



LEGAL INSIGHTS

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CONSTRUCTION CORNER

The Scope of Labor Law § 240(1)

By Gail L. Ritzert

In past installments of "Construction Corner," we have discussed a number of court decisions that address the breadth of Labor Law 240(1) and the potential defenses to the nondelegable duty imposed by the statute. Because the statute imposes a strict liability on the owner of property if it is found that the owner failed to provide a worker with certain proper safety devices and a safe place to work, plaintiff's counsel are creative in their approach and will often allege a Labor Law violation when their client sustains an injury while performing any type of repair or construction work. The Court of Appeals has issued decisions in a trio of cases that exemplify how far plaintiff's attorneys will go to seek the imposition of absolute liability on a defendant under the scope of Labor Law § 240(1). These cases are discussed in this article.

The One and Two-Family Homeowners Exception

In *Affri v. Basch*, 2009 N.Y. Slip Op 8673 (2009), the plaintiff alleged that he sustained personal injuries while renovating an apartment in a private

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The General Obligations Law has now been amended to prohibit health insurers and other benefits providers from recovering the proceeds of settlements of personal injury, malpractice and wrongful death actions.

The Rise and Fall of Health Insurer Liens in New York: The New General Obligations Law § 5-335(a)

By Sean P. Dwyer

Lien letters on behalf of health insurers seeking reimbursement for medical services rendered to claimants have long been the bane of attorneys in New York. This practice of health insurers was as predictable as the rising sun: with the inception of litigation, either side was subjected to a barrage of claims by insurers asserting that the underlying action could not be settled without the health carrier's consent and satisfaction of the reimbursement claim. What made confronting these subrogation and reimbursement claims particularly vexing is that a series of recent

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The Pitfalls of Patriotism: The Problems of 'Forced Patriotism' at Sports Venues

By Carla Varriale



A decision by three New Jersey teenagers to remain seated during the singing of "God Bless America" during the seventh inning stretch at a New Jersey minor league baseball game and the subsequent actions of venue employees recently gave rise to a lawsuit that has now been settled for an undisclosed amount.

Gadye v. Bases Loaded Group, LLC et al, which catapulted the three teenagers into newspaper headlines, triggered a debate about whether a venue can implement a policy that restricts spectator movement during the singing of "God Bless America" or whether such "patriotic rituals" have a place at a sports venue, particularly a venue that is publicly owned or funded.

The New Jersey lawsuit was commenced in September 2009 and sought compensatory and punitive damages and reasonable attorneys' fees as a result of the defendants' alleged "tortious and intentional acts." In a complaint filed in U.S. District Court, the plaintiffs and their guardians alleged that the Newark Bears berated and then ejected them from Bears & Eagles Riverfront Stadium because they did not stand during "God Bless America." The song was played during the seventh inning stretch.¹ The lawsuit alleged that the Bases Loaded Group LLC (Newark Bears) has a policy that requires patrons to stand during "God Bless America" and that patrons are instructed to rise and invited to sing. Defendant Thomas Cetnar III allegedly enforced this policy and ejected the teenagers because they remained seated. The plaintiffs claimed that they were unaware of the policy and that they remained quiet and respectful throughout the baseball game. After an unsatisfactory meeting with the Newark Bears, the plaintiffs filed suit alleging that the policy had been instituted in an effort to promote patriotism among those attending games. They alleged that their ejection from the baseball game violated their constitutional rights, federal and state public accommodation

laws and New Jersey state laws against discrimination.

An Irving Berlin song written during the World War 1, "God Bless America" is no stranger to controversy in the context of sports venues.² The song became a fixture at baseball stadiums for a period of time after the terrorist attacks on the World Trade Center in 2001. In another headline-grabbing case, Bradford Campeau-Laurion sued the New York Yankees and the City of New York in a recent federal lawsuit, contending that his rights were violated at a baseball game in 2008 when he left his seat to use the restroom during the playing of "God Bless America," also during the seventh inning stretch. He was allegedly advised that he had to wait for the song to conclude before he could go to the restroom. He claimed that when he protested, he was ejected from Yankee Stadium by a police officer. The New York Civil Liberties Union argued that the New York Yankees' policy, when implemented by the City police officers, was tantamount to "enforced patriotism" and violated Campeau-Laurion's constitutional rights. The City settled the case, without admitting any liability. Campeau-Laurion obtained \$10,001, and the City paid \$12,000 in legal fees to the New York Civil Liberties Union. The Yankees did, however, note in settlement papers filed with the federal court that patrons at the team's new stadium would be permitted to move freely during the playing of "God Bless America."

These cases demonstrate that a policy of "forced patriotism" (particularly when coupled with a restriction of spectator movement) will provoke controversy and strong emotions. Moreover, the inevitable media scrutiny and similarly inevitable legal challenge (particularly if a patron is ejected or arrested) will likely cause venue owners and operators to rethink these policies.

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1. Defendant Bases Loaded leases the Bears & Eagles Riverfront Stadium from the Essex County Improvement Authority.

2. See Richard K. Hayes, *God Bless America, Land that I Love*.

INSURANCE COVERAGE CORNER

The Intentional Acts Exclusion for Respondeat Superior Claims and the Importance of an Assault and Battery Exclusion

By Abbie Havkins and
Matthew Kraus

Insurers are increasingly being called upon to defend and indemnify their insureds for actions arising out of assaults, sexual abuse, harassment and the like. When these allegations are asserted solely against the insured's employees and no conduct (intentional or negligent) is asserted against the insured employer, the question arises as to whether the intentional acts exclusion can be invoked to disclaim coverage to the insured. In such cases, the insured-employer's liability is sought to be imposed on a vicarious liability respondeat superior basis. Given the breadth of the duty to defend, the insured (often joined by plaintiff's counsel seeking a "deep pocket") will usually concede that the employee, the active wrong-doer, may not be entitled to coverage. Instead the insured will argue that it is entitled to a defense and indemnification since the assault was not intended from its standpoint. These insureds also argue that allegations of vicarious liability are not grounded in intentional conduct, and therefore, the exclusion should not be applicable. Insurers, at least those in New York, should resist the temptation to "compromise" and provide a defense subject to a reservation of rights. Such a "compromise" requires the insurer to inform the insured of its right to

select its own (potentially high-priced) counsel, or risk a finding of "bad faith" according to at least one New York Appellate Division decision about which we have previously written. More importantly, insurers that decline to provide a defense when the only allegation in the complaint alleges intentional conduct by the insured's employees may be on solid ground depending on the specific allegations.

In *RJC Realty Holding Corp. v. Republic Franklin Insurance Company*, 2 N.Y.3d 158 (2004), the New York Court of Appeals considered the issue of whether an insurer was obligated to defend its insured, a beauty salon in an action against the salon based on an alleged sexual assault by its employee. Reversing the Appellate Division, the Court of Appeals essentially answered that it depends on whether the actions of the employee could be imputed to the employer. Invoking the traditional rules applicable to determining whether an employee's actions could be imputed to the employer under the doctrine of respondeat superior, the Court held that if the action of the employee could not be imputed to the employer, then the intentional element of the cause of action also could not be imputed to the employer for coverage purposes. However, as in the case relied upon to support that holding, in such a scenario the employer could not be liable and was entitled to summary judgment. See *Judith M. v. Sister of Charity Hospital*, 93 N.Y.2d 932 (1999) ("Assuming plaintiff's allegation of sexual abuse are true, it is clear that the employee here departed from his duties . . . [and] the courts below properly dismissed plaintiff's respondeat superior cause of action"). In such cases, insurers must ensue that defense counsel vigorously acts to have such claims dismissed.

In the alternative scenario, where the insured employee's conduct is imputed to the employer (for example for conduct reasonably expected by the

insured) according to the reasoning of *RJC Realty*, the intentional element of the conduct should also be imputed to the employer rendering an intentional acts exclusion applicable. However, no cases have expressly so held.

Both of these scenarios must be distinguished from claims alleging direct claims against the employer such as claims for negligent supervision, negligent hiring, negligent retention or other negligent conduct by the employer. In such cases, neither the intentional acts exclusion nor the definition of an "occurrence" as an accident will provide any comfort to the insurer. In these scenarios, only an assault and battery exclusion will provide an insurer with a rock-solid basis to avoid coverage. The moral of the story is that an intentional acts exclusion will not always provide an insurer with the coverage protection it desires. In situations where the only claim against the insured employer is vicarious liability based on an employee's intentional, often-time egregious, conduct, the insurer seeking to rely on an intentional acts exclusion will be placed in the uncomfortable position of arguing that the employee's conduct must be imputed to the insured employer. Not only is this contrary to its insured's interest but should the argument not prevail the insurer has potentially provided the plaintiff with evidence or arguments that buttress its claim against the employer. An insurer wishing to avoid this awkward scenario and be in the best position to avoid potential defense and indemnity obligations for the intentional acts of an insured's employee should give serious consideration to including an assault and battery exclusion in its policy in addition to—not in place of—the intentional acts exclusion.

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Court Awards \$9.5 Million to Norwegian Cruise Line Employee as a Result of Slip and Fall

By Gregg Scharaga

A Florida trial court awarded \$9.5 million to a British fitness instructor who alleged that he was injured when he slipped and fell on a wet floor at a cruise ship spa. Plaintiff Danny Simpson sustained a back injury and became incontinent and impotent as a result of the fall in 2006. The defendant was Steiner Transocean, which operated the spa on Norwegian Cruise Line's Norwegian Crown (NCL).

The incident occurred after Simpson had just finished conducting a fitness class. A woman on a nearby treadmill vomited on the floor. A cleaner was called in to wash the area, but did not thoroughly dry it, and when the plaintiff returned to the area, he unknowingly slipped and severely injured his back, suffering two herniated discs in his lower spine.

The plaintiff's counsel argued that the NCL cleaner had failed to dry an area on the gym floor and had also failed to warn the plaintiff of that fact. In fact, the cleaner had told Simpson that she had completed her task and the room was ready for use. The plaintiff relied on the cleaner's representations and assumed that the floor was therefore safe.

The jury awarded \$9.5 million to Simpson to cover past and future medical costs, with the majority of the award representing compensation for past and future pain and suffering. The herniated discs the plaintiff allegedly suffered severely and permanently damaged the plaintiff's nerves, leaving him incontinent and impotent. The plaintiff also alleged that he was suffering from constant back and leg pain and numbness, and would not be able to feel pleasure from sexual intercourse.

Although the defendant is seeking a new trial or a reduction of the jury award, this case highlights the duty owed by cruise line operators and their contractors, to not only passengers but to their own employees, to protect them from dangerous conditions of which the operators and contractors have notice.

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residence. The plaintiff had previously been hired by the defendant, an owner of a private residence, to do small jobs. On the date in question, the plaintiff had been hired to install appliances in an apartment within the residence. While installing a vent in the roof, the plaintiff fell from a ladder sustaining injuries. The plaintiff commenced an action against the homeowner asserting claims under Labor Law §§ 200, 240(1) and 241(6) and common law negligence. Following the completion of discovery, counsel for the defendant filed a motion for summary judgment asserting that the defendant, as the owner of a two-family residence, was exempt from liability under Labor Law §§ 240(1) and 241(6). The plaintiff opposed the motion and cross-moved for summary judgment, asserting that the defendant directed and controlled his work, thus precluding the application of the two-family residence exception. The trial court denied both motions.

The Appellate Division, Second Department reversed, holding that the defendant established that he was protected by the two-family homeowner's exemption to Labor Law §§ 240(1) and 241(6). The Court also found that the plaintiff failed to demonstrate that the defendant's decisions regarding the aesthetic placement of the vent on the roof and his general supervision of the work were sufficient to establish control over the plaintiff's work to overcome the statutory exemption. In addition, the Appellate Division found that the plaintiff's failure to establish a triable issue of fact as to whether the defendant exercised supervisory control over his work entitled the defendant to a dismissal of the Labor Law § 200 and common-law negligence claims.

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The Court of Appeals granted the plaintiff leave to appeal and affirmed the Appellate Division's decision.

In rendering its decision, the Court of Appeals noted that Labor Law 240(1) provides in pertinent part:

All contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not control the work*, in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor . . . devised which shall be so constructed, placed and operated as to give proper protection to a person so employed (emphasis added).

A similar homeowner's exemption is found in Labor Law § 241.

The exemption was enacted so that "the law would be fairer and more clearly reflect the practical realities governing the relationship between homeowners and the individuals they hire to perform construction work in their home." See *Cannon v. Putnam*, 76 N.Y.2d 644 (1990). In this case, the homeowners provided the plaintiff with instructions on how they wanted the home to look after the work was completed. They did not provide the plaintiff with any materials, nor were they present when the work was performed. The means and methods of how the work would be accomplished were left to the plaintiff. Therefore, the majority held that these instructions were not sufficient to establish control to overcome the statutory exemption.

Federal Preemption Under the Longshore and Harbor Workers' Compensation Act

In *Lee v. Astoria General Contracting Company, LP*, 2009 N.Y. Slip (2009), the plaintiff, a millwright, was injured while working on a barge owned and operated by the defendant. The plaintiff sought and was awarded benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). The plaintiff then commenced an action in state court against Astoria General Contracting and Orion Power of New York asserting claims under Labor Law §§ 200, 240(1) and 241(6) and common law negligence. Astoria and Orion impleaded plaintiff's employer as a third-party defendant.

The defendants and third-party defendant moved for summary judgment, asserting that the plaintiff's claims were precluded by section 905(a) of the LHWCA. In opposition, the plaintiff argued that the barge did not constitute a "vessel" under 33 USC 905(b). The trial court dismissed the complaint finding that section 905 of the LHWCA preempted Labor Law §§ 240(1) and 241(6) claims. The Appellate Division, First Department reversed and granted summary judgment to the plaintiff under Labor Law § 240(1). The Court of Appeals reversed, dismissing the plaintiff's complaint.

The LHWCA provides compensation to workers injured on navigable waters of the United States in the course of their employment. Similar to New York Workers' Compensation Law, the act further provides that eligible workers are precluded from recovery of damages against their employers. However, the act does not preclude the employee from recovery of damages in a negligence claim against a third person other than his or her employer. The entitlement to a recovery under section 905(a), however, depends on whether the plaintiff was injured on a vessel.

The threshold question that had to be



answered in this case was whether the barge was a "vessel" as defined by the LHWCA. Vessels include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* (citations omitted). Since the barge in issue was capable of being used as a means of transportation on water, it qualified as a "vessel" under the statute.

The next question addressed was whether section 905(b) preempted the plaintiff's Labor Law claims. The Court found that section 905(b) of the LHWCA provides that an action in negligence may be brought against a vessel and that such remedy "shall be exclusive of all other remedies against the vessel except remedies available under this chapter." *Id.*; 33 USC 905(b). The Court held that the LHWCA preempted the plaintiff's Labor Law §§ 240(1) and 241(6) claims, since the statute expressly intends claims to be brought solely within its confines of the LHWCA and does not permit strict liability claims, as provided by Labor Law §§ 240 and 241(6). Therefore, the Court held that the plaintiff's claims were

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preempted by federal law, and it reinstated the trial court's decision dismissing the plaintiff's complaint.

The Plaintiff as a Volunteer

In *Stringer v. Barbara Musacchia, Individually and as trustee of the John Musacchia Residual Trust B-1*, 11 N.Y.3d 212 (2008), the Court held that a volunteer was not entitled to protection under Labor Law § 240.

The defendant was the sole trustee of the trust, which owned property in Green County. The defendant's son held hunting excursions on the land, including an annual turkey hunt. Certain "friends" who were invited to attend the hunting parties were asked to do chores around the property in the afternoon after the morning hunt. The plaintiff, an archer, met the defendant's son at an archery exhibition. The plaintiff also had experience in construction. Since the defendant's son wanted to erect a shed on the property to house equipment, and his mother refused to authorize the expense as too costly, the defendant's son extended an invitation to the turkey hunt to the plaintiff if he was willing to build a shed in the afternoons. The plaintiff agreed and travelled to New York.

The plaintiff spent the week hunting on the property in the morning and building the shed in the afternoon. On the tenth day of his stay, while standing on an extension ladder and attempting to install a rafter in the shed, the ladder "kicked out" from beneath him and he fell eight feet to the ground, sustaining personal injuries. The plaintiff sued the defendants, asserting that they violated Labor Law §§ 200, 240(1) and 241(6). At the close of discovery, the parties moved for summary judgment. The trial court granted the defendants' motion dismissing the plaintiff's claims under Labor Law §§ 200 and 241, but granted the plaintiff's motion under Labor Law 240(1). The Appellate Division, Third Department, with two justices dissenting, modified the decision, dismissing the plaintiff's Labor Law § 240(1) claim, and the Court of Appeals affirmed.

The Court of Appeals reasoned that the primary purpose of Labor Law 240(1) is to extend protection to workers or employees who are engaged in certain construction, renovations and excavation work. "Inclusion in the 'special class for whose benefit absolute liability is imposed' requires a plaintiff to demonstrate that 'he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or agent.'" (citations omitted) Thus, the plaintiff was obligated to establish an employee-employer relationship, which requires showing: (1) the voluntary undertaking of mutual obligation—the employee

agrees to perform a service in return for compensation; (2) while not essential, the employer may exercise authority in directing and supervising the means and methods of the work; and (3) the employer decides whether the task undertaken has been completed satisfactorily. *Id.* (citations omitted).

In considering these factors, the Court held that the plaintiff "does not become an employee covered by Labor Law § 240(1) by providing casual, uncompensated assistance to another person with a repair or construction project in an informal arrangement that does not give rise to mutual duties or obligations between them and bears none of the traditional hallmarks of an employment relationship." *Id.* Accordingly, by voluntarily agreeing to construct the shed in return for participating in the hunt, the plaintiff was not entitled to protection under Labor Law § 240.

These decisions serve as a reminder that the courts will follow the trend to narrowly construe the statute, and that simply because a claim has been asserted under the Labor Law does not mean that the statute actually applies to the facts of the case.

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The Rise and Fall of Health Insurer Liens in New York

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court decisions gave health carriers the authority to press their claims often to the detriment of their own insured, the plaintiff, and the effective negotiation and resolution of claims by defense counsel. But it seems that the sun may now be setting for health insurers seeking reimbursement of these subrogation claims.

In November 2009, Governor David Paterson signed into law Senate Bill S66002, which enacted sweeping changes in the New York General Obligations Law and Article 45 of the CPLR. The new law, touted as a major victory for both plaintiffs and defendants, effectively vitiates a health insurer's ability to enforce reimbursement claims in personal injury, wrongful death and malpractice actions. Significantly, the General Obligations Law has now been amended to prohibit health insurers and other benefits providers from recovering the proceeds of settlements of personal injury, malpractice and wrongful death actions.

The newly created GOL §5-335(a) provides in relevant part:

§5-335. Limitation of nonstatutory reimbursement and subrogation claims in personal injury and wrongful death actions.

(a) When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there

is a statutory right of reimbursement. By entering into any such settlement, a plaintiff shall not be deemed to have taken an action in derogation of any nonstatutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement constitute a violation of any contract between the plaintiff and such benefit provider.

Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider . . .

The new law also amends General Obligations Law § 5-101 to now define the term "benefit provider" as "any insurer, health maintenance organization, health benefit plan, preferred provider

organization, employee benefit plan or other entity which provides for payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments or any other benefits under a policy of insurance or contract with an individual or group."

The effect of the new law on health insurers and the settlement of personal injury suits cannot be understated. Up to now, health insurers seeking recovery have relied upon two decisions from the Court of Appeals for legal authority to compel enforcement of their claims: *Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514 (1996), and *Fasso v. Doerr*, 12 N.Y.3d 80 (2009).

In *Teichman*, an infant plaintiff's mother in a medical malpractice action was notified by her health insurer that the family's health plan provided for reimbursement in the event that she was repaid any medical expenses from another source. Asserting that it had a "lien" on any recovery in the underlying suit, the insurer attempted to compel the plaintiff's mother to execute a

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reimbursement agreement. The plaintiff, however, did not consent to or sign the agreement. After the case settled, the plaintiff moved to vacate the insurer's claim, and the health carrier cross-moved for permission to intervene and to seek a declaration that it was entitled to the amount it expended plus all payments for future medical expenses. The issue reached the Court of Appeals, which held that the insurer's reimbursement claim did not give rise to a lien, but, rather, that the insurer should have been granted permission to intervene to enable it to establish its right to recoup any covered medical payments included in the settlement.

The *Teichman* decision literally opened the floodgates for health carriers asserting claims in personal injury actions. These attempts often led to inconsistent application of the law. For example, the First, Second and Third Departments of the New York State Appellate Division routinely frowned upon a health carrier's right to intervene, while the Fourth Department Appellate Division endorsed the insurer's right. With inconsistency came uncertainty as plaintiffs and defense counsel pursued different strategies to confront a carrier's reimbursement claim. Depending upon the amount, plaintiff's counsel either paid the claim, attempted to negotiate a reduction or rolled the dice by ignoring the claim. In turn, defense counsel relied upon hold harmless or indemnification language in settlement agreements as a safeguard from an insurer's claims. But even this stratagem of end-runs around reimbursement claims remained uncertain after the Court of Appeals decision in *Fasso v. Doerr*, 12 N.Y.3d 80 (2009).

In *Fasso*, a medical malpractice action, the plaintiff alleged that she required a liver transplant as a result of the defendant's medical malpractice resulting in significant medical costs incurred by her health carrier. The health carrier

intervened in the action seeking to subrogate against the defendant. During trial, the insurer relied solely on the plaintiff's proof to establish its subrogation claim. As the case progressed, the plaintiff and defendant settled for an amount far less than the professional liability coverage available and stipulated that the insurer's claim would be dismissed because the settlement was less than the actual damages. The settlement expressly provided that the health insurer's claim would be dismissed because the plaintiff was not made whole since the payment was

The provisions of the new law affect only settlements. An insurer's rights to subrogation and reimbursement are not affected if a case proceeds to verdict and a judgment is filed. Obviously, this limitation creates a powerful incentive for both plaintiffs and defendants to resolve claims before trial.

less than her actual damages. While the insurer did not contest the settlement, it contested the proposed dismissal and moved for a mistrial seeking an opportunity to call witnesses and to produce evidence to support its own subrogation claim. The trial court rejected the insurer's contention and approved the settlement.

On appeal, the Court of Appeals reversed and vacated the settlement observing "[o]nce an insurer has paid a claim and the tortfeasor knows or should have known that a right to subrogation exists, the wrongdoer and the

insured cannot agree to terminate the insurer's claim without its consent and such an agreement cannot be asserted as a defense to the insurer's cause of action." While the Court of Appeals acknowledged that its decision could adversely affect the ability of parties to reach negotiated settlements, it suggested that fashioning a remedy was better left in the hands of the state legislature.

Undoubtedly, the drafting of General Obligations Law § 5-335(a) reflects an attempt by the legislature to address the problems raised by the Court of Appeals. Beyond GOL § 5-335(a), the new law makes several other changes to New York's Collateral Source rule found in Article 45 of the CPLR. CPLR 4545 is now redrafted to combine subdivisions (a), (b) and (c) into a single section. The most substantive impact of this change is that CPLR 4545(b), which applied only in actions by public employees against public employers, is repealed. That provision provided for collateral source offsets for injured public employees only for past damages, not future damages. The language of CPLR 4545 was also amended to remove specific references to statutorily recoverable items that do not qualify as collateral sources and replaced it with general language exempting "those payments as to which there is a statutory right of reimbursement." The language of the statute was further amended to expressly state that any collateral source deduction is to be made after the verdict, and that a plaintiff "may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery." Other revised portions of CPLR 4545 include amendments to the method in which itemized verdicts are calculated in both jury and bench trials and the applicability of

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structured judgments in malpractice actions under Article 50-A of the CPLR.

The new law has its limitations. It applies only to personal injury, wrongful death and malpractice actions—thus, property damage claims are unaffected. The law is not intended to affect the rights of insurers that have a statutory right to a lien or reimbursement (e.g., worker's compensation lien). Moreover, the provisions of the new law affect only settlements. An insurer's rights to subrogation and reimbursement are not affected if a case proceeds to verdict and a judgment is filed. Obviously, this limitation creates a powerful incentive for both plaintiffs and defendants to resolve claims before trial.

Unsurprisingly, while both the plaintiff's and defense bars laud the new General Obligations Law, health insurers are scrambling to develop strategies to circumvent its prohibitions. One emerging tactic by insurers that will likely require resolution by a court down the road is that health carriers are now couching reimbursement liens as "statutory liens" authorized under the federal ERISA law (29 U.S.C. 1002 et seq.) and that the limitations on insurers' claims imposed by the new General Obligations Law are preempted by federal law.

The merits of this response are highly questionable. A review of ERISA demonstrates that there are no specific statutory rights for medical liens. Any health insurer, such as a group benefit plan, while falling under the shadow of ERISA (29 USC § 1002(1)), will have only a contractual right to subrogation or reimbursement. This contractual right is rooted in the language of the particular policy and agreement between the plan and its members. While there is a provision that provides for "appropriate equitable relief" in the enforcement of plan language (29 USC § 1132(a)(3)), there is no statutory right of subrogation

or reimbursement per se.

The argument of federal preemption posed by health insurers is equally tenuous. While ERISA preempts all state laws insofar as they relate to employee benefit plans (29 USC § 1144(a)), preemption, however, does not apply to those state laws that regulate insurance, banking or securities (29 USC § 1144(b)(2)(A)). This is known as the ERISA Savings Clause. In *Kentucky Assn. of Health Plans v. Miller*, 123 S.Ct. 1471, 1478 (2003), the Supreme Court laid the groundwork for when preemption takes place or not under the ERISA Savings Clause by establishing two elements: (1) the state law must be specifically directed toward entities engaged in insurance, and (2) the state law must substantially affect the risk pooling agreement between the insurer and the insured. On its face, the new General Obligations Law is specifically directed toward entities engaged in insurance as it defines not only benefit providers—but it also specifically excludes their liens and rights of reimbursement if not statutorily based. Second, by shifting responsibility for a portion of a plaintiff's damage, there can be no doubt that this new law will substantially affect the risk pooling agreement.

Needless to say, the war over health insurer liens is far from over. In the near future, we will certainly see a new wave of court decisions interpreting the validity of the new General Obligations Law. But for now, counsel can express a collective sigh of relief and enjoy the sunset while it lasts.

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HRRV ON TRIAL

Bronx County Jury Returns Verdict for Contractor in Catastrophic Injury Case

Lorraine Vasquez-Sullivan v. FC Bruckner Plaza Associates, LP, et al
Supreme Court, Bronx County
Index No. 1481/97
December 2009

York Hunter of New York, an HRRV client, has emerged victorious in a catastrophic injury case involving a five-and-half-week jury trial before Judge Cynthia Kern in Bronx County Supreme Court.

In a complex trial that spanned the testimony of more than a dozen experts in fields ranging from architecture, lighting design and engineering to psychiatry, bariatric surgery and neurosurgery, the jury unanimously absolved York Hunter of all liability in the case and awarded over \$7.78 million in damages against York's co-defendants, FC Bruckner Plaza and First New York Management.

The case originated on December 3, 1996, when the plaintiff, then 38 years old, tripped and fell on a curb located on the roof top parking lot of a recently built shopping mall known as the Shops at Bruckner Plaza at 845 White Plains Road in the Bronx. The plaintiff, who was Christmas shopping at the time with her husband, claimed that her fall was caused by a curb not properly demarcated and by a defective lighting plan that was not completed by the construction manager, York Hunter. Moreover, the plaintiff claimed that the mall was unlawfully operating with an expired certificate of occupancy in violation of New York City Code. York Hunter had been hired by the mall owners, FC Bruckner Plaza, to build the mall.

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HRRV ON TRIAL

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After the fall, the plaintiff was immediately diagnosed with a herniated disc of the cervical spine for which she underwent an anterior disectomy. After this surgery, doctors recommended that the plaintiff also undergo surgery of her lumbar spine. The plaintiff's physicians, however, advised the plaintiff to lose weight before performing further surgery. After several months of unsuccessful diet plans, and, at the recommendation of her treating doctors, the plaintiff underwent laparoscopic Roux-en-Y gastric bypass surgery to reduce her caloric intake. Unfortunately, after the surgery, the plaintiff developed complications, and, during surgery to correct the complications, her esophagus was ruptured. The plaintiff underwent four surgeries to attempt to repair her esophagus, which all failed. As a result, the plaintiff had a Hickman's catheter inserted in her chest and a permanent feeding tube installed in her stomach to take nutrition.

After the failed bariatric surgery, the plaintiff underwent eight additional surgeries on her cervical and lumbar spine, which included fusion surgery at multiple vertebral levels in the back and neck. Doctors had also implanted a permanent morphine pump in the plaintiff's lower back to alleviate continuous spinal pain, which allegedly rendered the plaintiff incapacitated. By 2008, the plaintiff, who had suffered severe depression prior to the accident, had undergone 12 surgeries and was hospitalized for severe psychiatric episodes requiring projected future medical expenses by a Life Care Planner in excess of \$5 million. Thirteen years after the accident, the plaintiff is presently unable to eat normally and is required to take nutrition through the abdominal feeding tube for life.

At the trial, the mall's owners claimed that York Hunter had failed to properly construct the lighting plan and demarcate the curb at the scene of the accident in accordance with contract specifications and pursuant to the project schedule. During trial, HRRV, on behalf of York Hunter, proved that the contract specifications did not call for demarcation and that the original lighting plans drafted by the owner's architect and consultants were defective. Utilizing complex architectural and electrical schematics, it was shown to the jury that the owner's lighting plan was deficient and that York Hunter, in fact, had corrected these deficiencies within the project schedule. Moreover, vigorous cross-examination of the owner's witnesses revealed that the owner, not York Hunter, had control over the lighting systems and curb painting at the time of the accident.

Beyond liability, and prior to trial, HRRV conducted a meticulous investigation of the plaintiff, which included video surveillance showing the plaintiff shopping, driving and engaging in



In a complex trial that spanned the testimony of more than a dozen experts in fields ranging from architecture, lighting design and engineering to psychiatry, bariatric surgery and neurosurgery, the jury unanimously absolved York Hunter of all liability in the case.

physical activities all of which contradicted the extent of the plaintiff's claims of disability and her own "Day in the Life" video.

At the conclusion of the evidence, the plaintiff's counsel asked the jury to find the defendants liable and to award \$19 million in past and future damages. The jury unanimously exonerated HRRV's client York Hunter of any responsibility for the accident but found the co-defendants Bruckner and First NY Management 100 percent liable. The jury awarded \$7.78 million in damages against these defendants.

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HRRV DECISIONS OF INTEREST

Summary Judgment Granted in Negligent Supervision Case

Solomon Rapoport v. Cambridge Development, LLC d/b/a Atria Retirement Living and The Avondale Group, Inc., f/k/a Home Care Services of America, Inc.
 Supreme Court, New York County
 Index No. 105141/06
 December 17, 2009

HRRV scored a major summary judgment victory in a catastrophic injury case before Justice Jane Solomon in New York County Supreme Court on behalf of The Avondale Group, Inc. *Solomon Rapoport v. Cambridge Development, LLC* arose out of a tragic accident, which resulted in the paralysis of the plaintiff, an elderly resident of a retirement living facility. According to the plaintiff, he suffered severe neck and back injuries when he slipped and fell while running in the lobby hallway of Atria Retirement Living.

Although the plaintiff did not allege a defect in the floor, he charged that Avondale, along with the co-defendant, Atria, failed to supervise him and were aware that he had been running in the hallways on prior occasions. He further charged that Atria and Avondale were negligent in allegedly evaluating him as suitable for living in a retirement living facility despite a diagnosis of Alzheimer's disease.

In support of its motion, Avondale, a home health care agency, argued that it had only been retained to provide medication management services on Solomon Rapoport's behalf. It submitted an affidavit from an expert in the field of geriatric medicine who reasoned that these services, known as "assisted self-medication," are limited to dispensing medication and providing fluid to assist in swallowing. This limited scope of services does not give rise to any ongoing duty to monitor



the plaintiff's activities or to safeguard him against falling injuries. In granting Avondale's motion for summary judgment, the court agreed with the defendant's arguments and found that the plaintiff's claims that the defendants failed to use reasonable care in evaluating him, and that that failure "was the proximate cause of [his] injuries," was entirely conclusory. The court noted that "[t]his attempt to posit a duty and simultaneously to bridge the evidentiary gap between plaintiff's illness and his accident does not suffice to withstand defendants' motions."

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Case Dismissed Based on Plaintiff's Failure to Provide Discovery

Iwuagwu v. GT Motors, LTD.
 Supreme Court, New York County
 Index No. 300128/06
 November 12, 2009

Although generally reluctant to do so, New York courts will, on occasion, dismiss a plaintiff's case following a repeated failure to provide discovery. In *Iwuagwu v. GT Motors, LTD.*, the plaintiff alleged that the defendants, an automotive repair shop and its principals, converted his vehicle after a dispute over a repair bill. The plaintiff repeatedly failed to appear for a

deposition, in violation of several court orders. The defendants moved to dismiss and, based on the prior orders and the plaintiff's well-documented refusal to cooperate with defense counsel, the court granted the motion.

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Jonathan Judd and Christopher Gibbons represented the defendants.

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HRRV DECISIONS OF INTEREST

Court Finds No Duty Owed by Sterling Mets with Respect to Parking Lot Adjacent to Stadium

Carmelina Giacalone v. Sterling Mets, LP and Central Parking Systems of New York Supreme Court, New York County

Index No. 17351/09

January 20, 2010

Carmelina Giacalone alleged that on July 3, 2006, while traversing through the Shea Stadium parking lot, she sustained personal injuries when she tripped and fell “on a broken, uneven, defective cracked and/or depressed portion of the pavement.” She alleged that Sterling Mets and Central Parking were negligent in the ownership, maintenance, operation, supervision and/or control of the parking lot.

HRRV moved on behalf of Sterling to dismiss the plaintiff’s Verified Complaint on the basis that Sterling did not owe a duty to the plaintiff and, therefore, could not have breached a duty, giving rise to liability. In support of its motion to dismiss, Sterling relied on its Restated Agreement with the City of New York to demonstrate that Sterling had no responsibility for the parking lot outside of the stadium.

The plaintiff asserted that Sterling’s motion was premature due to lack of discovery and that the Restated Agreement between the City and Sterling contained certain provisions suggesting Sterling’s involvement with the operation of the parking lot. According to the plaintiff, the Restated Agreement required Sterling to provide attendants as may be necessary for the operation of the stadium parking lot, to properly police the stadium facility and stadium approach area and to clean the parking lot area.

HRRV argued that the plaintiff misinterpreted the Restated Agreement as it does not require Sterling to maintain the H-2 parking lot where the alleged accident occurred. HRRV also disputed the plaintiff’s contention that Sterling’s motion was premature due to lack of discovery, as there was no discovery needed to demonstrate that Sterling did not owe the plaintiff a duty with regard to the parking lot.

In granting Sterling’s motion, Justice Allan B. Weiss relied upon Sterling’s documentary evidence, mainly the Restated Agreement, to conclude that Sterling did not lease, occupy, control or assume the obligation to maintain or repair the parking lot. Justice Weiss concluded that Article VII of the Restated Lease Agreement expressly provides that the City has the exclusive right to operate and control the stadium parking area and that the City is responsible for all repairs of the parking area. The court found no ambiguity with respect to the scope of Sterling’s obligations as to the parking lot under the agreement and, as such, concluded that Sterling did not owe a duty of care to the plaintiff. Therefore, because no duty was owed, Sterling could not be held liable for the plaintiff’s alleged injuries.

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