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## Video Contest

As you can see from the screen shot below, I recently shot some educational videos that are intended to answer some important legal questions in my areas of practice (I'll let you know when they're posted). And I intend to shoot more educational videos.



In keeping with my pledge to keep my office at the forefront of technology, whoever comes up with the top 3 ideas for new video topics for me to address will each get a free cutting-edge flash drive directly from me.

## How One NY School Got Away With Negligent Supervision – and Why That Should Worry Us

A few weeks ago, I was contacted by a woman who was quite distraught after her teenage daughter, who has Down's Syndrome, was reported missing from her New York school for children with special needs. She was ultimately found 5 hours later wandering by the side of a Manhattan highway, and taken home.

Although this mother was extremely angry with her daughter's school - and understandably so - I explained to her that she did not have a viable [school negligence case under New York law](#) because, fortunately, her daughter had not been harmed. In other words, regardless of the school's level of negligence, and in this case, I think there is a strong argument that they were grossly negligent, and perhaps reckless, in their failure to supervise properly this disabled girl, a court will likely disallow any award unless the plaintiff can show that she sustained damages as a direct result of the school's negligence.

While it is indeed fortunate that this girl was not harmed, the flip side to this story is rather troubling: I fear that since nothing terrible happened to this child, the school may not take the necessary precautions to assure that a similar occurrence never happens again.

## Another Reason Why Many Business Fraud Claims Fail Under New York Law

Following up on my earlier post, "[Why Many \(If Not Most\) Business Fraud Claims Are Dismissed By New York's Courts](#)," an April 9 decision from a New York County trial judge that appears in the April 13 edition of the New York Law Journal sets forth a very important - and common - reason that so many business fraud claims are dismissed: **because these claims were already waived by contract.**

But before getting to the "meat" of the New York trial court's decision in [MBIA Insurance Corp. v. Merrill Lynch](#), some perspective is in order:

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To do so, please contact us through our website, [www.JonathanCooperLaw.com](http://www.JonathanCooperLaw.com) or via e-mail at [jmcooper@jmcooperlaw.com](mailto:jmcooper@jmcooperlaw.com)

## *The Most Important Question You Need Answered Before Starting a Products Liability Case in New York*

Although there is not much literature written for non-lawyers on the subject, it is probably the most important question that needs to be considered before undertaking a products liability lawsuit in New York: *is the claim supported by reliable scientific data?*

In [Myancela v. Biro Manufacturing Co.](#), a New York [defective design](#) and [failure to provide adequate warnings](#) case that was reported upon in last month's New York Law Journal, the plaintiff sustained serious personal injuries, including a particularly bad laceration to her hand which was caught in a poultry cutter that was supposedly manufactured by the defendant. In a move that has now become common fare for defendants in [products liability cases](#), the defendant sought to preclude the plaintiff's expert from testifying at trial, and therefore, to dismiss the complaint, on the grounds that the expert's conclusions (and the complaint) were neither based upon nor supported by reliable scientific evidence.

Under the circumstances, and given the importance of the issue, I thought it would be worthwhile to review the standard under which a New York State court would have to evaluate the defendant's motion.

Here's the *Frye* test that New York's State courts (there is a slightly different test used in the Federal Courts) employ to determine whether an expert will be allowed to testify, and the test is two-fold:

First, when dealing with 'novel scientific evidence,' the Court must ask "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally."

Second, and assuming that the first prong of the test is met (and the expert's testimony and claim is based upon valid, reliable and accepted science), the Court must then ask, just as in any case, whether there is a proper foundation to determine whether the accepted scientific methods were used in this specific case.

If the plaintiff's evidence fails either of these two tests, the claim will fail, and the complaint will be dismissed. Consequently, it is of paramount importance that this issue be clarified - ***before you bring any lawsuit claiming that you were injured by a defective product.***

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*"It is of paramount importance that you clarify whether your claim is supported by reliable scientific data before you bring a products liability lawsuit in New York."*

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*This publication is intended to educate small businesses and individuals about general litigation matters, as well as personal injury and defective product issues. It is not intended to be legal advice, and does not constitute an attorney-client relationship until we have a written agreement. To discuss your particular issues or case, please contact the Law Offices of Jonathan Cooper at 516.791.5700.*

## Why There Are So Few Successful Defective Products Lawsuits

by Jonathan M. Cooper

This **FREE eBook**, which explains the intricate world of defective products cases, and how the laws governing product safety play a vital role in protecting children and the general public from dangerous products is available to be downloaded directly from:

[www.ProductsLiabilityBook.com](http://www.ProductsLiabilityBook.com)

### Why Many Business Fraud Claims Fail Under New York Law cont'd from page 1

when is the last time anyone saw two more unlikeable parties on the opposite ends of a lawsuit? On the one hand, you have an insurance company, and on the other, a bank that stands accused of issuing misleading information that led to losses in the billions of dollars?

Anyway, I digress.

While the facts of this particular case are neither surprising nor (unfortunately) unique, the court's decision is useful as a reminder why many business fraud claims fail under New York law. In rejecting the plaintiff insurer's [business fraud](#) claims that were centered on their contention that they were not required to do their own forensic analysis - or actively guard itself against a fraud by the defendant - before entering into an agreement with the defendant, the court stated as follows:

“In Citibank, N.A. v. Plapinger, 66 N.Y.2d 90 (1985), the Court of Appeals set down the now-familiar doctrine that a specific (rather than general) disclaimer in a guarantee bars the guarantor's claim for fraud in the inducement, where the guarantor specifically disclaimed reliance on the very information which it now claims caused it to be misled. The Court in Plapinger further held that a clause declaring the agreement absolute and unconditional, and containing a waiver of affirmative defenses, ‘reinforces’ the specificity of the disclaimer.”

In other words, the court held that if you sign an agreement that essentially says in bold print: “you're a big boy, and you have to do your own investigation and research before you choose to invest,” then you had better be prepared to live with the consequences of the decision not to perform your own due diligence.

**COMMUNICATION POLICY:** As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.




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*“If you don't do your own due diligence before you choose to invest, then you'd better be prepared to live with the consequences.”*

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## Finally, New York State to Allow E-Filing of Claims Against New York City

*Finally.*

For those of us who have been electronically filing just about all of our cases with the New York State courts, one type of claim has consistently held us back, slowed us down, and kept us with one foot firmly planted in the drudgery of "snail-mail" litigation: cases against New York City.

As we've noted elsewhere, such as in our article "[The Most Critical Mistake to Avoid When Suing a New York Municipality](#)," the requirement of filing properly a Notice of Claim against New York municipalities (such as New York City or the New York City Transit Authority) within 90 days of the occurrence has fostered a great deal of litigation, and is often difficult for lawyers

to comply with, particularly when they are first contacted about a potential case only days before this time runs out.

The beauty of this new statute, at least from my perspective, is that it not only eliminates the need for the multiple copies that need to be served via certified mail, and the attendant trips to the post office, it also compels the City to issue an identification number that will serve as conclusive proof of filing and receipt. As a result, and in sum, it will reduce paperwork and expense, and will allow the prosecution of cases to move more quickly and efficiently.

If only we didn't have to wait 180 days for the law to become effective ...



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