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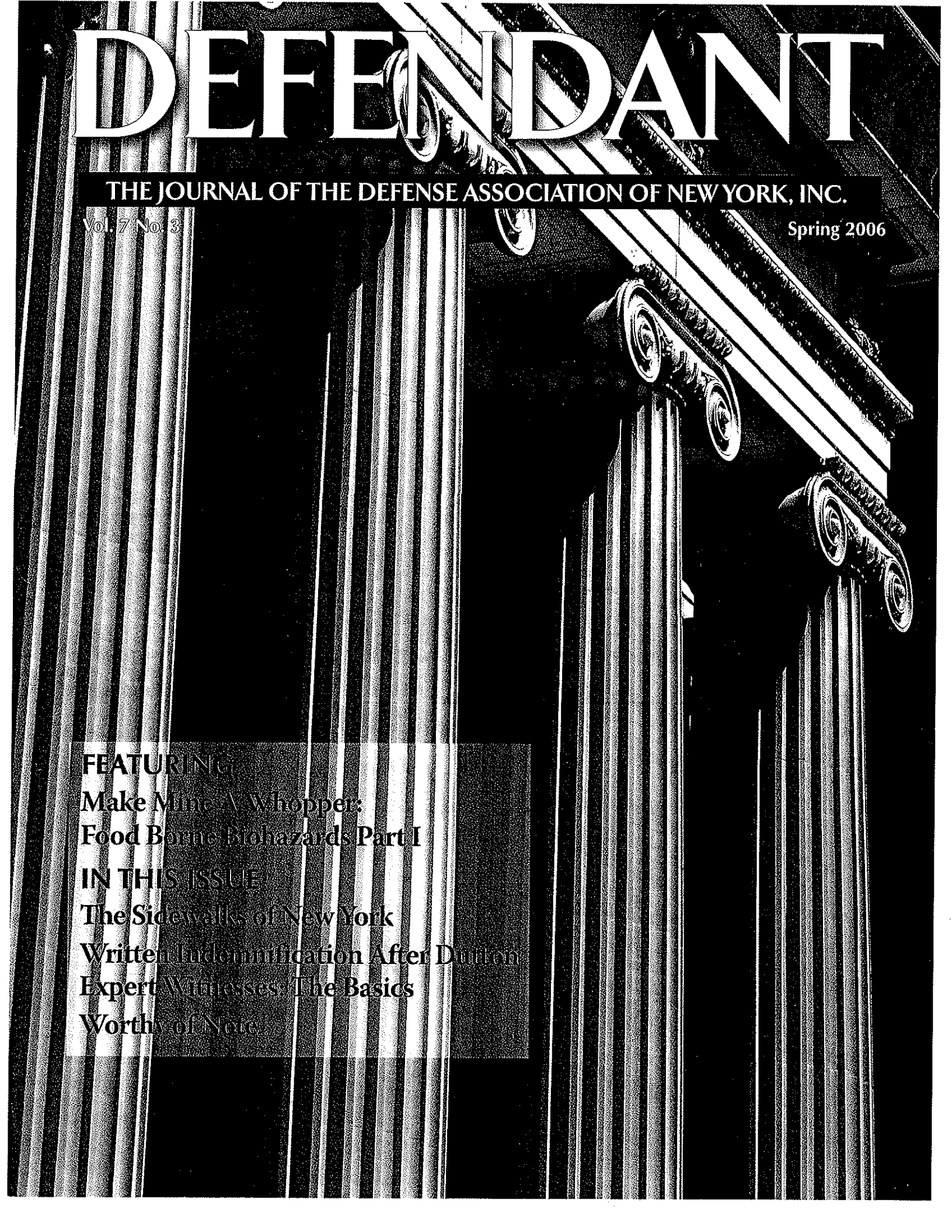

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Worthy of Note

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President's Column

ANDREW ZAJAC*

As I near the end of my term as president of DANY, I am happy to report that the state of the organization is strong. The general membership is very supportive of our various events. DANY's leadership, which is comprised of its Officers, Past Presidents and Board of Directors, is an excellent blend of veterans and individuals new to the organization.

Our events this year were outstanding. This past fall, we combined our annual Past Presidents' Dinner with an emotional tribute to a great man and one of DANY's founding members: the late Jim Conway. Our annual Charles C. Pinkney award was given to an outstanding jurist, Hon. Barry Salman, Administrative Judge, Twelfth Judicial District Supreme Court, Bronx County. In attendance that night was the Hon. Mario Biaggi, former member of the United States Congress. Also in attendance were the following members of the judiciary: Howard Silver, Kenneth Thompson, Nelson Roman, Howard Sherman, Joseph Giamboi, Jerry Crispino and Lee Holzman. It was truly a memorable evening.

In addition, the quality of our CLE events has been exceptional, and the seminars well-attended. Many thanks to the State Insurance Fund for the use of its facilities for this purpose.

I would be remiss if I failed to acknowledge the extraordinary work of our Executive Director, Tony Celentano. Tony is the heart and soul of our organization.

Our incoming President is Marty Hayes. I wish Marty all of the best, and I am sure that he will have the same support from DANY's leadership and all of its members as I have enjoyed.

It has been an honor and privilege to serve as the President of DANY.

The Defendant Welcomes Contributors
Send proposed articles to:
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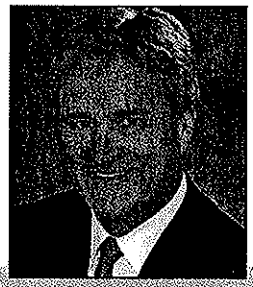
* *Andrew Zajac is the head of the appeals unit at Fiedelman & McGaw, Jericho, New York.*

Make Mine A Whopper: Food Borne Biohazards



JOHN J. MCDONOUGH, ESQ.*

(Editor's Note: This is the first installment of a multi-part article that will discuss potential liabilities in regard to food borne biohazards)

In 1906, Upton Sinclair's novel, *The Jungle*, exposed the poor sanitation practices of the meatpacking industry and spurred revolutionary statutory protection for American meat consumers and industry workers. Today, exactly a century later, with Americans and others ingesting meat, which might be more properly labeled a biohazard,[1] the ultimate conclusion of Sinclair's novel takes on a new meaning. In short, it's a new type of jungle out there. Although the jungle of 2006 may no longer be a world of slaughterhouses in which meat falls to the floor only to be placed back on the conveyor belt, it is one in which the food supply to that same source of meat has become contaminated giving rise to neurological disease and death to the ultimate human and animal consumers.

This new jungle takes the form of Bovine Spongiform Encephalopathy, (hereinafter, "BSE") commonly known as "Mad Cow Disease" and its human (although not yet verified) counterpart, variant Creutzfeldt-Jakob Disease. The United States became the twenty-sixth nation to report a case of BSE when a Holstein cow slaughtered at a plant in Washington State was diagnosed with the disease in December 2003.[2] While the industry faced severe consequences at the international level, reports indicate that domestic beef sales remain steady.[3] For example, in 2003, beef consumption in the United States was reported at twenty-seven (27) billion pounds, down slightly from the 2002 pre-outbreak consumption of twenty-seven point nine (27.9) billion pounds.[4] In 2004, Americans consumed approximately twenty-seven point six (27.6) billion pounds of beef, and, in 2005, the estimated retail equivalent value of the United States' beef industry was seventy-eight billion dollars.[5]

This paper is presented in six parts. The first part features a discussion of the disease process of BSE and the symptoms, incubation period, tests for, and effects thereof. In the second part, the authors address variant Creutzfeldt-Jakob Disease, (hereinafter, "vCJD"), which is fatal to humans, and may be linked to the consumption of BSE contaminated products. The third part traces the evolution of BSE and, in some locations, vCJD, from their origins in the United Kingdom and across the world. The fourth part outlines the United

Continued on next page

* *Mr. McDonough is a partner of Cozen O'Connor and chairs the firm's Complex Tort Practice Group.*

States' Government's efforts to address the problems presented by BSE and the legal challenges thereto. The fifth part surveys BSE-related litigation in Canada and France. The paper, then, concludes with a discussion of a possible, albeit, undetected cluster of vCJD closer to home: in Cherry Hill, New Jersey, and observations of the challenges presented by BSE to the members of the legal community.

I. THE DISEASE PROCESS OF BSE.

BSE, or Mad Cow Disease, is a chronic, degenerative, and fatal neurological disorder that affects the central nervous system of cattle.[6] Current research confirms that BSE infectivity occurs in the brain, trigeminal ganglia, tonsils, spinal cord, and distal ileum of the small intestine, as well as the retina of the eyes of infected cattle.[7] BSE gets its name from the spongy appearance of the brain tissue seen in infected cattle when said tissue is examined under a microscope.[8]

Based on the information known to date, BSE is not contagious and there is no evidence that the disease is transmitted through direct contact or animal-to-animal spread.[9] Rather, animal consumption of BSE contaminated feed is the primary means of infection.[10] BSE infected animals may display changes in temperament, such as, nervousness or aggression, abnormal posture, difficulty rising, decreased milk production, or loss of body weight despite continued appetite.[11]

At present, there is no treatment for BSE.[12] The course of the disease varies from two weeks to fourteen months and usually results in death or humane destruction within four months in countries where the disease is present.[13] The incubation period for BSE (the time from when an animal becomes infected until it first exhibits symptoms of the disease) is anywhere from thirty months to eight years, with a few rare exceptions for younger animals.[14] An infected animal's condition rapidly deteriorates following an onset of symptoms, and such deterioration usually takes between two weeks and six months.[15] Most cases of BSE in Great Britain occurred in dairy cows between three and six years of age.[16]

There is no current test to detect BSE in a live animal or muscle meat.[17] Veterinary pathologists confirm the disease via a postmortem microscopic examination of brain tissue using laboratory techniques such as a histopathological examination to detect sponge-like changes in brain tissue.[18] This test and immunohistochemistry, which examines BSE firrils are "gold standard" tests, which take more than a week to run.[19] More rapid tests, which provide results within about two days, detect abnormal prion in dead animals' brain or spinal cord tissue, and are used to determine the presence of BSE and obtain an indication of its prevalence.[20] These tests, however, may be unable to detect the disease during the vast majority of the time a cow is infected.[21]

II. BSE AFFECTS HUMANS IN THE FORM OF CREUTZFELDT-JAKOB DISEASE

Creutzfeldt-Jakob Disease, (hereinafter, "CJD") is a rare disease found in humans, which is similar to BSE.[22] Scientists report a possible link between consumption of BSE contaminated product and vCJD, a variant of CJD.[23] According to current scientific research, neither cooking nor irradiation kills the BSE agent.[24]

The disease (vCJD) has an incubation period of several years, or decades, such that the symptoms thereof do not immediately present themselves.[25] If, for example, a person develops vCJD from consuming a BSE-contaminated product, (although the link between the two is not yet scientifically proven) he or she likely consumed the contaminated product a decade or more beforehand.[26] Symptoms of vCJD include memory lapse, loss of motor skills, depression, and mood swings.[27] Neurological abnormalities such as ataxia, dementia, and myoclonus present themselves late in the illness.[28] The median age at death of patients with vCJD is twenty-eight years.[29]

Examination of brain tissue obtained via biopsy or autopsy is the only method of confirming vCJD.[30] No known cure exists for vCJD and the disease is fatal after at least four and usually within thirteen months of an onset of symptoms.[31] Scientists recently developed experimental drugs and, in cases outside the United States, vCJD sufferers have filed suit seeking access to these new medications.[32]

III. THE EVOLUTION AND ORIGINS OF BSE AND VCJD.

BSE among cattle was first described in the United Kingdom in November 1986, and epidemiological evidence established that the outbreak of BSE was related to many years of production and use of contaminated meat and bone meal.[33] While the exact source and nature of the contamination was unclear at first, it was later discovered that the cause was the recycling of cattle infected with BSE.[34] There is also strong evidence and general agreement that feeding young calves rendered bovine meat and bone meal amplified the outbreak.[35]

All told, there have been more than one hundred and eighty-seven thousand (187,000) confirmed cases of BSE worldwide, over ninety-five percent of which occurred in the United Kingdom.[36] To date, one hundred and fifty (150) cases of vCJD have been identified worldwide with the vast majority of these cases occurring in England at the height of its BSE epidemic.[37] Although there is a reported case of vCJD in the United States, there is clear epidemiologic evidence that, in that case, the disease was acquired in the United Kingdom.[38] Thus, to date, there is no evidence of a case of vCJD, which arose and/or was acquired inside the United States.[39]

There have, however, been three documented incidents of BSE in the United States.[40] The first incident occurred in December 2003 in a Canadian born cow in Washington State.[41] The second occurred in June 2005 in a cow born and raised on a ranch in Texas.[42] March 2006 saw the third case of BSE involving an Alabama cow, whose origin and movement to Alabama remain undetermined.[43]

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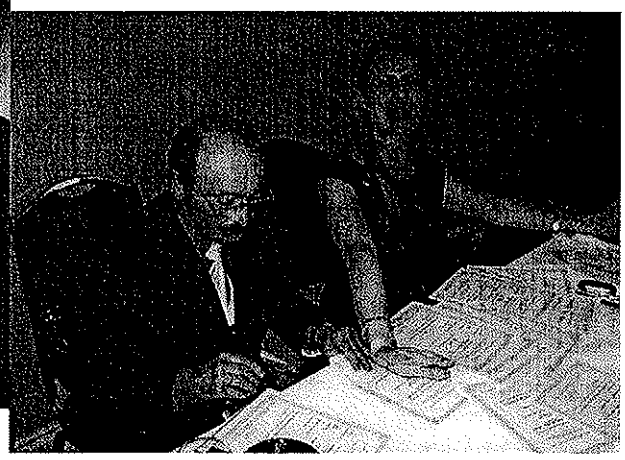

Tony Celentano and Connie McClenin

The Sidewalks of New York,

Changes in Liability in the Post September 2003 Era

MATTHEW M. CORDREY, ESQ.*

I. In September of 2003, The City of New York Common Counsel passed "The Sidewalk Law" (New York City Administrative Code Section 7-201) It dramatically shifted liability away from the City and onto commercial owners of land adjacent to the sidewalks. Under the old common law and municipal statutes, the City of New York was responsible for those sidewalk defects for which they had prior written notice. In most cases the notice was provided by way of a Big Apple Map[1]. The City was also responsible for removal of snow and ice on public sidewalks but usually not for several hours after a snowstorm.

Under the Sidewalk Law, the "owner of adjacent commercial property" is now responsible for maintaining sidewalks free of debris, snow and ice and defects in the structure of the sidewalk and for preventing the "negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags". [2]

The outline of this article is to show exceptions to sidewalk liability for the adjacent commercial landowner and tenants, and to give a framework for looking at the liability of the commercial landowner and commercial tenant under the new law.

An exemption for liability written into the statute is that adjacent residential property owners, where there are one, two or three residential units used exclusively for residential use, are not responsible for the sidewalks. The building must be owner occupied.

Other notable exceptions that should be explored after notice of a claim is received are:

A. Exceptions:

a. Where the City of New York or its agencies, **caused** the defect (e.g. buses or sanitation trucks driving over sidewalks repeatedly and breaking up flags),

b. Where a third party contractor, utility company, opened up the sidewalk but did not patch it properly and thereby **caused the defect** (This defense usually requires an expert engineering opinion),

c. Where the defect is **caused by the special use** of some third party, such as an adjacent commercial tenant's abuse of a driveway by its trucks using the driveway and running over the sidewalk,

d. Where a third party or municipality has contracted for or been empowered by legislation to be able **to use and maintain a portion of the sidewalk** (e.g. bus shelters, subway grates, Con Edison grates),

e. In snow and ice cases, **where the accident occurs during a storm or within a short period of time after the storm** and it would be unreasonable to require removal in that time interval, (See section III below)

f. In snow and ice cases, where the landowner's removal of snow and ice did not create a hazard **greater** than the natural snowfall, (See section III below)

g. Other Sidewalk obstructions not caused by adjacent landowner or tenant:

i) **Parking sign removal**. There are literally thousands of stubs from old parking signs on sidewalks, that the City of New York does not remove completely and cuts at the base. The Appellate Division First Department has held that these are a hazard, a created condition by the City's negligence and "not subject to the prior written notice statute. *Bisulco v. The City of New York*, 186 A.D.2d 84; 588 N.Y.S.2d 26 (1st Dept., 1992),

ii) **curbs.** Courts have repeatedly held that curbs are the responsibility of municipalities or the State of New York as they are considered part of the roadway. *See* for example, *Benenati v. City of New York*, 282 AD2d 418, 723 NYS2d 69 (2nd Dept., 2000) where the court held that a broken curb near a driveway was not part of the sidewalk and therefore not a special use for which the adjacent landowner could be held responsible. Liability for broken curbs is usually a state or municipal one assuming prior written notice has been given to the State or City. See *Nado v. The State of New York*, 220AD2d 397, 631 N.Y.S.2d 444 (2nd Dept., 1995) Obviously, if both the broken sidewalk and the curb, with prior written notice, caused the accident, then there is going to probably be joint liability.

Continued on page 14

* *Matthew M. Cordrey is associated with the firm of Herzfeld & Rubin, P.C. working in the Litigation Department doing defense work.*

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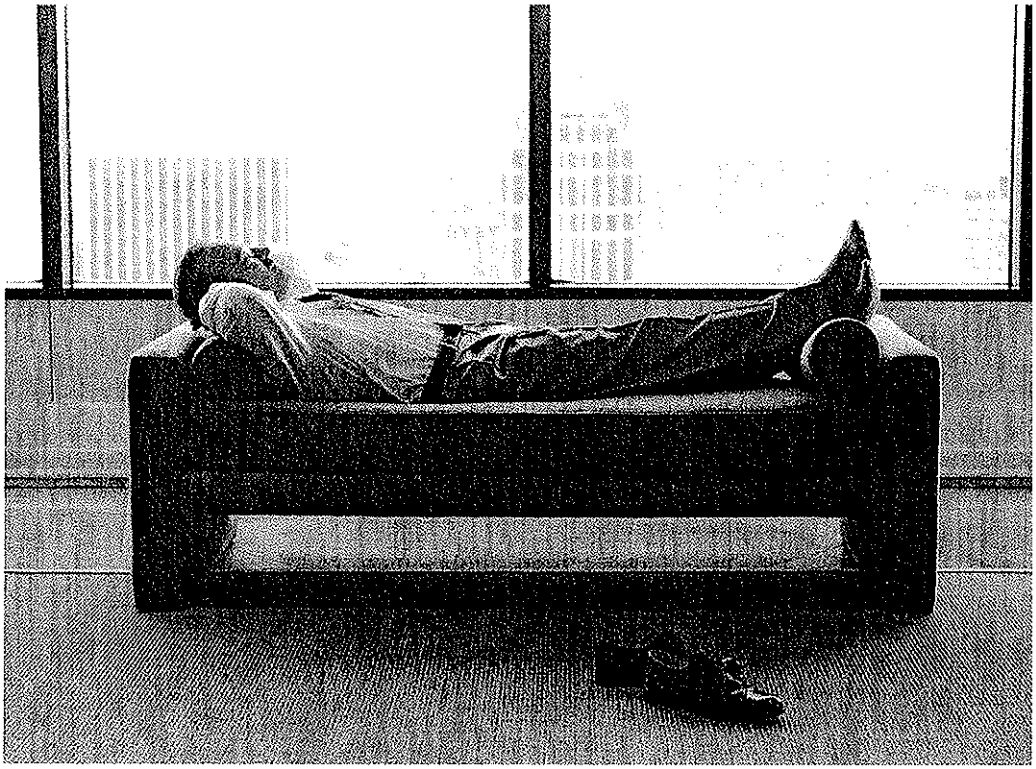

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Written Indemnification After Dutton

Have We Circumvented The Grave Injury Statute

GARY ROME*

I. THE CONCEPTS OF INDEMNITY AND CONTRIBUTION.

A. INDEMNITY; A DEFINITIONAL GUIDELINE:

Indemnity, as taught in law school and as defined in Black's Law Dictionary, involves the transfer of an entire risk from one party to another. Thus, indemnity has been defined as a reimbursement, or an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss. *See Black's Law Dictionary, 1990, at page 769.* An alternate definition is that indemnity is a "contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." *Id.* Until recently, the concept of partial indemnity, by definition, was a foreign concept, Through some tortured legal reasoning, as we will discuss later, it appears that New York law will recognize partial written indemnification.

B. WRITTEN INDEMNIFICATION IN GENERAL.

The Court of Appeals has recognized that provided the "'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'", a party is entitled to full indemnification even if the promisee/indemnitee is negligent. *See Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 521 N.Y.S.2d 216, 218 (1987) *quoting Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 344 N.Y.S.2d 336. *See also Di Sano v. KBH Construction Co.*, 721 N.Y.S.2d 200, 202-203 (4th Dep't 2001); *New York Tel. Co. v. Gulf Oil Corp.*, 609 N.Y.S.2d 244, 245-246 (1st Dep't 1994). It has been noted, however, that although one is able to be indemnified pursuant to the terms of a written agreement for one's own negligence, because such a principle is generally unfavored, the indemnification clause is subject to close judicial scrutiny under which the intention of the parties must be clearly expressed and deemed unequivocal. *See Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 367-368 (1989); *Niagara Frontier Transportation Auth. v. Tri-Delta Construction Corp.*, 487 N.Y.S.2d 428, 430 (4th Dep't 1985), *aff'd*, 65 N.Y.2d 1038. Nevertheless, the Court of Appeals has recognized that indemnification for one's own negligence under these circumstances can be enforced provided, of course, contractual indemnification was not prohibited by statute. *See Drzewinski v. Atlantic Scaffold & Ladder Co.*, 521 N.Y.S.2d at 218.

C. THE STATUTORY ENTITLEMENT TO CONTRIBUTION:

Prior to the appellate courts recognizing the possibility of partial contractual indemnity, parties who relied upon an apportionment of the loss, as opposed to an entire shifting of the loss, set forth claims for contribution. Noting the exceptions under the General Obligations Law Sections 15-108 and 18-201 as well as the grave injury statute, the statutory entitlement to contribution is set forth in Section 1401 of the CPLR. Under Section 1401 of the CPLR, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." *CPLR Section 1401.* Section 1402 of the CPLR merely codifies that the equitable shares amongst tortfeasors "shall be determined in accordance with the relative culpability of each person liable for contribution." *CPLR Section 1402.* If *Dutton* or the language giving rise to the partial indemnification debate caused by *Itri Brick* is ever confirmed by the Court of Appeals, then the New York courts will have established a means for a party to obtain contribution by contract under the misnomer of indemnification.

II. A BRIEF OVERVIEW OF CONTRACTUAL INDEMNIFICATION IN A LABOR LAW CONTEXT PRIOR TO THE 1981 AMENDMET.

A. HE QUEVEDO DECISION:

In 1982, the Court of Appeals interpreted the former Section 5-322.1 of the General Obligations Law in the context of an owner seeking to obtain contractual indemnity from a contractor. *See Quevedo v. City of New York*, 451 N.Y.S.2d 651 (1982). Under the pre-1981 statute, a party in a construction context could not seek indemnification if the injury was caused by or resulted from the sole negligence of the party seeking to be indemnified. *See id* at 653. The Court of Appeals began its abrogation of the intentions of the Legislature to strike clauses in which a party could be indemnified for its sole negligence by taking a practical approach in interpreting the contract. *See id.* at 653-654. Thus, even when a clause created an obligation to indemnify one for one's sole negligence, the statutory bar as set forth by the General Obligations Law was not deemed void if the agreement required indemnification under circumstances where the sole negligence of the party

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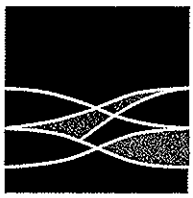
**Gary Rome is partner at Barry, McTiernan & Moore in Manhattan. He specializes in Labor Law matters.*



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Expert Witnesses: The Basics

MICHAEL J. CAULFIELD*

INTRODUCTION

Your success in litigation will often depend on the performance of expert witnesses.

FINDING AND HIRING YOUR EXPERT

Once you and your client/carrier have decided that you need to engage an expert witness, the first step is to locate one. The best resource is other attorneys who may have handled similar cases. Published cases and trade journals often reveal experts who have been successfully involved in your type of case. There are also various agencies who for a fee will locate an expert for you. No matter how you locate your expert before you retain him/her be sure to investigate him/her.

Licensing bodies should maintain records as to whether or not one of their own is a member in good standing. For physicians licensed in New York, The Office of Professional Medical Conduct can be a helpful source of information. You do not want to hire an expert and then learn he or she has been disciplined.

An internet search may reveal articles written by or about your proposed expert that will give you some insight into the approach of the person you plan to work with on your case. Other attorneys or databases, such as DRI, may be able to provide transcripts of testimony of that expert. There is no substitute for reading the verbatim performance of your proposed witness. Will he hold up under cross? Will he wilt?

Once you have identified your expert and done your due diligence check, prepare a retainer agreement or review his/her proposed retainer agreement carefully. Needless to say, hourly rate, expense reimbursement and availability are key components of any retainer agreement. Be sure your client/carrier read and understand the proposed agreement and, if appropriate, have them co-sign it.

PROVIDING YOUR EXPERT WITH BACKGROUND INFORMATION ON OPPOSING EXPERT

You have done a careful job finding and hiring your expert. Many of the same steps now apply to gathering material about adverse experts, not only for your own review, but for review by your expert. You should supply your expert with the credentials (CV), articles, transcripts, licensing/disciplinary information and anecdotal information concerning adverse experts. If you are to persuade a fact finder that your expert is smarter than your adverse expert, it will help if your expert knows as much about his/her opposite number as possible.

VISIT THE SCENE

The next step in working with your expert is elementary, but critical. Visit the scene with your expert. Accident reconstruction experts and safety/human factors experts must visit the place where the accident happened. You must go too. So why not go together? Reading the expert's report is fine, but actually seeing the report created in the field is better. You might also consider inviting your client and/or a representative of your carrier to be present. There are many cases where you client must be present to explain the case. If your expert does something that you do not understand, do not end the visit without finding out. Why did he take a certain measurement? Why did he take a certain photograph?

PRODUCT INSPECTION

Likewise with products liability cases, be sure to go to the product inspection with your expert. Bring your client/carrier, if appropriate. Ask questions of your expert. Do this privately if other counsel/experts are present.

TIME OF DAY / TIME OF YEAR

If lighting, time of day and/or season of the year are relevant, try to visit the scene or inspect an outdoor product at the proper time. A night accident usually requires a night visit. A winter visit usually requires a winter visit.

PROVIDING ADVERSE REPORTS AND TEST RESULTS

In addition to your adverse expert's background information, you need to provide your expert with your adverse expert's exchange information. CPLR 3101(d). Whether you are working with an engineer, an economist or a radiologist, they need to see what the other side is thinking. You may be tempted to comment on the adverse reports and tests, but keep that to yourself. Let your expert form his/her own conclusions. You want to avoid sharing your attorney work product with your expert as it may become available to your adversary through discovery.

PROVIDING PUBLIC RECORDS

If you have uncovered public records relevant to an accident, be sure to provide same to your expert.

Do not assume that he/she will find the recall notice on the product in question, the newspaper article about the accident or the police report. Once again, avoid the temptation to comment on these items of public

Continued on page 10

* *Michael J. Caulfield is managing attorney for St. Paul Travelers Staff Counsel in NYC.*

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Expert Witnesses: The Basics

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record. Let the expert form his/her own conclusions. You want to avoid sharing your attorney work product with your expert as it may become available to your adversary through discovery.

ATTORNEY WORK PRODUCT

Attorney work product is protected from disclosure. CPLR 3101(c). Attorney work product is uniquely the product of a lawyer's learning and professional skills. Hoffman v. Ro-San 73 A.D. 2d 207, 425 N.Y.S. 2d 619 (First Dept., 1980). Do not provide your expert with any legal memoranda that you do not want your adversary to see. While your expert exchange pursuant to CPLR 3101(d) must include a summary of the grounds for your expert's opinion, the grounds for your expert's opinion should not be your work product.

Expert exchange is subject to the "substantial need" and "undue hardship" exception. CPLR 3101(d)(2). Your adversary may seek more information if the exception applies. Nevertheless, such exceptional disclosure should not include "mental impressions, conclusions, opinions or legal theories of any attorneys . . ." CPLR 3101(d)(2).

Many articles have been written on this subject alone. See e.g. "Avoiding Harmful Expert Disclosures" from For The Defense, January 2004, by Paul M. Mannix. Much case law has been generated attempting to deal with this issue. Awareness of the issue and planning accordingly are key to staying out of trouble.

EXPLAIN YOUR GOALS TO YOUR EXPERT

In order to help you as much as possible your expert should know what you are trying to accomplish by hiring him/her. Is the expert exchange intended to educate your adversary as to your defense and encourage settlement discussion? Will you be playing your expert exchange close to the vest and revealing the minimum required by law in order to ambush your adversary at trial? If your expert understands your approach he/she can help you achieve your goals in the preparation of any report and expert exchange.

EXPLAIN APPLICABLE RULES OF EVIDENCE TO YOUR EXPERT

If you plan on using a hypothetical question, assuming facts in evidence, be sure to carefully review each fact and the entire question several times with your expert.

If you anticipate difficulty introducing certain testimony or a document, be sure to advise your expert what to expect by way of questions from you and possible voir dire from your adversary. Alert your expert to important language, e.g. use of the diagram or model will be "helpful" in explaining a concept to the jury.

While on trial you will undoubtedly be alert for objectionable questions posed to your expert on cross-examination. However, you should share with your expert the danger of certain types of questions that may be posed. Compound questions are always problematic because it is unclear which part of the question is being answered. Ambiguous questions need to be clarified. While leading questions are permitted on cross-examination, your expert will want to explain his/her "yes" or "no" answer. His/her awareness of what to expect will help.

EXPLAIN APPLICABLE COURT PROCEDURES TO YOUR EXPERT

Make sure your expert is familiar with the procedure for handling physical evidence, such as photographs, in court. The roles of the clerk and/or court officer may vary from courtroom to

courtroom. Your expert should also know the difference between items received "in evidence" and those "marked for identification."

You may want your expert to move closer to the jury. Your request that the witness be permitted to stand and approach the jury, if granted, should be met with confidence by your expert. This is his/her opportunity to show a high degree of knowledge and preparation. Your expert will be ready only if you prepare him for his time to prove himself.

CONCLUSION

For some this brief road map was a chance to revisit concepts addressed and practiced many times over. For others, it was an introduction to the practicalities of working with expert witnesses. In either case the challenge is always to maximize the impact of your expert and achieve a favorable result for your client.

Production Information

2006 Display Advertising Rates

(Prices are per insertion)

Deadlines: The Defendant is published quarterly, four times a year. Reservations may be given at any time with the indication of what issue you would like the ad to run in. Deadlines are two weeks prior to theprinting date.
Discount: Recognized advertising agencies are honored at a 15% discount off the published rate.
Art Charge: Minimum art charge is $125.00. Custom artwork, including illustrations and logos, is available at an additional charge. All charges will be quoted to the advertiser upon receipt of copy, and before work is performed.
Color Charge: Each additional color is billed net at $175.00 per color (including both process and PMS).
Bleed Charge: Bleed ads are billed an additional 10% of the page rate.
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Inserts: Call for details about our low cost insert service.
Advertising Materials: EPS files of advertisements, press optimized, ALL FONTS embedded can be emailed to; fmoreira@suffolk.lib.ny.us; Negatives, 133 line screen, right reading, emulsion side down-offset negatives, only. ALL COLOR MUST BE BROKEN DOWN INTO CMYK, for 4-color ads, progressive proofs or engraver's proofs must be furnished. Please call 631-664-7157 if other accommodations need to be met. NO FAXED COPIES.
Bleed: 8½ x11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.

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Full Page Width x Height 7½" x 10" $400	Third Page Vert. Width 2 3/8" x Height 10" $175	Two-Thirds Page Width x Height 4 7/8" x 10" $350	Third Page (Square) Width x Height 4 7/8" x 4 7/8" $175	Third Page (Horizontal) Width x Height 7½" x 3 3/8" $175
			Half Page (Horizontal) Width x Height 7½" x 4 7/8" $275	Half Page (Vertical) Width x Height 4 7/8" x 7½" $275

Worthy Of Note

VINCENT P. POZZUTO*

1. NEGLIGENCE

Town not lable for improper signage.

Carollo v. Town of Colden, 811 N.Y.S.2d 543 (4th Dept. 2006)

Plaintiff sued Town alleging negligence in maintenance of roadway. The court held that the alleged negligence of the Town in failing to provide proper signage was not relevant because it was uncontroverted that plaintiff was aware of the condition of the road, having traveled the road by automobile and bicycle on numerous occasions before the accident. With respect to claim of negligence in failing to use proper line markings, the Court noted that the town submitted an expert's affidavit establishing that there is no law, rule or regulation requiring road markings delineating lanes and that even if there were such requirements, it would have been impossible to place markings on freshly oiled and stoned road surface at issue.

2. EQUITABLE ESTOPPEL & FRAUD

Equitable estoppel is not applicable to municipality. Fraud and negligence causes of action dismissed.

Van Kleeck v. Hammond, 811 N.Y.S.2d 452 (3rd Dept. 2006)

Plaintiff was employed in Police Department of defendant Town of Lloyd. In 2006, the Town Board established a full time chief of police position. Plaintiff was hired as a provisional chief with a personal services contract. Plaintiff claimed that the Board assured him he would be retained as part-time chief if he retired, and that based on this assurance he did in fact retire. The Board did not retain plaintiff as part-time chief, and instead hired a full-time chief. Plaintiff sued for fraud and negligence. The court held that the Board was not equitably estopped from denying the alleged assurance to retain plaintiff as part time chief, because equitable estoppel is not applicable to a municipality acting in a governmental capacity. The Court further held that plaintiff could not maintain the fraud cause of action, because he unjustifiably relied on a vague assurance which was a promise regarding future acts. Finally, the negligence cause of action was dismissed because plaintiff could not establish a special relationship with the Board.

3. PROCEDURE

Court providently exercised discretion in vacating default.

Calderon v. 163 Ocean Tenants Corp., 811 N.Y.S.2d 428 (2nd Dept. 2006)

Defendant was served by delivery of process to the Secretary of State. The court held that Defendant's affidavits on motion to vacate were sufficient to demonstrate that it did not receive actual notice of the action in time to defend. The court further held that there was no evidence that the defendant deliberately attempted to avoid notice of the action.

4. NEGLIGENT ENTRUSTMENT

Owner of boat granted summary judgment. Summary judgment denied for parents of minor operating boat.

Kelly v. DiCerbo, 811 N.Y.S.2d 530 (4th Dept. 2006)

Plaintiffs were the parents of an infant who was injured while a passenger in a boat that collided with a boat being operated by a minor, Christopher DiCerbo. The minor's parents and the boat's owner moved for summary judgment. The court held that the plaintiff's raised a triable issue of fact as to whether the minor's parents "should have known" that Christopher was likely to use the boat in a dangerous manner. Plaintiffs submitted affidavits from three neighbors who averred that Christopher operated the boat recklessly on multiple occasions. The boat owner was granted summary judgment. The court held that plaintiffs' submissions established that the boat owner was present when Christopher operated the boat or knew of the neighbors' complaints.

5. PROCEDURE

Plaintiff failed to satisfy due diligence requirements for "Nail and Mail" service.

O'Connell v. Post, 811 N.Y.S.2d 441 (2nd Dept. 2006)

Defendant had a home address in New Hyde Park and a vacation address in East Hampton. Plaintiff's process server affixed the complaint to the door of the East Hampton home. This substituted service followed one unsuccessful attempt at personal service at the New Hyde Park address, and one unsuccessful attempt at personal service at the East Hampton address. The court held that this did not constitute "due diligence", so as to allow for "Nail & Mail" service. The court noted that the process server made no effort to determine the defendants business address in order to attempt personal service thereof. Further, the two attempts at personal service were made on weekdays during hours when it reasonably could have been expected that defendant was either working or in transit to work.

6. INSURANCE

Broker's failure to advise insured of carrier's unauthorized status was not proximate cause of injury.

PMA Corporation v. Kalvin-Miller International, Inc., 811 N.Y.S.2d 87 (2nd Dept. 2006)

Continued on next page

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

 Continued from page 11

The defendant insurance broker procured a general commercial liability policy on behalf of plaintiffs from Reliance Insurance Company of Illinois. Reliance was not authorized to engage in insurance business in the State of New York. The plaintiffs suffered a loss during the policy period. Reliance was placed in liquidation and the plaintiffs were not able to recover from the New York State Insolvency Fund as Reliance was not authorized to do business in New York. Plaintiff claimed that the defendant never advised that Reliance was an unauthorized carrier. The court held that because defendant produced an affidavit from plaintiff's prior agent attesting that plaintiff was aware that Reliance was an unauthorized carrier, and because a letter existed notifying plaintiff of Reliance's unauthorized status, plaintiff could not prove proximate cause.

7. INSURANCE

Two infants' exposure to same lead hazard in same apartment constituted single "occurrence".

Ramirez v. Allstate Insurance Company, 811 N.Y.S.2d 19 (1st Dept. 2006)

Each of the two infant-plaintiffs suffered injury as a result of exposure to lead injury as a result of exposure to lead. Defendant insured the building under a home-owners policy with a "per occurrence" limit of $200,000. The court held that by reason of a clause in the policy stating that regardless of the number of injured persons, damages resulting from one occurrence would not exceed the policy limits, exposure to the same lead hazard in the same apartment constituted only one occurrence. The court held that it was irrelevant that each plaintiff may have ingested the lead at different times due to the language of the clause.

8. VENUE

Special circumstances warranted placement of action in county in which second action was brought.

Messira v. Upper Hudson Primary Care Consortium, Inc., 811 N.Y.S.2d 147 (3rd Dept. 2006)

Plaintiffs commenced initial action in Washington County, the location of the hospital where the infant-plaintiff was born. It was then discovered that a second defendant, an entity located in Albany County, was the hospital's owner. The court held that although venue for consolidating actions in differing counties should usually be placed in the county where the action was first commenced, special circumstances may warrant placement of the consolidated action in the second county. The court held that because the infant would have great difficulty attending proceedings in Washington County, and because there were many non-party medical professionals in Albany County, the action should be venued in the second county.

9. SPOLIATION

Unavailability of actual handle and affixing screws did not warrant directed verdict; adverse inference charge was more appropriate sanction.

Enstrom v. Garden Place Hotel, 811 N.Y.S.2d 263 (4th Dept. 2006)

Plaintiff was allegedly insured when he was attempting to lift himself out of a whirlpool tub located in a hotel room at the Garden Place Hotel. Plaintiff placed his hand on a plastic handle affixed to the wall of the tub, and the handle came off as he lifted, causing him to fall. After the tub and handle were inspected by the manager of the hotel, the handles were replaced. Plaintiff sought a directed verdict on spoliation. The court held that although plaintiff's expert did not have the actual handle, he was provided with exemplars, and plaintiff was therefore able to present a prima facia case based on design defect. The court ordered that an adverse inference charge was the more appropriate sanction.

10. SUMMARY JUDGMENT

Material issues of fact existed as to whether operators of river rafting business had duty to protect customer from disorderly conduct of other customers even after rafts were underway on river.

Castillo v. Kittatinany Canoes., 811 N.Y.S.2d 27 (1st Dept. 2006)

Plaintiff was on a trip on the Delaware River operated by defendant. Defendants operate a business providing daily rafting trips under a license from the National Parks Service. Plaintiff was about ten minutes into her trip when she was struck in the face by a water balloon launched from a sling shot by three men on another raft. Defendant argued that it had no duty to plaintiff once she and the men were on the river, a public waterway under the control of the United States Department of the Interior. The court held that this argument failed to address defendant's duty to prevent disorderly conduct before the men boarded the raft in the first place. Because there was evidence of disorderly behavior before the men boarded the raft, issues of fact precluded summary judgment.

11. TOXIC TORT

Plaintiff must establish level of exposure to toxin.

Zaslowsky v. J.M. Dennis Construction Company Corp., 810 N.Y.S.2d 484 (2nd Dept. 2006)

Plaintiff claimed to have been injured when she was exposed outdoors to natural gas caused by the rupture of an underground gas line. The court held that to establish a relationship between an individual's illness and a toxin suspected of causing that illness, plaintiff must establish (1) her level of exposure to the toxin, (2) that the toxin is capable of causing the alleged illness and the level of exposure to the toxin that will engender that illness, and (3) the probability that the toxin caused her injuries. As none of plaintiff's experts were able to articulate with any specificity the level of natural gas to which plaintiff was exposed, the plaintiffs were unable to raise a triable issue of fact as to the causal connection between the gas leak and her alleged injuries.

12. SNOW REMOVAL

Building manager and snow removal contractor lacked sufficient time to remedy hazardous condition created by storm.

Aguilar v. Beckson Associates Continued on next page

Realty Corp., 810 N.Y.S.2d 513 (2nd Dept. 2006)

Plaintiff slipped and fell on ice on the exterior stairs of a building managed by defendant Beckson. The court held that defendants established their prima facie entitlement to summary judgment with plaintiff's own observations that there was ongoing precipitation at the time of the accident.

13. DISCOVERY

Plaintiff was not entitled to pre-action disclosure of defendant's investigative file.

Uddin v. New York City Transit Authority, 810 N.Y.S.2d 98 (1st Dept. 2006)

Plaintiff was injured while waiting on subway platform and falling onto track. Plaintiff's counsel demanded disclosure of defendant's investigative file. The court held that while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether plaintiff has a cause of action worth pursuing.

14. LEAVE TO AMEND

Despite passage of a year since filing of original answer, allowing amendment did not prejudice plaintiff.

Antwerpse Diamont Bank N.V. v. Nissel, 810 N.Y.S.2d 180 (1st Dept. 2006)

Court allowed defendant to amend answers to interpose statute of limitations defense. The court noted that there was no prejudice to plaintiff because of the lack of significant discovery or progress in the case. Further, the documents necessary to demonstrate the statute of limitations defense were in plaintiff's possession.

15. PRODUCTS LIABILITY

Act of infant-plaintiff's brother constituted a superseding cause.

Mrakovcic v. Rose Art Industries, Inc., 809 N.Y.S.2d 538

Infant-plaintiff was injured when his 5 ½ year old brother hurled a broken piece of dry erase board at him. The court held that the act of the infant-plaintiff's brother was not a foreseeable consequence of the alleged failures of the defendant and that the infant brother's actions constituted a superseding cause.

16 PRODUCTS LIABILITY

Affidavit of plaintiff's expert failed to raise a triable issue of fact; affidavit of defendant's expert established that likely cause of accident was not attributable to any design defect.

D'Auguste v. Shanty Hollow Corp., 809 N.Y.S.2d 555 (2nd Dept. 2006)

Plaintiff, an experienced skier, was injured when his ski snapped off and he thereafter lost his balance and fell. According to a post-accident report, one of plaintiff's bindings was cracked. On a motion for summary judgment, the court held that plaintiff's expert failed to raise a triable issue of fact. The court held that plaintiff's expert's background did not include experience in the ski equipment manufacturing industry and thus "was insufficient to lend credence to his opinions." Further, plaintiff's affidavit was not supported by facts such as the results of actual testing of the binding, a deviation from industry standards, or statistics showing consumer complaints. On the contrary, the court held that defendant's affidavit established that the release of the binding may have been caused by the setting of the retention/release valve for the bindings.

17. LABOR LAW

Jury finding that Industrial Code Violation did not constitute a failure to use reasonable care set aside.

Owen v. Schulmann Construction Corp., 809 N.Y.S. 2d, 544 (2nd Dept. 2006)

Plaintiff was a plumber on a work site. Plaintiff testified at trial that while working after hours to install a vent, he attempted to walk around a pile of debris approximately 10 feet by 10 feet in size. He tripped on a piece of electrical cable which wrapped around his ankle. The jury found that 12 NYCRR 23-107(e)(2), which prohibits debris and scattered tools and materials in a working area, was violated. However, the jury further found that the violation did not constitute a failure to use reasonable care. The Court held that where a jury finds a violation of the Industrial Code, but nevertheless absolves a defendant of liability, the verdict should be set aside if the defendant's explanation as to why the violation did not constitute negligence is not plausible. The Court found that there was no explanation as to why the debris was not removed even though it was after hours and the electrical work had been completed. The verdict was thus set aside.

18. LABOR LAW

Issue of fact as to whether plaintiff's actions were sole proximate cause of fall.

Bisch v. Erie Industrial Development Agency, 809 N.Y.S. 2d 696 (4th Dept. 2006)

Plaintiff brought 240(1) cause of action after falling from a ladder. According to plaintiff, the ladder was not tied off or secured in any manner. In opposition, defendant submitted medical records indicating that plaintiff told his treating physicians that he did not recall the event and that he might have had a shock from an impplanted defibrillator. The records further indicated that he had forgotten to take his heart medication that morning. In addition, defendant submitted the testimony of an eyewitness who testified that the ladder was tied off. The Court held that this evidence created an issue of fact on the issue of sole proximate cause.

19. WORKER'S COMPENSATION

Worker's Compensation bar extended to wholly owned subsidiary of Plaintiff's Employer.

Ortega v. Noxxen Realty Corp., 809 N.Y.S. 2d 546 (2nd Dept. 2006).

Plaintiff, an employee of Gaseteria Oil Corp. allegedly was injured when he fell from a ladder and scaffold while engaged in reconstructing a car wash located next to a Gaseteria gas station. *He commenced suit against Noxxen Realty Corp., the owner of the premises, which was a wholly owned subsidiary of Gaseteria*. Noxxen argued that it was alter ego of Gaseteria. The Court agreed and held that the exclusivity provision of the Worker's Compensation Law extends to bar plaintiff's suit against Noxxen.

20. PREMISES LIABILITY

Owner lacked actual or constructive notice of allegedly defective door.

Continued on page 22

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II. DISPUTES BETWEEN COMMERCIAL LAND OWNER AND THEIR TENANTS OVER WHO IS RESPONSIBLE FOR SIDEWALK REPAIRS OR MAINTENANCE:

a. *Who is responsible for repairing defective sidewalk slabs under most leases? Answer: the landowner.*

The replacement of concrete slabs is considered a "structural" repair. Courts have held that sidewalk slabs are "structural" in nature and generally the responsibility of the landowner. *See for instance, Berkowitz v. Dayton Construction, Inc., et al,* 2 AD3d 764, 796 NYS2d 730 (2nd Dept., 2003); *Feldman v. Kings Hero Restaurant,* 270 AD2d 1, 702 NYS2d 476 (1st Dept., 2000). Most form leases make structural repairs an obligation of the landlord.

b. *General Obligations Law Section 3-521*

Often a landowner will try to pass liability for accidents arising out of defective sidewalks or exterior spaces to the commercial tenant through the terms of the lease. Usually this takes the form of a hold harmless clause. These clauses are governed by the statute known as the General Obligations Law. The specific section dealing with indemnity clauses is 3-521[3]. This section prohibits enforcement of any clauses in a lease which would require the tenant to hold harmless the landlord for liability caused by the landlord's own negligence.

c. *Exception*:

1. The older commercial rule allowing for large commercial tenants to indemnify landlords for negligence of any party to the lease through the vehicle of insurance to cover third party accidents, is still partially in effect in the First Department. *Hogeland v Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 161, 366 N.E.2d 263, 397 N.Y.S.2d 602 (1977); *Great Northern Insurance Co., v. Interior Construction Co.*, 18 A.D.3rd 371, 796 NYS2d 51 (1st Dept., 2005) (Clause allowed for tenant to hold landlord harmless for the negligence of landlord unless it was the sole cause of the accident, it was stipulated that the landlord's actions were not the sole cause in this case) *See also Parra v. Ardmore Management Co.*, 258 AD2d 267, 488 NYS2d 36 (1st Dept., 1999)
2. However, there is a split between the First and Second Department to some extent as to how they will enforce hold harmless clauses that allow negligence on the part of the landlord to be indemnified by the tenant. Where there is clear evidence of negligence on the part of the landlord that is a proximate cause of the accident, both Departments will not follow the older line of commercial cases that allowed indemnity to the landlord for its negligence and strike hold harmless clauses for violating the General Obligations Law. *Compare, Gibson v. Bally Total Fitness Corp,* 1 AD3d 477, 767 NYS2d 135 (2nd Dept., 2003) and *Edwards v. Getty Petroleum,* 172 AD2d 715, 569 NYS2d 104 (2nd Dept., 1991) *with Extaza of 34th Street v. City Stores Co., Inc.*, 97 A.D.2d 391; 468 N.Y.S.2d 10; (1ST Dept., 1983); *Automatic Findings, Inc. v. Allied Outdoor Advertising, Inc.*, 214 A.D.2d 482, 625 N.Y.S.2d 220(1st Dept.,1995); *and in a related context, Cavanaugh v 4518 Assoc Cavanaugh v 4518 Assoc.* 9 A.D.3d 14; 776 N.Y.S.2d 260(1st Dept., 2004) (In labor law case where Contractor found 70% negligent by jury, Court refused to allow contractual indemnity against a subcontractor based on argument made by appellant that Hogeland should apply regardless of negligence.)

   The First Department will follow the older commercial rule, *See Great Northern, supra*; where the parties have shown an unmistakable intent to allow for a tenant to indemnify a landlord so long as: a) the landlord did not create the defective condition, b) the landlord was not the sole cause of the accident, c) the tenant was required to name the landlord and d) both parties had mutual waivers of subrogation in their policies.

   The Second Department still has not ratified the *Hogeland* case and generally follows strictly the letter of GOL Section 3-521, striking down the hold harmless clauses that purport to indemnify the landlord for its negligence. In *Stern's Dept. Stores, Inc. v Little Neck Dental*, 11 A.D.3d 674; 783 N.Y.S.2d 645(2nd Dept., 2004)(jury found landlord 40% responsible for accident and tenant 60% liable. Court denied contractual indemnity for landlord and distinguishing *Hogeland* case on two grounds: 1) the indemnity clause in the lease only allowed for indemnity not caused by landlord's negligence and secondly there was no clause in the lease limiting the indemnity to insurance the tenant obtained for the landlord)[4]

   Breakaway Farm, Ltd. v Ward, 2005 NY Slip Op 01302, (2nd Dept., 2005) (complaint for property damage reinstated and summary judgment of defendant landlord for lack of liability based on lease provisions, reversed; The Court held that 5-321 voids provisions that exempt landlord for its own negligence and finds that insurance procurement clauses which burden the tenant cannot be used to avoid the restrictions of 5-321.

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In *Colosi v. RATL, LLC*, 7 A.D.3d 558; 776 N.Y.S.2d 496

(2nd Dept., 2004), the Court held: "Contrary to the contention of the defendants third-party plaintiffs-lessors, the Supreme Court correctly determined that the broad indemnification clause which was the basis of their contractual indemnification claim against the third-party defendant-lessee was unenforceable under *General Obligations Law § 5-321*. The indemnification provision was not limited to the lessee's acts or omissions, it failed to make an exception for the lessors' own negligence, and it did not limit the lessors' recovery under the lessee's indemnification obligation to insurance proceeds."

III. SNOW AND ICE CASES.

Under the new statute, the standard for adjacent landowners to deal with snow and ice is set forth as follow: "Failure to maintain such sidewalk in a reasonably safe condition shall include.....the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

Liability does not attach just because a person slips on snow or ice on the sidewalk. Plaintiff must still prove: 1) that the "failure to maintain" was *negligent*, and that this made the sidewalk *unreasonably safe* and 2) that the violation of the statute was the *proximate cause* of the injury. Comparative negligence is still a viable defense. So are the other defenses in snow and ice cases that are available to private property owners.

Slipping and falling on a sidewalk while a storm is still in progress or a short time thereafter cannot be the basis for a lawsuit against an adjacent landowner. *Fuks v New York City Tr. Auth.*, 243 AD2d 678, 663 N.Y.S.2d 639,(2nd Dept., 1997)[5] Removing snow and ice does not impose liability just because it is incomplete or it exposes a dangerous condition not created by the abutting owner,. *Simmons v. Metropolitan Life Ins. Co.*, 84 N.Y.2d 972, 622 N.Y.S.2d 496(1994) *Bonfrisco v. Marlib Corp.*, 24 NY2d 817 (1969); *Nevins v. Great Atlantic & Pacific Tea Co.*, 164 AD2d 807, 559 NYS2d 539 (1st Dept., 1990). The abutting landowner is negligent if the removal creates a dangerous condition increasing the natural hazard. *Gaudino v. 511 West 232nd St. Owners Corp.*, 279 A.D.2d 272,719 N.Y.S.2d 39(1st Dept., 2001; *Rugova v. 2199 Holland Ave. Apartment Corp.*, 272 AD2d 261, 708 NYS2d 390 (1st Dept., 2000)

The created condition from shoveling or removal or lack thereof does not become dangerous unless it is reasonably foreseeable that it will cause injury to pedestrians and the defendant has notice of the condition, *See Simmons supra*.

Liability can also be present when the adjacent owner allows water to artificially flow onto the sidewalk and thereby create a hazard. *Roark v. Hunting*, 24 NY2d 470 (1969)(melted snow dripping from a sign causing ice); *Wragge v. Lizza Asphalt Constr. Co.*, 17 N.Y.2d 313 , 270 N.Y.S.2d 616 (1966)(wrongful death action from water negligently flowing from adjacent land to street causing auto accident); *Tremblay v. Harmony Mills*, 171 NY 598 (1902) (leader from gutter system discharging water from roof onto sidewalk.)

In ice patch cases or "black ice cases" constructive notice is a main point to investigate in discovery. Courts have held that this type of condition is often too difficult even for the defendant to have had notice of and have dismissed the case on summary judgment. *See Stoddard v. GE Plastics Corp.*, 11 AD 3d 862, 784 NYS 2d 195 (3rd Dept., 2004)

Snow removal contractors were in the past not often viable direct parties for plaintiffs. More recently, they have been sued and held into cases where they created a condition that caused the accident. The standard articulated in the most recent case is that they have no duty under the law to third party pedestrians who slip on the premises the contractor removes snow from unless their contract is comprehensive and takes over the duty of the landowner or they "launch a force of harm that caused the accident, or there is detrimental reliance on their activity by the plaintiff" *See, Capestany v. C&S Properties*, 17 A.D. 3d 502, 793 NYS 2d 492 (2nd Dept., 2005), *Espinal v. Melville Snow Contrs*, 98 NY2s 136, 746 NYS 2d 129 (2002) However, if their contract with the owner, requires them to indemnify the owner, then they can be brought into a third party action for indemnification.

IV. TRIVIAL DEFECTS OR DEMINIMUS CASES.

An adjacent landowner cannot be held liable for a trivial defect that causes injury where there is no trap, nuisance and a pedestrian merely stumbles, trips or stubs a toe on a trivial defect. What constitutes "trivial" is determined from all the facts surrounding the accident including the width and length of the defect, its irregularity, its depth, its elevation, its overall appearance and the time, place and circumstances of the accident. Whether a defect is trivial is usually a question of fact for a jury, *Friedman v. Beth David Cemetery*, 796 NYS2d 167 (2nd Dept., 2005)

However, Courts have regularly decided as a matter of law when the defect is so trivial that a jury should not make the decision and the case dismissed. Generally speaking this occurs when the defect is less than one

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obtaining indemnity was not at issue. *See id.* Thus, the Court of Appeals indicated that if the facts of a given case did not create circumstances under which the party seeking to be indemnified was solely negligent, the indemnification clause would be enforceable. *See id.* at 654. In providing this rationale, the Court seemed to indicate that clauses which violated the General Obligations Law should be deemed voidable as opposed to being void for all purposes depending upon the factual determination of a party's negligence. *See id.* This was the state of the law until the Legislature passed an amendment to the General Obligations Law governing contracts in the Labor Law/construction field.

III. THE LEGISLATIVE RESPONSE.

A. EXAMINING THE STATUTORY LANGUAGE OF THE GENERAL OBLIGATIONS LAW.

Effective in 1981, in order to avoid the harsh results of *Quevedo* in an industry in which the Legislature expressed a desire to protect workers from owners or general contractors who would cast safety aside knowing that they would be entitled to contractual indemnification from any subcontractor who entered upon a job site, and for other reasons, the Legislature set forth the following:

> Section 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases
>
> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of a bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.
> 2. The provisions of this section shall only apply to covenants, promises, agreements or understandings in, or in connection with or collateral to a contract or agreement, as enumerated in subdivision one hereof, entered into on or after the thirtieth day next succeeding the date on which it shall have become a law.

B. THE DECISIONAL ACKNOWLEDGEMENT OF THE LEGISLATURE'S INTENT.

In interpreting the prior General Obligations Law enacted in 1975, the Fourth Department, in the context of *Quevedo*, noted that the original 1975 Act was passed "to prevent a practice prevalent in the construction industry of requiring contractors and subcontractors to assume liability by contract for the negligence of others." *County of Onondaga v. Penetryn Systems, Inc.*, 446 N.Y.S.2d 693, 694 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 729 (1982). The pre-amended statute was also noted to have been passed in order to avoid "coercive" bidding requirements which restricted the number of contractors who could afford appropriate coverage and in order to avoid unfairly imposing liability upon a contractor for the fault of others over whom no control existed. *See id.* The Legislature also hoped that the costs of construction would be reduced by avoiding higher bids which incorporated the costs of contractual insurance coverage. *See id.* Under the revised provisions of the General Obligations Law, even the First Department, which handed down *Dutton*, noted that the Legislature sought to prevent a prevalent practice in the construction industry of requiring subcontractors to assume the liability of a responsible or negligent owner or general contractor under contracts which were often non-negotiable. *See Padro v. Bertelsman Music Group*, 718 N.Y.S.2d 296, 298 (1st Dep't 2000), *quoting Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786 (1997).

IV. THE LEADING COURT OF APPEALS DECISIONS INTERPRETING THE 1981 AMENDMENT.

A. BROWN V. TWO EXCHANGE PLAZA PARTNERS.

After a rather long delay, the Court of Appeals next issued significant guidelines in the landmark decision of *Brown v. Two Exchange Plaza Partners*. *See Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 1991 (1990). In *Brown*, the Court was confronted with a fact scenario in which a general contractor was held liable pursuant to Labor Law Section 240(1) as a result of a scaffold collapsing. *See id.* at 992-993. The general contractor, however, was determined to be free of negligence. *See id.* There was also a finding that a subcontractor who retained plaintiff's employer was free of negligence. *See id.* at 993. Another subcontractor, who erected the scaffold, was found to be negligent. *See id.* Significantly, the *Brown* Court noted that it was interpreting a broad based indemnification clause. *See id.* [1] In light of the broad nature of the indemnification agreement, the subcontractor who like the general contractor was found to be free of negligence, argued that the general contractor could not enforce its indemnity agreement due to the fact that theoretically, the clause could have required indemnification even if the general

contractor was negligent. *See id.* at 994. Thus, the subcontractor argued that the general contractor's indemnity clause was void and unenforceable under the General Obligations Law. *See id.*

The Court of Appeals once again noted the purpose of the original enactment of General Obligations Law Section 5-322.1 as previously set forth *supra*. *See id.* at 995. The 1981 amendment was enacted, according to the *Brown* Court's reference to its legislative history, to prevent an owner or general contractor from being indemnified "for their *own negligent actions* . . . even if the accident was caused only in part by the owner's or contractor's negligence." *Id.* (emphasis added). In rationalizing that because there was no evidence of any fault on behalf of the general contractor, the Court ruled that neither the wording nor the intent of the amended statute would be violated if the indemnification was enforced. *See id.* It is respectfully submitted that the Court emphasized, incorrectly, the concept of seeking out a promisee's degree of negligence rather than merely voiding the agreement if it was constructed too broadly. *See id.* The *Brown* Court in so holding, failed to explain how a job site could be safer, how the costs of construction could be decreased, or how non-negotiable contracts could be avoided by circumventing the seemingly explicit intention of the Legislature which would have, assumedly, simply voided the indemnification clause. *See id.* This is especially true in light of the memorandum prepared by Assemblyman Ralph Goldstein who stated, in reflecting upon the 1981 amendment, that by "holding promisors liable for 'partial' or 'contributory' negligence of the promisee, the law became less than fully effective. A clause in the contract between a promisor and promisee which requires the promissor (sic) to indemnify the promisee will be illegal." *See Mem. of Assemblyman Goldstein, 1981 N.Y. Legis. Ann., at 502.* Thus, a fair reading of Assemblyman Goldstein's comments would lead one to conclude that the passage of the 1981 amendment was not intended to create a doctrine of partial contractual indemnification even if a promisor only indemnified the promisee for the promisor's percentage of fault. *See id.* That is, seemingly, whether the law required partial indemnification for a promisor's or a promisee's negligence would be irrelevant to effectively reducing construction costs and fulfilling the other stated purposes of the legislation. *See id.*

It is respectfully submitted that if the *Brown* Court would have simply voided the indemnification clause rather than perform a *Quevedo* analysis of determining whether the contract was voidable under the facts of a given case depending upon whether the promisee was negligent, the circumvention of the grave injury statute and the development of a theory of partial contractual indemnity in Labor Law cases would not have arisen.

It is this author's opinion that once the Legislature precluded a promisee from obtaining indemnification for their own negligence whether they were negligent in whole or in part, the practice of not voiding the entire indemnification clause if improperly drafted, even for a non-negligent promisee, should have terminated. It is this author's opinion that the legislative intent would best be met if the focus and analysis shifted from the degree of negligence of the promisee, or after *Itri Brick* if the indemnification clause is a valid partial indemnity agreement, to whether the indemnification agreement would allow indemnity, to any extent, if the promisee was negligent. Such clauses should be deemed void and unenforceable under any fact scenario. Thus, if the Court of Appeals adopted a strict construction of Section 5-322.1 of the General Obligations Law, thereby voiding indemnification clauses *ab initio* if the clause can be construed to require indemnification if the promisee is negligent in whole or in part, it is respectfully submitted, that such an approach would be consistent with the language and intent of the statute, and the issue of bypassing the grave injury statute by creating a doctrine of partial contractual indemnification would be avoided.

B. ITRI BRICK & CONCRETE CORP. V. AETNA CASUALTY & SURETY CO.

Following the analysis in *Brown*, the Court of Appeals' next significant pronouncement came in 1997. *See Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 658 N.Y.S.2d 903 (1997). In *Itri Brick*, the Court of Appeals next decided the issue of whether a general contractor, who had been found partially negligent, could enforce a broadly worded indemnification agreement under which full, rather than partial, indemnification was contemplated. *See id.* at 904-905. The two agreements which were before the Court were both found to have been drafted in extremely broad terms. *See id.* at 905-907. In the first agreement, the subcontractor was to hold the general contractor harmless:

> from all liability, loss, cost or damage from claims for injuries or death from any cause, while on or near the project, of its employees or the employees of its subcontractors, or by reason or claims of any person or persons for injuries to person or property, from any cause occasioned in whole or in part by any act or omissions of the second party [subcontractor], its representatives, employees, sub-contractors or suppliers and whether or not it is contended the first party [general contractor] contributed thereto in whole or in part, or was responsible therefore by reason of non-delegable duty.

Id. at 909. The second indemnification agreement was similar in that indemnity was to be triggered for any and all liability, just or unjust, and all resultant damages, "in connection with or resulting from the work or by reason of the operations performed on behalf of or on the property of [the general contractor] by the named insured Subcontractor, his agents, servants or employees." Id.

Under the facts of both cases decided by the Court of Appeals, the general contractor, who was seeking indemnity, was found to be partially negligent. *See id.* at pp. 905-906. In finding that both indemnification clauses contemplated a complete rather than a partial shifting of liability, the indemnification agreements were noted to be similar to the contractual language reviewed in *Brown*. *See id.* at 907. Both

Continued on next page

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indemnification clauses also required the subcontractor to indemnify the general contractor without limitation in the event that the general contractor was found to be negligent. *See id.* In fact, as the Court noted, in the first agreement, the subcontractor was obligated to indemnify the general contractor even if the general contractor caused the injury in whole or in part. *See id.* The Court of Appeals correctly noted that because both general contractors were found to be negligent, the indemnification agreements were unenforceable. *See id.* Any other result would have been in contravention to the language, purpose, and history of the General Obligations Law, Section 5-322.1. *See id.* The Court supported its holding by noting that the purpose of the General Obligations Law was to prevent, as previously noted, coercive bidding which increased construction costs by unfairly imposing liability on subcontractors for the negligence of other entities who they did not control, and "to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others." *Id.* The Court also alluded to the economic impact created by the high expense of a contractor having to purchase double coverage for both general liability and contractual coverage. *See id.* The Court noted that its decision was consistent with a prior 1987 ruling in which the Court of Appeals presented little analysis. *See Quain v. Buzzetta Construction Corp.*, 69 N.Y.2d 376, 514 N.Y.S.2d 701, 702 (1987). *See also Hawthorne v. South Bronx Community Corp.*, 78 N.Y.2d 433, 576 N.Y.S.2d 203 (1991).

In both instances, the general contractor raised the argument that the General Obligations Law would not preclude the enforcement of their agreements either *ab initio*, as already decided in *Brown* but also, even in the event that the general contractor was found to be partially at fault. *See id.* at 908. The argument was made that the general contractors should be indemnified for that portion of the award not attributable to their own negligence. *See id.* In other words, if the general contractors were found 20% liable, and the subcontractor from whom indemnity was sought was found to be 80% liable, rather than voiding the entire right to indemnification, the general contractors argued that they should be entitled to collect 80% of their contribution from their subcontractor. *See id.* The Court of Appeals in addressing this argument, noted the statutory language which would void any agreement purporting to indemnify or hold harmless the promisee against liability which was caused by or resulted from the negligence of the promisee. *See id.* Unlike the indemnification agreement in *Brown*, there was no savings clause under which indemnification was to be enforced only to the fullest extent permitted by law. *See id.* Thus, in noting that the *Itri Brick* agreements contemplated full indemnification even under circumstances wherein the general contractor was found to be negligent in whole or in part, there was no rationale under which the general contractors could enforce their indemnification agreements without violating public policy and the provisions of the General Obligations Law. *See id.*

In denying the general contractors' attempts to enforce a theory of partial contractual indemnification, the Court of Appeals, rather than merely rejecting such a theory under circumstances where a broad indemnification agreement existed and the party seeking to enforce indemnification was found liable, added language, arguably gratuitously, which has been the focus of much debate. *See id.* That is, in *dictum*, the Court of Appeals noted that whether or not the General Obligations Law would allow enforcement of a "partial indemnification" agreement was irrelevant due to the fact that the agreements before the Court contemplated complete indemnification. *See id.* The Court of Appeals then noted that the "question whether a negligent contractor/promisee could enforce an indemnification agreement, not withstanding section 5-322.1, so long as the agreement did not purport to indemnify the contractor for its own negligence is not before us." *Id.* It is based upon this statement that the First Department handed down *Dutton*.

V. THE DUTTON CASE.

The First Department in a decision dated July 2, 2002 adopted a theory of partial contractual indemnification based upon percentages of fault and, of course, the terms of the indemnification clause. *See Dutton v. Charles Pankow Builders, Ltd.*, 745 N.Y.S.2d 520, 521-522 (1st Dep't 2002). As a point of reference, this is the same Court which in July, 1999, precluded enforcement of a general contractor's indemnification clause which contained a savings clause, and required indemnification even if the general contractor was negligent in part for plaintiff's injuries. *See Correia v. Professional Data Management, Inc.*, 693 N.Y.S.2d 596, 598-601 (1st Dep't 1999).

In turning first to the *Correia* case, the indemnification clause which the general contractor sought to enforce against its subcontractor would have required indemnification from all liability while on or near the construction project for injuries occasioned in whole or in part by any act or omission of the subcontractor and whether or not it was contended that the general contractor "contributed thereto in part, or was responsible therefore by reason of non-delegable duty." *Id.* at 598. The contract also stated that if the indemnification provision was limited by applicable law, then indemnity was to be limited to conform with the law provided that the enforcement of the indemnification provision "shall be as broad as permitted by applicable law . . . " *Id.* Indemnification also applied to any loss "whether or not caused or claimed to have been caused in part (but not solely) by the negligence of [the general contractor]." *Id.* In denying the general contractor's motion for summary judgment, the First Department noted that issues of fact existed as to whether or not the general contractor might be negligent. *See id.* at 599. Although it would seem unlikely that a scenario could have existed under which the general contractor

could have been solely responsible for the accident, nevertheless, the First Department seemed to imply that contractual indemnification could not be enforced if the general contractor was found to be negligent in part. *See id.* In fact, the First Department noted that an indemnitor/subcontractor's negligence would be irrelevant in considering whether or not to enforce an indemnification agreement, "while the negligence of the indemnitee . . . is critical and, if established, would fall afoul of [the] General Obligations Law." *Id.* at 600. Thus, no mention was made that if negligence was established as to the indemnitee/promisee, an entitlement to some form of indemnification would survive such a finding. *See id.* Rather than to set forth a specific precedent regarding the issue of partial indemnification, the First Department noted "that the validity of partial indemnity agreements appears still to be unsettled." *Id. See also Bright v. Tishman Construction Corp. of New York,* 1998 U.S. Dist. Lexis 1659 (U.S.S.D. NY 1998) (holding that a broadly worded indemnity clause was void even under a theory of partial indemnification due to the absence of clear and specific language indicating indemnification was not sought for one's own negligence under circumstances where the promisee/general contractor was found negligent).

In *Dutton,* a jury rendered a verdict in favor of two construction workers which apportioned liability 20% against the general contractor and 80% against a subcontractor/employer. *See Dutton v. Charles Pankow Builders, Ltd.,* 745 N.Y.S.2d at 521. In citing *Itri Brick,* the employer/subcontractor sought to void the indemnification clause due to the fact that it purported to indemnify the general contractor for its own negligence in violation of the General Obligations Law. *See id.*

The general contractor's indemnification clause required the subcontractor to indemnify the general contractor to the fullest extent permitted by applicable law for all damages "sustained in connection with the subcontractor's work 'regardless of whether [the general contractor is] partially negligent . . . excluding only liability created by the [general contractor's] sole and exclusive negligence'". *Id.*

As of July, 2002, the First Department now found "that the clause calls for partial, not full, indemnification of the general contractor for personal injuries partially caused by its negligence, and is therefore enforceable." *Id.* The First Department reasoned that because the contract contained a savings clause limiting the subcontractor's obligation to that which was permitted by law, **and** because the indemnification clause excluded an obligation to indemnify the general contractor for its sole and exclusive negligence, the indemnity agreement was enforceable. *See id.* The only reference to this striking conclusion, apart from general contract interpretation, was a reference to *Itri Brick. See id.* Thus, the Court made no attempt whatsoever to provide a reasonable basis for allowing the general contractor to partially enforce its indemnification clause to the extent that it was not negligent irrespective of the amendment to the General Obligations Law which required an indemnification clause to be void and unenforceable if it purported to indemnify or hold harmless a general contractor against liability caused by or resulting from the negligence of the general contractor "whether such negligence be in whole or in part." *See General Obligations Law Section 5-322.1.* Thus, we have now come full circle in abrogating exactly that which the Legislature attempted to enforce. *See id.* Now, because the Court from as early as *Quevedo,* adopted an analytical approach to rendering an indemnity clause void and unenforceable, depending upon whether or not the promisee was negligent, rather than simply voiding the clause in its entirety if the clause did not exclude enforcement for a negligent promisee, assuming a ruling similar to *Dutton* is upheld by the Court of Appeals, we have created a means for a general contractor to enforce an indemnification agreement despite an adverse finding of negligence and in contravention not only to the language of the General Obligations Law, but also, in direct contravention to the rationale and purpose of the statute and its amendment as discussed *supra.*

The problem in this author's opinion is not that the First Department misapplied prior decisional guidelines, but rather, was almost forced into rendering such a decision by the historically improper application of the General Obligations Law. One has to believe that the Legislature carefully drafted the title of the statute which reads "[a]greements exempting owners and contractors from liability for negligence void and unenforceable; certain cases." *General Obligatons Law Section 5-322.1.* What is missing from the Court of Appeals' rationale, it is respectfully submitted, is reasoning as to how an analytical approach can be taken in interpreting indemnification clauses when the Legislature intended the clauses to be both void and unenforceable. After all, the Legislature did not entitle this section "agreements to be partially enforced even if an owner and contractor is partially at fault" or "agreements which may be void." It is respectfully submitted that if our Legislature required the courts to interpret and analyze the facts of each case to determine whether the language of an indemnity agreement should be deemed void and unenforceable, a much different title and statutory language would have been drafted. If the amendment to the General Obligations Law was enacted in order to further restrict negligent owners and general contractors from obtaining indemnity not just when they were solely negligent, but whenever they were partially negligent, the 1981 amendment has clearly been circumvented. How does the present interpretation make the job site a safer place? Even more obvious, in view of the stated purpose of the enactment of the General Obligations Law and its amended form, and even more glaringly and alarmingly, how will a subcontractor/employer's cost of insurance not increase exponentially as a result of *Dutton* and the historical approach to interpreting Section 5-322.1 of the General Obligations Law?

VI AN UPDATED LOOK AT DUTTON

As of as of the drafting of this article, there were only fifteen appellate decisions which cited *Dutton.* Previously, the Court of Appeals denied leave to appeal the First Department's decision in *Dutton. See Dutton v. Charles Pankow Builders, Ltd.,* 99 N.Y 2d 511, 760 N.Y.S.2d 102 (2003).

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The Sidewalks of New York

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inch in height. *See Trincere v. County of Suffolk*, 90 N.Y. 2d 976, 665 NYS 2d 615 (1997) *See also Morales v. River Bay Corporation*, 226 A.D. 2d 271, 641 NYS 2d. 276(1st Dept., 1996)(1 inch difference in slabs was held too trivial)

Attached is an outline giving a framework to analyze liability issues for sidewalk injury claims in New York City

(Footnotes)

[1] These maps were filed with the City Department of Transportation and show marked defects on roads and sidewalks.

[2] Section 7-210 reads as follows: a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

[3] General Obligations Law Section 3-521 reads as follows: §5-321. **Agreements exempting lessors from liability for negligence void and unenforceable**

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

[4] The *Stern Dept Store, supra*, Court went on to hold, ", the lease in *Hogeland* provided that the landlord would not be responsible for any portion of loss or damage caused the tenant wholly or in part by the landlord's negligence where such loss or damage was "recovered or recoverable" by the tenant from insurance covering such loss or damage. No such provision appears in the lease in the instant case."

[5] Courts have held as a matter of law that a slip and fall shortly after the storm can be dismissed as a matter of law, *Russo v 40 Carden St. Partners*, 2004 NYSlipOp 02567, (2nd Dept., 2004) (50 minutes after the storm); *Drake v. Prudential Ins Co*, 153 AD2d 924, 545 NYS2d 731 (failure to clear overnight storm by 7:30 AM held not actionable)

Analysis Outline for NY City Sidewalk Liability Cases.

A. What is the exact location and cause of the accident. (BP, photos, statements)

B. Does the client occupy and own a one two or three family residential building?

C. What caused the condition?
   - -snow and ice during or right after a storm?,
   - -Negligent removal of snow and ice?,
   - -Defective construction of the slab?,
   - -utility contractors negligently repairing the slab?,
   - -poor workmanship by the tenant or landlords contractor?,
   - -wear and tear?,

D. Who caused the condition,
   - -landlord?,
   - -Tenant?,
   - -contractor?,
   - -the City? or one of its agencies?

E. Was the accident due to a:
   - -sidewalk vault?,
   - -grate?,
   - -gas or oil pipe, or
   - -other facility used by the building owner or tenant (special use) or other third parties.

F. Was a contractor doing work on the sidewalk for the tenant, landlord or someone else?

G. When was the last time someone did slab work on the sidewalk and what record is there of this work? (contracts, invoices, Big Apple Map, permits, FOIL request for DOT records, Building department records)

H. For a snow and ice case:
   - -when did it last snow or sleet or rain before the accident?,
   - -what do the weather reports say?,
   - -who does snow removal?,
   - -how often do they do it?
   - -With what materials?
   - -Are any outside contractors used?,
   - -What billing, invoices and contracts does the client have with these contractors?

I. How does the lease and any riders to the lease define the repair and maintenance responsibility for the premises and sidewalks,

J. How is "demised premises" defined under the lease?
   - -Is it just the interior space? More often than not demised premise means only the interior space leased unless specific reference is made to sidewalks.

K. What do the repair and maintenance clauses of the lease say about who is responsible for repairs in general and sidewalks in particular? Most leases require a first floor commercial tenant to keep the sidewalks clean and to remove snow and ice, but this does not require them to make structural repairs. [Courts have held that sidewalk slabs are "structural" in nature and generally the responsibility of the landowner. *See for instance, Berkowitz v. Dayton Construction, Inc., et al*, 2 AD3d 764, 796 NYS2d 730 (2nd Dept., 2003); *Feldman v. Kings Hero Restaurant*, 270 AD2d 1, 702 NYS2d 476 (1st Dept., 2000)]

L. What do the indemnity clauses say?
   - -Are these clauses enforceable under NY General Obligations Law Section 5-321?
   - -What do the insurance procurement clauses say?
   - -Is the lease signed?
   - -Has the lease expired?
   - -Is it still in use by the parties?

M. Is the defect trivial or less than an inch?

OTHER INVESTIGATIVE AREAS:

1. Records Searches in NYC Building Department and Dept of Transportation for street and sidewalk opening permits.
2. On occasion, a title search for a survey shows that the landowner's actual ownership has boundaries that come into play or are a complete defense in multiple defendant cases.

Make Mine A Whopper *Continued from page 2*

(Footnotes)

[1] Robyn Mallon, (Note) *The Deplorable Standard of Living Faced by Farmed Animals in America's Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm*, 9 Mich. St. J. Med. & Law 389 (2005).

[2] Jason, R. Odeshoo, (Note) *No Brainer? The USDA's Regulatory Response to the Discovery of "Mad Cow" Disease in the United States*, 16 Stan. L. & Pol'l. Rev. 277, 278 (2005).

[3] *See id.* (noting that in March 2004, the Commerce Department reported that the U.S. trade deficit rose to a record $43.1 billion due, in part, to a forty percent drop in meat shipments to nations that had banned American beef). *But see Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric., Animal, & Plant Health Inspection Servs.*, (hereinafter, *Ranchers Cattlemen)*, 415 F.3d 1078, 1105 (9th Cir. 2005) (noting that the American demand for beef in 2004 is estimated to have increased seven to eight percent over 2003 levels).

[4] Background Statistics: U.S. Beef and Cattle Industry, USDA Economic Research Service, Mar. 6, 2006, available at: http://www.ers.usda.gov/news/BSECoverage.htm (last visited Apr. 10, 2006).

[5] *Id. See also Ranchers Cattlemen, supra* note 3, at 1105 (noting that the American demand for beef in 2004 is estimated to have increased seven to eight percent over 2003 levels).

[6] USDA Fact Sheet: *Bovine Spongiform Encephalopathy – Mad Cow Disease,* (hereinafter, *USDA Fact Sheet*) available at: www.fsis.usda.gov/Fact_Sheets/Bovine_Spongiform_Encephalopathy_Mad_Cow_Disease/index.asp (last visited Apr. 10, 2006).

[7] *Id.*

[8] *Id.* (indicating that BSE belongs to a family of diseases known as the transmissible spongiform encephalopathies (hereinafter, "TSE"). TSE animal diseases found in the United States include scrapie in sheep and goats, chronic wasting disease in deer and elk, transmissible spongiform encephalopathy in mink, and feline spongiform encephalopathy in cats. There is, however, no evidence to date that BSE has emanated from TSEs in other animals). *See also Ranchers Cattlemen surpa* note 3, at 1085 (describing the effect of TSEs as creating myriad tiny hold in the brain and slowly deteriorating its victims' mental and physical abilities until death results).

[9] *USDA Fact Sheet, supra* note 6.

[10] *Id. But see Ranchers Cattlemen, supra* note 3, at 1086 (noting that in experiments on sheep, mice, and hamsters, BSE was transmitted through whole blood transfusion; at least one case of vCJD is believed to have been transmitted through human transfusion; and that other studies suggest that BSE may be transmitted through saliva and maternally).

[11] *USDA Fact Sheet, surpa* note 6.

[12] *Id.*

[13] *Id.*

[14] *Id. See also Ranchers Cattlemen, supra* note 3, at 1086 (noting that BSE has an incubation period that lasts an average of four to five years during which time the animal carries the disease, but demonstrates no outward symptoms).

[15] *USDA Fact Sheet, supra* note 6.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *USDA Fact Sheet, supra* note 6.

[21] *Ranchers Cattlemen, supra* note 3, at 1086.

[22] *Federal Agencies Take Special Precautions to Keep "Mad Cow Disease" Out of the U.S.*, U.S. Dep't. of Health and Human Servs., Aug. 23, 2001, *available at*, http://www.hhs.gov/news/press/2001pres/01fsbse.html (last visited Apr. 10, 2006).

[23] *Id. See also, USDA Fact Sheet, supra* note 6; Elizabeth Weise, *Agriculture Dept. Confirms Third Case of Mad Cow; Animal Did Not Enter the Food Chain; Chief Vet Says U.S. Beef Remains Safe*, USA Today, Mar. 14, 2006, 9A.

[24] *USDA Fact Sheet, supra* note 6.

[25] Robyn Mallon, *supra* note 1, at 393. *See also,* Jason, R. Odeshoo, *surpa* note 2, at 281; *Mad Cow Disease: Improvements in Animal Feed Ban and Other Regulatory Areas Would Strengthen U.S. Prevention Efforts, (hereinafter, GAO Report)* U.S. Gen. Accounting Office, Pub. No. GAO-02-183, at 4 (2002), available at: http://www.gao.gov/htext/d02183.html (last visited Apr. 10, 2006) (noting that CJD may have an incubation period of up to thirty years).

[26] *USDA Fact Sheet, supra* note 6.

[27] Robyn Mallon, *surpa* note 1, at 393; Jason, R. Odeshoo, *surpa* note2, at 281.

[28] *USDA Fact Sheet, supra* note 6. *See also* Jason, R. Odeshoo, *supra* note 2, at 281 (citing Philip Yam, *Mad Cow's Human Toll*, Sci.Am., May 2001, at 12) (noting that a person with CJD eventually falls into a coma and dies, almost always within a year of the onset of symptoms and usually within four months).

[29] *USDA Fact Sheet, supra* note 6.

[30] *Id. See also, Ranchers Cattlemen, supra* note 3, at 1086 (noting that no live animal test for BSE exists and cows must be slaughtered to be tested).

[31] Robyn Mallon, *supra* note 1, at 393. *See also, USDA Fact Sheet, supra* note 6; United States Department of Health and Human Services, Fact Sheet No. 2001.08.23: *Federal Agencies Take Special Precautions to Keep "Mad Cow Disease" Out of the United States*, available at: http://www.hhs.gov/news/press/2001pres/01fsbse.html (last visited Apr. 10, 2006); Jason, R. Odeshoo, *supra* note 2, at 281.

[32] Jason, R. Odeshoo, *supra* note 2, at 281 (citing Jeremy Laurance, *CJD Victim Improves with Revolutionary Drug Treatment*, Indep. (U.K.), Sept. 27, 2003, at 5; Paul Gillbride, *Woman's Family Wins Court Fight for New CJD Drug*, Daily Express (London), Jan. 24, 2004, at 7 (reporting husband's argument before

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DEFENDANT

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Worthy Of Note *Continued from page 15*

Rodriguez v. 105 East Clarke Assoc. and LLC, 810 N.Y.S. 2031 (1st Dept. 2006)

The Infant-Plaintiff was injured on defendant's premises when an allegedly defective door slammed on her hand. The Court held that defendant established its prima facie entitlement to summary judgment by submitting evidence that the door was checked on a regular basis, that it was checked immediately after the accident and found to be operating normally and that there were no records of complaints or other accidents involving the door.

21. LABOR LAW

Floor of trailer did not present an elevation related risk.

Kulavany v. Cerra Products, Inc., 809 N.Y.S. 2d 48 (1st Dept. 2006)

Plaintiff's legs fell through the floor of a trailer, up to his knee. The Court held that this cannot be considered to be an elevation-related risk.

22. LABOR LAW

Hazard that caused alleged injuries was not covered by scaffold law.

Harmon v. Hotel Syracuse, Inc., 809 N.Y.S. 2d 373 (4th Dept. 2006)

Plaintiff was holding a compressor near his feet while standing on a ladder. The compressor swung into the ladder when plaintiff's co-worker, who was holding the other end of the compressor, unexpectedly released it. The Court held that because plaintiff did not fall from the ladder, and because the compressor did not strike him, his injuries were only tangentially connected with the effects of gravity and as such, Labor Law § 240 (1) did not apply.

23. EVIDENCE

Unsigned deposition transcripts are inadmissible on motion for summary judgment.

Pina v. Flik International Corp., 809 N.Y.S. 752 (2nd Dept. 2006)

The Court held that where a party fails to show that unsigned deposition transcripts that were submitted in support of motion for summary judgment had previously been forwarded to the witnesses for their review pursuant to CPLR § 3116(a), such transcripts were inadmissible.

24. FIREFIGHTER'S RULE

Firefighter's injuries were not caused by alleged building code violations.

Zvinys v. Richfield Investment Company, 808 N.Y.S. 640 (1st Dept. 2006)

On plaintiff's claim under General Municipal law § 205-a, the Court held that the building owners sustained their burden of proof by submitting admissible evidence that the fire arose out of the activities of a tenant in overloading a single power strip. The Court further held that plaintiff's expert affidavit was speculative and conclusery. The expert never visited the premises or inspected the circuit breakers, and did not cite to any statutes, codes or industry standards allegedly violated. Moreover, the expert did not inspect the smoke alarm system or cite any sections regarding smoke alarms that were violated.

Make Mine A Whopper *Footnotes Continued from page 21*

Scottish Court of Session to procure experimental vCJD treatment for his wife); Jeremy Laurance, *Father's Legal Fight Wins Son Time, but Raises Ethical Issues*, INDEP. (U.K.), Sept. 27, 2003, at 5 (reporting British High Court's decision to allow CJD sufferer to receive injections of pentosanpolysulphate over objections of the Commission on the Safety of Medicines).

[33] *United States Department of Health and Human Services, Fact Sheet, supra* note 31. *See also* Jason, R. Odeshoo, *supra* note 2, at 282 (noting that the BSE crisis originated in England in the mid-1980s when cows in the Sussex and Kent regions began showing signs of aggression and difficulty maintaining balance).

[34] U.K. Min. of Agric., Fisheries & Food, The BSE Inquiry Vol. 1: Findings and Conclusions, at 20 (2000) available at: http://www.bseinquiry.gov.uk/pdf/ (last visited Apr. 9, 2006); Jason, R. Odeshoo, *supra* note 2, at 282-3.

[35] *United States Department of Health and Human Services, Fact Sheet, supra* note 31.

[36] *Ranchers Cattlemen, supra* note 3, at 1085.

[37] *Id.* at 1086.

[38] *BSE in an Alabama Cow*, CDC Release, Mar. 15, 2006, available at: www.cdc.gov/ncidod/dvrd/bse/news/alabama_cow_031506.htm (last visited Apr. 10, 2006). *See also, Ranchers Cattlemen, supra* note 3, at 1086, n.4 (noting that one case of vCJD in the United States occurred in a Florida woman born in England who was believed to have been exposed to vCJD before moving to the United States).

[39] *See USDA Fact Sheet, supra* note 6. *See also, Ranchers Cattlemen, supra* note 3, at 1086 (noting that no vCJD case has ever been linked to North American beef).

[40] Elizabeth Weise, *supra* note 23. *See also* USDA Statement Release No. 0336.05, Aug. 30, 2005; FDA Statement on USDA Announcement of Positive BSE Test Result, Mar. 13, 2006.

[41] *Id.*

[42] *Id.* The Texas cow was approximately twelve years old at the time of its death, meaning it was born prior to a 1997 feed ban instituted by the FDA to help minimize the risk that a cow might consume feed contaminated with the agent thought to cause BSE. The cow was sold through a livestock sale in November 2004 and transported to a packing plant where it was declared dead on arrival. The cow was then shipped to a pet food plant where it was sampled for BSE, was not used in any plant product, and was later destroyed. *See Investigation Results of Texas Cow that Tested Positive for Bovine Spongiform Encephalopathy*, USDA Release No. 0336.05, Aug. 20, 2005.

[43] *Id.*

Written Indemnification After Dutton *Continued from page 19*

It appears that the First Department will continue to enforce what it determines to be legally sufficient partial indemnification provisions. *See Mannino v. J.A. Jones Construction Group, LLC.*, 16 A.D.3d 235; 792 N.Y.S.2d 32 (1st Dep't 2005). In noting that the indemnification clause between the general contractor and the subcontractor/employer contained the requisite savings clause by limiting indemnity to that which is permitted by law, the First Department noted that a recovery under a partial indemnity theory did "not run afoul" of the General Obligations Law. *Id.* at 236. One should be careful, however, in attempting to extend *Dutton* even in the First Department. That is, although there are other cases in which the holding of *Dutton* is applied, if the indemnity clause is deemed to be one which seeks full indemnification as opposed to partial indemnity, the General Obligations Law will bar recovery for a party who is found to be partially at fault. *See Cavanaugh v. 4518 Associates*, 9 A.D.3d 14, 776 N.Y.S.2d 260 (1st Dep't 2004). Yet the indemnification clauses in *Cavanaugh* and *Dutton* are remarkably similar with what seems to be an intent in both cases to create full indemnity to the general contractor if the general contractor is free of negligence and partial indemnity to the general contractor for that portion of fault which was not attributable to the general contractor.

The First Department set forth no analysis whatsoever as to why the *Cavanaugh* clause would not be interpreted as requiring partial indemnity. Was it the fact that the *Dutton* clause explicitly noted that indemnity would not be enforced if the general contractor was solely and exclusively negligent? Was the *Dutton* clause determined to be partial indemnity friendly because it called for indemnity "regardless of whether [the general contractor is] partially negligent" while the *Cavanaugh* clause noted that the general contractor was to be entitled to indemnity "regardless of whether or not [the accident was] caused in part by a party indemnified hereunder?" *Compare Dutton v. Charles Pankow Builders, Ltd.*, 745 N.Y.S. 2d at 521 *with Cavanaugh v. 4518 Associates*, 776 N.Y.S. 2d at 263. Perhaps the First Department was troubled by the language in the *Cavanaugh* contract that stated that the general contractor would be entitled to indemnity whether or not the subcontractor's negligence or omission was either the entire cause of the loss or only a partial cause of the loss. *See id.* However, the same result would have been achieved in *Dutton*, at least as far as the clause was quoted in the decision. *See id.* In other words, both indemnity agreements contained savings clauses and both seemed to require the subcontractor to indemnify the general contractor whether the subcontractor was completely or partially at fault provided the general contractor was not entirely at fault. The only conclusion one can reach at this juncture, for cases pending in the First Department, in light of *Mannino* and other recent decisions is that one must analyze the language of the indemnity clause with extreme precision before determining if partial indemnity can apply.

The First Department also recently failed to extend *Dutton* under circumstances in which a contract contained a general savings clause, but the indemnification provision failed to contain a savings clause. *See Linarello v. City University of New York*, 6 A.D.3d 192, 774 N.Y.S.2d 517 (1st Dep't 2004). Thus, at least in the First Department, if one is seeking partial written indemnification, the indemnity clause must contain a savings clause together with specific and acceptable partial indemnification language. *See id.*

Although people have approached me and indicated that the Second Department, in their opinion, will not enforce *Dutton* or partial written indemnity, I am far less certain of the result. There was no reported case as of as of the drafting of this article in which the Second Department cited *Dutton* and weighed in on the issue.

The Second Department refused to extend a recovery under a partial indemnity theory in a case decided nearly five months after *Dutton*. *See Carriere v. Whiting Turner Contracting*, 299 A.D. 2d 509, 750 N.Y.S. 2d 633 (2d Dep't 2002). However, in declining to enforce an indemnity agreement in favor of a party found 70% negligent as against a party found 25% negligent, the decision was a relatively easy one in light of the fact that the indemnity clause at issue was clearly seeking full indemnity. *See id.* at 635. In *Carriere*, indemnity was to apply whether the party seeking to be indemnified was negligent "in whole or in part." *Id.* Thus, a *Dutton* issue was never reached due to the fact that the clause did not limit indemnity to circumstances in which the party seeking to be indemnified was negligent in part (i.e. the sole negligence of the party seeking to be indemnified was never excluded from the clause). *See id.*

The Second Department has mentioned *Dutton* twice. Neither case sheds much light as to how the Second Department will rule on a truly clear partial indemnity clause. In the first reference to *Dutton*, the Second Department merely indicated that an indemnity clause which was never quoted was not void *ab initio*. *See Reborchick v. Broadway Mall Properties, Inc.*, 10 A.D.3d 713, 781 N.Y.S. 2d 899 (2d Dep't 2004). As the owner and general contractor were found to be free of negligence, they were afforded indemnity. *See id.* Thus, there was never a true *Dutton* issue to decide.

A similar result was reached in the second case which cited *Dutton*. *See Stachura v. 615-51 Street Realty Corp.*, 22 A.D.3d 744, 803 N.Y.S. 2d 114 (2d Dep't 2005). Once again indemnity was enforced under circumstances in which the party seeking indemnity was found to be free of negligence. *See id.* Thus, *Dutton* was only favorably cited under circumstances in which a partial indemnity issue never arose. *See id.* In fact, in *Stachura*, the Court noted that the indemnity clause did not require the subcontractor to indemnify the general contractor for the claims arising out of the general contractor's negligence. *See id.*

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VII. RELATED CONSIDERATIONS.

A. WRITTEN INDEMNIFICATION AND INSURANCE LAW.

It is now black letter law in New York that agreements to insure and written indemnification agreements bear separate consideration. *See Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283, 285-286 (1990). *See also Cavanaugh v. 4518 Associates, supra.* The Second Department has recently also noted that even if the insurance procurement language and the written indemnification language are contained within the same paragraph, a separate analysis as to both issues must be presented. *See Cappellino v. Atco Mechanical,* 708 N.Y.S.2d 704, 705 (2d Dep't 2000).

The General Obligations Law in invalidating contracts which would indemnify a negligent promisee for its own negligence specifically states that such a prohibition "shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer." *General Obligations Law Section 5-322.1.* Thus, the *Kinney* Court ruled that an "agreement to procure insurance is *not* an agreement to indemnify or hold harmless, and the distinction between the two is well recognized." *Kinney v. G.W. Lisk Co.*, 557 N.Y.S.2d at 285 (citations omitted). The Court of Appeals noted that the General Obligations Law was amended to support "the strong public policy of placing and keeping responsibility for maintaining a safe workplace on [an owner or a general contractor]." *Id.* (citations omitted). The Court of Appeals reasoned that unlike an indemnification agreement that would hold an owner or general contractor harmless for their own negligence, and thus violate public policy, "the same cannot be said for an agreement which simply obligates one of the parties to a construction contract to obtain a liability policy insuring the other." *Id.* (citations omitted). In addition, the *Kinney* Court, in citing the legislative history of the General Obligations Law 1981 amendment noted that "the statute would effect substantial savings in the cost of construction projects specifically because it had found that liability protection insurance, which contractors and subcontractors could still be required to procure, was considerably less expensive than hold-harmless coverage, which they would no longer need to purchase." *Id.* (citations omitted).

B. COVERAGE CONSIDERATIONS.

Although the far reaching insurance implications of *Dutton* can best be analyzed as a separate presentation, one must nevertheless at least inquire as to what coverage will now be afforded to a subcontractor/employer who must render payment for their equitable share of liability under a qualified, indemnification agreement. *See Dutton v. Charles Pankow Builders, Ltd.*, 745 N.Y.S.2d 520 (1st Dep't 2002). One would certainly expect the workers' compensation carrier to deny coverage based upon the fact that its insured is only obligated to render payment under its contractual obligations. One would expect that the general liability carrier will argue that its employee exclusion provision should apply. Clearly, a general liability carrier has, under the prior status of New York law, not sought to collect premiums for partial contractual indemnification coverage for accidents relating to its insured's employees. In addition, by assessing indemnification on an equal basis with an apportionment finding, clearly cases such as *Dutton* are in actuality merely assessing comparative fault or apportionment against a subcontractor/employer as opposed establishing liability under contract law. *See id.* After all, under *Dutton* the percentage of liability assessed against the employer is only computed by ascertaining the fact finder's determination as to the employer's apportionment of fault. This is purely a contribution/negligence analysis that invokes no application of contract law. Nevertheless, it seems inescapable that although the Court is essentially requiring apportionment under *Dutton*, coverage will have to be afforded under the contractual liability coverage portion of the CGL policy. *See generally Hawthorne v. South Bronx Community Corp.*, 78 N.Y.2d 433, 576 N.Y.S.2d 203 (1991).

In *Hawthorne*, strikingly similar arguments were set forth, in a separate context, between the general liability carrier and the workers' compensation carrier. *See id.* The *Hawthorne* Court decided the issue of "whether the existence of an insured's contractual duty to indemnify supersedes a common-law duty to indemnify and thereby relieves the insurer of the latter risk from liability on its policy." *Id.* at 204. An employee of the mutual insured had been injured while working at a construction site. *See id.* The employer, prior to the passage of the grave injury statute, was impleaded under theories of contribution, common law indemnity, and contractual indemnity. *See id.* Plaintiff recovered against the owner and general contractor under the Labor Law and the employer was deemed to be 100% at fault. *See id.* Both of the insurers of plaintiff's employer claimed that their coverage should not be triggered. *See id.* As usual, the workers' compensation policy excluded coverage for its insured's contractual liability. *See id.* The general liability carrier's policy contained a traditional exclusion as to common law liability as to injuries incurred by its insured's own employees. *See id.*

The workers' compensation carrier argued that because the indemnification language of the contract between its insured and the general contractor was applicable, and because its duty to insure for common law indemnity was quasi-contractual in nature and therefore would be superseded by an express contract for written indemnification, no coverage existed. *See id.* Additionally, the workers' compensation carrier argued that in light of the insurance procurement provisions of its insured's contract, indemnity should be provided by the general liability carrier because it was the clear intent of the parties to allocate the risk of loss in such a manner. *See id.* at 204-205.

The general liability carrier argued that because common-law liability and contractual liability existed, indemnity should be shared equally between the general liability carrier and the workers' compensation carrier.

See id at 205. These exact same arguments can be expected to be raised by claims examiners and practitioners who attempt to apply *Dutton*. Thus, the Court of Appeals' reasoning in *Hawthorne* becomes important and in all likelihood, controlling, when these issues are raised in a *Dutton* context.

The *Hawthorne* Court reasoned that without the contractual indemnification clause, the workers' compensation carrier would have been fully responsible for plaintiff's damages. *See id.* The mere fact that an indemnification provision existed, in no way altered the common-law duty of the mutual insured. *See id.* Thus, the Court further reasoned that under what will be an often repeated fact pattern, both "a contractual duty and a common-law duty to indemnify existed, with the common-law duty depending not on contract, but on the fact that the owner and general contractor have been held vicariously liable, without fault, for [the employer's] negligence." *Id.* (citations omitted). Now, however, barring a grave injury, under the same fact pattern no common law obligation would exist. *See infra*.

In *Hawthorne*, in light of the fact that separate insurance policies were issued to cover both contractual and common-law liability, there was no equitable principle under which either insurer would be able to avoid covering the loss. *See Hawthorne v. South Bronx Community Corp.* at 205-206. To enable an insurer to avoid payment at the expense of the other carrier would simply have resulted in a windfall for one of the insurers. *See id.* at 205. The Court noted that under the facts which create an insured's liability on two separate theories under which coverage was afforded under two separate policies, an insured, having paid for both coverages, is entitled to obtain coverage under both policies. *See id.* The *Hawthorne* Court concluded that because either carrier would have been obligated to pay the entire judgment should the other policy not have been purchased, where "both policies exist, and coverage limitations are not implicated, each insurance company is equally responsible for indemnifying their insured." *Id.* at 205-206. Before applying *Hawthorne* to the implications of *Dutton*, one must first consider the significance of the passage of the grave injury statute.

C. HOW DUTTON CIRCUMVENTS THE GRAVE INJURY STATUTE.

The grave injury statute, enacted in 1996, states in pertinent part that the "liability of an employer . . . shall be exclusive and in place of any other liability whatsoever to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, [and] [f]or purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." *Workers' Compensation Law Section 11*. The statute also notes that an "employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'". . . *Id.* Thus, an employer of an injured worker is not liable to a third person for contribution or common law indemnity unless a grave injury is proven. *See id.*

Dutton perhaps gives insight as to what a contract for contribution would entail under the statutory language. Nevertheless, under traditional theories of liability, the general liability carrier of an employer had come to rely upon the fact that absent an insurance procurement provision, unless a valid indemnity agreement existed **and** the promisee was found to be free of negligence, any liability which could be asserted against its insured would fall within the ambit of the workers' compensation policy should the insured's employee have sustained a grave injury. This is clearly no longer the case if *Dutton* or a similar holding is affirmed by the Court of Appeals.

In *Hawthorne*, the Court noted that prior to the passage of the grave injury statute, dual coverage existed. *See Hawthorne v. South Bronx Community Corp.*, 576 N.Y.S.2d at 204-206. Barring a grave injury, there seems to be little room for argument that provided a valid *Dutton* clause existed, coverage under the contractual liability portion of the CGL policy will be triggered to the extent of the percentage of negligence found as against the employer. *See id.* In essence, therefore, the Court of Appeals has successfully circumvented the grave injury statute by judicially creating a theory of apportionment or contribution as against a negligent employer under a contractual indemnity nomenclature provided of course the subcontractor/employer entered into a judicially qualified partial indemnification agreement. Rendering this analysis even more difficult to accept is that if the same contractor/employer entered into an agreement in which the indemnification clause sought full indemnification, the grave injury statute would still protect the subcontractor/employer's general liability carrier who issued appropriate contractual liability coverage. It is hard to believe that in the construction field, subcontractors have or even in the future will take into account such a scenario. Insurers of subcontractors, however, must now navigate dangerous waters as their insurance risks have obviously been greatly affected. Claims representatives and defense practitioners alike should be well aware of the implications of *Dutton* and be prepared to set forth appropriate arguments depending upon the language set forth in the indemnity agreement and any other defenses which might exist. Practitioners who represent self-insureds, should also advise their clients of the risks which now exist regarding exposure even in cases in which their employees have not sustained a grave injury provided, of course, an indemnification clause has been drafted within the meaning and application of *Dutton* or for that matter a written contribution clause has been drafted to satisfy the grave injury statute.

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D. INDEMNITY WITHOUT AN EXECUTED CONTRACT

As noted in the previous discussion, barring a grave injury, a valid written indemnity agreement, or a valid insurance procurement agreement, an employer is not subject to third party litigation involving a claim for personal injuries filed by its insured employee. The Court of Appeals was recently asked to decide whether the grave injury statute required an executed written contract setting forth an indemnity provision. *See Flores v. The Lower East Side Service Center, Inc.*, 4 N.Y.2d 363, 795 N.Y.S.2d 491 (2005).

In *Flores*, the Court was asked to interpret the relationship between two business entities under circumstances in which the general contractor never executed the contract between the parties. *See id.* at 492-493. The contract required indemnity for any injuries "arising out of or resulting from performance of the work". *Id.* Plaintiff Flores was injured while working for the general contractor. *See id.*

The owner, in seeking to enforce the indemnification clause, argued that the grave injury statute's preclusion of a third party action without a valid written indemnity agreement was inapplicable based upon the course of conduct demonstrated by the parties. *See id.* at 493. Noting that the grave injury statute did not expressly state that the written contract must be executed, the owner argued that the general contractor's conforming conduct as to the terms of the contract proved its intent to accept the terms of the contract thereby satisfying the statutory requirement that a written indemnity contract be entered into prior to the date of loss. *See id.*

The Court of Appeals accepted the owner's argument that because the Legislature did not specifically require that the contract be signed to be enforceable, one must consult the common law which would enforce the agreement. *See id.* at 494. The *Flores* Court reasoned that if the Legislature had intended to require a signed contract, the statute would have included the term "signed" or "subscribed." *Id.* at 495.

Although this rationale is not on its face troublesome, many practitioners who this author has spoken with were troubled by the Court's finding that even in the context of an indemnity agreement, a Court may look to the "expressed words and deeds" of the parties to ascertain their intent as to whether a contract existed. *Id.* Although the Court of Appeals mentioned the Statute of Frauds and certain statutes which specifically require an executed agreement to be enforceable, the *Flores* Court did not discuss any prior precedent in which indemnity agreements were enforced without the signature of the party from whom indemnity would be sought. *See id.* at 495-496. Notwithstanding the Statute of Frauds, the Court concluded an agreement existed by virtue of such facts as the general contractor's admission that a contract existed, the absence of an affidavit from the general contractor indicating that the contract presented had not been accepted, and the general contractor's adherence to the terms of the purported contract by its conduct throughout the project. *See id.* at 496-497.

Following *Flores*, the Third Department has enforced an indemnity agreement which was contained on the back page of a two sided purchase order which allegedly was never exchanged for the project at issue, but was exchanged with respect to prior projects between the same parties. *See Gilbert v. Albany Medical Center*, 799 N.Y.S.2d 685 (3d Dep't 2005). The Fourth Department extended *Flores* to require indemnity based upon a pre accident letter, the conduct of the parties, and a post accident signed agreement. *See Nephew v. Klewin Building Co.*, 804 N.Y.S.2d 157 (4th Dep't 2005).

E. INDEMNITY WITHOUT REFERENCE TO THE SPECIFIC PROJECT IN THE CONTRACT

The Court of Appeals has also recently explored the requisite specificity of an indemnity provision in the context of interpreting the grave injury statute. *See Rodrigues v. N & S Building Contractors*, 5 N.Y.3d 427, 805 N.Y.S. 2d 299 (2005). In *Rodrigues*, the general contractor and plaintiff's employer had a longstanding relationship. *See id.* at 430. The parties executed a one page agreement approximately four months prior to the accident in which the plaintiff's employer agreed to the fullest extent permitted by law to indemnify and hold harmless the general contractor "against any claims, damages, losses, and expenses, including legal fees, arising out of or resulting from performance of subcontracted work to the extent caused in whole or in party by the Subcontractor." *Id.* The subcontractor/employer argued that indemnity could not be enforced on the basis that the contract did not make reference to the job site at which the accident occurred. *See id.* at 431. In upholding the indemnification clause, the Court of Appeals noted that the general contractor had presented sworn testimony, without contradiction, that the one page agreement governed all job sites between the parties. *See id.* at 432. The Court also noted that because the agreement made no reference to any site, to hold otherwise would render the agreement meaningless. *See id.*

The Court of Appeals also held that the language of the indemnity provision itself was sufficiently clear and unambiguous to satisfy the requirements of the grave injury statute. *See id. at 433.* The test invoked by the Court was if the "written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered." *Id.*

As to *Dutton*, one assumes that the clause cited in the decision sought full indemnity as in *Brown* or *Itri Brick* as the Court noted in dictum that the general contractor "of course, would not be entitled to indemnification ... for losses resulting from its own negligence." *Id.* at 430. At least on this occasion, the Court did not gratuitously add an *Itri Brick* "teaser" as to the possibility of a different result if the indemnity clause sought only partial indemnification.

VIII. ETHICAL CONSIDERATIONS

A. INDEMNIFICATION CONSIDERATIONS AND OPINIONS

Generally speaking one does not expect to encounter an ethical dilemma when asked to offer an opinion as to the viability of a written indemnification provision. Clearly outside counsel or staff counsel, as legal advocates for the insured client have no real or apparent conflict in providing a case evaluation as to a defendant's likelihood of prevailing on its claim that a certain written indemnification provision will or will not ultimately be enforceable. Obviously, an analysis of the contract language, what triggers indemnity, and which parties if any are negligent are all important considerations which defense counsel usually address without invoking any potential ethical conflicts which may arise from the tripartite relationship between defense counsel, defense counsel's client and the insurance carrier who has retained defense counsel.

However, there are issues raised by the prior discussion herein in which defense ounsel should remain cautious. For example, as we all know, defense counsel should never render an opinion as to a coverage determination involving a request for additional insured status by an adverse party. The only position defense counsel can maintain, without compromising the ethical obligation to defend his/her client zealously, is that the client has purchased all applicable coverage pursuant to its contractual obligations. Yet, when one considers the implications of a case such as *Flores,* offering an opinion as to the viability of a written indemnity provision without raising ethical improprieties, now becomes more challenging.

For many years, a fair number of insurers have included in their policies a broad based additional insured endorsement. Known throughout our industry as a "CG 20 10 11 85" endorsement, additional insured status is afforded to anyone who the insured is obligated to indemnify "AS REQUIRED BY CONTRACT, PROVIDED THE CONTRACT IS EXECUTED PRIOR TO LOSS." Note that the endorsement, unlike the judicially interpreted grave injury statute, specifically requires that the contract for indemnity be executed. Thus, I submit, it is clear that whenever one is faced with the prospect of interpreting intent through the parties' prior conduct, in the absence of a signed agreement under which indemnity is contemplated,defense counsel must be careful never to offer an opinion that an insurer is obligated to indemnify another party especially if the broad based endorsement is the basis for affording an additional insured status. That is, under this scenario, although the client might be required to indemnify another, the insurer of that client will not be obligated to cover that risk under the terms of its policy. Although the number of issues which can arise from this anomalous situation are too innumerable to discuss, I would suggest that when asked to render an opinion as to the viability of a written indemnification provision, defense counsel must remain astutely aware of any coverage implications which could give rise to an ethical dilemma.

B. ETHICAL IMPLICATIONS ARISING FROM INSURANCE PROCUREMENT PROVISIONS.

It is clear from our prior discussion that defense counsel must leave its client's coverage considerations for the insurer or the insurer's coverage counsel to decide. Yet in the real defense world, accomplishing this feat is often difficult.

In New York, there is no question that Labor Law cases give rise to the greatest number of instances under which there is a claim for additional insured status. This will often arise in the form of defense counsel being required to respond to a tender offer from an adversary. A tender offer, for any newly admitted attorney, is simply a formal request that is issued by one party under which its defense and indemnity is offered to another party pursuant to a prior agreement between those parties. That is, in the usual circumstance in which a general contractor wishes to invoke the insurance or written indemnity provisions of its contract with a subcontractor, the general contractor will "tender" its defense in a formal correspondence asking that its subcontractor, and more realistically, its subcontractor's insurance carrier, accept its contractual obligations and agree to defend, indemnify, and insure the general contractor in the pending litigation. Usually, the general contractor's attorney or its insurer will have already obtained and reviewed the applicable contract and the subcontractor's insurance certificate which will provide the name of the subcontractor's commercial general liability insurer. Often, either at a time when a second tender is issued or when a tender is issued in response to the litigation, the subcontractor is represented by counsel. The ethical considerations arise for the subcontractor's defense counsel when they are the recipient or when they are copied on the tender letter.

I personally believe that it is in error to ignore the tender letter. Remaining silent could invoke the argument at a later point in time that one's failure to contradict the conclusions reached by the tendering party was tantamount to an admission or consent to the tender request. Accordingly, I suggest that in framing a proper response to the tender for the benefit of one's client, counsel should immediately respond by indicating amongst other relevant facts:

1. Lest silence be deemed an admission, one should indicate that the response is being furnished to avoid such a conclusion.

2. It should be noted that the tender should be addressed to your client's insurer as they are the only party who can render a coverage decision.

3. Emphasize that it is your position that your client has purchased all appropriate coverage, but it is the obligation of the party tendering the defense to have met all notice requirements and other prerequisites to obtaining additional insured status; none of which are being waived by your response.

4. Emphasize that your client did not breach any other provision of its contract and any issue regarding written indemnification is either premature and/or rendered unenforceable for whatever reasons you can articulate.

5. Request any additional information such as the

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entire contract with all riders and documents incorporated by reference, daily work logs the general contractor might possess, etc. which will support the notion that the tender, at least as to written indemnity, is premature.

I believe that you are also obligated to forward the tender request to your client's insurer. In doing so, I would not copy anyone other than your client. Your client should also be copied on your response to counsel's tender as should the insurer. You can generally do so under separate cover as there is no need for your adversary to know when you are communicating with your own client or your client's insurer.

There is much discussion in appellate cases as to how quickly one must respond to a tender before certain defenses are waived. Saving those discussions for another article, it is critical to note that your responses must be issued immediately. There can be no benefit from failing to respond to the tender within a few days of its receipt. There can, however, be serious ramifications if the response is delayed. Thus, both your response to counsel issuing the tender and your separate correspondence to your client's insurer, which encloses the tender letter and your response, should be sent within a few days of receiving the tender.

As to your client's insurer, I suggest that the comments be kept to a minimum as one does not wish to engage in coverage issues. I would fax and mail a copy of the tender and your response to the carrier. I would advise them that if they choose they may also wish to respond to the tender request. I would also advise the carrier that you will, as always, defer all coverage decisions to them. Finally, I would suggest that you note that you have copied your client on this communication. In light of the fact that your client might be required to satisfy the request for future defense costs and at least the out of pocket costs for having failed to purchase the proper insurance coverage should the tender be valid and should their insurer deny coverage to the tendering party, it is obviously important that you keep the insured client aware of all developments in this regard.

The subject of declaratory judgment actions, when one is on the tendering side of the debate, is also a recurrent ethical consideration. The issue usually arises when one represents an owner or general contractor who has tendered their defense, but is unable to obtain a tender acceptance. At this juncture, the insurer, more often than the insured, requests that defense counsel take further action.

It is my opinion that both staff counsel and panel counsel have similar issues which must be addressed. If the insurer agrees to retain coverage counsel to pursue the tender in the form of a declaratory judgment action in the name of the insurer, then there are generally no ethical issues which will arise. Counsel merely should cooperate with coverage counsel in order to further its client's interests through a recovery in the declaratory judgment action. Obviously, if the action is successful, your client will have benefited by obtaining additional coverage and perhaps by reducing its risk of increased premium costs at its next renewal if the loss and its associated defense costs are to be paid by another carrier.

The more difficult issue arises when defense counsel is asked to bring suit. The suit can take the form of a third-party action or a declaratory judgment action. If a declaratory judgment action is chosen, staff counsel is probably precluded from bringing the action in the name of the carrier. This is true because staff counsel should never offer the appearance of siding with an insurer as against an insured even if no true conflict exists. At the very least, one would run the risk of being unable to represent the insured in future litigation although the real issue in my mind is the need for staff counsel to avoid the appearance of the corporate practice of law.

The issue is complicated for panel counsel as well. First and foremost, panel counsel may have a true conflict in bringing suit against another carrier who defense counsel has represented. Secondly, though not an employee of the insurer filing suit, there is still the ghost of the tripartite relationship which seems to offer questions of impropriety even in the absence of an actual conflict.

One way to avoid the conflict is to commence a third-party action against the lower tiered contractor itself. Commencing a third-party action against the contractor and its insurer will result in the same dilemma as the declaratory judgment action. However, if defense costs or the duty to defend are real issues and defense costs cannot be deferred until after the litigation is decided, a third-party action against the lower tiered contractor alone will not suffice.

My best suggestion is to politely request that the insurer consider retaining coverage counsel to commence a separate declaratory judgment action. If unacceptable, then it is my opinion that defense counsel, to protect its insured client's interests, should pursue all claims that defense counsel can ethically pursue certainly against the lower tiered subcontractor and if possible, its insurer as well.

(Footnotes)

[1] The indemnification clause was quoted as follows: "Subcontractor hereby agrees, to the extent permitted by law, to assume the entire responsibility and liability for and defense of and to pay and indemnify the Owner and Contractor against any loss, cost, expense, liability or damage and will hold each of them harmless from and pay any loss, cost, expense, liability or damage (including, without limitation, judgments, attorney's fees, court costs and the cost of appellate proceedings), which the Owner or Contractor incurs because of injury to or death of any person or on account of damage to property, including loss of use thereof, or any other claim arising out of, in connection with, or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor or any of its officers, directors, employees, agents, subcontractors or anyone directly or indirectly employed by Subcontractor for whom it may be liable as it relates to the scope of this contract, whether such injuries to person or damage to property are due to any negligence of the Owner, the Contractor, its or their employees or agents or any other person. Subcontractor will purchase and maintain such insurance as will protect it including contractual coverage".

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