UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, *et al* Plaintiffs,	:	
vs.	:	
JEFFREY DERDERIAN, *et al* Defendants.	:	C.A. No. 04-312-L

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS MULTI-STATE INSPECTIONS, INC. AND HIGH CALIBER INSPECTIONS, INC.'S MOTION TO DISMISS

I. INTRODUCTION

Defendants Multi-State Inspections, Inc. and High Caliber Inspections, Inc., are inspection companies (on information and belief operated as alter egos by the same individual), who inspected The Station Nightclub on multiple occasions, the most recent being just four months before the fire. Specifically, on October 8, 2002, an employee of Multi-State Inspections, Inc. inspected the premises for Essex Insurance Company, accompanied by Michael Derderian, later rendering him a written report[1] with recommendations to Derderian to reduce the risk of harm to patrons; specifically, "Repair door on right side of risk as well as push bar." No mention was made of the Station's rated occupancy as a nightclub, the adequacy of exits for such rating or, notably, the highly flammable foam covering interior walls. Four months after this inadequate liability inspection, sparks from onstage fireworks

[1] Exhibit A, attached. It is unknown before discovery whether Derderian's copy of the inspection report was furnished directly by Multi-State or indirectly through its principal, Essex. In either case, Derderian's receipt thereof and reliance thereon cannot come as a surprise to either Essex or Multi-State.

ignited the overlooked foam, turning The Station into an inferno within two minutes.

In its recent Motion to Dismiss, Defendants Multi-State Inspections, Inc. and High Caliber Inspections, Inc. rely upon a claimed immunity under Rhode Island General Laws Title 27, Chapter 8, Section 15, entitled "Insurance Inspections." This is the same statutory section relied upon by amicus curiae Property & Casualty Insurance Association of America (PCIA) in support of Defendant Essex Insurance Company's Motion to Dismiss.[2]

Because Multi-State and High Caliber acted as inspecting agents for liability insurers such as Essex, Plaintiffs incorporate and adopt the points and authorities contained in their opposition to Defendant Essex' Motion to Dismiss.

II. DISCUSSION

A. R.I.G.L. § 27-8-15 Does Not Immunize Liability Insurance Inspections

Multi-State and High Caliber's Motion to Dismiss relies upon R.I.G.L. § 27-8-15 which provides:

> **§ 27-8-15 Insurance inspections. – The furnishing of,** or failure to furnish, **insurance inspections** or advisory services **in connection with or incidental to the issuance or renewal of a policy of property, casualty, or boiler and machinery insurance shall not subject the insurer,** whether domestic or foreign, its agents, employees, or service contractors, **to liability for damages from injury, death, or loss occurring as a result of any act or omission in the course of those services.** This section shall not apply in the event the active negligence of the insurer, its agent, employee, or service contractor, created the condition that was the proximate cause of injury, death or loss.

[2] Defendant Essex' Motion to Dismiss was fully briefed, including the PCIA amicus brief, and argued before this Court on December 7, 2004. On January 10, 2005 Defendant Essex moved to dismiss the First Amended Master Complaint incorporating its earlier-filed papers regarding the original Motion to Dismiss.

Multi-State and High Caliber's Motion must fail because the statutory immunity contained in R.I.G.L. § 27-8-15 insulates issuers of property, casualty, boiler and machine insurance only. Multi-State and High Caliber, by contrast, undertook the inspections in question on behalf of liability insurers like Essex. A bright-line distinction between casualty and property insurance is drawn in the Rhode Island General Laws. Specifically, Rhode Island's General Laws clearly divide Title 27, pertaining to all insurance matters, into chapters pertaining to "Liability Insurance" (ch. 7) and "Casualty Insurance" (ch. 8). The provision in question, Title 27, Chapter 8, § 15 appears within the "casualty" chapter. No analogous provision appears anywhere in Chapter 7, the "Liability Insurance" chapter.

That the Rhode Island General Assembly chose to confer immunity from third-party liability for negligent inspections upon all but liability insurers is instructive concerning Rhode Island's public policy. The conspicuous absence of liability insurers from Rhode Island's inspectors' immunity statute compels the conclusion that the legislature intended common law remedies to remain against them and their agents like Multi-State. The well-recognized maxim of statutory interpretation, *expressio unius et exclusio alterius*, tells us that if Rhode Island wanted to insulate liability insurers and their inspectors, it would have done so clearly and unequivocally...but it has not.

Rhode Island's refusal to confer inspection immunity upon liability insurers and their inspection agents stands to reason when one considers the close

relationship between foreseeability and duty.[3] An issuer of fire or casualty insurance is concerned about risk to its insured's business and physical property. Inspections by such carriers necessarily attempt to foresee such property risks, only. An insurer of liability for personal injury to third parties, by contrast, is concerned in its inspections with hazards to third parties – in this case, patrons of the Station nightclub.

It is entirely foreseeable that a negligently performed inspection of possible hazards to third parties will result in injury to those very third parties. It is, therefore, entirely reasonable that Rhode Island has chosen not to insulate liability insurers from liability to the same third parties whose harm its inspections are intended to avoid. This is particularly true where, as here, it is likely that the insured (Michael Derderian, in his capacity as owner of the Station nightclub) relied on the results and written recommendations[4] of the inspection, which was not only known to him but conducted in his presence.

B. Movants' "Passive Negligence" Argument is Irrelevant

After claiming the immunity protection of R.I.G.L. § 27-8-15, Defendants Multi-State and High Caliber further argue that the statute's "active negligence" exception does not apply:

> Actually, Plaintiffs' complaint against High Caliber and Multi-State is completely based on the inspectors [sic] omissions in inspecting the

[3] "It is the likelihood of injury to another that gives rise to the duty to exercise due care...The foreseeability of injury is the touchstone of the quality of the act as negligent. This is the basis of liability." Dooney, James A., Modern Tort Law, § 3.10.

[4] The twin notions of foreseeability and reliance by the insured, both present here in the context of a liability insurance inspection followed by written recommendations to the insured, dovetail with Restatement Torts 2d Section 324A(c), discussed, *infra*. That section speaks of liability when one undertakes to render services for another "which he should recognize as necessary for the protection of a third person" where "the harm is suffered because of the reliance of the other...upon the undertaking."

> premises and not on any affirmative act or action of a [sic] inspector while on the premises, let alone any active negligence attributable to High Caliber and Multi-State.

Defendants' Memorandum of Law at 6. However, as explained above, because the statutory immunity of § 27-8-15 does not apply to liability insurance inspections under the Rhode Island General Laws, this Court need not concern itself whether High Caliber and Multi-State's negligence was active or passive.

C. Movants' Proximate Cause/Duty Argument Is Equally Unavailing

Conceding that R.I.G.L. § 27-8-15 just might not apply to them, High Caliber and Multi-State go on to argue that they either could not have, or need not have, alerted the Derderians to deadly dangers:

> Even in the event that R.I.G.L. § 27-8-15 did not apply to the inspections performed by High Caliber and Multi-State, they did not have any authority to personally institute or compel the owners of 211 Cowesett Avenue, West Warwick, R.I. to institute the changes that the plaintiffs now claim make liable [sic]. ... High Caliber and Multi-State owed no obligation to the owners of 211 Cowesett Avenue, West Warwick, R.I., let alone foreseeably [sic] third parties entering the property as to the risks complained of in the plaintiffs' complaint.

Defendants' Memorandum of Law at 7.

However, this apparent attempt at a proximate cause or duty argument fails in the instant case where the Defendants in fact produced an inspection report which was furnished to the Derderians with specific (unfortunately, incomplete) recommendations for decreasing the Derderians' liability to third-parties such as Plaintiffs. Not only were High Caliber and Multi-State in a position to recommend safety/liability improvements to Michael Derderian (with whom Multi-State's principal employee toured the facility), but they in fact did so, albeit in a grossly

negligent manner. Under Restatement, Torts, 2d § 324A(c)[5] "one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person...is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking if...(c) the harm is suffered because of reliance of the other...person upon the undertaking." Paragraph 658 of the First Amended Master Complaint specifically alleges that "Essex' insured, Michael Derderian, relied upon the results and recommendations of said negligently performed inspections." Taken as a whole, Plaintiffs' allegations against Multi-State and High Caliber sufficiently plead claims under § 324A.

It is absolutely necessary that discovery be taken to flesh out the facts of multiple inspections, recommendation reports and reliance of insureds before the applicability of § 324A can be further tested. Just as the facts have not yet been sufficiently developed to support a motion to dismiss under Rule 12(b)(6) by Defendant Essex Insurance Company, so is the motion to dismiss of High Caliber and Multi-State premature.

Plaintiffs respectfully pray that Defendants High Caliber and Multi-State's Motion to Dismiss be denied and that discovery proceed on the liability of all "insurance inspection defendants" in this matter.

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[5] Rhode Island's embrace of § 324A was extensively briefed and argued in opposition to Defendant Essex Insurance Company's Motion to Dismiss and will not be repeated here. Suffice it to say that in the present procedural posture, without any discovery whatsoever, it can hardly be said that it is "clear beyond doubt that plaintiffs cannot conceivably prove a set of facts in support of their claim which would entitle them to relief." 1A *Barron and Holtzoff,* § 356, p.363, citing *Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957).* It is likely that discovery will flesh out the insured's reliance upon the written recommendations of Defendants Multi-State and High Caliber.

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CERTIFICATION

I hereby certify that an exact copy of the within document was electronically mailed to the following individuals on this 20th day of January, 2005.

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