

A VOICE FOR MAGISTRATES  
Hon. Mark Farrell of Amherst  
Town Court



has taken  
office as  
president  
of the New  
York State  
Magistrates Association.

Legal News in Brief Page 4

THE CHECKS IN THE MAIL  
The Erie  
County Clerk's  
Office is now  
accepting  
closing  
documents for  
real estate deals by mail or  
drop-off rather than in person  
only.



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DUST-UP OVER DRUG ARS  
Erie County has joined several  
states in filing a suit accusing  
Merck of Medicaid fraud over  
its marketing of the arthritis  
drug Vioxx.

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TAKE NOTICE

Our Special Report continues  
inside with a guest column  
from Daniel Geher and  
Matthew Lerner on legal  
precedents and recent  
legislative activity that could  
affect late-notice claims.

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## SPECIAL REPORT ■ INSURANCE ISSUES

### Appeal takes aim at scaffold law

BY ANNEMARIE FRANCIZYK  
Business First

A statewide business coalition with Buffalo roots is not backing down from its efforts to topple a 122-year-old law that organizers say is harming New York's construction industry.

Businesses for a Better New York is taking its challenge of the state's "scaffold law" to an appeals court in November after two tries before federal judges here.

Section 240 of the state's Labor Law, known as the scaffold law, makes owners, contractors and employers strictly liable for gravity-related worksite injuries, regardless of employee negligence or safety measures taken by the employer.

"We are automatically liable regardless of whether the employee was drunk or told not to go up there," said Frank DeCarlo, coalition cofounder and president of Paragon Restoration, a Depew company that remediates damage caused by fires, water and mold. "We cannot defend ourselves in court. Isn't that a constitutional right? We're being denied due process."

He and the coalition membership — in the hundreds, from sole proprietors to major construction companies — are seeking fairness,

not a pass on employee safety.

"If there's an employer who fails to comply by OSHA rules and regulations and puts his employees in an unsafe situation, they are entitled to suffer the consequences," DeCarlo said.

The lawsuit argues that the law is pre-empted by Occupational Safety and Health Administration regulations. It also violates the equal-protection and commerce clauses of the federal constitution by driving up insurance costs for New York companies compared to those in states with no liability clauses, said the group's attorney, Hugh Russ, a partner at Hodgson Russ LLP.

The lawsuit was filed by Businesses for a Better New York a year ago in federal court in Buffalo after failed attempts to get the state Legislature to rescind or modify the scaffold law. It was dismissed first by a U.S. magistrate judge and then in U.S. District Court. Next stop: U.S. Court of Appeals, 2nd Circuit, in New York City. Briefs are expected to be filed by Nov. 30, with arguments following in early 2008.

"We're not going quietly," Russ said. The coalition wants a chance in court to show that the scaffold law does not make New York a safer place to work and drives up insur-



JOHN COURTNEY/BUSINESS FIRST

**Hurwitz & Fine PC partner Michael Perley, who stands in front of some downtown scaffolding, believes the state's scaffold law is unfair to employers.**

ance premiums dramatically in New York compared to other states, he said.

While Businesses for a Better New York is taking the judicial route, organizations such as Unshackle Upstate New York, the coalition spearheaded by the Buffalo-Niagara Partner-

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### Dinaldo seeks 'openness' in rates

BY ANNEMARIE FRANCIZYK  
Business First

More reforms might be coming to New York's workers' compensation program as state leaders consider changing how to set the rates that control what businesses pay for coverage.

State Insurance Superintendent Eric Dinaldo has recommended that rate setting be determined by open competition among insurance carriers. His proposal would remove that task from the Compensation Insurance Rating Board, the private association of insurance carriers.

The CIRB, however, could continue to contribute to the workers' compensation program by collecting and analyzing the data used for rate setting, at least for the time being, Dinaldo said. The CIRB has functioned as the system's rate-making and data-gathering entity for 90 years, Dinaldo said.

The superintendents' recommendations, filed with the governor and Legislature this fall, are part of the 2007 Workers' Compensa-

# SCAFFOLD: Law dates to 1885

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ship, is attempting reform from a legislative approach, including the scaffold law as part of its lobbying agenda once again in 2008.

Enacted in 1885 primarily to protect immigrant workers building skyscrapers in Manhattan, the scaffold law pertains to falls from scaffolds and ladders and other gravity-related injuries, including those caused by items that fall. The law was thought to have outlived its usefulness and become obsolete after the passage of the Workers' Compensation Law in the early 1900s.

Plaintiffs' attorneys argue, however, that the workers' compensation program doesn't go far enough to pay workers for some of the dramatic injuries that occur from a fall, especially those that affect a worker's future livelihood. They say the law is a powerful tool to use against mighty corporations, offering far protection for people who take on hazardous jobs in high places.

The law frees the worker from responsibility and makes the employer solely to blame, and that's what makes the law unfair to owners, contractors and employers, said defense attorney Michael Perley, a partner at Hurwitz & Fine PC.

"You will see actions by the employer that the court will disregard, that in the large part (were) the reason why the employee was injured," said Perley, who has 10 such cases pending. "I've been very successful in defending the issue of liability, but I would be lying if I didn't tell you a majority of cases generally end up with a determination of liability."

Perley said the Court of Appeals has made some precedent-setting decisions that considered the injured worker's appropriate use of equipment provided by the employer. The decisions could pre-empt a legislative solution, he said. Ultimately, Perley would

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Michael Perley  
Hurwitz & Fine PC

like to see the law change so that the same safety measures are required of owners and contractors while allowing the defense to find out if the employee did something to contribute to the injury, presenting the jury to weigh all the relevant issues.

In Western New York, juries have awarded injured workers upwards of \$5 million in scaffold-law cases. Critics say it's a scenario that has driven up insurance costs, adding between \$5,000 and \$10,000 to the price of a newly built home, and caused the loss of 86,000 construction jobs in the past eight years. DeCarlo has had to make strategic business decisions he believes he wouldn't have faced without a scaffold law.

Despite not having any employee become injured, the company's insurance rates are "off the charts," DeCarlo said. When his liability insurance rates hit \$45,000 a few years ago, he cut the employees at Paragon from a dozen to four and has kept employment there to ensure low exposure to risk. Expansion, he says, is not an option.

## COMP: CIRB would still collect data

FROM PAGE 1

increased price competition and lower premiums for employers because it will drive carriers to achieve greater efficiency. Fostering competition will also make the state more attractive to new insurers," he said.

The CIRB currently proposes rates on behalf of all insurance carriers after adding industry overhead and other factors into the rate-making process. But under the new

# Buyers more likely to bypass traditional insurance agents

BY ANNEMARIE FRAMCZYK

Business First

Who'll win this one: Anonymous Voice on the Phone or Friendly Neighborhood Insurance Agent?

Right now, Anonymous Voice is gaining on Insurance Agent, particularly when the dust-up is about auto insurance. Recent research suggests that more and more Americans would choose to buy car coverage either online or by phone from an insurance company, bypassing an agent.

The growing interest in direct buying is distressing to agents who pride themselves on customer service. However, changing consumer preferences present opportunities for agent-reliant insurance companies to diversify their sales channels.

The shift was identified in the 2007 Customer Focus Insurance Study by Veritis Communications, a Baltimore advertising and marketing consulting agency. The study shows that the 35-to-49 age group is driving the trend. Forty-five percent of that group said they are likely to make a direct auto-insurance purchase, an increase from 30 percent four years ago.

In addition to being key decision makers for auto insurance, these are adults who have shown a propensity for using the Internet to research and purchase products and have a very high response to direct mail," said Scott Marden, director of marketing research at Veritis.

Consumers typically are shopping for price, wagering that without a middleman

and the commission, they'll spend less. Insurance companies such as Liberty Mutual and Allstate recognized the opportunity early on and added direct-buy options.

The century-old Liberty Mutual was founded on the direct-buy concept and now has 400 offices across the country, including four in the Buffalo area. The company added a call center in 1997 and online sales last year, said Glenn Greenberg, company spokesman in Boston. Allstate customers can contact the company directly too, but they are usually directed to a community-based agent, said Krista Conte, the company's New York spokeswoman.

"People see Allstate and they think 'agent,'" Conte said, adding that agent-based auto-coverage sales increased 7 percent last year.

Still, 65 percent of auto insurance is sold through direct channels, the balance through independent agencies, according to Conning Research & Consulting of Connecticut. And that's what fosters the agents.

Fred Holender at Lawley Service Inc. in Buffalo and Joseph Millemaci at Vanner Insurance Agency said independent agents offer objective advice on a range of products that can be tailored to an individual. Then they advocate for the client with the insurer if a claim is made. And there are no surprises, Millemaci said.

"These (direct-buy) companies come in with low prices to capture the market," he said. "They get hit with losses and then they have to raise rates."

WHEN DISASTER STRIKES  
TURN TO



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