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LITERATURE SHOWS LAWYERS THE MIRACLES OF LANGUAGE

Special St. John's Edition

Reflections by Judge Bellacosa
Federal Rules of Civil Procedure
Non-Compete Clauses
Modernizing Financial Services
Limiting Urban Sprawl
Pitfalls in Property Conveyance

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EDITOR'S NOTE: *At the request of the* Journal*, St. John's University School of Law agreed to have members of its faculty prepare articles for this special edition as part of the lectures, symposia and other activities underway this year to mark 75 years since the law school was established.*

In addition to thanking the professors whose works appear here, we wish to express our gratitude to Professors Edward Cavanagh and Vincent Alexander for their assistance in coordinating the project.

In future years, we hope that other law schools will be able to work with the Journal *in preparing similar editions devoted to articles that their faculty members are uniquely qualified to share with our readers.*

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On The Cover

This month's cover illustration is a montage of books cited in Professor Margaret Turano's article on how reading good books can help lawyers see the world though a lens other than their own.
Cover Design by Lori Herzing

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A Quarter Century in Albany: A Period of Constructive Progress

BY JOSEPH W. BELLACOSA

My assigned role in this special edition, a collection of perspectives from my new academic colleagues, is quite simple. It is even relatively easy—until one dives seriously into the task.

I have been asked to provide an overview, by scanning the pages and synapses of my memory. The designated period is from the present—year 2000—back to my arrival in 1975 at the New York State Court of Appeals in Albany. The latter date also coincidentally marks the point of my departure from my then-faculty colleagues at St. John's, proving perhaps that one can go "home" again, even after 25 years.

But what can be said of this quarter century? On one hand, the span seems like the mere blink of an eye; on another, the compression and stream of events, personalities, policies, politics and enactments of all types seems like countless, scattered mosaic chips. At this first stage of early reflection on my farewell to Albany and the Court of Appeals, I am pleased to report that my impressions in looking back are firmly positive. As I do so, I also perceive a constructive order of progress and a consilience of goodness concerning the matters on which I will now tender this somewhat peripatetic perspective.

In the main, my technique will unfold in chronological sequence of selected events. Here and there, I will collate some items around a common issue or theme, irrespective of time frame. Also, my ruminations are multi-layered—clerk and counsel to the Court (1975-1983); Sentencing Guidelines chairperson (1983-1985); chief administrative judge (1985-1987); judge, Court of Appeals (1987-2000).

My glimpse will take a look at institutions—mainly judicial—and some historical events, reforms, crises, and even a bit about the personalities and officeholders who found themselves joining issues at a given point in time. They were at work, grappling for solutions. Lastly, in the interest of reserving plenty of space for my new colleagues and to save some of my thoughts and ideas for a more reflective, comprehensive endeavor sometime later, I will be severely selective. This is an anecdotal exercise, not an empirical research study. As a gallimaufry, however, the medley is no less valuable than a more disciplined modality—this one is just different and I thought I would state that at the outset—or near the outset!

1975-1977

The year 1975 was a time of big changes in Albany. Governor Hugh L. Carey had just defeated Malcolm Wilson for governor (the end of the long Rockefeller era starting in 1958). Mario M. Cuomo was appointed New York State secretary of state, later to become lieutenant governor and ultimately governor for three terms.

In 1975, Chief Judge Charles D. Breitel swore in the last two statewide-elected judges of the New York State Court of Appeals—Jacob D. Fuchsberg and Lawrence H. Cooke. The election year before in 1973, Judge Breitel had defeated pre-eminent trial lawyer Fuchsberg for the hotly contested chief judgeship. And in 1972, in a real hullabaloo, Judges Gabrielli, Jones and Wachtler had won three sharply contested seats. So, in three straight years of hard-fought elections virtually the entire seven-judge Court of Appeals membership changed, and all the seats and seniority changed. Remarkably, institutional values and continuity, and jurisprudential *stare decisis* reigned and prevailed. *Compare Simpson v. Loehmann*, 21 N.Y.2d 305, 287 N.Y.S.2d 633 (1967), *reh'g*.

JOSEPH W. BELLACOSA, now dean of St. John's University School of Law, retired as an associate judge of the Court of Appeals this past summer. Before joining the Court of Appeals, he served at various times as an assistant dean for academics and administration at St. John's Law, and as an associate professor of criminal law and procedure, federal and state civil procedure, and ethics. From 1975 to 1983, he was the chief clerk and counsel to the Court of Appeals. He later served as a judge on the state Court of Claims, and from 1985 to 1987 he was chief administrative judge of New York State Courts. He received both his bachelor's degree and his LL.B from St. John's University.

denied, 21 N.Y.2d 990 (1968), *with People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419 (1976).

At this juncture in 1975, Chief Judge Breitel and the other members of the court convinced me to take a "temporary leave" of academe and undertake the job as clerk of the Court (and counsel as they re-defined it). As the first clerk to be admitted to the Conference Room for the case discussions of the judges, I witnessed the enormity of the municipal fiscal appeals crisis, capped by *Flushing National Bank v. Municipal Assistance Corp. of NYC*, 40 N.Y.2d 731, 392 N.Y.S.2d 392 (1977). In that one case, I was the proverbial "fly on the wall" observing big stakes litigation and legislation and inter-branch maneuverings. The case involved a moratorium on the payment of interest on municipal debt. It was enacted to buy time for more stable solutions to the crisis. The late Judge Simon Rifkind, as special counsel to the state and Governor Carey, argued with extraordinary appellate rhetoric that the Court "dare not" declare the Act unconstitutional, lest blood flow in the streets of New York City because all municipal services would cease as a result of a potential bankruptcy. The Court courageously "dared" to decide in accordance with principle, not in expediency or in reaction to forceful rhetoric. It upheld the full faith and credit obligations to pay the interest, as contractually promised and secured. *Id*., at 738-739.

Also during that period, the Maurice Nadjari New York State Special Prosecutor cases abounded. The Court ultimately upheld the rule of law there, too, over political and polemical machinations. Those rulings helped to curtail the prosecutorial excesses that flourished in the operations of that office. *See, e.g*., *People v. Mackell*, 40 N.Y.2d 59, 386 N.Y.S.2d 37 (1976); *Dondi v. Jones*, 40 N.Y.2d 8, 386 N.Y.S.2d 4 (1976).

The Rockefeller Drug Laws also came to the Court's docket for the first major challenge after their enactment. These cases upheld the legislation as facially constitutional, with a rare case exception proviso tucked into the opinion. The exception quickly, and over the long haul, unraveled. *Compare People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471 (1975), *with People v. Jones* 39 N.Y.2d 694 *and People v. Thompson*, 83 N.Y.2d 477, 611 N.Y.S.2d 470 (1994).

A remnant of New York's old death penalty statute was declared unconstitutional during the late 70s. A remarkable footnote in the dissent by Chief Judge Breitel is worth noting for its historical and juridical perspective. He would have upheld the imposition of the death sentence there against a defendant who had killed a police officer in the line of duty. *People v. Davis* 43 N.Y.2d 17, 39 n.*, 400 N.Y.S.2d 735 (Breitel, Chief Judge, dissenting in part but "speaking only for [himself]").

During these extraordinary years of jurisprudential case developments (among many others not recounted here), court reforms were also successfully launched and accomplished. In 1977, the voters approved three separate state Constitutional amendments after two separate legislative passages. This was achieved virtually on a dare under the leadership of Chief Judge Breitel and Governor Carey to the legislative branch. Thus, New York put in place an appointive system for its Court of Last Resort, a centralized administrative and operational budget structure for its judicial branch, and an independent Commission on Judicial Conduct to investigate and prosecute judicial wrongdoing.

1979-1984

The beginning of 1979 brought the first appointment to the Court under the brand new system: Governor Carey appointed the most junior judge of the Court, Lawrence H. Cooke, as the new chief judge to succeed Judge Breitel, who had reached the mandatory retirement age of 70.

A fresh, vigorous, proactive style of judicial management was implemented by Chief Judge Cooke. It shook up the old system and flexed the new centralized managerial powers. But, the assignment of trial judges ran into a major roadblock of checks and balances proportions in the case of *Morgenthau v. Cooke*, 56 N.Y.2d 24, 451 N.Y.S.2d 17 (1982). Not only did the Manhattan district attorney challenge and win over the chief judge in the latter's own court, but Mr. Morgenthau also took the unusual step (for him) of arguing personally to the remaining six judges. The case ironically involved the Court's own consultative-approval power, and "the rule of necessity" had to be invoked so as not to disqualify the entire Court from ruling on the purely state issue. *Id*. at 29, n.3.

Governor Carey also challenged judicial prerogatives by proposing to cut and alter the judicial budget, and how it is legislatively adopted. Last-minute negotiations avoided litigation and a constitutional contretemps for that early 80s period between the executive and judicial branches of state government.

While these matters of state kept percolating and occasionally bubbling over, the cases and appeals kept tumbling onto the Court's docket in large numbers. Yet, they were considered and decided with institutional integrity and faithfulness to the common law decisional process. Indeed, this was accomplished even though the Court's membership also experienced major new changes under the new appointive system during this period. Governor Cuomo had succeeded Carey in 1982 and the new chief executive was proactive in diversifying the Court with women and minorities, *e.g.*, Judith Kaye, Fritz Alexander, and later George Bundy Smith, and later still Carmen Beauchamp Ciparick. The governor was intensely interested in the Court and its work, having been a law clerk to Judge Adrian Burke there as

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his first law job after graduation from law school in 1956. Like his predecessor Governor Carey in two respects, Governor Cuomo is also a distinguished St. John's alumnus.

Immediately upon his inauguration in 1983, Governor Cuomo shook the political establishments by naming Richard D. Simons, an experienced appellate judge from upstate as his first appointment to the Court of Appeals. This appointment was deemed significant because Judge Simons was a Republican, and Governor Cuomo was a nationally renowned Democrat. As a result, the new system was seen as truly nonpartisan and based on merit.

Also during this period, another death penalty statutory vestige, *People v. Lemuel Smith* 63 N.Y.2d 41, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985), was decided. This case involved the killing of a corrections officer by a life-sentenced inmate. Then-Judge Kaye's 4-3 majority opinion in 1984 completed the elimination altogether of New York's prior death penalty provisions. Moreover, Governor Cuomo vetoed legislative efforts to revive a new death penalty regimen in New York, as many other states had done. He did this 12 times during his three terms as governor.

1985-1992

Another remarkable breakthrough occurred with Governor Cuomo's selection of another well-known Republican, Sol Wachtler, as the next appointed chief judge in 1985. The next era of court reforms and personal management style was opened with this significant leadership succession. Later the governor and chief judge would clash on the recurring independent judicial budget question. Indeed, a highly contentious and public litigation ensued, but was ultimately settled.

Other important reforms predominated, however, during this period—chapter 300 of the Laws of 1985 brought civil *certiorari* control to the Court of Appeals docket, reducing its appeals argument load from more than 700 per year to a more manageable and appropriate 300, and more lately about 200. Certifications of state law questions by Federal Courts of Appeals were authorized mainly for the diversity type of cases. Individual case assignment methods were employed for greater trial court efficiency, management and accountability. Also, court buildings financing legislation was approved in an effort to upgrade state court facilities. These were very important advancements.

The Court disputed within itself on its adjudicative track concerning a major federalism development, state and U.S. constitutional dual protection issues. *See People v. Scott*, 79 N.Y.2d 474, 583 N.Y.S.2d 920 (1992). The Court once again had an extraordinary death penalty exercise, in *People v. Johnson*, 69 N.Y.2d 339, 514 N.Y.S.2d 324 (1987), albeit indirectly. The controversy pitted New York's Court of Last Resort against Mississippi's Supreme Court. New York's good sense and constitutional correctness prevailed, thanks to a unanimous Supreme Court decision resting on the full faith and credit clause of the U.S. Constitution. *Johnson v. Mississippi*, 486 U.S. 578 (1988). This came about due to some relentless, persevering and prodigious lawyering through the law firm of Cahill, Gordon and Reindel which provided *pro bono* counseling, in the brightest and best traditions of the legal profession. *Id*.

I would like at this point to insert two of my own opinions out of the many hundreds reported, as further insights into some other important institutional manifestations. *Parkview Associates v. New York City*, 71 N.Y.2d 274, 525 N.Y.S.2d 176 *cert. denied*, 488 U.S. 801 (1988), shows the power of letter of the law because the Court's order effectively lopped 12 stories off a luxury apartment on the upper east side of Manhattan. They were built atop an existing 19-story building in violation of the light and air Building Code protections of neighboring property dwellers. This land use planning case really brought home to me (the mere author of a unanimous opinion) the force of the judicial decretal phrase "it is hereby ordered, decreed and adjudged"—especially the first time I drove up fashionable Park Avenue and saw the dramatic shrinkage in the height of that building back to its original level.

The second illustration is a simple concurring opinion, *Braschi v. Stahl Associates*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989). There, my fourth vote, needed to make a binding ruling, was rendered separately to create a rare plurality decision in our Court. It effected a just result for dwelling protection purposes (to prevent eviction). The independently expressed ground and vote transcended (some might say side-stepped) other troubling public policy issues involving rent control, the definition of "family," and inheritance and gay rights claims. The Court, as an institutional tribunal however, functioned at its best in that case.

The jurisprudential lesson of that case also illustrates that pluralities are the exception to the work of the Court of Appeals. It strives—and succeeds—as a matter of strong policy for achievement of consensus, *i.e.*, majority expressions that provide more reliable law predictions and counseling to clients. Indeed, unanimity is achieved more than 90% of the time, a statistic often overlooked or missed by those commentators looking longingly for institutional discord. In all my varied roles, I found the Court of Appeals to be a pre-eminently harmonious lot of strong-minded individuals who know how to hold their conscientious ground, maintain respect for the colleagues and preserve the transcendent institutional val-

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ues and traditions of a great common law Court, worthy of the Cardozo legend and reputation.

After Chief Judge Wachtler's fall from power and grace in late 1992, the Court had to struggle to maintain its equilibrium and recover from the crisis. He resigned immediately after his arrest and the remaining six members rallied together out of institutional commitment to faithfully continue and carry out the Court's work.

1993

Next, historically, Governor Cuomo appointed Judith S. Kaye as the Court of Appeals' third appointed chief judge. The Court further proved how strong it is as an institution under the leadership that she has provided for the balance of the 90s and into the new millennium. She is a superb "Chief" in the adjudicative, as well as administrative and executive functions. Her leadership continues to bring new, inspired and effective reforms such as jury expansion, and distinctive initiatives (concerning among others, children's and family issues, professional programs, and alcohol and drug abuses in the legal profession).

On the public policy agenda and on the Court's docket, the dismal humanitarian, policy and fiscal impacts and consequences of the Rockefeller Drug Laws unfortunately continued to generate major controversy and questions into the 90s. *See People v. Angela Thompson*, 83 N.Y.2d 477, 611 N.Y.S.2d 470 (1994). But the Sisyphean struggle up the hill of this reform (as some of us see its need) continues to grow with stronger voices and shoulders of concern, effort and persuasion. The mountain of inmates and the monumental human deficits from this so-called "reform" measure of its time (1973) will be conquered in time—the sooner, the better, in my judgment.

Politics—public disputation and polemical engagement—sharpened during this period in regard to the role of the courts. Attention focused especially once again on the death penalty question, triggered in part by a tough election in 1994. Governor Cuomo lost his bid for a fourth term, closing the Carey-Cuomo (1974-1994) era. Senator George Pataki won the election by a close margin, with the death penalty as a major point of difference in the campaign. Chapter 1 of the Laws of 1995 followed and a new era of death penalty concerns began with rules-making, collateral litigation, contentious disputes, and as of this writing five death penalty cases progressing through briefing to oral argument on the docket of the Court of Appeals. These will be the first direct appeals addressing the multi-faceted issues under New York State's death penalty statute.

In the midst of these momentous, inherently life or death type cases, the public-media-political appetite for sharp rhetoric over what judges do and how they do their work was also heightened in other categories of work, as in cases like judicial removal and discipline. *See e.g.*, *In re Duckman*, 92 N.Y.2d 141, 677 N.Y.S.2d 248 (1998).

Some Self-Drawn Lessons

I am about to conclude this exercise with a few self-drawn lessons. Before I finish, however, let me please add a plug for clearer, more cogent writing, for briefer briefs and for the massive reduction of footnotes in advocacy writing. I cannot urge elimination of footnotes since I am an occasional offender myself in rare opinions, and I recognize their importance in scholarly writings. *See*, *e.g.*, *People v. Owusu*, 93 N.Y.2d 398, 408 n.1, 414 n.2, 690 N.Y.S.2d 863 (1999)—but oh what fun an occasional dissenting expression can be, since the judge there does not carry the weight of responsibility for the declared rule of law or the burden of holding concurring votes within a majority writing.

This reflection exercise has made me realize that I should also declare simply an expression of public gratitude for the gift of my varied public services. No one could ask for—or be entitled to—more than these privileged perches and participatory professional adventures that have been given to me: 25 years of public work providing me with sparkling enlightenment and professional fulfillment.

Because I saw and experienced the few things I have written about here firsthand (and so many more), I could also say that my belief in the essential integrity and genius of our system of governance and judicial process has been vindicated and proven. For the most part, devoted public servants—agents working for the good of individuals, community and society at large—are hard at their jobs, day in and day out. I can attest to that, and do so proudly based on my longtime association with them.

Additionally, I can testify to the strength, resiliency, stability and regenerative power of our most cherished institutions like our Court of Appeals—able to survive shudders and severe storms—even when a test seems at the level of a "Perfect Storm." Being tested and recovering from shock waves and crises, however, is one thing. Coming out stronger than before is quite another. That is a core reflection and lesson I carry back to the Academy with me from my 25-year sojourn in Albany, virtually all of it in and about the Court of Appeals of the State of New York.

My privilege and opportunity now extend to being in a position to share these gifts and reflections with students and colleagues at St. John's University, School of Law—my own beloved Alma Mater, and with different professional audiences and communities as well. This article and those of my colleagues that follow are a good start in sharing a bit of what has been presented to me over my career thus far.

Reflections on Reading

Moments of Grace: Lawyers Reading Literature

BY MARGARET V. TURANO

When Justice Anthony Kennedy of the U.S. Supreme Court visited St. John's Law School this spring and learned that the school offers a course entitled Law & Literature, he commented that every student should take such a course. Using a "garbage-in, garbage-out" analogy, he suggested that absorbing the good clean prose and lofty ideas of the master-writers would necessarily edify and improve a lawyer.

The law-and-literature connection is neither new nor outlandish. Law as a discipline is one of the humanities, that is, a branch of knowledge concerned with human beings and their culture, including philosophy, literature and the fine arts, and excluding the sciences. Over time, however, legal education has inclined more toward professional training. Lawyers have proliferated, so the practice of law has become more competitive, and the law often concerns itself with redistributing wealth, convicting a criminal, or getting the best deal or the fewest restrictions for a client. Nevertheless, we are humanists. Our cases arise because humans beings interact with each other, harm each other, relate to their spouses and their children, relate to the earth, and strive for power, justice, vindication, or revenge.

Justice Kennedy's vision of literature in the life of a lawyer differs from that of several lawyers of my acquaintance who, though good and successful lawyers, nevertheless resist (or flatly reject) the suggestion that reading good books makes better lawyers. They correctly say (although who would know this better than Justice Kennedy?) that the law has practical effects on real people while literature fancifully describes fictive characters; a poet or playwright can write whatever he pleases, whereas a judge's decisions change people's lives. They conclude that law and literature run on parallel, non-intersecting lines. Literature may relax a person and allow her to "escape," but it is essentially frivolous, or at best a luxury, to be tucked into a lawyer's schedule after she has finished the "real" work of lawyering. They say that lawyers can acquire the same insight and wisdom by interacting with people as by reading about them, and they say that reading is no more important for lawyers than for anybody else. They argue this as though to invite rebuttal, but in my view no cerebral rebuttal is possible. I simply think about literature in a different way: I believe that reading good books utterly permeates, transfigures and inspirits a person and bestows wisdom, insight and compassion. It keeps lawyers attuned to the miracles language can produce, allows them to see a situation through a lens other than their own, nourishes their capacity for astonishment and keeps them asking the right questions.

Language as Miracle

Lawyers are wordsmiths, like novelists and poets. Our tools are the same: words, sentences and paragraphs.[1] James Boyd White, the "dean" of the law-and-literature movement, reminds us what we share in common with the story-tellers:

> One way in which the law is poetic is that it works by narrative. From outside it can of course be described as a structure of rules or a set of institutions, as a tool for policy implementation, and so on, but if it is looked at from the inside, as an activity in which individual minds engage, . . . it is better talked about in other terms—as an art of language, as a way of creating versions of experience in cooperation or competition with others. From this point of view, the law always begins in a story: usually in the story the client tells. . . . It ends in story too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means. The final legal version of the story almost always includes a decision or an agreement about what is to remain unsaid. Beyond the story is a silence it acknowledges.[2]

MARGARET V. TURANO teaches trusts and estates law at St. John's in addition to her course in law and literature. She is the author of *New York Estate Administration* published by Lexis Publishing and the author of the Practice Commentaries in the McKinney's editions of the New York Estates, Powers & Trusts Law and the Surrogate's Court Procedure Act. A graduate of the College of New Rochelle, she has a master's degree from the University of Wisconsin, a J.D. from St. John's University School of Law and an LL.M. from Yale Law School.

The way that we as lawyers tell our story matters. To be a good writer is an essential trait for a lawyer, and reading good books can affect a lawyer in two ways. The first is quite trite but important: it can improve a lawyer's technical writing skills. Good writing is a lifelong process, and when one ingests good language, prosaic or poetic, on a regular basis, one's writing necessarily improves.

Naturally we are limited in our legal writing; we cannot write briefs in iambic pentameter or create facts as we go along. Still, legal writing that is lean, precise, strong and direct is beautiful, and those are learned traits. As Benjamin Cardozo notes in his mesmerizing 1930 essay, *Law and Literature*,[3] "the highest measure of condensation, of short and sharp and imperative directness, a directness that speaks the voice of some external and supreme authority, is consistent . . . with supreme literary excellence." According to Justice Cardozo, judges can be the "mouthpiece of divinity"[4] whose "magisterial or imperative" style can "fill cathedrals or the most exalted of tribunals."[5] The thrill of such writing, he continues, "is irresistible. We feel the mystery and the awe of inspired revelation."[6]

Even in less earth-moving and less majestic opinions, however, Justice Cardozo believes that a judge can clinch an opinion by finding the right word:

> What a cobweb of fine-spun casuistry is dissipated in a breath by the simple statement of Lord Esher in *Ex parte* Simonds, that the court will not suffer its own officer "to do a shabby thing." If the word shabby had been left out, and unworthy or dishonorable substituted, I suppose the sense would have been much the same. But what a drop in emotional value would have followed. As it is, we feel the tingle of the hot blood of resentment mounting to our cheeks. For quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English judges are a mine of instruction and a treasury of joy.[7]

A regular diet of good prose has to affect one's writing style—how could it not?[8] But reading good books affects a lawyer's writing in another, subtler way as well: it makes him think purposefully about language and keeps him aware of the kinds of magic language can perform.

Everyone reading this article will have his own memories of being gloriously moved by some book or another. *Schindler's List* comes to mind; Thomas Keneally's language makes injustice come alive in a way that is brand new and devastating, and the sheer nobility of his protagonist, Oskar Schindler, ennobles us all.[9] Reading *Schindler's List* inspires; it is "a meditative draught to the soul."[10]

Excerpts from many books other than the one I have chosen would have been appropriate to illustrate the magic of words—almost all of Shakespeare, Emily Brontë's *Wuthering Heights*,[11] Don DeLillo's *White Noise*,[12] Chris Adrian's short story "Every Night for a Thousand Years,"[13] Jane Austen's *Northanger Abbey*,[14] A.S. Byatt's *Possession*,[15] John Kennedy Toole's *A Confederacy of Dunces*,[16] Rick Bass' short story "The Hermit's Story,"[17] among many others. For the sheer defamiliarizing power of language, however, I have chosen a passage from a novel by Walker Percy, a hilarious postmodern Christian existentialist. *The Second Coming*[18] begins when a 21-year-old woman, Allison (Allie), makes her escape from a psychiatric hospital by following directions she has written out for herself and left in the dressing room before undergoing electric shock treatment. The escape is successful but the electricity has compromised her language skills, so as she makes her way to an old house her aunt has devised to her, she (and derivatively we) experience language afresh. Allie believes that words are supposed to mean something,

and she is intensely curious about them. The results can be funny, such as when, an hour or so after her escape, a wiry runner joins her as she sits on a park bench:

> "I just ran eighteen miles." He closed his eyes and took a deep breath.
>
> "Why?"
>
> "I've been into running for three months."
>
> "You've been what?" What was the meaning of the expression "into running"? Perhaps he was in trouble. He was on the run.[19]

Inside the humor, however, is a probing look at language. For Allie, "questions asked were to be answered, printed words were to be read."[20] So, when a religious missionary approaches Allie on the street, the following scene ensues:

> [T]he woman was smiling, for all the world as if she knew her. Oh my, she thought, perhaps she does and I am supposed to know her. . . . Evidently the woman had something to say to her or expected her to say something, for she did not step aside. As she watched the woman's radiant smile and cast about in her mind for where she might have known her, she noticed that the woman held a sheaf of pamphlets in one hand and that her fingers were ink-stained. From the pressure of the strap of the shoulder bag on the wool of the sweater, she judged that the bag was heavy. Perhaps it was filled with more pamphlets. The woman, still smiling, was handing her a pamphlet. Anxious to make up for not being able to recognize the woman, she began to read the pamphlet then and there. The first three sentences were: *Are you lonely? Do you want to make a new start? Have you ever had a personal encounter with our Lord and Saviour?* While she was reading, the woman was saying something to her. Was she supposed to listen or read?
>
> . . .
>
> Facing the woman, she considered the first sentences of the pamphlet. "Yes," she said, "there is a sense in which I would like to make a new start. However—"
>
> But the woman was saying something.
>
> "What?"
>
> "I said, are you alone? Do you feel lonely?"
>
> She considered the questions. "I am alone but I do not feel lonely."
>
> "Why don't you come to a little get-together we're having tonight? I have a feeling a person like yourself might get a lot out of it."
>
> She considered that question. "I'm not sure what you mean by the expression 'a person like yourself.' Does that mean you know what I am like?"
>
> But the woman's eyes were no longer looking directly at her. . . .[21]

Language bristles and glistens in such a passage. Having read it, we can no longer take language for granted.

Henry David Thoreau commented in his journal that the song of the wood thrush

> affects the flow and tenor of my thought, my fancy and imagination. It lifts and exhilarates me. It is inspiring. It is a meditative draught to my soul. It is an elixir to my eyes and a fountain of youth to all my senses.[22]

A few days later he wrote (about the same bird) that it

> never fails to speak to me out of an ether purer than that I breathe of immortal beauty and vigor. He deepens the significance of all things seen in the light of his strain. He sings to make men take higher and truer views of things.[23]

I use the quotation advisedly, although it applies to wood thrushes and not prose, because Thoreau's prose has precisely the same effect on me. I need meditative draughts to the soul and breaths of immortal beauty and vigor. I believe that most lawyers do.

Seeing Through a New Lens

The second fruit of reading literature is that it helps us to see things in new ways. It helps us to understand human problems in ways we could not have before. "[A] work of fiction can render with greater precision than any other instrument of knowledge both the lived experience and its wider moral import. This is largely because fiction has at its disposal that subtlest of probes, the imagined consciousness."[24]

Literature helps us to imagine and metabolize experiences that we could not possibly have had ourselves. It makes us understand the universality of human experience, even that experience which is totally foreign to our own. The examples are unlimited, but I offer a few that come to mind. Toni Morrison's *The Bluest Eye*[25] recounts a father's rape of his child, who believes she is ugly because she is black, and who descends into madness in her quest for blue eyes. Having read it, we understand the trauma of child abuse in a completely unfamiliar and haunting way. Edith Wharton's *Summer*[26] puts motherless children in a new light. *King Lear*[27] and its modern counterpart, Jane Smiley's *A Thousand Acres*,[28] make us think afresh about homicidal sibling rivalry and, at the other end, *Antigone*[29] describes sibling love beyond all understanding. Shakespeare's *Measure for Measure*[30] makes us rethink the spirit versus the letter of the law and hypocrisy in leadership. Walker Percy's *Lancelot*[31] gives new insights into the mind of the criminally insane. Primo Levi's *Periodic Table*[32] transports us to Europe in 1944, as does Kurt Vonnegut's *Slaughterhouse Five*.[33]

Lawyers and judges need to understand the lives of the human beings they deal with. Samuel Johnson de-

fines law as "human wisdom acting upon human experience for the benefit of the public."[34] Experience and wisdom are arguably the very stuff of our existence, both as lawyers and as humans. We glean a good proportion of our wisdom from our own experiences, but it seems pinched to limit "experience" and "wisdom" only to our direct experiences and the wisdom that we, unassisted, derive from them. Literature allows us to partake in the larger body of wisdom and experience. Those who have been given the gift of words (Charlotte Brontë, Thomas Hardy, Zora Neale Hurston, the Psalms poets, to name a few) offer to us in turn generous gifts of wisdom and experience. They do not paint simple, facile, reductionist heroes and villains, but rather they create messy, complex characters and situations. They give us access to the enormity of life.

No one does this better than Toni Morrison. In her novel *Beloved*, she creates an image of spinning. Her protagonist, Sethe, is haunted by the deed she committed: killing her baby girl as the slave-catcher approached. The baby's ghost haunts her house for years, hurling furniture and leaving handprints in the frosting on cakes. Without warning, Paul D, one of the other slaves on the plantation Sethe escaped from, arrives at her door. Sethe has begun to entertain, fearfully and tentatively, the notion of forgiving herself and allowing love in her life. In the "spinning" passage, a neighbor named Stamp has handed Paul D a newspaper clipping showing a picture of Sethe and recounting her crime. Paul D believes the story is a mistake and has shown Sethe the clipping.

> She was spinning. Round and round the room. Past the jelly cupboard, past the window, past the front door, another window, the sideboard, the keeping-room door, the dry sink, the stove—back to the jelly cupboard. Paul D sat at the table watching her drift into view then disappear behind his back, turning like a slow but steady wheel. Sometimes she crossed her hands behind her back. Other times she held her ears, covered her mouth or folded her arms across her breasts. Once in a while she rubbed her hips as she turned, but the wheel never stopped.
>
> . . .
>
> It made him dizzy. At first he thought it was her spinning. Circling him the way she was circling the subject. Round and round, never changing direction, which might have helped his head. Then he thought, No, it's the sound of her voice; it's too near. Each turn she made was at least three yards from where he sat, but listening to her was like having a child whisper into your ear so close you could feel its lips form the words you couldn't make out because they were too close. He caught only pieces of what she said—which was fine, because she hadn't gotten to the main part—the answer to the question he had not asked outright, but which lay in the clipping he showed her. And lay in the smile as well. Because he smiled too, when he showed it to her, so when she burst out laughing at the joke—the mix-up of her face put where some other colored woman's ought to be—well, he'd be ready to laugh right along with her. "Can you beat it?" he would ask. And "Stamp done lost his mind," she would giggle. "Plumb lost it."[35]

The "spinning" passage is in the approximate center of the novel, the rest of which also loops and spins, giving us shard after shard of this staggeringly large story, piece after piece of its evil, and finally its love and redemption, because it is ungraspable in one chunk. None of us can have had this experience, but Toni Morrison gives it to us, a strong and disturbing gift.

Nurturing the Capacity for Astonishment, and Learning the Questions to Ask

Lawyers are in a profession that burns us out. We make phone calls while driving. We sign papers while talking on the phone. We eat food standing up. We are

surrounded by whirring machines spewing paper that requires attention. We worry about finishing our work, about money, about making mistakes. We hear our clients' stories, but we become jaded. We feel ourselves "undying," rather than "being alive."[36] Literature can wake us up, make us smile, and restore wonder. It can make us look at ourselves closely.

I return to Walker Percy's *Second Coming* by way of illustration. Allison finds the house her aunt left to her, situated at the edge of a golf course, but it has been destroyed by fire, so she sets up housekeeping in its only intact part, a greenhouse. Will Barrett, a 55-year-old rich retired trusts-and-estates lawyer, hits a slice that breaks a window in Allie's greenhouse. He goes to retrieve the ball. Allie holds it out to him, and he identifies it as a Hogan. The following ensues:

> "Hogan woke me up."
>
> "What?"
>
> "Hogan woke me up."
>
> "Hogan woke you up?"
>
> "It broke my window." She nodded toward the greenhouse.
>
> "Which one?"
>
> "Not those. At the end of my house, where I was sleeping. The surprise of it was instigating to me."
>
> "Okay, okay. Will five dollars do it?" He fumbled in his pocket.
>
> No answer. Eyes steady, hands still.
>
> "Did you say your house?"
>
> "Yes, it is my house. I live there."
>
> There was a window broken in the lower tier. His slice could hardly have carried so far. . . .
>
> "Okay, how much do I owe you?"
>
> "It was peculiar. I was lying in my house in the sun reading this book." She had taken a book from the deep pocket of the jacket and handed it to him, as if to prove—prove what?—and as he examined it, a rained-on dried-out 1922 *Captain Blood*, he was thinking not about Captain Blood but about the oddness of the girl. There was something about her speech and, now that he looked at her, about her. For one thing, she spoke slowly and carefully as if she were reading the words on his face. The sentence, "I was lying in my house" was strange. "The surprise of it was instigating." Though she was dressed, like most of the kids here, in oversized men's clothes, man's shirt, man's jacket, there was something wrong—yes, her jeans were oversize too, not tight, and dark blue like a farm boy's. Yet her hair was cut short and brushed carefully, as old-fashioned as the book she was reading. It made him think of the expression "boyish bob."
>
> "I was lying in my house reading that book. Then *plink, tinkle*, the glass breaks and this little ball rolls up and touches me. I felt concealed and revealed." Her voice was flat and measured. She sounded like a wolf child who had learned to speak from old Victrola records. . . .
>
> Oh well. She was one of the thousands who blow in and out every summer like the blackbirds, nest where they can, in flocks or alone. Sleep in the woods. At least she had found a greenhouse.
>
> As he turned away, gripping the three-iron with a two-handed golfer's grip and with a frowning self-consciousness which almost surprised him, she said, "Are you—?"
>
> "What?" He cocked the club for a short clip and hung fire.
>
> "Are you still climbing on your anger?"
>
> "What?"
>
> When he swung around, she was closer, her eyes full on him, large grey eyes set far apart in her pale (Yes, that was part of the oddness, not the thinness of her face but its pallor. Her skin was as white as a camellia petal yet not unhealthy) face. Her gaze was steady and unfocused. Either she was not seeing him (Was she blind? No, or she'd have never found the Hogan . . .) or else she was seeing all of him because all at once he became aware of himself as she saw him, of his golf clothes, beltless slacks, blue nylon shirt with the club crest, gold cap with club crest, two-tone golf shoes with the fringed forward-falling tongues, and suddenly it was he not she who was odd in this silent forest, he with his little iron club and nifty fingerless glove.[37]

This writing did not change my actions as a lawyer; it changed my thinking. What *was* he doing on that golf course? Who *is* the mad one? Walker Percy was a physician who repudiated his profession to become a writer. In *The Second Coming* both he and Will Barrett were trying to understand the central mystery of their lives: their fathers' suicides. The defamiliarizing relationship he had with Allie made him ask questions like, "Am I doing something worthwhile? Am I living my life well? Am I doing good work?" These questions are crucial for lawyers. We are meant to live good lives, to be godly and compassionate. Reading good books keeps us focused on these questions. It keeps our vision elevated. It exercises our tired synapses. It expunges the trivial sound-bite.

As humanists we have certain seeds within us. If our souls are parched and shaded, those seeds will not blossom and bear fruit. Reading literature provides the sunshine and the water for those seeds. In his short story "The Hermit's Story,"[38] Rick Bass, after creating an utterly astonishing visual scene, muses, "It would be curious to tally how many times any or all of us reject, or fail to observe, moments of grace."[39] Literature gives us the wisdom to recognize the moments of grace in our lives. More

than that, it gives us moment after moment of grace, until, suddenly, we find that we are living lives of grace.

1. Annie Dillard says the following in her book *The Writing Life* (Harper Perennial 1989):

   > A well-known writer got collared by a university student who asked, "Do you think I could be a writer?"
   >
   > "Well," the writer said, "I don't know. . . . Do you like sentences?"

2. James Boyd White, *Telling Stories in the Law and in Ordinary Life: The* Oresteia *and "Noon Wine,"* in Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 168 (University of Wisconsin Press 1985).
3. Benjamin Nathan Cardozo, Law and Literature and Other Essays and Addresses, reprinted in Selected Writings of Benjamin Nathan Cardozo 339 (Fallon Publications 1938).
4. *Id*. at 344.
5. *Id*. at 342.
6. *Id*. He was reacting to J. Mansfield's freeing a slave purchased in Virginia and brought to England: "The air of England has long been too pure for a slave, and every man is free who breathes it." *Id*. at 344.
7. *Id*. at 347. Justice Cardozo also discusses and condemns the cut-and-paste style, which he wryly calls "the tonsorial or agglutinative" style.
8. Admittedly, reading good books is only one step of a process that continues all our lives until we put down our pen for the last time. Another step in the process is deliberately to study matters of style. No source is better than White & Strunk's *Elements of Style,* which most lawyers need to pick up and read regularly. Another wonderful book is Henry Weihofen, *Legal Writing Style* (West Hornbook 1980).
9. Thomas Keneally, Schindler's List (Touchstone 1982).
10. Henry David Thoreau, Journal of June 22, 1852, in Journal: The Writings of Henry D. Thoreau (Princeton University Press), *quoted in* Lang Elliott, Music of the Birds 29 (Houghton Mifflin 1999). Please indulge me in this brazen anachronism. Thoreau actually used the phrase to describe the song of a wood thrush, and I return to it in the text presently.
11. Emily Brontë, Wuthering Heights (Norton 1963).
12. Don DeLillo, White Noise (Viking 1985).
13. Chris Adrian, "Every Night for a Thousand Years," *reprinted in* Best American Short Stories of 1998 83 (Houghton Mifflin 1998).
14. Jane Austen, Northanger Abbey (Signet Classic 1965).
15. A.S. Byatt, Possession (Random House 1990).
16. John Kennedy Toole, A Confederacy of Dunces (Louisiana State University Press 1980).
17. Rick Bass, "The Hermit's Story, *reprinted in* Best American Short Stories of 1999 1 (Houghton Mifflin 1999).
18. Walker Percy, The Second Coming (Ivy Books 1980).
19. *Id.* at 31.
20. *Id.* at 30.
21. *Id.* at 29-30.
22. Henry David Thoreau, Journal of June 22, 1852, in Journal: The Writings of Henry D. Thoreau (Princeton University Press), *quoted in* Lang Elliott, Music of the Birds 29 (Houghton Mifflin 1999).
23. *Id.* at 27 (Journal of July 5, 1852).
24. *New York Times Book Review*, August 22, 1993 at 10.
25. Toni Morrison, The Bluest Eye (Plume 1970).
26. Edith Wharton, Summer (Bantam 1993).
27. William Shakespeare, King Lear, in Shakespeare, The Complete Works 1136 (ed. Harrison, Harcourt, Brace & World 1952).
28. Jane Smiley, A Thousand Acres (Knopf 1992).
29. Sophocles, Antigone (Oxford University Press 1973).
30. William Shakespeare, Measure for Measure (Signet Classic 1988).
31. Walker Percy, Lancelot (Ivy 1977).
32. Primo Levi, The Periodic Table (Schocken Books 1984).
33. Kurt Vonnegut, Slaughterhouse Five (Delacorte Press 1969).
34. Mrs. Prozzi, Anecdotes of Samuel Johnson (1786), quoted in John Bartlett, Bartlett's Familiar Quotations 429 (1968).
35. Toni Morrison, Beloved, 159, 161 (Plume 1987).
36. e.e. cummings, "the great advantage of being alive (instead of undying)," in A Selection of Poems (Harvest 1965).
37. Walker Percy, The Second Coming at 68-70.
38. Rick Bass, "The Hermit's Story," *reprinted in* The Best American Short Stories 1999 (Houghton Mifflin 1999).
39. *Id.* at 13.

Will the Proposed Amendments to The Federal Rules of Civil Procedure Improve the Pretrial Process?

By Ettie Ward

If Congress has no objections or modifications to a packet of amendments to the Federal Rules of Civil Procedure that the U.S. Supreme Court promulgated on April 17, 2000,[1] they will become effective on December 1, 2000.

The most significant changes relate to discovery.[2] The proposed amendments to Rules 26, 30, and 37 have the potential to effect major changes in discovery practice, but have thus far generated relatively little public debate, despite the publication of the proposed rules for comment, and public hearings held in December 1998 and January 1999.[3] The Civil Advisory Committee seemed to downplay the significance of the proposed changes, explaining that:

> [T]he Committee determined to focus on the architecture of discovery rules and determine whether modest changes could be effected to reduce the costs of discovery, to increase its efficiency, to restore uniformity of practice, and to encourage the judiciary to participate more actively in case management. The Committee determined expressly not to review the question of discovery *abuse*, a matter that had been the subject of repeated rules activity over the years.[4]

Reduction in delays and in the costs of federal litigation, together with deterrence of discovery abuses, have been recurrent themes in civil rules reform over the last 30 years.[5] Through these amendments, the legal profession has sought not only to expedite litigation, but to address the precipitous decline in the public's opinion of lawyers and the legal system.[6] Many of the changes made in pretrial practice in the last few decades were designed to involve a judicial officer earlier and more effectively in the pretrial process.[7] Similar themes were included in the Civil Justice Reform Act of 1990 (CJRA) and the individual district plans mandated by the Act.[8] Unfortunately, the CJRA failed to deliver on its promises of cost and delay reduction, and lawyers, as well as the public, remain uneasy with the pretrial process.

The current proposed amendments were drafted in response to continued concerns about the overall costs of the discovery process. At the outset, Judge Niemeyer, as chair of the Civil Rules Advisory Committee, posed three questions that zeroed in on the concerns about the pretrial practice voiced in recent years:

1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process?
2. Are there rules changes that can be made to reduce the cost and delay of discovery without undermining a policy of full disclosure?
3. Should the federal rules for discovery, applying to cases involving substantive law and procedure, as well as to cases involving state law, be made uniform throughout the United States?[9]

To answer these questions, the Advisory Committee went to commendable lengths in soliciting the views of the academic community, the bench, the bar, and bar associations. In addition, the Advisory Committee asked the Federal Judicial Center to conduct a survey of attorneys about discovery. It also asked the RAND Institute to re-evaluate its database, collected in connection with its work under the Civil Justice Reform Act, for information on discovery practices.[10]

The Federal Judicial Center survey results (to the extent that the responses of 1,000 attorneys can be considered a representative sampling) provided few surprises and, to a large extent, could be read as encouraging. The results indicated a consensus that discovery is now working efficiently in a majority of cases. Complaints

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about discovery typically involved the expense and time associated with discovery, with particular complaints about depositions (for plaintiffs) and document production (for defendants). Not surprisingly, high levels of discovery problems and high expenses were found more likely to occur in cases with high stakes, high levels of contentiousness, high levels of complexity, or high volumes of discovery activity. Survey respondents expressed almost universal agreement that the most effective mechanism to control litigation excesses is earlier and more extensive judicial involvement. The survey also indicated that there was extensive support for national uniformity of discovery rules; practice is stressful enough without having to deal with 94 variations of disclosure.[11]

The correct answer to each of Judge Niemeyer's questions is obviously "yes." The Advisory Committee's response to Judge Niemeyer's questions is the current proposed amendments to the Federal Rules.

Uniformity Restored

The voluntary disclosure requirements adopted in the 1993 amendments permitted districts, by local rule, to "opt out" of initial disclosure.[12] The opt-out provision contained in the 1993 version of Rule 26(a)(1) to the Federal Rules of Civil Procedure permitted nonuniformity, but was drafted to deal with a particular situation at a particular time. The opt-out provision allowed the ongoing experimentation encouraged by the CJRA to come to a natural conclusion. Districts were in the midst of evaluating their Expense and Delay Reduction Plans ("District Plans"); the RAND Institute was conducting a major study of a number of districts pursuant to the act; and the opt-out mechanism also recognized that many districts had adopted portions of their District Plans in reliance on language contained in proposed Rules Amendments promulgated in 1991.[13] With the sunset of the CJRA, there is no longer a need to defer to local variations.

Even more significantly, districts may have more enthusiastically adopted the opt-out than was expected. For example, only one-third of the districts accepted Rule 26(a)(1); approximately one-third opted out of Rule 26(a)(1); and the remaining one-third adopted a modified version of mandatory disclosure as part of local rules or the District Plans promulgated under the CJRA.[14]

Although local rules and standing orders may no longer be used to vary the parties' obligation under the proposed changes to Fed. R. Civ. P. 26(a), the parties may still stipulate to "opt out" of the initial disclosure requirements, the court may issue a case-specific order with regard to disclosure, and the court *must* issue such an order if a party expressly objects to disclosure. [15]

Eight categories of proceedings are exempted from disclosure.[16] The categories identify cases that are likely to have little or no discovery or in which initial disclosure is unlikely to contribute to development of the case. It is estimated that these eight categories will constitute the bulk of the civil caseload in some districts.[17]

The amendment to Fed. R. Civ. P. 26(d) would delete a district's option to opt-out of this provision by local rule, except in the eight categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E). Thus, districts would no longer be authorized to exempt cases by local rule from the moratorium on discovery before the Rule 26(f) conference.[18] Parties may agree to disregard the moratorium by stipulation, and although a court may issue a case-specific order departing from the Rule 26(d) moratorium, standing orders applicable to all cases or categories of cases are not authorized.[19]

Reflections on the Revision Process

One threshold question, not specifically addressed by the Civil Rules Advisory Committee in the effort that led to the current proposals, is whether continued tinkering with the pretrial rules on a regular basis adversely affects our ability to evaluate the effectiveness of the existing rules structure. We cannot ignore serious problems, but neither should we act to solve problems before we determine that, in fact, a problem exists.

Empirical and anecdotal evidence shows that discovery is working well in most cases, but that serious abuses and excessive costs and delay are still associated with discovery in certain cases. We should, therefore, question the need to make broad rules changes, which may or may not affect the bottom line in cases where such abuses, costs, and delay occur. A broad-brush approach has the advantage of uniformity, but it does not permit targeting the intractable problem cases. It is entirely possible that a broad-brush approach may have unintended and adverse effects on cases that previously were not problems.

We should also recognize the direction in which we are being carried by the current rules revisions process. From the date of enactment of the Federal Rules, and particularly after the 1970 amendments, discovery in the federal courts has been relatively uninhibited, and almost entirely lawyer-controlled. Some of the changes in 1970 were specifically designed to permit parties to conduct discovery without leave of court.[1] The negative aspects of this free-wheeling discovery—overly aggressive behavior, excessive and redundant use of discovery, inappropriate and inadequate responses, obstreperous conduct, and delaying tactics—have been criticized, and the rules amendments since 1970 have tried to address these problems.[2]

Truly inappropriate, abusive conduct can be addressed by sanctions, but much of the discovery gamesmanship involves strategic use (and overuse) of procedural rules, and does not involve any violation of the rules, as such.[3] The rule changes, especially since 1983, have focused on involving a judicial officer in the pretrial process early and consistently. This concept of judicial management has expanded from setting pretrial schedules and supervising settlement discussions, to limiting the depth and breadth of discovery and, where appropriate, requiring alternative dispute resolution. Equally important, judges are being asked to monitor the activities of lawyers, especially out-of-control "Rambo-style" litigators,[4] who are unable to litigate collegially. The shift from attorney-managed discovery to judicially supervised discovery is a fundamental change, which is only accelerated by the current proposed amendments.

Ettie Ward

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1. Advisory Committee's Explanatory Statement Concerning 1970 Amendments to Discovery Rules ("Other changes . . . are designed to encourage extrajudicial discovery with a minimum of court intervention.").
2. *See* Advisory Committee Note to 1980 Amendment to Fed. R. Civ. P. 26(f) ("There has been widespread criticism of abuse of discovery: [A]buse can best be prevented by intervention by the court."); Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 26 ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."); Advisory Committee Note to 1993 Amendment to Fed. R. Civ. P. 33 ("The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice.").
3. Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 26 ("Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that although authorized by the broad, permissive terms of the rules, nevertheless results in delay").
4. *See, e.g.*, K. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751, 755 (1994) "([Rambo] tactics . . . are characterized alternatively as zealous advocacy; disdain for common courtesy and civility; and a scorched earth strategy. Rambo litigators are perceived as those who use discovery as a weapon, constantly threaten other lawyers with Rule 11 motions, and utilize an aggressive and abusive style of litigation in order to 'win at all costs.'" (footnotes omitted)); G. Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 Loy. L.A. L. Rev. 81 (1991).

The proposed amendment to Fed. R. Civ. P. 26(b)(2) eliminates the possibility of opt-out, by district-wide local rule, from the presumptive limits in the Federal Rules on the number of depositions and interrogatories, or the length of depositions under Rule 30. A district may still, by order or local rule, limit the number of requests under Rule 36 because there is no "national" rule limiting the number of Rule 36 requests for admissions. The Advisory Committee Note comes out strongly on the side of uniformity, stating, "There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts."[20] Although limits can still be modified by court order or parties' agreement in an individual action, the Advisory Committee Note clearly states that "standing" orders are *not* authorized.[21]

A major virtue of the Federal Rules as originally envisioned in 1938 was transubstantive procedural uniformity. The procedures would be uniform in most cases in every district court. Elimination of the opt-out provision, with regard to initial disclosure, and with regard to limits on depositions and interrogatories, would mark a welcome return to that original vision. Although it may be appropriate to leave room for local variations in some areas, the situations in which that may occur should be clearly limited. The amendments to Fed. R. Civ. P. 26(a), 26(b)(2), and 26(d) eliminate the opt-out provisions and are "intended to establish a nationally uniform practice."[22]

Mandatory Automatic Disclosure

The changes to Fed. R. Civ. P. 26(a) modify the standard for disclosure, by narrowing the initial disclosure obligation, and, as noted above, eliminate the possibility of opt-out by local rule. The standard under the proposed amendment requires disclosure of "discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment." The 1993 version required disclosure of "discoverable information relevant to disputed facts alleged with particularity in the pleadings." The "use" referred to in the proposed rule is intended to include any use at a pretrial conference, to support a motion, or at trial. Disclosure is also triggered by use in discovery.

The proposed changes address some of the original concerns about disclosure that made the 1993 initial disclosure requirements controversial in the first place, particularly the concern that a party lacked clear guidance as to what information had to be disclosed. Tying disclosure to a party's use of information is intended to give more explicit guidance to disclosing parties. In addition, the tie-in between disclosure and pleading "disputed facts alleged with particularity" created confusion by arguably imposing a stricter pleading standard to trigger disclosure than to withstand a motion to dismiss or to generate discovery requests.

Part of the original opposition in 1993 to initial disclosure stemmed from a reluctance by litigators to see their role in pretrial practice as participants in a cooperative venture. These is a natural tension between a lawyer's responsibility to advocate zealously on behalf of a client and a lawyer's duty as an officer of the court. To the extent that discovery is lawyer-controlled, without an umpire to make sure it is a fair fight, the process may often spiral out of control. Initial disclosure was intended to mandate cooperation so that it would not be a sign of capitulation or weakness, and to speed the efficient exchange of basic, discoverable information required for disposing of a case by motion, trial or settlement. Widespread opt-outs undercut the value of such a rule, and the amendment both reduces the volume of material required to be disclosed, and eliminates the

district-wide opt-out to establish a uniform rule applicable to all cases not exempted specifically by the rule.

One can argue that making any change in the initial disclosure requirement may be premature because of the relative paucity of experience under the initial disclosure rule adopted in 1993. Complaints about disclosure have focused more on lack of compliance than on any dissatisfaction with the standard.

To date, only a relatively small percentage of cases have used the initial disclosure provisions of Rule 26(a)(1), particularly if we take into account the number of districts that have opted-out or those that purport to use disclosure but operate under significant variations from the initial disclosure requirements of Rule 26(a)(1). Further, even in districts that require disclosure, the parties in many cases stipulate to opt-out of the disclosure requirements.[23] As a result, the universe of those with extensive experience under Rule 26(a) disclosure is quite small. Although surveys indicate that those who have used the disclosure provisions have a certain level of satisfaction with disclosure,[24] support for disclosure appears minimal. All that we can conclude is that mandatory initial disclosure is neither as bad as its critics had feared, nor as salutary as its proponents had hoped. Mandatory initial disclosure has, so far, either been largely ignored or has had little impact, positive or negative, on federal litigation. Eliminating the opt-out is likely to have more impact on use of initial disclosure than modification of the disclosure requirements.

A more minor change with respect to initial disclosure involves modification of the timing of disclosure relative to the Rule 26(f) conference. Under proposed Rule 26(a)(1)(E), parties must exchange initial disclosure within 14 days after the Rule 26(f) conference, unless a different time is set by the court or the parties so stipulate. In addition, if a party objects to disclosure during the Rule 26(f) conference and states the objection in the Rule 26(f) plan, the court must rule on the objection and set a new time for any required disclosure. Under the 1993 rule, the time for initial disclosure was within 10 days after the Rule 26(f) meeting, unless otherwise stipulated or ordered. The proposed amendment also explicitly provides that those joined in an action after the Rule 26(f) conference must provide initial disclosure within 30 days after service. The 1993 version failed to address when later-added parties had to provide disclosure.

Scope of Discovery

Perhaps the most revolutionary change included in the proposed amendments is one that had been discussed in many variations for many years, but had never previously been adopted by the Advisory Committee—a modification of the scope of discovery.[25] The intent is to narrow the current standard under Rule 26(b)(1), that parties may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense" of a party. The amendment to Rule 26(b)(1) would create two levels of discovery: (1) attorney-controlled discovery of matter relevant to a "claim or defense" and (2) court-controlled discovery under the present standard, based on relevance to the "subject matter," upon a showing of good cause.

Thus, the old standard is not completely eliminated, but is available only after the narrower attorney-managed discovery has been tried, and only upon a party's application to the court for additional discovery upon a showing of "good cause."

The new standard was proposed in similar form at various times by bar associations and other groups, including the American College of Trial Lawyers and the American Bar Association. The intent is to reduce the costs associated with extensive, broad discovery under the old standard.

It is unclear whether the rule change will produce the desired effects. The "subject matter" standard, having been tested over time in the courts, has been interpreted by the courts, and is generally understood by the bench and bar. It is likely that adoption of a new, more restrictive, standard will trigger an extensive shake-out period as courts and parties explore its parameters. The courts will have to determine how much the new standard of "relevant to a claim or defense of any party" reins in discovery "relevant to the subject matter." The proposed two-tier system is also likely to generate satellite litigation to determine what constitutes a "good cause" showing in this context, and to obtain court permission for additional discovery. Courts will necessarily be required to spend more time resolving discovery disputes under the new standard.

There may also be unanticipated, and perhaps undesirable, spillover effects on pleadings resulting from parties' efforts to obtain sufficient discovery in the first instance without having to demonstrate "good cause."

Unless and until parties accept the first tier of attorney-controlled discovery as sufficient for motion practice, trial or settlement, neither the courts nor the parties will realize substantial savings of time or expense. Expense and time will only be reduced if the parties stop after the initial discovery stage, or if judges uniformly interpret the "good cause" requirement strictly. Nor does the proposed rule change necessarily reduce discovery abuse. To the extent we wish to address abuses of discovery, we already have adequate mechanisms in Rules 16, 26 and 37, as well as the court's inherent powers, to supervise and manage the parties' conduct of discovery and to sanction inappropriate behavior.

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The sphere of attorney-controlled discovery is significantly reduced by the proposed change. The theory is that if you have to go ask the "umpire" for permission (under the "good cause" requirement), the more outrageous, egregious discovery demands are likely to be dropped. "Asking" creates another layer, and having to make the application may result in a drop-off in requests. Lawyers recognize that the most effective way to address problems in pretrial practice, discovery, and case disposition, is to involve judges earlier and more extensively.[26]

The probable net effect of these changes will be to continue to shift the ball to the judge's "court."

Moreover, any impact of the rules changes is arguably limited. The vast majority of cases do not now raise issues regarding the *scope* of discovery. The Federal Judicial Center survey, conducted as part of this rules amendment process, found that most cases did not have serious discovery problems.[27] Those that did have discovery problems complained about the time and expense allocated to discovery. On the other hand, there is a sense that a broad discovery standard allows parties to conduct unnecessary and redundant discovery, but the Federal Rules provide mechanisms for addressing that type of overuse and abuse, even under the current standard. Accordingly, we are yet again modifying the rules to address a minority of troublesome cases, without fully considering the impact and costs to litigants and the courts in cases that would not otherwise raise "scope of discovery" problems. The majority of cases do not have an overload problem in terms of discovery's scope. Complex, "big discovery" cases that generate discovery problems will continue to receive special treatment and are likely to satisfy a "good cause" test routinely.

Length of Depositions

Fed. R. Civ. P. 30(d)(2) would be amended under the proposed rules to limit any deposition to one day and seven hours, unless otherwise authorized by the court or stipulated by the parties. Under the proposed amendments, the court must allow additional time for a deposition if it is needed, or if the deposition is impeded or delayed.

This proposal for a one-length deposition to fit all cases has generated some opposition. In presenting this proposed change, the Advisory Committee recognizes that seven hours is an arbitrary limit. Why not six or eight? Although one seven-hour day is not unreasonable for most depositions, the importance of this change is not its substance, but that it represents yet another aspect of the shift from attorney-directed discovery to court-supervised and managed discovery. The message from the Advisory Committee is that lawyers cannot be trusted to set reasonable limits on their own.

Although the cost of depositions is high and constitutes a significant portion of discovery expenses in certain litigations, establishing blanket limitations is not likely to be a panacea, and not all lengthy depositions are abusive or unnecessary. Indeed, most depositions are not lengthy. The Federal Judicial Center survey determined that in most cases depositions fall within the seven-hour, one-day limit.[28] The complex, "big" discovery cases, which tend to have longer depositions, will not be subject to this limit, but will seek and get individualized treatment; many small cases do not even use depositions as a discovery mechanism in view of the expense. Thus, we are again generating a rule to deal with a relatively small band of problem cases—cases that are already being extensively managed by the judiciary.

These problem cases are not going to be resolved by the presumptive limit adopted. The courts already have the authority to limit depositions in individual cases under Fed. R. Civ. P. 30(d)(2). Rather, we may be encouraging motion practice and more extensive judicial intervention to resolve disputes as to additional time, or to determine whether any party delayed or interfered with the proceedings. A seven-hour, one-day presumptive limit will not be effective in reducing the excessive cost of depositions. Indeed, it would not be surprising if the amendments have the perverse effect of causing some depositions to run longer to reach a perceived seven-hour norm.

Conclusion

The proposed amendments to the federal discovery rules are well-intentioned and may fundamentally affect the way litigators practice in federal court. Yet, there is no assurance that the proposed changes will make a significant impact on the intractable problem of how to reduce discovery costs and eliminate discovery abuses.

The probable net effect of these changes will be to continue to shift the ball to the judge's "court," and to impose judicial oversight earlier and on a greater number of discovery issues that previously were left to the attorneys to resolve. If judicial control of pretrial practice is the ultimate end, perhaps we should confront that directly, rather than gnawing at the edges of pretrial practice.

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1. Communication from the Chief Justice, the Supreme Court of the United States, transmitting Amendments to

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the Federal Rules of Civil Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072, April 17, 2000.

2. In addition, there are proposed amendments to Fed. R. Civ. P. 4, 5, 12 and Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims.
3. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, Request for Comment and Notice of Public Hearings (August 1998). More than 300 comments were received and more than 70 witnesses testified during three hearings in December 1998 and January 1999. Minor changes were made to the proposed rules as a result of the comments. May 11, 1999 Report of Advisory Committee on Civil Rules, Judge Paul V. Niemeyer, Chair, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure at 2. *See* J. Solovy and R. Byman, *Discovery: Amending The Rules*, Feb. 15, 1999 Nat'l. L.J. at B17.
4. May 11, 1999 Report of Advisory Committee on Civil Rules, transmitted by Judge Paul V. Niemeyer, Chair, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure at 3.
5. *See*, *e.g.*, Advisory Committee Note to 1980 Amendment to Fed. R. Civ. P. 26(f) ("There has been widespread criticism of abuse of discovery"); Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 26; Advisory Committee Note to 1993 Amendment to Fed R. Civ. P. 30 (An "objective is to emphasize that counsel have a professional obligation to develop a cost-effective plan for discovery").
6. *See* J. Kerper & G. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. Legal Prof. 103, 109 (1998); S. Daicoff, *Asking Leopards to Change Their Spots*; *Should Lawyers Change? A Critique of Solutions to Problems with Professionalism By Reference To Empirically Derived Attorney Personality Attributes*, 11 Geo. J. Legal Ethics 547–553 (and accompanying notes) (1998) (discussing recent opinion polls).
7. *See*, *e.g.*, Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 16 ("Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case . . . , the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."); Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 26(g) ("Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision"); Advisory Committee Note to 1993 Amendment to Fed. R. Civ. P. 2b(f) ("This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement.").
8. 28 U.S.C. §§ 471–482 (1994).
9. June 30, 1998 Report of the Advisory Committee on Civil Rules, transmitted by Paul V. Niemeyer, Chair, to Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure at 2.
10. *Id*.
11. T. Willging, J. Shapard, D. Steinstra, & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases*, Fed. Jud. Ctr., August 22, 1997 (submitted to the Judicial Conference Advisory Committee on Civil Rules, for consideration at its September 4-5, 1997 meeting).
12. Fed. R. Civ. P. 26(a).
13. Advisory Committee Note to 1993 Amendment to Fed. R. Civ. P. 26(a).
14. D. Steinstra, *Implementation of Disclosure in United States District Courts with Specific Attention to Court's Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Fed. Jud. Ctr., March 30, 1998).
15. Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(a).
16. The eight categories of proceedings that would be exempted under the proposed amendment to Fed. R. Civ. P. 26(a)(1)(E) are:

    (i) an action for review on an administrative record;

    (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

    (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

    (iv) an action to enforce or quash an administrative summons or subpoena;

    (v) an action by the United States to recover benefit payments;

    (vi) an action by the United States to collect on a student loan guaranteed by the United States;

    (vii) a proceeding ancillary to proceedings in other courts; and

    (viii) an action to enforce an arbitration award.
17. Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(a)(1)(E).
18. Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(d). The proposed amendment to Rule 26(f) clarifies that the parties need only "confer," and not necessarily "meet," to formulate their discovery plan.
19. *Id*.
20. Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(b)(2).
21. *Id*.
22. Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(a)(1); *see also* Advisory Committee Notes to proposed 2000 Amendments to Fed. R. Civ. P. 26 (b)(2) and 26(d).
23. This is particularly true in the "big discovery" cases, and parties in such cases are likely to continue to "stipulate" out of disclosure requirements or to object to disclosure. The Advisory Committee recognized this, but concluded that it "did not seem useful to draft a rule that exempts 'big discovery' or 'problem discovery' cases." June 30, 1998 Report of the Advisory Committee, *supra,* note 9, at 8–9.
24. T. Willging, *et al.*, *Discovery and Disclosure Practice*, *supra,* note 11, at 18–27.
25. June 30, 1998 Report of the Advisory Committee, *supra,* note 9, at 9–10; Advisory Committee Note to proposed 2000 Amendment to Fed. R. Civ. P. 26(b)(1).
26. T. Willging, *et al.*, *Discovery and Disclosure Practice*, *supra,* note 11, at 3, 9, 41–45.
27. *See* June 30, 1998 Report of the Advisory Committee, *supra,* note 9, at 3.
28. T. Willging, *et al.*, *Discovery and Disclosure Practice*, *supra,* note 11, at 31 ("Overall, however, the median length of the longest deposition is only four hours, and 75% of the attorneys reported the longest deposition was no longer than seven hours.").

Courts in New York Will Enforce Non-Compete Clauses in Contracts Only if They Are Carefully Contoured

By David L. Gregory

Covenants not to compete in the future against one's current employer are increasingly part of the employment relationship, especially in many non-unionized employment settings that involve senior executives and specialized high-tech, computer-based knowledge workers. Employers are more frequently incorporating these restrictive covenants into written contracts that they insist prospective employees sign at the commencement of employment. The covenants are becoming much more specific, elaborate and sophisticated. Generally, they must be very carefully contoured if they are to be enforceable in court.

The courts historically have not been well-disposed to boilerplate covenants not to complete. These absolute constraints offend principles of freedom of contract, mobility of workers, and the capitalist political economy favoring vigorous, free competition. However, courts do sustain carefully drafted restrictive covenants, upon proof that the covenant was necessary and its restrictions reasonable in all of the particular circumstances.

Today, the business vitality and strategic plans of many enterprises can be placed on a single computer disc. Given the vulnerability of most businesses to computer-based sabotage, as well as pervasive and compelling concerns about ensuring sufficient protections against theft of trade secrets, the proliferation of restrictive covenants not to compete against one's former employer is manifestly understandable.

In 1999, the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals, and the U.S. District Court for the Southern District of New York each issued very important and separate decisions, spanning much of the jurisprudential spectrum regarding the (non)enforceability and (non)viability of restrictive covenants not to compete in employment.

The tensions within and among these dynamic, important decisions reflect the historical wariness of the judiciary toward these covenants, as well as the obvious viability and compelling importance of enforcing them in narrowly contoured circumstances. These decisions may also recognize, at least in part, the virtually immediate obsolescence of restrictive covenants in the high-tech, cyberspace global employment environment of computer-mediated and specialized knowledge workers.

Once again, New York and the Second Circuit are at the epicenter of one of the hottest issues in all of contemporary employment law, with ramifications for business competitors, employers.

Historical Overview

The employer's ability to place post-employment restrictions on employees generally is a matter of state law. Some states have statutorily codified these matters; New York has not. The absence of a comprehensive statutory scheme makes it difficult to determine whether and under what circumstances restrictive employment covenants may be enforced in New York.

New York public policy fundamentally opposes employer attempts to limit a former employee from earning a livelihood. Because of this strong public policy favoring free competition, New York courts carefully scrutinize restrictive covenants not to compete with one's former employer. While New York courts periodically may enforce covenants not to compete in connec-

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tion with the sale of a business in order to protect the business's good will, the courts in the employer-employee context will most likely enforce the covenants only where the employee's services are highly specialized or extraordinary, or where the employee is using confidential company information that is a trade secret. Otherwise, former employees generally are free to compete with their former employers after the employment relationship is severed, and boilerplate absolute restrictive covenants will not be enforced by the courts.

An employee's common law duty of confidentiality to the employer does not necessarily end upon termination of the employment relationship. Even after the relationship ends, an agent "has a duty to the principal not to use or to disclose to third persons . . . in competition with the principal . . . trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use."[1] The former employee is otherwise usually free to use information that was obtained through general skill, knowledge and experience.

If a covenant is too broad, courts may unilaterally blue pencil the agreement, and enforce the balance.

Although New York courts have historically disfavored non-compete agreements that limit the former employee's opportunities to earn a living after leaving a particular employer, New York law does afford protection to former employers when such agreements are reasonable under the particular circumstances. A restrictive covenant "will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."[2] Employers have legitimate interests in enforcing restrictive covenants to protect against the use or disclosure of trade secrets or confidential customer lists, or to protect against the use of the services of former employees whose services are unique or extraordinary.[3]

Where there is no restrictive covenant, the employer's ability to enjoin former employees from soliciting clients turns primarily on whether the client information is tantamount to a trade secret. New York has adopted the definition of trade secrets found in § 757, Comment b of the Restatement (First) of Torts (1939). Where the customer information does not constitute a trade secret, the former employer may not enjoin the former employee from soliciting customers, unless the employee has obtained the customer information by wrongful means such as theft.

The primary fact issue in trade secret cases is whether the employee is making use of trade secrets acquired while employed. If no trade secret is involved, then the courts reach the question of the reasonableness of the covenant. In determining whether information is generally kept confidential, courts examine the manner in which the employer treats the information. The former employer has no protectable interest in restricting information that is easily accessible or commonly known to others.

The "unique or extraordinary" employee rationale for enforcing restrictive covenants has only rarely been successfully invoked by former employers in New York courts. Originally, this rationale applied even more narrowly to truly unique talents.[4]

In determining the reasonableness and duration of the restrictive covenant, the employer's legitimate interests are balanced against the employee's interest in working in her/his profession. The employer must demonstrate that the length of the restriction is necessary to prevent loss of business. There is no precise duration of the restriction that will always be reasonable. The particular facts and circumstances usually determine the reasonableness; restrictions of more than one to two years will probably be unreasonable in almost any context. The geographic area specified in the covenant similarly must also be limited to that reasonably necessary to protect the employer's interest. What "off-limits" geographic area may be reasonable also depends upon the specific facts. The restricted territory should be no more than coextensive with the same geographical area in which the former employee did business.

If a covenant is too broad, courts may unilaterally blue pencil the agreement, and enforce the balance. However, a court may "throw up its hands and void the entire covenant if the infirmities are too patent."[5]

Covenants not to compete occasionally provide that the former employee is to receive continued compensation during any period in which the non-compete covenant is in effect, and/or during which the former employee cannot find non-competitive work. One expedient alternative to drafting meticulous restrictive covenants, and to litigating their enforceability in perpetuity, may simply be financial payment by the former employer to the former employee to induce the former employee to remain "off the market" for whatever period of time agreed upon by the parties.

The 1999 New York "Trilogy" of Decisions

Ticor Title Insurance Co. v. Cohen[6] Ticor commenced an action for injunctive relief against Cohen in the

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Southern District of New York on June 5, 1998. The court issued an order permanently enjoining Cohen from working in the title insurance business and from appropriating Ticor's corporate opportunities for a period of six months. Cohen appealed to the Court of Appeals for Second Circuit.

Ticor Title Insurance sells title insurance nationwide and is the leading title insurance company in New York State. Ticor focuses primarily on multi-million dollar transactions handled by real estate lawyers. Title insurance salespeople from different companies compete to insure the same real estate transaction, seeking business from the same group of widely known attorneys. Cohen's clients consisted almost exclusively of real estate attorneys in large New York law firms. Cohen, initially employed by Ticor as a title insurance salesman, became senior vice president in charge of several major accounts.

On October 1, 1995, Ticor and Cohen, both represented by counsel, began to negotiate an employment contract. The contract, including a covenant not to compete, would expire December 31, 1999. The non-compete provision stated that during his employment with Ticor and "for a period ending on the earlier of . . . June 30, 2000 or . . . 180 days following termination of employment," Cohen would not engage in the business of title insurance in the State of New York. There was also an express term in the contract that Ticor was willing to enter into this contract only on condition that Cohen accept the post-employment restriction.

The Second Circuit concluded that if unique services of a former employee are available to a direct competitor, the former employer could suffer irreparable harm.

On October 27, 1995, Cohen's counsel faxed Ticor a proposed final version of the contract, which was accepted by both parties. This final version included the non-compete clause in its original form. In consideration for the non-compete provision, Cohen became one of the highest paid sales representatives at Ticor. His annual compensation was guaranteed at $600,000, plus commissions. In addition to the compensation package, Cohen received expense account reimbursements, paid memberships to exclusive clubs, tickets, fringe benefits, and his own staff.

On April 20, 1998, TitleServ, a direct competitor of Ticor, offered to employ Cohen for a substantial salary and signing bonus. Cohen sent Ticor a letter on April 21, 1998, notifying Ticor of his resignation effective May 21, 1998. He agreed to begin working for TitleServ on May 27, 1998, six days after his resignation from Ticor.

Cohen spoke with 20 Ticor customers about TitleServ before submitting his resignation, and he told each of them about his proposed move. However, he insisted that he never attempted to solicit any business for TitleServ before leaving Ticor. Cohen's assertion was contradicted by his deposition, when he admitted that he directly solicited Polevoy and secured a promise that Polevoy would follow him from Ticor to TitleServ.

Affirming the trial court, the Court of Appeals held that Ticor would suffer irreparable injury absent the issuance of an injunction; the services provided by Cohen were unique and provided a basis for enforcement for the non-compete clause. It would be difficult to calculate monetary damages that would redress the loss of a relationship with a client that would produce an indeterminate amount of business in the future. Further, the employment contract that Cohen signed stated that Ticor would suffer irreparable harm in the event the non-compete clause was breached, an important equitable element when the former employer seeks enforcement.

The Second Circuit rejected Cohen's argument that the non-compete provision was void as a contract in restraint of trade and therefore violated public policy. The court held that under New York law contracts in partial restraint of trade, if reasonable, are permitted. Assuming a non-compete clause is reasonable in time and geographic scope, enforcement will be granted: (1) to prevent an employee's solicitation or disclosure of trade secrets; (2) to prevent an employee's release of confidential information to customers; or (3) in those cases where the employee's services to the employer are special or unique. The reasonableness test was satisfied, because the duration of the covenant was only six months, the scope was not geographically overbroad, and it applied only to New York State.

Cohen also unsuccessfully argued that his services were not sufficiently unique to justify injunctive relief. The Second Circuit concluded that if unique services of a former employee are available to a direct competitor, the former employer could suffer irreparable harm. Unique services can be attributed to special talents, ability, or reputation. However, it is not necessary that the employee should be the only "star" of the former employer, or that the business inevitably will fail if the employee leaves. The inquiry focuses more on the em-

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ployee's relationship to the employer's business than on the individual person of the employee.

The *Ticor* court used the same analysis as in *Maltby v. Harlow Meyer Savage, Inc.*[7] In *Maltby*, a state trial court found that several currency traders were unique employees because of their special relationships with customers, fostered by the employer at his expense. The *Ticor* trial court found the facts of *Maltby* indistinguishable and applied New York law to grant an injunction.

The court should conduct a case-by-case analysis, focusing on the conduct of the employer in imposing the terms of the restrictive agreement.

The trial court in *Ticor* found Cohen's relationships with clients were "special" because: (1) the title insurance business relies heavily on personal relationships, (2) maintaining current clients in the established group of lawyers is crucial; and, (3) Cohen consented, by signing the contract with the aid of counsel. Where the employee's services are "special, unique or extraordinary," injunctive relief is available to enforce a covenant not to compete, when the covenant is reasonable, even though competition does not involve disclosure of trade secrets or confidential lists.

BDO Seidman v. Hirshberg[8] The New York Court of Appeals had to resolve whether the "reimbursement clause" in an employment agreement between the parties, requiring the former employee to compensate the former employer for serving any client of the firm's Buffalo office within 18 months after the termination of his employment, was an invalid and unenforceable restrictive covenant.

BDO commenced an action against Hirshberg in January 1995 in New York State Supreme Court. The Supreme Court granted summary judgment to the former employee, concluding that the reimbursement clause was an overbroad and unenforceable anti-competitive agreement. The Fourth Department agreed, holding the entire agreement invalid.

BDO is a national accounting firm, with 40 offices throughout the United States, including four in New York State. Hirshberg began employment at BDO's Buffalo office in 1984. In 1989, he was promoted to manager, and required to sign a "Manager's Agreement." Pursuant to the agreement, he acknowledged that a fiduciary relationship existed between him and BDO. Hirshberg agreed that if, within 18 months following his termination, he served any former client of BDO's Buffalo office, he would compensate BDO "for the loss and damages suffered" in an amount equal to one and one-half times the fees BDO had charged that client over the last fiscal year of the client's patronage.

Hirshberg resigned from BDO in October 1993. During discovery, BDO submitted a list of clients that he had solicited, and who were billed $138,000 in the fiscal year. Hirshberg denied serving some of the clients, asserting the clients were personal clients that he had brought to the firm through his own efforts.

Reversing the court below, the New York Court of Appeals held that the trial court erred in granting Hirshberg's summary judgment motion and found that BDO was entitled to partial summary judgment. The Court of Appeals declared the restrictive covenant enforceable in accordance with the narrow class of clients to which the covenant specifically applied. The issue of damages was remitted to the Supreme Court for a determination regarding the validity of the liquidated damages clause.

The Court of Appeals further found that accountancy has all the earmarks of a learned profession. When employment agreements are made between professionals, greater weight is given to the interests of the employer in restricting competition within a confined geographical area.

The legitimate purpose of an employer in connection with non-compete agreements is "to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of employment." The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment. Therefore, if the former employee abstains from unfair means in competing for those clients, the employer's interest in preserving its client base against the competition of the former employee is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients.

BDO's legitimate interest was protection against Hirshberg's beneficial use of client relationships that BDO enabled Hirshberg to acquire during the course of his employment with BDO. Extending the non-compete agreement to BDO's clients with whom a relationship with Hirshberg did not develop through assignments to perform direct, substantive accounting services would, therefore, violate the reasonableness test, and would

constitute a restraint "greater than is needed to protect" these legitimate interests. It would also be unreasonable to extend the covenant to the personal clients of Hirshberg who came to the firm solely for his services. BDO has no legitimate interest in preventing defendant from competing for their patronage.

Except for this element of overbreadth and overreaching, the remainder of the restrictive covenant did not violate the reasonableness test. The restraint was reasonable in duration and geographic area, because it was limited to 18 months and only to clients in the Buffalo office. Further, Hirshberg remained free to compete in any market for new business, and could keep his personal clients, and those clients of BDO's that he had not served to any significant extent. There was no evidence suggesting that the restrictive covenant, if cured of its overbreadth, would cause undue hardship to the former employee. Likewise, with the broad array of accounting services available in the Buffalo area, such a restriction would likely not adversely affect the availability of accounting services to the public.

As noted, New York follows the blue pencil rule, which permits courts to sever overbroad portions of a restrictive covenant and grant partial enforcement. However, this blue pencil power is limited to situations where the unenforceable portion is not an essential part of the agreed exchange. The court should conduct a case-by-case analysis, focusing on the conduct of the employer in imposing the terms of the restrictive agreement. If the employer demonstrates no overreaching or coercive use of bargaining power, and has in good faith sought to protect a legitimate business interest, partial enforcement may be justified when the restrictive covenant is consistent with reasonable standards of fair dealing.

The provision in the BDO-Hirshberg agreement for damages was essentially a liquidated damages clause. To be valid, the damages must be difficult to ascertain, and must be a reasonable measure of the anticipated probable harm. The damages in this case were difficult to ascertain, thereby satisfying the first part of this test. However, the evidence was not sufficient to answer satisfactorily the second element of its test, which was remanded to the Supreme Court for factual determination.

EarthWeb, Inc. v. Schlack[9] On September 27, 1999 plaintiff EarthWeb, Inc. moved for preliminary injunctive relief to enjoin Schlack from commencing employment with International Data Group, Inc., and from disclosing or revealing EarthWeb's trade secrets to IDG or any third parties. On September 28, 1999, EarthWeb filed an order to show cause, and sought a temporary restraining order, which was granted. In a dramatic development, the federal district court found the restrictive covenant inherently inapplicable in the computer industry.

EarthWeb provides online products and services to business professionals in the information technology ("IT") industry. It is a publicly traded company, employing approximately 230 people in offices located in New York City and around the nation. EarthWeb offers IT professionals information, products, and services to use for facilitating tasks and solving problems in a business environment. Advertising is the employer's primary source of revenue.

Schlack, who began his employment on October 19, 1998, and resigned less than a year later, was responsible for the content of all of the employer's Web sites, and he had overall editorial responsibility. He resigned to accept a position with EarthWeb rival Itworld.com, a subsidiary of IDG. Before commencing work for EarthWeb, Schlack executed an "Employment Agreement." The employment was "at-will" and provided for annual compensation of $125,000, a performance bonus of $20,000, and stock options. The agreement had a confidentiality provision that prevented the employee from disclosing or using, at any time during or after the term of employment, any confidential information. The agreement also provided for a one year non-compete provision preventing the employee from directly or indirectly working for any person or entity that directly competed with EarthWeb. "Directly competing" was defined as a person or entity or division of an entity that was:

> (i) an online service for Information Professionals whose primary business is to provide IT Professionals with a directory of third party technology, software, and/or developer resources; and/or an online reference library, and or
>
> (ii) an online store, the primary purpose of which is to sell or distribute third party software or products used for Internet site or software development

EarthWeb said Schlack was privy to trade secrets and other confidential information that he would likely use and disclose at his new work, with this information grouped into four categories: (1) strategic content planning; (2) licensing agreements & acquisitions; (3) advertising; and (4) technical knowledge.

As discussed, Schlack was primarily responsible for determining what content EarthWeb licensed or acquired for its Web sites, and he was privy to information concerning a wide range of matters. He worked collaboratively with department heads on technology issues, marketing, and advertising. However, Schlack did not have access to advertiser lists, source codes, or configuration files, nor did he have direct contact with EarthWeb's highest executive officers. He was not involved in

developing or planning overall business strategies, and he had no access to company-wide financial reports or information. Further, EarthWeb did not allege that Schlack misappropriated or stole trade secrets.

When operational, Itworld.com would be a Web site for IT professionals, providing news, product information, and editorial opinions written primarily by an internal staff of more than 275 journalists. Itworld.com would rely on original content for over 70% of its Web site's material.

However, comparing Itworld.com to EarthWeb was regarded as inherently ephemeral, given the remarkable dynamics of the Internet.

EarthWeb argued that Schlack should be enjoined from commencing employment with Itworld.com, because Schlack's new employer would directly compete with EarthWeb. Therefore, enforcement of the non-compete agreement that Schlack had with EarthWeb was necessary to prevent the disclosure of trade secrets. EarthWeb also contended that Schlack's services were unique or extraordinary, thereby providing a further basis for enforcement of their agreement.

The 1999 New York "Trilogy" of cases will be a critical reference point for anyone considering restrictive employment covenants not to compete against one's former employer.

Schlack asserted that the non-compete agreement did not apply to Itworld.com, because its primary business did not involve offering "a directory of third party technology," an "online reference library," or an "online store." Schlack also denied knowledge of any trade secrets, or that his services were unique or extraordinary.

The court denied EarthWeb's motion for a preliminary injunction, and the TRO was dissolved. The court held that the restrictive covenant was overbroad, and that there was no imminent risk of disclosure of trade secrets. The court further found that enforcement of the covenant would work undue hardship on defendant Schlack because a one-year hiatus from the IT industry would be far too long. The industry simply changes too quickly, fast eclipsing any legitimate purpose in a one-year term in the restrictive covenant.

The Future of Restrictive Employment Covenants

EarthWeb may well best represent the problematic future of restrictive employment covenants in New York and beyond. The covenants will probably continue to proliferate, but their ultimate utility and enforceability may continue to be sharply curtailed by the courts. Perhaps most significantly, in many sectors of the computer-integrated and mediated economy, *EarthWeb* has signaled that the viable term of restrictive covenants will probably be measured in weeks, if at all, but certainly not in years.

In the Second Circuit, irreparable harm may be presumed if a trade secret has been misappropriated. It is also possible to establish irreparable harm based on the disclosure of trade secrets, particularly where the employee competes directly with the employer, and the transient employee possesses highly confidential or technical knowledge concerning manufacturing processes or marketing strategies.

Inevitable disclosure doctrine has been used several times to enforce non-compete and confidentiality agreements.[10] However, in cases that do not involve the actual theft of trade secrets, the courts are essentially asked to bind the employee to an implied-in-fact restrictive covenant based on a finding of inevitable disclosure. This is directly counter to New York's strong public policy disfavoring broad restrictive agreements.

Absent evidence of actual misappropriation by an employee, restrictive covenants should be enforced in only the rarest of cases. Factors to consider in weighing the appropriateness of granting injunctive relief are whether: (1) the former and prospective employers are direct competitors providing the same or very similar products or services; (2) the employee's new position is nearly identical to the former job, such that the employee could not reasonably be expected to fulfill the new job responsibilities without using the trade secrets of the former employer; and (3) the trade secrets are highly valuable to both employers.

Application of the inevitable discovery of trade secrets doctrine is fraught with hazard. One risk is the shift in bargaining power that occurs upon the commencement of an employment relationship marked by the execution of a confidentiality agreement. Courts are left without a frame of reference, because there is no express non-compete agreement to test for reasonableness. A very carefully written agreement that contains an express and meticulously contoured non-compete clause is the best way of promoting predictability during the employment relationship, and afterwards.

In *EarthWeb*, the agreement contained a limited restrictive covenant as well as a nondisclosure provision. The terms of the agreement provided that Schlack was an employee-at-will, and there was no provision for severance payment. *EarthWeb* maintained the right to mod-

ify the agreement. The effect would have been to indenture Schlack to *EarthWeb*. The court did not allow *EarthWeb* to expand the agreement to achieve this result, and did not allow the employer to circumvent the agreement by asserting the doctrine of inevitable disclosure as an independent basis for relief. Therefore, any entitlement to a preliminary injunction must rest on the restrictive covenant, and not on the confidentiality provision combined with the theory of inevitable disclosure.

The *EarthWeb* court found the one-year duration of the restrictive covenant far too long, considering the dynamic nature of the computer industry, its lack of geographic borders, and the reality that Schlack's market value depended on keeping abreast of changes in the industry. While courts may "blue pencil" such provisions to make them enforceable, the federal district court in New York declined because the restrictive employment agreement was overbroad. Schlack's services were not "unique or extraordinary." EarthWeb failed to show that Schlack's replacement was impossible, or that the loss of his services would cause EarthWeb irreparable injury.

A trade secret is defined as "any formula, patter, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it." New York courts consider the following factors in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and other involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. The owner of a trade secret must take reasonable measures to protect it.

Of the four broad categories of trade secrets asserted by EarthWeb, only the strategic content planning was arguably entitled to protection. EarthWeb's proof on the issue was weak. The court doubted that Schlack had access to the type of information traditionally afforded trade secret protection, because he was privy only to general conceptual goals, not particular details.

Thus, EarthWeb did not establish an imminent and inevitable risk of disclosure warranting preliminary relief. Moreover, Itworld.com, Schlack's new employer, indicated that Schlack's position would not involve matters he worked on at EarthWeb. The court found no imminent risk that Schlack would disclose or use trade secrets in connection with his work, and that the restrictive covenant would work undue hardship on Schlack, because of its undue one-year duration length in the fast-paced computer industry.

The tension at the intersection of protecting trade secrets and strategic plans, free and fair competition, and mobility of workers will become even more pronounced as computer technology pervades virtually every aspect of the economy. Employers must be meticulous in drafting restrictive covenants, and, at least in the computer industry, the duration may be considerably less than one year. If employees are diligent and reasonable in protecting compelling interests, carefully crafted restrictive agreements will probably remain viable in such special circumstances. The 1999 New York "Trilogy" of cases will be a critical reference point for anyone considering restrictive employment covenants not to compete against one's former employer.

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1. Restatement (Second) of Agency § 396(b).
2. *Reed, Roberts Assocs., Inc. v. Strauman*, 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677 (1976).
3. *Lumex, Inc., v. Highsmith,* 919 F. Supp. 624, 628 (E.D.N.Y. 1996).
4. Steven M. Kayman, *A Wayward Notion in New York's Common Law: The Unique Employee Rationale for Enforcing Non-Competes*, 15 Touro L. Rev. 123, 136 (Fall 1998); *see also* Christine M. O'Malley, *Covenants Not To Compete In The Massachusetts Hi-Tech Industry: Assessing The Need For a Legislative Solution*, 79 B.U. L. Rev. 1215 (1999).
5. *Reimer & Co. v. Cipolla*, 929 F. Supp. 154, 160 (S.D.N.Y. 1996).
6. 173 F.3d 63 (2d Cir. 1999).
7. 166 Misc. 2d 481, 633 N.Y.S.2d 926 (Sup. Ct., N.Y. Co. 1995).
8. 93 N.Y.2d 382, 690 N.Y.S.2d 854 (1999).
9. 71 F. Supp. 2d 299 (S.D.N.Y. 1999).
10. *See Lumex, Inc. v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996); *Eastman Kodak Co. v. Powers Film Prods., Inc.*, 189 A.D. 5556, 179 N.Y.S. 325 (4th Dep't 1919); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995); *Doubleclick, Inc. v. Henderson*, 1997 N.Y. Misc. LEXIS 577 (Sup. Ct., N.Y. Co. Nov. 5, 1997).

Gramm-Leach-Bliley Act Challenges Financial Regulators to Assure Safe Transition in Banking Industry

By Vincent Di Lorenzo

After repeated attempts during the last two decades, Congress enacted financial services modernization legislation that was signed into law by the President on November 12, 1999.[1] The legislation, which took effect March 12, 2000, repealed the statutory separation of investment and commercial banking that had been in existence since 1933.

Financial services regulators now bear the responsibility of ensuring not only a profitable but a responsible and safe transition.

To understand the transition, it is helpful to consider three questions: What purpose was the Gramm-Leach-Bliley Act (the "Act") intended to serve? What means did Congress employ to accomplish such purpose? What issues remain to be settled?

Purpose of the Act

The discussion of the Act's purpose in its legislative history is sparse, although three goals are identified.[2] First, the Act sought to allow banks to compete more effectively with other financial services providers. Second, it sought to improve access to financial services. Third, it sought to enhance the safety and soundness of the banking industry.

The first two goals were served by eliminating the barriers separating banking and other financial services industries. The third goal was also thought to be served through elimination of such barriers, assuming capital from other financial services industries would be attracted to banking. More obviously, the aim of safety and soundness was served through requirements imposed for eligibility to engage in non-bank services, through functional regulation of diverse financial services, and through restrictions regarding transactions with affiliates. Interestingly, consumer protection is not stated to be a primary purpose of the Act. However, in the legislative tug of war that led to final passage, privacy issues, community reinvestment issues, and other consumer protection issues surfaced and received legislative attention.

There is no doubt that increased access to non-bank financial services would result from authorizing banks to provide such services. The extensive bank branch network would lead to this result.

There is some question about whether authorization of such services as principal, rather than as agent, was necessary. Banks were already permitted to serve as securities brokers and as financial advisers. Access to such financial services at bank branch locations was in place. The general public was therefore not likely to be provided increased access to securities investments by the Act. Arguably, however, medium size businesses did not have adequate access to the securities markets for debt and equity placements. Allowing them to accomplish such placements through banks—the banks with whom they have a current and on-going business relationship, for example—might increase their ability to access such markets.

In addition, banks had received less expansive powers to serve as insurance brokers. National banks had been granted such power, *if* they exploited the National Bank Act's authorization for insurance sales when "located" at a place with a population of less than 5000.[3] State banks required state authorization for insurance sales, which was not always available due to pressures from the insurance industry lobby. Increased access to insurance products would be accomplished by eliminating these restrictions.

Whether legislation was needed to accomplish the first goal of making banks more competitive is not clear. Non-banks had never received the power to offer deposits. Yet, members of the general public were direct-

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ing more and more of their savings into non-deposit products such as mutual funds. On the lending side, securities and insurance firms had not entered the home lending market to a significant degree. Rather, it was mortgage companies that were diverting customers from traditional home mortgage lenders. There was evidence, however, that business firms were increasingly using the securities markets as avenues for business debt in lieu of reliance on bank business loans.

Understanding the true purposes sought to be served by phrases such as "more competitive" and "increased access" helps us to judge, and perhaps predict, how bank powers might be expanded by future regulatory rulings. The Act contains a list of new powers explicitly granted to bank affiliates and subsidiaries, but also contains a broad authorization for additional activities as long as they are "financial in nature." The bank regulatory agencies will give meaning to this phrase. The Act directs them to be guided by the purposes the Act was intended to serve.

The Express Grant of Powers

The 1933 Glass-Steagall Act separated commercial and investment banking through four provisions. Two provisions, §§ 16 and 21, prohibited banks themselves from underwriting securities, subject to some exceptions, and securities firms themselves from receiving deposits. These prohibitions are not lifted by the 1999 Act. Two other provisions of the Glass-Steagall Act, §§ 20 and 32, prohibited affiliates from underwriting securities and prohibited common officers, directors and employees. These two prohibitions were repealed by the 1999 Act. Thus banks still cannot directly underwrite securities without restriction.

During debates preceding passage of the Act, there was disagreement about whether bank subsidiaries should be allowed to engage in non-bank functions such as securities and insurance underwriting. The final legislation was a compromise, with bank affiliates granted greater powers than bank subsidiaries.

The 1999 Act permits the creation of a "financial holding company." This is optional. Banks can remain as parts of a "bank holding company" structure and have the same powers they had before enactment of the 1999 Act. The new financial holding companies are expressly given the power to own subsidiaries, *i.e.*, bank affiliates, which conduct the following activities:[4]

1. insurance activities, as principal or agent, when the insurance indemnifies against loss, harm, damage, illness, disability or death,[5]
2. securities activities, including underwriting and dealing in securities,
3. any activity a bank holding company may engage in outside of the United States and which the Board has determined, as of November 11, 1999, to be usual in connection with the transaction of banking or other financial operations abroad,[6]
4. ownership of any company as part of a bona fide underwriting or merchant or investment banking activity, or representing an investment made in the ordinary course by an insurance company.

The new financial holding companies are expressly given the power to own subsidiaries.

In addition, the financial holding company subsidiary is authorized to engage in other activities that have been deemed to be permitted for bank holding companies. The Act explicitly grants the power to engage in any activity deemed to be "closely related to banking" prior to its enactment.

As noted above, the financial holding company subsidiary may engage in merchant banking activities, subject to some limits. This provision was added to accommodate investments that securities firms and insurance firms make in the normal course of business.[7] Thus, share ownership is not permitted to the bank itself to any greater degree than before the Act's passage. In addition the securities or insurance affiliate is not permitted to "routinely manage or operate" a company, except as necessary to achieve a reasonable return on its investment. In other words, passive investments are permitted. For securities affiliates, the investments must also be held only for such period of time as will permit their sale on a reasonable basis. Insurance companies typically make more long-term investments. Therefore, for insurance affiliates the investments are those "permitted under state insurance law" and made in the ordinary course of business.

The Federal Reserve Board and Department of the Treasury are authorized to issue regulations regarding merchant banking activities to protect depository institutions and to ensure compliance with the purposes and prevent evasions of the Act. An interim rule issued on March 28, 2000, sets parameters for merchant banking activities and investments.[8] Among the requirements imposed are policies and systems to monitor and assess risks associated with merchant banking investments, policies for assuring the corporate separateness of financial holding companies and each portfolio company, and policies to limit the potential that the financial holding company or its affiliated depository institution may be legally liable for the financial obligations or operations of those companies. The rule also implements the

Act Does More Than Codify Evolutionary Changes

Proposals for the financial services reform now in place have been characterized by some as a mere recognition of change that had taken place without legislative sanction. This is an exaggeration.

The Federal Reserve Board had permitted bank affiliates to underwrite corporate debt and equity securities, but the extent of such operations was restricted.[1] The comptroller of the currency had permitted some underwriting activity by subsidiaries of national banks.[2] However, whether this decision had been authorized under existing legislation was debatable. The courts had permitted national banks to sell insurance policies as agents.[3]

Finally, subsidiaries of state-chartered banks had been subjected to the same restrictions regarding securities and insurance activities as principals that were applicable to national banks, plus the additional requirement of state authorization of a particular activity.[4] Neither the bank regulators nor the courts had permitted bank affiliates to act as "merchant banks."

These restrictions and uncertainties are now eliminated. Securities underwriting by either bank affiliates or subsidiaries, insurance underwriting by bank affiliates and merchant banking activities by bank affiliates are all sanctioned by the Gramm-Leach-Bliley Act.

Vincent DiLorenzo

1. 61 Fed. Reg. 68,750 (1996) (Federal Reserve Board decides bank affiliates may derive up to 25 percent of total revenue from underwriting and dealing in securities). *See also Securities Ind. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 839 F.2d 47 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988) (court finds Board's gross revenue limitation, imposed in a 1987 order permitting bank affiliates to underwrite securities, to be reasonable and consistent with the banking statute).
2. The Comptroller of the Currency adopted regulations in 1997 allowing operating subsidiaries of national banks to engage in activities not permitted to banks themselves. 12 C.F.R. § 5.34(c). In December 1997 the Comptroller approved an application by a national bank to underwrite and deal in municipal revenue bonds through a subsidiary, subject to the same revenue limits as the Fed had imposed on bank affiliates. Zion's First National Bank, Salt Lake City, Utah (December 11, 1997), available at <http://www.occ.treas.gov./m/emp/dec97/mtdec97.htm>.
3. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). In *Barnett*, the Court ruled that Florida law, prohibiting bank insurance sales, was preempted by the National Bank Act. However, the Court recognized that the power to conduct insurance sales by state banks depended on authorization under state law.
4. The 1991 amendment to the Federal Deposit Insurance Act provides that neither a state-insured bank nor its subsidiaries can engage in any activity as principal unless it is permissible for national banks or the FDIC permits it. 12 U.S.C. § 1831a.

cross-marketing prohibitions in the Act, and the provisions of §§ 23A and 23B of the Federal Reserve Act as applied to transactions between depository institutions and a portfolio company controlled by the same financial holding company. Finally, the rule establishes aggregate investment limits to limit the potential level of risk to a depository institution affiliated with a financial holding company.

The negotiations preceding passage of the Act centered, among other issues, on the powers to be granted to bank subsidiaries, if any. The fear was one of greater risk of diminished public confidence in the bank, and possible risk to the federal deposit insurance fund, in the event of significant losses encountered in non-bank activities. Ultimately, financial subsidiaries of banks were also given expanded non-bank powers, but not as extensive as affiliates. Specifically prohibited for bank subsidiaries is the power to engage in:[9]

1. underwriting of insurance or providing or issuing annuities,
2. real estate investment or development,
3. merchant banking.

The last prohibition might be lifted in five years, however. The Federal Reserve Board and Department of the Treasury are to make this determination.[10]

Future Authorizations: Activities Financial in Nature

In addition to the enumerated "financial" powers authorized for financial holding companies and financial subsidiaries, other activities are authorized if they are "financial in nature." For affiliates, the authorization is for activities that are "financial in nature or incidental to such financial activities" or are "complementary to a financial activity." For subsidiaries, the authorization is for activities that are "financial in nature or incidental to a financial activity."

The authority to determine what activities fall within these terms is left to the Federal Reserve Board and the Department of the Treasury. Each agency can veto expansion of powers proposed by the other. The aim is to ensure consistency and to stimulate cooperation between the two.[11]

In making decisions on new activities the agencies are to be guided by:

1. the purposes of the 1999 Act and 1956 Bank Holding Company Act;

2. changes in the financial services marketplace;
3. whether the activity will allow effective competition with non-bank related firms which seek to provide financial services; and
4. whether the activity will allow use of available or emerging technology for delivery of financial services.

Activities that are "complementary" to financial activities are subjected to the explicit additional statutory requirement that they must not pose a substantial risk to the safety or soundness of the depository institution or the financial system generally.[12]

The review of the legislative purpose of making banks "more competitive" makes it clear that the focus is on traditional bank activities. In other words, when customers are being diverted from traditional bank activities by non-bank firms that provide substitutes, then there may be justification for expanding bank powers. The form of the service is new, but the starting point for evaluating banks' competitiveness is traditional bank services.

The answer to the question of what future activities will be deemed to be "financial in nature" is permitted to be more expansive, however, when focusing on the legislative purpose of "increased access" to financial services. The desired access is not limited to traditional bank products. The only limitation is that the products must be "financial."

Safety and Soundness: Eligibility Requirements

In order for an existing bank holding company to become a financial bank holding company it must file a declaration with the Federal Reserve Board. In that declaration it must certify that all of its depository institution subsidiaries are (a) well capitalized and (b) well managed. The term "well capitalized" is not defined in the 1999 Act. Rather, the Bank Holding Company Act and regulations issued under that Act currently contain requirements that are incorporated by reference. Thus, a well capitalized bank must meet certain risk-based capital requirements.[13] A "well managed" bank must have a composite rating of at least 1 or 2, and a rating for the management component of at least 2, on its most recent examination.[14]

If a new acquisition of a bank is being made, the Federal Reserve must approve the application under § 3 of the Bank Holding Company Act, just as was required before enactment of the 1999 Act. Financial holding companies are under a continuing obligation to ensure that all of their depository institutions are well capitalized and well managed. If this is not true at any time, notice will be provided by the Federal Reserve. Thereafter, a corrective agreement must be executed within 45 days, unless extended by the Federal Reserve. In addition, compliance must occur within 180 days, unless extended by the Federal Reserve. If compliance is not achieved, (a) the Federal Reserve may, in its discretion, order divestiture of the holding company's depository institutions, or (b) the holding company must elect to cease all activities that are not "closely related to banking."

A bank that decides to form a financial *subsidiary* must receive the approval of the federal agency with jurisdiction. It must also meet certain eligibility requirements.[15] First, the bank must be well capitalized and well managed. The term "well capitalized" is given the meaning found in § 38 of the Federal Deposit Insurance Act. The term "well managed" is defined in the same manner as is described above for financial holding companies. Curiously, the requirements applicable to financial subsidiaries of insured state banks, as opposed to national banks, state only that the institution must be well capitalized.[16]

If the bank fails to meet the well capitalized or well managed requirements, then the same 45-day/180-day corrective action requirements discussed above, with regard to financial holding companies, is imposed. The agency providing notice and ordering divestiture would be the appropriate federal regulatory agency, *e.g.*, the comptroller of the currency for national banks.

Second, the size of financial subsidiaries must not be too large in relation to the bank. Specifically, the aggregate consolidated assets of all financial subsidiaries must not exceed 45% of the bank's total assets or $50 billion, whichever is less. Third, there are requirements designed to ensure the financial stability of large banks if they decide to form financial subsidiaries. If a bank is among the 50 largest insured banks, its issue of subordinated debt must be rated in one of the top three investment grade categories by a nationally recognized rating agency. As an alternative to this requirement, if the bank is one of the second 50 largest insured banks the Federal Reserve Board and Department of Treasury are authorized to set other criteria that are "comparable" and "consistent with the purpose for which the rating requirement" was imposed.[17] If a bank later fails to meet the subordinated debt rating requirement, or other comparable requirement, it is then barred from making further equity or debt investment in any financial subsidiary until the requirement is again satisfied.

A fourth requirement imposed on financial subsidiaries of banks relate to risk management and corporate identity.[18] The Act provides that the bank must identify and have in place, within the bank and the financial subsidiary, procedures for identifying and managing financial and operational risks that adequately protect the national bank from such risks. In addition, the bank must have policies and procedures in place to

preserve the separate corporate identity and limited liability of the bank and its financial subsidiary.

The requirements discussed above all relate to the legislative purpose of preserving safe and sound operations. The Act imposes an additional requirement of Community Reinvestment Act compliance. This relates to the topic of community obligations and is therefore discussed below.

Safety and Soundness: Functional Regulation

Congress and the courts have always been deferential toward the bank regulatory agencies and have relied on them to determine permissible bank activities consistent with considerations of safety and soundness. They have also relied on them for oversight over the activities of banks, including periodic examinations and determinations regarding bank policies resulting from such examinations. When bank industry activities were limited to traditional bank functions, such reliance and deference was understandable. However, as banks began to enter non-traditional fields, such as securities brokerage and securities underwriting, the bank regulators continued to insist on jurisdiction.

The changes regarding exemptions formerly enjoyed by banks under the 1934 and 1940 statutes become effective May 12, 2001.

The 1999 Act alters the jurisdictional mix by introducing regulation along functional lines. Functional regulation assures that the agencies with the most expertise have jurisdiction over particular financial services regardless of the entity offering such service. Securities activities, for example, are subject to the SEC's jurisdiction regardless of whether conducted by a bank or a securities firm. Generally speaking, jurisdiction is given to the SEC for all securities activities, state insurance regulators for all insurance activities, and the bank regulatory agencies for all banking activities.[19] Functional regulation also fosters the goal of consistency in regulation.

In line with this approach, Title II of the Act provides for functional regulation of bank securities activities. Sections 201 and 202 of the Act repeal the blanket exemption of banks from the registration requirements imposed on "brokers" and "dealers" under the Securities Exchange Act of 1934. Retained are a limited number of exemptions for some traditional bank arrangements and activities. These include transactions in a trustee capacity, third-party brokerage arrangements with registered broker-dealers, transactions in commercial paper or bankers acceptances, and transactions as part of a bank's transfer agency activities for employee and shareholder benefit plans among others.[20] Similar changes are made to the exemptions formerly enjoyed by banks in the 1940 Investment Company Act[21] and the Investment Advisers Act of 1940.[22] The changes regarding exemptions formerly enjoyed by banks under the 1934 and 1940 statutes become effective May 12, 2001.

Title III of the 1999 Act addresses the regulation of insurance activities. The Act makes the states, *i.e.*, state insurance regulators, the primary regulators of all insurance activities including insurance activities of national banks.[23] It also encourages a system of uniform or reciprocal state laws for licensing of persons engaged in insurance activities.

As discussed above, the 1999 Act creates a new holding company entity known as a financial holding company. This is an entity which has at least one bank subsidiary. Therefore, the Federal Reserve Board was given supervisory authority over the financial holding company. This would give it authority over subsidiaries of the holding company as well. To ensure that the purpose of functional regulation is met, some restrictions are imposed on the Federal Reserve's supervisory role.

First, the Federal Reserve may require a holding company or its subsidiaries to file reports on financial condition, risk management, transactions with depository institution subsidiaries and affiliates, and compliance with federal law that the Federal Reserve has authority to enforce.[24] However, the Federal Reserve must rely on reports filed with other regulatory agencies, publicly reported information, and externally audited financial statements to the fullest extent possible.

Second, the Federal Reserve is given the power to examine holding companies and subsidiaries. However, any "functionally regulated subsidiary" may be examined only if the Federal Reserve believes: (a) the subsidiary is engaged in activities that pose a material risk to the affiliated depository institution, (b) an examination is needed to inform itself of risk management systems, or (c) the subsidiary is not complying with federal law that the Federal Reserve has the authority to enforce and a determination on this issue cannot be made by examining only the depository institution affiliate or the holding company.[25] Deference to other agencies' examinations is also required by the Act. The term "functionally regulated subsidiary" means (1) a registered broker-dealer, (2) a registered investment adviser, (3) a registered investment company, (4) an insurance company supervised by a state insurance regulator, or (5) an entity regulated by the Commodity Futures Trading Commission.[26]

Third, the Act restricts the Federal Reserve's power to impose capital requirements on functionally regulated subsidiaries. The Fed may not do so if the subsidiary is in compliance with the capital requirements of its primary regulator.[27]

Safety and Soundness: Transactions With Affiliates

One type of control designed to ensure safe and sound transactions with affiliates is to apply the requirements and restrictions in §§ 23A and/or 23B of the Federal Reserve Act.[28] Financial holding companies are subject to all the limits on "covered transactions" with affiliates contained in §§ 23A and 23B of the Federal Reserve Act.[29]

The 1999 Act also makes both §§ 23A and 23B applicable to financial subsidiaries,[30] with one exception. Section 23A limits aggregate "covered transactions" between a member bank and any one of its affiliates.[31] This limitation does not apply to financial subsidiaries.[32] All other limitations and requirements do apply, including limits on aggregate covered transactions with *all* affiliates, prohibitions against purchase of low-quality assets from an affiliate, the requirement that the terms and conditions of any covered transaction be consistent with safe and sound banking practices, the requirement of specified collateral for any loan or guarantee, and the requirement that transactions, as defined in § 23B, be on terms that are substantially the same as those for comparable transactions with non-affiliated companies.[33]

In addition to these existing limitations and requirements that apply to financial affiliates and are being applied to financial subsidiaries, the 1999 Act authorizes the appropriate federal banking agency to impose, by regulation or order, additional restrictions or requirements on relationships or transactions between banks and bank subsidiaries or affiliates.[34] This would be based on a finding that such requirements or restrictions are consistent with the purposes of the 1999 Act and appropriate to avoid (a) any significant risk to the safety and soundness of the bank or the federal deposit insurance fund, or (b) other adverse effects, such as unfair competition, conflicts of interest, or unsound banking practices.

Another control involving transactions with affiliates involves tying arrangements for bank customers. The Act subjects a financial subsidiary of a bank to the prohibition on tying arrangements which are contained in the Bank Holding Company Act Amendments of 1970.[35]

Consumer Obligations and Protections

Although the statements of purpose in the legislative history of the 1999 Act do not mention consumer protection, consumer protection issues became the primary focus of the legislative debates preceding passage of the Act. Several protective provisions are incorporated into the Act, including requirements regarding disclosure of ATM fees[36] and authorization of rule-making governing sales practices, offers and advertising regarding insurance products by depository institutions.[37] Two consumer protection issues almost derailed the Act: (a) community reinvestment, and (b) privacy protections.

Community Reinvestment

The Community Reinvestment Act of 1977 (CRA) applies only to insured depository institutions. There were proposals to extend the CRA to other financial entities, such as insurance companies or mortgage loan companies. These proposals were rejected.

The federal agencies' enforcement power under the CRA has always been limited and discretionary. It was limited to denial of an application for a "deposit facility,"[38] *e.g.,* establishment or relocation of a branch, merger with or acquisition of assets of a bank, or establishment of a bank holding company. It was discretionary in that an institution's CRA record was merely required to be "take[n] into account" when a federal agency made its decision.

The 1999 Act extends the CRA to a limited degree and strengthens it by removing agency discretion when dealing with the formation of the new financial subsidiaries or financial holding companies. As before, reinvestment obligations are imposed only on depository institutions. However, under the 1999 Act the CRA record determines whether a bank may engage in the newly authorized non-bank activities. Section 121 of the Act, authorizing financial subsidiaries of national banks, allows such subsidiaries only if the bank and all of its depository institution subsidiaries have a rating of at least "satisfactory" at their last CRA examination. Section 103 of the 1999 Act imposes the same requirement on financial holding companies. These requirements are mandatory—*i.e.,* the newly authorized powers cannot be conducted if any depository institution fails to meet this minimum CRA rating.

Privacy of Financial Records

Contrary to a widely held public perception, before the 1999 Act the financial records of bank customers generally were not protected as private records, *i.e.,* records that could not be shared with bank affiliates or third parties.[39] The newly authorized affiliations with non-bank entities create greater potential for sharing of information among related entities. Banks and other financial services industries argued that this was needed to promote targeted marketing of the full range of financial services, and more informed decisions regarding customers, based on a complete financial picture.

However, several privacy protections were extended to consumers in the 1999 Act. First, "financial institutions" must disclose their policies for sharing of information to customers when a customer relationship is established and annually thereafter.[40] Second, customers can choose not to have their private financial information, which is referred to as "nonpublic personal information" in the Act, shared with third parties.[41] This is an "opt-out" provision. It does not apply when the information is to be shared with affiliates. Third, pretext calling—use of fraudulent or deceptive means to obtain private customer information—is made a federal crime, punishable by up to five years in prison.[42] These protections are contained in Title V of the 1999 Act. They do not preempt or supersede state law if stronger privacy protections are provided under state law.[43]

The new requirements apply to all "financial institutions." This term encompasses any institution engaged in financial activities as described in newly enacted § 4(k) of the Bank Holding Company Act,[44] including banks, securities firms and insurance companies, among others. The opt-out provisions apply to "nonpublic personal information."[45] This is defined as personally identifiable financial information that is (a) provided by a consumer to a financial institution, (b) results from any transaction or service with or for the consumer, or (c) otherwise obtained by the financial institution. It does include any list of consumers derived from nonpublic personal information. It does not include publicly available information or any list derived from using only publicly available information. These protections apply to "consumers," that is, individuals who obtain financial products or services to be used primarily for personal, family or household purposes.[46]

Small banks feared they would be at a disadvantage under the opt-out provisions of the 1999 Act. The fear was that large banks would have affiliates providing a full range of financial information, while small banks would not. As noted above, information can be freely shared with affiliates. Consequently, an exception was made to the opt-out requirement for joint marketing arrangements between financial institutions. Thus, nonpublic information can be provided to a non-affiliated third party to, for example, market a bank's own products and services, or products and services offered through a joint agreement between two or more financial institutions.[47] To take advantage of this exception, the joint marketing arrangement must be disclosed to the customer.

Conclusion

Enactment of the Gramm-Leach-Bliley Act thrusts us into an era filled with uncertainty. Can banks safely combine with securities and insurance firms? What effect will such combinations have on consumers? The uncertainty makes us anxious because of the nation's poor experience with expansion of powers of savings and loan associations in the 1980s. Only time will tell whether the Act can provide the benefits its sponsors envisaged.

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1. Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338. All references in these endnotes are to sections of this Act (hereinafter "Act").
2. H. R. Rep. No. 106–434, at 151–2 (1999) (conference report); S. Rep. No. 106–44, at 4 (1999).
3. 12 U.S.C. § 92.
4. Section 103 of the Act adds subsection (k) to § 4 of the 1956 Bank Holding Company Act, 12 U.S.C. § 1843. Expressly authorized financial activities are enumerated in paragraph (k)(4) of § 1843.
5. State laws forbidding or restricting affiliation of an insurer with a depository institution are preempted. Act § 306. *But see* §§ 104(c) (state information collection and capital requirements), 104(d)(2), (3) (other state laws regarding insurance), 104(e) (non-discrimination).
6. In the Board's amendment of Regulation Y, effective March 11, 2000, it listed the following activities: (1) providing management consulting services, (2) operating a travel agency in connection with financial services, and (3) organizing, sponsoring and managing a mutual fund, subject to prohibitions on management of entities in which invested and limits on holdings in the fund. 12 C.F.R. § 225.86, 65 Fed. Reg. 14, 433 (2000).
7. There was a desire to ensure that "these investments do not result in breaching the barrier between banking and commerce." H.R. Rep. No. 106–74, Part I, at 122 (1999) (House Banking Committee Report).
8. 65 Fed. Reg. 16459 (2000).
9. Section 121 of the Act adds § 5136A to the National Bank Act which both authorizes new "financial" activities for subsidiaries of national banks and expressly prohibits certain activities. These prohibitions are also applied to all federally insured banking institutions. Act § 121(d)(1). Insurance products authorized prior to January 1, 1999 are grandfathered for national banks and their subsidiaries. Act § 302.
10. Act § 122.
11. H. R. Rep. No. 106–74, *supra* note 7, at 98.
12. Section 121(a), which added new § 4(k) to the 1956 Bank Holding Company Act. Safety and soundness is also *one* of the purpose of the Act.
13. 12 C.F.R. § 208.43.
14. 12 U.S.C. § 1841(o)(9).
15. All requirements are contained in § 121 of the Act.
16. Act § 121(d).
17. The alternative criteria is discussed in interim rules issued by the Federal Reserve Board, 12 C.F.R. § 208.17, 65 Fed. Reg. 14810 (2000), and the Department of the Treasury, 12 C.F.R. § 1501.2, 65 Fed. Reg. 14819 (2000).
18. Section 121(a) enacts a new § 5136A of the National Bank Act. The requirements discussed are contained in subsection (d) of this new provision. They are also applied to insured state banks by § 121(d) of the Act.
19. *See* § 111 of the Act, which amends § 5(c) of the 1956 Bank Holding Company Act, 12 U.S.C. § 1844(c)(4).

20. Section 201 of the Act deals with registration as a broker, and § 202 deals with registration as a dealer. Each contains a distinct list of exemptions for certain bank activities.
21. Act §§ 211–216.
22. Act §§ 217–219.
23. Act § 301. *See also* § 104 regarding licensing.
24. Section 111 of the Act amends § 5(c) of the 1956 Bank Holding Company Act to provide for these requirements in subparagraph 5(c)(1), 12 U.S.C. § 1844(c)(1).
25. Act § 111(c)(2).
26. Act § 111(c)(5).
27. Act § 111(c)(3). However, it may impose capital requirements on registered investment advisers or licensed insurance agency subsidiaries with regard to their activities other than investment advisory, insurance agency or incidental activities.
28. 12 U.S.C. §§ 371c (Federal Reserve Act, § 23A) and § 371c-1 (Federal Reserve Act, § 23B).
29. Depository institutions with interests in non-financial institutions which are grandfathered are prohibited from engaging in "covered transactions," as defined in § 23A, with any non-financial affiliate controlled by the financial holding company. Covered transactions are loans to the affiliate, investments in the affiliate's securities, most purchases of assets from the affiliate, acceptance of the affiliate's securities as collateral for any loan, and guaranteeing in any manner any extension of credit to the affiliate. Section 103 of the Act adds subsection (n) to § 4 of the 1956 Bank Holding Company Act, and the requirements of § 23A are addressed in § 1843(n)(6), 12 U.S.C. § 1843(n)(6).
30. Act § 121(b).
31. 12 U.S.C. § 371(a)(1)(A).
32. Section 121(b) of the Act adds subsection (e) to 12 U.S.C. § 371c which provides for this exception in § 371c(e)(3). 12 U.S.C. § 371c(e)(3).
33. 12 U.S.C. §§ 371c(a)(1)(B) (aggregate limit on covered transactions with all affiliates), 371c(a)(3) (purchase of low-quality asset), 371c(a)(4) (consistent with safe and sound banking practices), 371c(c) (collateral for loans, extensions of credit, guarantees, acceptances and letters of credit), 371c-1(a)(1) (terms that are substantially the same).
34. Act § 114.
35. 12 U.S.C. §§ 1971, 1972.
36. Act §§ 702–703.
37. Act § 305. The Act specifically identifies a concern regarding tying or coercion connected to extensions of credit and mistaken beliefs that insurance products may be federally insured.
38. 12 U.S.C. § 2903.
39. L. Richard Fischer, The Law of Financial Privacy ch. 5 (2d ed. 1991).
40. Act § 503.
41. Act § 502.
42. Act § 521.
43. Act § 507.
44. Act § 509(3).
45. Act § 509(4) defines this term.
46. Act § 509(9).
47. Act § 502(b)(2).

Control of Suburban Sprawl Requires Regional Coordination Not Provided by Local Zoning Laws

By Philip Weinberg

Concerns about suburban sprawl have surfaced as a first-magnitude political issue. More than half of all Americans now live in suburban areas. While some of these communities, especially in New York State, are older, efficiently structured towns built around commuter rail lines, many are distant from public transportation and shopping, requiring car trips for just about any purpose. Shopping centers, sports stadiums and office building complexes are routinely placed, with local government approval, where they are accessible only by automobile.

The results of this frenzy of construction away from public transportation are vast. Country roads are replaced by six-lane highways, which themselves rapidly become congested. Air quality deteriorates as traffic increases and automobile commutes lengthen. Farmland is lost to development, along with forests and wetlands. Affordable housing becomes an endangered species, and cities lose their tax base as shopping, industry and offices migrate. As distinguished authors Jane Jacobs and René Dubos have noted, echoing the thoughts of Lewis Mumford long before them, vital, thriving cities are essential to culture and indeed civilization. We all instinctively travel on vacation to successful, active cities and to unspoiled, bucolic countryside. Sprawl destroys both.

What can the law do to address these concerns? Land use decisions have traditionally been made by local zoning authorities—in New York State, by town planning boards. In recent years, economic development seems to be the engine driving decisions of planning boards. As towns compete for shopping malls and office parks to augment their real property tax base, quality of life and particularly environmental concerns take a back seat. Many New Yorkers are starting to ask whether more development is invariably better.

In fact, the Empire State is far behind the curve. An increasing number of states have now legislated to limit sprawl in a variety of ways. Several states require large-scale developments to obtain state as well as local government approval, enabling the state to limit the impact that development may have on other localities in the form of side effects such as added traffic on highways in neighboring towns, or increased water pollution through runoff. Vermont was the first to adopt this approach in 1970.[1] Other states leave land use decisions with local government but require municipalities to meet threshold requirements in the state's land-use plan, again providing a broader perspective on the impact of development. Oregon has pioneered this technique.[2] It essentially mandates that localities, while free to control land use, must conform to state-enacted goals. New Jersey has more recently adopted this method as well.[3]

A third approach, taken by Florida and some other states, balances state and local interests through regional land use planning agencies empowered to review local approvals of developments with regional impact.[4] In Britain, many cities are surrounded with greenbelts, parkland moats, preventing sprawl beyond the city's borders.

New York itself has recognized on more than one occasion the need to protect areas from uncontrolled, or minimally controlled, sprawl. The Adirondack Park Act[5] and the Long Island Pine Barrens Maritime Reserve Act[6] mandate approval by a regional body of land-use decisions in those two areas—the Adirondacks because

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of their statewide significance as a scenic and recreational resource, and Long Island's pine barrens because of a legislative finding that overdevelopment there will jeopardize the entire Long Island water supply. Shouldn't New York's suburbs, the Hudson Valley, the Finger Lakes and Buffalo-Niagara area, each with irreplaceable natural resources and each beset with the problems engendered by sprawl, deserve similar protection?

Environmental Quality Review

The State Environmental Quality Review Act (SEQRA)[7] furnishes a partial remedy for this problem. It requires any local, or state, governmental agency to weigh the environmental consequences of any action it sponsors, funds or permits that may result in significant impact. In addition, agencies must consider ways of mitigating the impacts they identify, as well as alternatives to the action.

The vehicle to accomplish these goals is the environmental impact statement, or EIS, that the responsible agency (or in some cases the developer) is required to prepare and circulate. In fact, unlike its federal counterpart, the National Environmental Policy Act (NEPA),[8] SEQRA has been construed by New York courts to mandate that the agency choose, not merely examine, the more environmentally appropriate alternative.[9]

However, several factors prevent SEQRA from achieving its theoretical potential to curb unrestrained development. First, the courts are deferential to the discretion of land-use agencies in their evaluation of environmental impact and choice of measures to adopt. As long as the agency took the requisite "hard look" and identified and discussed environmental concerns, its determination on how to deal with those concerns will be upheld unless found to be arbitrary and capricious—a severe burden for challengers to meet. As the Court of Appeals held in one leading case, *Jackson* v. *New York State Urban Development Corp.*, SEQRA "does not require an agency to impose every conceivable mitigation measure, or any particular one."[10] Second, the Court of Appeals has limited standing to object to SEQRA compliance to those who can show environmental—not simply economic—injury, and furthermore, that injury must be different in kind from that suffered by the public in general.[11] Third, the lead agency with responsibility to prepare the EIS and to weigh alternatives and mitigation measures may be a local government body such as a town board or planning board with a vested interest in seeing the project through. Fourth, as important as SEQRA is as a means of compelling consideration of environmental issues, the courts have consistently, and wisely, reminded us that the act is not a substitute for planning or a means of finessing local zoning provisions. As the Court of Appeals has noted, "except where the proposed action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating 'legal issues concerning compliance with local government zoning.'"[12] The statute itself makes clear its intent not to alter the jurisdiction of government agencies.[13]

To fill this gap in part, the New York Legislature has before it for the second year a bill to amend the state's Executive Law to encourage localities to create commissions to promote regional land-use planning and decision making.[14] The bill contains an express legislative finding that planning and zoning by localities has "supported a pattern . . . of land use which necessitates reliance on the automobile that in many areas results in traffic congestion and extension of roadways, water, sewer[s] and utilities to serve dispersed development patterns." The state is to provide funds for localities creating the comprehensive planning recommended by the bill.

Even if this bill is enacted, how successful is this venture likely to be? Long Island has had regional land-use planning for decades, yet its suburban sprawl is as pervasive as any in the nation; and, as noted earlier, overdevelopment so seriously threatened its water supply that a state agency had to be established to limit destruction of the island's pine barrens. The prospect of state encouragement actually altering local government land-use decisions in ways that would significantly reduce sprawl does not seem great. Unless stronger medicine is prescribed, towns are likely to continue to decide land-use issues in ways that will improve their real property tax base, whatever sprawl may result.

Governor Pataki has on several occasions expressed his support for curbing sprawl, and had admirably led the state in purchasing park lands and open space, but there has been little progress in fostering planning and cooperation among municipalities to reduce sprawl itself. New York needs leadership on this front as much as with open space preservation.

The Tax Base and School Financing

The fact that public schools are chiefly financed through local property taxes, in New York as in every state, drives land-use decisions and deters regional planning. The system also creates vast inequalities in resources between school districts with disparate tax bases.

The highest courts of several states, including California and New Jersey, have in fact ruled that these disparities deny equal protection of the laws to pupils in underfunded districts,[15] and New York's Court of Appeals has similarly found a possible violation of the state Constitution's provision mandating adequate public ed-

ucation and remanded the pending litigation for trial on that and related issues.[16]

Whether these court decisions will truly end inequities in school funding, let alone the land-use decisions that foster those inequities, is highly debatable. First of all, it is unlikely that the courts would deny a community the right to tax its residents more than the overall statewide average in order to maintain a better school system. Even if the courts were to mandate equal funding, if a prosperous town or district elected to increase its schools' resources, would the resulting disparity in funding trigger another finding of unconstitutionality? This vexing problem, akin to squaring the circle, will surely be shunned by the courts.

New York's courts have made clear the constitutional mandate for suburban towns to meet reasonable needs for affordable housing.

Moreover, the decisions in California, New Jersey and other states holding school financing disparities unconstitutional, while surely correct and welcome, have not led to complete equality in public school funding. Nor have those decisions significantly curbed suburban sprawl, as even a casual visit to New Jersey or California will demonstrate. Clearly, more is needed to accomplish that goal than revising school financing, however laudable and appropriate that step might otherwise be.

Better Public Transportation

Improving public transportation is an absolute must if New York is serious about reducing sprawl. The New York metropolitan area, like most major cities and their suburbs, developed along subway and commuter rail networks. Now that suburban residences, workplaces and shopping centers have in many areas outdistanced public transportation, it is essential for New York to invest in extending and augmenting rail passenger service—by far the most efficient and attractive way of getting large numbers of people to and from their daily destinations.

Unfortunately, however, our transit system was designed decades ago to convey passengers from the outskirts of New York City to Manhattan and back. Now that traffic patterns have shifted, with numerous commuters crossing the metropolitan region daily, traveling, for example, from Connecticut to New Jersey, or from Westchester to Long Island, improved transportation must be available to reduce automobile congestion and the need for new and costly highways and bridges. New Jersey, California and Massachusetts have greatly broadened their commuter rail networks in recent years, while New York has failed to do so.

A project now under way linking the Long Island Rail Road with Grand Central Terminal, within walking distance of where two out of every three of its Manhattan riders work, is a giant step forward. So, too, will be completion of transit links to La Guardia and Kennedy airports and the long-overdue Second Avenue subway.

These projects, as important as they are, are still only a start; far more needs to be done. Through commuter trains should run on existing trackage from Connecticut and Long Island to New Jersey. With short, relatively inexpensive track connections, trains could easily run from Westchester to Long Island, and from Rockland and Orange counties through New Jersey into Penn Station. Light rail transit—using modern streetcars—is being built in New Jersey, Oregon, Maryland and other states to connect cities with their suburbs. It is embarrassing that the Empire State has elected not to use this relatively inexpensive transit option. Similarly, Albany and Buffalo should have commuter rail service, much of which can use existing tracks. All that we need is the will—and the funding, from Congress and the state. That in turn, depends on the willingness of our elected officials to fight for that funding, as Senator Moynihan has for the new Amtrak Penn Station in New York's Farley Post Office, and former Senator D'Amato did for funds to bring the Long Island Rail Road into Grand Central Station.

In addition, new large office complexes, sports stadiums, shopping centers and residential developments should be required to show access to public transportation, where feasible, as a condition of obtaining their permits for construction. That step in itself would go far toward curbing sprawl.

Affordable Housing

Any plan to reduce sprawl must take into account the continuing need for affordable housing. Opponents of regional land-use planning have sometimes argued that adopting it will encourage towns to slow the pace of residential development and so hamper the construction of affordable housing.

The fears of opponents need not be the case at all. First, New York's courts have made clear the constitutional mandate for suburban towns to meet reasonable needs for affordable housing. In *Berenson v. Town of New Castle,*[17] the Court of Appeals held that a large Westchester suburban town could not constitutionally exclude all multi-family housing. Although New York has not explicitly mandated that localities zone to furnish affordable housing, as the New Jersey Supreme Court did

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in its *Mt. Laurel* decision,[18] the obligation, as the court held in *Berenson*, nonetheless clearly exists.

Connecticut and Massachusetts have embraced a statutory measure that New York would do well to enact. If builders in those states dedicate a sizable proportion of their development—30% in Connecticut, 20% in Massachusetts—to affordable housing, localities may only zone out that development for reasons related to health or safety, not for esthetic or economic reasons.[19]

Further, there is no intrinsic conflict between rational, planned development and affordable housing. This is particularly true if the state expresses affordable housing goals as part of its legislation guiding municipalities. The main concern is that there be meaningful planning so that sprawl can be controlled.

Brownfields Restoration

Another prime ingredient of rational development relates to the degree to which parcels contaminated with hazardous waste are restored. CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act,[20] imposes strict cleanup requirements on owners of such land, as do the companion provisions of state law.[21]

In recent years battle lines have been drawn over the extent to which industrial sites need to be rehabilitated. These parcels, which have become known as brownfields, are typically located in older urban areas, zoned for industrial or commercial use. If federal and state authorities insist that they be restored to the same degree as residential land, at prodigious cost to their owners, many sites will likely not be restored at all. This means they will lie fallow, not returned to the tax rolls, and commercial and industrial development will flow to now-pristine parcels outside the cities. This vastly augments sprawl, because economics will drive developers to use tracts not reachable by public transportation or accessible to an urban work force. On the other hand, advocates of more thorough cleanup argue that industrial and commercial sites are often in neighborhoods where people live, and/ children play and attend school, so that it is both hazardous and discriminatory to hold these sites to a less stringent standard of remediation than a suburban or rural parcel.[22]

Resolving these issues is clearly not easy, but a Superfund Working Group created by Governor Pataki has proposed varying cleanup levels depending on the type of soil and the use of the parcel, wisely recognizing that a site in an industrial area need not be restored as completely as one in a residential neighborhood. A voluntarily cleaned parcel may obtain a release of future liability from the State Department of Environmental Conservation (DEC), known as a covenant not to sue. State assistance will be available for preparing "brownfield redevelopment area plans" in order to revitalize neighborhoods, such as in Brooklyn, Buffalo and Niagara Falls, with pockets of contaminated sites. A second bill, drafted by a private group known as the Pocantico Roundtable, furnishes somewhat greater protection from liability for those who voluntarily remediate sites.

Enactment of legislation to deal with brownfields effectively is a vital component of any serious effort to reduce sprawl in New York.

Conclusion

There is still time to halt sprawl and encourage development where it belongs, and historically has taken place—in cities and suburbs served by public transportation. To do so, New Yorkers should be willing to work together in accomplishing these goals that will benefit the economy, the environment and the quality of life of our citizenry.

Home rule and local land use control should be balanced against regional needs. Just as Clemenceau noted that war is too important to leave to the generals, deciding how we will use our land, and the kind of state we will leave to future generations, is far too crucial to leave exclusively to the whims of local governments.

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1. Vt. Stat. Ann., tit. 10, §§ 6085, 6086.
2. Ore. Rev. Stat. §§ 197.005–740.
3. N.J. Stat. Ann. § 10:5–12.5.
4. Fla. Stat. Ann. § 380.012–.12.
5. N.Y. Exec. Law §§ 800–819.
6. N.Y. Envtl. Conserv. Law art. 57.
7. N.Y. Envtl. Conserv. Law art. 8.
8. 42 U.S.C. §§ 4321–4370a.
9. *Town of Henrietta v. New York State Dep't of Envtl. Conserv.*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dept. 1980).
10. 67 N.Y.2d 400, 421–22, 503 N.Y.S.2d 298, 308 (1986).
11. *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991).
12. *See WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 382, 583 N.Y.S.2d 170, 174 (1992).
13. N.Y. Envtl. Conserv. Law § 8-0103(6).
14. N.Y. Sen. 1367-A (1999).
15. *Serrano v. Priest*, 487 P.2d 1241, 5 Cal.3d 584 (1971); *Robinson v. Cahill*, 355 A.2d 129, 69 N.J. 449 (1976).
16. *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995).
17. 38 N.Y.2d 102, 378 N.Y.S.2d 672 (1975).
18. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 67 N.J. 151, *cert. denied*, 423 U.S. 808 (1975).
19. Conn. Stat. §§ 8-2g–8.30; Mass. Gen Laws Ann. ch. 1218, § 28; ch. 40A, § 9.
20. 42 U.S.C. §§ 9601–9675.
21. N.Y. Envtl. Conserv. Law §§ 27-1301–27-1321.
22. For an excellent summary of these issues, *see* Michael B. Gerrard, *Rewriting New York State's Cleanup Programs*, N.Y.L.J., May 28, 1999. Current legislative proposals are outlined in Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J., Sept. 24, 1999.

A Primer on Conveyancing

Title Insurance, Deeds, Binders, Brokers and Beyond

BY PATRICK J. ROHAN

Conveyancing, the process whereby a property owner and prospective purchaser come together to bring about a smooth transfer of title to property, should provide adequate protections for the vendor and vendee before, during and after the transaction is consummated. Failure to take the legal steps necessary to assure these protections, however, can be expensive for one or both sides in the transaction. In addition to competent legal assistance, the typical transaction should also include the multi-faceted benefits of title insurance.

What Can Go Wrong

Murphy's Law as applied to the simple real estate transaction teaches that what might go wrong usually does.

Conveyancing has always been fraught with pitfalls, especially for the purchaser, because the common law is heavily weighted in the seller's favor. Further, the law of damages contains some unique rules that facilitate the forfeiture of the purchaser's down payment (usually referred to as "earnest money").

To these hidden dangers may be added archaic principles governing casualty insurance and "risk of loss"; paragraphs in form real estate contracts that all but eliminate any cause of action the purchaser might have to recover damages for fraud or for innocent but serious misrepresentation; and the maze of rules governing binders and real estate brokers (about which the average layman is either uninformed or misinformed).

When one considers that the purchase of a home is the largest single transaction that most people enter into in their lifetime, it is astonishing to find that consumer protection in this area is seriously defective and in danger of being further watered down by state and local proposals for diminishing (or eliminating) the lawyer's role in the process. This state of affairs is all the more surprising when one realizes that expert legal services have always been available to the home buyer at a modest cost. In fact, any cost-benefit analysis would quickly demonstrate that this area of legal practice has furnished all but universal representation to home buyers for a modest, one-time fee.

This article focuses on the realities of conveyancing, and the steps that should be taken to cope with the many problems that can arise.

The Attorney's Role

A knowledgeable attorney, who makes intelligent use of title insurance, is the most effective source of consumer protection. Moreover, such protection can be provided by buyer's counsel from start to finish and thereafter, a factor frequently overlooked by proponents of allowing brokers to prepare real estate contracts. The latter also ignore the inherent conflict of interest that exists, not only between buyer and seller, but also between the seller and broker and buyer and broker.

Any attorney engaged in a specialized real estate practice, or even a general law practice, should be able to protect the client in a conveyancing matter, regardless of whether the client is a purchaser or a seller. Attorneys are exposed to an in-depth analysis of this subject in law school. Thereafter, practical experience, specialized Bar Association participation and CLE programs combine to make the lawyer uniquely qualified to perform this function. In no way can the real estate broker (much less a salesperson) hope to match the attorney's scope and depth of knowledge.

Any legislation, regulation or judicial decisions that operate to limit the attorney's role is also likely to deprive the purchaser of the only professional who is in a

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position to explain the need for, and modest cost of, title insurance protection.

The Advantages of Title Insurance

In many sections of New York, as well as in surrounding states, it was not uncommon for the parties and their mortgage lender to ignore the availability of title insurance,[1] or to save a few dollars and proceed without it. However, a unique event occurring within the past few decades—the advent of successful Indian land claims—has changed the situation overnight.

Banks, which previously might have relied upon an opinion letter from their counsel, the Recording Act, or a "Land Court" title, were stunned to find that these mechanisms afforded no protection from Indian claims that could wipe out their entire mortgage security. Moreover, lender's counsel, who previously gave the title a clean bill of health, were not liable in malpractice, because no conveyancers had been on the lookout for potential Indian land claims. However, it is an ill wind that does not do someone some good. Here, in one fell swoop, institutional lenders learned that title insurance is a *sine qua non*, and available at modest cost to themselves and/or their borrowers. Some less dramatic examples of the salutary role played by title insurance underscore this point:

Property Purchased From or Through a Decedent's Estate Few real estate brokers, much less lay persons, realize that, by statute, a *bona fide* purchaser from an administrator or intestate distributee is not protected for two years following the death of the property owner, if a hitherto unknown will comes to light that confers title on a third party (*i.e.*, not the person who initially appeared to have authority to sell the property). Moreover, that same law mandates that the statute of limitations never runs against the actual devisee, if the will in question had been fraudulently concealed or destroyed.[2]

Purchasing Property Owned by an Incapacitated Person In recent years, there has been a growing tendency on the part of families to have a guardian appointed for an elderly relative under Article 81 of the Mental Hygiene Law (MHL), a process that replaced the former practice of having such person declared "incompetent" and in need of a conservator or committee under the former Articles 77 and 78 of the MHL. However, a little-known statute decrees that the sale of a conservatee's real property requires prior court approval for the contract and conveyance to be valid.[3]

Similarly, obscure statutory rules govern the right to trace the proceeds of a real estate sale, where the conservator, guardian or committee sells real estate of the ward to a third party, if the will of the person with the disability devised the same premises to a named beneficiary. With an ever-increasing elderly population, statutes such as these may wreak havoc on transactions carried out without legal counsel or title insurance.

Unconstitutional or Otherwise Defective Statutes and Procedures Occasionally, title may be acquired or affected by a statute or governmental procedure later held to be unconstitutional or otherwise invalid. Thus, for example, a title may be acquired by eminent domain or by a real estate tax foreclosure, only to have a court later find that the mandated statutory procedures were not observed, or that such procedures were themselves illegal or unconstitutional (and the resulting title defective). Here again, title insurance would come to the rescue.

Thus, for example in *Board of Education v. Miles*[4] the New York Court of Appeals invalidated a retroactive statute designed to eliminate a "right of re-entry" or "possibility of reverter" that served no useful purpose (while at the same time rendering a title unmarketable, uninsurable and unmortgageable). When such a pre-existing right was eliminated, because the statutory period for filing a memorandum of intention to preserve the same had expired, all knowledgeable observers concluded that the statute had made the title in question marketable and insurable. Unfortunately, the courts later declared the statute unconstitutional and the conveyance to the *bona fide* purchaser a nullity. Fortunately, the presence of title insurance saved the financial hide of both the disappointed purchaser and the mortgage lender.

Problems Due to Adverse Possession and Easements by Prescription A view of the premises, coupled with a search of all recorded documents, may appear to give rise to a title that is marketable in all respects. However, a third party may actually be entitled to the subject property via adverse possession. Such person usually has no document to record (and may have no court decree recognizing the adverse possession title), and therefore no duty to record anything in the land records.

While the increasingly dense use of real property tends to diminish the opportunity for, and frequency of, adverse possession claims, the same cannot be said of conduct giving rise to an easement by prescription. These rights may be present and enforceable, although the recording office contains no hint of their existence. Although such situations may not give rise to a malpractice action against the purchaser's broker or counsel, they are usually fully compensable under the title insurance policy. The same is true of forgeries in the chain of title and false affidavits of title issued by an imposter vendor.

Problems Linked to Recordation of Deeds It is not uncommon for participants in real estate transactions to assume that everything has been successfully com-

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pleted once the closing has taken place.[5] However, such is not the case. Consider the following hypothetical situations, all of which are governed by the New York "race-notice" recording act provisions:

Example No. 1:

A purchases Blackacre from O in 1999, but neglects to record his deed.

B, a subsequent *bona fide* purchaser, acquires title to Blackacre from O in the year 2000.

Before B records his deed, A records his.

Result: B and his lender have no rights to the land. While they were subsequent *bona fide* purchasers, they did not "first record."

Example No. 2:

O sells Blackacre to A on July 1, 2000.

The title closer neglects to record A's deed and mortgage for several days.

Before A's documents are recorded, B, a subsequent *bona fide* purchaser, buys the same property from O and promptly records. Thereafter, A's instruments are recorded.

Result: The deed to A (as well as his bank's mortgage) have been cut off by the a subsequent *bona fide* purchaser who first recorded.

Example No. 3:

O sells Blackacre to A in the year 2000. The deed and mortgage in question are promptly delivered to the Recording Office. However, the local government officials in charge of the recording office misplace A's documents. As a consequence, these documents are never, in fact, recorded or indexed. In an alternative scenario, those documents are recorded but never indexed:

Thereafter, O fraudulently sells the same parcel to B, a *bona fide* purchaser, who promptly records.

Result: While the issue is not entirely free from doubt, A may lose the property because of the failure of the recording office to properly record and index his deed.

In all of the foregoing illustrations, the parties whose interests were cut off by virtue of the recording act mechanism will not suffer the full economic consequences if, but only if, they had title insurance.

Numerous other traps for the unwary are inherent in the conveyancing process. Thus, for example, an attorney handling the transfer of a multiple dwelling would inquire early on about the presence or absence of a certificate of occupancy as well as the terms thereof; the presence or absence of rent control and third-party occupants. For example, there are also numerous lower court cases to the effect that an occupant of illegal residential space may refuse to pay rent, remain in possession, and be immune from eviction.[6]

Similarly, a commercial property may only exist as a non-conforming use under the applicable zoning law. The vendee may be paying a purchase price that is based on the income of such a commercial establishment. However, if the non-conforming property is ever more than 50% destroyed, the premises must be rebuilt in accordance with the current zoning law, *i.e.*, the exemption afforded the non-conforming use is lost. Thereafter, the residual value of the property for a conforming use may only be a fraction of its former value as a non-conforming use. While a title insurance policy does not cover such public law problems (including environmental regulations), an experienced lawyer should be able to spot these issues early on and provide a purchaser with guidance on whether to go ahead with the purchase. Neither a real estate broker nor a salesperson would be expected to be fully conversant with such public law concerns and to be able to advise potential purchasers as to such matters.[7]

The Real Estate Broker's Function

Hardly a month goes by without a flurry of new cases on the employment of a broker, the latter's function and right to compensation. This state of affairs is traceable, in large part, to ignorance on the part of the public regarding to the governing legal rules, and the multiple conflicts of interest inherent in such representation.

The parties to a residential real estate transaction are frequently at a disadvantage because of ignorance of prevailing legal rules regarding brokerage, and the widespread currency of misconceptions regarding the same. Among the difficulties generated by this information gap may be listed the following:

Statute of Frauds Problems The average layman (seller) assumes that a real estate brokerage agreement must be in writing and subscribed by both the seller and the broker. However, in New York State, the brokerage agreement need not be written and subscribed. This is perhaps the largest single exception to the Statute of Frauds and may lead to a vendor being liable to several different real estate brokers on multiple contracts of employment.

When a Brokerage Commission Is Deemed Earned The average lay person assumes that he or she is not obligated to pay a commission to the broker unless and until there is a successful closing. While this is the preferred view in some states, it is not the law in New York.

Assuming the parties have not expressly agreed otherwise, the law implies that the broker's commission is earned as soon as a prospective purchaser is produced

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who is ready, willing and able to meet the vendor's terms. The fact that some unforeseen, subsequent event (such as failure of the seller to produce a marketable title) prevents a successful closing from taking place does not eliminate the vendor's obligation to pay the broker a commission.

Multiple Brokerage Arrangements The average home seller is not conversant with different types of brokerage arrangements and their legal import. These arrangements may be synopsized as follows:

- A mere listing, whereby any number of brokers may be engaged and only the broker who is the first to secure a buyer is entitled to be paid.
- An "exclusive agency," whereby property owners agree to retain only one broker to sell the premises (for a period ranging from three to six months), but reserves the owners' right to sell the premises themselves and not owe the retained broker a commission.
- An "exclusive sale" arrangement, whereby no one (including the property owner) can sell the premises without compensating the retained broker (during a specified period, ranging from three to six months).

Over the course of a prolonged period of searching for a buyer, owners may enter into one or more of these brokerage arrangements and later find themselves obligated to pay two or more commissions. Confusion on the part of sellers may also be traced, in part, to the presence of an umbrella "multiple listing" system or the advent of a new type of representative known as the "Buyer's Broker."

Conflicts of Interest Among Participants The broker (and salespeople employed by the broker) are "agents" of the seller and legally obligated to give their principal their undivided loyalty.[8] However, as a matter of business and human relations, brokers deal almost exclusively with prospective purchasers, and over time they may align themselves with such prospects (in terms of disclosing confidential data, the seller's negotiation strategy, etc.). This aspect of the relationship is compounded by the felt necessity for being the first broker to bring the parties to contract (at the risk of total loss of the commission if they finish second).

Other aspects of the broker's operations may present conflict-of-interest situations as well. Thus, for example, there is a growing trend toward brokers receiving a second commission for steering purchasers to a particular mortgage lender, with or without the purchaser being fully apprised of this arrangement. Similarly, it is not uncommon to insert a provision into the real estate contracts to the effect that the broker will receive half of the buyer's down payment in situations wherein the seller is entitled to forfeit the same because of the purchaser's failure to live up to his or her contractual obligations.

Uncertainties About the Broker's Role in Novel Situations The law relating to full disclosure to prospective purchasers is subject to rapid expansion and change. Thus, for example, there may be confusion about the broker's responsibility to make disclosures to the prospective buyer relating to the presence of toxic substances including asbestos, lead paint and radon gas; the fact that a prior owner or occupant committed suicide or died of AIDS; the fact that a nearby resident has registered under "Megan's Law"; the presence of ghosts and similar complicating factors.[9]

The courts have gone both ways in such cases, and the law is frequently in a state of flux or uncertainty. The party employing a real estate broker may bear the brunt of a loss attributable to the constantly changing line between the "caveat emptor" principle and the modern trend toward full disclosure of all relevant data.

Negligence Issues What is the legal standard of liability where a broker or salesperson is accused of negligence in a conveyancing situation?

Because real estate brokers and their sales personnel traditionally did not get involved in drafting legal instruments, there is a dearth of precedents on just what constitutes malpractice on their part. If the involvement of brokers in conveyancing is expanded, will they be held to the same standard as attorneys performing the same function? If so, will the brokers and/or salespersons have adequate malpractice insurance coverage? Further, will their insurance carriers be able to avoid liability if the broker's conduct partakes of fraud or intentional misconduct?

Few of these issues are free from doubt.

Problems With the Binder Document

In many parts of the state, brokers employ a document known as a "binder" in order to bring the prospective purchaser to the stage of being a ready, willing and able purchaser. Here again, the average layman is unfamiliar with the nature and import of the document that is placed before him or her for signature.

First and foremost, the "binder" is a full-fledged real estate contract if it contains the few key terms mandated by the Statute of Frauds. Few buyers are aware of this fact, while others labor under different misconceptions as to the document's legal import. Thus, for example, some are of the view that the document is not binding unless and until they furnish the broker with a deposit of some kind. Contrarywise, some people are of the view that they have secured a binding real estate contract to acquire the premises if the seller cashes a down payment check that states that it is part payment on the sale of the particular property. Both of these assumptions are incorrect.

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Equally disconcerting are the items the law will imply to round out the terms of a bare-bones binder. Thus, for example, in the absence of a clause setting forth the amount of mortgage a purchaser requires, the law implies that the purchaser has no need for financing and has agreed to pay all cash. Such an assumption would be contrary to the fact in all but the most extreme case.

Similarly, the law will imply that the purchaser is entitled to "marketable title," but not necessarily an "insurable title." This implication is critical in light of the fact that institutional lenders now insist on the availability of title insurance before making a permanent loan. Again, in the absence of a term in the binder covering the matter, the law will imply closing within a reasonable time and transfer of possession on closing.

However, such traditional inferences seldom coincide with the needs of today's vendors and vendees. It is usually necessary to dovetail the buyer's closing date with another closing involving the seller, or with the expiration of the buyer's previous lease. The seller's plans to move to another state, school registration deadlines and like circumstances frequently make selection of a precise closing date a matter of vital importance to one or both of the parties.

Similarly, the law may imply that the seller will give, and the buyer will accept, the type of deed customarily used in the community in question. As a consequence, the law may imply that the buyer must accept a "bargain and sale deed with covenant against the grantor's acts," the type of deed used in the downstate area. This gives the purchaser less protection than a Full Covenant and Warranty deed. Conversely, the law may conclude that the parties have impliedly agreed to use a Full Covenant and Warranty deed, thereby imposing potential future liability on the seller to both the immediate buyer and to purchasers on resale for years to come. Few, if any, sellers would knowingly agree to give such a deed, especially where the buyer is purchasing title insurance.[10]

The Risk to the Buyer's Down Payment

Generally prevailing rules regarding contract damages require aggrieved parties to take steps to minimize their damages when the other side defaults on their obligations. However, the real estate coveyancing contract constitutes a major exception to these general principles.

Sellers need not mitigate their damages and may retain the entire down payment no matter how large. In other words, the seller can keep the buyer's down payment even though the seller can easily sell the premises to a third party for the original contract price or more. This fact of life, plus the ease with which the forfeiture may be carried out, combine to make this route the seller's remedy of choice. This exacerbates the buyer's risk of forfeiture—a danger the vendee seldom fully appreciates.

Thus, for example, a purchaser who refuses to close because title is unmarketable must be correct as to the grounds asserted, and, where title defects are cureable, the seller must be afforded a reasonable opportunity to attend to the same.

No area of the law is more misunderstood than that of "risk of loss." Here the applicable rule may foster unjust and unanticipated results.

Forfeiture of one's down payment is a distinct possibility where the initial contract contains a "time of the essence" provision, or where the seller unilaterally imposes such a clause after the original closing date has been passed without the buyer being in a position to close. Because of these omnipresent risks of forfeiture, purchasers need the advice of legal counsel and/or the title insurance company's legal staff. Neither source of advice may be available in instances where the contract is prepared by a broker or salesperson.

Further, where the contract calls for both a "marketable" and an "insurable" title, it is easier for a purchaser to back out of a deal (and avoid forfeiture of the down payment) based upon the title company's refusal to insure the title in question "without exception." Here there is no need to prove that title is, in fact, unmarketable.

The "Risk of Loss" Quagmire

No area of the law is more misunderstood than that of "risk of loss." Here the applicable rule may foster unjust and unanticipated results. In some cases the seller is able to collect the full purchase price (for a damaged or destroyed property) and simultaneously collect the full insurance proceeds. The absurdity in such situations, of course, is that the purchaser must pay the full price for the damaged premises, while the seller is doubly compensated.

While it is true that purchasers have an "insurable interest" from the moment of contract (and could purchase casualty loss insurance to cover this exposure), they are seldom aware of this, and even if they are aware, mistakenly assume that the situation is covered

by the presence of insurance carried by the seller. The "Uniform Vendor-Purchaser Risk Act"[11] reduces the purchaser's exposure by keeping the risk of loss on the seller until the purchaser obtains either title or possession. However, this statutory protection is only applicable where the contract of sale is silent on the subject.

In addition, two recurring fact patterns put the purchaser at risk even where the statute applies. One such situation is the case wherein the seller allows the buyer to go into possession shortly before the closing date. The second such situation consists of instances wherein lessees exercise an option to purchase contained in their lease. Because such lessees have possession at the time they exercise the option (which exercise gives rise to a binding real estate contract), the lessee has the risk of loss under the Vendor-Purchaser Risk Act.[12] It is safe to conclude that a purchaser's counsel would address these matters in the applicable legal document. It is equally safe to conclude that a broker handling the matter might well lack the necessary sophistication to address these obscure, but critical, issues.

Deficiencies in the Full Covenant and Warranty Deed

A buyer or broker may falsely assume that the purchase is fully protected by a "Full Covenant and Warranty Deed." To begin with, attorneys downstate advise their grantor clients *not* to give such a deed, in order to avoid future liability generated by the conduct of past owners of the property in question.

Accordingly, the local custom is to give only a "Bargain and Sale Deed with Covenant Against the Grantor's Acts." Here the seller is merely guaranteeing that he or she did nothing to mar the title. Even if the purchaser has contracted for and received a "Full Covenant and Warranty Deed," the protection thus obtained may be more illusory than real. For example, any grantor in the chain who is liable on such a deed has an exposure that is limited to the plaintiff's actual damages, or the consideration received when that particular defendant conveyed the title to the subject premises, whichever is less. Accordingly, a full recovery may not be obtained from such person. Even this limited relief may be unobtainable if the particular defendant is judgment proof, has died or disappeared. In marked contrast, the purchaser with title insurance coverage can merely turn the title problem over to his carrier (a company that is not only amenable to process in the State of New York but solvent as well). As in other problem situations, the presence of legal representation greatly increases the likelihood that the purchaser will have acquired title insurance as part of the closing process.

Deficiencies in the Protections of the Recording Act

It is customary to assume that parties to a real estate transfer are fully protected by the operation of the Recording Act. However, as previously noted, purchasers and lenders may be adversely affected by timing consideration, mis-indexing and a host of other recording act mishaps that were not of their own making. Moreover, parties searching a title must be aware that they must "grantor" each person in the chain all the way back and all the way forward. By this is meant that the title searcher must anticipate that any party in the chain may have sold the premises twice, *i.e.*, have sold it before he sold it or sold it after he sold it.

Again, complex rules governing title searches mandate that subsequent *bona fide* purchasers are only responsible for covenants and easements set forth in their direct chain of title.[13] Accordingly, covenants and easements that are set forth in properly recorded documents will not be valid against a subsequent *bona fide* purchaser, unless found in a document that forms part of the present seller's direct chain of title. Here employment of a knowledgeable attorney is essential to make certain that covenants and easements are set forth in a document that is part of the direct chain of title and property indexed.

Purchasers who wish to avoid future litigation concerning such covenants and easements should order title insurance. Because the title company is undertaking an insurer's liability, and will suffer an economic loss if it later must litigate (even if the insurer wins such a suit), the company will read any and all relevant recorded documents. In other words, the title company personnel will read parallel deeds coming out of a common grantor (to learn any pertinent data contained therein), even though the case law does not require the title searcher to read such documents. Conversely, where a subsequent purchaser relies on the less demanding type of search procedure authorized by the above-cited case law, a litigant may be able to prove that the vendee was actually aware of the true state of the record, having been informed about the same prior to closing by the title company's preliminary report.

It is clear that these title searching complexities are beyond the expertise of the real estate broker and can only be handled adequately by counsel for the seller or purchaser, as the case may be.

The Purchaser's Right to Judicial Relief

Where purchasers seek judicial relief in a conveyancing situation, a number of obstacles lay in their path.

Failure of consideration and breach of contract theories may be unavailing, because the contract usually "merges in the deed" and disappears at the closing for

all practical purposes. Thereafter, the purchaser must rely upon express promises contained in the deed, because the law will not imply any promises or covenants in a deed if they are not expressly set forth in the same.

Similarly, a cause of action based upon fraud (or innocent but serious misrepresentation), is usually ruled out by the presence of a "*Danann*" Merger[14] clause in the contract's fine print. This clause states as follows:

> The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition there of. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the a fore said premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises as is * * * It is understood and agreed that all understandings and agreements here to fore had between the parties here to are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition.[15]

The courts have generally enforced this clause. Where such is the case, it is possible to make an end run by bringing suit against the broker or salesperson, if any, who made or repeated the false representations (unless, of course, the quoted clause states that *neither the owner nor the broker* made representations other than those expressly set forth in the contract). Legal counsel for the purchaser would make any necessary modifications or exceptions to the quoted passage if employed at the contract stage.

Conclusion

This article barely scratches the surface of the subject. However, it is hoped that what has been said makes clear the following:

- The vendor and vendee need expert advice from the inception of the conveyancing transaction right through the recording phase and beyond.
- Attorneys are the only ones with the necessary expertise to guide the parties through the legal maze
- The presence of counsel helps guarantee that the most effective device for consumer protection in this field (*i.e.*, title insurance) will be brought to bear to protect the consumer's single most costly lifetime expenditure.
- Competent legal advice over the full cycle of conveyancing process cannot be supplied by a broker or salesperson drafting binders, contracts or other legal documents.
- Legislation and regulations that facilitate non-lawyers' control of the process are counterproductive, in that they may operate in such a way as to actually interfere with a lawyer- directed transaction that has worked reasonably well for decades. Moreover, such a change could also lessen the chance that the consumer would be fully advised of his or her need for title insurance.[16]

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1. In preparing this article, the writer communicated with Commonwealth Title, which offers title insurance in New York State. The writer inquired about the cost of title insurance for a home in the New York City area selling for $250,000, with the buyer taking out a $200,000 mortgage to finances the same. The writer was advised that the cost of the fee policy would be $1,319 and the cost of the simultaneous mortgage policy protecting the lender would be $332. The cost of a "Market Value Rider Endorsement" (which automatically increases the face of the policy to keep abreast of inflation in real property values) is also available for an additional payment of ten percent of the cost of the fee policy (in this case, an additional fee of $132). These fees are remarkably low by any standard and compare favorably with the premium for a single year's fire insurance coverage. In marked contrast, the title insurance premium is paid only once and insures the home buyer for as long as he or she owns the premises. Moreover, the insurance continues in effect after the property is re-sold, if the departing owner conveys title by way of a full covenant and warranty deed (thereby possibly making such vendor liable on a future suit based on the covenants contained in the deed).

   It should be noted that downstate the practice is *not* to use "Full Covenant and Warranty" deeds. The seller's rationale is that the vendee will pass along any problem that arises to his title insurance carrier and if a Full Covenant and Warranty Deed has been utilized, the title company will have a cause of action in subrogation against the seller, (after having been paid for the risk the insurer was undertaking). The seller's counsel will also point out that the title insurance premium is determined solely by the face amount (upper limit) of the insurance policy. Therefore, the premium paid by the purchaser is not affected by the type of deed such buyer has agreed to accept.
2. N.Y. Estates, Powers and Trusts Law 3-3.8 (Purchaser from a distributee not protected from claim of a devisee of the same property, where the latter claims the real estate within two years of the property owner's death).
3. *See* N.Y. Real Property Actions & Proceedings Law § 1712.
4. *Board of Education v. Miles*, 15 N.Y.2d 364, 259 N.Y.S.2d 129 (1965), interpreting Real Property Law § 345 and Real Property Actions & Proceedings Law §§ 1950–1955.
5. For authorities on the effect of negligence on the part of recording office personnel, *see* 4A Warren's Weed, § 4.04 (1995); *Camfield v. Luther Forest Corp.*, 98 Misc. 2d 903, 414 N.Y.S.2d 833 (Sup Ct. 1979).
6. *See Corbin v. Harris*, 92 Misc. 2d 480, 400 N.Y.S.2d 309 (Sup. Ct. 1977); *Aponte v. Santiago*, 165 Misc. 2d 968, 630 N.Y.S. 2d 869 (Civ. Ct. 1995); *Bartolomeo v. Runco*, 162 Misc. 485, 616 N.Y.S.2d 695 (City Ct. 1944). *See also H. Casabianca, Inc. v. Connobbio*, 205 Misc. 2d 380, 127 N.Y.S.2d 418 (Mun. Ct. 1952); and cases cited in 2 Resch, New York Landlord & Tenant §§ 23.12, 36.2 (3rd Edition); N.Y. Multiple Dwelling Law § 302(1)(b).

7. On the legal problem generated by condominium, cooperative and home owner association arrangements, *see* Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems And Possible Solutions*, 73 St. John's L. Rev. 3 (1999).
8. *See* N.Y. Real Property Law § 443.
9. *See Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dep't 1991) (Purchaser's performance excused where vendor could not deliver the premises empty, because of the admitted presence of two ghosts).
10. For an analysis of the difficult problems experienced in attempting to prevent real estate brokers from drawing contracts, or otherwise acting in an adversary capacity in conveyancing, *see Duncan & Hill Realty, Inc. v. Dep't of State*, 62 A.D.2d 690, 405 N.Y.S.2d 339 (4th Dep't 1978). For an analysis of the different positions taken on these issues in other parts of the country, *see* Gouday, *Too Many Hands In The Cookie Jar: The Unauthorized Practice of Law By Real Estate Brokers*, 75 Or. L. Rev. 889 (1996); Palomar *The War Between Attorneys And Lay Conveyancers - Empirical Evidence says 'Cease Fire'*, 31 Conn. L. Rev. 423 (1999). For an analysis of the leeway presently afforded real estate brokers in some counties of New York State, *see* Prinzivalli, *Preparing Real Estate Contracts: How Far Can Brokers Go?*, 217 N.Y.L.J., page 1, col. 4 (6/9/97).
11. N.Y. General Obligations Law § 5-1311.
12. For an in-depth discussion of the "risk of loss" rules applicable under the statute and under the common law, *see World Exhibit Corp. v. City Bank Farmers Trust Co.*, 296 N.Y. 586 (1946); *Lucenti v. Cayuga Apartments, Inc.*, 48 N.Y.2d 530, 423 N.Y.S.2d 886 (1979).
13. On the extent of the title search that must be conducted as to easements and covenants contained in parallel deeds coming out of a common grantor but not found in the immediate grantor's direct chain of title, *compare Ammirati v. Wire Forms, Inc.*, 298 N.Y. 697 (1948); *Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 267 N.Y. 242, 578 (1935); *Witter v. Taggart*, 78 N.Y.2d 234, 573 N.Y.S.2d 146 (1991).
14. This notorious exoneration clause takes its name from the Court of Appeals decision in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
15. Id. at 320. The merger or exoneration clause quoted in the text is frequently accompanied by a statement that the terms of the contract cannot be altered except by another (subsequent) agreement that is in writing and subscribed.
16. Of course, the purchase of title insurance does not eliminate all risks associated with acquiring real property. Thus, for example, the title company typically will not insure against what a "view" would disclose; the rights of third parties in possession; and the impact of public law (such as rent control and environmental regulations). It should also be noted that the outer limit of the title insurance company's liability is fixed by the face amount of the policy. In other words, the carrier cannot be held for more than the face of the policy on a theory that the company was negligent in conducting its title search.

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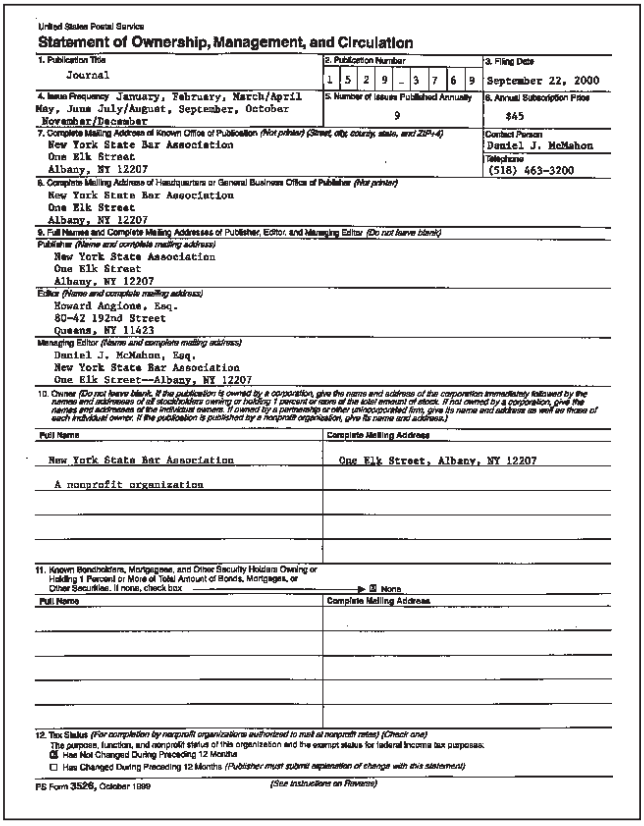

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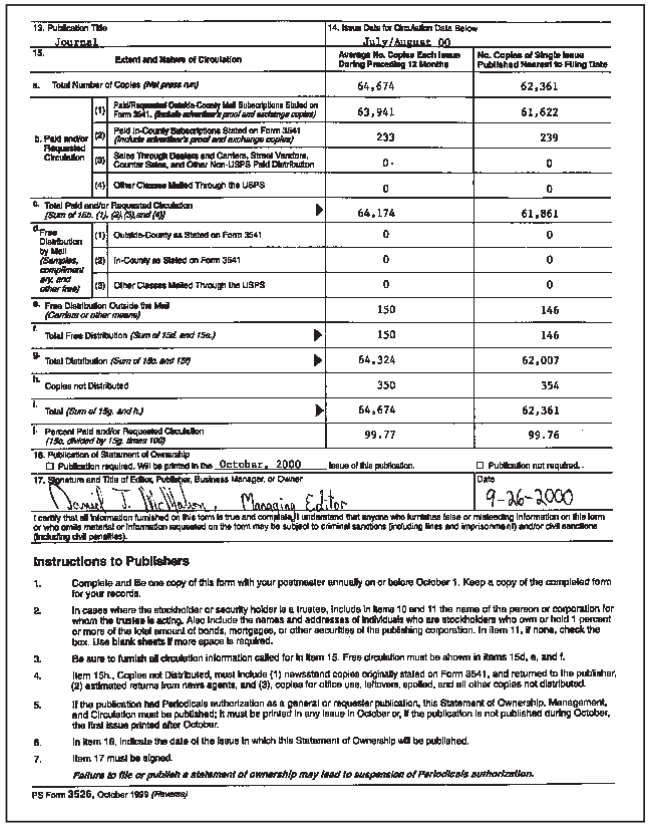

13. Publication Title: Journal	14. Issue Date for Circulation Data Below: July/August 00	
15. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	64,674	62,361
b. Paid and/or Requested Circulation (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	63,941	61,622
(2) Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	233	239
(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
(4) Other Classes Mailed Through the USPS	0	0
c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2), (3), and (4))	64,174	61,861
d. Free Distribution by Mail (Samples, complimentary, and other free) (1) Outside-County as Stated on Form 3541	0	0
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e. Free Distribution Outside the Mail (Carriers or other means)	150	146
f. Total Free Distribution (Sum of 15d. and 15e.)	150	146
g. Total Distribution (Sum of 15c. and 15f)	64,324	62,007
h. Copies not Distributed	350	354
i. Total (Sum of 15g. and h.)	64,674	62,361
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16. Publication of Statement of Ownership
☐ Publication required. Will be printed in the October, 2000 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: Daniel J. McMahon, Managing Editor — Date: 9-26-2000

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Language Tips

By Gertrude Block*

Question: Is there a verb *garnishee*, meaning "to garnish," or is *garnishee* only the person who is the object of the garnishment process?

Answer: The *American Heritage Dictionary* and *Webster's New World Dictionary* both list "to decorate" as the first meaning of the verb *garnish*, and allow that a secondary meaning is to *garnishee*, but the description of that concept is essentially left to the later definitions of *garnishee* and *garnishment*. Both identify *garnishee* as a noun and a verb, with the verb defined as using legal process to prevent a third party from paying money (wages in a typical case) or some other asset over to an individual against whom a creditor has filed suit and obtained a judgment for a debt the individual owes the creditor.

Black's Law Dictionary recognizes only *garnish* as the verb available to convey the concept of the legal process at work in these circumstances. It defines *garnishee* only as a noun, used to identify the third party who has been instructed not to turn over an asset to the debtor in the underlying action by a creditor. *Black's* defines *garnishee* as "a person or institution . . . that is indebted to or is a bailee for another whose property has been subjected to garnishment. *Black's* adds that the person known as a *garnishee* may also be called the "garnishee-defendant," as opposed to the principal defendant, who is "the primary debtor."

The difficulties with the two words are addressed in the 1999 edition of *The New York Times Manual of Style and Usage*. Its entry for *garnish, garnishee* states: "Both are properly used as verbs in the sense of putting a lien on property or wages to satisfy a debt. But *garnishee* is more common (despite objections by lawyers), perhaps because the more usual meaning of *garnish* is adorn or decorate. As a noun, *garnishee* means the person served with a legal *garnishment*."

As I've noted in the past, the process in which nouns such as *garnishee* acquire a meaning as verbs occurs frequently. It has given us the verb *assault*, which at one time was only a noun created from the verb *assail* (now rare, except perhaps in poetry). The same process has made the noun *demurrer* both the actor and the action. At one time the verb *demur* had two corresponding forms—the noun *demurrer* (one who demurs) and the noun *demurral* (what the demurrer made when he demurred). And in past years, *counsel* was the advice rendered by an adviser (a *counselor*). Now *counsel* is used to identify not only the advice and the adviser but also the verbal action that delivers the advice: "The attorneys counseled their client."

From the Mailbag (I):

Mail is still arriving from readers of the column on salutations that appeared in the March/April issue of the *Journal*. Attorney Theodore S. Wickersham wrote from New York City that he has been using "Gentlemen/Mesdames" (the plural of "Sir/Madam") without further salutation for years, thus avoiding "Dear" and the "current spin" on "Ladies."

Retired-attorney Ben Podgorben e-mailed his opinion that "each word used should add something to the communication." Therefore, he points out, "Dear" is unnecessary, except when one wants to convey additional warmth to the communication. That is also true, he says, of other salutations such as "Sir," "Madam" and "Gentlemen."

Other correspondents agree. Morton M.Z. Lynn, justice (retired) of the City Court of Albany, wrote that he learned back in his army service as a company clerk (and later as a regimental sergeant-major) that there was no point to either a salutation or a complimentary close. On return to civilian life, he used neither salutation nor complimentary close, with one exception. He generally addressed judges as "Dear Judge So-and-So" or, in writing to a panel of judges, addressed them as "This Honorable Court," with the closing, "Yours respectfully."

Judge Lynn noted that he had never had a complaint about this practice from anyone.

A footnote to the honorific "Gentlemen" in salutations: The current widespread use of both "Gentlemen" and "Ladies" has probably hurried the demise of those salutations. A case-in-point: a recent article in the local newspaper, which reported that as a result of the efforts of local police officers and the FBI, "The gentleman in custody had confessed to three robberies this year." Another news story reported that one of two "ladies" currently being held on suspicion of robbery in the local jail had bitten the other "lady" so severely that the second "lady" had been admitted to a hospital for treatment. If these individuals are gentlemen and ladies, no wonder that honorific has been abandoned!

From the Mailbag (II):

Attorney Sandra W. Jackson of New York City commented (in reference to the discussion of negatives that have no affirmatives) that *unfurling* does have an affirmative form. She wrote, "Mr. Basendale was indeed *furling* his umbrella if he was going to check it," for *furling* is "to wrap and secure." She added two more "affirmatives": *array* and *wieldy*, although the latter is labeled "rare" by her *Funk and Wagnalls* dictionary (no publication date included).

Thanks to all those who wrote on these subjects.

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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