



# LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP

## INSURANCE COVERAGE CORNER

### Exploring an Insurer's Duty to Defend and/or Indemnify a Purported Additional Insured

By Abbie Havkins and Matthew Kraus

One of the most frequently litigated coverage issues involves an insurer's duty to defend and/or indemnify a purported additional insured. Specifically, when is a party claiming additional insured status entitled to coverage under a commercial general liability (GL) policy?

Generally speaking, insurance policies convey additional insured status in one (or more) of four ways. The first two ways are straightforward and generate little controversy. Additional insured status is easily conferred when an entity is listed as such in the policy, generally through an endorsement. Additional insured status may also be unambiguously provided when the policy itself states that such status is conferred to entities listed on a certificate "on file" with the insurer or designated on a Certificate of Insurance.<sup>1</sup>

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### New York Appellate Court Disregards Release and Reverses Summary Judgment Decision in Case Involving Spa/Fitness Center

By Steven H. Rosenfeld and Carla Varriale

In light of the growth of the spa and fitness industries and recognizing the liability exposure facing owners, a recent decision by the New York's Appellate Division, First Department, wherein the court refused to enforce a signed release denying a spa's motion for summary judgment, is worthy of consideration.

In *Debell v Wellbridge Club Mgt. Inc.*, 2007 NY Slip Op 03833, the plaintiff was injured while participating in member activities at a spa while under the supervision of one of the spa's trainers. During a complimentary one-hour training session, the trainer had the plaintiff do an upper body arm exercise on a "hang bar" even though the plaintiff had difficulty in using the hang bar and complained that it hurt his upper back, shoulders and neck. During that session, plaintiff tore the rotator cuff in his left shoulder and suffered a herniated disc in his cervical spine. The plaintiff had signed a release in the spa's membership application which provided:

"[T]he Member hereby assumes all risks associated with the use of the Spa facilities, waives all rights . . . and hereby agrees to release . . . the Spa from the indemnify [sic] the Spa against, any and all claims, including, but not limited to personal injury, including bodily injury and death . . . whether or not based on the acts or omissions of the Spa, arising out of or in any way connected with the use of the Spa facilities . . ." (emphasis added).

Based on this release, the spa moved for summary judgment dismissing the plaintiff's action. The First Department found the release void as against public policy citing General Obligations Law §5-326, which provides:

Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages

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HAVKINS  
ROSENFELD  
RITZERT &  
VARRIALE, LLP  
HRRV  
COUNSELORS AT LAW

Eleven Penn Plaza  
Suite 2101  
New York, New York 10001  
212-488-1598  
212-564-0203 Facsimile

114 Old Country Road  
Suite 300  
Mineola, New York 11501  
516-620-1700  
516-746-0833 Facsimile

www.hrrvlaw.com

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## Spa/Fitness Center Decision

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caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.”

Facilities that are places of instruction and training have been previously found to be outside the scope of the statute (*see generally, Lemoine v. Cornell Univ.*, 2 AD3d 1017 [2003], *lv denied* 2 NY3d 701 [2004]). Here, even though the plaintiff sustained his injury while being instructed by a spa trainer, the court found the instruction ancillary to the other “recreational” activities offered by the spa. The court noted that the spa offered various services relating to health and beauty, and access to exercise equipment, a swimming pool, whirlpool, jacuzzi, sauna and

steam room. Although the spa offered a free introductory class and four free training sessions, there was no mention of training or instruction in its published advertisements. The court also took note that the plaintiff did not take a training session until nine months after joining the spa and that there was no evidence that the plaintiff enrolled at the spa for the purpose of receiving instruction.

### Contact

**Steven H. Rosenfeld**  
in the New York, New York office  
steven.rosenfeld@hrrvlaw.com  
(646) 747-5105

**Carla Varriale**  
in the New York, New York office  
carla.varriale@hrrvlaw.com  
(646) 747-5115

## Court Holds that Sanctioning of Sporting Event by National Organization Does Not Equal Control

Justice Alan Saks, sitting in Supreme Court, Bronx County granted summary judgment in favor of USA Cycling, which had sanctioned, but not organized, a road race during which the plaintiffs were injured when the pace vehicle veered off the course and into the crowd.

In *Chittick, et al v. USA Cycling, Inc. et al*, Index No. 20955/04, September 21, 2007, a local promoter organized the event, obtained sanctioning from USA Cycling and employed the driver of the pace vehicle, which was owned by the promoter. In granting summary judgment and dismissing the complaint as against USA Cycling, Judge Saks found, *inter alia*, that: (1) as a sanctioning body, USA Cycling did not exercise sufficient control over the manner in which the event was conducted; (2) there was no proof that the race organizer was the agent of USA Cycling; and (3) the financial benefit derived from participant entrance fees and the imposition of an insurance surcharge by USA Cycling were not factors in determining the degree of control exercised by USA Cycling.

Effectively, the Court held that merely sanctioning an event does not equate to control over the event sufficient to support a finding of liability.

Steven H. Rosenfeld and Carmen A. Nicolaou of HRRV represented USA Cycling.

## Insurers Beware: The Emerging Pitfalls of Electronic Disclosure and Its Sanctions

By Sean P. Dwyer

The sweeping changes to the federal rules governing electronic discovery and enacted in December, 2006 (Federal Rules of Civil Procedure 16 and 26) are quickly approaching their one year anniversary benchmark and the courts have made it unequivocally clear that litigants will be held to strictly comply with these new requirements at their own jeopardy. The critical nature of electronically stored information in insurance coverage litigation cannot be understated — the insurance industry overwhelmingly conducts its daily business operations via electronic information. Coverage documents, broker and adjuster communications, and claim investigation files are just a few items in the vast universe of information that is routinely transmitted or stored electronically and are now termed as electronic discovery (EDD) under the new federal rules.

With a significant percentage of insurance coverage litigations being brought in the federal circuits, it has become absolutely imperative that insurers and their counsel recognize the legal and ethical obligations to identify and produce electronic discovery early in litigation in order to avoid catastrophic and costly consequences. Over this past summer, the perils of “e-discovery” played a pivotal role against a casualty carrier—this time in connection with the insurance coverage battles resulting from the September 11, 2001, terrorist attack on the World Trade Center.

In the case of *In re September 11th Liability Insurance Coverage Cases*, 2007 WL 1739666 (S.D.N.Y. June 18, 2007), United States District Judge Alvin K. Hellerstein, for the Southern District of New York, sanctioned a leading casualty carrier and its counsel \$1.25 million upon finding that the

insurer, among other alleged discovery violations, had failed to produce electronic coverage documents previously demanded during the litigation. The Court was particularly troubled by the insurer’s deletion of the electronic version of coverage documents even after counsel had instructed that all underwriting communications were to be preserved in compliance with the federal rules governing electronic discovery. The message sent by the Court in this case and by federal circuits in other cases cannot be clearer: *There is no substitute for care and diligence during the discovery process.* The voluminous information maintained by the insurance industry in electronic format multiplies the risks and liabilities for insurers in coverage litigations.

Significantly, the obligation to produce electronic discovery has now found its place in state venues. Many commercial litigation parts in New York that routinely adjudicate insurance coverage litigation matters now model discovery orders around the federal rules for electronic disclosure. Insurers, therefore, must be doubly vigilant to ensure that an effective litigation strategy is developed with counsel at the inception of a coverage matter. This strategy should, at a minimum, address critical issues on electronic discovery including the identification, retention and production of relevant electronic documents. Lines of communication between the insurer and counsel should be immediately established that designate responsible liaisons to coordinate disclosure. All potential electronic documents should be carefully reviewed and evaluated by counsel to ensure that information subject to a legal privilege is not disclosed. Above all, an insurer should be prepared to respond to inquires from both counsel and the court on its information technology systems and methods



of electronic storage in the event that unexpected issues arise.

The attorneys of HRRV are uniquely qualified to provide analysis and recommendations to assist our clients in responding to the complex issues of electronic discovery in coverage litigation. We have provided instructional programs on electronic discovery issues at nationally recognized seminars, and our attorneys have been regularly quoted in legal publications on the new federal rules. If you have any questions regarding this area, please do not hesitate to contact the firm.

### Contact

Sean Dwyer  
in the Mineola, New York Office  
sean.dwyer@hrrvlaw.com  
(516) 620-1720

## INSURANCE COVERAGE CORNER

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Problems arise, however, when additional insured status is provided in a “generic” or “blanket” form rather than by explicitly naming the entities entitled to such status. Compounding the difficulty is the fact that providing additional insured status generically is much more common than specifically listing the entities. Generic additional insured status is generally provided in one of two ways, both leading to confusion and, inevitably, litigation. Some insurance policies contain a provision, often as an endorsement, modifying the “Who is An Insured” definition to include all entities performing work for the named insured and whose liability arises out of their work for the Named Insured. Other policies provide coverage where liability arises out of the negligence of the named insured.

More common is a provision that expands the “Who is An Insured” definition to include all entities for which the Named Insured was required to procure insurance pursuant to the terms of a written contract. Typically, but not always, the policy will provide that the coverage provided for such additional insureds is limited to instances where the additional insured’s liability arises out of work for the named insured or in other policies where liability arises out of the named insured’s negligence.

Significant litigation has arisen between insurers who might have to provide coverage to additional insureds (defense and indemnity) and the additional insureds (or their own insurers) seeking such coverage over whether the additional insureds were entitled to a defense prior to a determination of whether their liability arose of the named insured’s negligence or work performed by or for the named insured. Insurers insisted that, since coverage was predicated on a finding of “liabil-

### Generic additional insured status is generally provided in one of two ways, both leading to confusion and, inevitably, litigation.

ity” arising out of prescribed circumstances that, (in contrast to coverage for named insured’s whose coverage was triggered by claims for damages falling within the policy), coverage and hence a defense was not owed until such a liability finding was made. In short, insurers argued that a finding of liability was a condition precedent to coverage. Putative additional insureds naturally argued that no such condition precedent existed and that, if a named insured was entitled to coverage, it was as well.

New York’s Court of Appeals recently resolved this issue, adopting the argument of the additional insured’s set forth above. In *BP Air Conditioning v. One Beacon Insurance Group*, 8 N.Y.3d 708, 840 N.Y.2d 302 (2007) the Court answered in the negative the question of whether liability must be determined before an additional insured is entitled to a defense, holding that “the obligation of an insurer to provide a defense to an additional named insured under the policy exists to the same extent as it does to a named insured”. Noting that it was “well settled” that an insurer’s duty to defend its insured is “exceedingly broad”, the Court observed that an insurer must provide a defense whenever the allegations of the complaint “suggest ... a reasonable possibility of coverage”, quoting *Automobile Insur-*

*ance Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2007). The Court held that with regard to the duty to defend, a liability “alleged to arise” is equivalent to liability “arising out of” such operations within the meaning of the policy. Therefore, if under any reading of the BP Air complaint there was any “possibility” that the injuries arose out of the named insured’s work, the insurer’s obligation to provide a defense to the additional insured was triggered. The Court found that such a result comported with the “reasonable expectation and purpose” of the ordinary businessperson. “Where a contract or purchase order requires the named insured to obtain additional insurance coverage, the additional insured’s reasonable expectation is protection for lawsuits arising out of the named insured’s work, i.e., “litigation insurance”. Indeed, the Court of Appeals, once again relying on an agreement to which the insurer was not a party in order to delineate the scope of coverage of the insurance policy, (as it did in *Pecker Iron Works of N.Y. v. Traveler’s Ins. Co.*, 99 N.Y.2d 391, 393 (2003)), based its assessment of the additional insured’s insurance coverage expectations not on the insurance policy itself but on a purchase order. In strong language, the Court unanimously held that “[d]enying [the additional insured] a defense in the underlying matter would rewrite the policy without regard to [the additional insured’s] reasonable expectations as expressed in the purchase order, and provide a windfall for the insurer.”<sup>2</sup>

The Court’s increasing willingness to rule in favor of additional insureds with regard to an insurer’s defense obligations is further illustrated by its failure to even mention the insurer’s reasonable expectations. Equally illustrative was

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the Court's willingness to impose coverage obligations on an insurer based on a document never seen by the insurer and based on a contract with which it had no privity. Insurers should recognize the potential implications of the Court's reasoning that an entity which not mentioned in the insurance policy was entitled to coverage under that policy based solely on its unilateral expectations derived from a document to which the insurer was not a party.

The potential impact of the *BP Air* decision is further magnified when read in conjunction with the Court of Appeals' decision in *Pecker, infra*. *Pecker* held that an additional insured was entitled to primary insurance from the additional insured carrier and that the additional insured carrier could not utilize the "Other Insurance" provision in the policy issued directly to the additional insured to obtain contribution from the additional insured's own carrier.

Such rulings must be carefully considered by insurers issuing policies which link insurance coverage to other contracts. Doing so may well result in an insurer providing coverage which it never intended to provide solely because a contract to which it was not a party led a third-party to believe it would be entitled to coverage. The financial consequences of these recent decisions could be significant to insurers since the additional insureds sometimes do not pay any premiums for such coverage, and often neither do the named insureds.

The clear message for insurers is that, under the terms of most policies as they are currently structured, they will be required to defend additional insureds in a large variety of circumstances. Indeed, given the Court of Appeal's reliance on an additional insured's reason-

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able expectation of "litigation insurance" based on a document never seen by the insurer, and its apparent disinterest in the insurer's reasonable expectations it is difficult to envision situations in which the duty to defend will not be imposed. Perhaps the Court of Appeals found that the insurer who ties coverage to another contract has implicitly or even explicitly agreed to provide whatever coverage that contract requires. Regardless of the rationale behind the decision insurers must recognize the significant exposure *BP Air* has created. Steps can be taken to limit such potential exposure.

Since reliance on "reasonable expectations" to interpret any contract, such an insurance policy should not come into play when the language of the insurance contract is clear and unambiguous, insurers seeking to limit their defense and, perhaps, indemnify, obligations should not utilize generic or blanket forms granting additional insured status based on the terms of some (unseen) document. Rather, they should only grant such status to specifically identified entities. However, that alone is not enough. There must

also be limits on additional insurance coverage which are specific, clear, and unambiguous, and which must be provided to the specified additional insured entities. That way either because the insurance policy is clear precluding the considerations of extrinsic evidence, or if not clear the additional insured is at least on notice that the additional insured coverage is limited, insurers should be able to limit their defense obligations to putative additional insureds. Given how impractical it would be for an insurer to review all of the contracts entered into by its insureds, such an approach would best limit an insurer's ever expanding and increasingly expensive obligation to provide "litigation insurance" to additional insureds.

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### Notes

1. While Certificates of Insurance under New York law do not confer insurance coverage and are "for information only," this rule does not apply if the insurance policy provides that entities listed on the Certificate qualify as additional insureds. *Penske Truck Leasing Co., L.P., v. Home Insurance Company*, 251 A.D.2d 478 (2nd Dep't 1998).

2. Given the fact that premiums are not always increased to provide coverage for additional insureds it is unclear why New York's highest court found that denying coverage would result in a "windfall" to the insurer.

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### Contact

**Abbie Havkins**  
in the New York, New York office  
[abbie.havkins@hrrvlaw.com](mailto:abbie.havkins@hrrvlaw.com)  
(646) 747-5100

**Matthew Kraus**  
in the New York, New York office  
[matthew.kraus@hrrvlaw.com](mailto:matthew.kraus@hrrvlaw.com)  
(646) 747-5127

## TEAM Helps Leagues, Teams and Facilities Avert Alcohol-Related Liability

*(Editor's Note: A regular feature of Legal Insights will be a conversation with a person involved in an area in which we practice. This issue features a conversation with Jill Pepper, the Executive Director of TEAM Coalition, Inc., an alliance of professional and collegiate sports, entertainment facilities, concessionaires, stadium service providers, the beer industry, broadcasters, governmental traffic safety experts, and others working together to promote responsible drinking and positive fan behavior at sports and entertainment facilities.)*

### **Q. (HRRV)** **What is TEAM's mission?**

#### **A. (Jill Pepper)**

TEAM (Techniques for Effective Alcohol Management) Coalition's mission is to provide effective alcohol service training in public assembly facilities and promote responsible alcohol consumption that enhances the entertainment experience while reducing alcohol-related instances both in facilities and on surrounding roadways.

### **Q. What benefits can an entity realize by becoming a part of TEAM?**

**A.** TEAM offers its member organizations, which include professional and collegiate sports, entertainment facilities, concessionaires, stadium service providers, the beer industry, broadcasters, and governmental traffic safety experts, the following benefits:

- Reducing alcohol-related incidents in stadiums and crashes on roadways
- Promoting family atmosphere, fan enjoyment, and safety
- Helping to prevent underage access to alcohol
- Helping to ensure compliance with alcohol laws
- Alerting stadium staff to liability issues
- Reducing insurance claims and liability suits

### **Q. How does TEAM interact with the different venues, leagues, managers and vendors?**

**A.** TEAM does not offer its members a "one-size-fits-all" approach to effective alcohol management. Each venue, league, team, and concessionaire utilizes what TEAM has to offer in a way that best fits the needs and goals of that organization.



TEAM has three primary offerings that the member organizations utilize:

- TEAM's primary function is to provide a training program for facility employees, designed to incorporate every job function in the building from beer sellers, to usher, security, and maintenance workers. The training program includes certification that is recognized by states with regulations regarding server training. However, all participants in the training program receive certification, which means that the TEAM program offers members a reasonable effort that goes beyond compliance with state laws.
- TEAM does not weigh in on what alcohol policies are the best for sports venues, as each has its own challenges when it comes to fan safety and security. TEAM prioritizes alcohol policy communication and enforcement. TEAM tracks the policies across all leagues, and TEAM helps facilities communicate those policies to fans. An integral part of the TEAM training program is to ensure facility managers are prepared to educate their staff as to what should be done when policies are violated. That is the key.
- Fan education regarding their responsibility when it comes to alcohol consumption is the third component of TEAM's platform. The Responsibility Has Its Rewards campaign encourages fans of all sports to never drive drunk, always have a designated driver, never provide alcohol to anyone under 21, and always buckle up. The campaign includes sweepstakes, Public Service Announcements, and event marketing.

### **Q. What training and educational services does TEAM provide to coalition members?**

**A.** TEAM training in effective alcohol management is an employee-focused, full-facility alcohol management program

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## Jill Pepper on Averting Alcohol-Related Liability

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available to sport and entertainment facility professionals. It has combined the wisdom of industry operations professionals from professional and collegiate sports, concessionaires, stadium operators, and stadium service partners. TEAM training represents the most comprehensive thinking about alcohol management, preparing facility operations managers to train alcohol servers and event-day employees to manage the sale, service and consumption of alcohol at public gatherings. Each year, over 25,000 employees of nearly 100 sports and entertainment facilities become certified in the TEAM program.

Key components of TEAM training include:

- Recognizing signs of impairment
- Understanding how the misuse of alcohol affects employees, guests, the facility and the community

Managing alcohol effectively by working together as a team

- Demonstrating reasonable efforts to minimize liability when it comes to alcohol-related incidents
- Helping to prevent underage access to alcohol by checking IDs and looking for pass-offs
- Helping to ensure compliance with state alcohol service laws

**Q. What are your thoughts regarding tailgating? What steps can be taken to eliminate or to minimize the risk of alcohol-related incidents at facilities where tailgating is permitted?**

**A.** Tailgating is definitely a challenge for facility managers. For many fans, it is as much a part of the game day experience as singing the National Anthem or standing up to cheer when your favorite team scores. In order to ensure fans are

acting safely and responsibly, facility managers need to enforce pre-game alcohol policies as stringently as they do for alcohol service policies during the game. Limiting the hours fans can tailgate and what they can bring in to the parking lot are important steps. Monitoring the tailgating areas to ensure fans are following the policies is necessary. Security staff, uniformed-officers, and facility managers should be very visible in the tailgating areas. And those areas should have signs posted with the policies and consequence of violating those policies easily visible.

A critical component toward minimizing alcohol-related incidents in facilities where tailgating is permitted is to train the ticket takers at all the gates in the TEAM program. If ticket takers witness a fan showing the warning signs of impairment and they take action before the fan even enters the facility, then alcohol-related incidents can be avoided.

**Q. Do smaller venues have different alcohol-related risks than larger venues? Is the size of or type of venue significant from TEAM's perspective?**

**A.** From TEAM's perspective, the size of the venue matters less than the venue's preparedness when it comes to alcohol management. A 13,000-seat arena hosting a heavy metal rock festival with a total of 400 employees may have as many alcohol-related incidents on a per-fan or per-employee basis as an 80,000-seat stadium with 3,000 employees hosting a playoff-determining game between two long-time rivals. In either case, facility managers need to have a plan to handle fans who appear to have had too much to drink and violate the fan code of conduct. The goal is to keep everyone safe. And that is where TEAM is here to help.

## SCHEDULED PRESENTATIONS

- ▶ **Potential Litigation Arising Out of Lead Paint Toy Recalls**  
Tara Fappiano  
Andrews Publications  
October 25, 2007  
Webinar
- ▶ **Finding the "Green" In Green Construction**  
Sean Dwyer  
27th Annual International  
Risk Management Institute  
Construction Risk Conference  
October 29–November 1, 2007  
Orlando, FL
- ▶ **How to Take and Defend Effective Depositions**  
Jonathan A. Judd  
Litigation Institute of New York  
November 2, 2007  
New York, NY
- ▶ **Venue and Premises Liability**  
Carla Varriale & Steve Rosenfeld  
2007 International Conference  
on Sport and Entertainment  
Business  
November 15–17, 2007  
Columbia, South Carolina
- ▶ **Evidence: Strategies for Finding, Preserving and Using Evidence to Support Your Case**  
Sean Dwyer  
November 29, 2007  
Long Island, NY
- ▶ **Avoiding Liability as an Owner/Operator of a Sports or Recreation Facility**  
Carla Varriale  
Athletic Business Conference & Expo  
November 29, 2007  
Orlando, FL
- ▶ **International Sports Law**  
Carla Varriale  
December 5, 2007  
London, England
- ▶ **Venue and Premises Liability**  
Carla Varriale & Steve Rosenfeld  
2008 Stadium Managers Association  
(SMA) Seminar  
February 3–7, 2008  
San Diego, CA

## General Obligations Law §15-108 Amended to Exclude Voluntary Discontinuances

By Jonathan Judd

General Obligations Law §15-108 applies where a plaintiff settles with a defendant in a personal injury action leaving remaining, non-settling defendants. The settling defendant may not seek contribution from a non-settling defendant. Nor may a non-settling defendant seek contribution from a settling defendant. Additionally, if the settling defendant is subsequently found partially liable, any damages which the plaintiff recovers from a non-settling defendant will be reduced by an amount equal to the stipulated settlement or the settling defendant's equitable share of liability, whichever is greater.

According to its legislative history, the statute was designed to "encourage plaintiffs to voluntarily release those defendants who appear not to bear any liability, which would in turn reduce the litigation costs of those ostensibly blameless defendants [and]... make many summary judgment motions unnecessary, [reducing]... the burden on the court system."

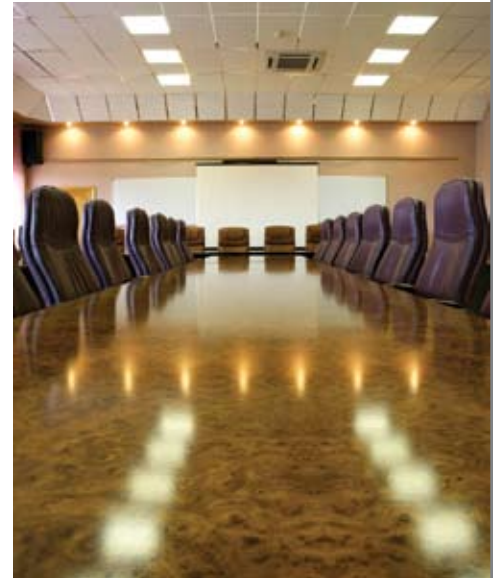
Originally, a settlement or voluntary discontinuance would yield the same result, i.e., the release of the defendant from the action. Plaintiffs were reluctant to provide a defendant with a voluntary discontinuance without some monetary consideration, even where it appeared that no liability existed, since new facts or theories could potentially arise to inculpate the released defendant, with any damages recoverable from the remaining defendants reduced by the amount of the released defendant's equitable share of liability.

Since the statute essentially reduced the amount of damages received by a plaintiff by the equitable share of the released defendant's liability, even where the plaintiff received no consideration

for the release, defendants with no liability needed to bring summary judgment motions instead of having actions voluntarily discontinued against them. Non-settling defendants also found themselves in an untenable position since a defendant who was released from an action under §15-108 could not later be sued for contribution by a non-settling defendant who was nevertheless entitled to a reduction equal to the released defendant's share of liability.

Previously, if the defendant seeking a voluntary discontinuance was forced to move for summary judgment because the plaintiff refused to oblige, a non-settling defendant would be compelled to oppose that motion. If that motion was granted, the settling defendant was forever free from liability, and the remaining defendant was not entitled to any reduction in the amount of the released defendant's equitable share of damages.

The New York State Legislature has addressed this situation by amending §15-108 to add subdivision (d), which carves out an exception for a discontinuance given without monetary consideration. Now, a plaintiff may voluntarily discontinue an action against a defendant who does not appear to be liable without risking a reduction of a damages award if the released defendant is later found to be partially liable. Non-settling defendants who believe that the released defendant may be partially or fully liable may implead the released defendant to seek contribution under the law as amended. Defendants who are released without monetary consideration should be aware that, if new facts and theories of liability arise later, they may be brought back into the action by a non-settling defendant in a third-party claim for contribution or indemnity.



Prior to this amendment, the reduction of damages by the greater of either the settlement amount or the equitable share of liability was applied automatically when a defendant who had entered into a release or covenant not to sue was found liable. This still applies to situations in which a settling defendant, as part of the agreement or the release, provides the plaintiff with monetary consideration greater than one dollar. However, in situations in which a claim is voluntarily discontinued without monetary consideration, a non-settling defendant will be required to implead that defendant in order to seek contribution.

The amendment took effect on July 4, 2007, and applies to releases or covenants not to sue effective on or after that date. Only time will tell whether the amendment will dissuade defendants from seeking voluntary discontinuances since they could be brought back into the action at a later date by a non-settling defendant seeking contribution.

### Contact

**Jonathan Judd**  
in the New York, New York office  
jonathan.judd@hrrvlaw.com  
(646) 747-5120