NEW YORK STATE BAR ASSOCIATION

Journal

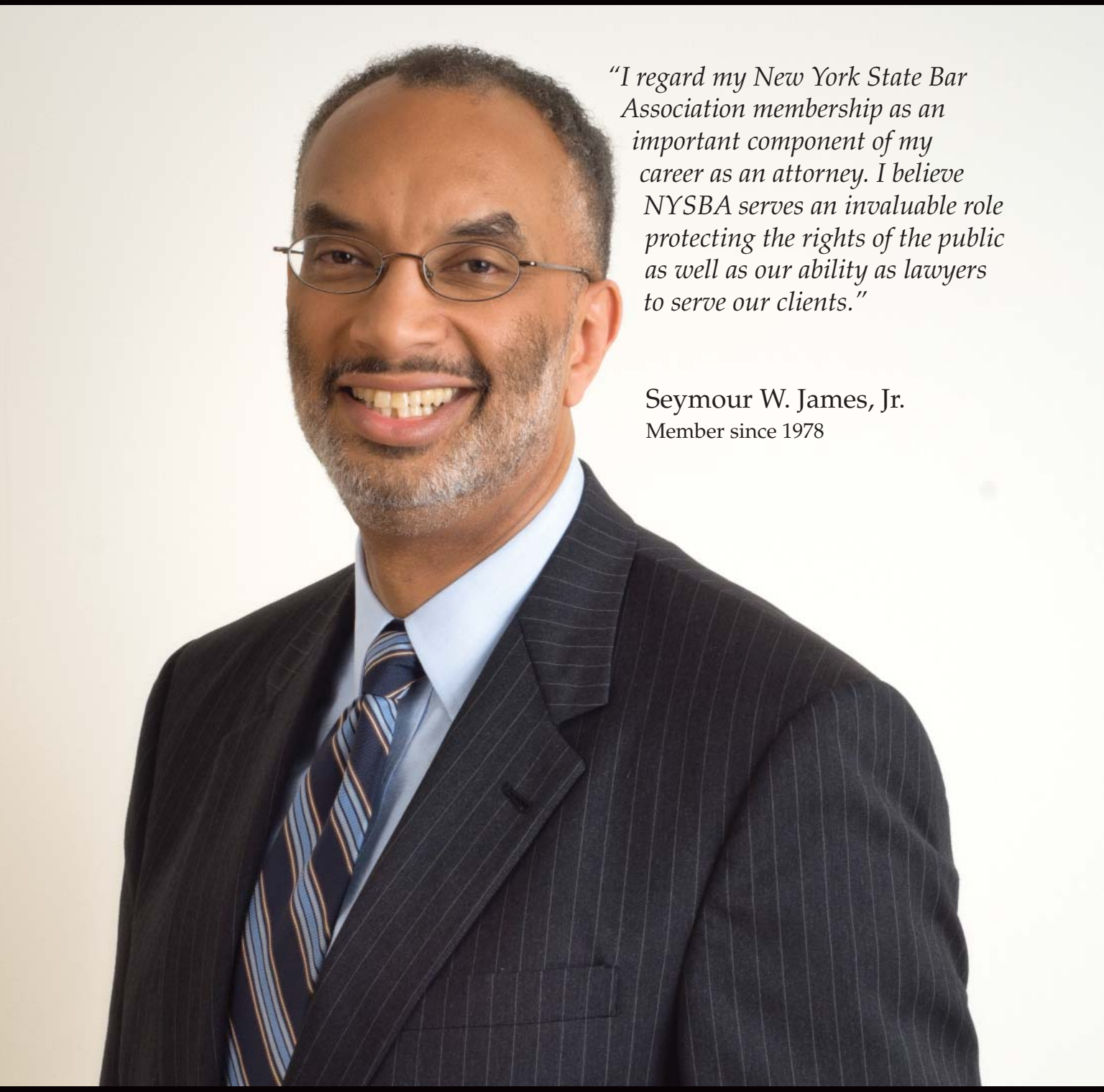
JULY/AUGUST 2008
VOL. 80 | NO. 6

How to Lose a Client in 10 Steps

Don't turn a promising relationship into a one-off representation

by Richard B. Friedman and Carla M. Miller

Also in this Issue



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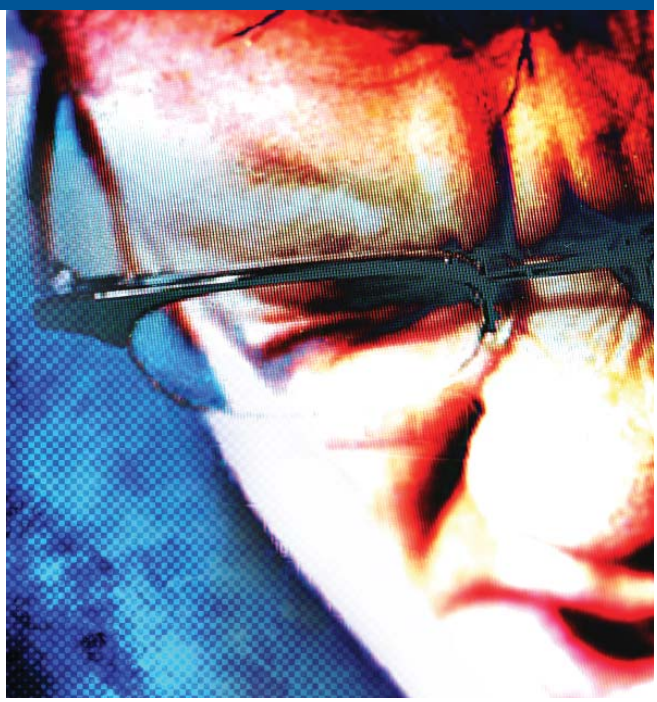

DEPARTMENTS

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The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $20. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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BERNICE K. LEBER

"Helping Lawyers, Helping Clients": The Wrongfully Convicted

As you know from my first President's column, the theme I have chosen for the coming year is "Helping Lawyers, Helping Clients." I decided to devote this column to a problem with which we have become far too familiar of late: the plight of innocent persons who served time in prison for crimes that they did not commit. This is an issue that affects not only those wrongfully convicted but also their families, the lawyers who represent them, the criminal justice system and, in a larger sense, our society.

The number of exonerations in New York and elsewhere undermines the belief that the criminal justice system will protect the innocent. With increasing frequency, the media have reported not only about the innocent who have served time in prison for crimes that they did not commit, but also about those who committed the crimes who escaped prosecution. When this happens with regularity – more than 200 people have been freed across the country – there is need to take a step back and review our criminal justice system. Most of the exonerations have resulted from advances in DNA identification, but many convictions are not susceptible to such proof.

Since 1992, Barry Scheck and Peter Neufeld have cut through a swath of wrongful incarcerations nationwide with the establishment of the renowned Innocence Project at Cardozo Law School. Anthony Capozzi was one of their clients. In 1985, Capozzi was charged with three rapes in Buffalo. The rape victims told police that their attacker was about 160 pounds. Capozzi weighed 200 to 220 pounds. None of the victims mentioned a prominent three-inch scar on Capozzi's face. All three victims identified Capozzi in court as the attacker. In 1987, he was convicted by a jury of two rapes and acquitted of the third. He was sentenced to 35 years, and served 20.

Luckily, biological evidence had been collected from two victims (and stored in a hospital drawer). When the evidence was tested in 2007 at the request of Capozzi and his attorney, sperm collected during the rape examinations of both victims matched the DNA profile of another man currently in state custody – and proved that Capozzi could not be the rapist.

Capozzi was exonerated and released from jail in April 2007. His is one of many reported cases in New York going back as far as 1984. It is obvious that there will be many more to come.

There are many causes for convictions going awry: problems with eyewitness identification procedures; the collection, testing and retention of forensic evidence; and investigative policies – to name a few. In 2004, the State Bar first addressed one issue involved in convicting the innocent – false confessions and the manner in which those confessions were preserved. Our Criminal Justice Section and the New York County Lawyers' Association presented to the House of Delegates a joint resolution urging the Legislature to enact laws requiring the videotaping of custodial interrogations. The House overwhelmingly passed the resolution, and the issue became one of our legislative priorities.

A working group spearheaded by Vincent Doyle was formed to draft proposed legislation. Under Vince's leadership, the group successfully advocated for the establishment of a pilot project to tape confessions. In 2006, at the urging of Vince, and Ron Kennedy of State Bar staff, the State Legislature allotted $100,000 for a pilot project in Broome and Schenectady Counties. The Legislature appropriated an additional $100,000 in 2007, and we are in the process of bringing two additional counties on board. These projects are under way, and we will report on the results we receive from the participating counties.

Not every conviction is infused with the problems I have mentioned. The greatest number of people who are convicted fully deserve to be convicted. In addition, our prosecutors often decline to prosecute cases where guilt is not clearly established.

To date, no New York bar association has undertaken a study, in one place, of the relevant cases. One of the State

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Bar's missions is to study and improve the law. For this reason, I have asked Barry Kamins to chair a Task Force on Wrongful Convictions. The blue ribbon panel of prosecutors, defense lawyers, law school professors, civil litigators, and representatives from the police and the Fortune Society will examine both reported and pending cases of wrongful convictions in order to identify the causes and to attempt to eliminate them. The task force will isolate the systemic causes that produced these injustices. By focusing on current rules, procedures and statutes that were implicated in each case, the task force also will propose solutions in the form of procedural changes and legislation.

You should also watch for a series of hearings later this year in different regions around the state that the task force will be holding about the issue of wrongful convictions. Part of the mission of the task force is to provide opportunities to educate the profession and the public about the experiences of those intimately involved in all phases of the criminal justice system. The purpose of the hearings will be to expand on and garner further views on the causes of these erroneous convictions, with the aim of ensuring that our laws, policies and practices are designed to reduce the risk of convicting the innocent and increase the likelihood of convicting the guilty.

I am hopeful that under the task force leadership of Barry Kamins, our Association will continue make a systemic difference in the manner in which cases are prosecuted. I started this column by intending to share with you an issue that affects our society, our profession and our clients. Fundamentally, we became lawyers in order to help others. Through this task force, we may shed light in an area deserving of study and remain constant to our mission as lawyers. ■

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Practical Skills Series: Basic Matrimonial Practice
October 2 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Handling DWI Cases in New York
October 16 Buffalo
October 23 Long Island
October 24 New York City
November 13 Albany

Risk Management for the Solo/Small Firm
October 21 Buffalo
October 28 Albany
November 6 Westchester
November 20 New York City

Practical Skills Series: Probate and the Administration of Estates
October 23 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Practical Skills Series: Basics of Bankruptcy
Fulfills NY MCLE for all attorneys (7.5): 1.0 ethics and professionalism; 2.5 skills; 4.0 practice management
October 28 Buffalo; Syracuse
October 30 Albany; Long Island; New York City

Emerging Issues in Environmental Insurance
(program: 9:00 am–1:00 pm)
October 31 New York City

Tenth Annual Institute on Public Utility Law
November 7 Albany

ADR
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How to Lose a Client in 10 Steps

By Richard B. Friedman and Carla M. Miller

Many litigators in law firms devote a great deal of time and energy to developing new relationships and winning new corporate clients. Once the client has signed on and a case is under way, however, too often outside counsel concentrates so much upon the matter at hand that they neglect the client relationship. While outside counsel may be unaware of this inadvertent lack of attention, the client will certainly notice. This failure to communicate properly can easily turn a promising long-term relationship into a one-off representation, no matter how favorable the outcome of the matter. Maintaining a good working relationship with in-house counsel is the key to keeping that client.

In our careers as outside counsel with extensive experience in litigation and arbitration matters and as in-house litigation counsel for several major corporations, we have seen how a lack of communication, as well as failing to meet in-house counsel's expectations and ignoring the client's corporate dynamics, can quickly ruin the relationship between outside and in-house counsel. Whether through oversight, overwork or lack of attention, these 10 common missteps will help to make sure that the client does not come back.

1. Don't Learn About the Client's Industry, Business Lines and Internal Dynamics

While the facts of any given case may be plain enough for outside counsel within the framework of the law, the context of the matter is often more important for the corporate client. The only way to assess the relative importance of a given matter for a corporation is to understand how it fits in with the client's industry, business lines and internal dynamics. For instance, while the matter may involve a relatively small revenue stream, the business unit at issue could be a rapidly growing, high-profit line that senior company personnel view as crucial to a strategic shift from older, low-margin lines. By neglecting to develop an understanding of the client, outside counsel cannot properly prioritize and will be unable to provide the value-added advice and counsel that keeps a client coming back.

2. Don't Discuss Projected Fees

Outside counsel will, of course, want to achieve the best possible result for the client on any given matter. While focusing on winning a case, however, counsel may lose

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sight of the overall context of the matter for the client. Corporate executives assess most corporate-related projects in terms of revenues, costs, margins and income. Litigation is an added, if unavoidable, cost that corporate clients want to keep as low as possible. They may seek a fee cap; they may want to be notified when fees for a given matter hit a certain level; or they may want to take advantage of, or initiate, early settlement possibilities. Outside counsel may be confident that they are performing excellent work for the client, but the price of such services may simply be too high. Surprising the client with a higher-than-expected bill is a surefire way to strain, if not end, what might seem to be a thriving business relationship.

3. Ignore the Client's Billing Guidelines

Use of outside legal services, such as in a takeover contest, almost always represents a cost center for corporations that reduces the money available for more profitable endeavors (the most notable exceptions being when a corporation sues to gain advantage in a business dispute or to recover a substantial amount of damages). While litigation is not a cost that can be unilaterally reduced, an overwhelming number of large corporations still seek to manage litigation costs to the extent possible through the implementation of billing guidelines. Outside counsel have the duty to adhere to those guidelines. If a case demands an exemption from certain guidelines, counsel should seek client approval for such exemption for a matter in its entirety or for a particular period of time; they also should be able to provide a compelling argument as to why those guidelines would be counterproductive in the pending matter. Clients hate surprises, particularly costly ones. Failing to pay attention to billing guidelines will present clients with the kind of surprise they will not wish to repeat.

4. Ignore the Client's Staffing Preferences for Outside Counsel

Like any other corporate department, the legal department has to live within its budget, or the head of the department must be able to explain why it could not. To make it easier to estimate legal costs and to keep fees manageable, many companies have gone to a great deal of trouble to develop staffing guidelines for outside counsel. For instance, the guidelines may specify that no more than two attorneys can attend a deposition or conference absent explicit client approval. If outside counsel believe that the staffing guidelines are unreasonable in a given case, they need to seek permission from the client before departing from those guidelines so that in-house counsel can make the case to their own management. Budgeting for litigation is difficult enough for in-house counsel. Making that job even harder is one way to quickly alienate a corporate client.

5. Change Key Personnel Without Telling the Client

The relationship between in-house and outside counsel is built upon the interaction between people. The better the communication between the client and outside counsel, the stronger the relationship will be. A key part of that communication involves staffing. If outside counsel is contemplating staffing changes, counsel should communicate them to in-house counsel. The client may have strong preferences as to which attorneys are involved in certain aspects of a given matter. In addition, the client may work very well with particular support staff and an unexplained personnel change may cause a serious disruption to the relationship. Clients often like the certainty gained by dealing with people they know. Changing personnel with little or no notice adds unnecessary uncertainty for the client and potential strain to the relationship with outside counsel.

6. Don't Answer Client Queries Promptly

One of the most important practices within the legal profession is being responsive to clients. It is, after all, their money, their time and perhaps their business that is at stake in the matter. While it is not always possible to respond to a client query right away due to various circumstances, outside counsel should make it their practice to respond in as timely a manner as possible. When the lead partner in the matter is unavailable, another lawyer should be able to answer the client query or find someone who can do so. If the client does not hear back in a timely manner, he or she may assume that outside counsel is not actively working on the matter, even if that is decidedly untrue. A failure to communicate is one of the fastest ways to jeopardize a client relationship.

7. Don't Explore Settlement Possibilities

Everyone likes to win, but for corporations the definition of winning generally comes down to the bottom line. Viewed through that lens, an expensive win may be far less desirable for a corporation than a less expensive loss or settlement. Accordingly, outside counsel should not only be focused on winning the case. When the final costs are tallied, that success may be too expensive in the corporate context. Besides the cost in money, corporations also must account for the cost in time and disruption to day-to-day business. Reaching an early settlement on the most favorable terms may not be as gratifying to outside counsel as winning a difficult case in court, but winning at all costs is not a winning strategy for keeping corporate clients.

8. Engage in Unduly Aggressive Tactics

No one wants a lawyer who is not going to aggressively represent his or her interests. As U.S. Supreme Court Justice Antonin Scalia said in a case involving the right to choose defense counsel, "I don't want a 'competent' lawyer. . . . I want to win."[1] No court, however, wants to have to deal with overly aggressive counsel or to wade through

pages of gratuitously nasty correspondence. While it may seem like an easy way to demonstrate a winning attitude for clients, unduly aggressive tactics and offensive communications rarely, if ever, serve a client's best interests in any particular matter. Such behavior by outside counsel only alienates judges and results in unnecessary costs, which will eventually alienate the client.

9. Don't Communicate Key Dates

In-house counsel need to be able to properly oversee litigation. To do that they may want to attend certain depositions and/or hearings to observe the interaction between outside counsel, on the one hand, and adverse counsel and the judge, on the other hand. Outside counsel should make it a practice to always alert in-house counsel to key events ahead of time so that the client can choose whether to attend. Indeed, in-house counsel should be considered not only as clients but as partners in the litigation and should be kept abreast of all upcoming key dates. It is demeaning to the client if in-house counsel are not given the opportunity to participate meaningfully in the client's own case.

10. Send Working Drafts and Submit Briefs for Review at the Last Minute

Unless they have specifically said otherwise, clients do not want to see working drafts that are not ready to be filed. In addition, in-house counsel have a host of non-litigation responsibilities which may make it impossible to review briefs on very short notice. While briefs must sometimes be turned around very quickly, outside counsel should strive to give the client sufficient time to review all draft papers. Outside counsel should also devote the same care to invoices, which may be the only work product the client sees for weeks. Failing to ensure that work product is of the highest quality will not engender respect or consideration for future matters.

Conclusion

While it is easy enough to lose a client through these 10 steps, the key to keeping the client happy is, simply, communication. Communication is the key to any good relationship. Where potential issues arise, communication enables both parties to address these issues and resolve them in a timely fashion. By making sure to develop and maintain open lines of communication with in-house counsel, outside counsel improve their chances of achieving the best possible result for the client in the matter at hand and heighten their prospects for future business. ■

1. Linda Greenhouse, *Justices Hear Case on Right to Choose Defense Counsel*, N.Y. Times, Apr. 19, 2006.

BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

Don't Cry Over Spilt Milk!

The Court of Appeals has returned to, and decided, an issue left open in its 2004 decision, *MetLife Auto & Home v. Joe Basil Chevrolet*,[1] in *Ortega v. City of New York*,[2] "whether New York recognizes the tort of third-party negligent spoliation of evidence. We conclude that the tort is not cognizable in this state."[3]

After a van burst into flames, injuring the plaintiffs (the owner/driver and passenger), the vehicle was towed from the scene by a private towing company, Ridge, at the direction of police investigating the accident. It was eventually brought to a police facility in Queens.[4] The attorney for the passenger commenced a special proceeding against Ridge and the New York City Police Department to prevent destruction of the vehicle until it could be inspected, and the trial court issued an order granting the plaintiffs[5]

> a period of 60 days to inspect the vehicle and precluding its alteration or destruction until completion of the inspection. The preservation order was served on Ridge and the police department. The Legal Bureau of the police department promptly forwarded a written request, along with a copy of the court order, to the property clerk at Queens Point Auto Pound directing preservation of the vehicle pending Peralta's inspection.[6]

In an all-too-predictable series of events, the vehicle was destroyed before any inspection could take place.[7] The plaintiffs did not commence an action against the vehicle manufacturer, the prior owner, or the service station that had serviced the vehicle the day before the fire, electing instead to sue the city of New York ("the City") on two legal theories: first, a claim of negligent spoliation of evidence and, second, civil contempt for violating the court's preservation order, rendering it liable, the plaintiffs claimed, for all damages flowing from the preservation order.[8]

The plaintiffs moved for summary judgment on both claims:

> In support of the motion, plaintiffs submitted the affidavit of an accident reconstruction expert who opined that the destruction of the vehicle and resultant inability of plaintiffs to inspect it presented a fatal obstacle to determining the cause of the fire or identifying the responsible parties. As a result of the City's negligence, plaintiffs contended they were precluded from recovering damages from any of the tortfeasors who were ultimately responsible for their injuries.[9]

The Court noted that the City opposed the motion,

> alleging that the negligent spoliation of evidence claim was inherently speculative because inspection of the vehicle might not have revealed the cause of the fire, and that destruction of the vehicle did not necessarily preclude a viable lawsuit against the true tortfeasors. The City's expert, an automotive engineer, concluded that other methods of investigation – including the review of product design, recall information, previous lawsuits, service records and the like – might have revealed circumstantial evidence regarding the cause of the fire sufficient to support a lawsuit against the vehicle manufacturer, previous owner or the service station that inspected the vehicle.[10]

The trial court dismissed the contempt claim, reasoning that the claim should be adjudicated by the court that had issued the preservation order in the special proceeding (a finding that was not challenged), dismissed the owner/driver's claim for spoliation, since she had not been a party to the special proceeding and had not demonstrated that the City breached a duty it owed her, but permitted the passenger's claim for negligent spoliation to proceed.[11]

The Appellate Division agreed that the owner/driver's claim was properly dismissed, and held that the passenger's claim was not supportable after a search of the record.[12] The Court of Appeals granted leave.[13]

The Court began with an overview of the current state of spoliation law in New York before turning to the issue at hand, namely, the viability of a third-party claim for negligent spoliation, a claim the Court did not have to reach in *MetLife* since the plaintiff in that action had failed to demonstrate the existence of a duty owed by the spoliator.[14]

The Court next reviewed the origin of third-party claims for negligent spoliation and the elements the plaintiffs proposed for the claim in New

York, including a rebuttable presumption that "but for" the spoliation, the injured party would have prevailed in pending or potential litigation.[15]

The Court's analysis began with whether a redress should exist for every wrong:

> In New York, while the desire to provide an avenue to redress wrongs is certainly an important consideration underlying our tort jurisprudence, the recognition that there has been an interference with an interest worthy of protection has been the beginning, not the end, of our analysis. "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world."[16]

New York courts "also weigh other judicial and social policy concerns in determining whether to recognize new tort causes of action."[17] While not condoning the violation of the preservation order, the Court said:

> [W]e are not convinced that existing New York remedies are inadequate to deter spoliation or appropriately compensate its victims. Based on a review of cases across the nation, it appears that destruction of evidence by an entity without ties to the underlying litigation is not a frequent occurrence. As the California Supreme Court concluded when it ended its state's 15-year experiment with the tort: "If existing remedies appear limited, that may well be because third party spoliation has not appeared to be a significant problem in our courts."[18]

Would the plaintiffs be able to obtain any redress?

> As the present case demonstrates, there will be unfortunate instances when third parties with a duty to preserve evidence but no connection to the underlying lawsuit will negligently breach that duty, presenting a situation where discovery sanctions are inadequate to address the spoliation victim's loss. But even in this case, plaintiffs were not left without recourse. Under our civil contempt statutory scheme, a party who suffers a loss or injury as a result of violation of a court order can seek full compensation from the contemnor. The City conceded at oral argument that, had plaintiffs pursued their contempt claim, they would – at the very least – have been entitled to monetary damages in an amount necessary to reimburse them for additional investigation, research or expert expenses incurred in attempting to prove the underlying negligence claim absent inspection of the vehicle.[19]

The Court acknowledged the plaintiffs' argument that the contempt remedy was not adequate, since they would not be able to recover for pain and suffering and emotional distress, which concededly were not caused by the City, but determined that the speculative nature of the claim outweighed the arguments for the creation of a new tort:[20]

> The same concerns about speculation are evident in this case. Plaintiffs contend that examination of the vehicle would have revealed either a design or manufacturing defect, improper maintenance or faulty repair services. But it is also possible that the fire caused so much damage to the van that an inspection would fail to disclose a conclusive cause. Or an inspection could have resulted in conflicting expert opinions with differing views on causation, rendering plaintiffs' success in a lawsuit dependent on which party's expert the jury found most credible. Finally, inspection of the vehicle might not have disclosed any maintenance issues, manufacturing deficiencies or design defects, thereby failing to supply a basis to hold any of those defendants liable. These are among the possibilities that the finder of fact would have to ponder were we to recognize

the spoliation of evidence cause of action, with no meaningful way for the jury to reliably resolve whether the destruction of evidence was, in fact, the cause of plaintiffs' failure to obtain damages for their burn injuries from the original tortfeasors.

Plaintiffs' claims further present uncertainties with respect to recovery of damages. Plaintiffs assume that, had the van not been destroyed, they would have been able to obtain a judgment in the full amount of damages from a responsible defendant with adequate funds or insurance coverage. But even if plaintiffs prevailed in the underlying lawsuit, this outcome would not be assured. Had more than one defendant been joined in the action and multiple causes assigned to the accident, liability might have been apportioned among the tortfeasors without any one defendant bearing responsibility for the total judgment. If plaintiffs obtained a judgment against the original tortfeasor or tortfeasors, there is no guarantee they would have collected damages in full. The complexities inherent in any multiple party negligence action would be compounded in a spoliation claim since litigation emphasizing the impact of destruction of evidence would afford the jury no reasonable means of determining how liability might have been apportioned among tortfeasors in the original litigation or of assessing plaintiff's own comparative fault, if any.[21]

The Court concluded its opinion with another public policy reason for denying recognition of the claim:

> Recognition of the tort has the potential to create significant liability for municipalities in New York since these entities perform a myriad of functions – including towing and warehousing vehicles involved in accidents – which could give rise to spoliation claims. We are not persuaded that it would be sound public policy to create a new tort that shifts liability from responsible tortfeasors to government entities that serve as repositories of evidence that may or may not be relevant in future civil cases. Municipalities might prove unduly attractive defendants, diverting the focus of litigation away from the tortfeasors who actually caused the injury and resultant damages.[22]

A notable omission from the Court's opinion is any mention of the Second Department's 1998 decision in *DiDomenico v. C&S Aeromatik Supplies, Inc.*,[23] where a claim by an injured employee was allowed to proceed directly against his employer where the employer destroyed the instrumentality that caused plaintiff's injuries, along with records that might have led to the identification of parties directly responsible for the harm.[24] Whether any part of *DiDomenico* remains viable is unclear. ■

1. 1 N.Y.3d 478, 775 N.Y.S.2d 754 (2004).
2. 9 N.Y.3d 69, 845 N.Y.S.2d 773 (2007).
3. *Id.* at 73.
4. *Id.*
5. *Id.*
6. *Id.* at 73–74.
7. *Id.* at 74.
8. *Id.*
9. *Id.* at 75.
10. *Id.*
11. *Id.* at 76.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 78.
16. *Id.* (citations omitted).
17. *Id.* at 79.
18. *Id.* (citation omitted).
19. *Id.* at 80.
20. *Id.*
21. *Id.* at 82.
22. *Id.* at 82–83.
23. 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998).
24. *Id.*

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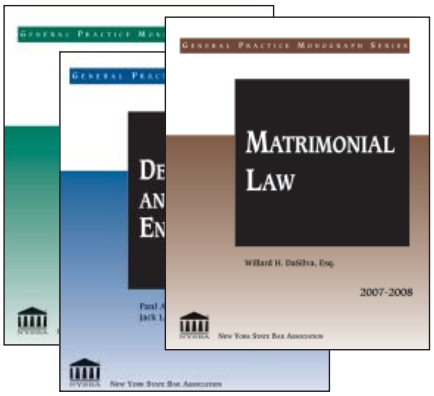

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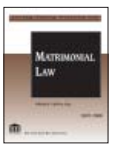

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Riverkeeper v. Planning Board of the Town of Southeast

The Court of Appeals Reminds Lower Courts Not to Second-Guess SEQRA Determinations

By Richard L. O'Rourke and Edward J. Phillips

Since its adoption over 30 years ago, the New York State Environmental Quality Review Act (SEQRA)[1] has provided a procedural framework for ensuring public participation in the land use and planning process. SEQRA further requires government agencies to strike a balance by permitting land development only when potentially significant adverse environmental impacts have been identified and mitigated to the maximum extent practicable. Redress for those objecting to SEQRA determinations is available under CPLR Article 78, and thousands of such proceedings have been commenced by disgruntled property owners, members of the public, government agencies and public interest groups.

Last year, the *Journal* published an article titled "Is the Public Being Protected? A Lead Agency's Duty Under SEQRA to Review Newly Discovered Information."[2] The article suggested that many of our court decisions, including those issued by the Court of Appeals, often failed to provide sufficient guidance as to when "newly discovered information" was important enough to require a SEQRA lead agency to reexamine a proposed action. One of the main decisions profiled in the article was *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*,[3] which was issued by the Appellate Division, Second Department in 2006. That decision, however, has now been reversed by the New York Court of Appeals.

The Court of Appeals's seemingly unremarkable and straightforward opinion in *Riverkeeper* upholds the Town of Southeast Planning Board's determination not to require the preparation of a Supplemental Environmental Impact Statement (SEIS) based upon alleged newly discovered information and changed circumstances. Thus, the decision reverses the Appellate Division's directive to the Planning Board to prepare the SEIS. The Court of Appeals relied upon its long-standing rule that a lead agency's SEQRA determinations must be sustained by a reviewing court unless found to be "arbitrary, capricious or unsupported by substantial evidence."[4]

An examination of the issues before the Court of Appeals in *Riverkeeper* confirms that if New York jurisprudence previously lacked clarity with respect to when "newly discovered information" will require the prepara-

tion of an SEIS (a dubious proposition in our view), any such deficiency has now been remedied. This article will discuss the parties' respective contentions in *Riverkeeper*, as well as the arguments raised by the New York State Attorney General's Office when it appeared as *amicus curiae* before the Court of Appeals and unsuccessfully argued that the Planning Board's SEIS determination was flawed.

When viewed against the backdrop of the project's history and the relevant legal issues, *Riverkeeper* sends both a powerful and clear message to lower courts that a lead agency's SEIS determination is entitled to significant judicial deference. This principle should not be compromised or relaxed because a project opponent raises allegations of newly discovered information or changed circumstances involving an important natural resource, such as drinking water. In all instances, the standard of judicial review is the same. As the Court of Appeals succinctly states in *Riverkeeper*, "[i]t is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence."[5] *Riverkeeper* also reaffirms that a lead agency can and should rely upon the expertise of other agencies in connection with its environmental decisionmaking. Finally, *Riverkeeper* clarifies important legal and practical issues involving the sequencing of SEQRA review and the regulatory permitting process for large-scale land use projects.

The Project

The project at issue in *Riverkeeper* involves a 104-lot, single-family residential development in the Town of Southeast. The property consists of 310 acres bisected by a county road, thus creating a northern and southern parcel. The project is known as "The Meadows at Deans Corners" or simply the "Meadows."

In 1988, the applicant sought preliminary subdivision approval from the Town of Southeast Planning Board. Initially, the applicant proposed a 139-lot development in a cluster format. The perimeter of the site, consisting of approximately 200 acres, would remain undeveloped and serve as a natural buffer to surrounding properties and as a wildlife habitat.

The Planning Board initiated the subdivision review process, as well as an environmental review pursuant to SEQRA. For purposes of SEQRA review, the Planning Board served as "lead agency." In 1989, the Planning Board issued a "Positive Declaration" for the project, which triggered full SEQRA review. The environmental review that followed included, among other things, the preparation and acceptance of a DEIS, FEIS, SEIS and FSEIS.[6]

In 1991, the Planning Board issued a SEQRA Findings Statement for the Meadows. The Findings Statement expressly addressed, among other things, impacts associated with wetlands, the integrity of the watershed, control of phosphorus pollution, water supply, stormwater runoff and sewage disposal. Such issues were examined in requisite detail at that early stage of the Meadows application, and the Planning Board acknowledged that the project would be subject to further review and refinement by involved agencies during various permitting processes.

The Planning Board's Findings Statement concluded that the development of the Meadows property as a residential subdivision, in the manner proposed in 1991, would minimize or avoid known adverse environmental impacts to the maximum extent practicable. No neighboring property owners or other parties challenged the Findings Statement following its adoption.

Thereafter, the applicant and its technical consultants attempted to work with various regulatory agencies, including the New York City Department of Environmental Protection (NYCDEP), to finalize numerous engineering and design issues concerning the project. During this time, however, NYCDEP was engaged in updating its regulations governing development in the New York City Watershed for the first time since 1953.[7] This period of regulatory uncertainty and transition created delays for projects such as the Meadows, which involved development within the New York City watershed.

In 1998, after the Watershed Regulations became effective, the applicant submitted a proposed preliminary plat to the Planning Board. At that time, the Planning Board and its independent planning consultant sought to determine whether any aspects of the project had changed since the previous environmental reviews done in connection with the 1991 Findings Statement. To that end, the applicant was directed to prepare an updated traffic study that sampled current and projected traffic levels. The study concluded that the Meadows would not adversely affect local intersections. In August 1998, the Planning Board issued a resolution granting preliminary subdivision approval for the Meadows pursuant to Town Law § 276(5). Like the Planning Board's SEQRA Findings Statement, the grant of preliminary subdivision approval went unchallenged.

The applicant returned to the task of completing its regulatory approvals, but opposition to the project, which had been gathering, became more vocal and organized. In 2002, the applicant received a letter purportedly from the Planning Board chairman, advising that its preliminary subdivision approval had expired. In response, the applicant filed a CPLR Article 78 proceeding challenging that determination and seeking a default approval of the final plat pursuant to Town Law § 276(8). The litigation quickly settled and, in June 2002, the Planning Board granted final subdivision approval for the Meadows.

Riverkeeper I

The Planning Board's issuance of final subdivision approval was challenged in two related Article 78 proceedings, which the parties subsequently dubbed "*Riverkeeper I*." The petitioners claimed that various project revisions and regulatory and other changes were not addressed, or were inadequately addressed in connection with the 1991 SEQRA Findings Statement. In particular, the petitioners argued that the following matters, among other items, required further study through the preparation of an SEIS.

- In 1998, the United States Army Corps of Engineers (ACOE) and the New York State Department of Environmental Conservation (NYSDEC) completed remapping the wetlands lines on the project site which resulted in expansion of the wetlands from 71.8 acres to 79.59 acres.
- In 2000, NYSDEC identified the Muscoot Reservoir, a source of drinking water for New York City, as water quality limited based on current conditions. This finding recognized that the Muscoot Reservoir did not meet water quality standards, established pursuant to the Clean Water Act, based upon its existing phosphorus levels. The project site contains a watercourse known as Holly Stream, which is an indirect tributary to the Muscoot Reservoir.
- In April 2001, NYSDEC and NYCDEP developed total maximum daily loads (TMDLs) for phosphorus loading for drinking water reservoirs located in the Town of Southeast. These TMDLs provide planning goals to achieve non-point source[8] reductions in phosphorus loading.
- In December 2001, Governor Pataki designated the East of the Hudson portion of the Watershed, including the Town of Southeast, as a "Critical Resource Water" (CRW).
- In May 2002, ACOE also designated all water bodies and wetlands in the Watershed East of the Hudson as Critical Waters, stating that "[t]his watershed is considered to have special environmental and ecological significance that warrants the additional protection of CRW designation."
- The NYCDEP practice of flagging watercourses had resulted in the realignment of planned roadways within the development and the addition of two unpaved, emergency access roads.
- Responding to requirements imposed by NYCDEP, the applicant had increased the number of detention basins designed to capture stormwater runoff from nine to 20.
- Other residential development near the project site potentially increased traffic impacts and impacts to the quantity and quality of the potable water supply.
- And, in 1999, Hurricane Floyd purportedly caused flooding of Holly Stream, which crosses a portion of the project site.

In February 2003, Justice Francis A. Nicolai, J.S.C., issued a decision annulling the final subdivision approval granted by the Planning Board.[9] The court remitted the matter to the Planning Board for consideration of whether an SEIS was required with respect to certain specific project revisions and regulatory and other changes identified by the petitioners, occurring after approval of the preliminary plat in 1998. In particular, Justice Nicolai instructed the Planning Board to focus upon the above-mentioned areas of environmental concern in determining whether an SEIS was needed.

Upon remittal, the Planning Board examined existing reports and analyses that related to the revisions and changes identified in the trial court's decision. It also reviewed new information generated in connection with the project's applications before permitting agencies.[10] Based upon these materials, the Planning Board determined that the project modifications and regulatory and other changes identified in *Riverkeeper I* did not give rise to potentially significant adverse environmental impacts that were not previously examined by the Planning Board. In April 2003, the Planning Board adopted a seven-page resolution describing the scope of its review and setting forth its conclusion that no SEIS was required.

Riverkeeper II

In May 2003, the same group of petitioners commenced three Article 78 proceedings ("*Riverkeeper II*") challenging the Planning Board's determination that an SEIS was not required.[11] All three proceedings were assigned to the same trial judge (Justice Nicolai) that had remitted the matter to the Planning Board in *Riverkeeper I*.

By decision dated October 31, 2003, Justice Nicolai concluded that the Planning Board took the required "hard look" at the areas of environmental concern identified in *Riverkeeper I* and made a "reasoned elaboration" of the basis for its determination that an SEIS was not required. The court also found that the Planning Board's "recognition that other agencies have permitting authority and the Board's requirements that [the developer] must obtain the relevant permits prior to final subdivision [approval] is not an improper segmentation or improper delegation to other agencies."[12]

The petitioners then appealed to the Appellate Division, Second Department. That court, with one justice dissenting (Hon. Robert A. Spolzino, J.S.C.), reversed the judgments dismissing the petitions and held that the Planning Board had failed to discharge its duties as a SEQRA lead agency by dispensing with the preparation of an SEIS.[13] The majority stated that an SEIS *was required* to analyze the changes to the regulatory environment and to confirm the project's "harmony with the new regulatory scheme."[14]

The majority also ruled that the Planning Board improperly deferred its duties as SEQRA lead agency. On

this question, the majority appeared troubled by an observation made by the Planning Board in its 1991 Findings Statement, which mentioned that other agencies would be evaluating the environmental impacts of the Meadows project. The majority also admonished the Planning Board for rendering its determination not to require an SEIS "in the face of an appreciable probability" that one or more permits would not issue for the Meadows without further revisions to the project.[15] When the Planning Board had made its SEIS determination, ACOE had recently received correspondence from NYCDEP, the United States Department of Environmental Protection and the United States Department of the Interior, Fish and Wildlife Service raising concerns about wetland impacts on the project site.

Justice Spolzino dissented. He applied the standard of judicial review established in *Jackson v. New York State Urban Development Corp.*[16] and subsequent cases in concluding that the Planning Board had "rationally determined on the basis of substantial evidence in the record that no supplemental environmental impact statement . . . was necessary."[17] The dissent characterized the result reached by the majority as improper "second-guessing" of an administrative decision and rejected the majority's conclusions about the effect of the passage of time and changed circumstances.[18] The dissent found ample support in the record for the Planning Board's negative determination concerning the SEIS and found no improper deferral of the examination of any environmental issue by the Planning Board. The dissent noted that SEQRA encourages lead agencies to draw upon the expertise and advice of other involved agencies.[19]

After unsuccessfully moving for leave to appeal in the Appellate Division, the applicant sought leave from the Court of Appeals. Because the Court of Appeals grants less than 10% of motions for leave to appeal, the applicant's chances of obtaining a favorable outcome at this juncture appeared slim. Moreover, the case did not involve a split in authority among the departments of the appellate divisions or, for the most part, a novel question of law. Instead, the applicant's motion for leave principally argued that the Appellate Division majority had failed to apply the correct standard of review – established 20 years earlier by the Court of Appeals in *Jackson* – and consequently had reached the wrong result.

Nevertheless, the Appellate Division's departure from *Jackson* undoubtedly raised a question of statewide public importance. The sharply different conclusions reached by the majority and the dissent also revealed a profound disagreement over the interpretation of SEQRA. Under the majority's view, the Planning Board should have refrained from issuing its SEIS determination until other

involved agencies had completed their permitting processes, or it should have solicited comments from those agencies before proceeding. Yet, no such requirements are found in SEQRA or its implementing regulations. In fact, a lead agency has no authority under SEQRA to compel an involved agency to provide it with materials or information concerning a permit application.

If the Appellate Division was now instructing lead agencies to stop and wait for such information, SEQRA review would undoubtedly become more protracted. Indeed, SEQRA review could stall in the face of a demand for an SEIS from a project opponent while the lead agency struggled to carry out this solicitation process. Despite the long odds, in March 2007, the Court of Appeals agreed to hear the case.

Key Issue of Water Quality

In any long-running litigation, it is not uncommon to see parties make subtle changes in strategy or adjust their emphasis on particular claims. Arguments are raised, met with opposition and scrutinized by courts. When the process involves multiple trips to the courthouse, the parties can (and should) hone their arguments to maximize their chances of a favorable outcome. Certainly, when attorneys have a case reach the Court of Appeals they will be bringing their "A-game."

Such was the case when *Riverkeeper II* reached the Court of Appeals. In coordinated fashion, the petitioners advanced an array of arguments relating to the project modifications and regulatory and other changes at issue. But one issue had clearly risen to the top of their agenda – phosphorus loading into the Muscoot Reservoir. This issue also attracted the attention of the New York State Attorney General's Office, which decided to appear *amicus curiae* before the Court of Appeals. The Attorney General's Office took the position that the Appellate Division's determination should be affirmed, though it limited its arguments solely to the issue of phosphorus loading.

Phosphorus is a nutrient found naturally in soils and minerals, living organisms, and water. Man-made sources of phosphorus in the environment include wastewater treatment plants, failing septic systems and fertilizers. When it rains, soil material containing phosphorus is often transported by stormwater runoff, and ultimately this runoff can find its way into reservoirs. Phosphorus *per se* is not harmful, but excessive levels of phosphorus in a reservoir promote algae growth which, in turn, can adversely affect the odor and taste of drinking water.[20]

Phosphorus loading from the project site was among the various issues alleged by the petitioners to require the preparation of an SEIS. As mentioned above, a stream that crosses a portion of the project site is an indirect tributary to the Muscoot Reservoir. Additionally, in 2000, NYSDEC designated the Muscoot Reservoir as "water quality limited" based on then-current conditions including excess phosphorus loading. And in 2001, NYSDEC and NYCDEP had developed TMDLs for phosphorus loading for the Muscoot and other drinking water reservoirs in the Croton Watershed.[21]

Once the case reached the Court of Appeals, the issue of the project's adverse phosphorus impacts, if any, seemingly took on heightened significance.

Nevertheless, once the case reached the Court of Appeals, the issue of the project's adverse phosphorus impacts, if any, seemingly took on heightened significance. The petitioners stressed that the Muscoot Reservoir is one of 12 major reservoirs that supply unfiltered drinking water to approximately *10 million* New Yorkers, almost half the population of the state. Together with the Attorney General's Office, the petitioners argued that, with an important public resource at stake, the Planning Board was remiss by not requiring the preparation of an SEIS. In essence, the petitioners' message to the Court of Appeals was "better safe than sorry."

The issue, however, was not that simple. The primary method of evaluating a project's phosphorus and related stormwater impacts is a mandatory engineering study known as a Stormwater Pollution Prevention Plan (SPPP). Generally, NYCDEP requires that projects within the New York City Watershed maintain post-development stormwater pollutant loading to pre-construction levels as a condition of approval. In the case of the Meadows, the applicant's SPPP contained over 1,500 pages of narrative and stormwater calculations.

At the time of the Planning Board's SEIS determination, the Meadows' SPPP had already been subject to several years of review and comments by NYCDEP staff. The document, which was initially drafted in 2000, was then in its fourth revised form. Although NYCDEP had not yet approved the Meadows' SPPP, it had been deemed "complete" by NYCDEP when the Planning Board issued its 2003 SEIS determination. NYCDEP's acceptance of an SPPP as "complete" is a significant milestone and typically a precursor to the plan's approval.[22] By the time the

Court of Appeals heard the *Riverkeeper* appeal, NYCDEP had approved the Meadows' SPPP and granted all necessary approvals for the project.

Significantly, the Meadows' SPPP found that, among other things, the stormwater mitigation measures designed for the project would actually *reduce* phosphorus loading from the property after construction was complete. Specifically, the SPPP calculated that total phosphorus loads generated from the Meadows property would be reduced by 23.5% in a post-development condition.

The Court of Appeals

Although the record on appeal contained no evidence contradicting the Meadows' SPPP, the petitioners nevertheless disputed its methodology and conclusions. The petitioners alleged that the SPPP had not been sufficiently available for public review while it was being formulated and vetted by NYCDEP, and thus they did not have an opportunity to scrutinize its conclusions. The New York State Attorney General argued that the Meadows' SPPP had utilized a modeling technique for predicting phosphorus loads that was less accurate than other available models. The Attorney General also argued that the Planning Board should have required an SEIS to study the implementation of additional remedial measures on the project site, which might have further mitigated phosphorus loading to the Muscoot Reservoir below the 23% reduction found in the Meadows' SPPP.

The applicant, in turn, asserted that the Planning Board reasonably relied upon the Meadows' SPPP and its conclusion that post-construction phosphorus loading from the property would actually be reduced relative to pre-construction levels, through the project's advanced stormwater management features. The applicant further argued that SEQRA does not obligate a project applicant to implement remedial measures for the purpose of improving pre-existing environmental conditions as a condition to developing its property, in addition to arguing that a SEQRA lead agency has no duty to undertake such an analysis.[23] The applicant also pointed out that regulatory agencies continue to rely upon the same methodology used in the Meadows SPPP and that, in any event, SEQRA does not require a lead agency to search for "scientific unanimity" in rendering determinations of environmental significance.[24] To the contrary, *Jackson* requires that a lead agency take a "hard look" at the available information. The lead agency's assessment of the available information will not be disturbed unless found to be "arbitrary and capricious."[25]

On the deferral issue, the applicant argued that in 1991, the Planning Board had promptly commenced the procedural steps required by SEQRA to undertake its environmental review "at the earliest possible time."[26] As lead agency, the Planning Board examined matters such as wetlands impacts, the integrity of the watershed, control of phosphorus pollution, stormwater runoff and sewage disposal at the level of detail possible at that early stage of the Meadows application.[27]

In a project requiring extensive regulatory permitting, such as the Meadows, fully engineered project plans cannot be finalized until those agencies with permitting authority have reviewed and approved the applicant's technical designs. The overlapping regulatory review conducted by agencies such as ACOE, NYSDEC and NYCDEP is a routine and inevitable aspect of any significant development activity in the New York City Watershed. Thus, the applicant defended the Planning Board's observation in the 1991 Findings Statement that some systems proposed for the Meadows might undergo design modifications in light of this overlapping regulatory review; it simply reflected a practical reality for any such development of a significant scale.[28]

The Court's Decision

The Court's unanimous decision in *Riverkeeper* was delivered by Chief Judge Kaye, who also wrote the Court's seminal decision in *Jackson*. Chief Judge Kaye began by returning to *Jackson* and reiterating that a lead agency's determination regarding the necessity for an SEIS "is limited to whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."[29] The Court elaborated as follows:

> It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts.[30]

The Court then analyzed the project's lengthy and complex history and the environmental reviews conducted by the Planning Board and various regulatory agencies. In particular, the Court examined the project revisions and regulatory and other changes identified in *Riverkeeper I*. When viewed through the lens of the *Jackson* standard of review, the Court of Appeals reached the same conclusion as did Justice Spolzino in the Appellate Division, who had been the lone dissenter below. The Court held:

> We thus conclude that the Board took a hard look at the areas of environmental concern and made a reasoned elaboration of the basis for its conclusion that a second SEIS was not necessary. The Board relied on the material already in its file, including the DEIS, FEIS and initial SEIS, supplemental reports by the Town's wetlands consultant and the developer's engineering consultant, as well as its own environmental and plan-

ning consultant. The Board's determination that the changes did not present significant adverse environmental impacts and did not require the preparation of a second SEIS was not arbitrary or capricious and is supported by the evidence.[31]

The Court rejected the petitioners' claim that the Planning Board had improperly deferred its SEQRA responsibilities by making its SEIS determination prior to the completion of the various permitting processes still pending at that time. On this point, the Court of Appeals concluded as follows:

> A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking. While a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment. Though the SEQRA process and individual agency permitting processes are intertwined, they are two distinct avenues of environmental review. Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not await another agency's permitting decision before exercising its independent judgment on that issue.
>
> . . .
>
> The Board's [SEIS] resolution indicates a familiarity with the required permits and its mere acknowledgment that the developer would be required to seek approval from the [ACOE] pursuant to the Clean Water Act for wetlands disturbance does not rise to the level of improper deferral. On these facts, the Board, having access to the relevant permit applications and making independent decisions as documented in the April 2003 resolution, was not required to wait for agency permitting decisions before determining whether to require a second SEIS.[32]

Finally, the Court held that the Planning Board did not have an affirmative statutory obligation under SEQRA to notify or solicit comments from other agencies when determining whether an SEIS would be required. While the Court acknowledged that SEQRA encourages the open exchange of information between a lead agency and other involved agencies,[33] it reasoned that a lead agency's discretion to solicit comments "must be balanced against SEQRA's mandate that the regulations be implemented 'with minimum procedural and administrative delay . . . [and] in the interest of prompt review.'"[34] Striking the same balance here, the Court found that the Planning Board's failure to solicit comments before making its SEIS determination was neither arbitrary nor capricious. The Court explained as follows:

> While a lead agency's failure to solicit comments before determining that a SEIS is not required may at times evidence the lack of a "hard look," that is not the case here. The Board's involvement in the Meadows project spanned almost 15 years at the time of the SEIS determination. The Board opened public comment periods when it reviewed the DEIS, FEIS and initial SEIS. In addition, the Board took into account expert reports finding that the changes in the project and the regulations posed no significant adverse environmental impact. That the Board did not solicit comments for a second SEIS does not mean that it failed to take a hard look. With an extensive understanding of the Meadows project, the Board properly applied its own discretion.[35]

Conclusion

Riverkeeper provides a hearty endorsement of the concept that a lead agency's SEQRA determinations will not be disturbed, will not be second-guessed and a reviewing court shall not substitute its judgment for that of the agency so long as there is substantial evidence in the record to support the determination. Opponents to land use development may still attempt to seize upon project modifications and regulatory changes as a basis to stall expeditious and efficient land use review by complaining that a costly and time-consuming SEIS must be prepared. But a lead agency's determination not to require an SEIS will be upheld so long as it is supported by substantial evidence. Not every project modification or regulatory change must be examined through the preparation of an SEIS, because doing so would paralyze economic development in New York State. A lead agency has latitude in making such decisions and a court's review of those decisions must be guided by the proper standard of judicial review. It is not the job of the court to inject itself into a lead agency's deliberative process by weighing alternatives or speculating as to other steps that might have been useful. ■

1. N.Y. Environmental Conservation Law §§ 8-0101–8-0117 (ECL).

2. James Bryan Bacon, N.Y. St. B.J. (Jan. 2007) p. 32.

3. 32 A.D.3d 431, 820 N.Y.S.2d 113 (2d Dep't 2006), *rev'd*, 9 N.Y.3d 219, 851 N.Y.S.2d 76 (2007).

4. *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).

5. *Riverkeeper*, 9 N.Y.3d at 232.

6. The other acronyms mentioned here, which will be familiar to SEQRA practitioners, stand for Draft Environmental Impact Statement (DEIS), Final Environmental Impact Statement (FEIS) and Final Supplemental Environmental Impact Statement (FSEIS).

7. NYCDEP did so in response to United States Environmental Protection Agency regulatory requirements imposed pursuant to the Safe Drinking Water Act Amendments of 1986. *See* 42 U.S.C. §§ 300f–300j-26 and the 1989 Surface Water Treatment Rule, 40 C.F.R. § 141.71. NYCDEP published draft regulations in 1990 and revised draft regulations in 1993 and 1994. The final Watershed Regulations did not become effective until May 1997. *See* 10 N.Y.C.R.R. Part 128.

8. Pursuant to ECL § 17-0105(16), "[p]oint source" is defined so as to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged."

9. *See Riverkeeper, Inc. v. Planning Bd. of Town of Southeast & Glickenhaus*, 2003 WL 2004173, 2003 N.Y. slip op. 50776(U) (Sup. Ct., Westchester Co. 2003).

10. These additional materials included two reports generated by an independent wetlands consultant retained by the Town Board of the Town of Southeast (the "Town Board") to review the applicant's local wetlands permit application before the Town of Southeast Conservation Advisory Commission (the "Conservation Commission"). The Conservation Commission is an independent advisory board in the Town of Southeast charged with rendering a report and recommendation to the Town Board with respect to permit applications for wetlands activities. The independent wetlands consultant was tasked with evaluating the applicant's wetlands-related submissions; verifying prior wetlands delineations made by the applicant and regulatory agencies; and identifying the extent of wetlands impacts posed by the Meadows project. In addition, the Planning Board received copies of the applicant's applications for: (1) a State Pollution Discharge Elimination System (SPDES) permit to be issued by the New York State Department of Environmental Conservation (NYSDEC); (2) a wetlands activities permit to be issued by the United States Army Corps of Engineers (ACOE); and (3) a Stormwater Pollution Prevention Plan (SPPP) to be approved by the New York City Department of Environmental Protection (NYCDEP). There were further materials before the Planning Board, including but not limited to: (1) a report prepared by the applicant's groundwater consulting firm setting forth the results of recent testing, (2) submissions from the applicant's engineering consultant, and (3) the analyses of the applicant's wetlands consultant. These submissions specifically addressed the project revisions, regulatory and other changes identified in *Riverkeeper I*.

11. A. 61-81, 251-281, 571-590.

12. The court's October 31, 2003, decision is unreported.

13. *See Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 32 A.D.3d 431, 820 N.Y.S.2d 113 (2d Dep't 2006), *rev'd*, 9 N.Y.3d 219, 851 N.Y.S.2d 76 (2007).

14. *Riverkeeper*, 32 A.D.3d at 434. On this point, the majority relied upon *Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dep't 2000). *Doremus*, however, involved the extraordinary situation of a lead agency utilizing a FEIS to approve the rezoning of an undeveloped 81-acre parcel of property where it had, 11 years earlier, relied upon the same FEIS to *deny* an application to rezone the same property. In the interim, the proposed project had changed. The lead agency's action was challenged in an Article 78 proceeding, which alleged the FEIS could not possibly have addressed the potential environmental impacts stemming from the developer's new proposal. The trial court found that the differences between the proposals were "radical" and that the environmental impacts of project's modifications were "unstudied" and "unknown." *See Doremus v. Town of Oyster Bay*, N.Y.L.J., Jan. 28, 1998, pp. 6, 7 (Sup. Ct., Kings Co. 1998). The Appellate Division, Second Department agreed with that assessment and affirmed the trial court's decision.

15. *Riverkeeper,* 32 A.D.3d at 436.

16. 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).

17. *Riverkeeper,* 32 A.D.3d at 436 (Spolzino, J., dissenting).

18. *Id.* at 442.

19. *Id.* at 442–43.

20. *See generally* <http://home2.nyc.gov/html/dep/html/watershed_protection/html/prestricted.html>; <http://home2.nyc.gov/html/dep/html/watershed_protection/html/regulatory.html>.

21. *See generally* <http://www.dec.ny.gov/docs/water_pdf/npsource.pdf>.

22. The acceptance of an application as complete triggers a 45-day regulatory deadline within which NYCDEP must make a decision on the application. *See* 10 N.Y.C.R.R. § 128-2.3(d)(5). The Meadows' SPPP was approved by NYCDEP on January 28, 2004.

23. *See, e.g.*, ECL § 8-0109(1), (2)(b) (a lead agency must examine "the environmental impact of *the proposed action* including short-term and long-term effects" and to choose alternatives that, to the "maximum extent practicable," minimize or avoid such adverse environmental effects) (emphasis added); 6 N.Y.C.R.R. § 617.7(c)(1)(i) (criteria for determination of significance include, among other things, whether the proposed action will result in "a *substantial adverse change* in existing air quality, ground or surface water quality or quantity . . . a substantial increase in potential for erosion, flooding, leaching or drainage problems") (emphasis added); 6 N.Y.C.R.R. § 617.7(a)(1) (in making an initial determination of environmental significance, a lead agency must examine whether "*the action* may include the potential for at least one significant adverse environmental impact.") (emphasis added); 6 N.Y.C.R.R. § 617.2(b)(1) (defining the term "action," in relevant part, as including "projects or physical activities, such as construction or other activities that *may affect the environment* by changing the use, appearance or condition of any natural resource or structure") (emphasis added); 6 N.Y.C.R.R. § 617.2(r) (defining the term "impact" as "to *change or to have an effect* on any aspect(s) of the environment") (emphasis added). The plain language of these provisions forecloses the notion that a lead agency is required to examine, or empowered to exact from a property owner, the implementation of measures aimed at remediating some pre-existing environmental problem.

24. *See, e.g.*, *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 55, 735 N.Y.S.2d 83 (1st Dep't 2001) ("[D]iffering conclusions reached by other experts concerning the potential adverse environmental impacts are insufficient to annul an agency's determination"), *leave to appeal denied*, 97 N.Y.2d 613, 742 N.Y.S.2d 606 (2002); *Argyle Conservation League v. Town of Argyle*, 223 A.D.2d 796, 798, 636 N.Y.S.2d 150 (3d Dep't 1996) ("[S]cientific unanimity need not be achieved and the FGEIS is not required to make an exhaustive analysis of every possible environmental impact"); *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 51, 625 N.Y.S.2d 371 (4th Dep't) ("It is not a court's function to resolve the disparity in data presented to an agency"), *appeal dismissed,* 86 N.Y.2d 776, 631 N.Y.S.2d 603 (1995).

25. *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).

26. 6 N.Y.C.R.R. § 617.1(c).

27. *See* ECL § 8-0109(4) ("[T]he length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.").

28. *See* 6 N.Y.C.R.R. § 617.3(b) ("SEQRA provides all involved agencies with the authority, following the filing of a final EIS and written findings statement . . . to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied"); *In re Application of Croton Watershed Clean Water Coalition, Inc.*, 2 Misc. 3d 1010(A), 784 N.Y.S.2d 919 (Sup. Ct., Westchester Co. 2004) ("[T]he Court has found no authority to suggest that a lead agency must resolve all permitting issues before a determination of significance may be rendered.").

29. *Riverkeeper,* 9 N.Y.3d at 231–32 (quoting *Jackson*, 67 N.Y.2d at 417 (quotation marks omitted)).

30. *Id.* at 232.

31. *Id.* at 233–34 (footnote omitted). The Court gave short shrift to the petitioners' contentions regarding the purported need to prepare an SEIS to study the project's phosphorus impacts upon the Muscoot Reservoir. As mentioned, the 23% reduction in phosphorus loads calculated in the Meadows' SPPP was not contradicted by any evidence in the record. The petitioners' effort to challenge the SPPP through arguments advanced by their counsel found no traction in the Court of Appeals. Similarly, arguments raised by the Attorney General's Office that purported to invoke technical materials outside the record were implicitly rejected by the Court without comment.

32. *Id.* at 234–35 (footnote and citation omitted).

33. *See* 6 N.Y.C.R.R. §§ 617.3(d), (e), 617.14(c).

34. *Riverkeeper,* 9 N.Y.3d at 235 (quoting 6 N.Y.C.R.R. § 617.3(h)).

35. *Id.*

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We are grateful to Chief Judge Kaye for her caring and creative vision, commitment, and continuing support of the parent education program, a much needed resource for the parents and children of this state.

The New York State Parent Education and Awareness Program

By Evelyn Frazee and Susan L. Pollet

The court system is often criticized as being insensitive, overly complex, costly, and slow – particularly in the areas of matrimonial and family law. While the litigation process can be polarizing, for many the courts present a last chance for positive change, redemption, and a better life. The New York State Parent Education and Awareness Program (PEAP or the "Program") is a court initiative offering research-based information that can provide help and hope to parents, and their children, who are embroiled in custody litigation.

The divorce or separation of parents can be a traumatic experience for children, one that affects them not only at the outset, but for life. The PEAP is designed to educate divorcing or separating parents about the impact of their breakup on their children. The primary goal is to teach parents ways they can reduce the stress of family changes and protect their children from the negative effects of ongoing parental conflict, in order to help foster and promote their children's healthy adjustment and development.

Background

You do not have to know someone who is undergoing a separation, divorce or other child-centered litigation nor do you have to be personally involved in such an experience to recognize that putting children in the middle of parental conflict can be detrimental to their health and well-being. For years studies have documented an increased risk of adverse outcomes for children from such conflict, including poor psychological adjustment, greater incidence of behavioral problems, higher utilization of mental health services as adults, and higher rates of disruption in their own marriages, to name but a few.[1]

Many parents have not been educated about these issues, however, and some, despite their awareness, are unable to change their behavior because they do not have the tools to do so. Experience has shown that if parents are educated to better understand the psychological and legal process they are undergoing, the breakup and its aftermath can be less traumatic for both parents and children.[2] Indeed, some experts have advocated requiring

parents to attend parent education, describing it as "mandating an opportunity," with the goal of "empowering" parents with information and resource options.[3]

The recognition that such intervention could produce better outcomes for children affected by divorce led to the first court-affiliated parent education program in 1978. By 2001, "thirty-five states had established them by legislation or court rule."[4] Institutionalized parent education now exists in all but six states in the United States.[5] While the benefits of parent education inure to the parents and their children, these programs also recognize that divorce and separation may have "social and economic costs for society as well as for the individual."[6]

New York State joined the movement to provide parent education on a statewide basis in 2001, under the direction of its Chief Judge, Judith S. Kaye. In her 2001 State of the Judiciary address, Chief Judge Kaye announced the initiation of the New York State PEAP and the appointment of a 19-member, multi-disciplinary Advisory Board to recommend standards, guidelines and requirements for establishing and conducting parent education in New York State. The Program was implemented by a 2001 Administrative Order of former Chief Administrative Judge Jonathan Lippman.[7] In October 2003, the Advisory Board released its report and recommendations for uniform standards and procedures for the certification and monitoring of parent education programs. The Board's recommendations, which were adopted, set minimum standards to ensure that program content and administration reflect current research and best practices, including a child-centered approach and protocols for the safety of victims of domestic violence. The order was amended in 2004.[8]

By Court Rule of July 24, 2006, Family Court Judges and Supreme Court Matrimonial Justices were empowered to order, in their discretion, parents of children under the age of 18 years who are involved in custody, visitation, divorce, separation, annulment or child support court actions or proceedings, to attend PEAP-certified parent education programs. The Court Rule was subsequently revised on May 15, 2007, to clarify that judges cannot order parents to attend parent education where there is any history, or specific allegations or pleadings, of domestic violence or other abuse involving the parents or their children.

Features of the Program

Unlike many states, New York's parent education program is provided for separating parents who may not have been married as well as for divorcing parents. In addition to being ordered or referred to parent education by the courts, parents are free to self-refer and attend voluntarily; they may be referred to parent education by their attorneys, mental health professionals or other entities and individuals with an interest in them and their children.

In order to accept court referrals, a parent education provider must be certified. The certification process is carried out under the direction and oversight of the Program's counsel and director. First, a provider must submit a written application. After the application is satisfactorily reviewed, a full class cycle is observed and critiqued to ensure that the applicant's program complies with both the administrative protocols and curriculum requirements. Certification is for a three-year period; programs are subject to review at the end of that period, to qualify for re-certification. To promote best practices, annual training for program provider administrators and presenters is also conducted.

The Program recognizes the unique, and often dangerous, circumstances of domestic violence victims and has undertaken several measures, both in the administration and presentation of parent education, to foster safety and the dissemination of appropriate information. A child's parents are not permitted to attend the same class session. Enrollment information is confidential and will not be revealed. Providers are required to have a safety plan and security measures. In addition to the Court Rule prohibiting courts from ordering parents to parent education when domestic violence is present, victims of domestic violence are able to "opt out" of attendance. A domestic violence

victim who opts out is provided with the *Parent's Handbook* distributed in class and a certificate that can serve to counter any inappropriate attempts by the other parent to use parent education attendance as an issue in litigation.

The curriculum is sensitive to domestic violence and the possibility of inadvertently sending a domestic violence victim messages that could be harmful or compromise the victim's safety. Thus programs are required to teach parallel parenting – how to parent with an abusive former partner or spouse or when there is high conflict – as well as cooperative parenting. The curriculum is "skills based"; it incorporates skills for conflict management, such as adopting a more businesslike approach, and disengaging from inflammatory verbal exchanges and interactions with the children's other parent. This provides parents with exposure to behaviors that can alter often entrenched and dysfunctional ways of relating to each other and gives them the opportunity to practice these techniques.

The curriculum is sensitive to domestic violence and the possibility of inadvertently sending a domestic violence victim messages that could be harmful or compromise the victim's safety.

The required curriculum addresses parenting issues and the legal process.[9] In the Parenting & Child Well-Being portion of the curriculum, four broad topics are covered: creating and maintaining supportive parent-child relationships; providing a stable, supportive home environment; maintaining healthy parental functioning and psychological well-being; and protecting children from ongoing conflict between parents (this includes a discussion of parallel and cooperative parenting).

The curriculum also includes a short overview of the legal process. It covers legal terminology in the area of custody and visitation, the various options for resolving disagreements, information about how the court makes a custody/visitation decision, the importance of the timely payment of child support, and the necessity of obeying court orders.

Implementation and Current Status

The PEAP program began in July 2005. There are 50 certified providers that cover all 62 counties in New York State; classes are offered at 93 sites. As of October 2007, approximately 7,957 parents have attended parent education classes since the Program's launch. These figures also reveal increasing awareness and utilization of the Program: there were 575 attendees from July through December 2005; a total of 3,623 parents attended in 2006; in 2007, as of October 30, there were approximately 4,334 attendees. It is anticipated that with continued outreach efforts these numbers will keep growing.

PEAP offers ongoing assistance to help foster the efficient operation of existing programs and to encourage new providers to establish programs so quality parent education is available to all parents in the state. A Web site[10] is maintained as a resource for parents, providers and the courts. The public portion of the Web site sets forth the protocols, procedures and requirements of the Program as well as an updated list of certified providers. Providers and the courts can obtain additional information and assistance in a password-protected portion of the Web site.

To ensure the delivery of appropriate information in a way that meets best practices, PEAP has obtained feedback via surveys of judges, judicial officers, and court clerks; parents' viewpoints and comments are obtained from a post-class survey administered to all attendees. Valuable insight is gleaned from the required reports filed by providers. Input is also solicited from interested individuals and groups, such as lawyers and domestic violence advocates. The information received from these and other resources has been applied to make changes and improvements to the Program.

Does Parent Education Make a Difference?

According to a study of the A.C.T. – For the Children (**A**ssisting **C**hildren through **T**ransition) program, which served as a model for the PEAP curriculum, "[p]arents reported overwhelmingly that they (a) found the program helpful, (b) have increased their understanding of their children's divorce-related needs and how to meet them, and (c) were planning to put into practice program principles and skills."[11] A follow-up study was conducted via telephone interviews with 85 randomly selected parents to assess outcomes at six months and one year after participating in the A.C.T. program.[12] The key results included "statistically significant decreases in conflict between parents (especially on child-related issues), increases in effective parenting practices, decreases in the need or desire to litigate and, more importantly, increases in children's healthy adjustment."[13] While much of the data upon which the survey relies is subjective and anecdotal, it does indicate that parents are finding value in

that program and their children are finding some relief as a result of their parents' heightened awareness of risk factors and the measures that can be undertaken to reduce them.

Similar sentiments are echoed by the majority of parents who attend the PEAP's certified programs. Parents repeatedly express gratitude for the information they receive, and the form in which they receive it. Comments frequently heard from parents who have attended parent education include, "I wish I had taken this class sooner – I had no idea that what I was doing could be harming my child, I would not have done things in the same way" or "All divorcing or separating parents should be required to take this course." This translates to children making healthier adjustments – one of the key outcomes of the Program.

Conclusion

The Parent Education and Awareness Program is a valuable resource that can reduce the polarization often engendered by litigation. It provides much-needed education and support for separating or divorcing parents, and in turn, helps make their children's lives more liveable. While still relatively new to New York State, a formal system of parent education is becoming part of the fabric of divorce or separation when minor children are involved. As a service to clients engaged in divorce, separation or custody and visitation proceedings, practitioners should encourage parent education attendance. ■

1. *See* Joanne Pedro-Carroll & Evelyn Frazee, *Program Can Help Protect Children in Break-ups*, N.Y.L.J., Jan. 4, 2001, p. 1, col. 1; Brenda L. Bacon & Brad McKenzie, *Parent Education After Separation/Divorce – Impact of the Level of Parental Conflict on Outcomes*, 42 Fam. Ct. Rev. 85 (Jan. 2004).

2. *See* Stephen W. Schlissel, *Board Developing Standards on Parent Education Programs*," N.Y.L.J., Oct. 7, 2003, p. 16, col. 1.

3. Virginia Petersen & Susan B. Steinman, *Helping Children Succeed After Divorce. A Court-Mandated Educational Program for Divorcing Parents*, 32 Fam. & Conciliation Cts. Rev. 27, 28 (Jan. 1994).

4. Nancy Ver Steegh, *Book Review: The Unfinished Business of Modern Court Reform: Reflections on Children, Courts, and Custody by Andrew I. Schepard*, 38 Fam. L. Q. 449, 460–461 (Summer 2004).

5. *See* October 2003 *Report of the Advisory Board*, Appendix A.

6. *Id.*

7. Admin. Order 145/01 (Feb. 1, 2001).

8. Admin. Order 208/04 (May 12, 2004).

9. Curriculum content is set forth in detail in the October 2003 *Report of the Advisory Board* (pp. 23–48) and on the Program's Web site, address below.

10. The Program Web site address is <www.nycourts.gov/ip/parent-ed>.

11. October 2003 *Report of the Advisory Board* at 387, 388.

12. JoAnne Pedro-Carroll, Ph.D. & Evelyn Frazee, J.S.C., *A.C.T. – For the Children: Helping Parents Foster Resilience and Protect Children from Conflict in the Aftermath of a Break-up*, N.Y.L.J., Jan. 4, 2001, col. 1, p. 1.

13. *Id.*

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2007 Insurance Law Update

Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part II

By Jonathan A. Dachs

This article is the second of two that survey general issues concerning coverage and claims; it will report on developments in uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law addressed by the courts in 2007, as well as other issues more specific to these separate categories of coverage.

Conflicts of Law

In *Progressive Ins. Co. v. Ramnarain*,[1] the respondent (claimant) was a New York resident. At the time of the accident, he was operating a vehicle registered in New York and insured by a New York policy. The accident took place in Pennsylvania and the offending vehicle was registered in Pennsylvania. The rental contract for the adverse vehicle was entered into in Pennsylvania and the insurance policy on that vehicle was contracted in Pennsylvania. Under New York law (applicable at the time), vicarious liability attached to the owner of a vehicle negligently operated in New York.

Under Pennsylvania law, however, vicarious liability does not attach because to impose liability on a person for an injury resulting from the operation of a motor vehicle, he or she must either be in the actual operation or control thereof, or stand in the relation of master or principal to the person whose act occasions the injury (unless liability is otherwise imposed by statute). Further, under Pennsylvania law, a lessor of a motor vehicle is generally not liable for the negligence of a lessee while operating the vehicle, unless it can be demonstrated that the lessor was negligent in leasing the vehicle to a person whom the lessor knew to be incompetent. Since New York and Pennsylvania laws conflicted on the issue of vicarious liability, the court was forced to engage in a choice of law analysis.

The court applied the analysis set forth in *Neumeier v. Kuehner*,[2] *i.e.*, the rule that "the conduct of a domiciliary within their own state which does not cast them liable, should not result in liability by reason that liability would be imposed under the tort law of the state of the victim's domicile" and that "[i]f the parties are domiciled in different states with conflicting laws, the law applied will usually be determined by the situs of the tort, unless displacing it will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." The court held that Pennsylvania law applied and determined that vicarious liability could not be imposed upon the owner of the offending vehicle, and thus its insurer was not obligated to provide indemnification.

In *Jones v. AIG Ins. Co.*,[3] the defendant issued a Florida insurance policy covering a vehicle that was registered in Florida to the tortfeasor, who was purportedly a Florida resident. The plaintiff, who was injured in an accident in New York, submitted a claim for no-fault benefits to the defendant, which claim was denied on the ground that the policy was revoked for material misrepresentation – *i.e.*, that the insured actually resided and garaged his

vehicle in New York. New York law does not allow for retroactive cancellation. Insofar as Florida law allows for the retroactive cancellation of an insurance policy where a material misrepresentation is contained within the insurance application, there was a clear conflict between the laws of Florida and New York that the court had to resolve. To do so, the court applied the conflict of law rules relevant to contracts, *i.e.*, the "center of gravity" or "grouping of contacts" inquiry, to determine which state had the most significant contacts to the dispute. This analysis focused on the place of contracting, the place of negotiation and performance of the contract, the location of the subject matter of the contract and the domicile or place of business of the contracting parties. The court concluded that Florida law should apply.

The court explained,

> Defendant issued its insurance policy to [the insured] in Florida, who purportedly was a resident of Florida, for a vehicle registered in Florida, which terms incorporated Florida law. The only connection between the policy and New York is that [the insured] was driving the vehicle in New York at the time of the accident.[4]

Moreover, Florida's significant contacts with the subject contract and legitimate governmental interest in protecting its honest policyholders from bearing the burden of paying claims incurred by dishonest policyholders outweighed New York's governmental interest in protecting innocent third parties from being deprived of insurance coverage. This was especially true since New York statutes provide the means to ensure compensation to persons injured, due to the fault of uninsured motorists within the state, by requiring New York policyholders to purchase uninsured motorist coverage,[5] and by establishing and providing insurance through the Motor Vehicle Accident Indemnification Corp. (MVAIC).[6]

In *Atlantic Mutual Ins. Co. v. Goglia*,[7] the court applied the New Jersey law governing the definition of a hit-and-run, which did not require physical contact, rather than New York's definition, which required physical contact. The accident at issue occurred in New Jersey when a New York resident was caused to swerve to avoid a vehicle that came to a short stop in front of him and struck a utility pole, which then fell across his vehicle and trapped him inside it. Relying upon Ins. Law § 5103(e), which provides that every automobile insurance policy procured in New York must provide the minimum uninsured motorist coverage mandated by the law of another state when the insured automobile is involved in an accident in that state, the court held that "the statutory and regulatory scheme contemplates that the New Jersey requirements for uninsured motorists coverage should be incorporated into [this] New York contract."[8]

Worth Construction Co. Inc. v. Admiral Ins. Co.[9] involved the issue of coverage for a construction accident. The court used the "center of gravity" analysis to conclude that the law of New York – where the accident occurred and the underlying personal injury action was pending, rather than the law of New Jersey, where the subject policy was issued – was applicable. Thus, the court held that the additional insured's notice of the accident almost 15 months after learning of it was untimely as a matter of law, and did not apply New Jersey's prejudice rule, which would have resulted in a contrary finding, unless the insurer could demonstrate prejudice.

Statute of Limitations

In *Preferred Mutual Ins. Co. v. Rand*,[10] the court held that "[c]laims made under the uninsured motorist endorsement of automobile insurance policies are governed by the six-year statute of limitations applicable to contract actions. [Furthermore, t]he claim accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured."[11] Here, the six-year statute of limitations began to run when it was determined that the vehicle was stolen. In *One Beacon Ins. Co. v. Espinoza*,[12] the court noted that the demand for arbitration was not barred by the statute of limitations since it was made within six years after the accident took place.

Uninsured Motorist Issue: Self-Insurance

The court in *ELRAC, Inc. v. Suero* stated that "[f]rom an injured claimant's perspective, '[t]he right to obtain uninsured motorist protection from a self-insurer is no less than the corresponding right under a policy issued by an insurer.'"[13] Further, the court held that a claim for uninsured motorist benefits against a self-insured vehicle owner, while statutorily mandated, remains contractual rather than statutory in nature and is, thus, subject to a six-year statute of limitations.

Insurance Law § 3420(d) speaks to an insurer's duty to provide prompt written notice of denial or disclaimer. A vehicle is considered "uninsured" where the offending vehicle was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage. In *Topliffe v. U.S. Art Co.*[14] and *Only Natural, Inc. v. Realm National Ins. Co.*,[15] the court held that Ins. Law § 3420(d) does not apply to claims that do not involve "death or bodily injury."

In *Schulman v. Indian Harbor Ins. Co.*,[16] the court reaffirmed that

> Insurance Law § 3420(d) requires an insurer to provide a written disclaimer "as soon as is reasonably possible." The reasonableness of the delay [in disclaiming] is measured from the time when the insurer "has sufficient knowledge of facts entitling it to disclaim, or knows it will disclaim coverage." The insurer bears the burden of justifying any delay.

> [Furthermore, w]hile Insurance Law § 3420(d) speaks only of giving notice "as soon as is reasonably possible," investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer.[17]

Based upon the record before it, the *Schulman* court concluded that the defendant failed to establish satisfactorily that the delay in disclaiming was occasioned by its need to conduct a thorough and diligent investigation. The complaint in the underlying personal injury action, and the circumstances surrounding the initial cursory inquiry by the defendant's claim analyst, provided sufficient criteria that the insured may have breached the applicable notice requirements or that a more thorough investigation would have revealed whether that was so. The disclaimer was issued approximately 10 months after the insurer acknowledged the untimely notice of claim, and almost five months after it learned that the insured may have been untruthful as to his knowledge of the claim and commenced investigation into the facts. Thus, the disclaimer was held to be untimely.

On the other hand, in *Tully Construction Co. v. TIG Ins. Co.*,[18] the court observed that

> it is the insurer's responsibility to explain its delay in giving written notice of disclaimer, and an unsatisfactory explanation will render the delay unreasonable as a matter of law. However, an insurer's delay in notifying the insured of a disclaimer may be excused when the insurer conducts an "investigation into issues affecting [its] decision whether to disclaim coverage." In that case, the burden is on the insurer to demonstrate that its delay was reasonably related to its completion of a thorough and diligent investigation.[19]

In *Tully Construction*, the court held that a delay of 42 days was not unreasonable where the insurer conducted a thorough and diligent investigation into whether it had grounds for a disclaimer based on late notice. The facts and circumstances of this case presented an issue that warranted further investigation.

In *Hermitage Ins. Co. v. Arm-ing, Inc.*,[20] the court held that a delay of two months, occasioned by the insurer's need to investigate the claim to determine when its insured received notice of the accident, was reasonable under the circumstances. In *Ace Packing Co., Inc. v. Campbell Solberg Assocs., Inc.*,[21] the court held that where the insurer, upon receipt of late notice, immediately retained an investigator to investigate the claim and the issue of late notice (*i.e.*, when the plaintiff first learned of the accident and/or lawsuit, whether the plaintiff would claim that prior notice was given), the adjuster sought to interview the plaintiff about those issues, but the plaintiff refused to cooperate with the adjuster for 30 days, and the insurer disclaimed eight days after it received the pertinent information from the plaintiff, the court held that the 38-day delay in disclaiming was reasonable.

Where the initial notice to the insurer did not make it readily apparent that the claim was being asserted under the claimant's father's policy, rather than his own policy, the court, in *New York Central Mutual Fire Ins. Co. v. Gordon*,[22] held that notice was insufficient to commence the time running on the insurer's disclaimer, based upon an exclusion from coverage under the father's policy.[23] In *Massot v. Utica First Ins. Co.*,[24] the court held that a disclaimer was sufficiently specific where it identified the applicable policy exclusion and set forth the factual basis for the insurer's position that the claim fell within that exclusion. It is well established that

> [a]n insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation must demonstrate that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation; and that the attitude of the insured, after his [or her] cooperation was sought, was one of "willful and avowed obstruction."[25]

The court upheld the insurer's lack of cooperation defense in *New South Ins. Co./GMAC Ins. v. Krum*,[26] where the evidence established that the insurer placed unsuccessful calls to the insured at his home and work numbers, sent three certified and regular-mail letters to his last-known address, personally visited his home on two occasions and left a message with his mother to stress the importance of his cooperation, but the insured never responded.[27]

Similarly, in *Continental Casualty Co. v. Stradford*,[28] the insured ignored a series of written correspondence and telephone calls from its insurer's representatives and from defense counsel, repeatedly refused to provide requested documents, records and evidence, and unreasonably refused to consent to a recommended settlement based upon adverse findings of experts. Notwithstanding his own request for new counsel, he refused to execute stipulations consenting to a change of attorney. He also failed to appear for scheduled depositions and meetings. Two letters sent to him, advising that he risked a disclaimer of coverage if he continued to breach the cooperation clause of his policy, were returned as "unclaimed."

In two other claims, Continental obtained orders in a declaratory judgment action relieving it of its duty to defend and indemnify as a result of the insured's failure to cooperate in the defense of those claims. Under these circumstances, the court held that the insurer carried its burden to establish that it acted diligently in seeking to bring about the insured's cooperation; its efforts were reasonably calculated to obtain the insured's cooperation;

and the attitude of the insured after his cooperation was sought was one of "willful and avowed obstruction."[29] The court further held, however, that the insurer's disclaimer for lack of cooperation was untimely. The court reasoned that the lapse of time, in excess of two months from the date it was readily apparent that the insurer's efforts to obtain the insured's cooperation were fruitless, until the date it sent its disclaimer, was, without explanation, not "as soon as is reasonably possible" within the contemplation of Ins. Law § 3420(d). The court specifically rejected the excuse that the insurer "was consulting with claims counsel to determine whether the six-year-long, well-documented pattern of willful non-cooperation warranted a disclaimer of coverage."[30]

One of the investigators stated that the insured's principal avoided all attempts by the investigator to contact him for approximately one month.

In *Preferred Mutual Ins. Co. v. SAV Carpentry, Inc.*,[31] the insurer presented evidence that it sent the insured numerous letters regarding its discovery obligations and hired two separate investigators to locate and interview the insured's principal. One of the investigators stated that the insured's principal avoided all attempts by the investigator to contact him for approximately one month. The court held that this demonstrated that the insurer diligently sought the insured's cooperation by means reasonably calculated to obtain such cooperation, and that the insured's non-cooperation consisted of willful and avowed obstruction. Therefore, the court upheld the non-cooperation defense.

On the other hand, in *State Farm Mutual Automobile Ins. Co. v. Campbell*,[32] the court held that the insurer failed to establish that it was sufficiently diligent or that its efforts were reasonably calculated to bring about its insured's cooperation. In addition, the non-action of the insured did not constitute "'willful and avowed obstruction.'"[33]

In *Wood v. Nationwide Mut. Ins. Co.*, the court observed that "mere inaction by an insured does not by itself justify a disclaimer of coverage on the ground of lack of cooperation."[34] Thus, where the insurer offered no explanation for the failure of its field investigator to travel to the plaintiff's house, for the failure of its private investigator to obtain a statement from the plaintiff or for its failure to attempt to obtain a transcript of the hearing before the Workers' Compensation Board, the court concluded that the insurer was not entitled to invoke a non-cooperation defense. In addition, the court held that the insurer's 19-month delay in disclaiming coverage was unreasonable as a matter of law.

In *Maldonado v. C.L.-M.I. Properties, Inc.*, the court held that "where an injured party fails to exercise the independent right to notify an insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well."[35] In that case, there was no evidence that the injured plaintiff ever gave notice to the insurer, and the insurer's disclaimer also specified the plaintiff's failure to provide timely notice as a separate ground for disclaiming coverage.

However, in *Schlott v. Transcontinental Ins. Co.*,[36] notice of the accident, claim and lawsuit was (untimely) provided to the insurance company first – and only – by the injured parties, as opposed to the insured. The insurer's disclaimer letter was addressed to the insured with a "cc" to the injured parties and only mentioned the insured's failure to provide any notice, but did not separately mention the injured party's late notice. This is notwithstanding numerous prior decisions, including the Court of Appeals's decision in *General Accident Ins. Group v. Cirucci*[37] and several decisions of the Appellate Division, including the First Department.[38] All of these consistently held that where notice is provided first (or only) by or on behalf of the injured party, pursuant to his or her independent right to give notice pursuant to Ins. Law § 3420(a)(3), the notice of disclaimer must address with specificity the grounds for disclaiming as to *both* the injured party *and* the insured. In *Schlott*, the First Department concluded that Transcontinental "complied with the mandate of section 3420(d) when it gave notice of disclaimer to the insured and sent a copy to the injured party."[39]

Without citing to any case law and without attempting to distinguish the above-cited precedents, or the Pattern Jury Charge based thereon (NYPJI 4:79), which states, "[a] disclaimer is ineffective as to the injured person where it relies solely on the insured's failure to give timely notice and does not refer to the injured party's allegedly untimely notice," the First Department in *Schlott* held that a disclaimer based solely upon the insured's late notice will not be effective against the injured party. The court concluded, "The fact that Defendant omitted from that notice any specific reference to the injured party's own failure to afford the insurer timely notice did not prejudice Plaintiffs."[40] (It is unclear where, how and/or why the court obtained the impression that the plaintiffs were required to demonstrate prejudice as a result of the defendant's improper disclaimer under the facts and circumstances of this case, insofar as no case had ever previously so held in the context of a case governed by Ins. Law § 3420(d).)

In *GEICO Co. v. Wingo*,[41] the court held that where neither the insured nor the injured claimants provided

the insurer with notice of the commencement of litigation by providing a copy of the papers served in the lawsuit, there was no need to timely disclaim on that ground until after the insurer first learned of the action, upon receipt of a copy of a motion for default sent to it by the injured parties. In *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*,[42] the court held that "since there was no coverage in the first instance, there was no requirement for [the insurer] to provide a timely disclaimer."[43] The Second Department, in *Auerbach v. Otsego Mutual Fire Ins. Co.*,[44] reiterated the general rule that an insurer is not entitled to insist upon strict adherence to the terms of its policy after it repudiates liability by disclaiming coverage.

In *New York Central Mutual Fire Ins. Co. v. Hildreth*,[45] the court restated the well-established rule that a reservation of rights letter is not a disclaimer. Still, a reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured. In that case, the court held that the carrier did, in fact, waive the right to disclaim by continuing to defend the insured for more than one year after it learned of the grounds for disclaimer, *i.e.*, settlement of the underlying action without consent. In *Progressive Northeastern Ins. Co. v. Heath*,[46] the fact that the insurer paid no-fault benefits did not establish that it waived the right to disclaim coverage on a UM claim (on the basis of a late notice defense).

A reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured.

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to cancel an owner's liability insurance policy, an insurer must strictly comply with the detailed and complex statutes, rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, *e.g.*, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan and/or was paid for under premium financing contract.

In *Auto One Ins. Co. v. Santos*,[47] the court held that the 12-point type requirement be used in cancellation notices is "unambiguous and absolute," thereby indicating that there must be strict compliance with that statutory condition. In *Halycon Ins. Co. v. Fox*,[48] the court credited the testimony of the Assistant Vice President of Claims of a company that handled claims on behalf of the insurer, in which he described the manner in which his company stored and printed its electronic records, and gave a detailed explanation as to why the point size on the version of the notice of cancellation initially submitted to the court differed from the version of the notice of cancellation sent to the insured, which did, in fact, comply with the statutory point size requirements. The fact that the witness did not personally print the replica of the notice of cancellation went to the weight to be accorded to the replica, not its admissibility.

In *Government Employees Ins. Co. v. Lopez*,[49] the court held that a premium finance agency that sought to cancel an assigned risk policy because of the insured's failure to make required payments under the premium finance agreement did *not* have to advise the insured of a particular "right of review" in order for the cancellation to be valid.

> While Banking Law § 576(1)(c) and (d) sets forth detailed requirements for the form and content of the cancellation notice that a premium finance company must send to the insured, these provisions do not require the agency to advise the insured that he or she has the right to have the NYAIP's Governing Committee review the cancellation of the assigned risk automobile insurance policy.[50]

In *Thibeault v. Travelers Ins. Co.*,[51] the court held that the insurer met its initial burden of proving that its policy had been canceled by describing the office practice it used to ensure that notices of cancellation are properly mailed. This raised a presumption that the insureds had received the notice, which shifted the burden to the insureds to rebut the presumption. While noting that "an insured's denial of receipt, standing alone, is insufficient to rebut the presumption,"[52] the court noted that the insureds submitted additional evidence that there was an omission in the address as stated on the policy application and used by the insurer, *i.e.*, omitting the name of the insured's business under which the post office box was registered. The court found that this prevented delivery of the notice, which was sufficient to rebut the presumption and raise an issue of fact as to delivery of the notice.

In *Progressive Classic Ins. Co. v. Kitchen*,[53] the court held that in the absence of proof that the insurer filed a copy of its notice of cancellation with the Department of Motor Vehicles within 30 days of the effective date of the cancellation, the cancellation was ineffective as against persons other than the named insured and members of the named insured's household. In *Jones v. AIG Ins. Co.*,[54] the court noted that New York law does not allow for retroactive cancellation of motor vehicle liability insurance polices.

Stolen Vehicle

Automobile insurance policies generally exclude coverage for damages caused by drivers of stolen vehicles and/or drivers operating without the permission or consent of the owner. In such situations, the vehicle at issue is considered "uninsured" and the injured claimant

will be entitled to make an uninsured motorist claim. In *McDonald v. Rose*,[55] the court determined, as a matter of law, that the offending vehicle was stolen, based upon documentary evidence consisting of a theft report from the date of the accident, an affidavit of theft filed with the insurer, the accident report indicating that the accident occurred 11 days after the vehicle was reported stolen and that the driver fled the scene, and the affidavit of the insured's husband, who had borrowed the vehicle on the day it was stolen and asserted facts relating to the theft.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant. "The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable." In *Kobeck v. MVAIC*,[56] the court observed that the requisite physical contact must result from a collision and that "[t]he physical contact requirement is intended to prevent against fraudulent claims, hit-and-run claims being by their nature 'easy to allege and difficult to disprove.'"[57]

Another requirement for a valid "hit-and-run" claim is a report of the accident within 24 hours or as soon as reasonably possible to a police officer, peace or judicial officer, or to the Commissioner of Motor Vehicles. In *Caceres v. MVAIC*, the court held that where a question exists as to whether an accident report was timely filed pursuant to Ins. Law § 5208(2)(A) "and the issue cannot be resolved without a determination of the credibility of [the claimant]," an evidentiary hearing is appropriate.[58]

In *Rojas v. MVAIC*,[59] the claimant submitted an affidavit, stating that he was injured when struck by a hit-and-run vehicle, in support of his application for leave to sue MVAIC. However, MVAIC submitted an FDNY Ambulance Call Report in which the claimant was reported to have stated that he was injured while defending himself and had punched a man. These conflicting accounts were held to create an issue of fact to be resolved at a hearing.

Yet another requirement for a valid hit-and-run claim is the filing of a statement under oath that the claimant has a cause of action against a person whose identity is unascertainable. In *Eveready Ins. Co. v. Mesic*,[60] the court held that the claimant's failure to file a sworn statement with the insurer after the alleged hit-and-run accident vitiated coverage. The fact that the insurer received some notice of the accident by way of an application for no-fault benefits did not negate the breach of the policy requirement of a sworn statement as to the hit-and-run.[61]

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent." Under that endorsement, and whether or not they are covered by a Security Fund, any and all insolvencies give rise to a valid SUM claim.[62] In cases involving mandatory UM coverage, as opposed to SUM coverage, only insolvencies that are not covered by a Security Fund give rise to a valid UM claim.

In *AIG Claims Services, Inc. v. Bobak*,[63] although the offending vehicle's insurer became insolvent, there was evidence that another insurer had issued an excess policy on the offending vehicle and the vehicle owner may have had additional coverage. This led the claimant to file an SUM claim with his own insurer, and thus the arbitration was stayed to determine the issues of insurance coverage.

In *Progressive Ins. Co. v. Elias*,[64] the issue before the court was whether a letter from the New York State Liquidation Bureau advising a claimant that the PMV Fund (Public Motor Vehicle Liability Security Fund) was "financially strained" constitutes a denial of coverage within the meaning of Ins. Law § 3420(f)(1). There was a hearing at which the parties, including the Superintendent of Insurance, relied upon their evidentiary submissions, which included a copy of the Liquidation Bureau's letter, and an affidavit from the Supervisor of the PMV Fund, with copies of the Fund's income and disbursement reports for the pertinent period. At the hearing the parties recited the history of the PMV Fund and the pre- and post-Regulation 35-D case law on the issue of insolvency and UM coverage. Justice Jaime A. Rios noted that insofar as the insured did not purchase SUM coverage, but only mandatory, basic UM coverage and the tortfeasor's insolvent insurer paid into the PMV Fund, the claimant was required to seek payment from the Fund rather than his or her own insurer, unless the insured could establish that the Fund "[was] denying them coverage based upon its inability to pay any allowed claims."[65]

The court went on to hold that

> notwithstanding the "financial strain" language in the letter of June 27, 2005, the letter from the Liquidation Bureau/PMV Fund without more, does not demonstrate an inability of the PMV Fund to pay allowed claims. To the contrary, the letter confirms that the claim is a covered claim and advises the Reliance insured . . . of a certain set of procedures to follow in the event a claim is pursued against him.[66]

Indeed, the court noted that the Fund supervisor's affidavit "sets forth that all allowed claims applied for payment out of the PMV Fund by the New York State Supreme Court are processed and paid by the Liquidation Bureau in order of receipt." In addition, based upon that affidavit, the court held, "[I]t appears that as of December 31, 2006, the PMV fund had a balance of $113,352.82, unpaid

claim obligations of $3,464,353.34, and the claims next in line to be paid by the PMV fund were received by the Bureau on February 1, 2006."[67]

The court further noted, "Pursuant to Insurance Law § 7606, insurers issuing insurance policies or surety bonds described in VTL § 370 shall continue to make payments of three percent of all net direct written premiums of such policies to the PMV fund on a quarterly basis until the net value of the PMV fund equals fifteen percent of the outstanding claim reserves of all authorized insurers contributing to the PMV fund." The court clearly stated that the PMV Fund did not have sufficient funds to pay all pending claims at once. However, the Fund supervisor's affidavit and annexed financial documents demonstrated that "despite some delay, allowed claims are being paid." Thus, since the evidence failed to demonstrate that the claimants had been denied compensation from the PMV Fund due to its inability to pay, they were "unable to establish that the [tortfeasor's] vehicle was an uninsured motor vehicle pursuant to Insurance Law § 3420(f)(1) and, thus, are precluded from seeking UM arbitration from Progressive."[68]

Actions Against MVAIC

Insurance Law § 5218 provides as follows:

> (c) In any action in which the plaintiff is a qualified person, for the death of, or bodily injury to, any person arising out of the ownership, maintenance or use of a motor vehicle in this state and judgment is rendered for the defendant on the sole ground that the death or personal injury was occasioned by a motor vehicle: (i) the identity of which, and of the owner and operator of which, has not been established, or (ii) which was in the possession of some person other than the owner or his agent without the consent of the owner and the identity of the operator has not been established, that ground shall be stated in the judgment. The plaintiff, upon complying with paragraph one of subsection (a) of section five thousand two hundred eight of this article, may within three months from the date of the entry of the judgment make application to bring an action upon the cause against the corporation in the manner provided in this section.
>
> (d) In any action commenced in respect of the death or injury of any person arising out of the ownership, maintenance or use of a motor vehicle in this state the plaintiff shall be entitled to make the corporation a party defendant if the court has entered the order provided for in subsection (a) of this section.

In *Steele v. MVAIC*,[69] the court held that the three-month extension provided in Ins. Law § 5218(c) is not a limitations period but, rather, a savings clause. This clause is intended to provide qualified persons, who were unsuccessful in litigation in establishing that the putative owner or operator of a hit-and-run vehicle were actually involved in the accident, additional time to sue MVAIC in the event the applicable statute of limitations (*i.e.*, three years for personal injury actions (CPLR 214)) has run in the interim. In so holding, the court expressly disagreed with two decisions of the Second Department, which interpreted the three-month provision of § 5218(c) as a strict limitations period that supplants the applicable statute of limitations.[70]

The personal injury action in *Steele* was terminated by a stipulation of discontinuance rather than a judgment. Moreover, the court held that the claimant's application for leave to sue MVAIC, brought within three years after her reaching majority, and only after she had made all reasonable efforts to ascertain the identity of the owner and operator of the offending vehicle, was timely and properly made.

Underinsured Motorist Issues: Trigger of Coverage

In *GEICO v. Young*,[71] the court held that the tortfeasor's vehicle was not underinsured where the limits of the tortfeasor's bodily injury coverage and the limits of the claimant's bodily injury coverage were identical. The court reached this conclusion despite the fact that payments were made under the tortfeasor's policy to more than one claimant.

In *Allstate Ins. Co. v. Dawkins*,[72] the court relied on the Regulation 35-D SUM endorsement, which provides that an uninsured motor vehicle includes a vehicle for which there is bodily injury liability insurance coverage applicable at the time of the accident. However, in *Dawkins* the amount of the insurance coverage was reduced by payments to other persons injured in the accident, to an amount less than the bodily injury liability limits of the insured's policy. In this case, the court held that although the bodily injury limits of the tortfeasor's policy and the claimant's policy were the same, *i.e.*, $25,000/$50,000, and since only $12,500 in coverage remained under the tortfeasor's policy after paying claims of two other individuals, the offending vehicle qualified as "uninsured." Thus, the claimant had a valid SUM claim subject to the offset provisions of the policy.

Offset Provision

In *GEICO v. Young*, the court held that the offset or reduction in coverage provision of Condition 6 to the Regulation 35-D SUM endorsement was "not ambiguous and misleading." The court then held that GEICO properly offset the full $50,000 received by the claimants from the tortfeasor's insurer against the SUM limits under the GEICO policy, thereby precluding any recovery under the SUM endorsement. In *Hament v. State Farm Mutual Automobile Ins. Co.*,[73] the court held that payments received from both the underinsured driver and the vicariously liable owner of that vehicle were to be aggregated for purposes of reducing the SUM limits

under the "Maximum SUM Payments" provision of the policy.

Settlement Without Consent

In *New York City Transit Authority v. Williams*,[74] the court granted the Petition to Stay Arbitration on the basis of a release signed by the claimant. This was presumably accomplished without the consent of the Transit Authority, a self-insured party. ■

1. 15 Misc. 3d 897, 838 N.Y.S.2d 375 (Sup. Ct., Queens Co. 2007).
2. 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972).
3. 15 Misc. 3d 1123(A), 841 N.Y.S.2d 219 (Sup. Ct., Queens Co. 2007).
4. *Id.*
5. *See* N.Y. Insurance Law § 3420(f) ("Ins. Law").
6. *See* Ins. Law §§ 5201–5225.
7. 44 A.D.3d 558, 845 N.Y.S.2d 2 (1st Dep't 2007).
8. *Id.* at 560.
9. 40 A.D.3d 423, 836 N.Y.S.2d 155 (1st Dep't 2007), *rev'd on other grounds*, 2008 WL1899978 (2008).
10. 15 Misc. 3d 1112(A), 839 N.Y.S.2d 436 (Sup. Ct., Richmond Co. 2007).
11. *Id.* (citations omitted).
12. 37 A.D.3d 607, 830 N.Y.S.2d 287 (2d Dep't 2007).
13. 38 A.D.3d 544, 545, 831 N.Y.S.2d 475 (2d Dep't 2007) (citations omitted).
14. 40 A.D.3d 967, 838 N.Y.S.2d 571 (2d Dep't 2007).
15. 37 A.D.3d 436, 827 N.Y.S.2d 880 (2d Dep't 2007).
16. 40 A.D.3d 957, 836 N.Y.S.2d 682 (2d Dep't 2007).
17. *Id.* at 957–58 (citations omitted); *see also Wood v. Nationwide Mut. Ins. Co.*, 45 A.D.3d 1285, 845 N.Y.S.2d 641 (4th Dep't 2007).
18. 43 A.D.3d 1150, 842 N.Y.S.2d 528 (2d Dep't 2007).
19. *Id.* at 1152 (citations omitted).
20. 46 A.D.3d 620, 847 N.Y.S.2d 628 (2d Dep't 2007).
21. 41 A.D.3d 12, 835 N.Y.S.2d 32 (1st Dep't 2007).
22. 46 A.D.3d 1296, 850 N.Y.S.2d 653 (3d Dep't 2007).
23. *See also Temple Constr. Corp. v. Sirius Am. Ins. Co.*, 40 A.D.3d 1109, 837 N.Y.S.2d 689 (2d Dep't 2007) (8-day delay not untimely; 47-day delay unreasonable where record is silent as to when insurer completed its investigation).
24. 36 A.D.3d 499, 828 N.Y.S.2d 342 (1st Dep't 2007).
25. *Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793 (1967).
26. 39 A.D.3d 1110, 835 N.Y.S.2d 479 (3d Dep't 2007).
27. *See also Gen. Assurance Co. v. Garcia*, 37 A.D.3d 466, 830 N.Y.S.2d 237 (2d Dep't 2007).
28. 46 A.D.3d 598, 847 N.Y.S.2d 631 (2d Dep't 2007).
29. *Id.* at 600.
30. *Id.* at 601.
31. 44 A.D.3d 921, 844 N.Y.S.2d 363 (2d Dep't 2007).
32. 44 A.D.3d 1059, 845 N.Y.S.2d 88 (2d Dep't 2007).
33. *Id.* at 1059 (citation omitted); *see also N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 840 N.Y.S.2d 358 (2d Dep't 2007).
34. 45 A.D.3d 1285, 1287, 845 N.Y.S.2d 641 (4th Dep't 2007).
35. 39 A.D.3d 822, 823, 835 N.Y.S.2d 335 (2d Dep't 2007).
36. 41 A.D.3d 339, 838 N.Y.S.2d 559 (1st Dep't 2007), *leave to appeal denied*, 9 N.Y.3d 817, 851 N.Y.S.2d 126 (2008).
37. 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979).
38. *See Carter v. Mount Vernon Fire Ins. Co.*, 188 A.D.2d 430, 591 N.Y.S.2d 1022 (1st Dep't 1992); *Legion Ins. Co. v. Weiss*, 282 A.D.2d 576, 723 N.Y.S.2d 235 (2d Dep't 2001); *Vanegas v. Nationwide Mut. Fire Ins. Co.*, 282 A.D.2d 671, 723 N.Y.S.2d 516 (2d Dep't 2001); *State Farm Mut. Auto Ins. Co. v. Joseph*, 287 A.D.2d 724, 732 N.Y.S.2d 66 (2d Dep't 2001); *State Farm Mut. Auto Ins. Co. v. Cooper*, 303 A.D.2d 414, 756 N.Y.S.2d 87 (2d Dep't 2003); *GEICO v. Jones*, 6 A.D.3d 534, 774 N.Y.S.2d 435 (2d Dep't 2004); *Hereford Ins. Co. v. Mohammod*, 7 A.D.3d 490, 776 N.Y.S.2d 87 (2d Dep't 2004); *Halali v. Evanston Ins. Co.*, 8 A.D.3d 431, 779 N.Y.S.2d 119 (2d Dep't 2004) ; *Pawley Interior Contracting, Inc. v. Harleysville Ins. Co.*, 11 A.D.3d 595, 782 N.Y.S.2d 660 (2d Dep't 2004); *Vacca v. State Farm Ins. Cos.*, 15 A.D.3d 473, 790 N.Y.S.2d 177 (2d Dep't 205); *Shell v. Fireman's Fund Ins. Co.*, 17 A.D.3d 444, 793 N.Y.S.2d 110 (2d Dep't 2005); *Utica Mutual Ins. Co. v. Gath*, 265 A.D.2d 805, 695 N.Y.S.2d 839 (4th Dep't 1999).
39. 41 A.D.3d at 340.
40. *Id.*
41. 36 A.D.3d 908, 830 N.Y.S.2d 215 (2d Dep't 2007).
42. 36 A.D.3d 645, 828 N.Y.S.2d 479 (2d Dep't 2007).
43. *Id.* at 646; *see also Solomon v. USF&G Co.*, 43 AD3d 333, 841 NYS2d 39 (1st Dep't 2007).
44. 36 A.D.3d 840, 829 N.Y.S.2d 195 (2d Dep't 2007).
45. 40 A.D.3d 602, 835 N.Y.S.2d 409 (2d Dep't 2007).
46. 41 A.D.3d 1321, 837 N.Y.S.2d 476 (4th Dep't 2007).
47. 14 Misc. 3d 1220(A), 836 N.Y.S.2d 483 (Sup. Ct., Suffolk Co. 2007).
48. 44 A.D.3d 662, 843 N.Y.S.2d 165 (2d Dep't 2007).
49. 44 A.D.3d 256, 841 N.Y.S.2d 130 (2d Dep't 2007).
50. *See also AIU Ins. Co. v. Rodriguez*, 43 A.D.3d 1042, 842 N.Y.S.2d 502 (2d Dep't 2007).
51. 37 A.D.3d 1000, 830 N.Y.S.2d 387 (3d Dep't 2007).
52. *Id.* at 1001.
53. 46 A.D.3d 333, 850 N.Y.S.2d 1 (1st Dep't 2007).
54. 15 Misc. 3d 1123(A), 841 N.Y.S.2d 219 (Sup. Ct., Queens Co. 2007).
55. 37 A.D.3d 781, 830 N.Y.S.2d 765 (2d Dep't 2007).
56. 16 Misc. 3d 592, 836 N.Y.S.2d 864 (Sup. Ct., Madison Co. 2007).
57. *Id.* at 597 (citing *Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 328, 574 N.Y.S.2d 927 (1991)).
58. 37 A.D.3d 215, 215, 829 N.Y.S.2d 487 (1st Dep't 2007).
59. 37 A.D.3d 216, 830 N.Y.S.2d 65 (1st Dep't 2007).
60. 37 A.D.3d 602, 831 N.Y.S.2d 426 (2d Dep't 2007).
61. *See also Hanover Ins. Co. v. Etienne*, 46 A.D.3d 825, 848 N.Y.S.2d 312 (2d Dep't 2007).
62. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dep't 2002).
63. 39 A.D.3d 1178, 835 N.Y.S.2d 925 (4th Dep't 2007).
64. 15 Misc. 3d 1113(A), 839 N.Y.S.2d 436 (Sup. Ct., Queens Co. 2007).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*; *see also to same effect*, *Integon Nat'l Ins. Co. v. Cittadino*, Queens Co. Sup., Index No. 15836/04 (Rios, J.), decided March 28, 2007 (as of August 24, 2006, the PMV Fund had a balance of $2,361,054.07, unpaid claim obligations of $6,246,404.40, and the claims next in line to be paid from the PMV Fund were received by the Bureau on July 11, 2005); *Mejia v. Santos*, N.O.R., N.Y.L.J., Mar. 16, 2007, p. 24, col. 1 (Sup. Ct., Bronx Co. 2007) (notice stating that claim is covered by PMV Fund is neither a denial or disclaimer; the PMV Fund may ultimately be a source of recovery; current balance of $126,103.82 as of June 12, 2006, measured against claim obligations of $5,619,576.20, demonstrates Fund's financial strain, but Fund is a revolving fund, continually replenished; delay in payment does not equate with uncollectibility). *See* Norman H. Dachs & Jonathan A. Dachs, *The "Top 10" Insolvency and the PMV Fund*, N.Y.L.J., May 8, 2007, p. 3, col. 1.
69. 39 A.D.3d 78, 829 N.Y.S.2d 467 (1st Dep't 2007).
70. *See Gittens v. MVAIC*, 7 A.D.3d 528, 775 N.Y.S.2d 571 (2d Dep't 2004); *Kearse v. MVAIC*, 28 A.D.2d 703, 280 N.Y.S.2d 917 (2d Dep't 1967).
71. 39 A.D.3d 751, 835 N.Y.S.2d 283 (2d Dep't 2007).
72. 17 Misc. 3d 1117(A), 851 N.Y.S.2d 62 (Sup. Ct., Queens Co. 2007).
73. 2007 WL 143036 (S.D.N.Y. 2007).
74. 36 A.D.3d 706, 826 N.Y.S.2d 580 (2d Dep't 2007).

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Members of a Limited Liability Company May Now Commence Derivative Actions on Behalf of the LLC

By David H. Peirez and Gabrielle R. Schaich

This past Valentine's Day, a closely divided Court of Appeals decided an issue that had been a point of controversy between the First and Second Departments of the Appellate Division: Whether a single member of a limited liability company may commence a derivative action on behalf of the company, even in the absence of express language in the Limited Liability Company Law (LLCL) permitting such a suit, and notwithstanding evidence in the legislative history that state lawmakers actually had rejected such a right. Nevertheless, by a four-to-three vote, and over a vigorous dissent, the Court held in the affirmative.

Lower Courts Hold the Statute Does Not Permit Derivative Actions

Prior to the decision by the Court of Appeals, courts – especially the Appellate Division, Second Department – had held that the statute simply did not allow for derivative actions by individual members of a limited liability company. They pointed to legislative history and found that when the New York State Legislature enacted the Limited Liability Company Law in 1994, a conscious decision was made to eliminate that right.[1] Prior drafts of the bill had included such a right, but this provision was eliminated as a way to help the bill pass.[2]

The Second Department thus had held that the deliberate omission of such a remedy in the statute was fatal to any such action.[3] Instead, pursuant to LLCL § 408(b), any lawsuit brought on behalf of a limited liability company must be approved by a majority of the managers of the company.[4] Managing members have statutory and common law fiduciary duties in connection with their operation of a limited liability company.[5] Accordingly, the decision to sue remained with managers, who are in turn responsible to the members of the company by virtue of their fiduciary duties.[6]

Minority members of limited liability companies may, of course, sue managing members in a *direct* action.[7] These claims are founded on a right that belongs to the minority member personally.[8]

The view of the Second Department on the issue was acknowledged and followed by the New York State Supreme Court, New York County, in *Tzolis v. Wolff*.[9] In *Tzolis*, the supreme court noted that the Second Department had been the only one of the Appellate Division courts to address directly the question of limited liability company derivative actions and recognized that, therefore, it was obligated to follow Second Department precedent on the issue – notwithstanding some non-binding federal court precedent to the contrary.[10]

The First Department Recognizes a Member's Common Law Right to Bring a Derivative Action

On appeal, the First Department reversed, in part, the supreme court's decision in *Tzolis*.[11] The Appellate Division ruled that "the mere omission of [language in the Limited Liability Company Law granting a member of a limited liability company standing to sue derivatively], a factor other courts see as a sole or significant reason to reject standing, is not enough to deprive a limited partner of the right to assert a claim on behalf of the company."[12] The court based its reversal on four premises:

> (1) the historic judicial recognition of the common-law right to bring a derivative action on behalf of a corporation or a limited partnership, both of which share many of a limited liability company's characteristics; (2) the principles of statutory construction, which provide that only a clear statement of legislative intent may override the common law; (3) the fact that most states provide a statutory right to bring a derivative claim; and (4) the unpersuasive rationale of those decisions which have rejected derivative claims for limited liability companies.[13]

After *Tzolis*, several First Department decisions similarly upheld derivative actions brought on behalf of limited liability companies.[14] However, the First Department had granted leave to appeal its *Tzolis v. Wolff* decision to the Court of Appeals. On February 14, 2008, New York State's highest court issued a four-to-three decision on the issue, thereby settling the First and Second Department split.[15]

Four to Three, the Court of Appeals Holds LLC Members May Bring Derivative Suits

The Hon. Robert S. Smith wrote the *Tzolis v. Wolff*[16] majority opinion, in which Judges Judith S. Kaye, Carmen Beauchamp Ciparick, and Eugene F. Pigott, Jr., concurred. Judge Smith introduced the majority decision by noting that derivative suits have been a part of New York State's general corporate law since at least 1832, and that the common law had permitted derivative actions brought on behalf of ordinary business corporations and partnerships prior to the passage of any statutory authority.

The majority conceded that the New York State Legislature had removed sections of the proposed Limited Liability Company Law providing for derivative actions as a remedy for limited liability company members. The Court noted, however, that "since the Legislature obviously did not intend to give corporate fiduciaries a license to steal, a substitute remedy must be devised."[17] Judge Smith recognized that there are *direct* remedies for limited liability company members, but that such remedies carry risks that derivative actions do not. For example, where one member is sued by all other members of a limited liability company in a direct suit for stealing $100, there is a likelihood of a double recovery; such may be avoided by means of a derivative action.

The majority further noted that, notwithstanding the events preceding passage of the Limited Liability Company Law, as carefully outlined in the dissenting opinion (*see* discussion *infra*), the legislative history was devoid of any evidence that there had been an attempt or wish to eliminate, rather than to merely limit or reform, derivate suits. In addition, nothing in that history revealed what questions were raised about the derivate rights provisions later removed prior to the law's enactment, or why the derivative rights provisions had jeopardized the bill's passage. Judge Smith opined that some legislators *did* expect, although no one expressed the expectation, that there would be no derivative suits; meanwhile, it was entirely reasonable for other legislators to have expected the courts to follow established case law and recognize derivate suits in the absence of a clear prohibition. Indeed, he noted, "[i]t is even possible that neither [the Senate nor the Assembly] expected anything, except that the problem would cease to be the Legislature's and become the courts'.'"[18]

Judge Smith summed up the majority view by explaining, "[t]he legislative history is, in short, far too ambiguous to permit us to infer that the Legislature intended wholly to eliminate, in the LLC context, a basic, centuries-old protection for shareholders, leaving the courts to devise some new substitute remedy."[19]

The Dissent

Joined by Judges Victoria A. Graffeo and Theodore J. Jones, the Hon. Susan P. Read began her vigorous dissent – an opinion nearly double the length of the majority's – by warning, "Never before has a majority of the Court read into a statute provisions or policy choices that the enacting Legislature unquestionably considered and rejected."[20]

Judge Read carefully detailed events preceding the passage of the Limited Liability Company Law, setting forth the basis for the Legislature's deletion of the express right of limited liability company members to bring derivative actions. The dissent explained that on March 31, 1992, a limited liability company bill was introduced in the New York State Assembly. It was substantially identical to the ultimately enacted Limited Liability Company Law, with one exception: the bill authorized members to bring derivative actions by or against a limited liability company. On May 12, 1992, another limited liability company bill was introduced, but this time in the New York State Senate. The bill was substantially identical to the Assembly bill with the exception of the *absence* of language authorizing derivative actions. Judge Read pointed out that, when negotiating the bills, legislators expressly noted either the inclusion or exclusion of the right to bring derivative actions. Nevertheless, the Assembly and Senate failed to pass a limited liability company bill in 1992 and resumed efforts to negotiate a mutually agreeable statute in 1993.

On July 7, 1993 the Assembly passed a bill that allowed for derivative actions, and delivered it to the Senate for consideration. The Senate did not act on the bill, thereby delaying passage of any limited liability company law for another year. It was not until April 1994 that an Assembly bill was introduced into the Senate; the bill did not authorize derivative actions (as had been the case with every prior Senate bill). Judge Read noted that the bill was quickly adopted by both the Assembly and Senate, and was delivered to the Governor on July 15, 1994, which he signed into law on July 26, 1994. She concluded that the Senate had refused to pass a limited liability company statute if it allowed for derivative suits; therefore, the deletion of this provision represented a legislative bargain which enabled the bill to pass.

Judge Read next addressed the majority's discussion of the common law, under which partners had a right to bring a derivative action on behalf of the partnership prior to the passage of the Partnership Law. This statute ultimately codified the right. Judge Read distinguished this from the majority's adoption of a common law right permitting members of limited liability companies to bring derivative actions. She noted that, with regard to partnership law, there was no evidence that the Legislature had ever considered and rejected the issue of whether to authorize partners to bring derivative suits. The dissent additionally noted that the Partnership Law contains a section providing that, in cases not covered thereunder, the rules of law and equity shall govern. There is no analogous section in the Limited Liability Company Law.

Clearly troubled with the majority decision, the dissent stated that "the modern Legislature reasonably expects the judiciary to respect its policy choices." For this reason, Judge Read explained, the Court cannot expect that the Legislature would have written an explicit prohibition against derivative actions into the law. Judge Read further noted that there is no settled law, in New York or elsewhere, on the subject of derivative rights for limited liability company members, and "whether or not to vest LLC members with the right to sue derivatively is a Legislature's choice to make, not ours."[21]

Finally, the dissent pointed out that the majority did not refer to a single case where the Court of Appeals had read into a statute a provision or policy choice that the Court knew the enacting Legislature had rejected. Instead, Judge Read cited several New York cases finding that the deletion of a certain statutory provision was indicative of legislative intent.[22]

The dissent closed with a rather pointed summation:

> Fourteen years after the fact the majority has unwound the legislative bargain. The proponents of derivative rights for LLC members – who were unable to muster a majority in the Senate – have now obtained from the courts what they were unable to achieve democratically. Thanks to judicial fiat, LLC members now enjoy the right to bring a derivative suit. And because created by the courts, this right is unfettered by the prudential safeguards against abuse that the Legislature has adopted when opting to authorize this remedy in other contexts.
>
> Presumably, those businesses electing to organize as LLCs relied on what the Limited Liability Company Law says, and counted on the New York judiciary to interpret the statute as written. Instead, the majority has effectively rewritten the law to add a right that the Legislature deliberately chose to omit. For a Court that prides itself on resisting any temptation to usurp legislative prerogative, the outcome of this appeal is curious.[23]

Conclusion

In *Tzolis*, the Court of Appeals opened up two doors: the first is that New York law permits members of limited liability companies to bring derivative actions on behalf of their companies; the second (and perhaps the more

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Vacating Surrogate's Court Judgments, Orders and Decrees

Although N.Y. Civil Practice Law and Rules 5015 contains a list of grounds for vacating a judgment, order or decree, that list is not exhaustive. The courts have recognized additional grounds upon which to grant vacatur. This article explores the statutory and common law bases upon which to secure the vacatur of a surrogate's court judgment, order or decree, and addresses the time period within which a party seeking such relief must do so.

Grounds for Vacatur

Absent statutory guidance with respect to the vacatur of judgments, orders and decrees in the N.Y. Surrogate's Court Procedure Act, the CPLR governs requests for such relief in the surrogate's courts.[1] The grounds enumerated in CPLR 5015 apply and provide that judgments, orders and decrees may be vacated for the following reasons:

1. Excusable default – if the application is made within one year after service of a copy of the decree or order with written notice of its entry upon the applicant, or if the decree or order was entered by the applicant, then within one year after such entry.
2. Newly discovered evidence which if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under CPLR 4404.
3. Fraud, misrepresentation or other misconduct of an adverse party.
4. Lack of jurisdiction to render the judgment or order.
5. Reversal, modification or vacatur of a prior decree or order upon which it is based.[2]

Newly Discovered Evidence

The New York Court of Appeals recently applied CPLR 5015 in the context of a motion to vacate a probate decree on the grounds of newly discovered evidence.[3] In *American Committee for Weizmann Institute of Science v. Dunn*, the petitioner, a charity to which the decedent allegedly promised to bequeath her cooperative apartment, commenced a proceeding to vacate a probate decree.[4] The petitioner based its request for relief on two grounds: (1) newly discovered evidence, namely, letters from the decedent's former attorney and the Institute's vice president, both of which, the petitioner contended, evidenced the decedent's intent to leave her co-op to the Institute and "form[ed] an integrated contract"; and (2) newly discovered evidence, which established that the decedent's brother and niece, both of whom cared for the decedent during her illness, unduly influenced the decedent into revising her will and bequeathing the co-op to her niece some five days before she died.[5]

Noting that the letters were insufficient to establish the decedent's intent to forgo the right of testation, the Court cast aside the petitioner's first argument and addressed the undue influence argument.[6] In that regard, the Court reiterated that the standard for vacating a judgment, order or decree on the basis of newly discovered evidence requires the presentation of a "substantial basis for challenging the proffered will" and "'reasonable probability of success' on the merits of its challenge."[7] Applying that standard, the Court held that the petitioner's newly discovered evidence did not give rise to a substantial basis upon which to vacate the contested probate decree.[8]

The Court premised its decision on the theory that the proffered evidence merely established that the decedent made a bequest to "a close relative whose father – the decedent's brother and executor – opened his home to decedent while she received hospice care for terminal cancer during her final days."[9]

More recently, in *In re Efros*, Surrogate's Court, New York County, reached a contrary conclusion, based on the same standard.[10] There, JP Morgan Chase Bank, N.A. ("JP Morgan") moved for an order vacating a previously probated will, asserting that there was newly discovered evidence of undue influence.[11] According to JP Morgan, the newly discovered transcripts of telephone conversations established that the decedent's closest family members unduly influenced her into changing her will.[12] Applying the standard set forth in *Weizmann Institute*, the court found that the circumstances

warranted vacatur,[13] reasoning that the decedent, a 93-year-old woman, "believed she 'had no choice' but to change her will to accord with the unremitting demands of her closest family members."[14]

In addition to establishing the requisite substantial basis and reasonable probability of success on the merits, a party seeking vacatur on the grounds that there is newly discovered evidence must make a number of other showings. Most notably, the petitioning party must demonstrate that the newly discovered evidence is material, as opposed to cumulative, and could not have been discovered at an earlier time by the exercise of due diligence.[15] Simply presenting new evidence that impeaches the credibility of a witness will not suffice.[16]

As such, in *In re Catapano*, the Appellate Division, Second Department affirmed an order of Surrogate's Court, Suffolk County. That court had denied the appellants' motion to vacate a decree on the ground of newly discovered evidence because said evidence failed to refute the trial testimony of the respondent's witness.[17]

Excusable Default

The standard for vacatur is identical where the basis for such relief is excusable default. In *In re Wang*, the Appellate Division, Second Department considered whether Surrogate's Court, Suffolk County, properly denied the appellants' motion to vacate a probate decree for excusable default.[18] Before answering that question, the court reiterated that, "[i]n order for the decree to be vacated, it must appear that there is a substantial basis for the contest and a reasonable probability of success on the part of the petitioner."[19] Accordingly, the court, noting that the appellants' evidence amounted to little more than speculation, found that the appellants did not establish the requisite substantial basis and affirmed the surrogate's order.[20]

Fraud, Misrepresentation or Other Misconduct

There appears to be some tension with respect to the standard and its application in the context of vacatur on the basis of fraud, misrepresentation and other misconduct. On the one hand, the prevailing view is that the standard set forth above applies with equal force in situations involving fraud, misrepresentation and other misconduct.[21] For example, in *In re Kaufman*, the Appellate Division, Fourth Department affirmed an order of Surrogate's Court, Monroe County, in which that court denied the petitioner's motion to vacate a decree on the basis of fraud.[22] As the Appellate Division explained, "the moving party must fulfill his burden of proof by establishing sufficient facts from which the court can determine that a fraud has been committed."[23]

On the other hand, there is limited support for the proposition that the standard is somewhat more lenient where the basis for vacatur is fraud, misrepresentation or other misconduct. Indeed, at least one trial court has held that a party seeking to vacate a probate judgment, order or decree need not plead facts sufficient to establish a reasonable probability of success on the merits.[24] To the contrary, as Surrogate's Court, New York County, explained in *In re Sandow*, the party need only show, with some degree of probability, that its "claim is well founded and that, if afforded an opportunity, [it] will be able to substantiate" the claim.[25] It is arguable, however, whether that remains good law in light of the *Weizmann Institute* decision.

This point is somewhat more cogent where there is evidence of a confidential relationship.[26] In such a circumstance, there appears to be a presumption in favor of fraud, such that the burden shifts to the fiduciary to establish the absence of fraud or misconduct by clear and convincing evidence.[27] It has been held that the fiduciary's failure to carry that burden warrants vacatur.[28]

In re Hunter, in which the respondent, the decedent's granddaughter, commenced a proceeding to vacate the court's decree, helps illustrate the point.[29] The decree settled the first intermediate account of the co-trustee of the trust created for the respondent's benefit, and the respondent sought to withdraw her waiver and consent, arguing that the co-trustee secured such waiver and consent through fraud, misrepresentation or other misconduct.[30] Upon consideration of the fraud argument, the court ruled in favor of the respondent, finding that the co-trustee failed to make full and adequate disclosure of the respondent's rights and the pertinent facts to the respondent.[31] The court was particularly troubled by the fact that the co-trustee forced the respondent to sign the disputed waiver and consent before reviewing it.[32] Accordingly, the court concluded that the co-trustee could not establish that the circumstances surrounding the respondent's waiver were "just and fair" and vacated its decree.[33]

The list contained in CPLR 5015 is not exhaustive, and it does not constrain the surrogate's courts from vacating probate judgments, orders or decrees on other grounds.

Interests of Justice

The list contained in CPLR 5015 is not exhaustive, and it does not constrain the surrogate's courts from vacating probate judgments, orders or decrees on other grounds.[34] Indeed, New York courts, including the surrogate's courts, are vested with discretionary authority to vacate judgments, orders and decrees for good cause shown.[35] Although courts typically exercise this power sparingly, they do so where the interests of justice require vaca-

tur.[36] The standard for vacatur in the interests of justice is fact-specific and oftentimes turns upon the peculiarities of particular cases, rather than broadline rules.[37] As Surrogate Preminger explained in *In re Ziegler*, "[t]here is . . . no ready template for this standard."[38]

In *In re Culberson*, the Appellate Division, Third Department addressed this very issue.[39] There, the decedent had died, leaving a will in which he bequeathed all of his property to his children; he named one of the respondents to act as the executor of his estate.[40] The respondents refused to furnish the petitioner with a copy of the decedent's will or to file said will for probate for more than four years after the decedent's death. Surrogate's Court, Rensselaer County, dismissed the petitioner's proceeding, *sua sponte*, for failure to prosecute.[41] Insofar as the surrogate's court dismissed the petitioner's proceeding without prejudice, the petitioner commenced a second proceeding and moved to vacate the surrogate's previous dismissal.[42] Although the surrogate's court had initially denied the petitioner's motion, the Appellate Division reversed that court's decision, finding that the interests of justice required vacatur.[43] The Third Department based its decision on the fact that the respondents had caused the delay in question, among other things, and, therefore, could not assert prejudice as a ground for denying the petitioner's motion for vacatur.[44]

Time for Seeking Vacatur

Except as to excusable default, for which there is a one-year limitations period, CPLR 5015 does not contain a statute of limitations for the vacatur of a judgment, order or decree.[45] However, in the absence of such a limitations period, courts have held that a party seeking to vacate a probate decree must attempt to do so within a reasonable time after the date upon which the disputed judgment, decree or order is entered.[46] The failure to make the requisite motion or petition within a reasonable time may result in its denial.[47]

Further, the petitioning party's failure to make a motion or commence a proceeding for vacatur within a reasonable time may arm that party's adversary with the affirmative defense of laches.[48] Courts have held that the applying party's unreasonable delay, when coupled with prejudice to that party's opponent, serves as a valid basis upon which to deny a motion or petition for vacatur.[49] The lone instance in which this affirmative defense does not apply, is a motion to vacate for lack of jurisdiction, as delay alone will not suffice for the purpose of conferring jurisdiction upon a court.[50]

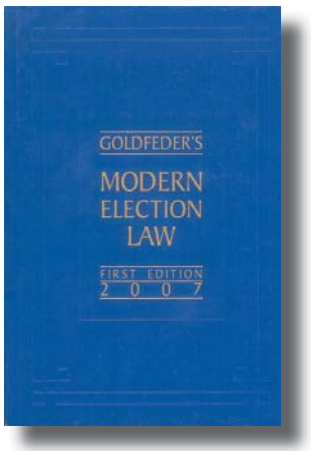
Conclusion

Given that the list of grounds for vacatur set forth in CPLR 5015 is not exhaustive, the prudent practitioner will recognize the need to look beyond the text of that statute when called upon to make or oppose a motion to vacate a probate judgment, order or decree. Indeed, because CPLR 5015 does not contain a complete list of the bases for vacatur, an attorney must look to the pertinent case law to effectively represent his or her client's interests on a motion to vacate a surrogate's court judgment, order or decree. The attorney's failure to review both the statutory and common law authority, and to do so within a reasonable time after the surrogate's court enters its judgment, order or decree, may prove fatal for the purpose of a motion or petition to vacate a prior decision. ■

1. N.Y. Surrogate's Court Procedure Act 102 (SCPA).
2. CPLR 5015.
3. *See generally Am. Comm. for Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 854 N.Y.S.2d 89 (2008).
4. *Id.* at 86.
5. *Id.* at 91–97.
6. *Id.*
7. *Id.* at 94–96.
8. *Id.* at 98.
9. *Id.*
10. *In re Efros*, N.Y.L.J., Mar. 27, 2008, p. 34, col. 1 (Sur. Ct., N.Y. Co.).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *In re Catapano*, 17 A.D.3d 673, 674, 794 N.Y.S.2d 403 (2d Dep't 2005).
16. *Id.*
17. *Id.*
18. *In re Wang*, 5 A.D.3d 785, 787, 773 N.Y.S.2d 578 (2d Dep't 2004).
19. *Id.* at 787.
20. *Id.*
21. *In re Leeper's Will*, 53 A.D.2d 1054, 1055, 385 N.Y.S.2d 887 (4th Dep't 1976).
22. *In re Kauffman*, 54 A.D.2d 1067, 388 N.Y.S.2d 765 (4th Dep't 1976).
23. *Id.*
24. *In re Sandow*, 25 Misc. 2d 356, 357, 206 N.Y.S.2d 694 (Sur. Ct., N.Y. Co. 1960).
25. *Id.* at 359.
26. *In re Hunter*, 190 Misc. 2d 593, 599, 739 N.Y.S.2d 916 (Sur. Ct., Westchester Co. 2002).
27. *Id.*
28. *In re Levy*, 19 A.D.2d 413, 418–19, 244 N.Y.S.2d 22 (1st Dep't 1963).
29. *Hunter*, 190 Misc. 2d at 595.
30. *Id.*
31. *Id.* at 598–600.
32. *Id.*
33. *Id.*
34. *In re Culberson*, 11 A.D.3d 859, 861, 784 N.Y.S.2d 167 (3d Dep't 2004).
35. *In re Masline*, 52 A.D.2d 739, 382 N.Y.S.2d 180 (4th Dep't 1976).
36. *Culberson*, 11 A.D.3d at 862.
37. *In re Ziegler*, 161 Misc. 2d 203, 207, 613 N.Y.S.2d 316 (Sur. Ct., N.Y. Co. 1994).
38. *Id.* at 207.
39. *Culberson*, 11 A.D.3d at 860–61.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 861–62.
44. *Id.*
45. CPLR 5015.
46. *Green Point Sav. Bank v. Arnold*, 260 A.D.2d 543, 544, 688 N.Y.S.2d 595 (2d Dep't 1999); *see also In re Smith*, N.Y.L.J., Oct. 6, 2006, p. 34, col. 5 (Sur. Ct.) (explaining that an application for vacatur "must be made within a reasonable time of the discovery of the new evidence").
47. *Id.*
48. *In re Petrolino*, N.Y.L.J., July 7, 1995, p. 36, col. 6 (Sur. Ct.).
49. *In re Bobst*, 165 Misc. 2d 776, 783, 630 N.Y.S.2d 228 (Sur. Ct., N.Y. Co. 1995).
50. David D. Siegel, McKinney's Practice Commentary: CPLR 5015 (2007).

BOOK REVIEW

BY HOWARD G. LEVENTHAL



HOWARD LEVENTHAL is a Special Referee at Supreme Court, New York County. The views expressed in this book review are solely those of the reviewer in his personal capacity.

Election Law

Goldfeder's Modern Election Law, Jerry H. Goldfeder, New York Legal Publishing Corp. (2007)

We are all familiar with the old saw: "Those who can, do; those who can't, teach." Jerry Goldfeder dispels this aphorism, both doing *and* teaching election law.

Mr. Goldfeder cut his eyeteeth way back in 1981, aiding the quixotic mayoral campaign of Assembly Member Frank Barbaro, who was seeking to unseat the popular incumbent, Mayor Ed Koch, in New York City's Democratic Party primary election. Planning a primary election campaign is like a chess game or military operation. The candidate must plan moves and countermoves. In order to avoid a divide-and-conquer strategy by the incumbent, Barbaro sought to eliminate competitors for the anti-Koch vote. This meant knocking Melvin Klenetsky off the ballot on technicalities under New York's arcane, often confusing, Election Law, so that the anti-Koch forces, theoretically, could coalesce and, united under one banner, defeat the incumbent. It sounded good in theory. In practice, Barbaro was unable to knock Klenetsky off the ballot, and, in the final analysis, it was irrelevant, because Ed Koch handily defeated them both and went on to be elected to a second, and then a third, term as mayor. This baptism of fire gave birth to a lifelong love for and career in election law, however. Goldfeder learned and played the game, rubbing elbows and locking horns with the greats in the field. He went on to teach Election Law at Fordham Law School.

Goldfeder's Modern Election Law is a primer on Election Law, useful at all levels: to the neophyte, to the seasoned practitioner, to the appellate lawyer, and to the justices and special referees who must call the balls and strikes and, ultimately, decide the cases. (Indeed, if it were dressed in a yellow cover, instead of navy blue, it might have been titled *Election Law for Dummies*. But don't be fooled by the simplicity of style and colloquial manner in which it is written.) There's a lifetime of experience and insightful scholarship packed into pages that capture the nitty-gritty of election law. Goldfeder can truly say, "I served in the trenches."

Part I of *Modern Election Law* starts off stating the obvious: the candidate wakes up one day and has an epiphany – she[1] wants to run for elective public office. The candidate first must identify the position for which she hopes to run. There are two ways of obtaining a place on the ballot in a general election: by designation of an established political party (either in a primary or by a party convention), or by nomination of an "independent body." Professor Goldfeder identifies the statutes with which a prospective candidate must be familiar – the Election Reform Act of 1992, the Ballot Access Law of 1996, and, of course, the Election Law itself, as well as the Rules of the Boards of Election. (Years ago, even finding the applicable rules was a task in itself.) As if the applicable rules, regulations and forms are not sufficiently daunting, Goldfeder admonishes the prospective candidate of the necessity to familiarize herself with political party rules as well. The playing field has become more level, thanks, in part, to the relative accessibility of rules and forms online.

The issue of residency is discussed at length – there's no place like home – since many public offices require residency within a particular district. New York recognizes that an individual may have more than one residence, but only one may qualify as that place where a person maintains a fixed permanent and principal home and to which she, wherever temporarily located, always intends to return. (It's amazing how many candidates for public office live in an unheated basement or attic in a home owned by an aunt or uncle, bereft of furniture, sleeping on a folding cot, while their spouses and children live in a sumptuous home in the suburbs. In 2001, a candidate was actually prosecuted criminally, and convicted of false registration under the Election Law, illegal voting, and offering a false instrument for filing.) Professor Goldfeder discusses in detail how a challenger may seek to show that the bona fides or duration of a candidate's residence does not meet the statutory standard, the burden of proof, and how the candidate may demonstrate eligibility.

The petitioning process is the subject of a lengthy chapter. Professor Goldfeder gives savvy advice as to the right way to gather signatures and the pitfalls to avoid – such as making sure overzealous petition gatherers don't "jump the gun" by collecting

signatures on designating petitions before the opening bell. The nit-picking process of attacking the validity of signatures on the designating petitions of competitors is discussed in great detail, as only one who has been engaged in the process can. Helpful hints are given as to how to ensure that signatures gathered by your side are protected from challenges.

Candidates are advised to keep a healthy distance from the petitions and to avoid being a subscribing witness. This will prevent the opposition from subpoenaing the candidate, and tying up and preventing the latter from campaigning, and will also avoid the danger of the candidate being thrown off the ballot if tainted by allegations of fraud in the signature-gathering process. If an ordinary signature gatherer is found to have engaged in fraud, the entire work product of that person may be discarded by the court. However, if the candidate herself is found to have participated in fraud, however small, the candidate may be disqualified, even if there is an otherwise sufficient number of valid signatures on the designating petition. And what happens if a voter moves from one residence to another within the county? Read the book to find the answers.

There is a whole chapter devoted to staying on the ballot, general objections, specifications of objections, board hearings, and the judicial process. Timetables have to be adhered to rigorously. The failure to commence a judicial proceeding in a timely manner is a fatal defect. There are different timetables for petitions to validate or to invalidate a designating petition. There are differences between proceedings brought by an objector and by an aggrieved candidate. Judicial proceedings require meticulous compliance with the mode of service specified in the order to show cause. The petitioner must have standing. All necessary parties, including the Board of Elections, must be named as parties and properly served within the time specified by the court. And as if this isn't enough, different counties have their own rules governing election proceedings.

Professor Goldfeder also discusses little-known alternative methods of securing a place on the ballot, as well as the rules applicable to extraordinary situations, such as death, criminal convictions, disqualification, etc. Money, the mother's milk of politics, rates an entire chapter, discussing, inter alia, public financing of campaigns, legal limitations on contributions, and how one may ascertain the limits for a particular race.

Pragmatic advice is given as to actions to be taken by a candidate in the days leading up to and on Election Day itself, to protect against the election being stolen. The presence of police and the role of poll watchers is discussed, along with what to do if there is equipment breakdown or failure, or if a prospective voter's name is not listed in the voter registration book.

The book also features a chapter on hypothetical ethical issues for election lawyers. This is not surprising. given that Andrew Cuomo, Attorney General of the State of New York, and himself steeped in New York politics, tapped Goldfeder to be his Special Counsel on Public Integrity. To his credit, Goldfeder has included a disclaimer that the views expressed in his book are his, not those of the New York State Department of Law.

Part II contains Election Law forms, rules and reports. Everything you'll need is in one concise book.

The law is fully and clearly set forth, enabling the practitioner to argue to the jurist presiding, "As it says in *Goldfeder's Modern Election Law . . .*" Judges and referees have a very limited time in which to render decisions in election cases; so, if counsel presents appropriate citations to case law, statutes, rules and regulations, it conserves judicial resources and furthers the goal of judicial economy. Why plunk down your hard-earned money to buy this book? Easy: it's the same book which the judges and referees who decide the case will be using. ■

1. Goldfeder always uses "she" rather than "he."

Book Notes

J. Michael Hayes, a past contributor to the *Journal* and a chapter author of the New York State Bar Association's upcoming *Treatise on Plaintiff's Personal Injury Actions in New York*, has just written a new book titled *Liens vs. Subrogation: An Alternative to Giving Away Your Client's Personal Injury Recovery*. Mr. Hayes may be contacted at jmh@jmichaelhayes.com.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/08 - 5/27/08	4,586
NEW LAW STUDENT MEMBERS 1/1/08 - 5/27/08	521
TOTAL REGULAR MEMBERS AS OF 5/27/08	65,205
TOTAL LAW STUDENT MEMBERS AS OF 5/27/08	2,084
TOTAL MEMBERSHIP AS OF 5/27/08	67,289

BY WILLIAM MAKER, JR.

William Maker, Jr., is a member of McMillan Constabile, Maker & Perone, LLP, Larchmont, NY, and is the Town Attorney for the Town of Mamaroneck. He received his LL.M. and his J.D. from New York University School of Law and a B.A. in Economics from Queens College of the City University of New York.

Of Keystrokes and Ballpoints: Real Estate and the Statute of Frauds in the Electronic Age

When cramming for the bar exam lo those many years ago, each of us memorized the legal transactions that require a writing in order to be enforceable. While §§ 5-701 and 5-703 of the N.Y. General Obligations Law (GOL) contain a lengthy list of such transactions, most of us remember only two or three. The one we all remember is that an agreement for the sale of real property is enforceable if it is in writing with a contract, or some memorandum of it, signed by the party who refuses to acknowledge the contract.[1]

With e-mail becoming such a popular means of communication, a clash between electrons and ink was inevitable. So far, New York has produced two lower court cases involving real estate transactions where, like the Pilgrims, the Statute of Frauds found itself in a strange, new world. Will the Internet be as friendly to the statute as Squanto was to Myles Standish or will it produce odd results, like the Pilgrims' descendants winning two World Series in the space of four years?[2]

The two cases reached opposite conclusions. *Rosenfeld v. Zerneck*[3] endorsed the notion that e-mails can create a binding real estate contract. *Vista Developers Corp. v. VFP Realty LLC*[4] did not.

In *Rosenfeld*, a seller responded to an e-mail and telephone call from prospective purchasers with an e-mail of his own. In the "Subject" line of his e-mail, the seller typed the street address of the property offered for sale. Below appeared the date and the names of the parties to whom and by whom the message was sent. The text read:

> "Dear Tom & Debbie,
> "This note is to confirm yesterday's telephone conversation in which I accepted your all cash offer of $3,525,000 for 18 PPW, with no contingencies for financing or sale of your present residence, to close no later than July 1, 2004.
> "As we discussed, please contact Liz early next week to schedule your inspection. My attorney will prepare a contract of sale, to be signed after your engineer's report. (What is the contact information for your attorney? Will you be making the purchase jointly? What is your present address?)
> . . .
> "With kind regards,
> "Michael."[5]

When Michael refused to consummate the transaction because no formal contract was signed, Tom and Debbie commenced suit for specific performance, arguing that Michael's e-mail, when coupled with an earlier one of theirs, constituted a legally binding contract. The first question was whether Michael's typed signature on the e-mail satisfied the Statute of Frauds.

Because no other New York cases had dealt with this issue, the *Rosenfeld* court drew from *Parma Tile Mosaic & Marble Co. v. Estate of Fred Short*.[6] Real estate was not at issue in *Parma*. It involved another type of transaction that requires the signature of the party to be held accountable, *i.e.*, a promise to pay another's debts. The Court of Appeals was confronted with the question of whether the imprint of a sender's name on a telefacsimile ("fax") transmission of a guaranty was a subscription by the sender sufficient to satisfy the Statute of Frauds. Although recognizing that a signature can be printed, the court held that a printed signature must be inserted "'with an intent, actual or apparent, to authenticate a writing.'"[7] Here the fax machine was programmed to print the sender's name automatically when the recipient's fax machine printed the transmission. That was not enough to "constitute a signing authenticating the contents of the document for Statute of Frauds purposes."[8]

The *Rosenfeld* court distinguished the *Parma* fax from Michael's e-mail, noting that Michael purposely typed his name at the end of the message, "manifest[ing] his intention to authenticate this transmission for statute of frauds purposes."[9] Hence, Michael could not escape liability based upon the Statute of Frauds. (The case was dismissed, however, because the e-mails did not set forth the amount of the down payment – an essential term.)

Vista Developers Corp. v. VFP Realty LLC involved a series of e-mails between a prospective buyer and seller. Each e-mail contained a typewritten signature. Again the seller was the defendant, urging dismissal of the purchaser's complaint for specific performance based upon the Statute

of Frauds. The *Vista Developers* court never dealt with the content of the exchanged e-mails for it found as a matter of law that e-mails cannot satisfy the Statute of Frauds in real estate transactions. The court's logic focused on the difference between GOL § 5-703, which governs real estate transactions, and GOL § 5-701, which pertains to other transactions that require a writing.

The plaintiff's argument hinged on GOL § 5-701(b)(4), which provides:

> For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing.

Thus, argued the plaintiff, the e-mails complied with the "[subscription] by the party to be charged" requirement of the Statute of Frauds.[10] The defendants countered by noting that paragraph (b) of GOL § 5-701 applies only to what the statute defines as "qualified financial contracts"[11] and that contracts for the sale of real property are not included in that definition.[12]

Because the modernization of the Statute of Frauds contained in GOL § 5-701(b)(4) does not appear in GOL § 5-703, the court reasoned "that the intent of the Legislature was to amend the method for establishing agreements required to be in writing other than those involving contracts and conveyances concerning real property, which are purposely dealt with in a separate section of Article 5."[13] Accordingly, e-mails could not satisfy the statute's subscription requirement for real estate contracts.

Two Smoking Guns Ignored

Not presented to the *Vista Developers* court were two arguments that may have swayed its decision – one from the ancient world and one from modern times.

Telegrams

Often when confronted by newfangled innovations, courts will look to the rules established when dealing with earlier technology.[14] The *Vista Developers* plaintiff might have argued that the case law involving the "original e-mail," *i.e.*, the telegram, was pertinent.

Now forgotten, the telegram once was a major means of communication. A sender would give a message either in writing or orally to a telegraph company that would transmit that message over wire to its office nearest the recipient. There, the impulses from the wire would be converted to written words with the sender's name subscribed at the bottom. The telegram then would be delivered to the recipient. The use of telegrams satisfied the Statute of Frauds long before GOL § 5-701 was amended by adding paragraph (b)(4).[15]

This similarity between telegrams and e-mails cogently argues for the importation of "telegram jurisprudence" into the world of e-mails.

The Electronic Signatures and Records Act

Article III of the N.Y. State Technology Law[16] has ushered in a new legal world that most of us have yet to explore. The Legislature's stated intention is "to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents."[17] With that in mind, the law states that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand.

The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[18]

While GOL § 5-703 does not specifically authorize electronic signatures on real estate contracts, it does not specifically disavow them. Moreover, the areas where the State Technology Law, by its own terms, does not apply, include such matters as wills, powers of attorney, health care proxies, negotiable instruments and "any conveyance or other instrument recordable under article nine of the real property law"[19] but not real estate contracts.

Vista Developers may have been decided differently if the State Technology Law had been brought to the court's attention.

Conclusion

While there is now a particular conflict between courts of co-ordinate jurisdiction, in time either the appellate courts or further legislation will quiet that controversy. However, there is a more important point.

Though obviously focused upon the commercial arena, the State Technology Law is predicated upon a legislative finding "that it is in the best interest of the state of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology *in the everyday lives and transactions of such individuals and entities*."[20] As a result, we and our clients unwittingly may be entering into binding agreements every day through the casual use of e-mail. Think about that before e-mailing an invitation to lunch. If you're not careful, you may be obligating yourself to pick up the check. ■

1. GOL § 5-703(2): "A contract for . . . the sale, of any real property, or interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

2. Massachusetts's answer can be found in *Shattuck v. Klotzbach*, 14 Mass. L. Rptr. 360 (Super. Ct. 2001), where it was decided that e-mail can satisfy the Statute of Frauds.

3. 4 Misc. 3d 193, 776 N.Y.S.2d 458 (Sup. Ct., Kings Co. 2004).

4. 17 Misc. 3d 914, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007).

5. *Rosenfeld*, 4 Misc. 3d at 194–95.

6. 87 N.Y.2d 524, 640 N.Y.S.2d 477 (1996).

7. *Id.* at 527 (quoting Judge Cardozo in *Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.*, 245 N.Y. 305, 310 (1927)).

8. *Id.* at 528. It is imperative to remember that the events in *Parma* predated an amendment to GOL § 5-701 and the enactment of Article III of the State Tech. Law (discussed below). Either may have led the Court to a different conclusion.

9. *Rosenfeld*, 4 Misc. 3d at 196. *See also Stevens v. Publicis, S.A.*, 854 N.Y.S.2d 690 (1st Dep't 2008). ("The e-mails . . . constitute 'signed writings' within the meaning of the Statute of Frauds, since plaintiff's name at the end of his e-mails signified his intent to authenticate the contents.").

10. GOL § 5-703(2).

11. GOL § 5-701(b)(2)(a)–(j). It also does not apply to contracts involving a natural person.

12. *Vista Developers Corp. v. VFP Realty LLC*, 17 Misc. 3d 914, 919–20, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007).

13. *Id.* at 921. GOL § 5-703 actually appears in Title 7 of Article 5 of the N.Y. General Obligations Law.

14. For example, the Court of Appeals declined to hold an Internet service provider liable for defamatory e-mails sent by one of its subscribers. The Court analogized libel by e-mail to slander by telephone. Since years ago it had exonerated the telephone companies from such liability, the Court freed Internet service providers as well, holding that such providers play the same passive role with respect to message content as telephone companies do. *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 701 N.Y.S.2d 684 (1999), *cert. denied*, 529 U.S. 1098 (2000).

15. *La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp.*, 28 Misc. 2d 764, 768, 216 N.Y.S.2d 186 (City Ct., N.Y. Co. 1961) ("The signature on the telegram in suit, although typed in the office of the telegraph company, is therefore defendant's authorized signature within the requirements of the Statute of Frauds.").

16. State Tech. Law §§ 301–309. The federal government has a similar statute – the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001–7006), known colloquially as the E-Sign Law. Though applicable only to transactions "affecting interstate or foreign commerce" (15 U.S.C. § 7001(a)), the term "transaction" includes "the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof." 15 U.S.C. § 7006(13)(B). Furthermore, while the law specifically exempts areas that historically have been the sole province of the states, such as wills and family law (*see* 15 U.S.C. § 7003(a)(1), (2)), no specific exception appears for intrastate real estate sales.

17. 2002 N.Y. Laws ch. 314, § 1.

18. State Tech. Law § 304(2). Section 302(3) defines an "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." The definition of an electronic signature in the E-Sign Law, 15 U.S.C. § 7006(5), is nearly identical.

19. State Tech. Law § 307(1), (2), (3).

20. 2002 N.Y. Laws ch. 314, § 1 (emphasis supplied).

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8. Choosing the right font. Many writers believe that any font will do for legal documents.

Typefaces, also called fonts, affect the readability of documents. Use fonts that make the text easy to read. In legal writing, that means fonts like Times New Roman, Courier New, or any font with the word "book" in it rather than the Arial font. Times New Roman and Courier New are serif fonts. Arial is a sans serif font. A serif font has small lines at the top and bottom of each letter. A sans serif font has no lines. The lines in the serif font draw the reader's attention and let the eye move easily from letter to letter. The writer's goal is to make it easy for the reader to move through the text.

Don't mix fonts in the same document. Keep it professional.

9. Right-ragged effect. Some legal writers recommend full justified text. Others recommend non-justified text.

Also known as non-justified or flush-left, a right-ragged effect refers to allowing lines of text to end naturally on a page. The text is aligned, or flush, to the left. It creates a loose, or ragged, right edge. A right-ragged effect leaves varying amounts of white space (no words appear) at the end of lines, It doesn't force the text to line up flush with the margin. Ragged right is the most common ragged alignment. The opposite — full justification, or flush-right — creates a straight right-hand edge to the text.

Leave plenty of white space on the right-hand side of the page; it's easier on the eye. Readers prefer unjustified text. It's easier to follow. Full justification causes the spacing between words to fluctuate from line to line. Full justification cramps or stretches out words. The text must be even on the left- and right-hand sides. Full justification disrupts readers: It forces readers to stop and readjust to the spacing on each line. Although full justification presents a clean and crisp document, it's difficult to read. Right-ragged promotes reading flow.

You'll find the right-ragged effect in textbooks more than in novels. Because justified text is more formal than non-justified text, most newspapers use justified text.

To create a right-ragged effect, use the left justification (or align left) feature on your computer program.

10. Word and line spacing. Word spacing: The trend is to put one space between sentences in publishing. For unpublished, typed documents, put two spaces between sentences.[5]

Line spacing: Single-spaced final copies of a document are easier than double-spaced documents for readers to see and comprehend. Single-space all correspondence, but double-space between paragraphs.

Make sure you know your audience. If you're writing to a judge, check the court's rules for spacing requirements. If you're writing to your boss, know your boss's rules on spacing.

11. Citations. Some legal writers believe that lawyers should cite according to the Bluebook. Others rely on ALWD,[6] the Association of Legal Writing Directors Citation Manual. Still others follow the New York Law Reports Style Manual, New York's Official Style Manual (Tanbook).[7]

How you cite depends on your audience.[8] Most federal judges and practitioners, law-review and law-journal editors, and Moot Court associations use the Bluebook.[9] Some law school legal-writing programs use ALWD instead of the Bluebook. New York judges use the Tanbook for opinions published in the official reports. If you're an attorney who writes to or for a New York state court, don't use the Bluebook. New York practitioners should use the Tanbook when writing for New York courts.

Under the Tanbook, citations are surrounded by parentheses and supporting information is added in brackets. Periods are omitted in key places, such as after the "v" in "versus." Three examples from the 2007 Tanbook: Caselaw: (*Matter of Ganley v Giuliani*, 253 AD2d 579, 580 [1st Dept 1998], *revd* 94 NY2d 207 [1999].) Statute: (Penal Law § 125.20 [4].) Secondary authority: (The Bluebook: A Uniform System of Citation [Colum L Rev Assn et al. eds, 18th ed 2005].).

Unlike the Bluebook, ALWD makes no distinction between citing for law reviews and law journals and citing in practitioners' legal documents.

12. The one-sentence paragraph. Some readers believe that a one-sentence paragraph signals undeveloped ideas in an unsophisticated, juvenile style. But one-sentence paragraphs are acceptable to transition between two large paragraphs in a document. Doing so forms a bridge between two lengthy paragraphs. In a lengthy paragraph, readers must work overtime to understand the meaning of the words and the connections between them. A one-sentence paragraph eliminates some work for the reader. A one-sentence paragraph also gives readers a chance to catch their breaths between long paragraphs. But be careful. Use one-sentence paragraphs sparingly for dramatic effect: to emphasize an important point.

13. Spelling out numbers. From a tradition that evolved during the typewriter era and primarily to avoid forgery, some legal writers spell out numbers and then identify the number in parentheses. *Example:* "Respondent's apartment has six (6) bedrooms and three (3) bathrooms." Imagine if you were to say this to someone: "His

Leave plenty of white space on the right-hand side of the page; it's easier on the eye.

apartment has six six bedrooms and three three bathrooms." The point is that you wouldn't say it: It's redundant. If you wouldn't say it out loud, don't write it.

Having too many footnotes or endnotes will cause readers to lose focus.

The Tanbook recommends spelling up to and including the number nine and denoting with figures numbers above nine.[10] The Bluebook[11] and ALWD explain that the legal convention is to spell out zero to ninety-nine and use numerals for higher numbers.[12] ALWD advises readers to designate numbers with numerals or spell out the numbers, but not both.

The Legal Writer recommends following the Tanbook. Spelling numbers from zero to nine and denoting numbers above nine with figures is easier to read.

14. Hyphenating phrasal adjectives. Hyphens are thought to be old-fashioned and needlessly complex. Others believe that correctly used hyphens eliminate confusion.

The Legal Writer recommends hyphenating compound adjectives. *Example:* "I'm a real estate practitioner." *Or:* "I'm a real-estate practitioner." In the first example, without the hyphen, the reader understands that your real-estate practice is fake. In the second example, with the hyphen, the reader understands that you practice real-estate law. Correct hyphenation signals formality and adds clarity. Adding the hyphen won't bother anyone. It might even impress your reader that you know the correct rule.

Don't hyphenate when the compound is not an adjective phrase. *Correct:* "Family-law practitioner." *Also correct:* "Practitioner of family law." *Correct:* "Real-estate owner." *Also correct:* "Owner of real estate."

Don't hyphenate when the first word in the adjectival phrase ends in "ly." *Incorrect:* "Physically-incapacitated defendant." *Correct:* "Physically incapacitated defendant."

Some writers say you shouldn't hyphenate two-word modifiers whose first element is a comparative or a superlative. The Legal recommends hyphenating. *Examples:* "Lowest-priced suit"; "upper-level apartment"; "best-dressed attorney." *Also acceptable:* "Lowest priced suit"; "upper level apartment"; "best dressed attorney."

Don't hyphenate in a compound predicate adjective whose second element is a past or present participle. *Incorrect:* "His judicial opinions were wide-reaching." *Correct:* "His judicial opinions were wide reaching."

Hyphenate suspension adjectival phrases. *Incorrect:* "Ten and twenty dollar bills." *Correct:* "Ten- and twenty-dollar bills." *Or:* "10- and 20-dollar bills."

Conclusion. This ends the Legal Writer's 11-part Do's, Don'ts, and Maybes series. ■

1. *See* Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I*, 80 N.Y. St. B.J. 64 (Feb. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II*, 80 N.Y. St. B.J. 64 (Mar./Apr. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III*, 80 N.Y. St. B.J. 64 (May 2008).

2. Robert J. Kapelke, Judges' Corner, *Some Random Thoughts on Brief Writing*, Colorado Lawyer, 29, 29 (Jan. 2003).

3. *Contra* Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Review 4, 6-8, 10, 12 (2001).

4. Richard A. Posner, *Against Footnotes*, 38 Court Review 24 (2001).

5. *See* Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I*, 80 N.Y. St. B.J. 64 (Feb. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II*, 80 N.Y. St. B.J. 64 (Mar./Apr. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III*, 80 N.Y. St. B.J. 64 (May 2008).

6. Association of Legal Directors (ALWD) Citation Manual (3d ed. 2006).

7. New York Law Reports Style Manual (Tanbook) (2007), *available at* http://www.nycourts.gov/reporter/New_Styman.htm (html version) and http://www.nycourts.gov/reporter/NYStyleMan2007.pdf (pdf version) (last visited Apr. 20, 2008).

8. *See* Gerald Lebovits, Legal Writer, *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 64 (Oct. 2007).

9. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

10. Tanbook R. 10.2(a)(1), at 58.

11. Bluebook R. 6.2(a), at 73.

12. ALWD R. 4.2(a), at 29.

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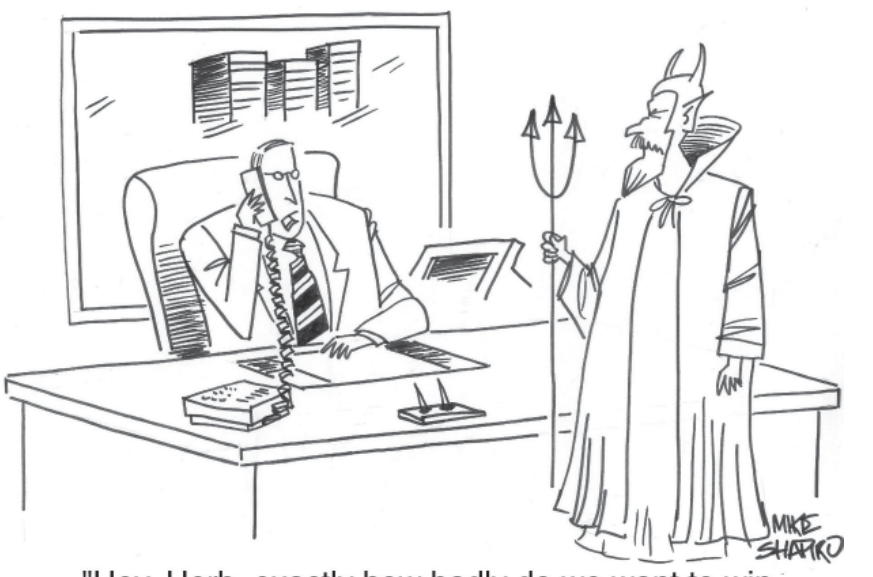

"Hey, Herb, exactly how badly do we want to win all our cases?"

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am in the middle of a dilemma which is all the more disconcerting because it's mainly of my own making. It involves a personal injury action and the derivative claim of a spouse.

About a month ago, a neighbor of mine (Harry) was involved in an automobile accident in which one of his hands was injured. At first the injury didn't appear to be severe, and I was primarily involved in helping him with the no-fault application. About a week later he dropped by my office and we spoke for a few minutes. I then learned that surgery was indicated and had him sign a retainer (after giving him a reduced fee as a neighbor). I told him that my secretary would type in the details at the top later, which she did, including the client's name and address. I also had her add a routine loss of services claim on behalf of Harry's wife.

A few weeks afterwards Harry developed complications from the surgery on his hand, and it now appears that he may lose complete use of that hand. This is of course serious, especially in Harry's case, because he earns his living as an auto mechanic.

Yesterday, he was home and recovering so I stopped by with the Summons and Complaint for him to verify. His first question to me was, "What is my wife's name doing on my lawsuit?" He then went on to tell me that he was planning on leaving his wife as soon as their son graduated from high school, in about a year. Apparently, his wife has no knowledge of these plans.

The news came as a complete shock to me. We live in a relatively small community and we are part of a tightly knit group of traveling "soccer parents." I know his wife well and had just assumed that she would be included as a plaintiff. However, I don't remember actually discussing it with Harry when he signed the blank retainer.

What do I do about the loss of services claim?

Sincerely,
Stuck in the Middle

Dear Stuck:

The awkward circumstance in which you find yourself presents ethical, legal and even social questions.

Let's begin with the basics. Your only client in this personal injury action is Harry. Harry is the injured party, he is the sole person with whom you met, and he alone signed the retainer. The fact that you erroneously (and improperly) added his wife's derivative claim for her loss of services to the retainer after Harry had signed it does not make the wife your client.

Your best course now is to draw up a new retainer for Harry, which sets forth only his claim. A Retainer Statement must then be filed with the Office of Court Administration, or an Amended Statement, if you already filed one including the wife's derivative claim.

The easy part now being resolved, one can probably guess your other concerns: "But what about his wife?" "How will she know that she has a right to bring a derivative claim, and that she should consult with another attorney?" "What if she asks me about the case?" "What if everyone thinks I'm a heel when they find out a year from now that I knew about the impending divorce all along?"

Again, back to basics. You must put Harry's interest before your own – but in an honorable fashion. If Harry told you about his divorce plans in confidence then, of course, you cannot reveal that confidence. DR 4-101. But your efforts to preserve the confidence cannot include lying to or misleading his wife.

It is hard to predict exactly how events will unfold, but it may be prudent to assume that the derivative claim, regardless of its intrinsic value, will loom large at some point in the litigation, and this should be explained to Harry.

Even if his wife is presently unaware of her right to bring a derivative claim, she will presumably learn about it if and when she consults a matrimonial lawyer. Her derivative action can be brought within the applicable statute of limitation, and would then be joined with the personal injury action. *Buckley v. National Freight, Inc.*, 90 N.Y.2d 210, 659 N.Y.S.2d 841 (1997). Nor should Harry think that he can avoid his wife's involvement by settling his case within the next year, before he files for divorce. In order to settle his case, the defendant will certainly require Harry to execute a general release, and this would, absent special circumstances, also extinguish his wife's potentially viable claim. *Buckley*, *supra.* This could leave Harry open to a claim by his wife.

I don't mean to suggest that you should advise Harry to allow you to add his wife's derivative claim (with her consent, of course) just to keep up appearances or to make matters simpler. In fact, under these circumstances it likely would be improper for you to represent the wife. Harry's confidential information to you seems to create differing interests (DR 5-105) and at minimum the appearance of

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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impropriety, which would preclude joint representation.

In light of the fact that you probably will see Harry's wife from time to time, and that she can be expected to ask about the progress of the litigation, it is important that you discuss with Harry what you can and cannot tell her. This conversation should include not only the limits he might place on you, but also how your own ethical obligations come into play.

Finally, even though this may be a big case, and undoubtedly you would like to keep it, you should consider the possibility that Harry might be better served by an attorney who is removed from his social setting. DR 5-101. On that down note, I wish you good luck.

The Forum, by
Lucille Fontana
White Plains, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My firm represents a number of companies in the construction business, and they are frequently sued by construction workers who are injured on the job. Lately we have had several cases in which the injured plaintiffs – not employees of any of our clients – are in this country illegally. One of our clients wants to know whether it would be permissible to report both the plaintiff in this case, and his employer, to the authorities.

My client has not proposed threatening criminal charges. Instead, he proposes simply to provide the authorities with the documentation and depositions obtained during discovery. These show that that the plaintiff is here illegally, obtained employment illegally, and that his employer hired him knowing about his status, or, at least, that he was hired without a required pre-employment investigation. There is no intent to threaten or to gain an advantage in the litigation, although an advantage could result.

My client feels that because he has learned what he has about this worker he should, as a good citizen, inform the proper authorities. My questions are: What is my client allowed or required to do? What am I, as the client's attorney, allowed or required to do? Would my firm or my client face any liability if either of us were to make such reports?

Signed,
Concerned Professional

Editor's Note: The Forum presents a slightly edited version of the question from "Stuck" which was published in the June issue of the *Journal.*

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The modern tendency is to omit the words of the from statements like, "All of the shareholders shall be entitled to vote." In the expression, "None of the shareholders shall be entitled to vote," omission of the phrase of the would be incorrect, so wouldn't the omission of those words also be incorrect in "all shareholders"?

Answer: The correspondent's logic is excellent. Indeed, he could have used another expression in his comparison to solidify his point, for if you delete the words *of the* from the phrase "omission of the words," the result is not idiomatic English.

But language is sometimes not logical, and that is especially true with idioms. So the argument fails; both "all of the arguments" and "all the arguments" are correct. The latter is also shorter, which, in writing, is a benefit, all other things being equal. But the shortest and most direct statement, "No shareholders are entitled to vote," would obviate the question.

What bothers me about the submitted sentence, however, is not whether the phrase *of the* stays or goes, but the use of the word *shall* further along in his quotation. Why use the future tense *shall* instead of the present-tense verb *are*? The word *shall* may also be ambiguous because it is archaic, a legalism almost never used to designate the present tense in ordinary English. The manual *Words and Phrases* devotes many pages to appellate court decisions about the meaning of *shall*.

In ordinary English, *shall* indicates future tense, but it is hardly used for that purpose, only sometimes replacing the word *should* in a first person interrogative: "Shall I take my umbrella with me today?" "Shall we leave now?"

The words *shall* and *will* have an interesting history. Before the 17th century, both often indicated only simple futurity, until an Oxford University geometry professor, perhaps seeking to add the precision of geometry to language, set forth the rule that *shall* in the first person ("I shall") indicated simple futurity. He reserved the use of *shall* to express emphasis in the first person; one must use *shall* to indicate determination. The reverse would be true for second and third persons, "You will" and "He or she will" expressing determination, and "you and he or she shall" indicating simple futurity.

As you can guess, although the philosopher-grammarians of the 18th century worked hard to enforce that complicated rule, they were as unsuccessful doing so as they were with many other rules they tried to enforce, including the distinction between *different from* and *different than*, *who* and *whom*, and their rule against ending sentences with prepositions ("What are you looking at?") H.L. Mencken's spoof of that rule in his *Dictionary* is often repeated: "A preposition is a very bad word to end a sentence with."

Question: Are the two phrases, *whether* and *whether or not* interchangeable?

Answer: Not always, and when the phrase *or not* is unnecessary, better omit it. Here are two sentences in which *whether* alone is enough: *The question is whether the defendant intended to strike the plaintiff. The witness does not recall whether the defendant was present at the crime.*

But you need *or not* when the phrase introduces a dependent clause. Without the phrase *or not* in the following sentences, they would be unidiomatic: *Whether or not the search committee hires a consultant, some unbiased advice is needed. The stock market reflects expectation, whether or not the expected events occur.*

In both of those two sentences you can move the phrase or not to the end of the dependent clause: *Whether the search committee hires a consultant or not, some unbiased advice is needed. The stock market reflects expectation, whether the expected events occur or not.*

The exception to this rule is that when there are two alternatives, and the second is clearly stated, omit *or not*. This sentence illustrates: *Whether you take a plane or drive your car, you can expect to encounter delays.*

From the Mailbag

On the day the question about "all of the" arrived, so did an e-mail from another reader in which she criticized the following incorrect statement: "It's not so unpopular of an opinion . . ." She wondered why the word *of* was inserted into a negative statement, when you would never insert it into a similar affirmative statement like, "It's so popular of an idea."

It may be explainable by the process of analogy. Phrases like, "much of a problem," "more of a solution" and "a great amount of trouble" require that the words *of a* and *of*, respectively, be added for correct grammar. So the common errors, "It's not so unpopular of an opinion," "not so big of a house," came about. The correct statements would be "not so popular an opinion," and "not so big a house."

Potpourri

English teachers tell us to avoid negative statements. I can recall one who would not let a hapless student finish a sentence that she began with the words, "I don't think . . ." The teacher would interrupt, "If you don't think, just sit down." But negatives are not all bad. Some vividly portray great emotion, and I wish I could quote them to that teacher. Consider Sir Walter Scott's "unwept, unhonored, and unsung," predicting the death of "the man with soul so dead,/Who never to himself hath said/This is my own, my native land!" Or Lord Byron's account of "the wretch, . . . concentered all in self," who died, "unknelled, uncoffined, and unknown." Or George Orwell's, "not unblack dog [who] chased a not unsmall rabbit across a not-ungreen field." ■

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important) is that the Court of Appeals is now willing to read into statutes provisions which the Legislature had considered, but rejected. What changes may come of this remarkable Court of Appeals four-to-three decision are yet to be seen. ■

1. *Caprer v. Nussbaum*, 36 A.D.3d 176, 189, 825 N.Y.S.2d 55 (2d Dep't 2006); *Schindler v. Niche Media Holdings, LLC*, 1 Misc. 3d 713, 716, 772 N.Y.S.2d 781 (Sup. Ct., N.Y. Co. 2003).

2. *Caprer*, 36 A.D.3d at 189.

3. *See id*.; *see also Hoffman v. Unterberg*, 9 A.D.3d 386, 388–89, 780 N.Y.S.2d 617 (2d Dep't 2004) (ruling that an "owner/member of a limited liability company does not have the right to bring a derivative action on behalf of the company").

4. *Lio v. Mingyi Zhong*, 10 Misc. 3d 1068(A), 6, 814 N.Y.S.2d 562 (Sup. Ct., N.Y. Co. 2006); *see* LLCL § 408(b) (providing that "the managers shall manage the limited liability company by the affirmative vote of a majority of the managers").

5. *See* LLCL § 409(a) (requiring a manager to "perform his or her duties . . . in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances"); *see also Nathanson v. Nathanson*, 20 A.D.3d 403, 404, 799 N.Y.S.2d 83 (2d Dep't 2005); *TIC Holdings, LLC v. HR Software Acquisition Group, Inc.*, 194 Misc. 2d 106, 113–14, 750 N.Y.S.2d 425 (Sup. Ct., N.Y. Co. 2002), *aff'd*, 301 A.D.2d 414, 755 N.Y.S.2d 19 (1st Dep't 2003).

6. *See id*.

7. *See, e.g.*, *Caprer*, 36 A.D.3d at 191–93; *KSI Rockville, LLC v. Eichengrun*, 305 A.D.2d 681, 682, 760 N.Y.S.2d 520 (2d Dep't 2003); *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 322–23, 659 N.Y.S.2d 276 (1st Dep't 1997); *Lio*, 10 Misc. 3d at 4.

8. *See id*.

9. 12 Misc. 3d 1151(A), 5–7, 819 N.Y.S.2d 852 (Sup. Ct., N.Y. Co. 2006).

10. *Id*.; *see Cabrini Dev. Council v. LCA Vision, Inc.*, 197 FRD 90, 97–98 (S.D.N.Y. 2000), *vacated in part on other grounds sub nom. Excimer Assocs., Inc. v. LCA Vision, Inc.*, 292 F.3d 134 (2d Cir. 2002) (ruling that the Legislature's failure to grant members the right to sue derivatively on behalf of limited liability companies does not prevent the court from recognizing such a right in common law); *Weber v. King*, 110 F. Supp. 2d 124, 131 (E.D.N.Y. 2000) (explaining that a limited liability company is a cross-breed of the corporate and partnership forms, that statutory authority provides the right to bring derivative actions on behalf of a corporation and partnership, and therefore members may commence a derivative action on behalf of a limited liability company).

11. *Tzolis v. Wolff*, 39 A.D.3d 138, 829 N.Y.S.2d 488 (1st Dep't 2007).

12. *Id*. at 139.

13. *Id*. at 142–43.

14. *See, e.g., Bischoff v. Boar's Head Provision Co.*, 38 A.D.3d 440, 440, 834 N.Y.S.2d 22 (1st Dep't 2007); *Wilcke v. Seaport Lofts, LLC*, 45 A.D.3d 447, 448, 846 N.Y.S.2d 133 (1st Dep't 2007); *see also Out of the Box Promotions LLC v. Koschitzki*, 15 Misc. 3d 1134(A), 7, 841 N.Y.S.2d 821 (Sup. Ct., Kings Co. 2007).

15. The First Department granted leave to appeal its February 8, 2007 decision in *Tzolis v. Wolff* on May 31, 2007. *See Tzolis v. Wolff*, 2007 N.Y. App. Div. Lexis 6760, *1 (1st Dep't May 31, 2007).) The issue certified for appeal was "whether, in the absence of express language in the Limited Liability Company Law, a member of a limited liability company has standing to sue derivatively on the company's behalf."

16. 10 N.Y.3d 100, 855 N.Y.S.2d 206 (2008).

17. *Id*. at 105.

18. *Id*. at 108.

19. *Id*.

20. *Id*. at 109.

21. *Id*. at 119.

22. *Id*. at 120 (citing, *e.g.*, *People v. Bratton*, 8 N.Y.3d 637, 838 N.Y.S.2d 828 (2007); *In re Grand Jury Subpoena Duces Tecum (Museum of Modern Art)*, 93 N.Y.2d 729, 697 N.Y.S.2d 538 (1999); *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966 (1998); *People v. Korkala*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984).

23. *Tzolis*, 10 N.Y.3d 121.

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BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Usage Controversies — Part II

In the last column, the Legal Writer discussed four controversies in legal writing. We continue with 10 more.

5. Placing quotation marks. Many legal writers believe that periods and commas go inside or outside quotation marks depending on the quotation. They'd be right in England. They're wrong in America.

Use quotation marks to introduce and close quotations.[1] Periods always go inside quotation marks. *Correct:* The attorney told the jury "you must find the defendant not guilty of murder in the second degree."

Commas always go inside quotation marks. *Correct:* The attorney told the judge that the plaintiff had "moved for legal, or attorney, fees," but the attorney was wrong. *Exceptions:* "I want to settle," she said, "but my client doesn't." My boss always said, "It is what it is."

Semicolons go outside quotation marks. *Correct:* The prosecutor told the jury that "the defendant bought the gun from a local pawn shop"; the prosecutor then published the gun to the jury.

Colons always go outside quotation marks. *Correct:* The attorney asked the following question: "Did you take any medications today?" The judge noted that "the attorney gave us a list of colors": red, blue, green and orange.

Whether quotation marks go before or after a question mark depends on whether the question is in the original. *Example of question in the original:* The clerk asked me, "Sir, do you want to submit opposition papers?" *Example of question not in the original:* Who said, "I have nothing to offer but blood, toil, tears and sweat"?

Putting quotation marks before or after an exclamation point depends, like the question mark, on whether the exclamation point is in the original. *Example of exclamation point in the original:* "Counselor, you know exactly what I mean!" said the judge. *Example of exclamation point not in the original:* "Counselor, stop calling me "ma'am"!

6. Footnotes and endnotes. Some overuse them. Others don't use them at all.

Avoid putting substance or deep analysis in footnotes or endnotes. Footnotes or endnotes are acceptable for collateral thoughts, special effects, excerpts of testimony, and quoting statutory or constitutional provisions. If the material is important enough to warrant a footnote or an endnote, then it's important enough to include in the text. Being a substantive argument in a footnote or endnote is like being a middle child — you'll be ignored. Footnotes or endnotes are an unpleasant interruption for readers: "'Having to read a footnote resembles having to go downstairs to answer the door while in the midst of making love.'"[2]

For legal briefs, use footnotes, if at all, and not endnotes. Unless you're writing a law review or journal article, don't include citations in footnotes or endnotes. The Legal Writer does not recommend citational footnotes. Those who favor citational footnotes argue that footnoting citations makes sentences shorter; paragraphs more forceful and coherent; ideas, not numbers, more controlling; poor writing more laid bare; caselaw better discussed; and string citations less bothersome.[3] Opponents of citational footnotes — like the Legal Writer — argue that looking up and down at the footnotes is distracting.[4] Readers need to find citations quickly.

Having few footnotes or endnotes will draw the reader's attention to the footnote or endnote. If the footnote or endnote isn't important or necessary, cut it out. Draw the reader's attention with your text.

Having too many footnotes or endnotes will cause readers to lose focus, and your footnotes or endnotes will lose value.

Don't try to cheat on page limit by putting the bulk of your text in footnotes or endnotes. Everyone will see right through this tactic.

7. S' or s's. Singular possessive: Some legal writers add only an apostrophe and leave out the "s." The Legal Writer recommends putting an apostrophe "s" after a singular possessive ending in a sibilant (Ch, S, X, or Z sound). That way you'd write it the way you'd say it out loud. *Example:* John Adams's Thoughts on Government. *Not:* John Adams' Thoughts on Government." *Example:* John Roberts's opinion. *Not:* John Roberts' opinion. Without the apostrophe "s," the pronunciation would be incorrect.

Plural possessives: Don't use an apostrophe "s" after a plural possessive ending in a sibilant. *Example:* "The attorneys' rules directed all internal disputes to arbitration." *Not:* "The attorneys's rules directed all internal disputes to arbitration."

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