

## OPENING STATEMENT

This issue's lead article is a book review of "A Hole in the Water", a novel by Lionel René Saporta. While book reviews are not normally the subject of Cases & Points' lead articles and are not likely to become a regular feature, we thought that our readers would find the review (and the book) both interesting and informative as it is based upon an actual case handled by AGF&J and because our partner, Dan Friedman, is the inspiration for one of the main characters in the book.

This issue also contains an article about the oft-occurring evidentiary issue of spoliation and focuses on the different remedies provided by New York State's and the Federal Courts.

In addition, this issue reports on the Balbuena v. IDR case in which New York's Court of Appeals has finally put to rest the conflict over an illegal alien's right to recovery of lost wages.

### Book Review

#### A Hole in the Water By: Lionel René Saporta (iUniverse, Inc. 2005)

A Hole in the Water is a work of fiction, involving intrigue, betrayal, violence and greed, as well as the discovery of one's self. The premise of the book, however, arises from an actual jewellers block claim and litigation. Several years ago AGF&J represented various London insurance companies and Lloyds Syndicates in a \$5 million diamond claim by Atlas Diamonds, Inc. Atlas alleged that approximately \$5 million in diamonds, many of which belonged to memoholders, was stolen from its safe by a team of highly sophisticated safe crackers. After an extensive investigation, the claim was denied because of evidence that Atlas staged the burglary and because Atlas failed to comply with the books and records clause of the policies. Litigation ensued and went through the Federal Courts, up to the U.S. Court of Appeals (2<sup>nd</sup> Circuit).

Atlas was represented by the book's author, Lionel Saporta. Underwriters were represented by Dan Friedman of AGF&J. Much of the book involves the protagonist, John Pilgrim's, discovery of his heritage. Although Mr. Saporta takes certain liberties with the facts (the case did not actually involve multiple murders!), the author often describes the forensic evidence, the operation of the London insurance market and the legal issues, with accuracy.

Dan's character, Ralph Goodman, while described upon first impression as being "unassuming", "large, and "beefy", Mr. Saporta graciously goes on to say that:

"... later, upon becoming better acquainted with him, you'd realize that "shrewd" "meticulous" and "decent" would fit as well."

Mr. Saporta, when describing Dan's character, Ralph Goodman, writes:

"Goodman was the kind of guy you forget. Professionally, you might forget him until maybe he'd climbed half-way down your throat and was throttling you."

Anyone who knows Dan, who appears throughout the book, the diamond industry or the London insurance market would enjoy reading the book, although the book's description of the outcome of the case has no basis in reality. The book ends with a settlement of the case during trial and the subsequent shooting of the insured's attorney. In reality, the Atlas case ended less dramatically, with a successful motion for summary judgment by AGF&J based upon Atlas' failure to comply with the books and records clause of the policies. The United States District Court for the Southern District of New York dismissed the suit and the United States Court of Appeals for the Second Circuit upheld the dismissal. (6247 Atlas v. Threadneedle Ins. Co., 923 F. Supp. 523, aff'd, 104 F.3d 352 (2<sup>nd</sup> Cir. 1996).) The Atlas decision is one of the leading cases involving the "books and records" defense, in the United States.

"A Hole In The Water" is published by iUniverse Inc. and can be purchased on [www.amazon.com](http://www.amazon.com) or [www.BarnesandNoble.com](http://www.BarnesandNoble.com).

#### The Two Worlds of Product Spoliation: New York and Federal Courts – A Comparison

By: Jade M. Priest and John F. Fabiani

#### INTRODUCTION

Spoliation of evidence is an issue which often arises, especially in product liability cases where preservation of the machine or device which is said to have caused the injury is crucial to the parties' proof. Often, evidence is innocently destroyed or disposed of because

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the party is unaware that a lawsuit may be filed. Other times, the evidence is intentionally disposed of to thwart the other party's ability to prove its case or defense. The difference in the way each of the situations are treated by New York State Courts and the Federal Courts is examined in this article.

Spoilation has been defined by state and federal courts as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation," West v. Goodyear Tire & Rubber Co. et al., 167 F.3d 776, 779 (2<sup>nd</sup> Cir. 1999); Telecom International America, Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999); MetLife & Home v. Joe Basil Chevrolet, et al., 807 N.E.2d 865 (N.Y. 2004). However, federal and state courts have taken different approaches with respect to the sanctions they will impose on spoliators. This article will explore where these courts have drawn the line with respect to the degree of punishment necessary to deter parties from engaging in this behavior and to mitigate the prejudice suffered by the non-spoiliating party.

## WEIGHING THE FACTORS

In determining the appropriate sanction in a case of spoliation, courts have generally weighed several factors including: "1) deter[ing] parties from engaging in spoliation, 2) plac[ing] the risk of erroneous judgment on the party who wrongfully created the risk and 3) restor[ing] [the] prejudiced party to the same position he would have been in," McEachron v. Glans, 1999 U.S. Dist. LEXIS 21928, 8 (N.D.N.Y. 1999) quoting Kronish 150 F.3d at 126; Kirkland v. New York City Housing Auth., 666 N.Y.S.2d 609, 612-613 (1<sup>st</sup> Dept. 1997).

A cursory glance at state and federal case law easily leads one to the conclusion that New York State Courts have taken a stern position, weighing these factors heavily against the spoliating party in an effort to make clear that no sanction is too drastic to send the message that spoliation will not be tolerated. Alternatively, federal courts have taken a more forgiving approach, exploring every avenue to avoid issuing what they consider "drastic sanctions", such as dismissals or preclusion of evidence.

## IMPOSING THE SANCTION

### NEW YORK STATE COURTS:

In taking a firm stance, New York State Courts have emphasized the need for deterrence and have not hesitated in issuing dismissals as sanctions for spoliation, even when they've found that the spoliating party did not act willfully but merely negligently, and even in design defect cases in which examination of the specific product involved is not essential to maintain a cause of action or to mount a defense. See Squitieri v. City of New York, 669 N.Y.S.2d 589 (1<sup>st</sup> Dept. 1998); Kirkland; Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 633 N.Y.S.2d 493 (1<sup>st</sup> Dept. 1995).

In Kirkland, a case successfully argued by AGF&J, the Appellate Division (1<sup>st</sup> Dept.) took a hard line against the New York City Housing Association for its failure to preserve a stove that was allegedly the cause of death of a woman who caught fire while attempting to light it. The rationale behind dismissing the case was the court's emphasis on not allowing the spoliating party to reap the benefits of its spoliation; "loss of evidence should be rendered costly enough an enterprise that it

will not be undertaken" Kirkland 666 N.Y.S.2d at 612 quoting Semper, Remedies for Spoliation of Evidence in Product Liability Litigation, 19 Prod Safety & Liab Rep, BNA, No. 21, 618 (May 24, 1991). The Court further stated that whether the spoliation was intentional or negligent is irrelevant because dismissal is permissible in either scenario

Similarly, in Squitieri the City of New York brought a third party action alleging that the street sweeper at issue was defectively designed by Elgin. After inspecting the street sweeper, the city disposed of it along with various others, finding them to be unsafe for use. Elgin moved to dismiss based on spoliation of the street sweeper, alleging that their ability to put forth an adequate defense had been impaired. Even though the court noted that in a design defect cause of action, circumstantial evidence is sufficient to establish the defect, they nonetheless held that the prejudice suffered by Elgin was too great. They reasoned that without the street sweeper Elgin would be unable to effectively counter the city's allegations that their maintenance of the sweeper was properly performed and not the source of the plaintiff's injuries. Therefore, they dismissed the 3<sup>rd</sup> party action stating that loss of a key piece of evidence before the other party's expert had an opportunity to inspect it was grounds for dismissal.

### FEDERAL COURTS:

In contrast, Federal courts take the position that dismissal as a sanction is drastic and "should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions," West 167 F.3d at 779. Even in situations where the courts have found a party's spoliation was intentional, the courts have been reluctant to grant dismissals.

In fact, in product liability cases, where the very product has been lost or destroyed, federal courts have taken an even more lenient stance in issuing sanctions for spoliation, stating that if circumstantial evidence is available then the non-spoiliating party has not been sufficiently prejudiced to warrant dismissal. Ramirez v. Berkel, Inc., 2004 U.S. Dist. LEXIS 4510 (S.D.N.Y. 2004); Valentine v. Museum of Modern Art, 29 F.3d 47 (2<sup>nd</sup> Cir. 1994). Under such circumstances the courts have normally issued adverse-jury instructions as the appropriate remedy, noting that even preclusion of evidence can be drastic, as it is tantamount to summary judgment.

In Perez-Velasco, plaintiff brought a manufacturing defect suit against the defendant after suffering injuries while riding on a 2000 Suzuki Vitara. 266 F.Supp.2d 266 (D.P.R. 2003). After filing the complaint and inspection by plaintiff's expert, the Suzuki Vitara was relinquished to a financing entity who then sold it to a 3<sup>rd</sup> party before defendant was afforded the right to inspect the vehicle. By the time the defendant was able to track down the Suzuki, it had been repaired and bore no semblance to its post-accident outlook. The court issued Rule 37 sanctions, precluding introduction of plaintiff's expert testimony, opining that dismissal was not warranted even though the crucial piece of evidence in the case had been spoliated. Hence, the defendant would then likely have a viable motion for summary judgment and/or a strong motion for a directed verdict at the close of the plaintiff's case at trial on the basis that plaintiff cannot prove a manufacturing defect without expert testimony. The court in such situations could seemingly avoid unnecessary continued litigation by issuing the dismissal upon motion for spoliation of evidence as do New York State Courts.

## CONCLUSION

Given the clear difference in approach taken by New York State and Federal Courts in issuing sanctions in cases of spoliation of evidence in product liability cases, this is an issue to be considered by product defendants during the initial stage of litigation if faced with a decision of whether to remove a case to federal court. Determining whether the product at issue is properly preserved and, if not, whether a motion for spoliation of evidence will be an option, is something defendants should do early on. Many product manufacturers remove cases to federal court as a matter of course. However, in a case commenced in New York State court which involves spoliation of evidence by the plaintiff, a decision to remain in state court could be a valuable tactic which might result in early dismissal of the case.

### **Balbuena v. IDR Realty – Illegal Aliens’ Right to Recover Lost Wages in Bodily Injury Lawsuits Is Finally Settled in New York.**

By Michael E. Gorelick

The issue of undocumented, illegal aliens’ right to recover lost wages in bodily injury lawsuits in New York has been the subject of much discussion and litigation. As we reported in the last issue of *Cases & Points*, the issue would soon be decided by New York’s Court of Appeals. This issue has now been settled by New York’s highest Court in Balbuena v. IDR Realty.

Mr. Balbuena was a native of Mexico who entered the United States without permission. While employed as a construction worker he fell from a ramp while pushing a wheel barrow, sustaining head trauma and other debilitating injuries that have rendered him incapacitated and totally unable to work.

Balbuena and his wife brought an action for common law negligence and violations of New York’s Labor Law seeking damages, including past wages from the time of the accident until the verdict and future loss of earnings.

Defendants moved for partial summary judgment dismissing plaintiff’s claim for lost wages, relying on the United States Supreme Court’s 2002 decision in Hoffman Plastic which held that an undocumented alien who provided fraudulent work papers in violation of Federal law could not be awarded back pay for work not performed as a result of an employer’s unfair labor practice.

The Supreme Court denied the motion, concluding that State law allows an undocumented alien to recover lost wages and that Hoffman did not apply to tort actions brought under State law. The Appellate Division, First Department, modified by granting defendants’ motion for partial summary judgment dismissing Balbuena’s claim for lost earnings to the extent it sought damages based on wages plaintiff might have earned in the United States. In deciding Balbuena (and a companion case involving the same issue), the majority of the Court of Appeals concluded that New York’s Labor Law applies to all workers, regardless of their immigration status. The Court also concluded that limiting a lost wages claim by an injured undocumented alien would lessen an employer’s incentive to comply with the Labor Law and supply all of its workers with a safe work place. Although the Court indicated that it recognized that plaintiff’s presence in this country without authorization is impermissible under Federal law, it further held that it was insufficient to justify denying plaintiff a portion of the damages to which it would otherwise be entitled.

Thus, the Court held that a jury’s analysis of a future wage claim submitted by an undocumented, illegal alien is similar to a claim asserted by any other injured person and its determination by the jury must be based on all of the pertinent factors (including plaintiff’s illegal employment status). However, that status, alone, does not deprive the plaintiff of the right to seek recovery for lost wages.

The law has now been settled that an illegal alien plaintiff’s right to recover future lost wages will be a question of fact for the jury, and not subject to a summary judgment claim by defendants based upon plaintiff’s illegal status. (2006 WL 396844, decided 2/21/06)

## **Recent Decisions of Interest**

### • **Insurance Coverage – Exclusion for Injury to Employees of Contractors**

In 405 Bedford Ave. Development Corp. v. U.S. Liability Ins. Group, the plaintiff/insured, 405 Bedford, was sued in a personal injury action by Santos Hernandez. Mr. Hernandez was injured at a construction site on premises owned by the plaintiff. He had been hired by Russo Construction to perform the construction project and was an employee of Russo. 405 Bedford’s request for defense and indemnification in the Hernandez action was denied because of the policy’s exclusion for injury to employees, contractors and employees of contractors.

In moving for summary judgment, the insurer contended that the endorsement clearly and unequivocally excluded coverage for injuries sustained by employees of contractors. Defendants established that it was not in dispute that (1) Russo was a contractor hired by plaintiff; (2) Hernandez was an employee of Russo; and (3) Hernandez was injured in the course of his employment with Russo.

In opposing the motion, plaintiff argued that the policy was ambiguous and thus, must be construed against the defendants. The Court granted summary judgment to the defendant insurer, declaring that the exclusion was clear and unambiguous and excluded an injury to an employee of a contractor if such injury occurred in the course of the employee’s work. Thus, based upon the undisputed facts, the Court found the loss was excluded, as a matter of law and found no support for plaintiff’s contention that the policy was in any way ambiguous. (Decided Sup. Ct., Kings Co. 10/21/05, J. Jones.)

U.S. Liability was represented by AGF&J in the 405 Bedford action. Should you have any questions about that case or the application of the injury to employees of contractors exclusion, please feel free to contact Jay Gunsher.

### • **Insurance Coverage – Failure to Cooperate**

Although an insured’s duties to provide prompt notice to, and cooperate with, its insurer in the defense of claims and suits against it are contained in the same policy section, they are, in fact, distinct duties governed by different standards. This distinction proved crucial to the Court’s determination in City of New York v. Continental Cas. Co., 805 N.Y.S.391, (1st Dept. 2005).

In this case, the City of New York had entered into a contract with Welsbach Electric Corp. to provide labor and materials for the maintenance of illuminated traffic signals. The contract required Welsbach to obtain liability insurance as well as to indemnify and hold the City harmless for any loss, damage, injury or death arising out of the performance of the contract.

Welsbach purchased an insurance policy from Continental which named the City as an additional insured.

On April 4, 2001, an employee of Welsbach was working in a “cherry-picker” attached to one of its truck and was injured while repairing a traffic light. He and his wife commenced a personal injury action against Con Edison alleging that he was electrocuted due to Con Edison’s negligence. Con Ed brought a third-party action against Welsbach seeking indemnification or contribution. Continental assumed Welsbach’s defense in November, 2002.

In December, 2002, Con Ed commenced a second third-party action against the City seeking indemnification and contribution from the City for its alleged failure to provide the plaintiff with a safe place to work, as well as the necessary training and safety equipment to perform his work.

On April 1, 2003, more than three months after it had been served with the second third-party action, the City faxed the Complaint to Welsbach requesting that Welsbach forward it to the insurer, Continental. It never directly forwarded the suit papers or demand to Continental.

Continental declined coverage on the basis that the City had not been given prompt notice of the accident and did not immediately send copies of the suit papers to it.

The City commenced a declaratory judgment action against Continental and then moved for summary judgment, arguing that since Continental was timely notified of the accident by the named insured, Welsbach, the City was entitled to rely upon that timely notice. In reversing the trial court’s ruling and in granting the City’s motion for summary judgment, the Appellate Division examined the differences between the duty to provide prompt notice and the duty to cooperate.

The Court acknowledged that, in New York, late notice of occurrence or claim would void coverage, even without a showing of prejudice to the insurer. However, the Court found that the insurer did, in fact, have timely notice of the occurrence and claim due to its receipt of timely notice from, and acceptance of coverage on behalf of, Welsbach. The Court found that the City’s failure to forward the suit papers to Continental in a timely fashion constituted, at most, a failure to cooperate.

However, the Court noted that a disclaimer on the basis of lack of cooperation will stand only when the insured’s actions are deliberate and that the insurer had the burden of proving (1) that it acted diligently in seeking to bring about the insured’s cooperation, (2) that its efforts were reasonably calculated to obtain the insured’s cooperation and (3) that the insured’s attitude demonstrated “willful and avowed obstruction”. Mere inaction by the insured is not a sufficient basis for a disclaimer based upon lack of cooperation.

Thus, after examining the facts, the Court found that Continental had not established the elements of a lack of cooperation defense and that, as a matter of law, it was obligated to provide a defense to the City in the underlying action.

**•INSURANCE COVERAGE—POLICY INTERPRETATION**

In Kramarik v. Travelers (3d Dep’t. 2006), plaintiff, the insured under Traveler’s policy sued for recovery of defense costs and indemnification incurred in defending an underlying tort action.

The plaintiff/insured owned and operated Bobby Kaye Entertainment, a discjockey entertainment company that was hired to provide a foam pit dance party at the State University of New York at Fredonia. A “foam pit” is a vinyl dance floor with inflatable sides that is filled with foam bubble liquid. While entering the pit, Karen Zahm fell, hitting her head on the vinyl bottom and fracturing several vertebrae. Ms. Zahm’s suit against the insured resulted in a judgment of \$180,000 in her favor. The insured requested defense and indemnification from Travelers during the course of the underlying action. Defendant declined coverage based upon an exclusion in its policy for coverage for injuries arising out of the use of “amusement devices operated by [the insured] including but not limited to the Aerotrim cross-trainer device or similar devices.” The term “amusement device” was not defined in the policy.

In support of its declination, the insurer relied upon dictionary definitions in asserting that any “piece of equipment” that provides a “means of amusing or entertaining” falls within the exclusion. Travelers contended that plaintiff, himself, advertised the foam pit dance party as an amusement activity, calling it a “whacky, wild and wet fun-filled event” and “the most fun you can have with your clothes on”.

In affirming the lower Court’s grant of summary judgment to the insured, the Appellate Division noted that the “very purpose of this business is to provide entertainment and amusement” and thus, defendant’s interpretation of the term “amusement device” would apply to almost any piece of equipment used in his business and, if correct, would make the coverage illusory.

Thus, the Court found that adoption of an interpretation that excluded coverage for the tools of plaintiff’s trade would contradict his reasonable expectations as a business person seeking insurance coverage for injuries resulting from the operation of his entertainment business.

**AGFJ DEVELOPMENTS**

AGF&J is pleased to announce that Jessica Ferraro has joined the Firm as an associate. Jessica graduated from Brooklyn Law School and earned her BA from Boston University.

William Palmer, a paralegal at AGF&J has earned his Independent, General Adjuster’s License from the New York State Insurance Department. In addition to his paralegal duties, Bill adjusts claims and serves as a No Fault arbitrator at Arbitration Forums’ New York City office.

**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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