

OPENING STATEMENT

Readers of the New York area's newspapers may have been struck recently by reports concerning the avalanche of claims and lawsuits arising out of clean up and debris removal work at the World Trade Center site and the many claimants' inability to obtain compensation for their injuries. More than 7,000 lawsuits have been filed, and yet reportedly none of the workers have been compensated for their claims of respiratory and other injuries they say they received in responding to the disaster. Special indignation has focused upon a little-known insurance company with a curious name: The World Trade Center Captive Insurance Company which is the subject of our lead article in this issue of *Cases & Points*

World Trade Center Captive Insurance Company and In Re World Trade Center Litigation:

A Situation Ripe for Change

By Thomas R. Maeglin

The need for a specialized insurance program for the WTC clean up effort became evident immediately after the events of September 11, 2001. Shortly after the attacks, the City of New York hired four leading construction companies to assist police, fire fighters and others in the clean up of the ground zero area. The firms responded without a contract and without first securing liability insurance. Others followed in the massive effort. Insurers were unwilling, however, to underwrite the risk. Thus, for over eight months, the WTC site clean up proceeded, exposing workers to gasses and dust produced by the wreckage, and exposing contractors to large scale liability. Private clean up and repair work continued at many other sites around lower Manhattan long afterward.

Creation of WTC Captive It was clear from early on that the scale of the problem was sufficient to ruin many of the companies that had come to the aid of the City at a time of great need. Construction firms envisioned claims coming not only from workers at the site itself, but from the many residents of the area as well as workers in nearby offices. The nature of the dust, ash and debris raised fears of widespread respiratory and other injuries. So authorities looked to the federal government for help.

After protracted negotiations with City and State authorities, Congress, in February of 2003, directed the Federal Emergency Management Agency to provide up to \$1,000,000,000 to establish a captive insurance company out of funds it had previously appropriated for disaster relief for the terrorist attacks of September 11th (See Pub.L. 108-7; Pub.L. 107-117). The company was to address "claims arising from debris removal including claims made by city employees." The

act's legislative history tells that the money was proposed as a reimbursement to the City and State of New York. The program was referred to as "liability insurance," and was expressly to exclude certain types of claims, such as those arising from the aircraft crashes themselves and collapse of the WTC buildings, and claims under workers compensation, disability or retirement benefit programs. Once this federal funding was promised, more needed to be done at the state and city level. The State Legislature amended sections of the Insurance Law; and a non-profit corporation had to be formed for this special purpose.

The World Trade Center Captive Insurance Company and its Policy

In 2004, the City of New York established The World Trade Center Captive Insurance Company. The company is under the direction of five city officials appointed by the mayor. Under the policy issued by WTC Captive, the City of New York is the Named Insured and all of the contractors, subcontractors, architects and engineers working at Ground Zero were named as Additional Insureds. The company was funded in 2005 with a one-time paid-in premium of \$999,900,000.

The policy issued to the City by WTC Captive has some similarities to Commercial General Liability Insurance policies issued to business everywhere, though it is more limited and tailored to respond to WTC clean up claims. The policy's coverage agreement provides,

In consideration of the Premium ... and subject to all terms, conditions, and limitations of this Policy ..., the Company shall pay on behalf of the Insureds all sums which Insureds become legally obligated to pay as Damages because of Claims ... arising from or relating to Debris Removal, provided the following conditions are met:

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- (i) The Claim falls within the scope of General Liability, Marine Liability, Environmental Liability, or Professional Liability; and
- (ii) The Claim arises from an Occurrence during the Exposure Period.

Nothing hereunder shall preclude the Company from settling and paying a Claim prior to the commencement of a Suit.

The Policy gives the Company the right and duty to defend an Insured against any Suit seeking any Damages to which the Policy may apply, even if the Suit is groundless, false or fraudulent. The policy had an Exposure Period running from September 11, 2001 to August 30, 2002. A few common policy exclusions limit coverage, excluding punitive damages; workers compensation claims; fines and penalties; and intentional acts. The insureds have a duty to provide timely notice of claim or suit (but not occurrence), and the Policy expressly requires "material prejudice to the interests of the Company" in order for the delay to result in a loss of coverage. The Company agrees to pay claims promptly "[w]hen the amount payable on a covered Claim, pursuant to a settlement or final judgment in a Suit or otherwise, is determined and the Company has received evidence of its obligation to pay any such amount".

Performance of the World Trade Center Captive

Initially, the creation of the WTC Captive was greeted with relief by the companies it insured. Michael Feigin, the Executive Vice President and Chief Administrative Officer of Bovis Lend Lease Holdings, Inc., told the U.S. Senate Committee on Environment and Public Works, "But for WTC Captive, expenses for lawyers and consultants would have exceeded any fees made [by the contractors] in a matter of months. As a result of these ongoing expenses and potential liabilities, we would probably lose our bonding lines, our banking support and our insurance coverages. In short, responding to a disaster when called would have taken a thriving business employing over 2,500 people in 20 states and Latin America and put us out of business. Every company responding to a disaster without some kind of protection faces the same choice."

With the passage of time, however, officials began to take notice that victims were not being compensated by the fund, while newspapers reported that the company had paid tens of millions of dollars of administration and legal fees. There was outrage that the federal funds were being used to fight the heroes of 9/11 in court. Salaries and benefits given to WTC Captive officials drew criticism. Officials defended their work as following the company's mandate to defend the City and its contractors. Still, journalists and officials tended to view the \$1 billion provided by FEMA as something analogous to the September 11 Victim Compensation Fund, which had been established not for the purpose of defending claims, but for paying victims' survivors in exchange for their relinquishing claims against the airlines.

Meanwhile, the number of claims pending in state and federal court continued to grow. Eventually, the claims, now in the thousands, were brought under the jurisdiction of Judge Alvin Hellerstein in a class action law suit in the United States District Court for the Southern District of New York under the caption In Re World Trade Center Disaster Site Litigation, with dozens of contractors, businesses, building managers and owners named as defendants, and with clean up at many locations besides Ground Zero at issue. One recent analysis has estimated the cost of treating the health problems associated with the clean up at approximately \$393,000,000 annually.

Compensation Fund Proposals

In short, the system dealing with the problem has increasingly appeared inadequate. Officials at WTC Captive can hardly be blamed for the situation. By not paying claims under the policy, they have rightly treated the policy as "litigation insurance" created for the benefit of contracting firms. Indeed, if the company were measured by the standards of a liability insurer, it would undoubtedly be considered a success. And with litigation ensuing, there have been no settlements or final judgments that would necessitate payment.

Of course, the role of WTC Captive is only a small part of the picture. In the courtroom, Judge Hellerstein has urged lawyers to come to a settlement that would cap the liability of the city and its contractors who worked at Ground Zero at \$1 billion. He has also appointed Special Masters with special expertise in mass torts to facilitate group settlements by organizing cases into categories.

In the political arena, there are several proposals to create a compensation fund. One was introduced in Congress by New York Representative Carolyn B. Maloney in 2003, but not acted upon; other Representatives and Senators have supported the idea. Kenneth Feinberg, who administered the September 11th Victims Compensation Fund, has volunteered to administer a new fund. Mayor Bloomberg has called upon Congress to amend the law that mandated the \$1 billion FEMA payments, to liquidate WTC Captive and transfer its funds to the September 11th Fund. There have also been proposals to deal with some claims through public employees' pensions.

Given that it took over three years to create WTC Captive itself, there is reason to be skeptical about a quick resolution of the problem. Still forces may be coming into alignment that could lead to a change. The anguish of victims continues to cause consternation. The New York Post quoted one worker as saying, "When I got called to the World Trade Center, it did not take me five years to get there – it shouldn't have taken five years to talk about compensation. People don't want to be millionaires. They're in a hole because of all these health problems." The emotional appeal of those injured; the almost incalculable exposure to insurers and parties; the fear that tort lawyers will benefit more than victims; the clogging of the courts—these factors combine to present strong reasons why a different solution could be reached, making the World Trade Center Captive Insurance Company an interesting footnote in the history of September 11th and its aftermath.

Recent Decisions of Interest

Also in this issue, we are pleased to report several insurance coverage and personal injury cases in which AGF&J attorneys were successful in obtaining summary judgment in favor of our clients.

Insurance Coverage:

In *NWL Holdings, Inc. (d/b/a National Wholesale Liquidators) v. Discover Property & Casualty Insurance Company*, a declaratory judgment action in the United States District Court for the Eastern District of New York, **Michael Gorelick** was successful in obtaining summary judgment in favor of AGF&J client NWL. NWL brought a federal declaratory judgment action seeking an order declaring that Discover was obligated to defend NWL and to reimburse it for attorneys fees and expenses incurred in its defense of an underlying state action.

In the underlying action, Nawaz Malik, a former employee of NWL sued NWL and another employee, Muhammad Akram, alleging that Akram sexually assaulted him at work. Causes of action plead in the underlying action included (1) sexual harassment, (2) retaliation based upon complaints of sexual harassment, (3) intentional infliction of emotional distress, (4) assault and (5) battery. Negligent supervision,

the time of the assault was a Commercial General Liability Insurance policy issued by Discover to NWL. A covered occurrence under the policy was defined as “an accident”. Excluded from coverage was “bodily injury. . . expected or intended from the standpoint of the insured”.

The court began its analysis by discussing the 2004 Court of Appeals decision in *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 2 N.Y.3d 158, in which the court held that a sexual assault committed by an employee is an “accident” and therefore an “occurrence” covered by the policy because the sexual assault was neither intended nor expected by the employer and the employer could not be found liable for the sexual assault committed by its employee under the doctrine of respondeat superior when he was not acting within the scope of his employment. In the Malik action, however, a cause of action based upon respondeat superior was not alleged. Nonetheless, the court explained that the New York Court of Appeals, in *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61(1997), broadened protection for insureds by requiring that courts look beyond the four corners of the complaint in determining whether the case stems from any potentially covered occurrence. The Court of Appeals opined that an insurer should not be permitted to use the pleading as a shield to avoid defending its insured and thus has an obligation to provide a defense whenever “it has actual knowledge of facts establishing a reasonable possibility of coverage,” even if that possibility is not plainly stated in the language of the complaint. *Id* at 63 and 67. In the NWL case, the court agreed with NWL’s arguments that a liberal interpretation of the complaint reveals allegations which support a claim of negligent supervision and that notwithstanding the lack of any such allegation in the complaint, the defendant had knowledge of facts establishing a reasonable possibility of coverage e.g., repeated complaints by Malik of unwanted sexual advances prior to the actual assault. The court agreed that these facts were sufficient to put the defendant on notice that a claim for negligent supervision could ensue. Hence, the court found Discover had a duty to defend.

The defendant also argued in opposition to summary judgment that the “Employer’s Liability” exclusion in the policy applies. This excludes from coverage bodily injury to an employee “arising out of the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured’s business.” The court simply stated that it could not take seriously any argument that the commission of a sexual assault “ar[ose] out of [Akram’s] employment.”

For more information on insurance coverage issues, please contact Michael Gorelick at mgorelick@agfjlaw.com

Personal Injury:

Trip and fall cases:

Leonard Kamlet obtained summary judgment in favor AGF&J client Y.S.G.F. Realty, LLC., in a trip and fall action brought by plaintiff Joseph Rizzi in Supreme Court, Richmond County.

Mr. Rizzi was allegedly injured when he tripped and fell on the sidewalk in front of the property owned by Y.S.G.F. When deposed, the plaintiff suffered memory loss could not recall the accident. At the completion of discovery the defendant moved for summary judgment on the grounds that the plaintiff was unable to identify the cause of the accident. The court held that the, although the plaintiff submitted an expert affidavit evidencing various Building Code violations, any conclusion that the violations were the proximate cause of the accident would be pure speculation since the plaintiff could not

recall the accident and there were no eyewitnesses. could just as possibly have been caused by the plaintiff’s misstep or loss of balance as a defect on the premises.

In another trip and fall case in Supreme Court, New York County, **Siobhan Forde** was successful in obtaining summary judgment in favor of AGF&J clients Sandra Friedman Mocio and Rosemary Mocio.

In that case, plaintiff Sandra Haberny tripped and fell in front of a pizzeria two months prior to the amendment of Section 7-210 of the New York City Administrative Code. Prior to the amendment of the Code, the City of New York had a non-delegable statutory duty to maintain public sidewalks in a reasonably safe condition. The old law imposed a duty on the adjacent property owner only if there was evidence it either created the unsafe condition on the sidewalk or put the area to a special use for hie or her own benefit. In that instance, the adjacent property owner would have been deemed to have assumed a duty to maintain the area. The amendment to the Code now imposes that duty on owners of adjacent property in the first instance, with the exception of one and two family dwellings.

In the Haberny case, the adjacent property owners, the Mocios, replaced the entire sidewalk seventeen years prior to the subject accident. Accordingly, the plaintiff and the co-defendant City of New York argued that Mocio was therefore liable for the plaintiff’s accident on the subject sidewalk as she owed a duty to maintain the sidewalk she installed. However, since 15 year prior to the accident, the Mocios had not undertaken any repairs of the sidewalk, nor made any special use of the sidewalk.

In the area where plaintiff tripped and fell there was a height differential between two sidewalk slabs, which was repaired shortly after the plaintiff’s accident. There was no evidence that the Mocios repaired the sidewalk or that they caused or had notice of the defect prior to the plaintiff’s accident. The City’s record search did not reveal any “other parties” who worked on the sidewalk area. The plaintiff’s attorney conjectured that since it would be unusual for the City or a municipal utility or contractor to repair the sidewalk voluntarily, the Mocios must have repaired it. The court granted summary judgment in favor of the Mocios stating that the opposition’s arguments against summary judgment amounted to only conjecture and surmise, which is insufficient to defeat a showing of entitlement to summary judgment.

For more information about the *Rizzi* and *Haberny* cases and related issues, please contact Leonard Kamlet at lkamlet@agfjlaw.com or Siobhan Forde at sforde@agfjlaw.com

Motor Vehicle Accident Cases:

Siobhan Forde was successful in obtaining summary judgment in favor of two AGF&J clients based upon the plaintiffs’ failure to meet the threshold of “serious injury” required by New York Insurance Law Section 5102 in order to maintain an action for negligent operation of a motor vehicle.

In the first case, *Mecham v. Dionne Green, Chrysler Financial, et al.*, the Supreme Court, Bronx County, determined that AGF&J client Chrysler made a *prima facie* showing of entitlement to summary judgment on the basis that the plaintiff did not sustain a “serious injury” as a result of a three car collision. Defendant introduced the expert medical reports of orthopedic surgeon Martin Barschi, M.D. and radiologist Scott Coyne, M.D., which demonstrated that the plaintiff’s lumbosacral and cervical spine conditions were chronic injuries sustained during two prior accidents.

In attempt to raise a question of fact so as to defeat summary judgment, the plaintiff submitted the affidavit of her neurologist, Richard Radna, M.D. and radiologist A.R. Ramachandran, M.D. Dr. Ramchandran failed to state an opinion at all as to causation. Although Dr. Radna opined that the plaintiff's decreased spinal range of motion was the result of the accident which was the subject of litigation, the doctor failed to state with specificity the extent to which the range of motion was decreased and his first examination of the plaintiff was more than two and a half years after the accident. Hence, the court found his opinion purely speculative and insufficient to raise a question of fact as to "serious injury." Furthermore, neither doctor responded to Dr. Coyne's opinion that the plaintiff's injuries were pre-existing. Hence, the court granted Chrysler's motion for summary judgment and dismissed the plaintiff's complaint as against all defendants.

Similarly, in the second case, *Kim v. Amaya*, the Supreme Court, New York County, granted summary judgment and dismissed the plaintiff's complaint against AGF&J client Carlos Amaya. Specifically, the court found that the physician's affirmation submitted in opposition to summary judgment was based upon an examination that took place more than three years after the accident. Furthermore, the court noted that it did not consider the physician's conclusions as they were based upon his review of medical records that were not properly before the court.

For more information on the "serious injury" threshold required by New York Insurance Law Section 5102 and summary judgment strategy based upon this law, please contact Siobhan Forde at sforde@agfjlaw.com

Procedural Law:

On behalf of AGF&J client, QBE Insurance, **Michael Gorelick** and **Alexandra Rigney**, successfully defeated a motion to change the venue of a declaratory judgment action against M.C.A.A. from New York County to Suffolk County.

QBE brought a declaratory action in the Supreme Court, New York County against M.C.A.A. (d/b/a The Barracks) seeking a declaration rescinding the QBE policy due to material misrepresentations by the insured in procuring the policy. The Barracks is a tavern located in Suffolk County, New York, where it is alleged in the underlying action that decedent Jillian McLees became intoxicated, and as a result, was involved in a fatal car accident in Suffolk County.

M.C.A.A. moved to change the venue of the declaratory judgment action from New York County to Suffolk County. It argued that because the defendants in the underlying action are residents of Suffolk County, the circumstances that gave rise to the action occurred in Suffolk County, the witnesses are located in Suffolk County and the insured business is located in Suffolk County change of venue for convenience of material witnesses is warranted.

Pursuant to CPLR 510(1), the "court, upon motion, may change the place of trial of an action where: the county designated for that purpose is not a proper county..." CPLR 503 proscribes that the proper venue based on residence is "the county in which one of the parties resided when [the action] was commenced..."

CPLR 503 (c) provides that a foreign corporation authorized to do business in New York is a resident of the "county in which its principle office is located." Hence, the court concluded that, since it is uncontested that QBE's principle office is in New York County, the defendant's motion to change venue based upon 510(1) must be denied.

CPLR 511(a) states that a demand for change of venue pursuant to 511(b) must be served "with the answer or before the answer is served." 511(b) then provides that the defendant may, within 15 days after service of the demand, move to change the place of trial if the plaintiff did not consent to the change within five days after service of the demand for change of venue. Here, the defendant served its change of venue demand several months after its answer. Thus, the court denied the defendant's motion to change venue to the extent it was made pursuant to CPLR 511(a). The court also noted that the defendant did not comply with 511(b) as the motion to change venue was not served within 15 days after the demand was served.

The court goes on to discuss the defendant's failure to meet the requirements for change of venue pursuant to CPLR 510(3). A party seeking a discretionary change of venue pursuant to CPLR 510(3) must establish with detailed relevant information that the convenience of nonparty witnesses would be enhanced by the change. Here, the court found that M.C.A.A. did not make a proper showing of the witnesses' identities and availability, the nature and materiality of their testimony and the manner in which the initial venue would inconvenience them. Furthermore, the court noted that the location of the facts and circumstances surrounding the underlying Dram Shop action and the convenience of witnesses in that action is irrelevant to the instant motion. Instead, the convenience of material witnesses in the declaratory judgment action, which QBE showed would be less inconvenienced by the New York County venue than the Suffolk County venue, are at issue in the motion. Hence, based upon the foregoing reasoning, the court denied the motion for change of venue and entered an order retaining venue in New York County.

For more information regarding issues of proper venue, please contact Michael Gorelick at mgorelick@agfjlaw.com or Alexandra Rigney at arigney@agfjlaw.com.

AGFJ DEVELOPMENTS

AGF&J is pleased to announce that, effective April 19, Chirs Christofides, joined the firm. Chris, a member of the firm, is a distinguished, well-known attorney who has litigated many high profile insurance defense and subrogation actions.

AGF&J is also pleased to announce that Alexandra Kears will join the Firm as an associate in September 2007. Alex will graduate this May from Brooklyn Law School and earned her BA in 2004 from Emory University. Alex clerked at our firm throughout law school.

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 opinions expressed herein are ours, and do not necessarily reflect those of our clients.