CM EAST COAST REPORT of Recent Decisions

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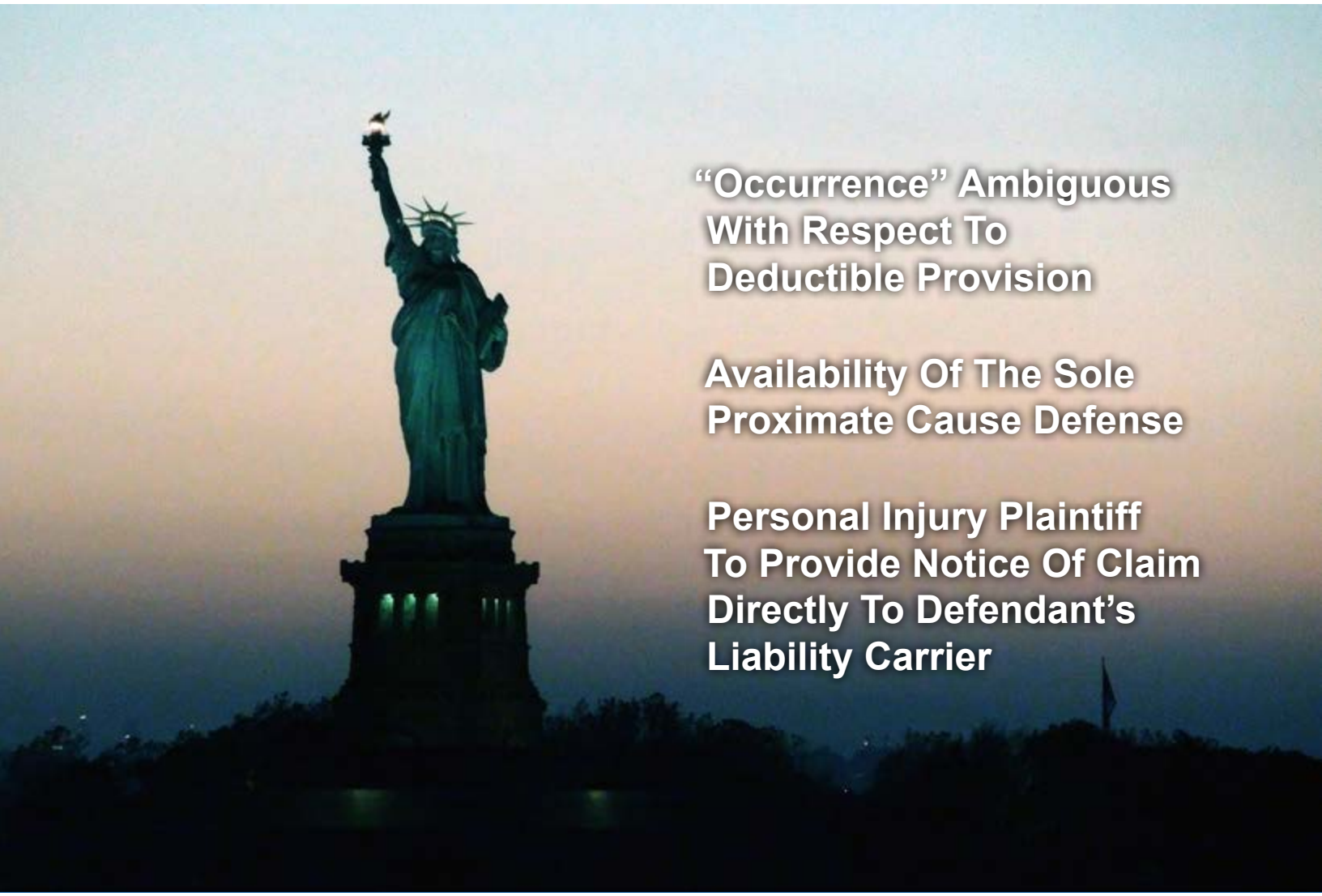

"Occurrence" Ambiguous With Respect To Deductible Provision

Availability Of The Sole Proximate Cause Defense

Personal Injury Plaintiff To Provide Notice Of Claim Directly To Defendant's Liability Carrier

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

Clausen Miller PC

CM EAST COAST REPORT of Recent Decisions

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Southern District Of New York Finds The Term "Occurrence" Ambiguous With Respect To Deductible Provision Despite Definition In Policy

by **Theodore A. Mottola**

In *Rokeach v. Hanover Ins. Co.*, 2015 WL 2400097 (S.D.N.Y. May 19, 2015), the Court ruled on a declaratory judgment action to determine the application of a deductible provision in a business owner's insurance policy. The Court ruled that as it appeared in the deductible provision, the term "occurrence" was ambiguous, and it would be up to a jury to apply the provision to determine coverage. *Id.* at *6.

The record indicated that the insured, Rokeach, owned and operated a welding business that stored a considerable amount of scrap metal in Uniondale, New York. *Id.* at *1. Rokeach was insured under a business owner's insurance policy issued by the insurer, Hanover Insurance Company ("Hanover") which, among other things, provided coverage for losses resulting from theft. *Id.* at *3.

Rokeach first noticed that some of the scrap metal being stored at the Uniondale location was missing in the summer of 2011, when an employee notified the owner that an entire bin of scrap metal was empty. *Id.* at *1. After discovering the theft, an inventory of all metal at the Uniondale location was taken, and Rockeach discovered more losses from theft including several pieces of metal that had been moved from one end of the yard to another in preparation for future thefts. *Id.*

Interviews and factual testimony made it clear to both Rokeach and Hanover that the theft at the site had taken place over several weeks or months, with a small amount taken during each theft. *Id.* at *2. Furthermore, it became clear that the same individuals committed all of the thefts. *Id.* Prior to submitting a claim, the police were able to act on information from a neighbor and arrested two individuals who admitted taking metal from the location over a period of several months. *Id.*

Soon after, Rokeach submitted a claim for property loss due to theft. *Id.* While both parties agreed that theft was a covered loss under the Policy, Hanover denied the claim noting that "[e]ach occurrence of theft is a separate claim subject to a separate deductible. Based on . . . tickets provided . . . the value of each load falls below the $1000 policy deductible. Accordingly, we will be unable to issue any payment for the damages sustained." *Id.* at *2-3.

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The Policy language stated that the most Hanover would pay for a covered loss "in any one 'occurrence' is the applicable Limit of Insurance shown in the Declarations." *Id*. at *3.

Furthermore, the policy's deductible provision stated, "[w]e will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible shown in the Declarations." *Id*.

Hanover argued that although "occurrence" was defined in the Policy, that the definition did not apply to the term occurrence in the deductible provision since the word itself was not in quotation marks. *Id*. at *4. Hanover argued that since words in quotation marks in a policy have special meaning, that occurrence when not in quotation marks could not be the same as the defined "occurrence" found in quotation marks. *Id*.

Rokeach argued that "occurrence" was clearly defined in the policy as "one cause, act, event or a series of similar, related causes, acts involving one or more persons" and as such, the similar events of theft which were perpetrated by the same individuals meant only one application of a deductible. *Id*. The Court, as a preliminary matter, determined that the series of thefts did indeed fall within the "occurrence" definition contained in the Policy. *Id*. at *5.

Hanover argued that since no quotation marks appeared in the occurrence in the deductible provision, that instead of using the policy definition, occurrence should be subject to its usual meaning in a property policy setting. *Id*. The Court then analyzed if occurrence when undefined has a clear unambiguous definition. *Id*.

Using the language from *World Trade Center Properties, LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003), the Court made a comparison between the series of thefts which resulted in a loss in this matter and the terrorist attacks on the World Trade Center on September 11, 2011. *Id*. at *6. The Second Circuit stated that "(t)o be sure, a jury could find two occurrences in this case . . . or it could find that the terrorist attack, although manifested in two separate airplane crashes, was a single, continuous, planned event causing a continuum of damage that resulted in . . . a single occurrence." *Id*. citing *World Trade Center Properties*, 345 F.3d at 190.

The Court, using the above language as support, held that when occurrence in a policy is undefined, the term is ambiguous with respect to a series of events which cause similar property damage. *Id*. at *6. The Court said that while "Hanover is correct that the term 'occurrence' does not appear in the quotation marks in the deductibles provision of the Policy . . . it is not clear that the undefined term 'occurrence' must be interpreted in a manner that would preclude the aggregation of multiple visits by a set of thieves to a single property into a single 'occurrence'." *Id*.

Thus, the Court determined that it would be up to a jury to determine if the thefts would qualify as a single occurrence subject to a single deductible or in fact were several occurrences each subject to the deductible for theft in the Policy. *Id*.

Learning Point: In the context of an insurance policy, underwriters and carriers need to be aware that use of defined terms within the Policy without quotation marks can create ambiguities which may be resolved by a jury, creating a difference between what the insurer thinks it agreed to insure and what it actually will be responsible for. ♦

Second Department Refuses To Apply Contractual Indemnity Clause To Scope Of Work Transferred Between Subcontractors

by ***Nicholas J. Marino***

In *Lombardo v. Tag Court Square, LLC*, (126 A.D.3d 949, March 25, 2015), the Second Department considered consolidated appeals from the decision and order of Justice Arthur Schack of Supreme Court, Kings County, denying motions for summary judgment filed on behalf of two sub-contractors in this tort action sounding in theories of common law negligence and violation of New York's Labor Law. Plaintiff Lombardo allegedly sustained severe personal injuries during the course of his employment as a painter with Third-Party Defendant Spectrum Painting Contractors ("Spectrum"). Spectrum entered into a lengthly written contract with Defendant and construction manager Pavarini McGovern to perform painting work at the Premises. The contract contained a detailed scope of work, broad indemnity clause, and an explicit change order procedure which required written, countersigned memorialization for any changes in the scope of work. Defendant Geiger Construction Company ("Geiger") was separately hired by the Premises owner, Defendant Tag Court Square, to perform exterior weatherproofing, including stucco application at the building's roof levels.

During the course of construction activities at the Premises the job fell behind schedule, and that portion of Geiger's scope of work relating to stucco application was re-assigned to Spectrum. Despite the clear language of the contract, no change orders memorializing this reassignment were generated. Plaintiff was injured when he slipped and fell while performing stucco work, which was supervised exclusively by Spectrum. He brought suit alleging violations of Labor Law §§200 and 241(6), and common law negligence against Geiger, as well as the ownership and construction management entities. Pavarini and the ownership entities commenced a Third-Party Action against Spectrum seeking contractual and common law indemnity. At the close of discovery, both Geiger and Spectrum moved for summary judgment. The lower court found questions of fact sufficient to deny both motions in their entirety.

In reversing Justice Schack's decision in part, the Second Department emphasized that contractual indemnity provisions must be strictly construed to avoid imposing a duty that the parties did not intend, citing to *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 (2nd Dep't 2012). Although Spectrum's contract contained an enforceable indemnity clause, the Court remarked that there was no evidence that the parties intended

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for that clause to apply to Spectrum's performance of the extra-contractual stucco work. The Court relied upon the lack of any change order for the stucco work, which was outside the scope of the painting work set forth in the contract. Without further evidence, it rejected the construction manager's reliance upon testimony that a change order "might" have been issued. Consequently, the Court granted Spectrum summary judgment dismissing the contractual indemnity claim against them. Since Plaintiff had not sustained a grave injury as defined by the Workers' Compensation Law, the balance of the third-party complaint against Spectrum was also dismissed.

Although the Court reversed that portion of Justice Schack's decision denying Geiger's motion to dismiss the Labor Law claims, it affirmed the denial of summary judgment for the common law negligence and contractual indemnity claims. Despite Geiger's failure to exercise supervisory control over Plaintiff's work, there were questions of fact as to whether Geiger's own employees created the condition that caused Plaintiff's accident.

Learning Point: The Second Department has provided a stark example of the importance of abiding by bargained for contractual modification procedures, such as change orders. Despite the fact that Spectrum agreed to otherwise indemnify the construction manager and owners, and also agreed to perform the additional work, the Second Department refused to apply the terms of the contract to this additional scope absent the proper documentary support.

This decision underscores the vital importance for prospective indemnitees to abide by contractual procedures at all times, even when otherwise pressured by the time constraints inherent in construction projects. Because of the court's strict interpretation of indemnity provisions, cutting corners can have dire consequences that can obviate an otherwise well-crafted agreement. Concordantly, modifications to a scope of work should clearly reflect the intent of the contracting parties both to delineate their respective duties and define their remedies. ♦

Second Department Slowly Eroding The Availability Of The Sole Proximate Cause Defense To Labor Law §240 Claims

by ***Serena A. Skala***

In *Doto v. Astoria Energy II, LLC*, 2015 N.Y. App. Div. LEXIS 4536, 2015 Slip Op 04605, a construction worker injured in a fall on a construction site brought a cause of action against the site's owner and general contractor alleging violation of New York Labor Law §240, 241(6) and 200, and common law negligence. Plaintiff specifically alleged that the site's owners violated the Labor Law by failing to provide adequate safety devices causing Plaintiff to have to elect amongst a variety of methods for accessing a raised platform on the site.

At the time of the incident, Plaintiff was employed by Third-Party Defendant Newtron Heat Trace, LLC ("Newtron") hired to install electric heat tracing for the construction project. According to Plaintiff, he was assigned by his employer to work on a permanent platform that was three to four stories above the ground, but was not provided any specific instructions on how to access the platform. It appears that there were several options for accessing the platform, the most direct route was to climb up a scaffolding ladder near the platform, step onto a scaffolding gate that provided access to a narrow board next to the platform, and then climb from the gate onto and over the three and a half foot railing of the permanent platform. Both Plaintiff and the site safety manager testified that many construction workers climbed the scaffolding instead of using ladders, and that the workers on site could climb over railings to access the platforms as long as they were secured with a harness and halyards. Plaintiff confirmed that he was indeed wearing a harness with two six foot lanyards at the time of the accident, but nevertheless lost his footing and fell from the railing to the platform three feet below.

The Appellate Division, Second Department overturned the Lower Court's decision, and held that Plaintiff was entitled to summary judgment on his Labor Law §240 claim and denied Defendants' cross-motion for summary judgment as to Plaintiff's Labor Law §200 and 241(6) claims. With regard to Plaintiff's Labor Law §240 claim, the Second Department held that Plaintiff submitted sufficient evidence demonstrating that Defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of his injuries. In so holding, the Second Department found that Defendants failed to raise a triable issue of fact as to whether Plaintiff's actions in using the scaffolding and climbing over the railing, rather than using a permanent ladder which was approximately 25 to 30 feet from the scaffolding ladder to access the platform was the sole proximate cause of his injury. The sole proximate cause defense applies when the

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safety devices that a plaintiff alleges were absent were actually readily available at the work site, albeit not in the immediate vicinity of the accident, and the plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. Despite the availability of other means of ingress and egress to the platform, the Court held that there was no evidence that anyone instructed Plaintiff that he was expected to use such other methods, *i.e.* the permanent ladder, rather than the scaffolding to access the platform.

The Appellate Division also overturned that branch of the Lower Court's decision which granted Defendants' cross motion for summary judgment as to the issue of common law negligence and a violation of Labor Law §200 claim. Labor Law §200 is a codification of the common law duty of owners, contractors and their agents to provide workers with a safe place to work. Such claims typically fall under two categories: claims that are the result of a dangerous or defective condition at the work site, and claims involving the manner in which the work is performed. The Appellate Division held that because Plaintiff's Labor Law §200 claim was based upon allegations that a dangerous condition existed on the Premises where the work was being undertaken, Defendants, in moving for summary judgment, were required to make a *prima facie* showing that they neither created the dangerous condition on the Premises nor had actual or constructive knowledge of it. The Second Department found that Defendants failed to meet this burden of proof, and thus, summary judgment was inappropriate as to Labor Law §200. Interestingly, the Appellate Division appears to have concurred with Plaintiff's categorization of his Labor Law §200 claim as one concerning a dangerous condition, and not one concerning the means and methods of his work. Although it does not appear that Defendants argued that such ingress and egress is not a dangerous condition, because it is not discussed in the Second Department's opinion, it is interesting that the Court did not raise this issue *sua sponte* as the particular methods of ingress and egress are more a means and methods issue under Labor Law §200, which requires a different analysis on summary judgment. Nevertheless, the Appellate Division stated that the Lower Court should have denied that branch of Defendants' cross-motion regardless of the sufficiency of the opposition papers. Finally, the Appellate Division held that Defendants did not establish *prima facie* that Industrial Code §12 NYCRR 23-1.7(f) asserted by Plaintiff was inapplicable to the facts or that the alleged violation was not a proximate cause of Plaintiff's injuries.

Learning Point: The Second Department continues to expand the reach of Labor Law §240 and Labor Law §200. When asserting the "sole proximate cause" defense in opposition to a plaintiff's summary judgment motion predicated on Labor Law §240, defendants, at a minimum, should focus on their ability to create an issue of fact as to a plaintiff's awareness of the other safety options available; Courts continue to be lenient on an otherwise contributorily negligent plaintiff under the guise of Labor Law §240. Further, in moving for summary judgment, defendants should argue both categories of liability under Labor Law §200; the Second Department has expanded the reach of the "dangerous condition" prong to include more non-traditional fact patterns. ♦

Appellate Court Grants Defendant Landowner Summary Judgment On The Basis That The Allegedly Defective Condition Was Open And Obvious, And Inherent Or Incident To The Nature Of The Property

by **Gregory J. Popadiuk**

In *Mossberg v. Crow's Nest Mar. of Oceanside*, 2015 NY Slip Op 04618 (2d Dep't June 3, 2015), the Appellate Division, Second Department reversed an order from the trial court denying the landowner Defendant's motion for summary judgment. The Appellate Court stated that a landowner has a duty to exercise reasonable care in maintaining its property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property. However, the Appellate Court explained that a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incident to the nature of the property, and that could be reasonably anticipated by those using it.

Plaintiff was an experienced boatman and allegedly sustained personal injuries when he slipped and fell into the water while exiting from a friend's sailboat. The sailboat had been coming alongside the dock located at the landowner Defendant's marina. As Plaintiff attempted to step onto the dock, he slipped and fell. He commenced the action against the landowner Defendant's marina. During his deposition, Plaintiff testified that, when he was stepping onto the dock, "the dock looked shiny" and "[i]t could have been wet," although it "wasn't probably" wet. In a later Affidavit, Plaintiff stated that "[t]he only reason I fell was that the dock was slippery."

The landowner Defendant moved for summary judgment arguing that Plaintiff failed to identify the defective condition, assumed the risk by "jumping" from boat to dock; and that it lacked actual or constructive knowledge of the condition. In opposition, Plaintiff maintained that he properly set forth the defective condition that caused his accident, that he did not assume the risk of the injury while disembarking from the boat in the customary manner of reasonable boating, and that the landowner Defendant knew or should have known that the dock was excessively slippery. Plaintiff also offered the Affidavit of a Professional Engineer in opposition to the motion.

The trial court determined that the landowner Defendant did not meet its

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prima facie burden establishing that Plaintiff was unable to identify the cause of his accident. Rather, the trial court held that proximate cause could be inferred from the circumstances as Plaintiff testified that he stepped onto the boat dock, felt his right foot slip, the dock appeared "shiny" and, as a result, he fell into the water. Equally unavailing to the trial court was the landowner Defendant's argument that Plaintiff assumed the risk by "jumping" from a moving sailboat onto the dock. Although the trial court did not go so far as to state that jumping from a sailboat to a dock may be a risk inherent in boating, it found an issue of fact based upon Plaintiff's deposition testimony wherein he explained that he merely "stepped" from the sailboat onto the dock. Finally, the trial court was persuaded by the opinion of Plaintiff's professional engineer who stated in an Affidavit that the dock did not have a sufficient slip-resistant surface in violation of New York State 2010 Building Code. The professional engineer opined within a reasonable degree of engineering certainty that this was a proximate cause of Plaintiff's accident. As such, the trial court held that the purportedly concealed condition of the dock created a triable issue of fact. Finally, the trial court noted that the landowner Defendant did not meet its *prima facie* burden in establishing that it lacked notice of any condition based on an admission during the deposition testimony of the witness that he painted the dock every other year with an oil-based paint mixed with sand.

The Appellate Division reversed stating that a slippery condition on a dock is necessarily incidental to its nature and location near a body of water. The Court further held that Plaintiff's expert opinion was speculative, conclusory, and insufficient to defeat the landowner Defendant's motion for summary judgment. The expert's inspection of the dock was conducted seven months after the subject accident. There was no showing that the alleged area tested by the expert was in the same condition as it was on the date of the accident. Finally, the Court explained that Plaintiff's expert failed to identify the basis for his "coefficient of friction value," which he apparently utilized as a standard to arrive at certain conclusions.

Learning Points: The decision is significant because it reaffirms that an open and obvious condition will not be a basis for imposing liability, particularly in a situation where a plaintiff has experience in the activity allegedly causing the injuries sustained. Furthermore, although it was not directly addressed, the decision is equally significant because it underscores the impropriety of a plaintiff submitting an Affidavit that is contradictory to his or her deposition testimony for purposes of defeating a defendant's motion for summary judgment. Finally, the decision highlights the need for any expert to lay a sufficient foundation in order for his or her opinions to be considered, including inspecting the subject location at or around the time of the accident, demonstrating that the cause of the accident was in the same condition on the date that the accident occurred, and thoroughly explaining the basis for his or her opinions. ♦

New York's Appellate Division Defines Duty Of Personal Injury Plaintiff To Provide Notice Of Claim Directly To Defendant's Liability Carrier

by **Marc P. Madonia**

In *Kleinberg v. Nevele Hotel, LLC*, 2015 NY Slip Op 03891 (3rd Dep't 2015), New York's Appellate Division, Third Department, held that liability policies requiring "prompt notice" of a potential claim as a condition precedent to third-party liability coverage require the plaintiff to take steps to request relevant insurance coverage information from a defendant and to follow-up an initial request that receives no response or an incomplete response, in order to demonstrate "reasonably diligent efforts" to identify and provide notice to the third-party liability carrier, such that the carrier's failure to actually receive timely notice does not vitiate coverage.

Underlying the *Kleinberg* case was a personal injury action that Kleinberg filed against Nevele Hotel ("Nevele"). In the underlying action, Robert Kleinberg alleged that he suffered an injury on the slopes of Nevele Hotel's ski resort and that the injury was the result of Nevele's negligence. Nevele was insured for liability by Lexington Insurance Company ("Lexington").

Kleinberg's accident happened in February, 2006. Nevele created an incident report the day of the accident. Kleinberg sent a notice letter to Nevele which was received by Nevele in March, 2006, roughly one (1) month after the incident occurred. In June 2006, Kleinberg again sent written correspondence to Nevele, again informing of the personal injury claim and enclosing a questionnaire requesting Nevele provide its insurance carrier information to Kleinberg. Kleinberg's letters also requested Nevele directly provide notice of the claim to its insurance company or inform Kleinberg if Nevele was not insured. The questionnaire provided by Kleinberg, however, only requested automobile insurance information, despite the fact that Kleinberg's claim did not involve any automobile. Nevele responded to the June 2006, letter and questionnaire, but provided no response to the portion of the questionnaire requesting automobile insurance coverage information. Kleinberg never requested Nevele provide information concerning its liability insurance for injuries on the slopes. Other than the two (2) letters and the questionnaire, Kleinberg made no other investigatory efforts to identify Nevele's liability carrier, or provide notice to Nevele's liability carrier directly.

Lexington did not receive written notice of Kleinberg's claim until January 2007, approximately ten (10) months after the incident occurred, when Nevele gave Lexington notice. Lexington refused to defend or

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indemnify Nevele on the grounds that coverage under its policy was vitiated due to its failure to receive timely notice of Kleinberg's claim. Kleinberg then filed a declaratory judgment action seeking a declaration that Lexington was obligated to defend and indemnify Nevele.

The Appellate Division, Third Department, noted the long-standing Court of Appeals precedent in New York holding that where a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier "within a reasonable period of time." The Court also confirmed the long-standing precedent that, because an injured party is allowed by law to provide notice to an insurance company, he or she is also generally held to any prompt notice condition precedent of a policy.

The Court did not revolve around whether Lexington had been given notice "within a reasonable period of time" of Kleinberg's injury claim. To the contrary, the Appellate Division noted that the ten (10) month delay between Nevele's receipt of Kleinberg's March 2006, Notice letter and the January 2007, Notice provided by Nevele to Lexington, was not a reasonable period of time. The Court also noted that measuring the delay from the June 2006, letter sent by Plaintiff to Nevele, and the seven (7) month period of time between the June 2006, letter and Lexington's receipt of Notice from Nevele in January 2007, was also insufficient to provide timely notice. Thus, the sole focus of the *Kleinberg* case was whether Kleinberg could show his failure to give timely notice independent of Nevele was due to his failure to know the identity of Nevele's liability carrier despite "reasonably diligent efforts to obtain such information."

The Appellate Division, Third Department, ultimately held that Kleinberg's failure to: 1) follow-up with Nevele regarding the identity of its insurer following the June 2006, letter; 2) include in its questionnaire a request for information concerning Nevele's liability insurance carrier; and 3) make any investigatory efforts outside of its two letters to Nevele, did not demonstrate "reasonably diligent efforts" to obtain information concerning the identity of Nevele's liability carrier for purposes of providing notice. The Appellate Division reversed the trial court's denial of Lexington's motion for summary judgment on Kleinberg's declaratory judgment action, and declared that Lexington had no duty to defend or indemnify Nevele due to its failure to receive timely notice of Kleinberg's claim from either Nevele or Kleinberg.

Learning Point: Liability carriers with policies requiring notice of a third-party claim within a reasonable period of time as a condition precedent to coverage are well advised to have counsel obtain information from the claimant concerning the claimant's efforts to provide notice of its claim. If there is any question as to whether an insured gave timely notice of a claim, a liability carrier may avoid coverage if it can also show that the claimant did not make reasonably diligent efforts to identify the liability carrier. ♦

Second Department Determines That, For The Purposes Of A Premium Audit Provision, ISO Codes Listed On A Policy's Declarations Page Do Not Determine Premiums To Be Charged

by ***Mark J. Perry***

In *Iner-Reco, Inc. v. Transcorp Constr. Corp.*, 2015 NY Slip Op 05444 (2d Dep't 2015), Plaintiff insurer, Iner-Reco, Inc., provided polices of general liability insurance to the Transcorp Construction Company for policy periods 2002-2003 and 2003-2004.

Each Policy contained a premium audit provision. Pursuant to that provision, at the end of each policy period, Iner-Reco was to engage in an audit of the Insured's company in order to calculate the premium due for that period in accordance with the insurer's rules and regulations. At the completion of the relevant policy periods, the insurer did engage in the audits and sought payment. When the Insured refused to pay, Iner-Reco filed suit, seeking payment of premiums due.

During the audit, the insurer used a classification system approved by the New York State Insurance Department, and utilized two relevant class codes: 91585 for "contractors—subcontracted work—in connection with construction, reconstruction, repair or erection of buildings", and 91584 for "contractors—subcontracted work—in connection with construction, reconstruction, repair or erection of buildings—for industrial use" (emphasis added). The insurer charged the same premium rate for both classifications.

Apparently, using information provided by Defendant in its Application for insurance, the insurer listed on the Declarations pages of the Policies only classification code 91584, which was related to industrial uses. Neither Policy provided coverage under classification code 91585.

At trial, it was revealed that during the audit, despite the stated definitions in the classification system, the insurer again incorrectly utilized code 91584 for some of the Insured's work, though the Insured did no work that was "for industrial use."

There were thus two inaccuracies in the insurer's categorization of the Insured's work. First, the Declarations pages of the Policies utilized an incorrect category. Second, during the audit, a portion of the work was

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again incorrectly categorized as "for industrial use." The Insured pointed to N.Y. ISC. LAW § 2314, which states:

> No authorized insurer shall, and no licensed insurance agent, no employee or other representative of an authorized insurer, and no licensed insurance broker shall knowingly, charge or demand a rate or receive a premium which departs from the rates, rating plans, classifications, schedules, rules and standards in effect on behalf of the insurer, or shall issue or make any policy or contract involving a violation thereof.

The question before the Court was whether the inaccurate categorizations of the work constituted the charging of a premium that departed from the rates, rating plans, classifications, schedules, rules and standards in effect by the insurer, in violation of § 2314, which would invalidate the premium charged. The Court held that the inaccuracies did not violate § 2314, and made two important findings of fact.

First, the Court found that the insurer's rules and regulations provided that the final premium owed would be determined based on the actual, not the estimated, bases. Because the rules and regulations called for the premium to be determined based on the actual work done, rather than the estimates used in applying for the Policies, the code category listed in the Policies' Declarations pages was irrelevant to the analysis.

Second, the Court found that the premium rate required under 91585 was the same as the rate required under 91584. Because the rates were the same, the mistake did not cause the insurer to depart from the rates then in effect.

Thus, the Court found that, although the code categories were inaccurate, the insurer did not violate § 2314. The Court concluded that the insurer had a right to recover the balance of earned premiums due from Defendant/Insured.

Learning Points: Inaccuracies in the codes used to identify work categories for the purpose of estimated premiums, or premium deposits, may not cause problems during subsequent litigation, as long as the insurer's rules and regulations require the final premium to be based on the actual work performed and covered. On the other hand, if an inaccuracy in the codes used during an audit cause an insurer to charge the wrong amount, the insurer may be in violation of N.Y. ISC. LAW § 2314. ♦

DEFENSE DEPARTMENT'S SUCCESS IN NEW YORK CONTINUES

Summary Judgment Granted In Favor Of Clausen Miller's Client In Engineering Malpractice Litigation

Carl M. Perri (NY/NJ Partner) and **Matthew T. Leis** (NY/NJ Sr. Associate) in Clausen Miller's Professional Liability and Casualty Defense department, recently won summary judgment on behalf of our Client in a construction defect/engineering malpractice litigation, after lengthy motion practice. This case involved the design and construction of an open air parking lot through the use of prefabricated concrete elements. Our Client was an engineering firm which participated in the design of the precast concrete. Several years after the project was completed, Plaintiff claimed she slipped on black ice in the lower level of the garage due to alleged improper design and construction of the structure allowing water to travel between the concrete elements. Due to the alleged severity of Plaintiff's claimed injuries, she was seeking at least $17,000,000 in damages at trial.

There was significant motion practice at the close of discovery in this multi-party litigation, with 16 various motions seeking dismissal of direct, third-party and various cross-claims. Messrs. Perri and Leis prepared a Motion for Summary Judgment on our Client's behalf which sought dismissal of the third-party and cross-claims asserted against it. In short summary, the Motion argued that the evidence failed to show that our Client was professionally negligent, a difficult argument to make insofar as it is factually sensitive. In so doing, we examined the expert opinions of parties adverse to our Client and proved, as a matter of law, that there was no evidence of a departure from accepted engineering principals which proximately caused Plaintiff's alleged injuries. The other portions of our Motion defeated claims for contractual indemnification (including theories of quasi-contract) and common law contribution. The Court adopted our arguments in full, and in a 34 page Decision dismissed all claims against our Client. None of the parties with claims against our Client appealed the Decision, indicating their opinion of the likelihood of reversal on appeal.

Needless to say, our Client and its insurance carrier were very pleased with this outcome. We saved them the costs of a lengthy trial, uncertainty of judgment and possible exposure well beyond the Client's Policy limit.

If you would like to learn more about casualty defense or professional malpractice defense, please feel free to e-mail **Carl M. Perri** (**cperri@clausen.com**) or call him at 212-805-3958.

ANIMALS

HORSE OWNER NOT LIABLE FOR INJURIES IN HORSE FIGHT

Wemer v. Walker, 2015-Ohio-1713 (Ohio App.)

Helper sustained injuries trying to stop a fight between horses tied to same ring. ***Held:*** Horse owner's conduct was not willful and wanton, the predicate for liability under equine activity statute. The owner had warned the helper that the horses would fight.

DOG OWNER NOT LIABLE FOR FAILURE TO CONTROL ANIMAL

Doerr v. Goldsmith, 2015 N.Y. LEXIS 1332 (N.Y. Ct. App.)

Plaintiff sued alleging defendant negligently "controlled and directed their dog into the path of the plaintiff" in Central Park. Defendant argued that plaintiff could not bring an action based on injuries caused by a domestic pet under *Bard and Petrone v. Fernandez*, 12 N.Y.3d 546 (2009). The trial court denied the motion, accepting plaintiff's theory that liability is premised on the owner turning the animal into an "instrumentality of harm" and the Appellate Division affirmed, stating that the Court recently had "recognized that an accident caused by an animal's aggressive or threatening behavior is fundamentally distinct" from one caused by an animal owner's negligence in permitting the animal to wander off the property where it was kept. ***Held:*** The Court of Appeals held that the *Bard* rule applies, stating "the dogs' choice does not result in negligence liability for the owner."

FIRST PARTY PROPERTY

NO COVERAGE FOR WATER DAMAGE UNDER POLICY'S SUDDEN AND ACCIDENTAL ENDORSEMENT

Platek v. Town of Hamburg, 24 N.Y.3d 688 (N.Y.)

A water main abutting insureds' property burst and flooded their basement. ***Held:*** The insurer did not err in denying coverage under the homeowner policy's water loss exclusion. The sudden and accidental exception endorsement did not resurrect coverage for the excluded peril.

INDEMNITY

PREMISES OWNER ENTITLED TO SUMMARY JUDGMENT ON INDEMNITY CLAIMS AGAINST DECEDENT'S EMPLOYER

Melito v ABS Partners Real Estate, LLC, 2015 N.Y. App. Div. LEXIS 4638 (N.Y. App. Div. 1st Dep't)

Decedent electronic mechanic fell to his death down an unguarded elevator shaft. His wife sued the owner and manager of the premises. The trial court entered summary judgment in defendant's favor against the plaintiff but denied it with respect to defendant's third-party common law and contractual indemnity claims against the elevator company, decedent's employer. ***Held:*** There was no evidence that defendant was negligent as its liability is solely statutory which is covered by the protections of Labor Law 240 (1), which releases owners from liability for failing to provide protection to a worker during the performance of labor such as erection, demolition, repairing of a building or structure. This accident was caused by decedent's employer allowing decedent to perform his job near the unguarded shaft way without providing him with any safety equipment, and therefore summary judgment should have been granted in defendant's favor on its indemnity claims.

INVITEES

STORE OWNER NOT LIABLE TO HEROIC PATRON

Smallwood v. MCL, Inc., 2015-Ohio-1235 (Ohio App.)

Store patron was injured pursuing criminal who robbed cashier. ***Held:*** Owners generally owe a duty of care to invitees but are not expected to guard against unforeseeable risks. No reasonable person would foresee that a customer would chase a robber. The danger was obvious, making a warning unnecessary. Owner had no duty to prevent patron from pursuing robber, which could have caused more harm than good.

LIABILITY INSURANCE COVERAGE

CONNECTICUT SUPREME COURT: NO COVERAGE UNDER CGL FOR DATA BREACH

Recall Total Info. Management, Inc. v. Federal Ins. Co., 317 Conn. 46 (Conn.)

The policyholder lost tapes containing information about IBM employees when the tapes fell off a truck during transport. IBM never filed suit, but it demanded reimbursement of sums spent because of the breach. ***Held:*** IBM's claim against the policyholder did not trigger the insurer's duty to defend under a general liability policy. Additionally, the lower court held that the loss of the computer tapes did not meet the definition of "personal injury" in the policy.

SEPARATE PROCEEDINGS PRECLUDE APPLICATION OF EXCLUSION

American Casualty Co. of Reading, P.A. v. Gelb, 2015 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 1st Dep't)

Plaintiff insurers moved for summary judgment seeking a declaration that liability policy did not cover defense costs for an adversary proceeding commenced by bankruptcy creditors against company and its officers. Liability policies had been issued for two separate policy periods: (1) from 2006 to 2007, and (2) from 2007 and 2013. Plaintiffs argued that both the merger litigation initiated in 2007 and the adversary proceeding initiated in 2009 arose out of the same transaction, constituting a single claim under the 2006-2007 period. The 2006-2007 policy excluded claims brought by or on behalf of the company against any of its own directors or officers whereas the 2009 policy did not. The trial court denied the motion and granted defendants' cross motion seeking a defense in the adversary proceeding. ***Held:*** The merger litigation and the adversary proceeding are two separate proceedings as they involved different parties, allegations and causes of action, even if they arose from the same merger transaction. Thus, the adversary proceeding claim arose in 2009 and is not subject to the exclusion.

UNDER NONCUMULATION CLAUSE, EXPOSURE TO LEAD PAINT BY TWO SUCCESSIVE TENANTS CONSTITUTED ONE ACCIDENTAL LOSS

Nesmith v. Allstate Ins. Co., 24 N.Y.3d 520 (N.Y.)

Members of two different families—who were successive tenants—were exposed to lead paint in the same apartment. The landlord's insurance policy contained a noncumulation clause which stated that "[a]ll bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." ***Held:*** The successive tenants were injured by exposure to the same general conditions which were part of a single accidental loss, and thus only one policy limit was available to the two families.

NOTICE OF CLAIM TO INSURANCE BROKER WAS NOT IMPUTED TO CARRIER

Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 24 N.Y.3d 578 (N.Y.)

Policyholder provided notice of claim to its insurance broker, but not to its carrier. ***Held:*** An insurance broker is normally the agent of the insured, and not the carrier. Notice of a claim made to the broker did not, therefore, constitute notice to the carrier.

LIMITATION OF ACTION

WARNING LETTER SUFFICIENT TO TRIGGER RUNNING OF LIMITATIONS PERIOD

Matter of Banos v. Rhea, 2015 N.Y. LEXIS 1035 (N.Y.)

Petitioner alleged that she never received a warning letter from Respondent New York City Housing Authority about termination of her Section 8 benefit. Respondent moved to dismiss the proceeding as time barred, but the lower court denied the motion, reasoning that Respondent failed to show that it strictly adhered with the consent judgment's requirement to send three notices. ***Held:*** The statute of limitation begins to run as soon as the tenant receives a "T-3 letter," regardless of whether Respondent has proven that it sent the other notice mailings mandated by the consent judgment. The Court identified the T-3 letter as the only relevant notice, and held that there is no indication in the consent

judgment that all of the procedural requirements are conditions precedent to the commencement of the statute of limitation.

MEDICAL MALPRACTICE

PATIENT PERMITTED TO RELY UPON THE THEORY OF *RES IPSA LOQUITUR* IN MEDICAL MALPRACTICE ACTION AGAINST MULTIPLE DEFENDANTS

Frank v. Smith, 127 A.D.3d 1301 (N.Y. App. Div. 3d Dep't)

Plaintiff sustained numbness and loss of flexibility in his fingers following shoulder surgery. There was evidence that the injury occurred during the procedure, but the cause was disputed. Plaintiff's expert opined that injury was caused by negligence on the part of either the surgeon or anesthesiologist. ***Held:*** In a multiple defendant action in which plaintiff relies on the theory of *res ipsa loquitur*, a plaintiff is not required to identify the negligent actor, a rule that is particularly appropriate in a medical malpractice case in which the plaintiff has been anesthetized.

HOSPITAL COULD BE HELD VICARIOUSLY LIABLE FOR ACTS OF EMERGENCY ROOM CONTRACT PHYSICIAN

Smolian v. Port Auth. of N.Y. & N.J., 128 A.D.3d 976 (N.Y. App. Div. 2d Dep't)

Plaintiff alleged malpractice in relation to psychiatric care he received from a contract physician working in hospital's emergency room. Hospital denied vicarious liability for the alleged malpractice of a doctor who was not its employee. ***Held:*** Hospital could be held liable for contract physician's conduct where patient sought emergency room treatment from center and not from a particular doctor of his/her choosing.

PRODUCT LIABILITY

FAILURE-TO-WARN CLAIM NOT PREEMPTED BY FEDERAL DRUG LAW

Reckis v. Johnson & Johnson, 28 N.E.3d 445 (Mass.)

Parents sued manufacturer of over-the-counter Children's Motrin for failure to warn of possibly life threatening diseases if allergic reactions occur. ***Held:*** Claim was not preempted by the federal Food Drug & Cosmetic Act. Conflict preemption occurs when compliance with state law would conflict with requirements of federal law. Although FDA did not require manufacturer to identify the life-threatening diseases in warnings, it did not preclude manufacturer from warning about their possible onset. ***Further held:*** Qualified pharmacologist may opine on the cause of child's injury even though he had never diagnosed or treated a patient with the disease. Expert's opinions were consistent with existing medical literature and testimony of treating physicians.

UNFORESEEN RECKLESS CONDUCT OF SECOND DRIVER HELD SUPERSEDING CAUSE

Bowman v. Kennedy, 126 A.D.3d 1203 (N.Y. App. Div. 3d Dep't)

Driver stopped vehicle and waived pedestrian across street and in front of vehicle. A second vehicle failed to slow down and drove around the stopped vehicle, onto the shoulder of the highway, and struck the pedestrian. ***Held:*** The conduct of the second driver constituted an unforeseeable, superseding cause of plaintiff's injuries, severing any causal nexus between plaintiff's injuries and any alleged negligence on the part of the stopped driver.

SALVAGE NOT REASONABLY FORESEEABLE USE

Hockler v. William Powell Co., 2015 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 1st Dep't)

Plaintiff brought strict products liability and negligence claims against defendant, who manufactured valves that had asbestos, alleging that he developed peritoneal mesothelioma as a result of his exposure to asbestos in the course of dismantling and salvaging scrap metal work from the steam systems. Plaintiff's claims were based on the defective design of the valves. ***Held:*** Dismantling and salvaging do not constitute a reasonably foreseeable use of the valves. Even if defendant's valves were defectively designed, plaintiff did not use the product in a reasonably foreseeable manner, and therefore the complaint should have been dismissed.

TORTS

SURVEILLANCE CAMERAS DID NOT CREATE NUISANCE

Scott v. Nameth, 2015-Ohio-1104 (Ohio App.)

After homeowner installed privacy fence and security cameras around his property, adjoining neighbors sued for nuisance. ***Held:*** Recovery for a qualified public nuisance caused by the negligent maintenance of a condition requires a "real, material, and substantial" injury. Neighbors' emotional discomfort in using their home and yard was insufficient. Nuisance must cause physical discomfort. No physical reason prevented neighbors' use of property.

SOCIAL HOST NOT LIABLE FOR DRUNK-DRIVING ACCIDENT

Tomasheski v. Ryan, 2015-Ohio-1593 (Ohio App.)

After drinking at defendant's home, intoxicated driver killed two people and injured two others. ***Held:*** Social host is not liable for injuries to the public at large caused by intoxicated guests as long as drinker had been served in a non-commercial capacity. A commercial proprietor has proprietary interest and motive to exercise greater supervision than others. Any change in law must come from the legislature.

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