

## 10 Years Strong — and Still Growing



Sometimes it's hard to believe it's already been a decade since we founded Goldberg Segalla. As the old saying goes, time flies when you're having fun — not to mention working hard with a talented team for a stellar group of clients.

We're proud that we've been serving some of our clients continuously since the first day we opened our doors. We're also very proud to represent the clients who have joined us along the way. But even as we celebrate the past and present during our 10th anniversary year, our focus is firmly on the future. That is why we have continued to grow, as reflected in the profiles of our newest attorneys contained within this issue of the *Legal Update*. We've grown to be 120 lawyers strong now, by continuing to add accomplished attorneys who not only bring the firm invaluable experience, but also enhance our culture.

This growth is driven directly by the demands of our clients, who have shown their trust in our work and our Best Practices approach by assigning us more work when they need us, expanding their use of our services by calling on different practice areas, and referring us to their colleagues.

As we continue to grow, we will strive to deepen relationships with our clients and embrace their priorities as our own. We look forward to the success the future holds for our clients and our entire team.

Thank you for making our first 10 years a wonderful experience for all of us here at Goldberg Segalla. Here's to the next decade of working together.

If you haven't already checked it out, please visit [www.GoldbergSegalla.com](http://www.GoldbergSegalla.com) to view our 10th-anniversary video.



### TABLE OF CONTENTS

#### About Coverage

Standing to Contest	2
Insurer Has No Duty to Notify	2
Beneficiary's Claim for Pecuniary Loss	3
Choice-of-Law Principles	3
"Legal Services"	4
Wrap-Up Policies	4

#### About Defense

Notice of Condition	5
Bad Faith Attempt to Delay Payment	5
Subcontractors	6

#### New Additions

7

#### News and Highlights

9

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## Coverage

### Third Circuit Declares That Insurers Have Standing to Contest Mass-Tort Bankruptcy Plan

In *In Re: Global Industrial Technologies, Inc.*, 2011 U.S. App. LEXIS 9109 (May 4, 2011, 3rd Circuit (PA)), the U.S. District Court for the Third Circuit has given insurers the opportunity to contest the formation of mass-tort bankruptcy trusts, and potentially to minimize potential tort claims. Despite a strong four-judge dissent and recognizing the insurer's financial stake in such proceedings, the Third Circuit succinctly summarized its holding:

The decision we announce is no more far-reaching than this: when a federal court gives its approval to a plan that allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and have their legitimate objections addressed. In short, they at least have bankruptcy standing.

Global Industrial Technologies, Inc. and several of its subsidiaries filed for bankruptcy protection. The bankruptcy resulted, in large part, from the number of asbestos claims made against one of the company's subsidiaries, totaling over 400,000 separate claims and nearly \$1 billion in costs. Although not cited as a reason for the bankruptcy, one class action involving 169 silica claims existed at the time of the bankruptcy.

As part of the bankruptcy plan, an asbestos trust was established. The plan also called for an injunction of silica-related claims, and channeling of those claims to a separate silica trust. The trust was to be fully funded by insurance, with assignments of policies made to the silica trust. The insurers objected, arguing that the silica trust was neither necessary nor appropriate and that it appeared over 90 percent of the proposed silica claims were suspect. The bankruptcy court confirmed the plan notwithstanding the objection, holding that the issue of claim legitimacy was ultimately irrelevant and that the insurers had no standing to object. In other words, since the insurers were only there to pay liability claims, they had no interest in the formation of the trust.

The Third Circuit reversed, citing the "broad right" of participation in bankruptcy cases and finding that the silica trust would not be "insurance neutral" because the mere promise of the

trust increased claims by 27 times, creating an increase in exposure including new administrative costs and litigation costs to ferret out fraudulent claims. The court also held that based upon the facts presented, allegations of collusion between the debtor and plaintiffs' counsel was warranted.

### Second Circuit Holds Insurer Has No Duty to Notify Injured Party of Disclaimer Until Injured Party Provides Notice

In *Travelers Indem. Co. of Am. v. Estate of Zeygermakher*, 2011 U.S. App. LEXIS 11711 (2d Cir. N.Y. June 8, 2011), the Second Circuit departed from what was assumed to be the necessary practice in New York and held that under New York Insurance Law 3420(d)(2) (formerly 3420(d)) an insurer need not copy an injured plaintiff on a disclaimer or even notify the injured plaintiff of the disclaimer until the injured party provides notice.

Traditionally, both courts and practitioners have interpreted 3420(d) to mean that although the insurer need not disclaim based upon the injured party's late notice if the first notice is received from the insured, the injured party at least needs to be provided notice of the disclaimer. According to the Second Circuit, that is not the case. Citing *Webster ex rel. Webster v. Mount Vernon Fire Ins. Co.*, 368 F.3d 209 (2d Cir. 2004) and *Agway Insurance v. Alvarez*, 258 A.D.2d 487, 488 (2d Dep't 1999), the Second Circuit held that an insurer need not notify the injured party of a late-notice disclaimer if the first party to provide notice to the insurer is the insured.

In *Zeygermakher*, the injured plaintiff fell down a flight of stairs at the insured premises. Eight months later, he died of his injuries, and five months after that, his estate sued. The insurer was not placed on notice until the suit was filed—some 13 months after the accident. The insurer disclaimed coverage to the named insured. Three days later, it sent a separate letter to the injured party. Rather than simply holding that the second letter complied with 3420(d)(2) (now 3420(d)(2)), the court



held that the insurer need not provide notice to the injured party at all.

In the district court decision, the court considered both options: (1) that the letter to the injured party was timely and sufficient; and (2) that the injured party need not be given notice at all. See *The Travelers Indemnity Company of America v. Estate of Yuri Zeygermakher*, 2010 U.S. Dist. LEXIS 32330 (E.D.N.Y. April 1, 2010). With regard to the first, the court held that the separate notice to the insured was sufficient to comply with the rules and purpose of 3420(d)(2). With regard to the second, the court stated that “New York law was clear” and did not require insurers notify injured parties of late notice where the first notice came from the insured. Notably, both the Second Circuit and district court’s decisions are silent regarding an insurer’s obligations where a disclaimer on the application of an exclusion or other basis.

#### **Homeowners Policy Does Not Exclude Beneficiary’s Claim for Pecuniary Loss Against One Insured for Death of Another Insured**

In *Cragg v. Allstate Indemnity Co.*, 2011 NY Slip Op 4767, 2011 N.Y. LEXIS 1391 (June 9, 2011), a three-year-old child, Kayla Cragg, accidentally drowned in a swimming pool at her residence. At the time, Kayla and her mother resided with her grandparents and were all insureds on the grandparents’ homeowners policy. The policy issued by Allstate included a family exclusion that provided: “[w]e do not cover bodily injury to an insured person ... whenever any benefit of this coverage would accrue directly or indirectly to an insured person.”

Kayla’s father, who did not reside with the family and was not an insured on the policy sued the mother for wrongful death, eventually obtaining a \$300,000 default judgment against the mother—\$150,000 for Kayla’s pre-death pain and suffering and \$150,000 for his own pecuniary loss, a separate element of damages allowed by New York’s wrongful death statute.

The Court of Appeals ruled that, while Kayla’s pain and suffering was excluded by the policy because such damages would inure to her estate which itself would fall within the definition of an “insured,” the father’s pecuniary loss claim was not excluded because he was not an insured and the benefit of coverage would not accrue to any insured. The father had argued that the family exclusion’s use of the term “benefit”

means payment and only payment. The court agreed, finding no payment of policy proceeds would accrue to an insured. Thus, the family exclusion was inapplicable. Allstate was obligated to cover one half of the father’s judgment for the death of a person insured by the homeowners policy.

#### **New York: Insurer’s Insolvency Is Not Reason Enough to Negate Choice-of-Law Principles**

In *Matter of the Liquidation of Midland Insurance Company*, 2011 N.Y. Slip Op. 2716 (April 5, 2011), the insurer was declared insolvent and placed into liquidation. Article 74 of Insurance Law gives a liquidator (in New York state) the authority to review claims submitted by policyholders and make recommendations to the court on what claims should or should not be allowed. Exclusively applying New York state law, the liquidator sent out a Notice of Recommendation of Disallowance (NOD) to major policyholders.

In response, major policyholders asserted that the liquidator could not legitimately disallow a claim without first conducting a choice-of-law analysis to determine which substantive state law applies to each claim. The liquidator and the insurer asserted that the choice-of-law standards did not apply in this case because the insurer was insolvent and Article 74 of Insurance Law negated the “grouping of contacts” approach to choice-of-law issues.

Initially the Supreme Court found for the policy holders, stating that the Liquidator committed an error in exclusively applying New York substantive law to each claim. The court held that, according to the “grouping of contacts approach”, the Liquidator was obligated to conduct a thorough analysis of each policy made with the insurer to determine which substantive state law applied. The Appellate Division reversed the Supreme Court’s decision, following its prior decision in a similar choice-of-law dispute. The court stated that in this case New York law must apply because New York has a “paramount state interest” in making sure the liquidator makes equitable distributions from an insolvent insurer’s estate. It held that to interpret the insurer’s policies under laws of more than one state “would run afoul” of insurance law § 7474 (a), which prohibits the creation of “sub-classes among the policy holders.”

On appeal, the New York Court of Appeals struck down the appellate division’s decision and reinstated the trial court’s

holding. The court stated that the claims of the major policyholders originated from insurance policies issued prior to the insurer's insolvency. Because of this the court concluded that choice-of-law principles continue to apply once an insurer has been declared insolvent. Relying on its interpretation of § 7433 (a) of Insurance Law, the court held that a blanket application of New York law to the insurer's policies would frustrate the statutory provision that requires the submission and allowance of claims by the liquidator justly owed to the major policyholders.

### **New York: Policy Covering "Legal Services" Covers Losses Incurred Due to Fraud**

In *Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. American Guarantee & Liability Insurance Co.*, 2011 NY Slip Op 4589, 1 (3d Dept. 2011) (June 2, 2011), the Third Department found that insurance policies covering "legal services" performed by an insured lawyer may include activities such as making deposits and requesting wire transfers for purported clients.

The insured, a law firm, was approached by an individual claiming to be the chief executive officer of a Taiwanese corporation. The individual sought legal assistance in collecting debts in North America and later sent the insured a signed retainer agreement. The insured subsequently received a



check from a purported debtor in the amount of \$384,700. The purported chief executive officer requested that the value of the check after the insured's legal fees be transferred to a third

party in South Korea. The insured opened a bank account, deposited the check, and requested the wire transfer. After the funds were transferred, however, the bank notified that the check was counterfeit and the insured's account was overdrawn. The bank filed an action against the insured.

The insured had a professional liability policy, which provided coverage for any claim "based on an act or omission in insured's rendering or failing to render Legal Services for others." The policy defined "Legal Services" as: "those services performed by an Insured as a licensed lawyer in good

standing . . . or in any other fiduciary capacity but only where the act or omission was in the rendition of services ordinarily performed as a lawyer."

The Third Department, citing *Rules of Professional Conduct* (22 NYCRR 1200.0) Rule 1.15 (a), noted that "An attorney in possession of a client's funds is a fiduciary." The rules require that such funds be promptly paid or delivered to the client or a third party upon client's request. Making a deposit and requesting wire transfers at the request of the purported client was therefore within the insured's fiduciary capacity and under rules imposed upon attorneys acting in their professional capacity. Because such activities fall under the ordinary operations of attorneys, the court held that the insured was performing legal services when it deposited the check and ordered the wire transfers. The insurer thus had a duty to defend the insured law firm.

### **New York: Notice by One Insured Cannot Be Imputed to Another Under Wrap-Up Policies**

In *Continental Casualty Co. v. Employers Insurance Co. of Wausau*, 2011 NY Slip Op 4594 (1st Dept. 2011)(June 2, 2011), the First Department held that notice of an action against one insured under "wrap-up" policies did not constitute notice of an action against another insured under the same policies. The court also held that notice of a claim was not within a reasonable time when the relevant records were already in the possession of the defense counsel prior to the litigation in question.

The insurer issued an asbestos installer primary comprehensive general liability (CGL) policies from 1970 to 1987. Another insurer, from the '60s to the '70s, issued wrap-up policies covering all contractors on a specified construction site. In 2003, however, the insurer found evidence indicating that the asbestos installer was covered by the wrap-up policies. The insurer subsequently sent the wrap-up insurer a letter notifying it of an asbestos action of another claimant. In that letter, it invited the wrap-up insurer to discuss "other" unspecified asbestos claims. It then sought coverage for the "other" claims, contending the 2003 notice constituted notice of all the asbestos claims.

The First Department noted an insurer may obtain reimbursement from another insurer only if it gave the other insurer notice of the claim that is "reasonable under the

circumstances.” Because each insured had an independent duty to give notice under the wrap-up policies, the court reasoned, notice of some claim against an insured did not constitute notice of other claims not identified in the notice. Furthermore, because the insurer could have reviewed the records evincing the coverage in question at any time, the 2003 letter, even if it were notice, was not within a “reasonable time under all the circumstances.”

## Defense

### New York: Court of Appeals Issues Decision Regarding Actual Notice of Condition

In *Groniner v. Mamaroneck*, 2011 NY Slip Op 4544, 2011 NY Lexis 1344 (N.Y.) (June 2, 2011), the plaintiff commenced a personal injury action against the Village of Mamaroneck after she slipped and fell on a parking lot owned and maintained by the village. The village moved for summary judgment, asserting that it had neither received prior written notice of the defect nor created the icy condition. The plaintiff opposed the motion, asserting that the written notice requirement does not apply to publicly owned parking lots. The Supreme Court granted the village’s motion and the Appellate Division affirmed. In a 4-to-3 decision, the Court of Appeals affirmed. The majority opinion notes that Village Law 6-628 and CPLR 9804 are nearly identical in that they require actual notice to a village to establish liability arising from a defect or snow or ice upon the following: a sidewalk, cross-walk, street, highway, bridge or culvert. The majority decision concluded, as have other New York courts for nearly 30 years, that a parking lot serves the same “functional

purpose” as a highway, and as such, that notice is required to establish liability against a village arising from a parking lot defect. Chief Judge Lippman’s dissent concludes that the Court of Appeals’ prior decision in *Walker v. Town of Hempstead*, 84 NY2d 360 (1994) is controlling, and that as the court found therein, that General Municipal Law 50-e (4) contains clear, prohibitory language strictly limiting deviations from the notice requirements specifically set forth in that section, excepting only notice of defect provisions pertaining only to the six enumerated locations. Additionally, the dissent also concludes that it is so obvious as to hardly merit serious discussion, that a parking lot does not fulfill the same function as a highway, as the purpose of the former is to accommodate stationary or parked cars, whereas the latter is to enable vehicles to move with expedition. As such, the dissent asserts that the majority decision is disturbing the legislative policy judgment contained in GML 50-e(4) as previously recognized by the Court of Appeals and enforced in the *Walker* decision by reason of “judicial aversion to municipal liability.”

### Connecticut: Insurer’s Election of Appraisal Process Under Policy Not a Bad Faith Attempt to Delay Payment

In *Jansma v. Patrons Mut. Ins. Co.*, 126 Conn. App. 855, 15 A.3d 163 (Mar. 1, 2011), the plaintiffs’ home was damaged by fire. The parties agreed to seek an estimate from one contractor as to the cost to repair the residence. The plaintiffs were unhappy with the amount of the estimate and hired another contractor to perform a second estimate, which was higher than the first estimate. The defendant insurer refused to pay the higher estimate and instead elected to submit the claim to appraisal as allowed by the insurance policy. The insurer then paid the full amount determined by the appraisal process. The plaintiffs sued for bad faith, claiming that the defendant’s election of the appraisal process was unjustified as there was no disagreement as to the cost to repair the residence. The trial court rendered summary judgment for the defendant. The Connecticut Appellate Court upheld this ruling, stating that the policy clearly provided that either party may elect appraisal if they did not agree on the cost to repair or replace the residence. The court found that the facts clearly showed that there was a disagreement as to the cost to repair the residence, and the insurer’s invocation of the appraisal process did not constitute a bad faith attempt to delay payment of the claim and was not otherwise unjustified.



## New York: Middleman Subcontractor May Be Statutory Agent

In *Nascimento v. Bridgehampton Const. Corp.*, A.D.3d, 2011 NY Slip Op 04607(1st Dept. 2011)(June 2, 2011), the appeal involves the issue of whether a middleman subcontractor, who subcontracts the work that gives rise to the plaintiff's injury to another subcontractor, is a statutory agent within the meaning of Labor Law §§ 240(1) and 241(6).

Here, the general contractor subcontracted the framing work to the appellant subcontractor, Bayview, which in turn subcontracted it to a second subcontractor, and eventually, to a third subcontractor (the plaintiff's employer). Bayview cross-moved for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, on the ground that it did not have the authority to supervise the work or control safety practices at the worksite. It also argued that plaintiff's motion for summary judgment on liability on the Labor Law claims should be denied, based on conflicting versions of the accident given by the plaintiff and another witness.

The Supreme Court granted plaintiff's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) claims, and denied Bayview's cross-motion.

The court then considered "the more complex question" raised by Bayview, to wit, that it was not a statutory agent because "it did not have the authority to oversee the work plaintiff was performing or the site's safety conditions." Although it rejected the plaintiff's argument that all subcontractors in "the chain of command" fall within the purview of the Labor Law, it held that subcontractors were only liable as agents "if it had the authority to supervise or control the work giving rise to the obligations imposed by [Labor Law §§ 240(1) and 241(6)]," citing *Russin v. Lousi N. Picciano & Son*, 54 N.Y.2d 311, 317-318 (1981).

Relying on *Weber v. Baccarat, Inc.*, (70 A.D.3d 487, 488 [2010]) and *Everitt v. Nozkowski*, (285 A.D.2d 442, 444 [2001]), the court noted that subcontractors have been held to be statutory agents of general contractors where the provisions of the subcontracts explicitly granted supervisory authority, and those in which the evidence showed that the subcontractors actually exercised supervisory authority (although, inconsistently, the court also holds that it is "irrelevant" whether the subcontractor supervised the work).

In denying Bayview's motion, the court relied on the principle that "once a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity.



This decision appears to raise as many questions as it answers, including the fundamental one: If a subcontractor delegates supervisory authority to another, and does not exercise any supervision at all, how can such subcontractor be liable under the Labor Law?

## New Additions

### Albany

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#### Matthew Cabral

Matthew Cabral is an associate in the firm's Albany office. His broad litigation experience includes cases involving construction defects and injury, premises liability, personal injury and professional liability. In addition to his litigation background, Mr. Cabral has worked on environmental policy and enforcement issues while clerking for the U.S. Environmental Protection Agency New England Region Offices of Regional Counsel and Environmental Stewardship. Matt has also studied international legal issues. While in law school he earned a Concentration in International Law and assisted with international oil pollution enforcement efforts while clerking for the U.S. Coast Guard First District Legal Office.

### Buffalo

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#### Christopher Bopst

Christopher Bopst, a partner in the firm's Buffalo office, is a commercial and construction partner who handles arbitration, litigation and appeals throughout the United States. In his 13 years of practice representing a wide range of clients from individuals and small businesses to Fortune 500 companies, he has handled significant cases involving contract disputes and business tort claims, real property litigation, and trade secret and other intellectual property disputes. He also handles construction matters from contract negotiation on multi-million-dollar projects to significant litigation, including both contract and bond claims through construction defect matters, arising out of substantial residential and commercial construction projects. Chris also has handled appeals to both state and federal courts in multiple states.



#### Robert E. Gallagher, Jr.

Robert Gallagher is special counsel in the firm's Buffalo office. He has extensive trial experience, having taken more than 30 trials to verdict, including cases brought under New York's Labor Law, products liability, motor vehicle and premises liability areas. Bob also has

a vast amount of first- and third-party benefit disputes experience, Special Investigation [Fraud] Unit litigation, loss transfer, SUM and UM insurance litigation, and all aspects of appellate practice.



#### Arlow M. Linton

Arlow Linton is an associate in the firm's Buffalo office. His experience includes matters involving construction litigation as well as contracts, zoning and property disputes. His professional associations include memberships in the American Association for Justice, the New York State Trial Lawyers Association and the New York State Defenders Association.



#### Kathleen J. Martin

Kathleen Martin, special counsel in the firm's Buffalo office, is an accomplished and versatile attorney with over 11 years of experience in personal injury, municipal liability, labor law, medical malpractice, products liability, insurance law and wrongful death. She has successfully briefed and argued several appeals involving complex issues of negligence and damages before the Appellate Division, Fourth Department. Kathleen is well-versed and experienced in the post-judgment present value application of Article 50-A and 50-B of the New York CPLR and routinely and successfully handles cases with catastrophic injuries and complex negligence.



#### Philip H. McIntyre

Philip McIntyre, special counsel in the Buffalo office, has advised management-side labor and employment clients in both the private and public sectors, including manufacturing companies, health care organizations, insurance companies, colleges, temporary staffing companies, not-for-profit organizations, municipalities and public authorities. His client representations have involved numerous kinds of adversarial claims including discrimination, harassment, wage/hour issues, statutory and constitutional employee rights, wrongful discharge and related torts such as defamation, and duty of fair representation and other labor law claims.

## Hartford

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### Troy A. Bataille

Troy Bataille is an associate in the firm's Hartford office. He concentrates his practice in civil litigation, where he has a wide range of experience in tort, products liability, and commercial disputes. Troy also focuses on state and federal environmental compliance and litigation for all environmental media including hazardous waste, the Clean Water Act, oil spill prevention plans (SPCC), lead-based paint, and PCBs, to name a few. He regularly counsels clients through preemptive solutions to changing laws and after government inspections or enforcement actions.



### Angeline N. Ioannou

Angeline Ioannou is special counsel in the firm's Hartford office. She has over 13 years of experience in civil litigation and she has handled a broad range of tort, products liability and indemnification claims for major retail chains, furniture manufacturers, insurance companies, contractors, condominium associations and property management companies. She has jury trial, bench trial and appellate experience. Angie is active in the Connecticut Bar Association, the New Haven County Bar Association, the Connecticut Defense Lawyers Association and the Defense Research Institute.

## Long Island

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### Kenneth R. Lange

Kenneth Lange is special counsel in the firm's Long Island office. He has defended clients through trial in general liability matters, and he focuses his practice on complex and high-exposure personal injury actions involving construction, New York Labor Law, wrongful death, premises liability, products liability, lead exposure and asbestos. His clients include products manufacturers and distributors, general contractors and subcontractors, residential landlords, and private schools.

## Princeton

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### Gregory Samurovich

Gregory Samurovich is special counsel in the firm's Princeton office. He focuses his practice on complex, high-exposure civil litigation in the medical device, manufacturing and transportation industries. He has represented national and international Fortune 500 companies, including manufacturers of medical devices and instruments, elevators and escalators, communications systems, home building products, and motor vehicles, as well as a major freight and package shipping company and an Ivy League educational institution. Greg's experience includes matters involving products liability, serious injury and wrongful death claims, catastrophic motor vehicle and industrial accident liability, chemical exposure, property damage and fire, and construction and workplace accidents, as well as complex commercial litigation and strategic advice.

## Syracuse

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### Cory DeCresenza

Cory DeCresenza is an associate in the firm's Syracuse office. He was admitted to practice in New York in February 2010 and is a former clerk for the New York State Appellate Division, Fourth Department.

## White Plains

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### Andrew J. Scholz

Andrew Scholz, special counsel in the White Plains office, is a trial lawyer with over 10 years of experience defending companies and individuals in state and federal trial and appellate courts. His practice focuses on mass tort, toxic tort, environmental, products liability, transportation and complex commercial litigation. He has tried and arbitrated cases in New York and Washington, D.C. Andrew currently serves as co-chair of the Toxic Tort Subcommittee within the American Bar Association's Mass Torts Committee.

## News and Highlights

### **Princeton-Philadelphia Team Successful for Insurer in Retrospective Workers' Compensation Case**

A team of Goldberg Segalla attorneys from the firm's Princeton and Philadelphia offices secured a federal court victory for Liberty Insurance Corporation in the company's suit to collect retrospective workers' compensation insurance premiums owed by an insured. Jonathan M. Kuller of Goldberg Segalla's Princeton office and Matthew R. Shindell of the firm's Philadelphia office represented the insurer in this case before the U.S. District Court for the Western District of Pennsylvania, and Anthony J. Golowski II of the Princeton office performed legal research for the case and assisted in writing the brief.

This case involved a retrospective insurance premium arrangement by which the insurer administered a workers compensation program for PGT Trucking, Inc. After the carrier sought a declaration of rights under the insurance policies provided to PGT and recovery of unpaid premiums totaling over \$180,000, PGT filed a counterclaim that included a statutory claim for insurer bad faith under 42 Pa.C.S.A. § 8371 as well as a claim of breach of fiduciary duty.

The insurer filed a motion to dismiss these two claims, and on June 27, 2011, the court issued a ruling granting that motion. In dismissing the statutory bad faith claim, the court agreed with the carrier's argument that PGT's counterclaim failed to plead sufficient facts to establish a plausible claim against our client. In dismissing the claim of breach of fiduciary duty, the court stated there is no independent cause of action for such a breach in cases involving retrospective premium arrangements.

The case is *Liberty Insurance Corporation v. PGT Trucking, Inc.*, 2011 U.S. Dist. LEXIS 68444 (W.D. Pa. 2011).

### **Sarah Fang Secures Appellate Victory in Workplace Injury Case**

In a case handled by Sarah X. Fang, an associate in our Princeton office, the New Jersey Appellate Division affirmed a trial court's decision granting our client's motion for summary judgment in a personal injury case.

The firm's client, one of the world's largest privately held building services companies, was sued based upon the plaintiff's allegation that it failed to properly maintain and inspect the bathroom of the plaintiff's place of employment and such failure was responsible for an injury sustained when a bathroom door came loose and fell, striking her left hand. The trial court granted our motion for summary judgment, finding that the plaintiff could not establish that the accident was caused by any negligence or that our client breached any duty.

The Appellate Division affirmed, finding that the plaintiff failed to establish causation and could not use the doctrine of *res ipsa loquitor* to establish causation.

### **Court Decries Plaintiff's Pursuit of "Windfall" Insurance Coverage in Victory Obtained by Patrick Omilian**

Goldberg Segalla obtained a complete dismissal with prejudice of a plaintiff's complaint seeking accident/sickness coverage under a mortgage insurance policy underwritten by our client. The case was handled by Patrick B. Omilian, an associate in our Buffalo office, and was argued in the New York State Supreme Court, Monroe County.

In this case, the plaintiff's husband had received accident/sickness coverage under his mortgage insurance policy, but his wife, as a co-borrower, never received such coverage under this policy. Her husband's accident/sickness coverage terminated when he reached the age of 65. Eight years later, the plaintiff suffered a disability and sought for herself the accident/sickness coverage once held by her husband, and her claim was accordingly denied by our client.

In a decision issued June 29, 2011, the court fully granted the motion for summary judgment requested by our client and the co-defendant mortgage lender, noting that policyholders have a responsibility to understand their availability of coverage—and that failure to do so “should not now mandate a windfall award of cost-free accident/sickness insurance coverage.”

### **Matthew Lerner Obtains Pre-Answer Dismissal of Complaint Alleging Defamation**

Matthew S. Lerner, a partner in Goldberg Segalla's Albany office, recently achieved a pre-answer dismissal of a complaint asserted against his client regarding alleged defamation. The plaintiff claimed that Matt's client, a member of a prestigious local social organization, had defamed her and attempted (with the help of other organization members) to prevent her from gaining future employment. The plaintiff claimed that a newspaper article about her stemmed from the members' plot against her. The trial court agreed with Matt's argument that the plaintiff's claims failed to state a cause of action and were asserted beyond the applicable limitations period.

### **William Greagan and Matthew Lerner Successful for Electrical Contractor in Worksite Injury Case**

William J. Greagan and Matthew S. Lerner, partners in the firm's Albany office, successfully defended a contractor who installed electrical outlets to a facility that contained a machine that injured a plaintiff; the plaintiff's arm was amputated by the machine when he reached into its grinding mechanism without disabling the machine. The plaintiff argued that the contractor negligently designed the electrical system because its employees did not employ safety stops for the machines. Bill and Matt demonstrated that the facility owner and the employee's supervisor refused the contractor's offer to provide the electrical system with the safety stops. The trial court agreed with Bill and Matt, holding that the electrical contractor did not have a duty to install the safety stops in the face of the owner's refusal of its offer to install them.

### **Quick Dismissal Achieved in \$3.5 Million Lease Dispute Over Soap Opera Set**

After the cancellation last year of one of the most popular soap operas of all time, longtime fans of the multiple-Day-time-Emmy-Award-winning show weren't the only ones left wanting more. The owner of the studio space where the show was taped filed a \$3.5 million lawsuit against the show's production company, claiming breach of contract and alleging that the lease for the studio space was improperly terminated. The quick dismissal of the suit achieved by Christopher J. Belter and Daniel B. Moar of our Business and Commercial

Practice Group highlights Goldberg Segalla's capabilities to resolve potentially disruptive disputes in a highly efficient manner.

The plaintiff had claimed that the production company did not provide proper notice regarding termination of the lease after it learned from the network that the show would be cancelled, and it asked the court to order our client to pay a holdover penalty of over \$3.1 million plus interest and incidental and consequential damages. Chris and Dan demonstrated to the court that the studio's lawsuit was without merit because it ignored a contract provision applicable to termination of the lease and distorted an inapplicable contract provision in its attempt to collect the damages.

The court agreed and on July 6, 2011, granted our pre-answer motion to dismiss the claim, ending the lawsuit at the earliest possible stage and allowing our client to remain focused on producing TV entertainment — without the unwanted business drama of prolonged litigation.

### **Lead Paint Defense Verdict Upheld**

William J. Greagan and Bryan D. Richmond, trial attorneys in Goldberg Segalla's Albany office, successfully defended an apartment building owner in a case before the New York Appellate Division, 3rd Department. The ruling, issued June 9, 2011, upheld a defense verdict in a lead paint case where the plaintiff was diagnosed with attention deficit hyperactivity disorder, oppositional defiant disorder, a cognitive disorder and learning disabilities which were alleged to have been the result of an elevated blood lead level at the defendant's apartment house. The court held in *Cunningham v. Anderson*, 2011 NY Slip Op 4800 (3rd Dept. 2011)(June 9, 2011), that the landlord's liability for injuries related to a defective condition including lead paint cannot be established without proof that the landlord had actual or constructive notice of the condition for sufficient period of time such that the condition should have been corrected. In a lead case, notice can be established by proof that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment.

The jury found that the defendant had such notice and was therefore negligent — but the negligence was not a substantial factor in causing the plaintiff's injuries. The appellate court agreed that the jury could rationally credit the testimony of the defendant's experts and their opinion that the effects of lead poisoning only minimally affected the plaintiff in relation to the factors that were present, thereby finding that the defendant's negligence was not a substantial factor in causing the plaintiff's injuries. The defendant's experts opined that ADHD is a congenital condition and that there are no scientific studies proving that it is caused by lead exposure. They further opined that the plaintiff's disorders and disabilities were caused by other factors, mainly social and environmental circumstances in his upbringing, which were supported by scientific studies and articles showing a link between socio-economic factors and psychological development. Proof of the plaintiff's social and family factors was presented through school and medical records as well as testimony from the plaintiff's sister.

The court also agreed that the plaintiff's conduct when he was a preteen and teenager, including discontinuing prescribed medication, and failing to attend school, may have constituted a failure to mitigate damages at a time when the plaintiff could be held legally responsible for his actions.

#### **Daniel W. Gerber Chairs 2011 DRI Insurance Roundtable**

Daniel W. Gerber, Co-Chair of Goldberg Segalla's Global Insurance Services Practice Group, was the Chair of the 2011 Insurance Roundtable, an annual summit of insurance claims executives and leading members of the defense bar. The event was presented by the Defense Research Institute (DRI) June 21-22 in Washington, D.C.

DRI's Insurance Roundtable is designed to address issues facing both insurers and their counsel and provides an open forum to discuss legal and ethical issues, enhance best practices, and foster greater growth and understanding in the industry-counsel relationship. This year's Insurance Roundtable focused on developing mutually beneficial and adaptable solutions to move the insurance industry and its counsel toward greater partnership on issues including Medicare compliance, technological challenges, metrics and claims leakage.

#### **John Jablonski Conducts Seminar on Records Management and Avoiding Litigation Risks**

John Jablonski, Chair of the firm's E-Discovery Practice Group, recently conducted a full-day seminar for health-care provider members of a privately held national risk management organization. The seminar was specifically designed to help members identify litigation risks associated with poor records management and teach comprehensive records management solutions, including developing policy, procedures and defensible records retention schedules.

If your company or organization would benefit from a similar program, please contact John directly at 716.566.5469 or [jjablonski@goldbergsegalla.com](mailto:jjablonski@goldbergsegalla.com).

#### **Goldberg Segalla Welcomes Summer Law Clerks From Diversity-Focused Internship Program**

This summer, Goldberg Segalla welcomed the first law clerks placed in a law firm through a new diversity-focused internship program developed by the Minority Bar Association of Western New York, of which Goldberg Segalla partner Joseph M. Hanna is President, and the University at Buffalo Law School.

The collaborative program is designed to provide opportunities for minority law students at UB Law School to gain firsthand experience in the legal system. Several UB Law students had already begun summer clerkships in area courts through the program, and Goldberg Segalla led the program's expansion to area law firms, where students can improve their legal research and writing skills while learning about case management and client service from mentors at the firms. The program is expected to grow significantly, as several other law firms have expressed interest in participating as well.



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