
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.

CASES AND POINTS

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O OPENING STATEMENT

The tragic events of September 11 have left an indelible mark on our lives. The way New York looks, as well as the way we look at New York, has been changed forever.

Our firm website, created several years ago, displays a view of the skyline of lower Manhattan in which the Twin Towers of the World Trade Center are prominent.

Since the catastrophic events we have received several e-mails and phone calls from people who have visited our website inquiring, and even suggesting, that we change our homepage.

After careful consideration and much discussion, we have decided to leave our logo intact, in remembrance of those who worked or perished there and to show that although terrorists can destroy a building, they cannot destroy New York's spirit.

We invite our readers to visit our website <http://agfjlaw.lawoffice.com> and e-mail their comments.

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COVERAGE AND LIABILITY ISSUES ARISING OUT OF THE TERRORIST ATTACKS

By

Michael E. Gorelick and Roxanne Minott

The terrorist attacks of September 11 on the World Trade Center and the Pentagon killed more than 6,000 people and resulted in financial losses which have been estimated to be in excess of \$60 billion.

One of the industries most seriously affected by the disaster will be the insurance industry. An unprecedented number of business interruption and business expense claims have already been filed, as have thousands of property damage and life insurance claims.

It is hoped that, in view of the extraordinary circumstances, parties will not rely upon technicalities and that most claims will be amicably and promptly resolved by negotiation, and, if necessary, alternate dispute resolution.

Obviously, an informal resolution of all coverage disputes will not be possible. Determination of the various coverage and liability issues presented by the claims arising from this disaster are beyond the scope of this article. However, this article will identify those areas of property and casualty claims most likely to result in litigation.

War Risk and Terrorism Exclusions

In the days immediately following the disaster, a representative of a major insurer was interviewed on

national television to describe her company's response to claims arising from the tragedy. In her interview, she stated that although the claims were "clearly excluded" as "acts of war", her company was, nonetheless, waiving the applicability of the war risk exclusion. Although this gesture was magnanimous based upon her company's position with regard to the technical applicability of the war risk exclusion, the proposition upon which it is based is by no means universally accepted.

In fact, most insurers have taken the position that the war risk exclusion in their policies does not apply because the losses were caused by acts of terrorism, not by acts of war. On the other hand, it is likely that insurers whose policies contain specific "acts of terrorism" exclusions, may take the position that the claims are not covered.

It is likely that those insureds whose claims are denied because of either the war risk or the terrorism exclusions will sue for coverage.

The spectre of a class action or multi-district litigation in which the insurer/defendants are pitted against each other trying to establish whether the losses occurred from acts of war or acts of terrorism cannot be ruled out.

Number of Occurrences or Losses

New York Office Address
120 Wall Street
New York, New York 10005
(212) 422-1200

e-mail address
insurancelaw@agfjlaw.com

New Jersey Office Address
70 South Orange Avenue
Livingston, New Jersey 07039
(973) 597-0920

Many of the policies that may be called upon to respond to first-party and third-party liability claims express the limit of coverage in terms of the number of “occurrences” or “losses”.

A determination of the number of occurrences or losses may also be a major point of contention..

For example, the World Trade Center landlord, Larry Silverstein, who acquired the ground lease to operate the World Trade Center less than two months before the attacks, is seeking recovery of \$7.2 billion from his insurers for the destruction of the two Towers on the premise that the two airplane collisions were separate “occurrences”, thus entitling him to collect the \$3.6 billion dollar per occurrence limit of his policy twice. The landlord’s insurers, however, have taken the position that because the attack was coordinated and arose from a common plan, it qualifies as a “single occurrence” for which the single occurrence limit of (\$3.6 billion) is available.

• **Business Interruption Claims**

Normally, coverage of business interruption and business expense claims is triggered by physical loss or damage to the insured property as the result of a covered peril, which results in business interruption or additional business expense being incurred by the insured.

Obviously, policyholders whose buildings or businesses were physically damaged as a result of the attacks should be entitled to recover business interruption and business expense claims under their policies. However, many of the claimants filing business interruption claims did not suffer physical damage to their buildings. Instead, they have filed claims for business interruption and business expense because they were forced to close their businesses as the result of the events. These policyholders are likely to be entitled to coverage under their policies for

losses resulting from acts of the “civil authority” because of the embargo imposed in Manhattan, south of Canal Street, for several days following the event, and in the case of businesses located closer to “Ground Zero”, for weeks after the event.

It is likely that most of the issues arising from these claims are likely to revolve around the adjustment and measure of the damages.

In addition, many claims for business interruption will be filed by people whose businesses have been affected but who are located no where near the site. Such claims may come from such diverse insureds as the Stock Exchanges which were closed for four days after the attacks, stock brokerage concerns located across the country who were inactive during that time period and other far flung businesses whose operations were dependent upon doing business with another company which was located within the disaster epicenter.

The determination of these coverage issues will, of necessity, be based upon the specific wording of each individual policy.

• **Bodily Injury Lawsuits**

Although the American Trial Lawyers Association initially suggested a moratorium on bodily injury lawsuits arising out of the tragic events, plaintiff’s attorneys have been gearing up to commence lawsuits seeking to recover damages for the deaths, bodily injuries and property damage suffered in the attacks.

Major targets of such lawsuits will be the airlines whose jetliners were used in the attacks. Those airlines are likely to face claims by the estates of passengers, the victims killed or injured on the ground and those who suffered property damage resulting from the attacks, based upon claims of negligence against the airlines in failing to have procedures in place to foil the hijackings or to prevent the

use of the planes as weapons of mass destruction after the hijackings.

Although the airlines involved have offered settlements to the estates of its passengers killed in the disaster in return for covenants not to sue, it is unclear how many of those offers will be accepted. Nor is it clear what response will be made to the claims filed on behalf of persons who were killed or injured who were not passengers on the planes.

It is also likely that lawsuits will be commenced against the landlord and the Port Authority of New York and New Jersey, the owner of the World Trade Center, alleging failure to have an adequate escape and evacuation plan in effect.

Suits against the Federal Government and the operators of Newark and Logan Airports are likely, based upon the operators’ and the FAA’s failure to have an adequate plan to prevent the hijacking and the use of hijacked planes as weapons of mass destruction.

It can only be hoped that reason will dictate the results of all of these claims and suits and that, to the greatest extent possible, claims will be fairly resolved.

Recent Decisions of Interest

• **Labor Law – Workers Standing on Ladders Injured by Falling Objects Are Not Covered by New York’s Labor Law § 240(1)**

In two cases decided simultaneously by the Court of Appeals, it was held that New York’s Labor Law § 240(1) did not apply.

In one case, a worker standing on a ladder to remove window frames was injured by falling glass from an adjacent window. In the other case, a worker standing on a ladder was injured when the electrical fixture he was installing fell and cut him. In neither case did the worker fall from the ladder.

New York's Court of Appeals held that New York's Labor Law § 240(1) did not apply in either of these cases because the falling objects were not being hoisted or secured and did not fall as a consequence of the absence of any of the safety devices listed in the Statute. Nor did these cases involve a falling worker because neither worker was injured by a fall from an elevated work place. Thus, it was held that the workers' right to recover arose only out of their negligence claims. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).

- **Labor Law – An Intoxicated Worker Injured in a Fall Was Entitled to Recover Under New York's Labor Law**

In *Sargeant v. Murphy Family Trust*, __A.D.2d__, 726 N.Y.S.2d 537 (4th Dept., 2001), an intoxicated roofer, walking across the roof, stepped onto yellow insulation where a roof panel had been removed. The insulation had no underlying support and the worker fell more than 20 feet to the floor below.

The Fourth Department held that the injured roofer was entitled to summary judgment on liability pursuant to Labor Law § 240(1) because, despite his intoxication, there were no safety devices in place to prevent the accident and thus, no reasonable jury could conclude that the roofer's intoxication and subsequent actions were the sole proximate cause of his injuries.

- **Measure of Damages for Breach of an Agreement to Procure Insurance for Another's Benefit**

In the recent Court of Appeals decision in *Inchaustegui v. 666 5th Avenue* (96 N.Y.2d 111), reported in Cases & Points, Vol III, Issue 2, it was held that the measure of damages resulting from one party's failure to obtain liability insurance for the benefit of another who had purchased

his own insurance, is limited to that party's actual loss, as measured by the premium paid by that party for its own insurance and the deductible amount of that policy.

In *Trokie v. York Preparatory School Inc.*, __A.D.2d__, 726 N.Y.S.2d 37 (1st Dept., 2001), New York's Appellate Division, First Department, relying upon, *Inchaustegui*, also held that the proper measure of the damages for breach of a construction contract insurance, procurement clause included, as well as the premium paid by the damaged party for its own insurance any out-of-pocket costs incurred by that party in connection with its insurance. In the *Trokie* case, however, the Court concluded that those "out-of-pocket" costs included not only the deductible sum of that party's policy but, in addition, any increase in that party's future insurance premiums resulting from the liability claim reported under its policy.

- **Spoliation of Evidence May Constitute a Separate Cause of Action**

In a novel holding by a trial court, which it likely to be appealed, it was held that an insurer may be sued by its policyholder for negligent destruction of evidence that the policyholder needs to mount a legal defense to a property damage negligence suit brought against it.

In *Fada Industries v. Falchi Building Co.*, 730 N.Y.S.2d 827 (2001), Justice Patricia Satterfield of Supreme Court, Queens County, recognized the existence of an independent tort for spoliation of evidence.

Previously, although New York's Courts have imposed discovery or even trial sanctions against the parties who had improperly deposed of evidence. However, they would not recognize a separate cause of action for damages against that party.

In the *Fada* case, a tenant (Koolwear Inc.), was sued by a fellow

tenant, (Fada Industries), which claimed that a leaking water heater in Koolwear's space had caused \$60,000 in damages on Fada's premises. Koolwear, in turn, sued its insurer, General Accident, for the negligent loss or destruction of the water heater, which it claimed was key evidence in the case.

Koolwear claimed that General Accident had taken possession of the water heater after the leak occurred and that the appliance could no longer be found. Koolwear contended that not only did the loss of the appliance impair its ability to defend itself from Fada's property damage claim, it made it impossible to identify the manufacturer of the water heater or to plead that manufacturer as third-party defendant in the action.

In her decision, Justice Satterfield observed that when key evidence is destroyed by a plaintiff and impairs a defendant's ability to answer the claim, "remedial action is obligatory". She further observed that in this case, however, no remedial action is available to Koolwear except for a damage claim against the party that destroyed or lost the water heater, its own insurer. In her decision, Justice Satterfield noted that six courts, including California, have allowed spoliation claims for damages to go forward while twelve State Appellate Courts have declined to recognize such an action. She reasoned that in view of New York's strong public policy penalizing spoliation of key evidence, the Court should recognize the tort where no other remedy would be available to the defendant/insured.

The Appellate Court's treatment of this case, if it is not settled, will be of significant importance to insurers and their representatives (including investigators, adjusters and, in some cases, attorneys, as well).

- **Automobile Insurance – Threshold Motions of Summary Judgment Based Upon Plaintiff's**

Lack of “Serious Injury” Can Be Granted Even Where the Defendant Is Precluded from Testifying on Liability

Insurance Law § 5012(d) requires that a plaintiff must have sustained a “serious injury” in order to maintain an action for damages.

In *Levitskaya v. Nijem and 77th Street Car Service*, (index No. 33693/99, Order and Decision dated August 17, 2001) an action in which the defendants were represented by AGFJ, Justice Margaret Cammer of Supreme Court, Kings County, held that even though the defendants had been precluded from testifying at trial because they failed to appear at Examinations Before Trial, they were, nonetheless, entitled to a grant of summary judgment where the plaintiff had failed to sustain a “serious injury”.

Significantly, even though the plaintiff claimed to have sustained numerous injuries, the most serious of which were herniations of discs in the cervical and lumbar spines, and although plaintiff also alleged that she was unable to perform substantially all of her usual and customary daily activities for more than 90 days during the 180 days immediately after the accident, the Court granted defendants summary judgment, nonetheless.

Defendants moved for summary judgment on the basis that plaintiff’s injuries did not meet the “serious injury” threshold. In support of the motion, defendants submitted reports from an orthopedic surgeon and a neurologist who examined the plaintiff on behalf of the defendants. Those reports set forth, in specific detail, the doctors’ findings which negated plaintiff’s claims of disc herniations as a result of the accident.

In opposition to the motion, plaintiff submitted her own affidavit as well as the affirmations of her treating physician and chiropractor

The Court found that since a chiropractor is not a “medical doctor” under New York law, there is no authority for his submission of an affirmation, in lieu of a sworn affidavit. Thus, the Court found that the chiropractor’s affirmation was of no probative value.

The Court also noted that in opposing the motion, the plaintiff was obligated to present objective, quantified evidence of the extent or degree of limitation and its duration when her claim of serious injury was based upon the “significant limitation of use of a body function or system” as defined by the Statute.

In granting defendant’s motion, the Court found that under New York law, an affidavit simply setting forth the doctor’s observations are not sufficient unless supported by objective proof such as x-rays, MRIs tests or other similarly recognized quantitative results based upon a neurological examination. The Court also found that since the plaintiff’s physician ceased treatment of the plaintiff in 1999 and did not see her again until almost two years later and that his affirmation had not explained the significant lapse of time between the cessation of plaintiff’s treatment after the accident and the physical examination conducted two years later, the affidavit was insufficient to overcome defendants’ evidentiary showing of lack of serious injury. Thus, the motion was granted and the Complaint was dismissed.

Should you have any questions, please feel free to call Gail Monaco.

• **Automobile Insurance – The Opening of a Taxicab Door into the Path of a Bicyclist Constituted “Use and Operation” of the Vehicle**

In *Cohn v. Nationwide Mutual Insurance Company*, __A.D.2d__, 2001 N.Y. Slip Opinion 07093 (September 17, 2001) the Appellate Division, Second Department,

reversed the trial court and held that the defendant/insurers were required to indemnify the plaintiff for injuries sustained as the result of an accident which occurred when a passenger exiting the insured’s taxicab, opened the rear door of the vehicle into the path of an oncoming bicyclist.

Section 388 of the Vehicle and Traffic Law provides coverage to permissive users and owners of vehicles for claims arising out of the “use and operation” of the vehicle. The Appellate Division found that the opening of the insured’s taxicab rear door by its passenger in the path of an oncoming bicyclist and the claims arising therefrom, did, in fact, result from the “use and operation” of the vehicle within the definition of the Vehicle and Traffic Law.

AGF&J’S DEVELOPMENTS

Michael Gorelick recently participated in a seminar for leading defense law firm managing partners sponsored by the Federation of Defense and Corporate Counsel which focused on the successful implementation of client litigation guidelines and protocols.

PUBLIC EDUCATION SERVICE

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

AGF&J’s Cases and Points is published as a service to our friends and clients. It is only a summary of, or commentary upon, case law and should not be relied upon as authoritative support. Also, the

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Cutout

New York Court allows a tort claim for spoliation of evidence.

A Queens County Court has ruled, in a novel holding, that an insurer may be sued for negligent destruction of evidence that its policyholder may need to mount a legal defense to a property damage liability claim.

In *Fada Industries v. Falchi Building Co.*, Justice Patricia Satterfield recognized, for the first time, the existence of an independent tort for spoliation of evidence. Previously, where spoliation of evidence has been alleged, the Courts have imposed discovery or trial sanctions against the parties who deposed of evidence, but did not find that destruction of evidence gave rise to a cause of action for which damages could be recovered against them.

A tenant, Coolwear Inc., was sued by a fellow tenant, Fada Industries, who claimed that a leaking water heater in Coolwear’s space had caused \$60,000 in damages on Fada’s premises. Coolwear, in turn, sued its liability insurer, General Accident Insurance Co., for the negligent loss or destruction of the water heater, which it claimed was key evidence in the case. Coolwear claimed that General Accident’s adjuster took possession of the water heater after the leak occurred and that the appliance could no longer be found. Not only did the loss of the appliance impair Coolwear’s ability to defend itself from the property damage claim, it made it impossible to name the manufacturer of the water heater as third-party defendant in the action.

In *Fada*, the Court recognized spoliation of evidence as an independent tort cause of action. It is likely that this novel case will be appealed.

• Measure of Damages for Breach of an Agreement to

Procure Insurance for Another’s Benefit

Following the recent Court of Appeals decision in _____, New York’s Appellate Division, First Department, has held that proper measure for damages for breach of construction contract insurance procurement clause is the premium paid by the damaged party for its own insurance plus any out-of-pocket costs that it may have incurred incidental to the policy (including the deductible amount) and any increase in its future insurance premiums resulting from the liability claim (*Trokie v. York Preparatory School Inc.*, __A.D.2d__, 726 N.Y.S.2d 37 (1st Dept., 2001)).

• Automobile Law – Defendants Were Entitled to Summary Judgment on the Basis that Plaintiff Had Not Sustained a “Serious Injury” As Required by Insurance Law § 5012(d) As a Matter of Law Even Where Plaintiff IPretended That She Had Sufferd Disc Herniations As a Result of the Accident

In granting the defendant’s motion for summary judgment, the Court found that the plaintiff must present objective, quantified evidence of the extent or degree of limitation and its duration when she claims a “significant limitation of use of a body function or system”. The Court also found that under New York law, an affidavit simply setting forth the doctor’s observations are not sufficient, unless supported by objective proof such as x-rays, MRIs, tests or other similarly recognized quantitative results based on the neurological examination. Thus, the Court found that since plaintiff’s physician ceased treatment of plaintiff in 1999 and did not see her again until almost two years later and did not explain the significant lapse of time

between the cessation of plaintiff’s physical treatments after the accident and the physical examination conducted two years later, the Court found that it was insufficient to overcome the defendant’s showing of lack of serious injury and thus, granted defendant’s motion to dismiss.

conomic loss from the tortfeasor. However, until Oberly, attorneys representing parties who had sustained less than serious injuries have utilized the “permanent loss of use” exception to bring lawsuits for injuries which did not qualify under the other exceptions to the Statute because the injury was neither significant nor consequential. In Oberly, the Court of Appeals closed that loop-hole, with the expected result being the settlement of more claims without litigation and an increase in the number of serious injury “threshold” motions being granted to defendants.

• Burdens of Proof in meeting the serious injury “threshold”. Herniated discs are not per se “serious injuries”.

The question of the respective burdens of proof in “threshold motions” continues to be the subject of litigation and debate. A recent instructive decision of New York’s Appellate Division, Third Department, may go a long way in quieting that debate.

In *Rose v. Furgerson*, 721 N.Y.S.2d 873 (3rd Dept., 2001), the automobile which was being driven by the plaintiff was struck from behind by defendant’s vehicle. On the date of the accident, plaintiff drove himself home and his wife took him to the hospital. At the hospital he was x-rayed and given a neck brace to wear. He missed one day of work as a result of the accident. An MRI was performed approximately two months after the accident wherein the radiologist concluded that plaintiff showed evidence of bulging of the

disc at the C5-6 level “without significant consequences” as well as a minimal degree of subligamentous extrusion at the C6-7 level with “no significant compromise of the canal in the midline”. After reviewing the MRI, plaintiff’s orthopedist diagnosed plaintiff as having a

Container Machinery Group. United, in turn, brought a third-party action against plaintiff’s employer, Southern Container, seeking common law contribution and indemnification. Southern moved to dismiss the third-
