



# LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP

## CONSTRUCTION CORNER

### Labor Law 240(1) and Ordinary Perils of the Workplace

By Gail L. Ritzert

In its recent decision of *Edward Cohen v. Memorial Sloan-Kettering Cancer Center, et al*, 11 N.Y.3d 823 (2008), the Court of Appeals dismissed the plaintiff's Labor Law § 240(1) claim on the ground that the plaintiff was injured as the result of a usual and ordinary danger encountered at a construction site. The Court held that "no Labor Law § 240(1) liability exists where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for safety devices in the first place."

In *Cohen*, the plaintiff, an employee of the electrical subcontractor working on a renovation project at Memorial Sloan-Kettering Cancer Center, was assigned to install metal racks in the ceiling of a room in the complex. To perform the task, the plaintiff chose a six-foot A-frame ladder that was made available for his use. When the plaintiff moved the ladder to gain access to a part of the ceiling, its first rung was rendered completely inaccessible by a piece of cast iron pipe installed in the wall by the plumber. The pipe was to be used for a toilet, which was to be installed later in the project. The ladder was placed in



the only location available to gain access to the ceiling. After installing the metal rack in this location, the plaintiff fell while stepping directly to the ground from the second step of the ladder. There was also another cast iron pipe protruding a few inches behind the ladder's second rung.

The plaintiff commenced a lawsuit against Memorial Sloan-Kettering and HRH Construction, the construction manager, seeking a recovery under Labor Law §§ 240(1) and 241(6). The defendants moved for summary judgment seeking the dismissal of both claims. In their motions for summary judgment, the defendants argued, in part, that the plaintiff's injury resulted from a separate hazard (roughed out

plumbing pipe) unrelated to the danger that brought about the need for the ladder in the first place. Judge Tolub granted the defendants' motion and dismissed the complaint. The Appellate Division, First Department affirmed the dismissal of the claim pursuant to Labor Law § 241(6), but reversed and reinstated the Labor Law § 240(1) claim in a 3-2 decision.

Labor Law § 240(1) requires that adequate safety devices be provided to workers for tasks that entail a significant risk because of the relative elevation at which the task must be performed. However, the Court of Appeals has limited the scope of Labor Law § 240(1) and, in *Nieves v. Five Boro*

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## Fireworks at SLA Conference: Donald Fehr Reacts to Jerry Reinsdorf's Comments

By Jarett L. Warner

Typically, in this writer's opinion, one of the most exciting parts of the annual Sports Lawyers Association Conference is the Saturday morning General Counsel's and Executive Director's Forums. This year did not disappoint.

Donald Fehr, the executive director and general counsel of the Major League Baseball Players Association (MLBPA), took the opportunity to respond to comments made by Jerry Reinsdorf, chairman of the Chicago White Sox. A large portion of Reinsdorf's luncheon speech the day before was focused on criticizing MLBPA and Fehr. First, Fehr responded to Reinsdorf's comments that the union was much too interested in protecting the civil liberties of its members. Fehr noted that this is a good thing and how this issue arises in relation to, among other things, MLB's search for players' involvement with drugs. Fehr also recounted a story about the union protecting pitcher Fergie Jenkins with regard to questioning by MLB concerning a drug charge for possession of marijuana.

Fehr also responded to Reinsdorf's claim that MLBPA was only concerned with maximizing player salaries rather than the good of the game. Fehr stated that he did not comprehend exactly what the term "good of the game" meant and that the union's job was to maximize its members' conditions, including salary. Fehr noted that it was not the job of the union to follow management's lead and that if he did so he would probably be fired.

Although Reinsdorf said MLBPA blocked drug testing in 1985 (specifically MLB was concerned with cocaine use), Fehr

responded that MLB's proposed policy violated the collective bargaining agreement and the National Labor Relations Act and that an arbitrator determined that MLB's acts were unlawful. Fehr maintained that if the union does not do what the players want, Fehr would be fired, and that the players are involved in the decisions regarding all issues.

The other star of the Saturday morning forum was DeMaurice F. Smith, the newly elected executive director of the National Football League Players Association (NFLPA). Smith first called for a moment of silence for his predecessor, Gene Upshaw, who recently passed away and noted that "we lost a leader. I could never fill his shoes." Smith noted that he came from a long line of Baptist preachers and proved that he could easily follow in the footsteps of his ancestors, delivering a powerful speech about the future of the NFLPA.

Smith said that the owners opted out of the last year of the collective bargaining agreement, which would have guaranteed the owners \$8 billion. He stated that this opt-out will push the league into an uncapped salary cap year and recognized the threat of a lockout if a deal is not completed. Smith also said that the players understand that there may be a war on the forefront, but stated that the NFL and NFLPA "as partners . . . will find a way."

The Executive Director's Forum was rounded out by Paul Kelly, executive director of the National Hockey League Players' Association (NHLPA), and Hal Biagas, deputy counsel for National Basketball Players Association (NBPA), who was

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filling in for Billy Hunter (executive director of NBPA) who had a family emergency.

Kelly noted that the league's revenue had increased year after year, and although he recognized that there were a few struggling franchises, he focused on the strong franchises doing well (i.e., Chicago, Boston, Washington). With regard to the recent bankruptcy filing of the Phoenix Coyotes, he stated that the union was not taking sides but wanted the issue to be resolved as soon as possible since it involved Coyotes' players whose futures were uncertain. Kelly urged that the television production of the NHL in the United States needed much improvement. Although he stated that the Versus channel is a great partner, it has problems as it does not have highlight shows like ESPN. He stated that people "don't want to tune into Versus unless you like turtle wrestling." Kelly urged NBC to do more, noting that the hockey season began earlier than January and that NBC does not put hockey on television during sweeps week.

Biagas reported on increased television ratings for basketball, a predicted 1-2 percent increase in revenue for this season and advised that under the current collective bargaining agreement, the players get 57 percent of the revenues. Biagas stated that the current CBA has two years left, that he does not believe that the NBA will exercise its third-year option and thus the current agreement will expire in June 2011. Biagas commented that when the CBA was entered into, all sides believed that it was fair for the players to receive 57 percent of the revenues. Now that the revenue has dropped, the owners are attempting to make up for the lost revenue. Finally, Biagas called Reinsdorf's comment that unions only care about salaries offensive.

### General Counsel's Forum

Here are the highlights from the General Counsel's Forum presentations:

- **MLB:** Thomas J. Ostertag, senior vice president and general counsel of the MLB, spoke about the fraudulent actions of some foreign players with regard to their actual identity and age (using the Smiley Gonzalez case as an example) and noted that there has not been a lot of litigation recently. He also briefly discussed the MLB's antitrust exemption, which has not had any attacks in the past year.
- **NFL:** Dennis Curran, senior vice president/labor litigation and policy of the NFL, noted that the owners had elected to take two years off the collective bargaining agreement, which now expires after the 2010 season. Negotiations for

a new agreement will begin in the next month or so. He noted that the recession has affected the NFL, as among other things, over 100 positions had been cut by the NFL and that the NFL's teams had laid off 200 people. Despite the layoffs, the salary cap had increased to \$123 million. Curran discussed some of the ongoing litigation, including the Vikings case involving the suspension of certain players for the use of diuretics, which is scheduled for trial in June. He also discussed the Plaxico Burrese case, where the Court has held that the fact that Burrese shot himself in the leg does not mean he forfeited his contract, because it was not willful.

- **NHL:** William Daly, deputy commissioner of the NHL, was extremely optimistic about the state of the league. He noted that the NHL experienced its fourth straight year of growth, which set a new attendance record of 21 million league-wide and an average of 17,500 people per game. He stated that television ratings have increased with a lot of new sponsorship. Daly admitted that in United States currency, the growth in revenue this year would be approximately 1 percent. The NHLPA has given notice it that will not reopen the CBA this year, and thus it will run through at least the 2010–2011 season. Daly also discussed the NHL's antitrust litigation with Madison Square Garden, which has been settled. MSG had challenged the NHL's ability to control the New York Rangers' Web site as part of the NHL. However, the Court held that the Rangers had released its ability to control its Web site. Finally, Daly discussed the bankruptcy filing of the Phoenix Coyotes, commenting that the filing was done just to break the existing lease to accommodate a relocation to Ontario.
- **NBA:** Daniel S. Rube, senior vice president and deputy general counsel of the NBA, reported that the state of the NBA was extremely strong and that it had a more up-tempo style. He noted that the Game 6 playoff game between the Rockets and Lakers was the highest viewed NBA game on ESPN ever. Attendance was up this past season a shy less than 1 percent, the third highest in NBA history. Rube also commented that the NBA's international presence continues to expand, with strong partnerships from U.S. and China-based companies. The NBA and NBPA are completing the fourth year of a six-year agreement, which will take them through the end of the 2010–2011 season, with a league option for the 2011–2012 season. The players are guaranteed a 57 percent payment of revenues.

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*A.C & Refrigeration, et al*, 93 N.Y.2d 914(1999), held that “the extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do “not encompass any and all perils that may be connected in some tangential way with the effects of gravity” citing *Ross v. Curtis Palmer Hydro Elec.*, 81 N.Y.2d 494 (1993). In *Nieves*, the plaintiff was injured when he tripped over a portable light that was concealed by a drop cloth. Thus, in dismissing the plaintiff’s Labor Law § 240(1) claim, the Court in *Nieves* went on to hold that “where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists.” Similarly, in *Melber v. 6333 Main Street, et al*, 91 N.Y.2d 759, the Court of Appeals held that Labor Law § 240(1) did not apply where the plaintiff was injured when he tripped over an electrical outlet protruding from the unfinished floor while walking on stilts.

In light of the Appellate Division’s split decision, the defendants filed an appeal to the Court of Appeals. The Court of Appeals reversed that branch of the Appellate Division’s decision which had reinstated the Labor Law § 240(1) claim. Citing *Nieves, supra*, the Court found that “here, the presence of two unconnected pipes protruding from a wall was not the risk which brought about the need for the [ladder] in the first instance,” but was one of the “usual and ordinary dangers at a construction site” to which the “extraordinary protections of Labor Law § 240(1) [do not] extend.”

Clearly, not every accident that occurs on a construction site results in a

finding of liability under the Labor Law and not every incident that occurs on a ladder or scaffold results in the imposition of liability under Labor Law § 240(1). When assessing the applicability of Labor Law § 240(1), a determination must be made whether the incident was the result of a gravity-related event related to the failure of a safety device or arose from a peril ordinarily encountered on a construction site. If the claim

arose from an ordinary peril a construction worker should expect to encounter on a construction, renovation or excavation project, a motion for summary judgment seeking a dismissal of the Labor Law § 240(1) should be pursued.

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## Legislative Update: A Ticket to Ride . . . For Now

By Carla Varriale

This past July, prior to the expiration of a New York law permitting the resale of tickets without a price cap, New York State’s Assembly extended the free market for sports, concert and theater ticket resale in New York for another year. Among other things, Bill No. S05715A governs the resale of tickets to places of entertainment and requires the consumer protection board to report on the effectiveness of the regulation of the sale of tickets in New York. As of the time this issue went to press, the bill was awaiting the signature of Governor David Paterson.

The assembly’s decision effectively sidelined New York City Council Bill 727-A, which sought to improve the “sale of tickets to individual consumers by operators of theater, music or sporting events taking place in New York City at places of public entertainment.” Bill 727-A, the subject of public hearing in May, contained proposed pro-consumer provisions. Some of those provisions required that at least 15 percent of the total number of tickets for an event be released from the box office when they initially go on sale, no individual be permitted to purchase more than four tickets for an event, tickets be printed with the date and time of the sale and a record of the total number of seats that were made available be displayed for at least six months after an event.

What will be gleaned from the upcoming study of New York’s dynamic ticket market is not clear. Nor is it clear whether this study will spur changes to New York’s ticket resale laws or additional consumer protections. What is clear, however, is that this latest development highlights the emergence of transparency as a lodestar in the ticketing industry.

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## Court of Appeals Declares Landlord an Additional Insured Even Absent Traditional Insurance Procurement Provision in the Lease

By Joseph G. Silver and Matthew Kraus

The New York Court of Appeals has found that a landlord qualified as an additional insured under its tenant's general liability insurance policy despite the fact that the underlying lease agreement did not contain a clear insurance procurement provision.

New York courts have historically refused to confer coverage to an entity purporting to be an additional insured pursuant to a blanket additional insured endorsement in the absence of a contract that contains a clear and unambiguous insurance procurement clause. See e.g., *Public Adm'r of Bronx County v. Equitable Life Assurance Soc'y of United States*, 198 A.D.2d 105, 603 N.Y.S.2d 830 (1st Dep't 1993). The underlying rationale was that courts should not strain to superimpose an unnatural or unreasonable construction of policy terms to expand coverage where the provisions are clear and unambiguous. Thus, where a policy requires a written contract to confer additional insured status and the lease in question does not contain an insurance clause, courts have been reluctant to confer additional insured status onto the landlord. See *Maurice Goldman & Sons v. Hanover Ins. Co.*, 80 N.Y.2d 986, 592 N.Y.S.2d 645 (1992).

In *Kassis v. Ohio Cas. Ins. Co.*, 2009 N.Y. Slip Op 5207 (2009), the Court of Appeals took a more liberal view regarding coverage for additional insureds. There, the Court was asked to determine whether a landlord, Joseph Kassis, qualified as an additional insured under the general liability insurance policy issued by the Ohio Casualty Company to its tenant, Superior Sign Co., Inc., in an underlying personal injury action. Ohio Casualty disclaimed

coverage to Kassis on the ground that Kassis did not qualify as an additional insured. Ohio Casualty argued that while the policy contained a blanket endorsement that conferred additional insured status to "any person or organization whom [Superior Sign is] required to name as an additional insured on this policy under a written contract or agreement," the lease agreement did not contain a valid insurance procurement provision. Kassis claimed that the lease had an enforceable insurance procurement clause, since it provides that Superior Sign must, "at its sole cost and expense and for the mutual benefit of Landlord and Tenant . . . maintain a general liability policy . . . providing coverage against claims for bodily injury, personal injury and property damage."

In overturning the Appellate Division, Fourth Department's determination that Ohio Casualty had no duty to defend or indemnify Kassis, the Court stated that "additional insured" is a recognized term in insurance contracts, and "the well-understood meaning of the term is an entity enjoying the same protection as the named insured." *Kassis*, 2009 N.Y. Slip Op at 3. Accordingly, the Court found that the critical issue came down to whether, under the lease, Superior Sign was required to ensure that Kassis received general liability insurance coverage equivalent to the coverage Superior Sign enjoyed.

The Court began its analysis by examining the lease's specific insurance provisions. The Court noted that the lease required Superior Sign to maintain general liability insurance for the "mutual benefit" of Superior Sign and Kassis, which meant that Kassis and Superior Sign were intended to enjoy the same level of coverage. In addition, the lease's other insurance provisions specified that Superior Sign may obtain

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certain types of insurance coverage just for itself (and without mutually benefiting Kassis). Put differently, the fact that the lease stated that the general liability insurance ran to the parties' mutual benefit when juxtaposed with the fact that the lease contemplated disparities in coverage under other types of insurance made it clear that Superior Sign and Kassis were to enjoy the same level of general liability insurance coverage. Accordingly, the Court held that Ohio Casualty had a duty to defend and indemnify Kassis despite the absence of an unambiguous insurance procurement provision.

The *Kassis* decision could have a significant impact on underwriting. The use of blanket additional insured endorsements has become commonplace in the industry. Blanket additional insured endorsements relieve the insurer from the need to issue a separate endorsement for each person or entity requiring additional insured status. It also allays the concerns of the named insured (as well as its agent or broker) that it could be subject to breach of contract actions since the putative additional insured would qualify for coverage even in the absence of a specific endorsement. However, the *Kassis* Court conferred additional insured status under a blanket endorsement notwithstanding the absence of a traditional insurance procurement provision. This could cause underwriters to abandon their use of blanket endorsement for fear that too many entities would qualify as an additional insured.

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## HRRV DECISIONS OF NOTE

## Nightclub owner granted summary judgment in assault incident and contractual indemnification against security company

*Leonard Salati v. Janet Jackson, 10th Avenue Hospitality Group, LLC d/b/a Club Marquee, Knight Time Security of New York, Inc. and Titan Security, Inc.*  
*Supreme Court, New York County*  
*Index No. 101999/05*

June 23, 2009

Leonard Salati was a patron at Marquee, a nightclub in Manhattan, when he was allegedly assaulted by two or more nightclub security guards and/or bodyguards accompanying Janet Jackson, who was a patron at the nightclub. 10th Avenue Hospitality Group, LLC, which owns and operates Marquee, contracted with Knight Time Security to provide security guards at Marquee. The written agreement between the parties required Knight Time Security to indemnify 10th Avenue for any personal injury claims, including attorneys' fees, that might arise from any provision of the security contract.

Salati alleged that 10th Avenue negligently hired and retained Knight Time Security and negligently failed to maintain the premises in a safe manner. 10th Avenue cross-claimed

against Knight Time Security, seeking full indemnification including the cost of its defense.

Justice Jane Solomon, sitting in Supreme Court, New York County, held that there was no evidence to support Salati's negligent hiring and retention claim and dismissed said claim. As to plaintiff's negligent security claim against 10th Avenue, Justice Solomon determined that 10th Avenue had met its burden by demonstrating that security at Marquee was adequate as a matter of law based upon a lack of evidence of prior instances of violence between patrons and the fact that it hired Knight Time Security to provide security services to Marquee. Justice Solomon held that Salati failed to meet his burden to come forward with evidence that the security measures were anything but adequate. Justice Solomon also dismissed Salati's claims against Janet Jackson based upon a lack of evidence that her bodyguard assaulted plaintiff or that anyone assaulted plaintiff at Jackson's direction.

Lastly, the court granted 10th Avenue's contractual indemnification cross-claim against Knight Time Security based upon an enforceable indemnification clause in the contract between the parties. Justice Solomon determined that the alleged incident arose out of the provisions of the security contract given Knight Time Security's admission that its security guards participated in the forcible ejection of plaintiff from Marquee. Justice Solomon further decided that Knight Time Security's

argument that the indemnification agreement was void under the General Obligations Law Section 5-322.1 (a statute which concerns written agreements in the construction industry) was without merit. As such, 10th Avenue was entitled to a judgment on its contractual indemnification cross-claim against Knight Time Security in an amount to be determined.

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## HRRV DECISIONS OF NOTE

### Summary judgment granted in go-kart accident case

*Brittany N. Polikoff, an infant under the age of 18 years, by her mother and natural guardian Robin Polikoff and Robin Polikoff, individually v. Strike Long Island, LLC*  
Index No. 013769/07

June 8, 2009

Infant plaintiff Brittany N. Polikoff allegedly sustained injuries while operating a go-kart at the defendant's indoor go-kart facility. She alleged that she lost control and collided with the wall of the go-kart track after an employee of the defendant Strike Long Island, Inc. remotely increased the speed of her go-kart.

Strike moved for summary judgment on the grounds that it did not create or have notice of any alleged condition and that there was no evidence that any of its employees remotely increased the speed of the go-kart that the infant plaintiff was operating. Further, Strike argued that the infant plaintiff assumed the risk of sustaining injuries as a result of operating a go-kart and that any injuries that she sustained were a result of her own actions.

In support of the motion, Strike cited to the infant plaintiff's deposition testimony wherein she stated that she previously had experience operating a go-kart and that she had her foot all the way down on the pedal prior to the incident occurring. Strike also submitted an affidavit from one of its employees which indicated that the plaintiff was properly instructed on how to use the go-kart and was shown a video on proper usage of the go-kart by Strike's employees prior to the incident occurring.

In granting Strike's motion, the Court agreed that there was no evidence that Strike's employees remotely increased the speed of the subject go-kart, and as such, the infant plaintiff's argument was mere speculation. Moreover, the court agreed that the infant plaintiff assumed the risk of sustaining injuries as she had prior experience in operating go-karts and had been instructed in proper usage. The court noted that "[w]hen it is shown indisputably that a particular injury was caused by a condition or practice which is common to a particular sport . . . summary judgment is warranted . . ." (*Checchi v.*



**The court agreed that the infant plaintiff assumed the risk of sustaining injuries as she had prior experience in operating go-karts and had been instructed in proper usage.**

*Soccoro*, 169 A.D.2d 807, 808 (2d Dep't 1991)) and held that "the prospect of the go-kart hitting the bumper of the track is an inherent risk of the activity and was foreseeable by plaintiff." The court also agreed that the plaintiff in opposition to the motion failed to establish that the defendant created or had notice of any condition that would enhance the risks inherent in the ride (*Loewenthal v. Catskill Funland, Inc.*, 237 A.D.2d 262 (2d Dep't 1997).

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## HRRV DECISIONS OF NOTE

## Appellate Division affirms summary judgment for the City of New York

*Larry Rooney v. Sterling Mets, LP and the City of New York*  
 Appellate Division,  
 Second Department  
 2009 N.Y. Slip Op 05311  
 June 23, 2009

In *Larry Rooney v. Sterling Mets, LP and the City of New York*, the Appellate Division, Second Department affirmed the decision of the Supreme Court, Queens County, which granted the City of New York's motion for summary judgment.

Plaintiff Larry Rooney alleged that he sustained personal injuries on August 21, 2005, when he fell as he stepped off an orange painted curb that had a missing piece, immediately outside of Shea Stadium. He alleged that Sterling and the City were negligent in their ownership, operation, maintenance and control of Shea Stadium and the subject curb. The plaintiff argued that the walkway outside of Shea Stadium was not subject to the City's prior written notification law.

Justice Phyllis Orlikoff Flug, sitting in the Supreme Court, Queens County, granted the defendants Sterling Mets' and the City's motion for summary judgment. Justice Flug found that the purported condition was a trivial defect, lack of notice and speculation as to the cause of the fall. With regard to the City's lack of notice, the defendants established that the City did not have prior written notice of the purported condition as required in the City of New York Administrative Code § 7-201(c), by submitting a copy of the Big Apple Pothole Sidewalk Protection Corporation Map for the general area outside of Shea Stadium before the date of the alleged accident. The Big Apple Map reflected

that there were no recorded defects.

The plaintiff appealed the decision, arguing that the Supreme Court erred in ruling that prior written notice was necessary in order to find that the City had notice of the purported condition and that there was a question of fact whether the City had constructive notice and whether the condition was trivial. The plaintiff did not appeal the dismissal of Sterling from the action.

The Appellate Division, Second Department affirmed the decision of the Supreme Court, Queens County, stating that "[t]he City established its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence that the City had no prior written notice of the alleged defective curb condition." As a result, the Appellate Division did not consider any of the other arguments raised by the plaintiff.

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## SCHEDULED PRESENTATIONS

- ▶ **Successfully Navigating the Appeals Process**  
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