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CIVIL PRACTICE

Jay C. Carlisle†

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This year's *Survey* Article on New York Civil Practice is dedicated to our colleague and friend Professor Philip Blank who served as Associate Dean at Pace Law School until his untimely death on February 5, 1989.

We grieve for Phil Blank. We recall the final words of Elizabeth Barrett Browning's sonnet entitled *Grief*:

Deep-hearted man, express
Grief for thy Dead in silence like to death — Most like a monu-
mental statue set
In everlasting watch and moveless woe
Till itself crumble to the dust beneath. Touch it; the marble eyelids
are not wet:
If it could weep; it would arise and go.
We miss you Philip!

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I. INTRODUCTION

Your *Survey* author spent half of 1989 in London teaching at University College and studying recent changes in the English legal system.¹ Fortunately, the British Institute of Advanced Legal Studies collects every published New York State and federal decision, so I was able to "keep terms" with New York Civil Practice while living in the city Samuel Johnson describes as the greatest in the world.

During the *Survey* year the New York Court of Appeals upheld the constitutionality of the state toxic tort revivor statute and adopted the market share theory in DES cases.² The court also gave the bar a Christmas present in *Tewari v. Tsoutsouros*³ and clarified important discovery issues.⁴ Two appellate courts held that the AIDS virus falls

1. See Carlisle, *English White Paper Law Reforms: An Outline For Equal Access Of Justice*, 62 N.Y. St. B.J. 54 (Jan. 1990); Carlisle, *White Paper: An Outline For Improved Access To Justice*, 202 N.Y.L.J., Aug. 7, 1989, at 2, col. 3; Carlisle, *Senior Judges Attack Legal Reforms*, 201 N.Y.L.J., May 30, 1989, at 2, col. 3; Carlisle, *House of Lords Debated Drastic Legal Reforms*, 201 N.Y.L.J., April 12, 1989, at 2, col. 3; Carlisle, *Radical Changes Proposed In English Legal Systems*, 201 N.Y.L.J., Feb. 3, 1989, at 2, col. 3.

2. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989).

3. 75 N.Y.2d 1, 549 N.E.2d 1143, 550 N.Y.S.2d 572 (1989).

4. See *infra* notes 333-335 and accompanying text.

within New York Civil Practice Law and Rules ("CPLR") 214-c⁵ and issued important decisions in notice of claims cases.⁶ Also, several trial courts actively applied new sanctions rules.⁷ Perhaps the most important developments during the *Survey* year were the bench and bar proposals relating to mandatory continuing legal education and pro bono publico requirements.⁸

II. NEW LEGISLATION AND COURT RULES

A. *New Legislation*

Space limitations prevent inclusion of an appendix summarizing all CPLR amendments enacted during the *Survey* year. The two most important changes are: the newly enacted CPLR 312-a and several lower court decisions interpreting that section, which permits service of summons by mail as an alternative to traditional methods of service,⁹ and the amendment of CPLR 2103 to authorize service of interlocutory papers in an action by electronic means.¹⁰ Both provisions are effective January 1, 1990. Prior to discussing these important CPLR changes, the practitioner should be alerted to several other amendments to various New York statutes.

1. *New York Insurance Law*

Chapter 673 of the Laws of 1989,¹¹ effective July 22, 1989, amends section 5208(a)(1) of the New York Insurance Law to extend the period of time to file a notice of claim with the Motor Vehicle Automobile Insurance Corporation ("MVAIC") from ninety days to one-hundred eighty days after the cause of action accrues.

2. *New York General Municipal Law*

Chapter 346 of the Laws of 1989,¹² effective July 12, 1989, ex-

5. See *infra* notes 303-306 and accompanying text.

6. See *infra* notes 311-316 and accompanying text.

7. See *infra* notes 42-104 and accompanying text.

8. See *infra* notes 107-138 and accompanying text.

9. See N.Y. CPLR 312-a (McKinney Supp. 1990); see also N.Y. CPLR 2103 (McKinney Supp. 1990); *infra* notes 21-22.

10. See N.Y. CPLR 2103 (McKinney Supp. 1990).

11. See Act of July 22, 1989, ch. 673, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 1337 (codified at N.Y. INS. LAW § 5208(a)(1) (McKinney 1985 & Supp. 1990)).

12. See Act of July 12, 1989, ch. 346, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 771 (codified at N.Y. GEN. MUN. LAW § 205-a (McKinney Supp. 1990)).

pands the protection given to firemen under New York General Municipal Law section 205-a to policemen by adding section 205-e to the General Municipal Law. Under section 205-a, a special cause of action was created in favor of firefighters injured or killed because a municipal law or regulation or state or federal statute was violated. This is a strict liability standard. Section 205-e gives the same protection to police officers and partially overrules the Court of Appeals opinion in *Santangelo v. State*¹³ which was discussed in the 1985 Survey.¹⁴ Section 205-e should be applied retroactively.

3. *New York General Business Law*

Chapter 279 of the Laws of 1989,¹⁵ effective July 15, 1989, amends subdivision (b) of section 198-a of the New York General Business Law ("Lemon Law") to provide refunds upon a manufacturer's failure to correct a substantial defect or condition which an authorized dealer has refused to repair. Chapter 444 of the Laws of 1989¹⁶ amends General Business Law section 198-b to add a lessee as one entitled to the benefits of the Lemon Law. If the lessor fails to repair a defect, he must refund the payments made under the lease and cancel the future payments. This provision is effective July 14, 1989. Effective January 1, 1990 is Chapter 609 of the Laws of 1989,¹⁷ which amends subdivision (f) of section 198-b of the General Business Law to allow the consumer the option of arbitrating his dispute with the dealer. The arbitration decision is binding and the arbitrator may award attorneys' fees to the prevailing consumer.

4. *New York Executive Law*

Chapter 307 of the Laws of 1989,¹⁸ effective immediately, includes a surviving spouse of a victim who died from a cause not di-

13. 129 Misc. 2d 898, 494 N.Y.S.2d 49 (Ct. Cl., Suffolk Co. 1985).

14. See Brodsky, *Civil Practice, 1985 Survey of N.Y. Law*, 37 SYRACUSE L. REV. 263, 302 (1986).

15. Act of July 7, 1989, ch. 279, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 677 (codified at N.Y. GEN. BUS. LAW § 198-a(b) (McKinney Supp. 1990)).

16. Act of July 16, 1989, ch. 444, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 904 (codified at N.Y. GEN. BUS. LAW § 198-b (McKinney Supp. 1990)).

17. Act of July 21, 1989, ch. 609, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 1245 (codified at N.Y. GEN. BUS. LAW § 198-b(f) (McKinney Supp. 1990)). See also Spencer, *Appeals Court Upholds Lemon Law Refunds*, 202 N.Y.L.J., Nov. 29, 1989, at 1, col. 3; Wise, *'Lemon' Law Found Not Tied to Mileage*, 202 N.Y.L.J., Dec. 9, 1989, at 1, col. 6.

18. See Act of July 10, 1989, ch. 307, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 717 (codified at N.Y. EXEC. LAW § 624(1) (McKinney Supp. 1990)).

rectly related to the crime, as a person eligible to receive benefits under the Crime Victims Compensation Act.

5. *New York Uniform Justice Court Act*

Chapter 119 of the Laws of 1989¹⁹ amends the New York Uniform Justice Court Act, in relation to temporary assignment of town and village justices.

6. *CPLR 3017(c)*

Chapter 442 of the Laws of 1989,²⁰ effective August 16, 1989, adds dental malpractice actions to those for which there shall be no *ad damnum*.

7. *CPLR 312-a*

Chapter 274 of the Laws of 1989²¹ adds CPLR 312-(a) which permits service of summons by mail. The new rule is based on Federal Rules of Civil Procedure rule 4(c)(2)(C)(ii), and is effective for a two year experimental period from January 1, 1990 until January 1, 1992. CPLR 312-a provides that process may be served via first class mail. The defendant then signs and returns an acknowledgement. If the acknowledgement is not received by the sender, she may use any other method of service available and request reasonable costs for service.²²

8. *CPLR 2103*

Chapter 461 of the Laws of 1989,²³ effective January 1, 1990, amends CPLR 2103 to authorize service of interlocutory papers in an action by electronic means, including fax machines. Chapter 478 of

19. See Act of June 2, 1989, ch. 119, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 378 (An Act to amend the Uniform Justice Court Act in relation to temporary assignment of town and village justices); see also 31 N.Y. ST. B. NEWS, July, 1989, at 1, col. 1.

20. Act of July 16, 1989, ch. 442, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 903 (codified at N.Y. CPLR 3017(c) (McKinney Supp. 1990)).

21. Act of July 7, 1989, ch. 274, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 672 (codified at N.Y. CPLR 312-a (McKinney Supp. 1990)).

22. N.Y. CPLR 312-a (McKinney Supp. 1990). See detailed discussion of CPLR 312-a, *infra* notes 194-210.

23. Act of July 16, 1989, ch. 461, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 924 (codified at N.Y. CPLR 2103 (McKinney Supp. 1990)).

the Laws of 1989²⁴ amends CPLR 2103 authorizing service of interlocutory papers by using overnight delivery services. It is effective January 1, 1990, and provides that service is complete upon deposit of the paper into the custody of the delivery service. When the time period is measured from the service of the paper, one day is added to the prescribed period.

The new service by fax provision has generated substantial comment and some confusion.²⁵ It is beyond this *Survey's* scope to discuss CPLR 2103 in depth, however, a few basic points explaining service of interlocutory papers by electronic means are merited.

First, the new bill is consensual and not mandatory. Service by electronic means, including facsimile machines and computer transmissions, is permitted only upon revocable consent. Consent means more than merely printing a fax number on the blueback;²⁶ however, until this question is settled, lawyers not wishing to consent to electronic service of papers should not print fax numbers on their litigation papers.²⁷ Additionally, consent can be withdrawn at any time.²⁸

Second, service by electronic means assumes that the follow-up mailing requirements will be met simultaneously or shortly after the documents have been faxed and not before.²⁹ The statute's definition makes it "crystal clear that the mailing is posting, not the receipt . . . service is complete when the faxing has been accomplished and the original papers have been posted."³⁰ Because service is completed by the electronic transmission, and not by receipt of mail, the five day mailing provision of CPLR 2103(b)(2) is not applicable. Thus, the

24. Act of July 16, 1989, ch. 478, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 948 (codified at N.Y.CPLR 2103 (McKinney Supp. 1990)).

25. See Rothman, *Courts Differ on Willingness to Accept Filings by Facsimile*, 15 Litigation News 6 (1989); *State Bar Committee Says Attorneys Can Serve Papers Via Fax*, 61 N.Y. ST. B.J. 60 (Feb. 1989); Carpinello, *Fax Bill Explained*, 202 N.Y.L.J., Aug. 22, 1989, at 2, col. 6; *State Bar Panel Warns Fax Will Lead to Added Litigation*, 202 N.Y.L.J., July 28, 1989, at 1, col. 1 (discussing report by N.Y.S.B.A. Commercial and Federal Litigation Section entitled *New York's New Fax Law: An Invitation to Litigation*); Adams, *Cuomo Signs Law to Permit Service by Facsimile Machine*, 202 N.Y.L.J., July 21, 1989, at 1, col. 2; Spencer, *'Faxed' Court Papers Get Bar Units Support*, 201 N.Y.L.J., Feb. 23, 1989, at 1, col. 3; *Faximania Hits the Bookshelves*, Reporter Dispatch, Dec. 18, 1989, at B-1, col. 1; see also McGuire, *Service By Fax*, 202 N.Y.L.J., Dec. 28, 1989, at 2, col. 6 (letter to the editor).

26. See McGuire, *supra* note 25.

27. See Carpinello, *supra* note 25.

28. *Id.*

29. *Id.*

30. *Id.*

transmitting party is responsible for any errors or an incomplete transmission.

Third, service by fax has some disadvantages.³¹ Most fax machines use paper that is specially treated and which disintegrates with time. Also, faxed papers don't arrive in a blueback neatly stapled together. Large fax transmissions can be unmanageable. The lawyer has to mail the papers anyway. Perhaps one constructive result of the fax fixation by lawyers is recently amended General Business Law section 396(aa),³² which prohibits unsolicited fax advertising, defines junk fax, and provides for damages to the recipient of \$100 or actual damages. Prohibitions against junk fax became effective January 20, 1990.³³

B. New Court Rules

1. United States Supreme Court

Last year Congress limited the mandatory jurisdiction of the United States Supreme Court³⁴ and, effective January 1, 1990, the Court has several new rule changes.³⁵ Lawyers should also be aware of changes relating to court hours (no longer open on Saturdays from 9:00 a.m. to 12:00 p.m.), docketing fees, service and filing of papers, length of documents and cover colors, time for filing a petition for writ of certiorari, time for filing reply briefs, binding requirements, form of typewritten papers, and appearance of counsel.

2. United States District Courts

At a meeting on November 16, 1989, the Board of Judges of the Southern District of New York adopted amendments to the Joint Local Rules of the Southern and Eastern Districts of New York. The changes in the local rules,³⁶ which became effective on November 27,

31. See *New York's New Fax Law: An Invitation to Litigation*, Report of NYSBA Commercial and Federal Litigation Section (copy on file at Syracuse University College of Law, H. Douglas Barclay Law Library).

32. See N.Y. GEN. BUS. LAW § 396(aa) (McKinney Supp. 1990).

33. *Id.*

34. See Carlisle, *Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 134.

35. See 13 S. Ct. Bull. (CCH) 9011-86 (Dec. 19, 1989); see also Supreme Court Rules, *codified in* title 28 of the United States Code, rules 14.4, 18.3, 20.2, 15.3, 18.6, 20.3(b), 20.4, 24.3, 24.4, 26, 37.3, 44 (effective Jan. 1, 1990).

36. See *In re Joint Local Rules of Court (Southern District Only)* by Charles L. Briant (order dated Nov. 27, 1989); see also 1990 MCKINNEY'S N.Y. RULES OF THE

1989, are based on the report of the Judicial Conference of the United States and upon recommendation of the Committee on Rules of Practice and Procedure of the Southern District of New York. Other changes in the rules are expected.

3. *Appellate Division*

Last year's *Survey* discussed revised rules for fiduciaries in the First and Second Departments.³⁷ They required attorneys to file annual affidavits of compliance.³⁸ Both courts have jointly amended their rules, effective December 11, 1989, to require attorneys to affirm compliance at the time they file biennial registration statements with the office of Court Administration.³⁹

C. *Future Developments*

Look for the United States Congress to enact statutes of limitations for federal civil actions that don't currently have them.⁴⁰ Additionally, look for the New York State Legislature to pass an omnibus amendment to CPLR article 31 involving disclosure.⁴¹

III. SANCTION CASES, MANDATORY CONTINUING LEGAL EDUCATION, AND COMPULSORY PRO BONO

A. *Sanction Decisions*

Last year's *Survey* alerted the bar to the new sanction rules for frivolous litigation practice.⁴² The three rules, effective January 1, 1989, authorize across the board financial penalties against attorneys

COURT, ch. 2, § 130; Squiers, *Southern District Acts to End Rules Conflict*, 202 N.Y.L.J., Nov. 28, 1989, at 1, col. 3 (eliminated rules relating to restrictions on class action suits, use of depositions in foreign courts, writs to stop expulsion of aliens, restatement of federal procedural rules).

37. See *Civil Practice, 1988 Survey*, *supra* note 34, at 88-89.

38. *Id.*

39. See 202 N.Y.L.J., Dec. 11, 1989, at 12, col. 3.

40. See *N.Y.S.B.A. House Votes To Seek Federal Statute of Limitations*, 31 N.Y. ST. B. NEWS, Sept. 1989, at 1, col. 3.

41. The most important suggested change to CPLR article 31 should relate to amendment of CPLR 3120(a) that a party "specifically" designate disclosure items. The "designation" requirement has been interpreted restrictively and has precluded pre-trial discovery for both plaintiffs and defendants. See N.Y. CPLR 3120(a) (McKinney 1970 & Supp. 1990).

42. See *Civil Practice, 1988 Survey*, *supra* note 34, at 82-88 (discussing 22 NYCRR 130, 130(a) (1988)); see also *Top State Court Adopts Sanction Rules*, 200 N.Y.L.J., Oct. 26, 1988, at 1, col. 4.

and their clients for frivolous conduct.⁴³ The new rules, which were implemented by part 130 of the Rules of the Chief Administrative Judge,⁴⁴ affect not only actions filed after January 1, 1989, but pending ones as well.⁴⁵ There is a \$10,000 cap on civil sanctions against lawyers and clients and a \$250 cap against attorneys who unjustifiably fail to attend a scheduled appearance in a criminal action.⁴⁶ We pointed out that the new rules are not applicable to town or village courts, small claims courts, or to proceedings commenced under articles 3, 7, 8, or 10 of the Family Court Act.⁴⁷ They do apply, however, to any other conduct which is frivolous. This includes motions, appeals, special proceedings, Article 78 cases, and summary proceedings.⁴⁸ The new rules also include as frivolous conduct the making of an unjustified motion, and can be applied by judges in the housing section of the New York Civil Court.

During the *Survey* year, family court judges were authorized to fine attorneys who fail to attend a scheduled appearance.⁴⁹ Similarly, a state supreme court judge sanctioned a defendant in a divorce action \$5,580 for making a frivolous motion.⁵⁰ Additionally, the United States Supreme Court, on an issue of first impression, held that rule 11 sanction fines are limited to lawyers who offend the rule, thus exempting the lawyers' firms from its reach.⁵¹ Federal courts also im-

43. See *Civil Practice, 1988 Survey*, *supra* note 34, at 82-88.

44. One of the rules, a Rule of the Chief Judge, authorizes the sanctions. The other two regulations, Rules of the Chief Administrative Judge, list definitions and criteria to be considered by judges in imposing the penalties in criminal and civil matters.

45. See MCKINNEY'S 1989 N.Y. RULES OF THE COURT, ch. 2, § 130-1, 130-2.

46. See *Civil Practice, 1988 Survey*, *supra* note 34, at 85.

47. *Id.*

48. *Id.*

49. See Spencer, *Attorneys Face Family Court Sanctions*, 202 N.Y.L.J., Dec. 7, 1989, at 1, col. 3 (both judges and lawyers practicing in family court requested the Chief Administrator of the courts to amend part 130-a of the rules to give judges authority to fine lawyers up to \$250 for an unjustified failure to appear for a scheduled family court proceeding).

50. See *Smerling v. Smerling*, 144 A.D.2d 1046, 535 N.Y.S.2d 510 (1st Dep't 1988) (affirming lower court); see also Kohn, *Judge Imposes \$5,580 Sanction in Divorce Case*, 202 N.Y.L.J., Nov. 21, 1989, at 1, col. 5.

51. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989); see also Wise, *Supreme Court Narrows Scope For Imposing Rule 11 Sanctions*, 202 N.Y.L.J., Dec. 6, 1989, at 1, col. 1. In another matter, the United States Supreme Court granted certiorari to provide guidelines in applying sanctions against lawyers who file improper law suits. See *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890 (D.C. Cir.), *cert. granted sub. nom. Cooter & Gell v. Hartmax Corp.*, 110 S. Ct. 275 (1989). *Cooter* is

posed sanction fines on law firms in an arbitration matter,⁵² in two copyright cases,⁵³ in a post-trial motion relief case,⁵⁴ in a negligence action,⁵⁵ in a civil rights matter,⁵⁶ in securities litigation,⁵⁷ for abusive discovery,⁵⁸ for failure to complete service of papers,⁵⁹ for jurisdictional defects,⁶⁰ for use of a fraudulent exhibit,⁶¹ for significant misrepresentations in motion papers,⁶² and in a bankruptcy case.⁶³ In addition, The Federal Savings and Loan Insurance Corporation was fined for pursuing frivolous lawsuits related to three failed thrift institutions.⁶⁴

In New York State, trial judges are actively imposing the Chief Judge's new sanction rules in a variety of matters,⁶⁵ despite attempts by the legislature to enact a bill which would suspend the rules until 1991.⁶⁶ Although many members of the bar continue to oppose the

discussed in *Supreme Court Takes Lawyer Sanctions Case*, 202 N.Y.L.J., Oct. 17, 1989, at 2, col. 3.

52. See *\$25,000 Sanction for Wilson, Elser*, 201 N.Y.L.J., May 26, 1989, at 1, col. 3.

53. See Squiers, *Lawyer Sanctioned For \$62,000 in Costs*, 201 N.Y.L.J., Feb. 7, 1989, at 1, col. 3 (sanctions imposed on solo practitioner); Squiers, *Lawyer Sanctioned for 'Disregard' of Rules*, 201 N.Y.L.J., June 13, 1989, at 1, col. 5.

54. See *Veliz v. Crown Lift Trucks*, 714 F. Supp. 49 (E.D.N.Y. 1989).

55. See Fox, *Negligence Lawyer Sanctioned For 'Street Fighting' Tactics*, 201 N.Y.L.J., June 9, 1989, at 1, col. 1.

56. See Squiers, *Stiff Fine For Law Firm's Frivolous Suit*, 201 N.Y.L.J., March 24, 1989, at 1, col. 3.

57. See *McMahon v. Shearson/American Express Inc.*, 709 F. Supp. 369 (S.D.N.Y. 1989).

58. See Squiers, *Fine Upheld Against Firm on Appeal: \$15,000 Sanction Imposed For Abusive Discovery*, 202 N.Y.L.J., August 14, 1989, at 1, col. 3.

59. See *Yosef v. Passamaquoddy Tribe*, 879 F.2d 283 (2d Cir. 1989).

60. See Squiers, *\$10,000 Sanction Of Lawyer Upheld: Second Circuit Panel, 2-1 Holds Jurisdictional Defect Is Cause For Fine*, 201 N.Y.L.J., May 19, 1989, at 1, col. 3 (discussing *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d Cir. 1989)).

61. See *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 880 F.2d 642 (2d Cir. 1989); see also Squiers, *Sanctions Imposed on Three Law Firms*, 202 N.Y.L.J., July 19, 1989, at 1, col. 3.

62. See *First City Fed. Savs. Bank v. Dennis*, 128 F.R.D. 180 (S.D.N.Y. 1989); see also Silberberg, *South District Civil Practice Roundup*, 202 N.Y.L.J., Dec. 7, 1989, at 3, col. 1.

63. See Squiers, *Bankruptcy Case Draws \$60,000 Sanction*, 202 N.Y.L.J., August 15, 1989, at 1, col. 3.

64. See Lavelle, *FSLIC Lawyers Face Sanctions*, Nat'l L.J., June 5, 1989, at 3, col. 1.

65. See *State Judges Using Sanctions as Lawmakers Press for Halt*, 201 N.Y.L.J., May 17, 1989, at 1, col. 1.

66. *Id.*; see also Spencer, *Legislators Move to Suspend Sanction Rules*, 201 N.Y.L.J., Mar. 8, 1989, at 1, col. 3.

rules,⁶⁷ the New York State Bar Association calls for the continuation of sanctions⁶⁸ pending a study to review them.⁶⁹ The New York State Bar Association has formed a special committee, under the leadership of former Court of Appeals Judge Hugh R. Jones, to review the rules and recommend changes. The Jones Committee anticipates completing its work early in the 1990 legislative session.⁷⁰ Assemblyman Eric W. Vitaliano, who sponsored the 1989 bill against sanctions, and Dale M. Volker, chair of the Senate's Code Committee, will probably try to suspend or pre-empt the sanction rules by legislation during 1990.⁷¹

New York State courts applied the new sanction rules during the *Survey* year in cases involving filing of a frivolous motion,⁷² a landlord-tenant action,⁷³ a contract action,⁷⁴ a tort action,⁷⁵ three pro se actions,⁷⁶ a frivolous claim,⁷⁷ frivolous conduct,⁷⁸ a wrongful dis-

67. See Walshe, *Dismay at Sanction over Unsettled Issue*, 201 N.Y.L.J., June 9, 1989, at 2, col. 6; Adams, *Lack of Dignity in Court? Blame the Judges*, 201 N.Y.L.J., May 12, 1989, at 2, col. 3; *County Bar Panel to Air Sanction Rules*, 201 N.Y.L.J., May 10, 1989, at 2, col. 3; see also Herman, *Rule 11 Is Prejudicial to Plaintiff*, Nat'l L.J., July 24, 1989, at 17, col. 1; Spencer, *Lawyers Give Mixed Notices to Federal Sanction Rules*, 201 N.Y.L.J., Jan. 19, 1989, at 1, col. 3.

68. Spencer, *State Bar Panel Opposes Curbs on Sanctions*, 202 N.Y.L.J., Aug. 15, 1989, at 1, col. 5; *Bar Group Opposes Bills in Legislature to Suspend Sanctions Against Attorneys for Filing Frivolous Suits*, 61 N.Y. ST. B.J. 67 (Oct. 1989); see also Spencer, *Report on Dishonest Lawyers Stuns Legislators*, 201 N.Y.L.J., Mar. 30, 1989, at 1, col. 3.

69. See Spencer, *State Bar Panel to Study Rules Allowing Sanctions of Lawyers*, 202 N.Y.L.J., Oct. 12, 1989, at 1, col. 1; *Bar Group Calls for Continuation of Sanctions Against Attorneys Pending Study*, 31 N.Y. ST. B. NEWS, Sept. 1989, at 2, col. 1.

70. See Spencer, *supra* note 25, at 1.

71. *Id.*

72. See *Kudish v. Murray*, 202 N.Y.L.J., Nov. 3, 1989, at 29, col. 6 (Sup. Ct., Suffolk Co.) (\$2,000 sanction against plaintiff's counsel); *In re Isseks*, 144 Misc. 2d 322, 544 N.Y.S.2d 471 (Sup. Ct., Orange Co. 1989), *discussed in* 202 N.Y.L.J., Aug. 15, 1989, at 21, col. 3; see also Kohn, *Firm Fined \$2,000 for Frivolous Motion*, 202 N.Y.L.J., Nov. 3, 1989, at 2, col. 3.

73. *102 Chambers St. Restaurant Corp. v. George*, 202 N.Y.L.J., Sept. 27, 1989, at 23, col. 4 (N.Y.C. Civ. Ct., N.Y. Co.) (petitioner landlord sanctioned for falsely alleging that premises were not a multiple dwelling).

74. See *Takisada Ltd. v. Ambassador Factors Corp.*, 202 N.Y.L.J., Sept. 14, 1989, at 22, col. 6 (Sup. Ct., N.Y. Co.) (suit over undisputed provisions sets sanctions for plaintiff).

75. *Byrne v. City of N.Y.*, 201 N.Y.L.J., April 6, 1989, at 31, col. 2 (Sup. Ct., N.Y. Co.) (counsel's conduct sanctioned in personal injury action for actions taken to prolong litigation with intention of harassing the defendant into offering an unwarranted settlement).

76. See *Bruckner v. Janitor Apartments Co.*, 202 N.Y.L.J., Dec. 28, 1989, at 28, col. 5 (N.Y.C. Civ. Ct., Queens Co.); *Winters v. Gould*, 143 Misc. 2d 44, 539 N.Y.S.2d 686 (Sup. Ct., N.Y. Co. 1989) (\$10,000 fine on pro se tenant); *Tobjy v. Tobjy*, 202 N.Y.L.J.,

charge action,⁷⁹ and for discovery abuse.⁸⁰ Sanctions were also applied under the CPLR.⁸¹

There were several significant sanction decisions decided during the *Survey* year. One decision restricts the right of federal judges to impose sanctions on law firms.⁸² Another fined a lawyer \$10,000 for his mistake in determining that a federal district court had subject matter jurisdiction to hear a "diversity" case.⁸³

In *Pavelic & LeFlore v. Marvel Entertainment Group*, the United States Supreme Court was faced with the issue of whether Federal Rules of Civil Procedure rule 11 permits the imposition of sanctions only against the individual attorney who signs a paper or whether the signer's firm may also be sanctioned.⁸⁴ Eight Justices, speaking through Justice Scalia, held that the obligations under rule 11 are personal and that the consequences of violating it are likewise personal. Justice Scalia concluded that: "where the text [of the rule] establishes a duty that cannot be delegated . . . one may reasonably expect it to authorize punishment only of the party upon whom the duty is

Sept. 6, 1989, at 26, col. 5 (Sup. Ct., N.Y. Co.) (pro se post judgment divorce action); see also Fox, *\$10,000 Penalty for Court 'Abuser'*, 201 N.Y.L.J., April 3, 1989, at 1, col. 4.

77. See *Gotham Air Conditioning Serv. Inc. v. Heitner*, 144 Misc. 2d 430, 544 N.Y.S.2d 703 (Sup. Ct., Queens Co. 1989) (meritous defenses in traverse hearing on jurisdictional defense warrants sanctions).

78. *In re Travelers Ins. Co.*, 202 N.Y.L.J., Nov. 16, 1989, at 21, col. 6 (Sup. Ct., Nassau Co.) (insurance company sanctioned for frivolous conduct).

79. See *Santangelo v. Goldman Sachs & Co.*, 202 N.Y.L.J., Nov. 22, 1989, at 21, col. 4 (Sup. Ct., N.Y. Co.) (Staten Island attorney fined \$5,000 plus \$1,000 in costs for bringing frivolous wrongful discharge action on behalf of former employee of Goldman Sachs & Co.).

80. See *Kar Mar Equip. Corp. v. Marv Blank*, No. 89-167 (Sup. Ct., Putnam Co. Nov. 14, 1989).

81. See *Lowitt v. Korelitz*, 152 A.D.2d 506, 544 N.Y.S.2d 14 (1st Dep't 1989) (sanctions appropriate under CPLR 3126 for failure to comply with disclosure order); *Simmons v. Mercer*, 146 A.D.2d 833, 536 N.Y.S.2d 862 (3d Dep't 1989) (\$2,000 sanction in eviction proceeding for prolonged dilatory behavior of defendant and the expense and inconvenience to the plaintiff); see also *Prudential Abstract Co. v. McKirgan*, 202 N.Y.L.J., Aug. 24, 1989, at 26, col. 5 (Sup. Ct., Westchester Co.) (sanctions against counsel under CPLR 8303-a).

82. See *Pavelic*, 110 S. Ct. 456; see *supra* text accompanying note 51.

83. See *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d Cir. 1989).

84. *Pavelic*, 110 S. Ct. at 458. *Pavelic* involved a copyright infringement action for forty-four million dollars. The Second Circuit upheld sanctions for \$50,000 against one of the firm's attorneys, \$100,000 against the client, and another \$50,000 against the now-dissolved law firm. *Pavelic & LeFlore v. Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988). These sanctions were not challenged on appeal.

placed.”⁸⁵ Justice Marshall dissented on the grounds that the majority’s interpretation of rule 11 represented “an unnecessary erosion of the discretion of federal trial judges.”⁸⁶ *Pavelic* may have some bearing on 22 NYCRR 130.1(b), which allows financial sanctions up to \$10,000 to be imposed not only against the attorney personally but also upon a partnership, firm, corporation, government agency, prosecutor’s office, legal aid society, or public defender’s office with which the attorney is associated and has appeared as attorney of record.⁸⁷ However, the New York rule, unlike its federal counterpart,⁸⁸ does not state that a lawyer’s obligation under 22 NYCRR 130 is strictly personal. Additionally, the bar should take note of a recent New York State Bar Association Ethics Opinion which concludes that agreements purporting to shift sanctions from a lawyer to a client violate several ethical prohibitions and are clearly improper.⁸⁹

In *International Shipping Co. v. Hydra Offshore, Inc.*,⁹⁰ the United States Court of Appeals for the Second Circuit, in a divided opinion, affirmed the imposition of \$10,000 in sanctions on a lawyer for initiating a claim over the sale of a vessel in Foley Square rather than across the way at 60 Centre Street.⁹¹ The suit was dismissed by Judge Leisure because foreign parties were present on both sides which destroyed diversity jurisdiction (one of the defendants was a

85. *Pavelic*, 110 S. Ct. at 459; see also *Court Eases Firm Worries on Rule 11 Sanctions*, Nat’l L.J., Dec. 18, 1989, at 5, col. 5.

86. *Pavelic*, 110 S. Ct. at 460 (Marshall, J., dissenting).

87. See 22 NYCRR 130.1(b) (1988).

88. See FED. R. CIV. P. 11.

89. See Opinion No. 1989-3, Committee on Professional Ethics of the New York State Bar Association, reprinted in 202 N.Y.L.J., Dec. 29, 1989, at 2, col. 3. The question was whether “[a] provision purporting to shift sanctions from lawyer to client might be included either in a retainer or other agreement after a court has already imposed sanctions on the lawyer” is proper. The opinion stated:

Sanctions are imposed against the client purely for their deterrent effect. But sanctions are imposed against the attorney also for disciplinary purposes, as a punishment for dereliction of duty by an officer of the court who should know better. Allowing the client to reimburse the attorney would interfere with the court’s attempt to maintain discipline. Therefore reimbursement by the client should be prohibited.

Id.

90. 875 F.2d 388.

91. A corporate defendant is a citizen of both its state of incorporation and the state where it has a principal place of business. There is still some disagreement as to what constitutes a principal place of business and as Circuit Court Judge Pratt stated it is “a complicated and as yet unsettled area of diversity jurisdiction.” See Squiers, *supra* note 60.

Liberian corporation with its principal place of business based in New York). Two of the three judge panel held that diversity jurisdiction did not exist and that "[r]ule 11 . . . requires that members of the bar avoid haphazard superficial research."⁹² The dissent argued against sanctions because the question regarding diversity jurisdiction is unsettled.⁹³ There remains the issue of how far courts will extend the *International Shipping* ruling. Will failure to adequately research issues of *in personam* jurisdiction and other complex jurisdictional matters result in the imposition of sanctions? Because subject matter objections can be raised at any time, can a court sanction lawyers when it raises such objections *sua sponte*?

Three state court opinions, which inhibit pro se litigation by plaintiffs,⁹⁴ raise the question of when sanctions should be used to discipline vexatious pro se litigants. In *Winters v. Gould*,⁹⁵ Justice Tomkins was the first New York State jurist to impose maximum sanctions of \$10,000 against "a chronic abuser of the judicial system."⁹⁶ Justice Tomkins enjoined Mr. Winters from engaging in further legal action unless represented by a lawyer and only with prior approval of the appropriate administrative judge. Justice Tomkins stated that the \$10,000 maximum penalty "does not provide adequate authority to prevent egregious conduct,"⁹⁷ and urged that state court judges be given discretion to impose sanctions with no "specified monetary limit."⁹⁸ In another eviction case, *Bruckner v. Janitor Apartments Co.*, the defendant won possession of premises used by a pro se plaintiff.⁹⁹ Plaintiff failed to appeal that decision but brought a plenary suit which was dismissed for failure to state a cause of action. When he filed another suit, the court granted defendant's motion to dismiss and, pursuant to the new sanction rules, set down a hearing to determine the imposition of sanctions and attorneys' fees on plain-

92. *International Shipping*, 875 F.2d at 393.

93. *See id.* (Pratt, J., dissenting)

94. *See Winters*, 143 Misc. 2d 44, 539 N.Y.S.2d 686; *Bruckner*, 202 N.Y.L.J., Dec. 28, 1989, at 28, col. 5; *Tobjy*, 202 N.Y.L.J., Sept. 6, 1989, at 26, col. 5.

95. 143 Misc. 2d at 44, 539 N.Y.S.2d at 686.

96. *Winters*, 143 Misc. 2d at 47, 539 N.Y.S.2d at 689. Plaintiff Philip Winters had filed a frivolous action to set aside an eviction order and a back rent judgment for \$5,700. Winters had also been his own attorney in nearly ten years of what Justice Tomkins characterized as litigation which imposed "substantial burdens on the court system." *Id.*

97. *Id.* at 48, 539 N.Y.S.2d at 689.

98. *Id.* at 47, 539 N.Y.S.2d at 689; *see Fox, supra* note 76.

99. *Bruckner*, 202 N.Y.L.J., Dec. 28, 1989, at 28, col. 5.

tiff.¹⁰⁰ In *Tobjy v. Tobjy*, the pro se defendant engaged in post-judgment divorce litigation which the court found "litigious."¹⁰¹

It is highly unlikely that the Chief Judge's sanction rules were intended for "normal use" against pro se litigants. Former Chief Administrative Judge Rosenblatt, while speaking about imposition of sanctions under the new rules, stated they will be "sparingly applied" in only "rare and necessary cases."¹⁰² Today when substantial numbers of New York's citizens have no access to lawyers in housing and matrimonial actions,¹⁰³ our courts can expect to see more pro se litigation. Without mandatory pro bono or court-ordered counsel in eviction cases,¹⁰⁴ the bench and bar may wish to question the use of 22 NYCRR 130 sanctions against pro se litigants.

B. Mandatory Continuing Legal Education ("MCLE")

Last year's *Survey* briefly discussed proposals for mandatory continuing legal education and compulsory pro bono.¹⁰⁵ These proposals, which have important implications for the profession, continue to be debated and are worthy of discussion.¹⁰⁶

Since Minnesota's adoption of MCLE in 1975, thirty-two other states have implemented similar programs.¹⁰⁷ On May 20, 1988 the New York State Bar Association's Special Committee on Lawyer Competency submitted its final report on recommendations to promote and improve professional competency among lawyers in New

100. *Id.*

101. *Tobjy*, 202 N.Y.L.J., Sept. 6, 1989, at 26, col. 5.

102. See *Civil Practice, 1988 Survey*, *supra* note 34, at 83.

103. See *Donaldson v. State*, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1st Dep't 1989).

104. See Spencer, *Lawyers Give Mixed Notices to Federal Sanction Rules*, 201 N.Y.L.J., Jan. 19, 1989, at 1, col. 3. This article features remarks of Judge Charles L. Haight of the Southern District who stated: "There [is] . . . the potential for reform and the very real danger of mischief." The outcome depends "upon the good will of judges and lawyers in the spirit in which they attempt to make [sanction rules] work." *Id.*

105. See *Civil Practice, 1988 Survey*, *supra* note 34, at 90-91.

106. See generally Yanas, *The President's Message*, 61 N.Y. ST. B.J. 3 (December 1989) [hereinafter *President's Message*]; Yanas, *State Bar: Consensus Through Diversity*, 202 N.Y.L.J., Nov. 17, 1989, at 2, col. 3 [hereinafter *Consensus Through Diversity*]; Dixon, *MCLE: No Longer a Trend*, 31 N.Y. ST. B. NEWS, Oct. 1989, at 1, col. 3; Spencer, *State Bar Panel To Weigh Mandatory Pro Bono Plan*, 202 N.Y.L.J., Sept. 12, 1989, at 1, col. 3. For thorough discussions of MCLE see NYSBA, *Final Report of the Special Committee on Lawyer Competency* [hereinafter *Musselman Report*]; *Report of the Chicago Council of Lawyers on Mandatory Continuing Legal Education* (December 1988) (copies on file at Syracuse University College of Law, H. Douglas Barclay Law Library).

107. See Dixon, *supra* note 106, at 1.

York.¹⁰⁸ The report considered adoption of MCLE but expressly rejected it on the grounds that "it would be counterproductive."¹⁰⁹ At an October 1988 meeting of the NYSBA's House of Delegates, a majority of the lawyers present decided to examine how MCLE could be adopted and administered in New York.¹¹⁰ Professor Robert McKay was appointed to chair a special committee to examine MCLE.¹¹¹

The McKay Committee distributed a draft report on July 7, 1989.¹¹² The report suggests that attorneys complete twenty-four hours of CLE courses every two years.¹¹³ Shortly before the report was issued, the chairman of the Assembly Judiciary Committee agreed to delay consideration of an MCLE bill sponsored by Assemblyman Edward Griffith of Brooklyn.¹¹⁴ His bill would require all licensed attorneys to take fifteen hours of CLE courses each year.¹¹⁵

The McKay Plan will be debated by the NYSBA House of Delegates in late January of 1990. The debate will be bifurcated.¹¹⁶ First, the pros and cons of MCLE will be discussed and the house will vote on whether to approve the general concept of MCLE. If that vote is positive, the House will vote on the revised McKay Plan to implement MCLE in New York. Implementation would be through rules adopted by the New York Court of Appeals and administered by a commission appointed by Chief Judge Wachtler and the four appellate division presiding justices. If the McKay Plan is not adopted, the state legislature is expected to introduce an MCLE bill early in 1990.¹¹⁷ Kenneth J. Munnely, counsel to the Assembly's Judiciary Committee reports that "[MCLE's] time is going to come soon."¹¹⁸

1. *Arguments for MCLE*

Lawyer misconduct and incompetence is a serious problem in

108. See *Consensus Through Diversity*, *supra* note 106, at 2, col. 2.

109. See *Musselman Report*, *supra* note 106, at 12.

110. See *Consensus Through Diversity*, *supra* note 106, at 2, col. 3.

111. *Id.*

112. See NYSBA, *Draft No. 1 Mandatory Continuing Legal Education for Attorneys* (July 7, 1989) [hereinafter *McKay Plan*] (copy on file at Syracuse University College of Law, H. Douglas Barclay Law Library).

113. *Id.* at 4.

114. See Spencer, *Legislative Push for Mandatory CLE Delayed*, 201 N.Y.L.J., May 18, 1989, at 1, col. 3.

115. *Id.*

116. See *Consensus Through Diversity*, *supra* note 106, at 2, col. 3.

117. See Spencer, *supra* note 114.

118. *Id.*

New York.¹¹⁹ There is no doubt that continuing legal education programs improve lawyer competency.¹²⁰ MCLE will increase the quality and variety of CLE courses, and will provide greater competitiveness in course pricing and greater geographic availability of CLE courses. MCLE will not prevent voluntary attendance at CLE courses. It merely provides the added benefit of bringing CLE programs to persons who normally do not attend them.¹²¹ This group includes many lawyers whose incompetence most threatens the public.

MCLE will improve the public perception of the legal profession. It will aid in reducing unethical conduct and will stimulate more self-learning.¹²² Finally, lawyers are a self-regulated profession. Prospective attorneys voluntarily submit to LSAT examinations and to the rigors of law school. They take bar examinations and submit to detailed character and fitness reviews. Lawyers pay a biannual registration fee and are subject to sanction rules, attorney disciplinary agencies, IOLA filing requirements, fiduciary and fee requirements, and to malpractice insurance.¹²³ Thus, MCLE is a small burden, particularly when it will increase lawyer competency.¹²⁴

2. *Arguments against MCLE*

a. *No Proof That MCLE Works*

The principal argument against MCLE is that there is no evidence it reduces attorney incompetence or increases public trust and

119. Adams, *Judges Rip Courtroom Misconduct, Incompetence*, 201 N.Y.L.J., May 5, 1989, at 1, col. 3 (citing Association of the Bar of the City of New York Poll of Judges on Attorney Performances).

120. See Brink, *Self-Regulation in CLE as a Means to Professionalism* (1987) (cited as Appendix J in the *Musselman Report*) (statement by former ABA president David Brink at 1987 meeting of Association of CLE Administrators).

121. See *Musselman Report*, *supra* note 106, at 11-12. John Yanas, president of the New York State Bar Association points out that "only 15% of our membership participate in any of our [CLE] programs." See *President's Message*, *supra* note 106.

122. See *Musselman Report*, *supra* note 106, at 11-13.

123. See *Civil Practice, 1988 Survey*, *supra* note 34, at 82-90. Also effective December 12, 1989, the First and Second Departments amended their respective rules on fiduciary filings to require they be completed in the biennial registration statements furnished by the Office of Court Administration. See 202 N.Y.L.J., Dec. 11, 1989, at 12, col. 3 (reprinting amended rules).

124. See Dixon, *supra* note 106, at 1.

respect for the legal profession.¹²⁵ Since MCLE's first adoption by Minnesota in 1975, there has been no study on this point.¹²⁶ It is highly unlikely, however, that malpractice claims and client grievances are diminished by MCLE. Additionally, the public takes little note of which professions have mandatory continuing education and what the requirements include. Assuming the public did know about the MCLE requirements, they would wonder why lawyers did not spend more than twelve hours a year on MCLE. In addition, the public will believe that the high cost of MCLE will be passed on to them in higher legal fees.

b. MCLE Is Expensive

Administration of an MCLE program in New York will require compliance checking, accreditation of programs, and sanction enforcement.¹²⁷ Without careful monitoring MCLE will not be effective. Already thousands of attorneys fail to comply with mandatory biannual registration requirements and none of them have been sanctioned.¹²⁸ Additional costs for registration fees, travel, hotels, meals, record keeping, and reporting will require New York lawyers to spend over ten million dollars per year.¹²⁹

MCLE will increase the cost of sponsoring CLE programs. Course administration, processing of accreditation applications, attendance and program evaluation reporting, and compensation for prominent speakers will eliminate most of the low cost CLE programs sponsored by local bar associations and academic institutions. CLE will also become commercialized and competitive. Just as bar review courses cost law graduates over \$1,300 each, MCLE courses will force New York lawyers to collectively contribute large sums of money to profit-making business organizations.

Similarly, MCLE will be difficult to administrate. With over 90,000 lawyers in New York required to complete twelve hours of MCLE each year, it will be impossible to maintain high quality

125. See *Musselman Report*, *supra* note 106, at 11-13; see also *Consensus Through Diversity*, *supra* note 106, at 2, col. 3.

126. See *Musselman Report*, *supra* note 106, at 11-13.

127. *Id.*

128. Spencer, *Noncompliance Seen in Bar Registration*, 202 N.Y.L.J., Dec. 11, 1989, at 1, col. 5; see also Adams, *Bar Gropes to Curb Unlicensed Lawyers*, 202 N.Y.L.J., Dec. 21, 1989, at 1, col. 3.

129. See *Musselman Report*, *supra* note 106, at 11-13.

courses. In addition, the reporting and compliance requirements envisioned by the McKay Plan will require an expensive bureaucracy.¹³⁰

c. MCLE Diverts Attention and Resources Away from Professional Competency Issues and Solutions

The main causes of malpractice claims and grievances against lawyers are law office management failures,¹³¹ and dishonesty.¹³² Many of these problems are caused by economics, and a mandatory twelve hours of legal education each year will exacerbate the situation.¹³³ Instead, law schools should devote more time to instructing their students in practice management skills,¹³⁴ and more financial resources should be devoted to strengthening attorney disciplinary agencies.¹³⁵

d. Conclusion

Clearly there is a nationwide trend towards MCLE.¹³⁶ Serious questions exist in New York, however, as to how MCLE can be implemented.¹³⁷ If MCLE can be shown to improve lawyer competence with minimal cost to the consumer, it should be adopted. "Cost" and "competence" concerns, however, are open to question. Whatever the result, the bench and bar should continue the debate with one goal in mind — to improve the quality and quantity of legal services to the citizens of New York.¹³⁸

C. Compulsory Pro Bono

The concept of mandatory pro bono ("MPB") has also divided the bench and bar.¹³⁹ Chief Judge Wachtler favors MPB,¹⁴⁰ as do

130. *Id.*; see also Adams, *Jersey Mandatory CLE Angers New Yorkers*, 201 N.Y.L.J., May 24, 1989, at 1, col. 3.

131. See Musselman Report, *supra* note 106, at 11-13.

132. *Id.*

133. See Dixon, *supra* note 106.

134. See Musselman Report, *supra* note 106, at 9-11.

135. *Id.* at 15-16.

136. See President's Message, *supra* note 106, at 70 ("The trend nationwide is toward MCLE.").

137. *Id.*

138. See Dixon, *supra* note 106; see also Nassau Bar Doing Its Share, 201 N.Y.L.J., April 25, 1989, at 2, col. 6 (letter to the editor).

139. See Wise, *Bar Groups Split on Mandatory Pro Bono Plan*, 202 N.Y.L.J., Oct. 20, 1989, at 1, col. 3 [hereinafter *Bar Groups Split*]; Wise, *Bar Leaders Resist Pro Bono Plan*, 202 N.Y.L.J., Oct. 17, 1989, at 1, col. 3 [hereinafter *Bar Leaders*]; see also Spencer,

Attorney General Robert Abrams¹⁴¹ and presiding Justice Francis Murphy of the First Department.¹⁴² Prominent organizations such as the Legal Aid Society¹⁴³ and the Association of the Bar of the City of New York¹⁴⁴ have placed their institutional support behind MPB. The majority of New York State's bar associations and private practitioners, however, oppose the concept.¹⁴⁵

The MPB issue arose when the Marrero Commission, an advisory panel appointed by Chief Judge Wachtler, proposed that all of New York's 90,000 lawyers donate at least twenty hours of free legal time a year to pro bono projects.¹⁴⁶ Finding that there is a "crisis" in the availability of legal services which threatens to destroy "the legitimacy of the legal system," the Marrero proposal contains the following elements: 1) a general requirement that lawyers donate twenty hours of their time each year to pro bono representation or legal assistance; 2) lawyers in law firms of ten attorneys or less can donate one thousand dollars per lawyer to an organization providing legal services to the poor instead of providing it themselves; 3) work in excess of twenty hours per year by one lawyer in a firm can be credited toward the requirements for other lawyers at the firm — nonetheless, credit would not be transferable if the lawyer donating the time had less than two years of legal experience; and 4) if lawyers accumulating more than twenty hours a year do not credit excess time

State Bar Panel to Weigh Mandatory Pro Bono Plan, 202 N.Y.L.J., Sept. 12, 1989, at 1, col. 4; Spencer, *supra* note 106, at 1, col. 3; Milano & DeRose, *Mandatory Pro Bono: An Alternative Proposal*, 201 N.Y.L.J., March 30, 1989, at 1, col. 1.

140. Wise, *Wachtler Urges Pro Bono Work by All Lawyers*, 201 N.Y.L.J., June 14, 1989, at 1, col. 3.

141. *Abrams Seeks Public Support for Mandatory Pro Bono Plan*, 201 N.Y.L.J., April 11, 1989, at 2, col. 1.

142. Murphy, *Compulsory Pro Bono Called 'Inevitable, Necessary'*, 201 N.Y.L.J., May 1, 1989, at 37, col. 3.

143. Fox, *Legal Aid Proposes Changes in Mandatory Pro Bono Plan*, 202 N.Y.L.J., Dec. 8, 1989, at 1, col. 1 (Legal Aid Society reports "general support for the Marrero Committee's overall recommendations for mandatory pro bono services by attorneys"); see also Norlander, *Mandatory Pro Bono - It's the Law*, 201 N.Y.L.J., Jan. 30, 1989, at 1, col. 1 (statement by former director of Westchester County Legal Services).

144. See *Bar Groups Split*, *supra* note 139 ("The City Bar . . . 'reluctantly' but forcefully endorsed the proposal as essential to meet a 'desperate' need.").

145. Wise, *Solo, Small-Firm Lawyers Oppose Pro Bono Report*, 202 N.Y.L.J., July 12, 1989, at 1, col. 3.

146. Wise, *Wachtler Panel Votes Mandatory Pro Bono*, 201 N.Y.L.J., Jan. 13, 1989, at 1, col. 3.

to other attorneys at the firm they may carry the excess hours over for as many as two additional years.

The Marrero proposals have been opposed by eleven county bar associations.¹⁴⁷ Also, the National Lawyers Guild and the Washington Legal Foundation, two bar groups from opposite ends of the political spectrum, are in opposition to MPB.¹⁴⁸ This is in spite of a recently released study by a NYSBA commission which concludes that there is a desperate need for legal help for the poor in New York.¹⁴⁹ The NYSBA has approved a broad-based voluntary pro bono plan as an alternative to the Marrero proposals.¹⁵⁰

The Marrero Commission will submit a final proposal to Chief Judge Wachtler in early 1990. It is likely that MPB will continue to have serious consequences for all New York attorneys,¹⁵¹ and that there will be more debate.¹⁵² This is particularly true in light of the unresolved issue of whether indigent housing court defendants facing eviction have a constitutional right to counsel.¹⁵³

IV. JURISDICTION

A. Subject Matter Jurisdiction

Last year's *Survey* criticized the New York Court of Appeals'

147. *Bar Leaders Resist*, *supra* note 139 (Albany, Brooklyn, Broome, Erie, Nassau, New York, Queens, Sullivan, Suffolk, Westchester, and Bronx Counties).

148. *See Bar Groups Split*, *supra* note 139, at 7, col. 3.

149. *See Landmark NYSBA Study Verifies New York Poor Are Denied Promise Of Equal Justice Under Law*, 31 N.Y. ST. B. NEWS, Dec. 1989, at 1, col. 3.

150. *NYSBA House Approves Broad-Based Voluntary Pro Bono Plan as Alternative to Chief Judge's Proposal*, 31 N.Y. ST. B. NEWS, Dec. 1989, at 1, col. 1; *see also* Pines, *Lawyers Look For Ways To Get Legal Aid To Poor*, Reporter Dispatch, at A-11, col. 2 (Nov. 27, 1989); Gallagher, *Funds Volunteers Sought For Legal Service For Poor*, Reporter Dispatch, at A-17, col. 2 (Oct. 29, 1989).

151. *See NYSBA Approves Pro Bono Plan*, *supra* note 150, at 2 (NYSBA mailbag highlighting letter from solo practitioner who eloquently argues that MCLE and MPB will force him to retire from practice).

152. *See* Ellman, *Lawyers Who Pay Off Their Debt to Society with Unbillable Hours*, 202 N.Y.L.J., Dec. 22, 1989, at 1, col. 3; Dean, *'And What Am I Doing?'*, 202 N.Y.L.J., Dec. 18, 1989, at 3, col. 1; Wise, *Students Lead Way in Support of Public-Interest Internships*, 201 N.Y.L.J., April 20, 1989, at 1, col. 3.

153. *See* *Donaldson v. State*, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1st Dep't 1989) (unanimous five-justice panel concluded it lacked subject matter jurisdiction to rule on merits in declaratory judgment action to determine if housing court defendants in eviction proceedings were entitled to counsel); *see also* Adams, *Panel Remands Lawyers-For-Poor Action*, 202 N.Y.L.J., Dec. 22, 1989, at 1, col. 3; Danzig, *The Joys Of Pro Bono*, 202 N.Y.L.J., Dec. 22, 1989, at 2, col. 3.

holding in *Simpson Electric Corp. v. Leucadea*.¹⁵⁴ It was suggested that federal courts should have exclusive subject matter jurisdiction in RICO claims.¹⁵⁵ This position follows the position of the United States Court of Appeals for the Sixth Circuit,¹⁵⁶ but the New York rule follows the positions of the California Supreme Court and the Fourth and Ninth Circuits.¹⁵⁷ In May of 1989, the United States Supreme Court agreed to review the Fourth Circuit's decision in *Tafflin v. Levitt*.¹⁵⁸ The lack of explicitness regarding subject matter jurisdiction in the RICO statute should also be clarified by Congress.¹⁵⁹ In any event, satellite litigation on this matter should end sometime in 1990.

During the *Survey* year, the United States Supreme Court purported to bury pendent jurisdiction in *Finley v. United States*.¹⁶⁰ The Court had previously rejected pendent jurisdiction in *Aldinger v. Howard*,¹⁶¹ but left open the issue of whether pendent jurisdiction could exist if a federal claim was within the exclusive jurisdiction of a federal court. In *Finley*, the Court held that absent an independent base for subject matter jurisdiction against one of several defendants, dual litigation will be required.¹⁶²

There has been some disagreement as to whether 28 U.S.C. section 1332(c) is applicable to alien foreign corporations.¹⁶³ In *Petro-*

154. 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988) (holding concurrent subject matter jurisdiction exists between New York State and federal courts in RICO cases).

155. See *Civil Practice, 1988 Survey*, *supra* note 34, at 95.

156. See *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988).

157. See *Spencer, Bar Panel Urges Congress to Settle RICO Jurisdiction*, 202 N.Y.L.J., Sept. 25, 1989, at 1, col. 1 (referring to Report of NYSBA Commercial and Federal Litigation Sections Committee on Legislation).

158. 865 F.2d 595 (4th Cir. 1988).

159. See *Spencer*, *supra* note 157, at 1; see also 18 U.S.C. §§ 1961-1968 (1988).

160. 109 S. Ct. 2003 (1989) (on an issue of subject matter jurisdiction the Supreme Court, in a 5-4 decision, refused to allow a San Diego woman whose family died in a 1983 airplane crash to sue the federal government, San Diego, and a utility company in one federal lawsuit). But see *Huberman v. Duane Fellows Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989) (Judge Leisure held that *Finley* is not applicable to a third-party defendant).

161. 427 U.S. 1 (1976).

162. *Finley* involved an action under the Federal Tort Claims Act. Pendent jurisdiction was sought against the municipal and utility defendants on state claims. Thus, in actions against pendent parties, as opposed to pendent claims, subject matter jurisdiction will be restricted. See *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966).

163. See *Silberberg, Southern District Civil Practice Roundup*, 202 N.Y.L.J., Nov. 2, 1989, at 3, col. 1.

leum & Energy Intelligence Weekly, Inc. v. Liscom,¹⁶⁴ Judge Walker concluded, "after careful and exhaustive examination of relevant district and circuit court opinions," that section 1332(c) does apply to foreign corporations. He rejected as dicta language in several Second Circuit opinions which suggested that alien corporations are not citizens of the state in which they have their principal place of business.¹⁶⁵

In a disappointing decision, the First Department held *sua sponte* that it lacked subject matter jurisdiction to determine whether tenants faced with eviction had a constitutional right to counsel.¹⁶⁶ In *Donaldson v. State*, ten public interest law organizations sought Article 78 declaratory relief, on behalf of two clients, to compel the judiciary to develop a program for assignment of counsel in some housing court cases.¹⁶⁷ Because supreme court justices were named as defendants, the matter was filed in the appellate division. In May of 1989, prior to oral argument, the appellate division had asked the parties to brief the issue of venue, and subsequently ruled that the case was properly brought in the First Department. None of the parties, each of whom were represented by expert counsel, raised the issue of whether the Article 78 proceeding should be heard in supreme court instead of the appellate division. However, after oral argument Justice Kupferman found this issue to be dispositive and sent the case to New York Supreme Court.¹⁶⁸

B. Long-Arm Jurisdiction

A review of the many cases decided during the *Survey* year which involve personal jurisdiction supports the observation that "long-arm inquiries can leave the realm of the merely monotonous and become intensely monotonous."¹⁶⁹

Most of the significant long-arm cases involve application of CPLR 302(a)(1).¹⁷⁰ Of particular interest is what activities by a non-

164. No. 88 Civ. 3840 (S.D.N.Y. Sept. 27, 1989).

165. *Liscom*, No. 88 Civ. 3840.

166. *Donaldson*, 156 A.D.2d at 292, 548 N.Y.S.2d at 677.

167. *Id.*

168. *Id.* at 292, 548 N.Y.S.2d at 678.

169. Siegel, *The Affliction Known As Long Arm Jurisdiction*, 199 N.Y.L.J., May 31, 1988, at 5, col. 3.

170. N.Y. CPLR 302 (McKinney 1972 & Supp. 1990). Subsection (a)(1) is applicable to commercial and tort related litigation which arises out of the "transaction of business" or "contracts anywhere" clauses. For representative cases involving what

domiciled defendant constitute a transaction of business.¹⁷¹ Although a single act may be enough, the Court of Appeals has stressed that the "nature and quality" of the contact is crucial.¹⁷² It is also clear that a transaction of business can occur without the defendant being physically present in New York.¹⁷³ Thus, courts frequently grappled during the *Survey* year with the question of whether telephone contacts with New York were sufficient for a transaction of business.¹⁷⁴

In *Otterbourg Steindler v. Shreve City Apartments, Ltd.*,¹⁷⁵ the First Department overturned a decision of the supreme court which had held there was no jurisdiction over the defendant in a suit for legal fees. The First Department stressed that telephone contacts and written communications were purposeful activity and constituted a transaction of business.¹⁷⁶ The defendants in *Otterbourg* argued that the Court of Appeals decision in *Haar v. Armendaris Corp.*¹⁷⁷ was controlling, but the First Department distinguished *Haar* on the grounds that the defendant in *Haar* had not communicated exten-

constitutes a transaction of business, see *Carte v. Parkoff*, 152 A.D.2d 615, 543 N.Y.S.2d 718 (2d Dep't 1989); *Heaps v. Simon & Schuster*, 150 A.D.2d 164, 540 N.Y.S.2d 437 (1st Dep't 1989). For representative cases involving the contracts anywhere clause, see *Finest Fruits Inc. v. Bertuca*, 714 F. Supp. 94 (S.D.N.Y. 1989); *Drake America Corp. v. Speakman Co.*, 144 A.D.2d 529, 534 N.Y.S.2d 679 (2d Dep't 1988).

171. See N.Y. CPLR 302(a)(1); see also Carlisle, *Civil Practice, 1987 Survey of N.Y. Law*, 39 SYRACUSE L. REV. 75, 102 n.200 ("In the context of CPLR 302(a)(1), the transaction of business involves purposeful activity in the forum, perhaps only a single act out of which a cause of action arises. This concept is to be distinguished from doing business which contemplates a whole complex of activities as discussed [above]."). An excellent example of what constitutes "doing business," decided during the *Survey* year, is *New York Marine Managers Inc. v. M.V. Topori*. *New York Marine Managers* stands for the proposition that a foreign corporation doing business in New York may be sued on any claim, even those that do not arise from activities within state. See *New York Marine Managers*, 716 F. Supp. 783 (S.D.N.Y. 1989).

172. See *George Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 363 N.E.2d 551, 394 N.Y.S.2d 844 (1977).

173. See *Parke-Bennet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

174. See *Carte v. Parkoff*, 152 A.D.2d 615, 543 N.Y.S.2d 718 (2d Dep't 1989); *International Fin. Corp. v. Angus Brands, Inc.*, 202 N.Y.L.J., Sept. 19, 1989, at 22, col. 1 (Sup. Ct., N.Y. Co.); see also Barker, *Notice of Claim; Personal Jurisdiction*, 201 N.Y.L.J., March 27, 1989, at 3, col. 1.

175. 147 A.D.2d 327, 543 N.Y.S.2d 978 (1st Dep't 1989).

176. *Otterbourg*, 147 A.D.2d at 334, 543 N.Y.S.2d at 979. Defendant had retained the law firm to represent it in a bankruptcy action in New York. The parties engaged in at least ninety-three phone calls as well as numerous letters and settlement negotiations via telephone conference calls. See *id.*

177. 31 N.Y.2d 1040, 294 N.E.2d 855, 342 N.Y.S.2d 70 (1973) (agent cannot rely on his own acts in acquiring jurisdiction over the principal).

sively with the plaintiff's attorney in New York.¹⁷⁸ Another significant case where jurisdiction was asserted over a defendant who never entered New York, but had telephone contacts, was *Picard v. Elbaum*.¹⁷⁹ Judge Mukasey emphasized that directing the sale of securities in New York from Connecticut by telephone was continuous activity which impacted heavily on the forum and constituted a transaction of business.¹⁸⁰

In *Carte v. Parkoff*, the Second Department held that a New Jersey dentist did not transact business in New York merely because he solicited New York customers by placing a New York telephone number and address in a New York directory.¹⁸¹ The Second Department also held there was no jurisdiction under CPLR 302(a)(3)(ii)¹⁸² because the alleged injury to the plaintiff occurred in New Jersey rather than in New York.¹⁸³ In a similar case, the United States District Court for the Southern District of New York held that jurisdiction under CPLR 302(a)(2)¹⁸⁴ requires that the out-of-state defendant actually be in New York when the tort is committed.¹⁸⁵

Another interesting jurisdictional inquiry during the *Survey* year concerns application of the "arising under" requirement. Personal jurisdiction is not obtainable under CPLR 302(a)(1) unless a substantial relationship between the claim and the transaction in New York is established. This relationship is usually not a problem in breach of contract actions where the breach occurs outside of New York. If the plaintiff's claim, however, involves injury outside New York, there is usually not a sufficient nexus to satisfy the arising under requirement.¹⁸⁶ Thus, transactions of business by out-of-state defendants in New York, which cause a plaintiff to sustain injuries outside of New York, are too remote to warrant the exercise of long-arm jurisdiction.¹⁸⁷

178. *Otterbourg*, 147 A.D.2d at 333, 543 N.Y.S.2d at 982.

179. 707 F. Supp. 144 (S.D.N.Y. 1989).

180. *Picard*, 707 F. Supp. at 144.

181. *Carte*, 152 A.D.2d at 615, 543 N.Y.S.2d at 718.

182. N.Y. CPLR 302(a)(3)(ii).

183. *Carte*, 152 A.D.2d at 616, 543 N.Y.S.2d at 718.

184. See N.Y. CPLR 302(a)(2).

185. See *Roth v. El-Al Israel Airlines, Ltd.*, 709 F. Supp. 487 (S.D.N.Y. 1989).

186. See *Krakower v. Battles Universal Inc.*, 152 A.D.2d 656, 543 N.Y.S.2d 526 (2d Dep't 1989).

187. See *Myers v. Ocean Cruise Lines, S.S.*, No. 66670 (S.D.N.Y. 1989) (Westlaw, Allfeds library, Dist file) (newspaper advertisements and their relation to injury plaintiff sustained on ship cruise were too remote); *Holzman v. Mount Mansfield Co.*, No. 65560

Finally, we call the *Survey* reader's attention to the most recent case interpreting CPLR 302(b).¹⁸⁸ In *Sovansky v. Sovansky*,¹⁸⁹ the Second Department held that long-arm jurisdiction could not be asserted in an action to vacate or modify provisions of a Michigan divorce decree. The Second Department restrictively applied the subsection (b) language which permits long-arm jurisdiction if the plaintiff's claims accrue under the laws of New York.¹⁹⁰

C. Statutory Requirements for Service of Summons

Prior *Survey* articles have devoted substantial portions of the jurisdiction section to a recitation of cases which demonstrate that New York courts require strict compliance with service of summons and notice provisions.¹⁹¹ The author continues to remind the practitioner that even a minor defect may cause the action to be dismissed and, if the statute of limitations has run, there is no six month grace period under CPLR 205(a).¹⁹² Cases during the *Survey* year once again warrant the admonition that to avoid jurisdictional service challenges, always debrief the process server.¹⁹³

1. CPLR 312-a

It is questionable whether valuable judicial resources should be used to determine whether strict compliance requirements have been satisfied.¹⁹⁴ Additionally, the fairness of dismissing meritorious claims solely because of law office failure to properly serve a summons has been questioned.¹⁹⁵ Hopefully, our concerns will be minimized by

(S.D.N.Y. 1989) (Westlaw, Allfeds library, Dist file) (no jurisdiction over Vermont ski resort on basis of newspaper advertisement placed in New York which allegedly caused injury outside of New York); see also *Chamberlain v. Jiminy Peak*, 155 A.D.2d 768, 547 N.Y.S.2d 706 (3d Dep't 1989) (no jurisdiction based on advertisement placed in New York).

188. N.Y. CPLR 302(b).

189. 139 A.D.2d 724, 527 N.Y.S.2d 475 (2d Dep't 1988).

190. *Sovansky*, 139 A.D.2d at 725, 527 N.Y.S.2d at 476; see also King, *Conflict of Laws*, 1988 *Survey of N.Y. Law*, 40 SYRACUSE L. REV. 211, 226 (1989).

191. See *Civil Practice*, 1988 *Survey*, *supra* note 34, at 101-07; *Civil Practice*, 1987 *Survey*, *supra* note 171, at 111-17; Carlisle, *Civil Practice*, 1986 *Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67, 93-99 (1987).

192. N.Y. CPLR 205(a) (McKinney Supp. 1990); see also Siegel, *Civil Procedure*, 198 N.Y.L.J., Sept. 28, 1987, at S-24, col. 1.

193. See *Civil Practice*, 1988 *Survey*, *supra* note 34, at 101.

194. See *id.* at 101-02.

195. *Id.*

newly enacted CPLR 312-a.¹⁹⁶ This experimental statute provides for service of summons by first class mail and will probably be permanently enacted prior to its expiration date of January 1, 1992.

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 three 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.¹⁹⁷

It appears at first glance 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, 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. Thus, CPLR 312-a is probably not applicable in the Court of Claims and in family court. CPLR 312-a is clearly applicable in the supreme and county courts, because they are directly subject to the CPLR. The new statute is also authorized by legislative order in the civil, district, city, town, and village courts.¹⁹⁸ It should not be used when seeking a provisional remedy.

CPLR 312-a does not require a process server. Mailed service can be completed by the plaintiff or by his attorney or the attorney's employee. 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

196. See N.Y. CPLR 312-a (McKinney Supp. 1990); see also McLaughlin, *Service by Mail in New York*, 202 N.Y.L.J., Oct. 10, 1989, at 1, col. 1; 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.

197. See N.Y. CPLR 308(2) (McKinney Supp. 1990) (deliver and mail); N.Y. CPLR 308(4) (McKinney Supp. 1990) (nail and mail); N.Y. CPLR 308(5) (McKinney Supp. 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 (McKinney 1986) (service on a registered agent).

198. Siegel, 359 N.Y. ST. L. DIG. 1 (Nov. 1989).

same manner as service made within the state.¹⁹⁹ Arguably, Federal Rules of Civil Procedure rule 4(e)(2)(e)(ii) does not permit mailing outside of New York.²⁰⁰ After January 1, 1990, however, rule 4(e), which permits mailing in any manner authorized by state procedure, should permit out of state mailing under CPLR 312-a in federal actions.

Any defendant, with the exception of those governed by CPLR 309²⁰¹ (infants, incompetents and conservatees) may be served by mail. This includes defendants referred to in CPLR 308 (individuals), CPLR 310 (partnerships), CPLR 311 (corporations and certain government entities), and CPLR 312 (courts, boards and commissions). CPLR 307 (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.

CPLR 312-a contemplates first class mailing only.²⁰² Proof of mailing is not necessary because proof is the defendant's acknowledgement. Nonetheless, if costs are later sought, because the defendant avoids service by mail, it may be useful to obtain a certificate of first class mailing from the clerk at the post office. The plaintiff's mailing must include the summons, the complaint or a notice pursuant to CPLR 305(b), two copies of the statement and acknowledgement, and a self-addressed return envelope.²⁰³

Service by mail is complete when the defendant, the defendant's attorney, or an employee of the attorney mails or delivers a signed acknowledgement to the plaintiff.²⁰⁴ The statute of limitations will continue to run until that date. If the acknowledgement is complete within thirty days (plus ordinary first class mailing time) proof of service is deemed complete under CPLR 306.

If the defendant refuses to acknowledge service under CPLR 312-a the plaintiff must complete service under some other method.²⁰⁵ Plaintiff, however, may ask the court to assess the reasonable expense of other service on the defendant.²⁰⁶ When another method is at-

199. *See generally* N.Y. CPLR 312-a (McKinney Supp. 1990); N.Y. CPLR 308 (McKinney 1986 & Supp. 1990); N.Y. CPLR 313 (McKinney 1972).

200. COUND, FRIEDENTHAL, MILLER & SEXTON 186-88 (5th ed. 1989).

201. N.Y. CPLR 309 (McKinney 1986).

202. *Id.* 312-a.

203. *Id.*

204. *Id.* 312-a(b).

205. *Id.* 312-a(e).

206. N.Y. CPLR 312-a(f).

tempted, the summons must refer to the prior unsuccessful attempt by mail.²⁰⁷ 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 130.²⁰⁸

Mail service is common under Federal Rules of Civil Procedure rule 4 and works well. Although the New York bar seems to thrive on strict compliance collateral litigation,²⁰⁹ it is highly likely that CPLR 312-a will reduce this litigation and ultimately result in fairness and justice to litigants.²¹⁰

2. *Strict Compliance*

No *Survey* on New York Civil Practice would be complete without reference to some of the significant decisions which demonstrate the importance of strictly complying with service statutes. The strict compliance case of the year is *Horowitz v. Village of Roslyn*,²¹¹ where the Second Department held that failure to comply with an obscure provision of the Nassau County Administrative Code regarding service resulted in dismissal of the plaintiff's tort action. In *Horowitz*, the plaintiff sought damages for defendants' alleged failure to maintain a roadway. Plaintiff commenced her action against Nassau County by serving a summons and complaint on the Nassau County Clerk pursuant to CPLR 311.²¹² Immediately thereafter, the county clerk forwarded the papers to the county attorney under Section 11-4.0 of the County Administrative Code. This section provides that service in all actions against Nassau County must be made on the county attorney or the county executive. After issue was joined, the defendants moved to dismiss the complaint for lack of personal jurisdiction. The motion was granted. The Second Department, with a vigorous dissent by Justice Rubin, held that the Nassau County Code service statute was a "special law" which was inconsistent with the general provisions of CPLR 311. Relying on CPLR 101, in which the New York State

207. *Id.* 312-a(e).

208. 22 NYCRR 130 (1987).

209. *See Civil Practice, 1988 Survey, supra* note 34, at 103-04.

210. *See Davies, supra* note 200.

211. 144 A.D.2d 639, 535 N.Y.S.2d 79 (2d Dep't 1988).

212. N.Y. CPLR 311(4) (McKinney Supp. 1990) (provides that "service upon . . . governmental subdivisions shall be made by delivering the summons . . . upon a county . . . to the clerk of the board of supervisors, clerk, attorney or treasurer").

Legislature disclaimed the intent to repeal any procedural rules inconsistent with the CPLR, the Second Department affirmed the dismissal.²¹³ The court, relying on the doctrine of strict compliance, rejected plaintiff's argument that the defect in service was cured by the county clerk's immediate redelivery of the summons and complaint to the county attorney.²¹⁴ The Second Department reached similar results in *Parisi v. Fretta*,²¹⁵ where the defendant had actual notice, and in *Sweda v. Gordon*,²¹⁶ where a resident physician at a hospital was held not to be an agent under CPLR 311. A final service compliance case of the year is *Caudle v. Adler*,²¹⁷ where in-hand personal delivery of summons and complaint was made on Dr. Marvin Adler instead of his son Dr. Jeffrey Adler. The Second Department dismissed the case because there was no evidence that the defendant, who had actual notice, attempted to evade service. These decisions and others during the *Survey* year created endless collateral litigation, and caused hardship and injustice for litigants.²¹⁸

213. *Horowitz*, 144 A.D.2d at 641, 535 N.Y.S.2d at 82; see also N.Y. CPLR 101 (McKinney 1972).

214. *Id.* at 641, 535 N.Y.S.2d at 82.

215. 151 A.D.2d 653, 542 N.Y.S.2d 713 (2d Dep't 1989).

216. 151 A.D.2d 740, 543 N.Y.S.2d 131 (2d Dep't 1989); see also N.Y. CPLR 311 (McKinney Supp. 1990).

217. 146 A.D.2d 598, 536 N.Y.S.2d 522 (2d Dep't 1989).

218. See N.Y. CPLR 308(1) (McKinney 1972 & Supp. 1990). For cases wherein actions were dismissed for failure to comply with the service statute, see *Dorfman v. Leidner*, 150 A.D.2d 935, 541 N.Y.S.2d 278 (3d Dep't 1989) (insufficient service on physician's receptionist even though process server was told by office staff they were authorized to accept service on physician's behalf); *Hoffman v. Petrizzi*, 144 A.D.2d 437, 534 N.Y.S.2d 11 (2d Dep't 1989) (personal service insufficient on physician when his receptionist merely stated, "I will take them"); *Avery v. Bazin*, 144 A.D.2d 609, 535 N.Y.S.2d 61 (2d Dep't 1988) (service on physician's medical assistant at doctor's office was insufficient). But see *Jones v. Nossoughi*, 147 A.D.2d 447, 537 N.Y.S.2d 565 (2d Dep't 1989) (service on physician's secretary was sufficient when made in doctor's office in presence of man who identified himself as physician); *Velez v. Smith*, 149 A.D.2d 753, 540 N.Y.S.2d 339 (2d Dep't 1989) (service on defendant's grandmother who owned building wherein defendant had apartment was improper). Regarding sufficiency of service under CPLR 308(4), see *Cuomo v. Cuomo*, 144 A.D.2d 331, 533 N.Y.S.2d 940 (2d Dep't 1989); *Anello v. Barry*, 149 A.D.2d 640, 540 N.Y.S.2d 460 (2d Dep't 1989); *Schurr v. Fillebrown*, 146 A.D.2d 623, 536 N.Y.S.2d 532 (2d Dep't 1989) (service on person of suitable age and discretion but mailing to defendant's address invalid because defendant had not resided there for six years). For cases dealing with CPLR 308(5), see *Fattarusso v. Leuco American Improvement Corp.*, 144 A.D.2d 626, 535 N.Y.S.2d 62 (2d Dep't 1989) (failure to comply with due diligence requirement); *DeShong v. Marks*, 144 A.D.2d 623, 535 N.Y.S.2d 19 (2d Dep't 1989) (failure to comply with due diligence requirement even though defendant clearly had actual notice); *Sullivan v. Murray*, 145 A.D.2d 826, 535 N.Y.S.2d 811 (3d Dep't 1989) (failure to comply with due diligence requirement); *Giselle*

D. *The Hague Convention*

Last year's *Survey* reminded the practitioner of service under the Hague Convention.²¹⁹ The Hague Convention mandates that service abroad on a defendant who is a citizen of a nation that is a signatory to the convention must satisfy not only the requirements of New York State's service statutes, but also conform with the Hague Convention service requirements.²²⁰ The Convention is not applicable to citizens of nations who have not ratified it or if service is made upon the defendant, or the defendant's agent, within the United States. A forum selection clause may void application of the Convention.²²¹

The most instructive Hague Convention case decided during the *Survey* year was *Vazquez v. Sund Emba A.B.*²²² In a thoughtful opinion, which carefully interprets the provisions and purpose of the Convention, the Second Department held that the requirements of service pursuant to the Convention were satisfied.²²³ The Second Depart-

Arce v. Beleslaw Rydzewski, 201 N.Y.L.J., April 27, 1989, at 26, col. 4 (N.Y.C. Civ. Ct., Queens Co.) (failure to comply with due diligence requirement). For cases decided based on CPLR 311, see *Franchido v. Onay*, 150 A.D.2d 518, 541 N.Y.S.2d 113 (2d Dep't 1989) (conclusory affidavits not enough to show service impractical; also no affidavits of attempted service from processors who allegedly attempted service); *Weldon v. Long Island College Hosp.*, 142 Misc. 2d 82, 535 N.Y.S.2d 949 (Sup. Ct., Kings Co. 1988) (no showing that service impracticable). *But see* *Tremont Savings & Loan Assoc. v. Ndanusa*, 144 A.D.2d 660, 535 N.Y.S.2d 8 (2d Dep't 1989) (service by publication approved because service impracticable). For cases interpreting the New York Vehicle and Traffic Law service provisions, see *Henderson v. City of New York*, 143 A.D.2d 884, 533 N.Y.S.2d 547 (2d Dep't 1988) (service on New York City not effective as to Health and Hospitals Corporation); *Harrington v. Victory Trucking Co.*, 141 Misc. 2d 327, 533 N.Y.S.2d 233 (Sup. Ct., Suffolk Co. 1988); *Nunez v. Nunez*, 145 A.D.2d 347, 535 N.Y.S.2d 613 (1st Dep't 1988).

219. *See Civil Practice, 1988 Survey, supra* note 34, at 108-09; Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1963, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; *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).

220. *See, e.g., Vazquez v. Sund Emba A.B.*, 152 A.D.2d 389, 548 N.Y.S.2d 728 (2d Dep't 1989).

221. *See Civil Practice, 1988 Survey, supra* note 34, at 108-09.

222. 152 A.D.2d 389, 548 N.Y.S.2d 728.

223. *See Vazquez*, 152 A.D.2d at 389, 548 N.Y.S.2d at 728. Plaintiff's tort action was against a limited company organized under the laws of Sweden. Although plaintiff alleged defendant was doing business in New York, both parties implicitly consented that service pursuant to the Hague Convention was required. The plaintiff's summons and complaint written in English was personally served by a Swedish notary public upon the defendant's managing director in Sweden. Defendant moved to dismiss the complaint on the grounds that the restrictive language of article 10(e) of the Hague Convention, as applied to the Swedish declaration when it signed the Convention, prohibited personal

ment pointed out that "compliance with the Convention is mandatory in all cases to which it applies, and that the law of . . . New York determines whether or not service of process abroad is necessary."²²⁴ The Second Department also observed that the plaintiff had relied on "general guidelines" for Convention service, published by the United States Department of State.

Although the State Department guideline lacks the force of law and is not controlling on this court, *we recognize it to the extent that it reflects the State Department's advice to practitioners*, based on an interpretation of Swedish law, furnished primarily by the Swedish Ministries of Foreign Affairs and Justice in 1981 to the American Embassy in Stockholm.²²⁵

The Second Department also held that the plaintiff's failure to translate the summons and complaint into the language of the signatory nation did not violate the Hague Convention.²²⁶ However, the court warned the practitioner that:

Even though the Convention has been strictly followed, our own standards of due process require that the method of service be reasonably calculated, as a matter of fair play, to give actual notice to a prospective party abroad. Failure to provide a translation abroad may, in some instances, constitute a denial of due process.²²⁷

Lawyers making service under the Convention should follow applicable State Department guidelines, which are available by telephoning Washington, D.C.²²⁸ The practitioner should also have process translated into the language of the foreign nation where the defendant resides. A translation may cost a few dollars, but why risk a dismissal under New York law for failure to do so?

E. Forum Non Conveniens

New York courts may dismiss cases under CPLR 327(a), even if they have subject matter and personal jurisdiction.²²⁹ Last year's *Sur-*

service by a notary. The defendant argued that personal service must be made by a "central authority" of the Swedish government. The supreme court denied the motion to dismiss and held that service was sufficient under article 10(e) of the Convention. The Second Department affirmed.

224. *See id.* at 395, 548 N.Y.S.2d at 731.

225. *Id.* at 396, 548 N.Y.S.2d at 732 (emphasis added).

226. *Id.* at 398, 548 N.Y.S.2d at 733.

227. *Vazquez*, 152 A.D.2d at 398, 548 N.Y.S.2d at 733 (citations omitted).

228. *See Civil Practice, 1988 Survey, supra* note 34, at 109 (1989).

229. N.Y. CPLR 327(a) (McKinney Supp. 1989).

vey reminded the practitioner that while a section 327 motion may be subject to an interlocutory appeal in state court, federal courts do not permit *forum non conveniens* appeals until after trial.²³⁰ In *Chasser v. Achille Lauro Lines*,²³¹ the United States Supreme Court granted certiorari to determine if the Second Circuit was correct in concluding that it did not have interlocutory authority to review a federal judge's ruling that a personal injury and wrongful death suit must be tried in United States courts and not a foreign forum.²³² On May 22, 1989 the Supreme Court ruled unanimously that the defendants could only challenge the district court's denial of their *forum non conveniens* motion after trial.²³³

There were few noteworthy cases under CPLR 327(a) this year. In *Martin-Trigona v. Waaler & Evans*,²³⁴ the First Department held that an action in fraud against an Illinois law firm could be dismissed on the ground of *forum non conveniens*.²³⁵ More importantly, several New York courts held that defendants waive their *forum non conveniens* motions by waiting too long to make the motion.²³⁶ These decisions follow the lead of the First Department in *Corines v. Dobson*,²³⁷ which denied a CPLR 327(a) motion which was made after discovery was completed. Because 327(a) motions are tantamount to subject matter jurisdiction objections under CPLR 3211(a)(2), it

230. See *Civil Practice, 1988 Survey*, *supra* note 34, at 110-12 (denial of a *forum non conveniens* motion is not appealable under 28 U.S.C. § 1291); see also *Carlenstolpe v. Merek & Co.*, 819 F.2d 33 (2d Cir. 1987) (Second Circuit ruled for the first time that federal district court order denying motion to dismiss on *forum non conveniens* grounds is not an appealable order under 28 U.S.C. § 1291).

231. 844 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988); see also Note, *Justices to Decide Issue in Achille Lauro Hijacking*, 200 N.Y.L.J., Oct 12, 1988, at 1, col. 1.

232. See *Chasser*, 844 F.2d at 52.

233. See *Lauro Line, S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989) (suit stemming from Palestinian terrorists' hijacking of cruise ship may be tried in federal court in New York).

234. 148 A.D.2d 361, 539 N.Y.S.2d 9 (1st Dep't 1989).

235. *Marten-Trigona*, 148 A.D.2d at 363, 539 N.Y.S.2d at 11 ("plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties"). But see *Gyenes v. Zionist Org. of Am.*, 202 N.Y.L.J., Aug. 9, 1989 at 18, col. 5, (Sup. Ct., N.Y. Co. 1989).

236. See, e.g., *International Hous. Ltd. v. Rafidian Bank Iraq*, 721 F. Supp. 1112 (S.D.N.Y. 1989); *Bock v. Rockwell Mfg. Co.*, 151 A.D.2d 629, 543 N.Y.S.2d 89 (2d Dep't 1989); *Persaud v. Goriah*, 143 Misc. 2d 225, 539 N.Y.S.2d 872 (Sup. Ct., Bronx Co. 1989).

237. 135 A.D.2d 390, 521 N.Y.S.2d 686 (1st Dep't 1988).

would appear they can be raised at any time.²³⁸ Nonetheless, in *Bock v. Rockwell Manufacturing Co.*, the Second Department held that the defendants were guilty of laches.²³⁹ "Having participated in the action for such an extended period of time, to wit, approximately fifteen months before moving to dismiss, the defendants cannot claim that New York is an inconvenient forum."²⁴⁰ Similarly, in *Persaud v. Goriah*, Judge Friedman held that a delay of almost eighteen months between service of the summons and complaint and a 327(a) motion was a waiver of the defendant's right to make the motion.²⁴¹ The waiver principle was also applied by Judge Ward in *International Housing Ltd. v. Rafidain Bank Iraq*.²⁴²

Because prior *Surveys* have tracked the *Bhopal* case,²⁴³ it is appropriate to report that on February 14, 1989 the Supreme Court of India ordered a full and final settlement of 470 million dollars.²⁴⁴ Although this figure represents the largest award ever for an industrial accident,²⁴⁵ the damages could have been much higher if the case had not been dismissed in New York under the doctrine of *forum non conveniens*. Not only does India have a much stricter standard of liability and causation than the United States, but compensation awards for personal injury law suits have historically been less in India.²⁴⁶

238. See SIEGEL, HANDBOOK ON NEW YORK PRACTICE § 28 (1978) ("There is no stated time limit on when the motion can be made."); see also N.Y. CPLR 3211(a)(2).

239. *Bock*, 151 A.D.2d at 631, 543 N.Y.S.2d at 91.

240. *Id.* (citations omitted).

241. *Persaud*, 143 Misc. 2d at 230, 539 N.Y.S.2d at 875 ("The court finds that delay sufficient to support the conclusion that defendant accepted the jurisdiction of the New York courts and waived her right to make the *forum non conveniens* motion.").

242. 712 F. Supp. at 1120. The court's holding that it lacked personal jurisdiction mooted the *forum non conveniens* motion but noted that the motion "is inappropriate in the procedural context of this case, as a default judgment had already been entered in this action." *Id.*

243. See *In re Union Carbide Corp.*, 634 F. Supp. 842 (S.D.N.Y. 1986), modified *sub nom.* Plaintiffs v. Union Carbide Corp., 809 F.2d 195 (2d Cir. 1987); see also *Civil Practice, 1988 Survey*, *supra* note 34, at 112; Reese, *Conflict of Laws, 1987 Survey of N.Y. Law*, 39 SYRACUSE L. REV. 219, 224-26 (1988); N.Y. Times, Feb. 15, 1989, at A1, col. 5.

244. See N.Y. Times, Feb. 15, 1989, at A1, col. 5.

245. See Labaton, *Bhopal Outcome: Trial is Avoided*, N.Y. Times, Feb. 15, 1989, at D3, col. 1.

246. *Id.*

*F. Waiver of Jurisdictional Defenses, Appearance, and
Jurisdictional Disclosure*

Two years ago *Addesso v. Shemtob*²⁴⁷ was discussed in some detail in this *Survey*. That case held that defendants seeking to take advantage of jurisdictional challenges must rigidly abide by the requirements of CPLR 3211(e).²⁴⁸ During the *Survey* year three courts in the appellate division reminded the bar that valid jurisdictional objections will be waived by failure to raise them properly.²⁴⁹ Although there were limited exceptions to the harsh *Addesso* rule,²⁵⁰ the practitioner should remember to raise her CPLR 3211(7) objection whenever she first files a motion or an answer.²⁵¹ Frivolous motions may result in sanctions,²⁵² thus lawyers should be careful to determine if a jurisdictional challenge actually exists.

Another interesting example where the personal jurisdiction defense was waived occurred in *Kaider v. International Union of Operating Engineers Local 14*.²⁵³ After the plaintiff had attempted service of a summons with notice, the defendants removed the action to federal court. The action was later remanded to state court. Justice Hentel held that the failure of the defendants to preserve any objections based on lack of personal jurisdiction in their removal petition meant the objection had been waived.²⁵⁴

Once the question of personal jurisdiction is raised by motion,

247. 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987).

248. See *Civil Practice, 1987 Survey*, *supra* note 171, at 135; see also N.Y. CPLR 3211(e).

249. See *DeFilippis v. Perez*, 148 A.D.2d 490, 539 N.Y.S.2d 22 (2d Dep't 1989) (defendants waived defense of lack of personal jurisdiction by failure to raise it in their initial answer to original complaint and in their motion to dismiss for failure to state a cause of action); *Reed v. New York*, 147 A.D.2d 767, 537 N.Y.S.2d 350 (3d Dep't 1989) (holding that "when a party fails to move to dismiss for lack of personal jurisdiction or to assert such a defense in its answer, such an objection is deemed waived. . ."); *Rubino v. City of New York*, 145 A.D.2d 285, 538 N.Y.S.2d 547 (1st Dep't 1989) (jurisdictional defenses waived when not properly raised).

250. See *Blumstein v. Menaldino*, 144 A.D.2d 412, 533 N.Y.S.2d 987 (2d Dep't 1988) (defendants objection to personal jurisdiction was properly considered on renewed motion even though defendants initially failed to raise it).

251. N.Y. CPLR 3211(f).

252. 22 NYCRR 130, 130-a (1987).

253. 202 N.Y.L.J., Oct. 23, 1989, at 28, col. 3 (Sup. Ct., Queens Co.).

254. Justice Hentel relied on *Farmer v. National Life Ass'n*, 138 N.Y. 265, 33 N.E. 1075 (1893). Modern courts have rejected *Farmer*. See also *Wurtenberger v. Cunard Line Ltd.*, 370 F. Supp. 342 (S.D.N.Y. 1974); *Simkins v. Gruenspan*, 118 Misc. 2d 107, 459 N.Y.S.2d 955 (Sup. Ct., N.Y. Co. 1983).

the practitioner should not hesitate to insist on the jurisdictional disclosure provided by CPLR 3211(d).²⁵⁵ In state courts, good faith conclusory allegations of jurisdiction present a "sufficient start" to entitle a plaintiff to disclosure on jurisdictional issues.²⁵⁶ Furthermore, jurisdictional disclosure orders cannot be appealed as a matter of right.²⁵⁷

Finally the bar should be alert to the consequences of making an informal appearance.²⁵⁸ When a defendant participates in a lawsuit on the merits, she submits to the court's *in personam* jurisdiction and cannot later attack the jurisdiction of the court.²⁵⁹ This principle was carefully analyzed during the *Survey* year by the First Department in *Rubino v. City of New York*.²⁶⁰ In *Rubino*, a tort action was filed against the City of New York and the Board of Education.²⁶¹ The corporation counsel answered on behalf of the city only, but engaged in pre-trial discovery on behalf of both defendants. At trial, the corporation counsel represented both defendants. The trial court dismissed the action after completion of the plaintiff's case.²⁶² The First Department affirmed the dismissal against the city but reinstated the complaint against the Board of Education.²⁶³ Following the remand, the corporation counsel moved to dismiss the complaint against the Board of Education on jurisdictional grounds. The First Department held that the defendant, Board of Education, did not show that it was without knowledge of the lawsuit and that the participation on its behalf by corporation counsel constituted an informal appearance.²⁶⁴ Thus, the Board of Education waived its jurisdictional defense. The

255. See N.Y. CPLR 3211(d).

256. See 1 WEINSTEIN-KORN-MILLER, NEW YORK CIVIL PRACTICE ¶ 301.07, at 3-16 (1990).

257. See *Dioguardi v. Flushing Hosp. & Medical Center*, 149 A.D.2d 651, 540 N.Y.S.2d 463 (2d Dep't 1989); *Blumstein v. Menaldino*, 144 A.D.2d 412, 533 N.Y.S.2d 987 (2d Dep't 1988).

258. See N.Y. CPLR 320 (McKinney 1972 & Supp. 1990); WEINSTEIN-KORN-MILLER, *supra* note 256, § 320.12, at 3-432.

259. See McLaughlin, *Practice Commentaries*, N.Y. CPLR 320, 363-64.

260. 145 A.D.2d 285, 538 N.Y.S.2d 547 (1st Dep't 1989).

261. *Rubino*, 145 A.D.2d at 285, 538 N.Y.S.2d at 547. Plaintiff, a Bronx school teacher, was injured when a metal object was hurled into the schoolyard from adjoining property. Plaintiff sued the school board and the city, but only served summons and complaint on the latter entity.

262. *Id.* at 287, 538 N.Y.S.2d at 548.

263. *Id.*

264. *Id.* at 287, 538 N.Y.S.2d at 549.

message to the bar is clear; if multiple defendants are named make sure your appearance is solely on behalf of your client!

V. STATUTE OF LIMITATIONS

The New York Court of Appeals issued five important decisions interpreting and applying article II of the CPLR.²⁶⁵ Also, the courts in the appellate division issued important opinions involving the borrowing statute,²⁶⁶ recently-enacted CPLR 214-c,²⁶⁷ and notice of claims.²⁶⁸ Finally, the United States Court of Appeals for the Second Circuit held that CPLR 203(b)(5) applies to federal diversity suits.²⁶⁹

A. New York Court of Appeals

1. CPLR 214-c

In *Hymowitz v. Eli Lilly & Co.*,²⁷⁰ the New York Court of Appeals unequivocally held that the revivor statute enacted in 1986 was constitutional.²⁷¹ The court then rejected concerted action and several other theories in favor of a "market share theory, using a national market."²⁷² Thus liability is apportioned so as to correspond to the

265. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989); *Rizk v. Cohen*, 73 N.Y.2d 98, 535 N.E.2d 282, 538 N.Y.S.2d 229 (1989); *Scott v. Uljanov*, 74 N.Y.2d 673, 541 N.E.2d 398, 543 N.Y.S.2d 369 (1989); *Yonkers Contracting Co. v. New York*, 74 N.Y.2d 682, 541 N.E.2d 413, 543 N.Y.S.2d 384 (1989).

266. See *infra* notes 291, 296 and accompanying text.

267. See *infra* notes 270-271 and accompanying text.

268. See *infra* notes 310-319.

269. See *Personis v. Oiler*, 889 F.2d 424 (2d Cir. 1989).

270. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989); see also *DES Market-Share Liability Ruling Stands*, Nat'l L.J., Nov. 13, 1989, at 6, col. 1. For further discussion of *Hymowitz*, see Hamm, *New York's Tort Law: Whither The Wachtler Court?*, 202 N.Y.L.J., Sept. 19, 1989, at 1, col. 1; Schlesinger & Sanocki, *A Definitive DES Ruling In New York*, 201 N.Y.L.J., April 19, 1989, at 3, col. 1; Spencer, *DES Claimants Argue Validity of Suits*, 201 N.Y.L.J., Feb. 16, 1989, at 1, col. 3; Spencer, *DES Suits On Docket Of State's High Court*, 201 N.Y.L.J., Feb. 6, 1989, at 1, col. 3; Spencer, *State's DES Revival Law Upheld*, 201 N.Y.L.J., April 5, 1989, at 1, col. 3. *But see* Sandberg v. White Laboratories, 871 F.2d 3 (2d Cir. 1989) (New York's toxic tort revivor statute, reviving DES actions, did not also revive injuries caused by ingestion of diethylstilbestrol (DES)).

271. N.Y. CPLR 214-c (McKinney Supp. 1990); see also *Civil Practice, 1986 Survey*, *supra* note 191, at 72-74.

272. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The Court of Appeals market share approach represents a compromise between the position adopted by the First Department in *Bichler v. Eli Lilly*, that parallel conduct is sufficient to impose liability within concerted action theory of tort liability, and therefore, joint and

overall culpability of each defendant, measured by the amount of injury each defendant created to the public at large. Any defendant who is part of a market producing DES will be liable even though there is no proof that its product caused a particular plaintiff's injury.²⁷³ The court in *Hymowitz* also held that the liability of DES producers is several and not joint, and that the plaintiff's recovery should not be inflated when all participants in the market are not before the court. Thus, no defendant is to be responsible for more than its own market share. Therefore, as a practical matter, some plaintiffs may recover less than 100% of their damages.²⁷⁴ The United States Supreme Court denied certiorari in *Hymowitz*.²⁷⁵ It should be noted that while the market share approach is limited to DES cases, this ruling could have significant impact on courts handling DES actions in other parts of the nation, and in products liability cases in general.²⁷⁶ More important for New York plaintiffs is that over 500 DES lawsuits have been freed for trial.²⁷⁷ Also, the omission in the revivor statute with respect to punitive damages should not preclude such recovery.²⁷⁸

several liability is applicable, and the argument that general theories of products liability should apply which would require proof that the named defendant actually marketed the product which caused injuries to the plaintiff. See *Bichler*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981). The compromise was reached by a panel of five judges. Three of the court's judges recused themselves. Justice Mullen, who was designated pursuant to New York Constitution, article VI, section two, concurred in *Hymowitz v. Eli Lilly*, and *Hanfing v. Eli Lilly*, and dissented in part in *Tigue v. E.R. Squibb & Sons*, and *Dolan v. Eli Lilly*. *Hymowitz*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989). Justice Mullen concurred in the adoption of the market share theory, but was the sole dissenter insofar as he argued that the market share theory should be qualified. He argued that if a defendant can prove its particular pill was not ingested by the plaintiff, no liability should be against the defendant. He also argued that the liability of the remaining defendants should then be joint and several, so that each plaintiff is entitled to recover 100% of all damages.

273. *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. New York joins California, Washington, and Wisconsin in adopting market share theory.

274. *Id.* at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

275. 110 S. Ct. 350 (1989).

276. See *DES Market-Share Liability Ruling Stands*, *supra* note 270, at 6, col. 1 (no reason given by the Supreme Court for denial of certiorari, Justice O'Connor and Justice Scalia did not participate in the decision).

277. See *State's DES Revival Law Upheld*, *supra* note 270, at 1, col. 3.

278. See, e.g., *Racich v. Celotex Corp.* 887 F.2d 393 (2d Cir. 1989).

2. CPLR 214-a

In *Scott v. Uljanov*,²⁷⁹ the New York Court of Appeals clarified CPLR 214-a,²⁸⁰ which does not define the term "medical malpractice." The plaintiff, after consuming "substantial quantities of vodka and valium" entered Binghamton General Hospital and was placed in a bed with side rails. Thirty minutes later he climbed out of the bed and injured himself. Almost three years later he sued the hospital. The hospital claimed his suit was a medical malpractice claim and barred by the two and one-half year period under CPLR 214-a. A divided appellate division characterized the claim as negligence,²⁸¹ however, the Court of Appeals unanimously held the claim to be one of malpractice and dismissed it.²⁸² The court reasoned that the hospital's supervision and treatment of a patient during his initial emergency room care "constituted an integral part of the process of rendering medical treatment to him."²⁸³ The *Scott* opinion restricts the Court of Appeals' earlier opinion in *Bleiler v. Bodnar*,²⁸⁴ and stands for the proposition that almost any activity performed by the hospital during the healing process constitutes medical malpractice for the purposes of CPLR 214-a.

In *Rizk v. Cohen*,²⁸⁵ the Court of Appeals further restricted the continuous treatment doctrine when it held that a physician-initiated contact with a patient was merely a renewal of the physician-patient relationship and did not fall under the doctrine of continuous treatment.²⁸⁶ The court also rejected the defendant's fraudulent concealment argument because the plaintiff's allegations did not establish that the defendant made subsequent misrepresentations in an attempt to conceal his earlier negligence.²⁸⁷

Other decisions decided during the *Survey* year indicate that the

279. 74 N.Y.2d 673, 541 N.E.2d 398, 543 N.Y.S.2d 369 (1989).

280. See N.Y. CPLR 214-a (McKinney Supp. 1990).

281. *Scott v. Uljanov*, 140 A.D.2d 830, 528 N.Y.S.2d 435 (3d Dep't 1988).

282. *Scott*, 74 N.Y.2d at 675, 541 N.E.2d at 398, 543 N.Y.S.2d at 370.

283. *Id.* at 675, 541 N.E.2d at 399, 543 N.Y.S.2d at 370.

284. 65 N.Y.2d 65, 479 N.E.2d 230, 480 N.Y.S.2d 885 (1985).

285. 73 N.Y.2d 98, 535 N.E.2d 282, 538 N.Y.S.2d 229 (1989).

286. The court in *Rizk* held that the mere reliance on diagnosis, combined with doctor-initiated contact after two and one-half years does not meet requirements of continuous treatment tolling the statute in the absence of objective factors indicating that the extended period had been expressly contemplated. *Rizk*, 73 N.Y.2d at 105-06, 535 N.E.2d at 286, 538 N.Y.S.2d at 233.

287. *Id.*; see also *Simcusi v. Saeli*, 44 N.Y.2d 442, 450, 377 N.E.2d 713, 716, 406 N.Y.S.2d 259, 262 (1978).

continuing treatment and equitable estoppel doctrines continue to be restrictively applied.²⁸⁸

3. *New York Court of Claims Limitation*

In *Yonkers Contractors Co. v. State*,²⁸⁹ the Court of Appeals reversed a decision of the First Department which held that a Court of Claims judge had discretion to permit a claim to be filed late in an action arising out of public construction contracts. It is the legislature's responsibility to enact statutes of limitations, and judges have very limited discretion, if any, to extend them.

B. Borrowing Statute

CPLR 202 applies to actions brought by non-residents based on causes of action which occurred outside New York.²⁹⁰ These actions are subject to the limitation periods of New York and of the state in which they accrued and, thus, are barred if either period has expired.

In *Besser v. E.R. Squibb & Sons, Inc.*,²⁹¹ the First Department held that the one year revivor statute²⁹² did not apply to a claim of a non-resident of New York. Justice Sullivan, writing for the majority, noted that New York's borrowing statute was enacted to prevent forum shopping by non-resident plaintiffs.²⁹³ Justice Asch, in a thoughtful and well-reasoned dissent, argued that the plaintiff was a New York resident because she resided in New York when her revivor claim was filed in 1986. He also stressed that because CPLR

288. See *Edmonds v. Getchonis*, 150 A.D.2d 879, 541 N.Y.S.2d 250 (3d Dep't 1989) (continuous treatment doctrine applied in dental malpractice action); *Levine v. Lumbermens Mutual Casualty Co.*, 147 A.D.2d 423, 538 N.Y.S.2d 263 (1st Dep't 1989) (continuous representation in legal malpractice action tolled statute of limitations); *Werner v. Kwee*, 148 A.D.2d 701, 539 N.Y.S.2d 449 (2d Dep't 1989) (continuous treatment doctrine not applied). For equitable estoppel doctrine, see *Pennsylvania Eng'g Corp. v. Islip Resource Recovery Agency*, 714 F. Supp. 634 (E.D.N.Y. 1989) (equitable tolling doctrine not applicable to arbitration act's time limitations for seeking to vacate arbitration award); *Majid v. Fielitz*, 700 F. Supp. 704 (E.D.N.Y. 1988) (challenged evidence relevant to equitable estoppel); *Ross v. Community Gen. Hosp.*, 150 A.D.2d 879, 541 N.Y.S.2d 246 (3d Dep't 1989) (no continuous treatment but issue of fact as to whether equitable estoppel doctrine applies). See generally *Barker, Medical Malpractice: As Time Runs Out*, 202 N.Y.L.J., Aug. 24, 1989, at 3, col. 1.

289. 74 N.Y.2d 682, 541 N.E.2d 413, 543 N.Y.S.2d 384 (1989).

290. See N.Y. CPLR 202 (McKinney Supp. 1990).

291. 146 A.D.2d 107, 539 N.Y.S.2d 734 (1st Dep't 1989); see also *Anderson, Court Bars A DES 'Revival' Suit*, 201 N.Y.L.J., April 3, 1989, at 1, col. 3.

292. N.Y. CPLR 214-c (McKinney Supp. 1990).

293. *Besser*, 146 A.D.2d at 114, 539 N.Y.S.2d at 737.

214-c is not limited solely to New York residents, that general principle of statutory construction could not justify dismissal of her claim under CPLR 202.²⁹⁴ Justice Asch stated that the "notwithstanding" language of the revivor statute controlled and that the majority violated former Chief Judge Breitel's warning that "purpose cannot be a warrant to go beyond the language used."²⁹⁵ The Court of Appeals will hear *Besser* during 1990 and its decision will be reported next year. Other borrowing statute cases during the *Survey* year indicate that New York courts are restrictively applying CPLR 202.²⁹⁶

C. CPLR 203(b)(5): Sixty-Day Extension Applicable in Federal Diversity Cases

Prior *Survey* articles have discussed CPLR 203(b)(5).²⁹⁷ The major question relating to this statute during the *Survey* year was whether federal plaintiffs in diversity actions could take advantage of the sixty-day extension.²⁹⁸ The Second Circuit Court of Appeals held in *Personis v. Oiler*²⁹⁹ that the extension is applicable in diversity actions. On the issue of whether CPLR 203(b)(5) applies to federal diversity cases, the court held that:

It has long been established as a matter of federal law that state statutes of limitations govern the timeliness of state law claims under federal diversity jurisdiction. State law also determines the related questions of what events serve to commence an action and to toll the statute of limitations in such cases.³⁰⁰

On the issue of whether, under New York State law, CPLR 203(b)(5) is limited to suits brought in state court, the Second Circuit held that: "we find nothing in the text of the statute that confines its effect to

294. *Id.* at 118-24, 539 N.Y.S.2d at 740-44 (Asch, J., dissenting).

295. *Id.* at 119-20, 539 N.Y.S.2d at 741 (Asch, J., dissenting).

296. *See, e.g., Ceres Partners v. Gel Assocs.*, 714 F. Supp. 679 (S.D.N.Y. 1989) (action barred under CPLR 202); *Miller v. Grigoli*, 712 F. Supp. 1087 (S.D.N.Y. 1989) (action barred under CPLR 202); *DeMartino v. Rivera*, 148 A.D.2d 569, 539 N.Y.S.2d 38 (2d Dep't 1989) (action barred under CPLR 202). *See generally* Schlam & Genack, *New York's 'Borrowing' Statute: Injunctions*, 202 N.Y.L.J., April 21, 1989, at 3, col. 1 (discussion of place of injury test).

297. *See Civil Practice, 1988 Survey, supra* note 34, at 114-15; *Civil Practice, 1987 Survey, supra* note 171, at 121-22.

298. *See Kohn, U.S. Judges Differ On Rule Extending Filing Deadlines*, 202 N.Y.L.J., Sept. 26, 1989, at 1, col. 1 (four judges said 203(b)(5) was applicable in federal diversity cases and two said no).

299. 889 F.2d 424 (2d Cir. 1989).

300. *Personis*, 889 F.2d at 426 (citations omitted).

state court suits. Nor have we located any legislative history suggesting such a limitation.”³⁰¹

D. CPLR 214-c: The Discovery Rule

Prior editions of the *Survey*³⁰² have analyzed CPLR 214-c which applies a date of discovery accrual to some substance exposure cases. These articles predicted that New York courts would liberally construe the statutory reference to “substance.” In *Prego v. City of New York*,³⁰³ the Second Department held that CPLR 214-c applies to the AIDS virus because the statute is intended to apply to biological as well as chemical substances. The Second Department stated: “having waited so long for the Legislature to correct the unfairness of the old ‘date-of-exposure’ rule, we are not prepared to begin a retreat from the recently enacted remedial provisions of section 214-c by carving out artificial exceptions where the Legislature saw fit to create none.”³⁰⁴ Shortly after the *Prego* decision, the First Department reached the same result in *DiMarco v. Hudson Valley Blood Services*.³⁰⁵ The *Prego* case began trial in Kings County Supreme Court on January 2, 1990,³⁰⁶ and the result of the case will be reported in next year’s *Survey*.

In *Hoemke v. New York Blood Center*,³⁰⁷ Judge Owen dismissed a medical malpractice action and other claims against New York doctors who gave the plaintiff blood transfusions that may have caused her to acquire AIDS. The case is one of first impression on the issue of whether doctors have a duty to warn past patients that they may have developed AIDS from some prior treatment. If Judge Owen had found a duty, the defendant doctors would have been unable to raise a statute of limitations defense under CPLR 214-a. In another AIDS-related case,³⁰⁸ Justice Cohen held that a plaintiff, who was allegedly

301. *Id.* at 427.

302. See *Civil Practice*, 1988 *Survey*, *supra* note 34, at 117-18; *Civil Practice*, 1986 *Survey*, *supra* note 191, at 70-72.

303. 147 A.D.2d 165, 541 N.Y.S.2d 995 (2d Dep’t 1989).

304. *Prego*, 147 A.D.2d at 174, 541 N.Y.S.2d at 1011.

305. 147 A.D.2d 156, 542 N.Y.S.2d 521 (1st Dep’t 1989).

306. See Lagnado, *Dying AIDS Doc Wins a Round Against City*, N.Y. Post, Nov. 21, 1989, at 7, col. 1; *Doctors Claim of Getting AIDS At Work Goes To Trial*, Reporter Dispatch, Dec. 6, 1989, at A-6, col. 2.

307. 720 F. Supp. 45 (S.D.N.Y. 1989); see also Squiers, *AIDS Risk Warning Held Not Required*, 202 N.Y.L.J., Sept. 22, 1989, at 1, col. 5.

308. *Shawn v. Legs Co. Ltd. Partnership*, 202 N.Y.L.J., Sept. 11, 1989, at 23, col. 4

fired because he had the AIDS virus, could claim intentional infliction of emotional distress in a wrongful termination case. Justice Cohen stated: "if our community has determined to protect disabled persons from discrimination in employment, it follows that a jury could find that screaming at someone with a disability that he is going to be fired for that disability is utterly intolerable in a civilized community."³⁰⁹

E. 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. Prior *Survey* articles have warned that there is no comprehensive compilation of conditions precedent.³¹⁰ In addition, during the *Survey* year, courts continued to dismiss cases for failure to comply with notice of claim requirements.³¹¹ Furthermore, sections 50(e) and 50(l) of the New York General Municipal Law continued to cause complications for the bar. While the ninety-day time period under section 50(l) is ninety days after "the happening of an event" lawyers have difficulty determining what the event is.³¹² Moreover, practitioners representing criminal defendants should remember to file their notice of claim prior to an acquittal verdict, otherwise it will be too late to recover damages.³¹³ Finally, New York's General Municipal Law requires that a motion for leave to file a late notice of claim must be filed in state supreme or county court, and not in federal court.³¹⁴

(Sup. Ct., N.Y. Co.); see also Anderson, *Trial Ordered of AIDS Suit Over Firing*, 202 N.Y.L.J., Sept. 11, 1989, at 1, col. 5.

309. *Shawn*, 202 N.Y.L.J., Sept. 11, 1989, at 23, col. 4.

310. See *Civil Practice*, 1987 *Survey*, *supra* note 171, at 133-34.

311. See *Altmayer v. City of N.Y.*, 149 A.D.2d 638, 540 N.Y.S.2d 459 (2d Dep't 1989) (notice of claim insufficient for lack of specificity); *Lopez v. Brentwood Union Free School Dist.*, 149 A.D.2d 474, 539 N.Y.S.2d 969 (2d Dep't 1989) (trial court improvidently deemed late notice of claim timely); *Strevell v. South Colonie Cent. School Dist.*, 144 A.D.2d 733, 535 N.Y.S.2d 147 (3d Dep't 1988) (late notice of claim permitted).

312. See N.Y. GEN. MUN. LAW § 50(e), (l) (McKinney Supp. 1990); see also Barker, *Recent Developments*, 201 N.Y.L.J., Jan. 23, 1989, at 3, col. 1.

313. See Ginsburg, *New Developments For Late-Notice Claims For False Arrest, Malicious Prosecution*, 202 N.Y.L.J., Aug. 25, 1989, at 1, col. 1 (explaining how and when applications for extension of notice of claim may be made).

314. See *Lipinski v. Skinner*, 700 F. Supp. 637 (N.D.N.Y. 1988). In *Lipinski*, the

Two other decisions merit brief mention. In *Schaeffer v. New York*,³¹⁵ a court of claims judge held that it is necessary to obtain a return receipt when serving a notice of intention to file a claim against the State of New York by mail.³¹⁶ It is important to remember that the date of receipt, and not the date of posting, of a notice of claim is crucial. Furthermore, the Court of Appeals held that under New York Eminent Domain Procedure Law ("EDPL") section 503(B)³¹⁷ a claim for damages arising out of the condemnation of real property must be interposed by filing a written claim, demand, or notice of appearance "within the time specified by the court."³¹⁸ The Court of Appeals states "the time . . . is not a statute of limitations. Nor is it a condition precedent." Instead it is a "procedural direction" subject to the court's "broad discretion."³¹⁹

F. Miscellaneous

There were many statute of limitations decisions reported during the *Survey* year. A few are particularly worthy of mention.

1. Three Year Statute of Limitations for Civil Rights Cases

In *Corbett v. Reynolds*,³²⁰ the First Department held that civil rights claims under 42 U.S.C. section 1983³²¹ are governed by CPLR 214(5), which is a three-year general personal injury statute.³²² The First Department relied on the United States Supreme Court's holding in *Owens v. Okure*,³²³ which determined the applicable statute of

plaintiff commenced a civil rights claim in federal court and sought permission to file a late notice of claim as to his pendent state claims. His notice was denied, without prejudice, and the court held that it could be filed only in New York State supreme or county courts. *Id.* at 637.

315. 145 Misc. 2d 135, 545 N.Y.S.2d 1019 (Ct. Cl. 1989) (claimant served a notice of intention to file a medical malpractice claim sent by express mail but service of claim was filed more than ninety days after accrual of the cause of action); *see also* Kohn, *Receipt Held Required of Claim Against State*, 202 N.Y.L.J., Oct. 21, 1989, at 1, col. 5.

316. *Schaeffer*, 145 Misc. 2d at 139, 545 N.Y.S.2d at 1021.

317. N.Y. EDPL 503(B) (McKinney 1979 & Supp. 1990).

318. *See Grandinetti v. Metropolitan Transp. Auth.*, 74 N.Y.2d 785, 543 N.E.2d 737, 545 N.Y.S.2d 94 (1989).

319. *Grandinetti*, 74 N.Y.2d at 785, 543 N.E.2d at 738, 545 N.Y.S.2d at 94.

320. 151 A.D.2d 227, 542 N.Y.S.2d 163 (1st Dep't 1989).

321. 42 U.S.C. § 1983 (1982 & Supp. V 1988).

322. N.Y. CPLR 214(5) (McKinney 1972 & Supp. 1990).

323. 109 S. Ct. 573 (1989).

limitations for 42 U.S.C. section 1983 actions to be the state's general or residual personal injury statute of limitations.

2. *Waiver of Limitations Defense*

In *Armstrong v. Peat, Marwick, Mitchell & Co.*,³²⁴ the First Department held that a defendant who failed to raise a statute of limitations defense either by motion or in its original answer, could interpose the defense in an amended answer. The key is whether the amendment causes the plaintiff "prejudice or surprise resulting from the delay."³²⁵ Personal jurisdiction defenses *must* be raised either by motion or in the original answer.³²⁶

3. *CPLR 205(a)*

Prior *Survey* articles have warned that the six-month grace period provided by CPLR 205(a) is absolutely not applicable for a matter dismissed for lack of personal jurisdiction.³²⁷ In *Dyer v. Cahan*,³²⁸ the First Department held that a dismissal for lack of subject matter jurisdiction will be given the benefit of CPLR 205(a), provided that other elements of the statute are satisfied.

4. *Uniform Federal Limitation Period*

Most limitations periods in federal actions are adopted from similar state statutes.³²⁹ This practice results in a lack of uniformity. The New York State Bar Association's distinguished Section on Commercial and Federal Litigation has urged Congress to adopt uniform federal limitations periods.³³⁰ Developments will be reported in next year's *Survey*.

VI. DISCLOSURE

There were many disclosure decisions rendered during the *Sur-*

324. 150 A.D.2d 189, 540 N.Y.S.2d 799 (1st Dep't 1989).

325. *Armstrong*, 150 A.D.2d at 190, 540 N.Y.S.2d at 801.

326. *See* *Addesso v. Shemtob*, 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987).

327. *See Civil Practice, 1988 Survey, supra* note 34, at 101; *Civil Practice, 1987 Survey, supra* note 191, at 111.

328. 150 A.D.2d 172, 540 N.Y.S.2d 785 (1st Dep't 1989).

329. *See Section Urges Congress To Adopt Uniform Limitation Periods For Federal Actions*, 31 N.Y. ST. B. NEWS, June 1989, at 13, col. 3.

330. *See* Report of NYSBA Commercial and Federal Litigation Section (on file at Syracuse University College of Law, H. Douglas Barclay Law Library).

vey year. New York courts continued to restrictively apply provisions of article 31 to limit discovery requests.³³¹ In addition, cases were dismissed for failure to comply with disclosure orders.³³² The three most important opinions during the *Survey* year related to waiver of the doctor-patient privilege in a personal injury action,³³³ to the lawyer-client privilege in corporations,³³⁴ and to ex parte communications by a claimant's attorney with current employees and agents of a corporate adversary.³³⁵ Additional decisions discussing the work-product privilege,³³⁶ preaction disclosure,³³⁷ fifth amendment objections,³³⁸ disclosure from experts for third party defendants,³³⁹ appeal

331. See *Cardillo v. Hillcrest Gen. Hosp.*, 149 A.D.2d 454, 539 N.Y.S.2d 953 (2d Dep't 1989) (no waiver of physician-patient privilege in medical malpractice case and disclosure denied); *Colish v. Abramson*, 150 A.D.2d 210, 540 N.Y.S.2d 813 (1st Dep't 1989) (tax records not subject to discovery); *Spancrete Northeast, Inc. v. Elite Assocs., Inc.*, 148 A.D.2d 694, 539 N.Y.S.2d 441 (2d Dep't 1989) (disclosure requests improper because they sought information of a confidential and improper nature); *Randall Elec., Inc. v. State*, 150 A.D.2d 875, 540 N.Y.S.2d 901 (3d Dep't 1989) (plaintiff not entitled to compel discovery of documents created as result of informal, off-the-record negotiations designed to settle claim); *Lopez v. Huntington Autohaus Ltd.*, 150 A.D.2d 351, 540 N.Y.S.2d 874 (2d Dep't 1989) (overbroad interrogatories were irrelevant and immaterial and therefore burdensome and oppressive); *Auburn Publishers, Inc. v. City of Auburn*, 147 A.D.2d 900, 537 N.Y.S.2d 354 (4th Dep't 1989) (no disclosure because requested information would interfere with law enforcement investigation); *Semi-Alloys, Inc. v. Electroalloy Corp.*, 150 A.D.2d 550, 541 N.Y.S.2d 128 (2d Dep't 1989) (no disclosure for confidential documents); *Bartl v. Robert Half of Long Island, Inc.*, 150 A.D.2d 747, 542 N.Y.S.2d 197 (2d Dep't 1989) (no disclosure of trade secrets).

332. See *Beard v. Peconic Foam Insulation Corp.*, 149 A.D.2d 555, 540 N.Y.S.2d 258 (2d Dep't 1989) (trial court did not improvidently exercise its discretion in invoking sanction of dismissal for plaintiff's failure to comply with court ordered discovery); *Capoccia v. Brognano*, 149 A.D.2d 867, 540 N.Y.S.2d 368 (3d Dep't 1989) (civil complaint dismissed for failure to comply with disclosure orders); *Walk & Smile v. 2491 Atlantic Ave. Corp.*, 150 A.D.2d 366, 540 N.Y.S.2d 541 (2d Dep't 1989) (order of trial court affirmed for failure to comply with discovery deadlines).

333. See *Dillenbeck v. Hess*, 73 N.Y.2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 (1989).

334. See *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989).

335. See *Niesig v. Team I*, 149 A.D.2d 94, 545 N.Y.S.2d 153 (2d Dep't 1989); see also *O'Mara, Niesig Contrasts With California Ban*, 202 N.Y.L.J., Sept. 20, 1989, at 2, col. 7; *Dorn, Reconsider Neisig*, 202 N.Y.L.J., Aug. 30, 1989, at 2, col. 7; *Anderson, Bar Lawyer Questions of Company Workers*, 202 N.Y.L.J., Aug. 11, 1989, at 1, col. 3.

336. See *In re Estate of Johnson*, 142 Misc. 2d 690, 538 N.Y.S.2d 173 (Sup. Ct., N.Y. Co. 1989) (documents absolutely protected from disclosure by work-product privilege).

337. See *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536 N.Y.S.2d 784 (1st Dep't 1989) (preaction disclosure is not permissible as a fishing expedition to ascertain whether a course of action exists).

338. *Chase Manhattan Bank v. Federal Chandros, Inc.*, 148 A.D.2d 567, 539

of federal discovery orders,³⁴⁰ non-party document discovery,³⁴¹ and standards for disclosure by experts³⁴² should be noted. The practitioner should also be aware of recent disclosure developments pertaining to commissions for extrastate testimony,³⁴³ complications of using depositions in consolidated actions,³⁴⁴ and use of word processor technology for interrogatories.³⁴⁵ Finally, the New York State Bar Association has proposed major changes in federal discovery rules.³⁴⁶

In *Dillenbeck v. Hess*, a divided New York Court of Appeals held that a defendant does not waive the doctor-patient privilege even when the plaintiff presents clear proof that the defendant's physical condition is in controversy.³⁴⁷ The *Dillenbeck* decision extends the

N.Y.S.2d 36 (2d Dep't 1989) (to successfully invoke protections of fifth amendment, litigants must make particularized objection to each discovery request).

339. See *Breslauer v. Dan*, 150 A.D.2d 324, 540 N.Y.S.2d 854 (2d Dep't 1989) (special circumstances permit disclosure of report of expert for third-party plaintiffs under N.Y. CPLR 310(d)(1)(i) and (iii)).

340. See *In re American Tobacco Co.*, 866 F.2d 552 (2d Cir. 1989) (order directing a witness to produce evidence sought for use in trial was not appealable in advance of an adjudication of contempt, even though order only requested documents, and was granted by a court other than where action was pending).

341. See *Stotsky v. Gerring Indus., Inc.*, 143 Misc. 2d 372, 540 N.Y.S.2d 401 (Sup. Ct., Cattaraugus Co. 1989) (third party not a "party" within meaning of N.Y. CPLR 3120 so that discovery inspection could not proceed by mere notice).

342. See *Rosario v. General Motors Corp. & Lee's Pontiac, Inc.*, 148 A.D.2d 108, 543 N.Y.S.2d 974 (1st Dep't 1989). The court in *Rosario* held:

[W]hen material physical evidence is inspected by an expert for one side, and then lost or destroyed before the other side has had an opportunity to conduct its own expert inspection, a special circumstance exists within the meaning of CPLR 3101(d)(1)(iii) that per se warrants disclosure directly from the expert concerning the facts surrounding his inspection.

Id. at 109, 543 N.Y.S.2d at 974.

343. See *Stanzione v. Consumer Builders, Inc.*, 140 A.D.2d 682, 540 N.Y.S.2d 482 (2d Dep't 1989).

344. See *Stotsky v. Geering Indus.*, 143 Misc. 2d 372, 540 N.Y.S.2d 401 (Sup. Ct., Cattaraugus Co. 1988).

345. Party requesting response to "word processor" interrogatories should forward the disk with the interrogatories to facilitate response. Conversation with Robert M. Milner, Esq., Dec. 9, 1989.

346. See Nance, *Bar Urges Reform of Federal Discovery*, 202 N.Y.L.J., July 31, 1989, at 1, col. 3. According to a 1988 survey, 53% of New York lawyers agreed that discovery abuse was a problem. Agreement was very vocal among lawyers who specialize in discovery-intensive fields such as antitrust, intellectual property and securities. The report proposed changes to tighten the restrictions on discovery, to add cost-benefit language and to adopt new local court rules in the federal courts for the southern and eastern districts of New York. *Id.*

347. *Dillenbeck*, 73 N.Y.2d at 289, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714.

rule established in *Koump v. Smith*³⁴⁸ that a defendant does not waive the doctor-patient privilege unless she asserts her condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff."³⁴⁹ Judge Bellacosa, in his vigorous dissent in *Dillenbeck*, argued that the *Koump* rule was "misapplied and then extended in a direction antithetical to that which was intended."³⁵⁰ In *Dillenbeck* there was no reason to prevent the plaintiff from examining the hospital report which demonstrated defendant's high blood alcohol level. Certainly evidence of her intoxicated condition was relevant and could lead to evidence admissible at trial.³⁵¹

In *Rossi v. Blue Cross & Blue Shield*, the Court of Appeals ruled unanimously that a memo written by a Blue Cross staff lawyer to the firm's medical director was not subject to disclosure.³⁵² The opinion provides guidelines for the difficult questions raised by the attorney-client privilege issue in the corporate context. The *Rossi* opinion expands the scope of this privilege and broadly applies it. The Court of Appeals, speaking through Judge Kaye, stated: "so long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters."³⁵³ In *Niesig v. Team I*, the Second Depart-

348. 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969). In *Koump*, the Court of Appeals held that a defendant does not waive the doctor-patient privilege by defending a tort suit where her physical condition is in controversy, unless she "affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff." *Koump*, 25 N.Y.2d at 294, 205 N.E.2d at 861, 303 N.Y.S.2d at 864.

349. *Id.* In *Dillenbeck*, plaintiff's decedent died in an accident caused by an intoxicated defendant. The defendant's blood level was tested "high" at the hospital and plaintiff requested the report pursuant to N.Y. CPLR 3121(a). The plaintiff's request was refused, on the basis of doctor-patient privilege, because the defendant's answer did not place her condition in controversy.

350. *Dillenbeck*, 73 N.Y.2d at 290, 536 N.E.2d at 1134, 539 N.Y.S.2d at 715 (Bellacosa, J., dissenting). Judge Bellacosa concluded his opinion stating: "to allow defendant to sweep scientific evidence under the rug of a physician-patient privilege in this case is to allow her to hide the truth, without legal justification or good purpose." *Id.* at 282, 536 N.E.2d at 1129, 539 N.Y.S.2d at 710.

351. See Siegel, *Doctor-Patient Privilege*, 351 N.Y. ST. L. DIG. 1 (March 1989). "Had the blood test been given by a police officer, for example, it would have been disclosable under New York Vehicle and Traffic Law provisions, which even make submission to chemical tests mandatory in serious accident cases." *Id.*; see also N.Y. VEH. & TRAF. LAW 1194(2)(a) (McKinney Supp. 1990).

352. *Rossi*, 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508; see also Spencer, *Lawyer-Client Privilege in Corporations Defined*, 201 N.Y.L.J., June 17, 1989, at 1, col. 3.

353. *Rossi*, 73 N.Y.2d at 594, 540 N.E.2d at 706, 542 N.Y.S.2d at 511 (citations omitted).

ment prohibited all ex parte communication by a claimant's attorney with all current employees of a corporate adversary.³⁵⁴ The Second Department presumption that all current employees are agents of a corporation contradicts the Court of Appeals' view as to the attorney-client relationship.³⁵⁵ The *Niesig* opinion is also arguably contrary to the Court of Appeals' decision in *Rossi*, and unfairly dismisses American Bar Association Model Rule of Professional Conduct rule 4.2.³⁵⁶ It also fails to provide adequate guidelines for corporate counsel who will be faced with serious conflict of interest problems.

VII. RES JUDICATA

Prior *Survey* articles³⁵⁷ have discussed the substantial developments in the doctrines of claim preclusion³⁵⁸ and issue preclusion.³⁵⁹ The Court of Appeals has adopted the use of the terms "claim preclusion" instead of "res judicata," and "issue preclusion" instead of "collateral estoppel."³⁶⁰

While there were few significant claim preclusion decisions dur-

354. *Niesig*, 149 A.D.2d 94, 545 N.Y.S.2d 153.

355. *Compare Nieseg*, 149 A.D.2d at 102, 545 N.Y.S.2d at 156-57 with *Priest v. Hennessy*, 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980).

356. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (Discussion Draft 1983); see also *Dorn*, *supra* note 355, at 2, col. 7.

357. See *Civil Practice*, 1988 *Survey*, *supra* note 34, at 120-26; *Civil Practice*, 1987 *Survey*, *supra* note 171, at 107-18; *Civil Practice*, 1986 *Survey*, *supra* note 171, at 141-48.

358. Under the doctrine of claim preclusion, a final judgment on the merits bars a subsequent action between the parties, or persons in privity with them, from relitigating the same cause of action. It bars the relitigation of claims that might have been litigated as well as those which actually were litigated. See *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981); *Smith v. Russell Sage College*, 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981).

359. As the doctrine of issue preclusion now stands, a valid final judgment on the merits rendered by a court of competent jurisdiction prevents relitigation by the parties or their privies of matters of fact or law actually litigated or necessarily determined in the earlier action. "First, the identical issue must necessarily have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985). When issue preclusive effect is given to an administrative finding in a subsequent judicial proceeding, additional factors must be considered. See *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 527 N.E.2d 754, 531 N.Y.S.2d 876 (1988). For a discussion of the factors, see *Civil Practice*, 1988 *Survey*, *supra* note 34, at 123-26; *Carlisle, Administrative and Arbitral Issue Preclusion in Subsequent Judicial Proceedings*, 16 WESTCHESTER B.J. 263 (Fall 1989).

360. See *In re American Ins. Co.*, 43 N.Y.2d 184, 189 n.2, 371 N.E.2d 798, 801 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977).

ing the *Survey* year,³⁶¹ New York State appellate courts continued to liberally apply the doctrine of issue preclusion in 1989.³⁶² In *People v. Nixon*,³⁶³ the Third Department held that claim preclusion would not prevent the involuntary recommitment of a mental patient. Justice Levine, in a thoughtful opinion involving a substantial and novel issue, applied the principles of the *Restatement (Second) of Judgments* to conclude that "litigation concerning the status of a person's mental capacity does not lend itself to the application of res judicata on a transactional analysis basis."³⁶⁴

In *Stevenson v. Goomar*,³⁶⁵ the Third Department held that issue preclusion would not bar relitigation of the findings of an administrative proceeding in a subsequent tort action. Although the doctrine was applicable under standards recently established by the Court of Appeals,³⁶⁶ the Third Department refused to apply issue preclusion on the grounds that it would deprive Dr. Goomar of a jury determina-

361. See *Murray v. National Broadcasting Co., Inc.*, 718 F. Supp. 249 (S.D.N.Y. 1989); *People v. Nixon*, 148 A.D.2d 75, 543 N.Y.S.2d 998 (3d Dep't 1989); see also *Colonial Acquisition Part. v. Colonial at Lynnhfield, Inc.*, 697 F. Supp. 714 (S.D.N.Y. 1988); *Feigen v. Advance Capital Management Corp.*, 146 A.D.2d 556, 536 N.Y.S.2d 786 (1st Dep't 1989) (applying transactional analysis theory); *Flushing Nat'l Bank v. Durante Bros. & Sons*, 148 A.D.2d 415, 538 N.Y.S.2d 569 (2d Dep't 1989) (federal court's prior dismissal of claims, even without specifying whether dismissal was with prejudice, is claim preclusion); *La Ruffa v. Smith*, 148 A.D.2d 885, 539 N.Y.S.2d 520 (3d Dep't 1989) (petitioner failed to show he did not have a full opportunity to litigate first claim and claim preclusion applied); *Ross Bicycles, Inc. v. Citibank, N.A.*, 146 A.D.2d 330, 539 N.Y.S.2d 906 (1st Dep't 1989) (discussing doctrine of res judicata); *Staten Investors Group v. Schaffer*, 147 A.D.2d 631, 537 N.Y.S.2d 990 (2d Dep't 1989) (termination of federal action upon filing of voluntary dismissal was claim preclusion).

362. See *Chism v. New York City Transit Auth.*, 145 A.D.2d 400, 535 N.Y.S.2d 730 (2d Dep't 1989); *Langdon v. Wen Management Co.*, 147 A.D.2d 450, 537 N.Y.S.2d 603 (2d Dep't 1989); *Murphy v. Sachem Cent. School Dist.*, 147 A.D.2d 623, 538 N.Y.S.2d 31 (2d Dep't 1989); see also *Young v. Coughlin*, 866 F.2d 567 (2d Cir. 1989); *Schulkin v. Stern*, 145 A.D.2d 326, 534 N.Y.S.2d 990 (1st Dep't 1988). But see *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) (arbitration award entered against defendants did not have preclusive effect); *Armstrong v. Bucci*, 153 A.D.2d 652, 544 N.Y.S.2d 668 (2d Dep't 1989). For a compilation of recent issue preclusion cases, see Carlisle, *supra* note 359, at 263-73. See also Barker, *Tewari Reversal; Collateral Estoppel*, 202 N.Y.L.J., Nov. 27, 1989, at 3, col. 3.

363. 148 A.D.2d 75, 543 N.Y.S.2d 998 (3d Dep't 1989).

364. *Nixon*, 148 A.D.2d at 79, 543 N.Y.S.2d at 1000-01.

365. 148 A.D.2d 217, 544 N.Y.S.2d 690 (3d Dep't 1989).

366. See *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276-77, 528 N.E.2d 153, 155-56, 532 N.Y.S.2d 230, 232-33 (1988), *cert. denied*, 109 S. Ct. 785 (1989); *Brugman v. City of N.Y.*, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

tion of the factual issues of the case.³⁶⁷ Justice Levine, in a well reasoned dissent, found that the majority had applied "the kind of formalistic approach to collateral estoppel that the court of appeals has repeatedly rejected."³⁶⁸ He also pointed out that the Court of Appeals' criteria for issue preclusion do not require that a prior administrative determination be made by a jury. Justice Levine stated: "to do so would severely undercut any application of collateral estoppel as to either prior administrative or arbitration determinations."³⁶⁹ Unfortunately the *Stevenson* case cannot now be appealed to the state's highest court because the decision was made on a summary judgment motion, and thus, will be sent back to the trial court. If the plaintiff loses there, which is unlikely because of the strength of her case, she can then appeal the appellate division's decision not to apply issue preclusion. In another matter, a family court judge held that a summary judgment on the issue of paternity did not have issue preclusive effect on a subsequent action on the very same issue.³⁷⁰ Both of these decisions demonstrate the conflict between the principles of fairness, finality, uniformity, and avoiding inconsistency which underlie the doctrine of issue preclusion.³⁷¹

Finally, in *Murray v. National Broadcasting Co.*,³⁷² the United States District Court for the Southern District of New York held that the "might have been" litigated requirement adopted by the United States Supreme Court in *Federated Department Stores, Inc. v. Moitie*,³⁷³ is not applicable to proceedings subject to the relitigation exception of the Anti-Injunction Act.³⁷⁴ Unless the claims have actually been litigated they will not be given preclusive effect.

367. *Stevenson*, 148 A.D.2d at 223, 544 N.Y.S.2d at 694.

368. *Id.* at 221, 544 N.Y.S.2d at 691 (Levine, J., dissenting).

369. *Id.* at 225, 544 N.Y.S.2d at 695 (Levine, J., dissenting).

370. *In re A.T. (M.K.)*, 202 N.Y.L.J., Oct. 24, 1989, at 30, col. 4 (Fam. Ct., Westchester Co.)

371. See Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84-94 (1986) (analyzing policy principles underlying the doctrine of issue preclusion).

372. 718 F. Supp. 249 (S.D.N.Y. 1989).

373. 452 U.S. 394, 398 (1981). New York courts have also adopted the "might have been raised" requirement for invocation of claim preclusion. See *O'Brien*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687.

374. "The relitigation exception does not protect the full res judicata effect of a federal court's judgment; rather it protects only matters that actually have been decided by a federal court." *Staffer v. Bouchard Transp. Co., Inc.*, 878 F.2d 638, 643 (2d Cir. 1989).

The practitioner should also note that the United States Supreme Court has granted certiorari to determine whether issue preclusion bars the relitigation of a claim before a jury that was improperly dismissed.³⁷⁵ In *Lytle v. Household Manufacturing, Inc.*,³⁷⁶ the United States Court of Appeals for the Fourth Circuit held that the trial judge had erred when he dismissed a claim in which the plaintiffs were entitled to a jury trial, but barred the issue from being tried again because the trial judge had decided the remaining equitable claims in the case.

VIII. PLEADINGS AND MOTIONS, VENUE, APPEALS

A. Pleading and Motions

The most important case decided during the *Survey* year was *Tewari v. Tsoutsouras*.³⁷⁷ The Court of Appeals held that failure to file a notice of malpractice action, as required by CPLR 3406(a),³⁷⁸ was not grounds for dismissal of the plaintiff's complaint. The *Tewari* opinion reversed a decision of the Second Department that had threatened to convert many medical malpractice actions into legal malpractice claims.³⁷⁹ Judge Simons dissented, and stated that the majority's ruling could undercut the intention of the 1985 Medical Malpractice Reform Act to remove "stale and meritless litigation" from the court system.³⁸⁰ Unfortunately, the *Tewari* rule as set forth by the Second Department, caused a substantial increase in motion

375. See *Lytle v. Household Mfg. Inc.*, 109 S. Ct. 3239 (1989).

376. 831 F.2d 1057 (4th Cir. 1987).

377. 75 N.Y.2d 1, 549 N.E.2d 1143, 550 N.Y.S.2d 572 (1989); see also Spencer, *Malpractice Lawsuit Reinstated Despite Defect in Notice Filing*, 202 N.Y.L.J., Oct. 25, 1989, at 1, col. 3.

378. N.Y. CPLR 3406(a) (McKinney 1989) requires plaintiff's attorneys to file a notice of the medical malpractice action and affidavit of merit with the clerk of the court within sixty days after issue is joined. In *Tewari*, issue was joined in June, 1989, and, after plaintiffs failed to comply with discovery demand, a CPLR 3406(a) motion was made. The trial judge permitted the late notice in an order dated May 1, 1987. The Second Department reversed, and stressed that the plaintiff had not given a "reasonable excuse" for the eight-month delay. See *Tewari v. Tsoutsouras*, 140 A.D.2d 104, 532 N.Y.S.2d 288 (2d Dep't 1988).

379. *Tewari*, 140 A.D.2d at 112, 532 N.Y.S.2d at 293; see also Fox, *Failure to Follow CPLR Change Hits Lawyers*, 201 N.Y.L.J., Feb. 9, 1989, at 1, col. 3; Barker, *Procedure in Medical Malpractice Actions*, 201 N.Y.L.J., April 24, 1989, at 3, col. 1. Under the *Tewari* doctrine defendants file motions to dismiss even with short delays. See *Dedely v. Kings Highway Hosp. Center, Inc.*, 201 N.Y.L.J., March 24, 1989, at 26, col. 5 (Sup. Ct., Kings Co.).

380. *Tewari*, 75 N.Y.2d at 14, 549 N.E.2d at 1149, 550 N.Y.S.2d at 578 (Simons, J.,

practice and unfairness to many litigants whose meritorious claims were dismissed.³⁸¹ On the other hand, the motions would have decreased once plaintiff's attorneys learned to comply with the rule.

The courts in the appellate division also dismissed actions where a complaint was filed after expiration of twenty days following service of demand,³⁸² and for failure to show a meritorious cause of action by way of an affidavit of merit which merely recited conclusory allegations contained in the complaint.³⁸³ Motions seeking to restore cases to trial calendars were seldom granted.³⁸⁴ Furthermore, motions seeking to amend pleadings and bills of particulars were liberally granted,³⁸⁵ except in the Second Department.³⁸⁶

Finally, the Second Department, in *Kodack v. Pratt*,³⁸⁷ limited the scope of the Court of Appeals' recent decision in *Mihlovan v. Grozavu*.³⁸⁸ In *Mihlovan*, the court held that all parties must be notified if a motion to dismiss is to be converted into one for summary judgment.³⁸⁹ In *Kodack*, however, the Second Department concluded that the *Mihlovan* rule is not applicable when the motion papers indicate that the parties are "deliberately charting a summary judgment course."³⁹⁰ Consequently, supreme court judges may sometimes not

dissenting); see also Rosenthal, *Rationale Disputed in 'Tewari' Ruling*, 202 N.Y.L.J., Nov. 7, 1989, at 2, col. 6.

381. See *Puccini v. Owens-Illinois Glass Co.*, 146 A.D.2d 758, 537 N.Y.S.2d 242 (2d Dep't 1989) (plaintiff failed to show cause for delay and make a prima facie showing of legal merit under N.Y. CPLR 3012(b)).

382. See *Billings v. Berkshire Mutual Ins. Co.*, 149 A.D.2d 895, 540 N.Y.S.2d 577 (3d Dep't 1989).

383. See *Aleshin v. City of Long Beach*, 147 A.D.2d 604, 538 N.Y.S.2d 13 (2d Dep't 1989); *Hillegass v. Duffy*, 148 A.D.2d 677, 539 N.Y.S.2d 426 (2d Dep't 1989).

384. See *Aleshin*, 147 A.D.2d 604, 538 N.Y.S.2d 13; *Hillegass*, 148 A.D.2d 677, 539 N.Y.S.2d 426.

385. See *Clark v. Taylor Wine Co.*, 148 A.D.2d 908, 539 N.Y.S.2d 536 (3d Dep't 1989); *Miller v. Danchak*, 144 A.D.2d 825, 534 N.Y.S.2d 784 (3d Dep't 1989); *Stengel v. Clarence Materials Corp.*, 144 A.D.2d 917, 534 N.Y.S.2d 28 (4th Dep't 1988); *Rutz v. Kellum*, 144 A.D.2d 1017, 534 N.Y.S.2d 293 (4th Dep't 1988).

386. See *Garza v. Vico Util., Inc.*, 150 A.D.2d 520, 541 N.Y.S.2d 229 (2d Dep't 1989) (leave to amend denied); *Trachman v. Nassau Queens Medical Group*, 152 A.D.2d 562, 543 N.Y.S.2d 491 (2d Dep't 1989) (leave to amend denied); *Sylvester v. Stephens*, 148 A.D.2d 523, 539 N.Y.S.2d 27 (2d Dep't 1989) (leave to amend denied). But see *Hayden v. Josim Assocs.*, 148 A.D.2d 495, 538 N.Y.S.2d 838 (2d Dep't 1989) (leave to amend permitted).

387. 151 A.D.2d 551, 542 N.Y.S.2d 326 (2d Dep't 1989).

388. 72 N.Y.2d 506, 531 N.E.2d 288, 534 N.Y.S.2d 656 (1988).

389. *Mihlovan*, 72 N.Y.2d at 506, 531 N.E.2d at 289, 534 N.Y.S.2d at 657.

390. *Kodack*, 151 A.D.2d at 552, 542 N.Y.S.2d at 327.

be required to notify parties pursuant to CPLR 3211(c) of their intent to treat a dismissal motion as a motion for summary judgment.

B. Appeals

The Court of Appeals is dismissing motions for permission to appeal that do not strictly comply with rule 500.11(d)(1)(iii), and (d)(1)(iv) of its rules.³⁹¹ These requirements relate to timeliness and jurisdiction.³⁹² Motion practice before the Court of Appeals is becoming increasingly important.³⁹³ Moreover, the use of section 500.17 of the court rules, which permits the court to review certain certified questions from some federal courts and from state courts of last resort will increase.

Appellate lawyers practicing in the First and Second Departments should read Daniel Wise's excellent article describing how appellate panel assignments are made.³⁹⁴ On a similar track, Chief Judge Wachtler has named a task force to examine the need for additional justices on the courts in the appellate division and the issue of adding judicial departments or redrawing the boundaries of existing departments.³⁹⁵ This topic is important for the bar because as a practical matter, the courts in the appellate division represent the court of last resort for most litigants.

391. See, e.g., *Horowitz v. Village of Roslyn*, 74 N.Y.2d 835, 545 N.E.2d 631, 546 N.Y.S.2d 341 (1989); *Redcross v. Aetna Casualty & Sur. Co.*, 74 N.Y.2d 836, 545 N.E.2d 632, 546 N.Y.S.2d 342 (1989); see also Stein, *New York Court of Appeals Roundup*, 202 N.Y.L.J., Oct. 26, 1989, at 3, col. 1 (discussing dismissals under 20 NYCRR 500.11).

392. The decisions on pending motions showed the breadth of motion practice before the court. The court ruled on motions for leave to appeal, to dismiss appeals, for reargument, to grant or continue stays, for leave to intervene, for vacatur of earlier orders, for leave to appear as amicus curiae, for poor person relief, for assignment of counsel, to strike portions of the record, to amend the remittitur, for reconsideration of an earlier order, and for a waiver of strict compliance with the requirements of the Rules of Practice of the Court. See also Meyer, *Taking an Appeal to the Court of Appeals — Part II*, 202 N.Y.L.J., Sept. 18, 1989, at 2, col. 3 (excellent review of essential steps for appeal); Meyer, *Taking an Appeal to the Court of Appeals*, 202 N.Y.L.J., Sept. 15, 1989, at 1, col. 1.

393. See *Home Ins. Co. v. American Home Prods. Corp.*, 873 F.2d 520 (2d Cir. 1989); see also Stein, *New York Court of Appeals Roundup*, 202 N.Y.L.J., Sept. 22, 1989, at 3, col. 1.

394. See Wise, *Appellate Panel Assignments: A Procedural Mystery Solved*, 202 N.Y.L.J., Oct. 25, 1989, at 1, col. 1.

395. See Spencer, *Appellate Case Transfer Plan Put on Hold*, 202 N.Y.L.J., Nov. 20, 1989, at 1, col. 6; Spencer, *Study of Appellate Divisions Set*, 202 N.Y.L.J., Sept. 21, 1989, at 1, col. 3.

C. Venue

The venue cases reported during the *Survey* year indicate the increasing use of venue motions to achieve strategic objectives.³⁹⁶ Several cases are worthy of note. In *Toro v. Gracin*,³⁹⁷ the First Department held that a five-month delay from period of commencement of an action to filing a change of venue motion was not inordinate. In *D'Andrea v. Albert Palancia Agency, Inc.*,³⁹⁸ the First Department denied a change of venue on the grounds that the motion was made almost seven months after the notice of issue was filed. The distinction between the two contrary rulings rests on the extent to which pre-trial activity has been conducted. This approach is questionable because often a litigant does not know if a venue motion is warranted until after discovery is completed.

In *Jansen v. Bernhang*,³⁹⁹ the Second Department reversed the trial court's denial of a venue motion on the grounds that the only nexus Rockland County had with the action was the fact that the plaintiff resided there. The Second Department also concluded that the rule favoring venue in rural counties where speedy trials can be had is an important factor but can be outweighed by other factors.⁴⁰⁰ Because the claim arose from a contract made and to be performed in New York City and the prospective witnesses lived in New York County, a venue change to New York was proper. In a similar matter, the First Department found proper venue solely on the residence of the plaintiff in Bronx County.⁴⁰¹

Finally, in *Saal v. Claridge Hotel and Casino*,⁴⁰² the Second Department reminded the practitioner that a plaintiff forfeits her rights

396. See *Brady v. Exxon Co.*, 153 A.D.2d 519, 544 N.Y.S.2d 599 (1st Dep't 1989) (venue motion denied); *Chimarios v. Duhl*, 152 A.D.2d 508, 543 N.Y.S.2d 681 (1st Dep't 1989) (venue motion denied); *Voorhees v. Babcock & Wilcox Corp.*, 150 A.D.2d 676, 541 N.Y.S.2d 550 (2d Dep't 1989) (venue motion denied); *Weissmandl v. Murray Walter, Inc.*, 147 A.D.2d 474, 537 N.Y.S.2d 574 (2d Dep't 1989) (venue motion denied); *Westinghouse Elec. Corp. v. Nuttall Gear Corp.*, 147 A.D.2d 405, 537 N.Y.S.2d 821 (1st Dep't 1989) (venue motion denied); *Maynard v. Oakes*, 144 A.D.2d 229, 534 N.Y.S.2d 541 (3d Dep't 1988) (venue motion denied).

397. 148 A.D.2d 364, 539 N.Y.S.2d 322 (1st Dep't 1989).

398. 145 A.D.2d 334, 534 N.Y.S.2d 996 (1st Dep't 1988).

399. 149 A.D.2d 468, 539 N.Y.S.2d 963 (2d Dep't 1989).

400. *Jansen*, 149 A.D.2d at 470, 539 N.Y.S.2d at 964.

401. See *Torriero v. Austin Truck Rental, Inc.*, 143 A.D.2d 595, 533 N.Y.S.2d 278 (1st Dep't 1988).

402. 152 A.D.2d 631, 543 N.Y.S.2d 521 (2d Dep't 1989).

to select a forum by selecting improper venue, and that venue would be changed to a county selected for trial by the defendant.

IX. MISCELLANEOUS

During the 1989 *Survey* year, some decisions and other items of interest emerged that merit mentioning.

A. Trial by Jury in Removal Cases

In *Torchia v. Proctor & Gamble*,⁴⁰³ Judge Sweet reminded the bar of the important differences in procedure in state and federal practice with respect to a litigant's request for trial by jury. The plaintiff initiated an action in state court, demanded a jury two months after defendant answered and then filed a petition for removal to federal court. In state court, jury demands are made when a note of issue is filed but, in federal practice, a jury demand must be filed no later than ten days after the service of the last pleading relating to the issue for which a jury is sought. Because the plaintiff's jury demand was not timely under the Federal Rules of Civil Procedure, plaintiff waived a jury. Judge Sweet held "more than merely showing that a case was removed" is necessary for the court to grant a jury trial.⁴⁰⁴

B. Punitive Damages

In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,⁴⁰⁵ the United States Supreme Court refused to find that punitive damages in personal injury and product liability cases are unconstitutional under the eighth amendment's prohibition against excessive fines. The 7-2 opinion left open the issue of whether jury awards for punitive damages violate due-process protections.⁴⁰⁶ The *Kelco* ruling should have minimum impact in New York because punitive awards are rare due to the restrictive standards relating to proof that conduct was intentional, that injuries resulted from a conspiracy to harm, or that injuries resulted from gross negligence.⁴⁰⁷

403. No. 89 Civ. 2589 (S.D.N.Y. Oct. 12, 1989).

404. *Torchia*, No. 89 Civ. 2589.

405. 109 S. Ct. 2909 (1989).

406. Justices Brennan and Marshall, in a separate concurring opinion, welcomed a future challenge under the due process clause. See *Kelco*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring).

407. See Fox, *Justices Uphold Punitive Awards in Injury Cases*, 201 N.Y.L.J., June 27, 1989, at 1, col. 3. For a general discussion on the constitutional issues relating to

C. Attorneys' Fees in Civil Rights Cases

In *Texas State Teachers Association v. Garland Independent School District*,⁴⁰⁸ the United States Supreme Court rejected the "central issue" test for determining "prevailing party" status under 42 U.S.C. section 1988⁴⁰⁹ and held that attorney's fees could be recovered if a party is successful on any significant issue in the litigation which achieves some of the benefit they sought in bringing the suit.

D. Judge Present at Jury Selection

In *Guarnier v. American Dredging Co.*,⁴¹⁰ the First Department reminded the bench and bar that pursuant to CPLR 4107, upon application of a party, a judge must be present during the entire jury selection. The trial court cannot assign a law secretary to supervise part of the voir dire.

E. Motions to Dismiss Not Applicable to Small Claims Cases

In *Weiner v. Tel Aviv Car & Limousine Service, Ltd.*,⁴¹¹ Judge Friedman, in a thoughtful opinion, concluded that motions to dismiss under CPLR 3211(a)(7)⁴¹² are rarely, if ever, applicable to small claims cases. He also found that even if motions to dismiss are proper, they should never be "converted" to summary judgment motions pursuant to CPLR 3211(c).⁴¹³

F. Failure to Reduce Stipulated Settlement to Writing

In *Deal v. Meenan Oil Co.*,⁴¹⁴ the Second Department held that, even though a stipulation of settlement was not reduced to writing or stenographically recorded, the open court requirement for enforce-

punitive damages, see *Study Says Punitive Awards Aren't Excessive*, Nat'l L.J., Nov. 27, 1989, at 5, col. 1; Blum, *Paper Asks New Look at Punitive Damages*, Nat'l L.J., June 5, 1989, at 18, col. 3; Wishingrad, *Pull the Plug on Punitives*, Nat'l L.J., June 5, 1989, at 1, col. 3; Hoenig, *Are Punitive Damages Unconstitutional?*, 201 N.Y.L.J., March 29, 1989, at 3, col. 1; Wishingrad, *Eighth Amendment 'Due Process'*, 201 N.Y.L.J., Jan. 13, 1989, at 2, col. 3.

408. 109 S. Ct. 1486 (1989).

409. 42 U.S.C. § 1988 (1982).

410. 145 A.D.2d 341, 535 N.Y.S.2d 705 (1st Dep't 1988); see also N.Y. CPLR 4107 (McKinney 1963 & Supp. 1990).

411. 141 Misc. 2d 339, 533 N.Y.S.2d 372 (N.Y.C. Civ. Ct., N.Y. Co. 1988).

412. N.Y. CPLR 3211(a)(7).

413. N.Y. CPLR 3211(c).

414. 153 A.D.2d 665, 544 N.Y.S.2d 672 (2d Dep't 1989).

ability was met because the challenged settlement was memorialized in the minutes of the court clerk.

G. Structured Payments and Applicability in Federal Court

In *Ursini v. Sussman*,⁴¹⁵ Justice Ira Gammernan detailed the calculation necessary to apportion a \$5.5 million verdict over fifty years under CPLR article 50-A.⁴¹⁶ His opinion is one of the first involving a large award. It should serve as a model for the bench and bar when applying article 50-A. The legislature expanded the law in 1986 to make structured payments mandatory in personal injury, injury to property, and wrongful death actions commenced after July 1, 1986.⁴¹⁷ The 1985 legislation required structured payments for medical malpractice awards. Moreover, if damage awards in personal injury actions filed in federal courts exceed \$250,000, section 50-B is applicable.⁴¹⁸

H. United States Supreme Court to Transmit Decisions by Computer

By early 1990, the United States Supreme Court will make its decisions available to the public electronically within moments after they are handed down from the bench.⁴¹⁹ No longer will New York lawyers have to designate someone to wait in line at the Court for one of the limited number of printed opinions. Instead, Project Hermes will make decisions of the court available within minutes to an unlimited public.

I. Mandatory Retirement for State Judges

One of New York State's most productive judges turned seventy-six during the *Survey* year and faced mandatory retirement. In *EEOC*

415. 143 Misc. 2d 727, 541 N.Y.S.2d 916 (Sup. Ct., N.Y. Co. 1989); *see also* Kelner & Kelner, *Structured Judgments in Personal Injury Litigation*, 202 N.Y.L.J., July 12, 1989, at 3, col. 1; Anderson, *A Judge's Model for Structuring Award*, 201 N.Y.L.J., May 12, 1989, at 1, col. 3.

416. N.Y. CPLR §§ 5031-5039 (McKinney Supp. 1990).

417. *See* Act of July 2, 1985, ch. 294, 1985 N.Y. LAWS 2143 (codified at N.Y. CPLR §§ 5031-5039 (McKinney Supp. 1990)).

418. *See* N.Y. CPLR §§ 5041-5049 (McKinney Supp. 1990); *see also* Act of July 30, 1986, ch. 682, 1986 N.Y. LAWS 2843.

419. *See Supreme Court to Transmit Decisions by Computer*, N.Y. Times, Dec. 19, 1989, at A24, col. 3.

v. New York,⁴²⁰ however, Judge Wood ruled that the mandatory retirement of judges in New York violated federal age discrimination laws. The judge then passed mental and physical exams and was designated by Governor Cuomo to serve another two years in the Second Department.

J. Law School Dismissals

In *In re Susan "M,"*⁴²¹ the First Department reversed a dismissal of petitioner's Article 78 proceeding on the grounds that law schools owe students some kinds of safeguard against the possibility of arbitrary or capricious error in grading exams before expelling students for academic deficiency. The *Susan "M"* decision has generated substantial comment in New York law schools.

K. Lawyers' Fees Subject to Forfeiture

In *United States v. Monsanto*,⁴²² the United States Supreme Court, in a 5-4 decision, ruled that federal forfeiture laws do not violate a defendant's sixth amendment right to counsel. Thus, the Comprehensive Forfeiture Act of 1984 is constitutional.⁴²³

L. Attorneys' Fees for Outgoing Attorney

In *Cheng v. Modansky Leasing Co.*,⁴²⁴ the issue before the Court of Appeals was whether an outgoing attorney in a personal injury action was entitled to a fee determined on a fixed dollar amount based on the reasonable value of his services or a contingent percentage fee based on his proportionate contribution to the final recovery. The Court of Appeals reversed the Second Department,⁴²⁵ and ruled that the outgoing attorney deserved a percentage of the substantial fee recovered as a result of settlement prior to trial.⁴²⁶ The court's opinion suggests that, absent an outgoing attorney's waiver of a contingent

420. 729 F. Supp. 266 (S.D.N.Y. 1990); *see also*, Squiers, *EEOC Files Suit on Behalf of State Judge*, 202 N.Y.L.J., Oct. 31, 1989, at 1, col. 3.

421. 149 A.D.2d 69, 544 N.Y.S.2d 829 (1st Dep't 1989).

422. 109 S. Ct. 2657 (1989).

423. 21 U.S.C. § 853 (1988).

424. 73 N.Y.2d 454, 539 N.E.2d 570, 541 N.Y.S.2d 742 (1989).

425. *Cheng v. Modansky Leasing Co.*, 137 A.D.2d 781, 525 N.Y.S.2d 328 (2d Dep't 1988).

426. *Cheng*, 73 N.Y.2d at 460, 539 N.E.2d at 573, 541 N.Y.S.2d at 745.

percentage in writing, the incoming attorney will have to share fees on an equitable risk assessment basis.

M. Attorneys' Fees Awards in Actions Against the State

On October 26, 1989, Governor Cuomo signed a bill authorizing the award of attorneys' fees against the state.⁴²⁷ The state law will take effect on April 1, 1990 and expire two years later, unless it is extended by the legislature. Awards are limited to cases where the state cannot show that its position was "substantially justified." In *Pierce v. Underwood*,⁴²⁸ the United States Supreme Court held that fees could be awarded only if an agency had proceeded when there was no fair ground for litigation.

N. Law Firm Partnership Agreements

In an issue of first impression, the Court of Appeals ruled in *Cohen v. Lord, Day & Lord*⁴²⁹ that law firm partnership agreements cannot impose financial penalties on partners who withdraw from the firm. If the agreements restrict the practice of law they will be unenforceable. Judge Hancock and Chief Judge Wachtler dissented.

X. CONCLUSION

I wish to express my appreciation to the Institute for Advanced Legal Studies in London for making their "New York Section" available to me. In Middle Temple's Essex Court, a reminder proclaims: "Vestigia nulla retorsum." The downhill path is easy, but there is no turning back. Those words describe my commitment to New York Civil Practice. Thanks to the judges, lawyers, faculty, colleagues, and students who remind me each year that there is no turning back!

427. See Spencer, *Cuomo Signs Bill Authorizing Awards of Fees Against State*, 202 N.Y.L.J., Oct. 27, 1989, at 1, col. 1.

428. See 487 U.S. 552 (1988); see also Act of Oct. 25, 1989, ch. 770, 1989 MCKINNEY'S SESS. LAWS OF N.Y. 1559.

429. 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989); see also Spencer, *Court Voids Firm's Partner-Move Penalty*, 202 N.Y.L.J., Dec. 20, 1989, at 1, col. 3.