



LEGAL INSIGHTS

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INSURANCE COVERAGE CORNER

In Holding that Insurance Brokers Have No Common Law Duty to Disclose Fee Arrangements, Court of Appeals Clarifies Rules Regarding Their Duties

By Abbie Havkins and David Rosenthal

In *People v. Wells Fargo Ins. Servs., Inc.*, 2011 N.Y. Slip Op 1070 (N.Y. February 17, 2011), the New York Court of Appeals dismissed the New York Attorney General's breach of fiduciary duty and fraud claims against an insurance broker holding that insurance brokers do not have a common law fiduciary duty to disclose "incentive" arrangements to their customers. Insurance brokers, however, pursuant to an Insurance Department Regulation now have to disclose these "incentive" arrangements to their insured clients. See 11 NYCRR § 30.3 (a) (2).

Wells Fargo, entered into various "incentive" arrangements with insurance companies, resulting in production

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Friend or Foe?

Ethical Considerations of Deceptive Access to Social Networking Sites and the Reasonable Expectation of Privacy

By Steven H. Rosenfeld and Carmen A. Nicolaou

The plaintiff in your personal injury action has produced medical records of significant orthopedic and neurological injury and testified that his injury has severely limited his ability to enjoy life. Although his treatment has long since ended and there is no real residual impact, he spends his days in his apartment watching television. His friends have shunned him. His family is growing tired of his endless self-pity. But he just cannot seem to motivate himself to get past his constant pain—which resulted from your client's negligence. And his psychiatrist stands ready to testify in support of his claims.

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The Next Significant Environmental Issue in New York: Marcellus Shale Drilling

By Tara C. Fappiano



Deep within the earth is a layer of sedimentary rock that is the gas-rich Marcellus Shale, a substantial portion of which lies in the Southern Tier, Twin Tiers and Catskills region of New York State. Hydro-fracking, a type of hydraulic drilling, offers opportunities for extracting natural gas from this natural resource. But, there has been significant debate about the potential environmental impact of these activities. At the same time, it is recognized that the Marcellus Shale offers opportunities for major economic development in areas of New York that have been hit hard by the recession. An executive order signed by the former governor in 2008, and extended in December 2010, placed a de facto moratorium on hydro-fracking in New York, sending land developers elsewhere, many to the neighboring state of Pennsylvania. However, that moratorium will expire in the spring of 2011. While the current governor is expected to extend the order for some time, the Department of Environmental Conservation (DEC) has been charged with reviewing the environmental impacts and permitting process.

The Phases of the Drilling Process

Mineral and Surface Rights

The first step for land developers is to obtain mineral rights through lease agreements or land purchases, with landowners in the region. They would then engage in exploration techniques to pinpoint drilling locations. Seismic testing is widely used in the exploration process, using vibrations and explosives that could adversely affect the surrounding land. Through this process, the drill sites are selected.

In essence, a mineral rights lease may be drawn up to give the developer gas company the right to develop the minerals. It would address such issues as the type of work to be done and compensation. Surface use agreements are also drawn up to discuss how the developer will use the land. These agreements typically define the legal relationship between the landowner and the gas company. A landowner should be mindful to define the term of the lease explicitly and be wary of language creating automatic extensions of the lease. These agreements should also be crafted to deal with the issue of reclamation of the property, discussed below.

Finally, a landowner who signs a lease faces a number of potential legal or financial liabilities for potential environmental damage and should include indemnity language in these leases to shift the financial responsibility for those liabilities.

Site Preparation, Drilling and Extraction of Gas

As one might expect, there is a need to create access to drilling sites for vehicles and equipment involved in the drilling process. Residual drilling fluid waste and storm-water runoff is produced, creating the need to develop tanks and pits to store the waste and try to prevent unnecessary erosion of the land. Necessarily, access roads must be built, requiring the clearing of vegetation. A big concern of opponents of hydro-fracking is that the drilling itself utilizes millions of gallons of water, which must be obtained from somewhere. In addition, once extracted, the gas must be transported to a treatment plant or processed on-site to remove impurities. Proponents of hydro-fracking, however, will point out that in addition to the economic stimulus the process can provide, the gas, once extracted, can then last for decades and be a significant natural resource.

Site Abandonment and Reclamation

Of course, at some point the site will no longer produce gas, at which point it must

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be capped and plugged. The land must be returned to its previous conditions, although the terms of remediation are often dealt with in mineral rights leases. This process is called reclamation, and the oversight of that process can lead to a whole host of additional legal concerns.

Potential Environmental Impacts

Land

Certainly, the land around a well site is altered significantly, which has an impact upon crops, animals and native vegetation. There are concerns about soil becoming heavily compacted and eroded, which could lead to decreased soil percolation, increased water runoff, less vegetative growth and an impact on the quality of the water in nearby areas. There is also a concern that new species of vegetation and animals would then take over the area, many of them unwelcome and most hard to displace once they arrive.

Air

Air pollution is a major concern of opponents of hydro-fracking, who cite the heavy truck traffic and the emission of carbon dioxide and particulates as the main concerns. There is also a concern of methane escaping from leaking valves, which has been seen to occur at active sites. Other increased emissions include nitrogen oxides, volatile organic compounds, benzene, toluene, ethyl benzene, xylene, sulfur dioxide, ozone and hydrogen sulfide. The question is whether state and federal regulations are sufficient to curb the potential adverse health impacts, or whether all such health impacts can be determined and protected against.

Noise

Another concern is the idea that there will be a constant annoyance in the form of noise, emanating from truck traffic, gas compressors and seismic testing.

Water Pollution

This is the most significant environmental concern associated with hydro-fracking. As mentioned, a great deal of water is used during the drilling process. In Pennsylvania, much of this water is being taken from inexpensive sources—nearby streams, rivers or lakes. This gives rise to the need for quality water management, certainly an issue that will be of great importance if drilling begins in New York. A variety of chemicals are also mixed with water to perform various functions, such as to increase gas flow efficiency, dissolve minerals and prevent oxidation. Other materials found within the water include a mix of rock, minerals and sometimes radioactive material. Many of these materials are contained in on-site storage tanks, raising another concern about leaks or overflow from those tanks, and the contamination or pollution of land and water that could result from such an event.

This overview highlights that the legal and environmental issues that this process will create are varied, numerous and, in some cases, not completely known. Gas industry executives have stated that hydro-fracking is safe and has been performed in other regions for decades. Whether these viewpoints and concerns can be reconciled, either now or after hydro-fracking is permitted in the state, remains to be seen.

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Update: Another Extension for MSP Reporting Requirements

By Jonathan Judd

We previously reported on the delayed implementation of the Medicare Secondary Payer (MSP) mandatory reporting requirements for property and casualty insurers until January 1, 2011. Implementation has again been postponed—this time until January 1, 2012 for liability claims that do not involve ongoing medical responsibility.

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) amended the MSP rule, which dates back to 1980 but has historically not been strongly enforced because Medicare did not closely monitor when a personal injury suit by a Medicare beneficiary resulted in the beneficiary receiving a settlement or judgment. As a result, Congress passed the MMSEA in an attempt to reduce federal health care expenditures by ensuring that funds paid by primary payers, including those used to settle personal injury lawsuits, were disclosed and the government has an opportunity to recover the health care payments it made. The MMSEA is applicable to group health plans, liability insurers, (including self-insurers), no-fault insurers and worker's compensation carriers.

The MMSEA does not create any new payment requirements. However, it imposes stringent new reporting requirements bearing draconian sanctions for failure to comply so as to ensure that the primary payers issue the payments mandated by the existing law.

The latest delay is evidently attributable to the fact that more specific guidelines must be provided to attorneys and insurance professionals regarding the manner in which complete and correct information can most efficiently be collected.

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Court of Appeals Decision May Significantly Expand Municipal Liability

By Jonathan Judd

In *San Marco v. Village of Mt. Kisco*, 2010 N.Y. Slip Op 9197 (December 16, 2010), the New York Court of Appeals addressed whether statutes requiring prior written notice on the part of the Village of Mt. Kisco (the Village) barred recovery where the plaintiff, Dale San Marco, fell on black ice and was injured. Its decision could significantly expand the liability of municipalities. The fall occurred on property owned by the Village, which brought a motion for summary judgment based on the fact that it had not been given prior statutory notice of the allegedly dangerous condition. The Court of Appeals held that the Village was not entitled to summary judgment because the ice on which the plaintiff fell may have been created by the Village's snow removal operation.



The plaintiff slipped and fell in a parking lot owned by the Village while on her way to work on Saturday, February 5, 2005, at approximately 8:15 a.m. At about 4:45 a.m. the prior morning, the Village had salted the parking lot because it was icy. No Village employees worked at the lot on weekends. Weather records reflected that, sometime after the Village salted on February 4 and the time of the plaintiff's accident, the temperature rose above freezing for approximately 19 hours. It then dropped back below freezing.

Following the incident, the plaintiff commenced an action against the Village seeking damages for her injuries. Her husband brought a derivative claim as well. She alleged that her fall was caused by black ice that was caused by the melting and refreezing of a pile of snow that the Village had plowed into an area adjoining the parking spaces. Specifically, she claimed that the Village was negligent in piling the snow so close to the parking spaces and in failing to remove the ice from the lot.

The Village asserted that Village Law § 6-628 and Village of Mt. Kisco Code § 93-47 shielded it from liability in the absence of prior written notice of the dangerous condition. Pursuant to Village Law § 6-628, a municipality cannot be liable as a matter of law "unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the

snow or ice, relating to the particular place, was actually given to the Village clerk." Mt. Kisco Code section 93-47 provides that "[n]o civil action shall be brought or maintained against [the Village] for damages or injuries to person or property sustained in consequence of . . . the existence or accumulation of snow or ice upon any street, highway, bridge, culvert, sidewalk or crosswalk, unless written notice of the existence of such condition, relating to the particular place, had theretofore actually been given to the Board of Trustees of the Village."

Although the Village proffered evidence before the Supreme Court that it had not received the requisite notice, the Supreme Court rejected the Village's argument that the action had to be dismissed due to the absence of notice. The Supreme Court reasoned that the snow removal undertaken by the Village gave rise to an exception to the written

notice requirement, and found a question of fact regarding whether the Village created the hazard. Citing *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999), the Supreme Court held that a prior written notice statute does not protect a municipality from liability where the "locality created the defect or hazard through an affirmative act of negligence."

Relying on the decisions of the Court of Appeals in *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) and *Oboler v. City of New York*, 8 N.Y.3d 888 (2007), the Appellate Division, Second Department reversed and granted summary judgment to the Village. Those decisions, which involved a pothole and uneven manhole cover, respectively, held that the "affirmative creation" exception to prior written notice statutes applies only where the action of the municipality "immediately results in the existence of a dangerous condition." Reasoning that this "immediacy test" extends to snow melting cases, the Second Department found that the Village's action of snow plowing did not amount to "immediate creation" of the hazard which allegedly caused the plaintiff's fall. Rather, held the Second Department, "the environmental factors of time and temperature fluctuations . . . caused the allegedly hazardous condition."

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The Second Department granted the plaintiff leave to appeal to the Court of Appeals, which reversed and reinstated the plaintiff's claim. In so holding, the Court of Appeals considered the public policy considerations underlying prior written notice statutes and distinguished the facts of the plaintiff's claim from those in *Yarborough* and *Oboler*. The Court of Appeals determined that the immediacy requirement for "pothole cases" should not be extended to cases involving hazards related to negligent snow removal. In concluding that the Village should not be shielded from liability as a matter of law, the Court of Appeals reasoned that "prior written notice statutes were enacted to protect municipalities from the 'vexing problem of municipal street and sidewalk liability' (*Barry v. Niagara Frontier Tr. Sys.*, 35 N.Y.2d 629, 633 [1974]) when they have no reasonable opportunity to remedy the problem."

The Court of Appeals noted that, in *Yarborough* and *Oboler*, it held that a municipality could only be liable for its actions that immediately produced a hazardous condition. It stated that:

These holdings merely reinforced the object of prior written notice statutes to protect municipalities from liability for a road construction or repair, recognizing the difficulty in determining, after the passage of time, whether the initial repair was negligent. At the same time, the affirmative creation exception addressed situations where a hazard was foreseeable, insofar as the municipality created it, by, for example, digging an unmarked ditch in a road or neglecting to cover a street drain. Considering the present facts in light of the underlying purpose of prior written notice statutes, we find these statutes were never intended to and ought not to exempt a municipality from liability as a matter of law where a municipality's negligence in the maintenance of a municipally owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts. Unlike a pothole, which ordinarily is a product of wear and tear of traffic or long-term melting and freezing on pavement that at one time was safe and served an important purpose, a pile of plowed snow in a parking lot is a cost-saving, pragmatic solution to the problem of an accumulation of snow that presents the foreseeable, indeed known, risk of melting and refreezing.

Moreover, a patch of pavement may gradually and unpredictably deteriorate, making the point at which the efficacy of the initial repair ceases unknown to the municipality. It is therefore understandable that the hazard may escape detection until the municipality receives written notice of the problem. However, in the case of

black ice that forms from plowing snow in a municipally owned parking facility, a municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data. Indeed, there is evidence that in the case at bar, the Village treated the same parking lot with salt and sand the day before the accident, in order to limit the hazards of black ice. Thus, the determinative factor in this case should be whether the Village's snow removal efforts created the ice condition on which [the plaintiff] fell.

The Court of Appeals concluded that :

[A]t this juncture, [the] plaintiff raises triable issues of fact that compel denial of summary judgment. Primarily, a jury must decide whether [the plaintiff] fell on ice created by the Village's snow clearance operation. And relatedly, there are factual issues concerning whether the Village exercised its duty of care to maintain the parking lot in a reasonably safe condition by plowing snow high alongside active parking spaces, and in failing to salt or sand the lot on weekends, despite the fact that it remained open seven days a week.

Although the Court of Appeals noted that it sought neither to "create a new burden on municipalities to remove all snow off-premises in order to avoid liability" nor to "render the municipality an insurer of pedestrians," the decision could, of course, be detrimental to municipal defendants in the future, insofar as it appears to expand the circumstances under which they may be deemed to have created a dangerous condition. The holding arguably eviscerates the "immediate creation" test enumerated by *Yarborough* and *Oboler* and substitutes an uncertain standard with no temporal boundary. As the Defense Association of New York asserted in its amicus curiae brief in support of the Village's position, to impose liability on a municipality for creating a condition caused over time by nature would seemingly "undermine the vestigial elements of sovereign immunity retained by subdivisions of the State, at a time when new inroads into their pocketbooks could hardly be considered in the public interest." It will be interesting to see how strictly the courts interpret *San Marco* in cases arising from accidents occurring during this unusually harsh winter, since the numerous snowstorms that have battered New York have left municipalities with severely limited options regarding where to deposit snow they have cleared.

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The Dental Professional's Primer on Dealing with Difficult Patients: Informed Consent, Requests for Records and Avoiding Claims of Abandonment

By Sean P. Dwyer and Shanna R. Torgerson

It goes without saying that every practitioner will encounter a difficult patient at one point in his or her career. Difficult patients are an unfortunate fact of life in any field of health care. While a majority of your patients are pleasant and cooperative, there will always be a few troublesome patients who can and will create circumstances adverse to your practice. It is an equally unfortunate fact that many malpractice claims against dental professionals arise from their relationships with problem patients. While there is no guaranteed cure for avoiding claims brought by the problem patient, there are several hot spots in your practice which should be addressed that can short-circuit potential claims and enhance your defense down the road.

Using Informed Consent to Your Advantage with the Difficult Patient

A majority of malpractice claims brought by problem patients entail "the bad result." It may involve the failed implant, the difficult extraction resulting in nerve injury or the ill-fitting bridge. The key defense to these claims is properly securing informed consent, which includes the patient understanding and acknowledging the potential complications of treatment.

The general rule is that a dentist must disclose the risks or hazards that could influence a reasonable person in making a decision to give or withhold consent. Whether or not a treating dental practitioner fulfills this statutorily legal duty to inform the patient is a question of practice within the standard of care. True consent involves the informed exercise of choice. The average patient, who knows little about dentistry, typically can turn to no one other than his or her doctor for advice and direction in making an intelligent and informed decision. Thus, the doctrine of informed consent addresses the adequacy of information given to the patient to enable the patient to make a wise choice regarding whether or not to undergo treatment. Consider the following recommendations as a checklist when you seek informed consent from your patient:

Informed consent is more than a signature on a form; it is a process that defines the expectations and responsibilities of the doctor and patient.



- The informed consent process should occur in advance of the treatment or procedure—preferably in the practitioner's office or another comfortable setting where treatment can be discussed with the patient. Ideally, informed consent should not be secured in the treatment chair seconds before the procedure is about to commence.
- The informed consent process should include a thorough discussion of all significant risks (including death), anticipated benefits, and alternatives to treatment, explained in language the patient can understand.
- Anesthesia risks should be addressed as separate issues, with the specific risks, anticipated benefits and alternatives explained.
- The patient has a right to refuse any or all parts of the proposed treatment or procedure.
- The informed consent process should always be recorded as a note in the patient record, in addition to inclusion of the signed consent form. That note should include an assessment of the patient's understanding.
- While the doctor's staff may assist with aspects of patient education, the actual achievement of consent to treatment is the doctor's nondelegable duty.

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- Written materials, models, pictures and videos may be used to facilitate the informed consent process. This type of material can be particularly helpful in implant and bridge cases.
- The patient should receive a copy of any informed consent forms after she or he signs them.
- Ensure the patient is competent to provide meaningful consent to treatment, including being adequately "health literate." If the patient is not competent, the patient's legal surrogate must provide consent. The relationship of the surrogate to the patient should be noted on both the consent form and in the note.
- If a translator assists with the informed consent process, his or her name and role should be documented on both the consent form and in the note.

Responding to the Difficult Patient's Requests for Records

Another hot spot in your practice is the way that your office responds to a patient's requests for records. Routinely, a practitioner will get the first clue that he or she may be facing a lawsuit when the practitioner receives a letter from the patient's attorney requesting a copy of the chart. At the outset, while it may be tempting to contact the patient's attorney and ask questions, or even plead your defense in an attempt to avoid litigation, this is not advisable. Any statement you make may be used against you down the road. Another temptation is to ignore or delay the request for records from the patient. This is not only improper, but it also contradicts the law.

Section 18 of the New York State Public Health Law applies to records maintained by health care facilities licensed by the Department of Health. These include hospitals, home care facilities, hospices, health maintenance organizations and shared health facilities. Its provisions also apply to health care practitioners, including physicians, physician assistants, specialist assistants, audiologists, chiropractors, dentists, dental hygienists, midwives, occupational therapists, optometrists, ophthalmic dispensers, physical therapists, physical therapist assistants, nurses, podiatrists, psychologists, social workers and speech pathologists. The law describes such facilities and practitioners as "providers." Health care practitioners not specifically included in this paragraph are not covered by Section 18.

The law permits access by "qualified persons." "Qualified persons" include the patient or an incapacitated adult patient's legal guardian. A parent or legal guardian of a minor may access the minor's records when the parent or guardian

consented to the care and treatment described in the record or when the care was provided without consent in an emergency resulting from an accidental injury or the unexpected onset of serious illness. "Qualified persons" include holders of health care proxies for living patients, the executors and administrators of estates of deceased patients and, if there is no will, the distributees of the estate under the Estates, Powers and Trusts Law. An attorney representing a "qualified person" is also a "qualified person," provided that the attorney has a signed power of attorney specifically authorizing the attorney to request medical records. Health care providers, insurance companies, other corporate entities and attorneys lacking a power of attorney are not qualified persons.

Section 18 requires that within 10 days of a written request for access to records, the provider must give the qualified person the opportunity to inspect the records. Providers must also provide copies of records if copies are requested. Providers are permitted to charge reasonable fees to recover costs for inspections and copying. However, a qualified person cannot be denied access to information solely because of inability to pay.

The law also states that access to the following records or parts of records may be denied:

- Personal notes and observations maintained by the practitioner
- Information that was disclosed to the practitioner under the condition that it would be kept confidential and it has been kept confidential since then
- Information about the treatment of a minor that, in the opinion of the practitioner, should not be disclosed to the parents or guardians (a patient over the age of 12 may be told that his or her parents or guardians have requested the patient's records and, if the patient objects, the provider may deny the request)
- Information that the practitioner determines may reasonably be expected to substantially harm the patient or others
- Substance abuse program records and clinical records of facilities licensed or operated by the Office of Mental Health (these records may be disclosed pursuant to a separate process in Section 33.16 of the Mental Hygiene Law)
- Information obtained from other examining or treating practitioners which may be requested from other practitioners directly

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- When other provisions of law prevent their release (for example, Section 17 of the Public Health Law prohibits the release of records to parents or guardians concerning the treatment of a minor for venereal disease or for performance of an abortion)

Section 18 requires a provider who denies access to part or all of a record to inform the qualified person which of the above reasons caused the denial. Most importantly, a practitioner receiving a request for records and suspecting that it may be the foreshadowing of a claim or lawsuit should immediately contact his or her malpractice carrier or seek advice from an attorney.

Confronting and Discharging Difficult Patients

A difficult patient may lead a practitioner to make the decision to end treatment. Legitimate reasons for ending the dentist-patient relationship may include chronic noncompliance, rudeness to office staff or nonpayment of bills. While these patient behaviors can affect the interactive caregiving process, they may also identify patients with a propensity to file a claim against you. To help reduce the risk of a future claim, a dentist may terminate or discharge a patient from the practice.

There are, however, certain exceptions that apply to terminating a patient. You may not terminate your professional relationship for any discriminatory purpose or in violation of any laws or rules prohibiting discrimination such as the Americans with Disabilities Act. If the patient is a member of a managed care network, you should consider discussing your intentions to discharge the patient with the health plan administrators, as special conditions may apply. They also can provide you with a listing of other member dentists in the area who are accepting new patients.

Reduce the Risk of Abandonment

Abandonment occurs when a dentist suddenly terminates a patient relationship without giving the patient sufficient time to locate another practitioner. Conversely, a patient may withdraw from a dentist's care at any time without notifying the dentist. A claim of abandonment may serve as an independent basis for a claim in a lawsuit and also invoke disciplinary

action by licensing authorities. The key to avoiding a claim of abandonment is to have a set protocol that complies with accepted standards.

To reduce the risk of allegations of abandonment, it is recommended that, if possible, you discuss with the patient in person the difficulties in the dentist-patient relationship and your intention to discharge the patient from the practice. Be sure to document the discussion fully in the patient's dental record, also noting the presence of any witnesses such as a patient's family member or a member of your office staff. Documentation in dental records should never include subjective or disparaging statements or judgments about a patient.



Write a Formal Discharge Letter

While the specific rules for discharging a troublesome patient may vary from state to state, all jurisdictions require that you notify the patient in writing of your intention to terminate the dentist-patient relationship. Specify in the letter a termination date after which you will no longer provide care to the patient. Generally, this is at least 30 days from the date of the letter. You should also state in the letter that you will be available to provide only emergency care or services during the 30-day notice period.

The discharge letter should include:

- (a) A description of any urgent dental problems the patient may have, including, if appropriate, a time frame within which the patient should be seen by another dental practitioner, and the potential implications or consequences if treatment is not received
- (b) An offer to forward copies of the patient's dental records to the subsequent treating dentist. (You may also include a HIPAA compliant authorization for the patient's convenience.)
- (c) The name and phone number of a local dentist referral service, or the local/state dental society, to assist the patient in locating a dentist who is accepting new patients.
- (d) The letter should be marked "personal/confidential" and mailed by certified mail, return receipt requested, to the patient's last known address. File a copy of the letter and

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the receipt in the patient's dental record. If the letter is returned unclaimed, mail it again. If the letter is returned a second time, file it in the patient's dental record as proof of your attempts to contact the patient. It is also suggested that you mail a copy of the letter by regular, first class mail, in case the certified letter is not claimed.

Inform Your Staff

Communicate with your staff when you have formally discharged a patient from your practice. Office staff should not schedule an appointment for a discharged patient after the termination date specified in the letter, as doing so may reestablish a dentist-patient relationship.

If you are covering for another dentist and must see a former patient that you discharged, be sure to inform the patient that you are seeing him or her as the covering dentist for the new dentist and are not resuming your former dentist-patient relationship. Document this communication in your progress notes in the patient's dental record.

In all, dealing with the difficult patient requires forethought and planning on your part. As a practitioner, you will inevitably encounter these types of patients. Taking the time to create effective risk management procedures within your practice is the key to successfully handling the most troublesome patient.

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New York: A Second Look at MMA? Promoters and Fans Hope So

By Carla Varriale and James Han

The Ultimate Fighting Championship (UFC), with the support of Madison Square Garden Sports, held a press conference on January 14, 2011, and renewed its commitment to legalizing the sport of mixed martial arts (MMA) in New York. If the ban on MMA is lifted, the UFC will bring MMA bouts to Madison Square Garden and other New York venues. However, legislators must first allow the state's Athletic Commission to sanction and regulate the sport. The January 14 press conference demonstrates the strong public relations and lobbying efforts by the UFC. It featured New York Assemblyman Dean Murray and Madison Square Garden Sports President Scott O'Neal. Both men highlighted the viability of the sport as a potential revenue generator for the state and its putative place in mainstream sports.

New York is one of only a handful of states that prohibits MMA. There have been no sanctioned MMA events held in New York since MMA was banned in 1997. In 1995, the UFC held its first event in Buffalo, New York. "UFC VII" drew a crowd of 10,000 and was broadcast on Pay-Per-View. However, New York's Athletic Commission had no jurisdiction over the sport. Its control over singular sports, such as boxing, did not apply to MMA because MMA combines elements of boxing, wrestling, jiu-jitsu and kickboxing. Thereafter, Senator Roy Goodman emerged as a staunch opponent of MMA, lobbying his fellow senators to ban the sport. Amidst a strong push to ban the sport, Governor George Pataki signed a bill into effect on February 7, 1997 banning MMA bouts in New York. MMA was on the verge of sanctioning in 2008, but concerns voiced by the Committee on Tourism, Arts and Sports Development delayed its passage. The recent efforts to lift the ban were hobbled by a series of unsuccessful bills in the legislature. New York's present fiscal woes, however, may kindle a renewed interest in the sport—and its potential economic benefits.

Proponents of sanctioning the sport have observed that MMA bouts held at the neighboring Prudential Center in Newark, New Jersey, and similar venues that are accessible from New York have siphoned away fans and much-needed revenue at a time when the state's budget is in a choke hold of its own. The potential revenue, which the UFC and MMA supporters estimate could be in the range of tens of millions of dollars per year, would be a welcome panacea, given New York's already battered budget. As observed by Donald J. Vaccaro, CEO and president of Ticket Network (<http://corporate.ticketnetwork.com>) and Metro Entertainment, LLC, sanctioning MMA could have a ripple effect on other aspects of New York's economy as well. Vaccaro noted that a review of ticket sales for UFC fights held in Las Vegas last year revealed that roughly 90 percent of the customers who purchased tickets to those fights resided outside of the state of Nevada. He believes that similar events in New York would also attract a high percentage of out-of-state attendees. "Because most people traveling from out of state to New York reserve a hotel room for an average of 2.5 nights," Vaccaro noted, "you could expect people who visit to see a fight to spend at least a day or two in the city, shopping, sightseeing, dining out and generally supporting the tourism industry in New York."

The sport, once described as "barbaric" because it permits punching, kicking and choke holds, may now be having its moment. The recent press conference was a step forward to making the prospect of sanctioned MMA bouts in New York more attractive to both legislators and taxpayers.

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CONSTRUCTION CORNER

Limitations on Use of Industrial Code to Support Claims Under Labor Law § 241(6)

By Gail L. Ritzert

In this column we address the plaintiff's use of alleged Industrial Code violations to support claims asserted under Labor Law § 241(6). To establish such a claim, a plaintiff must establish a violation of a rule set forth in Part 23 of the Industrial Code. However, plaintiffs' attorneys have attempted to expand the application of Labor Law § 241(6) to certain inhalation claims and to the use of the regulations set forth in Part 12. Perhaps the most publicized attempt to impose liability under the Labor Law for alleged inhalation injuries involves the claims asserted by the workers hired to clean buildings located in downtown Manhattan following the terrorist attacks of September 11, 2001. In those actions, the plaintiffs are attempting to bootstrap claims under Labor Law § 241(6) by asserting that the defendants violated various sections of Part 12 of the Industrial Code, including regulations set forth in 12 NYCRR 1.4, 1.5, 1.6, 1.7, 1.8, 1.9 and 1.10.

However, in its recent decision in *Nostrom v. A.W. Chesterton Company*, 15 N.Y.3d 502 (2010), the New York Court of Appeals held that 12 NYCRR Part 12 was not created to give effect to the provisions of Labor Law § 241(6), and the intent of Labor Law § 241(6) was not to impose vicarious liability in connection with the regulations in Part 12.

In *Nostrom*, the personal representative of Donald Nostrom asserted claims

under Labor Law § 241(6) to recover for the personal injuries and resulting death due to the decedent's exposure to asbestos through airborne dust and contact with asbestos-containing materials. To support this claim, the plaintiff alleged that the defendants violated regulations 12-1.4(b)(3)(4) and 12-1.6(a) of Part 12 of the Industrial Code. In assessing the validity of the plaintiff's claims, the Court reviewed the intent of Labor Law § 241(6) and the fact that it will only apply vicarious liability on owners and contractors for the conduct of others for injuries that arise from construction, excavation or demotion work, and where the owners and contractors are required to comply with the rules promulgated by the Commissioner Labor, i.e., the Industrial Code.

Thus, the Court went on to review the intent of Parts 12 and 23 of the Industrial Code. Part 23 of the Industrial Code was specifically enacted to govern the protection of workers in construction, demolition and excavation operations. The regulations specifically state that the rules in Part 23 apply to "owners, contractors and their agents" and that these individuals are obligated by the Labor Law to "provide such persons with safe working conditions and safe places to work." 12 NYCRR 23-1.3. Conversely, Part 12 of the Industrial Code does not specifically provide that it applies to owners, contractors and their agents. Nor does it contain an expressed intent to impose liability under the Labor Law.

Without an expressed intent for Part 12 to serve as a predicate for liability under Labor Law § 241(6), the Court of Appeals held that the Industrial Code sections cited by the plaintiff were not specifically sufficient to support a claim under Labor Law § 241(6). However, the Court did note that there was one exception. Section 23-1.7(g) makes any "unventilated confined area" where dangerous air contaminants may be

present subject to the provisions of Part 12. Hence, the inclusion of Part 12 into this narrow application to specific work under specific circumstances—unventilated confined areas of a construction, excavation or demolition site—will impose a duty on an owner and contractor to comply with Part 12. But, outside that very limited circumstance, Part 12 may not be used to impose liability on owners and contractors under Labor Law § 241(6).



Therefore, when faced with any claim asserted under Labor Law § 241(6), not only must defense counsel ensure that the plaintiff's injuries arose from construction, demolition or excavation work, but counsel must also make sure that the claims are supported by a sufficiently specific provision of Part 23 of the Industrial Code and that the provisions apply to the facts of the case.

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Friend or Foe?

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But the plaintiff (let's call him Mr. Happy) maintains a Facebook page, which looks like a brochure for Mardi Gras. He has taken four vacations in the last two years (all since sustaining his life-changing injury) and has faithfully posted photographs of his good times including—your personal favorite—parasailing off the coast of Jamaica. Of course, you only know this because you have managed to view Mr. Happy's Facebook page. This genius has failed to utilize any of the security protections provided by Facebook. As such, his page can be viewed by any member of the Facebook nation—which, of course, includes you. (You only joined to re-establish contact with some long-lost friends from high school.) Does this—or should this—relatively simple and virtually cost-free method of investigation create any ethical conundrums for the practicing litigator?



What if, however, the plaintiff has availed himself of the Facebook security protections, thereby limiting access to his life's details to his 786 friends, of which you are not one? You do not want to be deceitful to gain access (more about this shortly)—but you are suspicious about his claims of endless solitude and misery. Can you launch a frontal assault and obtain a court order for access to his page—and perhaps deleted pages? Does he have a reasonable expectation of privacy as to the materials posted on the page—even if he used security protections?

Included among the 500 million Facebook friends, 100 million MySpace users and 200 million Twitter users are lawyers, paralegals, investigators and, of course, litigants. And, although these sites are primarily used for socializing and networking (as well as mounting the occasional revolution), they provide an abundance of information that can be used to defend a claim.

The Back Door Approach—What Constitutes Deceptive Access?

Most social networking sites, Facebook included, have privacy settings that are controlled by their members. The standard default setting allows anyone who is a member of the same network to view another member's site, photos and profiles without actually “friending” (making any contact with) the member. Networks have historically been based on geographic regions and educational institutions. If a member chooses to secure his or her page, he or she can limit page access to allow friends or friends of friends—rather than leaving it open to any member of the site. Of course, many people fail

to properly secure their pages; they either just choose to leave them open or are too liberal in accepting friend requests, which ultimately allows complete access to their page and all of the information posted thereon—providing anyone with a computer unfettered access to their life and daily activities.

Notwithstanding the ability to access a litigant's Facebook page—the critical question for litigators is whether it is ethical. When a plaintiff has a secured site, lawyers and their investigators need to be mindful of what methods they use and under what limited circumstances, if any, they will be able to use deception to gain access to the plaintiff's site.

ABA Rules of Professional Conduct DR 7-104(A)(1) states that lawyers cannot

Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In addition, Rule 8.4(c) of the New York Rules of Professional Conduct states that “[a] lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

The first New York pronouncement on the subject was by the New York County Lawyers' Association in Opinion 737, issued on May 3, 2007, which, although not specifically addressed to cyberspace, discussed the question of whether lawyers in the private sector may use undercover investigators who “dissemble” without violating the ethical proscription against tactics involving deceit or misrepresentation. Allowing the use of deception, under limited circumstances, this opinion stated:

Nongovernment attorneys may . . . ethically supervise nonattorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means;

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and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code [of Professional Responsibility] (including, but not limited to, DR 7-104, the "no-contact" rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.

The opinion, stressed, however, that "[i]n most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of nonattorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available." While this opinion carves out an exception for the use of deception, it is clearly a finite and limited exception, which would not apply under most circumstances.

In March 2009, the Philadelphia Bar Association Professional Guidance Committee issued an opinion based on an inquiry by an attorney as to whether it would be ethical if her paralegal "friended" a plaintiff to gain information off of the site to be ultimately used to impeach a plaintiff, finding that:

[T]he proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

Is it considered deceptive and unethical if a lawyer or an investigator accesses a plaintiff's unsecured site by simply switching his/her network? For example, a plaintiff has an unsecured Facebook page and is a member of the New York City network. An investigator, who also has a personal Facebook page, is a member of a different network. The investigator joins the New York City network to view the plaintiff's page. At no time does the investigator make any contact with the plaintiff. Since the page is unsecured, no contact is necessary. Nevertheless, is this conduct deceptive?

On September 10, 2010, the New York State Bar Association (NYBSA) Ethics Committee issued Opinion 843—finding that "New York's Rule 8.4 would not be implicated because

the lawyer is not engaging in deception by accessing a public website available to anyone in the network."

Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

The NYBSA Ethics Committee did comment on and attempt to distinguish the 2009 Philadelphia opinion, noting that:

One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented witness, whereas our opinion concerns a party—and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a represented party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an unrepresented party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

The NYBSA Ethics Committee also seems to have conditioned its opinion on "the lawyer . . . not employ[ing] deception in any other way (including, for example, employing deception to become a member of the network). It is unclear from the opinion whether or why simply changing one's network to an open network to access an unsecured site would be considered deceptive—which generally requires one to cause another to believe what is not true or fail to believe what is true. When one simply changes his or her network to view an unsecured site, no contact is made and there is no impact on

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the person's conduct. We would argue that absent contact, there cannot be deception. On the other hand, joining a network that requires a proprietary e-mail address—such as a college or high school network without having an entitlement to the address—would likely present a problem. In any event, attorneys must be mindful that any access to a plaintiff's social network site must be done carefully and with knowledge that accessing and securing the plaintiff's information from a social networking site could result in a finding that such material was secured by the use of deception and preclude its use at the time of trial.



Knocking on the Front Door—Is There a Reasonable Expectation of Privacy?

So, let's assume that Mr. Happy has availed himself of the security protections provided by his chosen social network. You are able to present a reasonable claim that he has placed information on his page which is inconsistent with his claims in your litigation, perhaps concerning the extent and nature of his injuries, or even with respect to whether there is liability. The litigator is precluded from "friending" Mr. Happy or even having someone else do so in order to gain access. How then can the litigator access that information?

The next logical step is to file a motion seeking to force the plaintiff and the site operator to provide access to the plaintiff's social networking pages and accounts. The site operator will oppose the motion, citing, most notably, the Stored Communications Act, 18 U.S.C. 2701, et seq., which prohibits an entity such as Facebook or MySpace from disclosing such information without the consent of the owner of the account. And, of course, Mr. Happy's lawyer will oppose the application saying that the information posted by his client is private, since he secured it on the site by limiting access.

Notwithstanding the aforementioned protestations, a New York trial level judge, Jeffrey Arlen Spinner, sitting in Supreme Court, Suffolk County, recently ordered access to a plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information. Recognizing the absence of any New York case law addressing the issues presented, in *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Cty., September 21, 2010), Justice Spinner found instructive several cases from other jurisdictions, most notably, Colorado, New Jersey, California, Ohio and the Canadian provinces of Ontario and British Columbia. See *Ledbetter v. Wal-Mart Stores Inc.*,

06-cv-01958-WYD-MJW (D.Col., April 21, 2009), information contained on the public access areas contradicted plaintiffs' allegations regarding the effect of their injuries on their daily lives and the information sought on the secured pages was "reasonably calculated to lead to the discovery of admissible evidence and is relevant to the issues in the case."; *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 06-5337 (D.N.J. December 14, 2007), "[t]he privacy

concerns are far less where the beneficiary herself chose to disclose the information."; *Moreno v. Hanford Sentinel Inc.*, 2009 Cal. App. LEXIS [Ct. App. 5 Dist 2009), no person would have reasonable expectation of privacy where the person took the affirmative act of posting his or her own writing on MySpace, making it available to anyone with a computer and opening it up to public eye; *Dexter v. Dexter*, 2007 Ohio App. LEXIS 2388 (Ohio Ct. App. Portage Co. 2007), no reasonable expectation of privacy regarding MySpace writings open to public view; *Leduc v. Roman*, 2009 CarswellOnt 843 (February 20, 2009), "To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial." See also *Kent v. Laverdiere*, 2009 CanLII 16741 (ON S.C. April 14, 2009); *Bishop v. Minichiello*, 2009 BCSC 358 (CanLII, April 7, 2009); *Goodridge v. King*, 2007 CanLII 51161 (ON S.C. October 30, 2007); *Kourtesis v. Horis*, 2007 CanLII 39367 (ON S.C. September 24, 2007).

Justice Spinner rejected the plaintiff's privacy concerns by noting that neither Facebook nor MySpace guarantees complete privacy, and as such, she had no legitimate reasonable expectation of privacy. In fact, MySpace warns users to remember that both their profiles and MySpace forums are public spaces, and Facebook advises that users post content at their own risk and that although there are privacy options to limit access to pages, no security measures are perfect or impenetrable.

Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew

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that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, “[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.” Citing Dana L. Fleming and Josheph M. Helihy, Department: Heads Up: What Happens When the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites, 50 3 B.B.J. 16 (January/February, 2009).

Simply put, the defendant’s need for the information sought outweighed any privacy of the plaintiff’s privacy concerns. Justice Spinner noted that “[t]he materials including photographs contained on these sites may be relevant to the issue of damages and may disprove Plaintiff’s claims [and that] [w]ithout access to these sites, Defendant will be at a distinct disadvantage in defending this action.” In doing so, he treated this no differently than any other discovery dispute—nor should he have.

Justice Spinner’s decision will most certainly give rise to a plethora of Facebook and MySpace subpoenas in New York personal injury actions—at least until a Supreme Court in a different county or an appellate court rules otherwise. It appears that while back door access is limited, the front door is wide open.

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bonuses for Wells Fargo through its “Millennium Partners Program.” The State, through the Attorney General, alleged that Wells Fargo “steered” its customers to use certain insurance companies and to stay away from other companies that did not participate in the Millennium program. The State further alleged that the incentive programs were not disclosed to Wells Fargo’s customers.

The complaint asserted causes of action under Executive Law § 63(12), as well as unjust enrichment, fraud and breach of fiduciary duty claims. The New York Supreme Court dismissed the case with leave to amend. The plaintiff, Attorney General, chose not to replead but appealed instead to the Appellate Division. The Appellate Division, First Department, affirmed the trial court’s decision. The plaintiff, Attorney General, obtained leave and appealed the Appellate Division’s decision. *Wells Fargo*, 2011 N.Y. Slip Op at 1.

The Court of Appeals first observed that the various causes of action all “boiled down to a claim for breach of fiduciary duty.” Noting that, absent any allegation of misrepresentations or actual injury, “the case rests on the rule that one acting as a fiduciary in a particular transaction may not receive, in connection with that transaction, undisclosed compensation from persons with whom the principal’s interest may be in conflict.” Finding that, “in general” the rule is a “sound one,” the Court finds it to be inapplicable. *Wells Fargo*, 2011 N.Y. Slip Op at 3.

The Court of Appeals found that there was “truth” in the Attorney General’s arguments that: (1) an insurance broker is the agent of the insured; (2) that a principal-agent relationship is a fiduciary relationship; and (3) that a fiduciary must

disclose to its principal any interest in a transaction that causes the fiduciary’s loyalties to be divided. However, it found that these propositions were “not as simple as the Attorney General suggests.” In its decision, however, the Court only rebutted the first argument, observing that a broker has a “dual agency status” and that the “word ‘broker’ suggests an intermediary—not someone with undivided loyalty to one or the other side of the transaction.” *Wells Fargo*, 2011 N.Y. Slip Op at 5, citing *Bohlinger v. Zanger*, 306 N.Y. 228, 230, 117 N.E. 2d 338 (1954).

Given this apparent “complexity” in the insurance broker’s role, the Court of Appeals reached down to three Appellate Division, First Department decisions for support and held that “a broker need not disclose to its customers contractual arrangements it has made with insurance companies.” *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378 (1st Dep’t 2008); *Hersch v. DeWitt Stern Group, Inc.*, 43 A.D.3d 644, 645 (1st Dep’t 2007); *Wender v. Gilberg Agency*, 304 A.D.2d 311 (1st Dep’t 2003). Perhaps recognizing that the Attorney General was not seeking to impose such a broad duty, but merely seeking to impose liability on a broker for failing to disclose that there was a compensation arrangement that could be contrary to its customers’ interests (without necessarily revealing its terms or other parts of the contractual arrangement), the Court found that if there were to be exceptions to the rule, the case did not present an opportunity to make such exceptions. To the Court, the case did not present such an opportunity, in large part because the “parties seem to agree that arrangements like those the Attorney General complains of have been common place, and have not been generally disclosed.” *Wells Fargo*, 2011 N.Y. Slip Op at 6.

In the final effort to justify the decision, and perhaps give some solace to the Attorney General (now governor), the

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Court conceded that such nondisclosure “may be a bad practice,” but that it was now prohibited by a recently adopted regulation of the Insurance Department. The Court correctly noted that New York Insurance Department Regulation 11 § 30.3 (a) (2), effective January 1, 2011, now requires disclosure to a purchaser of insurance if a broker “will receive compensation from the selling insurer . . . based in whole or in part on the insurance contract” that the broker sells. The Court of Appeals held that:

A regulation, prospective in effect, is a much better way of ending a questionable but common practice than what the Attorney General asks us to do here: in substance to outlaw the practice retroactively by creating a new common law rule.

The potential impact of this decision for brokers goes well beyond its holding. Not only can brokers now argue that they do not have undivided loyalties to their insureds, but this case can even be used to support the argument that even if a practice is “bad” so long as it is common place and not expressly prohibited by statute or regulation, it is not actionable. Only time will tell if the Courts narrow this unusual ruling or restrict it to its facts. Clearly, the Attorney General’s Office bet wrong by deciding not to amend the complaint and instead appeal, especially given the Regulation, and has created, at least for the time being, precedent that will assist brokers in defending claims from disgruntled customers.

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HRRV ON TRIAL

HRRV Obtains Defense Verdict for White Plains Bar

Maier v. Tri-Kelly’s, Inc.

Supreme Court, Westchester County

Index No. 19758/08; February 7, 2011

Plaintiff Kelly Maier, a patron of the Thirsty Turtle, alleged that while exiting the White Plains bar in the early morning hours of January 1, 2008, she slipped and fell due to a wet condition on the floor, approximately three to five feet from the entrance. As a result of her fall, the plaintiff sustained a bi-malleolar fracture requiring surgery. The plaintiff alleged that when she entered the Thirsty Turtle, approximately an hour before her accident, she observed the wet condition and complained to a female bartender. The plaintiff further alleged that in that hour before her accident, no one at the Thirsty Turtle cleaned the condition. Thirsty Turtle had no record of this incident.

At trial, Maier and her friend testified inconsistently as to the events preceding the plaintiff’s accident. Specifically, Maier alleged that she was sitting at the bar the entire time she was at Thirsty Turtle and was looking in the area of where she had observed the wet condition and no one from the Thirsty Turtle remedied it. Her friend, however, testified that she and the plaintiff, along with two other female friends, were dancing for a period of time, left the dance floor to use the bathroom located on the lower level and returned to dancing before the group started making their way out. The plaintiff’s friend also admitted that she had no way of knowing as to whether the condition the plaintiff slipped on was the same condition that they had observed when they walked in.

In addition, the defense was able to locate and subpoena the EMT and the triage nurse who treated the plaintiff shortly after the accident. The EMT testified that the plaintiff had told him that she “stumbled” causing her to injure her ankle. The triage nurse testified that the plaintiff told her she “missed a step and landed on her right ankle” causing her to be injured.

The Thirsty Turtle’s assistant manager and bartender on the night of the accident testified that there were approximately 26 employees working at the Thirsty Turtle that evening and that it would have been virtually impossible for a condition, such as the one alleged, to have existed for any extended period of time. He also testified that, based on the location of the alleged condition, approximately five to seven employees were stationed within one to two feet of the condition. In addition, the location was in a high-traffic area where bus boys and wait staff regularly transgressed. Finally, the assistant testified that had the accident occurred within the Thirsty Turtle, an incident report would have been generated. The fact that one does not exist would only show that either Thirsty Turtle was not aware of it or that the accident occurred outside the Thirsty Turtle.

At the close of trial, on February 7, 2011, the Westchester County jury rendered a verdict in favor of the defendant.

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Frank Repercussions in Hot Dog Toss Lawsuit

By Carla Varriale

The Kansas City Royals have lost a motion for summary judgment in *John Coomer v. Kansas City Royals Baseball Corporation*, 1016-CV4073, Circuit Ct., Jackson, Cty., February 9, 2011, a well-publicized lawsuit arising out of the antics of the team's mascot, Sluggerrr. Coomer claimed that he was seriously injured when Sluggerrr, perhaps discharging his mascot duties with too much zeal and "hot-dogging" for the fans, hit him in the eye with a hot dog thrown during the popular "Hot Dog Toss" promotion.

Coomer's lawsuit asserted one count of negligence and one count of battery against the Royals. The Royals argued, in part, that implied assumption of risk was a complete bar to the lawsuit.

There seemed to be little dispute that the risk of being struck by an errant object (even a tossed hot dog) was a well-known or incidental risk associated with a professional baseball game, of which Coomer was aware and to which he consented. Coomer argued, however, that the Royals, by and through its employee Sluggerrr, failed to exercise reasonable care in tossing hot dogs into the stadium seating area due to the manner in which the Hot Dog Toss promotion was performed. Sluggerrr allegedly did not throw the hot dog in an arc high into the stands. Rather, he projected the hot dog directly into Coomer, who was seated only a few feet away.

Coomer successfully argued that the Royals' purported failure to supervise and train Sluggerrr regarding the proper method to toss a hot dog into the stands caused his injuries and was not the sort of risk he assumed when he attended the baseball game. The court dismissed the battery claim because although the toss may have been negligent, there was no evidence that Sluggerrr, or anyone on behalf of the Royals, intended to harm Coomer.

This decision appears to be at odds with a 2009 decision by New York's Appellate Division, Second Department, which precluded a Shea Stadium concession vendor from recovering for injuries allegedly sustained after he was struck by a spectator who sought a T-shirt that had been "launched" into the stands as part of an in-game promotional event. *In Cohen v. Sterling Mets, L.P.*, 58 A.D.3d 791; 870 N.Y.S.2d 914 (2d Dep't, 2009), the court affirmed the dismissal of the plaintiff's negligence action against Sterling, applying the doctrine of assumption of the risk of an open obvious condition. The *Cohen* court further held that a spectator at a sporting event is deemed to have consented to those risks commonly appreciated which are inherent in and arise out of the event—those risks include the risk of injury presented by bats, balls or even T-shirts that may enter the stands.

Interestingly, the Missouri court's decision did acknowledge that the Hot Dog Toss is one of the inherent, common risks of injury associated with a baseball game that a spectator may assume. As such, this may be the first time a court has held that such a promotional activity presents a similar risk of injury to a spectator (*Cohen* involved a vendor—which, we would argue is a distinction without a difference) at a baseball game as an errant baseball or bat does. So, although the Royals lost this motion, the decision in *Coomer* could conceivably open the door for other teams and venues to argue that spectators injured by flying hot dogs and T-shirts (if the tosses are performed with due care) assumed the risk of injury and are precluded from bringing suit. This is certainly a result that teams and venues should relish.

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HRRV DECISIONS OF INTEREST

HRRV Prevails in Appeal of Summary Judgment Motion in Personal Injury Action Brought by Concessionaire

Reiss v. Ulster County Agricultural Society Appellate Division, Second Department Index No. 7149/06 November 3, 2010

HRRV prevailed in an appeal of the summary judgment decision in favor of the Ulster County Agricultural Society (the Society) in a personal injury action brought by a concessionaire who slipped and fell at the Ulster County Fair. The fair was operated by the Society on premises owned by Ulster County. The injured plaintiff operated concession stands and had been present for each of the six days of the Ulster County Fair. Significantly, rain began falling a few days before the accident and continued through the date of the incident, the last day of the fair.

The Appellate Division, Second Department affirmed the granting summary judgment to the Society, noting that the Society made a prima facie showing that it was entitled to summary judgment and that the plaintiff should have observed the open and dangerous condition presented by rain soaked hay. The plaintiff was aware of the rainy and muddy conditions of the fairgrounds, but traversed them anyway. The Appellate Division agreed that the conditions were readily observable by a reasonable use of one's senses and that the condition of the area was not inherently dangerous. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment and dismissal of the complaint were warranted under the circumstances.

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HRRV DECISIONS OF INTEREST

“Law of the Case” Applied to Enforcement of a Forum Selection Clause in a Camp Enrollment Form Signed by a Parent

Bernstein v. Wysoki
 Supreme Court, Nassau County
 Index No. 20226/09
 February 14, 2011

Infant plaintiff Jordan Bernstein allegedly sustained injuries as a result of medical treatment and diagnosis rendered to him while he was enrolled at Camp Island Lake located in Starrucca, Pennsylvania (Wayne County), during the 2007 summer camp season. Prior to the summer session, co-plaintiff Malka Bernstein, the infant plaintiff’s mother, signed an enrollment form. One of the terms and conditions listed on the enrollment form is a forum selection clause, which states that “The venue of any dispute that may arise out of this agreement or otherwise between the parties to which the camp or its agent is a party shall be either the local District Justice Court or the Court of Common Pleas, Wayne County, Pennsylvania.” The action was commenced in Supreme Court, Nassau County, in the state of New York.

Initially, the camp moved to dismiss the complaint on the grounds that the venue was improper based upon the forum selection clause in the executed enrollment form. However, the Supreme Court denied the motion, holding “that a parent cannot bind a minor child to a forum selection clause.” One of the camp’s employees, an infirmarian physician, whose motion was denied on similar grounds, appealed the decision to the Appellate Division, Second Department. In a decision dated August 24, 2010, the Appellate Division reversed the Supreme Court’s decision, holding that the forum selection clause is enforceable as a general matter even though it does not include any language expressly providing that the plaintiffs and the camp intended to grant exclusive jurisdiction to Pennsylvania. The forum selection clause relates to both jurisdiction and venue, and employs mandatory venue language, providing that the venue of any dispute arising out of the agreement or otherwise between the parties “shall be either the local District Justice Court or the Court of Common Pleas, Wayne County, Pennsylvania.”

Furthermore, the Appellate Division held that the camp’s infirmarian physician, as an employee of the camp, is entitled



to enforce the forum selection clause despite her status as a nonsignatory to the camp contract. The forum selection clause itself applies to “any dispute that may arise out of this agreement or otherwise between the parties to which the camp or its agents is a party.” Accordingly, the forum selection clause was valid and enforceable as to the camp and its employees.

The camp and its employee, an infirmarian nurse, moved to renew the Supreme Court’s prior decision, which denied its motion to dismiss the complaint. In their motion, the defendants argued that given the Appellate Division’s decision, the Supreme Court should acknowledge, abide by and adhere to said decision, which has changed the law in this action and has affected a prior determination. Alternatively, the defendants argued that the “law of the case” doctrine applies in this action, and a trial court is governed by the common law concept of stare decisis when applying the decisions of appellate courts.

In a decision dated February 14, 2011, the Supreme Court granted the motion to dismiss the plaintiffs’ complaint, holding that the Appellate Division’s decision constitutes the law of the case on this issue.

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HRRV DECISIONS OF INTEREST

Civil Rights Action Against City, Night Club and Security Company Dismissed

Michaels v. The City of New York
U.S. District Court, Southern District of New York
10 Civ. 2666 (SHS)
February 16, 2011

As alleged in his complaint, on the night of July 15, 2008, Jonathan Michaels, along with a group of friends, sought to enter Marquee, a Manhattan night club, owned and operated by 10th Avenue Hospitality Group, LLC. Michaels was stopped at the door by Melissa Petters, an employee of Forte Security, which had been contracted by Marquee. Petters requested that Michaels hold his hands out in front of him and, without his consent, proceeded to remove the contents of his pockets. In his pockets, she found three loose pills, which fell to the floor. Although Michaels asserted that the pills were his prescription medication, Petters believed they were the drug known as ecstasy. A chemical test later determined that the pills were, in fact, Klonopin—a legal prescription medication that Michaels had been prescribed.

Petters picked up the pills from the ground and told Michaels to pick up an envelope lying by her feet. Michaels picked up the envelope, which contained cocaine. The face of the complaint does not allege where the envelope had come from. In any event, Petters took the plaintiff's driver's license and with the help of unidentified persons held him outside the club in a gated area while she called the police. About 15 minutes later, Police Officer Yeoman Castro and two other police officers arrived at Marquee. Michaels told the officers that the pills were his prescription medication, but the officers rejected his explanation, allegedly without inspecting the pills themselves.

The officers arrested the plaintiff and took him first to the police station for processing, and then to Manhattan Central Booking, where he spent the night. The following morning, he was arraigned on the charge of criminal possession of a controlled substance and released. The criminal complaint includes confessions allegedly made by Michaels to Castro and Petters about his possession of illegal drugs that night. Following his arraignment, Michaels returned to court three times before the charge against him was dismissed approximately seven months later.

While he was in custody on the night of July 15, 2009, the plaintiff asked an unidentified officer for his medication, which he uses to treat Crohn's disease, an inflammatory intestinal disorder. The officer told Michaels that in order to receive his medication that night he would have to be taken to the hospital in handcuffs and on a stretcher, but his arraignment

would be delayed by four days as a result. Given this choice, Michaels opted not to receive his medication that night. Three days after his release, Michaels suffered a Crohn's disease attack, which he attributes to his earlier inability to take his prescription medication and the stress caused by his detention. Michaels was hospitalized at North Shore University Hospital for approximately one week.

Two weeks before Michaels's arrest at Marquee, the club had entered into a settlement agreement with the City of New York to settle a public nuisance action. The settlement permitted Marquee—which the City had shut down in late June because of repeated drug arrests on the premises—to re-open on the condition that Marquee implement a drug enforcement program. 10th Avenue agreed, inter alia, to monitor illegal activity at Marquee, employ a private security company such as Forte, randomly search patrons, inform authorities about illegal activity, serve as a complaining witness and provide monthly reports to the City. The settlement further provided that the parties would meet on or before July 18, 2008, to discuss initiating new search procedures and other security concerns. According to the plaintiff, prior to July 15, 2008—the



night Michaels was arrested and two weeks after the settlement had been signed—the City had given 10th Avenue and Forte no guidance or training as to how to comply with the settlement.

On March 24, 2010, the plaintiff commenced an action in the U.S. District Court for the Southern District of New York, against the City, Forte, Petters, Officer Castro, and several principals of 10th Avenue, alleging, pursuant to 42 U.S.C. §1983, false arrest, false imprisonment, malicious prosecution and municipal liability claims against all defendants. The plaintiff asserted a deliberate indifference claim pursuant to section

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1983 against the City Defendants (which included the named and unnamed police officers). In addition, he asserted a claim for supervisory liability against several individuals associated with Marquee, against Strauss, Tepperberg, 10th Avenue and Forte; assault and battery against Petters and other unnamed Forte and 10th Avenue Marquee employees; negligent hiring, training and retention against the City; and negligence against the City Defendants.

All defendants moved to dismiss in lieu of answering, and Judge Sidney Stein granted the motions in their entirety. Initially, Judge Stein held that because the plaintiff's complaint failed to allege a sufficiently "close nexus," between the state and the private parties to bring the challenged actions of private parties under the color of state law, the section 1983 claims against 10th Avenue, its principals, Petters, and any unidentified employees of 10th Avenue or Forte should be dismissed. The false arrest and false imprisonment claims were dismissed because based on the face of the complaint; the police officers had probable cause to arrest Michaels. The malicious prosecution claims were dismissed because, even though City officials initiated a prosecution against the plaintiff, the probable cause which led to the plaintiff's arrest did not dissipate before his arraignment the next morning.

The plaintiff alleged that the City Defendants violated his Fourteenth Amendment substantive due process rights through their deliberate indifference to his serious medical needs. In rejecting this claim, Judge Stein found that the plaintiff did not show, in objective terms, that a reasonable person would have known about his serious medical needs—alleging

only that, while in custody, he requested his prescription medication for Crohn's disease and not that he showed any outward symptoms of the disease or that he otherwise conveyed to any City Defendant that he believed his condition was grave. Moreover, the complaint indicated that Michaels was, in fact, able to receive his medication—albeit under certain conditions—even though these conditions were that he be "handcuffed to a stretcher and transferred to Bellevue [Hospital]," which would in turn allegedly delay his arraignment for four days.

The plaintiff also asserted claims for municipal liability pursuant to *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), on the theory that the settlement between 10th Avenue and the City represented a City policy. Judge Stein rejected this claim noting that the plaintiff failed to claim that the settlement was unconstitutional on its face and that the plaintiff did not plead facts sufficient to show that the private-party defendants acted under color of state law or to adequately allege any deprivation of his constitutional rights.

The court declined to exercise jurisdiction over the remaining state law claims.

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HRRV IN THE PUBLIC EYE

HRRV Lawyers Tapped to Moderate Long Island Judicial Panel

HRRV attorneys Sean P. Dwyer and Shanna R. Torgerson have been selected to co-moderate the upcoming judicial forum "What Civil Court Judges Want You to Know" to be held on May 19, 2011, on Long Island.

Featuring a panel of esteemed Supreme Court justices from both Nassau and Suffolk Counties, the day-long panel will provide litigation attorneys in all specialties with an interactive view from the bench on issues critical to effectively handling pretrial and trial proceedings in Supreme Court. The judicial panel will include Suffolk County Justices Hon. Paul J. Baisley, Hon. Jerry Garguilo and Nassau County Justices

Hon. Stephen A. Bucaria, Hon. Edward W. McCarty III, Hon. R. Bruce Cozzens Jr. and Hon. F. Dana Winslow. The panel will cover areas that include litigation strategy, discovery proceedings, dispositive motions and the presentation of a case at trial.

Hosted by the National Business Institute, Sean and Shanna will lead the panel in what promises to be an interesting and informative event. The forum will be held at the Marriott Conference Center in Melville, New York. Further details on the location and agenda will be announced in March and can be found on the HRRV website.

HRRV DECISIONS OF INTEREST

Court Finds Sterling Equities and Sterling Mets Owe No Duty with Respect to Citi Field

Christopher Poggiali v. Sterling Equities, Inc.
 Supreme Court, Nassau County
 Index No. 018087/10
 January 28, 2011

In an action stemming from an injury sustained by a spectator at a New York Mets game at Citi Field, wherein Sterling Equities, Inc. and Sterling Mets, L.P. argued that documentary evidence demonstrated that neither was the correct party to the action, Justice Jeffrey Brown granted the defendants' motion to dismiss.

The moving defendants argued that neither was involved in the ownership, operation, management, maintenance or control of Citi Field at any time relevant to the plaintiff's action. Sterling Equities submitted an affidavit from its general counsel and Sterling Mets submitted an affidavit from its former director of stadium operations to demonstrate that neither entity owned, operated, maintained, managed, inspected, supervised, repaired or controlled any portion of Citi Field either prior to or including April 5, 2010. The moving defendants also submitted a copy of the Stadium Lease Agreement entered into by Queens Ballpark Company, LLC to demonstrate that it was the entity that operated the stadium on April 5, 2010.

The plaintiff opposed the motion and argued that Sterling Equities and Sterling Mets' motion was premature as the parties had not conducted discovery. Moreover, the plaintiff claimed that the affidavits submitted were self-serving. The plaintiff merely relied on a page from the Sterling Equities website and information from Bloomberg/Business week and Hoovers in an attempt to demonstrate that Sterling Equities and Sterling Mets owned and operated the Mets franchise.

Defendant Aramark claimed that its contracts with Queens Ballpark reflected that Sterling Mets was somehow involved in the operation of Citi Field. Aramark relied upon a provision in the contracts that required the consent of Sterling Mets for certain operations to argue that, at a minimum, Sterling Mets had a duty to oversee and consent to certain operations at Citi Field.

The court held that Sterling Equities and Sterling Mets met their burden of proof and submitted sufficient documentary evidence, mainly affidavits from individuals with personal knowledge of the facts and a contract regarding Queens Ballpark's responsibilities with respect to Citi Field. On the contrary, the plaintiff failed to raise a triable issue of fact and merely submitted an attorney's affirmation in opposition to the motion. Likewise, the Internet pages offered by the plaintiff in opposition were hearsay and did not stand for the proposition that the moving defendants owed a duty. The court also rejected Aramark's contentions and noted that Sterling Mets was not a signatory to either contract with Aramark.

Contact

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