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N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

- Guardians Ad Litem in Housing Court
- The Dividing Line Between the Martin Act and Common Law Fraud
- Surveys and Title Insurance
- Tenant Buyouts
- Boards of Assessment Review
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ON THE COVER

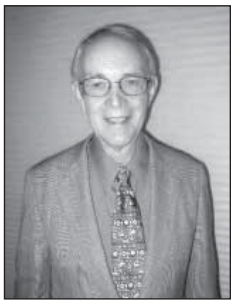
"SKYLINE MONTAGE"—Painted by Sherman Stein, a retired professor of mathematics at the University of California, Davis and the father of former Section chair Joshua Stein. This painting was commissioned at Joshua's request originally for use as a logo on his website, www.real-estate-law.com. The image includes representative iconic buildings from around the country, including the Empire State Building, 1515 Broadway, the Lipstick Building, and the U.S. Bank Tower in Los Angeles. The lower buildings in the foreground could be anywhere, but the rooftop tanks suggest New York.

Message from the Section Chair

1. **Subprime Loans**. Efforts to deal with the aftermath of the subprime lending mess abound:

(a) The federal "*Mortgage Reform and Anti-Predatory Lending Act of 2007*" (H.R. 3915), introduced by Barney Frank et al., is described as comprehensive legislation to combat abuses in the mortgage lending market and to provide basic protections to mortgage consumers and investors in three areas: (1) establish a federal duty of care, prohibit steering and calling for licensing and registration of mortgage originators, including brokers and bank loan officers; (2) set a minimum standard for all mortgages stating that borrowers must have a reasonable ability to repay; and (3) attach limited liability to secondary market securitizers who package and sell investors in home mortgage loans outside of these standards. It would expand consumer protections for "high-cost loans" under the Home Ownership and Equity Protection Act and include important protection for renters of foreclosed homes. It also would incorporate counseling for certain first-time buyers. The provisions for limitation of liability and preemption of state law are controversial and may be amended. The National Association of Mortgage Brokers has praised many of the provisions but warned of the potential unintended harm consumers might face if the yield spread premium paid to mortgage brokers is eliminated.

(b) **FHA Reform**. The Expanding American Homeownership Act (H.R. 1852) ("FHA Reform Act") would enable the FHA to reach more prospective borrowers and allow millions more low- and moderate-income families to achieve homeownership. The FHA Reform Act would increase loan limits; make the down payment requirement more flexible; and create a new, risk-based insurance premium structure that would match the premium amount with the



credit profile of the borrower. To refinance with FHA, subprime borrowers must: (1) be able to afford payments on a fixed-rate loan at a market rate of interest, with FHA insurance premiums; (2) have a property with sufficient equity to qualify for FHA financing; (3) meet other standard underwriting criteria that balance the overall risk of the mortgage; and (4) be owner-occupiers. FHA also offers a refinancing option, FHASecure, to creditworthy homeowners who were making timely mortgage payments before their loans reset but are now in default.

(c) N.Y. State "*Responsible Lending Act*" (A8972) (Towns) would amend the Banking Law by adding a new section 6-m entitled "Subprime and Nontraditional Home Loans." Several of the definitions refer to the Federal Register. A subprime first-lien home loan is defined as one having an APR of three or more points above the yield on comparable treasury securities; a subordinate-lien home loan is one having an APR of five or more points above. *Limitations*: no lender shall make a home loan without *verifying the borrower's reasonable ability to repay the scheduled payments* of principal, interest, taxes, insurance, assessments and mortgage premiums; ability to repay shall be determined based on the fully indexed rate and a *fully amortizing repayment schedule* based on the term in the note or a 40-year term, whichever is less; *borrower's income and financial resources shall be verified*, based on appropriate documents; lenders will have a *rebuttable presumption* that the loan was made with due regard to repayment ability if the lender demonstrates that based on a fully amortizing repayment schedule, the *borrower's total monthly debts*, included amounts owed under the loan and escrows for taxes and insurance, *do not exceed 50% of the borrower's verified monthly gross income*. *Prohibited practices*: (1) no negative amortization, (2) no balloon payments, (3) no increase in interest rate after default, (4) no more than two payments paid in advance from loan proceeds, (5) no modification or deferral fees, (6) no forum requirement, (7) no financing of insurance or other products, (8) no loan flipping that does not have tangible net benefit, (9) no refinancing of special mortgages (government or nonprofit loans with terms favorable to the borrower), (10) no lending without disclosure of availability of counseling, (11) mandatory disclosure of taxes and insurance payments, (12) no encouragement of default on existing loans, (13) no prepayment penalties, and (14) no yield spread premiums.

(d) *NAMB Lending Integrity Seal of Approval*. The National Association of Mortgage Brokers (NAMB) has announced a new Lending Integrity Seal of Approval, to be the symbol of the industry's best mortgage originators—those who meet broad standards that take into account past behavior and reputation, continuing education, ethics training, and a pledge to adhere to NAMB's ethics policies and standards of business practice.

The Real Property Law Section (RPLS) Real Estate Finance Committee has been asked to monitor the subprime loan situation, evaluate the proposals, and inform RPLS members. Committee Co-Chairs are Steve Alden (smalden@debevoise.com) and Victoria Grady (vgrady@phillipslytle.com).

(e) The federal *Helping Families Save Their Homes from Bankruptcy Act* (S.2136, introduced by U.S. Senator Durbin) would (1) eliminate a provi-

sion of the bankruptcy law that prohibits modification to mortgage loans on the debtor's primary residence (so that primary mortgages are treated the same as vacation homes and family farms), (2) extend the time frame debtors are allowed for repayment (to support long-term mortgage restructuring), (3) waive the bankruptcy counseling requirement for families whose houses are already scheduled for foreclosure (so that time is not lost as families fight to save their homes), (4) combat excessive fees charged to debtors in bankruptcy, (5) maintain debtors' legal claims against predatory lenders while in bankruptcy, (6) reinforce that bankruptcy judges can rule on core issues rather than deferring to arbitration, (7) enact a higher homestead floor for homeowners over the age of 55, and (8) reinforce that consumer protection claims still be available in bankruptcy (see chart on page 38).

Subprime lending will be a major topic at the Section's July **Summer Meeting** in Hershey, PA. Come join in!

2. **Diversity**. The RPLS will be manning a table at the NYSBA's fifth annual Celebrating Diversity event at the State Bar reception at the New York Marriott Marquis on Monday, January 28, 2008, from 6 to 8 p.m. The event is designed to introduce minority attorneys to opportunities for involvement and professional development available through the NYSBA and the RPLS. Our Diversity Coordinators are Karen DiNardo and David Berkey. RPLS minority members are encouraged to attend and lend a hand.

3. **Section Website**. The RPLS Web site at http://www.nysba.org/realprop has several features:

- *N.Y. Real Property Law Journal*: issues back to 1998
- Real Property Committees: rosters and mission statements
- Minutes: minutes of Executive Committee meetings
- Upcoming Events: schedule of RPLS CLE and committee meetings
- Join the Section Listserve: access to the Real Property Forum discussion group
- RPLS Blog: postings to the blog
- Status of Pending Legislation: listing of bills of interest in the senate and assembly
- 2007–2008 Legislative Memoranda: memoranda on bills prepared by the RPLS
- Useful Links for the RPLS: to other sites

Check out our site!

Karl B. Holtzschue

Guardians Ad Litem in Housing Court

By Gerald Lebovits, Matthias W. Li and Shani R. Friedman

I. Introduction

Each year, thousands of adults suffering from physical, mental, or other incapacities are found incapable of adequately defending or prosecuting their rights in proceedings before New York City Civil Court, Housing Part, commonly called Housing Court. Many of these adults are elderly.[1] Many suffer from physical debilitation, mental illness, and substance addiction.[2] Many are victims of physical, mental, and financial abuse. Many are unable to receive benefits to which they are entitled. Many have no one who will help them. Many cannot even come to court.

As dictated by Civil Practice Law and Rules (CPLR) Article 12, Housing Court must appoint a guardian ad litem (GAL) to advocate for and assist the incapacitated person, who is then known as a ward.[3] The standard under CPLR 1201 is that Housing Court must appoint a GAL for "an adult incapable of adequately prosecuting or defending his rights." All involved must aid the incapacitated using the least restrictive means to intervene in their lives. Governmental agencies like Adult Protective Services (APS),[4] a division of the New York State Department of Social Services (DSS), and the court itself affect the ability of GALs to advocate for their wards.

Consequences, including involuntary relocation and the eviction of those who deserve protective services, come not only from the merits of Housing Court litigation but also from incapacitated litigants' lack of legal representation;[5] the lack of affordable housing in New York City; tenants, landlords, charities, and government personnel scrambling over scarce resources; the poverty suffered by most Housing Court litigants with diminished capacity; and the hectic pace of Housing Court proceedings. Those who serve as GALs perform an invaluable service defending societal values and maintaining the integrity of the Housing Court and summary eviction proceedings by protecting those most in need. But simply appointing a GAL does not resolve all the problems for the incapacitated, the adverse parties, or the court itself. Frustrations and delays beset too many cases involving GALs.[6]

This article discusses the role GALs play in Housing Court and the law affecting GALs, wards, and potential wards.

II. The GAL's Duties

Until 1962, when CPLR 1201 was enacted, GALs were called "special guardians" when they served in special proceedings like summary nonpayment and holdover proceedings. Whether in a special proceeding or a plenary action, a GAL is "an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed."[7] Translated from Latin, ad litem means "for the suit."[8]

Housing Court may appoint a guardian on its own initiative,[9] even when a potential ward opposes the motion. The CPLR contains no requirement that a prospective ward agree with the appointment, and case law permits the appointment. In the 1998 case of *Anonymous v. Anonymous*, for example, the Appellate Division, First Department, affirmed the Supreme Court's appointment of guardian ad litem despite the defendant's objection.[10] It is difficult in practical terms to appoint a GAL without the ward's consent and cooperation, and it makes the GAL's work challenging if the ward does not consent. The GAL will nevertheless help the court by presenting an objective assessment after an investigation. Due process will be satisfied by the GAL's and the court's always considering the ward's best interests; by allowing the ward to speak and be heard, at least to an adequate extent, on whether to appoint a GAL and on any other relevant issue that might arise during the proceeding; and by permitting the ward to hire an attorney.

In appointing a GAL, the court may set out the GAL's duties in a court order. Doing so can help assure that the GALs will do what they are required to do in each specific case, assuage the opposing party that the proceeding will move relatively expeditiously, and assure the public that appointing the GAL is appropriate.

The GAL's primary obligation "is to act in his or her ward's interest."[11] Although the scope of the GAL's duties is narrow, the GAL takes on a variety of roles, acting simultaneously as an advocate, social worker, and liaison between the ward, APS, social service agencies, the marshal, the ward's family, opposing counsel, and the court. The GAL is often called upon to establish a relationship with the ward to understand the ward's concerns and wishes.

The GAL might also engage in settlement negotiations, become familiar with what benefits the ward may receive, and assure that the ward receives required services from appropriate agencies. The GAL may not control the ward's finances, but the GAL intervenes with social service agencies, the Social Security Administration, the New York City Housing Authority, SCRIE, Section 8, and APS, among others. The GAL might hire an attorney for the ward, perhaps by seeking the aid of The Legal Aid Society, Legal Services for New York City, MFY Legal Services, Inc., Northern Manhattan Improvement Corp. Legal Services, or a law school clinic like Cardozo Bet Tzedek Legal Services. The GAL might also proceed to trial, with or without an attorney representing the ward.

A GAL's role is limited to the action or proceeding before the court. The role of a Mental Hygiene Law (MHL) Article 81 guardian, often called a "community guardian," is far broader. An Article 81 guardian can be appointed after a Supreme Court proceeding as a guardian of the ward's property, person, or both, and not merely for a piece of litigation. GALs are also different from law guardians who represent children in Supreme Court matrimonial actions, from family court law guardians, and from family court and surrogate's court guardians.[12]

MHL Article 81 guardians have more expansive powers, such as the ability to relocate a ward, than Housing Court GALs. For an MHL Article 81 guardian to be appointed, the ward must be found incapacitated or agree that appointing an MHL Article 81 guardian is necessary.[13] In MHL Article 81 proceedings, proof of the ward's incapacitation must be based on clear and convincing evidence that "the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability."[14] Because MHL Article 81 guardians have greater powers over their wards than Housing Court GALs do, the law establishes the higher standard of competency to appoint an Article 81 guardian, as opposed to the lower standard of incapacity to defend or prosecute rights in order to appoint a Housing Court GAL.

The incompetency standard for a Housing Court GAL appointment is less than and different from the incompetency standard for an MHL Article 81 guardian. Were the law otherwise, GALs would be appointed only after the Supreme Court declared an individual incompetent.

MHL Article 81 sets out a method for the courts to determine a litigant's competency, and "until that is done the courts should not have to decide case by case whether a particular party is of sufficient mentality to be a suitor or defendant."[15]

Once appointed, a Housing Court GAL is assigned to a specific proceeding. In a nonpayment proceeding, a ward routinely has rental arrears, often sizeable by the time a GAL is appointed, and might also not be paying ongoing use and occupancy. A ward who meets APS guidelines and becomes an APS client is entitled to receive services. These services include APS's applying on the ward's behalf for a grant to cover arrears and for voluntary or involuntary financial management, a program by which APS will oversee paying the rent and housing bills with the ward's funds to assure that the rent will be paid and not squandered or allowed to sit unused. If the ward is not an APS client, these applications may be made to another social service agency like Self Help or the Jewish Association for Services for the Aged (JASA).

Holdover proceedings are often initiated because of alleged nuisances, sometimes caused by outstanding psychological or physiological conditions like obsessive-compulsive disorder, dementia, or Alzheimer's. Common nuisances include having unmanageable pets or hoarding, called a Collyer's condition after the Collyer brothers, who hoarded in a New York townhouse in the 1950s. These nuisances might create a fire hazard, odors, or a rodent or garbage infestation. In cases of a tenant-ward's unmanageable-pet problem, inappropriate behavior, or hoarding, the GAL, working with APS and the landlord, will coordinate with the necessary agencies or third parties, such as Animal Control, a psychiatrist, JASA, or a company to which APS contracts out for a cleaning to resolve the nuisance. Although the court has the power in a pending proceeding to grant access to a landlord to effect repairs, the Housing Court GAL does not, however, have the authority to allow cleaners into the apartment without the ward's consent and may not force the ward to comply. Only an Article 81 guardian may force compliance.

Under a March 2007 Civil Court Advisory Notice[16] and a March 2007 binding directive[17] from the New York City Civil Court's Administrative Judge, issued in response to a 2007 decision of the Appellate Term, First Department, in *BML Realty Group v. Samuels*,[18] GALs must fill out a GAL Case Summary form,[19] which they must retain in their files for three years. The Case Summary form documents the GAL's contacts with the ward, the GAL's advocacy efforts, and the steps the GAL took to follow through with the plan set forth in any stipulation of settlement. The court may require the GAL to submit the case summary form or may question the GAL on the record. If the court requires the GAL to submit the case summary form, the judge may direct on the GAL appointment order that the GAL submit it. The case summary form is not intended to be placed in the court file unless the file is sealed. The GAL might be asked to give the administrative judge a copy of the summary.

III. Conflicts Arising from the GAL's Role

As an officer of the court, the GAL is required to investigate fully and fairly and to keep the court informed about the information obtained during the investigation of the ward.[20] GALs who advocate for litigants with diminished capacities often face moral and ethical dilemmas arising from that investigation and from the tension between advocating for their wards and being officers of the court. Can the GAL both report objectively to the court and still always advocate in the ward's best interests? May the GAL's judgment be substituted for the ward's?

If the GAL and the ward disagree on how to handle the case, should the GAL go forward if doing so means contradicting the ward's wishes? If a ward is in a nursing home, hospital, or rehabilitative institute and is unlikely to resume tenancy at the location in dispute, should a GAL be allowed to enter into a stipulation of settlement on the ward's behalf in

which the ward surrenders the apartment if the ward opposes that settlement? If a landlord offers significant incentives for the tenant to surrender possession, may a GAL sign a stipulation to relocate the ward if the ward refuses to leave? If a ward wants a trial in a nonpayment case but has no valid defense, and the GAL can get a stipulation of settlement offering the ward needed time to pay the arrears, may the GAL act contrary to the ward's intentions and risk an eviction post-trial for failure to pay a possessory judgment in five days?

No apparent or uniform answer exists for these questions. Addressing these questions was a New York County Lawyers' Association (NYCLA) Task Force on Housing Court Resources Subcommittee, which held a conference in October 2004 and issued a report on Housing Court GALs.[21] NYCLA's Board of Directors approved the Task Force's final report, called *Report on Resources in the Housing Court*, on February 5, 2007.[22] The final report incorporates all the subcommittee's recommendations.[23]

NYCLA's final report, tracking its Subcommittee Report, advises that "[i]f there is no agreement between the GAL and the respondent (and counsel for the respondent, if any), the Housing Court Judge is to evaluate the respondent to determine whether the respondent has sufficient capacity to decide how the case should be resolved."[24] If the ward has sufficient capacity, NYCLA would urge the court to refer the case for trial or another proceeding. If not, NYCLA would urge the court and the GAL to refer the case to APS for an Article 81 proceeding.[25] Only Article 81 guardians have the power to compel wards to accept settlements.

Other authorities and practitioners agree with NYCLA's position. According to those who hold this view, GALs are not vested with the authority to settle cases. CPLR 1207, they argue, "grants authority to the representatives of an infant or a person judicially declared incompetent to settle claims, but does not include guardians ad litem among the representatives with settlement authority."[26] They contend that a fair reading of CPLR 1207 is that "the legislature did not authorize guardians ad litem to settle claims on behalf of the individuals they represent, unless the ward has been declared incompetent."[27] For support, they cite *In re Estate of Bernice B.*, in which the New York County Surrogate's Court found in 1998 "that a GAL cannot bind her adult ward to a settlement of which the ward disapproves unless the ward's incapacity to participate in the litigation (or in its settlement) has been established under the special procedural safeguards afforded by the [MHL]."[28] They also cite *Tudorov v. Collazo*, in which the Appellate Division, Second Department, wrote, as to CPLR 1207, that if a ward objects to a GAL's attempt to settle a case, "a guardian ad litem is not authorized to apply for approval of a proposed settlement of a party's claim. . . ."[29] They additionally note that the concept of a GAL's "stepping into the ward's shoes" appears in "training manuals" only and has no case law support.[30]

Others have a different opinion. They might agree that the GAL may not settle a proceeding without court approval. But, they argue, the court may approve a GAL's proposed settlement of any proceeding, including ones that surrender possession, and the ward's desires are relevant but not determinative. For proponents of this view, the relationship between a GAL and a ward is different from that of attorney-client, in which the attorney must follow the client's wishes but in which a GAL might be obliged out of necessity to act contrary to the ward's desires and to support a settlement position adverse to what the ward wants.

Some courts have allowed GALs to act contrary to their wards' wishes. The Appellate Division, Third Department, in *In re Feliciano v. Nielson*, for example, quoting from dictum from the Court of Appeals in *In re Aho*, held that "a guardian ad litem is not to be viewed as an 'unbiased protagonist of the wishes of an incompetent' and may even act contrary to the wishes of its ward."[31]

Many judges agree with *Feliciano*. One, in a law journal article, has written that "[t]he GAL steps into the shoes of the ward. . . ."[32]Another, in a training outline, has explained that "[a]lthough the ward's desires are relevant, they are not determinative. Thus, a guardian ad litem may have to act contrary to the ward's desires and maintain a position adverse to the ward."[33] A third, Justice Fern A. Fisher, the New York City Civil Court Administrative Judge, whose office oversees the GAL program, submitted a Comment in opposition to the NYCLA Subcommittee Report, arguing that a GAL must act in the ward's interests but may act in opposition to the ward's preferences.[34] The Comment notes the difference in the statutory procedure to settle claims by infants, judicially declared incompetents, and conservatees and the role of the judge and GAL in settling claims against respondent-tenants not judicially declared incompetent but who nevertheless are incapable of adequately defending their rights.[35] The Comment looks to the CPLR's legislative intent and argues that "the legislature considered and rejected CPLR 1207 and 1208's application to actions where the GAL is appointed to defend the interests of a party," including respondent-tenants in Housing Court.[36] Justice Fisher argues that if the ward and the GAL disagree, and the judge does not find that an Article 81 proceeding is warranted, the case should not be sent out for a trial that can lead to an eviction.

Justice Fisher opines, therefore, that the judge should determine whether to so-order a settlement or recommendation if the ward disagrees with the settlement the GAL recommends.[37] In making that determination, the court and the GAL should consider the least-restrictive alternatives when intruding into the ward's autonomy.

Practical concerns underlie the belief that a GAL, supervised by the

court and acting with the court's permission, should be allowed to urge a court to disregard a ward's irrational wishes. Just because the court or a GAL wants to refer the matter for an Article 81 guardian does not mean that APS will accept the case or that the Supreme Court will appoint an Article 81. GALs and Housing Court judges are not the wards' attorneys and do not prepare the papers for Supreme Court. The ward might be evicted if an Article 81 guardian is not appointed. Not accepting a fair stipulation that a GAL negotiates might also result in possible injustices because Article 81 proceedings are lengthy, drawn-out affairs. Even if the Housing Court matter is stayed pending an Article 81 proceeding, possible injustices might include denying landlords legitimate use and occupancy (which APS will not pay if it seeks an Article 81 guardian) and forcing the ward's neighbors to tolerate the ward's allegedly intolerable behavior.

After NYCLA issued its Subcommittee Report and Justice Fisher issued her Comment, the Subcommittee issued a Minority Report but adhered to its majority views.[38] NYCLA's final report, approved, as mentioned above, in February 2007, considered and rejected Justice Fisher's Comment.

The reality is that GALs, to some valid extent, make decisions that affect their wards. In striving to "protect and assist a party, [GALs] do substitute their judgment and decisions for the decision making that the party otherwise would exercise in a proceeding and curtail the party's autonomy and freedom in that respect."[39] This curtailment of the ward's autonomy ranges from invasions into the ward's financial independence in the form of APS involuntary financial management, to the GAL's coordinating a heavy-duty cleaning, to emergency hospitalization or institutionalization of the ward, to the GAL's recommending an MHL Article 81 guardianship proceeding. In an Article 81 guardianship proceeding, the Article 81 guardian is even more involved in the ward's life than a Housing Court GAL may ever be.

When a disagreement between the GAL and the ward's attorney arises over how to handle the ward's case, should the GAL, as an officer of the court, report this to the court, and whose position should prevail? One author has opined "that [the lawyer] can seek judicial removal of the present guardian [ad litem] and appointment of a new guardian ad litem . . . [and] then the attorney can seek judicial resolution of the disagreement with the guardian [ad litem], or can withdraw from the case."[40] According to a civil court advisory opinion, "a GAL should allow the attorney to handle all the legal paperwork related to the case unless the attorney takes action contrary to the ward's welfare."[41] If there is a conflict, or when the GAL believes that the attorney is not doing the work, the GAL should notify the judge, and the matter should be discussed and resolved on the record.[42] Disagreements between the GAL and the ward's attorney might develop because they have different practical and ethical obligations toward the ward and might differ about what is in the ward's best interests.

Attorneys also experience conflicts. As the New Jersey Supreme Court in *In re M.R.* explained, "[g]enerally, the attorney should advocate any decision made" by the incapacitated person, and "[o]n perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*."[43] But if the client opposes a GAL, the attorney may move for a GAL only if the client is incapacitated and "if there is no practical alternative, through the use of a power of attorney or otherwise, to protect the client's best interests. . . ."[44] If that happens, the attorney may not be a witness at a contested hearing.[45]

A question exists whether a GAL may perform purely legal work on the ward's behalf, such as drafting a memorandum of law. Some GALs who are attorneys will perform legal work out of kindness to their wards and generosity to the court. Although it is often difficult to find an attorney for the ward, the better practice is for GALs not to perform legal work and, instead, to do their best to retain an attorney. As three experts explain:

> Even when the guardian ad litem is a lawyer, he or she cannot take on the dual role of acting as both guardian ad litem and legal counsel. Guardians ad litem and counsel for defendants perform different roles. The guardian ad litem is an officer of the court whose role is to protect the interests of the ward and report to the court. The attorney, while an officer of the court as well, must be a zealous advocate for the client in an adversarial process. The two roles are distinct, as are the obligations.[46]

It is difficult for an attorney-GAL to see a defect in the pleadings and not point it out to the court. Courts often tolerate GALs who do legal work. It would be unseemly for a court, having heard a GAL argue a meritorious legal issue for a ward, to disregard the argument, not because of its merits, but because the GAL perhaps should not have been the one to make it. The line between an attorney-GAL and an attorney is sometimes blurred.

Another issue arising out of the GAL's role is whether private legal malpractice insurance will protect GALs. GALs need not be lawyers.[47] GALs should be indemnified by legal malpractice insurance, some argue, because GALs are involved in legal proceedings and perform at least quasi-legal, if not fully legal, work to protect their wards. The NYCLA Task Force on Housing Court Resources Subcommittee's report notes, however, that "[t]here is a diversity of opinion among private attorneys

with regard to whether private legal malpractice insurance will cover work performed as a *pro bono* GAL in Housing Court."[48]

The New York State Attorney General has issued an opinion stating that court-certified volunteer GALs are entitled to state indemnification under the Public Officers Law § 17(1)(a) because they are state-sponsored volunteers.[49] Under Public Officers Law § 17(1)(a), GALs are entitled to state indemnification only if they are deemed an "employee" and not independent contractors. If the court determines that GALs, paid or unpaid, are independent contractors, then GALs would not be entitled to state indemnification. Under a New York State Attorney General Advisory Opinion dated October 24, 2006, paid GALs will not be indemnified under the Public Officers Law because they are not volunteers.[50] Unless the Attorney General issues a different opinion or the Legislature amends the law, some compensated GALs, who are at risk of being sued by incapacitated, paranoid wards, might be disinclined to serve. Other GALs will serve but will be victimized by frivolous litigation. Several groups, including the New York State Bar Association's Real Property Law Section's Landlord and Tenant Proceedings Committee, have therefore proposed legislation to compel the state to indemnify Civil Court GALs.[51]

GALs have some protection, however, from lawsuits by their wards. The Civil Court in *Lau v. Berman* has held that a ward may not sue a GAL absent the ward's first obtaining court approval, and that the ward's failure to do so must result in dismissing the action: "Once a court appoints a guardian to represent an incapacitated person, litigation against the guardian as representative of the incapacitated person may not proceed without permission of the court which appointed the guardian."[52] The court found that a suit against a GAL for breach of duty, conspiracy, and defamation for acting against the ward's interests must be treated differently from other actions because "[a] guardian ad litem may be obliged to act contrary to the wishes of the incompetent and adopt a position that is adverse to the position of the ward."[53]

IV. Who May Be Appointed to Serve as a GAL?

Because issues involving incapacitated litigants are critical to the court, the litigants, and the public, the New York City Civil Court has a GAL program in place. The court trains and certifies GALs, serves as a liaison to other agencies and stakeholders, and in general administers the GAL program.

To become a certified Civil Court GAL, the appointee must undergo a court-approved daylong training program. The training, overseen by the Civil Court Administrative Judge's office, is currently offered twice each year in two live training sessions, usually in January and June. Video replays of the trainings can be viewed in between the scheduled live sessions.[54] Attorneys admitted to the bar for at least two years can receive a total of six free Continuing Legal Education (CLE) credits for completing the training.[55]

Applications to serve as a Housing Court GAL are available online.[56]

Court certification is not necessary for trained pro bono professionals associated with social service agencies"[57] or for students affiliated with a law school's elder-law clinic.[58]

Courts must take the proposed GAL's financial ability into account under CPLR 1202(c) when determining whether the GAL can provide for the ward's best interests.[59] Before a court may make an appointment, the proposed GAL must sign an affidavit "stating facts showing his ability to answer for any damage sustained by his negligence or misconduct."[60] These facts include the GAL's assets, income, and liabilities.[61] CPLR 1202(c) is not always used in summary proceedings, in which Housing Court GALs have vastly fewer powers than Supreme Court Article 81 guardians and in which Housing Court monitors its GALs more closely than other courts do. GAL appointment orders in Housing Court sometimes provide that the GAL will serve without bond. Some appointment orders even provide that GALs need not comply with CPLR 1202(c) affidavit requirement.[62] The fear is that compelling GALs to submit these affidavits is an onerous demand that might decrease the available pool of GALs who could assist Housing Court litigants. A Civil Court directive provides, however, that "Judges must insure that [a CPLR 1202(c)] affidavit is filed."[63]

Housing Court GALs need not file a notice of appointment under § 36.2(c) of the Rules of the Chief Judge, but judges; judicial hearing officers; and their spouses, children, and parents are disqualified from service as a GAL.[64]

It is widely agreed that private law firms should be encouraged to serve as GALs, given the level of legal training and expertise that attorneys possess. Private attorneys serving as GALs increase the efficiency of the GAL appointment and training process.[65] But a GAL need not be an attorney.[66] Nor must a GAL be a doctor when the ward is mentally impaired.[67]

V. How GALs Are Appointed

A GAL may be appointed upon APS motion under CPLR 1202(a), or the court may appoint a GAL on motion or "at any stage of the action upon its own initiative."

CPLR 1201 lists three categories of persons who must appear by a GAL: (1) certain infants; (2) certain adjudicated incompetents or conservatees; and (3) individuals "incapable of adequately prosecuting or defending [their] rights." This article addresses the third category.

As to potential wards who might be incapable of adequately defending their rights, the court should hold a hearing to ascertain the need to appoint a GAL for them even when they

have competent counsel or when they and their attorneys object to appointing a GAL.[68] The court in *Fran Pearl Equities Corp. v. Murphy* found that a hearing is required to determine whether to appoint a GAL.[69] According to *Silver & Junger v. Miklos*,[70] the court may appoint a GAL without a hearing if it relies on APS's psychiatric documents and the petitioner's letter to APS supporting the need for a GAL. A hearing is not required if the proposed ward and opposing party agree, on consent, that a GAL is needed or would be helpful to resolve the proceeding. No hearing is required when GAL appointment can be based on the court record and documentation that raise no issues of fact.

If the court before which the proceeding is pending does not appoint a GAL, an application for a GAL may also be made under CPLR 1202(a)(1) on motion by "an infant party if he is more than fourteen years of age." CPLR 1201 additionally provides that unless the court appoints a GAL, an infant shall appear by a parent having legal custody or, if there is no parent, by another person or agency having legal custody. The phrase "having legal custody" refers to judicially determined custody. Allowing a parent or legal guardian to appear without appointing a GAL eliminates an unnecessary application to the court. Appointing a GAL is required if "the right to custody exists neither by parenthood or by decree."[71]

CPLR 1202(a)(2) provides that a motion to appoint a GAL may be brought by a "relative, friend or a guardian, committee of the property or conservator." A government agency like APS or DSS has standing to move for a GAL, given its duties under Social Services Law § 473 and 18 N.Y.C.R.R. 457. APS has standing as a friend of the court to move to appoint a GAL without moving to intervene in the proceeding.[72]

Under CPLR 1012(a)(1), a court must permit a person to intervene as a party when a state statute confers the right to do so.[73] A protective services agency must have a network of professional consultants and service providers and may be involved with health, mental health, aging, and legal and law-enforcement agencies.[74] The Social Services Law does not give a protective services agency the right to intervene to seek a GAL for a party.[75] In a special proceeding in the Housing Court, therefore, APS intervention is permitted only by leave of the court.[76]

CPLR 1202(a)(3) provides that a motion to appoint a GAL may be brought by "any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."[77] The "other party" may be the opposing one or the opposing party's counsel. Courts interpret CPLR 1202(a)(3) to require a party who knows, or believes, that the opposing party suffers from a mental condition to bring that condition to the court's attention.[78] This is especially true of the opposing side's attorney, who is an officer of the court. The opposing side has a duty to inform the court of an adversary's incapacity, especially when evidence in a prior proceeding between the two parties suggested that a guardian was required. In *Jackson Gardens LLC v. Osorio*, the court found that "[t]he fact that a guardian was found to be needed in a prior case, between the same parties, six months prior, clearly placed a duty on the petitioner to inform the court, and makes his failure to do same inexcusable."[79]

Even when a litigant has insufficient proof to move for a GAL, the litigant still has an obligation to bring the potential ward's mental disability to the court's attention.[80] Securing a judgment and evicting a tenant the landlord knew was mentally incapacitated and in a nursing home can subject the landlord to claims for wrongful eviction and property damage.[81] Not only does moral obligation require informing the court of a litigant's possible incapacity, but a legal one does as well.

Sometimes a landlord will have a duty to inform the court that a tenant might need a GAL if for no reason other than that the nuisance allegations that form the grounds for the holdover suggest a pattern of bizarre acts that might warrant a GAL. On the other hand, sometimes counsel will be only too glad to raise the matter of appointing a GAL so as to frazzle a nervous, unrepresented litigant or cause a court to question the litigant's rationality and good faith.

A court-approved GAL is appointed when a Housing Court judge submits a Guardian ad Litem Request form to the borough's Housing Court Supervising Judge or GAL coordinator, who maintains a list of court-approved GALs. The Housing judge may request a GAL who has particular experience or specialization. The Supervising Judge or GAL coordinator gives the appointing judge two or three names from the list, and the appointing judge's court attorney contacts the first of the two or three to assess availability and interest. The potential GAL may accept only if the court makes the initial contact; no other party to the case may arrange for the appointment. The court attorney informs the potential GAL of the basic facts of the case, including whether the ward is an APS client. If the potential GALs decline appointment, the Supervising Judge or GAL coordinator provides new names.

Once a person agrees to serve as a GAL, the appointing judge or court attorney prepares an order of appointment, which, when completed and signed by the appointing judge, is submitted to the Supervising Judge. The court attorney then mails the order and the papers in the court file to the GAL.

A judge may also directly appoint a potential ward's relative, friend, therapist, or social worker to serve as the GAL, although the judge should be on guard for the potential of a conflict of interests. A judge who makes a direct appointment need not submit anything to the Supervising Judge or GAL coordinator, and the

Supervising Judge or GAL coordinator will not give the appointing judge a list of potential GALs. According to a Civil Court advisory notice, those non-court-certified individuals, "as a condition of the appointment, must participate in training specified by the Administrative Judge."[82]

CPLR 1202(c) provides that no GAL appointment is valid unless the GAL files written consent of the appointment with the court. A court may not appoint a GAL who is unwilling to serve.

VI. Housing Court's Authority to Appoint a GAL

The Civil Court, including its Housing Part, has the authority to appoint a GAL in a summary proceeding[83] and need not refer a GAL motion to a Supreme Court judge. Under CPLR 1202(a), "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action."[84] Even if an adjudication of incompetency has not been made, the court must appoint a GAL if court intervention is required to protect the best interests of a litigant incapable of adequately asserting claims and rights.[85]

One Civil Court judge in three decisions published more than 15 years ago wrote that Housing Court does not have the jurisdiction to appoint GALs.[86] All other courts have disagreed. These courts, from the Appellate Term down,[87] have explained that Civil and Housing Court judges "ha[ve] the duty to protect a litigant who is incapable of protecting his or her interests"[88] and "'the inherent' power to appoint a guardian ad litem."[89]

VII. When Can a GAL Be Appointed?

Housing Court must appoint a GAL for litigants in a pending proceeding if the court finds, based on a preponderance of the evidence, that the litigants are incapable of adequately prosecuting or defending their rights.[90] A determination of incompetency, unlike in an Article 81 proceeding, is not required.[91] The Court of Appeals in the seminal *Sengstack v. Sengstack* found that although a GAL appointment should not be used to evade a formal declaration of incompetency, the court still has a duty to protect a litigant who might be incompetent but not formally declared incompetent.[92]

Under CPLR 1202, a GAL may be appointed at any stage of the action or proceeding. The Appellate Division, First Department, in *In re Beyer*, confirmed in 1964 that CPLR 1202(a) allows courts to appoint GALs at any stage and "to a complex of situations, some of which may antedate the technical institution of the proceeding."[93] The court may, therefore, appoint a GAL before the action or proceeding begins. That might occur when a landlord's attorney serves a petition and notice of petition and alerts the court to appoint a GAL rather than allow a tenant to be evicted for failing to answer the petition in a nonpayment proceeding or for being absent at an inquest in a holdover proceeding.

In actions or proceedings involving incompetents, the court should wait for the application of the persons entitled to move for the appointment of a GAL before the court appoints the GAL. If that procedure might endanger the incompetent's interests, then the appointment can be made at the inception of the action or proceeding—for example, in an order to show cause before the petition and notice of petition are served.[94] The court may also appoint a GAL after the parties have agreed on a settlement[95] or after a judgment is entered[96] or at the appeals stage.[97]

An action or proceeding against litigants incapable of adequately protecting their interests may not proceed without notice to the court of the litigant's incapacities and a court inquiry.[98] Following the proposition set out in *Vinokur v. Balzaretti* that "[t]he public policy of this State, and of this court, is one of rigorous protection of the rights of the mentally infirm,"[99] a hearing should be conducted whenever a question of fact arises about whether a GAL is required.[100] Questions of fact might concern a potential ward's alleged delusional behavior, poor judgment, and subclinical manifestations.[101] The court in *Weingarten v. State* held that when a party eligible under CPLR 1202(a) applies for the appointment of a GAL for an individual who resides in a mental institution, a rebuttable presumption arises that the individual is incapacitated.[102]

CPLR 1201 dictates that a litigant's mental impairment less than incompetency may support appointing a GAL.[103] A GAL must be appointed if a potential ward does not understand the nature of the legal proceeding or the possible consequences of the court's judgment.[104]

The proposed ward's physical impairments may also warrant appointing a GAL if the proposed ward is pro se and unable to appear in court to defend or assert a claim.[105] A GAL will also be appointed when the litigant is unable to appear in court because of incarceration.[106] In *Leibowitz v. Hunter*,[107] the court granted a motion to appoint a GAL to aid a plaintiff in a coma due to injuries sustained in a car accident. Some courts have declined to appoint a GAL if the potential ward's physical incapacity was not linked to a mental incapacity.[108]

The court will take a host of factors into account to determine whether a litigant requires a GAL. A litigant's decreased mental ability or physical agility caused by advanced age,[109] disease,[110] or drug or alcohol abuse[111] is relevant. Patients in psychiatric institutions presumptively require a GAL's assistance.[112] Courts will consider affidavits from neighbors, physicians, and others capable of attesting to the litigant's mental and physical capabilities.[113]

Not only are tenants eligible to receive a GAL, but landlords are as well. A GAL may also be appointed in any Housing Court proceeding, not

just an eviction proceeding. Although GALs are seen most commonly in nonpayment and holdover proceedings, they serve in illegal lockout and HP (repair) proceedings.[114]

The GAL's role ends when the case is dismissed, discontinued, settled, or otherwise resolved. A new GAL is required for every new proceeding,[115] although the judge who believes that the GAL performed satisfactorily and developed a positive relationship with the ward may appoint the same GAL for the new proceeding.

VIII. Vacatur of Judgments

Most courts, if pressed, will vacate a final judgment of possession and warrant of eviction if they find that an individual required a GAL during the action or proceeding but did not have one, regardless of whether an attorney represented the tenant at the trial.[116] In *124 MacDougal St. Assocs. v. Hurd*, the court vacated a default judgment against a tenant who needed a GAL and an Article 81 guardian.[117] Courts have vacated foreclosure, divorce, and money judgments more than a year after the default for mentally incapacitated defendants.[118]

If the court, once notified that a tenant is incapacitated, fails to make the appointment or give careful consideration to the need for a GAL, it is "improvident and requires the reversal of the judgment."[119] Most courts will similarly vacate a judgment and restore a party to possession if they find that the party was unable to defend rights in the proceeding adequately.[120] Of import is a March 2007 Civil Court Advisory Notice stating that "if it appears that a respondent is incapable of adequately defending against a proceeding, the court should appoint a guardian ad litem and any default judgment entered prior to the appointment in most instances should be vacated. Failure to vacate the default judgment maybe [*sic*] reversible error."[121]

When APS moves for a GAL, it will often tell the court on the landlord's application that the motion to vacate the judgment may be held in abeyance. Many GALs never move to vacate the judgment. They will use the judgment's nonvacatur as a bargaining tool, if the ward will not otherwise be prejudiced, to get more time to satisfy the judgment. Often landlords consent to giving wards time to satisfy the judgment if the judgment is not vacated. Landlords also consent to GALs in close cases on the condition that the court not immediately vacate the judgment.

An out-of-court stipulation signed by a tenant incapable of adequately defending his or her rights will be vacated if the tenant required a GAL.[122] If a tenant is "unable to address a particular topic without going off on a tangent"[123] and otherwise is unable to defend legal rights, the default judgment should be vacated and a GAL appointed.

In *Roe Corp. v. Doe*,[124] the court vacated a judgment of possession after finding that the petitioner-landlord, who knew about the respondent-tenant's incapacities, had a legal obligation to inform the court that the tenant was incapacitated.[125] In *V.K.*, the court went even further, holding that '"a petitioner, in any proceeding, [must] be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem."[126] If a party fails "to notify the court of an adversary's disability before obtaining a default judgment, [it] is a fraud on the court and a basis to vacate the judgment."[127]

IX. When GALs Are Not Required

Some courts will not vacate a judgment despite the ward's incapacitation. These courts will deny a motion to appoint a GAL even after a default and eviction, and even when the landlord knew about the tenant's infirmities.[128] In *Kalimian v. Driscoll*, the court found that the fact that counsel represented the tenant played no role in determining whether the tenant was prejudiced by the absence of a GAL,[129] but the court in *Hertwig-Brilliant v. Michetti* found that failure to appoint a GAL was harmless because competent counsel represented the litigant, who was also helped by family.[130] Some courts will not appoint a GAL when the respondent waits two years in the proceeding until the eve of the trial to move for a GAL.[131] The court in *321 W. 16th St. Assocs. v. Wiesner*, for example, refused to appoint a GAL late in the proceeding.[132]

A court will deny a motion to appoint a GAL and vacate a judgment if the potential ward does not prove an incapacity to prosecute or defend rights.[133] Thus, a motion will be denied if the letter of the psychologist who examined the tenant does "not state that [the] tenant was incapable of defending her rights or that appointment of a guardian was needed . . . ."[134]

When a motion to appoint a GAL is made, the court must balance the litigant's interests with those of third parties, such as other tenants in the building, to assess whether to appoint a GAL. At first, litigants might appear unable to defend their rights adequately. After further assessment, the court might determine that the potential ward does not need a GAL.[135]

Some courts have declined to appoint a GAL on the ground that appointing one will not help a recalcitrant litigant. *Stratton Coop., Inc. v. Fener*[136] was a nuisance proceeding in which the tenant repeatedly refused access to her home or to cure hazardous accumulations.[137] In that case, the Appellate Division, First Department, affirmed the final judgment and the decision finding that appointing a guardian (an Article 81 guardian in this instance) would not have resolved the issue of access and that the rights of the other tenants needed to be acknowledged. The court balanced the tenant's needs with the rights of the other tenants in the building whose health and safety were at risk.

Similarly, in *Pinehurst Constr. Corp. v. Schlesinger*,[138] a nuisance

holdover proceeding, although the Appellate Term dissent argued that the final judgment after trial should be reversed because it appeared that the tenant was an "elderly, chronically sick, and apparently disturbed tenant,"[139] the majority found no basis to conclude that appointing an Article 81 guardian, "even if warranted, would remedy the long-standing, acute problems posed by tenant's aggressive, antisocial behavior."[140]

Having a history of mental impairment is insufficient by itself to require either the appointment or continued service of a GAL. The incapacity could have disappeared by the time the new action or proceeding began.[141]

X. Removing a GAL

A court's disagreement with a guardian's choices is insufficient to warrant replacing the guardian. In *Sutherland v. New York*,[142] the plaintiff's mother accepted a lump sum monetary offer from the city to settle her and her child's claims, despite the trial court's view that the child's best interests required that payment be made over a period of years. The trial court entered an order removing the mother as guardian and replacing her with a GAL. The Appellate Division, First Department, reversed, finding that the disagreement was insufficient to warrant removing the natural parent as GAL.[143]

Likewise, the court in *Stahl v. Rhee* found that a plaintiff's mother's refusal to accept a settlement on her son's behalf was insufficient to replace the mother, acting as legal guardian, with a GAL.[144] The plaintiff became severely mentally retarded from his exposure to antibacterial skin cleanser prescribed for him shortly after his birth. According to the Appellate Division, Second Department, Supreme Court improperly discharged the plaintiff's mother as the plaintiff's guardian and inappropriately replaced her with a court-appointed GAL when the plaintiff's mother refused to accept a proposed settlement "under any circumstances" because it would not cover her son's expenses.[145] The Appellate Division held that the mother's decision was not unreasonable, arbitrary, or capricious, especially absent proof of a conflict of interest between the mother and the infant plaintiff. The Second Department therefore reversed the Supreme Court's decision removing the child's mother as his legal guardian.[146]

Courts have the power to remove a GAL on their own motion if a GAL, in the GAL's capacity as an officer of the court and as the person charged with protecting the ward's rights, engages in conduct that prejudices or harms the ward.[147] The court in *De Forte v. Liggett & Myers Tobacco Co.* found that "[t]he rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem."[148] A judge who determines that the GAL is acting against the ward's best interests should remove the GAL. If the Civil Court removes the GAL from its list of certified GALs, each Housing judge overseeing a particular case decides whether to remove the GAL while the proceeding is pending. A court may further vacate a warrant of eviction and restore a tenant to possession, even after the marshal executes the warrant of eviction, if the GAL's ineffective assistance caused the eviction.[149]

A court should be wary about defaulting a ward whose GAL did not appear. Under CPLR 1203, no default may be entered until 20 days after a GAL is appointed.[150] Even after that time passes, the court should not begin to consider a default judgment against the ward until the court inquires diligently into what caused the default. If the GAL is responsible for the default, the court should consider relieving the GAL, appointing a new GAL, and informing the Administrative Judge.

Sometimes a GAL behaves egregiously, although not necessarily toward the ward. In *Hitchcock Plaza, Inc. v. Clark*, a GAL spat on an associate of the opposing side's law firm.[151] The law firm moved for sanctions against the GAL. The court denied the motion because the GAL was not a party or an attorney, sustained the spitting charge and referred the GAL to the Administrative Judge.[152]

When the judge or the Civil Court's GAL program believes that a GAL is performing inadequately, they must do their best to investigate the matter promptly. A complaint against a GAL triggers due process rights. Under § 36.3(e) of the Rules of the Chief Judge, "The Chief Administrator [of the Courts] may remove any [GAL] from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A [GAL] may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal." The Chief Administrator's duties to consider removing a Civil Court GAL are delegated to the Civil Court's Administrative Judge.

XI. Proper Advocacy

The courts must determine whether a GAL has represented the ward's best interests. Courts have the continuing responsibility to supervise the GAL's work.[153] In a New York City Civil Court Advisory Notice dated March 2007, the court advised that judges must assess the adequacy of the GAL's advocacy for the ward before it may so-order a stipulation that a GAL wishes to enter into.[154] The judge must assess whether the GAL has met with the ward and attempted to have a home visit, whether the GAL has determined what the ward desires as an outcome of the case, and whether the GAL has investigated and weighed all the factors in the case and recommends a settlement in the ward's best interests. The GAL must also develop a plan to assist the ward in obtaining repairs, money, or other assistance to comply with the proposed stipulation and follow through with the plan to assist the ward. The

GAL must inform the court whether the ward agrees with the proposed settlement. Finally, the GAL must try to locate a missing ward and take all possible steps to get the ward to come to court.

In making these assessments, the court must allocute on the record any significant stipulation, such as one that settles a proceeding. The court should not simply sign the stipulation as if were a two-attorney stipulation, even if the GAL is an attorney.[155]

The court's supervisory role limits a GAL's advocacy. Once again, as three experts explain:

> If a settlement does not compromise a ward's property rights (*e.g.*, if there is no provision that a default will result in the issuance or execution of a warrant of eviction, or that a property right will be surrendered), then the court may determine that a settlement is appropriate without further action to protect the ward, and the court—not the guardian ad litem—may approve the settlement. On the other hand, if the ward's property rights are implicated (*e.g.*, if the settlement provides for a warrant or surrender), the court must make an initial determination whether it can approve the settlement.[156]

The GAL's duties and the court's obligations are fact specific. The more the ward gives up in terms of a settlement, the more the GAL must investigate, advocate, and explain.[157] Likewise, the court must assure the integrity of the proceedings and protect the ward's rights by inquiring, examining, and allocuting on the record.[158]

XII. Service Issues

Before any action or proceeding may go forward, the ward or potential ward must receive the petition and notice of petition underlying the proceeding as well as any motion to appoint a GAL.[159] The RPAPL and the CPLR require service so that the ward or the ward's guardian, committee, or conservator will get notice of any pending action or proceeding.[160]

a. Service of Petition and Notice of Petition

Under RPAPL § 735, the petition and notice of petition must be personally delivered on the respondent, delivered and left with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, or served by conspicuously placed service.[161] Properly serving the petition, notice of petition, and any predicate notice is especially important when the landlord knows that the tenant resides in a hospital, nursing home, or other institution.[162] The landlord's failure to mail additional copies of the petition and notice of petition to this additional, alternative address will result in a dismissal of the proceeding.[163]

In the nonpayment summary proceeding *Parras v. Ricciardi*,[164] the court vacated the default judgment awarded to a petitioner-landlord who failed to mail additional copies of the petition and notice of petition to the nursing home where the tenant-respondent was residing.[165] The court found that "when the landlord knows the tenant is living in a nursing home, the tenant must be served with the petition and notice of petition at the nursing home in order for the court to have jurisdiction over the summary proceeding."[166] The court also found that RPAPL § 735(1)(a) forbids a default against tenants not served at their other residential address even if the petitioner does not learn about the other residence until the person preparing the affidavit of nonmilitary service discovers the tenant's whereabouts in connection with preparing the affidavit of investigation.[167]

In RPAPL § 735(1)(a), "residence" "means the particular locality where the tenant is actually living at the time the summary proceeding is commenced."[168] This residence might be a location different from the premises of which the landlord seeks possession. Even proper service at the nursing home would not have been satisfactory in *Parras*, though, because the landlord knew that the respondent was mentally incompetent and did not inform the court of that fact before it obtained a default judgment.[169]

b. Service Upon the Ward of a Motion to Appoint a GAL

CPLR 1202(b) requires that a notice of motion to appoint a GAL "be served upon the guardian of [the ward's] property, upon [the ward's] committee or upon [the ward's] conservator" or, if none exists, then "upon the person with whom [the ward] resides."[170] CPLR 1202(b) also requires personal service on the potential ward if that person is over the age of 14 and has not yet been judicially declared incompetent.[171] The court must deny a motion not served on the potential ward.[172] Unless there is a judicial declaration of incompetence or court determination of the litigant's mental condition, the potential ward must be given an opportunity to be heard.[173] The court in *Beach Haven Apts. Assocs. LLC v. Riggs* held that "it is critical that the proposed ward be properly served so that he is aware of the motion and the basis upon which APS seeks the imposition of a guardian ad litem and so that he can appear in court and argue for or against the motion."[174]

XIII. Compensation for GALs

CPLR 1204 sets forth the compensation that GALs may receive for their services.[175] In proceedings in which the ward is an APS client, APS, through the New York City Human Resources Administration (HRA), will provide compensation of $600 for the entire action or proceeding, whether or not the GAL is an attorney or has special skills.[176] The GAL order should include a note that HRA will pay the GAL $600 in exchange for the GAL's services.[177] An exception to the normal APS compensation policy could entail the court's asking

HRA to approve a higher fee when the GAL provides more services than usually required.[178] A court that believes that the ward is or will be an APS client may appoint the GAL immediately with the understanding that a determination whether APS will compensate the GAL will be made later.[179]

Upon either the GAL's or the GAL's attorney's filing an affidavit that shows the services rendered, the court may, in the case of a ward who is not an APS client, enter an order granting the GAL reasonable compensation. The compensation may "be paid in whole or part by any other party or from" the ward's recovery or other property.[180] If the GAL seeks more than $500 in compensation in a non-APS case, then the GAL or the GAL's attorney "must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the [GAL or the attorney retained by the GAL] has filed the notice of appointment and certification of compliance."[181] No compensation may be awarded unless the GAL "has filed the notice of appointment and certification of compliance form."[182]

Details about compensation for Civil Court GALs are available on the court's Web site.[183]

Compensation "shall not exceed the fair value of services rendered."[184] What qualifies as reasonable compensation varies from case to case. So long as a GAL can support the request for compensation with an application "supported by [an] itemized documentation showing the work performed and his hourly rate"[185] and the "fees are fair and reasonable,"[186] the court will award the requested compensation. The GAL was able to meet this standard in *C.F.B. v. T.B.* and was awarded nearly $8,000.[187] In a different case, *Bolsinger v. Bolsinger*, the Appellate Division found that "[i]n fixing the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 should not be enhanced just because an attorney does it."[188] Rather, other factors must be considered to determine the appropriate compensation. In *Bolsinger*, the court stated that these factors include fixing the compensation "'with due regard to the responsibility, time and attention required in the performance of [the GAL's] duties,' the result obtained, and the funds available to the person who must bear the cost of the guardian ad litem's services."[189]

A court that deems a GAL's compensation excessive will reduce the amount. In *In re First National City Bank* (*In re Springett's Trust*), the court found that the GAL "rendered extensive services for a period of almost five years"[190] and that "his services were of considerable assistance to the court."[191] But the court relied on the other factors to reduce the amount awarded from the requested $8,000 to $4,000.[192]

Courts will take the paying ward's net worth into account to determine the reasonableness of the GAL's compensation. In *In re Becan*, a 1966 case, the court determined the tenant's net worth to be small because his estate totaled less than $2,500.[193] The court noted additionally that the appointed GAL expended a minimum amount of effort. The court reduced the original $250 award to the GAL to $100. The court found that because the GAL was a guardian of the court who was appearing in an accounting of the estate of an incompetent veteran, the GAL was "bound to conscientiously perform [his] respective duties, with the understanding that [he] may be asked to accept most moderate compensation for [his] services."[194]

CPLR 1204 permits GALs to be compensated from the proceeds of the ward's award and allows payment to be made by "any other party," including the party whom the GAL does not represent. In *Perales v. Cuttita*,[195] the Appellate Division, Third Department, held that the Special Term had acted within its discretion when it required the Commissioner of Social Services to pay the attorney for services rendered as a GAL for residents of adult-care facilities.

CPLR 1204 restricts the GAL's compensation to be paid from a non-party. In *In re Baby Boy O.*, the GAL went uncompensated because the mother did not receive a recovery from which the GAL could be paid.[196] Because the Commissioner of Social Services was not a party to the proceeding, moreover, the Commissioner could not be directed to pay the GAL. A party can be ordered to pay the GAL if that party's actions led to appointing the GAL. In *In re Ault*, the court found that CPLR 1204 directs that "a party may be charged with payment of the compensation of a guardian ad litem only where the actions of such party generated unnecessary, unfounded or purely self-serving litigation that resulted in the appointment of a guardian."[197]

XIV. The Role of Adult Protective Services

APS is a governmental agency created under New York's Social Services Law § 473 for New York City's five boroughs.[198] To be eligible for APS services, individuals must be at least 18 years old; not reside permanently in a hospital, nursing home, or rehabilitation facility; and as a result of mental or physical impairments be unable to meet the following three criteria. The first of these criteria is that prospective clients be unable to "meet their essential needs for food, shelter, clothing, or medical care"[199] or protect themselves from "physical, sexual, or emotional abuse, active, passive or self-neglect or financial exploitation."[200] The second criterion is that the individuals be "in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, active, passive or self-neglect or financial exploitation, or by hazardous conditions caused by the action or inaction of either themselves or other individuals."[201] The third criterion is that the individuals

have "no one available who is willing and able to assist."[202] APS does not consider the individuals' income in determining whether to aid them.

Title 18 N.Y.C.R.R. 457 sets forth the criteria to determine whether someone needs APS services. Individuals and organizations may refer individuals to APS, either by telephone or the Internet. APS then responds to the referral by conducting an assessment. APS will assist clients to get grants for rent arrears, medical and psychiatric care, services like Meals on Wheels and home care, public assistance, and other programs to enable clients to remain at home. APS's mission is to provide services while using the least-restrictive measures possible. APS occasionally needs to use more-restrictive measures, such as putting the client on financial management, referring the case to its Office of Legal Affairs to appoint a GAL, and, if necessary, referring the case to an Article 81 guardian who can enforce an order to conduct a heavy-duty cleaning or to arrange to relocate a ward to a more affordable apartment or a setting with a suitable level of care.

From time to time APS will accept as a client someone whom the courts, landlords' attorneys, and tenant advocates might agree does not need a GAL. Courts, landlords' attorneys, and tenant advocates are also surprised occasionally to learn that APS will not accept someone they agree should have a GAL. One explanation for the incongruence is that the APS acceptance criteria as outlined above differ from the CPLR 1201 standard for appointing a GAL: that the person be an adult incapable of adequately prosecuting claims and defending rights.

APS assessments are designed to satisfy APS acceptance criteria and not CPLR 1201, even though APS will submit its assessment reports to Housing Court pursuant to a motion to secure a GAL under CPLR 1201 and to vacate a judgment if one exists. Judges and practitioners are occasionally stymied by APS reports that do not directly cover the factors helpful in deciding whether a potential ward has or had the physical or mental wherewithal to litigate. These factors, typically absent from APS assessments, include whether the potential ward understands the court process and the contours of the specific litigation.

When an APS assessment concludes that a potential ward is severely mentally retarded, one can assume that the potential ward is or was unable to prosecute claims and assert defenses. The ward is therefore entitled to a GAL and to vacate the judgment under CPLR 1201. Less clear is when the assessment finds the potential ward depressed. A valid assessment of clinical depression under DSM IV means that the potential ward is incapable of prosecuting and asserting claims and defenses. But mere nonclinical depression is different. Just because someone is depressed, a natural state for someone facing eviction, does not mean that the person is or was unable to prosecute claims and assert defenses, even if it might mean that the depressed person is entitled to APS services.

Similarly unhelpful is psychiatric terminology in reports that Housing judges often see using the words "rule out," as in, "rule out bipolar disorder." "Rule out" means that the psychiatrist does not rule something out—that the psychiatrist cannot say that the potential ward is not bipolar. This is different from ruling something in—that is, saying that the ward is bipolar. A "rule out" formulation is relevant, if at all, on the possibility that something cannot be or was not excluded. The formulation is inadmissible if offered as proof of a conclusion. Only if based on a reasonable degree of certainty or similar belief expressing a probability supported by a rational basis is expert medical opinion testimony admissible as a conclusion.[203]

If APS does not accept a client during the proceeding, the Housing judge who wants to appoint a GAL must find and appoint a volunteer. The typical ward cannot afford to pay for a GAL, and volunteers are hard to find.[204] But the Civil Court's GAL program makes prospective GALs aware that they are expected to accept at least three pro bono cases a year.

Endnotes

1. *See* New York City Dep't for the Aging, *Quick Facts on the Elderly in New York City*, *available at* http://home2.nyc.gov/html/dfta/downloads/pdf/quickfacts.pdf (last visited Aug. 11, 2007) (reporting that according to 2005 Census, approximately 943,000 New York City dwellers are over 65 and that approximately 2.4 million individuals are over 65 in New York State).
2. *See* N.Y.C. Dep't of Health and Mental Hygiene, Div. of Mental Hygiene, *Prevalence and Cost Estimates of Psychiatric and Substance Use Disorders and Mental Retardation and Developmental Disabilities in N.Y.C.* iv (2003), 9, *available at* http://www.nyc.gov/html/doh/downloads/pdf/mh/mh-2003prevalence.pdf (last visited Aug. 11, 2007) (noting that about 366,000 individuals in New York City have psychiatric and substance-abuse disorders).
3. For two excellent pieces on GAL law and practice, see Jeanette Zelhof, Andrew Goldberg & Hina Shamsi, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 Cardozo Pub. L. Pol'y & Ethics J. 733 (2006); Judith J. Gische, *Guardian ad Litem Appointments in Civil Proceedings for Adults Incapable of Adequately Prosecuting or Defending Their Rights*, 19 Westchester B.J. 289 (1992).
4. Adult Protective Services was formerly known as Protective Services for Adults (PSA).
5. *See generally* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659 (2006) (discussing problems facing pro se litigants in Housing Court).
6. One Housing Court judge has written that "[o]ur sense of concern and frustration is heightened at times by the perceived inaction, delay and bureaucratic impenetrability of government agencies and programs (Adult Protective Services [APS]) . . . [and] the perceived delay in related matters in other courts (*e.g.*, Supreme Court Article 81 proceedings). . . ." Marc Finkelstein, Guardians Ad Litem in Housing Court 4 (unpublished outline revised for N.Y. St. B. Ass'n Cttee on Landlord-Tenant Proceedings (Sept. 14, 2006) (on file with author) (alteration original).

7. *De Forte v. Liggett & Myers Tobacco Co.*, 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964) (citing *Honadle v. Stafford*, 265 N.Y. 354, 356, 193 N.E. 172, 173 (1934); *Lee v. Gucker*, 16 Misc. 2d 346, 347, 186 N.Y.S.2d 700, 702 (Sup. Ct. N.Y. County 1959)).

8. BLACK'S LAW DICTIONARY 46 (8th ed. 2004).

9. *See City of N.Y. v. Tillis*, N.Y.L.J., Feb. 9, 2000, at 29, col. 4 (Hous. Part Civ. Ct. N.Y. County 2000) (noting Housing Court's bringing application for GAL on its own motion).

10. *See* 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.).

11. *Pettas v. Pettas*, 88 Misc. 2d 955, 957, 389 N.Y.S.2d 537, 539 (Sup. Ct. Nassau County 1976).

12. In the Family Court of the State of New York in the City of New York, law guardians are private practitioners or lawyers from The Legal Aid Society, Lawyers for Children, the Society for the Prevention of Cruelty to Children, or the Children's Law Center whom the judge assigns to represent a child in Family Court under the Family Court Act. N.Y.C. BAR ASS'N, *Introductory Guide to the New York City Family Court* 4 (2006) (Gerald Lebovits, principal author), *available at* http://www.abcny.org/pdf/famguide_ms.pdf (last visited Aug. 11, 2007). For the differences between guardians in Family Court and Surrogate's Court, see *id.* at 38 ("The Family Court has similar jurisdiction and authority as the Surrogate Court about the guardianship of the person of a minor, a child 17 years or younger. Normally, guardianship petitions of the person of a minor are filed in the Family Court. The Surrogate's Court has the power over the property of a minor and may appoint a guardian of the person, the property, or both the person and the property."). For an excellent piece on legal guardians and children, see CROSS-BOROUGH COLLABORATION, THE BASICS: BECOMING A LEGAL GUARDIAN IN NEW YORK STATE (2002), *available at* http://www.brooklynbar.org/vlp/booklets/81441CBCBasicGuardiansrcb.pdf (last visited Aug. 11, 2007).

13. *See* N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney's 2007).

14. *Id.* § 81.02(b).

15. *Sengstack v. Sengstack*, 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342, 151 N.E.2d 887, 890 (1958).

16. Fern Fisher, Admin. Judge, N.Y.C. Civ. Ct., Advisory Notice, *Settlements in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).

17. Fern Fisher, N.Y.C. Civ. Ct., Directives and Procedures, *GAL Case Summary* (eff. Mar. 7, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/DRP/drp178.pdf (last visited Aug. 11, 2007).

18. 15 Misc. 3d 30, 31, 833 N.Y.S.2d 348, 349 (App. Term 1st Dep't 2007) (per curiam) (vacating judgment because GAL, despite not having met or visited tenant, entered into stipulation for judgment of possession to landlord, despite parties' knowledge that APS intended to file for Article 81 guardianship).

19. CIV-LT-57, *GAL Case Summary* (eff. Feb. 2, 2007), *available at* http://nycourts.gov/courts/nyc/housing/pdfs/gal%20pdfs/casesummary.pdf (last visited Aug. 11, 2007).

20. *Riley v. Erie Lackawanna R.R. Co.*, 119 Misc. 2d 619, 621, 463 N.Y.S.2d 986, 987 (Sup. Ct. Chautauqua County 1983).

21. N.Y. County Lawyers' Ass'n (NYCLA), *Task Force on Housing Court Resources Subcommittee Report*, *available at* http://www.nycla.org/siteFiles/Publications/Publications468_0.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Subcommittee Rpt.*"]. The recommendations of the groups that participated at the NYCLA conference appear at 3 Cardozo Pub. L. Pol'y & Ethics J. 591 (2006).

22. N.Y. County Lawyers'Ass'n (NYCLA), *Report on Resources in the Housing Court*, *available at* http://nycla.org/siteFiles/News/News59_1.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Final Rpt*."].

23. *Id.* at 8–14, 19–21.

24. *Id.* at 12; *accord NYCLA Subcomm. Report*, *supra* note 21, at 12.

25. *Id.*

26. ZELHOF ET AL., *supra* note 3, at 745.

27. *Id.* This proposition has case law support: "Although a guardian ad litem appointed for an incapacitated adult party may prosecute or defend the claims and rights of such a party, the guardian ad litem is the only CPLR 1201 representative who is not expressly authorized by statute to apply for court approval of a proposed compromise of the claims of such incapacitated party pursuant to CPLR 1207." *DeSantis ex rel. Qualtiere v. Bruen*, 165 Misc. 2d 291, 295, 627 N.Y.S.2d 534, 537 (Sup. Ct. Suffolk County 1995).

28. 176 Misc. 2d 550, 553, 672 N.Y.S.2d 994, 997 (Sur. Ct. N.Y. County 1998) (cited in ZELHOF ET AL., *supra* note 3, at 763 n.112).

29. 215 A.D.2d 750, 750, 627 N.Y.S.2d 419, 419 (2d Dep't 1995) (mem.) (cited in Paris R. Baldacci, *Addressing the Challenge of Persons with Diminished Capacity in Housing Court: Index of Materials* 212, 213 (unpublished outline for N.Y.C. Bar Ass'n CLE, Dec. 7, 2005).

30. ZELHOF ET AL., *supra* note 3, at 762 ("MFY [legal services] attorneys have heard references during court appearances, and have seen references in training materials for guardians ad litem, to the concept of 'stepping into the shoes' of wards. An electronic search of reported cases in New York State does not provide guidance as to the content of this phrase.").

31. *Feliciano v. Nielson*, 290 A.D.2d 834, 835, 736 N.Y.S.2d 510, 512 (3d Dep't 2002) (quoting *In re Aho*, 39 N.Y.2d 241, 247, 383 N.Y.S.2d 285, 288, 347 N.E.2d 647, 651 (1976)).

32. GISCHE, *supra* note 3, at 290.

33. FINKELSTEIN, *supra* note 6, at 21.

34. *See* Fern A. Fisher, *Comment to the NYCLA Task Force on Housing Court Resources Subcommittee Report on Standardized Procedures in Cases Where GALs Are Appointed for Respondents with Diminished Capacity* 6 (2006).

35. *Id.* at 1–2.

36. *Id.* at 2.

37. *Id.* at 6.

38. *See NYCLA Subcommittee Rpt.*, *supra* note 21, at Addendum.

39. *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 732, 711 N.Y.S.2d 90, 95 (Hous. Part Civ. Ct. N.Y. County 1999).

40. Neil H. Mickenberg, *The Silent Clients: Legal Aid and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 634 (1979) (footnotes omitted).

41. N.Y.C. Civ. Ct., Advisory Notice, *GAL Cases Where There Is Also an Attorney of Record* (eff. Apr. 18, 2007).

42. *Id.*

43. *In re M.R.*, 135 N.J. 155, 177–78, 638 A.2d 1274, 1285 (1994).

44. N.Y. St. B. Ass'n, Cttee. on Prof. Ethics, Op. 746 (July 18, 2001); *accord* ABA Formal Ethics Op. 96-404, *Client Under a Disability* (Aug. 2, 1996).

45. *Id.*

46. ZELHOF ET AL., *supra* note 3, at 771.

47. *Bolsinger v. Bolsinger*, 144 A.D.2d 320, 321, 533 N.Y.S.2d 934, 934 (2d Dep't 1988) (mem.).

48. *NYCLA Final Rpt.*, *supra* note 22, at 13.

49. Op. Att'y Gen. No. 2006-F3. *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F3.pdf (last visited Aug. 11, 2007).

50. Op. Att'y Gen. No. 2006-F5, *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F5.pdf (last visited Aug. 11, 2007).

51. The legislation, proposed by retired Housing Judge Bruce Gould and written by Dov Treiman, Esq., both Committee members, would provide as follows: "Subdivision (j) of section 110 of the New York City Civil Court Act is added to read as follows: (j) In actions and

proceedings before the Housing Part, guardians ad litem appointed by the court pursuant to Article 12 of the civil practice law and rules shall be deemed state employees solely for the purposes of 'the Public Officers Law Section 17, titled, Defense and indemnification of state officers and employees.'"

52. *Lau v. Berman*, Index No. 18375CVN2004, at 4 (Civ. Ct., N.Y. County) (Kern, J.) (unpublished opinion) (quoting *Aho*, 39 N.Y.2d at 247, 383 N.Y.S.2d at 288, 347 N.E.2d at 651) (explaining that a "guardian ad litem may [not] be regarded as an unbiased protagonist of the wishes of an incompetent").

53. *Id.* (citing *Smith v. Keteltas*, 27 App. Div. 279, 50 N.Y.S. 471 (1st Dep't 1898)).

54. N.Y.C. Civ. Ct., Housing Part, *Prospective Guardians Ad Litem*, *available at* http://www.nycourts.gov/courts/nyc/housing/GALprospective.shtml (last visited Aug. 11, 2007).

55. *Id.*

56. *See* http://www.nycourts.gov/courts/nyc/housing/pdfs/GALapplication.pdf (last visited Aug. 11, 2007).

57. 22 N.Y.C.R.R. Part 36.1(b)(3) (Rules of the Chief Judge).

58. *Soybel v. Gruber*, 132 Misc. 2d 343, 347, 504 N.Y.S.2d 354, 357 (Hous. Part Civ. Ct. N.Y. County 1986). In *Soybel*, at issue was the then-extant Brooklyn Law School's Senior Citizen Law Office.

59. *See Backerman v. Coccola*, 189 A.D. 235, 237, 178 N.Y.S. 423, 424 (1st Dep't 1919).

60. N.Y. C.P.L.R. 1202(3)(c) (McKinney's 2007).

61. *Weingarten v. State*, 94 Misc. 2d 788, 791, 405 N.Y.S.2d 605, 607 (Ct. Cl. 1978).

62. FINKELSTEIN, *supra* note 6, at 20 ("Guardian ad litem orders do often provide that the guardian ad litem is to serve without bond. . . .") & 21 ("[I]t might be argued that the specific affidavit requirement of 1202(c) is not necessary for GAL's in Housing Court.").

63. N.Y.C. Civ. Ct., *Housing Part Guardian ad Litem*, LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (last visited Aug. 11, 2007).

64. *Id*. at 1.

65. *NYCLA Final Rpt*., *supra* note 22, at 9. For the benefits of serving as a Housing Court GAL, see William J. Dean, Pro Bono Digest, *Service as a Guardian ad Litem*, N.Y.L.J., July 3, 2006, p. 3, col. 1 (quoting private practitioners who serve as volunteer GALs, including this: "My greatest accomplishment as a lawyer will always be my work on behalf of a mentally disabled indigent client, for whom I served as a guardian ad litem.") (quoting Lisa E. Cleary, Esq.).

66. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

67. *Barnes v. MRG Partners*, N.Y.L.J., Nov. 29, 2000, at 29, col. 3 (Hous. Part Civ. Ct. N.Y. County).

68. *See Kalimian v. Driscoll*, N.Y.L.J., Mar. 6, 1991, at 22, col. 3 (Civ. Ct. N.Y. County) (vacating jury verdict despite presence of counsel because tenant was "unable to effectively cooperate with [counsel] at trial, post-trial and on appeal and does not fully understand the legal and practical consequences of subject summary proceedings"), *aff'd*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).

69. N.Y.L.J., Jun. 16, 1989, at 25, col. 5 (App. Term 1st Dep't) (per curiam).

70. N.Y.L.J., Aug. 24, 1994, at 23, col. 4 (Hous. Part Civ. Ct. Bronx County).

71. *Villafane v. Banner*, 87 Misc. 2d 1037, 1038-39, 387 N.Y.S.2d 183, 184 (Sup. Ct. N.Y. County 1976).

72. *N.Y. Life Ins*. 184 Misc. 2d at 731, 711 N.Y.S.2d at 93.

73. N.Y. C.P.L.R. 1012(a)(1) (McKinney's 2007).

74. N.Y. Soc. Serv. L. § 473(2)(a) (McKinney's 2003).

75. *N.Y. Life Ins*., 184 Misc. 2d at 729, 711 N.Y.S.2d at 93.

76. *See* N.Y. C.P.L.R. 401 (McKinney's 2007); *N.Y. Life Ins*., 184 Misc. 2d at 731, 711 N.Y.S.2d at 94.

77. N.Y. C.P.L.R. 1202(a)(3) (McKinney's 2007).

78. *See, e.g.*, *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 749, 443 N.Y.S.2d 506, 507 (4th Dep't 1981) (mem.) ("[P]laintiff had the burden to bring the condition of defendant's mental state to the court's attention so that it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her."); *Barone v. Cox*, 51 A.D.2d 115, 118, 379 N.Y.S.2d 881, 884 (4th Dep't 1976); *Parras v. Ricciardi*, 185 Misc. 2d 209, 214, 710 N.Y.S.2d 792, 796-97 (Hous. Part Civ. Ct. Kings County 2000) ("When a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so . . . the court may thereafter in its discretion appoint a guardian ad litem to protect the defendant's interests.").

79. N.Y.L.J., July 11, 2001, at 25, col. 6 (Hous. Part Civ. Ct. Queens County).

80. *State of N.Y. v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 25, col. 6 (Sup. Ct. Albany County).

81. *See Benenson v. Dimonda*, N.Y.L.J., Jan. 16, 2002, at 22, col. 1 (Civ. Ct. Kings County); *Parras*, 185 Misc. 2d at 213-14, 710 N.Y.S.2d at 796.

82. N.Y.C. Civ. Ct., LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (revised) (last visited Aug. 11, 2007).

83. *See, e.g.*, *N.Y.C. Hous. Auth. v. Hart*, N.Y.L.J., May 16, 1990, at 29, col. 3 (Civ. Ct. N.Y. County 1990).

84. N.Y. C.P.L.R. 1202(a); *accord* Finkelstein, *supra* note 6, at 8 (noting that Housing Court judges have authority to appoint GALs).

85. *Stane v. Dery*, 86 Misc. 2d 416, 417, 382 N.Y.S.2d 607, 608 (Sup. Ct. N.Y. County 1976); *Soybel*, 132 Misc. 2d at 343, 504 N.Y.S.2d at 354.

86. *See 1199 Hous. Corp. v. Jackson*, N.Y.L.J., Mar. 20, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County) ("[T]here is no basis for a guardian ad litem to be appointed by this court. . . ."); *Silgo 22nd St. Assocs. v. Hennies*, N.Y.L.J., Apr. 24, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County 1991) (same); *Zuckerman v. Burgess*, N.Y.L.J., Mar. 13, 1991, at 22, col. 3 (Hous. Part Civ. Ct. N.Y. County 1991) (same).

87. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349; *83 E. Assocs. v. Mager*, N.Y.L.J., Nov. 10, 1992, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (finding, given documentation submitted supporting tenant's mental condition, that "it was an abuse of discretion for [Housing Court] to have denied, without a hearing, the motion to ascertain whether tenant was capable of . . . adequately defending her interests in the litigation").

88. *Soybel*, 132 Misc. 2d at 347, 504 N.Y.S.2d at 357.

89. *466 Assocs. v. Murray*, 151 Misc. 2d 472, 476, 573 N.Y.S.2d 360, 363 (Civ. Ct. N.Y. County 1991).

90. *N.Y. Life Ins.*, 184 Misc. 2d at 728-729, 711 N.Y.S.2d at 92 ("The standard of proof to establish the grounds for a guardian ad litem is a preponderance of the evidence.").

91. *In re Lugo*, 8 A.D.2d 877, 877, 187 N.Y.S.2d 59, 61 (3d Dep't 1959) (mem.), *aff'd*, 7 N.Y.2d 939, 197 N.Y.S.2d 740 (1960); *Anonymous v. Anonymous*, 3 A.D.2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); *Stane*, 86 Misc. 2d at 417, 382 N.Y.S.2d at 608.

92. *See* 4 N.Y.2d at 509, 176 N.Y.S.2d at 342.

93. 21 A.D.2d 152, 154, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).

94. *See id*. at 155, 249 N.Y.S.2d at 324.

95. *See Riley v. Erie L. R.R. Co.*, 119 Misc. 2d 619, 619, 463 N.Y.S.2d 986, 986 (Sup. Ct. Chautauqua County 1983).

96. *See, e.g.*, *Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.

97. *See In re Application of King*, 284 A.D. 748, 749, 135 N.Y.S.2d 495, 496 (2d Dep't 1954).

98. *See id.* at 214, 710 N.Y.S.2d at 796.

99. 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).

100. *See Shad v. Shad*, 167 A.D.2d 532, 533, 562 N.Y.S.2d 202, 203 (2d Dep't 1990).

101. *Grasso v. Matarazzo*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3 (Hous. Part Civ. Ct. Kings County); *Kings 28 Assocs. v. Raff*, 167 Misc. 2d 351, 353, 636 N.Y.S.2d 257, 258 (Hous. Part Civ. Ct. Kings County 1995).

102. 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.

103. *Jonas Equities v. Brunelle*, N.Y.L.J., Feb. 6, 1991, at 25, col. 2 (Hous. Part Civ. Ct. Queens County), *rev'd on other grounds*, N.Y.L.J., Jun. 29, 1992, at 32, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

104. *1021-27 Ave. St. John HDFC v. Hernandez*, N.Y.L.J., May 6, 1992, at 23, col. 3 (Hous. Part Civ. Ct. Bronx County).

105. Finkelstein, *supra* note 6, at 10.

106. *Wenzel v. Wenzel*, 122 Misc. 2d 1001, 1003, 472 N.Y.S.2d 830, 834 (Sup. Ct. Suffolk County 1984).

107. *Lebowitz v. Hunter*, 45 Misc. 2d 580, 581, 257 N.Y.S.2d 434, 435 (Sup. Ct. N.Y. County 1965).

108. *See, e.g.*, *S. Indust., Inc. v. Esray Fabrics, Inc.*, 81 A.D.2d 647, 647, 438 N.Y.S.2d 341, 342 (2d Dep't 1981) (mem.).

109. *Bird v. Citibank, N.A.*, 102 A.D.2d 718, 719, 477 N.Y.S.2d 1, 3 (1st Dep't 1984) (mem.); *Vinokur*, 62 A.D.2d, at 990, 403 N.Y.S.2d at 316.

110. *In re Christopher*, 177 Misc. 2d 352, 354, 675 N.Y.S.2d 807, 807 (Sup. Ct. Queens County 1998).

111. *Anonymous v. Anonymous*, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.) (appointing GAL due to defendant's "chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense").

112. *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607 ("[W]hen an application is made for appointment of a guardian ad litem to represent a person who resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a presumption that the person involved is unable to adequately prosecute or defend his rights.").

113. *See, e.g.*, *466 Assocs.*, 151 Misc. 2d at 474, 573 N.Y.S.2d at 361.

114. *See Acosta v. Beka Realty LLC*, N.Y.L.J., Oct. 3, 2005, at 17, col. 1 (Hous. Part Civ. Ct. Kings County) (appointing GAL in HP proceeding).

115. *Kirso Prop. Co. v. Brief, Comm'r of Soc. Servs. of City of N.Y.*, N.Y.L.J., Jun. 29, 1998, at 30, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

116. *See, e.g.*, *Kalimian*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam) ("The fact that tenant was represented by counsel in the trial proceedings is of little, if any, relevance in determining whether she was prejudiced by the absence of a guardian ad litem.").

117. *124 MacDougal St. Assoc. v. Hurd*, N.Y.L.J. Feb. 2, 2000, at 28, col. 4 (Civ. Ct. N.Y. County).

118. *See Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.

119. *See, e.g.*, *Rakiecki v. Ferenc*, 21 A.D.2d 741, 741, 250 N.Y.S.2d 102, 103 (4th Dep't 1964) (mem.).

120. *N.Y.C. Hous. Auth. v. Beverly B.*, N.Y.L.J., Apr. 13, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).

121. N.Y.C. Civ. Ct., Adv. Notice, *Default Judgments in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/*default*.pdf (last visited Aug. 11, 2007) (citing, among others, *Oneida Nat'l Bank & Trust Co. Cent. N.Y. v. Unczur*, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971)).

122. *See e.g.*, *Grasso*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3.

123. *Deepdale Gardens Third Corp. v. Knox*, N.Y.L.J., Oct. 1, 1996, at 26, col. 1 (Sup. Ct. Queens County).

124. N.Y.L.J., Jan. 15, 2003, at 21, col. 5 (Dist. Ct. Nassau County) [incorrectly labeled "Richmond County District Court" in N.Y.L.J.].

125. *See Id*.

126. *N.Y. Life Ins.*, 184 Misc. 2d at 737, 711 N.Y.S.2d at 97 (quoting *In re Estate of Bacon,* 169 Misc. 2d 858, 864, 645 N.Y.S.2d 1016, 1020 (Sur. Ct. Westchester County 1996)).

127. *See, e.g.*, *Hotel Pres. v. Byrne*, N.Y.L.J., Mar. 12, 1999, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (vacating default judgment because petitioner knew or had reason to know that respondent was incapable of protecting her interests when judgment was entered); *Jackson Gardens*, N.Y.L.J., July 11, 2001, p. 25, col. 6 (vacating default judgment because petitioner knew that respondent-tenant had GAL in prior proceeding); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, at 28, col. 4 (Hous. Part Civ. Ct. N.Y. County) (vacating judgment because petitioner had accepted rent from APS and complained about tenant's behavior); *Glick v. Quintana*, N.Y.L.J., Nov. 30, 1992, at 27, col. 4 (Civ. Ct. N.Y. County) (vacating default judgment because petitioner knew that respondent had a GAL in two prior proceedings).

128. *See, e.g.*, *Greene v. Resch*, 114 Misc. 2d 780, 783, 452 N.Y.S.2d 314, 316 (Hous. Part Civ. Ct. Kings County 1982) (denying vacatur of judgment even though opposing party knew about tenant's mental incapacity).

129. N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).

130. *In re Hertwig Brilliant*, N.Y.L.J., Nov. 9, 1993, p. 26, col. 1 (Sup. Ct. N.Y. County 1993).

131. *See, e.g.*, *355 W. 85th St. Corp. v. Tremblay*, N.Y.L.J., Apr. 3, 2002, at 18, col. 5 (Hous. Part Civ. Ct. N.Y. County).

132. *See* N.Y.L.J., Nov. 19, 1998, at 32, col. 4 (App. Term 1st Dep't) (per curiam).

133. *See Urban Pathways, Inc. v. Lublin*, 227 A.D.2d 186, 186, 642 N.Y.S.2d 26, 26 (1st Dep't 1996) (mem.).

134. *Wilson Han Assocs., Inc. v. Arthur*, N.Y L.J., July 6, 1999, at 29, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1999) (mem.).

135. *See S. Indus.*, 81 A.D.2d at 647, 438 N.Y.S.2d at 341 (finding that physical impairment alone did not render tenant unable to defend his interests adequately).

136. 211 A.D.2d 559, 559, 621 N.Y.S.2d 77, 78 (1st Dep't 1995) (mem.).

137. *Id*., 621 N.Y.S.2d at 78.

138. 12 Misc. 3d 26, 816 N.Y.S.2d 815 (App. Term 1st Dep't 2006) (per curiam).

139. *Id.* at 29, 816 N.Y.S.2d at 817 (Gangel-Jacob, J., dissenting).

140. *Id.* at 27, 816 N.Y.S.2d at 816.

141. *See Arcieri v. Arcieri*, 49 Misc. 2d 223, 224, 266 N.Y.S.2d 1020, 1021 (Sup. Ct. Kings County 1966) (finding that prior institutionalization did not evidence existing incompetency).

142. 107 A.D.2d 568, 568, 483 N.Y.S.2d 307, 308 (1st Dep't 1985) (mem.).

143. *See id.* at 569, 483 N.Y.S.2d at 308.

144. 220 A.D.2d 39, 44-45, 643 N.Y.S.2d 148, 152 (2d Dep't 1996).

145. *Id*. at 43, 643 N.Y.S.2d at 151.

146. *See id.* at 46, 643 N.Y.S.2d at 153.

147. *N.Y.C. Hous. Auth. v. Maldonado*, N.Y.L.J., Apr. 13, 2005, p. 19, col. 3 (Hous. Part Civ. Ct. Bronx County).

148. 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964).

149. *See Pomeroy Co. v. Thompson*, N.Y.L.J., Sept. 18, 2002, p. 20, col. 6 (Hous. Part Civ. Ct. N.Y. County) (finding that GAL, APS, and N.Y.C. Department of Investigation failed to protect ward's tenancy because no one submitted application for grant for arrears before eviction), *aff'd*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004) (per curiam).

150. N.Y. C.P.L.R. 1203 provides that "[n]o judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him."

151. 1 Misc. 3d 906(A), 781 N.Y.S.2d 624, 2003 N.Y. Slip Op. 51524(U), at *1, 2003 WL 23109709, at *3, 2003 N.Y. Misc. LEXIS 1635 (Hous. Part Civ. Ct. N.Y. County, Dec. 19, 2003) (Gerald Lebovits, J.).

152. The GAL in the proceeding was eventually removed from the Civil Court's GAL program.

153. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349 (*quoting N.Y.C. Hous. Auth. v. Jackson*, 13 Misc. 3d 141(A), 2006 N.Y. Slip Op. 52265(U), 2006 WL 3437858, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 17, 2006) (mem.)).

154. N.Y.C. Civ. Ct. Advisory Notice, *Settlements in GAL Cases* (Mar. 8, 2007) *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).

155. *Id.*

156. Jeanette Zelhof et al., *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 Cardozo Pub. L. Pol'y & Ethics J. 733, 765 (2006).

157. *See id.* at 763.

158. *See id.*

159. N.Y. Real Prop. Acts & Proc. L. 735 (McKinney's 2007).

160. *Id.*

161. *Id.*

162. *See Parras v. Ricciardi*, 185 Misc. 2d 212-13, 710 N.Y.S.2d 792, 795.

163. *Id.* at 212–13, 710 N.Y.S.2d at 795.

164. *Id.* at 212, 710 N.Y.S.2d at 795.

165. *Id.*, 710 N.Y.S.2d at 795.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*, 710 N.Y.S.2d at 796.

170. N.Y. C.P.L.R. 1202(b) (McKinney's 2007).

171. *Id.*

172. *Andrews v. Mensch*, 100 Misc. 2d 79, 81, 418 N.Y.S.2d 527, 528 (Dist. Ct. Suffolk County 1979) ("Nevertheless, CPLR 1202 requires that notice be given to the person who would be represented and since no such notice has been given in this instance, the court is inclined to deny the motion with leave to renew upon proper papers."); *see also Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.

173. *Bocina v. Schlau*, 125 Misc. 2d 682, 683, 480 N.Y.S.2d 93, 94 (Sup. Ct. Suffolk County 1984) (citing *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607)).

174. N.Y.L.J., Jul. 29, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).

175. N.Y. C.P.L.R. 1204 (McKinney's 2007).

176. *See* New York State Unified Court System: Existing Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

177. *See id.*

178. *See id.*

179. *See id.*

180. N.Y. C.P.L.R. 1204 (McKinney's 2007).

181. 22 N.Y.C.R.R. 36.4(b)(1) (McKinney's 2007).

182. *Id.* 36.4(b)(2).

183. *See* New York State Unified Court System: Exisiting Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

184. 22 N.Y.C.R.R. 36.4(b)(4) (McKinney's 2007).

185. *C.F.B. v. T.B.*, 9 Misc. 3d 1105(A), 806 N.Y.S.2d 443, 2005 N.Y. Slip Op. 51412(U), at *5, 2005 WL 2185481, at *4, 2005 N.Y. Misc. LEXIS 1902, at *12 (Sup. Ct. Erie County May 24, 2005).

186. *Id.*

187. *See id.*

188. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

189. *Id.*, 533 N.Y.S.2d at 935 (quoting *In re Becan*, 26 A.D.2d 44, 48, 270 N.Y.S.2d 923, 930 (1st Dep't 1966), and *In re Lydia E. Hall Hosp. (Cinque)*, 117 Misc. 2d 1024, 1025, 459 N.Y.S.2d 682, 683 (Sup. Ct. Nassau County 1982)).

190. 35 A.D.2d 927, 927, 316 N.Y.S.2d 575, 576 (1st Dep't 1970) (per curiam).

191. *Id.*, 316 N.Y.S.2d at 576.

192. *Id.*

193. 26 A.D.2d at 48, 270 N.Y.S.2d at 930.

194. *Id.*, 270 N.Y.S.2d at 930.

195. 127 A.D.2d 960, 961, 512 N.Y.S.2d 565, 566 (3d Dep't 1987).

196. 298 A.D.2d 677, 679, 748 N.Y.S.2d 811, 813 (3d Dep't 2002).

197. 164 Misc. 2d 272, 274, 624 N.Y.S.2d 351, 353 (Sur. Ct. N.Y. County 1995).

198. For an explanation at APS's Web site of what the agency does, see http://www.nyc.gov/html/hra/downloads/pdf/adult_protective_services.pdf (last visited Aug. 11, 2007).

199. APS Memorandum W2-244, Rev. Jan. 2005 [hereinafter "APS Memorandum"].

200. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g., Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532 (1979).

204. The New York City Bar Association used to be a source of volunteer GALs. The City Bar's GAL program no longer exists, even though program details still appear on the City Bar's Web site. See http://www.abcny.org/CityBarFund/CommunityOutreachLawProgram.htm (last visited Aug. 11, 2007).

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Private Right of Action—The Uncertain Dividing Line Between the Martin Act and Common Law Fraud

By Vincent Di Lorenzo

Twenty years ago the New York Court of Appeals ruled that private parties may not bring an action for violations of the Martin Act but can bring actions alleging common law fraud. The Court never, however, delineated the dividing line between the two actions. Lower courts have struggled to formulate a legal standard to determine when a right of action is available. Two distinct standards have been employed by the lower courts. The standards are inconsistent and create uncertainty for the practitioner. This article explores the two standards recognized by the lower courts and compares the standards against the rulings of the Court of Appeals. It concludes that the Court needs to clarify the proper dividing line between permissible and impermissible actions in order to avoid inconsistent outcomes in the lower courts.

Court of Appeals Creates Uncertainty

In 1987 the Court of Appeals, in *CPC International, Inc. v. McKesson Corp.*,[1] ruled that (a) there is no private cause of action for violations of the antifraud provisions of the Martin Act, and (b) plaintiff could maintain and had sufficiently pleaded a cause of action for common law fraud. *CPC International* was a claim alleging violation of section 352-c of the General Business Law. A majority of the Court concluded that the purpose of the Martin Act generally, and section 352-c specifically, was ". . . to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices. . . ."[2] In other words, the Legislature intended that the Attorney General have exclusive authority to enforce the statute. Nonetheless, the Court admonished the Legislature to consider the merits of a statutorily expressed private cause of action to serve as a further deterrent to fraudulent practices and to "add a remedy for defrauded investors in those cases where none exists in common-law fraud . . ."[3]

In *CPC International,* the court refused to dismiss plaintiff's claim for common law fraud. The allegations of fraudulent conduct were based upon the preparation and distribution of projections that materially misrepresented the financial condition of a corporate subsidiary. In other words, the case involved affirmative misrepresentations, rather than omissions. Moreover, the dispute between the parties was whether reliance—one of the elements for recovery for common law fraud—had been sufficiently alleged by the plaintiff,[4] and whether projections constitute material existing "facts" that could support an action in common law fraud. The factual allegations on which the fraud action was based fell within the scope of the prohibition in section 352-c of the General Business Law. Therefore it was not clear why the court permitted the common law fraud action to be maintained, while ruling that the Attorney General has exclusive power to enforce the provisions of the Martin Act. Unfortunately, in its opinion, the Court of Appeals never presented any dividing line between an impermissible private action under the Martin Act and a permissible action in common law fraud.

Four years later the Court of Appeals had its last opportunity to clarify the dividing line it sought to create in *CPC International*. In *Vermeer Owners, Inc. v. Guterman*,[5] the Court ruled that a private cause of action may similarly not be maintained under section 352-e of the Martin Act, which specifically addresses real estate syndication offerings including offerings of interests in condominium or cooperative units. Once again, the Court recognized the possibility of a private action based on a claim of common law fraud without delineating the dividing line between permissible and impermissible actions. *Vermeer Owners* involved an affirmative misrepresentation and one contained in the offering plan. However, in that case, the claim of common law fraud was dismissed because the Court ruled that nothing in the record established that the plaintiffs in fact relied on the misrepresentations.

The Court of Appeals, in its two decisions, has recognized the possibility of a private right of action alleging common law fraud but has never explained the dividing line between permissible and impermissible actions brought by private parties. Some appellate courts have attempted to formulate a distinction based on the more demanding pleading requirements for an action in common law fraud, e.g., proof of reliance, to draw a distinction. Other appellate courts have focused on whether the factual basis for the common law fraud action was a disclosure contained in the offering plan or required by the Attorney General's regulations. Their attempts to formulate a distinction are discussed below.

Standards Employed by the Lower Courts

Faced with no standard announced by the Court of Appeals, the lower courts have had to struggle to determine when an action pleaded as an action in common law fraud is actually alleging a violation of the Martin Act and therefore not available to private parties. One "standard" first announced by the First Department in 1995 is frequently repeated in subsequent lower court decisions. In *Whitehall Tenants Corp. v. Estate of Olnick*,[6] the court ruled that a private

cause of action for common law fraud could not be maintained because "private parties will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney General under the Martin Act . . ."[7] This statement alone does not clarify when an action is merely an attempt to press a claim that only the Attorney General may bring.

The lower courts have followed two inconsistent approaches in attempting to draw a line between permissible and impermissible actions. First, courts have based the distinction on the unique elements for recovery required in an action in common law fraud—requirements that are more demanding than the action that may be brought under the Martin Act. An action alleging common law fraud requires (a) a representation of a material fact, (b) that is untrue, (c) scienter; i.e., that is known to be untrue or with reckless indifference as to truth or falsity, (d) intention to deceive; i.e., to induce plaintiff to act or refrain from action in reliance on the misrepresentation, (e) actual and justifiable reliance, and (f) injury.[8] In contrast, a violation of the Martin Act occurs regardless of proof of scienter, including intention to deceive, or reliance.

Many appellate courts have used the differences in the elements of recovery for actions based on common law fraud, as opposed to violations of the Martin Act, as the standard to differentiate permissible from impermissible private actions.[9] In *Whitehall*, for example, the plaintiff's action was dismissed because without evidence of reliance or intent to defraud, plaintiff was endeavoring to vindicate a wrong committed exclusively to the Attorney General under the Martin Act.[10] Courts embracing this view have, at times, dismissed the common law fraud action but only because one or more of the unique elements for recovery in common law fraud; e.g., reliance or intent to deceive, were absent. However, other appellate decisions have seemingly rejected a dividing line based on the elements for recovery.[11]

Second, other appellate courts have created a dividing line based on the factual allegations presented in the claim. Namely, if the misrepresentation or omission is based on the disclosures required by the Martin Act and the Attorney General's regulations, then such courts have refused to permit plaintiffs to use the misrepresentation or omission as the basis of a common law fraud action. In *Rego Park Garden Owners, Inc. v. Rego Park Garden Associates*,[12] for example, the court emphasized that a failure to disclose the availability of the tenants association's engineer's report as a basis for a common law action would permit private parties to maintain an action based on a violation of the Martin Act because such disclosure was allegedly required under the Attorney General's regulations. Other courts have similarly focused on the disclosure requirements under the Martin Act and dismissed allegations of common law fraud when based on representations made in the offering plan.[13] Yet, this approach has also been criticized in other appellate decisions.[14]

In sum, the appellate cases are divided on the proper standard to be employed to differentiate permissible and impermissible actions, with no consistency even within the same department. Instead, various decisions in both the First and the Second Departments do not contain a consistent standard to guide the lower courts within that Department.

The uncertainty generated by the conflicting decisions of the Appellate Division results in unpredictable outcomes at the trial court level. Two recent decisions in the trial courts, both in the Second Department, illustrate this unpredictability. In February 2007, the Supreme Court in Kings County refused to dismiss an action alleging common law fraud based on the defendants' argument that the allegedly false representations were contained in the offering plan and therefore were solely within the jurisdiction of the Attorney General.[15] However, in July 2006, the Supreme Court in Nassau County dismissed an action alleging common law fraud specifically because the alleged misrepresentations were made in materials contained in the offering plan and, therefore, in the court's view, alleged a violation of the Martin Act that could be prosecuted only by the Attorney General.[16]

As between the two standards, the standard relying on the elements for recovery is more consistent with the little guidance provided by the Court of Appeals. In the *Vermeer* case the misrepresentation that was the bases for the action in common law fraud *was* contained in the offering plan. Moreover, in *CPC International* the court's recognition of the desirability of a private right of action under the Martin Act, to provide a remedy where none exists in common law fraud,[17] appears to refer to the stringent elements for recovery imposed in such a cause of action. Certainly, causes of action are typically differentiated based on the required elements for recovery and not the factual allegations that might prove such elements. The First Department recently embraced this dividing line,[18] but the decisions in the Second Department continue to provide inconsistent guidance for the lower courts. Given the paucity of guidance in the Court of Appeals' two decisions on point, and the resultant differences of opinion generated in the lower courts, it is necessary for the Court to clarify the dividing line between permissible and impermissible private actions.

Another Alternative—The Deceptive Practices Act

Faced with uncertainty regarding the courts' characterization of some common law actions as attempts to circumvent the prohibition against private actions to enforce the Martin Act, some attorneys have resorted to the New York Deceptive Practices Act. The Deceptive Practices Act prohibits "deceptive acts or practices

in the conduct of any business."[19] The New York State Legislature expressly granted a private right of action under the Act to "any person who has been injured by reason of any violation of this section."[20] To maintain a cause of action a party must prove that (a) the defendant was guilty of a material deceptive act or practice in the conduct of a business, (b) the challenged conduct was consumer oriented, and (c) plaintiff was injured by reason of such act or practice; i.e., the injury was caused by the deceptive act or practice.[21] Thus, unlike common law fraud the plaintiff need not prove (a) scienter, or intent to deceive, and (b) reliance.

This raises the issue of whether public offerings of interests in condominiums or cooperative units should be construed as "consumer-oriented" under the Deceptive Practices Act. This issue arose because the Court of Appeals has noted that in order to fall under the provisions of the Act, the defendant must engage in "acts or practices" that are "directed at wrongs against the consuming public" as shown by such acts or practices "hav[ing] a broader impact on consumers at large."[22] The Court also noted that deceptive actions in private contractual transactions unique to the parties are not covered by the Act.[23]

In order to fall under the scope of the Act, the offering of condominium or cooperative units to the general public must meet this threshold standard. In several decisions over the years the Second and Fourth Departments have applied the Act to allegations of fraud in the offering of cooperative or condominium units to the general public, construing these offerings to be consumer transactions.[24] Unfortunately, none of these decisions explained why the court concluded that these offerings were "consumer-oriented" transactions.

Two recent decisions in the First and Third Departments have disagreed with this conclusion. In *Thompson v. Parkchester Apartments Co.*[25] the court concluded that allegedly false information concerning the condition of the plumbing contained in a condominium offering plan did not have "a broad impact on consumers at large" and therefore did not state a viable claim under the Deceptive Practices Act.[26] In *Green Harbour Homeowners' Association v. G.H. Development and Construction, Inc.*,[27] the Third Department came to the same conclusion with reference to allegedly deceptive conduct in connection with the offering of interests in a homeowners' association. The court noted that the statute encompasses deceptive business practices that have a broad impact on consumers at large and excludes private, single-shot contractual transactions. It then concluded that the dispute in question did not have ramifications for the public at large. It was characterized as a disputed practice unique to the parties to this particular complex and therefore fell outside the scope of the Deceptive Practices Act.

These First and Third Department decisions appear to demand more than the Court of Appeals intended in its rulings concerning the scope of the Deceptive Practices Act. They conclude that each offering of interests in a condominium or cooperative development involves a transaction that is a private contractual dispute unique to the parties to that transaction. This ignores that the offering is of many units and made to the public at large. Indeed, in the two cases announcing the "consumer-oriented" requirement under the Deceptive Practices Act, the Court of Appeals permitted the action to be maintained when the deceptive acts or practices were part of standard documents utilized by an insurance company[28] but did not permit it to be maintained when they were part of an insurance policy tailored to meet the individual purchaser's wishes and requirements.[29] In the former case the Court emphasized that the acts are consumer oriented in the sense that they potentially affect similarly situated consumers.[30] Indeed in 2001 the Court of Appeals, *in dicta*, noted that the Deceptive Practices Act has been applied by the lower courts to real estate transactions, including sales of condominium units, and that this result is not surprising.[31] In a real estate context the misrepresentation in the sale of a single parcel, perhaps made to a single buyer, is a private, contractual transaction unique to the parties that the Court of Appeals stated is excluded from the reach of the Act.[32] This contrasts with the broader effect of a misrepresentation made in connection with the sale of many parcels to many purchasers in a development.[33]

The Deceptive Practices Act has been considered an alternative that avoids the prohibition against private actions under the Martin Act. However, recent decisions in the appellate courts have cast doubt on that conclusion. It is time for the Court of Appeals to clarify the law—to explain what it meant when it imposed a requirement that a deceptive act or practice must have a consumer impact.

Conclusion

When attempting to sue sponsors for fraudulent conduct in an action claiming common law fraud or a violation of the Deceptive Practices Act, plaintiffs face uncertainty, and outcomes in the courts have become unpredictable. This is because the Court of Appeals has not delineated a line between impermissible private actions under the Martin Act and permissible private actions alleging common law fraud. It is also because the Court of Appeals has failed to clarify the meaning of its requirement that deceptive conduct under the Deceptive Practices Act must have a consumer impact. The appellate courts have formulated different, inconsistent standards to answer these questions left unanswered by the Court of Appeals. It is time for the Court to clarify these legal standards to avoid more unpredictable and inconsistent results in the lower courts.

Endnotes

1. 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).
2. *Id.* at 277.
3. *Id.* at 278.
4. *Id.* at 285.
5. 78 N.Y.2d 1114, 585 N.E.2d 377, 578 N.Y.S.2d 128 (1991).
6. 213 A.D.2d 200, 623 N.Y.S.2d 585 (1st Dep't 1995).
7. *Whitehall Tenants Corp.*, 213 A.D.2d at 200. This statement was reiterated by the First Department three years later in *Thompson v. Parkchester Apartments Co.*, 249 A.D.2d 68, 670 N.Y.S.2d 858 (1st Dep't 1998) and later cases have frequently voiced the same caveat citing either the *Thompson* or the *Whitehall* decisions.
8. Vincent Di Lorenzo, NEW YORK, CONDOMINIUM AND COOPERATIVE LAW § 5:5 (2d ed. 1995).
9. *Kramer v. W10Z/515 Real Estate Ltd. P'ship*, 2007 WL 299 3665, 2007 N.Y. Slip Op. 07763 (1st Dep't 2007); *2 Fifth Ave. Tenants Ass'n v. Abrams*, 183 A.D.2d 577, 583 N.Y.S.2d 466 (1st Dep't 1992) (motion for summary judgment denied because the materiality of the alleged omission, the reasonableness of reliance thereon, and whether there was fraudulent intent present unresolved questions of fact); *Eagle Tenants Corp. v. Fishbein*, 182 A.D.2d 610, 582 N.Y.S.2d 218 (2d Dep't 1992) (action alleging constructive fraud must be dismissed because the action attempts to premise liability on a wrongful omission regardless of the existence of deceitful intent); *Rubenstein v. East River Tenants Corp.*, 139 A.D.2d 451, 527 N.Y.S.2d 29 (1st Dep't 1988) (action alleging common law fraud properly dismissed because knowledge of the defects in question precluded reliance); *East End Owners Corp. v. Roc-East End Associates*, 128 A.D.2d 366, 516 N.Y.S.2d 663 (1st Dep't 1987) (cooperative corporation could maintain action alleging common law fraud, but this action fails because plaintiff had means to discover the true nature of the transaction and therefore was not induced to enter into the transaction by misrepresentations). *See Granite Partners L.P. v. Bear, Stearns Co., Inc.*, 17 F. Supp. 2d 275, 291-92 (S.D.N.Y. 1998) (dismissing common law actions based on breach of fiduciary duty and negligent misrepresentation because they do not require proof of intentional deceit and therefore are allegations that are actionable under the Martin Act).
10. *Whitehall Tenants Corp.*, *supra*, note 7 at 201.
11. *See Bd. of Managers of the Fairways at N. Hills Condo. v. Fairways at N. Hills*, 150 A.D.2d 32, 545 N.Y.S.2d 343 (2d Dep't 1989). The *East End Owners* decision was criticized in, but the court presented no alternative dividing line between permissible and impermissible private actions. *See also 167 Hous. Corp. v. 167 P'ship*, 252 A.D.2d 397, 675 N.Y.S.2d 91 (1st Dep't 1998) (plaintiff's claim that it relied on representations in the contract of exchange, which are wholly derived from the offering plan, is impermissible, since plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney General under the Martin Act).
12. 191 A.D.2d 621, 595 N.Y.S.2d 492 (2d Dep't 1993).
13. *Shen v. Astoria Fed. Sav. & Loan*, 295 A.D.2d 319, 744 N.Y.S.2d 336 (2d Dep't 2002); *Thompson v. Parkchester Apartments Co.*, 271 A.D.2d 311, 706 N.Y.S.2d 637 (1st Dep't 2000); *167 Hous. Corp. v. 167 P'ship*, 252 A.D.2d 397, 675 N.Y.S.2d 91 (1st Dep't 1998).
14. *Scalp & Blade, Inc. v. Advest, Inc.*, 281 A.D.2d 882, 722 N.Y.S.2d 639 (4th Dep't 2001) (nothing in the Martin Act or in the Court of Appeals' cases precludes a plaintiff from maintaining common law causes of action based on such facts as might give the Attorney General a basis for proceeding civilly or criminally under the Martin Act).
15. *Bd. of Managers of the Arches at Cobble Hill v. Hicks & Warren, LLC*, 14 Misc. 3d 1234 (A), 836 N.Y.S.2d 497 (unreported disposition), 2007 WL 556897, 2007 N.Y. Slip Op. 50297 (u) (Sup. Ct. Kings Co. 2007). The court cited the Fourth Department's decision in *Scalp & Blade, Inc. v. Advest, Inc.* 281 A.D.2d 882, 883, 722 N.Y.S.2d 639 (4th Dep't 2001). *See* decisions in the Second Department, *supra* note 9.
16. *Hamlet On Olde Oyster Bay Home Owners Ass'n Inc. v. Holiday Org. Inc.*, N.Y.L.J., August 17, 2006, at 23, 24. (Sup. Ct., Nassau Co.). The court cited the Second Department's decision in *Rego Park Garden Owners, Inc. v. Rego Park Garden Associates*, 191 A.D.2d 621, 595 N.Y.S.2d 492 (2d Dep't 1993).
17. 70 N.Y.2d 268, 278, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).
18. *Kramer v. W10Z/515 Real Estate Ltd. P'ship*, 2007 WL 299 3665, 2007 N.Y. Slip Op. 07763 (1st Dep't 2007).
19. N.Y. Gen. Bus. Law § 349(a) (McKinney 2004).
20. N.Y. Gen. Bus. Law § 349(h) (McKinney 2004). The Executive Memoranda issued by the Governor explains the purpose behind the 1980 amendment to the statute that recognized a private right of action: "This bill . . . will encourage private enforcement of these consumer protection statutes, add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General in the prosecution of consumer fraud complaints." 1980 N.Y. Sess. Laws 1867 (McKinney).
21. *See Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000); *see also Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 55, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995).
22. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24-25, 623 N.Y.S.2d 529 (1995).
23. *Oswego Laborers' Local 214 Pension*, 85 N.Y.2d at 25.
24. *B.S.L One Owners Corp. v. Key Int'l Manuf., Inc.*, 225 A.D.2d 643, 640 N.Y.S.2d 135 (2d Dep't 1996); *Breakwaters Townhomes Association of Buffalo, Inc. v. Breakwaters of Buffalo, Inc.*, 207 A.D.2d 963, 616 N.Y.S.2d 829 (4th Dep't 1994); *Board of Managers of Bayberry Greens Condominium v. Bayberry Greens Associates*, 174 A.D.2d 595, 571 N.Y.S.2d 496 (2d Dep't 1991).
25. 271 A.D.2d 311, 706 N.Y.S.2d 637 (1st Dep't 2000).
26. The court also concluded that since the misrepresentations were contained in the offering plan, the Attorney General has exclusive authority to pursue a claim pursuant to the Martin Act.
27. 307 A.D.2d 465, 763 N.Y.2d. 114 (3d Dep't 2003).
28. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529 (1995).
29. *New York University v. Continental Insurance Company*, 87 N.Y.2d 308, 321, 639 N.Y.S.2d 283 (1995).
30. *Oswego Laborers'*, 85 N.Y.2d at 27.
31. *Polonestsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 53, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001). The Court cited the Second Department's decision in *Bayberry Greens*.
32. *See Canario v. Gunn*, 300 A.D.2d 332, 751 N.Y.S.2d 310 (2d Dep't 2002).
33. *See Latiuk v. Faber Construction Co., Inc.*, 269 A.D.2d 820, 703 N.Y.S.2d 645 (4th Dep't 2000).

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Surveys and Title Insurance

By James M. Pedowitz

Almost twenty-five years ago, Bernard M. Rifkin, Esq., of blessed memory, wrote an excellent article entitled "Land Surveys and the New York Law of Real Property," published in the *New York State Bar Journal* of November 1982, Volume 54, Number 7.[1]

Today, there is a much greater appreciation for the need to have a current accurate survey of land and improvements being purchased or mortgaged. However, besides the professional reputation of the surveyor, there is no assurance that the survey being relied upon as accurate is indeed "accurate."

There is a considerable misconception by many professionals, including lawyers, that the fact that a title insurer accepts a print of a survey, deletes the exception: "any state of facts that an accurate survey would disclose," and refers to the facts disclosed thereon, means that the survey is insured as accurate, and that survey map is insured as "accurate." Neither the American Land Title Association ("ALTA") title policy forms of 1992 nor the new 2006 forms contain any such "insuring provision."[2] As the commentaries to the new 2006 title policy forms make abundantly clear—if it is not in the Insuring Provisions, it is *not* insured.[3]

When a survey is "read into" a title report or title commitment, it will be found in Schedule "B" of the title report, commitment or policy. Schedule "B" is where the title insurer lists the "Exceptions," in other words, the matters that are *not* insured by the policy.

However, there is an Endorsement form that is available, at an extra charge, titled "Land Same as Survey Endorsement" that insures "that said land is the same as that delineated on the plat of a survey made by _____, designated Job No. _____. "Although this endorsement does not insure the accuracy of the survey, it insures the Assured against loss which the Assured sustains in the event that the said assurances shall prove to be incorrect. With this endorsement, the Insured is protected against loss if the survey map erroneously depicts the property described in Schedule "A" of the title policy. The author was recently consulted by a title insurer that had insured a parcel of vacant land in Connecticut, and had used a survey made by a local surveyor that showed two elaborate large stone piers at the entrance to a driveway leading into the property. Apparently those stone piers had historic significance, and the replacement value was approximately $200,000. A current survey by the adjoining property owner, which the insured later confirmed as correct, showed that the surveyor of the insured land had erroneously misplaced the insured land by over fifty feet, and that the valuable stone piers were not located on the land insured by the title policy. The title insurer declined coverage for the value of the stone piers, and stated that its insurance covered only the lands described in Schedule "A" of its policy. As a result, the policy did not insure that the stone piers were part of the insured land. The Insured was irate, but still had no recourse against the title insurer; although, he would have a cause of action against the surveyor, if the survey was made for, or guaranteed to the insured, *and* if the applicable statute of limitations for negligence or malpractice had not already expired.

There are also a number of other situations where it is important for an owner to obtain a title survey that is certified or guaranteed to the owner as correct. Are the offsets from the boundary lines correct? Are the fence lines accurately located? Is the building shown on the survey correctly located?

Some things are covered by the title insurance, such as encroachments on to neighboring property. However, there are some instances where an encumbrance can be created on title, such as when a street is incorrectly located. Another instance of a possible encumbrance on a title can be found when a violation of a restrictive covenant is not correctly depicted on the survey.

For a lucid discussion of various real estate contract provisions dealing with facts that would be disclosed by an accurate survey, the Rifkin article mentioned in the first paragraph is most enlightening.[4]

Endnotes

1. Bernard M. Rifkin, *Land Surveys and the Law of New York Real Property*, 54-7 N.Y.St. B. J. 445 (1982).
2. *See* American Land Title Association's Loan Policy (1992), http://www.alta.org/forms/loan.doc; American Land Title Association's Loan Policy (2006), http://www.alta.org/forms/loan.doc.
3. *See* American Land Title Association's Policy (2006), http://www.alta.org/forms/loan.doc (stating "[a]ny claim of loss or damage that arises out of the status of the [t]itle or by any action asserting such claim shall be restricted to this policy").
4. Rifkin, *supra* note 1.

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Tenant Buyouts

By Nancy Ann Connery

This article will review the issues that most commonly arise in connection with tenant lease buyouts. A lease buyout occurs when a landlord wishes to recapture space leased to a tenant and the tenant is willing to relinquish the space to the landlord. The landlord may want to recapture the space for its own use, to demolish the building and construct a new building, to lease the space to a desirable "credit" tenant, to convert the space to another use, or for any one of a number of other reasons. Unless the lease gives the landlord the right to terminate the tenant's lease (a desirable clause to include in any lease in a building that is in the path of redevelopment) or to relocate the tenant, the landlord will have to persuade the tenant to relinquish the space and will usually pay the tenant a significant sum to obtain the tenant's agreement. At a minimum, the tenant will negotiate for enough money to cover its estimated relocation costs. In addition, the tenant will usually negotiate for a premium. The landlord should have an idea of what it is willing to pay to terminate the tenant's lease and should fully understand the consequences if it is unable to negotiate an acceptable buyout price.

Although tenant lease buyouts are not difficult transactions, they raise a number of issues, some of which are discussed below.

I. General Considerations

Confidentiality Agreements. If a building owner is about to negotiate with a number of tenants to buy out their leases, it is critical to obtain confidentiality agreements from the tenants and their brokers. Because one brokerage firm may be engaged by more than one tenant to negotiate on its behalf, brokers (both the individual brokers and the firm) should be prohibited from obtaining information concerning other tenant negotiations from other employees and principals of the firm. They should also be prohibited from disclosing information to other employees and principals of the firm.

Transfer Taxes. With respect to New York State Real Estate Transfer Tax, a lease termination is not taxable if the tenant pays the landlord a termination fee, although a return should be filed. Reg. 575.7(d)(2); CCH Par. 59-407. However, a lease termination transaction is taxable if the landlord pays the tenant a fee for early termination of the lease. The consideration is the termination fee. Reg. 575.7(d)(2); CCH Par. 59-407. The value of the remaining rental payments are not deemed consideration. Sec. 1401(d)(iv).

Although there is no applicable regulation, New York City has adopted the same approach and treats the surrender of a lease for consideration paid by the landlord to the tenant as a transaction for which New York City Real Property Transfer Tax must be paid.

Another issue to consider is the time at which transfer taxes are payable. NYS real estate transfer taxes are payable within 15 days of delivery of the instrument effecting the conveyance. NYC Real Property Transfer Taxes are payable within 30 days of delivery of the "deed." One question is whether transfer taxes are paid when the lease termination agreement is executed or when the tenant's leasehold estate actually ends. Arguably, they are payable when the tenant's leasehold estate actually terminates and a surrender agreement is delivered, assuming a surrender agreement is required to be delivered when the tenant vacates the premises. The argument is that the termination agreement is comparable to a contract of sale and the surrender agreement is comparable to the deed. However, a case can be made that transfer taxes are payable when the lease termination agreement is executed, especially if the lease termination agreement is the only agreement executed, on the theory that the termination agreement itself is the instrument of conveyance. Clearly, if the tenant's leasehold estate is terminated as of the date a lease termination agreement is signed and the tenant remains in occupancy pursuant to a stipulation of settlement executed in connection with a holdover proceeding, it would be prudent to pay the transfer tax on execution of the termination agreement. This is because the tenant's leasehold estate ends on the date of execution of the agreement.

Income Taxes. The parties should consult their tax lawyers and accountants concerning income tax consequences of the lease termination. A lease termination fee payable by a landlord to a tenant to enable the landlord to use and occupy the space generally will be treated as capital expenditure amortized over the balance of the term of the terminated lease. However, if such a payment is made to allow the landlord to enter into a new, more favorable lease with a different tenant, the termination payment will be amortized over the term of the new lease. If such payment is made to enable the landlord to demolish the tenant's space and construct a new building, such payment will be amortized over the cost recovery period for the new improvement.[1]

A tenant entering into a buyout agreement should expect to pay income tax on the termination fee. Capital gain rates should apply if the necessary holding period has been met, and income tax rates will apply if the capital gain holding period has not been met. Some tenants structure their transactions so that the landlord pays a part of the termination fee directly to the contractors providing construction services with respect to the buildout of the tenant's new space. However, such a structure probably does not insulate the tenant from current tax liability.

The author thanks Paul Daus of Marks Paneth for his advice and assistance in preparing the foregoing discussion of income tax consequences.

Effective Termination Language. Any termination agreement must contain effective termination language. This is particularly important because a summary proceeding may be commenced to evict a tenant only if (a) the tenant has not paid rent, (b) the tenant has not paid real estate taxes payable under the lease, or (c) the lease term has terminated, in which event a holdover proceeding may be commenced. There is a plethora of cases in which courts have faced the issue of whether or not termination language created a conditional limitation that effectively terminates the lease, forming the basis for a holdover proceeding. Generally, language to the effect that the landlord "may" terminate the lease is ineffective in creating a conditional limitation. Accordingly, the termination provision should provide that, upon the specified date, the term of the lease ends as fully and completely as if such date were the date originally fixed in the lease for the end of the lease term.

Possible Termination Structures. The parties can execute a simple amendment to the lease that changes the expiration date and provides for payment of the termination fee. Alternatively, if the landlord wants greater certainty that the tenant will in fact vacate by an agreed date, the parties can execute an agreement currently terminating the lease, provide for service of a holdover petition, and concurrently enter into a stipulation settling the holdover proceeding and allowing the tenant to remain in occupancy until the agreed vacate date.

II. Issues

ISSUES	LANDLORD CONSIDERATIONS	TENANT CONSIDERATIONS
Amount of termination fee	No. 1 issue Landlord may want to structure the termination agreement so that the fee is "X" dollars as of an outside date, increases by a negotiated amount if tenant vacates earlier (subject to a cap), and decreases by a negotiated amount if tenant vacates later. The idea is to give the tenant an economic incentive to leave the premises in a timely fashion.	No. 1 issue Tenant needs to consider the costs of termination, which include transfer taxes (the tenant, as the "grantor" is the person primarily liable under the transfer tax laws for payment of transfer tax), income tax, relocation costs, and costs of entering into a new lease (including legal costs and any increase in rental values).
How is the termination fee paid?	The landlord is generally more concerned with the timing of payment of the termination fee than to whom the fee is paid. The landlord will generally be unenthusiastic about paying part of the termination fee through the grant of a rent concession because of the risk that it will tend to encourage the tenant to hold over. That concern can be overcome to a certain extent by providing for the expiration of the rent concession period by a date certain.	The tenant may request that all or part of the termination fee be paid through (a) direct payment to the tenant, (b) payment of a portion of the termination fee directly to those contractors building tenant's new space, and/or (c) the granting of a rent concession for all or part of the period that the tenant remains in occupancy of the premises after the lease termination agreement is signed. The tenant should consider the tax consequences of the grant of a rent concession.
Timing of payment of termination fee	From landlord's standpoint, the fee should be paid when the tenant delivers the "goods" and vacates the premises. If the landlord agrees to front load a part of the payment, it should consider whether to require immediate termination of the lease with institution of a holdover proceeding and execution of a stipulation of settlement. The landlord's attorney should consult with a landlord-tenant attorney with respect to such a structure.	The tenant wants to front load payment of the termination fee as much as possible because it will incur leasing expenses before it vacates the premises (payment of attorneys' fees to negotiate new lease, construction costs, first month's rent for new space, security deposit for new space, etc.). Tenant may argue that, by signing the agreement providing for early termination of the lease, it has performed its side of the bargain and therefore should receive immediate payment. The landlord's response is that it is bargaining for vacant space that is free of the tenancy.

		There are multiple solutions to the timing problem, from (a) payment of the full termination fee upon execution to (b) payment of a sufficient portion of the termination fee when the tenant signs the termination agreement and/or signs a new lease to cover the tenant's costs to (c) payment of the termination fee when the tenant vacates the premises.
Securing the landlord's obligation to pay the termination fee	The landlord will not want to secure the termination fee. An institutional owner probably will not consider securing its obligations at all. A shell company owed by a real estate developer should be prepared to find ways to secure its obligation to pay the termination fee.	The tenant needs to know that it will be paid the termination fee when it vacates the premises. Security can be achieved in a variety of ways, and the need for security depends in part on the identity of the owner entity. If the tenant is dealing with a strong institutional landlord, security for the landlord's obligation to pay the termination fee may not be much of an issue. If the landlord is a shell company or anything other than an "institutional" type of entity, an important issue for the tenant is how to ensure that it receives its termination fee. There are any number of ways to deal with the security issue, among them: 1. Landlord pays all or a substantial portion of the termination fee on signing of the termination agreement, with the balance paid into escrow immediately prior to the date tenant plans to vacate. The escrowed amount is then paid to the tenant when the tenant vacates. 2. Landlord pays all or a substantial portion of the termination fee into escrow when the tenant gives notice that it is about to sign a new lease, with delivery of the termination fee (or portion thereof) upon tenant's delivery to landlord of a copy of the executed and delivered lease, along with an affidavit that the lease is in full force and effect and is not subject to any conditions. 3. Letter of credit security (preferable to a cash escrow in case of a landlord bankruptcy). 4. Escrow of termination fee up front. However, an escrow does not necessarily protect the tenant's right to the termination fee if there is a landlord bankruptcy, and escrow of the full termination fee may be an unattractive option for the landlord. 5. Personal guaranty

Conditions to payment of termination fee	Conditions to payment: –Tenant actually vacates –No occupancies, subtenants, etc. –Personal property removed –Premises left in condition required by lease –All tenant representations true and accurate	Are conditions to payment too onerous? Are conditions clear, defined, and objective? Should failure to meet the specified conditions justify nonpayment of the termination fee or merely entitle the landlord to damages? If some of the conditions aren't met, should the landlord be entitled to withhold the entire termination fee or only a portion of the fee?
Who pays transfer tax?	Tenant should pay. By statute, the grantor has primary liability and the grantee secondary liability. In a tenant buyout, the grantor is the tenant. Accordingly, absent an express provision to the contrary, the tenant has primary liability for transfer taxes. It is best to include an express allocation of responsibility in the agreement because, among other things, tenants are not always aware of transfer tax liability.	Landlord should pay. Tenant will argue it wants the termination fee to be "net."
Date by which tenant must vacate	Landlord wants vacant possession of space as soon as possible. Landlord seeks certainty. Landlord wants an outside date of delivery of possession, and to cap any *force-majeure* rights of extension. Landlord may have its own construction deadlines. A delay by the tenant in vacating can significantly increase the landlord's cost of construction. If landlord has paid in advance all or a part of the termination fee, it will need an absolute outside date.	Tenant wants as much flexibility as possible as to the vacate date. Tenant wants indefinite f*orce-majeure* extensions of the vacate date. Tenant's risk is that it cannot, for reasons that may be beyond its control, vacate by a specific date; and it will be out of business if it is evicted and the new space is not yet ready. Tenant wants an extension of time if its departure from the premises is delayed by lack of availability of the freight elevator. Tenant doesn't want to lose the termination fee (having spent a significant amount to lease other space) if it misses the deadline but should be willing to agree to an adjustment of the termination fee if it misses the agreed vacate date (unless the tenant misses the date because of a *force-majeure* event).
Structuring the transaction	Landlord may require immediate termination of the lease, with execution of a court-ordered stipulation that allows the tenant to remain in possession of the premises for an agreed period of time—especially if landlord is making any up-front payments to the tenant. Landlord is likely to insist on immediate termination if it has prepaid all or part of the termination fee.	Tenant's true concern should be when it has to vacate, rather than when the lease terminates. A legal structure in which the lease is currently terminated but the tenant is permitted to remain in possession under the terms of a stipulation is not necessarily a problem, although it does limit the tenant's ability to hold over if it finds itself unable to timely vacate.

	Immediate termination coupled with execution of a court-ordered stipulation often generates a significant amount of negotiation and significantly increases attorneys' fees. Landlords should bear in mind that once the tenant has signed the new lease, it will have a very strong incentive to vacate the premises as soon as possible, in order to avoid double liability for rent (to both its old landlord and its new landlord). Accordingly, a possible compromise is to provide for partial payment of the termination fee when the new lease is signed, with the balance payable when the premises are surrendered.	Tenants are frequently concerned about being boxed into a court-ordered time frame that is too rigid and that may prove too short in light of unanticipated circumstances (e.g., casualty destroys new premises before tenant takes occupancy, construction is delayed by strikes, terrorist attack).
Tenant's security deposit	Landlord will prefer to hold the security deposit until the tenant vacates. If landlord agrees to return the tenant's security deposit, the agreement should allow the landlord to offset any rent arrears against payment of the termination fee, and the landlord should be sure it holds back enough of the termination fee to assure payment of possible arrears.	Tenant should ask for the immediate return of the security under its existing lease since it will have to provide its new landlord with security.
Description of premises to be vacated	Landlord's attorney should confirm what spaces are occupied by tenant. Although the lease may specify what floor the tenant occupies, the tenant may have entered into side agreements (written or oral) under which it occupies other space in the building (e.g., roof antenna, basement storage space). Accordingly, tenant should be required to vacate all space leased, used, and/or occupied by it.	
Scope of representations	Landlord wants broad representations: –No lease modifications –No subtenants –No assignment –No liens (judgment liens, etc.) encumbering the lease –No violations –No mechanic's liens –No occupants other than tenant Landlord will want tenant's representations to be true at time of execution as well as at date termination fee is paid.	Concern about scope of representations: –Are representations true? –Should an immaterial misrepresentation stop payment of the termination fee? –Should representations survive and, if so, for how long?

	Landlord will want representations to survive without limit. Survival is appropriate since landlord will not obtain title insurance, and liens encumbering the tenant's leasehold estate could arguably affect the landlord's ability to obtain a "clean" termination of lease.	
Condition of premises at end of lease and departure from premises	Landlord wants space vacated in accordance with applicable lease provisions. Landlord needs to consider whether the tenant has made any special alterations that it wants tenant to remove.	Tenant should consider the following surrender issues: –Should tenant's restoration obligations be waived? –Should the premises be broom clean if the landlord is demolishing the building? –Should the tenant have the right (but not the obligation) to leave behind personal property? –Tenant will generally want the right to use the freight elevator for free, including on weekends. –Tenant may ask for an extension of the vacate date if tenant is delayed by reason of unavailability of freight elevator.
Casualty and condemnation	If a casualty or condemnation occurs that would have entitled landlord to terminate the lease, no termination fee should be due and payable.	Tenant will argue that the landlord is paying for tenant's agreement to vacate early. In addition, tenant's economic decisions about its new premises (such as cost of buildout) are made in reliance on the expectation that tenant will receive the negotiated termination fee.

Endnote

1. Although such payments may be currently deductible if made to cancel a lease that would have expired by its terms during the year of payment.

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Protecting Boards of Assessment Review When Dealing with Unresponsive Property Owners Who Challenge Their Assessments

By Marc W. Brown

I. Introduction

Every year, thousands of real property tax assessment complaints are filed by commercial and residential property owners across New York, claiming that their assessments are unequal, excessive, unlawful, or misclassified.[1] Quite often, these complaints are submitted without any information to support the requested relief. In order to properly examine these complaints, the Board of Assessment Review (the "Board") has the right to request reasonable supporting documentation.[2] Frequently, however, the requested information is not provided in a timely manner or not provided at all. Under these circumstances, the Board is justified in dismissing the landowner's complaint.

Several recent decisions by the New York State Supreme Court, Appellate Division, Fourth Department, have reiterated the Boards' rights to request supporting information and to dismiss complaints where such information is not supplied. Moreover, the Appellate Division found that where Boards properly dismiss complaints when the requested information is not supplied, landowners are precluded from obtaining subsequent Real Property Tax Law (RPTL) Article 7 or Small Claims Assessment Review (SCAR) relief. The Appellate Division interpreted the property owners' unresponsiveness to be "willful" and granted the Town of Amherst's (the "Town") motions to dismiss the owners' Article 7 petition, while upholding the SCAR hearing officer's refusal to hear the complaints.[3]

II. Background

A. *Gelber* and *GLR*

On April 15, 2005 (*Gelber*) and May 13, 2005 (*GLR*), petitioners retained counsel to represent them before the Amherst Board. On June 3, 2005, petitioners filed complaints challenging their 2005–2006 assessments, alleging that the assessments on their commercial properties were excessive and should be reduced. Petitioners either checked the "[a]dditional supporting documentation" section of the complaint and attached a self-serving document that provided insignificant information regarding their property or did not provide any documentation whatsoever to support their claims.

"[T]he Appellate Division found that where Boards properly dismiss complaints when the requested information is not supplied, landowners are precluded from obtaining subsequent Real Property Tax Law Article 7 or Small Claims Assessment Review relief."

On June 7, 2005, petitioners' counsel appeared at a hearing before the Amherst Board but did not provide additional information to support petitioners' claimed relief. Petitioners' counsel was informed that unless the Board received relevant, property-specific supporting information, it could not adequately review petitioners' assessment challenges. The Board requested, in writing, that petitioners provide additional information by June 14, 2005, and informed petitioners' counsel that a "willful neglect or refusal to provide that information requested will result in the dismissal of [their] complaint[s]." Petitioners' counsel *did not object* to any of the information requested by the Board.

By June 14, 2005, the Board had not received the requested information from petitioners. The Board did, however, receive a letter from petitioners' counsel stating that he had not received the information but would forward it to the Board upon receipt. Notably, petitioners' counsel did not ask the Board for an extension of time within which to provide the requested information. On June 27, 2005, when the Board had still not received any of the requested information, it dismissed petitioners' complaints.

Despite the Board's dismissal of their complaints, petitioners commenced RPTL Article 7 proceedings claiming that their properties were overassessed. After answering the petitions, the Town moved to dismiss the complaints based on petitioners' failure to exhaust their administrative remedies by not providing the Board-requested information. The Supreme Court denied the Town's motions, finding that Board's requests and time requirements were not in accordance with the underlying purpose of the RPTL, and that petitioners' noncompliance did not frustrate the Board's administrative review process.

B. *Sterben*

Between March 11, 2005, and May 14, 2005, five residential property owners retained counsel to challenge their assessments before the Amherst Board. On June 3, 2005, petitioners filed complaints challenging their 2005–2006 assessments as excessive. Petitioners checked the "[a]dditional supporting documentation" section of their complaints and attached a one-page list with prior and tentative assessments and recent "comparable sales" to support their complaints.

On June 7, 2005, petitioners' counsel appeared before the Board and was informed that the Board needed additional information in order to properly evaluate the complaints. The Board requested, in writing, that petitioners provide such information by June 14, 2005. Petitioners' counsel did not object to the information requested by the Board, and even *countersigned* the request form, which stated that a "willful neglect or refusal to provide that information requested will result in the dismissal of [their] complaint[s]."

On June 14, 2005, the Board received a letter from petitioners' counsel stating, "[w]e have attempted, within the 5 business days allotted, to obtain the additional information you requested, supplemental to the comparable sales we provided with each of our residential Grievances. Unfortunately, none of that information is immediately available." Again, petitioners' counsel did not ask the Board for an extension to provide the requested information or attempt to narrow the request. In late June 2005, when the Board had not received any of the requested information from petitioners, it dismissed petitioners' complaints.

Petitioners then filed SCAR petitions challenging their assessments, and on August 30 and 31, 2005, appeared for hearings before a State of New York (the "State") SCAR hearing officer. After hearing petitioners' counsel and a Board representative who confirmed that petitioners' complaints were dismissed by the Board, the hearing officer found that RPTL § 525 precluded petitioners from bringing the SCAR proceedings and dismissed them.

Petitioners subsequently commenced a CPLR Article 78 proceeding to determine whether the hearing officer's decisions were made in violation of a lawful procedure, were affected by an error of law, were arbitrary and capricious, or constituted an abuse of discretion. The Town answered the petitions and, together with the State, moved to dismiss the proceeding because the hearing officer properly refused to hear petitioners' SCAR complaints. The Supreme Court refused to dismiss the proceeding and granted petitioners' requests for SCAR hearings *de novo* with respect to their assessment challenges and instructed the State to issue written findings after reviewing the evidence submitted at the hearings.

III. The Board's Powers When Reviewing Tax Assessment Complaints

Under RPTL § 525(2)(a), Boards are granted specific powers in connection with their review of tax assessment complaints. If a Board is not satisfied that it can make a reasonable determination by merely reviewing the written complaint, it is empowered to require the owner to appear before it "and to produce any papers relating to such assessment."[4]

> If the person whose real property is assessed . . . shall *willfully neglect* or refuse to attend and be so examined, or to answer any question put to him or her relevant to the complaint or assessment, such person shall *not* be entitled to any reduction of the assessment subject to the complaint.[5]

It is for the Board, *not the property owner*, "to determine what information is material to the proceeding" and the "boundaries of the inquiry are broad."[6] Consequently, a property owner's failure to provide records or other information requested by the Board is considered to be willful neglect that may result in the dismissal of their complaint.[7]

The Board's review of assessment complaints is part of the administrative review process.[8]

> Such process cannot be *frustrated* or avoided at the will of the taxpayer by either nonparticipation or by *failure or refusal intentionally to give the information desired by the reviewing authority*. Later reviews of the proceedings by courts are severely hampered if not totally prejudiced by any willful neglect or refusal by the petitioner to *fully participate* in the administrative review. . . . The administrative procedures for tax assessment review are designed to insure the accuracy of the assessment, and not designed to be an adversary proceeding.[9]

The Board's administrative review is not intended to be an idle exercise, but rather should address claimed inequities and adjust them amicably.[10] It is imperative, therefore, that sufficient facts regarding the owner's complaint be presented to the Board in order for realistic adjustments to be made.[11] Moreover, when requesting a reduction in their assessment, the owner may not refuse to supply the additional information requested by the Board.[12]

Accordingly, an owner's failure to respond to the Board's request for information amounts to a frustration of the review process and constitutes a failure to exhaust one's administrative remedies.[13] In addition, when an owner evinces a desire to frustrate the review process, its actions are deemed "willful" under RPTL § 525(2)(a) and may result in the dismissal of the owner's subsequent Article 7 petition.[14] With regard to SCAR proceedings, "[w]hen a Hearing Officer's determination [under title 1-A of RPTL Article 7] is challenged, the court's role is limited to ascertaining whether the determination has a rational basis."[15]

In *Gelber* and *GLR*, the Appellate Division reversed the Supreme Court's Orders and dismissed the petitions because petitioners did not provide the information the Board requested, did not contend that the

information requested was irrelevant, and did not seek an extension of time to submit the information.[16] The Appellate Division found that "[t]he Board dismissed the complaints based on its determination that petitioners' failure to comply with the Board's legitimate and reasonable request for information was willful."[17]

In *Sterben*, the Appellate Division held that the Supreme Court erred in granting petitioners' request for a *de novo* SCAR hearing and found that the Supreme Court should have dismissed the petitions in their entirety.[18] The Appellate Division ruled that the hearing officer's determinations with respect to each petitioner had a rational basis "inasmuch as the record supports the determinations of the Board that petitioners' failure to comply with the request for documentation was willful."[19]

IV. The Impact of *Gelber*, *GLR*, and *Sterben*

Based on the decisions in *Gelber*, *GLR*, and *Sterben*, property owners who file tax assessment complaints without supporting documentation, and who fail to respond to requests made by Boards for additional documentation in support of their complaints, risk not only having their assessment complaints dismissed but also being precluded from RPTL Article 7 or SCAR relief. Unresponsive owners and their counsel should be mindful of the requirements of RPTL § 525(2)(a) and timely provide requested supporting information to the Board. The Appellate Division clearly confirmed the Board's right to request the information it needs to evaluate real property tax assessment complaints and the property owner's obligation to provide such information to the Board. These recent decisions emphasize the legitimacy of Boards adopting a uniform policy of requesting and receiving supporting information and dismissing complaints when that information is not forthcoming.

"Unresponsive owners and their counsel should be mindful of the requirements of RPTL § 525(2)(a) and timely provide requested supporting information to the Board."

Endnotes

1. *See* N.Y. Real Prop. Tax Law § 706(1) (McKinney 2006).
2. *See* N.Y. Real Prop. Tax Law § 525(2)(a) (McKinney 2007).
3. *See Sterben v. Bd. of Assessment Review of Town of Amherst*, 41 A.D.3d 1214, 838 N.Y.S.2d 279 (4th Dept. 2007); *GLR Holdings v. Williams*, 41 A.D.3d 1209, 836 N.Y.S.2d 473 (4th Dept. 2007); *Gelber Enters. v. Williams*, 41 A.D.3d 1207, 838 N.Y.S.2d 330 (4th Dept. 2007).
4. N.Y. Real Prop. Tax Law § 525(2)(a) (McKinney 2007).
5. *Id.* (emphasis added).
6. *Grossman v. Bd. of Trs. of Vill. of Geneseo*, 44 A.D.2d 259, 263, 354 N.Y.S.2d 188, 194 (4th Dept. 1974).
7. *Parkway Plaza v. Assessor of City of Canandaigua*, 269 A.D.2d 811, 812, 703 N.Y.S.2d 790, 791 (4th Dept. 2000); *Sarsfield v. Bd. of Assessors of Town of Islip*, 240 A.D.2d 506, 659 N.Y.S.2d 773 (2d Dept. 1997).
8. *Albion Mobile Homes, Inc. v. Morrissey*, 112 Misc. 2d 810, 813, 447 N.Y.S.2d 804, 807 (Sup. Ct., Orleans Co. 1981).
9. *Id.* (emphasis added.)
10. *Sterling Estates v. Board of Assessors of the County of Nassau*, 66 N.Y.2d 122, 125, 495 N.Y.S.2d 328, 329, 485 N.E.2d 993, 994 (1985).
11. *Id.*
12. *See Jakubovitz v. Dworschak*, 67 A.D.2d 977, 978, 413 N.Y.S.2d 444, 445 (2d Dep't 1979).
13. *See Sterling Estates*, 66 N.Y.2d at 125, 495 N.Y.S.2d at 329, 485 N.E.2d at 994; *Albion*, 112 Misc. 2d at 812–13, 447 N.Y.S.2d at 806–07.
14. *See Fifth Ave. Off. Ctr. Co. v. City of Mount Vernon*, 89 N.Y.2d 735, 741-42, 658 N.Y.S.2d 217, 220, 680 N.E.2d 590, 593 (1997); *Town of Babylon v. Perry*, 164 Misc. 2d 934, 935, 626 N.Y.S.2d 654, 655 (Sup. Ct., Suffolk Co. 1995), *aff'd*, 230 A.D.2d 802, 803, 646 N.Y.S.2d 623 (2d Dep't 1996), *leave denied*, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617 (1997).
15. *Meola v. Assessor of Town of Colonie*, 207 A.D.2d 593, 594, 615 N.Y.S.2d 506, 507 (3d Dep't 1994), *lv. denied*, 84 N.Y.2d 812, 622 N.Y.S.2d 915, 647 N.E.2d 121 (1995). *See McNamara v. Board of Assessors of Town of Smithtown*, 272 A.D.2d 617, 618, 709 N.Y.S.2d 821, 822 (2d Dep't 2000).
16. *Gelber*, 41 A.D.3d at 1208, 838 N.Y.S.2d at 332.
17. *Id.*
18. *Sterben*, 41 A.D.3d at 1215; 838 N.Y.S.2d at 280.
19. *Id.*

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Another Foreclosure Notice

By Steven J. Baum

Signed into law by the Governor on August 1, 2007 but still not well known, is Chapter 458 of the Laws of New York 2007. Effective immediately (and thus creating voluminous issues for foreclosure attorneys, judge's clerks and intake clerks across the state), the statute amends the Real Property Actions and Proceedings Law. It also amends subparagraph (iii) of paragraph 3 of subdivision (g) of section 3215 of the Civil Practice Law and Rules.

RPAPL § 1320 is brand new and adds yet another notice to foreclosure actions. In case you do not follow foreclosure notice legislation, your attention is called to the Equity Theft Prevention Act (Chapter 308 of the laws of 2006). The Equity Theft Act already requires a notice be served on colored paper on the homeowner along with the summons and complaint in foreclosure. RPAPL § 1320 requires a notice be included with the summons in foreclosure where the residential property does not contain more than three units (not always ascertainable these days). Apparently the legislature felt one notice was not enough

The new notice must be in boldface type. It must read as follows:

NOTICE
YOU ARE IN DANGER OF LOSING YOUR HOME
If you do not respond to this summons and complaint by serving a copy of the answer on the attorney for the mortgage company who filed this foreclosure proceeding against you and filing the answer with the court, a default judgment may be entered and you can lose your home.
Speak to an attorney or go to the court where your case is pending for further information on how to answer the summons and protect your property.
Sending a payment to your mortgage company will not stop this foreclosure action.
YOU MUST RESPOND BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE PLAINTIFF (MORTGAGE COMPANY) AND FILING THE ANSWER WITH THE COURT.

Despite comments by the Real Property Law Section of the New York State Bar Association submitted to the legislature along with a proposed revised notice, the law was passed in its original form.

"RPAPL § 1320 is brand new and adds yet another notice to foreclosure actions."

The notice assumes that answering the summons is the best way to proceed. However, contacting the mortgage servicer to work out the loan might be a better or alternative. Certainly the notice does not state that filing an answer may increase litigation costs, which can be charged to the loan balance in most cases. Directing a homeowner to answer the proceeding without consulting an attorney may also have detrimental effects.

The notice may confuse homeowners because it states they should speak to an attorney *or* go to the court where their case is pending for further information on how to answer the summons. Court personnel cannot give legal advice. Are employees of the court system in New York prepared for the barrage of questions that will be posed to them?

The amendment to CPLR 3215(g)(3)(iii) requires a copy of the summons be mailed to the defendant at least twenty days before entry of judgment. Before the amendment, actions affecting real property were excluded from this requirement. Undoubtedly this new requirement may set the stage for further litigation in the foreclosure arena.

While the Equity Theft Act requires a separate notice be served on the homeowner, the new RPAPL § 1320 requires a notice be made part of the summons—thus resulting in every defendant, including lienors, occupants and judgment creditors receiving it. The Equity Theft notice advises a homeowner there are "government agencies, legal aid entities and other nonprofit organizations that you may contact for information about foreclosure while you are working with your lender during this process." The Equity Theft notice states the telephone number for the New York State Banking Department along with its Web site address.

What's a homeowner in foreclosure to do?

They receive a separate notice on colored paper advising them of various state agencies that can offer help. They also receive a different notice (on the same type of paper the summons and complaint is printed on) attached to the summons telling them they have to answer the complaint.

One notice says to call the New York State Banking Department; the other notice says to see an attorney or visit the courthouse.

One notice does not tell them to answer the complaint; yet the other one does.

The Equity Theft notice tells them certain organizations can help while they are working with their lender. The 1320 notice doesn't say anything about calling their lender.

The homeowner's lender may tell him or her to send payments to stop the foreclosure (known as "reinstatement"), while the 1320 notice tells them sending a payment to their mortgage company will not stop the foreclosure.

"The person intended to be protected by these laws may end up the most confused and possibly hurt the most."

In short, there appears to be little or no coordination among legislators, the judiciary and the Bar Association. Each seems to have its own opinion about what is right for a home-owner facing foreclosure. The result is legislation without regard to the meaning or effect of prior legislation or the important opinions of other professionals. The person intended to be protected by these laws may end up the most confused and possibly hurt the most.

Steven J. Baum, Steven J. Baum, P.C.

Detailed Chart Comparing Provisions of Current Bankruptcy Bills Dealing with Modification of Home Mortgages, as of October 17, 2007

Prepared by Mark S. Scarberry
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Robert M. Zinman, Scholar in Residence, American Bankruptcy Institute

Due to a publishing error, the full chart was not included in this issue. For your convenience, we have included a revised version of the chart dated 12/13/07 in this web version of the *Journal*.

Bergman on Mortgage Foreclosures
Notice of Appearance—When the Borrower Is a Faker

By Bruce J. Bergman

Although loans to less creditworthy borrowers (in mortgage industry parlance, D paper) expose lenders and servicers to more problems than loans to borrowers with good credit (A paper), most mortgage holders are certainly familiar with those borrowers who use every trick and technique to delay a foreclosure action so they can live rent free at the property for untold months or years. There is assuredly no limit to the creativity of wily borrowers in this regard.

Every now and again, though, the courts see through the artifice and slam the sham tactics. A recent case is a good example of that, in the context of the obligations that a notice of appearance imposes [*36 North Water, Inc. v. Mark Caliper, Inc.*, 295 A.D.2d 499, 744 N.Y.S.2d 454 (2d Dep't 2002)].

To explain, when in New York defendants are served with the summons and complaint, they have a number of choices as to responding. They may default or answer or submit a notice of appearance and waiver or a notice of appearance.[1] If an answer is interposed and then stricken upon a motion for summary judgment (which is typical in a foreclosure case), or when a notice of appearance is submitted, that party remains entitled to notice of all subsequent proceedings. That means, for example, that when a foreclosing plaintiff applies for a judgment of foreclosure and sale, notice of that must be given to the defendant who was so entitled.

What happens, then, if a foreclosing plaintiff's counsel somehow errs and does not send that notice of motion to the defendant? (For any number of reasons, it *can* happen.) Does this violation of the rules cause an otherwise valid foreclosure sale to be vacated with all the time and costs that foists upon a lender or servicer? (Defaulting borrowers will not hesitate to launch such an assault.) Well, of course, it could, but it really depends upon the circumstances—which is what the noted case was all about.

> *"[W]hen a foreclosing plaintiff applies for a judgment of foreclosure and sale, notice of that must be given to the defendant who was so entitled."*

The key element this case reaffirmed is that failure to provide notice of application (for judgment, for example) is not necessarily fatal *unless* that omission prejudiced the defendant. In this case, although it was true that no notice of the motion for judgment was given to the defendant, the defendant was nevertheless fully aware of all the proceedings because its attorneys were later served with the judgment when it issued, the referee's report, and the notice of sale. Indeed, this defendant attacked the judgment on a number of occasions (so he obviously knew about it) and even attended the foreclosure sale!

How could this defendant claim it was hurt merely by not receiving notice of application for the judgment when it knew everything that happened thereafter? Of course it made no sense, and clearly this party suffered no damage by not having received that notice. On that basis, the court treated the miscue as meaningless, and the foreclosure sale survived the hostilities. This time, form did not prevail over substance. We don't suggest that courts are so regularly sympathetic to the position of foreclosing plaintiffs, but it is heartening to observe that borrowers' trickery does not always succeed.

Endnote

1. The subject of how to respond to a complaint in a mortgage foreclosure case and the consequences of each approach is reviewed at length at 2 *Bergman on New York Mortgage Foreclosures*, Chap. 19, Matthew Bender & Co., Inc. (rev. 2004).

Mr. Bergman, author of the three-volume treatise *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a Partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

The Real Property Law Section Has a Blog

The Real Property Law Section has a significant presence on the Bar Association's Website. At http://www.nysba.org/realprop Section Members can find, among other items of interest, Minutes of the Section's Executive Committee, a list of the Section's Committees and their members, prior issues of the *N.Y. Real Property Law Journal*, case summaries under Loislaw Watch, downloadable forms, and the status of pending legislation.

Since May of 2005, the Section has had an interactive e-mail listserv, the real-property-forum, through which Members have obtained advice and information on various real estate related issues. There is significant participation (approximately 2,300 members subscribe to the forum), and responses to questions posed on the listserv are very informative. It is anticipated that the forum will continue to be an important part of the Section.

As technology advances, however, the needs of the Section and its members have changed. In June of 2007, the Real Property Section, joining a number of other NYSBA Sections and at the direction of Karl Holtzchue, current Section Chairperson, started its Real Property Law Section Blog. What is a Blog?

According to Wikopedia: "A blog (a portmanteau of web log) is a website . . . (to) provide commentary or news on a particular subject such as food, politics, or local news; some function as more personal online diaries. . ."

A Section Member can access the Real Property Section Blog at http://www.nysbar.com/Blogs/RPLS. The RPLS Blog will be used in place of the rpannounce e-mail list.

The BLOG will include announcements of committee meetings, recent case summaries, articles, and any other material appropriate for the Section authored by its members. While there is no standard format, material being posted should be concise and to the point, and include a caption. Material for the Blog is to be e-mailed to Michael Berey, the Section Webmeister, at mberey@firstam.com.

The first item posted to the Blog was by Steven Baum, a Member of the Section's Executive Committee, on the recent decision of the Appellate Division, Second Department, on "MERS Held to Have Standing to Foreclose." Other postings, as of the date of the preparation of this article, are "The Purchaser Hasn't a Ghost of a Chance Under Case Law or the PCDA" by Karl Holtzchue, "Contracts of Sale-Change in Zoning," "Rockland County Recordings," "Contract Closing Date and Time of the Essence," "NYC Real Property Tax Rates for 2007-2008," "Mortgage Recording Tax—Columbia and Sullivan Counties," and "Mamaroneck, Westchester County—Discharge Compliance Certificates."

If a Member wishes to comment on any item that is on the Blog, he or she needs only to click the "Comment" button at the end of the posting. Note that comments to each NYSBA Blog are moderated by the NYSBA Blog Administrator to prevent the posting of objectionable messages known as "splog" or "Blog spam," to limit the posting of mere chatter and to restrict a comment to the topic of the item to which the response is being made. The Blog Administrator will post comments to postings several times a day.

Frequently Asked Questions

The following Frequently Asked Questions are from NYSBA with modifications.

What is a Blog?

A Blog; (a diminutive of Web log) is a Web site where entries are written in chronological order and displayed in reverse chronological order. Blogs provide commentary or news on a particular subject which, for the Real Property Law Section Blog will include specific topics of interest to Section members.

What is the difference between a Blog and a forum (listserve)?

A Blog is Web-based and provides a means of publishing short articles and accepting commentary. A forum, also known as a listserv, is e-mail based and provides a means for one member of the group to contact all the other members of the group at the same time. Responses to the initial message also go to all members. NYSBA Forums provide a Web-based archive where the discussion is organized into threads (topics). Forums are available only to members of a defined group. Blogs are available to be read by all with Internet access and a desire to learn more about the topic.

I get so much e-mail. How can I best manage that volume and still know what is going on?

For many people the volume of e-mail received is overwhelming. Members of Forums can choose to receive messages in a digest format so they aren't distracted by multiple e-mails. A Blog User can bookmark a Blog in his or her Web browser and check in as time allows or the User can sign up for an RSS feed. An RSS feed requires an RSS (really simple syndication) reader; many are available free or are a part of an Internet browser. When a new Blog post is made those who have signed up for the RSS feed receive a notification and open the RSS reader to read and respond to the new Blog post. This is a newer technology and may not be for everyone but for those with an interest in using

RSS it is available for NYSBA Blogs. You may wish to discuss this with your office's IT professional.

How can I find a message I saw on the Blog without scrolling long pages?

NYSBA Blogs offer automatic archives by month and certain Blogs, like the Real Property Law Section Blog, provide categories for easy sorting. Click on the category of interest to see all the Blog posts related to that topic. Click on a listed month (i.e., June 2007) to see all the posts for that month. You can also find cross-referenced posts by clicking the tags at the bottom of a post to see other posts specifically related to the one you are reading.

I made a Blog comment and it didn't show up. What's the hold up?

NYSBA Blogs welcome comments but all comments on all NYSBA Blogs are moderated by a real person to avoid spam posts and other irritating clutter. If you feel your comment was unfairly rejected, etc. please contact only technical support, the telephone number is listed below.

What if I have a technical problem?

Contact the NYSBA at (518) 463-3200 and ask to speak to someone about Blogs. Or e-mail Webmaster@nysba.org and put Blogs in the subject line.

In conclusion, the Real Property Section has made great strides in the use of technology to benefit its membership. It is hoped that all Members regularly participate in the forum and access the Blog for current information.

Michael Berey
Blogmeister

Michael Berey is General Counsel, First American Title Insurance Company of New York.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Section Committees & Chairs

The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.

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For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

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