NEW YORK STATE BAR ASSOCIATION

JULY/AUGUST 2000 | VOL. 72 | NO. 6

Journal

LAWSUITS ON THE LINKS: LIABILITY FOR STRAY SHOTS

Inside:

Editorial Offices
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

Advertising Representative
Network Publications
Sheri Fuller
10155 York Road, Suite 205
Crestridge Corporate Center
Hunt Valley, MD 21030
(410) 628-5760
e-mail: sfuller@networkpub.com

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(518) 463-3200
e-mail: mis@nysba.org

ON THE WORLD WIDE WEB:
http://www.nysba.org

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Note to Readers

Effective with this issue, the last page will be devoted to one of the columns that are part of the *Journal* tradition. The list of Association officers and members of the House of Delegates will be moved inside the magazine, usually to page 62.

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On The Cover

Louis P. DiLorenzo of Bond, Schoeneck & King in Syracuse, a member of the *Journal*'s Board of Editors, tees off on the Leatherstocking Golf Course at the tournament held during the June House of Delegates Meeting in Cooperstown.

Photograph by Colleen Brescia *Cover Design by Lori Herzing*

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $12. Periodical postage paid at Albany, NY with additional entry Endicott, NY. POSTMASTER: Send address changes to: One Elk Street, Albany, NY 12207.

President's Message

PAUL MICHAEL HASSETT

A Counsellor's Role

One of the rites of passage for a bar association president-elect is attendance at the Bar Leadership Institute, an intensive course in bar association administration presented by the Division for Bar Services of the ABA in Chicago. I had been to the BLI some years ago as president-elect of the Bar Association of Erie County and had looked forward to the return trip. This time, however, my attendance was interrupted for a sad responsibility: I had to go from Chicago to New York to attend a funeral. My cousin, William D. Hassett, had died unexpectedly, if not suddenly, at the young age of 63. Many members of our Association may know of Bill because of his service as commissioner of commerce and chairman of the Urban Development Corporation during the administration of Governor Hugh Carey.

During that very early morning flight from O'Hare to LaGuardia, I reflected at length on my long relationship with Bill. I was, of course, his cousin, but in retrospect that was least definitive aspect of our relationship. I had been his attorney for many years, and his extensive and sometimes creative business ventures were a large part of my continuing education as a lawyer. Bill's business career took me down paths I would not otherwise have traveled, and the knowledge thus gained contributed significantly to my professional experience. Most importantly, however, I was his counsel. I reflected that morning on the many times when I would answer the phone and hear his familiar voice saying: "Listen . . ." followed by a description of some problem or possibility or just an idea that had popped into his head and that he wanted me to analyze. "Just think about it," he'd say, "and we'll talk more next week."

Bill was not, of course, the only client with whom I had that kind of relationship, but his untimely death forced me to think about what was significant in my representation of him. I was struck by that singular role. On the wall of my office is my Admission Certificate to the Supreme Court for the Fourth Judicial Department, dated almost 35 years ago and it says that I was "Admitted and Licensed to practice as an Attorney and Counsellor." The role of counsellor is perhaps the most significant aspect of the general practice of law. It is in the continuing relationship with a client, whether an individual or an entity, that an attorney's accumulated knowledge and experience become the basis for his or her importance to the client and participation in the client's personal and business affairs. Although those who concentrate in litigation or transactional practice have their own rewards and satisfactions, I think that the continuing relationship between the general practitioners and their clients best typifies those special skills and attributes of an attorney that best define our profession.

To those who advocate the "fully-integrated" model of "multi-disciplinary practice," an entity in which lawyers and non-lawyers have equal ownership and control, the dispensation of legal services is just another kind of personal service. We are often warned that in the not too distant future it will become commonplace for clients to search for attorneys on the Internet and that other personal service providers with more competitive cost structures will compete with us for those clients. Perhaps the greatest contribution of our Association's report of the Special Committee on the Law Governing Firm Structure and Operation is in its description of the practice of law and its distinction from other professional providers of personal services. Bob McCrate and his committee have performed a monumental service, not just because it will form the future of the debate over MDP, but because it reminds us all of the special privileges and the special responsibilities of the American lawyer. The strict requirements of American legal education, superimposed on a bachelor's degree in the arts, the sciences, or business, and followed by a rigorous theoretical and practical examination, is just the beginning. Years of practice and continued study, learning from one's partners and associates as well as one's adversaries, sharpens the skills and broadens the knowledge of the practitioner in the way that pure academic study can never do. The result is not a mere provider of personal services, nor is it someone whose strengths and qualities can be outlined on a web page. On the contrary, the result is an Attorney and Counsellor at Law, one prepared to embark on a unique relationship with

Paul Michael Hassett can be reached at 1500 Liberty Building, Buffalo, N.Y. 14202.

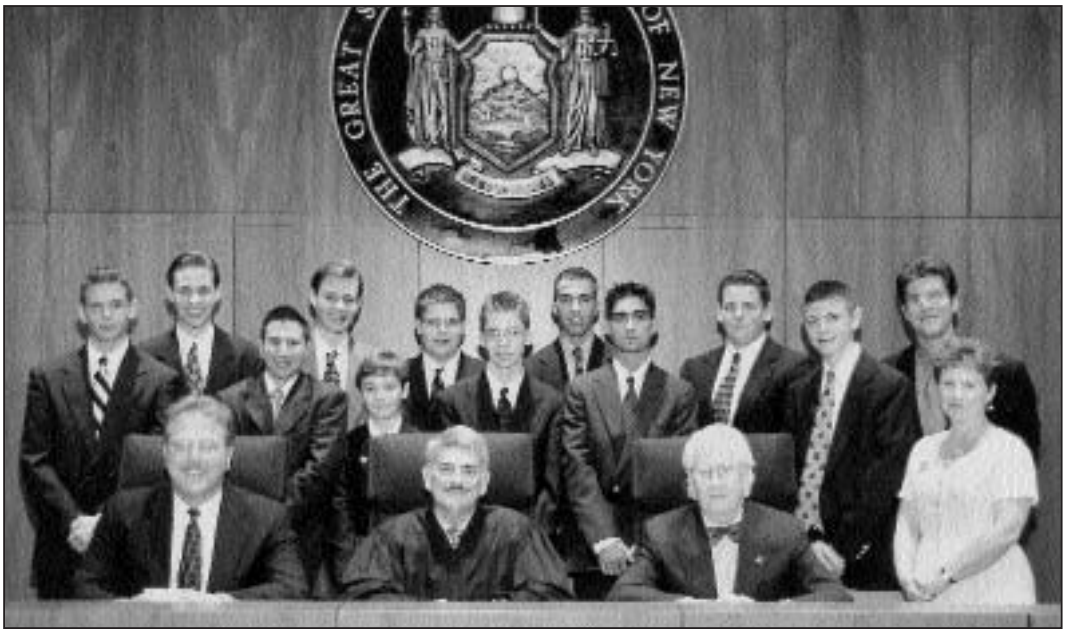
his or her clients—a relationship in which the product is not just information but knowledge, and not just advice but wisdom.

My forced reflection that morning reminded me that the nature of that relationship is what makes the private practice of law so rewarding. It is precisely because of the "core values of the profession" espoused so eloquently in the report of our Special Committee that lawyers are able to function in a role beyond that of technicians who understand statutes and regulations and are able to impart their meaning to clients. Our responsibility to protect client confidences, not only from voluntary disclosure but from compulsory disclosure by court order, is at the foundation of the personal, private, professional relationship between the general practitioner and his continuing client. The client's knowledge that the attorney cannot accept the representation of anyone whose interests are adverse to those of the client offers a level of comfort and confidence unique to that relationship. The principal tenet of the attorney-client relation—that the lawyer's advice and counsel are independent, not only of influence from any other client but even from influence of the attorney's own interests—provides a degree of security that no other professional relationship can offer.

The broad professional education of a lawyer, with its emphasis on factual analysis and problem solving against a traditional structure of reliable standards buttressed by a set of ethical principles unique to our profession, makes possible the singular relationship between client and counsel.

At the end of the journey on that morning, I went to say goodbye to Bill, deeply saddened by his passing but glad that I had been his attorney, his counsellor, and his friend.

St. Francis High Wins State and Interstate Trial Tournaments



Members of the mock trial team from St. Francis High School in Hamburg assembled for this photograph at the Justice Building in Albany with, seated left to right, James F. Lee, chair of the Committee on Citizenship Education, Richard Lee Price, an acting Supreme Court justice in Bronx County who presided at the final argument, and Paul Michael Hassett, then president-elect of the NYSBA. Standing, from left to right, are team members Jeffrey Weimer, Lucian Sikorskyj, Jason Pieczonka, Jerod Sikorskyj, Sean Maloney, Andrew Kowalewski, James DeVoy, A. J. Kelchlin, Brian Collesano Michael Gibson and Michael Grandits, attorney-advisor Kevin Szczepanski, and teacher-coach Mary V. Knab.

The team from St. Francis High School in Hamburg in Erie County defeated the team from Roslyn High School in Nassau County at the Statewide High School Mock Trial Final held May 12 in an Appellate Division courtroom at the Justice Building in Albany. The St. Francis team then went to Maryland for the Interstate Tournament, where it defeated Broadneck Senior High School of Annapolis on May 19 at the Court of Appeals in Annapolis. The fact pattern for the tournament involved a fictional high school student accused of illegally accessing and disabling an Internet filter system installed by a school district (see the March-April issue of the *Journal*). Kevin Szczepanski, the attorney-advisor to the St. Francis team, is an alumnus of the school and was a member of its mock trial team that advanced to the state semifinals in 1988.

Both the Statewide Mock Trial Tournament and the Interstate Tournament are made possible through grants from The New York Bar Foundation.

Lawsuits on the Links: Golfers Must Exercise Ordinary Care To Avoid Slices, Shanks and Hooks

By Robert D. Lang

Spurred on in part by the success and publicity surrounding Tiger Woods, more people than ever before are playing golf. The National Golf Foundation reports that, in 1999, a total of 26.4 million Americans played golf, and more than half of them played eight or more rounds per year. Thirty percent of today's golfers are under the age of 30. Some three million Americans tried golf for the first time in 1999.

This increased course traffic contributes to heightened concern over personal injuries from being struck by golf balls. The range of potential plaintiffs includes other golfers, caddies, spectators, prospective members looking at a course or club, greenkeepers, residents of adjacent properties, and pedestrians and motorists on adjacent roads. Among the potential defendants are the golfer who struck the ball, the course or club owners if a suit alleged negligent design of the golf course, and a club professional who may have been supervising the play at the time of the accident.

Given the increased number of golfers, now typically armed with technologically advanced multi-metal woods, irons promising to produce explosive power due to new revolutionary breakthroughs, and with minds crowded with diverse "swing thoughts" ranging from "grip it and rip it" (courtesy of John Daly) to the more tranquil "see the ball, be the ball" (advocated by Ty Webb of *Caddyshack*), crowded golf courses can give rise to potential liability for personal and property damage that may be the result of the seemingly inevitable off-line shot.

Some of the significant legal concerns that threaten to intrude upon an otherwise pleasant day on a public or private golf course are reviewed in the sections that follow.

Liability for Errant Shots

It is now well established in New York that the mere fact that a person is struck by a golf ball driven by a player does not constitute proof of negligence on the part of the golfer who hit the ball. A golfer is only required to exercise ordinary care for the safety of those persons reasonably within the range of danger of being struck by the ball.

Although a golfer about to hit a ball must, in the exercise of due care, give an adequate and timely warning to those who are unaware of his intentions of play and who may be endangered by that play, this duty does not extend to those persons who are not in the intended line of play. The evolution of the case law on the subject has defined the type of action that will result in liability.

Risks that golfers accept In *Trauman v. City of New York*,[1] the defendant's drive from the ninth hole at the Pelham Bay golf course sliced into the first fairway (which was parallel to the ninth fairway), striking the plaintiff. The plaintiff, who was playing golf for only the second time, was struck over the left eye, suffering serious injuries.

In dismissing the claim against the defendant, the court held that there was no duty to give an advanced warning to persons not in his line of play nor to persons on contiguous holes or fairways, because the danger to those players could not be reasonably anticipated. The court took judicial notice that "there is an abundance of authority throughout the country that participants must know that many bad shots carry the ball to the right or left of an intended line of play and that such a player would be endangered by such bad shots. This risk all golf players must accept."

Although the *Trauman* suit was filed in Supreme Court, Bronx County, Judge Streit nevertheless found it appropriate to cite an old Scottish court decision, *An-*

Robert D. Lang is a member of the firm of D'Amato & Lynch in New York City, where he is the head of the casualty defense department. He is a graduate of the City College of New York and received his J.D. from the Cornell Law School. He plays at Fresh Meadow Country Club, where his 14 handicap is sometimes questioned.

drew v. Stevenson,[2] as support for the proposition that any person who, while playing golf but not paying attention to what is going on around him, should not be entitled to recover damages for injuries suffered while playing golf. The court, finding that the plaintiff was not in the defendant's line of play, dismissed the complaint.

In *Turel v. Milberg*,[3] the plaintiff was injured while golfing at the Elmwood Country Club when he was struck by a golf ball hit by the defendant, a member of the plaintiff's own foursome. Liability was sought to be predicated on the failure of the defendant to shout "fore" before hitting away. The plaintiff conceded that, in golf, "no one can tell with certainty when he hits a ball where it is going," certainly as true a statement today as it was in 1957. Moreover, because the plaintiff admittedly saw the defendant swing, the failure of the defendant to yell "fore" was found to be irrelevant. The case was therefore dismissed.

In *Jenks v. McGranaghan*,[4] the defendant had driven a golf ball from the eighth tee of the Windsor Golf Course without warning to players standing near the ninth tee, adjacent to the eighth fairway, striking one of the players in the eye, causing blindness. Members of the defendant's threesome shouted "fore," but the plaintiffs did not hear the warning.

The court observed that "there is no fixed rule regarding the distance and angle which are considered within the foreseeable danger." Significantly, however, at the time that the defendant drove the ball, the plaintiff walked out from behind the screen to where he had previously left his golf bag. The Court of Appeals focused on this fact, pointing out that, at the time that the defendant was preparing to drive, the plaintiff was therefore still behind the protective fence. Noting that a "golfer cannot be expected to break his concentration while addressing the ball the instant before he hits to look up and see if someone has just stepped into the danger zone" (a finding which would have the full support of swing gurus Leadbetter and Harmon), the court concluded that there was therefore no duty to yell "fore" before hitting. A unanimous Court of Appeals found that the defendant did not breach a duty to the plaintiff and affirmed dismissal of the plaintiff's complaint.

In *Jackson v. Livingston Country Club*,[5] the plaintiff and his partners had hit to the green on a par three. Although the plaintiff was aware of the governing local rule providing that golfers, after reaching the green on par three holes, would permit players behind them to drive to the green, neither the plaintiff nor his partners waved the defendants on. Nevertheless, the defendant and his partner hit onto the green. The plaintiff, after the defendants' group began hitting, walked off the back of the green and about 10 feet away from it while defendant teed off. While walking, the plaintiff heard one of his partners shout a warning. The plaintiff turned his head to the left and was struck in the eye by the defendant's ball.

Photo by Colleen Brescia

Both the defendant golfer and the country club moved for summary judgment. Although the court dismissed the case against the country club, the court held there was an issue of fact for the jury to determine, namely whether the defendant golfer was negligent in driving without giving a warning at the time when the plaintiff was walking away from the green, directly in the intended line of flight of defendant's ball, and with his back to the tee.

In *Noe v. Park Country Club of Buffalo*,[6] the plaintiff and the rest of his foursome, having left the ninth green, proceeded to the tenth tee. The defendant was playing in a foursome immediately behind plaintiff's group. The defendant's ball off of the tee came to rest 240-250 yards from the ninth green, in the rough, about 5 to 6 feet from the edge of the right fairway. Waiting until the plaintiff's foursome left the ninth green, the defendant then played his ball, slicing it. When he saw that his ball was traveling to the right and towards the tenth tee, which was 25 yards from the right of the ninth green, he yelled, "fore." Although the club golf professional, who was standing behind the ninth green, heard the defendant's

warning, the plaintiff unfortunately did not and the ball struck plaintiff in the head.

The Appellate Division affirmed the decision below granting summary judgment, citing the rule that there was no duty to warn persons not in the intended line of flight. Applying that principle of law to the facts in this case, the court held that the plaintiff was close to the tenth tee at the time the ball was struck, and therefore was not in the intended line of flight of defendant's ball. Accordingly, the complaint was dismissed.

In *McDonald v. Huntington Crescent Club, Inc.*,[7] the plaintiff, while working as a caddy at the Huntington Crescent Club, was struck in the head by a golf ball driven by the defendant. The court dismissed the action against the defendant golf club, holding that, whether the club had appropriately instructed the plaintiff regarding safety on the golf course was irrelevant because the plaintiff admittedly had caddied more than 200 times on the club's golf course. The court also ruled that the golf club had no duty to construct fairway barriers to protect caddies from golf balls.

However, the court allowed the case to go forward against the golfer who struck the plaintiff, citing the rule that a golfer has a duty to give a timely warning to other persons within a foreseeable element of danger and to those in or near the intended line of flight. In *McDonald*, the caddy was standing near the intended line of flight and there was an issue of fact regarding whether the defendant golfer called out "fore" after he struck the ball. Given these questions of fact, the court denied the defendant golfer's motion for summary judgment dismissing the complaint.

In *Richardson v. Muscato*,[8] the defendant golfer missed the twelfth green with a nine-iron, hooking the ball. The approach shot struck the plaintiff, who was standing in the vicinity of the thirteenth tee. The defendant admitted that, before he took a shot, he observed people between the twelfth and thirteenth tees and that there was only about 40 feet between the twelfth green and thirteenth tee. The defendant also conceded that the plaintiff and his foursome were only 20 to 25 feet off of the twelfth green when the defendant took his approach shot. In these circumstances, the Appellate Division ruled that whether the plaintiff was in the foreseeable ambit of danger could not be determined without a trial of the facts, and therefore denied the defendant's motion for summary judgment.

In *Rabinowitz v. Roland Stafford Golf School*,[9] the defendant, while attempting to play through a group which included the plaintiff, shanked his 3-wood off the tee at a 90-degree angle, striking the plaintiff, who had been standing approximately 30 feet from the defendant. The court granted the defendant's motion for summary judgment, pointing out that the risk of mis-hit golf balls and misdirected shots is inherent in the game of golf. The court observed that, while shanking a ball at a 90-degree angle "is very unusual," "it does happen on rare occasions" and is a shot that is "clearly unintended." Since there was therefore no duty to warn the plaintiff, the court granted summary judgment dismissing the complaint.

Injuries to non-golfers Nor is it necessary to be on a golf course to suffer serious personal injury from golf.

In *Nussbaum v. Lacopo*,[10] the plaintiff was struck by a golf ball while relaxing and sitting in his patio at his home abutting the thirteenth hole of the private Plandome Country Club in Nassau County. Plaintiff suffered a brain concussion and was hospitalized for four weeks. The golfer, a 15-year-old boy, who was not a club member and was actually a trespasser, did not see the plaintiff and did not yell "fore" after hooking his ball.

While shanking a ball at a 90-degree angle "is very unusual," it "does happen on rare occasions" and is a shot that is "clearly unintended."

The plaintiff's wife conceded that no golf ball had previously struck their home, although balls were found in the bushes and fence area on plaintiff's property. Using language that suggests a social commentary, the Court of Appeals observed, "These invasions are the annoyances which must be accepted by one seeking to reside in the serenity and semi-isolation of such a pastoral setting."

The *Nussbaum* suit was filed against the country club and the golfer. The Court of Appeals held that the accident was unforeseeable because the plaintiff's property in the fairway was separated by 20 to 30 feet of dense rough and a stand of trees 45 to 60 feet in height. The court was unpersuaded that the plaintiff's rights as a homeowner had suffered an intrusion, finding this to be the result of choosing to live near a country club and observing that "one who deliberately decides to reside in the suburbs on very desirable lots adjoining golf clubs and thus receive the social benefits and other not inconsequential advantages of country club surroundings, must accept the occasional, concomitant annoyances."

The court held that the failure of defendant to yell "fore" was irrelevant because the plaintiff, living so

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close to a golf course, would necessarily hear numerous warning shouts each day and, because the warnings would normally be directed to other golfers, the plaintiff could be expected to ignore them. The court also found that the mere fact that the plaintiff hooked his ball badly did not mean that defendant was negligent. In words that have special meaning to all golfers, the court said,

> Golfers are notorious in the tedious preparation they give to a shot. They know that concentration is the key to the game. Yet even the best professional golfers cannot avoid an occasional 'hook' or 'slice.' For this reason, persons on the golf course other than players are charged with assuming the risk.

In a 4-3 decision, the court affirmed the dismissal of the plaintiff's claims.

The dissent, written by Judge Bergan, took the majority decision to task for the above-noted social overtones, remarking, "The majority opinion seems to suggest that the social benefit of adjacency to a country club requires a man to accept, without protest, being hit by a golf ball. Plaintiff owned his home and had quite as much right to occupy it safely as defendant country club had to use its land for a game. No social or other benefit has come to plaintiff because the club owned the adjacent land. The record demonstrates, on the contrary, not only a disadvantage but a safety hazard."

A golfer is not generally liable to individuals located entirely outside the boundaries of a golf course who happen to be hit by a stray or mis-hit ball.

In the leading case of *Rinaldo v. McGovern*,[11] the New York Court of Appeals dealt with the issue of whether a golfer who accidentally missed the fairway with his drive and instead sent the ball soaring off of the golf course and onto an adjacent roadway could be held liable in negligence for the resulting injury.

Both *Rinaldo* defendants, while teeing off at the eleventh hole of the Spring Valley Country Club, "sliced" their balls well off of the fairway. One of the defendants' balls struck and shattered plaintiff's car windshield, injuring plaintiff. Speaking for the Court of Appeals, Judge Titone noted wryly, "There is no evidence that either defendant was careless or guilty of anything other than making an inept shot."

The court stated the general rule, namely that a golfer preparing to drive a ball has no duty to warn persons not in the intended line of flight of another tee or fairway. Further, whatever may be the extent of a golfer's duty to other players in the immediate vicinity of a golf course, a golfer is not generally liable to individuals located entirely outside the boundaries of a golf course who happen to be hit by a stray or mis-hit ball.

Seeking to distinguish *Nussbaum*, the plaintiff pointed out that he did not choose to reside on a property abutting a golf course but was an entirely innocent traveler who happened to be driving on a road near a golf course when the defendants hit their concededly inept shots. However, the court held that this distinction was irrelevant because there was no duty to warn the travelers of a sliced ball. The court further held that, even if the golfers had yelled "fore," it was unlikely that the plaintiff, who was driving in a vehicle on a nearby roadway, would have heard, much less had an opportunity to act upon, that shouted warning.

The court also dismissed the plaintiff's claim of negligence because even an occasional "hook" or "slice" cannot be entirely avoided in golf. Without citing such controlling authorities as Nicklaus, Palmer or Watson, the unanimous Court of Appeals correctly observed that, as every golfer knows full well, "even with the utmost concentration and the tedious preparation that often accompanies a golfer's shot, there is no guarantee that the ball will be lofted onto the correct path." The court ruled that, to sustain liability, the plaintiff would have to show that the golfer failed to exercise due care by, for example, aiming so inaccurately as to unreasonably increase the risk of harm. In *Rinaldo*, there was no evidence to support that claim because the proof before the court established only that "slicing" is a common problem among both inexperienced and experienced golfers alike and that the defendant golfer, likewise, had such a problem. In these circumstances, the case was dismissed.

In *Defonce v. K.S.B. Arrowwood Realty Corp.*,[12] the plaintiff, an employee of a Westchester golf course, was injured when a golf ball hit by the defendant "sliced" away from the fairway. (The owners of the golf course itself could not be sued directly because the plaintiff's exclusive remedy against his employer was in Worker's Compensation.)

The lower court denied the defendant golfer's motion for summary judgment. The Second Department reversed, citing the rule that a golfer preparing to drive a ball has no duty to warn those persons not in the intended line of flight or on another tee or fairway. The court therefore granted summary judgment because the

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injured employee was not in the intended line of flight of the ball. Further, the court found that a golfer cannot be found to be liable merely because he "sliced" the ball. Finally, inasmuch as the plaintiff conceded that he had watched the defendant swing, the question of whether the defendant had shouted "fore" was held to be irrelevant in the facts of this case.

Conclusion

The key issue in suits based on golf course mishaps is whether the defendant golfer should have reasonably foreseen that the injured plaintiff was subject to an unreasonable risk of harm at the time the defendant attempted her/his shot. If there was such a risk, then the defendant golfer is required to give a fair warning before or immediately after the shot is taken in order to allow the plaintiff an opportunity to take necessary precaution.

However "negligent" (in a golfing sense) a slice, shank or hook may be, it is not actionable *per se* (in a legal sense). Put simply, the crux of the inquiry is whether the harm to the defendant was reasonably foreseeable, with the onus on the player taking the shot to take reasonable precaution to protect those in the intended line of flight of the ball.

As more people play golf, it will be to the benefit of all players, from novices to single-digit A players, to observe these fundamental points on safety so that we may all enjoy a competitive or recreational round of golf without a request for judicial intervention.

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1. 208 Misc. 252, 143 N.Y.S.2d 467 (Sup. Ct., Bronx Co. 1955).
2. 13 Scot. L.T. 581 (1905).
3. 10 Misc. 2d 141, 169 N.Y.S.2d 955 (1st Dep't 1957).
4. 30 N.Y.2d 475, 334 N.Y.S.2d 641 (1972).
5. 55 A.D.2d 1045, 391 N.Y.S.2d 234 (4th Dep't 1977).
6. 115 A.D.2d 230, 495 N.Y.S.2d 846 (4th Dep't 1985).
7. 152 A.D.2d 543, 543 N.Y.S.2d 155 (2d Dep't 1989).
8. 176 A.D.2d 1227, 576 N.Y.S.2d 721 (4th Dep't 1991).
9. 157 Misc. 2d 458, 596 N.Y.S.2d 991 (Sup. Ct., Delaware Co. 1993).
10. 27 N.Y.2d 311, 317 N.Y.S.2d 347 (1970).
11. 78 N.Y.2d 729, 579 N.Y.S.2d 626 (1991).
12. 207 A.D.2d 427, 615 N.Y.S.2d 87 (2d Dep't 1994).

Summing up 1999 'SUM' Decisions: Courts Provide New Guidance on Coverage Issues for Motorists

BY JONATHAN A. DACHS

The ever-changing, complex-as-ever areas of uninsured motorist ("UM"), underinsured motorist ("UIM") and supplementary uninsured motorist ("SUM") insurance coverage produced another series of significant decisions in 1999. A review of the most significant decisions follows, in keeping with a tradition begun on these pages in 1993.[1]

GENERAL ISSUES

Purchase of UM/SUM Coverage

Questions often arise in regard to whether requested SUM coverage has actually been purchased and/or whether a particular policy provides SUM coverage.

In *Santaniello v. Interboro Mutual Indemnity Insurance Co.*,[2] the court noted: "As a general rule, 'insurance agents have a common law duty to obtain requested coverage for their clients within a reasonable time or inform the client of their inability to do so' (*Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371 (1997)). An agent may be held liable for neglect in failing to procure the requested insurance." In this case, the court held that a triable issue of fact existed regarding whether the agent exercised due care to ensure that the requested increased uninsured/underinsured motorist coverage of $100,000/$300,000 had been issued. It therefore reversed the grant of summary judgment to the agent.

In *Nationwide Insurance Co. v. Miscione*,[3] the court held that the lower court had erred in finding that a Business Auto Coverage policy did not contain underinsured motorist coverage. The policy contained an endorsement for "uninsured" motorist coverage that defined an "uninsured" motor vehicle as including one "for which the sum of all liability bonds or policies at the time of the accident provides at least the amounts required by the applicable law where a covered auto is principally garaged but their limits are less than the limits of their insurance," *i.e.*, an "underinsured" motor vehicle.

"Insured Persons"

A relative of the "named insured" or spouse, while a resident of the same household as the insured or spouse, is included in the definition of an "insured" under the UM and SUM endorsements.

"Relatives" In *Hartford Ins. Co. v. Babb*,[4] the policy defined an "insured" as the policyholder or the policyholder's spouse or family member, and defined "family member" as "a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child." The court held that a "live-in friend" of the policyholder did *not* fit into the definition of an "insured" under the policy for uninsured motorists benefits when struck as a pedestrian (and not occupying the insured vehicle).[5]

In *Ortiz v. New York City Transit Authority*,[6] the court stated: "Even if the word 'spouse' could be understood to include same-sex partners living together in a spousal relationship, plaintiff fails to raise an issue of fact as to whether such was the nature of his relationship with the named insured."[7] The court also rejected the argument that the claimant was a "relative" given the sexual aspect of the relationship.

"Resident" It is well-established that an individual can have more than one residence. Whether the claimant is a resident of the insured's household, and therefore an insured under the policy, has continued to be a frequently litigated issue. As in prior years, the in-

JONATHAN A. DACHS, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer in Mineola, N.Y., is author of "Uninsured and Underinsured Motorist Protection" 4 *New York Insurance Law*, Chapter 51 (Matthew Bender & Co., Inc.), and of a chapter on UM/UIM and SUM (pre- and post-Regulation 35-D), in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). A frequent lecturer on various topics in insurance law, appellate practice and legal writing, he is a graduate of Columbia University and received his J.D. degree from New York University.

terpretation of the term "resident" varied depending upon whether it was used in a coverage clause or in an exclusionary provision.

In *Prudential Property & Casualty Ins. Co. v. Galioto*,[8] the court held that the named insured's son was a resident of her household and, therefore, an "insured" under her SUM policy where he had his own key to her home and was free to come and go at will, kept clothing and received mail there, spent three to four nights each week there, and spent the remainder of his time at the home of his mother's former boyfriend.

In *American National Property & Casualty Co. v. Chulack*,[9] the court held that the petitioner had raised a triable issue of fact regarding whether the claimant qualified as a resident relative of the insured's by claiming that he was not living in the same household as his parents at the time of the accident. The court stated: "Evidence that the respondent's driver's license, voter's registration card, and the previous year's income tax returns listed his parents' home address as his own residence address is insufficient to establish that the respondent was 'living with' his parents at the time of the accident."[10]

In *General Assurance Co. v. Schmitt*,[11] the court, interpreting an exclusionary provision in a homeowner's policy, held that where the insured premises was a two-family home, which consisted of two apartments that shared a common heating system and mailbox, but had separate gas and electric connections, separate kitchen and bathroom facilities, and separate locked entrance doors that excluded entry at will, held that the occupants of one of the apartments was not a member of the insured's household and, therefore, the exclusion barring liability coverage for injury to relatives residing in the named insured's "household" did not apply.

Use or Operation/Accidents

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle. Intentional acts are not considered "accidents."

In *Morris v. Allstate Insurance Co.*,[12] Nathaniel Hester was a passenger in a vehicle owned by Richard Ingegneri and driven by Matthew Ingegneri. Upon seeing the plaintiff riding his bicycle alongside the highway, Hester leaned out of the moving vehicle, placed his hands on the plaintiff's back and shoved the plaintiff off his bicycle, causing him to fall and be injured. Demanding that Ingegneri's insurance company defend Hester in the underlying personal injury action, the plaintiff contended that Hester was a "person using" the vehicle and that his actions did not amount to intentional conduct. The court disagreed and held that Hester was not an "insured person" under Ingegneri's policy because he was not "using" the vehicle at the time of the accident. The court also held that Hester's conduct amount to an intentional act, and was thus excluded from coverage under the policy.

In *Progressive Cas. Ins. Co. v. Yodice*,[13] plaintiff alleged that a ride known as the Whip, which was secured to the rear of a vehicle, was negligently operated, causing injuries to a number of people at a party. The owner of the truck and ride was insured by Progressive under a commercial auto policy that covered only the truck. In upholding Progressive's denial of coverage, the court noted that

> not every accident involving an automobile concerns the use or operation of that vehicle. The accident must be connected with the use of the automobile *qua* automobile. The use of the automobile as an automobile must be the proximate cause of the injury (citations omitted). The inherent nature of an automobile is to serve as a means of transportation to and from a certain location (citation omitted). The accident in question did not arise out of the use or operation of the truck as a truck, *i.e.*, as a means of transportation; it arose out of the operation of a business operating a ride, which happened to be permanently secured to the back of a stationary vehicle.

In *Argentina v. Emery World Wide Delivery Corp.*,[14] the Court of Appeals held that under New York Vehicle and Traffic Law § 388(1), loading and unloading constitute "use or operation" of a vehicle. The court further held that under *that statute*, the vehicle need not be a proximate cause of the injury before the vehicle's owner may be held vicariously liable (distinguishing *Walton v. Lumbermen's Mutual Casualty Co.*).[15]

Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the new mandatory UM endorsements require such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions. The interpretation of the phrase "as soon as practicable" was a hot topic in 1999.

In *State Farm Mutual Automobile Insurance Co. v. Adams*,[16] the court noted that where the policy requires the claimant/insured to give notice of claim to the SUM insurer "as soon as practicable," this requires that notice be given "within a reasonable time under all the circumstances." Where there is a substantial delay in giv-

Court of Appeals Reverses Bettenhauser *Finding*

In a unanimous decision dated June 20, 2000, the Court of Appeals reversed the Second Department finding in the *Worcester Ins. Co. v. Bettenhauser*[1] decision that appears on page 24 of the main text.

Disagreeing with the lower court's conclusion that the policy language at issue expressed only a lack of coverage and not an exclusion, the Court of Appeals found that, although "drawing the line between a lack of coverage in the first instance (requiring no disclaimer) and a lack of coverage based on an exclusion (requiring a timely disclosure) has at times proved problematic," in this particular case, "timely disclaimer was necessary because Bettenhauser's claim fell within the policy's coverage provisions set out in the 'Insuring Agreement'," and denial of coverage was "predicated on one of the designated 'Exclusions'."

This decision should lend some clarity to the frequently debated issue of "when is an Exclusion not an Exclusion."

There had been two dissents in the *Bettenhauser* decision by the Appellate Division. The Court of Appeals had dismissed Bettenhauser's appeal as of right, *sua sponte*, on the ground that the dissents did not provide a predicate for an appeal as of right under CPLR 5601(a). Shortly thereafter, however, the Court of Appeals granted a motion for leave to appeal by permission.

1. 260 A.D.2d 488, 688 N.Y.S.2d 202 (2d Dep't 1999); 2000 N.Y. LEXIS 1375 (N.Y. June 20, 2000).

ing such notice, the claimant/insured is obliged to demonstrate that he/she "acted with 'due diligence' in ascertaining the insurance status of the vehicle involved in the collision."[17]

The Court of Appeals offered its view on this subject in *Metropolitan Property & Casualty Insurance Co. v. Mancuso* [decided together with *Nationwide Insurance Co. v. DiGioacchino*].[18] The Court first noted that "in cases of underinsured coverage . . . questions as to the timeliness of notice and compliance with notice provisions have proven particularly troublesome." In contrast to insurance coverage for risks such as fire, theft and death, which "typically materialize instantly and unambiguously upon the occurrence of a single event, and for which the point at which a claim ripens is readily discernible," a claim for underinsured benefits "has a number of conditions along the way." Although an accident is the first event, "an accident and a tortfeasor, without more, does not give rise to an underinsurance claim." Rather, there may be no such claim "unless and until other conditions exist, including not only the injuries but also the insufficiency of the relevant tortfeasor coverage to compensate for them." Even then, however, "a claim for underinsurance need not be paid unless and until another 'condition precedent' is met," *i.e.*, the exhaustion of the tortfeasor's limits of liability by the payment of judgments or settlements. The court also noted that "it takes time, investigation and analysis to determine whether [a claim for underinsurance benefits] will actually result," and that a number of factors come into play, including "the seriousness and nature of the insured's injuries," "the potential liability of multiple parties," and "the extent of the tortfeasor's coverage." Moreover, "[b]ecause these factors will vary from case to case, so too will the time at which an underinsurance claim becomes readily ascertainable."

Accordingly, the Court of Appeals interpreted the phrase "as soon as practicable" in the context of underinsured motorist coverage by holding that "the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured." The court contemplated an objective standard for what constitutes "reasonable ascertainment."

The Court of Appeals also held that the phrase "within 90 days or as soon as practicable" is ambiguous because it does not indicate from what date or event the 90 days is to be measured and, therefore, construed that phrase to allow the insured to file a claim 90 days or as soon as practicable (whichever is longer) from the date that he/she knew or should reasonably have known that the tortfeasor was underinsured.

Significantly, the court took note of the fact that for purposes of determining the extent of the tortfeasor's coverage, the recently amended New York Insurance Law § 3420(f)(2)(A), which requires carriers to disclose their policy limits within forty-five days after a written request by any person seeking damages who is also covered by his or her own underinsurance (and who reveals his or her own coverage limits), should be used.

Thus, in *Mancuso*, the accident occurred in May 1993, the plaintiff did not commence his action against the tortfeasor until March 1995 and did not learn of the limits of the tortfeasor's policy until May 30, 1996. He provided notice of an SUM claim six days later. Under those circumstances, the Court of Appeals concluded that the plaintiff "should reasonably have known of his underinsurance claim well before he gave notice of it on June 5, 1996. He filed the claim fourteen months after he

began his personal injury action and three years after the accident." Such untimely notice was held to be unreasonable as a matter of law.

Similarly, in *DiGioacchino*, the accident took place in December 1994. The plaintiff commenced the action against the tortfeasor in January 1996 and did not learn of the tortfeasor's insurance policy limits until ten months later, in October 1996. He gave notice of an SUM claim the next day. Under those circumstances, the Court of Appeals also concluded that the insured did not give notice of an underinsured claim "as soon as practicable."

In *Nationwide Insurance Co. v. Montopoli*,[19] the action was commenced against the tortfeasor nine months after the accident; a demand for insurance information was made eleven months after the accident; notice of an underinsurance claim given one year and ten months after the accident. Under those circumstances, the court held that notice was not given "as soon as practicable." In *Eagle Insurance Co. v. Bernardine*,[20] the accident took place in February 1997; notice of an SUM claim was not given until December 1997, two months after receiving disclaimer from tortfeasor's insurer. There, too, the court held that notice was not given as soon as practicable. In *Allstate Insurance Co. v. Gomez*,[21] the court found a question of fact requiring a hearing as to whether a 14-month delay in notifying the insurer of accident was reasonable.

On the other hand, in *Nationwide Insurance Co. v. Brown-Young*,[22] the accident took place on October 27, 1995; notice of an SUM claim was not given until July 17, 1997 because the claimant was not initially aware of severity of her injury. The court held that notice was given "as soon as practicable" under those circumstances. In *Travelers Property Casualty Corp. v. Fusilli*,[23] the action was begun against tortfeasor in August 1995; plaintiff learned of the tortfeasor's coverage limits in July 1997, and then promptly gave notice of SUM claim. The court held that the notice was reasonable and timely as a matter of law because plaintiff's counsel was diligent in requesting the coverage information and "there is nothing to indicate that further requests would have produced the information sought any sooner."

In *Fatima Cab Corp. v. Sharma*,[24] although the policy contained a provision requiring an application for uninsured motorist benefits within ninety days of the accident, the claimant waited sixteen months after learning that the offending vehicle's policy had been canceled before requesting uninsured motorist benefits. Under those circumstances, the court held that notice was not given as soon "as reasonably possible through the exercise of ordinary diligence."

In *Utica Mutual Insurance Co. v. Gath*,[25] the court noted that the injured party has an independent right to give notice and is not bound by the insured's late notice of claim.[26] In *Serravillo v. Sterling Ins. Co.*,[27] the court also held that notice to an insurance broker cannot be treated as notice to the insurer because a broker is deemed to be the agent of the insured and not the insurer.

Finally, in *Mancuso*, the Court of Appeals, *sub silentio*, resolved the conflict over whether a claimant for UM, UIM or SUM benefits who has failed to provide the insurer with written notice of the claim in a timely fashion may successfully contend that the earlier notice of the accident and of a claim that the insurer received via the submission of no-fault forms is sufficient to meet the notice requirements of the policy. In *Mancuso*, the court held that notice of a no-fault claim is *not* a valid substitute for notice of a UM, UIM or SUM claim.

Notice of Legal Action

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition precedent to coverage, that the insured or his/her legal representative "immediately" forward to the insurer a copy of the summons and complaint and/or other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In *Nationwide Insurance Co. v. Lukas*,[28] the court held that the claimant breached the condition of the policy because he waited approximately 22 years after commencing the underlying lawsuit to forward a copy of the summons and complaint to the SUM insurer. In *Nationwide Mutual Insurance Co. v. Tarsia*,[29] the court held that a letter by the claimant advising Nationwide that he was injured in an accident and might have a potential claim under the SUM endorsement was insufficient to apprise Nationwide of the pendency and settlement of the underlying action and, therefore, claimant breached the condition of his policy by failing immediately to send the summons and complaint in that action to Nationwide.

The Notice of Legal Action condition is "devoid of ambiguity" and "the insurer need not show prejudice before it can assert the defense of noncompliance."

In *Nationwide Mutual Insurnace Co. v. Vivas*,[30] the court held that the Notice of Legal Action condition is "devoid of ambiguity," and that "the insurer need not show prejudice before it can assert the defense of noncompliance." In *Allstate Insurance Co. v. Kruger*,[31] the court held that "the absence of prejudice on the part of Allstate cannot cure [the] failure to forward a copy of the summons and complaint to Allstate as required under the policy").[32]

On the other hand, in two other cases, *Interboro Mutual Indemnity Insurance Co. v. Noel*,[33] and *Nationwide Ins. Co. v. Sobiesiuk*,[34] the Second Department held that the language of the policy did not clearly designate the giving of notice of a lawsuit as a condition precedent to arbitration and that the term in those policies, *i.e.*, "legal papers" was ambiguous, and, therefore, held that the failure to comply with those provisions did not result in the forfeiture of the right to underinsurance benefits.[35] *Sobiesiuk* involved an out-of-state policy whose language did not follow the language of Regulation 35-D and, therefore, the court found the pre-Regulation 35-D *Stechman* case to be controlling. It is not clear why the *Noel* court came to a different conclusion than the courts in *Lukas*, *Tarsia*, *Vivas*, and *Kruger*, *supra*. Although *Noel* involved a mandatory uninsured motorist (UM) policy, and not a Regulation 35-D policy, the pertinent language of the Notice of Legal Action conditions were precisely the same in both endorsements.

Discovery

The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

Continuing a trend that developed in 1998, several courts held that the failure of the insurer timely to request the discovery it claims to need precludes it from subsequently asserting the right to such discovery as a ground for staying a demanded arbitration. In *Liberty Mutual Insurance Co. v. Almeida*,[36] the court stated: "Where an insurer has ample time to seek discovery of it insured as provided for in the insurance policy, but unjustifiably fails to do so, it is not entitled to a stay of arbitration." To the same effect was *Interboro Mutual Indemnity Insurance Co. v. Noel*.[37]

In *Almeida*, however, the court added: "Where an insurer presents a justifiable excuse for its failure to seek such discovery, a temporary stay of arbitration will be granted to allow the insurer to obtain discovery." In *Interboro Mutual Indemnity Insurance Co. v. Wiener*,[38] the court held that discovery should occur after the conclusion of the preliminary hearing at which various threshold procedural issues determinative of whether the arbitration may proceed are to be litigated.

In *State Farm Insurance Co. v. Hiney*,[39] the court held that discovery is not an issue for determination by the arbitrator but, rather, a threshold issue to be determined by the court preliminary to arbitration.

Excused Compliance With Conditions Precedent

In *State Farm Insurance Co. v. Domotor*,[40] the court held: "An insurance carrier may not insist upon adherence to the terms of its policy after it has repudiated liability on the claim by sending a letter disclaiming coverage (citations omitted) for '[o]nce an insurer repudiates liability . . . the insured is excused from any of its obligations under the policy (citation omitted).'" As the court further noted, "the insurance carrier 'must stand or fall upon the defense upon which it based its refusal to pay.'"[41]

Petitions to Stay Arbitration

In *DelGaudio v. Aetna Insurance Co.*,[42] the court held that it was not sufficient for an insurer simply to oppose a petition to compel arbitration; rather, a formal application to stay arbitration must be made by the required motion on notice (or petition) in order to obtain affirmative relief.

In *Rodriguez v. Allstate Insurance Co.*,[43] the court noted: "In order to provide legally sufficient notice of a Civil Practice Law & Rules (hereinafter CPLR) 7503(c) proceeding, the application to stay arbitration must be served in the same manner as a summons or by registered or certified mail, return receipt requested (CPLR 7503(c)). . . . It is well settled that service of a Notice of Petition to stay arbitration by ordinary mail, is jurisdictionally defective. . . . Regular mail delivery is not a method available to commence a special proceeding."

In *New York Central Mutual Fire Insurance Co. v. Cavanagh*,[44] the court held that where the insurance agreement itself is silent as to venue, a special proceeding to stay arbitration is to be brought "in a court in the county in which one of the parties resides or is doing business."[45]

Exceptions to the 20-Day Rule CPLR 7503(c) provides, in pertinent part, that an application to stay arbitration "must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." It is, of course, well-established that the failure to make a timely application to stay arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding. One exception to the 20-day rule—the *Matarasso* exception—is that where the application to stay is based upon the ground that no agreement to arbitrate exists, it may be entertained even if made after the 20-day period had expired.[46]

In *DelGaudio*,[47] the insurer sought to stay arbitration on the ground that there was no physical contact between the alleged hit and run vehicle and its insured's vehicle. Although the petition was filed after the 20-day period had expired, the insurer argued that this case fell within the *Matarasso* exception to the 20-day rule because in the absence of physical contact, there is no hit and run and, therefore, no coverage. In rejecting this argument, the court held that the 20-day rule applied, citing several cases from last year which had held that the issue of whether there was physical contact with the uninsured vehicle relates to whether certain conditions of coverage had been satisfied and not whether the parties agreed to arbitrate their disputes.[48]

In *Allstate Insurance Co. v. White*,[49] the court held that a letter or demand for arbitration that did not contain the 20-day notice required by CPLR 7503(c) did not operate to begin the 20-day period within which the insurer was required to seek a stay.[50]

Burden of Proof An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.

In *Nationwide Insurance Co. v. Sillman*,[51] and *Liberty Mutual Insurance Co. v. Bohl*,[52] the courts reiterated that a *prima facie* case of coverage could be made out by the submission of a police accident report which contains the offending vehicle's insurance code designation.

Similarly, in *Allcity Insurance Co. v. Iglesias*,[53] the court noted that a *prima facie* showing of insurance coverage can be made by the submission of Department of Motor Vehicle records indicating coverage on the date of the accident.

An interesting question arises when the DMV records relied upon to demonstrate coverage on the date of the accident themselves indicate that such coverage had been canceled before the accident. Although several recent cases—including the 1999 case of *Allstate Ins. Co. v. Lopez*,[54]—have held that, under those circumstances, the petition should be denied outright because unsubstantiated conjecture that there may have been some defect in the cancellation of the policy covering the offending vehicle did not warrant a hearing on the issue,[55] in *Iglesias*, the court held that a factual question was raised by such a DMV record since such proof is not necessarily dispositive of the issue [of whether the cancellation was valid].[56] Thus, the question remains whether petitioner can demonstrate that the [tortfeasor's] vehicle had insurance coverage at the time of the accident"—which question should be resolved at a preliminary framed issue hearing.[57]

In *American Transit Insurance Co. v. Story*,[58] the petitioner's proof that it did not insure the offending vehicle on the date of the accident was a notice of cancellation from 1991. However, the respondent's proof that the petitioner *did* insure that vehicle was a DMV registration report indicating such coverage after the purported cancellation. Thus, the court agreed with respondent that the DMV records indicated "that a policy had been either reissued or newly issued by Petition after 1991 and was in effect at the time of the accident, and that petitioner offered no probative evidence to the contrary."

Arbitration Awards

In *Solkav Solartechnik, Ges m.b.H. v. Besicorp Group, Inc.*,[59] the Court of Appeals held that because a special proceeding to compel or stay arbitration is no longer pending after a judgment is entered directing arbitra-

tion and the arbitration is thereafter held, all subsequent applications, such as applications to confirm or vacate an arbitration award, must be brought in a new proceeding, under a new index number. Following that decision, legislation was introduced that would, in effect, have overruled *Solkav* and provide that all applications relating to an arbitration must be presented in the same case even if final judgment has been entered on a prior application. That legislation, Senate Bill No. 3071-A and Assembly Bill No. 5937-A, passed both houses. However, in 1999, Governor Pataki refused to sign it into law. Thus, the *Solkav* rule still prevails.

Statute of Limitations

In *Morrison*,[60] the court noted: "A demand for arbitration of an uninsured motorist's claim is subject to the six-year Statute of Limitations, which runs from the date of the accident or from the time when subsequent events render the offending vehicle 'uninsured.'" Since, in that case, the demand was filed more than six years after the accident date, the claimant was required "to come forward with legally sufficient proof that a later accrual date applies . . . and that he diligently sought to determine whether the offending vehicle was insured on the date of the accident." Finding such proof lacking in this case, the court granted a permanent stay of arbitration.

A notice of denial or disclaimer must apprise with a high degree of specificity the grounds upon which it is based.

UNINSURED MOTORISTS ISSUES

Duty to Provide Prompt Notice of Disclaimer or Denial

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant. In *Utica Mutual Insurance Co. v. Gath*,[61] the court noted that such a notice of denial or disclaimer must apprise with a high degree of specificity the grounds upon which it is based. Failure by the insurer to give such reasonably timely and specific notice may result in the insurer being precluded from relying upon a breach of a policy condition or an exclusionary provision in the policy.

In *Fairmont Funding, Ltd. v. Utica Mutual Ins. Co.*,[62] the court held that § 3420(d) "is inapplicable to insurance claims not based on 'death or bodily injury.'" In *Colonial Penn Ins. Co. v. Pevzner*,[63] the court held that a *41-day* delay in disclaiming coverage based upon a failure to provide timely notice of an accident was unreasonable as a matter of law.[64] In *Moirano v. Aetna Casualty & Surety Co.*,[65] the court held that an unexplained failure for "approximately three months" to issue a disclaimer based upon an exclusion in the policy resulted in "an estoppel which precludes the defendant [insurer] from litigating the basis for its disclaimer in this action." And, in *Allstate Insurance Co. v. Negron*,[66] the court held that a delay of nearly nine months was unreasonable as a matter of law.

On the other hand, in *Brooklyn Hospital Center v. Centennial Insurance Co.*,[67] the court held that a delay of "approximately 43 days" was not unreasonable in view of the steps taken by the insurer's claims examiner to investigate the claim, which was based upon medical malpractice allegedly committed more than twenty years earlier. In *Larson v. New York State Thruway Authority*,[68] the court held that a delay of just over two months presented a question of fact that required resolution at trial.

Notwithstanding the foregoing, several courts in 1999 reaffirmed the proposition that even if an insurer fails to give timely written notice of disclaimer or denial, the insurer may still assert that no coverage for the subject vehicle or incident was ever in effect. In *Nationwide Insurance Co. v. Sillman*,[69] the court held that there was no requirement to timely disclaim as the uninsured motorist coverage would not attach unless and until it was established that the offending vehicle was uninsured on the date of the accident. In *Allstate Insurance Co. v. Frederick*,[70] the court held that there was no requirement to disclaim because "the uninsured motorist coverage of the petitioner's policy does not attach unless and until it has been established that there was no insurance coverage on the [offending] vehicle on the date of the accident." In *Allstate Insurance Co. v. Young*,[71] the court held that the failure to issue a timely disclaimer does not create coverage where none otherwise exists. And in *State Farm Mutual Automobile Insurance Co. v. Bentley*,[72] the court held that there was no requirement to disclaim in a case of "noncoverage by lack of inclusion" rather than "by reason of exclusion."

In *Worcester Insurance Co. v. Bettenhauser*,[73] the Second Department addressed an issue posed by a provision in a SUM policy that no coverage was provided for bodily injury sustained by any person "while 'occupying' . . . any motor vehicle owned by . . . any 'family member' which is not insured for this coverage under the policy." In a decision later overturned by the Court of Appeals (see box page 20), the court held that the provision expressed a lack of coverage for which no prompt disclaimer was required, not an exclusion requiring timely disclaimer, despite the fact that the provision was con-

tained under the heading "Exclusions." The opinion distinguished *General Accident Ins. Co. v. Lobritto*,[74] *Aetna Insurance Co. v. Boucher*,[75] and *Unigard Insurance Group v. Bothwell*,[76] earlier holdings by the same court.

Cancellation of Coverage

Generally speaking, to effectively cancel an owner's policy of liability insurance *as to third parties*, the insurer must file its notice of termination or cancellation with the DMV no later than thirty days after the effective date of the cancellation.

In *Colonial Penn Insurance Co. v Martich*,[77] however, the court noted that pursuant to New York Vehicle & Traffic Law § 313(2)(a) (hereinafter "Veh. & Traf. Law"), an insurer is not required to provide notice of termination to the DMV with reference to the "non-renewal of a policy which has been in force for at least six months" because such non-renewals are not considered a "cancellation" or "termination."

"Underinsured motorist coverage is triggered when the limit of the insured's bodily injury liability coverage is greater than the same coverage in the tortfeasor's policy."

Hit-and-run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run accident is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.

In *General Accident Insurance Co. v. Gladstone*,[78] the claimant was injured while riding his bicycle on the paved shoulder of the highway, when an overtaking tractor trailer passed so close as to graze his portfolio, which was strapped to the bicycle's rear carrier, causing him to lose control, hit a pothole and fall to the ground. The court held that the claimant was not entitled to make a hit-and-run claim because the tractor-trailer never came into contact with him or his bicycle and, in any event, a bicycle is not included within the statutory definition of a "motor vehicle."[79] Moreover, the court held that the contact in this case did not originate in a collision and, therefore, the rule allowing hit-and-run claims in cases involving "indirect physical contact" did not apply.

In *GEICO v. Yarmoluk*,[80] where a car struck a muffler in the road and then lost control and crashed into a guardrail, the court held that there was no "physical contact" in the absence of a witness who saw the muffler fall off a vehicle and/or proof as to how long the muffler had been in the roadway. In the court's view, the claimant failed to sustain his burden of establishing that the claim originated in a collision and that the detached part, in an unbroken chain of events, caused the problem.[81]

In *Tri-State Consumer Insurance Co. v. Dabush*,[82] the court noted that "reasonable efforts" must be made to ascertain the identity of either the owner or operator of the offending vehicle.

Out-of-state Coverage

In *Lopez*,[83] the court noted:

> Consistent with New York public policy to protect innocent victims of traffic accidents . . . personal protection insurance liability coverage underwritten in a sister State by insurers authorized to do business in New York is required to conform to New York minimum financial requirements and, if not, is deemed to do so.

Thus, where an insured waives uninsured motorist coverage when an out-of-state policy is issued, that policy "must be construed to contain uninsured motorist benefits."[84]

In *Allstate Ins. Co. v. Pierre*,[85] on the other hand, the court noted that a company that is *not* authorized to transact business in New York is not subject to Insurance Law § 5107 and does not, therefore, have New York's bodily injury (or UM) liability limits read into its out-of-state policy. Thus, in that case, a vehicle covered by a Florida policy which contained only PIP and property damage coverage, but not bodily injury coverage (as allowed by Florida law) was deemed an "uninsured" vehicle.

UNDERINSURED MOTORIST ISSUES

Trigger for Coverage

In *Mancuso*,[86] the court reiterated that "underinsured motorist coverage is triggered when the limit of the insured's bodily injury liability coverage is greater than the same coverage in the tortfeasor's policy." Similar holdings were reached in *Liberty Mutual Insurance Co. v. D'Antonio*,[87] and *Allstate Insurance Co. v. DeMorato*.[88] In *Conklin v. St. Paul Fire & Marine Insurance Co.*,[89] the court held that where the limit of the alleged tortfeasor's coverage for bodily injury is *the same* as the limit of the claimant's coverage for bodily injury, the tortfeasor is not underinsured and the underinsured motorist coverage is not triggered.

In *New York Central Mutual Fire Insurance Co. v. White*,[90] the court noted that under Regulation 35-D, the underinsured motorist coverage can be triggered if the amount of the tortfeasor's bodily injury liability coverage is reduced by payments to others to an amount less

than the bodily injury liability limits of the claimant's policy.

Consent to Settle

In *New York Central Mutual Fire Insurance Co. v. Cavanagh*,[91] the court restated a well-known rule:

> Where an automobile insurance policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy . . . unless the insured can demonstrate that the insurer, by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement.[92]

In *U.S.A.A. Casualty Insurance Co. v. Kaufman*,[93] the claimant settled with the tortfeasor without the SUM carrier's knowledge or consent and issued a release which did not preserve the SUM carrier's right of subrogation. (Although the release contained an exclusion, that exclusion was limited to no-fault claims and, therefore, did not serve to preserve the subrogation right for SUM benefits paid.) Accordingly, the demanded arbitration was permanently stayed by virtue of claimant's breach of the conditions precedent to SUM coverage.

"Release or Advance"

In *Allstate Insurance Co. v. Mannuci*,[94] the policy provided that if the insured settles with a negligent party "for the available limit of the motor vehicle bodily injury liability coverage of such party, release may be executed with such party after thirty calendar days actual written notice to [the SUM insurer]." The court noted: "The purpose of the provision is to give [the SUM insurer] an opportunity to investigate the financial status of the third-party tortfeasor and the propriety of pursuing a subrogation action."

Reduction-in-coverage Clause

In *General Accident Insurance Co. v. Brown*,[95] the court held that where the declarations sheet of a policy contains "a single, combined limit of uninsured/underinsured motorist coverage," the "offset" in the policy for the amount received from the tortfeasor is "valid and enforceable."[96] Moreover, where, as in this case, the amount of the offset equals the limit of coverage otherwise available, the arbitration should be permanently stayed (because there is nothing to arbitrate).[97]

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1. *See* Dachs, Jonathan A., *Uninsured and Underinsured . . . But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage*; 66 N.Y. St. B.J. 13 (September/October, 1994); *Uninsured and Underinsured Motorist Cases in 1994*, 67 N.Y. St. B.J. 24 (November, 1995); *The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995*, 68 N.Y. St. B.J. 42 (July/August, 1996); *Developments in Uninsured and Underinsured Motorist Coverage*, 69 N.Y. St. B.J. 18 (September/October, 1997); *Legislative and Case Law Developments in UM/UIM/SUM Law - 1997*, 70 N.Y. St. B.J. 46 (September/October, 1998); *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, 71 N.Y. St. B.J. 8 (May/June, 1999).
2. 267 A.D.2d 372, 700 N.Y.S.2d 230 (2d Dep't 1999).
3. 267 A.D.2d 312, 699 N.Y.S.2d 892 (2d Dep't 1999).
4. N.Y.L.J., Sept. 1, 1999, p. 30, col. 5 (Sup. Ct., Nassau Co.).
5. *But see Gaetan v. Fireman's Ins. Co. of Newark*, N.Y.L.J., Nov. 3, 1998, p. 1, col. 3 (Sup. Ct., Suffolk Co.), *aff'd.*, 264 A.D.2d 806, 695 N.Y.S.2d 608 (2d Dep't 1999) (quoted in *Slattery v. City of New York*, 179 Misc. 2d 740, 686 N.Y.S.2d 683 (Sup. Ct., N.Y. Co. 1999), *aff'd.*, 266 A.D.2d 24, 697 N.Y.S.2d 603 (1st Dep't 1999)) (construing an exclusion provision) — "In the context of insurance and benefits . . . the term 'family' often refers to such persons as habitually reside under one roof and form one domestic circle, or such persons as are dependent on each other for support or among whom there is legal or equitable obligation to furnish support. . . ." In addition, "in the context of uninsured motorist coverage a 'family' includes not only those in a legal or blood relationship to the insured but those who live within the insured's domestic circle.").
6. 267 A.D.2d 33, 699 N.Y.S.2d 370 (1st Dep't 1999).
7. *Cf. 390 West End Assocs. v. Wildfoerster*, 241 A.D.2d 402, 661 N.Y.S.2d 202 (1st Dep't 1997).
8 266 A.D.2d 926, 697 N.Y.S.2d 415 (4th Dep't 1999).
9. 265 A.D.2d 550, 697 N.Y.S.2d 153 (2d Dep't 1999).
10. *See Garrett v. American Mfrs. Mut. Ins. Co.*, 262 A.D.2d 1001, 691 N.Y.S.2d 804 (4th Dep't 1999) (conflicting evidence as to whether claimant, who clearly resided primarily with her father, *also* resided with her mother).
11. 265 A.D.2d 299, 696 N.Y.S.2d 72 (2d Dep't 1999).
12. 261 A.D.2d 457, 690 N.Y.S.2d 102 (2d Dep't 1999).
13. 180 Misc. 2d 863, 694 N.Y.S.2d 281 (Sup. Ct., Richmond Co. 1999).
14. 93 N.Y.2d 554, 693 N.Y.S.2d 493 (1999).
15. 88 N.Y.2d 211, 644 N.Y.S.2d 133 (1999) (involving the no-fault law).
16. 259 A.D.2d 551, 686 N.Y.S.2d 438 (2d Dep't 1999).
17. *See Allstate Ins. Co. v. Morrison*, ___ A.D.2d ____, 700 N.Y.S.2d 74 (2d Dep't 1999); *State Farm Mut. Auto. Ins. Co. v. OK Hwa Pak*, 266 A.D.2d 397, 698 N.Y.S.2d 306 (2d Dep't 1999) (notice of an underinsured motorist claim provided more than two years after the action was commenced against the tortfeasor was held to be untimely and, thus, the arbitration was permanently stayed). *See also LaBella v. Allstate Ins. Co.*, 261 A.D.2d 367, 689 N.Y.S.2d 197 (2d Dep't 1999) (4 years); *Serravillo v. Sterling Ins. Co.*, 261 A.D.2d 384, 689 N.Y.S.2d 521 (2d Dep't 1999) (9 months).
18. 93 N.Y.2d 487, 693 N.Y.S.2d 81 (1999).
19. 262 A.D.2d 647, 692 N.Y.S.2d 459 (2d Dep't 1999).
20. 266 A.D.2d 543, 699 N.Y.S.2d 85 (2d Dep't 1999).
21. 263 A.D.2d 481, 691 N.Y.S.2d 916 (2d Dep't 1999).
22. 265 A.D.2d 918, 695 N.Y.S.2d 823 (4th Dep't 1999).
23. 266 A.D.2d 48, 698 N.Y.S.2d 641 (1st Dep't 1999).
24. 267 A.D.2d 237, 699 N.Y.S.2d 461 (2d Dep't 1999).
25. 265 A.D.2d 805, 695 N.Y.S.2d 839 (4th Dep't 1999).
26. *See* Ins. Law § 3420(a)(3); *see also Serravillo v. Sterling Ins. Co.*, 261 A.D.2d 384, 689 N.Y.S.2d 821 (2d Dep't 1999).

27. 261 A.D.2d 384, 689 N.Y.S.2d 521 (2d Dep't 1999).
28. 264 A.D.2d 778, 695 N.Y.S.2d 132 (2d Dep't 1999).
29. 265 A.D.2d 936, 695 N.Y.S.2d 811 (4th Dep't 1999).
30. 267 A.D.2d 105, 699 N.Y.S.2d 410 (1st Dep't 1999).
31. 264 A.D.2d 443, 694 N.Y.S.2d 132 (2d Dep't 1999), *appeal granted*, 94 N.Y.2d 755, 701 N.Y.S.2d 711(1999).
32. *But cf.*, *New York Mut. Underwriters v. Kaufman*, 257 A.D.2d 850, 685 N.Y.S.2d 312 (3d Dep't 1999) (involving a homeowners policy).
33. 265 A.D.2d 557, 697 N.Y.S.2d 303 (2d Dep't 1999). *See* Dachs, Norman, and Dachs, Jonathan, *Notice of Legal Action*, N.Y.L.J., Nov. 9, 1999, p. 3, col. 1.
34. 263 A.D.2d 510, 691 N.Y.S.2d 925 (2d Dep't 1999).
35. *See Federal Ins. Co. v. Stechman* (a pre-Regulation 35-D case), 192 A.D.2d 531, 595 N.Y.S.2d 815 (2d Dep't 1993).
36. 266 A.D.2d 547, 699 N.Y.S.2d 287 (2d Dep't 1999).
37. 265 A.D.2d 557, 697 N.Y.S.2d 303 (2d Dep't 1999).
38. 267 A.D.2d 310, 699 N.Y.S.2d 894 (2d Dep't 1999).
39. 262 A.D.2d 1076, 691 N.Y.S.2d 804 (4th Dep't 1999).
40. 266 A.D.2d 219, 697 N.Y.S.2d 348 (2d Dep't 1999).
41. *See State Farm Mut. Auto. Ins. Co. v. Callisto*, 255 A.D.2d 876, 680 N.Y.S.2d 39 (4th Dep't 1998); *Vanguard Ins. Co. v. Polchlopek*, 18 N.Y.2d 376, 275 N.Y.S.2d 515 (1966).
42. 262 A.D.2d 641, 692 N.Y.S.2d 473 (2d Dep't 1999).
43. 180 Misc. 2d 969, 690 N.Y.S.2d 919 (Civ. Ct., N.Y. Co. 1999).
44. 265 A.D.2d 787, 697 N.Y.S.2d 193 (3d Dep't 1999).
45. CPLR 7502(a).
46. *See Matarasso v. Continental Cas. Co.*, 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982).
47. *DelGaudio*, 262 A.D.2d 641.
48. *See*, *e.g.*, *CNA Ins. Co. v. Rosa*, 253 A.D.2d 494, 676 N.Y.S.2d 500 (2d Dep't 1998); *Nationwide Ins. Co. v. McConnell*, 248 A.D.2d 476, 668 N.Y.S.2d 920 (2d Dep't 1998).
49. 267 A.D.2d 382, 700 N.Y.S.2d 724 (2d Dep't 1999).
50. *See Blamowski v. Munson Transp. Inc.*, 91 N.Y.2d 190, 195, 668 N.Y.S.2d 148 (1997); *Albert Bailek Assoc., Inc. v. Northwest-Atlantic Partners, Inc.*, 251 A.D.2d 145, 674 N.Y.S.2d 352 (1st Dep't 1998).
51. 266 A.D.2d 551, 699 N.Y.S.2d 98 (2d Dep't 1999).
52. 262 A.D.2d 645, 694 N.Y.S.2d 72 (2d Dep't 1999).
53. 264 A.D.2d 580, 694 N.Y.S.2d 395 (1st Dep't 1999).
54. 266 A.D.2d 209, 697 N.Y.S.2d 684 (2d Dep't 1999).
55. *See Eagle Ins. Co. v. Battershield*, 225 A.D.2d 545, 638 N.Y.S.2d 758 (2d Dep't 1996).
56. *See Hanmer v. Tofany*, 34 A.D.2d 383, 312 N.Y.S.2d 295 (4th Dep't 1970).
57. *See State Farm Mut. Auto. Ins. Co. v. Castro*, 266 A.D.2d 464, 698 N.Y.S.2d 535 (2d Dep't 1999) (triable issue as to insurance coverage for offending vehicle should be resolved at a hearing).
58. 260 A.D.2d 240, 686 N.Y.S.2d 704 (1st Dep't 1999).
59. 91 N.Y.2d 482 (1998).
60. *Allstate Ins. Co. v. Morrison*, 267 A.D.2d 381, 700 N.Y.S.2d 74 (2d Dep't 1999).
61. 265 A.D.2d 805, 695 N.Y.S.2d 839 (4th Dep't 1999).
62. 264 A.D.2d 581, 694 N.Y.S.2d 389 (2d Dep't 1999).
63. 266 A.D.2d 391, 698 N.Y.S.2d 310 (2d Dep't 1999).
64. *See also Nationwide Mutual Ins. Co. v. Steiner*, 199 A.D.2d 507, 605 N.Y.S.2d 391 (2d Dep't 1994) (41 days).
65. 259 A.D.2d 470, 686 N.Y.S.2d 76 (2d Dep't 1999).
66. 262 A.D.2d 407, 689 N.Y.S.2d 663 (2d Dep't 1999).
67. 258 A.D.2d 491, 685 N.Y.S.2d 267 (2d Dep't 1999).
68. N.Y.L.J., Sept. 22, 1999, p. 30, col. 4 (Ct. of Claims 1999).
69. 266 A.D.2d 551, 699 N.Y.S.2d 98 (2d Dep't 1999).
70. 266 A.D.2d 283, 698 N.Y.S.2d 266 (2d Dep't 1999).
71. 265 A.D.2d 278, 696 N.Y.S.2d 189 (2d Dep't 1999).
72. 262 A.D.2d 739, 691 N.Y.S.2d 603 (3d Dep't 1999).
73. 260 A.D.2d 488, 688 N.Y.S.2d 202 (2d Dep't 1999).
74. 240 A.D.2d 493, 658 N.Y.S.2d 438 (2d Dep't 1997).
75. 238 A.D.2d 414, 656 N.Y.S.2d 316 (2d Dep't 1997).
76. 237 A.D.2d 450, 655 N.Y.S.2d 77 (2d Dep't 1997). [*NOTE: In* Bettenhauser*, although there were two dissents, the Court of Appeals dismissed Bettenhauser's appeal as of right, sua sponte, on the ground that the dissents did "not provide a predicate for an appeal as of right under CPLR 5601(a)." However, shortly thereafter, the Court of Appeals granted Bettenhauser's motion for leave to appeal (by permission). Thus, this case was argued before the Court of Appeals in mid-2000 but a decision had not been announced when this article went to press.*]
77. 260 A.D.2d 378, 687 N.Y.S.2d 714 (2d Dep't 1999).
78. 260 A.D.2d 855, 687 N.Y.S.2d 830 (3d Dep't 1999).
79. Veh. & Traf. Law § 125.
80. 262 A.D.2d 561, 692 N.Y.S.2d 433 (2d Dep't 1999).
81. *See Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 874 N.Y.S.2d 927 (1991).
82. 264 A.D.2d 848, 695 N.Y.S.2d 414 (2d Dep't 1999).
83. *Allstate Ins. Co. v. Lopez*, 266 A.D.2d 209, 697 N.Y.S.2d 684 (2d Dep't 1999).
84. *Midwest Mut. Ins. Co. v. Pisani*, 250 A.D.2d 512, 513, 673 N.Y.S.2d 126 (1st Dep't 1998).
85. N.Y.L.J., Jan. 25, 1999, p. 32, col. 1 (Sup. Ct., Nassau County 1999).
86. *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 N.Y.2d 487, 693 N.Y.S.2d 81 (1999).
87. 266 A.D.2d 393, 697 N.Y.S.2d 532 (2d Dep't 1999).
88. 262 A.D.2d 557, 694 N.Y.S.2d 67 (2d Dep't 1999).
89. 260 A.D.2d 529, 688 N.Y.S.2d 241 (2d Dep't 1999).
90. 262 A.D.2d 415, 691 N.Y.S.2d 134 (2d Dep't 1999), *appeal denied*, 94 N.Y.2d 751, 699 N.Y.S.2d 6 (1999).
91. 265 A.D.2d 787, 697 N.Y.S.2d 193 (3d Dep't 1999).
92. *See*, *e.g.*, *State Farm Automobile Insurance Co. v. Blanco*, 208 A.D.2d 933, 934, 617 N.Y.S.2d 898 (2d Dep't 1994).
93. 261 A.D.2d 275, 690 N.Y.S.2d 269 (1st Dep't 1999).
94. 258 A.D.2d 869, 686 N.Y.S.2d 149 (3d Dep't 1999).
95. 263 A.D.2d 542, 693 N.Y.S.2d 223 (2d Dep't 1999).
96. *See In re Allstate Ins. Co.*, 81 N.Y.2d 219, 597 N.Y.S.2d 904 (1993).
97. *See also GEICO v. Ciaffone*, N.Y.L.J., Sept. 29, 1999, p. 34, col. 5 (Sup. Ct., Nassau Co. 1999); *Selimis v. General Accident Ins.*, 264 A.D.2d 738, 695 N.Y.S.2d 118 (2d Dep't 1999) (offset included in policy and referred to in dec. sheet valid and enforceable).

Life Insurance and Annuities May Insulate Some Assets From Loss In Unexpected Bankruptcy Filings

BY STEPHEN Z. STARR AND BRIAN C. BANDLER

Individuals often have long-term financial plans and goals, such as buying a new home, retiring early, or earning greater investment returns. No one usually plans to file for a personal bankruptcy. However, the need to file for personal bankruptcy can arise from a variety of circumstances, and many individuals are more at risk for bankruptcy than they might imagine. (See box on page 29.)

New York State residents faced with this type of unexpected crisis can be better prepared for it if they have made contingency plans using whole life insurance and annuities.

These plans can provide flexibility that is distinct from traditional alternatives to bankruptcy filing, such as repayment plans made through credit counseling services or a debtor's out-of-court workout with creditors. Nor do they involve the eligibility requirements for filing one type of bankruptcy as opposed to another and the respective advantages and disadvantages of each.[1]

The exemption for the cash value of whole life insurance, and to a lesser extent annuities, provides honest debtors with a way to preserve assets when faced with bankruptcy. Assuming that the claim of exemption for such insurance and annuities is not set aside by the bankruptcy court, a debtor can emerge from bankruptcy still in possession of whole life insurance policies and annuities and be free to receive such annuity payments, draw upon the cash value of such policies or maintain the policies for the insurance protection they provide. This will help the debtor achieve a fresh start, which is one of the principal goals of bankruptcy.

Overview of Bankruptcy Process

The filing of a bankruptcy petition creates an estate consisting of the debtor's property wherever located.[2] However, the debtor is allowed to claim certain property as exempt by listing it on a schedule of exemptions and indicating the legal basis supporting such exemption claim.[3]

An exemption is an interest of the debtor in property withdrawn from the estate (and hence from creditors) for the benefit of the debtor.[4] Because New York has "opted out" of the federal exemption provisions applicable to bankruptcy, a New York resident must look to the New York state exemption scheme to determine the permissible exemptions.[5] Unless a party in interest raises a timely objection to a claimed exemption, such property is exempt.[6] (See the box on page 30 for a summary of major New York exemptions.)

Because the majority of individual bankruptcy filings are under Chapter 7 of the Bankruptcy Code,[7] (the "Code"), the focus of this article is on Chapter 7 (liquidation), rather than on Chapter 13 (wage earner repayment plans) or Chapter 11 (reorganization). In Chapter 7, a trustee is appointed[8] by the U.S. trustee to marshal and liquidate the assets of the estate to raise cash to pay off creditors.[9] To the extent that an exemption claim is successfully challenged by the bankruptcy trustee, the

STEPHEN Z. STARR is an associate in the New York office of Curtis, Mallet-Prevost, Colt & Mosle LLP, practicing in the bankruptcy department. He is a graduate of Columbia University and received his J.D. from the University of Southern California Law Center.

BRIAN C. BANDLER, an attorney who formerly practiced with the trusts and estates department of a Manhattan firm, is now a vice president at J.P. Morgan in the Private Banking Fiduciary Management Group. A graduate of Dartmouth College, he received a J.D. degree from Fordham University School of Law and an LL.M. in taxation from New York University School of Law.

The opinions expressed in the article are those of the authors individually.

property claimed as exempt comes into the estate for the benefit of creditors.

Pre-Bankruptcy Exemption Planning

For those who have the financial means, establishing specialized trusts can be an effective means of asset protection. For a number of reasons, however, asset protection trusts may be particularly vulnerable in the event of bankruptcy, or otherwise not suitable for the average debtor. (See the box on page 31.)

Relocation to another state to take advantage of more favorable homestead exemptions also has drawbacks. (See the box on page 34.)

Before bankruptcy, a certain measure of asset protection in the form of pre-bankruptcy exemption planning may be obtained by converting non-exempt assets into exempt assets.[10] In support of such planning, the Second Circuit Court of Appeals has held that "[e]ven the conversion of non-exempt property into exempt property by an insolvent contemplating bankruptcy has been held a transaction not intended to defraud creditors in the absence of extrinsic fraud."[11] Although the Code does not explicitly authorize pre-bankruptcy exemption planning, the holding of the Second Circuit is consistent with the legislative history of the Code.[12]

Exemption for life insurance policies For certain beneficiaries, New York law exempts the proceeds of life insurance policies, including the cash value of whole life policies.[13] The New York Insurance Law provides that:

> If a policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable otherwise to a third person, such third person shall be entitled to the *proceeds and avails* of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal court of the person effecting the insurance.[14]

The term "proceeds and avails" is defined in connection with life insurance policies to include:

> death benefits, accelerated payments of the death benefit or accelerated payment of a special surrender value, cash surrender and loan values, premiums waived, and dividends, whether used in reduction of premiums or in whatever manner used or applied, except where the debtor has, after issuance of the policy, elected to receive the dividends in cash.[15]

New York law has generally equated ownership of the insurance policy as equivalent to "effecting" the policy within the meaning of Insurance Law § 3212.[16]

If a beneficiary "effects" insurance on her/his spouse, the proceeds will also be exempt from the spouse-beneficiary's creditors.[17] Thus, where the spouse of the insured is both owner and beneficiary of the policy, the benefits will be exempt from both the claims of the insured's creditors and the spouse's creditors.

The case of *In re Rundlett*[18] illustrates how this exemption works. In *Rundlett*, the debtor was the widow of the chairman of an investment banking firm and had signed certain personal guarantees of her husband's debts before his death.[19] At the time of his death, five life insurance policies were in force covering the debtor's husband's life and naming the debtor as beneficiary. The debtor received the proceeds of these policies totaling $3.5 million and spent approximately $1.2 million before her bankruptcy.

Causes of Personal Bankruptcies

Personal problems: Unemployment, illness, divorce, accidents and excessive debts are the most common problems that lead to personal bankruptcy filings. The normal preventive measures are prudent personal financial habits, adequate savings, and sufficient health, disability, home, auto and life insurance coverage.

Risky businesses: Entrepreneurs, owners of closely held businesses and sole proprietors may incur personal business related liabilities beyond their ability to repay, even though they have prudent personal finances and adequate personal insurance.

Professional malpractice: Corporate officers, directors and skilled professionals (doctors, lawyers, architects, etc.) may incur liabilities connected to their business and professional activities beyond their ability to repay, despite a high net worth, insurance against negligence or indemnification agreements. Judgments can occur in excess of policy limits, indemnitors can become insolvent or file bankruptcy themselves.

Civic and charitable liabilities: Board members and trustees of civic, social and charitable organizations, such as co-op apartments, political action groups, homeowners associations, or religious organizations, among others, may unwittingly incur liability as a result of their volunteer activities. Many such organizations maintain inadequate insurance coverage, or it may not cover the type of liability involved (*e.g.*, defamation, employment discrimination, etc.), or the claim may result in a judgment in excess of insurance policy limits.

Summary of Major Exemptions

Following is a summary of some of the major exemptions that may apply to certain assets when a New York State resident files for bankruptcy.

Homestead $10,000 of equity ($20,000 if married filing jointly).

Various public sector pensions, IRAs, KEOGHs, and private employers' tax qualified pension plans.

"ERISA qualified" plans.

Life insurance—beneficiaries may exempt "proceeds and avails" (including cash surrender value and loan value) from insured's debts. If spouse of insured "effects" the policy, also exempt from spouse's creditors.

Annuity—amount necessary to meet debtor's ordinary financial needs. If purchased within six months of bankruptcy filing, there is a $5,000 cap.

Motor vehicles—$2,400 ($4,800 if married filing jointly)

Wedding ring

Family Bible

In her bankruptcy, the debtor sought to exempt the entire $3.5 million in insurance proceeds. The bankruptcy court had found that only $603,098 in proceeds of two policies that were assigned to the debtor by her husband were entitled to exemption, and that the remaining $2,924,903 was non-exempt. On appeal, the District Court reasoned that only the proceeds of two policies assigned to the debtor by her husband were "effected" by the debtor such that they would be exempt from the claims of her creditors.[20] In addition, the ruling was based on the fact that the debtor's husband had purchased four of the five insurance policies, while his company had purchased the fifth policy. Regarding the policy taken out by the husband's company, the District Court upheld the bankruptcy court's ruling that where a corporation takes out an insurance policy on the life of a shareholder, the shareholder's wife cannot be regarded as having effected the insurance.[21]

Life insurance policies, to the extent of their cash or surrender value while the insured is alive and the death benefit proceeds after the insured's death, are subject to federal estate and gift taxes if the policies are owned by the insured, her/his spouse or another individual. An irrevocable transfer of an existing life insurance policy to a life insurance trust can serve both to exclude the policy and its proceeds from the debtor's bankruptcy estate, and exclude the policy from the debtor's estate for federal estate and gift tax purposes. If the debtor lives for three years after transferring ownership of an existing life insurance policy on her/his life to a qualified trust,[22] the proceeds will avoid estate taxation both at the debtor's death and at the death of her/his spouse. Instead, the life insurance is taxed at its value at the time it is given to the trust, when its value may be fully or partially sheltered from gift tax by the $10,000 annual exclusions available to the debtor and her/his spouse. In addition, if the trustee of the insurance trust is the applicant for and the original owner of a new policy on the debtor's life, the death benefit paid on the new policy will not be subject to estate tax at the debtor's death, even if he/she dies within three years after the policy was purchased.

Purchase of annuities At first glance, New York appears to provide a potentially unlimited exemption for annuities,[23] regardless of whether the debtor is in bankruptcy. The law provides that when a debtor pays the consideration for an annuity contract, the annuity contract and "benefits, rights, privileges, and options" thereunder due or prospectively due, are not subject to execution.[24] A judgment debtor/annuitant may only be compelled upon court order to "pay to a judgment creditor . . . a portion of such benefits [under an annuity contact] that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him."[25] Thus, under New York state law, as a matter of debtor-creditor law, annuities can be a useful asset protection device for residents who may be faced with adverse money judgments.

However, in bankruptcy the debtor will be allowed only a $5,000 exemption if the annuity contract was "initially purchased by the debtor within six months of the debtor's filing a petition in bankruptcy" and "not purchased by application of proceeds under settlement options of annuity contracts purchased more than six months before the debtor's filing a petition in bankruptcy or under settlement options of life insurance policies."[26]

Thus, if an annuity is purchased as a pre-bankruptcy exemption planning device within six months before a bankruptcy filing, a debtor will be limited to the $5,000 exemption. If purchased more than six months before a bankruptcy filing, depending upon the "reasonable needs of the judgment debtor and his family, if dependent upon him," the debtor may be able to claim the entire annuity as exempt.[27] However, in the face of an objection, the bankruptcy court would then determine what amount of the annuity should go to the debtor's

bankruptcy estate for the benefit of creditors and what amount should remain property of the debtor.[28]

Transfer Issues

A fraudulent transfer cause of action under the Code essentially requires either actual fraud[29] or that the debtor, while insolvent, received less than reasonably equivalent value for the transfer.[30]

Under the Code, insolvency is defined as "the sum of . . . debts greater than all of such entity's property, at a fair valuation" exclusive of any fraudulently transferred or concealed property, or exempt property.[31] A trustee in bankruptcy can bring an action to set aside a fraudulent transfer under New York law,[32] with a six-year reachback period,[33] rather than the one-year reachback period contained in the Code.[34]

The Second Circuit Court of Appeals has held that a transfer before bankruptcy of non-exempt assets does not *ipso facto* compel the conclusion that there was an actual intent to hinder, delay, or defraud creditors; rather, intrinsic evidence of an actual intent to hinder, delay, or defraud creditors must be established beyond the mere fact of the transfer.[35] Lawful exemption planning is permissible. (See the box on page 37.)

In addition, assuming the debtor is not insolvent, the transfer of assets as part of estate planning or tax planning may avoid characterization as a fraudulent conveyance.

Denial of discharge issue One of the main goals of a personal bankruptcy is to obtain a discharge of indebtedness.[36] Although most unsecured obligations are subject to discharge, the Code provides that certain classes of obligations are automatically excepted from discharge[37] or are excepted from discharge upon order of the bankruptcy court.[38]

A debtor may also be denied a discharge in bankruptcy of all obligations, if there was a fraudulent concealment of assets[39] within one year before the bankruptcy petition was filed[40] or one year afterward.[41]

In the case of *In re Carletta*,[42] husband and wife joint debtors residing in New York, on the advice of counsel, used non-exempt cash and a tax refund to purchase two universal life insurance policies for initial premiums of $3,500 and $4,062 respectively. A creditor filed a complaint in their bankruptcy seeking to deny the debtors' discharge pursuant to Code § 727(a)(2)(A).[43] The debtors denied that they made the transfers with actual intent to hinder, delay, or defraud a creditor.[44] The bankruptcy court ruled that no intent to hinder, delay or defraud creditors was present, reasoning as follows:

> Debtors did not engage in sharp dealings, act in a secretive manner or make misrepresentations to creditors. Debtors' pre-bankruptcy planning was not accompanied by concealment or conduct calculated to mislead creditors. Debtors clearly revealed their actions and simply followed counsel's advice in effectuating their rights of exemption as set forth by the New York legislature. . . . It is not unusual for debtors to convert sub-

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Offshore Trusts Not Viable for Average Debtors

Establishing a domestic or offshore trust can be an excellent means of asset protection and estate planning. But it is not foolproof.

Funds in a self-settled trust are not beyond the reach of creditors under New York law,[1] only a trust for the benefit of someone other than the debtor would provide protection.[2]

The transfer of a fund to establish such a trust could potentially be set aside as an actual or constructive fraudulent conveyance[3] up to six years after the transfer.[4]

Also, even if the offshore jurisdiction does not recognize U.S. judgments,[5] a U.S. bankruptcy court can use civil or criminal sanctions against the debtor and thereby compel the debtor to return the offshore trust's assets to the U.S.[6]

Finally, the debtor may incur substantial legal and administrative costs associated with establishing and maintaining offshore entities.[7]

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1. N.Y. Estate Powers & Trusts Law § 7-3.1(a); *Dillon v. Spilo*, 275 N.Y. 275, 279 ("[i]t is only where a third party establishes the trust that the income of the beneficiary may not be reached to satisfy claims of creditors"); *see also In re de Kleinman*, 172 B.R. 764, 772 (Bankr. S.D.N.Y. 1994).
2. *Sattin v. Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998) (where debtor transferred property to his wife within one year prior to involuntary bankruptcy filing against him and his wife, she had established offshore trusts of which husband was beneficiary, property so transferred determined to be property of the debtor's bankruptcy estate).
3. Under either bankruptcy law (United States Code title 11 § 548) or state law (N.Y. Debtor and Creditor Law §§ 273-277) *et seq.*).
4. N.Y. Civil Practice Law and Rules § 213.
5. Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts*, 32. Vand. J. Transnat'l L. 739, 741 (May 1999) ("[T]he typical offshore jurisdiction does not recognize foreign judgments.").
6. Federal Rules of Bankruptcy Procedure 9020.
7. Eric Henzy, at 740 ("Attorneys specializing in offshore trusts typically charge as much as $18,500 to set up a trust and several thousand dollars each year for maintenance of the trust.").

Rules Covering Homesteads

A homestead is one of the major exemption planning devices available. Although the New York exemption is small compared with the amount allowed in other states, moving to another state is not a viable option for most debtors.

New York protects $10,000 of equity in principal residence.[1] The figure is $20,000 for married debtors filing a joint petition who jointly own their residence.[2]

Florida allows an unlimited homestead exemption for a personal residence.[3]

Texas allows an unlimited homestead of up to 200 acres, outside of a city or town, including a home or business on such land.[4]

Connecticut allows a $75,000 homestead exemption.[5]

There is a six-month waiting period to re-establish domicile for bankruptcy.[6] Many debtors will not want to relocate to another state due to career, personal or family reasons. Exemptions based on relocation to another state for purposes of claiming favorable exemptions have also been denied by bankruptcy courts.[7]

The U.S. Senate and the House have passed bankruptcy reform legislation that proposes to cap permissible homestead exemption at $100,000 in the Senate Bill and $250,000 in the House Bill. When this article went to press, a conference committee was attempting to resolve differences in the bills.

1. N.Y. Civil Practice Law and Rules § 5206(a), made applicable through N.Y. Debtor and Creditor Law Cred. Law § 282, since New York has opted out of the federal exemptions set forth in United States Code title 11 U.S.C. § 522(d) (hereinafter U.S.C.); *See In re Miller*, 103 B.R. 65, 67 (Bankr. N.D.N.Y. 1989).
2. *John T. Mather Memorial Hospital, Inc. v. Pearl*, 723 F.2d 193, 194 (2d Cir. 1983).
3. Florida Constitution article 10, § 4(a)(1) and article 7, § 6.
4. Texas Constitution article XVI, § 51; Texas Property Code § 41.002.
5. Connecticut General Statutes § 52-352b(t).
6. 11 U.S.C. § 522(b)(2)(A) (must be domiciled in the new state at least "180 days immediately preceding the date of the filing of the [bankruptcy] petition, or for a longer portion of such 180 day period than in any other place" before the exemption laws of that state can be utilized).
7. *See e.g.*, *In re Coplan*, 156 B.R. 88 (Bankr. M.D. Fla. 1993); *In re Schwarb*, 150 B.R. 470 (Bankr. M.D. Fla. 1992).

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> stantially all of their assets into exempt property on the eve of bankruptcy. For the Court to render a per se rule that this is sufficient extrinsic evidence for a finding of actual intent to defraud would effectively swallow Code § 727(a)(2).[45]

The *Carletta* court distinguished the case before it from *Norwest Bank Nebraska, N.A. v. Tveten*,[46] in which the debtor was a physician who converted $700,000 of non-exempt property into exempt property on the eve of bankruptcy. The *Carletta* court found that while the amount of non-exempt property converted to exempt assets is relevant to a Code § 727(a) determination, this fact alone is not dispositive, because a holding of fraud is fact-specific in each case.[47]

By contrast, in the case of *In re Portnoy*,[48] the debtor had personally guaranteed a bank loan in excess of $1 million. Less than 17 months later, the debtor transferred substantially all of his assets valued in excess of $700,000 to an offshore trust based on the island of Jersey.[49] More than five years later, the debtor filed a voluntary Chapter 7 petition.[50]

In the debtor's schedules, the debtor in *Portnoy* identified his interest in the offshore trust as being limited to his status as "one of the beneficiaries as determined by the [offshore trust] trustees in their sole discretion."[51] Based on this and other facts, the bank then brought a complaint for denial of discharge pursuant to Code § 727(a)(2)(A) and (a)(4). The bankruptcy court denied the debtor's motion for summary judgment, finding that triable issues of fact existed concerning the debtor's intent in transferring the assets to the offshore trust[52] and concerning whether his failure to list his "control powers" over the trust assets in the schedules to his bankruptcy petition was knowing or reckless.[53]

Although the debtor's transfer of assets occurred outside of the one-year period before a bankruptcy filing specified in Code § 727(a), the court stated that "'continuing concealment' of property will be found to bar the debtor's discharge when he continued to conceal the existence of the property with the intent to hinder, delay, or defraud."[54]

Denial of discharge is most likely to pose a problem in exemption planning involving the purchase of life insurance or annuity contracts where a very large lump sum cash payment is used to acquire life insurance shortly before filing bankruptcy, or a little more than six months before filing bankruptcy in the case of an annuity. The other factor to consider is how much whole life insurance coverage is acquired. To the extent that the total coverage is entirely out of proportion to the debtor's income and anticipated needs of her/his dependents in the future, the risk increases that discharge may be denied.

Conclusion

Whole life insurance provides a significant exemption for New York State residents that should not be overlooked in exemption and asset protection planning. In the case of married couples, maximum protection will be gained if each spouse is the owner and beneficiary of a policy on the other spouse. Moreover, life insurance held by an irrevocable trust may be excluded from the debtor's bankruptcy estate and also excluded from the debtor's estate for estate and gift tax purposes.

The greater the time period from the acquisition of such insurance or an annuity contract to the filing of bankruptcy, the less likely that an exemption for such insurance or annuity may be subject to a claim of fraudulent conveyance. The exemption planning transaction may be insulated from being treated as a fraudulent conveyance if the debtor was solvent at the time he/she purchased insurance or an annuity contract and can establish legitimate reasons for the transfer, such as providing for the debtor's dependents in case of her/his disability or death, estate planning or tax avoidance. In this regard, it would be to the debtor's advantage to have the transfer occur as part of a comprehensive estate plan that encompassed tax, estate planning and asset protection goals, beyond merely pre-bankruptcy exemption planning. The participation of counsel specialized in tax and estates, and not just bankruptcy, may aid the debtor in establishing a basis to protect the transfer from avoidance.

In the absence of actual fraud, the transfer generally will not be disturbed if the debtor was solvent at the time, or if the transfer was for fair consideration. However, if the debtor was insolvent at the time of the transfer, there is a risk that a bankruptcy court in hindsight will not agree with the debtor's determination of what constitutes fair consideration, particularly if the debtor had substantial assets.

An underlying message in many of the exemption planning cases, as articulated in the *Zouhar*[55] case, is that "when a pig becomes a hog it gets slaughtered." In exemption planning, particularly when an unlimited exemption is available, such as that for life insurance, a debtor should not be greedy. Rather, the debtor should make a realistic and reasonable assessment of her/his assets, current liabilities, future earning prospects and anticipated future liabilities (such as for dependents, medical needs, and retirement). If the transaction is later challenged, the existence of a well-reasoned, contemporaneous assessment of the reasons for the transfer may help prevent it from avoidance.

Finally, in the event of a bankruptcy filing, assuming that good records are kept regarding the source of the funds used to acquire the exempt asset, the exempt asset is fully described in the schedules to the debtor's petition, the debtor responds truthfully at the 341(a) meeting of creditors, or any other related discovery, the exemption planning transaction should not be grounds for denial of discharge pursuant to Code § 727.

It would be to the debtor's advantage to have the exemption planning transfer occur as part of a comprehensive estate plan that encompassed tax, estate planning and asset protection goals.

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1. Individuals are eligible to file for liquidation under Chapter 7 of the Bankruptcy Code, reorganization under Chapter 11, and, subject to having a regular source of income and certain debt limits, repayment plans under Chapter 13.
2. United States Code, Title 11 § 541 (hereinafter U.S.C.).
3. 11 U.S.C. § 522; *See also* Schedule C (Property Claimed As Exempt) to Official Form No. 6 promulgated by the Judicial Conference of the United States.
4. *Owen v. Owen*, 500 U.S. 305 (1991).
5. 11 U.S.C. § 522(b)(1); N.Y. Debtor and Creditor Law § 284 (hereinafter N.Y. Debt. & Cred. Law); *see In re Kaufman*, 68 B.R. 391, 393 (Bankr. S.D.N.Y. 1986).
6. 11 U.S.C. § 522(*l*). Such objection must be brought within 30 days after the conclusion of the meeting of creditors or the filing of an amendment to the list. Federal Rules of Bankruptcy Procedure 4003(b). The Supreme Court has held that the trustee may not contest the validity of a claimed exemption after the expiration of the 30-day period, even if the debtor had no colorable basis for claiming the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). Some courts have called this "exemption by default." *See, e.g., In re Morgan*, 149 B.R. 147 (9th Cir. BAP 1993).
7. 11 U.S.C. § 701-766.
8. 11 U.S.C. § 701.
9. 11 U.S.C. § 704(1). Such trustee also has extensive powers to avoid many types of transfers made prior or subsequent to bankruptcy filing. *See* 11 U.S.C. §§ 544, 545, 547, 548, 549, 553(b), and 724(a).
10. *See In re Carletta*, 189 B.R. 258, 261 (Bankr. N.D.N.Y. 1995) (pre-bankruptcy exemption planning "is a strategy whereby financially besieged debtors liquidate non-exempt assets and use the proceeds of that liquidation to purchase exempt property prior to filing a bankruptcy petition.").
11. *Schwartz v. Seldon*, 153 F.2d 334, 336 (2d Cir. 1945).
12. *See* H.R. 595, 95th Cong. (1977); S. 989, 95th Cong. (1977); 1978 U.S.C.C.A.N. pp. 5787, 5862, 6317.
13. N.Y. Debt. & Cred. Law § 282.
14. N.Y. Insurance Law § 3212(b)(1) (hereinafter N.Y. Ins. Law) (emphasis added).

15. N.Y. Ins. Law § 3212(a)(1).
16. *In re Rundlett*, 153 B.R. 126, 129 (Bankr. S.D.N.Y. 1993), *citing to Kaufman v. New York Life Ins. Co.*, 32 A.D.2d 79, 299 N.Y.S.2d 269, *aff'd* 26 N.Y.2d 878, 309 N.Y.S.2d 929 (1970).
17. *See In re Bifulci*, 154 F. Supp. 629, 631 (S.D.N.Y. 1957).
18. *Rundlett*, 153 B.R. 126.
19. *Id.* at 128.
20. *Id.* at 129, *citing to* N.Y. Ins. Law § 3212. *See also In re Mata*, 244 B.R. 580 (Bankr. W.D.N.Y. 1999) (where husband and wife file a joint case under § 302 of the Bankruptcy Code and is owner of a life insurance policy covering the owner's life, the policy is not exempt from claims of the spouse's creditors).
21. *Id.* at 132.
22. Section 2035 of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 2035. A life insurance trust is generally far simpler and cheaper to establish and maintain than an offshore trust. *See generally* Howard Zaritsky, Tax Planning For Family Wealth Transfers, § 11.04[2] at 11-24 (1997).
23. Defined as "any obligation to pay certain sums at stated times, during life or lives, or for a specified term or terms, issued for a valuable consideration, regardless of whether such sums are payable to one or more persons, jointly or otherwise, but does not include payments under a life insurance policy at stated times during life or lives, or for a specified term or terms." N.Y. Ins. Law § 3212(a)(2).
24. N.Y. Ins. Law § 3212(d)(1).
25. N.Y. Ins. Law § 3212(d)(2).
26. N.Y. Debt. & Cred. Law § 283(1).
27. 11 U.S.C. § 522(*l*). Such objection must be brought within 30 days after the conclusion of the meeting of creditors or the filing of an amendment to the list. Federal Rules of Bankruptcy Procedure 4003(b). The Supreme Court has held that the trustee may not contest the validity of a claimed exemption after the expiration of the 30-day period, even if the debtor had no colorable basis for claiming the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). Some courts have called this "exemption by default." *See, e.g., In re Morgan*, 149 B.R. 147 (9th Cir. BAP 1993).
28. N.Y. Ins. Law § 3212(d)(2).
29. "The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily - (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1).
30. As an alternative to avoidance of a fraudulent transfer based on actual intent to hinder, delay, or defraud creditors, the Code provides that a trustee may avoid transfers of an interest of the debtor in property, made within one year of the filing of the bankruptcy petition, where the debtor, "(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured." 11 U.S.C. § 548(a)(1)(B).
31. 11 U.S.C. § 101(32).
32. "[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable under section 502(e) of this title." 11 U.S.C. § 544(b). To set aside a fraudulent transfer under New York law, a plaintiff must establish either that an obligation was incurred with actual fraudulent intent (N.Y. Debt. & Cred. Law § 276), or that fair consideration was not received in exchange for such obligation, by a defendant that was insolvent or became insolvent as a result of incurring the obligation in question. N.Y. Debt. & Cred. Law § 273. Fraudulent intent requires a showing of intent to hinder, delay or defraud either present or future creditors. N.Y. Debt. & Cred. Law § 276.
33. The applicable statute of limitations is six years. N.Y Civil Practice Law & Rules § 213.
34. 11 U.S.C. § 522(*l*). Such objection must be brought within 30 days after the conclusion of the meeting of creditors or the filing of an amendment to the list. Federal Rules of Bankruptcy Procedure 4003(b). The Supreme Court has held that the trustee may not contest the validity of a claimed exemption after the expiration of the 30-day period, even if the debtor had no colorable basis for claiming the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). Some courts have called this "exemption by default." *See, e.g., In re Morgan*, 149 B.R. 147 (9th Cir. BAP 1993).
35. *In re Adlman*, 541 F.2d 999, 1002-1003 (2nd Cir. 1976).
36. *See* 11 U.S.C. §§ 524, 1141, 1328.
37. *See* 11 U.S.C. §§ 523(a)(1)(certain types of taxes); 523(a)(3)(unscheduled debts); 523(a)(5)(divorce related debts); 523(a)(7)(governmental fines and penalties); 523(a)(8)(certain student loans); and 523(a)(9)(death or injury caused by drunk driving).
38. *See* 11 U.S.C. §§ 523(a)(2)(A) and (B)(fraudulently obtained goods, services and loans); 523(a)(2)(C)(debts for "luxury goods"); 523(a)(4)(fiduciary breach, embezzlement); and 523(a)(7)(willful and malicious injury).
39. Where, "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated or concealed [property of the debtor]." 11 U.S.C. § 727(a)(2).
40. 11 U.S.C. § 727(a)(2)(A).
41. 11 U.S.C. § 727(a)(2)(B).
42. *See In re Carletta*, 189 B.R. 258, 260 (Bankr. N.D.N.Y. 1995) (pre-bankruptcy exemption planning "is a strategy whereby financially besieged debtors liquidate non-exempt assets and use the proceeds of that liquidation to purchase exempt property prior to filing a bankruptcy petition.").
43. *Id.*
44. *Id.* at 261.
45. *Id.* at 262.

46. 848 F.2d 871 (8th Cir. 1988).
47. *See Carletta*, 189 B.R. 263 (pre-bankruptcy exemption planning "is a strategy whereby financially besieged debtors liquidate non-exempt assets and use the proceeds of that liquidation to purchase exempt property prior to filing a bankruptcy petition.").
48. 201 B.R. 685 (Bankr. S.D.N.Y. 1996).
49. *Id.* at 689.
50. *Id.* at 691.
51. *Id.*
52. *Id.* at 701.
53. *Id.* at 702; *See also In re Pomerantz*, 215 B.R. 261 (Bankr. S.D.Fla. 1997) (denying discharge to debtor who breached contractual agreement to use proceeds from sale of New York home to pay off a debt, and rather used all of the proceeds, shortly after judgment was entered against her in New York, to purchase home in Florida claimed as exempt homestead in subsequent bankruptcy filing).
54. *Portnoy* 201 B.R. at 695-696.
55. *In re Zouhar*, 10 B.R. 154, 156 (Bankr. D.N.M. 1981).

Ethical Considerations

In this article we have assumed that counsel would only advise their clients to pursue lawful and permissible exemption planning, as opposed to fraudulent transfers of assets on the eve of bankruptcy.

However, we note that at least for now, the state of the law is that those who assist fraudulent transfers, such as counsel, but do not receive any direct benefit from the transfers themselves, are not subject to liability.[1]

We leave for another day a discussion of the ethical and professional responsibility issues associated with pre-bankruptcy exemption planning,[2] but note it is a good practice to provide the client with a letter or memorandum memorializing counsel's exemption planning advice, the reasons for it, and the potential vulnerability of certain exemption claims. Although outside of bankruptcy such correspondence would be privileged,[3] in the event of a bankruptcy filing, such correspondence may not be insulated from discovery by a bankruptcy trustee.[4] Thus, counsel would be well-advised to be circumspect in the preparation of such correspondence and consider while drafting it how it might be viewed and interpreted by the trustee, creditors, or the bankruptcy court.

Stephen Z. Starr, Brian C. Bandler

1. Craig H. Averich and Blake L. Berryman, *Attorney Liability For the Client's Fraudulent Transfer: Two Theories*, 7 J. Bankr. L. & Prac., 495 (July/August 1998).
2. *See* King et al., 1 *Collier on Bankruptcy*, § 8.06(1)(c) at 8-55 (15th ed.) (discussing ethical issues attendant to exemption planning).
3. N.Y. Civil Practice Law and Rules §§ 3101(c), 4503(a).
4. *See In re Foster*, 217 B.R. 631 (Bankr. D. Colo. 1997) (attorney-client privilege passed to Chapter 7 trustee and neither it nor work-product doctrine barred turnover of documents related to pending pre-petition civil litigation commenced by individual debtor) *aff'd in part, rev'd in part*, 188 F.3d 1259 (10th Cir. 1999) (the Circuit Court affirmed the bankruptcy court's decision that the work product doctrine did not apply, however, the court remanded the case back to the bankruptcy court to determine whether the attorney-client privilege applied to the individual documents sought). *But cf. McClarty v. Gudenau*, 166 B.R. 101, 102 (E.D. Mich. 1994) (attorney-client privilege enjoyed by individual debtor did not pass to trustee upon bankruptcy filing); *In re Hunt*, 153 B.R. 445 (Bankr. N.D. Tex. 1992) (attorney-client privilege did not pass to independent trustees under individual debtors' reorganization plans); *see also* Russell, *Bankruptcy Evidence Manual* § 501.7 at 509 (1999) ("It is presently unsettled whether a trustee may waive an individual debtor's attorney-client privilege").

Close Attention to Detail Can Persuade Judges to Order Truly Complete Discovery Responses

By Michael Weinberger

Production of documents is a well-known source of headaches in the course of litigation. A corporation directed to produce all documents entitled "Gas Tank Crash Tests" may comply technically, while nevertheless omitting documents entitled "Gas Tank Safety Tests."

Confronted with requests to require that litigants produce all genuinely relevant documents, a federal magistrate judge in Brooklyn and a Supreme Court judge in Queens have issued rulings that illustrate how the discovery process can be kept from degenerating into legal hair-splitting.

Their carefully crafted orders resolved critical issues central to the cases being tried. Although the rulings were made in products liability and negligence settings, the solutions they embody could be relevant in real estate transactions, marital litigation, and a wide range of other cases.

In one case, Magistrate Judge Joan Azrack of the U.S. District Court for the Eastern District, effectively ruled that the defendant could not have its cake and eat it too. The issue involved a large food processing machine with hidden blades and a plaintiff who lost several fingers when he tried to clear a jam on the first day he had used it. The magistrate ruled that the defendant manufacturer could not insist that an allegedly defective housing and switches on the machine worked fine and should not have been removed by the owner, while also refusing to produce maintenance records for the housing and switches on similar machines.

In the other case, Judge Herbert Posner of the Supreme Court, Queens County, dealt with obstacles faced by a plaintiff who had been rendered a paraplegic by the malfunction of a hoist machine that lacked a safety latch. He issued an explicit and detailed order directing the defendant to provide not only "records" of the equipment affected but also to interview its employees on the relevant issues and to turn over a wide range of documents affecting all hoists in the facility and the maintenance records for them.

The evolution of the two cases and the circumstances that led to the judges' rulings provide an instructive look at how close attention to the nuances of a situation can provide an attorney with enough information to win an order that ultimately yields discovery of facts that an opponent would prefer not to reveal.

Magistrate Azrack's Ruling

In Magistrate Azrack's case, a state court pre-suit discovery order had given counsel for the plaintiff the opportunity to examine the food processing machine in its factory setting. The client, who accompanied the attorney, explained that a piece of sheet metal housing that covered feed belts had not been on the machine when he was injured. Because the absence of this housing was directly implicated in the accident, the key question became, Why wasn't the housing there at the time of the accident?

The housing was connected to a particular type of microswitch. Research on how the microswitch operated provided a good hunch about why the housing and the microswitch might have been removed. The hunch was later confirmed in interviews with several of the client's co-workers, who described problems the machine could encounter when the housing and microswitch were in place. The theory of the case, therefore, was fashioned around how the desire to avoid

Michael Weinberger directs a practice in New York City that concentrates on product liability cases. The author of *New York Products Liability 2nd*, published by West Group, he has lectured for the Practising Law Institute, the New York State Trial Lawyers Association, and numerous bar associations. He was the counsel for the plaintiff in both of the cases described in this article. A graduate of Brooklyn College of the City University of New York, he received his J.D. from Brooklyn Law School.

these problems could motivate the factory to take off the housing and the microswitch.

A suit was initiated against the manufacturer of the machine. The manufacturer had also provided service on this type of machines, although it may not have provided significant service on this particular unit. After issue was joined, a notice was served on the manufacturer asking it to either: (1) admit that customers were taking off the housing, or, if it denied this, (2) produce maintenance records for this model machine, not just this particular unit.

The defendant objected to the request for an admission and simultaneously declined to produce the maintenance records. The defendant's position was that only information and records on this particular unit were discoverable. It would not voluntarily produce maintenance records for units used by other customers, even though the records covered the same model.

At a discovery conference before Magistrate Azrack, the defendant said its general theory of the case was that the housing and the microswitches worked well and should not have been removed. The plaintiff explained that if this was the defense, the defendant either had to respond to the Notice to Admit that customers were taking off the housing or produce the records on other machines.

The defendant countered that even if the records were relevant to the plaintiff's theory, they were in hundreds of customer files, possibly thousands, and it would be a tremendous burden to produce them. The plaintiff offered to pay for a secretary or office clerk to go through the files. If it took a week, so be it, that person's salary would be paid.

Magistrate Azrack considered the arguments and reviewed the plaintiff's pleadings, which specifically asserted that the housing and switches were deficient and were being removed by the manufacturer's customers. She held that the maintenance records were discoverable, and because the cost of their production was going to be covered, the asserted burden of producing them was not determinative of the issue. The records, she held, had to be produced.

Several weeks later, plaintiff's counsel received about 50 pages of records, but they were not accompanied by an affidavit describing their completeness or the search that led to their production. Defense counsel was informed that this response was not acceptable, and a series of letters were exchanged. Eventually, about 200 additional pages of records were produced, along with a detailed description of the document search that led to them.

The records implied that other large companies were using this machine without the sheet metal housing.

Rulings by a federal magistrate and a state court judge illustrate how the discovery process can be kept from degenerating into legal hair-splitting.

Several companies had disabled or bypassed electric switches to do so. One internal memo discussed the problems that a particular customer had when the housing was placed over the feed belts. The hunch that other customers, not just the plaintiff's employer, had taken off the housing, appeared to be true.

Because the documents were not entirely clear, however, a deposition on this issue was held soon afterward. After several hours of dueling, the defendant's witness acknowledged that the company had been on notice, years before the plaintiff's accident, that customers were removing the housing. The manufacturer's response was basically to tell the customers to restore the housing. It apparently did little else. The case settled three months after the document production and deposition.

The settlement would not have been possible without Magistrate Azrack's ruling, which recognized that the defendant could not maintain that the housing and switches worked fine and assert that their removal by customers was an absolute defense for the manufacturer, yet also refuse to produce maintenance records reflecting how other machines of this type were being used. Her position was also a factor in motivating the defendant to produce the additional 200 pages of documents when it appeared that the initial 50-page production was not truly responsive.

A bill for the cost of the document search was never received. When an inquiry was made, the response was that the files were neatly kept in one person's office. The defendant then conceded that the documents had been retrieved and copied by the individual very easily. No secretary or paralegal was needed.

Judge Posner's Ruling

In Judge Posner's case, the hook on a hoist machine lacked a safety latch. The hook was also bent, or "spread," out of specifications, although a blue collar worker would not be able to tell this by simply looking at it. Indeed, several engineers who were deposed in the case also could not tell. According to several witnesses the hook had been in this condition for quite some time.

Two months remained on the statute of limitations when the case was referred to a products liability attor-

ney to assess the viability of a lawsuit. Because the hoist was manufactured more than 25 years ago, the best theory, it seemed at the time, would be against the company that had last inspected the hoist. Such hoists are covered by regulations of the Occupational Safety and Health Administration and by standards of the American Society of Mechanical Engineers. All require, at a minimum, annual inspections.

The referring attorney had already deposed the owner of the hoist in a pre-action deposition. The owner's witness stated that, according to its "records," the hoist had been disposed of. After reading this deposition, the trial attorney contacted the owner's attorney and requested a complete paper trail covering maintenance and inspection of the hoist.

In view of the imminent expiration of the statute of limitations, the request for the paper trail was made by certified mail. Several days later, the owner's attorney advised in a telephone call that the records indicating the hoist had been discarded appeared to be in "error" and that indeed the hoist was still available. It had been removed from the accident site and was actually in the same building where the owner's attorney maintained his office. Somewhat surprised, counsel for the plaintiff demanded to see the hoist within 48 hours. The owner's attorney agreed.

Careful analysis of craftily worded document productions can lead to discovery orders that force the production of all truly relevant evidence.

Unfortunately, the hoist lacked an inspection sticker or tag, let alone the name and address of the inspection company. The owner's attorney claimed that there were no inspection records for this hoist. Technically speaking, he was right, but only in a roundabout way that related to the central issue in the case.

The claim could be made that there were "no inspection records for *this* hoist," because the inspection company hired by the hoist owner had missed this particular unit. Although hired to conduct an inspection of "all" hoists at the factory, the company had never inspected this one. It never got a list of all the hoists at this facility and apparently did not even know this particular hoist was there.

Although one could argue this was negligence on the part of the inspection company,[1] at this stage the plaintiff's counsel still did not know who that company was or even that an inspection contract existed. All he was told was, "There were no inspection documents on this particular hoist."

Pointing to the error in the "records" claiming that the hoist had been discarded, plaintiff's counsel asked Judge Posner, who was supervising pre-action discovery, for a comprehensive order directing the defendant to turn over all its maintenance records and contracts on hoists, whether they listed this particular hoist or not. Judge Posner agreed and issued an instructive order[2] that provided in pertinent part:

> [Respondent] and its attorneys are directed to list, by year, the names and addresses of entities that performed maintenance or installation services on hoists at [respondent's facility] in general, between the year this hoist was purchased, 1971, and the year of petitioner's accident, 1995. Respondent is directed not to rely exclusively on its "records" to compile this information, but rather, to interview its employees on this.
>
> Because it is claimed some hoist related documents do not list serial numbers, this information shall not be limited to Serial Number L-0808H [the hoist involved in this case], but rather, parties who worked on hoists . . . in general shall be listed—whether or not [respondent] is positive they worked on L-0808H.
>
> If maintenance contracts covering hoists in [the facility] between 1971-1995 exist they are to be provided. If the contracts do not exist computer summaries of the contracts' purchase orders are to be provided. The actual "Procurement Requests" for hoist work are to be provided to the extent possible, and a complete computer summary thereof (known as "Order Releases").
>
> This ruling does not relate to the topic of admissibility at trial, which shall be passed on by the Trial Judge. Compliance with this Order shall be completed by November 7, 1997, and shall relate to all hoist components illustrated in Exhibit B [photograph of hoist components] attached hereto.

Confronted with this order, the hoist owner produced a lengthy affidavit accompanied by all the maintenance contracts. The contracts were individually numbered and identified and made a matter of record. They were not produced as a series of loose pages whose contents were not recorded.

The litigation against four of five defendants was subsequently settled without trial. The fifth defendant is pursuing an appeal on an unrelated issue.

Conclusion

Compliance with document production requests are often craftily worded, but careful analysis of the language and effective presentation to the court can lead to discovery orders that force the production of all truly relevant evidence.

If the defendant says there are "no inspection records" on a product, perhaps the product should have been inspected but was missed and the contract indicating that it should have been inspected may not be produced. Likewise, the production of safety and maintenance records indicating a problem with a component in a machine may be resisted on the theory that they do not relate to the individual and particular unit involved in the suit, even though they are, in fact, highly relevant to a true understanding of how the unit was typically being used.

Devices such as requesting an affidavit describing the search may also provide clues suggesting that a less-than-frank document production is being attempted. A response without numbered documents may also be a clue that the responding party is responding with a series of incomplete loose pages that lack key documents.

Unfortunately, the tactics of an opponent may also include the claim that producing the documents would be a "burden," even if there is no basis for the assertion. Faced with such a claim, the offer to pay for the cost of a clerk or paralegal to do the work can diffuse the issue.

When these techniques uncover enough facts to suggest that potentially vital information is being withheld on highly technical grounds, judges may be persuaded to issue orders that direct truly complete document production, as Magistrate Azrack and Judge Posner did.

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1. *Abato v. Millar Elevator Serv. Co.*, 261 A.D.2d 873, 690 N.Y.S.2d 806 (4th Dep't 1999); *Sosa v. Ideal Elevator Corp.*, 216 A.D.2d 128, 629 N.Y.S.2d 253 (1st Dep't 1995).
2. *In re Forde*, Index No. 17651/97 (Sup. Ct., Queens Co. Oct. 29, 1997).

The Most Powerful Word In the Law: "Objection!"

BY ALAN D. MARRUS

If you had to select a single word with the greatest impact on the evolution of law and justice, what would it be? My nomination goes to "Objection!"

The invocation of this word can change the direction of a trial and the outcome of an appeal. It can reinforce the bond between an attorney and client, disrupt an adversary on the path to legal victory, and summon the intervention of judicial power in an adversarial proceeding. This one word is so mighty that it can actually get a trial lawyer to stop speaking in the middle of a sentence. There simply is no other word in the legal lexicon with such power.

Given the majestic power of "Objection!" it deserves to be followed by an exclamation point. It is an expression of protest in the face of improper, unfair or illegal action. Or as one cynic has observed, it can be "the cry of a lawyer who sees truth about to creep into the courtroom." However it is defined, "Objection!" is an exclamation designed to bring attention to the party making it and to draw attention away from the party causing it.

Indeed, the failure to utter this word in a timely fashion can alter the course of any litigation. The most damning improper and prejudicial testimony may be heard by a jury in the absence of or by a delay in objecting to such testimony. An appellate court may refuse to review an egregious error warranting reversal of the judgment below solely because this one word was not timely uttered in the court below.

As a judge for 17 years and before that an appellate attorney, I have experienced firsthand the agony and the ecstasy of an objection. To preside over a trial punctuated by a series of worthless objections is like being a student in a classroom while a teacher drags a stick of chalk forcefully across a blackboard. It causes great mental anguish.

The appellate lawyer who rises joyfully from a desk chair upon discovering reversible error in a trial transcript will surely slump back down when the transcript omits any mention of the word "objection!" by a lawyer witnessing the same error at the trial.

The judge's gratification is surely matched by the joy of an appellate attorney who discovers the word in a trial transcript contemporaneous with the erroneous event that will lead to reversal.

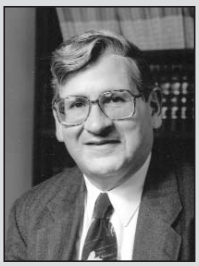
When to Object

Consideration of the power of an objection and the dire consequence that may result from the failure to make one might lead a lawyer to conclude that the more objections you make, the better you will do for your client. As one lawyer once boasted, "If I make enough objections, I can protect my client's rights and protect myself from a malpractice suit later on." But as trial judges like to tell jurors when it comes to evaluating testimony, "It's the quality that counts, not the quantity."

A trial lawyer walks a fine line. The lawyer wants to keep the confidence of the client, the respect of the lawyer on the other side, and the support of the judge in contested matters. These are all immediate concerns. Down the road, if the client loses in the lower court, there may be an appeal and an issue may be raised on the appeal if an objection was made in the lower court. Preserving the record for appeal is, thus, an important but somewhat hypothetical concern. Prevailing in the lower court is the immediate, greater concern.

Hypothetical, future appellate strategies may conflict with real, immediate trial concerns. A lawyer at the crossroads of this dilemma must choose a path wisely, balancing the impact the objection will have in the trial court against the benefit of preserving the issue for appellate review.

Let's suppose your adversary calls a witness to give expert testimony concerning an important issue at trial.



ALAN MARRUS was named to the Criminal Court of the City of New York in 1983 and has been an acting Supreme Court justice in Kings County since 1986. Earlier, he was a chief of the Appeals Bureau in the Bronx District Attorney's Office. He is a graduate of Brooklyn College and received his J.D. from George Washington University Law Center.

After the direct examination of the expert's credentials, the judge wants to know if you have an objection to the witness being qualified as an expert. Let's further suppose that the witness's credentials are dubious and may not legitimately qualify the witness to be an expert. Add to the equation your beliefs that the witness may help you as much as hurt your case and that the trial judge will qualify the expert no matter what you do.

If you object, you know you will be overruled by the trial judge and perhaps look somewhat foolish in the eyes of the jury. An objection may also undercut the portion of the expert's testimony that could help your side. By not objecting, you perhaps send a stronger signal to the jury that the witness doesn't concern you, but you realize that you will probably fail to preserve the issue of the witness's expertise for appellate review.

I can't say what the final answer is to this question, but I know that you have no lifelines. If you have waited until this point, it may already be too late; the preferable strategy is to anticipate this issue and bring it up in a conference beforehand with your opponent and the judge.

There should be an overriding concern regarding the effect that the number of your objections will have on your influence with the judge and your credibility as an advocate.

In addition to being concerned about the strategic wisdom of the individual objection, there should be an overriding concern regarding the effect that the number of your objections will have on your influence with the judge and your credibility as an advocate. An advocate who makes too many objections risks a severe diminution in influence and credibility in the lower court.

Put yourself in the position of a trial judge who hears very few objections from a lawyer during the trial. When the tranquility of the trial is then suddenly interrupted by "Objection!" don't you think the judge will give that objection serious attention? Contrast that with a judge bombarded with frequent objections. Unless it is one of those rare situations where voluminous objections are warranted by a continuing pattern of egregious conduct on the other side, the judge is not likely to give great credence to any individual claim of error.

A trial lawyer should not only be concerned with preserving issues for appeal, but also with preserving the lawyer's credibility in the lower court.

How to Make an Objection

The way an objection is made may also have an impact on its relative effectiveness in the lower court or on a subsequent appeal.

To maximize the impact on a lower court judge, a litigant may ask to approach the bench to describe to the judge in great detail the full scope of an objection. If the sidebar conference is not placed on the record, however, there will be no preservation of the issue for appeal. A lengthy sidebar conference, moreover, regardless of whether it is placed on the record, creates a disruption of the proceeding in the lower court. Thus, while frequent, lengthy, recorded sidebar conferences generate a record on appeal that is fertile for appellate review, they disrupt a trial by frustrating a jury and alienating the trial judge.

Lawyers seem to feel the need to follow up on an objection whether it has been overruled or sustained. An overruled objection is sometimes followed by an "exception" from the party who made the objection. "Exception!" is an outmoded word, no longer necessary to preserve an issue for appeal. Its use is thought to both highlight judicial error and make clear that the lawyer's original protest has not been properly heeded.

Appellate courts, however, no longer require the invocation of "Exception!" to preserve an issue for appeal when a timely objection has been denied. Thus, an exception today constitutes an attorney's barren attempt to reply to an adverse ruling. It constitutes an unnecessary disruption of the proceedings and may well alienate the trial judge, who enjoys few luxuries in court, one of which is supposed to be having the last word when an issue is raised.

Another dubious expression that sometimes follows an objection is "move to strike!" A lawyer will sometimes employ this exclamation following a sustained objection to a witness's answer. When a judge sustains an objection to an improper answer by a witness, it follows logically that the testimony must be disregarded by the jury. Indeed it is customary for a trial judge to instruct jurors at the beginning of a trial that when an objection to a witness's answer is sustained, the jurors must disregard that testimony. Court reporters are well aware when they read back testimony during deliberations that a sustained objection to a witness's answer requires them to skip that answer.

"Move to strike!" may actually have the opposite effect of what a lawyer intends. It invites the judge to strike a portion of the witness's answer and not the entire response. Without such clarification, a sustained ob-

jection to a witness's answer arguably strikes the entire response.

Standards for Appellate Review

Knowledge of the appellate process is essential to a trial attorney who contemplates using objections primarily to preserve issues for appeal. Trial attorneys should be aware of the scope of review of trial errors in New York's appellate courts.

The Appellate Division may not consider an error in the record absent preservation of that issue by a timely objection. Nevertheless, the Appellate Division can review unpreserved errors in "the interest of justice." The absence of an objection in the record on appeal is, therefore, not necessarily fatal to subsequent review by the Appellate Division.

The Court of Appeals, however, has no "interest of justice" jurisdiction. The absence of a timely objection to a claimed error will, therefore, preclude review of an issue in that court. Because the Court of Appeals reviews only a tiny percentage of cases tried in the lower courts, however, making objections solely to preserve issues for review by the Court of Appeals is a strategy unlikely to succeed. Nevertheless, to have any chance of success in the Court of Appeals, a timely objection is required.

Although individual objections may be spontaneous, an attorney's pattern of objecting should reflect an overall coherent strategy.

Types of Objections

Objections occur in different situations, creating different challenges for the attorneys and the trial judge.

Perhaps the simplest and most straightforward situation occurs when an objection is made to the form of an adversary's question. There the basis of the objection and the ruling required from the court are generally obvious. If an attorney has asked a hypothetical, compound or confusing question, a prompt objection will usually lead to a prompt "sustained" from the court, or in many cases a prompt "withdrawn" by the attorney posing the faulty question. "Form objections" are generally the easiest for opposing counsel to make and for the trial judge to understand and to handle.

Somewhat more challenging are objections based on evidentiary grounds. Here a trial judge may better handle the objection if it is accompanied by the specific evidentiary ground alleged, *e.g.*, "hearsay," "irrelevant," etc. The risk to the party specifying the ground, however, is that the wrong ground will be identified even though the objection has merit on another ground. In such a case, the trial judge has the option of sustaining the objection because of its general merit or overruling the objection because the specific ground stated is incorrect.

What makes this objection situation the most difficult is when the ruling of the court depends on the answer of the witness. A trial judge may not know if a witness's answer will contain irrelevant or improper information until the witness actually answers. Worse yet is the situation where the judge seeks a preview of the answer at a sidebar conference by asking counsel who posed the question what the answer will be. Many times a witness will not answer the question the way the court is told by counsel. Counsel should anticipate these situations before the trial starts, or certainly before the witness takes the stand, and make a motion in *limine* to alert the court and secure a thoughtful ruling. This preemptive strike may result in an instruction to the witness, before testifying, clarifying what may or may not be said.

Another common objection situation is an objection to the conduct of the opposing counsel. Claims that an attorney is "badgering the witness," "reading inaccurately from a document," "failing to disclose discoverable material," and the like are a public attack on the behavior of opposing counsel. Because of the personalized nature of such objections, a response may follow from the attorney who is the subject of such an objection, such as, "No, I'm not" or "I did turn over the document." In these situations, the judge must respond quickly and firmly to identify any misconduct and make sure that such colloquy between counsel ends. An attorney who makes a "personalized objection" should do so only in clear cases of misconduct where judicial intervention is required. These objections and the inevitable retorts from the other side diminish counsel's standing with the judge and jury.

Another frequent occasion for an objection occurs when counsel reacts to a comment in the opposing lawyer's summation. The most common basis for a summation objection is, "That's not the evidence." Unless it is absolutely clear that no such evidence was offered at the trial, a trial judge will generally respond to such an objection by admonishing the jury, "It is your recollection of the evidence that controls." A flurry of these objections generally does little to help the attorney making them. Such behavior is generally viewed as disruptive and petty.

Perhaps the two most embarrassing objection situations for counsel are when counsel fails to make an objection so obvious that the judge says "sustained!" anyway or when counsel objects to a question that is sustained and then proceeds to ask that witness the very same question at the next available opportunity. In the former, the court's action may cause the embarrassment, in the latter, it is counsel's own actions that amuse the judge and jury, thereby undermining counsel's credibility in making future objections.

Conclusion

As this discussion illustrates, objections present counsel with an opportunity to influence the outcome of litigation in both the trial and appellate courts. Using them wisely and effectively is a complex determination, involving legal and tactical concerns. Failing to use them timely, misusing them or using them too often may have dire consequences.

Judges must rule on objections that range from the obvious to the incomprehensible. Indeed, some objections may test the psychic ability of a judge to read an attorney's mind or divine a future answer by a witness. Although individual objections may be spontaneous, an attorney's pattern of objecting should reflect an overall coherent strategy.

It might be advisable for attorneys to consider some guidelines in making objections:

(1) Too few objections may signify inattentiveness or carelessness; too many may signify an attempt to disrupt and annoy;

(2) It is better to anticipate objectionable testimony and seek a ruling *in limine* in advance of the testimony rather than object after the witness has answered;

(3) A general objection with one specific reason will be more effective in the trial court while a specific objection with numerous general grounds may have greater impact in an appellate court, and

(4) The failure to timely object or prevail on an objection that does not help your side can be equally harmful to your cause. Errors of omission and commission are both prevalent when it comes to objections.

An objection is a powerful weapon. Like all weapons, it can be dangerous to the party using it. Its judicious use or non-use may be the decisive factor in a battle between litigators.

POINT OF VIEW

Reflections on Being Mediators

BY DAVID S. ROSS AND VIVIEN B. SHELANSKI

We come from different backgrounds and have taken different paths to becoming mediators. However, we agree that mediation demands creativity, insight and determination.

Although our approaches may vary and our perceptions of our work may differ, we both thoroughly enjoy mediating disputes. A deep sense of personal fulfillment comes from helping people resolve their legal problems and move forward with their lives.

David S. Ross

Studying the law, litigating cases and becoming a full-time mediator involved a gradual and quite personal evolution for me. After receiving my undergraduate degree in history from the University of Virginia, law school seemed like a good choice. I thought that becoming a lawyer would impress my peers and please my family, particularly my parents. As I began studying for the LSAT, I made myself a deal—if I got into a "Top 10" law school, I would go. I ended up choosing New York University School of Law.

After earning my J.D., I was still undecided about the type of legal practice that I wanted to pursue. When I went to Cravath, Swaine & Moore and met with the litigators there, I decided to try my hand at litigation. They were an impressive and dynamic group of people and, I guess at some level, I wanted to be like them.

I worked as a litigator at Cravath for several years before deciding to leave the security of "the firm" to embark on a career as a mediator. At the time, the firm was involved in a large and demanding case that lasted several years. We had a great team that expended a lot of time and energy on the case, but just as we were about to go to trial, the case settled. The judge acted as a mediator, and I was impressed by the efficiency of the mediation process.

About the same time, a trauma in my family forced me to reassess my values and goals, and to identify my true priorities. Although I was not married yet, I knew that I wanted to spend more time with my family than a litigator's schedule would allow. I also relished the idea of helping people to resolve their problems in a more peaceful way. The adversarial games litigators play seemed a little silly to me. Given my positive experience with mediation, as well as some research, it seemed to be a natural fit. My role would shift from fighter, "How am I going to win this case? How am I going to knock the other guy down?" to problem-solver, "What is really important to these people? How can I help these people resolve their dispute?"

I had some anxiety about the change. As a corporate litigator, I was drawing a substantial salary, so the decision to return to school to get an LL.M. from Columbia University Law School in a program that focused on mediation involved a major commitment. My friends and family were a bit surprised, several even thought I was crazy. After all, I was suddenly moving from a well-respected and well-understood profession to a new career in mediation, a field most knew little about.

However, the process of earning my LL.M. degree helped to educate my friends and family about how and why mediation works. In 1993, I shed the "litigator" label in favor of the "mediator" title.

In the years since, I have come to understand that the vast majority of disputes can benefit from mediation, and most can be resolved to the mutual benefit of everyone involved. My role as mediator requires me to focus on the parties' real interests and needs. Negotiation and joint problem-solving skills are critical, as is active listening and the ability to demonstrate empathy. I collaborate with lawyers and their clients to structure the right process and to reach a result they think is satisfactory.

I am currently mediating an increasing number of employment discrimination and harassment cases, including class actions. These situations typically involve relationships that have suffered a significant breakdown and bring with them highly charged emotions on both sides. Underlying the legal claims and intransigent positions are unmet expectations, bruised egos and raw feelings. Often, one or both party's values are being challenged, making the issues deeply personal. My job is to help people clarify for themselves and each other the risks and opportunities of litigation, to understand each other's perspective, to find common ground, and ultimately to assist them in reaching a resolution that meets their respective needs as fully as possible.

Mediating disputes provides a unique view of the attorney's role in the dispute resolution process. To be successful, a lawyer's approach to mediation must be significantly different than the presentation in a courtroom. The most effective mediation advocates understand that "pit bull" advocacy does not play well at the mediation table. Successful mediation advocates understand how mediation works. They help clients identify and prioritize their interests, and then work with the mediator (and the other parties) to meet them as fully as possible.

Looking back on my life as a practicing attorney, I can say that litigating

cases presented tremendous challenges. On occasion, I miss the long-term relationships that can be forged with clients—particularly when you are working together for a common cause over a long period of time. On balance, however, I find mediation to be equally, if not more, challenging. It is certainly far more emotionally draining. But, with this comes due gratification as the parties resolve their problem and shake hands—sometimes they hug me, and often they hug their lawyers!

I feel fortunate to be able to pursue an area of the law that advances my core values. Occasionally, a former colleague will tell me that he or she would like to move from litigation to mediation. That I have made this transition and that it has worked out has influenced every aspect of my life, professionally and personally. Working as a mediator has helped me to fully appreciate that conflict is an inescapable part of life. I now view it less as an opportunity to "win" and more as an opportunity to uncover and address hidden emotions and underlying needs.

Vivien B. Shelanski

As an undergraduate at Bryn Mawr in the 1960s, I was active in a variety of civil rights efforts, and a career in advocacy was appealing. Instead of heading to law school, however, I followed another interest and earned a Ph.D. in the philosophy of science at the University of Chicago. I spent the next decade in a variety of challenging positions, which included teaching at Harvard and administrative roles at the National Science Foundation and the OECD in Paris.

Fifteen years after finishing my undergraduate work, advocacy still beckoned, and I entered New York University School of Law. After clerking for a federal judge who was known for settling high-profile cases, I was a litigator for 10 years, first with a large firm on Wall Street and then with a high-quality boutique firm, also in Manhattan.

In 1992, I became an assistant attorney general with the New York State Department of Law, Real Estate Financing Bureau. There, I became embroiled in bitter battles that dealt with New York's intricate statutes and regulations relating to condominiums and co-ops. The cases were complex and involved multiple parties, including owners, sponsors, tenants boards, and banks. The course of litigation was long and tortured, in part because under the statutory scheme, only the state could sue. Meanwhile, people were living with the disputes daily, with emotions as intense as those in a marital dispute. During my work on these cases, we used mediation to bring people together and expedite solutions.

Mediation continued to be a large part of my work life when I was invited to serve at the U.S. Court of Appeals for the Second Circuit as assistant Circuit executive for legal affairs. There, I had an opportunity to work with the Second Circuit's "Civil Appeals Management Program," a forward-thinking effort in which civil cases on appeal go before a staff counsel in a pre-argument meeting designed to further a mediated resolution. These cases were a real challenge because one party had already prevailed in the District Court, but the mediation program was amazingly effective. After three years with the Court of Appeals and a taste of life as a neutral, JAMS offered me the opportunity to join as a mediator and as in-house legal counsel.

In my view, a good mediator must be a superb listener and an astute reader of people. I also believe that a mediator should have a solid grounding in the substantive law involved in the case. With relevant knowledge and work experience, a mediator gains credibility with all the participants in the mediation and understands the consequences should the matter proceed in court. A litigation background is tremendously valuable, as is varied life experience.

My work affords me the opportunity to see a wide range of advocacy styles. The most effective mediation advocates are those who understand the difference between the lawyer as litigator and the lawyer as mediation counsel. In a court case, the judge or jury has to be convinced. In mediation, it is the parties themselves who must agree to and support the decision. Courtroom tactics can be counterproductive in mediation; the effective mediation advocate uses persuasion, not a sledgehammer.

When I see a skilled litigator in action, a piece of me misses the thrill (and accompanying fear) of appearing before a good judge, fielding tough questions with articulate arguments, and jousting with a skilled adversary. However, I do not foresee leaving my satisfying work as a mediator and returning to litigation. All too often, clients face huge bills, cases drag on, and then get resolved on the brink of trial. To me, both the money and the human capital can be used more productively.

When I reflect on my years as a litigator and mediator, I am struck by the differences in responsibility. As a lawyer in a case, you have one client to and for whom you are responsible. As a mediator, you don't have a single client, but the sense of responsibility to assist the parties in resolving the dispute can be intense, especially when the matter involves issues such as health care, employment or housing. I mediate many emotionally charged cases and find them to be both demanding and rewarding.

A productive mediator can have a direct effect on the parties' daily lives. It is gratifying to work with parties who have been locked in combat for years, to work through the emotions and issues, and to see the case resolved so people are able to move on with their lives.

DAVID S. ROSS AND VIVIEN B. SHELANSKI are members of the JAMS panel of resolution experts in New York. Ross has resolved many types of two-party and multi-party cases, with a focus on employment, commercial and securities matters. Shelanski has mediated numerous intense disputes involving employment, commercial, and real estate matters.

Language Tips

By Gertrude Block

Question: When I completed freshman orientation some time ago, I believed I was oriented. However, now I hear that I was "orientated." Which is correct?

Answer: The answer is more complicated than one might think; the current verb, *orientated*, was created by a process called backformation. It works like this. First there is a verb, *orient*, derived from the Middle French noun meaning the part of the world where the sun rises. Then, from the English verb *orient*, a new noun, *orientation*, was formed, by adding *-ation* to the verb *orient*. Finally, from the new noun, another new verb, *orientate*, was "backformed," resulting in a longer verb with the same meaning as the original verb (*orient*).

English speakers frequently create backformations, sometimes unintentionally causing needless duplication. Backformation created the redundant verb *administrate*, from the noun *administration*, a noun formed when *-ation* was added to the verb *administer*. Perhaps the longer verb *administrate* sounded important; at any rate, it has taken over.

The backformation habit persists even in nouns that don't end in *-ation*. Consider the verb *recidivate*, which a correspondent asked me to comment on after reading the following sentence in a legal journal: "Only 2% of probationers recidivate." Another reader sent the verb *aggressed*, which she saw in a Chicago Tribune article: "Haiti . . . has aggressed against none of its neighbors." *The American Heritage Dictionary* (in its 1985 printing) notes that this verb "has a long and honorable history," but "has lately become associated with the jargon of psychology and is often objected to." But both *recidivate* and *aggress* are useful verbs that have been quickly adopted. Another such verb, *morph*, a backformation of the noun *morphosis* was approvingly listed by The American Dialect Society, an organization of academics and other English aficionados.

And in a recent issue of the *New York Times* a full-page advertisement appeared, featuring a young man who said, "I pause live TV when people call right in the middle of playoffs." That sentence made me blink and re-read. The noun *pause* (as in, "Her pause was noticeable") and the intransitive verb *pause* (as in, "I paused before entering the room") would not have caused that reaction. But here was a new, non-standard, transitive verb created by giving *pause* a noun-object ("TV"). Could the ad-writer have created it to call attention to the ad?

Another reader sent an item indicating that category changes do not always succeed. Phil Donahue said of a young woman who had been sentenced to a prison for a minor crime: "That sentence was unfair. She should have been probated."

From The Mailbag

More responses to my request for alternatives to the gender-related salutations, *Gentlemen* and *Dear Sirs*: Some readers commented that because each word in a communication should add something, delete all salutations. One reader added that a nice feature of e-mail is that it dispenses with salutations. But most correspondents agreed with Ithaca attorney Henry W. Theisen, who preferred *Greetings*.

On other matters, my thanks to Denver attorney (and absentee New York lawyer) Andrew Oh-Willeke, who sent a perceptive comment regarding the use of the word *violate* instead of *breach* in the statement, "Performance of this Agreement will not violate the terms of any contract, obligation, law, regulation, or ordinance to which it becomes subject." That language is appropriate, he said, because a law may be "violated," but not "breached." (See the May *Language Tips*.)

And, regarding the "Potpourri" item in the same issue, which listed problems that advertisers encounter when their English slogans are translated into Spanish, New York attorney Corby Gary wrote that those problems are really non-existent, because Spanish readers would not translate English words literally, but instead would choose their appropriate Spanish meaning. Mr. Gary is correct, and I appreciate his setting the record straight.

But Attorney Zane H. Leeper, an American who moved to Mexico, wrote that some translations can cause problems. Americans who ask Mexican women if they are *embarazado* are perhaps unaware that the Spanish adjective means "pregnant," not "embarrassed." The request *Deme luz* (literally, "give me a light") can translate into Spanish as, "Give me birth," or "Have my baby." And an English speaker may cause instant violence by saying *Tu madre!* although all that means is "Your mother."

Mr. Leeper added that Germans say, "My watch is making." The French say, "My watch is marching." Americans say, "My watch is running." And Mexicans say, "My watch is walking." He asks, "Are Germans therefore industrious, French militaristic, Americans hyperactive, and Mexicans lazy?"

Gertrude Block is a lecturer emeritus and writing specialist at Holland Law Center, University of Florida, Gainesville, FL 32611, and a consultant on language matters. She is the author of Effective Legal Writing, (5th ed. Foundation Press, July 1999), and co-author of Judicial Opinion Writing Manual (West Group for ABA, 1991).

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu

New Members Welcomed

FIRST DISTRICT
Laila Abou-rahme
Karen Louise Abrams
Nancy Gibana Abudu
Mariana Teresa Acevedo
Charles Chahid Achkar
Anna May Adams
Scott Michael Adler
Adewolfe David Agbayewa
John Paul Ahern
Usman Beshir Ahmad
Laura Ahn
Hubert Rich Akuetey
Sham-e-ali Al-jamil
Patricia Susan Alarcon
Jean Christophe Albert
Michael William Alessi
Ericka Nicole Alford
Justin Escher Alpert
Nicholas Peter Altieri
Raymond Kofi Amanquah
Kensuke Ambe
Edward Arnold Amiley
Brigitte Adrienne Amiri
Deborah Lynn Ander
Lee Ann Anderson
Matthew B. Anderson
Sharon Marie Anderson
Jennifer Michelle Anglim
Michael J. Annicelli
Kofi Appenteng
Christine Lisa Arena
Pauline Arnakis
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Phillip Leroy Baskerville
Bella Blat
V. Laurence Bochner
Richard Michael Boye
Elaine Karen Bradshaw
Michael David Breslin
Joshua Adam Bretstein
Tracia Caroline Callender
John Thomas Carlton
Joseph Peter Carvini
Kelly T. Casey
Elizabeth Anne Chang
Lea-wei Chang
Jacqueline Elaine Chinquee
Franklin Kuan Chiu
Erika Cohen
Kellis B. Collins
Delano Edward Connolly
Adam S. Covitt
Simone Tyler Cox
Asaf Cymbal
Dennis George Dacosta
Luigi Dagostino
Denise Maxine Dash
Fern Evelyn Dejonge
Louis Stephen Desorbo
Frank-Willem J. DeWit
Booth Justin Dickenson
Jason Everett Dizon
George Richard Dodge
Craig Thomas Donovan
Thomas P. Duggan
David Ross Ehrlich
Alyson Jennifer Eltman
Anthony Robert Esposito
David Esses
Robert Benjamin Estes
Robyn Jennifer Falik
Peter James Fama
James Anthony Fanto
Elizabeth Anisa Farid
Darren Shelard Fields
Lisa DiAnne Fill
Mitchell Jared Flachner
Alexandra Steele Flanders
Valerie L. Forbes
Yehudah Forster
Benzion Frankel
Scott Samuel Gale
James Joseph Galleshaw
Bryan Goldstein
Frank Aurelio Gonzalez
Tracey Andrice Grant
Elliott Stephen Greenspan
Eliza Grinberg
Umit Mike Gursoy
Suhana S. Han
Edward Joseph Harrington
Sherine Shirlian Henry
Patricia L. Howland
Lisa Ellen Hoyes
Donna Janele Hyer-Spencer
Cassandra Hyppolite
David Lee Ingle
Carolyn Marie Iozzia
Andrea Irslinger
Samuel Alfred Kamara
Bella Soohee Kang
Ayanna Njeri Kemp
Erika Kerber
Saul Jonathan Klein
Ilya Z. Kleynerman
Allen Victor Koss
Maria Kron
Barbara Christine Kryszko
Irena Lakhtarnik
Herschel I. Langner
Kristian K. Larsen
Erin J. Law
Raymond Lee
Marion T D. Lewis
Arun Limani
Susan Lori Litt
Joshua Graham Losardo
Timothy L. Lyons
Seth J. MacArthur
Santosh Kumari Madahar
Myles Joseph Magbitang
Brendan Joseph Mahaffey-Dowd
Gioia Marisa Maiellano
George Basil Manos
Eduard Margulyan
Karen Jill Markovic
Daniel Mordecai Marks
Lindsay Adair Martin
Arlene Frances McCrea
Mildred A. McGuire
Bernadette Milara McKain
Marc Anthony Merolesi
Robert Paul Meyerson
Robert Mark Michell
Kay Nichols Monroe
Anina Hope Monte
Kieran E. Morris
Aama Nahuja
Aashish Kumar Nangia
Elura Christine Nanos
Jennifer Ann Nocella
Brian Nolan
Jennifer Lee Novelli
Nicole Ann Nurse
Jennifer Clapperton Oliver
Demetra Pantazopoulos
Gilbert Calvin Parris
Antonio Pasquariello
Michael Patigalia
Michael Rhein Patrick
Michael J. Piazza
Nathalie Lynne Pierre
Dawn Marie Pinnisi
Biagina A. Pomilla
Laura Jean Popa
Wallace Prince
Raja Rajeswari
Monica Marie Regina
Charles Philip Reichmann
Christopher John Robles
Matilde Lucia Roman
Christopher S. Ronk
Laura Ann Rosenbury
Jonathan Howard Rosenthal
Christopher Francis Ryan
Vincenzo Saulino
Natasha Monique Saxton
Bennett Schlansky
Vincent John Scordley
Ted Somos
Samuel C. Spirgel
Nicole Judith St. Louis
E. Paul Stewart
Larissa Stolyar
Sirina Alethia Sucklal
Pierre Sussman
Benny F. Terrusa
Damani Thomas-Wilson
Raphael Treitel
John Karl Urda
Chukwuma Kenneth Uwechia
Michael G. Valloney
H. Dana Vanhee
Max Vern
Kenneth P. Volandes
Efrem Wietschner
Kim Angela Williams
Julia Lynn Wilson
Robert Thomas Yee
Pauline Yeung
Alexander Jia-Yo Yu
Thomas V. Zacharia
Navid Zareh
Carol L. Ziegler

THIRD DISTRICT
Jennifer M. Boll
Christina Mary Butler
Liliana Correia
Stafford Davis
Martin G. Deptula
Robert Dodig
Cathy Levitz Drobny
John Michael Dubuc
Karen Louise Eschholz
Regina Fitzpatrick
Michael J. Garvey
Melissa Anne Grieves
Michael Joseph Hill
Kevin Charles Honikel
Paul S. Hudson
Brent Murphy Karpiak
Louis M. Klein
Christopher Luhr
Matthew Hawthorne McNamara
Sharon Gail Miller
Rebecca Ann Millouras-Lettre
Timothy Morrison
Tamara L. Nestle
Michael O'Connor
Justin Esward Proper
Tara Michele Rosenbaum
Patricia Brockenaver Sheppard
Sarah Elizabeth Shulman
Paul David Soares
Letizia P. Tagliafierro
Dennis R. Vetrano

FOURTH DISTRICT
Robert W. Locicero
Michael Jeremy Mercure
Lori J. Miller
Daniel Phillip Oleary
Christopher Robert Rediehs
Patricia Ann Regan-Bianchini
Gregory Edward Schaaf
Lois Cullen Valerio
Catherine Kee Weidman

FIFTH DISTRICT
Tanya Yolande Bartucz
Heather Ann Clemens-Sponenburg
Gary Anthony Hall
Susan L. King
Lance C. Marzano
Edward Joseph McGraw
Regina Spause McGraw
Christine Maureen McHugh
Benjamin Means
Edmond Frank Morreall
James Christopher O'Leary

SIXTH DISTRICT
Charles Edward Bailey
Kevin A. Dayton
Casey Egan Doyle
Kuo-chang Huang
Christopher Joseph Konrad
Randolph V. Kruman
Catherine Ann Lemmer
John Anthony McHugh
Scot Gordon Miller
Aaron M. Pichel
James Steven Sharak

SEVENTH DISTRICT
Drew R. Dubrin
David Pieterse
Andrea Joan Schoeneman
Tyesha Marshay Wyatt-Williams

EIGHTH DISTRICT
Paul B. Becker
Timothy Ray Collins
Willis Clay Geer
James Daren Lapiana
Christopher Lee McDaniel
Terrence Michael McNamara
Antoinetta Donna Mucilli
Bridget Maureen O'Connell
Alphonso O'Neil-White
Karen Rene Peterson
Barbara M. Watson

NINTH DISTRICT
Mohd S. Aloeidat
Denise Rita Altro
Michael J. Amoroso
Rafal Ankier
Paul Edward Asfendis
Theresa J. Baker
Thomas William Bauer
Howard R. Borowick
Rachel Gluckman Brandon
Donna Marie Brautigam
Anthony Peter Burger
Jacqueline Marie Burns
Clara Lillian Campos-Raymond
Paul Edward Carney
Michael Peter Catina
John Peter Cerone
Bruno Cilio
Barbara Ann Clay
Mitchell David Cohen
Sean F. Condon
Marion Elaine Costello
Tamika Ann Coverdale
Wendy L. Craft
Edward C. Crouter
Susan M. Damplo
Peter James Dauria
Robert Patrick Degen
Alfred B. Delbello
Frances A. DeThomas
Theresa J. Difalco
Edward D. Dillon
Marc A. Ditomaso
Michael Frederick Divalentino
Laurie Ann Dorsainvil
Lori A. Eaton
Hazem J. Ennabi
David J. Fair
Kathryn M. Farrell
Richard Anthony Fava
Pablo Emilio Fernandez-Herrera
Andrew Seth Fink
J. Lynne Flaherty
Diane Pandolfi Foley
Myrna B. Forney
Kerri Lynne Fredheim
Michael Adam Freimann
David A. Garcia
Dennis Vincent Gargano
Michael Anthony Giannasca
Gaetano Antonio Gizzo
Lyle Marc Goldstein
Vanessa A. Gomez
Thomas A. Graci
Ashima Gupta
Barry David Haberman
Adam James Halper
Barbara May Hasselman
Patricia Ann Hecht
Jonathan G. Jacobson
Dolores Arlene Jones
Kunihiko Kashiwaya
Dara Susan Katcher
Gary A. Kibel
Julie Elizabeth Kocaba
Samuel J. Koh
Candace Mi Kyong Kwon
Lisa Kay Lahiff
Barbara Lynn Leifer-Woods
Jeffrey C. Leo
Edward C. Levine
Dana Marie Loiacono
Ian Scott MacDonald
Geraldine P. Maguill
Emily C. Mann
Jason Stuart Marin
Nancy M. Markey
Kenneth John Mastellone
Donald Joseph Mckiernan
Rekha Nori
Joseph Francis O'Brien
Julio Ocampo
Adrienne Jill Orbach
Suzanne B. Oshatz
Frank Joseph Paldino
Michelle Leclair Paniccia
Eileen May Prickett
James Thomas Prunty
Ralph Louis Puglielle
David I. Rifas
Margarita Rose Rivera
James Anthony Rogers
Seth Andrew Romanick
Peter John Runge

James Anthony Sahagian
Jerome Roger Sandberg
Mary O'Neill Schlageter
Shannon Herron Schleif
Timothy Francis Schweitzer
Denise Josephine Schwieger
Darren Mel Shapiro
Lin Shi
Julie Silverstein
William Peter Skladony
Stephen Mark Spedaliere
Nicole Daniele Stevens
Warren Sussman
Nancy A. Tagliafierro
Jennifer C. Taylor
Wendy A. Teller
Gregory J. Tembeck
Christopher Michael Thomas
Nachman Aaron Troodler
Salvatore Villani
Andrea Y. Wang
Mark Jay Weinstein
Joseph Paul Wodarski
Christopher Thomas Woodley
Marc Alan Yaggi
Alexander J. Zadrima
Eric William Zitofsky

TENTH DISTRICT

Suzanne Jean Adams
Joan Wendy Adler
Michael Bruce Adler
Salvatore J. Alesia
Linda Yolanda Alfani
Kirsten Beth Alford
David H. Allweiss
Catherine Anagnostopoulos
Salvatore M. Antonacci
Peter Patrick Arcuri
Rachel A. Baiera
Claudette Jaleh Bakhtiar
Gene Dennis Barr
Christopher John Barrella
Joseph Francis Battista
Susan Amanda Baumann
Tovar Brierre Beaulieu
Oded Ben-Ami
Medgine Bernadotte
Thomas Andrew Bizzaro, Jr.
Debra Bloom
Karen Bobley
Toni Bonanno
Jonathan Matthew Borg
Matthew Brew
Helene Brodowski
Jean-phillipa Gallieni Bruno
Thomas F. Callahan
Mario Alberto Campos
Alfonso Castellani
Janine Castorina
Daniel John Catalanello
Marsha Simone Cato
Sherril-Anne Francena Cleveland
Leigh Christine Cohan
Andrew Steven Cohen
Dina M. Corigliano
Robert James Cosgrove
Carmela Crimeni
Daniel James Cronin
Jennifer Lea David
Robert J. De Silva
Anthony Phillip Decapua
Sal Frank Deluca
Mitchell L. Diamond
Michael Anthony Dibrizzi
Adriana Dimaggio
Michael Daniel Divers
Eric Howard Dorf
Matthew John Driscoll
Kelly A. Dunbar
Robert Garcia Eaton
Veronica Ekeoseye Ebhuoma
Tara Linette Eyer
Cynthia Hazar Fareed
Deirdre Arlana Finley
Carl C. Fiore
Louis Howard Fiore
Matthew Lawrence Fleischer
John T. Flippen
Patrick Formato
Regis A. Gallet
Christopher John Garcia
Giana F. Gaudelli
Denise Hargleroad Gibbon
Timothy Michael Gilmartin
Robert Louis Gioia
Joseph Gioino
Nicholas C. Girardi
Virginia Glanda
Jaclyn Dana Goldstein
Deborah Golpariani
Dimitrios Gounelas
Paula Eve Grafstein
David Ian Greenberger
James Andrew Gregory
Anthony Michael Grisanti
John James Grocki
Aaron Christopher Gross
Charles Guttler
Christopher Michael Hahn
Rachel Hargrave
Cathy S. Harkins
Mary C. Hartill
Keshia B. Haskins
Andrew Scott Hazen
Robert Scott Hazzard
Lesli Patricia Hiller
John Dean Homerick
Paul S. Hyl
Raymond Iryami
Elias A. Jaghab
Janice L. Jessup
Eric Harold Jones
Michael Howard Joseph
Sheila M. Joseph
Gary E. Kalbaugh
Brian Paul Kalmaer
Julian Richard Keskinyan
Claudia Marcela Kessler
Charlotte Khodadadi
Bobby H.J. Kim
Ik Cheol Kim
Kimberly Meredith Knispel
Timothy Kozak
Peter Kreymer
Andrew Justin Kurtz
Kevin Ryan Laffin
William Lamot
Karen Ann Laufman
Beth Marie Lavelle
Tina Lee
Stella Lellos
Barbara A. Leone
Kyle Frederick Lester
Jared A. Levy
Jordan Jordan Linn
Jennifer S. Lippmann
Christine A. Lobasso
Richard Leon Lonschein
James J. Lynch
Michael Keith Maiolica
Rachel Mallozzi
Scott Jared Mandel
Matthew Moss Mandell
Jason Philip Manheim
Christopher Francis Mansfield
Peter S. Marchelos
Daniel Peter Marcote
Nancy Angele Margro
Francisco Javier Martialay
Sophia Josephine Martins
Dean Shaun Mastrangelo
Richard Gerard Mastronardo
Gregory Laurence Matalon
Karen Byank Mathura
Jonathan Grady Matrisciano
Bryan J. Mazzola
Edward Hornidge McCarthy
John Healy McCreery
Christopher Dean McDonald
Ann McGrane
Alita P. McKinnon
Susan Michelle McLendon
Colleen C. McMahon
Alice F. McMath
Michelle Lisa Meiselman
Joseph Pineda Mendoza
Suzanne Martin Mensch
Kristi Anne Middleton
Suzanne Helen Middleton
David Theodore Mitrou
Andrew Antonio Monteleone
Claude D. Morgan
Christine Elizabeth Morton
Stephana Andrea Mosera
Joseph Anthony Mucha
Michele A. Musarra
Donna Y. Nadel
Richard S. Naidich
Sakeena Naqvi
Pamela Michelle Nash
Melissa Shari Norden
Joseph Anthony Norton
Angela C. Nwadiogbu
Chinwe Angela Nwadiogbu
Megan Elizabeth O'Donnell
Lawrence Okechukwu Ogbutor
Oluremilekun Adedeji Oshikanlu
Mary Elisabeth Ann Ostermann
Tamiko Elizabeth Overton
Rada Panic
Christina M. Panzarella
James Beauregard Parker
Ralph H. Pecorale
Naim Moshe Peress
Robert Anthony Perrotta
Barbara Stegun Phair
Judith Williams Pitsiokos
Richard Steven Prisco
Jennifer Marie Pulick
Robert F. Quinlan
Amy Marie Reiter
Veronica Renta
James Brian Rettinger
Marc Richard Riccio
Paul David Rogan
Milagros Rogers
Donald T. Rollock
Patricia Ann Rooney
Stuart Brian Rosen
Yael M. Rosenblatt
Michael P. Ross
Todd M. Rubin
Linda Anne Ruggieri
Mary Bernadette Samenga
Joseph Raymond Sanchez
Raymond Scott Santiago
Brian Marc Schames
John Thomas Seybert
Erin A. Sidaras
Yael Silverstein
Teresa Ann Simms
Joseph Daniel Simonetti
Georgia Skevofilax
Peter Douglas Smith
Sidney N. Solomon
Thomas J. Stringer
Robert G. Sullivan
Susan Riley Sullivan
John L. Tarnowski
Jonathan Eward Tenbrink
Michael P. Tobin
Carlos Torres
Andrew P. Tranes
Elisabetta Tredici
Lora Jean Tryon
John Anthony Tucci
Diana Tully
Miranda Westley Turner
Christopher Todd Vetro
Glen M. Vogel
Sean M. Walter
Glenn P. Warmuth
Marc Howard Weissman
Joshua Matthew Wekstein
James Christopher White
Taya Nicole Williams
Brian Patrick Wright
Michael S. Yadgar
Daron Saul Eliezer Yemini
Wendy Yun
Michael Lawrence Zaiff
Loretta Zanzalari
Ronald Lee Zaslow
Christopher W. Zeh

ELEVENTH DISTRICT

Russell Evan Adler
Madochee Andre
Eyad Asad
Cheryl Lynn Bartow
Kara Louise Beloreshka
Steven Byrne
Mercedes S. Cano
Stefanie Robin Cardarelli
Carla C. Carter
Jonathan Louis Chait
Norman Chan
Ann Song Cho
Josephine Hae-mee Choi
Bryan Sung-Hyun Chung
Penny L. Collender
William John Crowe
Derek Christopher Dalmer
Michael Charles Duggan
Lisa M. Ernst
Thomas S. Ferrugia
Leanne Michelle Fields
Camille Christine Fouche
Dale I. Frederick
John Wilson Freeman
Donny Frenkel
Debra A. Fruendt
Theodoros A. Gaillas
Eric Armando Garcia
Suzanne M. Garcia
Susan A. Glover
Pauline Michele Gowdie
Andrew Green
Audrey M.I. Greene Perez
Lavi Zev Greenspan
Brett Michael Hallstein
Patrick Joseph Haughey
Nicole Camille Haynes
Paula Louise Heaven
Nicole Yvette Henriquez
Jamie Beth Herdan
Eddie Nelson Hernandez
Rongguo Hu
Melody Co Huang
Christopher Stefan Jay
Jennifer Kim
Sherri S. Kosches
Ruth Ku
Dennis Kucica
Daniel John Kuzyk
Fearonce Gerard Lalande
Thomas William Ledwith
Daniel Isaac Leibler
Fengling Liu
Anthony D. Luis
Jay Scott Markowitz
Jerry Marti
Heather Anne McClintock
Michael Thomas McNamara
Sean Anthony McNicholas
Maria Cathy Miles
Florence Nduka Monwe
Jacqueline Jeannette Morales
George A. Moskal
Raymond Peter Mulligan
Elysia Gah-hay Ng
Richard Ng
Peter Thanh Nguyen
Donal Ambrose O'Buckley
Maria O. Odegbaro
Elswith F. Ogaldez
Antonio Jose Otero
Tracy Ann Paler
Yohan Park
Kimara Irene Patton
Lisa Nichelle Pitts
Dayna Renee Press
Leonardo Benjamin Pytel
Shearon Anita Ramnarine-Jokhai
Mohamed Raffi Rasul
Manuel R. Reynoso
Jemma Robain-Lacaille
Laurence Douglas Rogers
Sheri B. Ross
Samuel D. Rubin
Yas Sadri
Eric Mitchell Sarver
Bencion Joseph Schlager
Renee Faye Schnall
Ghita Schwarz
Doris L. Sepulveda-Lorenzo
Angela Alyce Shelton
Hannah Simpson-Grossman
Loaknauth Rajesh Sobhai
Robert Sungolowsky
Olutoyin Eniola Thomas
Otis Andrew Thompson
Nicholas Yukio Tomizawa
Damon Treitler
Julio Jay Vasquez
Hardy Vieux
Ron Samuel Welner
Mirna Loyce White
Jack Jonathan Yachbes
Man C. Yam
Susan Yung
Avi Mordechai Zwelling

TWELFTH DISTRICT

Adewole Agbayewa
Michael Barbosa
Joell Carol Barnett
Lara Rachel Binimow
Nailah K. Byrd
Daniel Chernin
James Joseph Crofts

Herbert Daniel Daughtry
Lauren Meryl Diamond
Harold S. Entes
Charmaine Fearon
Louis Peter Feuchtbaum
Eric Bradley Fields
Cristina Garcia
Adam Laurence Goldman
Terri Jane Goldstone
Adilia Gonzalez-Harris
Alice Rachel Greenberg
John Arthur Howard
Allyson D. Johnson
Debra Ann Kelly
Stephanie L. Kenney
Jennifer Deborah Kim
Pearl Mary Lestrade-Brown
Sheila Elizabeth McGrath
Elizabeth Maria Mignone
Melissa Kathy Milevoj
Serena Murphy
Anne Louise O'Brien
Renee S. Peay
Iliana Perez
Debbie-Ann Ralston
Yana A. Roy
Daniel R. Ryan
Gabriela Sustrean
Mark Allan Tanner
Kellie Terese Walker
Brian Daniel Yomtov
Ava L. Zelenetsky

OUT-OF-STATE
Amal A. Abdallah
Jeffrey Leonard Abrams
Charles A. Acevedo
Alan Jay Ackerman
Daniel Lloyd Adams
Michael Glen Adelman
Matthew Ayoola Adeola
Victor Alexander Afanador
Oluwole Olawale Afolabi
Tahir Aftab
Ayisat Olatumdune Agbaje
Cheolhyo Ahn
Chung Hoon Ahn
Nnena Anne Ahukannah
Timo Matti Airisto
Tinuade Sarah Akinshola
Skekvos Michael David Alachouzos
Christopher Wade Algeo
Serajul Ferdows Ali
Paul A. Alongi
Turki Ibrahem Altamimi
Elizabeth Mary Alvarez
Gregory Robert Alvarez
James G. Amalfitano
Kei Amemiya
Maria K. Anastasia
Elic Eliahu Anbar
Sal M. Anderton
Astrid Francoise Andre
Michael James Anstett
Derek Peter Apanovitch
Melissa Appelbaum
Rhonda Sue Armstrong
Jonathan Peter Arnold
Douglas Eugene Arone
Ernst Ashurov
Evgeny V. Astakhov
Dominic James Auld
Robert P. Avolio
Felix Ebruba Ayan Ruoh
Ramin Azadegan
Lawrence Okechukwu Azubuike
Grace Victoria Bacon
Marc Joseph Bagan
Andras Gyorgy Balazsy
Michael Angelo Baldassare
Stephen Francis Balsamo
Constantine Bardis
Parthenopy Alexandra Bardis
Adam Barea
Joseph Marijan Barisic
Paul A. Barkus
Franca Baroniweyeneth
Jennifer Broeck Barr
Rick Barreca
Tracey E.J. Barrett
Ilan David Barzilay
Armando Emilio Batastini
Lynne Miriam Baum
Terrence Jay Baxter
Mary Stephanie Beaty
Colin Christof Becker
Anne Becker-Christensen
Joel Kevin Bedol
Austin Benjamin Bell
Simon Richard Bell
Arik Ben-Ezra
Catherine Antonietta Benanti
Megan Wolfe Benett
Robert Thomas Bennett
Julie Carina Bergkamp
Eric Thomas Berkman
Noah Abraham Berlin
Jennifer Lee Betinis
Kalindi S. Bhatt
Farmida Bi
Maurizio Bianchini
Diana Billik
Oleg O. Bilousenko
Marie Teresa Bitonti
Mary Jo Black
Jeffrey Marc Bloom
Mary Elizabeth Bloom
Dan Erick Boeskin
Stephanie Anne Bogan
Deanna Darice Boll
James J. Bonicos
Holly J Gower Boots
Alexander Henderson Bopp
John Michael Borkholder
Steven Jay Borofsky
Michael Botton
Elisabeth Eileen Boyan
Heidi Boyette
Jerry William Boykin
Kathleen Veronica Boyle
James Christian Bradbury
Douglas Schuyler Bramley
Amy T. Brantly
Michael David Braun
Adam Rhys Brebner
Gregg Bowyer Brelsford
Erin Powers Brennan
Lisa H. Brenner
Gineen Maria Bresso
Andrew Macdonald Bretherton
Alicia Rosalie Bromfield
Howard Jason Brookman
David Adam Brooks
Warren Errol Brown
Howard Edward Brownstein
Kelly B. Bryan
Stephen William Bucher
Anne Mae Buckley
Richard Edward Buckley
Kristen Skog Buerstetta
Lisbeth Margot Bulmash
Claudia Burke
Ronald Victor Burke
Henry A. Burr
Jessica M. Busby
Gregory Aldon Buxton
Jill Marie Byrnes
Shelley S. Cabangon
Marco A. Cabezas
Paul Alfred Cagno
Susannah Cahill
Rong Cai
Joseph Giordano Calella
James Joseph Callaghan
Ingrid Cylene Callies
David Leonard Calone
Spenta R. Cama
Robert John Cameron
Brian P. Campbell
Lara Marisia Campbell
Mellissa Nadine Campbell
Clara Campos-Raymond
Charles Albert Candon
Barry Matthew Capp
Frank V. Carbonetti
Spencer F. Cargle
Alison Mains Carling
Paul Joseph Carlino
William H. Carmel
Michael A. Carrasco
Keidi Shauna Carrington
Mark F. Casazza
David Jordan Caspi
James M. Cassidy
Margaret M. Cassidy
Michael Lee Castellano
Silvia Carolina Cavagarcia
Todd Jason Cavaluzzi
Paige Ellen Chabora
Julie Dror Chadbourne
Chi Hsi Chao
Carmen SuzAnne Chapman
Steven Charnovitz
Brian Smith Chavies
Devin Alexandra Cheema
Chun-chang Chen
Hua Chen
Yan Chen
Shun-yi Chiang
Michael R. Chiappetta
Marcella Chimienti
Joseph Michael Chioffi
Mark Min-hee Cho
Wen-ching Chou
Diana Justein Chow
Wei Chu
Steven Ilyoung Chung
Loredana Maria Cirillo
Steven Citarella
Bonnie Lisa Clair
Alison Mallory Clark
Ewan Marcus Clark
Jennifer Ann Clay
Bartosz Stefan Clemenz
Christopher T. Cloutier
Yvonne Janette Co
Michael David Vincenzo Coco
Robert Hodges Coggins
Carl A. Cohen
Harvey J. Cohen
Jennifer Blythe Cohen
Stacey Robin Cohen
Meera Sara Coilparampil
Pascal Marcel Colbatzky
Alexa Anne Cole
Mary Macisaac Coleman
Marie Ann Collins
Gabriela Ina Coman
Amy Beth Comer
Steven Denis Conlon
Brian Mark Connelly
Mark James Connor
Dean Constantine
Jennifer Ellen Cook
Alan Philip Cooke
Katherine Lord Cooper
Joseph Michael Corazza
Nisha Teresa Cordero
Geert Willem Hubert Corstens
Mitchell Costom
Dawn Caresse Cox
David Kerry Crenshaw
David B. Crevier
Sha-shana N.L. Crichton
Jason Paul Criss
Vita Maria Cristiano
Daniel Clark Crosby
Nicole Lorraine Cucci
Renee Ann Cullmann
Robert Patrick Curley
John Daniel Daley
Christopher Lee Damandl
Steven J. Daniels
Sebastian Bernard C. Daub
Kelly Lyn Davis
William Dillard Davis
Jamal Malik Dawkins
Grant Mathew Dawson
Danielle Deak
Horace Patrick Decarbuccia
John Joseph Delany
Chrisandra Delesky
Michael Nicholas Delgass
Brent Alan Delmonte
Marie Florence Lajara Delosreyes
Fernandez Fiorella Delpino
Nicola Demuth
Stephen Denaro
Kathleen Denicholas
Francis Greaves Depeiza
Hetal H. Desai
Jennifer Louise Destefano
Manuela Di Re
Gregorio A. Dickson
Amy Jessica Dilcher
James Joseph Dillon
Mayankkumar Manhar Dixit
Jon Andre Dobson
Vincent Russell Donahue
William Patrick Donahue
Rebecca Lynn Donnini
Tiffany Frances Maria Donovan
Alexander Dorrbecker
Edward Crawford Dorsey
Sam Anthony Dotro
Alexandra Doumas
Elodie Gaudy Dowling
James Samuel Du Pre
Duane Kirkland Duclaux
Jeffry William Duffy
Jon Michael Dumont
Michael Thomas Dunn
Nickie Trang Duong
Angela Marie Dusenbury
Kurt Howard Dzugay
Martin D. Eagan
Richard Patrick Earley
Hideki Ebata
Catherine Collins Egan
Rebecca Nicole Eichler
Osnat N. Eliram
Kevin Dean Ellman
Jerry Howard Elmer
Michael Christopher Engel
Tanya Epstein
Christopher Eyakiniovo Eribo
Mark Christopher Errico
Gretchen Krantz Evans
Ebenezer Kobena Eyiah
K. Facer
Omar Jacob Facuse
Christine Marie Fader
Thomas Michael Fallas
Charles Joseph Falletta
Simon Farrant
Fedra Florence Fateh
Teresa J. Fazio
Tracy Ann Feanny
Keith John Feeney
Brent Lee Feller
William Joseph Fenrich
Dana Kendall Ferrera
Robert C. Fiedler
Glenn J. Figurski
Michelle Ann Fish
David Benjamin Fishberg
Louis Karl Fisher
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Nancy C. Fletcher
Robert V. Fodera
Karen L. Folster
Andrew Mitchell Fortis
Edward P. Fradkin
S.M. Chris Franzblau
Jared Oliver Freedman
Gregory James Freeman
Jed Saler Freeman
Bettina Veronica Freire
Richard Samuel Fridman
Ari Fried
Ian C. Friedman
S. David Friedman
Robert Matthew Frost
Preston I. Fulford
Marcus Christoph Funke
Seth Anthony Fuscellaro
Rajdeep S. Gadhok
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Adam Jonathan Gallagher
Aaron Paul Gallo
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Rufina C. Garay
Gerald James Gardner
Michelle Ava Gardner
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Miguel Garzon
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Olaf Gerber
Michael Robert Geroe
Nicole Gerson
Stuart Michael Gerson
Rachel L. Gervais
John Colin Gibson
Bruce W. Gilchrist
Melbra Jane Giles
Borden Robert Gillis
Todd Andrew Gillman
Eva Gils
Francis John Giordano
Giles Francis Giovinazzi
Jayson D. Glassman
Reena Gogna
Seth Alan Gold
Andrew David Goldberg
Jennifer Anne Goldberg
Lisa Bonnie Goldberg
James Kasen Goldfarb
Julie Ann Goldman
Elizabeth Rose Goldstein
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Buckley, Hon. John T.
Burrows, James A.
DiLorenzo, Louis P.
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Getnick, Michael E.
Gingold, Harlan B.
* Jones, Hon. Hugh R.
Klein, Michael A.
Mawhinney, Donald M., Jr.
Priore, Nicholas S.
Rahn, Darryl B.
†* Richardson, M. Catherine
Sanchez, Ruthanne
Uebelhoer, Gail Nackley

Sixth District
Anglehart, Scott B.
Denton, Christopher
Drinkwater, Clover M.
Hutchinson, Cynthia
Kachadourian, Mark
Kendall, Christopher
Madigan, Kathryn Grant
Mayer, Rosanne
Peckham, Eugene E.
Perticone, John L.
Reizes, Leslie N.

Seventh District
Bleakley, Paul Wendell
Buzard, A. Vincent
Castellano, June M.
Dwyer, Michael C.
Getman, Steven J.
Heller, Cheryl A.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Small, William R.
Trevett, Thomas N.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
†* Witmer, G. Robert, Jr.

Eighth District
Attea, Frederick G.
Cassano, Thomas R.
Church, Sanford A.
Dale, Thomas Gregory
Eppers, Donald B.
Evanko, Ann E.
Freedman, Bernard B.
†* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Graber, Garry M.
† Hassett, Paul Michael
McCarthy, Joseph V.
O'Donnell, Thomas M.
Palmer, Thomas A.
Pfalzgraf, David R.
Webb, Paul V., Jr.

Ninth District
Aydelott, Judith A.
Berman, Henry S.
Galloway, Frances C.
Gardella, Richard M.
Giordano, A. Robert
Golden, Richard Britt
Headley, Frank M., Jr.
Herold, Hon. J. Radley
Klein, David M.
Kranis, Michael D.
Manley, Mary Ellen
McGlinn, Joseph P.
Miklitsch, Catherine M.
* Miller, Henry G.
Mosenson, Steven H.
O'Keeffe, Richard J.
* Ostertag, Robert L.
Scherer, John K.
Steinman, Lester D.
Stewart, H. Malcolm, III
Wolf, John A.

Tenth District
Abrams, Robert
Asarch, Joel K.
†* Bracken, John P.
Capell, Philip J.
Corcoran, Robert W.
Dietz, John R.
Filiberto, Hon. Patricia M.
Fishberg, Gerard
Gutleber, Edward J.
Karson, Scott M.
Levin, A. Thomas
Meng, M. Kathryn
Mihalick, Andrew J.
O'Brien, Eugene J.
†* Pruzansky, Joshua M.
Purcell, A. Craig
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.
Walsh, Owen B.
Wimpfheimer, Steven

Eleventh District
Bohner, Robert J.
Darche, Gary M.
DiGirolomo, Lucille S.
Glover, Catherine R.
James, Seymour W., Jr.
Nashak, George J., Jr.

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Kessler, Steven L.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Schwartz, Roy J.
Torres, Austin

Out-of-State
Chakansky, Michael I.
Hallenbeck, Robert M.
* Walsh, Lawrence E.

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Penal Law § 10.00(7) includes, where appropriate, a government.[13] "Besides," he said, it is not the County that is prosecuting the State of New York, it is "The People of the State of New York."[14] The People themselves are often unhappy with their government.[15]

He cited a variety of cases in which the state, or one of its departments had sued itself or another one of its departments.[16] He argued that it was specifically acknowledged that the state could sue itself in the Civil Practice Law and Rules.[17]

Unlike the prohibition on trademark counterfeiting, which was intended to protect the trademark owner, this section is intended to assure the buyer that he gets what he thinks he's buying, Termm argued.

Besides, Max Termm insisted, if the state can produce Nikes without paying exorbitant sums to self-absorbed athletes, our way of life (and sport) as we know it will come to an end. Our athletes must receive astronomical sums of money that look like telephone numbers with area codes, he argued, or they might actually be the target of bribe attempts—like the famous Chicago Black Sox "Shoe Contract-less" Joe Jackson. As usual, the author's great-great-granddaughter refused to reveal the result of the case, so as not to alter history or subject the author to inside trading temptations.

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1. Bad pun based upon the fact that "nike" is Greek for "victory." This footnote is required by the Federal Witless Assistance Program for the humor impaired.
2. 527 U.S. 666 (1999).
3. 15 USC § 1125(a).
4. New York did not have enormous advertising costs or endorsement contracts with famous athletes.
5. Thus disproving Gerald Ford's comment that if the government made beer it would cost $40.00 a six pack.
6. Which stands for Fair Debt Collection Practices Act, and not Federal Dumb Court Pronouncements Act as some attorneys have been asserting.
7. 15 U.S.C. §§ 1692-1692o.
8. 15 U.S.C. § 1692a(4).
9. Cases have held that debts include a dishonored check. *Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); rent, *Romea v. Heilberger & Assocs.*, 988 F. Supp. 712 (S.D.N.Y. 1997), *aff'd*, 988 F. Supp. 715 (S.D.N.Y. 1998); insurance premiums, *Kahn v. Rowley*, 1997 U.S. Dist. LEXIS 10308 (M.D. La. July 11, 1997); and dues to homeowners associations, *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997).
10. *People v. Tanner,* 153 Misc. 2d 742, 582 N.Y.S.2d 641 (Crim. Ct., N.Y. Co. 1992).
11. In the future, the author's great-great-granddaughter advises me, atheists will attempt to get sellers of the Bible prosecuted for Criminal Simulation under the theory that it is passing itself off as having a divine origin, but the district attorney will decline to bring charges.
12. Definitions are important in criminal law. The Court of Appeals determined in *People v. Owusu*, 93 N.Y.2d 398, 690 N.Y.S.2d 863 (1999) that teeth used to bite a victim are not "dangerous instruments" because body parts are not instruments. The court literally followed the advice of the crime dog McGruff and took a bite *out* of crime.
13. Thus waiving any argument concerning sovereign immunity.
14. Criminal Procedure Law § 1.20 (1) provides, inter alia, "Every accusatory instrument, regardless of the person designated therein as accuser, constitutes an accusation on behalf of the state as plaintiff and must be entitled 'the people of the state of New York' against a designated person, known as the defendant."
15. And hence the hoary saying "When the Legislature is in session no one's property is safe."
16. *New York State Dep't of Mental Hygiene v. New York State Div. of Human Rights*, 66 N.Y.2d 752, 497 N.Y.S.2d 361 (1985); *New York State Dep't of Audit and Control v. Crime Victims Compensation Bd.*, 76 A.D.2d 405, 431 N.Y.S.2d 602 (3d Dep't 1980); *New York State Dep't of Civil Service v. New York State Human Rights Appeal Bd.*, 66 A.D.2d 309, 414 N.Y.S.2d 46 (3d Dep't 1979); *New York State Div. of State Police v. McCall*, 98 A.D.2d 921, 470 N.Y.S.2d 916 (3d Dep't, 1983); *New York State Educ. Dep't v. New York State Div. of Human Rights Appeal Bd.*, 92 A.D.2d 648, 460 N.Y.S.2d 176 (3d Dep't 1983); *People ex rel. Dew v. Reid*, 82 Misc. 2d 583, 372 N.Y.S.2d 462 (Sup. Ct., Oneida Co. 1975); *People v. New York State Div. of Parole*, N.Y.L.J. July 2, 1999, p. 30 col 6B; *People of the State of New York ex rel. Nunez v. New York State Div. of Parole*, 255 A.D.2d 159, 679 N.Y.S.2d 582 (1st Dep't 1998) to name more than a few.
17. Civil Practice Law and Rules 8601 (hereinafter CPLR) 8601 is captioned, "Fees and other expenses in certain actions against the state." It provides that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state." He argued that the language of the statute which literally referred to a party other than the state prevailing in an action against the state recognized that the state could sue the state and prevail in such an action.

    When two state entities sue and one prevails as in footnote 16, does the losing party that appeals get the automatic stay in CPLR 5519(a)(1) available to the appellant when it is the state?

JAMES M. ROSE, a practitioner in White Plains, is the author of *New York Vehicle and Traffic Law,* published by West Group.

RES IPSA JOCATUR

Will New York State Nikes Become Pyhrric Victories?[1]

BY JAMES M. ROSE

The law of the 21st century appears on the author's fax machine from time to time. It is supplied by his great-great-granddaughter who will figure out how to manipulate time in the future. Her company, *Nunc Pro Tunc Filings Inc.*, was an immediate success with harried attorneys who had to be in two courts at once and needed to file pleadings after the statue of limitations had run.

She has recently advised me what will happen in the next few years in the wake of the U.S. Supreme Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*[2] The case stands for the proposition that states cannot be sued for violating patents. The New Jersey plaintiff had developed a patented method of marketing certificates of deposit to save for college education expenses. The plaintiff alleged under the Trademark Remedy Clarification Act § 43 (a)[3] that its patent was being infringed by the State of Florida. The court, in a decision by Judge Scalia, ruled that the federal courts had no jurisdiction over the matter, because the Eleventh Amendment to the Constitution forbids out-of-state residents from suing a state in federal courts where Congress did not specifically authorize it and the state did not waive sovereign immunity.

In the future, another resident of New Jersey, P. S. De Raysistans, Esq., wrote to the governor of the State of New York. He suggested (as a public service for which he claimed *pro bono* time credit) that New York could market its own version of expensive patented or trademarked items of apparel at lower costs.[4]

The governor saw a chance for increasing the state's revenue and quickly began to put out New York-made Nike Air shoes. They were manufactured (with the distinctive Nike swoosh on them) in New York state prisons, which still paid their workers more than Nike did. He wasn't worried that Nike would sue or threaten to move its plants out of the state, because all of its plants were in Third World countries where the hourly wage won't buy a lotto scratch-off ticket.

The shoes were indistinguishable from authentic Nikes except that they cost $29.95.[5] Nike was without a remedy because it could not sue a state for trademark infringement.

However, Mr. De Raysistans wanted something for his brilliant idea. He wrote to the governor and demanded that he acknowledge the source of the idea. The governor demurred.

Mr. De Raysistans then hired a New Jersey attorney, Jack L. N. Hyde of Hyde & Seik, P.C. to write to the governor demanding the governor acknowledge his debt of gratitude and give his client "the credit he deserves for his services to New York."

Much to Mr. Hyde's shock, the attorney general of New York responded by suing Hyde & Seik under the Fair Debt Collection Practices Act.[6] That statute[7] prohibits persons (including attorneys) from taking certain actions to collect the debts of their clients. Hyde asserted that he did not come within the act, but Assistant Attorney General Mort Mane replied that he did. A subsection of the act[8] defines a creditor as a person to whom a debt is owed. In this case it was a debt of gratitude. Hyde asserted that the debt was not one that came under the statue.[9] The definition includes "an obligation owed for credit or services." Here Mr. De Raysistans himself alleged that he had performed a public service and deserved credit for it. Judge Hugh De Mann ruled that the statute did cover the governor, who was a consumer of advice. The advice benefited not only the state of New York, but the governor personally. His popularity in the polls went up 10 points when he brought out the cheap Nikes.

The governor denied in court that Mr. De Raysistans was the sole source of his inspiration. He insisted that he had always planned to charge residents of the state for Air of some kind, since it was one of the few items the state had not figured out how to tax. To charge them for New York Nike Airs was just a part of his plan.

De Raysistans was not through, however. He went to the district attorney of Albany County, Max Termm, a political rival of the governor. The district attorney then brought criminal charges against the state under N.Y. Penal Law § 170.45 for criminal simulation. That section of the Penal Law makes it a crime for a person to pass off as authentic some item that appears to have a source it does not in fact possess. The section has been held to apply to sweatshirts from Hardrock Café[10] even when the seller did not say that they were genuine. "These shoes are not Air Jordans," Termm told the press, "They're ersatz."[11]

Assistant Attorney General Mane responded by arguing that the district attorney of a single county (which is itself but a subdivision of the state of New York) could not charge the state itself with a crime. Max Termm replied that the definition of "person"[12] in

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