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BY JEFFREY D. FRIEDLANDER

Defending the City

The City of New York is one of the most sued entities in the world. Each year about 24,000 claims against the city are filed with the city's comptroller. Acting pursuant to the New York City Charter and the General Municipal Law, that office investigates and attempts to settle them.[1] Nevertheless, on average about 8,000 of the claims filed against the city result in litigation each year and are defended by the Law Department's Tort Division. In the last fiscal year, the city paid nearly $600 million in tort settlements and judgments.

The key elements of the Tort Division's operation, which I will discuss below, are: case management, early settlement and vigorous litigation. The Law Department also works vigorously for legislative changes and for appellate decisions that will significantly reduce municipal tort liability.

Management of the Caseload

With 215 attorneys, the Tort Division is the Law Department's largest, comprising about one-third of the entire department. Given its caseload, the number of attorneys and the complexity of many of its cases, office management is the first order of business of the division.

Five of the Tort Division's 10 units represent the city in tort cases in each of the city's five boroughs. Referred to as "borough offices," these five units handle the bulk of the cases filed against the city in the civil and supreme courts of each county. Because of the large volume of cases the borough offices handle, attorneys practicing in them cannot have individual caseloads. Rather, the offices are staffed horizontally with attorneys assigned specific tasks on a multitude of cases. In the entire city, 60 attorneys litigate approximately 27,000 cases in their pretrial phases. They conduct and defend depositions, serve and answer discovery demands and engage in motion practice. Other attorneys are designated trial attorneys. They are assigned cases in the Trial Assignment Parts, and often select juries in cases on a back-to-back basis. Nevertheless, in Fiscal Year 2003, lawyers in the Tort Division tried 210 cases completely to verdict and obtained defense verdicts in 115 of those cases, a track record comparable to that of defense lawyers in the private tort bar.

The Tort Division's Medical Malpractice Unit both directly defends the New York City Health and Hospitals Corporation in malpractice cases and manages outside counsel retained to defend it in other actions. In all, there are about 1,900 malpractice cases pending against the Hospitals Corporation. In Fiscal Year 2003, the City paid $194 million to settle or satisfy judgments in medical malpractice cases.

The Special Litigation Unit handles higher exposure and more complex tort cases that require vertical attention. Ideally, the same attorney will handle a case from when the city's answer is interposed until it is tried. The unit's 30 line attorneys each handle 40-50 cases, which can include catastrophic injury cases, highway design claims, and toxic torts like lead and asbestos. In Fiscal Year 2003, the city paid $66 million to resolve 276 Special Litigation Unit cases.

A new subdivision of the Tort Division, the World Trade Center Unit, was created in 2002 to handle litigation anticipated from the terrorist attacks of Sept. 11, 2001. A total of 2,325 people filed claims alleging that they were injured either in the attacks or in the subsequent recovery effort. With the city demonstrating that it would fairly but vigorously defend any actions brought against it, the overwhelming majority of these claimants opted for quick and no-fault relief by filing claims with the Victim Compensation Fund established by Congress and led by Kenneth Feinberg, rather than pursuing litigation claiming the city was at fault for their 9/11 related injuries. The unit also oversees outside counsel representing the city in several large property damage suits arising from the attacks, in which collectively more than $1 billion is at stake.

A new unit — the Risk Management Unit — was created in the Tort Division in 2002. It has three primary objectives: (1) to reduce the number of tort claims brought against the city by identifying from pending cases problems that can be solved, and, not incidentally, thereby promoting public safety; (2) to preserve defenses by coordinating record retention by city agencies; and (3) to prevent tort fraud by identifying and investigating fraudulent claims.

Early Settlement

Historically, the city failed to resolve a number of claims equal to the number of new claims being filed against it in a given year, resulting in a growing backlog of pending cases. The backlog exacerbated staffing issues and compromised the city's ability to defend itself, since the overwhelming volume of cases prevented proper and timely preparation of cases that might be expected to go to trial. Thus, in recent years, both the comptroller and the Law Department have aggressively pursued new settlement projects, especially those targeted at resolving cases early. Early settlement not only relieves pressure on the resources of the Law Department, the comptroller's office and the courts, but also allows injured plaintiffs who in fact have a legitimate claim to recover reasonable compensation in a reasonable time.

To promote early settlement, the Tort Division moves virtually all of the tort cases filed against the city initially through the Early Intervention Unit. The staff of this unit prepares responsive pleadings, pursues insurance takeovers where appropriate and, most importantly, attempts to settle as many meritorious cases as it can before referring cases to the borough offices. In Fiscal Year 2003, the unit settled 1,467 cases. These efforts, along with those of the comptroller, have reduced the city's backlog of open cases from 50,000 to 40,000.

We expect this trend to continue as the city explores other innovations. For example, in February 2004, the comptroller began a two-year pilot program with Cybersettle, a private dispute resolution company. Claimants

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Jeffrey D. Friedlander *is first assistant corporation counsel of the City of New York.* **Thomas Merrill,** *deputy chief of the Tort Division of the Law Department, assisted in the preparation of this article.*

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and the city submit over the Internet a range of three numbers for which they would be willing to settle the claim. If there is a match, the computer will confirm a settlement by disclosing only the settlement amount to the parties. If the case does not settle, it proceeds with neither side knowing the amounts for which the other was willing to settle. In March 2004, the comptroller's office settled 37 percent more claims than it did in March 2003, due, in part, to this pilot program.

Legislative Efforts

The Tort Division has spearheaded the Law Department's initiatives for changes in the laws that govern tort actions. Last year, the New York City Council joined in these efforts by enacting Local Law 49 of 2003, the so-called "sidewalk bill." Although private landowners have always been responsible by law for maintaining the sidewalks in front of their buildings, anomalously, tort liability for accidents occurring on adjacent sidewalks fell on the city and not them. The new law shifts liability to the owners of commercial property and multiple residences and requires all property owners to obtain liability insurance against sidewalk claims.[2] It will take a while for the full impact of this law to be felt, but early signs are encouraging. Since the law went into effect on Sept. 15 sidewalk claims against the city are down 65 percent from the same period in the previous year. We estimate that the law will eventually eliminate 1,700 annual claims against the city.

On the state level, the city's main priority — and that of municipalities from one end of the state to the other — is legislation that would amend the collateral source rule as it relates to governmental entities. Pursuant to CPLR §4545, a court must reduce a jury award against a private defendant by the amount it finds any collateral source replaced, or will replace, an item of damages (such as lost earnings) included in that award. However, the section of the statute pertaining to actions against public employers[3] does not permit the reduction of a jury award to take into account the future collateral sources a plaintiff will receive. This enables public employees who receive disability pensions because of their accidents to "double-dip" by recovering future lost wages from the city in addition to their pensions.[4] Thus, if a public employee sues both the city and a private codefendant, the private codefendant can reduce its liability by the amount of a pension award but the city cannot. This inequity will cost the city $130 million in pending cases alone. At last count, our continuing effort to effect this change has the support of 655 other New York State municipalities.

Another of the changes in the law that we are seeking is the elimination of joint and several liability in actions against municipalities. The city is a "deep-pocket" defendant and is often sued in cases of weak liability but involving catastrophic injuries. For instance, in *Colicchio v. City of New York*, a jury found a codefendant driver 95 percent responsible for an accident on the 86th street Transverse in Central Park. But because the city was found 5 percent at fault, it became entirely responsible for $3 million in economic damages. If the city's legislative proposal to eliminate joint liability in these circumstances becomes law, the city will save $15 million per year.

Another way to reduce the city's tort exposure is to vigorously litigate cases in which the city does not believe it should be found liable and, where appropriate, to appeal unfavorable decisions. A recent decision of the Court of Appeals illustrates the importance of this appellate strategy. On March 25, 2004, the Court issued a consolidated opinion in the cases of *Pelaez v. Seide* and *Harris v. Llewellyn* that affirmed the dismissals of two claims against public health agencies brought on behalf of children exposed to lead paint in privately-owned residences.[5] In its decision, the Court reaffirmed that, when defining the scope of a municipality's tort duty, it will consider the effect of its decision on both the public purse and on the ability of government to operate.

A municipality cannot generally be held liable for errors its health officials make when investigating reported cases of lead poisoning.[6] Thus, in both *Pelaez* and *Harris*, the liability of the municipal defendants turned on whether health officials had assumed, and then breached, special duties to protect the infant plaintiffs.

Health officials generally advise parents of lead poisoned children to feed them iron-rich foods and to wash their hands frequently. Aimed at reducing both the body's absorption of lead and the amount of dust ingested by hand-to-mouth activity, these interventions are recommended by the Centers for Disease Control and are clearly beneficial. Yet one court found that the New York City Department of Health had assumed a special duty to protect an infant plaintiff by giving his family this advice.[7] That decision led to a spate of new claims against government defendants, all alleging that by counseling an infant's mother, a health agency had assumed a special duty to protect the infant from a private landlord's failure to abate a lead paint hazard.

The Court of Appeals recognized that this holding unreasonably expanded the potential liability of municipalities. When government is sued on a theory of secondary liability, the Court of Appeals will restrict liability because "no government could possibly exist if it was made answerable in damages whenever it could have done better to protect someone from another person's misconduct."[8]

Pelaez will immediately impact about 500 similar lead paint claims that currently are pending against the city. Its duty analysis also applies in other secondary liability cases, making them more difficult to bring.

Unexpected Contingencies

At any time, an unexpected tragedy can occur and further stretch the limitations of the Tort Division's staffing. In October 2003, the Andrew J. Barberi collided with a pier on Staten Island. The accident has generated 191 claims against the city seeking $3.39 billion in damages. Although the city retained outside counsel to assist on issues of maritime law in federal court, lawyers from the Tort Division have been assisting the firm and working with the comptroller to evaluate each of the claims that arose from the accident. Thus far, the city has met with lawyers for 53 of the claimants and settled 16 cases. The Law Department and the comptroller's office have encouraged potential plaintiffs to come forward and present claims for speedy resolution.

Conclusion

Faced with an overwhelming volume of cases, the Law Department's Tort Division is able to defend the city zealously in a wide variety of cases. By increasing early settlements and creating a Risk Management Unit, the Tort Division is attacking its caseload. *Pelaez* was an important victory for the Division, but legislative help is needed to cure inequities in the law and to reduce the amount of money the city spends unnecessarily on judgments and claims, money that can much better be allocated to education and to the public health, safety and welfare.

1. As a condition precedent to suing the City, a plaintiff must file a Notice of Claim with the City. The claim may not be put into suit until efforts to resolve it have failed.

2. Administrative Code §§7-210, 7-211.

3. Certain public employees are excluded from Workers' Compensation. They may in some situations sue the City if they are injured on the job. See, e.g., General Municipal Law §§205-a and 205-e.

4. *Iazzetti v. City of New York*, 94 N2d 183 (1999).

5. 2004 NY LEXIS 475.

6. See *Davis v. Owens*, 259 AD2d 272 (1st Dep't), lv. den'd 93 NY2d 810 (1999) and *Gibbs v. Paine*, 280 AD2d 517 (2d Dep't), lv. den'd 96 NY2d 441 (2001).

7. See, e.g., *Valencia v. Lee*, 123 FSupp2d 666 (EDNY 2000), vacated, 316 F3d 199 (2003).

8. 2004 NY LEXIS 475, *28.

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