OCTOBER 2005
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NEW YORK STATE BAR ASSOCIATION
Journal

This Land is Your Land?

Eminent Domain's Public Use Limitation

by David C. Wilkes and John D. Cavallaro

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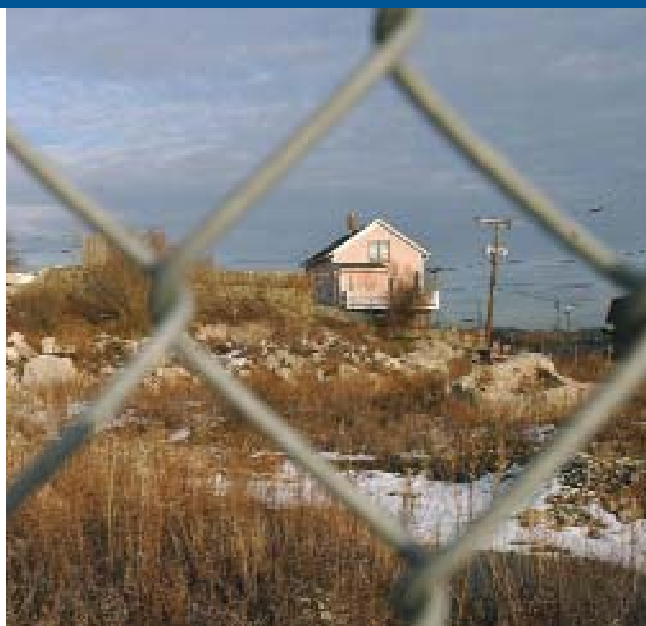

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Photo by Getty Images

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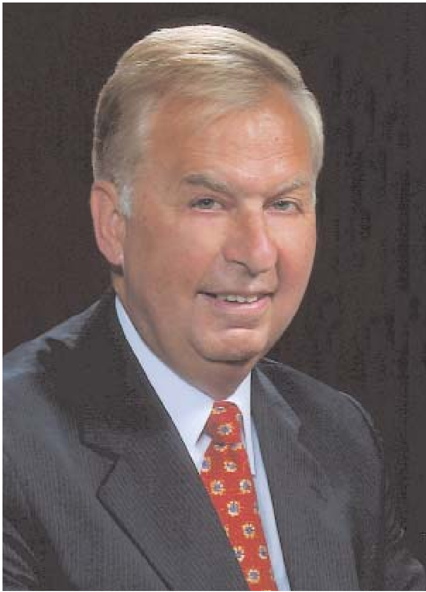

Whatever Happened to a Limited Federal Government?

President George W. Bush told a group of governors in 2001: "The framers of the Constitution did not believe in an all-knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government's powers and reserved the remaining functions of government to the states."[1] Senate Majority Leader Bill Frist has expressed similar sentiments.

However, notwithstanding the recognition of the important role of states in the federal system, in recent years, Congress and the President have shown a willingness to adopt legislation that not only fails to return power to the states, but rather tramples on the rights of the states to determine what is best for their own citizens in areas of law traditionally reserved to the states. The most dramatic recent example of this disturbing trend is the Terri Schiavo case, where Congress legislated on issues of family law, health care proxies, and the rights of individuals and families to determine what kind of medical care they receive.

Unhappy with the outcome of the case in Florida state courts, Congress and the President decided to give Schiavo's parents another chance – in federal court, on a blank slate. A federal district court was granted jurisdiction to consider a claim by Schiavo's parents regarding withholding of food, fluids or medical treatment and to make a de novo determination, regardless of previous state court determinations.[2] In enacting this law, the legislative and executive branches violated not only principles of federalism, but also the principle of the separation of powers.

Understandably, that excursion into federal law caused a great furor. The point for lawyers was not whether you agreed with the outcome of the case in the Florida courts, but rather that it was a matter for the Florida courts and legislature to determine. The fact that the Schiavo case was highly controversial and well publicized was no reason to ignore the traditional role of states. The problem was compounded when proponents of the legislation did not agree with the outcome in federal court and unfairly criticized the federal judges.

Tort law is another area in which the federal government is meddling in states' laws. A striking example of why the federal government should stay out of telling the states what their tort laws should be is the so-called Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The bill, which passed both houses of Congress on July 29 and was signed into law by the President on August 10, is basically a highway funding law. Buried deep in this bill is a provision abolishing vicarious liability of owners of motor vehicles who rent or lease a vehicle to a person whose negligence results in injury or death.

Many applauded the elimination of vicarious liability on leased cars in New York, and that change was consistent with our Association's call for the New York State Legislature to do away with the vicarious liability of leasing companies. However, the new law abolishes not only vicarious liability for car leasing companies, but also for car rental companies. The Association has never endorsed relieving rental car companies of vicarious liability for the negligent acts of drivers. There is a great difference between imposing vicarious liability on companies which lease cars – a financial arrangement – and imposing liability on companies providing short-term car rentals – which is like loaning your car to a friend or relative. The rental car agent,

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

like anyone else who owns a car, is in a position to decide whether a person should be entrusted with a vehicle.

Regardless of whether the vicarious liability provisions were consistent with our views, we do not support the federal government's intrusion into the traditional role of states in determining how much tort protection to provide to local citizens. New York State should be free to provide more or less protection than is needed for citizens in different states such as Idaho and Nebraska. When Congress becomes involved in state issues, typically there is inadequate consideration of the issues and the differences among states. Also, members of our local legislature are more accountable to us as citizens of New York than are congressional legislators from Idaho and Nebraska. President Bush recognized this concept when he announced, in the speech referred to above, his intention "to bring decision-making closer to the people" and acknowledged the need to determine "how best to devolve authority back to the states."

Often when the federal government intrudes into areas of law traditionally reserved to the states, there is little or no opportunity given for affected states to be heard. Before the vicarious liability provisions became law, there was no formal hearing on the issue. The provisions were offered in the form of an amendment to the massive highway bill, with very limited time for debate on the amendment. It appears that there was a clear strategy implemented by special interest groups based outside New York State to maneuver behind the scenes and attach these provisions to the bill, which was destined to become law because of all of the special projects members of Congress were able to provide for their districts.

Currently pending in Congress are many other bills that propose a huge shift in the traditional spheres of the state and federal governments. These include a national automobile no-fault bill and legislation limiting the awards available to persons injured by medical malpractice (H.R. 5 and S. 354, the Help Efficient, Accessible, Low-Cost, Timely Healthcare [HEALTH] Act of 2005). As to the HEALTH Act, obviously, the individual needs of states and their citizens vary, and states have a right to determine the extent to which their citizens will be able to recover as the result of medical malpractice and to determine if a crisis exists. Whatever malpractice insurance crisis may exist in other states, none has been proven to exist in this state.

The Association has taken the position that caps are a particularly inappropriate way to try to limit malpractice insurance premiums. Caps discriminate against low-wage earners, and there has been absolutely no proof in any of the states where caps have been adopted that they result in lower insurance premiums. That is the genius of letting states experiment – they can be mini-laboratories to determine what works. Caps have not worked. When Congress imposes a one-size-fits-all approach, it fails to honor the uniqueness of each state and imposes uniformity, even when that is not necessarily the most effective means for dealing with a policy problem.

When Congress intervened in the Schiavo case, one Republican Congressman observed, "My party is demonstrating that they are for states' rights unless they don't like what the states are doing."[3] That Congressman was right, because there is a glaring inconsistency between the stated adherence to the principles of deferring to states in their traditional areas of power and actions that have usurped states' rights when it suited our leaders' needs.

You can be sure that your Association will continue to advocate against the federal government's intrusion in areas of state law in which Congress has no business legislating. By writing letters to the editor and op-ed pieces and conveying our position to our legislators, the Association will play a leadership role in this important area. As always, your comments are welcome. You can e-mail me at president@nysbar.com. ■

1. Remarks at National Governors' Association Meeting, Feb. 26, 2001.

2. Pub. L. No. 109-3.

3. Rep. Christopher Shays of Connecticut, N.Y. Times, Mar. 23, 2005.

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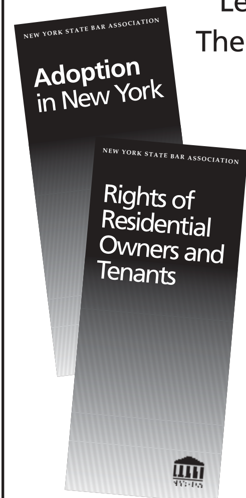

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Bridging-the-Gap: Intellectual Property
October 27 Uniondale, LI
November 3 Albany; New York City
November 4 Tarrytown
November 17 Rochester

Risk Management for Attorneys: How to Stay Our of Your Lawyer's Office
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.5): 2.5 in ethics and professionalism; 1.0 in practice management and/or areas of professional practice
October 27 New York City
October 28 Melville
December 2 Tarrytown

2005 Update and Overview on Premises Liability
Fulfills NY MCLE requirement for all attorneys (6.0): 1.5 in skills; 4.5 in practice management and/or areas of professional practice
October 28 Buffalo; New York City

New York Appellate Practice
Fulfills NY MCLE requirement for all attorneys (7.0) (8.0 in NYC only): 0.5 in ethics and professionalism; 3.5 in skills (4.5 in NYC only); 3.0 in practice management and/or areas of professional practice
October 28 Tarrytown
November 9 Buffalo
November 10 Uniondale, LI
December 1 New York City

Divorce Law 2005: Part B and Maintenance at 25, the CSSA at Sweet 16
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in practice management and/or areas of professional practice
October 28 New York City
November 18 Melville, LI
December 2 Syracuse
December 9 Albany

Update 2005
(Live Sessions)
Fulfills NY MCLE requirement for all attorneys (8.0): 1.0 in ethics and professionalism; 7.0 in practice management and/or areas of professional practice
November 4 New York City

Update 2005
+(Video Replays)
Fulfills NY MCLE requirement (8.0): 1.0 in ethics and professionalism; 7.0 in practice management and/or areas of professional practice
October 25 Albany
October 26 Utica
November 3 Binghamton
November 9 Plattsburgh; Saratoga
November 10 Ithaca
November 18 Buffalo; Canton
December 1 Poughkeepsie; White Plains
December 2 Loch Sheldrake; Melville, LI; Suffern; Watertown
December 7 Rochester
December 9 Jamestown

Discovery Proceedings in Surrogate's Court
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.0): 0.5 in ethics and professionalism; 1.0 in skills; 1.5 in practice management and/or areas of professional practice
October 27 Mt. Kisco
November 4 New York City
November 18 Smithtown, LI

+Seventh Annual Institute on Public Utility Law
Fulfills NY MCLE requirement (6.0): 1.0 in ethics and professionalism; 5.0 in skills, practice management and/or areas of professional practice
October 28 Albany

Ethics for Real Estate Attorneys
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism
November 3 Rye Brook
December 6 New York City

Mental Health Courts: Better Outcomes from the Legal and Mental Health Systems
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 in ethics and professionalism;1.0 in skills; 1.5 in practice management and/or areas of professional practice
November 4 New York City

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

2005 Update on Evidence for the Criminal Practitioner
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 1.5 in skills; 2.5 in practice management and/or areas of professional practice

November 4 Albany; Buffalo; Melville, LI
December 2 New York City

Procurement Lobbying and Ethics Reform in New York State: New Laws You Should Know
(half-day program)

November 7 Albany

Using the Internet for Legal Research with Leigh Webber
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November 9 Syracuse
November 10 Tarrytown
November 29 New York City
November 30 Uniondale, LI

Franchise, Distribution and Licensing Law
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November 10 New York City

Practical Skills – Purchases and Sales of Homes
Fulfills NY MCLE requirement for all attorneys (6.5): 1.5 in ethics and professionalism; 2.0 in skills; 3.0 in practice management and/or areas of professional practice

November 15 Albany; Buffalo; New York City; Rochester; Syracuse; Uniondale, LI; Westchester

Intermediate Elder Law
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 6.0 in practice management and/or areas of professional practice

November 10 Syracuse
November 17 Tarrytown
November 30 Buffalo; Melville, LI
December 5 Albany
December 6 New York City

+Third Annual Sophisticated Trusts & Estates Institute
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November 17–18 New York City

Ethics and Professionalism
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November 18 Rochester
November 30 Albany; Syracuse
December 6 Buffalo
December 8 Uniondale, LI
December 9 New York City; Tarrytown

Practical Skills – Basics of Civil Practice – The Trial
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.5 in skills and 3.5 in practice management and/or areas of professional practice

November 29 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

James McElhaney's Trial Evidence
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in skills

November 30 New York City
December 1 Long Island

+Advanced Real Estate Practice

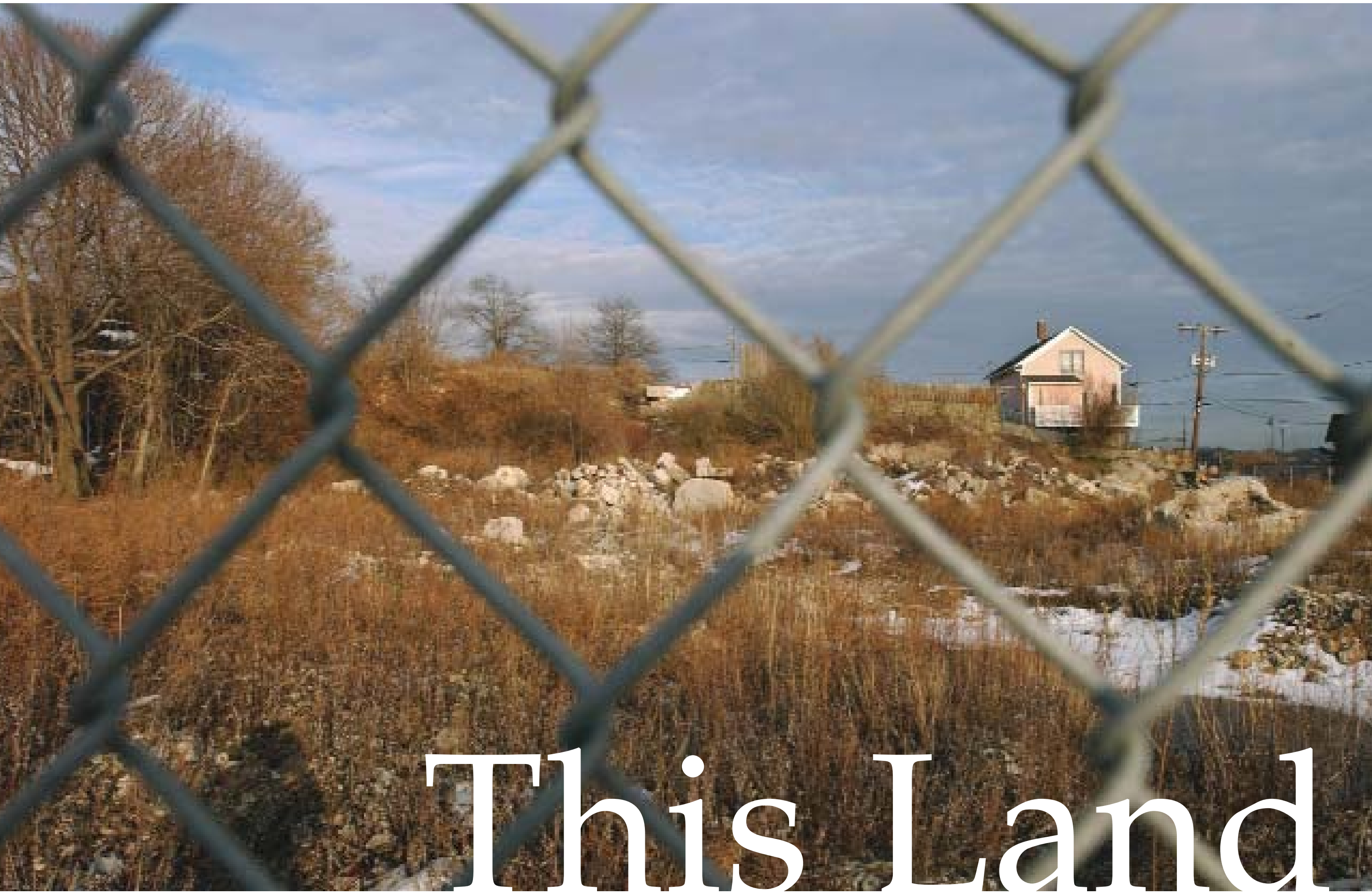
December 2 New York City

Employment Law Litigation Institute

December 2 New York City

Tax Issues in Real Estate Practice
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 in practice management and/or areas of professional practice

December 2 Buffalo
December 6 Melville, LI
December 7 New York City
December 8 Syracuse



This Land

Eminent Domain's Public Use Limitation

By David C. Wilkes and John D. Cavallaro

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Is Your Land?

Eminent domain is a remote, if awesome, government power in the day-to-day life of most people. It tends not to evoke real passion – until it happens to you. The constitutional muscle of government to take away private property for a public use may seem amply justified in the abstract: Roads are needed for travel, railways and airports are needed to facilitate commerce, towns require parks, water must be supplied. But when one's home is in the balance, perhaps the place where one was born and lived an entire life,[1] theoretical and utilitarian notions of the "public good" seem to work a cruel and unfair result on the individual.

But still more unsettling to many than the notion that property might be taken for an obvious general public benefit is the suggestion that this power might be used to transfer private property for another private owner's profit, along with all the traditional rights that permit sale, use, rental, disposition, and other choices of fee simple ownership. Seemingly, if property can be forcibly passed from one private owner to another, "public use" is a phrase with no meaning and no end.

A large body of state and federal case law has at various times offered blatantly inconsistent readings of the Public Use Clause of the U.S. and many state constitutions, and occasionally overruled earlier decisions. Before its publication, the U.S. Supreme Court's widely publicized and much anticipated decision in *Kelo v. City of New London* was warily eyed by many as an opportunity for the Court to expand public use doctrine. Lawyers, commentators, activists, and ordinary citizens alike asked whether *Kelo* would mark the end of all restrictions on the power of eminent domain and open the door to unfettered condemnations of private property for the sole benefit of other private owners, all uses being considered essentially public uses, no matter how indirect. And following the decision, which approved the taking of private property for transfer to corporate pharmaceutical giant Pfizer, Inc., many seem now to contend that those doors have indeed swung open wider than ever before.

A study of the record facts of *Kelo*, however, and the chain of significant state and federal public use decisions rendered over a long history, reveals that such a view of *Kelo* and its result would be misguided. This is particularly so as the doctrine of public use is applied in New York State. *Kelo* involved no notably lesser set of circumstances of necessity than earlier decisions of the high court, such as those considered in *Berman v. Parker*[2] and *Hawaii Housing Authority v. Midkiff*,[3] two landmark decisions that long ago established an expansive definition of the Public Use Clause. Arguably, the Supreme Court has gone further in the past in its expansive reading of the public use doctrine than it did in *Kelo*. Certainly, New York has long taken a broad view of public use, both in cases and by statute, as discussed below.

New York has long taken a broad view of public use, both in cases and by statute.

The important question one might have asked while awaiting the *Kelo* decision should have been the opposite of what was often heard. The issue of the day was, rather, whether the scope of the Public Use Clause was about to be *restricted*, initiating a retreat from established case law. The answer, now provided by the Supreme Court, was that it would adhere to precedent. Indeed, as discussed later in this article, one may easily envision a set of facts that would test the limits of public use, transfers to private interests, and deference to local legislative determinations, far more vividly than the fairly unremarkable particulars of *Kelo*.

Public Use = Public Welfare

The government's power to take privately owned property for its own use is restricted by the Fifth Amendment to the U.S. Constitution. This provides, in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.[4]

State constitutions, such as New York's,[5] often include a parallel public use provision. The U.S. Supreme Court has long held that the Due Process and Takings Clauses preclude the application of eminent domain for uses that are purely private. Justice Salmon Chase famously wrote, in the 1798 case *Calder v. Bull*,[6] "a law that takes property from A. and gives it to B. . . . cannot be considered a rightful exercise of legislative authority."[7]

The Supreme Court made a similar pronouncement in an 1896 case that is often cited by those favoring a narrow construction of "public use," *Missouri Pacific Railway Co. v. Nebraska*.[8] While striking down what was "in essence and effect" a taking of a railroad's right of way so as to accommodate a private farmers' group that wanted a grain elevator for its own benefit, the Court, canvassing the record, observed that there was absolutely no indication that the parties or the lower courts had claimed this was a taking for a public use under the right of eminent domain.[9] Rather, the beneficiaries of the elevator, according to the Court, were the members of the private group of farmers, and as such, it was fundamental that this was an impermissible taking for purely private gain.

Case law, inherently fact-driven, develops ungracefully and rarely follows a direct route to becoming fixed principle. Early judicial benches in American history were never afforded the opportunity to rule on municipal economic development plans resembling those of the modern era; it would be unwise to speculate much about how those courts might have applied the Public Use Clause many years later, when local governments were striving to cope with urban blight.

By 1954, when *Berman v. Parker*[10] was argued, city sprawl, including that of the nation's capital, had resulted in obsolete layouts, substandard housing, blighted areas, dilapidation, a lack of sanitary facilities, overcrowding, and other ills that became the subject of legislative concern. Coordinated planning and redevelopment of wide swaths of metropolitan areas, with consequent acquisition and assembly of real property for lease and sale, was seen by Congress as the solution to problems in its own home, the District of Columbia. The appellants in *Berman*, owners of a department store that sat within the area to be condemned, contended that the project was no more than a taking from one businessman for the benefit of another businessman – an argument that echoes in many of today's condemnation proceedings.

Berman marks the beginning of jurisprudence clarifying the coterminous nature of the power of eminent domain with the broad reach of the police power to combat threats to the public welfare. Justice Douglas, writing for the Court, spoke of the impossibility of imposing a neat definition on the police power's reach: "to trace its outer limits is fruitless, for each case must turn on its own facts."[11] And this was to form the basis for a heightened emphasis – applied in many cases that followed in the state and federal courts, most notably this year in *Kelo* – upon affording legislative determinations of public interest near-irrefutable weight.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.[12]

Comparing the effects of miserable housing conditions to a sewer that contaminates a river,[13] Justice Douglas reflected that the concept of the public welfare could go well beyond narrow pragmatic concerns:

> The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[14]

The use of private enterprise to accomplish public purpose goals, an issue that has become a dominant topic of discussion surrounding the *Kelo* case, was squarely addressed in *Berman* over 50 years ago: "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

Midkiff's Public Use Expansion

The perimeter of the public use doctrine was again tested in the nation's high court, in 1984, on a seemingly compelling set of facts, and found to be expansive in *Hawaii Housing Authority v. Midkiff*.[15] There, in contrast to a conventional economic development scheme aimed at eradicating urban blight, the Hawaii Legislature sought to undo a centuries-old land oligopoly that was responsible for heavily concentrated ownership that skewed the residential land market and artificially inflated prices.

The local system was traceable to the early high chiefs of the Islands, and resulted in a feudal system of property leases to land tenants who could not afford to purchase their property. The Legislature's Land Reform Act created a condemnation scheme that would take property from the lessors and transfer it to the lessees in order to reduce the concentration of land ownership. It is difficult to imagine a scheme more narrowly focused on the simple transfer of property from one private owner to another, and with the notable absence of any requirement that property be put to any particular use, let alone a public one.

The *Midkiff* Court, in an opinion that now has added significance because its author, Justice O'Connor, also wrote *Kelo*, began its analysis with *Berman v. Parker*. Rather than engaging in much of an evaluation of the Hawaii Legislature's condemnation scheme and whether it would result in some form of public benefit, the Court focused on its own limited say in the matter. "There is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." But, the Court concluded, citing *Berman*, that role is "an extremely narrow one." Citing to *Berman*'s reliance on a 1925 decision,[16] *Midkiff* holds that a determination of "public use" by a legislature warrants deference "until it is shown to involve an impossibility."[17] The rationale was that it was not for the courts to begin deciding what was and was not a governmental function, or to start passing judgment on legislation based on the court's particular views of the issue of the day.

Courts should apply a highly deferential standard of review, *Midkiff* says, refraining from overriding legislative judgment about what is a public use "unless the use be palpably without reasonable foundation."[18]

During the period following *Berman* and particularly around the time *Midkiff* was decided, most state courts followed the federal lead in deferring almost entirely to legislative determinations of public use. The Supreme Court of Michigan's 1981 decision in *Poletown Neighborhood Council v. City of Detroit*[19] is a foremost and well-publicized example. Consistent with *Berman* – and with *Midkiff*, which would follow three years later – the *Poletown* court upheld an urban renewal plan condemning 465 acres of privately owned properties, including stores, schools, churches, and a hospital, in order for General Motors to construct an assembly plant.[20]

Some state courts, however, struck down the condemnation powers under their own constitutions that would allow transfer of property from one private owner to another.[21] A significant spark for much of the debate that has flared over public use in recent years came from a front page article in the *Wall Street Journal* in 1998 that contended local and state governments were using the power of eminent domain as "a marketing tool for governments seeking to lure bigger business."[22]

The most significant case that truly reignited the fire in the debate over the proper limits of "public use" was the 2004 decision in *County of Wayne v. Hathcock*,[23] in which Michigan's Supreme Court again took up the subject, but found that it had been wrong before. The court overturned its own decision in *Poletown*, writing that "*Poletown*'s 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity."[24] *Hathcock* represented a return to Justice Chase's words of over two centuries ago that rested on a common sense limitation, for its time, on

A significant spark for much of this debate came from a front page article in the *Wall Street Journal* in 1998 that contended local and state governments were using the power of eminent domain as "a marketing tool for governments seeking to lure bigger business."

the exercise of eminent domain powers, a limitation rarely, if ever, imposed by the New York courts in today's economically motivated era.

Economic Development Takings in New York

In New York, the term public use is "broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community."[25]

> It is the established law [in New York] that in the exercise of the power of eminent domain the opinion of the legislature or the tribunal upon which is conferred power to determine the questions of necessity or expediency in the acquirement of private property for public use is political, not judicial, in its nature.[26]

Not unlike the City of New London in *Kelo*, condemnors typically execute takings within the framework of a state statutory scheme. New York is no exception. "The Eminent Domain Procedure Law was enacted in 1977 to supplant a mosaic of more than 150 scattered provisions with a uniform procedure."[27] New York's Eminent Domain Procedure Law (EDPL) requires that condemnors, after satisfying the necessary notice and hearing requirements, issue a determination and findings.[28] EDPL § 204(B) requires that

> [t]he condemnor, in its determination and findings, shall specify . . . (1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; (4) such other factors as it considers relevant.[29]

Article 2 of the EDPL provides property owners with the arena to combat the "public use" question, one of the four elements found in EDPL § 204. However, entering condemnees must be cautious, yet considerate, of the EDPL's strict procedural hurdles, which are ungenerous to the parties. Property owners must ensure that they satisfy the EDPL's truncated limitations period before having the opportunity to assert the procedural shortcomings the municipality took in arriving at its determination and findings. The proverbial double-edged sword is ever present.

Under EDPL § 207, the condemnee, after publication of the determination and findings, has only 30 days to commence an original proceeding in the Appellate Division where the real property is located.[30] The proceeding is limited to whether the locality's determination and findings should be confirmed or rejected. In considering the challenge, the Appellate Division's scope of review includes whether

> (1) the proceeding was in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and (4) a public use, benefit or purpose will be served by the proposed acquisition.[31]

Although procedurally rigid, the four-prong test of EDPL § 207 does offer New York condemnees an opportunity to contest the determination and findings on grounds other than public use – a fact notably not present in *Kelo*. For example, the determination and findings may be rejected on grounds that the taking is excessive, or the condemnor failed to comply with the State Environmental Quality Review Act.[32]

Section 207 remains the primary vehicle to contest economic development takings in New York. One may contend that *Kelo*'s New York cousin passed through the Court of Appeals 30 years ago at a time when the U.S. Supreme Court was not willing to hear the appeal.[33] In *Yonkers Community Development Agency v. Morris*, the N.Y. Court of Appeals found that a taking by the City of Yonkers for the expansion of the Otis Elevator Co. plant was a public purpose.[34] "[E]conomic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[35] The Court declared that

> [n]or does it undercut the public purpose of the condemnation of the substandard land that Otis' motives are to serve its own interests. There is nothing malevolent about that. Most sponsors, where urban renewal involves industrial revival, are, as may be expected in our private enterprise economy, nonpublic and, at least in large part, profit-motivated.[36]

Thus in *Morris*, the Court of Appeals echoed some of its earlier decisions that upheld the constitutionality of takings where substandard real estate was taken for redevelopment by private entities.[37]

More than a decade later, Court of Appeals jurisprudence continued to endorse the *Morris* holding.[38] Over the owner's objection, the Court held that the taking of property for the construction of an intersection providing additional access to a mall and the property across from the mall was a public purpose.[39] The Court advanced a balancing test validating the condemnation where the public use is paramount and dominant compared with the incidental private benefit. Relief to traffic congestion, said the Court, outweighed the incidental increased mall access with its consequent private benefit. "[W]e reject petitioner's argument that a condemnation proceeding is automatically tainted by the financial involvement of a private party."[40] Of interest, the Court also rejected the petitioner's secondary argument that the village essentially contracted away its eminent domain powers, because it was induced by the nearby property owner's

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$1.5 million commitment to the project. The Court decided that a "contracting away" of eminent domain powers did not occur because there was no *quid pro quo* between the property owner's financial commitment and the village's decision to condemn the land.[41]

Morris firmly opened the doors for a rush of decisional law on New York economic development takings. Perhaps testing the outer limit of the *Morris* standard, the Fourth Department held, in *Sun Co. v. City of Syracuse*, that "[t]here is no prohibition against private funding of a public condemnation."[42] The *Sun Co.* court upheld a taking for the redevelopment of lakefront property that included a proposed retail shopping mall, a park, a light industrial trade zone, multi-family housing, a marina, office park and commercial retail uses. The condemnor's public purpose finding was sustained even where the preferred developer agreed to pay the condemnor's acquisition costs, which in turn would be paid to the condemnees.[43] Despite the private developer's intertwined financial interest in the taking, the court found that the development agreement between the municipality and developer was not violative, but rather assured the condemnees a certain and adequate source of payment.[44]

The condemnees unsuccessfully contended that an ordinary strip shopping center lacks the necessary public elements sufficient to maintain the taking. However, the court looked to improved aesthetics, reduced physical blight, improved infrastructure, employment opportunities, increased tax revenues and the mitigation of environmental concerns as paramount public purposes, despite the developer's incidental private benefits.[45]

Even in the absence of partial public use characteristics, like the park alluded to in *Sun Co.*, state courts have ratified economic development takings.[46] For example, the condemnation of a building for resale to a department store has survived a public purpose challenge.[47] "The mere fact that the property will be sold to a private entity to effectuate the redevelopment does not destroy the public benefit or invalidate the condemnor's determination so long as the public purpose is dominant."[48]

Since *Morris*, the chain of public use economic development takings has remained unbroken, and in some instances strengthened. As demonstrated in *Morris*, historically, condemnors have been careful to make findings showing that the property proposed to be condemned is substandard. "Taking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use."[49] A finding of substandard property has long been one of the hooks upon which the courts have hung judicial opinions confirming economic development takings. Even recently, the Second Department explained that a municipality's taking of substandard land for urban renewal serves a valid public purpose.[50]

Yet, the Third Department, building on *Morris*'s strong foundation, announced that a finding of substandard property is not required to uphold a taking's validity.[51] "If the primary object of the project is a public purpose, it is not necessary that individual parcels be found substandard and immaterial that they may, in fact, be resold to private parties."[52] Likewise, the *Kelo* Court was not swayed by the owner's argument that her individual property was not blighted.

Over 30 years of takings jurisprudence has developed in New York since *Morris*. Facially, condemnees are left to establish that the private benefit is the dominant force driving the condemnation and far outweighs the public advantage. Whether it be tens of acres of land condemned for a waterfront redevelopment or a single building earmarked for a department store, little room has been left to argue that a public purpose is not being served.

No Surprises in *Kelo*

Up to and including *Kelo*, however, neither the Supreme Court nor New York State's courts have upheld as valid a true circumstance in which one private property is being transferred to another absent concerns about blight or correction of a local economy in true distress. Presumably, based on the fairly consistent decisions of the Supreme Court in this area, and considering New York's broad application of the Public Use Doctrine, a blatant transfer of one private owner's property to another where there is no suggestion of benefit by anyone other than Owner B, the taking exceeds the public use limitation and would be struck down. Such a legislative action would present precisely the long-awaited public use determination that is "palpably improper" or the speculation of economic benefit that is "impossible" under *Midkiff*. Likewise, New York's dominant public purpose-incidental private benefit standard should operate to invalidate such a transparent taking for purely and solely private gain. Otherwise, correction of urban blight remains a valid public purpose as *Kelo* reaffirms, and as *Morris*, and its progeny, have stated for years. ■

1. Such was the case for Wilhelmina Dery, a petitioner in *Kelo v. City of New London*, __ U.S. __, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). She was born in her Fort Trumbull, Connecticut, home in 1918 and lived there for more than 83 years.
2. 348 U.S. 26 (1954).
3. 467 U.S. 229 (1984).
4. U.S. Const., Amend. V.
5. N.Y. Const. Art. 1, §§ 6, 7.
6. 3 U.S. (3 Dall.) 386 (1798) (Chase, J.).
7. *Id.* at 388.
8. 164 U.S. 403 (1896).
9. *Id.*
10. 348 U.S. 26 (1954).
11. *Id.* at 32.

12. *Id.*

13. *Id.* at 33.

14. *Id.*

15. 467 U.S. 229 (1984).

16. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), *cited by Berman v. Parker*, 348 U.S. 26, 32 (1954).

17. 467 U.S. at 240.

18. *Id.* at 241.

19. 304 N.W.2d 455 (Mich. 1981).

20. *Id.* at 455.

21. *See, e.g.*, *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1 (Ill. 2002); *Avalonbay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001). Several federal decisions found against the public purpose as well: *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *see Daniels v. The Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002).

22. Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, Wall St. J., Dec. 2, 1998, at A1.

23. 684 N.W.2d 765 (Mich. 2004).

24. *Id.* at 786.

25. *In re Byrne*, 101 A.D.2d 701, 702, 476 N.Y.S.2d 42 (4th Dep't 1984); *accord Vitucci v. N.Y. City Sch. Constr. Auth.*, 289 A.D.2d 479 (2d Dep't 2001), *leave denied*, 98 N.Y.2d 609 (2002).

26. *In re City of N.Y. (Ely Ave.)*, 217 N.Y. 45, 57, *rearg. denied*, 217 N.Y. 665 (1916) (citations omitted).

27. *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986).

28. EDPL § 204(A).

29. EDPL § 204(B).

30. EDPL § 207.

31. *Id.*

32. *Mayo v. Windels*, 255 A.D. 22, 5 N.Y.S.2d 690 (2d Dep't 1938), *aff'd*, 281 N.Y. 837 (1939); *see Hubbard v. Town of Sand Lake*, 211 A.D.2d 1005, 1006, 622 N.Y.S.2d 126 (3d Dep't 1995).

33. *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478, 373 N.Y.S.2d 112, *appeal dismissed*, 423 U.S. 1010 (1975).

34. *Id.* at 481–82.

35. *Id.*

36. *Id.* at 482.

37. *Cannata v. City of New York*, 11 N.Y.2d 210, 227 N.Y.S.2d 903 (1962).

38. *Waldo's v. Village of Johnson City*, 74 N.Y.2d 718, 544 N.Y.S.2d 809 (1989).

39. *Id.* at 720.

40. *Id.* at 721.

41. *Id.* at 722.

42. *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 625 N.Y.S.2d 371 (4th Dep't 1994).

43. *Id.* at 40.

44. *Id.*

45. *Id.* at 42.

46. *See, e.g.*, *In re Glen Cove Cmty. Dev. Agency*, 259 A.D.2d 750, 686 N.Y.S.2d 306 (2d Dep't 1999).

47. *Id.*

48. *Id.* at 751.

49. *Wheeler v. Town of Islip*, 51 Misc. 2d 386, 273 N.Y.S.2d 399 (Sup. Ct., Suffolk Co. 1966) (quoting *Cannata v. City of N.Y.*, 11 N.Y.2d 210, 215, 227 N.Y.S.2d 903 (1962)).

50. *Haberman v. City of Long Beach*, 307 A.D.2d 313, 762 N.Y.S.2d 425 (2d Dep't 2003).

51. *Amsterdam Urban Renewal Agency v. Bohlke*, 40 A.D.2d 736, 336 N.Y.S.2d 725 (3d Dep't 1972).

52. *Id.* at 737.

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

Introduction

This is the last part of a three-part article addressing post-commencement, non-summary judgment dismissals of civil cases. The first part offered a brief historical and philosophical background on the development of these dismissal issues, suggested why courts are more empowered and may be more willing to use the dismissal weapons at their disposal, and addressed one particular type of dismissal: failing to appear in court. The second part addressed dismissals for failure to prosecute and for failure to restore cases after dismissal from the trial calendar for more than one year. This third part addresses dismissals arising in the disclosure world, as a penalty for a party's and/or an attorney's failure to comply with disclosure orders. It does not address efforts to compel compliance with disclosure that occurs in the context of Differentiated Case Management or informally with an assigned judge. Rather, it picks up at the point where resort to motion practice is deemed necessary.

Compel, Resolve, Preclude, Or Dismiss?

CPLR Article 31 provides two options when a party or attorney fails to provide disclosure: A motion under CPLR 3124[1] to compel production of the items in question, and a motion under CPLR 3126 for a sanction for the failure to provide the items in question.

These two sections are most often used in tandem, with relief sought in the alternative. Generally, in noticing a motion concerning outstanding disclosure, the notice of motion will first seek penalties pursuant to CPLR 3126 and then, alternatively, an order of production pursuant to CPLR 3124.

CPLR 3126 sets forth three types of disclosure penalty, but makes clear that the court is not limited to those three: issue resolution in favor of the party obtaining the order,[2] issue preclusion,[3] and an order dismissing or striking a pleading or imposing a stay until compliance is obtained.[4] Most practitioners will list first the most draconian relief sought, followed, in descending order of severity, by the alternative forms of relief requested. It is important to remember to request the catchall relief at the end of the notice of motion of "such other and further relief as the Court deems just," so that the court is free to fashion other relief not specified in the notice of motion. Attorneys will often also seek a penalty under Rule 130-1.1,[5] alleging that the failure to provide disclosure, particularly when the failure to obey one or more court orders is involved, constitutes frivolous conduct.

If there has been non-compliance with a proper demand for disclosure, the moving party may, in the first instance, simply move to compel production pursuant to CPLR 3124, particularly since the court is likely to consider a request to dismiss a pleading as overkill under such a scenario. However, once there is an established track record of non-compliance, whether for the particular disclosure sought, or a prior history of non-compliance regarding other disclosure, then a motion seeking penalties under CPLR 3126 is appropriate. As for a request for sanctions under Rule 130-1.1, many practitioners caution that it is a good idea to sleep on such a request before serving it, keeping in mind that what goes around, often comes around. An appellate court may impose a financial sanction on appeal when the request for a sanction was denied by the trial court.[6]

Trial courts are vested with broad discretion to resolve disclosure disputes.[7] However, "the remedy should be as 'narrowly tailored as possible to the circumstances of the individual case.'"[8] In order to obtain a reversal of a trial court's discovery penalty, the appellate court must be convinced that there was an improvident exercise or abuse of discretion by the trial court. Unfortunately for litigants on the receiving end of a CPLR 3126 penalty, abuse of discretion is a little like pornography, appellate courts seem to know it when they see it, and when they don't see it, there is no relief.

Compliance with court orders requires both a timely response and one made in good faith.[9] Willful and contumacious behavior may be inferred, resulting in the dismissal of a complaint, for an inadequately explained three-year delay in furnishing disclosure set forth in a Preliminary Conference order.[10] When faced with an inability to timely comply with a disclosure order, efforts should be made to obtain the consent of opposing counsel, via a written stipulation, preferably "so ordered," so as to permit additional time to furnish disclosure without penalty.

Disclosure penalties may also be imposed for spoliation of evidence. The court's penalty should be tailored as narrowly as possible to alleviate any prejudice created by the loss or alteration of evidence.[11]

Any attempt to predict the particular type of penalty to be imposed for a particular course of conduct or noncompliance involves too many factual and personality variables to be a worthwhile exercise.

Good Faith

Uniform Rule 202.7 requires that, in Supreme and County Courts,[12] a party, prior to making a motion relating to disclosure or a bill of particulars, must confer in good faith with the recalcitrant party in an effort to resolve the dispute without resort to motion practice. While there is no requirement for a separate affidavit or affirmation,[13] it is good practice to make the good-faith representation in a separate document, placed directly below the notice of motion, since clerks reviewing the submitted motion papers generally look for such a document, and cannot be expected to read through a lengthy affidavit or affirmation to locate the magic phrase.

The absence of a good-faith affirmation mandates denial of a motion related to disclosure or a bill of particulars.[14] Similarly, an affirmation that fails to set forth the good faith effort to resolve the dispute is deficient, and should lead to denial of the motion.[15] It is good practice to detail the efforts made to resolve the dispute, with copies of letters sent annexed as exhibits, and the date and details of telephone conversations set forth in the body of the affirmation. For courts that take these affirmations seriously (unfortunately, some don't), something more than a single, pro forma letter is generally required.[16] The failure to include an affirmation of good faith can be raised in the first instance by an appellate court.[17] However, the failure to include the good-faith affirmation has been held excusable where parties engaged in discovery disputes for the three years prior to the motion to strike the note of issue and "any effort to resolve the present dispute non-judicially would have been futile."[18]

"All Too Familiar . . ."

Brief mention was made in the first article in this series of *Kihl v. Pfeffer*.[19] In *Kihl*, the Court of Appeals found that the "plaintiff, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in his favor, culminating in his disregard of an order compelling him to answer interrogatories."[20] The Court, in dismissing the plaintiff's complaint, concluded: "Regrettably, it is not only the law but the scenario that is all too familiar."[21]

Members of the bar were wise to take this opinion as a warning that what certain members of the bar, and some judges, considered to be "accepted practice," was now subject to the

most severe disclosure sanction possible, dismissal of a pleading. While the facts in *Kihl* may seem particularly egregious, those who like practicing "on the edge" should not assume that there is a minimum of three strikes required before you are out.[22] However, three strikes almost invariably guarantees a dismissal.[23]

Living Dangerously: Conditional Orders

A common result of a disclosure motion, often after a prior motion has been made, or one or more conference orders have been ignored, is the conditional order of dismissal or preclusion. A conditional order will recite that if a certain act is not performed by a date certain, either set forth in the order or running from service of the order, the defaulting party's pleading will be stricken or some form of preclusion will take effect. Generally, a subsequent motion is required to enforce the penalty set forth in the conditional order.

Indeed, *Kihl* involved a conditional order of dismissal that the trial judge, on a subsequent motion, allowed the defaulting party to avoid the penalty set forth in the conditional order. The Court of Appeals determined it was an abuse of discretion for the trial court not to have enforced the conditional order of dismissal.

Clearly, the best approach when faced with a conditional order is timely compliance with all of the terms of the order. Unfortunately, when the conditional order directs, for example, supplemental responses to items demanded in a bill of particulars,[24] what constitutes compliance with the conditional order can, itself, be a matter of dispute, with the risk of a penalty based upon a judge's interpretation of compliance.

While a trial court's discretion in fashioning relief related to disclosure disputes is quite broad, a party has a right to have an opportunity to be heard before a conditional order may be issued.[25] Thus, where in response to a disclosure deadline set forth in a prior order, the plaintiff wrote and requested an extension of time, the defendant also wrote, apparently requesting the issuance of a conditional order, and the trial court issued an order granting the extension, together with a conditional order of dismissal, the Second Department held it was an improvident exercise of discretion for the trial court to have issued the conditional order since the plaintiff did not have an opportunity to oppose the request before the trial court granted the request.

Conclusion

With the increased pressure on litigants to move cases through the state court system, attorneys may be forced to resort to motion practice more frequently than in the past to move a dilatory or slothful opponent along, in order to avoid having the disclosure clock run down before all necessary disclosure is completed. Anecdotally, there has been a decrease in attorneys extending professional courtesies in this area because the magnanimous party may end up with the loss of disclosure to which he or she was entitled. An increase in disclosure motions, coupled with the fraying of most courts' willingness to tolerate disclosure delays, may well lead to an increase in the number of dismissals arising from failing to provide disclosure. Once again, an up-to-date diary and tickler system will help reduce the likelihood of a disclosure penalty. ■

1. A motion to compel is available for all disclosure devices except a notice to admit – the failure to respond to a notice to admit means that the items set forth in the notice are "deemed admitted" if the notice is not responded to within 20 days. CPLR 3123.

2. CPLR 3126(1).

3. CPLR 3126(2).

4. CPLR 3126(3).

5. N.Y. Comp. Code R. & Regs., tit. 22.

6. *Jacobs v. Macy's East, Inc.*, 17 A.D.3d 318, 792 N.Y.S.2d 574 (2d Dep't 2005).

7. *Milbrandt & Co., Inc. v. Griffin*, 19 A.D.3d 662, 798 N.Y.S.2d 908 (2d Dep't 2005).

8. *Matusewicz v. Jo Jo's Auto Parts, Inc.*, 18 A.D.3d 828, 796 N.Y.S.2d 385 (2d Dep't 2005).

9. *Maneti v. Ariana Realty Co.*, 19 A.D.3d 436, 796 N.Y.S.2d 243 (2d Dep't 2005).

10. *Frost Line Refrigeration, Inc. v. Frunzi*, 18 A.D.3d 701, 795 N.Y.S.2d 741 (2d Dep't 2005).

11. "[A] sanction less severe than the striking of a pleading 'is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case.'" *Wetzler v. Sisters of Charity Hosp.*, 17 A.D.3d 1088, 794 N.Y.S.2d 540 (4th Dep't 2005).

12. 22 N.Y.C.R.R. § 202.7. For reasons unknown to me, a good-faith effort to resolve motions relating to disclosure or bills of particulars – in effect, one may be less civil in Civil Court.

13. Pursuant to CPLR 2106, an attorney admitted to practice in New York may affirm the truth of a document, subject to the penalties for perjury, dispensing with the need to have an affidavit notarized.

14. *Cestaro v. Chin*, __ A.D.3d __, 799 N.Y.S.2d 143, 2005 N.Y. App. Div. LEXIS 7931 (2d Dep't July 18, 2005).

15. "The affirmation was deficient in that it did not set forth any good-faith effort made to resolve the dispute." *Id.*

16. *See, e.g.*, *Eaton v. Chahal*, 146 Misc. 2d 977, 533 N.Y.S.2d 642 (Sup. Ct., Rensselaer Co. 1990).

17. *Kovacs v. Castle Restoration & Constr., Inc.*, 262 A.D.2d 165, 692 N.Y.S.2d 63 (1st Dep't 1999).

18. *Carrasquillo v. Netsloh Realty Corp.*, 279 A.D.2d 334, 719 N.Y.S.2d 57 (1st Dep't 2001).

19. 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

20. *Id.* at 122.

21. *Id.*

22. Baseball analogies are endemic to our profession, and I apologize to those who do not relish America's national pastime.

23. *See, e.g.*, *Devito v. J&J Towing, Inc.*, 17 A.D.3d 624, 794 N.Y.S.2d 74 (2d Dep't 2005).

24. Yes, you are correct, a bill of particulars is not technically a disclosure device, but bills of particulars are generally treated in the same manner as disclosure devices when it comes to non-compliance.

25. *Mahopac Ophthalmology v. Tarasevich*, __ A.D.3d __, 799 N.Y.S.2d 568, 2005 N.Y. App. Div. LEXIS 8219 (2d Dep't Aug. 1, 2005).

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So What's ERISA All About?

A Concise Guide for Labor and Employment Attorneys

By Stephen E. Ehlers and David R. Wise

The Employee Retirement Income Security Act of 1974,[1] better known as ERISA, touches virtually all areas of practice from collective bargaining to family law. Labor and employment attorneys who avoid ERISA, believing it is confusing and incomprehensible, do themselves and their clients a disservice. Although the Act is replete with highly complex and technical issues and the related common law is still evolving, counsel will seldom be involved with the minutia of ERISA.

The purpose of this article is to provide an overview so that you will recognize ERISA issues when they arise. The focus will be on Title I of ERISA, because it is the most important and commonly encountered. The Secretary of Labor is authorized by § 1135 to promulgate regulations to implement Title I and has made extensive use of such power.

Legislative History

ERISA, codified in 29 U.S.C., was enacted by Congress to stem abuses in private pension plans.[2] In the past, employees sometimes failed to receive promised pensions because employers mismanaged the plans, abused their powers, and imposed unreasonable requirements. From the 1940s to the late 1960s, the number and size of pension plans increased rapidly due to employers seeking ways to augment compensation in the face of wage and price controls, and the National Labor Relations Board's ruling that pensions were a mandatory subject of collective bargaining.

Senator Jacob Javits introduced the first broad pension reform bill in 1967. Congress had determined that no standards existed to ensure the financial stability of pension plans, employees were being deprived of benefit information, there were few safeguards, workers were often denied their expected benefits, and plans were terminated without adequate funds. ERISA was enacted to remedy these problems, and it became law on September 2, 1974. It is divided into four titles.

Title I amends the federal labor law. It protects the rights of employees and permits them to bring civil actions to recover benefits, clarify their rights and remedy breaches of fiduciary duty.

Title II amends the Internal Revenue Code. The provisions of Titles I and II are overlapping and often identical. Title II also deals with individual retirement accounts and Keogh plans and contains contribution and benefit limits for pension plans.

Title III divides the regulatory jurisdiction over employee benefit plans between the Department of the Treasury and the Department of Labor.

Title IV establishes the Pension Benefit Guaranty Corporation (PBGC), which pays pensions to participants in certain defined benefit pension plans when the plans cannot.

Overview of ERISA

ERISA controls the establishment and operation of both types of employee benefit plans – pension and welfare. Pension plans provide retirement income; welfare plans provide all other employee benefits.[3] Employee benefit plans regulated by ERISA include those maintained by a single employer, by groups of employers (multiple employer plans) and by unions and employers together (multi-employer plans). (Government and church plans are generally exempt.) ERISA is a comprehensive, remedial statute that largely addresses pension issues; nevertheless, ERISA litigation often involves welfare plan issues. The main thrusts of ERISA are to see that employees have access to detailed information about their plans, to assure proper plan management and to ensure that sufficient assets are set aside to pay promised pensions. ERISA mandates no substantive pension or welfare benefits; it is purely procedural. Employers are not required by ERISA to provide any employee benefit plans or any particular level of benefits.

ERISA requires that plans operate pursuant to detailed written plan documents and that participants be given an easily readable abstract called a summary plan description (SPD). Upon request, participants must receive reports concerning their accrued pension benefits and plans must submit detailed financial reports to the federal government. The Act requires that virtually all employees be allowed to participate in pension plans if one has been established[4] and that pensions be vested in accordance with reasonable standards.[5] Once vested, employees cannot lose their accrued pension benefits even if they leave their jobs. The concept of vesting is inapplicable to welfare plans.[6]

The safekeeping of every plan is entrusted to fiduciaries; these are individuals who either actually exercise control over employee benefit plans or who are named in the plan document. They must act prudently and for the sole benefit of the participants.

Funding

Most employee benefit plans come about when a single employer establishes a plan for its employees or a union negotiates a plan for its members. The Taft-Hartley Act generally prohibits payments from an employer to a union;[7] however, contributions to qualified employee benefit plans are permitted under strict conditions, including the requirement that the plan's assets be held in trust pursuant to a written agreement.

An employer becomes bound to a collective bargaining agreement (CBA) and obligated to contribute to plans by signing a CBA or by delegation of its rights to an association of employers which signs a CBA. CBAs may appear to expire on a certain date but often contain automatic renewal ("evergreen") clauses. If an employer does not give a properly timed notice to terminate the CBA, the obligation to contribute may continue. Employers may also make voluntary contributions to pension plans such as a profit-sharing plan, and employees may defer wages into a pension plan under Internal Revenue Code § 401(k).

Fiduciaries

Those who exercise discretionary control over employee benefit plans are charged with fiduciary obligations, and trust law permeates ERISA fiduciary litigation. ERISA requires that fiduciaries be named in the plan document.[8] However, fiduciaries may also become such by reason of their actual exercise of discretionary control over a plan or its assets.[9] Some plans are essentially insurance contracts; in others the fiduciaries hold the assets of the plan in trust; other plans are a combination of the two. In all cases the fiduciaries must discharge their duties for the exclusive purposes of providing benefits to participants and defraying the reasonable expenses of the plan with the care and skill that a prudent person would exercise. They must also diversify the investments of the plan assets to minimize the risk of loss.[10]

Single employer plans are often run by management personnel who may thereby become fiduciaries even if the plan document names someone else. However, in the multi-employer (or union) context, the Taft-Hartley Act requires that plans be managed by a board of trustees composed equally of employer and union representatives.

Fiduciaries may not engage in "prohibited transactions," which are specified in § 1106. These include transactions between a plan and a "party in interest," the acquisition of employer securities (with certain exceptions), dealing with plan assets for the fiduciaries' own benefit and transactions that are adverse to the interests of the participants. Section 1107 contains exemptions to prohibited transactions and the Secretary has exempted certain classes by regulation.

The Secretary, participants, beneficiaries and other fiduciaries may sue fiduciaries for a breach of duty. The Second Circuit Court of Appeals has held that fiduciaries may seek contribution and indemnity from one another

and district courts have generally followed suit.[11] A plan may use plan assets to purchase insurance for its fiduciaries, but the insurer must reserve recourse against the fiduciaries. Fiduciaries may purchase a non-recourse rider but may not use plan assets to pay the premium.[12] Fiduciary liability insurance should not be confused with the requirement for a fidelity bond of at least 10% of the plan's assets.[13]

When representing an employer it is important first to determine if management has created an ERISA plan, and then to identify the fiduciaries (both named and functional) and explain their obligations under ERISA. The employer should monitor the activities of the plan's fiduciaries and its professionals. Often the employer is itself a fiduciary by default, by its actions or in accordance with a plan document.

Fiduciaries should be encouraged to obtain advice from capable consultants and experienced ERISA counsel. Plan design is important for tax-qualification purposes, and specialists can help assure that plans meet the ever-changing requirements for participation, vesting and benefits.

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Reporting and Disclosure

ERISA contains reporting and disclosure requirements that should be followed with care. Plans must be detailed and in writing.[14] Significant plan modifications and annual financial reports are to be communicated in writing to participants. At certain times participants must be given a summary plan description understandable by the average participant.[15] If the plan document and the SPD differ, the courts have sometimes held that the one which is more generous to the participant controls.[16]

Section 1024 requires that the plan administrator provide a participant with a copy of the plan document, the SPD, the latest annual report and other relevant documents upon request. Under § 1132, an administrator who fails to provide the documents within 30 days may be liable for a penalty of $100 per day. While the plan administrator is often identified in the SPD, the employer (the plan sponsor) may be the plan administrator, intentionally or by default. Participants in pension plans must be given a statement of their accrued and vested benefits upon written request.[17]

Pension Plan Issues

There are two types of pension plans: a defined contribution plan (an individual account plan such as a money purchase plan or profit-sharing plan) and a defined benefit plan, which usually provides a monthly sum upon retirement. Individually directed, defined contribution plans which are available under § 1104(c) are becoming quite popular; these are governed by regulations found at 29 C.F.R. § 2550. Such plans should be contrasted with IRC § 401(k) salary deferral plans, which constitute a type or component of a defined contribution plan.

Generally a participant may not assign his or her pension rights and a qualified pension is not subject to enforcement of a judgment.[18] There are two statutory exceptions: a voluntary and revocable assignment of less than 10% of the benefit and a qualified domestic relations order (QDRO).

In the context of a divorce, a participant's pension may be divided with a former spouse through a qualified domestic relations order. A QDRO is a state court order, a DRO or domestic relations order, which meets the statutory test of § 1056(d). A QDRO is binding on the pension plan. A convenient approach is to have a proposed DRO "pre-qualified" by the pension plan before it is signed by the judge. ERISA requires that pension plans have a written procedure for qualifying DROs. Section 1055 provides that a spouse must share in a pension unless a written waiver has been executed by the participant and the spouse. Notwithstanding the "anti-alienation" provision, pensions in pay status may be attached by the federal government for unpaid taxes and to enforce alimony and child support orders. However, state tax authorities may not attach pension benefits.

ERISA imposes minimum funding standards for defined benefit pension plans to assure that promised benefits will be paid to pensioners. If a defined benefit plan is unable to pay promised benefits, the PBGC may assume liability, using premiums which are collected through a per capita tax.

Attorneys for employers participating in multi-employer plans should understand the concept of withdrawal liability as detailed in §§ 1381–1405. Withdrawal liability is a highly technical, dangerous and complicated area of ERISA. An employer, and members of its control group,[19] can incur a large financial obligation by completely or partially withdrawing from a multi-employer pension plan. Employers who withdraw (typically by ceasing operations) must act promptly upon receipt of a plan's notice of withdrawal liability. An attorney who is familiar with such matters can assure that the employer's rights are protected. If not, they will be quickly forfeited,

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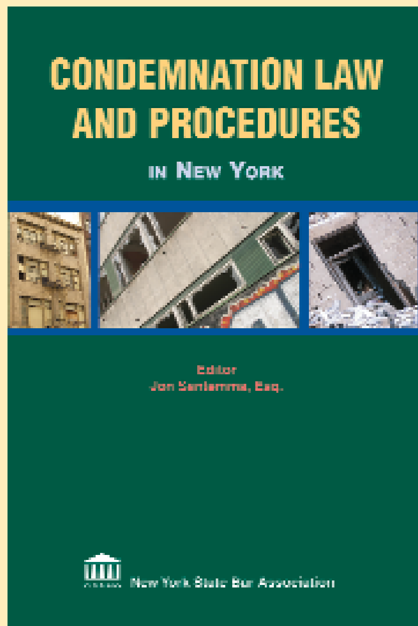

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The government has the ability to acquire title to property for public use by condemning it through the power of eminent domain. This power can have wide-ranging impact—from the partial taking of a merchant's parking lot to widen a street, to major economic redevelopment projects such as the one in the much-publicized *Kelo v. City of New London* decision.

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often with grave consequences. Some employers, such as those in the construction industry, have an unfounded fear of withdrawal liability, failing to realize that § 1388 often provides an exception for certain seasonal or cyclical businesses. The termination of a qualified single-employer pension plan should also be approached with great caution since it often creates a complex series of legal and financial relationships which may result in an exposure of the employer's assets.

Welfare Plan Issues

Welfare plans provide employee benefits such as health and hospital care, disability pay, vacation money, severance pay, job training and legal services. In the single-employer context, eligibility to participate often depends only on one's status as an employee for a short period. In the multi-employer context, welfare plans usually require the employee to work in covered employment (*i.e.*, at the trade described in the CBA) for a certain period to be eligible for benefits during a subsequent period.

A large body of case law is developing concerning the eligibility of retirees for lifetime health insurance.

There are significant differences between health plans which provide benefits through insurance and those which pay benefits directly. Insured plans are subject to the mandates of state insurance laws. For self-insured plans, ERISA preempts state insurance laws.[20] A self-insured plan may appear to be insured if either administered by an insurance company or when benefits are paid through an insurance company. However, the test for preemption purposes is whether the benefits are paid with the plan's own assets. Stop-loss insurance can cloud this issue as the courts are divided over whether it equates to an insured plan.

A large body of case law is developing concerning the eligibility of retirees for lifetime health insurance. These cases turn on the contractual obligations undertaken to provide benefits to retirees and whether there has been a clear reservation of the right to amend the plan to discontinue the benefits.[21] In the multi-employer context, the plan documents and the CBA are contracts which will be examined to discern the parties' intent. If they are ambiguous, extrinsic evidence of intent may be considered. If there is no CBA then only the plan documents are reviewed for intent. The fact that one has retired on an employer's pension does not assure lifetime participation in its health plan. Termination of coverage, reduction of benefits, and increases in the former employees' level of contribution to the plan have all triggered litigation.

Contrary to pension benefits, welfare benefits can be assigned (to a provider or to others) and benefits, such as vacation pay, can be levied upon by judgment creditors. Attorneys must remember that unions, pension plans, and welfare plans are each distinct legal entities, operating under unique plan documents, and subject to different laws.

The federal law pertaining to continuation coverage for group health plans (commonly known as COBRA) is found at §§ 1161–1169. It provides for the continuation of participation for persons who lose coverage as a result of a "qualifying event" such as the loss of a job or a divorce. Employers must comply with strict notice requirements to individuals eligible for COBRA. Those individuals must make their elections promptly and pay the premiums on time. COBRA invites "negative selection," encouraging the infirm or injured to elect coverage, while those who are healthy may decline coverage. The premium rate, however, is identical for all who are eligible. Many states have laws similar to COBRA (*e.g.*, N.Y. Insurance Law § 3221). Generally, ERISA does not preempt such laws for insured plans or employers with fewer than 20 employees.

COBRA should be contrasted with a conversion right that permits an individual to convert a group policy to an individual policy upon losing group coverage. N.Y. Insurance Law §§ 4216(d) and 3221(e) require that group life and health policies contain such a conversion privilege.

Qualified medical child support orders (QMCSOs) are another unique aspect of welfare plans.[22] A QMSCO in effect mandates continued medical coverage for dependent children under a parent's health plan. The goal is to protect the rights of children to medical coverage during and after a divorce.

Administration

The operation of plans and processing of claims, which is referred to as administration, is the source of much litigation. Section 1133 sets forth the procedure which administrators must follow when denying a benefit claim. The Secretary has promulgated detailed regulations that are provided at 29 C.F.R. § 2560.503-1. The claimant must receive a written notice which sets forth the specific reason for the denial and offers the opportunity to have the administrator's decision reviewed by the plan's fiduciaries. The review procedure must be set forth in the plan documents including the SPD.

A plan's personnel or an employer's office staff sometimes offers interpretations of a plan document to a participant or to a service provider. While often well-intentioned, this is a dangerous practice that should be discouraged. Courts have held that a plan may be collateral-

ly estopped from denying an interpretation of an ambiguous provision of the plan document once it has been relied on. The courts balance ERISA's requirement that the plan be in writing with the right of others to rely on a plan representative's interpretation.[23] However, if a representative makes a statement which clearly conflicts with the written plan, those who rely on the statement may be left without recourse. Courts have held that ERISA provides no remedy for a definite misstatement about the plan document and that state law remedies such as collateral estoppel and negligent misrepresentation are preempted by ERISA, leaving a misled participant or provider with no remedy.[24] Although federal courts have acknowledged their duty and power to develop a federal common law under ERISA, they have been reluctant to use that power to remedy such problems.[25] If instead a plan fiduciary misleads a participant, equitable relief may be obtained in some circumstances under § 1132(a)(3).

Preemption

ERISA supersedes all state laws that "relate to an employee benefit plan" but it does not preempt federal laws.[26] The courts have struggled mightily with the issue of which state laws "relate to" ERISA plans. Section 1144(b) contains an exception to the general preemption provision for state insurance, banking and securities laws but then provides that employee benefit plans may not be "deemed" to be insurance companies, banks or investment companies.

The courts have held that ERISA preempts a wide range of state laws and have addressed the preemption issue in numerous contexts such as state anti-subrogation statutes that prohibit health plans from recouping benefit payments from the proceeds of a participant's claim against a responsible third party. Court decisions concerning this issue often turn on the distinction between an insured plan (state law is not preempted) and a self-insured plan (state law is preempted). The U.S. Supreme Court has affirmed the critical importance of this difference.[27]

Insured welfare plans willing to assume the risk of large losses may avoid the mandates of state insurance laws by becoming self-insured. Stop-loss insurance (which provides insurance for catastrophic losses) blurs the line and creates dangers and uncertainties, since the courts are divided as to whether it transforms a self-insured plan into an insured plan.[28]

Litigation

Section 1132 is the heart of ERISA for litigation purposes. It sets forth the types of civil actions that may be brought, who may institute each type and the available forms of relief. A benefit plan may sue and be sued as a legal entity. Section 1132 contains a venue provision which facilitates the participant's choice and also provides for the manner and place for service of process. The plan document must identify each plan's agent for service of process.[29] Section 1113 contains the applicable statute of limitations which may be shortened for benefit claims litigation by the terms of the plan documents. The exhaustion of a participant's administrative remedy (the review process) has repeatedly been held to be a condition precedent to the commencement of benefit claims litigation.[30] The statute is silent, and there remains a division of authority, concerning the right to a jury trial in ERISA cases. Many cases turn on the distinction between claims for legal relief and equitable relief.[31]

Section 1132 confers the federal courts with jurisdiction over ERISA cases without regard to the amount in controversy or the citizenship of the parties. The federal courts are given exclusive jurisdiction over almost all civil actions. However, § 1132 gives concurrent jurisdiction to the federal and state courts in all benefit claim cases. ERISA is the applicable law in either court. If a

> Counsel should review both the trust document and the plan documents to assure that the fiduciaries are given broad discretion.

benefit case is brought in state court, the plan's attorney usually will remove the action to the federal court.

Section 1140 makes it unlawful for employers to discriminate against employees for exercising their rights under an employee benefit plan.[32] This type of claim, in which an employer is sued for discriminatory employment practices, should be contrasted with a participant's claim directly against a plan. However, § 1132 is applicable to both kinds of claims, and the court may allow either party a reasonable attorneys fee in either case.

Until recently, it was thought by many that the standard for judicial review of fiduciary appeals was "arbitrary and capricious." However, the Supreme Court of the United States has held that a participant is entitled to a *de novo* review unless the plan documents give broad discretionary authority to the fiduciaries in making such decisions.[33] Counsel should review both the trust document and the plan documents to assure that the fiduciaries are given broad discretion; as these documents will control the standard of judicial review.

Occasionally, employers become delinquent in their contributions to multi-employer plans. When this persists employers are sued by the plans under § 1145. ERISA severely restricts available employer defenses. Section 1132 permits the plan to recover the delinquency plus interest, penalty interest, attorneys fees and costs. Section 1132 provides that the court "shall" award these additional items in a successful action. The federal courts are divided on the issue of ERISA's preemption of state law remedies (such as mechanic's liens and construction payment bonds) to collect unpaid employer contributions.[34]

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Not all counsel will need expertise in ERISA, but this overview should provide you with a working knowledge of its fundamentals and an awareness of potential problems so that you may better address ERISA issues when they arise. ■

1. 29 U.S.C. §§ 1001–1191c.
2. Section 1002(3) defines the term "plan" as an employee benefit pension or welfare plan (the entity which provides the benefits) but ERISA also uses the term to mean the written description of the plan. Unless otherwise noted, all section references are to 29 U.S.C.
3. 29 U.S.C. § 1002(1), (2).
4. 29 U.S.C. § 1052.
5. 29 U.S.C. § 1053.
6. *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988).
7. 29 U.S.C. § 186.
8. 29 U.S.C. § 1102(a)(1).
9. 29 U.S.C. § 1102(c)(3).
10. 29 U.S.C. § 1104.
11. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).
12. 29 U.S.C. § 1110.
13. 29 U.S.C. § 1112.
14. 29 U.S.C. § 1102(a)(1).
15. 29 U.S.C. § 1022.
16. *Heidegerd v. Olin Corp.*, 906 F.2d 903 (2d Cir. 1990); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985); *see Hansen v. Cont'l Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Maher v. Stracham Shipping Co.*, 817 F. Supp. 43 (E.D. La. 1993); *Cohen v. Baker*, 845 F. Supp. 289 (E.D. Pa. 1994).
17. 29 U.S.C. § 1025.
18. 29 U.S.C. § 1056(d).
19. 29 U.S.C. § 1002(40)(B).
20. 29 U.S.C. § 1144.
21. *Hansen v. White Farm Equip. Co.*, 788 F.2d 1186 (6th Cir. 1986); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512 (8th Cir. 1988); *Smith v. ABS Indus. Inc.*, 890 F. 2d 841 (6th Cir. 1989).
22. 29 U.S.C. § 1169.
23. *National Cos. Health Benefit Plan v. St. Joseph's Hosp.*, 929 F.2d 1558 (11th Cir. 1991).
24. *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).
25. *Chemung Canal Trust Co.*, 939 F.2d 12; *Bast v. Prudential Ins. Co.*, 150 F.3d 1003 (9th Cir. 1998).
26. 29 U.S.C. § 1144.
27. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).
28. *Michigan United Food & Commercial Workers Union v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985); *Moore v. Provident Life & Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986); *N. Group Servs., Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987); *Brown v. Granatelli*, 897 F.2d 1351 (5th Cir. 1990); *Thompson v. Talquin Bldg. Prods. Co.*, 928 F.2d 649 (4th Cir. 1991).
29. 29 U.S.C. § 1022.
30. *Denton v. First Nat'l Bank of Waco*, 765 F.2d 1295 (5th Cir. 1985); *Mason v. Cont'l Group, Inc.*, 763 F.2d 1219 (11th Cir.1985); *Springer v. Wal-Mart Assocs.' Group Health Plan*, 908 F.2d 897 (11th Cir. 1990).
31. *Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35 (3d Cir. 1991); *Crews v. Cent. States Pension Fund*, 788 F.2d 332 (6th Cir. 1980).
32. *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 14 EBC 1673 (6th Cir. 1991).
33. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).
34. *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990); *Ret. Fund of Fur Mfg. Indus. v. Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989); *see Plumbing Indus. Bd. v. E.W. Howell Co.*, 126 F.3d 61 (2d Cir. 1997).

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Scaffold Law Liability

The New Dynamic

By William G. Pixley

It appears that the Court of Appeals has reinterpreted the fundamental obligations of owners and contractors under § 240(1) of the Labor Law, better known as the Scaffold Law. This article examines the current state of Scaffold Law jurisprudence in the wake of the Court's decision in *Blake v. Neighborhood Housing Services of New York City.*[1]

Blake addressed "the question whether a plaintiff who was injured while using a ladder may prevail in a . . . § 240(1) action even when a jury finds that the ladder was so constructed and operated as to give him proper protection and he was the sole cause of his injury."[2] In answering that question favorably for the defendant, the Court sparked a debate about whether it had impliedly overruled longstanding precedent interpreting § 240(1) as placing ultimate responsibility for worksite safety on owners and contractors rather than on workers themselves. Two recent decisions by the Court in the aftermath of *Blake* support the view that the Court no longer follows such precedent.

A "Flat and Unvarying" Duty

Some background is helpful in understanding the seismic shift this reinterpretation of the Scaffold Law represents. As relevant here, § 240(1) provides that "[a]ll contractors and owners . . . shall furnish or erect . . . scaffolding . . . ladders . . . and other [safety] devices which shall be so constructed, placed and operated as to give proper protection to [workers]." This language long had been interpreted by the Court of Appeals as "placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves,"[3] meaning that the "[n]egligence, if any, of the injured worker is of no consequence."[4] Indeed, in *Bland v. Manocherian*, the Court recognized that "[t]he policy purpose underlying . . . § 240 is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker."[5]

Thus, in *Haimes v. New York Telephone Co.*, the Court ruled that there was liability under § 240(1), even though the worker himself failed to secure a ladder.[6] In at least two other cases, including *Bland,* the Court held that there was liability under § 240(1) notwithstanding evidence indicating that the accident was caused by a misplacement of a ladder by the worker himself.[7] In yet another case, although ladders were present at the worksite, the worker scaled a 31-foot vertical column without one and fell when he lost his grip. The Court held that there was

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liability as a matter of law under § 240(1), without regard for the lack of care on the part of the worker, because the defendants failed to erect a ladder "for plaintiff's specific task" or to provide alternative safety devices.[8] The Court considered it irrelevant under § 240(1) that alternative safety devices, such as nets or lifelines, may "have been infeasible, [or] even dangerous."[9]

A Limited Defense

These cases, and many others like them in lower courts, clearly suggest that the liability of owners and contractors under the Scaffold Law is not absolved by worker negligence, even negligence in proceeding without a safety device. Under this interpretation of § 240(1), the collapse of a ladder, for example, is a statutory violation even if it was the result of worker negligence because "[t]he ladder did not prevent plaintiff from falling . . . [and] thus the 'core' objective of section 240(1) was not met."[10] The liability of owners and contractors was "primary and inescapable"[11] and proximate cause an issue only if there was evidence that the worker's injuries were wholly unrelated to the hazard that created the need for the safety device in the first place.[12]

Consistent with this interpretation of the Scaffold Law, the applicability of the recalcitrant worker defense was limited to instances in which a worker deliberately refused to use an available safety device after being instructed to do so.[13] In one notable case, *Gordon v. Eastern Railway Supply*,[14] a worker fell from a ladder while sandblasting. He chose the ladder for the job, rather than an available scaffold,[15] despite being warned not to sandblast from a ladder. The supreme court denied cross motions for summary judgment under § 240(1). On appeal, the Appellate Division modified the order by granting judgment to the worker. In making its determination, the Appellate Division rejected the defendants' contention that there was an issue of fact regarding the applicability of the recalcitrant worker defense. It held that the obligation of owners (and contractors) under the statute is not satisfied by merely giving safety instructions or by making safety devices available, but only by furnishing, placing and operating such devices so as to give proper protection.[16]

The Court of Appeals expressed similar views in affirming, noting that there was a statutory violation because the ladder did not prevent the worker from falling and the evidence that the worker had been instructed to use a scaffold "does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense."[17] Under *Blake* and its progeny, the continued viability of this decision, like others already mentioned, is in doubt.

Blake was not a bolt out of the blue. It was presaged by a cryptic memorandum-decision in 1998 in *Weininger v. Hagedorn & Co.*,[18] yet another case involving a fall from a ladder. The Court held that the worker was not entitled to a directed verdict under § 240(1) because, "[i]n the circumstances presented, a reasonable jury could have concluded that [his] actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) did not attach."[19] What those circumstances were, was never explained by the Court,[20] thus opening the door to the argument – made by many defendants thereafter – that, notwithstanding precedent, a worker's negligence in using, or failing to use, a safety device could constitute a defense to liability under § 240(1). *Blake* and its progeny appear to confirm that this argument is not off the mark.

Sole Proximate Cause Considered

Blake concerned an appeal by a plaintiff from a judgment dismissing a complaint entered upon a special verdict in an action brought under § 240(1). The plaintiff commenced the action seeking damages for the injuries he sustained in a fall from an extension ladder that suddenly retracted. The only possible explanation for the catastrophic failure of the ladder was the plaintiff's failure to lock the extension clips in place before ascending the rungs, *i.e.*, a failure on the part of the plaintiff to operate the ladder properly. The ladder itself was conceded to function properly in that it was not defective. Insofar as relevant here, a single question was submitted to the jury for its answer: Was the ladder so constructed and operated as to give proper protection to the plaintiff? When the jury answered that question in the affirmative, the trial court deemed the special verdict favorable to the defendant as a matter of law and entered judgment accordingly.

On appeal, the plaintiff argued that the issue never should have been submitted to the jury and that his negligence, if any, in setting up the ladder does not absolve the defendant of liability. The defendant, citing *Weininger*, argued that there was sufficient evidence for a jury to conclude that the plaintiff was the sole proximate cause of the accident. In an amicus brief, the New York State Trial Lawyers Association argued, based principally on *Haimes*, that the sole proximate cause defense should not apply where it is the worker who negligently chooses, places or sets up the device in issue. In the end, it was the defendant who prevailed, the Court of Appeals affirming on the basis of the *Weininger* decision.

In so deciding, the Court of Appeals undertook a wholesale review of Scaffold Law jurisprudence. Highlights of that review include the following observations:

- Neither the Court nor the legislature has "ever suggest[ed] that a defendant should be treated as an insurer after having furnished a safe workplace";[21]
- "The point of § 240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so";[22] and

- "'[S]trict' or 'absolute' liability is necessarily contingent on a violation of section 240(1)."[23]

The Court also explained the meaning of *Weininger*:

> Under . . . § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation. That is what we held in *Weininger*.[24]

The Court, however, did not explicitly overrule any prior precedent. Indeed, it did not discuss prior precedent except to distinguish *Bland*, suggesting that *Bland* turned on evidence, lacking in *Blake*, "that better safety devices could have prevented the accident."[25] *Haimes*, the case upon which amicus principally relied, was never mentioned by the Court.

Legislative Purpose

The Court said that in the matter before it, the jury's affirmative answer to the question posed on the verdict sheet "lead[s] to the inescapable conclusion that the accident happened not because the ladder malfunctioned or was defective or improperly placed, but solely because of plaintiff's own negligence in the way he used it."[26] Based on that conclusion, the Court found *Weininger* controlling. "As in *Weininger*, the record now before us fully supports the jury's findings that there was no statutory violation and that plaintiff alone, by negligently using the ladder with the extension clips unlocked, was fully responsible for his injury."[27]

> The *Blake* holding may be broader in its scope than even the Second Department recognized in *Plass*.

Although the Court acknowledged that the purpose of the statute is the protection of workers and that the statute should be construed liberally to accomplish that purpose, it said, "[T]o impose liability for a ladder injury even though all the proper safety precautions were met would not further the Legislature's purpose."[28] The Court expressed for the first time the view that "the Legislature has enacted no-fault workers' compensation to address workplace injuries where, as here, the worker is entirely at fault and there has been no Labor Law violation shown."[29]

In the immediate aftermath, some courts were reluctant to accept *Blake*, as it was a radical departure from prior case law, and tried to distinguish *Blake* so as to leave that precedent intact. One court, for example, suggested that *Blake* applies only when there has been an "intentional misuse of the safety device, or . . . other egregious misconduct, neutraliz[ing] the protections afforded by the safety device."[30]

Application of *Blake*

At least one court, however, embraced an interpretation of *Blake* precluding injured workers from recovering under § 240(1) whenever their accident is caused by their negligence, even negligence involving the construction, placement or operation of a ladder or scaffold. In that case, *Plass v. Solotoff*,[31] the Second Department awarded summary judgment, dismissing a complaint brought by a worker who was injured when he inadvertently stepped backward off the edge of a scaffold that he negligently constructed.

The two most recent decisions by the Court of Appeals on the subject indicate that the *Blake* holding may be broader in its scope than even the Second Department recognized in *Plass*. In one of these cases, the worker failed to use an available safety line;[32] in the other, the worker failed to use an available ladder.[33] In both cases, the worker lost in the Court of Appeals based on *Blake*. In neither case was the Court particularly concerned with whether the worker had acted negligently or intentionally. The determinative facts in each instance appear to be – as they were in *Blake* – that there were adequate safety devices available and the worker to his detriment chose not to use them.

In *Cahill*, the first of the two cases, there was evidence that the worker was trained in the use of a safety line and was previously admonished for failing to use one. Regardless, he was not using a safety line on the day he fell, even though one was nearby that he could have relocated for his use.[34] The Court held that it was error for the trial court to award the worker summary judgment on his § 240(1) claim because, pursuant to *Blake*, the evidence was sufficient to support the conclusion that, even if he was not recalcitrant, he alone was to blame for his injury.

Montgomery concerned a worker who climbed up to an elevated work place without a ladder and then injured himself later when he jumped back down.[35] Although there were no ladders in the immediate vicinity where the accident occurred, there were ladders elsewhere at the job site. The First Department held that the trial court erred in not awarding summary judgment to the defendants dismissing the § 240(1) claim. The Court of Appeals agreed, ruling that the worker's choice not to use a "readily available" ladder was the sole cause of his injury under *Blake*.

A Difficult Reconciliation

Neither of these results may be justified under precedent prior to *Weininger* and *Blake*. The operative facts in both

Cahill and *Montgomery* appear indistinguishable from those in *Zimmer* and *Gordon*. Certainly the parallels between *Gordon* and *Montgomery* are particularly strong inasmuch as the scaffolding in *Gordon* was just as available as the ladder in *Montgomery*. Again though, the Court, as in *Blake*, failed to address specifically the prior precedent.

What is at work here? It appears that, without expressly saying so, the Court has changed its interpretation of § 240(1) in a fundamental way. If owners and contractors truly bore ultimate responsibility for the placement and operation of safety devices, as the Court indicated in the past, how does one explain *Blake*? If it truly makes no difference under § 240(1) that safety devices are available elsewhere on a worksite if they are not provided specifically for the work being performed, as the Court indicated in *Gordon*, how does one explain *Cahill*? If the statutory duty of owners or contractors encompasses the "flat and unvarying" duty to erect a ladder for a worker's specific task, as the Court indicated in *Zimmer*, how does one explain *Montgomery*?

The apparent answer is that the Court is no longer interpreting the responsibility of owners and contractors under § 240(1) in the same way it once did. It was, at one time, the view of the Court that owners and contractors could not discharge their duty under § 240(1) simply by making a defect-free ladder available to a worker, and that owners and contractors bore the further responsibility to ensure that the ladder was properly placed and operated by the worker. However, under *Blake* and its progeny it may fairly be said that the obligations of owners and contractors do not extend beyond making defect-free ladders available to workers. If a worker then chooses not to use the ladder, or neglects to operate or place it properly, and is injured as a result, the worker is solely to blame for his injuries and thus precluded from recovering under the statute.

The Court has couched this change in terms of proximate cause. In reality, the change heralded by *Weininger* and effected by *Blake* is no less than a reinterpretation of the fundamental obligations of owners and contractors under § 240(1). It is only because of that reinterpretation, which significantly narrows the scope of the statutory obligation, that the Court could rule in *Cahill* and *Montgomery* that the plaintiffs were solely to blame for their injuries.

Litigation under the Scaffold Law has entered a brave new world. For years, plaintiffs have benefited from an expansive interpretation of the statute. It is now clear that "the pendulum has swung back in the defendants' direction."[36] ■

1. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (Dec. 23, 2003).
2. *Id.* at 283.
3. *Gordon v. E. Ry. Supply*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127 (1993), *aff'g* 181 A.D.2d 990, 991, 581 N.Y.S.2d 498 (4th Dep't 1992).
4. *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219 (1991).
5. 66 N.Y.2d 452, 461, 497 N.Y.S.2d 880 (1985).
6. 46 N.Y.2d 132, 412 N.Y.S.2d 863 (1978) (worker personally selected and placed the ladder and he alone failed to secure it against slippage).
7. *Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996) (owner liable for worker's placement of ladder on a floor, which the worker conceded could have been slippery due to an earlier accident); *Bland*, 66 N.Y.2d at 457 (owner liable for misplacement of a ladder, which the worker himself had placed).
8. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 519, 493 N.Y.S.2d 102, *reargument denied*, 65 N.Y.2d 1054, 494 N.Y.S.2d 1033 (1985).
9. *Id.* at 519.
10. *Gordon*, 82 N.Y.2d at 561.
11. *Haimes*, 46 N.Y.2d at 137.
12. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49 (1993); *Rocovich*, 78 N.Y.2d at 513.
13. *See Jastrzebski v. N. Shore Sch. Dist.*, 88 N.Y.2d 946, 647 N.Y.S.2d 708 (1996), *aff'g on opinion below* 223 A.D.2d 667, 637 N.Y.S.2d 439 (2d Dep't); *Hagins v. State*, 81 N.Y.2d 921, 597 N.Y.S.2d 651 (1993).
14. 82 N.Y.2d 555.
15. *Gordon*, 181 A.D.2d at 991.
16. *Id.* at 991–92.
17. *Gordon*, 82 N.Y.2d at 563.
18. 91 N.Y.2d 958, 672 N.Y.S.2d 840, *reargument denied*, 92 N.Y.2d 875, 677 N.Y.S.2d 777 (1998).
19. *Id.* at 960.
20. A close examination of the record in *Weininger* reveals that the decision was not, in fact, a radical break from precedent. There was evidence that the accident was caused by a *deliberate misuse* of an A-frame ladder. The properly functioning ladder apparently collapsed when the worker stood "on the crossbars of the back side of the ladder, rather than on the steps," Michael P. Mezzacappa & Stephanie B. Gitnik, *Court of Appeals Ruling Significantly Affects Labor Law Cases*, N.Y.L.J., Mar. 11, 2004, col. 4; *see Secord v. Willow Ridge Stables*, 179 Misc. 2d 366, 370–71, 684 N.Y.S.2d 867 (Sup. Ct., Monroe Co. 1999).
21. *Blake*, 1 N.Y.3d at 286.
22. *Id.*
23. *Id.* at 289.
24. *Id.* at 290.
25. *Id*. at 292. In fact, the jury in *Bland* returned its verdict in favor of the plaintiff based on a specific finding that the ladder had been placed improperly, and the evidence in *Bland* was that the plaintiff himself had positioned the ladder. *Gordon*, 66 N.Y.2d at 457.
26. *Blake*, 1 N.Y.3d at 284.
27. *Id.* at 291.
28. *Id.* at 292.
29. *Id.*
30. *Robinson v. City of New York*, 4 Misc. 3d 542, 547, 779 N.Y.S.2d 757 (Sup. Ct., Bronx Co. 2004).
31. 5 A.D.3d 365, 773 N.Y.S.2d 84 (2d Dep't), *appeal denied*, 2 N.Y.3d 705, 780 N.Y.S.2d 310 (2004).
32. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).
33. *Montgomery v. Fed. Express Corp.*, 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005).
34. *Cahill*, 4 N.Y.3d at 38.
35. *Montgomery*, 4 N.Y.3d at 806.
36. Michael Steinberg, *Latest on Scaffold Law Liability*, The Daily Record, Mar. 31, 2005, at 1.

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Enabling Copyright Infringement

The U.S. Supreme Court held online file-sharing services Grokster and StreamCast may be responsible for contributory copyright infringement liability if they induce others to engage in copyright infringement using their software.[1] The Ninth Circuit Court of Appeals had dismissed the case on summary judgment grounds, based on the prior Supreme Court ruling of *Sony Corp. of America v. Universal City Studios, Inc.*[2] The Supreme Court vacated the Ninth Circuit's dismissal finding the *Grokster* case to be significantly different from *Sony*, and that reliance on *Sony* was error. The Court noted *Sony* dealt with a claim of liability based solely on distributing a product with both lawful and unlawful uses, while in *Grokster*, evidence of the defendants' words and deeds goes beyond distribution, and shows an intent to cause, and profit from, third-party acts of copyright infringement.[3]

In *Grokster*, the defendant companies distributed free "file sharing" software that allows computer users to share electronic files through peer-to-peer networks in which computers communicate directly with each other, rather than through central servers. The networks formed through such software can be used to share any type of digital file; however, in this case, the software was mostly used to share copyrighted music and video files without authorization. A group of movie studios and other copyright holders led by Metro-Goldwyn-Mayer Studios, Inc. (MGM) sought damages against the defendants, alleging they knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act.

The district court, while acknowledging that defendants' users had directly infringed MGM's copyrights, granted summary judgment to the defendants as to liability arising from distribution of the software. The Ninth Circuit affirmed dismissal of the claims against the defendants, reading the *Sony* decision to hold that

> the distribution of a commercial product capable of substantial non-infringing uses could not give rise to contributory liability for infringement, unless the distributor had actual knowledge of specific instances of infringement, and failed to act on that knowledge.[4]

The Ninth Circuit held that the defendants were not liable because the software was capable of substantial non-infringing uses, and the defendants had no actual knowledge of infringement. The court also found that the defendants did not materially contribute to the users' infringement because users search for, retrieve, and store the infringing files with no involvement by the defendants. Finally, the Ninth Circuit held that there could be no liability under a vicarious infringement theory because the defendants did not monitor or control the software's use.

The U.S. Supreme Court vacated, finding that the Ninth Circuit's decision rested on an erroneous understanding of *Sony*.[5] The Supreme Court held that

> one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, [going beyond mere distribution with knowledge of third-party action,] is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.[6]

The Supreme Court noted that its prior precedent-setting decision, *Sony*, addressed whether secondary liability for infringement can arise from the mere distribution of a commercial product. In *Sony*, the plaintiffs claimed the manufacturers of videocassette recorders (VCRs) were contributorily liable for the infringement that occurred when VCR owners taped copyrighted programs. However, the VCR's principal use was "time-shifting," the taping of a program for later viewing at a more convenient time, which the Court found to be a fair, non-infringing use. Furthermore, there was no evidence in *Sony* that the manufacturers took any active steps to increase profits from any infringing

conduct. In *Sony*, the Court found that the only conceivable basis for liability was on a theory of contributory infringement through distribution of a product and, because the VCR was "capable of commercially significant non-infringing uses," the Court held that the manufacturers were not liable.

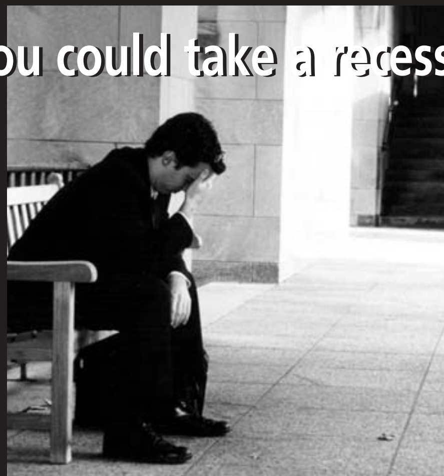
However, the Supreme Court held that the Ninth Circuit was in error relying on *Sony* because *Sony* did not displace other secondary liability theories, and nothing in *Sony* required courts to ignore evidence of intent to promote infringement.[7] Where there is evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in infringing conduct, such steps show an affirmative intent that the product be used to infringe, and overcome, the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.

The Supreme Court found that the defendants' unlawful objective was unmistakable, and thus they could be liable for contributory copyright infringement.[8] The Court noted that there was proof elicited showing defendants specifically attempting to satisfy a known source of demand for copyright infringement, namely the market comprising former Napster users.[9] The defendants' efforts and intent to supply services to former Napster users indicates an intent to induce infringement. The Court also pointed to the defendants' failure to attempt to develop filtering tools or other mechanisms to diminish the infringing activity of those using their software.[10]

Finally, the Court noted that the defendants profited from infringing uses of its software, as they made money selling advertising space, and most use involved copyright infringement. The Supreme Court acknowledged that the software involved has the ability to transfer non-infringing files, such as works that are in the public domain, and that users could even download the legal briefs in this case.[11] However, the Court noted that the popularity of such non-infringing use was not quantified, and that approximately 90% of the files available for download were, in fact, copyrighted works.[12] The Court found that the evidence in this case was different from *Sony* – because the defendants' words and deeds went beyond distribution – and could show an intent to cause and profit from third-party acts of copyright infringement.[13] If liability was to be found against the defendants for inducement of infringement, it would not be on the basis of a presumptive or imputed fault merely because the defendants produced the software, but rather from their illegal objective, established by their own statements and actions.

The Court, in vacating the Ninth Circuit decision, remanded the case to the district court for reconsideration of MGM's motion for summary judgment and possible further proceedings. It is possible that, in light of the fairly strong directive from the Supreme Court, the district court could rule in favor of MGM's motion. If the district court finds that there is an issue of fact to be determined regarding inducement of infringement, the case will proceed to trial on that issue. While the decision is not likely to halt the use and proliferation of file-sharing software and services, it does make it more difficult for such services to operate legally and perhaps will encourage such services to develop and promote non-infringing uses of their technology. ■

1. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, LTD.*, __ U.S. __, 2005 WL1499402 (June 27, 2005).
2. 464 U.S. 417 (1984).
3. *Grokster, LTD.*, 2005 WL1499402, at *16.
4. *Id.* at *8.
5. *Id.* at *12.
6. *Id.* at *13, pp. 10–24.
7. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).
8. *Grokster, LTD.*, 2005 WL1499402, at *16 (discussing IIIB).
9. *Id.* at *15, IIIA.
10. *Id.* at *14, IIIA.
11. *Grokster, LTD.*, 2005 WL1499402, at *5, IA.
12. *Id.* at *11.
13. *Id.* at *16.



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Class Warfare

Aggregating and Prosecuting Consumer Claims as Class Actions – Part II

By Thomas A. Dickerson

In this second part of our examination of New York State consumer class actions,[1] we review the assertion of statutory causes of action alleging violations of General Business Law §§ 340 (Donnelly Act), 349 (deceptive business practices) and 350 (false advertising), the Telephone Consumer Protection Act, the Public Health Law, Civil Rights Law § 51, Real Property Law § 274, and statutes governing tenant security deposits and no-fault insurance.

In addition, consumer class actions brought in New York state courts may be removed to federal district court or may be stayed or dismissed because of the application of mandatory arbitration agreements that may prohibit the use of the class action device, even within the context of class-wide arbitration. And last, settlements of consumer class actions based upon the distribution of coupons and other non-cash benefits to class members may be appropriate if carefully designed.

Statutory Theories of Liability

There are a variety of consumer protection statutes that have been asserted in CPLR Article 9 consumer class actions. Among them are the following:

General Business Law §§ 349, 350: The most popular consumer protection statute is General Business Law (GBL) § 349. As we discussed,[2] GBL § 349 is a statutory complement to or substitute for a common-law fraud claim. The statute covers a broad and growing spectrum of goods and services "appl[ying] to virtually all economic activity"[3] and is broader than common law fraud (no proof of reliance or scienter[4] required, but must prove causation[5]) and "encompasses a significantly wider range of deceptive business practices than were ever previously condemned by decisional law."[6]

The courts have been willing to certify GBL § 349 (deceptive business practices) and § 350 (false advertis-

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ing[7]) claims. For example, in 2004, GBL § 349 class actions were certified involving so-called "fat fingers" telephone service,[8] overpayments for title insurance,[9] obstructed views of a Michael Jackson concert,[10] hair loss product misrepresented as having no known side effects,[11] and failure to honor a Qualcomm 2700 $50 rebate program.[12] Usually, but not always,[13] these are limited to a class of New York residents upon whom the deceptive act was performed in New York State.[14]

The deceptive acts must be consumer oriented[15] and based upon uniform printed misrepresentations[16] or uniform omissions of material fact[17] or a common course of conduct.[18] Although section 901(b) of the Civil Practice Law and Rules prohibits a class action seeking a minimum recovery or treble damages, such damages may be waived in a GBL § 349 class action[19] as long as class members are notified and given a chance to opt out.[20]

GBL § 340 claims alleging a violation of the Donnelly Act, New York's antitrust statute, have, generally, not been certified[21] on the grounds that the treble damages provision constitutes a penalty and is prohibited by CPLR 901(b).

Telephone Consumer Protection Act (TCPA) claims may be uncertifiable as well because some courts have held that the $500 minimum damages and the TCPA treble damages provision constitute penalties which are also prohibited by CPLR 901(b).[22]

Public Health Law (PHL) claims under § 2801-d, involving the mistreatment of residents of residential care facilities, are certifiable[23] and claims involving overcharges for hospital medical records may be certifiable under PHL § 18(2)(e).[24]

Tenant security deposit claims may be certifiable[25] as long as they involve uniform misconduct by landlords in failing to properly handle security deposits.

Privacy claims are certifiable based upon a violation of Civil Rights Law § 51[26] or common law theories such as breach of fiduciary duty.[27]

No-fault insurance coverage claims are certifiable, especially, when the class action seeks to enforce a decision on the merits in a non-class action.[28]

Real Property Law § 274 claims may be certifiable, such as those involving fax fees, quote fees and satisfaction fees,[29] and recording and fax fees.[30]

Mandatory Arbitration Agreements and Class Actions

Manufacturers and sellers of goods and services have with increasing frequency used contracts with clauses requiring aggrieved consumers to arbitrate their complaints[31] instead of bringing lawsuits (particularly class actions).[32] The language in such an agreement seeks to extinguish any rights customers may have to litigate a claim before a court of law. The U.S. Supreme Court[33] has addressed the enforceability of contractual provisions requiring mandatory arbitration, including who decides arbitrability and the application of class procedures: the court or the arbitrator.[34] New York State courts have, generally, enforced arbitration agreements, including those prohibiting class actions.[35]

Class-Wide Arbitration

Mandatory arbitration agreements are considered to be a viable means by which to counteract class actions because some courts may view these two procedural devices, arbitration and the class action, as competing and contradictory. In fact, arbitration and the class action device are complementary and seek greater efficiencies than otherwise would be available to individual litigants. Class-wide arbitration should be encouraged and can enhance the overall effectiveness of arbitration proceedings.[36] Class-wide arbitration and the enforceability of contractual clauses prohibiting class actions and class-wide arbitration have been considered by federal and New York state courts.[37] Permitting class actions to be litigated within the context of arbitration proceedings is appropriate.[38]

Removal to Federal Court

Defendants may remove a consumer class action brought in the New York state courts to a federal district court.[39] Class plaintiffs may seek to remand on the grounds that class member damages do not meet the jurisdictional amount in controversy or a federal claim is not set forth in the complaint[40] or is not based upon the citizenship of the real parties in interest.[41] As a general rule federal courts do not permit the aggregation of the claims of individual class members[42] and, hence, remand may be appropriate. However, some federal district courts have permitted, for jurisdictional purposes, the aggregation of statutory damages[43] or punitive damages[44] or attorneys fees[45] or the value of injunctive relief[46] or the value of disgorgement damages.[47] Defendants may also seek to remove to federal court, relying upon supplemental jurisdiction pursuant to 28 U.S.C. § 1367. With respect to meeting the jurisdictional amount in controversy some courts have held that 28 U.S.C. § 1367 requires only that the class representative's claim meet the amount in controversy.[48]

Class-wide arbitration should be encouraged and can enhance the overall effectiveness of arbitration proceedings.

Class Action Fairness Act of 2005

Defendants may also seek removal based upon the recently enacted federal Class Action Fairness Act of 2005[49] (CAFA). The CAFA is meant, in part, to curb perceived abuses[50] in consumer class actions often brought in state courts such as "disproportionately large fees received by plaintiffs' lawyers, with class members left with coupons and other awards of little or no value."[51] The CAFA grants (federal) district courts original jurisdiction of any civil action in which the matter in controversy exceeds $5 million, exclusive of interests and costs, and that is between citizens of different states, or citizens of a state and foreign state or its citizens or subjects.[52]

Upon removal the federal court may[53] "decline to exercise jurisdiction over a class in which more than one-third but less than two-thirds of the members of the proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed, based on consideration of 'several factors.'"[54] The extent to which the CAFA may impact upon CPLR Article 9 consumer class actions remains to be seen.

Coupon Settlements

Consumer class actions often result in settlements wherein class members receive coupons or certificates for the purchase of defendants' products or services.[55] Such settlements have been criticized as, primarily, benefiting class attorneys at the expense of class members.

> The stark reality of coupon settlements is that they may only benefit the attorneys representing the class, who are paid in cash, and the defendants who are relying on a coupon design and redemption process which guarantees that very few coupons will ever be redeemed. The telltale sign of this lawyer's "bargain" is that very few coupon settlement agreements provide for coupon tracking or promise to continue issuing coupons until a specific dollar amount is redeemed. . . . Low coupon redemption rates make a mockery of the concept that class members should receive value for settling their claims.[56]

The CAFA seeks to address such abuses.[57]

Coupon settlements are useful, however, and may be appropriate if designed properly to maximize class benefit.[58] The features of acceptable coupon settlements include (1) coupons must be redeemable in cash[59] often with the creation of a clearinghouse[60] to help sellers find buyers, (2) anti-stacking provisions preventing use of two or more coupons together should be rejected,[61] (3) the court should require the parties to track coupon redemptions and make timely reports to the court until the cash value of the settlement has been reached,[62] (4) coupons should be redeemable over a reasonable time period,[63] (5) if class member identity is unknown, *cy pres* techniques should be used[64] and (6) attorneys fees should be based on claims made[65] or class counsel should be paid, in whole or in part, in the very same coupons given to class members.[66]

Conclusion

New York courts are generally receptive to consumer class actions involving misrepresented or defective goods and services and involving common law claims or violations of consumer protection statutes. ■

1. For more on New York State class actions see Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, New York, 1988–2005; see also Justice Dickerson's 2005 revision of Article 9 of Weinstein, Korn & Miller's *New York Civil Practice*, LexisNexis, 2005.

2. Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, N.Y. St. B.J., Sept. 2004, p. 10.

3. *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999).

4. *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30 (2001); *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892 (2000); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, NA*, 85 N.Y.2d 20, 25, 647 N.Y.S.2d 741 (1995); *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 739 N.Y.S.2d 565 (1st Dep't 2002) (class certification granted); *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) (certification granted to GBL § 349 claim); *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 919 (Table) (Sup. Ct., Nassau Co. 2004) ("The Court of Appeals has held that reliance and scienter are not elements of a [GBL § 349] claim").

5. *Emilio v. Robison Oil Corp.*, 15 A.D.3d 609, 790 N.Y.S.2d 535 (2d Dep't 2005) ("Assuming arguendo that a violation of General Obligations Law § 5-903 can qualify as a deceptive trade practice, there is no nexus between this violation and the damages claimed by the plaintiff for himself and any member of the class"); *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep't 2004) ("Individual trials also would be required to determine damages based on the extent of each plaintiff's injuries"; certification denied); *DeFilippo v. Mut. Life Ins. Co.*, 13 A.D.3d 178, 787 N.Y.S.2d 11 (1st Dep't 2004) (class decertified because a Court of Appeals decision (*Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002)) which held that "the deceptive acts or practices under GBL § 349 '[are] not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer' eliminated any doubt [such claims] would require individualized inquiries into the conduct of defendants' sales agents with respect to each individual purchaser"); *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 744 N.Y.S.2d 31 (1st Dep't 2002) (certification denied); *Ho v. Visa USA, Inc.*, 3 Misc. 3d 1105(A), 787 N.Y.S.2d 677 (Table) (Sup. Ct., N.Y. Co. 2004) (class certification not appropriate; GBL §§ 349, 350 claims dismissed as too remote), *aff'd*, 16 A.D.3d 256, 793 N.Y.S.2d 8 (1st Dep't 2005).

6. *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30 (2001).

7. *Colbert v. Rank Am., Inc.*, 295 A.D.2d 300, 743 N.Y.S.2d 150 (2d Dep't 2002) (GBL § 349 claim sustained; GBL § 350 claim dismissed); *Colbert v. Rank Am., Inc.*, 295 A.D.2d 302, 742 N.Y.S.2d 905 (2d Dep't 2002) (motion to decertify denied); *People v. Lipsitz*, 174 Misc. 2d 571, 582–83, 663 N.Y.S.2d 468 (Sup. Ct., N.Y. Co. 1997) ("the mere falsity of the advertising content is sufficient as a basis for the false advertising charge").

8. *Drizin v. Sprint Corp.*, 12 A.D.3d 245, 785 N.Y.S.2d 428 (1st Dep't 2004) (class of telephone users charged defendants with fraud and violation of GBL § 349 by maintaining "numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers . . . 'fat fingers' business . . . customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers"; class certification granted but limited to New York State residents); *Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A) (Sup. Ct., N.Y. Co. 2005) (notice by publication and direct mail "by including the notice within the telephone bill . . . or by separate mailing via U.S. mail" approved).

9. *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 919 (Sup. Ct., Nassau Co. 2004) (classes of home buyers charged title insurance companies with fraud, unjust enrichment and violation of GBL § 349 by failing to

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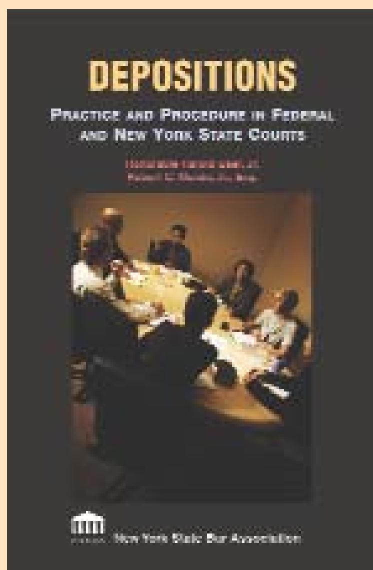

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"comply with their own filed and state-approved title insurance premium rates"; certification granted).

10. *Gross v. Ticketmaster L.L.C.*, 5 Misc. 3d 1005(A), 798 N.Y.S.2d 709 (Table) (Sup. Ct., N.Y. Co. 2004) (class of purchasers of $98.50 tickets for a concert "billed as 'Michael Jackson: 30th Anniversary Celebration, the Solo Years' claimed obstructed views and charged defendant with fraud, breach of contract, unjust enrichment and violation of GBL § 349. After dismissing the fraud claim the Court granted class certification, finding the "class action form . . . superior to a large number of individual claimants having to pursue their respective rights to small refunds").

11. *Mountz v. Global Vision Prods., Inc.*, 3 Misc. 3d 171, 770 N.Y.S.2d 603 (Sup. Ct., N.Y. Co. 2003) (class of purchasers of Avacor, a hair-loss treatment product, alleged fraudulent and negligent misrepresentations of "'no known side effects' [as being] refuted by documented minoxidil side effects . . . cardiac changes, visual disturbances, vomiting, facial swelling and exacerbation of hair loss"; GBL §§ 349, 350 claims sustained but limited coverage to New York residents deceived in New York).

12. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027(A), 798 N.Y.S.2d 709 (Table) (Sup. Ct., Kings Co. 2004) (a class of purchasers of the Qualcomm 2700 wireless telephone charged defendant with fraud, breach of contract, negligent misrepresentation and violations of GBL § 349 in failing to honor a $50 rebate promotion. The court dismissed the GBL § 349 claim but certified the class).

13. In *Peck v. AT&T Corp.*, N.Y.L.J., Aug. 1. 2002, p. 18, col. 2 (N.Y. Sup.), a GBL § 349 consumer class action involving cellphone service which "improperly credited calls causing [the class] to lose the benefit of weekday minutes included in their calling plans," approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut ("it would be a waste of judicial resources to require a different [GBL § 349] class action in each state . . . where, as here, the defendants have marketed their plans on a regional [basis]").

14. In *Goshen v. The Mut. Life Ins. Co.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) and *Scott v. Bell Atl. Corp.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002), 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."

15. Do corporations and other non-consumers have standing to assert claims under GBL § 349? The Second Circuit Court of Appeals in *Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 217–18 (2d Cir. 2003), certified two questions to the N.Y. Court of Appeals, the first of which was answered at *Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc.*, 3 N.Y.3d 200, 205 (2004). Relying upon the common law rule that "an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured" the Court of Appeals held, without deciding the ultimate issue of whether non-consumers are covered by GBL § 349, that Blue Cross's claims were too remote to provide it with standing under GBL § 349 ("Indeed, we have warned against 'the potential for a tidal wave of litigation against businesses that was not intended by the Legislature'").

16. *Gaidon v. The Guardian Life Ins. Co.*, 2 A.D.3d 130, 767 N.Y.S.2d 599 (1st Dep't 2003) (certification denied; oral misrepresentations require individual proof); *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep't 2004) ("Plaintiffs have not demonstrated that all members of the class saw the same advertisements"; class action decertified); *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) ("allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed"; certification granted to GBL § 349 claim).

17. *Gross v. Ticketmaster*, 5 Misc. 3d 1005(A) (certification granted); *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007(A) (certification granted; "Because the allegations . . . involve largely omissions and not affirmative representations, no individual issues of what the defendants said will predominate"); *Broder v. MBNA Corp.*, 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep't 2001) ("allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed"; certification granted to GBL § 349 claim).

18. *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 (1st Dep't 2004):

> A cause of action under General Business Law § 349 is stated by plaintiffs' allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development, and creating an "applications barrier" in its Windows software that, unbeknownst to consumers, rejected competitors' Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant's products and denial on consumer access to competitors' innovations, services and products.

19. *Id*. at 40:

> A cause of action under General Business Law § 349 is stated by plaintiff's allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices. . . . We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a "penalty" within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages . . . CPLR 901(b), which prohibits class actions for recovery of minimum or punitive damages, [is] inapplicable.

Super Glue Corp. v. Avis A Rent Car Sys., Inc., 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dep't 1987); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986), *aff'd*, 60 N.Y.2d 979, 516 N.Y.S.2d 652 (1987); *Burns v. Volkswagen of Am., Inc.*, 118 Misc. 2d 289, 460 N.Y.S.2d 410 (Sup. Ct., Monroe Co. 1982) ("as at actual damages, however, § 901(b) would not bar a class action"); *Hyde v. Gen. Motors Corp.*, N.Y.L.J., Oct. 30, 1981, p. 5 (N.Y. Sup.).

20. *Ridge Meadows Homeowners' Ass'n, Inc. v. Tara Dev. Co., Inc.*, 242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dep't 1997):

> On appeal . . . plaintiffs consent to strike that portion of the sixth cause of action seeking [minimum and treble damages pursuant to GBL § 349(h)] and to limit their demand to actual damages. Thus, CPLR 901(b) is no longer applicable and that cause of action may be maintained as a class action. . . . We further modify the order by providing that any class member wishing to pursue statutory minimum and treble damages . . . may opt out of the class and bring an individual action.

21. See, e.g., the following cases:

Second Circuit: *Leider v. Ralfe*, 2005 WL 152025 (S.D.N.Y. 2005) ("federal and state claims based on De Beers alleged price-fixing, anticompetitive conduct and other nefarious business practices"; certification denied for Donnelly Act and GBL § 350 claims; "I further hold that N.Y. C.P.L.R. § 901(b) applies to this matter, notwithstanding plaintiffs' arguments that to should be displaced by [F.R.C.P.] 23").

New York: *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002) ("private persons are precluded from bringing a class action under the Donnelly Act . . . because the treble damage remedy . . . constitutes a 'penalty' within the meaning CPLR 901(b)"); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002); *Ho v. VISA U.S.A. Inc.*, 3 Misc. 3d 1105(A), 787 N.Y.S.2d 677 (Table) (Sup. Ct., N.Y. Co. 2005) ("plaintiffs' alleged injury is far too remote to provide antitrust standing under the Donnelly Act" and is dismissed), *aff'd*, 16 A.D.3d 356, 792 N.Y.S.2d 8 (1st Dep't 2005); *Rubin v. Nine West Group, Inc.*, 1999 WL 1425364 (N.Y. Sup. 1999) ("Although plaintiff makes the general statement that 'CPLR 901(b) does not create a barrier to class actions under the Donnelly Act' . . . a reading of that statute and the Act establish the contrary"); *Russo & Dubin v. Allied Maint. Corp.*, 95 Misc. 2d 344, 407 N.Y.S.2d 617 (Sup. Ct., N.Y. Co. 1978) ("even if plaintiff's contention that they are bringing this action for single damages were accepted and such an action was permitted, this action could nevertheless not proceed as a class action. Plaintiffs cannot be considered adequate class representatives since by demanding members of the class to waive their right to treble damages, they cannot be said to fairly and adequately protect the interest of the class"); *Blumenthal v. ASTA*, N.Y.L.J., July 8, 1977, p. 5, col. 1 (N.Y. Sup.) (certification denied).

22. In *Ganci v. Cape Canaveral Tour and Travel, Inc.*, 4 Misc. 3d 1003(A) (Sup. Ct., Kings Co. 2004) and *Giovanniello v. Hispanic Media Group USA, Inc.*, 4 Misc. 3d 440, 780 N.Y.S.2d 720 (Sup. Ct., Nassau Co. 2004) classes of consumers who received unsolicited telephone calls or commercial faxes claimed violations of the federal Telephone Consumer Protection Act (TCPA). In denying class certification the courts relied upon CPLR 901(b). "The TCPA statute does not specifically provide for a class action to collect the $500 damages and said $500 damages is a ' penalty' . . . or a 'minimum measure of recovery' . . . the allowance

of treble damages under the TCPA is punitive in nature and constitutes a penalty." *See Rudgayzer v. LBS Commc'ns, Inc.*, 6 Misc. 3d 20, 789 N.Y.S.2d 601 (N.Y. App. Term. 2004) (class action under TCPA prohibited by CPLR 901(b)).

23. In *Fleming v. Barnswell Nursing Home*, 309 A.D.2d 1132, 766 N.Y.S.2d 241 (3d Dep't 2003), the survivor of a deceased nursing home resident commenced a mass tort class action against the nursing home and physician alleging medical malpractice, negligence and a violation of PHL § 2801-d. Class certification was denied for the negligence claims but granted for the PHL § 2801-d claims.

> An action by residents of a residential health care facility for violating their rights or benefits created by statute . . . may be brought as a class action if the prerequisites to class certification set forth in CPLR article 9 are satisfied . . . violation of DOH rules affecting residents predominate . . . [claims of] inadequate heat and inedible food are typical.

24. *Feder v. Staten Island Hosp.*, 304 A.D.2d 470, 758 N.Y.S.2d 314 (1st Dep't 2003) (patients claim overcharges for copies of medical records as violative of PHL § 18(2)(e); certification denied).

25. *Miller v. 14th St. Assocs.*, N.Y.L.J., May 29, 1985, p. 12, col. 1 (N.Y. Sup.), *aff'd*, 115 A.D.2d 1022, 495 N.Y.S.2d 879 (1st Dep't 1985), *motion for leave to appeal dismissed*, 67 N.Y.2d 603, 500 N.Y.S.2d 1025 (1986) (plaintiff class of two million tenants sue defendant class of New York City landlords seeking higher interest rates on security deposits; motion for summary judgment and dismissal of class allegations denied).

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

27. *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 739 N.Y.S.2d 565 (1st Dep't 2002) (certification granted to privacy class action challenging the sale of confidential and/or prescription information without prior notice); *Smith v. Chase Manhattan Bank USA*, 293 A.D.2d 598, 741 N.Y.S.2d 100 (1st Dep't 2002) (bank customers challenge sale of their names, phone numbers and credit histories to telemarketing firm in return for which Chase would receive "a commission [of up to 24% of the sale] in the event that a product or service offered were purchased"; complaint dismissed).

28. *Gurnee v. Aetna Life & Cas. Co.*, 104 Misc. 2d 840, 428 N.Y.S.2d 992 (Sup. Ct., Erie Co.) (case dismissed), *aff'd*, 79 A.D.2d 860, 437 N.Y.S.2d 944 (4th Dep't 1980), *rev'd*, 55 N.Y.2d 184, 448 N.Y.S.2d 145, *cert. denied*, 103 S. Ct. 83 (1982); *Gurnee v. Aetna Life & Cas. Co.*, N.Y.L.J., Nov. 28, 1983, p. 12, col. 4, *aff'd*, 101 A.D.2d 722, 477 N.Y.S.2d 956 (1st Dep't 1984) (class certification granted; bilateral class action of insureds against automobile liability insurance companies over the coverage of no fault insurance).

29. In *Dougherty v. North Fork Bank*, 301 A.D.2d 491, 753 N.Y.S.2d 130 (2d Dep't 2003) a class challenged a mortgagor's imposition of "a $5 'Facsimile Fee,' a $25 'Quote Fee' and a $100 'Satisfaction Fee' for the preparation of [a mortgage] satisfaction"; summary judgment for plaintiffs on the facsimile fee and quote fee as a violation of Real Property Law § 274-a(2)(a) and summary judgment to defendant on the satisfaction fee).

30. In *Trang v. HSBC Mortgage Corp.*, N.Y.L.J., Apr. 17, 2002, p. 28, col. 3 (N.Y. Sup.) and *Negrin v. Norwest Mortgage, Inc.*, 293 A.D.2d 726, 741 N.Y.S.2d 287 (2d Dep't 2002) classes of mortgagors claimed that recording and fax fees violated GBL § 349 and Real Property Law § 274-a. The court in *Trang* denied defendant's motion for summary judgment and set a hearing date for plaintiff's class certification motion. The court in *Negrin* reversed on class certification because the lower court failed to determine if the plaintiff had standing to represent the class and "to analyze whether the action meets the statutory prerequisites for class action certification."

31. *See* Sternlight & Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse?*, 67 Law & Contemp. Probs., Winter/Spring 2004 Nos. 1 & 2, pp. 77–78:

> Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she received regarding her credit card, cellular phone, land phone, insurance policies, mortgage and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class action liability, either in court or in arbitration . . . numerous courts have held that the inclusion of a class action prohibition in an arbitration clause may render that clause unconscionable [reviewing cases].

32. See, e.g., the following cases:

Third Circuit: *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 S. Ct. 1145 (2001) (TILA).

Fourth Circuit: *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (no unconscionability).

Fifth Circuit: *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (no unconscionability).

Sixth Circuit: *Burden v. Check into Cash of Kentucky*, 267 F.3d 483 (6th Cir. 2001).

Seventh Circuit: *Caudle v. Am. Arbitration Ass'n*, 2000 WL 1528950 (7th Cir. 2000).

Eighth Circuit: *In re Piper Funds, Inc.*, 71 F.3d 298 (8th Cir. 1995).

Ninth Circuit: *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) (unconscionable).

Eleventh Circuit: *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331 (11th Cir. 2000).

See Hickok, Arbitration Clauses and Class-Wide Adjudication, 26 C.A.R. 307 (2005) (Estreicher & Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, N.Y.L.J., June 10, 2005, p. 3 ("Similarly, most federal courts agree that the inclusion of a class action prohibition in an arbitration clause does not render that clause or the arbitration agreement unenforceable")).

33. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (class-wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (arbitration clause which is silent on fees and costs is insufficient to render agreement unreasonable); *Shearson Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

34. *Bazzle*, 539 U.S. 444 (class-wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (arbitrator should decide whether treble damages are prohibited by agreement's limitation on recovery of punitive damages). *See Pedcor Mgmt. Co. v. Nations Personnel of Texas*, 2003 WL 21927036 (5th Cir. 2003) ("we hold today that [following *Bazzle*] . . . arbitrators should decide whether class arbitration is available or forbidden").

35. *See, e.g.*, *Tsadilas v. Providian Bank*, 2004 WL 2903518 (1st Dep't 2004) (arbitration provision in a credit card agreement enforced "even though it waives plaintiff's right to bring a class action," claim of exposure to "potentially high arbitration fees [as] premature"; credit card agreement as a whole was not unconscionable" because plaintiff had the opportunity to opt out without any adverse consequences"); *Brown & Williamson v. Chesley*, 7 A.D.3d 368, 372, 777 N.Y.S.2d 82 (1st Dep't 2004) ("Consistent with the public policy favoring arbitration, the grounds for vacating an arbitration award are narrowly circumscribed by statute"), *rev'g* 194 Misc. 2d 540, 749 N.Y.S.2d 842 (Sup. Ct., N.Y. Co. 2002) (trial court vacated an arbitrator's award of $1.3 billion of which $625 million was to be paid to New York attorneys in the tobacco cases); *Ranieri v. Bell Atl. Mobile*, 304 A.D.2d 353, 354, 759 N.Y.S.2d 448 (1st Dep't 2003) (class action stayed pending arbitration: "Given the strong public policy favoring arbitration, and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions . . . is neither unconscionable nor violative of public policy" (citations omitted)); *In re Application of Correction Officers Benevolent Ass'n*, 276 A.D.2d 394, 715 N.Y.S.2d 387 (1st Dep't 2000) (parties agreed to class-wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998) (arbitration and choice of law clause enforced; arbitration before International Chamber of Commerce was, however, substantively unconscionable); *Hackel v. Abramowitz*, 245 A.D.2d 124, 665 N.Y.S.2d 655 (1st Dep't 1997) (although the issue as to the arbitrability of the controversy is for the court, and not the arbitrator, to decide, a party who actively participated in the arbitration is deemed to have waived the right to so contend); *Spector v. Toys "R" Us*, 2 Misc. 3d 1006(A), 784 N.Y.S.2d 924 (Sup. Ct., Nassau Co.), *aff'd*, 12 A.D.3d 358, 784 N.Y.S.2d 153 (2d Dep't 2004) (motion to add credit card issuing bank as necessary party denied; arbitration clause does not apply); *Johnson v. Chase Manhattan Bank, USA, N.A.*, 2 Misc. 3d 1003(A), 784 N.Y.S.2d 921 (Sup. Ct., N.Y. Co. 2004) (class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act); *Rosenbaum v. Gateway, Inc.*, 4 Misc. 3d 128(A), 791 N.Y.S.2d 873 (N.Y. App. Term 2004) (arbitration clause in computer "Standard Terms of Sale and Limited Warranty Agreement" enforced and small claims

court case stayed); *Flynn v. Labor Ready, Inc.*, 193 Misc. 2d 721, 751 N.Y.S.2d 722 (Sup. Ct., Kings Co. 2002) (class of employees challenge propriety of "receiving their wages by . . . cash voucher" which could only be cashed by using the employer's cash dispensing machine and paying as much as $1.99 per transaction; action stayed and enforced arbitration clause after employer agreed to pay some of the costs of arbitration); *Berger v. E Trade Group, Inc.*, 2000 WL 360092 (N.Y. Sup. 2000) (misrepresentations by online broker "in its advertising and marketing materials, knowingly exaggerated the sophistication of its technology and its capacity to handle its customers' transactions"; arbitration agreement enforced); *Hayes v. County Bank*, 185 Misc. 2d 414, 713 N.Y.S.2d 267 (Sup. Ct., N.Y. Co. 2000) (unconscionable "payday" loans; motion to dismiss and enforce arbitration clause denied pending discovery on unconscionability); *Carnegie v. H & R Block, Inc.*, 180 Misc. 2d 67, 687 N.Y.S.2d 528 (Sup. Ct., N.Y. Co. 1999) (after trial court certified class, defendant tried to reduce class size by having some class members sign forms containing retroactive arbitration clauses waiving participation in class actions), *modified*, 269 A.D.2d 145, 703 N.Y.S.2d 27 (1st Dep't 2000) (class certification denied).

36. *See* Hickok, *Arbitration Clauses and Class-Wide Adjudication*, 26 C.A.R. 307 (2005).

37. See, e.g., the following cases:

Supreme Court: *Bazzle*, 539 U.S. 444 (class-wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available).

Second Circuit: *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997) (class-wide arbitration barred unless provided for in agreement).

New York: *In re Application of Correction Officers Benevolent Ass'n*, 276 A.D.2d 394 (parties agreed to class-wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); *Harris v. Shearson Hayden Stone, Inc.*, 82 A.D.2d 87, 441 N.Y.S.2d 70 (1st Dep't 1981) (arbitration agreement enforced; class-wide arbitration not appropriate).

38. *Johnson v. Chase Manhattan Bank, USA, N.A.*, 2 Misc. 3d 1003(A), 784 N.Y.S.2d 921 (Sup. Ct., N.Y. Co. 2004) (class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act).

39. See, e.g., the following cases:

Second Circuit: *Farr v. Gonzo Corp.*, 212 F. Supp. 2d 199 (S.D.N.Y. 2001).

New York: *Kenevan v. Empire Blue Cross & Blue Shield*, 248 A.D.2d 42, 677 N.Y.S.2d 560 (1st Dep't 1998) (class action removed to federal court, certified and remanded to state court after dismissal of ERISA claims; summary judgment granted and $3 million awarded to class).

40. *See, e.g.*, *Tremblay v. Phillip Morris, Inc.*, 231 F. Supp. 2d 41 (D.N.H. 2002) (smokers class action not removable under federal official removal statute).

41. *See, e.g.*, *Garbie v. Chrylser Corp.*, 8 F. Supp. 2d 814 (N.D. Ill. 1998) (citizenship of real parties in interest must be considered on remand motion).

42. *See, e.g.*, *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 392 U.S. 332 (1969).

43. *See, e.g.*, *Werwinski v. Ford Motor Co.*, 286 F.3d 611 (3d Cir. 2002) (trebled statutory compensatory damages aggregated); *contra Biggerstaff v. Voice Power Telecomm., Inc.*, 221 F. Supp. 2d 652 (D.S.C. 2002) (individual damages under TCPA may not be aggregated).

44. *See, e.g.*, *Hutchins v. Progressive Paloverde Ins. Co.*, 211 F. Supp. 2d 788 (S.D. Va. 2002) (punitive damages may be aggregated); *contra Gilman v. BHC Sec., Inc.*, 104 F.3d 1418 (2d Cir. 1997) (punitive damages may not be aggregated).

45. *See, e.g.*, *Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864 (5th Cir. 2002) (attorneys fees may be aggregated); *contra Ratliff v. Sears Roebuck & Co.*, 911 F. Supp. 177 (E.D.N.C. 1995) (attorneys fees may not be aggregated).

46. *See, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Me. 2001); *contra Leonard v. Enterprise Rent A Car*, 279 F.3d 967 (11th Cir. 2002).

47. *See, e.g.*, *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979); *contra Colon v. Rent-A-Center, Inc.*, 13 F. Supp. 2d 553 (S.D.N.Y. 1998) (compliance costs may not be aggregated).

48. *See, e.g.*, *Olden v. LaFarge Corp.*, 203 F.R.D. 254 (E.D. Mich. 2001); *contra In re Life USA Holding, Inc. Ins. Litig.*, 242 F.3d 136 (3d Cir. 2001).

49. *See* Weinstein, Korn & Miller, New York Civil Practice, § 901.10[3].

50. *See* Vairo, Class Action Fairness Act of 2005, LexisNexis 2005 at p. CAFA-4–5.

> Defendants have long complained about the economic pressure that class actions place on them. Consumer class actions, in which individual damages may be minimal but in the aggregate huge, have been of particular concern. . . . Compounding the problem for defendants, these cases often were brought in so-called "judicial hellholes" where certain judges were known to certify classes and then award substantial damages and attorney's fees. . . . One solution is to give defendants a free pass out of the state courts, and CAFA is designed to do just that.

51. *Id.*

52. Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005).

53. *Id.* The federal court must decline jurisdiction in class actions in which (1) more than two-thirds of the members of the proposed plaintiff classes in the aggregate are citizens of the state where the action was originally filed, at least one defendant is a defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted, and who is a citizen of the state where the action was originally filed and principal injuries resulting from the alleged or related conduct were incurred in such state and (2) during the three-year period preceding filing, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or (3) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state where the action was originally filed.

54. *Id.* at § 4. The factors to be considered include whether (1) the claims involve matters of national interest, (2) the claims will be governed by the laws of the state where the action was originally filed or by the laws of other states, (3) the class action has been pleaded in a manner that seeks to avoid federal jurisdiction, (4) the action was brought in a forum with a distinct nexus with class members, the alleged harm, or the defendants, (5) the number of citizens of the state or original filing in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state and the citizenship of other proposed class members is dispersed and (6) during the three-year period proceeding filing, one or more other class actions asserting the same or similar claims on behalf of the same persons have been filed.

55. *See, e.g.*, *Peck v. AT&T Corp.*, N.Y.L.J., Aug. 1, 2002, p. 18, col. 3 (N.Y. Sup. 2002) ("the Settlement will give each current [cell phone] subscriber 60 minutes of free airtime. Past subscribers will receive a calling card worth 180 minutes of free long distance calls. . . . Indeed, about 74 percent of the Class will receive more minutes than they lost"); *Kahn v. Bell Atl. NYNEX Mobile*, N.Y.L.J., June 4, 1998, p. 29, col. 2 (N.Y. Sup.) (settlement agreement provided for "free air time" to some members of the class and $225,000 in legal fees and costs; "The problem is that very little evidence has been submitted to demonstrate that the free airtime and other purported benefits of the Settlement Agreement adequately compensate all of the Class Members which by its terms only benefits a segment of the Class"); *Klein v. Robert's Am. Gourmet Foods*, No. 006956/02 (Nassau Sup. Jan. 14. 2003) (as reported in 24 Class Action Reports 61 (2003)) (snack foods Pirate's Booty, Fruity Booty and Veggie Booty misrepresented as to fat and caloric content; settlement included promise to keep issuing food product coupons until $3.5 million worth were redeemed with coupon tracking reports every six months); *Branch v. Crabtree*, No. 15822/89, West. Sup. Oct. 31, 1995 ($1,000 towards purchase of car; transferable and can be bartered); *Feldman v. Quick Quality Rest., Inc.*, N.Y.L.J., July 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (16 million purchasers of fast-food products overcharged one cent; coupons worth 50 cents each toward purchase of Burger King products; coupons issued until specific sum redeemed reached).

56. Dickerson & Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?*, 12 Advancing the Consumer Interest, No. 2 (Fall/Winter 2000).

57. *See* Weinstein, Korn & Miller, New York Civil Practice, § 908.06, n. 4:

> If the District Court to which the class action is removed approves of a coupon settlement the "portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed" or if the coupons are not used to determine the fee award the "any attorney's fee" award shall be based upon the amount of time class counsel reasonably expended working on the action.

58. *Id.*

59. *See, e.g.*, *Branch v. Crabtree*, Index No. 15822/89, West. Sup. Oct. 31, 1995 (certificates transferable and can be sold for cash to others).

60. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y. 2001) (settlement plan included "development and operation of a secondary market in the certificates").

61. *See, e.g.*, *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000) (settlement provides for issuance of "Toshiba Bucks" coupons for purchase of defendant's products which are assignable, aggregatable and transferable and available on electronic media; one-year redemption period).

62. *See, e.g.*, *Klein v. Robert's Am. Gourmet Foods*, No. 006956/02 (Nassau Sup. Jan. 14. 2003) (as reported in 24 Class Action Reports 61 (2003)) (snack foods Pirate's Booty, Fruity Booty and Veggie Booty misrepresented as to fat and caloric content; settlement included promise to keep issuing food product coupons until $3.5 million worth were redeemed with coupon tracking reports every six months); *Feldman v. Quick Quality Rest., Inc.*, N.Y.L.J., July 22, 1983, p. 12, col. 4 (N.Y. Sup.) (16 million purchasers of fast-food products overcharged one cent; settlement provided for 50-cent coupons which defendants would continue to issue until a specified sum of money was redeemed).

63. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y. 2001) (certificates redeemable within five years and may be converted into cash within four years); *In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001) ("coupons entitling [class members] to $6 off the price of one future wire transfer for every transfer made since November 1993 . . . can be used throughout a 35-month period").

64. *See, e.g.*, *Feldman*, N.Y.L.J., July 22, 1983 (16 million purchasers of fast food products overcharged one cent; settlement provided for 50-cent coupons which defendants issued to next best class of customers who purchased products).

65. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 WL 22862013 (D. Me. 2003), *modifying* 216 F.R.D. 197 (D. Me. 2003) ("vouchers to music club members giving them the opportunity to purchase a regular price CD at 75% off the regular music club price. . . . I have determined to delay award of attorneys fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is").

66. *In re Auction Houses Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y.2001) ($512 million settlement in either cash or discount certificates. "Plaintiffs' lead counsel would receive their fee of approximately $26.75 million in the same ratio of cash and certificates as the class members – approximately $21.53 million in cash and $5.22 million worth of discount certificates").

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

Remembering *Brown*

The NYSBA's Tribute to "Ordinary" Heroes

By Monica Finch

During the Depression, the Works Progress Administration funded an oral history project that paid unemployed writers to record interviews with former slaves, Native Americans, and immigrant blue-collar workers of every ethnicity. This unparalleled project demonstrated that even "ordinary" people's personal experiences are part of the great mosaic of events called history.

The Oral Tradition

In keeping with the oral history tradition, an event was held on May 25, in New York City, titled *Remembering* Brown v. Board of Education *and Related Litigation: A Tribute to the New York Attorneys Who Made Legal History* and hosted by outgoing NYSBA President Kenneth G. Standard and the Association. The honored guests were some of the prominent attorneys, judges, and civil rights leaders who early in their careers played integral roles in the years leading up to the landmark *Brown* decision. Theirs were stories of "ordinary" people practicing their professions, following their consciences, and accomplishing extraordinary things.

Remarks

In his introduction, President Standard said, "In [*Brown*], we saw the culmination of one step of a long journey. And that culmination came about because of the courage, commitment, dedication, inspiration and intelligence of many people of different races coming together in the name of justice."

Special guest American Bar Association President Robert J. Grey Jr. said, "In [*Brown*], we as a people decided what America will be like. . . . We did this as a unified population of whites, Jews, Asians, Hispanics, and African Americans. . . . We, as a people, want America to reflect the great ideals that were set out in the Declaration of Independence and Constitution."

An Evening Among "Ordinary" Heroes

• Hon. George Bundy Smith, Associate Judge of the New York State Court of Appeals, served as moderator for the speakers' panel. Reared in the South, Judge Smith was just one of the guests who personally experienced segregation's outrages. Judge Smith was a student at Yale Law School in 1961, when he met Thurgood Marshall. It was a turning point in his life. In short order, Judge Smith was on his way to Montgomery, Alabama, where he had the privilege of eating dinner with Martin Luther King Jr. during strategy discussions.

Judge Smith recalled, "It was four years before the [NAACP's] Legal Defense Fund, under Jack Greenberg and Louis Pollak, won *Abernathy v.*

Alabama before the Supreme Court, that I was able to become a free man."

• As did several of his colleagues, Conrad K. Harper began his career as an attorney for the NAACP Legal Defense and Educational Fund. For many years, he was a partner at Simpson Thacher & Bartlett in New York. In 1993, Mr. Harper was appointed legal advisor and senior legal officer for the U.S. Department of State. He also was the first African-American president of The Association of the Bar of the City of New York.

Mr. Harper devoted his time on the dais to pay tribute to Charles Hamilton Houston – the "chief architect in the legal strategy to overthrow segregation" and Thurgood Marshall's legal mentor.

• Judge Jawn A. Sandifer argued *Henderson v. United States* in 1950 before the U.S. Supreme Court – another thin edge of the legal wedge that made way for *Brown*. He explained the nuances of the "sophisticated" Northern brand of segregation, which he encountered while litigating cases involving racial discrimination and de facto segregation in Long Island and New York City public schools.

Reflecting on those years, Judge Sandifer said, "We had to deal with a different type of segregation in the Northern states. In the South, it was much clearer than de facto segregation. The statutes were clear – you were separate."

• Attorney and educator Jack Greenberg was assistant counsel for the NAACP Legal Defense and Educational Fund, successor to Thurgood Marshall as director-counsel from 1961 to 1984. He and Marshall argued *Brown* before the Supreme Court.

Greenberg spoke of *Delaware*,[1] one of the key five cases leading to *Brown*, which addressed the lack of secondary schools for blacks south of Wilmington. The case was bolstered by the pioneering work of psychologist Kenneth Clark, whose research documented segregation's pernicious impact on black children. The strength of the psychological evidence, cited by judges in the *Delaware* and *Kansas*[2] decisions, played a vital role in crafting the *Brown* argument because it demonstrated that not only were black children not being adequately educated, they were also being psychologically harmed.

In closing, Greenberg said *Brown* had a greater impact than, ostensibly, ending segregation alone: "[The *Brown* decision] broke up the whole rotten racist political system that governed this country."

• Judge Constance Baker Motley, while still a student at Columbia University School of Law, joined the NAACP and worked on all the major school segregation cases fought by its Legal Defense Fund. In the early 1960s, Judge Motley won nine of the 10 civil rights cases she argued before the Supreme Court, including James Meredith's successful bid to attend the University of Mississippi – one of the South's oldest and most racially entrenched institutions.

Her other firsts include: the first African-American woman to serve in the New York State Senate and to be appointed to the federal bench. She also was the first woman and the first African-American woman to serve as Chief Judge for the Southern District of New York.

Judge Motley reminded us that *Brown* was not the end of segregation, rather, "It took many years and many more cases to force *Brown* into previously segregated schools."

The More Things Change . . .

• Post *Brown*, Julius L. Chambers litigated a series of landmark cases determining how far public schools must go to achieve integration by busing students, consolidating school districts, and other means of relief. He still maintains that "it is vital that black and white children attend school and learn together; it is essential for the country."

However, blacks and other minorities are now beginning to question if integration is really beneficial to them, he said. Schools nationwide are beginning to re-segregate. "There is a retreat from desegregation," Mr. Chambers said. "Minority students are disadvantaged by school districts' [inequitable] allocation of resources."

Citing the current Bush administration as abetting a backslide into segregation, Mr. Chambers said, "The moral lesson of 2005 is that we've just begun the fight and there is much for all of us to do."

• Early in his career, Hon. Nathaniel R. Jones served as assistant general counsel on President Johnson's National Advisory Commission on Civil Disorders (*aka* the Kerner Commission), which investigated the urban race riots in the mid-1960s. As the NAACP's general counsel, he argued several cases before the Supreme Court involving Northern school segregation.

Harkening back to Judge Sandifer's battles against Northern segregation, Judge Jones encountered similar inferior conditions for black students in Detroit's public schools in the late 1960s. The "fiction," he said, was the argument that *Brown* only applied to schools in Southern states with their *de jure* segregation system. It was argued that Northern de facto segregation was "benign" and not by malicious design – simply the result of "happenstance" such as housing patterns. "There was no state action for which the Fourteenth Amendment could be used for remedy," opponents insisted.

When the Detroit School Board offered to voluntarily desegregate the schools, the state of Michigan passed Act 48, which forbade the school board from doing so. In subsequent litigation, a judge said that the "people of Michigan are too good to engage in that [discrimination]."

Furthermore, he said, Jones et al. could not prove the state and school board practiced segregation.

The battle went all the way to the Supreme Court, which held for the state of Michigan and the Detroit school system.[3]

Justice Thurgood Marshall wrote the dissenting opinion. As he later commented: "The majority and many Americans may feel that it is wise and to the good to leave our schools in our cities divided black and white; and to refuse to apply the mandate of *Brown* and subsequent holdings."

"Had the Supreme Court been consistent," said Judge Jones, "it could have changed the landscape of America." Indeed, Justice Marshall predicted the strategies of the current "education reform" movement, said Judge Jones, with its charter schools and vouchers siphoning off funds from schools and "warehousing" minority students in inner-city schools. In conclusion, he said, "We are facing a time when we need some good thinking, some good lawyering along the lines of the buildup to the *Brown* decision."

• Jeff L. Greenup was reared in Louisiana. He was in private practice throughout his career, but was involved in civil rights cases (mostly pro bono) in New York and in the South. During the heady days of the 1960s, he served as president of the NAACP's Manhattan branch.

Mr. Greenup recounted the story of a case he took for the NAACP. It involved an adolescent black girl in Westchester County, who was being prosecuted for assault after a white male schoolmate called her the "N" word, and she reacted by slapping him. When her family saw they were the only black people in the courtroom, they asked the NAACP for help. Mr. Greenup took the case, the charges were dismissed and the girl was acquitted. A good outcome.

Despite the result, the fact of the assault charge revealed a disturbing aspect, demonstrating yet again the unique challenges posed by discrimination in the North. The Northern brand, though more subtle than an ax handle, was perhaps even harder to litigate than the blatant, in-your-face Southern style. Ugly as the latter was, people knew what they were up against.

More Stories to Tell

There are many more stories to tell, and the May 25 program made a good start. As Judge Sandifer, possibly one of the seniormost *Brown* veterans, later told Cyril Barker of the *Amsterdam News*: "I thought they had forgotten. There are not many of us left from the Civil Rights Movement. I'm thrilled." ■

1. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).
2. *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951).
3. *Milliken v. Bradley*, 418 U.S. 717 (1974).

MEMBERSHIP TOTALS

New Regular Members 1/1/05 - 9/5/05	**6,925**
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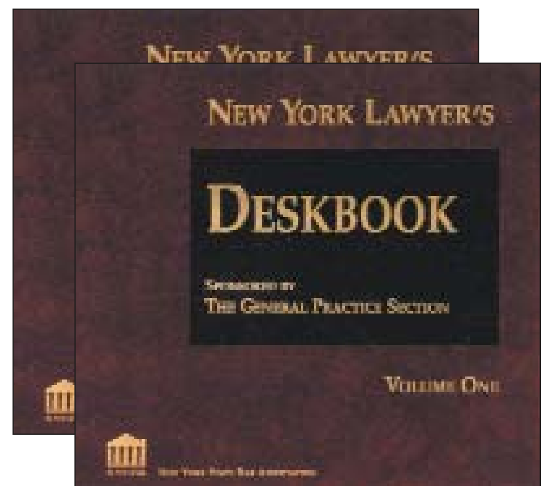

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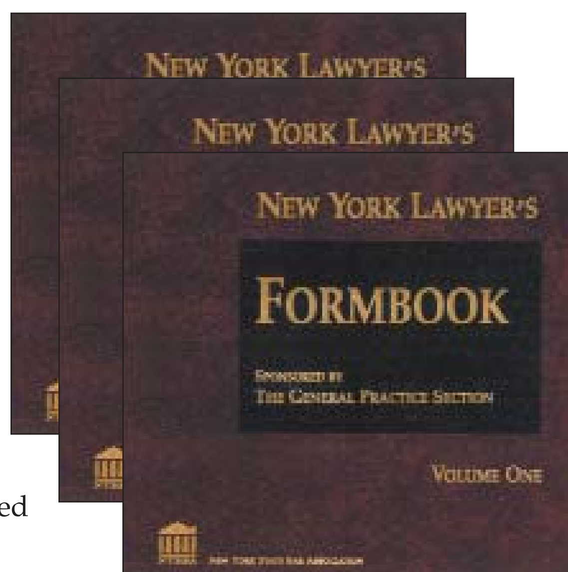

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NEW YORK STATE BAR ASSOCIATION

To the Forum:

Recently, an important client asked if my firm would substitute as counsel in a dispute in which prior counsel had filed a demand for arbitration pursuant to an agreement. It turned out that my firm had previously performed legal work on behalf of the named arbitrator. While I was debating whether it would be proper to accept the representation under these circumstances, and before any hearings had been held, the arbitrator, *sua sponte*, issued a decision that the matter in dispute was not within the scope of the arbitration agreement. Can I now properly go to court and argue that the arbitrator was wrong as a matter of law, seek to overturn his ruling under Article 75 of the CPLR, and ask that the arbitration be directed to proceed?

Sincerely,
I'd Rather Be Right

Dear Rather Be Right:

You are properly concerned, because you are facing a situation in which a former client of your firm, now acting as arbitrator, has the power to make a decision affecting the rights of a current client. You inform us that before you were asked to substitute as counsel, the arbitrator rendered a decision that the controversy was beyond the scope of the arbitration agreement. At least initially, the representation you have been asked to undertake is limited solely to a proceeding on appeal, in which you will argue, on the law, that the matter is arbitrable. Standing alone, that would not violate any ethical proscription. If you succeed, however, you may be asked to appear as an advocate before your former client. Accordingly, your question covers three sets of duties: duties to your former client, duties to your current client, and duties to the potential adversary.

Let's start with your current client. During your initial discussion of the arbitration matter, the prior relationship with the arbitrator should have been mentioned immediately. Among the questions that might naturally arise are as follows: Was the prior legal work for the arbitrator by someone else in the firm, or by you personally? How long ago? One question that your current client might not ask, but which you must still consider, is whether there is any possibility that confidences of the former client could be disclosed to the current client in the course of the present representation, because such confidences must be protected. Thus, the answer to this question may depend upon the nature and sensitivity of the prior representation: Was it an automobile accident or a matrimonial dispute? In any event, the current client should be disabused of any impression that a prior acquaintance with the arbitrator might give him some kind of advantage should the case be redirected to arbitration.

Now let's discuss your obligations to your former client, the arbitrator, and to your adversary. There is an obligation to make full disclosure to the other side, and to remind the arbitrator (lest he has forgotten), about the prior relationship. Further, and as indicated above, you must still guard the confidences of the former client throughout. There is also a very practical reason to make full disclosure: if you proceed with the arbitration without doing so, a favorable outcome could be challenged under CPLR 7511(b)(1)(ii) for alleged partiality by the arbitrator.

A judge in a similar situation, while he may not be subject to disqualification based on relationship or pecuniary interest (*cf.* Judiciary Law § 14), would still have to consider recusal pursuant to Canon 3(E) and Canon 2 of the Code of Judicial Conduct, the latter of which commands the avoidance of even the appearance of impropriety – whether or not the judge is challenged to do so by a litigant. Indeed, even if your adversary, after disclosure, agrees to proceed, the arbitrator may still choose to recuse himself. This is because there is a duty of full disclosure by the arbitrator himself as to the prior representation, no matter how long ago, and no matter how trivial it might have been.

Every possible precaution must be taken to avoid even the appearance of impropriety (*cf.* DR 9-101) if anything might give rise to a perceived unfair advantage. As should be evident, the governing rule here is complete honesty. The only thing to be held back is any revelation of client confidences, whether they are those of a current or former client.

True professionalism means not only steering clear of the ethical "don'ts," but also governing yourself by the "ought-tos."

The Forum, by
Edward J. Greenfield,
(J.S.C., ret'd),
New York, NY

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.**

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LETTERS TO THE FORUM:

We received the following reader response to the question and answer featured in last issue's Forum, "Wondering on the West Side."

To the Forum:

Having read "Wondering on the West Side," I would not do such a deal myself. The point here is that practicing lawyers do not operate in a vacuum. Your client's friends and your client may have a different perception five minutes or several years after the transaction. It's at that time that she consults a lawyer and he calls you a thief and takes a retainer. In over 20 years of practice and thousands of cases and transactions I have managed to stay out of that type of mess by not engaging in suspect transactions. You will make less money and will pass up on "good deals" but you will keep your law license. We can quote rules and principles to come to that result, but if we lose sight of the human dynamics and make this a sterile discussion of legal ethics I do not see how we advance the cause of professionalism. Our Bar President is right, we must focus on professionalism issues; in other words, how we treat and address one another in the context of representing our clients in court and in transactions. I hope we have the opportunity to resolve some of the issues which I see as important in how we act toward one another, and how this impacts the legal profession as a whole.

Sincerely,
Anthony K. Modafferi, III
A.K. Modafferi & Assoc.
Jersey City, NJ

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently was retained by an insurance carrier to defend both a corporation and one of its former officers in a civil securities fraud case. Both prospective clients are covered by the same insurance policy, and share a common interest in defending the claims made against them, for which both are exposed to potential liability. There is one wrinkle here, however, which gives me pause: My two potential clients are embroiled in a separate, unrelated litigation in which the individual client claims that compensation is owed by her former employer, the corporate client. This employment dispute has been pending for some time now, and has nothing to do with the merits of the fraud case for which I have been retained. My clients have both assured me that the issues in the two cases are entirely distinct, and that they are willing to execute a written waiver of any potential conflict. Nonetheless, I still feel a little uncomfortable representing two clients who are at each other's throats, albeit in a different, unrelated forum. Is there a real conflict, or is it all in my mind?

Sincerely,
A Cautious Counselor

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NEW YORK STATE BAR ASSOCIATION

The Legal Writer
Continued From Page 64

then decide whether they can represent the client effectively. Lawyers have an ethical responsibility to be prepared and competent to represent a client.[17] A lawyer incompetent to represent a client may decline employment, associate with a lawyer competent to represent the client, refer the matter to a competent lawyer, or tell the client that the lawyer needs to spend time studying a legal issue or practice area. This rule has teeth. For not verifying another's writing and research, local counsel,[18] co-counsel,[19] and supervising attorneys[20] risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.[21] Lawyers also owe a duty to the court to be candid about the law and the facts of a case.[22] The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Research

Lawyers must avoid the pitfalls of under-preparation. Poor research wastes the court's time and the taxpayer's money. It also wastes the client's time and resources.[23] Lawyers must know the facts of the case and the applicable law. Knowing fact and law adverse to their clients' interests helps lawyers advise their clients and argue their cases. Lawyers must know adverse facts and law for ethical reasons, too. A lawyer must cite controlling authority directly adverse to the client's position if the lawyer's adversary has failed to cite that controlling authority.[24] Lawyers who move ex parte or seek an order or judgment on a default must further inform the court fully about contrary fact and law to insure that the court commits no injustice.[25]

Failing to find controlling cases reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims.[26] Courts are unsympathetic to lawyers who bring claims that, in light of controlling authority, should not be brought. The case law on this point is legion.[27]

Lawyers must cite cases that continue to be good law. They may not conceal from the court that a case they cite has been reversed or overruled, even if it was on other grounds. Citing reversed cases or overruled principles is a sure way to lose the court's respect. In one example, a federal district court in Illinois chastised the lawyers for failing to make sure that the cases they cited still controlled.[28] In response to the lawyers' statement that the court's public disapproval would damage their reputation, the court stated that the reprimand's effect on their reputations "is perhaps unfortunate, but not, I think, undeserved."[29]

> To make a point, and possibly to humiliate, one court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendant's brief."

Argument

Ethical writing is more persuasive than deceptive writing.[30] Disclosing adverse authority, even when the lawyers' opponents haven't raised it, can diffuse its effects and increase confidence in the lawyers' other arguments. Lawyers who don't address adverse authority risk the court's attaching more significance to that authority than it might otherwise deserve. The more unhappy a lawyer is after finding adverse authority, the wiser it is to address it.[31]

It's not enough to find controlling authority. To argue competently, a lawyer must also know what the case or statute stands for. One defense lawyer who misinterpreted an important case in her brief faced possible sanctions from a New York federal district court.[32] The court scheduled a hearing to determine whether the lawyer's misstatement occurred intentionally or due to her "extremely sloppy . . . reading" of the case.[33] To make a point, and possibly to humiliate, the court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendants' brief."[34]

Lawyers must cite cases honestly.[35] They must cite what they use and use what they cite.[36] They mustn't pass off a dissent for a holding.[37] The cases must also conform to what the lawyers argue they stand for. Thus, a federal district court in New York ordered a plaintiff's lawyer to show cause why it shouldn't sanction him for, among other briefing mistakes, citing four cases that didn't support his argument.[38] The lawyer's mistake was to cite four cases not resolved on the merits.[39]

A lawyer may argue a position unsupported by the law to advocate that the law be extended, limited, reversed, or changed. It chills advocacy to sanction for what, in hindsight, is frivolous litigation. But as one New York court explained, frivolous litigation is "precisely the type of advocacy that should be chilled."[40]

Lawyers must also argue clearly. Unclear arguments increase the possibility that courts might err. One Missouri appellate court explained that briefs that don't competently explain a lawyer's arguments force the court either to decide the case and establish precedent with inadequate briefs or to fill in through research the gaps left by deficient lawyering.[41] Rejecting the idea that it should do the lawyers' research for them, the court dismissed the appeal.[42]

To embody the profession's ethical ideals, lawyers' writing must be accurate and honest. Citing authority is common sense; authority bolsters argument. But citing can be a must: some lawyers have incurred sanctions and reprimands for arguing positions without citing legal authority at all.[43]

Civility

Lawyers should be courteous to opposing counsel and the court.[44] Appellate lawyers may attack the lower court's reasoning but not the trial judge personally.[45] Never may a lawyer make false accusations about a judge's honesty or integrity.[46] Many courts have sanctioned lawyers for insulting their adversaries or a lower court. In one case, the Appellate Division, First Department, sanctioned a lawyer for attacking the judiciary and opposing counsel.[47] The court found that the lawyer's behavior "pose[d] an immediate threat to the public interest."[48]

Ghostwriting

The American Bar Association, while condemning "extensive" ghostwriting for pro se litigants, has found that disclosing ghostwriting is not required if the lawyer only "prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se."[49] But the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has concluded that lawyers may not prepare papers for a pro se client's use in litigation "unless the client commits . . . beforehand to disclose such assistance to both adverse counsel and the court."[50] At least two federal district judges in New York have disapproved of ghostwriting.[51]

So many judicial opinions trash lawyers for their writing that until *The Legal Writer* resumes next month with Part II of this column, it's apt for lawyers and judges to consider this:

> Reading these cases, we might experience a bit of schadenfreude — being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?[52]

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. He thanks court attorney Justin J. Campoli for assisting in researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, The Ethics of Legal Writing, an unpublished two-part manuscript for CLEs the authors gave at the New York Court of Appeals in April 2002 and June 2003. Several citations in this two-part column are taken from that manuscript. For a text on ethics and legal writing, see Drake University Law School Professor Melissa H. Weresh's *Legal Writing: Ethical and Professional Considerations*, which Lexis/Nexis will publish in late 2005.

2. *See* Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 895 (1999) (recommending that law schools teach professionalism in legal writing); Beth D. Cohen, *Instilling an Appreciation of Legal Ethics and Professional Responsibility in First Year Legal Writing Courses*, 4 Perspectives 5 (1995) (same); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. Legal Educ. 501 (1990) (same); Melissa H. Weresh, *Legal Writing Symposium, Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 27 Touro L. Rev. 427 (2005) (same).

3. ABA Standards of Approval of Law Schools 302(b) (2001).

4. The New York Code differs from the ABA's Model Rules in substance and style. The Model Rules, for example, allows lawyers to reveal a client's confidential information to prevent "death or substantial bodily harm"; New York's Code doesn't. Another difference is that the New York Code includes the Canons and the Ethical Considerations but the Model Rules don't.

5. *See, e.g.*, Code of Professional Responsibility Canon 1 (Jan. 1, 2002) ("A lawyer should assist in maintaining the integrity and competence of the legal profession."), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf (last visited June, 1 2005).

6. *See, e.g., id.* EC 2-2 ("[L]awyers should encourage and participate in educational and public relations programs . . . . ").

7. *See* 22 NYCRR 1200.1 *et seq.*

8. *E.g.*, *The Cadle Co. v. Demadeo*, 256 F. Supp. 2d 155, 156 (E.D.N.Y. 2003).

9. E.D.N.Y. L.R. 1.5(b)(5); N.D.N.Y. L.R. 83.4(j); S.D.N.Y. L.R. 1.5(b)(6); W.D.N.Y. L.R. 83.1(b)(6).

10. New York: 22 NYCRR 130-1.1(a). Federal: Fed. R. Civ. Pro. 11(c); Fed R. App P. 38.

11. *See* Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, 9 Scribes J. of Legal Writ. 77, 78-79 (providing many examples of courts sanctioning lawyers for failing to abide by court and disciplinary rules).

12. *Kernisan v. Taylor*, 171 A.D.2d 869, 870, 567 N.Y.S.2d 794, 795 (2d Dep't 1991) (mem).

13. DR 2-109(a)(1), (2) (22 NYCRR 1200.14(a)(1), (2)).

14. *See Providian Nat'l Bank v. McGowan*, 179 Misc. 2d 988, 1000, 687 N.Y.S.2d 858, 866 (Civ. Ct. Kings County 1999), *modified mem.*, 186 Misc. 2d 553, 554, 720 N.Y.S.2d 709, 709–10 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000).

15. *See id.*, 687 N.Y.S.2d at 866.

16. *In re Capoccia*, 275 A.D.2d 804, 809, 712 N.Y.S.2d 699, 703 (3d Dep't 2000) (per curiam). Advancing false claims is improper. *Kushner v. DBG Prop. Inv., Inc.*, 793 F. Supp. 1161, 1181 (S.D.N.Y. 1992); *In re Babigian*, 247 A.D.2d 817, 817–18, 669 N.Y.S.2d 686, 686–87 (1998) (per curiam).

17. DR 6-101(a)(2) (22 NYCRR 1200.30(a)(2)).

18. *Long v. Quentex Resources, Inc.*, 108 F.R.D. 416 (S.D.N.Y. 1985).

19. *Pravic v. U.S. Indust.-Clearing*, 109 F.R.D. 620 (E.D. Mich. 1986).

20. DR 1-102(a)(2) (22 NYCRR 1200.3(a)(2)).

21. DR 7-101 (22 NYCRR 1200.32).

22. For a history of lawyers' conflicting roles as advocates and court officers, see Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 Suffolk U.L. Rev. 59, 66–74 (1997).

23. *See Roeder v. Islamic Rep. of Iran*, 195 F. Supp. 2d 140, 184–85 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2836 (2004).

24. DR 7-106(b)(1) (22 NYCRR 1200.37(b)(1)).

25. *Id.*; DR 1-102(a)(5) (22 NYCRR 1200.3(a)(5)).

26. *See, e.g.*, Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527, 534 (2002) (giving examples of consequences for poor research).

27. *See, e.g.*, *Schutts v. Bentley Nev. Corp.*, 966 F. Supp. 1549, 1563 (D. Nev. 1997); *Peterson v. Foote*, 1995 WL 118173, at *8 n. 25, 1995 U.S. Dist. LEXIS 3391, at *30 n. 25 (N.D.N.Y. 1995); *Pierotti v. Torian*, 81 Cal. App. 4th 17, 20, 96 Cal. Rptr. 2d 553, 566 (2000); *McCoy v. Tepper*, 261 A.D.2d 592, 593, 690 N.Y.S.2d 678, 679 (2d Dep't 1999) (mem); *Saveca v. Reilly*, 111 A.D.2d 493, 494, 488 N.Y.S.2d 876, 877 (3d Dep't 1985); *Estate of A.B.*, 1 Tuck 247 (N.Y. Sur. Ct. 1866); Marguerite L. Butler, *Rule 11 Sanctions and a*

Lawyer's Failure to Conduct Competent Legal Research, 29 Cap. U.L. Rev. 681 (2002).

28. *See Gould v. Kemper Nat'l Ins. Co.*, 1995 WL 573426, at *1, 1995 U.S. Dist. LEXIS 14102, at *2 (N.D. Ill. 1995).

29. *Id.* at *4, 1995 U.S. Dist. LEXIS 14102, at *13.

30. Nancy Lawler Dickhute, *Playing By the Rules: Dealing Effectively With Adverse Authority in Writing a Brief*, Neb. Lawyer 34 (Sept. 2003).

31. Geoffrey Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:206 (3d. ed. 2001).

32. *See Hernandez v. N.Y.C. Law Dep't Corp. Counsel*, 1997 WL 27047, at *14, 1997 U.S. Dist. LEXIS 620, at *43 (S.D.N.Y. 1997).

33. *Id.*

34. *Id.* at *14 n.11, 1997 U.S. Dist. LEXIS 620, at *43 n.11.

35. *United States v. Jolly*, 102 F.3d 46, 50 (2d Cir. 1996); *People v. Whelan*, 165 A.D.2d 313, 324 n.3, 567 N.Y.S.2d 817, 824 n.3 (2d Dep't); *In re Cicio v. City of N.Y.*, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 468–69 (2d Dep't 1983) (per curiam); Ronald V. Sinesio, *Imposition of Sanctions Upon Attorneys or Parties for Miscitation or Misrepresentation of Authorities*, 63 A.L.R.4th 1199 (1998); H. Richard Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 Hofstra L. Rev. 729 (1978).

36. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982).

37. *Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986) (per curiam).

38. *See USA Clio Biz, Inc. v. N.Y.S. Dep't of Labor*, 1998 WL 57176, at *2, 1998 U.S. Dist. LEXIS 783, at *6–7 (E.D.N.Y. 1998).

39. *Id.*, 1998 U.S. Dist. LEXIS 783, at *7.

40. *Gordon v. Marrone*, 155 Misc. 2d 726, 732, 590 N.Y.S.2d 649, 653 (Sup. Ct. Westchester County 1992), *aff'd*, 202 A.D.2d 104, 111, 616 N.Y.S.2d 98, 102 (2d Dep't 1994), *appeal denied*, 84 N.Y.2d 813, 647 N.E.2d 453, 623 N.Y.S.2d 181 (1995).

41. *See Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. 2004).

42. *In re Knight*, 264 App. Div. 106, 34 N.Y.S.2d 810 (1st Dep't 1942) (per curiam); *In re Schwartz*, 202 App. Div. 88, 195 N.Y.S. 513 (1st Dep't 1922); *Goldreyer v. Shalita*, 152 N.Y.S. 1002 (App. Term 1st Dep't 1915) (per curiam).

43. *E.g.*, *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding lawyer who made unsupported arguments in reply brief); *Chapman v. Hootman*, 999 S.W.2d 118, 124 (Tex. App. 1999) (same).

44. Donald H. Green, *Ethics in Legal Writing*, 35 Fed. Bar News & J. 402, 405 (1988) (discussing incivility in legal profession).

45. Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 Rev. Litig. 301, 327 (2004).

46. DR 8-102(b) (22 NYCRR 1200.43(b)).

47. *See In re Truong*, 2 A.D.3d 27, 30, 768 N.Y.S.2d 450, 453 (1st Dep't 2003) (per curiam).

48. *Id.*; *cf. In re Justices of the App. Div., First Dep't v. Erdmann*, 33 N.Y.2d 559, 559–60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973) (per curiam) (finding that isolated instances of lawyer's disrespect outside court not subject to discipline).

49. Am. Bar Ass'n, Comm. on Eth. & Prof. Resp., Informal Op. 1414, *Conduct of Lawyer Who Assists Litigant Appearing Pro Se* (1978).

50. Ass'n Bar City N.Y., Comm. on Prof. & Jud. Eth., Op. 1987-2 (1987), *available at* http://www.abcny.org/Ethics/eth1987-2.htm (last visited July 6, 2005); *see also* N.Y. St. Bar Ass'n Op 613 (1990).

51. *See Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (noting that court ought not countenance pro se litigant's undisclosed legal assistance); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) (noting that undisclosed representation of pro se litigant "smacks of the gross unfairness that characterizes hit-and-run tactics").

52. Mary Whisner, *When Judges Scold Lawyers*, 96 Law Lib. J. 557, 558 (2004) (endnote omitted).

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LANGUAGE TIPS

GERTRUDE BLOCK

Question: I recently found this gem in an opinion of a state supreme court: "We interpolate that we pretermit in this instance any discussion." Please comment on the language.

Answer: The law school professor who submitted this request wrote in parentheses, "I suppose that what the opinion-writer meant was 'We aren't going to discuss . . .'" His guess is as good as any. The only thing really clear about the statement is that the drafter was not interested in being clear.

This kind of writing has always given lawyers a bad name. Sir Thomas More wrote in 1516 that in the kingdom of Utopia, "They have no lawyers, . . . for they consider them as a sort of people whose profession it is to disguise matters." And Thomas Jefferson wrote, "It's the trade of lawyers to question everything, yield nothing, and to talk by the hour." An anonymous wag said that a lawyer's version of the Lord's Prayer would be, "The Lord is my external-internal integrative mechanism. . . . He positions me in a non-decisional stance. He maximizes my adjustment."

Ronald Goldfarb blames law schools for lawyers' bad writing. On entering law school, students have already read enough legal writing to form the opinion that they should "write like a lawyer." And the ponderous law review articles, legal treatises, and legal opinions they read as law students do nothing to dispel that belief. But although lawyers receive most of the criticism for bad writing, they do not have a monopoly on it.

Opaque writing can be intentional – where the drafter wants to make a simple statement seem complex. A person is not a person, but "a human individual." Phrases substitute for single words: "Eventual outcome" could be "outcome"; "behavioral dynamics" could be "behavior"; "predicated and initiated" could be "caused." Appointees to government positions seem to favor this method. When the newly appointed coordinator of the Consumer Affairs Department in the State Department was asked by a reporter what her position would entail, she said that she would be a coordinator of "input, throughput, and output." Pressed for details she explained, "For example, when an import on leather tax is being considered, it is my duty to let the Secretary of State know that this will cause the price of shoes to increase for the consumer."

Sometimes, however, opaque writing is caused by stacking modifiers in front of nouns. I call this "adjective-buildup." Here is an example, from a jurisprudence text:

> Does the requirement that a federal district court spend time on a property claim which would, at best, be a state small claims court matter if **state-action-conferred federal jurisdiction** were not implicated, comport with the suggestion that the Supreme Court should "avoid wasting its ammunition in petty quarrels"? (Emphasis added.)

Adjective-buildup achieves brevity, but not clarity.

Sometimes, however, clarity is not desirable. One way to avoid it is by the liberal use of negatives. When a reporter asked President Ford's chief financial advisor to predict the coming month's price-index (a question he preferred not to answer), he responded: "I can't say with great confidence, but I can say what data we have does not suggest that the July rise will not be repeated in the month of August."

Obscurity may also come from negative qualifications. Here is a passage from Section E of a state insurance code, so heavily qualified that it is almost incomprehensible:

> This Section shall not apply to temporary life insurance binders nor to contracts of life or health and accident insurance which do not contain a provision for cancellation prior to the date to which premiums have been paid, nor to the contracts provided in Part XV of this Chapter.

Negatives are also useful to imply lukewarm enthusiasm, as in the comment of a former president about a government official who was under indictment: "Mr. _____ is not a dishonest man." Alexander Pope had a name for such language, "Damn with faint praise, assent with civil leer,/And without sneering, teach the rest to sneer."

> Opaque writing can be intentional – to make a simple statement seem complex.

Finally there is the "spin": writing designed to put the best face on a bad situation. Recently, General Richard B. Myers, Chairman of the Joint Chiefs of Staff, ventured a new name for the war in Iraq. After more than four years of calling it a "war on terror," he suggested that we are instead involved in a "global struggle against violent extremists." However, President Bush has rejected that spin, announcing, "Make no mistake about it, we are at war."

Wrong Word Department

A group of construction workers were sitting on a terrace wall on 52nd Street outside the CBS building. One worker pulled a cell phone from his pants pocket. Another worker warned, "Hey, you shouldn't carry that around in your pocket; it could make you impudent." ■

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

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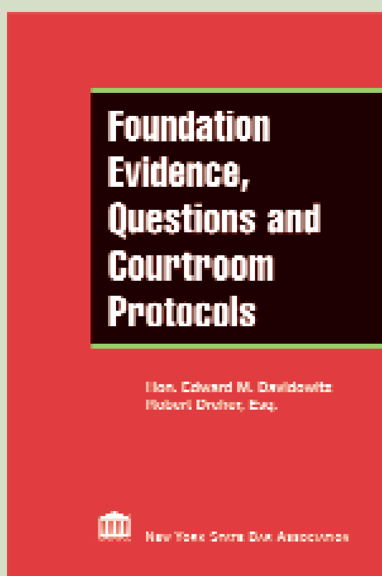

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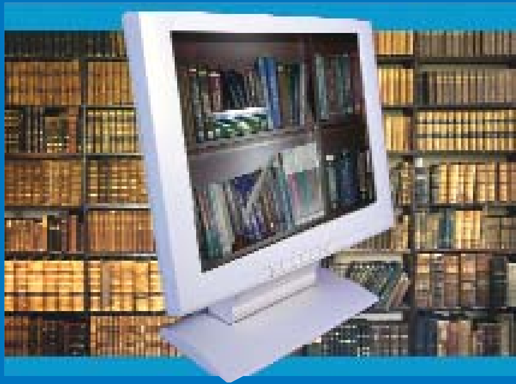

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BY GERALD LEBOVITS

Legal-Writing Ethics — Part I

Ethics permeate every part of a lawyer's professional life, including legal writing.[1] Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.[2] A lawyer's writing should embody the profession's ethical ideals. Courts and disciplinary or grievance committees can punish lawyers who write unethically. This article notes some of the ethical pitfalls in legal writing.

Rules Lawyers Must Know

Most lawyers know the American Bar Association's Model Rules. Law students in ABA-approved law schools learn them,[3] and New York State Bar applicants study them to pass the Multistate Professional Responsibility Examination (MPRE). But New York, together with California, Iowa, Maine, Nebraska, Ohio, and Oregon, has not adopted the Model Rules. New York lawyers must be familiar with the New York State Bar Association's Lawyer's Code of Professional Responsibility, first adopted in 1970 and last amended in 2002, which differs from the Model Rules.[4]

The State Bar's Code is divided into three parts: the Disciplinary Rules as adopted by the four departments of the New York State Supreme Court's Appellate Division, the Canons, and the Ethical Considerations. The Disciplinary Rules set the minimum level of conduct to which lawyers must comport, or face discipline. The Canons contain generally accepted ethical principles.[5] The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not mandatory.[6] The Disciplinary Rules, the Canons, and the Ethical Considerations, together with court rules, guide lawyers through ethical issues that affect their writing as advocates and advisors.

New York's Disciplinary Rules are promulgated as joint rules of the Appellate Division,[7] which is charged with disciplining lawyers who violate the Disciplinary Rules. A lawyer whose writing falls below the standards set in the Disciplinary Rules might face public or private reprimand, censure, or suspension or disbarment. The Disciplinary Rules are not binding on federal courts in New York State.[8] But because the federal district courts in New York have incorporated by reference the Disciplinary Rules into their local rules,[9] federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.[10] To avoid being sanctioned for deficient legal writing, lawyers must know the pertinent law and facts of their case, the court's rules about the form of papers, and the Disciplinary Rules.[11] Court-ordered sanctions differ from disciplinary action. They can range from costs and fines on lawyers or their clients, or both, to publicly rebuking lawyers. Courts sanction lawyers to discourage wasting judicial resources on litigation that lacks merit and to punish lawyers who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.[12]

> The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Lawyer's Role as Advocate

The first question lawyers must ask themselves is whether they should handle a particular case or client. New York lawyers have a gatekeeping role to prevent frivolous litigation. Lawyers must decline employment when it is "obvious" that the client seeks to bring an action or argue a position to harass or injure or when the client seeks to argue a position without legal support.[13]

When is it "obvious" that a claim lacks merit? One factor is whether the lawyer claims to specialize in a practice area and therefore should have known that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.[14] The court stated that sanctions were appropriate because the lawyers knew that their arguments were frivolous but still wasted the court's time and their client's and the plaintiff's time and money.[15] The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.[16]

Lawyers whose potential client litigates for a legitimate purpose must

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