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## THE INSURANCE DEFENSE UPDATE

### **Court Of Appeals Overrules Prior Cases Holding That Parties Stipulating To Altered Damages Do Not Forfeit The Right To Appeal On Liability**

*Adams v. Genie Industries, Inc.*, 14 NY3d 535 (2010)

This was a strict products liability case where the plaintiff fell from a personnel lift that was alleged to be defective. The jury found the defendant liable and awarded damages. The court granted the plaintiff's motion for additur, ordering a new trial on the issue of past and future pain and suffering damages. Instead of the new trial, the defendant agreed to increase the award of damages. The defendant appealed based solely on liability.

Before the Court of Appeals could address the issue of liability, it had to first determine whether the defendant had a right to appeal. It is a long standing rule that parties who agree to a modification of damages as an alternative to a new trial may not appeal because it is not an aggrieved party.

The court overruled its prior decision in *Batavia Turf Farms v. County of Genesee*, 91 NY2d 906 (1998) where it dismissed an appeal holding that a party that stipulates to a reduction in damages in lieu of a new trial forfeits all further review of other issues. The holding in *Adams* held that "[i]t is unfair to bar a party from raising legitimate appellate issues simply because that party has made an unrelated agreement on the amount of damages." The court went further to say that the rule in *Batavia* could operate as a trap. As such, the court determined that a party who agrees to a modification of damages instead of a new trial may not appeal on damages, but may appeal based on the issue of liability.



### **Insured Required To Defend Injury Action Without Regard To Actual Fault**

*Regal Const. Corp. v. National Union Fire Ins. Co of Pittsburgh, PA*, 15 NY3d 34 (2010)

In this case the Court of Appeals had to address the issue of whether an insurer was obligated to defend and indemnify an additional insured for potential liability arising out of operations of the primary insured.

In this case, URS Corporation hired Regal Construction as general contractor for a renovation project at Rikers Island. Regal was required to obtain general liability insurance that named URS as an additional insured. The policy that Regal obtained covered the additional insured "only with respect to liability arising out of [Regal's] ongoing operations performed for [URS]." During the project, Regal's project manager was walking through the facility with Regal's superintendent and an employee of Regal's demolition subcontractor explaining to them what walls needed to be demolished. The area where they were walking consisted of temporary sheets of plywood spread over the steel floor joists. The project manager stepped off of the plywood and onto a steel floor joist where he slipped and injured his back. The project manager claimed that URS had just painted the floor joist which was the cause of the accident.

Regal commenced a declaratory judgment action against URS seeking a declaration that URS was not entitled to coverage as an additional insured.

The Court stated that an "insurer's duty to defend its insured is exceedingly broad" and an insurer is obligated to defend claims when a complaint's allegations potentially fall within the protection of the policy. This applies to both additional insureds and named insureds.

The phrase "arising out of" in an additional insured clause means "originating from, incident to, or having connection with." There must be some causal connection between the injury and the risk for which coverage is provided. The inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained."

The Court of Appeals distinguished this case from the issue in *Worth Construction Co., Inc. v. Admiral Ins. Co.*, 10 NY3d 411 (2008). In *Worth*, the court held that because the subcontractor was completely removed from the premises at the time of the incident, the injury did not arise out of the operations of the subcontractor. The subcontractor in that case, who was hired to install a staircase, was required to obtain insurance and name the general contractor as an additional insured. The subcontractor installed the staircase and once they completed the installation, vacated the premises. At that point another subcontractor began work in that vicinity and an employee fell on the fireproofing that was installed by yet another subcontractor. The court held that the staircase was merely the location of the accident, but held no connection between the accident and the work.

The Court of Appeals ultimately held that there was a definitive connection between the accident and Regal's work being that the project manager was giving instruction regarding what work needed to be performed. Therefore, the court determined that URS was entitled to a defense and indemnification.

## Summary Judgment Was Granted In Favor Of Worker In Scaffold-Law Claim Because Worker Was Not Told Where Safety Devices Were Or That He Must Use Them



In this case, the plaintiff, an ironworker, was assigned to remove a section of metal decking from the second floor of a building owned by the defendant. The plaintiff was partnered with another man and both were under the direction of the foreman. While the plaintiff was cutting the metal with a two-handed saw, its blade jammed, propelling him forward through an uncovered opening. The plaintiff landed on a temporary floor situated between the first and second floors, sustaining injuries.

During depositions, the assistant project manager testified that safety equipment was available for use at the project site, but could not say whether any equipment was in the area where the plaintiff fell. He also testified that there was a “standing order” that all the ironworkers should have a harness on. But, again, he could not state whether these instructions were given to the ironworkers.

Plaintiff filed a motion for partial summary judgment on the Labor Law Section 240(1) claim.

The Court of Appeals held that summary judgment should be granted in favor of the plaintiff because there was no evidence that the plaintiff knew where to find the safety devices that the defendant claims were readily available.

## Exclusion Language Related To Automobile Accidents Allows Insurance Company To Deny Coverage

*DMP Contracting Corp. v. Essex Insurance Company*, 2010 WL 3543347 (2010)

In *DMP Contracting Corp. v. Essex Insurance Company*, 2010 WL 3543347 (1st Dept 2010), the Supreme Court denied plaintiff’s motion for summary judgment, stating that defendant was not obligated to defend plaintiff’s underlying personal injury action. Plaintiff appealed the ruling to the Appellate Division. The incident arose from an underlying slip and fall action against a property owner. A resident slipped and injured herself while trying to enter a vehicle. The resident sued for negligence stating the property owner allowed the parking lot to remain in an uneven, snowy and icy condition. The property owner filed a third party complaint against plaintiff, an excavation contractor. The property owner sought indemnification from the insured plaintiff, who failed to add property owner as an additional insured on plaintiff’s commercial general liability policy (CGL) with defendant.

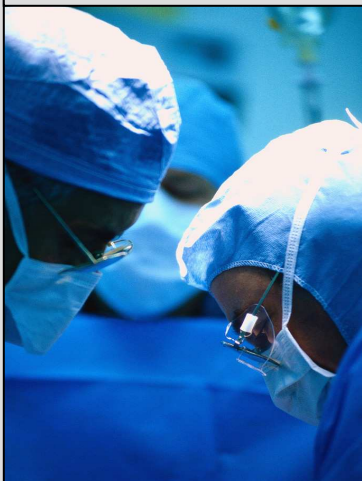
Defendant denied coverage on the grounds that the CGL policy excluded coverage for “snow removal and for any personal injuries arising out of the use of ‘any auto,’ whether owned by the insured or not . . . .” The Appellate Division, First Department stated that “any . . . exclusion . . . from policy coverage must be specific and clear in order to be enforced”, and “an ambiguity in an exclusionary clause must be construed most strongly against the insurer.” The Appellate Division further stated that the test for ambiguity is “whether the language of the insurance contract is ‘susceptible of two reasonable interpretations.’”

Applying these principles, the Appellate Division determined that defendant had no duty to defend because the policy’s unambiguous “auto exclusion” bars “even the potential for coverage of the underlying claim.” The plain meaning of the language focused on the connection between a vehicle and the injury not between a vehicle and the insured. The Appellate Division further pointed out that because plaintiff conceded the accident arose out of the use of a vehicle, a fair reading of the language by the plaintiff would have placed plaintiff on notice that coverage was not applicable to the use of “any auto.”



## Plaintiff’s Use Of Exacerbation Language Not Sufficient To Justify “Serious Injury”

*Tandoi v. Clarke*, 2010 WL 2773531 (2010)



In *Tandoi v. Clarke*, 2010 WL 2773531 (3rd Dept. 2010), the Plaintiff filed a motion for summary judgment on the issue that plaintiff suffered serious injury. The Supreme Court denied Plaintiff’s motion on the grounds that plaintiff did not suffer serious injury under the “significant limitation of use” category within the meaning of Insurance Law § 5102(d). Plaintiff’s injuries were caused when Plaintiff was struck from behind by a car driven by defendant. Plaintiff appealed, contending that the Supreme Court erred in denying her motion.

The Third Department affirmed the decision. The Appellate Division stated that although Plaintiff succeeded in establishing a prima facie showing that she sustained a serious injury through the diagnosis of her treating physiatrist and neurosurgeon, which stated she suffered from a disc herniation and was the permanent and direct result of the motor vehicle accident, defendant offered testimony from an expert orthopedist who stated that plaintiff suffered from disc degeneration. The Appellate Division determined that since none of Plaintiff’s experts diagnosed her with the aggravation of a preexisting condition. The proof presented was exclusively from defendant’s expert, who stated that any limitation to Plaintiff was “not significant.” The Appellate Division affirmed the decision by the Supreme Court in denying Plaintiff’s motion for summary judgment because the defendant raised a triable issue of fact.

## Antisubrogation Rule Bars Umbrella Insurer's Claim For Indemnification

*Ohio Casualty Insurance Company v. Transcontinental Insurance Company*, 372 FedAppx 107 (2010)



In *Ohio Casualty Insurance Company v. Transcontinental Insurance Company*, 372 Fed.Appx. 107 (2nd Cir. 2010), the U.S. Court of Appeals for the Second Circuit addressed the issue of whether an umbrella policy insurer can seek indemnification from a general liability insurer based on various policies issued by the parties. The Plaintiff appealed a motion for summary judgment granted to defendant. The district court held that the antisubrogation doctrine barred plaintiff's indemnification claim. The plaintiff argued that it should be indemnified for money plaintiff contributed to the settlement of a wrongful death lawsuit. The incident arose when the survivor of an employee brought an action seeking damages for wrongful death. An employee of the insured sustained bodily injuries that led to death while working on a construction site. The insured's claim was not brought under Workers Compensation Law.

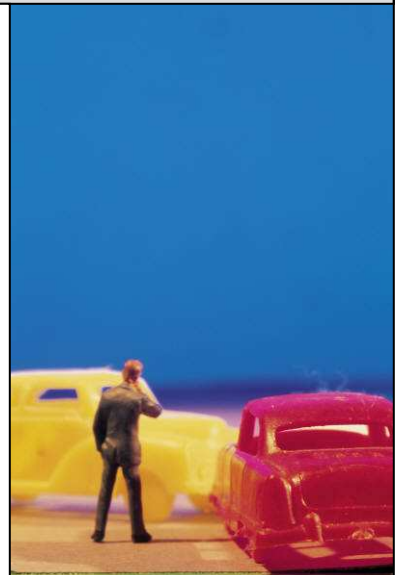
The issue before the court was whether the plaintiff's umbrella policy insured employer for liability for risk of death of the victim. In New York, the subrogation rule entitles an insurer to "step in the shoes" of the insured to seek indemnification from a third party whose wrongdoing has caused a loss for which the insurer is bound to reimburse. The New York Court of Appeals has made it clear that "an insurer, however, has no right of subrogation against its own insured from a claim arising from the risk for which the insured was covered." The court pointed out that the language in plaintiff's policy stated the coverage was applicable to employees who were not subject to the New York Workers Compensation Law. The Court of Appeals further reiterated that "insurers are not permitted to limit their coverage for workers' compensation or employers' liability," and that "New York law does not distinguish, for purposes of the antisubrogation rule, between subrogation claims brought directly against an insured and claims brought against a common insurer." Thus, because the claim was not brought under the Workers Compensation Law, plaintiff's umbrella policy did not exclude coverage for the insured's liability and plaintiff was not entitled to indemnification.

## Son And Daughter-In-Law Living In Household Of Named Insured Were Included In Insured's Uninsured Motorist Coverage

*In the Matter of Allstate Insurance Company v. Ban*, 2010 WL 3910595 (2010)

In *In the Matter of Allstate Insurance Company v. Ban*, 2010 WL 3910595 (2nd Dept. 2010), the New York State Appellate Division Second Department addressed the issue of whether an insured's son and daughter-in-law were insured persons under the insured's automobile liability insurance policy. In a proceeding to permanently stay arbitration of a claim for uninsured motorist benefits, the Supreme Court determined that on the date of the subject accident, both the son and daughter-in-law were residents of the insured's household.

The Appellate Division, Second Department affirmed the decision. The Appellate Division stated that "the claimants were insured persons under the uninsured motorist endorsement of the subject automobile liability insurance policy." The insurer's argument was premised on the fact that, prior to the accident, the claimants purchased a separate home which they intended to move into after extensive renovations. Furthermore, insurer argued that claimants listed their new home as their address. The Supreme Court determined that these facts were not dispositive of the issue, adding that the claimants had been living in the insured's home for at least seven years prior to the accident. The Appellate Division affirmed, determining that the claimants "actually resided in the [named insured's] household with some degree of permanence and with the intention to remain for an indefinite period of time."



## Camp Cannot Assert Assumption Of Risk Against Infant Who Slid Down Banister

*Trupia v. Lake George Central School District*, 14 NY3d 392 (2010)

Plaintiff, in this case, was an eleven year old boy who slid down the banister at camp and seriously injured himself. The plaintiff, through his parents, sued the camp for negligent supervision.

The defendant moved the trial court seeking to amend the answer to include assumption of risk. The trial court granted this amended. Assumption of risk at one point was an absolute bar for recovery. The New York State Legislature, however, abolished contributory negligence and assumption of risk as absolute defenses and provided that "in any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence and assumption of risk, shall not bar recovery." Contributory negligence and assumption of the risk, however, may be applied when assessing damages owed to a claimant.

The Court of Appeals went on to say that allowing the defense of assumption of risk as a bar for recovery would leave little to an educational institution's duty to supervise. Additionally, the Court held that children act impulsively, which is part of being a child, and therefore cannot be deemed to have assumed the risks. It did not hold, however, that children could never assume the risk of activities, such as athletics, in which they freely and knowingly engage. Ultimately, the court denied defendant's request to amend the answer to include the affirmative defense of assumption of risk.