutions to submit its Concussion Safety Protocol to the Concussion Safety Protocol Committee by May 1 of each year.[99]

Although landowners and operators of the facilities will be able to assert an affirmative defense under assumption of the risk doctrine, when faced with claims of breaching their duty of care, whether other organizations that set standards and regulate sports activities and equipment such as the NCAA, will be deemed to have a duty of care to the student athletes as well seems to be the next development in this area.

In *Greiber v. Nat.Collegiate Athletic Ass'n*, 2017 WL 6940498 (2017), plaintiff, a student-athlete, alleged she suffered from two concussions from playing women's collegiate lacrosse. The first concussion occurred in 2013, when a ball ricocheted off bleachers, hitting plaintiff in the head.[100] The second concussion occurred almost a year later, when plaintiff and another player slipped on wet grass, colliding heads.[101] Plaintiff brought suit against the NCAA (among others), alleging the NCAA had a duty to plaintiff to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize risk of injury to student athletes.[102] In support of her allegations, plaintiff argued that while men were required to wear hard helmets when playing men's collegiate lacrosse, women were not, and by not allowing women to wear helmets, the NCAA exacerbated the risk of sustaining a head injury. The NCAA, in a motion to dismiss for failure to state a cause of action, argued that they did not breach any duty to plaintiff, arguing the NCAA is made up of over 1,000 autonomous member institutions,

and did not have a special relationship with plaintiff or any of the other 460,000 student-athletes.[103] The NCAA further argued that plaintiff assumed the inherent risks of participating in contact sports.[104] The Supreme Court, Nassau County, denied the NCAA's motion, finding that the NCAA prohibited plaintiff from utilizing protective head gear, as they had the authority to make rules and exercised those rules over the safety equipment worn by student-athletes.[105]

Conclusion

Before you pick up those golf clubs, attend your kid's little league game, or enjoy a trip to Busch Gardens, make sure you read the fine print on your entry ticket, watch where you step and steer clear of foul balls. "Be safe out there."

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Resources

American National Standards Institute (https://www.ansi.org/)

ASTM International (https://www.astm.org/)

Consumer Product Safety Commission (https://www.cpsc.gov/Regulations-Laws--Standards)

NCAA Sports Science Institute (http://www.ncaa.org/sport-science-institute)

National Operating Committee on Standards for Athletic Equipment (https://nocsae.org/)

Medicine & Science in Sports & Exercise (https://journals.lww.com/acsm-msse/pages/default.aspx)

Statutes

8 N.Y.C.R.R. 136.5 (Concussion management and awareness)

New York General Business Law § 399-dd (Playgrounds)

New York General Obligation Law § 5-326 (Waivers)

New York General Obligation Law § 9-103 (Recreational Use)

New York General Obligation Law § 18-101 (Skiing)

New York General Obligation Law § 18-103 (Skiing)

New York General Obligation Law § 18-106 (Skiing)

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Bowler, T. (Spring, 2015), *Legal Corner. The NCAA softball bullpen without a backstop*, The Bulletin, 61 (2), 15-16.

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Bowler, T. (Fall, 2012), *The "big wooden slide" has a giant splinter leading to litigation*, The Bulletin, 59 (1), 11-14.

Endnotes

1. *Peralta v. Henriquez*, 100 N.Y.2d 139, 143-144 (2003).
2. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976).
3. *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986).
4. *Morgan v. State*, 90 N.Y.2d 471, 484 (1997).
5. *Maddox v. City of New York*, 66 N.Y.2d 270, 278 (1985).
6. *Bryant v. Town of Brookhaven*, 135 A.D.3d 801, 802 (2d Dep't 2016).
7. *Sanchez v. City of New York*, 25 A.D.3d 776 (2d Dep't 2006).
8. *Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 970 (1992).
9. *Turcotte*, 68 N.Y.2d at 439 (1986) (citations omitted).
10. *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 659 (1989).
11. *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d at 395.
12. *Id.* at 396.
13. *Id.*
14. *Custodi v. Town of Amherst*, 20 N.Y.3d at 89.
15. *Id.*
16. *Maddox*, 66 N.Y.2d at 275.
17. *Id.* at 278-279.
18. *Morgan*, 90 N.Y.2d at 480, 486.
19. *Id.* at 486.
20. *Lomonico v. Massapequa Public Schools*, 84 A.D.3d at 1034.
21. *Id.* (*See, Digose v. Bellmore–Merrick Cent. High School* Dist., 50 A.D.3d 623, 624 (2d Dep't 2008)).
22. *Turcotte*, 68 N.Y.2d at 443. (plaintiff alleged foul riding by another jockey, and that the racetrack was negligently watered and groomed) *Id.* at 436 (cupping comes from over watering of the race track). *Id.* at 443
23. *Siegel v. City of New York*, 90 N.Y.2d at 482.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 488-89.
28. *Siegel v. Albertus Magnus High School*, 153 A.D.3d at 573.
29. (Citing to *Siegel v. Albertus Magnus High School*, 2015 WL 12805935, 3 (Rockland Sup.Ct., 2015).
30. *Siegel*, 153 A.D.3d at 575.
31. *Id.* (citation omitted).
32. David Glovin, *Baseball Caught Looking as Fouls Injury 1750 Fans a Year*, Bloomberg (September 9, 2014, 4:05 PM), https://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year.
33. Billy Witz, *A Foul Ball, an Injured Little Girl and Another Cycle of Anguish*, (June 1, 2019), https://www.nytimes.com/2019/06/01/sports/fan-hit-foul-ball-almora.html.

34. *Akins v. Glens Falls City School Dist*., 53 N.Y.2d at 329.
35. *Id.*
36. *Smero v. City of Saratoga Springs*, 169 A.D.3d 1169, 1170 (3d Dep't 2018) (citations omitted).
37. *Akins*, 53 N.Y.2d at 328.
38. *Id.* at 331.
39. *Zlotnick v. New York Yankees Partnership*, 154 A.D.3d at 588.
40. *Id.*
41. *Gilchrist v. City of Troy*, 113 A.D.2d 271, 273-74 (3d Dep't 1985).
42. *Smero*, 169 A.D.3d at 1169.
43. *Id* at 1169-70.
44. *Id.* at 1171.
45. *Id*.
46. *Id*.
47. *Id*. at 1172.
48. *Newwcomb v. Guptill Holding Corp*., 31 A.D.3d 875, 876 (3d Dep't 2006) (*See Roberts v. Boys & Girls Republic, Inc*., 51 A.D.3d 246 (1st Dep't 2008)).
49. *Thomas v. State*, 59 Misc.3d at 2.
50. *Id*.
51. *Id.*
52. *Id.*
53. *Id.* (*See, Starke v. Town of Smithtown*, 155 A.D.2d 526 (2d Dep't 1989)).
54. *Id.* (*See, Cherry v. Hofstra Univ*., 274 A.D.2d 443 (2d Dep't 2000)).
55. *Leitner v. The City of New York*, 60 Misc.3d at 1.
56. *Id.*
57. *Id.* at 2.
58. *Id.*
59. *Maddox*, 66 N.Y.2d at 277.
60. *Sirianni v. Town of Oyster Bay*, 156 A.D.3d 739, 740 (2d Dep't 2017).
61. *Roberts*, 51 A.D.3d at 247.
62. *Id*. at 248.
63. *David v. County of Suffolk*, 1 N.Y.3d 525, 526 (2003).
64. *Mirand v. City of New York,* 84 N.Y.2d 44, 48 (1994).
65. *Merson v. Syosset Central School District*, 286, A.D.2d 668 (2d Dep't 2011).
66. *A.C. by Fajardo v. Brentwood Union Free School Dist*., 63 Misc.3d 1204(A), 1. (Note, a motion to reargue/reconsider is currently pending in Nassau County).
67. 67. *Id.*
68. *Id.* at 2.
69. *Id.*
70. *Id*. at 3.
71. *Id*.
72. *Id.*
73. *Id.*
74. *Id.* at 2.
75. *Valenzuela v. Metro Motel, LLC*, 170 A.D.3d at 780.
76. *Id.* (*See Moseley v. Philip Howard Apts Tenants Corp*., 134 A.D3d 785, 787 (2d Dep't 2015)), *Y.H. v. Town of Ossining*, 99 A.D.3d 760, 761 (2d Dep't 2012), *Newman v. Oceanside Union Free School Dist*., 23 A.D.3d 631, (2d Dep't 2005), *Belkin v. Middle Country Cent. School Dist*., 261 A.D.2d 563 (2d Dep't 1999).
77. *Adriana G. v. Kipp Washington Heights Middle School*, 165 A.D.3d at 469.
78. *Id.* at 470.
79. *Id.* (*See Schmidt v. One N.Y. Plaza Co. LLC,* 153 A.D.3d 427, 428–429, (1st Dep't 2017); *Griffith v. ETH NEP, L.P*., 140 A.D.3d 451, (1st Dep't 2016), *lv denied* 28 N.Y.3d 905, (2016)); (*see also*, *Berr v. Gran*t, 149 A.D.3d 536, 537, (1st Dep't 2017); *Alvia v. Mutual Redevelopment Houses, Inc*., 56 A.D.3d 311, 312, (1st Dep't 2008)).
80. Hunting, fishing, organized gleaning as defined in § 71-Y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs.
81. In determining if a property is conducive to the activity in question, courts should look to see if the property has been used by recreationists in the past for the same activity. (*Iannotti v. Consolidated Rail Corp*, 74 N.Y.2d 39, 45 (1989).
82. *Id*.
83. *Sena v. Town of Greenfield*, 91 N.Y.2d 611, 615 (1998) (*see Franham v. Kittinger,* 83 N.Y.2d 520,523 (1994), *Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 451 (1986)).
84. *Albright v. Metz*, 88 N.Y.2d at 660.
85. *Id.* At 662-663.
86. *Sena*, 91 N.Y.2d at 613.
87. *Id*. at 615 (*citing Ferres v. City of New Rochelle*, 68 N.Y.2d at 452).
88. New York Obligations Law § 18-101.
89. *Sytner v. State*, 223 A.D.2d at 142.
90. *Id.*
91. *Id.*
92. *Id.*
93. Plaintiff's neighbor was able to maneuver over the ice and avoid the bare spot. *Id.*
94. *Id.*
95. *Fest v. Apel Capital, LLC*, 171 A.D.3d at 1017-18.
96. *Id.* at 1018.
97. *Bufano v. National Incline Roller Hockey Assn*., 272, A.D.2d 359, 360 (2d Dep't 2000) (*See also, Brookner v. New York Road Runners Club*, 51 A.D.3d 841-842 (2d Dep't 2008)).
98. In 2012, New York enacted 8 N.Y.C.R.R. 136.5, which lays out the minimum standards for public schools and concussion management. (The regulation is mandatory for public schools and charters, and may be implemented by nonpublic schools, if they choose). See Appendix for full statute.
99. Prior to 2015, the NCAA's Constitution only required that Division I institutions have a Concussion Management Plan for student-athletes. The plan did not have to be submitted to the NCAA for approval.
100. *Greiber v. Nat. Collegiate Athletic Ass'n*, 2017 WL 6940498, at 2.
101. At the time of plaintiff's accidents, schools were not required to submit their Concussion Management Plan for review.
102. *Id.*
103. *Id.* at 4.
104. *Id.*
105. *Id.* at 5.

The Path To Expand Damages for Emotional Pain and Anguish for a Family Member's Personal Injury or Death: From *Greene* to the Grieving Families Act

By V. Christopher Potenza and Alice A. Trueman

There has been a palpable movement in the courts and in the legislature to expand damages in cases of emotional pain and anguish and wrongful death.

The New York Court of Appeals, in the case of *Greene v. Esplanade*, 36 N.Y. 3d 513 (2021), rendered a decision in February 2021 to expand recovery rights to a grandparent under the "zone of danger" doctrine.

The case involved the tragic death of a two-year-old child resulting from pieces of a building façade that had broken off and fallen onto the child. At the time of the incident, the child's grandmother was next to the child as debris suddenly fell from the building, and the plaintiff grandmother was herself struck by debris. The grandmother had initially filed a lawsuit based on two causes of action sounding in negligence and wrongful death. However, the grandmother moved to amend the complaint to add another cause of action based on negligent infliction of emotional distress pursuant to the zone of danger doctrine.

The zone of danger doctrine provides for a right of recovery for infliction of emotional distress where one is threatened with bodily harm as a consequence of a defendant's negligence and flows *only* from the viewing of death or serious physical injury of a member of that person's "immediate family." The term "immediate family" was at the crux of the debate in the *Greene* case.

Procedural History of the *Greene* Decision

The case was first heard by the Supreme Court, King's County. The grandmother argued that she should be classified as an "immediate family" member of the decedent child based on the "unique and special nature" of the relationship between a grandparent and a grandchild. The Supreme Court granted plaintiff's right to amend the complaint based on the zone of danger doctrine and concluded that based on the "unique and special" relationship between the grandmother and grandchild, the plaintiff should be considered an "immediate family" member of the child. The court noted the specific recognition of special custody rights of grandparents with respect to grandchildren in support of its decision.

Defendants appealed to the Appellate Division, Second Department, arguing that grandparents are excluded from the designation of "immediate family." The Second Department reversed the lower court, holding that the grandmother was not "immediate family" so as to permit her to recover on a claim that sounded in negligent infliction of emotional distress based on the zone of danger doctrine. The Second Department relied on the 1984 case of *Bovsun v. Sanperi,* which stood for the proposition that the term "immediate family" encompasses only spouses and their children. *See Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984). The appellate court therefore concluded that the grandmother's proposed amendment was patently devoid of merit, and that leave to amend the complaint should be denied. The majority decision referenced several cases which highlighted the courts' steadfast adherence to the definition of "immediate family" as described in *Bovsun.* In *Trombetta v. Conkling,* 82 N.Y.2d 549 (1993), the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt where the niece's mother had died when the niece was 11 and the aunt had been her sole maternal figure. Further, in *Jun Chi Guan v. Tuscan Dairy Farms*, 24 A.D.3d 725 (2nd Dep't 2005), the Second Department rejected a grandmother's argument that she should be considered immediate family and de facto maternal figure, where her grandson was killed in a stroller she was pushing, even though she spent the most time with the infant during his waking hours.

The Second Department's dissenting opinion in *Greene* provided a comprehensive historical overview of emotional damages and applied pertinent law to the facts of this case. The dissent examined the seemingly arbitrary and unjust results that followed from the application of the term "immediate family" as limited by *Bovsun,* and further stated that the current state of the law does not reflect modern familial structures and modern societal norms. Further, the dissent referenced the concept of the common-law system as a living mechanism—one that is ever-growing and responding to the surging reality of changed conditions. The dissent provided that where a rule produces arbitrary results, it is the duty of the court to inquire into the rule's continued viability, and if appropriate, reformulate the rule or abolish it completely.

As addressed in the dissent, it is not surprising that the definition of "immediate family" as applied by the courts in years past has evoked controversy and repeated challenges. While many modern families fall into the traditional two spouse and child/children structure, a great many families fall into untraditional models which include children being raised by grandparents, aunts, uncles, siblings, step-parents, and more.

The Court of Appeals Decision of Feb. 18, 2021

While reversing the lower court's decision, the Appellate Division also granted leave to appeal to the Court of Appeals. The Court ultimately decided that the grandmother in this case should be classified as an "immediate family" member of the decedent grandchild. While the Court noted the "historically circumspect approach" to expanding liability for emotional damages, the Court based its decision on the increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense. The Court further indicated that the *Bovsun* did not provide an exhaustive list of family members that could qualify as "immediate family."

The majority, however, strongly emphasized that its decision does not establish "outer limits" to the definition of "immediate family." In fact, the Court indicated that it was tasked with determining *only* whether the grandmother in this case warranted a classification as a member of the "immediate family." The Court even referenced the fact that the decisions in *Bovsun* and *Trombetta* also refused to set "outer limits" of the term.

The concurring opinion agreed with the majority decision yet simultaneously rebuked the decision stating that the "Court has missed the moment." The concurring justices indicated that the Court could have discarded the "immediate family" requirement altogether, which is premised on antiquated definitions based strictly by marriage and degrees of consanguinity. Further, the concurring opinion argued that the limitation of "immediate family" as provided by *Bovson* is underinclusive in that it assumes that only spouses and certain relatives have the type of emotional attachment to the third-party victim that justifies recovery.

The significance of the Court of Appeals decision in *Greene* is that it has become apparent that the Court is willing to review the classification of additional types of plaintiff family members eligible for emotional damages. It should be anticipated that plaintiffs will seek to test the "outer limits" of the "immediate family" definition. Notably, various states such as California, Oregon, Texas, and New Jersey, have either abandoned the "immediate family" rule or expanded to more permissive rules as to who may recover under such circumstances. In considering the nuances of what constitutes familial affection, familial love, and bonds that comprise family, it is understandable why New York courts may wish to move to a more permissive and inclusive test to consider the nature of a bystander's relationship to a victim.

Why did the Court of Appeals not discard the "immediate family" requirement altogether? Also, why has the Court of Appeals been so reluctant to set the "outer limits" of the phrase of "immediate family?"

Some would argue that by either discarding the rule altogether or by expanding the outer limits, the Court may be allowing the floodgates to open to all types of plaintiffs, with potentially tenuous affections or sentiments to the victim. However, the courts are well adept in ferreting out proper individuals to recover damages in other areas of the law, so it is not clear why this area would be any different. Others may argue that the nuanced nature of familial bonds and relationships are too difficult to define, thus leaving an amorphous and open interpretation as the best solution to evaluate the bystander-victim relationship on a case-by-case basis, rather than a sweeping change of approach.

However, there is likely a historical component to the reluctance of the Court to either discard or set "outer limits" of the "immediate family" rule. While the zone of danger doctrine is a common-law doctrine it is still borne out of an era where the courts and the legislature found it to be against public policy to recover for damages arising purely from mental trauma or anguish in the absence of physical contact or injury. In 1961, the Court first recognized that a plaintiff could recover on a claim for damages based on mental distress without physical injury. *See Battalla v. State of New York*, 10 N.Y.2d 34 (1961). Essentially, the Court determined that if the victim plaintiff could show that the defendant breached a duty of care, and that the said breach resulted directly in the victim plaintiff's emotional harm, even absent physical injury, it was a compensable claim. However, such recognition only pertained to the direct victim. Derivative claims of bystanders, regardless of their familial connection, were not recognized as having any merit despite them suffering emotional distress as a result of witnessing the injury or death of another. The *Bovsun* decision in 1984 then carved out a loophole to this general denial of recovery of derivative claims of emotional distress or anguish under circumstances where the bystander was an "immediate family" member and was confronted with fear of physical harm or injury while being in the proximity of danger, coupled with the mental anguish and trauma of witnessing the injury or death of a loved one. Adding the physical danger component to the doctrine is what makes the derivative claim viable.

In *Greene*, the concurring justices urged the Court to use its power to change both old rules of law as well as outdated common law rules, and cited the case of *Woods v. Lancent*, which provided:

> [W]hile legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' No reason appears why there should not be the same approach when traditional common-law rules of negligence result in injustice (*Woods v. Lancet*, 303 N.Y.

349, 355 [1951], quoting *Funk v. United States,* 290 U.S. 371, 382 [1933]).

However, the hesitancy of the majority in *Greene*, *Bovson*, and *Trombetta*, to define the "outer limits" of "immediate family," or to reject such limitation altogether, may be rooted in the historical truth that the legal landscape in respect to the areas of mental anguish, mental trauma, and emotional distress, has overarchingly been based on a framework and tradition of limiting those who can recover and what can be recovered.

The Current Wrongful Death Statute and the Push for Reform Through the Grieving Families Act

A similar theme of the curtailing of damages for mental anguish and trauma can be seen in New York's Wrongful Death Statute. The current Wrongful Death Statute is codified in the Estates, Powers, and Trust Law. EPTL 5-4.4(a) states that the damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees. The distributees of a decedent are those who can take, per the statute, of the decedent's estate when the decedent dies intestate (without a will). New York's Wrongful Death Statute was enacted in 1847 when the family structure was far different from that of today. EPTL 5-4.3 indicates that a distributee can recover compensation for *pecuniary injuries* resulting from the decedent's death. The current law is restricted to what the victim would have *financially* contributed to certain family members left behind.

This means that a whole host of victims, who die at the hands of the negligence of another, are considered practically worthless under the law in the event of wrongful death. Loved ones who suffer a death of their family member who is a retiree, disabled individual, a child, stay at home-parent, grandparent, is in between jobs, or makes a meager income, are faced with the harsh reality that their grief will not be compensated.

It should be noted that unlike the common law doctrine of zone of danger, a wrongful death action in New York is purely a statutory right and cause of action. The Court of Appeals, in *Liff v. Schildkrout*, 49 N.Y.2d 622 (1980), in denying a husband's claim for loss of consortium within a wrongful death action concerning his deceased wife, held that the legislature, by including the pecuniary injury limitation in its statutory scheme, prevents the courts from recognizing loss of consortium within a wrongful death action. The Court explicitly stated that if a change should be made, it is for the legislature, and not the courts to make. This again, displays the Court's sensitivity as to the intent of the legislature and its careful efforts to not broaden the interpretation of the statute beyond its original aim.

In response to this current state of the law, which is leading to what some may argue is disparate and inadequate compensation to family members of the deceased, a new bill labeled the Grieving Families Act (S.74-A/A.6770), has been introduced to the legislature. The bill provides for an avenue for damages to be awarded for grief and anguish as a result of the wrongful death of a victim, separate and apart from any pecuniary loss.

Specifically, the proposed bill provides the type of damages that may be awarded to the person for whose benefit an action for wrongful death is brought i.e. grief and anguish; loss of love, society, protection, comfort, companionship and consortium; reasonable funeral expenses; reasonable expenses for medical care, treatment prior to death; pecuniary injuries due to loss of services, support, inheritance; and loss of nurture, guidance or education.

If enacted, the proposed bill would lead to a vast expansion of the damages allowed for the pain, anguish, and grief of loved ones as a result of a victim's wrongful death, and would bring New York in the company of the 40+ other states who have enacted similar legislation.

Conclusion

In sum, both the courts and legislature are reviewing and taking steps towards expanding the compensation available *to family members* for emotional injuries suffered due to the injury or loss of a loved one. We should be on close watch for further developments in this area as the legal landscape is evolving beneath our feet.

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Smoking, Healing, and Litigation

By Nicole Snyder

Smoking, once a common practice in and out of the office, has become increasingly taboo. I distinctly remember my parents requesting the non-smoking section at Friendly's, but if I did the same today, I am sure it would cause some confusion.

The dangers of smoking and exposure to second-hand smoke have been known since 1964. In 1964 Surgeon General Luther Terry issued a report wih 10 other physicians defining the link between smoking and serious illnesses. The major finding linked incidents of lung cancer with smoking. Today, smoking continues to be strongly associated with lung cancer, but our understanding of the seriousness of the danger of smoking has evolved.

> "We continue to learn of the dire implications smoking and tobacco has on the human body. This is increasingly apparent in wound healing and bone health. "

Despite smoking rates declining substantially since the surgeon general's 1964 report, there are approximately 44 million smokers, 440,000 premature deaths contributed to smoking, and $96 billion in smoking-related medical costs.[1] Today smoking remains one of the leading causes of preventable disease. Today, we know smoking deteriorates the healing process because of its effect on circulation, cardiovascular well-being, and overall health. However, this connection remains largely unrecognized in personal injury law, despite smoking being a voluntary activity that leads to preventable consequences. This article examines the scientific connection between smoking, healing, and health and discusses the implications smoking could have in personal injury proceedings.

Tobacco Litigation

Ever since the link between tobacco and serious illness and diseases was established, the tobacco industry has been inundated with litigation. The first 30 years of litigation tended to come from individual smokers and their families. The tobacco industry fought off these claims effectively, disputing the veracity of the scientific evidence put forward by Surgeon General Luther Terry. Only a few of the cases brought in the first wave by individuals made it to trial and none of the cases were successful.

The second round of litigation in the 1980s and 1990s were also largely unsuccessful in claiming a failure to warn and strict liability with only one case succeeding, when the estate of Rose Cipollone, out of New Jersey, was awarded a $400,000 jury verdict.

State agencies in the mid- to late-1990s involved themselves in litigation under the pretenses of reimbursing the public for the public expenses of illnesses brought on because of smoking and tobacco. Famously, in *United States v. Philip Morris*, the federal government sued tobacco companies in a racketeering case. In 2006, the U.S. District Court held that tobacco companies had violated RICO due to their deception. Today, lawsuits against big tobacco are brought in class actions.

The country's evolving relationship with tobacco is obvious through the evolution of litigation against tobacco. However, less than 15 years after the last major suit against tobacco, we continue to learn of the dire implications smoking and tobacco has on the human body. This is increasingly apparent in wound healing and bone health.

Wound Healing[2]

The process of wound healing is comprised of three stages, which include the inflammatory stage, proliferative stage, and the tissue remodeling stage. All three of these stages serve different purposes in regeneration, but all three also rely heavily on oxygen pressures and blood flow to aid regrowth and repair. Healing is centered on the respiratory and cardiovascular systems, both of which are heavily affected by the side effects of smoking. Without proper oxygen levels and blood flow, cells are prone to hypoxia, which significantly delays the wound healing process in all three stages.

Chemical compounds in cigarettes, specifically nicotine, reduce blood flow contributing to hypoxia and other wound complications. Additionally, carbon monoxide and hydrogen cyanide are alleged to affect wound healing. Carbon monoxide is known to reduce oxygenation of the bloodstream. Smoking also restricts blood vessels, and narrowed vessels lower oxygen in the bloodstream, creating delays in healing.

Moreover, white blood cells, cells that prevent and fight infection, are decreased by smoking. Smoking also weakens the immune system, leaving patients more vulnerable to infection. This decrease could contribute to infections potentially risking the smoker's life and increasing the time it takes for the wounds to heal. Vitamin C, an important vitamin for the skin, may also be decreased as a result of smoking, again, leading to an increased time for

healing. Smoking increases the likelihood of infection, a failed skin graft, blood clots, and scarring.

Abstaining from smoking before and after surgery can improve a patient's chances for a successful surgery and cut down on post-operative costs for both the patient and insurance companies.

Bone Health[3]

As with wound healing, bone health relies primarily on properly oxygenated blood. As previously described, smoking constricts the ability of blood to become oxygenated. Bones, therefore, may weaken as a result of smoking. In fact, smoking is one of the leading risk factors for osteoporosis, a condition that weakens the bones and increases the likelihood of fractures. Osteoporosis makes it difficult for bones to heal and can result in pain and disability.

Outside of osteoporosis, studies have shown that nicotine actually prevents new bone from being created. Nicotine prevents the production of osteoblasts, cells essential to the construction of new bone. Smoking also prevents the effective absorption of calcium, which aids in bone strength, and without which bones become fragile. Lastly, smoking decreases the amount of estrogen in the body. Estrogen is important to building and maintaining a strong skeletal system.

Comparative Negligence

By definition, comparative negligence introduces the notion that plaintiffs may have contributed to their own injury. Given the evidence against smoking and how it contributes to healing, bone health, and overall health, it seems reasonable that an individual who smokes contributes to his or her own injuries. Additionally, this approach is not a completely new idea. Asbestos litigation has used comparative fault in cases where individuals are both exposed to asbestos and cigarette smokers. The Centers for Disease Control estimates smoking is the cause of approximately 80-90% of lung cancer, while asbestos exposure is only the primary cause cited in approximately four percent of cases.[4]

Recently, due to asbestos exposure litigation, courts have seen an uptick of cases that result in lung cancer. The court in *Dafler v. Raymark Indus., Inc*. considered when the worlds of asbestos exposure and cigarette smoking collide. The plaintiff claimed his exposure to asbestos had caused his lung cancer, but he was a smoker of 45 years. The jury found the plaintiff's smoking habits contributed to 70% of his lung cancer, and his asbestos exposure only contributed to 30%. This case, out of the state of New Jersey, cited six other states that have permitted a comparative analysis of asbestos exposure and cigarette smoking.

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Phishing Scams: Do You Need a Bigger Boat?

By Alyssa Jordan Pantzer

I believe that law firm associates universally strive to do well in their role. In large part, that requires that they successfully accomplish tasks assigned by law firm partners (or members). So, when a law firm associate receives an urgent message perceivably from a partner who she regularly works for requesting something to be completed immediately, she responds. The message might be a little odd; it might be from a different email account, for example, a g-mail account, called something like lawfirm0234@gmail.com. But the "From line" says:

FROM: [Law firm partner's name] lawfirm1234@gmail.com.

The message states "Can you help me out with something today? It's very important. Please advise."

Now, I would agree that a law firm associate is highly likely to question *why* this law firm partner is requesting assistance from a g-mail account, rather than from the regular work email account. But still, the law firm associate *just might* respond to the g-mail request that appears to be, and absolutely could be, from her boss. The law firm associate's reply might say something to the effect of "Of course. What can I help you with?"

The next email is likely to confirm the law firm associate's suspicions that these emails are not actually from her boss when the supposed law firm partner says, "I would have called you to discuss this but I'm unable to call or receive any calls at the moment. I will need you to run an errand for me at any retail store. Kindly confirm we can get some Google Play cards to send out to some clients." The request for "some Google Play cards" is highly likely to end the conversation. And the law firm associate is likely to immediately reach out to someone who can notify the firm that she has been unsuccessfully phished.

This phishing scheme example is minimally infiltrative and, for the most part, readily discernible as a fraud; however, internet criminals are becoming more adept, making all businesses increasingly vulnerable. Is your business adequately protected, or are you going to need a bigger boat?

According to the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA), "[p]hishing is a form of social engineering" that uses email or malicious websites to solicit personal information by posing as a trustworthy organization."[1] A phisher employs social engineering by using human interaction—social skills—to obtain or compromise information.[2]

Phishing scams are happening all the time. The FBI's Internet Crime Complaint Center, referred to by the FBI as "IC3," gathers data concerning internet-based crime. According to IC3, internet-enabled theft, fraud, and exploitation were responsible for $2.7 billion in financial losses in 2018.[3] IC3 received 351,937 complaints in 2018—an average of more than 900 every day. The complaints reported most commonly were for non-payment/non-delivery scams, extortion, and personal data breaches.[4] In 2019, IC3 received 467,361 complaints—an average of nearly 1,300 every day, and recorded a staggering $3.5 billion in losses to individual and business victims.[5]

Phishing is not limited to any one industry. In fact, the Department of Homeland Security itself has been phished. According to CISA's website report released on June 18, 2019, the department experienced an email phishing scam that tricked users into clicking on malicious attachments.[6] Notably, the attachments appeared, presumably even to the most discerning members of the department, to be legitimate department notifications.[7]

So, the question presents itself: what happens when a phishing attack actually is successful? An employee of a company is successfully duped and transfers a sum of money to a phisher. How can the company recover its losses? A first thought might be to turn to your company's insurance carrier, but are phishing scam losses covered? Luckily for businesses that experience these losses, the recent case law suggests that courts are inclined to afford coverage.

Medidata Sols., Inc. v. Fed. Ins. Co., 268 F. Supp. 3d 471 (S.D.N.Y. 2017).

In *Medidata*, defendant Federal Insurance Company ("Federal") denied a claim submitted by their insured, Medidata Solutions, Inc. ("Medidata"). The parties cross-moved for summary judgment in the Southern District of New York. Medidata prevailed.

The Facts

In the summer of 2014, Medidata legitimately notified its finance department that the company's short-term business plans included a possible acquisition, and that they should be prepared to assist with significant transactions on an urgent basis. Alicia Evans worked in accounts payable. On September 16, 2014, she received an email she believed to be from the company's president. The email contained the president's name, email, and picture in the "From" field. The message stated that Medidata was close to finalizing an acquisition, and that an attorney named Michael Meyer ("Meyer") would contact Evans. The email advised Evans that the acquisition was strictly confidential and instructed her to devote her full attention to Meyer's demands. Evans, presumably eager to meet the needs of

the company's president, replied: "I will certainly assist in any way I can and will make this a priority."

That same day, Evans received a phone call from Meyer. Meyer demanded that Evans process a wire transfer to him—a physical check would not suffice due to time constraints. Evans told Meyer that she needed an email from Medidata's president, Vice President Ho Chin, and Director of Revenue Josh Schwartz, confirming that she had authority to process the wire. Chin, Evans, and Schwartz then received a group email purportedly from Medidata's president stating that he was "undergoing a financial operation" and that he had already spoken with Evans and that she would file the wire after they signed off. Again, the email from Medidata's president to Chin, Evans, and Schwartz contained the president's email address and his picture in the "From" field next to his name.

Having received the confirmation she needed, Evans logged onto Chase Bank's online system and initiated the wire transfer. She entered the banking information provided by Meyer. Schwartz and Chin also logged onto Chase and approved of Evans' requested transfer. $4,770,226 was wired to the bank account number provided by Meyer.

In the same way, four days later, on September 18, 2014, Meyer contacted Evans and requested a second transfer. This time, Chin noted that the email address in the "Reply To" field looked suspicious. Chin spoke with Evans, and she composed a new email to Medidata's president inquiring about the transfers. He stated that he had not requested the wire transfers, and the company realized that they had been phished. Medidata contacted the FBI and hired outside counsel to investigate. The investigation revealed that a hacker was able to alter the emails that were sent to Medidata's employees to mimic emails from Medidata's president.

Medidata held a $5,000,000 insurance policy with Federal called "Federal Executive Protection," which included a "Crime Coverage Section" addressing loss caused by various criminal acts, including "Forgery Coverage Insuring," "Computer Fraud Coverage," and "Funds Transfer Fraud Coverage." On September 25, 2014, Medidata submitted a claim to Federal requesting coverage, which Federal denied.

Computer Fraud Coverage

The policy's Computer Fraud Coverage protected the "direct loss of Money, Securities or Property sustained by an Organization resulting from Computer Fraud committed by a Third Party." The Policy defined "Computer Fraud" as: "[T]he unlawful taking or the fraudulently induced transfer of Money, Securities or Property resulting from a Computer Violation." A "Computer Violation" included both "the fraudulent: (a) entry of Data into . . . a Computer System; [and] (b) change to Data elements or program logic of a Computer System, which is kept in machine readable format . . . directed against an Organization."

Medidata argued that the Computer Fraud coverage should apply because a thief fraudulently entered and changed data in Medidata's computer system by creating spoof emails posing as Medidata's president. Federal countered that the thief did not require direct access to Medidata's systems to create the spoof emails because there had been no "fraudulent entry of data into Medidata's computer system." Rather, "[t]he subject emails containing false information were sent to an inbox which was open to receive emails from any member of the public," thus the entry of the fictitious emails "was authorized." In addition, there had been no "change to data elements" because the emails did not cause any fraudulent change to data elements or program logic of Medidata's computer system.

> "Internet criminals are becoming more adept, making all businesses increasingly vulnerable. Is your business adequately protected, or are you going to need a bigger boat?"

In finding that the Computer Fraud coverage should apply, the court referred to the New York Court of Appeals decision in *Universal Am. Cor. v. National Union Fire Ins. Co. of Pittsburgh, PA.*[8]

In that case, a health insurance company, Universal American Corp. ("Universal"), was defrauded by healthcare providers that entered claims for reimbursements for services that were not actually rendered, and their own insurance carrier denied their claim.

Universal argued that it should be afforded coverage under its fraud clause, which covered "loss resulting directly from a fraudulent (1) entry of Electronic Data or Computer Program into or (2) change of Electronic Data or Computer Program within" the computer system. In finding that coverage was properly denied, the court held that the unambiguous language of Universal's policy "applie[d] to losses incurred from unauthorized access to Universal's computer system, and not to losses resulting from fraudulent content submitted to the computer system by authorized users."[9] The court reasoned that the drafter's "intentional placement of the word 'fraudulent' before the words 'entry' and 'change' "manifested the parties' intent to provide coverage for a violation of the integrity of the computer system through deceitful and dishonest access." The fraud clause was not triggered because the health care providers' fraudulent claims were legitimately submitted by authorized users.

Based on the ruling in the *Universal* case, the court in *Medidata* found that the fraud on Medidata fell within the kind of "deceitful and dishonest access" imagined by the Court of Appeals, thereby activating Medidata's Computer Fraud Coverage. The court found that the *Universal* case does not require a thief to actually hack into a company's computer system and execute a bank transfer on their own to trigger coverage. Rather, *Universal* should be read as finding coverage for fraud where the perpetrator violates the integrity of a computer system through unauthorized access and denying coverage for fraud caused by the submission of fraudulent data by authorized users.

The court found that the fraud on Medidata was achieved by entry into the Medidata's email system by way of spoofed emails that appeared to be from the company's president. Because the spoofed emails gained entry, there was a Computer Violation as defined by the policy, and coverage should have been afforded under the Computer Fraud clause.

Funds Transfer Fraud Coverage

The Policy defined "Funds Transfer Fraud" as: "fraudulent electronic . . . instructions . . . purportedly issued by an Organization, and issued to a financial institution directing such institution to transfer, pay or deliver Money or Securities from any account maintained by such Organization at such institution, without such Organization's knowledge or consent."

Federal argued that coverage should not be afforded because the wire transfers were initiated voluntarily and, therefore, Medidata made the transfers with "knowledge and consent." The court disagreed, finding that the company's consent was illusory, since it was "obtained by trick." The court noted, "[a]s the parties are well aware, larceny by trick is still larceny." Accordingly, Medidata demonstrated that the Funds Transfer clause was triggered by the theft.

The Second Circuit Court of Appeals affirmed the district court's decision, finding that Medidata should have been awarded coverage pursuant to the Computer Fraud provision, and therefore, declining to opine on any further avenues of coverage.

Children's Place, Inc. v. Great Am. Ins. Co., 2019 U.S. Dist. LEXIS 70109 (D.N.J. 2019)

In the *Children's Place, Inc.* case, defendant-insurer made a pre-answer motion to dismiss, which the court granted in part and denied in part. Plaintiff, The Children's Place, Inc. (TCP) learned on July 14, 2017 that it had made two payments totaling $967,714.29 to a hacker, rather than to its vendor, Universal Apparel Co., Ltd. ("Universal"). According to the complaint, in sum, a hacker intercepted an email conversation between TCP and Universal, inserted itself into the conversation, requested a change of bank information, and fraudulently directed TCP to pay Universal using the new bank account number. The fraud took place over a six-week period.

At the time of the transfers, TCP was insured by a crime protection policy, including coverage for computer-related crime and social engineering schemes issued by Great American Insurance Company (GAIC). The policy provided coverage for "Computer Fraud," "Forgery or Alteration," and "Fraudulently Induced Transfers."

Computer Fraud

The policy defined Computer Fraud as:

> loss resulting directly from the use of any computer to impersonate you, or your authorized officer or employee, to gain direct access to your computer system, or to the computer system of your financial institution, and thereby fraudulently cause the transfer of money, securities or other property from your premises or banking premises to a person, entity, place or account outside your control.

On its motion to dismiss, GAIC argued that TCP was not eligible for the Computer Fraud coverage because the complaint failed to allege that the hacker gained "direct access" to TCP's computer system or financial institute. The court disagreed, finding that TCP's complaint adequately alleged that the hacker "redirected [email] messages to go to him," and that "an email system that does not send the messages to the intended recipient is no longer under the control of the sender," therefore, the hacker "effectively gained access to TCP's email system."

GAIC also argued that the hacker did not "fraudulently cause the transfer of money" from TCP because TCP voluntarily transferred sums of money to the hacker. The court also found this argument unpersuasive, holding that it was "premature at the motion to dismiss stage" to assess whether the hacker's activities were a cause of the transfer of funds.

Forgery or Alteration

Forgery or Alteration was defined in the policy as "loss resulting directly from forgery or alteration of checks, drafts, promissory notes, or similar written promises, orders, or directions to pay a sum certain in money that are . . . made or drawn by or drawn upon you . . ."

GAIC argued that the Forgery or Alteration coverage did not apply and the court agreed. TCP argued that the directions it received from the hacker as to the new bank information, to which TCP was to direct payment, constituted a forgery. This theory was unavailing, and the court granted GAIC's motion to dismiss on this provision of coverage.

Fraudulently Induced Transfers

The policy defined Fraudulently Induced Transfers as:

> A transfer resulting from a payment order transmitted from you to a financial institution, or a check drawn by you, made in good faith reliance upon an electronic, telefacsimilie, telephone or written instruction received by you from a person purporting to be an Employee, your customer, a Vendor or an Owner establishing or changing the method, destination or account for payments to such Employee, customer, Vendor or Owner that was in fact transmitted to you by someone impersonating the Employee, customer, Vendor or Owner without your knowledge or consent and without the knowledge or consent of the Employee, customer, Vendor or Owner.

However, the policy contained a condition precedent for coverage pursuant as follows:

> that before forwarding [a] payment order to a financial institution or issuing [a] check, you verified the authenticity and accuracy of the [payment] instruction received . . . , including routing numbers and account numbers by calling, at a predetermined telephone number, the [person] who purportedly transmitted the instruction to you.

Defendant argued that plaintiff failed to state a claim under the policy's coverage for Fraudulently Induced Transfers because "TCP failed to comply with the condition precedent by not attempting to call Universal at the predetermined number to verify" the new bank account information. TCP countered that the "application of the verification requirement would result in illusory coverage and cannot be given effect." The court noted that TCP's interpretation of the condition precedent was incorrect because it assumed that TCP had to *successfully* verify the authenticity of a payment instruction. To the contrary, the policy only required that TCP *attempt to* verify the authenticity of the payment instruction. Accordingly, the court held that TCP also failed to state a claim as to the Fraudulently Induced Transfers coverage and granted GAIC's motion to dismiss.

The court allowed plaintiff leave to amend the complaint. An amended complaint was filed on May 24, 2019. The amended complaint drops the claim for coverage pursuant to the Fraudulently Induced Transfer provision (probably because TCP, in fact, did not comply with the condition precedent), and expands upon the pleading for coverage pursuant to the Computer Fraud and Forgery or Alterations provisions of coverage. GAIC answered, rather than moved to dismiss. On February 18, 2020 the court issued an Order requiring that any party seeking leave to file a motion for summary judgment do so by March 3, 2020.

So what does the case law mean for policyholders? Certainly, policyholders must find out what their business policy actually includes and whether there is any coverage for computer-related crime and social engineering schemes. It is also prudent to determine whether the policyholder's excess coverage will apply. Policyholders should also be wary of condition precedents like the one in *Children's Place, Inc.* case, which served as a barrier for the policyholder to obtain coverage under the Fraudulently Induced Transfers provision. Policyholders would also be well-advised to determine whether their social engineering fraud endorsement is capped at a lower coverage amount or has a higher self-insured retention.

Of course, avoiding infiltration by way of social engineering schemes like the ones described in these cases is the preferred practice, but even the most sophisticated companies can fall victim. Donna Gregory, the chief of IC3, states in IC3's 2019 report that "[c]riminals are getting so sophisticated," and "[i]t is getting harder and harder for victims to spot the red flags and tell real from fake."[10] Going forward, as internet criminals become more adept, if companies cannot entirely avoid infiltration, the next best thing is making sure that the right amounts and types of insurance coverage are available.

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Endnotes

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'Take It or Leave It' Approach Benefits Insurers Under § 2610

By William Murphy

I. Introduction

On paper, New York State has historically supported automobile insureds and their right to freely select auto body shops for accident repairs without interference from insurers. New York Insurance Law § 2610(a) states that "[w]henever a motor vehicle collision or comprehensive loss shall have been suffered by an insured, no insurer providing collision or comprehensive coverage therefore shall require that repairs be made to such vehicle in a particular place or shop or by a particular concern." The statute was enacted to protect the public, which includes independent auto body and repair shops, from the "steering" tactics practiced by some automobile insurers.[1] Steering, when applied to car insurance, is when an insurance provider directs their policyholders or third party claimants to get their vehicles repaired at a specific body shop through coercion or enticement.[2] Insurance companies have also been known to steer policyholders away from specific collision providers and instead toward repair shops selected by the insurers.[3]

In furtherance of this legislative intent, N.Y. Ins. Law § 2610(b) additionally provides that "the insurer shall not, unless expressly requested by the insured, recommend or suggest repairs be made to such vehicle in a particular place or shop." Corresponding regulations outline other obligations of both the insurer and insured for negotiating collision claims "in good faith" to reach a "prompt, fair and equitable settlement."[4] However, this does not mean that an insured is automatically entitled to reimbursement for the full amount charged by his or her preferred repair shop. Where the parties cannot reach an agreed price, the insured bears the burden of establishing the reasonable cost of the repairs necessary to bring the vehicle to its condition prior to the loss.[5]

What appears, on its surface at least, as a clear and comprehensive legislative scheme aimed at safeguarding the motorist public as well as small businesses and their labor force has instead functioned as a subversive tool utilized by the major insurance providers to bully consumers into cheaper, inferior auto repair work and local body shops into economic submission or extinction. In response to N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7, large insurers have adopted a "take it or leave it" approach with repair estimates. This leaves insureds with the choice of either suing for the difference between their preferred shop's estimate and the insurer's, or accepting repairs from an unfamiliar shop that honors the insurer's estimate, generally because of the large volume of referral work they receive from the insurer. Similarly, body shops are forced to choose between potential payment battles with insurers over each claim or receiving work from insurers at hourly labor rates far lower than necessary to provide quality while also profiting in the hope that volume will be enough to compensate.

In litigation, insurers have raised arguments ranging in scope from the unreasonableness of a specific body shop's labor rates to First Amendment violations in order to avoid paying claims in full. Troubling however, is that few published opinions considering this issue exist as typical damages in these cases, rarely more than a few thousand dollars, dictate proceedings in local small claims courts where arbitrators, referees, and judges often just split the difference between the estimates, leaving insureds at a loss. More troubling still is that few insureds initiate lawsuits at all, given the investment of time and money required and the tediousness of proving the cost "reasonable" and the repairs "necessary" through expert witnesses when compared to the judgment they stand to receive *if* they receive one at all. Conversely, large insurance companies equipped with resources and armed with in-house adjusters frequently employ experienced local law firms to litigate these cases in bulk, leavings insureds and body shops alike at an even greater disadvantage.

II. Labor Rate Disputes

The most common strategy used by large insurers to frustrate the application of N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7 is to simply allege that the cost of an insured's auto repairs was unreasonable. Specifically, insurers focus these arguments on attacking a body shop's hourly labor rate. During 2001, *Rizzo v. Merchants and Businessmen's Mutual Insurance Company* presented the court with this exact scenario.[6] In *Rizzo*, the plaintiff-insured claimed $2,857.29 in damages from the defendant-insurer resulting from a disagreement over reasonable hourly labor rates for necessary automobile repairs.[7] On appeal, the court found the $50 hourly labor rate charged by the plaintiff-insured's preferred body shop reasonable when juxtaposed with the defendant-insurer's contention that an hourly labor rate of only $28 was appropriate.[8]

Two years later, in *Mass v. Melymont*, a court similarly held hourly rates of $50 for body and paint labor and $55 for mechanical and frame labor reasonable.[9] Notably, the court in *Mass* premised its findings on a survey of average hourly labor rates published by the Long Island Auto Body Repairmen's Association in April 2003.[10] Per the 2003 survey, which included 130 repair shops, the average body labor rate was $57.50 per hour, the average paint labor rate was $57.38 per hour, the average mechanical

labor rate was $64.10 per hour, and the average frame labor rate was $62.61 per hour.[11] In its opinion, the court observed that even the lowest labor rates reported within the survey were blatantly higher than prevailing labor rates claimed by insurers ranging from $38-$42 per hour and reprimanded the industry for "notoriously and significantly undercut[ting] the prevailing market rate of shops.[12]

Subsequently, the prevailing labor rate acknowledged by courts has risen commensurate with inflation and other factors in sporadic published opinions through the years. In 2007, the court in *Gapud v. Kaur*, the most recent searchable decision addressing specific labor rates, held a rate of $65 to be fair and reasonable.[13] Insurers nevertheless persist in underpaying insured's claims by disputing and purposefully diminishing body shop labor rates to this day. An upstate body shop, Nick's Garage, has engaged in an onslaught of federal litigation against insurers premised on this very situation over the past decade.[14] In response, insurers have maintained on the record that an hourly labor rate of $44-$46 is reasonable as recently as 2017.[15] They have supported said claims by contending that the overwhelming majority of body shops routinely accept these rates while only a small minority of overpriced outliers do not.[16] The Second Circuit however, in *Nick's Garage v. Nationwide*, recognized this conduct by insurers as the precise "steering" tactics New York law aimed to protect against in allowing Nick's Garage to move forward with its claims.[17] The court held that although large insurers with the "capacity to bring a substantial volume of business to a repair shop, can prevail upon shops to agree to a particular labor rate," this "does not show that one of the insurer's claimants can reasonably expect to get her car repaired at that rate."[18] Notwithstanding clear and established precedent, these small victories have unfortunately done little to curb the unlawful practices of insurers and level the playing field for the general public as these cases still appear regularly on small claims dockets across the state.

> "What appears, on its surface at least, as a clear and comprehensive legislative scheme aimed at safeguarding the motorist public as well as small businesses and their labor force has instead functioned as a subversive tool utilized by the major insurance providers to bully consumers into cheaper, inferior auto repair work and local body shops into economic submission or extinction."

III. Other Insurer Tactics

Through the years, insurers have also adopted more creative strategies to undermine N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7. Among them were challenges to the constitutionality of N.Y. Ins. Law § 2610(b) prohibiting the unsolicited recommendation of repair shops by insurers. At issue in *Allstate Insurance Company vs. Serio* was an insurer's proposed preferred repairer promotion in which, in exchange for reduced premium payments, insureds agreed that repairs would be completed at a repair shop recommended by the insurer.[19] In *Serio*, the Court of Appeals reinforced the legislative intent behind N.Y. Ins. Law § 2610(b) to protect consumer rights and combat improper enticement by insurers but distinguished the instant proposed promotion as a matter of valid contractual negotiation and obligation occurring prior to an insured's active claim.[20] Additionally, the court permitted the distribution of literature and the installation of signs advertising the insurer's proposed promotion.[21] During a concurrent federal lawsuit, it was determined that N.Y. Ins. Law § 2610(b) need not be evaluated for constitutionality under the First Amendment as the issue was adequately resolved on state law grounds.[22]

Other tactics employed by insurers to avoid full payment for an insured's claims have similarly invoked contract law principles. In *Rizzo*, the court rejected an insurer's argument of accord and satisfaction when the insured accepted checks in the amount of the insurer's estimate of repairs in allowing the insured's suit to move forward.[23] Subsequently, insurers have attempted to delineate between the rights of "first-party" and "third-party" insureds under N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7, resulting in conflicting precedent. For example, in *M.V.B. Collision Inc. v. Allstate Insurance Company*, an individual involved in an automobile accident for which an insurer's insured was 100% at fault was foreclosed from proceeding against the insurer for failure to fully pay her claim because she was an "incidental" rather than "intended" beneficiary of the insured's policy.[24] In other words, under the *M.V.B. Collision* court's "four corners" approach to a typical collision insurance policy, any motorist involved in an automobile accident for which he or she bears no fault is at the complete mercy of the other motorist's insurer when dealing with repairs.[25] Years earlier however, in *Mass*, the court drew no such distinction in permitting a third-party insured's claim to proceed,[26] leaving an unanswered question for insurers to continue exploiting.

Further, insurers have attacked the rights of body shops as assignees of insureds to successfully assert claims. In the automotive repair industry, it is not uncommon for motorists seeking expediency to assign the rights to any insurance payments to their respective repair

shops after a loss. In such cases, it is the body shop directly claiming full reimbursement for repair work from insurers. That said, *M.V.B. Collision* casts serious doubt on the feasibility of this consumer-friendly practice moving forward as there, in addition to denying a third-party insured's claim, the court additionally denied the right of a body shop as assignee to proceed with underpayment claims under N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7.

IV. Conclusion

When examining the few published cases dealing with N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7, as well as local small claims court dockets, a clear and intentional pattern of conduct by insurers emerges and leaves body shops and consumers alike with little recourse. One spirited challenge to this troubling reality was brought by Nick's Garage during its series of lawsuits.[27] Specifically, Nick's Garage broadly alleged that insurers engaged in deceptive trade practices violative of N.Y. Gen. Bus. Law § 349.[28] Although this argument was summarily rejected by lower courts, the Second Circuit in late 2017 found that a genuine issue of material fact existed in evaluating insurer practices, providing a glimmer of hope for body shops and affected insureds.[29] Nevertheless, these practices continue to frustrate motorists, body shops, and legislative schemes, not only across New York, but also across the nation.[30] It is evident that significant reform is necessary to realize the actual intent of N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7.

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6 188 Misc.2d 188.

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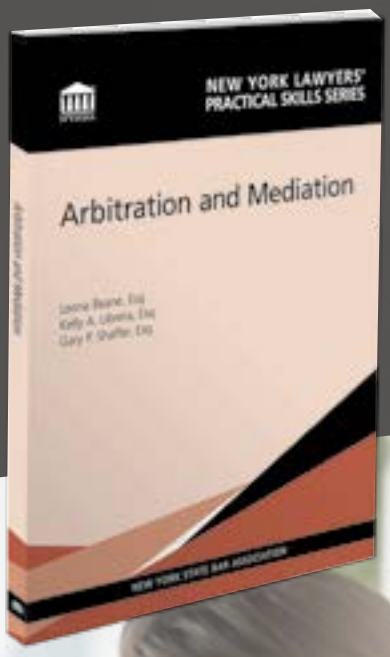

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