

LEGAL DEVELOPMENTS NEWSLETTER

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INSURANCE COVERAGE: LATE NOTICE OF OCCURRENCE, CLAIM AND SUIT AND THE “NO PREJUDICE” RULE - THE SAGA CONTINUES

Two Appellate Division, First Department Justices call for the abolition of the “no Prejudice” rule in New York State

New York State is one of a minority of jurisdictions that still follows the “no prejudice” rule with regard to denials of insurance coverage for untimely notice of occurrence, claim or suit.¹ Under the “no prejudice” rule, standard liability policy provisions which require the insured to provide the carrier with notice of an “occurrence,” claim or suit, as soon as practicable, provide a valid basis for a denial of coverage even where the insurance carrier cannot show any prejudice as a result of the delay in the affording of notice.

The rationale for the “no prejudice” rule is that because of the nature of liability insurance, prejudice can be inferred from a delay in affording notice to the insurance carrier, and because the insurance carrier will lose the ability to promptly investigate the claim, engage in settlement negotiations and to set reserves.

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 substantial and significant (i.e., a material breach).²

Under the “no prejudice” rule, unexplained delays in the providing of notice by the policyholder are upheld as a valid basis for a complete disclaimer of coverage even where the delay is brief and the carrier sustained no actual prejudice from the delay.³

Many judges in New York view the “no prejudice” rule as unfair, overly strict and punitive to policyholders who can be left without a defense and indemnification after paying their premiums in the event of a relatively minor delay in complying with the no-

tice provisions.

Two years ago, in a footnote to a decision entitled Brandon v. Nationwide Mutual Insurance Company,⁴ the Court of Appeals signaled that it might, in the future, abolish the “no prejudice” rule and join the majority view on this issue.

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.

In Brandon, Nationwide had promptly been provided with a notice of an intention to make a claim under the SUM portion of the policy. Therefore, the Court concluded that Nationwide had received notice of the occurrence and claim. The Court determined that because it received prompt notice of claim, Nationwide had an opportunity to investigate the incident, and the failure to forward the suit papers promptly was not a sufficient basis for a denial of coverage in the absence of prejudice. Therefore, the Court of Appeals held that the “no prejudice” rule would not be applied to the provision requiring that suit papers be forwarded to the carrier in the SUM context.

In Brandon, the Court of Appeals made it clear that it was only doing away with the “no prejudice” rule in the context of the narrow facts presented. In the now famous footnote 3, the Court of Appeals stated that New York is one of a minority of states that still follows the “no prejudice” rule when examining disclaimers of coverage for late notice of occurrence or claim in the liability policy context. To some readers, the Court of Appeals expressed an antipathy towards the “no prejudice” rule when it stated that:

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. . . states often begin the shift to a prejudice requirement in the uninsured motorist context, where various policy considerations - the adhesive nature of insurance contracts, the public policy objective of compensating tort victims, and the inequity of the insurer receiving a windfall due to a technicality are clearly implicated.⁵

However, the Court of Appeals concluded this loaded footnote by declining to rule on the “no prejudice” rule in general, stating that “the issue of whether New York should continue to maintain the ‘no prejudice’ exception when insurers assert late notice of claim as a defense is not before us.”⁶ As such, the Brandon decision clearly left the “no prejudice” rule intact with regard to disclaimers of coverage for late notice of occurrence, claim and suit in the liability policy context.

More recently, in a decision dated July 1, 2004, the Court of Appeals had the opportunity to abolish the “no prejudice” rule in a case entitled American Transit Insurance Company v. Sartore,⁷ but declined to do so.

In Sartore, the Court of Appeals unanimously upheld a disclaimer of coverage based upon the insured taxicab company’s failure to provide notice of occurrence, claim or suit. In this decision, the Court of Appeals did not mention the issue of prejudice and simply recited the “well settled” principle of insurance law, which holds that “an insurer has the right to demand that it be notified of any loss or accident that is covered under the terms of the insurance policy.” Perhaps the facts of Sartore were not appropriate for the Court to raise the prejudice issue.

In Sartore, the insured never provided the insurance carrier with notice of the occurrence, claim or suit.

The insurance carrier in Sartore only received notice after there was a \$100,000.00 judgment against the insured, when notice of the judgment was delivered to the insurance carrier by counsel for the injured party.

This brings us to the December 21, 2004 decision of the Appellate Division, First Department in the case entitled Great Canal Realty Corp. v. Seneca Insurance Co, Inc.⁸ In Great Canal, which involved a denial of coverage for late notice where the insured afforded notice approximately four months after the incident, two of the five Justices of the Court expressly held that the insurance carrier, Seneca Insurance, should be required to prove that it was prejudiced by the delay before being permitted to disclaim coverage. The opinion of Judge Katerson, which was joined by Judge Ellerin, offered a scathing attack on the “no prejudice” rule. Judge Lerner concurred in the decision, but on different grounds, holding that summary judgment should have been denied to Seneca not because prejudice should be required but instead because there was an issue of fact as to whether the insured had a valid excuse for the late notice based upon a well-settled defense known as a “reasonable belief in non-liability.”⁹

Judge Tom joined Judge Marlow in a dissenting opinion, in which it was stated that the Court should be bound by legal precedent in New York State and that essentially, only the Court of Appeals had the power to change the law in the state. The dissent wrote that New York still follows the “no prejudice” rule and that there was no reasonable excuse for the four-month delay in providing notice in the case at hand.¹⁰

Because there were two dissenters in Great Canal, Seneca Insurance Company will be able to take the appeal to the Court of Appeals as matter of right.¹¹ Therefore, the Court of Appeals may very well be reviewing Great Canal in the near future.

The Court of Appeals may rule on the issue of whether the “no prejudice” rule should be abolished before it hears arguments in Great Canal. There are two cases on the Court of Appeals’ February docket involving disclaimers of coverage for late notice in which the “no prejudice” rule has been invoked: Argo Corporation v. Greater New York Mutual Ins. Co.,¹² and Rekemyer v. State Farm Automobile Insurance Co.¹³

We will follow these cases and will provide you with updates on this important issue as developments occur.

WHEN IS A BRAIN INJURY A “GRAVE INJURY” UNDER SECTION 11 OF THE WORKERS’ COMPENSATION LAW?

Court of Appeals holds that the term “permanently disabled” within the brain injury section of the “grave injury” definition means unemployable in any context

By now, claims professionals in the general liability arena are well aware of the restrictions that were placed upon third-party actions against employers by the enactment of the Omnibus Workers’ Compensation Reform Act of 1996. This legislation significantly altered Section 11 of the Workers’ Compensation Law by providing that third-party actions for contribution and common-law indemnification against an injured worker’s employer can only be brought if the injured worker sustained a “grave injury” as defined in the statute.

The statute also left intact the ability of the claimant to bring a third-party action against an employer where the claim is one for contractual indemnification based upon a written contract that was entered into prior to the occurrence that caused the injury.

The term “grave injury” is defined in Section 11 of the Workers’ Compensation Law as follows:

. . . death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

The purpose of the 1996 reform was to protect employers’ liability carriers (1B coverage) from exposure to third-party tort claims by permitting such claims only in cases of narrowly defined “grave” injuries, or, where the employer entered into a written contract affording another party a right of contractual indemnification.

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In Castro v. United Container Machinery Group, Inc.,¹⁴ the Court of Appeals established that it would uphold the legislative intent of the Omnibus Reform Act of 1986 by strictly construing the “grave injury” definition. In Castro, the Court of Appeals held that the grave injury category of “loss of multiple fingers” must be read to mean total amputations and that a partial loss of multiple fingers does not constitute a “grave injury.” In Meis v. ELO Org., LLC,¹⁵ the Court of Appeals held that the loss of a thumb did not qualify as a “permanent and total loss of use” of a hand, and was therefore not a “grave injury”.

While some of the “grave injury” categories are clearly defined, the brain injury category, which is defined as an “acquired injury to the brain caused by an external physical force resulting in permanent total disability,” requires interpretation. The term “permanent total disability” is not defined in the statute and, not surprisingly, a split in the various Appellate Divisions on the meaning of this phrase developed. In viewing this issue, the Third and Fourth Departments have held that a “permanent total disability” as used in Section 11 of the Workers’ Compensation Law means that the injured worker is not employable in even the most menial tasks.¹⁶

The Second Department’s standard in order for a brain injury to meet the “grave injury” definition was even more strict than the unemployability standard. In Shuler v. Kings Plaza Shopping Center and Mar., Inc.,¹⁷ the Second Department held that the plaintiff had not sustained a grave injury where he was able to perform such daily life activities as dressing and feeding himself. Under the stricter approach that had been offered by the Second Department, a brain injury is not a “grave injury” unless the plaintiff is essentially in a vegetative state.

The Court of Appeals has now resolved this split between the Departments in Rubeis v. Aqua Club, Inc.¹⁸ In Rubeis, the court of Appeals addressed three separate cases which all pres-

ented the issue of whether a brain injury met the “grave injury” standard of Section 11 of the Workers’ Compensation Law.¹⁹

Without addressing the facts and specific injuries alleged by each of the plaintiffs in these three cases, suffice it to say that the Court of Appeals clearly adopted the test that had been developed by the Third and Fourth Departments and held that a brain injury constitutes a “grave injury” within the meaning of the statute when the plaintiff is unemployable “in any capacity.” The Court of Appeals made it clear that the “grave injury” standard in the brain injury setting will not be met where the plaintiff is simply unable to perform his or her prior job. As long as the plaintiff is able to be gainfully employed in “any capacity,” the grave injury standard will not have been met.²⁰

In Rubeis, the Court of Appeals rejected the stricter “vegetative state” standard that had been adopted by the Second Department. The majority of the Court held that the Workers’ Compensation Law deals with employment benefits and the term “disability” generally refers to an inability to work. Judge Read was the sole dissenter in the Rubeis decision. She supported the Second Department’s requirement of a vegetative state.²¹

Insurance carriers that issue employers’ liability (“1B” coverage) insurance would have obviously preferred the more strict “vegetative state” standard that had been employed by the Second Department. Nonetheless, the issue is now resolved.

Now, in determining whether construction site owners, general contractors, building owners and other “claimants” will be permitted to bring third-party actions against employers for common-law indemnity and contribution in brain injury cases, the issue will be whether the injured plaintiff is employable in any context. Employability may be able to be established through the deposition testimony of the injured plaintiff - assuming the injured plaintiff can speak. Another way to prove employability will be through the use of vocational rehabilitation experts.

LEGAL FEES IN DECLARATORY JUDGEMENT ACTIONS - THE COURT OF APPEALS HOLDS THAT THE CARRIER THAT LOSES A DECLARATORY JUDGEMENT ACTION MUST PAY THE INSURED’S LEGAL FEES INCURRED IN THE UNDERLYING ACTION AND THE DECLARATORY JUDGEMENT ACTION, EVEN WHERE A DEFENSE HAS BEEN PROVIDED

Insurance carriers often bring a declaratory judgment action after issuing a disclaimer of coverage. If the insurance carrier believes that the coverage issues are not clear cut, it may opt to provide the insured with a qualified defense in the underlying action while the declaratory judgment action is pending. By providing a defense, the insurance carrier is in a better position to control costs and limit exposure.

Under New York law, where a declaratory judgment action is instituted by the insurance carrier against its insured, thereby casting the insured in a “defensive posture,” the insurance carrier will have to pay the insured’s legal fees in the underlying action and the declaratory judgment action if the insurance carrier is found to owe a duty to defend and indemnify.²² This rule applies even where the insurance carrier has provided a qualified defense in the underlying action.²³

The fact that the insurance carrier may be subjected to additional costs, in the form of a judgment for the insured’s legal fees in defending a declaratory judgment action, should always be considered when deciding whether to institute a declaratory judgment action. However, the risk may be well worth it to an insurance carrier that wants a clear declaration from the court regarding any possible obligation to defend and indemnify where the potential exposure is high.

DIRECT ACTIONS BY INJURED PARTIES AGAINST CARRIERS - THE COURT OF APPEALS HOLDS THAT A JUDGEMENT AGAINST THE INSURED IS A PRE-REQUISITE TO A DIRECT ACTION BY THE INJURED PARTY AGAINST THE CARRIER

New York is a "direct action" state with a statute that permits an injured party that has obtained a judgment against a defendant to bring a direct action against the defendant's insurance carrier in an effort to compel the carrier to satisfy the judgment.²⁴

Before bringing a direct action against the defendant's insurance carrier, the judgment must remain unsatisfied for at least for 30 days. The "direct action" statute permits the injured party to litigate coverage issues directly against the defendant's insurer. In the "direct action" case, the coverage defenses available to the insurance carrier will be litigated and if the grounds for denying coverage are found to be invalid, the defendant's insurance carrier will be compelled to satisfy the unpaid judgment to the extent of available insurance coverage.

Insurance carriers should be mindful of the possibility of a "direct action" when issuing a denial of coverage. If an insurance carrier issues a denial of coverage and simply closes its file, it may be forced to litigate the coverage issues later when the plaintiff brings a direct action against the carrier. While valid coverage defenses will survive and lead to a successful defense of the direct action, the insurance carrier will not be able to contest the judgment amount. One of the risks of an improper denial is that the insurance carrier may be stuck with the damage award previously set.

While New York law does not require an insurance carrier to bring a declaratory judgment action promptly following a disclaimer of coverage as in some jurisdictions,²⁵ the commencement of a declaratory judgment action offers some strategic advantages. The carrier may have an opportunity to step in and defend the underlying action or settle the underlying action if it is unsuccessful

in the declaratory judgment action.

Another option, of course, is to provide a defense while simultaneously bringing a declaratory judgment action.

Although New York's "direct action" statute clearly provides that the injured party cannot bring a direct action against the insurance carrier until the judgment has been unpaid for a period of at least 30 days, plaintiffs' attorneys often attempt to commence direct actions prematurely before a judgment has been rendered.

In Lang v. Hanover Insurance Company,²⁶ the Court of Appeals held that an injured party does not have standing to bring an action against a defendant's insurance carrier, with whom it lacks contractual privity, until a judgment against the defendant-insured has remained unpaid for at least 30 days as required by New York's "direct action" statute.

In Lang, an injured plaintiff argued that despite the wording of the direct action statute, under New York's declaratory judgment statute, CPLR 3001, the plaintiff was nonetheless entitled to bring a declaratory judgment action against the defendant's insurance carrier before obtaining a judgment. The Court of Appeals rejected the plaintiff's argument and held that in order to bring a direct action against an insurance carrier, the injured party must first obtain a judgment against the defendant-insured, and that judgment must have been unpaid for 30 days, as required as a condition precedent by the direct action statute.²⁷

If an injured party attempts to bring a direct action against the insurance carrier prior to obtaining a judgment, the insurance carrier should move for a prompt order of dismissal. The dismissal would be "without prejudice," and the injured party would be able to bring the action if and when a judgment is obtained.

THE APPELLATE DIVISION, FIRST DEPARTMENT HOLDS THAT ILLEGAL ALIENS CANNOT RECOVER LOST WAGES BASED UPON THEIR ILLEGAL EMPLOYMENT IN THE UNITED STATES

In 1986, the United States Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"). Pursuant to IRCA, the employment of illegal aliens became illegal and subjected violators to civil and criminal penalties.

In 2002, the United States Supreme Court held that the National Labor Relations Board was prohibited by IRCA from awarding back pay to illegal aliens. In a 5-4 decision, the Supreme Court held that "awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."²⁸

The Court further held that "awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations."²⁹

Prior to the Supreme Court's decision in Hoffman, New York Courts had permitted claims of lost wages by illegal aliens based upon the illegal aliens' rate of pay in the United States.³⁰ However, since Hoffman, defense attorneys began to argue that illegal aliens were barred from bringing claims for lost earnings, arguing the IRCA and the Supreme Court decision in Hoffman bars such claims.

Until recently, no Appellate Court had addressed the issue of whether or not claims by illegal aliens for lost earnings were still viable in the wake of Hoffman. In two decisions rendered simultaneously, Sanango v. 200 East 16th Street Housing Corporation³¹ and Balbuena v. IDR Realty, LLC,³² the Appellate Division, First Department has now held that illegal aliens who bring personal injury actions cannot maintain claims for lost earnings based upon their rate of earnings in the United States. Instead, illegal alien plaintiffs can claim lost earnings based upon evidence of what they would have earned in their home country.

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INDEMNIFICATION CLAUSES MUST BE UNMISTAKABLY CLEAR TO BE ENFORCEABLE— PARTIES MUST BE CLEARLY IDENTIFIED

Court of Appeals narrowly construes terms of an indemnification provision to deny indemnification rights to a third-party to the contract

Third-party actions may only be brought against employers if the plaintiff has sustained a “grave injury” or if the third party claim is one for contractual indemnification based upon a written contract entered into prior to the alleged subject accident. Because the “grave injury” standard is strictly construed and difficult to satisfy, the ability to bring a third-party action against an employer will often depend upon whether there is a viable claim for contractual indemnification against the employer.

Boilerplate language purporting to include a broad list of indemnitees has become commonplace in construction contracts and leases. These contracts often state that the parties entitled to indemnification include the building owner and the owner’s “agents.”

In Tonking v. the Port Authority of New York and New Jersey, which New York’s Court of Appeals decided on December 2, 2004, the issue presented was whether a construction contract between an owner (the Port Authority) and a subcontractor (VPH Mechanical) afforded a right of indemnification in favor of the construction manager (Bovis), a non-party to the contract.³⁷

In Tonking, an employee of VPH brought an action for personal injuries sustained in a construction site accident against the Port Authority and Bovis.

The contract contained an indemnification clause which described the parties entitled to indemnification as the Port Authority and its officers, “agents,” and employees.

Bovis argued that as the construction manager, it was an “agent” of the Port Authority and was therefore entitled to bring a third-party claim for contractual indemnification against the subcontractor. VPH, which was represented by CKB&B, LLP (Michael P. Kandler and Jason E. Goldberg), argued that an examination of the language used by the parties throughout the contract showed that the parties did not intend to confer a right of indemnification upon Bovis by using the term “agents” in the indemnification clause.

As required by New York Law, the Court of Appeals strictly construed the indemnification clause and held that the term “agents” did not sufficiently identify the construction manager. Therefore, Bovis was not entitled to contractual indemnification against the injured plaintiff’s employer. The Court of Appeals noted that the parties to the contract, the Port Authority and the plaintiff’s employer (VPH) had used the term “construction manager” repeatedly throughout the contract (*i.e.*, more than 130 times).

Despite Bovis’ argument that as the construction manager, it was acting as an agent of the owner, the Court of Appeals held that if the parties had wanted to unmistakably confer a right of indemnification upon Bovis, they would have used the term “construction manager” or would have identified Bovis by name. The Court of Appeals noted that in strictly construing the contract, the purpose of Workers’ Compensation Law Section 11 (*i.e.*, to limit third-party actions against employers) was being met.

Because the “grave injury” standard is strictly construed, even catastrophic injuries may not meet the “grave injury” standard. Therefore, the issue of whether defendants can transfer significant exposure to an injured plaintiff’s employer will often rest upon the existence of a viable contractual indemnification claim.

As established by Tonking, indemnification clauses are strictly construed under New York law and any litigant that is prosecuting or defending a third-party claim for contractual indemnification must examine the language of the indemnification clause to make sure that the intent to indemnify is “unmistakably clear.” Labels in an indemnification clauses such as “agent” may not be sufficiently specific and clear to entitle a party to claim the benefit of an indemnification clause.

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Sanango involved an illegal alien who sustained injuries at a construction site and brought an action asserting violations of Labor Law § 240. At trial, the jury awarded the plaintiff \$96,000 for lost earnings.³³

The defendant moved to vacate the award of lost earnings, arguing that IRCA and Hoffman precluded an award of lost wages to an illegal alien. The First Department held that New York State tort law that had permitted undocumented aliens to recover compensation for lost illegal wages as an element of damages is pre-empted by IRCA pursuant to the Supremacy Clause of the United States Constitution. The Appellate Division held that in light of the enactment of IRCA and the Supreme Court’s decision in Hoffman, “plaintiff’s status as an undocumented alien bars or limits his recovery for lost earnings.”³⁴

The Appellate Division recognized that the United States Supreme Court had held in Hoffman that:

“it subverts federal immigration policy to compensate an undocumented alien for wages that, but for some violation of his rights, he might have earned illegally in the United States.”³⁵ However, the Appellate Division, First Department held that the plaintiff in Sanango could recover lost wages based upon evidence of what he could have earned in his home country. The Court remanded the case for trial for a factual determination on this issue.³⁶

Obviously, the First Department’s holdings in Sanango and Balbuena will benefit liability insurance carriers and defendants in personal injury actions brought by illegal aliens. In the First Department, illegal aliens can no longer obtain damages for wages they would have earned in the United States had they not been injured. As many illegal aliens in New York State come from third world countries, it will be very difficult for plaintiffs to prove that they would have had significant earnings in their home country.

We will follow this issue to see how it is addressed by the other three Appellate Divisions in New York State.

1. Security Mutual Insurance Company v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902 (1972); American Home Assurance Co. v. International Insurance Co., 90 N.Y.2d 433, 441-442, 661 N.Y.S.2d 584 (1997).
2. See Brandon v. Nationwide Mutual Insurance Company, 97 N.Y.2d 491, 496, 743 N.Y.S.2d 53, 56 (2002) (noting that “[g]enerally, ‘one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice’”), citing Unigard Security Insurance Company v. North River Insurance Company, 79 N.Y.2d 576, 581, 584 N.Y.S.2d 290, 292 (1992).
3. See Deso v. London & Lancashire Indem. Co., 3 N.Y.2d 127, 164 N.Y.S.2d 689 (1957) (holding an unexcused 51-day delay in providing notice unreasonable as a matter of law); Rushing v. Commercial Cas. Ins. Co., 251 N.Y. 302 (1929) (holding a 22-day delay in providing notice without explanation or excuse to be unreasonable as a matter of law); Zadrima v. PSM Insurance Co., 208 A.D.2d 529, 616 N.Y.S.2d 817 (2d Dep’t 1994); Heydt Contracting Corp. v. American Home Assurance Company, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dep’t 1989); Herold v. East Coast Scaffolding, Inc., 208 A.D.2d 592, 617 N.Y.S.2d 197 (2d Dep’t 1994).
4. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
5. 97 N.Y.2d at 496, 743 N.Y.S.2d at 56 (fn 3).
6. 97 N.Y.2d at 496, 743 N.Y.S.2d at 56 (fn 3).
7. 3 N.Y.3d 71, 781 N.Y.S.2d 630 (2004).
8. 13 N.Y.3d 227, 787 N.Y.S.2d 22 (1st Dep’t 2004).
9. 13 N.Y.3d 227, 787 N.Y.S.2d at 30.
10. 13 N.Y.3d 227, 787 N.Y.S.2d at 30.
11. See CPLR 5601 (providing that “[a]n appeal may be taken to the court of appeals as of right in an action originating in the supreme court, . . . from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal”).
12. 1 A.D.3d 264, 767 N.Y.S.2d 577 (1st Dep’t 2003).
13. 7 A.D.3d 955, 777 N.Y.S.2d 551 (3rd Dep’t 2004).
14. 96 N.Y.2d 398, 736 N.Y.S.2d 287 (2001).
15. 97 N.Y.2d 714, 716, 740 N.Y.S.2d 689 (2002).
16. See Way v. Grantling, 289 A.D.2d 790, 736 N.Y.S.2d 424 (3d Dep’t 2001); Knauer v. Anderson, 2 A.D.3d 1314, 769 N.Y.S.2d 799 (4th Dep’t 2003).
17. 294 A.D.2d 556, 743 N.Y.S.2d 141 (2d Dep’t 2002).
18. 3 N.Y.3d 408, __ N.Y.S.2d __ (2004).
19. The cases considered included Rubeis, Largo-Chicaiza v. Westchester Scaffold Equipment Corp., and Knauer v. Anderson.
20. 3 N.Y.3d 408, __ N.Y.S.2d __.
21. See 3 N.Y.3d at 418, __ N.Y.S.2d __.
22. See Mighty Midgets, Inc. v. Centennial Insurance Co., 47 N.Y.2d 12, 21-22, 416 N.Y.S.2d 559 (1979).
23. US Underwriters Insurance Company v. City Club Hotel, LLC, 3 N.Y.3d 592, __ N.Y.S.2d __ (2004).
24. See N.Y. Insurance Law § 3420(b)(1). See also Fisons Corp. v. Lumbermens Mutual Casualty Co., 229 A.D.2d 925, 925, 645 N.Y.S.2d 230, 230 (4th Dep’t 1996) (noting that § 3420(b)(1) “authorizes a direct action against an insurer where a judgment has been entered against its insured and remains unsatisfied at the expiration of 30 days from service of notice of entry of the judgment”).

25. See e.g. Gibraltar Ins. Co. v. Varkalis, 115 Ill.App.2d 130, 253 N.E.2d 065 (Ill. App. Ct. 1969) (noting that in Illinois, if “an insurer is presented with a claim that may or may not be covered by the policy, if the carrier refuses to provide its insured an unrestricted defense, yet desires to ultimately urge exclusionary coverage defenses, it must: (1) Secure a declaratory judgment of its rights and obligations while defending its potential insured on a reservation of rights, or (2) Defend its potential insured on a reservation of rights and adjudicate its coverage in a supplemental suit”).
26. 3 N.Y.3d 350,787 N.Y.S.2d 211 (2004).
27. N.Y. Insurance Law § 3420(b)(1).
28. See Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 149 (2002).
29. 535 U.S. at 150.
30. See Public Administrator of Bronx County v. Equitable Life Assurance Society of the United States, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dep’t 1993) (noting that “the plaintiff administrator should be permitted to offer evidence of any wages that his decedent, an alien working in the United States on an apparently illegal basis, might have earned”); Collins v. New York City Health and Hospitals Corp., 201 A.D.2d 447 N.Y.S.2d 387 (2d Dep’t 1994); Klapa v. O & Y Liberty Plaza Co., 168 Misc.2d 911, 645 N.Y.S.2d 281 (Sup. Ct. N.Y. County 1996) (stating that “[i]n New York, an illegal alien may sue to recover damages for future lost earnings resulting from tortious injury”).
31. 788 N.Y.S.2d 314, 2004 WL 2984888 (N.Y.A.D. 1 Dept.).
32. 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep’t 2004).
33. See 788 N.Y.S.2d 314, 2004 WL 2984888 (N.Y.A.D. 1 Dept.).
34. 788 N.Y.S.2d 314, 2004 WL 2984888 (N.Y.A.D. 1 Dept.).
35. 788 N.Y.S.2d 314, 2004 WL 2984888 (N.Y.A.D. 1 Dept.).
36. See 788 N.Y.S.2d 314, 2004 WL 2984888 (N.Y.A.D. 1 Dept.).
37. 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 (1st Dep’t 2003). CKB&B, LLP, represented the Second Third-Party Defendant-Respondent, VPH Mechanical Corp., and obtained a dismissal of Bovis’ Second Third-Party action.

