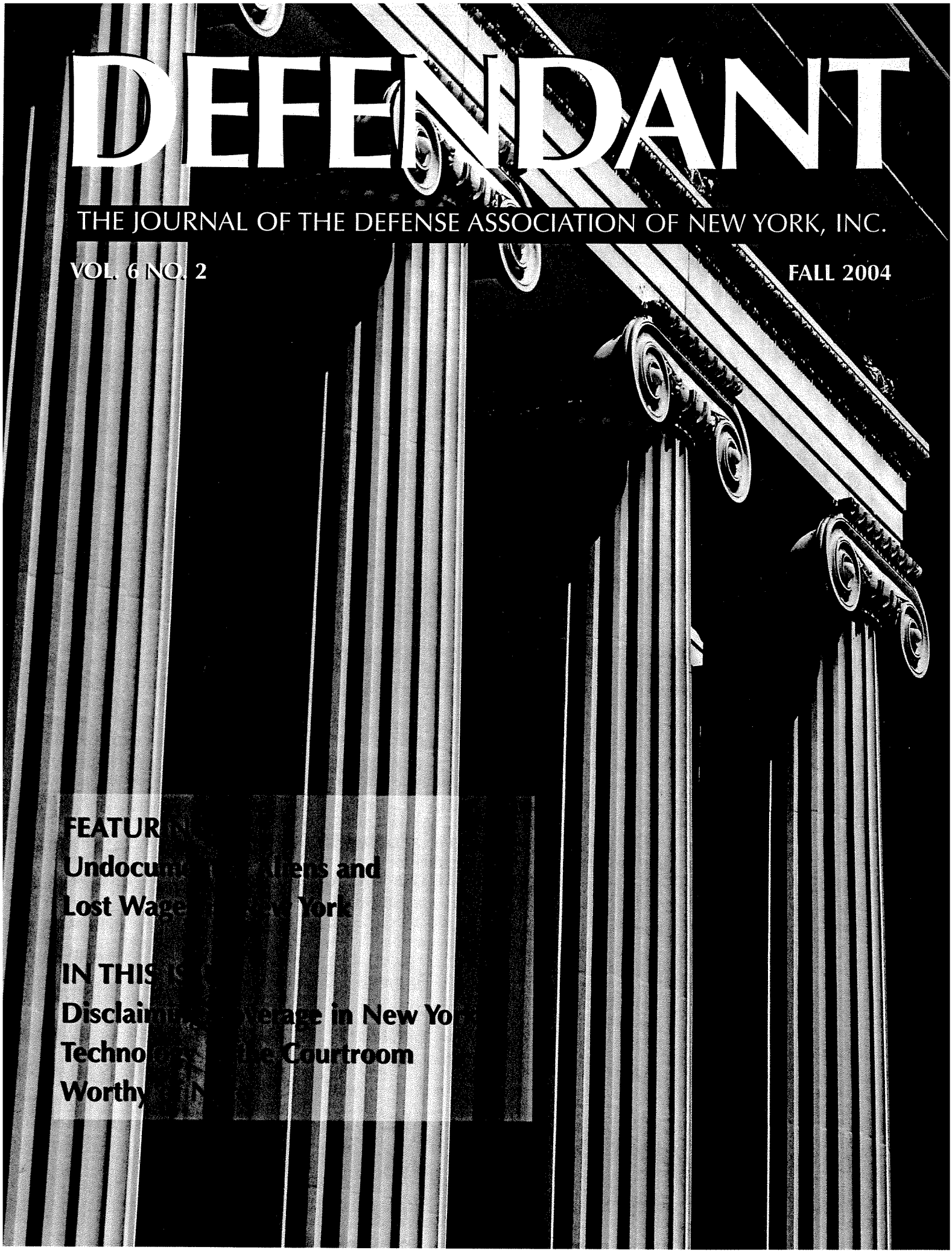

DEFENDANT

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

VOL. 6 NO. 2 FALL 2004

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President's Column

JEANNE CYGAN*

Traditionally, the first column by a new president discusses what our Association's plans are for the membership during the coming year. However, I would like to depart from this and, instead, take a moment to acknowledge the men and women of the civil defense bar.

Whether you are a home owner with a sidewalk in front of your house, a driver involved in a fender bender or a professional providing services to the community, the moment you realize that you are involved in a lawsuit, a sinking feeling hits. It's a felling of betrayal. Everything has been turned upside down. You go to work every day, you pay your taxes-what did do to deserve this? Is someone going to take your house? Are you going to lose everything you've worked for? Who's on your side? Who's gong to help you tell your side of the story? Who's going to protect you?

That's the role of the civil defense attorney. For all the media hype we see and read about who represents the "little guy", the answer is: we do. Civil defense lawyers do. Yes, there are huge corporations and institutions that are sued and civil defense lawyers represent them as well. Those are the cases that seem to get the headlines. But the cases that are on the court calendars every day, day after day never make the headlines. We're there too. We're especially there. We're there to make sure that no one--judge or jury--ever forgets that behind that term "defendant" is a real person. It is a tremendous privilege and a tremendous responsibility to do what we do.

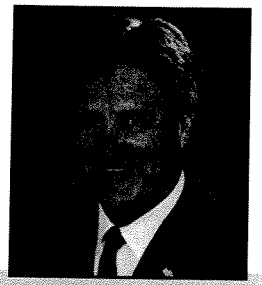
It is not a nine-to-five job as anyone who is on trial over a weekend can tell you. And when you are on your feet cross-examining the other side's expert, you are very much alone despite six pairs of eyes looking your way.

So why does someone go into civil defense work? The answer can be found in the words and ideas of our colleagues. You hear them in the corridors of the courthouses. You hear them during the breaks in depositions. They are fair-minded, ethical professionals who believe that hastily drawn conclusions and rushes to punish do not serve the true interests of justice and, in turn, do not serve our society.

This is just a small snapshot of the civil defense bar. I am proud to be a member of it and I hope to serve it well as President of DANY this year.

** Jeanne Cygan is Senior Trial Counsel with the firm of Fiedelman Garfinkel and Lesman located in Manhattan.*

Undocumented Aliens and Lost Wages in New York



JOHN J. McDONOUGH, ESQ.*

Hoffman Plastic Compounds v. National Labor Relations Board. In *Klapa v. O & Y Liberty Plaza*, 645 N.Y.S 2d 281 (Sup. Ct. NY Co. 1996)

Justice Lorraine S. Miller fairly summarized New York's then existing decisional law when she stated:

> The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact. Therefore, in order to rebut such a claim, defendants must be prepared to demonstrate something more than just the mere fact that the plaintiff resides in the United States illegally. Absent such a showing, a defendant will be precluded from presenting to the jury evidence which would indicate a plaintiff's immigration status. *Klapa* @282.

Judge Rivera, formerly sitting in the Supreme Court of Kings County, now sitting on the bench of the Appellate Division Second Department, amplified this point in *Guzman v. American Ambulette Corp.*, 2/1/01 N.Y.L.J. 30 (col. 1) in dealing with the plaintiff's motion *in limine* which sought to preclude the defendant's attorney from advising the jury of plaintiff's undocumented immigrant status. In granting plaintiff's motion Judge Rivera stated that in order to limit an undocumented alien's right to show a future wage loss, based on American dollars, the burden is on the defendant to demonstrate, with concrete evidence, that plaintiff's deportation is imminent.

Following these cases and the tragic events of September 11, 2001, the United States Supreme Court examined the right of an illegal alien to obtain an award for past lost wages in *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed 2d 271 (2002). In *Hoffman*, the Supreme Court reviewed a National Labor Relations Board award on back pay to alien workers who were terminated because of their participation in organizing a union, in violation of §8(a)(3) of the National Labor Relations Act. The Court determined that an award of back pay for work not performed was contrary to the purposes underlying the Immigration Reform and Control Act ("IRCA") and the

Continued on page 2

** Mr. McDonough is a partner in the Manhattan office of Cozen O'Connor and is Chairman of the firm's Complex Litigation Practice Group.*

Undocumented Aliens and Lost Wages in New York

Continued from page 1

subsequently enacted provisions of IRCA that make it illegal for an employer to hire illegal aliens in the United States (8 U.S.C. §§1324a(a)(1), 13246, 1324c(a)(1)-(3)). Under IRCA it is "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." Id., 147, 122 S. Ct. 1275. Consequently, the Court held that the NLRB could not award back pay to an illegal alien, ruling that such an award was beyond the Board's remedial discretion and "trivializes" the immigration laws. Id. 150, 122 S. Ct. 1275.

The first case interpreting the impact of *Hoffman* in New York on a plaintiff in a personal injury action who is also an undocumented alien, and who is seeking lost past and future wages was *Cano v. Mallory Management*, 195 Misc. 2d 666, 760 NYS2d 816. (Sup. Ct., Richmond Co., Judge Maltese, 2003). In that matter, Judge Maltese of Supreme Court Richmond County, was confronted by a motion to dismiss the plaintiff's action entirely based on the fact that plaintiff was an illegal alien. The plaintiff conceded he was not a citizen and could not produce a resident alien identification card (green card). However, the plaintiff produced a social security number and had apparently paid some income taxes. The plaintiff was injured on the job when a Con Edison-owned electrical meter exploded.

Judge Maltese reviewed the Hoffman decision and concluded Con Edison was attempting to greatly expand the holding of that case. Judge Maltese approvingly cited *Collins v. NYCHHC*, 201 A.D. 2d 447, 606 NYS2d 387 (2nd Dept., 1999) as allowing the trier of fact to be made aware of the plaintiff's immigration status, the length of time that he might have continued to earn wages in the United States and the potential for deportation. In ruling against Con Edison, Judge Maltese indicated that a bar to a tort suit of the type sought by Con Edison would have to be enacted by the legislative, not created by the judiciary.

Judge Mega of the Supreme Court of Richmond County was the next judge in New York to address the Hoffman decision. In *Majlinger v. Cassino Contracting Corp.*, 1 Misc. 3d 659, 766 NYS2d 332, (Sup. Ct., Richmond Co., Justice Maga, 2003) the plaintiff was an undocumented alien who fell from a scaffold while at a job site. After admitting he had no documents to establish he could gain lawful employment, the defendants moved for partial summary judgment in regard to plaintiff's lost earnings, citing *Hoffman*.

Judge Mega reviewed the reasoning in *Hoffman* and concluded that the interpretation given to the Immigration Reform and Control Act ("IRCA"), by the Court required him to grant judgment to the defendants on the issue of lost wages. In so doing, he noted "the Supreme Court observed that the IRCA was conceived as a "comprehensive scheme" to combat the employment of illegal aliens in the United States which "forcefully elevated the prohibition of such employment to a "central" position in the implementation of federal immigration policy by attempting to diminish the attractive force of employment, which, like a "magnet" pulls illegal immigrants toward the United States." *Majlinger*, @ NYS 2d 334. This matter is now on appeal to the Appellate Division, Second Department.

United States Magistrate Judge Pollak of the United States District Court for the Eastern District of New York rejected the applicability of Hoffman in deciding to grant plaintiff's request for a protective order with regard to various immigration documents the defendant sought from plaintiff in *Flores v. Amigon*, 233 F. Supp 2d 462 (ED 2002). *Flores* is clearly factually dissimilar from *Hoffman* in that Ms. Flores sought back pay (overtime) for work she actually performed. Magistrate Judge Pollak highlighted this distinction in the two cases by pointing on how extending the fair wage provisions of the Fair Labor Standards Act promotes the goals of IRCA by disincentivizing employers from hiring illegal aliens. Despite the dissimilar fact patterns many plaintiff's lawyers cite *Flores* for supporting the proposition that the reasoning of *Hoffman* is being rejected in New York federal courts.

In May of 2003, Judge Rosalyn Richter of Supreme Court New York County rejected applying *Hoffman* to an injured construction worker, who was also an undocumented alien, in denying defendant's motion for partial summary judgment in *Balbuena v. IDR Realty*, NYLJ 5/28/03 (Sup. Ct. N.Y. Co. Judge Richter, 5/16/03. Judge Richter determined that since there was no federal statute nor any federal constitutional issue in dispute that New York common law applied to allow the lost wage claim to proceed. This matter is now on appeal to the First Department.

In April of 2004 United States District Court Judge McMahon declined to set aside a jury verdict for a plaintiff, which included a lost wage component, in which he rejected the application of *Hoffman* in *Madeira v. Affordable Housing Foundation*, 315 F. Supp. 2d 504 (SDNY 2004). The plaintiff in Madeira was injured at a construction site and was an undocumented alien . After noting that the U.S. Supreme Court found that an award to an undocumented alien for back pay for work not performed was contrary to the purposes of IRCA because various sections of that statute make it impossible for an undocumented alien to legally obtain employment in the United States, Judge McMahon reviewed several state court cases, but did not cite or review *Majlinger*, and concluded *Hoffman* did not apply.

In *Madeira*, Judge McMahon clearly opened the gates to discovery of plaintiff's immigration status by holding, contrary to the standard set forth in *Klapa*, supra, by Judge Miller, that "plaintiff's alien status is relevant to determining whether lost earnings are appropriate and, if so, how much should be awarded" *Madeira*, Id at 507.

Granting plaintiff's motion to quash former employer in *Pacheco v. G. Stoll Construction Co.*, Sup. Ct. Rockland Co. Index No. 6/11/04, Judge Andrew P. O'Rourke rejected the reasoning of *Majlinger* as an "unwarranted extension of

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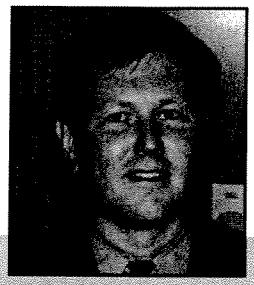
Technology in the Courtroom



FRANK V. KELLY, ESQ.*

Technology has boomed ahead over the past generation at an astonishing pace. We have gone from meager computational power to desktop, nay laptop architecture sufficient to run a virtual office, edit and direct a movie and sundry wizardry which would mystify the denizens of the law office of fifty years ago.

The legal profession has lagged in the utilization of the magnificent tools of productivity as no other save English professors. It was even overheard by your humble author that two hoary lions of the bar were riding the commuter rail from "Cheever Country" and bragging of their total unfamiliarity with anything more technologically intensive than a fountain pen. When challenged as to why, then, his eminence gris was carrying a computer bag, he responded in wide-eyed surprise that the bag was a more business looking way of transporting his gym clothes to and fro. He proceeded, thereupon, to open the bag and prove his veracity to eye and nose.

At length our profession shall come to embrace the computer as our own. However, the inertia to overcome will be great. The penchant for paper is pervading. The infrastructure to be dealt with is out of synchronization with the tools available to be used.

Some Courts are making great strides in electronic case filing and paperless motions, electronic discovery banks, scanned decisions available on a website. But at the risk of strangling the golden goose and arousing the ire of members of bar, I suggest website chat room conferencing. To wit: A case is filed electronically and given an index number as in the usual course. Counsel appearing is assigned a secure access number for each case (or firm, or attorney bar number). When issue is joined via electronic means with court forwarded service of the electronic pleading via email (no "dog ate my homework") defalt motions.

The Court then schedules a date and time to electronically sign in to the Judge's "chat room". Who needs what and when can be cordially and civilly discussed and an electronic order entered. The effect for bench, bar and client is to decrease travel time to zero. There will be no time lost because counsel had a train delay or was stuck on another appearance in another part. There will be no need to decipher the illegible scrawl of the harried from the "pink copy" of the order drafted in felt tip marker, rife with interlineations and superscripts. Presumably, none could be heard to say "I don't know-it's not my file", when the file should be sitting with them at the computer. Or dare I even dream, there will be no dispute as to who demanded or responded to what and when, for everything will be available in electronic form having been created electronically or otherwise scanned into the computer. Perhaps, the Court will be able to confirm demands and responses from its discovery bank and the confirmation code assigned upon filing.

The Courthouse of today does only in rare instances begin to make itself amenable to the power of communication available to the computer literate. Unfortunately, since the advent of the Terror Wars since September 11, 2001, it appears that we have hit a lag in what attorneys may bring to court in the way of electronic do-dads. This is proper in light of security, b ut will hopefully soon be "worked-around". I might humbly suggest pre-registration of electronic devises with radio tags or other e-signatures available for ready reference to a secure attorney only entrance, etc.

The pervading utility of the electronic marvels pedestrian in business and life will make the delivery of our stock in trade available by different avenues and media, for example, it is my fervent hope in the very near term to proceed as follows:

... We will now hear closing arguments in the case (e.g. intersection automobile accident. A question of lights) ... Mr. Kelly...Thank you your honor, counsel, jurors, ladies and gentlemen. I invite your attention to the big screen before you.

Scene comes up it is of Ist Street and A Avenue on a clear bright day (testimony has been uncontroverted that the accident occurred on a clear bright day at Ist Street and A Avenue). A view north bound from beyond the intersection shows the plaintiffs vehicle, a red corvette, license plate "HI SPD " approaching the intersection at a rapid rate Of travel. A side view shows the plaintiff talking on her cell phone and balancing a cup of coffee as she approaches the intersection.

Another perspective of the same intersection shows defendant's vehicle, a subdued green Volvo wagon, license plate "SFTY IST", approaching the intersection from the East. The defendant's vehicle appears to be moving at a normal rate of speed, with the driver properly restrained.

Camera cuts back to a side perspective of the intersections showing plaintiff's vehicle and the traffic control device. The

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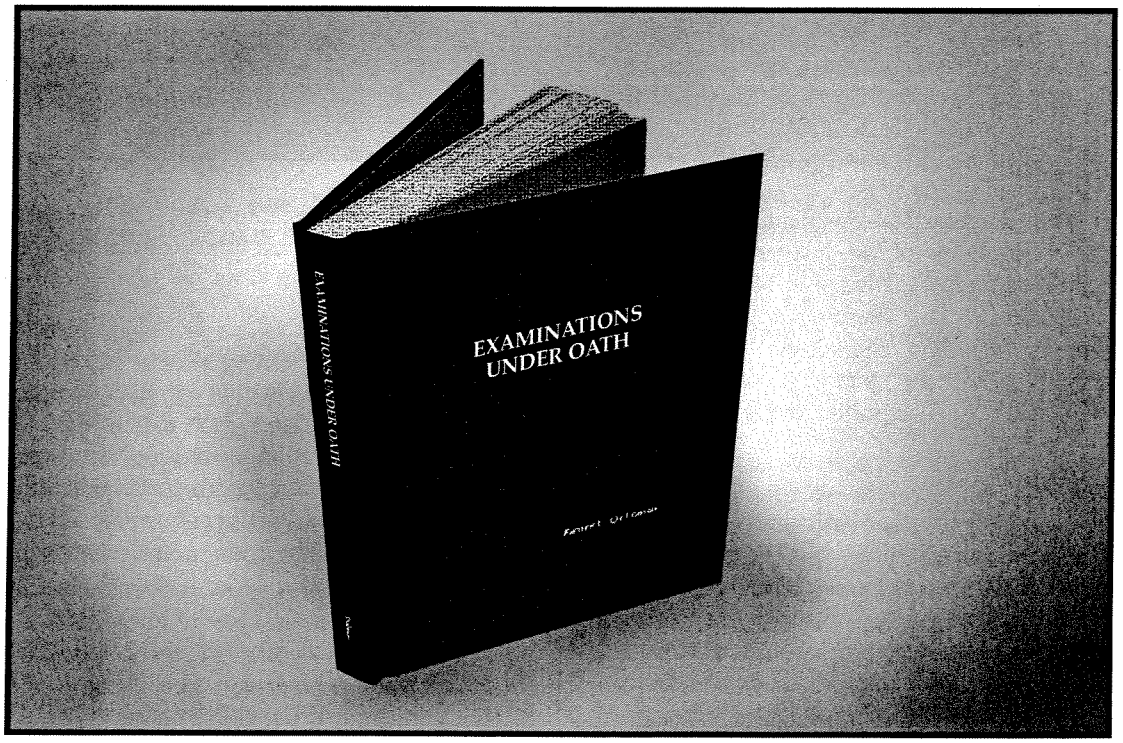
* *Frank V. Kelly maintains a trial and appellate practice in the metropolitan area with offices in Westchester County.*

Examinations Under Oath



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Disclaiming Coverage In New York

SALVATORE J. CALABRESE, ESQ.*

Section 3420 of the New York State Insurance Law controls the rights and obligations of an insurance carrier in connection with a disclaimer of coverage in New York State. The statute and the case law that interprets it set forth rather specific requirements regarding disclaimers of coverage. Where a carrier fails to adhere strictly to the terms and conditions of the statute, any purported disclaimer will be without effect.

DUTIES TO INSUREDS

Generally speaking, an insurance carrier has two specific and independent duties to its insureds in New York State. The carrier has the duty to defend any claim or lawsuit brought against the insured and the carrier has the duty to indemnify the insured as against any potential adverse verdict or judgment. In New York State, the duty to defend is broader than the duty to indemnify. Hicksville Motors v. Merchant Mutual Insurance Company, 97 AD2d 396, 467 NYS2d 220 (2nd Dept. 1983), affirmed, 61 NY2d 661, 472 NYS2d 88 (1984). The duty to defend arises whenever allegations in the complaint fall or arguably fall within the scope of the risk undertaken by the insurer. This is true regardless of how false, groundless or outrageous the allegations might be. Seaboard Surety v. Gillette Company, 64 NY2d 304, 486 NYS2d 873 (1984). Where an allegation or claim within a complaint creates any possibility whatsoever that coverage could attach, the insured is entitled to a defense. State of New York v. Blank, 820 FSupp 697 (USDC SDNY 1993). The obligation to defend must be initially evaluated based upon the "four corners" of the complaint. Whenever there is any allegation within a complaint or pleading that could result in coverage, the carrier must provide a defense. If there are claims that are covered as well as claims that are not covered by a given policy, a carrier must defend but should reserve its rights and disclaim its obligation to indemnify should a judgment be rendered upon a non-covered claim. As described below, this may create the right on the part of the insured to select counsel at the carrier's expense.

A recent case from the Appellate Division, Second Department, describes the two independent duties that a carrier owes to its insured. It clearly discusses the fact that the duty to defend is based upon the allegations of the complaint where the duty to indemnify is based upon whether or not the loss is covered by the policy of insurance. New York City Housing Authority v. Commercial Union Insurance Company, 289 AD2d 311, 734 NYS2d 590 (2nd Dept. 2001). The burden of proof is upon the insurance carrier to establish that a given loss falls outside the policy and a carrier must timely disclaim coverage where it is alleged that a given loss is not covered based upon exclusionary language within the policy.

DISCLAIMERS OF COVERAGE

New York State requires that an insurance carrier seeking to disclaim coverage based upon exclusionary language within the policy or based upon the insured's failure to provide timely notice of an incident or occurrence must do so in a timely fashion. Failure to timely disclaim will result in an estoppel that will prevent the carrier from disclaiming coverage.

There is no obligation upon an insurance carrier to disclaim coverage where the incident or accident is clearly outside of the coverage provided within the policy. Failure to disclaim does not create coverage where none existed. The most obvious example is where no policy exists. Aetna Casualty v. Rodriguez, 102 AD2d 744, 476 NYS2d 879 (1st Dept. 1984). The New York State Insurance Law does not require a carrier to disclaim coverage where the claim does not fall within the coverage terms of the policy of insurance. A timely disclaimer is required only where a disclaimer is based upon exclusionary language within the policy, Markevics v. Liberty Mutual, 97 NY2d 646, 735 NYS2d 865 (2001), or where there is an issue of late notice to the carrier by the insured.

TIMELINESS OF DISCLAIMER

Where a carrier seeks to disclaim coverage based upon exclusionary language within the policy, it must do so in a timely fashion. Jefferson Insurance v. Travelers Indemnity, 92 NY2d 363, 681 NYS2d 208 (1998). In New York State a disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds upon which the disclaimer is predicated". Hazen v. Otsego Mutual Fire Insurance Company, 286 AD2d 708, 730 NYS2d 156 (2nd Dept. 2001).

Similarly, where a carrier seeks to disclaim coverage based upon an insured's failure to provide timely notice of an accident or occurrence, it must disclaim coverage in a timely fashion. New York Central Mutual v. Markowitz, 147 AD2d 461, 537 NYS2d 571 (2nd Dept. 1989). Where a carrier does timely disclaim coverage based upon lack of notice, New York Courts will uphold the disclaimer. Smalls v. Reliable, 205 AD2d 523, 612 NYS2d 674 (2nd Dept. 1994). Carriers must be aware that an injured party is entitled to provide notice to the carrier

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in connection with an accident or incident. Where an injured party provides notice directly, he or she must act reasonably and provide notice to the carrier as soon as possible. Under these circumstances, a carrier seeking to disclaim must disclaim both to the insured and the injured party and the disclaimer must specifically address the reasons for the disclaimer as to each party. *Ringel v. Blue Ridge Insurance Company*, 293 AD2d 460, 740 NYS2d 109 (2nd Dept. 2002). The insured party or the claimant will bear the burden of proving that any delay in providing notice to the carrier was reasonable under the circumstances.

Whether or not notice to a carrier is timely under the circumstances is a question that must be answered on a case-by-case basis. Where an insured is aware that an accident has occurred and an individual has sustained injuries, notice should clearly be given to the carrier and failure to provide notice under those circumstances will support a disclaimer. *Paramount Insurance Company v. Rosedale Gardens, Inc.*, 293 AD2d 235, 743 NYS2d 59 (1st Dept. 2002). The Courts have excused a failure to provide notice where an insured reasonably believed that an individual was injured due to the criminal activity of another under circumstances where the insured would be relieved of any responsibility. *Agado Realty Corp. v. United International Insurance Company*, 288 AD2d 145, 733 NYS2d 407 (1st Dept. 2001). Clearly, an insured must give notice when it reasonably believes that a claim could be made but the Courts will excuse an insured that fails to provide notice under circumstances where the insured could reasonably believe that a claim will not be made or that the insured bears no responsibility. These matters must be resolved on a case-by-case basis and a declaratory action should be instituted immediately whenever a question of timely notice of an occurrence is presented.

New York State is extremely strict in connection with the timeliness of a disclaimer. The general rule is that a carrier must disclaim "as soon as practicable". The timeliness of an insured's disclaimer is measured from the point in time when it first learns of the basis for a denial of coverage. *American Casualty Insurance v. Silverman*, 271 AD2d 528, 705 NYS2d 676 (2nd Dept. 2000). It is however clear that in New York State an insurer must act quickly and obtain any necessary investigation as soon as possible. Once this information is in hand, an insurer is obligated to make a decision quickly and immediately notify the insured if the carrier intends to disclaim. Two months has been held to be a reasonable time within which to disclaim coverage where a carrier was able to show that it immediately requested investigation and instituted a declaratory action ten days after its disclaimer. U.S. *Underwriters v. Congregation BiNai Israel*, 900 FSupp 641, *affirmed*, 101 F3d 685 (2nd Circuit 1995). However, two months was held to be an unreasonably long delay and a disclaimer was disallowed where a carrier could not establish why it delayed two months in disclaiming coverage. Investigation had not been ordered in a timely fashion and there was no declaratory action instituted. *Hartford Insurance v. Nassau County*, 46 NY2d 1028, 416 NYS2d 539 (1979). A two-month delay in issuing a disclaimer has often been disallowed as unreasonably long. *See, e.g., 2540 Associates Inc. v Assicurazioni Generali, S.P.A.*, 271 AD2d 282, 707 NYS2d 59 (1st Dept. 2000). Thirty days has been held to be a reasonable disclaimer under a homeowner's policy (although 21 days was also disallowed when a carrier did nothing during that time period). *Kramer v. Government Employees Insurance Company*, 269 AD2d 567, 703 NYS2d 514 (2nd Dept. 2000). It does appear that the courts generally accept disclaimers made within 30-40 days if timely investigation was undertaken. Any disclaimer made after two month's time is suspect and will not be sustained unless the carrier acted reasonably and can demonstrate its reasonable actions. The most important factor is that the carrier immediately obtains investigation and that it acts quickly when information is received.

Obviously, in those instances where the disclaimer is based upon a failure on the part of the insured to provide timely notice of a claim or occurrence, the disclaimer must be made quickly. *Matter of Arbitration between State Farm Insurance Company and Merrill*, 192 AD2d 824, 596 NYS2d 554 (3rd Dept. 1993). A carrier however is still entitled to undertake some investigation even where a disclaimer is based upon failure to provide timely notice but such disclaimer must be made as soon as possible after a reasonable investigation is made. *Gizzi v. State Farm*, 56 AD2d 973, 393 NYS2d 107 (3rd Dept. 1977). Moreover, a carrier must raise all reasons for a potential disclaimer as soon as information is received by the carrier that would justify a disclaimer. Failure to raise all potential bases will result in a preclusion against the carrier to raise them at a later date. *DeForte v. Allstate Insurance*, 81 AD2d 465, 442 NYS2d 307 (4th Dept. 1981).

PARTIES AND ATTORNEY'S FEES

The Courts favor the carrier that obtains investigation as soon as possible and acts quickly. There is also a preference for the carrier that institutes a declaratory action whenever there is any question concerning the insured's right to coverage. Where there is any question regarding the obligation to provide coverage or defend an insured, the best approach is to defend under a reservation/disclaimer and immediately commence a declaratory action. The plaintiff or claimant in the underlying action, if any, must be considered a necessary party in any declaratory action commenced. *See*, FRCP Rule 19, *Federal Kemper Insurance Company, v. Rauscher*, 807 F2d 345, 354 & n.5 (3d Cir. 1986). It should be noted that there are issues concerning the carrier's obligation to pay the insured's attorneys fees in defending a declaratory action instituted by the carrier. Where the insured has "been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations", the carrier will be obligated to pay the attorney's fees of the insured. *Mighty Midgets v. Centinennial Insurance Company*, 47 NY2d 12, 21 416 NYS2d 559, 564 (1979). The general rule is that the insured can not recover fees in an affirmative action against the carrier but may be entitled to fees in defending an action brought by the carrier. Nonetheless, the carrier is best advised to bring the action and to do so as soon as possible. If the exposure does not justify the expense of the declaratory action, perhaps the matter should not be resisted.

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Disclaiming Coverage in New York

Continued from page 7

INSURED'S FAILURE TO PROVIDE TIMELY NOTICE

It is clear that in New York State a carrier is relieved of its obligation to perform under a policy of insurance where the insured fails to provide timely notice of a claim as required by the policy. *Security Mutual Insurance Company v. Acker/Fitzsimmons Corp.*, 31 NY2d 436, 440, 340 NYS2d 902 (1972); *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 AD2d 235, 743 NYS2d 59 (1st Dept. 2002). New York State courts have consistently held that the obligation on the part of an insured to provide timely notice to the carrier is a condition precedent and failure to provide notice vitiates the carriers' obligation to provide coverage. Where an insured fails to provide timely notice as required by the policy, the burden is upon the insured to establish why it failed to do so. *Agado Realty Corp. v. United International Insurance Company*, 288 AD2d 145, 733 NYS2d 407 (1st Dept. 2001).

It does not appear that there is a specific general rule regarding notice to the carrier and it is difficult to know how long is too long. If the delay is excessive or if the carrier has been prejudiced by the delay, a disclaimer should be evaluated. The Courts seek to evaluate a late notice issue on a case-by-case basis. Each case requires specific research into the facts of the delay. It does appear that some delays are too long as a matter of law. *Geico v. Fasciano*, 212 AD2d 579, 622 NYS2d 738 (2nd Dept. 1995), *leave to appeal denied*, 85 NY2d 812, 631 NYS2d 288 (1996) (holding 10 month delay too long under homeowner's policy); *Shaw Temple A.M.E. Zion Church v. Mt. Vernon Fire Insurance Company*, 199 AD2d 374, 605 NYS2d 370 (2nd Dept. 1993) (holding nine month delay too long under general liability policy).

The issue of whether or not an insured has given timely notice of an occurrence, incident or litigation is often a question of fact in New York. However, there are circumstances where the issue can be determined as a matter of law. In *Village of Endicott, New York, v. Insurance Company of North America*, 908 FSupp 115, *opinion vacated in part on reconsideration*, 914 FSupp 26 (USDC NDNY 1996) the Court held that the issue can be determined as a matter of law when (1) the facts bearing on the delay in providing notice are not in dispute and (2) the insured has not offered a valid excuse for the delay.

NO NEED TO ESTABLISH PREJUDICE

As of this writing, there is no obligation that carriers establish prejudice when disclaiming based upon the insured's failure to provide timely notice. *Gizzi v. State Farm*, 56 Ad2d 973, 393 NYS2d 107 (3rd Dept. 1977), *see, also, Argo Corp. v. Greater New York Insurance Company*, 1 AD3rd 264, 767 NYS2d 577 (1st Dept. 2003). Since the notice obligation is a condition precedent to the existence of coverage, there is no requirement that a carrier show prejudice where a disclaimer is based upon the insured's failure to provide notice. *State Farm v. Romero*, 109 AD2d 786, 486 NYS2d 297 (2nd Dept. 1985). However, the general "no prejudice" rule that applies to a primary insurer does not extend to a contract of reinsurance. A re-insurer in New York State will not have a valid disclaimer where the disclaimer is based upon a failure to provide prompt notice unless the re-insurer is able to show prejudice. *Uniguard Security v. North River Insurance Company*, 79 NY2d 576, 584 NYS2d 290 (1992). Obviously, it is difficult for a re-insurer to establish prejudice sufficient to sustain a disclaimer of coverage.

New York is one of the last jurisdictions to follow the no prejudice rule and it appears that the New York High Court is considering a re-evaluation of this position. The case of *Brandon v. Nationwide Insurance Company*, 97 NY2d 491, 743 NYS2d 53 (2002) indicates a change in direction and philosophy. *Brandon* involved an underinsured motorist claim and held that the UM carrier must establish prejudice when disclaiming its underinsured obligations under the facts presented. The Court declined to consider the broad "no prejudice" rule applicable to disclaimers based upon late notice because the issue was not properly before it. It did make clear that prejudice would henceforth be required to support disclaimers in uninsured motorist claims and it implied that it will reconsider the no prejudice rule when it is again presented for consideration. It is the opinion of the writer that New York will abandon the no prejudice approach when the issue is next considered by the High Court. [1]

RESERVATION OF RIGHTS

There are times when a carrier will seek to reserve its rights concerning indemnification and defend an insured under a reservation. It is important to note that a reservation of rights is not a disclaimer of coverage and does not comply with the statutory obligation in New York State to promptly disclaim coverage. *Zappone v. Home Insurance*, 55 NY2d 131, 447 NYS2d 911 (1982).

Where there is a conflict between the interests of the insurer and the insured in connection with a given claim, a reservation or conditional defense can create a right on the part of the insured to select its own counsel. *225 East 57th Street Owners Inc. v. Greater New York*, 187 AD2d 360, 589 NYS2d 481 (1st Dept. 1992). An obvious case is a complaint that alleges intentional assault as well as negligent assault. There, a carrier may agree to defend but disclaim any indemnification obligation if a jury finds that damages resulted from an intentional act.

Under these circumstances, there is a clear conflict between the interests of the insured and the interests of the insurer and the insured would be entitled to select its own counsel at the carrier's expense.

Where a carrier does reserve its rights regarding indemnity, it

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[1] *In footnote #3 of the Brandon opinion (743 NYS2d at 56, 97 NY2d at 469), the Court discusses the history of the rule and its abandonment by all other states. It provides an indication of its inclination and intention.*

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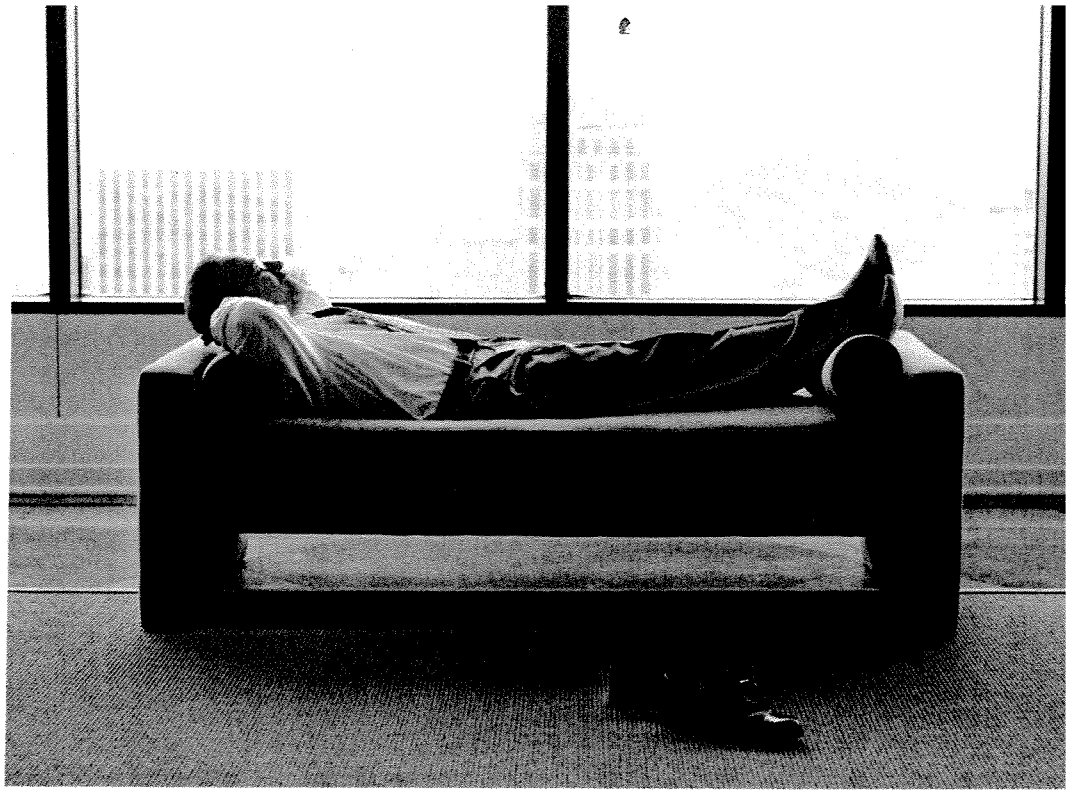

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Disclaiming Coverage in New York

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must undertake investigation immediately and determine if it will defend. If an election to disclaim is made, a disclaimer must be served in a timely manner. If a defense is provided, a clear disclaimer must be provided to all parties entitled to notice that clearly sets forth the extent of coverage and the specific reasons why coverage is limited.

TO WHOM NOTICE REQUIRED

The statutory authority in New York State requires that notice of a denial of coverage be provided "to the insured and the injured person or any other claimant". The Courts broadly interpret this phrase and the carrier is wise to place any potential interested party on notice of a disclaimer or reservation. *Excelsior Insurance Company v. Antretter Contracting Corp.*, 262 AD2d 124, 693 NYS2d 100 (1st Dept. 1999). In this regard, it is best to place all interested parties on notice via certified mail, return receipt requested. This should include the insured, the injured party, all parties to a litigation and all counsel involved. Additionally, inquires should be made as soon as possible whether or not the insured has a contractual relationship with any party. In those instances where an insured does have a contractual relationship (i.e., a lease or construction contract), the carrier should place all parties to the agreement on notice in case there is a covered contractual indemnification or additional named insured status. Excelsior v. Antretter, supra.

Disclaiming coverage in New York requires strict adherence to the statutory requirements and further requires that action be taken quickly. Any failure or misstep by the disclaiming carrier will result in a waiver or estoppel. In this area of the law it is essential that the carrier be knowledgeable and that it proceed as rapidly as possible.

CHECKLIST FOR INITIAL COVERAGE EVALUATION

1. Establish that a valid policy exists and that the loss date is within an applicable policy period.
2. Determine whether or not the insured provided timely notice of the claim.
3. Establish that a defendant or defendants is/are named insured(s).
4. Where appropriate, undertake immediate investigation to ascertain whether or not the insured has a contractual relationship with any other party to the litigation or with any other party that could be involved in the claim.
5. Review the complaint and determine whether or not any count or cause action is one for which coverage exists.
6. If there are multiple claims, both covered and uncovered, a defense should be provided and a disclaimer provided to the insured wherein it is made clear that the carrier will indemnify only where a judgment is based upon a covered claim. If the multiple claims create a conflict between the interests of the carrier and the insured, the insured should be advised that it has the right to select its own counsel for whom the carrier will pay.
7. Any issue or questions concerning applicability of coverage should be immediately identified and investigation undertaken immediately to assess whether or not a disclaimer or conditional defense will be provided.
8. The matter should be diaried for ten (10) days and an evaluation made as soon as possible regarding applicability of coverage.
9. A final determination must be made within thirty (30) days as to whether or not coverage will be provided (or sooner if investigation is received).
10. If there is any question as to the applicability of the duty to defend or the duty to indemnify, the insured should be defended under a specific reservation of rights and a declaratory action should be instituted immediately. In those circumstances where a final determination cannot be made, a declaratory action should be instituted after defense counsel is retained. The declaratory judgment action should be instituted within forty (40) days of the initial receipt by the carrier of the relevant summons and complaint (or sooner if possible).

DEFENDANT

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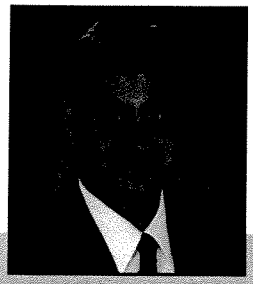
Worthy of Note



VINCENT P. POZZUTO*

1. INSURANCE

THIRTY-ONE DAY DELAY IN DISCLAIMER NOT UNTIMELY

New York Central Mutual Fire Insurance Company v. Majid, 773 NYS.2d 429 (2nd Dept. 2004). The plaintiff insurance company discovered upon its investigation of an underlying motor vehicle accident that the insured was utilizing the vehicle as a livery car at the time of the accident. This discovery was made on June 11, 2001, and a disclaimer was issued based on the livery vehicle exclusion in the policy on July 12, 2001. The insured argued that the disclaimer was untimely as a matter of law. The Court held that under the circumstances, it was not unreasonable for the insurance company to consult with counsel regarding the exclusion prior to disclaiming coverage, and that the disclaimer was timely as a matter of law.

2. INSURANCE

CARRIER HAD DUTY TO DEFEND ALL CLAIMS, AS LONG AS NEGLIGENCE CLAIM REMAINED PENDING

Murphy v. Nutmeg Insurance, 773 NYS.2d 413 (2nd Dept. 2004). Plaintiffs commenced an action seeking a declaration that the defendant insurance company was obligated to defend and indemnify them, pursuant to an errors and omissions policy, in an underlying federal action sounding in RICO violations, breach of fiduciary duty and negligence. The Court held that defendant was obligated to defend plaintiffs as to all claims for relief, so long as there remained pending a claim sounding in negligence. Also note that because the various plaintiffs each made claims for contribution, the defendant insurance company was obligated to retain separate counsel for each, due to the existence of the possibility of a conflict.

3. MEDICAL MALPRACTICE

EXPERT DISCLOSURE SUFFICIENT

Greenfield v. Kenan, 773 NYS.2d 444 (2nd Dept. 2004). Plaintiff's action was dismissed with leave to make a motion to vacate the dismissal within forty-five days due to the unavailability of plaintiff's expert. The dismissal would require the vacater motion to be accompanied by an expert affidavit identifying the expert and the theories of liability. The lower court denied the motion to vacate on the grounds that the expert affidavit asserted a "markedly different" theory of liability than that contained in the original bill of particulars. The Appellate Division held that the original bill of particulars contained an allegation that defendant doctor should have "aspirated [the] plaintiff's condition" and that this theory was sufficiently articulated in the expert's affidavit, and specifically where he asserted that the defendant "missed two critical opportunities to diagnose [an] infection and give timely treatment."

4. CP LR SECTION 306-b

UNDER 1997 AMENDMENT, PLAINTIFF'S SECOND ACTION TIME BARRED

Gem Flooring, Inc. v. Kings Park Industries, Inc., 773 NYS.2d 442 (2nd Dept. 2004). Plaintiff suffered property damage due to defendant's alleged negligence of June 8, 1998. PLAINTIFF filed suit on June 7, 2001, but failed to effectuate service of process within 120 days. Plaintiff never motioned the Court for an extension of time to effectuate service. Plaintiff commenced a second action on November 8, 2001 against the same defendant for the same causes of action. The Court held that under the amendment to CPLR Section 306-b, the action was no longer "deemed dismissed" for failure to effectuate service within 120 days. Because plaintiff never motioned for an extension of time to effectuate service, plaintiff cannot avail itself of CPR Section 205(a), which allows for the recommencement of a second action where the prior action was timely commenced and terminated in any manner other than by, among other things, "a failure to obtain personal jurisdiction over the defendant." As such, the second action filed more than three years after the statute of limitations was time barred.

5. LABOR LAW

DEFENDANTS ENTITLED TO JUDGMENT AS A MATTER OF LAW WHERE plaintiff's ACTIONS WERE THE SOLEAND PROXIMATE CAUSE OF HIS INJURIES

Plass v. Sotoloff, 773 NYS.2d 84 (2nd Dept. 2004). Plaintiff conducted a drywall business as a sole proprietor. He contracted with a general contractor to perform drywall work in connection with the construction of a store in Great Neck. Plaintiff owned the scaffold he was using, which was made up of three 10 foot by 18 inch planks. On the day of the accident, plaintiff decided to use only one plank. He fell off the plank into the gap created by the absence of the other two planks. The lower court denied defendant's judgment as a matter of law after plaintiff's case in chief. The Appellate Court reversed and dismissed the Labor Law 240 and 241(6) causes of action, finding that plaintiff unilaterally made the decision to use only one plank, despite having all three planks available, and that this constituted the sole proximate cause of his injuries.

6. STATUTE OF LIMITATIONS

RELATION BACK DOCTRINE DID NOT APPLY AN AMENDED ACTION AGAINST NEW DEFENTANT WAS TIME BARRED

Pappas v. 31-08 Cafe Concerto, Inc., 773 NYS.2d 108 (2nd Dept. 2004). Plaintiff filed a motion for leave to serve an amended complaint adding a new defendant. The lower court denied the motion and the Appellate Division affirmed. Under the Relation Back Doctrine, an untimely claim can relate back

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

Worthy of Note

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to a claim previously asserted against a co-defendant for statute of limitations purposes, where the two defendants are united in interest. The doctrine requires plaintiff to establish that both claims arose out of the same conduct, that the two defendants are united in interest and by that relationship that the new party can be charged with notice of the institution of the prior action such that there is no prejudice and that the new party knew or should have known that but for a mistake by plaintiff as to the identity of proper parties, the action would have been brought against him as well.

7. EVIDENCE/LABOR LAW

EVIDENCE OF IMMEDIATE INSTRUCTION WAS TOO EQUIVOCAL TO SUPPORT RECALCITRANT WORKER DEFENSE

Vacca v. Landau Industries, 773 NYS.2d 21 (1st Dept. 2004). The Court held that in the First Department, an immediate instruction is a requirement of the recalcitrant worker defense. Here, plaintiff's site superintendent, in opposition to plaintiff's motion for summary judgment, submitted an affidavit stating that at some time prior to October 31, 1998, the exact date of which he "[did] not recall", he instructed plaintiff to wear a safety harness. The Court held that the affidavit was too equivocal to support a recalcitrant worker defense.

8. EXPERT EVIDENCE

plaintiff's EXPERT CONCLUSION INSUFFICIENT TO CREATE AN ISSUE OF FACT

Trojahn v. O'Neill, 773 NYS.2d 99 (2nd Dept. 2004). Plaintiff's decedent was killed and infant daughter was injured when they were struck by a vehicle in a parking lot owned by the defendant, Citibank. Citibank moved for summary judgment arguing that the defendant driver was traveling at a high rate of speed and looking in another direction and that the Citibank employees had no notice of prior accidents at the site. Plaintiff opposed the motion, submitting an expert affidavit asserting that Citibank negligently designed the parking lot by permitting tall vehicles such as vans to park near the walkway connecting the building to the parking lot, thereby eliminating the line of sight for pedestrians and operators of automobiles. In reply, Citibank submitted its own expert affidavit stating that there were no design criteria, laws, codes or statutes requiring owners to issue height restrictions on vehicles thereby barring vans and minivans from parking lots. The Court held that plaintiff's expert affidavit was insufficient to create an issue of fact.

9. DAMAGES

FUTURE LOST EARNINGS OF $4,264,578.00 WAS NOT EXCESSIVE

Tassone v. Mid Valley Oil Company, Inc., 773 NYS.2d 744 (3rd Dept. 2004). After a jury award, the Court held that plaintiff's economist properly relied on plaintiff's age and income level at the time of the accident (22), the normal work life expectancy for an individual in plaintiff's profession, plaintiff's work experience and track record as a hard worker, his extensive training in electronic communications while in the Army, a letter from his employer regarding plaintiff's employment prospects, his acceptance into the union at the third highest electrical union rating, testimony from a rehabilitation counsel that plaintiff would have reached "journeymen" status in the union, and projected salary increases of 4% per year in sustaining a jury award of $4,264,578.00 for future lost earnings.

10. EVIDENCE

PLAINTIFF SUBMITTED ENOUGH CIRCUMSTANTIAL EVIDENCE FOR INFERENCE OF NEGLIGENCE

Affenito v. P.J.C. 90th Street, LLC, 774 NYS.2d 30(1st Dept. 2004). Plaintiff was injured at 8:30 a.m. when his bike slid out from underneath him while riding on East 90th Street. Plaintiff testified that as he approached the defendant's premises, he noticed in his peripheral view someone wearing a white busboys' coat, standing between two cars "looking down." After the accident, plaintiff observed the substance that he slipped on as well as the busboy hosing the substance down the center of the street. Defendant testified that there was a hose located on the 90th Street side of the restaurant and the sidewalk would be cleaned before 10:30 a.m. After the grant of summary judgment to the defendant, the Appellate Division reversed holding that plaintiff's testimony, in light of defendant's deposition testimony, was sufficient to give rise to an inference of negligence. Defendant acknowledged that the hose existed, and that the cleaning was done before 10:30 a.m., and that the busboys wore white uniforms.

11. INSURANCE

ADDITIONAL INSURED SCHOOL DISTRICT ENTITLED TO DEFENSE AND INDEMNITY

Ambrosio v. Newburgh Enlarged City School, 774 NYS.2d 153 (2nd Dept. 2004). The plaintiff school district sought a declaration that a kennel club's insurance company was obligated to defend and indemnify it as an additional insured under the kennel club's policy in connection with an underlying personal injury action arising out a trip and fall at the school during a dog show. The school district had leased certain grounds to the kennel club for the dog show. The insurance company denied coverage on the grounds that the location where plaintiff fell was not covered by the additional insured endorsement and that notice of the occurrence was untimely. The Court held that although the sidewalk where plaintiff fell was not specifically named in the endorsement, its use was incidental to the covered premises as a means of getting from rooms within the school to fields where the dog show was being held. As to notice, the Court held that the kennel club's notice to the carrier a few weeks after the occurrence would be deemed noticed by the school district as the school district and the kennel club were not adverse to each other.

12. SPECIAL EMPLOYEE

PLAINTIFF HELD TO BE A SPECIAL EMPLOYEE OF CITY, COMPLAINT DISMISSED

Bono v. City of New York, 774 NYS.2d 250 (App. Term, 2003). A framed issue hearing was held during which representatives of the City Department of Housing Preservation and Development testified that the HPD had complete control over hiring, firing and discipline of workers in plaintiff's position and that the HPD employees assigned all work to be done by plaintiff in the first instance. The Court held that "all essential, vocational and commonly recognizable components of the work relationship" between plaintiff and the City existed and affirmed dismissal under the special employee doctrine and the worker's compensation bar.

13. EVIDENCE

DEPOSITION OF TESTIMONY OF DEFENDANT WHO VOLUNTARILY LEAVES STATE IS INADMISSIBLE

Daly v. Keith, 774 NYS.2d 105 (Ct. of Appeals 2004). The Court held that by voluntarily leaving the state and refusing to return for trial, defendant procured her own absence and therefore failed to satisfy CPR Section 3117(a)(3)(ii).

14. EVIDENCE

EXPERT'S OPINION LACKED ADEQUATE FACTUAL FOUNDATION

Moss v. City of New York, 774 NYS.2d 139 (1st Dept. 2004). In an action involving a slip and fall on ice, the Court held that plaintiff's expert opinion that defendant's snow removal operations over the course of the week preceding the accident caused partially melted snow to dam up and refreeze on the sidewalk was supported only by photographs taken in the aftermath of the accident and was properly precluded as lacking actual factual foundation.

15. SUMMARY JUDGMENT

SPECULATIVE ARGUMENT DID NOT BAR SUMMARY JUDGMENT

Battista v. Rivera, 774 NYS.2d 136 (1st Dept. 2004). Plaintiff sued the owner and driver of a parked car, after a van struck the parked car, traveled 60 feet, went through a stop sign without stopping, entered the intersection and struck a car being operated by plaintiff. The Court found that plaintiff only offered speculation "grounded in theory rather than fact", that perhaps the parked car protruded into the van's path causing the chain of events leading to the collision with the plaintiff's vehicle. The Court held that such a speculative argument may not be the basis of a denial of a Motion for Summary Judgment.

16. LABOR LAW

PLANK USED AS A PASSAGEWAY, SECTION 240(1) DID NOT APPLY

Pole v. Ryan Homes, 774 NYS.2d 225 (4th Dept. 2004). Plaintiff, employed by a painting subcontractor, attempted to enter a house by using an unsecured plank. The plank was approximately eight to ten feet long and 12 inches wide, and served as a ramp between the garage floor and the threshold of the door to the house. Plaintiff was injured when the plank tipped. The Court held that when a plank is used as a passageway, rather than as a functional equivalent of a scaffold or ladder, labor law Section 240(1) does not apply.

17. PROCEDURE

COURT REVERSES GRANT OF PLAINTIFF MOTION TORESTORE CASE TO TRIAL CALENDAR AFTER ONE YEAR

Castillo v. City of New York, 775 NYS.2d 82 (2nd Dept. 2004). After plaintiff's action had been dismissed pursuant to CPR 3404, plaintiff moved to restore the case more than one year later. The Court held that the excuse that the plaintiff attorney missed a trial conference because she was unaware of the date amounted to law office failure and did not constitute a reasonable excuse. In addition, the Court held that plaintiff engaged in only minimal activity during the time the case was marked off and before the motion was made to restore the case. The limited activity was insufficient to rebut the presumption of abandonment.

18. PREMISES LIABILITY

HEARSAY EVIDENCE INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT

Joseph v. Hemlok Realty Corp., 775 NYS.2d 61 (2nd Dept. 2004). Plaintiff alleged personal injuries arising out a window falling on his right hand while visiting a friend's apartment. The building owner moved for summary judgment arguing that it had no notice of any defective condition involving the window. In opposition, plaintiff offered only his own testimony that either his friend or his friend's roommate complained about the window to the building superintendent. Plaintiff failed to produce either an affidavit or testimony of his friend. The Court held that plaintiff failed to raise a triable issue of fact.

19. DUTY

DEFENDANT CONTRACTOR DID NOT ASSUME DUTY TO PLAINTIFF'S DECEDENT

Plaintiff's decedent and plaintiff arrived at defendant building owner's premises to pick up their grandchildren from school. Plaintiff noticed a contractor's employees working in the area of the front entrance. As plaintiff's decedent approached the front entrance, the defendant's contractors employee gestured for her to use the emergency door to gain access. After entering the emergency door, the decedent fell down the stairway sustaining fatal injuries. The Court held that the defendant contractor did not assume the duty to plaintiff defendant merely by directing her to use a different entrance way.

20. EVIDENCE

HEARSAY

AIU Insurance Company v. American Motorist Insurance Co., 778 NYS.2d 479 (1st Dept. 2004). AIU, the general liability carrier for an owner and general contractor, moved for summary judgment in a declaratory judgment action against St. Paul, the carrier for two subcontractors, Forest Electric and Cord Contracting, relative to an underlying personal injury action. After an earlier Appellate decision modified the grant of summary judgment to AIU, and held that St. Paul's duty to defend and indemnify was dependent upon the resolution of whether the underlying plaintiff's injuries "arose out of"Forest's failure to remove debris from the worksite, AIU again moved for summary judgment relying on the testimony of Cord's foreman, Dermot Fenlon. Fenlon testified that the underlying plaintiff told him that the work area had inadequate lighting causing him to step on a silver piece of pipe. The lower court granted summary judgment to AIU. The Appellate Division reversed holding that Fenlon's testimony was inadmissible hearsay that could not support a motion for summary judgment unless accompanied by other direct evidence.

21. SANCTIONS

SPOLIATION

Iannucci v. Rose, 778 NYS.2d 525 (2nd Dept. 2004). The defendant threw out a ladder five days after plaintiff's accident. Plaintiff moved to strike the defendant's answer on the grounds of spoliation of evidence. The lower court denied the motion and the Appellate Division affirmed. The Court held that there was no evidence that the defendant acted willfully, contumaciously or in bad faith, and concluded that the destruction of the evidence did not deprive plaintiff of the means to prove his case.

22. AUTOMOBILE

PLAINTIFF FAILS TO MEET SERIOUS INJURY THRESHOLD

Burke v. Torres, 778 NYS.2d 486 (1st Dept. 2004). In an automobile case, the defendant moved for summary judgment on the grounds that plaintiff, a police officer, could not cannot show that he suffered a serious injury within the meaning of

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Worthy of Note

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Insurance Law Section 5102(d). Plaintiff argued that he either missed work or was placed on limited or restricted duty for more than 90 days during the 180 days following the accident. The Court held that in the absence of any documentation or affidavit from the police department substantiating plaintiff's time out of work and the specific nature of his duties both before and after the accident, plaintiff was entitled to summary judgment. Plaintiff also argued that he sustained a consequential or significant injury. The Court held that the plaintiff's physician did not report his personal observations of plaintiff while sitting and standing, did not identify tests performed to determine pain tolerance, did not compare plaintiff's ability to sit and stand to the norm and did not compare plaintiff's pain to the pain plaintiff would feel, if his discs were bulging more severely or if the discs were herniated.

23. SUMMARY JUDGMENT

STARE DECISIS AND ASSUMPTION OF RISK

Samuels v. High Braes Refuge, Inc., 778 NYS.2d 640 (4th Dept. 2004). Plaintiff was injured in a snow tubing accident on defendant land owner's property. Defendant moved for summary judgment. The Court held that plaintiff raised a triable issue of fact as to whether defendant required a payment of a fee for use of its property for snow tubing, thus barring the application of immunity under general obligations law Section 9-103. The Court further held that two lower court orders granting summary judgment to defendant in two cases involving other people involved in the same accident as plaintiff did not mandate the application of stare decisis, as the record failed to establish that the factual evidence admitted to the Court in the prior cases was identical to the subject case, and in any event, the lower court orders were not binding upon the Appellate Court. The Court also held that plaintiff raised a triable issue of fact as to whether she made an informed estimate of the risk involved as measured against her skill and experience.

24. LABOR LAW

SPECIAL EMPLOYEE DOCTRINE

Bailey v. Gantter, 778 NYS.2d 637 (4th Dept. 2004). Plaintiff, an employee of Marinich Builders, was assigned by his employer to work with defendant Gantter, a subcontractor of Marinich. The Court allowed defendant leave to amend to add a worker's compensation bar defense under the special employee doctrine, but denied defendant summary judgment on that defense. The Court found that the plaintiff set up his own work schedule, primarily used his own tools and answered directly to Marinich, which paid his salary. The Court held that this created an issue of fact as to whether Marinich surrendered complete control and supervision of plaintiff's work over to defendant Gantter.

25. NOTICE OF CLAIM

LEAVE TO FILE LATE NOTICE OF CLAIM DENIED

Anderson v. City University of New York at Queens College, 778 NYS.2d 304 (2nd Dept. 2004). The Court held that claimant's delay in filing a notice of claim due to ignorance of the law was not excusable and that the claimant failed to set forth facts showing that his claim was meritorious. The Court further held that claimant failed to show that defendant had notice of the essential facts constituting the claim since the "recreation incident report" prepared by the claimant made no mention of the allegedly defective condition and did not connect claimant's injuries to any negligence on the part of the defendant.

26. AUTOMOBILE

PLAINTIFF FAILED TO ESTABLISH SERIOUS INJURY THRESHOLD

Collius v. Stone, 778 NYS 2d 79 (2nd Dept. 2000). In an automobile case, the Court held that plaintiff failed to raise a triable issue of fact as to whether she suffered a "serious injury" under Insurance Law Section 5102(d). The Court found that plaintiff's orthopedist did not take into account the plaintiff's history of having been involved in subsequent accident where she injured her neck and back. The Court further found that plaintiff's radiologist failed to express an opinion with respect to causation.

27. INSURANCE

LIMITATION OF LIABILITY PROVISION APPLIED IN A LEAD PAINT CASE

Hiraldo v. Allstate Insurance Co. 778 NYS 2d 50(2nd Dept. 2004). After obtaining a jury award for pain and suffering in an infant's lead paint case, plaintiff brought a direct action against defendant Allstate pursuant to Insurance Law Section 3420(a)(2) to recover on the judgment. Plaintiffs were awarded $555,000 in the underlying tort action. Defendant Allstate issued three policies of insurance to the three years, with each policy containing an aggregate limit of $300,000. The policies contained a limiting provision stating that "damages resulting from one loss" will not exceed the limit of liability and that "personal injury...resulting from one accident or from continuous exposure to the same general conditions is considered the result of one loss." The plaintiff's argued that because the infant-plaintiff was continually exposed to the lead hazard over a period of three years, during which years his injuries were exacerbated the limiting provision should not apply. The Court held that pursuant to the end in language of the applicable policy the infant plaintiff's exposure to lead paint while residing at the insured premises constituted one loss and thus the limiting provision applied.

28. INSURANCE

DEFENDANT FAILED TO RAISE A TRIABLE ISSUE OF FACT RELATIVE TO POLICY EXCLUSIONS

Shelby Casualty Insurance Company v. Compono, 778 NYS 2d 96 (2nd Dept. 2004). In an action for a declaratory judgment declaring that plaintiff was not obligated to defend or indemnify defendant Elizabeth Compono in a suit brought against her by her daughter Liles for personal injuries arising out of an alleged dog bit by Compono's dog, the plaintiff carrier moved for Summary Judgment. The policy contained an exclusion for bodily injuries to the insured and any of the insured's relatives and any of the insured's relatives residing in the home. Defendant conceded that she was related to Liles and that they lived together in defendant's homes, sharing a kitchen, dining area, living room, bathroom and telephone line. The Court held that defendant failed to raise a triable issue of fact from which a jury could infer. that defendant and Liles maintained separate households.

Technology in the Courtroom

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camera stays on this perspective and shows plaintiff travelling into the intersection at high speed and against the RED Light. Plaintiff's vehicle slams into the side of defendant's vehicle.

Thank you for your time and attention members of the jury. Please return a verdict for the defendant.

The film just shown was not taken on the day of the accident and is nothing other than a digital creation. It is a tool of the communication art available now.

I have previewed the foregoing scenario for various members of the bar. Almost unanimously the critique is that the argument is too persuasive. (Sacre Coeur! As if there could be such a thing as too persuasive in our business). The other universal criticism is that the digital presentation is not subject to evidentiary foundation. It is, of course, not evidence but argument. And, assuming testamentary or documentary foundation **fair comment** on upon the evidence.

Of course, no litigant would pose for a staged recreation of an accident. Especially a recreation that defeats their case. Nonetheless, the tools are available now to easily recreate the scene and import and edit the images and people depicted. For a modest fee of three to five thousand dollars one may now purchase a digital video camera of production quality. A desktop with Pentium IV or equivalent and off-the-shelf video editing software is all that is required for your digital summation.

I rather fancy a voice over soundtrack from the videotaped deposition or real time in court digital camera supporting the action depicted. I would use a picture in picture of the witness describing the actions in series-taken from your planned direct or cross-examination.

The scene of the street can be managed from the perspective street shots. Thereafter, the parties can be digitally edited into their respective vehicles (which can also be digitally introduced if reasonable approximations are unavailable.) The software available can easily capture images of the parties from the videotaped deposition or your desktop digital camera. Frankly, this has become kid's stuff-literally-as I entertain my own kids with made up adventures which cut and paste their likeness into all manner of cartoon exploits.

The capital costs of the electronics and software are trending towards negligible in the appropriate case. Notably, the cost amortized over successive uses will be sight. The cost in professional standing to those who forego this communication tool will be overawing.

We must, of course treat the one valid criticism of the technique. That the presentation may be onfusing if the provenance is not explained. Shame on the practitioner who does not explain at the earliest possible time what he intends to do and how. Nonetheless, I humbly offer that a brief explanatory charge by the court- not inlike that for the use of deposition testimony- would resolve any juror confusion.

I have taken the liberty of drafting a useful direction as follows:

> *Jurors, counsel has elected to convey his closing argument to you by an audiovisual presentation. The presentation you are about to see is counsel's comment upon the evidence and his version of what the evidence has shown.*
>
> *Please take note that the presentation is not an actual film of the incident but is a recreation offered as argument for your consideration.*

Jurors are quite attuned to this type of presentation, as they are seen everyday. People merely watching television are shown recreations, as are business people, educators, scientists and almost everyone else. Digital video recreations, projections and presentations are ubiquitous today. Jurors are certainly savvy enough to tell the difference between actual footage of the "caught on video" kind and a recreation. Merely telling the jury what the presentation is easily dispels any lingering confusion.

In sum, the impact of the computer is making itself felt in the legal profession in numerous ways. Its use as a tool of communication must be adopted as our own.

Undocumented Aliens and Lost Wages in New York

Continued from page 2

Hoffman. Judge O'Rourke did leave the door open for some discovery by the defense by summarizing the current law in New York on the issue as permitting plaintiff's illegal alien status to be considered by the jury on the issue of the length of time during which the plaintiff might have continued to work in the United States.

In Public Administrator v. Yeshiva of Central Queens, in Sup. Ct. Kings Co. Index (6/22/04), Judge Randolph Jackson denied the defendant's motion for partial summary judgment which had sought a dismissal of plaintiff's lost wage claim. In rejecting the precedential value of Majlinger and the applicability of Hoffman, Judge Jackson did indicate that the trier of fact, in determining lost wages, should be able to consider whether the plaintiff is legally authorized to work in the United States.

At this point, with Majliner on appeal to the Second Department and Balbuena on appeal to the First Department, the issue of whether and to what extent an undocumented alien can make a claim for past and future lost wages in dollars remains unresolved. For purposes of discovery to be obtained from individuals making such claims, it is significant to note the evolution of the law in this regard.

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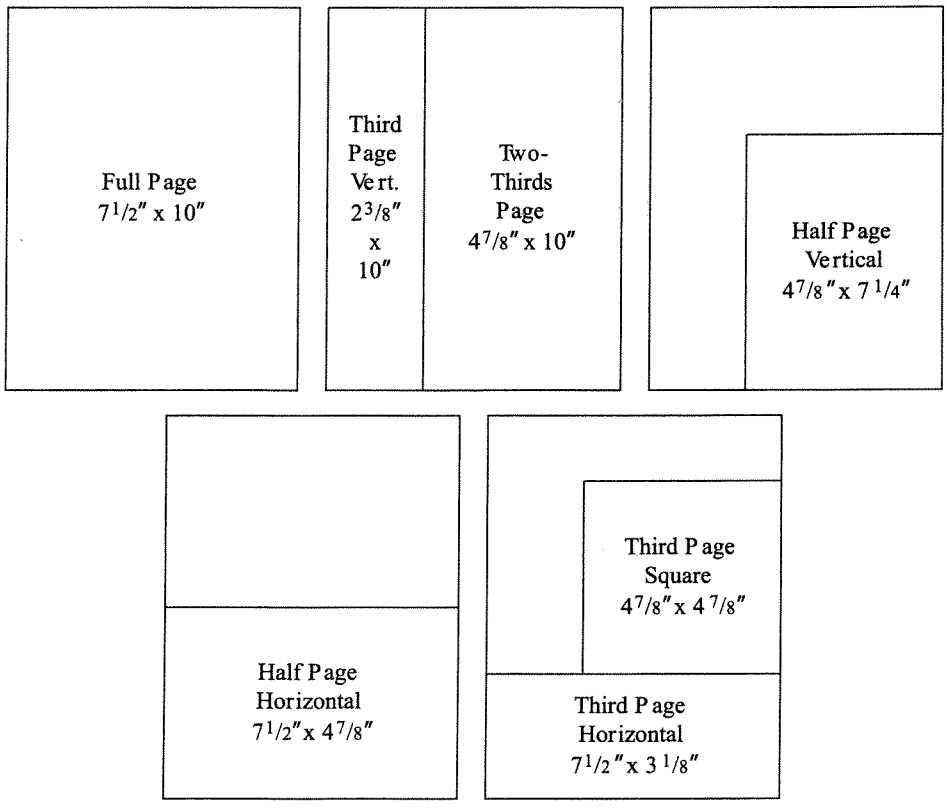

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