



LEGAL INSIGHTS

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INSURANCE COVERAGE CORNER

New York Court of Appeals Revitalizes Often Overlooked Coverage Defense

By Abbie Havkins and Linda Fridegotto

The fundamental underpinning of insurance policies is fortuity. Insurance policies generally require “fortuity” and thus implicitly exclude coverage for intended expected or known harms. See *Consol. Edison Co. of N.Y. v. All-state Ins. Co.*, 98 N.Y.2d 208, (2002). A fortuitous event is defined by the Insurance Law as “any occurrence or failure to occur which is, or is assumed by the parties to be, a substantial extent beyond the control of either party.” See N.Y. Insurance Law § 1101(a)(1). It therefore follows that a fortuitous loss is a necessary element of insurance policies based on either an “accident” or “occurrence” and that a known loss cannot be a fortuitous one.

The insured has the initial burden of proving that the damage was the result of an “accident” or “occurrence” to establish coverage where it would not otherwise exist. Once coverage is established, the insurer bears the burden of proving that an exclusion applies.

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New York Appellate Court Applies Assumption of Risk in Mosh Pit Case

By Steven H. Rosenfeld

A New York appellate court has, for the first time, applied the doctrine of primary assumption of the risk to a claim of injury sustained in or in the vicinity of a mosh pit. HRRV represented the victorious defendant, BB King Blues Club.

In *Schoneboom v. BB King Blues Club*, 2009 N.Y. Slip Op 08160 (November 12, 2009), the Appellate Division, First Department held that a club patron was barred by the doctrine of primary assumption of the risk from seeking damages for injuries suffered when an identified person in a group of slam dancers slammed into him.

The court held that “[a]fter observing the open and obvious slam dancing from a safe vantage point, and fully appreciating the risk of colliding with a slam dancer, plaintiff nonetheless elected to place himself in close proximity to that activity, thereby assuming the risk that resulted in his injuries.”

The plaintiff nonetheless elected to place himself in close proximity to that activity, thereby assuming the risk that resulted in his injuries.

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Court Applies Assumption of Risk Bar to Suit Against Health Club Whose Employees Fail to Use Defibrillator

By Carla Varriale

A New York trial court recently dismissed a personal injury action arising out of the cardiac arrest and subsequent death of a patron of a health club which that provided an external defibrillator, as required by law, but whose employees failed to use the defibrillator because they erroneously believed the cabinet in which it was housed was locked.

In *DiGiulio v. Gran, Inc.* (Supreme Court, New York County, Index Number 105441/06, October 13, 2009), the plaintiff's decedent suffered a heart attack and collapsed while working out on a treadmill owned and/or operated by the defendants' health club. The assistant manager was notified of the collapse by another club member and promptly called 911. Another club employee began administering cardiopulmonary resuscitation (CPR) within two to three minutes. After approximately five minutes, paramedics arrived and used a defibrillator on the club member who had collapsed. He was revived, hospitalized, and subsequently died. Although a defibrillator was provided at the health club approximately twenty yards away from where the plaintiff's decedent collapsed, the assistant manager admitted that he did not try to use the defibrillator because he believed that the cabinet in which it was kept was locked and he did not have a key. The defibrillator cabinet, however, was not locked.

The plaintiff's negligence action attacked the health club's alleged failure to use the available defibrillator. An automated external defibrillator (AED) is a battery-driven device used to administer an electric shock through the chest wall of a person who has gone into cardiac arrest. The shock, called defibrillation, may help the heart establish an effective rhythm of its own. Trained nonmedical personnel can use an AED to treat a person in cardiac arrest.

In *DiGiulio*, the plaintiff argued that the failure of the defendants' employees to use the available defibrillator was a breach of the reasonable duty of care owed to members of the club and that this breach proximately caused the member's death in this case. Furthermore, the plaintiff contended that the health club's assistant manager was negligent in failing to attempt to open the cabinet and that the assistant manager's negligence should be imputed to the health club. In addition to the common-law negligence claims, plaintiffs also asserted claims that the health club violated New York General Business Law (GBL) Section 627-a(1), which requires every



health club of 500 or more members to maintain at least one defibrillator on its premises as well as personnel who are trained and certified in its proper use.¹

The defendants argued, among other things, that they had no duty to use the defibrillator because, by voluntarily participating in the activity of exercising on a treadmill, the plaintiff's decedent assumed the risk of cardiac arrest.

The Court agreed. Noting evidence that the plaintiff's decedent regularly exercised on the treadmill, the Court determined that he assumed the inherent risk of suffering cardiac arrest while doing so. The Court cited two cases that held that the risk of cardiac failure is inherent in participating in exercise or sporting activity or exercise. *See Rutnik v. Colonie Center*

1. General Business Law Section 627-a provides as follows: Automated external defibrillator requirements. (1) Every health club as defined under paragraph-b of subdivision one of the section 3000-d of the public health law whose membership is 500 persons or more shall have on the premises at least one automated external defibrillator and shall have in attendance, at all times during business hours, at least one individual performing employment or individual acting as an authorized volunteer who holds a valid certification of completion of a course in the study of the operation of AEDs and a valid certification of the completion of a course in the training of cardiopulmonary resuscitation provide by nationally recognized organization or association. (2) Health club and staff pursuant to subdivision one of this section shall be deemed a "public access defibrillation provider" as defined in paragraph (c) of subdivision one of the section 3000-b of the public health law and shall be subject to the requirements and limitation of such section. (3) Pursuant to sections 3000-a and 3000-b of the public health law, any public access defibrillation provider, or any employee or other provider who, in accordance with the provisions of this section, voluntary and without expectation of the monetary compensation renders emergency medical or first aid treatment using an AED, which has been made available pursuant to this section, to a person who is unconscious, ill or injured, shall be liable only pursuant to section 3000-a of the public health law. In New York, some local municipalities have enacted additional requirements for certain organizations or locations such as nursing homes and adult care facilities. For example, in Suffolk County, all health clubs regardless of size, are required to have AEDs at their facilities.

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Court Applies Assumption of Risk Bar to Suit Against Health Club Whose Employees Fail to Use Defibrillator

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Club, 249 A.D.2d 873, 672 N.Y.S.2d 451 (3rd Dep't 1998), a wrongful death action involving an experienced racquetball player who suffered cardiac arrest while playing racquetball was dismissed because the decedent assumed the risk of playing racquetball and there was no requirement to have a defibrillator during the tournament. See also *Colon v. Chelsea Piers Management*, 50 A.D.3d 616, 855 N.Y.S.2d 201 (2nd Dep't 2008), a wrongful death action involving a basketball player who suffered cardiac arrest while playing basketball was dismissed because the defendants had no statutory duty to provide an AED or personnel trained in CPR. (Even assuming that Chelsea Piers Management's premises fell within the definition of a health club, GBL Section 627-a did not become effective until July 20, 2005.)

***DiGiulio* highlights some of the practical difficulties and potential liabilities facing health club owners and operators and their employees. It also underscores some potential litigation issues presented by GBL 627-a(1).**

The argument that the assistant manager in *DiGiulio* who assumed a duty to obtain and to use the defibrillator assumed a duty of reasonable care was likewise unavailing. The Court rationalized that an actor can only be held liable in New York if discontinuing his aid or protection leaves the other person in a worse position.² Here, the Court held that neither the health club nor the assistant manager placed the plaintiff's decedent in a more vulnerable position.

2. New York's so called "Good Samaritan" law is set forth in New York Public Health Law Section 3000-a and insulates persons who render aid under certain circumstances for their ordinary negligence. While negligence is generally described as a failure to exercise ordinary care, "gross negligence" means a failure to use even slight care, or is conduct that is so careless as to show complete disregard for the rights and safety of others.

With regard to the plaintiff's claims regarding the defendants' purported violation of GBL Section 627-a(1)'s requirement that the health club have at least one external defibrillator, the Court determined that the health club was in compliance with GBL Section 627-a (1). Noting that the club, which has approximately 3,000 members, was subject to GBL Section 627-a(1), the Supreme Court held that the health club complied because it had a defibrillator on the premises at the time of the member's collapse. The Supreme Court declined to impose liability on a health club which, in compliance with the statute, had an accessible defibrillator on the premises but, due to the "poor judgment" of an employee, did not utilize it. The Court determined that there is "nothing in the statute" which suggests that principles under the common law should be extended so as to make the health club liable for an employee's negligence in using, or attempting to use, an available defibrillator.

Although it is not known if this decision will be appealed, *DiGiulio* highlights some of the practical difficulties and potential liabilities facing health club owners and operators and their employees. It also underscores some potential litigation issues presented by GBL 627-a(1). For example, determining whether a facility is a "health club"³ within the meaning of the statute is an obvious issue. Moreover, requiring health clubs to have a defibrillator may present challenges if club staff are not trained and prepared to use the defibrillator. In the meantime, prudent recreation and sports centers should consult their state and local laws and determine the scope of their requirements in order to avoid liability. Given the salutary purpose of Section 627-a and similar laws, unnecessary deaths and potential liability of "Good Samaritans" are both undesirable outcomes.

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3. New York's Public Health Law, Section 3000-d, defines health club as follows: "Health club" means any commercial establishment offering instruction, training or assistance and/or the facilities for the preservation, maintenance, encouragement or development of physical fitness or well-being. "Health club" as defined herein shall include, but not be limited to health spas, health studios, gymnasiums, weight control studios, martial arts and self-defense schools or any other commercial establishment offering a similar course of physical training.

CIVIL PRACTICE CORNER

Packing a Punch Under the Common Law

By Gail L. Ritzert

In actions arising from commercial or municipal construction projects, defendants' cross-claims and third-party claims generally focus on the indemnification provisions contained in the various contracts executed by the parties. While claims for common-law indemnification are routinely asserted in cross-claims and third-party complaints, the claim will often be an afterthought for some attorneys. The consequences of losing sight of this claim can be severe. This point was driven home by the Court of Appeals in the decision it rendered in *Cunha v. City of New York*, 12 N.Y.3d 506 (2009).

The plaintiff was injured while working in a ditch as part of a roadway excavation in Brooklyn, New York. While the plaintiff was attempting to expose an underground utility wire in a seven-foot ditch, the trench collapsed injuring him.¹ The plaintiff commenced an action against the City of New York asserting claims under Labor Law §§ 200, 240(1), and 241(6). In turn, the City commenced a third-party action against the plaintiff's employer, JLJ Enterprises, Inc., the prime contractor for the work, and Haks Engineers, P.C., which was retained to perform engineering inspection services.

Addressing the City's motion for summary judgment seeking the dismissal of the plaintiff's Labor Law §§ 200 and 241(6) claims² and for contractual and common-law indemnification against Haks, the trial court dismissed

1. The walls of the trench were not shored, and the Industrial Code requires shoring in trenches greater than five-feet deep.

2. The plaintiff voluntarily discontinued the Labor Law § 240(1) claim.

the plaintiff's Labor Law § 200 claim against the City, but denied the motion as to the plaintiff's Labor Law § 241(6) claim and the City's request for indemnification against Haks. The City and Haks entered into a settlement with the plaintiff, in which the City conceded that there was a violation of the Industrial Code entitling the plaintiff to a recovery under Labor Law § 241(6). Thus, the only issues that remained for the jury to consider were the City's indemnification claims against Haks.

The City's claims against Haks were based on the terms and obligations set forth in the contract between Haks and the City. Significantly, in its contract, Haks agreed to inspect the work performed by all trades and to ensure that the work was performed in accordance with the contract specifications, and that the trades followed the contract's safety guidelines.

The jury was asked to assess whether Haks was negligent, whether its negligence was a substantial factor in bringing about the accident, and Haks percentage of fault.³ The jury found Haks negligent, but only apportioned 40 percent of the liability to it. The jury was not asked to and did not identify the entity which was 60 percent at fault. Following the jury's verdict, the City moved for a directed verdict on its contractual indemnification claim. The trial court denied the motion.

On appeal, the Appellate Division, First Department reversed the trial court and held that the City was entitled to full common-law indemnification from Haks, the party responsible for the accident. The court further held that it was an error for the jury to be instructed to allocate fault. The Appellate Division also determined that the City was entitled to the recovery of the attorney fees, costs, and disbursements incurred as part of its common-law indemnification claim.

3. The City objected to the third question, asserting that the jury should not be asked to apportion liability.

See *Chapel v. Mitchell*, 84 N.Y.2d 345 (1994). In doing so, the court expressly rejected Haks' argument that the City waived its right to recover its costs and fees when it settled the claim.⁴ The court of Appeals granted Haks' motion for leave to appeal and affirmed the Appellate Division decision.

In deciding in favor of the City, the Court of Appeals acknowledged the well-settled case law that permits a party to settle a claim and then seek indemnification from the wrongdoer as long as the settling party can show that it may not be held liable to any degree. Here, the trial court had determined that the City was not actively negligent when it dismissed the plaintiff's Labor Law § 200 claim. Moreover, at trial, counsel for Haks conceded that the City's active negligence was not an issue. Therefore, there was no basis for the jury to even consider that the City was negligent. Nor was there a basis to surmise that the remaining 60 percent of the liability rested with the City. Accordingly, the City's request for indemnification was granted against Haks. The Court of Appeals did not address the City's contractual indemnification claim since it found the City was entitled to common-law indemnification.

Although the City moved for contractual indemnification from Haks at the close of the trial, the decisions rendered by the Appellate Division and the Court of Appeals resoundingly illustrate that claims for common-law indemnification are as equally important to preserve and defend against as contractual claims, and that counsel must defend against both claims at every stage of the litigation process.

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4. See *American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 307 A.D.2d 939 (2003); see also *Fessenden v. Marshalls Dept. Store of Pittsford, NY*, 261 A.D.2d 839 (1999).

Application of Article 16 in Dram Shop Claims

By Carmen A. Nicolaou

A common misconception in cases based in whole or in part on the existence of a non-delegable duty is that this duty precludes the application of CPLR Article 16, the New York statutory framework which modifies the common-law rules of joint and several liability. One such non-delegable duty subject to this misconception is New York's Dram Shop Act. Contrary to what is often argued by members of the plaintiff's bar, defendants in Dram Shop actions **are** entitled to the protections of Article 16.

At common law, one who provided intoxicating liquor was not liable for injuries caused by the drinker, who was held solely responsible. The Dram Shop Act created an exception to the common-law rule and imposed a non-delegable duty upon a defendant who "unlawfully" sells alcohol to another person for injuries caused by reason of that person's intoxication. See N.Y. General Obligations Law § 11-101 (2004). Specifically, the Dram Shop Act states as follows:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

N.Y. CLS Gen. Oblig. § 11-101

Once a plaintiff is able to establish a Dram Shop claim, the seller (in addition to being able to seek contribution from the intoxicated person) can seek protection under Article 16. Specifically, CPLR § 1601 sets forth in pertinent part:

Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be 50 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; provided, however, that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with



due diligence he or she was unable to obtain jurisdiction over such person in said action . . .

Under Article 16, a plaintiff can recover his or her entire judgment for non-economic loss from any party found 51 percent or more at fault. In other words, any party found 50 percent or less at fault is only responsible for its proportionate share of non-economic loss (better known as "pain and suffering"), unless an exception set forth in CPLR §1602 applies. In this case, the limited liability protections of Article 16 would not apply and a tortfeasor found even 1 percent at fault would be responsible for all economic and non-economic loss.

Section 1602(2)(iv) states, "[t]hat the limitations set forth in this article shall not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (iv) any liability arising by reason of a non-delegable duty or by reason of doctrine of respondeat superior." Personal injury plaintiffs often argue that this section is an exception to the protections of Article 16 and, as such, precludes the application of Article 16 in Dram Shop actions. In 2001, however, the New York Court of Appeals held otherwise and restated this holding as recently as 2006.

Specifically, in *Rangolan v. County of Nassau*, 9 N.Y.2d 42, 749 N.E.2d 178 (2001), the Court of Appeals, addressing a certified question by the United States Court of Appeals for the Second Circuit, analyzed whether §1602(2)(iv) is an exception to Article 16 protection. The plaintiff, an inmate in the Nassau County Correctional Center, was assaulted by a fellow inmate named Steven King. On appeal, the County argued that the district court erred when it failed to give the jury the standard charge in accordance with the apportionment

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Application of Article 16 in a Dram Shop Claims

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rules set forth in Article 16. The plaintiff argued that the County was not entitled to Article 16 protection since the County had a non-delegable duty to protect him and such a duty was an enumerated exception to Article 16 protection. The Court of Appeals concluded that this particular section was a savings provision and not an exception. Specifically, the Court, when looking at the history of the provision, found that §1602(2)(iv) was a “savings provision that preserves principles of vicarious liability. It ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR Article 16 is not construed to alter its liability.” *Id.* at 47.

In 2006, in *Frank v. Meadowlakes Development Corporation*,, 6 N.Y.3d 687, 849 N.E.2d 938 (2006), the Court of Appeals again addressed the meaning of this section and reiterated that the language of § 1602(2)(iv) was “merely intended to insure that the courts did not read Article 16 as altering pre-existing law regarding respondeat superior or non-delegable duties.”

Article 16 remains a viable defense for sellers of alcohol charged with violating the Dram Shop Act. As such, if the seller can establish that it was 50 percent or less at fault, usually pointing the finger for the balance of fault at the intoxicated person, it can limit its liability for non-economic loss to its actual percentage of fault.

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How to Handle Employee Misconduct

Facility Operators Can Stay Out of Court by Paying Attention to the ‘Three Rs’

By Carla Varriale

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When it relates to employee misconduct, ignorance is not bliss. In fact, it is just the opposite. That’s why facility operators should remember the “Three Rs”: Record, React and Review. Fitness, recreation and athletic facilities can be fertile terrain for inappropriate behavior, and these three fundamental practices have either prevented industry professionals from going to court over employment and liability issues, or gotten them off the hook in front of a judge or jury. Here’s how they work:

- 1. Record.** Maintain written reports of any employee’s misconduct or questionable behavior, and make sure the staff members involved sign off on all performance evaluations and disciplinary actions. Keep those documents on file for at least seven years.
- 2. React.** Follow up the first “R” by taking appropriate action against a staff member. This can include reassignment to a different department or section of the facility, the scheduling of behavior-modification sessions, demotion or even termination.
- 3. Review.** Consider the effects of the second “R.” If you’ve addressed a performance issue, set a timetable for future performance evaluations. Consider, too, what other action (if any) is required. For example, is additional training needed? What else must be taken into account to ensure that the situation has been properly handled and rectified?



Documentation of alleged improper instruction, injurious behavior or inappropriate actions of employees and independent contractors (such as personal trainers) shows due diligence on the part of an employer. Reports of undocumented conduct or, even worse, hearsay, look bad in court.

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CO-OP/CONDO CORNER

Hamlet: Act I, Scene II

Appellate Division Holds True to Court of Appeals' Prohibition of Private Cause of Action for Martin Act Violation

By Jarett L. Warner

In *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v. Holiday Org., Inc.*, 2009 N.Y. Slip Op. 06803 (September 29, 2009), the Appellate Division, Second Department followed the Court of Appeals' decision in *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236 (2009) (see *Legal Insights*, Spring 2009) and would not allow private causes of action with regard to inaccurate budget projections contained within an offering plan.

In this case, individual owners of a condominium development experienced problems with their residences shortly after moving in, including with regard to their heating, air conditioning and plumbing systems. Likewise, there were similar problems with regard to the common areas of the development. Due to the fact of the necessary repairs to the common areas and that the expenses were much higher than the budget projections contained in the offering plan, owners' assessments were significantly higher than anticipated.

As a result, the owners commenced a lawsuit against the sponsor, a member of the sponsor, the principals of the members, the sponsor's parent organizations, the real estate broker, the engineering firm and the architectural firm. The owners asserted causes of action for, among other things, common-law fraudulent inducement, negligent misrepresentation and breach of contract.

The Appellate Division reasoned that since the budget projections were included in the offering plan as required by the Martin Act (General Business Law § 352, et seq.) as well as the implementing regulations thereto, they could not be the basis for causes of action alleging common-law fraud inducement or negligent representation against the sponsor, its members or principals.

The Appellate Division held that the lower court (Supreme Court, Nassau County) properly dismissed the sponsor, the member of the sponsor, the principals of the members, and the sponsor's parent organizations from the lawsuit. The Appellate Division reasoned that since the budget projections were included in the offering plan as required by the Martin Act (General Business Law § 352, et seq.) as well as the implementing regulations thereto, they could not be the basis for causes of action alleging common-law fraud inducement or negligent representation against the sponsor, its members or principals. The Court cited to the Court of Appeals' decision in *Kerusa*.

In *Kerusa*, the Court of Appeals stated in its decision dated April 2, 2009 that the Martin Act makes it illegal to participate in a public offering of securities in real estate unless an offering statement is filed with the attorney general and that the statement must include any additional information as the attorney

general may prescribe to provide potential purchasers an adequate basis upon which to form their basis as to whether to make the purchase and that it cannot omit any material fact or contain any untrue statement of a material fact. The disclosure requirements prescribed with regard to newly constructed condominiums "detail the format and content of offering plans and filings, including the word-for-word representation that must be made in the certification to be sworn to by the sponsor and the sponsor's principals in the offering plan . . . and the requirements for offering plan amendments, including the direction that '[a]n amendment must include a representation that all material changes of facts or circumstances affecting the property or the offering are included . . . ' (13 NYCRR 20.5[a][2])."

The Appellate Division in *Hamlet* also held that the lower court properly dismissed the owners' causes of action against the real estate broker and engineering and architectural firms for breach of contract, fraudulent inducement, negligent misrepresentation and negligence/malpractice. The basis for the dismissal of these claims was that the certifications in the offering plan executed by these entities were done pursuant to the attorney general's implementing regulations and, thus, no private cause of action existed against them.

Finally, the Appellate Division did find that the owners had a viable cause of action seeking damages for breach of contract based upon certain provisions of the purchase agreements.

In sum, the Appellate Division, Second Department would not permit private causes of action for fraud inducement or negligent representation as long as the sponsor complies with the Martin Act and its implementing regulations and discloses the budget projections in the offering plan.

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See *Northville Indus. Corp. v. Nat'l Union Fire Ins. Co.*, 89 N.Y.2d 621. An insurer, in exchange for a premium, is willing to pay its insured (in first-party actions) or indemnify its insured (in third-party actions) an amount substantially above the premium if a covered (and not excluded) event occurs during the policy period. The insured pays a premium to protect itself from a potentially calamitous loss, and the insurer is willing to provide such coverage because it believes that by spreading the risk over numerous insureds the premiums it collects will exceed the losses it must pay.

As long as the insurer's underwriters and actuaries evaluate the risks properly and the insurance policy is carefully drafted to provide only the intended coverage, this system works for the mutual benefit of insurers and insureds. As in other areas, investing in securities, and other forms of gambling come to mind, advance knowledge or inside information can upset this delicate balance. If an insured knows, while shopping for an insurance policy, that it has sustained a loss or that a basis for a claim against it actually exists and does not relay that information to the insurer, it is not buying coverage for a potential loss, rather it is selling the insurer a known, but undisclosed, loss. The essential element of fortuity has been eliminated.

To protect against such situations, some, but not all, insurance policies contain provisions excluding coverage where, prior to the policy period, the insured knew of the loss for which it is now seeking coverage or knew of acts, omissions or circumstance which might give rise to a claim. Courts however have not viewed such provisions favorably and have gone out of their way to



construe such provisions narrowly. For example, some courts have found that if the extent of the loss is not known or if the culpable parties have not been determined or if a lawsuit has not been brought although one has been threatened, then neither the known loss doctrine nor the related exclusions may be invoked by insurers seeking to avoid coverage.

A recent decision by the New York Court of Appeals, applying Pennsylvania law, signals a much more favored approach to such defenses to coverage. In *Executive Risk Indemnity v. Pepper Hamilton, LLP*, 2009 N.Y. Slip Op 7453, 2009 N.Y. Lexis 3911 (2009), the Court of Appeals was asked to decide whether a "prior knowledge" exclusion in the insurers' policies were applicable and supported summary judgment in the insurers' favor. The underlying lawsuit arose out of the law firm defendant's representation of a client, SFC, which pooled, packaged and then sold student loans to investors including the preparation of Private Placement Memoranda. The law firm's malpractice policies contained a provision excluding any act, error or omission if any insured prior to the issuance of the policy "knew or could have reasonably foreseen" that such act, error or omission "might be the basis of a claim."

Prior to issuance of the malpractice policies, the law firm had learned that its client had been involved in securities fraud by making inaccurate representations. This information was not conveyed to the insurers. At that time, no claims had been asserted or

threatened against the law firm. There is no indication in any of the decisions that the law firm itself was involved in any improper conduct. After SFC filed for bankruptcy several years later and it was alerted by the bankruptcy trustee that claims would be asserted against it, the law firm notified its insurers. Perhaps reflecting the view that the exclusion would not be enforced, the primary insurer did not contest its obligation to provide a defense; however, the "more aggressive" excess insurers denied any indemnity obligations.

The trial court granted summary judgment to the insurers declaring that they had no obligation to defend the underlying suit based on the prior knowledge exclusion. The Appellate Division reversed, holding that the prior knowledge exclusion required that the known act, error, omission or circumstance be "wrongful conduct on the part of the insured." See *Executive Risk Indem. Inc. v. Pepper Hamilton LLP*, 56 A.D.3d 196, 204 (1st Dep't 2008).

The Court of Appeals reversed this determination and read the exclusion far more expansively, holding that it applied to knowledge of **any entity's** act, error, omission or circumstance if the insured either knew or reasonably could foresee that such other entity's acts or omissions could rise to a claim against it. In other words, even though there was absolutely no evidence that the law firm had itself acted improperly, the mere fact that it had learned of the possibility that claims against its former client might be asserted was sufficient to invoke the prior knowledge exclusion.

The Court held as follows:

Given the law firm defendants' role in the securitization of the loans and [its lawyers] close involvement with SFC, a reasonable attorney with the law firm defendants' knowledge should have anticipated the possibility of a lawsuit, particularly when

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millions of dollars may have been lost from activities of which they were aware. Here, the law firm's knowledge of its client's fraudulent payments prior to its application for excess coverage coupled with the fact that a reasonable attorney would have concluded that the law firm defendants would likely be included in the litigation because of their role in their client's business would satisfy the test of *Coregis* and create an obligation for the law firm to inform its insurers of this potential litigation.

Id. at 9-10, *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302 (3rd Cir. 2001).

This represents a potential dramatic expansion of the known loss doctrine and insurance policy exclusions incorporating that doctrine. Given that exclusions are read as narrowly as possible and any potential ambiguity read against the insurer, the Court of Appeals could easily have affirmed the Appellate Division by finding that the language of the exclusion was ambiguous. Alternatively, the Court could have followed the track of many courts that have required great specificity in the knowledge actually required. By declining to take that approach, the New York Court of Appeals has breathed new life into the known loss doctrine and insurers and their lawyers should carefully explore the potential applicability of this revitalized defense.

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New York Appellate Court Applies Assumption of Risk in Mosh Pit Case

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The First Department decision affirmed the order of Justice Marcy Friedman, sitting in Supreme Court, New York County, granting summary judgment. Justice Friedman had noted that the 36-year-old plaintiff testified that he was standing in the vicinity of "a lot of people bouncing around, bouncing off each other," but that he did not participate in the fun. Notwithstanding this claim, Justice Friedman held that the plaintiff, an experienced concertgoer, assumed the risk of being struck by a fellow concertgoer when he deliberately placed himself in proximity to the mosh pit—even though he knew that an aggressive type of moshing was in progress. Justice Friedman had also rejected the plaintiff's contention that he did not consent to the risk because he did not actually participate in moshing, stating that "[i]t is well settled that 'a spectator generally will be held to have assumed the risks inherent in the game, including the specific risk of being struck.'"

Lastly, Justice Friedman rejected the plaintiff's contention that he did not assume the risk of an assault or that a triable issue of fact existed as to whether he was assaulted, noting that the plaintiff and his friends, all of whom submitted affidavits in opposition to the motion, did not claim that they made any complaint to security about "assaultive behavior." In any event, Justice Friedman held that even assuming *arguendo* that BB King had a duty to impose reasonable security measures to minimize danger, there was no evidence that it breached any such duty.

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HRRV ON TRIAL

HRRV Achieves Favorable Verdict in Bronx County Labor Law Case

Valdovinos v. Shore Road Apartment Corporation
Supreme Court, Bronx County
Index No. 21157/2005
September 15, 2009

The plaintiff claimed that Shore Road Apartment Corporation violated Labor Law § 241(6), specifically by failing to ensure that the general contractor performing work in a cooperative apartment failed to provide a guard on a table saw being used by the plaintiff to do his work. The plaintiff claimed the following injuries: a severe laceration to the left index finger with a comminuted compound fracture to the DIP joint, requiring a fusion to the distal interphalangeal joint, with a skin graft and insertion of a pin; a subsequent removal of the pin; a severe laceration to the left ring finger requiring a skin graft; and a permanent injury to the flexor tendon in the left index finger, including numbness and pain.

During the trial before Justice Kern in Supreme Court, Bronx County, the jury returned its verdict, finding that the plaintiff was 75 percent comparatively negligent, with only 25 percent liability attributed to Shore Road. The total verdict (before the allocation of fault) was \$261,375.89 (\$11,375.89 medical expenses; \$200,000 past pain and suffering, \$50,000 future pain and suffering for 45 years). The pretrial settlement demand was \$950,000.

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HRRV DECISIONS OF INTEREST

Claim Against Tractor Trailer Owner and Operator Dismissed in the Absence of ‘Serious Injury’

In *Michael C. Ciesiulka and Kristine L. Ciesiulka v. Joseph Rebovich, Reinhart Transportation, LLC and John Doe*, United States District Court, Western District of New York, 08CV204 (November 6, 2009), the plaintiffs claimed that they sustained serious personal injuries when their vehicle was struck by a tractor trailer operated by defendant Joseph Rebovich and owned by Reinhart Transportation. The plaintiffs alleged that the tractor trailer struck the left side of their vehicle while they were driving on Genesee Street in Cheektowaga, New York.

The defendants moved for summary judgment on the grounds that the plaintiffs did not sustain a “serious injury” as defined by New York Insurance Law § 5102(d) or economic loss greater than the basic economic loss required by Insurance Law § 5104. The plaintiffs had invoked three of the four categories used to define “serious injury” pursuant to § 5102: (1) permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of a body organ or member or significant limitation of use of a body function or system; and (3) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In support of their motion, the defendants cited the police report, the plaintiffs’ deposition testimony and medical records and the plaintiffs’ independent medical examinations to prove that the plaintiffs failed to meet the threshold level to satisfy any of the above categories. The defendants successfully rebuffed plaintiff Michael Ciesiulka’s efforts to link the purported herniated discs in his back with the subject accident and noted that he did not miss any time from work as a result of the accident. In fact, he admitted that he continued to perform his daily activities. The defendants argued that any degenerative changes that existed were a result of prior injuries that progressed over time. Kristine Ciesiulka’s injuries were soft-tissue in nature, and she admitted that she missed only one day from school and one week from work. She also continued her normal activities, including household chores, after the accident.

In granting the defendants’ motion, the court agreed that the plaintiffs failed to establish a prima facie case that the



plaintiffs sustained a “serious injury” pursuant to New York Insurance Law based on any of the three categories that they invoked. The court noted that the police report confirmed that neither plaintiff was transported to the hospital following the accident. Michael Ciesiulka did not miss any time from work as a printing press operator, an occupation that required frequent bending, kneeling, reaching, grasping and lifting, or taken anti-inflammatory medication. His examinations showed that he made an excellent recovery and sustained only soft tissue strain, which would resolve itself over time. He continued with his normal and customary daily activities. Kristine Ciesiulka likewise did not prove any permanent consequential limitation resulting from the accident. Her medical records demonstrated only myofascial or soft tissue sprain of limited duration. She, too, continued to perform her daily activities.

The court considered whether the plaintiffs showed more than “mild, minor or slight limitation of use.” See *Miki v. Shufelt*, 285 A.D.2d 949 (3d Dep’t 2001). The Court noted that mere allegations of pain or limited range of motion were insufficient to satisfy the burden imposed on the plaintiffs. See *Gonzalez v. Green*, 24 A.D.3d 939 (3d Dep’t 2005). In order for plaintiffs to prove that they were prevented from performing the material acts of daily living for 90 days during the 180 days following the accident, they need to prove more than a brief period of time missed from work. See *Thompson v. Abbasi*, 15 A.D.3d 95 (1st Dep’t 2005). Consequently, the Court dismissed the plaintiffs’ action in its entirety.

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HRRV DECISIONS OF INTEREST

Appellate Division Affirms Dismissal of Roadie's Labor Law Claim

In the Fall 2008 issue of *Legal Insights*, we reported on the dismissal of a Labor Law action brought by Thomas Bowman, a stagehand employed by Beach Concerts, Inc. Bowman allegedly sustained injuries during the scope of his employment while assisting in the erection of a stage set for a concert to be held at the Jones Beach Theatre in the summer of 2000. The plaintiff claimed that, while loading boxes of stage set components onto a forklift, the forklift operator ran over his foot, causing a crush injury requiring surgery and leading to deep vein thrombosis.

The plaintiff initially alleged common-law negligence and violations of Labor Law §§ 200 and 241(6) by two touring companies, and the § 241(6) claim was eventually discontinued.

The Supreme Court, New York County (Braun, J.) granted the motion for summary judgment by the defendant touring companies and dismissed the § 200 and common-law negligence claims. In so holding, Justice Braun found that only Beach Concerts (the plaintiff's employer), and not the defendants, had control and supervision over the plaintiff's work.

In *Bowman v. East-West Touring Company and Cygnus Productions, LLC*, Appellate Division, First Department, 2009 N.Y. Slip Op 07747 (October 29, 2009), the Appellate Division affirmed Justice Braun's order on the same ground. The court also found that, although it had reinstated the plaintiff's claim after a previous dismissal arising from a default, holding at that time that the claim had sufficient merit to proceed, its prior order was not "law of the case" and thus did not preclude the granting of the summary judgment to the defendants.

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HRRV Obtains Reversal of Trial Court Denial of Summary Judgment

Insurance coverage for partially collapsed buildings has become an increasingly litigated and expensive issue. As the American infrastructure ages, more and more structures will "collapse" and their owners will seek substantial reimbursement from their insurers. However, insurers and their lawyers working together can sometimes defeat such claims.

In *Rapp B. Properties v. RLI Insurance Co. and Alea North America Insurance Co.*, 2009 N.Y. Slip Op 06462, Supreme Court of the State of New York, Appellate Division, First Department (September 15, 2009), the Appellate Division reversed the order of Supreme Court, New York County and dismissed all claims against RLI and Alea in a subrogation action in which the plaintiff claimed more than \$1 million in damages.

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HRRV DECISIONS OF INTEREST

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The plaintiff sought indemnification under the defendants' policies for damage to its building's south wall as a result of collapse. The plaintiff claimed that this was a covered peril. The alleged damage consisted of "severe cracking, bulging, splaying and displacement of the exterior brick facade." The defendants had disclaimed coverage on the ground that the damage was "due to wear and tear and gradual deterioration not collapse." The insurers' policies contained additional coverage provisions defining collapse. The lower court had denied the defendants' motion for summary judgment on the grounds that there were questions of fact relating to whether there was a collapse within the meaning of the policies.

On appeal, the First Department ruled that the interpretation of an unambiguous provision of an insurance contract is a question of law for the court. *See White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007). Therefore, it held that regardless of the cause or causes of the damage, it was error for the lower court to deny the insurers' motion, because there was no collapse within the meaning of the policies. Specifically, the court cited to testimony that the building and its south wall were still standing three months after the damage was observed in July 2005.

Standing alone, the testimony belied any claim that the wall's collapse was "abrupt," within the meaning of the additional coverage provisions. In addition, the plaintiff's expert architect stated that he observed displacement of brick masonry units and opined that there was an "imminent risk that the wall would completely collapse." In light of the policy language, which excludes imminent collapse from the definition, the architect's affidavit did not bring the occurrence within the coverage of the policies. This was based upon another First Department case, *Rector St. Food Enters., Ltd. v. Fire & Cas. Ins. Co. of Conn.*, 35 A.D.3d 177 (2006), in which the Court held that a building that was "shown to have had two-to-three-inch-wide cracks in its facade and was sinking, out of plumb, and leaning" did not meet a materially identical definition of collapse. The court also rejected the plaintiff's argument that there was hidden "decay," a phenomenon which, by definition, does not occur abruptly.

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