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CIVIL PRACTICE

Jay C. Carlisle†

INTRODUCTION

During the *Survey* year seventeen articles of the CPLR were amended and three new articles were added.¹ Also, effective December 1, 1991, Congress has approved important amendments to the Federal Rules of Civil Procedure,² Civil Justice Expenses and Delay Reduction Plans were adopted by the Board of Judges of the Southern and Eastern Districts of New York.³ Additionally, there have been significant developments in the decisional law of discovery,⁴ statute of limitations,⁵ sanctions,⁶ and *res judicata*.⁷ These and other areas should be of interest to the practitioner.

I. NEW LEGISLATION AND RULES

Space limitations prevent inclusion of an appendix summarizing all CPLR legislation enacted during the *Survey* year. The practitioner should review the table of contents for the various CPLR publications.⁸ The most important development relates to several changes

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The 1991 article on New York Civil Practice is dedicated to the Honorable Sybil Hart Kooper, who was a distinguished justice on the Appellate Division for the Second Department. Justice Kooper died during the *Survey* year.

We worked together on the Chief Judge of New York's Task Force on Women and the Courts. Justice Kooper had a wonderful sense of humor, great compassion, and extraordinary human strength. The bench and bar of the United States will sorely miss her.

1. See *infra* notes 8-67 and accompanying text.

2. See *infra* notes 68-166 and accompanying text.

3. See *infra* notes 167-206 and accompanying text.

4. See *infra* notes 572-88 and accompanying text.

5. See *infra* notes 207-335 accompanying text.

6. See *infra* notes 608-38 and accompanying text.

7. See *infra* notes 509-31 and accompanying text.

8. The complete text should be available for review in the 1991-92 CPLR publications by Matthew Bender, Gould Publications or West's McKinney Commentaries. Copies of the entire legislative texts may be obtained by contacting the Department of Governmental Relations. The practitioner should also consider subscribing to the Annual Legislative Bulletin of the Association of the Bar of the City of New York. The Bulletin analyzes the merits of the proposed bills and discusses their impact on current

relating to the Federal Rules of Civil Procedure.⁹ Prior to discussing these changes, the bench and bar should be alerted to some of the statutory changes.

A. Section 306-a; New Requirements for Proof of Service

CPLR 306-a became effective on September 1, 1991.¹⁰ It requires that the summons and proof of its service be filed with the clerk of the court within thirty days after service is complete. The new statute applies to actions commenced in the supreme or county courts, including third party actions.¹¹ It requires that a copy of the summons with proof of service be filed with the clerk of the court in the county in which the action is brought within thirty days after service is complete, regardless of how or upon whom it was served.¹² CPLR 306-a applies to all cases pending as of September 1, 1991.¹³ The deadline for that filing was October 1, 1991. If the filing requirements are not followed, the statute states that the court shall grant a nunc pro tunc order to permit a late filing but also states "upon application."¹⁴ If the clerk enters the order without involving a judge, the late filer will not need to file a Request for Judicial Intervention and will save the \$75 RJI fee.¹⁵

laws. It is an excellent research tool and will keep the practitioner abreast of developments in Albany.

9. See *infra* notes 68-206 and accompanying text.

10. Act of June 12, 1991, ch. 166 § 381, 1991 MCKINNEY'S SESS. LAWS OF N.Y. (codified at N.Y. CIV. PRAC. L. & R. 306-a (McKinney Supp. 1991) [hereinafter N.Y. CPLR]). See also Robert A. Barker, *CPLR § 306-a — Thirty Days to File*, N.Y.L.J. Sept. 23, 1991, at 3; David D. Siegel, *The New Mandatory Filing Rule: An Oct. 1 Filing Could Avoid Additional Fee*, N.Y.L.J. Sept. 26, 1991, at 1; and David D. Siegel, *Mandatory Filing (And Fee Paying) Takes Effect Sept. 1, 1991*, 381 N.Y. L. DIG. Sept. 1991, at 1.

11. The new section is similar to the requirement of the Civil Court Act (§ 409). It requires a filing within fourteen days; however, the nunc pro tunc order in the Civil Court Act must be served on the defendant, even one in default, who is then given an additional period of time to answer. CPLR 306-a does not contain a similar provision.

12. See *supra* note 10.

13. The new act is applicable according to § 406 of the same session law to all actions "pending on or commenced on or after Sept. 1, 1991, provided however, that for purposes of this section service of such summons made prior to such date shall be deemed to have been completed on Sept. 1, 1991."

14. See *supra* note 10, and accompanying text.

15. *Id.*

B. Section 310; Substituted Service on Partnerships

Subdivisions (b) and (c) were added to CPLR 310 in 1991.¹⁶ They allow substituted service upon a partner being served on behalf of a partnership.¹⁷ Thus the leave and mail and nail and mail provisions of CPLR 308¹⁸ are now available for service of summons upon a partnership. The practitioner should not assume that all CPLR 308 provisions have been incorporated into the new additions to CPLR 310.¹⁹ Since strict compliance with all service statutes in New York is required, one should carefully comply with CPLR 310.²⁰

C. Section 312-a; Service by Mail in New York is Permanent

CPLR 312-a was enacted in 1990 as a two year experiment.²¹ In 1991 the legislature made it a permanent part of New York civil practice. The statute provides for service of summons by first class mail. Before discussing CPLR 312-a, three key observations are necessary. First, plaintiffs must successfully use the new service statute within the applicable statute of limitations period. If less than six months of life remains in the statute of limitations, a traditional method of service should be used. Second, if the defendant fails to acknowledge service within thirty days after receipt of the mailed service (plus ordinary mailing time) the plaintiff must complete service by traditional means. Thus, strict compliance requirements remain important. Third, service under CPLR 312-a must not be confused with other CPLR provisions authorizing use of mail.²²

16. See Act of July 15, 1991, ch. 338 § 1, 1991 MCKINNEY'S SESS. LAWS OF N.Y. (codified N.Y. CPLR 310).

17. *Id.*

18. See Harry Gold, *Revised Law Applies to All Foreign Limited Partnerships*, N.Y.L.J., Nov. 13, 1991, at 35, col. 2; Steven C. Schwartz, *Amended CPLR 310 Serving of Process on Partnerships*, N.Y.L.J., January 15, 1992, at 1, col. 1.

19. *Id.*

20. *Id.*

21. See N.Y. CPLR 312-a (McKinney Supp. 1990); see also Joseph M. McLaughlin, *Service by Mail in New York*, N.Y.L.J. Oct. 10, 1989, at 1, col. 1; David D. Siegel, *The New Statute on Summons Service by Mere Mail: When To Use It, and When Not to. Part I*, 359 N.Y. ST. L. DIG., Nov. 1989, at 1. In 1991 the Legislature enacted the statute permanently. See Act of July 1, 1991 ch. 249 § 1, 1991 MCKINNEY'S SESS. LAWS OF N.Y.

22. See N.Y. CPLR 308(2) (McKinney 1990) (deliver and mail); N.Y. CPLR 308(4) (McKinney 1990) (nail and mail); N.Y. CPLR 308(5) (McKinney 1990) (mail by ex parte order); N.Y. VEH & TRAF. LAW § 253 (McKinney 1986) (mail under nonresident motorist statute); N.Y. BUS. CORP. LAW § 306(a) (McKinney 1986) (service on a registered agent).

It appears that CPLR 312-a may be used in all state courts where the CPLR is applicable. Because the New York State Legislature specifically made similar amendments in section 403 of the New York City Civil Court Act and the Uniform Court Acts,²³ however, it is unlikely that service by mail can be used in other courts not directly subject to the CPLR in the absence of legislative approval. The new statute has been authorized by legislative order in the civil, district, city, town and village courts.²⁴

CPLR 312-a does not require a process server.²⁵ Mailed service can be completed by the plaintiff or by his attorney or the attorney's employee.²⁶ Although CPLR 312-a does not specifically provide for mailing to defendants outside New York, it is compatible with CPLR 313, which permits a summons to be mailed outside New York in the same manner as service made within the State. Any defendant, with the exception of those governed by CPLR 309²⁷ (infants, incompetents and conservatees) may be served by mail. This includes defendants referred to in CPLR 308²⁸ (natural person), CPLR 310²⁹ (partnerships), CPLR 311³⁰ (corporations and certain government entities), and CPLR 312³¹ (courts, boards and commissions). CPLR 307³² (service on the state) is referred to in 312-a; however, section 307 does not include actions against the state in the Court of Claims.³³

CPLR 312-a contemplates first class mailing only. Proof of mailing is not necessary because proof is the defendant's acknowledgment. Nonetheless, if costs are later sought, because the defendant avoids service by mail, it is useful for the lawyer to have his or her secretary prepare an affidavit of mailing. The plaintiff's mailing must include the summons, the complaint or a notice pursuant to CPLR 305(b),³⁴ two copies of the statement and acknowledgment, and a self-addressed return envelope.

23. Siegel, *supra* note 21.

24. *Id.*

25. N.Y. CPLR 312-a (McKinney 1990).

26. *Id.*

27. N.Y. CPLR 309 (McKinney 1990).

28. N.Y. CPLR 308 (McKinney 1990).

29. N.Y. CPLR 310 (McKinney 1991).

30. N.Y. CPLR 311 (McKinney 1990).

31. N.Y. CPLR 312 (McKinney 1990).

32. N.Y. CPLR 307 (McKinney 1990).

33. *Id.*

34. N.Y. CPLR 305(b) (McKinney 1990).

Service by mail is complete when the defendant, the defendant's attorney, or an employee of the attorney mails or delivers a signed acknowledgment to the plaintiff.³⁵ The statute of limitations will continue to run until that date. If the acknowledgment is complete within thirty days (plus ordinary first class mailing time) proof of service is deemed complete under CPLR 306.³⁶ If the action is in supreme or county court, one must file a copy of the summons and acknowledgment with the clerk of the county in which the action is brought within thirty days after the acknowledgment is returned to the plaintiff.³⁷

If the defendant refuses to acknowledge service under CPLR 312-a the plaintiff must complete service under some other method. Plaintiff, however, may ask the court to assess the reasonable expense of other service on the defendant. When another method is attempted, the summons must refer to the prior unsuccessful attempt by mail. Unfortunately, 312-a does not explicitly provide for attorney's fees for alternative service. If it can be shown, however, that a defendant frivolously ignores service by mail, sanctions can be sought under 22 NYCRR 130.³⁸

D. Section 2307; Subpoena Duces Tecum

CPLR 2307³⁹ has been amended by deleting subdivision (b) and providing that a subpoena duces tecum can be complied with by producing a full-sized legible reproduction of the item or items required to be certified as complete and accurate by either the person in charge of the library, department or bureau or the person's designee, and no personal appearance to certify the item or items is necessary, unless by court order under CPLR 2214(d).⁴⁰

E. Section 3101, 3406; Medical Malpractice Panels Abolished

Chapter 165 of the Laws of 1991⁴¹ repeals § 148-a of the Judici-

35. N.Y. CPLR 312-a (McKinney 1990).

36. *Id.*

37. N.Y. CPLR 306-a (McKinney 1992).

38. N.Y. COMP. CODE R. & REG. tit. 22, § 130 (1988) [hereinafter NYCRR].

39. See Act of July 15, 1991, ch. 389 § 1, 1991 MCKINNEY'S SESS. LAWS OF N.Y. (effective January 1, 1992) (codified at N.Y. CPLR 2307 (McKinney 1992)).

40. *Id.*

41. See Act of June 12, 1991, ch. 165 § 47, 1991 MCKINNEY'S SESS. LAWS OF N.Y.

ary Law⁴² and amends CPLR 3101(d)(ii)⁴³ and CPLR 3406.⁴⁴ The new law abolishes the three person panels used in medical malpractice panels and was effective October 1, 1991, except in pending actions in which a formal written recommendation as been signed and forwarded as of that date.⁴⁵ The Office of Court Administration has amended Uniform Rules 202.21⁴⁶ and 202.56⁴⁷ which referred to the panels. An important change for the practitioner to note with respect to Uniform Rule 202.21(a) is that the certificate of readiness must accompany a note of issue in a medical malpractice action.⁴⁸

F. Other Changes in CPLR

Additional changes in the CPLR have been made with respect

42. Act of June 12, 1991, Ch. 105, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 47 (repealing N.Y. JUD. LAW § 148-a, effective October 1, 1991).

43. See Act of June 12, 1991, Ch. 165, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 45 (codified at N.Y. CPLR 3101).

44. See Act of June 12, 1991, Ch. 165, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 46, codified at N.Y. CPLR 3406(b).

45. *Id.*

46. See N.Y. UNIFORM RULES OF THE COURT § 202.21 (McKinney 1992).

47. *Id.* at 202.56.

48. David D. Siegel, 382 N.Y. ST. L. DIG., Oct. 1991, at 4.

to CPLR 302(b),⁴⁹ 321(a),⁵⁰ 3016(h),⁵¹ 3101(d)(1)(ii),⁵² 3211(a)(11),⁵³ 4504,⁵⁴ 5018(d),⁵⁵ 5222(a),⁵⁶ 5222(a),⁵⁷ 5521,⁵⁸ 6511(d),⁵⁹ 8007⁶⁰ and

49. *See* Act of April 22, 1991, ch. 69, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 7 (codified at N.Y. CPLR 302(b) (McKinney 1992)). This provision was amended to provide that in any proceeding under the Family Court Act, § 10, the family court can exercise personal jurisdiction over a non-resident respondent. The amendment provides for long-arm jurisdiction in child abuse cases where the abused or neglected child resides or is domiciled in New York and where the alleged abuse or neglect occurred within the State.

50. *See* Act of July 1, 1991, ch. 236, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (codified at N.Y. CPLR 321 (McKinney 1992)) (amended by adding references to §§ 1809 and 1809-A of the N.Y.C. CIV. CT. ACT, and the UNIFORM DIST. CT. ACT and the UNIFORM CITY CT. ACT).

51. *See* Act of July 26, 1991 ch. 653, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 3 (codified at N.Y. INS. LAW § 2342 (McKinney Supp. 1992)) (amended to replace the reference to GEN. MUN. L. § 305 with a reference to ARTS AND CULT. AFF. L. § 20.09).

52. *See* Act of June 12, 1991 ch. 165, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 45 (codified at N.Y. CPLR 3101 (McKinney 1992)). This provision was amended to delete the provision allowing a party to condition an offer to disclose an expert witness's name and make him available for deposition on all parties waiving a hearing of the matter before the malpractice panel, and the provision specifying that if the offer was conditioned upon a waiver of the malpractice panel's hearing of the matter, the panel shall not be utilized. The October 1, 1991 date applies only to actions where, as of this date, the medical malpractice panel members have not signed and forwarded to all the parties a formal written recommendation relating to the question of liability.

53. *See* Act of July 26, 1991, Ch. 656, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 4 (codified at N.Y. CPLR 3211 (McKinney 1992)) (amended to replace the reference to GEN. MUN. L. § 305 with a reference to ARTS AND CULT. AFF. L. § 20.09).

54. *See* Act of July 19, 1991, Ch. 457, MCKINNEY'S SESS. LAWS OF N.Y. § 1 (codified at N.Y. CPLR 4504 (McKinney 1992)) (amended to add references to "podiatrist" and "podiatry").

55. *See* Act of July 26, 1991, Ch. 648, MCKINNEY'S SESS. LAWS OF N.Y. § 2 (codified at N.Y. CPLR 5018 (McKinney 1992)) (adds a new subdivision (d) which permits a county clerk to adopt a new docketing system utilizing electro-mechanical, electronic or any other method he or she deems suitable for maintaining the dockets).

56. *See* Act of July 15, 1991, Ch. 314, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (codified at N.Y. CPLR 5222 (McKinney 1992)) (amended to require that a restraining notice include an original signature or copy of the original signature of the clerk of the court or attorney who issued it).

57. *Id.*

58. *See* Act of July 25, 1991, Ch. 582, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 6 (codified at N.Y. CPLR 5521 (McKinney 1992)) (allowing courts to give preference for argument of appeals from orders, judgments or decrees in proceedings brought under provisions of the Family Court Act if any party or counsel for a minor, who is the subject of the proceeding, applies).

59. *See* Act of July 26, 1991, Ch. 648, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 3 (codified at N.Y. CPLR 6511 (McKinney 1992)) (adding a new subdivision (d) which permits a county clerk to adopt a new indexing system utilizing electro-mechanical, electronic or any other method he or she deems suitable for maintaining the indexes).

8009.⁶¹

G. Additional 1991 Legislative Changes

The practitioner should note additional legislative changes to the General Associations Law,⁶² the Insurance Law,⁶³ the Judiciary Law,⁶⁴ the Public Officers Law,⁶⁵ Vehicle and Traffic Law,⁶⁶ and the New York City Civil Court Act.⁶⁷

H. Changes in the Federal Rules of Civil Procedure

Last years' *Survey* alerted the practitioner to important changes made in the Judicial Improvements Act of 1990.⁶⁸ It is worth another brief mention because many members of the bar remain unaware of its key points. Fortunately Professor John B. Oakley of the California at Davis Law School has written a litigators piece describing the Act of

60. See Act of July 19, 1991, Ch. 449, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (codified at N.Y. CPLR 8007 (McKinney 1992)) (amended by substituting the reference to "published" with "principally circulated.").

61. See Act of May 24, 1991, Ch. 143, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (codified at N.Y. CPLR 8009 (McKinney 1992)) (amended by increasing fees).

62. See Act of June 12, 1992, Ch. 166, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 274 (codified at N.Y. GEN. ASS'NS LAW § 19 (McKinney Supp. 1992)) (relating to service of process against an association upon the secretary of state).

63. See Act of July 15, 1991, Ch. 320, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 2 (codified at N.Y. INS. LAW § 5102(a)(5) (McKinney Supp. 1992)). This amendment adds new subsection (5) relating to "basic economic loss" and provides that there be an option to purchase, for an additional premium, an additional \$25,000 of coverage which will be applied to loss of earnings from work and/or psychiatric, physical or occupational therapy and rehabilitation after the initial \$50,000 of basic economic loss has been exhausted.

64. See Act of June 12, 1991, Ch. 165, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 47 (repeals effective October 1, 1991 § 148-a of the JUD. LAW which established medical malpractice panels).

65. See Act of July 1, 1991, Ch. 212, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 2 (amending, effective July 7, 1991, N.Y. PUB. OFF. LAW § 87(2)(j)).

66. See Act of June 12, 1991, Ch. 166, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 286 (amending, effective June 12, 1991, VEH. & TRAF. LAW § 254(2) relating to service of summons on secretary of state in action against non-resident defendant).

67. See Act of July 26, 1991, Ch. 659, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 11 (amending, effective November 1, 1991, § 1812-A of the Act). See also Act of April 22, 1991, Ch. 66, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (amending, effective January 1, 1992, § 1900 of the Act); Act of July 23, 1991, Ch. 591, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (amending, effective July 23, 1991, § 1908 of the Act); Act of July 1, 1991, Ch. 261, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (amending, effective January 1, 1992, § 1908(f) of the Act); Act of July 1, 1991, Ch. 249, 1991 MCKINNEY'S SESS. LAWS OF N.Y. § 1 (amending, effective July 1, 1991, § 1908-a of the Act).

68. See Carlisle, *Civil Practice, 1990 Survey of N.Y. Law*, 42 SYRACUSE L. REV. 343, 351-353 (1991).

1990.⁶⁹ Professor Oakley points out that Congress has narrowed the right to invoke federal jurisdiction originally or by removal.⁷⁰ He also explains the dramatic expansion of the right to invoke the supplemental jurisdiction necessary for a federal court to adjudicate claims under state law that are transactionally related to litigation in federal court.⁷¹ Finally, Professor Oakley discusses the important new changes in federal venue law.⁷²

During the *Survey* year several important changes in the Federal Rules of Civil Procedure became effective and the Advisory Committee of Civil Rules held a hearing on a number of proposed amendments to the Civil Procedure Rules.⁷³ A Civil Justice Expense and Delay Reduction Plan was adopted by the Board of Judges of the Southern District of New York on December 12, 1991⁷⁴ and by the Eastern District of New York on December 17, 1991.⁷⁵ Also the President's Council on Competitiveness issued an Agenda for Civil Justice Reform in America which advocates major changes in the litigation process.⁷⁶ The bench and bar should also be aware of amendments to the Federal Rules of Criminal Procedure,⁷⁷ Federal Rules of Evidence,⁷⁸ Federal Rules of Appellate Procedure,⁷⁹ Federal Bank-

69. See John B. Oakley, *Recent Statutory Changes in The Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

70. *Id.*

71. *Id.*

72. *Id.*

73. See Proposed Amendments to The Federal Rules of Civil Procedure and the Federal Rules of Evidence, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

74. See Civil Justice Expense and Delay Reduction Plan as adopted by the Board of Judges of the Southern District of New York on December 12, 1991 (on file with the Syracuse Law Review) [hereinafter S.D.N.Y. Education Plan].

75. See Civil Justice Expense and Delay Reduction Plan as adopted by The Board of Judges of the Eastern District of New York on December 17, 1991 (on file with the Syracuse Law Review) [hereinafter E.D.N.Y. Education Plan].

76. See A Report from the President's Council on Competitiveness: Agenda For Civil Justice Reform In America, August 1991 [hereinafter Council on Competitiveness]. See also Michael Wines, *Bush Sets Rules to Curb U.S. Lawyers' Litigation*, N.Y. TIMES, October 24, 1991, at A22; John H. Cushman, Jr., *Federal Regulation Growing Despite Quayle Panel's Role*, N.Y. TIMES, Dec. 24, 1991, at A1. Most of the proposals in the Justice Reform Act should be introduced in early 1992 in the U.S. Senate as the Access to Justice Act of 1992.

77. See H.R. Doc. No. 78, 102nd Cong., 1st Sess. (1991).

78. See H.R. Doc. No. 76, 102nd Cong., 1st Sess. (1991).

79. See H.R. Doc. No. 79, 102nd Cong., 1st Sess. (1991).

ruptcy Rules.⁸⁰ Finally, the bar should note that the Second Circuit Appellate Rules have been amended.⁸¹

1. *Federal Rules of Civil Procedure*

On April 30, 1991 the United States Supreme Court ordered that the Federal Rules of Civil Procedure for the United States District Courts (hereinafter "Rule" or "Rules") be amended by including new chapter headings VIII and IX, amendments to Rules C and E of the Supplemental Rules for certain Admiralty and Maritime Claims, new forms 1A and 1B to the Appendix of Forms, the abrogation of Form 18A, and amendments to Civil Rules 5, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 72, and 77.⁸² These changes were transmitted to the Congress by the Chief Justice pursuant to 28 U.S.C. §§ 2072-74⁸³ and became procedural law through congressional inaction. The amended Rules apply to all civil actions commenced after December 1, 1991 and all pending proceedings "insofar as just and practicable"⁸⁴ The changes to the Rules include major reforms in the areas of pleading, discovery, subpoenas and motions. The most important changes are summarized below.

a. *Rule 5: Service and Filing*

Rule 5 has been amended in three important respects.⁸⁵ First, the amended rule requires that a certificate of service be filed with the court, together with a copy of the papers served. This requirement is applicable to all post-complaint papers filed unless the court orders otherwise.⁸⁶ Second, papers may be filed by facsimile transmission, if permitted by the local rules of the district court, provided the local rules are consistent with the standards established by the Judicial Conference.⁸⁷ Third, the rule prohibits court clerks from refusing to accept for filing any paper solely because it is not in conformity with

80. See H.R. DOC. NO. 80, 102nd Cong., 1st Sess. (1991).

81. See N.Y.R. OF CT. 661 (McKinney's 1992).

82. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R. DOC. NO. 77, 102nd Cong., 1st Sess. 1 (1991) [hereinafter CIVIL RULES].

83. *Id.* See 28 U.S.C. §§ 2072-74 (1988).

84. CIVIL RULES, *supra* note 82, at 1.

85. *Id.* at 55.

86. FED. R. CIV. P. 5. See also CIVIL RIGHTS, *supra* note 82, at 94-95 (Advisory Committee Notes).

87. FED. R. CIV. P. 5, CIVIL RULES, *supra* note 82, at 105 (Advisory Committee Notes).

the Rules or any local rule or practice.⁸⁸

b. Rule 15: Amended and Supplemental Pleadings

The amendments to Rule 15 seek to freely allow amendments to pleadings to correct formal defects such as misnamed or misidentified parties.⁸⁹ The Rule has been changed so that an amendment to a pleading relates back to the time of filing when "relation back is permitted by the law that provides the statute of limitations applicable to the action" The Advisory Committee notes to this section make it clear that it is intended to clarify the ambiguity created by the Supreme Court's decision in *Schiavone v. Fortune*.⁹⁰ Thus, Rule 15 should be liberally construed to permit any relation back that is permissible under the applicable limitations law. The Advisory Committee explained "[w]hatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim."⁹¹ The provisions in the old Rule 15, which permit a relation back if the claim or defense asserted arose out of the same conduct, transaction, or occurrence as that alleged in the original pleading, is retained in the amended rule as an alternative ground for the relation back of amendments.

Rule 15 has also been revised to permit an amendment to change or add the name of a party against whom a claim is asserted, so long as the action against that party arose out of the same circumstances as those giving rise to the original claim, and the party has either (a) received actual notice of the action or (b) knew or should have known that, but for a mistake in naming the party in the original complaint, the action would have been brought against that party.⁹² If either of these requirements is satisfied within the time permitted under Rule 4(m) for service of the complaint, then an amendment changing or adding the name of a party will be deemed to relate back to the time of the original filing. This revision overrules the *Schiavone*

88. FED. R. CIV. P. 5, CIVIL RULES, *supra* note 82, at 105-06 (Advisory Committee Notes).

89. CIVIL RULES, *supra* note 83 at 56, 111-13.

90. 477 U.S. 21 (1986); CIVIL RULES, *supra* note 82, at 112 (Advisory Committee Notes).

91. CIVIL RULES, *supra* note 82, at 112 (Advisory Committee Notes).

92. FED. R. CIV. P. 15, CIVIL RULES, *supra* note 82, at 112-13 (Advisory Committee Notes).

holding.⁹³

c. Rule 24: Intervention

Rule 24 has been revised to require that when the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in 28 U.S.C. § 2403.⁹⁴

d. Rule 34: Production of Documents

Rule 34 has been revised to permit courts to compel non-parties to produce documents and things or to submit to an inspection as provided in Rule 45.⁹⁵ The changes in the Rule are not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but it is unlikely that separate actions will be filed in light of the Rule 34 revision.⁹⁶

e. Rule 35: Physical and Mental Examinations

Rule 35 has been revised to expand the range of physical and mental examinations which the court can order.⁹⁷ The old rule permitted examinations only by physicians.⁹⁸ The new Rule permits examinations to be conducted "by a suitably licensed or certified examiner. . . ."⁹⁹ This suggests that a party can be compelled to submit to an examination by a dentist, a podiatrist, an occupational therapist, or any other professional required to be licensed provided that the individual is qualified to present relevant testimony on the party's physical or mental condition.¹⁰⁰ It should be noted that the court has the responsibility to determine the suitability of the examiner's qualifications, even if the proposed examination is to be conducted by a physician. "If the proposed examination and testimony calls for an

93. CIVIL RULES, *supra* note 82, at 112-13 (Advisory Committee Notes).

94. FED. R. CIV. P. 24. *See* CIVIL RULES, *supra* note 82, at 115 (Advisory Committee Notes).

95. FED. R. CIV. P. 34. *See also* CIVIL RULES, *supra* note 82, at 123 (Advisory Committee Notes).

96. CIVIL RULES, *supra* note 82, at 123 (Advisory Committee Notes).

97. FED. R. CIV. P. 35; CIVIL RULES, *supra* note 82, at 126 (Advisory Committee Notes).

98. CIVIL RULES, *supra* note 82, at 126 (Advisory Committee Notes).

99. FED. R. CIV. P. 35(c).

100. CIVIL RULES, *supra* note 82, at 126 (Advisory Committee Notes).

expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician.”¹⁰¹

f. Rule 41: Dismissal of Actions

Rule 41 has been revised to delete language that permitted the use of the rule as a device to terminate a non-jury action on the merits when the plaintiff had failed to carry a burden of proof in presenting the plaintiff's case.¹⁰² A Rule 41 motion to dismiss on the basis that the plaintiff's evidence is insufficient as a matter of law should be treated as a motion for judgment on partial findings, as provided in revised Rule 52.¹⁰³

g. Rule 44: Proof of Official Records

Rule 44 has been revised to make use of the Hague Public Documents Convention.¹⁰⁴ It provides that final certification of a foreign official record is not required if the record and attestation are certified as provided in a treaty or convention to which the foreign country where the official record is located and the United States are both parties.¹⁰⁵ It should be noted that this revision changes the former procedure for authentication of foreign official records only with respect to records from nations that are signatories to the Hague Convention.

h. Rule 45: Subpoena

Rule 45 has been completely revised. Subdivision (a) is amended in seven significant respects.¹⁰⁶ Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of the court. It permits attorneys, in addition to clerks, to issue subpoenas. In addition, attorneys representing a party in federal court now have the authority to issue and serve a subpoena in any federal court nationwide. Consequently the Advisory Committee states, “the amended rule effectively authorizes service of a subpoena anywhere in the United States by an

101. *Id.* at 126-27.

102. FED. R. CIV. P. 41. *See* CIVIL RULES, *supra* note 82, at 128 (Advisory Committee Notes).

103. CIVIL RULES, *supra* note 82, at 128 (Advisory Committee Notes).

104. FED. R. CIV. P. 44. *See* CIVIL RULES, *supra* note 82, at 131 (Advisory Committee Notes).

105. CIVIL RULES, *supra* note 82, at 131 (Advisory Committee Notes).

106. FED. R. CIV. P. 45; CIVIL RULES, *supra* note 82, at 143 (Advisory Committee Notes).

attorney representing any party.”¹⁰⁷ The revised Rule recognizes the potential for attorneys to abuse their power to issue and serve subpoenas. Subsection (c) of the Rule imposes an affirmative duty on the party or attorney responsible for the subpoena to “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.”¹⁰⁸ The sanctions include reimbursement of lost earnings and reasonable attorney’s fees.

Rule 45 has also been revised to include specific grounds for quashing or modifying a subpoena. The new Rule protects intellectual property and unretained experts from the apparent abuse of the subpoena process.¹⁰⁹ The new Rule authorizes a district court to quash or modify a subpoena seeking the disclosure of confidential information or the opinion of an unretained expert unless a “substantial need” is shown and “reasonable compensation” is provided to the subpoenaed party.¹¹⁰

i. Rules 47 and 48: Abolition of Alternate Jurors

Rule 47 has been revised to no longer allow alternate jurors in federal civil cases.¹¹¹ Rule 47 also now permits a juror to be excused for “good cause” at any time during deliberations as well as trial.¹¹² This provision may be used without causing a mistrial. In addition, Rule 47 limits preemptory challenges to the number provided by 28 U.S.C. § 1870 — currently, three challenges to a party.¹¹³ As a result of these changes, the Advisory Committee comments, “it will ordinarily be prudent and necessary, in order to provide for sickness and disability among jurors, to seat more than six jurors.”¹¹⁴

j. Rule 50: Judgment As Matter Of Law

Rule 50 has been revised to delete reference to a “directed verdict” or to a “judgment notwithstanding the verdict.”¹¹⁵ The revised

107. CIVIL RULES, *supra* note 82, at 144 (Advisory Committee Notes).

108. FED. R. CIV. P. 45(c)(1).

109. CIVIL RULES, *supra* note 82, at 148 (Advisory Committee Notes).

110. FED. R. CIV. P. 45(c)(3)(B)(iii).

111. FED. R. CIV. P. 47. *See* CIVIL RULES, *supra* note 82, at 152 (Advisory Committee Notes).

112. FED. R. CIV. P. 47(c). *See* CIVIL RULES, *supra* note 82, at 152-53 (Advisory Committee Notes).

113. FED. R. CIV. P. 47(b). *See also* 28 U.S.C. § 1870 (1985).

114. CIVIL RULES, *supra* note 82, at 154 (Advisory Committee Notes).

115. FED. R. CIV. P. 50. *See* CIVIL RULES, *supra* note 82, at 159, 162.

rule renames these motions “judgments as matter of law.”¹¹⁶ A party may move for a judgment as a matter of law on any claim at any time during a trial after the non-moving party has “been fully heard.”¹¹⁷ Paragraph (a)(1) of the revised Rule specifies that the motion should be granted if “there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the non-moving] party with respect to that issue”¹¹⁸ The moving party is responsible for specifically identifying the basis on which judgment as a matter of law might be granted. The revised Rule “aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law”¹¹⁹

k. Rule 77: District Courts and Clerks

Rule 77 has been revised to permit district courts, upon motion, to prolong the time to appeal in cases where a party’s notice of appeal is filed late because he was unable to receive notice of judgment against him.¹²⁰ The amended Rule works in relation to Federal Rule of Appellate Procedure 4(a) to allow a district court to enlarge the time for appeal by fourteen days when it determines that notice of the judgment was in fact not received by the appellant and that no prejudice would be caused by allowing the appeal.¹²¹ The revised Rule authorizes the prevailing party in the action to serve notice of the judgment on the losing party to help ensure its receipt.¹²²

l. Rules 52, 53, 63, and 72

Rule 52, has been revised to permit courts to render “judgment on partial findings” in bench trials.¹²³ Rule 53 has been revised to require masters to serve a notice of the filing of their report on all parties.¹²⁴ Rule 63 has been revised to allow cases to proceed before substitute judges without regard to the reasons for the original jurist’s inability to continue.¹²⁵ Rule 72 has been revised to clarify an ambi-

116. FED. R. CIV. P. 50.

117. *Id.* 50(a)(1).

118. *Id.*

119. CIVIL RULES, *supra* note 82, at 159 (Advisory Committee Notes).

120. *Id.* at 173 (Advisory Committee Notes).

121. *Id.*

122. FED. R. CIV. P. 77(d).

123. FED. R. CIV. P. 52.

124. *See id.* 53.

125. *See id.* 63.

guity concerning the time for objecting to a magistrate's report.¹²⁶

2. *Proposed Amendments to the Federal Rules of Civil Procedure*

On November 21, 1991 the Judicial Conference of the United States' Advisory Committee of Civil Rules met in Los Angeles to consider a number of proposed amendments to the Federal Rules of Civil Procedure. The Conference has proposed amendments to Rules 1, 11, 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 43, 54, 56, 58, 83, and 84. The Conference also has proposed amendments to Rules 702 and 705 of the Federal Rules of Evidence. Although it is beyond the scope of this article to comment in detail on the proposed rules, we call the following items to the readers attention.

a. *Rule 11*¹²⁷

The proposed revision restates the obligations that a litigant owes to the court prior to signing and filing a pleading, motion, or other document. It also provides that these obligations are of a continuing nature and imposes a duty on the litigant to withdraw allegations and positions once they are no longer tenable.¹²⁸ The revised rule also calls attention to the potential for nonmonetary sanctions and allows sanctions to be imposed on a person or firm responsible for the presentation, rather than only on the individual signing a paper.¹²⁹

b. *Rule 26*¹³⁰

The proposed revision mandates that litigants disclose, without any request, three types of basic information that presently are usually obtained through discovery requests or after pretrial conferences.¹³¹ This disclosure relates to persons likely to have significant information about the claims and defenses, documents likely to bear significantly on these issues and information concerning any claimed damages. It also relates to expert testimony. If a litigant fails to make the required disclosures, he can be subject to imposition of traditional

126. CIVIL RULES, *supra* note 82, at 172 (Advisory Committee Notes).

127. See Proposed Amendments to the Federal Rules of Civil Procedure at Rule 11, *supra* note 73. See also Carlisle *Avoiding the Chancellor's Boot: Application of Sanctions in Federal District and Appellate Court Practice*, 18 WESTCHESTER CO. BAR J. No. 4 (1991).

128. *Id.*

129. *Id.*

130. See Proposed Amendments at Rule 26, *supra* note 73.

131. *Id.*

sanctions and to preclusion of the use of evidence and notification to the jury that evidence was not disclosed as required.¹³²

*c. Rule 30*¹³³

The most significant changes in this proposed revision involve the establishment of presumptive limits on the number and length of depositions. Absent some other directive from the court, as in a scheduling order, no more than ten depositions may be taken by the plaintiffs, no more than ten by the defendants, no more than ten by third-parties, and the actual examination of the deponent is to be limited to six hours.¹³⁴ Thus, it is contemplated that the deposition will be completed in a single day. The revision also adds provisions designed to deter improper conduct during depositions such as coaching the deponent through objections and inappropriate directions not to answer.¹³⁵ Finally, the revision makes it easier to take depositions by video or audio recording by eliminating the need to obtain court approval for such depositions. A litigant can notice a deposition to be taken by any of the three standard methods — stenographic, video recording, or tape recording.¹³⁶

*d. Rule 32*¹³⁷

The proposed revision permits the use at trial of depositions of expert witnesses without having to account for their unavailability.¹³⁸ This revision should particularly be useful with respect to depositions of treating physicians. It will also be a cost-saving measure for other experts, who under the changes in Rules 26 and 30 will be deposed only after a detailed report has been provided to other parties. Another change is to eliminate the risk of nonattendance at a deposition when a party that has received inadequate advance notice of a deposition is unable to obtain a court ruling on its motion for a protective order before the deposition.¹³⁹

132. Proposed Amendments, *supra* note 73.

133. *Id.* at Rule 30.

134. *Id.*

135. *Id.*

136. *Id.*

137. Proposed Amendments at Rule 32, *supra* note 73.

138. *Id.*

139. *Id.*

*e. Rule 33*¹⁴⁰

The proposed revision provides that, absent leave of court or the agreement of the parties, no more than fifteen interrogatories may be served by one party upon another.¹⁴¹ Subparts are counted in determining the number of interrogatories permitted. It should be noted that this number is less than prescribed in the local rules for the Southern District of New York. It should also be noted that given the disclosures required by revised Rule 26(a), interrogatories will no longer be needed to obtain much of the information that has typically been sought in such discovery requests.

*f. Rule 34*¹⁴²

The proposed revision provides that documentary requests may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party.¹⁴³ The parties are authorized to extend the time to provide access to the documents when this will not interfere with schedules ordered by the court.¹⁴⁴

*g. Rule 36*¹⁴⁵

This revision provides that requests for admission may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party.¹⁴⁶

*h. Rule 37*¹⁴⁷

The proposed revision makes changes to complement the provisions for disclosure contained in Rule 26(a). If a party fails to comply with Rule 26(a), he may be precluded from offering such evidence on a motion under Rule 56 or at trial, and the jury can be informed of such failure.¹⁴⁸

140. *Id.* at Rule 33.

141. *Id.*

142. Proposed Amendments at Rule 34, *supra* note 73.

143. *Id.*

144. *Id.*

145. *Id.* at Rule 36.

146. *Id.*

147. Proposed Amendments at Rule 37, *supra* note 73.

148. *Id.*

*i. Rule 43*¹⁴⁹

The proposed revision provides in nonjury cases, particularly with respect to the testimony of experts of lay witnesses concerning historical matters not in substantial dispute, the court can expedite trial and make the testimony more understandable if all or portions of the direct testimony are presented in the form of a written report prepared in advance by the witness.¹⁵⁰ The revision specifically authorizes this practice, subject, however, to the right of cross-examination in the traditional manner.¹⁵¹

*j. Rule 56*¹⁵²

The proposed revision enhances the utility of the summary judgment procedure. It eliminates ambiguities and inconsistencies in the current language.¹⁵³ It also sets a single, understandable standard for determining when summary adjudication is proper, establishes national procedures to facilitate fair consideration of Rule 56 motions; and addresses gaps in the rule that have frequently frustrated its intended purposes.

3. Agenda for Civil Justice Reform in America

The President's Council on Competitiveness has recommended fifty specific changes to our current civil litigation system.¹⁵⁴ These changes may be implemented by legislation, by amendment to the rules of civil procedure and evidence, and through administrative actions including an executive order. The Justice Department will coordinate the Administration's civil justice reform effort.¹⁵⁵ The areas of recommendations include (1) voluntary dispute resolution, (2) discovery, (3) more effective trial procedures, (4) expert evidence reform, (5) punitive damages, (6) improves use of federal judicial resources, (7) enhanced incentives for encouraging meritorious litigation, (9) reducing unnecessary burdens on federal courts, and

149. *Id.* at Rule 43.

150. *Id.*

151. *Id.*

152. Proposed Amendments at Rule 56, *supra* note 73.

153. *Id.*

154. See Council on Competitiveness Report, *supra* note 76. See also Cushman, *supra* note 76.

155. *Id.*

(10) eliminating litigation over poorly drafted legislation.¹⁵⁶

Of particular interest to the New York bench and bar are recommendations relating to punitive damages and discovery. The Council urges that there be a judicial determination of the amount of punitive damages, and that a cap be placed on punitive damages.¹⁵⁷ In discovery matters the Council suggests the adoption of numerical limits on discovery requests and that additional discovery be governed by market incentives.¹⁵⁸ The Council also proposes a "loser pays" rule in discovery motions and requires that parties consult prior to seeking court intervention in discovery disputes.¹⁵⁹ On October 22, 1991 President Bush ordered the Government's lawyers to abide by twenty of the fifty rules mentioned in the Council's report.¹⁶⁰ The President's order affects civil cases to which the government is a party. This includes about one fourth of all 56,000 civil cases filed in all federal courts in the United States and about sixteen percent of federal and state civil appeals.¹⁶¹ The new discovery rules require Government lawyers to offer to exchange "core information" with opposing parties.¹⁶² This includes the names and locations of persons that are relevant to the lawsuit, and the location of important documents.¹⁶³ The new rules also mandate that government lawyers attempt to resolve disputes over discovery requests with opposing lawyers before taking the dispute to a judge.¹⁶⁴

President Bush has asked that all fifty of the Council's proposals on civil litigation be adopted nationwide, stating these changes would "restore sanity" to a civil justice system that the President claims is stifling innovation and raising the cost of doing business.¹⁶⁵

4. *Civil Justice Expense and Delay Reduction Plans*

On December 12, 1991, the Civil Justice Expense and Delay Reduction Plan was adopted by the Board of Judges of the Southern

156. *Id.*

157. *Id.*

158. *Id.*

159. Council on Competitiveness Report, *supra* note 76.

160. Wines, *supra* note 76.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Wines, *supra* note 76.

District of New York.¹⁶⁶ On December 17, 1991, a similar plan was adopted by the Board of Judges of the Eastern District of New York.¹⁶⁷ Some of the changes proposed in these plans are similar to those proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

a. The Southern District Plan

The plan does not apply to Multi-district Litigation cases. These cases are subject to special rules in the Manual For Complex Litigation and are generally supervised by the Judicial Panel on Multi-district Litigation.

The Southern District will implement the following procedures or practices.¹⁶⁸ First, there shall be early judicial case management in all cases.¹⁶⁹ Second, a simplified case assignment system and a differential case management system based upon whether a case is "Complex," "Standard" or "Expedited" will be created.¹⁷⁰ The designation will be made by the judge and it will be based upon case information statements filed by the parties or by a determination made at a case management conference. Third, an initial case management conference should be held in all cases within 120 days of filing the complaint.¹⁷¹ Fourth, in cases determined to be expedited, defined categories of relevant documents will be produced automatically; discovery will be limited; and the case will be set for trial within one year of service of the complaint, unless good cause is shown.¹⁷² Fifth, in complex and standard cases, a case management plan will be developed at the case management conference.¹⁷³ The plan should be issued following the conference, and a magistrate shall be designated for each such case. Sixth, for complex and standard cases, the court should set a firm trial date which generally will be as early as reasonable and no later than eighteen months after the filing of the complaint.¹⁷⁴ Seventh, pre-motion conferences should be considered by

166. See S.D.N.Y. Reduction Plan, *supra* note 74.

167. See E.D.N.Y. Reduction Plan, *supra* note 75.

168. See S.D.N.Y. Reduction Plan, *supra* note 74.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. S.D.N.Y. Reduction Plan, *supra* note 74.

174. *Id.*

judges where advisable.¹⁷⁵ Eighth, judges should decide motions with reasonable promptness.¹⁷⁶ Ninth, although individual judges are responsible for handling their own dockets in a timely manner, imbalances in the number of pending cases may lead to reassignment of cases or the provision of additional resources.¹⁷⁷ Tenth, the court shall request authorization for additional magistrate judges where appropriate.¹⁷⁸ Eleventh, at the initial case management conference, a discovery plan should be formulated.¹⁷⁹ Twelfth, the court should adopt guidelines for deposition practice, interrogatories, requests for documents and discovery of experts.¹⁸⁰ Thirteenth, guidelines should be established for cases brought by prisoners *pro se*.¹⁸¹ Fourteenth, sanctions for failure to comply with discovery obligations should be imposed where appropriate.¹⁸² Fifteenth, appeals from discovery rulings by magistrate judges on discretionary issues are disfavored.¹⁸³ Sixteenth, a two year program of mandatory court-annexed mediation will be established for expedited cases, and a sample of other civil cases.¹⁸⁴ Seventeenth, for complex and standard cases, a voluntary court-annexed arbitration program will be considered.¹⁸⁵ Eighteenth, the use of Alternative Dispute Resolution mechanisms shall be monitored by the Advisory Group.¹⁸⁶ Finally, the court should commence a program modernizing all existing courtrooms, chambers and court offices.¹⁸⁷

b. The Eastern District Plan

The Eastern District did not adopt a formal system of differentiated case management whereby different types of cases would be assigned to different tracks.¹⁸⁸ The Eastern District Judges did adopt procedures relating to (1) reassignment, (2) setting of trial dates,

175. *Id.*

176. *Id.*

177. *Id.*

178. S.D.N.Y. Reduction Plan, *supra* note 74.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. S.D.N.Y. Reduction Plan, *supra* note 74.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. E.D.N.Y. Reduction Plan, *supra* note 75.

(3) discovery and pretrial practice, (4) mandatory pretrial disclosure, (5) motion practice, (6) pretrial conferences, (7) complex litigation alternative dispute resolution (which includes court annexed arbitration, early neutral evaluation of cases, trials before magistrate judges, settlement conferences, special masters, court-annexed mediation and publicizing alternatives to trials), (8) sanctions, (9) attorneys' fees and (10) trial practices (which addresses the use of expert witnesses, jury selection, bench trials and miscellaneous practices).¹⁸⁹ Of particular interest to the practitioner are the Eastern District plan's reference to discovery, sanctions and trial practices.

i. Discovery

For an eighteen month period, in every civil case filed on or after February 1, 1992, excluding social security, habeas corpus, and *pro se* cases, as well as civil rights cases in which there is an immunity defense available, the parties must make automatic disclosure of certain items.¹⁹⁰ These disclosures generally should be made by a plaintiff within thirty days after service of an answer to its complaint and by a defendant within thirty days after serving its answer to the complaint.¹⁹¹ Failure to make the required automatic disclosure may result in sanctions pursuant to Rule 37(b).¹⁹²

There will be limitations on discovery. In every civil case on or after February 1, 1992, a limitation on the number of interrogatories shall be established by agreement of the parties or by court order.¹⁹³ In the absence of any agreement or court order, the number of interrogatories, including subparts, shall be presumptively limited to fifteen.¹⁹⁴ In every civil case on or after February 1, 1992 a limitation on the number of depositions shall be established by agreement of the parties or by court order.¹⁹⁵ In the absence of any agreement or court order the number of depositions shall be presumptively limited to ten per side (plaintiffs constitute one side, defendants one side, and all other parties one side).¹⁹⁶ The Eastern District Plan also provides for

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. E.D.N.Y. Reduction Plan, *supra* note 75.

194. *Id.*

195. *Id.*

196. *Id.*

some mandatory pretrial disclosure.¹⁹⁷

ii. Sanctions

Prior to seeking sanctions pursuant to Rule 11, a party alleging a Rule 11 violation, shall give timely notice to the alleged violator at the time the violation is committed. If this alleged offending conduct does not cease, the party victimized may move for sanctions.¹⁹⁸ In addition, a Rule 11 motion must be a separate application to the court and may not consist of a request for sanctions tacked on to another motion.¹⁹⁹

iii. Trial Practices

In bench trials, the court may direct that an expert's direct testimony be submitted in writing and that only the cross-examination be done before the fact-finder.²⁰⁰ In bench trials, where appropriate, expert testimony may be taken by deposition.²⁰¹ Bench trials shall be encouraged. In every civil case on or after February 1, 1992, the parties shall be advised that they may be given a date certain for trial if they consent to trial before a magistrate judge.²⁰² The court may require the parties in all cases to file a pretrial statement of stipulated facts and of facts that are disputed.²⁰³ Any objection to documentary evidence shall be made by motions *in limine* if such documentary evidence has been designated at least ten days prior to trial.²⁰⁴ Except exhibits used for the purpose of impeachment or rebuttal, shall be marked prior to trial.²⁰⁵ Where appropriate, the court may order that direct testimony be submitted in writing.

I. CONCLUSION

All attorneys who practice in the United States District Courts for the Eastern and Southern Districts of New York should obtain copies of the Civil Justice Expense and Delay Reduction Plans by contacting the clerks office for each court. Adoption of these plans

197. *Id.*

198. E.D.N.Y. Reduction Plan, *supra* note 75.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. E.D.N.Y. Reduction Plan, *supra* note 75.

204. *Id.*

205. *Id.*

will substantially improve the delivery of justice in the Southern and Eastern Districts.

II. STATUTE OF LIMITATIONS

During the *Survey* year the Court of Appeals followed the majority rule that application of a statute of limitations is usually defendant-orientated.²⁰⁶ The Court issued eleven statute of limitations opinions and ruled against plaintiffs nine times. Thus, the Court continues its long tradition of narrowly applying statutes of limitations and deferring to the legislature to correct any wrongs.²⁰⁷

However, the Court of Appeals did rule that attorney malpractice claims are governed by the six-year statute of limitations for contract actions.²⁰⁸ Also, the courts in the appellate division issued important opinions involving the applicable statute of limitations period in attorney malpractice cases,²⁰⁹ and the federal courts in New York issued several instructive opinions.²¹⁰ Finally, the United States Supreme Court adopted a uniform statute of limitations period for 10(b) and Rule 10(b-5) action under the Securities and Exchange Act of 1934.²¹¹

A. Court of Appeals

1. CPLR 214-a: The Continuous Treatment Doctrine²¹²

The applicability of the continuous treatment doctrine requires that there be more than merely a continuing relationship between the

206. See CHASE & BARKER, CIVIL LITIGATION IN NEW YORK (2d Ed.) at 299 ("New York's application of its statutes of limitations is often defendant oriented").

207. See *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 467 N.E.2d 517, 478 N.Y.S.2d 853, *cert. denied*, 469 U.S. 1192 (1985); *Steinhardt v. Johns Manville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244, *cert. denied and appeal dismissed sub nom.*, 456 U.S. 967 (1982); *Rosenberg v. Johns-Manville Sales Corp.*, 54 N.Y.2d 1008, 450 N.E.2d 1297, 446 N.Y.S.2d 244, *cert. denied and appeal dismissed*, 456 U.S. 967 (1982); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979); *Schwartz v. Heydon Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remititur amended*, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied*, 374 U.S. 808 (1963); *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

208. *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d 700, 586 N.E.2d. 1014, 579 N.Y.S.2d 324 (1992). See *infra* notes 287-90 and accompanying text.

209. See *infra* notes 291-97 and accompanying text.

210. See *infra* notes 306-35 and accompanying text.

211. See *infra* notes 306-12 and accompanying text.

212. N.Y. CPLR 214-a (McKinney 1992)

physician and the patient.²¹³ The underlying rationale is the existence of a "continuing trust and confidence" which warrants the tolling of the limitations period.²¹⁴ In this respect the Court of Appeals continued to restrictively apply the doctrine during the *Survey Year*.

In *Nykorchuck v. Henriques*,²¹⁵ the Court of Appeals held the doctrine did not apply. The plaintiff's suit was commenced more than eight years after a lump on her breast was discovered and more than four years after her last appointment with defendant in connection with another medical condition.²¹⁶ The Court based its decision on the plaintiff's failure to allege facts which would support a finding that a course of treatment was established in connection with her breast condition.²¹⁷ The Court pointed out that the only course of treatment alleged was related to a separate medical condition, endometriosis.²¹⁸ Judge Kaye, in dissent, stressed the ongoing relationship between plaintiff and her gynecologist and concluded that the defendant's acts of alleged negligence, combined with wrongful omissions, may constitute a continuous course of treatment, separate and apart from any treatment for endometriosis.²¹⁹

In *Massie v. Crawford*,²²⁰ plaintiff sought to recover damages for personal injuries, which allegedly were caused by the presence of an intrauterine birth control device ("IUD"). The defendant gynecologist moved for partial summary judgment contending that claims of malpractice were barred by the two and one-half year statute of limitations.²²¹ The trial court and appellate division denied the motion, holding that the continuous treatment exception applied and presented a question of fact for the jury.²²² The Court of Appeals reversed on the grounds that plaintiff's subsequent visits to her doctor were for routine gynecological examinations and were not therapy to correct a medical condition. Judge Hancock dissented and stated "The decisive question pertains to the purpose and nature of plain-

213. See *Richardson v. Orentreich*, 64 N.Y.2d 896, 898, 477 N.E.2d 210, 211, 487 N.Y.S.2d 731, 732 (1985) (citing *Coyne v. Bersani*, 61 N.Y.2d 939, 940, 463 N.E.2d 371, 372, 474 N.Y.S.2d 970, 971 (1984)).

214. *Richardson*, 64 N.Y.2d at 898, 477 N.E.2d at 211, 487 N.Y.S.2d at 732.

215. 78 N.Y.2d 255, 577 N.E.2d 1026, 573 N.Y.S.2d 434 (1991).

216. *Nykorchuck*, 78 N.Y.2d at 257, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435.

217. *Id.* at 259, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.

218. *Id.*

219. *Id.* at 260-61, 577 N.E.2d at 1029-30, 573 N.Y.S.2d at 437-38.

220. 78 N.Y.2d 516, 583 N.E.2d 935, 577 N.Y.S.2d 223 (1991).

221. *Massie*, 78 N.Y.2d at 519, 583 N.E.2d at 937, 577 N.Y.S.2d at 224.

222. *Id.*

tiff's visits to Dr. Crawford after the procedure in 1969 when the IUD was implanted."²²³ He noted that plaintiff stated that her subsequent visits were referable to the continued implantation of the IUD. He also noted that plaintiff maintained that the visits were made at the instance of the doctor who advised her to return for follow-up visits with respect to the IUD. Judge Hancock concluded "That these visits may have included general examinations or other medical services in addition to IUD care certainly does not, as a matter of law, make them 'discrete, complete and routine' examinations unrelated to defendant's follow-up care of plaintiff's IUD condition."²²⁴ Thus, there remained questions of contested fact which Judge Hancock believed should be decided at trial instead of by motion. Judge Hancock distinguished *Nykorchuck v. Henriques*²²⁵ because the alleged continuous treatment related to a separate medical condition.²²⁶

In *Cooper v. Kaplan*, plaintiff alleged "that defendant committed medical malpractice when he prescribed birth control pills knowing that she had previously had phlebitis while taking similar medication."²²⁷ Defendant moved to dismiss the action because three years had passed after the pills were prescribed. Plaintiff argued that the action was timely because of the continuous treatment doctrine. Plaintiff's counsel argued that defendant has supplied his client with a six-month prescription, that she spoke to him on at least two occasions to complain of leg pain, and that he advised her to continue the medication. The Court of Appeals unanimously held that since the record did not "reflect that plaintiff contemplated, or had, a continuing patient physician relationship with defendant," the Court could not consider the legal question concerning whether the conduct mentioned by plaintiff's counsel could constitute continuous treatment.²²⁸

2. CPLR 214-c: Date of Discovery²²⁹

In *Enright v. Eli Lilly & Co.*, the Court of Appeals, speaking through Chief Judge Wachtler dismissed the claim of a brain dam-

223. *Id.* at 521, 583 N.E.2d at 938, 577 N.Y.S.2d at 225 (Hancock, J., dissenting).

224. *Id.* at 521, 583 N.E.2d at 938, 577 N.Y.S.2d at 225.

225. 78 N.Y.2d 255, 577 N.E. 1026, 573 N.Y.S.2d 434.

226. *Massie*, 78 N.Y.2d at 516, 583 N.E.2d at 935, 577 N.Y.S.2d at 223 (citing *Nykorchuck*, 78 N.Y.2d at 255, 577 N.E.2d at 1026, 573 N.Y.S.2d at 434).

227. 78 N.Y.2d 1103, 1104, 585 N.E.2d 373, 374, 578 N.Y.S.2d 124, 125 (1991).

228. *Cooper*, 78 N.Y.2d at 1104, 585 N.E.2d at 374, 578 N.Y.S.2d at 125.

229. N.Y. CPLR 214-c (McKinney 1992).

aged granddaughter of a woman who had ingested DES.²³⁰ According to the allegations of the complaint, the infant plaintiff's injuries were caused by her premature birth, which in turn resulted from damage to her mother's reproductive system caused by the mother's in utero exposure to DES. The Court stressed its concern that the rippling effects of DES exposure may extend for generations. Chief Judge Wachtler proclaimed "[i]t is our duty to confine liability within manageable limits. Limiting liability to those who ingested the drug or were exposed to it in utero serves this purpose."²³¹ Judge Hancock filed a vigorous dissent. He stated:

Today, however, in what appears to mark an abrupt change in the course of New York strict products liability jurisprudence, a cut-back on recent precedent and a rejection of policy established by the Legislature and accepted by our Court, the majority denies [plaintiff] the right to sue.²³²

Judge Hancock explained that the plaintiff should have the same right to sue drug makers for her injuries as does her mother. He stated: "Is there any basis in the law or social policy or any principled reason in justice and fairness for holding that she — unlike other members of the class — should not be permitted to prove her case."²³³

In *Anderson v. Eli Lilly Co.*, plaintiff, whose spouse allegedly suffered certain injuries to her reproductive system due to her in utero exposure to the DES drug, commenced an action against manufacturers of DES, asserting a derivative cause of action for the loss of consortium.²³⁴ Defendants moved for a summary judgment, contending that plaintiff could not recover since his spouse's exposure to DES and her resultant injuries occurred before the marriage. The motion was granted by the trial court and affirmed by the appellate division.²³⁵ The Court of Appeals rejected plaintiff's contention that the Legislature's enactment of the new discovery statute of limitations (CPLR 214-c) created a cause of action. The Court stated that "[t]hat

230. 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1991). Chief Judge Wachtler framed the issue as follows: "The question in this case is whether the liability of manufacturers of the drug diethylstilbestrol [DES] should extend to a so-called 'third generation' plaintiff, the granddaughter of a woman who ingested the drug." *Enright*, 77 N.Y.2d at 380, 570 N.E.2d at 198, 568 N.Y.S.2d at 550.

231. *Id.* at 387, 570 N.E.2d at 203, 568 N.Y.S.2d at 555.

232. *Id.* at 389, 570 N.E.2d at 205, 568 N.Y.S.2d at 557.

233. *Id.* at 389, 570 N.E.2d at 204, 568 N.Y.S.2d at 556.

234. 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991).

235. *Anderson*, 79 N.Y.2d at 798, 580 N.E.2d at 67, 580 N.Y.S.2d at 169.

provision merely temporarily revived certain previously time barred claims—it did not act to create any new causes of action.”²³⁶

3. CPLR 214(3) Replevin²³⁷

In *Solomon R. Guggenheim Foundation v. Lubell*, the Court of Appeals held that the three year replevin statute of limitations began to run when the true owner demanded return of stolen artwork.²³⁸ The Court rejected a discovery date accrual even though the artwork was missing for more than 20 years before demand and the owner had not reported it lost or stolen. The Court held that even though the artwork was possessed by a good faith purchaser for value, since the true owner had no duty of diligence to search for artwork, the discovery rule was not applicable. The Court also stressed that selection of an earlier time to foreclose rights of a true owner to recover stolen property would encourage illicit trafficking in stolen art.²³⁹

4. CPLR 204(a): Stay of Commencement of Action²⁴⁰

In *Burgess v. Long Island Railroad Authority*, plaintiff was injured on the tracks of the Long Island Railroad after discharge from a LIRR train.²⁴¹ He failed to serve a summons and complaint on the public authority until more than one year and thirty days after his claim accrued. Thus, the Court of Appeals ruled his claim untimely and correctly dismissed.²⁴² The Court reminded the bar that a person has one year from the date a claim accrues to commence an action against a public authority.²⁴³ The Court also reminded the bar that the complaint must contain an allegation that at least thirty days have elapsed since the authority was presented with a demand or claim and that the authority has neglected or refused to adjust or pay the claim.²⁴⁴ The Court noted that this stay of thirty days is not counted as part of the limitations period and the plaintiff may serve a com-

236. *Id.* at 799, 588 N.E. at 68, 580 N.Y.S.2d at 170.

237. N.Y. CPLR 214(3) (McKinney 1992).

238. 77 N.Y.2d 311, 313, 569 N.E.2d 426, 427, 567 N.Y.S.2d 623, 626 (1991).

239. *Solomon*, 77 N.Y.2d at 320, 569 N.E.2d at 431, 567 N.Y.S.2d at 628 (“To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art.”).

240. N.Y. CPLR 204(a) (McKinney 1992).

241. 79 N.Y.2d 777, 587 N.E.2d 269, 579 N.Y.S.2d 631 (1991).

242. *Burgess*, 79 N.Y.2d at 778, 587 N.E.2d at 269, 579 N.Y.S.2d at 631.

243. *Id.*

244. *Id.*

plaint at any time up to one year and thirty days after the claim has accrued.²⁴⁵

The Court of Appeals rejected plaintiff's argument that because he was injured on a Friday night and could not present his claim to the defendant's claim office until the next Monday, he was actually stayed for thirty-three days and was entitled to one year and thirty-three days to commence his action.²⁴⁶

5. CPLR 217: Article 78 Proceedings²⁴⁷

There is a four month statute of limitations for a proceeding against a body or officer after the determination being reviewed becomes final or binding upon the petitioner.²⁴⁸ The four month period is inapplicable if the body or officer is acting in its legislative capacity.²⁴⁹ The limitation period begins to run — becomes "final" and "binding" — as soon as the aggrieved party is notified, and not when the action directed by the determination is taken.²⁵⁰ Also, some periods of time are less than four months.

In *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven*,²⁵¹ petitioners challenged the approval of a subdivision project. They commenced an Article 78 proceeding more than 30 days after the Board's preliminary approval of a development project but within 30 days of the final approval. The supreme court granted a motion to dismiss the petition as untimely and the appellate division affirmed. It held that when the Board granted preliminary approval it had completed its environmental review of the project. Thus, any proceeding challenging the environmental review should have been commenced within 30 days of the Board's filing of its decision giving preliminary approval.²⁵² The Court of Appeals pointed out that Town Law section 282 governed, and that the question was whether the time for commencing a proceeding under section 282 begins to run upon the filing of preliminary plat approval or the final

245. *Id.*

246. *Id.*

247. N.Y. CPLR 217 (McKinney 1992).

248. *Id.*

249. *Id.*

250. See Carlisle, *Civil Practice, 1986 Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67, 104-05 (1987).

251. 78 N.Y.2d 608, 585 N.E.2d 778, 578 N.Y.S.2d 466 (1991).

252. *Long Island Pine Barrens Society, Inc.*, 78 N.Y.2d at 611, 585 N.E.2d at 780, 578 N.E.2d at 468.

approval decision where the challenge to the plat is solely on environmental grounds and the environmental review procedure is completed prior to the filing of the decision approving the preliminary plat. The Court of Appeals held that under such circumstances, petitioners were required to begin their Article 78 proceeding within thirty days of the filing of the preliminary, not the final plat approval decision.²⁵³

In *New York State Ass'n of Counties v. Axelrod*,²⁵⁴ appellant's filed an Article 78 proceeding to annul a Medicaid reimbursement recalibration regulation. The Court of Appeals held that appellant's action was timely because it was commenced within four months of its members receipt of the rate recomputation notices which, for the first time, apprised the facilities of their actual reimbursement rates.²⁵⁵ The Court stated the "DOH determination could not be deemed 'final' for Article 78 purposes until NYSCAC's members were able to ascertain the consequences of the recalibration regulation so that its impact could be accurately assessed, including awareness whether the facilities were aggrieved."²⁵⁶

6. CPLR 208: Infancy Toll and Continuing Treatment Doctrine²⁵⁷

In *Daniel J. v. New York City Health & Hospitals Corp.*,²⁵⁸ the Court of Appeals reversed the appellate division and held that the ten year extension afforded to infants by CPLR 208 runs from the initial negligent act and not from the end of any period of subsequent continuous treatment.²⁵⁹

On November 17, 1978 petitioner gave birth to Daniel J. at a hospital operated by respondent. On December 4, 1978, he underwent emergency surgery there to correct a strangulated hernia. After two follow-up visits to the hospital's out-patient clinic in December 1978, Daniel was readmitted and additional surgery was performed, followed by continued treatment at the hospital for the next three

253. *Id.* at 613, 585 N.E.2d at 781, 578 N.Y.S.2d at 469.

254. 78 N.Y.2d 158, 577 N.E.2d 16, 573 N.Y.S.2d 25 (1991).

255. *New York State Ass'n of Counties*, 78 N.Y.2d at 165, 577 N.E.2d at 20, 573 N.Y.S.2d at 29.

256. *Id.* at 165, 577 N.E.2d at 20, 573 N.Y.S.2d at 29.

257. N.Y. CPLR 208 (McKinney 1992).

258. 77 N.Y.2d 630, 571 N.E.2d 704, 569 N.Y.S.2d 396 (1991).

259. *Daniel J.*, 77 N.Y.2d at 630, 571 N.E.2d at 706, 569 N.Y.S.2d at 398 ("The issue is whether the maximum 10-year extension of the Statute of Limitations afforded to infants by CPLR 208 runs from the initial negligent act or from the end of any period of subsequent continuous treatment").

months. Daniel lost both testicles and will require lifelong hormonal treatment. Petitioner filed a proceeding asking for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e(5), and also immediate leave to serve a summons and complaint.²⁶⁰ In support of her request to serve the notice, petitioner argued that Daniel J. had received "continuous treatment" for his hernia and testicle problems until March 15, 1979 and, therefore, the action commenced December 12, 1988 was timely under CPLR 208.²⁶¹ The supreme court agreed and the appellate division affirmed.²⁶²

The Court of Appeals rejected petitioners argument that the action accrued at the end of Daniel J.'s continuous treatment and that the ten year toll for infancy began to run at that time. The Petitioner contended that at the time CPLR 208 was enacted the cause of action in continuous treatment actions accrued at the end of the treatment, not the beginning.²⁶³ She argued that rule should be applied and that when it is applied, the ten year infancy toll did not begin to run until the end of Daniel J.'s continuous treatment.²⁶⁴ The Court of Appeals explained that there was support for the petitioners position in the legislative history discussing the proposed amendment of the infancy toll.²⁶⁵ Nonetheless, the Court concluded that its holding in *McDermott v. Torre*²⁶⁶ required that the claim be dismissed.²⁶⁷

260. *Id.* at 633, 571 N.E.2d at 705, 569 N.Y.S.2d at 397. (Petitioner claimed "respondent was guilty of malpractice because of its doctors' initial failure to diagnose the undescended testicle problem immediately after Daniel J.'s birth and based on a notation in respondent's records indicating that the infant's right testicle may have subsequently been compromised during the December 4, 1978 surgery.").

261. *Id.* at 633, 571 N.E.2d at 706, 569 N.Y.S.2d at 398.

262. *Id.*

263. *See Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (holding cause of action in continuous treatment actions accrued at the end of the treatment, not the beginning). This rule was changed in *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982) (holding an action in medical malpractice accrues at the date of the original negligent act or omission; subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable Statute of Limitations).

264. *Daniel J.*, 77 N.Y.2d at 635, 571 N.E.2d at 706, 569 N.Y.S.2d at 398.

265. *Id.* at 635, 571 N.E.2d at 707, 569 N.Y.S.2d at 399.

266. 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982).

267. *Daniel J.*, 77 N.Y.2d at 635, 571 N.E.2d at 707, 569 N.Y.S.2d at 399. The Court held that "[t]o apply the *Borgia* definition of accrual to CPLR 208 now would perpetuate the illogical consequences of the rule we corrected in *McDermott* and create an unwarranted exception for accrual applicable only to infants' claims." *Id.* at 635, 571 N.E.2d at 707, 569 N.Y.S.2d at 399 (citations omitted).

7. *CPLR 208: Infancy Toll*²⁶⁸

In *Hernandez v. New York City Health and Hospitals Corp.*, the Court of Appeals was faced with the difficult question of whether the statute of limitations in a wrongful death action was tolled by the infancy of the sole distributee of decedent's estate.²⁶⁹ The complaint had been served after expiration of the one year ninety day statute of limitations then applicable to claims against the New York City Health and Hospitals Corporation. The action was dismissed as untimely by the trial court and reinstated by the appellate division.²⁷⁰

The Court of Appeals, speaking through Judge Kaye, pointed out that the appellate division held that the statute of limitations on the wrongful death claim was tolled until the guardian was appointed.²⁷¹ The appellate division also held that where the sole distributee is an infant, no one is eligible to receive letters of administration and bring a wrongful death action as personal representative of the estate until a guardian is appointed.²⁷² In addition, the appellate division noted supreme court's error in concluding that there were other distributees and overruled its own prior decision in *Cruz v. Mt Sinai Hospital*.²⁷³

The appellate division then granted leave to appeal, certifying the following question: "Was the order of this Court, which modified the order of the supreme court, properly made?"²⁷⁴ The Court of Appeals answered that question in the affirmative, "concluding that the statute of limitations was tolled until the appointment of the infant's guardian."²⁷⁵ Judge Kaye explained that under the EPTL,²⁷⁶ plaintiffs have two years, measured from the date of death in which to bring a wrongful death action.²⁷⁷ Judge Kaye noted that at the time the present action was commenced, however, a one year ninety day statute of limitations applied to actions brought against this municipal

268. N.Y. CPLR 208 (McKinney 1992).

269. 78 N.Y.2d 687, 689, 585 N.E.2d 822, 822, 578 N.Y.S.2d 510, 510 (1991).

270. *Hernandez*, 78 N.Y.2d at 687, 585 N.E.2d at 822, 578 N.Y.S.2d at 510.

271. *Id.* 689-90, 585 N.E.2d at 823, 578 N.Y.S.2d at 511.

272. *Id.* at 690, 585 N.E.2d at 823, 578 N.Y.S.2d at 511.

273. 61 A.D.2d 915, 402 N.Y.S.2d 842 (1st Dep't 1978).

274. *Hernandez*, 78 N.Y.2d at 690, 585 N.E.2d at 823, 578 N.Y.S.2d at 511.

275. *Id.*

276. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney Supp. 1992) [hereinafter "EPTL"].

277. *Hernandez*, 78 N.Y.2d at 690, 585 N.E.2d at 823, 578 N.Y.S.2d at 511.

defendant.²⁷⁸ Therefore, unless that limitations period was tolled, plaintiff's action was not timely. Judge Kaye stated:

The confluence of the pertinent EPTL, SCPA and CPLR provisions in this case thus gives rise to an unusual — perhaps unique — problem. EPTL 5-4.1 grants the personal representative procedural authority to bring the wrongful death claim; SCPA sections 1001 and 707 make it impossible for anyone to assume that role until a guardian is appointed for the infant sole distributee; and CPLR 208 speaks of tolling the Statute of Limitations when the person entitled to bring the action is under a disability at the time of accrual.²⁷⁹

Judge Kaye reasoned:

We decline to reach that unnecessarily harsh result, and instead would construe the toll of CPLR 208 to apply until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first.²⁸⁰

Judge Kaye concluded that the infant-sole distributee should have the benefit of the toll provided by CPLR 208.²⁸¹

Judge Alexander, joined by Chief Judge Wachtler and Judge Titone, dissented.²⁸² He explained that the majority legislative interpretation constituted nothing less than sheer judicial legislation. Judge Alexander focused solely on CPLR 208 and argued that the infant's claim should be dismissed because the representative was not under the disability of infancy.²⁸³ This reasoning fails to consider that it was impossible for a representative to be appointed until the appointment of a guardian. The claim was for the infant's sole benefit and but for his infancy he would otherwise be the representative.²⁸⁴

278. *Id.*

279. *Id.* at 693, 585 N.E.2d at 825, 578 N.Y.S.2d at 511-12.

280. *Id.*

281. *Id.*

282. *Hernandez*, 78 N.Y.2d at 695, 585 N.E.2d at 826, 578 N.Y.S.2d at 514 (Alexander, J., dissenting).

283. *Id.*

284. *Id.*

8. *CPLR 213: Six Years for Contract Actions Governs Claims for Legal Malpractice*²⁸⁵

In *Santulli v. Englert, Reilly & McHugh, P.C.*,²⁸⁶ the Court of Appeals affirmed a decision by the appellate division for the Third Department which refused to dismiss a legal malpractice claim filed four years after the cause of action arose. The appellate division concluded the case was governed by the six year statute of limitations for contract claims but held that an "express promise to obtain a specific result" was required.²⁸⁷ The Court of Appeals unanimously ruled that a lawyers "implied promise to exercise due care" in providing legal services is enough to sustain a breach of contract action.²⁸⁸ Thus, the Court held that the choice of the applicable statute of limitations was properly related to the remedy rather than to the theory of liability.²⁸⁹

B. Appellate Divisions

Two appellate division decisions held that the six month extension under CPLR 205(a)²⁹⁰ cannot be invoked to file late notices of claim.²⁹¹ Two appellate divisions applied the relation back doctrine under CPLR 203(b)²⁹² and one appellate division refused to do so.²⁹³

285. N.Y. CPLR 213 (McKinney 1992).

286. 78 N.Y.2d 700, 586 N.E.2d 1014, 579 N.Y.S.2d 324 (1992).

287. *Santulli*, 78 N.Y.2d at 705, 586 N.E.2d at 1015, 579 N.Y.S.2d at 326.

288. *Id.*

289. *Id.* The practitioner should note that "[t]o the extent the legal malpractice claim seeks damages different from or greater than those customarily recoverable under a breach of contract claim, CPLR 214(6) will govern." *Id.* at 708, 586 N.E.2d at 1019, 579 N.Y.S.2d at 329.

290. N.Y. CPLR 205(a) (McKinney 1992)

291. *See Dreger v. N.Y.S. Thruway Auth.*, 177 A.D.2d 762, 575 N.Y.S.2d 743 (3d Dep't 1991) (failure to comply with condition precedent to valid commencement of action is fatal and does not trigger ameliorative tolling of statute of limitations) and *Matter of David Lipinski v. County of Broome*, 175 A.D.2d 369, 572 N.Y.S.2d 98 (3d Dep't 1991) (six-month tolling provision of statute of limitations operates as a toll following termination of action and not following denial of motion; consequently CPLR 205(a) has no application to motion for leave to serve late notice of claim under General Municipal Law).

292. *See Mondello v. New York Blood Center*, 175 A.D.2d 718, 665 N.Y.S.2d 573 (1st Dep't 1991) (appellate division reversed supreme court and held plaintiff's claim was interposed against Blood Collection Center at the time his complaint was served on the hospital); *Bruns v. Village of Catskill*, 169 A.D.2d 963, 564 N.Y.S.2d 857 (3d Dep't 1991) (claim asserted against a new party related back to the date plaintiff's claim was interposed because new claim arose from the same transaction and unity of interest and actual notice requirements were satisfied).

293. *See Kaczmarek v. Benedictine Hosp.*, 176 A.D.2d 1183, 575 N.Y.S.2d 617 (3d

In *Golub v. Baer, Marks & Upham*,²⁹⁴ the Second Department held that the six year statute of limitations is applicable in legal malpractice cases.²⁹⁵ The appellate division stated:

Where the action is to recover damages to pecuniary interests and arises out of the contractual relationship of the parties, the six-year Statute of Limitations applies, even though the allegations in the complaint are phrased in terms of professional malpractice.²⁹⁶

In *Newman v. Orentreich*,²⁹⁷ the First Department held that the continuous treatment doctrine was not applicable to a patient who received a series of silicone injections in her face for treatment of acne scars and the effects of aging and who later claimed that the injections had disfigured her. The appellate division explained there was no indication that the physician and patient contemplated the patient's uninterrupted reliance on the physician's observations, directions, concern and responsibility of overseeing her progress.²⁹⁸

In *DeLeon v. Hospital of the Albert Einstein College of Medicine*, the First Department held that a cause of action alleging that a hospital was negligent in its hiring of an employee who later committed malpractice is one which sounds in negligence, rather than malpractice, and is therefore subject to the longer three year statute of limitations.²⁹⁹ Two appellate division decisions refused to apply the equitable estoppel doctrine.³⁰⁰ In *Coopersmith v. Gold*, the Third Department, in a case transferred from the Second Department under the backlog program, held the doctrine could not be applied in a lawsuit against plaintiff's former psychiatrist.³⁰¹ Similarly in *Spinosa v. Weinstein*, the Second Department held that the doctrine could not be

Dep't 1991) (plaintiffs' designating unknown medical doctors as John Doe defendants in their original wrongful death complaint against hospital did not toll running of statute of limitations because relation back doctrine was not applicable).

294. 172 A.D.2d 489, 567 N.Y.S.2d 843 (2d Dep't 1991) (appellate division also held that the doctrine of continuous representation tolled the Statute of Limitations, as evidenced by an invoice from the defendant to the plaintiffs for legal services performed in connection with earlier legal services).

295. *Golub*, 172 A.D.2d at 489, 567 N.Y.S.2d at 844.

296. *Id.* (citations omitted).

297. 169 A.D.2d 546, 564 N.Y.S.2d 731 (1st Dep't 1991).

298. *Newman*, 169 A.D.2d at 546, 564 N.Y.S.2d at 732.

299. 164 A.D.2d 743, 566 N.Y.S.2d 213 (1st Dep't 1991).

300. *Coopersmith v. Gold*, 172 A.D.2d 982, 568 N.Y.S.2d 250 (3d Dep't 1991); *Spinosa v. Weinstein*, 168 A.D.2d 32, 571 N.Y.S.2d 747 (2d Dep't 1991).

301. *Coopersmith*, 172 A.D.2d at 983, 568 N.Y.S.2d at 251.

applied in a lawsuit against plaintiff's podiatrist.³⁰² Finally, in *Bogle v Mann*, the Third Department reminded the bar that the four month limitation under CPLR 217³⁰³ commences to run — becomes "final" and "binding" — as soon as the aggrieved party is notified, and not when the action directed by the determination is taken.³⁰⁴

C. Federal Practice

Last year's *Survey*³⁰⁵ discussed the Second Circuit's ruling in *Ceres Partners v. GEL Associates*, which adopted a uniform federal statute of limitations for actions brought under section 10b of the SEC Act of 1934.³⁰⁶ During the *Survey* year, the Second Circuit held in *Welch v. Cadre Capital* ("*Welch II*"), that the *Ceres* ruling was not retroactive.³⁰⁷ In *Lampf, Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*,³⁰⁸ the Supreme Court held that there should be a uniform limitations period for all claims arising under section 10(b) and Rule 10(b-5) of the Act. The Supreme Court held that those actions must now be commenced within one year after the discovery of the facts constituting the violation, and in any case within three years after such violation, as provided for other express causes of action under the 1934 Act and the Securities Act of 1933.³⁰⁹ The Supreme Court gave retroactive application to the new rule, applying it to litigation in which the new rule was announced.³¹⁰ The Court remanded *Welch I* for reconsideration in light of the *Lampf, Pleva* holding. The Second Circuit in *Welch II* held that the application of the ruling adopting a uniform federal statute of limitations for actions brought under section 10b of the Securities and Exchange Act of 1934 is retroactive.³¹¹

In *Kulzer v. Pittsburgh Corning Corp.*, the Second Circuit held that the failure to include a statute of limitations defense in a pretrial motion and raising of the defense in a "boilerplate" manner did not amount to a waiver of the limitations defense.³¹² The Second Circuit

302. *Spinosa*, 168 A.D.2d 32, 571 N.Y.S.2d 747 (2d Dep't 1991)

303. N.Y. CPLR 217(1) (McKinney 1992)

304. 167 A.D.2d 721, 562 N.Y.S.2d 885 (3d Dep't 1990).

305. See Jay A. Carlisle *Civil Practice, 1990 Survey of New York Law*, *supra* note 68, at 384 (1991).

306. 918 F.2d 349, 352 (2d Cir. 1990).

307. 946 F.2d 185 (2d Cir. 1991).

308. 111 S. Ct. 2773 (1991).

309. *Lampf, Pleva*, 111 S.Ct. at 2775.

310. *Id.* at 2786. See also *Welch II*, 946 F.2d at 186.

311. *Welch II*, 946 F.2d at 186.

312. 942 F.2d 122, 125 (2d Cir. 1991).

also held that New York CPLR 205(a) (six month extension) was applicable to a claim under New York tort law brought in federal court, which was dismissed for lack of subject matter jurisdiction because diversity was lacking.³¹³

In *Schmidt v. Bishop*, Chief Judge Brieant considered whether a federal district court sitting in a diversity case should apply the "delayed discovery" doctrine in child sex abuse cases.³¹⁴ Chief Judge Brieant recognized that victims of child sexual abuse often do not realize until years later either that they have been abused at all or the scope of their injuries.³¹⁵ Nonetheless, he refused to adopt such a rule because there was no authority for it under New York State law.³¹⁶ Chief Judge Brieant also refused to apply the doctrines of equitable estoppel³¹⁷ and duress.³¹⁸

Finally, the practitioner should be alerted to 28 U.S.C. § 1658 which enacts a general four year statute of limitations respecting civil actions arising under Acts of Congress that do not specifically set forth a period of limitations.³¹⁹ This provision applies only to causes of action arising under legislation which Congress enacts after December 1, 1990.³²⁰ Thus, the new statute is not retroactive. Also, the new statute does not consider whether there should be tolling provisions applicable to federal statutes of limitations and does not incorporate applicable state tolling provisions by reference. The practitioner is reminded that the new statute is not applicable in diversity cases where state limitation periods and tolling provisions are

313. See *Diffley v. Allied-Signal, Inc.*, 921 F.2d 421 (2d Cir. 1990).

314. 779 F. Supp. 321 (S.D.N.Y. 1991). For similar decisions in the state courts, see *Bassile v. Covenant House*, 152 Misc. 2d 88, 575 N.Y.S.2d 233 (Sup. Ct., N.Y. Co. 1991); *Burpee v. Burpee*, 152 Misc. 2d 466, 578 N.Y.S.2d 359, (Sup. Ct., Nassau Co. 1991). See also, Robert A. Barker, *Cause of Action in Child Abuse*, N.Y. L.J. Oct. 28, 1991, at 3.

315. *Schmidt*, 779 F. Supp. at 321.

316. *Id.* See also *Rizk v. Cohen*, 73 N.Y.2d 98, 104, n. 3, 535 N.E.2d 282, —n.3, 538 N.Y.S.2d 229, 232 n.3 (1989) (this court has consistently refused to judicially adopt the so-called 'discovery' rule).

317. *Schmidt*, 779 F. Supp. at 321 (district court also refused to apply doctrine of fraudulent concealment on grounds that there was not active concealment as distinct from the initial wrong) See also *Rizk*, 73 N.Y.2d 98, 535 N.E.2d 282, 538 N.Y.S.2d 229, 233 (fraudulent concealment claim fails when "plaintiff relies on the same act which forms the basis of his negligence claim").

318. *Id.* (district court rejected argument that the statute was tolled because plaintiff was under duress because duress was not an element of the cause of action asserted). See *Cullen v. Margiotta*, 811 F.2d 698, 722 (2d Cir. 1987), *cert. denied*, 483 U.S. 1021 (1987).

319. See 28 U.S.C. § 1658 (1985).

320. *Id.*

applied.³²¹

D. Notice of Claim Provisions

Some limitations of time are not statutes of limitations but are actually conditions precedent. These time limitations require that the plaintiff do an act other than commencing an action prior to the expiration of a stated time period. If the act is the filing of a notice of claim, the plaintiff must plead and prove compliance with the condition precedent.

In *Parks v. Hutchins*, the Court of Appeals affirmed the appellate division's decision that the defendant City of New York was not entitled to prior written notice pursuant to the so-called pothole law.³²² Four appellate division decisions denied motions by plaintiffs to file late notices of claim. In *Copeland v. New York City Housing Authority*, the First Department held that law office failure was not a sufficient excuse for failure to timely file a notice of claim under General Municipal Law section 50-e(5).³²³ The First Department also held that a hospital dietary aide was not entitled to file a late notice of claim against the city under GML section 50-e(5)³²⁴ because the City had no control over the City Health and Hospitals Corporation and could not have had actual notice of the accident by virtue of information contained in workers' compensation claims forms.³²⁵

In *Pantelup v. City of New York*, the Second Department held that the supreme court did not improvidently exercise its discretion in denying application for leave to file late notice of claim where the record demonstrated that about nine months elapsed prior to plaintiffs seeking leave to file the late notice.³²⁶ In *Quintero v. Town of Bab-*

321. For a fuller discussion of the new federal statute of limitations see Siegel, *The Statute of Limitations in Federal Practice, Including the New "General" One in Federal Question Cases*, 134 F.R.D. 481 (1991).

322. 78 N.Y.2d 1049, 581 N.E.2d 1339, 576 N.Y.S.2d 84 (1991). See also N.Y. ADMINISTRATIVE CODE § 7-201[c][2] [formerly § 394-1.0[2]]. The Court of Appeals also held that "the evidence adduced at trial was sufficient to support the jury's conclusion that defendant committed negligent acts which constituted a proximate cause of the injuries sustained by the plaintiffs." *Parks*, 78 N.Y.2d at 1051, 581 N.E.2d at 1340, 576 N.Y.S.2d at 85.

323. *Copeland v. New York City Housing Auth.* 173 A.D.2d 335, 335, 575 N.Y.S.2d 283, 283 (1st Dep't 1991).

324. *Skelton v. City of New York*, 176 A.D.2d 664, 575 N.Y.S.2d 317 (1st Dep't 1991).

325. *Id.* at 664, 575 N.Y.S.2d at 317.

326. 176 A.D.2d 932, 575 N.Y.S.2d 371, (2d Dep't 1991)

ylon, the Second Department reversed the supreme court and held that the doctrine of equitable estoppel could not be used to excuse an untimely filing of a notice of claim.³²⁷

Three supreme court decisions permitted late notice of claim filing under General Municipal Law 50-e³²⁸ and two supreme courts permitted late notice of claims in other matters. In *West v. New York City Health and Hospitals Corp.*, the supreme court granted plaintiffs motion for an order directing the respondents to accept as timely a notice of claim served January of 1991 that related to the infant plaintiff's birth in March 1986.³²⁹ The court distinguished cases denying late notice, noting that the legislative intent was to prevent stale claims, which was not shown here.³³⁰ In *Leggio v. Islip Public School District*, the Supreme Court permitted a late notice of claim filing on the grounds that the respondent had actual knowledge of the accident as well as the essential facts constituting the claim on the day of the incident.³³¹ In *Alvarado v. New York City Health and Hospitals Corp.*, the supreme court granted plaintiff's motion to file a late notice of claim under GML section 50-e(5) on the grounds that the short delay caused by plaintiff's lack of English was excusable.³³² In *Kutsak v. New York City Health and Hospitals Corp.*, a late notice of claim was allowed despite lack of medical affidavits.³³³ Finally, in *The Matter of Susan A.*, an HIV patient was granted application to file late notice of claim more than ten years after the alleged negligence.³³⁴

III. JURISDICTION

A. Subject Matter Jurisdiction

The most important decisions rendered during the *Survey* year relate to subject matter jurisdiction in federal courts. In *Freeport-McMoran, Inc. v. K N Energy, Inc.*, the Supreme Court reversed the Court of Appeals for the Tenth Circuit and held that addition of a limited partnership as a plaintiff did not destroy diversity jurisdic-

327. 172 A.D.2d 527, 567 N.Y.S.2d 870 (2d Dep't 1991).

328. N.Y. GEN. MUN. LAW § 50-E (McKinney Supp. 1992) [hereinafter "GML"].

329. 151 Misc. 2d 66, 67, 572 N.Y.S.2d 282, 283 (Sup. Ct., Kings Co. 1991).

330. *West*, 151 Misc. 2d at 69, 572 N.Y.S.2d at 284.

331. 206 N.Y.L.J., Nov. 5, 1991, at 25 (Sup.Ct., Suffolk Co.).

332. 206 N.Y.L.J., Oct. 15, 1991, at 33 (Sup.Ct., N.Y. Co.).

333. 205 N.Y.L.J., June 25, 1991, at 24, (Sup. Ct., Kings Co.).

334. 206 N.Y.L.J., Aug. 28, 1991, at 24 (Sup.Ct., Nassau Co.).

tion.³³⁵ The Court distinguished its holding from *C.I. Carden v. Arkoma Associates*³³⁶ on the grounds that complete diversity of citizenship existed at the time the action was commenced.³³⁷ The Supreme Court stated “[w]e have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.”³³⁸

In *Weltover, Inc. v. Republic of Argentina*, the Second Circuit held for the first time that a foreign sovereign’s nonpayment to a foreign plaintiff of a debt payable in the United States was sufficient to establish subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976.³³⁹ In *A.F.A. Tours, Inc. v. Whitchurch*, the Second Circuit held that the \$50,000 amount in controversy requirement under 28 U.S.C. § 1332 was applicable to an alleged punitive damage claim in a trade secret case.³⁴⁰ The Second Circuit reminded the bench and bar that the sum claimed by the plaintiff controls if the claim is apparently made in good faith.³⁴¹ It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.³⁴²

In *Somlyo v. J. Lu-Rob Enterprises, Inc.*, the Second Circuit reminded the bench and bar that the right to remove a state court action to federal court on diversity grounds is statutory, and must therefore be invoked in strict conformity with statutory requirements.³⁴³ The case presented a novel question of civil procedure: whether compliance with the Local Rules of a federal district court is a prerequisite to the timely filing of a notice of removal under the removal statute.³⁴⁴ The Second Circuit answered this question in the affirmative but excused departure from the local rules on the grounds of fairness.³⁴⁵ Nonetheless, the *Somlyo* case stands for the proposition that the bar must be familiar with the local and business rules of the federal court wherein the removal notice is filed.³⁴⁶

335. 111 S. Ct. 858, 859 (1991).

336. 110 S. Ct. 1015 (1990).

337. *Freeport-McMoran*, 111 S. Ct. at 860.

338. *Id.* at 860.

339. 941 F.2d 145 (2d Cir. 1991).

340. 937 F.2d 82 (2d Cir. 1991).

341. *A.F.A. Tours*, 937 F.2d at 82.

342. *Id.*

343. 932 F.2d 1043 (2d Cir. 1991).

344. *Somlyo*, 932 F.2d at 1045.

345. *Id.*

346. *See id.*

In *Chesley v. Union Carbide Corp.*, the Second Circuit reversed a determination by the district court that it did not have ancillary jurisdiction to consider applications for attorney fees and disbursements with respect to a settlement fund deposited in India.³⁴⁷ The circuit court ultimately held that the Indian funds were exempt from the attorney's charging lien under principles of in rem jurisdiction.³⁴⁸ Nonetheless, the case is important because it permits a federal district court to exercise ancillary jurisdiction after a foreign court has accepted jurisdiction over a matter.³⁴⁹ Judge Altimari pointed out in his concurring opinion that "In my view, the majority opinion fails to properly adhere to our earlier pronouncement that, following the *forum non conveniens* dismissal, the district court 'cease[d] to have any further jurisdiction over the matter.'³⁵⁰ Judge Altimari also noted that the exercise of ancillary jurisdiction over a matter creates the potential for shared jurisdiction which is unrealistic.³⁵¹

Last year's *Survey* discussed the Judicial Improvements Act of 1990,³⁵² and stressed that the Act made significant subject matter jurisdictional changes. We refer the reader to Professor John B. Oakley's excellent article entitled *Recent Statutory Changes In the Law Of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*.³⁵³ Professor Oakley points out that Congress has "enacted (1) a modest narrowing of the right to invoke federal jurisdiction originally or by removal; (2) a significant expansion of the right to invoke the 'supplemental' jurisdiction necessary for a federal court to adjudicate claims under state law that are transactionally related to litigation in federal court; and (3) a dramatic liberalization of the law of federal venue."³⁵⁴ Professor Oakley's piece should be mandatory reading for a federal litigator.

B. Jurisdiction

A review of the cases published during the *Survey* year indicate

347. 927 F.2d 60 (2d Cir. 1991).

348. *Chesley*, 927 F.2d at 62.

349. *Id.*

350. *Id.* at 67-68.

351. *Id.* at 68 (citing *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 205 (2d Cir.), *cert. denied* 484 U.S. 871 (1987)).

352. See Jay A. Carlisle, *Civil Practice, 1990 Survey of New York Law*, *supra* note 68, at 351-53.

353. See Oakley, *supra* note 69.

354. *Id.* at 735.

that New York state and federal courts are restrictively applying principles of general and specific jurisdiction. Also, federal district courts issued many opinions interpreting CPLR 301 and 302. Finally, the Appellate Division for the First Department decided the most significant cases involving commercial and tort actions under CPLR 302(a)(1).³⁵⁵

1. CPLR 301: General Jurisdiction³⁵⁶

Under CPLR 301, personal jurisdictions based on physical presence, domicile, consent, or “doing business” permit New York courts to assert jurisdiction over a defendant for any cause of action irrespective of whether it arises from the defendant’s contacts with New York.³⁵⁷ The doing business concept was discussed during the *Survey* year by the Second Circuit in *Landoil Resources v. Alexander & Alexander Serv., Inc.*, wherein the Second Circuit held that the presence of a permanent locale in the State of New York is not a prerequisite to the exercise of jurisdiction under CPLR 301.³⁵⁸ The court stated “the issue of whether a defendant has such a systematic and continuous contact with New York as to be tantamount to presence within the state is a fact-sensitive determination requiring a balancing of all relevant factual circumstances.”³⁵⁹ Although the court recognized that the third party defendants conducted many activities in New York in connection with their substantial and continuous solicitation of business, it concluded that the absence of other activities of substance in New York precluded the assertion of general jurisdiction by the district court.³⁶⁰ The circuit court also rejected the argument that the third party defendants were doing business in New York through an agent or subsidiary.³⁶¹

In *Klinghoffer v. S.N.C. Achille Lauro*, the Second Circuit reversed the district court and remanded the case for consideration of whether the Palestine Liberation Organization was doing business in New York.³⁶² The court stressed that an organization is “doing busi-

355. See *Lisec v. Lenhardt*, N.Y. L.J. Jan. 8, 1992, at 21, col.3.

356. N.Y. CPLR 301 (McKinney 1990 & Supp. 1992).

357. *Landoil Resources v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990)

358. 918 F.2d 1039, 1044 (2d Cir. 1990) (as amended, Jan 2, 1991).

359. *Landoil Resources*, 918 F.2d at 1046.

360. *Id.*

361. *Id.*

362. 937 F.2d 44, 46 (2d Cir. 1991).

ness" under CPLR 301 when it is engaged in "such a continuous and systematic course" of activity that it can be deemed to be "present" in New York.³⁶³ The Second Circuit stated:

Whether this test is met depends on the aggregate of the organization's activities; the key question is whether 'the quality and nature' of the defendant's contacts with New York 'make it reasonable and just according to 'traditional notions of fair play and substantial justice' that it be required to defend the action in New York.³⁶⁴

The circuit court pointed to the substantial contacts the PLO has with the state of New York, but held only those contacts not conducted in furtherance of the PLO's observer status may properly be considered as a basis of jurisdiction.³⁶⁵ The Second Circuit rested this decision on two grounds. First, were the PLO not a permanent observer at the United Nations, it would not be able to enter New York.³⁶⁶ Second, and more importantly, "basing jurisdiction on the PLO's participation in UN-related activities would put an undue burden on the ability of foreign organizations to participate in the UN's affairs."³⁶⁷

Two federal district court decisions remind the bar that CPLR 301 jurisdiction requires some evidence of an unlicensed foreign corporation having an office, real estate, bank accounts and employees in New York.³⁶⁸ Finally in *Tuxedo Network v. Hughes Communications Carrier Services, Inc.*, Judge Cedarbaum reminded the bar that a foreign corporation may be subject to general CPLR 301 jurisdiction under the doctrine of *Gelfand v. Tanner Motor Tours, Ltd.*³⁶⁹ In this respect, Judge Cedarbaum held that the New York representative of a nonresident defendant need not be the official agent of the defendant.³⁷⁰

363. *Klinghoffer*, 937 F.2d at 50-51.

364. *Id.* at 51.

365. *Id.*

366. *Id.*

367. *Id.*

368. *See Marks v. Farm and Wilderness Foundation*, 753 F. Supp. 523 (S.D.N.Y. 1991); *Volkswagen De Mexico, S.A. v. Germanischer Lloyd*, 759 F. Supp. 1053 (S.D.N.Y. 1991).

369. 753 F. Supp. 514 (S.D.N.Y. 1990) (citing *Gelfand*, 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 966 (1968)).

370. *Tuxedo Network*, 753 F. Supp. at 514.

2. CPLR 302: Longarm Jurisdiction

There were four instructive opinions on CPLR 302(a)(1) jurisdiction during the *Survey* year. In *First National Bank And Trust Company v. Wilson*, the appellate division reversed the supreme court's decision that it had in personam jurisdiction.³⁷¹ The appellate division held that longarm jurisdiction cannot be asserted over a nondomiciliary who was never physically present here and who never agreed to provide any goods or services here, other than a promise to guarantee payment by another nondomiciliary.³⁷² In *Home Box Office, Inc. v. Baum*, the First Department held that in-state negotiation and execution of affiliation contracts and letter agreements in connection with a cable programmer's provision of services demonstrated purposeful activities from which defendants benefit so as to justify jurisdiction.³⁷³ Also, in *Torrioni v. Unisul, Inc.* the First Department held that a Florida corporation was subject to long-arm jurisdiction in New York pursuant to the "contracts anywhere" provision of CPLR 302(a)(1).³⁷⁴ The defendant manufactured a machine in Florida which allegedly caused an injury in New York.³⁷⁵ In addition, the defendant contracted to sell that and other machines to New York and thereafter arranged for direct shipments of those machines.³⁷⁶ Finally, in *Glastechnische Industrie GmbH. v. Lenhardt Maschinenbau BmbH, et al.*, the First Department reminded the bar that a suit against a nondomiciliary under the long-arm statute must arise out of the contacts enumerated in CPLR 302(a)(1).³⁷⁷ This decision, which was decided on December 31, 1991, demonstrates that the burden is on the party asserting jurisdiction to show the existence of some articulable nexus between the business transacted and the cause of action sued upon.³⁷⁸

In *Hatch v. Tran*, the Second Department held that a challenge to in personam jurisdiction is distinct from a claim that plaintiff did not properly serve process on the defendant.³⁷⁹ The appellate division also held that a challenge to the basis must be pled with particularity

371. 171 A.D.2d 616, 567 N.Y.S.2d 468 (1st Dep't 1991).

372. *First National Bank*, 171 A.D. at 616, 567 N.Y.S.2d at 468.

373. 172 A.D.2d 222, 568 N.Y.S.2d 69 (1st Dep't 1991).

374. 176 A.D.2d 623, 575 N.Y.S.2d 66 (1st Dep't 1991).

375. *Torrioni*, 176 A.D.2d at 623-24, 575 N.Y.S.2d at 66-67.

376. *Id.* at 624, 575 N.Y.S.2d at 67.

377. 173 A.D.2d 70, 577 N.Y.S.2d 803 (1st Dep't 1991).

378. *Glastechnische*, 173 A.D.2d at 72, 577 N.Y.S.2d at 804.

379. 170 A.D. 649, 567 N.Y.S.2d 72 (2d Dep't 1991).

or it will be waived.³⁸⁰ The appellate division noted that plaintiff was injured in a multi-vehicle accident in New Jersey while operating a bus. In a joint answer the respondents raised the affirmative defense that "the Complaint was not properly served and hence, the Court lacks jurisdiction over the said defendants herein."³⁸¹ In response to a later motion, the respondents cross-moved to dismiss the complaint on the ground that there was no basis for jurisdiction over them in New York.³⁸² The appellate division pointed out that an objection to personal jurisdiction is waived unless it is raised in the answer or in a preanswer motion to dismiss, whichever comes first.³⁸³ The appellate division stated:

Since a challenge to the basis of the court's jurisdiction is distinct from a claim of defective service of process, the respondents were required to plead this defense with particularity. Fairly read, the answer raised only the claim of defective service of the complaint; therefore any contention with respect to the basis of the court's in personam jurisdiction was waived.³⁸⁴

The *Hatch* case is a good example of how a defendant who initially raises a "boilerplate" affirmative defense in his answer that the court lacks in personam jurisdiction may be later precluded from moving for summary judgment on more particular grounds for the jurisdictional defect.³⁸⁵

3. *In Rem Jurisdiction*

In *Chesley v. Union Carbide Corp.*, the Second Circuit held that attorneys, who represented victims of the Bhopal disaster, could not recover their fees and costs because jurisdiction could not be exercised with respect to the settlement fund which was on deposit in India.³⁸⁶ The Second Circuit rested its decision on a common law rule which prohibits state and federal courts from assuming in rem jurisdiction over a res that is already under the in rem jurisdiction of another court.³⁸⁷

In *American Express Travel Related Services Co. v. Khan*, the

380. *Hatch*, 170 A.D.2d at 650, 567 N.Y.S.2d at 73-74.

381. *Id.* at 650, 567 N.Y.S.2d at 73.

382. *Id.*

383. *Id.*

384. *Id.* at 649, 567 N.Y.S.2d at 73 (citations omitted).

385. *Hatch*, 170 A.D.2d at 649-50, 567 N.Y.S.2d at 73-4.

386. *Chesley*, 927 F.2d at 60.

387. *Id.* at 67.

supreme court upheld the attachment of a non-domiciliaries bank account in New York for purposes of obtaining quasi-in-rem jurisdiction.³⁸⁸ Although the agreement between the plaintiff and defendant did not, as in *Banco Ambrosiano v. Artoc*,³⁸⁹ require that payments be made at a particular bank, the court held that jurisdiction existed in a contract action because defendant had furnished defendant with the name and account number of his New York bank.³⁹⁰

C. Statutory Requirements for Service of Summons

We again remind the bar that New York courts require strict compliance for service of summons and notice. This is important because a defect in service dismisses the action and if the dismissal occurs after the applicable statute of limitations has expired, there is no six month grace period under CPLR 205(a).³⁹¹ Also, CPLR 312-a, service by mail, has been permanently enacted³⁹² and CPLR 306-a has been added to require filing of summons with proof of service in all actions within thirty days of service, regardless of how or on whom served.³⁹³ CPLR 310 has been amended to provide for more liberal service on partnerships,³⁹⁴ and several federal service cases are worthy of brief mention. Finally, we select the Court of Appeals decision in *Ling Ling Yung v. County of Nassau*³⁹⁵ as the plaintiff's case of the year.³⁹⁶

1. Statutory Requirements Under CPLR 308

New York courts continue to require strict compliance with CPLR 308.³⁹⁷ Subsection (1) of the service statute requires in hand personal delivery.³⁹⁸ Subsections (2) and (4) require exact compli-

388. N.Y. L.J., Oct. 31, 1991, at 23.

389. 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

390. *American Express*, N.Y. L.J., Oct. 31, 1991, at 23.

391. N.Y. CPLR 205(a) (McKinney 1990).

392. See *supra* notes 21-38 and accompanying text.

393. See *supra* notes 10-15 and accompanying text.

394. See *supra* notes 16-20 and accompanying text.

395. 77 N.Y.2d 568, 571 N.E.2d 669, 569 N.Y.S.2d 361 (1991).

396. See *infra* notes 439-443 and accompanying text.

397. N.Y. CPLR 308 (McKinney 1990 & Supp. 1992). See also *Flick v. Stewart-Warner*, 76 N.Y.2d 50, 555 N.E.2d 907, 556 N.Y.S.2d 510 (1990).

398. See *Dorfman v. Leidner*, 76 N.Y.2d 956, 565 N.E.2d 472, 563 N.Y.S.2d 728 (1990).

ance,³⁹⁹ and subsection (5) places an onerous burden on the plaintiff to demonstrate that service is otherwise "impracticable".⁴⁰⁰

a. CPLR 308(1): In Hand Service

In *Ciotti v. King*, the Second Department held that petitioner made a prima facie showing of personal delivery by proof that the process server entered respondent's home and immediately handed papers to respondent's wife, who then handed them to respondent in the presence of the process server.⁴⁰¹ This case reminds the bar that the "general vicinity" exception to the Court of Appeals' ruling in *Macchia v. Russo*⁴⁰² is very limited.

b. CPLR 308(2): Leave and Mail Service

Six appellate division decisions demonstrate the importance of exact compliance with CPLR 308(2). In *Glasser v. Keller* the appellate division held that a hospital did not constitute a private surgeon's "actual place of business", as he was not an employee, but only had privileges and performed operations on the premises.⁴⁰³ Similarly in *Continental Hosts, Ltd. v. Levine*, the Second Department held that service of process on defendant in an accounting malpractice case was not sufficient because it was made on defendant's former place of business which he had vacated upon retirement.⁴⁰⁴

Another line of cases stressed the importance of complying with the mailing requirements of CPLR 308(2). In *Donohue v. Schwartz*, the First Department reminded the bar that the statute of limitations is not tolled by delivery of process to a person of suitable age and discretion where process was not mailed to either defendant's last known residence or actual place of business.⁴⁰⁵ With respect to the mailing requirement, it is essential that it be effected within twenty

399. See Jay A. Carlisle, *Civil Practice, 1990 Survey of New York Law*, *supra* note 68, at 373-374.

400. *Id.*

401. 175 A.D. 889, 573 N.Y.S.2d 740 (2d Dep't 1991).

402. 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986). In this familiar case, a summons was delivered to the defendant's son outside the family house, and the son entered the house and gave the summons to the father. *Macchia*, 67 N.Y.2d at 592, 496 N.E.2d at 680, 505 N.Y.S.2d at 591. The Court held that the delivery of a summons to the wrong person does not confer jurisdiction over a defendant even though he shortly receives it thereafter. *Id.*

403. 149 Misc. 2d 875, 567 N.Y.S.2d 981 (Sup. Ct., Queens Co. 1991).

404. 170 A.D.2d 430, 565 N.Y.S.2d 222 (2d Dep't 1991).

405. 174 A.D.2d 318, 570 N.Y.S.2d 542 (1st Dep't 1991).

days of the substituted service.⁴⁰⁶

In *NYS Higher Education Services Corp. v. Palmeri*, the Third Department held that there was no jurisdiction because the mailing was made 26 days after the service at defendant's residence, rather than the required 20 days.⁴⁰⁷ Similarly in *Greenberg v. Rosenberg* the Second Department held plaintiff's action to be time barred for the following reason:

Although the summons and complaint were delivered to a person of suitable age and discretion at the appellant's place of business on December 22, 1986, process was not mailed until December 24, 1986, initially to the wrong address, and again on January 16, 1987, to the correct address.⁴⁰⁸

Finally, in *Pickman Brokerage v. Bevona*, the First Department held that the defendant was not properly served when process was left with the janitor or office building maintenance employee in the lobby of defendant's office building.⁴⁰⁹

c. CPLR 303: Service on Defendant's Agent

In *Broman v. Stern*, the Second Department held that the mailing of summons and complaint to an attorney for the defendants did not constitute valid service, absent evidence that the defendants had in fact authorized their attorney to accept process on their behalf.⁴¹⁰ The appellate division stated:

That the attorney for the defendants-respondents claimed that he was authorized to accept service on behalf of his clients is immaterial under the circumstances of this case. In general, representations made by an individual who accepts the service of process are not binding on the defendant in the absence of proof that the defendant himself knew of such representations.⁴¹¹

Broman reminds the bar that the agency requirements of CPLR 303

406. *Donohue*, 174 A.D. 2d at 318, 570 N.Y.S. 2d at 542.

407. 167 A.D.2d 797, 563 N.Y.S.2d 358 (3d Dep't 1990).

408. 174 A.D.2d 601, 602, 571 N.Y.S.2d 309, 309 (2d Dep't 1991).

409. 149 Misc. 2d 879, 881, 568 N.Y.S.2d 287, 288 (Sup. Ct., N.Y. Co. 1991). *But see Costine v. St Vincent's Hospital & Medical Center of New York*, 173 A.D.2d 422, 570 N.Y.S.2d 50 (1st Dep't 1991) (held that guard at security booth outside private residential community in which defendant lived, by screening process server and representing that he would pass along legal papers to defendant, exhibited sufficient maturity and responsibility for effective service of process).

410. 172 A.D.2d 475, 567 N.Y.S.2d 829 (2d Dep't 1991).

411. *Broman*, 172 A.D.2d at 477, 567 N.Y.S.2d at 831.

are limited and that service of a summons and complaint should not be made on an agent unless done pursuant to CPLR 318.⁴¹² *Broman* also reminds the bar that even if a defendant's attorney had been properly designated as agent for the service of process, mailing a summons and complaint to a person to be served does not constitute valid service under CPLR 308(3).⁴¹³

d. CPLR 308(4): Nail and Mail

New York plaintiffs continue to ignore or disregard Professor Farrell's advice that service of process under CPLR 308(4) is Good Old Unreliable Service.⁴¹⁴ It is essential that the plaintiff show he has made "diligent" attempts to make service under subsections 1 and 2 of CPLR 308.⁴¹⁵ Five appellate division decisions demonstrate that subsection 4 of CPLR 308 is fraught with danger.

In *Zymantiene v. City of New York*, the First Department reversed and remanded on the grounds that service of process was not proper under CPLR 308(4).⁴¹⁶ The process server averred that she had attempted personal service twice at the resident address and that the defendant could not be found at the address, the defendant's whereabouts were never determined, despite the process server's questioning of local residents.⁴¹⁷ The appellate division stressed that further investigation was necessary to show due diligence.⁴¹⁸

Similarly in *Rothenberg v. Julien*, the First Department held that plaintiff's action was properly dismissed for lack of jurisdiction because the process server made only one attempt at substituted personal service.⁴¹⁹

In *Empire Ins. Co. v. Marquez*, the Third Department reminded the bar that wedging of the summons and complaint in the door frame of a locked screen door was not "affixation" within the rule permitting service by affixing the summons to the door of a business dwelling, or usual place of abode.⁴²⁰ The safe method is to affix the

412. N.Y. CPLR 318 (McKinney 1992).

413. *Broman*, 172 A.D.2d at 477, 567 N.Y.S.2d at 831.

414. Farrell, *Good Old Unreliable Service Under New York's Nail and Mail Statute*, N.Y. L.J., July 28, 1986, at 1.

415. N.Y. CPLR 308 (4) (McKinney 1992).

416. 174 A.D.2d 372, 571 N.Y.S.2d 5 (1st Dep't 1991).

417. *Zymantiene*, 174 A.D.2d at 372, 571 N.Y.S.2d at 6.

418. *Id.*

419. 172 A.D.2d 216, 567 N.Y.S.2d 721 (1st Dep't 1991).

420. 168 A.D.2d 810, 564 N.Y.S.2d 232 (3rd Dep't 1991).

summons with "a nail, tack, tape, rubber band, or some other device which will ensure a genuine adherence."⁴²¹

Two appellate divisions reminded the bar of the importance of complying with the mailing requirements under CPLR 308(4). In *Kazdan v. Merlis*, the Second Department held that plaintiffs failed to prove that the process server exercised due diligence prior to resorting to substituted service or that he properly fixed and mailed copies of summons and complaint to effectuate service.⁴²² In addition, no evidence was presented that service was ever completed by filing proof of service with the clerk of the court.⁴²³ Similarly in *Rosato v. Ricciardi*, the Third Department held that timely proof of service was not filed until the default judgment was sought, well beyond 20 days after the nailing and mailing procedure.⁴²⁴ The Third Department also noted that the failure to timely file proof of service was a "mere irregularity" without jurisdictional implications.⁴²⁵ However, we note that if the statute of limitations had expired, plaintiff would be unable to obtain a six month extension under CPLR 205(a).⁴²⁶

e. CPLR 308(5): Expedient Service

Should personal delivery, "leave and mail" or "nail and mail" service all prove to be "impracticable," CPLR 308(5) permits service to be made "... in such manner as the court, upon motion without notice, directs."⁴²⁷ Although expedient service does not require "due diligence", three appellate division decisions during the *Survey* year indicate that the moving party must demonstrate the "impracticable" requirement with particular specificity.⁴²⁸

421. *Empire Ins. Co.*, 168 A.D.2d at 810, 564 N.Y.S.2d at 233.

422. 174 A.D.2d 711, 711, 571 N.Y.S.2d 760, 761 (2d Dep't 1991).

423. *Kazdan*, 174 A.D.2d at 711, 571 N.Y.S.2d 760.

424. 174 A.D.2d 937, 571 N.Y.S.2d 633 (3d Dep't 1991).

425. *Rosato*, 174 A.D.2d at 938, 571 N.Y.S.2d at 634.

426. N.Y. CPLR 205(a) (McKinney 1992).

427. N.Y. CPLR 308(5) (McKinney 1992).

428. See *Giannizzero v. Herzel*, 170 A.D.2d 647, 567 N.Y.S.2d 70 (2d Dep't 1991) (appellate division held that despite impracticability of locating passenger, it had not been shown that service on taxicab insurer, which had no relationship with passenger, was reasonably calculated to apprise passenger of action pending against him); *Rivera v. Mazzola*, 169 A.D.2d 827, 565 N.Y.S.2d 216 (2d Dep't 1991) (because defendant could have been personally served pursuant to the long arm statute, personal service was not impracticable and plaintiff was not entitled to expedited service); *Dime Savings Bank of New York, FSB v. Mancini*, 169 A.D.2d 964, 564 N.Y.S.2d 859 (3d Dep't 1991) (mere showing that defendant had "ducked" service was insufficient for purposes of expedited service).

2. *Statutory Requirements for Service under CPLR 311*

CPLR 311 provides for personal service upon a corporation or governmental subdivision.⁴²⁹ Thus, service upon any domestic or foreign corporation must be made by serving an officer, director, managing or general agent, cashier or assistant cashier or any other agent authorized by appointment or by law to receive service.⁴³⁰ This service statute was strictly construed by the First Department, which held that personal service on a corporation was not proper pursuant to an ex parte order under CPLR 308(5).⁴³¹ The appellate division impliedly ruled that CPLR 311 is the pre-emptive method of service and that the provisions for expedient and substituted service offered by CPLR 308 are not available for use against corporations.⁴³² The message is clear, CPLR 308 is for individuals and CPLR 311 is for corporations.

The First Department, in *Chow v. Kenteh Enterprises Corporation*, reminded the bar twice that service under CPLR 311 is limited to the persons designated in the statute.⁴³³ The First Department held that service of process on an attorney who filed the Certificate of Incorporation and who was listed as the person to whom the Secretary of State should mail a copy of the process served on the Secretary, was insufficient to acquire personal jurisdiction over the defendant.⁴³⁴ The appellate division stated:

The attorney was not a person authorized to accept service (see, CPLR 311[1]), nor was the Secretary of State served. Further, cases such as *Fashion Page, Ltd. v. Zurich Insurance Co.* and the other authorities relied upon by plaintiff, are clearly inapposite, since the process server here did not rely upon any conduct, procedure, or representation made by the attorney, but had in fact been instructed by his superiors to make service on the attorney.⁴³⁵

Finally, the bench and bar should be alerted to the First Department's decision in *American Home Assurance Co. v. Morris Industrial Builders, Inc.*, wherein the appellate division held there that an unli-

429. N.Y. CPLR 311 (McKinney 1992).

430. *Id.* § 311(1).

431. See *LTD Trading Enterprises v. Vignatelli*, 176 A.D.2d 571, 574 N.Y.S.2d 745 (1st Dep't 1991).

432. *Vignatelli*, 176 A.D.2d at 571, 574 N.Y.S.2d at 745.

433. 169 A.D.2d 572, 564 N.Y.S.2d 426 (1st Dep't 1991).

434. *Chow*, 169 A.D.2d at 572, 564 N.Y.S.2d at 427.

435. *Id.* at 572, 564 N.Y.S.2d at 427 (citations omitted).

censed New Jersey process server who was not a resident of New York could serve legal papers in New Jersey as required by CPLR 313.⁴³⁶ The appellate division found that the defect as to residence was a mere irregularity and would be disregarded.⁴³⁷

3. *Strict Compliance Cases of the Year for Plaintiff and Defendant*

The strict compliance case of the year for plaintiffs is the Court of Appeals decision in *Ling Ling Yung v. County of Nassau*.⁴³⁸ The Court overruled *Horowitz v. Incorporated Village of Roslyn*⁴³⁹ and held that service of process on the County Clerk pursuant to CPLR 311(4) was not defective due to Section 11-4.0 of the Nassau County Administrative Code, which requires service to be made on the County Executive or Attorney.⁴⁴⁰ The Court, speaking through Chief Judge Wachtler, noted that "CPLR [101] governs the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute"⁴⁴¹ Chief Judge Wachtler concluded that CPLR 311 should govern because "to allow the County to continue to impose more stringent service of process requirements and to hold attorneys to a higher standard would undermine the uniformity and compromise the predictability of the CPLR."⁴⁴²

The strict compliance case of the year for defendants is the First Department's decision in *Rosenblum v. 170 West Village Associates*.⁴⁴³ In *Rosenblum*, the appellate division held that the failure to properly serve a third-party summons necessitated dismissal of a third party complaint, even though the third-party defendant was also a defendant in a second action commenced by the plaintiff.⁴⁴⁴ The second ac-

436. 176 A.D.2d 541, 575 N.Y.S.2d 14 (1st Dep't 1991).

437. *American Home Assurance*, 176 A.D.2d at 544, 575 N.Y.S.2d at 16. See also *Todaro v. Wales Chemical Co.*, 173 A.D.2d 696, 570 N.Y.S.2d 595 (2d Dep't 1991) and *Glasser v. Kaswol Construction Corp.*, 176 A.D.2d 858, 575 N.Y.S.2d 336 (2d Dep't 1991) (holding that service improper under CPLR 311). But see *Psathas v. Catskill Reg. Off-Track Betting Corp.*, 173 A.D.2d 1070, 570 N.Y.S.2d 407 (3d Dep't 1991) (holding service proper under CPLR 311 on public benefit corporation when president's assistant appeared and took the summons).

438. 77 N.Y.2d 568, 571 N.E.2d 669, 569 N.Y.S.2d 361 (1991).

439. 144 A.D.2d 639, 535 N.Y.S.2d 79 (1989)

440. *Ling Ling Yung*, 77 N.Y.2d at 570, 571 N.E.2d at 670, 569 N.Y.S.2d at 362.

441. *Id.* at 570, 571 N.E.2d at 670, 569 N.Y.S.2d at 362. See also *Barker, Potential Derailment of Lawsuits*, N.Y.L.J., May 29, 1991, at 3, col. 1.

442. *Id.* at 572, 571 N.E.2d at 671, 569 N.Y.S.2d at 363.

443. 175 A.D.2d 702, 573 N.Y.S.2d 92 (1st Dep't 1991).

444. *Rosenblum*, 175 A.D.2d at 703, 573 N.Y.S.2d at 93.

tion had been consolidated with the underlying action.⁴⁴⁵ The appellate division, citing *Macchia v. Russo*⁴⁴⁶ and *Markoff v. South Nassau Community Hosp.*,⁴⁴⁷ stated:

It is very basic that, as a general matter, jurisdiction cannot be obtained over a defendant except through strict compliance with the statutorily mandated procedures.⁴⁴⁸

4. CPLR 312-a and Service by Mail

The bench and bar are reminded that CPLR 312-a was permanently enacted during the *Survey* year. In this respect we remind the practitioner not to serve by mail if the statute of limitations has less than six months remaining prior to expiration.⁴⁴⁹

The basis for this admonition is evident from the result in *Nelson v. Abbott Laboratories*.⁴⁵⁰ In this case, the defendants moved to dismiss plaintiff's toxic tort suit as time-barred and for improper service of process.⁴⁵¹ The court held that service by mail had not been properly made pursuant to CPLR 312-a since the statute of limitations expired before the defendant's acknowledgments could be returned.⁴⁵² This lengthy opinion explains why plaintiffs failed to follow or to fully comprehend the procedures set forth in the new mailing statute and concludes with the admonition:

Because the acknowledgments were not received by the expiration of the Statute of Limitations, not only was service under CPLR 312-a defective, it was also untimely.⁴⁵³

In another important case, *Meneely v. Hitachi Seiki, USA*, the Second Department reminded the bar that use of mail to accomplish extraterritorial service of process in federal court is improper.⁴⁵⁴ In *Meneely*, the appellate division held that under the Federal Rules of Civil Procedure 4(c)(2)(C)(ii) service of process is limited to within the territorial limits of the State in which the district court sits unless

445. *Id.*

446. 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986).

447. 61 N.Y.2d 283, 461 N.E.2d 1253, 473 N.Y.S.2d 766 (1984).

448. *Rosenblum*, 175 A.D.2d at 703, 573 N.Y.S.2d at 93.

449. *See supra* notes 21-38 and accompanying text.

450. N.Y.L.J., Nov. 12, 1991, at 36 (Sup. Ct., Nassau Co. 1991).

451. *Nelson*, N.Y.L.J., Nov. 12, 1991, at 36.

452. *Id.*

453. *Id.* at 36.

454. 175 A.D.2d 111, 571 N.Y.S.2d 809 (2d Dep't 1991).

service is otherwise authorized by a federal statute or rule.⁴⁵⁵ Thus, extraterritorial service of process made prior to January 1, 1990 (the date New York adopted CPLR 312-a) is improper.⁴⁵⁶

Two other "mailing" cases merit mention. In *In re Abrams*, the attorney general served a subpoena via telefax to petitioner at his Manhattan office and other papers by express mail to his Florida residence.⁴⁵⁷ Petitioner challenged the validity of the service. The supreme court held that the challenge to service must be sustained under CPLR 308.⁴⁵⁸ The court granted the motions without prejudice to re-serve but made it clear that service was improper.⁴⁵⁹ In *Broman v. Stern*, the Second Department held that mailing a summons and complaint to the defendant's attorney was not proper service even though the attorney had represented that he was authorized to accept service.⁴⁶⁰

5. Related Service Tips

Service of process under New York Vehicle and Traffic Law ("VTL"), section 253 allows the practitioner to serve a summons upon the Secretary of State if the plaintiff includes the defendant's out-of-state address.⁴⁶¹ In *Squire v. Greenberg*, the First Department held that willful misrepresentation of one's address at the time of a motor vehicle accident estopped defendants from claiming defective service through the Secretary of State under the VTL.⁴⁶² Similarly in *Sherrill v. Pettiford*, the Second Department held that a motor vehicle licensee who failed to comply with the statute requiring notice to the Commissioner of Motor Vehicles of a change of residence within ten days of the change was estopped from challenging the propriety of service made to the former address.⁴⁶³

In *Zimmerman v. Mingo*, Second Department held that a defendant claiming lack of personal jurisdiction failed to meet his burden of proving that he changed his New York domicile after he enlisted in

455. *Meneely*, 175 A.D.2d at 112, 571 N.Y.S.2d at 810.

456. *Id.*

457. N.Y.L.J., March 28, 1991, at 26 (Sup. Ct., N.Y. Co. 1991).

458. *Abrams*, N.Y.L.J., March 28, 1991 at 26.

459. *Id.*

460. 172 A.D.2d 475, 567 N.Y.S.2d 829 (2d Dep't 1991).

461. N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986).

462. 173 A.D.2d 362, 569 N.Y.S.2d 730 (1st Dep't 1991).

463. 172 A.D.2d 512, 567 N.Y.S.2d 859 (2d Dep't 1991).

the Army and was stationed in Kentucky.⁴⁶⁴ The appellate division based its decision on the general rule in New York, i.e., military service does not affect a person's domicile unless he manifests a clear intent to change it.⁴⁶⁵ Finally, in *Peterson v. IBJ Schroder Bank & Trust Co.*, the First Department reminded the bar that a summons is jurisdictionally defective when it does not contain a description of the nature or basis of the action and is not otherwise accompanied by a complaint.⁴⁶⁶

6. *The Hague Convention*

The Hague Convention mandates that service abroad on a defendant who is a citizen of a signatory nation must satisfy not only the requirements of New York State's service statutes, but also the service requirements of the Hague Convention.⁴⁶⁷ The Convention is not applicable to citizens of nations who have not ratified it, nor is it applicable if service is made upon the defendant or the defendant's agent within the United States.⁴⁶⁸ A forum selection clause may void application of the Convention.⁴⁶⁹

In *Philip v. Monarch Knitting Machine Corp.*, the First Department held that service of process by registered mail upon a Japanese corporation at its principal place of business in Japan was in conformity with the Hague Convention.⁴⁷⁰ In another matter the First Department held that an order of the Surrogate Court directing a non-party Italian citizen to testify at a deposition in New York was invalid for failure to follow the Hague Convention.⁴⁷¹

7. *Service of Process in Federal Practice*

Three decisions by the Court of Appeals for the Second Circuit

464. 171 A.D.2d 662, 567 N.Y.S.2d 142 (2d Dep't 1991).

465. *Zimmerman*, 171 A.D.2d at 662, 567 N.Y.S.2d at 142.

466. 172 A.D.2d 165, 567 N.Y.S.2d 704 (1st Dep't 1991).

467. *See Vazquez v. Sund Emba A.B.*, 152 A.D.2d 389, 548 N.Y.S.2d (1989). *See also* Committee on Federal Courts of the New York State Bar Association, *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63 (1988) (discussing the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1963).

468. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

469. *Schlunk*, 486 U.S. at 694. *See also* Jay A. Carlisle, *N.Y. Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 108-09 (discussing Hague Convention).

470. 169 A.D.2d 603, 565 N.Y.S.2d 21 (1st Dep't 1991).

471. *In the Matter of the Application of Francesca v. Agusta-Vacca-Graffagni*, 171 A.D.2d 595, 567 N.Y.S.2d 664 (1st Dep't 1991).

make it clear that when a plaintiff sues the United States he must serve the Attorney General of the United States within 120 days after filing his complaint as required under Rules 4(d)(4) and 4(j).⁴⁷² In *McGregor v. U.S.*, the plaintiff sued a V.A. Hospital under the Federal Tort Claims Act seeking damages for her husband's wrongful death, which she claimed resulted from negligent treatment at the hospital.⁴⁷³ On the same day plaintiff filed her complaint, she properly served the United States Attorney by having a copy of her summons and complaint personally delivered to his office.⁴⁷⁴ Plaintiff did not, however, make any attempt within the 120-day period to serve the Attorney General in Washington by registered or certified mail.⁴⁷⁵ Plaintiff's complaint was dismissed by the district court and when she refiled it, the statute of limitations had run.⁴⁷⁶ The Second Circuit held plaintiff's first complaint was properly dismissed for lack of jurisdiction and that her second complaint was properly dismissed with prejudice on the ground that it was time barred.⁴⁷⁷

In *National Development Co. v. Triad Holding Corp.*, the Second Circuit held that a person can have two or more "dwelling houses or usual places of abode," for purposes of the federal rule permitting substituted service.⁴⁷⁸ The circuit court reject Adnan Khashoggi's claim that service at his New York City apartment was improper because his dwelling or usual place of abode was at his home in Saudi Arabia.⁴⁷⁹

D. *Forum Non Conveniens*

There were seven important appellate division decisions during the *Survey* year which interpret and apply the provisions of CPLR 327(a). In addition, the Second Circuit reversed a district court and held that the doctrine of forum non conveniens should not be applied.

472. See *McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991); *Zankel v. United States of America*, 921 F.2d 432 (2d Cir. 1991); *Frasca v. United States*, 921 F.2d 450 (1991).

473. 933 F.2d 156 (2d Cir. 1991).

474. *McGregor*, 933 F.2d at 164.

475. *Id.*

476. *Id.* at 159.

477. *Id.*

478. 930 F.2d 253 (2d Cir. 1991).

479. *National Development Co.*, 930 F.2d at 258. The circuit court left open the question of whether the service would have been valid if Khashoggi had not been actually living at the Olympic Tower apartment when service was effected. *Id.*

Also, the U.S. Supreme Court issued an important decision on the enforceability of forum selection clauses.

1. *CPLR 327(a)*

CPLR 327(a) permits a court to dismiss any action if it finds that "in the interest of substantial justice the action should be heard in another forum" ⁴⁸⁰ The Court of Appeals has held however, that the availability of an alternative forum is not an absolute precondition for dismissal. ⁴⁸¹ The Court of Appeals has also ruled that "a court does not have the authority to invoke the doctrine on its own motion." ⁴⁸²

During the *Survey* year the Third Department reminded the bench and bar that a trial court must first determine its personal jurisdiction over a defendant before undertaking a forum non conveniens analysis. ⁴⁸³ In addition, several important decisions by the First Department make it clear that a plaintiff's choice of forum should not be disturbed absent other factors which strongly favor the defendant. ⁴⁸⁴ Similarly, the First Department decisions indicate that the plaintiff's New York residence is the most significant factor in a forum non conveniens analysis. ⁴⁸⁵ For example, in *Gomez Munoz v. American Pacific Mining, New York, Inc.*, the First Department held the denial of a CPLR 327(a) motion was not an abuse of discretion even though plaintiff's personal injury claim arose in Honduras. ⁴⁸⁶ Similarly, in *Gyenes v. Zionist Organization of America* the First Department held that defendants, in an action arising out of the death of a child attending a cultural program in Israel, were not entitled to dismissal on fo-

480. N.Y. CPLR 327 (McKinney 1992).

481. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597, *cert. denied*, 469 U.S. 1108 (1985).

482. *See VSL Corp. v. Dunes Hotels & Casinos*, 70 N.Y.2d 948, 519 N.E.2d 617, 524 N.Y.S.2d 671 (1988).

483. *See I.F.S. Int'l, Inc. v. S.L.M. Software, Inc.*, 174 A.D.2d 811, 570 N.Y.S.2d 745 (3d Dep't 1991) (held that doctrine of forum non conveniens has no application unless state court has first obtained personal jurisdiction over defendant).

484. *See Cadet v. Short Line Terminal Agency, Inc.*, 173 A.D.2d 270, 569 N.Y.S.2d 662 (1st Dep't 1991) (although residence of plaintiff is not sole determining factor on forum nonconveniens motion, it is generally the most significant factor in the equation); *Waterways Ltd. v. Barclays Bank PLC*, 174 A.D.2d 324, 571 N.Y.S.2d 208 (1st Dep't 1991) (unless balance is strongly in favor of defendant, plaintiff's choice of forum should rarely be disturbed by motion to dismiss made on grounds of forum non conveniens).

485. *See Cadet*, 173 A.D.2d 270, 569 N.Y.S.2d 662.

486. 176 A.D.2d 624, 575 N.Y.S.2d 67 (1st Dep't 1991).

rum non conveniens grounds.⁴⁸⁷ In three other cases the appellate division reversed supreme court decisions to grant CPLR 327 grounds for causes of action that arose in New Jersey,⁴⁸⁸ Bermuda⁴⁸⁹ and Jamaica.⁴⁹⁰

2. *Forum Non Conveniens in Federal Court*

Last year's *Survey* alerted the bench and bar to *Borden v. Meiji Milk Products* where the circuit court held that the simple uniform standard of *Gulf Oil v. Gilbert* permits reversal of a forum non conveniens determination only when there has been a very clear abuse of discretion by the district court.⁴⁹¹ During the *Survey* year the Second Circuit reversed a district court's dismissal of a plaintiff's complaint on forum non conveniens grounds.⁴⁹² The circuit court held that the district court erred in finding that issues of foreign law and access to foreign witnesses were central to deciding the case.⁴⁹³ The circuit court also held that the district court abused its discretion in determining that the defendant had met its burden of demonstrating that trial in the Southern District of New York was inappropriate.⁴⁹⁴

3. *U.S. Supreme Court and Enforceability of Forum Selection Clauses*

In Carnival Cruise Lines, Inc. v. Shute, a Washington State

487. 169 A.D.2d 551, 564 N.Y.S.2d 155 (1st Dep't 1991).

488. *Mejia v. Car Trucking, Inc.*, 176 A.D.2d 592, 575 N.Y.S.2d 35 (1st Dep't 1991) (wrongful death action arising from automobile accident in New Jersey but both decedent and allegedly negligent defendant were New York residents).

489. *Waterways Limited*, 174 A.D.2d 324, 571 N.Y.S.2d 208 (dismissal on forum non conveniens grounds improper even though all activities occurred in Bermuda because loan agreement and note were executed in New York and provided that New York law governed and note was payable in New York).

490. *Berkrot v. National Car Rental*, 175 A.D.2d 80, 573 N.Y.S.2d 171 (1st Dep't 1991) (trial court abused its discretion in dismissing, on CPLR 327 grounds, action brought by New York passenger of rental vehicle involved in accident in Jamaica against New York husband of driver). See also David Siegel, *Winning In Another Court by Violating The Condition of a N.Y. Forum Non Conveniens Dismissal: Any Consequence?*, 380 N.Y. LAW DIG. August 1991.

491. 919 F.2d 822 (2d Cir. 1990) (citing *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947)).

492. See *R. Maganlal & Co. v. M.G. Chemical Co., Inc.*, 942 F.2d 164 (2d Cir. 1991).

493. *Maganlal*, 942 F.2d at 165.

494. *Id.* The Second Circuit noted that a district court has broad discretion in deciding whether to dismiss an action on grounds of forum non conveniens, but observed that a court's discretion in this area is not so broad as to preclude meaningful appellate review of its decisions. *Id.* at 167.

couple purchased passage on a ship owned by the petitioner, a Florida-based cruise line.⁴⁹⁵ The petitioner sent respondents tickets containing a clause designating courts in Florida as the agreed-upon forum for the resolution of disputes. The respondents boarded the ship in Los Angeles, and, while in international waters off the Mexican coast, one of them suffered injuries when she slipped on a deck mat. The respondents filed suit in a Washington Federal District Court, which granted summary judgment for the petitioner. The Court of Appeals reversed, holding, *inter alia*, that the forum selection clause should not be enforced under *Bremen v. Zapata Off Shore Co.* because it was not "freely bargained for," and because its enforcement would operate to deprive the respondents of their day in court in light of evidence indicating that they were physically and financially incapable of pursuing the litigation in Florida.⁴⁹⁶

The Supreme Court, speaking through Justice Blackmun, held that the Court of Appeals erred in refusing to enforce the forum-selection clause.⁴⁹⁷ Justice Stevens filed a dissenting opinion in which Justice Marshall joined.⁴⁹⁸ The Supreme Court began by noting that the case was in admiralty, and federal law governs the enforceability of the forum selection clause. The Court explained that in *Bremen*, it addressed the enforceability of a forum-selection clause in a contract between two business corporations.⁴⁹⁹ The Court held that, in general, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."⁵⁰⁰ The Supreme Court rejected the circuit court's finding that the Carnival Cruise forum selection clause was unenforceable because, unlike the parties in *The Bremen*, respondents were not business persons and did not negotiate the terms of the clause with petitioner. The Supreme Court also rejected the circuit court's alternative finding that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.⁵⁰¹

495. 111 S. Ct. 1522 (1991).

496. *Carnival Cruise Line*, 111 S. Ct. at 1528 (citing *Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (1972)).

497. *Id.*

498. *Id.* at 1529-38 (Stevens, J. dissenting).

499. *Id.* at 1525.

500. *Id.* at 1526.

501. *Carnival Cruise Line*, 111 S. Ct. at 1523.

The Supreme Court refined the analysis of *Bremen* to account for the realities of form passage contracts. The Court stated:

A clause establishing ex ante the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense [of pretrial motions to determine the correct forum,] and conserving judicial resources.⁵⁰²

The Supreme Court concluded by holding that forum-selection clauses contained in form passage contracts should not be set aside absent a showing of a bad-faith motive, fraud or overreaching.⁵⁰³ The dissent stressed that forum selection clauses in passenger tickets should be reviewed with heightened scrutiny because they can involve elements of adhesion and are usually offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.⁵⁰⁴ The dissent also pointed out that the *Bremen* holding had nothing to say about stipulations printed on the back of passenger tickets. The dissent concluded by stating,

Under these circumstances, the general prohibition against stipulations purporting 'to lessen, weaken or avoid' the passenger's right to a trial certainly should be construed to apply to the manifestly unreasonable stipulation in these passenger's tickets. . . . I would continue to apply the general rule that prevailed prior to our decision in *The Bremen* to forum-selection clauses in passenger tickets.⁵⁰⁵

4. *The Bhopal Case*

Prior *Survey* articles have tracked developments relating to the Bhopal case.⁵⁰⁶ Two years have passed since Union Carbide paid the Indian government 470 million dollars to the survivors of 1984's Bhopal disaster and for the families of the 3,700 persons who died. Less than 5 million dollars has reached the intended beneficiaries. The rest remains in government hands. Unlike the Ghandi administration,

502. *Id.* at 1526 (citations omitted).

503. *Id.*

504. *Id.*

505. *Id.* at 1533.

506. See Jay A. Carlisle, *N.Y. Civil Practice, 1986 Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67 (1987); Jay A. Carlisle, *N.Y. Civil Practice, 1987 Survey of N.Y. Law*, 39 SYRACUSE L. REV. 75 (1988); Jay A. Carlisle, *N.Y. Civil Practice, 1988 Survey, supra* note 470 at 77.

which approved the Union Carbide settlement offer in 1989, the present administration argues that Union Carbide is criminally responsible for the leak and has asked the Indian Supreme Court to reopen the case.⁵⁰⁷

IV. RES JUDICATA

There were 24 significant res judicata cases decided during the *Survey* year. New York courts applied the doctrine to 18 cases⁵⁰⁸ and rejected it in six others.⁵⁰⁹ Most of these cases involved application of collateral estoppel or issue preclusion. The bottom line is that plain-

507. See Jeremy Main, *Where Bhopal's Money Went*, FORTUNE, June 3, 1991, at 17.

508. See *Jason v. Chusid*, 172 A.D.2d 172, 567 N.Y.S.2d 709 (1st Dep't 1991) (estate proceedings); *McCue v. Abel*, 171 A.D.2d 845, 567 N.Y.S.2d 781 (2d Dep't 1991) (tortious interference with contract action); *Zisholtz v. Bank of New York*, 171 A.D.2d 745, 567 N.Y.S.2d 301 (2d Dep't 1991) (breached loan agreement); *Delford Indus., Inc., v. N.Y.S. Dep't of Envtl. Conservation*, 171 A.D.2d 941, 566 N.Y.S.2d 984 (3d Dep't 1991) (article 78 proceeding); *Department of Hous. Preservation & Dev. v. Mill River Realty*, 169 A.D.2d 665, 565 N.Y.S.2d 44 (1st Dep't 1991) (estopped from arguing economic feasibility of repairing building); *Owens v. New York City Hous. Auth.*, 934 F.2d 405 (2d Cir. 1991) (employee collaterally estopped from litigating subsequent age discrimination suit); *Schlaifer Nance & Co. v. Estate of Warhol*, 764 F. Supp. 43 (S.D.N.Y. 1991) (res judicata given to arbitration award); *Temple of Lost Sheep v. Abrams*, 930 F.2d 178 (2d Cir. 1991) (collateral estoppel in federal civil rights action); *Milltex Industries Corp. v. Jacquard Lace Co., Ltd.*, 922 F.2d 164 (2d Cir. 1991) (preclusive effect given to state court judgment in federal court); *Coopersmith v. Big Apple Credit Corp.*, N.Y. L.J., Aug. 29, 1991 (Civ. Ct., Queens Co. 1991) (action for damages against credit agency); *Gogliano v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991) (civil rights claims); *Mishal Bin Saud v. The Bank of New York*, 929 F.2d 916 (2d Cir. 1991) (RICO claims should have been raised earlier by counterclaim); *Samuels v. Northern Telecom, Inc.*, 942 F.2d 834 (2d Cir. 1991) (Title VII lawsuit); *Jacobson v. 201 W. 89 Owners, Inc.*, 173 A.D.2d 334, 575 N.Y.S.2d 475 (1st Dep't 1991) (real estate matter); *People v. Roselle*, 152 Misc. 2d 191, 575 N.Y.S.2d 778 (Co. Ct., Westchester Co. 1991) (family court finding given preclusive effect to stop subsequent criminal action); *People v. Transworld Airlines*, 171 A.D.2d 76, 575 N.Y.S.2d 1 (1st Dep't 1991) (petitioner collaterally estopped from relitigating issue of whether advertising was deceptive in light of prior finding in federal court).

509. *Loth v. 63 Associates, Inc.*, 170 A.D.2d 295, 566 N.Y.S.2d 22 (1st Dep't 1991) (property purchase); *Wollman v. Long Island Jewish Medical Center*, 170 A.D.2d 673, 566 N.Y.S.2d 937 (2d Dep't 1991) (action by doctor to compel hospital to reinstate his professional privileges); *Deutsch v. Crosson*, 172 A.D.2d 238, 567 N.Y.S.2d 733 (2d Dep't 1991) (action challenging facial constitutionality of statute setting annual salaries of Family Court judges did not have res judicata effect in action challenging constitutionality of statute as applied); *State of Gorman Brothers, Inc.*, 166 A.D.2d 859, 563 N.Y.S.2d 187 (3d Dep't 1990) (indemnification from truck owner); *Khandhar v. Elfenbein*, 943 F.2d 244 (2d Cir. 1991) (arbitration finding does not collaterally estop plaintiff from maintaining a claim of medical malpractice in federal court); *People v. Moses Tepfer*, N.Y.L.J., Oct. 4, 1991, at 23, col. 3 (Crim. Ct., N.Y. Co. 1991).

tiff's counsel should become familiar with the doctrine in order to use it offensively,⁵¹⁰ and to screen cases that appear to be worthwhile on the merits but may be "losers" when the doctrine is applied. Similarly, defense counsel should be alert to using a *res judicata* defense to defeat an otherwise meritorious claim by a plaintiff.⁵¹¹

The most important *res judicata* cases during the *Survey* year were the Court of Appeals decisions in *Allstate Insurance Co. v. Zuk*⁵¹² and *In re Nassau Insurance Co.*⁵¹³ In addition there were three other trial and appellate court decisions that set forth good tactical points for the bar to be aware of.

A. Allstate Insurance Co. v. Zuk

In this case, Zuk was cleaning a gun, which accidentally discharged and caused Smith's death.⁵¹⁴ Zuk pleaded guilty to second degree manslaughter.⁵¹⁵ Subsequently, the administratrix of Smith's estate brought a wrongful death action against Zuk.⁵¹⁶ Zuk sought defense and indemnification from Allstate Insurance Company under a homeowner liability policy issued to his parents. The policy covered the home where the accident occurred. Allstate brought an action seeking relief of its defense and indemnification obligation.⁵¹⁷ Allstate based its claim on the fact that its policy excepted coverage for "bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person."⁵¹⁸ Allstate contended that preclusive effect should be granted to Zuk's criminal conviction for recklessly causing the death of Smith, therefore relieving Allstate of its duty to indemnify or defend Zuk. At the trial level, Allstate moved for summary judgment and was denied.⁵¹⁹ The Second Department reversed and granted Allstate summary judgment.⁵²⁰ The Second Department "held that Zuk's guilty plea in the criminal

510. See Carlisle, *N.Y. Civil Practice, 1986 Survey*, *supra* note 507.

511. See Carlisle, *Getting A Full Bite of the Apple*, 55 FORDHAM L. REV. 63 (1986).

512. 78 N.Y.2d 41, 574 N.E.2d 1035, 571 N.Y.S.2d 429 (1991).

513. 78 N.Y.2d 888, 577 N.E.2d 1039, 571 N.Y.S.2d 447 (1991).

514. *Allstate Ins. Co.*, 78 N.Y.2d at 41, 574 N.E.2d at 1035, 571 N.Y.S.2d at 429.

515. *Id.*

516. *Id.*

517. *Id.* at 43-44, 574 N.E.2d at 1036, 571 N.Y.S.2d at 430.

518. *Id.* at 44, 574 N.E.2d at 1036, 571 N.Y.S.2d at 430.

519. *Allstate Ins. Co.*, 78 N.Y.2d at 41, 574 N.E.2d at 1035, 571 N.Y.S.2d at 429.

520. *Id.*

proceeding established as a matter of law that Smith's death was caused by a criminal act and therefore Zuk was collaterally estopped from contesting that conclusively determined issue"⁵²¹ in a subsequent civil action. The Court of Appeals granted leave to appeal and reversed the appellate division.

The Court, speaking through Judge Bellacosa, reasoned that although the criminal conviction established that Zuk "recklessly" caused Smith's death, the term "reckless" has different meanings in criminal law and in civil law. Judge Bellacosa explained that behavior, which may be reckless for criminal responsibility purposes, does not necessarily mean that the actor reasonably expected the accident to result.⁵²² Judge Bellacos concluded:

In sum, the issue whether Smith's death could 'reasonably be expected to result' from Zuk's acts was not necessarily determined in the criminal proceeding and was not identical to the issues that were determined there. Thus, Allstate should not be permitted to use collateral estoppel to deprive the Zuks of their only opportunity to determine the effect, if any, of the conviction with its distinctively defined elements on the applicability of the exclusion clause.⁵²³

Thus, it was not possible or appropriate to decide, as a matter of law, whether Smith's death could "reasonably be expected to result" from Zuk's actions.⁵²⁴

2. *Res Judicata Practice Tips*

In *Kokoletsos v. Semon*, the Second Department held that since the order of dismissal in an earlier action by plaintiffs against defendant was based on the fact that the court had lacked personal jurisdiction over the defendant, the prior adjudication was not on the merits and could not be relied upon by defendant for res judicata purposes.⁵²⁵

In *New York City Department of Housing Preservation and Development v. Bobker*⁵²⁶ defendant moved for an order for reargument of a prior decision of the supreme court affirming a Civil Court Judg-

521. *Id.* at 44, 574 N.E.2d at 1036-37, 571 N.Y.S.2d at 430-31.

522. *Id.* at 44, 574 N.E.2d at 1037, 571 N.Y.S.2d at 431.

523. *Id.* at 46-47, 574 N.E.2d at 1038, 571 N.Y.S.2d at 432.

524. *Allstate Ins. Co.*, 78 N.Y.2d at 47, 574 N.E.2d at 1038, 571 N.Y.S.2d at 432.

525. 176 A.D.2d 786, 575 N.Y.S.2d 116 (2d Dep't 1991).

526. N.Y.L.J., May 17, 1991, at 29, col. 5 (Sup. Ct., Kings Co.).

ment. The Supreme Court of Kings County dismissed the motion on the grounds that the defendant could show none of the elements necessary to grant a motion to re-argue and that the judgment was res judicata and could not be disturbed simply because there had been a subsequent change of decisional law.⁵²⁷

In *Carino v. Town of Deerfield*, the United States District Court for the Northern District of New York held that the defendants were not deemed to have waived the affirmative defense of res judicata by failing to expressly assert it in their answer, despite the fact that Rule 8 of the Federal Rules of Civil Procedure requires that the defense be affirmatively pled in the answer.⁵²⁸ The District Court relied on the circuit court's ruling in *Weston Funding Corp. v. Lafayette Towers Inc.*,⁵²⁹ which held that the defense can be raised by way of motion for summary judgment so that the plaintiff is provided with an adequate opportunity to present arguments rebutting the defense.⁵³⁰

V. PLEADINGS AND MOTION PRACTICE

The Court of Appeals issued three instructive opinions clarifying when a summary judgment motion should be granted. The Court also held that a defendant, who failed to provide particulars relating to their counterclaims, could not be precluded from offering any defense to the plaintiff's complaint. In addition, the First Department held that motion calendar rules conditioning the making of written motions on prior judicial consent were improper. Also a supreme court held that a party's inability to read English defeated a summary judgment motion. Finally, there were several important state and federal decisions regarding the pleading with specificity rules and other matters of interest to the federal practitioner.

A. Motion Practice

In *Star v. Berridge*,⁵³¹ the Court of Appeals modified and affirmed a judgment of the appellate division granting summary judgment against the plaintiff's claims in a wrongful death action. The Court held that in light of plaintiff's medical expert's affidavit the appellate division should not have granted summary judgment on the

527. *Bobker*, N.Y.L.J., May 17, 1991, at 29

528. 750 F. Supp. 1156 (N.D.N.Y. 1990).

529. 410 F.2d 980 (S.D.N.Y.), *aff'd on other grounds*, 550 F.2d 710 (2d Cir. 1977).

530. *Carino*, 410 F. Supp. at 982.

531. 77 N.Y.2d 899, 571 N.Y.S.2d 74, 568 N.Y.S.2d 904 (1991).

issue of whether the defendant actually installed a lead shield as ordered by the New York State Department of Health.⁵³² The Court held that "summary judgment was properly granted [as] to the remaining defendants, because, on [the] record, they owed no duty of care to the plaintiff or her decedent."⁵³³ In *Pearce, Urstadt, Mayer & Greer Realty Corp. v. Atrium Development Associates*, the Court of Appeals reversed the order of the appellate division granting summary judgment on the grounds that ambiguities in the brokerage agreement made summary judgment inappropriate in a suit by a loan broker to recover its commission.⁵³⁴ Judge Kaye dissented because she believed the majority's interpretation of any ambiguity in the brokerage agreement was contrary to established principles of contract law.⁵³⁵

In *Fiore v. Oakwood Plaza Shopping Center, Inc.*, the Court of Appeals affirmed the granting of a summary judgment in lieu of complaint.⁵³⁶ The plaintiffs, who had obtained a money judgment in Pennsylvania, sought to enforce it in New York pursuant to CPLR 3213.⁵³⁷ The supreme court granted plaintiffs' motion for summary judgment and concluded that the Pennsylvania court had personal jurisdiction over the defendants. The supreme court also found "that due process requirements had been satisfied, and that the judgments were valid and conclusive in the forum state."⁵³⁸ As a result, the court concluded, the Pennsylvania judgments were entitled to full faith and credit.⁵³⁹ The appellate division affirmed. On appeal, defendants attempted to argue the merits of the Pennsylvania judgment. In addition, defendants argued that cognovit judgments as a matter of law are not entitled to full faith and credit in New York. The Court of Appeals held that defendants had voluntarily, knowingly and intelligently waived their rights to notice and an opportunity to be heard.⁵⁴⁰ The Court stated "The facts clearly demonstrate that such a valid waiver was effected, according to plaintiffs, and therefore the

532. *Star*, 77 N.Y.2d at 899, 571 N.Y.S.2d at 74, 568 N.Y.S.2d at 904.

533. *Id.* at 901, 571 N.E.2d at 75, 568 N.Y.S.2d at 905.

534. 77 N.Y.2d 490, 571 N.E.2d 60, 568 N.Y.S.2d 890 (1991).

535. *Pearce, Urstadt*, 77 N.Y.2d at 495-96, 571 N.E.2d at 63, 568 N.Y.S.2d at 893.

536. 78 N.Y.2d 572, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991).

537. *Fiore*, 78 N.Y.2d at 576, 585 N.E.2d at 365, 578 N.Y.S.2d at 116.

538. *Id.* at 576-77, 585 N.E.2d at 366, 578 N.Y.S.2d at 117.

539. *Id.* at 577, 585 N.E.2d at 367, 578 N.Y.S.2d at 117.

540. *Id.* at 581, 585 N.E.2d at 368, 578 N.Y.S.2d at 119.

Pennsylvania judgment should be afforded full faith and credit.”⁵⁴¹

In *Hochberg v. Davis*, the First Department held that “Information Sheets” of various parts of the Supreme Court could not condition the making of written motions on prior judicial consent.⁵⁴² The appellate division recognized that the practice of conditioning the making of motions on prior judicial approval may discourage the filing of frivolous motions but concluded that it may prevent a party from exercising the option to move for relief to which he may be entitled.⁵⁴³ The appellate division stated:

Denying a party permission to engage in motion practice hinders the performance of counsel who are encouraged and, in fact, are required to be zealous in their representation of their clients.⁵⁴⁴

Insofar as any inclination of the part of counsel to file frivolous motions, the appellate division noted that practice may be discouraged by the court’s authority to impose sanctions.⁵⁴⁵

In *Great Eastern Bank v. Chen*,⁵⁴⁶ the plaintiff moved for summary judgment against defendants, the individual guarantors of eight promissory notes that had gone into default. The court denied plaintiff summary judgment against one of the defendants on the ground that since he was unable to read or understand English his allegation that plaintiff had failed to inform him that he was personally guaranteeing the obligation raised an issue of fact to be resolved by trial.⁵⁴⁷

B. Pleading

During the *Survey* year New York state and federal appellate courts made it clear that the practitioner must comply with rules which require that all averments of fraud or mistake must be pled with particularity.⁵⁴⁸ Malice, intent, knowledge and other conditions of mind of a person may be averred generally.⁵⁴⁹ Also the Second

541. *Id.* at 577, 585 N.E.2d at 366, 578 N.Y.S.2d at 117.

542. 171 A.D.2d 192, 195, 575 N.Y.S.2d 311, 313 (1st Dep’t 1991).

543. *Hochberg*, 171 A.D.2d at 194, 575 N.Y.S.2d at 312.

544. *Id.* at 195, 575 N.Y.S.2d at 312.

545. *Id.*

546. N.Y.L.J., Nov. 13, 1991, at 24 (Sup. Ct., Queens Co. 1991).

547. *Great eastern Bank*, N.Y.L.J., Nov. 13, 1991, at 24.

548. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767 (2d Cir. 1991); *I. Meyer Pinchus & Assoc., P.C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759 (2d Cir. 1991); *O’Brien v. National Property Analysts Partners*, 936 F.2d 674 (2d Cir. 1991); *Breard v. Sachnoff & Weaver, Ltd.*, 941 F.2d 142 (2d Cir. 1991).

549. *See Breard v. Sachnoff & Weaver, Ltd.*, 941 F.2d 142 (2d Cir. 1991).

Circuit rendered important decisions with respect to *sua sponte* dismissals,⁵⁵⁰ appeals,⁵⁵¹ enforcement of judgments⁵⁵² and dismissals pursuant to Rule 12(b)(6).⁵⁵³

In *Williams v. Varig Brazilian Airlines*,⁵⁵⁴ the First Department held that slander claims had not been pleaded with required particularity. The plaintiff was precluded from alleging that remarks made by her supervisor were slanderous, by failure to comply with procedural requirements that she list specific dates and places where the alleged statements were made and names of persons who overheard them.⁵⁵⁵

Four decisions of the Second Circuit alert the bench and bar to the strict compliance pleading requirements of Rules 12(b)(6) and 9(b). In *Kramer v. Time Warner, Inc.*, the bottom line is that the purpose of Rule 9(b) is threefold — (1) it is designed to provide a defendant with fair notice of a plaintiff's claim, (2) to safeguard a defendant's reputation from improvident charges of wrongdoing, and (3) to protect a defendant against the institution of a strike suit.⁵⁵⁶ Thus, although Rule 9(b) permits knowledge to be averred generally, it requires plaintiffs "to plead the factual basis which gives rise to a 'strong inference' of fraudulent intent."⁵⁵⁷

In *Thomas v. Scully*,⁵⁵⁸ and *Scottish Air International, Inc. v. British Caledonian Group, PLC*,⁵⁵⁹ the Second Circuit limited the dis-

550. See *Thomas v. Scully*, 943 F.2d 259 (2d Cir. 1991) (*sua sponte* dismissal on Fed. R. Civ. P. 12(b) (6) motion is not favored); *Scottish Air Int'l Inc. v. British Caledonian Group, PLC*, 945 F.2d 53 (2d Cir. 1991) (*sua sponte* grant of summary judgment not favored).

551. See *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79 (2d Cir. 1991) (appeal dismissed for mootness); *Caribbean Trading and Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111 (2d Cir. 1991) (appeal dismissed for lack of jurisdiction under the collateral order doctrine); *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627 (2d Cir. 1991) (rule 54(b) certification is abuse of discretion and therefore circuit court lacks jurisdiction on appeal); *United States v. Levy*, 947 F.2d 1032 (2d Cir. 1991) (interlocutory appeal unavailable in criminal case to review challenge to personal jurisdiction).

552. See *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (strictly applying Fed. R. Civ. P. 69(A) directs that the laws of New York State be applied in enforcing a judgment obtained in a federal court located in New York).

553. See *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42 (2d Cir. 1991).

554. 169 A.D.2d 434, 564 N.Y.S.2d 328 (1st Dep't 1991).

555. *Williams*, 169 A.D.2d at 434, 564 N.Y.S.2d at 328.

556. 937 F.2d 767 (2d Cir. 1991).

557. *Kramer*, 937 F.2d at 776.

558. 943 F.2d 259 (2d Cir. 1991).

559. 945 F.2d 53 (2d Cir. 1991).

strict court's discretion to dismiss plaintiff's claims *sua sponte* under Rule 12(b)(6) and Rule 56. The circuit court pointed out that *sua sponte* dismissals for a failure to state a claim on which relief can be granted should not be granted unless the plaintiff is given an opportunity to be heard. The Second Circuit also reminded the bar that the ten day notice rule contained in Rule 56(c) is applicable to all but "exceptional" cases.⁵⁶⁰ In *Cortec Industries, Inc. v. Sum Holding Ltd.*,⁵⁶¹ the Second Circuit expanded the power of federal district courts to grant 12(b)(6) dismissals in securities cases. The court held that the district court is not required to limit its inquiry regarding the complaint's viability to its four corners, but may consider documents plaintiffs relied upon even though plaintiff did not attach these papers to, or incorporate them by reference in, the complaint.⁵⁶²

In *United States v. Paccione*, the circuit court reminded the bar that Federal Rule of Civil Procedure 69(A) will be strictly applied and that the laws of New York State will be applied when enforcing a judgment obtained in a federal court located in New York.⁵⁶³

C. Bills of Particulars

In *Northway Engineering, Inc. v. Felix Industries, Inc.*, the Court of Appeals was faced with the question of whether an order of preclusion, entered when the defendants failed to provide particulars relating to their counterclaims, also precluded the defendants from offering any defense to the complaint.⁵⁶⁴ The Court, speaking through Chief Judge Wachtler, explained that any party may demand disclosure of evidence, or information leading to evidence, without regard to the burden of proof.⁵⁶⁵ The Chief Judge stressed that a bill of particulars is a more limited device and that its purpose is to amplify or supplement a pleading. Chief Judge Wachtler noted that the plaintiff demanded particulars only with respect to the counterclaims. Thus, when the defendants failed to comply with the demand, the trial court properly precluded the defendants from proceeding on the counterclaims, but erred when it gave the preclusion order the addi-

560. *Scottish Air Int.*, 945 F.2d at 55.

561. 949 F.2d 42 (2d Cir. 1991).

562. *Cortec Indus.*, 949 F.2d at 44.

563. 949 F.2d 1183 (2d Cir. 1991).

564. 77 N.Y.2d 332, 569 N.E.2d 437, 567 N.Y.S.2d 634 (1991).

565. *Northway Eng'g*, 77 N.Y.2d at 336, 569 N.E.2d at 439, 567 N.Y.S.2d at 637.

tional effect of depriving the defendants of their general denials.⁵⁶⁶

Judge Kaye dissented and explained that plaintiff's request for a bill of particulars was not addressed merely to defendants' counterclaims.⁵⁶⁷ She stated "[i]nstead, plaintiff's request was directed to specific paragraphs of the answer which defendant itself had denominated 'counterclaim and defense.'"⁵⁶⁸ Judge Kaye also stressed that defendants calculated indifference to the CPLR "should not be rewarded by now reversing summary judgment."⁵⁶⁹ She stated:

That is an improper result in this case, and a very poor example for other cases. Plaintiff should have the balance due on its contract rather than defendants' renewed foot-dragging, discovery run-arounds, and litigation in the trial court-as well as a bill of costs from us.⁵⁷⁰

VII. DISCLOSURE

The Court of Appeals rendered an important decision regarding the application of the attorney-client privilege to corporate investigations.⁵⁷¹ There were other important opinions issued with respect to the attorney-client and work product privileges, expert witnesses, and the notice requirement under CPLR 3120. Discovery was limited in DES cases and several courts limited the right of a motion to strike in discovery cases. Finally, the Fourth Department followed the First Department's decision in *Marte v. W.O. Hickol Manufacturing Co., Inc.*,⁵⁷² and held that a plaintiff was entitled to the discovery of surveillance videos.⁵⁷³

A. Attorney-Client Privilege For Corporate Investigations

In *Spectrum Systems International Corporation v. Chemical Bank*, the Court of Appeals held that a report, prepared by a law firm during an internal investigation of possible fraud by employees of its

566. *Id.* at 335, 569 N.E.2d at 439, 567 N.Y.S.2d at 636.

567. *Id.* at 338, 569 N.E.2d at 441, 567 N.Y.S.2d at 638 (Kaye, J. dissenting).

568. *Id.*

569. *Id.* at 339, 569 N.E.2d at 442, 567 N.Y.S.2d at 639.

570. *Northway Eng'g*, 77 N.Y.2d at 339, 569 N.E.2d at 442, 567 N.Y.S.2d at 639.

571. *See Spectrum Systems Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 581 N.E.2d 1051, 575 N.Y.S.2d 809 (1991).

572. 154 A.D.2d 173, 552 N.Y.S.2d 297 (1st Dep't 1991). *See also* DiMichel v. South Buffalo Ry. Co., 181 A.D.2d 1075, 585 N.Y.S.2d 717 (4th Dep't 1992). *But see* Careccia v. Enstrom, 174 A.D.2d 48, 578 N.Y.S.2d 678 (3d Dep't 1992).

573. *Marte*, 154 A.D.2d at 178, 552 N.Y.S.2d at 300.

client, was privileged.⁵⁷⁴ The Court, speaking through Judge Kaye, held that the privilege is limited to communications and not the underlying facts. Also, the communication must be made to facilitate the rendition of legal advice or services.⁵⁷⁵ Judge Kaye reasoned that "while information received from third persons may not itself be privileged . . . a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing."⁵⁷⁶ Judge Kaye emphasized the Court's holding in *Rossi v. Blue Cross and Blue Shield of Greater New York*⁵⁷⁷ and stressed that to be protected, the communication need only be "primarily or predominantly of a legal character."⁵⁷⁸ Thus, the Court recognized how the privilege works in practice. The *Spectrum Systems* decision should be welcomed by corporations who are engaged in self policing. It represents an important contribution to the policy of encouraging open communication in the corporate context.

B. Attorney-Client, Doctor-Patient and Work Product Privilege

In *Cooper-Rutter Assoc. v. Anchor National Life*, the Appellate Division, First Department held that handwritten memoranda prepared by a person who was both in-house counsel and the corporate secretary to one defendant were not shielded from discovery by the attorney-client privilege.⁵⁷⁹ The appellate division stressed that the documents were not primarily of a legal character, but expressed substantial non-legal concerns.⁵⁸⁰ In a similar matter the Third Department reversed and modified a supreme court order which denied plaintiff's motion to compel disclosure of certain materials which defendant had claimed were exempt from discovery as privileged attorney-client communications.⁵⁸¹

In *Soper v. Wilkinson Match, Inc.*, plaintiff's personal injury action sought recovery for injuries they sustained as the result of a defective lawn mower.⁵⁸² The supreme court partially granted plaintiffs' motion to compel discovery, and defendant appealed. The Third De-

574. 78 N.Y.2d 371, 581 N.E.2d 1055, 575 N.Y.S.2d 809 (1991).

575. *Id.* at 377, 581 N.E.2d at 1060, 575 N.Y.S.2d at 814.

576. *Id.*

577. 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989).

578. *Rossi*, 73 N.Y.2d at 595, 540 N.E.2d at 706, 542 N.Y.S.2d at 571.

579. 168 A.D.2d 663, 563 N.Y.S.2d 491 (2d Dep't 1990).

580. *Cooper-Ritter Assoc.*, 168 A.D.2d 663, 563 N.Y.S.2d at 492.

581. *Id.* at 664, 563 N.Y.S.2d at 492.

582. 176 A.D.2d 1025, 575 N.Y.S.2d 180 (3d Dep't 1991).

partment held that a list of other products liability claims involving lawn mowers manufactured by the defendant's predecessor-in-interest was not immune from discovery as privileged attorney work product unless there was a showing that any particular legal skills were necessary to compile the list.⁵⁸³ Finally, in *Rodriguez v. New York City Transit Authority*, the supreme court held that medical tests performed on a subway motorman after his train was involved in an accident were not protected by the doctor-patient privilege.⁵⁸⁴ The court stressed that the motorman had not been injured in the accident, but agreed to be tested pursuant to a stipulation between his union and the Transit Authority. The supreme court distinguished *Koump v. Smith*⁵⁸⁵ and *Dillenbeck v. Hess*⁵⁸⁶ on the grounds that in those cases the rulings, relied upon by the defense for protective orders against disclosure, were applied to drivers of vehicles who had been injured by accidents. The supreme court also refused to follow a decision last year which sustained the doctor-patient privilege to after-accident medical tests performed on two bus drivers.⁵⁸⁷

C. Expert Witness Cases

In *Jasopersaud v. Rho*, the Appellate Division, Second Department formulated useful guidelines for determining what information must be disclosed with respect to the "qualifications" of each expert witness under CPLR 3101(d).⁵⁸⁸ The appellate division, speaking through Justice Sybil Hart Kooper, held that items requesting the medical school attended by the expert and the expert's board certifications, experts area of special expertise, jurisdictions of expert's licensure, and location of expert's internships, residencies and fellowships, were proper inquiries bearing upon qualifications of an expert. The appellate division held that dates associated with attainment of those qualifications did not have to be provided. Also, a demand for the expert's present hospital affiliations did not have to be provided and requests for the description of "every medical and/or medical record, textbook, and "all" treatises and/or articles relied on by the expert

583. *Soper*, 176 A.D.2d at 1025, 575 N.Y.S.2d at 180.

584. 151 Misc. 2d 1027, 574 N.Y.S.2d 505 (Sup. Ct., Bronx Co. 1991).

585. 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969).

586. 73 N.Y.2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 (1989).

587. See *Tillman v. Metropolitan Suburban Bus Auth.*, N.Y. L.J., Aug. 1, 1990, at 21, col. 3 (Sup. Ct., Nassau Co. 1990).

588. 169 A.D.2d 184, 572 N.Y.S.2d 700 (2d Dep't 1991).

were overly broad.⁵⁸⁹

In *Parsons v. City of New York*, the Appellate Division, First Department set forth helpful guidelines with respect to the pre-trial disclosure of an expert's testimony.⁵⁹⁰ The appellate division held that the defendants violated their obligation to disclose a summary of the expert's testimony when they did not mail the summary until one year after the expert inspected the site and only five days before the scheduled start of trial. The appellate division also held that the defendants gave plaintiff a misleading summary that did not fairly and accurately reflect the expert's testimony at trial.⁵⁹¹ Accordingly, the appellate division reversed a jury verdict in favor of the defendants and remanded the case for a new trial.

In *Lillis v. D'Souza*, the Appellate Division, Third Department held that the statute requiring disclosure of experts and their opinions does not require a party to retain an expert at any specific time.⁵⁹² In the absence of intentional or willful nondisclosure by the defendants, the expert testimony could be presented even though the defendants did not respond until the second day of trial to the demand for disclosure of the expert's report under CPLR 3101(d)(1)(i).⁵⁹³

D. Notice Requirements under CPLR 3120

In *Mendelowitz v. Xerox Corp.*, the Appellate Division, First Department clarified when the phrases "all," "all other," or "any and all" may be used in a request for discovery of documents under CPLR 3120.⁵⁹⁴ The appellate division explained that the burden of specification in notice for production of documents is on the requesting party. The appellate division also explained that the use of such phrases as "any and all" does not automatically render a document request improper.⁵⁹⁵ The appellate division noted that exceptions have been found "in certain limited circumstances" where "the use of these phrases may relate to specific subject matter" and does not therefore impede a ready identification of the particular object to be produced.⁵⁹⁶ Thus, the First Department modified an order of the

589. *Jaspersaud*, 169 A.D.2d at 84, 572 N.Y.S.2d at 700.

590. 175 A.D.2d 783, 573 N.Y.S.2d 677 (1st Dep't 1991).

591. *Parsons*, 175 A.D.2d at 784, 572 N.Y.S.2d at 678.

592. 174 A.D.2d 936, 572 N.Y.S.2d 136 (4th Dep't 1991).

593. *Lillis*, 174 A.D.2d at 936, 572 N.Y.S.2d at 137.

594. 169 A.D.2d 300, 573 N.Y.S.2d 548 (2d Dep't 1991).

595. *Mendelowitz*, 169 A.D.2d at 303, 573 N.Y.S.2d at 550.

596. *Id.* at 304, 573 N.Y.S.2d at 550.

supreme court and stressed that the plaintiff should strive to use other disclosure devices to meet his burden of specificity.

E. Discovery Limited in DES Cases

In *In Re New York Count DES Litigation*, the Appellate Division, First Department held that the physician-patient privilege barred access to any records, except those of mothers during the pregnancy period.⁵⁹⁷ Justice Asch analyzed the issue of whether the relatives of some 800 plaintiffs had waived their physician-patient privilege in terms of basic privacy rights. Justice Asch noted that both state and federal courts have increasingly accepted the idea that a right of privacy exists. He modified the supreme court's order, on the law and facts and in the exercise of discretion "to limit the disclosure of such records to the ingesting mother's medical history during the period of gestation"⁵⁹⁸

F. Motions to Strike

There were seven important appellate division decisions rendered during the *Survey* year which discussed the merits of striking a pleading for failure to comply with a discovery request.⁵⁹⁹ These decisions remind the bench and bar that the sanction of striking a pleading is a drastic one which should only be imposed where the moving party establishes that failure to disclose is willful, contumacious or in bad faith. The decisions also point to the availability of sanctions for discovery abuses under Part 130 of the new uniform rules of court.⁶⁰⁰

G. Miscellaneous

There were several other interesting disclosure decisions rendered during the *Survey* year. Preaction disclosure under CPLR 3102(c) is generally not favored in New York. In *Bliss v. Jaffin*, the Appellate Division, First Department reversed the supreme court's

597. 168 A.D.2d 44, 570 N.Y.S.2d 804 (1st Dep't 1991).

598. *DES Litigation*, 168 A.D.2d at 48, 570 N.Y.S.2d at 806.

599. See *Ahroni v. City of New York*, 175 A.D.2d 789, 572 N.Y.S.2d 925 (2d Dep't 1991); *Forman v. Jamesway Corp.*, 175 A.D.2d 514, 572 N.Y.S.2d 782 (3d Dep't 1991); *Roof v. Bogdanski*, 174 A.D.2d 1046, 572 N.Y.S.2d 825 (4th Dep't 1991); *Bufogle v. Pesiri*, 171 A.D.2d 833, 567 N.Y.S.2d 769 (2d Dep't 1991); *Nudelman v. New York City Transit Authority*, 172 A.D.2d 503, 567 N.Y.S.2d 851 (2d Dep't 1991); *American Reliance Ins. Co. v. National General Ins. Co.*, 174 A.D.2d 591, 571 N.Y.S.2d 493 (2d Dep't 1991); *Sieden v. Copen*, 170 A.D.2d 262, 565 N.Y.S.2d 803 (1st Dep't 1991).

600. See Part 130 of the Uniform Rules of the Trial Court (22 NYRCC 130-1.1).

decision to permit preaction disclosure and held that the plaintiff had failed to show sufficient factual basis for disclosure.⁶⁰¹ In *Hughes v. Witco Corporation-Chemprene Division*, the Appellate Division, Third Department held that the trial court had improperly refused a request for preaction disclosure.⁶⁰² The Third Department speaking through Justice Yesawich stated "she is entitled to conduct pretrial discovery to identify and to discover the precise facts needed to draft the pleadings" ⁶⁰³

In *Mihalakis, D.O., v. Cabrini Medical Center*, the Appellate Division, First Department reminded the bench and bar that "[t]he courts are mindful of allowing *pro se* litigants some leeway to prosecute their actions."⁶⁰⁴ In *Anonymous v. State Department of Health*, the Third Department held that where there is express statutory authority for issuance of subpoenas, CPLR 2307 does not apply.⁶⁰⁵ Finally, the New York State Bar Association's Committee on Commercial and Federal Litigation has issued a report proposing a series of pre-trial procedural reforms to "effect cost and time saving . . . without any significant further appropriation of public funds."⁶⁰⁶

VII. SANCTIONS CASES

Prior *Survey* articles have discussed the development of sanction case law in New York but this is the first piece to devote a specific section to this area of the law. During the *Survey* year important sanction cases were issued by state and federal courts.

A. U.S. Supreme Court

In *Chambers v. Nasco Inc.*, the Supreme Court expanded the power of federal courts to impose sanctions.⁶⁰⁷ The Court held that a district court, sitting in diversity, properly invoked its inherent power to impose sanctions upon a party for bad faith conduct without relying on a statute or rule.⁶⁰⁸ The Court also held that federal courts sitting in diversity can use their inherent power to assess attorney fees

601. 176 A.D.2d 106, 573 N.Y.S.2d 687 (1st Dep't 1991).

602. 175 A.D.2d 486, 572 N.Y.S.2d 531 (3d Dep't 1991).

603. *Hughes*, 175 A.D.2d at 488, 572 N.Y.S.2d at 532.

604. 176 A.D.2d 589, 590, 574 N.Y.S.2d 752, 753 (1st Dep't 1991).

605. 173 A.D.2d 988, 569 N.Y.S.2d 500 (3d Dep't 1991).

606. Spencer, *Reform of Pre-Trial Procedures Will Cut Court Costs*, N.Y. L.J., Jan. 3, 1992, at 1.

607. 111 S. Ct. 2123 (1991).

608. *Chambers*, 111 S. Ct. at 2127.

as a sanction for bad faith conduct even if applicable state laws do not recognize a bad faith exception for the general rule against fee shifting.⁶⁰⁹

In *Chambers*, the district court had imposed sanctions on a party who had (1) attempted to deprive the court of jurisdiction by acts of fraud, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce the plaintiff to exhausted compliance.⁶¹⁰ The district court recognized that the conduct in the first and third categories could not be reached by Rule 11, which governs only papers filed with the court. The district court also explained that the falsity of the pleadings did not become apparent until after the trial on the merits, so that it would have been impossible to assess sanctions at the time the papers were filed. Consequently the district court deemed Rule 11 insufficient for its purposes. The district court also declined to impose sanctions under 28 U.S.C. § 1927 against a party. The court therefore relied on its inherent power in imposing sanctions. The Supreme Court affirmed.⁶¹¹ Thus, district courts can be expected to apply sanctions irrespective of the availability of any rule or statute authorizing the imposition of a sanction or penalty.

In *Business Guides, Inc. v Chromatic Communications Enterprises, Inc.*, the Supreme Court was faced with the issue of whether a Rule 11 sanction could be imposed on a party based on a finding by the district court that reasonable inquiry was not made by the party prior to signing a temporary restraining order application and a subsequent affidavit.⁶¹² The Court decided the issue pursuant to the plain meaning of the Rule. Because the language of the rule itself does not limit the imposition of sanctions to pro se parties, the Supreme Court declined to accept petitioners argument that it should be so limited. Next, the Court determined that the appropriate standard for imposing Rule 11 sanctions on a party is a "reasonable under the circumstances" test.⁶¹³ Thus, any party who signs a paper or document will be responsible for its contents with regard to any Rule 11 sanctions.

609. *Id.* at 2123.

610. *Id.*

611. *Id.*

612. 111 S. Ct. 922 (1991).

613. *Business Guides*, 111 S. Ct. at 923.

B. Court of Appeals for the Second Circuit

The Second Circuit issued several interesting sanctions decisions. In *United States of America v. International Brotherhood of Teamsters*, the Second Circuit vacated a district court sanction order and remanded the case for clarification as to the standards for application of Rule 11, 28 U.S.C. § 1927(fn) and the inherent powers of the court.⁶¹⁴ The *Teamsters* decision also provides instructive guidelines for the bench and bar when faced with sanction motions. The Second Circuit also ruled that district courts have power to impose Rule 11 sanctions even when they lack subject matter jurisdiction to adjudicate the merits of a dispute.⁶¹⁵ Also a sanction of more than \$60,000 imposed by the U.S. Bankruptcy Court on a former White Plains solo practitioner was unanimously reversed by the Second Circuit.⁶¹⁶

In *Farino v. Walshe*, the Second Circuit held that a lawyer could not deduct a portion of his Rule 11 sanction from a settlement fund set aside for his clients.⁶¹⁷ The Court also directed the lawyer to show cause as to why he should not be assessed sanctions under Federal Rule of Appellate Procedure 38 for filing an appeal.⁶¹⁸ In *Healey v. Press*, the Second Circuit reversed a district court's imposition of sanctions.⁶¹⁹ In light of the abuse of discretion standard being applied pursuant to *Cooter v. Hartmarx*,⁶²⁰ this decision was unexpected.⁶²¹ The Second Circuit stressed the fact that the district court did not give appellant a proper opportunity to oppose the motion for sanctions and to augment the record with appropriate countervailing evidence. The court concluded that the district court's imposition of sanctions under Rule 11 and section 11(e) of the SEC Act constituted an abuse of discretion.⁶²²

C. Court of Appeals

There were two significant sanctions decisions in the New York Court of Appeals during the *Survey* year. In *Maroulis v. 64th Street-*

614. 948 F.2d 1338 (2d Cir. 1991).

615. See *Chemiakin v. Yefimov*, 932 F.2d 124 (2d Cir. 1991).

616. See *Matter of Cohoes Indus. Terminal, Inc.*, 931 F.2d 222 (1991).

617. 938 F.2d 6 (2d Cir. 1991).

618. *Farino*, 938 F.2d at 8.

619. 947 F.2d 611 (2d Cir. 1991).

620. 496 U.S. 384 (1990).

621. See Carlisle, *Avoiding the Chancellor's Boot: Application of Sanctions in Federal District and Appellate court Practice*, 18 WESTCHESTER B.J. 287 (1991).

622. *Healey*, 947 F.2d at 623.

Third Avenue Associates, the Court of Appeals imposed sanctions in the amount of \$2,500 on an attorney.⁶²³ The Court held that the attorney's motion for leave to appeal from a nonfinal order involving an accounting for a dissolved partnership was frivolous within the meaning of 22 NYCRR 130.1.1(a) & (c). The Court stated:

No reasonable argument can be made that the current motion is within the jurisdiction of this Court. The persistent course of party-attorney Bert's frivolous and meritless motion practice in this Court, including motions clearly outside the Court's jurisdiction and repetitive motions for reargument, constitutes a strategy undertaken primarily to delay resolution of the litigation This abuse of the judicial process supports the imposition of sanctions.⁶²⁴

In *Intercontinental Credit Corporation Division of Pan American Trade Development Corp. v. Roth*, the Court of Appeals held that sanctions would be imposed separately upon the appellant and his attorney, in the amount of \$2,500 each.⁶²⁵ The Court stated that "[i]t is clear that the present motion was 'undertaken primarily to delay or prolong' the Israeli enforcement proceedings. This is precisely the type of misuse of judicial process that part 130 was adopted to curtail."⁶²⁶

D. Appellate Division Sanction Cases

There were at least twelve significant part 130 sanction decisions rendered during the *Survey* year.⁶²⁷ In addition two appellate divi-

623. 77 N.Y.2d 831, 567 N.E.2d 978, 566 N.Y.S.2d 584 (1991).

624. *Maroulis*, 77 N.Y.2d at 831, 567 N.E.2d at 978, 566 N.Y.S.2d at 584.

625. 78 N.Y.2d 306, 579 N.E.2d 688, 574 N.Y.S.2d 528 (1991).

626. *Intercontinental Credit Corp.*, 78 N.Y.2d at 308, 579 N.E.2d at 1089, 574 N.Y.S.2d at 529.

627. See *Papakostas v. Harkins*, 171 A.D.2d 733, 567 N.Y.S.2d 289 (2d Dep't 1991); *Santangelo v. Goldman Sachs & Co.*, 169 A.D.2d 692, 565 N.Y.S.2d 75 (1st Dep't 1991); *Wallace v. Rockville Centre Union Free School District*, 167 A.D.2d 392, 561 N.Y.S.2d 918 (2d Dep't 1990); *Belsky v. Belsky*, 175 A.D.2d 900, 573 N.Y.S.2d 745 (2d Dep't 1991); *Harley v. Harley*, 170 A.D.2d 779, 565 N.Y.S.2d 625 (3d Dep't 1991); *Creative Bath Product v. Connecticut General Life Ins. Co.*, 173 A.D.2d 400, 570 N.Y.S.2d 31 (1st Dep't 1991); *Donovan A. Lewis v. Agency Rent-A-Car*, 171 A.D.2d 731, 567 N.Y.S.2d 286 (2d Dep't 1991); *Kernisan v. Taylor*, 171 A.D.2d 869, 567 N.Y.S.2d 794 (2d Dep't 1991); *Edwards v. Edwards*, 165 A.D.2d 362, 567 N.Y.S.2d 645 (1st Dep't 1991); *Levin v. Axelrod*, 168 A.D.2d 178, 571 N.Y.S.2d 345 (3d Dep't 1991); *Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 A.D.2d 533, 568 N.Y.S.2d 590 (1st Dep't 1991); *Liker v. Grossman*, 175 A.D.2d 911, 573 N.Y.S.2d 749 (2d Dep't 1991).

sions imposed sanctions under CPLR 8303-a.⁶²⁸ Three of these decisions are particularly worthy of mention. In *Liker v. Grossman*, the Second Department imposed a \$9,500 sanction on an appellate lawyer.⁶²⁹ The plaintiff's case was originally dismissed in New York County. The plaintiff then filed the same action in Kings County where it was dismissed. The plaintiff's appeal was rejected by the Second Department who then ordered the parties to show cause why sanctions should not be imposed. The Second Department based its decision on the fact that the plaintiff and his lawyer were misusing the judicial resources of the court and that this was by and of itself sanctionable conduct. Another interesting decision involved a sanction imposed on a lawyer by the First Department.

In *Rosenman Colin v. Edelman*, the First Department based its decision on the frivolous motion practice of defendant's attorney.⁶³⁰ The appellate division stated: "However, the propriety of making the motion aside, we cannot overlook Sutton's flouting of well-understood norms of motion practice requiring the moving party to set forth whatever it is he has to say in papers accompanying the notice of motion" ⁶³¹

In *Edwards v. Edwards*, the First Department reversed a decision of the trial court to impose a \$10,000 sanction against a matrimonial lawyer who allegedly was having a sexual relationship with his client.⁶³² The appellate division, speaking through Justice Sullivan, explained that pursuant to section 130-1.1(c) of the Uniform Rules for the New York State Trial Courts, conduct is frivolous if "it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."⁶³³ Justice Sullivan concluded that where the allegedly frivolous conduct consisted of the attorneys refusal to withdraw as counsel, the party who sought to compel him to do so must establish that there was a clear and unequivocal duty to do so under the existing law. Absent such a showing, the trial court erred in imposing the sanction.

628. See *Grasso v. Mathew*, 164 A.D.2d 476, 564 N.Y.S.2d 576 (3d Dep't 1991); *Jacobson v. Chase Manhattan Bank*, 174 A.D.2d 709, 571 N.Y.S.2d 559 (2d Dep't 1991).

629. 175 A.D.2d 911, 573 N.Y.S.2d 749 (2d Dep't 1991).

630. 165 A.D.2d 533, 568 N.Y.S.2d 590.

631. *Rosenman*, 165 A.D.2d at 536, 568 N.Y.S.2d at 592.

632. 165 A.D.2d 362, 567 N.Y.S.2d 645 (1st Dep't 1991).

633. *Id.* at 366.

E. Sanction Cases In Trial Courts

During the *Survey* year New York State trial courts vigorously imposed sanctions in litigants and their counsel.⁶³⁴ Three cases merit mention. In *Sher v. Scott*, the supreme court denied sanction requests on the grounds that counsel for both sides engaged in unprofessional conduct.⁶³⁵ The court found that both counsel were unprofessional and obnoxious. In *Robinson v. Ross*, a Justice Court for the Village of Scarsdale imposed sanction under CPLR 8303-a against a defendant's attorney who had advanced a frivolous defense.⁶³⁶ Finally, in *Solow v. Wellner*, a Civil Court judge imposed \$186,000 in sanctions against an attorney representing a landlord in a rent-strike dispute.⁶³⁷ The judge assessed \$3,000 in sanctions for each of the 62 rent-disputes that went to judgment during the trial.

CONCLUSION

We are again grateful for the helpful comments and suggestions from our colleagues of the bench and bar and in academia. I am particularly thankful to the 1992 graduating class of the Pace University School of Law for keeping me alert to new developments in New York Civil Practice. I also appreciate the helpful suggestions from lawyers who have attended CLE classes I have taught at the Practising Law Institute, New York State Trial Lawyers Institute, Defense Association of New York, New York County Lawyers Association, White Plains Bar Association and the Office of Court Administration.

634. See *Arthur Young & Co. v. Feerick*, N.Y.L.J., May 7, 1991, at 21, (Sup. Ct., N.Y. Co. 1991); *Lightron Corp. v. J.S.M. Holdings, Inc.*, 149 Misc. 2d 617, 567 N.Y.S.2d 976 (Sup. Ct., Nassau Co. 1990); *Forstman v. Arluck*, 149 Misc. 2d 929, 566 N.Y.S.2d 462 (Sup. Ct., Suffolk Co. 1991); *Willer v. 61 Jane Street Tenants Corp.*, N.Y.L.J., Aug. 25, 1991, at 25, (Sup. Ct., N.Y. Co. 1991); *Charney v. North Jersey Trading Corp.*, N.Y.L.J., Aug. 27, 1991, at 23 (Sup. Ct., N.Y. Co. 1991).

635. N.Y.L.J., Aug. 27, 1991, at 25 (Sup. Ct., Queens Co. 1991).

636. 149 Misc. 2d 289, 564 N.Y.S.2d 650 (Just. Ct., Westchester Co. 1990).

637. N.Y.L.J., Sept. 20, 1991, at 1 (Civ. Ct., N.Y. Co. 1991).