

LEGAL DEVELOPMENTS NEWSLETTER

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**INSURANCE COVERAGE: THE NEW YORK STATE COURT OF APPEALS REAFFIRMS THE "NO-PREJUDICE" RULE FOR DISCLAIMERS OF COVERAGE BECAUSE OF LATE NOTICE OF OCCURRENCE, CLAIM AND SUIT**

In our first issue of the newsletter (Volume 1, Issue 1, February, 2005) we discussed the uncertainty that had grown under New York law with regard to the "no-prejudice" rule in the wake of the decision of the New York Court of Appeals in In re Brandon (Nationwide Mutual Insurance Company).<sup>1</sup>

New York State has long been one of a minority of jurisdictions that follows the no-prejudice rule with regard to denials of insurance coverage for untimely notice of occurrence, claim or suit.<sup>2</sup> Under the no-prejudice rule, compliance with the notice provisions of a liability insurance policy is treated as a condition precedent to coverage and a failure to comply with the notice provision, "[a]bsent a valid excuse, vitiates the policy even where the carrier has suffered no prejudice."<sup>3</sup>

The rationale for the no-prejudice rule is that it protects the insurance carrier against fraud or collusion; gives the insurance carrier an opportunity to investigate claims promptly; allows the carrier to make an early estimate of potential exposure and establish adequate reserves; and gives the carrier an opportunity to exercise early control of claims, which aids settlement.<sup>4</sup>

The no-prejudice rule is a significant departure from the standard rule of contract interpretation which holds that there will be no forfeit for a breach of a contract unless the breach is a

substantial and significant ("material") breach.<sup>5</sup>

Almost three years ago, in a footnote to a decision entitled In re Brandon, the Court of Appeals signaled that it might, in the future, abolish the no-prejudice rule and join the majority view on this issue. Under the majority rule, in order to deny insurance coverage based upon an insured's failure to afford prompt notice of an occurrence claim or suit, an insurance carrier must prove that it was prejudiced by the delay in the providing of notice.<sup>6</sup>

In Brandon, the Court of Appeals held that in the Supplementary Uninsured Motorist ("SUM") context, the insurance carrier must prove that it was prejudiced before it can disclaim coverage based upon the failure of the insured to forward a copy of the summons and complaint in the underlying lawsuit. While the holding of Brandon was limited to the SUM context, some practitioners interpreted the decision as being critical of the no-prejudice rule in general.

In the wake of Brandon, in a decision rendered by the Appellate Division, First Department on December 21, 2004 in Great Canal Realty Corp. v. Seneca Insurance Company, Inc., two of the five justices of the court expressly held that the insurance carrier, Seneca Insurance Company, should be required to prove that it was prejudiced

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## PRACTICE TIP - DISCLAIMERS OF COVERAGE UNDER NEW YORK INSURANCE LAW SECTION 3420(d)

Most claims professionals would make the reasonable assumption that the issuance of a written disclaimer of coverage to an insured based upon the insured's failure to comply with the notice requirements of the policy would be a fairly simple task. However, written disclaimers of coverage for policies issued in New York State involving claims of bodily injury or death must comply with the requirements of Section 3420(d) of New York's Insurance Law, which sets forth several requirements that are strictly applied by New York courts.<sup>29</sup> Because this statute is strictly construed by the courts, if the written disclaimer does not precisely comply, the insurance carrier may be estopped from disclaiming coverage.

Insurance Law Section 3420(d) of the Insurance Law, which only applies to liability policies "delivered or issued for delivery" in New York State, provides as follows:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

This statute provides that written disclaimers of coverage must be issued "as soon as is reasonably possible" and that the written disclaimer of coverage must be delivered to both the insured and the "injured person" as well as "any other claimant."<sup>30</sup> Therefore, the disclaimer letter should reflect that a copy of the letter was also delivered to the injured claimant (the injured party's attorney, if known, will suffice) and any other claimant. The term "any other claimant" would appear to apply to a potential co-defendant who may have an indemnity or contribution claim against the insured. In order to prove mailing, disclaimer letters should be mailed to all necessary parties by certified mail, return receipt requested.

In construing this section of the Insurance Law,

courts in New York have held that if the disclaimer is mailed only to the insured and not to the injured party, it will be deemed void and the carrier will be estopped from disclaiming coverage.<sup>31</sup>

The requirement that written disclaimers be issued "as soon as is reasonably possible" has been strictly construed by New York courts.<sup>32</sup> The Appellate Division, First Department has held that where an insurance carrier did not have a reasonable excuse for the "delay," a disclaimer of coverage for late notice by the insured that was mailed thirty days after the carrier received notice of the claim was "untimely" and therefore ineffective.<sup>33</sup>

In justifying this seemingly harsh ruling, the First Department held that a disclaimer of coverage for late notice does not require investigation as the basis for the disclaimer is typically readily apparent from the time that the carrier receives the notice of claim.<sup>34</sup> As such, disclaimers for late notice must be treated with urgency and as soon as it becomes clear to the insurance carrier that there is a valid disclaimer for late notice (or any other grounds), the written disclaimer of notice should be issued.

An insurance carrier's time clock for disclaiming coverage for any reason begins to tick as soon as the carrier has sufficient factual information on which the disclaimer of coverage is to be based.<sup>35</sup> Therefore, the facts regarding possible disclaimers of coverage must be promptly investigated, and as soon as a sufficient factual basis is found to exist for a disclaimer of coverage, the written disclaimer must be promptly mailed to all required parties.

The written disclaimer of coverage must promptly apprise the claimant (and any other required recipient) with a high degree of specificity of the ground or grounds on which the disclaimer is predicated.<sup>36</sup> Therefore, the policy provisions upon which the disclaimer is based should be quoted in the disclaimer letter and the factual basis upon which the insurance carrier is basing its determination that there is no coverage obligation should be clearly explained. This normally entails a description of the nature of alleged occurrence, the nature of the claims in the complaint (if the matter is in suit), and a clear description of why coverage is excluded or otherwise unavailable.

Reservation of rights letters do not serve to toll the

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time in which an insurance carrier must issue a disclaimer or denial of coverage under Section 3420(d) of the Insurance Law.<sup>37</sup> This concept trips up many claims professionals who believe that the issuance of a reservation of rights letter will enable them to deliberately review the facts and decide whether to disclaim coverage at a later time. While reservation of rights letters under New York law still have some utility, they generally do not extend the carrier's time to issue a "prompt" disclaimer under Section 3420(d).<sup>38</sup>

Fortunately for insurance carriers that have grounds for a disclaimer, Insurance Law Section 3420(d) only applies to claims for bodily injury or death caused by an "accident."<sup>39</sup> Therefore, property damage claims and "personal and advertising injury claims", and any other non-bodily injury or death claim are governed by the less onerous common-law of New York State.<sup>40</sup>

New York courts have also held that Section 3420(d) of the Insurance Law applies to denials of coverage based upon policy exclusions or policy conditions.<sup>41</sup> Section 3420(d) does not apply where the denial is based upon the fact that a claim falls entirely outside the scope of coverage under the insuring agreement.<sup>42</sup> Courts have held that a failure to comply with the strict requirements of Insurance Law Section 3420(d) was not intended to create insurance coverage by estoppel where insurance coverage was never intended in the first instance.<sup>43</sup> Therefore, where the denial is based upon "non-coverage" grounds, such as the party seeking coverage is not an "insured"; that the occurrence did not fall within the policy period; or that the claim does not fall within the definitions for covered "bodily injury," "property damage" or "personal and advertising injury," the disclaimer of coverage would have to comply with New York State's common-law, not the strict requirements of Insurance Law Section 3420(d).<sup>44</sup>

New York law is clear that where a disclaimer falls within the scope of Insurance Law Section 3420(d), if a known grounds for disclaiming coverage is omitted from the written disclaimer, the insurance carrier will be estopped from later asserting that ground for disclaiming coverage.<sup>45</sup> Therefore, under New York law, any viable grounds for disclaiming coverage should be included in the disclaimer letter or the insurance carrier will risk a finding by a court that a basis for disclaiming should have been included in the original disclaimer and is therefore waived.

This brings us to a particularly draconian interpretation of Insurance Law Section 3420(d) that has been adopted by New York State's Appellate Division in the realm of disclaimers for late notice of occurrence, claim and suit. Insurance Law Section 3420(a)(3) provides that a notice of claim to an insurer may be made either by the insured or by the injured party. Therefore, New York Courts have held that when an insurance carrier disclaims coverage for failure to comply with the notice provisions of the policy, it must set forth in the disclaimer letter that the insured and the "injured party" failed to comply with the notice of occurrence claim and suit provisions.<sup>46</sup>

In these cases, New York Courts have held that because the insurance carrier's written disclaimer of coverage cited only the insured's failure to comply with the notice provisions of the policy, the insurance carrier was later estopped from asserting that the injured party failed to comply with the notice provision. Because the injured party is entitled under Section 3420(a)(3) of the Insurance Law to provide the notice of occurrence, claim and suit to the carrier, a duty to defend and indemnify the insured was found to exist when the injured party tendered the notice to the hapless insurance carrier. This is a particularly troubling problem for insurance carriers because New York State is a "direct action" state whereby the injured party can bring a lawsuit against the defendant's insurance carrier after a judgment has been entered seeking indemnification directly from the carrier. Therefore, written disclaimers of coverage for late notice of occurrence, claim and suit should always cite both the insured's failure to comply with the notice provisions of the policy as well as the failure of the injured party (or parties) to comply with the notice provisions of the policy.

Because of the strict requirements of Insurance Law Section 3420(d), we believe that an insurance carrier that is seeking to disclaim coverage on a policy issued in New York should seek legal counsel to ensure that the disclaimer of coverage is properly issued. However, if the insurance carrier decides to perform this vital task on its own, it should be aware of all the strict requirements of New York law so that it does not find itself estopped from asserting a valid grounds for disclaiming coverage.

- Michael P. Kandler

## LIABILITY FOR CONSTRUCTION SITE ACCIDENTS - RECALCITRANT-WORKER DEFENSE STRENGTHENED IN WAKE OF BLAKE V. NEIGHBORHOOD HOUSING SERVICES OF NEW YORK CITY

Commercial general liability carriers that issue policies in New York State are by now well aware of the strict liability imposed against construction site owners and general contractors for any “gravity related” accidents under New York State Labor Law Section 240(1). Labor Law Section 240(1), often called the “Scaffold Law,” provides that:

[a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility.”<sup>47</sup> It is well-settled that the duty imposed by this statute is “nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work.”<sup>48</sup>

As the statute has been interpreted by the New York State Court of Appeals, owners and general contractors at construction sites may be found strictly liable for injuries sustained by construction workers as a result of “gravity-related accidents” (*i.e.*, falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured).<sup>49</sup>

The statute has been broadly construed so that it will apply to gravity related construction accidents that were caused by a failure of those in charge of the work site to provide a proper scaffold, hoist, stay, ladder or other protective device.<sup>50</sup> The strictly liable party may, of course, seek contribution or indemnification from a third-party under a theory of negligence or contractual indemnification.

It has long been held by New York Courts that the comparative negligence of a plaintiff/worker is not an available affirmative defense to a claim under this section of the Labor Law.<sup>51</sup> As such, even accidents that are caused in large part by the stupidity of the injured construction worker have nonetheless resulted in the imposition of strict liability

under Section 240(1).<sup>52</sup>

Over the years, New York Courts have broadly construed the statute to encompass a wide range of construction site hazards that bear little resemblance to a typical fall from a defective scaffold or ladder.<sup>53</sup>

Various defenses to Labor Law Section 240(1) claims have evolved. These defenses include the plaintiff was not engaged in a “protected activity,” the hazard at issue is not within the scope of the statute, and, the height differential involved is insufficient.

Another available defense to a Labor Law Section 240(1) claim—that the plaintiff’s negligence was the “sole proximate cause” of the accident, was recently approved by the Court of Appeals in Blake v. Neighborhood Housing Services of New York City, Inc.,<sup>54</sup> which offered a glimmer of hope to defendants in Labor Law 240(1) cases.

Blake involved an accident in which the plaintiff, who operated his own contracting company and was working alone on a renovation job, fell from a ladder when the upper portion of the ladder retracted.<sup>55</sup> Because comparative negligence is not an available defense under Labor Law Section 240(1), the fact that the plaintiff fell from a ladder that he owned and had set up would not necessarily prevent a liability finding against the defendants under Labor Law Section 240(1). However, in Blake, the Court of Appeals held that because the plaintiff’s negligence in failing to make sure that the A-frame ladder was locked was the sole proximate cause of the accident, there was no liability under Labor Law Section 240(1).<sup>56</sup>

The Court of Appeals reiterated that in order to establish liability under Section 240(1), a plaintiff must establish that: (1) there was a failure to provide a proper safety device within the meaning of Section 240(1); and (2) that this violation of 240(1) was a proximate cause of the plaintiff’s accident.<sup>57</sup> The Court noted that the mere fact that a plaintiff falls from a scaffolding surface is insufficient in and of itself to establish that the device did not provide proper protection.<sup>58</sup>

The plaintiff in Blake testified that the ladder that he was using “was steady, had rubber shoes and was in proper working condition.”<sup>59</sup> The plaintiff further testified that the ladder was stable and that there was no reason to have it steadied during use.<sup>60</sup> He also

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## Labor Law § 240(1)

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revealed that he was not sure if he had locked the extension clips in place before ascending the rungs.<sup>61</sup> Therefore, there was sufficient evidence to support the jury's finding that the ladder that was being used was proper and adequate and that the accident was not proximately caused by a Labor Law Section 240(1) violation.<sup>62</sup> Instead, the Court held that the "sole proximate cause" of the accident was the plaintiff's negligence in failing to properly secure the ladder.<sup>63</sup> In an unusual show of support for owners and contractors in the Labor Law § 240 context, the Court held that "[t]he point of Labor Law § 240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so."<sup>64</sup>

Therefore, under the holding of Blake, where a defendant can establish that a proper and appropriate safety device was supplied to the injured plaintiff, and that the accident was caused solely by the injured plaintiff's negligence, there will be no liability under Labor Law Section 240(1).

Another defense available to contractors and owners under Labor Law Section 240(1) is the "recalcitrant worker" defense.<sup>65</sup> However, before the Blake decision, this defense had been narrowly construed so that it rarely afforded a viable defense to a defendant in a 240(1) action.<sup>66</sup> Prior to Blake, in order to prove that it was entitled to the protection of the "recalcitrant worker" defense, a defendant had to prove that the worker was injured as a result of a "refusal" to use available safety devices provided by the employer or owner.<sup>67</sup> Of course, it is difficult to prove that a worker "refused" to use available safety devices and the invocation of the "recalcitrant worker" defense has often been rejected by New York Courts.<sup>68</sup>

In Cahill v. Triborough Bridge and Tunnel Authority,<sup>69</sup> the Court of Appeals integrated the "sole proximate cause" defense that was articulated in Blake with the "recalcitrant worker" defense and held that a worker who fell from a height after choosing not to use an available safety line was not entitled to the protection of Labor Law Section 240(1).<sup>70</sup> The holding of Cahill signals that the "recalcitrant worker" defense has been strengthened by the sole proximate cause doctrine, and may now be a stronger defense available to defendants in 240(1) cases.

In Cahill, the deposition testimony established that there was a mechanical "manlift" that was some-

times available for workers to climb up and down wall-like structures known as "forms."<sup>71</sup> However, when the manlift was not available, workers had been instructed to use safety lines affixed to the forms.<sup>72</sup> The evidence established that plaintiff and the other workers attended frequent safety meetings in which they were instructed in the use of the safety lines.<sup>73</sup> The plaintiff's supervisor had previously caught him climbing a form without a safety line and the plaintiff had been warned that he was required to use a safety line.<sup>74</sup> The accident occurred when the plaintiff chose not to use a safety line and fell from one of the forms. The trial court granted the plaintiff summary judgment on the 240(1) claim, rejecting the "recalcitrant worker" defense.<sup>75</sup>

The Appellate Division, with one justice dissenting, affirmed the order granting summary judgment in favor of the plaintiff, holding that "the recalcitrant worker defense is not applicable" because the defendant had not shown that the plaintiff had disobeyed an immediate instruction to use a harness or other actually available safety device.<sup>76</sup> The Court of Appeals reversed and held that the defendants were entitled to a dismissal of the plaintiff's 240(1) claim.<sup>77</sup>

In Cahill, the Court of Appeals cited the "sole proximate cause" defense that had been articulated in Blake, stating that "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability."<sup>78</sup> In holding that the § 240(1) claim should be dismissed, the Court of Appeals integrated the "recalcitrant worker" defense within the reasoning of the sole proximate cause doctrine. The Court stated that the facts of the case established that: the plaintiff knew that there were proper safety lines available, and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.<sup>79</sup> The Court reasoned that the plaintiff "was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them."<sup>80</sup> The controlling question was not whether plaintiff was "recalcitrant," but "whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident."<sup>81</sup>

As such, the Court of Appeals decision in Cahill signals a strengthening of the "recalcitrant worker"

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## Insurance Coverage

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by the insured's delay in affording notice before being permitted to disclaim coverage.<sup>7</sup> The opinion of Judge Catterson, which was joined by Judge Ellerin, offered a scathing critique on the no-prejudice rule.<sup>8</sup>

As we anticipated, because there were two dissenters in Great Canal, Seneca Insurance Company was able to appeal the First Department's decision to the Court of Appeals.

Two other cases, Argo Corporation v. Greater New York Mutual Insurance Company,<sup>9</sup> and Rekemeyer v. State Farm Automobile Insurance Company<sup>10</sup> - which also involved the applicability of the no-prejudice rule, reached the Court of Appeals docket and were decided just prior to the Court of Appeals' decision in Great Canal.

In Argo, the Court of Appeals allayed any fears that the no-prejudice rule was in jeopardy and clearly held that at least in the liability insurance arena, the no-prejudice rule is still intact in New York State.<sup>11</sup>

Argo involved an alleged slip and fall on ice adjacent to a property that was managed by the Argo Corporation ("Argo"). Argo was served with a negligence summons and complaint on February 28, 2000. Argo failed to tender the complaint to its insurance carrier, Greater New York Mutual ("GNY") and on November 10, 2000, Argo was served with a default judgment. Argo received a notice of entry of the default judgment and of the scheduling of a hearing on the judgment on February 13, 2001. On February 21, 2001, Argo received a note of issue for trial readiness.<sup>12</sup>

It was not until May 2, 2001, over one year after it was served with the summons and complaint, that Argo first notified GNY of the lawsuit. On June 4, 2001, GNY disclaimed coverage because of the late notice of the lawsuit and occurrence.<sup>13</sup>

Under New York law, an insured's late notice of occurrence, claim or suit may be excused if, under the facts and circumstances presented, the delay is deemed reasonable.<sup>14</sup> However, the delay in the affording of notice by Argo was found to be patently unreasonable. The trial court agreed that Argo failed to comply with the notice conditions in the policy and dismissed Argo's declaratory judgment action. The Appellate Division affirmed, holding that "the insureds are unable to provide an excuse for their failure to comply with the policy's notice provisions."<sup>15</sup>

The Court of Appeals granted leave to appeal and

unanimously affirmed the Appellate Division's dismissal of the declaratory judgment action against GNY. In its decision, the Court of Appeals clearly reaffirmed the proposition that at least in the liability insurance context, the no-prejudice rule is still intact:

The rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy. A liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule. Argo's delay was unreasonable as a matter of law and thus, its failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of lawsuit.<sup>16</sup>

Rekemeyer involved a claim for supplementary SUM benefits.<sup>17</sup> In Rekemeyer, the Court of Appeals continued the trend, which it started in Bran-  
don, of relaxing the no-prejudice rule in the SUM context. The claimant, who sustained injuries in an automobile accident, failed to place her automobile insurance carrier on notice of her intention to make a SUM claim until six months after she was informed that the tortfeasor only had \$50,000.00 in automobile liability coverage.<sup>18</sup>

The Court of Appeals held that this six month delay in placing her carrier on notice of her intention to bring a SUM claim was untimely.<sup>19</sup> However, the Court of Appeals held that the facts presented called for a relaxation of the no-prejudice rule and held that in order to deny the insured's claim for SUM benefits, the carrier would have to prove that it was prejudiced by the six month delay.<sup>20</sup> The Court cited the fact that the plaintiff had timely provided her insurance carrier with notice of the accident and had made a claim for no-fault benefits soon thereafter.<sup>21</sup>

The claimant's insurance carrier, State Farm,

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undertook an investigation of the accident and required the plaintiff to undergo medical examinations.<sup>22</sup> Under these circumstances, the Court of Appeals held that the no-prejudice rule should not be applied because State Farm had been afforded with sufficient notice of the accident and claim so as to promote the valid policy objective of curbing fraud or collusion.<sup>23</sup> Under these circumstances, the Court held that if State Farm would be permitted to disclaim without showing that it was prejudiced by the delay in affording notice, it would result in a windfall to State Farm.

As such, while the no-prejudice rule is clearly well intact in the liability insurance arena, in the SUM context, where the insurance carrier has received notice of the accident, and has been afforded the opportunity to conduct an investigation into the circumstances of the accident, the insurance carrier will not be afforded the benefit of the no-prejudice rule.

In a decision dated June 16, 2005, the Court of Appeals reversed the Appellate Division's ruling in Great Canal and held that Seneca Insurance owed no duty to defend or indemnify Great Canal because Great Canal's failure to satisfy the notice of occurrence provision of the policy vitiated the coverage obligation.<sup>24</sup>

The Court again held that in the liability insurance context, the insurance carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence.<sup>25</sup> In Great Canal, in addition to arguing that the no-prejudice rule should not apply, the insured argued that its delay in affording coverage was excusable because it was reasonable under the circumstances.<sup>26</sup> Specifically, the insured argued that its delay in affording notice should be excused because it had a good-faith belief in non-liability.<sup>27</sup>

The Court of Appeals rejected this argument holding that while a good-faith reasonable belief in non-liability may in some circumstances excuse a delay in affording notice, the insured bears the burden of establishing the reasonableness of the proffered excuse. The Court noted that when an insured argues that it had a reasonable belief in non-liability, "the insured's belief must be reasonable under all the circumstances" and that "it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence."<sup>28</sup>

Under the facts and circumstances of Great Canal, the Court held that the insured failed to raise a triable issue of fact as to whether its delay in giving notice was reasonably founded upon a good faith belief of non-liability.

- Michael P. Kandler

## THE COURT OF APPEALS HOLDS THAT AN UNSIGNED CONTRACT IS A SUFFICIENT BASIS FOR A VIABLE CLAIM FOR INDEMNIFICATION AGAINST AN EMPLOYER UNDER WORKERS' COMPENSATION LAW SECTION 11

Prior to the enactment of the Omnibus Workers' Compensation Reform Act of 1996, third-party actions against employers were freely permitted.<sup>82</sup> However, with the advent of the 1996 Reform Act, which was passed for the stated purpose of limiting actions against employers, third-party actions against employers became impermissible unless one of two criteria are met: (1) the injured employee sustained a "grave injury" as specifically defined in the statute; or (2) the claim against the employer is "for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."<sup>83</sup>

As expected, a significant amount of litigation ensued involving the issue of whether or not the criteria for permissible third-party actions against an employer had been met. In Castro v. United Container Machinery Group, Inc.,<sup>84</sup> the Court of Appeals held that the "grave injury" criteria would be strictly construed.

While a significant volume of case law developed concerning the "grave injury" standard,<sup>85</sup> there is significantly less case law on the provision permitting third-party claims against employers for contribution or indemnification based upon a "written contract." As discussed in our first issue, in Tonking v. Port Authority of New York and New Jersey,<sup>86</sup> the Court of Appeals indicated that the contractual indemnification provision of Workers' Compensation Law Section 11 would also be strictly construed by the Court to meet the purpose of limiting actions against employers.

It is not uncommon in New York to find that construction work or other services have been performed without a signed contract. The question then arises as to whether a situation in which work is performed pursuant to an unsigned contract satisfies the "written contract" requirement of Section 11 of the Workers' Compensation Law. The Court of Appeals has now held in Flores v. Lower East

Side Service Center, Inc.,<sup>87</sup> that where parties have exchanged a written contract and their conduct was consistent with the provisions of the contract, even if the contract is not signed, the "written contract" requirement of Section 11 of the Workers' Compensation Law has been met.

In Flores, the Court of Appeals held that the defendant owner was entitled to summary judgment on its claim for contractual indemnification against the impleaded employer.<sup>88</sup> Even though the contract was not signed, the Court held that the evidence in the case established that the parties intended to be bound by the written contract.<sup>89</sup> In reaching this conclusion, the Court of Appeals relied upon its 1977 decision in Brown Brothers Electrical Contracting v. Beam Construction Corp.,<sup>90</sup> in which it held that "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound."<sup>91</sup>

Therefore, where the parties show that they intended to be bound by an unsigned contract, the unsigned contract will provide a sufficient predicate for a claim of contractual indemnification against an employer under Section 11 of the Workers' Compensation Law.

- Michael P. Kandler

## PRODUCT LIABILITY INSURANCE COVERAGE - COURT OF APPEALS NARROWLY CONSTRUES A STANDARD VENDORS ENDORSEMENT TO AFFORD COVERAGE ONLY FOR CLAIMS OF A DEFECTIVE PRODUCT

In a four-to-three decision rendered on June 29, 2005, entitled, Raymond Corporation v. National Union Fire Insurance Company of Pittsburgh, PA, the New York State Court of Appeals narrowly construed the insuring agreement contained in a standard vendor's endorsement to encompass only claims stemming from a defective product.<sup>92</sup>

Raymond was a declaratory judgment action brought by a manufacturer of side-loaders, ("Raymond") and a vendor of Raymond's products ("Arbor"), against Raymond's primary liability insurer, National Union Fire Insurance Company of Pittsburgh, PA ("National Union").<sup>93</sup> In the declaratory judgment action, Arbor sought coverage as an additional insured on a vendor's endorsement that was issued with the National Union policy.<sup>94</sup> The Court of Appeals reversed the decision of the Appellate Division, Third Department<sup>95</sup> and held that because the accident in the underlying action, which had been settled prior to the institution of the declaratory judgment action, was caused entirely by the negligence the vendor's employee in installing the side-loader, the vendor's endorsement did not afford coverage.<sup>96</sup>

In the underlying action, the end user of the side-loader product - "Ryerson" - rented the Raymond manufactured side-loader for use at its Philadelphia warehouse.<sup>97</sup> Arbor, a vendor of Raymond side-loaders, agreed to install and service the side-loader.<sup>98</sup> Evidence in the underlying action established that the side-loader was installed in a negligent manner by the Arbor technician, which resulted in an accident in which a Ryerson employee sustained serious head and brain injuries while operating it.<sup>99</sup> The parties did not dispute that Arbor's negligence, not any defect in the Raymond product, caused the accident.<sup>100</sup>

The underlying action settled for \$6,000,000.00, with \$3,000,000.00 paid by Arbor's primary liability insurer.<sup>101</sup> National Union asserted that its vendor's endorsement did not afford coverage to Arbor, which was solely at fault for the accident.<sup>102</sup> Raymond and Arbor asserted that the vendor's endorsement did afford coverage to

Arbor. National and Raymond agreed to contribute \$2,500,000.00 and \$500,000.00 respectively, while reserving their rights to resolve their coverage dispute against National Union in a separate action.<sup>103</sup> In the subsequent declaratory judgment action, Raymond and Arbor sought judgment against National Union for Raymond's \$500,000.00 contribution toward the settlement of the underlying action.<sup>104</sup> National Union counterclaimed for judgment against Raymond in the amount of its \$2,500,000.00 contribution.<sup>105</sup> After discovery, both parties moved for summary judgment.<sup>106</sup> The trial court denied Raymond's motion and granted National Union summary judgment, dismissing Raymond's complaint and issuing judgment on National's counterclaim. The court concluded that the vendor's endorsement was limited to personal injury claims arising out of a product defect only.

The Appellate Division, Third Department read the vendor's endorsement as broad enough to cover claims arising out of the vendor's negligence, as long as the accident arose out of the use of the primary insured's product.<sup>107</sup>

In a four-to-three decision, the Court of Appeals reversed the Appellate Division and held that the vendor's endorsement only afforded coverage for product defect claims and did not afford coverage where the evidence established that the injury was caused entirely by the negligence of the vendor, and not by any defect in the product.<sup>108</sup> It should be pointed out that only the duty to indemnify was addressed in the Raymond decision.<sup>109</sup> Under the doctrine that the duty to defend is broader than the duty to indemnify,<sup>19</sup> as long as any claim of a defective product is made, even under the Court of Appeals narrow interpretation in Raymond, a duty to defend under the vendor's endorsement would be triggered.

The vendor's endorsement (Endorsement 5, Additional Insured-Vendors Schedule) included the following standard insuring language:

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(Continued on page 10)

## Product Liability Insurance Coverage

(Continued from page 9)

“(s)ection III - Who Is An Insured” is amended to include as an Insured any person or organization (referred to below as “vendor”) shown in the schedule, but only with respect to “Bodily Injury” or “Property Damage” arising out of “Your Products” (Raymond’s products) shown in the schedule which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others in the regular course of the vendor(‘)s business, subject to [additional exclusions].<sup>111</sup>

The majority cited the standard insurance policy interpretation proviso which requires that the Court “construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.”<sup>112</sup>

In short, the majority held that the language of the insuring agreement contained in the vendor’s endorsement which limited coverage to bodily injuries “arising out of (Raymond’s products) means injuries arising out of defects in the products, rather than arising out of the vendor’s negligence.”<sup>113</sup> In its decision, the Court of Appeals cited Couch on Insurance, stating that, “(c)overage under the vendor’s endorsement is limited to injuries arising out of a defect in the manufacturer’s product.”<sup>114</sup> The Court also relied upon the language in a decision by the Seventh Circuit in Hartford Fire Insurance Company, v. St. Paul Surplus Lines Insurance Company.<sup>115</sup> In Hartford, the Seventh Circuit discussed the purpose of vendor’s endorsements as illustrated by the risks encountered by manufacturers and vendor’s in their respective roles:

[t]he purpose of a vendor’s endorsement is to protect the vendor (i.e., dealer or other distributor) against the expense of being dragged as an additional defendant into a lawsuit arising from a defect in a product that it distributes. It makes sense for the manufacturer to buy the insurance, as he has a better sense of the risk that there will be suits complaining about defects in his

products. This assumes, however, that the vendor’s role in the distribution of the product is passive. The manufacturer would be unlikely to insure the vendor against defects introduced by the vendor himself, . . . the risk of those defects being better known to the vendor than to the manufacturer. . . . Beyond that, the vendor’s endorsement is inapplicable if the vendor, whether by participating in the creation of the product or by altering or repairing it, may be responsible for the alleged defect out of which the product liability suit arises. That at least is the “majority view, . . .”<sup>116</sup>

The Court also cited the Seventh Circuit’s reasoning in noting that vendor’s endorsement policies are “cheap add-ons” to product liability policies:

and their cheapness makes the most sense if they’re limited to the case in which the vendor, being completely passive in relation to the harm giving rise to liability rather than the active author of the harm, would be entitled to indemnity from the manufacturer in the event that he (the vendor) was sued and held liable and made to pay damages . . .<sup>117</sup>

The dissent, in an opinion written by R.S. Smith, analyzed the wording of the insuring language of the vendor’s endorsement along with the exclusions and reasoned that if the insuring agreement was as limited as the majority viewed it, the exclusions would be entirely unnecessary.<sup>118</sup> The vendors endorsement included typical exclusions for contractual liability; express warranties unauthorized by the primary insured; any failure to make inspections, adjustments, tests or servicing that the vendor has agreed to make or normally undertakes; and demonstration, installation, servicing or repair operations except such operations performed by the vendor. The dissent reasoned that the exclusion for:

[d]emonstration, installation, servicing or repair operations except such operations performed by the Vendor, necessarily implied that coverage does exist for demonstrations and the like that are performed by the vendor.<sup>119</sup>

(Continued on the following page)

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**Product Liability Insurance Coverage***(Continued from previous page)*

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Therefore, the dissent reasoned that the wording of the vendor's endorsement clearly implied that coverage was afforded for damages that arose out of the product but which were not caused solely by a defect in the product.<sup>120</sup> The dissent's reasoning is further supported by the basic New York Insurance interpretation proviso that the term "arising out of" is broadly construed.<sup>121</sup>

The decision of the majority in Raymond establishes that under New York law, standard vendor's endorsements limit coverage to claims of product defects and do not afford coverage for claims of negligence by the vendor.

As noted above, the Raymond decision deals only with the duty to indemnify. Under New York law, if any claim asserted in a pleading could result in a covered loss, the insurance carrier must defend the entire lawsuit.<sup>122</sup> Therefore, if a pleading includes claims of a defective product, the carrier that issued a vendor's endorsement would owe a duty to defend the vendor. The extent to which a duty to indemnify would be owed under the vendor's endorsement would be determined by the extent to which the damage was actually caused by a product defect, which would include design defects, manufacturing defects and defective warnings.<sup>123</sup>

- Michael P. Kandler

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**Labor Law § 240(1)***(Continued from page 5)*

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defense by the merger of this defense with the "sole proximate cause" defense. The Court of Appeals established that a defendant need not prove that the plaintiff disobeyed an "immediate instruction" to use a safety harness or other actually available safety device" in order to be afforded the protection of the recalcitrant worker doctrine. As long as a worker has been advised of the availability of an appropriate safety device and had been instructed that he is required to use the safety device there will be no liability under Labor Law Section 240(1) if the worker is then injured as a result of his own decision to decline to use the safety device.

- Michael P. Kandler

1. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
2. See In re Brandon, 97 N.Y.2d at 496, 743 N.Y.S.2d at 56 fn.3.
3. Security Mutual Insurance Company of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440-443, 340 N.Y.S.2d 902 (1972).
4. See Uniguard Security Insurance Company v. North River Insurance Company, 79 N.Y.2d 576, 582, 584 N.Y.S.2d 290 (1992)
5. See In re Brandon, 97 N.Y.2d at 496, 743 N.Y.S.2d at 56 (noting that “[g]enerally, one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice”) (internal quotation marks omitted), citing Uniguard Security Insurance Company, 79 N.Y.2d at 581, 743 N.Y.S.2d 290.
6. See In re Brandon, 97 N.Y.2d at 496, 743 N.Y.S.2d at 56 fn.3.
7. 13 A.D.3d 227, 787 N.Y.S.2d 22 (1<sup>st</sup> Dep’t 2004).
8. See Great Canal Realty Corp., 13 A.D.3d at 235, 787 N.Y.S.2d at 29.
9. 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005).
10. 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).
11. See Argo Corp., 4 N.Y.3d at 340, 794 N.Y.S.2d at 707.
12. See Argo Corp., 4 N.Y.3d at 337, 794 N.Y.S.2d at 705.
13. See Argo Corp., 4 N.Y.3d at 377, 994 N.Y.S.2d at 705.
14. See Security Mutual Insurance Company of New York, 31 N.Y.2d at 441, 340 N.Y.S.2d at 905-906.
15. See Argo Corp., 1 A.D.3d 264, 265, 767 N.Y.S.2d 577, 578 (1<sup>st</sup> Dep’t 2003).
16. Argo Corp., 4 N.Y.3d at 474, 796 N.Y.S.2d at 16.
17. 4 N.Y.3d 468, 796 N.Y.S.2d 13.
18. See Rekemeyer, 4 N.Y.3d at 471, 796 N.Y.S.2d at 15.
19. See Rekemeyer, 4 N.Y.3d at 474, 496 N.Y.S.2d at 16.
20. See Rekemeyer, 4 N.Y.3d at 475, 796 N.Y.S.2d at 17.
21. See Rekemeyer, 4 N.Y.3d at 475-476, 796 N.Y.S.2d at 17.
22. See Rekemeyer, 4 N.Y.3d at 475-476, 796 N.Y.S.2d at 17.
23. See Rekemeyer, 4 N.Y.3d at 476, 796 N.Y.S.2d at 17.
24. Great Canal Realty Corp. v. Seneca Insurance Company, Inc., 2005 WL 1403524, 2005 N.Y. Slip Op. 05115.
25. See Great Canal Realty Corp., 2005 WL 1403524 (citations omitted).
26. See Great Canal Realty Corp., 2005 WL 1403524 (citations omitted).
27. See Great Canal Realty Corp., 2005 WL 1403524 (citations omitted).
28. See Great Canal Realty Corp., 2005 WL 1403524 (citations omitted).
29. See Metropolitan Property & Casualty Insurance Company v. Stowe, 7/11/200 NYLJ, (col.5) (observing that “the law regarding disclaimers by insurance is very strict-Insurance Law Section 3420”).
30. N.Y. Insurance Law § 3420(d).
31. See Markevics v. Liberty Mutual Insurance Company, 97 N.Y.2d 646, 649, 735 N.Y.S.2d 865, 868 (2001) (finding Liberty Mutual’s disclaimer ineffective as “the carrier did not give timely written notice of its disclaimer to the injured party”).
32. U.S. Underwriters Insurance Company v. City Club Hotel, LLC, 369 F.3d 102, 109 fn.8 (2d Cir. 2004) (observing that “[t]he requirements under New York law are clear and strict: an insurer must give notice of its intention to disclaim coverage ‘as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage’”), citing Hartford Insurance Company v. County of Nassau, 46 N.Y.2d 1028, 1029, 416 N.Y.S.2d 539 (1979).

33. See West 16<sup>th</sup> Street Tenants Corp. v. Public Service Mutual Insurance Company, 290 A.D.2d 278, 279, 736 N.Y.S.2d 34, 34 (1<sup>st</sup> Dep't 2002) (holding that the "[d]efendant's 30-day delay in disclaiming coverage was . . . unreasonable as a matter of law under Insurance Law § 3420(d). . . . [because the] [p]laintiff's delay in notifying [the] defendant of the occurrence giving rise to the claim, the sole ground on which [the] defendant disclaimed coverage, was obvious from the fact of the notice of claim and the accompanying complaint, and [the] defendant had no need to conduct an investigation before determining whether to disclaim").
34. See West 16<sup>th</sup> Street Tenants Corp., 290 A.D.2d at 279, 736 N.Y.S.2d at 35.
35. See Generali-U.S. Branch v. Rothschild, 295 A.D.2d 236, 237, 744 N.Y.S.2d 159, 161 (1<sup>st</sup> Dep't 2002) (stating that "[t]he reasonableness of any delay in disclaiming coverage must be judged from that point in time when the insurer is aware of sufficient facts to issue a disclaimer") (citation omitted).
36. See General Accident Insurance Group v. Cirucci, 46 N.Y.2d 462, 463, 864, 414 N.Y.S.2d 512, 514 (1979).
37. See Hartford Insurance Company, 46 N.Y.2d at 1029, 416 N.Y.S.2d at 541 (stating that "[a] reservation of rights letter has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage"); Allstate Insurance Company v. Gross, 31 A.D.2d 389, 391, 297 N.Y.S.2d 625, 627-628 (1<sup>st</sup> Dep't 1969) (holding "in the case before us that even though there is a reservation of rights, such reservation will not serve to excuse the insurer from its obligation to give written notice of disclaimer within a reasonable time").
38. See Pennsylvania Millers Mutual Insurance Company v. Sorrentino, 238 A.D.2d 491, 492, 657 N.Y.S.2d 62, 63 (2d Dep't 1997) (holding that the "reservation of rights letter did not constitute a written notice of disclaimer in compliance with Insurance Law § 3420(d)"); Mohawk Minden Insurance Company v. Ferry, 251 A.D.2d 846, 848, 674 N.Y.S.2d 512, 514 (3d Dep't 1998) (holding that the "[p]laintiffs . . . reservation of rights letter did not constitute an effective disclaimer").
39. Incorporated Village of Pleasantville v. Calvert Insurance Company, 204 A.D.2d 689, 690, 612 N.Y.S.2d 441, 443 (2d Dep't 1994) (holding that Insurance Law § 3420(d) is inapplicable to this case since the underlying claim does not involve death or bodily injury").
40. See Brown v. State Farm Insurance Co., 237 A.D.2d 476, 477, 655 N.Y.S.2d 104, 105 (2d Dep't 1997) (holding that "because this case involved property insurance, Insurance 3420(d) does not apply"); State v. Ackley, 245 A.D.2d 668, 669, 664 N.Y.S.2d 876, 878 (3d Dep't 1997) (noting that Section 3420(d) of the Insurance Law "does not apply where, as here, the underlying claim does not involve bodily injury or death").
41. Zappone v. Home Insurance Company, 55 N.Y.2d 131, 137, 447 N.Y.S.2d 911, 915 (1982).
42. Zappone, 55 N.Y.2d at 137, 447 N.Y.S.2d at 915.
43. See Worcester Insurance Company v. Bettenhauser, 95 N.Y.S.2d 185, 188-189, 712 N.Y.S.2d 433, 435 (2000) (stating that a "[d]isclaimer pursuant to Section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. . . . [because] the insurance policy does not contemplate coverage in the first instance"); Zappone, 55 N.Y.2d at 134, 138, 447 N.Y.S.2d at 915.
44. See e.g. Zurich Insurance Co. v. Travelers Indemnity Company, 184 A.D.2d 454, 456, 586 N.Y.S.2d 932, 934 (1<sup>st</sup> Dep't 1992) (observing that where Section 3420(d) of the Insurance Law does not apply, "the remaining parties may seek estoppel of Travelers' disclaimer of coverage only at common law").
45. See General Accident Group, 46 N.Y.2d at 864, 414 N.Y.S.2d at 514 (holding that because the insurer failed to assert a late notice defense in its initial disclaimer letter, it was precluded from raising it subsequently).
46. See Legion Insurance Company v. Weiss, 282 A.D.2d 576, 723 N.Y.S.2d 235 (2<sup>nd</sup> Dep't 2001); Vanegas v. Nationwide Mutual Fire Insurance Company, 282 A.D.2d 671, 723 N.Y.S.2d 516 (2<sup>nd</sup> Dep't 2001); Eagle Insurance Company v. Ortega, 251 A.D.2d 282, 674 N.Y.S.2d 56 (2<sup>nd</sup> Dep't 1998); United States Liability Insurance Company v. Young, 186 A.D.2d 644, 588 N.Y.S.2d 640 (2<sup>nd</sup> Dep't 1992); Utica Mutual Insurance Company v. Gath, 265 A.D.2d 805, 695 N.Y.S.2d 839 (4<sup>th</sup> Dep't 1999); Gross v. New York Central Mutual Fire Insurance Company, 2002 WL 31914673 (Sup. Ct., Appellate Term, 1<sup>st</sup> Dep't 2002).
47. Ross v. Curtis-Palmer Hydro-Electric Company, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49, 52 (citations and internal quotation marks omitted).

48. Ross, 81 N.Y.2d at 500, 601 N.Y.S.2d at 52. See Haimes v. New York Telephone Company, 46 N.Y.2d 132, 136-137, 412 N.Y.S.2d 863 (1976).
49. See Ross, 81 N.Y.2d at 401, 601 N.Y.S.2d at 53.
50. See Melber v. 6333 Main Street, 91 N.Y.2d 759, 762, 676 N.Y.S.2d 104, 105 (1998) (noting that the Court of Appeals has “broadly construed” the terms of Labor Law § 240(1) “in a variety of circumstances”); Wise v. 141 McDonald Avenue, LLC, 297 A.D.2d 515, 516, 748 N.Y.S.2d 439, 540 (1<sup>st</sup> Dep’t 2002) (stating that “Labor Law § 240(1) is to be construed as liberally as necessary to accomplish the purpose for which it was framed”) (citations omitted); Conway v. New York State Teachers’ Retirement System, 141 A.D.2d 957, 958, 530 N.Y.S.2d 300, 302 (2d Dep’t 1988) (noting that the “statutory duty” of Section 240(1) of the Labor Law “is to be broadly applied”).
51. See Stolt v. General Foods Corporation, 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650, 651 (1993) (stating that “[i]t is well settled that the injured’s contributory negligence is not a defense to a claim based on Labor Law § 240(1) and that the injured’s culpability, if any, does not operate to reduce the owner/contractor’s liability for failing to provide adequate safety devices”); Wieszchowski v. Skidmore College, 147 A.D.2d 822, 823, 537 N.Y.S.2d 91, 913 (3d Dep’t 1989) (stating that “[t]he duty imposed under the statute [§ 240(1)] is an absolute one and the worker’s possible contributing negligence is not a valid defense”) (citations omitted).
52. See e.g. Sharp v. Scandic Wall Limited Partnership, 306 A.D.2d 39, 40, 760 N.Y.S.2d 478, 480 (1<sup>st</sup> Dep’t 2003); Bombard v. Christian Missionary Alliance of Syracuse, 292 A.D.2d 830, 739 N.Y.S.2d 516 (4<sup>th</sup> Dep’t 2002) (holding that the plaintiff’s failure to lock the scaffold wheels goes towards his own negligence and is not relevant consideration on a Labor Law § 240(d) cause of action); Sherman v. Eugene I. Pitrowski Builders, Inc., 229 A.D.2d 959, 960, 645 N.Y.S.2d 244, 244-246 (4<sup>th</sup> Dept 1996); Bustos v. Rome General Lumber and Hardware, 6 Misc.3d 546, 551, 785 N.Y.S.2d 880, 884 (Sup. Ct. Oneida Co. 2004) (stating that the “[p]laintiff’s negligence in not” securing the subject ladder or “by tying it or having it held” “is rendered irrelevant by Labor Law § 240(1)’s non-delegable statutory duties”).
53. See e.g. Becerra v. City of New York, 261 A.D.2d 188, 190, 690 N.Y.S.2d 52, 54 (1<sup>st</sup> Dep’t 1999) (finding plaintiff’s fall through a hole in permanent floor while performing construction work to be gravity related and within purview of Labor Law § 240(1)); Smith v. Artco Industrial Laundries, Inc., 222 A.D.2d 1028, 635 N.Y.S.2d 884 (4<sup>th</sup> Dep’t 1995) (finding a welder’s fall down a laundry chute to be related to work protected by Labor Law § 240(1)).
54. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
55. 1 N.Y.3d at 283, 771 N.Y.S.2d at 485.
56. See Blake, 1 N.Y.3d at 291, 771 N.Y.S.2d at 491 (holding that “the record . . . fully supports the jury’s findings that there was no statutory violation and that plaintiff alone, by negligently using the ladder with the extension clips unlocked, was fully responsible for his injury”).
57. See Blake, 1 N.Y.3d at 287, 771 N.Y.S.2d at 488 (stating that “[t]hroughout our Section 240(1) juris prudence we have stressed two points in applying the doctrine of strict (or absolute) liability. First, that liability is contingent on a statutory violation and proximate cause”).
58. See Blake, 1 N.Y.3d at 287, 771 N.Y.S.2d at 489 (noting that “an accident alone does not establish a Labor Law § 240(1) violation or causation”).
59. Blake, 1 N.Y.3d at 283, 771 N.Y.S.2d at 485.
60. See Blake, 1 N.Y.3d at 284, 771 N.Y.S.2d at 485.
61. See Blake, 1 N.Y.3d at 284, 771 N.Y.S.2d at 485.
62. See Blake, 1 N.Y.3d at 290, 771 N.Y.S.2d at 490.
63. See Blake, 1 N.Y.3d at 290, 771 N.Y.S.2d at 490.
64. Blake, 1 N.Y.3d at 286, 771 N.Y.S.2d at 487.
65. See Blake, 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 490 fn.9 (stating that “Labor Law § 240(1) does not extend to a “recalcitrant worker,” meaning one whose refusal to use available safety devices results in injury”).
66. See Andrew W. Siracuse, Defense of Contributory Negligence has returned to Scaffold Law Cases, 5/10/99

- N.Y.L.J. 1, (col.1) (noting that courts have limited the recalcitrant worker defense “so severely that it was widely assumed that the defense had only a nominal existence”).
67. See Hagins v. State of New York, 81 N.Y.2d 921 (1993); Kaffke v. New York State Electric & Gas Corporation, 257 A.D.2d 840, 841, 685 N.Y.S.2d 305, 306 (3d Dep’t 1999) (noting “that the safety device must be visible at the worker’s immediate work site”).
68. See Crespo v. Triad, Inc., 294 A.D.2d 145, 147, 742 N.Y.S.2d 25, 29 (1<sup>st</sup> Dep’t 2002) (holding that the defendants “fail[ed] to raise an issue of fact with respect to their recalcitrant worker defense, where they fail to adduce any evidence that plaintiff refused to obey an order to utilize safety devices immediately available to him”); DeJara v. 44-14 Newtown Road Apartment Corporation, 367 A.D.2d 948, 950, 763 N.Y.S.2d 654, 656 (2d Dep’t 2003) (holding that the “Supreme Court properly declined to submit a recalcitrant worker defense to the jury, as there was no evidence that the decedent refused to use any additional safety devices provided to him and available at the work site on the day of the accident”); Morin v. Machnick Builders, Ltd., 4 A.D.3d 668, 772 N.Y.S.2d 388 (3d Dep’t 2004) (finding the recalcitrant worker defense inapplicable); Howe v. Syracuse University, 306 A.D.2d 891, 760 N.Y.S.2d 922 (4<sup>th</sup> Dep’t 2003).
69. 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).
70. See Cahill, 4 N.Y.3d at 37-38, 790 N.Y.S.2d at 77.
71. See Cahill, 4 N.Y.3d at 37-38, 790 N.Y.S.2d at 75.
72. See Cahill, 4 N.Y.3d at 37-38, 790 N.Y.S.2d at 75.
73. See Cahill, 4 N.Y.3d at 37-38, 790 N.Y.S.2d at 75.
74. See Cahill, 4 N.Y.3d at 38, 790 N.Y.S.2d at 75.
75. See Cahill, 4 N.Y.3d at 38, 790 N.Y.S.2d at 75.
76. See Cahill, 4 N.Y.3d at 38, 790 N.Y.S.2d at 75-76.
77. See Cahill, 4 N.Y.3d at 40, 790 N.Y.S.2d at 76-77.
78. See Cahill, 4 N.Y.3d at 39, 790 N.Y.S.2d at 76.
79. See Cahill, 4 N.Y.3d at 40, 790 N.Y.S.2d at 76.
80. See Cahill, 4 N.Y.3d at 39, 790 N.Y.S.2d at 76.
81. See Cahill, 4 N.Y.3d at 39-40, 790 N.Y.S.2d at 76.
82. See Barbieri v. Mount Sinai Hospital, 264 A.D.2d 1, 5-6, 706 N.Y.S.2d 8 (1<sup>st</sup> Dep’t 2000) (noting that “[t]he point of the statutory amendment was to abolish such third-party actions and to restore a regime wherein workers’ compensation was the exclusive remedy . . . in order to reduce insurance premiums and the attendant cost of doing business in the state”) (citations omitted); Castro v. United Container Machinery Group, Inc., 273 A.D.2d 337, 338, 339, 710 N.Y.S.2d 90, 91 (2d Dep’t 2002) (same proposition); Way v. Grantling, 289 A.D.2d 790, 791, 736 N.Y.S.2d 424, 426 (3d Dep’t 2001) (recognizing “that both the statutory language and the legislative history support the interpretation that the purpose of the amendments to Workers’ Compensation Law § 11 effected by the Omnibus Workers’ Compensation Reform Act of 1996 was to limit, substantially, the number of third-party claims maintainable against employers”).
83. N.Y. Workers’ Compensation Law § 11.
84. 96 N.Y.2d 398, 736 N.Y.S.2d 287 (2001).
85. See discussion contained within Issue 1, Volume 1 concerning brain injuries.
86. 3 N.Y.3d 486, 787 N.Y.S.2d 708 (2004), aff’g, 2 A.D.3d 213, 768 N.Y.S.2d 311 (1<sup>st</sup> Dep’t 2003).
87. 4 N.Y.3d 363, 795 N.Y.S.2d 491 (2005).
88. See Flores, 4 N.Y.3d at 367, 795 N.Y.S.2d at 493.
89. See Flores, 4 N.Y.3d at 370-371, 795 N.Y.S.2d at 496-497.
90. 41 N.Y.2d 397, 393 N.Y.S.2d 350 (1977).
91. Flores, 4 N.Y.3d at 368, 755 N.Y.S.2d at 495.
92. 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
93. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.

94. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
95. Raymond Corporation v. National Union Fire Insurance Company of Pittsburg, PA, 6 A.D.3d 788, 775 N.Y.S.2d 102 (3d Dep't 2004).
96. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
97. See Raymond Corp., 6 A.D.3d at 788-789, 775 N.Y.S.2d at 103.
98. See Raymond Corp., 6 A.D.2d at 788-789, 775 N.Y.S.2d at 103.
99. See Raymond Corp., 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453; Raymond Corp., 6 A.D.3d at 788-789, 775 N.Y.S.2d at 103.
100. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
101. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
102. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
103. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
104. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
105. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
106. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
107. See Raymond Corporation, 6 A.D.3d 788, 775 N.Y.S.2d 102.
108. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
109. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453.
110. See Fitzpatrick v. American Honda Motor Co. 78 N.Y.2d 61, 65, 571 N.Y.S.2d 672, 673-674 (1991); Town of Massena v. Healthcare Underwriters Mutual Insurance Company, 98 N.Y.2d 435, 443, 749 N.Y.S.2d 456, 459 (2002).
111. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip. Op. 05453 citing Couch on Insurance § 130:3 (3d ed. 1996) (internal quotation marks omitted).
112. Raymond Corp., 2005 WL 1523565, citing Consolidated Edison Company of New York v. Allstate Insurance Company, 98 N.Y.2d 208, 211, 222, 746 N.Y.S.2d 622 (2002).
113. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip. Op. 05453 (internal quotation marks omitted).
114. Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip. Op. 05453 (internal quotation marks omitted).
115. 280 F.3d 744, 745 (7<sup>th</sup> Cir. 2002).
116. Hartford Fire Insurance Company, 280 F.3d at 746-747.
117. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453 citing Hartford Fire Insurance Company, 280 F.3d at 747.
118. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453 (dissent).
119. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453 (dissent).
120. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453 (dissent).
121. See Raymond Corp., 5 N.Y.3d 157, 2005 WL 1523565 (N.Y.), 2005 N.Y. Slip Op. 05453 (dissent).
122. See Town of Massena, 98 N.Y.2d at 443, 749 N.Y.S.2d at 459 (noting that “[i]f the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend); Servitone Construction Corporation v. Security Insurance Company of Hartford, 64 N.Y.2d 419, 424, 488 N.Y.S.2d 139, 142 (1985) (stating that “[t]he duty to pay is determined by the actual basis for the insured’s liability to a third person”); Goldberg v. Lumber Mut. Casualty Ins. Co. of New York, 297 N.Y.248 (1948) (observing that “[t]he courts have frequently remarked that the duty to defend is broader than the duty to pay”); Conrad R. Sump & Co. v. Home Insurance Company, 267 A.D.2d 415, 417, 701 N.Y.S.2d 103, 105 (2d Dep’t 1999) (noting that “[i]f any claim arguably arises from a covered event, the insurance carrier must defend the entire action, and assumes the risk and the consequences of making its own decision as to what is alleged or

what might be proved against its insured”).

123. See Servitone Construction Corporation, 64 N.Y.2d at 424, 488 N.Y.S.2d at 142.

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