

## OPENING STATEMENT

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A recent case decided by New York's highest court is the subject of the main article in this issue of *Cases & Points*.

In that case, New York's Court of Appeals interpreted a State statute (General Obligations Law §5-321) which provides that a lease in which one party seeks to exempt itself from liability for its own negligence is unenforceable. To paraphrase an old joke, the case asks "Anyone who believes that such a contract is unenforceable, please take one step forward". Like the old joke, after most people stepped forward, the Court's response was: "Not so fast . . ."

Court of Appeals upholds right of commercial landlords to obtain indemnification from tenants for their own negligence.

By Thomas R. Maeglin

Many people are familiar with the principle under New York law that landlords may not include provisions in leases under which their tenants must indemnify them for their own negligence. Some know that such provisions, which call to mind the villainous landlords of yesterday's melodramas, offend public policy, so much so that a law was enacted against them – General Obligations Law section 5321. They may be surprised to learn, therefore, of a recent decision by the Court of Appeals, Great Northern Insurance Company v. Interior Construction Corp., 7 N.Y.3d 412, 2006 N.Y.Slip.Op. 07519, 2006 WL 2970545 (2006), reaffirming generation-old precedent and holding that such agreements are not *per se* invalid, but may be valid and enforceable under the right circumstances.

The facts of Great Northern involve a straightforward property damage claim by a commercial tenant against a commercial property owner and a fellow tenant. New Water Street Corporation was the owner of a property which was the location of tenant Depository Trust & Clearing Corporation, which undertook construction at the premises. Depository engaged a contractor to perform renovations, and in the course of construction, their contractors at the site failed to properly close the water feeds to a sprinkler system. Naturally, someone opened the sprinkler system, allowing water to escape, which then damaged property belonging to another tenant below. A downstairs tenant brought a property damage suit against New Water and Depository. The Owner asserted a third-party claim for indemnification against the tenant. The owner sought indemnification under a lease that provided:

"Tenant shall indemnify and hold harmless Landlord . . . from and against any and all claims arising from or in connection with (A) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created (other than by Landlord) in or about the Premises during the term of this Lease . . . ; (B) any act, omission or negligence of Tenant or any of its subtenants or licensees . . . or contractors; (C) any accident, injury or damage whatsoever (unless caused solely by Landlord's negligence) occurring in, at or upon the Premises; and (D) any breach or default by Tenant in the full and prompt payment and performance of Tenant's obligation under this Lease . . . ."

The lease also required the tenant to maintain general liability insurance with a \$5 million limit and which named Owner as an additional insured. The parties' policies were also to include mutual waivers of subrogation. Depository had, in fact, obtained such a policy. The action proceeded to a settlement, in which all claims except for the indemnification cross-claims were disposed and the parties stipulated to apportionment of 90% liability to plaintiff.

The owner made a motion for Summary Judgment at the trial level that was denied. That decision was affirmed on reargument. On appeal, the Tenant argued that the language of the lease did not "unmistakeably require indemnification" under these facts; and 2) the lease provision was unenforceable and contrary to public policy under GOL 5-321 because it obligates the tenant to indemnify the landlord for the landlord's own negligence.

The Court of Appeals affirmed the order granting summary judgment to the building owner. It held that the indemnification provision unambiguously evinced

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an intent for the Tenant to indemnify the Owner for the Owner's own negligence, so long as the Owner was not 100% negligent. It also held that the indemnity provisions did not violate GOL § 5-321 because it was part of a commercial lease, negotiated between two commercial parties, coupled with an insurance procurement provisions. In other words, the parties had agreed that Tenant would obtain such insurance as would cover both the Tenant and the Owner for any claims that arose against either out of the lease. Moreover, the Court observed, the result was what the parties had plainly intended. The owner, the victim of any negligence, would have adequate recourse for its damages and the Third-party Defendant Tenant's insurer would bear the ultimate responsibility for the loss.

Where, you may ask, is the exception to GOL 5321 found for commercial tenants and landlords who allocate risk by means of insurance? Nowhere in the statute, but courts have read this statute to allow such lease provisions since at least 1977, when the Court of Appeals decided Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 366 N.E.2d 263, 397 N.Y.S.2d 602 (1977). In the Hogeland case, the Court of Appeals laid great emphasis upon the fact that the lease term had been negotiated by parties with fairly equal bargaining power (not the landlord in the black cape and top hat and the defenseless maiden, but a shopping center owner and a retail business tenant). The Court said:

At the very outset, we remark on the fact that the lengthy lease before us obviously was one negotiated at arm's length between the representatives of two sophisticated business entities, one a large department store company and the other the real estate corporation which organized, owned, constructed and managed the shopping center. The tenant had tailored the construction to its special needs. And the mutual nature of the arrangements for the maintenance of appurtenances such as those involved in this very case is tell-tale evidence that the lease was not one whose making dominated by either party.

See Hogeland at 158. With that the Court announced a rule of construction in which courts are to look to the "unmistakable intent of the parties" rather than the semantic stereotypes with which an agreement may be phrased. It suffices that the agreement between the parties connotes an "intention to indemnify (which) can be clearly implied from the language and purposes of the entire agreement". See id. In the Great Northern decision, the Court of Appeals expressly reaffirms the rule announced in Hogeland. That case, the Court said, was not meaningfully distinguishable from this matter, and the Court refused to overturn thirty-year-old precedent that concerned both contractual rights and statutory interpretation.

The key to making these indemnification provisions enforceable is in parties' allocating the risk of liabilities to third parties between themselves through the employment of insurance. The fact that a lease concerns commercial premises or entities will not automatically make an indemnification provision enforceable. See Danielson v. Jameco Operating Corp., 20 A.D.3d 446 (2<sup>nd</sup> Dep't 2005). The landlord must limit its recovery under the tenant's indemnification to insurance proceeds. See id. Moreover, the obligation to obtain insurance against third-party liability must be mutual; a landlord cannot circumvent GOL § 5-321 simply by placing the burden to procure insurance on the tenant. See Breakaway Farm Ltd. v. Ward, 15 A.D.3d 517 (2<sup>nd</sup> Dep't 2005).

While the Great Northern decision arises from the setting of leases of real property, other contracts may contain similar indemnity and insurance provisions. Construction contracts, for example, invariably allocate risk among various parties engaged in a construction project. GOL § 5-321, however, only applies to leases of real property and has not been extended to impact other types of agreements; for example, licenses or service contracts.

Where does all of this leave GOL § 5-321, the statute enacted for the purpose of preventing "the landlord's circumvention of long established rules of liability arising out of the relationship of landlord and tenant"? This shield against the overreaching landlord remains as mighty as ever, still rendering unenforceable provisions in residential and commercial leases that purport to shift liability for third-party claims to tenants, regardless of the landlord's own negligence, without the use of insurance. See Wolfe v. Long Island Power Authority, 824 N.Y.S.2d 390 (2<sup>nd</sup> Dep't 2006). Of course, GOL § 5-321 never prevented a landlord from inserting a lease term obligating the tenant to indemnify the landlord for the *tenant's* negligence. Thus, today's Damsel in Distress leasing real property still enjoys some protection from her mustache-twirling landlord, but she would be well advised to protect herself with a thoroughly modern policy of liability insurance.

For more information on the Great Northern case or indemnification provisions, in general, contact Tom Maeglin at [maeglin@agflaw.com](mailto:maeglin@agflaw.com).

## Recent Decisions of Interest

Automobile Liability – The Effect of the Transportation Act of 2005 upon Suits Against the Lessors or Renters of Automobiles in New York

The question presented in the recent case of Graham v. Dunkley (2006 WL 2596327) seemed to have been definitively answered on August 10, 2005 when the Federal Transportation Equity Act went into effect. A section of that Act (also known as the Graves Amendment) was intended to preclude leasing or rental companies from being held vicariously liable under New York law for damages sustained in a motor vehicle accident unless the leasing or rental company was itself guilty of negligence or of criminal wrongdoing.

Since the enactment of that statute, the Courts of several States (Connecticut, Maine and Florida) have interpreted the law to bar such claims against leasing and rental companies under their laws. Two lower level New York Courts (Supreme Court Nassau County and Supreme Court Erie County) have also held that the law precludes such actions under New York law. In fact, New York's Appellate Division, Second Department, in applying New Jersey law, has held that the law would preclude such actions under that State's law, as well. However, the question in New York is now unsettled.

On September 11, 2006, Justice Polizzi of Supreme Court, Queens County, decided Graham, in which he concluded that the Federal statute only applied in cases having a substantial effect upon interstate commerce. Justice Polizzi then concluded that New York's Vehicle & Traffic Law, §388 did not have a substantial effect upon interstate commerce, but rather was simply a statute which codified one aspect of New York's substantive tort law doctrine of imputed liability.

Thus, he held that, as applied to New York Vehicle & Traffic Law § 388, the Federal Transportation Act was an unconstitutional exercise of congressional authority under the Commerce Clause of the United States Constitution, Article 1, Section 8, and did not preclude such suits in New York.

In Dunkley, the plaintiff alleged that she suffered personal injury as the result of a motor vehicle accident that occurred in Queens County, New York on June 17, 2005. The Transportation Act applies to lawsuits commenced on or after the effective date (August 10, 2005), regardless of the date of the accident involved. Plaintiff commenced an action on March 16, 2006 (after the enactment of the Transportation Act) against the driver of the vehicle and upon the registered owner, Nissan Infiniti LT. (“NILT”). The lessor, NILT, made a pre-answer motion for dismissal of plaintiff’s tort action and all cross-claims against it on the ground that plaintiff failed to state a cause of action because Article 6 of the United States Constitution (the “Supremacy Clause”) and the Transportation Acts of 2005 expressly preempted New York State’s Vehicle & Traffic Law § 388. Thus, defendant argued, the action was precluded.

However, because he found that the Act was unconstitutional, as applied, Judge Polizzi denied the lessor’s motion to dismiss.

An appeal is expected in this case and in fact, it is possible that this case could wind its way all the way to the United States Supreme Court to determine the constitutionality of the Act. This is a case of great significance to insurers and practitioners, alike. Its fate on appeal will be the subject of a future report by us.

For more information on the Dunkley case or suits against lessors in New York, in general, contact Michael Gorelick at [mgorelick@agfjlaw.com](mailto:mgorelick@agfjlaw.com).

- Automobile Insurance – Uninsured Motorist Coverage

In Liberty Mutual Fire Ins. Co. v. Rondina, 821 N.Y.S.2d 325 (decided September 22, 2006), the Appellate Division, Fourth Department, was called upon to decide whether the insureds could compel arbitration of their claim for uninsured motorist coverage for injuries sustained by their son while he was a passenger on an insured all-terrain vehicle.

In affirming the trial court’s grant of the insurer’s petition to permanently stay arbitration, the Appellate Division held that, as a matter of law, uninsured motorist coverage extends to all motor vehicles as defined by Vehicle & Traffic Law § 125. However, because ATVs are specifically excluded from the definition of motor vehicles by that section of the Statute, the Appellate Division found that the court below properly concluded that the uninsured motorist endorsement in the policy issued by petitioner to respondent did not encompass the claim for injuries sustained by their son.

- Auto Liability – “Serious Injury” Threshold

AGF&J was successful in obtaining a dismissal of an automobile liability suit brought against the Firm’s client in Supreme Court, Nassau County. In Ibrahim v. Amitay and NIV’s Dairy, Inc., (decided on October 13, 2006) plaintiff claimed that defendant’s truck struck his vehicle when he attempted to change lanes and that, as a result of the accident, he sustained permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system and a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all of the material acts which constitute his usual and

customary daily activities for more than 90 days during the 180 days immediately following the occurrence of the injury.

To support his claim, plaintiff submitted an affirmation from his doctor in which he indicated that the plaintiff remained under his care for approximately 4 months following the accident and that he advised the plaintiff to refrain from working, due to his injuries. Plaintiff’s affidavit stated that he was not able to return to work for the period January 27<sup>th</sup> through June of 2004 and that, in fact, he is still not fully returned to his pre-accident customary activities.

In support of the motion for summary judgment, AGF&J submitted evidence that had been obtained through investigation that plaintiff was involved in accidents in June 2001, February, 2002 and November, 2004 and argued that the affirmation submitted by plaintiff’s doctor was insufficient in its failure to factor in injuries sustained by the plaintiff in those prior accidents.

Justice Michelle Woodard found that the defendants had established their entitlement to summary judgment by submitting affirmed reports and affirmations of their medical experts and that having done so, it was incumbent upon plaintiff to rebut defendant’s showing by proffering evidentiary proof in admissible form, that raises one or more material triable fact issues concerning the severity of plaintiff’s injury claims. However, the Court agreed that plaintiff has failed to do so. Thus, summary judgment was granted to the defendants.

Should you have any questions about this case or “threshold motions” in general, please contact Barry Jacobs or Amy Davidoff at [bjacobs@agfjlaw.com](mailto:bjacobs@agfjlaw.com) or [adavidoff@agfjlaw.com](mailto:adavidoff@agfjlaw.com)

- Premises Liability-Forseeability

In Mei Cai Chen v. Everprime 84 Corp., 2006 WL 3314966 (decided November 16, 2006), the Appellate Division, First Department reversed the decision of the trial court which denied defendant’s motion for summary judgment dismissing the Complaint.

In Chen, in which AGF&J represented the defendant/appellant, plaintiff was injured when she fell backwards down the outside stairs leading to the inward opening door of a building. Plaintiff testified that she was attempting to enter the building when she found she could not turn her key in the door’s lock. She then tried turning the doorknob which “suddenly loosened up” and came out of the door. According to the plaintiff, she fell backwards down the stairs when the doorknob came out of the door.

In reversing the trial court below and in granting summary judgment to the defendant dismissing the Complaint, the Appellate Division held that:

“Assuming without deciding that plaintiff has raised an issue as to whether defendant was negligent in failing to remedy the defective conditions of the lock and doorknob, falling backwards was not, as a matter of law, “among hazards that are naturally associated” . . . with the condition the defendant failed to repair, namely, the jammed lock and loose doorknob of an inward opening door. Stated otherwise, defendant cannot be held liable for plaintiff’s injury, since (they) resulted from an occurrence (a fall down the stairs) that was not “within the class of foreseeable hazards that the [alleged] duty [to fix the lock and doorknob] existed to prevent.”

In dismissing the Complaint, the Appellate Division specifically added to its decision its observation that questions of foreseeability are for the Court to determine as a matter of law when, as here, “there is only a single inference that can be drawn from the undisputed facts.”

Justice Malone issued a dissenting opinion disagreeing with the majority in which he stated that he would find that an issue of fact existed as to whether defendant had actual or constructive notice of the defective notice of the defective doorknob.

Because of the reversal and the dissent, it is possible that the plaintiff will seek leave to appeal to the Court of Appeals.

For more information on this case or the “forseeability” doctrine, in general, please contact Jade M. Priest at [jpriest@agfjlaw.com](mailto:jpriest@agfjlaw.com).

- Negligence-Premises Liability

In Hyland v. City of New York, 821 N.Y.S.2d 138 (decided September 12, 2006), the plaintiff, a New York City police officer, sued the defendants, the City of New York and Western Beef alleging that she was injured as the result of a pot hole located on the public roadway immediately adjacent to Western Beef’s driveway. Plaintiff was on duty and had been assigned to scooter patrol when she attempted to enter the Western Beef parking lot to investigate possible illegal activity. She alleged that as she was turning from the street into the parking lot, the front wheel of her scooter struck a pot hole in the roadway causing her to lose control and fall forward over the handlebars, sustaining injuries.

The Supreme Court granted the defendants’ motions for summary judgment. On appeal, the Appellate Division, Second Department affirmed, finding that as a general rule, the owner of land abutting public property is not liable for keeping that public property in a safe condition unless the landowner actually created the dangerous condition, made a special use of the public property, or breached a specific ordinance or statute obligating the owner to maintain the public property.

The Court declared that Western Beef made a prima facie showing of entitlement to summary judgment by demonstrating that it did not create the allegedly dangerous condition or cause it to occur though the special use of the roadway and that no Statutes or ordinances conferred liability upon it.

The City had also moved for summary judgment, on the ground that it had not received prior written notice of the allegedly dangerous condition, as required by the Administrative Code of the City of New York. The Court found that the opinion of the plaintiff’s experts that the City negligently repaired the roadway was speculative and unsupported by the record and thus, was insufficient to raise an issue of fact. Accordingly, the Appellate Division affirmed the grants of summary judgment to both defendants.

- Insurance Coverage – Late Notice

Morris Park Contracting v. National Union Fire Insurance Company, 822 N.Y.S.2d 616 (decided October 17, 2006) was an action for a declaratory judgment by an insured seeking a declaration that the defendant-insurer must defend and indemnify the plaintiff in an underlying action. The defendant moved for summary judgment, contending that the plaintiff had violated the policy’s provision with regard the requirement that it provide prompt notice of occurrences, claims and suits to the insurer. On appeal, the Appellate Division, Second Department affirmed the Supreme Court’s denial of the insurer’s motion for summary judgment.

The Court noted that the record demonstrated that the insured, Morris Park, was served in the underlying personal injury action with a Complaint dated July 22, 2002. That Complaint contained an ad damnum seeking \$10 million in damages, a figure far in ex-

the Complaint contained only vague and generalized allegations of injury without any particularity or substantiation.. The Court found that in view of the commonplace practice of exaggerating damages request in personal injury actions, the ad damnum clause, alone, was not sufficient to requiring the giving of notice to National Union, the excess insurer. Rather, it is the combination of the ad damnum figure and evidence regarding the seriousness of the injuries which triggers that obligation.

The Court noted that following receipt of the Complaint, Morris Park served an Answer and discovery demands in the underlying action. It thereafter actively investigated the claim by requesting information regarding the occurrence of the injured party’s accident (of which it had no previous knowledge) and the nature and extent of the injuries. This ongoing investigation lead to the service of a Bill of Particulars dated January 22, 2003 upon Morris Park, setting forth a lengthy list of serious injuries for which the injured party for the first time claimed Morris Park was legally responsible. Morris Park then notified the excess insurer, National Union, of the claim eight days later on January 30, 2003. The Court noted that National Union maintains that Morris Park was fully aware of the claimed injuries and the probability that its excess coverage policy with National Union would be implicated by November 27, 2002 at the latest. On that date, Morris Park’s counsel sent a report to the primary insurer listing various injuries and damages claimed by the injured party in a second supplemental Bill of Particulars served in a related action against several municipal defendants. The Court noted that while that report constitutes some evidence that Morris Park may have had sufficient information at that time to alert National Union of a possible excess coverage claim, it was unable to reach such a conclusion as a matter of law on the record before it. Accordingly, the Court affirmed the trial court’s denial of the insurer’s motion for summary judgment.

It should be noted that a lengthy, well-thought-out dissent was issued by Justice Dillon and, a motion for leave to appeal to the Court of Appeals is likely.

## AGFJ Developments

- AGF&J is pleased to announce that, effective January 1, 2007, noted defense attorney, Irwin D. Miller, will be joining the firm. Irwin, who will be a member of the firm, is a distinguished, well-known trial attorney who has tried many high profile Labor Law, premises and automobile liability cases.

## 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.

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