

New York's Longstanding "No Prejudice" Rule for Late Notice Disclaimers is Reversed by Statute

On July 21, 2008, New York Governor David Paterson signed into law Chapter 388 of the Laws of New York, 2008, which reverses New York's "no prejudice" rule for disclaiming coverage on the basis of an insured's late notice of an occurrence or suit.

New York Courts have long enforced disclaimers of coverage based upon an insured's late notice of an occurrence or suit without requiring that an insurer establish prejudice as a result of the late notice. Under the new amendment to Insurance Law §3420, in order to effectively disclaim coverage for late notice, an insurer will be required to establish material prejudice as a result of the insured's delay in providing notice of

a claim.

The requirement of a showing of material prejudice will make it extremely difficult for an insurance carrier to effectively disclaim based on an insured's breach of a policy's notice conditions.

The new law will only apply to policies issued, renewed, or amended on or after January 17, 2009.

History of the "No Prejudice" Rule

New York has long been among a minority of states which did not require an insurance company to show prejudice before effectively disclaiming coverage based on an insured's late notice of a

claim. Although there had previously been calls for a change to New York's strict "no prejudice" rule, the New York State Court of Appeals had consistently upheld disclaimers of coverage based on late notice of a claim without requiring a showing of prejudice.¹ While there were limited exceptions, such as an insured's reasonable belief in non-liability or other extenuating circumstances,² an insured's failure to provide timely notice of an occurrence or suit resulted in a breach of a policy's notice provisions and would vitiate coverage. *Id.*

Despite modifications made to the "no prejudice" rule in the limited context of Supplementary Uninsured Motorist
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Court of Appeals Upholds Validity of Partial Indemnity Agreements in Construction Contracts

In *Brooks v. Judlau Contracting, Inc.*, the Court of Appeals resolved a developing split in the Appellate Division by holding that partial indemnity agreements are valid under General Obligations Law §5-322.1.¹

As practitioners in the field of construction accident litigation know, the issue of whether or not indemnity provisions in construction trade con-

tracts are void under General Obligations Law §5-322.1 has been a hotly litigated subject over the past several years. General Obligations Law §5-322.1, enacted in 1975, states that indemnity agreements in construction contracts, which purport to require indemnity of the promisee against liability for damage arising out of bodily injury or property damage "contributed to, caused by or resulting from the negligence of the promisee, or his agents or employees, are void and unenforceable."² For many years following the enactment of this statute, Courts in New York routinely struck entire indemnity provisions as void and

unenforceable even if the promisee, typically an owner or general contractor, bore little or no negligence. The statute was interpreted so as to prohibit indemnity agreements in construction contracts, even where the promisee was found to be only one percent at fault, and the promisor was found to be the primary tortfeasor.³

With the amendment of Workers' Compensation Law §11, the enforceability of indemnity provisions in written construction contracts attained even greater significance. Amended in 1996, §11 of the Workers' Compensation Law prohibited third party claims against employers for contribution and Common Law indemnification unless the injured party sustained a "grave injury" as defined by the statute.
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The Court of Appeals Revisits the Scope of Labor Law §240(1)

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("SUM") coverage,³ the New York Court of Appeals had steadfastly affirmed the "no prejudice" rule in the context of liability policies. The Court of Appeals in *Argo Corporation v. Greater New York Mutual Insurance Company* and *Great Canal Realty Corp. v. Seneca Insurance Company, Inc.* recently affirmed the principle that in the liability insurance arena, the insurance company need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence.

With the passage of Chapter 388, the legislature has done what the Court of Appeals refused to do — eliminate the "no prejudice" rule. The following is a synopsis of the significant changes resulting from the new legislation.

1. The new law provides that for occurrence-based policies affording coverage for personal injury or property damage, the insurer cannot deny coverage for failure of the insured, injured party, or claimant, to give timely notice of a claim unless the insurer has suffered prejudice as a result of the delayed notice.

2. An insurer's rights shall not be deemed prejudiced unless the failure to provide timely notice "materially impairs the ability of the insurer to investigate or defend the claim."

3. When an insurer brings a declaratory judgment action seeking to enforce a late notice disclaimer, the burden of proving material prejudice will be on the insurance carrier if the notice of the occurrence or suit was provided within two (2) years of the time required under the policy; the burden of proving that the insurer did not suffer material prejudice will be on the insured if the notice was provided more than two (2) years after the time required under the policy.

4. There will be an irrebuttable presumption of prejudice if, prior to the providing of notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise.

5. Claims-made policies, which require the submission of a claim during a policy period to trigger coverage, are exempt from the new law. As the statute only applies to liability coverage, the new law does not apply to first party property claims.

6. Where an insurance carrier has disclaimed coverage based upon late notice, the new law expressly permits an

injured plaintiff to bring a declaratory judgment action directly against the insurer. In such a declaratory judgment action, the sole question to be determined will be the validity of insurer's disclaimer or denial based upon the failure to provide a timely notice. However, if the insurance carrier commences a declaratory judgment action within sixty (60) days of its disclaimer, the injured party will not have the right to bring the declaratory judgment action. Under New York's current direct action statute, an injured party cannot bring a direct action of any kind against a defendant's insurance carrier until thirty (30) days after the entry of judgment in the underlying case.

7. Policy Information Required to be Provided to the Injured Party Upon Written Request.

The new law requires that where an injured person or other claimant in a bodily injury or death case provides a written request for policy information to a liability insurance carrier, the liability insurance carrier must provide the following information to the injured person or claimant within sixty (60) days of receipt of the written request: (a) confirmation in writing regarding whether the insured had a liability insurance policy of the type covered by the statute (a liability policy affording coverage for death or bodily injury arising out of a motor vehicle accident or other accident); and (b) provide the liability insurance limits of the coverage provided under the policy. This policy information provision does not apply to umbrella or excess policies, or to claims involving property damage. If the claimant does not provide sufficient information to allow the insurer to identify a policy that may be applicable to this reporting requirement, the insurer must notify the claimant of the information needed within forty-five (45) days, after which the insurer has an additional forty-five (45) days to provide the information required.

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When the Law Will Take Effect

8. The new law will become effective 180 days after it was signed into law, and will not apply to policies already issued or issued before the 180-day period. Because the bill was signed into law on July 21, 2008, the law will only affect policies issued, renewed, or modified on or after January 17, 2009.

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9. Therefore the "no prejudice" rule will still apply to late notice disclaimers on policies issued before January 17, 2009.

What Qualifies as "Material Prejudice"?

The new law states that an insurer will not be prejudiced by a failure to timely provide notice unless the insurer's ability to investigate or defend the claim is "materially impaired." Because New York has long followed the "no prejudice" rule, it is difficult to predict how New York Courts will determine whether an insurer has suffered material prejudice as a result of late notice. In discussing prejudice to a liability insurance carrier, the First Department has emphasized factors such as loss of opportunity for an early settlement, loss of opportunity to investigate a claim in its early stages, and an inability to locate witnesses.⁴

To further guide our attempt to predict how New York Courts may rule in the future, we believe that it is instructive to examine how Courts in other jurisdictions have dealt with this issue.

New Jersey Courts have held that there must be a "likelihood of appreciable prejudice" as a result of an insured's delay in providing notice of an occurrence.⁵ New Jersey Courts have held that a carrier "must establish more than the mere fact that it cannot employ its normal procedures in investigating and evaluating the claim." *Id.* Further, an insurance carrier must establish that its likelihood of success in defending against the accident victim's claim is affected. *Id.* In deciding whether carriers have met this burden, New Jersey Courts have examined factors such as the opportunity to examine records and effectuate an early settlement.⁶

In California, an insurer has the burden of showing substantial, actual prejudice to effectively disclaim coverage based on an insured's breach of the policy's notice provisions.⁷ The Court in *Belz v. Clarendon America Ins. Co.* held that in order to establish actual prejudice, an insurer must show that it would have handled the underlying claim in a different way, and show that there is a substantial likelihood that it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability. *Id.*

Therefore, an examination of the law in jurisdictions that do not employ the "no prejudice" rule reveals that the predominant factor in establishing material prejudice is an actual showing that the insurer lost an opportunity to settle a claim or limit its damages as a result of the late notice. These Courts have considered factors such as the loss of an opportunity to interview a necessary witness or investigate a claim at an early stage as key factors in showing material prejudice. We believe that there is a strong possibility that New York Courts will follow the lead of jurisdictions such as New Jersey and California, and require similar showings to establish material prejudice.

Conclusion

The new insurance bill recently signed into law by Governor Paterson requires insurance carriers to establish material prejudice in order to effectively disclaim coverage as a result of late notice of an occurrence, claim, or suit under a policy. The new legislation reverses New York's historic "no prejudice" rule, which allows carriers to disclaim coverage based upon late notice without showing prejudice.

As a result of the new law, which only applies to policies issued, renewed, or amended on or after January 17, 2009, insurance carriers cannot deny or disclaim coverage for late notice of an occurrence, claim, or suit unless they can show "material prejudice" as a result of the delay. Based on the case law of other jurisdictions, we believe that in order to demonstrate material prejudice, a carrier will have to show that it missed an opportunity to settle a claim at an early stage or that the ability to defend the suit was compromised as a result of the delay. Such material prejudice may arise where evidence has been lost or altered, or witnesses have died or have become unavailable as a result of late notice.

While it is difficult to predict how New York Courts will determine what constitutes material prejudice, it is highly likely that carriers will face an extremely difficult burden in effectively disclaiming coverage based on an insured's late notice.

- by Michael P. Kandler, Esq., and Eric L. Shoikhetman, Esq.

Notes

¹ *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005)

² *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 833 N.E.2d 1196 (2005)

³ *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002)

⁴ *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 743 N.Y.S.2d 59 (1st Dept. 2002); *Hartford Fire Ins. Co. v. Baseball Office of the Com'r*, 236 A.D.2d 334, 654 N.Y.S.2d 21 (1st Dept. 1997)

⁵ *Hobart Bros. Co. v. National Union Fire Ins. Co.*, 2008 WL 2735620 (N.J. Super. 2008) (finding that mere speculation of prejudice does not suffice)

⁶ *Gazis v. Miller*, 874 A.2d 591 (N.J. Super. 2005) (finding no prejudice to the insurer since the insurer had opportunity to settle claim prior to filing of suit)

⁷ *Belz v. Clarendon America Ins. Co.*, 158 Cal. App. 4th 615, 69 Cal. Rptr. 3d 864 (2007)

Court of Appeals Upholds Validity of Partial Indemnity Agreements in Construction Contracts

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Workers' Compensation Law §11 provides that the only third party indemnity claims that may be maintained against employers are (1) claims for contribution or Common Law indemnity where the injured plaintiff has sustained a "grave injury," or (2) where the indemnity claim is based upon a written agreement, which was executed prior to the accident. Workers' Compensation Law §11; *Stabile v. Viener*, 291 A.D.2d 395, 737 N.Y.S.2d 381 (2nd Dept. 2002). Based upon the strict construction of the "grave injury" criteria, defendant owners and general contractors in Labor Law §§240(1) and 241(6) cases have no ability to obtain indemnification from employers where the indemnity agreement has been found to be unenforceable under General Obligations Law §5-322.1.⁴ Therefore, the issue of whether or not liability can be "passed through" to the plaintiff's employer is often determined by the enforceability of written indemnity provisions under General Obligations Law §5-322.1.

Partial Indemnity Agreements Under GOL §5-322.1

In an effort to create indemnity provisions in construction contracts that would be enforceable under General Obligations Law §5-322.1, indemnity provisions with "savings clauses" such as "to the fullest extent permitted by law" have become increasingly common. These indemnity provisions were intended to require indemnity for damages arising out of construction work except for damages caused by the negligence of the promisee. Because these indemnity provisions carved out from the indemnity obligation any damages caused by the promisee's negligence, they were described as "partial contractual indemnification" agreements.⁵

The Court of Appeals first raised the question of whether indemnity agreements which contemplated partial contractual indemnification might be enforceable under General Obligations Law §5-322.1 in *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 786 (1997). The Court of Appeals decision in *Itri Brick & Concrete Corp.* addressed two separate construction site accident cases in which Labor Law violation claims had been asserted by injured workers against general contractors. In each case, the general contractor had entered into written contracts with the injured party's employer. Each of the contracts at issue in *Itri Brick* contained broad indemnification provisions requiring the employer to indemnify the general contractor for any damages arising out of the work, whether or not the damage was caused by the negligence of the general contractor. In each of the cases addressed, the general contractors were found to be partially negligent in causing the plaintiff's injuries. As framed by the Court, the issue presented in *Itri Brick* was "whether, and to what extent, an indemnification agreement between a general contractor and a subcontractor can be enforced where the general contractor has been found partially negligent in an action brought by an

employee of the subcontractor against the general." The Court of Appeals held that the indemnity provisions at issue were void and unenforceable under General Obligations Law §5-322.1, because they required complete indemnity, even for the promisee's acts of negligence. Therefore, even though the general contractors were found only partially at fault, the indemnity provisions were stricken in their entirety and no contractual indemnification was permitted. However, the Court expressly left unanswered the question of whether partial contractual indemnification would be permitted where the indemnification provision did not purport to indemnify the promisee for its own negligence:

Moreover, whether or not §5-322.1 would allow enforcement of a "partial indemnification" agreement is irrelevant here; the agreements in these cases explicitly provided for complete indemnification and there were findings that the general contractor was negligent. The question whether a negligent contractor/promisee could enforce an indemnification agreement, notwithstanding §5-322.1, so long as the agreement did not purport to indemnify the contractor for its own negligence is not before us.⁶

In 2002, the Appellate Division, First Department upheld a "partial indemnification" agreement under §5-322.1 in *Dutton v. Charles Pankow Builders, Ltd.*, 296 A.D.2d 321 (1st Dept. 2002). The indemnity provision in *Dutton* contained a savings clause stating that indemnification of the general contractor by the subcontractor was required "to the fullest extent permitted by applicable law." The First Department found that the indemnity provision was enforceable under General Obligations Law §5-322.1, because it did not require the subcontractor to indemnify the general contractor for the general contractor's negligence.⁷

In the wake of *Dutton*, while the Fourth Department adopted partial contractual indemnification, *Buchwald v. Verison New York, Inc.*, 52 A.D.3d 1301 (4th Dept. 2008), the position of the Second and Third Departments on this issue was not entirely clear.

With the Court of Appeals decision in *Brooks v. Judlau Contracting, Inc.*, the Court of Appeals answered the question that it had posed in *Itri Brick* in the affirmative, and held that partial indemnification agreements, which do not require indemnification of the promisee for the promisee's own negligence, are enforceable under General Obligations Law §5-322.1.

Like *Itri Brick*, *Brooks* involved a claim by an injured construction worker under Labor Law §240(1) against a general contractor — Judlau Contracting, Inc. At the time of the accident, the plaintiff was employed by a subcontractor, Thunderbird Constructors, Inc., on a project involving the renovation of a highway overpass. The plaintiff sustained

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injuries when a perimeter safety cable that had been installed by Judlau came loose, causing the plaintiff to fall 18 feet to the pavement below. Judlau asserted a third party claim for contractual indemnification against Thunderbird. Summary judgment on the issue of liability under Labor Law §240(1) against the general contractor was awarded in favor of the plaintiff. The bifurcated trial of the action involved the amount of damages and the third party claim by the general contractor for contractual indemnification against the employer. Following the trial, the trial Court granted the employer's motion for a directed verdict, dismissing the third party claim for contractual indemnity. In its decision, the trial Court found that the actions of the general contractor in improperly installing the safety cable were a substantial factor in causing the plaintiff's accident, and that Judlau was actively negligent "at least to some degree." Because the general contractor was found to be partially at fault, the trial Court ruled that the indemnity provision was unenforceable under General Obligations Law §5-322.1. Unlike the indemnification provision at issue in *Itri Brick*, the indemnity provision at issue in Judlau contemplated partial indemnification, calling for indemnity "to the fullest extent permitted by law." The Appellate Division, Second Department affirmed the trial Court's finding, but granted leave to appeal to the Court of Appeals on the certified question as to whether the holding with regard to partial indemnification under General Obligations Law §5-322.1 was proper.

In its decision and order in *Brooks*, the Court of Appeals held that indemnity provisions, which contemplate partial indemnity, are enforceable even where the promisee is found to be partially negligent in causing the accident. The indemnity provision in *Judlau* contained the savings provision commonly seen in construction contracts which require indemnity only "to the fullest extent permitted by law." The Court of Appeals held that the language "to the fullest extent permitted by law" contemplates partial indemnification and is intended to limit the promisor's contractual indemnity obligation solely to damages caused by its own negligence. The Court of Appeals noted that there had been inconsistency by New York Courts on this issue, and that the "more sound" approach is to enforce partial indemnification agreements

under General Obligations Law §5-322.1. The Court noted that there was no language within the statute that prevents partial indemnification provisions such as the one before the Court, where it is shown that both a general contractor and its subcontractor are joint tortfeasors.

As such, the rule set forth in *Dutton* that partial indemnity agreements are enforceable under General Obligations Law §5-322.1, even where the promisee is partially at fault, is now the law in all four departments of the State of New York. Indemnity provisions in construction contracts, which include savings provisions such as "to the fullest extent permitted by law," are enforceable, even where the promisee is found to be partially at fault. Under the reasoning of the Court of Appeals in *Brooks*, contractual indemnity provisions will be enforceable, as long as they do not purport to require indemnity of the promisee for the promisee's own negligence. This holding will certainly assist commercial general liability insurance carriers who insure owners and general contractors in shifting exposure in Labor

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Law claims to the commercial general liability carrier of the employer, through third party claims for contractual indemnification.

- by Michael P. Kandler, Esq.

Notes

¹ *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008)

² General Obligations Law §5-322.1

³ *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 786 (1997)

⁴ *Stabile v. Viener*, 291 A.D.2d 395, 737 N.Y.S.2d 381 (2nd Dept. 2002)

⁵ *Itri Brick*, *supra*

⁶ *Itri Brick*, *supra*

⁷ *Dutton v. Charles Pankow Builders, Ltd.*, 296 A.D.2d 321 (1st Dept. 2002)

The Court of Appeals Expands the Scope of Labor Law §240(1):

Owner Found Liable Despite the Fact That it Had No Knowledge of the Work Being Performed, and the Owner's Approval for the Work, Which was Required by the Lease, was Not Obtained

In *Sanatass v. Consolidated Investing Company, Inc.*, 10 N.Y.3d 333 (2008), the Court of Appeals took a step backward from a trend of strengthening Labor Law §240(1) defenses by imposing liability against a building owner which had no knowledge of the work being performed at the time of the accident. Moreover, the owner was found liable despite the fact that a lease provision, which required approval by the owner of any construction work, was violated.

Commercial general liability insurance carriers that issue policies in New York State are 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 §240(1). Labor Law §240(1), often called the "Scaffold Law," provides that:

"All 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 so as to give proper protection to a person so employed."

The purpose of the statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility.¹ It is well settled that the duty imposed by this statute is "non-delegable 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."²

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" (e.g., falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured).³ 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. The strictly liable party may, of course, seek contribution or indemnification from a third party under the theory of negligence or contractual indemnification.

One of the onerous provisions of Labor Law §240(1) is that the comparative negligence of a plaintiff/worker is not an available affirmative defense to a claim under this section of the Labor Law.⁴ Therefore, 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 §240(1).⁵

As we had previously noted in our newsletter, 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.

However, over the past several years, the Court of Appeals has rendered decisions which strengthened defenses available to Labor Law §240(1) defendants. In the second volume of our newsletter (August, 2005), we discussed the Court of Appeals' decisions in *Blake v. Neighborhood Housing Services of New York City, Inc.*, and *Cahill v. Triborough Bridge and Tunnel Authority*, which strengthened the "sole proximate cause" defense and the "recalcitrant worker" defense. In these decisions and in other recent Appellate Division decisions, New York State Courts appeared to recognize that the broad interpretation of Labor Law §240(1) liability had gone too far.

However, the Court of Appeals took a step backward from this trend of strengthening defenses available to Labor Law §240(1) defendants in its recent decision and order in the case of *Sanatass v. Consolidated Investing Company, Inc.*, 10 N.Y.3d 333 (2008).

In *Sanatass*, the plaintiff was an employee of a contractor who was hired by a commercial tenant in a building to install air conditioning units and perform duct work. The tenant's lease with the building owner ("Consolidated") prohibited lessees from making any changes to the demised premises without the prior consent of the building owner. A witness for the building owner testified that the provision requiring the consent of the owner was to ensure that the quality of the contractor was acceptable. The tenant violated this lease provision by proceeding with the construction work without the owner's consent. Moreover, the owner had no knowledge that the work was ongoing. The plaintiff/worker was injured when a commercial air conditioning unit that was being hoisted, fell approximately seven feet and knocked the plaintiff to the floor.

Relying on the prior Court of Appeals decision in *Abbate v. Lancaster Studio Assoc.*, 3 N.Y.3d 46 (2004), the trial Court dismissed the Labor Law §240(1) claim against the building owner, holding that because the construction work was being performed without the owner's knowledge and in violation of lease provisions, the owner was not subject to the strict liability of Labor Law §240(1). In a 3-to-2 decision, the Appellate Division, First Department affirmed the dismissal of the Labor Law §240 claim.⁶ Because there were two dissenters, an appeal was taken to the Court of Appeals as of right.

In a majority decision, the Court of Appeals reversed the decision and order of the Appellate Division and reinstated the plaintiff's Labor Law §240(1) claim against the building owner.

In its decision, the Court of Appeals again noted that the
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purpose of Labor Law §240(1) was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor." The majority acknowledged its prior decision in *Blake* and noted that an owner is not "an insurer after having furnished a safe workplace" and that an accident, in and of itself, does not establish a statutory violation. However, the majority relied upon the often cited broad duties imposed by Labor Law §240(1) and held that "It is clear that the statutory duty imposed by this strict liability provision is non-delegable and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control."⁷

The majority distinguished its prior decision in *Abbatiello* in which it held that a building owner was not liable for injuries sustained by a cable television technician, where the building owner was unaware of the work that was being performed by the cable television technician. The Court of Appeals held that its holding in *Abbatiello* was limited to the unique circumstances of that case, and the fact that New York's Public Service Law requires that cable repair workers be given access to buildings to perform repair work. The Court of Appeals noted that in the cable television repair context, if not for Public Service Law §219, the cable television repair technician would be a trespasser.

In our opinion, the Court of Appeals missed an opportunity in *Sanatass* to impose a reasonable and pragmatic limitation on the strict liability imposed against owners under Labor Law §240(1). This sentiment was expressed by Judge Smith in his dissent, which was joined by Judge Read.

In his dissent, Judge Smith noted that the lease specifically prohibited the tenant from hiring a contractor to make any alterations in the premises without the landlord's prior written consent. The testimony in the record indicated that the reason for this lease provision was to permit the owner to approve of the contractor to make sure that proper methods were employed.

Judge Smith stated strongly that the majority had gone too far in imposing liability against building owners who had done everything in their power to provide a safe workplace:

I do not see how the statutory goal of preventing workplace accidents is advanced by holding a landlord liable in a situation like this. What could anyone expect the landlord to do to prevent the accident, other than what it did? The point of Labor Law §240(1) is to compel ... owners to comply with the law, not to penalize them when they have done so. ... The result the majority reaches effectively treats this landlord 'as an insurer' — contrary to our view of the purpose of the statute as expressed in *Blake*.

We will, of course, continue to monitor the Court of Appeals' interpretation of this important statute in future newsletters.

- by Michael P. Kandler, Esq.

Notes

¹ *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993)

² *Ross, supra*

³ *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 (2003)

⁴ *Spages v. Gary Null Assoc.*, 788 N.Y.S.2d 355 (1st Dept. 2005)

⁵ *Spages, Id.*

⁶ *Sanatass v. Consolidated Investing Company, Inc.*, 833 N.Y.S.2d 12 (1st Dept. 2007)

⁷ *Sanatass v. Consolidated Investing Company, Inc.*, 10 N.Y.3d 333 (2008)

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