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REMEDIATION ISSUES IN ENVIRONMENTAL CASES

Inside:

Officer Liability for Pollution

Court Policies on Adjournments

Pension Simplification

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On The Cover

The photos on the cover depict a remediation project undertaken at a site with leaking underground storage tanks (LUSTs) in Utica, N.Y. (A further description of the project is provided in the box on page 14.)

Photographs by Leo F. Hobaica

Cover Design by Lori Herzing

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President's Message

Thomas O. Rice*

The Year Past – Danger Clearly Present

So little time and so much to do. A year goes by and then it's time. Time to pass the baton, time to renew confidence in ourselves, and time to say thank you.

At this time last year, I was preparing to embark on a great adventure. I was fortunate indeed to have Paul Hassett serving as president-elect and you as partners. Paul's invaluable assistance and your support will never be forgotten.

As Paul and Steve Krane prepare to take the helm in their steady hands, another extraordinary group of people cannot go unnoticed. The dedication and ability of the staff in Albany are models for any organization.

Bill Carroll, John Williamson, and their colleagues are not only trusted tutors, they are good friends. They have my eternal gratitude for making the impossible possible, preventing me from making mistakes (those I made were entirely mine), and working tirelessly on your behalf.

Without slighting anyone else on staff, I want to acknowledge Kathy Heider and everyone in the Meetings Department. Meetings don't just happen. They are planned and implemented with military precision. There are special people in that department and we are all the better for them.

I especially want to thank Beth Krueger. *Amanuensis* (Beth, I hope you're smiling), editor and advisor, she unfailingly managed to get extensions for me to file this *Message,* gave freely of her own time, and is the best driver of a BMW "Z" I've ever known. Beth, "Thank You" is not adequate, but is sincerely meant.

Exceptional as is our staff, you the members have inspired me and are, and will always be, a continuing source of optimism and renewal. Stories that lawyers are complacent, self-absorbed, and focused exclusively on bottom-line issues are just wrong.

In every community, public and private sector attorneys embody the tradition of dedicated service to clients and community. Despite the burdens of daily practice, they find time to volunteer legal services to the indigent, serve on boards, advise civic groups, and work to improve the legal process.

Read some of the more than 100 analyses of bills prepared by our members. Recall our affirmative legislative proposals. Reflect on the work of hundreds of faculty members at our CLE programs. Remember the editors and authors who contribute to our journals and newsletters. Recognize in yourselves and your peers the values that distinguish a professional.

Keep in mind the *pro bono* representation of people escaping domestic violence, denied food and shelter, and discriminated against in housing and employment. Don't forget the dedicated work of attorneys in legal aid and legal services offices. There is much to admire and even more to emulate.

Unfortunately, however, terms of office do not coincide with the completion of all we wish to accomplish in a year's time. Frequently, forces beyond our control have slowed progress.

While visiting the Bar Center last spring, I was reminded of some of the initiatives of former presidents of the Association. The problems our predecessors faced also required perseverance. The struggle to provide legal services for the poor and improve court structure, civil procedure, and legal education called for long-term commitment. That in mind, frustrations are lessened and determination to make progress is increased.

The legislative process prolongs, sometimes painfully, resolution of issues that we recognize require immediate action. Increasing the scandalously low fees paid assigned counsel and the struggle to preserve adequate levels of funding for civil legal services are perennial battles. Constitutionally difficult hurdles in the way of court reorganization, including a Fifth Department, are annual challenges.

The glass, however, is more than half full. Bar Association participation provides unique opportunities for members of the bench and bar to shape the rule of law. Through their collective talent and energy, our members make meaningful contributions to improvement of the system.

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PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 5

This past year alone, our Executive Committee and House of Delegates endorsed tens of reports and recommendations. We have urged:

- Expanded availability of programs for court-annexed and court-referred non-binding alternative dispute resolution for use in appropriate cases, with safeguards and additional required training (Committee on ADR, Stephen P. Younger of New York City, chair).
- Enhanced fair hearings in administrative proceedings (Special Committee on Administrative Adjudication, Mark H. Alcott of New York City, chair).
- Action by the Administrative Board with respect to pay-to-play campaign contributions (Task Force to Study Pay-to-Play Concerns, A. Thomas Levin of Mineola, chair).
- Creation of an optional simplified civil case resolution procedure (Commission on Providing Legal Services for the Middle-Income Consumers, Frank M. Headley Jr. of Scarsdale, chair).
- Standardizing procedures for obtaining trial transcripts (Committee on Courts of Appellate Jurisdiction, Scott M. Karson of Melville, chair).

We have also proposed rules for case management, considering local needs and conditions (Special Committee to Review the Chief Judge's Comprehensive Civil Justice Program, Richard B. Long of Binghamton, chair). We commented on the recommendations of the chief judge's committee on grand jury procedures (Special Committee on the Grand Jury Project, Susan B. Lindenauer of New York City, chair). We continued to assist in the development of MCLE rules (Special Committee to Review the MCLE Proposal, co-chaired by Ellen Lieberman of New York City and Conal E. Murray of Mount Kisco), and expanded both the subject matter and types of MCLE offerings (Committee on CLE, Conal E. Murray, chair). We updated law guardian standards (Committee on Children and the Law, John E. Carter Jr. of Albany, chair). Study of how to develop ways to build public understanding and improve the justice system is well under way (Special Committee on Public Trust and Confidence in the Legal System, Ellen Lieberman, chair).

In thoughtful reports of the Association, our members propose solutions to issues. When considering the present and future of the profession, however, no demand is greater than preparing a responsible and reasoned response to the challenges to an independent legal profession mounted by the "Big Five" consulting firms and their vision of so-called multi-disciplinary practice. To be distributed for comment before it is considered by our House of Delegates in June, the report of the Special Committee on the Law Governing Firm Structure and Operation, chaired by Bob MacCrate, is widely awaited.

New York's unique position as the commercial and financial capital of the world makes the report of our committee unusually important. There is little doubt that the report will make as significant a contribution to resolution of the issue as any produced by the ABA MDP Commission.

The matter of MDP, arising from the business expansion plans of non-lawyers, must be resolved in the public interest and with the stated goals of the ABA in mind: "To preserve the independence of the legal profession and the judiciary as fundamental to a free society." We do well, therefore, to remember the warnings of Senior U.S. District Court Judge William M. Hoeveler: "We must never lose our independence or permit incursions into it. *The danger is clearly present*; an independent judiciary without an independent bar is like a scabbard without a sword."

The ABA House of Delegates and the bar of every state must and will defend the interests of society. The organized bar will do its duty as Professor Bernard Wolfman describes:

> As Charles Wright, the President of the American Law Institute, periodically reminds its members, they must check their clients and their clients' interests at the door before they enter the conference hall to persuade and to vote. Charley does this in the same vein as Erwin Griswold had done earlier when the Dean reminded us all that he and other lawyers sell their services, but *they are obligated not to sell their souls.*

This year has made it clear to me. There is no doubt. The Bar will not be misled. It will not be deceived. It will not abdicate responsibility.

We can't and we won't be bought. The Bar will place principle before profit; ethics before economics.

I am humbled by the privilege it has been to serve you, grateful for the honor you have given me, and will always treasure the friendships you have extended me.

PEACE.

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Environmental Cases in New York Pose Complex Remediation Issues With Profound Impact on Land Values

By Peter S. Palewski

Lawsuits involving environmental contamination by toxic agents are on the rise,[1] yet an understanding of how aggrieved landowners can protect their rights, seek damages and obtain remediation from the party at fault is not well known.

Laymen are unlikely to comprehend the profound impact that toxic contamination may have on the environment and land values. The environmental lawyer must be in a position to carefully, repetitively and patiently explain to clients that once real property or waters are contaminated, the negative impact may last for generations. By emphasizing the seriousness of environmental contamination, and seeking damages from those responsible, the lawyer plays an important role in the restoration and preservation of all of earth's life forms.

Environmental contamination may consist of toxins, pesticides, herbicides, hazardous wastes, radiation, chemical and petroleum spills and pollution. The many effects on life forms are all negative. Many contaminants release mutagens, which cause genetic mutations, and teratogens which cause defects or deformities in the embryonic stages of life forms. In addition, contamination "stigmatizes" real property and usually substantially lessens its market value.[2]

In New York State, anyone who contemplates acquiring real property that may be subject to environmental problems should be aware of the impact on land values, the cost and complexity of remediation, and whether remediation of the parcel can, in fact, ever be achieved. The potential purchaser must also consider possible liabilities to adjacent or nearby landowners and whether these liabilities could lead to costly, protracted litigation. Proposing to sell such property may have the unintended effect of embarking upon a lengthy and expensive remediation program or becoming embroiled in unanticipated litigation.

The trend in New York Courts is to hold the property owner to high standards. "The notion that each must use his property so as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—may be traced at least to the Digest of Justinian."[3] "The rules for permissible land use with direct impact on neighboring property have become far more strict, and the sensitivity to noxious intrusions far keener."[4] "Concern for the preservation of an often precarious ecological balance . . . has today reached a zenith of intense significance."[5]

A Quick Look at Federal Law

The Federal Tort Claims Act applies only to suits against the federal government.[6] The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[7] is not applicable unless the contamination is first remediated and the owner of the property thereafter seeks to recover the cost of the remediation from the "Superfund."[8] Under CERCLA, the seller of property cannot contract away liability for contamination. A property owner may be held liable for damages up to $50 million[9] in addition to remediation costs. Federal legislation has moved from a very limited fault-based scheme toward one of almost absolute liability.[10]

Other salient federal legislation can be found in the Clean Water Act,[11] a listing of "Hazardous Substances" by the Environmental Protection Agency,[12] "Determination of Reportable Quantities for Hazardous Substances"[13] and "Technical Standards and Corrective Action Requirements for Owners and Operators of

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This article reflects in part research done for an environmental lawsuit commenced in U.S. District Court for the Northern District of New York in March 1994 and concluded by stipulated settlement in September 1998.

Underground Storage Tanks (UST)"[14] and the "Resource Conservation and Recovery Act (RCRA)."[15]

The RCRA creates a wide window of liability that enables private citizens to enforce its provisions. This can be accomplished through direct suit to obtain court control of monitoring and testing and court orders directing the cessation of leakage and payment of cleanup costs by the parties responsible for land or water contamination.[16] The Environmental Protection Agency (EPA) delegates this regulatory program to the individual states.[17] The Toxic Substances Control Act,[18] requires that chemicals be tested before they are made available in the marketplace. It also provides for citizen lawsuits with provisions for awarding attorney fees and expert witness fees[19] where the use of a chemical substance "will present an unreasonable risk of injury to health or environment."[20] The state and federal acts are harmonized.[21]

Photo by Leo F. Hobaica

Utilization of any of the federal remedies could foreclose the possibility of other litigation and/or could be exclusive. Although the several remedies available under federal law should be considered, this article is focused primarily on New York State remedies.

Basic Statutes in New York

In New York, article 12 of the N.Y. Navigation Law provides that the New York State Department of Environmental Conservation (NYSDEC) may use the Environmental Protection and Spill Compensation Fund[22] to clean up a discharge for injured parties. Thereafter the injured party's claim is vested in the state.[23]

Entities having title or possession at the time a contaminant spill is discovered are considered to be "dischargers,"[24] and no consideration is given for the historical title or use of the property.[25] Once the source of the contamination is determined, the responsible party can be compelled either by a private lawsuit or NYSDEC intervention to remediate the affected lands or waters. A lawsuit can compel the contaminator to indemnify the affected party for any damage claims that might be brought by downgradient or downstream landowners.

Under article 27 of the N.Y. Environmental Conservation Law, counties throughout the state are required to locate "inactive hazardous waste sites" and report them to the NYSDEC,[26] which is mandated to undertake a comprehensive study and develop a proposed remediation plan.[27] The clerk of each county must maintain an updated index identifying the owner and location of each such site.[28] These indices should routinely be consulted before embarking on a litigation plan.

Getting Involved in an Environmental Case

It is common for prospective purchasers of commercial properties to make closing of the sale contingent upon a "Phase One" environmental assessment,[29] which determines whether con-taminants are on or affect the property.[30] If contaminants are found, a "Phase Two" assessment is made of groundwater, air, substrate and buildings setting forth a "cleanup" or "remediation" plan.[31]

Under current law, the record owner of real property bears the responsibility for any cleanup that may be necessary to bring the property within the guidelines of the NYSDEC.[32] Furthermore, the engineering firm conducting an environmental assessment is mandated to report the existence of contaminants to NYSDEC within two hours of discovery.[33] Upon receiving notification, NYSDEC will demand that the contaminator immediately cease further discharges, commence containment and remediation measures[34] and submit a proposed remediation plan.[35]

Obviously, almost all prospective purchasers will avoid any site that cannot pass the Phase One assessment. The innocent purchaser of contaminated lands cannot seek the cost of remediation from the New York Environmental Protection and Spill Compensation Fund,[36] but rather must seek recovery against the seller, prior owner or causer of the spill.[37] If the discovered contamination flows onto adjacent lands, the owner of the property either from which it emanated or passed through is considered a "discharger" of the contaminant and becomes responsible for all damages, "direct and indirect," caused by the contamination.[38] A lessor may be liable for contamination caused negligently by a lessee regardless of the lease provisions.[39]

Remediation: What to Expect The cost of remediation is usually extreme. Expenditures of upwards of $10,000 for a "Phase I" assessment of even a small parcel are the norm, and a "Phase II" study will bring additional costs of upwards of $20,000, depending on the nature and extent of the contamination and the geo-

Analyzing Levels of MTBE

The process of analyzing a site for contamination from a substantial gasoline spill provides an example of how data is developed for contamination by any type of toxic substance.

A substantial gasoline spill is likely to produce detectable levels of volatile organic compounds (VOCs) in groundwater after the contaminant has passed through the soil layers above. Major components of gasoline are methyl tertiary butyl ether (MTBE) and benzene, toluene, ethylbenzene and xylene (BTEX).

Recurrent high levels of MTBE suggest an active or ongoing gasoline spill because it normally vaporizes in a relatively short period of time. Thus, the practitioner should consider obtaining a mandatory injunction compelling the contaminator or discharger to remove the suspected source, such as a leaking underground storage tank (LUST), if the levels of MTBE remain constant.

New York State now has the lowest MTBE groundwater level limits in the nation at 10 parts per billion.[1] Both BTEX and MTBE will be found in air samples, which are usually taken from the lowest point in an affected building, ordinarily the basement area. Both compounds migrate with the groundwater. The greater the amount of either substance that is found in the air, substrate, groundwater, or bedrock, the greater the contamination and the longer it will last; also, the greater the risk to life forms, including humans.

1. Richard Perez-Pena, *Stricter Ground Water Limit for Gasoline Additive is Set*, N.Y. Times, Nov. 10, 1999, at B6.

graphic area involved. The initial installation of remediation equipment for even a small contaminant "spill" of, for example, 5,000 gallons, may cost upwards of $300,000 with annual costs for monitoring, upgrades, and technical attention exceeding $100,000 after the equipment is in place and operational.

When a downgradient landowner is affected by migration of contamination from another's land, all is not lost, even if the affected owner lacks the financial wherewithal to initiate cleanup. If the emanating source's owner is financially sound or adequately insured,[40] the injured party may bring an action for a permanent mandatory injunction, thereafter promptly requesting, by motion, a temporary restraining order compelling the discharger to cease further contamination and to immediately install an appropriate remediation system.[41]

If diversity of citizenship exists between the emanator and the aggrieved party, damages in almost any contamination case will exceed the $75,000 federal threshold. In *Leone v. Leewood Service Station, Inc.*,[42] the plaintiff recovered a verdict of $310,000, modified to $285,000 for a spill of "between 50 and 200 gallons" of gasoline.[43]

Of course, the amount of any recovery will depend on the value of the affected real property, the severity and longevity of the contamination and the efforts and skill of counsel.

What Experts? What For?

At the outset of environmental contamination, litigation plaintiff's counsel must secure the consent of the client to use several experts including a hydrogeologist, a licensed environmental engineer, an environmental scientist and chemist, and a real estate appraiser. Their work is necessary to establish a *prima facie* case for damages to lands or waters.

By ascertaining the type and levels of contaminant present in surface or groundwaters, the hydrogeologist is instrumental in determining the source of contamination, if unknown, and giving an opinion on whether it is the result of a single historic event or is ongoing and current.

The environmental engineer, who is integrally dependent upon the findings of the hydrogeologist, applies relevant rules, regulations and legislation to the spill, determines an appropriate remediation or containment plan and may monitor the contaminator's remediation efforts. The environmental engineer will also, after the fact, determine whether acceptable procedures were followed by the discharger or if statutory standards or those common to the particular industry concerned were violated by the discharger.

The environmental chemist and scientist, using data compiled and reports made by the hydrogeologist and environmental engineer, can make extremely accurate calculations regarding the longevity of the contamination as well as its toxicity and its effect on the environment.

The real estate appraiser's task is to calculate the market value of the property unimpaired by contaminants versus its value in the contaminated condition. It is crucial that each expert be supplied with all data relevant to the spill and all reports generated among the experts.[44]

The environmental practitioner can make an initial evaluation of the plaintiff's case by carefully examining the data and reports provided by the hydrogeologist.

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(For an example, see accompanying item on detecting levels of methyl tertiary butyl ether (page 10).)

The trial proof will likely include background lay testimony concerning the affected property's ownership, actual cost of improvements and use. Extensive expert testimony, however, must be presented to establish the identity of the contaminant, its source,[45] the probable duration of its effect on the environment, the misfeasance/malfeasance and regulatory or statutory violations perpetrated by the discharger and, of course, the damages caused by diminished property value. At current rates for a case involving only a small "spill," the minimum aggregate fees for the services of these experts, through trial of the action, can be expected to exceed $150,000.

The plaintiff's papers must educate the court on the steps that will be required for the defendant to address the problem properly.

In New York State, assuming that the contaminant spill has been reported, the plaintiff may make Freedom of Information Law (FOIL)[46] demands upon the NYSDEC to obtain any data or documentation submitted by the discharger relevant to the spill. This information is essential for study by the plaintiff's experts. Under current case law, it is essential that even the real estate appraiser be supplied with documentation establishing the subject property's contamination.[47] Documentation filed by the remediation contractor will contain contamination locations, site elevation gradients, underground or above ground storage tank location, air, soil and groundwater contaminant values and periodic remediation reports or summaries.

Practice and Theories of Liability

The statute of limitations for actions brought for the redress of damages caused by environmental contamination begins to run on the date of discovery of the contamination.[48]

Based upon the given facts and circumstances, a contamination lawsuit will arise under negligence, trespass, nuisance, statutory strict liability, and common law strict liability theories which should be pleaded in tandem. Pleadings should also contain a separate count or cause of action seeking a permanent mandatory injunction to compel the defendant to undertake and continue remediation measures at least until NYSDEC standards are attained.

The trespass action and the injunction demand[49] are the springboards for a motion for a temporary restraining order brought for immediate cessation of ongoing contamination. Because the effects of most contamination cannot be stopped simply by closing a valve, the plaintiff's papers must educate the court on the steps that will be required for the defendant to address the problem properly, as recommended by the plaintiff's environmental engineer. The plaintiff's TRO should, effectively, be the beginning of a recalcitrant defendant's remediation program at the defendant's sole expense.

The practitioner should consult local codes and regulations. For example, the Utica City Code § 2-16-68 provides in relevant part that "the operation of any device, instrument . . . machinery which causes discomfort or annoyance to reasonable persons of normal sensitivities or which endangers the comfort, repose, health or peace of residents in the area shall be deemed and is declared to be a public nuisance and may be subject to abatement summarily by a restraining order or injunction issued by a court of competent jurisdiction."

Trespass is the invasion of the owner's interest in the exclusive possession of its property. If the plaintiff can establish that the defendant performed an intentional act responsible for causing the contamination of property, he has established a cause of action for trespass.[50] New York courts have recognized trespass causes of action under varied circumstances involving subterranean gasoline migration.[51] In the case of *Gendron v. State*,[52] the court allowed the plaintiff's claims for conversion of real property, trespass, negligence, "unlawful and reckless damage" to property and "intentional and unjustifiable damage" to property.

In New York, an action can be maintained for a private nuisance only if the landowner's actions have an impact on immediate landowners or their tenants. The actionability of a suit is determined by whether the creator of the nuisance has demonstrated unreasonableness in view of the creator's needs and those of its neighbors.[53] Where an outside source intentionally and unreasonably, or negligently or recklessly, interferes with an owner's use and enjoyment of land, an action for nuisance is stated.[54] In numerous cases, New York courts have recognized the viability of a nuisance action in the case of subterranean chemical or gasoline contamination.[55]

The New York approach contrasts with the rule in most other states, where the essential element of an actionable nuisance claim is whether the neighbors have suffered harm or are threatened with injuries that they should not have to bear.[56] A nuisance may grow out of

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Example of Remediation Project

Federal litigation involving gasoline contamination at the site depicted on the cover began in March 1994. The location, owned and operated by Sun Co. Inc. (R&M) of Philadelphia, was abandoned as a filling station in October 1997. Evidence showed that several thousand gallons of gasoline had been spilled, as determined by years of inventory shortages ignored by the defendant.

The plaintiff, a church that was a downgradient landowner, reached a seven-figure settlement with defendant R&M in September 1998. One of the settlement terms required the defendant to continue remediation indefinitely until standards set by the New York State Department of Environmental Conservation (NYSDEC) were achieved.

Even before the defective tanks were removed, an underground vapor extraction manifold was installed to extract volatile organic compounds (VOCs) and water, which is then incinerated, run through a filter and discharged into the municipal sewer system. It is still in operation today. Microbes, which literally consume organic compounds, were placed into monitoring wells sunk at the site. The microbes travel in the groundwater and are intended to speed up the remediation process. An environmental scientist familiar with the project has said he believes that the spill can never be completely cleaned up, even if the NYSDEC standards are met.

CONTINUED FROM PAGE 12

negligence, but even if there is no negligence a nuisance may also exist when the use of property results in damage to another.[57] The motive underlying the actions of a defendant may be considered. Where contamination could have been avoided if the defendant had taken minimal precautionary measures, the defendant incurs liability for nuisance.[58] Where the gravity of the harm outweighs the utility of the defendant's conduct, liability is imposed based upon nuisance.[59]

Private actions under the strict liability provisions of Navigation Law § 181 got off to a shaky start with the Fourth Department's errant ruling in the case of *Snyder v. Jessie.*[60] This decision was scuttled when the Navigation Law was amended by the legislature to include private plaintiffs.[61] A current decision holds that provisions of the Navigation Law must be liberally construed.[62]

Commencing Remediation

A threat of significant daily fines[63] or a desire to mitigate damages may motivate the contaminating party to initiate a cleanup. After all reports and data on the remediation effort are obtained either through a FOIL request made to the NYSDEC or discovery demands made directly to the defendant and/or its remediation contractor (and this documentation may be voluminous), it must be examined and understood by the plaintiff's counsel, with the assistance of his scientific experts.

Eventually, patterns will emerge from the data that will define the following concerns: (1) the composition of the contamination; (2) the source of the contamination; (3) the geographic area affected by the contamination or "plume;" and (4) the environmental impact of the contamination on surface and groundwater, the substrate, bedrock, structures, air quality and life forms, including people.

The plaintiff's environmental engineer may determine that the defendant's remediation effort is insufficient or that the contamination affects a far greater geographic area than stated by defendant's remediation contractor. If this occurs, counsel should consider drafting a letter to the NYSDEC concisely stating what further steps the remediation effort should address. Plaintiff may also wish to install its own monitoring facilities to police the defendant's efforts and to ascertain the true nature and extent of the contamination. This is particularly important due to the direct relationship of the severity of the contamination to monetary damages.

How Will the Case Fare in Court?

In the due course of litigation, the plaintiff will eventually face the defendant's motion for summary judgment and to dismiss the complaint. Plaintiff's counsel must meticulously craft opposing papers and diligently prepare his oral argument to defeat the motion. This will entail affidavits from plaintiff's experts supporting each cause of action together with countless exhibits redundantly verifying every point made in the affidavits. Case law, statutes, rules, regulations and industry standards must be cited.[64] Organization of extensive opposition papers will result in a comprehensive consideration of each issue that must later be proved upon trial.[65]

Defendant's Liabilities When evidence is presented at trial to substantiate all of the plaintiff's causes of action, it may demonstrate an actual or implied intentional course of conduct on the part of the defendant that will merit a charge permitting the jury to consider an award of punitive damages.[66]

Where the defendant knew or should have known that there was a continual or unexplained loss in the inventory of any substance that could cause contamina-

tion, the defendant has the obligation to ascertain the reason and to take all appropriate steps to abate the loss.[67]

The combined fact patterns demonstrated at trial to prove the case theories of trespass, nuisance, negligence and injunction are likely to demonstrate amply that the defendant, at some point, knew that it was a discharger but continued to use its faulty facilities nonetheless.

If the trial court becomes convinced that the acts or omissions on the part of the defendant were willful, or if the defendant ratified (repeated) an act it knew was wrongful, *e.g.*, by filling leaking underground storage tanks (LUSTs) whose defects have been shown by many months of inventory shortage,[68] the plaintiff will be able to obtain a charge to the jury to consider rendition of a verdict for punitive damages.[69]

An obstinate failure to perform a duty warrants the presumption of indifference to others' rights and is tantamount to intentional misconduct. Punitive damages have historically been awarded against corporations where a wrongful act is subsequently ratified.[70]

In federal court, a claim for punitive damages need not be specifically stated.[71] In New York State the demand for relief may include a request for punitive damages.[72]

When punitive damages are sought, all circumstances immediately connected with the transaction tending to exhibit or explain defendant's motivation for the conduct in question are admissible in the liability stage phase of the trial.[73]

The general test of corporate liability for punitive damages is whether the particular wrongful conduct was brought to the attention of managerial personnel with authority to make a decision for the corporation that would prevent the damage.[74] Where there was no doubt that responsible management officials were cognizant of pollution emanating from an oil company's terminal, the question of punitive damages was properly submitted to the jury.[75]

It would be reasonable to include expert and counsel fees as part of the plaintiff's damages because the statute makes a discharger of contaminants liable for "all damages, direct or indirect."[76] Although a defendant can normally be found liable for counsel fees where its acts necessitated legal action,[77] this rule finds little adherence by New York State courts. In federal actions, the "prevailing party" may apply for payment of counsel fees where the defendant is the United States.[78] But at least two New York cases have held that "to the extent that plaintiffs are able to establish that they incurred liability for counsel fees . . . [they] may be recovered as 'indirect damage' under Navigation Law § 181(1) and (5)."[79]

There is no action for personal injury under the Navigation Law.[80] However, damages for personal injury may be recovered under common law theories.[81]

Measuring Damages

Damages in a land contamination case are established by comparing the market value of the property as "unimpaired" by the contaminant versus the value of the property "as impaired." It is not unusual for a parcel of otherwise desirable property to be appraised at zero market value because of the "stigma" caused by awareness of the contamination. Stigma emanates from the public perception or fear of chemical contamination,[82] as well as the extremely high cost of remediation.

The plaintiff's real estate appraiser must be eminently qualified to express an opinion on market value, diminution and resultant damages. The plaintiff's ap-

praisal report might state that the property unimpaired by contamination has a high market value but that, due to the "stigma" of the contamination, the property has a lessened or even zero market value.[83]

Even when NYSDEC standards are attained by remediation, many experts opine that contaminated lands can never be returned to their pristine condition.

The defendant, attempting to defuse a stigma claim, might submit an appraisal purporting to use a "market value approach" to damage. Close examination of the defendant's appraisal, however, may reveal that the appraiser, although claiming to use a "market value approach," has actually segued into a "value in use" approach. The "value in use" theory holds that because only a portion of the subject premises is affected by emanation of contaminants, the majority of it is not because people continue to use portions of the premises anyway and thus the portions still used have value to the owner and thus experience no diminution in market value.[84]

The defense may adamantly insist that an extremely low or zero market value must be incorrect because the property is still in active use. Plaintiff's counsel should dismiss this defense argument as fallacious and be prepared to distinguish the concept of "market value" from "value in use"[85] for the court through the testimony of the plaintiff's appraiser. It might well be argued that the defendant discharger has caused the plaintiff to be a "prisoner" on its own contaminated property because it lacks the wherewithal to move or acquire a new facility.

The plaintiff may encounter other obstacles in establishing the market value of contaminated real property, because structures may have inherent problems such as asbestos, "sick building syndrome" or general disrepair. Such conditions are likely to negatively affect value, as can title problems and actual or potential claims against the plaintiff by downgradient landowners. Plaintiff's counsel must advise his appraiser to consider any known detriments to the property's value "as unimpaired" by contamination. Even though plaintiff's appraiser will usually seek to disclaim consideration of any "unknown condition," the value of the plaintiff's case may be negatively affected at trial if the defendant's appraiser presents mitigating valuation factors that were unaddressed by the plaintiff.

The appraiser must also be kept current on the laboratory analyses of on-site air, soil, groundwater and bedrock samples, because, at trial, the appraiser must testify how he/she ascertained that the subject site was contaminated. In the case of *Putnam v. State*,[86] the defendant convinced the court that "remediation of [the] property was complete."[87] This case is a gross example of a plaintiff's contamination case gone awry. The court considered the "spill" as a "temporary easement." The court apparently was persuaded to adopt the "value in use" theory of damages, finding that "the owner might be able to successfully use or rent the commercial portion of such property." The court in so doing ignored the basic tenet of stigma, a corollary of which is that the property has little or no market value regardless of the possibility that it might still be used for some actual or conjectural purpose. Indeed, even when NYSDEC standards are attained by remediation, many experts opine that contaminated lands can never be returned to their pristine pre-contaminated condition and market value may be forever negatively affected.[88] New construction on contaminated lands is impermissible.[89]

Actions for Personal Injuries Although contaminated, the plaintiff's property may still remain in use. While the affected property may be usable, the plaintiff's attorney must be alert to anecdotal evidence of disease, particularly cancers and neurological problems, among the property's occupants or users.

Current decisions hold that no action for personal injuries can be maintained under Navigation Law § 181.[90] However, if a toxicologist's study demonstrates with a reasonable degree of medical certainty that the users of the property have incurred a disease from the contaminant, in proving the causes of action for negligence, nuisance and trespass plaintiff's counsel may also establish a right to damages for personal injury outside the ambit of the Navigation Law.

Using "The Fund" An entity whose property is contaminated may also file a claim for "damage to real estate or personal property, natural resources or loss of income or tax revenue, as the result of a discharge of petroleum"[91] with the New York State Environmental Protection and Spill Compensation Fund.[92]

This claim may be referred for arbitration of all issues, including the identity of the contaminator, or discharger, and the particulars of the claimed loss. This procedure should be used only when there are no identifiable "deep-pocket" defendants, as recovery will be minimal, any claim for exemplary damages is foreclosed, and any right of action is subrogated to the State of New York.

LUST Cases All unprotected steel storage tanks will eventually leak.[93] In a LUST case, the defendant may emphasize that its tanks passed "tightness tests" in

order to justify the continued use of the tanks even as they continued to leak. New York law, however, requires that tanks be taken out of service when an inexplicable product loss is even briefly ongoing.[94]

The use of unprotected unlined steel tanks for underground storage of hazardous substances is now prohibited under EPA regulations effective as of December 22, 1998.[95] Undoubtedly thousands of these tanks remain in service nonetheless. For example, the New York State Department of Transportation has begun an effort to comply with the stricter EPA regulations by cataloging the location of noncomplying tanks so that they can be replaced at a (non-specified) future date. Failing to excavate underground storage tanks which show continual inventory shortages may constitute evidence of negligent conduct.[96]

Failure to have a comprehensive spill remediation agenda in place,[97] and failure to account for all variables that could affect a product loss,[98] may also constitute negligence on the part of the defendant. When a fuel supplier has actual or constructive notice of a leak, a duty arises to inspect the system before making further deliveries. Violation of that duty is negligence.[99]

Common Law Strict Liability As yet, because New York does not consider the storage of gasoline to be "abnormally dangerous," common-law strict liability does not arise from gasoline "spills."[100]

Courts in other states, however, have held that storage of gasoline in a residential area is an abnormally dangerous activity,[101] and that those who attempt to increase profit by locating filling stations near residential areas should be held liable for harm to persons or property from gasoline stored at or leaking from those stations.[102]

Persistent pleading of common law strict liability by plaintiff's attorneys may eventually find an approving appellate ear in New York State. The case of *Kowalski v. Goodyear Tire & Rubber Co.*[103] sets forth criteria for determining whether the culpable party is engaging in an abnormally dangerous activity giving rise to common law strict liability.

Punitive Damages Plaintiff should consider whether it can prove that a contaminating defendant has done so recklessly or willfully or ratified (repeated) a bad act once it knew of the contamination. This proof may be direct or circumstantial.

As noted above, in establishing the elements of trespass, nuisance, negligence or strict liability, the continued use of porous storage tanks, the disregard of inventory shortages and the failure to promptly investigate and cease use of faulty facilities or remediate contamination all militate against the defendant.

The very real threat of facing a punitive damages award may be instrumental in bringing the defendant to the settlement table.

Recommended Reading

In addition to the other authorities cited herein, the practitioner should be familiar with the following: New York State Department of Environmental Conservation, *Petroleum Bulk Storage* (1992); *Petroleum Contaminated Soil Guidance Policy*, NYSDEC Spill Technology and Remediation Series (STARS) Memo #1; *Site Assessments at Bulk Storage Facilities*, NYSDEC Spill Prevention Operations Technology Series (SPOTS) Memo #14; Environmental Protection Agency, *Superfund Innovative Technology Evaluation Program. Technology Profiles*, EPA/540/R-97/502 (9th ed. 1996); American Society for Testing and Materials, *ASTM Standards on Environmental Site As-*

sessments for Commercial Real Estate (1997); Lorne G. Everett, Groundwater Monitoring (Genium Publishing Corp. 1992).

Conclusion

The pursuit of those responsible for damaging our environment can reward the practitioners with the understanding that they have been instrumental in the arduous process of returning our planet to its natural condition. As environmental lawyers we can actively participate in the Earth's stewardship.

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1. 2 James T. O'Reilly & Caroline B. Buenger, Toxic Torts Practice Guide 25-52 (West Group, 2d ed. 1999).
2. Litigating the Value of Contaminated Property - A Mock Trial 80-87, 97-113 (New York State Bar Association Coursebook Fall 1994). *See Nashua Corp. v. Norton Co.*, 90-CV-1351, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997).
3. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996).
4. *Mandell v. Pasquaretto*, 76 Misc. 2d 405, 350 N.Y.S.2d 561 (Sup. Ct., Nassau Co. 1973). *See* Daniel Kopec & Philip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 Rutgers L.J. 597 (1992).
5. *Wood v. Picillo*, 443 A.2d 1244, 1249 (R.I. 1982).
6. *See* United States Code, tit. 28 §§ 1346(b), 2671-2680 (U.S.C.).
7. 42 U.S.C. §§ 9601-9675.
8. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997).
9. 42 U.S.C. § 9607(c)(1)(D).
10. Daniel Kopec & Philip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 Rutgers L.J. 597, 601 (1992).
11. 33 U.S.C. §§ 1251-1387.
12. Code of Federal Regulations, tit. 40 § 116.4 (C.F.R.).
13. 40 C.F.R. Pt. 117.
14. 40 C.F.R. Pt. 280.
15. 42 U.S.C. §§ 6901-6991i. Under *Meghrig v. KFC Western*, 516 U.S. 479 (1996), RCRA does not apply to recoveries for past cleanup costs.
16. *See Gache v. Town of Harrison*, 813 F. Supp. 1037 (S.D.N.Y. 1993).
17. Michael B. Gerrard et al., Environmental Impact Review in New York 5-120 (Matthew Bender 1999).
18. 15 U.S.C. §§ 2601-2692.
19. 15 U.S.C. § 2619.
20. 15 U.S.C. § 2604(f)(1).
21. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 41, 464 N.Y.S.2d 249 (3d Dep't 1983); *State v. Monarch Chems., Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982).
22. N.Y. Navigation Law § 179 ("Nav. Law").
23. Nav. Law § 188.
24. *See Domermuth Petroleum Equip. & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985).
25. *See White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991), *aff'd, modified sub nom. White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995).
26. N.Y. Environmental Conservation Law § 27-1303 (ECL).
27. ECL § 27-1305.
28. N.Y. Real Property Law § 316-b.
29. American Society for Testing and Materials, *Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process*, ASTM Standart E1527-97.
30. *See Vandervort. v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995).
31. American Society for Testing and Materials, *Standards Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process*, ASTM Standard E1903-97.
32. Nav. Law art. 12.
33. Nav. Law § 175; N.Y. Comp. Code R. & Regs., tit. 17 § 32.3 (N.Y.C.R.R.).
34. 17 N.Y.C.R.R. § 32.5.
35. 17 N.Y.C.R.R. § 32.4(b)(8).
36. Nav. Law § 179.
37. *White v. Regan*, 171 A.D 2d 197,575 N.Y.S.2d 375 (3d Dep't 1991), *aff'd, modified sub nom. White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995).
38. *White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995); *see* Nav. Law § 181. *Cf. Phillips v. Sun Oil Co.*, 307 N.Y. 328 (1954).
39. N.Y. General Obligations Law § 5-321; *Drouin v. Ridge Lumber*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994).
40. Since 1993 most casualty insurance policies have contained a disclaimer of liability for environmental contamination. But specific policies for environmental risks are available. *See* Environmental Aspects of Real Estate Transactions 329-45 (James B. Witkin ed., ABA 1995).
41. *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993).
42. 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995).
43. *Id.* at 670, 672.
44. *See Putnam v. State*, 223 A.D.2d 872, 636 N.Y.S.2d 473 (3d Dep't 1996).
45. *See State v. Willets Point Contracting Corp.*, 125 A.D.2d 742, 844, 509 N.Y.S.2d 163 (3d Dep't 1986).
46. N.Y. Public Officers Law art. 6.
47. *See Putnam*, 223 A.D.2d at 874.
48. N.Y. Civil Practice Law & Rules § 214-c(2); *see Pfohl v. AMAX, Inc.*, 222 A.D.2d 1068, 635 N.Y.S.2d 880 (4th Dep't 1995); *Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687 (4th Dep't 1996); *Town of Guilderland v. Texaco Ref. & Mktg., Inc.*, 159 A.D.2d 829, 552 N.Y.S.2d 704 (3d Dep't 1990); *Annunziato v. City of New York*, 224 A.D.2d 31, 647 N.Y.S.2d 850 (2d Dep't 1996); *Grossjahann v. George B. Wilkins & Sons, Inc.*, 244 A.D.2d 808, 666 N.Y.S.2d 271 (3d Dep't 1997); *cf. State v. Stewart's Ice Cream Co.*, 64 N.Y.2d 83, 484 N.Y.S.2d 810 (1984).
49. *See Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993).
50. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996).
51. *See, e.g., Jensen*, 82 N.Y.2d 77; *Drouin v. Ridge Lumber*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994).
52. 161 A.D.2d 936, 557 N.Y.S.2d 507 (3d Dep't 1990).

53. *Mandell v. Pasquaretto*, 76 Misc. 2d 405, 350 N.Y.S.2d 561 (Sup. Ct., Nassau Co. 1973) (citing *Waters v. McNearney*, 8 A.D.2d 13, 185 N.Y.S.2d 29 (3d Dep't 1959), *aff'd*, 8 N.Y.2d 808, 202 N.Y.S.2d 24 (1960)).
54. *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 394 N.Y.S.2d 169 (1977). Copart, a company engaged in preparing new cars on leased premises adjacent to a Con Ed plant, lost in its effort to recover damages it said were due to noxious emissions from Con Ed smokestacks. The Court of Appeals found that the jury had been properly instructed that liability for a private nuisance may arise only where an invasion of another's interest in the use and enjoyment of land is intentional and unreasonable or where such an invasion is negligent or reckless. The court noted that contributory negligence may be a defense where the nuisance is based on negligent conduct but not where it is based on intentional conduct.
55. *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993); *Drouin v. Ridge Lumber*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994); *Gendron v. State*, 61 A.D.2d 936, 557 N.Y.S.2d 507 (3d Dep't 1990); *Nalley v. General Elec. Co.*, 165 Misc. 2d 803, 630 N.Y.S.2d 452 (Sup. Ct., Rensselaer Co. 1995); *Snyder v. Jessie*, 145 Misc. 2d 293, 546 N.Y.S.2d 777 (Sup. Ct., Monroe Co. 1989), *aff'd, modified*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *later proceeding*, *Snyder v. Newcomb Oil Co.*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993); *Leone v. Leewood Serv. Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995).
56. *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982).
57. *Swift & Co. v. People's Coal & Oil Co.*, 186 A. 629 (Conn. 1936).
58. *Scribner v. Summers*, 84 F.3d 554, 558 (2d Cir. 1996).
59. *See id.*
60. 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990).
61. 1991 N.Y. Laws ch. 672, § 2 (codified at Nav. Law § 181(5)); *see Wheeler v. National Sch. Bus Serv.*, 193 A.D.2d 998, 598 N.Y.S.2d 109 (3d Dep't 1993); *Snyder v. Newcomb Oil Co., Inc.*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993).
62. *145 Kisco Ave. Corp. v. Dufner Enters., Inc.*, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep't 1993).
63. *See, e.g.*, ECL art. 71; Nav. Law § 181(3)(a)(1).
64. *See State v. Willets Point Contracting Corp.*, 125 A.D.2d 742, 509 N.Y.S.2d 163 (3d Dep't 1986).
65. *See* Dean M. Cordiano & Lynn Anne Glover, *Groundwater Contamination Claims in Connecticut*, 60 Conn. B.J. 167 (1986).
66. *Caso v. Gotbaum*, 67 Misc. 2d 205, 212, 323 N.Y.S. 2d 742, 751 (Sup. Ct., Nassau Co. 1971), *rev'd on other grounds*, 38 A.D.2d 955, 331 N.Y.S.2d 507 (2d Dep't 1972).
67. *Lowenthal v. Perkins*, 164 Misc. 2d 922, 626 N.Y.S.2d 358 (Sup. Ct., Tompkins Co. 1995).
68. *Id*.
69. *See Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716 (2d Cir. 1977); *United States v. Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993 (W.D.N.Y. 1994).
70. *See* 36 N.Y. Jur. 2d *Damages* § 182 (1984 & Supp. 1999).
71. *Nelson v. G.C. Murphy Co.*, 245 F. Supp. 846 (N.D. Ala. 1965).
72. *Anderson v. WHEC-TV*, 92 A.D.2d 747, 461 N.Y.S.2d 998 (4th Dep't 1983).
73. *Moran v. International Playtex, Inc.*, 103 A.D.2d 375, 480 N.Y.S.2d 6 (2d Dep't 1984).
74. *Benson v. Syntex Labs., Inc.*, 249 A.D.2d 904, 672 N.Y.S.2d 191 (4th Dep't 1998).
75. *See Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716 (2d Cir. 1977); *United States v. Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993 (W.D.N.Y. 1994).
76. Nav. Law § 181; *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996).
77. 2 Robert L. Rossi, Attorneys' Fees § 8.3, at 123-24 (Lawyer's Cooperative Publishing, 2d ed. 1995).
78. *See* 28 U.S.C. § 2412.
79. *Strand*, 232 A.D.2d at 909; *see State v. Tartan Oil Corp.*, 219 A.D.2d 111, 116, 638 N.Y.S.2d 989 (3d Dep't 1996).
80. *Strand*, 232 A.D.2d at 909; *see Wever Petroleum v. Gord's Ltd.*, 225 A.D.2d 27, 649 N.Y.S.2d 726 (3d Dep't 1996).
81. *See, e.g.*, *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984).

82. *See, e.g.*, *Criscuola v. Power Auth.*, 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993).
83. Litigating the Value of Contaminated Property - A Mock Trial (New York State Bar Association Coursebook Fall 1994); Environmental Aspects of Real Estate Transactions 315-428 (James B. Witkin ed., ABA 1995); *see* Environmental Watch, Appraisal Institute, vol. 8, No. 1 (Spring 1994).
84. National Association of Independent Fee Appraisers, Principals of Real Estate Appraising (1983).
85. *See* Edwin M. Rams, Ram's Real Estate Appraising Handbook 145-95, 198-203 (Prentice Hall 1975).
86. 223 A.D.2d 872, 636 N.Y.S.2d 473 (3d Dep't 1996).
87. *Id.* at 875.
88. *See Nashua Corp. v. Norton*, 90-CV-1351, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997). The issue has spawned controversy over whether sites should be restored as so-called "green fields" returned to a pristine condition, or allowed to remain as "brown fields," defined by the EPA as abandoned, idled or under-used industrial or commercial sites that are not being expanded or developed because of real or perceived environmental contamination. Revitalization programs are extensively discussed in Daniel P. Selmi & Kenneth A. Manaster, State Environmental Law 9-94 through 9-112 (West Group 1999). Legislative proposals pending in New York State would allow owners to remediate a parcel to a greater or lesser degree depending on whether its proposed future use would be residential or industrial.
89. 9 N.Y.C.R.R. § 653.1.
90. *See, e.g.*, *Wever Petroleum v. Gord's Ltd.*, 225 A.D.2d 27, 649 N.Y.S.2d 726 (3d Dep't 1996); *Lowenthal v. Perkins*, 164 Misc. 2d 922, 626 N.Y.S.2d 358 (Sup. Ct., Tompkins Co. 1995).
91. 2 N.Y.C.R.R. § 402.3.
92. Nav. Law § 179.
93. *See* A Guide to Toxic Torts (Margie Searcy-Alford ed., Matthew Bender 1990); Kuperstein, Attorney's Guide to Engineering § 3.03(4) (Matthew Bender 1986).
94. 6 N.Y.C.R.R. § 613.4(d).
95. 40 C.F.R. Pt. 280.
96. *See Dance v. Town of Southampton*, 95 A.D.2d 442, 445, 467 N.Y.S.2d 203 (2d Dep't 1983).
97. *See* Timothy Patrick Brady & John E. Wertam, *Developments in Connecticut Environmental Law*, 67 Conn. B.J. 157 (1993).
98. *See* 6 N.Y.C.R.R. § 613.4.
99. *See Lowenthal v. Perkins*, 164 Misc. 2d 922, 626 N.Y.S.2d 358 (Sup. Ct., Tompkins Co. 1995) (citing *Lockwood v. Berardi*, 135 A.D.2d 881, 522 N.Y.S.2d 279 (3d Dep't 1987)).
100. *Snyder v. Jessie*, 145 Misc. 2d 293, 546 N.Y.S.2d 777 (Sup. Ct., Monroe Co. 1989), *aff'd, modified*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *later proceeding*, *Snyder v. Newcomb Oil Co.*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993).
101. *See, e.g.*, *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976); *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969).
102. *See City of Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515 (D. Colo. 1981).
103. 841 F. Supp. 104 (W.D.N.Y. 1994).

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Courts May Find Individuals Liable for Environmental Offenses Without Piercing Corporate Shield

BY BENEDICT J. MONACHINO

Since the late 1970s when numerous federal and state environmental laws were enacted, the courts have grappled with the tension between limiting personal liability under the corporate form and imposing liability on corporate officers and shareholders for causing or contributing to environmental pollution.

In interpreting federal environmental statutes such as the Comprehensive Environmental Recovery Compensation and Liability Act (CERCLA),[1] the federal courts sought to balance the need to preserve traditional corporate principles with the need to ensure that those who have actually caused or contributed to environmental damage are held responsible. As one federal court held, one cannot lightly disregard a dominant characteristic of corporate law, namely, affording shareholders an opportunity to limit their personal liability.[2]

A significant body of federal case law now provides diverse standards of liability based on certain recurring factors. The courts have looked to the corporate individual's degree of authority, the exercise of that authority, the specific responsibility for health and hazardous waste disposal, and the individual's personal involvement in the daily operation of the corporation. In fashioning a standard of liability, the courts have imposed individual liability on corporate officers and shareholders without piercing the corporate veil.

Given the courts' willingness to look beyond the corporate veil, corporate lawyers and in-house counsel need to be aware of the potential individual liability risk for hazardous waste contamination under existing federal and state environmental laws. Accordingly, counsel should be prepared to advise corporate officers and shareholders on a comprehensive hazardous waste policy to avoid liability for pollution caused by the corporations they own or operate.

Federal Law

In environmental enforcement actions, federal courts have widely applied the common law principle of imposing personal liability on an officer or shareholder of a corporation, provided that certain standards are met. Under CERCLA's statutory framework, the familiar standard of liability, namely "actual participation" in the wrongful conduct of the corporation, has generally been expanded to include the "exercise of control" over the immediately responsible company and even the "failure to prevent" the discharge of hazardous waste.

One federal case, however, rejected outright any imposition of personal liability unless the corporate veil could be pierced under traditional common law theories. Still another imposed personal liability on an individual who was an officer and shareholder of a company who leased to a tenant that operated a polluting facility, without any finding that the individual actually participated in the operations of the facility or was otherwise involved in or exercised control over the polluting facility.

Although the standards applied in officer/shareholder liability cases run the gamut of possibilities, the weight of authority leans to application of the "actual participation" or "authority to control" standard or both.

This lack of uniformity in the standard of liability has led to inconsistencies in the Second Circuit and the federal trial courts. In June 1998, the U.S. Supreme Court decision in *United States v. Bestfoods*[3] increased predictability by enunciating a standard of operator liabil-

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ity of parent corporations under CERCLA that looks to whether the parent has directly participated in hazardous waste handling and matters involving environmental compliance. The Court held that, for purposes of operator liability under CERCLA, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[4]

As indicated below, some courts have begun to adopt the *Bestfoods* standard when determining whether corporate officers should be held liable as operators under CERCLA in disregard of the corporate shield.

Still unsettled, however, is the issue of whether the "arranger" or "transporter" categories of responsible parties under CERCLA may be found liable under the *Bestfoods* standard. To fully appreciate the impact of the *Bestfoods* decision and the questions that remain, it is helpful to examine how the law developed in this area.

Authority to Control

One of the leading cases in environmental enforcement actions is a 1986 decision by the Eighth Circuit, *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.[5] It held both senior officers and lower level employees in a closely held corporation individually liable under CERCLA.

The Eighth Circuit found that CERCLA § 107(a) makes the following persons strictly liable: (1) the owner and operator of facilities from which there is a release or threatened releases of hazardous substances; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person; or (4) transporters of hazardous substances who selected the facility in question for the disposal or treatment of those hazardous substances.

The court noted that under CERCLA § 101(21), "persons" include individuals and corporations and does not exclude corporate officers or employees.[6] Further, the term "owner or operator" is defined in § 101(20), in the case of a facility, to be any person owning or operating such facility.

NEPACCO contracted through corporate representatives for the transport to, and disposal of, hazardous waste at the site. The vice president of NEPACCO and supervisor of one of its plants had authority to control handling and disposal of hazardous waste, qualifying as a possessor of hazardous waste and, therefore, liable under § 107 for arranging for its disposal.

The court reasoned that it is the "authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme."[7] Furthermore, his liability did not rest on his status as a corporate officer or shareholder, rather, it rested on the fact that he was in charge of the transportation and disposal of hazardous waste. The court also held that he was liable independent of a "piercing the corporate veil" theory because he personally participated in wrongful conduct by personally arranging for the disposal of hazardous substances in violation of CERCLA § 107(a)(3).[8] In this regard *NEPACCO* can also be included among those cases employing the "actual participation" standard discussed below.

Turning to the issue of individual liability under the Resource Conservation and Recovery Act (RCRA),[9] another federal environmental statute similar to CERCLA, the court reasoned that its "analysis of the scope of individual liability under the RCRA is similar to our analysis of the scope of individual liability under CERCLA."[10] The court held that both the vice president and the president of NEPACCO were liable under RCRA § 7003(a) as persons contributing to the disposal of hazardous substances. Although the president was not involved in the decision to transport and dispose the hazardous substances, he was liable because he was responsible for all of NEPACCO's operations, and, therefore, had ultimate authority to control the disposal of hazardous substances. Hence, the senior officers who did not participate, as well as a lower-level employee who actively participated, were all held personally liable.

In *NEPACCO*, the court imposed individual liability independent of piercing the corporate veil. The court merely interpreted CERCLA and found that its broad definition of "person" invited imposing liability without the necessity of piercing the corporate veil. In addition, the court used RCRA's personal liability provisions to impose liability on a corporate officer who as shareholder was not directly involved in the final decision that led to the harm. Thus, senior officers and shareholders in a closely held corporation could be held responsible for the acts of lower level employees based on their ultimate authority to exercise control over the corporation's activities. Active participation was not necessary for liability.

Under *NEPACCO*, the absence of day-to-day participation in the operations of the business becomes irrelevant where the individual defendant has ultimate authority to control corporate activities.

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Related Decisions Similarly, other cases have imposed individual liability on shareholders and officers when they exercised control or authority over corporate activity.

In *New York v. Shore Realty Corp.*,[11] the Second Circuit found the individual defendant liable, without piercing the corporate veil, as an "operator" using the same analysis and interpretation of CERCLA as the Eighth Circuit in *NEPACCO*. The court noted that "an owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.'"[12] Disregarding the defendant's status as a shareholder, the court held that the individual defendant was "in charge of the operation of the facility in question, and as such [was] an 'operator.'"[13] Moreover, the court found liability appropriate without piercing the corporate veil where the corporate officer knowingly directed and actively participated in the maintenance of hazardous waste.[14]

The exercise of control should specifically relate to the management of, or participation in, hazardous waste operations in order to find operator liability.

Although the Second Circuit followed *NEPACCO* in affixing individual liability based on the exercise of control over corporate activities, the court's finding that operator liability is appropriate where the officer manages or directs disposal of hazardous waste suggests that, according to the Second Circuit, the exercise of control should specifically relate to the management of, or participation in, hazardous waste operations in order to find operator liability. In this regard, *Shore Realty* may also be included among those cases employing the "actual participation" standard discussed below.

Liability When Control Is Exercised Federal district courts have premised liability on the factor of control or authority.

In *United States v. Carolawn Co.*,[15] the federal court in South Carolina ruled that a corporate official with control and authority over the activities of a facility or who participated in the management of a facility may be individually liable under CERCLA § 107 despite the corporate character of the business. In denying the individual defendants' motions to dismiss the government's complaint for failure to state a claim against them, the court stated that CERCLA imposes personal liability against corporate officials who are responsible for daily operations. The court further noted that CERCLA broadly defines "persons" who are subject to liability as including individuals, and that an "owner" or "operator" may be an individual or a corporation. Hence "to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs . . . notwithstanding the corporate character of the business."[16]

In *Vermont v. Staco, Inc.*,[17] individual liability as against some defendants was found under CERCLA based solely on such defendants' positions of ultimate authority within a rather complex corporate structure. For some defendants, there was no allegation that the individual defendant actively participated in the wrongful acts. The court found the individual defendants were "owning and managing stockholders, [and] personally liable in their respective executive capacities in the corporate structure."[18] The court further held that "each individual defendant here was either personally involved in the corporate acts of Staco, or was in a position as a corporate officer or major stockholder, to have 'ultimate authority to control' the proper handling of mercury at the Staco plant."[19]

In *Kelley ex. rel. Michigan Natural Resources Commission v. Arco Industries Corp.*,[20] a court in Michigan imposed individual liability based solely upon a defendant's position of control and authority. The *Arco* court found that the State of Michigan had stated a valid claim under CERCLA by alleging that one defendant had "overall responsibility for operation and management" and that the other defendant "directly" oversaw the operations and management of the plant. The court denied defendant's summary judgment motion since power or authority, responsibility, control and involvement were factors to be considered.[21] Here, as in *NEPACCO*, direct officer participation was not relevant to the *Arco* decision. There was no allegation that the individual defendant actively had participated in the act. In fact, the senior officer had no particular involvement except that, as chairman of the board, he had ultimate authority over the operations of two plants.

In *Idylwoods Associates v. Mader Capital*,[22] the federal court in western New York considered a summary judgment motion for personal liability under CERCLA even though the individual controlling shareholder ("Wolfson") of the co-defendant corporation owned the contaminated property for only three days. Wolfson owned 11% of the stock and combined with other family members, the Wolfson family held approximately 39% of the

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CERCLA vs. Navigation Law

CERCLA was enacted to provide for the cleanup of hazardous waste sites and spills. Its chief objective is to "'initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'"[1]

The purpose of the N.Y. Navigation Law is "to ensure prompt and effective cleanup of environmental pollutants."[2] The Navigation Law applies to petroleum spills only while CERCLA applies to those hazardous substances, specifically excluding petroleum, as defined under the statute.

CERCLA facilitates hazardous waste site cleanups by placing the financial responsibility for cleanup on those responsible for the waste.[3] Similarly, Navigation Law § 181(5) permits "any injured person" to bring a claim against one who actually caused or contributed to the discharge.[4]

Both statutes provide for the establishment of a fund to finance hazardous waste cleanups.[5] Finally, both statutes provide for government and private lawsuits against responsible parties for reimbursement holding owners and operators of polluting facilities strictly liable for damages.[6]

One difference is the particular statutory scheme each statute employs for attaching liability to a party.

Specifically, liable parties under CERCLA are: (1) the owner or operator of the polluting facility, (2) the owner or operator at the time the hazardous materials were disposed of at the facility, (3) any person who arranged by contract, agreement, or otherwise for disposal, treatment, or transport of the hazardous substances, and (4) any person who accepts or accepted such substances for transport to a facility which that person selected.[7] On the other hand, the Navigation Law simply imposes liability on "any person who has discharged petroleum."[8]

CERCLA defines "owner or operator" as any person owning or operating a facility,[9] and the definition of "person" includes an "individual."[10] In contrast, the Navigation Law defines "person" as an individual as well as a corporation.[11] Thus, although each statute employs a different statutory scheme, the specific objective of affixing liability to one who caused or contributed to the environmental damage is, in substance, the same.

1. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989) (quoting H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 22 (1980)), *cert. denied*, 494 U.S. 1057 (1990).
2. *White v. Long*, 85 N.Y.2d 564, 569, 626 N.Y.S.2d 989 (1995).
3. *Walls v. Waste Resource Corp.*, 823 F.2d 977, 981 (6th Cir. 1987).
4. *See White*, 85 N.Y.2d at 569.
5. 26 U.S.C. § 9507; N.Y. Navigation Law § 179 ("Nav. Law").
6. 42 U.S.C. § 9607(a); Nav. Law § 181.
7. 42 U.S.C. § 9607(a).
8. Nav. Law § 181(1).
9. 42 U.S.C. § 9601(20)(A).
10. 42 U.S.C. § 9601(21).
11. Nav. Law § 172(14).

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stock of the corporation. On December 18, 1959, Wolfson purchased 269 acres on which an inactive waste disposal site was located. On December 21, 1959, Wolfson conveyed his interest in this property to four couples who soon thereafter conveyed their interest to another co-defendant, Witben Realty Corporation.

Wolfson, as a shareholder only, was a paid consultant to the corporation and had a business and personal relationship with the officers and directors of the corporation. Although Wolfson attempted to portray himself as a hands-off consultant to the corporation, available only on an as-needed basis, evidence showed that Wolfson was the controlling shareholder, that he was in daily contact with the management of the corporation, and that he made recommendations to the operating officers and to its board of directors. Although the court found that one could draw a reasonable inference from the record that Wolfson managed and controlled the corporation, it denied summary judgment against him brought by a co-defendant because genuine issues of material facts existed regarding whether Wolfson could be found to have managed the affairs of the corporation to such an extent that he would be liable as an owner or operator under CERCLA.[23]

No Liability Without Actual Exercise of Control Two decisions have established the principle that the mere authority to control the operations of the facility is

not enough to affix liability if there has been no actual exercise of that authority.

Lenders who hold security interests are one beneficiary of this principle. CERCLA provides a liability exemption for those who hold "indicia of ownership primarily to protect [a] security interest."[24] This "secured creditor" exemption to the definition of owner or operator insulates holders of security interests against liability when they seek to protect their security interests upon a debtor's default in real or personal property.

This situation was addressed by *In re Bergsoe Metal Corp.*,[25] where the Ninth Circuit rejected the imposition of CERCLA "owner" liability on a corporate creditor who had a secured interest in the assets of the operator of the facility. The court said the focus must be on the creditor's actual activity, not the unexercised rights it may have, and held that there must be some actual management of the facility before a secured creditor can be held liable for action or inaction that results in the discharge of hazardous wastes.[26]

Similarly, in *New York v. Exxon Corp.*,[27] the Southern District of New York held that the mere authority to control the operations of a facility was insufficient for liability where there had been no actual exercise of such control. This distinction is consistent with the contrasting circumstances in *Idylwoods*, where the Western District of New York found evidence that the controlling shareholder was in daily contact with management and made recommendations to the operating officers and to the company's board, thereby exercising his control.

Actual Participation

The cases employing the "actual participation" standard have imposed personal liability where the evidence indicated that the individual officer/shareholder actually participated in the operations of the facility.

In *United States v. Mottolo*,[28] the government sought reimbursement from various chemical companies and the owner and operator of a hazardous waste site for response costs incurred in connection with the cleanup of the waste site. Richard Mottolo had bought the site in 1964, and in 1973 he purchased a company whose primary business was cleaning drains, septic tanks and grease traps. From 1975 on, although neither Mottolo nor the company had a license to haul hazardous waste, the company contracted to dispose of chemical wastes, which were dumped at the site. Until he incorporated the company in 1980, Mottollo had run it as a sole proprietorship, arranging for the transportation of chemical wastes to the site and at times driving tank trucks of waste himself.

Ruling on the government's motion for summary judgment, the federal court in New Hampshire held that Mottolo, as the individual owner and operator of the waste site, could not escape personal liability by using the corporate form as a shield. The court noted that although the corporate form is generally recognized for most purposes, it may not be used to thwart federal legislative policies as, for example, with CERCLA whose expressed goal is to ensure "'that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'"[29] The court reasoned that this goal would be frustrated because an unincorporated violator could escape liability merely by changing company structure.[30]

Similarly, in *United States v. Ward*,[31] in disregarding the corporate form, a federal court in North Carolina found the individual defendant personally liable under CERCLA § 107(a) for being responsible for the day-to-day operations of the corporation and for participating in arranging for the disposal of the PCB fluids. Following the *NEPACCO* analysis and citing the broad definition of "person" under CERCLA, the court reasoned that, as a result of his personal involvement in the decisions regarding disposal of the hazardous waste, Ward was a "person" who "'arranged for disposal or treatment, or arranged with a transporter for disposal or treatment' of the generators hazardous substances."[32]

This also satisfies both the "authority to control" and the "actual participation" standards discussed below.

In *Columbia River Service Corp. v. Gilman*,[33] the plaintiff sued the individual and corporate defendants as owners or operators under CERCLA § 107(a) to recover response costs for cleanup of hazardous substances. In its decision, a federal court in the State of Washington applied the principle set forth in *NEPACCO* that persons who are officers, directors, shareholders and employees of a corporation may be personally liable as an operator under CERCLA for activities over which they had direct control and supervision.[34] Moreover, the court referred to *NEPACCO* in finding that individual personal liability depends on several factors, namely capacity to timely discover discharges, capacity to prevent and abate damages, and the power to direct activities of persons controlling the mechanism causing pollution.[35]

It is likely that an increasing number of circuit and district courts will adopt the* Bestfoods *standard.

In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*,[36] a federal court in northern California granted summary judgment to a minority shareholder of a corporation, dismissing the CERCLA claim against him on the ground that there was no evidence showing that he was involved in the affairs of the facility or its operations. Nor was there any evidence that such shareholder ever exercised control over the affairs of the companies that did operate the facility, or that he was otherwise intimately involved in those companies' operations.[37]

In *United States v. Amtreco, Inc*.,[38] the corporate defendant and its sole owner and shareholder were sued under CERCLA for recovery of cleanup costs in connection with contamination resulting from the treatment of wooden fence posts at a manufacturing facility. In finding personal liability against the individual shareholder, a federal court in Georgia found that the individual shareholder controlled all corporate decisions: he had the authority to hire and fire employees at the site and to direct their activities; he dealt with customers from an office on the site; and he actively participated in the wood-treating process by personally purchasing raw materials for the wood treating operations. Because the shareholder actively participated in the management of the defendant corporation, he was liable as an owner and operator under CERCLA under the "actual participation" standard.[39]

Effects of the Bestfoods Decision In *United States v. Green*,[40] a case decided after the Supreme Court's *Bestfoods*[41] decision, the government had sued a resin manufacturer and its principal owner under CERCLA to recover response costs incurred in connection with the release of hazardous substances into the environment from the manufacturer's facility. The individual defendant asserted as an affirmative defense that despite his ownership and control over the facility he did not engage in any illegality that would justify imposing liability on him personally for the acts of the corporation. The United States asserted that the individual defendant was liable under CERCLA because he exercised control over corporate activity.

Relying on *Bestfoods*, the federal court in western New York denied the plaintiff's motion to dismiss the defendant's affirmative defense. It construed the defendant's assertion of no illegality as a denial that he participated in the management of the facility's pollution control operations including decisions relating to hazardous waste disposal and environmental compliance, finding that if proved at trial this defense would insulate him from liability.[42] The court thus departed from the standard of liability employed in *Idylwoods*, where evidence of the individual defendant's exercise of control or authority over general corporate activity was sufficient to affix operator liability to an officer of the corporation. By relying on *Bestfoods*, however, the court was saying that more than general authority was necessary; the defendant would also have to be found to have been actively involved in decisions related specifically to hazardous waste handling and environmental compliance. The Western District of New York is one of at least two courts that have applied the *Bestfoods* standard for determining operator liability of corporate officers under CERCLA.

In *Carter-Jones Lumber Co. v. Dixie Distributing Co.*,[43] the landowner brought a cost-recovery action against defendant and its sole shareholder for reimbursement of costs incurred in the cleanup of hazardous waste. The Sixth Circuit found the individual liable as an arranger because he played an active role in arranging for disposal and participating in activity that resulted in the release of hazardous substances in his capacity as an officer of defendant corporation. Thus, he satisfied the *Bestfoods* standard that an officer must have participated in operations relating to disposal of hazardous waste before individual liability may be imposed.[44]

As the *Green* and *Carter-Jones* decisions illustrate, it is likely that an increasing number of circuit and district courts will adopt the *Bestfoods* standard—*i.e.*, examining whether the parent or officer directly participated in hazardous waste operations—when determining the li-

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ability not only of owners and operators but also of "arrangers" and even "transporters" as responsible parties under CERCLA.

Failure to Prevent

The cases employing the "failure to prevent" standard have imposed personal liability where the evidence shows that the individual officer or shareholder failed to take steps to abate or avoid hazardous waste contamination.

A leading case in the "prevention" standard line of cases is *Kelley v. Thomas Solvent Co.*[45] In articulating a standard for deciding whether a defendant individual in a close corporation could have prevented or abated the hazardous waste discharge, the federal court in western Michigan suggested that one focus on "the corporate individual's degree of authority in general and specific responsibility for health and safety practices, including hazardous waste disposal."[46] The court further advised looking at such evidence as the individual's authority to control waste handling practices, responsibility undertaken for waste disposal practices and responsibility neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal including whether the individual made any effort to avoid or abate hazardous waste contamination.[47]

Thus the focus in *Thomas Solvent* is largely on the question of whether the corporate individual could have prevented the hazardous waste discharge. The key to this determination, according to the court, was the extent to which an individual was involved in the actual waste disposal practice and the explicit responsibility undertaken by "job description or agreement" as a means of determining one's ability to prevent hazardous discharges.[48]

The Extremes

There are also courts that refuse to impose liability unless the corporate veil is pierced and those that find individual liability even in the absence of control or active participation.

In *Joslyn Corp. v. T.L. James & Co.*,[49] the federal court in western Louisiana, without discussing the facts in a 1988 decision, rejected outright the decisions of other courts holding that corporate officers may be individually liable independent of the corporate veil. The court held that the corporate form with limited liability for shareholders "is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers."[50]

While individual liability is nonetheless a question of state law, it remains to be seen whether the federal court in Louisiana would retreat from this position in a proper case that presented circumstances similar to those in the Supreme Court's 1998 decision in *Bestfoods*.

At the other end of the spectrum, in *Nurad, Inc. v. William E. Hooper & Sons Co.*[51] the federal court in Maryland imposed liability on an officer and shareholder of a company upon whose property a tenant operated a polluting facility. Here, there was no finding that the individual actually participated in facility operations or otherwise had the authority to control the operations of the company responsible for the site.

Broad Definitions of "Person" With the exception of *Joslyn*, the federal courts have widely interpreted CERCLA as having a broad definition of "person" which includes individuals. The courts are also willing, if certain standards are met, to disregard the traditional protection offered by the corporate form. By relying on key words such as "ultimate authority" and "control over the operations," these courts displayed a willingness to impose liability on senior officers and stockholders for the acts of lower level employees, even in the absence of direct officer participation.

None of the decisions have attempted to distinguish liability based on the quantity of shares owned; minority shareholders as in *Staco* were equally liable as were majority shareholders. All of the decisions involved closely held corporations where the shareholders were active in the business or should have known of illegal activity. Moreover, the "authority to control" cases generally relied on certain recurring factors in affixing personal liability: (1) the individual's degree of authority within the corporation; (2) the individual's specific responsibility for safety and health practices, including hazardous waste disposal; and (3) the responsibility undertaken by the individual for waste disposal practices.[52]

In light of *Green* and *Carter-Jones*, the federal courts are beginning to adopt the *Bestfoods* standard for operator liability under CERCLA. As more of these courts follow *Bestfoods*, a more uniform standard of individual liability will emerge. Ultimately, it appears the weight of authority in future cases will lean to a standard of "actual participation," not just in general corporate activity, but specifically, in hazardous waste handling and environmental compliance matters.

New York Common Law

Notwithstanding these federal cases, New York common law has developed some basis for imposing individual liability in environmental cases without the necessity of piercing the corporate veil.

New York courts generally disregard the corporate form reluctantly,[53] and only when the opposing party shows that the corporate form is being used fraudulently or as a means of carrying on business for personal rather than corporate ends.[54] However, New York courts have held that a corporate officer who controls corporate conduct and actively participates in that conduct is liable for the torts of the corporation.[55]

Bellinzoni v. Seland[56] is just one in a line of New York cases standing for the proposition that personal liability will be imposed on an officer who participates in tortious conduct on behalf of the corporation. The Appellate Division, Second Department, reversed the lower court's judgment granting defendant's motion to dismiss the complaint in a negligence action to recover damages for personal injuries. Citing a line of cases dealing with the personal liability of a corporate officer, the court held that an "officer of a corporation . . . who participates in the commission of a tort by the corporation is personally liable therefor."[57] The court based its decision on defendant's personal supervision and participation in the construction work that the plaintiffs alleged was performed negligently.

Taken as a whole, these cases illustrate the common law principle that in New York the actual participation standard prevails, and individual liability may be imposed.

In *Clark v. Pine Hill Holmes, Inc.*,[58] the Appellate Division, Fourth Department affirmed the trial court's judgment that Pine Hill Holmes, Inc. and its corporate officer were jointly and severally liable for failure to construct the plaintiff's home in a workmanlike manner. The court's affirmance was based on the general rule that an officer of a corporation who participates in the commission of a tort by the corporation is personally liable therefor. The court also found that an officer is not liable for the negligence of the corporation merely because of his relationship to it. Moreover, it must be shown that the officer participated in the wrongful conduct.[59]

In *State v. Amicucci*,[60] a case dealing with an officer and sole shareholder of a corporation charged with petroleum contamination under the N.Y. Navigation Law, the court declined to use the reasoning in *Shore Realty* and other federal cases to impose liability because those decisions relied on CERCLA, which does not apply to petroleum contamination. Nevertheless, the court imposed liability by relying on the *Pine Hill* and *Bellinzoni* decisions, holding that a corporate officer may be personally liable if it can be shown that he participated in the commission of a tort by the corporation.[61]

Taken as a whole, these cases illustrate the common law principle that in New York the actual participation standard prevails, and individual liability may be imposed for individual participation in tortious conduct of the corporation without piercing the corporate veil.

New York Reliance on Federal Law

More recently, there are indications that New York courts are prepared to go beyond common law principles and rely on federal case law in certain circumstances.

This use of federal law is illustrated by *Malin v. Bill Wolf Petroleum Corp.*,[62] a 1999 decision by the Supreme Court in Nassau County. It relied on federal case law interpreting CERCLA in deciding to impose liability on an officer/shareholder of a close corporation under provisions of New York's Navigation Law. Unlike the *Amicucci* case, where the court declined to draw on CERCLA case law, the *Malin* court was willing to make a comparison between the state Navigation Law and CERCLA. The decision was the first to use the Navigation Law as the basis for holding an individual shareholder of a close corporation liable for cleanup costs without piercing the corporate veil. The costs resulted from a petroleum spill on property leased and maintained by corporations owned by a shareholder.

The facts of the case provide an insight into circumstances in which liability will be found. In 1957, pursuant to a lease agreement with Mobil Oil Co., and in accordance with plans and specifications supplied by Mobil, plaintiff Ann Malin constructed a gasoline service station with four underground storage tanks on property she owned. When the lease expired, Ann Malin leased the property to defendant, 2001 First Ave. Corp. owned and controlled by defendant Cary Wolf. Defendant BW Realty Corp., also controlled by Wolf,[63] purchased the four underground storage tanks and other miscellaneous equipment at the station from Mobil.

As tenant, 2001 subleased the property to various dealers who operated a gasoline service station on the property. The subleases did not relieve 2001 of its obligations under 2001's master lease with Ann Malin to "comply with all statutes, ordinances, rules, orders, regulations and requirements of the federal, state, county, town village or local authorities" pertaining to the property; 2001 remained responsible and liable to Ann Malin for such breaches.

The subleases of 2001 required the subtenants to purchase all gasoline from Amoco through defendant Bill Wolf Petroleum Corp. as broker, which also received a commission on all gasoline sales. During the lease term, employees of Wolf Petroleum visited the site at least once a month and oversaw operations, acting as liaison between the subtenants and Amoco.[64]

In 1983, Cary Wolf arranged to have the underground gasoline storage tanks tested. The tests revealed that two of the tanks were corroding. The following year, Cary Wolf arranged for the removal and replacement of those two gasoline storage tanks under the oversight of one of Wolf Petroleum's employees.

Around this time, BW Realty transferred ownership of the underground tanks to defendant Route 109 Service Stations Inc., another Wolf-controlled corporation. In 1991, as a result of Suffolk County's enforcement efforts to bring the station's tanks into compliance with the Suffolk County Sanitary Code, Wolf Petroleum insisted that Ann Malin share the cost of bringing the tanks into compliance. Ann Malin refused, noting that under the parties' master lease agreement the tanks were the responsibility of 2001. When no one responded to Suffolk County's enforcement efforts, Suffolk County cited Ann Malin along with two of the corporations controlled by Cary Wolf for non-compliance. When Cary Wolf was unable to negotiate with Ann Malin a new lease agreement having lower rent payments to defray the costs of the contamination cleanup and replacement of the tanks, defendant 2001 abandoned the property.[65]

In December 1992, Ann Malin arranged to have three underground gasoline storage tanks, a fuel oil tank and a waste oil tank excavated. The excavation of the tanks revealed extensive petroleum contamination. Although the New York State Department of Environmental Conservation asked Ann Malin and defendants 2001, Route 109 and Wolf Petroleum, among others, to remediate the site, only Malin responded. Cary Wolf and the Wolf-controlled corporations denied any responsibility for the petroleum discharge.[66]

Ann Malin thereupon brought an action against Cary Wolf individually and against his corporations under Navigation Law § 181(5) to recover cleanup costs and indirect damages incurred in the remediation of petroleum contamination. The court granted summary judgment to Ann Malin against both the Cary Wolf-controlled corporations and Cary Wolf individually on the issue of liability. As to Cary Wolf's individual liability as an owner and operator, the court, while noting it could find no case directly on point, reasoned that the statutory language of the Navigation Law does not preclude the imposition of individual liability. Noting that Navigation Law § 181(5) permits a claim by the injured person against the person who has discharged the petroleum, the court found that "under the circumstances found here, the imposition of individual liability upon defendant Cary Wolf is most appropriate."[67]

Sensible corporate risk management practices should include a thoughtful, well-planned petroleum and hazardous waste disposal policy.

Although the Navigation Law does not specifically address whether a court may hold a corporate officer or shareholder individually liable for cleanup costs, the *Malin* decision addressed the issue by looking for guidance in the federal cases that have interpreted similar federal environmental statutes. Similar to the federal courts, the *Malin* court weighed the need to preserve traditional corporate principles with the need to ensure that those who have actually caused or contributed to environmental damage are held responsible under the Navigation Law. Thus, the issue before the court was how to resolve the tension between affixing liability to one who caused or contributed to the discharge and the traditional protection of the corporate structure.

The *Malin* court resolved this tension by relying on *Shore Realty*,[68] *Idylwoods*[69] and the federal cases interpreting CERCLA. The *Malin* court noted that Cary Wolf was president of the defendant corporations, he was personally involved with the stations' operations, he had total responsibility for the underground gasoline storage tanks, and he made all decisions with respect to environmental compliance.[70] Based on these factors, the *Malin* court found that Cary Wolf participated in, and was directly responsible for, all of the defendant corporations' operations, and he had ultimate authority to control the disposal and discharge of the companies' hazardous substances. He was, therefore, a person who qualified as a discharger of petroleum under the Navigation Law.[71]

By looking to Wolf's authority to control all aspects of the operations of the Wolf-controlled companies, the *Malin* court, within the context of the Navigation Law, was able to resolve the tension between recognizing the traditional corporate structure and holding individual polluters responsible for the damage they cause. Although the *Malin* court did not discuss Wolf's ultimate power to prevent contamination, its emphasis on Wolf's personal involvement with all aspects of the station's operation, suggests that it could have predicated liabil-

ity upon Wolf's failure to make any effort to prevent or abate hazardous waste contamination.

Future New York cases will have to determine whether liability can be predicated upon a more narrow scope of factors; for example, whether the evidence satisfies only the ultimate authority or failure to prevent standard.

Conclusion

In view of the standards of individual liability for environmental contamination that have evolved under federal case law, corporate clients need to be advised of the potential individual liability risks for hazardous waste contamination under CERCLA, and, in light of the *Malin* decision, for petroleum contamination under New York's Navigation Law.

Given the courts' willingness to look beyond the corporate form, shareholders and high-ranking officers with responsibility for operating a company should conduct an internal review of all hazardous waste handling practices. Sensible corporate risk management practices should include a thoughtful, well-planned petroleum and hazardous waste disposal policy including the maintenance and periodic testing of underground storage tanks.

Some time and expense spent now devising an environmental policy geared to the safe handling and avoidance of petroleum and hazardous substance contamination could save many times that amount later in cleanup costs, litigation costs and headaches.

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1. United States Code, tit. 42, §§ 9601-9675 (U.S.C.).
2. *Berger v. Columbia Broad. Sys., Inc*. 453 F.2d 991, 994 (5th Cir. 1972); *Baker v. Raymond Int'l, Inc*., 656 F.2d 173, 179 (5th Cir. 1981).
3. 524 U.S. 51 (1998).
4. *Id*. at 66.
5. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).
6. *Id*. at 743.
7. *Id*.
8. *Id*.
9. 42 U.S.C. §§ 6901-5991i.
10. 810 F.2d at 745.
11. 759 F.2d 1032 (2d Cir. 1985).
12. *Id*. at 1052.
13. *Id*.
14. *See id*.
15. 14 Envtl. L. Rep. 20699 (D.S.C. 1984).
16. *Id*. at 20700.
17. 684 F. Supp. 822 (D. Vt. 1988), *vacated in part on other grounds*, Civ. No. 86-190, 1989 U.S. Dist. LEXIS 17341 (D. Vt. Apr. 20, 1989).
18. *Id*. at 832.
19. *Id*. at 835.
20. 723 F. Supp. 1214 (W.D. Mich. 1989).
21. *Id*. at 1219.
22. 915 F. Supp. 1290 (W.D.N.Y. 1996).
23. *Id*. at 1310.
24. 42 U.S.C. § 9601(20)(A).
25. 910 F.2d 668 (9th Cir. 1990).
26. *Id*. at 673.
27. 112 B.R. 540 (S.D.N.Y. 1990), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991).
28. 695 F. Supp. 615 (D.N.H. 1988), *aff'd*, 26 F.3d 261 (1st Cir. 1994).
29. *Id*. at 622 (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc*., 805 F.2d 1074, 1081 (1st Cir. 1986)).
30. *Id*. at 624.
31. 618 F. Supp. 884 (E.D.N.C. 1985).
32. *Id*. at 895.
33. 751 F. Supp. 1448 (W.D. Wash. 1990).
34. *Id*. at 1454.
35. *Id*.
36. 781 F. Supp. 1454 (N.D. Cal. 1991).
37. *Id*. at 1458.
38. 809 F. Supp. 959 (M.D. Ga. 1992).
39. *Id*. at 966-67.
40. 33 F. Supp. 2d 203 (W.D.N.Y. 1998).
41. 524 U.S. 51 (1998).
42. *See Green*, 33 F. Supp. 2d at 218.
43. 166 F.3d 840 (6th Cir. 1999).
44. *See id*. at 846-47.
45. 727 F. Supp. 1532 (W.D. Mich. 1989).
46. *Id*. at 1543.
47. *See id*. at 1543-44.
48. *Id*.
49. 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990).
50. *Id*. at 226.
51. Civ. No. 90-661, 1991 U.S. Dist. LEXIS 17090 (D.Md. Aug. 15, 1991), *aff'd in part, rev'd in part on other grounds*, 966 F.2d 837 (4th Cir. 1992).
52. *See Thomas Solvent*, 727 F. Supp. at 1543.
53. *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979).
54. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981).
55. *State v. Ole Olsen, Ltd*., 35 N.Y.2d 979, 365 N.Y.S.2d 528 (1975).
56. 128 A.D.2d 580, 512 N.Y.S.2d 846 (2d Dep't 1987).
57. *Id*. at 580.
58. 112 A.D.2d 755, 492 N.Y.S.2d 253 (4th Dep't 1985).
59. *See id*.
60. Index No. 629/94 (Sup. Ct., Putnam Co., Apr. 12, 1995).
61. *Id*. at 13.
62. Index No. 21438/96 (Sup. Ct., Nassau Co., Apr. 6, 1999).
63. *Id*. at 3.
64. *Id*. at 4.
65. *Id*. at 5-6.
66. *Id*. at 6-7.
67. *Id*. at 15.
68. 759 F.2d 1032 (2d Cir. 1985).
69. 915 F. Supp. 1290 (W.D.N.Y. 1996).
70. *Malin*, Index No. 21438/96, at 15.
71. *Id*. at 15-16.

Adjournments in State Civil Practice: Courts Seek Careful Balance Between Fairness and Genuine Needs

By Stephen G. Crane and Robert C. Meade Jr.

We know that we should not put off until tomorrow what we can do today. But in the busy lives of civil practitioners, postponement is occasionally necessary.

The judge's job in the first instance is to secure justice to the parties in each case. Under some circumstances, justice may require that a party be given additional time, and at others that an adjournment be denied lest the adversary be prejudiced. This involves a careful balancing of factors that are considered in this article.

Attorneys may sometimes wonder why judges are not more generous with adjournments. In the busier metropolitan areas of the state, it might be asked, will there not always be many more cases to be addressed even if adjournments are accorded with great liberality?

It is a source of continual frustration to trial judges that attorneys too often fail to act upon what they must know at some level—that if an adjournment is granted in one case, parties in other matters and the court itself can be adversely affected. Even in a very busy court, indeed especially there, schedules must be made. Undoing the schedule in one case can have a ripple effect on others. If Case A is postponed, Case B may have to be dislodged and C and D in turn.

Furthermore, a judge is continuously faced with an excess of work and a shortage of time. Efficiency and conserving time, especially trial time, are critical. An adjournment interferes with the court's efficiency and can produce downtime.

In an era of case management, a judge is also obliged to keep a close watch on the age of the inventory. Some delay is inevitable, but it must be kept to a minimum. If it is not, the judge is held accountable to the public, to the bar and to court administrators (see the box on page 39). Given the caseload carried by many judges, the aging of an inventory can place great pressure on a judge to hurry, and this may not benefit the cause of justice.

Adjournments in General

Adjournments cannot be granted willy-nilly. Nothing makes a judge see red more easily than the lawyer who answers a calendar call with, "I don't really have authority to discuss this case; I was sent here to get an adjournment."[1] Regardless of the stage of the case, the attorney requesting an adjournment must have a good reason for doing so. The more critical the point in the case, or the longer the adjournment sought, the better this reason must be. If another party to the case will suffer from the adjournment, then the reason must outweigh the possible prejudice.

What is a good reason will depend upon many circumstances. As a general rule, however, counsel should

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not seek a postponement because of self-created circumstances. If an attorney fails to prepare, to request necessary discovery at the proper time, to proceed with pretrial proceedings with dispatch, to retain an expert, or to keep witnesses informed of the court's schedule, that attorney may well find an unsympathetic bench.

Furthermore, an attorney seeking an adjournment should be prepared to proceed in the event it is denied. It is improper to presume that the application will inevitably be granted and accordingly to fail to prepare. Counsel should also be sure to review the rules of the court. It is highly disconcerting to a judge to have an attorney seek an adjournment without having consulted relevant court rules. Nowadays these can be found in a variety of places, including the Internet, so there is little excuse for a casual attitude.

Nothing makes a judge see red more easily than the lawyer who answers a calendar call with, "I don't really have authority to discuss this case; I was sent here to get an adjournment."

Counsel also should follow this golden rule—always let the adversary and the court know as soon as possible about a difficulty on which an adjournment request may be founded. This is a matter of courtesy and respect. But, it is also in the interests of the applicant because it minimizes possible assertions of prejudice by the adversary and the risk of judicial annoyance.

Adjournments Prior to Trial

The earlier in the life of a case an adjournment is sought, the more likely it is to be granted. As a case ages, a judge feels increasing need to see to its disposition, thus magnifying the substantiality of the reason required for its adjournment.

Adjournment of Motions Civil practice cannot proceed without the reasonably easy adjournment of motions. The time periods set forth in the N.Y. Civil Practice Law and Rules (CPLR) are often too short to satisfy the practical needs of busy practitioners. The attorney who initiates the motion can generally choose a date when it is convenient. But, at the moment a motion is unexpectedly made in a case, an opposing attorney is likely to have commitments in other cases, whether taking depositions or preparing or opposing motions, arguing appeals or conducting trials, not to mention other professional tasks. And, the moving attorney will be similarly situated when it comes time to reply.

Beyond scheduling conflicts that require adjournments, the complexity of the motions themselves may raise the need for time extensions. Frequently, motions such as applications to dismiss or for summary judgment demand more research and writing than can be accomplished properly within the CPLR time frames. Judges do not seek motions submitted hastily at the expense of sound supporting or opposing papers. So, adjournments are a fact of life.

The Uniform Rules for the New York State Trial Courts do set a limit, however, on how generous the court will be or allow the parties to be to one another. Rule 202.8(e) provides that there shall be no more than three stipulated adjournments for a total of 60 days unless the court specifically provides for further time in advance. This rule is motivated by experience with the unduly slow-moving motion. Such motions can lead to serious delay. Attorneys who procrastinate on one motion may well be inclined to do so on the next. Months can turn into years. Although weighty motions, of course, require more time than applications to compel depositions, change venue, or the like, how many motions for summary judgment, even embracing all issues in the whole case, really require six months to brief?

Courts generally are quite reasonable when it comes to granting adjournments on motions. Probably the greatest source of difficulty for the court in this area involves over-aggressive, unprofessional attorneys who refuse to extend one another basic courtesies. Disputes over adjournments on motions are almost never justified. Unfortunately, they occur. Sometimes attorneys will deny a legitimate request for additional time merely to be difficult or "because my client told me to." Some litigators will obtain an adjournment on consent and later decline to return the courtesy. It is rare that a judge will refuse to consider papers submitted on motions (sur-replies apart). Jockeying for advantage or sheer obstinacy and lack of courtesy by attorneys do little except win them a black mark with the court.

Judges generally will grant reasonable accommodations to counsel when it comes to argument of motions. Because argument may be scheduled by the court without advance consultation with counsel, scheduling conflicts can arise through no fault of the attorneys. Reasonable adjournments, accordingly, are appropriate. However, given the time constraints under which the court must operate, these cannot be overly extensive, preferably a week or two. Counsel would be well advised to keep this in mind when seeking adjournments on motions.

Some judges may be a "hot bench," that is, they may review motion papers before argument. Attorneys

should be mindful of this and show respect for the judge's time. It is a great trouble and discourtesy to such a judge for an attorney to appear in court at the hour appointed for argument and ask for an adjournment. That attorney is asking the judge to review the papers twice. It is even worse if the attorney sends a messenger to make the plea. Such a tactic is also discourteous to opposing counsel. Counsel should inform the adversary and the court as early as possible of a problem with a scheduled date.

Adjournments of Conferences In our era of active case management, court conferences are a staple of professional life. In the pre-note-of-issue phase, preliminary conferences set the basic direction of the case. This is confirmed or modified as circumstances require at compliance or status conferences.

It is important that the preliminary conference take place with dispatch. Even though there is nothing to prevent attorneys from proceeding with disclosure in the absence of it, experience shows that, all too often, cases will drift without judicial direction at the outset. Accordingly, Uniform Rule 202.12(b) provides that a date shall be fixed for a preliminary conference to take place within 45 days after the filing of the Request for Judicial Intervention (RJI). Uniform Rule 202.19 was recently added to the Uniform Rules as part of the Comprehensive Civil Justice Program (CCJP), announced by the Unified Court System in March 1999. This rule provides that a preliminary conference shall be conducted within 45 days after filing an RJI. Sometimes, of course, an RJI is accompanied by a significant motion, which may affect the parameters of disclosure or even moot the case. It may be appropriate in such instances to adjourn the conference until the motion is resolved. In any event, adjournments of preliminary conferences may be appropriate for the same reasons discussed in connection with motions. But, given the path-setting function of this conference, it is important that adjournments be brief, *e.g.*, a week or two.

The preliminary conference is an occasion to address settlement, or, at least, to narrow the issues. Whatever disclosure schedule is useful to advance the case fairly and rapidly, including disclosure in stages, should be issued.[2] Under the CCJP, the court will assign a case to a Differentiated Case Management (DCM) track, or confirm the track selection made by the filing party in the RJI, a new form of which became effective January 31, 2000. The track selection will determine the deadline by which disclosure is to be completed—8, 12 or 15 months in expedited, standard, or complex cases, respectively.[3] The court will issue a preliminary conference order setting the dates by which items of disclosure are to be completed within the relevant overall deadline.[4] A compliance conference date shall be set forth in the order of DCM cases (no later than 60 days prior to the date for completion of discovery)[5] so that the court can monitor progress of discovery, explore settlement, and fix a deadline for filing the note of issue.

In contrast with the preliminary conference date, the parties can select a compliance conference date to suit their convenience. In any event, they know the date months in advance. There is, thus, less reason to grant an adjournment of such a date than of the preliminary conference date or of a return date or argument on a motion. Furthermore, the compliance conference is a tool to promote efficient progress in the pretrial phase of the case and to minimize delay. By that date, much, sometimes all, discovery is to have taken place. The court, therefore, must be parsimonious about granting adjournments. An attorney seeking an adjournment of such a conference should have a good reason—a genuine problem that arose without counsel's fault—and any adjournment should be brief, *e.g.*, a week or two. This is true even if the request is on consent of all parties.

Adjournments of Discovery Deadlines Another sort of request for adjournment crops up with frequency in the pre-note-of-issue phase of the case—the request to adjourn discovery deadlines. This is sought, not because of conflicts in counsel's schedule, but, as with motions, because counsel needs more time to complete appointed tasks.

The court has broad discretion to supervise discovery, including fixing deadlines and ruling on requests for additional time in which to conduct disclosure.[6] Requests for adjournments of discovery deadlines are a major problem for our court system. The preliminary conference order usually contains deadlines for conducting phases of discovery and for all disclosure. Much is riding in every case on adherence to deadlines. Unfortunately, it is very common, at least downstate, for discovery scheduling orders to be violated. Sometimes the violations result in disclosure motions; in other instances, the parties may appear at a compliance conference when the court finds, to its acute dismay, that there has been noncompliance with the prior order. Obviously, a court system that is serious about providing fair but swift justice cannot be indifferent to such situations. This is so whether the violation was caused by efforts at obstruction or lassitude. Attorneys should not expect the court to countenance *de facto* "adjournments" of disclosure deadlines.[7] Sanctions are appropriate in such cases.[8]

The importance of complying with discovery obligations was strongly emphasized in a 1999 decision of the Court of Appeals. Chief Judge Judith Kaye, writing for a unanimous court in *Kihl v. Pfeffer*,[9] upheld the dis-

missal of a complaint for failure to provide timely disclosure, noting:

> [W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint.
>
> Regrettably, it is not only the law but also the scenario that is all too familiar. 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 (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.[10]

If a party has some basis for failing to provide disclosure as previously ordered, as where a witness has been taken ill, a judge will respond reasonably. But the party should seek an extension of a deadline from the adversary and then from the court. The parties cannot extend a court's disclosure schedule on their own. The party should seek approval *in advance of the deadline in question*. Failing to do this not only violates a court directive, it may also have an adverse impact on other aspects of the court's schedule, *e.g.*, the other party may decline to produce its witness because of the failure to produce the first one; the deposition may stall for lack of compliance with a document demand or medical record authorizations.

A common illustration of problems with "adjournments" of disclosure dates concerns depositions. Typically, the preliminary conference order provides for the plaintiff to be deposed first and then for depositions of defendants on staggered dates. But, if plaintiff fails to appear, defendants may refuse to do so as well. Or, if one defendant fails to appear, those next in line may decline to submit to an EBT until that defendant appears. These problems can cause serious delay and be quite unfair. Parties do not have the right to adjournments by self-help.[11]

Changes of Counsel A particular variation of the adjournment problem is presented by attempts to change counsel. These can occur, of course, in the post-note-of-issue phase of the case as well, where they may be even more disruptive.

When an attorney wishes to end representation of a party in litigation, a substitution on consent can be made by filing a form. However, there are many occasions when the attorney must move to be relieved, as where the client can no longer be located or there are disputes between attorney and client over the fee or the manner in which the representation is proceeding. The attorney seeks leave to be relieved, but granting the motion involves a stay of proceedings so that the client can retain a new attorney.[12]

An attorney needs to be just as energetic in this context as in others. The delay involved in affording the client an opportunity to obtain new counsel can adversely affect the progress of the case. The new attorney may well seek a further adjournment in order to become familiar with the case. Especially on the eve of trial, but at other key points as well, the outgoing counsel needs to set forth a good reason for discontinuing the representation. Genuine and substantial differences of view on how the representation should be conducted can constitute such a reason. In addition, if the withdrawal comes on the eve of trial or at some other key point, counsel should explain why the motion for leave to withdraw was not made earlier. It is frustrating to the court and to the cause of justice if the outgoing attorney turns out to have made a motion at an inconvenient time when it could easily have been made much earlier. If a motion is made on the eve of a pretrial conference or, say, a few days prior to trial, but could have been made four or five months earlier, the court is likely to be unsympathetic.[13] Counsel again need to realize that late requests of this sort may be unfair to the other side, and

Time Constraints on Judges

Time constraints on judges abound in the rules. They range from CPLR 2219 ("[a]n order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days") to Uniform Rules for the New York State Trial Courts, Rule 202.19 (setting forth the differentiated case management directives for the completion of discovery in expedited, standard and complex cases) to Uniform Rules 202.12(b), 202.16(f), 202.26, 202.56(b), 202.60, and 202.64 (regulating the times within which preliminary and pretrial conferences are to be held).

Together with an overlay of the aspirational standards and goals that the computerized Civil Case Information System automatically gives each case, these deadlines placed on judges represent a tremendous pressure and a motivational prod that undergirds their attitudes about adjournments.

they interfere with the judge's orderly scheduling of matters for trial, causing derivative harm to other parties in other cases.

In addition, if, as sometimes occurs, the motion for leave to withdraw is not the first substitution of counsel in the case, the moving attorney may well encounter skepticism on the part of the judge. A client who repeatedly changes attorneys may appear too fickle or too calculating for his or her own good.[14]

If a court is of the opinion that granting a motion for leave to withdraw and allowing the client time to find a new lawyer would frustrate the cause of justice, the court should deny the application. It should not grant the motion but deny the client a chance to find a new attorney.[15]

Adjournments of Trials

Whether to adjourn a scheduled trial date or to grant a continuance once the trial has commenced[16] are matters committed to the discretion of the judge.[17] The judge needs to weigh carefully and in a balanced manner all considerations relevant to the achievement of justice under the circumstances.[18]

Judge (then Justice) Titone wrote in one case:

> It is an abuse of discretion to deny a continuance where the application complies with every requirement of the law and is not made merely for delay, where the evidence is material and where the need for a continuance does not result from the failure to exercise due diligence. Liberality should be exercised in granting postponements or continuances of trials to obtain material evidence and to prevent miscarriages of justice.[19]

A judge needs to be concerned whether the other party would be materially harmed by the delay. If the adjournment is brief, then the harm may be insignificant, assuming the request is well-founded and not the result of the attorney's own conduct. Lack of an adversary's objection is a factor favoring the grant of the adjournment. If the adversary does object, it should articulate concretely how it will suffer harm.[20] But the judge will also have to consider whether granting an adjournment would be overly generous and adversely affect other cases. Will other parties be penalized, in terms of efficient preparation for trial based upon an expected trial date or in other respects, if an adjournment is granted in an earlier case, which will have to be tried later, on a date originally scheduled for the trial in another case? Will an adjournment create downtime for the judge?

If trial has actually begun, it may be difficult to give an adjournment of more than a day or two. More flexibility is available in non-jury cases. As before, there must be a good reason for the delay being sought. Because the trial is such a critical stage in the case, and it generally takes so long to reach it, an attorney should not seek to move it or interrupt it without a showing of true need. Minor necessities will not suffice. And, the reason must not be the result of counsel's inaction or other fault. Vacation or business plans of counsel or a party will probably not suffice if the trial was scheduled some time in advance.

If there have been previous adjournments of the trial date, the attorney must expect the judge's patience and credulity to be increasingly tried.[21] An attorney who, for instance, obtains an adjournment of the trial to resolve a problem with an expert will face a difficult time getting another adjournment if the problem persists. If different grounds are offered for a series of adjournment requests, the judge is likely to wonder if the truth is not that the party is trying to avoid the day of reckoning.

It is true, however, that courts have ruled that the mere grant of previous adjournments is not a basis for denying a further request that is well-founded. If the previous adjournments were brief and the reason for the latest request lies outside the control of the applicant (as where an independent medical witness has left town and not yet returned), then a further adjournment may be necessary to a fair process.[22] Of course, the briefer the adjournment sought, the better its prospects. Also relevant is whether previous adjournments were given to the other side. The court may find unacceptable the refusal to consent of a party that itself benefited from previous adjournments.[23]

The following are circumstances that may well constitute good reason to adjourn a scheduled trial date or to adjourn a trial that has already commenced:

- *Illness of counsel or a party*. If it is the party who is ill, the judge may require a showing that the presence of the party is essential to fair proceedings. The judge may also require a medical affidavit.
- *Unanticipated events at trial*. Events may transpire at trial that are unanticipated even by the most diligent and prepared counsel. Fairness may require a continuance to permit some preparation to address such an event or collection of proof to respond to it. The court may issue an unexpected ruling that alters a party's trial preparation and strategy.[24] A witness may testify in a manner dramatically inconsistent with past deposition testimony. Or a document may surface the existence of which may have been unknown. The opposing attorney who can show that the testimony or evidence is new may be able to obtain the relief of a curtailed trial day, or, perhaps, a day off from the trial to prepare adequately. In some instances of this sort of surprise, the attorney may need to take a deposition of the witness on an issue over a weekend, perhaps, or to contact witnesses to rebut testimony that took an unexpected turn. The graver the surprise and the more the need for op-

posing proof, the greater the time counsel may seek. In a jury trial context, however, the judge is obviously limited in how much time can be afforded. Even if the judge were to grant an adjournment of a week or two, the attorney needs, as a practical matter, to consider the price to be paid in juror annoyance or, perhaps, a mistrial.[25]

- *Unavailability of a witness*. If a witness becomes ill or otherwise unavailable, a continuance may be in order. The witness should be identified. If illness is involved, again, medical proof should be provided. Of course, it must be demonstrated that the presence of the witness is essential to a fair trial. The testimony should not be cumulative. Mere speculation on this score will not suffice.[26] It must also be shown that the witness will be available on the requested adjourned date. The judge needs to be assured that there will not be a continuing problem.

In addition, the movant must demonstrate diligence.[27] Attorneys should give careful attention to this consideration. The absence of diligence is often apparent to judges, especially the later the application is made. The pleadings and decisions on motions should have formed a framework of the case. The applicant should have been able to tell from this framework and from discovery what needs to be proven and what claims or defenses would have to be met. Further detail may have surfaced at the pretrial conference. If the trial date had been set with precision or even reasonably clear approximation, then the judge may well conclude that a diligent attorney preparing the case in a responsible way would have undertaken to procure the attendance of the witness upon whose absence an application is based.[28] Indeed, some judges give the parties a short time, say a week, after the conference at which the trial date is fixed, to contact witnesses and experts in a last-ditch opportunity to change the trial date. Beyond that one week, if no one objects, the date becomes fixed. Accordingly, the attorney who seeks a later adjournment had better be prepared with a concrete demonstration of energetic preparation. A vague affirmation will probably fail of its purpose.

Trial dates are often set on a tentative basis in a compliance conference or even a preliminary conference order. Many judges will confirm the date at the final compliance conference. Under the CCJP, the trial date must in any event be fixed at a pretrial conference, which is to take place within 180 days after the filing of the note of issue. The trial date is to be within eight weeks of the pretrial conference.[29] Thus, attorneys in many cases will know at least the approximate trial date well in advance. Major matters of trial preparation, such as withdrawing from the case if there is a problem or retaining an expert or locating fact witnesses, should be taken care of well in advance, not mere days before trial.

Attorneys should keep in mind that as trial dates are confirmed in cases, the judge records them in a book or computer and makes scheduling decisions for other cases based upon that information. Once the date is set, significant disruption can occur to the court from late requests for adjournments. Such requests really should be confined to serious emergencies that arise at the last minute through no fault of counsel.

A problem that recurs with frequency just before and during trial is obtaining the presence of professionals, such as physicians, and expert witnesses.[30] It is difficult to predict trial dates with absolute accuracy, and the schedules of experts are often so complicated that conflicts and problems may occur in good faith. Courts are disinclined to deny a party a day in court, after years of waiting, because of the absence of a crucial expert witness where the proponent has been diligent.[31] If, for example, a party's counsel has acted energetically but the expert makes a diary error that is discovered at the last moment, this may justify an adjournment.[32]

In general, it should be possible to work around many such scheduling problems. Modest alterations can be made in the trial schedule. An adjournment of a few hours or a day may suffice. Often, it is possible to take a witness of this sort out of turn. Although this may not be ideal trial presentation, that consideration can be outweighed by the need to avoid complications or delays that would ensue from an adjournment. At times it may be appropriate for the court to direct that the testimony be taken on videotape and later presented in court that way rather than through the live witness. Again, counsel might prefer to have the witness appear live before the jury, but this preference should not be determinative if the only alternative is a lengthy delay.

Denial of a request for an adjournment of a few hours or a day because of unavailability of an expert witness, especially in a non-jury case, may result in a finding of abuse of discretion if there has not been a lack of dili-

Major matters of trial preparation, such as withdrawing from the case if there is a problem or retaining an expert or locating fact witnesses, should be taken care of well in advance.

gence. If the period sought is longer, an abuse is less likely to be found.[33]

Engagement on Trial

If an attorney is obliged to attend a conference in one court at the same time he or she is supposed to attend a conference in another, it should be possible to adjourn one or the other. Flexibility is less available when an attorney's inability to appear in one court for whatever purpose is due to being on trial elsewhere. This happens often. Such situations are governed by Part 125 of the Rules of the Chief Administrator of the Courts.[34]

That an attorney is engaged in another court is a ground for an adjournment. "Engagement" is defined as "actual engagement on trial or in argument before any state or federal trial or appellate court."[35] What is "actual engagement on trial" may be subject to different interpretations. If a trial has actually begun, there shall be no adjournment to permit counsel to appear elsewhere except in the discretion of the trial judge, who shall grant a reasonable adjournment so that counsel can appear in an appellate court.[36]

When an attorney has conflicting engagements, the courts in question are to determine in which matters adjournments should be granted and which are to proceed. Rule 125.1(c) sets forth a list of proceedings in order of priority to be accorded by the court. When the conflict is between two general civil matters, priority is to be accorded to the one in which there is to be a jury trial. Beyond this, an attorney in conflicting general civil matters should proceed in any case given a statutory preference or, absent that, any case involving exceptional circumstances.[37] If there is no case of the latter variety, counsel should proceed in the case that was first scheduled. Illustrations of exceptional circumstances are provided and may include a case in which a witness or party may have difficulty attending.[38] If a matter has been much adjourned, that is a factor to be taken into account by the court in which an application to adjourn is made.[39]

The existence of an engagement is to be established by submission to the judge of an affidavit or affirmation in accordance with Rule 125.1(e)(1). The attorney should not rely upon lesser means, such as sending an emissary to request an adjournment orally, or placing a telephone call to the court clerk.[40] Nor should the attorney submit an incomplete affirmation. If an affirmation in compliance with Rule 125.1(e)(1) is properly submitted and reflects a conflict, a judge in a case of lesser priority may be found to have engaged in an abuse of discretion if an adjournment is denied.[41]

When cases are fixed for trial a significant period in advance, counsel must appear or send a substitute.[42] If a date for trial has been fixed at least two months in advance, the attorney who has been designated to serve as trial counsel must appear on that date unless actually engaged elsewhere, in which event he or she must supply substitute trial counsel.[43]

With the advent of the Comprehensive Civil Justice Program, which requires elimination of the Trial Assignment (or "dual track") Parts, some bar groups expressed concern that there would be an increase in scheduling conflicts for attorneys because a greater number of pure IAS Judges would be vying for their presence at the same time. Although Part 125 of the Rules of the Chief Administrator provides a road map to resolve such conflicts, the fear is that the road has potholes. The court system is installing a computerized means by which judges can determine the existence of scheduling conflicts. In New York County Supreme Court, a local rule is being adopted that will standardize the method for selecting trial dates. The attorneys will have the opportunity to consult their trial schedules and the schedules of parties and witnesses before the date is finalized. The rule promotes consultation among judges. The need for adjournments may thus be reduced; conflicts can be resolved by reasonable accommodation among judges attuned to the legitimate scheduling concerns of the trial Bar. Part 125 would be available to resolve conflicts not otherwise avoided.

Conclusion

There will always be a need for adjournments. But, the bar can avoid trouble for itself and its clients and difficulties for the bench by being diligent, seeking an adjournment only for good cause, consulting the adversary fully, and respecting the rights of parties in other cases and the time of the judge. It is best not to put off anything until tomorrow unless doing so is objectively necessary rather than the result of inattention or lassitude of counsel.

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1. No appearance in court should be for naught. Every time a case is before the court, it should be for the purpose of advancing it to the point of disposition.
2. Uniform Rules for the New York State Trial Courts, Rule 202.12(c) ("Uniform Rule") prescribes the matters that must be considered at the preliminary conference including simplification and limitation of factual and legal issues where appropriate. The *Operating Statement* of the Commercial Division of the Supreme Court, New York County, obligates the parties to cooperate in identifying and engaging in limited-issue discovery in aid of early disposition and requires the court at the preliminary conference to directed such limited-issue discovery. *Operating Statement*, at 11, 12 (Oct. 1999).
3. Uniform Rule 202.19(b)(2).
4. Uniform Rule 202.12(d).
5. Uniform Rule 202.19(b)(3).
6. *See Red Apple Supermarkets, Inc. v. Malone & Hyde, Inc.*, 251 A.D.2d 78, 673 N.Y.S.2d 672 (1st Dep't 1998).
7. *Id*.

8. CPLR 3126; Uniform Rule 202.12(f).
9. 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
10. *Id.* at 122-23 (citations omitted).
11. The preliminary conference order can be framed in ways that minimize such disputes. If the order sets out specific days on which each party is to appear and one day is missed for some reason, that can knock the entire schedule off track. Instead, the court can fix a deadline for the completion of all depositions and leave it to the parties to arrive at specific dates within the deadline. The court might also employ a schedule of fixed dates shortly after the deadline which must be adhered to by the parties if they are unable to agree on dates of their own.
12. *See* CPLR 321.
13. *See Rosato v. Macier*, 222 A.D.2d 865, 635 N.Y.S.2d 726 (3d Dep't 1995).
14. *Schneyer v. Silberg*, 156 A.D.2d 200, 548 N.Y.S.2d 458 (1st Dep't 1989), *appeal dismissed*, 77 N.Y.2d 872, 568 N.Y.S.2d 914 (1991).
15. *J.C.S. Design Assocs., Inc. v. Vinnik*, 85 A.D.2d 572, 445 N.Y.S.2d 717 (1st Dep't 1981).
16. CPLR 4402.
17. *Spodek v. Lasser Stables*, 89 A.D.2d 892, 453 N.Y.S.2d 706 (2d Dep't 1982).
18. *Le Jeunne v. Baker*, 182 A.D.2d 969, 582 N.Y.S.2d 564 (3d Dep't 1992).
19. *Balogh v. H.R.B. Caterers, Inc.*, 88 A.D.2d 136, 141, 452 N.Y.S.2d 220, 224-25 (2d Dep't 1982) (citations omitted). *See Mura v. Gordon*, 252 A.D.2d 485, 675 N.Y.S.2d 142 (2d Dep't 1998).
20. *See Rodriguez v. Pisa Caterers, Inc.*, 146 A.D.2d 686, 537 N.Y.S.2d 50 (2d Dep't 1989).
21. *See Wolosin v. Campo*, 256 A.D.2d 332, 681 N.Y.S.2d 358 (2d Dep't 1998); *Goldstein v. Goldstein*, 251 A.D.2d 272, 675 N.Y.S.2d 64 (1st Dep't 1998).
22. *See Gombas v. Roberts*, 104 A.D.2d 521, 479 N.Y.S.2d 592 (3d Dep't 1984).
23. *See Stabler v. Manhattan & Bronx Surface Transit Operating Auth.*, 155 A.D.2d 390, 548 N.Y.S.2d 17 (1st Dep't 1989) (reversal of order denying request for continuance by plaintiff after 13 previous adjournments had been given to defendant).
24. *See id.* (bifurcation of liability and damages).
25. Of course, the departure may be so excessive that the surprised party may seek preclusion of the evidence altogether. This is a subject beyond the scope of this article. *See, e.g.*, Uniform Rule 202.17(g), (h).
26. *Metropolitan Transp. Auth. v. Cosmopolitan Aviation Corp.*, 99 A.D.2d 767, 471 N.Y.S.2d 872 (2d Dep't), *aff'd*, 64 N.Y.2d 623, 485 N.Y.S.2d 37 (1984).
27. *Rodriguez v. Pisa Caterers, Inc.*, 146 A.D.2d 686, 537 N.Y.S.2d 50 (2d Dep't 1989).
28. *See Paulino v. Marchelletta*, 216 A.D.2d 446, 628 N.Y.S.2d 541 (2d Dep't 1995); *Wren v. Lawrence Hosp.*, 203 A.D.2d 559, 612 N.Y.S.2d 933 (2d Dep't 1994); *Vogelhut v. Waldbaum's Supermarket*, 127 A.D.2d 590, 511 N.Y.S.2d 647 (2d Dep't 1987).
29. Uniform Rule 202.19(c).
30. *Bruce v. Hospital for Special Surgery*, 34 A.D.2d 963, 312 N.Y.S.2d 765 (2d Dep't 1970) (abuse of discretion in refusing defendant's request for adjournment of three weeks so physician could testify as to crucial factual issue where excuse for unavailability was reasonable); *see Wai Ming Ng v. Tow*, 260 A.D.2d 574, 688 N.Y.S.2d 647 (2d Dep't 1999).
31. *Goichberg v. Sotudeh*, 187 A.D.2d 700, 590 N.Y.S.2d 283 (2d Dep't 1992).
32. *See Mura v. Gordon*, 252 A.D.2d 485, 675 N.Y.S.2d 142 (2d Dep't 1998).
33. *Spodek v. Lasser Stables*, 89 A.D.2d 892, 892-93, 453 N.Y.S.2d 706, 707 (2d Dep't 1982).
34. Uniform Rule 202.32.
35. Rules of the Chief Administrator of the Courts, Rule 125.1(b) ("Chief Admin. Rule").
36. Chief Admin. Rule 125.1(f).
37. Chief Admin. Rule 125.1(d).
38. *See id.*
39. Chief Admin. Rule 125.1(e)(2).
40. *See Foster v. Gherardi*, 201 A.D.2d 701, 608 N.Y.S.2d 289 (2d Dep't 1994); *Maiello v. Chrysler Corp.*, 150 A.D.2d 849, 540 N.Y.S.2d 602 (3d Dep't), *appeal dismissed*, 74 N.Y.2d 945, 550 N.Y.S.2d 278 (1989).
41. *Gage v. Gage*, 227 A.D.2d 443, 643 N.Y.S.2d 358 (2d Dep't 1996); *Avital v. Avital*, 152 A.D.2d 523, 543 N.Y.S.2d 466 (2d Dep't 1989).
42. *Clarke v. New Rochelle Hosp. Med. Ctr.*, 149 A.D.2d 559, 539 N.Y.S.2d 1008 (2d Dep't 1989); *Claburn v. Claburn*, 128 A.D.2d 937, 512 N.Y.S.2d 906 (3d Dep't 1987); *Romer v. Middletown Sch. Dist.*, 137 Misc. 2d 46, 519 N.Y.S.2d 924 (Sup. Ct., Orange Co. 1987).
43. Chief Admin. Rule 125.1(g).

Summary of Report

Committee Report Recommends Pension Simplification Commission

BY ALVIN D. LURIE

Pension simplification is not just for pensioniks in the bar. It has increasingly seeped into the practice of many related disciplines—estates and gifts, domestic relations, taxation, trusts, state and local, employment law, elder law, labor relations, and litigation, to mention just a few.

Few are the lawyers who do not have a vested interest in its simplification. The very complexity of the rules has kept too many from engaging in this area, with resultant disservice to themselves and their clients.

With these concerns in mind, the New York State Bar Association's Special Committee on Pension Simplification, in a report approved by the Executive Committee, has recommended changes in the Employee Retirement and Income Security Act (ERISA). The principal conclusion of the report, entitled *ERISA: A Process Still Awry, A Need to Simplify*, is that the federal government should create a pension simplification commission. The commission would operate in much the same way as the New York State Law Revision Commission, which has exercised a beneficial influence on the development of coherent, comprehensive revisions in New York statutes.

This article covers the highlights to provide members with information they can use in helping to shape public opinion in the hope that legislators and regulators will agree on the value of a commission as a vehicle for carefully considered change.

The very phrase "pension simplification" is to many an oxymoron, or at least an unrealistic goal. There have been calls for simplification of ERISA almost from the time it was enacted 25 years ago. Instead, each ensuing session of Congress has introduced an exponential growth in the complexity of the law.

In the present environment, however, factors seemingly quite unrelated to pension simplification may now provide the impetus for simplification. The increasing popularity of measures to "save Social Security" is likely to lead to moves to strengthen the private pension scheme. Social Security without the support of a muscular private security system cannot provide a financially secure retirement for all working Americans.

A simplified ERISA could perform its function of strengthening and improving pensions for workers while unshackling the business community from rules that discourage pension growth.

The issue is not just simplification for its own sake, or even for the sake of individual plan sponsors for whom the risks of plan disqualification have grown exponentially and the costs of administration have become increasingly prohibitive. More importantly, the matter has a macroeconomic dimension. An efficient, cost-effective pension scheme is critical to the economic health of the nation, sustaining not only the financial well-being of retirees, but, also—as the largest single repository of private capital and the principal inducement to personal savings and investment—the greatest private engine for economic growth.

Mission and Response

The mission of the committee was set by the specific direction from the Executive Committee to determine "whether major simplification of the federal legislation pertaining to qualified pension . . . plans can be achieved" and to make recommendations "with the object of eradicating rules that burden the system beyond the benefits they provide."

The initial response to that mandate was the issuance of a 1988 report that identified areas of the law believed to warrant across-the-board simplification. The most recent report focuses instead on what the committee concluded would be the only way to achieve a thorough simplification—the establishment of a simplification

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commission. The ultimate goal is not to set up another bureaucracy, but to achieve expansion of coverage of and benefits for the rank-and-file by discouraging the abandonment of private pension plans by employers, large and small, and encouraging the adoption of new plans by small employers where most of the non-coverage has always prevailed.

The committee found that mushrooming pension legislation and regulation has had devastating effects on the survival of private pensions, let alone their future growth. Conversely, it found, a meaningful simplification of the laws and cutting back of governmental regulations would have an enormously salutary effect on future growth of the private pension system.

Legislative History

There were dire predictions, almost as soon as the ink dried on the signed copy of ERISA,[1] that its regulation of pensions would bring down the private pension movement; and the cries increased with each succeeding amendment. That the predicted collapse did not occur was a tribute to the resiliency of the American entrepreneurial community.

Nevertheless, the continual assault of the legislative-regulatory regimes on pension planning has had its effect. The flight from defined-benefit to defined-contribution plans, and particularly to 401(k) plans, was not accidental, but rather a direct response to the contraction of defined benefits and the expanded compliance costs associated with defined-benefit designs. The more recent proliferation of unqualified deferred compensation plans, not just for the highly compensated, reflected more of the same.

The so-called "success tax," Internal Revenue Code § 4980A (IRC), which imposed a 15% surtax on distributions from all qualified plans and retirement arrangements over a certain threshold level, forced many of the participants (including company owners), who were often the principal beneficiaries of pension plans, to at last acknowledge that they and their families might be fortunate to realize, after tax, 10 cents on each pension dollar they had accumulated over their careers. That led to a lessening of faith in pension plans as the "quintessential tax shelter" (a phrase that was practically a synonym for "pension plan" before Congress started to tighten the regulations).

It would be naive to minimize the lure of a tax shelter as an important contributor to the success of the private pension system. In the small plan universe at least, the creation of a pension plan is often due at least as much to the owner's search for personal financial security as to concern for the retirement security of employees. Therefore, the subsequent elimination of the success tax,[2] in stages—first, as a three-year moratorium in 1996, and, then, by total repeal in 1997—is perhaps the single most positive development in recent years to restore the enthusiasm of the business community for private pension plans.

Members Sought for Pension Commission

The Association is seeking additional members to work on proposals to simplify the pension laws. One project is being discussed in the press and by lawmakers in Washington, but the Special Committee on Pension Simplification believes that more needs to be accomplished.

The committee is being expanded to continue its work relating to ERISA as well as identify problems and devise improvements in other pension provisions. Areas of approach under consideration include legislation, amendments to pension plan rules in general, development of special rules to assist small businesses, or a combination of actions. With a view toward assisting small businesses, the committee is examining means of preserving flexibility of design options, while enabling smaller companies to be largely freed of legislative and regulatory complexities in matters of plan design, operation, administration and reporting. The overall objective is to eliminate provisions that burden the system beyond the benefits provided.

Members interested in joining the committee are asked to contact the incoming president of the Association, Paul Michael Hassett, in either a letter or a call to the NYSBA office in Albany.

Piecemeal Improvements

Recently there have been other "positive" developments for pensions of all-sized businesses. Notable examples are repeal of IRC § 415(e) (limiting the benefits that can be provided to any individual from a combination of a defined benefit and defined contribution plan), of IRC § 401(a)(26) (requiring high-percentage, *i.e.*, 40%, participation in plans of small employers), and of the family aggregation rules.

Another was the liberalization, under the Small Business Job Protection Act of 1996, of both the employee leasing provisions and the use of § 530 of the Revenue Act of 1978 as a defense against worker misclassification in payroll tax disputes with the Internal Revenue Service.

All have had a significant impact on pension planning. Provisions later repealed or liberalized have often not so much been designed to correct perceived unfairness to participants as to raise revenue.

However, simplification of the pension law will not get far with piecemeal improvements at successive sessions of Congress. Although every session in at least the

Excerpt from Report

The following excerpt from the pension committee's report illustrates its findings on the difficulties in keeping abreast of the changes made in ERISA provisions over the years and the costs involved in the process.

To arrive at some comprehension of the burden of coping with ERISA's complexities, one need only sit in on any of the numerous study groups around the country and listen to the abstruse comments of experienced practitioners exchanging views as to the unending problems they continuously encounter in their practices, agonizing over minutiae, debating alternative and often opposing solutions.

Exhilaration may be detected among the participants engaging in these sessions. They do enjoy the intellectual challenge of what they do; they are no less adept at, nor relish any less than rocket scientists, their work. But while the expenditure of such erudition is an appropriate use of our nation's brainpower to launch us into space, or even cyberspace, it is dubious whether one can justify its employment in the launching or sustaining of viable pension plans for our millions of businesses, many small.

First, there is not enough of such talent to go around. Small businesses do not have access to it, and, quite apart from that, should not be obliged to pay for it. The bulk of practitioners who counsel the bulk of businesses are not sophisticated in pension matters; and the more the law keeps changing, the less so they become. As with Gresham's law, the bad drive out the good, as businesses are unable to afford the good, even if they can find them, let alone recognize who are good enough (query, how long will it be before none are?).

A constantly growing and changing body of qualified pension rules cannot be sustained by a constantly diminishing body of qualified practitioners. A regulatory scheme whose rules are beyond the skills of the regulators cannot long endure. A system whose compliance costs—just the administrative and professional costs of maintaining qualification—rival the costs of providing the benefits themselves will fall of its own weight.

last half dozen years has seen the introduction of so-called pension simplification measures, the proposals have largely died with the session's end.

The problem with ERISA is not regulation, but the extent of regulation—and not so much in the original version of the 93rd Congress, as in the accretions, constraints, and embellishments added in subsequent years. Congress has been its own harshest critic, judging by the changes it has made in the work product of its predecessors. The special committee has concluded that cutting back the present complexity is urgently needed. Even the IRA rules, which once offered a simple alternative to qualified plans, have now become so laden with variations, exceptions, restrictions and penalties—especially with the advent of Roth IRAs—that they have become as troublesome to work with as pension plans themselves.

The occasional demurrer from the call for simplification is posited not on a defense of complexity, but on concern that "simplification" is merely a cover for emasculation of hard-won pension benefits. The few small steps on the way to simplification have not gone far down that path. The road is long, and there is no real, organized constituency for simplification, not even among lawyers, who are obliged to master the all-too-frequent revision upon revision, intricacy upon convolution—"reticulations," the Supreme Court called them in *Nachman Corp. v. Pension Benefit Guaranty Corp.*,[3]—often at uncompensable hours. Practitioners' distaste for this sisyphean exercise is outweighed by fear that well-intentioned changes in the rules are more likely to add new complexities.

With concerns for the future of Social Security now taking center stage, it is only proper that private pensions receive a fresh look. Anyone who thinks seriously about this problem recognizes that a sound and expanding private pension program is a vital complement to Social Security. Together they are two-thirds of the support for that oft-mentioned three-legged stool. That means bringing into the rolls of the private retirement system the great majority of workers who do not yet have pensions, while preventing those now covered from losing their pensions as employers drop their plans.

The Case for a Simplification Commission

This is why the committee proposed the formation of a national commission on pension simplification—not just a showcase to give the appearance of momentum but a real, working body peopled by commissioners serious about getting the job done. For maximum impact, the recommendation is that commissioners be jointly appointed from among the private sector, government and academe by the president and the leaders of Congress.

The commission members should serve for a term of years sufficient to complete a total review and revision of the pension laws. The commission should be headed by a well-paid executive director of the highest professional credentials in the pension community, and one with a forester's skill to see the forest for the trees. There must, of course, be a staff of experts and aides from all the germane disciplines (the staff of the Joint Committee on Taxation is a good model).

Nor is it enough that the professional disciplines—actuarial, legal, economic, human relations—get their share of representation as commissioners and as staff members. There must be substantial input from (although not necessarily as commission members) the major sponsors and promoters of pensions—big business, small firms, labor unions, multiemployer plans and single-employer plans.

Simplification does not require unwinding the main strands of the present law, as some fear. The committee was sensitive to and sympathetic with those concerns, but did not think that they should stop the commission from looking at the law whole, the substance, procedure, sanctions—striking or revamping only what unduly complicates without sufficient benefits to participants (*i.e.*, to sufficient numbers of participants). The touchstone should be preservation of the voluntary pension system, not preservation of a structure that drives sponsors out of the system. Zero tolerance of perceived instances of plan discrimination might be good for individual participants, but, under a law-and-economics value system, bad for the pension universe. Quite simply the objective should be to eliminate rules generally perceived as making it too hard to maintain a plan, traps for the unwary, costs that make it unduly expensive to maintain the qualification of a plan, and penalties for failing that are too numerous and too harsh.

Of course, the function of the commission must not be to dismantle participant protections in the guise of simplification. But its mission statement should carry an injunction to balance benefit and burden. It should not be constrained to refrain from eliminating features of the rules that inflict pain on the many to provide gain to the few. For example, serious consideration should be given to a return to the historic reliance on "facts and circumstances" to administer the antidiscrimination test, rather than the bright line methodology now mandated in the regulations. A relaxation of the hypertechnical rules affecting minimum distributions and incidental benefit is another area ripe for simplification without damage to the equity of the system.

The commission could once and for all resolve some of the tension between the concepts of "exclusive benefit" and "incidental benefit" with which the courts continually wrestle—exclusively for participants, incidentally for plan sponsors. Perhaps it is time to recognize that there are many interests intertwined in the modern pension plan, just as Professor Berle, writing in his classic treatise, *The Modern Corporation and Private Property* (1932) with Professor Means, "discovered" more than 65 years ago that the modern corporation should reflect the needs of the employees, the business managers, the business owners, the community and the nation. Protection of participants' rights against alleged "discrimination," which figures so largely in much of the statutory, regulatory and judicial law, could then be viewed from another perspective. Recommended reading would be the recent opinion of the Supreme Court in *Hughes Aircraft Company v. Jacobson*,[4] involving a dispute between that company and its pension plan participants over surplus pension assets. The Court wrote that denying the company's interest in such surplus "would forestall employers' efforts to implement a pension plan. ERISA, by and large, is concerned with 'ensuring that employees will not be left emptyhanded once employers have guaranteed them certain benefits,' . . . not with depriving employers of benefits incidental thereto."[5]

Restatement of the Law

The end product of the commission's work would be a complete restatement of Title II (the so-called tax title), where most of the complexity resides. It would also be desirable to consider a partial rearrangement of both Title I (the labor title) and Title II to provide a single statement of the rules common to both titles in one place in the statute.

The current design, *i.e.*, separately stated rules in each of the titles, often in identical terms (but sometimes just enough different to compound ambiguity), is itself an unnecessary source of complication and is strictly a function of the way the 93rd Congress so honored the hegemony of the respective tax and labor committees that it gave them each their own separate title in the law. The predictable consequence has been that where the language in the two parts is at variance, or a rule articulated in one is not replicated in the other, courts have had to grapple with the question of whether to import material from one title into the other. This has too easily led into error judges who lacked an appreciation of the distinctive character and purpose of the tax qualification rules.

It is noteworthy that the call for simplification comes from the very category of lawyers most comfortable with—and presumably most benefiting from—the complexities of the law. The committee concluded that the problems posed by a restatement of the law can be largely dealt with by an accompanying statement of the commissioners, explaining exactly where the changes have been made and their intended effect. That would be the "legislative history." The success of restatements of law by the American Law Institute and other such respected bodies reinforces the committee's confidence in the process.

1. Pub. L. No. 93-406, 88 Stat. 829 (1974).
2. IRC § 4980A was repealed by Pub. L. No. 105-34, 111 Stat. 948 (1997).
3. 446 U.S. 359 (1980).
4. 525 U.S. 432 (1999).
5. *Id.* at 446 (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)).

NYSBA welcomes 44 new Sustaining Members to ranks

We wish to extend our sincere gratitude to the following 44 individuals who have recently become new Sustaining Members of the New York State Bar Association.

Our new Sustaining Members include:

Frederick H. Ahrens of Bath
Gerald S. Backman of New York
John T. Bigbie of London, England
Sharon Y. Bowen of New York
Charles W. Brumskine of Washington, D.C.
A. Vincent Buzard of Rochester
Philip J. Capell of Lake Success
Liu Chi of Beijing, Peoples Republic of China
Henry Christensen, III of New York
Joan M. Cresap of Lake Success
Malcolm H. Davis of New York
Lawrence F. Digiovanna of Brooklyn
Emily F. Franchina of Garden City
Mary Giordano of Garden City
David L. Glass of New York
William H. Green of Sands Point
Richard E. Gutman of Irving, Texas
Thomas J. Hall of Staten Island
Harold A. Mayerson of New York
Catherine D. McMahon of Houston, Texas
Henry G. Miller of White Plains
Michael Miller of New York
Martin Minkowitz of New York
Malvina Nathanson of New York
Hon. Mario J. Papa of Gloversville
Gerald G. Paul of New York
Leonard V. Quigley of New York
Carl Radin of New City
George Ribeiro of Central Hong Kong, Peoples Republic of China
Leonard Rosenberg of Great Neck
Michael J. Rufkahr of Washington, D.C.
Arthur V. Savage of New York
Leo L. Schmolka of Armonk
Thomas F. Segalla of Buffalo
Steven B. Shapiro of New York
Mitchell C. Shelowitz of Petah Tikva, Israel
Isaac Sherman of New York
Donald S. Snider of New York
Randolph F. Treece of Albany
John N. Tsigakos of Cranbury, N.J.
Spiros A. Tsimbinos of Kew Gardens
Eugene L. Vogel of New York
Cora T. Walker of New York
and J. Joseph Wilder of Buffalo.

Sustaining Member Honor Roll

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Lawyer's Bookshelf

New York Evidence With Objections, by Jo Ann Harris, Anthony A. Bocchino, and David A. Sonenshein, National Institute for Trial Advocacy, First Edition (1999), 190 pages, $29.95. Reviewed by Paul F. Kirgis.

With its large number of lawyers, its multitiered court system generating an extraordinary amount of published law, and its reluctance to follow federal procedural reforms, New York presents a compelling target for treatise writers of a procedural bent. New York civil practice has long been dominated by David Siegel, but the law of evidence has yet to be co-opted by so strong a personality. In recent years, significant players have entered the evidence field with offerings ranging from full length scholarly treatises[1] to practitioner-oriented trial manuals.[2] This year a new entrant joins the fray in *New York Evidence With Objections*, written by Jo Ann Harris with Anthony J. Bocchino and David A. Sonenshein.

Ms. Harris is well-positioned to tackle New York's occasionally idiosyncratic law of evidence. A member of the American College of Trial Lawyers, she was an assistant U.S. attorney in the Southern District for ten years and a solo practitioner in New York City for nine more before serving as assistant attorney general in the Criminal Division of the Department of Justice. This year she is scholar-in-residence at Pace Law School.

New York Evidence With Objections falls squarely on the practitioner-oriented end of the spectrum of evidence manuals. Like most NITA publications, it is written with the trial lawyer in mind. As Ms. Harris says in the preface, "This book is designed to provide the practitioner and student with a convenient reference for raising and responding to trial objections." At less than 200 pages in a 4" x 6" format, this slender volume can be easily transported to court or class. Ms. Harris has not attempted a thorough scholarly treatment, and her work should not be judged by that standard. If the book provides a user-friendly and accurate synopsis of New York evidence law, it has succeeded. For the most part, *New York Evidence With Objections* succeeds.

The book is organized alphabetically by topic. Some topics are quite narrow. For example, the first subject treated is "Ambiguous Questions," which might be considered a subtopic of objections to the form of a question. In other parts of the book, subtopics are covered within a larger topic group. The many exceptions to the hearsay rule, for instance, are all treated under the topic heading "Hearsay" instead of being scattered alphabetically.

Each entry begins with one or more sample objections based on the relevant topic. The objections are followed by one or more responses enunciating reasons why an objection should not be sustained. Ms. Harris then lists leading New York cases on the topic, complete with parenthetical explanations and accompanied by cross-references to any applicable New York statutes. Finally, Ms. Harris offers her own capsule summary of the issues raised by the topic.

Within each entry, the format is clear and easy to follow, and the references to New York cases and statutes are particularly helpful. Nevertheless, the book's organization is its greatest weakness. The weakness stems not from the format of the individual entries but from the decision to organize the book alphabetically. The alphabetical structure gives the book the feel of a dictionary, and, not coincidentally, the book has both the strengths and weaknesses of a dictionary.

Dictionaries are far more useful to readers than to writers. A reader who happens on an unfamiliar word can easily look up the word in a dictionary to get its meaning. On the other hand, a writer in search of the perfect word typically has little use for a dictionary. Dictionaries just aren't very helpful when a writer has an idea in mind and needs to come up with the perfect word.

Similarly, *New York Evidence With Objections* is most useful for a litigator on the receiving end of an objection. Take as an example a lawyer who, in cross-examining a witness about the witness's prior acts of untruthfulness, gets an objection to the scope of the cross-examination. The lawyer could (in theory) pull out *New York Evidence With Objections* and turn to the heading "Cross-Examination—Scope." There the lawyer would find the following objection: "I object. The question on cross-examination exceeds the scope of direct examination." Reading on, the lawyer would find, among others, the following possible response: "The question seeks to elicit information that is relevant to the credibility of the witness." The lawyer would then see Ms. Harris's explanation that normally cross-examination is restricted to the subject matter of direct, but that inquiry is also allowed into matters affecting the credibility of a witness.

So far, so good. But what of the lawyer defending a store owner in a slip-and-fall case who listens in horror as his adversary elicits testimony that the store owner stopped using wax on the store's floor after the plaintiff's injury? The lawyer knows there is something wrong with this line of questioning, but can't remember the correct terminology. This unlucky lawyer would page all the way through to the last entry of *New York Evidence With Objections* before finding "Subsequent Remedial Measures" and enunciating a proper objection.

Needless to say, no book can deliver perfect legal acumen on demand, and every trial lawyer should know basic principles like the one barring evidence of subsequent remedial measures to prove negligence. But reference manuals are most useful when they are organized around our pre-existing mental categories. To continue the writing analogy, often a thesaurus is more helpful for a writer than a dictionary, because the thesaurus uses in-

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TAX TECHNIQUES

Qualified State Tuition Programs And Education IRAs

BY RICHARD S. ROTHBERG

The advent of Qualified State Tuition Programs and Education Individual Retirement Accounts (Education IRAs), authorized under §§ 529 and 530, respectively, of the Internal Revenue Code (IRC), has brought new attention to the need for planning to meet higher education costs for children, grandchildren and other intended beneficiaries.

Qualified State Tuition Programs, known by the acronym QSTP, are established and maintained by the states. New York has enacted such a program, beginning in September 1997. Maine launched its program last year, which is managed by Merrill Lynch and is being offered nationally. Other states also have such programs. The details of New York's QSTP, a program application, and other information, are easily obtained by tapping the program's web site, www.nysaves.org. Information is provided there about how the program works, and a brochure and application can be obtained by download. The application is submitted to the Teachers' Insurance and Annuity Association of America (TIAA), which manages retirement funds for the New York school system employees, among others.

The first significant advantage of QSTP accounts is that contributions to them are considered completed gifts for federal gift tax purposes, even though the grantor retains much control over disposition of the funds, and such contributions are not taxed in the grantor's estate. A retained power to change beneficiaries and withdraw funds for the grantor's benefit, if contained in a conventional trust, would render the gift incomplete and cause estate taxation of the trust corpus at the trust grantor's death.

Contributions to a QSTP account are considered "present interest" gifts eligible for exclusion from gift and generation-skipping taxes to the extent that they do not exceed the traditional annual exclusion limits (generally $10,000 per year per donee, or $20,000 for a married couple). This is not, by itself, a benefit as distinguished from other forms of annual exclusion giving, but a special election is available that enables a grantor to use up to five years' worth of exclusions at once. If the grantor dies before the end of the five-year period, the portion of the "accelerated" gifts that has not been amortized is includible in the grantor's estate for estate tax purposes. The chief benefit of this provision is therefore the ability to remove a full five years' worth of income and growth on the contributed funds from the grantor's estate tax base, which is not possible with a series of annual gifts.

As enacted, IRC § 529(c)(5)(B) seems to open up an enormous expansion of the power to make annual exclusion gifts. That subsection provides that a change of beneficiary has no gift tax or generation-skipping tax consequences so long as the new beneficiary is not in a lower generation. Section 529(c)(4)(A) states that (with an exception discussed above) QSTP accounts are not subject to estate tax. Does this mean that a grantor can establish QSTP accounts for a whole array of non-descendants (such as nieces, nephews and the children of friends), claiming annual exclusion gift treatment, and then change the beneficiary of all the accounts (during life or by will) to his own children (subject to the $100,000 overall per-beneficiary limit)? The only statutory restriction on such a plan is that a change to a new beneficiary not in the old beneficiary's "family" may cause income tax under the annuity taxation principles of IRC § 72. This is not such bad news if the income tax consequences are manageable. However, proposed regulations would impose adverse gift tax consequences on inter-family changes.[1] Even if those regulations are adopted, the definition of "family" is still quite liberal; for example, nieces and nephews, and their spouses, are considered members of a grantor's family.

The second advantage of QSTP accounts is that they are exempt from federal income tax until distributions are made, and distributions are taxed based on an allocation between income and corpus. This allocation is made by a formula. If the distribution is "qualified" (that is, made after 36 months to pay certain described education costs), the distribution is taxed to the beneficiary, whose bracket is presumably very low. If the distribution is not "qualified," it is subject to a penalty. There is some confusion about whether the income portion of a nonqualified withdrawal is taxed to the grantor or the beneficiary. The Internal Revenue Code states that the distribution is included in the gross income of the "distributee" under IRC § 529(c)(3)(A), to the extent not excluded by a special provision. However, another provision, IRC § 529(b)(3), requires a QSTP to impose a "more than *de minimis* penalty on any refund of earnings from the account" that are not used in a prescribed manner. It appears that for this purpose the program treats the grantor as the "distributee," so that the income portion of such withdrawals is taxed to the grantor.

A third advantage is that New York QSTP accounts enjoy highly favored status for New York income tax purposes. The grantor may obtain a deduction from New York taxable income of up to $5,000 per year, and qualified distributions are exempt from New York income tax.

However, QSTP accounts are not an unmixed blessing. There are significant disadvantages as well. First, in-

QSTP and Education IRA Examples

Allocation rules contained in the proposed regulations for QSTP accounts, Proposed Treasury Regulation § 1.529-3, illustrate how distributions from a QSTP educational savings account are taxed. The earnings portion of a distribution is the product obtained by multiplying the amount of the distribution by the "earnings ratio." The balance of the distribution is treated as a non-taxable return on investment. The earnings ratio is the amount of earnings allocated to the account on the last day of the calendar year, divided by the account balance on that day (after distributions made that year are added back to both the numerator and the denominator).

One example taken from the proposed regulation is as follows:

Initial contribution - 1998	$18,000
Account balance at end of 2011 (including distributions made in 2011)	30,000
Earnings as of 12/31/11 (including distributions)	12,000
Distributions in 2011 for tuition	7,500
Earnings ratio for 2011 (12,000/30,000)	40%
Earnings portion of distribution (40% x 7,500)	3,000
Return of investment portion	4,500

The beneficiary in this example reports $3,000 of income on the distribution, even though the funds were used to pay an education expense. Note that in a traditional IRA, the contribution is deductible, but the entire distribution ($7,500 in this example) would be subject to tax.

Distributions from an education IRA are taxed differently. The portion of a distribution allocable to contributions, and thus not taxed, is the product obtained by multiplying the distribution by the ratio of total contributions to the account balance when the distribution is made. Thus:

Account balance immediately before distribution	$10,000
Total contributions	6,000
Distribution	1,000
Distribution allocable to contributions (1,000 x 6000/10,000)	600
Distribution allocable to earnings	400

If the distribution is applied entirely to qualified higher education expenses, no portion of the distribution is taxed. Otherwise, a further allocation is made. Thus, in the above example:

Qualified higher education expenses paid	$750
Earnings portion of distribution (see above)	400
Excludable portion (750/1000 x 400)	300
Taxable portion	100

The beneficiary in this example reports $100 of taxable income, whereas in a QSTP the entire "earnings portion" ($400 in this example) would be taxed. Unless an exception applies, the $100 taxable portion of the distribution will also be subject to a 10% penalty tax, or $10 in the above example.

vestment options are limited and not subject to the grantor's control. A New York QSTP account is managed by TIAA; neither the grantor nor the beneficiary has any input. Second, the consequences of the death or incompetence of the grantor are unclear. Program literature suggests that the executor or other personal representative will succeed to control over the account, which can create problems of fiduciary responsibility, court supervision and a potential for disputes. Third, it is not clear what happens to excess funds in the account after the beneficiary completes his education or dies. The account owner can change beneficiaries, but what if the account owner has also died, or there are no obvious other beneficiaries? The funds could presumably be distributed to the beneficiary, with whatever tax consequences, but what if the account owner would prefer not to do that because of a perceived lack of financial responsibility on the part of the beneficiary, or other problems in the beneficiary's life? Fourth, "qualified," and thus tax-favored, withdrawals are limited to higher-education costs. Withdrawals to pay other expenses of the beneficiary, such as private elementary or high-school tuition, are potentially subject to penalties and adverse tax treatment. Finally, the penalties associated with certain withdrawals, in the amount of 10%, are significant.

Education IRAs are simpler than QSTP accounts but are of little use to high net worth individuals. Contributions to an education IRA, under IRC § 530, are generally limited to $500 per year per beneficiary. The contributions must be in cash, and cannot be made after the beneficiary attains age 18. The limit on contributions is reduced as the grantor's income (modified in various ways) exceeds $95,000, or $150,000 for a married couple filing jointly, under a formula that precludes contributions altogether for an individual with a modified adjusted gross income exceeding $110,000, or a couple with a modified adjusted gross income exceeding $160,000. Contributions are treated as annual exclusion gifts that count toward the annual limit, and cannot be combined with contributions to a QSTP account. Contributions are not deductible, so the main income tax advantages of education IRAs are that funds in the account may be invested tax free and under the grantor's control (much like a conventional IRA), and may be withdrawn tax free if

qualified higher education expenses for the year exceed the amounts withdrawn. If the amount withdrawn exceeds the year's qualified higher education expenses, that portion of the excess attributable to earnings on the account is subject to tax. In order to determine the portion of the distribution attributable to earnings, the payments for qualified higher education expenses are pro-rated between contributions and earnings. A 10% penalty (with exceptions) also applies to distributions not used for education.

Changes of beneficiary of an education IRA are permitted within the family of the original beneficiary (according to a fairly generous definition of "family"). The new beneficiary must be under age 30.[2] Unused amounts must be distributed to the beneficiary at age 30 and will then become partially subject to tax, so it is highly desirable to shift the account to another beneficiary if one is available. However, the statute is silent regarding the person who has the right to make the change; presumably it is the original contributor, but even if that is correct, it is not clear who may make the change if the original contributor has died.

The use of education IRAs is complicated by the potential use of Hope Scholarship Credits and Lifetime Learning Credits for the same student. Under IRC § 25A(e), a taxpayer cannot claim the credits provided under that section if any exclusion from tax is claimed for distributions from the education IRA in that year. Since both tax benefits are elective, a determination can be made whether the better overall tax result is obtained by claiming available credits or by excluding an education IRA distribution from income. Because an education IRA distribution is taxable to the student, and the credits may be claimed by the parent, the credits may produce a better result in those instances where both are available. One can only hope that tax preparation software is equal to the task of sorting it all out.

1. *See* Proposed Treasury Regulation § 1.529-5(b)(3)(i).
2. *See* IRC § 530(d)(5).

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LAWYER'S BOOKSHELF

CONTINUED FROM PAGE 50

formation the writer already knows as a reference point.

For most inexperienced trial lawyers (the group at whom this book is aimed), the pre-existing evidentiary categories that serve as a reference point are the federal rules of evidence. Most lawyers joining the New York Bar over the last 20 years—even those from New York law schools—learned evidence through the lens of the federal rules. For these lawyers, the process of becoming a New York litigator involves incorporating New York's peculiarities into the framework of the federal rule. Recognizing this reality, most of the existing New York evidence manuals adopt the organization used by the federal rules. In doing so, they not only make it easier for the prospective objector to find the relevant objection, they also simplify the mental leaps where the two bodies of law differ. *New York Evidence With Objections* would be significantly more helpful if it followed their lead.

Substantively, the book is very solid. Ms. Harris has done a good job of presenting New York law, including its anomalies, in a clear and understandable way. I use a couple of litmus tests to evaluate a student's knowledge of New York evidence law, and *New York Evidence With Objections* passed them easily. For example, New York has idiosyncratic rules governing the admissibility of habit evidence. Habit evidence is generally admissible, particularly where the evidence involves the habit or routine practice of a business. Habit evidence is not admissible, however, in negligence cases unless the action stems from an injury in the workplace. This is a rule that even experienced New York litigators may not know, but Ms. Harris describes it succinctly in her entry on "Habit and Routine Practice."

Unfortunately, because of the limitations imposed by the format of the book, some important substantive points are buried. One issue made prominent by the recent trial stemming from the death of Amadou Diallo is the scope of New York's "voucher rule." Under the voucher rule, a party may not impeach its own witness except in certain very limited circumstances, most notably where the impeachment takes the form of a signed written or sworn oral prior inconsistent statement. Ms. Harris offers a deft and concise explanation of the rule, but it appears under the headings for "Impeachment—Bias, Prejudice, Interest, and Improper Motive" and "Impeachment—Prior Inconsistent Statements." An attorney who did not happen to look at those sections would miss this important point.

But that criticism may be too picky. This book is not intended as a comprehensive treatment of New York evidence law. It is, instead, designed to be a basic reference for busy trial lawyers and law students. Despite an organization that may limit its utility for some, it will serve that fundamental purpose. Its brevity and plain English make it non-threatening for novice litigators, and its relatively low price will make it enticing to cash-strapped students and young lawyers.

1. *See* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts (West Group 1996); Michael M. Martin et al., New York Evidence Handbook: Rules, Theory and Practice (Aspen Law & Business 1997).
2. *See* David M. Epstein & Glen Weissenberger, New York Evidence: 2000 Courtroom Manual (Anderson 1999); Helen E. Freedman, New York Objections (James Publishing 1999).

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PRACTICE HINTS

Computerized Research Of Social Security Issues

BY JAMES A. MACCARO

A great deal of information useful in practicing Social Security law is available through computer-based resources.

Social Security Plus, published by West Group is a CD-ROM that contains 12 reference sources, including basic official sources such as the Social Security Act, Regulations and Rulings, as well as *Programs Operations Manual System (POMS)* (the Social Security Administration's multi-volume manual of directives and procedures), *HALLEX* (which sets forth the procedures for administrative appeals), and *The Dictionary of Occupational Titles* (a description of all jobs existing in significant numbers in the national economy as compiled by the U.S. Department of Labor). In addition, a database of the full text of the bulk of relevant federal case law is provided, as well as commentary and other ancillary material relating to Social Security law, perhaps most notably the full text of the treatise *Martin on Social Security*.

The references can be searched by keywords, that is, the user can search in a single database or multiple databases for documents that contain specific concepts or references to specific regulations. All of the sources can be simultaneously searched, but this is a practical approach in only a very limited number of cases because of the large number of documents. Even a search of a relatively obscure concept can result in the user being overwhelmed with hundreds or even thousands of "matches."

An alternative to *Social Security Plus* is offered in the form of several CD-ROMs produced by the government (Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-0001; http://www.access.gpo.gov/su_docs). These products are not as extensive as the West Group product but they may be a more economical option. They operate along the same general principles as *Social Security Plus*.

SSA Publications on CD-ROM, produced by the Social Security Administration and updated monthly, consists of four reference sources: *POMS*, *the Social Security Handbook*, Social Security Rulings and Social Security Acquiescence Rulings. They can be searched by keywords and the results can be saved as a computer file or printed. Similarly, the government also offers the *HCFA Disc*, a database of statutory, regulatory and administrative material relating to Medicare and Medicaid issues, as well as several related medical references.

An excellent free source of information is the Social Security Administration's Internet site, http://www.ssa.gov, which provides detailed information on the basic principles of the various programs administered by the agency. In addition, the site includes press releases about the latest changes to the Social Security Act and Regulations.

Medical issues are a prime concern in the overwhelming majority of Social Security disability cases. Therefore, medical references are important when practicing in this area.

The regulations and case law provide that a doctor's qualifications, including whether he/she is a specialist in the relevant field, are to be considered when deciding the weight that is appropriate to give to a medical opinion, and that a chiropractor is not to be considered as a physician.[1] Therefore, having information about the qualifications of the author of a medical report or record can be important in a disability case.

The AMA Directory, a CD-ROM produced by the American Medical Association (Book and Product Group, American Medical Association, 515 North State Street, Chicago, IL 60610), is useful in this regard because it provides a directory of all physicians (M.D.s and D.O.s) licensed in the United States. It provides information about when a doctor was licensed, the schools that he or she attended, and her or his specialty. Also, this product can be helpful when trying to locate a client's past physicians to obtain supporting documentation because it provides telephone numbers and addresses. The American Medical Association offers free access to the directory through its Internet site, http://www.ama-assn.org.

Basic knowledge about a client's medical problems is essential to providing effective representation. Consequently, a potentially useful CD-ROM is *STAT!-Ref* (800-755-7828), a collection of medical reference books that can be searched by keywords, *e.g.*, a disease or symptom. The books featured are *The Merck Manual of Diagnosis and Therapy*, *Mosby's Complete Drug Reference*, *Dictionary of Medical Acronyms & Abbreviations*, The American Psychiatric Association's *Diagnostic & Statistical Manual of Mental Disorders* and several other respected titles. Also, all of the books are cross-referenced with *Stedman's Dictionary*, the leading medical dictionary.

The user of *STAT!-Ref* is provided a "search statement" (the more common computer term is "search engine"). To use, type in the words that you want to search in the area below the "search statement" and adjust for "precision" (how closely the matches should comply with the keywords) with the "pre-

cision bar" located on the left of the bottom of the screen. The results of the search can be "bookmarked" for future reference or printed but, apparently due to copyright concerns, cannot be saved as a separate computer file.

Effective legal representation can play an important role in securing the Social Security benefits to which a claimant is entitled.[2] The digital age offers representatives new tools to reach this objective.

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1. *Schisler v. Sullivan*, 3 F.3d 563 (2d Cir. 1993); *Diaz v. Shalala*, 59 F.3d 307 (2d Cir. 1995); Code of Federal Regulations, tit. 20, §§ 404.1527, 416.927; Social Security Ruling 96-2p.
2. *Condon v. Bowen*, 853 F.2d 66 (2d Cir. 1988).

James Maccaro is a senior attorney with the Social Security Administration, assigned to the Office of Hearings and Appeals in Jericho. He is a graduate of Fordham University and received his J.D. degree from St. John's University School of Law.

EDITOR'S MAILBOX

Poem and Women's Issues

First, I thank Andrea Atsuko Dunham for the poem, "Challenges." It brought tears to my eyes and repentance to my heart.

On the other hand, I resent some of the comments by the Hon. Francis T. Murphy. When he says the women of the 15th, 16th and 17th centuries still live in the backwaters of the human mind, he means, of course, the human male mind. I firmly believe that most men do not beat their wives. I'm sure someone will quote the so-called "fact" that 50% of women report being abused. Even if true (it certainly doesn't refer to the type of abuse in the article), it means less than 50% of the men are abusers—believe it or not, some men abuse many women in their lifetime.

I was legal advisor to Family Court intake (Nassau County) in the late 1960s and have seen the horror and felt the frustration expressed in the article, but how do you force someone to testify at the trial even if we prevent her from dismissing the charges? Do we throw her in jail? The defendant still has to be proved guilty. How many abused wives will take the stand and lie by denying they were beaten or say they attacked the man first? I wish a law could cure this horror, but I fear only time will as we teach each generation of women to be stronger and stronger and not to take it anymore.

Robert Orens
Dunnellon, Fla.

Language Tips

By Gertrude Block*

Question: Given the explosion of Internet and "dot.com" companies, what is the proper way to describe electronic mail: *email* or *e-mail*?

Answer: That question, submitted by New York City attorney Daniel Hollman, is hard to answer, because there is no definitive response. Hyphenation is merely a step in the process of merging two separate words into one word. When related words are used together frequently, they first become hyphenated and finally, with wide usage, are considered one word. A glance at some pages in the 1985 *American Heritage Dictionary* (College Edition) confirms that process: *backup*, now considered one word, was still hyphenated; *background* was also hyphenated, although *backtalk* had already become one word; *footnote* and *nonfat* also had hyphens.

When members of a profession frequently use two words together, the two become one word although the general public still thinks of them as two. In the 1985 *AHD,* for example, *foreclose* was hyphenated although in legal contexts it was one word. In March 1999, a lawyer wrote to ask about *courthouse*. Research revealed that lay dictionaries such as *The Random House Dictionary* (1993) and *The New World College Dictionary* still listed it as two words, but legal writers considered it one word.

E-mail is still listed with a hyphen in most sources, although the avant-garde *Webster's Third New International Dictionary of the English Language* lists it as *email*. The *World Book* (1999 printing) and *Black's Law Dictionary* (Seventh Edition) retain the hyphen. Both The Associated Press and *The New York Times* have settled on e-mail.

In short, usage is in flux, but for propriety it is safer to keep the hyphen in *e-mail*.

Computer language, however, as Mr. Hollman correctly observed, is exploding. In its 1985 edition the *AHD* did not even list *toolbar*, *typeover*, and *endnote* (though *tool-box* is listed). *Data base* was listed as two words; *key-board* and *key-note* were hyphenated. Those hyphens have now disappeared. I'll risk a wager that within the next five years, *e-mail* will also lose its hyphen, but majority usage still retains it today.

Question: Lately, in agreements, I have been seeing an increased use of the word *violate* as in "performance of this Agreement will not violate the terms of any contract, obligation, law, regulation, or ordinance to which it is or becomes subject." What has happened to the word *breach*, and is the use of the word *violate* proper in this context?

Answer: My thanks to Stephen S. Strunck, staff counsel for IBM Global Services, for submitting a question never before asked.

To answer it, I consulted three authorities: *Black's Law Dictionary, Fifth Edition*; *Ballentine's Law Dictionary, Third Edition*; and *Words and Phrases*. Although the three sources are in substantial agreement about the meaning of the words, none provides a definitive answer.

All three define *violation* as "injury; infringement; breach of right, duty or law; ravishment; seduction." All three define *breach* similarly, but omit the final synonyms ("ravishment, seduction"), defining *breach* legally as: "The breaking or violating of a law . . . either by commission or omission. [Breach] exists where one party to contract fails to carry out term, promise, or condition of the contract."

Thus "violation" of a contract seems to constitute a "breach" of that contract. But does any "violation" of a contract "breach" the contract, or does the violation have to be "material" to do so? All three authorities consulted skirt this question carefully, without answering it. Although the two terms seem to be synonymous, it may be that, of the two, "breach" is the broader term.

Perhaps only material violations of a contract cause it to be breached. Readers who have practical experience in contract law may provide a more precise answer to that question.

Potpourri

Some time ago, an attorney who had moved to Mexico mailed me a list of expressions that when used there by an English-speaking individual contain a meaning different than intended. That list is filed away safely, but I can't find it at the moment.

More recently, a reader sent another list, indicating that translating English into Spanish has caused considerable problems for advertisers, as well. Some items on his list:

Coors' slogan, "Turn it loose," emerged in Spanish as "Suffer from diarrhea."

Perdue Chicken's slogan, "It takes a strong man to make a tender chicken" became, in Spanish, "It takes an aroused man to make a chicken affectionate."

American Airlines' promotion to advertise its new leather seats ("Fly in leather") translated in Mexico into "Fly naked."

And Parker Pen's "It won't leak in your pocket and embarrass you" was understood in Spanish to mean "It won't make you pregnant."

Spanish/American idioms are not alone in presenting problems: Clairol's "Mist Stick" translated into German as "Manure Stick," and Pepsi's "Come alive with the Pepsi generation" became, in Chinese, "Pepsi brings your ancestors back from the grave."

Another reader sent a list of problems encountered by an American woman married to a Filipino. It began, "When my husband says yes, he could also mean one of the following:"

(a) I don't know.
(b) If you say so.
(c) If it will please you.
(d) I hope I have said *yes* enthusiastically enough so that you know I mean *no*.

The author added, "You can imagine the confusion surrounding movie dates, the laundry, and who will take out the garbage." (This list appeared in *Culture Shock: A Guide to Customs and Etiquette of Filipinos*.)

* Writing specialist emeritus and lecturer at Holland Law Center, University of Florida, Gainesville, FL 32611, and consultant on language matters. She is the author of *Effective Legal Writing*, fifth edition (Foundation Press, July 1999), and co-author of *Judicial Opinion Writing Manual* (West Group for ABA, 1991).
The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu

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FOURTH DISTRICT
Clements, Thomas G.
Coffey, Peter V.
DeCoursey, Eleanor M.
Eggleston, John D.
FitzGerald, Peter D.
Higgins, Dean J.
Hoye, Polly A.
Lorman, William E.
McAuliffe, J. Gerard, Jr.
Rider, Mark M.
Tishler, Nicholas E.

FIFTH DISTRICT
Baldwin, Dennis R.
Bowler, Walter P.
Buckley, Hon. John T.
Burrows, James A.
Coleman, Ralph E.
DiLorenzo, Louis P.
Dwyer, James F.
Gingold, Harlan B.
* Jones, Hon. Hugh R.
Klein, Michael A.
Mawhinney, Donald M., Jr.
McArdle, Kevin M.
Priore, Nicholas S.
Rahn, Darryl B.
†* Richardson, M. Catherine
Sanchez, Ruthanne
Uebelhoer, Gail Nackley

SIXTH DISTRICT
Anglehart, Scott B.
Denton, Christopher
Gorgos, Mark S.
Gozigian, Edward
Hutchinson, Cynthia
Kendall, Christopher
Kilpatrick, Todd D.
Madigan, Kathryn Grant
Peckham, Eugene E.
Reizes, Leslie N.
Tyler, David A.

SEVENTH DISTRICT
Buzard, A. Vincent
Cristo, Louis B.
Heller, Cheryl A.
Inclima, Charles P.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Schumacher, Jon L.
Taylor, Jeffrey Lee
Trevett, Thomas N.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
Walsh, Mary Ellen
†* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Attea, Frederick G.
Church, Sanford A.
Clark, Peter D.
Eppers, Donald B.
Evanko, Ann E.
Freedman, Bernard B.
†* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Graber, Garry M.
† Hassett, Paul Michael
McCarthy, Joseph V.
O'Donnell, Thomas M.
O'Reilly, Patrick C.
Peradotto, Erin M.
Pfalzgraf, David R.
Rybak, Daniel A.
Spitzmiller, John C.

NINTH DISTRICT
Aydelott, Judith A.
Berman, Henry S.
Coffill, Randall V.
Fine, James G.
Galloway, Frances C.
Gardella, Richard M.
Giordano, A. Robert
Hall, H. Glen
Headley, Frank M., Jr.
Kranis, Michael D.
Longo, Joseph F.
Manley, Mary Ellen
McGlinn, Joseph P.
Miklitsch, Catherine M.
* Miller, Henry G.
Mosenson, Steven H.
* Ostertag, Robert L.
Steinman, Lester D.
Stewart, H. Malcolm, III
Wolf, John A.

TENTH DISTRICT
Abrams, Robert
Asarch, Joel K.
†* Bracken, John P.
Corcoran, Robert W.
Fishberg, Gerard
Franchina, Emily F.
Futter, Jeffrey L.
Gutleber, Edward J.
Hodges, H. William, III
Levin, A. Thomas
Levy, Peter H.
Mihalick, Andrew J.
O'Brien, Eugene J.
†* Pruzansky, Joshua M.
Purcell, A. Craig
Reynolds, James T.
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.

ELEVENTH DISTRICT
Bohner, Robert J.
Darche, Gary M.
DiGirolomo, Lucille S.
Glover, Catherine R.
James, Seymour W., Jr.
Nashak, George J., Jr.
Reede, Barbara S.
Terranova, Arthur N.

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

OUT-OF-STATE
Dwarica, Leonard A.
Hallenbeck, Robert M.
* Walsh, Lawrence E.