

## Issue Update

## PRESIDENT'S MESSAGE

Happy New Year! On January 17th, we kicked off the New Year with the MDLA's Mid-Winter Social at the Boston College Club. Approximately 40 MDLA members, including three recipients of the MDLA Lawyer of the Year, John P. Ryan, Robert A. Curley, Jr. and Lee Stephen MacPhee, were in attendance for an informative 30 minute presentation entitled "Clarity, Comprehension and Coherence: Keys to Persuading a Jury," by jury consultant, Edward Schwartz of Edward P. Schwartz Consulting. The program was informative and very well received by the members.

Please mark your calendars and plan to attend the MDLA Annual Meeting and Spring Seminar scheduled for May 12th. Details will follow in future newsletters.

I look forward to meeting the goals we, as an organization, have set for the New Year (including an increase in the number and active participation of our members, improving the quality educational and social events we provide to our members, as well as the advancement of the administration of justice) and seek your input into how we can better realize our mission. If you have any comments or suggestions on how to improve the MDLA, please drop me a note or give me a call.

In order to continue to provide our membership with newsletters, seminars and other events, we need your financial support. If you have not already done so, please return your MDLA dues as soon as possible. We are always looking to our members to become active participants in the organization. If you would like to submit an article of interest to the defense bar for publication in our monthly newsletter or make a presentation at an MDLA meeting, please let me know, or e-mail your proposed articles to Micahel Sams of Sherin and Lodgen at [mpsams@sherin.com](mailto:mpsams@sherin.com).

This month's article is by MDLA Board member, Michael Sams and Jill Brannelly of Sherin & Lodgen, LLP, concerning the assignment of indemnification rights.

I would also like to take this opportunity to acknowledge the passing of my partner, mentor and friend, John A. Donovan, Jr., who was so instrumental in my career, as well as the careers of many MDLA members. He was a gentleman and a friend to the entire Bar and will be missed.

*Michael Giunta*

Upcoming  
Events

Annual Meeting  
May 12, 2006

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## THE APPEALS COURT HOLDS GENERAL CONTRACTOR CAN ASSIGN CONTRACTUAL INDEMNIFICATION RIGHTS AGAINST SUBCONTRACTOR TO SUBCONTRACTOR'S EMPLOYEE

MICHAEL P. SAMS, ESQ. AND JILL M. BRANNELLY, ESQ.

On January 3, 2006, the Appeals Court in *Spellman v. Shawmut Woodworking & Supply, Inc.* held that a general contractor could assign its contractual indemnification rights against a subcontractor to the subcontractor's employee. Lawyers Weekly No. 10-001-06. In *Spellman*, the Plaintiff, an employee of East Coast Fireproofing, Inc. ("East Coast"), was injured while working at a construction site. East Coast was a subcontractor for the construction project. The Plaintiff applied for and received workers' compensation benefits from East Coast's insurer and, along with his wife and two sons, sued the general contractor for the project, Shawmut Woodworking & Supply, Inc. ("Shawmut"), alleging that its negligence caused the Plaintiff's injuries. Because the Plaintiff collected workers' compensation benefits, the exclusivity provision of the Worker's Compensation Act barred suit against East Coast.

Under its subcontract with Shawmut, East Coast agreed to defend and indemnify Shawmut from and against any and all claims and damages arising out of or resulting from East Coast's work and caused in whole or in part by East Coast's negligence. Shawmut answered the Plaintiff's complaint and gave notice to East Coast's insurer of its request for defense and indemnification. Shawmut thereafter filed a third party complaint against East Coast, alleging that in the subcontract it had expressly agreed to indemnify Shawmut and asserting a breach of contract claim concerning East Coast's failure to name Shawmut as an additional insured.

Approximately one month before the scheduled trial, the Plaintiffs and Shawmut entered into an 'Assignment of Rights and Agreement Not

to Pursue Satisfaction Under Agreement for Judgment.' Under the Assignment, Shawmut:

assigned to the Plaintiffs any and all rights and claims it has brought or may have against East Coast arising out of or resulting from Plaintiffs' claims against Shawmut for personal injuries suffered on or about August 23, 1996, including whatever rights Shawmut has or may have against East Coast for contractual indemnification, legal expenses, negligence, and breach of contract.

In conjunction with this, the Plaintiffs and Shawmut entered into an agreement for judgment for \$300,000. In the Assignment, the Plaintiffs agreed to seek the agreement for judgment's satisfaction solely from the proceeds of Shawmut's assigned claims against East Coast, and not from Shawmut.

Ten months later, the Plaintiffs sought leave to amend their complaint to add East Coast as a defendant so that they could pursue the contractual indemnification and breach of contract claims that Shawmut had assigned. East Coast moved to dismiss Shawmut's third party complaint on the grounds that the Plaintiffs could not recover because Shawmut had not incurred an actual loss and the agreed-upon judgment of \$300,000 was illusory.

The trial court allowed the Plaintiffs' motion to amend to add East Coast as a defendant, denied East Coast's motion to dismiss Shawmut's third party complaint, and reported the decision to the Appeals Court.

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The Appeals Court affirmed both the Assignment's validity and the trial court's allowance of the Plaintiffs' motion to amend. The Appeals Court found that the agreement for judgment and the Assignment's covenant not to pursue satisfaction of the agreement from Shawmut did not invalidate the Assignment, even where Shawmut suffered no tangible damages. The Appeals Court further found that that Assignment's enforceability is not limited to the amount specified in the agreement for judgment. The agreement for judgment is not enforceable against East Coast because it was not a party to it.

The Appeals Court held, however, that to recover under the indemnification provision, the Plaintiffs still have to prove that East Coast's negligence caused the Plaintiffs' injuries and have to prove their damages in full. Moreover, the court held that the Plaintiffs must prove their assigned claims to establish East Coast's liability. The Appeals Court rejected Shawmut's argument that if an indemnitee gives proper notice to an indemnitor who neglects to defend, the indemnitor should be held liable for the settlement amount. Rather, the court found the indemnification provision applies only if the Plaintiffs prove that East Coast's negligence, in whole or in part, caused their injuries. Until they do so, the indemnification provision and East Coast's corresponding duty to defend does not apply.

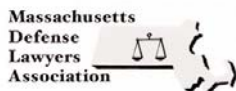
The Appeals Court found the Plaintiffs' burden of proving their claims and damages in full mitigated the risks of collusion and fraud. The Court found these risks further offset by important policy considerations such as encouraging settlement agreements, settled law that contracts not to sue are usually valid, and the general contractor's permissible objective to shift financial consequences of risks involved in performing

construction contracts to another entity. The Court found the risks of fraud and collusion further mitigated by the fact that if the Plaintiffs do not prevail on their underlying claims against Shawmut, there will be no contractual claim for East Coast to indemnify.

The *Spellman* decision is an important one for general contractors who are sued by a subcontractor's employee injured on a construction site. By assigning its contractual indemnification rights against the subcontractor to the employee-and by entering into an agreement for judgment and covenant not to seek satisfaction of the agreement from the general contractor-the general contractor can effectively remove itself from a lawsuit. The general contractor will not have to expend the time and expense to prove its claims against the subcontractor to obtain indemnification. Conversely, the *Spellman* decision seems to undercut the reason for a plaintiff to enter into similar agreements with a general contractor because even with such an agreement/assignment, the plaintiff still has the same burdens of proof.

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"The most perfidious way of harming a cause consists of defending it deliberately with faulty arguments." *Friedrich Nietzsche*



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2003-2004	Eileen P. Kavanagh Litchfield Cavo
2002-2003	Barbara Hayes Buell Bloom & Buell
2001-2002	Robert A. Curley, Jr. Curley & Curley, PC
2000-2001	Brian P. Voke Campbell Campbell Edwards & Conroy PC
1999-2000	Christopher A. Duggan Smith & Duggan
1998-1999	Paul P. O'Connor Milton, Laurence & Dixon
1997-1998	John J. Ryan, Jr. Ryan, Coughlin & Betke, LLP
1996-1997	Francis J. Lynch, III Lynch & Lynch
1995-1996	Patricia Angell Barbalunga Moriarty, Donoghue & Leja, PC
1994-1995	Daniel J. Griffin, Jr. Martin Magnuson McCarthy & Kenney
1993-1994	James M. Campbell Campbell Campbell Edwards & Conroy PC
1992-1993	Thomas E. Peisch Conn Kavanaugh Rosenthal Peisch & Ford, LLP
1991-1992	Lee Stephen MacPhee Morrison Mahoney
1990-1991	Peter J. Black Meehan, Boyle, Black & Fitzgerald, P.C.
1989-1990	Scott J. Tucker Tucker, Heifetz & Saltzman

## Recipients of the Defense Lawyer of the Year Award 1992-2005

2005	John P. Ryan Sloane and Walsh, LLP
2004	Robert A. Curley, Jr. Curley & Curley, P.C.
2003	Francis J. Lynch, III Lynch & Lynch
2002	Patricia A. Barbalunga Moriarty, Donoghue & Leja, P.C.
2001	Richard P. Campbell Campbell Campbell Edwards & Conroy
1998	John P. Fitzgerald Cogavin & Waystack
1997	William J. Dailey, Jr. Sloane and Walsh, LLP
1995	Raymond J. Kenney, Jr. Martin Magnuson McCarthy & Kenney
1994	John A. Wickstrom Tashjian, Simsarian & Wickstrom
1993	Lee Stephen MacPhee Morrison Mahoney LLP

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