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DEFENDANT

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FEATURING:

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TIMELY NOTICE OF CLAIM AND THE ADDITIONAL INSURED

*by John J. McDonough **

New York law has historically been relatively favorable to an insurer when late notice is received from an insured or an additional insured in regard to a suit or potential claim. Typically, commercial general liability policies following standard Insurance Services Office ("ISO") format contain a requirement that the "insured" is obligated to provide notice to the insurer "as soon as reasonably practicable" following a loss or potential liability.

Under New York law the timely notice requirement of an insurance policy is a condition precedent to coverage, and an unreasonable and unexcused delay in providing notice affords grounds for denying coverage, without any necessity of prejudice to the insurer.

As to what constitutes timely notice from an insured, courts generally look to the facts and circumstances of each case. Heydt Contracting Corp. v. American Home Assur. Co., 146 A.D.2d 497, 536 N.Y.S.2d 770. Reasonableness of a delay in notification is usually a question of fact for the jury. Deso v. London & Lancashire Ins., Co., 3 N.Y. 2d 127, 164 N.Y.S.2d 689.

Once the notice is received from the insured Section 3420(d) of the New York State Insurance Law then requires that insurer to act promptly with respect to accepting the claim, denying the claim or requesting more information. In cases where the insurer has failed to provide justification for its delay in the initial handling of the claim, delays in issuing a denial of the claim as short as 41 days have been deemed unreasonable as a matter of law. Nationwide Mutual Ins. Co. v. Steiner, 605 N.Y.S.2d 391.

Assuming that the named insured has given timely notice of an occurrence to its insurer but an additional insured on that same policy is late in giving notice, can an additional insured rely upon or "piggy-back" onto the original timely notice given to the insurer by the named insured? There now seems to be a split in authority on this issue between the Second and First Departments as a result of a recent case decided by the First Department that has had the effect of eroding the ability of insurers to deny claims to insureds based on late notice of claim.

Because of the "severability of interest" provision in ISO form commercial general liability policies, the notice of claim requirement applies separately to each "insured". The definition of "who is an insured" in ISO form commercial general liability policies includes all additional insureds. Thus, any ISO form policy requires timely notice of each occurrence from the named insured as well as each additional insured.

The traditional rule in New York is that notice of a claim or suit given to a liability insurer by the named insured does not constitute notice from the additional insured, when the additional insured takes a position in the underlying action that is "adverse" to the named insured. To determine whether the named insured and the additional insured are "adverse" for purposes of the latter relying upon timely notice furnished to the insurer by the former, two distinct periods of time are evaluated. This analysis is best exemplified by the Second Department's decision in National Union Fire Insurance Co. of Pittsburgh v. State Insurance Fund, 266 A.D.2d 518, 699 N.Y.S.2d 101.

To determine "adversity" for notice purposes the rule in New York requires courts to look at both the time the named insured gave notice and at the time the additional insured sought coverage or tendered its defense. If the additional insured is adverse, that is, has interposed a claim, cross-claim or third-party claim against the named insured, at either of these two stages of the claim, the additional insured may not rely on the notice provided by the named insured to the insurer and the insurer can deny coverage to the additional insured based on late notice.

The First Department has seemingly retreated from the traditional rule and, in so doing, diminished the ability of insurers to deny coverage to additional insureds on late notice grounds. In the recent case of New York Telephone

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** Mr. McDonough is the Editor of The Defendant, a member of the Board of Directors of DANY and a member of the international firm of Cozen O'Connor.*

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Co. v. Travelers Casualty and Surety Co. of America, 280 A.D.2d 268, 719 N.Y.S.2d 648, that Court held that as long as the additional insured and named insured are not adverse at the time the named insured gives notice to the insurer the additional insured may "piggy-back" or rely on the timely notice of the named insured. The Court did not incorporate into its analysis the relationship of the parties at the time the additional insured sought coverage. Adversity between the named insured and additional insured at this latter stage of litigation is much more common as appeared to the time when the named insured is giving notice as the additional insured may not then know of the claim or of its status as an additional insured. An analysis which looks only at the earlier period to determine adversity will make it more uncertain, at best, for insurers to decline coverage to additional insureds based on late notice.

Whether the First Department's decision in New York Telephone, supra, represents a break with traditional law in this area, including its own precedents, see Structure Tone, Inc. v. Burgess Steel Products Corp., 249 A.D.2d 144, 672 N.Y.S. 2d 33, or is a simple one time deviation from established New York law on late notice bears close monitoring by claims and coverage professionals.

A REVIEW OF "ON TRIAL"

Written by Henry J. Miller, Esq.
ALM Publishing, a Division of American Lawyer Media, Inc.
Purchase Price $24.95. Reviewed by John J. Moore

by John J. Moore

Henry Miller has long been associated with DANY in one form or another and indeed has offered his services from time to time to the benefit the members of the association. Recently, he published a book entitled "On Trial", which is now available for purchase. A noted trial attorney actively engaged in trying cases for the past four decades, he is a member of the law firm of Clark, Gagliadi and Miller, P.C. A former member of the Board of Directors of the Defense Association of New York, a Director of the International Academy of Trial Lawyers and New York State Trial Lawyers Association, a past President of the American College of Trial Lawyers and past President of the New York Bar Association,

Having known the author for many years, I expected to be deeply amused with "On Trial". This was reinforced by his acknowledgements at the beginning of the book, his writing clearly surpassed any anticipation I possessed. After the turning of but a few pages, I knew I was into more than mere humor. I was reading a primer on how to try a case and the many unanticipated events that would flow from the experience.

"On Trial" from the beginning to end employs a technique that allows the trial lawyer to condense and systemize each portion of the trial into a formula which can be most valuable in the young attorney's presentation. From the opening remarks to the summation, there are "Jewels" to be taken and utilized in the course of most trials. A young lawyers "must' is the reading of Mr. Miller's book.

Equally important are the many suggestions outside the framework of the trial such as dealing with, the experts, familiarization with the courtroom, the judges, their quirks and how to deal with them. The disappointment of defeat and how one functions with it is an enlightening chapter along with candid suggestions regarding all phases of litigation. The author proffers ways to deal with the "sharp shooters" of the bar, and then offers the reader a general procedure to employ in those areas where humility is required.

This is a book that can be read conceivably in one sitting and then re-read and ingested bit by bit. "On Trial" should be required reading for the young attorney and a remembrance for the more senior members of the profession. As usual, Mr. Miller has out, done himself.

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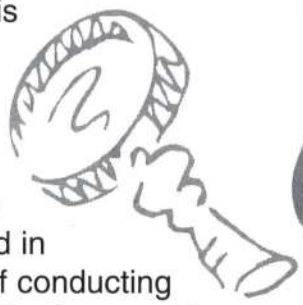

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SUMMARY JUDGEMENT AND THE FEIGNED ISSUE OF FACT DOCTRINE[1]

*by Steven R. Kramer**

We are all familiar with the rule that the existence of a genuine issue of material fact precludes the award of summary judgment.1 The rule's reference to a "genuine issue" might appear to be a matter of semantics. In practice, however, the term "genuine issue" has been treated by the Courts not as an innocuous term but, rather, a stringent requirement on the party opposing a motion for summary judgment. Parties - typically the plaintiff - have attempted to circumvent this requirement by creating or fabricating an issue of fact by a variety of means. This is the "feigned issue of fact" doctrine. One of the most frequent occurrences of the doctrine is the situation where a party in opposition to a summary judgment motion submits an affidavit that contradicts his own sworn. deposition testimony. The Appellate Divisions have consistently applied the doctrine in such situations, and have increasingly applied the doctrine to also reject an affidavit of a witness that contradicts the plaintiffs sworn. testimony.

The Court of Appeals has long recognized the feigned issue of fact doctrine. In a pre-CPLR case, Rubin v. Irving Trust Co.,[2] the Court stated that "The ultimate question is whether plaintiff has shown the existence of a triable fact issue. If the issue claimed to exist is not 'genuine, but feigned, and there is in truth nothing to be tried' summary judgment is properly granted." Similarly, in Glick & Dolleck v. Tri-Pac Expert Corporation,[3] a post-CPLR case, the Court of Appeals stated "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable.' The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned."

Every Department has applied the doctrine without hesitation in the situation where a plaintiff submits an affidavit that contradicts his sworn deposition testimony. In Pacheco v. Fifteen Twenty Seven Associates, L.P.,[4] the First Department held:

> The statements in the hospital record offered in support of the cross motion are hearsay, contradicted by the meteorological data and no more reliable than their source, which is plaintiff himself Plaintiffs affidavit in opposition merely reiterates that he has no recollection of the date of the accident. 'It is well established that on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated.' Where the asserted factual issue is merely feigned, summary judgment should be granted. Plaintiffs allegations as to the date of his injury 'are unsubstantiated by evidentiary facts and are thus insufficient to raise a triable issue of fact necessary to defeat a motion for summary judgment.5

The Second Department recently applied the doctrine in Ilardi v. Inte-fac Corporation,[6] where the Court stated "The injured plaintiffs affidavit, which indicated that he slipped and fell as a result of defective lighting at the premises where the accident occurred, only raised a feigned factual issue which will not serve to defeat the defendants' motion for summary judgment."[7] The Third and Fourth Department have equally applied the doctrine.[8]

REJECTION OF WITNESS AFFIDAVITS

The above cases involved the situation where the plaintiff tendered an affidavit that contradicted his sworn deposition testimony. Rejection of such affidavits is easy to rationalize because it is obvious that the defendant's motion has alerted the plaintiff to fatal gaps in proof and the plaintiff (and counsel) is attempting to nullify the admissions made at deposition. The doctrine was recently extended by the First Department in Perez v. Bronx Park South Associates[9] to include the situation where a plaintiff

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opposed a motion for summary judgment not by tendering his affidavit but, rather, by relying on a contradictory witness affidavit.

In Perez v. Bronx Park South Associates the plaintiff slipped and fell on the exterior steps of an apartment building. At deposition, plaintiff testified unequivocally that he did not observe any leaflets on the steps when he left the building in the morning or when he later returned for lunch. The plaintiff also conceded that the accident took place an hour and half after he entered the building for lunch. The defendant moved for summary judgment arguing that the plaintiff, like the plaintiff in Gordon v. American Museum of Natural History,[10] could not prove that the defendant had actual or constructive notice of the alleged hazardous condition. The plaintiff opposed the defendant's motion not by tendering his affidavit but, rather, by relying on an affidavit from a witness who alleged that she observed leaflets on the steps the night before and morning of the accident. Because the contradictory witness affidavit was clearly tailored to overcome the admissions made by the plaintiff at his deposition, the First Department applied the feigned issue of fact doctrine and affirmed the trial court's grant of the defendant's motion. The First Department reasoned:

> In light of the foregoing, plaintiffs own deposition testimony makes it clear that none of the criteria necessary to sustain a cause of action against the landowner has been met. Plaintiffs submission of a one-page affidavit from his neighbor, an alleged eyewitness to the accident, which consists of nothing more than two relevant sentences of conclusory allegations tailored to overcome plaintiffs testimony, is insufficient to warrant the denial of defendant's motion. As we held in Phillips v. Bronx Lebanon Hospital, '[w]hile issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiffs own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.11

The Perez[12] decision is a logical extension of the First Department's earlier decision in Phillips v. Bronx Lebanon Hospital.[13] In Phillips, the plaintiff and two eyewitnesses submitted affidavits in opposition to the defendant's motion for summary judgment that contradicted the plaintiffs sworn deposition testimony. In reversing the trial court's denial of the defendant's motion, the First Department held:

> While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiffs own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.14

The Phillips decision is consistent with the First Department's decision in Tse Chin Cheung v. G&M Hardware & Electric, Inc.[15] In Tse Chin Cheung, the First Department rejected the plaintiff s attempt to defeat summary judgment by submitting his affidavit as well as the affidavit of his brother. The First Department held that "the affidavits submitted by plaintiff and his brother in opposition to defendants' motion ... were properly rejected by the court as self-serving statements directly contradicting their earlier deposition testimony ..."[16]

The Second Department has also rejected self-serving affidavits tendered by both the plaintiff and witnesses. In Buziashvili v. Ryan,[17] the Second Department stated that "[t]he self-serving affidavits submitted by the plaintiff, his sister, and his cousin's wife that the plaintiff had lived at the Brooklyn apartment for over 1 1/2 years presented a feigned factual issue designed to avoid the consequences of the plaintiffs earlier admission that he had only lived there for a few months."

The above cases make clear that, although a court may generally not weigh the credibility of the affiants on a motion for summary judgment, an exception exists where an issue of fact is not "genuine" but "feigned." In light of Perez,18 this exception is now applicable not only to the situation where a party submits an affidavit that contradicts his sworn deposition testimony, but also where a party attempts to overcome his deposition testimony by tendering a contradictory affidavit from a witness.

DOCUMENTS OVERCOMING FEIGNED ISSUES

All of us have been faced with the situation where a plaintiffs deposition testimony, although implausible or down-right false, seemingly creates an issue of fact. Many motions for summary judgment have not been made because it was thought that the motion would be summarily denied due to the existence of an issue of fact. But, the feigned issue of fact doctrine has permitted defendants to obtain summary judgment when defendants have tendered documentary evidence establishing the falsity of the plaintiffs testimony.

A recent example of the application of the feigned issue of fact doctrine to this scenario is Leo v. Mt. St. Michael Academy.[19] In Leo, the plaintiff slipped on a stairway and testified at deposition that the stairs were worn and water had accumulated from students tracking it in on their shoes

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because it was raining on the day of the accident. The defendant moved for summary judgment and relied on an affidavit of a meteorologist who summarized weather reports that established it was not raining on the day of the accident. In addition to the meteorologist's affidavit, the defendant relied on the deposition of a student who testified that he was standing next to plaintiff when he fell, there was no water on the steps at that time, and he had never seen water on those particular steps at any time. Notwithstanding that the plaintiff did not tender an affidavit that contradicted his deposition testimony, the First Department nonetheless applied the feigned issue of fact doctrine. The Court held:

> The credibility of the parties is not a proper consideration for the court weighing the sufficiency of the pleadings, and the plaintiffs statements in opposition to the motion are accepted as true 'unless the facts sworn to are patently untrue.' Where, as here, documentary evidence conclusively establishes that an issue of fact is 'not genuine, but feigned', it is appropriate to summarily resolve the matter.20

Documentary evidence also trumped a plaintiffs feigned issue of fact in American Realty Co. v. 64B Venture.[21] In American Realty Co., plaintiff commenced a declaratory judgment action to determine whether it had properly exercised its option to renew a lease. When the evidence established that the plaintiff assigned its right to exercise the renewal option, plaintiff responded by submitting a statement by its limited partner that the landlord had not consented to the assignment and by claiming that a provision requiring consent of the landlord was deleted from the assignment agreement. The defendant countered with documentary evidence consisting of a separate agreement, dated the same day as the assignment agreement, establishing that the landlord had consented to the assignment. Despite the seemingly dueling affidavits of the parties, the First Department affirmed the trial court's grant of the defendant's summary judgment motion, reasoning "Where, as here, issues were 'not genuine, but feigned,' it was not improper to resolve questions of credibility on a motion for summary judgment."[22]

A plaintiffs specious claim was again defeated by documentary evidence in Kessner v. Izsak.[23] In Kessner, plaintiffs agreed to purchase a parcel of land but failed to appear for closing. After plaintiffs commenced an action for specific performance against the seller, the seller offered plaintiffs another opportunity to close, but plaintiffs once again failed to appear. The seller then moved for summary judgment and plaintiffs opposed the motion by claiming that the seller had breached a clause of the contract that required the seller to cooperate prior to closing in the filing of alteration plans. The seller responded by tendering documentary evidence establishing that it had executed alteration plans prepared by plaintiffs. When the plaintiffs appealed the grant of defendants' motion, the First Department stated "In this posture, Supreme Court was fully justified in concluding plaintiffs had raised only feigned issues, not any genuine factual issues warranting a trial."[24]

The Second Department has also held that documentary evidence will trump a feigned issue of fact. In Assing v. United Rubber Supply Co., Inc.,[25] the Court stated:

> If the issue claimed to exist is not genuine, but feigned and therefore there is nothing to be resolved at trial, 'the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.' The record in this case discloses an absence of a genuine issue of fact with regard to the plaintiffs' contention that United manufactured, supplied or distributed an allegedly defective hose which caused the injuries of the plaintiffs George Assing and Ruthven Collette... United has, however, conclusively vitiated the probity of the plaintiffs' submission by uncontroverted documentary evidence indicating that the label was from a shipment of hose which had been ordered by the employer of the plaintiffs George Assing and Ruthven Collette in March 1977, more than 14 months after the accident. The plaintiffs offered no meaningful rebuttal to this evidence.

Similarly, in Fisch v. Aiken,[26] the Second Department stated "Here, the appellant's affidavit merely presents a feigned factual issue designed to avoid the consequences of the petitioner's documentary evidence."

CONCLUSION

It is true that an issue of fact will result in the denial of a motion for summary judgment, but careful attention must be paid to determine whether the purported issue of fact is "genuine" or "feigned." The Courts seem to have divided the feigned issue of fact doctrine into two distinct scenarios: (i) when a party attempts to overcome his own deposition testimony by tendering his or a witness' contradicto-

ry affidavit, or (ii) when a party asserts a patently false claim. If your issue of fact fits into either scenario, make that motion for summary judgment.

[1] *See* Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 597-98 (1980); Friends of Animals v. Associated Fur Manufacturers, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 791-92(1979).

[2] 305 N.Y. 288, 113 N.E.2d 424, 432 (1953).

[3] 22 N.Y.2d 439, 293 N.Y.S.2d 93, 94 (1968).

[4] 275 A.D.2d 282, 712 N.Y.S.2d 535, 537 (1st Dept. 2000).

[5] *See also* Joe v. Orbit Industries, Ltd., 269 A.D.2d 121, 703 N.Y.S.2d 14,16 (1st Dept. 2000) ("The mother's affidavit in opposition attesting to having seen the dog at the garage premises contradicts her deposition, in which she testified that she had only seen the dog tied up in the vacant lot. Her self-serving affidavit opposing the motion cannot be relied upon to contradict her prior testimony, and, thus, is insufficient to raise a genuine, as opposed to feigned, issue of fact as to Orbit's ownership or control of the dog."); Kistoo v. City of New York, 195 A.D.2d 403, 600 N.Y.S.2d 693, 694 (1st Dept. 1993) ("Here, the IAS court improperly relied on plaintiffs self-serving affidavit, which directly contradicted her prior deposition testimony that she did not see her assailant enter the building."); American Realty Co. v. 64B Venture, 176 A.D.2d 226, 574 N.Y.S.2d 344, 345 (1st Dept. 1991) ("Where, as here, issues were not genuine, but feigned', it was not improper to resolve questions of credibility on a motion for summary judgment.").

[6] 736 N.Y.S.2d 401, 402 (2nd Dept. 2002).

[7] *See also* Nieves v. Iss Cleaning Services Group, Inc., 284 A.D.2d 441, 726 N.Y.S.2d 456, 457 (2nd Dept. 2001) ("These contradictory statements raised a feigned factual issue designed to avoid the consequences of her earlier admission."); Oza v. Sinatra, 176 A.D.2d 926, 575 N.Y.S.2d 540, 542(2nd Dept. 1991) ("Nevertheless, if the issue claimed to exist is not genuine, but feigned, and there is really nothing to be resolved at the trial, 'the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.'"); Prunty v. Keltie's Bum Steer, 163 A.D.2d 595, 559 N.Y.S.2d 354, 355 (2nd Dept. 1990) ("Absent prejudice to the other side, the court has the inherent power to permit changes to a deposition transcript after it has been signed. However, on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated. If the issue claimed to exist is not genuine, but is feigned and there is nothing to be tried, then summary judgment should be granted.").

[8] *See* Regula v. Ford Motor Credit Titling Trust, 280 A.D.2d 843, 720 N.Y.S.2d 609, 611 (3rd Dept. 2001) ("Behr opposed the motions with nothing other than his own deposition testimony and affidavit stating that, as he traveled eastbound on Mariaville Road, he saw the driver's side of Regula's vehicle traveling toward him in his eastbound travel lane and that the point of impact of the vehicles was in his own lane of traffic. In view of Behr's original statement that he had no recollection of the accident, his current inability to recall any of the other events leading up to the collision and the fact that his statement is completely self-serving, directly contradicted by all of the physical evidence at the accident scene and unsupported by any expert opinion, we conclude that he has 'only raised a feigned factual issue which will not serve to defeat the motions for summary judgment.'"), Andrews v. Porreca, 227 A.D.2d 940, 643 N.Y.S.2d 250, 250 (4th Dept. 1996) ("The assertion of plaintiff in an opposing affidavit that she recalls having seen the electrical tape over the top portion of the outlet for about three months before the accident is a 'feigned attempt to avoid the consequences of her earlier testimonial admission' and is insufficient to defeat defendants' motion.").

[9] 285 A.D.2d 402, 728 N.Y.S.2d 33 (1st Dept. 2001), leave den., N.Y.2d (February 14, 2002).

[10] 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).

[11] 728 N.Y.S.2d at 34.

[12] *See* note 9, *supra*.

[13] 268 A.D.2d 318, 701 N.Y.S.2d 403 (1st Dept. 2000).

[14] 701 N.Y.S.2d at 405.

[15] 249 A.D.2d 28, 670 N.Y.S.2d 495 (1st Dept. 1998).

[16] 670 N.Y.S.2d at 496.

[17] 264 A.D.2d 797, 695 N.Y.S.2d 396, 398 (2nd Dept. 1999).

[18] *See* note 9, *supra*.

[19] 272 A.D.2d 145, 708 N.Y.S.2d 372 (1st Dept. 2000).

[20] 708 N.Y.S.2d at 374.

[21] 176 A.D.2d 226, 574 N.Y.S.2d 344 (1st Dept. 1998).

[22] 574 N.Y.S.2d at 345.

[23] 170 A.D.2d 351, 566 N.Y.S.2d 52 (1st Dept. 1991).

[24] 566 N.Y.S.2d at 33.

[25] 126 A.D.2d 590, 511 N.Y.S.2d 31, 32 (2nd Dept. 1987).

[26] 259 N.Y.S.2d 423, 687 N.Y.S.2d 885, 885-86 (2nd Dept. 1998).

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*by John J. Moore **

WORTHY OF NOTE

*Christine Moore ***

NEGLIGENCE SLIP AND FALL ELEMENTS

In Chemont v. Pathmark Supermarkets, Inc., (____ A.D.2d ____, 720 N.Y.S.2d 148), the Second Department held that to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant's employees to discover and remedy the condition.

The store owner was not liable to a patron who slipped and fell on a puddle of rain water in the store's entrance following a severe and sudden thunderstorm where the rain water had not accumulated on the floor of the vestibule for a sufficient length of time before the patron fell so as to permit the store to discover and remedy the condition, and there was no evidence that water on the floor was a recurrent dangerous condition, or that the store owner had actual knowledge of the allegedly dangerous condition

RES IPSA LOQUITUR - ELEMENTS

The First Department recently held that the application of the doctrine of res ipsa loquitur requires that the instrumentality responsible for the injury be under the exclusive control of the party to be cast in negligence.

The doctrine did not apply to an action brought by a hotel worker against the contractor who had performed renovations at the hotel which the worker sought to recover for injuries sustained when she was struck by a light fixture that fell from the ceiling, where the worker could not show that the contractor, as opposed to one of its subcontractors, had installed the fixture, or that it had not tampered with it after the installation.

The inexplicable fall of the fixture is something that does not ordinarily occur without the negligence, so that the doctrine of res ipsa loquitur may apply to an action arising from such an incident, (Greenidge v. HRH Construction Corp., ____ A.D.2d ____, 7720 N.Y.S.2d 46).

EVIDENCE - MEDICAL TEXT - INADMISSIBLE

The Third Department recently held that medical texts are generally inadmissible as substantive evidence, (Shane "MM" v. Family and Children's Services, ____ A.D.2d ____ 720 N.Y.S.2d 219).

NEGLIGENCE - ASSUMPTION OF RISK - INAPPLICABLE

It was recently held by the Appellate Division, First Department that evidence of a student, who was injured while riding a bicycle on a student tour, was compelled by her counselors, over her protestations, to ride the bicycle even though she got off the bike three times, precluded the defense of assumption of risk to the negligence claim asserted against the tour operator, Pfeifer v. Musiker Student Tours, Inc., ____ A.D.2d ____, 720 N.Y.S.2d 121).

NEGLIGENCE - SLIP AND FALL - ELEMENTS

In Chemont V. Pathmark Supermarkets Inc., (____ A.D.2d ____, 720 N.Y.S.2d 148), the Second Department held that to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant's employees to discover and remedy the condition.

The store owner was not liable to a patron who slipped and fell on a puddle of rain water in the store's entrance following a severe and sudden thunderstorm where the rain water had not accumulated on the floor of the vestibule for a sufficient length of time before the patron fell so as to permit the store to discover and remedy the condition, and there was no evidence that water on the floor was a recurrent dangerous condition, or that the store owner had actual knowledge of the allegedly dangerous condition.

DISMISSAL - VACATING - ELEMENTS

In order to vacate a dismissal of a matter that has been deemed abandoned, the plaintiff must demonstrate (1) a meritorious cause of action, (2) a reasonable excuse for the delay, (3) the absence of prejudice I to the opposing party, (4) and a lack of intent to abandon the action.

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A construction worker who was allegedly injured from a fall from a ladder was entitled to the restoration of his action to the trial calendar due to his failure to appear at a scheduled status conference; the worker's affidavit of merit established a viable claim, delays in seeking to restore the case to the calendar were caused by confusion stemming from bankruptcy proceedings against the worker's employer and the worker's decision to change law firms, and the worker's motion to restore the action demonstrated a lack of intent to abandon the action; so indicted the First Department in Enax v. New York Telephone Co., (____ A.D.2d ____, 720 N.Y.S.2d 126).

STIPULATIONS OF SETTLEMENT - ELEMENTS

In Royal York Realty, Inc. v. Anconia, (____ A.D.2d ____, 720 N.Y.S.2d 544), the Second Department submitted that stipulations of settlement are favored by the Courts and not lightly cast aside. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident may a party be relieved from the consequences of a stipulation made during the litigation.

INDEMNIFICATION - CONTRACTUAL - AUTOMOBILE

In ELRAC, INC. v. Masara, (____ A.D.2d ____, 720 N.Y.S.2d 517), The Second Department held that pursuant to a vehicle rental agreement, a rental agency was entitled to contractual indemnity from a vehicle lessee in connection with an accident involving the rented vehicle. The agreement provided that the lessee would indemnify the agency for all claims arising out of the use of the rented vehicle, and the lessee did not dispute that she rented the vehicle, that the rented vehicle was involved in an accident, and that a third party sustained the damages as a result of the accident.

INSURANCE - POLLUTION - PERSONAL INJURY

A pollution exclusion clause of a building owner's general business policy did not apply to an underlying personal injury action against the owners relating to fumes contained within the building premises. The exclusion covered injury attributable to a pollutant that had either emanated from source outside the building or in some manner escaped from the building premises, so indicated the First Department in ,Republic Franklin Ins. Co. v. L&J Realty Corp., (____ A.D.2d ____, 720 N.Y.S.2d 473).

SUMMARY JUDGMENT - VERIFIED PLEADING

It was recently held by the First Department that a verified pleading was the equivalent of a responsive affidavit for purposes of a motion for summary judgment, (Travis v. Allstate Ins. Co., A.D.2d_, 720 N.Y.S.2d 499).

In an action against an insurance company for wrongful refusal to pay a claim, the amended complaint verified by the insured was the equivalent of a responsive affidavit where it contained all of the factual allegations referred to in the memorandum of law and relied on to oppose the insurance company's motion.

PREJUDICE FROM DELAY - DISMISSAL

In Moldovan v. Miller, ____ A.D.2d ____, 720 N.Y.S.2d 482), the First Department indicated that the defendants in a personal injury action by plaintiff whose fingertip was severed at age two when the landlord of the family's apartment slammed the door on her hand showed significant prejudice from the delay in prosecution of the action to justify a dismissal of the action. Counsel was unable to locate the landlord and superintendent, and did not even know if either were still alive or available to testify.

INSURANCE - DUTY TO PAY - THIRD PERSON - COOPERATION OF INSURED

In Chase Automotive Finance Corp. v. Allstate_ Insurance Ins. Co., (____ A.D.2d ____, 721 N.Y.S.2d 116), the Third Department ruled that neither the insured's failure to submit additional sworn proof of loss or to attend an examination under oath, nor insured's withdrawal of her own claim, negated the insurer's duty to pay lienholder following a reported theft of an automobile, where insured had a sworn affidavit of the vehicle theft, the matter was promptly reported to the authorities as required by the terms of the policy, and the vehicle was never found.

LABOR LAW - LIABILITY - ELEMENTS

It was recently indicated by the Appellate Division Second Department that to be liable under the labor law section imposing general duty to protect health and safety of workers, a property owner or general contractor must have had the authority to control the activity which brings about the injury, to enable it to avoid or correct the unsafe condition.

A general contractor was not liable for injuries sustained by an employee of a subcontractor, as a result of a crane accident, where although the contractor assumed some general supervisory duties over the project, there was insufficient evidence with regard to the contractor's actual or constructive notice of a hazard which caused the injury, or that the contractor maintained the requisite supervision or control over the activity which caused the injury. (Braun v. Fischbach & Moore, Inc., (____A.D.2d ____, 721 N.Y.S.2d 79).

DISCLOSURE - FAILURE TO COMPLY

In Cooper _v. Shepherd, ____ A.D.2d ____, 721 N.Y.S.2d 30), the First Department held t although plaintiffs delay in complying with a court ordered discovery was unexcused, given the lack of evidence that plaintiffs actions were willful and contumacious, the strong show-

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ing that plaintiffs claim had merit, and the lack of evidence that defendants were prejudiced by the delay in receiving the requested discovery, it was an improvident exercise of discretion for the court to impose the drastic sanction of dismissing the complaint. The court reinstated the complaint on the condition that, within 20 days of service of a copy of the order with notice of entry, plaintiffs counsel pay $500 dollars to the defendants.

DESTRUCTION OF EVIDENCE - SANCTIONS

It was recently indicated by the Second Department in New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec. Inc., (____ A.D.2d ____, 721 N.Y.S.2d 92, that where a party destroys key physical evidence such that its opponents are prejudicially bereft of an appropriate means to confront a claim within incisive evidence, the spoliator may be punished by the striking of its pleading.

The sanction of the striking of the pleading may be applied even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.

HIGH-LOW AGREEMENTS - ELEMENTS - TIMELY PAYMENT

In Batista v. Elite Ambulette Service Inc., (____ A.D.2d ____, 721 N.Y.S.2d 355), the First Department ruled that the phrase "anything the jury comes back with" as used in a high-low settlement under which the accident victim would receive "anything the jury comes back with" between $150,000 and $900,000 or would not receive less than the lower figure or more than the higher figure referred not to gross figure arrived at by the jury but to that figure after apportionment for a comparative fault, absent language in the stipulation to the contrary.

A plaintiff who tendered a release reciting an incorrect settlement amount despite requests from defendants for release reciting the correct amount was not entitled to an award under the statute providing for costs and interest if the settling defendant fails to pay the settlement within the 21 days of the plaintiffs tendering of release.

EVIDENCE - STATEMENT REGARDING BROKEN ITEM

In Gelpi v. 37th Avenue Real Corp., (____ A.D.2d ____, 721 N.Y.S.2d 380), the Second Department ruled that a premises liability plaintiff's testimony that, before she fell in a supermarket, she overheard a customer tell a store employee that he had a jar of minced garlic and "it was either broken or it was leaking, cracked or something" was not inadmissible hearsay where the truth of the statement was not at issue.

An out-of-court statement by unknown declarants, are admissible to establish notice of the dangerous condition even where the accuracy of the statement is not established. Where the truth of the statement is not at issue, it does not matter that the original declarant is unknown and unavailable for cross-examination. Anyone who heard an out-of-court utterance which is offered merely to prove that it was made may testify to it, and have his veracity tested upon cross-examination in the ordinary way.

ASSUMPTION OF RISK - ELEMENTS

In Gamble v. Town of Hempstead (____ A.D.2d ____, 721 N.Y.S.2d 385), the Second Department held that the application of the doctrine of assumption of risk requires not only knowledge of the injury causing the defect, but also, the appreciation of the resultant risk.

An awareness of the risk, for purposes of the doctrine is not to be determined in a vacuum, but rather, it is to be assessed against the background of the skill and experience of the particular plaintiff.

By engaging in a sport or a recreational activity, a participant consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the sport generally and which flow from such participation.

NEGLIGENCE - RECALCITRANT WORKER DEFENSE - ELEMENTS

A worker who did not use a 24-foot ladder provided by his employer when attaching a television cable to a box on a pole, and instead climbed onto a roof to gain access to the pole, because there was shrubbery blocking the access, and there was accumulated debris in the alleyway, did not deliberately refuse to use a safety device and thus was not barred by the recalcitrant worker defense from relying on the protection of the Scaffold Law and provisions of Labor Law obligating employers to provide adequate safety protections, after he was injured due to a collapse of the roof of the shed on which he was sifting while working, so indicated the First Department in Harris v. Rodriquez, (____ A.D.2d ____, 721 N.Y.S.2d 344).

The recalcitrant worker defense to claims under the Labor Law requires a showing of the injured worker's deliberate refusal to use available and visible safety devices in place at the work station.

TRIAL - WEIGHT OF EVIDENCE

In Myers v. S. Schaffer Grocery Corp., ____ A.D.2d ____, 721 N.Y.S.2d 347), the First Department submitted

that disputes as to the significance of the evidence and the credibility of the witnesses are for the jury, rather than the court, to resolve.

RES JUDICATA - HUNTING ACCIDENT - ELEMENTS

In Lossa v. Marcone, ____ A.D.2d ____, 721 N.Y.S.2d 652), the First Department ruled that a hunter was collaterally estopped on the issue of his negligence in a wrongful death action arising from a fatal shooting of his hunting partner even though the State Department of Environmental Conservation, in revoking his hunting license, found that he "simply did not take the time to positively identify his target (as legal game) and shot in haste"; stakes in license revocation proceeding were trivial compared to those involved in the instant action for compensatory and punitive damages, and the hunter's burden in the license revocation was to prove a total absence of negligence on his part.

COURTS - RULES - VALIDITY - ELEMENTS

The exercise of the Court of Appeals' rule-making power does not carry with it a decision that the rules are all constitutional, for such a decision would be equivalent of an advisory opinion which the Court of Appeals is without constitutional power to give. The promulgation of rule a by the Court of Appeals, acting in its administrative capacity, is not a prior determination that it is valid and constitutional, and a determination must await the adjudication in a future case. (New York State Ass'n. of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 721 N.Y.S.2d 588).

EVIDENCE - HEARSAY - ELEMENTS - INADMISSIBLE

In Nucci v. Proper, (95 N.Y.2d 597, 721 N.Y.S.2d 593), the Court of Appeals stated that in determining the reliability of proffered hearsay testimony, a court must decide whether the declaration was spoken under circumstances which rendered it highly probable.

The testimony by a cousin of a high school student who worked as an intern at a hospital regarding a conversation she had with an intern several days after the incident in which the patient suffered brain damage due to oxygen deprivation while being anesthetized, in which the intern stated that she had been present during the incident, and that the anesthetist technician she was with had discovered a problem and alerted the physicians, lacked sufficient indicia of reliability, and thus was not admissible under an exception to the hearsay rule in a medical malpractice matter, even though both cousin and intern were available for cross examination at time of trial.

The reliability of evidence, the showing of which must be made for evidence to be admissible under the exception of the hearsay rule, is the sum of the circumstances surrounding of the making of the statement that render the declarant worthy of belief, and relevant factors include spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, unlikelihood of faulty recollection, and the degree to which the statement was against the declarant's interest.

MALPRACTICE - PHYSICIAN PATIENT RELATIONSHIP - DUTY

It was recently indicated by the Second Department that a physician who examined a patient one time, solely for the purpose of a pre-employment physical, was not proved to have affirmatively advised the patient as to a course of treatment, and thus, there was no physician-patient relationship, as required for the imposition of liability in a medical malpractice suit for wrongful death. The evidence that the physician advised the patient of a positive tuberculosis test result and that she should obtain a second opinion was insufficient. (White v. SouthSide Hosp., ____ A.D.2d ____, 721 N.Y.S.2d 678).

Liability for a medical malpractice matter may not be imposed in the absence of a physician-patient relationship.

LIMITATIONS - CONTINUOUS - TREATMENT - INAPPLICABLE - ELEMENTS

The Second Department recently indicated that medical malpractice plaintiffs failed to demonstrate that a future visit was anticipated following the visit in question, or that the patient's complaints within a year later were related to the earlier complaints, and thus, the continuous treatment doctrine did not apply to overcome a partial limitations bar, (Sottile, Megna, M.D.,P.C., ____ A.D.2d ____, 722 N.Y.S.2d 41).

For the continuous treatment doctrine to apply, further treatment must be explicitly anticipated by both the physician and the patient, as demonstrated by scheduled appointment for the near future, which was agreed upon at a regularly the last visit and conforms to the periodic appointments relating to the treatment in the immediate past.

NEGLIGENCE - SCAFFOLDING - LIABILITY - ELEMENTS

In Corona v. Metropolitan 298-308 Associates, Inc., (____ A.D.2d ____, 722 N.Y.S.2d 51), the Second Department ruled that the key criterion in ascertaining liability under the scaffold law is not whether the party charged with the violation actually exercised control over the work, but rather whether he or she had the right to do so.

The evidence established that the managing agent for the building's owner and three partners in the agent's business association had the right to control the work of the contractor's employee, and thus, the agent and its

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partners were liable under the scaffolding law for the employee's injury when he fell off a roof of a building in the course of his employment, even if the agent and its partners exercised no actual control over the employee's activities.

FIREFIGHTERS' RULE - ELEMENTS

The Court of Appeals in Galapo v. City of New York, (95 N.Y.S.2d 568, 721 N.Y.S.2d 857), ruled that the common law doctrine known as the "firefighters' rule", bars recovery by a firefighter against a property owner or occupant for injuries related to the risk firefighters are expected to assume as part of their job.

The rule is grounded on the policy that - unlike members of the general public -firefighters are specially trained and compensated to confront hazards, and therefore must be precluded from recovering damages for the very situation that create a need for their services. The firefighters are expected to assume as part of their job, the risk inherent and this applies equally to police officers.

CHARGE WAIVER

In Rios v. Smith, 95 N.Y.2d 647, 722 N.Y.S.2d 220), The Court of Appeals ruled that a challenge to the jury instruction in a suit brought against a farm owner for negligently entrusting an all-terrain vehicle (ATV) to his minor son, which had allegedly resulted in injuries to a friend of the son who fell from the back of the ATV, on the basis that the parent's liability for the negligent entrustment should not be considered by the jury before the child's negligence is determined, was not preserved for appellate review, where the owner's objection at the trial was on a wholly different ground.

JUROR'S CONDUCT - ATTORNEY

The First Department recently submitted that statements made by a juror, who was also an attorney, during jury deliberations in a civil trial action did not amount to juror's misconduct warranting a new trial. The statements by the juror were not directed at the evidence, but were merely his understanding of the law, on which the jury was properly instructed and was presumed to have followed (23 Jones Street Associates v. Beretta, A.D.2d 722 N.Y.S.2d 229).

DISCLOSURE - NON-PARTY WITNESS STATEMENT

In Yasnogordsky v. City of New York, (____ A.D.2d ____, 722 N.Y.S.2d 248), the Second Department ruled that generally, statements by a nonparty witness obtained in an investigation after an accident are immune from disclosure pursuant to the rule pertaining to materials prepared for litigation.

A statement of a nonparty witness obtained in an investigation after the accident should be disclosed where it is inconsistent in a material respect with his or her testimony at a deposition, pursuant to the statutory provision permitting the disclosure of material prepared for litigation where the plaintiff has substantial need of it and is unable to obtain its substantial equivalent without undue hardship.

The Trial Court should not have decided an injured bus passenger's motion which to compel the City Transit Authority to disclose a statement of a non-party witness, obtained in an investigation after the accident, without reviewing that statement in camera.

INSURANCE - PROCUREMENT - DUTY

In Structural Building Products Corp. v. Business Ins. Agency. Inc. (_____ A.D.2d _____, 722 N.Y.S.2d 559), the Second Department ruled that absence evidence that a broker breached any duty, or failed to exercise due care in procuring insured's commercial general liability insurance policy, the broker was not liable for the alleged neglect in failing to procure insurance that covered a breach of contract claim asserted against the insured.

The agent or broker may be held liable for neglect for failing to procure insurance with liability limited to that which would have been borne by the insurer had the policy been in force; however, the insured must establish that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction.

INSURANCE - DECLINEATION - DUTY OF INSURED

In American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc. (____ A.D.2d ____, 722 N.Y.S.2d 570), the Second Department indicated that an insurer cannot insist upon cooperation or adherence to the terms of its policy after it has repudiated liability on the claim by sending a letter denying liability.

Once an insurer repudiated its liability, the insured is excused from any of its obligations pursuant to the policy.

EXPERT WITNESS - CALLED BY OPPOSITION

In Vega v. LaPalorcia, (_____ A.D.2d. _____, 722 N.Y.S.2d 563), the Second Department submitted that a plaintiff in a medical malpractice matter may call as a witness the defendant doctor and question him or her as an expert witness. The plaintiff was entitled to fully examine the defendant's physician regarding the alleged departure from accepted medical practice and the issue of informed consent.

AUTOMOBILE - EMERGENCY DOCTRINE

In Dormena v. Wallace, (_____ A.D.2d _____, 723 N.Y.S.2d 72), the Second Department indicated that a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic; rather, such a scenario presents an emergency situation, and the actions of the driver presented with that situation must be judged in that context.

MALPRACTICE - HOSPITAL - VICARIOUS LIABILITY - EXCEPTION

The Second Department recently held that an exception to the general rule that a hospital is not vicariously liable for malpractice of a private attendance physician exists where the patient enters the hospital through the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing.

A hospital could not be held vicariously liable for any malpractice committed by the patient's private physician of twenty years while the patient was hospitalized (Woodard v. LaGuardia Hospital, _____ A.D.2d_____, 723 N.Y.S.2d 109).

INSURANCE - LATE NOTICE - BELIEF OF NON-LIABILITY

The Third Department recently indicated in Spa Steel Products Co., Inc. v. Royal Ins. Co., (_____ A.D.2d_____, 722 N.Y.S.2d 827), that whether an insured acted reasonably in its belief of nonliability for a potential claim, and therefore delayed notification of the potential claim to the insurer, is generally a question of fact.

RES JUDICATA - ELEMENTS

In Waylonis v. Baum, (_____ A.D.2d _____723 N.Y.S.2d 55), the Second Department ruled that the doctrine of res judicata bars a party from relitigating issues which were or could have been litigated in a prior action or proceeding.

PLEADINGS - BILL OF PARTICULARS - AMENDED - NOTE OF ISSUE

An amended bill of particulars that was served without leave of court, after a note of issue had been filed, was deemed a nullity as declared by the Appellate Division, Second Department (Golub v. Sutton, _____ A.D.2d_____, 723 N.Y.S.2d 59).

90-DAY NOTICE - OBLIGATION OF PLAINTIFF

In Biggs v. Mary Immaculate Hosp., (_____ A.D.2d _____, 723, N.Y.S.2d 70). The Second Department ruled that to avoid being held in default, a plaintiff served with a 90-day notice must either comply with the notice by filing a note of issue or by moving, before the default date, to vacate the notice or to extend the 90-day period.

GENERAL MUNICIPAL LAW - LATE NOTICE - ELEMENTS

In Russo v. Monroe-Woodbury Central School District, (_____ A.D.2d _____, 723 N.Y.S.2d 198), the Second Department held that where a claimant seeks leave to serve a late notice of claim pursuant to the General Municipal Law, the court must consider if there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and if the defense would be substantially prejudice by the delay.

A failure to establish a nexus between the delay in filing the notice of claim is not necessarily fatal to the motion for leave to file the late notice of claim, where as in; the case at bar knowledge of the facts alleged in the claims was received contemporaneously and there was not prejudice due to delay.

DISCLOSURE - DENIAL - IMPROVIDENT DISCRETION

In Manrique v. Warshaw Woolen Associates, Inc., (_____ A.D.2d _____, 723 N.Y.S.2d 498), the First Department held that the trial Court improvidently exercised its discretion by refusing to allow defendants in a personal injury action to conduct an additional physical examination and receive authorizations for disclosure of records by plaintiffs treating physicians, even though request was not made until after discovery deadline had passed, where at the time of the request the note of issue had not been filed, the case is less than a year old, the parties had timely conducted much of the discovery, no prejudice to the plaintiff was shown, and a lack of timeliness did not appear to have been willful.

INSURANCE - PROCUREMENT - SUBCONTRACTOR

It was recently indicated by the First Department that a subcontractor had no contractual obligation to indemnify and procure insurance for a phone company, where that duty arose out of the prime contract between the company and the contractor, the subcontractor was not a party to the prime contract, the subcontractor never undertook to satisfy indemnity and insurance procurement obligations set forth in the prime contract, the prime contract had no provisions expressly requiring the subcontractors to purchase insurance or to indemnify, and contract limited duty of subcontractors to "work to be done under such subcontractors" (Bussanich v. 310 East 55th Street Tenants, _____ A.D.2d _____, 723 N.Y.S.2d 444).

MALPRACTICE - VICARIOUS LIABILITY - HMO

In Jones v. U.S. Health Care (____ A.D.2d____, 723 N.Y.S.2d 478), the First Department ruled that a health

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maintenance organization (HMO) could not be held vicariously liable for doctors' and hospitals' alleged malpractice in discharging a maternity patient and her baby prematurely. The HMO's group master contract, membership card and member handbook clearly stated that doctors and hospitals participating in the health care program were independent contractors, and HMO would have paid for a longer hospital stay if the treating doctors had decided that it was medically necessary.

RIGHTS - WAIVABLE

In Green v. Montgomery (95 N.Y.2d 693, 723 NYS2d 744), the Court of Appeals submitted that even such constitutional rights as the right to a jury trial, the right to appeal, and the right against self-incrimination are waivable .

GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - IMPROPER ENTITY

It was recently indicated by the First Department in Lugo v. New York City Housing Authority (____ A.D.2d ____, 724 N.Y.S.2d 28), that an accident victim who mistakenly brought an action against the City, believing it to be the owner of premises where the accident occurred was not entitled to file a late notice of claim upon discovering that the City Housing Authority was the actual owner of the premises. The identity of the premises owner was easily ascertainable.

NEGLIGENCE - PRIMA FACIE CASE - ELEMENTS

To make out a prima facie case of negligence, a plaintiff must prove that the defendant owed a duty, breached that duty, and that the breach proximately caused the plaintiffs injury, so indicated the First Department in Wayburn v. Madison Land Ltd. Partnership, (____ A.D.2d ____, 724 N.Y.S.2d 34).

ASSUMPTION OF RISK - CHEERLEADER

In Traficenti v. Moore Catholic High School, (____ A.D.2d ____, 724 N.Y.S.2d 24), the First Department held that the risk posed to a cheerleader by performing her cheerleading routine on a bare wood gym floor, as opposed to a matted surface, was obvious and had to be deemed to have been freely assumed, such that liability could not be imposed upon the parochial high school for injuries sustained by the cheerleader on a theory that We school failed to require the use of mats during the routine.

The students spotters failure to catch the cheerleader was not an intervening or superseding cause of the cheerleader's injuries precluding the imposition of liability on the parochial high school. It could not be said that the spotter's error was not foreseeable, and there was an issue of fact as to whether that error was proximately caused by a failure of the school to properly instruct the team so as to assure that the risks of the activity in which the students were engaged were not unreasonably augmented.

COLLEGES - OFF CAMPUS PROPERTY - DUTY

In Frank v. 5 Towns College (____ A.D.2d ____, 724 N.Y.S. 175), the Second Department ruled that the defendant college owed a duty to warn the plaintiff of defective windows in an off-campus housing because it had assumed the responsibility for any problems that arose as a result of off-campus housing it arranged for its students, and the plaintiff relied thereon.

GENERAL MUNICIPAL LAW - ASSUMPTION OF RISK - PARK

The Second Department recently indicated that City owed no duty to supervise the behavior of players in an independent adult softball league that was using the city's softball facilities, but was neither sponsored by the city nor run under its auspices and thus the city would not be held liable to the player for injuries suffered while another player, who allegedly had been drinking in violation of the rules applicable to the city leagues, ran into him at second base, (Mauro v. City of Yonkers, ____ A.D.2d ____, 724 N.Y.S.2d 194).

Even if the, city had a duty to enforce the rule against alcohol or prevent a drunken behavior on the city-owned field, the softball player injured in the collision with the opposing player during the game assumed the risk inherent in the activity by participating in a game of softball with players whom he knew had been drinking alcoholic beverages.

VENUE - RESIDENCY

In Pellegrino v. File, (____ A.D.2d ____, 724 N.Y.S.2d 165), the First Department ruled that venue in a legal malpractice action brought by a husband and wife was properly in New York County, though the couple's marital residence was in Richmond County. The husband moved out of the marital residence prior to the institution of the action, and established a bona fide residence in New York County.

AUTOMOBILE - DOUBLE PARKED - LIABILITY - PROMIATE CAUSE

In O'Malley v. USA. Waste of New York, Inc., (____ A.D.2d ____, 724 N.Y.S.170), the Second Department held that vehicle owners were negligent in failing to secure the steel door to a container being transported by

the vehicle, and thus, were liable to a motorist who, upon leaving his vehicle, was struck by the door, even though the motorist's vehicle was double-parked. The double-parking did not cause or contribute to the accident, but merely furnished the condition or occasion for the occurrence.

FORKLIFT OWNER - LIABILITY

In Brady v. Biotech Corp., (____ A.D.2d ____,724 N.Y.S.2d 480), the Second Department held that a forklift owner was not liable for any injuries incurred by the forklift operator when the forklift allegedly failed to brake, resulting in the operator's foot being caught between the forklift and wall, inasmuch as the owner had no notice of the alleged defect and its actions were not the proximate cause of the operator's injuries.

AUTOMOBILE - NO-FAULT - SERIOUS INJURY - HERNIATED DISC

In Lesser v. Smart Cab Corp., (____ A.D.2d ____, 724 N.Y.S.2d 412), the First Department indicated that whether a herniated disc suffered in an automobile collision satisfies the "serious injury" threshold under the no-fault law is a question for the trier of the facts.

GENERAL MUNICIPAL LAW - PAINTING OF CURB

It was recently held by the Second Department that the painting of a curb cut with white enamel paint so as to render it inherently slippery did not give rise to a cause of action on behalf of a pedestrian who slipped on the surface (LaRussa v. Shell Oil Co., ____ A.D.2d ____, 724 N.Y.S.2d 459).

NEGLIGENCE - SNOW REMOVAL - DUTY

In Grau v. Taxter Park Associates, (____ A.D. ____, 724 N.Y.S.2d 497), the Second Department submitted that there was no duty to remove snow and ice while a storm was in progress.

Liability for the failure to remove accumulated snow and ice can attach only a reasonable time after the storm has ended.

Snow or ice removal actions taken during a storm may be actionable if performed negligently, i.e., they either cause or create a hazardous condition or exacerbate the naturally hazardous condition created by the storm.

In the cited case, no evidence indicated that a hazardous condition was either created or exacerbated by a snow removal contractor's ice removal efforts during a storm, so as to support the imposition of liability on the contractor or premises owner in favor of the victim of a slip and fall on a patch of ice.

DEPOSITION TRANSCRIPTS - ERRORS - PROCEDURES

It was recently indicated by the Supreme Court that any claim regarding the accuracy of a transcription of deposition will generally require a hearing to determine whether the stenographer erred, as the stenographer certifies the correctness of the transcript. A motion to suppress the transcript will be considered reasonably prompt if made within 60 days after receipt of a copy of said transcript.

The obvious transcription errors in which the stenographer either failed to transcribe or garbled certain portions of deponent's testimony, coupled with typographical errors and misspelling of names and dental terms, did not warrant partial suppression of the deposition where, while the errors rendered some portions of the testimony unclear, they did not appear to contradict deponent's defense to the dental malpractice claim, and thus were harmless. The defendant would be permitted to reconstruct those questionable portions of his testimony (Principale v. Lewner, _____ Misc.2d _____724 N.Y.S.2d 575).

AUTOMOBILES - THEFT - DUTY OF OWNER

In Adamson v. Evans, (____ A.D.2d ____, 724 N.Y.S.2d 760), the Second Department ruled that an owner was not liable for the negligence of a thief who was operating the owner's motor vehicle without his permission at the time of the accident, absent any evidence that the vehicle was being operated with his consent or that the owner left the car unattended with the keys in the ignition or otherwise violated the Vehicle and Traffic Law.

AUTOMOBILE - NO-FAULT - SERIOUS INJURIES - HERNIATED DISC

The Second Department recently submitted that the medical evidence that an automobile accident victim suffered from a disc herniations and bulging disc were insufficient to show that he suffered a "serious injury" within the meaning of the threshold for tort suit under the no-fault law absent any proof that the disc problems were the result of an accident and any evidence as to the extent or degree of the victim's alleged physical limitations (Ceglian v. Chan, ____ A.D.2d ____, 724 N.Y.S.2d 762).

INSURANCE - RENTAL - EXTENT OF COVERAGE

In ELRAC INC. v. Ward, (96 N.Y.2d 58, 724 N.Y.S.2d 692), The Court of Appeals ruled that the same minimal insurance requirements were imposed on a car rental companies, regardless of whether they self-insure or purchase outside insurance. The primary coverage required of rental car companies by statute includes a duty to defend.

The renters of the vehicle, while operating the vehicle "in the business of the owner", within the meaning of the statute providing that insurance policy providing that the minimum liability coverage required to be obtained by rental car companies must inure to the benefit of any person legally operating the vehicle in the business of the owner.

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FORUM NON CONVENIENS - ELEMENTS

It was recently held by the First Department that an action by Irish citizens living in London to recover for injuries sustained while vacationing in Granada when a husband was hit with a power boat owned and operated by a local sports business as he was snorkeling was better adjudicated in Granada, and thus would be dismissed under the doctrine of form non conveniens contingent on the defendant agreeing to waive the statute of limitations defense in Granada. The accident occurred in Granada, the material witnesses were in Granada or England, all medical treatment was rendered in Granada and London and the law of Granada will apply (Healy v. Renaissance Hotel Operating Co., ____ A.D.2d ____, 624 N.Y.S.2d 719).

ANTI-SUBROGATION RULE - ELEMENTS

The Court of Appeals recently submitted in ELRAC INC. v. Ward, (96 N.Y.2d 58, 724 N.Y.S.2d 692), that subrogation" is an equitable doctrine that entitled an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrong doing has caused a loss for which the insurer is bound to reimburse the insured.

Pursuant to the "anti-subrogation rule" an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered, even where the insured has expressly agreed to indemnify the party from whom the insured's rights are derived and thus the owner may not step into the shoes of the insured to sue a third party tort feasor if that third party also qualifies as an insured under the same policy for damages arising from the same risk covered by the policy.

The rule that a rental company cannot enforce a standard clause in the rental agreement requiring the renter to indemnify it for any injuries caused to third parties by the use of the rental vehicle, where the damages falls below the minimum insurance that the rental company is required to provide under the vehicle and traffic law, is supported by the anti-subrogation rule even though the company is a self-insurer. Self-insurers are not immune from anti-subrogation principles.

DAMAGES - FRACTURED COCCYX

In Loney v. Fico, (____ A.D. ____, 725 N.Y.S.2d 45), the First Department ruled that an award of $149,050.00 for past pain and suffering was fairly supported by the evidence. The plaintiffs injury, a fracture coccyx was not amenable to casting or surgical intervention and involved a painful healing process lasting several years, and plaintiff suffered severe pain for eight or nine months after the accident that did not fully abate until some two years after the accident, with resulting incapacitation and loss of enjoyment of life.

RES IPSA LOQUITUR - HOSPITALS

It was recently submitted by the First Department in Thomas v. New York University Medical Center (____ A.D.2d ____, 725 N.Y.S. 35), that a hospital and other defendants were liable pursuant to the doctrine of res ipsa loquitur in a medical malpractice matter to a patient injured when he partially slid off an operating table while under general anesthesia. Such accident would not have occurred absent negligence, and the defendants failed to explain their conduct in the operating room which lead to the accident.

NEGLIGENCE - OUT OF POSSESSION OWNER

Generally, to hold an out-of-possession owner liable for injuries caused by a defect or dangerous conditions, the owner must have retained sufficient control over the premises and much have actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, he or she could have corrected it, so indicated the Second Department in Abrams v. Berelson, A.D. 725 N.Y.S.2d 81).

ASSUMPTION OF RISK - DANCER

The testimony of a dancer who was allegedly injured when a make shift stage where she was performing started to shake, indicated that she had actual knowledge of the defect, and thus, the doctrine of assumption of risk applied to preclude the imposition of liability on the sponsor of the dance, competition, absent any evidence of inherent compulsion, so indicated the Second Department in Meli v. Star Power Nat Talent Co. (____ A.D.2d ____, 725 N.Y.S.2d 92).

EVIDENCE GUILTY PLEA

The Third Department recently submitted that a truck driver's guilty plea to a traffic violation was admissible in a personal injury matter arising out of an intersection collision, notwithstanding an inadvertent or artful description of the turn in conviction as alleged right turn rather than illegal left turn (Miszko v. Luma, (____ A.D.2d ____, 725 N.Y.S.2d 459).

INSURANCE PROCUREMENT - DAMAGES

In Inchaustegui v. 666 5th Ave., Ltd. Partnership (96 N.Y.2d 111, 725 N.Y.S.2d 627), the Court of Appeals ruled that a landlord's damages for the subtenant's breach

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compatible. For purposes of statutory construction, a prior general statute yields to a later specific or special statute.

LIMITATIONS - RELATION-BACK - CPLR 203 - ELEMENTS

The applicability of the relation-back doctrine requires proof that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well (Spaulding v. Mt. Vernon Hosp., ____ A.D.2d ____, 725 N.Y.S.2d 358).

A patient failed to establish the applicability of the relation-back doctrine in a medical malpractice action brought against the hospital and nurse, and, by amended complaint, against the anesthesiologist, and so the complaint against the anesthesiologist was time-barred. The claims did not arise out of the same conduct, in that causes of action asserted against the hospital in the original complaint were based on its vicarious liability for the nurse's alleged negligence in improperly inserting a needle into the patient's arm while she was in labor, whereas as claims against the anesthesiologist in the amended complaint were based on entirely different conduct, anesthesiologist alleged negligence in improperly inserting an intravenous line when the tubal ligation was performed and in thereafter failing to timely diagnose the patient's alleged injury, and the anesthesiologist had no reason to know that, but for a mistake, the action, which was based on the nurse's alleged negligence, would have been brought against her as well.

The burden is on the plaintiff to establish the applicability of the relation-back doctrine once the defendant has demonstrated that the statute of limitations has expired.

JUROR'S QUALIFICATIONS

In People v. Hausman, (____ A.D.2d ____, 727 N.Y.S.2d 109), the Second Department indicated that for purposes of jury selection it is almost always wise to err on the side of disqualification since the worse the Court will have done in most cases is to have replaced one impartial juror with another impartial juror.

When a question is raised about the juror's ability to be impartial, the juror must expressly state that his prior state of mind concerning the case or the parties will not affect his verdict, and that he will render an impartial verdict solely based, on the evidence. If there is any doubt that the jury is unbiased, the Court should discharge the juror for cause.

For the juror to be impartial, it is not enough if the juror merely says that he will try to be fair, or that he hopes or thinks it probable that it could be fair.

Nothing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication that she is predisposed against a particular defendant or a particular type of case.

NEGLIGENCE - CONSTRUCTION - SCAFFOLDING LAWS - ELEMENTS

In Narducci v. Manhasset Bay Associates, (96 N.Y.2d 259, 727 N.Y.S.2d 37), the Court of Appeals generally outlined the applicability of the Scaffolding Laws. In the cited case it indicated that not every worker who falls at a construction site, not every object that falls on a worker, gives rise to the extraordinary protection of the Scaffold Law; rather, liability is contingent upon the existence of a hazard contemplated in the Scaffold Law and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.

While the Scaffold Law is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed, this principal operates to impose absolute liability only after a violation of the statute has been established. A violation of said law cannot establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury. Scaffold Law applies to both "a falling worker" and a "falling object" situation.

With respect to falling objects, the Scaffold Law applies where the failing of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned must be secured.

For the Scaffold Law to apply in a case involving a worker injured by a failing object, the worker must show more than simply that an object fell causing injury to a worker, and must show that the object fell, while being hoisted or secured, because the absence or inadequacy of the safety device or the kind enumerated in the statute. The fact that an injured worker may have been working at an elevation when an object fell is of no moment in a

"falling object" case pursuant to the Scaffolding Law, because type of hazard is involved. Working at an elevation does not increase the risk of being hit by an improperly hoisted load of materials from above, as the hazard posed by working at an elevation is that, in the absence of adequate safety devices, a worker might be injured in a fall, while failing objects are associated with the failure to use a different type of safety device also enumerated in the statute.

A worker who was injured while removing window frames from a third floor of a fire damaged building when he was struck by a piece of glass that fell from an adjacent window frame was not injured by an object that was being hoisted or secured, or due to an elevation-related risk, and thus could not recover for his injuries under the Scaffolding Law. The glass that fell was part of a pre-existing building structure and was a general hazard, rather than a hazard specifically addressed by the Scaffold Law, and the fact that the worker was performing work at a height was irrelevant, since the ladder upon which he was standing functioned properly. The ladder had no casual connection to his injury, and thus was not an inadequate safety device which could support a recovery pursuant to the Scaffold Law. The worker did not contest that the ladder functioned properly, and his injuries were not due to a fall, but rather, was caused by a falling object.

The fact that gravity worked upon the object which caused the worker's injury standing alone is insufficient to support this Scaffold Law claim. Workplace accidents which stem from "gravity-related" occurrences stemming from improperly hoisted or inadequately secured objects, but which involve only a de minimis elevation differential, may be distinguished from accidents within the scope of the Scaffold Law, on the basis that such occurrences do not fit within the Legislature's intended application of the statute.

DISCLOSURE - SUBPOENA

The First Department recently indicated that a subpoena may not be used for the purpose of discovery or to ascertain the existence of evidence (Porter v. SPD Trucking, ____ A.D.2d ____, 727 N.Y.S.2d 70).

INSURANCE NOTICE - ENDORSEMENT

In Steadfast Ins. Co. v. Sentinel Real Estate Corp., (____ A.D.2d ____, _A.D.2d 727 N.Y.S.2d 393), the First Department ruled that an endorsement which purported by its terms only to add to a pre-printed notice requirements of a commercial general liability policy did not supersede a notice provision, so as to obviate the requirement that the insured gave prompt notice of the occurrence.

An insured need not demonstrate that it has been prejudiced by the insured's failure to comply with the policy's noticed condition in order to disclaim coverage based on such non-compliance.

The insured did not satisfy the noticed requirements when it served notice upon the insurer approximately 10 months after an action was commenced. The Court further indicated that the insurer's decision not to become actively involved in the claim until it approached the per claim or aggregate self-insured retention limits of the policy did not without more, estop it from disclaiming coverage based on insured's non-compliance with the noticed condition. It is to be noted that the policy required notice of claim within 15 days.

WITNESSES - IMPEACHMENT

In Cammarota v. Drake, (____ A.D.2d ____, 727 N.Y.S.2d 809), the Third Department submitted that the general rule prohibiting a party from impeaching his or her own witness does not apply where the witness is an adverse party.

INSURANCE - INTENTIONAL ACT - ELEMENTS

In Slayko v. Security Mut. Ins. Co., (____ A.D.2d ____, _A.D.2d , 728 N.Y.S.2d 282), the Third Department submitted that in determining the applicability of a liability

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policy's intentional act's exclusion, the critical issue is not whether the cause of the injury was accidental or intentional, but whether the harm that resulted to the victim was expected or intended by the protected person.

A tort feasor's unintended harm to a shooting victim did not fall within the intentional acts exclusion in a homeowners general liability policy. Although it certainly appeared that the tort feasor intentionally pulled the trigger of a twenty gage shot gun, the record was devoid of evidence that he intended to injure the victim or was aware that the gun was loaded prior to his discharge, and the victim's personal injury complaint as well as both parties deposition testimony,

AUTOMOBILES - RENTAL VEHICLES - AUTHORIZED DRIVER

The Court of Appeals in addressing the liability of a rental driver for property damage to the vehicle is driven by a person other than the authorized driver indicating that the General Business Law Section 396-Z(2) prohibited a company from holding an authorized driver liable for damage in excess of $100 dollars submitted that the question presented was whether this section applied to a driver other than the authorized driver. The Court concluded the legislature did not intend to add the requirement that the vehicle must be driven by the renter. Master Cars, Inc. v. Walters, (95 N.Y.S.2d 395, 718 N.Y.S.2d 7).

TRIVIAL DEFECT - EXCEPTION

In Argenio v. Met Transportation Authority, (277 A.D.2d 165, 716 N.Y.S.2d 657), the First Department indicated that a plaintiff who tripped and fell on a well traveled pedestrian walkway over a defect described as two inches wide, two inches long and one quarter inch deep with an edge in essence described a trivial defect. However, pursuant to the plaintiffs claiming that the defect was of a sufficient size to entrap the toe of a sneaker, resulted in the Supreme Court granting summary judgment. On appeal, the Court reversed indicating that the defect though trivial had the added factor of the presence of an edge which posed a tripping hazard rendering the defect non-trivial and thus raising a factual question.

STRICT PRODUCT LIABILITY - PERSPECTIVE PURCHASER

A plaintiff while at defendant's store was interested in purchasing a chair. The salesman invited her to sit upon it which she did and it promptly collapsed. The trial court rejected the plaintiffs proof of a defective product design since she had not purchased the chair. The court also rejected the claim pursuant the claim of a res ipsa theory. A defendant's verdict followed. On appeal, the First Department reversed on the ground that the product being held out for sale is a strict products claim was cognizable. The court held that the res ipsa claim was inapplicable, Rivera-Ermerling v. N. Fortunoff of Westbury, (____ A.D.2d ____, 721 N.Y.S.2d 653).

RELEASE - MUTUAL STATE OF FACT

In Gibli v. Kadosh, (279 A.D.2d 35, 717 N.Y.S.2d 553), the Appellate Division being confronted with a situation wherein a plaintiff executed a release on a mistaken premise and subsequently brought a suit for the injury sustained was permissible.

It appeared that a dentist performed work upon the plaintiff. During the course of the procedure, a nerve injury was incurred. Surgery was required for the injured plaintiff. A release was prepared wherein the dentist would pay for the surgical bills and then be released from further liability. After the surgery, it was discovered that the injury claimed to have been sustained was more severe. A different diagnosis was then rendered.

Upon institution of suit, a civil court judge set aside the release. The Appellate Term reversed and dismissed. The First Department then reversed and allowed the suit indicating in essence that a true mutual mistake of fact existed. The parties assumed one condition that could be treated by repairing the damaged nerve which turned out to be a different and far more serious diagnosis. The contract would not have been entered Into have the true facts been known.

TRIAL - COLLATERAL ESTOPPAL - BURDEN OF PROOF

In Mathieu v. Scalea, (_____A.D.2d _____, 728 N.Y.S.2d 755, the Second Department held that a party seeking to impose a doctrine of collateral estoppel has the burden of demonstrating that the issues in the present action are identical to the issues in the prior action, while the party resisting collateral estoppel must demonstrate that he or she lacked a full and fair opportunity to litigate the issues in the prior action.

SWEET 16; CPLR ART. 16 -- SIXTEEN YEARS AFTER ENACTMENT

*by *Julian D. Ehrlich*[1]

Understanding CPLR Article 16, which is entitled "Limited Liability of Persons Jointly Liable", is critical for 1) assessing accurate settlement values before trial, 2) creating coherent verdict sheets at trial and 3) determining which tortfeasor pays what amount after trial.

Art. 16 has been criticized as "dismally constructed"[2], "undistinguished"[3], possessing "the elegance and clarity of the Internal Revenue Code"[4], and a product of legislative battles that "yielded a statutory scheme built on compromises resulting in ambiguities, inconsistencies and difficulties in administration...[as a result of which] the effect of and meaning of many of the provisions remain uncertain."[5]

Not surprisingly then, sixteen years after enactment[6], Article 16 is plagued by divided thinking and unanswered questions in fundamental areas.

Indeed, one commentator writing in 2002 noted that "it is only in recent years that the impact of CPLR Article 16 has begun to be felt."[7]

Before Art. 16 was enacted in 1986, the common law rule of joint liability permitted a plaintiff to enforce the entire judgment against any defendant found even 1% liable.

Then, to relieve marginally responsible deep pocket defendants from paying large verdicts[8], Art. 1601(1) limited the amount of non-economic damages[9] that a plaintiff could enforce to a defendant's proportionate share where that defendant was found less than 51% liable. Thus, such defendants now have several liability only.

Art. 1602 contains a plethora of exceptions (and some explanations) to the limitation on joint liability in Art. 1601, which may account for the general lack of case law on the topic[10].

In 2001 the Court of Appeals clarified that Section 1602(2)(iv) is a saving provision rather than an exception to Art. 1601 for vicariously liable defendants in Rangolan v. County of Nassau[11].

While the debate continues after Rangolan as to whether a negligent defendant can apportion liability against an intentional tortfeasor under Section 1602(5)[12], this discussion first examines the effect of plaintiff's negligence and bankrupt defendants in applying Art. 1601, and then considers parties' pleading requirements.

Art. 1601(1) is not clear on how to handle plaintiff's comparative negligence in determining whether a defendant is 51% liable.

This statute states that when "...a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss...."

Does this language require that the plaintiff's share of fault be reallocated on a pro rata basis to the defendants for the limited purpose of calculating whether a defendant is 51% liable?

Case law is remarkably scarce given the elementary nature of the question and frequency with which plaintiffs are assessed comparative fault.

One reported case that addresses the issue is Robinson v. June[13], where a trial level court concluded that plaintiff's comparative negligence should be extrapolated and allotted to the defendants. The court in Robinson recognized that reallocating plaintiff's fault to the defendants in that case resulted in one defendants share being "nudged" over 50%; thus that defendant lost the "several only benefit of Article 16".[14] However, the court reasoned that since that defendant had been initially found 50% liable, the result of employing this method was not inconsistent with the statute's purpose of preventing defendants with "minor fault" from paying major financial punishment.[15]

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Would a defendant found liable in the range of 40% to 50% or lower be considered to have minor fault thus subject to reallocation? The court in Robinson refused to further define "minor fault"[16] but adopting this method for wider application would require that new thresholds be defined.

The PJI commentaries consider and reject the reallocation approach,[17] taking the view that the percentage number assigned to the defendants in the jury verdict determines whether a defendant is 51% liable.[18] The commentaries find that the statute's reference to "relative culpability" derives from CPLR Art. 14 -A, suggesting that the Legislature intended plaintiff's fault not be reallocated.[19]

Prof. David Siegel finds "[t]here are arguable points on both sides" but "probably" plaintiff's negligence should not be reallocated to the defendants given the overall statutory scheme. [20] In Prof. Siegel's view, the multitudes of exceptions in Art. 1602 indicate that had the Legislature considered the issue, it would not have reallocated plaintiff's share of fault.[21] Indeed, he notes that the extrapolation construction gives more money to less deserving plaintiffs since the greater the plaintiff's comparative share, the more likely a defendant will be reassessed over the 51% threshold.[22]

There is a similar split in thinking on reallocating fault in cases involving bankrupt defendants.

Art. 1601(1) states that when applying the limitation on joint liability to defendants found less than 51% liable, "the culpable conduct of any person not a party to the action shall not be considered in determining equitable share if the claimant proves with due diligence that he or she was unable to obtain jurisdiction over such person...."

In Matter of New York City Asbestos Litigation[23], a New York County trial level court held that bankrupt defendants share of fault should be reallocated to the remaining defendants since "the legislature did not intend to absolutely limit a tortfeasor's potential liability to the applicable share of fault" and "[a] corporation with respect to whom the automatic statutory stay of 11 U.S.C. §362 applies may be deemed to be beyond the court's jurisdiction for purposes of Art. 1601." Interestingly, the decision states that "equitable considerations simply have no standing in the interpretation of article 16."[24]

However, the First Department appears to have overruled that decision in the recent case of Kharmah v. Metropolitan Chiropractic Center.[25] In Kharmah, the court found that it was proper for the lower court to grant plaintiff's motion to sever the bankrupt parties and stated that "equity requires that the defendants-appellants have the benefit of CPLR article 16 rights even though there is an automatic stay" thus "their exposure should be limited proportionately to their share of fault."[26]

Accordingly, while there is tepid support for changing the allocations of fault to obtain joint liability in cases involving plaintiff's negligence and bankrupt defendants, doing so circumvents both fact finders determinations and the intent of the statute to "painstakingly balance"[27] harsh, inequitable results to defendants with burdens on innocent plaintiffs.

Also, the failure of either side to properly plead Art. 16 can determine the outcome but there is hardly clear direction in the statute or case law.

CPLR 1603 entitled "Burdens of Proof" contains requirements for both plaintiffs and defendants and pleading can determine the outcome of a case.

Art. 16 requires that the plaintiff allege and prove exemptions to Art. 1601. However, the statute is silent as to when this must be done or what form the allegations should take. Apparently, plaintiff must plead an exception whether or not the defendant asserts an Art. 16 affirmative defense which is awkward.28

How long can a plaintiff wait to plead Art. 16.?

In Mastorianni v. County of Suffolk[29], a trial court permitted plaintiff to plead the exception at the pretrial conference stage. In Morales v. County of Nassau[30], the Court of Appeals suggested the plaintiff would be allowed to wait until the charging conference stage but the same year the same court in Cole v Mandell Food Stores, Inc.[31] stated the plaintiff must plead Art. 16 "in time for the defendant to prepare its defense and adjust its trial strategy." Plaintiff first raising the point on appeal is too late.[32]

When plaintiff does assert Art. 16, what form shall it take?

Different panels of the First Department placed different emphasis on the form of plaintiff's pleading requirement in three decisions issued on August 1, 2001 dealing with apportioning liability against an intentional tortfeasor under Art. 1602(5).

In Roseboro v New York City Transit Authority[33], the majority's decision found that the form of plaintiff's pleading was the determining factor. Plaintiff alleged that the action "fell into one or more exceptions of Art. 16."[34] The court stated "the necessity to allege a ground for

exemption is construed as a pleading requirement to be asserted in the complaint or in an amendment to the complaint" and found that the plaintiff's failure to reference a specific section resulted in plaintiff waiving its arguments.[35] Plaintiffs identification of the section of Art. 16 in a motion in limine was deemed too late to afford the defendant notice to adjust its trial strategy.[36]

However, Judge Ellerin's dissent finds that plaintiff has no such requirement in either the statute or case law and places the burden on the defendant who "may always seek amplification by serving a bill of particulars requesting identification of the particular exemption".[37]

In Chianese v. Meir[38], the majority found that plaintiff's pleading specifically alleging Art. 1602(5) as an exemption was the determining factor in deciding not to permit apportionment as to the nonparty intentional tortfeasor.

However, in Concepcion v. New York City Health and Hospital Corporation[39], neither the majority, in deciding to permit apportionment as to the nonparty intentional tortfeasor, nor the dissent mention pleading at all.

Another important unanswered question of pleadings is whether a defendant must identify the non-party tortfeasor in affirmative pleadings to get the benefit of Art. 1601.

While Art. 1603 requires that a defendant who is asserting limited liability prove its equitable share by a preponderance of the evidence, there is no mention of any pleading requirement.

Again there is a divergence in thinking in reported cases.

In Marsala v. Weinraub[40] a split Second Department held that the defendants were not required either to plead Art. 16 as an affirmative defense or to provide a bill of particulars identifying nonparty tortfeasors to obtain the limitation in Art. 1601.[41]

Similarly in Rodi v. Landau4[2], a trial court permitted a defendant to introduce evidence at trial of a nonparty tortfeasor's culpability where the defendant pleaded Art. 16 as an affirmative defense but did not identify the nonparty.

However, in Ryan v. Beavers, the Fourth Department held that where a plaintiff demands, a defendant claiming the limitation of Art. 1601 in an affirmative defense must provide a bill of particulars. Similarly, in Zylinski v. Marine Drive Apartments[43], a trial court held that a defendant who pleaded Art. 16 as an affirmative defense but did not put the plaintiff on notice of the identity of the nonparty tortfeasor was not entitled to submission to the jury for determination of the nonparty culpability.

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Sweet 16; CPLR Art. 16 -- Sixteen Years After Enactment

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A balance of sorts was set forth in Maria E. v 599 West Associates[44]. In Maria E. a trial court held that the defendant must plead Art. 16 as an affirmative defense and provide plaintiff with a bill of particulars only where the identity of the alleged nonparty tortfeasor would likely surprise the plaintiff or raise issues of fact not appearing on the face of the pleading under CPLR 3018(b).[45]

This case-by-case approach would be fact specific but plaintiffs and defendants could be counted on to take self-serving positions regarding surprise.

Given the current state of the law, practitioners must take heed of which department they are in when drafting demands and responses for bills of particulars on this defense. Defendants must weigh the strategic benefits of withholding the identity of the nonparty against the likelihood of being precluded from asserting the defense. The safest course for practitioners is to serve detailed pleadings as early as possible. Form becomes substance.

Sometimes it takes a long time after a convoluted statute is enacted to resolve even a fundamental issue. For example, the Court of Appeals first decided how to handle plaintiff's comparative negligence in the context of General Obligations Law §15-108(a) 27 years after that statute was originally enacted.[46]

No doubt uncertainty will continue pending definitive decisions divining the Legislatures intent behind Art. 16.

Until then, Happy Birthday Art. 16!

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[2] *New York State Law Digest* by Prof. David Siegel, April 2001

[3] *New York Practice Third* by Prof. David Siegel (1999)

[4] McGlaughlin Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B CLPR §1602:1, 1996, Pocket Part at 228.

[5] *In re: Brooklyn Navy Yard Asbestos Litigation*, 971 F2d 831, 480 (1992) by Chief Judge Oakes.

[6] L. 1986, ch. 682 eff. July 30, 1996.

[7] "CPLR Article 16 and Dismissals of Claims Against Defendants" by Thomas A. Moore and Mathew Gaier, N.Y.L.J. February 5, 2002.

[8] *Concepcion v. New York City Health and Hospital Corporation*, 234 A.D2d 87, 729 NYS2d 478, 480 (1st Dept. 2001)

[9] §1600 states: "Definitions. As used in this article, the term "non-economic loss" includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss."

[10] *Matter of New York City Asbestos Litigation*, 175 Misc.2d 819, 670 N.Y.S.2d 735, 736 (J. Lehner 1998) stating "This section [Art. 1601] has received relatively little judicial attention because most tort litigation is excluded from its application by virtue of CPLR 1602."

[11] 96 N.Y.2d 42, 725 N.Y.S.2d 611 (2001).

[12] "Confusion Persists on Tortfeasor Liability" by Alan Kaminsky and Nicole Mauskpf N.Y.L.J. December 12, 2001, "CPLR Article 16; Substance and Procedure" by Prof. Vincent C. Alexander, N.Y.L.J. September 17, 2001, "Court of Appeals Addresses Joint Liability" by Alan Kaminsky and Rose M.J. Charles N.Y.L.J, May 25, 2001, " A Tricky Case: An Intentional Tort Combined With a Negligent Act" by Prof. Robert A. Barker N.Y.L.J., May 22, 2000.

[13] 167 Misc.2d 483, 637 N.Y.S.2d 1018 (J. Relihan 1996).

[14] 637 N.Y.S.2d at 1022.

[15] *Id.*

[16] *Id.*

[17] IB P.J.I. ∂ 2:275 p1215-1216 comment (2001).

[18] *Id.*

[19] *Id.*

[20] *New York Practice Third*, §168B, p 249-250 (1999).

[21] *Id.* at 250.

[22] *Id.*

[23] 175 Misc.2d 819, 670 N.Y.S.2d 735, 737-738 (J. Lehner 1998).

[24] *Id.* at 738.

[25] __ A.D.2d __, 733 N.Y.S.2d 165 (1st Dept. 2001).

[26] Id. at 166.

[27] Morales v County of Nassau, 94 NY2d 218, 703 NYS2d 61 (1999).

[28] *Cole v Mandell Foods Stores, Inc.*, 93 N.Y2d 34, 39, 687 NYS.2d 598, 600 (1999); *New York Practice Third* by Prof. David Siegel, p 255.

[29] 705 N.Y.S.2d 504 (Sup. Suffolk J Oshrin 2000).

[30] 94 N.Y.2d 218, 224, 703 NYS2d 61, 63 (1999).

[31] 93 N.Y.2d 34, 40, 687 NYS2d 598, 600 (1999).

[32] *Morales v. County of Nassau*, 94 NY2d 218, 703 NYS2d 61 (1999.

[33] 286 A.D.2d 222, 729 NYS2d 472 (1st Dept. 2001)), rearg. denied 287 A.D.2d 947, 732 NYS2d 855 (2001).

[34] 729 N.Y.S.2d at 474.

[35] *Id.*

[36] *Id.*

[37] 285 A.D.2d 315, 729 N.Y.S.2d 460 at 476.

[38] 285 AD2d 315, 729 NYS2d 460 (1st Dept. 2001).

[39] 284 AD2d 37, 729 NYS2d 478 (1st Dept. 2001).

[40] 208 A.D.2d 689, 617 NYS2d 809, 810-811 (2d Dept. 1994).

[41] 170 A.D.2d 1045, 566 NYS2d 112 (4 Dept. 1991).

[42] 170 Misc.2d 180, 650 N.Y.S.2d 514 (J Miller 1996).

[43] 680 N.Y.S.2d 830 (J. Sconiers 1998).

[44] 188 Misc.2d 119, 726 NYS2d 237 (J. Y Gonzales 2001)

[45] *Id.* at 124-125, 726 NYS2d at 241-242.

[46] *Whalen v. Kawaski Motors Corp.* 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1999).

COURT OF APPEALS GIVES THIRD-PARTY CLAIMS THE WHOLE FINGER

by Barbara D. Goldberg & Christopher Simone*

While Workers' Compensation Law / 11 has been the subject of much judicial review, it was only last year, in Castro v. United Container Machinery Group, Inc.,[1] that the Court of Appeals first had the opportunity to address the statute's "grave injury" provisions. The particular injury at issue was the "loss of multiple fingers". Construing the statute narrowly and strictly according to its express terms and as clearly intended by the legislature, the Court held, in no uncertain terms, that such provision means the loss of the "whole" finger, not just its tip.

GRAVE INJURY THRESHOLD

Section 11 of N.Y. Workers' Compensation Law, as amended in 1996,[2] provides that an employer of an injured worker shall not be liable to a third person for contribution or common law indemnity, unless the third person proves, through competent medical evidence, that the worker has sustained a "grave injury." The statute defines a "grave injury" as:

> only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

CASTRO V. UNITED CONTAINER MACHINERY GROUP

The plaintiff, Marvin Castro, commenced a products liability action against United Container Machinery Group, the manufacturer of a cardboard die cutting machine that severed the distal-most tips of five of his fingers (two from his right hand, three from his left) in a work-site incident. United then commenced a third-party action for contribution or indemnification against the plaintiff's employer, Southern Container Corp. Southern moved to dismiss the third-party complaint as barred by / 11 and United countered that the plaintiff sustained the "loss of multiple fingers". The Supreme Court, finding "questions of fact regarding the extent and nature of plaintiff's 'grave injury'", denied Southern's motion, but on appeal the Appellate Division, Second Department reversed and dismissed United's third-party complaint.[3] The Court held that based on the statutory language and the legislative history and purpose behind / 11, the loss of fingertips did not constitute the "loss of multiple fingers", and thus, the plaintiff did not sustain a "grave injury".[4]

The Court of Appeals subsequently granted United leave to appeal.[5] On appeal, United argued that the injury satisfied / 11's "loss of multiple fingers" criterion, despite the statute's silence on the issue of partial losses. United also contended that the question of whether the partial loss of multiple fingertips constituted a "grave injury" is a case-by-case question for the trier of fact. Lastly, United asserted that Southern's showing merely that the plaintiff lost the tips of five fingers was insufficient to satisfy its burden on summary judgment.[6]

A FINGER IS A FINGER IS A FINGER

In a unanimous opinion by Judge Ciparick, the Court rejected United's position as based on "a misguided reading of the requirements of Workers' Compensation Law / 11". The Court held that "based on the plain language and legislative history of Workers' Compensation Law / 11, plaintiff's injury cannot be classified as grave."[7] Specifically, the Court observed that since "[i]njuries qualifying as grave are narrowly defined" in the statute, "the only determination to be made is whether the injury falls within the statute's objective requirements." The Court therefore held that:

> The term "loss of multiple fingers" cannot sensibly be read to mean partial loss of multiple fingers. Words in a statute are to be given their plain meaning without resort to forced or unnatural interpretations (see, McKinney's Cons Laws of NY, Book 1, Statutes, / 232; Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583). As a matter of standard English usage, the word "finger" means the whole finger, not just its tip.
>
> There is, similarly, no merit in United's further contention that the word "total" appearing elsewhere in the litany of injuries leads to the conclusion that its absence in the phrase under consideration was intended to mean something less than a total loss of multiple fingers. In the list of

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> injuries contained at Worker' Compensation Law / 11, "total" is used in conjunction with the term "loss of use" and not in conjunction with "loss of multiple fingers" or any other enumerated body part. While the phrase loss of use might require some indication as to the degree of use lost, the term "loss of multiple fingers" does not.[8]

In rejecting United's interpretation of / 11, the Court applied the "plain meaning" formula, urged by Southern, that it enunciated in Majewski v. Broadalbin-Perth (supra) as follows:

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (Patrolmen's Benevolent Assn. v. City of New York, 41 N.Y.2d 205, 208; see also, Longines-Wittnauer v. Barnes & Reinecke, 15 N.Y.2d 443). As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:

> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (Tompkins v. Hunter, 149 N.Y. 117; see also, Matter of Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98).9

SECTION 11'S LEGISLATIVE HISTORY

As Castro explains, "[t]he legislative history is fully consistent with this reading of the statute".[10] Specifically, by limiting claims against employers to cases involving statutorily defined "grave injuries", the Legislature sought to limit the effect of Dole v. Dow Chemical Corp.,[11] which had allowed claims for contribution and indemnification against employers no matter how minimal the injury. This limitation was intended to align New York with other states where Workers' Compensation provides the *exclusive* remedy for workers injured on the job, and where, with the exception of *contractual* indemnification, no claims for contribution or indemnification against an employer are permitted. Section 11 does not deny plaintiffs recovery, as they may nonetheless maintain actions against other alleged tortfeasors (such as United in the Castro case) as they would have done even if permitted to sue their employers.

This purpose to limit, substantially, the number of third-party claims maintainable against employers is borne out by both / 11's statutory language and its legislative history. The Omnibus Workers' Compensation Reform Act of 1996, which amended / 11, states:

> It is the intent of the legislature that * * * employers obtain a degree of economic protection from devastating lawsuits. * * * It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and replacing [Dole v. Dow] liability except in cases of grave injury.12

The same objective is reflected in numerous memoranda contained in the Bill Jacket accompanying the legislation. For example, a Memorandum from the State Department of Labor to the Governor's counsel states that the proposed legislation "restores the integrity of the workers' compensation system" by "repeal[ing] current law which allows third parties to sue employers in workers' compensation cases." The Labor Department recognized that allowing third-party actions "not only undermined the intent of the workers' compensation law, but also costs New York employers millions in additional workers' compensation insurance premiums." Thus, WCL / 11 "would significantly limit when third parties may sue employers in workers' compensation cases."13

Moreover, in Majewski (supra), which held that / 11 was to be applied prospectively, the Court of Appeals specifically acknowledged that the intention of modifying the Dole case was "repeatedly expressed by all sides during the legislative debates," and that "[m]emoranda issued contemporaneously with the passing and signing of the Act provided that 'the exclusive remedy' [of Workers' Compensation] would be 'restored and reinforced'".[14]

It is likewise clear that the courts and the Workers' Compensation Board were to have no discretion in determining what constituted a "grave injury." This is made explicit by the language of / 11, stating that "grave injury" shall mean "only" one or more of the specifically enumerated injuries. As one authority has noted, "grave injury" is defined to be only those injuries "which are stated in the list provided in the statute and as determined by medical evidence to be a permanent and total loss", and that this "appears to express the intent of the legislature not to permit the Workers' Compensation Board discretion in determining whether an employer may be impleaded".[15]

In narrowly interpreting WCL / 11, the Castro Court, quoting the Governor's approval memorandum, recognized this extensive and unambiguous legislative history:

> The grave injuries listed are deliberately both *narrowly and completely described.* This list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action.16

Moreover, and apparently responding to United's argument that the statutorily enumerated injuries seemed arbitrary and without rational basis, the Court concluded that

"[w]hile it is doubtful that any list that purported to be the complete catalog of "grave" injuries would - or ever could - meet with universal approval, that is not the question before us and we may not lightly alter this legitimate exercise of legislative prerogative."[17]

The Court of Appeals' message in Castro is manifest: "grave injury" is a term of legislative origin and construct, and not one susceptible of varying or subjective interpretations. The narrowly defined "grave injuries" enumerated in Workers' Compensation Law / 11 are to be construed in strict accordance with their plain meaning and consistently with the legislature's purpose to significantly curtail third-party actions against employers, and without the exercise of judicial discretion.

THE EFFECT OF "CASTRO"

Although Castro has the direct result of prohibiting United's third-party action, its overall impact on insurance law reaches much further. In particular, the Court's treatment of the phrase "loss of multiple fingers" should apply equally to / 11's other objective "grave injuries", including the "loss of multiple toes", "loss of nose", "loss of ear" or "loss of an index finger". Furthermore, while the amputation of any portion of an "arm" or a "leg" necessarily qualifies as a "grave injury" given the attendant loss of the "hand" or "foot", respectively, in order to qualify as "grave" the amputation of those extremities otherwise must be complete.[18] The reasoning in Castro also provides some insight into just how "severe" facial disfigurement must be to qualify as grave, and it would seem that nothing short of catatonia or the like would satisfy the statute's "acquired injury to the brain" provision.

Called upon to interpret that latter provision in a summary judgment context, however, the Third Department held that "the 'permanent total disability' envisioned by the Legislature relates to the injured party's employability and not his or her ability to otherwise care for himself or herself and function in a modern society."[19] The Bench reasoned:

> Notably, with the exception of death, paraplegia and quadriplegia, none of the other categories of "grave injury" would have the likely effect of preventing the injured party from engaging in routine household functions. In fact, many of the categories, such as loss of the nose, an ear, an index finger or multiple fingers or toes, deafness and permanent and severe facial disfigurement, would permit the injured party to perform a wide range of personal activities. We therefore reject third-party defendant's contention that the burden was on the parties opposing the summary judgment motion to come forward with competent medical evidence that plaintiff's earnings capacity had been permanently and totally reduced to zero and also that plaintiff lacked the capability to attend to even routine household functions. To the contrary, we conclude that the competent evidentiary showing that plaintiff suffers from postconcussive syndrome, which has "permanently disabled [him] from competitive employment" in even the most menial of tasks and, in fact, that he has been awarded Social Security disability benefits, is sufficient to raise a material question of fact.[20]

While it appears that Way injected considerations into the interpretive process inconsistent with the strictures of Castro, it remains to be seen how the Court of Appeals will treat those considerations, particularly given that the "acquired injury" provision is by far the most problematic and difficult for the courts.

To be sure, the plain meaning and legislative history of /11 must be consistently applied. Before the decision, several appellate courts did so in a manner now substantiated by Castro[21]. Since the decision, the Second and Fourth Departments have disposed of several third-party claims citing Castro[22], as has at least one trial court.[23] It is likely that because of the clear mandate of Castro, the appellate courts will not be called upon to address many more "grave injury" cases since most will be dismissed at the trial level with little chance of reversal on appeal. Similarly, questionable cases may be settled with a nominal contribution from the employer. Several of the above noted post-Castro decisions were still pending at the time Castro was decided.

At the time it was handed down, Castro served to impliedly overrule two decisions of the Appellate Division, First Department, which were relied upon by United and the plaintiff. The second of the two cases, however, was eventually heard by the Court of Appeals. In Banegaz v. F.L. Smithe Machine Co., Inc.,[24] the operator of an envelope folding machine suffered in a work-site accident the complete amputation of his right ring finger and the partial amputation of his right pinky finger. He commenced a product liability action against the machine's maker, which brought a third-party claim against his employer. The trial court denied the employer's motion to dismiss the third-party action under / 11, and on appeal the First Department affirmed, holding as follows:

To read the phrase "loss of multiple fingers" to mean, as the employer urges, a total loss of multiple fingers would be to render superfluous the word "total" selectively used before the phrase "loss of use * * * of a [] * * * hand". Had the Legislature intended that the "loss of multiple fingers" must be "total" in order to qualify as a grave injury, it would have used that word immediately before that phrase"[25]

The argument rejected in Banegaz - that the "loss of multiple fingers" must be total - was the position accepted by the Court of Appeals in Castro. Moreover, Castro explicitly abjured the First Department's search for a modifier of the phrase "loss of multiple fingers", holding that, despite the statute's silence, the loss must be total. Thus, as the issue in Castro was identical, the holding of Banegaz has been undermined and should not be followed.

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Although addressing a different injury, the First Department's Meis v. ELO Organization, LLC[26] decision was also apparently overruled by Castro[27], as confirmed by the High Court's later disposition of the case upon the First Department's grant of leave.[28] In Meis, the plaintiff plumber sustained the complete amputation of the thumb of his dominant hand in a work-related injury. Meis sued the premises owner and general contractor, which in turn impleaded his employer. The employer moved, unsuccessfully, to dismiss the third-party actions under Workers' Compensation Law / 11. On appeal, the First Department, in a 4-1 decision, affirmed, finding that "a jury should be allowed to examine the degree of plaintiff's impairment to determine if it is sufficiently 'grave' to allow third-party recovery against his employer".[29] Such holding is now at odds with Castro and probably would not withstand Court of Appeals' scrutiny, inasmuch as it contradicts both / 11's plain meaning and legislative history.

To be sure, the "loss of a thumb" is not an enumerated "grave injury", and in fact, was specifically excluded from / 11. According to a reputable authority, the choice between inclusion of an index finger or a thumb was left to the plaintiff's bar, which ultimately opted for index finger.[30] Another source reports that prior to enacting / 11 the anatomical issues were discussed: the Governor wanted "thumb" in the list, whereas the Assembly Speaker Silver favored "index finger". Ultimately, the Governor dropped the thumb and the impasse was broken.[31] Thus, Meis specifically endeavored to expand / 11 to include an injury that was purposefully excluded.

In addition, among the factors the Meis majority considered as defining "grave injury" was whether the plaintiff was able to return to his trade.[32] As the dissent explained, however, "that * * * is not the standard".[33] In fact, if that were the standard then the Meis majority would have to agree with the holding of Castro because the plaintiff there eventually returned to the same job, performing the same work at the same die cutting machine.

Lastly, the Meis majority focused on the "loss of use" provision of / 11, noting that "[t]he statute does not require the total loss of a hand; it requires instead the loss of the hand's use".[34] This reasoning obviously ignores the plain meaning of the phrase "permanent and total" unmistakably employed to modify such loss. Interestingly, the same Court in Banegaz acknowledged this modifier and phraseology as such.[35] In Meis, however, the plaintiff *did not even allege*, much less prove, "permanent and total loss of use" of his hand; he claimed only limitations and restrictions of function.[36]

The sole dissenter in Meis, Justice Tom, criticized the majority's analysis as "ignoring the clear language of / 11 and expanding the statutory designated list", thereby "turn[ing] an exclusive legislative delineation into an illustrative and merely descriptive listing", which the Court "lack[ed] power to do".[37] This criticism evidently was well taken by the Court of Appeals, which seemed to borrow some of its reasoning and language. As Justice Tom correctly articulated, "the distinction [between injuries] lay well within the realm of legislative prerogative, leaving no room under these circumstances for judicial fiat."[38]

The Court of Appeals apparently agreed with Justice Tom when it subsequently reversed Meis and dismissed the third-party complaints, succinctly explaining (citation omitted):

> Workers' Compensation Law / 11 does not list the loss of a thumb as a "grave injury," and plaintiff failed to demonstrate that due to the amputation of his thumb he suffers a "permanent and total loss of use" of the hand (see Workers' Compensation Law / 11). Plaintiff's argument that the loss of his thumb automatically renders his hand totally useless is unavailing. As this Court recently held in Castro v. United Container Mach. Group, "[i]njuries qualifying as grave are narrowly defined * * * [and the w]ords in the statute are to be given their plain meaning without resort to forced or unnatural interpretations."[39]

SUMMARY JUDGMENT STANDARD

Some controversy over the applicable summary judgment standard on a motion to dismiss for lack of a grave injury under / 11 warrants a brief discussion. In Ibarra v. Equipment Control, Inc.[40], the defendant manufacturer, trying to maintain a third-party action against the plaintiff's employer, argued that the employer had the initial burden of showing, by evidentiary proof, that the plaintiff did not suffer a grave injury, and that since it failed to do so, the burden never shifted to the manufacturer to demonstrate otherwise. In support of this argument, the manufacturer relied on the holding of a Queens County, Supreme Court case called Harris v. Metropolitan Life Insurance Co.[41], which applied the ordinary summary judgment burden standards to a / 11 dismissal motion. The Second Department rejected this argument, stating:

> The Legislature, in amending Workers' Compensation Law / 11, specifically determined that an employer will not be held liable for contribution or indemnification to any third person "unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'". Thus, it is clear that the burden falls on the third party seeking contribution or indemnification against an employer to establish a "grave injury". Admittedly, * * * a

party seeking summary judgment must initially show a lack of triable issues of fact and it is only then that the burden shifts to the party opposing the motion. However, in cases involving Workers' Compensation Law / 11, as amended, the third party opposing the motion for summary judgment and seeking contribution or indemnification against an employer bears the ultimate burden of showing a "grave injury". At the very least, it must demonstrate the existence of a question of fact in this regard. This burden is not dependent on whether the party moving for summary judgment made a sufficient prima facie case as to the absence of a "grave injury". To the extent that Harris v. Metropolitan Life Ins. Co. * * * holds otherwise, we find it unpersuasive.

Although the grave injury issue in Ibarra, as now confirmed by Castro, was correctly decided, the Court's discussion respecting the ostensible shift in the parties's traditional summary judgment roles understandably created some confusion. Professor Alexander characterized the Court's holding as "questionable" since "[p]rima facie entitlement to summary judgment, whether upon the basis of the pleadings or actual evidence, must be shown by the moving party before any burden shifts to the opponent."[42] He further explained that / 11's allocation of the burden of proof to the third person should not affect the conventional criterion governing opposition to summary judgment because that burden

> properly construed, applies to the defendant's ultimate burden at trial on its claim over against the employer after plaintiff's case has been established. Until that point, the defendant/third person should be entitled to minimize plaintiff's injuries as part of its defense against the plaintiff's claim. It follows that the third person, in order to keep the employer in the case, should not be required to definitively prove, before trial, that the plaintiff has suffered a grave injury. To defeat an employer's motion for summary judgment, it should be sufficient for the third person to show that, on the evidence thus far produced, a jury reasonably could find the plaintiff's injuries to be grave. A triable issue of fact would thus exist.43

Recently, however, the Second Department expressly recognized and corrected the bewilderment created by Ibarra. Specifically, in Fitzpatrick v. Chase Manhattan Bank[44], the Court explained that the traditional standards for summary judgment did indeed apply to motion to dismiss in a / 11 context, as follows:

> We note that certain dictum in Ibarra v. Equipment Control, supra, appears to suggest that a proponent of a motion for summary judgment seeking to dismiss a third-party action for want of grave injury is not obligated to prove, prima facie, that the plaintiff did not sustain a grave injury. This is not so and to this extent Ibarra v. Equipment Control, supra, should not be followed. Rather, a proponent of a motion for summary judgment dismissing a third-party complaint because the plaintiff did not sustain a grave injury, is required to make a prima facie showing of entitlement to judgment as a matter of law, much the same as a defendant seeking summary judgment dismissing a claim for non-economic damages for lack of a serious injury under the No-Fault Insurance Law (Insurance Law / 5102[d]; see, Way v. Grantling, 186 Misc. 2d 110, 714 N.Y.S.2d 639; Harris v. Metropolitan Life Ins. Co., 183 Misc. 2d 431, 703 N.Y.S.2d 703).

Lastly, it should be observed that it will be the rare occasion where the issue of grave injury will reach a jury, especially in light of Castro. While there may be instances where such a determination may be open to varying interpretations - such as in a case as to whether a facial disfigurement is "permanent" and "severe" - thereby creating an issue of fact, in almost all cases the question will be addressed in the context of a summary judgment application by the employer who must show that the plaintiff's injury does not fit into the statutory definition of "grave". Castro teaches that / 11 easily lends itself to such a judicial determination in the first instance.

1. See, 96 N.Y.2d 398, 761 N.E.2d 1014, 736 N.Y.S.2d 287 (2001)
2. L. 1996, ch. 635
3. See, 96 N.Y.2d at 400, 761 N.E.2d at 1015, 736 N.Y.S.2d at 288
4. 273 A.D.2d 337, 338, 710 N.Y.S.2d 90, 91 (2nd Dept., 2000)
5. 96 N.Y.2d 701, 722 N.Y.S.2d 793 (2001)
6. See, Castro, at 400, 1015, 288
7. Id.
8. Id., at 401, 1016, 289
9. 91 N.Y.2d at 583, 673 N.Y.S.2d at 9
10. See, Castro, at 401, 1016, 289
11. 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972)
12. L. 1996, ch. 635, / 1; 1996 McKinney's Session Laws of N.Y., at 1913
13. Mem., August 7, 1996, from N.Y. State Department of Labor to Michael C. Finnegan; see, also, correspondence dated August 16, 1996 from The State Insurance Fund to the Governor's counsel, noting that

> [T]he bill restores the concept of workers' compensation being the exclusive remedy of injured employees. This is a crucial accomplishment since New York currently stands alone among states in allowing third parties to pursue claims for contribution and indemnity against employers to the full extent of the employer's equitable share of the employee's damages. The exposure to Dole v. Dow liability made it impossible for New York businesses to successfully compete with those of other states.

14. 91 N.Y.2d at 584, 585, 673 N.Y.S.2d at 969 (citations omitted)
15. Minkowitz, 2001 Supp Practice Commentaries, McKinney's Cons Laws of NY, Electronic Update

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16. See, Castro, at 402, 1016, 289 (emphasis in original)
17. Id.
18. It could be argued, consistently with / 11's plain meaning and legislative history, that the terms "permanent and total" apply not only to "loss of use" but to "amputation" as well. Indeed, it is conceivable that an "arm, leg, hand or foot" might be completely amputated in an accident, but later successfully reattached through surgical intervention. Under such circumstances, the "amputation" would not be "permanent and total", and thus, not "grave".
19. Way v. Grantling, 289 A.D.2d 790, 792, 736 N.Y.S.2d 424, 427 (3rd Dept., 2001)
20. Id., at 792-793, 427
21. See, e.g., Bardouille v. Structure-Tone, Inc., 282 A.D.2d 635, 724 N.Y.S.2d 751 (2nd Dept., 2001)(barely visible facial scarring and disfigurement of ear not "permanent and severe facial disfigurement"or "loss of ear"); Bradt v. Lustig, 280 A.D.2d 739, 721 N.Y.S.2d 114 (3rd Dept., 2001), app. dismissed, 96 N.Y.2d 823, 754 N.E.2d 202, 729 N.Y.S.2d 442, 2001 WL 557974 (May 10, 2001)(although WCL / 11 lists "paraplegia or quadriplegia" as grave injuries, paralysis contemplated by Legislature limited to permanent, not transient, paraplegia or quadriplegia); Hussein v. Pacific Handy Cutter, Inc., 272 A.D.2d 223, 708 N.Y.S.2d 74 (1st Dept., 2000)(injury causing corrected visual acuity of 20/40 in one eye not "grave injury"); Ibarra v. Equipment Control, Inc., 268 A.D.2d 13, 707 N.Y.S.2d 208 (2nd Dept., 2000)(loss of vision in one eye not "grave injury"); Hilbert v. Sahlen Packing Co., 267 A.D.2d 939, 701 N.Y.S.2d 564 (4th Dept., 1999), app. dismissed, 95 N.Y.2d 790, 711 N.Y.S.2d 156 (particular facial and internal injuries, fractures and partial loss of hearing and vision not "grave"); Barbieri v. Mount Sinai Hospital, 264 A.D.2d 1, 706 N.Y.S.2d 8 (1st Dept., 1999)(facial scarring not "permanent and severe facial disfigurement" and cognitive deficits not "permanent total disability" under / 11); Fichter v. Smith, 259 A.D.2d 1023, 688 N.Y.S.2d 337 (4th Dept., 1999), lv. denied/dismissed, 94 N.Y.2d 994 (fracture of both heels not "grave injury")
22. See, Sergeant v. Murphy Family Trust, ___ A.D.2d ___, ___ N.Y.S.2d ___, 2002 WL 398364 (4th Dept., March 15, 2002)(facial scarring); Perez v. Ozone Park Lumber, 290 A.D.2d 427, 738 N.Y.S.2d 580 (2nd Dept., 2002); Dunn v. Smithtown Bancorp, 286 A.D.2d 701, 730 N.Y.S.2d 150 (2nd Dept., 2001)(cognitive deficits, mild expressive language deficits, and impaired problem solving ability not "grave" injuries); McCoy v. Queens Hydraulic Co., Inc., 286 A.D.2d 425, 729 N.Y.S.2d 733 (2nd Dept., 2001)(loss of upper third of index finger not "grave"); Fitzpatrick v. Chase Manhattan Bank, 285 A.D.2d 486, 728 N.Y.S.2d 484 (2nd Dept., 2001)(cognitive deficits, facial fractures and significant restriction of use in wrist not "grave")
23. See, Weaver v. Greenlee Textron, Inc., 2001 WL 940215 (Sup. Ct., Cortland Co. July 17, 2001)(total loss of sensation in right pinky and decreased sensation in right ring finger not "grave injury" under "loss of multiple fingers" provision)
24. 266 A.D.2d 113, 698 N.Y.S.2d 143 (1st Dept., 1999)
25. Id., at 113-14, 143-44
26. 282 A.D.2d 247, 723 N.Y.S.2d 170 (1st Dept., 2001)
27. See, Siegel, New York State Law Digest, No. 501, September 2001, at p. 1-2
28. 286 A.D.2D 1010, 731 N.Y.S.2d 609
29. Meis, at 248-49, 171-72
30. Siegel, A Flood of 1996 Procedure Bills: The Workers' Compensation (Dole/Dow) Bill, New York Law Journal, Outside Counsel, October 7, 1996, at p. 6, col. 4
31. Metz, Court Rejects Suit on Finger Loss, Newsday, June 29, 2001, at A20
32. See, Meis, 282 A.D.2d at 248, 723 N.Y.S.2d at 171
33. Id., at 254, 176
34. Id., at 248, 171
35. See, Banegaz, 266 A.D.2d at 113-14, 698 N.Y.S.2d at 143-44
36. The plaintiff's bill of particulars alleged "'significant deficits in functional capabilities of the right upper extremity'; phantom pain in the amputated area; weakness, numbness, and tingling in the fingertips, 'residual diffuse swelling in the fingers and some slight restriction of motion of approximately 5 degrees at all PIP and MIP joints of the second through the fourth digits'; 'acute sensitivity at the end of the thumb metacarpal area to touch'; 'injuries to the nerves, muscles, blood vessels, tendons, ligaments and other soft tissues in and around the affected areas'; and 'permanent loss of use and function of the affected areas as well as chronic and continual pain restriction and limitation of motion and muscle spasm'". His bill also asserted "that his injuries will result in premature osteoarthritic changes; that he is unable to engage in 'those usual and customary daily recreational activities that [he] pursued prior to the occurrence'; that he has been confined to bed and home continuously and intermittently; and has been incapacitated from his job from the date of the accident to the present." (282 A.D.2d at 248, 723 N.Y.S.2d at 171)
37. See, Meis, 282 A.D.2d at 252-53, 723 N.Y.S.2d at 174
38. Id., at 253, 175. Consider the following similar language from Castro: "While it is doubtful that any list that purported to be the complete catalog of 'grave' injuries would - or ever could - meet with universal approval, that is not the question before us and we may not lightly alter this legitimate exercise of legislative prerogative." (Castro, at 402, 1016, 289)
39. 97 N.Y.2d 714, ___ N.E.2d ___, ___ N.Y.S.2d ___ (2002)
40. 268 A.D.2d 13, 707 N.Y.S.2d 208 (2nd Dept., 2000)
41. 183 Misc. 2d 431, 703 N.Y.S.2d 703 (2000)
42. Alexander, *Addressing the 'Grave Injury' Issue by Motion for Summary Judgment*, NYLJ, November 20, 2000, p. 3
43. Id.
44. 285 A.D.2d 486, 728 N.Y.S.2d 484 (2nd Dept., 2001)

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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.

Placement Charge:

There is a 10% charge for preferred positions. This includes cover placement.

Inserts:

Call for details about our low cost insert service.

Production Information

Mechanical Requirements:

Ad Size	Width x Height
Full Page	7 1/2" x 10"
Two-Thirds Page	4 7/8" x 10"
Half Page (Vertical)	4 7/8" x 7 1/4"
Half Page (Horizontal)	7 1/2" x 4 7/8"
Third Page (Vertical)	2 3/8" x 10"
Third Page (Square)	4 7/8" x 4 7/8"
Third Page (Horizontal)	7 1/2" x 3 1/8"

Advertising Copy:

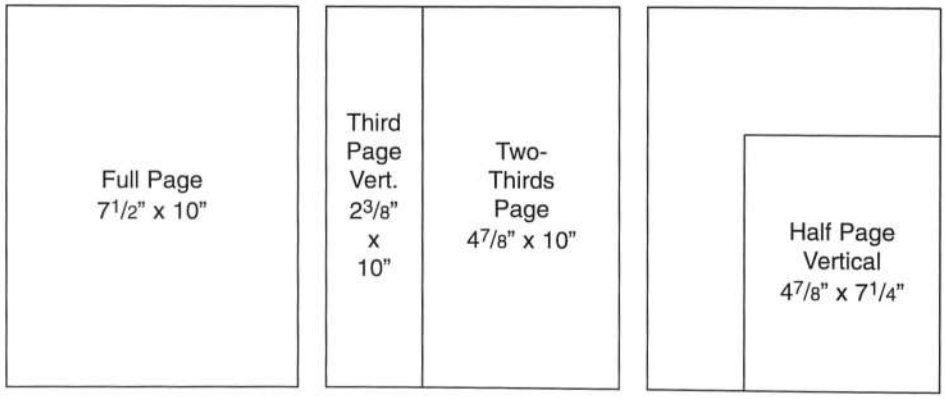
Publisher requires "Camera Ready" art conforming to sizes shown at left. Stats, veloxes or negatives are acceptable BUT NOT FAXED COPY. Publisher provides art if required (see item "Art Charge").

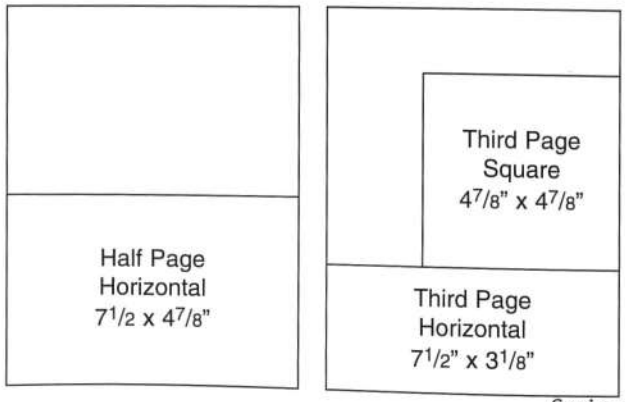
Color:

Specify PMS color. For best results use 133 line screen negatives, right reading, emulsion side down - offset negatives only. For 4-color ads, progressive proofs or engraver's proofs must be furnished.

Bleed:

The trim size of the publication is 8 1/2" x 11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.





THE DEFENDANT

25-35 Beechwood Ave.
P.O. Box 9001
Mt. Vernon, NY 10553
Tel.: (914) 699-2020
Fax: (914) 699-2025

ATTENTION MEMBERS

DANY HAS A WEBSITE

- View CLE & Dinner Announcements on Line •
- Read Recent Articles on Legal Issues •
- Search for other members •
- Confirm the Accuracy of your membership listing and add your telephone, fax numbers and your e-mail address •

View our site at

www.dany.cc or www.dany.ws

or

www.defenseassociationofnewyork.com

APPLICATION FOR MEMBERSHIP*

THE DEFENSE ASSOCIATION OF NEW YORK
Executive Office
25 Broadway - 7th Floor
New York, New York 10004
(212) 509-8999

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $150.00 for individuals admitted to practice more than five years; and $400.00 for firm, professional corporation or company.

Name _____

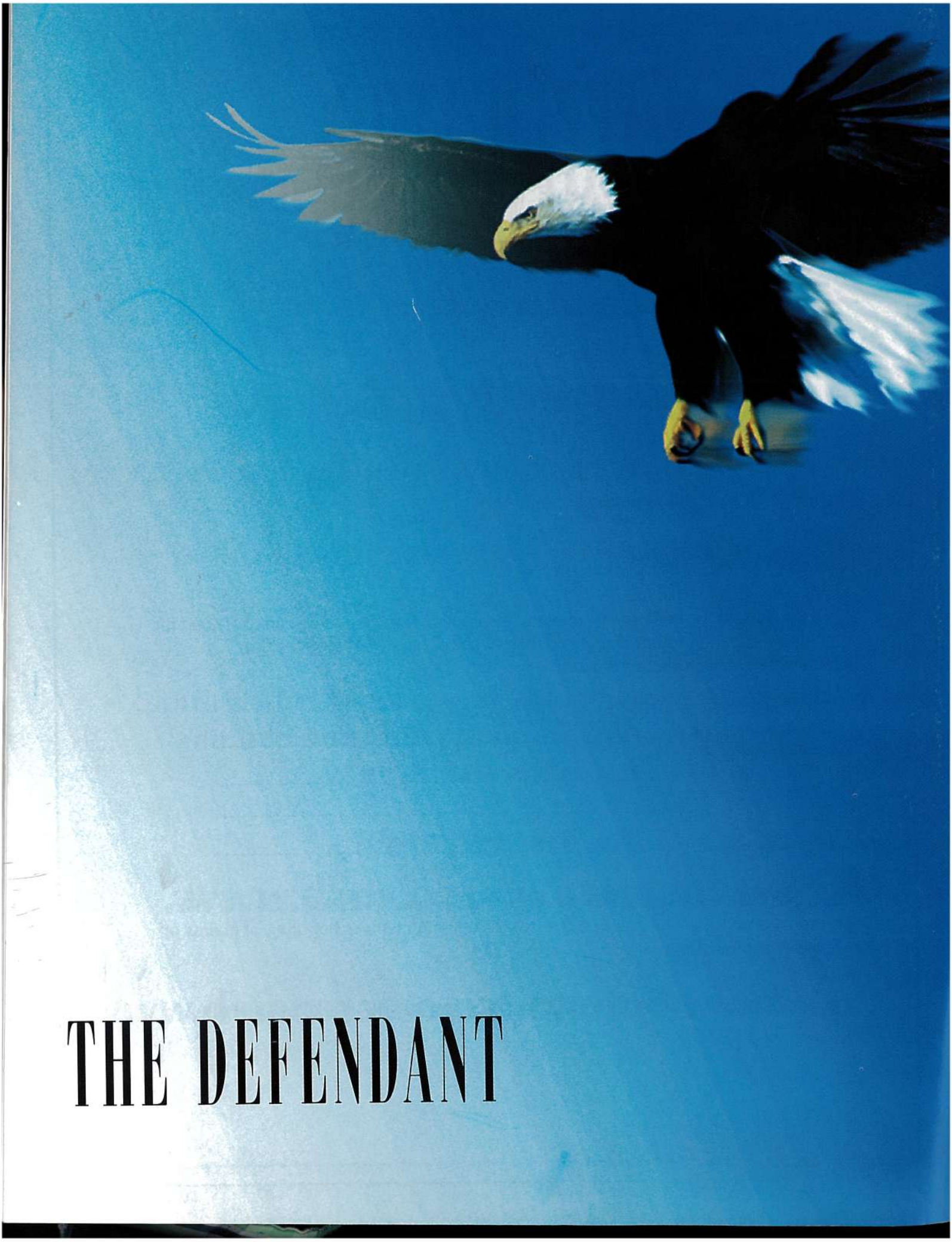
Address _____

_____

Tel. No._____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

*ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.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