

NEW YORK COURT RULES INSURER MUST DEMONSTRATE PREJUDICE TO DISCLAIM COVERAGE FOR "LATE NOTICE OF LAWSUIT"

New York Supreme Court Justice Edward D. Carni (Onondaga County) has become the most recent jurist to issue a ruling challenging New York State's status as a "no prejudice" state. Seizing upon an opening made by the New York Court of Appeals in 2002 in the context of Supplemental Uninsured Motorist insurance coverage (*In re Brandon*, 97 N.Y.2d 491, 743 N.Y.S.2d 53), the court concluded a commercial general liability insurer that has received notice of an underlying claim may not disclaim insurance coverage on grounds that it received late notice of the lawsuit subsequently filed in connection with that claim, unless it has been prejudiced as a result of the late notice. *Genesee Management Inc. v. Barrette*, 10/21/2003 N.Y.L.J., p. 20.

Debra Barrette was injured on-the-job at a beauty salon in May of 1996 when she tried to clean an electric transformer with a wet cloth. The salon obtained commercial liability and worker's compensation insurance through Fireman's Fund Insurance Company. According to the court, Fireman's "promptly and thoroughly" investigated the incident as a result of the worker's compensation claim that Barrette had filed. In May of 1999, Barrette separately sued the mall where the salon was located and the mall's managing agent, both of which were named as additional insureds under the Fireman's commercial liability policy. The case remained dormant until May of 2001 ("for reasons that are not clear in the record," according to the court), at which time the mall tendered its defense to the salon. After the salon forwarded the tender letter to Fireman's, Fireman's disclaimed coverage on the sole basis that it was not provided with timely notice of the lawsuit. Even though Fireman's had received notice of the accident, it stressed the fact that its commercial liability insurance policy required separate, timely notice of any lawsuit that arises from a reported claim.

The mall and its managing agent filed a declaratory judgment action and then moved for summary judgment, seeking an order requiring Fireman's to provide defense and indemnity coverage for the Barrette lawsuit. Fireman's cross-moved for summary judgment. The court noted that in opposition to the mall's motion "Fireman's has made no attempt to argue that it has been in any way prejudiced by Genesee's delay in tendering the defense and indemnification of the Barrette action." Not surprisingly, Fireman's relied on boiler-plate cases holding that the failure to provide timely notice of a claim relieves an insurer of its duty to provide insurance coverage of that claim, whether or not it can show prejudice resulting from the late notice.

Judge Carni determined that these cases were no longer black letter law given the Court of Appeal's 2002 ruling in *Brandon*, in which the high court concluded that in the context of SUM coverage, "insurers relying on the late notice of legal action defense should be required to demonstrate prejudice." Instead, Judge Carni boldly concluded: "This court finds that *Brandon* does apply to other

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forms of insurance agreements and that Fireman's may not disclaim coverage under the late notice of suit provision [of the insurance policy] absent a showing of prejudice." The court granted the insureds' summary judgment motion and denied Fireman's cross-motion.

The decision has no immediate impact on insurance coverage determinations that are based on the failure to give timely notice of an occurrence or claim, as opposed to the failure to give timely notice of a lawsuit. Additionally, the court's determination appears to have turned, at least in part, on the fact that Fireman's had learned about the underlying claim within a week of its occurrence. Nevertheless, Judge Carni's opinion is new, additional ammunition for those seeking to defeat "late notice of lawsuit" defenses to coverage. 📌

UNDOCUMENTED ILLEGAL ALIENS MAY NOT RECOVER FOR LOST WAGES, NEW YORK COURT RULES

The New York Supreme Court, Richmond County, has ruled that a plaintiff who cannot establish eligibility to work lawfully in the United States is prohibited from recovering for lost wages. *Majlinger v. Casino Contracting Corp.*, 2003 N.Y. Misc. LEXIS 1248 (Oct. 1). Acknowledging a split of authority among lower New York courts, Justice Christopher J. Mega determined that the federal Immigration Reform and Control Act barred the plaintiff from seeking lost wages in connection with his personal injury lawsuit.

Plaintiff Stanislaw Majlinger, a Polish immigrant, filed a lawsuit after falling from a scaffold while installing siding on property in Staten Island. His complaint alleged violations of sections 200, 240 and 241(6) of the New York Labor Law. The defendants previously moved to compel Majlinger to respond to demands for discovery concerning his immigration status and eligibility for employment in the United States. After the court granted the defendants' discovery motion, Majlinger responded by indicating that he was not in possession of any documents that would establish his employment eligibility. The defendants then filed a motion for partial summary judgment in connection with Majlinger's lost earnings claim.

The defendants, relying on a 2002 United States Supreme Court decision (*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137), argued that federal immigration law prohibits undocumented aliens from recovering lost wages for work not actually performed. In *Hoffman*, the Supreme Court ruled that the National Labor Relations Board could not award back pay to an undocumented alien who was terminated for union activity. The plaintiff argued that the holding in *Hoffman* did not apply to him, since *Hoffman* only addressed the ability of federal agencies to make a lost wages award. According to Majlinger, the ruling did not apply to the ability of an injured, undocumented worker to be awarded lost wages under state common law.

Justice Mega disagreed. He explained: "Although New York law has, in the past, permitted the recovery of lost wages for undocumented illegal aliens, the interpretation afforded to the Immigration Reform and Control Act by the United States Supreme Court in *Hoffman* would appear to require this court to conclude that plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this county...[F]or this court to sanction the recovery of lost wages by an undocumented alien for work not performed would run contrary to both the letter and spirit of the IRCA."

In April of 2003, another Supreme Court Justice from Staten Island, Joseph J. Maltese, reached a different conclusion, ruling that one's status as an illegal alien was a factual issue that may be presented to a jury, but would not bar a claim for lost wages as a matter of law. (*Cano v. Mallory Management*, 195 Misc.2d 666). According to Justice Maltese, "every case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly." Justice Mega granted the defendants' motion for partial summary judgment and dismissed Majlinger's lost wages claims nevertheless, stating that he "must respectfully disagree" with Justice Maltese "and look to our appellate courts for guidance." 📌

PENNSYLVANIA COURT GIVES POLICYHOLDERS DIRECT ACCESS TO REINSURANCE OF INSOLVENT INSURER

While in most instances there are barriers to policyholders having rights directly against the

reinsurer of an insolvent insurer, in a ground-breaking decision, Judge M. Hannah Leavitt of the Pennsylvania Commonwealth Court recently concluded that several policyholders were the intended third-party beneficiaries to certain reinsurance agreements and were thus entitled to the agreements' proceeds. *Koken, Ins. Comm'r of the Commonwealth of Pennsylvania v. Legion Ins. Co.*, 831 A.2d 1196 (2003).

The Psychiatrists' Purchasing Group ("PPG") was one of the policyholders who benefited from the decision. PPG is an insurance purchasing group that was established by the American Psychiatric Association as a vehicle for its member-psychiatrists to obtain professional liability insurance benefits tailor-made to the practice of psychiatry. Legion Insurance Company became the principal front company for PPG's insurance program in 1988, meaning that it bore very little risk, passing most of the potential risk onto reinsurers. In 1991, the program obtained reinsurance from Transatlantic Reinsurance Company ("TRC") for a portion of the program's losses. Over a period of years, TRC took on larger and larger shares of the program's risk, and by April 2002, reinsured approximately 95% of the program's risk. At the time Legion was deemed insolvent, approximately 7,000 psychiatrists and other mental health professionals insured through the program.

In April 2002, the Commonwealth Court of Pennsylvania placed Legion into rehabilitation. The state's insurance commissioner subsequently filed petitions seeking to place Legion in statutory liquidation. Shortly afterwards, several Legion policyholders, including PPG, petitioned to intervene in the action. The Commonwealth Court granted these petitions and re-opened the record to allow policyholders such as PPG to present evidence in support of their request for access to the reinsurance proceeds in order to satisfy outstanding claims, such as professional liability malpractice claims.

In her opinion and order on the insurance commissioner's liquidation petition, in addition to ruling that Legion was insolvent, Judge Leavitt granted the policyholders' petitions for direct access to the reinsurance agreements. In reaching its conclusion, the court found that the TRC reinsurance was negotiated for the benefit of the program participants; that during the history of the program, the program

administrator worked closely with TRC with regard to premium rate setting, underwriting and claims decisions, while Legion had minimal involvement with regard to program issues; that TRC, in effect, functioned as the direct insurer for PPG and the program's participants; that the program's participants were the intended beneficiaries of the TRC reinsurance; and that, for various reasons, the state guaranty funds might be inadequate or unavailable to pay all future claims for the program's participants.

The court explained that "Legion has no right to the proceeds of the reinsurance agreements that cover the liability claims of ... PPG" and that "[d]irect access to reinsurance . . . will give effect to the reasonable expectations of policyholders" and "will not adversely affect the Legion estate." Relying on case law as well as various provisions of Pennsylvania's Insurance Department Act, the Commonwealth Court's decision recognized policyholder's rights to obtain the intended benefits of the coverage they paid for: "The general rule makes little sense . . . where following it will turn upside down the contractual arrangements established by the [policyholders] for providing for their liability risks."

The decision is currently the subject of an appeal before the Supreme Court of Pennsylvania.

PPG was represented by Terence Cummings, Christopher Martin and Kimberlee Abraham of Ohrenstein & Brown, LLP. Readers interested in obtaining a copy of the court's decision may contact the editor. ✉

-Kimberlee Abraham

NEW YORK APPELLATE DIVISION RULES THAT LANDOWNER CAN BE FOUND LIABLE FOR INJURIES CAUSED BY "OPEN AND OBVIOUS" CONDITION

The Appellate Division, Second Department has ruled that a defendant landowner can be found liable for injuries caused by an "open and obvious" condition. *Cupo v. Karfunkel*, 2003 N.Y. App. Div. LEXIS 11069 (Oct. 27). Recognizing that its prior decisions on this issue have been "inconsistent," the unanimous appellate panel, in an opinion written by Judge Sandra L. Townes, clarified that the open and

obvious nature of an allegedly dangerous condition is relevant only to the issue of comparative fault.

The plaintiff, Denise Cupo, a courier for Federal Express Corporation, was injured while making a delivery to the defendants' building in Brooklyn. At the time of her accident, Cupo was pulling a manual hydraulic lift loaded with boxes from her truck to the delivery entrance of the building. Cupo's lift stopped suddenly and turned over, causing her to fall, when the front wheel of the lift caught in a "depressed area" of the sidewalk where the sidewalk met "the metal grille of a four-by-eleven feet transformer vault."

After discovery was completed, the defendants moved for summary judgment, arguing that the alleged dangerous condition that caused Cupo to fall was open and obvious and known to her, since she previously made deliveries to that building. The Supreme Court denied the motion.

On appeal, the Second Department agreed with the defendant that there was no duty to warn Cupo about the allegedly dangerous condition, given that it was "readily observable." According to the court, a different burden applies to a landowner's duty to maintain property in a safe condition. Judge Townes explained: "Where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk. Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden. Indeed, to do so would lead to the absurd result that landowners would be least likely to be held liable for failing to protect persons using their property from foreseeable injuries where the hazards were the most blatant." The court concluded that any prior Second Department decision not following the panel's ruling "should no longer be followed."

Since, according to the panel, the evidence presented an issue of fact as to whether, notwithstanding the "open and obvious" nature of the alleged dangerous condition, the defendants fulfilled their obligation to maintain the sidewalk in a reasonably

safe condition, the lower court was correct when it denied summary judgment to the defendants. ✎

“SPOILIATION OF EVIDENCE” LEADS JUDGE TO DISMISS RETAILER’S PRODUCT LIABILITY AND NEGLIGENCE CLAIMS AGAINST SHELVING MANUFACTURER AND INSTALLER

New York Supreme Court Justice J. Emmett Murphy (Westchester County) recently invoked the doctrine of "spoliation of evidence" to dismiss a retail store's product liability and negligence claims against the manufacturer, distributor and installer of a shelving rack used to display and store rolls of carpet. *Daikos v. Pergament Home Centers, Inc.*, No. 4122-00 (October 9, 2003). The court ruled that it was insufficient for the retail store to take pictures of the shelving system, without also preserving the actual shelving system for future inspection, since "it is not always possible to ascertain from a photograph" how the condition of a physical object may or may not have contributed to an accident.

Pergament used a detachable rail/step beam to prevent rolls of carpet being vertically displayed on a pallet shelf rack from falling into the self-service aisle of its Yonker's store. In November of 1999, the 30-pound step beam, which was located eight feet above the floor, dislodged from the shelf and struck the plaintiff Peter Daikos in the left eye as he was reaching for one of the carpets. Daikos was blinded in his left eye. The court noted that there was no evidence of comparative negligence.

According to the court's decision, the undisputed evidence developed during discovery established that the step beam could not have dislodged if, among other things, it had been fully seated in certain openings designed to support the beam and if safety clips, which were designed to withstand more than 1000 pounds of upward force, had been properly attached and left undisturbed. The court explained that the evidence also revealed Pergament's employees had recently painted the pallet rack shelving and the safety clips, which interfered with the safety clip's "alternate dual function" to indicate that the beam was securely in place.

Pergament impleaded the manufacturer of the shelving system, Eugene Welding Company, and Forman Industries, which distributed and installed

the shelving system in the Yonkers Pergament in 1995. Both third-party defendants filed summary judgment motions seeking to dismiss all of Pergament's claims.

In his sixteen page decision, Justice Murphy highlighted that while the severity of Daikos' accident was "readily apparent," and although Pergament had taken steps to document the accident with photographs and an accident report, it failed to preserve the most crucial evidence of all – the fallen beam. The court noted that although the store manager initially placed the beam involved in the accident in the back room of the store, one week later the beam was put back into use. "The store manager did not recall where the step beam was re-installed, nor did he recall if the safety clips were still attached," Justice Murphy explained.

Nine months after being named a defendant, Pergament closed its Yonkers store, disassembled the shelving unit and put the components into storage. This only worsened Pergament's situation, according to the court: "Assuming arguendo that Pergament can establish a chain of custody of the subject shelving unit from the date of the accident to the present storage facility, without relying on hearsay, and the step beam at issue can be identified by a pattern of blood stains that were never cleaned off the beam over a year after the beam was re-installed as part of a shelving unit in the Yonkers store, Pergament cannot establish that key physical evidence, particularly the condition of the removable safety clips on the beam at the time of the accident, had not been altered when the beam was re-installed and, thereafter, disassembled." The court also ruled that the manner in which the shelving unit was assembled at the time of the accident also was key physical evidence in connection with Pergament's negligent installation claims.

Since the physical characteristics of the beam was "central" to Eugene and Forman's defense, and since Pergament had deprived Eugene and Forman of the opportunity to examine the beam, the court ruled that it was appropriate to sanction Pergament by dismissing its claims against Eugene and Forman, leaving Pergament alone on the eve of trial to face Daikos' \$4.5 million settlement demand.

Abraham E. Havkins and Tara Fappiano of Ohrenstein & Brown represented Forman. Readers

interested in obtaining a copy of the court's decision may contact the editor. ✉

FEDERAL COURT RULES BANK IS "GROSSLY NEGLIGENT" FOR ALLOWING DESTRUCTION OF E-MAIL EVIDENCE IN DISCRIMINATION SUIT

In an evidence spoliation case of another sort, the United States District Court for the Southern District of New York has ruled that a bank was "grossly negligent" and possibly even "reckless" in failing to maintain backup computer tapes containing e-mails relating to an employee who alleges she was subjected to gender discrimination. *Zubulake v. UBS Warburg, LLC*, 10/28/2003 N.Y.L.J., p. 22. However, Judge Shira Scheindlin ruled that since the plaintiff could not demonstrate that the destroyed e-mails would have contained evidence supporting her discrimination claim, the jury would not be given an "adverse inference" instruction.

Plaintiff Laura Zubulake, who earned an annual salary of \$650,000 as an equity trader for UBS Warburg, sued the company for gender discrimination, failure to promote and retaliation under federal, state and city law. She repeatedly maintained during the course of her lawsuit that evidence she needs to prove her case is in e-mail correspondence sent among various UBS employees and stored only on the company's computer systems. Earlier this year, Judge Scheindlin ordered that the parties share in the cost of restoring certain relevant data from UBS' computer backup tapes. (UBS's counsel had originally agreed to produce the documents demanded by Zubulake without first determining how much it would cost to do so. Counsel eventually learned that the price tag for retrieving the correspondence would be approximately \$300,000.) During the restoration process, the parties discovered that certain backup tapes were missing. The parties also learned the certain e-mail messages, including messages relating specifically to Zubulake's EEOC charge and retaliation claim, were never saved.

Zubulake filed a motion for sanctions against UBS for failing to properly preserve its backup tapes and e-mails. In particular, she sought an adverse inference instruction against UBS regarding the missing backup tapes (which would have

allowed a jury to conclude that the missing e-mails contained information favorable to Zubulake's claims), and an order directing UBS to bear the cost of producing again for depositions certain employees concerning issues raised in newly produced e-mails.


Judge Scheindlin concluded that UBS had a duty to preserve documents relating to Zubulake even before Zubulake filed a formal charge against the company with the EEOC in August of 2001. According to the court, by April of 2001 "it appears that almost everyone associated with Zubulake recognized the possibility that she might sue." The duty to maintain documents relevant to the litigation arose at that time since litigation was "reasonably anticipated."

Judge Scheindlin next turned to the scope of the duty to retain documents: "Must a corporation, upon recognizing a threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' At the same time, anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary... The duty to preserve extends to those employees likely to have relevant information – the 'key players' in the case." Here, the court ruled that all of the individuals whose backup tapes were lost fell into this category.

Even though UBS' in-house attorneys advised employees to retain relevant documents, and even though the company had internal policies geared towards that purpose, the court specifically found that UBS was "grossly negligent" if not "reckless" in not ensuring that the backup tapes of the human resources employee directly responsible for Zubulake and who engaged in continuous correspondence regarding the case, were preserved. The court found that UBS was negligent, but not grossly negligent, in connection with lost backup tapes for the company's other employees.

Despite this factual finding, Judge Scheindlin declined to impose a severe spoliation sanction on UBS because "although UBS had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, Zubulake cannot demonstrate that the lost evidence would have supported her claims." The court based this conclusion in part on the fact that in prior motion practice,

where Zubulake had submitted to the court the sixty-eight e-mails that according to her were the "most relevant" of all the e-mails produced in UBS's sample restoration, none demonstrated that Zubulake was treated adversely because of her gender.

The court ultimately required UBS to pay for the costs of deposing several witnesses for a second time concerning issues raised specifically by the destruction of evidence and any newly produced e-mails. 

FEDERAL COURT DISMISSES PROPERTY DAMAGE CLAIMS OF CAMPBELL'S SOUP HEIRESS AGAINST RESIDENTIAL BUILDING AND MANAGEMENT COMPANY; MUNICIPAL CODE VIOLATIONS ARE INSUFFICIENT TO ESTABLISH LIABILITY FOR SPREAD OF FIRE

The United States District Court for the Southern District of New York has dismissed the negligence claims of Charlotte C. Weber –heiress to the Campbell's Soup fortune—against her Upper East Side building's co-op board and the building's management company, in connection with property damage arising from a fire that spread to Weber's apartment from the apartment directly beneath hers. *Weber v. Paduano*, 02 Civ. 3392 (GEL) (Nov. 20, 2003). Despite the fact that the building was cited after-the-fact for various fire code violations, Judge Gerard E. Lynch ruled that these violations were insufficient to impute liability to the building since Weber had not presented evidence that the violations impeded the fire department's ability to extinguish the blaze.

On March 19, 2001, a fire ignited in the apartment beneath Weber's. Although the Fire Marshall originally determined that the cause of the fire was "heat from electrical equipment," after a private investigation initiated by insurers of residents not named in the lawsuit, the Fire Marshall came to conclude that open candle flames were in fact the most likely cause of the fire. The final listed cause of the fire was "NFA [not fully ascertained] – heat from open flame (candles)."

One day after the fire, a firefighter with the New York City Fire Department's Bureau of Fire

Prevention issued a violation order to the building, citing three violations of the New York City Administrative Code and ordering they be cured within two weeks. The order required that stairwell doors throughout the building be readily openable without a key; that the doors be properly labeled, and that emergency lights be properly working throughout the building.

Weber alleged in her lawsuit that the building's alleged negligence, as reflected in the violation orders, delayed the firefighters' response time and hindered their ability to put out the fire quickly. Weber also claimed that the building was responsible for maintaining a smoke detector in the apartment where the fire originated, and that the building's failure to do so also contributed to the spread of the fire.

Judge Lynch granted the summary judgment motion of the building and the managing company, explaining that Weber's claims fail "as a matter of law." Noting that violations of municipal ordinances do not constitute negligence *per se*, but constitute "only evidence of negligence," the court noted that "the record is devoid of any basis from which to infer that the Building Defendants' alleged negligence, even if proved, caused or contributed materially to the damage to Weber's apartment. No testimonial or documentary evidence suggests that any of the acts of negligence alleged by Weber *in fact* impeded the Fire Department's response time or ability to put out fire quickly, and the jury lacks a non-speculative basis to conclude otherwise."

Specifically in connection with the alleged lack of a smoke detector in the apartment below, the court examined the record developed by the parties during discovery and concluded that "no witness has testified that the absence of a smoke detector had any effect whatever on the Fire Department's response time...The theory that smoke from the fire would have triggered a smoke detector" before the fire was otherwise detected by Paduano's housekeeper "is based on mere speculation. No evidence suggests that under the circumstances of this fire, presence of a smoke detector would have alerted the Fire Department to the fire before the Department in fact learned of it from building employees."

Weber's claims that the locked stairwell doors impeded the firefighters' progress "suffers from the

same defect," according to Judge Lynch, "that is, the absence of evidence from which a reasonably juror could infer proximate causation. While [firefighters] testified in general terms that mislabeled stairwells and locked stairwell doors can impede their work, neither could say that in this case, any such condition affected the Department's response time or ability to fight the fire effectively." A responding firefighter testified that each of the doors was clipped open in "half a second."

Weber cross-moved for summary judgment against the building on the basis of an alleged provision in the proprietary lease requiring the building to pay for damage to Weber's apartment. The court summarily denied Weber's application, noting that the complaint did not plead any claim related to the proprietary lease. "It is wholly inappropriate for Weber to seek to add a claim, let alone to move for summary judgment on such a phantom claim, after discovery has been completed and without leave of court."

The apartment cooperative and managing agent were represented by Bennett R. Katz of Ohrenstein & Brown. Readers interested in obtaining a copy of the court's decision may contact the editor.✉

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