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## Supreme Court of NY Reaffirms Rule on Disgorgement Coverage

On January 11, 2006, the Supreme Court of New York, New York County decided the case of Vigilant Insurance Company v. Bear Sterns Companies, Inc., reaffirming the rule that New York law prohibits insurance coverage for disgorgement of improperly obtained funds. In the unpublished decision, Justice Karla Moskowitz denied Bear Sterns' demand for indemnification for a judgment requiring the company to pay "\$25 million as disgorgement of commissions and other monies" obtained through alleged misconduct of Bear Sterns in providing its research analysts with incentives for specific findings.

In ruling on Vigilant, the Court explained that because disgorgement is a procedure designed to deprive a party of ill-gotten gains and to deter future misconduct, to allow insurance coverage for disgorgement would

**"...to allow insurance coverage for disgorgement would not only enable the insured to retain the ill-gotten funds, but eliminate any incentive for the insured to obey the law."**

not only enable the insured to retain the ill-gotten funds but eliminate any incentive for the insured to obey the law. Additionally, insurance companies should not bear the loss of wrongful conduct by an insured who would then suffer minimal consequences as a result of a disgorgement judgment.

In Vigilant, the judgment entered against Bear Sterns specifically delineated a specific

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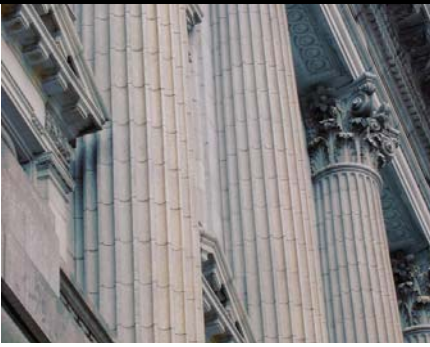
## Industry Watch

The American Risk Retention Coalition (ARRC), has been formed as a stand-alone affiliate of the Self Insurance Institute of America (SIIA) to defend the federal protection of retention groups as authorized by Congress through the Liability Risk Retention Act. For more information on this group, visit [www.rrr.com](http://www.rrr.com).



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## KINGS COUNTY SUPREME COURT DECISION EXPANDS THE BREADTH OF PERMISSIBLE DISCOVERY IN NEW YORK

**“admissibility is no longer the test to be applied in determining a motion for discovery.”**

*(Wiseman v. American Motors Sales Corp., 103 A.D.2d 230, 237, 479 N.Y.S.2d 528)*

A Kings County Supreme Court Justice has taken a major step toward expanding the limits of permissible discovery by directing a physician to produce his PowerPoint presentations and lecture handouts provided to the students that he taught at the New York University School of Medicine. *Greene v. Martas* (N.Y. Sup. Kings County, Index No. 43279/2001). In a written decision published in the *New York Law Journal* on April 15, 2005, Justice Gerard Rosenberg ruled that defendant Dr. Michael Silverstein must provide the plaintiffs with copies of his lecture handouts and PowerPoint presentations, even though neither Dr. Silverstein nor any other medical expert recognized his teaching materials as authoritative and none of the materials contained admissions regarding the infant’s treatment. The decision is particularly significant because it cites a line of Second Department cases originating from *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 237, 479 N.Y.S.2d 528, which held that “admissibility is no longer the test to be applied in determining a motion for discovery.”

Plaintiff Alice Greene, on behalf of her infant son, Thomas Mungoli, alleges that Dr. Silverstein committed malpractice when he delivered the infant plaintiff at New York University Medical Center in 1999. At his deposition, Dr. Silverstein testified that he has presented lectures in obstetrics and gynecology at the New York University School of Medicine since 1998. His testimony also revealed that he distributes written materials to accompany his lectures and also uses PowerPoint visual presentations, which are saved on his computer. After Dr. Silverstein’s deposition, the plaintiffs moved for an order compelling Dr. Silverstein to provide complete copies of his lecture handouts and PowerPoint presentations. In

response, Dr. Silverstein cross-moved for a protective order preventing the plaintiffs from obtaining the teaching materials.

Justice Rosenberg acknowledged that the lecture handouts and PowerPoint presentations are not admissible because no witness has recognized that they are authoritative. However, in granting plaintiff’s motion to compel and thereby denying Dr. Silverstein’s cross-motion for a protective order, Judge Rosenberg explained that the teaching materials are discoverable because they may potentially lead to admissible evidence regarding Dr. Silverstein’s knowledge and skill at the time of the infant’s delivery and may sharpen the issue of the relevant standard of obstetrical care in 1999. “The plaintiffs have narrowly tailored their discovery demands to include only those materials prepared by Dr. Silverstein for use by his students and to assist in his own teaching and do not seek discovery of all educational or reference materials in his possession relating to the relevant medical topics,” Judge Rosenberg noted.

From a practical perspective, even if a party seeks discovery materials which are not admissible at trial, courts may still require disclosure if the materials have the potential to lead to the discovery of admissible evidence. Here, Justice Rosenberg accepted plaintiffs’ argument that the inadmissible lecture handouts and PowerPoint materials could lead to the discovery of facts concerning the applicable standard of medical care in addition to the possibility that Dr. Silverstein could be charged with possessing superior knowledge and skills in comparison to his peers. Under this expansive view of permissible discovery, parties will have undoubtedly gained access to a wider scope of materials.

— by Bennett Katz



## Disgorgement Coverage *continued from page 1*

sum as owed as disgorgement and delineated other sums for other specified damages. It was this delineation which allowed the Court to easily determine that the delineated \$25 million was a disgorgement for violations alleged in the Complaint (which claims wrongful acts) even though neither the Complaint nor judgment in the underlying action stated what amount had been improperly obtained. Additionally, the Vigilant Court noted the general rule that an order to return money or property that has been wrongfully acquired is not “damages” or a “loss” as those terms are used in insurance policies. *Reliance Group Holdings, Inc. v. National Union Fire Insurance Co.*, 594 N.Y.S.2d 20 (N.Y. App. Div. 1993); *Level 3 Communications v. Federal Insurance Co.*, 272 F.3d 908 (7th Cir. 2001).

The Vigilant decision and the general policy and principles underlying the rule that insurance coverage will not inure to the

benefit of an insured who wrongfully obtained funds, which are then ordered disgorged, should be remembered whenever an action or claim involves allegations of intentional wrongdoing and disgorgement damages may be obtained. Such claims include allegations of violations of Section 11 of the 1933 Securities and Exchange Act (15 U.S.C. 77k), “greenmail” actions, “flipping” stocks, and improper commission payments.

In light of this recent ruling, and long standing rule, it is necessary that insureds recognize that the wording of a settlement agreement or consented judgment may determine whether coverage is available for a specified sum or liability. Likewise, insurers will necessarily be careful to review the potential damages associated with a claim and deny coverage fully where only a cause of action leading to disgorgement is viable.

— by *Michael Brown and Lauren Pape*

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## Meet Melissa Demmon



Ms. Demmon joined Ohrenstein & Brown from Mendes and Mount back in July 2000 to work more intimately with clients on their insurance coverage, professional liability and directors and officers’ liability concerns. Melissa quickly became a trusted advisor and experienced counselor through her efforts on critical matters including the IPO Laddering Litigation and Market Timing, Broker’s Steering and Excessive Fees Litigation stemming from the New York Attorney General investigation, and the litigation arising out of the Bid Rigging Investigations against major domestic insurers.

Melissa received her bachelor’s degree from Columbia College, Columbia University in 1995, and her law degree from St. John’s University School of Law in 1998. When not tending to client matters, Melissa is an avid runner, having run 3 marathons and 7 half-marathons. To contact Melissa about a pending matter, please email her at [melissa.demmon@oandb.com](mailto:melissa.demmon@oandb.com) or call her at 212-699-4551.



### By the Numbers

(stats from industry-related source)

# \$50.3 billion

2005’s all-time record  
for catastrophic losses  
for one year\*\*

# O&B NEWS

**Stephanie Kaufman &  
Matthew Maloney**

have become Counsel  
of the firm.

Welcome new attorneys:

- **Blaise Chow**, formerly of  
Mendes & Mount
- **Ari Magedoff**, formerly of  
White & Case

## Join Us at these Events:

**6/27 ACCA NY Chapter CLE**

Topic: How to Avoid Waiving Attorney/Client Privilege in Civil Matters  
Time: 8:30 - 9:30 a.m.

Speaker: Christopher Hitchcock, Partner

Location: Ohrenstein & Brown, One Penn Plaza, 46th floor

RSVP: 516-535-4427 or via [www.oandb.com](http://www.oandb.com)

**8/13 O&B Sprint for the Arts**

Time: 8:30 a.m.

For the Benefit of the Nassau County Museum of Art

Race will be on the grounds of the museum located at:

One Museum Drive, Roslyn Harbor, NY 11576

Runners, walkers welcome. Prizes, refreshments & fun for the entire  
family. Get details at [www.OandB.com](http://www.OandB.com)

**10/23 ACCA Annual Conference**

Visit [www.OanB.com](http://www.OanB.com) for details

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\*PowerPoint is a Registered Trademark of Microsoft Corp.

\*\*Figure does not include winter storm claims after Nov. 30 the official end of the hurricane season. (Leader's Edge Magazine, Jan/Feb. 2006)



OHRENSTEIN & BROWN LLP  
COUNSELORS AT LAW

ONE PENN PLAZA  
NEW YORK, NY 10119  
212-682-4500

1010 FRANKLIN AVENUE  
GARDEN CITY, NY 115530  
516-873-6334

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