



NEW YORK STATE BAR ASSOCIATION

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Journal

**CONSUMER PROTECTION LAWS:
UNMASKING DECEPTIVE PRACTICES**

Inside

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Mortgage Contingency Clauses
Shaping Future Strategies

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September 2004

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O N T H E C O V E R

The multi-dimensional face mask shown on the cover is a costume from a Venetian parade scene. It was chosen to symbolize the types of deceptive practices that the consumer laws described in the lead article are designed to combat.

Cover design by Lori Herzog.

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2004 by the New York State Bar Association. The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies \$18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

I have just returned from Atlanta, talking with bar leaders from across the country at the meetings of the National Conference of Bar Presidents and the American Bar Association. Immediate past President A. Thomas Levin and I also were there to accept on behalf of our Association the ABA's Partnership Award for exemplary initiatives to increase diversity in the legal profession.

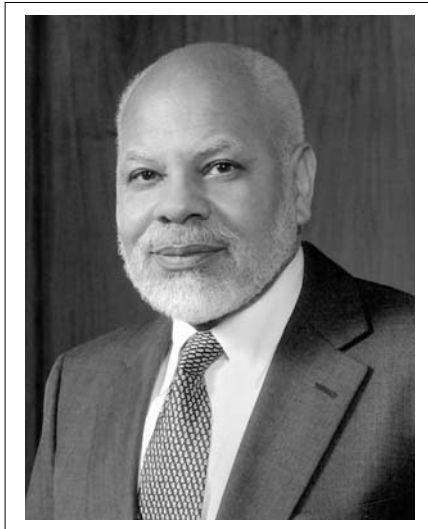
We were pleased to be recognized by our colleagues for our Association's actions and plans, and it was an excellent opportunity, at the presentation luncheon and in a panel discussion on this subject, to share our experiences and hear about those of other bars. These conversations were interesting and enlightening. Yet, we did not have the sense of satisfaction that comes when a project is complete. We have much more work to do. There are responsibilities and roles for each one of us to further inclusiveness in our offices, in the legal community, within our Association, sections and committees, and beyond. Why do all this? One answer is because it is the right thing to do. Beyond that, however, we have the words of our Association's House of Delegates diversity statement:

We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership.

But as I pointed out in my presentations in Atlanta, our Association's diversity effort is more than a well-worded resolution. It is not a one-time project, but requires continuing work by successive presidents and ongoing involvement of leadership, volunteers and staff throughout the Association. These elements have been critical to our progress to date and are to our further advancement. Maintaining the momentum will be both challenging and crucial.

Let me set the stage with a few milestones. Thomas Dyett was the Association's first known member of color, in 1927. To put this in perspective, we should consider that a variety of professional organizations were

PRESIDENT'S MESSAGE



KENNETH G. STANDARD

Diversity Enriches Us

racially exclusionary at that time and for a number of years thereafter.

Over the years, our Association has had a number of programs to promote equal opportunity. In the 1960s, for example, the Association endorsed civil rights legislation and urged bar associations to encourage diversity in membership and establish interracial committees of community and professional leaders. In the 1980s, we proposed amendments to the Code of Professional Responsibility to specifically address discrimination and bias within the profession; and we first hosted a conference of minority bar leaders. The Code changes were adopted by the Appellate Divisions in 1990. In the next decade, through the Committee on Minorities in the Profession, we conducted a minority counsel project to increase opportunities as outside counsel, prepared a hiring plan for use in private practice and held a roundtable of minority associates for candid discussions of obstacles to retention and growth.

Building on these individual initiatives, we are working to increase the impact of our efforts through Association-wide coordination and ongoing efforts, drawing on the strengths and experiences of our members, sections and committees. Among these elements:

- *Designating diversity as a priority of the Association, with plans and procedures that go beyond one presidency.*
- *Coordinating, on an ongoing basis, with our sections, committees and other groups.* In addition to encouraging all our sections to develop and act on diversity plans, we are taking steps to coordinate these efforts and share best practices, such as the Business Law Section's actions to promote opportunity and diversity in all its activities and the Environmental Law Section's minority fellowship program to give law students a hands-on introduction to the practice of environmental law through summer work and meetings with experienced attorneys. Coordinating these initiatives is among the missions of the Committee on Diversity and Leadership Development, with past President Lorraine Power

KENNETH G. STANDARD can be reached by e-mail at president@nysbar.com.

PRESIDENT'S MESSAGE

Tharp as Chair and fellow past President Tom Levin as Vice Chair.

- *Regularly communicating and coordinating with minority bar associations* to discuss member needs and opportunities to work together. We are institutionalizing these formerly occasional meetings with minority bar leaders, first held in 1989, and have added e-forums and other communications. Tom Levin and I met with many of these bar leaders in the spring. Another such meeting will be held in the fall that, schedules permitting, will include Lorraine, Tom and me, as well as President-Elect A. Vincent Buzard.

- *Expanding networking and opportunities to participate.* More than 300 attorneys attended the Celebrating Diversity reception at the Annual Meeting last January to meet with colleagues and learn more about ways to be involved in the Association and sections. We will be organizing more gatherings. We also are reviewing our activities to ensure that there are opportunities for new faces, new voices, new perspectives and new ideas to be at our tables.

- *Involving staff to facilitate continuity.* We have made enhancing diversity and opportunity for involvement a staff-wide responsibility, to promote continuity of effort and to assist in pursuing membership development, outreach and participation in all activities.

- *Monitoring our progress.* Over the years, our Committee on Women in the Law periodically has produced report cards on participation levels of women in the Association, shared with the sections, House and leadership. Through the Committee on Diversity and Leadership Development, we will be expanding this to attorneys of color and working closely with the sections on this project.

These are all works in progress requiring our ongoing attention. Yet this plan is incomplete if it does not include discussions with management of law offices on hiring, retention and professional growth. We are co-hosting with the Chief Judge such a meeting in the Capital District this fall. Further, Association leaders and the Committee on Legal Education and Admission to the Bar are continuing the dialogue with New York law school deans on increasing minority enrollment to help prepare tomorrow's generation of lawyers.

With these additions, our work to create a pipeline for a skilled, talented and inclusive profession still remains incomplete. This pipeline must be open, be a source of guidance and flow with encouragement, not leaks, beginning with the youngest students in elementary school. The big challenge that we confront in our long-term diversity efforts is the slow growth in the

ranks of minority attorneys, now believed to be about 10% of all attorneys in the country compared to an overall minority population in the nation of more than 30%. We, as a society, not just as lawyers, have to address the educational and cultural issues that allow this 20% gap.

Research presents a picture of progress but also discouragement and hurdles. First, the good news: A study of the American Council on Education, for example, found that between 1980–1981 and 2000–2001, minority enrollment in colleges and universities climbed 122%; associate's degrees earned, up 143%; bachelor's, up 164%; master's, up 180%. Overall, the number of professional degrees awarded has tripled. Yet this and other research reported lags in high school graduation rates and college entrance.

Our Association, for 30 years, has worked with teachers and administrators through our Law, Youth & Citizenship Program to infuse information about the legal system into classroom studies and to engage students' thinking through the mock trial and We the People constitutional projects, and other activities. We have worked to bring lawyers into the classroom, with the benefits of expanding students' knowledge about the law, bench and bar and the importance of citizen involvement in society, and inspiring them to strive for professional excellence. Youth education continues with the support of Association leadership.

Our Association is not alone in its concern about our future generations and the need to be involved in their well being now. Our colleagues in engineering and other quantitative sciences and in the corporate world also are increasingly active in mentoring youths and in helping teachers build appropriate curricula. Said Marc Saperstein, president of General Electric's foundation that has sponsored such initiatives, "[W]e know that without further progress, we will not develop the strong, diverse workforce that is essential to our success as a society." The GE Foundation noted in its research that "many of the students who would benefit from these efforts come from families struggling on the edges of our economy. These efforts provide a way for those students to change their trajectories for the future."

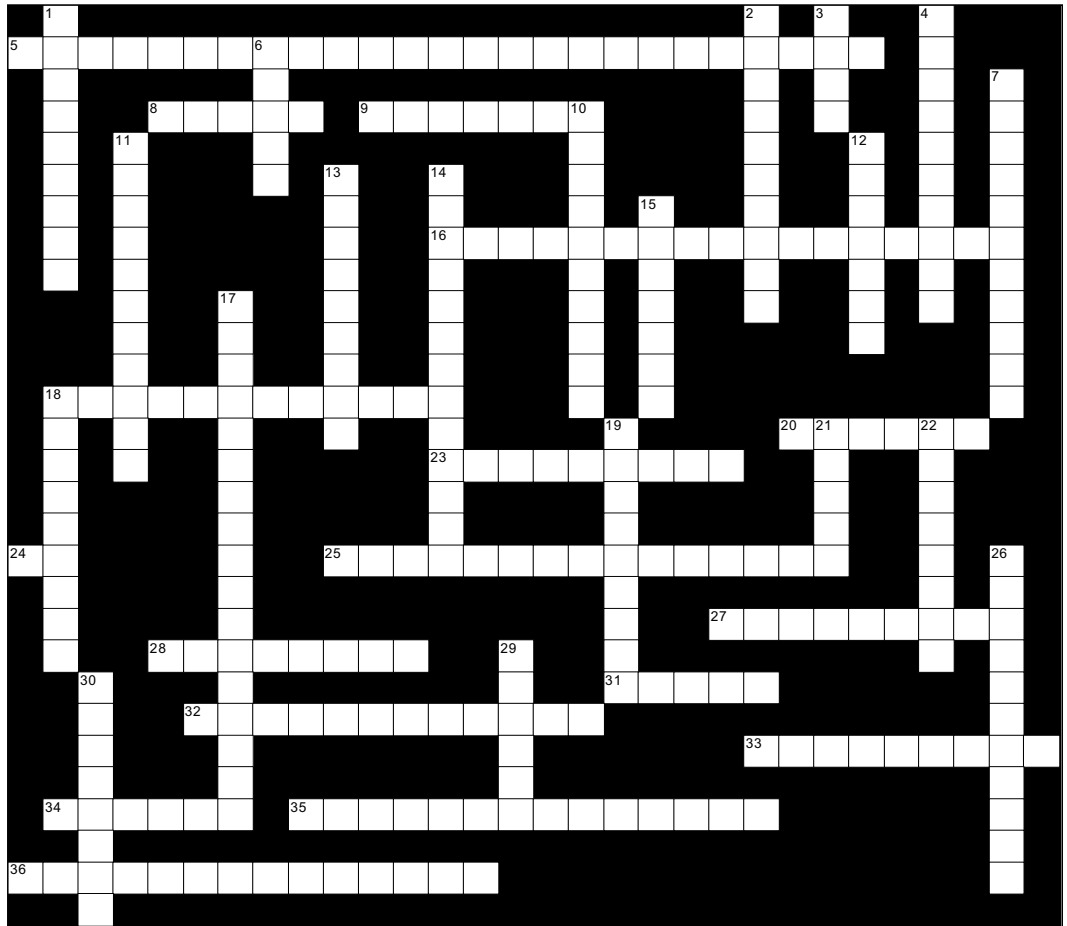
What an excellent opportunity for the professions, the academic and business communities to work together with the goal of strengthening the horizons of youth. I am eager to hear your suggestions about all these opportunities. I encourage your involvement in this effort and in all of our Association's activities. Join us – we have room for you.

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 59.)

Across

- 5 Grounds for pre-answer motion to dismiss under FRCP 12(b)(6)
- 8 What you do to the cases you read
- 9 What we learned to get from a case
- 16 Washington case establishing long-arm jurisdiction based upon "minimal contacts"
- 18 How most will end up paying the piper
- 20 You'll definitely be needing a lot of this!
- 23 Unfortunately, where you end up eating most of the time
- 24 Teacher's Assistant
- 25 Substantive academic and other activities outside of class
- 27 A building block of law school
- 28 Teaching method of calling on students for answers in open class



- 31 Two wrongs don't make a right

- 32 Is that state or federal law?
- 33 Better perform here, or no job
- 34 This better be ship shape if you have any hope of landing a job
- 35 A first-year class dealing with fundamentals of litigation
- 36 Affecting interstate business (some just never got this in school)

Down

- 1 Respected resume builder required by many large firms
- 2 Who you'll end up spending most of your time with
- 3 An appellate argument, but not really

- 4 Good idea to work somewhere before graduation
- 6 Something you may not get much of in law school
- 7 Where many first learn of their moral obligations
- 10 Another type of practice you may go into (not private)
- 11 Binding when dropped in the box
- 12 Your handwritten bible needed to pass exams in each class
- 13 The fancy firms where the big bucks are found
- 14 Your first job out – not involving the government
- 15 The last and final hurrah

Back to School Special, by J. David Eldridge

- 17 Take your victims as you find them
- 18 Flash cards, pre-printed outlines, etc.
- 19 "Look to your _____, look to your _____"
- 21 Must be had before acceptance
- 22 Important class for those intending to conduct trials (fed or state)
- 26 Critical Bar indicator for each school
- 29 Person who runs Law Review
- 30 Halfway there (for this semester, anyway)

New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes

BY THOMAS A. DICKERSON

Causes of action alleging the violation of one or more federal and/or New York State consumer protection statutes are often asserted in civil cases. This article reviews the consumer protection statutes most frequently used in New York State courts.

General Business Law § 349

The most popular of New York State's many consumer protection statutes is General Business Law § 349 (GBL), which prohibits deceptive and misleading business practices.¹ It allows consumers and even corporations² to sue for \$50 or actual damages, which may be trebled up to \$1,000 upon a finding of a willful or knowing violation.³ An additional civil penalty not to exceed \$10,000 may be imposed for a violation if the "conduct is perpetrated against one or more elderly persons."⁴

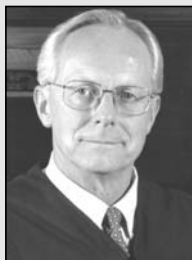
GBL § 349 may be preempted by other consumer protection statutes.⁵ Attorneys fees and costs may be recovered as well. As long as the deceptive business practice has "a broad impact on consumers at large"⁶ and constitutes "consumer-oriented conduct,"⁷ proving a violation of GBL § 349 is straightforward. GBL § 349 is a "broad, remedial statute . . . directed towards giving consumers a powerful remedy. The elements of a violation of [GBL § 349] are (1) proof that the practice was deceptive or misleading in a material respect and (2) proof that plaintiff was injured. . . . There is no requirement under [GBL § 349] that plaintiff prove that defendant's practices and acts were intentional, fraudulent or even reckless. Nor does plaintiff have to prove reliance upon defendant's deceptive practices."⁸

A well-pled GBL § 349 claim need not particularize the deceptive practice but should, at a minimum, allege that the defendants "engaged in consumer-related activity that affected consumers at large, utilized tactics that were deceptive and misleading in material respects, disseminated advertising through various mediums that was false in material respects" and led to injury⁹ resulting from such business practices and advertising.¹⁰

Threshold of Deception Initially, GBL § 349 had a rather low threshold for a finding of deception, *i.e.*, misleading and deceptive acts directed to "the ignorant, the

unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."¹¹ Recently, however, the Court of Appeals has raised the threshold to those misleading and deceptive acts "likely to mislead a reasonable consumer acting reasonably under the circumstances."¹²

Scope, Accrual & Limitations GBL § 349 applies to a broad spectrum of goods and services, and on its face applies to "virtually all economic activity and [its] application has been correspondingly broad. . . . The reach of [this] statute[] 'provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'"¹³ GBL § 349 is broader than common law fraud and "encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law."¹⁴ Hence, the statute "was intended to be broadly applicable, extending far beyond the reach of common law fraud."¹⁵



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He is the author of *Travel Law*, Law Journal Press, New York, 1981–2004 (see Travel Law's Web page at <<http://members.aol.com/travellaw/index.html>>), *Class Actions: The Law of 50 States*, Law Journal Press, 1988–2004 (see Class Action's Web Page at <<http://members.aol.com/class50/index.html>>), and more than 200 articles and papers on consumer law issues, many of which are available at <www.classactionlitigation.com/library/ca_articles.html> and <www.consumerlaw.org/links/#travel_articles>.

The article presented here has been adapted from a paper prepared for the 2004 New York State Judicial Seminar Program.

GBL § 349 claims are governed by a three-year period of limitations.¹⁶ Claims accrue when the consumer “has been injured by a deceptive act.”¹⁷ The statute does not apply to the claims of non-residents who did not enter into contracts in New York State¹⁸ or receive services in New York State.¹⁹ Finally, a GBL § 349 claim “does not need to be based on an independent private right of action.”²⁰

Territorial Reach The Court of Appeals has made it clear that the deceptive act must have occurred in New York. In decisions involving vanishing premium insurance policies²¹ and users of Digital Subscriber Lines for Internet services,²² the Court of Appeals, not wishing to “tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws” and seeking to avoid “nationwide, if not global application,” held that GBL § 349 requires that “the transaction in which the consumer is deceived must occur in New York.”

Following this latest interpretation²³ of the “territorial reach” of GBL § 349, the Court of Appeals dismissed a claim in a consumer action alleging misrepresentations by a New York-based Internet service provider.²⁴ The named representative had entered into the Internet contract in Arizona.

There was at least one case, however, where an action involved parties outside the state. In a GBL § 349 consumer class action involving cell phone service that “improperly credited calls causing [the class] to lose the benefit of weekday minutes included in their calling plans,” the court approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut, stating that it “would be a waste of judicial resources” to require a different class action in each state where the defendants marketed their plans on a regional basis.²⁵

Range of Goods & Services Covered The types of goods and services to which GBL § 349 applies include a lengthy and growing list. The following indicate the trends.

Apartment Rentals Renting illegal apartments²⁶ and renting illegal sublets²⁷ were found violative of the statute.

Attorney Advertising “The alleged conduct the instant lawsuit sought to enjoin and punish was false, deceptive and fraudulent advertising practices.”²⁸ “Divorce, Low Fee, Possible 10 Days, Green Card” also violated the Administrative Code of the City of New York §§ 20-700–20-706.²⁹

Au pair Services Misrepresenting the qualifications of an abusive au pair to care for handicapped children was covered by GBL § 349.³⁰

Arbitrator’s Award; Refusal to Pay An auto dealer’s refusal to pay arbitrator’s award under GBL § 198-b (Used Car Lemon Law) was found to be an unfair and deceptive business practice under GBL § 349.³¹

Auctions; Bid Rigging A scheme to manipulate public stamp auctions came “within the purview” of GBL § 349.³²

Automotive; Contract Disclosure Rule A violation of GBL § 396 “and the failure to adequately disclose the costs of the passive alarm and extended warranty constitute a deceptive action” in violation of GBL § 349.³³

Budget Planning A company misrepresented itself as a budget planner, which “involves debt consolidation and . . . negotiation by the budget planner of reduced interest rates with creditors and the cancellation of the credit cards by the debtors . . . the debtor agrees to periodically send a lump sum payment to the budget planner who distributes specific amounts to the debtor’s creditors.”³⁴

Cars A used car dealer violated GBL § 349 and Vehicle & Traffic Law § 417 (VTL) by failing to disclose that the used car was “previously used principally as a rental vehicle.”³⁵ In addition, the dealer was found to have committed “deceptive acts” that violated 15 NYCRR §§ 78.10(d), 78.11(a)(12), (13) by fraudulently and/or illegally forging the signature of one customer, altering the purchase agreements of four customers after providing copies to them, and transferring to 12 purchasers retail certificates of sale that did not contain odometer readings. The dealer was also found to have violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances.

Cell Phones Wireless phone subscribers sought damages for “frequent dropped calls, inability to make or receive calls and failure to obtain credit for calls that were involuntarily disconnected.”³⁶

Clothing Sales A refusal to refund purchase price in cash for defective and shedding fake fur led to suit.³⁷

Credit Cards A claim resulted when telemarketers told prospective customers that they were pre-approved for a credit card and that they could receive a low-interest credit card for an advance fee of approximately \$220. Instead of a credit card, however, consumers who paid the fee received credit card applications, discount coupons, a merchandise catalog and a credit repair manual.³⁸ In other such cases, the “gist of plaintiffs’ deceptive practices claim” was that “the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading”;³⁹ and a credit card company misrepresented the application of its low introductory annual percentage rate to cash advances.⁴⁰

Customer Information The drugstore chain CVS acquired customer files from 350 independent pharmacies without customers' consent; the "practice of intentionally declining to give customers notice of an impending transfer of their critical prescription information in order to increase the value of that information appears to be deceptive."⁴¹

Defective Automobile Ignition Switches A car dealer was held liable for damages to a used car that burned up 4 1/2 years after sale.⁴²

Defective Brake Shoes Midas Muffler was held liable for failure to honor brake shoe warranty.⁴³

Defective Dishwashers Misrepresentations made by General Electric "to the effect that certain defective dishwashers it manufactured were not repairable" were found deceptive under GBL § 349.⁴⁴

Door-to-Door Sales The statute supported a claim where a seller misrepresented and grossly overpriced water purification system.⁴⁵ In another case, the seller misrepresented and overpriced pots and pans.⁴⁶

Educational Services A seller failed to deliver computer programming course for beginners;⁴⁷ another failed to deliver a travel agent education program.⁴⁸

Employee Scholarship Programs There was a refusal to honor an agreement to provide a scholarship to employee.⁴⁹

Excessive & Unlawful Bail Bond Fees Misrepresentation of expenses in securing bail bonds.⁵⁰

Exhibitions & Conferences Misrepresenting length of and number of persons attending Internet exhibition.⁵¹

Furniture Sales Misrepresenting a sofa as being covered in Ultrasuede HP and protected by a five-year warranty;⁵² falsely promising to deliver furniture within one week;⁵³ failing to inform Spanish-speaking consumers of a three-day cancellation period;⁵⁴ in a case involving rent-to-own furniture, "an overly inflated cash price" for purchase may violate GBL § 349.⁵⁵

Hair Loss Treatment Marketing techniques portrayed as the modern day equivalent of the sales pitch of a snake oil salesman; alleged misrepresentations of "no known side effects" without revealing documented side effects "which include cardiac changes, visual disturbances, vomiting, facial swelling and exacerbation of hair loss"; GBL § 349 claim stated for New York resident deceived in New York.⁵⁶

Home Heating Oil; Unilateral Price Increase A home heating oil company's "conduct constituted a deceptive practice. It offered a fixed-price contract and then refused to comply with its most material term – an agreed-upon price for heating oil."⁵⁷

Home Inspections Civil engineer was liable for failing to discover wet basement.⁵⁸

In Vitro Fertilization Misrepresentations of *in vitro* fertilization rates of success.⁵⁹

Insurance Misrepresentations that "out-of-pocket premium payments [for life insurance policies] would vanish within a stated period of time";⁶⁰ misrepresentations by insurance agent as to amount of life insurance coverage;⁶¹ "allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability may be said to fall within the parameters of" an unfair or deceptive practice;⁶² automobile insurance company fails

to provide timely defense to insured;⁶³ practice of terminating health insurance policies without providing 30 days' notice violated terms of policy and was a deceptive business practice, because subscribers may have believed they had health insurance when coverage had already been canceled.⁶⁴

Internet Marketing & Services "Given plaintiff's claim that the essence of his contract with defendant was to establish his exclusive use and control over the domain name 'Laborzionist.org' and that defendant's usurpation of that right and use of the name after registering it for plaintiff defeats the very purpose of the contract, plaintiff sufficiently alleged that defendant's failure to disclose its policy of placing newly registered domain names on the 'Coming Soon' page was material" and constitutes a deceptive act under GBL § 349;⁶⁵ "Petitioner argues that the use of the words 'rules and regulations' in the Restrictive Clause [prohibiting testing and publication of test results of effectiveness of McAfee antivirus and firewall software] is designed to mislead consumers by leading them to believe that some rules and regulations outside [the restrictive clause] exist under state or federal law prohibiting consumers from publishing reviews and the results of benchmark tests. . . . [T]he language is [also] deceptive because it may mislead consumers to believe that such clause is enforceable under the lease agreement, when in fact it is not. . . . [A]s a result consumers may be deceived into abandoning their right to publish reviews and results of benchmark tests";⁶⁶ failing to deliver pur-

Practice of terminating health insurance policies without providing 30 days' notice violated terms of policy and was a deceptive business practice.

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chased magazine subscriptions;⁶⁷ misrepresented Digital Subscriber Line (DSL) Internet services.⁶⁸

"Knock-Off" Telephone Numbers [D]efendants [have] admitted [the] practice of maintaining numerous toll-free call service numbers identical, but for one digit, to the toll-free call service numbers of competitor long-distance telephone service providers. This practice generates what is called 'fat-fingers' business, i.e., business occasioned by the misdialing of the intended customers of defendant's competing long-distance service providers. Those customers, seeking to make long-distance telephone calls, are, by reason of their dialing errors and defendants' many 'knock-off' numbers, unwittingly placed in contact with defendant providers rather than their intended service providers and it is alleged that, for the most part, they are not advised of this circumstance prior to completion of their long-distance connections and the imposition of charges in excess of those they would have paid had they utilized their intended providers. These allegations set forth a deceptive and injurious business practice affecting numerous consumers" under GBL § 349.⁶⁹

Lasik Eye Surgery Medical malpractice and deceptive advertising arising from lasik eye surgery.⁷⁰

Liquidated Damages Clause It is deceptive for seller to enter "into contracts knowing that it will eventually fail to supply conforming goods and that, when the customer complains and subsequently attempts to terminate the contract [seller] uses the liquidated damages clause of the contract as a threat either to force the customer to accept the non-conforming goods or to settle the lawsuit."⁷¹

Loan Applications Automobile dealer completes and submits loan application to finance company and misrepresents teenage customer's ability to repay loan which resulted in default and sale of vehicle.⁷²

Mislabeling Pet dog dies from overdose of prescription drug, Feldene, mislabeled "1 pill twice daily" when should have been one pill every other day.⁷³

Mortgages "The defendants failed to prove that their act of charging illegal processing fees to over 20,000 customers, and their failure to notify the plaintiffs of the existence and terms of the settlement agreement, were not materially deceptive or misleading";⁷⁴ consumers induced to pay for private mortgage insurance beyond requirements under Insurance Law § 6503;⁷⁵ mortgagors desirous of paying off mortgages charged illegal and unwarranted fax and recording fees;⁷⁶ \$15 special handling/fax fee for a faxed copy of mortgage payoff statement violates Real Property Law § 274-a(2)(a) (RPL) which prohibits charges for mortgage-related documents and is deceptive as well.⁷⁷

Motor Oil Changes An "Environmental Surcharge" of \$.80 to dispose of used motor oil after every automobile oil change may be deceptive, since under Environmental Conservation Law § 23-2307, the company was required to accept used motor oil at no charge.⁷⁸

Movers; Household Goods Failing to unload the household goods and holding them "hostage" is a deceptive practice under GBL § 349.⁷⁹

Professional Networking Enforcing an unconscionable membership fee promissory note.⁸⁰

Privacy Sale of confidential patient information by pharmacy to a third party was "an actionable deceptive practice" under GBL § 349.⁸¹

Pyramid Schemes Selling bogus "Beat The System Program" certificates;⁸² selling misrepresented instant travel agent credentials and educational services.⁸³

Real Estate Sales Misrepresenting that a house with a septic tank was connected to a city sewer system;⁸⁴ deceptive advertisement and sale of condominium units;⁸⁵ deceptive sale of shares in a cooperative corporation;⁸⁶ of condominium units;⁸⁷ deceptive design and construction of home;⁸⁸ N.Y.C. Administrative Code §§ 20-700-20-706. Consumer protection law applies to business of buying foreclosed homes and refurbishing and reselling them as residential properties; misrepresentations that recommended attorneys were approved by Federal Housing Authority deceptive.⁸⁹

Securities Not Covered "Finally, section 349 does not apply here because, in addition to being a highly regulated industry, investments are not consumer goods";⁹⁰ "[s]ecurities instruments, brokerage accounts and services ancillary to the purchase of securities have been held to be outside the scope of the section."⁹¹

Sports Nutrition Products Manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals and sodium contained in its product.⁹²

Termite Inspections Misrepresentations of full and complete inspections of house and that there were no inaccessible areas are misleading and deceptive.⁹³

Tobacco Products Tobacco companies' scheme to distort body of public knowledge concerning the risks of smoking, knowing public would act on companies' statements and omissions, was deceptive and misleading.⁹⁴

Transportation Services, E-Z Passes The E-Z pass contract failed to reveal necessary information to customers wishing to make a claim and "on its face" constituted a deceptive practice.⁹⁵

Travel Services Misrepresented the availability and quality of vacation campgrounds;⁹⁶ misrepresented cruise;⁹⁷ refundability of tour operator tickets misrepresented

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sented;⁹⁸ attorney general charges travel agency with fraudulent and deceptive business practices in failing to deliver flights to Spain or refunds.⁹⁹

TV Repair Shops TV repair shop's violation of "Rules of the City of New York [6 RCNY 2-261 *et seq.*] . . . that certain procedures be followed when a licensed dealer receives an electronic or home appliance for repair . . . constitutes a deceptive practice" under GBL § 349.¹⁰⁰

Wedding Singers The bait-and-switch of a "40-something crooner" for the "20-something" Paul Rich who promised to deliver a lively mix of pop hits, rhythm-and-blues and disco classics.¹⁰¹ (For broken engagements and disputes over wedding preparations, generally, see *DeFina v. Scott*.¹⁰²)

False Advertising: GBL § 350

Consumers who rely upon false advertising and purchase defective goods or services may claim a violation of GBL § 350. A wide variety of such advertising may run afoul of the statute: defective "high speed" Internet services falsely advertised;¹⁰³ bank misrepresented that its LifePlus Credit Insurance plan would pay off credit card balances were the user to become unemployed.¹⁰⁴

GBL § 350 prohibits false advertising which "means advertising, including labeling, of a commodity . . . if such advertising is misleading in a material respect . . . [covers] . . . representations made by statement, word, design, device, sound . . . but also . . . advertising [which] fails to reveal facts material."¹⁰⁵

GBL § 350 covers a broad spectrum of misconduct: "[this statute] on [its] face appl[ies] to virtually all economic activity and [its] application has been correspondingly broad," and "proof of a violation of GBL 350 is simple, *i.e.*, 'the mere falsity of the advertising content is sufficient as a basis for the false advertising charge'";¹⁰⁶ magazine salesman violated GBL § 350 – "[the defendant's] business practice is generally 'no magazine, no service, no refunds' although exactly the contrary is promised."¹⁰⁷

Automobiles

A variety of consumer protection statutes are available to purchasers and lessees of automobiles, new and used. A comprehensive review of several of these statutes GBL § 198-b,¹⁰⁸ Used Car Lemon Law (express warranty),¹⁰⁹ UCC §§ 2-314, 2-318 (implied warranty of merchantability)¹¹⁰ and VTL § 417 (strict products liability)¹¹¹ appears in *Ritchie v. Empire Ford Sales, Inc.*,¹¹² a case involving a used 1990 Ford Escort that, 4 1/2 years after being purchased, burned up because of a defective ignition switch.

A comprehensive review of two other statutes (GBL § 198-a (New Car Lemon Law) and GBL § 396-p (New

Car Contract Disclosure Rules)) appears in *Borys v. Scarsdale Ford, Inc.*,¹¹³ a case involving a new Ford Crown Victoria, the hood, trunk and both quarter panels of which had been negligently repainted before sale.

Automotive Parts Warranty GBL § 617(2)(a) protects consumers who purchase new parts or new parts' warranties from breakage or a failure to honor the terms and conditions of a warranty. "The extended warranty and new parts warranty business generates extraordinary profits for the retailers of cars, trucks and automotive parts and for repair shops. It has been estimated that no more than 20% of the people who buy warranties ever use them. . . . Of the 20% that actually try to use their warranties . . . [some] soon discover that the real costs can easily exceed the initial cost of the warranty certificate."¹¹⁴

Midas would not honor its brake shoe warranty unless the consumer agreed to pay for additional repairs found necessary after a required inspection of the brake system. "If a part does not conform to the warranty . . . the initial seller shall make repairs as are necessary to correct the nonconformity."¹¹⁵

A violation of GBL § 617(2)(a) is a *per se* violation of GBL § 349, which provides for treble damages, attorneys fees and costs.¹¹⁶

Duty to Perform Quality Repairs Service stations should perform quality repairs. Quality repairs are those repairs held by those having knowledge and expertise in the automotive field to be necessary to bring a motor vehicle to its pre malfunction or predamage condition. A consumer sought to recover \$821.75 from service station for failing to make proper repairs to vehicle. "While the defendant's repair shop was required by law to perform quality repairs, the fact that the claimant drove her vehicle without incident for over a year following the repairs indicates that the vehicle had been returned to its pre malfunction condition following the repairs by the defendant, as required."¹¹⁷ One case involved a conflict in findings in Small Claims Court in auto repair case with the findings of an administrative law judge, under VTL § 398.¹¹⁸

Implied Warranty of Merchantability for Automobiles Both new and used cars carry an implied warranty of merchantability.¹¹⁹ The key statutes are UCC §§ 2-314 and 2-318. Although broader in scope than the Used Car Lemon Law, the implied warranty of merchantability does have its limits, *i.e.*, it is time barred four years after delivery.¹²⁰ Thus, a claim involving a defective mobile home was found to be time barred.¹²¹ A dealer may disclaim liability under such a warranty¹²² if such a disclaimer is written and conspicuous.¹²³

Magnuson-Moss Warranty Act & Leased Vehicles¹²⁴ In *Tarantino v. DaimlerChrysler Corp.*,¹²⁵

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*DiCintio v. DaimlerChrysler Corp.*¹²⁶ and *Carter-Wright v. DaimlerChrysler Corp.*,¹²⁷ it was held that the Magnuson-Moss Warranty Act, 15 USC §§ 2301–2312, applies to automobile lease transactions. However, in *DiCintio v. DaimlerChrysler Corp.*,¹²⁸ the Court of Appeals held that the Magnuson-Moss Warranty Act does not apply to automobile leases.¹²⁹

New Car Contract Disclosure Rule In a case brought by a consumer who demanded a refund or a new car after discovering that a new Ford Crown Victoria had several repainted sections, the court discussed liability under GBL § 198-a (New Car Lemon Law) and GBL § 396-p(5) (Contract Disclosure Requirements), stating that it “gives consumers statutory rescission rights ‘in cases where dealers fail to provide the required notice of prior damage and repair[s]’ [with a] ‘retail value in excess of five percent of the lesser of manufacturer’s or distributor’s suggested retail price.’”¹³⁰ The court dismissed the complaint, finding (1) that under GBL § 198-a the consumer must give the dealer an opportunity to cure the defect and (2) that under GBL § 396-p(5) Small Claims Court would not have the jurisdiction (money damages only up to \$3,000) to force “‘defendant to give . . . a new Crown Victoria or a full refund, minus appropriate deductions for use.’”

A car dealer who overcharged a customer for a 2003 Honda Pilot was held to have violated GBL § 396-p by failing to disclose the “estimated delivery date and place of delivery . . . on the contract of sale.”¹³¹ The court found that the violation of GBL § 396-p and the failure to adequately disclose the costs of the passive alarm and extended warranty constituted a deceptive act in violation of GBL § 349. Damages included \$2,251.50 (the \$2,301.50 which the customer overpaid, less the cost of the warranty of \$50), and punitive damages under GBL § 349(h), bringing the award up to \$3,000, the jurisdictional limit of Small Claims Court.

New Car Lemon Law New York State’s New Car Lemon Law (GBL § 198-a) provides: “If the same problem cannot be repaired after four or more attempts; Or if your car is out of service to repair a problem for a total of thirty days during the warranty period; Or if the manufacturer or its agent refuses to repair a substantial defect within twenty days of receipt of notice sent by you. . . . Then you are entitled to a comparable car or refund of the purchase price.”¹³² Before commencing a lawsuit seeking to enforce the New Car Lemon Law, however, the dealer must be given an opportunity to cure the defect.¹³³

Used Car Dealer Licensing A used car dealer sued a customer to collect the \$2,500 balance due on the sale of a used car.¹³⁴ Because the dealer failed to have a Second Hand Automobile Dealer’s license pursuant to New

York City Department of Consumer Affairs when the car was sold, the court refused to enforce the sales contract pursuant to CPLR 3015(e).

Used Car Extended Warranty A consumer purchased a 1993 Lexus with more than 110,000 miles and an extended warranty on the vehicle. After the vehicle experienced engine problems and a worn camshaft was replaced at a cost of \$1,733.66, the consumer made a claim under the extended warranty. The claim was rejected by the warranty company “on the basis that a worn camshaft was a pre-existing condition.” The court found this rejection unconscionable and awarded damages to cover the cost of the new camshaft. “In effect, the warranty company has chosen to warranty a 10-year-old car with over 110,000 miles on the odometer and then rejects a timely claim on the warranty on the basis that the car engine’s internal parts are old and worn.”¹³⁵

Used Car Lemon Law New York State’s Used Car Lemon Law (GBL § 198-b) provides limited warranty protection for 90 days or 4,000 miles, whichever comes first, for vehicles with odometer readings of less than 36,000. Some interesting results follow: a defective 1978 Chevy Malibu is returned within 30 days and a full refund awarded;¹³⁶ but a used car dealer must be given an opportunity to cure a defect before the consumer may commence a lawsuit enforcing his or her rights under the Used Car Lemon Law.¹³⁷

The Used Car Lemon Law does not preempt other consumer protection statutes¹³⁸ and has been applied to used vehicles with coolant leaks,¹³⁹ malfunctions in the steering and front-end mechanism,¹⁴⁰ stalling and engine knocking,¹⁴¹ and vibrations.¹⁴² An arbitrator’s award may be challenged in a special proceeding under CPLR article 75.¹⁴³ Recoverable damages include the return of the purchase price and repair and diagnostic costs.¹⁴⁴

Warranty of Serviceability Under VTL Used car buyers are also protected by VTL § 417, which requires used car dealers to inspect vehicles and to deliver a certificate to buyers stating that the vehicle is “in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery.” VTL § 417 is a non-waivable, non-disclaimable, indefinite, warranty of serviceability which has been liberally construed.¹⁴⁵

Specific instances follow: a dealer is liable for Ford Escort that burns up 4 1/2 years after purchase;¹⁴⁶ a used car dealer violated GBL § 349 and VTL § 417 in failing to disclose that used car was “previously used principally as a rental vehicle. In addition [dealer violated] 15 NYCRR §§ 78.10(d), 78.11(12), (13) . . . fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certifi-

cates of sale to twelve (12) purchasers which did not contain odometer readings. . . . [Also, dealer] violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances.”¹⁴⁷ Recoverable damages include the return of the purchase price and repair and diagnostic costs.¹⁴⁸

Home Improvement Cases

GBL § 772 provides homeowners victimized by unscrupulous home improvement contractors (who make “false or fraudulent written statements”) with statutory damages of \$500, reasonable attorneys fees and actual damages.¹⁴⁹

Contractor Licensing Homeowners often hire home improvement contractors to repair or improve their homes or property. Home improvement contractors must, at least, be licensed by the Department of Consumer Affairs of New York City, Westchester County, Suffolk County, Rockland County, Putnam County and Nassau County if they are to perform services in those counties (CPLR 3015(e)). Should the home improvement contractor be unlicensed, the contractor will be unable to sue the homeowner for non-payment for services rendered, although a salesman does not have to have a separate license.¹⁵⁰ As one court noted, “The Home Improvement Business provisions . . . were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors.”¹⁵¹

A number of decisions indicate the influence of the statute: an unlicensed home improvement contractor was unable to sue homeowner in Small Claims Courts for unpaid bills;¹⁵² the license of a subcontractor cannot be used by a general contractor to meet licensing requirements.¹⁵³ Obtaining a license during the performance of the contract may be sufficient.¹⁵⁴ Obtaining a license after performance of the contract is not, however: “The legislative purpose . . . was not to strengthen contractor’s rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed.”¹⁵⁵

Merchantability of New Housing

Provisions of GBL § 777-a include a statutory housing warranty of merchantability for the sale of a new house, which warrants that for one year “the home will be free from defects due to a failure to have been constructed in a skillful manner” and

that for two years “the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner” and that for six years “the home will be free from material defects.” The statute also requires timely notice from aggrieved consumers.¹⁵⁶ Failure to comply with notice requirements (GBL § 777-a(4)(a)) is fatal to claim for breach of implied warranty.¹⁵⁷

Movers

A claimant asserted that a mover hired to transport her household goods “did not start at time promised, did not pick up the items in the order she wanted and when she objected [the mover] refused to remove her belongings unless they were paid in full.”¹⁵⁸ The court noted the absence of effective regulations of movers. “The biggest complaint is that movers refuse to unload the household goods unless they are paid. . . . The current system is, in effect, extortion where customers sign documents that they are accepting delivery without complaint solely to get their belongings back. This situation is unconscionable.”

The court found a violation of 17 NYCRR § 814.7 when the movers “refused to unload the entire shipment,” violations of GBL § 349 in that “the failure to unload the household goods and hold them ‘hostage’ is a deceptive practice,” and also found a failure to disclose relevant information in the contract. It awarded statutory damages of \$50.

Loans & Credit

Several federal statutes and rules provide protection to consumers: Fair Credit Reporting Act: 15 USC §§ 1681–1681x; Home Ownership and Equity Protection Act: 15 USC § 1639 (HOEPA); Real Estate Settlement

Procedures Act: 12 USC §§ 2601–2617 (RESPA); Regulation Z: 12 CFR §§ 226.1–226.36; and Truth in Lending Act: 15 USC §§ 1601–1613 (TILA).

Consumers may sue for a violation of several of these federal statutes, which seek to protect borrowers, and recover appropriate damages.

In a case involving counterclaims by borrowers alleging violations of TILA, HOEPA and Regulation Z, the court stated that “mortgages were placed on . . . defendants’ properties without their knowledge or understanding. Not the slightest attempt at compliance with applicable regulations was made by the lenders. No Truth in Lending disclosures or copies of any of the loan documents signed at the closing were given to the defendants. Thus, plaintiffs did not comply with TILA and Regulation Z. . . . It also appears that the lenders violated HOEPA and Regulation Z in that they extended credit to the defendants based on their collateral rather than considering their income. . . . The lenders also violated Regulation Z which prohibits lenders from entering into a balloon payment note with borrowers on high-interest, high fee loans.”¹⁵⁹ An injunction preventing eviction issued.

A borrower who counterclaimed in Small Claims Court for violation of TILA was awarded rescission of a loan commitment with the lender and damages of \$400.¹⁶⁰ The court stated that “TILA [protects consumers] from the inequities in their negotiating position with respect to credit and loan institutions. . . . [TILA] requir[es] lenders to provide standard information as to costs of credit including the annual percentage rate, fees and requirements of repayment. . . . [TILA] is liberally construed in favor of the consumer. . . . The borrower is entitled to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required . . . together with a statement containing the material disclosures required . . . whichever is later. . . . The consumer can opt to rescind for any reasons, or for no reason.”

A mortgage lock-in fee agreement was found to be covered by TILA and RESPA.¹⁶¹ The court stated, “There is nothing in the New York regulations concerning lock-in agreements that sets out what disclosures are required and when they must be made. . . . In keeping with the trend toward supplying consumers with more information than market forces alone would provide, TILA is meant to permit a more judicious use of credit by consumers through a meaningful disclosure of credit terms. . . . It would clearly violate the purpose behind TILA and RESPA to allow fees to be levied before all disclosures were made . . . the court holds that contracts to pay fees such as the lock-in agreements must be preceded by all the disclosures that federal law requires.”

There are limits, however. A consumer recovered damages under the Fair Credit Reporting Act but was denied an award of attorneys fees.¹⁶² The court stated that “more must be shown than simply prevailing in litigation. It must be shown that the party who did not prevail acted in bad faith or for purposes of harassment.”

Finally, TILA has been held to preempt Personal Property Law provisions governing retail installment contracts and retail credit agreements,¹⁶³ and both TILA and RESPA have been held to “preempt any inconsistent state law.”¹⁶⁴

Fees for Mortgage-Related Documents A court found that a lender had violated RPL § 274-a(2)(a), which prohibits the charging of fees “for providing mortgage related documents,” by charging a consumer a \$5 “Facsimile Fee” and a \$25 “Quote Fee.”¹⁶⁵

Overcoats Lost at Restaurants

“For over 100 years consumers have been eating out at restaurants, paying for their meals and on occasion leaving without their simple cloth overcoats . . . mink coats . . . mink jackets . . . raccoon coats . . . Russian sable fur coats . . . leather coats and, of course, cashmere coats.”¹⁶⁶ Some protection exists for such losses.

A restaurant was held liable after its personnel encouraged a patron to remove his overcoat and then refused to respond to a claim after the overcoat disappeared from the coatroom.¹⁶⁷ In response to a consumer claim arising from a lost overcoat, the restaurant may seek to limit its liability to \$200 as provided for in GBL § 201. However, a failure to comply with the strict requirements of GBL § 201 “as to property deposited by . . . patrons in the . . . checkroom of any . . . restaurant, the delivery of which is evidenced by a check or receipt therefor and for which no fee or charge is exacted”¹⁶⁸ allows the consumer to recover actual damages upon proof of a bailment and/or negligence.¹⁶⁹ The enforceability of liability limiting clauses for lost clothing often depends upon adequacy of notice. For example, a clause on a dry cleaning claim ticket limiting liability for lost or damaged clothing to \$20 was held void for lack of adequate notice.¹⁷⁰

Pyramid Schemes

A pyramid scheme “is one in which a participant pays money . . . and in return receives (1) the right to sell products, and (2) the right to earn rewards for recruiting other participants into the scheme.”¹⁷¹ Pyramid schemes are sham money-making schemes that prey upon consumers eager for quick riches. GBL § 359-fff prohibits “chain distributor schemes” or pyramid schemes, voiding the contracts upon which they are based.

In a case involving pyramid schemes used to sell travel agent education programs, the court noted, "There is nothing 'new' about NU-Concepts. It is an old scheme, simply, repackaged for a new audience of gullible consumers mesmerized by the glamour of travel industry and hungry for free or reduced cost travel services."¹⁷² Another involved sales of bogus "Beat The System Program" certificates.¹⁷³

While at least one court has found that only the attorney general may enforce a violation of GBL § 359-fff,¹⁷⁴ others have found that GBL § 359-fff gives consumers a private right of action,¹⁷⁵ a violation of which also constitutes a *per se* violation of GBL § 349, which provides for treble damages, attorneys fees and costs.¹⁷⁶

Real Property, Apartments & Co-Ops

RPL § 235-b provides consumers a basis for claims that a residence has an implied warrant of habitability.

Tenants in one case¹⁷⁷ and co-op owners in another¹⁷⁸ brought actions for damages done to their apartments by the negligence of landlords, managing agents or others, having to do with water damage from external or internal sources. Such a claim may invoke RPL § 235-b, a statutory warranty of habitability in every residential lease "that the premises . . . are fit for human habitation." RPL § 235-b "has provided consumers with a powerful remedy to encourage landlords to maintain apartments in a decent, livable condition"¹⁷⁹ and may be used affirmatively in a claim for property damage¹⁸⁰ or as a defense in a landlord's action for unpaid rent.¹⁸¹ Recoverable damages may include apartment repairs, loss of personal property and discomfort and disruption.¹⁸²

Another such statute is the Multiple Dwelling Law, which provides for a duty to keep rental premises in good repair.

A tenant successfully sought damages arising from burst water pipes under Multiple Dwelling Law § 78, which provides, "Every multiple dwelling . . . shall be kept in good repair."¹⁸³ The court applied the doctrine of *res ipsa loquitur* and awarded \$264.87 for damaged sneakers and clothing, \$319.22 for bedding and \$214.98 for a Playstation and joystick.

Consumer Contracts

A number of statutes come into play when consumers enter into what are generically called "consumer contracts." The following indicates the breadth and scope of these laws, which include the CPLR, the GBL, the General Obligations Law (GOL), the Personal Property Law (PPL), and even the Uniform Commercial Code (UCC).

Type Size CPLR 4544 provides that "any printed contract . . . involving a consumer transaction . . . where the

print is not clear and legible or is less than eight points in depth . . . may not be received in evidence in any trial." CPLR 4544 has been applied in consumer cases involving property stolen from a health club locker,¹⁸⁴ car rental agreements,¹⁸⁵ home improvement contracts,¹⁸⁶ dry cleaning contracts¹⁸⁷ and financial broker-age agreements.¹⁸⁸

This consumer protection statute, however, does not apply to cruise passenger contracts, which are, typically, in smaller type size and are governed by maritime law (maritime law preempts state consumer protection statute regarding type size; cruise passenger contracts may be in 4-point type).¹⁸⁹ And it may not apply if it conflicts with federal Regulation Z ("Regulation Z does not preempt state consumer protection laws completely but requires that consumer disclosures be 'clearly and conspicuously in writing' [12 CFR § 226.5(a)(1)] and, considering type size and placement, this is often a question of fact").¹⁹⁰

Dog & Cat Sales Disputes involving pet animals are often brought in Small Claims Court, the relatively low jurisdictional limits of which can belie the passion the litigants bring to the proceedings.

"The plaintiffs . . . and the defendants . . . are exotic bird lovers. It is their passion for exotic birds, particularly, for Peaches, a 5-year-old white Cockatoo, which is at the heart of this controversy."¹⁹¹ "Cookie was a much loved Pekinese who swallowed a chicken bone and died seven days later. Could Cookie's life have been saved had the defendant Veterinarians discovered the presence of the chicken bone sooner?"¹⁹² A pet store negligently clipped the wings of Bogey, an African Grey Parrot, who flew away.¹⁹³ "Bianca and Pepe are diminutive, curly coated Bichon Frises (who were viciously attacked by) Ace . . . a large 5-year-old German Shepherd weighing 110 pounds."¹⁹⁴ Two dogs were burned with a hair dryer used by a dog groomer, one died and one survived.¹⁹⁵

GBL §§ 752-755 applies to the sale of dogs and cats by pet dealers, and gives consumers rescission rights 14 days after purchase if a licensed veterinarian "certifies such animal to be unfit for purchase due to illness, a congenital malformation which adversely affects the health of the animal, or the presence of symptoms of a contagious or infectious disease" (GBL § 753). The consumer may (1) return the animal and obtain a refund of the purchase price plus the costs of the veterinarian's certification, (2) return the animal and receive an exchange animal plus the certification costs, or (3) retain the animal and receive reimbursement for veterinarian services in curing or attempting to cure the animal. In addition, pet dealers are required to have animals inspected by a veterinarian prior to sale (GBL § 753-a)

and provide consumers with necessary information (GBL §§ 753-b, 753-c).

Several courts have applied GBL §§ 752–755 in Small Claims Court; one also applied UCC article 2.¹⁹⁶ In a similar vein, another held that a consumer's claims for an unhealthy dog are not limited to GBL § 753(1), but include breach of implied warranty of merchantability under UCC § 2-714.¹⁹⁷ One involved five instances of transactions involving sick German shepherds.¹⁹⁸ One court, in applying the General Business Law, held that buyers of a sick dog could not recover under GBL § 753 because they failed to have the dog examined by a licensed veterinarian.¹⁹⁹

Door-to-Door Sales “Some manufacturers . . . favor door-to-door sales [because] . . . the selling price may be several times greater than . . . in a more competitive environment [and] . . . consumers are less defensive . . . in their own homes and . . . are, especially, susceptible to high pressure sales tactics.”²⁰⁰ Personal Property Law §§ 425–431 afford consumers a “cooling-off” period to cancel contracts entered into as a result of high-pressure door-to-door sales tactics.²⁰¹ PPL § 428 gives consumers a right to rescind should a salesman fail to complete a Notice of Cancellation form on the back of the contract.

PPL § 428 has been used by consumers in a variety of sales where courts have found salespeople to have been less than straightforward, or where products proved shoddy: a misrepresented and grossly overpriced water purification system;²⁰² misrepresented pots and pans costing \$200 each;²⁰³ vinyl windows that were hard to open, did not lock properly and leaked;²⁰⁴ unauthorized design and fabric color changes and defects in overpriced furniture.²⁰⁵

Rescission is also appropriate if the Notice of Cancellation form is not in Spanish for Spanish-speaking consumers.²⁰⁶ A failure to comply with the disclosure requirements of PPL § 428 regarding cancellation and refund rights is a *per se* violation of GBL § 349, which provides for treble damages, attorneys fees and costs.²⁰⁷ In addition, PPL § 429(3) provides for an award of attorneys fees.

Lease Renewal Provisions General Obligations Law § 5-901 provides the consumer with protection in the area of personal property leases. An automatic renewal provision in a computer lease was held ineffective under GOL § 5-901 because the lessor failed to notify lessee of lessee's obligation to provide notice of intention not to renew.²⁰⁸ In addition, the court found such a provision may be unconscionable; “unless [the lessee] is willing to meet the price unilaterally set for the purchase of the equipment, [lessee] will be bound for a successive 12-month period to renting the equipment. This clause, which, in essence, creates a perpetual obligation,

is sufficiently one-sided and imbalanced so that it might be found to be unconscionable [under Utah law].”

Merchandise Delivery Dates GBL § 396-u protects consumers from unscrupulous salespeople who promise that merchandise will be delivered by a specific date when, in fact, it is not. “In order to induce a sale furniture and appliance store salesmen often misrepresent the quality, origin, price, terms of payment and delivery date of ordered merchandise.” A salesman promised delivery of new furniture within one week and then refused to return the consumer's purchase price when she canceled two weeks later unless she paid a 20% cancellation penalty. This constitutes a violation, because failure to comply with GBL § 396-u allows the consumer to rescind the purchase contract without incurring a cancellation penalty.²⁰⁹

A violation of GBL § 396-u may take several forms: failing to disclose an estimated delivery date in writing when the order is taken (GBL § 396-u(2)(a)); failing to advise of a new delivery date and giving the consumer the opportunity to cancel (GBL § 396-u(2)(b)(2)); failing to honor the consumer's election to cancel without imposing a cancellation penalty (GBL § 396-u(2)(a), (b)); failing to make a full refund within two weeks of a demand without imposing a cancellation penalty (GBL § 396-u(2)(d)).

In addition, a violation of GBL § 396-u is a *per se* violation of GBL § 349, which provides for treble damages, attorneys fees and costs.²¹⁰ GBL § 396-u itself, at subsection (7), provides for a trebling of damages upon a showing of a willful violation of the statute.²¹¹

A furniture store failed to timely deliver two of six purchased chairs. The court found that the delayed furniture was not “custom-made” and that the store violated GBL § 396-u(2) in failing to fill in an “estimated delivery date on the form as required by statute,” and in failing to give notice of the delay and advising the customer of her right to cancel under GBL § 396-u(2)(b).²¹² The court awarded GBL § 396-u damages of \$287.12 for the two replacement chairs, trebled to \$861.36 under GBL § 396-u(7). In addition, the court granted rescission under UCC § 2-601 (“if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole . . .”), awarding the customer the contract price of \$2,868.63 upon return of the furniture.

Retail Refund Policies An important element of the statutory scheme regulating retail sales concerns refunds, which are covered by GBL § 218-a.

Some stores refuse to refund the consumer's purchase price in cash upon the return of a product (“Merchandise, in New Condition, May be Exchanged Within 7 Days of Purchase for Store Credit . . . No Cash Refunds or Charge Credits”²¹³). In *Baker v. Burlington*

Coat Factory Warehouse,²¹⁴ a clothing retailer refused to refund the consumer's cash payment when she returned a shedding and defective fake fur two days after purchase. GBL § 218-a permits retailers to enforce a no cash refund policy, but only if there is a sufficient number of signs notifying consumers of "its refund policy including whether it is 'in cash, or as credit or store credit only.'"²¹⁵

Even if such signs are present, however, a refund cannot be denied if the product is defective and there has been a breach of the implied warranty of merchantability (UCC § 2-314). In such a case, consumers may recover all appropriate damages, including the purchase price in cash (UCC § 2-714).²¹⁶ In essence, UCC § 2-314 preempts GBL § 218-a.²¹⁷ Illustrative cases include complaints involving defective shedding fake fur²¹⁸ and a defective baseball bat.²¹⁹ It has been held that a "failure to inform consumers of their statutory right to a cash or credit card charge refund when clothing is defective and unwearable" is a violation of GBL § 349, which provides for treble damages, attorneys fees and costs.²²⁰

Rental Purchase Agreement Personal Property Law §§ 500–507 provides consumers who enter into rental purchase agreements with certain reinstatement rights should they fall behind in making timely payments, or otherwise terminate the contract (PPL § 501).

A court awarded a consumer damages of \$675.73 because the renter had failed to provide substitute furniture of a comparable nature after the consumer had reinstated his rental purchase agreement after skipping payments.²²¹ Another court awarded consumers damages of \$2,124.04 after their TV was repossessed, stating that "this Court finds that, in keeping with the intent of Personal Property Law which attempts to protect the consumer while simultaneously allowing for a competitive business atmosphere in the rental-purchase arena, that the contract at bar fails to reasonably assess the consumer of his rights concerning repossession."²²²

Implied Warranty of Merchantability UCC § 2-314 provides consumers with an implied warranty of merchantability for products, and has become a factor in a number of consumer lawsuits, including the following: alarm and monitoring systems, in which a contract clause disclaiming express or implied warranties was enforced;²²³ kitchen cabinets that melted in close proximity to stove found to constitute a breach of implied warranty of merchantability, and purchase price held to be the proper measure of damages;²²⁴ fake furs, where the court found that UCC § 2-314 preempts GBL § 218-a, discussed above;²²⁵ baseball bats;²²⁶ and even dentures, where the court stated that "implicated in the contract . . . was the warranty that the dentures would be fit for chewing and speaking. The two sets of dentures . . . were clearly not fit for these purposes."²²⁷

Licensing to Do Business

CPLR 3015(e) provides, in part, that "[w]here the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed . . . the complaint shall allege . . . that plaintiff is duly licensed. . . . The failure of the plaintiff to comply . . . will permit the defendant [consumer] to move for dismissal." This rule has been applied to the following:

Home Improvement Contractors "The Home Improvement Business provisions . . . were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors."²²⁸ An unlicensed home improvement contractor cannot sue a homeowner in Small Claims Courts for unpaid bills.²²⁹ The license of a subcontractor cannot be used by general contractor to meet licensing requirements.²³⁰ Salespeople, however, do not have to have a separate license.²³¹

Obtaining a license during the performance of the contract may be sufficient.²³² Obtaining a license after performance of the contract is not sufficient, however, because the legislative purpose "was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed."²³³

Used Car Dealers A used car dealer's claim against a consumer for balance of payment of \$2,500 for used car was dismissed for a failure to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs Regulation when the car was sold.²³⁴

Other Licensed Businesses "The legal consequences of failing to maintain a required license are well known. It is well settled that not being licensed to practice in a given field which requires a license precludes recovery for the services performed either pursuant to contract or in quantum meruit. . . . This bar against recovery applies to . . . architects and engineers, car services, plumbers, sidewalk vendors and all other businesses . . . that are required by law to be licensed."²³⁵

Telemarketing

It is quite common for consumers to receive unsolicited phone calls at their homes from mortgage lenders, credit card companies and the like. Many of these phone calls originate from automated telephone equipment or automatic dialing-announcing devices, the use of which is regulated by federal and New York State consumer protection statutes.

Federal Telephone Consumer Protection Act On the federal level the Telephone Consumer Protection Act²³⁶ (TCPA), codified at 47 USC § 227, prohibits users

of automated telephone equipment from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without express consent of the called party."²³⁷ The purpose of the TCPA is to provide "a remedy to consumers who are subjected to telemarketing abuses" and "to encourage consumers to sue and obtain monetary awards based on a violation of the statute."²³⁸ The TCPA provides a private right of action that may be asserted by consumers in New York State courts, including Small Claims Court.²³⁹

Some federal courts have held that the states have exclusive jurisdiction over private causes of action brought under the TCPA,²⁴⁰ while some scholars have complained that "Congress intended for private enforcement actions to be brought by *pro se* plaintiffs in small claims court, and practically limited enforcement to such tribunals."²⁴¹

Under the TCPA consumers may recover their actual monetary loss for each violation or up to \$500 in damages, whichever is greater. "[P]laintiff is entitled to damages of \$500 for the TCPA violation [and] an additional award of damages of \$500 for violation of the federal regulation";²⁴² treble damages may be awarded upon a showing that "defendant willfully and knowingly violated" the act;²⁴³ a plaintiff who received 33 unsolicited fax transmissions was awarded "statutory damages of \$16,500 or \$500 for each violation."²⁴⁴ This can add up; in 2001, a Virginia state court class action against the restaurant chain Hooters resulted in a jury award of \$12 million on behalf of 1,321 persons who had received six unsolicited faxes each.²⁴⁵

The constitutionality of the act has not gone unchallenged. Recently, a state trial court held that the TCPA, to the extent it restricts unsolicited fax advertisements, is unconstitutional as violative of freedom of speech,²⁴⁶ while another declined to pass on the constitutional issue for want of jurisdiction.²⁴⁷

New York State Telemarketing Statutes On the state level, GBL § 399-p "also places restrictions on the use of automatic dialing-announcing devices and placement of consumer calls in telemarketing"²⁴⁸ such as requiring the disclosure of the nature of the call, and the name of the person on whose behalf the call is being made. A violation of GBL § 399-p allows recovery of actual damages or \$50, whichever is greater, including trebling upon a showing of a willful violation.

Consumers aggrieved by telemarketing abuses may sue in Small Claims Court and recover damages under both the TCPA and GBL § 399-p. For example, a consumer sued a telemarketer in Small Claims Court and recovered \$500 for a violation of TCPA and \$50 for a violation of GBL § 399-p;²⁴⁹ a similar recovery was obtained in another case.²⁵⁰

Under New York State law, consumers are covered by a statute that permits them to opt out of receiving telemarketing calls. Pursuant to GBL § 399-z, known as the "Do Not Call" rule, consumers may prevent telemarketers from making unsolicited telephone calls by filing their names and phone numbers with a statewide registry. "No telemarketer . . . may make . . . any unsolicited telemarketing sales call to any customer . . . more than thirty days after the customer's name and telephone number[s] . . . appear on the then current quarterly no telemarketing sales calls registry." Violations of this rule may subject the telemarketer to a maximum fine of \$5,000. In March of 2002, 13 telemarketers accepted fines totaling \$217,000 for making calls to persons who joined the Do Not Call Registry.²⁵¹ In addition, the statute provides, "Nothing in this [rule] shall be construed to restrict any right which any person may have under any other statute or at common law."

Finally, New York consumers are protected against fraudulent or deceptive telemarketing practices under GBL § 399-pp, known as the Telemarketing and Consumer Fraud and Abuse Prevention Act. Telemarketers must register, pay a \$500 fee (GBL § 399-pp(3)) and post a \$25,000 bond "payable in favor of [New York State] for the benefit of any customer injured as a result of a violation of this section" (GBL § 399-pp(4)). The certificate of registration may be revoked and a \$1,000 fine imposed for a violation of this section and other similar statutes, including the federal TCPA.

The registered telemarketer may not engage in a host of specific deceptive (GBL § 399-pp(6)(a)) or abusive (GBL § 399-pp(7)) telemarketing acts or practices, must provide consumers with a variety of information (GBL § 399-pp(6)(b)) and may telephone only between 8:00 a.m. and 9:00 p.m. A violation of GBL § 399-pp is also a violation of GBL § 349, and also authorizes the imposition of a civil penalty of not less than \$1,000 nor more than \$2,000.

Conclusion

Although not always foolproof, consumer-oriented statutes, both state and federal, are potentially powerful tools that are available to all New Yorkers in their dealings with retail businesses. Attorneys consulted by an aggrieved consumer should always consider their use, either alone or in conjunction with other common-law theories of recovery.

1. For an excellent discussion of GBL § 349, see *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001), *rev'd in part*, 344 F.3d 211 (2d Cir. 2003).
2. See, e.g., *id.* 344 F.3d at 218–19 (" . . . a plaintiff need neither be a consumer nor be someone standing in the shoes of a consumer to have an actionable claim under [GBL §

- 349] . . . ‘although the statute is, at its core, a consumer protection device . . . it does provide a right of action to any person who has been injured by reason of any violation of this section.’ . . . We therefore held that a party has standing under Section 349 when its complaint alleges a ‘consumer injury or harm to the public interest’ . . . Thus ‘the critical question . . . is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer.’ Here Appellants’ deceptive practices involved serious harm to the public . . . induced consumers to smoke and discouraged them from quitting smoking, thus significantly increasing their risk of illness and even death. Accordingly, we find that the fact that [plaintiff] was not a consumer of defendants’ products does not prevent it from having standing to sue on its own behalf under Section 349’). New York Court of Appeals accepted two certified questions on scope of GBL § 349 in *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris Inc.*, 100 N.Y.2d 636, 769 N.Y.S.2d 196 (2003).
3. See, e.g., *Hart v. Moore*, 155 Misc. 2d 203, 587 N.Y.S.2d 477 (Sup. Ct., Westchester Co. 1992). However, at least one court has awarded damages exceeding the \$1,000 limit. See *Lipscomb v. Manfredi Motors*, N.Y.L.J., Apr. 9, 2002, p. 21, col. 6 (Civ. Ct., Richmond Co.) (damages consisted of the “balance owed to the claimant pursuant to the arbitrator’s award . . . reduced to the jurisdictional amount of \$3,000”); *Levitsky v. SG Hylan Motors, Inc.*, N.Y.L.J., July 3, 2003, p. 27, col. 5 (Civ. Ct., Richmond Co.) (“In addition GBL 349(h) allows the court to award punitive damages. The actions of the defendant entitled the claimant to an award of actual damages and punitive damages up to the \$3,000.00, the jurisdictional limit of small claims part”).
 4. *State of N.Y. v. Justin*, 3 Misc. 3d 973, 779 N.Y.S.2d 717 (Sup. Ct., Erie Co. 2003) (investment scheme for the purchase of pay phones marketed to elderly).
 5. *People v. Gift & Luggage Outlet, Inc.*, 194 Misc. 2d 582, 756 N.Y.S.2d 717 (Sup. Ct., N.Y. Co. 2003) (GBL §§ 870 *et seq.* prohibiting the sale of imitation weapons preempts GBL § 349 (GBL § 873 was enacted “to prescribe the enforcement mechanisms and penalties to be imposed for violations of [GBL § 872]. To accept the . . . argument that a violation of section 872 should also lead to the imposition of additional penalties pursuant to [GBL §§ 349, 350-d] would upset the statutory scheme and impose double penalties for the same violation in a manner not intended by the Legislature”).
 6. *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 532 (1995). See *Waltz v. First Union Mortgage Corp.*, 259 A.D.2d 322, 686 N.Y.S.2d 428 (1st Dep’t) (“Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers”), *appeal dismissed*, 94 N.Y.2d 795, 700 N.Y.S.2d 424 (1999); *Dunn v. Northgate Ford, Inc.*, 1 Misc. 3d 911(A) (Sup. Ct., Broome Co. 2004) (“there is evidence from other affiants that similar omissions and/or misstatements of fact, known to the dealer to be false or misleading . . . occurred in other sales at the same dealership . . . such practices are not isolated instances and would have a ‘broader impact on consumers at large’”); *McKinnon v. Int’l Fid. Ins. Co.*, 182 Misc. 2d 517, 522, 704 N.Y.S.2d 774 (Sup. Ct., N.Y. Co. 1999) (“the conduct must be consumer-oriented and have a broad impact on consumers at large”).
 7. See, e.g., *Berardino v. Ochlan*, 2 A.D.3d 556, 770 N.Y.S.2d 75 (2d Dep’t 2003) (claim against insurance agent for misrepresentations not consumer oriented); *Martin v. Group Health, Inc.*, 2 A.D.3d 414, 767 N.Y.S.2d 803 (2d Dep’t 2003) (dispute over insurance coverage for dental implants not consumer oriented); *Goldblatt v. MetLife, Inc.*, 306 A.D.2d 217, 760 N.Y.S.2d 850 (1st Dep’t 2003) (claim against insurance company not “consumer oriented”); *Rosenberg & Estis, P.C. v. Chicago Ins. Co.*, 2003 N.Y. Misc. LEXIS 895 (Sup. Ct., N.Y. Co. 2003) (conduct not consumer oriented; “Although the complaint includes allegations that the insurer’s alleged bad acts had an impact on the public [plaintiff] is a large law firm, which commenced this action to protect its interests under a specific insurance policy”); *Canario v. Gunn*, 300 A.D.2d 332, 751 N.Y.S.2d 310 (2d Dep’t 2002) (.78-acre property advertised as 1.5 acres in size; “the misrepresentation had the potential to affect only a single real estate transaction involving a single unique piece of property. . . . There was no impact on consumers or the public at large”); *Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285, 290, 703 N.Y.S.2d 103 (1st Dep’t 2000).
 8. *BNI N.Y. Ltd. v. DeSanto*, 177 Misc. 2d 9, 14–15, 675 N.Y.S.2d 752 (Yonkers City Ct. 1998).
 9. See *Anonymous v. CVS Corp.*, N.Y.L.J., Jan. 8, 2004, p. 19, col. 1 (Sup. Ct., N.Y. Co.) (“Deception itself with no other injury is not actionable under § 349 [citing] *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43 (1999)”).
 10. *Gabbay v. Mandel*, N.Y.L.J., Mar. 10, 2004, p. 19, col. 3 (Sup. Ct., N.Y. Co.).
 11. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273, 401 N.Y.S.2d 182 (1977).
 12. *Oswego Laborers’ Local 214 Pension Fund*, 85 N.Y.2d at 26.
 13. *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999).
 14. *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30 (2001).
 15. *State of N.Y. v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002).
 16. CPLR 214(2).
 17. *Feldman*, 210 F. Supp. 2d 294; see *Soskel v. Handler*, 189 Misc. 2d 795, 736 N.Y.S.2d 853 (Sup. Ct., Nassau Co. 2001) (unsatisfactory performance of hair transplant procedures; GBL § 349 claim accrued when last surgical procedure was performed).
 18. *Goshen v. Mut. Life Ins. Co.*, 286 A.D.2d 229, 730 N.Y.S.2d 46 (1st Dep’t 2001).
 19. *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 726 N.Y.S.2d 60 (1st Dep’t 2001).
 20. *Farino v. Jiffy Lube Int’l, Inc.*, 298 A.D.2d 553, 748 N.Y.S.2d 673 (2d Dep’t 2002).
 21. *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002).
 22. *Id.*
 23. See, e.g., *Murrin v. Ford Motor Co.*, 303 A.D.2d 475, 756 N.Y.S.2d 596 (2d Dep’t 2003) (GBL § 349 claim dismissed for failing to “allege that the deceptive acts complained of took place within the State of New York”); *Mounitz v. Global Vision Prods.*, 3 Misc. 3d 171, 770 N.Y.S.2d 603 (Sup. Ct., N.Y. Co. 2003) (“this complaint pleads no consumer action or contact occurring within New York State as the out-of-state plaintiffs”).
 24. *Truschel v. Juno Online Servs., Inc.*, N.Y.L.J., Dec. 12, 2002, p. 21, col. 4 (Sup. Ct., N.Y. Co.).
 25. *Peck v. AT&T Corp.*, N.Y.L.J., Aug. 1, 2002, p. 18, col. 3 (Sup. Ct., N.Y. Co.).
 26. *Bartolomeo v. Runco*, 162 Misc. 2d 485, 616 N.Y.S.2d 695 (Yonkers City Ct. 1994); *Anilesh v. Williams*, N.Y.L.J., Nov.

- 15, 1995, p. 38, col. 2 (Yonkers City Ct.) (landlord can not recover unpaid rent for illegal apartment).
27. *Yochim v. McGrath*, 165 Misc. 2d 10, 626 N.Y.S.2d 685 (Yonkers City Ct. 1995).
 28. *People v. Law Offices of Andrew F. Capoccia*, Albany County Sup., Index No: 6424-99, Aug. 22, 2000.
 29. *Aponte v. Raychuk*, 160 A.D.2d 636, 559 N.Y.S.2d 255 (1st Dep't 1990).
 30. *Oxman v. Amoroso*, 172 Misc. 2d 773, 659 N.Y.S.2d 963 (Yonkers City Ct. 1997).
 31. *Lipscomb v. Manfredi Motors*, N.Y.L.J., Apr. 9, 2002, p. 21, col. 6 (Civ. Ct., Richmond Co.).
 32. *Feldman*, 210 F. Supp. 2d 294.
 33. *Levitsky v. SG Hylan Motors, Inc.*, N.Y.L.J., July 3, 2003, p. 27, col. 5 (Civ. Ct., N.Y. Co.).
 34. *People v. Trescha Corp.*, N.Y.L.J., Dec. 6, 2000, p. 26, col. 3 (Sup. Ct., N.Y. Co.).
 35. *People v. Condor Pontiac*, 2003 N.Y. Misc. LEXIS 881 (Sup. Ct., Greene Co. 2003).
 36. *Naevus Int'l, Inc. v. AT&T Corp.*, 185 Misc. 2d 655, 713 N.Y.S.2d 642 (Sup. Ct., N.Y. Co. 2000).
 37. *Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951, 673 N.Y.S.2d 281 (Yonkers City Ct. 1998).
 38. *People v. Telehublink*, 301 A.D.2d 1006, 756 N.Y.S.2d 285 (3d Dep't 2003).
 39. *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 758 N.Y.S.2d 284 (1st Dep't 2003).
 40. *Broder v. MBNA Corp.*, N.Y.L.J., Mar. 2, 2000, p. 29, col. 4 (Sup. Ct., N.Y. Co.), *aff'd*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001).
 41. *Anonymous v. CVS Corp.*, 188 Misc. 2d 616, 728 N.Y.S.2d 333 (Sup. Ct., N.Y. Co. 2001).
 42. *Ritchie v. Empire Ford Sales, Inc.*, N.Y.L.J., Nov. 7, 1996, p. 30, col. 3 (Yonkers City Ct.).
 43. *Giarrantano v. Midas Muffler*, 166 Misc. 2d 390, 630 N.Y.S.2d 656 (Yonkers City Ct. 1995).
 44. *People v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 756 N.Y.S.2d 520 (1st Dep't 2003).
 45. *N.Y. Envtl. Resources v. Franklin*, N.Y.L.J., Mar. 4, 2003, p. 27, col. 1 (Civ. Ct., Kings Co.).
 46. *Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S.2d 182 (Yonkers City Ct. 1994).
 47. *Andre v. Pace Univ.*, 161 Misc. 2d 613, 618 N.Y.S.2d 975 (Yonkers City Ct. 1994), *rev'd on other grounds*, 170 Misc. 2d 893, 655 N.Y.S.2d 777 (App. Term, 2d Dep't 1996).
 48. *Brown v. Hambric*, 168 Misc. 2d 502, 638 N.Y.S.2d 873 (Yonkers City Ct. 1995).
 49. *Cambridge v. Telemarketing Concepts, Inc.*, 171 Misc. 2d 796, 655 N.Y.S.2d 795 (Yonkers City Ct. 1997).
 50. *McKinnon v. Int'l Fid. Ins. Co.*, 182 Misc. 2d 517, 704 N.Y.S.2d 774 (Sup. Ct., N.Y. Co. 1999).
 51. *Sharknet Inc. v. Techmarketing, NY Inc.*, N.Y.L.J., Apr. 22, 1997, p. 32, col. 3 (Yonkers City Ct.), *aff'd* N.Y.A.T., Decision dated Dec. 7, 1998.
 52. *Petrello v. Winks Furniture*, N.Y.L.J., May 21, 1998, p. 32, col. 3 (Yonkers City Ct.).
 53. *Walker v. Winks Furniture*, 168 Misc. 2d 265, 640 N.Y.S.2d 428 (Yonkers City Ct. 1996).
 54. *Filpo v. Credit Express Furniture Inc.*, N.Y.L.J., Aug. 26, 1997, p. 26, col. 4 (Yonkers City Ct.).
 55. *Colon v. Rent-A-Center, Inc.*, 276 A.D.2d 58, 716 N.Y.S.2d 7 (1st Dep't 2000).
 56. *Mountz v. Global Vision Prods., Inc.*, 3 Misc. 3d 171, 770 N.Y.S.2d 603 (Sup. Ct., N.Y. Co. 2003).
 57. *People v. Wilco Energy Corp.*, 284 A.D.2d 469, 728 N.Y.S.2d 471 (2d Dep't 2001).
 58. *Ricciardi v. Frank*, 163 Misc. 2d 337, 620 N.Y.S.2d 918 (Yonkers City Ct. 1994), *modified*, 170 Misc. 2d 777, 655 N.Y.S.2d 242 (N.Y.A.T. 1996).
 59. *Karlin*, 93 N.Y.2d 282.
 60. *Gaidon*, 94 N.Y.2d at 338.
 61. *Brenkus v. Metro. Life Ins. Co.*, 309 A.D.2d 1260, 765 N.Y.S.2d 80 (4th Dep't 2003).
 62. *Acquista v. N.Y. Life Ins. Co.*, 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dep't 2001).
 63. *Rubinoff v. U.S. Capitol Ins. Co.*, N.Y.L.J., May 10, 1996, p. 31, col. 3 (Yonkers City Ct.).
 64. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 704 N.Y.S.2d 44 (1st Dep't 2000).
 65. *Zurakov v. Register.Com, Inc.*, 304 A.D.2d 176, 760 N.Y.S.2d 13 (1st Dep't 2003).
 66. *People v. Network Assocs.*, 195 Misc. 2d 384, 758 N.Y.S.2d 466 (Sup. Ct., N.Y. Co. 2003).
 67. *People v. Lipsitz*, 174 Misc. 2d 571, 663 N.Y.S.2d 468 (Sup. Ct., N.Y. Co. 1997).
 68. *Goshen*, 98 N.Y.2d 314. In *Croak v. Bell Atl. Corp.*, N.Y.L.J., Jan. 10, 2002, p. 20, col. 4 (Sup. Ct., N.Y. Co.), the court dismissed a consumer class action claiming that DSL services were misrepresented as to speed and quality citing as authority *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 726 N.Y.S.2d 60 (1st Dep't 2001). The *Scott* decision was later modified by the Court of Appeals restoring the GBL § 349 claim.
 69. *Drizin v. Sprint Corp.*, 3 A.D.3d 388, 771 N.Y.S.2d 82 (1st Dep't 2004).
 70. *Gabbay v. Mandel*, N.Y.L.J., Mar. 10, 2004, p. 19, col. 3 (Sup. Ct., N.Y. Co.).
 71. *Morgan Servs., Inc. v. Episcopal Church Home & Affiliates Life Care Cmty., Inc.*, 305 A.D.2d 1105, 757 N.Y.S.2d 917 (4th Dep't 2003).
 72. *Dunn v. Northgate Ford, Inc.*, 1 Misc. 3d 911(A) (Sup. Ct., Broome Co. 2004).
 73. *Lewis v. DiDonna*, 294 A.D.2d 799, 743 N.Y.S.2d 186 (3d Dep't 2002).
 74. *Kidd v. Delta Funding Corp.*, 299 A.D.2d 457, 751 N.Y.S.2d 267 (2d Dep't 2002).
 75. *Walts v. First Union Mortgage Corp.*, N.Y.L.J., Apr. 25, 2000, p. 26, col. 1 (Sup. Ct., N.Y. Co.). See *Walts v. First Union Mortgage Corp.*, 259 A.D.2d 322, 686 N.Y.S.2d 428 (1st Dep't), *appeal dismissed*, 94 N.Y.2d 795, 700 N.Y.S.2d 424 (1999) (no private right of action under N.Y. Insurance Law § 6503; claims for money had and received, breach of fiduciary duty and tortious interference with contractual relation dismissed).
 76. *Negrin v. Norwest Mortgage, Inc.*, 263 A.D.2d 39, 700 N.Y.S.2d 184 (2d Dep't 1999).
 77. *Trang v. HSBC Mortgage Corp., USA*, N.Y.L.J., Apr. 17, 2002, p. 28, col. 3 (Sup. Ct., Queens Co.).
 78. *Farino v. Jiffy Lube Int'l, Inc.*, N.Y.L.J., Aug. 14, 2001, p. 22, col. 4 (Sup. Ct., N.Y. Co.).
 79. *Goretsky v. 1/2 Price Movers*, N.Y.L.J., Mar. 12, 2004, p. 19, col. 3 (Civ. Ct., N.Y. Co.).
 80. *BNI N.Y. Ltd.*, 177 Misc. 2d at 14-15; See *Ricucci v. Business Network Int'l*, Index No. SC 8876/97, Decision dated May 5, 1998, Yonkers City Ct. (TAD) (professional networking

- organization fails to deliver “good referrals” to real estate broker).
81. *Anonymous v. CVS Corp.*, N.Y.L.J., Jan. 8, 2004, p. 19, col. 1 (Sup. Ct., N.Y. Co.); *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 A.D.2d 598, 741 N.Y.S.2d 100 (2d Dep’t 2000).
 82. *C.T.V., Inc. v. Curlen*, N.Y.L.J., Dec. 3, 1997, p. 35, col. 1 (Yonkers City Ct.).
 83. *Brown*, 168 Misc. 2d 502.
 84. *Gutterman v. Romano Real Estate*, N.Y.L.J., Oct. 28, 1998, p. 36, col. 3 (Yonkers City Ct.).
 85. *Board of Mgrs. of Bayberry Greens Condo. v. Bayberry Greens Assocs.*, 174 A.D.2d 595, 571 N.Y.S.2d 496 (2d Dep’t 1991).
 86. *B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc.*, 225 A.D.2d 643, 640 N.Y.S.2d 135 (2d Dep’t 1996).
 87. *Breakwaters Townhouses Ass’n v. Breakwaters of Buffalo, Inc.*, 207 A.D.2d 963, 616 N.Y.S.2d 829 (4th Dep’t 1994).
 88. *Latiuk v. Faber Constr. Co.*, 269 A.D.2d 820, 703 N.Y.S.2d 645 (4th Dep’t 2000).
 89. *Polonetsky v. Better Homes Depot, Inc.*, 185 Misc. 2d 282, 712 N.Y.S.2d 801 (Sup. Ct., N.Y. Co. 2000), *aff’d in part, modified in part*, 279 A.D.2d 418, 720 N.Y.S.2d 59 (1st Dep’t), *rev’d*, 97 N.Y.2d 46, 735 N.Y.S.2d 479 (2001).
 90. *Fesseha v. TD Waterhouse Investor Servs., Inc.*, 193 Misc. 2d 253, 747 N.Y.S.2d 676 (Sup. Ct., N.Y. Co. 2002).
 91. *Berger v. E*Trade Group, Inc.*, 2000 WL 360092 (N.Y. Sup. Ct. 2000).
 92. *Morelli v. Weider Nutrition Group, Inc.*, 275 A.D.2d 607, 712 N.Y.S.2d 551 (1st Dep’t 2000).
 93. *Anunziata v. Orkin Exterminating Co., Inc.*, 180 F. Supp. 2d 353 (N.D.N.Y. 2001).
 94. *Blue Cross & Blue Shield of N.J., Inc.*, 344 F.3d 211.
 95. *Kinkopf v. Triborough Bridge & Tunnel Auth.*, 1 Misc. 3d 417, 764 N.Y.S.2d 549 (Civ. Ct., Richmond Co. 2003) (deceptive practices involve a failure to inform customers who or what is E-Z Pass, which of four different State authorities actually is the contracting party and what the rules are for filing claims and commencing lawsuits; “having four agencies with four separate procedures when a customer believes he or she has contracted with one totally different entity is a deceptive practice that entitles the claimant to damages of \$50.00”).
 96. *Meachum v. Outdoor World Corp.*, 235 A.D.2d 462, 652 N.Y.S.2d 749 (2d Dep’t 1997).
 97. *Vallery v. Bermuda Star Line, Inc.*, 141 Misc. 2d 395, 532 N.Y.S.2d 965 (Civ. Ct., N.Y. Co. 1988).
 98. *Pellegrini v. Landmark Travel Group*, 165 Misc. 2d 589, 628 N.Y.S.2d 1003 (Yonkers City Ct. 1995).
 99. *People v. P.U. Travel, Inc.*, N.Y.L.J., June 19, 2003, p. 20 (Sup. Ct., N.Y. Co.).
 100. *Tarantola v. Becktronix, Ltd.*, Index No: SCR 1615/03, N.Y. Civ. Ct., Richmond Co., Mar. 31, 2004 (Straniere, J.).
 101. *Jacobs, Bride Wins Lawsuit Over a Switch in Wedding Singers*, N.Y. Times, Sept. 10, 1998 at B1; *Griffin-Amiel v. Frank Terris Orchestras*, 178 Misc. 2d 71, 677 N.Y.S.2d 908 (Yonkers City Ct. 1998).
 102. N.Y.L.J., Feb. 24, 2003, p. 21, col. 4 (Sup. Ct., N.Y. Co.).
 103. *Goshen*, 98 N.Y.2d 314.
 104. *Card v. Chase Manhattan Bank*, 175 Misc. 2d 389, 669 N.Y.S.2d 117 (Civ. Ct., Kings Co. 1996).
 105. *Id.* at 395.
 106. *Karlin*, 93 N.Y.2d 282.
 107. *People v. Lipsitz*, 174 Misc. 2d 571, 663 N.Y.S.2d 468, 475 (Sup. Ct., N.Y. Co. 1997).
 108. *Millan v. Yonkers Ave. Dodge, Inc.*, N.Y.L.J., Sept. 17, 1996, p. 26, col. 5 (Yonkers City Ct.).
 109. Automobile manufacturers or dealers may sell consumers new and used car warranties which, typically, are contingent upon an opportunity to cure. *Borys v. Scarsdale Ford Inc.*, N.Y.L.J., June 15, 1998, p. 34, col. 4 (Yonkers City Ct.).
 110. *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250 (1995) (comparison of causes of action based upon strict products liability and breach of warranty of merchantability).
 111. Strict products liability theory applies to new and used car dealers. *Nutting v. Ford Motor Co.*, 180 A.D.2d 122, 584 N.Y.S.2d 653 (3d Dep’t 1992).
 112. N.Y.L.J., Nov. 7, 1996, p. 30, col. 3 (Yonkers City Ct.).
 113. N.Y.L.J., June 15, 1998, p. 34, col. 4 (Yonkers City Ct.).
 114. *Giarrantano v. Midas Muffler*, 166 Misc. 2d 390, 394, 630 N.Y.S.2d 656 (Yonkers City Ct. 1995).
 115. *Id.* at 397 (quoting GBL § 617(2)(a)).
 116. *Id.* at 398–99.
 117. *Welch v. Exxon Superior Serv. Ctr.*, N.Y.L.J., May 8, 2003, p. 25, col. 2 (Westchester City Ct.).
 118. *Shalit v. Dep’t of Motor Vehicles*, 153 Misc. 2d 241, 580 N.Y.S.2d 836 (Sup. Ct., Nassau Co. 1992).
 119. UCC §§ 2-314, 2-318; *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 638 N.Y.S.2d 250 (1995).
 120. UCC § 2-725.
 121. *Hull v. Moore’s Mobile Home, Stebra, Inc.*, 214 A.D.2d 923, 924, 625 N.Y.S.2d 710 (3d Dep’t 1995).
 122. UCC § 2-316.
 123. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (Utica City Ct. 1978).
 124. The federal Magnuson-Moss Warranty Act provides disclosure requirements for automobile warranties and requires warrantors to remedy defects under warranty “within a reasonable time.”
 125. N.Y.L.J., Oct. 30, 2000, p. 34, col. 5 (Sup. Ct., Westchester Co.).
 126. 185 Misc. 2d 667, 713 N.Y.S.2d 808 (Sup. Ct., N.Y. Co. 2000).
 127. N.Y.L.J., Aug. 30, 2000, p. 26 (Civ. Ct., Kings Co.).
 128. 97 N.Y.2d 463, 742 N.Y.S.2d 182 (2002).
 129. *Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951, 673 N.Y.S.2d 281 (Yonkers City Ct. 1998).
 130. *Borys v. Scarsdale Ford, Inc.*, N.Y.L.J., June 15, 1998, p. 34, col. 4 (Yonkers City Ct.).
 131. *Levitsky v. SG Hylan Motors, Inc.*, N.Y.L.J., July 3, 2003, p. 27, col. 5 (Civ. Ct., Richmond Co.).
 132. *Borys*, N.Y.L.J., June 15, 1998.
 133. *Chrysler Motors Corp. v. Schachmer*, 166 A.D.2d 683, 561 N.Y.S.2d 595, 596–97 (2d Dep’t 1990); *Kucher v. DaimlerChrysler Corp.*, 194 Misc. 2d 688, 754 N.Y.S.2d 512 (Civ. Ct., Queens Co. 2003).
 134. *B & L Auto Group, Inc. v. Zelig*, N.Y.L.J., July 6, 2001, p. 21, col. 2 (Civ. Ct., Bronx Co.).
 135. *Barthley v. Autostar Funding LLC*, Index No: SC 3618-03, Yonkers Small Claims Ct., Dec. 31, 2003 (Borrelli, J.).
 136. *Cintron v. Tony Royal Quality Used Cars, Inc.*, 132 Misc. 2d 75, 503 N.Y.S.2d 230 (Civ. Ct., Kings Co. 1986).
 137. *Millan*, N.Y.L.J., Sept. 17, 1996.
 138. *Armstrong v. Boyce*, 135 Misc. 2d 148, 513 N.Y.S.2d 613 (Watertown City Ct. 1987).

139. *Fortune v. Scott Ford, Inc.*, 175 A.D.2d 303, 572 N.Y.S.2d 382 (3d Dep't 1991).
140. *Jandreau v. LaVigne*, 170 A.D.2d 861, 566 N.Y.S.2d 683 (3d Dep't 1991).
141. *Ireland v. J.L.'s Auto Sales, Inc.*, 151 Misc. 2d 1019, 574 N.Y.S.2d 262 (Justice Ct., Wayne Co. 1991), *rev'd*, 153 Misc. 2d 721, 582 N.Y.S.2d 603 (County Ct., Wayne Co. 1992).
142. *Williams v. Planet Motor Car, Inc.*, N.Y.L.J., Jan. 3, 2002, p. 19, col. 3 (Civ. Ct., Kings Co.).
143. *Lipscomb v. Manfredi Motors*, N.Y.L.J., Apr. 9, 2002, p. 21, col. 6 (Civ. Ct., Richmond Co.).
144. *Williams*, N.Y.L.J., Jan. 3, 2002.
145. *Barilla v. Gunn Buick Cadillac-GMC, Inc.*, 139 Misc. 2d 496, 528 N.Y.S.2d 273 (Oswego City Ct. 1988).
146. *Ritchie v. Empire Ford Sales Inc.*, N.Y.L.J., Nov. 7, 1996, p. 30, col. 3 (Yonkers City Ct.).
147. *Condor Pontiac*, 3 N.Y. Misc. LEXIS 881.
148. *Williams*, N.Y.L.J., Jan. 3, 2002.
149. *Udezeh v. A+Plus Constr. Co.*, N.Y.L.J., Oct. 10, 2002, p. 22, col. 5 (Civ. Ct., Queens Co.).
150. *Tri-State Gen. Remodeling Contractors, Inc. v. Inderdai Baijnauth*, 194 Misc. 2d 135, 753 N.Y.S.2d 327 (Civ. Ct., Bronx Co. 2002).
151. *Routier v. Waldeck*, 184 Misc. 2d 487, 708 N.Y.S.2d 270 (Dist. Ct., Nassau Co. 2000).
152. *Cudahy v. Cohen*, 171 Misc. 2d 469, 661 N.Y.S.2d 171 (Dist. Ct., Nassau Co. 1997).
153. *Moonstar Contractors, Inc. v. Katsir*, N.Y.L.J., Oct. 4, 2001, p. 19, col. 6 (Civ. Ct., N.Y. Co.).
154. *Mindich Developers, Inc. v. Milstein*, 227 A.D.2d 536, 642 N.Y.S.2d 704 (2d Dep't 1996), *rev'g* 164 Misc. 2d 71, 623 N.Y.S.2d 704 (Sup. Ct., Westchester Co. 1995).
155. *B&F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 563 N.Y.S.2d 40 (1990).
156. *Rosen v. Watermill Dev. Corp.*, 1 A.D.3d 424, 768 N.Y.S.2d 474 (2d Dep't 2003).
157. *Taggart v. Martano*, 282 A.D.2d 521, 723 N.Y.S.2d 211 (2d Dep't 2001).
158. *Goretsky*, N.Y.L.J., Mar. 12, 2004.
159. *Bank of N.Y. v. Walden*, 194 Misc. 2d 461, 751 N.Y.S.2d 341 (Sup. Ct., Nassau Co. 2002).
160. *Cnty. Mut. Savings Bank v. Gillen*, 171 Misc. 2d 535, 655 N.Y.S.2d 271 (Mt. Vernon City Ct. 1997).
161. *Rochester Home Equity, Inc. v. Upton*, 1 Misc. 3d 412, 767 N.Y.S.2d 201 (Sup. Ct., Monroe Co. 2003).
162. *Tyk v. Equifax Credit Info. Servs., Inc.*, 195 Misc. 2d 566, 758 N.Y.S.2d 761 (App. Term, 2d Dep't 2003).
163. *Albank, FSB v. Foland*, 177 Misc. 2d 569, 676 N.Y.S.2d 461 (Albany City Ct. 1998).
164. *Rochester Home Equity, Inc.*, 1 Misc. 3d 412.
165. *Dougherty v. N. Fork Bank*, 301 A.D.2d 491, 753 N.Y.S.2d 130 (2d Dep't 2003). *See Negrin*, 263 A.D.2d 39.
166. *DiMarzo v. Terrace View*, N.Y.L.J., June 9, 1997, p. 34, col. 3 (Yonkers City Ct.), *remanded on damages only*, N.Y.A.T. Decision dated Oct. 27, 1998.
167. *Id.*
168. GBL § 201(1).
169. *DiMarzo*, N.Y.L.J., June 9, 1997.
170. *Tannenbaum v. N.Y. Dry Cleaning, Inc.*, N.Y.L.J., July 26, 2001, p. 19, col. 1 (Civ. Ct., N.Y. Co.).
171. *Brown*, 168 Misc. 2d 502.
172. *Id.*
173. *C.T.V., Inc.*, N.Y.L.J., Dec. 3, 1997.
174. *Pacurib v. Villacruz*, 183 Misc. 2d 850, 705 N.Y.S.2d 819 (Civ. Ct., Bronx Co. 1999).
175. *See, e.g., Brown*, 168 Misc. 2d 502; *C.T.V., Inc.*, N.Y.L.J., Dec. 3, 1997.
176. *Brown*, 168 Misc. 2d 502.
177. *Spatz v. Axelrod Mgmt. Co.*, 165 Misc. 2d 759, 630 N.Y.S.2d 461 (Yonkers City Ct. 1995).
178. *Seecharin v. Radford Ct. Apt. Corp.*, Index No. SC 3194-95, Yonkers City Ct. (TAD), Decision dated June 15, 1995.
179. *Spatz*, 165 Misc. 2d at 764.
180. *Id.* at 759; *Seecharin*, Index No. SC 3194-95.
181. *Kachian v. Aronson*, 123 Misc. 2d 743, 475 N.Y.S.2d 214 (Civ. Ct., N.Y. Co. 1984) (15% rent abatement).
182. *Spatz*, 165 Misc. 2d at 759.
183. *Goode v. Bay Towers Apts. Corp.*, 1 Misc. 3d 381, 764 N.Y.S.2d 583 (Civ. Ct., Queens Co. 2003).
184. *Welch v. N.Y. Sports Club Corp.*, N.Y.L.J., Mar. 21, 2003, p. 19, col. 3 (Civ. Ct., N.Y. Co.).
185. *Hamilton v. Khalife*, 289 A.D.2d 444, 735 N.Y.S.2d 564 (2d Dep't 2001); *Morris v. Snappy Car Rental*, 189 A.D.2d 115, 595 N.Y.S.2d 577 (4th Dep't 1993).
186. *Bauman v. Eagle Chase Assocs.*, 226 A.D.2d 488, 641 N.Y.S.2d 107 (2d Dep't 1996); *Filippazzo v. Garden State Brickface Co.*, 120 A.D.2d 663, 502 N.Y.S.2d 258 (2d Dep't 1986).
187. *Tannenbaum*, N.Y.L.J., July 26, 2001.
188. *Hacker v. Smith Barney, Harris Upham & Co.*, 131 Misc. 2d 757, 501 N.Y.S.2d 977 (Civ. Ct., N.Y. Co. 1986).
189. *Lerner v. Karageorgis Lines, Inc.*, 66 N.Y.2d 479, 497 N.Y.S.2d 894 (1985).
190. *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 758 N.Y.S.2d 284 (1st Dep't 2003).
191. *Mongelli v. Cabral*, 166 Misc. 2d 240, 632 N.Y.S.2d 927 (Yonkers City Ct. 1995).
192. *Mathew v. Klinger*, N.Y.L.J., Oct. 7, 1997, p. 29, col. 1 (Yonkers City Ct.), *modified*, 179 Misc. 2d 609, 686 N.Y.S.2d 549 (App. Term, 2d Dep't 1998).
193. *O'Brien v. Exotic Pet Warehouse, Inc.*, N.Y.L.J., Oct. 5, 1999, p. 35, col. 2 (Yonkers City Ct.).
194. *Nardi v. Gonzalez*, 165 Misc. 2d 336, 630 N.Y.S.2d 215 (Yonkers City Ct., 1995).
195. *Mercurio v. Weber*, N.Y.L.J., June 30, 2003, p. 33, col. 5 (Dist. Ct., Nassau Co.).
196. *Fuentes v. United Pet Supply, Inc.*, N.Y.L.J., Sept. 12, 2000, p. 24, col. 3 (Civ. Ct., Richmond Co.).
197. *Saxton v. Pets Warehouse, Inc.*, 180 Misc. 2d 377, 691 N.Y.S.2d 872 (App. Term, 2d Dep't 1999).
198. *Smith v. Tate*, N.Y.L.J., Jan. 28, 1999, p. 35, col. 5 (Civ. Ct., Suffolk Co.).
199. *Sacco v. Tate*, 175 Misc. 2d 901, 672 N.Y.S.2d 618 (App. Term, 2d Dep't 1998).
200. *Rossi*, 162 Misc. 2d 932, 936.
201. *Id. Compare Millan v. Yonkers Ave. Dodge, Inc.*, N.Y.L.J., Sept. 17, 1996, p. 26, col. 5 (Yonkers City Ct.) (cooling-off period under Door-to-Door Sales Act does not apply to sale of used cars which is governed, in part, by cure requirements under New York's Used Car Lemon Law (GBL § 198-b)).
202. *N.Y. Envtl. Resources*, N.Y.L.J., Mar. 4, 2003.

203. *Rossi*, 162 Misc. 2d 932; *N.Y. Envtl. Resources*, N.Y.L.J., Mar. 4, 2003.
204. *Kozlowski v. Sears*, N.Y.L.J., Nov. 6, 1997, p. 27, col. 3 (Yonkers City Ct.).
205. *Filpo v. Credit Express Furniture Inc.*, N.Y.L.J., Aug. 26, 1997, p. 26, col. 4 (Yonkers City Ct.).
206. *Id.*
207. *Rossi*, 162 Misc. 2d at 938–40.
208. *Andin Int'l, Inc. v. Matrix Funding Corp.*, 194 Misc. 2d 719, 756 N.Y.S.2d 724 (Sup. Ct., N.Y. Co. 2003) (legislative history provides that “[t]his bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals”).
209. *Walker*, 168 Misc. 2d 265. *But see Dweyer v. Montalbano's Pool & Patio Ctr., Inc.*, N.Y.L.J., Mar. 16, 2004, p. 18, col. 3 (Civ. Ct., N.Y. Co.) (“There is nothing in the statute that permits the consumer to rescind the contract; damages are the only remedy under the statute”).
210. *Walker*, 168 Misc. 2d 265.
211. *Id.*
212. *Dweyer*, N.Y.L.J., Mar. 16, 2004.
213. *Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951, 673 N.Y.S.2d 281 (Yonkers City Ct. 1998).
214. *Id.*
215. *Id.* at 953.
216. *Id.*
217. On the issue of preemption see *Eina Realty v. Calixte*, 178 Misc. 2d 80, 679 N.Y.S.2d 796 (Civ. Ct., Kings Co. 1998) (RPAPL § 711, which permits commencement of litigation by landlord within three days of service of rent demand notice, is preempted by Fair Debt Collection Practice Act (15 USC § 1692)).
218. *Baker*, 175 Misc. 2d 951.
219. *Dudzik v. Klein's All Sports*, 158 Misc. 2d 72, 600 N.Y.S.2d 1013 (Justice Ct., Albany Co. 1993).
220. *Baker*, 175 Misc. 2d at 956–57.
221. *Davis v. Rent-A-Center of Am., Inc.*, 150 Misc. 2d 403, 568 N.Y.S.2d 529 (Auburn City Ct. 1991).
222. *Osagiede v. Rent-A-Center*, N.Y.L.J., Dec. 2, 2003, p. 19, col. 3 (Civ. Ct., Richmond Co.).
223. *Cirillo v. Slomin's Inc.*, 196 Misc. 2d 922, 768 N.Y.S.2d 759 (Sup. Ct., Nassau Co. 2003).
224. *Malul v. Capital Cabinets, Inc.*, 191 Misc. 2d 399, 740 N.Y.S.2d 828 (Civ. Ct., Kings Co. 2002).
225. *Baker*, 175 Misc. 2d 951. On the issue of preemption see *Eina Realty*, 178 Misc. 2d 80 (RPAPL § 711, which permits commencement of litigation by landlord within three days of service of rent demand notice, is preempted by Fair Debt Collection Practice Act (15 USC § 1692)).
226. *Dudzik*, 158 Misc. 2d 72.
227. *Shaw-Crummel v. American Dental Plan*, N.Y.L.J., Mar. 31, 2003, p. 34, col. 6 (Dist. Ct., Nassau Co.).
228. *Routier v. Waldeck*, 184 Misc. 2d 487, 708 N.Y.S.2d 270 (Dist. Ct., Nassau Co. 2000).
229. *Cudahy v. Cohen*, 171 Misc. 2d 469, 661 N.Y.S.2d 171 (Dist. Ct., Nassau Co. 1997).
230. *Moonstar Contractors, Inc. v. Katsir*, N.Y.L.J., Oct. 4, 2001, p. 19, col. 6 (Civ. Ct., N.Y. Co.).
231. *Tri-State Gen. Remodeling Contractors, Inc.*, 227 A.D.2d 536.
232. *Mindich Developers, Inc.*, 164 Misc. 2d 71.
233. *B&F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 563 N.Y.S.2d 40 (1990).
234. *B & L Auto Group, Inc. v. Zelig*, N.Y.L.J., July 6, 2001, p. 21, col. 2 (Civ. Ct., Bronx Co.).
235. *Id.*
236. Telephone Consumer Protection Act of 1991, 47 USC § 227.
237. 47 USC § 227(b)(1)(B).
238. *Kaplan v. First City Mortgage*, 183 Misc. 2d 24, 28, 701 N.Y.S.2d 859 (Rochester City Ct. 1999).
239. *Kaplan v. Democrat & Chronicle*, 266 A.D.2d 848, 698 N.Y.S.2d 799 (4th Dep't 1998); *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174, 710 N.Y.S.2d 368 (2d Dep't 2000). *Compare Charvat v. ATW, Inc.*, 127 Ohio App. 3d 288, 712 N.E.2d 805 (1998) (consumer in Small Claims court has no private right of action under TCPA unless and until telemarketer telephones a person more than once in any 12-month period after the person has informed the telemarketer that he or she does not want to be called).
240. *See, e.g., Int'l Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000); *United Artists Theater Circuit, Inc. v. F.C.C.*, 147 F. Supp. 2d 965 (D. Ariz. 2000).
241. *Miller and Biggerstaff, Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 Fed. Comm. L.J., 667, 668–69 (2000) (“The TCPA presents ‘an unusual constellation of statutory features.’ It provides a federal right to be free from certain types of telephone solicitations and facsimiles (faxes), but it does permit a victim to enforce that right in federal court. The TCPA’s principal enforcement mechanism is a private suit, but the TCPA does not permit an award of attorney fees to the prevailing party, as do most other private attorney general statutes. The TCPA is practically incapable of forming the basis of a class action . . .”).
242. *Kaplan v. Life Fitness Ctr.*, Rochester City Ct., Dec. 13, 1999.
243. 47 USC § 227(b)(3).
244. *Antollino v. Hispanic Media Group, USA, Inc.*, N.Y.L.J., May 9, 2003, p. 21, col. 3 (Sup. Ct., N.Y. Co.).
245. *See Glaberson, Dispute Over Faxed Ads Draws Wide Scrutiny After \$12 Million Award*, N.Y. Times Sunday National Section, July 22, 2001 at 18 (“The basic damages were set by multiplying the six faxes received by the 1,321 recipients by \$500 and then tripling the amount”).
246. *Rudgayzer & Gratt v. Enine, Inc.*, 193 Misc. 2d 449, 749 N.Y.S.2d 855 (Civ. Ct., Kings Co. 2002).
247. *Bonime v. Mgmt. Training Int'l*, N.Y.L.J., Feb. 6, 2004, p. 19, col. 1 (Sup. Ct., N.Y. Co.).
248. *Kaplan v. First City Mortgage*, 183 Misc. 2d 24.
249. *Id.*
250. *Kaplan v. Life Fitness Ctr.*, Rochester City Ct., Dec. 13, 1999.
251. *See 13 Telemarketers Accept Fines for Violating Do Not Call Law*, The Journal News, Mar. 10, 2002 at 3A (“In most cases the settlement is for \$1,000 per call, compared with a maximum fine of \$2,000 per call. More than 200 more companies are being investigated. . . . More than 4,000 complaints have been filed and nearly 2 million households have signed up to bar calls from telemarketers nationwide.”).

Assess Your Grammatical Acumen

BY SUSAN MCCLOSKEY

Grammar is the user's manual that comes with a language. It helps writers shape their thoughts into sentences that mean something to readers. You may not often consult this manual, for the very good reason that you don't need to. Even if you have forgotten what a past participle is or cannot distinguish a coordinate from a subordinate conjunction, you probably use these grammatical elements accurately more often than not.

So, whether you picked up grammar on the fly or learned it by diagramming sentences under Miss Grundy's watchful instruction, you may be thinking right now that the last thing you want to do is read this essay. Before you act on that thought, however, take the Grammar Quiz.

The errors represented in the quiz are those I encounter in almost every document I review for my clients, no matter what their practice area or level of experience. Think of them as the Lawyers' Top Ten. If you recognize what is awry in every sentence and can set things to rights, read no further. But if even one sentence looks just fine to you, or if you're curious about the grammatical errors that *other* legal writers repeatedly commit, read on. For the grammarphiles among you, I've provided a Bonus Question to test your recall of the parts of speech and their functions in sentences. Along the way, perhaps even grammarphobes will conclude that grammar fosters something more than the chilly virtue of correctness. It makes intelligible the interchange between writer and reader in which lawyers daily engage.

Here's the quiz. You can check your answers on page 33.

GRAMMAR QUIZ

Identify and correct the errors in the following sentences.

1. Ordinary socializing and flirtation fails to satisfy the severity test of a valid sexual-harassment claim.
2. What type of damages are available for recovery against a builder under these circumstances?
3. Once a moving party meets their burden, the burden shifts.

4. Formal title to the property would remain with the wife, which may be unpalatable to the husband.

5. Whether due process was honored; whether the parties' rights to be heard and represented were fully exercised; whether the court's discretionary ruling was reasoned or arbitrary: This can be determined only on a case-by-case basis.

6. Bradley's client said she understood the charges a few times during the conversation.

7. To prove actual malice, the defendant must have known the statements were false or published them with reckless disregard despite knowing they were false.

8. Neither the report of Dr. Farragut nor Dr. Rider contains the requisite information.

9. In the case of the Loan, (1) there is an express loan, (2) the terms of which are set forth in the Note, (3) which interest rate exceeds the permissible rate of 20%.

10. Like *Sheffield*, the adoptive parent contracted orally, but not in writing, to raise his wife's child as his own.

11. Bonus Question: For the words you do not recognize in the first stanza of Lewis Carroll's *Jabberwocky*, identify their parts of speech (*e.g.*, noun, verb, adjective) and their function (*e.g.*, subject, verb, direct object).

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe;
All mimsy were the borogoves,
And the mome raths outgrabe.¹



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The errors in sentences 1 through 10 fall into three categories: (1) problems of *agreement*, in which the writer has obscured the relationship between subject and verb, or pronoun and antecedent; (2) problems of *modification*, in which the writer has mishandled the modifiers that elaborate the sentence's core meaning; and (3) problems of *coordination*, in which the writer has mismatched structures that should match or tried to compare incomparable things. Sorting the problems in this way makes them easier to recognize; once you've recognized them, solving them is a snap.

Problems of Agreement: Subject and Verb (# 1–2)

Among the rules of grammar, those pertaining to agreement are fundamental. *Every* reader is confused *every* time a writer obscures the relationship between a sentence's functional elements – its subject and verb, or its pronouns and the nouns they replace. Even the grammar-checking program on your computer reacts to simple instances of these problems, sending out green squiggles to summon you to greater care.

The first rule of agreement requires that the subject and verb of a sentence agree in number. A singular subject takes a singular verb; a plural or compound subject, a plural verb.

In **Sentence 1** of the Grammar Quiz, *Ordinary socializing and flirtation fails to satisfy the severity test of a valid sexual-harassment claim*, the writer broke this rule by giving a compound subject (*ordinary socializing and flirtation*) a singular verb (*fails*). This error is especially puzzling, because the writer almost certainly would never write *Paul and Fred wishes to jettison their voluble silent partner*. Why did he slip into an error here? Perhaps *ordinary socializing and flirtation* struck him as a unitary concept, like the compound-looking but singular-meaning subject of this sentence: *Having your cake and eating it too is a delectable impossibility*. Offices across the land would be very different places, though, if there were no distinction between saying hello to a co-worker and blowing him or her a kiss. It is prudent and courteous to honor that difference and grammatically correct to write the plural verb *fail*.

In **Sentence 2**, the writer mistook the subject, letting the noun closest to the verb determine the verb's number: *What type of damages are available for recovery against a builder under these circumstances?* The problem is that the grammatical subject is not the plural *damages*, but the singular *type*. You can avoid this routine error by remembering that the object of a preposition cannot be the subject of the verb. This rule disqualifies *damages*, *recovery*, *builder*, and *circumstances*, all of which follow prepositions. By process of elimination, you're left with *type*, a choice that is semantically as well as grammati-

cally accurate. The correct pairing of singular subject and singular verb clarifies that the writer is interested in the categories of damages, not in the dollar amount of the plaintiff's possible award. In response to her question, she expects *actual damages* or perhaps *punitive damages*, not *\$50,000*. Agreement maximizes the likelihood that she'll get the response she is seeking.

Problems of Agreement: Nouns and Pronouns (# 3–5)

Like subjects and verbs, pronouns and the nouns they replace must agree in number. But the second rule of agreement is more complicated than the first, because the pronoun must also agree with its antecedent in person and gender. A pronoun in the second person cannot, for instance, replace a noun in the third, as here: *If a person wants to thrive in solo practice, you had better get used to long hours and unpredictable revenue*. Nor, as a growing consensus holds, can a pronoun of one gender replace a noun that includes both genders in its meaning. The illustrative sentence above becomes grammatically accurate but politically suspect when you replace *person* with only the masculine *he* or only the feminine *she*.

The writer of **Sentence 3** ran up against this problem and solved it in the least satisfactory way: *Once a moving party meets their burden, the burden shifts*. He wished to avoid the ponderousness of *Once a moving party meets a moving party's burden* and the ungainliness of replacing *moving party* with *his or her*. So he seized grammar by the throat, gave it a good throttle, and replaced a singular noun with the plural pronoun *their*.

Until English evolves a singular, third-person pronoun to do the job that *he* alone used to do, you will have to be resourceful if you wish to be grammatical. If using *his or her* displeases you, you must improvise. You might remove the possessive pronoun altogether: *Once the moving party meets the burden, the burden shifts*. Or you might shift from the singular to the plural: *Once moving parties meet their burden, the burden shifts*. In some contexts, you can use *we*, *you*, or *one* to reach the safe harbor of gender neutrality. In this essay, I have chosen to be evenhanded instead of neutral, using the masculine pronoun for writers of the odd-numbered sentences in the Grammar Quiz and the feminine pronoun for writers of the even-numbered ones. An ideal solution? No. A reasonable expedient? I think so.

Sentence 4 illustrates the forlorn circumstance of a pronoun without a noun to relate to: *Formal title to the property would remain with the wife, which may be unpalatable to the husband*. Does the relative pronoun *which* refer to *title*, *property*, or *wife*? The first possibility makes no sense, because a *title* isn't even metaphorically unpalatable. *Property* makes sense only if we imagine an unusually ugly house and a husband of exacting taste. Even in

the context of divorce proceedings, it's unlikely that *wife* is the intended referent. The writer almost certainly meant *which* to refer to the idea she expressed in the main clause. But a pronoun can't do that job, because it derives its meaning not from phrases and clauses, but from its one-to-one relationship with a noun. Since *title*, *property*, and *wife* are the only nouns preceding the pronoun, and none tells us what the husband may find unpalatable, the writer must rephrase to eliminate the meaningless *which*: *Formal title to the property would remain with the wife, an arrangement that the husband may find unpalatable. Or, Formal title to the property would remain with the wife. The husband may dislike this arrangement.*

Unlike Sentence 4's *which*, which has nothing to refer to, **Sentence 5's** *this* has more to refer to than it can reasonably handle. In the long subclause, the writer specifies a three-pronged test of a court's just dealing: *Whether due process was honored; whether the parties' rights to be heard and represented were fully exercised; whether the court's discretionary ruling was reasoned or arbitrary.* He meant the singular *this* in the main clause to refer to all three prongs – something that a singular pronoun cannot do: *This can be determined only on a case-by-case basis.*

There are good and better ways to solve this problem. The plural *These* would be clearer than the singular *This*, but not perfectly clear. Demonstrative pronouns (*this*, *that*, *these*, and *those*) require for clarity the demonstration that their name specifies. At the fish market, for instance, the proprietor knows what you mean when you say *I'll take six of those*, because you can point to the salmon fillets. The identical instruction over the telephone would certainly prompt a request for clarification. In writing as in telephoning, you are unable to point, so the demonstrative pronouns do you little good. Utility and clarity alike increase when you place a noun after every written use of *this*, *that*, *these*, and *those*. In Sentence 5, *These elements* would be clearer than *These* alone.

Pronouns cease to be troublesome when you remember what they are and use them to do the work they're suited to do. Pronouns take the place of nouns so that you never need to write a sentence like this one: *John lost John's case when John's star witness left town on the day John planned to place John's star witness on the stand.* As long as every pronoun you write has an unambiguous relationship with a noun – not a phrase, not a clause, not everything that precedes the pronoun – all will be well. You make that relationship evident when the pronoun and its related noun agree in person, number, and gender.

Problems of Modification (# 6–7)

When Western Union charged by the word, people who sent telegrams knew how to reduce a thought to its

essential elements – an implied subject, a verb, and a participial adjective (*Got married*) or an implied subject, a verb, and a direct object (*Send money*). In the era of e-mail, writers can afford to be more expansive in their messages – to indicate, at the very least, whom they married or how much money they need. Modification denotes this fleshing out of a sentence's bare bones – the use of words, phrases, and clauses to tell the reader more about the sentence's essential elements of subject, verb, and object.

Observe the Zen-like statement, *The good is reached*, grow through modification into one of Justice Holmes's most famous sentences. First, the noun *good* acquires two modifying adjectives:

The ultimate good desired is reached.

This clause then takes on a pair of prepositional phrases:

The ultimate good desired is reached by free trade in ideas.

Then the modifying clauses arrive to elbow the thought toward increasing clarity. First, a new clause absorbs and subordinates the existing clause:

Men may come to believe that *the ultimate good desired is reached by free trade in ideas.*

This new clause shoots forth a subclause:

... *they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.*

When this modified main clause finally yields a pair of appositive subclauses, Holmes's thought is expressed:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.²

Justice Holmes certainly did not build this sentence in the word-phrase-clause order I've suggested, but he needed all three kinds of modifiers as he wrestled with his thought and pinned it to the page. One of the pleasures of writing springs from these transformations of vague notions into precise ideas. Of all the exercises of judgment that inform the crafting of a fine sentence, few require more care than the writer's decisions about which elements of a sentence to modify, how to modify them, and how extensively to do so.

In legal prose, carelessness on this score shows up most often in misplaced and dangling modifiers. **Sentence 6** of the Grammar Quiz represents the problem of a misplaced phrase: *Bradley's client said she understood the charges a few times during the conversation.* The

modifying phrase *a few times during the conversation* should tell us how often and in what circumstance the client *said*; in its current place in the sentence, it tells us instead about the client's intermittent comprehension of the charges. As soon as the writer moves the modifier closer to what it actually modifies, the sentence makes a different sense – in this case, one more flattering to Bradley's client: *A few times during the conversation, Bradley's client said she understood the charges.*

Sentence 7 contains a dangling modifier, a problem so common in legal prose that even skillful writers slip into it now and then: *To prove actual malice, the defendant must have known the statements were false or published them with reckless disregard despite knowing they were false.* Surely the last thing the writer expects the defendant to do is to prove his or her own actual malice. That task falls to the allegedly libeled *plaintiff*, who doesn't appear in the sentence except as the implied subject of the infinitive phrase. For the sentence to make sense, the implied subject and the stated subject of the main clause must correspond. The easiest solution is for the writer to alter the main clause by replacing *defendant* with *plaintiff*: *To prove actual malice, the plaintiff must show that the defendant knew the statements were false.*

Most legal writers need to keep in mind only two rules about the grammar of modification: (1) Give every modifier something it can reasonably modify, and (2) place modifying words, phrases, and clauses as close as possible to what they modify. Then you'll be able to express even your most intricate thoughts with Holmesian exuberance and not lose your reader along the way.

Coordination: Parallelism (# 8–10)

When grammatical elements in a sentence perform the same function, they should take the same form. Even without brushing up your Shakespeare, for instance, you know that Hamlet did not say, *To be, or stop being, that is the question.* That sentence just doesn't sound right. The conjunction *or* links a pair of alternatives, and you expect each alternative to match the other in form: *To be, or not to be.*

Many structures widely used in legal prose call for matches as exact as Hamlet's famous infinitives. You need parallel constructions when words, phrases, or clauses are (1) joined by *and* or *or*; (2) linked by the correlative conjunctions *either . . . or*, *neither . . . nor*, *both . . . and*, and *not only . . . but also*; and (3) presented as items in a series or a list. In **Sentence 8**, the writer missed the signal for matching structures that the correlative conjunctions *neither . . . nor* were sending her way: *Neither the report of Dr. Farragut nor Dr. Rider contains the requisite information.* Here, the problem is at once grammatical and semantic. After *neither* comes Dr. Farragut's report,

Answers to Grammar Quiz

1. Subject and verb disagree: Ordinary socializing and flirtation *fail* to satisfy the severity test of a valid sexual-harassment claim.

2. Subject and verb disagree: What type of damages *is* available for recovery against a builder under these circumstances?

3. Noun and pronoun disagree: Once a moving party meets *his or her* burden, the burden shifts.

4. Relative pronoun *which* lacks a clear antecedent: Formal title to the property would remain with the wife, an arrangement that may be unpalatable to the husband.

5. Demonstrative pronoun *this* lacks a clear antecedent: Whether due process was honored; whether the parties' rights to be heard and represented were fully exercised; whether the court's discretionary ruling was reasoned or arbitrary: *These elements* can be determined only on a case-by-case basis.

6. The modifying phrase is misplaced: *A few times during the conversation, Bradley's client said she understood the charges.*

7. The modifying infinitive phrase dangles: *To prove actual malice, the plaintiff must show that the defendant knew the statements were false or published them with reckless disregard despite knowing they were false.*

8. Parallel structures are lacking: The report of *neither Dr. Farragut nor Dr. Rider* contains the requisite information.

9. Parallel structures are lacking: In the case of the Loan, (1) *there is an express loan*, (2) *its terms are set forth in the Note*, and (3) *its interest rate exceeds the permissible rate of 20%*.

10. The terms of the comparison cannot be compared: *As in Sheffield, the adoptive parent in our case contracted orally, but not in writing, to raise his wife's child as his own.*

11. Bonus Question:

brillig: predicate adjective modifying expletive *it* (contracted in '*Twas*)

slithy: attributive adjective modifying *toves*

toves: noun; subject of the compound verb

did gyre and gimble: compound verb

wabe: noun; object of the preposition *in*

mimsy: predicate adjective modifying *borogoves*

borogoves: noun; subject of the verb *were*

mome: attributive adjective modifying *raths*

raths: noun; subject of the verb *outgrabe*

outgrabe: verb

but after *nor* comes Dr. Rider himself, apparently without the necessary goods. The writer can repair her grammar and clarify her meaning by making the *nor* phrase match the *neither* phrase, but the result is cumbersome: *Neither the report of Dr. Farragut nor the report of Dr. Rider contains the requisite information.* The match works better in reverse: *The report of neither Dr. Farragut nor Dr. Rider contains the requisite information.* Or, *Neither Dr. Farragut's nor Dr. Rider's report contains the requisite information.* To make the structures match, in other words, you sometimes have to experiment. But the experiment is always worthwhile and often revealing. Logically dissimilar elements, for instance, will resist your efforts to coordinate them – a reliable sign that you need to rethink what you're trying to say.

Sentence 9 presents a related problem of parallelism, this time in a staple of legal prose, a list. The writer uses his list to present facts about a loan, but the grammatical structure of the facts does not match: *In the case of the Loan, (1) there is an express loan, (2) the terms of which are set forth in the Note, (3) which interest rate exceeds the permissible rate of 20%.* Each item taken separately should cooperate with the opening prepositional phrase to state a fact about the loan. The independent clause of (1) does so, but the dependent clauses of (2) and (3) do not. What does it mean to write *In the case of the Loan, the terms of which are set forth in the Note* or *In the case of the Loan, which interest rate exceeds the permissible rate of 20%*? When the writer uses (1) as a template for (2) and (3), he solves the problem: *In the case of the Loan, (1) there is an express loan, (2) its terms are set forth in the Note, and (3) its interest rate exceeds the permissible rate of 20%.* The revised sentence has three independent clauses, each of which makes sense with the opening phrase.

A final problem of coordination appears in **Sentence 10**, where the writer tries to compare incomparable things – not just apples and oranges, but apples and chimpanzees. *Like Sheffield, the adoptive parent contracted orally, but not in writing, to raise his wife's child as his own.* But the adoptive parent is not at all like a legal case. To solve the problem, the writer has a choice. She can write, *Like the adoptive parent in Sheffield, the adoptive parent in the present case*, or she can do the job more efficiently: *As in Sheffield, the adoptive parent in this case . . .* Almost always traceable to haste, this particular error suggests a writer's willingness to embrace logical impossibility – an inclination that a client or a judge may find particularly alarming.

The Role of Grammar

These problems, whether of agreement, modification, or coordination, obscure the relationships between and among the words, phrases, and clauses on which the meaning of a sentence depends. As writers, we may conclude that an occasional obscurity – a dangling modifier here, or a pronoun without an antecedent there – will cause no lasting harm. As readers, though, we may not feel so sanguine. Sometimes we need all the grammar we can get.

The **Bonus Question** illustrates this circumstance. The opening stanza of Lewis Carroll's *Jabberwocky* contains words whose meanings we can only guess at, as Carroll fully intended. But that we *can* guess – that we can even begin to make sense of these words – depends on our knowledge of grammar. We

know, for instance, that *borogoves* is a noun because only nouns take the article *the* as a modifier. We know that it is a plural noun because it ends in *s* and takes the plural verb *were*. The clause *All mimsy were the borogoves* may call to my mind an image utterly unlike the one you see. But grammar lets us confidently agree that we're reading about certain things (*borogoves*) existing in a certain state of being (*mimsy*). Out of Carroll's delightful nonsense, in short, grammar goes a long way toward making sense.

Our job as writers is to turn our sense into someone else's. A writer does this job poorly whenever the reader stumbles over sloppily coordinated elements in a sentence or cannot easily discern which word functions as the subject of the verb; which noun a pronoun replaces; or which word another word, phrase, or clause modifies. Readers who encounter a few such errors may generously sort them out. Readers who encounter many may reach uncharitable conclusions about the writer's care, courtesy, or command of the language. Writers who bother to get the grammar right clarify their meanings and ease their readers' tasks. To this large extent, grammar always matters. It is the user's manual that no serious writer ever discards.

Writers who bother to get the grammar right clarify their meanings and ease their readers' tasks. To this extent, grammar always matters.

1. Lewis Carroll, *Jabberwocky*, in *A Victorian Anthology*, 1837–1895 (Edmund Clarence Stedman, ed., Cambridge, Mass.: Riverside Press, 1895); available at <www.bartleby.com/246/846.html>.
2. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

When a Mortgage Commitment Is Issued But Later Revoked, Who Keeps the Down Payment?

BY ERIC W. PENZER

With interest rates at or near their 40-year lows,¹ and a corresponding increase in the number of mortgage loan applications,² lenders must remain competitive in the industry by processing loan applications and issuing commitments as rapidly as possible. When a mortgage commitment is issued but subsequently revoked, however, is the purchaser still required to complete the transaction? If the sales contract is contingent upon the purchaser obtaining a financing commitment, what happens if that commitment is later revoked?

A mortgage contingency clause in a contract for the sale of real property is designed to allocate risk. It “protects a contract vendee from being obligated to consummate the transaction in the event mortgage financing cannot be obtained in the exercise of good faith and through no fault of the purchaser.”³ Most contracts contain a “contingency period” limiting the time within which the purchaser is permitted to cancel the contract because of an inability to obtain financing.⁴ The “standard” mortgage contingency clauses have evolved over time as the form contract has been revised. Notably, some versions of the clause do not address the situation where a mortgage commitment is issued but subsequently revoked after the contingency period expires. In that situation, does the seller keep the down payment as damages, or must it be returned to the purchaser? That question has been answered by several courts, with seemingly inconsistent results.

“Good Faith” Cases

The majority of cases on this issue stand for the proposition that the purchaser does not forfeit the down payment, at least where the purchaser acts in good faith and is not at fault for the mortgage commitment revocation. The Appellate Division, Second Department first addressed the issue in detail in *Lane v. Elwood Estates, Inc.*⁵ That case, although more than three decades old, still reflects the current state of the law, at least in the Second Department.

In *Lane*, the purchase contract executed by the plaintiffs and the defendant provided that in the event “the

lending institution . . . shall refuse to approve the application aforesaid for the amount set forth and upon the terms and conditions above described, the money deposited hereunder, shall be returned to [the plaintiffs], and upon such repayment both parties hereto shall be released from any further liabilities hereunder.”⁶ The plaintiffs obtained approval of their mortgage loan, and so informed the defendant. The defendant continued to work on the house to be sold and obtained a Certificate of Occupancy for the same. A closing of the title was scheduled for November 16, 1965. On October 25, 1965, however, the plaintiffs’ attorney wrote to the bank, informing it that the plaintiff-husband’s income had diminished significantly due to termination of his main employment. Accordingly, the bank withdrew approval of the mortgage. The plaintiffs then sought the return of their deposit.

After a bench trial, the lower court granted judgment in favor of the plaintiffs, reasoning that the contract provision permitted a recovery of the deposit because the mortgage application had not been approved.⁷ The Second Department affirmed.

The appellate court noted the trial court’s finding that the plaintiffs had acted in good faith in informing the lending institution of their change of circumstances, and further found that it was “apparent” from the testimony that the plaintiffs truly desired to purchase the house.⁸ Further, the court found that the plaintiff-husband made genuine efforts to obtain new employment, and delayed in informing the lending institution of his loss of employment only because he was hopeful that he



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would be able to secure substitute employment. Moreover, the court noted that it seemed “incredible” under the circumstances that the plaintiff-husband, the father of five children, one of whom had a brain injury, would deliberately bring about his own unemployment.⁹

In *Bobrowsky v. Landes*,¹⁰ the financial lender revoked its mortgage commitment after being advised by the plaintiffs prior to the closing that there was a substantial change in their financial circumstances. The trial court denied summary judgment in favor of the plaintiff-purchasers, but the Second Department reversed. The appellate court noted that there was no triable issue of fact concerning the plaintiffs’ good faith, inasmuch as their loss of income resulted from circumstances beyond their control.¹¹

Likewise, the court affirmed a grant of summary judgment to the prospective purchasers in *Byrne v. Collins*,¹² where a commitment was revoked due to one plaintiff’s loss of employment. In so affirming, the court held that the plaintiff made a “genuine effort” to secure other employment in order to obtain reinstatement of the commitment and, thus, there was no willful breach of contract.¹³

Summary judgment for the purchaser was denied in *Morris v. Hochman*,¹⁴ however, where the plaintiff’s mortgage commitment was revoked because she could not occupy the home as her primary residence, having decided to relocate to another state for employment purposes. The court determined that summary judgment in her favor – for the return of her down payment – was inappropriate inasmuch as the motion was made prior to discovery and “essential” issues of fact existed within her exclusive knowledge, presumably regarding her good-faith efforts to obtain financing.

The Appellate Division, First Department has likewise held that in the situation of a commitment revocation, the provisions of the contract do not control if the contract is silent on the issue of commitment revocation. Under the rule set forth by the court, the purchaser is entitled to recover the down payment unless “the commitment revocation and consequent failure of the transaction was attributable to bad faith on [the purchaser’s] part.”¹⁵

*Creighton v. Milbaur*¹⁶ was brought by the proposed purchaser of a condominium unit to compel the return of her down payment. The sale contract contained a mortgage contingency clause, permitting the plaintiff to cancel the contract in the event she was unable to obtain

financing by a specified date. It further provided, however, that the contract was to remain in full force and effect if the purchaser failed to give notice of her inability to obtain financing on or before the third business day following the date specified. The plaintiff obtained a mortgage commitment, which was subsequently revoked after the expiration of the contingency period.¹⁷

The court began its analysis by rejecting the sellers’ argument that they were entitled to retain the down

The right to the down payment turned on whether the failure of the transaction was attributable to bad faith on the part of the purchaser.

payment by virtue of the fact that the contingency period had expired. This argument, the court noted, was “flawed” because the contract was “devoid of any procedures to be followed in the event a commitment is later withdrawn.”¹⁸ Accordingly, the court held that inasmuch as a mortgage contingency

clause created a condition precedent to the contract of sale, the sellers’ claim to retain the down payment must be “based upon the general rule that a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent.”¹⁹ The court also made clear that the burden of establishing that the condition was prevented rested upon the seller, *i.e.*, the party seeking to enforce the contract. The court ruled that the defendant was not entitled to summary judgment, compelling the return of the down payment because it failed to offer evidence that the plaintiff was denied financing because she did not pursue her application in good faith.²⁰

The First Department applied this rule again in *Kapur v. Stiefel*.²¹ There, the purchaser of a condominium unit obtained a mortgage commitment, but it was revoked due to the termination of the purchaser’s employment. As in *Creighton*, the contract conditioned the plaintiff’s right to the return of his down payment upon his cancellation of the contract within a specified time period. The revocation came after the expiration of the contingency period set forth in the contract of sale. The court held, however, that the mortgage contingency provision was inapplicable “[i]nasmuch as plaintiff’s mortgage commitment letter was revoked by the lender after the contingency period.”²² Thus, the right to the down payment turned on whether the failure of the transaction was attributable to bad faith on the part of the purchaser.²³ The court held, however, that issues of fact existed concerning whether the termination of the plaintiff’s employment “was a circumstance of plaintiff’s making intended to bring about the failure of the subject real estate transaction.”²⁴

Notably, Justice Saxe dissented in *Kapur*. In his view, the purpose of the mortgage contingency clause was to allocate the risk of an unconsummated transaction. Specifically, the provision allocated the risk to the seller during the period prior to the purchaser's receipt of a mortgage commitment, and to the purchaser once that commitment was received.²⁵ According to Justice Saxe, the purchaser's receipt of the mortgage commitment, and the expiration of the cancellation period, were dispositive; no provision of the contract entitled the purchaser to cancel the contract and recover his down payment. Justice Saxe's view is consistent with Second and Third Department decisions discussed below.

Most recently, a Supreme Court justice applied the "good faith" rule in *Grillo v. Finch*.²⁶ There, the plaintiffs sued to recover their contract deposit. The contract contained a mortgage contingency provision permitting the purchasers to cancel the contract upon their failure to obtain a commitment prior to a specified date. The plaintiffs received a mortgage commitment, and advised the seller's attorney that they would be ready to close on a particular date. The closing did not occur, however, because the mortgage commitment was revoked based on, among other things, the plaintiffs' allegedly insufficient assets. Notwithstanding the scheduling of a "time of the essence" closing, the defendant's attorney subsequently faxed a proposed termination of the contract agreement to the plaintiffs' attorney for execution, and represented that upon execution he would return the deposit to the plaintiffs. Subsequently, however, the defendant retained new counsel and attempted to resurrect the "time of the essence" closing. The court noted that the purchasers' entitlement to the return of their deposit "turn[ed] upon whether the commitment revocation and consequent failure of the transaction was attributable to bad faith on [their] part."²⁷ The court also ruled that the plaintiffs' diligence and good faith were issues of fact for trial.

"Strict Construction" Cases

The Appellate Division, Third Department applied a seemingly "literal" construction of a contingency clause in *Tator v. Salem*.²⁸ There, the defendant entered into a contract to purchase realty from the plaintiff. The purchase offer was contingent upon the defendant's obtaining a mortgage loan, but the contingency was deemed waived unless the defendant provided written notice to the plaintiff of his inability to obtain the loan within 45 days after acceptance of the offer.

The defendant obtained a mortgage commitment, but it was revoked when the defendant's spouse was advised by the State Education Department that she could not practice public accountancy without qualifying as a certified public accountant.²⁹ The defendant's lending institution thereafter revoked its commitment,

after expiration of the 45-day period. The plaintiff brought the action to recover direct and consequential damages for the defendant's breach of contract. The trial court ruled in the plaintiff's favor, and the appellate division affirmed.

The Third Department strictly construed the contingency clause, holding: "Although defendant's duty to purchase the property was admittedly contingent upon his obtaining a mortgage loan, this condition was plainly waived by defendant's failure to notify plaintiff within the contractually provided 45-day period of his inability to obtain a loan."³⁰ The defendant's inequitable conduct, however, no doubt contributed to the court's determination. The court noted that the defendant had applied for a loan substantially in excess of the purchase price for the property, and made no apparent attempt to make alternative financing arrangements despite the fact that he owned "a considerable amount of land in several states."³¹ Moreover, he misled the lending institution by indicating that his wife would not have any earning power unless she qualified as a certified public accountant.

Likewise, in *Arnold v. Birnbaum*,³² a Second Department case, the plaintiffs and the defendants had contracted for the sale of a residential condominium unit. The contract was conditioned upon the plaintiffs obtaining a mortgage commitment within a contingency period. In addition, the contract required that, in the event the plaintiffs failed to obtain such a commitment by the end of the contingency period, they were to notify the defendants within five business days. Absent such notice, the contract provided that "it shall be conclusively presumed that the [plaintiffs] obtained a satisfactory mortgage commitment."³³

Although the plaintiffs in *Arnold* applied for and received a mortgage commitment, it was contingent upon the prior sale of their own apartment. Upon receipt of the commitment, the plaintiffs notified the defendants of the issuance of the mortgage commitment, but did not give notice that the commitment was conditional. After the contingency period expired, the plaintiffs notified the defendants that they were unable to sell the apartment and that, therefore, they could not obtain a mortgage.³⁴ The plaintiffs' request for a return of their down payment was refused, precipitating the litigation. The trial court granted summary judgment in favor of the plaintiffs, but the Appellate Division, Second Department reversed. According to the Appellate Division, the plaintiffs failed to avail themselves of the cancellation provision. Instead, they represented to the defendants that a mortgage commitment had been obtained, and by doing so satisfied the contingency clause, leaving no right of cancellation.³⁵

In *Roga v. Westin*,³⁶ the plaintiff sued to recover a down payment in connection with a contract for the sale of real property. The trial court granted summary judgment for the defendant seller, and the Second Department affirmed. With respect to the mortgage contingency clause, the court stated:

The plaintiff's right to cancel the contract for failure to obtain financing terminated prior to the prospective lender's revocation of its mortgage commitment. Pursuant to the mortgage contingency provision, the plaintiff's failure to give notice of cancellation within five business days after the commitment date resulted in a waiver of his right to cancel the contract.³⁷

In *D'Agnese v. Spinelli*,³⁸ however, involving a claim brought by the seller for breach of contract, seeking to retain the defendant's down payment, the Second Department affirmed the denial of summary judgment for the plaintiff. According to the court, issues of fact existed regarding "whether the plaintiff waived strict compliance with the mortgage contingency clause, and whether the defendant exercised good faith to retain the mortgage commitment which was previously issued by her lender."³⁹ In so ruling, the court cited the First Department's decision in *Creighton*.

In *Cortesi v. R & D Construction Corp.*,⁴⁰ it appears that the Third Department relied upon a perceived ambiguity in the contract to relieve the plaintiffs from what it considered to be an unjust result. The plaintiffs had entered into a contract with the defendants in November 1983 for the construction and sale of a home. The contract contained a mortgage contingency clause, which provided the plaintiffs 45 days to notify the defendants of their inability to obtain financing and, upon such notice, the contract would be canceled and the plaintiffs would be entitled to the return of their down payment. The plaintiffs were unable to secure an appropriate commitment for financing, inasmuch as the commitment they received expired before the scheduled closing date, and the lender refused to extend it. Accordingly, in February 1984, the parties met and modified the contract in several respects, most notably adjourning the closing date. The parties made no written reference in their modification to the mortgage contingency clause. The plaintiffs thereafter sought financing from multiple lending institutions but were unable to secure the same.

The plaintiffs notified the defendants of their inability to secure financing and requested the return of their

down payment. The defendants refused, citing the fact that the 45-day contingency period had long since expired and was not renewed in the modification. The plaintiffs brought suit seeking the return of their deposit, plus damages, and the defendants counterclaimed for damages for the plaintiffs' breach of contract. The trial court granted summary judgment in the plaintiffs' favor and dismissed the defendants' counterclaims. The Appellate Division affirmed.

According to the Appellate Division, although the modification resulted in a new contract, the unmodified terms of the original contract remained intact, including the 45-day contingency period. Moreover, the court

noted, the contract contained no date on which the period started to run, resulting in an ambiguity. The court determined that the only reasonable interpretation of the provision was that the contingency period began to run on the date of the modification and, therefore, had not expired when the plaintiffs canceled the contract.⁴¹

Justices Levine and Kane dissented in a memorandum

by Justice Levine, in which they applied a "literal" interpretation of the contingency clause.⁴² According to the dissenting justices, the conclusion was "inescapable" that the 45-day contingency period began to run upon the execution of the contract. Otherwise, "the time limit would be free-floating and essentially meaningless."⁴³ Therefore, the dissenting justices were of the view that by the "literal terms of the clause," the plaintiffs waived the mortgage contingency provision when they failed to cancel the contract within 45 days of its execution.

Conclusion

These cases may well be the last of a dying breed. The November 2000 revision of the Blumberg "standard form" residential contract of sale includes language making clear that once a commitment is issued, the purchaser is bound to perform the contract even if the lender fails or refuses to fund the loan for any reason. Although this revision may resolve the issue discussed above (and, of course, the parties are always free to specifically address that issue in additional detail in their contract), as long as "older" form agreements are in circulation, disputes will exist. And until the Court of Appeals clarifies this issue, or the Appellate Divisions reach an accord, there will continue to be uncertainty concerning the governing legal principles to be applied in resolving such disputes.

1. See Jim Carlton, *Home Investments (A Special Report)*, Wall St. J., June 14, 2004, at R8.

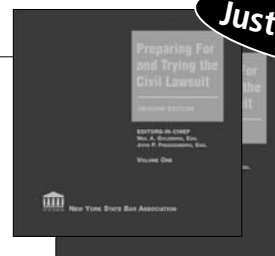
Until the Court of Appeals clarifies this issue, or the Appellate Divisions reach an accord, there will continue to be uncertainty concerning the governing legal principles to be applied in resolving such disputes.

2. See *Mortgages: Applications Increase as Rates Drop Back Below 6%*, Chicago Trib., July 8, 2004, at 2; Gail Kalinoski, *Explaining the Skittish Stock Market*, Westchester County Bus. J., May 31, 2004, at 17; Julie Haviv, *Mortgage Purchase Applications, Refinancings Fall Again*, Dow Jones Capital Markets Rpt., May 19, 2004.
3. *Creighton v. Milbaur*, 191 A.D.2d 162, 166, 594 N.Y.S.2d 185 (1st Dep't 1993).
4. See, e.g., *Roga v. Westin*, 212 A.D.2d 685, 686, 622 N.Y.S.2d 777 (2d Dep't 1995).
5. 31 A.D.2d 949, 298 N.Y.S.2d 751 (2d Dep't 1969).
6. *Id.* at 950 (dissenting opinion).
7. See *id.*
8. *Id.* at 950.
9. See *id.* at 949.
10. 124 A.D.2d 618, 507 N.Y.S.2d 879 (2d Dep't 1986).
11. See *id.* at 619.
12. 142 A.D.2d 661, 531 N.Y.S.2d 17 (2d Dep't 1988).
13. See *id.* at 662.
14. 296 A.D.2d 481, 745 N.Y.S.2d 549 (2d Dep't 2002).
15. *Kapur v. Stiefel*, 264 A.D.2d 602, 603, 695 N.Y.S.2d 330 (1st Dep't 1999).
16. 191 A.D.2d 162, 594 N.Y.S.2d 185 (1st Dep't 1993).
17. See *id.* at 164.
18. *Id.*
19. *Id.* at 165.
20. *Id.*
21. 264 A.D.2d 602, 695 N.Y.S.2d 330 (1st Dep't 1999).
22. *Id.* at 603.
23. See *id.*
24. *Id.*
25. See *id.* at 606 (Saxe, J., dissenting).
26. N.Y.L.J., Apr. 21, 2004, p. 17, col. 1 (Sup. Ct., Nassau Co.).
27. *Id.* (citing *Kapur*, 264 A.D.2d 602).
28. 81 A.D.2d 727, 439 N.Y.S.2d 497 (3d Dep't 1981).
29. See *id.* at 727.
30. *Id.* at 727-28.
31. *Id.* at 728.
32. 193 A.D.2d 710, 598 N.Y.S.2d 68 (2d Dep't 1993).
33. *Id.* at 711.
34. See *id.*
35. See *id.*
36. 212 A.D.2d 685, 622 N.Y.S.2d 777 (2d Dep't 1995).
37. *Id.* at 686.
38. 290 A.D.2d 528, 737 N.Y.S.2d 301 (2d Dep't 2002).
39. *Id.* at 528.
40. 137 A.D.2d 901, 524 N.Y.S.2d 874 (3d Dep't 1988).
41. See *id.* at 902-03.
42. See *id.* at 903 (Levine and Kane, JJ., dissenting).
43. *Id.*

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Yesterday's Strategies Rarely Answer Tomorrow's Problems

BY STEPHEN P. GALLAGHER AND LEONARD E. SIENKO JR.

Confronted with new competitive and market challenges, lawyers across the country face a critical choice: either wait and see what happens to demand for traditional legal services, or anticipate the changes certain to affect the future and act now to shape the direction of these new services. The competitiveness problem being faced by so many law firms today is not a problem of "foreign" competition, but rather a problem of "nontraditional" competition.¹

People throughout the legal community are beginning to realize that clients are demanding creative and pro-active lawyering, driven by new ways of thinking about legal solutions, while focusing on reducing rising legal costs. Lawyers will need to put aside the presuppositions of the old competitive world and compete according to totally new rules of engagement in order to survive in the increasingly turbulent business environment of the future.

Good examples of new market competition and challenges come from many state courts. For instance, look at the Utah State Court, whose mission is "to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law." The Utah State Court's Web site includes an area designed to help the public: Complete Divorce Papers Online, File Landlord-Tenant Disputes, and File Small Claims. The court's mission says nothing about preserving the lawyer's role in any of these transactions.

Richard Susskind, widely regarded as Europe's leading legal technology expert, was one of the first attorneys to write about the potential of the Internet to disrupt legal practice. In his book, *The Future of Law: Facing the Challenges of Information Technology*,² Susskind predicted, "Law will be gradually transformed from an advisory service to an information service as lawyers package their conventional work product in electronic form." If consumers can find what they need to know on the Internet, will they still need lawyers? Perhaps lawyers will have to assume an entirely new role. If Susskind is even remotely close to being right, what impact could this have on firm profitability, based upon the billable hour?

Consumers have changed much more than the business organizations upon which they depend, and many of these same consumers believe that today's organizations are failing or ignoring the very people they should be serving. Young people want to "opt in" and make their own choices, controlling their destinies and their cash. They want their voices to be heard, and they want them to matter."³ Shoshana Zuboff and James Maxmin, authors of *The Support Economy*,⁴ claim that we are seeing a new type of consumer with dramatically different buying patterns and interests. These authors cite "the interplay of new technologies, the new structure of consumption, and an enterprise logic capable of connecting these two"⁵ as being the driving forces behind today's economic revolutions.

In 1903, Henry Ford recognized a new kind of market arising from the needs of "ordinary" people – farmers and shopkeepers wanted a robust, well-made, inexpen-



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sive automobile.⁶ Ford's ability to unite mass production and mass communication was so successful that it helped fuel the shift in manufacturing from proprietary capitalism to a new enterprise logic that allowed the production of affordable products for mass consumption at a profit.⁷ Henry Ford said, "People can have a Model T in any color – as long as it's black."

Today, "ordinary" people have, once again, changed. They now prefer to rely on their own judgments and have a deepening sense of self, increasingly internalized values and a growing need for self-authorship. People are willing to pay for brand names and designer labels out of all proportion to their actual "value." Individuals no longer want to rely on group identification and compliance with group norms. Today's young consumers are clearly unlike any the world has ever seen.

Law firms and many of the other professional service providers face the same uncharted challenges in shaping the future of professional services. The medical profession has discovered that more than half of all Americans are not satisfied with the availability of their doctors and the amount of information they receive in an office visit. As a result, 52 million adults now turn to the Internet as their primary source of health-care information.⁸ Is there any reason to believe changes in consumer demands will not similarly affect the delivery of legal services in the future? Could the legal profession be immune to the disruptive potential of the Internet?

A friend of ours recently demonstrated how new markets characterized by wholly new approaches to consumption are created. His mother had been diagnosed with Alzheimer's disease, and rather than relying on her family physician to solve this problem, she immediately turned to the Internet. It was not very long before she had gained access to an electronic community and held person-to-person communications with experts throughout the world. The Internet changed her relationship with her family physician. No longer was she relying on the family doctor as her only source of information; she and her physician were now partnering to find the best clinical trials for her needs. Will consumers, like our friend, who can find on the Internet the information they need to know, no longer need doctors or lawyers? Probably not, but perhaps, the role of the professional will need to change.

New Direction, New Focus, New Culture

If lawyers are to compete in this new market, which is arising from the changing needs of "ordinary" people, they will have to compete according to totally new rules of engagement. Determining exactly what these new rules should look like is a challenge every law firm will struggle with in the coming months and years. Because professionals have so much discretion and autonomy in



Similar to the Utah State Court's Web site, the UCS Web site includes "click-through" guides for non-attorneys in the areas of family law, civil law and criminal law. It answers frequently asked questions, provides a glossary of legal terminology, discusses which papers to file and in which court, and makes available pdf versions of necessary forms or tells how to acquire them.

a law firm setting, culture⁹ is the dominant force in determining how lawyers of the firm actually behave toward one another and toward their clients. So, one of the greatest leadership challenges that law firms will face in the years ahead will be changing the firm culture to ensure an adequate supply of qualified leaders. Firms that are not able to adjust their cultures to meet these new challenges will struggle to survive.

David H. Maister, considered to be one of the world's leading authorities on the management of professional service firms, was the first widely known academic/practitioner who focused on law firm culture, leadership and the need for a new paradigm for the practice of law. Maister believes that, contrary to popular opinion, culture should not be seen as a given – it both can and must be managed.¹⁰ This is a fundamental change in approach to attorney recruitment, training and management that will help firms prepare for new markets char-

Generational Classification

For classification purposes, the *Randstad* study cited in the accompanying article divided the employee universe into four generational cohorts – Generation Y, Generation X, Baby Boomer, and Mature – as follows.

- Generation Y: adults between the ages of 18 and 24 (year of birth – 1980 to 1986)
- Generation X: adults between the ages of 25 and 39 (year of birth – 1965 to 1979)
- Baby Boomer: adults between the ages of 40 and 58 (year of birth – 1946 to 1964)
- Mature: adults aged 59 and older (year of birth 1900 to 1945)

acterized by wholly new approaches to the delivery and consumption of legal services.

Two aspects of culture that young people are now demanding include: a strong performance orientation and an open, trusting environment. It logically follows that law firms whose culture supports both a performance orientation (*i.e.*, firms that have an inspiring mission, stretch goals, demand accountability for results, and have tight performance systems) and an open, trusting environment will have a much greater chance of attracting and retaining talented people. Dimensions such as character, work ethic, emotional intelligence, dedication to fulfilling commitments, and values will be of renewed importance in identifying strong leaders for the future.

Leadership in Managing Talent

In 2001, McKenzie and Company published its *War for Talent* survey,¹¹ which should prove to be of particular interest to law firms and other professional service firms. The survey was developed to find out how companies build a strong pool of managerial talent – how they attract, develop, and retain key people in their organization and how they build a pipeline of younger talent who might one day move into more senior positions. The survey results showed how dramatically the *recruiting* game has changed and, of particular note to professional service providers, how *development* is so critical to attracting and retaining key people.

In an effort to attract and retain talented young professionals, law firms will need to alter their *recruiting* and *development* strategies. One of the first challenges law firms must face is creating an enterprise logic that brings together the new technology, the changing con-

sumer profile and the interests of talented young professionals. To begin to accomplish this, law firms will need to begin prioritizing people – empowering them, serving them, supporting them in new ways, while at the same time putting systems in place to exceed the expectations of clients and potential clients. The *War for Talent* survey confirmed: “Excellent *talent management* has become a crucial source of competitive advantage. Companies that do a better job of attracting, developing, exciting, and retaining their talent will gain more than their fair share of this critical and scarce resource and will boost their performance dramatically.”¹²

The *War for Talent* survey identified improvements in the frequency and candor of feedback, and enhancements in mentoring and coaching as effective ways for attracting and retaining talent. Another important research finding by the Corporate Leadership Council’s *Voice of the Leaders* study,¹³ was that corporations benefit quantitatively when they allocate their resources to help their employees gain the skills needed to become effective managers. Corporations that incorporate mentoring into their corporate culture actually return greater profits than corporations that do not use mentoring. This approach is in stark contrast to the “rank and yank” approach toward career development in which the burden is placed on the employee to “shape up or ship out” – *i.e.*, reach 2500 billable hours a year or forget about being considered for a permanent position.

The *Randstad 2004 Employee Review*¹⁴ provides a comprehensive study of workplace issues and trends. From the first *Randstad* study in 2000, *trust* has been the single most important concern for employees. Two years later, when corporate scandals left thousands out of work and retirement plans evaporated, *ethics* and *integrity* joined *trust* as the key aspects of employee loyalty. In the early years of the *Randstad* study, employee needs were essentially the same – money, advancement, incentives and rewards. By the year 2002, the balance between work life and family life became an issue. Today, employee needs are even more dynamic and fluid. Quality of life, being in control, stability, personal career solutions, better benefits and a feeling of value to society have all become higher priorities,¹⁵ along with cutting down on hours, billable or otherwise, spent working.

New Market Challenges and Finding New Talent

The American Productivity and Quality Center (APQC) is a consortium that focuses on identifying business best practices and innovative methods of transferring those practices. In 2001, it explored links between succession management and the leadership development process in companies. The APQC study pointed out that if economic growth continues at a mod-

est 2% for the next decade and a half, this would create the need for a third more senior leaders than there are today.

Yet the supply of the age cohort that has traditionally entered into the executive rankings (35 to 44 year olds) is actually declining in the United States and will drop by 15% between 2000 and 2015, because of the difference between the size of the Baby Boom generation and the much smaller Generation X. So, law firm strategists have to wonder, where will this endless reserve of talent be found?

Today, there are 40 million people aged 65 and over (14% of the population); in 2030 it will be a whopping 70 million people (20% of the population). People over the age of 85 are in the fastest-growing age group. The average retirement age has declined from around 65 some 15 years ago to around 58 today. At the same time, people are living longer. Males can expect to live an average of 72 1/2 years, while females will live almost five years beyond that.

Another important finding of the *Randstad 2004 Employee Review* was that even though 60% of employees are satisfied with their hours, there are noticeable differences between the generations. The study found that more experienced employees are far more comfortable than their younger co-workers. Only half of Generation X and Generation Y employees were satisfied with the hours they are asked to put in each week, as opposed to 72% of Matures.¹⁶ Not only will it be more difficult to find and retain talented professionals in the years ahead, those you do attract will be less interested in working extended hours. These new individuals – your future employees – want tangible support in leading the lives they choose.¹⁷

Coaching as a Part Of the New Law Firm Culture

In the book *Practice What You Preach*,¹⁸ David Maister showed (statistically) that success in professional businesses can come from stricter adherence (“discipline”) to a set of standards that other groups may also advocate, but do not enforce. Maister proved that having a skilled manager, team leader, or coach, one whose job is to manage the team and coach the individual players, will result in profits that are greater than those achieved by firms that provide no coaching or mentoring. David Maister has long challenged senior attorneys to become skilled managers who should be able to coach teams and individuals in setting higher standards for clients

and for the firm. Firms that can bring about such a change in firm culture will create new economic value for these firms.

Today’s intense competition dictates that cultural change needs to be performance-driven, and coaching for performance is a way of obtaining optimum performance. This can require a fundamental change in attitude in dealing with training and supervision of attorneys. Coaching is becoming one of the leading development interventions in the corporate world and, according to Maister, the most financially successful

businesses do better than the rest in virtually every measurement of employee attitudes, and those that do best on employee attitudes are demonstrably more profitable.

Probably the single most important draw for young recruits is a trusting, collaborative

working relationship among firm members and among suppliers, other business partners, clients and community members. Young professionals will also be looking for law firms that have made a significant commitment in technology to promote rapid communication and information-sharing to make their work lives easier and to better serve clients. The best leadership development programs are structured around action learning: solving real and important business problems. These programs can *only* be delivered face-to-face. Collaboration is becoming more and more an imperative; it is no longer a matter of choice.

An increasing number of attorneys, from sole practitioners to managing partners of some of the nation’s largest law firms, are turning to professional coaches to assist them in growing or changing their business or professional practice. Many of the managing partners who are working with professional coaches expect more than personal growth in attaining goals. Frequently, they are looking toward the long-term goal of a fundamental transformation of management style and culture. Whether you call it “coaching,” “advising,” “counseling,” or “mentoring,” done well it can help firms harness the potential within each of their people.

Law firms that think they can ignore the impact the Internet is having on the profession are sadly mistaken. Firms that continue to throw money at new recruits, while demanding 2,000 to 2,500 billable hours per year and providing them with limited feedback regarding their career advancement, may find their talent moving to firms more closely aligned to the core values of young professionals.

The best leadership development programs are structured around action learning: solving real and important business problems.

When the supply of talented young people seemed endless, law firms rarely placed great weight on character attributes and leadership skills, relying almost exclusively on class rank, educational background, practical skills, specialized knowledge, or work experience. As you sit down with your partners in the coming weeks to discuss the emerging market challenges, keep in mind that young professionals, your future employees, and today's consumers and your future clients, no longer want to rely on group identification or comply with group norms. They want to be treated as unique individuals. They prefer to rely on their own judgment, and you will need to find a way to accommodate them. Let us suggest you start by exploring the following possibilities.

- Could it be that clients will seek pro-active advice that will not be completely customized but will be targeted enough to meet their needs at a price far cheaper than one-on-one legal advice?

- Could it be that firms will be able to reduce billable-hour requirements, while improving firm profitability?

- Could it be that young professionals will be looking for firms with a greater sense of social responsibility, such as improving the global environment or improving business ethics?

- Could it be that the same senior partners many firms are now looking to "sunset" may be the untapped resources firms will need to lead the talent pool of the future?

- Could the new role for lawyers be more that of "coach," insofar as it complements the client's newly "Googled"¹⁹ knowledge, who will use the experience, judgment and expertise of the lawyers to put the knowledge into context?

As you work your way through these challenging questions, the only thing we can assure you is this: "Squeezing another penny out of costs, getting a product to market a few weeks earlier, responding to customer inquiries a little bit faster, ratcheting quality up one more notch, capturing another point of market share, tweaking the organization one additional time – these are the obsessions of managers today. But pursuing incremental advantage while rivals are fundamentally reinventing the industrial landscape is akin to fiddling while Rome burns."²⁰ Rest assured that yesterday's strategies just will not work in answering tomorrow's problems.

1. Gary Hamel & C.K. Prahalad, *Competing for the Future* 18 (Harvard Business School Press 1994).
2. Richard E. Susskind, *The Future of Law: Facing the Challenges of Information Technology* 46 (Clarendon Press 1996).

3. Shoshana Zuboff & James Maxmin, *The Support Economy: Why Corporations are Failing Individuals and the Next Episode of Capitalism* 10 (Penguin Putnam Inc. 2002).
4. *See id.*
5. *Id.* at 33.
6. Allan Nevis, with Frank Ernest Hill, Ford: *The Times, The Man, The Company* 567–77 (Scriber 1954).
7. Zuboff & Maxmin, *supra* note 3, at 53.
8. Susannah Fox, et al., *The Online Health Care Revolution*, Pew Internet & American Life Project, Nov. 26, 2001.
9. *Culture* in any organization is the system of beliefs that members share about the goals and values that are important to them and about the behavior that is appropriate to attain those goals and live those values.
10. Jay W. Lorsch & Thomas J. Tierney, *Aligning the Stars: How to Succeed when Professionals Drive Results* (Harvard Business School Press 2002).
11. *See* Ed Michaels, Helen Handfield-Jones & Beth Axelrod, *The War for Talent* (Harvard Business School Press 2001).
12. *Id.* at 7.
13. Corporate Leadership Council, *Voice of the Leader: A Qualitative Analysis of Leadership Bench Strength and Development Strategy* (Corporate Executive Board 2001).
14. Randstad North America is a wholly owned subsidiary of Randstad Holding nv, the fourth largest professional employment service provider in the world. *Randstad's 2004 Employee Review* marks the fifth year in Randstad's continuing exploration of real workplace issues and trends.
15. *Randstad 2004 Employee Review: What You Should Know Now About Your Workforce* – A comprehensive study conducted in partnership with Roper Public Affairs & Media of NOP World 6 (hereinafter "*Randstad 2004*"). *See* <<http://www.us.randstad.com>>.
16. *Randstad 2004*, *supra* note 15, at 15.
17. Zuboff & Maxmin, *supra* note 3, at 4.
18. David H. Maister, *Practice What You Preach* (The Free Press 2001) *See* <<http://www.davidmaister.com>>.
19. Google is a global technology leader focused on improving the way people connect with information. Google's innovations in web search and advertising have made its website a top Internet destination and its brand one of the most recognized in the world. Google maintains the world's largest online index of websites and other content, and Google makes this information freely available to anyone with an Internet connection.
20. Hamel & Prahalad, *supra* note 1, at x.

EDITOR'S MAILBOX

President's Message

I enjoyed reading Ken Standard's President's Message in the July/August Bar *Journal*. It represents a reasonable, well-argued point of view. It is not the only reasonable point of view.

On the Fourth of July, I too was concerned – concerned about the safety of my country. The question mark accompanying our freedom is whether America has the requisite steadfastness to stay the course for a generation or more against mad dogs who pretend to kill in the name of Allah. I'm not so sure that the September 11, 2001 murder of 3,000 Americans remains as fresh in our memories as self preservation should otherwise dictate. I hope that the fight for our very existence, let alone our way of life, will ride the persistence of necessity. Only time will fix the right. As Ken Standard has urged, I have thought long and hard about my freedoms. I have none – repeat none – if my safety and that of my loved ones is not guaranteed by the maximum use of law enforcement techniques and military force where and as necessary. What exactly constitutes a carefully crafted check and balance of governmental power is a function of the times in which we live. These are times as perilous as they are unusual. How rights and responsibilities and carefully crafted checks and balances can be perpetuated is a question that can be condensed into a much shorter and simpler question. What is reasonable? In the nature of things, what is "reasonable" is very much a relative term. Its content is derived from surrounding circumstances.

As to lawyers, they are trained in the law. They are neither its oracles, nor its owners. Because of their training they must be more circumspect in

their approach to it. It is posited that lawyers fill the role of standing up for civil rights, civil liberties and due process. In these perilous times, the question is not due process but rather its analogue, that is, how much process is due? If lawyers have an opportunity to remind and educate what we have to lose and how easy it is for freedom to slip away, they have a responsibility to be honest that in law, as in life generally, reasonable trade-offs are necessary as a means to protect the lives of innocent Americans. Freedom is not free-floating. It attaches to living beings and presupposes their personal safety. Incantations about civil rights, civil liberties and due process that are devoid of real-time factual content are mere concepts. Theory guides practice, but theory must be rooted in practice to avoid becoming mere abstraction. The life of the law is indeed experience.

We most assuredly can take lessons from President Lincoln's suspension of habeas corpus during the Civil War. He was first the Great Unionizer. Second, he was the Great Emancipator. He used ferocious military force at Antietam. Note that the Supreme Court withheld its decision in *Ex Parte Milligan* until 1866. These were the lessons of Lincoln. Recall that the Supreme Court – applying the rule of law as it then saw it – sanctioned Koramatsu's internment, and other Americans of Japanese ancestry. Earl Warren was California's Attorney General at the time. Contrary to your assertion, I do not recall German-Americans being interned during World War II.

As to George Washington, he can be quoted on many scores. One quote is from his Farewell Address. "Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?" Our first president was pointing to a danger in our judicial system that still exists today and is just as dangerous to

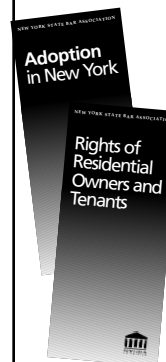
its functioning as those false alarms raised against the Patriot Act which was passed by overwhelming votes in the House and the Senate. I am still waiting to hear of a concrete instance of its abuse. The Constitution, as we were both taught, is not a suicide pact, such that we are to entrust entirely our nation's security to the courtroom. Wars are fought with armies not legal arguments in search of a factual home. The proposed Civil Liberties Restoration Act assumes that specific civil liberties have been unlawfully taken away. The assumption is as questionable as the purported remedy is unwarranted. I close with what the Supreme Court said as long ago as 1821. "The safety of the people is the supreme law." *Anderson v. Dunn*, 19 U.S. [6 Wheat.] 204 (1821). Responsibility stands on the same plateau as rights in any system of law which deigns to call itself civilized.

Respectfully yours,
Lawrence N. Gray, Esq.
Kings Park, NY

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PROGRAM	DATE	LOCATION
Henry Miller — The Trial	September 10 October 29 November 5	New York City Uniondale, LI Westchester
Bridging-the-Gap: Intellectual Property	September 21 September 28 October 19 October 26 October 27 November 3	Uniondale, LI Rochester New York City Buffalo Albany Syracuse
† Ninth Annual NYS and City Tax Institute	September 22–23	New York City
Basic Surrogate's Court Practice (half-day program)	September 24	New York City
† Hot Topics in Real Property Law and Practice (video replay) (half-day program)	September 29	Jamestown
† Hot Topics in Landlord/Tenant Practice	October 1	New York City
Suing and Defending Municipalities	October 1 October 1 October 28 November 3 November 10 November 19 December 3	Rochester New York City Albany Buffalo Westchester Uniondale, LI
† Ethics and Professionalism (video replay) (half-day program)	October 1	Canton
Practical Skills: Basic Matrimonial Practice	October 5	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester
Residential Mortgages	October 7 October 12 October 20 October 29 November 4	Albany New York City Uniondale, LI Buffalo Westchester
Microsoft Word for the Law Office with Leigh Webber	October 14 October 15 October 28 October 29	New York City Westchester Buffalo Syracuse
Health Care Provider Transactions: Practical Issues and Skills	October 15 October 28 November 5	New York City Albany Rochester
Article 9 of the UCC (half-day program)	October 20	New York City
Advice From More Experts: More Successful Strategies for Winning Commercial Cases in Federal Courts	October 22	New York City
Products Liability: Great Cases Revisited	October 22 November 5	Albany; Uniondale, LI Buffalo; New York City
Update 2004 (live sessions)	October 22 November 5	Syracuse New York City
Gathering and Presenting Evidence in the 21st Century	October 29 November 12	New York City Uniondale, LI

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

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Practical Skills: Probate and the Administration of Estates	October 27	Buffalo; Melville, LI; New York City; Rochester; Syracuse
	October 29	Albany; Westchester
† Matrimonial Update 2004	October 29	Syracuse
	November 5	Buffalo
	November 19	Melville, LI
	December 3	Albany
	December 10	New York City
Successful Strategies for Automobile Litigation	October 29	Rochester; Westchester
	November 5	Albany; Melville, LI
	November 19	New York City
† Second Annual Sophisticated Trusts & Estates Law Institute	November 4–5	New York City
† Update 2004 (video replays)	November 4	Albany
	November 10	Plattsburgh; Saratoga; Utica
	November 18	Ithaca
	November 19	Buffalo; Jamestown; Watertown
	November 29	Westchester
	November 30	Binghamton; Uniondale, LI
	December 1	Poughkeepsie
	December 3	Canton; Loch Sheldrake
	December 7	Rochester
	December 9	Suffern
Local Criminal Court Practice (half-day program)	November 4	Uniondale, LI
	November 5	New York City
	December 2	Buffalo
	December 7	Albany
Ethics and Professionalism (half-day program)	November 4	Buffalo
	November 18	Rochester
	November 23	Westchester
	November 29	Albany; New York City
	December 2	Uniondale, LI
	December 8	Syracuse
Practical Skills: Forming and Advising Businesses	November 15	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester
Hot Topics in Trusts and Estates Practice (half-day program)	November 16	New York City
	November 19	Syracuse
	November 30	Albany; Buffalo
	December 9	Tarrytown
	December 10	Uniondale, LI
Modern Discovery	November 17	Melville, LI
	November 19	Albany; Rochester
	December 3	New York City
† Advanced Elder Law	November 18	New York City; Syracuse; Uniondale, LI
	December 2	Albany
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† The Sixth Annual Institute on Public Utility Law	November 19	Albany
Fundamentals of Banking Law and Regulation	December 1	New York City
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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am General Counsel to a major University. A former graduate student (I shall call her Ms. Fortune), who was academically dismissed from the science program in which she was enrolled, has initiated a *pro se* lawsuit. In a rambling and verbose complaint, she claims a breach of contract, along with a number of other convoluted and inartfully stated causes of action. For example, Ms. Fortune claims bad academic advising, unfair grading, prejudices of various sorts, an incompetent science department generally and an unwillingness to make accommodation for a reading disability. In addition to naming the University as a defendant, she has named 14 faculty members and two administrators as individual defendants, citing various wrongs they allegedly committed against her during her academic career.

Needless to say, these persons are extremely upset at being targeted in the action, and several have demanded that the University allow them to hire private attorneys, whose fees are to be paid by the University. Not only might this result in an enormous expense for the University, but I personally would have to deal with up to 16 separate attorneys, as well as the *pro se* plaintiff herself.

We (that is, the relevant officers of the University and I) believe the complaint to be unfounded. In simple terms, Ms. Fortune did not fulfill graduate requirements and her time for doing so expired. Further, the faculty involved believed that she would not be successful, even if her time to complete the program had been extended. In short, it appears that the University has a strong defense to this suit. That, however, does not solve my immediate problem about the requests for outside counsel.

I have asked the individual defendants to postpone any decision about hiring their own attorneys, to let me respond to the complaint for everyone, and to conduct the litigation alone, at least for the present. I have explained that should it appear, at any time, that the interests of an individual defendant (or defendants) are different from those of the University, I would so advise that person or persons, who would then be free to hire individual counsel. I also told them that whether the University would cover the cost of outside counsel would be determined on the facts as they emerged during the litigation.

My question: Is this a fair, logical, fiscally responsible and ethical way to handle the requests for individual representation?

Thanking you in advance for your reply, I remain,

Fiscally and Ethically Concerned

Dear Fiscally and Ethically Concerned:

The course of conduct that you propose is fraught with peril, and should not be pursued.

EC 5-1 advises that the professional judgment of a lawyer should be exercised solely for the benefit of the client, free of compromising influences and loyalties. While your client, the University, and the individual faculty members and administrators named as defendants certainly have interests in common (in that they all want the plaintiff's claims dismissed), those interests may diverge quickly if one or more of the individuals are found liable, or even if it appears that this might happen. Some or all of them may then wish to pursue their own claims against one or more of the others, including your client – for example, in contribution or indemnification, or both.

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

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

EC 5-14 explains that this problem of conflicting loyalties arises "whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." Any doubt should be resolved against the propriety of the representation (EC 5-14). EC 5-15 further admonishes that a lawyer "should never represent in litigation multiple clients with differing interests . . . there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a

lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the lawyer refuse the employment initially."

In addition, your role as the University's General Counsel carries with it ethical implications relevant to this issue. A "lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity" (EC 5-18; DR 5-109). In a sense, this will relegate the individuals to a "second tier" of allegiance, and create an inherent conflict as you attempt to exercise your best judgment on behalf of the University and these individuals.

DR 5-105(A) is clear: "A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests." As the previous discussion indicates, it will be difficult for you not to run afoul of this Disciplinary Rule.

There is yet another potential problem. In representing multiple clients, an attorney might be privy to a confidence or learn a secret from one client that is potentially useful to another client, to the advantage of the latter, or which might work to the detriment of the client from whom the confidence or secret was obtained. The use of the information is prohibited by DR 4-101(B), unless informed consent is given.

Finally, although the decision of the University regarding payment for outside counsel touches on matters of policy and strategy that are beyond the scope of the Forum, your expression of concern for the University's financial well-being certainly constitutes an

interest of another client (*i.e.*, the University) that could affect your independent judgment in determining whether it would be proper for you to represent the individuals in this matter (DR 5-101(A)).

If a disinterested lawyer would believe that the lawyer can competently represent the interest of each potential client, and if each consents to the representation after full disclosure of the implications of the simultaneous representation, including the advantages and risks involved, the lawyer can proceed with the dual or multiple representation (DR5-105(C)). In that regard, a lawyer also should heed EC 5-16, which provides that "it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free from any potential conflict and to obtain other counsel if the client so desires."

If, however, a disinterested lawyer would conclude that a client *should not* agree, you should not undertake the representation, even if the client *does* agree (EC 5-16). And this situation warrants your declining the multiple representation – in other words, the client should be advised *not* to agree.

Should you elect to proceed notwithstanding the foregoing cautions, be sure to consider that if a conflict develops you may be required to withdraw from representing all defendants – including the University (*see* DR 2-110). On a related note, consider the strictures of DR 5-107 in connection with the University compensating you for the representation of the other defendants; under sections (A)(1) and (2), attorneys are prohibited from accepting compensation or "any thing of value" related to the subject matter of the employment from anyone other than the client, absent full disclosure and consent of the client.

Quite aside from all the potential problems that can arise during the course of a multiple representation, you may trip over another, more general ethical issue at the very beginning. It is one thing for a potential client to

ask you to represent him or her; it is entirely different for you to ask that individual, in effect, to employ you. Such direct solicitation may violate DR 2-103(A)(1) and other provisions of law (Judiciary Law § 479). This is of special concern where, as here, you indicate that several individuals have already indicated their desire for separate counsel.

One last practical note: it is not clear from your self-description as "General Counsel" whether you are employed as in-house counsel or have an independent practice, and are not an employee. If you are an employee of the University, and proceed in the defense of all the parties you mention, you must be especially careful that your actions on behalf of the individual defendants will be covered by professional liability insurance.

The Forum, by
M. David Tell
Wormser, Kiely, Galef & Jacobs LLP
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

Over the past 15 years, I have handled a variety of matters for a married couple – let me call them Mr. and Mrs. Andrews – and their two adult children, John and Betty (also fictitious names). Two years ago, Mr. Andrews died and I was engaged by the family to settle his estate. About one year later (a year ago), I was retained by Betty to represent her in a divorce proceeding. Most recently, John, who is a successful contractor and developer of luxury homes, engaged my services to convert his business from a partnership to a limited liability company, and to defend him in a rather complex construction litigation filed by a homeowner. John paid me a retainer on account for the litigation, and I anticipate a substantial legal fee by the time the action is concluded.

CONTINUED ON PAGE 58

Double-Dipping Lives On. *Holterman* and the Continuation of the *O'Brien* Dilemma

BY LEE ROSENBERG

The New York State Court of Appeals in its recent five to two decision in *Holterman v. Holterman*¹ once again had the opportunity to revisit the issue of “enhanced earning capacity.” This doctrine, stemming from the Court of Appeals’ seminal case *O'Brien v. O'Brien*,² has spawned a plethora of cases expanding the Court’s finding so as to provide for equitable distribution on the enhanced earnings created by various licenses, degrees, certifications, celebrity, and other instances in which a party possesses the ability to generate extraordinary earnings.³

In the wake of *O'Brien*, the Court of Appeals has addressed the dilemma created when the distribution of a party’s enhanced earnings results in a double-dipping/double-counting scenario – *i.e.*, the income stream from which the enhanced earnings are distributed is also used to award maintenance – or a triple-dipping when there is also a distribution from the same stream of income for the valuation of a business interest. In *McSparron v. McSparron*⁴ and *Grunfeld v. Grunfeld*,⁵ the Court warned against double dipping/double counting, but did not address the additional problem created when child support is also at issue and subject to payment from the very same income stream.

O'Brien mandates the consideration of enhanced earning capacity and the distribution thereof even though the party who possesses that capacity may lose it the day after it is distributed. This fiction created by *O'Brien* has been well criticized by the matrimonial bar.⁶ Now, in *Holterman v. Holterman*, where the Court of Appeals finally got to address the *O'Brien*, *McSparron* and *Grunfeld* multiple-dipping scenario as it relates to child support, and also had

the opportunity to reconsider *O'Brien* and its progeny, the Court wasted it. Only by virtue of the extensive dissent in *Holterman* by recently appointed Judge Robert S. Smith and joined by Judge Susan P. Read, acting as lone, common-sense voices in the wilderness, was the *O'Brien* dilemma tackled head on. Ultimately, the Court, by its majority, reaffirmed *O'Brien*, declined to extend the double-dipping/double-counting warning to child support, ignored the arguments raised in the dissent and continued the complex morass that results from the “enhanced earnings” doctrine.⁷

The facts of *Holterman* involve the distribution of the husband’s medical license and the enhanced earnings attributable thereto, as well as the impact of that distribution upon maintenance and child support.⁸ The parties had been married for 19 years and had two children. The wife had a master’s degree and had been employed during the marriage, but developed “significant health problems and was eventually diagnosed with chronic fatigue syndrome and fibromyalgia.” The wife ceased to work as a result of her health problems and the decision of the parties.

The wife was awarded 35% of the husband’s enhanced earning capacity, resulting in a net distributive award of \$184,931.52 to be paid over 15 years at 6% per annum, retroactive from the date of commencement.⁹ The annual award was calculated at \$21,288. Nondurational maintenance was then awarded to the wife at \$35,000 per year for the first five years and \$20,000 per year thereafter. In addition to the foregoing, child support was awarded to the wife on behalf of the two unemancipated children, in the sum of \$34,875.65 per year. All of these awards

necessarily flowed from the same stream of the husband’s income.

In affirming the 35% distribution of the enhanced earnings, the Court of Appeals reiterated the nearly two-decade-old “*O'Brien* rule” and began an analysis of the “double dip/double count” as it pertains to the child support award. The husband argued that in order to avoid the double dip/double count, the annualized distributive award payment of \$21,288 should be deducted from his gross income for child support purposes and be included in the wife’s income as a “reassignment” of income. In essence, the same argument advanced by Justice Robert A. Ross in the Nassau County, Supreme Court case of *Goodman v. Goodman*¹⁰ was advanced in Judge Smith’s dissent. The majority, however, dismissed the argument by holding that the statutory language of the Child Support Standards Act (CSSA)¹¹ does not allow for such a deduction, particularly as a distributive award is purposefully not deemed deductible to the payor nor income to the recipient under the Internal Revenue Code. Accordingly, the majority held, it should not be in the nature of a deduction from income under the provisions set forth by the legislature in enacting the CSSA. In contrast, the dissent asserted that the “unjust or inappropriate” language in the CSSA¹² should have been considered by the majority in order to obviate the financial burden to the husband and avoid the perils and injustice of the double dip. The dissent further criticized the majority for not examining the totality of the circumstances which the “unjust or inappropriate” language of the CSSA appears to contemplate and analyzed the depletion of the husband’s income stream at length. The dissent went fur-

ther still, arguing for the restriction of *O'Brien* to fact-specific circumstances involving the "'student-spouse/working-spouse syndrome,' or some reasonably analogous situation." Judge Smith suggests that any inequity created by the enhanced earning ability of one spouse can usually be addressed by awarding maintenance or in the distribution of other assets as is done by other states.¹³

Many in the matrimonial bar have opined that the CSSA, being a statutory creation of the legislature, does not, by virtue of its failure to specifically authorize same, permit the "reassignment of income" theory. Accordingly, the *Holterman* majority would appear to be correct. The statute, however, does not restrict a court from doing justice when child support is to be paid from the very same income stream already being used to provide maintenance and/or the distribution of assets, such as enhanced earnings or other "things of value." The adjustment may be made either in the maintenance award, the equitable distribution or through the use of the "unjust or inappropriate" provision of the CSSA itself.

It seems clear, however, that the *O'Brien* dilemma will continue into the unforeseen future as, barring legislative intervention, the Court of Appeals remains disinclined to undo 19 years of law which has seen millions upon millions of dollars distributed based upon legal fiction. Perhaps, however, there are some new voices of reason on the Court, and these may grow stronger in the years to come.

LEE ROSENBERG, ESQ., is a partner in the law firm of Saltzman Chetkof & Rosenberg LLP in Garden City, with a practice concentrating in matrimonial and family law.

1. 2004 N.Y. LEXIS 1520 (June 10, 2004).
2. 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985).
3. *E.g.*, medical board certification (*Savasta v. Savasta*, 146 Misc. 2d 101, 549 N.Y.S.2d 544 (Sup. Ct., Nassau

Co. 1989)); law degree (*Holihan v. Holihan*, 159 A.D.2d 658, 553 N.Y.S.2d 434 (2d Dep't 1990)); accounting license (*Duspiva v. Duspiva*, 181 A.D.2d 810, 581 N.Y.S.2d 376 (2d Dep't 1992)); physician's assistant certificate (*Morimando v. Morimando*, 145 A.D.2d 609, 536 N.Y.S.2d 701 (2d Dep't 1988)); academic degree and teaching certificate (*McGowan v. McGowan*, 142 A.D.2d 535, 518 N.Y.S.2d 990 (2d Dep't 1988)); unutilized master's degree (*Kaufman v. Kaufman*, 207 A.D.2d 528, 616 N.Y.S.2d 65 (2d Dep't 1994)); congressional career (*Martin v. Martin*, 200 A.D.2d 304, 614 N.Y.S.2d 775 (3d Dep't 1994)); celebrity (*Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct., N.Y. Co 1988), *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dep't 1991), *leave dismissed*, 79 N.Y.2d 851, 580 N.Y.S.2d 201, 588 N.E.2d 99 (1992)); harbor pilot's apprenticeship and license (*Pino v. Pino*, 189 Misc. 2d 331, 731 N.Y.S.2d 599 (Sup. Ct., Nassau Co. 2001)); extraordinary career earning ability (*Hougie v. Hougie*, 261 A.D.2d 161, 689 N.Y.S.2d 490 (3d Dep't 1999). *But see Spence v. Spence*, 287 A.D.2d 447, 731 N.Y.S.2d 66 (2d Dep't 2001)).

Two recent cases, *Sterling v Sterling*, 303 A.D.2d 290, 757 N.Y.S.2d 530 (1st Dep't. 2003) and *J.C. v. S.C.*, N.Y.L.J., Oct. 31, 2003, p. 20, col. 1 (Sup. Ct., N.Y. Co., Drager, J.), seem to have attempted to restrict the enhanced earnings doctrine, although the decision in *J.C. v. S.C.* appears to have resulted at least in part from a failure of proof. In an even more recent case, *A.Z. v. C.Z.*, N.Y.L.J., July 9, 2004, p. 19, col. 1 (Sup. Ct., Nassau Co., Ross, J.), the court declined to award any portion of the enhanced earnings based upon the court's view of the equities involved and the apparent inconsequential effect of the husband's degree on his earnings.

4. 87 N.Y.2d 275, 639 N.Y.S.2d 265, 662 N.E.2d 745 (1995).
5. 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).
6. Some of those critiques were referenced in Judge Robert S. Smith's dissent in *Holterman*. See also Hon. Anthony J. Falanga & Charlene Malone, Outside Counsel, *Time to Revisit Equitable Distribution of Prospective Income Streams?*, N.Y.L.J., July 7, 2003, p. 4, col. 4; Elliot D. Samuelson, *In the Absence of a License or Advanced Degree, Should the Special Skills and Knowledge of a Spouse*

Acquired on the Job, Which Creates Enhanced Earnings, Be Valued as a Marital Asset?, 36 Family L. Rev. 1 (Spring 2003); Elliot D. Samuelson, *Is it Time to Reverse O'Brien?*, 34 Family L. Rev. 3 (Fall/Winter 2002).

7. Examples of the complexity created by the enhanced earnings issue were recently set forth in a *New York Law Journal* article, Jay Landa & David Marcus, Outside Counsel, *Examining the Double-Dipping Conundrum*, N.Y.L.J., May 14, 2004, p. 4, col. 4.
8. The Husband was a salaried employee and as such there was no business interest to distribute.
9. The balance of the marital property was equitably distributed.
10. 195 Misc. 2d 204, 755 N.Y.S.2d 822 (Sup. Ct., Nassau Co. 2003).
11. Domestic Relations Law § 240(1-b) (DRL).
12. DRL § 240(1-b)(f).
13. The dissent observes that New York remains the only state to adopt the *O'Brien* doctrine.

FOUNDATION MEMORIALS

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

Medicaid Planning: An Obligation to Senior Citizens

BY MARVIN RACHLIN

Who are the people who seek Medicaid planning? They are our teachers, our homemakers, our truck drivers, our store clerks, our soldiers, sailors and airmen who were sent to fight our wars; they are our parents. We have learned how to keep them alive much longer, creating longer periods when those who have contributed so greatly to our society now become dependent on that society for necessary medical care.

As parents, there is no question of our obligation to our dependent children. When our parents become dependent, why do we even question our obligation to them? We have partially addressed this obligation with the enactment of the Medicare and Medicaid programs. Medicare is designed to address the short-term medical needs, whereas Medicaid is designed to meet short-term and long-term medical care needs.

When Medicaid was enacted in 1965, long-term care at home and in nursing homes was not yet recognized as the major need of our aging population. If we had foreseen the need, the Medicaid program would have been designed more like Medicare, available to virtually all senior citizens, instead of being a means-tested program with resource and income limitations. The reality is that the only program currently capable of providing necessary long-term medical care to our dependent senior citizens is Medicaid. Based on the 1965 Medicaid model, a dependent senior citizen is limited to an average of less than \$4,000 in savings and other resources, and less than \$750 per month in gross income. We tell a senior who needs medical care that it doesn't matter if your monthly expenses exceed your income; we still expect you to contribute to your own care.

We know that it is better and less expensive to maintain a person at home rather than in a nursing home. It is curious, therefore, why long-term home care continues to be targeted for reductions and limitations at all levels of government. The federal government tells states that they don't have to provide home care as part of the Medicaid program, so many states don't, which forces seniors to pay for their own home care or do without it. Those states that do provide home care continually try to limit and reduce the number of hours, reductions often unrelated to the level of need.

In New York State, the decision was made that Medicaid could pay to bathe and toilet a person, but not to protect that person from burning down the house as the result of forgetfulness, or from falling down the steps. We don't recognize safety monitoring as a need that Medicaid can meet, and neither do the federal courts.¹ We must ask ourselves why we are unwilling to protect the safety of our dependent senior citizens. How can we justify abandoning our protectors when they become our dependents? For those whose need is greatest, those who require nursing home care, our means-tested Medicaid program offers few options. Pay the exorbitant nursing home fees, using a lifetime of savings, until virtually everything is gone, or seek counsel capable of providing Medicaid planning and asset protection.

It is incredible that there are some among us who actually believe that Medicaid planning and asset protection are an abuse of the system. Have those advocates of senior poverty forgotten who we are planning for? Have they forgotten the contribution that the now-dependent seniors have made to us, to our society and to our nation? It

is we who are and should be indebted to them. They have paid their way and paid our way for decades. Who is more deserving of our concern, and our protection? It is not the dependent seniors who are abusing the system, it is our system that imposes poverty as a condition of receiving medical care. It is our system that is abusing a population most deserving of our gratitude, our respect and our protection.

To those who fear that Medicaid is a burden on limited resources, I say we must re-examine our priorities; providing long-term medical care for our seniors is not a burden, it is a partial fulfillment of an obligation, and it is an honor.

MARVIN RACHLIN is of counsel to Vincent Russo & Associates of Westbury, Islandia and Lido Beach. He is a former chief counsel to the Nassau County Department of Social Services.

1. See *Rodriguez v. City of N.Y.*, 197 F.3d 611 (2d Cir. 1999).

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ATTORNEY PROFESSIONALISM FORUM CONTINUED FROM PAGE 49

John just called and has put me in an awkward position. He told me that since his father's death, his mother's health has been deteriorating (she has Parkinson's disease) and he has been totally responsible for her care. This includes paying her bills, maintaining her house, and driving her to all her doctor appointments. His sister Betty moved to California after her divorce, and is unable to share this burden. John has also advised me that although his mother's physical health has declined, her intellect has not, and she refuses to move to an assisted-living facility.

After describing his "caretaker" role, John told me that his mother wanted a new will prepared that gave her house to John (in gratitude for all that he was doing) and her remaining property (consisting of a minimal amount of cash) to him and his sister in equal shares. Also, since Betty now

resided in California, his mother felt that it would be more practical if I, rather than Betty, served as co-executor with him under this will. He then ended the conversation by telling me that he would pick up a draft of the will next week, when he comes by for his EBT preparation. He also instructed that under no circumstances did he want me to bill his mother, given her limited income, and that he would take care of my fee.

I am confused. First, can I even represent Mrs. Andrews in this matter at the same time I represent her son? If I can represent both of them, shouldn't Mrs. Andrews herself have contacted me? What are my ethical and professional obligations in this situation?

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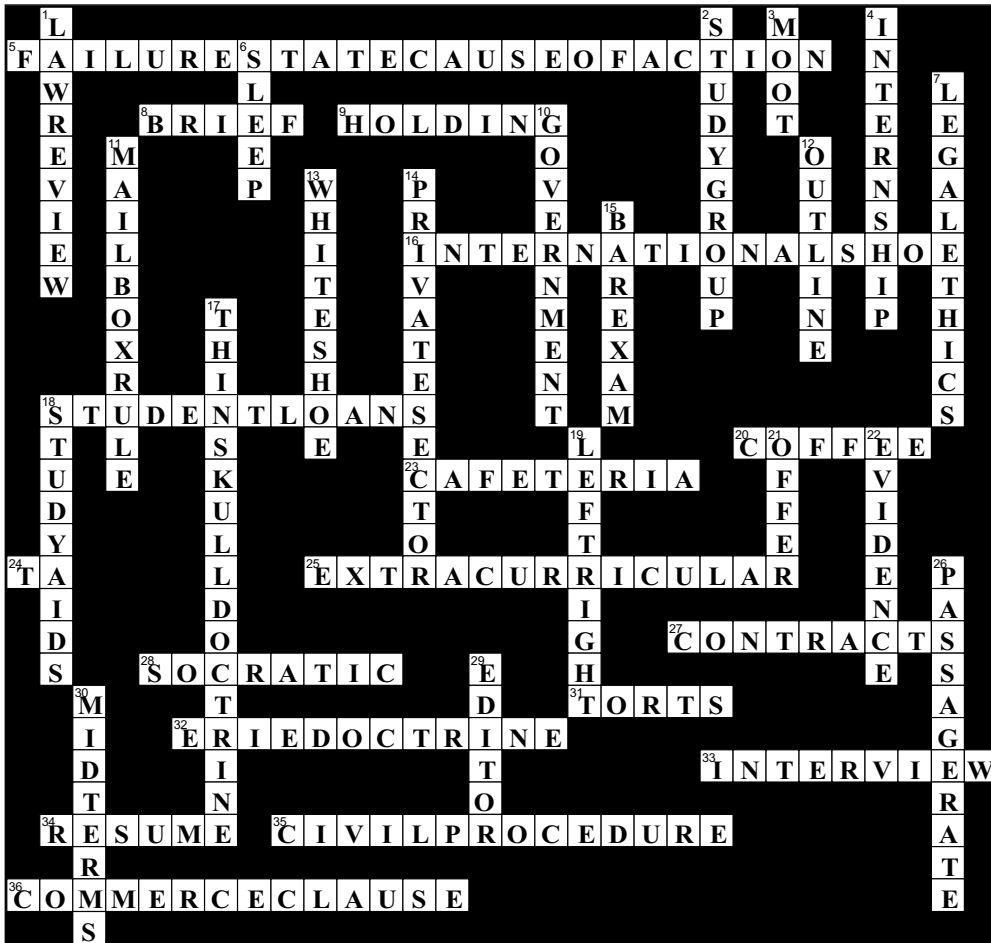
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Answers to Crossword Puzzle on page 8.



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Critics have long urged that opinions be shortened. From the 1899 Albany Law Journal: “[I]t behooves a judge to begin where his predecessors left off and go on from that point. . . . Too many long opinions are merely padded for pedantic display, or represent the result of the judge’s study of principles that are really trite, but happened to be unfamiliar to him.”²²

Fewer long opinions will lead to more thoughtful ones. First Circuit Judge Selya offered this advice in two law-review articles. In the first, he wrote that “judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. . . . [J]udges must begin to think more and write less.”²³ He elaborated in the second: “[I]f judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work conscientiously toward economies of phrase, the game will prove to be well worth the candle. With apologies to Robert Browning, the reality is that ‘less is more.’”²⁴

Less is more when opinions cut to the chase. Consider this California classic:

The court below erred in giving the third, fourth, and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.

The judgment is reversed and the cause remanded.²⁵

But brevity is vice if it leads to inadequate explanation. Writing should be economical, not clipped, casual, and abrupt. Here’s one Michigan opinion:

The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgins*

Rack Coating & Manuf., Inc. (1969), 17 Mich. App. 259. He didn’t. We couldn’t.

Affirmed. Costs to appellee.²⁶

Judicial brevity is also no virtue when a court decides too little: “[T]here is a Law of Judicial Parsimony, which states that a court should decide no more than it must. . . . But sometimes courts extend this ‘law’ to the point of deciding no more than is necessary to get the case off the desk. Judicial Parsimony then becomes judicial shortchange.”²⁷ Nor is brevity a virtue when a court addresses new, complex, and important problems. The opinion “will be longer, it *may* have to be historic, and it *will* have to be learned. If done well, it will be judicial operation at its finest.”²⁸

We remember the short and forget the long. The Golden Rule has 11 words, the Ten Commandments 75, the Gettysburg Address 267, the Declaration of Independence 1321. Note to my snoozing readers: This column has 1923. Enough said.

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1. Horace warned that “[w]hen a work is long, a drowsy mood may well creep over it.” John M. Lindsey, *The Legal Writing Malady*, N.Y. L.J., Dec. 12, 1990, at 2, col. 3 (quoting Horace, *Ars Poetica*, lines 335–38 (H.R. Fairclough trans.) (Loeb Classical Library rev. ed. 1929)).
2. Federal Judicial Center, *Judicial Writing Manual* 4 (1991).
3. American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 37 (1961).
4. See, e.g., Joseph W. Little, *The Workload of the United States Supreme*

Court: Ruling the Pen with the Tongue, 6 J. Legal Profess. 51 (1981).

5. To shorten opinions, see J. Allen Crockett, *Decision Writing*, 48 A.B.A. J. 864 (Sept. 1962); Charles G. Douglas, III, *How to Write a Concise Opinion*, 4B7 Judges’ J. 47 (1983); Robert Gardner, *Toward Shorter Opinions*, 55 Cal. St. B.J. 240 (1980); Herbert B. Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362 (1948); Marshall F. McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 A.B.A. J. 382 (May 1949). To combine brevity with clarity, see Francis Bergan, *Opinions and Briefs: Lessons from Loughran*, N.Y. St. B. Ass’n Found. (1970), in which Court of Appeals Judge Bergan analyzed Chief Judge Loughran’s opinions, and Charles A. Beardsley, *Judicial Craftsmanship*, 24 Wash. L. Rev. 146 (1949), which slashes a Washington Supreme Court opinion from 17 pages to one.
6. Dwight W. Stevenson, *Writing Effective Opinions*, 59 *Judicature* 134, 134 (1975).
7. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10, 11 (Nov. 1997).
8. *Id.*
9. *Id.*
10. William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 Buffalo L. Rev. 121, 125–26 (1995) (footnote omitted).
11. *Id.*
12. Marshall F. McComb, *The Writing and Preparation of Opinions*, 10 F.R.D. 1, 1 (1951).
13. William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 Buffalo L. Rev. 1273, 1300 (2001); see also William H. Manz, *New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos*, 74 N.Y. St. B.J. 8, 8 (2002).
14. Richard A. Posner, *The Federal Courts: Crisis and Reform* 72 (1985).
15. Ruggero J. Aldisert, *Opinion Writing* 86 (1990).
16. *Wells v. Garbutt*, 132 N.Y. 430, 435, 300 N.E. 978, 979 (1892).
17. William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act II, sc. II (Polonius).

CONTINUED ON PAGE 61

18. *Alliance to End Repression v. City of Chicago*, 733 F.2d 1187, 1193 (7th Cir. 1984) (Posner, J., concurring & dissenting).
19. Peter Hay, *The Book of Legal Anecdotes* 172 (1989) (quoting Oliver Wendell Holmes).
20. William Domnarski, *In the Opinion of the Court* 35 (1996).
21. Kent Haruf, *Writers on Writing: To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes*, N.Y. Times, Nov. 20, 2000, at E1, col. 1.
22. Editorial, 60 Albany L.J. 76 (1899) (reprinted in Robert A. Leflar, *Appellate Judicial Opinions* 200, 200–01 (1974)).
23. Bruce M. Selya, *Judges on Judging, Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 Ohio St. L.J. 405, 414 (1994).
24. Bruce M. Selya, *Favorite Case Symposium: In Search of Less*, 74 Tex. L. Rev. 1277, 1279 (1996). Judge Selya's favorite case is his own: *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1st Cir. 1987), which cited nothing at all. Justice Holmes once wrote an opinion that cited not a single case. See *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U.S. 66 (1921). In *Abrams v. United States*, 250 U.S. 616, 624 (1919), his greatest dissent, he again cited no case. Omitting citations sure shortens opinions.
25. *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461 (1855) (Heydenfeldt, J.).
26. *Denny v. Radar Indus., Inc.*, 28 Mich. App. 294, 184 N.W.2d 289 (1970).
27. Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 837 (1961).
28. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 682 (1965) (emphasis in original).

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Short Judicial Opinions: The Weight of Authority

BY GERALD LEBOVITS

Some judges who lament that lawyers' papers are too lengthy are more guilty of overwriting than lawyers. Judges who write lengthy opinions think they're creating memorable precedent. They're really nudging their snoozing readers to wake up and take a sleeping pill.¹

Ultimately, "[t]hree factors influence the scope . . . of an opinion: the complexity of the facts and the nature of the issues, the intended audience, and whether the opinion will be published."² An opinion's scope is important to litigants, especially losing litigants, who must be assured that the court considered their contentions fairly. Scope is also important to the public, who rely on the judiciary for assurance that cases are decided correctly. And scope is important to lawyers and judges, who rely on opinions for precedent. Opinions whose scope are too narrow will be misunderstood.

Opinion length — as opposed to scope — is unimportant to litigants: "[W]here the lawyer's own case is involved, the winner is rarely critical of the length, and the loser often feels that his points were not adequately discussed."³ Even so, length matters to everyone else, including opinion writers.

Concision is a virtue. Wordiness, not complexity, creates long opinions.⁴ But brief opinions are better than lengthy opinions even if the lengthy opinion is concise. Brief opinions hold the reader's attention, allow readers to move on to other things, and distill the opinion's essence. Lengthy opinions lend meaning to the phrase "weight of authority." The goal is to get to the point in an instant, er, instantly.⁵ The reader is key: "Too often . . . judges write . . . as if to themselves and as if their only purpose were to provide a

documentary history of having made a judgment. [But] the purpose of an opinion is to make a judgment credible to a diverse audience of readers."⁶

According to New York's Chief Judge Judith Kaye, opinion readers "expect a certain level of 'scholarliness.'"⁷ Still, "readers lament today's long, heavily footnoted, subsegmented, law review encrusted opinions."⁸ And "as the length of writings grows, the number of people who actually read them dwindles."⁹

The length of opinions and the number of citations have increased over time. In the New York Court of Appeals "between 1880 and 1970 . . . [o]pinions . . . range from 3.6 to 4.4 pages with no discernible trend. . . . After 1980, the average length of a majority opinion rose to 5.7 pages and, in both 1990 and 1993, it rose again to approximately six pages."¹⁰ In that time, "the number of citations per opinion reached a new high of 12.4 in 1980 and fell off only slightly, to 12.3 in 1990 and 11.5 in 1993."¹¹ It frustrates the bar that opinions have grown longer. In 1940, when opinions were much shorter than they are today, "well over 80 per cent of the lawyers [the American Bar Association surveyed] were dissatisfied with the then length of the opinions and preferred shorter opinions."¹² Good news might be on the horizon. In 2000, the average New York Court of Appeals opinion dropped to 5.2 pages and 10.9 case citations.¹³

Federal opinions are even longer than New York opinions. The average federal court of appeals opinion rose between 1960 and 1980 from 2863 words to 4020. Footnotes climbed from 3.8 to 7.0. Citations soared from 12.4 to 24.7.¹⁴

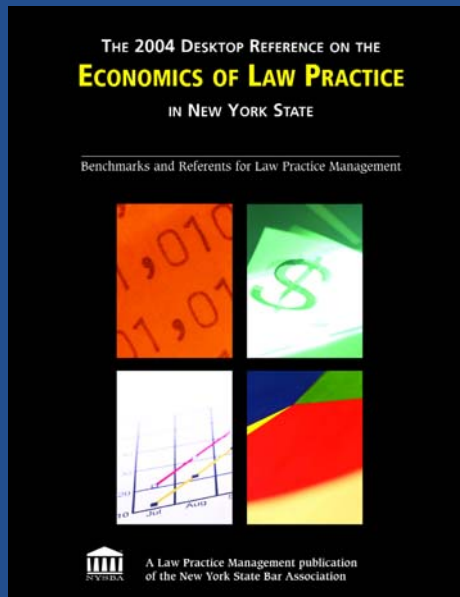
In addition to verbosity, overwriting causes long opinions. First Circuit Judge Aldisert cautioned against writing in depth: "When I see an opinion heavily overwritten, it is a signal to me that it is the product not of a judge, but of a law clerk, a person who is generally not sophisticated or perhaps confident enough to separate that which is important from what is merely interesting."¹⁵ Judge Vann used this put-down about a New York Court of Appeals opinion: "The discussion outran the decision."¹⁶ Overwritten opinions cause readers to say, "I understood the law until I read this opinion."

**Get to the point
in an instant,
er, instantly.**

As The Bard's aphorism goes, "brevity is the soul of wit," meaning wisdom.¹⁷ Judicial bard Richard Posner once paid homage to brevity and concision: "Judge Dumbauld's opinion for this court is concise — one might say summary — and not without wit. I admire witty and concise opinions, remembering Holmes' adage that a judge doesn't have to be heavy in order to be weighty."¹⁸

Judges who write in uncomfortable positions write less. Justice Holmes often wrote his opinions standing at a high desk. He explained why: "If I sit down, I write a long opinion and don't come to the point as quickly as I could."¹⁹ Justice Holmes messed up his knees but wrote succinctly and quickly, "usually within a day or two of getting the assignment."²⁰ Hemingway also wrote "some of his fiction while standing up."²¹

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