

## INSURANCE LAW

### **Notice to Insurer Concerning “Claims Made” Insurance Policy**

*McCabe v. St. Paul Fire & Marine Ins. Co.* (Motion for leave to appeal granted May 3, 2011)

79 A.D.3d 1612 (4th Dept. 2010)

Has the Fourth Department determined that an insurer regarding a “claims made” insurance policy need not receive a report of a claim during the policy period or extended reporting period, as long as there is a reasonable excuse for the late report outside of those time periods? The Fourth Department’s decision in *McCabe* raises that exact point.

In *McCabe*, the plaintiffs Amy and Thomas McCabe were the owners of a residence that was totally destroyed by fire on December 30, 2003. They retained attorney David E. Fretz to handle their fire loss claim under their homeowner’s policy. During the course of that representation, Fretz began to suffer from severe depression and thus became unable to handle his own and the plaintiffs’ business and legal affairs. As a consequence of Fretz’s neglect of their insurance claim, the plaintiffs lost their ability to recover on that claim.

The plaintiffs commenced a declaratory judgment action seeking a declaration that Fretz’s professional liability insurer, defendant St. Paul Fire & Marine Ins., is obligated to indemnify Fretz in the underlying legal malpractice action the plaintiffs brought against Fretz. Fretz’s malpractice insurance policy was a “claims made” professional liability insurance policy, which required that any claims must be reported to the insurer within the policy period and the extended reporting period.

The insurer first learned of the plaintiffs’ claim against Fretz on June 22, 2007, approximately three months after the extended reporting period for the “claims made” policy expired. It disclaimed coverage for Fretz based on the untimely notification. The plaintiffs obtained a default against Fretz in the underlying action and, following an inquest, Supreme Court awarded the plaintiffs

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*The Appeals Attorneys* provides timely summaries and access to cases that the highest courts in New York (and soon Connecticut, New Jersey, and Pennsylvania) will address in the near future. It is distributed on a quarterly basis via e-mail. For ease of reference, we have divided the cases by subject area. Links to jurisdictional information and links to full-text decisions are contained in each summary.

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\$226,000 in compensatory damages. The plaintiffs then commenced the declaratory judgment action against the insurer in an attempt to recover the compensatory award they received in the underlying action.

The Fourth Department concluded that the plaintiffs' claim was not invalidated even though they failed to give notice to Fretz's insurer during the policy period or extended reporting period. In reaching its conclusion, the court noted that the plaintiffs gave the insurer notice of their claim against Fretz as soon as reasonably possible. The court rejected the insurer's contention that Insurance Law sections (a)(3) and (4) included exceptions for claims made insurance policies. Those sections of the Insurance Law concern what is deemed notice and whether giving that notice as soon as reasonably possible suffices under insurance policy notice conditions. They generally apply to occurrence-based insurance policies.

The Court of Appeals will decide whether notifying an insurer as soon as reasonably possible within the context of a claims made policy is sufficient. If the court affirms the Fourth Department's holding, insurers of claims made policies will not have the same closure that they once had after the reporting period and extended reporting period expires.

## DEFAMATION

### Fact Versus Opinion in Summary Judgment Context

*Halstead v. Brokaw* (Motion for leave to appeal granted on Dec. 10, 2010)  
74 A.D.3d 1283 (2d Dept. 2010)

The appeal concerns one of three related actions to recover damages for defamation. The novel issue appears to concern a court's determination of whether a statement is one of opinion or of fact. The Court of Appeals will likely re-examine its holding in *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993), which set forth the following relevant factors for a court to determine whether a statement is an opinion or of fact: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact.'" (*Id.* [quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292 [1986]).

A unanimous panel at the Second Department granted the defendants' motion for summary judgment dismissing the second action. The court held that the plaintiff in action No. 2 failed to raise a triable issue of fact.

## Long-Arm Jurisdiction

*SPCA of Upstate N.Y., Inc. v. American Working Collie Assn.* (Motion for leave granted on Dec. 16, 2010)  
74 A.D.3d 1464 (3d Dept. 2010)

This appeal addresses the almost entirely subjective issue of long-arm jurisdiction in a defamation action. New York courts construe the long-arm jurisdiction category "transacts any business within the state" under CPLR § 302(a)(1) more narrowly in defamation cases than they do in other types of litigation.

The defendant published writings on the American Working Collie Association's website about her observations of certain rescued dogs housed at the plaintiff SPCA of Upstate New York, Inc. The SPCA and its executive director commenced an action against the AWCA claiming that they were defamed by the writings on the AWCA web site. The defendant executive director is a Vermont resident and president of the AWCA, which is an Ohio not-for-profit corporation. The president contacted the SPCA's executive director by telephone on three occasions regarding assistance she offered to SPCA. The AWCA president visited the SPCA on two occasions within a month; the visits amounted to approximately three-and-a-half hours in total.

The Third Department noted that whether the long-arm statute applied was a close call. The court analyzed the purpose of the defendant president's contacts with the SPCA in New York. The court's focus was not on whether there was evidence that any of those contacts garnered funds, yielded members or generated publicity for AWCA. The Court also noted that the

alleged defamatory comments were not made in New York and were placed on a Web site for AWCA members (located throughout the country) with no effort to direct the comments toward a New York audience.

Notably, the court recognized that the contact could support long-arm jurisdiction for causes of action other than defamation. Because the court framed the contacts as “help[ing] with a difficult situation that had developed suddenly regarding a large number of mistreated dogs,” the court refused to assert long-arm jurisdiction over the defendants under the “transacts any business within the state” prong.

The Court of Appeals will wrestle with just how narrowly it will construe contacts within a defamation context. The Court of Appeals’ decision, no doubt, will still leave litigants guessing whether contacts in future cases are too much or too little to assert jurisdiction.

## **BUSINESS LAW**

### **Automatic Renewal of Services Provision for Contract for Service Under General Obligations Law §§ 5-902 and 5-903**

*Ovitz v. Bloomberg L.P.* (Motion for leave granted on Feb. 17, 2011)  
77 A.D.3d 515 (1st Dept. 2011)

We are all familiar with those magazine subscription deals and the like where you sign up for a free trial period, and the magazine automatically renews your subscription if you do not contact the company to cancel. The matter in *Ovitz* addresses a somewhat similar concept.

General Obligations Law §§ 5-902 and 5-903 are statutes that place limitations on a lessor’s ability to automatically renew a contract for services. In *Ovitz*, the plaintiff and the defendants’ agreement contained an automatic renewal provision; the plaintiff was the representative of a putative class action regarding the inoperability and unenforceability of the defendants’ failure to provide the requisite notice set forth in § 5-903 to the plaintiff that the two-year subscription term was to be automatically renewed.

At least one New York court has recognized that § 5-903 is clearly designed to protect business people from inadvertent renewal pursuant to a automatic renewal clause by requiring timely and explicit notice of a provision for renewal. The novel issue is whether §§ 5-902 and 5-903 creates a private right of action. The First Department held that the language of the statutes and a legislative intent to create such a right of action is not fairly implied in the statutory provisions and their legislative history.

The Court of Appeals’ decision in this matter will impact businesses like those providing telephone services, real estate management services, and other service-oriented businesses.

### **Applicability of Business Corporation Law § 630 to Foreign Corporations/Personal Exposure of a Corporation’s 10 Largest Shareholders**

*Stuto v. Kerber* (Motion for leave granted on Feb. 15, 2011)  
77 A.D.3d 1233 (3d Dept. 2010)

This appeal will not only offer an analysis of Business Corporation Law § 630, it will

likely also provide a good explanation of the legislative history and interpretation of statutes. In *Stuto*, the plaintiff worked for the defendant, a defunct closely held foreign corporation incorporated in Delaware. The plaintiff obtained a judgment in Supreme Court, Albany County against the defendant based on a claim for unpaid wages. Thereafter, the plaintiff commenced an action against three of the 10 largest shareholders of the defendant corporation. Supreme Court granted the defendants’ motion to dismiss the plaintiff’s complaint, holding that Business Corporation Law § 630 did not apply to foreign corporations.

The Third Department upheld Supreme Court’s dismissal, observing that § 630 “is essentially the reenactment of former Stock Corporation Law § 71 and provides that ‘[t]he [10] largest shareholders’ of a nonpublicly traded company ‘shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation.’” Notably, the Third Department pointed out that former Stock Corporation Law § 71 did not apply to foreign corporations. As such, the Third Department noted that the legislative history of a particular enactment must be reviewed in light of the existing decision law, which the Legislature is presumed to be familiar with and to the extent it left it unchanged, that it accepted.

The Court of Appeals will determine whether Business Corporation Law § 630 applies to foreign corporations.

## PROCEDURAL LAW

### **Vacating Arbitration Award Based on Bias or Partiality**

*U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.* (Motion for leave to appeal granted on Nov. 18, 2010)  
73 A.D.3d 497 (1st Dept. 2010)

This appeal addresses the judicial review of arbitration awards and in what instances may a court vacate an arbitration award. The arbitration concerned a contractual dispute between the petitioner and satellite radio company Sirius Satellite Radio, Inc. By way of background, Sirius and former competitor XM Satellite Radio announced a merger in February 2007. The merger was subject to the approval of the Federal Communications Commission.

The petitioner in the appeal argued that the chairman of the arbitration panel improperly failed to disclose the relationship between his son, who is a Congressman, and Sirius. The chairman's son publicly supported the merger between Sirius and XM.

The First Department noted that the chairman should have disclosed his son's position irrespective of when the petitioner learned of the Congressman's support of the intended merger. Nevertheless, the First Department held that the petitioner failed to meet its burden of proving by clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced its rights or the integrity of the arbitration process or award. It proffered no proof of actual bias or even the appearance of bias on the part of the chairman.

The Court of Appeals will address whether the undisclosed facts provided a basis for challenging the arbitration award, and will likely set out a bright-line for future matters.

## ADMINISTRATIVE LAW

### **Power of Agency to Amend Regulation**

*Metropolitan Taxicab Bd. of Trade v. New York City Taxi & Limousine Comm.* (Motion for leave granted on Dec. 14, 2010)  
71 A.D.3d 508 (1st Dept. 2010)

Although this appeal addresses the New York City Taxi & Limousine Commission's (TLC) authority to amend its rules, the resolution of the appeal might have a broader impact regarding amendments to administrative regulations and the interpretation of the promulgating statutes. In this appeal, the TLC amended its rules concerning the statutory cap imposed on the amount charged by taxicab fleet owners when leasing vehicles to taxi drivers. The First Department noted that the TLC is vested with a broad grant of authority to promulgate and implement a regulatory program for the taxicab industry, including standards and conditions for service, safety, design, comfort, convenience, noise and air pollution control, and efficiency in the operation of vehicles.

The court held that the TLC was authorized to amend its rules on the issue under the broad grant of authority promulgated to it. The TLC amended its rules establishing the amount of vehicle lease caps by raising the lease amount for hybrid and fuel efficient vehicles and lowering the lease amount

for non-fuel efficient vehicles. The court also concluded that the amendments are rationally related to the legitimate governmental goals of providing incentives for fleet owners to purchase fuel efficient vehicles that are designed to reduce harmful emissions, and to require fleet owners to bear some of the additional fuel costs associated with the operation of non-fuel efficient vehicles.

### **Workers' Compensation — Presumption of Compensability/ Unexplained Death**

*Matter of Cappellino v. Baumann & Sons Bus Co.* (Motion for leave to appeal granted on Nov. 18, 2010)  
52 A.D.3d 1058 (3d Dept. 2008)

This particular appeal has been in the works for quite some time. It concerns an important Workers' Compensation Law issue — i.e., what evidence will rebut the presumption of compensability in the context of an unexplained death. Even when a death that occurs during the course of employment is unexplained, a claimant is entitled to a presumption of compensability. However, the Appellate Division has held that such a presumption may be rebutted by an employer with "substantial evidence to the contrary."

In *Matter of Cappellino*, the claimant's decedent sustained a fatal heart attack while walking through his employer's bus yard. After a series of hearings, the Workers' Compensation Board rendered a decision finding no causal relationship between the decedent's death and his employment. An impartial specialist who reviewed the decedent's medical records opined that his death was unrelated to his work activities. This opinion was based upon the decedent's documented medical history,

which included diagnoses of high blood pressure and high cholesterol and noted a strong family history of coronary artery disease. In addition, these records revealed that the decedent had been a chronic smoker, was markedly obese and had a permanent tracheostomy for obstructive sleep apnea. He had suffered two prior heart attacks for which he had been treated with intracoronary stent insertion and coronary balloon angioplasty.

The claimant submitted contrary medical proof on the issue of causation. Nevertheless, the Appellate Division concluded that the Board's determination that the decedent's fatal heart attack was not work related is amply supported by substantial evidence.

The Court of Appeals on this appeal will address the novel issue regarding rebutting the presumption of compensability.

### **Workers' Compensation – Interplay Between WCL §§ 15(3) (w) and 27(2)**

Matter of Collins v. Dukes Plumbing & Sewer Serv., Inc. (Motion for leave to appeal granted on Nov. 17, 2010)  
75 A.D.3d 697 (3d Dept. 2010)

These appeals concern the interplay between the recent amendments to Workers' Compensation Law §§ 15(3) (w) and 27(2). Section 15(3)(w), as amended in 2007, capped the number of weeks for which a claimant could receive that subdivision's nonscheduled permanent partial disability (PPD) benefits. The new cap on benefits applies only to accidents occurring after March 31, 2007. Section 27(2) was also amended in 2007 to require that any

PPD award under WCL § 15(3)(w) made on or after July 1, 2007 must be paid into the aggregate trust fund (ATF).

In each of the cases on these appeals, each claimant's injury was classified as a PPD and each claimant was awarded benefits under section 15(3)(w). These PPD awards were not capped because the claimants' injuries all preceded the March 31, 2007 date applying to section 15(3)(w). The uncapped PPD awards were made after July 1, 2007 and, therefore, the private insurance carriers for the claimants' employers were ordered to make a lump-sum payment of the present value of the awards into the ATF pursuant to the amended to section 27(2).

The Third Department disagreed with the carriers' argument that they should not have been required to make lump-sum payments into the ATF because those injuries were sustained before the effective date to the amendment to WCL § 27(2). The court also rejected the carriers' argument that mandating lump-sum payments of the claimants' uncapped PPD awards was improper because the actual amounts of their future benefits are unpredictable and there is no reliable way to calculate their present values. The court rejected two of the carriers' constitutional arguments that the amendment violated the Taking Clause of the Fifth and Fourteenth Amendments to the United States Constitution and the Contract Clause of the United States Constitution.

The Court of Appeals will likely focus its decision on the interplay between the two statutes. Depending on how the carriers' brief the issues, the court might also address the constitutional issues. The constitutional issues appear less noteworthy.

## **EDUCATION LAW**

### **Duty of School District to Fund Education of Non-Resident**

Bd. of Educ. of the Garrison Union Free Sch. District v. Greek Archdiocese Institute of St. Basil (Motion for leave granted Nov. 12, 2010)  
75 A.D.3d 569 (2d Dept. 2010)

This appeal addresses the issue of whether a school district must finance the education of a child living at a private institution within the district when the student originally was from out-of-state and was privately placed in the facility. The Second Department held that a school district does not have to fund the education of a child whose residency in the district is based solely on the private placement of the child in an institution in that district. The court's decision was based on its interpretation of Education Law § 4004. This statute is designed to allocate costs sensibly and avert burdening school districts with the costs of educating non-resident children. The court noted that the school district in this case has no control over placement of the child in the facility and it would be unfair to burden the school district with the cost of funding the education of non-resident children just because the district happens to have a child-care facility within its borders.

The Second Department granted the motion for leave to the Court of Appeals seeking a determination as to whether the Second Department's decision was correct.

The case presents a complex issue because the children are being cared for at a facility within the district, and denying them a tuition-free education could impact their ability to remain at

the facility. Essentially, the Court of Appeals will be deciding whether private placement of out-of-state children at such a facility constitutes residency within the district such that the local district must fund the child's education.

## NEGLIGENCE

### **Serious Injury — Findings of Limitations of Range of Motion Contemporaneous With the Subject Motor-Vehicle Accident**

*Adler v. Bayer* (Motion for leave to appeal granted on Jan. 18, 2011)  
77 A.D.3d 692 (2d Dept. 2010)

The Second Department has developed a line of analysis regarding demonstrating a prima facie case of "serious injury" pursuant to Insurance Law § 5102(d) and the Court of Appeals' decision in *Toure v. Avis Rent A Car Sys., Inc.* The case law requires that a plaintiff demonstrate limitations of range of motion contemporaneous with the subject motor-vehicle accident.

The plaintiff in *Adler* challenges this line of reasoning. The plaintiff in *Adler* was injured in a motor-vehicle accident when the vehicle in which he was a passenger went off the road and struck a tree. He sustained injuries to his back, knees, eyes, and head. The plaintiff's treating physician — a physical medicine and rehabilitation physician — verified the plaintiff's injuries to his right shoulder, right wrist, both knees, right ankle, and cervical and lumbar spine through different tests. However, he did not record the plaintiff's range-of-motion limitations because he opined that doing so would be "unreliable". In several follow-up examinations, the plaintiff's treating physician determined

that the plaintiff's examinations were no better and, therefore, he could not record range-of-motion limitations. Approximately four years after the accident, the plaintiff's treating physician quantified the plaintiff's range-of-motion limitations. At trial, the treating physician opined, within a reasonable degree of medical certainty, that the plaintiff's injuries constituted a "permanent partial disability and ... had impairment in multiple joints and ... has alterations on examination of different parts of his body."

The Second Department reversed a judgment in favor of the plaintiff after a jury trial and granted the defendants' motion for a directed verdict. In a terse, unrevealing decision, the court reasoned that "[t]he plaintiff was required to show the duration of the alleged injury and the extent or degree of the limitations associated therewith ..., which he failed to do." By citing *Ferraro v. Ridge Car Serv.*, the court's reasoning appears to be based on the plaintiff's failure to provide contemporaneous findings of range-of-motion limitations in his spine.

The novel question presented is whether Section 5102 and the Court of Appeals' case law interpreting the "serious injury" threshold require such a showing. The plaintiff argued in his motion for leave to appeal that such a showing punishes a plaintiff for first concentrating on treatment and not the litigation process.

Notably, the Court of Appeals will likely hear this appeal with another appeal on the same issue — *Perl v. Meher*, 74 A.D.3d 930 (2d Dep't 2010).

Also see *Travis v. Batchi* below.

*Travis v. Batchi* (Motion for leave to appeal granted on Feb. 10, 2011)  
75 A.D.3d 411 (1st Dept. 2010)

This appeal from the First Department addresses the same issue of contemporaneous findings. The court noted that the examination records of the plaintiff's own treating physician/expert fatally hindered the plaintiff's opposition to summary judgment on a "serious injury" threshold motion. The physician's affirmation submitted in opposition to the summary judgment motion stated that the plaintiff sustained a permanent injury to the knee as a result of the accident. He prepared this affirmation a few years after the accident. However, his examination records from a few weeks and a few months after the accident indicated that the plaintiff had full strength and range of motion in the knee. The plaintiff also had full strength and range of motion in the knee after a right knee anterior cruciate ligament reconstruction, partial medial and lateral meniscectomy and chondroplasty.

The court reasoned that, absent some explanation from the physician, the plaintiff's negative findings cannot be reconciled with the physician's affirmation submitted in opposition to the motion, which was prepared a few years after the accident, that the plaintiff sustained a permanent injury to the knee as a result of the accident.

This appeal appears to differ from *Adler v. Bayer* because, here, the plaintiff's physician indicated in the medical records that the plaintiff had full range of motion weeks and months after the accident.

## Scope of Social Host's Duty to Control Conduct of Intoxicated Guest

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*Martino v. Stolzman* (Motion for leave to appeal granted on Dec. 30, 2010)  
74 A.D.3d 1764 (4th Dept. 2010)

The Court of Appeals will yet again address the scope of a property owner's duty to control the conduct of intoxicated third parties. In this case, the Fourth Department held that the property owners had a duty to prevent the intoxicated guest from leaving their premises and driving away. The court also held that the property owners had a duty to guide the guest out of the driveway because the view of oncoming traffic was obstructed. After leaving the party, the guest backed his vehicle out of the driveway and it was then struck by an oncoming vehicle. The Fourth Department held that there was a question of fact as to whether the owners should have known that the guest was intoxicated. Implicit in the court's decision is that if the owners should have known the guest was intoxicated, then (1) they had a duty to prevent the guest from leaving, and (2) the failure to stop the guest was a proximate cause of the accident.

There was a two-justice dissent to the Fourth Department's decision. The dissent was against extending a property owner's duty to prevent accidents that did not occur on their property. The dissent noted that by extending the duty to control an activity not occurring on an owner's property or an area they control, the owner then becomes an insurer for injuries resulting from drinking.

The Court of Appeals has previously held that it was not its intent to make property owners an insurer for injuries resulting from intoxication.

## Assumption of Risk While Rollerblading and Liability for an Open and Obvious Condition on Roadway

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*Custodi v. Town of Amherst* (Motion for leave to appeal granted on Apr. 29, 2011)  
81 A.D.3d 1344 (4th Dept. 2011)

The Court of Appeals will address the scope of the doctrine of assumption of risk when engaged in the sport of rollerblading on a public sidewalk. The Court will also address whether a two-inch height differential between a driveway apron and the abutting street constitutes an open and obvious condition for which no liability can attach.

The plaintiff was rollerblading along the sidewalk because an ice cream truck had stopped in the roadway. When the plaintiff went to exit the sidewalk down a driveway apron, she tripped and fell over a two-inch height differential between the driveway apron and the adjacent roadway. The plaintiff claims she did not observe this height differential prior to the accident.

The trial court granted the defendant's motion to dismiss based on the doctrine of assumption of risk. The trial court held that because the accident occurred when the plaintiff was rollerblading she assumed all the risks inherent in such an activity. The trial court noted that tripping and falling, especially on sidewalks, which tend to be uneven, is a risk inherent in the sport of rollerblading.

The Fourth Department reversed the trial court's decision. The Fourth Department held that the height differential constituted a dangerous condition that was over and above the usual dangers inherent in the sport of rollerblading.

The Fourth Department further held that there was a question of fact as to whether the height differential between the driveway apron and curb was open and obvious.

There was a dissent to the Fourth Department's majority decision. The dissent agreed with the trial court's conclusion that the plaintiff's claim is barred by the doctrine of assumption of risk. The dissent noted that the plaintiff was an experienced rollerblader and made a choice to rollerblade on a surface that she knew to be uneven and bumpy; therefore, the dissent observed, she assumed the risks arising from the open and obvious condition of the sidewalk on which she was traveling.

The Court of Appeals' decision will have a significant impact on future litigation in the context of assumption of risk and open and obvious conditions.

## Liability of a Dog Owner When Dog Collides With Bicyclist in Public Street

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*Smith v. Reilly* (Motion for leave to appeal granted on July 1, 2011)  
83 A.D.3d 1492 (4th Dept. 2011)

The Court of Appeals will yet again address the scope of a dog owner's liability. This time the issue is whether a dog owner can be liable when his dog runs into the street and collides with a bicyclist.

The plaintiff was riding his bicycle when he claims a dog ran into the bicycle, causing the plaintiff to flip over the bicycle's handlebars. The trial court denied the defendant's motion for summary judgment because there was evidence that she knew her dog had a proclivity to get loose and would sometimes run in the roadway.

The Fourth Department affirmed the trial court's decision based on the Court of Appeals' previous holding that an owner can be liable if a dog acts in a manner that could cause harm to others and it results in an injury. The Fourth Department held that because the defendant knew her dog would get loose and sometimes run in the roadway it was for a jury to decide whether that behavior created a risk of harm to others.

There was a two-justice dissent. The dissent noted that while the defendant was aware that her dog would get loose, there was no evidence that she was aware or should have been aware that the dog would interfere with traffic in the roadway.

Absent from the trial court's decision and the Fourth Department's decision is any comment on whether the plaintiffs took any action to avoid contact with the dog. There is an assumption that the accident was caused by the dog, which is not able to defend itself. To expand a dog owner's liability in this context would create a loophole for plaintiffs to hold dog owners liable for almost any contact with a dog that gets loose on a public street.

[Editor's Note: The Court of Appeals reversed the Appellate Division order and granted the dog owner's motion for summary judgment dismissing the complaint. The court noted that the defendant established that she had no knowledge of her dog's propensities to interfere with traffic. Here is the slip opinion decision: [2011 N.Y. Slip. Op. 07478 \(Oct. 25, 2011\)](#)]

## LABOR LAW

Nascimento v. Bridgehampton Const. Corp., (Motion for leave to appeal granted on June 2, 2011)  
86 A.D.3d 189 (1st Dept. 2011)

This appeal involves the issue of whether a middleman subcontractor, who subcontracts the work that gives rise to the plaintiff's injury to another subcontractor, is a statutory agent within the meaning of Labor Law §§ 240(1) and 241(6).

Here, the general contractor subcontracted the framing work to the appellant subcontractor, Bayview, which in turn subcontracted it to a second subcontractor and, eventually, to a third subcontractor (the plaintiff's employer). Bayview cross-moved for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, on the ground that it did not have the authority to supervise the work or control safety practices at the worksite. It also argued that the plaintiff's motion for summary judgment on liability on the Labor Law claims should be denied, based on conflicting versions of the accident given by the plaintiff and another witness. While the plaintiff asserted that he fell while descending a ladder from a 14-foot high platform, the other witness stated he saw a worker "fall from the rafters," and that there was no ladder in the area.

Supreme Court granted the plaintiff's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) claims and denied Bayview's cross motion.

The First Department modified the trial court's decision to the extent of denying the plaintiff's motion. First, the court held that the conflicting versions of the accident did not create a material issue

of fact as to whether Labor Law § 240(1) was violated. The court distinguished the situation where the plaintiff alone offered different versions of the accident, which, in the court's view, "creat[ed] a need for cross-examination and justifying a challenge to his credibility." However, the court did find that the different versions of the accident did preclude summary judgment in the plaintiff's favor on the Labor Law § 241(6) claim.

Second, the Court considered "the more complex question" raised by Bayview, to wit, that it was not a statutory agent because "it did not have the authority to oversee the work plaintiff was performing or the site's safety conditions." Although it rejected the plaintiff's argument that all subcontractors in "the chain of command" fall within the purview of the Labor Law, it held that subcontractors were only liable as agents "if it had the authority to supervise or control the work giving rise to the obligations imposed by [Labor Law §§ 240(1) and 241(6)]," citing Russin v. Lousi N. Picciano & Son, 54 N.Y.2d 311, 317-318 (1981).

Relying on Weber v. Baccarat, Inc., (70 A.D.3d 487, 488 [1st Dept. 2010]) and Everitt v. Nozkowski, (285 A.D.2d 442, 444 [1st Dept. 2001]), the court noted that subcontractors have been held to be statutory agents of general contractors where the provisions of the subcontracts explicitly granted supervisory authority, and those in which the evidence showed that the subcontractors actually exercised supervisory authority (although, inconsistently, the court also holds that it is "irrelevant" whether the subcontractor supervised the work).

Although Bayview argued that there was no contract giving it authority to supervise, and that no evidence that it

had exercised such authority, the court found that a triable issue existed as to Bayview's authority by virtue of the fact that its subcontract with the next subcontractor down the chain included a delegation of supervision. In short, the court found that because Bayview had apparently delegated supervision authority to the next subcontractor, it must have possessed such authority to enable it to delegate in the first place. Ultimately, the court relied on the principle that "once a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity."

This decision appears to raise as many questions as it answers, including the fundamental one, that if a subcontractor delegates supervisory authority to another, and does not exercise any supervision at all, how can such subcontractor be liable under the Labor Law?

## **BAILMENT LAW**

### **Duty of Bailor for Injury to Bailee**

*Beazer v. New York City Health and Hosp. Corp.* (Motion for leave to appeal granted Nov. 9, 2010)  
76 A.D.3d 405 (1st Dept. 2010)

This appeal relates to the unusual issue of the nature and extent of the duty owed by a bailor of construction equipment to a bailee injured during its use.

The plaintiff was an employee of the construction manager of a project and was injured while using an unguarded power grinder. He obtained the grinder from either his employer's gang box or from a contractor, Beys, who owned

the grinder. The plaintiff's employer and Beys were both involved in flooring aspects of the project. Beys moved to dismiss the complaint, arguing that it had no duty to warn the plaintiff of obvious defects in the unguarded power grinder. The Supreme Court denied the motion.

In a 4-2 decision, the Appellate Division majority affirmed, holding that triable issues of fact existed as to: (1) whether there was a bailment in this case, and (2) if so, whether the bailment was gratuitous or a bailment for the mutual benefit of Beys and the plaintiff's employer. Because Beys had failed to demonstrate as a matter of law that it was a gratuitous bailor, questions of fact remained as to whether the higher duty applicable to bailments for mutual benefit was owed, which imposes liability for loaning dangerous equipment even if the defect was patent. The court reasoned that because there was evidence that both Beys and the plaintiff's employer were "engaged in a common task or seeking to accomplish a common purpose," a triable issue of bailment for mutual benefit was raised.

The dissent rejected this common-purpose rationale, finding that Beys was a gratuitous bailor or casual lessor as a matter of law, and, accordingly, Beys owed a lesser duty to warn only of known defects that were not readily discernible. The dissent would have granted Beys motion for dismissal because there was no duty to warn the plaintiff in this case because he testified that he knew the guard was missing from the grinder.

## Goldberg Segalla Appellate Practice Group

Our firm has assembled a group of attorneys with vast appellate experience (in addition to experience in a wide range of practice areas). Some of the group's attorneys have clerked at Connecticut's and New York State's highest courts, New York's and New Jersey's appellate division, and the United States Circuit Court of Appeals. Our group boasts a knowledge in the procedural requirements of the New York Court of Appeals and has used these skills to bring important issues to New York's highest court — where we have successfully argued our clients' positions. Of course, the appellate attorneys at Goldberg Segalla have also successfully argued and defended appeals in United States Circuit Courts of Appeals and state appellate courts.

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