
# LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP


## Appellate Division Reaffirms Principle that New York Labor Law § 240(1) Is a Fluid Safety Standard as Reversal Results in Summary Judgment in Favor of Defendants

**By Gail L. Ritzert and Christopher M. Gibbons**

HRRV recently secured a significant summary judgment victory in a Labor Law § 240(1) wrongful death case. In the case of *Guaman v. The City of New York*, 2018 N.Y. Slip Op 01025 (1st Dep't, February 13, 2018), the Appellate Division, First Department unanimously reversed the lower court and granted summary judgment in favor of the defendants. HRRV represented the defendants/third-party plaintiffs, The City of New York and D'Onofrio General Contractors Corp. The decision demonstrates the fluid statutory requirements of Labor Law § 240(1) and Labor Law § 241(6), and the contours of the "sole proximate cause" defense.

The plaintiff's decedent was fatally injured when he stepped on and fell through an uncovered and unguarded skylight on the roof of a warehouse located on Pier 42 in Manhattan. The decedent was employed by a subcontractor and was engaged in emergency repairs necessitated by Super Storm Sandy. The subcontractor was charged with repairing a number of skylights, each of which was a known hazard, so multiple levels of protection were put into place. Before any workers embarked onto the roof, the

### CONSTRUCTION CORNER

foreman set up a fall protection system consisting of safety lines anchored to exhaust fans in the middle of the roof. Each worker was given a harness and instructed to tie off before stepping onto the roof and not to untie until safely back in the lift. The foreman also cordoned off the working area — the workers were instructed to work on a single skylight until they were finished, and the foreman put up caution tape and barriers around them to keep them from wandering around the roof. In addition to these physical barriers, all witnesses (including the decedent's coworkers) agreed that the harnesses and safety lines were not long enough to have allowed the decedent to reach the skylight through which he fell. The lines permitted free movement within

▶ continued on page 2

**Spring 2018 — Volume 12, Issue 1**

# CONSTRUCTION CORNER

FROM PAGE 1

the work area, but the anchor points had to be moved when the work area moved.

The plaintiff sought summary judgment on the theory that the failure to protect the skylight in question, with a cover or railing, constituted a violation of Labor Law § 240(1). The defendants cross-moved on the issue of sole proximate cause, on the theory that the decedent caused his own accident by disconnecting his harness and leaving his work area. The motion court correctly held that the failure to cover the skylight, standing alone, does not necessarily establish liability under Labor Law § 240(1). The motion court found questions of fact sufficient to deny the plaintiff's motion based on evidence that the decedent was given an adequate fall protection system that would have prevented the accident if used properly. However, the court was not persuaded that the defendants had established entitlement to judgment as a matter of law on the issue of sole proximate cause. In particular, the motion court found questions of fact because no one actually saw the decedent disconnect his harness, there were no subsequent inspections of the fall protection system and there was varying testimony regarding the precise length of the retractable devices that connected the workers' harnesses to the safety lines. Furthermore, the motion court found that Labor Law § 241(6) applied to the facts of this case (based on a violation of 12 NYCRR 23-1.7(b)(1)(i)), but declined to grant judgment to the plaintiff due to questions of fact as to the decedent's negligence.

In reversing the motion court and granting summary judgment to the defendants, the Appellate Division, First Department reaffirmed the principle that Labor Law § 240(1) is a fluid safety standard. It is not enough for a plaintiff merely to demonstrate that some safety device could have prevented a gravity-related accident. In order to establish a prima facie violation of the statute (at least in cases where safety devices are actually provided), a plaintiff must demonstrate that the safety device he was provided was inadequate to protect him from the gravity-related risks associated with his work. Stated differently, a statutory defendant is not obligated to provide a protected worker with every conceivable safety device. Accordingly, the failure to install protective devices on the skylight through which the decedent fell was legally insignificant in light of the other devices that were actually provided (harnesses, safety lines and anchored tie offs).

The decision also demonstrates what is necessary to show to successfully invoke the "sole proximate cause" defense to a Labor Law claim. A defendant must establish that adequate safety devices were provided, that the plaintiff was instructed to use them and that the devices would have prevented the accident if the plaintiff had not chosen, for no good reason, not to use them. The *Guaman* decision confirms that this can be done through the submission of circumstantial evidence, as the decedent's negligent acts were not witnessed. Direct evidence of the decedent's negligence is not necessary where the circumstantial evidence is not subject to any other interpretation.

Finally, the First Department in *Guaman* affirmed the principle that once a "sole proximate cause" defense is established as a matter of law, technical violations of § Labor Law 241(6) do not result in liability.

In defending Labor Law claims it can often feel like the deck is stacked in favor of plaintiffs. The *Guaman* decision provides a road map for defending these cases on a "sole proximate cause" theory.

### Contact

**Gail L. Ritzert and Christopher M. Gibbons represented The City of New York and D'Onofrio General Contractors Corp.**

**Gail L. Ritzert: 516-620-1710 or gail.ritzert@hrrvlaw.com**

**Christopher M. Gibbons: 516-620-1721 or christopher.gibbons@hrrvlaw.com**

## HRRV's White Plains Office Celebrates 10-Year Anniversary

On February 10, 2018, HRRV's White Plains office marked its 10th anniversary.

When the office first opened, there were three people in temporary space. Since then, the office has grown to a staff of 15 at our current space at 170 Hamilton Avenue. Congratulations to our resident partner, Tara Fappiano, for her hard work and perseverance, and thank you to our staff and to our clients who have added to our success.

We look forward to continued growth.

# New York Court of Appeals Opens the Door to Access Social Media Posts in Discovery

**By Carla Varriale**

New York's highest court, the Court of Appeals, issued a decision on February 13, 2018, which opens the door for defendants to access a personal injury plaintiff's social media information.

In *Forman v. Henkin* (2018 N.Y. Slip Op 01015), the plaintiff allegedly sustained spinal and brain injuries when she fell from a horse that was owned by the defendant. She claimed, among other symptoms, cognitive defects, memory loss, difficulties with written and oral communication and social isolation. At her deposition, however, she admitted that she posted photographs of her pre-accident lifestyle but that she deactivated her Facebook account six months after the alleged accident.

The defendant sought an unlimited authorization to obtain the plaintiff's entire "private" Facebook account because it was material and necessary to the defense of the action. Among other things, the defense wanted to examine time stamps for her posts to determine how long it took her to compose posts, since she alleged cognitive impairment and difficulty communicating. But the defense also sought the content of her Facebook posts.

The plaintiff refused and claimed there was no basis to access the "private" portion of her Facebook account.

The motion court ordered disclosure of information showing each time she posted a message and the number of characters or words in the message, among other items. However, the motion court did not order disclosure of the content of any of the plaintiff's written Facebook posts, whether before or after the accident.


On appeal, the Appellate Division, First Department split on whether the defense was entitled to broader access to the plaintiff's Facebook account and called for reconsideration of the Appellate Division, First Department's previous decision in *Tapp v. New York State Urban Dev. Corp*., 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dep't 2013). In *Tapp*, the Appellate Division First Department held:

> The motion court correctly determined that plaintiff's mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims. (citations omitted).

The Court of Appeals addressed this precedent regarding the disclosure of social media information as "unduly restrictive and inconsistent with New York's policy of open discovery." The Court of Appeals reversed the Appellate Division, First Department's decision and reinstated the motion court's decision.

However, the Court of Appeals went even further: it rejected the prior decision that stated, to warrant discovery, a defendant had to establish a factual predicate for their request "by identifying relevant information in plaintiff's Facebook account — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses and other claims." The Court of Appeals held that this was unduly restrictive and contravened New York's open policy with respect to the disclosure of relevant material. It rejected the notion that the account holder's "privacy" settings should govern the scope of disclosure of social media materials. The Court of Appeals stopped short of finding that commencing a personal injury action opens up a personal injury plaintiff's entire Facebook account as discoverable. It declined to apply a "one size fits all" standard. The Court of Appeals, correctly, noted that even private materials may be subject to discovery if they are relevant and "reasonably calculated to contain relevant information." This is a friendlier standard for defendants to access social media records, especially Facebook. The *Forman* case can be used to obtain social media (not just Facebook) records and impeachment material that can be valuable to defendants.

**Contact**

**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**

# Utilizing Iranian Athletes in American Sporting Events Held Outside the United States: An Overview

**By Shawn Schatzle**

American sports organizations and leagues holding events outside the United States may be hesitant to utilize athletes who are nationals of Iran. However, due to certain exceptions to the Iran sanctions issued by the United States government, Iranian athletes may be utilized while still complying with the sanctions.

The Office of Foreign Assets Control (OFAC) of the United States Treasury is the governmental entity responsible for overseeing and enforcing U.S. economic sanctions issued against Iran, North Korea, Zimbabwe, Cuba and other countries. Such sanctions are issued for a variety of reasons, often in circumstances where the United States has reason to believe the country in question sponsors terrorism or commits human rights violations.

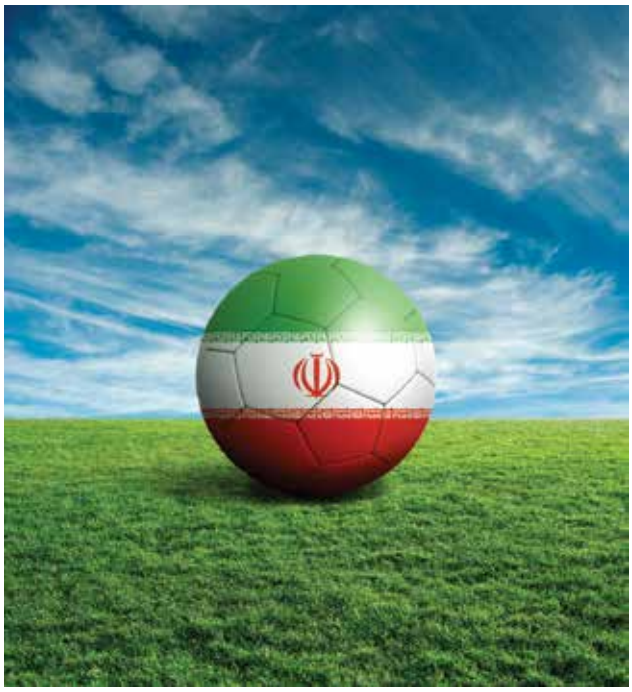
The sanctions asserted against Iran restrict U.S. persons from engaging in any transactions — including purchase, sale, transportation, swap, financing or brokering transactions — related to goods or services of Iranian origin. *See* 31 CFR § 560.206. Importantly, the prohibitions generally apply to transactions by U.S. persons in locations outside the United States, according to OFAC.

The broad prohibitions of these sanctions would appear to bar the utilization of paid Iranian athletes at American sporting events held outside of the United States.

The much-published, recent "nuclear deal" that lifts certain sanctions on Iran does not appear to have any effect on the ability of an American sports organization to utilize Iranian athletes. Pursuant to the nuclear deal, foreign subsidiaries of U.S. companies can now engage in a variety of transactions with the Iranian government, among other lifted restrictions, none of which appear to be relevant to sporting events.

However, under the relevant statutes, OFAC may issue licenses or authorization to allow certain activities that might otherwise be prohibited by the sanctions. *See also* 31 CFR § 560.501; 31 CFR § 501.801. The licenses can be specific or general: specific licenses require a person or entity to obtain express permission granting authority to perform a particular activity, whereas general licenses apply to all such activities that fall within the relevant scope of the license and do not require a person or entity to obtain express permission.

As relevant here, in September of 2013 OFAC issued two general licenses authorizing certain activities, including General License F, which "authorizes the importation and exportation of certain services in support of professional and amateur sports activities and exchanges involving the United States and Iran." The activities permitted include, but are not limited to, those relating "to exhibition matches and events, the sponsorship of players, coaching, refereeing and training."



**Therefore, although Iranian athletes appear to be able to participate in a sporting event held by an American person or entity, any financial transfers relating to the event cannot involve an Iranian bank account.**

By its plain language, General License F would therefore appear to affirmatively authorize the use of athletes who are Iranian nationals at sporting events organized, promoted and/or produced by U.S. persons or entities.

Notably, as set forth in Note 1 to General License F, U.S. banks "are authorized to process transfers of funds in furtherance of activities authorized by this general license so long as the transfer is consistent with 31 CFR § 560.516."

▶ continued on page 6

# Immigration Law: An Overview of I-9 Compliance


**By Patrick Lynott**

Earlier this year, Immigration and Customs Enforcement (ICE) staged a series of enforcement raids at ninety-eight 7-Eleven convenience stores across the country. It appears that this was the beginning of the Trump Administration's roll back of Obama-era policies that de-emphasized workplace raids. Indeed, ICE representatives confirmed that there will be additional enforcement raids this year. There is speculation that ICE is planning a large-scale enforcement action in San Francisco, California. The *San Francisco Chronicle* reported that this is a result of California's recently passed sanctuary law. If that is the case, it is reasonable to assume that ICE will plan enforcement action on other self-designated "sanctuary" locations, such as New York City.

Enforcement raids, which historically focused on agricultural businesses such as crop picking and meat packing, are a warrantless audit of a company's recordkeeping practices with regard to the I-9 form. Form I-9, officially called Employment Eligibility Verification, is a United States Citizenship and Immigration Services form used to verify the identity and work authorization of all paid employees in the United States. Its use was mandated by the Immigration Reform and Control Act of 1986 (IRCA). All U.S. employers must ensure proper completion of an I-9 form for each individual they hire.

## Completion of the Form

IRCA requires employers to verify that all newly hired employees present "facially valid" documentation verifying the employee's identity and legal authorization to accept employment in the United States. Every employee hired must complete an I-9 form at the time of hire. Employees must complete Section 1 of the form upon commencing employment. The employer must complete Section 2 within three days of the employee's starting date at work. The employer is responsible for ensuring that the forms are completed properly and in a timely manner. Be aware that the I-9 was updated on November 14, 2016, and all employers are responsible for use of the most recent version.

In completing the I-9 form, a prospective employee attests, under penalty of perjury, that she or he is authorized to work in the United States. A prospective employee must provide documents that prove his or her eligibility to work. A variety of documents are acceptable. Generally, a prospective employee must provide either one document that establishes both identity and employment eligibility from List A on the I-9 or one document that establishes identity from List B, and one document that establishes employment eligibility from List C. All documentation must be unexpired.

Often, employers believe that I-9 forms are a "one and done" process. However, employers must update or reverify certain identification documents at, or prior, to their expiration date. This does not apply to already presented and accepted nonexpired U.S. passports or Permanent Resident Cards when they reach their expiration date, nor to any List B documents, e.g., state driver's licenses and state identification cards. For U.S. citizens, I-9 forms are valid continuously unless a break of more than one year of employment occurs. International employees on F-1, H-1B or J-1 visas must have their I-9 reverified each time their visa has expired with a new work authorization permit.

Employers must retain an I-9 form for all current employees. Employers must also retain an I-9 form for three years after the date of hire, or one year after the date employment ends, whichever is later. Employers are not required to make or retain copies of the supporting documents. However, employers should have a consistent policy regarding copies of the supporting documents.

IRCA also contains antidiscrimination provisions. Under the act, anyone legally allowed to work in the U.S. cannot be discriminated against on the basis of national origin or citizenship status. In addition, an employer must accept any valid document or combination of documents specified in the I-9 form, as long as the documents reasonably appear genuine. Employers are prohibited from specifying which documents the employee has to provide, or requiring additional proof of identity or work authorization. Employers must also enforce I-9 compliance in a uniform manner, so it is imperative that companies standardize this process, and embody it in a written policy. It is also in the employer's best interest to avoid requiring an I-9 until a candidate is hired, rather than during the interview.

## Penalties for Noncompliance

The IRCA includes penalties for I-9 noncompliance. Federal law provides for imprisonment and/or fines for false

▶ continued on page 6

## Immigration Law: An Overview of I-9 Compliance

FROM PAGE 5

statements or use of false documents in connection with the completion of the form. An employer who hires an unauthorized worker can be fined between $250 and $5,500 per worker. An employer who knowingly accepts fraudulent documentation can also be criminally prosecuted. An employer who fails to keep proper I-9 records can be fined up to $1,100 per form, even if the employee is legally authorized to work in the U.S.

Corporate mergers and acquisitions often inadvertently give rise to noncompliance penalties since they can render all completed I-9s for an acquired company invalid. In order for the I-9s to transfer, the acquiring company has to assume all of the assets and liabilities of the former company. Mergers do not require new I-9s where the acquiring entity is a successor in interest. The acquiring company should, however, review I-9 compliance during the due diligence phase of the acquisition.

### How to Handle an Audit

As an initial matter, ICE does not need a warrant to enter public areas of a business, such as a lobby or waiting area. However, it does need a warrant or permission to enter a private area of a business, such as a restaurant's kitchen. It is helpful to mark certain areas "private" or "employees only." An employer should also inspect the warrant to determine if it is a judicial or an administrative warrant. A judicial warrant is signed by a judge (federal or state) and permits a search within certain parameters. An administrative warrant is signed by an official with the Department of Homeland Security, and generally relates to the removal of a specific individual. It doe not permit the search of the premises and will be clearly identified as Form I-200 or I-205.

If ICE gives an employer notice that its agents will be conducting an I-9 audit, the employer does not have to turn records over immediately. The law provides that an employer has three work days to produce its I-9 forms. An employer also has the right to speak to a lawyer before answering questions, providing documents (including I-9s) or signing any documents provided by ICE. It is in the best interests of the employer to quickly locate a qualified immigration attorney to consult with before turning over the I-9 forms for an audit. Also, if employees are members of a union, certain collective bargaining agreements require notification to the union and that copies of the audit documents be provided to the union.

After an audit, ICE may find some employees are not authorized to work. In that case, the employer will be given ten days to provide valid work authorization for such employees. If the employer cannot provide appropriate documentation by that time, the employee must be terminated.

### Conclusion

The I-9 form is a constant for employers and applies equally to multinational corporations and small businesses that only employ a few people. While most employers will never sponsor an employee for a visa or green card, they must still abide by immigration laws when hiring employees. Fortunately, the obligations are not overly onerous, and consistent recordkeeping practices can eliminate most potential problems. If you have questions regarding your company's I-9 compliance, consult with an immigration lawyer.

**Contact**

**Patrick Lynott: 646-747-5095 or patrick.lynott@hrrvlaw.com**

## Utilizing Iranian Athletes in American Sporting Events Held Outside the United States: An Overview

FROM PAGE 4

Under that statute, banks — or "depository institutions" — are "authorized to process transfers of funds" relating to specific or general licenses, so long as the transfers do "not involve debiting or crediting an Iranian account."

Therefore, although Iranian athletes appear to be able to participate in a sporting event held by an American person or entity, any financial transfers relating to the event cannot involve an Iranian bank account. As such, an American company should not attempt to wire or otherwise transfer funds to any Iran-based account. The alternative appears to be to instead transfer funds to a bank account in a country which is not under U.S. sanction and which does not have its own sanctions against Iran. That bank in a third-party country can then transfer funds to an Iranian account, if necessary, as part of the use of Iranian athletes.

In addition, any involvement with the government of Iran in the use of any Iranian athletes could complicate matters. Also, General License F obviously does not allow for transactions with any Iranian person who or entity that is specifically listed as under sanction, as expressly set forth in subparagraph (b).

The provisions of General License F also apply to American organizations seeking to utilize Iranian athletes in events held within the United States. However, such athletes must still obtain the necessary visa, and the financial restrictions relating to the transfer of funds must still be complied with.

**Contact**

**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

# The Rate and Risk of Head Injuries in Mixed Martial Arts Remain Unknown Due to a Lack of Regulation and Protocols, According to New Study

**By Shawn Schatzle**

It was May 25, 2013 in Las Vegas, the mecca of combat sports. T.J. Grant, then a 29-year-old native of Nova Scotia, was riding a four-fight win streak into a lightweight bout with former Ultimate Fighting Championship title contender Gray Maynard at UFC 160. Having competed in Brazilian jiu-jitsu and wrestling as a teenager, Grant began fighting in 2006 and had compiled an impressive record of 20–5 by the time he stepped into the cage in Vegas that night.

Maynard was a respected veteran who had almost become the UFC's Lightweight Champion on two occasions, only to fall just short in bouts against Frankie Edgar. Otherwise, he was undefeated in every bout he had competed in and was the favorite heading into UFC 160.

Despite the underdog status, Grant stopped Maynard with strikes inside the first round. It was only the second time Maynard had been defeated. Grant was dubbed the top contender to the championship. All of his hard work had finally paid off.

Shortly after his stunning victory in May of 2013, Grant was booked against then-champion Benson Henderson in a UFC Lightweight Title bout that was scheduled to headline UFC 164 in Milwaukee. It was not to be, however. He suffered a concussion in training and was pulled from the bout. He was replaced by Anthony Pettis, who defeated Henderson and went on to become a star for the UFC, even appearing on a Wheaties box. As for Grant, the win against Maynard would be the last time he would ever compete in mixed martial arts.

Realizing that he needed to find a way to support his family if he was not going to be competing, Grant spent time working in a potash mine in Saskatchewan. Headaches lasted for at least a year after the initial head injury. Even after they subsided, he still experienced short-term memory loss, sometimes forgetting why he went to a particular room in his house.

Grant is certainly not the only mixed martial arts athlete who has suffered a head injury, but a recent medical study indicates that the statistics are largely unknown. Researchers at St. Michael's Hospital in Toronto recently published an article in the journal *Trauma*, which analyzed 18 studies involving 7,587 patients with head injuries from mixed martial arts competition.

Following their review of the studies, the authors of the article

▶ continued on page 8

## The Rate and Risk of Head Injuries in Mixed Martial Arts Remain Unknown Due to a Lack of Regulation and Protocols, According to New Study

FROM PAGE 7

concluded that "the rate and potential risk of traumatic brain injury in mixed martial arts remain unknown due to a lack of regulation and protocols surrounding such injuries," according to a press release from the hospital concerning the article. The authors found that there was "no consistent definition of head injury, concussion or traumatic brain injury or consistent protocol for how [such] injuries are reported and medical clearance [for] return to play." There was also no information regarding long-term follow-up of injured fighters.

The lack of relevant statistics was noteworthy in light of the possibility of head trauma in the sport. For example, the researchers found that a significant portion of mixed martial arts bouts ended in stoppage due to strikes. More specifically, it was found that contests ended in a "technical knockout" or "knockout" at a rate ranging from 28.3 to 46.2 percent of all matches, with some studies finding that there was a lifetime average of 6.2 technical knockouts or knockouts in an individual career. No information was reported relating to head trauma sustained during training, however, which is notable, especially considering Grant's story.

The researchers at St. Michael's Hospital noted certain regulations generally in place relating to head injuries, although they highlighted deficiencies with such regulations. In Ontario, for example, fighters who sustain a head injury are suspended for a fixed period of sixty days, regardless of ongoing symptoms. Athletes can be cleared early by any physician with a normal CT, MRI or electroencephalogram.

A root issue may be the fact that mixed martial arts is not regulated by any single sanctioning body. Although organizations like the UFC and Bellator are well-known, they are merely promoters of the sport. Regulation is left up to individual states in the United States and provinces in Canada. Outside of North America, local athletic sanctioning bodies or commissions oversee events, or promoters are left to regulate their own events. This creates a logistical hurdle in setting forth comprehensive protocols for head injuries.

There have been attempts at setting uniform protocols by the Association of Boxing Commission (ABC). However, any regulations set forth by the ABC are not binding on individual member athletic commissions. When the ABC issued certain changes to the unified rules of mixed martial arts in August 2016, for example, representatives of the New Jersey commission expressly stated that their state would not adopt the new rules in full. Nevada has yet to even vote on whether to implement the new rules.

With that said, the individual athletic commissions who objected to certain portions of the new unified rules of mixed martial arts largely did so on the basis of fighter safety. New Jersey specifically objected to a rule change relating to the definition of a grounded fighter on the basis that it could potentially increase head strikes. This indicates that individual commissions may very well welcome a discussion regarding uniform protocols for dealing with head injuries in mixed martial arts. Perhaps the ABC will take up the topic in the near future. Any new protocols issued by the ABC regarding head injury regulations would then need to be voted on by each individual member commission.

For its part, the UFC has not been silent on the issue of fighter health. For example, in October 2017, heavyweight contender Mark Hunt was pulled from a bout in Australia due to troubling comments he made in a published article. Hunt complained of sleeping and memory issues, and noted that he was starting to stutter and slur his words. He opined that these issues were "the price of being a fighter." The UFC removed him from his scheduled bout and refused to book him again until he underwent a series of medical tests with specialists in Las Vegas. He apparently passed and competed against Curtis Blaydes on February 11, 2018 in Australia, losing a unanimous decision.

The UFC has also enacted a comprehensive drug testing program through a partnership with the United States Anti-Doping Agency (USADA), the goal of which is to police and hopefully minimize the use of performance-enhancing drugs in the organization. This program does not directly relate to the issue of head injuries, but it is evidence of the promotion's ability to tackle important issues when it elects to do so. Now may be the time to take on the issue of head injuries.

A prior version of this article appeared in the January 2018 issue of *Concussion Litigation Reporter*. More information can be found at concussionpolicyandthelaw.com/concussion-litigation-reporter.

**Contact**

**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## On Appeal, Patch of Mud Deemed Open and Obvious and Not Inherently Dangerous, Dismissing Youth Baseball Spectator's Claim

*Sirianni v. Town of Oyster Bay*
*Appellate Division, Second Department*
*Index No. 6666/2012*
*A.D. Docket No. 2016-03782*
*December 13, 2017*

Plaintiff Marian Sirianni was allegedly injured on June 12, 2011 while watching her grandson play youth baseball at Picken Field in Massapequa, New York. She had been standing in a spectator area behind one of the dugouts and began walking toward the field to say good-bye to her grandson. While doing so, she slipped in a patch of mud in the spectator area, sustaining injuries.

Sirianni thereafter commenced suit against the Town of Oyster Bay, which owned the public park in which the baseball field was located, and Plainedge Youth Baseball League (PYBL), the organizer of the baseball game. She alleged, among other things, that both defendants were negligent in their maintenance of the grounds surrounding the field, such that they should be held liable for negligence.

HRRV, on behalf of PYBL, moved for summary judgment on the basis that the patch of mud in question was open and obvious and not inherently dangerous as a matter of law. Similarly, in addition to other contentions, HRRV argued that the condition was a naturally occurring topographic condition that was not actionable as a matter of law. On these points, the deposition testimony of Sirianni's ex-husband was submitted, who testified that he consciously avoided mud throughout the spectator area of the field. Certified weather reports were also submitted, among other evidence, establishing that it had rained on the day of the accident, and on each of the three days leading up to it. The Town of Oyster Bay cross-moved with similar arguments.

Sirianni's counsel opposed the motion, largely on the basis of the opinion of an expert, who opined that various structural deficiencies in the park somehow caused the patch of mud in question. HRRV argued that the expert's opinions should be given no weight, as they were speculative, conclusory and without any independent factual basis.

HRRV's motion on behalf of PYBL was initially denied by Judge Angela Iannacci of Supreme Court, Nassau County. In a brief decision, the judge held that both PYBL and the Town of Oyster Bay had failed to meet their entitlement to judgment as a matter of law and that, in any event, Sirianni raised a triable issue of fact.

However, on appeal, the Appellate Division, Second Department reversed, dismissing Sirianni's negligence action in its entirety. The appellate court determined that the evidence established that "the mud condition of the field, caused by rain, was an open and obvious condition readily observable by those employing the reasonable use of their senses, and not inherently dangerous." As it relates to the plaintiff's opposition, the Appellate Division, Second Department similarly agreed with HRRV, holding that the opinions of the expert in question were "conclusory and speculative and with no independent factual basis."

**Contact**

**Carla Varriale and Shawn Schatzle represented Plainedge Youth Baseball League.**

**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**

**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

**The appellate court determined that the evidence established that "the mud condition of the field, caused by rain, was an open and obvious condition readily observable by those employing the reasonable use of their senses, and not inherently dangerous."**

# HRRV DECISIONS OF INTEREST

## Summary Judgment Granted to Festival Organizer in Connection with Golf Cart Accident

*Scaley-Schaefer v. Brusca*
*Supreme Court, Nassau County*
*Index No. 10064/2015*
*January 16, 2018*

The Oyster Festival is an annual event held in Oyster Bay, New York, featuring an oyster eating contest, a handcrafts tent, live music, various food vendors and other attractions. It is organized by the Oyster Bay Charitable Fund. On October 19, 2013, plaintiff Margaret Scaley-Schaefer attended the festival with multiple family members. She was involved in an accident and eventually filed suit.

While standing near a food vendor, Scaley-Schaefer's foot was run over by a golf cart driven by Robert Brusca, who was affiliated with two nonprofit organizations that were serving as food vendors. Brusca had just delivered food obtained from a nearby restaurant to the tent of one of the vendors, and was in the process of returning the cart to its parking location. He was not employed by or otherwise affiliated with the Oyster Bay Fund.

Scaley-Schafer and her husband — asserting a derivative claim — filed suit against the Oyster Bay Fund, Brusca and the two nonprofit organizations that he was affiliated with. They asserted that all of the named defendants were negligent for allowing her accident to occur. Specifically as to the Oyster Bay Fund, they asserted that inadequate protocols were in place to avoid the occurrence of accidents like the one in question.

HRRV, on behalf of the Oyster Bay Fund, moved for summary judgment, arguing that it was not affiliated with Brusca and therefore could not be held liable for the accident as a matter of law. More specifically, and in addition to other arguments, HRRV asserted that any alleged action or inaction on the part of the Oyster Bay Fund was not the proximate cause of the accident, as any fault for the happening of the accident was attributable to Brusca's failure to exercise due care. It was noted that Brusca's actions, or inaction, constituted an independent, intervening act, severing the nexus between any claimed negligence attributed to the Oyster Bay Fund.

In opposition, counsel for Scaley-Schaefer and her husband as well as counsel for some of the co-defendants, argued that the Oyster Bay Fund should have set up lanes of travel for golf carts throughout the Oyster Festival, so as to ensure that they were not used in pedestrian areas. HRRV argued that there was no factual, expert or legal basis to indicate that the Oyster Bay Fund was under any obligation to do so.

HRRV's summary judgment motion on behalf of the Oyster Bay Fund was granted by Judge James P. McCormack of Supreme Court, Nassau County. The judge noted that the Oyster Bay Fund met its burden as a matter of law on the issue of proximate cause, holding that Brusca's "actions in the manner in which he drove the cart [were] an intervening, [superseding] cause." In opposition, Judge McCormack noted that the other parties did not address the issue of proximate cause and, in any event, offered "no evidence or legal argument" to establish that the Oyster Bay Fund "should have arranged for specific cordoned-off lanes in which the golf carts could travel." He therefore granted summary judgment to the Oyster Bay Fund.

### Contact

**Carla Varriale and Shawn Schatzle represented the Oyster Bay Charitable Fund.**

**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**

**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## Curbing Around Miniature Golf Course Hole Deemed Not Inherently Dangerous and Readily Observable, Resulting in Dismissal of Infant Plaintiff's Negligence Action

*Luciani v. Fun Central*
*Supreme Court, Dutchess County*
*Index No. 2921/2014*
*August 22, 2017*

Philip Luciani went to a miniature golf course known as Fun Central in Wappinger Falls, New York with his daughter, infant plaintiff I.L., on July 2, 2011. While playing through the course, I.L. tripped as a result of a brick curb surrounding one of the holes, sustaining injuries.

Luciani thereafter filed suit against Redl Real Estate, LLC, the owner of the property, and Fun Central, Inc., the tenant at the time of the accident and the operator of the miniature golf course. He asserted that the course was defectively designed and constructed, among other allegations, such that the named defendants were liable for negligence. HRRV represented both defendants during the course of the litigation.

HRRV retained miniature golf expert Arne Lundmark to conduct an inspection of the course. He did so approximately six years after the accident, although the structural condition of the course was in the same condition as it was on the date of the accident. Lundmark effectively opined that there was nothing defective or dangerous about the curbing in question, and that the course was designed within industry standards.

Based largely on Lundmark's inspection, as well as the deposition testimony of the parties and photographs of the area in question taken shortly following the accident, HRRV moved for summary judgment, effectively arguing that there was no defect that the defendants could otherwise potentially be held liable for. In opposition, Luciani's counsel argued that questions of fact existed as to whether the curbing in question was defective, although no expert opinion was submitted on the issue.

HRRV's motion was ultimately granted by Justice Christine Sproat of Supreme Court, Dutchess County. The judge noted that the photographs revealed no visible defects, and she gave credit to the opinions of Lundmark. She held that "the curbing upon which [the infant plantiff] allegedly fell was not an inherently dangerous condition and was readily observable," warranting dismissal as a matter of law.

**The court held that "the curbing upon which [the infant plantiff] allegedly fell was not an inherently dangerous condition and was readily observable," warranting dismissal as a matter of law**

**Contact**

**Carla Varriale and Shawn Schatzle represented Redl Real Estate, LLC and Fun Central, Inc.**
**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**
**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## HRRV Secures Summary Judgment Victory in Broker Malpractice and Breach of Contract Action

*Faith Ministries, Inc. v. Program Brokerage Corp.*
*Supreme Court, New York County*
*Index No. 653213/2016*
*September 20, 2017*

HRRV obtained summary judgment in a broker malpractice and breach of contract action on behalf of Program Brokerage Corp. (PBC), an affiliate of Hub International Northeast (Hub). Plaintiff Faith Ministries, Inc. sought in excess of $1.3 million in damages for an alleged breach of contract by its retail insurance broker, RSA Insurance Agency; its principal, Mark Losavio (collectively RSA); and the wholesale broker, PBC.

On or about October 29, 2012, the plaintiff sustained property damage to properties located at 329-331 East 94th Street, 335 East 94th Street and 339 East 94th Street in New York, New York (collectively "the Property") as a result of Hurricane Sandy. The alleged damage sustained by the Property included water damage to Faith Ministries' equipment, business income losses and extra expense losses.

Through RSA, the plaintiff had obtained insurance policies from Praetorian Insurance Company, Technology Insurance Company and Continental Casualty Company. The plaintiff submitted claims to Praetorian, Technology and Continental for the damage sustained to the Property. Each insurer denied the claims and did not pay damages to Faith Ministries. Subsequently, Faith Ministries commenced a claim against Praetorian, Technology, Continental and PBC in the Eastern District of New York. However, the case was promptly dismissed as against PBC due to lack of diversity jurisdiction.

Faith Ministries then commenced an action in the Supreme Court of the State of New York, New York County against RSA and PBC. Faith Ministries alleged that PBC and RSA obtained insurance policies from Praetorian, Continental and Technology to cover the Property and that those policies failed to provide flood and/or sewer back-up coverage for the Property, which defendants allegedly agreed to procure for Faith Ministries. The plaintiff claimed that the defendants breached the agreement by failing to procure the requested coverage. Faith Ministries sought damages for the alleged failure to procure adequate insurance coverage.

Despite commencing a breach of contract action against PBC, the plaintiff admitted that it did not have a written contract with PBC. Instead, the plaintiff argued that Faith Ministries and PBC had a contract implied in fact because PBC underwrote the Praetorian policy for Faith Ministries. Faith Ministries further argued that PBC owed a duty to Faith Ministries and was obligated to know that the Property was located in a flood zone. Finally, the plaintiff argued that further discovery was necessary to ascertain whether PBC was responsible for the failure to procure adequate insurance.

PBC argued that it did not have a contractual relationship, express or implied, with Faith Ministries. PBC, as a wholesale broker, serves as an intermediary between the retail broker and the insurers. Accordingly, HRRV argued that PBC had a relationship with the retailer broker, RSA, and the insurer, but not with the insured, Faith Ministries. Indeed, PBC's contract in connection with this matter was with RSA, and not with the plaintiff. PBC and RSA's contractual agreement clearly and explicitly placed responsibility on RSA to determine that the quote provided by PBC provided the coverage requested by Faith Ministries.

Moreover, PBC argued that Faith Ministries failed to properly plead with specificity the details of an implied contract with PBC. PBC also contended that it did not owe a duty to Faith Ministries and demonstrated that there was no special relationship with Faith Ministries nor privity between PBC and Faith Ministries as Faith Ministries was not PBC's client.

Justice Charles Ramos of the Commercial Part of the Supreme Court, New York County agreed with PBC and dismissed the action against it. The court found that the plaintiff failed to state a claim for breach of contract. The court reasoned that first, plaintiff admitted that it did not have a written contract with PBC, and second, the complaint only contained vague allegations that failed to describe PBC's conduct with respect to the plaintiff. The court found the plaintiff's arguments on this point unavailing and held that "[b]ecause no express contract exists between plaintiff and PBC, and the facts are inconsistent with the existence of a contract-implied-in-fact and against the declaration of the party to be charged, plaintiff's cause of action for breach of contract is dismissed as against PBC." (internal quotations omitted). The well-reasoned, fairly lengthy decision was a complete win for PBC, and the plaintiff did not appeal the decision.

In the same decision, the court dismissed RSA's cross-claims for common-law and contractual indemnification and contribution against PBC. HRRV argued that RSA's cross-claims must be dismissed because: (1) common-law contribution is

▶ continued on page 13

# HRRV DECISIONS OF INTEREST

## HRRV Secures Summary Judgment Victory in Broker Malpractice and Breach of Contract Action

FROM PAGE 12

unavailable in a breach-of-contract action; (2) RSA, as the retail broker, cannot seek common-law indemnification from PBC, the wholesale broker, because RSA was the one with the duty to ensure adequate coverage for plaintiff; and (3) the agreement entered into between RSA and PBC grants PBC a claim for contractual indemnification against RSA.

The court again agreed with PBC. It held that as the only cause of action in the complaint was for breach of contract, contribution was unavailable and therefore RSA's cross-claim for contribution was dismissed. The court further found that RSA and PBC's agreement specified that PBC had no relationship or contact with the insured, and since the predicate of common-law indemnity is vicarious liability without actual fault, and liability against RSA would be based upon the defendants' own participation in the acts giving rise to the loss, the cross-claim for common-law indemnification was dismissed. Accordingly, PBC was granted a second complete win.

### Contact

**Abbie Havkins and Alexandra R. Kearse represented Program Brokerage Corp.**

**Abbie Havkins: 646-747-5100 or abbie.havkins@hrrvlaw.com**

**Alexandra Kearse: 646-747-5133 or alexandra.kearse@hrrvlaw.com**

## Court Grants Summary Judgment to Flag Football League and Property Owner, Holding that New York General Obligations Law § 5-326 Does Not Void Release

*Marc v. Middle Country Center School District, Long Island Flag Football League, Inc.*
*Supreme Court, Suffolk County*
*Index No. 3015/16*
*December 11, 2017*

Murat Marc was allegedly injured during a flag football game, when he jumped to catch a pass and landed on a sprinkler head, which he claimed to be concealed. The game was being played on a field located on the grounds of Newfield High School, owned by Middle Country Center School District. Prior to playing in the football game, the plaintiff executed a waiver and release of liability, releasing the Long Island Flag Football League as well as the owner of the field from liability for personal injuries arising out of his participation in the league.


In support of the motion, the defendants argued that by signing the release, the plaintiff effectively released the defendants from liability for any injuries the plaintiff sustained during the game.

When a participant pays a fee to use recreational facilities, or pays fees to a league, which are used to pay for the use of those facilities, a waiver and release of liability executed by the participant is void pursuant to New York General Obligations Law (GOL) § 5-326. In order to void a release pursuant to GOL § 5-326, there must be an evidentiary showing that the individual paid a fee for use of the facility.

At the outset, Justice Peter H. Mayer, sitting in Supreme Court, Suffolk County, found that the defendants had established a prima facie entitlement to dismissal of the plaintiff's complaint by producing the subject release. The documentary evidence further established that the plaintiff did not pay a fee to use the field where he was allegedly injured, and that no portion of the Long Island Flag Football League fees were used to pay for use of the subject field. As such, Justice Mayer determined that the release signed by the plaintiff is not void as against public policy pursuant to GOL § 5-326, and all claims against the defendants were dismissed.

### Contact

**Carla Varriale, Lindsay Kaplow and Michelle Bochner represented Middle Country Central School District and Long Island Flag Football, Inc.**

**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**

**Lindsay Kaplow: 646-747-5126 or lindsay.kaplow@hrrvlaw.com**

**Michelle Bochner: 646-747-6782 or michelle.bochner@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## Landlord Granted Summary Judgment in Contractual Indemnification Claim Against Tenant-Employer in Relation to Work-Related Injury on Leased Premises

*Coyle v. Miele Sanitation Company*
*Supreme Court, Rockland County*
*Index No. 033824/2014*
*July 14, 2017*

On October 2, 2012, plaintiff Stephen Coyle was allegedly injured in the course of his employment as a mechanic and maintenance worker with En-Tech Corp., a company that specialized in trenchless sewer rehabilitation. Coyle was working at a warehouse location in Tappan, New York that served primarily as a maintenance facility for En-Tech trucks and other equipment. He was performing maintenance on a truck in a parking lot at the premises when he allegedly tripped as a result of a pothole or similar defect. The lot was utilized exclusively by En-Tech.

Joseph and Gloria Miele owned the property and leased it to En-Tech. The lease agreement contained an insurance procurement provision and an indemnification provision, requiring En-Tech to indemnify the Mieles for "all claims and liabilities resulting from any acts or omissions by the tenants or for any claim arising out of by reason of occupancy of the premises by the tenant or business of the tenant."

As a result of his alleged accident, Coyle filed a negligence action against the Mieles. HRRV, on behalf of the Mieles, tendered the defense and indemnity to En-Tech and its insurer, as per the terms of the lease agreement. En-Tech's insurer denied coverage, largely on the basis of a lease addendum that contained a provision that the Mieles were responsible for maintaining the exterior of the building, including parking areas. On this basis, En-Tech's insurer asserted that the Mieles were not entitled to indemnification from En-Tech because they were potentially actively negligent. HRRV then filed a third-party action against En-Tech, primarily seeking to enforce the contractual indemnification provision.

At the close of discovery, En-Tech's counsel moved for summary judgment on the grounds that the contractual indemnification could not be enforced. In addition to the arguments previously raised by En-Tech's insurer, counsel for En-Tech argued that enforcement of the lease agreement would violate New York's General Obligations Law (GOL) § 5-321.

HRRV filed a cross-motion for summary judgment seeking enforcement of the contractual indemnification provision. HRRV argued that the contractual indemnification provision evidenced a clear intent for En-Tech to indemnify the Mieles for claims such as the one filed by Coyle. In addition, it was submitted that enforcement of the indemnification provision would not violate the GOL, as the provision was part of a commercial lease negotiated at arm's length, and that it was in conjunction with an insurance procurement requirement. As such circumstances constituted an exception to the general rule set forth in the GOL, HRRV argued that the provision had been triggered in favor of the Mieles and must be enforced, among other arguments.

Justice Thomas Walsh of Supreme Court, Rockland County granted HRRV's cross-motion for summary judgment on behalf of the Mieles and denied counsel for En-Tech's motion. The judge noted the applicability of the exception to the GOL, regardless of the Mieles potential negligence, and held that the indemnification provision required En-Tech to indemnify the Mieles "with respect to any personal injury claims arising out of any occurrence on the premises."

**Contact**

**Carla Varriale and Shawn Schatzle represented Joseph and Gloria Miele.**

**Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com**

**Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## Summary Judgment Granted in Bowling Alley Trip-and-Fall

*Rogers v. Herrill Bowling Corp.*
*Supreme Court, Nassau County*
*Index No. 604589/2015*
*October 23, 2017*

HRRV secured summary judgment for defendant Herrill Bowling Corp. in a trip-and-fall case brought in Nassau County Supreme Court.

Ellen Rogers claimed that on November 4, 2014, Herrill, which operated a bowling alley known as Herrill Lanes, negligently allowed a bowling ball bag — belonging to and set down by fellow patron and defendant Everett Freed — to remain on the concourse. Rogers tripped on the bag en route to the restroom, and as a result, she claimed to have fractured her clavicle, pelvis and multiple ribs.

At her deposition, Rogers acknowledged that Freed placed the bag on the concourse and that she had no idea how long the bag had sat on the floor. Notably, she agreed that an incident report narrative, prepared just after the fall, was accurate; the document stated that the plaintiff tripped over the bag and ball. Rogers also admitted that she was looking up while she was walking and had no trouble seeing where she was going. Meanwhile, Herrill's general manager — who walked the alley floor 20 to 40 times per day — was in the area just 10 minutes prior to the plaintiff's fall and saw no bag on the concourse.

HRRV moved for summary judgment on Herrill's behalf, on the grounds that it did not breach any duty owed to the plaintiff; the record confirmed that Herrill did not cause or contribute to the plaintiff's fall or have actual or constructive notice of the condition that did. In fact, there was no record of similar prior incidents, no reason to supplement Herrill's already-sufficient maintenance procedures and no indication that Herrill staff knew of the bag until after the plaintiff fell.

In a fact intensive decision, Justice Karen Murphy, sitting in Supreme Court, Nassau County, granted Herrill summary judgment on all claims. Because written discovery and depositions revealed no remaining material issues of fact, the case was ripe for judgment on the merits, and the court found that Herrill did not cause, create or have notice of the condition that caused the plaintiff's injuries. The testimony from Herrill's general manager was particularly instrumental in helping Herrill establish that it did not have notice, meeting its burden on summary judgment. Interestingly — and despite the plaintiff's acknowledgment that she tripped over a bowling ball bag — the court further found certain ambiguities in the plaintiff's testimony, and concluded that the plaintiff, in sum, did not actually know what caused her to fall. As a result, the court dismissed all of the plaintiff's claims.

### Contact

**Steven H. Rosenfeld and Andrew J. Curtin represented Herrill Bowling Corp.**

**Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com**

**Andrew Curtin: 646-619-8635 or andrew.curtin@hrrvlaw.com**

# HRRV DECISIONS OF INTEREST

## Courts Finds No Actionable Defect for a Smooth Tub and Grants Summary Judgment

*McCall v. 1394 B.P.R. Realty Corp.*
*Supreme Court, Bronx County*
*Index No. 22836/2013*
*October 26, 2017*

Plaintiff claimed in this case that she slipped and fell in her bathtub in her apartment. She had previously complained about the tub, and HRRV's clients, the building owner and management company, hired defendant Porcelain Refinishing to refinish the tub, which was done without complaint about one week before the accident date. The plaintiff claimed she slipped and fell only because the tub now was "slippery." She said she was told to place down a mat and failed to do so. There was also evidence that mats that would not harm the finish were to be supplied directly by Porcelain, by request, and that Porcelain gave instructions for the maintenance of the tub directly to the tenants.

Porcelain moved for summary judgment and argued it was an independent contractor, not liable to the plaintiff. It also argued that the alleged "defect," a smooth tub, was not a defective or hazardous condition. HRRV moved for summary judgment on the same grounds, a lack of hazardous condition, and also argued no additional duty to provide a mat. To the extent there was any question of there being a hazard, HRRV argued, the building owner and management company were entitled to indemnity from Porcelain, which created the condition.

Justice Mary Ann Briganti, sitting in Supreme Court, Bronx County, found that all defendants made out a prima facie case that there was no actionable defect in the tub, as there is no actionable defect for a smooth tub absent proof of a defect in the surface, or deviation for some industry standard. The mere allegation of a slippery tub is not enough to impute negligence. The court went on to state that even if the tub was slippery, there is no duty on landowners to provide a nonskid surface in bathtubs. The plaintiff failed to raise a question of fact in opposition to the motions.

**Contact**

**Tara C. Fappiano and Tiffany R. Fendley represented 1394 B.P.R. Realty Corp. and Genesis Realty Group.**

**Tara C. Fappiano: 914-290-6453 or tara.fappiano@hrrvlaw.com**

**Tiffany R. Fendley: 914-368-7213 or tiffany.fendley@hrrvlaw.com**

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP
HRRV
COUNSELORS AT LAW

1 Battery Park Plaza
6th Floor
New York, New York 10004
212-488-1598
212-564-0203 Facsimile

114 Old Country Road
Suite 300
Mineola, New York 11501
516-620-1700
516-746-0833 Facsimile

170 Hamilton Avenue
Suite 210
White Plains, New York 10601
914-290-6430
914-560-2245 Facsimile

www.hrrvlaw.com