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

## CASES AND POINTS

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### **O** PENING STATEMENT

On October 3, 2001, Reliance Insurance Company (and its related companies) filed for liquidation in the Commonwealth Court of Pennsylvania. As a result, that Court issued an Order staying all suits against Reliance or its insureds. Initially, New York Judges were unsure whether the Pennsylvania Court Stay Order applied to actions pending in New York's Courts. However, on December, 2001, the New York Superintendent of Insurance was appointed as Ancillary Liquidator of Reliance and the Supreme Court, New York County, eliminated any confusion or uncertainty as to whether actions against Reliance or its insureds could go forward in New York when it issued a formal Order staying those actions. The Stay was due to expire on June 17, 2002, but was extended, by further Order of the New York Supreme Court, for 120 days. That Stay is currently scheduled to expire on October 15, 2002.

Although no formal decision has been announced, it appears that the Stay will expire and will not be extended, at least as respects suits against insureds of Reliance.

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### AGF&J'S "SUMMER OF SUCCESS" RECENT CASES

By: Michael E. Gorelick

This summer has been a busy time for AGF&J. We successfully defended our clients in a wide variety of cases including: a disclaimer of coverage for an environmental clean-up claim, defense of an asbestos claim against a wire manufacturer, and the defense of a Labor Law case against the insured-church which was undergoing renovations. A summary of this summer's successful defenses is our lead story in this issue.

The first AGF&J case which was successfully defended this summer involved the applicability of the absolute pollution exclusion in a CGL policy to a claim for environmental damage caused by an insured's mining operations.

In *Gold Fields American Corp. v. Aetna Cas. & Surety Co., et al.*, the Appellate Division, First Department, unanimously affirmed the decision of the trial court which had granted the insurers summary judgment and which had ruled that "the absolute pollution exclusion relied upon by the defendant insurers cannot be reasonably and fairly interpreted except to exclude the underlying claims from the discharge of mining waste from coverage".

In *Gold Fields*, the plaintiff-insured had argued that the absolute pollution exclusion did not apply to the environmental remediation claims against it because the pollutant was also a product that could be sold and

because the pollution was "naturally occurring".

In affirming the summary judgment granted by the trial court, the Appellate Division held that "even if mining waste can be used as a commercial product, it is nonetheless covered by the absolute pollution exclusion, since indisputably hazardous substances were released into the open environment. . . The hazardous substances are not rendered non-polluting by the fact that they are naturally occurring, since in this case, the hazardous material is not found in its unaltered form because mining, an unnatural process, has altered its location".

Significantly, all of the defendant insurers other than the one represented by AGF&J, settled with the plaintiff-insured either prior to or after the lower court granted the summary judgment motion. AGF&J's client was the only insurer which refused to capitulate and successfully saw the case through to its final conclusion. (744 N.Y.S.2d 395, 6/27/02)

If you have any questions regarding this case, please feel free to contact Daniel J. Friedman at [dfriedman@agfjlaw.com](mailto:dfriedman@agfjlaw.com)

This summer AGF&J also successfully defended its clients in an asbestos case.

In *Dublirer v. AC&S, et al.*, the firm represented Harco Laboratories, Inc. and Harco Laboratories, as successor

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by merger to Harris Industries, Inc., in a suit brought against them by an elderly plaintiff who had suffered extensive exposure to asbestos containing products from 1940 until approximately 1982.

The plaintiff had been exposed to asbestos at the Federal Shipbuilding Dock at Kearney, New Jersey where ships were outfitted for the Brooklyn Navy Yard during World War II. After the War, from 1945 to 1955, he was a partner in a company which manufactured electrical health and beauty products such as heating pads. These products used flexible nichrome, heating element wire which contained small amounts of asbestos insulation. His business was then sold to another company where plaintiff became the manager of that company's heating pad division. It continued to use flexible nichrome wire in its heating elements which, until 1982, contained asbestos. The flexible nichrome wire had been purchased from a variety of sources which may have included a business incorporated by the principal shareholder of the defendants.

Harco and Harris Industries were incorporated in 1954. According to the documentary evidence produced in discovery, neither of those companies sold nichrome heating element wire and neither company sold items to the companies owned by plaintiff or for which plaintiff was employed.

Plaintiff contended that although, technically, its business may have purchased the nichrome wire from a prior, related corporate entity, that corporation was in effect, an alter ego of the defendants. Plaintiff argued that under Connecticut law (pursuant to which the defendants were incorporated), the corporate form should be disregarded because one corporation was merely an instrumentality of the other.

In rejecting plaintiff's argument the Court found that, as a matter of law,

there was no basis upon which to find the defendants liable for plaintiff's purported injuries. Further, the Court noted that there was no evidence that the defendants either dominated, or were dominated by, the prior corporation or that the control of one was used to commit a fraud or avoid a positive legal duty. Consequently, the Court held that, in the absence of fraud or some clearly illegal or evasive purpose, there was no reason to pierce the corporate veil. Accordingly, the Court granted summary judgment and dismissed the case as against the firm's clients. (Decision and Order of H. Freedman, J., Sup. Ct. N.Y. Co., 8/20/02). For further information about this Decision, please contact Glenn A. Jacobson at [gjacobson@agflaw.com](mailto:gjacobson@agflaw.com).

On the same day that *Dublirer* was decided, the Decision and Order of Justice John R. LaCava, of Supreme Court, Westchester County (dated 8/19/02) was entered. That decision also granted summary judgment to a defendant represented by AGF&J.

In *Robert Lee Johnson v. Grace Episcopal Church Co., Inc., et al.*, the firm represented Grace Episcopal Church, the owner of premises which were undergoing renovation. During the renovation, plaintiff was injured when a dumpster with four attached wheels belonging to his employer, Better Carting Service, and which had been filled with heavy construction debris by another contractor, Integrated Conservation Resource, tipped over and fell upon him as he and a co-worker were attempting to roll it out from a work site at the Church to a waiting Better Carting Service truck.

Plaintiff sought to impose liability upon the various contractors and upon the Church under New York's Labor Law § 200, and upon common law negligence principles.

Grace Episcopal Church and Integrated Conservation Resource each moved for summary judgment

seeking to dismiss the plaintiff's Complaint against them.

In granting the motion, the Court found that the Section of the New York Industrial Code upon which the plaintiff relied was inapplicable. The Court found that the Section which provides that "wheels of hand - propelled vehicles shall be maintained free-running and well-secured to the frames of the vehicles", was "obviously intended to insure that wheels do not collapse or stick causing a vehicle to tip over and injure a worker". The Court found that this Section of the Industrial Code was not applicable to this case where the allegation of the plaintiff related to an allegedly cracked, crumbling or uneven walkway and/or sidewalk.

Moreover, the Court found that liability under Labor Law § 200 and common law negligence principles will not attach when the dangerous condition complained of was open and obvious. Thus, since plaintiff was aware of the condition about which he complained and a crack from which he was attempting to pull the container and with which he struggled for approximately five minutes before his injury, Labor Law § 200 did not apply. Furthermore, the Court found that that Section of the Labor Law did not extend to defects or dangers arising from a subcontractor's methods, unless it was shown that the owner or general contractor exercised some supervisory control over the operation.

Here, since there was no evidence that the Church exercised any direction or supervisory control over the operation, and that the plaintiff's actions were performed entirely under the direction of his supervisor and the owner of the dumpster, the Court found that there was simply no basis, either under the Labor Law or common law negligence principles, to affix liability against the Church. Thus, the motion for summary

judgment was granted and the Complaint was dismissed.

For further information on this decision, please contact Tina Fugazzi at [tfugazzi@agflaw.com](mailto:tfugazzi@agflaw.com)

### Other Recent Decisions of Interest

- **Claims Arising From Sexual Relationship Between Therapist and Insured's Employee Are Not Covered By County's Professional Liability Policy**

In *McKay v. Healthcare Underwriters Mutual Insurance Company*, the Appellate Division, Third Department, was called upon to decide an appeal from an Order of the Supreme Court, Schenectady County, which had granted an insurer's motion for summary judgment dismissing the plaintiff's Complaint.

Previously, in 1997, plaintiff commenced an action against Joseph Ciani, an alcohol and drug abuse therapist employed by Schenectady County and her employer, the County, for emotional injuries arising out of a sexual relationship with Ciani which developed after plaintiff sought assistance for her alcohol and drug abuse problem from the County's Employee Assistance Program. Ciani had been the director of the program.

Plaintiff's Complaint against the County was dismissed but, after trial, she was awarded substantial damages based upon Ciani's negligence in the course of his therapist-client relationship with her.

After the judgment remained unsatisfied, the plaintiff brought an action against the County's professional liability insurer to enforce the judgment which had been rendered against Ciani.

The trial court granted the defendant-insurer's motion for summary judgment because Ciani's acts were outside the scope of his employment.

Plaintiff appealed, contending that her claim was covered because it

arose out of Ciani's negligence in rendering professional services.

In affirming the dismissal, the Appellate Division noted that because the policy was issued to the County, not to Ciani, the coverage sought by plaintiff must be based on Ciani's status as a County employee who provided professional services. Accordingly, the Court found that because the sexual relationship had no valid treatment purpose and no legitimate County business purpose, Ciani's acts were outside the scope of his employment and thus, not covered by the policy. (743 N.Y.S.2d 593, 6/6/02)

- **Claims Arising Out of Sexual Assault By the Insured's Employee Were Excluded by the "Abuse or Molestation" Exclusion and Did Not Arise from the Use or Operation of an Automobile**

In *Towne Bus Corp. v. Ins. Co. of State of Pennsylvania*, the Appellate Division, First Department, had to decide an appeal by the insured from a summary judgment granted to the defendant/insurer, declaring that it was not required to defend or indemnify the insured in an underlying action based on a sexual assault committed by its employee.

The underlying action was brought by a victim of an alleged sexual assault by a bus driver employed by the plaintiff. The insured bus company's claim for defense and indemnification in that action was denied by the insurer on the ground that the alleged sexual assault by the bus driver was clearly outside the coverage of both the general liability and automobile liability policies issued by the defendant.

The general liability policy contained an exclusion for claims arising out of "abuse or molestation" committed by plaintiff's employees and plaintiff's negligent employment, investigation and supervision of abusers and molesters. Based upon that exclusion, the Appellate Division

agreed that although the underlying Complaint also contained an allegation of wrongful imprisonment, no cause of action would exist but for the molestation, the claim is based on assault and molestation and thus, the exclusion applied as a matter of law.

Furthermore, the Court found that the injuries alleged in the underlying action cannot be considered as resulting from either an "accident" or the "ownership, maintenance or use" of a covered auto, as required by the automobile liability policy. Thus, the Appellate Division affirmed the trial court's grant of summary judgment to the insurer under both policies. (744 N.Y.S.2d 394, 6/27/02).

- **Fire Insurance: Evidence Supporting a Verdict that the Insured Caused the Fire**

*Saggese v. Madison Mutual Ins. Co.* involved an insured-plaintiff's appeal from a jury verdict of the Supreme Court, Oneida County, that, the fire which had destroyed the insured's residence had been intentionally set at the direction of the insured.

Plaintiff contended that several errors had been committed by the court below. First, plaintiff claimed that the jury's verdict was not supported by legally sufficient evidence. However, in rejecting this argument, the Appellate Division Third Department, found that defendant's presentation of un-disputed evidence: establishing that the fire was caused by the ignition of a trail of gasoline leading up the stairs from the first floor to the third floor; that the person accused of setting the fire was a long-standing acquaintance of plaintiff who owed him money; that the value of the property was approximately one-half of its insured value because of decreasing real estate values in the area; that the property was encumbered by two life estates; that plaintiff knew that no one would be in the building on the night of the fire; and that the plaintiff

arranged for a police officer to see him in Saratoga shortly after the fire, thereby creating the inference that he did not set the fire, was sufficient to support the jury's finding that the insured had directed the arson.

Plaintiff also contended that the Court erred in permitting the defendant's expert, a chemical engineer with a specialty of fire explosion and toxic explosion incidents and a sub-specialty in flame fired appliances, to testify with respect to the cause of the injuries sustained by the person accused of setting the fire at the plaintiff's residence. In rejecting that argument, the Court found that it was within the sound discretion of the trial court to determine whether the witness may testify as an expert and that the Court's determination should not be disturbed "in the absence of serious mistake, an error of law or abuse of discretion".

Finally, the plaintiff contended that the Court abused its discretion in refusing to permit the treating physician of the person accused of setting the fire to testify. However, the plaintiff attempted to call that witness on the fourth day of the trial and had failed to comply with the expert disclosure Order which required the plaintiff to disclose the existence of that witness prior to trial.

Accordingly, the Court found that no reversible error had occurred and affirmed the jury's finding that the insured could not recover because it had caused or procured the fire which destroyed the insured premises. (741 N.Y.S.2d 803, 5/3/02)

- **Failure to Issue A Prompt Disclaimer Estops Insurer; However, Mutually Exclusive "Other Insurance" Clauses of Two Policies Negated Each Other and Required Each Insurer to Contribute.**

In *Macari v. Nationwide Mut. Ins. Co.*, the Appellate Division, Second Department, affirmed an appeal from a

judgment declaring that the defendant, Nationwide Mutual, was obligated to defend and indemnify the plaintiff in an underlying action. In its decision, the Appellate Division also reversed the finding of the Trial Court that the coverage provided by another insurer, Firemans, was excess and that Nationwide's coverage was primary on the basis that the greater specificity of the language in Fireman's "other insurance" provision.

The insured, Macari, had been sued in an underlying action. Defendant, Nationwide, however, denied coverage to its insured in that action because its insured had failed to provide it with timely notice of the claim. However, the trial court found that Nationwide's unexplained delay in denying coverage of 20 months (from June, 1998 when Nationwide first received notice of the claim, until February, 2000 when it disclaimed coverage) was un-reasonable, as a matter of law. Thus, the Appellate Division found that the defense which might have been available to Nationwide had been waived by its failure to disclaim promptly.

While the Appellate Division affirmed that portion of the Trial Court's decision, it reversed the finding of the Supreme Court that the Fireman's policy was excess.

The Firemans policy issued to the insured, Macari, provided that its obligations are limited if "other valid and collectible insurance is available" to payment of "excess over any of the other insurance, whether primary, excess, contingent or on any other basis". The Court found that the meaning of this provision, despite its "super-escape phraseology" was essentially no different from that of Nationwide's, which stated that "if there is other insurance covering the same loss or damage, Nationwide will pay only the amount in excess of the other insurance policy's limit".

Thus, the Court found that since both policies cover the same risk and

both contain an "other insurance" provision constituting a standard "excess insurance" clause, the clauses negate each other, and each carrier must contribute its proportionate share to the loss determined in the underlying action. (745 N.Y.S.2d 191, 7/1/02)

**AGFJ DEVELOPMENTS**

We are pleased to announce that Gabriel I. Hidalgo and Anthony M. Barnes have joined the firm as associates.

Gabriel is a 1997 graduate of the University of Dayton School of Law who earned his BA degree from Marist College in 1994. Gabriel has extensive experience in all aspects of defense litigation.

Tony is a 1998 graduate of Loyola School of Law and is admitted in California and New York. Tony is an experienced insurance defense attorney who came to us from a well-respected California defense firm, Burnham Brown. He earned his BA degree in 1994 from U. Cal-Berkley where he was a three time member of its NCAA Championship Water Polo team.

**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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