NEW YORK STATE BAR ASSOCIATION

Journal

JULY/AUGUST 2005
VOL. 77 | NO. 6

David Orr – *In a grand tradition…*

Poetry critic, poet, lawyer

by Monica Finch

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July/August 2005

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PN: 40374 / **Member $72** / List $80 / 296 pages

Commercial Leasing with Forms on CD-ROM
This book examines in detail situations that arise during lease negotiations and numerous issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant.
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PN: 4074 / **Member $50** / List $65 / 450 pages

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General Practice Forms on CD-ROM — 2004 Edition
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PN: 61504 / **Member $280** / List $315

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Public Sector Labor and Employment Law is the leading reference on the subject in New York State. The 2005 supplement updates case and statutory law, features a completely rewritten chapter on "The Regulatory Network" and benefits from the guidance of Second Edition editors Jerome Lefkowitz and Melvin Osterman, and the fresh insights of editor Jean Doerr.
PN: 520504 / **Member $80** / List $95 / 644 pages

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Journal

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Albany, NY 12207
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FAX (518) 463-8844
www.nysba.org

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BY MONICA FINCH

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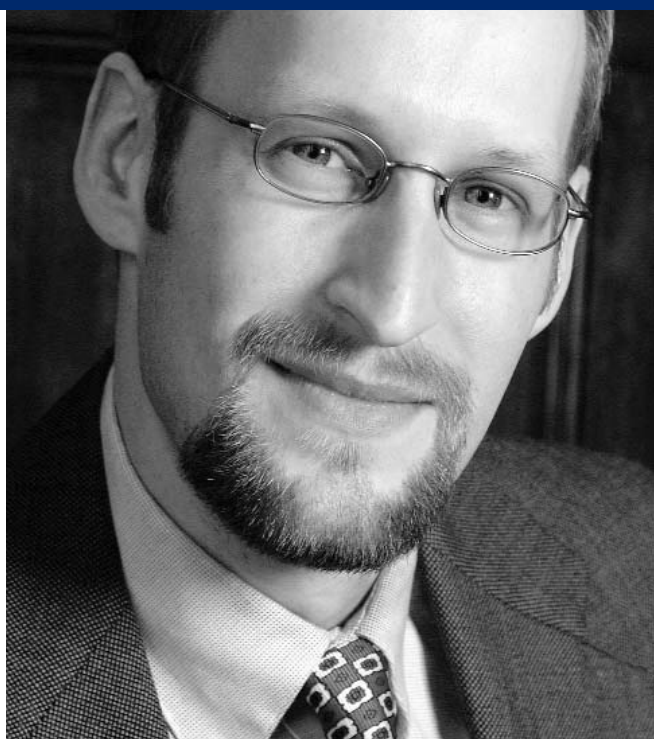

COVER AND PAGE 10 PHOTOGRAPHS: WALTER GARSCHAGEN

DEPARTMENTS

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PRESIDENT'S MESSAGE

A. VINCENT BUZARD

Educating the Public

I want to bring you up to date on the launching of some of the programs I discussed in my last message. From my experience and observation, as the Association year seems so short and begins right in the middle of the summertime, I know that precious time is lost if ideas aren't hatched until September and the committees not set up until thereafter. Therefore, I have attempted to have the task forces and committees that will be dealing with our new priorities for the year ready to go at this time. There will, of course, be additional new initiatives along the way.

I will concentrate this column on efforts to improve public understanding of the legal system and the lawyer's role in it, which is fundamental to the effective functioning of our justice system. Next time, my focus will be on our continued progress on our other new initiatives.

We are gathering up-to-date data to debunk the myth of the litigation crisis and, in that connection, received from the Office of Court Administration the statistics for the filings for the last 10 years. Not surprisingly, filings for all cases, including tort cases, have remained remarkably flat, with the numbers of each filing almost exactly mirroring the filings of a decade ago. Therefore, our experience in New York is the same as the national experience and that is contrary to popular belief. There are no increases in litigation, including and particularly tort litigation.

A study commissioned by the Center for Justice and Democracy and released in July, "Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry," presents a similar picture. The report, which analyzed performance in 2004 of the 15 largest medical malpractice insurers in the country, found that in the last five years the amount the insurers collected in premiums more than doubled and insurers accumulated record surpluses, while claims payouts remained essentially flat. The report is new and must be analyzed, but certainly seems to support our general understanding that runaway juries are a myth. We are gathering other information as well, because the myth of the litigation crisis spills over and affects the view that the public has of all lawyers.

I believe the way we handled the media in our communications about the recent decision by the New York State Court of Appeals, which held banning cameras from the courts to be constitutional, should be a model for the future. As soon as we heard of the decision, a group of our Media Services and Public Affairs staff and our outside agency, Linden, Alschuler & Kaplan, Inc., gathered. We discussed the proper response – one that was forward-looking and explained the

To Our Colleagues in London

As I write this, our colleagues in England are grappling with the tragic attacks in London on July 7. It was four years ago on September 11 that the leaders and members of our Association dedicated skills, resources and countless hours, often around the clock, to help survivors and families of the missing and victims of the horrific attack on the World Trade Center, and colleagues affected by the devastation. In my letters to the Law Society and the Bar Council of England and Wales, I expressed our Association's condolences for the extensive loss of life and injury caused by the bombings and offered our assistance based upon our experience. I wrote that, as attorneys, we deplore these illegal actions that defy the rule of law we have all pledged to support. We have common bonds in the core values of our justice system and in the strength of the rule of law in seeing us through difficult times.

Bar Association's position that cameras in the court provide opportunities to educate the public about how lawyers work and how the legal system works. Scott Eisenstein of the agency is a master at getting interviews, so he spent the day lining them up, and I spent the day being interviewed, with the result that we were in not only the legal publications but also in the mass media such as the *New York Times.* I was interviewed for over a half an hour by the *Times* reporter who did an excellent job quoting me. All together we had 25 articles around the state in the mass media explaining our position on the need for public understanding and the role of cameras. The obvious lesson in communications is to get out early, be prepared and not wait for the phone calls to come. We plan to use this same approach in the year ahead.

In those interviews, I also discussed our plans for renewed efforts to have cameras permitted in the trial courts. This will be a long and difficult task. In the short run, there are easier steps we can take to show the value of having cameras in the court. There is no prohibition on having cameras in the appellate courts or in any other proceeding where there are not witnesses testifying. I believe this is an enormous, but as yet untapped, opportunity for the broadcast media. I realize all the arguments as to why appellate arguments are hard to cover or, in the opinion of broadcasters, may not be interesting, but I believe that view is wrong. We just have to figure out how to deal with it. All of the important cases that the media cover so aggressively at the trial stage just fall off the map later as the cases work their way up the appellate courts. Also, there are other interesting proceedings and motions that could be, but are not currently, televised.

All of this effort is based upon the fundamental belief that if the people can see us at work, they will better understand and appreciate the legal system and what lawyers do. I believe that the public better understands what may sound like an unusual decision when they hear and see some of the arguments. Therefore I have appointed a task force led by Carolyn Nussbaum, who practices in Rochester and New York City with the firm of Nixon Peabody, to work with broadcasters and the Appellate Division and the other courts to attempt to get cameras into those courts more frequently. Carolyn served on the State Bar Special Committee on Cameras in the Courtroom that I chaired and is ideally suited to lead this effort.

Another aspect of our work to promote public understanding involves responding to the current attacks on judicial independence. We will continue the effort undertaken in the past year by Ken Standard to speak out in defense of that independence. This issue was discussed at our House of Delegates meeting in June, which included a report and recommendations of the New York County Lawyers' Association, presented by that Association's President, Norm Reimer, concerning resolutions proposed in Congress that would tell the courts to not in any way refer to foreign judgments. Any invasion of judicial independence, including Congress telling the Supreme Court what to review or not to review, is a significant breach of the separation of powers and of judicial independence. Our House of Delegates passed a resolution calling for the defeat of the congressional resolutions.

There are, of course, other examples of attacks on judicial independence and they will continue to occur. The congressman who represents the district where I am originally from in southern Indiana successfully attached a rider to a budget bill that would have prohibited the use of federal funds to enforce an order to remove the Ten Commandments.

I have the wholehearted backing of the Executive Committee and the House of Delegates to answer attacks on judicial independence in whatever form they may take, and I will certainly do so. Judicial independence is the cornerstone of the separation of powers in our form of government and of a free society. Our role as a bar association is to not only promote public understanding of the legal system and the lawyer's role in it, but also to speak for the judges who cannot defend themselves against such attacks.

As I discussed in my last message, inappropriate lawyer advertising only contributes to the lack of public understanding. I have established a task force charged with recommending changes in the enforcement of the rules and changes in the rules as needed, and development of programs for peer review. I have asked the task force to report back in November with a proposal that we can then consider at our January meeting. I am grateful to Bernice Leber for accepting the challenge of chairing the task force and to the other able members of the group.

We also need to do what we can as a bar association to educate people about basic rights and responsibilities and how the law affects daily life. That is the focus of another initiative under development with the help of our CLE Director, Terry Brooks – the presentation this year of People's Law School programs. We are working on lining up speakers and updating the State Bar's book on the law in New York, produced in the early '90s, for distribution at that school and beyond.

I want to hear from you with any thoughts you have on building public understanding. I will keep you apprised as further developments occur. In my next message, I will report to you on progress on other new initiatives that we are pursuing to enhance our CLE and law office management services, provide you with easy access to updates on developments in the law and practice, and address current court-related issues and procedures, including electronic filing and unlawful practice. Thank you for your continued support. ■

A. VINCENT BUZARD can be reached at president@nysbar.com.

NYSBACLE

Partial Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

†Collections and Enforcement of Money Judgments
(video replay)
Fulfills NY MCLE requirement (7.0): .5 in ethics and professionalism; 6.5 in skills, practice management and/or areas of professional practice
August 11 Jamestown

Henry Miller – The Trial
Note: CLE seminar coupons and complimentary passes CANNOT be used for this program
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 6.5 in skills
September 9 New York City
September 23 Melville, LI
September 30 Tarrytown

†Three Hot Topics in Criminal Law (video replay)
(half-day program)
September 16 Canton

Benefits, Health Care and the Workplace
September 19 Albany
September 21 New York City
September 29 Rochester

†First Corporate Counsel Institute
(two-day program)
Note: CLE seminar coupons and complimentary passes CANNOT be used for this program
Fulfills NY MCLE requirement (14.5): 4.0 in ethics and professionalism; 10.5 in skills, practice management and/or areas of professional practice
September 22-23 New York City

When Your Client's Health Law Problems Become Your Own and Meet the AUSAs
(half-day program)
Fulfills NY MCLE requirement for all attorneys (5.0): 0.5 in ethics and professionalism; 1.5 in skills; 3.0 in practice management and/or areas of professional practice
September 23 New York City

Ethics for Real Estate Attorneys
(half-day program)
September 23 Albany
September 28 Rochester; Tarrytown
December 6 New York City

Federal Sentencing Guidelines After *Booker*, *Fanfan* and Their Progeny: Update and Advice from Experts and Key Figures
(half-day program)
September 23 New York City
October 12 Albany
October 14 Buffalo

†Drafting Enforceable Employee Non-Competition Agreements
(one-hour program)
October 6 Telephone Seminar

Practical Skills – Introduction to Estate Planning
Fulfills NY MCLE requirement for all attorneys (8.0): 1.0 in ethics and professionalism; 2.0 in skills; 5.0 in practice management and/or professional practice
October 6 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

†Tenth Annual New York State and City Tax Institute
Note: CLE seminar coupons and complimentary passes CANNOT be used for this program
October 6 New York City

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
Fulfills NY MCLE requirement for all attorneys (9.0): 1.0 in ethics and professionalism; 2.5 in skills; 5.5 in practice management and/or areas of professional practice
October 6 Buffalo
October 7 Albany
October 11 Melville, LI
October 14 Syracuse
October 17 New York City; Tarrytown

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Update 2005
(Live Sessions)

October 7	Syracuse
November 4	New York City

†(Video Replays)

October 25	Albany
October 26	Utica
November 4	Jamestown; Watertown
November 9	Plattsburgh; Saratoga
November 10	Ithaca
November 18	Buffalo; Canton
December 1	Binghamton; Poughkeepsie; White Plains
December 2	Loch Sheldrake; Melville, LI; Suffern
December 7	Rochester

Avoiding Malpractice and Client Grievances
(half-day program)

October 7	Albany
October 21	Rochester
October 27	New York City
October 28	Melville, LI
December 2	Tarrytown

†Ethics and Professionalism
(video replay)

October 14	Canton

Medical Malpractice Litigation

October 14	Buffalo; New York City
October 21	Albany; Melville, LI

2005 Update and Overview on Premises Liability

October 14	Albany; Uniondale, LI
October 21	Syracuse
October 28	Buffalo; New York City

Practical Skills – Basic Matrimonial Practice
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 3.5 in skills; 2.5 in practice management and/or professional practice

October 18	Albany; Buffalo; New York City; Rochester; Smithtown, LI; Syracuse; Westchester

New York Appellate Practice

October 21	Albany
October 28	Tarrytown
November 9	Buffalo
November 10	Uniondale, LI
December 1	New York City

Divorce 2005: Equitable Distribution's 25th Birthday, the CSSA at Sweet 16 and Trends in Maintenance and Other Cutting-Edge Issues

October 21	Buffalo
October 28	New York City
November 18	Melville, LI
December 2	Syracuse
December 9	Albany

Discovery Proceedings in Surrogate's Court
(half-day program)

October 27	Mt. Kisco
November 4	New York City
November 18	Smithtown, LI

†Seventh Annual Institute on Public Utility Law

October 28	Albany

Mental Health Courts: Better Outcomes from the Legal and Mental Health Systems
(half-day program)

November 4	New York City

Ethics for Litigators and Trial Lawyers
(half-day program)

November 4	Uniondale, LI
November 16	Buffalo
November 18	Albany; New York City

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JONATHAN FRANZEN
IAN McEWAN ATONEMENT

David Orr – *In a grand tradition…*

Monica Finch is the editor of the *State Bar News* and has been a freelance writer for nearly 20 years.

By Monica Finch

Unlike the famous sword, poetry can be pulled from its stone by anyone – which is why it cuts so deeply.

– David Orr

Archibald MacLeish. Edgar Lee Masters. Wallace Stevens. They have something in common with David Orr, an attorney with Wollmuth Maher & Deutsch LLP in New York. They too were attorneys (early in his law career, Masters practiced with Clarence Darrow's firm) *and* poets. And Orr, although a poet in his own right, is better known as a poetry critic.

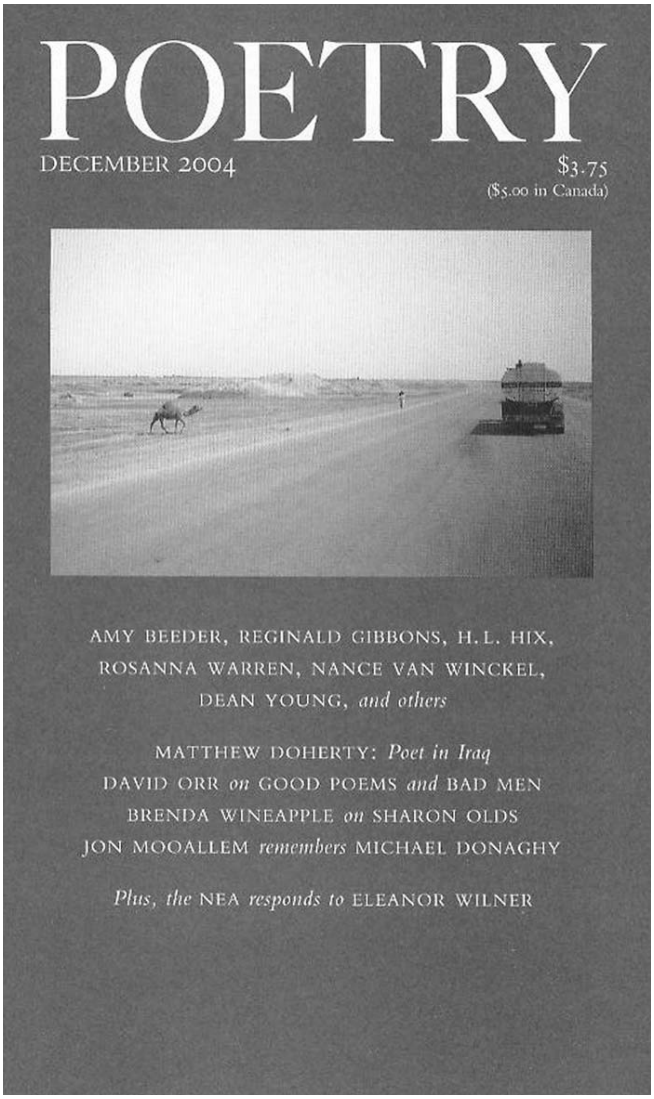
In April of this year he began writing a regular column, "On Poetry," for the *New York Times*. For several years prior, Orr's byline appeared frequently in the *Times'* Sunday *Book Review*. His work has also appeared in *Poetry*, the genre's flagship journal, and he wrote a piece for the online news and culture magazine, *Slate*. When the topic is poetry criticism, Orr is often quoted by other writers.

At first glance, the poet-lawyer dyad might seem an oxymoron. How does the lawyer, trained to parse language to its fundamentals, inhabit the same brain with the poet, a shape-shifter of words? What kind of alchemy goes on in this seeming left brain-right brain dichotomy? However, there is convergence, like a Venn diagram, and the *lingua franca* is – literally – words.

These intersections are recognized by at least one law school: the West Virginia University College of Law offers a unit titled "Strangers to Us All: Lawyers and Poetry." WVU College of Law also publishes *Off the Record: An Anthology of Poetry by Lawyers*, "the first collection of non-law-related poetry by lawyers ever published."

So rare a species is the lawyer-poet that a sighting often generates a news story. One article reported that Las Vegas public defender and poet Dayvid Figler "is said to have won a case in criminal court with his performance of a summation written entirely in blank verse."

The existence of this hybrid is apparently not so rare as one might think. The WVU College of Law Web site expresses it well: "The poet, like the lawyer, sees the world in a nuanced way that demands it be addressed with a special language,



Poetry magazine, December 2004.

language that calls attention to itself and sets itself apart by form, rhythm, and practice."

Orr, a South Carolina native, was an English major at Princeton. Until then, he hadn't encountered much poetry, especially contemporary poetry, which became his favorite genre. And despite his workload while a student at Yale Law School, he continued his devotion to the field, devouring literary publications, particularly the *Yale Review*. Many of his fellow law school classmates were also creative types who had been involved in the humanities during college, he says.

After reading innumerable poetry reviews, Orr thought it was something he could do well. "I took a shot at it," he said, and in 1999 sent off a trial balloon to *Poetry* magazine, "not thinking they'd take a draft review," he recalled. Much to his surprise and delight, *Poetry* published it.

Then in 2002, the editor at *Poetry* sent some of Orr's work to the editor of the *New York Times Book Review*. He, too, was impressed and contacted Orr at his office asking him to write reviews, which launched Orr as a peer reviewer. Now more commonly he writes what he calls "omnibus reviews" – critiques of five to 10 writers at once in a single review. In this format, Orr pays close attention to many books, reading deeply and doing much "mental gear shifting," as he calls it. He also has produced long articles on a single writer or subject.

Orr's critical style is a blend of high sarcasm, wit, and incisive analysis. In the annual *Times Book Review* poetry issue, Orr's review of the 18th edition of the esteemed *The Best American Poetry* contained this characteristic comment: "As for the poems themselves, they run the usual gamut from very good to slightly dull to what-were-you-thinking . . ."

Poetry's Small World

Orr said that "it is easy to get to know people" in poetry's relatively small, and often closed world. However, the practice of law "keeps you out of the world" and sometimes it is a lonely business. "In the poetry world," he recently wrote, "even the insiders are outsiders."

This can become problematic for a poet who is also a poetry *reviewer*. This same comfortable, nurturing small world can present problems for a reviewer when it comes to such concerns as where and when to publish. Although Orr is as hard on his own work as he is on others', it can become a prickly matter when writing criticism on another's work from within that small, often-intimate circle.

"Poetry's insular little world is a good thing for support," Orr noted, "but not so good [because you] don't see yourself as others do." He added that, however, "you can't write well if you can't imagine how others see you."

Often, the poet and the lawyer "seem to have the same view," because both have a "moral investment in what they write."

In the Practice of Law and Art

Orr, a commercial and civil litigator, sees many junctures in the practice of law and writing and reviewing poetry. "The similarities are in the structure of language and of writing in a certain form," he said. He also compared the way a lawyer must "feel [his] way through a problem from approach to resolution"; it is the same when writing poetry or criticism," because there are "many ways to go."

"The skills are more similar than people might believe," he said, and is grateful that his firm has been so accommodating.

His colleagues are also excellent foils: They are a "group of bright critical readers" and it is "good to keep those folks in mind, keep them in the back of your head as people who may read your work. They remind you they do not share the same reference points – they are people in other fields of endeavor. Poetry is not the world most people inhabit," he said.

Because poetry isn't a common or popular genre for the most part, modern poets' "target audience is people who don't read a lot of poetry," explained Orr. Therefore it is the poet's challenge to "give them something to hold on to."

A World View

Often, says Orr, the poet and the lawyer "seem to have the same view," because both have a "moral investment in what they write." As it is in the law, Orr noted that in poetry, it is "counter-productive to express a serious message in a frivolous manner." "Whenever poetry seems 'over determined,' it doesn't work as well – if it is not moral, it is frivolous," said Orr. In a sense, the poet and the lawyer both deal with ethical issues, basic questions of right and wrong, and determinations of what is just and unjust.

How important is the poet's activity in society? In a recent column for the *Times*, Orr discussed our desire that poetry do "something useful." "It's an unrealistic perception, of course, but it's a hard one to avoid in a culture that equates worth with utility."

His Future

Orr will continue practicing law while writing and reviewing poetry in his new role with the *Times*. In a couple of years he hopes to publish a collection of his own poetry as well as a volume of his essays and reviews.

Creating poetry "isn't writing Hallmark card verse," he said. And, he added, "There is a lot of value in people getting out there and saying what they think – whether reviewing or writing in the poetry world." ■

Orr on Poetry

***Collected Poems* by Donald Justice**

Is it better to be great, or to be a great example? In most artistic arenas, the answer is easy – who wouldn't rather be Laurence Olivier than someone known for playing a convincing butler? If you're a poet, though, this question isn't so simple. As general knowledge about poetry has faded, so has our confidence about what might constitute a "great" poem in the first place. Anyone trying to make a broad statement about poetry is forced to survey a crowd of self-promoting aspirants – the New Formalists, the Langpo refugees, the Post-Avant – which is probably why contemporary American anthologies often read like plays with a hundred parts, all small. And when so many scenes have been set aside for cooks and clowns and angry shopkeepers, would we even recognize a leading man if he showed up to audition?

New York Times Sunday Book Review, August 29, 2004

The Best American Poetry 2004

As poetry fans know, each edition offers all of the finest poetic moments of the past year, so long as they come in the form of one poem each by around 70 writers of varying skill, as chosen by an editor who is a famous poet with favors to trade and axes to grind. In the past, this simple yet elegant formula has produced such editorial highlights as . . . the appearances of several editors' spouses, the appearances of many editors' buddies and the inclusion of poems by John Ashbery or Donald Hall in nearly every volume, including the one compiled by John Ashbery himself (*l'état, c'est moi!*).

. . .

What this series really stands for [is] the idea of poetry as a community activity. "People are writing poems!," each volume cries. "You, too, could write a poem!" It's an appealingly democratic pose, and it has always been the genuinely "best" thing about the Best American series.

New York Times Sunday Book Review, November 24, 2004

"Bad Guys"

In response to the question, "Can a bad man be a good poet?" there are only two things to be said: "Yes" and "obviously." In part, that's because the poetry world sets the bar fairly low for "badness" – when we say a poet was a "bad man," we don't mean that he was a shotgun-toting, baby-kicking monster; we mean that he was unpleasant, disturbed, or a jerk. And considering that poetry's history is thick with unpleasant, disturbed jerks, the question would seem to answer itself.

. . .

This theatrical element . . . is related to what we might call the Second Law of Poetic Morality: how a poet acts can be as important as what he does. . . . Most of us – the wise and tolerant poetry reading audience – have a . . . theatrical view of The Poet. . . . [I]t has nothing to do with the basic function of a poet, which presumably is to write poetry. Of course, this kind of thinking has more to do with gut impulses than measured conclusions. When we think carefully about who poets actually are, and what they actually do, and who actually listens to them, then our ideas about The Poet tend to be less theatrical. But the point is that we usually *don't* think carefully; we're fans, and unexamined assumptions are nine-tenths of the joy of fandom.

Poetry magazine, December 2004

BY DAVID PAUL HOROWITZ

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"How Do I Dismiss Thee . . . ?"
Part I

This is the first part of a three-part article addressing post-commencement, non-summary judgment dismissals of civil cases. This part attempts to give a brief historical and philosophical background on the development of these dismissal issues, suggests why courts are more empowered and may be more willing to use the dismissal weapons at their disposal, and addresses one particular type of dismissal: failing to appear in court.

The second part will address dismissals for failure to prosecute and for failure to restore cases after dismissal from the trial calendar for more than one year. Dismissals arising in the disclosure world, as a penalty for a party's or an attorney's failure to comply with disclosure orders, will be discussed in the third part.

Why You Wake Up Screaming

You have a great case, a deep-pocket opposing party, reams of helpful disclosure, and more than one "smoking gun" to use at trial. The action has been successfully and correctly commenced, and you are planning to lop a few years off of your retirement target as a result of the resolution of the case. And then your case gets dismissed. Malpractice, professional embarrassment, and working weekends at WalMart until the day you die. Sound farfetched? A scare tactic? A bad dream? Read on.

Man, They Used to Have It Rough

In the days prior to the enactment of commencement by filing in supreme and county courts, difficulties abounded in successfully commencing an action. These included locating and serving a defendant prior to the expiration of the statute of limitations, avoiding "sewer service," and rushing about to obtain a 60-day toll of the statute of limitations by serving an upstate sheriff.

All in all, commencement was a nerve-wracking experience. Add to the mix the ability of a defendant to move to dismiss for improper service at any time by timely interposing an affirmative defense of lack of jurisdiction, and the risk of a dismissal arising from a commencement problem always lurked in the background, almost up to the time the check was cashed.

How Sweet It Is

Fast-forward to today's practice, and a practitioner need only file a summons and complaint, summons with notice, or petition with the clerk in the supreme or county courts in which the action is commenced in order to stop the clock on the statute of limitations.[1] Thereafter, the plaintiff has an almost leisurely 120 days to effect service of a summons and complaint or summons with notice, and 15 days for a petition,[2] with additional time possible by leave of court for good cause shown or in the interests of justice.[3]

Furthermore, a defendant alleging improper service must move within 60 days of answering or the defense is waived.[4] No more counting sheep at night, trying to doze off while nagging commencement worries keep you awake.

Looking a Gift Horse in the Mouth

Unfortunately, anecdotal evidence suggests that, into this veritable Shangri-la, storm clouds have drifted, raining post-commencement dismissals as a result of missed calendar calls, failure to timely file notes of issue in response to court-served 90-day notices, failure to restore marked-off actions, and failure to comply with disclosure orders.

This apparent increase in dismissals unrelated to commencement seems to have grown very nearly in tandem with the institution and implementation of Differentiated Case Management.[5] In addition to adding "DCM" to the litigator's vocabulary, Differentiated Case Management has increased the administrative pressure on judges to dispose of cases once "standard and goals" deadlines have been reached. While many judges are understanding and work to ameliorate some of the harsher aspects of DCM, there appears to be pressure to achieve case dispositions, sometimes at the expense of case resolution, and this "trickle-down effect" has led to an increased rate of case dismissals.[6]

What's That I Hear?

Given the relative simplicity of commencing actions in supreme and county courts today, one can argue that the most dangerous time in the life of a case may be the formerly tranquil, and relatively uneventful, time between commencement of an action and trial. Litigators may be forgiven if they sometimes feel as though there is a judge looking over their shoulder incanting "how do I dismiss thee . . ."

Trio of Court of Appeals Cases Signals Move Towards Requiring Strict Compliance With Court Orders and Procedural Rules

In three Court of Appeals decisions, each addressing a different area of attorney non-compliance with court

orders and rules, the Court has demonstrated an impatience both with attorneys' failure to comply, and courts' willingness to excuse non-compliance. Read together, the cases suggest that careful compliance with court orders and rules is more crucial today than ever before.[7]

First, in an appeal involving the failure to comply with disclosure orders, including a conditional order of dismissal, the Court of Appeals referenced the familiar "scenario" of non-compliance, explained "that compliance with a disclosure order requires both a timely response and one that evinces a good faith effort to address the requests meaningfully,"[8] and concluded:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders as are just," including dismissal of an action.[9]

This case should have made litigators sit up with a start, but experienced practitioners might be excused, based upon prior experience, for following Atticus Finch's admonition "It's not time to worry, Scout."

Next, in an appeal arising from a trial court's grant of permission to a defendant to move for summary judgment beyond the time permitted by CPLR 3212(a), and affirmed by the Appellate Division, the Court of Appeals held that the trial court should not have considered the merits of the defendant's motion. After reviewing the history of eve-of-trial summary judgment motions, the Court concluded that

> "good cause" in CPLR 3212(a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy. . . . No excuse at all, or a perfunctory excuse, cannot be "good cause."[10]

Biting your nails yet? Maybe it's time to worry.

Finally, just last month, the Court of Appeals held it to be an abuse of discretion for a trial court (affirmed by the Appellate Division) to allow an "interest of justice" extension of time to a plaintiff to serve a defendant beyond the time set forth in CPLR 306-b, where there was "extreme lack of diligence shown by plaintiff."[11] It's time to worry, Scout.

Missed Calendar Calls

We all know that feeling. It is 9:28 a.m. and you are still three blocks from the courthouse, your "secure-pass" is on your nightstand at home, and you are having slight chest pains as you jog towards the courthouse. Why? Because Judge "X" calls the calendar promptly at 9:30 am, there is no second call, and non-appearing parties are dismissed. Or, you have three cases on in New York County Supreme Court, the first at 71 Thomas Street, the second at 60 Centre Street, and the third at 111 Centre Street (fortunately, the case at 80 Centre Street was adjourned), all on at the same time, and, though a second call is available, you are afraid you will miss one or two of the calls, even if you are checked in on all three.

Judges are entitled to control the calling of their calendars, and attorneys have an obligation to appear in court, on time and prepared. And, while you could have left earlier and remembered your secure-pass, and your office could have sent three attorneys to cover the three cases in New York County, life, and the realities of practice, have a way of getting in the way[12] and endangering the oft-recited public policy that cases be decided on their merits.[13]

Rule 130-2.1 provides the statutory authority for the imposition of sanc-

tions and costs for failing to appear "at a time and place scheduled for an action or proceeding to be heard before a designated court."[14] While an assessment of sanctions under this rule is unpleasant, to be sure, the action or proceeding is not dismissed. Uniform Rule 202.27 provides the statutory basis for dismissing an action if the plaintiff fails to appear, or granting judgment by default if the defendant fails to appear, at a "scheduled call of a calendar or at any conference."[15]

As a practical matter, dismissals can occur in situations where a valid and reasonable excuse exists. Unfortunately, a trip to the Appellate Division may be required in order to have your case restored. For example, the First Department reversed the dismissal of a plaintiff's complaint where the plaintiff's counsel failed to appear on the return date of the motion to dismiss. The plaintiff moved to vacate the default, obviously explaining to the trial court what had transpired, and the motion to vacate was denied. The First Department explained why no attorney appeared:

> On a September 2000 return date for motions to dismiss and for leave to serve a supplemental pleading, counsel for plaintiff failed to appear since his one-month-old daughter was undergoing an emergency medical procedure for a spinal tap and his partner mistakenly appeared in the wrong location due to an office diary error.

The First Department found the denial of the motion to vacate to be an abuse of discretion.[16]

Similarly, The Second Department reversed a trial court's grant of dismissal of the plaintiff's action for failure to appear at several conference calls. There was confusion over the adjournment of a hearing and a lengthy delay in the proceedings due to the death of the plaintiff.[17] The First Department has found an attorney's "failure to timely appear as expected at the adjourned date of the pre-trial conference amounted to, at worst, law office failure, in that counsel misunderstood the scheduled time and failed to ensure that the court would be informed of his presence in another courtroom."[18] Whew! All's well that ends well, but at great expense in time, costs, and attorneys' fees.

However, don't let these happy endings encourage dilatory conduct. Note to file: "If case is dismissed, move promptly to vacate the dismissal!" For example, the Second Department noted counsel's prompt efforts to vacate a dismissal in an action where counsel submitted an affirmation explaining that he had, in fact, appeared at the prior conferences, or had outside counsel appear for him, that the conferences he did not attend were ones where his presence was unnecessary and, while at the conference that resulted in the dismissal, after speaking with one of the defendant's attorneys and at the suggestion of the attorney, he left the courtroom to make a telephone call.

This led him to miss the calendar call on that day (the decision does not explain what action opposing counsel took, or did not take, when the case was called). Counsel moved promptly to vacate the default and demonstrated the merit of his claim. Accordingly, the Second Department concluded that his complaint should not have been dismissed.[19]

Contrast this with a case where the plaintiff waited four years to move to vacate the default. The First Department affirmed the trial court's denial of plaintiff's motion to vacate.[20]

While a court may dismiss a case for failing to appear at a conference, or impose a sanction on the non-appearing attorney, it may not impose a monetary sanction on the party for the attorney's failure to appear at a scheduled conference.[21] The Second Department held that 22 N.Y.C.R.R. § 130-2.1(a) permits the imposition of a sanction on an attorney who fails to appear at a conference, but does not authorize imposition of a sanction on a party personally. Remember, a monetary sanction assessed against counsel is far less expensive than dealing with the repercussions of a dismissed case, and attorneys whose clients' cases are in danger of dismissal should request that the court sanction the attorney and not penalize the client. If a sanction is assessed, don't look a gift horse in the mouth. Pay the sanction: The party that accepts payment of the sanction waives the right to appeal any alleged inadequacy of the sanction that was imposed.

While dismissals can still result from problems in the commencement phase, the relative safety that once existed post commencement and before trial is fast disappearing. Opportunities now abound for mischief and mishap that can result in a post-commencement dismissal. Plea-sant dreams, at least until you read parts two and three. ■

1. CPLR 304.
2. CPLR 306-b.
3. However, the Court of Appeals has signaled that the discretion to trial judges in this regard is not unbounded. *See Slate v. Schiavone Constr. Co.*, 104 SSM 1, 2005 N.Y. LEXIS 500 (Mar. 29, 2005).
4. CPLR 3211(e).
5. 22 N.Y.C.R.R. § 202.19. The Office of Court Administration is currently considering changes to DCM, and, if the changes warrant, they will be addressed in a future column.
6. It is true, of course, that many of the cases dismissed were abandoned and/or lacking in merit.
7. Nothing in this column, or ever to escape the author's mouth or fingertips, is to suggest that any court order or rule should not be followed.
8. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87 (1999).
9. *Id.*
10. *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004).
11. *Slate v. Schiavone Constr. Co.*, 104 SSM 1, 2005 N.Y. LEXIS 500 (Mar. 29, 2005).
12. In one case, *Simmons v. Pantoja*, 306 A.D.2d 399, 760 N.Y.S.2d 881 (2d Dep't 2003), the appellate court vacated the dismissal, but defendant was *pro se*, and counsel would be advised not to rely on the same level of accommodation as that extended to a *pro se* litigant.
13. *See, e.g., Kaiser v. Delaney*, 255 A.D.2d 362, 679 N.Y.S.2d 686 (2d Dep't 1998).
14. 22 N.Y.C.R.R. § 130-2.1.
15. 22 N.Y.C.R.R. § 202.27.
16. *Cardinale v. Woolworth's, Inc.*, 304 A.D.2d 351, 758 N.Y.S.2d 296 (1st Dep't 2003).
17. *Horn v. North Shore Univ. Hosp.*, 303 A.D.2d 634, 756 N.Y.S.2d 862 (2d Dep't 2003).
18. *Perez v. N.Y.C. Hous. Auth.*, 290 A.D.2d 265, 736 N.Y.S.2d 29 (1st Dep't 2002).
19. *D'Aniello v. T.E.H. Slopes, Inc.*, 301 A.D.2d 556, 756 N.Y.S.2d 54 (2d Dep't 2003).
20. *Cosby v. R.G. Delivery Serv., Inc.*, 302 A.D.2d 308, 756 N.Y.S.2d 31 (1st Dep't 2003).
21. *Rizzuto v. Rizzuto*, 5 A.D.3d 579, 774 N.Y.S.2d 159 (2d Dep't 2004).

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Class Warfare

Aggregating and Prosecuting Consumer Claims as Class Actions – Part I

By Thomas A. Dickerson

We discussed the New York consumer's rights and remedies last year in the *Journal* under a variety of consumer protection statutes for claims arising from misrepresented and defective goods and services.[1] Now we survey the aggregation and prosecution of some of these claims as consumer class actions under Article 9 of the CPLR. Part I of our present discussion provides an extensive listing of, first, the types of goods and services the courts have addressed in the class action context and, second, the theories of liability asserted in consumer class actions. Part I concludes with a listing of common law theories of liability that have been asserted, and Part II will continue the discussion with consumer class actions alleging violations of statutory causes of action as the basis for liability, the impact of mandatory arbitration clauses on class actions, and the use of class action procedures within the context of arbitration.

Types of Claims

Over the last 10 years[2] the courts have addressed consumer class actions,[3] commenced pursuant to Article 9 of the CPLR, involving a variety of misrepresented or defective goods and services. The contexts in which these claims were brought follows.

Baby Makers: misrepresentation of *in vitro* fertilization rates;[4]

Bail Bonds: excessive and unlawful fees;[5]

Books: failure to adequately reveal that the novel *Chains of Command* was completed by lesser known writer after untimely death of author William J. Caunitz;[6] underpayment of book royalties on foreign sales to authors;[7] misrepresented annual rates of return in *The Beardstown Ladies' Common-Sense Investment Guide*;[8]

Cars, Cars, Cars: defective single recliner mechanisms;[9] deceptive engine oil disposal surcharge;[10] defective Lincoln Continentals;[11] misrepresented Automatic Ride Control;[12] deceptive pricing of identical octane gasolines;[13] misrepresented low prices, low finance charges, and guaranteed minimum trade-in allowances;[14] failure to disclose alternative rental car arrangements at lower rates;[15] misrepresented rental car replacement gasoline, personal accident insurance, and collision damage waivers;[16]

CDs and DVDs: inflated shipping and handling charges from music club;[17]

Computers, Software, and Internet Services: created a software applications barrier;[18] misrepresented DSL services;[19] misrepresented services by Internet provider;[20] unauthorized renewal of domain names registration;[21] failure to police chat rooms;[22] misrepresented ink jet printers;[23] defective Microsoft IntelliMouse Explorers;[24] improper billing for unlimited AOL service;[25] failure to provide 24-hour technical support;[26] failure to provide promised service;[27] misrepresented ability to upgrade computer;[28] vibration problems at normal operating speeds;[29]

Dental Products: defective polymer-based dental restorations;[30]

Drugs: price fixing;[31]

Electricity: residential electric supply's automatic renewal of customer contract without notice was failure to comply with General Obligations Law § 5-903;[32] seasonal electric service customers overcharged in violation of Public Service Commission tariff;[33]

Entertainment: obstructed view of Michael Jackson concert;[34] heavyweight boxing match stopped because Mike Tyson bit off opponent's ear;[35]

Food and Drink: misrepresentations that soft drink would "improve memory";[36] food poisoning;[37] misrepresented fat and caloric content in Pirate's Booty & Fruity Booty;[38] misrepresented fat content of Power Bars;[39] misrepresented baby food and cooking wine;[40] spoiled, stale and tasteless soft drinks;[41]

Gambling: racetrack bettors challenge rounding down of winnings;[42]

Grain Silos: misrepresented prevention of oxygen exposure;[43]

Hospitals: overbilling;[44]

Household Goods: disclosure of "effective economic interest rate" sought;[45] misrepresentations of amount of water purified by water filters;[46]

Insurance: failure to charge statutorily approved title insurance premium rates;[47] scheme to deny claims;[48] vanishing premium life insurance policies;[49] coverage and COD payments;[50] termination of coverage without notice;[51] medical fees in excess of Medicare rules;[52] failure to increase benefits;[53] improper deduction of contractor's profit and overhead;[54] misrepresented "Optional Premiums";[55] excess and unwarranted rate increases;[56]

Loans/Credit Cards/Debit Cards: illegal credit card/debit card tie-in;[57] high pressure sales;[58] payment allocation for cash advances;[59] misrepresented credit insurance;[60] excessive interest on payday loans;[61]

Mortgages: improper fax fees, quote fees and satisfaction fees;[62] improper recording and fax fees;[63] improper mortgage refinancing fees;[64] illegal loan application processing fees;[65] unnecessary private mortgage insurance;[66] improperly inflating escrow payments for realty taxes;[67]

Newspaper Subscriptions: changing the terms of a promotional offer after subscriptions purchased;[68]

Nursing Homes: mistreatment and malpractice;[69]

Personal Products: misrepresented suntan lotion;[70] different prices for chemically identical contact lens;[71] failure to reveal known side effects of hair loss product;[72] misrepresented Doan's Pills;[73]

Privacy: bank used unauthorized photo of employees;[74] pharmacy sold customer records and medical histories;[75] bank sold customer names and phone numbers to telemarketing firm;[76]

Class actions — misrepresentations that soft drink would "improve memory"; misrepresented suntan lotion; negligent tax advice.

Shippers: refunds of "an improperly collected Federal tax" sought from Federal Express;[77]

Tax Advice: unneeded and unwanted refund anticipation loans from tax preparer;[78] negligent tax advice;[79]

Telephones, Cell Phones, and Faxes: unsolicited telephone calls and faxes;[80] failure to honor Qualcomm $50 rebate;[81] deficient cell phone service and failure to reveal additional or roaming charges;[82] "fat fingers" toll-free call services;[83] improperly credited cell phone calls;[84] misrepresented cell phone rates;[85] inadequate cell phone service;[86] malfunctioning 800 numbers;[87] illegal automatic cell phone renewal clause;[88] failure to implement "All Call Restrict" service;[89] rounding up to whole minute increments;[90] defective cell phone service;[91]

Tobacco Products: price fixing;[92] addictive nature of nicotine misrepresented;[93]

Toys: shipping dates misrepresented;[94]

Travel: misrepresented campground sites;[95] flight misrepresented as "non-stop";[96] school trips cancelled;[97] deceptive cruise port charges;[98] airline overbooking;[99]

TV and Cable: cable television late fees;[100]

Windows: defective chemical preservative failed to keep windows from rotting and decaying.[101]

Theories of Liability

Consumer class actions typically assert common law theories of liability or violations of consumer protection statutes. The following enumerates many of the common law bases for liability. In Part II we will continue the discussion with statutory violations, among other things.

Common Law Claims

Breach of Contract

Breach of contract claims are, generally, certifiable under Article 9 of the CPLR and have included the following subjects: insurance;[102] oil and gas royalties;[103] book publishing;[104] air transportation services;[105] credit card agreements;[106] campground sites;[107] Michael Jackson concert tickets;[108] $50 cell phone rebates;[109] employment agreements;[110] failure to credit mortgage commitment fees;[111] and tour packages;[112] when they are based upon uniform[113] printed offers, solicitations or contracts that have been breached in a similar manner without regard to the quantitative differences in class member damages.[114] While oral representations[115] may be sufficient for class certification, printed contracts are, generally, necessary.

Quasi Contractual Claims

Breach of quasi-contractual obligations[116] are certifiable claims if the misconduct is uniform in its impact upon class members. Such claims have included:

Unjust Enrichment: artificially inflated prices for Microsoft software;[117] sale of confidential medical and prescription information;[118] sale of campground sites;[119] caller identification services;[120] obstructed concert view;[121] overpayments for title insurance;[122]

Money Had and Received: automatic renewal of domain name registrations;[123] mortgage recording taxes;[124]

Bad Faith Dealings: overcharges for rental car replacement gasoline, collision damage waivers and personal accident insurance;[125] book publisher's accounting of sales to foreign affiliates;[126] failure to give notice of 30-day insurance policy grace period;[127] underpayment of movie and video royalties;[128]

Breach of an Implied Covenant of Good Faith: underpayment of oil and gas royalties;[129] renewal of domain name registrations;[130] allocating credit card payments to cash advances;[131] marketing credit cards with hidden fees;[132]

Unconscionability: sale of campground sites;[133] sale of rental car replacement gasoline;[134]

Economic Duress: mortgage recording taxes;[135]

Penalties: cable television payment late fees;[136] service charges for checks returned because of insufficient funds.[137] It should be noted that Article 9 class actions seeking the imposition of a statutory minimum or the trebling of damages are usually,[138] but not always,[139] not certifiable as being prohibited by CPLR 901(b).

Breach of Warranty

Breach of warranty claims are difficult to certify as class actions for a variety of reasons: defective dental restorations;[140] defective recliner mechanism;[141] defectively designed Lincoln Continentals;[142] defective grain silos;[143] defective Microsoft IntelliMouse Explorers;[144] defective computer software;[145] misrepresented bottled soft drinks.[146] For example, the breach of an express warranty class action is rarely certified under Article 9 because proof of individual reliance may be required, some courts finding that individual reliance issues predominate over common questions.[147]

Fraud

Fraud claims are, generally, certifiable and have included: "fat fingers" toll-free call services;[148] campground

sites;[149] improper termination of insurance coverage;[150] method of amortizing mortgage principal balances;[151] telephone caller identification services;[152] marketing of Hyundai cars;[153] travel services;[154] failure of title insurers to charge mandated discounted rates for refinancing;[155] obstructed view for Michael Jackson concert;[156] failure to honor $50 cell phone rebate;[157] overpriced Burger King fast food;[158] if the representations are uniform and printed.[159] Usually,[160] but not always,[161] New York courts are willing to presume reliance in common law fraud class actions.

Breach of Fiduciary Duty

Breach of fiduciary duty claims are, generally, certifiable: unauthorized sales of pharmacy customer's medical and prescription information;[162] withholding of brokerage funds for 24 hours;[163] if there is a special relationship and uniform misconduct (*e.g.*, unneeded overpriced tax preparer refund anticipation loans).[164]

Negligence

Negligence claims that seek economic damages are, generally, certifiable, and have included negligent misrepresentations about the amount of water that can be purified;[165] the nature of a student tour;[166] the availability of a $50 cell phone rebate;[167] failure to give notice of 30-day insurance policy grace period;[168] negligent rendering of tax advice.[169] Generally, mass torts are not certifiable under Article 9 of the CPLR,[170] unless they involve mass torts arising from physical injury or property damage claims.

Part II

In Part II of this article we shall discuss consumer class actions alleging violations of statutory causes of action, the impact of mandatory arbitration clauses on class actions and the use of class action procedures within the context of arbitration. ■

1. *See* Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, N.Y. St. B.J. 10, Vol. 76, No. 7 (Sept. 2004).

2. For a description of Article 9 consumer class action cases from 1976 to 1995 see Dickerson, "Consumer Class Actions," *INCL Journal*, N.Y.S.B.A. (Dec. 1987) (various authors) and Justice Dickerson's annual class action summaries published in the *New York Law Journal*. *See, e.g.*, Dickerson & Manning, *A Summary of Article 9 Class Actions in 2003*, N.Y.L.J., April 7, 2004, p. 1.

3. For more on New York State class actions see Dickerson, *Class Actions: The Law of 50 States*, (2005) and Justice Dickerson's soon-to-be-published revision of the chapter on Article 9 in *Weinstein, Korn & Miller, New York Civil Practice, CPLR*.

4. *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999) (General Business Law § 349 (GBL) claim sustained).

5. *McKinnon v. Int'l Fid. Ins. Co.*, 182 Misc. 2d 517, 704 N.Y.S.2d 774 (Sup. Ct. 1999) (fraud and GBL § 349 claims sustained).

6. *Rice v. Penguin Putnam, Inc.*, 289 A.D.2d 318, 734 N.Y.S.2d 98 (2d Dep't 2001) (complaint dismissed).

7. *Englade v. Harper Collins Publishers, Inc.*, 289 A.D.2d 159, 734 N.Y.S.2d 176 (1st Dep't 2001) (certification granted).

8. *Lacoff v. Buena Vista Publ'g, Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183 (Sup. Ct., N.Y. Co. 2000) (complaint dismissed).

9. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 741 N.Y.S.2d 9 (1st Dep't 2002) (complaint dismissed); *Banks v. Carroll & Graf Publishers, Inc.*, 267 A.D.2d 68, 699 N.Y.S.2d 403 (1st Dep't 1999) (certification denied).

10. *Farino v. Jiffy Lube Int'l, Inc.*, N.Y.L.J., Aug. 14, 2001, p. 22, col. 3 (Sup. Ct., Suffolk Co.) (claims sustained; GBL § 349 does not require an underlying private right of action).

11. *Gordon v. Ford Motor Co.*, 260 A.D.2d 164, 687 N.Y.S.2d 369 (1st Dep't 1999) (certification denied).

12. *Faden Bayes Corp. v. Ford Motor Corp.*, Index No. 601076/97 (Sup. Ct., N.Y. Co.) (complaint dismissed), *aff'd*, 259 A.D.2d 352, 687 N.Y.S.2d 63 (1st Dep't 1999).

13. *Jurman v. Sun Co., Inc.*, N.Y.L.J., Aug. 8, 1997, p. 21, col. 4 (Sup. Ct., N.Y. Co.) (complaint dismissed; federal preemption).

14. *Branch v. Crabtree*, 197 A.D.2d 557, 603 N.Y.S.2d 490 (2d Dep't 1993) (certification granted).

15. *Gershon v. Hertz Corp.*, 215 A.D.2d 202, 626 N.Y.S.2d 80 (1st Dep't 1995) (complaint dismissed).

16. *Goldberg v. Enter. Rent-A-Car Co.*, 14 A.D.3d 417, 789 N.Y.S.2d 114 (1st Dep't 2005) (GBL §§ 349, 396-z, and restitution claims dismissed); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 979, 516 N.Y.S.2d 652 (1987) (certification granted); *Lewis v. Hertz Corp.*, 212 A.D.2d 476, 624 N.Y.S.2d 800 (1st Dep't 1995) (class decertified); *Super Glue Corp. v. Avis Rent-A-Car Sys., Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dep't 1987) (no affirmative cause of action available for bad faith dealings or unconscionability).

17. *Zuckerman v. BMG Direct Mktg., Inc.*, N.Y.L.J., July 13, 2000, p. 25, col. 1 (Sup. Ct., N.Y. Co.) (complaint dismissed).

18. *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dep't 2004) (unjust enrichment and GBL § 349 claims sustained).

19. *Scott v. Bell Atl.*, 282 A.D.2d 180, 726 N.Y.S.2d 60 (1st Dep't 2001), *aff'd in part sub nom. Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002)

(GBL § 349 class actions limited to New York residents exposed to deceptive act in New York State); *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep't 2004) (class decertified).

20. *Truschel v. Juno Online Servs., Inc.*, N.Y.L.J., Dec. 12, 2002, p. 21, col. 4 (Sup. Ct., N.Y. Co.) (GBL § 349 claim dismissed).

21. *Wornow v. Register.Com, Inc.*, 8 A.D.3d 59, 778 N.Y.S.2d 25 (1st Dep't 2004) (money had and received; claim sustained).

22. *Gates v. AOL Time Warner Inc.*, Index No. 604141/02, 2003 NY Slip Op 51002U, 2003 N.Y. Misc. LEXIS 751 (Sup. Ct., N.Y. Co. May 15, 2003) (Virginia forum selection enforced).

23. *Andre Strishak & Assocs. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 200 (2d Dep't 2002) (complaint dismissed).

24. *Ades v. Microsoft Corp.*, N.Y.L.J., Oct. 9, 2001, p. 27, col. 1 (Sup. Ct., Kings Co.) (claims for breach of contract and injunctive relief sustained).

25. *DiLorenzo v. Am. Online, Inc.*, N.Y.L.J., Feb. 8, 1999, p. 28, col. 5 (Sup. Ct., N.Y. Co.) (complaint dismissed; forum selection clause enforced).

26. *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998) (forum selection clause and arbitration clause enforced in part).

27. *Brummel v. Leading Edge Prods., Inc.*, N.Y.L.J., Feb. 19, 1998, p. 28, col. 1 (Sup. Ct., N.Y. Co.) (summary judgment for defendant; certification denied).

28. *Daex Corp. v. I.B.M.*, N.Y.L.J., Dec. 14, 1998, p. 29, col. 3 (Sup. Ct., N.Y. Co.) (plaintiffs strike class allegations).

29. *Brown v. Ford Motor Co.*, N.Y.L.J., Apr. 17, 1998, p. 26, col. 6 (Sup. Ct.) (complaint dismissed).

30. *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (2d Dep't 2003) (certification denied); *Rivkin v. Kulzer*, 289 A.D.2d 27, 734 N.Y.S.2d 31 (1st Dep't 2001) (certification denied).

31. *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002) (class allegations dismissed).

32. *Emilio v. Robison Oil Corp.*, 15 A.D.3d 609, 790 N.Y.S.2d 535 (2d Dep't 2005) (certification denied).

33. *KLCR Land Corp. v. N.Y. State Elec. & Gas Corp.*, 15 A.D.3d 719, 789 N.Y.S.2d 323 (3d Dep't 2005) (plaintiffs in class action challenging electricity rate stayed on grounds of primary jurisdiction sought class certification after PSC ruled in their favor; motion denied since trial court had not retained jurisdiction and plaintiffs failed to preserve issues on appeal: "We note that the PSC sent a letter to defendant in March 2004 requesting that it ascertain all other similarly situated customers who were adversely affected by defendant's misapplication of the tariff and to take necessary steps to rebill such customers").

34. *Gross v. Ticketmaster*, 5 Misc. 3d 1005A (Sup. Ct., N.Y. Co. 2004) (certification granted).

35. *Castillo v. Tyson*, 268 A.D.2d 336, 701 N.Y.S.2d 423 (1st Dep't 2000) (complaint dismissed).

36. *Donohue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 786 N.Y.S.2d 153 (1st Dep't 2004) (complaint dismissed).

37. *Lieberman v. 293 Mediterranean Mkt. Corp.*, 303 A.D.2d 560, 756 N.Y.S.2d 469 (2d Dep't 2003) (certification denied).

38. *Klein v. Robert's Am. Gourmet Foods*, No. 006956/02 (Sup. Ct., Nassau Co. Jan. 14, 2003) (settlement approved).

39. *Morelli v. Weider Nutrition Group, Inc.*, 275 A.D.2d 607, 712 N.Y.S.2d 551 (1st Dep't 2000) (claims not preempted).

40. *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218 (S.D.N.Y. 1996) (remanded to state court); *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344 (S.D.N.Y. 1996) (case remanded to state court).

41. *Heller v. Coca-Cola Co.*, 230 A.D.2d 768, 646 N.Y.S.2d 524 (2d Dep't 1996) (complaint dismissed; federal preemption).

42. *Zoll v. Suffolk Reg'l Off-Track Betting Corp.*, 259 A.D.2d 696, 686 N.Y.S.2d 858 (2d Dep't 1999) (complaint dismissed).

43. *Morgan v. A.O. Smith Corp.*, 233 A.D.2d 375, 650 N.Y.S.2d 748 (2d Dep't 1996) (certification denied).

44. *Meraner v. Albany Med. Ctr.*, 211 A.D.2d 867, 621 N.Y.S.2d 208 (3d Dep't 1995) (certification denied).

45. *Colon v. Rent-A-Center, Inc.*, 276 A.D.2d 58, 716 N.Y.S.2d 7 (1st Dep't 2000) (GBL § 349 claim sustained).

46. *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 744 N.Y.S.2d 31 (1st Dep't 2002) (class decertified).

47. *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007A, 784 N.Y.S.2d 919 (Sup. Ct., Nassau Co. 2004) (certification granted); Notice of Proposed Settlement dated March 31, 2005 providing for settlement fund of $31,500,000 to pay valid claims, notice costs, claims administration, attorneys fees not to exceed one third of fund, costs up to $275,000 and incentive awards not to exceed $10,000.

48. *Weiller v. New York Life Ins. Co.*, 6 Misc. 3d 1038A (Sup. Ct., N.Y. Co. 2005) (motion to preserve material evidence granted).

49. *Goshen v. The Mut. Life Ins. Co.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) (GBL § 349 class actions should be limited to New York residents exposed to deceptive act in New York State); *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30 (2001) (GBL § 349 claims governed by three-year statute of limitations in CPLR 214(2)); *DeFilippo v. Mut. Life Ins. Co.*, 13 A.D.3d 178, 787 N.Y.S.2d 11 (1st Dep't 2004) (class decertified); *Russo v. Mass. Mut. Life Ins. Co.*, 192 Misc. 2d 349, 746 N.Y.S.2d 380 (Sup. Ct., Tompkins Co. 2002) (certification denied).

50. *Goldman v. Metro. Life Ins. Co.*, 13 A.D.3d 289, 788 N.Y.S.2d 25 (1st Dep't 2004) (claims dismissed).

51. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 24, 704 N.Y.S.2d 44 (1st Dep't 2000) (certification granted).

52. *Sterling v. Ackerman*, 244 A.D.2d 170, 663 N.Y.S.2d 842 (1st Dep't 1997) (claims sustained; discovery on class issues).

53. *Kenavan v. Empire Blue Cross & Blue Shield*, 248 A.D.2d 42, 677 N.Y.S.2d 560 (1st Dep't 1998) (certification granted; summary judgment for class).

54. *Mazzocki v. State Farm Fire & Cas. Co.*, 170 Misc. 2d 70, 649 N.Y.S.2d 656 (Sup. Ct., N.Y. Co. 1996) (motion to change venue granted).

55. *Tuchman v. Equitable Cos., Inc.*, N.Y.L.J., July 18, 1996, p. 26, col. 5 (Sup. Ct., N.Y. Co.) (complaint dismissed).

56. *Empire Blue Cross Customer Litig.*, N.Y.L.J. Oct. 12, 1995, p. 28, col. 6 (Sup. Ct., N.Y. Co.) (certification denied).

57. *Ho v. Visa U.S.A., Inc.*, 3 Misc. 3d 1105A, 787 N.Y.S.2d 677 (Sup. Ct., N.Y. Co. 2004) (class certification not appropriate; GBL §§ 340, 349 claims dismissed), *aff'd*, 16 A.D.3d 256, 793 N.Y.S.2d 8 (1st Dep't 2005).

58. *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 758 N.Y.S.2d 284 (1st Dep't 2003) (GBL § 349 claim sustained).

59. *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) (certification granted); *Broder v. MBNA*, No. 605153/98 (Sup. Ct., N.Y. Co. Apr. 10, 2003) (J. Cahn) (settlement approved).

60. *Taylor v. Am. Banker's Ins. Group*, 267 A.D.2d 178, 700 N.Y.S.2d 458 (1st Dep't 1999) (certification granted to nationwide class).

61. *Hayes v. County Bank*, 185 Misc. 2d 414, 713 N.Y.S.2d 267 (Sup. Ct., Queens Co. 2000) (arbitration clause not enforced pending discovery on unconscionability).

62. *Dougherty v. N. Fork Bank*, 301 A.D.2d 491, 753 N.Y.S.2d 130 (2d Dep't 2003) (summary judgment for plaintiffs on fax and quote fees).

63. *Negrin v. Norwest Mortgage, Inc.*, 293 A.D.2d 726, 741 N.Y.S.2d 287 (2d Dep't 2002) (certification denied); *Trang v. HSBC Mortgage Corp.*, N.Y.L.J., Apr. 17, 2002, p. 28, col. 3 (Sup. Ct., N.Y. Co.) (defendant's summary judgment motion denied).

64. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 709 N.Y.S.2d 892 (2000) (complaint dismissed; reliance not a necessary element of GBL § 349 claim).

65. *Kidd v. Delta Funding Corp.*, 270 A.D.2d 81, 704 N.Y.S.2d 66 (1st Dep't 2000) (motion to change venue granted); *Kidd v. Delta Funding Corp.*, 2000 N.Y. Misc. LEXIS 378 (Sup. Ct., N.Y. Co. Sept. 18, 2000) (certification granted), *aff'd*, 289 A.D.2d 203, 734 N.Y.S.2d 848 (2d Dep't 2001).

66. *Walts v. First Union Mortgage Corp.*, N.Y.L.J., Apr. 25, 2000, p. 26, col. 1 (Sup. Ct., N.Y. Co. 2000) (certification granted); *Bauer v. Mellon Mortgage Co.*, N.Y.L.J., Aug. 14, 1998, p. 21, col. 5 (Sup. Ct., N.Y. Co.) (breach of contract and GBL § 349 claims sustained).

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67. *LeRose v. PHH US Mortgage Corp.*, 170 Misc. 2d 858, 652 N.Y.S.2d 484 (Sup. Ct., Niagara Co. 1996) (settlement disapproved).

68. *Abramovitz v. The New York Times*, Index No. 114272/96 (Sup. Ct., N.Y. Co. July 2, 1997) (J. Ramos) (certification denied; claims mooted by receipt of credit).

69. *Fleming v. Barnwell Nursing Home& Health Facilities, Inc.*, 309 A.D.2d 1132, 766 N.Y.S.2d 241 (3d Dep't 2003) (certification granted to Public Health Law § 2801-d claim).

70. *Archer v. Schering-Plough Corp.*, Index No. 603336/97 (Sup. Ct., N.Y. Co.) (complaint dismissed).

71. *Kramer v. Bausch & Lomb*, 264 A.D.2d 596, 695 N.Y.S.2d 553 (1st Dep't 1999) (claims not preempted by federal Food, Drug and Cosmetics Act); *Lattig v. Bausch & Lomb*, N.Y.L.J., Jan. 7, 1997, p. 26, col. 4 (Sup. Ct., N.Y. Co.) (fraud and GBL § 349 claims sustained).

72. *Mountz v. Global Vision Prods., Inc.*, 3 Misc. 3d 171, 770 N.Y.S.2d 603 (Sup. Ct., N.Y. Co. 2003) (motion to strike class allegations denied).

73. *Samuel v. Ciba-Geigy Corp.*, N.Y.L.J., May 20, 1997, p. 26, col. 1 (Sup. Ct., N.Y. Co.) (complaint dismissed; FTC primary jurisdiction).

74. *Caesar v. Chem. Bank*, 66 N.Y.2d 698, 496 N.Y.S.2d 418 (1985) (unauthorized use of pictures of employees; certification granted).

75. *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 739 N.Y.S.2d 565 (1st Dep't 2002) (certification granted).

76. *Smith v. Chase Manhattan Bank USA*, 293 A.D.2d 598, 741 N.Y.S.2d 100 (1st Dep't 2002) (complaint dismissed).

77. *Strategic Risk Mgmt., Inc. v. Fed. Express Corp.*, 253 A.D.2d 167, 686 N.Y.S.2d 35 (1st Dep't 1999) (complaint dismissed).

78. *Carnegie v. H&R Block, Inc.*, 269 A.D.2d 145, 703 N.Y.S.2d 27 (1st Dep't 2000) (certification denied; breach of fiduciary duty claim dismissed).

79. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998) (certification granted).

80. *Rudgayser & Grant v. LRS Communications*, 6 Misc. 3d 20, 789 N.Y.S.2d 601 (App. Term, 2d Dep't 2004) (class actions under Telephone Consumer Protection Act barred by prohibition in CPLR 901(b)); *Ganci v. Cape Canaveral Tour & Travel, Inc.*, 4 Misc. 3d 1003A (Sup. Ct., Kings Co. 2004) (certification denied); *Giovanniello v. Hispanic Media Group USA*, 4 Misc. 3d 440, 780 N.Y.S.2d 720 (Sup. Ct., Nassau Co. 2004) (certification denied).

81. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027A (Sup. Ct., Kings Co. 2004).

82. *Heiko Law Offices, P.C. v. AT&T Wireless Servs., Inc.*, 6 Misc. 3d 1040A (Sup. Ct., N.Y. Co. 2005) (class action stayed, arbitration agreement enforced, arbitrator to decide application of class action procedures).

83. *Drizin v. Sprint Corp.*, 12 A.D.3d 245, 785 N.Y.S.2d 428 (1st Dep't 2004) (certification granted).

84. *Peck v. AT&T Corp.*, N.Y.L.J., Aug. 1, 2002, p. 18, col. 3 (Sup. Ct., N.Y. Co.) (settlement approved).

85. *Ranieri v. Bell Atl. Mobile*, 304 A.D.2d 353, 759 N.Y.S.2d 448 (1st Dep't 2003) (class certification stayed pending arbitration).

86. *Naevus Int'l, Inc. v. AT&T Corp.*, 283 A.D.2d 171, 724 N.Y.S.2d 721 (1st Dep't 2001) (failure to extend credit claims not preempted).

87. *Judicial Title Ins. Agency v. Bell Atl.*, N.Y.L.J., July 1, 1999, p. 35, col. 1 (Sup. Ct., Westchester Co.) (certification granted).

88. *Kahn v. Bell Atl. NYNEX Mobile*, N.Y.L.J., June 4, 1998, p. 29, col. 2 (Sup. Ct., N.Y. Co.) (settlement disapproved).

89. *Lauer v. N.Y. Tel. Co.*, 231 A.D.2d 126, 659 N.Y.S.2d 359 (3d Dep't 1997) (certification granted).

90. *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (2d Dep't 1997) (complaint dismissed).

91. *Sirica v. Cellular Tel. Co.*, 231 A.D.2d 470, 647 N.Y.S.2d 219 (1st Dep't 1996) (certification denied).

92. *Lennon v. Philip Morris Co.*, 189 Misc. 2d 577, 734 N.Y.S.2d 374 (Sup. Ct., N.Y. Co. 2001) (price fixing claim under Donnelly Act dismissed; certification denied pursuant to CPLR 901(b)).

93. *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615 (1999) (certification denied; GBL § 349 claim dismissed).

94. *Castellucci v. Toys "R" US, Inc.*, N.Y.L.J., Aug. 9, 2001, p. 21, col. 5 (Sup. Ct., Westchester Co.) (certification denied).

95. *Colbert v. Rank Am., Inc.*, 295 A.D.2d 302, 742 N.Y.S.2d 905 (2d Dep't 2002) (motion to decertify denied).

96. *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 363, 702 N.Y.S.2d 111 (2d Dep't 2000) (certification granted).

97. *Dunleavy v. New Hartford Cent. Sch. Dist.*, 266 A.D.2d 931, 697 N.Y.S.2d 446 (4th Dep't 1999) (summary judgment for defendant granted).

98. *Cronin v. Cunard Line Ltd.*, 250 A.D.2d 486, 672 N.Y.S.2d 864 (1st Dep't 1998) (complaint dismissed).

99. *Parra v. Tower Air, Inc.*, N.Y.L.J., July 22, 1999, p. 30, col. 1 (Sup. Ct., N.Y. Co.) (claims preempted).

100. *Dillon v. U-A Columbia Cablevision*, 100 N.Y.2d 525, 760 N.Y.S.2d 726 (2003) (complaint dismissed).

101. *Williams v. Marvin Windows & Doors*, 15 A.D.3d 393, 790 N.Y.S.2d 66 (2d Dep't 2005) (claims barred by prior settlement in Minnesota state court nationwide class action).

102. *Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 766 N.Y.S.2d 719 (3d Dep't 2003) (certification denied).

103. *Cherry v. Res. Am., Inc.*, 15 A.D.3d 1013, 788 N.Y.S.2d 911 (4th Dep't 2005) (certification granted); *Freeman v. Great Lakes Energy Partners*, 12 A.D.3d 1170, 785 N.Y.S.2d 640 (4th Dep't 2004) (certification granted).

104. *Englade v. Harper Collins Publishers, Inc.*, 289 A.D.2d 159, 734 N.Y.S.2d 176 (1st Dep't 2001) (certification granted); *Stellema v. Vantage Press, Inc.*, 109 A.D.2d 423, 492 N.Y.S.2d 390 (1st Dep't 1985) (certification granted).

105. *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 363, 702 N.Y.S.2d 111 (1st Dep't 2000) (certification granted).

106. *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) (certification granted).

107. *Colbert v. Rank Am., Inc.*, 1 A.D.3d 393, 768 N.Y.S.2d 13 (2d Dep't 2003) (certification granted).

108. *Gross v. Ticketmaster*, 5 Misc. 3d 1005A (Sup. Ct., N.Y. Co. 2004) (certification granted).

109. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027A (Sup. Ct., Kings Co. 2004) (certification granted).

110. *Jacobs v. Bloomingdales, Inc.*, N.Y.L.J., May 27, 2003, p. 23, col. 1 (Sup. Ct., Nassau Co. 2003) (certification granted to unpaid wage claim).

111. *Mimnorm Realty v. Sunrise Fed. Sav. & Loan Ass'n*, 83 A.D. 2D 936, 442 N.Y.S.2d 780 (2d Dep't 1981) (certification granted).

112. *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct., N.Y. Co. 1976) (certification granted).

113. *See, e.g., DeFilippo v. Mut. Life Ins. Co.*,13 A.D.3d 178, 787 N.Y.S.2d 11 (1st Dep't 2004) (vanishing life insurance premium class action decertified because oral sales presentations created a predominance of individual issues); *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) ("Plaintiff's allegations of deceptive acts are based on identical written solicitations"); *Carnegie v. H&R Block, Inc.*, 269 A.D.2d 145, 703 N.Y.S.2d 27 (1st Dep't 2000) ("oral communications that allegedly induced [consumers] to obtain RALs [refund anticipation loans] cannot be proven on a class basis, but would require individualized proof"); *Taylor v. Am. Bankers Ins. Group*, 267 A.D.2d 178, 178, 700 N.Y.S.2d 458 (1st Dep't 1999) ("Although defendants contend that they used a variety of forms and promotions . . . the solicitations in question did not differ materially . . . given the uniformity of defendant's offers of coverage, any matters relating to individual reliance and causation are relatively insignificant").

114. *See, e.g., Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 766 N.Y.S.2d 719 (3d Dep't 2003) ("the individualized damages of the resulting class members would not preclude class certification"); *Broder*, 281 A.D.2d 369 ("Plaintiff alleges that defendant's practice of allocating credit card payment to cash advances, which were subject to a promotional annual percentage rate (APR) before the balance generated by purchases, which was subject to a significantly higher APR, deprived credit cardholders of the full benefit of the promotional rate, thereby rendering the promotion deceptive . . . allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed"; certification granted); *Englade v. Harper Collins Publishers, Inc.*, 289 A.D.2d 159, 734 N.Y.S.2d 176 (1st Dep't 2001)

("That individual authors may have differing levels of damages does not defeat class certification"); *Puckett v. Sony Music Entm't*, N.Y.L.J., Aug. 8, 2002, p. 18, col. 2 (Sup. Ct., N.Y. Co.) ("The class members' differing royalties may require individualized calculations of damages. However, it does not appear at this juncture that these calculations would be unduly difficult and so this fact will not prevent the certification of a class action"); *Gilman v. Merrill Lynch Pierce Fenner & Smith*, 93 Misc. 2d 941, 944, 404 N.Y.S.2d 258 (Sup. Ct., N.Y. Co. 1978) ("While the amounts potentially recoverable by each member of the class may differ, such circumstance is not sufficient to warrant denial of class status"); *Guadagno*, 89 Misc. 2d 697 ("That there may also exist individual questions with regard to . . . damages is not dispositive").

115. *See, e.g.*, *Compact Electra Corp. v. Paul*, 93 Misc. 2d 807, 403 N.Y.S.2d 611 (N.Y.A.T. 1997) (fraud counterclaim class action may be certifiable if the oral misrepresentations were based on "canned" techniques).

116. *See, e.g.*, *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 87–88, 434 N.Y.S.2d 698 (2d Dep't 1980) ("The doctrine of quasi contract embraces a wide spectrum of legal actions resting 'upon the equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another. . . . [I]t is not a contract or promise at all . . . [but] an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience, he ought not to retain . . . and which ex aequo et bono belongs to another").

117. *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 (1st Dep't 2004) ("plaintiffs' allegations that Microsoft's deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment").

118. *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 739 N.Y.S.2d 565 (1st Dep't 2002) (certification granted).

119. *Colbert v. Rank Am., Inc.*, 1 A.D.3d 393, 768 N.Y.S.2d 13 (1st Dep't 2003) (certification granted).

120. *Lauer v. N.Y. Tel. Co.*, 231 A.D.2d 126, 659 N.Y.S.2d 359 (3d Dep't 1997) (certification granted).

121. *Gross v. Ticketmaster*, 5 Misc. 3d 1005A (Sup. Ct., N.Y. Co. 2004) (certification granted).

122. *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007A, 784 N.Y.S.2d 919 (Sup. Ct., Nassau Co. 2004) (certification granted).

123. *Wornow v. Register.Com, Inc.*, 8 A.D.3d 59, 778 N.Y.S.2d 25 (1st Dep't 2004) (money had and received; claim sustained).

124. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 97–99, 434 N.Y.S.2d 698 (2d Dep't 1980) (duress in paying mortgage recording tax; certification granted).

125. *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 979, 516 N.Y.S.2d 652 (1987) (certification granted); *Super Glue Corp. v. Avis Rent-A-Car Sys., Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dep't 1987) (no affirmative cause of action available for bad faith dealings or unconscionability).

126. *Englade v. Harper Collins Publishers, Inc.*, 289 A.D.2d 159, 734 N.Y.S.2d 176 (1st Dep't 2001) (certification granted).

127. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 704 N.Y.S.2d 44 (1st Dep't 2000) (certification granted).

128. *Western N.Y. Pub. Broad. Ass'n v. Vestron, Inc.*, 238 A.D.2d 963, 661 N.Y.S.2d 555 (4th Dep't 1997) (certification granted).

129. *Freeman v. Great Lakes Energy Partners*, 12 A.D.3d 1170, 785 N.Y.S.2d 640 (4th Dep't 2004) (certification granted).

130. *Wornow v. Register.Com, Inc.*, 8 A.D.3d 59, 778 N.Y.S.2d 25 (1st Dep't 2004) (breach of covenant of good faith dismissed because "plaintiff received full benefit of that agreement").

131. *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) (certification granted).

132. *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 758 N.Y.S.2d 284 (1st Dep't 2003) (claim stated for breach of implied duty of good faith and fair dealing).

133. *Colbert v. Rank Am., Inc.*, 1 A.D.3d 393, 768 N.Y.S.2d 13 (2d Dep't 2003) (certification granted).

134. *Super Glue Corp. v. Avis Rent-A-Car Sys., Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dep't 1987) (no affirmative cause of action available for bad faith dealings or unconscionability).

135. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 97-99, 434 N.Y.S.2d 698 (2d Dep't 1980) (certification granted).

136. *Dillon v. U-A Columbia Cablevision*, 100 N.Y.2d 525, 760 N.Y.S.2d 726 (2003) (claims of Westchester County cable TV subscribers challenging $5.00 late fees as an "unlawful penalty" dismissed because the voluntary payment doctrine which "bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law").

137. *Clark v. Marine Midland Bank, Inc.*, 80 A.D.2d 761, 436 N.Y.S.2d 711 (1st Dep't 1981) (certification granted; penalty violation of U.C.C. § 1-106).

138. *See, e.g.*, *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002) ("private persons are precluded from bringing a class action under the Donnelly Act . . . because the treble damage remedy . . . constitutes a 'penalty' within the meaning CPLR 901(b)"); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002); *Rudgayser & Gratt v. LRS Communications, Inc.*, 6 Misc. 3d 20, 789 N.Y.S.2d 601 (2d Dep't 2004) (class actions under Telephone Consumer Protection Act barred by CPLR 901(b) prohibition against class actions seeking penalties); *Ganci v. Cape Canaveral Tour & Travel, Inc.*, 4 Misc. 3d 1003A, 791 N.Y.S.2d 869 (Sup. Ct., N.Y. Co. 2004) (motion to dismiss class allegations in action alleging violation of Telephone Consumer Protection Act (TCPA); motion to dismiss class allegations granted "since plaintiff's action sought to recover a minimum measure of recovery created and imposed by the TCPA, CPLR 901(b) specifically prohibited its maintenance as a class action"); *Giovanniello v. Hispanic Media Group USA*, 4 Misc. 3d 440, 780 N.Y.S.2d 720 (Sup. Ct., Nassau Co. 2004) ("the allowance of treble damages under the TCPA is punitive in nature and constitutes a penalty"; certification denied as violative of CPLR 901(b)); *Ho v. VISA U.S.A. Inc.*, 3 Misc. 3d 1105A, 787 N.Y.S.2d 677 (Sup. Ct., N.Y. Co. 2004) ("plaintiffs' alleged injury is far too remote to provide antitrust standing under the Donnelly Act" and is dismissed).

139. *See, e.g.*, *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 (1st Dep't 2004) ("We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a 'penalty' within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages . . . CPLR 901(b) which prohibits class actions for recovery of minimum or punitive damages, [is] inapplicable"); *Ridge Meadows Homeowners' Ass'n, Inc. v. Tara Dev. Co., Inc.*, 242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dep't 1997) ("On appeal . . . plaintiffs consent to strike that portion of the sixth cause of action seeking (minimum and treble damages pursuant to GBL § 349(h)) and to limit their demand to actual damages. Thus, CPLR 901(b) is no longer applicable and that cause of action may be maintained as a class action. . . . We further modify the order by providing that any class member wishing to pursue statutory minimum and treble damages . . . may opt out of the class and bring an individual; action"); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dep't 1987); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 979, 516 N.Y.S.2d 652 (1987); *Burns v. Volkswagen of Am., Inc.*, 118 Misc. 2d 289, 460 N.Y.S.2d 410 (Sup. Ct., Monroe Co. 1982) ("as for actual damages, however, § 901(b) would not bar a class action"), *aff'd*, 97 A.D.2d 977, 468 N.Y.S.2d 958 (4th Dep't 1983); *Hyde v. Gen. Motors Corp.*, N.Y.L.J., Oct. 30, 1981, p. 5 (Sup. Ct., N.Y. Co.).

140. *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (2d Dep't 2003) (certification denied as to express warranty claim; predominance of causation and reliance); *Rivkin v. Heraeus Kulzer GMBH*, 289 A.D.2d 27, 734 N.Y.S.2d 31 (1st Dep't 2001) (class of dental patients seeks damages for defective "polymer dental restoration, bonded to metal . . . that had failed"; strict products liability claims dismissed since only economic losses were sought).

141. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 741 N.Y.S.2d 9 (1st Dep't), *appeal dismissed*, 99 N.Y.S.2d 502 (2002) (claims dismissed in the absence of actual damages; manufacturer should not be "indemmifier[s] for a loss that may never occur" and finding that the best way to "promote consumer safety [was] to petition the NHTSA for a defect investigation").

142. *Gordon v. Ford Motor Co.*, 260 A.D.2d 164, 687 N.Y.S.2d 369 (1st Dep't 1999) (breach of implied warranty of merchantability and express warranty; certification denied).

143. *Morgan v. A.O. Smith Corp.*, 233 A.D.2d 375, 650 N.Y.S.2d 748 (2d Dep't 1996) (certification denied).

144. *Ades v. Microsoft Corp.*, N.Y.L.J., Oct. 9, 2001, p. 27, col. 1 (Sup. Ct., Kings Co.) (cabling causing freezing, pausing, program crashes and slowed operation; claims for breach of contract and injunctive relief requiring notice of cable defect viable).

145. *Brummel v. Leading Edge Prods., Inc.*, N.Y.L.J., Feb. 19, 1998, p. 28, col. 4 (Sup. Ct., N.Y. Co.) (certification denied; eight different warranties; reliance and choice of law issues).

146. In *Donahue v. Ferolito, Voltaggio & Sons*, 13 A.D.3d 77, 786 N.Y.S.2d 153 (1st Dep't 2004) a class of consumers sought an injunction "against continued sale of certain bottled soft drinks" because of misrepresentations that the "products would improve memory, reduce stress and improve overall health." The court dismissed the complaint finding no actual harm was alleged and no warranty was promised, and enforced a disclaimer of any health benefit.

147. *See, e.g.*, *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (2d Dep't 2003) (certification denied; predominance of the individual "issues of causation and reliance"); *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 744 N.Y.S.2d 31 (1st Dep't 2002) (certification denied; "Reliance . . . may not be presumed where, as here, a host of individual factors could have influenced a class member's decision [to purchase] the product . . . a variety of reasons for replacing their filters, including the lapse of time, taste and appearance of the water . . . reliance upon the alleged misrepresentations of Brita is an issue that varies from individual to individual"); *Morgan*, 233 A.D.2d 375 (certification denied; "Individual issues exist . . . [which] influenced their decision to purchase [the silos]"; *Brummel*, N.Y.L.J., Feb. 19, 1998, p. 28, col. 4 (defective computer software; certification denied; eight different warranties; reliance and choice of law issues).

148. *Drizin v. Sprint Corp.*, 12 A.D.3d 245, 785 N.Y.S.2d 428 (1st Dep't 2004) (certification granted to class of telephone users charging fraud by maintaining "numerous toll-free call service numbers that were nearly identical [except for one digit] to the toll-free numbers of competing long distance telephone service providers . . . 'fat fingers' business . . . customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers").

149. *Meachum v. Outdoor World Corp.*, 273 A.D.2d 209, 709 N.Y.S.2d 449 (2d Dep't 2000) (certification granted).

150. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 704 N.Y.S.2d 44 (1st Dep't 2000) (certification granted).

151. *Thompson v. Whitestone Sav. & Loan Ass'n*, 101 A.D.2d 833, 475 N.Y.S.2d 491 (2d Dep't 1984) (certification granted).

152. *Lauer v. N.Y. Tel. Co.*, 231 A.D.2d 126, 659 N.Y.S.2d 359 (3d Dep't 1997) (certification granted).

153. *Branch v. Crabtree*, 197 A.D.2d 557, 603 N.Y.S.2d 490 (2d Dep't 1993) (certification granted).

154. *Dunleavy v. Youth Travel Assocs.*, 199 A.D.2d 1046, 608 N.Y.S.2d 30 (2d Dep't 1993) (certification granted); *King v. Club Med, Inc.*, 76 A.D.2d 123, 430 N.Y.S.2d 65 (1st Dep't 1980) (certification granted); *Guadagno v. Diamond Tours & Travel Inc.*, 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct., N.Y. Co. 1976) (certification granted).

155. *In re Coordinated Title Ins. Cases*, 3 Misc. 3d 1007A, 784 N.Y.S.2d 919 (Sup. Ct., Nassau Co. 2004) (certification granted).

156. *Gross v. Ticketmaster*, 5 Misc. 3d 1005A (Sup. Ct., N.Y. Co. 2004) (certification granted).

157. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027A (Sup. Ct., Kings Co. 2004) (certification granted).

158. *Feldman v. Quick Quality Rests., Inc.*, N.Y.L.J., July 22, 1983, p. 12, col. 4 (Sup. Ct.) (fluid recovery; certification granted).

159. *See, e.g.*, *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep't 2004) (class of DSL subscribers claimed that defendant misrepresented the speed ("FAST, High speed Internet access"), connectivity ("You're always connected") and ease of installation ("self installation . . . in minutes") of its services; class decertified because of a lack of uniform misrepresentations; "the individual plaintiffs did not all see the same advertisements; some saw no advertisements at all before deciding to become subscribers"); *DeFilippo v. Mut. Life Ins. Co.*, 13 A.D.3d 178, 787 N.Y.S.2d 11 (1st Dep't 2004) (certification denied; oral sales presentations); *Zehnder v. Ginsburg & Ginsburg Architects*, 254 A.D.2d 284, 678 N.Y.S.2d 376 (2d Dep't 1998) (certification denied; condo designs not uniform); *Strauss v. Long Island Sports*, 60 A.D.2d 501, 401 N.Y.S.2d 233 (2d Dep't 1978) (certification denied); *Russo v. Mass. Mut. Life Ins. Co.*, 192 Misc. 2d 349, 746 N.Y.S.2d 380 (Sup. Ct., Tompkins Co. 2002) (certification denied; oral misrepresentations).

160. *See, e.g.*, *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998) (presumption of reliance; certification granted); *King v. Club Med, Inc.*, 76 A.D.2d 123, 430 N.Y.S. 2D 65 (1st Dep't 1980) (reliance presumed; certification granted); *In re Coordinated Title Ins. Cases*, 3 Misc. 3d 1007A, 784 N.Y.S.2d 919 (Sup. Ct., Nassau Co. 2004) ("In common law fraud claims, proof of plaintiff's reliance is crucial . . . reliance has been presumed in certain cases involving material omissions . . ."); *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct., N.Y. Co. 1976).

161. *See, e.g.*, *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615 (1999) (smokers class action certification denied); *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 744 N.Y.S.2d 31 (1st Dep't 2002) (certification denied; "[r]eliance is required . . . and such reliance may not be presumed where, as here, a host of individual factors could have influenced a class member's decision [to purchase] the product . . ."); *Banks v. Carroll & Graf Publishers, Inc.*, 267 A.D.2d 68, 699 N.Y.S.2d 403 (1st Dep't 1999) (certification denied); *Morgan v. A.O. Smith Corp.*, 233 A.D.2d 375, 650 N.Y.S.2d 748 (2d Dep't 1996) (certification denied).

162. *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 739 N.Y.S.2d 565 (1st Dep't 2002) (class certification granted; breach of fiduciary claim sustained at 188 Misc. 2d 616, 728 N.Y.S.2d 333 (Sup. Ct., N.Y. Co. 2001)).

163. *Gilman v. Merrill Lynch Pierce Fenner & Smith*, 93 Misc. 2d 941, 944, 404 N.Y.S.2d 258 (Sup. Ct., N.Y. Co. 1978) (brokerage customers claim breach of fiduciary duty by brokers "withholding funds due them for a period of 24 hours or more, thus permitting it to use such funds for a day or more for its own profit"; certification granted).

164. *Carnegie v. H&R Block, Inc.*, 269 A.D.2d 145, 703 N.Y.S.2d 27 (1st Dep't 2000) (breach of fiduciary duty claim dismissed; certification of GBL § 349 claim denied since misrepresentations, if any, based on oral statements).

165. *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 744 N.Y.S.2d 31 (1st Dep't 2002) (certification denied).

166. *Dunleavy v. New Hartford Cent. Sch. Dist.*, 266 A.D.2d 931, 697 N.Y.S.2d 446 (4th Dep't 1999) (parents seek to recover deposits paid for school trips; "'[i]n order to establish a claim for negligent misrepresentation, plaintiffs were required to demonstrate that defendant had a duty, based upon some special relationship with them, to impart correct information, that the information was false or incorrect and that plaintiffs reasonably relied upon the information provided' . . . we conclude that defendant established that its teachers did not provide any false information . . .").

167. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027A (Sup. Ct., Kings Co. 2004) (certification granted).

168. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 704 N.Y.S.2d 44 (1st Dep't 2000) (certification granted).

169. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998) (certification granted).

170. *See, e.g.*, *Rallis v. City of New York*, 3 A.D.3d 525, 770 N.Y.S.2d 736 (2d Dep't 2004) (water damage from flooding; certification denied); *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (2d Dep't 2003) (defective polymer-based system of dental restorations; certification denied); *Lieberman v. 293 Mediterranean Mkt. Corp.*, 303 A.D.2d 560, 756 N.Y.S.2d 469 (2d Dep't 2003) (food poisoning at restaurant; certification denied); *Geiger v. Am. Tobacco Co.*, 277 A.D.2d 420, 716 N.Y.S.2d 108 (2d Dep't 2000) (smokers' mass tort class action; certification denied); *Goldberg Weprin & Ustin, LLP v. Tishman Constr. Co.*, 275 A.D.2d 614, 713 N.Y.S.2d 57 (1st Dep't 2000) (collapse of elevator tower closes street; claims of class of businesses for economic losses dismissed); *Aprea v. Hazeltine Corp.*, 247 A.D.2d 564, 669 N.Y.S.2d 61 (2d Dep't 1998) (toxic emissions; certification denied); *Karlin v. IVF Am., Inc.*, 239 A.D.2d 562, 657 N.Y.S.2d 460 (2d Dep't 1997) (misrepresentation of *in vitro* fertilization successful pregnancy rates; certification denied), *modified on other grounds*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999); *Komonczi v. Fields*, 232 A.D.2d 374, 648 N.Y.S.2d 151 (2d Dep't 1996) (improperly performed colonoscopies; certification denied); *Hurtado v. Purdue Pharma Co.*, 6 Misc. 3d 1015A (Sup. Ct., Richmond Co. 2005) (prescribed users of pain reliever drug OxyContin seek damages for injuries flowing from defective product; certification denied); *McBarnette v. Feldman*, 153 Misc. 2d 627, 582 N.Y.S.2d 900 (Sup. Ct., Suffolk Co. 1992) (patients of AIDS-infected dentist seek emotional distress damages; certification denied; mass torts not favored).

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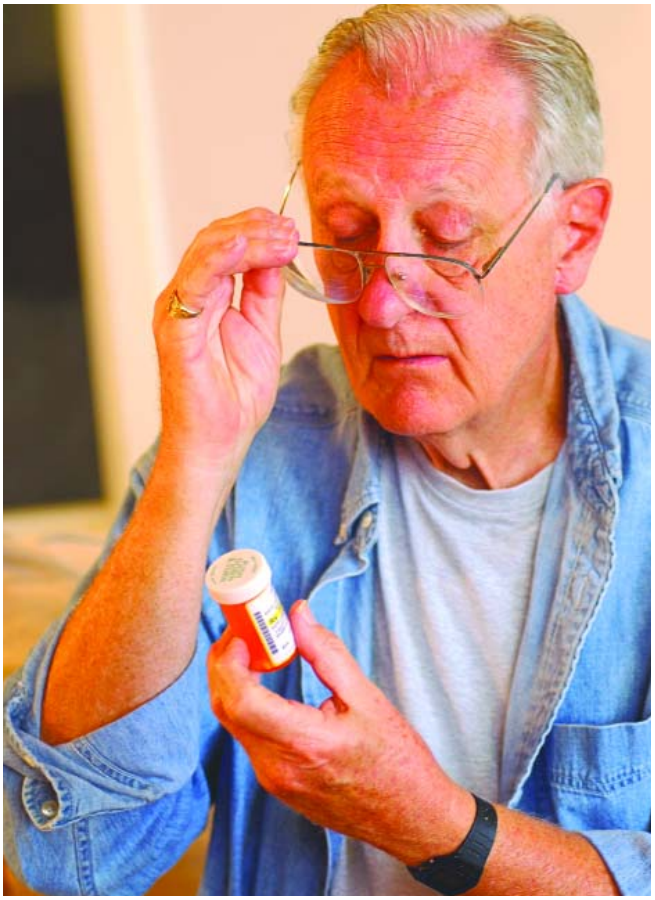

When the Baby Boom Boomerangs

Elder Law Section Publishes Long-Term Care Report*

By Howard F. Angione

The following is adapted from the "Digest of the Chapters" section of a 91-page report on the future of long-term care published by the Elder Law Section. The full report was distributed to section members, state legislators and Association leaders and is available on the NYSBA web site at <http://www.nysba.org/ltcrrreport>. Endnotes in this excerpt refer to chapter and section numbers of the report.

Members of the "Baby Boom" Generation[1] – officially anyone born between January 1, 1946, and December 31, 1964 – need only look at the long-term care expenses of their parents and grandparents to worry about how they will finance the care they will ultimately need for themselves. Nationally, more than 35 million people are age 65 or older. That number is expected to increase to 70 million by 2030.[2] New York's Office for the Aging estimates that by 2025 the over-65 population in the state will be 3.3 million, an increase of 30% over 30 years.[3] Another 1.1 million residents will be in the 60–65 age range.[4]

During the same time, however, the under-60 population will not be increasing at the same rates. That age group is expected to total 15.4 million in 2025, an increase of only 3% over 30 years.[5]

Not only does the decline of the under-60 population presage a decrease in the percentage of wage-earners contributing to Social Security and paying the taxes that finance programs such as Medicaid assistance, it also means that fewer individuals will be available to provide the home care that is the setting in which a majority of the elderly receive care today. This trend is likely to be accelerated by the decline in the number and size of extended families whose younger generations now provide care for their older relatives. Meanwhile, the percentage of available paid workers in relation to the number of elderly individuals will also be declining.[6]

The average expected lifetime nursing home stay was 2.7 years in 1995, but a projected 7% to 8% of those 45 or older could need five years or more of nursing home care during their lifetimes.[7]

Limitations on Today's Projections

Projections made today are not necessarily as certain as graphs may imply. A variety of changes in medicine and lifestyles could well lead to a demographic landscape far different than projections alone may suggest. On the optimistic side, improvements in medical care and lifestyles may decrease the need for care of individuals in their 60s and 70s. On the other hand, though, longer life expectancies

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**Louis W. Pierro of Albany, a former chair of the Elder Law Section, directed the committee that prepared the report. The authors were Elder Law Section members Bruce L. Birnbaum, Valerie J. Bogart, Michael D. Cathers, Anthony Enea, Natalie J. Kaplan, Robert J. Kurre, Stephen G. Levy, Ellen G. Makofsky, Elisabeth N. Radow, René H. Reixach, Neil Rimsky, Harriet M. Steinberg, Anthony H. Szczygiel and Brian Andrew Tully, and Gail Holubinka of MedAmerica Insurance Company of New York.*

may well lead to a need for chronic care late in life for even larger numbers of the elderly.

With the benefits of hindsight, it appears that an "institutional bias" developed in the public's perception of long-term care in 1965 when the government's early efforts to provide financial assistance for long-term care focused almost exclusively on funding for nursing home care.[8] Development of alternatives was slowed by this perception, but one of the challenges that remains is to determine how future needs can be met by efforts to foster alternatives such as home care, adult day care, respite services, congregate living settings, assisted living and continuing care retirement communities.[9]

Court decisions such as *Olmstead v. L.C.*[10] have also made it clear that there will be increasing scrutiny of whether institutionalization is justified. In *Olmstead*, the U.S. Supreme Court determined that the "most integrated setting" provision of the Americans with Disabilities Act prohibits unnecessary institutionalization of individuals who are eligible for publicly funded programs. The long-term impact of this decision is impossible to determine at this time, but the ultimate findings of New York's Most Integrated Setting Council[11] will be vital in developing plans for the future.

The Costs of Long-Term Care

Even if greater creativity in finding solutions may slow the pace of increases in government expenditures for long-term care, the current baseline figures provide an ominous foundation for future projections.

In fiscal year 2003, New York's Medicaid program spent more than $8.7 billion on institutional care – $6 billion on nursing home care, $1.2 billion at institutional care facilities for the developmentally disabled, and $1.5 million for the mentally retarded.[12] Another $3 billion was spent on various types of home care such as personal and home health services, private duty nursing, and hospice programs.

New York now spends more Medicaid dollars for nursing home and other institutional care than any other state – nearly double that of Pennsylvania, the next highest spending state.[13] New York also has the most nursing home residents of any state in the nation – 109,788 out of 1,346,686 persons living in nursing homes in the nation.[14] New York also uses Medicaid funds for a greater percentage of its population than the national average – 75% of its nursing home residents receive Medicaid assistance compared with a national average of 67%.

New York ranks only 18th among the states in the percentage of its elderly who live in nursing homes, but its percentage of persons age 65 and over who are in nursing homes (4.4%) is higher than the national average (3.8%).[15]

According to the most recently available figures, the average private-pay cost for nursing home care in New York State is $269 per day, or $98,185 per year, compared with a nationwide average of $180 per day.[16] The New York figure is deceptive, however. Care in downstate areas now routinely exceeds $300 per day and can range to $400 or more per day.[17]

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Medicaid has become the single largest appropriation in many New York county budgets.[18] Counties report that Medicaid caseloads have increased by an average of 7% and that in 2002 counties were budgeting an average 10% caseload increase.[19]

Myths and Unanswered Questions

One year in a nursing home costs $109,500 at a $300/day rate, or $135,050 at an increasingly common rate such as $370 per day. When round-the-clock care is provided at home by non-family members, a per-hour rate of even $15.41 yields the same $370 per-day expense as care in a nursing home.

Confronted with these realities, it is not surprising that individuals who need long-term skilled care ultimately have no alternative except the Medicaid program. In the words of the Court of Appeals, it is not surprising that "middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves" as the only way to obtain "government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment."[20]

Nevertheless, rational assessment of the Medicaid program continues to be plagued by mythological stereotypes and the lack of sufficient data to analyze the impact of existing rules for coverage.

Myth: Medicare Will Pay

Unfortunately, too many people only learn that Medicare will not pay for long-time care when they face the need for it. Aside from limited coverage for a maximum of 100 days after a hospital stay, Medicare does not pay nursing home bills or the cost of extended in-home services. Some high-end private insurance policies provide longer coverage, but it seldom lasts more than a few months beyond the end of Medicare's 100 days. Even within the 100-day period, neither Medicare nor the typical health insurance policy covers strictly "custodial" services for those who have ailments such as arthritis, dementia or Alzheimer's disease but do not need skilled nursing care and will not benefit from rehabilitation.[21]

Myth: Medicaid Recipients Fraudulently Shelter Assets

High among the frequently promulgated myths is the notion that individuals receiving Medicaid have fraud-

ulently concealed assets. If this did occur, they have committed perjury on their application forms that require a statement identifying all income, resources and gifts made. And if assets were sheltered, Medicaid retains the statutory right to make a claim for reimbursement from the estates of those who received services provided through the Medicaid program.

To qualify for Medicaid, individuals may retain only $4,000 in assets after providing for their funerals and retain a $50 per month "personal needs allowance" from their income.[22] If an individual is married, his or her spouse may retain title to a "homestead" (a house, cooperative apartment or condominium) if they have one, up to $95,100 in assets, and $2,378 in income.[23] By filing a "spousal refusal," a spouse may retain additional assets and decline to contribute 25% of any income beyond the $2,378 figure. Medicaid retains the right, however, to sue the refusing spouse to obtain reimbursement from assets and income for amounts that the program has paid on behalf of the recipient. The extent to which Medicaid is pursuing this option is unclear.[24]

Medicaid's "tape match" process provides a mechanism to discover assets not disclosed on an application. Periodically, the local agencies administering Medicaid receive tapes from the U.S. Internal Revenue Service listing interest on bank accounts and other assets. If the Social Security number on such a report matches the Social Security number of a Medicaid recipient, the Medicaid agency checks to see if the asset was disclosed on the original application (and presumably depleted after the period covered by the tape). If it was not, the agency asks for an explanation.

Myth: Millionaires Are Receiving Medicaid

Any current millionaire who is receiving Medicaid has probably filed a fraudulent application. If the recipient's spouse has more than a homestead and $95,100, the Medicaid program is failing to use its statutory right to obtain reimbursement for expenditures on behalf of the recipient.[25]

Any former millionaire on Medicaid would have had to give away his or her millions more than three years before seeking Medicaid assistance, or five years before seeking Medicaid if the millions were placed in trust. The transfer penalty rules[26] applicable to those who do not divest themselves of assets until faced with imminent nursing home admission would require a millionaire to retain a minimum of as much as $346,032 (on Long Island) to pay for nursing home care in the next three years before giving away any remaining assets.

Myth: Medicaid Recipients Leave Large Estates

Medicaid has a right to recovery from any assets of a recipient that are subject to administration or probate in the surrogate's court. Most local Medicaid agencies periodically send a representative to surrogate's courts to determine whether the Social Security numbers of decedents match those of deceased Medicaid recipients or their spouses.[27]

Unanswered Question: What Is the Effect of Asset Transfers on Medicaid Costs?

There is insufficient data to answer the question in New York State, but a nationwide study estimated that if *every* older individual with a significant incentive to divest countable assets to become eligible for Medicaid actually did divest every penny, the amount transferred would equal about 4% of Medicaid nursing home expenditures.[28]

Any current millionaire who is receiving Medicaid has probably filed a fraudulent application.

Unanswered Question: How Long Do Medicaid Recipients Pay Privately?

No analysis is known to be available, but every application for nursing home Medicaid requires information on the extent of private-pay coverage in the nursing home. Without violating any individual's privacy, this information should be analyzed and made available to those who must make decisions about eligibility rules for Medicaid.[29]

Unanswered Question: Is Medicaid Effectively Administering the Rules for Spousal Refusal?

Empirical evidence drawn from the experiences of elder law attorneys suggests that there are great varieties among the counties in the way the spousal refusal rules are interpreted.[30]

Financial Strategies for the Future

No single financial solution is likely to be found to the challenges that lie ahead for long-term care, but a mix of complementary actions holds the potential for incremental improvements in the overall picture.

Long-Term Care Insurance
Policies that cover long-term care needs at home or in a nursing home are a promising vehicle for individuals seeking to protect their assets and to provide for their own care. The policies are not a cure-all panacea, however. The cost ($4,000 or more per year for a typical couple in their early 60s) is beyond the means of many, and it is generally prohibitive by the time individuals are in their late 70s. Other potential purchasers have medical conditions that preclude them from obtaining coverage.[31]

Expansion of tax incentives for purchase of policies could lead to greater acceptance of the concept.[32]

"Partnership" Policies
These policies represent an early attempt to encourage individuals to purchase insurance that would allow them to retain assets and qualify for Medicaid after the minimum three-year coverage provisions of the policies had paid for the first three years of their care in a nursing home.[33]

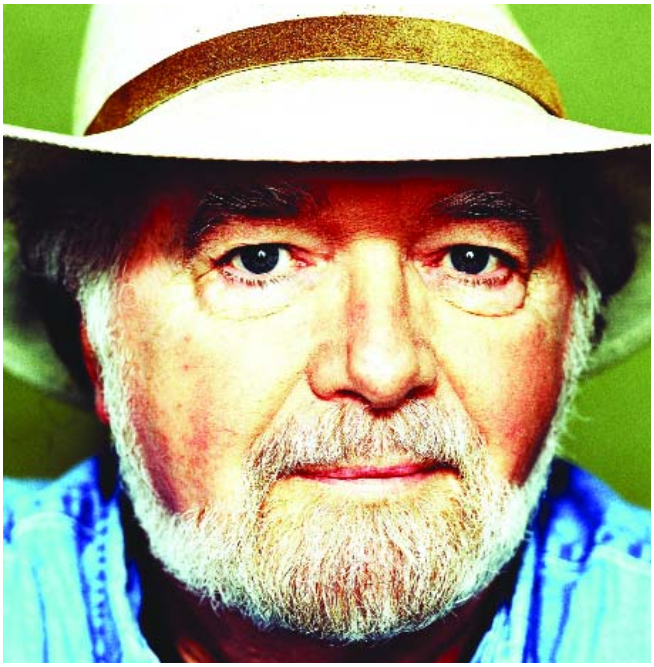
The value of the partnership approach is yet to be fully calculated. A provision that required an individual to return to New York State to obtain Medicaid coverage has discouraged some from purchasing the policies, although recent changes may allow states to make reciprocal agreements on this matter.

Expansion of Assisted Living Options
Many elderly who can no longer function on their own do not need the extensive services provided in nursing homes, but can benefit from various types of senior living homes, assisted living facilities, continuing care communities, and similar facilities.[34]

Assisted living costs that can range well beyond $3,000 per month when an individual needs supportive services that go beyond meals and housekeeping have prevented many of the elderly from using this option. Expansion of the "Assisted Living Program" now available on a limited basis may help to address this issue by allowing eligible individuals to receive assistance from the Medicaid program that is otherwise not available in most assisted living facilities.[35]

An October 2004 law authorizing eight fee-for-services communities will provide an opportunity to gauge the long-term viability of a benevolent care fund to make assistance available to qualifying subscribers unable to pay certain fees.

Incentives to Remain at Home
Modifications in homes, perhaps encouraged by tax deductions, could make it possible for some to remain home.[36] Other options include home sharing, day care programs and respite options that allow family caregivers to obtain occasional breaks in what often is an otherwise multi-hour, seven-day-a-week responsibility.[37]



Reverse Mortgages: These offer an opportunity for the elderly to benefit from accumulated equity in their homes. Up-front costs are significant, however, easily topping $10,000 on a $200,000 loan.[38] Programs to reduce costs and interest rates might lead to greater acceptance of this option.[39]

Pre-death Benefits from Life Insurance: New York's 2004–2005 budget calls for a feasibility study of allowing life insurance companies to pay accelerated benefits in the form of some or all of the insured's death benefits before death.[40]

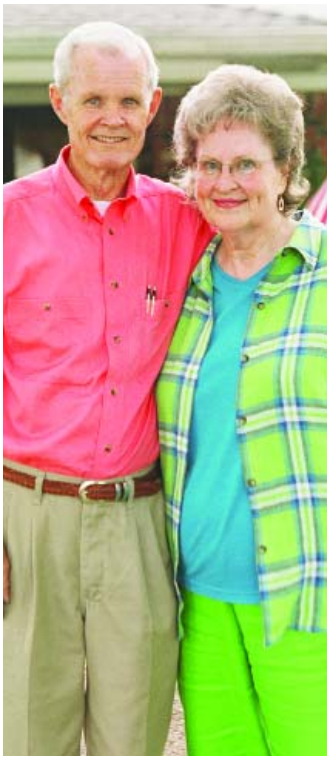
"Viatical Settlements" allow the sale of life insurance for a sum less than the death benefit when the insured is terminally ill. "Life Settlements" allow such a sale if life expectancy is longer than 12 months. Both require careful monitoring.[41]

Rethinking the Role of Government: Some have suggested that public financing of long-term care be viewed as analogous to public financing of retirement security. AARP and others support the development of a broader, social insurance program that would form the basis of long-term care financing.[42]

Proposal for Long-Term Care "Compact"

To encourage focused discussion on options that would avoid harm to New York State residents who must turn to the government for assistance, yet also curb the expenses of the Medicaid program, the Committee on Long-Term Care Reform has offered a proposal to create a "Compact" program.[43] The objective is to provide an alternative to the impoverishment process as the way to obtain government assistance.

Once individuals were diagnosed as chronically ill, instead of frantically giving away their assets to qualify



for Medicaid assistance, they would have the option to "pledge" that they would use a defined amount of their then-existing assets to pay for their long-term care needs. The amount pledged would be either a set maximum or up to one-half of their "countable assets," whichever was smaller.

Recent proposals by the Elder Law Section suggest that the maximum pledge would vary by region, using the three-year total of the "regional rate" that the state Health Department publishes as the average cost of a one month stay in a nursing home. At present, those figures are $9,612 per month and $346,032 over three years on Long Island; $8,870 and $319,320 in New York City; $8,332 and $299,952 in the northern suburbs of New York City; $6,981 and $251,316 in the Rochester area; $6,181 and $222,516 in western sections of the state; $6,501 and $234,036 in northeastern sections; and $5,988 and $215,568 in the central area. "Countable assets" is treated as a defined term that would exclude the value of the "homestead" where the participant lives and the value of special payments such as Agent Orange compensation if maintained in a separate account. Items falling within the definition of "countable assets" would include the principal of annuities purchased within three years before the individual first needed long-term care services and thus was eligible to sign up for the Compact program.

Until they spent their pledged amounts, Compact participants would remain responsible for their own care without Medicaid assistance, whether at home or in a nursing home. During that time, however, they would have full access to all their income and their assets. Individuals who had purchased long-term care insurance would be able to use payments from the insurance carrier toward meeting their pledge obligations. (Funds available from a long-term care policy would not be considered a "countable asset," and thus Compact participants who had previously purchased long-term care insurance might be able to retain all, or virtually all, of their assets.)

Once they had fulfilled their pledges, Compact participants would retain whatever assets were not used to complete their pledges. The Elder Law Section subcommittee charged with developing a detailed Compact proposal for consideration by state legislators currently envisions a post-pledge procedure in which Compact participants who had completed their pledges would pay 25% of their monthly income to the government agency administering the assistance program, and the agency would in turn pay the expense of long-term care services appropriate to their needs. Participants who required care in a facility such as a nursing home would also use at least a portion of their remaining income to supplement the daily rate applicable to government payments to the nursing home. If, for example, the government paid the facility at the rate of $200 per day, the Compact participant would pay a supplement equal to 20% of the rate – $20 per day and $600 in a 30-day month. The supplemental payments would be scaled back if they would leave the participant with a net income of less than $100 per month.

Assets that participants retained would be available to pay for services not covered by the current Medicaid program. Notable among them would be medical expenses not specifically related to long-term care, such as the cost of dental work, together with long-term care expenses that go beyond the scope of Medicaid coverage. Expenses of this type might include the services of a private duty nurse if an individual was seriously ill.

Overall, the objective would be to make Medicaid a true "safety net" for those whose needs grew so large that they had already spent half of their assets on long-term care, rather than the current situation in which Medicaid serves as a "first resort" for many who need care and impoverish themselves to obtain it.

For individuals who pledged less than the full three-year total of the regional rate for their areas, the "look-back process" would be simplified. They would be asked, subject to penalties for perjury, to disclose whether they had made substantial gifts within the past three years; if they had, those amounts would be added to the total of countable assets in determining the size of a pledge equal to half of their countable assets. The "spousal refusal" option would be eliminated in favor of a process that would look at a couple's total assets and assure that adequate resources were available for the "community spouse."

When the time came to seek government assistance, Compact participants would simply need to produce receipts for long-term care expenditures equal to the amount they had pledged to spend when they joined the Compact.

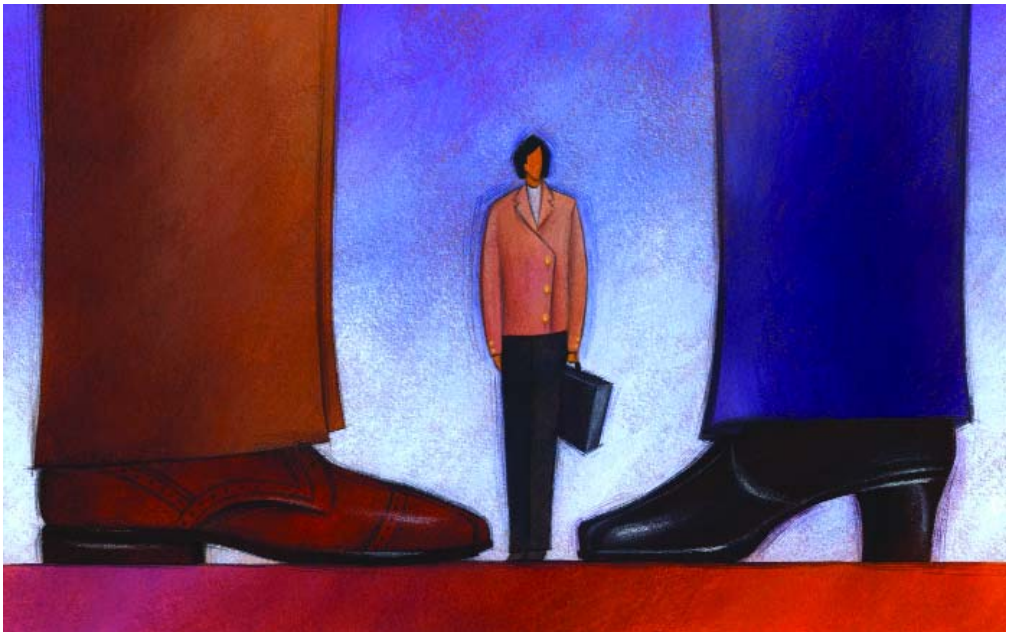
Caregiving Strategies

Members of the Long-Term Care Reform Committee concluded that concerns about containing costs should not blot out consideration of long-term actions designed to improve the quality of care.

The task force concluded that a need exists for programs that will assure respect for everyone's individual dignity and assure that the elderly do not receive treatments that are unnecessary, ineffective or harmful. They

urged further that steps be taken to facilitate changes in the training of health care professionals and to finance initiatives that would refocus the use of healthcare dollars. Much remains unknown about medical diagnosis and interventions. Among the least well understood are chronic conditions and age-related ailments.[44]

1. 1.2.
2. 1.2.
3. 1.3.
4. 1.3.
5. 1.3.
6. 8.2.
7. 1.7.
8. 8.1.
9. 1.7, 3.2, 8.2, 8.5.
10. 2.1 *et seq.*
11. 2.4.
12. 2.2.
13. 2.2.
14. 2.2.
15. 2.2.
16. 4.1.
17. 4.1.
18. 8.2.
19. 8.2.
20. *See* Introduction.
21. 4.1.
22. 5.1.
23. 5.1.
24. 5.2.
25. 5.2.
26. 5.1, *see* note 5.
27. 5.1.
28. 5.2, note 9.
29. 5.2.
30. 5.2.
31. 4.3, 4.6, 4.7, 5.3, 8.5.
32. 4.14.
33. 4.12, 5.4.
34. 3.3, 3.4, 3.5, 5.5.
35. 3.3, 5.5.
36. 3.2, 3.6.
37. 3.2, 3.6.
38. 3.2.
39. 3.6.
40. 4.9.
41. 4.9.
42. 8.3, 8.4, 8.5.
43. Chapter 6.
44. Chapter 7.



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Who's the Boss?

New York Defines Roles in the Professional Employer Organization Act

By Barry L. Salkin

The Professional Employer Organization industry has grown rapidly in recent years, spurred by the fact that while small employers account for most of the jobs and job growth in our economy, these businesses typically lack the resources to hire experienced managers to perform human resources, benefit management, safety oversight, or payroll services. Although Professional Employer Organizations, or PEOs, provide a welcome solution to many small businesses, PEOs have also been a source of legal concerns for a variety of reasons at both the federal and state levels. New York has responded with the enactment of the Professional Employer Organization Act, which will likely benefit both small businesses and their employees by clearly defining the rights and responsibilities of PEOs in a variety of contexts.

Demand for PEO Services

Small businesses face compliance with a bewildering range of state and federal employment laws. These same businesses often find it administratively or financially impossible to offer group health insurance, 401(k) retirement plans, and other employee benefits.[1] To address these issues, some small businesses have turned to their accountants for assistance. Other businesses look to payroll vendors, who can combine payroll services with a prototype 401(k) plan and recordkeeping services, as well as ensuring compliance with federal and state tax obligations.

Although accountants and payroll services are often capable of addressing these needs, PEOs provide a different approach that is, in many cases, more appealing to small businesses. A PEO will provide a client with workers who traditionally would have been on the client's payroll and treated as the client's employees. While many PEOs simply take over a client company's existing workforce, other PEOs assume the functions of recruiting, training, and placing employees in the workplace of the client company. A PEO will enter into an agreement with a client company to manage the human resources aspects of the client's business.

These agreements generally allocate to the PEO the responsibility for hiring and firing workers; managing payroll, including the withholding and paying of state and federal payroll taxes; and providing employee benefits, particularly 401(k) plans, group health plans, life insurance, and cafeteria plans, all of which are generally associated with a traditional long-term employment relationship. PEOs also enjoy economies of scale that allow them to provide benefits at a lower cost than if the client had provided these benefits. In fact, in many instances,

employees receive benefits that they would not otherwise have received but for the PEO relationship.[2] In addition, the allocation of responsibilities allows small businesses to concentrate on the products or services that are their core business.[3]

In addition to benefiting employers and employees, PEOs also benefit those government agencies that are responsible for administering tax and labor laws, in at least two ways. First, it is easier for a governmental agency to manage one PEO with 1,000 employees than to manage 100 employers with 10 employees each. Second, the experience PEOs have with federal and state tax reporting and federal reporting for employee benefit plans results in far fewer errors.[4]

A Growing Trend

The PEO industry is of relatively recent vintage but has been growing rapidly – a Department of Labor report characterized its growth as explosive.[5] In 1984 only approximately 200 PEOs existed, while in 2001 it was estimated that there were over 2,000 PEOs in operation. They are found in every state, believed to be growing at a rate of 20% to 30% per year, and in 2001 were estimated to employ between two and three million individuals.[6]

The average PEO clients are small employers with just 15 worksite employees; these employers are the least likely to provide quality employee benefits. For example, the Small Business Association has reported that workers at small businesses have only a 38% chance of having access to employer-provided health benefits.

A PEO should be distinguished from two other forms of outsourcing relationships: temporary staffing services and employee leasing.[7] A temporary staffing service recruits employees and assigns them to clients to support or supplement a client's workforce in special situations. In contrast, a PEO arrangement involves all or a significant number of a client's workplace employees in a long-term, non-project-related, employment relationship. Under a typical employee-leasing arrangement, a client company fires its employees, who are subsequently hired by an employee-leasing company, often on the same or very similar terms, and then leased back to the original employer by the employee-leasing company to perform the same work they were performing while they were the client's employees. In contrast, it is the position of the PEO industry that the employment relationship between the client company and the worksite employees does not terminate when a client company enters into an agreement with a PEO. Rather, the PEO becomes the "co-employer" with the client company in a tripartite relationship with the client company's employees and performs some of the functions typically associated with an employment relationship, such as hiring and firing workers, handling payroll, and providing employee benefits, while the client company retains day-to-day control of the workforce in carrying on the company's trade or business.

PEOs are also valuable to employees because the PEO provides additional legislative protection. That is, because most PEO clients have worksites with fewer than 15 employees, workers at these sites are often not protected by federal employment laws or benefits. By inclusion of a client's worksite employees in the larger workforce of the PEO for purposes of applying statutory coverage, the employees are in many instances covered by employment laws that would not otherwise apply, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Family and Medical Leave Act, the Americans with Disabilities Act, and the Worker Adjustment Retraining and Notification Act (WARN). Additionally, PEOs assist clients by managing costs associated with workers' and unemployment compensation claims in that certain employment-related risks are shifted, for a fee, from the client to the PEO. For example, the risks associated with workers' compensation may be shifted contractually to the PEO who undertakes to manage that risk through proactive loss control, as well as by safety and claims management.

State and Federal Concerns

Notwithstanding the advantages of PEOs, they are also a source of concern at both the federal and state levels. At the federal level, the concern is, in part, that client companies will utilize a PEO to obtain a benefit that is unavailable to them, or to manipulate nondiscrimination rules for employee benefits under the Internal Revenue Code of 1986, as amended ("Code").[8] For example, certain benefits that are available to employees under the Code are not available to partners, such as participation in a cafeteria plan on a pre-tax basis,[9] or eligibility for a qualified transportation fringe benefit,[10] or the receipt of medical benefits from a self-insured plan on a tax-free basis,[11] or the receipt of incentive stock options,[12] or participation in qualified stock purchase plans.[13]

If a partnership were to enter into an agreement with a PEO, it is questionable whether the partners, by virtue of being co-employed by the PEO, would become eligible to participate in a cafeteria plan[14] or a qualified transportation fringe benefit program, or to receive the same benefits as common law employees of a C corporation.[15] Similarly, an individual who was a highly compensated employee[16] for purposes of the Code's nondiscrimination provisions or a 5% owner of a stand-alone company probably would not be converted into a non-highly compensated employee or a less than 5% owner solely by virtue of entering into the PEO relationship. Therefore, companies should not consider entering into a relationship with a PEO solely to enhance the position of certain individu-

als with respect to employee benefits under the Code. If federal legislation that has been proposed in recent years is enacted, it will be clear that these aggressive positions have no statutory basis.

States have also expressed concerns over the operation of PEOs. First, there is a concern that PEOs may in substance be selling insurance to multiple employers, thus circumventing a state's insurance laws.[17] Second, there is a need to determine how state laws that regulate employees, such as workers' compensation, unemployment insurance, sales tax, and unauthorized practice of a profession – laws that did not contemplate a co-employment relationship – should apply to PEOs. To address these issues, a number of states have enacted laws regulating PEOs, either in the form of licensing or registration statutes. In September 2002, New York State recognized that "professional employer organizations provide a valuable service to commerce" and that "the rights and responsibilities of professional employer organizations therefore must be clearly defined,"[18] when the Legislature enacted the Professional Employer Organization Act. The Act should benefit both small businesses and their employees by clearly defining the rights and responsibilities of PEOs in a variety of contexts.

The Act

The Act defines "Professional Employer Organization"[19] as a person[20] whose business is entering into professional employer agreements with clients.[21] A "professional employer agreement" is a written contract under which (1) a PEO expressly agrees to co-employ all or a majority of the employees[22] "providing services" for the client; (2) the contract is intended to be ongoing rather than temporary in nature; (3) employer responsibilities for worksite employees, including those of hiring, firing, and disciplining, are expressly allocated between the PEO and the client; and (4) the PEO agrees to assume certain specified rights and responsibilities.[23] A worksite employee is defined under the Act as a person having an "employment relationship with both the [PEO] and the client" company.[24]

"Employment relationship" is not defined under the Act, however. As a matter of form, a PEO will typically enter into an employment agreement with worksite employees, but will that form, which purports to set forth the terms of an employment relationship, be respected? In this regard, one standard for determining whether an individual is an employee of an entity[25] is the 20-factor test used by the Internal Revenue Service.[26] In applying this rule, the IRS position is that an individual is either an employee of entity X or entity Y: he or she cannot concurrently be an employee of both a professional employer and a client company.[27]

The definition of "worksite employee" also provides that a client's officers, directors, shareholders, and partners can be worksite employees if they act as operational managers or perform services for the client. This formulation raises a number of interpretative issues. First, the Act is written in the disjunctive, but it is difficult to conceive of a circumstance in which a person is acting as an operational manager and not performing services for a client. Second, as drafted, "services," without any qualification, appears to be overbroad. For example, for purposes of the Code, a director of a corporation as such is not an employee, but if a director performs services for a corporation other than those required by attendance at and participation in meetings of the board of directors, he or she may be an employee.[28] Nonetheless, merely by his or her attendance at a board of directors meeting, a director is performing a service for a corporation. Third, it leaves open the question of whether a nonemployee shareholder performs a service for a corporation by providing a guarantee of the corporation's debt.[29]

The PEO is obligated to provide written notice of the relationship between the PEO and the client to the client's worksite employees.

The written professional services agreement will describe the services to be performed by the PEO, and also must provide[30] that the PEO

1. reserves a right of direction and control over the worksite employees. However, the client will maintain sufficient direction and control as is necessary to conduct the client's business, discharge any fiduciary obligations that it may have or comply with state licensing requirements;[31]
2. assumes responsibility for the withholding and remittance of payroll-related taxes and employee benefits for worksite employees and for which the PEO has contractually assumed responsibility from its own accounts, so long as the professional employer agreement with the client remains in effect;[32]
3. retains authority to hire, fire, and discipline employees.[33]

In certain industries, it may be difficult for the client company to transfer its rights to fire and discipline to PEOs. For example, if a church desired to enter into a

PEO relationship, it would not wish to relinquish its rights to hire, fire or discipline a minister. Also, presumably, this retained authority applies only to actual employees rather than deemed employees; in other words, a PEO could not fire a shareholder.

The PEO is also obligated to provide written notice of the relationship between the PEO and the client to the client's worksite employees.[34] The Act is silent as to how this written notice should be provided. For example, may the notice be posted at the client's worksite in the same manner as other notices are posted, or must it be delivered to such individuals? Also, regulations should clarify whether the notice may be provided electronically. Additionally, if the PEO desires to enter into separate employment agreements with each of a client's worksite employees, it is unclear whether the substance of the statutory notice may be folded into such employment agreement or, rather, must be delivered separately.[35]

As long as the PEO's professional employer agreement with a client remains in force, the PEO is statutorily assigned the responsibility to pay wages and collect, report, and remit employment taxes of worksite employees from the PEO's own accounts; pay unemployment insurance as required by the unemployment insurance law; and secure and provide required workers' compensation coverage either in its own or the client's name.[36]

Tax Withholding

For purposes of withholding New York State income tax, the PEO is considered an employer pursuant to Tax Law § 671.[37] In contrast, under current law, it may not be regarded as the employer for federal income and employment tax purposes. However, there are three ways in which a non-common law employer such as a PEO can be treated as an employer for federal tax purposes: as a statutory employer under I.R.C. § 3401(d)(1); as an authorized payroll agent under I.R.C. § 3504; and as a payroll processing agent.[38]

Workers' Compensation

The Act further provides that both the client and the PEO are considered as the employer for purposes of coverage under the Workers' Compensation Law, and both the PEO and the client are entitled to the protection of the exclusive remedy law, without regard to which of the entities secured or provided the workers' compensation coverage.

Unemployment Insurance

The Act makes the PEO liable, during the term of the PEO Agreement, for the payment of unemployment insurance contributions on wages paid by the PEO. The PEO reports these contributions to the Unemployment Compensation Fund using its Employer Account Number and its contribution rate.[39]

Practice of Insurance

The Act clarifies that the sale of PEO services in conformity with the Act does not constitute the sale of insurance for purposes of the state Insurance Law. However, unless it is appropriately licensed by the State Insurance Department, a PEO cannot function or hold itself out as an insurer, insurance broker, or insurance agent.[40]

Sales Tax

The Act provides that worksite employees whose services are subject to sales tax are deemed to be the employees of the client company for purposes of levying and collecting sales taxes on the performances of services.[41]

Collective Bargaining

The Act provides that the PEO arrangement has no effect upon existing collectively bargained agreements nor does anything in the Act alter the rights or obligations of any client, PEO, or worksite employee under the National Labor Relations Act or any applicable state law.[42]

State Licensing

The Act does not exempt a client or worksite employee from any state, local or federal licensing, registration or certification requirements.[43] Moreover, every individual who is required to be licensed, registered or certified and who is a worksite employee shall be deemed to be an employee of the client for purposes of any licensing, reg-

An important aspect of the Act is its treatment of welfare benefit plans.

istration or certification requirement.[44] One hopes that regulations or court decisions will construe "licensed, registered, or certified" broadly so that, for example, the provision will apply to a minister who has been ordained. Further, to avoid problems with unauthorized practice, the Act provides that the PEO shall not be deemed to be engaged in an occupation, trade or profession that is subject to licensing, registration or certification solely by entering into a professional employer agreement with a client or an employment agreement with worksite employees.[45] Conversely, worksite employees are not automatically deemed to be employees of the PEO for purposes of general liability insurance, automobile insurance, fidelity bonds, surety bonds, employer's liability not covered by workers' compensation, or liquor liability insurance covered by the PEO unless the worksite employees are included by specific reference in the professional employer agreement and applicable prearranged insurance contract or bond.[46]

Benefit Plans

An important aspect of the Act is its treatment of welfare benefit plans. The Act provides that a registered PEO shall be deemed for purposes of state law an employer[47] for purposes of sponsoring a welfare benefit plan[48] for its worksite employees. Further, worksite employees participating in the PEO's fully insured welfare benefit plan or plans are considered employees participating in a single-employee welfare benefit plan or plans. Third, a fully insured welfare benefit plan or plans offered by a registered PEO to its employer or worksite employees is not regarded for state law purposes as a multiple employer welfare arrangement (MEWA).[49]

The Act does not address the treatment of pension benefit plans, such as 401(k) plans, the treatment of which is governed by federal law, *i.e.*, the Code. For example, the IRS recently issued guidance regarding single-employer-defined contribution plans maintained by PEOs.[50] After acknowledging that the application of the common law to the PEO industry is quite complex, it indicated that a 401(k) plan maintained by a PEO would not be disqualified[51] for violating the Code's "exclusive benefit"[52] requirement, provided that the plan is a multiple-employer[53] 401(k) plan or, if the PEO currently maintains a single-employer plan, that the PEO take specific steps in connection with the IRS guidelines either to terminate the plan or to convert it into a multiple-employer plan.

Registration

The Act is a registration rather than a licensing statute. As part of the registration process, a PEO is required to provide the Department of Labor with the following information:

- the name or names under which it conducts its business;
- the address of its principal place of business;
- the address of each office the PEO maintains in the state;
- the PEO's employer identification number; and
- a list by jurisdiction of each name under which the PEO has operated in the preceding five years, including any alternative names, names of predecessors and, if known, successor businesses.[54]

In addition, if the PEO or the ultimate parent of a PEO group is a privately or closely held company, the PEO or PEO group, as applicable, is required to file a list of all persons or entities that either own a 5% or greater interest in the PEO at the time of the application or a list of persons who formerly owned a 5% or greater interest in the PEO or its predecessors in the preceding five years. If, however, the PEO or the ultimate parent of a PEO group is publicly traded, then the PEO or PEO group shall file a list of all persons or entities that own a 5% or greater interest in the PEO or the ultimate parent of the PEO group at the time of filing the application.[55]

Minimum Net Worth and Bonding

A PEO is required to submit annually an audited financial statement, prepared in accordance with generally accepted accounting principles, which statement must show a minimum net worth of $75,000[56] (or, if a submission is made on behalf of a PEO group, a combined or consolidated financial statement showing a minimum net worth of $75,000). Alternatively, the Department of Labor may request that the PEO post a bond with a minimum value of $75,000.[57]

Filing and Fees

Each PEO operating within New York is required to complete its initial registration within 180 days after the end of the PEO's fiscal year ending after the effective date of the Act, which was September 24, 2002.[58] Within 180 days after the end of the PEO's fiscal year, it is required to renew its registration by notifying the Department of Labor of any change in the information provided under the Act.[59]

The initial registration fee for most PEOs is $1,000[60] and there is an annual renewal fee of $500.[61] With respect to *de minimus* registrants (undefined), the initial filing fee and the annual fee are only $250 each.[62]

PEO Group

If two or more PEOs are majority-owned by the same ultimate parent, entity or person, they have the option of

registering as a PEO group. This status allows the members of the group to satisfy the Act's reporting and financial requirements on a consolidated basis. However, as a condition for having this status, each company that is a member of the group must guarantee payment of all financial obligations of each other.[63]

Exemption

In order to be exempt from the Act's registration requirements, a PEO must satisfy four conditions:[64]

- it must submit a properly executed request for registration on a form provided by the department;
- it must be incorporated outside of New York and be licensed or registered as a professional employer organization in another state that has the same or greater requirements as stated in the Act;
- it must not maintain another office in this state or solicit[65] in any manner clients located or domiciled in New York; and
- it must not have more than 25 worksite employees[66] in New York.

Both the registration and exemption of a PEO from registration are valid for a one-year period.[67]

Despite some ambiguities in the Act that may be addressed over time, New York's Professional Employer Organization Act is significant legislation for the PEO industry in this state. Indeed, the Act's treatment of a number of issues in a manner favorable to the local PEO industry should facilitate the industry's growth. At the same time, the Act provides countervailing safeguards for the public by requiring registration and minimum net worth requirements. ■

1. Bianchi, 399 T.M., Employee Benefits for the Contingent Workforce, at A-4 ("Bianchi").

2. John Richards, *Welfare Benefits Provided by PEOs*, 55 Tax Law. 7 (2001).

3. *Id.* at 79.

4. *Id.*

5. United States Department of Labor Advisory Council on Employee Welfare and Pension Plans, Report of the Working Group on the Benefit Implications of the Contingent Workforce, at 19 ("Advisory Council Report").

6. Report on Employee Leasing and Professional Employer Organizations to the NAIC Workers' Compensation Task Force and the IAIABC Executive Committee, at 5.

7. Temporary staffing, employee leasing and outsourcing arrangements are usually regarded as contingent workforce arrangements, while PEOs are not because they contain many aspects of the traditional employer-employee relationship. However, the Advisory Council Report, while not characterizing PEOs as part of the contingent workforce, stated that "from the employee's standpoint, they have all the hallmarks of the disconnect between employer and employee that characterize the other cohorts of the employee work force." Advisory Council Report, at 5, *quoted in* Bianchi, at A-60. At any earlier stage in the evaluation of the industry, PEOs were referred to as employee-leasing companies.

8. Richards, *supra* note 2, at 7–8.

9. I.R.C. § 125.

10. I.R.C. § 132(f); Treas. Reg. § 1.132-1(b). However, tokens or fare cards provided by a partnership to a partner are excludable from gross income as a *de minimus* fringe benefit if the value of the token and fare cards in any one month does not exceed $21. Treas. Reg. § 1.132-6(d)(1).

11. I.R.C. § 105(g). However, I.R.C. § 104(a)(3) has provided relief where the amounts received are through an arrangement having the effect of accident or health insurance.

12. I.R.C. § 422.

13. I.R.C. § 423.

14. David Fuller & Joseph Adams, *Treatment of Self-Employed Individuals in PEO Benefit Plans*, PEO Insider 16 (Mar. 2000); David R. Fuller, *Self-Employed Workers and Your Cafeteria Plan: Word of Caution for PEOs*, PEO Insider (June 1999).

15. As regards the treatment of shareholders for employee benefit purposes, I.R.C. § 1372 treats a 2% shareholder of an S corporation as a partner with respect to fringe benefits.

16. I.R.C. § 414(q) defines a "highly compensated employee" as a 5% owner of an entity in the current or prior year or an employee with compensation in the prior year in excess of $80,000 as indexed (currently $90,000) and, if elected by the employer, in the top paid group (the top 20% of the employees when ranked on the basis of compensation). "Employer" is determined on a controlled group basis under I.R.C. § 414(b), (c), (m) and (o).

17. Richards, *supra* note 2, at 8.

18. An Act to Amend the Labor Law, in relation to establishing the New York Professional Employer Act, Section 1 ("the Act"). 2002 N.Y. Laws ch. 565. The Act adds a new article 31 to the Labor Law.

19. Act § 916(4). Temporary help firms as defined in Act § 916(5) and employment agencies as defined in Article 11 of the General Business Law are deemed not to be PEOs for purposes of the Act.

20. The Act defines "person" broadly under Act § 916(2) as an individual, an association, a company, a firm, a partnership, a corporation or any other form of "legally recognized" entity. While "legally recognized" is undefined, this phrase presumably refers to the jurisdiction in which the entity was established, rather than New York.

21. "Client" is defined in a formal fashion under Act § 916(1) as a person who enters into a professional employer agreement with a PEO. Since that agreement must be evidenced by writing, there can be no *de facto* clients under the Act.

22. "Employee" is not defined under the Act, but is defined under § 2(5) of the Labor Law as "a mechanic, workingman or laborer working for another for hire."

23. Act § 916(3).

24. Act § 916(6). A shareholder can be a worksite employee under § 916(6) of the Act, and worksite employees have an employment relationship with a client. It is possible that a shareholder can be a worksite employee under the Act but not an employee.

25. Note, however, that the IRS will not rule on the issue of whether the PEO or the client company is the employer of a worksite employee. Rev. Proc. 2004-3, § 3.02(7), 2004-1 I.R.B. 114.

26. Rev. Rul. 87-41, 1987-1 C.B. 296. Applying the 20-factor test, the IRS almost invariably determines that the worksite employee is the employee of the client company. *See, e.g.*, Technical Advice Memorandum (TAM) 199918056. Federal legislation has been proposed on various occasions to address these issues in the context of employment tax withholding and employee benefit plans. *See, e.g.*, H.R. 3490, 106th Cong. (1999), the Professional Employer Organization Workers Benefits Act of 1999. To date, these efforts have proven unavailing, but it is likely just a matter of time before these issues are addressed at the federal level in some manner. Such laws should not affect state laws such as the Act.

27. There is a limited exception in the context of concurrent partnerships and joint venture relationships. Rev. Rul. 54-369, 1954-2 C.B. 364; Rev. Rul. 66-162, 1966-1 C.B. 234; Rev. Rul. 68-437, 1968-2 C.B. 183; Rev. Rul. 81-105, 1981-1 C.B. 256.

28. By way of illustration, for federal tax purposes bank directors who serve on various committees of a bank are not employees, even though by serving on those committees they are clearly undertaking a service to the bank. Similarly under Treas. Reg. § 31.3401(c)-1(f), while an officer of a corporation is generally an employee of that corporation, an officer who performs only minor services and who neither receives nor is entitled to receive any remuneration is not an employee of the corporation. Therefore, an individual could be considered a worksite employee, even though he or she is not an employee for federal income tax purposes.

29. In *Centel Communications Co. v. Comm'r*, 920 F.2d 1335 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit addressed the issue of whether a non-employee shareholder can perform a service for a corporation by providing a guarantee. It concluded that, at least for purposes of § 83 of the I.R.C. of 1986, as amended, it did not. It concluded that shareholders who were guaranteeing an entity's obligation were protecting their investment in the entity, rather than performing services for an entity. To the same effect, see *Oregon Metallurgical Corp. v. United States*, 12 Cl. Ct. 447, *vacated on other grounds*, No. 463-85T, 1987 U.S. Cl. Ct. 241 (Sept. 23, 1987), holding that a stock option issued by a corporation to its majority shareholders as consideration for the shareholder guarantee of a loan is a capital expenditure and therefore not deductible under I.R.C. § 83. *See also* TAM 2000043013 (holding that warrants transferred by a corporation to a banking institution in connection with the extension of credit were intended to compensate the bank for making the loan, rather than the performance of a service); TAM 9737001 (holding that stock and options transferred in exchange for cable network access were not transferred in connection with the performance of services). It is true that there are cases that arguably stand for the proposition that employees can provide services by offering guarantees. See, e.g., *Owensby & Kritikos, Inc. v. Comm'r*, 819 F.2d 1315 (5th Cir. 1987); *B.B. Rider Corp. v. Comm'r,* 725 F.2d 945 (3rd Cir .1984); *Shortmeyer v. Comm'r*, 40 T.C.M. (CCH) 589 (1980); *Ledford Constr. Co. v. Comm'r,* 36 T.C.M. (CCH) 858 (1977); and *Allison Corp. v. Comm'r*, 36 T.C.M. 689 (1977), although none of them expressly addresses the issue of whether providing a guarantee by an employee in and of itself constitutes the performance of a service. The issue rarely arises, because an individual who is designated as an employee is invariably providing some service to an employer.

30. Act § 922(1)(a).

31. Act § 922(1)(a)(i).

32. Act § 922(1)(a)(ii). The Act also requires every PEO to submit to the Department of Labor, within 60 days after the end of each quarter, a statement by an independent CPA that all applicable federal and state payroll taxes have been paid on a timely basis for the quarter.

33. Act § 922(1)(a)(iii).

34. Act § 922(1)(b).

35. *Id*.

36. Act § 922(3)(a)–(c).

37. Act § 922(2).

38. David Fuller, *Payroll Models for PEOs on the Move*, 6 PEO Insider 12 (Oct. 2002).

39. Act § 923.

40. Act § 922(7).

41. Act § 922(8).

"First order of business as the 'compromise' managing partner: I want my bust in the entrance hall."

42. Act § 917.

43. Act § 917(2).

44. Act § 917(2)(a).

45. Act § 917(2)(b).

46. Act § 922(6).

47. Of course, the determination that a PEO is an employer for state law purposes has no bearing on the issue of whether it is an employer within the meaning of § 3(5) of ERISA (codified at 29 U.S.C. §1002(5)).

48. While the Act does not define welfare benefit plan, it would be reasonable to interpret the Act in a manner consistent with § 3(1) of ERISA (codified at 29 U.S.C. § 1002(1)).

49. Act § 922(5). If an arrangement is a MEWA under § 3(40) of ERISA (codified at 29 U.S.C. § 1002(40)), the degree of permissible state regulation under ERISA depends upon whether the arrangement is fully insured or not. To the extent an arrangement is fully insured, the laws of any state which regulate insurance may apply to the arrangement, to the extent such law provides standards, requiring the maintenance of contributions, which any such plan or any trust maintained under the plan must meet in order to be considered under such law eligible to pay benefits when due as well as provisions enforcing such standards. ERISA § 514(b)(6)(A) (codified at 29 U.S.C. § 1144). In contrast, with respect to any other MEWA, any law of any state which regulates insurance may apply to the extent not inconsistent with Title I of ERISA. ERISA § 514(b)(6)(B). This limitation is not a significant one. For example, a state law requiring a MEWA to make imprudent investments would be inconsistent with ERISA's funding responsibility provisions and would therefore be preempted. Similarly, a state law that adversely affected a participant's right to receive plan documents would be inconsistent with ERISA's reporting and disclosure requirement. On the other hand, a state law would not be deemed to be inconsistent with ERISA if it required ERISA-covered MEWA to meet more stringent standards of conduct, such as providing more or greater protection to plan participants. ERISA Opinion letter 90-18A; *Fuller v. Norton*, 86 F.3d 1016 (10th Cir. 1996). In a series of advisory options, (92-04A, 92-05A, 92-07A, 93-29A, 91-17A, 91-47A, 95-22A) the U.S. Department of Labor (DOL) has taken the position that a welfare benefit plan maintained by an employee leasing organization is a MEWA for purposes of ERISA § 3(40) *available at* <www.erisaadvisoryopinions.com>. While these opinions were issued in an earlier stage of the evolving PEO industry, there is no indication that the DOL has modified its position in this area. See, for example, its refusal to exempt PEOs from the M-1 filing requirements for MEWAs.

50. Rev. Proc. 2002-21, 2002-19 I.R.B. 911, amplified by Rev. Proc. 2003-86, 2003-50 I.R.B. 1.

51. The effects of plan disqualification are the taxability of trust income, possible loss of tax deduction, and an inclusion in income by plan participants to the extent their interests are vested.

52. I.R.C. § 401(a) requires as a condition of tax qualification that a plan be maintained for the exclusive benefit of employees.

53. I.R.C. § 413(c).

54. Act § 919(1).

55. *Id*.

56. Act § 921(1).

57. Act § 921(2).

58. *Id*.

59. Act § 919(3).

60. Act § 920(1)(a).

61. Act § 920(1)(b).

62. Act § 919(6).

63. Act § 919(4).

64. Act § 919(5).

65. If solicitation is not limited to direct solicitation, arguably few PEOs, and none with a Web site, would be able to take advantage of this exception.

66. The regulations should specify the applicable measurement period, i.e., on any one day of the year or over the course of a year.

67. Act § 919(6).

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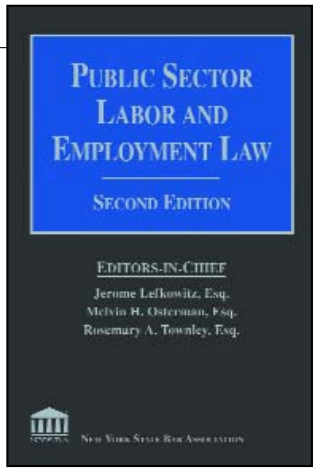

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BY DAVID P. MIRANDA

David P. Miranda <dpm@hrfmlaw.com> is a partner with the Albany law firm of Heslin Rothenberg Farley & Mesiti P.C., which focuses exclusively on intellectual property law and related litigation. He graduated from State University of New York at Buffalo and earned his law degree from Albany Law School. Recently, he served as editor in chief of the 2005 NYSBA *Internet Guide for New York Lawyers*, Second Edition.

Insurance Coverage for Intellectual Property Litigation

Litigation over intellectual property rights has increased in recent years, both in the number of lawsuits and the cost of conducting them. This is due in part to the commercial value of various forms of intellectual property, such as patents, copyrights, trademarks, and trade secrets. Federal Reserve Board Chairman Alan Greenspan recently noted that corporate valuation has shifted from physical property to intellectual property, and thus issues related to the protection of intellectual property have become more significant.

Although often more valuable than personal property, intellectual property can be more difficult to protect against theft and misuse. Lawsuits involving intellectual property rights often cost hundreds of thousands of dollars to prosecute and defend, due in part to the complexity of the law, the technical aspects of the underlying rights, and the value of intellectual property rights to the financial health of a business.

Some defendants in an intellectual property lawsuit will turn to their insurance carriers in an attempt to obtain a defense and possible indemnification of claims. Many comprehensive general liability (CGL) policies specifically exclude coverage of violations of certain intellectual property rights. However, courts have found that insurance coverage may be imposed under certain circumstances. For example, there is a developing area of case law arising out of claims that "advertising injury" provisions provide coverage for intellectual property lawsuits such as trademark infringement, trade dress infringement, trade secret misappropriation, and copyright infringement.

Trademark Infringement Coverage

Some trademark infringement claims fall within the advertising injury provisions of a CGL policy. For example, a CGL policy was implicated where a defendant was sued for trademark infringement of a slogan in its advertising.[1] The insured's use of a phrase potentially fell within the "infringement of slogan" advertising injury coverage in the CGL policy, and thus the insurer had a duty to defend the policy holder. In a case arising out of the Southern District of New York, the court also broadly interpreted the phrase "infringement of slogan" and the policy, requiring the insurer to provide a defense in a trademark infringement suit even though the policy provided an exclusion of coverage for trademark infringement.[2] The court found there was a reasonable possibility that the infringed mark would qualify as a slogan and fall within the language of the policy.

Trade Secret Misappropriation

The courts have been inconsistent in determining whether trade secret misappropriation claims trigger an insurance carrier's obligation to provide a defense under "advertising injury" provisions. In California, a beauty salon owner was sued for trade secret misappropriation by a competitor who alleged that the defendant had hired two former employees and was using trade secret customer lists to solicit new customers.[3] The Supreme Court of California held that coverage under the CGL policy was not triggered because the activities of the insured and his employees did not meet the standard for advertising injury, which the court interpreted as requiring widespread promotional activities directed to the public at large. Thus, the carrier did not have a duty to defend.

However, a Wisconsin state court found that insurance coverage was implicated under advertising injury provisions of an insurance policy under similar factual circumstances.[4] In the Wisconsin case it was alleged that the insured hired a former employee of the plaintiff, who possessed allegedly

stolen information about the plaintiff's thermostatic mixing systems. The plaintiff alleged several causes of action, including trade secret infringement and unfair competition for use of the stolen information in a competitive product. The Wisconsin court found that the allegations of trade secret misappropriation fell within the definition of "advertising injury" and therefore the insurance company had an obligation to defend the insured under the advertising injury provisions.

Trade Dress Infringement

A recent decision by the Second Circuit Court of Appeals clarifies an insurance carrier's obligation to provide a defense regarding trade dress infringement claims pursuant to "personal and advertising injury liability endorsement" of a liability insurance policy.[5] The insurance carrier refused to provide a defense to its insured, Bigelow, against whom a competitor, Celestial Seasonings, had asserted claims for false advertising, unfair competition, and trade dress infringement arising out of the packaging and advertising of specialty teas. The Second Circuit held that the false advertising claim did not involve an advertising injury within the meaning of the policy. However, the trade dress infringement claims that alleged Bigelow had marketed herbal teas in packaging with trade dress confusingly similar to Celestial's did involve claims for advertising injury, to the extent that the insured had copied the competitor's packaging and displayed it in published advertisements.

Although Celestial's complaint against Bigelow included specific claims of false advertising, the court found that these claims did not trigger a duty to defend because they concerned alleged false claims about Bigelow's products. However, the court found that the term "copying" could be construed broadly enough to include a claim for trademark or trade dress infringement.

The Second Circuit applied an analysis set forth by the Third Circuit.[6] Where an advertising injury is alleged, the relevant causation issue with regard to insurance coverage is not whether the injury *could have* taken place without the advertising, but whether the advertising did in fact *contribute materially* to the injury.[7] If Bigelow's copied trade dress created consumer confusion, the ads could be found to have contributed to such confusion. Since the ads were attached as exhibits to the complaint, Bigelow was entitled to believe that the ads would be used to prove likelihood of consumer confusion under the trade dress infringement claim, thus implicating insurance coverage.

Copyright Infringement

In some instances, courts have held that a claim for copyright infringement could fall within the advertising injury provision of a CGL policy. In a Florida state court case the plaintiff sued for copyright infringement arising out of the display of unauthorized cigar-shaped lighters at a trade show.[8] The Florida court found that the conduct constituted public display of a copyrighted work within the meaning of the word "advertisement" and imposed a duty to defend on the insurer under the CGL policy.

Attorney Responsibility to Notify Client of Potential Coverage Issues

New York's Court of Appeals held that a New York law firm that was retained to defend a corporate client in a patent infringement lawsuit did not have a duty to advise the client that the client's general liability insurance policy might cover the cost of litigation under a novel legal theory that patent insurance coverage might be available under an advertising injury provision in the client's CGL policy.[9] Significant to the Court's decision was the fact that the law firm was retained to defend a corporate client in a patent infringement lawsuit, and was not hired to address insurance coverage issues.

Furthermore, at the time of the law firm's representation, neither New York nor the jurisdiction in which the case was venued recognized the duty of an insurer to defend patent infringement claims under a general liability policy's advertising injury clause. The Court implied that although the law firm could not be held liable for its actions in failing to advise its clients regarding the potential coverage in these circumstances, such an obligation could be imposed if the courts were to begin to routinely broadly construe general liability policies to cover patent infringement and related litigation. ■

Federal Reserve Board Chairman Alan Greenspan recently noted that corporate valuation has shifted from physical property to intellectual property.

1. *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546, 552 (6th Cir. 2003).
2. *Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 02 CV 675 (LLS), 2002 U.S. Dist LEXIS 13027 (S.D.N.Y. July 15, 2002).
3. *Hameid v. Nat'l Fire Ins.*, 31 Cal. 4th 16, 71 P.3d 761 (2003).
4. *Fireman's Fund Ins. Co. v. Bradley Corp.*, 261 Wis. 2d 4, 660 N.W.2d 666 (2003).
5. *R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242 (2d Cir. 2002).
6. *Id*. at 248.
7. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 750 n.8 (3d Cir. 1999).
8. *Bear Wolf, Inc. v. Hartford Ins. Co.*, 819 So. 2d 818 (Fla. Dist. Ct. App. 2002).
9. *Darby & Darby, P.C. v. VSI Int'l, Inc.*, 268 A.D.2d 270, 701 N.Y.S.2d 50 (1st Dep't), *aff'd*, 95 N.Y.2d 308, 716 N.Y.S.2d 378 (2000).

BY G. WARREN WHITAKER

Revocable Trusts: Fact and Fiction

The revocable trust is an estate planning tool whose use varies widely along geographic lines. In most of the United States the revocable trust is a standard planning device for the medium and large estate. In New York, for historic and self-perpetuating reasons, the revocable trust is less often used although it is legally valid and offers many advantages. In the United Kingdom and some offshore jurisdictions whose laws are based on the English common law, revocable trusts are viewed with suspicion as potentially invalid "sham" trusts.

Unlike the irrevocable trust, which is created primarily for tax and asset protection advantages, the revocable trust offers no such benefits. Assets that are transferred to the revocable trust are fully includable in the settlor's estate at death, the income generated by those assets is fully taxable to the settlor during his or her life, and the assets of the revocable trust are fully subject to claims of the settlor's creditors and (in New York, although not in Connecticut and some other states) to the spousal right of election on death of the settlor.

A revocable trust, therefore, should be regarded as an extension of the will, which also has some of the advantages of a power of attorney. Its purposes are to allow the trustees to manage the property of the settlor during periods of incapacity and after death without the intervention of a court-appointed guardian (in case of incapacity), an executor (to administer property upon death) or a testamentary trustee (to administer ongoing trusts after the settlor's death). However, since very few settlors will transfer to their revocable trust *all* assets that they currently own, much less all assets that they may acquire in the future, it is essential that each settlor also have a power of attorney allowing the agent to add any assets to the revocable trust as well as a "pourover will" leaving the settlor's probate estate at death to the revocable trust.

The following are some of the basic issues to keep in mind regarding revocable trusts:

Settlor: Each individual whose estate is being planned should create a separate revocable trust and pourover will. While a married couple residing in a community property state may create one joint settlors' trust, separate trusts are advisable in New York to clarify ownership of property and to ensure that the full unified credit is available at each spouse's death.

Trustee: Under New York law as amended several years ago, the settlor can be sole trustee of his or her revocable trust.[1] However, it may be advisable to have a co-trustee in place from the beginning, particularly if the co-trustee is a family member of the settlor. This will ensure that during incapacity and at death there will be a second signatory on all financial accounts in the trust who is able to make decisions (payment of expenses, changing investments, etc.) without the delay of having a co-trustee accept appointment and give notice and signatures to the institutions that hold the assets. In any event, there should ideally be a succession of trustees designated both during the settlor's life and after the settlor's death.

Incapacity: Upon the incapacity of the settlor, the revocable trust should give the trustees the power to pay amounts to or for the benefit of the settlor, including payment of all expenses, and also to or for the benefit of the settlor's spouse. It may be advisable to have a definition of incapacity to indicate when the settlor (or any other trustee) will cease to act. The settlor should retain a testamentary general power of appointment to avoid the argument that a taxable gift took place at the

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moment of incapacity when the power to revoke could no longer be exercised.

Estate Administration: On the death of the settlor, assets that are held in the revocable trust will not be subject to probate. "Probate" is a word that instills fear in many people, conjuring up Dickensian images of estates trapped within the court system for decades while fees mount astronomically. In reality, the great majority of probates sail through the court system with relative ease. Nevertheless, there is inevitably some delay after death while the lawyer gathers all necessary information from the family, prepares a probate petition, and files it with the court along with other required documents. An estimate of the gross estate is required, the distributees must be identified and sign waivers or be given notice. An affidavit from a third party may be required to confirm the family tree, and affidavits regarding attorney/executors and beneficiaries of legacies may be needed. Finally, once all papers are submitted and confirmed to be in order, the family must wait for issuance of the probate decree, or at least for issuance of preliminary letters testamentary.

This delay can be avoided by transferring at least the assets for which immediate access is sought – usually the securities and large bank accounts – into the name of the revocable trust during the settlor's lifetime. In this way the successor trustees can immediately make decisions regarding changes in investment while they wait for the probate process to occur.

It is generally less important to have assets such as New York real property in the revocable trust, since real estate will not normally be sold for several months after the settlor's death, by which time probate will have been achieved in most cases. However, if delay in probate is anticipated, placing real property in the revocable trust may be advisable. In addition, ancillary probate in other states can be avoided if real property, owned by the settlor, that is located in those states is placed directly into the name of the revocable trust.

Avoiding Probate: Probate can only be avoided if every asset of the decedent is placed into the revocable trust, or into some other testamentary substitute such as a joint account that has a named beneficiary (for insurance and retirement benefits) or a Totten trust account. In most cases this is not necessary because, as indicated above, probate will be achieved in a matter of weeks. However, if the decedent has no close relatives, there may be a delay in probate since under New York law the closest relatives must be identified, if necessary through a genealogical tracing service, in order to serve them with a citation.[2] If the lawyer is aware that the client has no close relatives, does not know who they are, or does not wish them to get notice of probate, then placing all of the settlor's assets in a revocable trust may be advisable.

Privacy: A revocable trust is not typically filed with the surrogate's court and does not become a matter of public record, unlike the will – which can be obtained by the inquisitive. If a pourover will is probated, the court will ask to examine the revocable trust agreement and will require that notice of probate be given to all trust beneficiaries, but the revocable trust will not automatically be placed on file and become a matter of record.

Will Contest: Revocable trusts can be challenged by contestants just as wills offered for probate can be contested. However, the mechanism is different and often works to the advantage of the trustees of the revocable trust, who will have control of the trust assets during the contest. In addition they are not required to send a citation to the distributees, as they would be if they were probating a will. (Of course, potential contestants may be aware of the death of the settlor and the existence of the trust whether or not they are given notice.)

Trust Administration: Trustees appointed under a New York will must obtain letters of trusteeship from the surrogate's court. They must similarly obtain consent of the court to resign as trustees, to appoint successor or co-trustees, to make administrative amendments to the trust, to move the situs of the trust to another jurisdiction, or for almost any other extraordinary action they wish to take.

On the other hand, trustees under trusts that are created under the revocable trust agreement and continue on after the settlor's death are not required to obtain court approval for any of these acts. They are subject only to the requirements that are imposed upon them by the trust agreement itself.

"Probate" is a word that instills fear in many people, conjuring up Dickensian images of estates trapped within the court system.

Commissions: Trustees of revocable trusts are entitled to commissions at the same sliding rate as other New York trustees.[3] However, as indicated above, the settlor can be the sole trustee of his or her trust, and the settlor's spouse can be co-trustee or successor trustee upon the settlor's incapacity. If a client wants an institution or an unrelated person to manage his or her affairs, the client will have to pay for this service whether he or she uses a revocable trust or some other vehicle; the revocable trust does not create additional costs in such a situation.

On death, assets that are held in a revocable trust are not subject to executor's commissions. This can be a

significant benefit for the client in some instances. However, many clients name a spouse or child as executor so that there would be no executor's commission payable outside the family in any event. In addition, an institution or a lawyer who is asked to act as trustee of a revocable trust will expect to be paid a fee for handling the various administrative tasks that need to be performed.

In short, while the question of commissions must be looked at closely in each case, there may be some savings for the client by the use of a revocable trust, and there will almost never be additional costs generated over those of a probated estate.

Avoidance of Legal Fees: Let us not kid ourselves: one of the major reasons many people use revocable trusts is to avoid having anything to do with lawyers. They are persuaded that by signing a beautifully bound, mass-produced "living trust" they will insure that their assets are magically transported to their spouse and children free of delay, taxes, probate costs and, above all, legal fees.

Those of us with experience in the field know better. The surrogates of the various counties tell us that they regularly are asked to rule on incompetently drafted revocable trust agreements, churned out by non-lawyers or plucked off the Internet with no attention to legal niceties, tax provisions, or the particular situation of the decedent. The estates of people who have signed these documents usually experience far greater delays, legal fees, and loss of estate planning opportunities than properly planned and probated estates.

In short, a revocable trust is *not* a means of circumventing the legal system. People with more than the most modest assets cannot expect to have their estates planned or administered without a lawyer, any more than they can undergo neurosurgery without a doctor. However, lawyers for their part should be aware that they can make the legal system more streamlined and economical and less frustrating for their clients through the use of revocable trusts. ■

1. N.Y. Estates, Powers & Trusts Law 7-1.1.
2. N.Y. Surrogate's Court Procedure Act 1403 (SCPA).
3. SCPA 2309.

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It seems that all that my clients want to hear is good news. Would I be doing them a disservice by telling them what they want to hear? And am I doing my own practice a disservice by telling them the truth?

Sincerely,
Raw Meat Wannabe

Dear Raw Meat Wannabe:

Attorney professionalism comprises several equally important parts: service to clients; service to the professional legal community; integrity and honesty; a love of and interest in the law; and the aspiration to fulfill the highest goals of the legal profession. Meeting these standards in the context of client relations requires a daunting array of skills. Certainly, you must communicate your zealous advocacy on behalf of the client and your undying faith in the client's cause, and win the client's trust and confidence. In so doing, however, you also must honestly and accurately convey your objective assessment of the client's legal problem, and, relatedly, effectively manage the client's expectations so that the client will not anticipate an unreasonable result.

To accomplish the foregoing, you first must determine whether, under the applicable facts and law, your client has a colorable, non-frivolous claim within the meaning of DR 7-102(2). Once you determine that the claim or defense is not frivolous, you are obliged to tell the client the truth regarding the likelihood of success, even at the risk of losing a lucrative piece of business. The Ethical Considerations to the Lawyer's Code of Professional Responsibility encourage a lawyer to "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations." EC 7-8. A lawyer should initiate the decision-making process if the client does not do so, and should encourage the client to consider moral as well as legal issues. *See* EC 7-8. A lawyer furthers the interests of the client "by giving a professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the practical effect of such decision." EC 7-5.

Telling the truth does not seem to be your problem. The manner in which you communicate it may be. The hardest part of client relations is convincing the client that you are fully dedicated to her cause and that you will leave no stone unturned in defending or prosecuting her claim, while simultaneously providing detached, neutral, and objective advice.

You should listen carefully and attentively to the client's story when it is initially presented. Although it may seem obvious, an effort should be made to make the client feel comfortable. Lucille Fontana, a member of the NYSBA Attorney Professionalism Committee, and a past recipient of its Attorney Professionalism Award, has suggested sitting next to the client at your first meeting, so that you are not physically separated by a desk or conference room table. In this way you subliminally convey the message that you are on the client's side.

When the dreaded moment arrives and you must give your evaluation of the client's case (and here we assume that the news is not all good), try to deliver the message with as much tact and sensitivity as possible. Express your view objectively, and avoid purely negative judgments. For example, you might say, "There is a possibility that the jury could be sympathetic to the plaintiff because she is an elderly widow," but avoid, "and you can appear arrogant." If, in your professional judgment, there is a good chance that the client will be found liable (and that a settlement offer should be considered), a reference to another similar case in which that result ensued would be preferable to baldly stating your conclusion that the client will likely lose.

In addition, and as noted above, you must be careful about managing client expectations. In "Avoiding Legal Malpractice Claims," 15 Utah B.J. 8 (2002), Matthew L. Lalli noted that clients almost always believe that their position is correct and that their adver-

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

sary acted wrongly. These clients therefore conclude that if you are a good attorney you should prevail; and, in addition, they may have been convinced by television and movies that the best lawyer always wins. Such a client would be inclined to blame a bad result on the lawyer, rather than on the facts of the case – which may and frequently do include the client's own misconduct, negligence, breach of contract or knuckleheaded e-mail. A careful and tactful explanation of the vagaries of the justice system and the unpredictability of the results of litigation will go a long way towards managing client expectations.

Thus, while "Raw Meat Ralph" may be reeling in all the big fish now, there may be a price to pay when he fails to deliver on unjustified promises of success. And, in the long run, clients whose expectations have been properly managed may be the happiest, and the more likely to come to you again with new business.

The Forum, by
Barry R. Temkin
Fiedelman Garfinkel & Lesman
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a general practitioner with a potential win-win business deal with a long-time client. This person recently inherited seven co-operative apartments in a charming brownstone on the tony and expensive west side of Manhattan. She is both the sole beneficiary and executor, and hired me to settle the estate.

The estate has no liquid assets. There are sizeable estate taxes to be paid, both federal and state. After obtaining an appraisal of the apartments, my client listed two apartments for sale to raise funds to pay the estate taxes and for other administration expenses. One of the listed apartments quickly sold (I handled the closing) for about $20,000 over the appraised value.

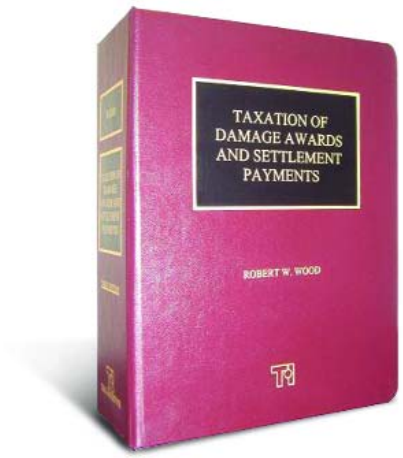
There have been no realistic offers made on the second apartment, and the listing agreement with the broker has expired. As it happens, I have a daughter in graduate school a few blocks away from the building and would like to purchase the apartment for her. With 90% financing based on the appraised value, I should be able to swing the monthly mortgage payments and maintenance until my daughter gets a job (I hope) after she graduates. With the estate tax due date looming and the saving of brokerage commissions, I think it would be a great deal for my client as well.

I raised the idea with my client and she was delighted. She said that although she may be able to get a higher price on the open market, she so appreciated the work I have done for her over the years that I should consider any potential loss of profit to be a gift. She was also grateful that we wouldn't have to deal with another attorney on the contract of sale and closing.

I am unsure as to whether this transaction is permissible, professionally and ethically. If it is permissible, what precautions should I take, if any, to avoid even the appearance of impropriety?

Sincerely,
Wondering on the West Side

BY JONATHAN R. FLORA



Taxation of Damage Awards and Settlement Payments

Taxation of Damage Awards and Settlement Payments (3d ed. 2005), by Robert W. Wood, published by the Tax Institute.

Tax practitioners who spend their days swimming through robustly regulated areas such as, say, the consolidated return rules, may find themselves fish out of water when tax planning the settlement of a lawsuit. Congress and Treasury have issued relatively scant guidance in this area, and courts have not always stepped up with uniform rules.

It is this dearth of guidance that makes the recent publication of the third edition of *Taxation of Damage Awards and Settlement Payments*, by Robert W. Wood, an essential tool for practitioners. Wood, who is probably the most prolific author in this area, has produced in the third edition a treatise that ties together and unifies a rich and diverse, but often conflicting and unsettled, area of tax law.

Scope

Wood's focus is the federal income tax consequences of settlement awards and judgments. Plaintiffs and unfortunately sometimes even their own counsel often react in disbelief to learn on the eve of settlement that receipt of a recovery may be includible in gross income. As Wood notes, "Unlike the well-planned business transaction, . . . tax planning is oftentimes overlooked in view of seemingly more pressing aspects of the case."

Wood's treatise is a toolkit for tax planning in this area, providing valuable resources from the time a complaint is prepared to the reporting of a final recovery. It provides a comprehensive discussion of all relevant substantive areas, with chapters on personal injuries, employment recoveries, business injuries, substantiation, payor tax treatment, structured settlements, taxation of legal fees, divorce and will contests, and antitrust actions.

Origin of the Claim

The book leads off appropriately with a discussion of the origin of the claim doctrine, which permeates taxation of settlements and damages both for a plaintiff and a defendant. The origin of the claim doctrine says that litigation settlements and judgments are taxed according to the nature of the underlying claim made in the litigation. This tax doctrine asks, in lieu of what were the payments received? Anyone who has worked for any meaningful amount of time with this doctrine, especially in a multiple-claim action, knows the question rarely yields a uniform answer.

Wood collects decisions which have linked recoveries to various items, demonstrating the divergent tax consequences that result. For example, a recovery compensating for injuries to a capital asset can result in recovery of basis and favorable capital gain rates. On the other hand, a recovery linked to back pay is not only taxable as ordinary income but also subject to withholding, FICA and FUTA. Taxpayers have also linked claims to involuntary conversions, qualifying for nonrecognition under Internal Revenue Code § 1033 ("Code"), or to physical personal injuries, which are excludable from gross income under § 104(a)(2).

Section 104(a)(2), one of a handful of Code provisions specifically directed to this area, excludes from gross income recoveries arising from certain qualifying injuries. The taxation of personal injury and employment discrimination awards changed dramatically in 1996 when Congress amended Code § 104(a)(2) to require a *physical* injury or sickness, as opposed to merely a personal one. Wood discusses the lack of guidance as to the meaning of "physical," and notes that Code § 104(a)(2) no longer applies to exclude from gross income damages received in the context of non-physical injuries, such as employment discrimination or injury to reputation.

Documenting Settlements

Wood is a strong advocate of allocating a settlement payment in the settlement documents. It is the taxpayer, of course, who must demonstrate what portion of a recovery is nontaxable or a capital item. He observes that "where a taxpayer goes to the trouble of specifying in a release the nature of the claims addressed and the tax treatment of that recovery, the taxpayer is far more likely to prevail."

Jonathan R. Flora is a tax partner at Lindquist & Vennum P.L.L.P., Minneapolis, Minnesota.

Indeed, tax planning for a litigant can never begin too early, since, as Wood explains, the complaint is the most important reference point in determining the taxation of a recovery. Nevertheless, Wood touts the settlement agreement as "vitally important." A failure to allocate in a settlement agreement will raise factual issues about the reason for the payment. His advice is straightforward: "Unless you are *sure* that a recovery is entirely excludable, always allocate – it is just that simple. At least then you have a fighting chance."

Wood also addresses the more mundane, although equally significant, issue of the proper reporting of settlement payments. He explains that one goal of a well-drafted settlement agreement is to "encourage and require that consistent tax treatment be applied by all parties."

Other Areas

The treatise covers a host of other areas, including the celebrated rift among the U.S. Circuit Courts of Appeal on the inclusion of attorneys' fees in the gross income of plaintiffs. For several years, a majority of Circuits required a contingency-fee plaintiff to report in gross income attorneys' fees. Wood describes how this tax treatment was recently altered in the American Jobs Creation Act of 2004[1] for claims of unlawful discrimination or specified claims against the government. (The Circuit split was even more recently addressed by the U.S. Supreme Court in *Commissioner v. Banks*,[2] a decision that post-dates the release of the third edition.)

Wood includes an entire chapter on structured settlements, addressing tax aspects of periodic payments both from the payee and payor standpoint. Similarly, there is a comprehensive analysis of the tax treatment of will contests, property settlements, alimony, spousal support and child support payments.

Practical Advice

One of the most rewarding aspects of the book is the assistance it provides to a tax practitioner. The book is littered with extensive and well-marked planning tips, cautions and examples. The chapter devoted to sample forms is an invaluable resource for practitioners in this area, containing numerous sample allocations, releases, settlements and assigns, along with relevant supporting authorities.

Wood's treatise is an excellent reference for both tax and non-tax practitioners who plan settlements or damage awards. Wood's contributions reflect his many years spent practicing and writing in this field. ■

1. P.L. 108-357.
2. 543 U.S. ____, 125 S. Ct. 826 (2005).

"Is it easier on your neck if I stand on the right when I'm shooting the breeze, or the left?"

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

MEMBERSHIP TOTALS

New Regular Members 1/1/05 - 6/27/05	**4,393**
New Law Student Members 1/1/05 - 6/27/05	**499**
Total Regular Members as of 6/27/05	**62,224**
Total Law Student Members as of 6/27/05	**2,897**
Total Membership as of 6/27/05	**65,121**

BY MARK H. ALCOTT

Commercial Litigation in New York State Courts

Commercial Litigation in New York State Courts (2d ed., 2005), Robert L. Haig, Editor-in-Chief, West's New York Practice Series

The new Second Edition of *Commercial Litigation in New York State Courts*, like its predecessor, is an invaluable resource for litigators, in-house counsel, and others with commercial matters in New York State courts.

In this edition, Editor-in-Chief Robert L. Haig continues his winning formula of integrating New York civil procedure with wide-ranging coverage of state substantive law. The five-volume set is a comprehensive overview of commercial litigation from start to finish, including chapters on jurisdiction, pleading, remedies, motions, trial, appeal, and settlement. It also includes separate substantive chapters on products liability, commercial defamation, sale of goods, securities litigation and other topics of particular interest to commercial litigators.

The late Arthur Liman, my eminent partner at Paul, Weiss, wrote of the first edition in 1996: "[W]hat distinguishes this treatise from other handbooks is the authors' insistence on a discussion of the practical aspects of each subject." Haig continues this methodology in the Second Edition. For example, while the chapter titled "The Complaint" discusses the basic law of pleadings and includes a sample, comprehensive complaint, it also provides a checklist for drafting, instructs as to pleading multiple causes of action, and blends in advice about conducting a litigation risk analysis.

Once again, Haig has corralled the writing talents of leading commercial litigators – 121 of them in all – many of them making an encore appearance from the first edition. The new edition adds 21 new chapters and 2,700 additional pages, substantially expanding and updating the 1995 original.

The establishment of the Commercial Division of the New York State Supreme Court is probably the single most notable development in New York commercial litigation since the publication of the first edition. This development was initiated by the Commercial and Federal Litigation Section of our Association[1] and implemented through the efforts of Chief Judge Kaye's Commercial Courts Task Force.[2] The Second Edition incorporates significant new material for judges, practitioners and litigants in the Commercial Division: an entire chapter dedicated to "Practice Before the Commercial Division," and an appendix that compiles in one place all Commercial Division rules, guidelines, forms, and other crucial documents.

Readers might be wondering what else could possibly be included in 21 new chapters that was not part of the already-comprehensive first edition. There is an all-new chapter titled "Discovery of Electronic Records," outlining New York developments in this fast-moving area of the law. New full-length chapters are also devoted to rapidly developing areas of commercial law, including Professional Liability, Franchising, Partnerships, and Government Entity Litigation. Each chapter is written – and if past is precedent, will be frequently updated – by leading lawyers in these fields. The authors include judges from all levels of the New York state court system, general counsel from major corporations, law professors, and leading commercial litigation practitioners from major law firms.

Haig's substantial accomplishment – other than persuading such luminaries to devote rare moments of spare time to this treatise – is to assemble, edit, unify, and comprehensively present this material in a single, invaluable resource. He is well placed to do so. A litigation partner at Kelley, Drye & Warren LLP with 35 years' experience, Haig founded, and served as the first chair of, the Association's Commercial and Federal Litigation Section.

Haig casts this work as an "idea book filled with nuggets of wisdom and perspective that could only be gained by years of experience in handling cases from the most simple to the most complex." It is that, but it is also much more: it is a comprehensive manual – albeit not a portable one – that should be in the library of every lawyer who litigates commercial cases in New York. ■

1. Commercial Courts Task Force of the Commercial and Federal Litigation Section, *A Commercial Court for New York*, N.Y. Litigator, N.Y. State Bar Ass'n, May 1995, at 13.

2. Mr. Haig and the Honorable E. Leo Milonas served as Co-Chairs of the Task Force.

MARK H. ALCOTT, President-Elect of the New York State Bar Association, is a senior partner in the Litigation Department at Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York City.

LANGUAGE TIPS

GERTRUDE BLOCK

Question: Has the word *acronym* become synonymous with *abbreviation*? On a recent National Public Radio program, "All Things Considered," the reporter listed several "acronyms," some of which were really just abbreviations.

Answer: The reporter was wrong. An acronym is a special kind of abbreviation, a word formed by the first letters of each word of a title. NASA is an acronym; SEC is an abbreviation. An old "Beetle Bailey" comic strip makes the point. General Halftrack suggests abbreviating, "Army Security System." "Won't do," says his secretary, "bad acronym."

Question: An official of the Privacy Information Center in Washington, D.C., said the following in an interview on public radio. Is his statement grammatical?

> The privacy problem is another area of the law that there's going to be a lot of attention paid in the future.

Answer: No, but his error, the omitted preposition, is widespread even among well-educated persons. In the sentence above, the preposition that should accompany the verb is omitted. The official intended to say that intention should be paid *to* the area of law, so he should have said:

> The privacy problem is another area of the law that there's going to be a lot of attention paid **to** in the future.

Prepositions are an endangered species these days. Their absence indicates an ignorance of English syntax. The following statements appeared recently in the press:

> Very little is known about what direction the North Korean president wants to take his country.
>
> Numerous projects for Chicago and surrounding areas will be presented at meetings for the public to comment.
>
> This city is a special place to live.

Changing the syntax immediately reveals what is wrong with these sentences:

> . . . The North Korean president wants to take his country a direction . . . (missing in)
>
> . . . The public will comment numerous projects. . . . (missing on)
>
> . . . to live a city . . . (missing in)

Why were the prepositions dropped? A good guess is that when the persons who wrote those sentences attended school, they were told by their teachers that they should not place prepositions at the end of sentences. In order to avoid doing so, they would have to draft the sentences:

> Very little is known about in which direction the North Korean president wants to take his country.
>
> Numerous projects for Chicago and surroundings areas, on which the public can comment, will be presented at meetings.
>
> This city is a special place in which to live.

Unable to decide where to put the preposition and unwilling to flout the "rule," people just omit it. But there is no rule against ending sentences with prepositions. It existed only in the mind of 18th century clergyman Robert Lowth, who, in 1762, wrote a prescriptive grammar that was published in 22 editions and had an enormous influence on the public. And Lowth never stated preposition-placement as a rule. He only wrote that in "elevated" writing, it was better to insert prepositions into sentences than to put them at the end. But English teachers stated Lowth's preference as a rule and it has confounded generations of students since. So ignore the "rule" and place your prepositions where you like; just don't omit them.

(In modern usage, the opposite tendency is to add prepositions and adverbs unnecessarily, but that subject will await future discussion. The subject is discussed in my book *Legal Writing Advice: Questions and Answers*.)

Question: My secretary maintains that *at risk* means the same thing as *risky*. She used *risky* in the sentence: "Teens are less risky today than they were in the past." Is that sentence correct?

Answer: No. She probably means "at less risk" if she means that the teens are safer (at less risk of harm to themselves) now. "Risky" means "hazardous, involving possible danger." It usually refers to behavior or objects, not to persons. "At risk" means "possibly subject to harm": "It is risky to climb rocks; one is at risk of falling." The difference is slight but important.

Potpourri

Those readers who remember their Latin courses will enjoy this statement seen in the local newspaper: "Swiss guards are checked to ensure that no electronic devices enter the *sanctum sanitorium*." If you've forgotten your Latin, "*sanctum sanctorum*" means "Holy of holies" or "an inviolable, private place." Sanitoriums (or sanitariums) have nothing to do with it. A lesson for us all: Don't flaunt your knowledge unless you're sure of it. ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her new book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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court officer made an observation in court after she observed the exhibit."

Obsolescent, obsolete. Something "obsolescent" is becoming "obsolete."

Opaque, translucent, transparent. Light cannot shine through something "opaque," and "opaque" people are obtuse. Light can shine through something "translucent," but images cannot be perceived. Images can be seen through something "transparent," and "transparent" people are frank and open.

Oral, verbal. "Oral" refers to spoken communication. "Verbal" refers to any communication using words, as opposed to nonverbal communication.

Oriented, orientated. "Oriented" is weak. Recast the sentence. "Orientated" is an unaccepted back-formation to some and an illiteracy to others.

Overlook, oversee. To "overlook" is not to notice. To "oversee" is to supervise. *Correct*: "The overseer overlooked something."

Paltry, petty, trivial. Something "paltry" is worthlessly small, especially compared to something else. "Petty" is used pejoratively. A "petty" thing or act is an unimportant thing or act. A "petty" person is narrow-minded. Something "trivial" is insignificant. *Correct*: "After defendant made a paltry contribution of $1.00 toward his $10.00 fine, a petty administrative-law judge resentenced him to pay $15.00 for committing a trivial offense on the subway."

Parameter, perimeter. "Parameter" is a mathematical term that denotes a quantity that varies depending on conditions. Only colloquially does it mean "perimeter," which means "boundary," "extent," or "limit."

Partly, partially. Unless idiom suggests otherwise, use "partly" to mean "in part." "Partially," like most adjectives that become adverbs (words that end in "ly"), are so prettified they look uglily. Especially avoid "partially" when that word is ambiguous: "The Appellate Division, Third Department, ruled partially for the appellant" might mean that the court was not impartial.

Pending, impending. Something "pending" has not yet come or is not yet settled. Something "impending" adds a threat.

Penniless, penurious. To be "penniless" is to be poverty stricken. To be "penurious" is to be stingy.

Penultimate. "Penultimate" means "next to last." It does not mean "ultimate" or "paramount."

People, persons, party, individual. Use "people" for individuals collectively. Use "persons" for a small and specific number of individuals. Does this compute? "Three people were in court, but two left. One people remained." No. One "person" remained. Therefore, "three *persons* were in court." And do you party? It is technically incorrect to refer to one litigant or person as a "party" — a party of one makes for a boring party — although this usage abounds in legal writing. "The party of the first part" is a legalism, and a stylistically incorrect one at that. Use "individual" to contrast one person with many. Do not use "individual" as a synonym for "person." And do not call someone "certain" or "one." *Incorrect*: "One John Doe." *Incorrect*: "A certain John Doe."

Percent, percentage. Use percent with a number. *Correct*: "Exactly 99.999 percent of New York's court attorneys are good at legal research." Use "percentage" when a number is omitted. *Correct*: "What percentage of the judge's opinions are decided within 90 days?" Neither "percent" nor "percentage" is spelled with two words in modern American English. *Incorrect:* "Per cent."

Peruse. To "peruse" means "to read carefully," not "to glance at."

Place, put. To "place" is to "put" carefully.

Pleaded, pled. The past participle of "plead" is "pleaded." "Pled" is disfavored.

Possible, feasible, practical, impractical, practicable, impracticable. What is "possible" can and likely will happen. What is "feasible" or "practicable" is desirable and efficient and can be done easily. A person or thing can be "practical," as opposed to "theoretical," but only a thing can be "practicable." "Practical" means "useful" or "sensible." It refers to an actuality. "Feasible" and "practicable" refer to potential. *Correct*: "It is possible that you will find the Manual for Small Claims Arbitrators a practical guide. Reading it in time for your next court date is practicable." *Correct*: "What is practicable is not always practical."

Precedence, precedents. "Precedents" are court decisions, whether binding, persuasive, distinguishable, on all fours, reversed, overturned, right, or wrong. Something given "precedence" has a priority in time or rank.

Precipitate, precipitant, precipitous. To "precipitate" is to cause something rashly. "Precipitant" and its adverb "precipitantly" stress the speed of "precipitate." "Precipitous" refers to physical steepness.

Prescribe, proscribe. To "proscribe" is to prohibit. To "prescribe" is to require.

Pretense, pretext. A "pretense" is a pretending. A "pretext" is an excuse for doing or not doing something. *Correct*: "The police officer had a pretense to expertise when he testified that he knew what a pretextual arrest is."

Principal, principle. As a noun, a "principal" is money or someone who either empowers an agent to agree to a contract or to commit a crime or who is first in rank. As an adjective, "principal" means "main." A "principle" is a basic truth, a fundamental law, a doctrine. *Incorrect*: "She is an effective principle court attorney." No, although she might be an effective principal court attorney if she has learned her legal principles and is ethically principled. *Mnemonic*: The school princip*al* is your pal, and a princip*le*, which means "a rule," ends in "le," like "ru*le*."

Prone, prostrate, supine. Being "prone" is lying face down. Being "prostrate" is lying face down submissively or fearfully. (A "prostate" is a male body part; a man cannot have prostrate cancer, although the illness may cause him to become prostrate.) Being "supine" is lying face up.

Prophecy, prophesy. A "prophecy" is a prediction. To "prophesy" is to make a prediction. *Correct*: "Judge X tried to prophesy a prophecy: 'You will not be a prophet in your own country.'"

Proposal, proposition. A "proposal" is an offer or plan that can be accepted or rejected quickly. A "proposition" requires study.

Proved, proven. "Proven" is disfavored in formal writing except to modify nouns directly. Thus, "Defendant was proved guilty," not "Defendant was proven guilty." *Correct*: "The assistant district attorney proved the guilt of defendant, a proven liar."

Punctilious, punctual. "Punctilious" means "meticulous." "Punctual" means "on time."

Purposefully, purposely. To do something "purposefully" is to do it single-mindedly. To do something "purposely" is to do it intentionally.

Rare, scarce. Things "rare" are forever in short supply. Things "scarce" do not have great value but are unavailable for the moment. Diamonds are rare; food might be scarce.

Reason, rationalize. To "reason" is to use analytical skills. To "rationalize" is to find an excuse for something.

Recollect, remember. To "recollect" — re-collect — suggests searching the mind to remember. To "remember" suggests instant recall.

Recur, reoccur. Something that "recurs" happens repeatedly. Something that "reoccurs" is repeated once.

Regretful, regrettable, regrettably. A "regretful" person is full of regret. "Regrettable" refers to situations that cause regret. Judge X: "Regrettably, counsel's papers muddied the issues." *Becomes*: "The court regrets that counsel's papers muddied the issues."

Reluctant, reticent. To be "reluctant" is to be hesitant. It used to mean "obstinate." To be "reticent" is to prefer not to speak.

Restive, restless. "Restive" is resistant or impatient. "Restless" is uneasiness of mind.

Revolt, revolution. A "revolt" is an uprising. A "revolution" is a successful revolt. Not a revolting development: "The American Revolution began as a revolt."

To have "zeal" is to be eager. To have "zest" is to enjoy.

Rudimentary, vestigial. Something is "rudimentary" if it appears at the beginning of an evolutionary process. Something "vestigial" is a trace of what is left at the end of the evolutionary process.

Sanctimony, sanctity. "Sanctimony" is hypocritical holiness. "Sanctity" is holiness.

Scan, skim. To "scan" means "to scrutinize closely." To "skim" is not to "scan."

Science, technology. "Science" is the search for truth. "Technology" applies science.

Sectarian, secular. "Sectarian" means "pertaining to religious groups." "Secular" means "not religious," "worldly."

Seminal. "Seminal" means "pertaining to semen" or "original." In legal writing, a "seminal case" is the original case on the subject.

Sensuous, sensual. Something or someone "sensuous" appeals to any of the five senses. "Sensual" refers to things sexual.

Sometime, some time, someday, some day. "Sometime" refers to an indefinite or future time. "Some time" refers to an amount of time or, if the object of a preposition, at a particular time. The same distinction applies to "someday" and "some day."

Special, especial. "Special" means "specific or particular." "Especial," a word not much in current use, means "outstanding." *Correct*: "Especial people teach special education."

Stationary, stationery. Something "stationary" does not move. "Stationery" is writing paper and envelopes.

Stipulation. A "stipulation" is a formal agreement between litigants. Judicial opinions, statutes, and attorney's briefs do not "stipulate."

Strategy, tactics. A "strategy" is a plan. "Tactics" put the plan into effect.

Talk to, talk with. "Talk to" suggests advising or reprimanding. "Talk with" suggests a conversation between equals, with equal participation.

Tenant, tenet. A "tenant" leases premises. A "tenet" is a doctrine a group accepts as true. *Correct*: "A tenet of New York landlord-tenant law is that nonpayment proceedings differ from holdovers."

Thankfully. Judge X: "Thankfully, counsel's papers are excellent." *Becomes*: "The court is thankful that counsel's papers are excellent."

Tortuous, torturous. "Tortuous" means "twisting and turning" or "devious." "Torturous" means "pertaining to torture" or "painful."

Toward, towards? — the former. The latter is the British variant, and American spelling is always simpler and shorter than British spelling. The same applies to "afterward" and "afterwards," to "upward" and "upwards," and to "onward" and "onwards." *A tip*: Spell conventionally, but use the shorter variant when you have a choice. Thus, prefer "dissociate" to "disassociate."

Unknown, unidentified. When referring to persons known or unknown, only hermits are unknown. *Incorrect*: "No arrest was made. The assailant is unknown." *Correct*: "No arrest was made. The assailant was unidentified."

Us, we. The Founding Fathers' problem: Should they have written "We the people" or "Us the people"? Use "we" as a subject or a subject complement. Use "us" as an object. *Correct*: "We the people must form a more perfect union." *Correct*: "They called on us the people to form a more perfect union." We the people can therefore be grateful for what the Founding Fathers wrote for us in the preamble to the U.S. Constitution. And how about the toy store? The correct name should be *Toys*

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"R" We. It is "We are Toys," not "Us are Toys."

Valuable, valued, invaluable. Something "valuable" has intrinsic or monetary worth. It is "invaluable" if it is priceless. Something or someone "valued" is held in high regard or appraised. Both valuable and invaluable mean "having great value." Some valuable advice: Because valuable and invaluable are synonyms, not opposites, do not use "invaluable," which many believe means "not valuable." *Correct*: "The entire Official Law Reports series is both valued and valuable."

Venal, venial. Someone "venal" is corruptible. Someone or something "venial" is forgivable.

Where, when, if. "Where" denotes a place. "When" denotes a time. Do not use "where" or "when" to define something. Recast the sentence to use "if." Also do not write, "The seminal case is *Mollineaux, where* the court held . . . ." Write, "The seminal case is *Mollineaux, in which* the court held . . . ."

While, a while. "While" refers to a period of time. *Incorrect*: "He wrote the opinion during the time that [should be *while*] he was in court." "A while" refers to a short period of time. *Correct*: "I will write for a while." *Correct*: "I will write awhile."

Zeal, zest. To have "zeal" is to be eager. To have "zest" is to enjoy. *Correct*: "I have zeal about his zest for writing." ■

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BY GERALD LEBOVITS

Problem Words and Pairs in Legal Writing — Part V

Parts I through IV of this series appeared in previous issues of the *Journal*. The Legal Writer continues.

Judicial, judicious. "Judicial" pertains to the judiciary. To be "judicious" is to be wisely cautious.

Jurist. A "jurist" is someone well versed in the law. Not all judges are jurists, and not all jurists are judges.

Last, latest. "Last" means "final." "Latest" means "most recent."

Leave me alone, let me alone. "Leave me alone" means "leave me by myself." "Let me alone" means "do not disturb me."

Lectern, podium. Speakers put notes, and pound, on a "lectern." Speakers stand on a "podium." If you want a podium under your lectern, get a platform. Those who do not know the difference between these words should get off their pulpit.

Lengthy, long. "Lengthy" refers to books, articles, talks, and arguments. "Long" refers to distance.

Liable to, likely. Both mean "probably," but "liable to" suggests negative consequences. *Correct*: "The plaintiff will likely go to trial. She is liable to lose the liability phase."

Libel, slander. "Libel" is written defamation; "slander," oral.

Lie, lay. To "lie" is to prevaricate or to recline or remain in one condition; conjugate — "I lie down," "yesterday I lay down," "I have lain down." To "lay" is to place or produce; conjugate — "I lay down the papers," "yesterday I laid the papers down," "I have laid the papers down."

Literally, figuratively. "Literally" means "true." "Figuratively" means "not literally."

Loan, lend. "Loan" is a noun. "Lend" is the verb. "Lend [not *loan*] me your ears."

Loath, loathe. To be "loath" is to be hesitant. To "loathe" is to hate. "I am loath to eat broccoli because I loathe broccoli."

Logistic, logistics, logistical. "Logistic" is the adjective. "Logistics" is the noun, not the plural of "logistic." "Logistical" is pretentious bureaucratese.

Majority, plurality. A "majority" is a number greater than half. A "plurality" is the greatest number of votes, but less than half. "Majority" is not a synonym for "most" or "major." *Incorrect*: "The law clerk spent the majority of her time drafting opinions." Drafting might, however, have occupied most of her time, the major part of her time, or the majority of her hours.

Masterly, masterful. Someone or something "masterly" has or contains the skills of a master. Someone "masterful" is powerful. *Correct*: "The masterful Chief Judge wrote a masterly opinion."

May be, maybe, perhaps. "May be," an adverb, means "is possibly." *Correct*: "It may be that the court reporter is right. On second thought, maybe the court clerk is right."

Meretricious, meritorious. "Meretricious" means "obviously vulgar." Something "meritorious" has merit.

Meticulous, scrupulous. To be "meticulous" is to be fussy about small details. To be "scrupulous" is to handle details precisely and in a principled way.

Mitigate, militate. To "mitigate" is to moderate or to alleviate. "Militate" is to have weight or effect, for or against. *Correct*: "The facts militate for mitigation of sentence."

Momentarily. Something that happens "momentarily" happens for a fleeting moment. "Momentarily" does not mean "at any moment."

Nauseated, nauseous. *Correct*: "I felt nauseated after I smelled the nauseous fumes of formaldehyde." Not to repeat this ad nauseam, but it is incorrect to write, "I felt nauseous yesterday."

Nearly, virtually. "Nearly" means "almost." "Virtually" means "in essence." *Correct*: "We have nearly approached virtual reality."

Nominal, low. How low can you go? A "nominal" amount is so low it is merely symbolic.

Nonsense. "Nonsense" is gibberish. Only colloquially does it mean "incorrect." *Incorrect*: "Appellee's argument is nonsense." *Correct*: "Carroll loved to write nonsense: 'Twas brillig, and the slithy toves/ Did gyre and gimble in the wabe: All mimsy were the borogoves/ And the mome raths outgrabe.'" Lewis Carroll, *Through the Looking Glass and What Alice Found There* 18–19 (1946).

Observance, observation, observed. "Observance" means "comply with" or "celebrate." *Correct*: "In observance of its rules, the OCA allowed its nonjudicial employees to engage in the observance of New Year's Day." (Written without the nominalizations, that sentence should read, "To observe its rules, the OCA allowed its nonjudicial employees to observe New Year's Day.") A quick observation: "Observation" and "observed" mean "noting" or "seeing." *Correct*: "The

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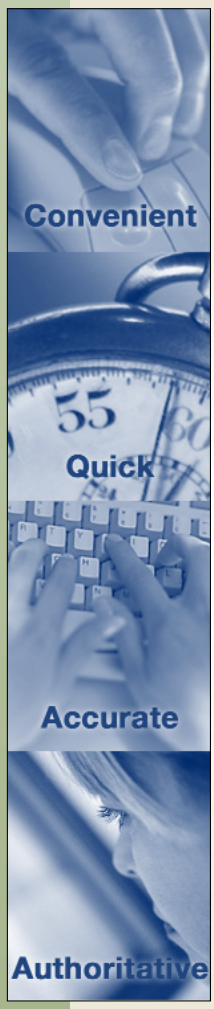

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