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INSURERS CONTINUE TO BATTLE OVER THE FATE OF NEW YORK'S "NO PREJUDICE" RULE; RECENT DEFEAT MOST SIGNIFICANT TO DATE

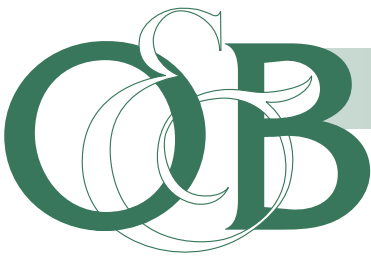
A Suffolk County Supreme Court Justice has taken the latest and boldest step towards eroding New York's "no prejudice" rule, which generally allows insurers to disclaim insurance coverage if an insured has provided an insurer with late notice of an occurrence or a claim, even if the insurer has not been prejudiced by the delay. In a written decision published in the *New York Law Journal* on May 25, 2004, Justice James Catterson ruled that Royal Global Insurance Company must provide insurance coverage for a medical malpractice lawsuit that was first brought 21 years after a disabled child's birth, even though the insured waited nine months to notify Royal about the lawsuit, and even though Royal did not learn about the underlying occurrence prior to the lawsuit. *St. Charles Hosp. and Rehab. Ctr. v. Royal Globe Ins. Co.* (5/25/04 N.Y.L.J., p. 20). The decision is particularly significant because it is the first one in which a New York court has required an insurer without prior notice of an occurrence to demonstrate prejudice before disclaiming coverage on the basis of the insured's late notice of the occurrence.

St. Charles Hospital and Rehabilitation Center was named as an additional insured under an insurance policy issued to the Catholic Diocese of Rockville Center. The policy provided per occurrence limits of \$500,000. A separate catastrophic liability insurance policy with coverage limits of \$12 million also named the hospital as an additional insured. St. Charles filed a claim with Royal in January of 1997, nine months after a malpractice lawsuit was filed against it by the guardians of a woman who was born at the hospital in 1975. The lawsuit charged the hospital with malpractice related to the woman's birth and post-delivery care. Royal

disclaimed coverage for the claim on late notice grounds. After the malpractice lawsuit was settled in March for \$4.3 million, St. Charles filed a declaratory judgment action against Royal, and immediately moved for summary judgment.

In granting St. Charles' summary judgment motion and denying Royal's cross motion for summary judgment, Judge Catterson acknowledged that New York has been one of the last states to maintain a no prejudice standard in insurance law, but accused Royal of "failing to recognize the turn of the tide." The court noted that the Court of Appeals ruled in 2002 in *Brandon v. Nationwide Mut. Ins. Co.*, 97 N.Y.2d 491, 743 N.Y.S.2d 53, that an insurer must demonstrate prejudice before disclaiming insurance coverage for a lawsuit, even if notice of the lawsuit was untimely, as long as the insurer had prior notice of the occurrence or the claim giving rise to the lawsuit. While *Brandon* did not address whether an insurer had to demonstrate prejudice if it did not have prior notice of the underlying occurrence or claim, Justice Catterson chose to read *Brandon* expansively, explaining in his opinion that the *Brandon* decision was the "clearest signal yet of the [Court of Appeals'] acknowledgement that the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected."

According to the court, the principal rationale for the no prejudice rule was based on the presumption that an insurer would be prejudiced if it could not investigate a claim or negotiate a settlement soon after the underlying occurrence. Here, Judge Catterson explained, this concern was moot since "twenty-one years after the occurrence is the soonest that St. Charles could have notified Royal of the Claim given that the commencement of the legal action was, in effect, the notice of the claim, which is often the case in 'infant' claims where the statute of limitations is so expansive."



The court also ruled that public policy concerns identified by the Court of Appeals in *Brandon*, including “the adhesive nature of contracts, the public policy objective of compensating tort victims and the inequity of the insurer receiving a windfall due to a technicality” weighed in favor of applying a prejudice standard to the facts of this case. For example, Judge Catterson observed that as an additional insured to another entity’s insurance policy, St. Charles never saw the policy and was not in a position to negotiate any of its terms. The court went on to explain: “As for the public objective of compensating innocent tort victims and the concern that they do not become public charges, the instant case could not speak more graphically to that concern. Tara Mulholland, the most innocent of victims as a severely handicapped newborn abandoned by her birth mother, could have easily become a public charge. The fact that her grandparents willingly took on the task of caring for her, years before commencing the underlying action, makes this a rare and unusual, if not unique situation rather than one that could ameliorate any broader public policy concerns.”

Although prejudice is often a question of fact, the court ruled that it could be decided as a matter of law in this case, since Royal did not conduct any investigation into the underlying occurrence. “An insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct,” Judge Catterson found. The court also noted that Royal had not even attempted to demonstrate that it had been prejudiced by the nine-month late notice.

Regardless of the outcome of the case on appeal, it will likely be up to the New York Court of Appeals to decide once and for all whether “no prejudice” will continue to be the general rule in New York or whether it has become, as Justice Catterson called it, an “exception” to the general rule of contract law that “one seeking to escape the obligation to perform under a contract must demonstrate a material breach of prejudice.” We will continue to monitor this issue and report to our readers on newsworthy developments.

NEW YORK HIGH COURT STRICTLY ENFORCES CPLR SECTION IMPOSING 120-DAY DEADLINE FOR SUMMARY JUDGMENT MOTIONS

The New York Court of Appeals has concluded that litigants may not file summary judgment motions more than 120 days after a note of issue has been filed, unless the litigant can demonstrate “good cause” for filing the motion late. *Brill v. City of New York*, 2004 N.Y. LEXIS 1526 (June 10). Strictly enforcing CPLR section 3212(a), the majority of the court reversed summary judgment that had been granted to the City of New York in personal injury lawsuit and remanded the case for trial, since the City’s attorneys filed the summary judgment motion a year after the case was put on the trial calendar.

Plaintiff Ona Brill sued New York City in March of 1998 for injuries allegedly sustained the month before when she allegedly fell on a public sidewalk in Brooklyn. Brill filed a note of issue and certificate of readiness in June of 2001 after discovery was completed, and sought a trial preference due to her age. The following year, in June of 2002, the City filed a summary judgment motion, arguing that it did not have prior notice of the alleged condition. Although the City did not offer any excuse or explanation for waiting more than the 120 days allowed by CPLR 3212(a) to file its motion, the trial court granted the City’s motion, and the appellate division affirmed.

Writing for the majority of the Court of Appeals, Chief Judge Judith Kaye explained that the courts below erred in dismissing the case against New York City, since the Supreme Court should not have considered the untimely summary judgment motion in the first place. The high court noted that while summary judgment is a useful procedural tool to “avoid needless litigation cost and delay,” the legislature explicitly amended the CPLR in 1996 to put an outside limit on the timing of such motions. “Eleventh-hour summary judgment motions, sometimes used as a dilatory tactic, left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial,” Judge Kaye wrote.

(Section 3212(a) of the CPLR, as amended in 1996, states that “the court may set a date after which no such [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.”)

Judge Kaye noted that since the CPLR was amended, there had been a split of authority on the issue of what was necessary to demonstrate “good cause.” Some lower courts had ruled that “good cause” required a satisfactory explanation for a delay in filing a motion on time; others had ruled that “good cause” was shown if the motion had merit and if there was no prejudice to the other party. The Court of Appeals rejected the latter approach, clarifying that CPLR 3212(a) “requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy...No excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” Since New York City did not offer any excuse for its tardy motion, the court ruled that the case must be restored to the trial calendar, and that the City can make a motion to dismiss or a motion for a directed verdict at the appropriate time at trial.

In a dissenting opinion, Judge George Bundy Smith concluded that the lower court had not abused its discretion in ruling on the City’s summary judgment motion, especially because the motion had merit and because “the time of litigants, jurors, lawyers, the judge, and other court personnel should not be wasted in going through the motions of a trial which has no merit and must be dismissed.” According to Judge Smith, the majority’s ruling will only give false hope to litigants and burden state courts with unnecessary trials.

The majority expressed its hope that this would not occur in practice: “Hopefully, as a result of the courts ‘refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future’ because movants will develop a habit of compliance

with statutory guidelines for summary judgment motions rather than delay until trial looms,” Chief Judge Kaye wrote.

FIRST DEPARTMENT JOINS OTHER DEPARTMENTS IN RULING THAT “OPEN AND OBVIOUS” DEFENSE IS NOT AN ABSOLUTE DEFENSE TO PERSONAL INJURY LAWSUITS

The First Department has joined the other three departments of the Appellate Division in ruling that “the open and obvious” defense to personal injuries is not a complete bar to recovery by a plaintiff. *Westbrook v. WR Activities-Cabrera Markers*, 773 N.Y.S.2d 38 (2004). While the open and obvious defense may relieve a defendant of any duty to warn about the condition, the trier of fact must determine whether or not it also relieves the defendant from the independent duty to correct the hazardous condition.

Plaintiff Ruth Westbrook alleged that she was injured after she tripped and fell over a cardboard box that had been left in an aisle of a Met Foods supermarket in the Bronx. Although the box was 2.5 feet long and 1.5 feet wide, Westbrook testified at her deposition that she did not see it as she turned a corner. In response to plaintiff’s negligence suit, the defendant moved for summary judgment. The Supreme Court granted the defendant’s motion, finding that the box was not inherently dangerous, and that as a matter of law it was readily observable by the use of Westbrook’s senses.

In reversing and reinstating Westbrook’s claims, Justice David B. Saxe explained on behalf of the majority of the appellate panel that if a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn the visitor of the danger. However, the question of whether a condition is open and obvious is generally a jury question. “The mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked,” Justice Saxe explained. Here,



the court ruled that it was wrong for the Supreme Court to decide the open and obvious issue as a matter of law.

More significantly, the Appellate Division ruled that even if the cardboard box were an open and obvious condition, Westbrook's complaint still would not be subject to dismissal, because the "open and obvious" defense does not have any bearing on a property owner's broader duty to maintain premises in a reasonably safe condition. Citing a Third Department decision, the majority noted that "a contrary rule of law would permit a landowner to persistently ignore an extremely hazardous condition—regardless of how foreseeable it might be that injuries will result from such condition—simply by virtue of the fact that it is obvious and apparent to onlookers."

In a concurring opinion, Presiding Justice John T. Buckley agreed that questions of fact existed concerning whether the cardboard box was an open and obvious hazard, but disagreed with the majority's ruling that the open and obvious doctrine negates only a duty to warn and permits recovery under a separate duty to maintain premises in a reasonably safe condition. "Such a rule effectively eliminates the open and obvious doctrine, inviting potentially limitless actions of questionable societal value, and exposes landowners to insurer-like liability," Justice Buckley explained. He appeared most concerned that courts and juries would conclude that a warning, or the presence of an open and obvious condition, is *never* sufficient to satisfy a landowner's duty to maintain premises in a safe condition. The majority responded, however, by noting that the standard is one of reasonableness, and that a trier of fact could legitimately conclude that a warning is sufficient to ensure the safety of premises under the right conditions.

From a practical perspective, even if the "open and obvious" defense is no longer a complete bar to recovery, courts still may grant summary judgment to defendants upon a proper showing that a condition is not inherently dangerous. For example, in *Hecht v. 281 Scarsdale Corp.*, 3A.D.3d 551,770 N.Y.S.2d 643 (2d Dep't 2004), the court dismissed the complaint of a plaintiff who struck his head on a visible overhead pipe and valve,

ruling not only that the condition was open and obvious, but also that it was not inherently dangerous as a matter of law. Similarly in *Stanton v. Town of Oyster Bay*, 2 A.D.3d 835, 769 N.Y.S.2d 383 (2d Dep't 2003), the plaintiff's complaint was dismissed when the court found that the mannequin over which plaintiff alleged he tripped not only was readily observable, but also not inherently dangerous. In Westbrook, the First Department ruled that the supermarket could not prevail on the argument that the box was not inherently dangerous, since its own store manager testified at deposition that an unopened single box in an aisle constituted a "tripping hazard" because it was not readily visible to customers walking through the aisles.

**DEBT COLLECTORS THAT DO NOT
INCLUDE LICENSE NUMBER
ON LETTERS TO CONSUMERS
NOT LIABLE UNDER FEDERAL
FAIR DEBT LAW**

A New York federal judge has ruled that a debt collector is not liable under the federal Fair Debt Collection Practices Act (FDCPA) for failing to include its New York City Department of Consumer Affairs license number on form letters sent to consumers. *Richardson v. AllianceOne Receivables Management*, 03 Civ. 5519, 2004 U.S. Dist. LEXIS 6943 (S.D.N.Y. April 23).

AllianceOne sent a letter to Robin Richardson in March of 2003 seeking to collect a balance of \$3,583.22 that AllianceOne claimed Richardson owed to one of its clients, a credit card company. The letter was written on AllianceOne stationery that included its address and toll-free telephone number, but not its license number. Richardson did not dispute that AllianceOne is licensed as a debt collection agency in New York City.

Richardson argued that by failing to include its license number on all correspondence, AllianceOne violated section 1692e(10) of the FDCPA, which prohibits debt collectors from using "any false representation or deceptive means" to collect a debt or obtain information about a consumer. According to Richardson, without

AllianceOne's license number, she could not obtain additional information about Alliance One or file a complaint against it with the Department of Consumer Affairs.

United States District Court Judge Denise Cote rejected Richardson's claims, noting that AllianceOne's letter contained sufficient information, such as the company's name, address and telephone number, to enable her to obtain information from the Department of Consumer Affairs. The court went on to conclude that even though a New York City ordinance requires all licensees to include their license number on any "advertisement, letterhead, receipt or other printed matter," the failure to abide by that ordinance does not give rise to an FDCPA violation. Judge Cote explained: "The violation of a technical City ordinance not specific to debt collection activities resulting in no identifiable harm to Richardson is insufficient to state a claim under the FDCPA."

PLAINTIFFS IN LEGAL MALPRACTICE LAWSUIT NO LONGER HAVE BURDEN TO PROVE THAT UNDERLYING JUDGMENT WOULD HAVE BEEN COLLECTIBLE, FIRST DEPARTMENT RULES

The New York Appellate Division, First Department, overruling precedent set in 1984, has concluded that plaintiffs in legal malpractice lawsuits need not prove as part of their case-in-chief that they would have been able to collect a judgment in the underlying lawsuit. *Lindenman v. Kreitzer*, 775 N.Y.S.2d 4 (1st Dep't 2004). In a unanimous opinion written by Presiding Justice Betty Weinberg Ellerin, the court ruled that the issue of judgment noncollectibility is a mitigation defense, for which the defendant retains the burden of proof.

Plaintiff Bruce Lindenman retained David Kreitzer and Kreitzer & Vogelmann to pursue a personal injury lawsuit against the Westwind Yachtclub after Lindenman was hit in the head in 1989 by a metal tray of dishes carried by one of the club's waiters. The lawsuit was dismissed in 1992 after the Kreitzer defendants failed to serve

a bill of particulars on behalf of Lindenman. Even after the Kreitzer defendants' motion for reargument was denied, and an appeal was dismissed, the defendants continued to tell Lindenman through 1997 that the case was active and proceeding.

Lindenman eventually learned that his case was dismissed years earlier, and sued Kreitzer (who was disbarred not only for neglecting cases but also for engaging in illegal bribe schemes with insurance adjusters) and Pariser & Vogelmann, the successor in interest of Kreitzer & Vogelmann, for legal malpractice. Ruling on the parties' summary judgment motions, the court found Kreitzer breached his duty of care to Lindenman, and that Vogelmann was vicariously liable for the breach as Kreitzer's partner. The court reserved for trial the issue of whether Kreitzer's breach was the proximate cause of Lindenman's alleged damages, and whether Kreitzer & Vogelmann was liable as a successor in interest to Pariser & Vogelmann.

After Lindenman presented three days of evidence at a bench trial, the defendants moved to dismiss on grounds that Lindenman had not presented evidence that a judgment obtained in the underlying personal injury lawsuit would have been collectible. Lindenman's counsel responded by cross-moving to reopen the trial to address this issue. The lower court denied the cross-motion, ruling that Lindenman had enough time to address the issue at trial, and that the defendants would be prejudiced since they were not provided with any discovery on the issue.

On appeal, the First Department acknowledged that decades before it had ruled (in *Larson v. Cruzet*, 105 A.D.2d 651, 481 N.Y.S.2d 368 (1984)) that "proof of the collectibility of the judgment is part of the plaintiff's affirmative case." In retreating from that position, Judge Ellerin explained that the *Larson* court had interpreted prior caselaw too broadly, and that while "plaintiff's burden of proof in a legal malpractice action is a heavy one, it is only after the plaintiff has proved the case within the case, including the value of the lost [underlying] judgment, that the issue of collectibility may arise." The court concluded that to the extent *Larson* held otherwise, and placed the burden affirmatively



on the plaintiff to establish collectibility as part of his or her prima facie case, it was overruled.

The First Department explained that placing the burden of proving noncollectibility on the defendant served the public policy of vindicating a plaintiff's right to establish that it was entitled to a judgment in the underlying matter, even if the judgment was not collectible: "The finding that the plaintiff was wronged by the defendant in the underlying action and wronged by the attorney who represented him in that action, is itself a vindication of the legitimacy of plaintiff's underlying claim and has value regardless of whether it is wholly collectible."

On the basis of this analysis, the court unanimously reversed the trial court's order denying Lindenman's motion to reopen the trial.

Prior to the *Lindenman* decision, collectibility was perceived as part of the plaintiff's burden of proof on causation, and therefore was a viable basis to move for summary judgment if plaintiff's proof was deficient. It now has been relegated, at least in the First Department, to an affirmative defense on mitigation of damages only. Even if evidence of noncollectibility is overwhelmingly favorable to defendant, it is no longer clear in light of the *Lindenman* decision that a defendant can prevail on this issue alone in a summary judgment motion.

**RULING INSURER'S EXCUSES FOR
DELAYS "PREPOSTEROUS," FEDERAL
JUDGE DENIES INSURERS'
MOTION TO VACATE \$102,000
DEFAULT JUDGMENT**

A New York federal court judge has refused to vacate a default judgment entered against an insurer who claimed that it did not answer a complaint or seek an extension of time to do so because it was "confused" over a multitude of similar lawsuits filed against it. *Boston Post Road Medical Imaging, P.C. v. Allstate Insurance Co.* (5/11/2004 N.Y.L.J., p. 23). Using particularly harsh language to describe Allstate's conduct in the case,

District Court Judge Lewis A. Kaplan concluded that Allstate's professed excuse was "incredible," "preposterous" and "about as lame as can be imagined," and that the decision not to appear in the lawsuit on time was willful.

In August of 2003, Boston Post Road Medical Imaging, as the assignee of the rights of approximately 40 of its patients, commenced a lawsuit in federal court against Allstate, seeking more than \$102,000 in outstanding fees for medical services rendered to patients that were allegedly owed under various Allstate automobile insurance policies. The complaint was served on Allstate on September 2, 2003. On December 4, 2003, Allstate's counsel wrote to the court to advise that its time to answer the complaint had expired, and to request an additional two weeks to respond to the complaint. Since the letter did not indicate that it had been sent to plaintiff's counsel, the court treated it as an ex parte communication and denied the application "without prejudice to motion on notice." Allstate did not make any motion, and a default judgment was entered against it on January 14, 2004. On February 17, 2004, Allstate moved to vacate the judgment and to dismiss the action for lack of subject matter jurisdiction.

In support of its motion, Allstate contended it "did not interpose an answer in this lawsuit due to the confusion on their part. Plaintiff and plaintiff's counsel has [sic] started numerous lawsuits in federal court against this defendant. Defendant is having a difficult time determining what these lawsuits are and what claims they involve." Judge Kaplan noted that Allstate's position was untenable given that each complaint bore the court's docket number and that the particular contracts that were the subject of each case were listed in a rider to each complaint. "Even assuming that it was burdensome and time-consuming for Allstate to figure out which particular contracts were at issue in which particular action, it was perfectly obvious from the moment that Allstate was served that it was obliged to submit an answer or motion within the requisite period or obtain an extension of time," the court explained. Judge Kaplan observed that given Allstate "is probably among the most frequent litigants in the

United States,” its failure to appear in this lawsuit in a timely fashion was “more egregious than mere negligence or carelessness” and was willful.

Allstate alleged that it had a meritorious defense to Boston Post’s claims—based on lack of subject matter jurisdiction—since Boston Post had aggregated more than 40 separate claims, none of which on its own met the requisite federal jurisdictional amount in controversy. The court concluded that even though Allstate’s defense had merit for purposes of seeking to vacate the default judgment, and even though the Second Circuit has repeatedly expressed a strong preference for resolving lawsuits on the merits, the particular circumstances here, including counsel’s failure to make a motion for an extension of time to answer even after the court invited Allstate to do so, warranted denial of the motion to vacate. Judge Kaplan concluded his opinion by ruling: “Taking into account the egregiousness of the default and [Allstate’s] lackadaisical approach, the motion to vacate the default judgment and for other relief is denied.”

NEW YORK JUDGE DISMISSES COMPLAINT AGAINST WATER THEME PARK FILED BY VISITOR WHO SLIPPED ON RUBBER RAFT

A Nassau County judge has dismissed a lawsuit filed against a water theme park by a woman who claims she was hurt while entering a rubber water raft. *Buffalin v. Splish Splash at Adventureland* (N.Y. Sup., Nassau Co., Index No. 19235/02). Plaintiff Anne Buffalin alleged she tore her rotator cuff after losing her footing while entering a 5-person rubber raft used for the “Mammoth River” ride at Splish Splash’s Riverhead, New York theme park. Buffalin testified at her deposition that she slipped on water that had accumulated in the bottom of the raft. She admitted seeing the water while entering the raft.

In a March 24, 2004 written decision, New York Supreme Court Justice Peter B. Skelos granted the park’s summary judgment motion, ruling that Buffalin was a voluntary

participant in recreational activities at the park and therefore had consented to “those commonly appreciated risks which are inherent in and arise out of the nature of such activities generally.” Judge Skelos emphasized that the amount of water in the raft was neither significant nor unusual, and that Splish Splash had a procedure in place to remove excess water from its rafts. “The fact that the raft was still wet when plaintiff entered is not unusual. This is a condition inherent in the nature of the activity at issue,” Judge Skelos noted.

Carla Varriale of Ohrenstein & Brown represented Splish Splash at Adventureland. Readers interested in obtaining a copy of the court’s decision may contact the editor.

AMENDMENT TO CPLR RELIEVES PLAINTIFFS OF OBLIGATION TO PLEAD SPECIFIC AMOUNT OF DAMAGES SOUGHT

Plaintiffs in personal injury and wrongful death lawsuits are no longer required to specify in their complaint the amount of damages they seek. Under a recent amendment to section 3017 of New York’s Civil Practice Law and Rules, personal injury and wrongful death plaintiffs now are only required to include in their complaint a “prayer for general relief.” If the action is brought in the Supreme Court, plaintiffs must also state whether or not the amount of damages sought exceeds the jurisdictional limits of all the lower courts that would otherwise have jurisdiction over the action.

Under the new procedural rule, which went into effect in November of 2003, defendants have the right to request from the plaintiff a “supplemental demand setting forth the total damages to which the pleader deems himself [or herself] entitled.” Plaintiffs must serve a supplemental demand within fifteen days of the request, or can face a motion to compel.

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