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## Civil Practice

Jay C. Carlisle

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# CIVIL PRACTICE

Jay C. Carlisle\*

*This year's Survey article on New York Civil Practice is dedicated to our colleague Professor Richard J. Daronco, whose untimely death in 1988 broke more than a few hearts. Professor Daronco was better known to the bench and bar of New York as Judge Daronco. He served as a family court judge, a justice of the Supreme Court for the Ninth Judicial District and as a distinguished federal court judge for the United States District Court for the Southern District of New York. The Westchester County Court House was recently named in honor of Judge Daronco.*

*For those of us who earn our living as teachers, Professor Daronco was a special person. He taught as an adjunct professor at Pace University School of Law. The students loved Professor Daronco's classes in trial practice. He was a wonderful and dedicated teacher who cared for his students and inspired his colleagues. Professor, judge, father, husband, brother, son and good friend of the faculty, deans, alumni and students of the Pace University School of Law, we salute you with the bittersweet words of A.E. Houseman's "To An Athlete Dying Young."*

*Today, the road all runners came,  
Shoulder—high we bring you home,  
And set you at your threshold down,  
Townsmen of a stiller town.*

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\* Professor of Law, Pace University School of Law. J.D., University of California at Davis; A.B., University of California at Los Angeles. Recipient of ALI-ABA 1989 Harrison Tweed Special Merit Award for contributions to post-graduate legal education. Professor Carlisle is a revision author for the Weinstein, Korn & Miller treatise on New York Civil Practice and is the annotation author for the treatise's 1988 Supplement. The author is grateful to his students at Pace University School of Law for inspiring him to teach New York Civil Practice. He also appreciates the assistance of Ms. Gloria Pagonico for typing her fourth Survey article.

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## I. INTRODUCTION

This is the fourth year your author has been privileged to contribute to the Civil Practice section of the Syracuse Law Review's *Survey of New York Law*.<sup>1</sup> On the date this year's piece is submitted to the *Survey* Editor, I will depart for England to spend the spring semester teaching remedies at University College in London. I will try, therefore, to follow the advice of the English

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1. See Carlisle, *Civil Practice*, 1987 *Survey of N.Y. Law*, 39 SYRACUSE L. REV. 75 (1988); Carlisle, *Civil Practice*, 1986 *Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67 (1987); Carlisle, *Civil Practice*, 1985 *Survey of N.Y. Law*, 37 SYRACUSE L. REV. 263 (1986). I also take this opportunity to salute my colleague Professor Richard T. Farrell of Brooklyn Law School for generously serving as the *Survey* author for ten years, beginning in 1974. See Farrell, *Civil Practice*, 1974 *Survey of N.Y. Law*, 26 SYRACUSE L. REV. 365 (1975). I have reviewed each of Professor Farrell's ten *Survey* pieces and always strive to emulate his decisive analysis and review of recent developments in the CPLR. (Dick, your 1978 *Survey* piece, which highlights *Shaffer v. Heitner*, 433 U.S. 186 (1977), is an oldie but a goodie!).

poet Robert Southey, written more than a century ago, "[i]t is with words as with sunbeams, the more they are condensed, the deeper they burn."<sup>2</sup>

During the 1988 *Survey* year, new sanction rules, effective January 1, 1989, were approved by the Court of Appeals,<sup>3</sup> several Uniform Rules were amended,<sup>4</sup> and existing rules applied by our courts.<sup>5</sup> New legislation was also passed relating to a comprehensive Interest On Lawyers Account (IOLA).<sup>6</sup> The Court of Appeals abolished the fiduciary shield doctrine,<sup>7</sup> limited the reach of our long-arm statute (CPLR 302(a)(1))<sup>8</sup> in defamation actions,<sup>9</sup> and ruled that motions to dismiss cannot be converted into summary judgments without notice to all parties.<sup>10</sup> The Court of Appeals also refined the doctrine of issue preclusion,<sup>11</sup> which has recently been expanded,<sup>12</sup> and issued interesting opinions involving statutes of limitation<sup>13</sup> and successive tort-feasor law.<sup>14</sup> Also, in June of 1988, the United States Supreme Court delivered a series of decisions which affect New York's substantive law pertaining to the

2. Rathvon, *I Heard Lincoln That Day*, 60 N.Y. St. B.J. 18, 19-21 (Nov. 1988). The bar is grateful to Westchester's H. Glen Hall for having transcribed William R. Rathvon's radio broadcast in 1938 from a long-playing Trans Radio Record citing the English poet Robert Southey.

3. Reprinted in MCKINNEY'S 1989 N.Y. RULES OF THE COURT pts. 130, 130-a (22 NYCRR 130, 130-a). See also *Top State Court Adopts Sanction Rules*, 200 N.Y.L.J., Oct. 26, 1988, at 1, col. 4 [hereinafter *Sanction Rules*]; Seigel, *New and Broad Sanctions Rules Take Effect January 1, 1988*, 347 N.Y. St. L. Dig., Nov. 1988, at 1. (Professor Siegel's discussion of the new sanction rules features a checklist review which is "must reading" for the bench and bar.).

4. See *infra* notes 103-25 and accompanying text.

5. See *infra* notes 126-37 and accompanying text.

6. See Act of Sept. 1, 1988, ch. 677, 1988 MCKINNEY'S SESS. LAWS OF N.Y. 1360 (codified at N.Y. JUD. LAW § 497 (McKinney Supp. 1989)).

7. See *infra* note 157 and accompanying text.

8. N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1989).

9. See *infra* note 158 and accompanying text.

10. See *infra* notes 390-91 and accompanying text.

11. See *infra* notes 370-84 and accompanying text.

12. See *Civil Practice, 1987 Survey*, *supra* note 1, at 141-47.

13. See *infra* notes 331-33 and accompanying text.

14. See Barker, *Successive Tort-Feasors*, 200 N.Y.L.J., Dec. 27, 1988, at 3, col. 1 (discussing *Glaser v. Fortunoff*, 71 N.Y.2d 643, 524 N.E.2d 413, 529 N.Y.S.2d 59 (1988)) (concluding that "a successive tort-feasor can be jointly liable with the primary tort-feasor, and not . . . liable only for the injuries he inflicted, when the injury is found to be single and undivisible"); see also Barker, *Recent Developments*, 199 N.Y.L.J., Apr. 25, 1988, at 1, col. 1; Barker, *Successive Tortfeasors*, 199 N.Y.L.J., Jan. 25, 1988, at 1, col. 1.

Hague Convention (service abroad),<sup>15</sup> notice of claim procedures in civil rights cases,<sup>16</sup> and forum selection clauses under CPLR 327(b).<sup>17</sup> These developments and other significant decisional law by New York trial and appellate courts will be analyzed.

## II. NEW LEGISLATION AND COURT RULES

### A. *New Legislation*

Appendix A lists new CPLR amendments enacted during the 1988 *Survey* year and summarizes amendments that are important to practitioners. The comments found in the Appendix regarding the new legislation only provide a brief overview and the complete text can be found in many different sources.<sup>18</sup>

Notwithstanding Appendix A, several CPLR amendments should be noted. CPLR 3101 has been amended to add a new subparagraph (d)(1)(ii),<sup>19</sup> which allows a party to offer to her adversary a proposal by which all experts would be identified and deposed.<sup>20</sup> CPLR 5519 has been amended to add a new subsection (g),<sup>21</sup> which requires that a defendant need only post a bond in the amount of \$1 million at the maximum to stay enforcement of a judgment.<sup>22</sup> This will unfortunately allow appellate courts to stay enforcement of judgments if there is "a reasonable possibility that

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15. See *infra* note 255 and accompanying text.

16. See *Felder v. Casey*, 108 S. Ct. 2302 (1988); see also *infra* note 340 and accompanying text.

17. N.Y. CPLR 327(b) (McKinney 1972 & Supp. 1989); see also *infra* note 267 and accompanying text.

18. The complete text should be available for review in the 1988 CPLR publications by Matthew Bender, Gould Publications or West's McKinney Commentaries. Copies of the entire legislative texts may be obtained by contacting the Department of Governmental Relations. The practitioner should also consider subscribing to the Annual Legislative Bulletin of the Association of the Bar of the City of New York. The Bulletin analyzes the merits of the proposed bills and discusses their impact on current laws. It is an excellent research tool and will keep the practitioner abreast of developments in Albany well in advance of the *Survey's* publication.

19. N.Y. CPLR 3101(d)(1)(ii) (McKinney Supp. 1989).

20. See *id.*; see also *infra* note 405 and accompanying text; Kramer & Moore, *Medical Malpractice: Comment on New Legislation*, 200 N.Y.L.J., Aug. 1, 1988, at 3, col. 1 (Daniel Kramer, Esq., is the new author for the *Survey's* section on Torts.); Siegel, *Practice Commentaries*, N.Y. CPLR 3101, at 4-5 (McKinney Supp. 1989).

21. N.Y. CPLR 5519(g) (McKinney Supp. 1989).

22. See *id.*; see also Siegel, *Practice Commentaries*, N.Y. CPLR 5519, at 80 (McKinney Supp. 1989).

the judgment may be reversed or determined excessive."<sup>23</sup> The CPLR was also amended in relation to prima facie proof of damages<sup>24</sup> and in relation to the payment of fees to a county clerk,<sup>25</sup> both of which became effective in July of 1988. Fee requirements of county clerks, CPLR 8018, was also amended by adding new subdivision (f),<sup>26</sup> which sets forth new fees for copies of records, and some prior requirements for certification, exemplification and copies of papers were deleted from CPLR 8020.<sup>27</sup> In addition, effective January 1, 1989, new special parts for the hearing of commercial claims will be effective in the district courts and city courts.<sup>28</sup> Essentially, the law creates a small claims court for corporations, partnerships and associations because existing small claims courts allow only for natural persons to bring actions.<sup>29</sup>

Finally, an important new piece of legislation is Chapter 677, which became effective February 1, 1989, and amends New York's IOLA program relating to interest on lawyer accounts.<sup>30</sup> It requires all New York attorneys to place qualified funds in an IOLA account in a banking institution offering such accounts.<sup>31</sup> The apparent purpose of the new bill is to provide funds for legal services and for the improvement of New York's administration of justice programs.<sup>32</sup>

### B. New Sanction Rules

Last year's *Survey* warned the practitioner of new "across the board" sanction rules for frivolous litigation practices.<sup>33</sup> Despite a

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23. Seigel, *supra* note 22, at 80.

24. See N.Y. CPLR 4533-a (McKinney Supp. 1989).

25. See N.Y. CPLR 8018 (McKinney Supp. 1989).

26. N.Y. CPLR 8018(f) (McKinney Supp. 1989).

27. N.Y. CPLR 8020 (McKinney Supp. 1989); Act of July 1, 1988, ch. 192, 1988 MCKINNEY'S SESS. LAWS OF N.Y. 379.

28. See Act of Aug. 4, 1987, ch. 653, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 1141-55. The Act adds an Article 18-A to the New York City Civil Court Act, as well as to the Uniform District Court Act and the Uniform City Court Act. The legislation does not become effective in the New York City Civil Court until January 1, 1991.

29. See *id.*

30. See Act of Sept. 1, 1988, ch. 677, 1988 MCKINNEY'S SESS. LAWS OF N.Y. 1360 (codified at N.Y. JUD. LAW § 497 (McKinney Supp. 1989)).

31. See *id.*

32. The IOLA Fund will distribute information to attorneys regarding their obligations under the new law and information on participating banks.

33. See *Civil Practice, 1987 Survey, supra* note 1, at 85-87.

large and vociferous response by the bar,<sup>34</sup> three new rules, effective January 1, 1988, were enacted which authorize:

financial penalties up to \$250 against lawyers who fail to appear without good cause at scheduled criminal proceedings, and up to \$10,000 against lawyers or litigants who engage in what a court determines are frivolous civil actions . . . . 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.<sup>35</sup>

The new sanction rules will be in addition to those already applied in state courts<sup>36</sup> and in federal courts under Rule 11 of the Federal Rules of Civil Procedure.<sup>37</sup> Although former Chief Administrative Judge Albert M. Rosenblatt assures the bar that the new rules will be "sparingly applied"<sup>38</sup> in only "rare and necessary cases,"<sup>39</sup> a state practitioner, familiar with Federal Rule 11 sanction cases, has reason to be alarmed. For example, a solo practitioner was "ordered by the U.S. Court of Appeals for the Second Circuit to pay \$100,000 in sanctions imposed two years ago by a federal judge for repeatedly pushing an untrue claim in a copyright infringement suit."<sup>40</sup> In addition, there are over 700 reported cases

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34. See Wise, *County Bar Report Objects to Draft of Sanction Rules*, 198 N.Y.L.J., Oct. 5, 1987, at 1, col. 1 (discussing many objections to the Office of Court Administration proposal authorizing judges to impose sanctions against attorneys for frivolous litigation); Chase, *Sanctions in State Courts-Proposed Rule Needs Changes*, 198 N.Y.L.J., Oct. 22, 1987, at 1, col. 3 (stating that the "disadvantages of judicial sanctions are likely to outweigh the advantages"); Note, *The Use of Rule 11 Sanctions and Prevailing Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice Dismissal*, 88 COLUMBIA L. REV. 1512 (1988); see also Menaker, *Sanctions for Frivolous Litigation: Should New York Have a Counterpart to Federal Rule 11?*, 59 N.Y. ST. B.J. 31, 33-34 (Nov. 1987) (stating that Rule 11 has a number of weaknesses which should be avoided by any New York rule).

35. *Sanction Rules*, *supra* note 3, at 1, col. 4, 6.

36. See N.Y. CPLR 8303-a (McKinney Supp. 1989); N.Y. CPLR 3126 (McKinney 1970 & Supp. 1989); MCKINNEY'S 1988 N.Y. RULES OF THE COURT § 202.12(g) (22 NYCRR 202.12(g)); Carlisle, *CPLR 8303-a: Attorney's Fees Sanctions for Frivolous Claims and Defenses Filed in Tort Cases*, 14 WESTCHESTER B.J. 273 (Summer 1987) (discussing the sanctions under CPLR 8303-a).

37. FED. R. CIV. P. 11.

38. Statement by Chief Judge Albert M. Rosenblatt, Administrative Judge for the State of New York, at the Special Meeting on Sanctioning Frivolous Litigation in State and Federal Courts (Nov. 9, 1988).

39. *Id.*

40. Squiers, *\$100,000 Sanction Against Lawyer Firm*, 200 N.Y.L.J., Aug. 16, 1988, at 1, col. 3.



in the federal courts involving Rule 11 sanctions.<sup>41</sup> As stated by Chief Judge Charles Brieant: “[f]ederal judges are issuing traffic tickets to those who clog the courts”<sup>42</sup> and New York State judges can now “fine lawyers for screwing up the business of the courts.”<sup>43</sup> Unfortunately, Chief Judge Brieant also notes that two-thirds of the federal sanctions cases have been brought against plaintiffs and their attorneys.<sup>44</sup> The federal bar does not know what the standards are because the “Chancellor’s Boot”<sup>45</sup> is applied in highly subjective opinions, many of which are not published.<sup>46</sup>

Chief Judge Brieant observes that Rule 11 sanctions create collateral litigation, poison the atmosphere making settlement difficult, and replace civil RICO claims as a cottage industry for lawyers.<sup>47</sup> Nonetheless, one report on federal sanctions under Rule 11 indicates that 77% of the lawyers and 90% of the judges approve of Rule 11 sanctions.<sup>48</sup> Similarly, the Office of Court Administration (OCA) claims that a majority of New York Civil Practice lawyers favor the new rules.<sup>49</sup> OCA also states that their rules differ from the federal rules in three key areas: (1) New York rules use “permissive” rather than the “mandatory” federal language;<sup>50</sup> (2) New York rules have a \$10,000 cap while the fine is “unlimited” under the federal rules;<sup>51</sup> and (3) New York rules are subject to interlocutory appeals to the Appellate Divisions.<sup>52</sup>

The new sanction rules are implemented in Part 130 of the Rules of the Chief Administrative Judge.<sup>53</sup> The rules apply to acts occurring on or after January 1, 1989, affecting not only new ac-

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41. See *supra* note 38.

42. *Id.* (statement by Chief Judge Charles L. Brieant).

43. *Id.*

44. See *id.*

45. See Burbank, *The Chancellor’s Boot*, 54 BROOKLYN L. REV. 31 (1988).

46. See *supra* note 38.

47. See *id.* See generally Bates, *The Rule 11 Debate, 4 Years Later*, Nat’l L.J., Oct. 13, 1987, at 3, col. 1 (discussing the pitfalls of Rule 11).

48. See *supra* note 38 (statement of Hon. Shira Seheidlin).

49. See *id.*

50. See *id.* (statement of Hon. Michael Colodner, Counsel to the Office of Court Administration for the New York State Courts).

51. See *id.*

52. See *id.* This is wonderful news for our Appellate Division judges who will no doubt spend their 1989 summer vacations reading Rule 11 sanction cases in an effort to learn how to define frivolity.

53. See MCKINNEY’S 1989 N.Y. RULES OF THE COURT pt. 130 (22 NYCRR 130).

tions, but pending ones as well.<sup>54</sup> Part 130-a,<sup>55</sup> applicable to unjustified failure to attend a scheduled appearance in a criminal action or proceeding, authorizes financial penalties not to exceed \$250 against lawyers who fail to appear without good cause.<sup>56</sup> What constitutes good cause? An affidavit of actual engagement should be enough, but is an actual engagement in the city court of Mount Vernon for a harassment defense good cause not to appear in New York Supreme Court for a homicide motion? Practitioners, however, should be aware that Part 130-a is not applicable in town or village courts.<sup>57</sup>

Part 130 of the new sanction rules is entitled "Awards of Costs and Imposition of Financial Sanctions for Frivolous Conduct in Civil Litigation."<sup>58</sup> This rule is inapplicable for requests of costs or fees subject to CPLR 8303-a,<sup>59</sup> covering frivolous claims or defenses in tort actions, wrongful death claims, and medical malpractice cases.<sup>60</sup> Additionally, Part 130 does not apply to town or village courts, small claims courts or to proceedings commenced under articles 3, 7, 8 or 10 of the Family Court Act.<sup>61</sup> It does apply, however, to "any other piece of conduct that can earn the ignominious frivolity label,"<sup>62</sup> including motions, appeals, special proceedings, Article 78 proceedings against administrative actions, and summary proceedings. The new rule also includes as frivolous conduct the making of an unjustified motion,<sup>63</sup> and can be applied by judges of the Housing Part of the New York City Civil Court.<sup>64</sup>

Moreover, rule 130.1 permits the court at its discretion to award any party or attorney in any civil action or proceeding the actual expenses and reasonable attorney's fees resulting from frivolous conduct.<sup>65</sup> In addition, in lieu of awarding costs, the court may at its discretion impose financial sanctions upon any party or at-

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54. *See id.*

55. *Id.* pt. 130-a (22 NYCRR 130-a).

56. *See id.* § 130-a.2 (22 NYCRR 130-a.2).

57. *See id.* § 130-a.1(a) (22 NYCRR 130-a.1(a)).

58. *Id.* pt. 130 (22 NYCRR 130).

59. *See id.* § 130.5 (22 NYCRR 130.5).

60. *See* N.Y. CPLR 8303-a (McKinney Supp. 1989).

61. *See* McKINNEY'S 1989 N.Y. RULES OF THE COURT § 130.1(a) (22 NYCRR 130.1(a)).

62. Siegel, *supra* note 3, at 1.

63. *See* McKINNEY'S 1989 N.Y. RULES OF THE COURT § 130.1(c)(ii) (22 NYCRR 130.1(c)(ii)).

64. *See id.* § 130.4 (22 NYCRR 130.4).

65. *See id.* § 130.1(a) (22 NYCRR 130.1(a)).

torney for frivolous litigation.<sup>66</sup> The payment of costs or the imposition of sanctions can be against either the attorney, the party or both.<sup>67</sup> The penalties can be against the attorney personally or 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 that has appeared as attorney of record.<sup>68</sup> Financial sanctions assessed against an attorney are paid to the Clients Security Fund, while financial sanctions paid by a party go to the State Commissioner of Taxation and Finance.<sup>69</sup> Cost awards go to the party or to the attorney and may include disbursements and attorney's fees.<sup>70</sup> Finally, an award for costs or sanctions may be sought by motion, cross motion or by the court on its own motion,<sup>71</sup> but financial penalties can only be granted upon a written decision setting forth the conduct on which the award or imposition is based and the reasons why the amount awarded is appropriate.<sup>72</sup>

There remains the question of what is frivolous conduct? Part 130.1(c) states:

(c) For purposes of this Part, conduct is frivolous if:

(i) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or

(ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.<sup>73</sup>

The rule also directs the court to consider the "circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct"<sup>74</sup> and "whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent to counsel."<sup>75</sup>

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66. *See id.*

67. *See id.* § 130.1(b) (22 NYCRR 130.1(b)).

68. *See id.*

69. *See id.* § 130.3 (22 NYCRR 130.3).

70. *See id.* § 130.1(a) (22 NYCRR 130.1(a)).

71. *See id.* § 130.1(d) (22 NYCRR 130.1(d)).

72. *See id.* § 130.2 (22 NYCRR 130.2).

73. *Id.* § 130.1(c) (22 NYCRR 130.1(c)).

74. *Id.*

75. *Id.* Thus, the practitioner should build a paper record to support a motion for sanctions.

The first question for attorneys concerned with the impact of the new rules is the meaning of the term "frivolous." It is highly likely that the state courts will follow the federal courts' objective standard suggested by *Eastway Construction Corp. v. City of New York*<sup>76</sup> instead of a more subjective standard that would be more apt to protect attorneys who make honest but unreasonable conclusions about the factual or legal strength of their cases.<sup>77</sup>

The second question relates to the amount of costs and sanctions to be awarded under the new rules. The court can order that the costs and sanctions be paid by either the client or his attorney.<sup>78</sup> As to the amount awarded, this determination should depend on the court's consideration of mitigating factors such as: (1) whether the client and lawyer believed they were correct in taking the course they did; (2) whether the frivolity was for the purpose of punishing an opponent; (3) whether the lawyer is a neophyte or an experienced advocate; (4) the ability to pay; (5) the need for compensation; (6) the degree of frivolity; and (7) the dangers of chilling the particular kind of litigation involved.

Lawyers seeking to avoid sanctions under the new rules should take protective measures. First, before filing any pleading or taking any course of action during litigation, the attorney should read the rules. This is important, not so much as an exercise, but to assist the practitioner in resisting a sanction motion because an affidavit can be filed asserting that the sanctions were specifically considered. A practitioner should consider whether the facts of the case

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76. 762 F.2d 243, 253-54 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987) (holding that "a showing of subjectively bad faith is no longer required to trigger the sanctions imposed by . . . rule [11]"); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987) (increasing sanction of \$1000 imposed by district court on client to \$10,000, allocated between both client and attorney, without explanation of why the former constituted an abuse of discretion); *see also* *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1372 (1987) (stating that Rule 11 is violated "only when it is patently clear that a claim has absolutely no chance of success"). *See generally* Note, *Plausible Pleadings Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

77. Former Chief Judge Weinstein, in *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir. 1987), suggests that the subjective element of a sanction rule is satisfied when an attorney makes a "reasonable inquiry into the facts and law." *Id.* at 567. The Second Circuit Court of Appeals, however, in a previous *Eastway* opinion, held that "sanctions should be imposed . . . [if] after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law . . ." *Eastway*, 762 F.2d at 254.

78. *See* MCKINNEY'S 1989 N.Y. RULES OF THE COURT § 130.1(b) (22 NYCRR 130.1(b)).

justify the filing of a particular pleading. For example, is the pleading in question based upon existing law or seeking an extension, modification or reversal of existing law? Is it counsel's intent to harass, delay or increase the cost of the litigation? Some lawyers, as a matter of common practice, may assert sanction defenses in their answers. These assertions would appear to be a violation of the new sanctions rule.

Another factor to raise in resisting the imposition of sanctions under the new rules is the amount of time available for investigation. For example, if the sanctioned matter arises in a special proceeding,<sup>79</sup> the amount of time available to investigate or make a "reasonable inquiry" would be far less than that involved in most kinds of litigation. One must also consider the source of information upon which the attorney relied. In many instances, the information must come from the client, placing a duty on counsel to verify pertinent facts. In addition, sanctions are less likely to be applied when the present attorney relied upon the representations of forwarding counsel or some other member of the bar. Finally, lawyers should be aware of sanctions that can be applied under the new individual assignment rules,<sup>80</sup> CPLR 3126<sup>81</sup> or pursuant to CPLR 8303-a.<sup>82</sup>

### C. Revised Rules for Fiduciaries

Revised rules for fiduciaries' handling of accounts became effective on November 30, 1988. These revisions amend Part 603<sup>83</sup> of the Appellate Division Rules in the First Department and Part 691<sup>84</sup> which governs conduct of attorneys in the Second Depart-

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79. Statutes authorizing special proceedings are found in and out of the CPLR. See generally D. SIEGEL, NEW YORK PRACTICE § 547 (1978).

80. See MCKINNEY'S 1989 N.Y. RULES OF THE COURT § 202.12 (f) (22 NYCRR 202.12(f)).

81. N.Y. CPLR 3126 (McKinney 1970 & Supp. 1989).

82. N.Y. CPLR 8303-a (McKinney Supp. 1989). For a more detailed discussion of CPLR 8303-a, see Carlisle, *supra* note 36; see also Anderson, *Sanctions Available for Bad Faith Claim*, 200 N.Y.L.J., Oct. 24, 1988, at 1, col. 3 (discussing first significant application of CPLR 8303-a sanctions for frivolous actions in *Eagle Ins. Co. v. Ruez* in the Supreme Court, Nassau County).

83. MCKINNEY'S 1989 N.Y. RULES OF THE COURT pt. 603 (22 NYCRR 603). The Appellate Division justices for the First Judicial Department amended Part 603 of the Rules of the Court by rescinding section 603.15 and substituting revised rules on fiduciary responsibility. See *id.* § 603.15 (22 NYCRR 603.15).

84. *Id.* pt. 691 (22 NYCRR 691). The Appellate Division justices for the Second Department amended section 691.12 of Part 691 by revising the rules on fiduciary responsibility.

ment. The new requirements provide that all special accounts, wherein an attorney is in possession of any money or other asset of a client, other than where an attorney maintains an account as executor, guardian, trustee or receiver, must be maintained in a separate bank account, apart from the personal or business accounts of the attorney or the attorney's firm.<sup>85</sup> All attorneys with offices in the First and Second Departments should obtain the complete text of the revised rules; the changes are identical in both departments. Pay close attention to the elaborate bookkeeping records which must be maintained and retained for seven years after the events which they record,<sup>86</sup> and note the annual certification of compliance requiring an attorney to file an affidavit with the clerk of the court, no later than January, 31 of each year, certifying that attorney's compliance with the revised regulations.<sup>87</sup> Failure to file the certification may result in disciplinary action against the attorney.<sup>88</sup> Also, language was added to the rules to govern random review and audit of the attorney's accounts in the event such a procedure becomes mandatory.<sup>89</sup>

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ity. *See id.* § 691.12 (22 NYCRR 691.12).

85. *See id.* §§ 603.15(b), 691.12(b) (22 NYCRR 603.15(b), 691.12(b)).

86. *See id.* §§ 603.15(c), 691.12(c) (22 NYCRR 603.15(c), 691.12(c)).

87. *See id.* §§ 603.15(l), 691.12(l) (22 NYCRR 603.15(l), 691.12(l)). The certification should be in the following form and will be available at all times to the Departmental Disciplinary Committee:

State of New York)

County of \_\_\_\_\_)

(type name) \_\_\_\_\_, being duly sworn, deposes and says:

I am familiar with DR 9-102 of the Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970 as amended, and with § 691.12 of the Court's Rules Governing the Conduct of Attorneys, which requires an attorney to preserve the identity of funds and property entrusted to him or her and to maintain certain records relating thereto.

I certify to this Court that I am in compliance with the above provisions of the Lawyer's Code of Professional Responsibility and this Court's Rules.

Signature of Attorney \_\_\_\_\_

Attorney \_\_\_\_\_

Firm Name \_\_\_\_\_

Office & P.O. address \_\_\_\_\_

Office telephone number \_\_\_\_\_

Home address \_\_\_\_\_

Home telephone number \_\_\_\_\_

*Id.* § 691.12(l) (22 NYCRR 691.12(l)) (identical language in § 603.15(l)).

88. *See id.* §§ 603.15(k), 691.12(k) (22 NYCRR 603.15(k), 691.12(k)). If you snooze, you lose!

89. *See id.*

*D. Client Notification of Settlement Checks*

Effective October 5, 1988, a State Insurance Department regulation requires claimants to be notified when insurance companies forward checks of \$5000 or more to a lawyer.<sup>90</sup> Thus, the practitioner intent on maintaining her client's trust should be sure to expedite insurance settlement checks with due diligence.

*E. Mandatory CLE and Pro Bono Work Plus Abolition of Medical Malpractice Panels*

During the 1988 *Survey* year, the House of Delegates of the New York State Bar Association voted to recommend mandatory continuing legal education (CLE) for New York State attorneys. While the proposal must ultimately be approved by the Association's Executive Committee and adopted by the Chief Judge, Sol Wachtler, and the respective Appellate Divisions, the practitioner should expect some form of mandatory CLE in the near future.<sup>91</sup> Additionally, a twenty-two member committee appointed by the Chief Judge is in the final stages of deliberation on "a detailed plan that would require attorneys to donate their legal skills to persons too poor to pay for them."<sup>92</sup> The committee is expected to submit its recommendations to Judge Wachtler early in 1989.<sup>93</sup> Implementation of the mandatory pro bono plan, requiring lawyers to donate at least twenty hours annually, will "be left primarily to Judge Wachtler's discretion . . . ." <sup>94</sup> If the plan is adopted, lawyers will probably have "to certify bi-annually that they have performed the required free service or its equivalent."<sup>95</sup> With mandatory CLE and pro bono requirements, revised fiduciary reg-

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90. See Spencer, *Clients to be Notified of Settlement Checks: Insurance Department Rule, Aimed at Curbing Theft by Lawyers, Urged by Clients' Security Fund*, 200 N.Y.L.J., Oct. 18, 1988, at 1, col. 3.

91. See Spencer, *State Bar to Weigh Education Issue*, 200 N.Y.L.J., Nov. 1, 1988, at 1, col. 4.

92. Wise, *Study Near End on Lawyer's Pro Bono Plan: Panel Named by Wachtler Weighing Required 20-Hour Annual Contribution; Vote Due in 2 Months*, 200 N.Y.L.J., Dec. 20, 1988, at 1, col. 3; see also Souther, *Mandatory Pro Bono*, N.Y. COUNTY LAWYER, Sept., 1988 (Florida and Arkansas have put mandatory public service requirements into effect and many other jurisdictions are considering the implementation of mandatory pro bono requirements.).

93. See Wise, *supra* note 92, at 1, col. 4.

94. *Id.*

95. *Id.*

ulations, and new sanction rules, the practitioner is justified in wondering when he will have time to practice law.

Finally, the Office of Court Administration is preparing proposed legislation to repeal the requirement that medical malpractice claims be reviewed by a panel consisting of a judge, lawyer and doctor.<sup>96</sup> Chief Judge Wachtler favors repeal of the requirement and former Chief Administrative Judge Rosenblatt agrees because of the needless delays caused by the panels.<sup>97</sup> The proposal for repeal of the panel requirement is supported by twenty-five bar associations including the New York State Bar Association and the Association of the City of New York.<sup>98</sup>

#### F. Attorney Advertising

There are no new rules for 1988 regarding attorney advertising; however, practitioners interested in using Madison Avenue techniques to increase business should be aware of the United States Supreme Court's recent decision in *Shapero v. Kentucky Bar Association*.<sup>99</sup> In *Shapero*, lawyers were permitted to solicit legal business for preliminary gain by sending truthful and nondeceptive letters to potential clients known to face particular problems.<sup>100</sup> Also, in *Anonymous v. Grievance Committee*,<sup>101</sup> the Appellate Division, Second Department, upheld a rule, required by all the departments, that attorney advertisements include the lawyer's name and address. A telephone number alone is not enough.<sup>102</sup>

#### G. Uniform Rules

Prior *Survey* articles have discussed the adoption of the Uniform Rules and proposed amendments to the rules.<sup>103</sup> Several amendments during the *Survey* year are worthy of note. In addi-

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96. See *supra* note 38.

97. See *id.*

98. See Wise, *End Sought to Medical Malpractice Panels*, 200 N.Y.L.J., Nov. 7, 1988, at 1, col. 3.

99. 108 S. Ct. 1916 (1988).

100. See *Shapero*, 108 S. Ct. at 1922-24.

101. 136 A.D.2d 344, 527 N.Y.S.2d 248 (2d Dep't 1988).

102. See *Anonymous*, 136 A.D.2d at 345, 527 N.Y.S.2d at 249.

103. See *Civil Practice*, 1987 *Survey*, *supra* note 1, at 84-85; *Civil Practice*, 1986 *Survey*, *supra* note 1, at 83-85.



tion, the practitioner should be aware of decisional law interpreting and applying the existing rules.

Uniform Rule 202.3(c)(6)<sup>104</sup> was effective April 1, 1988. This rule alters the Individual Assignment System to allow a "dual track" system.<sup>105</sup> Thus, a case may be assigned to one judge for all pretrial matters and to another judge for trial.<sup>106</sup> The "dual track" system is optional and whether it goes into effect in a particular district is determined by the Chief Administrator.<sup>107</sup> The First Judicial District has adopted the "dual track" system, but the Ninth Judicial District has not.<sup>108</sup>

Uniform Rule 202.7,<sup>109</sup> effective April 1, 1988, establishes a new affirmation requirement for certain motions. On motions for disclosure and bills of particulars, the movant must confirm that she conferred with opposing counsel in good faith and was not able to resolve the dispute.<sup>110</sup> The buzz word is "good faith" which New York courts have not yet defined. Records indicating the time, place, nature of consultation with your adversary, and the issues discussed should be kept to protect against issues being raised about good faith. Failure to comply with the good-faith requirement will not result in a denial on the merits.

Under Uniform Rule 202.12(a),<sup>111</sup> effective April 1, 1988, preliminary conferences are optional; however, a party may move for a preliminary conference (an affirmation of good faith must be filed with the motion) and the court may sua sponte order the conference.<sup>112</sup>

Uniform Rule 202.14,<sup>113</sup> effective April 1, 1988, authorizes the Chief Administrative Judge to expressly establish programs in the courts utilizing the services of special masters.<sup>114</sup>

Uniform Rule 202.16(g),<sup>115</sup> effective April 1, 1988, requires motions for or related to interim maintenance or child support to be

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104. MCKINNEY'S 1989 N.Y. RULES OF THE COURT § 202.3(c)(6) (22 NYCRR 202.3(c)(6)).

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *Id.* § 202.7 (22 NYCRR 202.7).

110. *See id.*

111. *Id.* § 202.12(a) (22 NYCRR 202.12(a)).

112. *See id.*

113. *Id.* § 202.14 (22 NYCRR 202.14).

114. *See id.*

115. *Id.* § 202.16(g) (22 NYCRR 202.16(g)).

decided within thirty days.<sup>116</sup>

Uniform Rule 202.56(b) and (c),<sup>117</sup> effective October 31, 1988, establishes new rules in relation to medical, dental and podiatric malpractice preliminary conferences.<sup>118</sup>

Additional changes were also made to other Uniform Rules. Only technical changes were made in the Uniform Rules for the Family Court,<sup>119</sup> while the Uniform Rules for the Court of Claims were changed by adding section 206.19<sup>120</sup> governing bifurcated trials in personal injury actions. Changes made in the Uniform Rules for the Surrogate Court include: sections 207.53<sup>121</sup> (contents required in guardianship and competency proceedings); 207.34<sup>122</sup> (provides procedure for the use of exhibits at trial); 207.20, 207.40 and 207.44<sup>123</sup> (expands list of documents to prove estate exempt from taxation); and 207.59<sup>124</sup> (establishes disclosure requirements relating to commissions and attorney's fees for an attorney-fiduciary). Also, section 214.7,<sup>125</sup> relating to conciliation procedures, was added to the Uniform Rules for Justice Courts.

Decisional law interpreting and applying the Uniform Rules should be noted. Although, during the *Survey* year, money sanctions for frivolity were available only in tort actions for frivolous claims and defenses, in *England v. Gradowitz Bros. Realty Corp.*<sup>126</sup> the court applied the sanctions to a mere motion.

In *Peterson v. Wert*,<sup>127</sup> the Appellate Division, Third Department, held that plaintiff must furnish the records of a treating physician only if he intends to call them at trial.<sup>128</sup> *Bradford v. City of New York*<sup>129</sup> followed the *Peterson* holding and ruled that

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116. *See id.*

117. *Id.* § 202.56(b), (c) (22 NYCRR 202.56(b), (c)).

118. *See id.*

119. *Id.* pt. 205 (22 NYCRR 205).

120. *Id.* § 206.19 (22 NYCRR 206.19).

121. *Id.* § 207.53 (22 NYCRR 207.53).

122. *Id.* § 207.34 (22 NYCRR 207.34).

123. *Id.* §§ 207.20, 207.40, 207.44 (22 NYCRR 207.20, 207.40, 207.44).

124. *Id.* § 207.59 (22 NYCRR 207.59).

125. *Id.* § 214.7 (22 NYCRR 214.7).

126. 137 Misc. 2d 21, 519 N.Y.S.2d 784 (Sup. Ct., Bronx Co. 1987) (interpreting Uniform Rule 202.12(g)).

127. 134 A.D.2d 668, 521 N.Y.S.2d 179 (3d Dep't 1987) (interpreting Uniform Rule 202.17).

128. *See Peterson*, 134 A.D.2d at 668, 521 N.Y.S.2d at 179.

129. 141 Misc. 2d 209, 532 N.Y.S.2d 1018 (N.Y.C. Civ. Ct., N.Y. Co. 1988) (interpreting Uniform Rule 202.17).

Uniform Rule 202.17(h) does not limit its application to examinations conducted only for litigation or pursuant to request of either party.<sup>130</sup>

In *In re Estate of Germain*,<sup>131</sup> the Appellate Division, Third Department, held that the sixty-day rule on entering orders applies only to the moving party whose motion is granted and not to the party moved against.<sup>132</sup> But why take a chance? Enter all orders immediately to avoid the abandonment consequences contemplated by the rule. Also, negotiations with one defendant cannot excuse delay in entering a judgment against another.<sup>133</sup>

In *Tewari v. Tsoutsouras*,<sup>134</sup> the Appellate Division, Second Department, limited the trial court's discretion to permit service of a late CPLR 3406(a)<sup>135</sup> notice, and ruled that the plaintiff's complaint should be dismissed.<sup>136</sup>

In *Shirlbarry Realty Co. v. Village of Monticello*,<sup>137</sup> the Appellate Division, Third Department, held that Uniform Rule 202.59(a) and (e), which requires exchange and filing of appraisal reports at direction of assigned judge during the pretrial conference, applies to proceedings pending on the effective date of the rule.<sup>138</sup>

Finally, the bench and bar should rejoice at the success of our state's new Individual Assignment System (IAS). Despite concern to the contrary, the IAS has reduced crowded dockets and has generally met with approval by the bar and the citizens of New York.<sup>139</sup>

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130. See *Bradford*, 141 Misc. 2d at 211, 532 N.Y.S.2d at 1020.

131. 138 A.D.2d 918, 526 N.Y.S.2d 662 (3d Dep't 1988) (interpreting Uniform Rule 202.37).

132. See *Germain*, 138 A.D.2d at 919-20, 526 N.Y.S.2d at 664.

133. See *Marine Midland Bank v. Bullard*, 139 Misc. 2d 1009, 528 N.Y.S.2d 965 (Sup. Ct., Onondaga Co. 1988); see also *Persaud v. Goriah*, 200 N.Y.L.J., Dec. 23, 1988, at 24, col. 5 (Sup. Ct., N.Y. Co.).

134. 140 A.D.2d 104, 532 N.Y.S.2d 288 (2d Dep't 1988) (interpreting Uniform Rule 202.56).

135. N.Y. CPLR 3406(a) (McKinney Supp. 1989).

136. See *Tewari*, 140 A.D.2d at 112, 532 N.Y.S.2d at 293.

137. 135 A.D.2d 16, 523 N.Y.S.2d 695 (3d Dep't 1988) (interpreting Uniform Rule 202.59).

138. See *Shirlbarry Realty*, 135 A.D.2d at 18-19, 523 N.Y.S.2d at 697.

139. See generally *IAS Gets Good, Poor Marks in State Survey of Lawyers*, 198 N.Y.L.J., Nov. 3, 1987, at 1, col. 3; see also Carlisle, *Simplified Procedure for Court Determination of Disputes Under New York's Civil Practice Law and Rules*, 54 BROOKLYN L. REV. 95, 128 (1988) (discussing IAS).

## III. JURISDICTION

A. *Subject Matter Jurisdiction*

The *Survey* seldom highlights recent decisional law on subject matter jurisdiction. This branch of jurisdiction is often referred to as competence. The competence of particular courts in New York is specified in the provisions of the state constitution and in various statutes.<sup>140</sup>

During the *Survey* year, the Court of Appeals, on a nationally disputed point which has not been resolved by the United States Supreme Court, held, in *Simpson Electric Corp. v. Leucadea*,<sup>141</sup> that New York State courts share subject matter jurisdiction with the federal courts over civil claims brought under the federal Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>142</sup> In *Simpson*, the Court of Appeals, overruling two Appellate Divisions, concluded that RICO does not confer exclusive jurisdiction on federal courts.<sup>143</sup> Thus, while many New York courts are relieving their crowded dockets by regularly dismissing cases on grounds of statute of limitations, res judicata and jurisdiction, the Court of Appeals has opened the door to RICO litigation on the policy grounds that "a determination of exclusive Federal jurisdiction would place an obstacle in the way [of] a private litigant who, for a variety of reasons, might prefer a State forum."<sup>144</sup> While the *Simpson* decision may cause the federal bench to cheer, why encourage lawyers in Jamestown to forego a trip to Buffalo to file their RICO claims in federal court? Judicial uniformity and consistency are more apt to be achieved by keeping RICO claims out of fifty separate state court systems.

On another tack, lawyers who occasionally file diversity claims in federal court should note the Federal Judicial Improvements and Access to Justice Act<sup>145</sup> which became law on November 19,

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140. See generally 1 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 301 (1986) [hereinafter 1 J. WEINSTEIN]. See also N.Y. CPLR 301 (McKinney 1986).

141. 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988).

142. See *Simpson Electric*, 72 N.Y.2d at 453-54, 530 N.E.2d at 861-62, 534 N.Y.S.2d at 153-54.

143. See *id.* at 455, 530 N.E.2d at 862, 534 N.Y.S.2d at 154-55. Although the Court of Appeals sustained jurisdiction, it rejected the RICO claim on its merits (case involved a RICO counterclaim by a defendant who claimed the plaintiff had inflated its bills).

144. *Id.* at 458, 530 N.E.2d at 864, 534 N.Y.S.2d at 157.

145. Pub. L. No. 100-702, 100 Stat. 4643 (1988).

1988 and increases to \$50,000 from \$10,000 the amount in controversy required for federal subject matter jurisdiction in all diversity cases, including those by and against decedents' estates, infants, incompetents and aliens.<sup>146</sup> Additional changes relating to removal of a state action to federal court became effective on November 19, 1988 and venue changes provided by the Act became effective on February 17, 1989. The main venue alteration is 28 U.S.C. § 1391(c) which affects the venue of an action against, but not by, a corporation.<sup>147</sup>

While on the topic of diversity jurisdiction, three decisions in the *Survey* year remind the bar that for diversity purposes a corporation is a citizen of the state where it is incorporated and where it has its principal place of business.<sup>148</sup> Also, because there is a presumption against diversity, if a defendant raises an issue of improper or collusive jurisdiction, the burden is on the plaintiff to prove that the district court's jurisdiction was properly invoked.<sup>149</sup> Finally, noncompliance with New York's "door closing statute," which precludes unauthorized foreign corporations from maintaining diversity suits in the federal courts of New York, is not applicable to the filing of a third-party action.<sup>150</sup>

### B. Constitutional Limitations on In Personam Jurisdiction

Last year's *Survey* discussed some of the relevant constitutional considerations necessary for the assertion of *in personam* jurisdiction in New York.<sup>151</sup> Our *Survey* deadline caused us to miss a recent United States Supreme Court decision, *Omni Capital International v. Rudolf Wolff & Co.*,<sup>152</sup> which was decided on December 8, 1987. In *Omni Capital*, the Supreme Court held that a federal district court in Louisiana lacked personal jurisdiction over nonres-

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146. See Abramson, *Diversity Jurisdiction Case Status May Become a Bit Harder to Attain*, Wall St. J., Oct. 26, 1988, at 16, col. 1.

147. See Siegel, *Significant Changes in Federal Jurisdiction and Practice Part II: Venue in Actions Against Corporations*, 349 N.Y. St. L. Dig., Jan. 1989, at 1.

148. See *Compucon Distribs. v. Cooper*, 685 F. Supp. 424 (S.D.N.Y. 1988); *Schneider v. Bahama Line, Inc.*, 664 F. Supp. 80 (S.D.N.Y. 1987); *St. Charles Cable T.V., Inc. v. Eagle Comtronics, Inc.*, 664 F. Supp. 824 (S.D.N.Y. 1987).

149. See *Horvitz v. Oconefsky*, 683 F. Supp. 959, 963 (S.D.N.Y. 1988).

150. See *Williams Erectors v. Mulach Steel*, 684 F. Supp. 357, 358 (E.D.N.Y. 1988); see also N.Y. Bus. Corp. Law § 1312(a), (b) (McKinney 1986).

151. See *Civil Practice, 1987 Survey*, *supra* note 1, at 88-98.

152. 108 S. Ct. 404 (1987).

ident defendants because there was no implied authorization for nationwide service of process under the Commodity Exchange Act provision permitting private causes of action and on the grounds that the requirements of the Louisiana long-arm statute were not satisfied.<sup>153</sup> This case is important for the New York practitioner because whenever she files a federal question case, she should be alert for a provision in the federal act which provides for nationwide service. In the absence of explicit or implicit authority to assert *in personam* jurisdiction over a nonresident defendant, the case may be dismissed unless basis is obtained under CPLR 302,<sup>154</sup> which the New York Court of Appeals twice referred to in 1988 as a long-arm statute that "does not provide for in personam jurisdiction in every case in which due process would permit it."<sup>155</sup>

### C. Long-Arm Jurisdiction

"The affliction known as long-arm jurisdiction"<sup>156</sup> has once again generated many cases during the *Survey* year. The Court of Appeals almost buried the fiduciary shield doctrine in *Kreutter v. McFadden Oil Corp.*,<sup>157</sup> and cut back on what constitutes a transaction of business for a defamation claim in *Talbot v. Johnson Newspaper Corp.*<sup>158</sup> In *Retail Software Services, Inc. v. Lashlee*,<sup>159</sup> the Court of Appeals for the Second Circuit clarified what kinds of contacts the United States Supreme Court considers sufficient to meet the "minimum contacts" standard.<sup>160</sup> Also, the Appellate Division, Second Department, held, in part, that a nonresident defendant's telephone contacts with New York were insufficient to support jurisdiction.<sup>161</sup> A review of other CPLR 302<sup>162</sup> cases decided during the *Survey* year supports Professor Siegel's observa-

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153. See *Omni*, 108 S. Ct. at 409.

154. N.Y. CPLR 302 (McKinney 1972 & Supp. 1989).

155. *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 830, 522 N.E.2d 1027, 1029, 527 N.Y.S.2d 729, 731 (1988); *Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d 460, 471, 522 N.E.2d 40, 46, 527 N.Y.S.2d 195, 201 (1988).

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

157. 71 N.Y.2d 460, 467-71, 522 N.E.2d 40, 44-46, 527 N.Y.S.2d 195, 199-200 (1988).

158. 71 N.Y.2d 827, 829-30, 522 N.E.2d 1027, 1028-29, 527 N.Y.S.2d 729, 731 (1988).

159. 854 F.2d 18 (2d Cir. 1988).

160. See *Retail Software*, 854 F.2d at 23-24.

161. See *Paradise Prods. v. Allmark Equip.*, 138 A.D.2d 470, 471, 526 N.Y.S.2d 119, 121 (2d Dep't 1988).

162. N.Y. CPLR 302 (McKinney 1972 & Supp. 1989).

tion that "long-arm inquiries can leave the realm of the merely monotonous and become intensely monotonous."<sup>163</sup>

In *CPC International, Inc. v. McKesson Corp.*,<sup>164</sup> the Court of Appeals held that the fiduciary shield doctrine was not available to defendants charged with tortious conduct in New York under CPLR 302(a)(2).<sup>165</sup> In *Kreutter*, the Court, without distinguishing between contract and tort, held that the fiduciary shield doctrine was unavailable to an individual in any case under CPLR 302.<sup>166</sup>

In *Kreutter*, the individual was the principal with a corporate agent acting for him in New York. The Court stressed that because the plaintiff had obtained jurisdiction over the nondomiciliary corporate defendant, its individual employee (principal) would undoubtedly be the main witness of the company, and he would have to come to New York to testify.<sup>167</sup> Thus, the inconvenience he would face if made an individual defendant was minimal.<sup>168</sup> Furthermore, the Court noted that the equitable concerns which motivated development of the fiduciary shield doctrine "are amply protected by New York's long-arm statute, which does not confer jurisdiction in every case where it is constitutionally permissible."<sup>169</sup> Finally, the Court stated in dicta that the fiduciary shield doctrine is not "desirable as a matter of public policy."<sup>170</sup>

Brian McFadden was a neighbor of mine, and despite his untimely death in 1983, I am sure he joins me in wishing that the Court's opinion in *Kreutter* had directed some discourse on the distinction between tort and contract actions. In effect, the Court buried the doctrine without analyzing its demise in terms of the nature of the liability. The plaintiff's fraud claim was in tort (the mere failure to perform a contract is not a fraud, but at the jurisdictional stage the Court was bound by the plaintiff's allegations), but what about nondomiciliary individuals making contracts on behalf of corporations who later breach them? *Kreutter* does not

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163. Siegel, *supra* note 156, at 5.

164. 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).

165. See *CPC Int'l*, 70 N.Y.2d at 287-88, 514 N.E.2d at 125-26, 519 N.Y.S.2d at 813-14.

166. See *Kreutter*, 71 N.Y.2d at 468-71, 522 N.E.2d at 44-46, 527 N.Y.S.2d at 199-200.

167. See *id.* at 471, 522 N.E.2d at 46, 527 N.Y.S.2d at 201.

168. See *id.*

169. *Id.* (fiduciary shield doctrine provides that an individual should not be subject to jurisdiction for his dealings with the forum state when acting solely in his corporate capacity).

170. *Id.*

address the latter question, so a clever lawyer may try to circumvent the Court's holding by explicitly alleging claims in both contract and tort.<sup>171</sup>

In *Talbot*, the Court of Appeals, in a memorandum opinion, held that two California defendants were not subject to *in personam* jurisdiction under the transaction of business clause in CPLR 302(a)(1)<sup>172</sup> on a defamation claim because there were no "purposeful activities" in New York.<sup>173</sup> The Court, citing *Asahi Metal Industries v. Superior Court*,<sup>174</sup> stated:

[w]hile appellants urge that jurisdiction may constitutionally be premised on broader standards articulated by the United States Supreme Court, the New York Long-arm statute . . . does not provide for in personam jurisdiction in every case in which due process would permit it.<sup>175</sup>

The Court's reliance on *Asahi*, which was analyzed in last year's *Survey*,<sup>176</sup> is curious because in that case five of the current Supreme Court Justices agreed that the specific elements of foreseeability stressed by the *Talbot* Court are not necessary, except in those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction . . ."<sup>177</sup> Once again, the Court of Appeals is reminding the practitioner that our state constitution has a due process clause which may require more for assertions of jurisdiction than its federal counterpart.<sup>178</sup> The message is unfortunately clear—the foreseeability element, a key one under the transaction

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171. Your *Survey* author is not trying to encourage more litigation for the Court of Appeals but anticipates further refinement of the fiduciary shield doctrine. It's been buried, but the Court of Appeals will have to shovel some more dirt on it to convince the bar of its permanent demise.

172. N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1989).

173. See *Talbot*, 71 N.Y.2d at 829, 522 N.E.2d at 1028, 527 N.Y.S.2d at 731 (alleged defamatory statements were contained in letters to a university writer by a California father dealing with incidents which occurred on the college campus during his daughter's attendance two years earlier—the defendant's newspaper quoted from the letters as well as a telephone interview with the daughter from California). Defamation is a cause of action excluded under CPLR 302(a)(2) and (a)(3). See N.Y. CPLR 302(a)(2), (3) (McKinney 1972).

174. 480 U.S. 102 (1987).

175. *Talbot*, 71 N.Y.2d at 829-30, 522 N.E.2d at 1029, 527 N.Y.S.2d at 731 (citing *Asahi*, 480 U.S. at 102 (citations omitted)).

176. See *Civil Practice*, 1987 *Survey*, *supra* note 1, at 88-97.

177. *Id.* at 91.

178. See *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).



of business clause of CPLR 302(a)(1), will not be given as much effect as the statute envisions.<sup>179</sup>

In *Retail Software*, the Court of Appeals for the Second Circuit took a more expansive view of long-arm jurisdiction than the *Talbot* Court.<sup>180</sup> Although the defendant's contacts with New York were limited (alleged misrepresentations on the fraud count were made in California and in a long distance telephone call with Retail's president in New York), the Court, relying on a long line of United States Supreme Court decisions,<sup>181</sup> concluded that by selling franchises to be operated here, the defendants "stood to benefit from this entry into New York"<sup>182</sup> and, therefore, "reached into" the State.<sup>183</sup> The Second Circuit also relied on New York's interest in protecting its citizens from fraudulent franchise sales.<sup>184</sup> In a similar line of cases, the federal courts for the Eastern and Southern Districts upheld long-arm jurisdiction under the "contracts anywhere" clause of CPLR 302(a)(1),<sup>185</sup> and under the statute's "transaction of business" clause.<sup>186</sup>

In *Paradise Products v. Allmark Equipment*,<sup>187</sup> the Appellate Division, Second Department, held that two New Jersey corporations were not amenable to *in personam* jurisdiction in New York.<sup>188</sup> The plaintiff had contacted one of the corporations by telephone seeking to purchase a 500-gallon copper kettle. Another corporation located the kettle and two of the plaintiff's representa-

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179. See N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1989).

180. See *Retail Software*, 854 F. Supp. at 21-22.

181. See *id.* at 22-23 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *McGee v. Int'l Life Inc.*, 355 U.S. 220 (1957)).

182. See *id.* at 23.

183. See *id.*

184. See *id.* at 24.

185. See *Davidson Pipe Supply Co. v. G.W. Sales, Inc.*, 685 F. Supp. 332, 333 (E.D.N.Y. 1988).

186. See *First City Fed. Sav. Bank v. Dennis*, 680 F. Supp. 579, 583 (S.D.N.Y. 1988). Lest the reader assumes that there were no significant federal cases during the *Survey* year where jurisdiction was declined, see *First City Sav. v. Keener*, 685 F. Supp. 58 (S.D.N.Y. 1988); *Atlantic Corp. v. Polskie Linie Oceaniczne*, 683 F. Supp. 347 (S.D.N.Y. 1988); *Coastal Mart, Inc. v. Coastal Oil Co.*, 681 F. Supp. 1090 (S.D.N.Y. 1988); *Pelligrino v. Stratton Corp.*, 679 F. Supp. 1164 (N.D.N.Y. 1988). In each of these cases, the defendant's contacts with New York were so limited that it would be almost impossible to conclude they could foresee being hauled into our state to litigate.

187. 138 A.D.2d 470, 526 N.Y.S.2d 119 (2d Dep't 1988).

188. See *Paradise Prods.*, 138 A.D.2d at 471-72, 526 N.Y.S.2d at 121.

tives traveled to New Jersey, purchased the kettle, and arranged to have it picked up in the Garden State rather than have it delivered to New York. The 500-gallon copper kettle was later found to contain pinholes which rendered it useless for the plaintiff's business. Because title passed in New Jersey and the plaintiff agreed to assume responsibility for shipping the product to New York (to save the \$150 delivery charge), the Appellate Division held that one defendant's knowledge that the kettle was destined for New York was insufficient to sustain jurisdiction.<sup>189</sup> Similarly, the other defendant's only contact with New York was one telephone call, which would not support a jurisdictional base.<sup>190</sup> Had the kettle been delivered to New York, the result would have been different. Thus, if your client is looking for a nonresident copper kettle, advise him to pay the delivery charge or brace yourself for a trip across the Hudson to argue the merits of whether pinholes render the kettle useless.

#### *D. Statutory Requirements for Service of Summons*

Last year's *Survey* continued to remind the practitioner that New York State courts require strict compliance for service of summons and notice.<sup>191</sup> This is important because a defect in service dismisses the action,<sup>192</sup> and if the dismissal occurs after the applicable statute of limitations has expired, there is no six-month grace period under CPLR 205(a)<sup>193</sup> and the action is dead, which means unhappy clients and higher malpractice rates. To avoid jurisdictional service challenges, always debrief the process server. Be pound wise rather than penny foolish! If the defendant raises a jurisdictional objection, successfully serve a second summons and let the defendant move to dismiss it on the grounds that a prior action is pending. By doing so, he must admit that the first action is not jurisdictionally defective. Another solution suggested by the Appellate Division, Second Department, is to re-serve the defendant in court before expiration of the statute of limitations.<sup>194</sup>

Also, once service is complete, beware of an adversary who

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189. *See id.* at 470-71, 526 N.Y.S.2d at 120.

190. *See id.* at 471-72, 526 N.Y.S.2d at 121.

191. *See Civil Practice, 1987 Survey, supra* note 1, at 111-20.

192. *See Siegel, Civil Procedure*, 198 N.Y.L.J., Sept. 28, 1987, at S-24, col. 1.

193. *See id.*; *see also* N.Y. CPLR 205(a) (McKinney Supp. 1989).

194. *See Kellner v. DeBushey, Ltd.*, 138 A.D.2d 460, 526 N.Y.S.2d 115 (2d Dep't 1988).

calls to request "more time" to submit an answer. Politely inform him that your office policy is to liberally stipulate to "more time" requests but only if your adversaries agree to waive all jurisdictional defenses. If he claims he "has not made that decision yet" or "must talk to the client" remind him of how much you dislike moving for default judgments, but that you have won a few of them.<sup>195</sup> In any event, follow up your conversation with a letter and be sure not to stipulate away a good cause of action. With the foregoing advice in mind, several *Survey* year service decisions merit mention. In addition, the United States Supreme Court's opinion in *Volkswagenwerk Aktiengesellschaft v. Schlunk*<sup>196</sup> deserves analysis because many New York practitioners are finding it increasingly necessary to bring suit against corporations and individuals who reside in nations that are signatories to the Hague Convention. This means compliance not only with New York service statutes such as CPLR 308,<sup>197</sup> Vehicle and Traffic Law section 253,<sup>198</sup> Business Corporation Law section 307,<sup>199</sup> etc., but also service of process requirements as directed by the Hague Convention. Finally, this portion of the *Survey* will briefly comment on the "fax phenomenon." The question of whether to fax or not to fax has prompted several judges during the *Survey* year to write faxing opinions.<sup>200</sup>

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195. See *Mulder v. Rockland Armor & Metal Corp.*, 140 A.D.2d 315, 527 N.Y.S.2d 550 (2d Dep't 1988), where the Appellate Division, Second Department, held that a default judgment should not have been granted, on the basis of the defendant's nine-day default in answering, at the time plaintiff moved to dismiss. See *id.* at 316, 527 N.Y.S.2d at 550. The Appellate Division stated:

[i]n view of the relatively short period of the delay, the absence of any claim of prejudice to the plaintiff, the existence of a possible meritorious defense, the absence of any willfulness on the appellant's part and the public policy in favor of resolving cases on the merits, the Supreme Court should have denied the cross motion and granted the appellants leave to file a late claim.

*Id.* at 316, 527 N.Y.S.2d at 550-51 (citations omitted).

196. 108 S. Ct. 2104 (1988).

197. N.Y. CPLR 308 (McKinney 1972 & Supp. 1989).

198. N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986 & Supp. 1989).

199. N.Y. BUS. CORP. LAW § 307 (McKinney 1986).

200. See *Calabrese v. Springer Personnel of New York, Inc.*, 141 Misc. 2d 566, 534 N.Y.S.2d 83 (N.Y.C. Civ. Ct., N.Y. Co. 1988); *Infilco Degremont, Inc. v. Carland Constr. Co.*, 200 N.Y.L.J., Dec. 27, 1988, at 25, col. 2 (Sup. Ct., N.Y. Co.).

### 1. Service on a Natural Person

CPLR 308(1)<sup>201</sup> requires personal delivery of the summons and notice to the defendant.<sup>202</sup> Delivery of the summons to the wrong person does not confer jurisdiction over a defendant even though there is immediate redelivery.<sup>203</sup> Subdivision (1) is arguably the most reliable and least likely to be challenged form of service; however, be sure to instruct your process server to “touch” the named defendant with the summons.<sup>204</sup> The so-called “general vicinity” exception—leaving the summons in the general vicinity of a person to be served who resists service—is a limited exception.<sup>205</sup> If there is any doubt that your process server satisfied the strict compliance requirements of CPLR 308(1), why risk the hazard of relying solely on in-hand-service, particularly if the statute of limitations is about to expire? If you need to be further convinced, read *Phi Sigma Phi Sorority, Inc. v. Simons*,<sup>206</sup> where the Appellate Division, Fourth Department, citing *Macchia v. Russo*,<sup>207</sup> reminds the practitioner that strict compliance means STRICT COMPLIANCE.<sup>208</sup> Also, once a defendant submits a sworn denial that he received the summons and notice, the burden shifts to the plaintiff to prove that the strict compliance requirements of CPLR 308(1) were satisfied.<sup>209</sup> This means a traverse hearing where a judge is more likely to credit the credibility of a defendant than a process server who “performed this task about 100 times a week.”<sup>210</sup> Finally, what happens if your process server dies after service and prior to a hearing as to whether service was properly effected? In *Gordon v. Nemeroff Realty Corp.*,<sup>211</sup> the Appellate Division, Second Department, held that the affidavit of service would be re-

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201. N.Y. CPLR 308(1) (McKinney 1972 & Supp. 1989).

202. *See id.*

203. *See Macchia v. Russo*, 67 N.Y.2d 592, 594, 496 N.E.2d 680, 681, 505 N.Y.S.2d 591, 593 (1986).

204. *See Phi Sigma Phi Sorority, Inc. v. Simons*, 137 A.D.2d 873, 874, 524 N.Y.S.2d 553, 554 (3d Dep't 1988).

205. *See Thermidor v. Wyckoff Heights Hosp.*, 130 A.D.2d 653, 515 N.Y.S.2d 583 (2d Dep't 1987); *Selby v. Jewish Memorial Hosp.*, 130 A.D.2d 651, 652, 515 N.Y.S.2d 580, 582 (2d Dep't 1987).

206. 137 A.D.2d 873, 524 N.Y.S.2d 553 (3d Dep't 1988).

207. 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986).

208. *See Phi Sigma*, 137 A.D.2d at 874, 524 N.Y.S.2d at 555.

209. *See Post v. Kolenda*, 142 A.D.2d 633, 634, 530 N.Y.S.2d 589, 590 (2d Dep't 1988).

210. *Phi Sigma*, 137 A.D.2d at 874, 524 N.Y.S.2d at 554.

211. 139 A.D.2d 492, 526 N.Y.S.2d 595 (2d Dep't 1988).

ceived as prima facie evidence of service, provided it was not conclusory or devoid of sufficient detail.<sup>212</sup> This means the affidavit must contain "sufficient factual detail and descriptive information to establish prima facie that personal service was made."<sup>213</sup>

Your best friend may be a process server, you may rejoice when your only son marries a process server, but if you read the 1988 *Survey* cases on service of summons and notice, you will heed my admonition to Never Trust a Process Server!

## 2. *Leave and Mail*

Leave and mail means that if one of the two steps is omitted, then the service is invalid.<sup>214</sup> CPLR 308(2)<sup>215</sup> was amended again during the *Survey* year<sup>216</sup> to make it gender neutral and to require that delivery and mailing be effected within twenty days of each other.<sup>217</sup> Also, service should be filed with the clerk of the court designated in the summons "within twenty days of either such delivery or mailing, whichever is effected later."<sup>218</sup> The amendments became effective January 1, 1989.<sup>219</sup>

During the *Survey* year, one court has held that substituted service of process on a doorman is valid only if he bars access to the defendant's apartment.<sup>220</sup> The Appellate Division, First Department, held that the mailing requirement of CPLR 308(2) was satisfied by mailing the summons to the defendant's post office box where the plaintiff did not know the actual place of residence of the defendant.<sup>221</sup> Also, the Appellate Term for the First Department ruled, in an issue of first impression, that leave and mail service was sufficient to commence criminal contempt proceedings.<sup>222</sup>

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212. See *Gordon*, 139 A.D.2d at 493, 526 N.Y.S.2d at 596.

213. *Id.*

214. See *Michaelson v. Hudson*, 142 A.D.2d 560, 560, 530 N.Y.S.2d 225, 226 (2d Dep't 1988).

215. N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1989).

216. See Act of June 20, 1988, ch. 125, 1988 MCKINNEY'S SESS. LAWS OF N.Y. 277 (codified at N.Y. CPLR 308(2) (McKinney Supp. 1989)).

217. See *id.*

218. *Id.* at 278.

219. See *id.*

220. See *Reliance Audio Visual Corp. v. Bronson*, 141 Misc. 2d 671, 673, 534 N.Y.S.2d 313, 315 (N.Y.C. Civ. Ct., N.Y. Co. 1988). A "dwelling place" under CPLR 308(2) does not extend to "the desk of the concierge." See *id.* at 673, 534 N.Y.S.2d at 314.

221. See *Townsend v. Hanks*, 140 A.D.2d 162, 527 N.Y.S.2d 415 (1st Dep't 1988).

222. See *Department of Hous. Preservation & Dev. v. 24 West 132 Equities, Inc.*, 137

This case is on appeal and should be affirmed by the Appellate Division, First Department. We will highlight it in next year's *Survey*.

### 3. Service on Defendant's Agent

CPLR 308(3)<sup>223</sup> permits service to be effected by delivery of the summons to an "agent designated under Rule 318."<sup>224</sup> In *Pabone v. Jon-Bar Enterprises*,<sup>225</sup> the Appellate Division, Third Department, held that service on a corporation by delivery of process to the Secretary of State is not personal delivery to the corporation or agent designated by CPLR 318.<sup>226</sup> In *Shepard v. Morning Pride Manufacturing Inc.*,<sup>227</sup> however, the Third Department upheld service upon a law partner of an attorney who was registered in New Jersey to accept process on the corporation's behalf.<sup>228</sup> The practitioner is also reminded that a recent amendment to CPLR 318 provides that the writing in which the principal appoints his agent must be executed and acknowledged in the same manner as a deed.<sup>229</sup>

### 4. Nail and Mail

Service under CPLR 308(4)<sup>230</sup> is always hazardous because it requires proof of "due diligence" to make service under subsections (1) and (2) of CPLR 308.<sup>231</sup> The due diligence requirements were so rigidly construed during the *Survey* year as to merit the conclusion that nail and mail service is "just plain unreliable service."<sup>232</sup> If you must use CPLR 308(4), remember that failure of

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Misc. 2d 459, 461-62, 524 N.Y.S.2d 324, 326-27 (Sup. Ct. App. T., 1st Dep't 1987).

223. N.Y. CPLR 308(3) (McKinney 1972 & Supp. 1989).

224. *See id.*

225. 140 A.D.2d 872, 528 N.Y.S.2d 912 (3d Dep't 1988).

226. *See Pabone*, 140 A.D.2d at 873, 528 N.Y.S.2d at 913; *see also* N.Y. CPLR 318 (McKinney 1972 & Supp. 1989).

227. 138 A.D.2d 74, 530 N.Y.S.2d 305 (3d Dep't 1988).

228. *See Shepard*, 138 A.D.2d at 76, 530 N.Y.S.2d at 307.

229. *See* Act of July 15, 1987, ch. 115, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 236 (codified at N.Y. CPLR 308(3) (McKinney Supp. 1989)); *see also* *Donaldson v. Melville*, 124 A.D.2d 361, 507 N.Y.S.2d 301 (3d Dep't 1986) (agency must be express and not implied).

230. N.Y. CPLR 308(4) (McKinney 1972 & Supp. 1989).

231. *See id.*

232. *See* Farrell, *Good Old Unreliable—Service Under New York's 'Nail and Mail' Statute*, 196 N.Y.L.J., July 28, 1987, at 1, col. 1; *see also* *Bailey Corp. v. Gould*, 143 A.D.2d 523, 533 N.Y.S.2d 34 (4th Dep't 1988); *Wiley v. Lipset*, 140 A.D.2d 336, 527 N.Y.S.2d 829

the plaintiff to file proof of the substituted service is fatal,<sup>233</sup> and have your process server make at least three serious attempts to make service under CPLR 308(1) and (2) at the defendant's residence and office. This procedure may be costly, but it will probably be good enough to keep your malpractice insurance rates current.<sup>234</sup>

Also, CPLR 308(4) was amended during the *Survey* year<sup>235</sup> to make it gender neutral and to require that delivery and mailing be effected within twenty days of each other. In addition, the amendment requires that service be filed within twenty days of the mailing or delivery, whichever occurs last.<sup>236</sup>

### 5. *Expedient Service*

CPLR 308(5)<sup>237</sup> does not require proof of due diligence under subsections (1) and (2), but it must be shown that service is "impracticable."<sup>238</sup> Thus, in *Bissinger v. Dibella*,<sup>239</sup> the Appellate Division, Second Department, held that expedient service was not available to a plaintiff because the papers in support of his application for CPLR 308(5) service were insufficient.<sup>240</sup> The Appellate Division stressed the plaintiff's failure to provide evidentiary facts establishing "fraud, deception, or misrepresentation or improper conduct"<sup>241</sup> which was calculated to prevent the plaintiff from ascertaining the defendant's address.

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(2d Dep't 1988); *Lukash v. O'Connell*, 138 A.D.2d 957, 526 N.Y.S.2d 290 (4th Dep't 1988); *Cooney v. East Nassau Medical Group*, 136 A.D.2d 392, 528 N.Y.S.2d 364 (1st Dep't 1988).

233. See *Wiley*, 140 A.D.2d at 336, 527 N.Y.S.2d at 829 (defendant's motion to vacate default judgment and to dismiss complaint granted and plaintiff's cross motion for leave to file late proof of substituted service denied).

234. See *Cooney*, 136 A.D.2d at 392, 528 N.Y.S.2d at 364 (due diligence shown where server's efforts to arrange for personal service on defendant at his place of work were unavailing, and server had made repeated attempts to serve defendant at his home, one occasion returning there at the time he had been specifically advised that defendant would be in).

235. See Act of June 20, 1988, ch. 125, 1988 MCKINNEY'S SESS. LAWS OF N.Y. 278 (codified at N.Y. CPLR 308(4) (McKinney Supp. 1989)).

236. See *id.*

237. N.Y. CPLR 308(5) (McKinney 1972 & Supp. 1988).

238. See *id.*

239. 141 A.D.2d 595, 529 N.Y.S.2d 516 (2d Dep't 1988).

240. See *Bissinger*, 141 A.D.2d at 596, 529 N.Y.S.2d at 517.

241. *Id.*

## 6. Related Service Tips

The Appellate Division, First Department, has held that the more permissive service of process allowed when service is on a corporation's agent under CPLR 311<sup>242</sup> will not be extended to service on a partnership under CPLR 310.<sup>243</sup> However, a general partner's managing agent may accept service for the partnership.<sup>244</sup> The Appellate Division, Second Department, reversed a trial court's decision and applied the doctrine of immunity from service to protect an Illinois defendant who voluntarily appeared at a deposition in New York.<sup>245</sup> The Second Department also ruled that a nonwillful bureaucratic delay by a town clerk, who failed to forward process to town officials, was a reasonable excuse for delay and permitted opening of a default judgment.<sup>246</sup> New York Supreme Courts have held that a statute authorizing service of process to be made upon the New York Higher Education Assistance Corporation is not sufficient for subject matter jurisdiction,<sup>247</sup> and that a copy of a summons and complaint and notice of filing—sent by registered mail, return receipt requested, and returned with envelope marked "returned to sender—forwarding time expired," and then filed with the clerk—was insufficient under Vehicle and Traffic Law section 253.<sup>248</sup> Also, a Family Court has ruled that out-of-state personal service of process is impermissible in a proceeding brought under article 8 of the Family Court Act.<sup>249</sup>

Finally, we located an old First Department case, *Lancaster v. Kindor*,<sup>250</sup> where the Appellate Division held that delay in filing proof of service under CPLR 308 is merely a procedural irregularity, which is not jurisdictional, and can be corrected nunc pro tunc

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242. N.Y. CPLR 311 (McKinney Supp. 1989).

243. See *Cooney*, 136 A.D.2d at 392, 528 N.Y.S.2d at 364; see also N.Y. CPLR 310 (McKinney 1972).

244. See *Carol Management Corp. v. Commissioner State of N.Y. Div. of Hous. & Community Renewal*, 140 Misc. 2d 673, 531 N.Y.S.2d 839 (Sup. Ct., Queens Co. 1988).

245. See *Moreo v. Regan*, 140 A.D.2d 313, 527 N.Y.S.2d 547 (2d Dep't 1988).

246. See *Curtis v. Town of Clinton*, 138 A.D.2d 445, 526 N.Y.S.2d 18 (2d Dep't 1988).

247. See *Bell v. New York Higher Educ. Assistance Corp.*, 140 Misc. 2d 229, 530 N.Y.S.2d 430 (Sup. Ct., N.Y. Co. 1988).

248. See *Harrington v. Victory Trucking Co.*, 141 Misc. 2d 327, 533 N.Y.S.2d 233 (Sup. Ct., Suffolk Co. 1988).

249. See *Jane O.J. v. Peter L.J.*, 141 Misc. 2d 434, 532 N.Y.S.2d 955 (Family Ct., N.Y. Co. 1988); see also N.Y. FAM. CT. ACT Art. 8 (McKinney 1983 & Supp. 1989).

250. 98 A.D.2d 300, 471 N.Y.S.2d 573 (1st Dep't 1984).



by the court.<sup>251</sup> In *Lancaster*, the court stated: "the purpose of requiring filing of proof of service, along with the ten-day grace period, pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of the summons."<sup>252</sup> Although the *Lancaster* plaintiff appeared pro se, the case may be helpful to some *Survey* readers.

### 7. *The Hague Convention*

Last year's *Survey* discussed the split of authority in state and federal courts on the issue of whether the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, an international treaty known as the Hague Convention, applied to service of process requirements in New York.<sup>253</sup> We stated that the conflicting approaches to the Convention, on the state and federal levels, would have to be clarified by the New York Court of Appeals and by the United States Court of Appeals for the Second Circuit.<sup>254</sup> In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,<sup>255</sup> the United States Supreme Court saved our highest courts the effort by holding, albeit in dicta, that "compliance with the Convention is mandatory in all cases in which it applies . . . ."<sup>256</sup> Thus, by virtue of the supremacy clause, the Hague Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies. In short, 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's CPLR, Business Corporation Law, and Vehicle and Traffic Law (or any other state service statute), but must also conform with the Hague service requirements. The Hague 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,

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251. See *Lancaster*, 98 A.D.2d at 306, 471 N.Y.S.2d at 577.

252. *Id.* at 306, 471 N.Y.S.2d at 577-78.

253. See *Civil Practice*, 1987 *Survey*, *supra* note 1, at 117-20. The United Kingdom, Japan, Germany, France, Italy and twenty-one other nations are parties to the Hague Convention.

254. See *id.*

255. 108 S. Ct. 2104 (1988).

256. *Schlunk*, 108 S. Ct. at 2111. "This language [in Article 1 of the Convention] is mandatory." *Id.* at 2108; see also Davies & Weinstock, *Getting it Done: The Service of Process Overseas*, Nat'l L.J., Oct. 3, 1988, at 15, col. 4; Note, *Committee Issues Nuts and Bolts: Report on Service Abroad*, N.Y. St. B. News, July 1988, at 5, col. 1.

within the United States. Similarly, a contractual choice of forum clause or a provision for an appointment by a foreign entity of an agent for service of process in the United States will avoid having to serve process abroad.

According to *Schlunk*, the law of the forum state determines whether service abroad is necessary.<sup>257</sup> Thus, if state law, consistent with federal and state due process laws, permits domestic service upon a domestic subsidiary, the Convention does not apply.<sup>258</sup>

#### 8. *To Fax or Not to Fax*

Two courts during the *Survey* year have permitted service papers upon an attorney through a facsimile (Fax) machine.<sup>259</sup> To conclude otherwise would, as Judge Lane puts it, "justify the blunt observation about the law which Charles Dickens put in the mouth of [Mr. Bumble in] *Oliver Twist*."<sup>260</sup> Nonetheless, there are serious objections to the Fax phenomenon, particularly if it is authorized by the Legislature for service of process purposes.<sup>261</sup> Unlimited faxing should not be dumped on the bar without full consideration of a few potential pitfalls. The *Survey* reader is encouraged to ponder the following: (1) "the hidden fax number" (lawyers may withdraw their fax numbers when they do not want to be served); (2)

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257. See *Schlunk*, 108 S. Ct. at 2108.

258. We could devote much more of the *Survey* to analyzing the Hague Convention. Fortunately for the bench and bar, however, Professor Mark Davies of Fordham Law School and Attorney Robert L. Haig of the New York bar have authored *Service of Process Abroad! A Nuts and Bolts Guide* which Professor Davies advises will be published in the December, 1988 Federal Rules Decisions. The article is also available from the New York State Bar Association's Committee on Federal Courts. Any New York lawyer representing a plaintiff suing a foreign national should read this piece. Failure to do so may result in a jurisdictional dismissal that will be fatal if the applicable statute of limitations has run. Further information regarding service abroad under the Hague Convention is available by telephoning the State Department in Washington, D.C. The numbers are as follows: (1) African Services Division, (202) 647-4994; (2) East Asia and Pacific Services Division, (202) 647-3675; European and Canadian Division, (202) 647-3444; Inter-American Division, (202) 647-3712; and the Near East and South Asian Division, (202) 647-3926. Identify the country that your defendant is a citizen of, and, without referring to your malpractice insurance company, ask for information. Next year's *Survey* will discuss the expected deluge of New York cases analyzing the Convention.

259. See *Calabrese v. Springer Personnel of N.Y., Inc.*, 141 Misc. 2d 566, 534 N.Y.S.2d 83 (N.Y.C. Civ. Ct., N.Y. Co. 1988); *Infilco Degremont, Inc. v. Carland Constr. Co.*, 200 N.Y.L.J., Dec. 27, 1988, at 25, col. 2 (Sup. Ct., N.Y. Co.).

260. See *Calabrese*, 141 Misc. 2d at 567, 534 N.Y.S.2d at 84.

261. See generally Annual Report of Office of Court Administration's CPLR Committee, Dec. 1988 (available from author).

many attorneys do not have fax machines (should we have mandatory fax purchases as a condition for admission to the bar); (3) the "dead sea scroll theory" (what to do with the 8000 pages of overnight faxed material); (4) how to certify receipt of faxed materials (your adversary "ducks" your certification telephone call); (5) midnight fax transmissions, or worse yet, fax transmissions to your summer hideaway on Cape Cod; (6) is the fax technology up to snuff; (7) certain fax documents are not clear on the machine (handwritten inserts frequently are not legible); (8) whether service by fax eliminates the five day mailing requirements under the CPLR; (9) time of receipt of faxed documents can be manipulated; and (10) whether faxing is the best form of actual notice. These and many other obstacles to service by the user-friendly facsimile machine should be considered.

#### IV. FORUM NON CONVENIENS

Even if a New York court has subject matter and personal jurisdiction, CPLR 327(a)<sup>262</sup> gives the court discretionary power to dismiss the case.<sup>263</sup> Under CPLR 327(b),<sup>264</sup> however, dismissal will not be allowed where the action arises out of a contract agreement or undertaking to which section 5-1402 of the General Obligations Law<sup>265</sup> applies if the parties have agreed that New York law will govern.<sup>266</sup> Several decisions during the *Survey* year apply subdivision (a) of CPLR 327, and the United States Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>267</sup> affects subdivision (b) of the statute.

##### A. CPLR 327(a)

CPLR 327(a)<sup>268</sup> permits a court to stay or dismiss any action if it feels that "in the interest of substantial justice the action should be heard in another forum."<sup>269</sup> The Court of Appeals has held,

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

263. *See id.*

264. N.Y. CPLR 327(b) (McKinney Supp. 1989).

265. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney Supp. 1989).

266. *See generally* 1 J. WEINSTEIN, *supra* note 140, at § 327.04 (revised edition 1988 by Jay C. Carlisle).

267. 108 S. Ct. 2239 (1988).

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

269. *Id.*

however, that the availability of an alternative forum is not an absolute precondition for dismissal.<sup>270</sup> The Court also ruled during the *Survey* year that a court may stay or dismiss a case under CPLR 327(a), in whole or in part, only upon motion of a party.<sup>271</sup>

In *VSL Corp. v. Dunes Hotels & Casinos*,<sup>272</sup> the Court of Appeals held that "a court does not have the authority to invoke the doctrine on its own motion."<sup>273</sup> This decision is puzzling as a *forum non conveniens* objection has traditionally been considered tantamount to a motion for dismissal on subject matter grounds under CPLR 3211(a)(2),<sup>274</sup> which clearly can be raised sua sponte by the court.<sup>275</sup> Also, in an era of conserving judicial resources, why permit out-of-state and foreign parties and their lawyers, in the absence of a forum selection clause, to use New York's courts without the judiciary having some say as to docket control?<sup>276</sup>

Also of note is last year's *Survey* discussion of *Carlenstolpe v. Merck & Co.*<sup>277</sup> In that case, the Court of Appeals for the Second Circuit ruled, on an issue of first impression, that a federal district court's order denying a motion to dismiss a complaint on *forum non conveniens* grounds was not an appealable order under 28 U.S.C. § 1291.<sup>278</sup> During the *Survey* year, however, the United States Supreme Court granted certiorari in *Chasser v. Achille*

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270. See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985).

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

272. 70 N.Y.2d 948, 519 N.E.2d 617, 524 N.Y.S.2d 671 (1988).

273. *VSL Corp.*, 70 N.Y.2d at 949, 519 N.E.2d at 617, 524 N.Y.S.2d at 671.

274. N.Y. CPLR 3211(a)(2) (McKinney 1970).

275. See D. SIEGEL, *supra* note 79, at § 28.

276. Several other *Survey* year decisions are of interest, including *Carvel Corp. v. Ross Distribs.*, 137 A.D.2d 758, 524 N.Y.S.2d 469 (2d Dep't 1988) and *Scottish Air Int'l v. British Caledonia Group P.L.C.*, 860 F.2d 57 (2d Cir. 1988). However, I modestly refer the *Survey* reader to my 1988 revision of CPLR 327 in the Weinstein, Korn & Miller treatise on *New York Civil Practice* for a more thorough discourse on CPLR 327(a).

277. 819 F.2d 33 (2d Cir. 1987).

278. See *Carlenstolpe*, 819 F.2d at 36. The Third, Fifth, Sixth and District of Columbia Circuits have also ruled that district court orders denying motions on *forum non conveniens* grounds are nonappealable. See *id.* at 33; see also *Partrederiet Treasure Saga v. Joy Mfg. Co.*, 804 F.2d 308 (5th Cir. 1986); *Rosenstein v. Merrell Dow Pharmaceuticals*, 769 F.2d 352 (6th Cir. 1985); *Nalls v. Rolls Royce, Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 461 U.S. 970 (1983); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983). The Fourth Circuit, however, has ruled that a district court order denying a motion to dismiss on *forum non conveniens* grounds is appealable. See *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

*Lauro Lines*<sup>279</sup> to determine if a federal appeals court has 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. The Court of Appeals for the Second Circuit said no, and, citing *Carlenstolpe*, pointed out that they had not considered the applicability of the *Cohen* doctrine<sup>280</sup> to the denial of a motion to dismiss on the basis of a contractual forum selection clause.<sup>281</sup> We will discuss this interesting development in next year's *Survey*.

A postscript to our *forum non conveniens* discussion is that the *Bhopal*<sup>282</sup> case, which never fully made it to the United States Supreme Court, was heard on appeal during the week of November 1, 1988 before the highest court in India.<sup>283</sup> The district judge hearing the case was removed for ordering Union Carbide to pay \$350 million in damages without bothering to establish the company's liability before announcing his verdict.<sup>284</sup>

#### ! B. CPLR 327(b)

Subdivision (b) of CPLR 327 was added in 1984<sup>285</sup> in order to render the doctrine of *forum non conveniens* inapplicable to certain commercial contract cases involving large monetary amounts.<sup>286</sup> Generally, choice of law clauses in non-consumer contracts involving at least \$250,000 are binding, even if the contract bears no reasonable relation to New York.<sup>287</sup> Similarly, choice of forum clauses control in non-consumer contracts for which a choice of law has been made if the contract involves at least \$1 million and the foreign corporation or nonresident defendant has agreed to the jurisdiction of New York courts. This is true even if the parties are nondomiciliaries and the cause of action bears no relationship

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279. 844 F.2d 50 (2d Cir.), *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. 3.

280. *See Chasser*, 844 F.2d at 52 (exception to the final order rule).

281. *See id.* at 54.

282. *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).

283. *See* N.Y. Times, Oct. 18, 1988, at D15.

284. *See id.*

285. *See* Act of July 19, 1984, ch. 421, 1984 MCKINNEY'S SESS. LAWS OF N.Y. 1407 (codified at N.Y. CPLR 327(b) (McKinney Supp. 1989)).

286. *See id.*

287. *See* N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney Supp. 1989).

to New York. The choice of law and forum selection provisions are implemented by General Obligations Law sections 5-1401 and 5-1402 respectively.<sup>288</sup>

CPLR 327(b) allows big spenders, wherever they are located in the world, to use New York courts. Nevertheless, in *Stewart Organization, Inc. v. Ricoh Corp.*,<sup>289</sup> the United States Supreme Court held that forum selection clauses binding in a state court will not be given the same binding effect in federal court.<sup>290</sup> The Court ruled that 28 U.S.C. § 1404(a), the federal venue transfer statute, supersedes the absolute requirements of a state *forum non conveniens* doctrine in the federal courts.<sup>291</sup> Thus, a forum selection clause, pursuant to CPLR 327(b), will at best be factored in as one of several criteria under the federal venue statute. Professor Youngblood argues that *Stewart* is good news for CPLR 327(b) agreements;<sup>292</sup> however, the Supreme Court may have added to the litigation explosion in New York.<sup>293</sup> For example, if California and Texas corporations stipulate under CPLR 327(b) to have a matter heard in a New York Supreme Court and Texas commences an action here, California can remove it to federal court and then try to venue it out of New York or even dismiss it.<sup>294</sup> The same is true for

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288. See *id.* §§ 5-1401, 5-1402.

289. 108 S. Ct. 2239 (1988).

290. See *Stewart*, 108 S. Ct. at 2244.

291. See *id.* *Stewart* involved both choice of law and choice of New York forums; however, *Stewart* filed suit in Alabama. Ricoh, relying on the clause, moved to transfer the case to New York under 28 U.S.C. § 1404(a) or to dismiss it under 28 U.S.C. § 1406. The district court would not enforce the forum selection clause because it concluded it must apply Alabama law, which invalidated forum selection clauses. On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed on the ground that the enforceability of such clauses in federal courts was a matter of federal rather than state law. In a split opinion, the Supreme Court affirmed and remanded the case to the district court for determination of the effect to be given to the forum selection clause under section 1404(a). See *id.* at 2245.

292. See Youngblood, *Forum Selection Clauses in New York Affected by High Court's Decision*, 200 N.Y.L.J., July 1, 1988, at 1, col. 3 (Professor Youngblood argues that the *Stewart* decision will make it more difficult for parties to subvert forum selection clauses by bringing suit in a hostile forum.).

293. See Carlisle, *Simplified Procedures for Court Determination Under New York's Civil Practice Law and Rules*, 54 BROOKLYN L. REV. 95, 96 n.5 (citing New York state caseload statistics from CASELOAD ACTIVITY REPORTING SYSTEM OF THE OFFICE OF COURT ADMINISTRATION OF THE UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK (1987)).

294. See 28 U.S.C. §§ 1404(a), 1406 (1982). Prior to *Stewart*, if Texas filed in New York, California would be absolutely required to litigate here in state or federal court. After *Stewart*, a 327(b) forum selection clause will no longer be binding in federal court. Thus, a defendant seeking to avoid the clause in a diversity action can remove to federal court and then try to venue the case elsewhere.

two foreign nationals. Clearly the Legislature's desire to open New York's doors to a hearing on the merits of certain types of big commercial litigation has been thwarted. We can expect, however, a substantial increase in Rule 12(b)(3)<sup>295</sup> venue litigation, which your *Survey* author eagerly awaits!<sup>296</sup>

## V. STATUTE OF LIMITATIONS

Of the many *Survey* year decisions interpreting and applying Article II of the CPLR, the following should be of interest. The United States Supreme Court's decision in *Felder v. Casey*<sup>297</sup> on the inapplicability of notice of claim requirements for civil rights actions filed in state courts is analyzed as are several pertinent notice of claim decisions by New York State courts. Also, the Court of Appeals ruled, in *Jackson v. L.P. Transportation Co.*,<sup>298</sup> that the No-Fault Law does not alter the general rule that the time for bringing a common law negligence action begins to run from the date of the occurrence, or justify an exception for personal injury claims based upon the negligent operation of a motor vehicle.<sup>299</sup>

### A. CPLR 203(b)(5): Delivery to Sheriff or County Clerk

CPLR 203(b)(5)<sup>300</sup> is a practitioner's blessing. If the tick-tick of the statute of limitations clock has almost run, properly serve the Sheriff, or appropriate county clerk, if the action is to be tried within the City of New York, and the clock will be tolled for sixty days so that the deep-pocket defendant can be served. If you need the extra sixty days, be sure to comply with the "exacting" requirements of 203(b)(5).<sup>301</sup>

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295. FED. R. CIV. P. 12(b)(3).

296. The U.S. Supreme Court's analysis of the weight to be given forum selection clauses, asserted as the grounds for a venue transfer, is likely to result in federal courts denying effect to these clauses, even in cases where New York law is clearly controlling. The Court itself acknowledged this possibility. One method of keeping the case in New York State courts, where the forum selection clause is binding, is to provide for nonremoval to federal court. But can a party stipulate away his removal rights?

297. 108 S. Ct. 2302 (1988); see also Schwartz, *Ruling on Section 1983 Notice of Claim Reviewed*, 200 N.Y.L.J., Aug. 5, 1988, at 3, col. 1; Steinglass, *Court's Notice-of-Claim Ruling May Encourage Section 1983 Cases*, Nat'l L.J., Aug. 15, 1988, at 14, col. 5.

298. 72 N.Y.2d 975, 530 N.E.2d 1282, 534 N.Y.S.2d 362 (1988).

299. See *Jackson*, 72 N.Y.2d at 975, 530 N.E.2d at 1282, 534 N.Y.S.2d at 362.

300. N.Y. CPLR 203(b)(5) (McKinney 1972 & Supp. 1989).

301. See *Civil Practice*, 1987 *Survey*, *supra* note 1, at 121-22 (discussing exacting re-

Two *Survey* year decisions of the Appellate Division, Second Department, should be of interest. In *Johnson Matthey, Ltd. v. Farrell*,<sup>302</sup> the Appellate Division gave the plaintiff a break and held that the three-year statute for conversion was tolled even though the plaintiff did not intend that service of process actually be attempted by the Sheriff.<sup>303</sup> The inadvertent failure to request on the summons and notice that the Sheriff serve the pleadings was not fatal. Believe it or not, the plaintiff's summons was stamped "Not For Service" by the friendly Sheriff's Department. In *Stein v. Blatte*,<sup>304</sup> the Second Department reminded the bar that rules for determining when the statute of limitations stops running do not apply to conditional time periods created by the court or by statute.<sup>305</sup> Similarly, a one-year time period in which to commence an action against the Port Authority is a condition precedent rather than a statute of limitations and cannot be extended by tolling provisions under 203(b).<sup>306</sup>

*B. CPLR 205(a): Six Month Extension*

CPLR 205(a)<sup>307</sup> provides that if a timely commenced claim is terminated in any manner other than by voluntary discontinuance, dismissal for want of prosecution, or a final judgment on the merits, the plaintiff may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after termination of the action.<sup>308</sup> Of course, the Court of Appeals has held that the extra six months is not applicable when an action is dismissed for lack of personal jurisdiction based on defective service because the original action was never started for purposes of CPLR 205(a).<sup>309</sup> In *Fleming v. Long Island Rail-*

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quirements of CPLR 203(b)(5)).

302. 141 A.D.2d 68, 533 N.Y.S.2d 87 (2d Dep't 1988).

303. See *Johnson Matthey*, 141 A.D.2d at 70, 533 N.Y.S.2d at 88. CPLR 203(b)(5) provides only for a 60-day toll when personal delivery of summons with notice is contemplated, and must be accomplished within 60 days after the applicable statute of limitations runs. See N.Y. CPLR 203(b)(5) (McKinney 1972 & Supp. 1989).

304. 140 A.D.2d 685, 528 N.Y.S.2d 882 (2d Dep't 1988).

305. See *Stein*, 140 A.D.2d at 687, 528 N.Y.S.2d at 883.

306. See *Savino v. Demiglia*, 133 A.D.2d 858, 519 N.Y.S.2d 384 (2d Dep't 1988).

307. N.Y. CPLR 205(a) (McKinney 1972 & Supp. 1989).

308. See *id.*

309. See Siegel, *supra* note 192; *Civil Practice*, 1987 *Survey*, *supra* note 1, at 111 n.278.



road,<sup>310</sup> the plaintiff was injured when he fell between the platform and a railroad car. The action was timely commenced by service of summons and complaint, but was dismissed for failure to comply with provisions of the Public Health Law.<sup>311</sup> The Court of Appeals held that the second action, commenced within six months of the dismissal of the original action, but not more than six years after the accrual of the cause of action, was not time barred because it fell within the six-month grace period of CPLR 205(a).<sup>312</sup> In *Butler v. Caldwell & Cook*,<sup>313</sup> however, the Appellate Division, Fourth Department, held the grace period to be inapplicable because the plaintiff's claims were not terminated, but merely conditionally dismissed with leave to amend.<sup>314</sup>

### C. CPLR 214-a: The Continuous Treatment Exception

The last two *Survey* articles have discussed the continuing treatment doctrine with respect to the two years and six-month statute of limitations under CPLR 214-a<sup>315</sup> for medical, dental and podiatric malpractice actions.<sup>316</sup> We pointed out that the rationale underlying the doctrine is the existence of a "continuing trust and confidence" that warrants the tolling of the limitations period.<sup>317</sup> During the *Survey* year, the Appellate Division, Second Department, held that what's good for doctors is good for lawyers. In *Stampfel v. Eckhardt*,<sup>318</sup> the Second Department referred to a "continuing representation" doctrine, which it ruled was sufficient to toll the running of the statute of limitations on landowners' legal malpractice claim against an attorney who represented them in their purchase of a tract.<sup>319</sup> The holding was based on the fact that the attorney's firm continued to represent the landowners in a later action for adverse possession brought by adjoining landown-

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310. 72 N.Y.2d 998, 530 N.E.2d 1291, 534 N.Y.S.2d 371 (1988).

311. See *Fleming v. Long Island R.R.*, 130 A.D.2d 59, 518 N.Y.S.2d 144 (2d Dep't 1988).

312. See *Fleming*, 72 N.Y.2d at 998, 530 N.E.2d at 1291, 534 N.Y.S.2d at 371.

313. 142 A.D.2d 962, 530 N.Y.S.2d 729 (4th Dep't 1988).

314. See *Butler*, 142 A.D.2d at 963-64, 520 N.Y.S.2d at 730.

315. N.Y. CPLR 214-a (McKinney Supp. 1989).

316. See *Civil Practice*, 1987 *Survey*, *supra* note 1, at 124-27; *Civil Practice*, 1986 *Survey*, *supra* note 1, at 106.

317. See *id.*

318. 143 A.D.2d 184, 531 N.Y.S.2d 814 (2d Dep't 1988).

319. See *Stampfel*, 143 A.D.2d at 185, 531 N.Y.S.2d at 815.

ers.<sup>320</sup> The *Stampfel* opinion follows the Court of Appeals' lead in *Board of Education v. Sargent*,<sup>321</sup> which concluded that the continuous treatment doctrine is available in professional malpractice cases.<sup>322</sup> The doctrine also applies to most fiduciary relationships.<sup>323</sup>

#### D. CPLR 214-c: The Discovery Rule

Two years ago, the *Survey* piece on New York Civil Practice analyzed newly enacted CPLR 214-c,<sup>324</sup> which applies a date of discovery accrual to some substance exposure cases and revives certain other substance claims.<sup>325</sup> We predicted that New York courts would liberally construe the statutory reference to "substance." During the *Survey* year, two courts did so in *Burdick v. Afrimet-Indussa, Inc.*<sup>326</sup> and *Prego v. City of New York*.<sup>327</sup> In *Burdick*, the Supreme Court of Onondaga County held that the use of 214-c in reviving claims for the latent effects of exposure to "tungsten-carbide" was not limited to the pure compound of tungsten and carbon alone, but included a category of the substance known as "hard metals disease."<sup>328</sup> In *Prego*, Kings County Supreme Court ruled that the statute of limitations on a physician's \$175 million negligence suit against the City of New York for contracting AIDS from a contaminated needle began to run from the date she discovered, or should have discovered, symptoms of the disease and not from the date she was stuck by the needle.<sup>329</sup> The *Prego* court

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320. See *id.*

321. 71 N.Y.2d 21, 517 N.E.2d 1360, 523 N.Y.S.2d 475 (1987); see also Barker, *The Badly Performed Contract*, 200 N.Y.L.J., Nov. 28, 1988, at 3, col. 1 (discussing *Board of Educ. v. Sargent*).

322. See *Sargent*, 71 N.Y.2d at 21, 517 N.E.2d at 1360, 523 N.Y.S.2d at 475.

323. See *McCabe v. RMJ Sec.*, 200 N.Y.L.J., Oct. 19, 1988, at 21, col. 6 (Sup. Ct., N.Y. Co.).

324. N.Y. CPLR 214-c (McKinney Supp. 1989).

325. See *Civil Practice, 1986 Survey*, *supra* note 1, at 70-72; see also Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*, 73 CORNELL L. REV. 469 (1988).

326. 138 Misc. 2d 598, 525 N.Y.S.2d 542 (Sup. Ct., Onondaga Co. 1988).

327. 141 Misc. 2d 709, 534 N.Y.S.2d 95 (Sup. Ct., Kings Co. 1988); see also Anderson, *Court Upholds Aids Doctor's Right to Sue*, 200 N.Y.L.J., Nov. 3, 1988, at 1, col. 3; N.Y. Times, Nov. 3, 1988, at B-7 (discussing AIDS-tainted blood as toxic substance); N.Y. Times, Dec. 9, 1988, at A-31 (discussing \$3.9 million award by jury in Wisconsin AIDS blood transfusion case).

328. See *Burdick*, 138 Misc. 2d at 598, 525 N.Y.S.2d at 542.

329. See *Prego*, 141 Misc. 2d at 711, 534 N.Y.S.2d at 97.

stressed that the Legislature did not enumerate the applicable "substances" to which the discovery rule would apply and, therefore, "the very plain meaning of the underlined material indicates that any 'substance' was intended."<sup>330</sup>

*E. CPLR 217: When is the Four Month Time Period Applicable?*

Generally, Article 78 proceedings are subject to a four-month statute of limitations. However, some actions, such as those against zoning boards and other agencies, have lesser time limits. The four month period begins to run when the petitioner is notified of the action to be taken against her, and not when the adverse determination is actually taken.<sup>331</sup> Thus, in *Waterside Associates v. New York State Department of Environmental Conservation*,<sup>332</sup> the Court of Appeals, in a four to three decision, held the petitioner's claim to be time barred because the proceeding was not commenced within four months from the time of respondent's refusal to honor an alleged "non-wetlands letter" pertaining to petitioner's land.<sup>333</sup> The respondent's response to the application was a form letter that did not unequivocally abrogate a prior "non-wetlands" letter. Consequently, the practitioner should review all correspondence and papers relating to the Article 78 client's relationship with the targeted respondent in order to be sure the four month period, or less, has not expired.

*F. Notice of Claim Provisions*

Last year's *Survey* distinguished notice of claim provisions from statutes of limitations and noted that the plaintiff must plead and prove compliance with conditions precedent.<sup>334</sup> Several *Survey* year opinions illustrate that notice of claim provisions must be

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330. *Id.* at 712, 534 N.Y.S.2d at 97.

331. See *Civil Practice, 1987 Survey*, *supra* note 1, at 127-28; see also *Goldstein v. Niagara Falls Memorial Medical Center*, 143 A.D.2d 515, 533 N.Y.S.2d 40 (4th Dep't 1988); *Bonar v. Shaffer*, 140 A.D.2d 153, 527 N.Y.S.2d 412 (1st Dep't 1988); *Sutherland v. Village of Suffern*, 139 A.D.2d 728, 527 N.Y.S.2d 479 (2d Dep't 1988).

332. 72 N.Y.2d 1009, 531 N.E.2d 636, 534 N.Y.S.2d 915 (1988).

333. See *Waterside Assocs.*, 72 N.Y.2d at 1010, 531 N.E.2d at 637, 534 N.Y.S.2d at 915-16.

334. See *Civil Practice, 1987 Survey*, *supra* note 1, at 133-34.

strictly complied with.<sup>335</sup> Similarly, in *Bacelokonstantis v. Nichols*,<sup>336</sup> the Appellate Division, Second Department, held that plaintiff's service of claim on a city agency was not timely because it was one day late.<sup>337</sup>

On a positive note, in *Felder v. Casey*,<sup>338</sup> the United States Supreme Court held that a Wisconsin state notice requirement, such as are frequently condition precedents to the maintenance of tort actions against municipalities and government entities in New York, could not be applied in federal civil rights actions brought in state courts.<sup>339</sup> Prior to *Felder*, there was no question that state notice of claim provisions were not binding in federal court. This opinion overrules the New York Court of Appeals' decision in *423 S. Salina St., Inc. v. City of Syracuse*,<sup>340</sup> which went the wrong way. Nonetheless, when joining state and federal claims in one action be sure to comply with applicable condition precedents for the state cause of action. Even after *Felder*, there is nothing to stop a lawyer from filing a notice of claim in a civil rights action brought under 42 U.S.C. § 1983. Who knows, counsel may be able to settle the case without serving a summons and complaint.

### G. Miscellaneous

Last year's *Survey* promised to report on the United States Supreme Court's decision in *Bendix Autolite Corp. v. Medwesco Enterprises*.<sup>341</sup> In *Bendix*, the Court examined Ohio's absence statute, which is similar to New York's CPLR 207<sup>342</sup> toll for absent defendants, requiring foreign corporations to designate an agent for service of process in the State. Failure to do so meant the tolling provision would not apply which forced foreign corporations to

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335. See *Moran v. Vaccaro*, 684 F. Supp. 1201 (S.D.N.Y. 1988); *Carnesi v. State*, 140 A.D.2d 912, 529 N.Y.S.2d 214 (3d Dep't 1988); *Combs v. Village of Freeport*, 139 A.D.2d 688, 527 N.Y.S.2d 443 (2d Dep't 1988); *Castro v. City of New York*, 139 A.D.2d 687, 527 N.Y.S.2d 441 (2d Dep't 1988).

336. 141 A.D.2d 482, 529 N.Y.S.2d 111 (2d Dep't 1988).

337. See *Bacelokonstantis*, 141 A.D.2d at 482, 529 N.Y.S.2d at 111. But see *ESO v. Westchester County*, 141 A.D.2d 542, 529 N.Y.S.2d 155 (2d Dep't 1988) (leave granted to serve late notice of claim).

338. 108 S. Ct. 2302 (1988).

339. See *Felder*, 108 S. Ct. at 2307.

340. 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986).

341. 108 S. Ct. 2218 (1988); see also *Barker, New York Practice (Statute of Limitation in Fraud, Death)*, 200 N.Y.L.J., Sept. 26, 1988, at 3, col. 1.

342. N.Y. CPLR 207 (McKinney 1972).

submit to general jurisdiction in Ohio. The Supreme Court ruled that the Ohio statute violated the interstate commerce clause.<sup>343</sup> We also promised to track *Greenwood v. State Office of Mental Health*<sup>344</sup> and *Hymowitz v. Eli Lilly & Co.*<sup>345</sup> We predicted *Hymowitz* would be affirmed by the Appellate Division, First Department, and it was.<sup>346</sup> We also believed that *Greenwood* would be reversed by the Court of Appeals for the Second Circuit, which it was.<sup>347</sup>

Other interesting *Survey* year decisions include *Banks Trust Co. v. Rhoades*,<sup>348</sup> where the Second Circuit declared that the statute of limitations for civil racketeering actions is four years for each separate injury sustained under the RICO Act,<sup>349</sup> and *Singer v. Eli Lilly & Co.*,<sup>350</sup> where a New York State Supreme Court judge declined to adopt federal practice and dismissed a DES claim for late filing.<sup>351</sup> Unlike federal practice, Justice Gammerman held that the expiration of New York's one year revival statute was not tolled by the fact that a class action had been filed during the revival period.<sup>352</sup>

## VI. RES JUDICATA (CLAIM PRECLUSION) AND COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

The doctrines of claim preclusion<sup>353</sup> and issue preclusion<sup>354</sup>

343. See *Bendix*, 108 S. Ct. at 2221.

344. 645 F. Supp. 111 (S.D.N.Y. 1986) (holding plaintiff's action not commenced for statute of limitations purposes on the date his complaint was placed in a night depository box maintained by the clerk of the court).

345. 136 Misc. 2d 482, 518 N.Y.S.2d 996 (1987) (challenge to revival statute of CPLR 214-c rejected).

346. See *Hymowitz v. Eli Lilly & Co.*, 139 A.D.2d 437, 526 N.Y.S.2d 922 (1st Dep't 1988).

347. See *Greenwood v. State Office of Mental Health*, 842 F.2d 636 (2d Cir. 1988).

348. 859 F.2d 1096 (2d Cir. 1988).

349. See *Banks Trust*, 859 F.2d at 1102; see also *Squiers, 4-Year Statute for Civil RICO Actions*, 200 N.Y.L.J., Oct. 7, 1988, at 1, col. 3.

350. \_\_\_\_ Misc. 2d \_\_\_\_, \_\_\_\_ N.Y.S.2d \_\_\_\_ (Sup. Ct., N.Y. Co. 1988).

351. See *id.*; see also *Anderson, DES Claim Dismissed for Late Filing*, 200 N.Y.L.J., Sept. 7, 1988, at 1, col. 5.

352. See *Singer*, \_\_\_\_ Misc. 2d at \_\_\_\_, \_\_\_\_ N.Y.S.2d at \_\_\_\_.

353. 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 which 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,

were liberally applied during the *Survey* year in a variety of contexts.<sup>355</sup> In fact, New York courts issue at least twenty publishable "res judicata" opinions each month! Before discussing the most important 1988 opinions, a few thoughts on terminology are merited.

In its broadest sense, the term "res judicata" has been used to refer to a variety of concepts, including collateral estoppel, dealing with preclusive effects of a judgment on subsequent litigation.<sup>356</sup> Claim preclusion is the doctrine that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on sufficient theories or if seeking a different remedy."<sup>357</sup> Therefore, use of the term res judicata for what is intended to be claim preclusion has the potential for confusion. Similarly, collateral estoppel is one of a number of doctrines collectively referred to as res judicata,<sup>358</sup> and the bench and bar frequently use the two terms interchangeably<sup>359</sup> which sometimes is ambiguous. Thus, modern approaches use the "new" terminology as suggested by Professor Vestal over twenty years ago.<sup>360</sup> *The Restatement (Second) of Judgments*<sup>361</sup> and the

429 N.E.2d 746, 445 N.Y.S.2d 68 (1981).

354. 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. Two prerequisites must be met to apply the doctrine in New York State courts. "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded . . . must have had a full and fair opportunity to contact the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 453, 482 N.E.2d 63, 66, 492 N.Y.S.2d 584, 588 (1985).

355. For examples of claim preclusion being applied, see *Bray v. New York Life Ins. Co.*, 851 F.2d 60 (2d Cir. 1988); *Kirkland v. City of Peekskill*, 828 F.2d 104 (2d Cir. 1987); *Mauncuso v. Celotex Corp.*, \_\_\_\_ Misc. 2d \_\_\_\_, \_\_\_\_ N.Y.S.2d \_\_\_\_ (Sup. Ct., Nassau Co. 1988); *Spargo v. State Comm'n on Gov't Integrity*, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dep't 1988). For examples of issue preclusion being applied, see *O'Malley v. Nassau County Medical Center*, 686 F. Supp. 62 (E.D.N.Y. 1988); *Rubel v. Eli Lilly & Co.*, 681 F. Supp. 151 (S.D.N.Y. 1987); *People v. Moore*, 142 A.D.2d 895, 531 N.Y.S.2d 397 (3d Dep't 1988); *Trivizas v. City of New York*, 137 A.D.2d 455, 524 N.Y.S.2d 715 (1st Dep't 1988).

356. 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, 65 (1986).

357. *Id.* at 66 n.13.

358. See *id.* at 63 n.2.

359. See *id.* at 65-66 nn.12-16.

360. See Vestal, *Extent of Claim Preclusion*, 54 *IOWA L. REV.* 1, 3-4 (1968); Vestal, *Procedural Aspects of Res Judicata/Preclusion*, 1 *U. TOL. L. REV.* 15, 28 (1969).

361. See generally *RESTATEMENT (SECOND) OF JUDGMENTS* §§ 17-19 (1982).

New York Court of Appeals<sup>362</sup> have adopted use of the terms "claim preclusion" and "issue preclusion," but on occasion even a distinguished judge or highly respected member of the bar reverts to the "old" terminology. These relapses are usually a sign of old age and should be avoided by the young at heart. Consistent use of the terms claim preclusion and issue preclusion will benefit the bench and bar.

### A. Claim Preclusion

Claim preclusion cases during the *Survey* year bar the relitigation of issues that might have been litigated as well as those that were actually litigated.<sup>363</sup> Courts during the *Survey* year continued to follow the "transactional analysis" approach first enunciated by the New York Court of Appeals in *Reilly v. Reid*.<sup>364</sup> The most interesting extension of the "might have been raised" requirement is found in *Ruiz v. Commissioner of the Department of Transportation of the City of New York*,<sup>365</sup> where the Court of Appeals for the Second Circuit applied the doctrine of claim preclusion to bar appellants from challenging the validity of summonses issued to them on fourth amendment grounds.<sup>366</sup> The Second Circuit also expanded the New York Court of Appeals' definition of privity as set forth in *Green v. Santa Fe Industries*.<sup>367</sup> The Second Circuit went so far as to analyze privity in terms of the fact that different parties in the first and second actions had the same attorney. Although "not conclusive on the issue of privity," this fact was surprisingly of "singular significance" for the court. In *Boronow v. Boronow*,<sup>368</sup> the New York Court of Appeals applied claim preclusion to bar relitigation of an issue of title ownership that could have been but was not litigated in the underlying matrimonial action.<sup>369</sup>

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362. See *American Ins. Co. v. Messenger*, 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).

363. See *supra* note 355.

364. 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645 (1978).

365. 200 N.Y.L.J., Oct. 20, 1988, at 21, col. 3 (2d Cir.).

366. See *id.*

367. 70 N.Y.2d 244, 514 N.E.2d 105, 519 N.Y.S.2d 793 (1987) (discussed in last year's *Survey*).

368. 71 N.Y.2d 284, 519 N.E.2d 1375, 525 N.Y.S.2d 179 (1988).

369. See *Boronow*, 71 N.Y.2d at 286, 519 N.E.2d at 1376, 525 N.Y.S.2d at 180.

*B. Issue Preclusion*

July 7, 1988, was issue preclusion day at the New York Court of Appeals in Albany. The Court decided three opinions which provide the bar and bench with new guidelines for when issue preclusion effect may be given to administration determinations. In *Allied Chemical v. Mohawk Power Corp.*,<sup>370</sup> and *Staatsburg Water Co. v. Staatsburg Fire District*,<sup>371</sup> the Court pointed to three additional factors that must be considered by courts when applying the doctrine to administrative determinations. Also, in *Halyalkar v. Board of Regents*,<sup>372</sup> the Court cut back on when preclusive effect can be given to administrative consent orders. Together, these three decisions restrict the Court's application of issue preclusion to the results of non-judicial proceedings as set forth in *Ryan v. New York Telephone Co.*<sup>373</sup>

In *Ryan*, the Court of Appeals ruled for the first time that the doctrine of issue preclusion can be applied to administrative determinations to bar subsequent litigation of claims in judicial forums.<sup>374</sup> Ryan was discharged by the New York Telephone Company after being arrested for theft of company property. The arrest was based on the testimony of two security investigators who claimed that Ryan had removed company property from the workplace. After his discharge, Ryan applied for unemployment insurance benefits, but his application was rejected by a claims examiner on the ground that the discharge was the result of Ryan's own misconduct. Ryan filed an administrative appeal and was granted a hearing before an Unemployment Insurance Administrative Law Judge (ALJ). After considering the testimony of Ryan and the hearsay testimony of one witness, the ALJ sustained the ruling of the claims examiner and found that the "claimant was seen . . . removing company property from the company premises."<sup>375</sup> The ALJ then affirmed the denial of Ryan's unemployment benefits. This ruling was affirmed by the Unemployment Insurance Appeal Board and upheld by the Appellate Division. Prior

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370. 72 N.Y.2d 271, 528 N.E.2d 153, 532 N.Y.S.2d 230 (1988).

371. 72 N.Y.2d 147, 527 N.E.2d 754, 531 N.Y.S.2d 876 (1988).

372. 72 N.Y.2d 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988).

373. 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

374. See *Ryan*, 62 N.Y.2d at 499, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

375. *Id.* at 498, 467 N.E.2d at 489, 478 N.Y.S.2d at 825 (quoting findings of the Administrative Law Judge).



to the Appellate Division's affirmation of the administrative determination, Ryan filed a tort action for false arrest, malicious prosecution, slander and wrongful discharge. The defendant raised an affirmative defense that because this turned on the question of Ryan's misconduct, *res judicata* barred relitigation of the issue. The affirmative defense was dismissed by the Special Term and the Appellate Division affirmed.<sup>376</sup> The Court of Appeals reversed, holding that issue preclusion applied.<sup>377</sup> As a result of the bar's criticism of *Ryan*, it was legislatively overruled in 1987 by section 623 of the Labor Law.<sup>378</sup> The new law generally provides, with some limitations, that no finding of fact or law in a decision made on a claim for unemployment insurance may be given preclusive effect in a subsequent litigation.<sup>379</sup> Nonetheless, the broader principles for which *Ryan* represented remained unchanged until July 7, 1988.

In *Staatsburg Water Co.*, the Court held that a determination by the Public Service Commission (PSC) was not binding on a defendant in a supreme court action.<sup>380</sup> The PSC had conducted a public hearing and issued a determination purporting to resolve the underlying controversy in the plaintiff's favor. In *Allied Chemical*, the Court held that a PSC determination did preclude subsequent litigation of the identical claims in a judicial forum.<sup>381</sup> Both opinions stand for the proposition that whenever issue preclusion arises from determinations of administrative agencies, additional factors must be considered by the court. These factors are part of a "multifaceted inquiry" designed to determine if the agency decision was "quasi-judicial in character," and they are to be considered with the requirements of identity of issue and full and fair opportunity to litigate. First, a court must determine if the agency had statutory authority to act adjudicatively. If so, the court must ascertain whether the procedures used in the administrative proceeding demonstrate that the "facts asserted were adequately tested, and that the issue was fully aired." Finally, the court must

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376. *See id.* at 497-98, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

377. *See id.* at 505, 467 N.E.2d at 493, 478 N.Y.S.2d at 829.

378. N.Y. LAB. LAW § 623 (McKinney 1988).

379. *See id.*

380. *See Staatsburg Water Co.*, 72 N.Y.2d at 156, 527 N.E.2d at 758, 531 N.Y.S.2d at 880.

381. *See Allied Chemical*, 72 N.Y.2d at 277, 528 N.E.2d at 155-56, 532 N.Y.S.2d at 233.

examine the "expectations of the parties." Thus, a party who explicitly solicits resolution of an issue from an agency and who fully participates in the administrative proceeding may be fairly precluded from relitigating the matter. "Expectations" means more than the knowledge that an administrative determination may have "potential collateral effects."

In *Halyalkar*, the Court cast new light on a question that has remained unresolved for many years. When is a matter actually litigated so as to satisfy the identity requirement under *Schwartz v. Public Administrator*?<sup>382</sup> Since the 1896 case of *Reich v. Cochran*,<sup>383</sup> when the Court of Appeals gave preclusive effect to a default judgment, issue preclusion has generally been applied to default and consent judgments. This position has been criticized by the *Restatement (Second) of Judgments* and was impliedly rejected in 1985 by the Court of Appeals in *Kaufman v. Eli Lilly & Co.*<sup>384</sup> In *Halyalkar*, the Court suggests that identity of issue is unlikely to ever be satisfied when a determination rests solely on a default or consent order. Dr. Halyalkar had entered a plea before the New Jersey Board of Medical Examiners whereby he was found guilty of professional misconduct in knowingly filing false medical examination reports. Five years later, the New York Office of Professional Medical Conduct filed similar charges and the Board of Regents suspended Dr. Halyalkar's physician's license for one year without a hearing on the grounds that issue preclusion applied.<sup>385</sup> The Appellate Division held that the two basic requirements of issue preclusion had been satisfied: (1) the identity of an issue necessarily decided in the prior action with one which is decisive of the present action, and (2) that there was a full and fair opportunity to contest the issue in the prior action.<sup>386</sup> The Court of Appeals addressed only the identity question and concluded that it did not exist.<sup>387</sup> The Court stressed that issue preclusion is a doctrine based on general notions of fairness involving a practical inquiry into the realities of litigation and concluded that, unlike a

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382. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

383. 151 N.Y. 122, 45 N.E. 367 (1896).

384. 65 N.Y.2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584 (1985).

385. See *Halyalkar*, 72 N.Y.2d at 264-65, 527 N.E.2d at 1223-24, 532 N.Y.S.2d at 87.

386. See *id.* at 266, 527 N.E.2d at 1224, 532 N.Y.S.2d at 88.

387. See *id.* at 266, 527 N.E.2d at 1224-25, 532 N.Y.S.2d at 88. Unlike the *Staatsburg Water Co.* case, the petitioner in *Halyalkar* did not challenge whether the administrative procedure was quasi-judicial in nature.

guilty plea for commission of a felony or other crime, consent pleas to administrative suspensions or revocations of licenses cannot be given preclusive effect.<sup>388</sup>

In conclusion, all three cases narrow application of issue preclusion to administrative determinations. *Halyalkar* also implicitly holds that consent orders and default judgments will not be given preclusive effect in any context unless it is unequivocally clear that a party could specifically foresee that that order or default would be later used against him and nonetheless deliberately decided to forego his full and fair opportunity to litigate in the first instance.

## VII. MOTION PRACTICE

The number of reported motion cases during the *Survey* year is impressive.<sup>389</sup> One important opinion is *Mihlovan v. Grozavu*,<sup>390</sup> in which the Court of Appeals resolved conflicting views in the First and Second Departments and ruled that all parties must be notified if a dismissal motion is to be converted into one for summary judgment.<sup>391</sup> Motions to amend pleadings were not liberally granted by courts during 1988 (if you snooze, you sometimes lose)<sup>392</sup> and motions to amend notices of claim were not encouraged by the appellate courts.<sup>393</sup> The practitioner should also

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388. See *id.* at 268-69, 527 N.E.2d at 1226, 532 N.Y.S.2d at 89.

389. See 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE, Art. 32 (Supp. 1988).

390. 72 N.Y.2d 506, 531 N.E.2d 288, 534 N.Y.S.2d 656 (1988); see also Spencer, *Court of Appeals Settles Conflict on Notices*, 200 N.Y.L.J., Nov. 17, 1988, at 1, col. 3. The Court of Appeals held that the Appellate Division could not properly convert defendant's motion into a summary judgment absent "adequate notice to the parties," which must be expressly given by the court unless the parties otherwise have adequate notice. See *Mihlovan*, 72 N.Y.2d at 508, 531 N.E.2d at 289, 534 N.Y.S.2d at 657; see also N.Y. CPLR 3211(c) (McKinney 1970 & Supp. 1989). Thus, trial courts must indicate they are clearly chartering a summary judgment course.

391. See *Mihlovan*, 72 N.Y.2d at 508, 531 N.E.2d at 289, 534 N.Y.S.2d at 657. The non-moving party must be given an "opportunity to make an adequate record" under CPLR 3211(c). See N.Y. CPLR 3211(c) (McKinney 1970 & Supp. 1989).

392. See *Saferstein v. Mideast Sys., Ltd.*, 143 A.D.2d 82, 531 N.Y.S.2d 333 (2d Dep't 1988); *Ross v. Ross*, 143 A.D.2d 429, 532 N.Y.S.2d 573 (2d Dep't 1988); *Courageous Syndicate, Inc. v. People-to-People Sports Comm., Inc.*, 141 A.D.2d 599, 529 N.Y.S.2d 520 (2d Dep't 1988); *Arrieta v. E-Z Tech*, 138 A.D.2d 657, 526 N.Y.S.2d 473 (2d Dep't 1988). But see *Cepeda v. Hertz Corp.*, 141 A.D.2d 394, 529 N.Y.S.2d 760 (1st Dep't 1988) (leave to amend granted to update injuries related to accident); *Hawkins v. Genessee Place Corp.*, 139 A.D.2d 433, 527 N.Y.S.2d 22 (1st Dep't 1988) (leave granted to amend answer).

393. See *Serrano v. City of New York*, 143 A.D.2d 652, 533 N.Y.S.2d 9 (2d Dep't 1988) (leave to amend notice of claim denied); *Eagle v. City of Yonkers*, 143 A.D.2d 626, 532

note that amendment of a complaint after a motion to dismiss does not abate the motion.<sup>394</sup>

CPLR 3215(c)<sup>395</sup> gives the plaintiff one year to obtain a default judgment against the defendant.<sup>396</sup> If the plaintiff doesn't act, the defendant can move to dismiss the action.<sup>397</sup> If the defendant serves his answer, however, he then waives the plaintiff's delay and the action continues.<sup>398</sup> In *Myers v. Slutsky*,<sup>399</sup> the Appellate Division, Second Department, refers to this phenomenon as the defendant in default for not defaulting the plaintiff who failed to default the defendant.

There was additional motion practice during the *Survey* year as a result of plaintiffs neglecting to serve certificates with their complaints in medical malpractice cases.<sup>400</sup> The Appellate Division, Second Department, has made it clear that the affidavit of merit under CPLR 3012-a<sup>401</sup> must be by a physician and not a layman.<sup>402</sup> Furthermore, failure to submit the affidavit will result in a dismissal of plaintiff's complaint.<sup>403</sup> Also, the certificate requirement under CPLR 3012-a is applicable to actions commenced in the court of claims.<sup>404</sup>

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N.Y.S.2d 887 (2d Dep't 1988) (same); *Groshans v. Town of Babylon*, 143 A.D.2d 666, 533 N.Y.S.2d 18 (2d Dep't 1988) (same).

394. See *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group*, 138 Misc. 2d 799, 525 N.Y.S.2d 541 (Sup. Ct., Queens Co. 1988).

395. N.Y. CPLR 3215(c) (McKinney 1970).

396. See *id.*

397. See *id.*

398. See *id.*

399. 139 A.D.2d 709, 527 N.Y.S.2d 464 (2d Dep't 1988).

400. See *Santangelo v. Raskin*, 137 A.D.2d 74, 528 N.Y.S.2d 90 (2d Dep't 1988) (failure to comply is default); *Jacoby v. Veloso*, 141 Misc. 2d 958, 535 N.Y.S.2d 333 (Sup. Ct., Richmond Co. 1988) (dismissing malpractice action for lack of CPLR 3012-a filing); *Haimoviei v. Haimoviei*, \_\_\_\_ Misc. 2d \_\_\_\_, \_\_\_\_ N.Y.S.2d \_\_\_\_ (Sup. Ct., N.Y. Co. 1988) (concluding that claim cannot be characterized as a medical malpractice action and, thus, no CPLR 3012-a filing required). The certificate requirement in medical malpractice cases does not apply to counterclaims. See *Koplick v. Arnott*, 137 Misc. 2d 944, 522 N.Y.S.2d 770 (N.Y.C. Civ. Ct., N.Y. Co. 1987).

401. N.Y. CPLR 3012-a (McKinney 1974).

402. See *Ward v. Hoffman*, 139 A.D.2d 691, 527 N.Y.S.2d 447 (2d Dep't 1988).

403. See *id.* at 693, 527 N.Y.S.2d at 448; see also *Sullivan v. H.I.P. Hosp., Inc.*, 138 Misc. 2d 711, 524 N.Y.S.2d 1022 (Sup. Ct., Queens Co. 1988) (failure to serve certificate of merit does not make the cause of action defective for lack of subject matter jurisdiction as plaintiff has 45 days to submit an expert's affidavit to support granting of leave to serve a later certificate).

404. See *Brown v. State*, 139 Misc. 2d 1020, 528 N.Y.S.2d 981 (Ct. of Claims 1988) (court rejected argument that language of CPLR 3012-a refers only to "plaintiff" and "com-

## VIII. DISCLOSURE

Of the many disclosure decisions rendered during the *Survey* year, the following areas should be of interest to the practitioner. Also, non-party disclosure practice has generated several instructive opinions by our courts in 1988.

## A. CPLR 3101

A 1988 amendment to CPLR 3101(d)(1)<sup>405</sup> adds a new subparagraph (ii) and redesignates the old (ii) to become (iii). These changes permit any party to offer to identify its medical expert and submit her to depositions if all other parties agree to forego the medical malpractice panel.<sup>406</sup> Of course, the other parties must agree to make their experts available for an EBT also.<sup>407</sup>

The attorney's work product privilege is not often recognized in New York civil practice because, unlike federal practice, the privilege is absolute.<sup>408</sup> Nonetheless, in *Rossi v. Blue Cross & Blue Shield*,<sup>409</sup> the Appellate Division, First Department, held that a memorandum by the insurer's associate in-house counsel on the issue of a possible lawsuit against the insurer was an attorney work product document.<sup>410</sup> Also, the Appellate Division, Third Department, ruled, in *Hoopes v. Carota*,<sup>411</sup> that the attorney-client privilege may yield to a strong public policy requiring disclosure and the burden of showing that the information sought is within the privilege is upon the party asserting it.<sup>412</sup> Finally, the Appellate Division, Second Department, held, in *O'Connell v. Jones*,<sup>413</sup> that because photographs prepared for litigation under CPLR 3101(d)<sup>414</sup> could not be duplicated due to a change in weather con-

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plaint," rather than "complaint" and "claim," and was therefore not applicable in court of claims).

405. N.Y. CPLR 3101(d)(1) (McKinney Supp. 1989).

406. *See id.*

407. *See id.*

408. *See* D. SIEGEL, *supra* note 79, at § 347.

409. 140 A.D.2d 198, 528 N.Y.S.2d 51 (1st Dep't 1988).

410. *See Rossi*, 140 A.D.2d at 200, 528 N.Y.S.2d at 53 ("The document reflects the use of the attorney's professional skills in analyzing the language used in the rejection letters.").

411. 142 A.D.2d 906, 531 N.Y.S.2d 407 (3d Dep't 1988).

412. *See Hoopes*, 142 A.D.2d at 909, 531 N.Y.S.2d at 410.

413. 140 A.D.2d 676, 529 N.Y.S.2d 19 (2d Dep't 1988).

414. N.Y. CPLR 3101(d) (McKinney Supp. 1989).

ditions, the plaintiff could discover them.<sup>415</sup>

### B. CPLR 3126

What happens if opposing counsel loses control at an EBT, uses intemperate language, and obstructs your line of questioning? Can you get his client's case dismissed? No, said the Appellate Division, Third Department, in *Mink v. Conifer Park, Inc.*<sup>416</sup> Sanctions are available against the attorney for his obstructive behavior, but it is highly unlikely any court will dismiss the action unless the plaintiff acts improperly during the EBT. With the new sanction rules effective January 1, 1989, "grin and bear it." After all, you're earning legal fees plus a monetary sanction award of up to \$10,000 for your adversary's frivolous behavior.

### C. Unlimited Disclosure in Custody Disputes?

In *Burgel v. Burgel*,<sup>417</sup> the Appellate Division, Second Department, held that in custody disputes the broadest possible latitude should be accorded to reasonable discovery requests because the best interests of the children is of primary concern.<sup>418</sup> Thus, one spouse may compel a test of the other spouse's hair to ascertain if he or she uses cocaine.<sup>419</sup>

### D. Pre-Action Disclosure

Attorney C. Vernon Mason and the Reverend Alfred C. Sharpton sought pre-action disclosure against CBS under CPLR 3102(c).<sup>420</sup> They wanted to take depositions of the named respondents and discover and inspect all documents, including audio and video recordings and photographs, pertaining in any manner to Tawana Brawly. In *Mason v. CBS*,<sup>421</sup> the Supreme Court, New York County denied pre-action disclosure on the grounds it is limited only to information necessary to frame a colorable

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415. See *O'Connell*, 140 A.D.2d at 676-77, 529 N.Y.S.2d at 20 (pictures of icy accident in slip-and-fall case).

416. 142 A.D.2d 899, 531 N.Y.S.2d 400 (3d Dep't 1988).

417. 141 A.D.2d 215, 533 N.Y.S.2d 735 (2d Dep't 1988).

418. See *Burgel*, 141 A.D.2d at 216, 533 N.Y.S.2d at 736.

419. See *id.* at 218-19, 533 N.Y.S.2d at 737; see also *Anderson, Court Requires Hair Samples of Mother in Custody Dispute*, 200 N.Y.L.J., Oct. 27, 1988, at 1, col. 4.

420. N.Y. CPLR 3102(c) (McKinney 1970).

421. \_\_\_\_ Misc. 2d \_\_\_\_, \_\_\_\_ N.Y.S.2d \_\_\_\_ (Sup. Ct., N.Y. Co. 1988).

complaint.<sup>422</sup>

### E. Non-Party Document Discovery

Non-party document discovery is available under CPLR 3111<sup>423</sup> and CPLR 3120(b).<sup>424</sup> In federal practice it is obtained pursuant to Federal Rule of Civil Procedure 45.<sup>425</sup> Non-party document discovery, particularly in complex litigation matters, is an important weapon in the litigator's handbag and, as a result, we have several interesting *Survey* year decisions to highlight.

The United States Supreme Court ruled, in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*,<sup>426</sup> that nonparties held in contempt, for failure to reply to a district court's subpoena duces tecum for documents, could challenge the court's lack of subject matter jurisdiction in defense of the civil contempt citation.<sup>427</sup> In a related matter, the New York Court of Appeals held that a non-party journalist's photos were immune from disclosure.<sup>428</sup>

The Court of Appeals for the Second Circuit has ruled that a district court's order denying a motion to compel a non-party witness to answer pretrial depositions was not appealable.<sup>429</sup> In *Dioguardi v. St. John's Riverside Hospital*,<sup>430</sup> the Appellate Division, Second Department, affirmed an order denying the deposition of a non-party witness on the grounds that there was an absence of "adequate circumstances" showing that the information sought to be discovered could not be obtained from other sources.<sup>431</sup> This decision is puzzling because a 1984 amendment expressly removed the term "adequate special circumstances" from CPLR 3101(a)(4)<sup>432</sup> and it should not now be resurrected by judicial fiat.

422. *See id.*

423. N.Y. CPLR 3111 (McKinney 1970).

424. N.Y. CPLR 3120(b) (McKinney 1970).

425. FED. R. CIV. P. 45; *see also* Carlisle, *Nonparty Document Discovery From Corporations and Governmental Entities Under the Federal Rules of Civil Procedure*, 32 N.Y.L. SCH. L. REV. 9 (1987) (discussion of non-party discovery under federal rules).

426. 108 S. Ct. 2268 (1988).

427. *U.S. Catholic Conference*, 108 S. Ct. at 2270.

428. *See O'Neill v. Oakgrove Constr. Co.*, 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988).

429. *See Barrick Group, Inc. v. Mosse*, 849 F.2d 70, 71 (2d Cir. 1988).

430. 144 A.D.2d 333, 533 N.Y.S.2d 915 (2d Dep't 1988).

431. *See Dioguardi*, 144 A.D.2d at 334-35, 533 N.Y.S.2d at 916.

432. *See* Act of Feb. 15, 1984, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE

Another important non-party disclosure case during the *Survey* year is *In re Estate of Kochovos*,<sup>433</sup> where the Appellate Division, First Department, reminded the bar that lawyers cannot serve subpoenas on non-party witnesses for production of documents without notice to other parties.<sup>434</sup> Failure to comprehend this simple rule, which is understood by any law school graduate who has taken a course in New York Civil Practice, has already generated too much litigation.<sup>435</sup>

## IX. MISCELLANEOUS

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

### A. *Litigant Not Specified in Notice of Appeal*

In *Torres v. Oakland Scavenger Co.*,<sup>436</sup> the United States Su-

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TO THE CHIEF ADMINISTRATOR OF THE COURTS OF THE STATE OF NEW YORK, 1984 MCKINNEY'S SESS. LAWS OF N.Y. 3708.

433. 140 A.D.2d 180, 528 N.Y.S.2d 37 (1st Dep't 1988).

434. See *Kochovos*, 140 A.D.2d at 181, 528 N.Y.S.2d at 38 ("The service of subpoenas on these non-party witnesses, requiring production of documents and attendance at a deposition without notice to the other parties to the action violates the express provisions of CPLR 3107 and CPLR 3120(b), which require notice to all adverse parties when such discovery devices are served on non-parties.").

435. In *In re Beiny*, 129 A.D.2d 126, 517 N.Y.S.2d 474 (1st Dep't), *reh'g denied*, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dep't 1987), a Big Law Firm (BLF) violated the "purple rule" and the "giggle rule" and proved once again that big doesn't mean smart. In *Beiny*, a BLF served an EBT notice and document subpoena on a non-party defunct law firm in Manhattan which had accumulated "records" from their prior representation of the BLF's adversary. The records were turned over to the BLF which promptly cancelled the EBT. Shortly thereafter, the records were used by the BLF at an EBT in London. The lawyers for the other side moved to suppress the documents and to disqualify the BLF. The Appellate Division, First Department, did just that and the BLF moved for reargument. See *id.* at 127-30, 517 N.Y.S.2d at 475-76. This was like the airplane that caught fire in the hangar on Floyd Bennett Field in Brooklyn. (The rescue squad tried to put out the fire with gasoline.) The BLF's argument on its rehearing motion made the Appellate Division, First Department, turn purple and then giggle. The motion was denied and the matter referred to the Departmental Disciplinary Committee for the First Department. Even BLF's have to follow the words of Mr. Kenny Rogers who said "[y]ou have to know when to hold, you have to know when to run and you have to know when to quit." As the First Department stated in *Kochovos*, "[t]he deceptive practice of counsel in engaging in this type of covert discovery warrants severe criticism." *Kochovos*, 140 A.D.2d at 181, 528 N.Y.S.2d at 38. If you ask a nonparty for documents and they give them to you, no notice is necessary to opposing counsel; but if you use judicial process, read CPLR 320(b) which requires notice! See N.Y. CPLR 320(b) (McKinney 1972).

436. 108 S. Ct. 2405 (1988).



preme Court held that a circuit court of appeals cannot waive the jurisdictional requirement of naming parties to an appeal, even for good cause.<sup>437</sup> Thus, there was not jurisdiction over the appeal of a litigant who was not specified in the notice of appeal due to a clerical error on the part of the secretary employed by the litigant's attorney.<sup>438</sup>

### B. *Motions to Withdraw*

Can an attorney accept a retainer with a written provision allowing him to withdraw at any time? In *Heinike Associates v. Liberty National Bank*,<sup>439</sup> the Appellate Division, Fourth Department, said no! Absent good and sufficient cause, the attorney of record must stay on the case.<sup>440</sup>

### C. *Dismissals Without Prejudice in the Second Circuit*

If a plaintiff seeks to dismiss her complaint without prejudice, and the trial court judge decides that if the motion is granted the complaint will be dismissed with prejudice, the plaintiff must be given an opportunity to withdraw the motion.<sup>441</sup> Also, a plaintiff cannot voluntarily dismiss a complaint and refile for purposes of overcoming an inadvertent failure to timely file a jury demand.<sup>442</sup>

### D. *Damages for Loss of Enjoyment and Emotional or Psychological Loss*

The Court of Appeals held, in *Lynch v. Bay Ridge Obstetrical & Gynecological Associates*,<sup>443</sup> that "emotional" or "psychological" damages in medical malpractice cases can be recovered.<sup>444</sup> Similarly, in *McDougald v. Garber*,<sup>445</sup> the Appellate Division, First Department, held that loss of enjoyment of life is a damage element separate and distinct from pain and suffering for which compensa-

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437. See *Torres*, 108 S. Ct. at 2407-08.

438. See *id.* at 2409.

439. 142 A.D.2d 929, 530 N.Y.S.2d 355 (4th Dep't 1988).

440. See *Heinike Assocs.*, 142 A.D.2d at 930, 530 N.Y.S.2d at 356.

441. See *Gravatt v. Columbia Univ.*, 845 F.2d 54 (2d Cir. 1988).

442. See *McNeillab, Inc. v. American Home Prods. Corp.*, 683 F. Supp. 332 (S.D.N.Y. 1987).

443. 72 N.Y.2d 632, 532 N.E.2d 1239, 536 N.Y.S.2d 11 (1988).

444. See *Lynch*, 72 N.Y.2d at 635, 532 N.E.2d at 1240, 536 N.Y.S.2d at 12.

445. 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

tion may be awarded despite the injured party's lack of cognitive awareness.<sup>446</sup>

#### *E. Certification to the New York Court of Appeals*

In *Deweerth v. Baldinger*,<sup>447</sup> the Court of Appeals for the Second Circuit held that, under New York law, certification of issues to the New York Court of Appeals should be limited to issues likely to occur with some frequency.<sup>448</sup>

#### *F. Dismissals for Mootness*

In *Boggs v. NYC Health & Hospitals Corp.*,<sup>449</sup> the Court of Appeals held that an appeal challenging Billy Boggs' involuntary commitment to a psychiatric hospital was rendered moot by her release after oral argument but prior to a decision by the Court.<sup>450</sup>

#### *G. Failure to Object to a Federal Magistrate's Recommendations*

In *Wesolek v. Canadair, Ltd.*,<sup>451</sup> the Court of Appeals for the Second Circuit held that failure to file objections in the district court to a magistrate's recommendation precluded a review on the merits of that court's adoption of the recommendations.<sup>452</sup>

#### *H. Southern District Changes Related Case Form*

The Board of Judges for the United States District Court for the Southern District of New York voted to change a form that is used by attorneys in filing civil complaints to notify the court of other related cases in the district. The revision removes a provision of the form that has required lawyers to file a related case only if they intended to move for consolidation of the related cases.<sup>453</sup>

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446. See *McDougald*, 135 A.D.2d at 94, 524 N.Y.S.2d at 200-01.

447. 836 F.2d 103 (2d Cir. 1987).

448. See *Deweerth*, 836 F.2d at 108 n.5.

449. 70 N.Y.2d 972, 520 N.E.2d 515, 525 N.Y.S.2d 796 (1988).

450. See *Boggs*, 70 N.Y.2d at 974, 520 N.E.2d at 516, 525 N.Y.S.2d at 797.

451. 838 F.2d 55 (2d Cir. 1988).

452. See *Wesolek*, 838 F.2d at 58.

453. See *Squiers, District Judges Change Related-Case Form*, 200 N.Y.L.J., Nov. 21, 1988, at 1, col. 3.

*I. United States Supreme Court: Selection of Cases*

A new bill passed by Congress abolishes the requirement that the Supreme Court hear certain types of cases that have previously fallen within their mandatory jurisdiction. Thus, no longer must the Supreme Court hear cases in which the highest court of a state has upheld a state or local law against a federal constitutional challenge or has held a federal statute unconstitutional. The bill preserves mandatory jurisdiction by the Supreme Court for a few appeals involving decisions by special three-judge federal district courts in certain voting rights cases.<sup>454</sup> In this respect, the *Survey* reader is reminded that, as a practical matter, the New York Court of Appeals "represents the court of last resort for virtually every litigant who appears before it."<sup>455</sup> In fact, the United States Supreme Court heard only one case from the New York Court of Appeals during its 1987-88 term.<sup>456</sup>

*J. Runaway Juries*

The United States Supreme Court has agreed to hear a defendant's argument that there is a constitutional right under the eighth amendment to be free from excessive damages in a civil lawsuit. In the case before the Court, a Vermont jury awarded allegedly excessive punitive damages to Kelco Disposal, Inc. because of unfair competition from Browning-Ferris Industries of Vermont.<sup>457</sup> We will discuss this interesting development in next year's *Survey*.

**X. CONCLUSION**

We are again grateful for the helpful comments and suggestions from our colleagues of the bench and bar and in academia. I am particularly thankful to the 1989 graduating class of the Pace University School of Law for keeping me ever alert to new develop-

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454. See N.Y. Times, June 9, 1988, at A-25, col. 4.

455. Stein, *New York Court of Appeals Roundup*, 200 N.Y.L.J., Aug. 29, 1988, at 3, col. 1 (referring to Annual Report of the Clerk of the Court of Appeals).

456. See *id.*

457. See N.Y. Times, Dec. 9, 1988, at A-34, col. 6. The actual damages were less than \$10,000 while the punitive damages awarded were in excess of \$6 million.

ments in New York Civil Practice. I hope to return safe and sound from a semester of teaching remedies at University College in London so that I can contribute to the 1990 Syracuse Law Review *Survey of New York Law*.

**APPENDIX A****TABLE OF NEW CPLR AMENDMENTS (1988)**

CPLR Section or Rule	Amendment	Effective Date
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214-b		06/27/88
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Amended to extend applicability of statute to "Agent Orange" actions commenced no later than 6/16/90.

308(2), (4)		01/01/89
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Amended substituted service and "nailing and mailing" provisions to require delivery and mailing or affixing and mailing to be effected within 20 days of each other; to require proof of service to be filed within 20 days of whichever is effected later; to make statute gender neutral.

325(g)		07/01/88
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Added new subdivision (g) permitting removal from one local (i.e. district, town, village or city) court to another in the same or an adjoining county whenever all judges in transferring court are unavailable or a jury cannot be assembled.

506(b)		04/09/88
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Added new paragraph (3) providing venue alternative—county of petitioner's residence—for Supreme Court proceedings against commissioner of education filed pursuant to Education Law § 4404.

3101		07/01/88
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Amended to renumber subparagraph (ii) as (iii) and add new subparagraph (ii), permitting consensual deposition of expert witnesses in lieu of holding a malpractice panel hearing.

3406		07/01/88
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Amended subdivision (b) to bring podiatric cases into scope of the rules; governing pre-calendar conferences in medical and dental malpractice cases, and to include expert witness deposition offers

and schedules in the conferences' scope. *See* amendment to CPLR 3101.

411(d), (e), (f) 07/01/88

Amended to make subsections (d), (e) and (f) applicable to all actions in which trial has not begun as of August 1, 1988.

4509 06/13/88

Amended to broaden the description of library records deemed confidential.

4533-a 07/08/88

Amended to increase maximum amount of bill or invoice admissible as *prima facie* proof of damages, from \$1,500 to \$2,000.

5036 07/01/88

Repealed subdivision (b) and added new (b) requiring that lump-sum payments be made by the medical malpractice insurance association.

5241(a)(1) 07/25/88

Amended to include "agreements or stipulations incorporated by reference in a judgment" in definition of "order of support."

5501(c) 07/01/88

Amended to make subdivision (c) applicable to all actions in which trial has not begun as of August 1, 1988.

5519(a)(1) 09/01/88

Amended to set a duration of 15 days for an automatic stay pending appeal—by the state, or a political subdivision or agency of the state from an adverse decision in an Article 78 proceeding involving license revocation and certain specified small entities.

5519 07/01/88

Added new subdivision (g) containing special provisions governing

stays in large-verdict (i.e., damages over one million dollars) medical, dental and podiatric malpractice actions.

5522

07/01/88

Amended L. 1986, ch. 682, to make subdivision (b) applicable to all actions in which trial has not begun as of August 1, 1988.

8001

01/01/89

Amended to increase subpoenaed-witness fees from \$2.00 to \$15.00 for attendance, and from 8 cents to 23 cents per mile for travel expenses; and to make statute gender neutral.

8007

08/28/88

Amended to exempt Westchester County from the statute's structured fee for display advertising of legal notices.

8017

07/31/88

Amended to relocate the previously misplaced "(a)" after the section heading.

8018(d)

07/31/88

Amended to add services to the list of items for which no fee may be charged where an index number has been assigned.

8018(e)

07/31/88

Repealed.

8019

07/31/88

Added new subdivision (f), setting fees for copying and certification of county clerk or county register records.

8020(f)

07/31/88

Amended to delete preparation and certification fees, and renumber (f)(5) as (f)(2).

8021(a)

07/31/88

Amended to delete (a)(6) and (a)(7) which provided for certain fees relating to papers and instruments in connection with real property, renumber (a)(8)-(a)(13) as (a)(6)-(a)(11); and amend (a)(12), now (a)(10), to include "recording" a notice of pendency or amended notice of pendency.

8021(b)

07/31/88

Amended paragraph 10 of subdivision (b) to apply to all counties in New York State, eliminating restriction to the counties within New York City.

8021(c)

07/31/88

Amended to delete (c)(6), (c)(8) and (c)(9); and to renumber (c)(7) as (c)(6) and (c)(10)-(c)(12) as (c)(7)-(c)(9).

8201

01/01/89

Amended to eliminate special costs for the counties in New York City; and, for all counties, to set costs awarded in proceedings before note of issue is filed at \$200, costs awarded after filing of note of issue but before trial at \$200, and for each trial, inquest or assessment of damages, at \$300.

8202

01/01/89

Amended to increase costs awarded on a motion to \$100 for all counties.

8203(a)

01/01/89

Amended to increase costs awarded on an appeal to the Appellate Division to \$250, unless the court awards a lesser amount, whether awarded before or after argument.

8204

01/01/89

Amended to increase costs on appeal to Court of Appeals to \$500, unless the court awards a lesser amount, whether awarded before or after argument.

8303(a)(6)

08/01/88



Amended to permit discretionary award of costs to plaintiff in an action brought under General Business Law § 520-a (requirements for credit card transaction forms).

8303(a)(6)

11/01/88

Amended to delete reference to General Business Law Article 26-A (regulation of theatrical syndication financing) and to insert reference to its current location in Arts and Cultural Affairs Law Article 23.