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## Civil Practice

Jay C. Carlisle

*Elisabeth Haub School of Law at Pace University*

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# CIVIL PRACTICE

Jay C. Carlisle\*

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\* Associate Professor of Law, Pace University School of Law; J.D., University of California at Davis; A.B., University of California at Los Angeles. The author wishes to express his sincere thanks to Gloria Pagonico for her patience in typing this article.

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## I. INTRODUCTION

During the *Survey* year, legislation was enacted relating to twenty-seven of the sixty-five articles of the CPLR. Additionally, there have been significant developments in the decisional law of

*res judicata*. These and other areas should be of interest to the practitioner.<sup>1</sup>

## II. NEW LEGISLATION

While the Civil Practice portion of the *Survey* has traditionally focused on developments in recent decisional law, it is important for the practitioner to be aware of many of the new amendments to the Civil Practice Rules.<sup>2</sup> Several of them are highlighted below. In addition, the new individual assignment system and the uniform rules of the court are mentioned.

### A. Section 214-c Last Exposure Rule Buried

Section 214-c,<sup>3</sup> as enacted by Chapter 682 of the Laws of 1986, became effective on July 30, 1986.<sup>4</sup> The statute provides that in all cases of exposure to a substance, the statute of limitations begins to run when the injury is, or with reasonable diligence could have been, discovered.<sup>5</sup> The statute applies to personal injury claims and property damage claims, but does not apply to medical or dental malpractice actions.<sup>6</sup> The statute directly overrules prior decisional law that required an action to be commenced within three

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1. The author gratefully acknowledges the encouragement and advice of Professor Richard T. Farrell of Brooklyn Law School. Professor Farrell was the author of the New York Practice segment of the *Survey* during the ten year period prior to this article. Following Professor Farrell's advice, I have tried to selectively review the areas of change in civil practice and procedure which I believe will be of interest to the practitioner. Reference to further decisional law is contained in the 1986 Supplements to Volumes I-VIII of WEINSTEIN-KORN-MILLER, for which I serve as a co-author.

2. Numerous amendments have been made to the CPLR during this *Survey* year. For a summary of these amendments see attached appendix.

3. See N.Y. CPLR 214-c (McKinney Supp. 1987).

4. See Siegel, *New York Adopts a "Discovery" Rule For Exposure Cases—And Even Offers a Short Time for Which To Revive Expired Claims*, 321 N.Y. St. L. Dig., at 1 (1986); Cook, *The New York Law Likely to Spur Filings of Toxic-Tort Claims*, Nat'l L.J., Sept. 22, 1986, § 1, at 10, col. 1; Wise, *Battle Lines Are Drawn In Fight Over Toxic-Tort Law*, N.Y.L.J., Aug. 4, 1986, at 1, col. 3; Law Signed to Extend Time for Filing Toxic-Tort Suits, N.Y.L.J., July 31, 1986, at 1, col. 3; Rheingold, *The New Statute of Limitations In Tort Actions in New York*, N.Y.L.J., July 29, 1986, at 1, col. 3; Hoenig, *More on Tort Reform—The New Statutes*, 196 N.Y.L.J., July 24, 1986, at 1, col. 1; Marlin & Levy, *New York Adopts Discovery Rule For Latent-Disease Cases*, N.Y.L.J., July 7, 1986, at 1, col. 3; Fox, *Reforms in Liability Insurance Urged by State Advisory Panel*, N.Y.L.J., Apr. 8, 1986, at 1, col. 3.

5. See N.Y. CPLR 214-c.

6. See *id.*

years from the date of last exposure to a toxic or harmful substance, even in those cases when the injured person was unaware of the injury.<sup>7</sup> The statute revives time-barred claims<sup>8</sup> in cases of exposure to DES, tungsten-carbide, asbestos, chlordane and polyvinyl chloride.<sup>9</sup> Time-barred cases, involving these five substances, are revived even if they were previously litigated but dismissed on statute of limitations grounds.<sup>10</sup> Certain wrongful death actions may not be covered.<sup>11</sup>

### 1. *Discovery Rule*

The discovery rule provision of newly added CPLR 214-c<sup>12</sup> states, in material part:

Notwithstanding the provisions of 214, the three year period within which an action to recover for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.<sup>13</sup>

CPLR 214-c<sup>14</sup> applies to all acts, omissions or failures occur-

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7. See *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 467 N.E.2d 571, 478 N.Y.S.2d 853 (1984), *cert. denied*, 105 S. Ct. 967 (1985); *Steinhardt v. Johns Manville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), *cert. denied and appeal dismissed sub nom.*, *Rosenberg v. Johns-Manville Sales Corp.*, 456 U.S. 967 (1982); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979); *Schwartz v. Heydon Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remititur amended*, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied*, 374 U.S. 808 (1963); *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *see also Segalla & Galbo, Asbestos: New York's Approach to the Statute of Limitations*, 57 N.Y. St. B.J. 28 (1985).

8. See Act of July 30, 1986, ch. 682, 209 MCKINNEY'S SESS. LAWS OF N.Y. 1567 (codified at N.Y. CPLR 214(c)).

9. See *id.* For a short definition of each substance see Rheingold, *supra* note 4.

10. See Act of July 30, 1986, ch. 682, 209 MCKINNEY'S SESS. LAWS OF N.Y. 1567.

11. See Rheingold, *supra* note 4 (most wrongful death actions, except ones which were not barred at the time of the decedent's death, are revived without any time limitation); *see also* N.Y. EPTL 5:4-1 (under New York law, a wrongful death action is available only if the decedent possessed a viable personal injury action at the time of death).

12. N.Y. CPLR 214-c.

13. *Id.*

14. *Id.*

ring prior to, on, or after July 1, 1986.<sup>15</sup> The statute may not apply to some pre-July 1, 1986 acts or omissions if the action was already time-barred and the injury was or should have been discovered prior to that date.<sup>16</sup> Nonetheless, some of the actions already barred are revived by a separate revival provision.<sup>17</sup> Professor Siegel points out that if the plaintiff discovers an injury and is unable to relate it to the cause, CPLR 214-c(4)<sup>18</sup> gives him five years to establish the requisite causation.<sup>19</sup> If the plaintiff discovers the cause within five years after discovery of the injury, he obtains an additional one year from the discovery of the cause to bring an action.<sup>20</sup> The plaintiff must show that the "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" in time to inform him earlier.<sup>21</sup> If the plaintiff fails to discover the cause within five years after discovery of the injury, CPLR 214-c<sup>22</sup> appears to be inapplicable and the claim is barred.<sup>23</sup> The practitioner should be aware that because the term "discovery of the injury" is not defined in CPLR 214-c,<sup>24</sup> application of decisional law will be necessary to establish when the time period begins to run. There are at least four "discovery of injury" definitions which may be adopted by New York courts. First, the date of discovery occurs with the discovery of the injury and the causation.<sup>25</sup> Second, the date of discovery is when the plaintiff knows, or by reasonable diligence should know, of his injury and that it was probably caused by the wrongful acts of another.<sup>26</sup> Third, discovery occurs when the plaintiff knows, or by the exercise of reasona-

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15. *See id.*

16. *See Marlen & Levy, supra* note 4, at 30.

17. *See infra* notes 30-41 and accompanying text.

18. *See* N.Y. CPLR 214-c(4).

19. *See* Siegel, *supra* note 4, at 1.

20. *See* N.Y. CPLR 214-c(4).

21. *Id.*

22. *See id.*

23. *See* Siegel, *supra* note 4, at 1.

24. *See* N.Y. CPLR 214-c.

25. *See Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969) (defining "discovery" as the knowledge of the injury together with the knowledge of the cause); *see also* *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977) (following majority rule enunciated in the *Warrington* case).

26. *See Nolan v. Johns-Manville, Asbestos & Magnesia Materials Co.*, 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979), *aff'd*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981).

ble diligence should know, that he suffers from a particular condition.<sup>27</sup> Fourth, the date of discovery is when the disease manifests itself.<sup>28</sup> The latter approach impliedly obligates a person to seek medical attention when the symptoms of his injury or disease appear. This final approach is the most likely to be adopted by New York courts.<sup>29</sup>

## 2. *The Revivor Statute*

Revival occurs only for claims that originate from one of the five substances previously mentioned.<sup>30</sup> All such prior exposure substance cases not brought before July 30, 1986 because of the statute of limitations time bar, or those brought and dismissed prior to July 30 on statute of limitations grounds, are revived for one year.<sup>31</sup> Revival occurs if, when the cause of action accrued, the injured person, having been fully aware of his rights, chose not to sue.<sup>32</sup>

The revivor statute states that an action may be "commenced

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27. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973). In *Borel*, the United States Court of Appeals held that the plaintiff's claim was not barred by the statute of limitations when he had filed his claim only seven months after an operation revealed for the first time that he had asbestosis. See *id.* at 1100. In stating the rule, the court held that "in cases involving similar injuries resulting from exposures to deleterious substances over a period of time, courts have consistently held that the cause of the action does not accrue until the effects of such exposures manifest themselves." *Id.* at 1102. The court of appeals concluded that the effects of the exposure only manifest themselves upon diagnosis. See *id.*

28. See *Urie v. Thompson*, 337 U.S. 163 (1949). In *Urie*, the United States Supreme Court adopted a discovery rule, rejecting any construction of the statute of limitations which would bar the cause of action before the plaintiff knew he had been injured.

29. If the Legislature had intended causation to be part of the discovery period, reference would have been made, as it was elsewhere, to "technical, scientific or medical" knowledge necessary for causation. New York courts have traditionally placed great emphasis on interpreting various statutes of limitations to conform with the Legislature's desire to provide repose to potential defendants. See generally WEINSTEIN-KORN-MILLER, CPLR MANUAL § 2.01 (1986 ed.) [hereinafter CPLR MANUAL]. The practitioner and the courts, however, should be aware of the Superfund Amendments and Reauthorization Act of 1986, No. 99-499, 100 Stat. 1613 (1986), which directs state statute of limitations periods for personal injury or property damage claims caused by exposure to any "hazardous substance," or "pollutant or contaminant" released into the environment from a "facility," to conform with the federally required commencement date. The federal date means the date the plaintiff knew, or reasonably should have known, that the personal injury or property damage was caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

30. See *supra* note 9 and accompanying text.

31. See Act of July 30, 1986, ch. 682, 209 MCKINNEY'S SESS. LAWS OF N.Y. 1567.

32. See *id.*

within the year following July 30, 1986."<sup>33</sup> What if, as of July 15, 1986, a case was pending in which a statute of limitations defense had been asserted? Can such a defense be expected to prevail? The intent of the statute probably was to cover this situation and consequently, the defense would not prevail. If there is any doubt, however, the lawyer should commence a new action. The revival statute expressly excuses the past failure to file a notice of claim and provides that no notice of claim is needed in actions against the state or municipalities.<sup>34</sup> One should note that revision of the laws on joint liability<sup>35</sup> and the new collateral source rule<sup>36</sup> do not pertain to suits revived under CPLR 214-c(4).<sup>37</sup>

Practitioners should expect the constitutionality of the revivor statute to be challenged. Insurance companies and manufacturers have been considering legal action to block the revival period as an unconstitutional impairment of contract.<sup>38</sup> Although it is fairly clear that the Legislature can extend a prior period of limitations,<sup>39</sup> insurance companies will probably argue that the revival law will force them to cover claims that were not taken into consideration in the setting of premiums because they were time barred when the policies were written.<sup>40</sup> This challenge should be unsuccessful

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33. *See id.*

34. *See id.*

35. *See infra* note 43 and accompanying text.

36. *See infra* note 73 and accompanying text.

37. *See* N.Y. CPLR 214-c.

38. *See* Wise, *supra* note 4, at 1.

39. *See* Campbell v. Holt, 115 U.S. 620 (1885) (Texas Legislature could suspend running of a statute of limitations without violating due process clause of fourteenth amendment); *see also* Gallewski v. H. Hentz & Co., 301 N.Y. 164, 93 N.E.2d 620 (1950) (Legislature could amend the statute of limitations to revive statutory claim for person imprisoned by the Germans during World War II); Robinson v. Robins Dry Dock Repair Co., 238 N.Y. 271, 144 N.E. 579 (1924); McCann v. Walsh Constr., 282 A.D. 444, 123 N.Y.S.2d 509 (3d Dep't 1953), *aff'd*, 306 N.Y. 904, 119 N.E.2d 596 (1954) (Legislature's revival of worker's compensation statute for certain slow starting diseases constitutionally valid because circumstances were such as to indicate a strong moral obligation to do so); Hintz v. State Tax Comm'n, 55 Misc. 2d 474, 285 N.Y.S.2d 482 (Sup. Ct., Albany Co. 1966).

40. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Spannaus successfully challenged a Minnesota law which required companies in a pension plan to pay certain benefits when they closed an office, irrespective of the terms stated in the plan. The Court found that the Minnesota statute operated retroactively to modify payments required under the pension plan and that the company had reasonably relied on actuarial predictions to determine what funding would be necessary to sustain the contractually mandated payments. Because the statute addressed no pressing societal concern, the United States Supreme Court concluded that it was a significant impairment of the contract and thus violative of the fourteenth amendment. The *Spannaus* case should be distinguishable on two



in view of the Court of Appeals' past deference to the Legislature's retroactive application of statutes of limitations.<sup>41</sup>

### *B. New Rules for Joint and Several Liability*

On July 30, 1986, Chapter 682 of the Laws of 1986 added Article 16 to the CPLR.<sup>42</sup> This provision should partially transform the law of joint and several liability in tort cases, posing new problems for trial lawyers and judges.<sup>43</sup> Traditionally, joint tortfeasors have been liable both jointly and severally.<sup>44</sup> In other words, the injured plaintiff could choose whether to sue one or all of the joint tortfeasors. Thus, if a joint tortfeasor was ten percent liable for a tort, he could be required to pay one hundred percent of the plaintiff's damages and then be forced to collect the remaining ninety percent from whomever else was liable.<sup>45</sup> Article 16 changed this concept in several ways. First, the defendant must be more than fifty percent liable before joint and several liability will be applied to him regarding a "non-economic loss."<sup>46</sup> Non-economic loss includes, but is not limited to, pain and suffering, mental anguish and loss of consortium.<sup>47</sup> The main provision does not apply to wrongful death cases or property damage cases because they involve economic losses.<sup>48</sup> If a defendant is found to be fifty percent or less liable, liability for non-economic loss will be limited to his equitable share.<sup>49</sup>

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grounds. First, it did not address an important societal issue (here, thousands of innocent people were barred from having meritorious claims heard). Second, the New York revival statute is limited in scope and time because it only allows claims barred before the amendment was enacted for a limited one year period.

41. See *supra* note 39.

42. See Act of July 30, 1986, ch. 682, 209 MCKINNEY SESS. LAWS OF N.Y. 1567-69 (codified at N.Y. CPLR 1600-1603 (McKinney Supp. 1987)).

43. See McLaughlin, *New Joint Several Liability Law: Problems for Lawyers and Judges*, N.Y.L.J., Oct. 1, 1986, at 1, col. 3; see also Hoenig, *supra* note 4; Siegel, *The New Law Partially Abolishing the Joint Liability in Tort Cases, Parts I, II, & III*, 322-24 N.Y. ST. L. DIG., Oct., Nov., Dec., 1986.

44. See generally 2A WEINSTEIN-KORN-MILLER, NEW YORK CIVIL PRACTICE § 1401.04 (1986).

45. *Id.*

46. See N.Y. CPLR 1601(1) (McKinney Supp. 1987).

47. See *id.* § 1600.

48. See *id.* § 1601(1). Economic losses susceptible to immediate mathematical calculation are not covered by Article 16 and remain subject to the traditional joint and several liability laws.

49. See *id.*

Assume that the practitioner files a negligence action seeking one million dollars in damages and names as defendants a homeowner, an installer, and a manufacturer. If the homeowner is found ten percent liable, the installer is found forty percent liable and the manufacturer is found fifty percent liable, none of them will be responsible for more than their share of the one million dollars attributed to pain and suffering. Thus, if the installer who is forty percent responsible has no insurance coverage and is otherwise liability-proof, the plaintiff will be unable to collect forty percent of his non-economic damages. The plaintiff can collect the entire amount of his economic loss from any of the defendants because these damages are not covered by the new statute.

Article 16 also implies that the plaintiff must join all persons possibly liable as defendants in order to prevent a named defendant from shifting the liability to a non-party.<sup>50</sup> For example, assume the plaintiff sued only the manufacturer and not the installer or homeowner. In the past, a plaintiff could recover the entire judgment from the "deep pocket" manufacturer. Under newly added Article 16, however, if the plaintiff names the deep pocket manufacturer as the sole defendant, and the manufacturer is less than fifty-one percent liable, the plaintiff will only recover for the manufacturer's percentage of liability. Of course, if the manufacturer was more than fifty percent responsible, he can still be liable for all of the damages. But why take that chance?

CPLR 1602<sup>51</sup> sets forth eleven exceptions to the new rule. The most important exception for most lawyers is subdivision 6 of section 1602,<sup>52</sup> which applies to automobile accident cases other than those involving a municipal vehicle. Thus, in the classical three car intersection collision case, a plaintiff can still recover the entire judgment from a deep pocket defendant who is only one percent liable.<sup>53</sup> Other important exceptions include claims filed under the

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50. See *infra* note 93 and accompanying text relating to amended CPLR 8303(a) (sanctions for frivolous pleadings). While Article 16 suggests naming every possible defendant, CPLR 8303(a) suggests that by doing so, the practitioner may be subject to sanctions. Thus, whenever it becomes clear that a designated defendant should be dropped from the action, the lawyer should do so expeditiously to avoid such sanctions.

51. See N.Y. CPLR 1602 (McKinney Supp. 1987).

52. See *id.* § 1602(6).

53. Excerpts from remarks by Lucille Fontana, Esq., at a Continuing Legal Education forum, the New York Practice Update, presented on October 15, 1986 at the Pace University School of Law.

Worker's Compensation Law,<sup>54</sup> and claims subject to Article 10 of the Labor Law.<sup>55</sup>

CPLR 1603<sup>56</sup> requires that a party asserting the limitations on liability prove by a preponderance of the evidence either that one of the eleven exceptions applies or that he is fifty percent or less responsible for the liability.<sup>57</sup> Because Article 16 is only effective as of July 30, 1986, there is no decisional law interpreting the preponderance of evidence standard under Section 1603.<sup>58</sup>

### C. Itemized Verdicts

CPLR 4111(f)<sup>59</sup> was enacted by Chapter 682 of the Laws of 1986 and became effective on July 30, 1986. Subsection (f) is applicable in personal injury, property damage and wrongful death actions not subject to subdivisions (d) and (e) of the rule.<sup>60</sup> Subdivisions (d) and (e) refer to medical or dental malpractice, personal injury, and wrongful death actions against public employers.<sup>61</sup> CPLR 4111(f)<sup>62</sup> requires that upon a finding of damages, the court must instruct the jury to specify the applicable elements of special and general damages on which the award is based and the amount of damages assigned to each element.<sup>63</sup> The allocation may include, but is not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering.<sup>64</sup>

Elements must be further itemized into compensation prior to the verdict and future damages.<sup>65</sup> The jury shall set forth the period of years over which the amounts are intended to provide compensation.<sup>66</sup> In computing the damages, the jury shall be instructed to award the full amount of future damages without reduction to

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54. See N.Y. CPLR 1602(4).

55. See *id.* § 1602(8).

56. See *id.* § 1603.

57. See *id.*

58. See *id.* The practitioner, however, should anticipate litigation in this area because the preponderance of the evidence standard contemplates a traverse hearing.

59. See N.Y. CPLR 4111(f) (McKinney Supp. 1987).

60. See *id.*

61. See *id.* § 4111(d), (e).

62. See *id.* § 4111(f).

63. See *id.*

64. See generally Hoenig, *supra* note 4, at 1.

65. See N.Y. CPLR 4111(f).

66. See *id.*

present value.<sup>67</sup>

#### *D. Collateral Source Rule*

CPLR 4545<sup>68</sup> was amended by Chapter 266 of the Laws of 1986 and became effective on June 28, 1986. The amendment added subdivision (c) which is applicable to personal injury, property damage or wrongful death actions where a plaintiff seeks to recover for the cost of medical care, dental care, custodial care, rehabilitation services, loss of earnings or other economic loss.<sup>69</sup>

In these cases, evidence will be admissible to establish that any such past or future cost or expense was, or will with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance, social security, disability plans, and pension plans.<sup>70</sup> Thus, collateral source evidence of this type is available to mitigate damages in all personal injury, property damage or wrongful death actions.<sup>71</sup> This provision does not apply to life insurance.<sup>72</sup> Plaintiffs can no longer introduce their medical bills into evidence if they have been, or will be, collaterally reimbursed for them.<sup>73</sup>

#### *E. Periodic Payment of Awards*

Article 50-B<sup>74</sup> was enacted by Chapter 682 of the Laws of 1986 and became effective on July 30, 1986. It provides that the jury will be asked to render a verdict itemizing damages between past special, past general, future special and future general damages.<sup>75</sup> The

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67. *See id.*

68. *See* N.Y. CPLR 4545(c) (McKinney Supp. 1987).

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See* Hoenig, *Products Liability*, N.Y.L.J., Mar. 27, 1986, at 1, col. 1 (citing *Morgan Guaranty Trust Co. v. Garrett Corp.*, 625 F. Supp. 752 (S.D.N.Y. 1986)).

74. Newly added Article 50-B of the CPLR consists of provisions 5041 through 5049 and is entitled "Periodic Payment of Judgments In Personal Injury, Injury to Property and Wrongful Death Actions."

75. *See* N.Y. CPLR 5041 (McKinney Supp. 1987). In 1985 Article 50-A of the CPLR was enacted. It created the structured judgment. In 1986 the structured judgment requirement was extended to tort actions in general by Article 50-B. *See* N.Y. CPLR art. 50 (McKinney Supp. 1987); *see also* Note, *The 1985 Medical Malpractice Reform Act*, 52 BROOKLYN L. REV. 135 (1986); Note, *Medical Malpractice Reform*, 14 FORDHAM URB. L.J. 773, 787 (1986).

plaintiff will receive a lump sum payment for all past and future damages not in excess of \$250,000, and any damages, fees or costs otherwise payable in a lump sum.<sup>76</sup> With respect to awards of future damages in excess of \$250,000, plaintiffs will receive the present value of a structured annuity contract that will provide for payment of the remaining amounts of future damages in periodic installments.<sup>77</sup> The annual payment for the first year will be determined by dividing the remaining amount of future damages by the number of years over which the payment will be made.<sup>78</sup> Payment in each successive year shall be computed by adding four percent to the previous year's payment.<sup>79</sup>

Thus, if a plaintiff is awarded \$750,000 for future payments to be structured from one to ten years, the jury must first find how long the person is expected to live. If the person's likely life expectancy is five years, the award must be structured over a five year period. If the life expectancy is ten years or more, the award cannot be structured for more than ten years. The \$750,000, minus \$250,000 which can be paid in a lump sum to the plaintiff, will be calculated through an annuity table to determine the present sum necessary for investment to yield \$500,000 over a ten year period. If \$375,000 is necessary for the ten year payout of \$500,000, the attorney's contingent fee will be based on that figure. In addition, the defendant is personally liable, along with his insurance company, for the payments during the structured time period. So, if the insurance company underwriting the annuity goes bankrupt, the individual remains liable on the judgment for all amounts unpaid by the annuity.<sup>80</sup>

#### *F. Health Care Arbitration*

Newly enacted Article 75-A provides that all health maintenance organizations (HMO's) must offer arbitration to their subscribers as an alternative to a malpractice action and health care professionals must participate in the arbitration.<sup>81</sup> The plaintiff must decide whether to participate in arbitration within twenty

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76. See *id.* § 5041(b).

77. See *id.* § 5041(e).

78. See *id.*

79. See *id.*

80. See Fontana, *supra* note 53.

81. See N.Y. CPLR 7551 (McKinney Supp. 1987).

days after receipt of the defendant's arbitration demand.<sup>82</sup> If the plaintiff consents to arbitration and the defendant then serves a concession of liability upon the plaintiff, damages will be arbitrated.<sup>83</sup> Although the defendant's concession of liability is not binding upon him for any other purpose, the arbitrator's decision as to damages is binding on all parties unless modified or vacated pursuant to the CPLR.<sup>84</sup>

The new proceeding is to be commenced and conducted in accordance with CPLR 75.<sup>85</sup> Damages will be determined, pursuant to provisions of law applicable in medical and dental malpractice actions, by a panel of three arbitrators.<sup>86</sup> Parties may take depositions and conduct discovery with the same rights, remedies, and obligations as in a civil action.<sup>87</sup> Persons who enroll in HMO's after the effective date of the amendment must arbitrate all medical malpractice claims.<sup>88</sup> Otherwise, in the absence of a concession of liability by the defendant, there is no required arbitration.<sup>89</sup>

### *G. Sanctions for Frivolous Claims*

Article 8303(a) of the CPLR<sup>90</sup> was amended by Chapter 220 of the Laws of 1986,<sup>91</sup> which became effective on June 28, 1986.<sup>92</sup> The article is applicable to claims, counterclaims, and defenses brought by plaintiffs or defendants for personal injury, property, or wrongful death actions found by the court to be frivolous.<sup>93</sup> A finding of frivolity can be made at any time during the proceedings or upon judgment, and such a finding permits the court to award to the

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82. *See id.* § 7556.

83. *See id.* (service of concession of liability must be made within twenty days after plaintiff's election).

84. *See id.* § 7565.

85. *See id.* §§ 7550-7556.

86. *See id.* § 7554.

87. *See id.* § 7561.

88. *See id.* § 7551.

89. *See* Bower, *Plaintiffs' Attorney's Analysis of Medical Malpractice Reform*, N.Y.L.J., Sept. 8, 1986, at 1, col. 3; Connors, *An Analysis of New York Medical Malpractice Reform*, N.Y.L.J., Aug. 15, 1986, at 1, col. 3.

90. *See* N.Y. CPLR 8303(a) (McKinney Supp. 1987).

91. Act of June 28, 1986 ch. 220, 209 MCKINNEY'S SESS. LAWS OF N.Y. 1208 (to be codified at N.Y. CPLR 8303(a) (McKinney Supp. 1987)).

92. *Id.*

93. *See generally*, Broder, *Trial Tactics and Techniques*, N.Y.L.J., Oct. 9, 1986, at 1, col. 1.

successful party costs and reasonable attorney fees, not exceeding \$10,000.<sup>94</sup> CPLR 8303<sup>95</sup> is in some respects similar to Rule 11 of the Federal Rules of Civil Procedure (FRCP)<sup>96</sup> that provides for the imposition of sanctions for the filing of frivolous pleadings. Although a discussion of recent developments with respect to FRCP 11<sup>97</sup> is beyond the scope of this article, every New York lawyer engaged in federal practice should become familiar with those recent developments.<sup>98</sup>

The first question for attorneys concerned with the impact of CPLR 8303<sup>99</sup> is the meaning of the term "frivolous." One distinguished judge has defined it to mean "[of] little or no weight, value or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose—[i]n pleading; [m]anifestly insufficient or futile."<sup>100</sup> Furthermore, application of sanctions under CPLR 8303<sup>101</sup> will depend on whether New York courts follow the objective standard of frivolity suggested by the Second Circuit Court of Appeals in *Eastway Construction Corp. v. New York*,<sup>102</sup> or a subjective standard which will be more apt to protect attorneys who honestly reach unreasonable conclusions about the factual or legal strength of their cases.<sup>103</sup>

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94. *See id.*

95. N.Y. CPLR 8303(a).

96. *See* FED. R. CIV. P. 11.

97. *Id.*

98. It is important to note that federal courts in the Second Circuit have adopted an objective, instead of a subjective, approach to the imposition of sanctions under FRCP 11. *See Eastway Constr. Corp. v. New York*, 762 F.2d 243 (2d Cir. 1986); *see also* Dombroff, *Attorneys In Affirming Pleadings Risk Sanctions*, Nat'l L.J., Jan. 27, 1986, at 15, col. 6; Adams & Nolan, *Pretrial Abuses Now Punished by U.S. Courts*, Nat'l L.J., Mar. 17, 1986, at 15, col. 1; Kohn, *Circuit Court Upsets Sanction of Lawyer For "Meritless" Suit*, N.Y.L.J., Oct. 24, 1986, at 1, col. 3. For a list of sanction cases during the 1986 Survey year, *see* Silberberg, *Civil-Practice Roundup in the Southern District*, N.Y.L.J., Dec. 5, 1985, Jan. 3, Feb. 5, Mar. 6, Apr. 4, May 8, June 6, July 9, Aug. 12, Sept. 4, Oct. 9, Nov. 7, Dec. 16, 1986, at 1, col. 3.

99. *See* N.Y. CPLR 8303.

100. *Eastway Constr. Corp. v. New York*, 637 F. Supp. 558, 565 (E.D.N.Y. 1986) (citing Oxford English Dictionary (1971)).

101. *See* N.Y. CPLR 8303.

102. 762 F.2d 243, 253-54 (2d Cir. 1986). *Eastway I* held that policy requires FRCP 11 not to be read according to its literal terms; instead, the Second Circuit stated "[s]anctions shall 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 . . . ." *See id.* In other words, *Eastway I* holds attorneys strictly liable for mistakes in judgment that lead to the filing of papers later deemed frivolous. *See id.*

103. Chief Judge Jack Weinstein suggests that the subjective element of a sanction

The second question relates to the amount of costs and attorney fees to be awarded to the successful party under CPLR 8303.<sup>104</sup> Apparently, the court can order that the costs and fees be paid by either the client or his attorney. 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 CPLR 8303(a)<sup>105</sup> should take protective measures. First, before filing any pleading or taking any course of action during litigation, the attorney should read CPLR 8303(a).<sup>106</sup> This is important, not so much as an exercise, but so that when resisting a section 8303(a)<sup>107</sup> sanction defense, one can file an affidavit asserting that it was specifically considered. One should ask himself if the facts of the case 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 are, as a matter of common practice, asserting 8303(a)<sup>108</sup> defenses in their answers. This would itself appear to be a violation of the new sanctions rule.

Another factor to raise in resisting the imposition of sanctions under CPLR 8303<sup>109</sup> is the amount of time available for investigation. For example, if the sanctioned matter arises in a special proceeding,<sup>110</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 informa-

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rule, such as FRCP 11, is satisfied when an attorney makes a "reasonable inquiry into the facts and law." See *Eastway Constr.*, 637 F. Supp. at 567-68.

104. See N.Y. CPLR 8303(a).

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.*

110. See D. SIEGEL, *NEW YORK PRACTICE* § 547 (1978).



tion upon which the attorney is relying. In many instances the information must come from the client, placing a duty on counsel to verify pertinent facts. Another factor is whether the representations of forwarding counsel or some other member of the bar were relied on by the present counsel. If so, sanctions under CPLR 8303(a)<sup>111</sup> are less likely to be applied.

Lawyers should also be aware of sanctions that can be applied under the new individual assignment rules,<sup>112</sup> CPLR 3126<sup>113</sup> or pursuant to the inherent powers of the court.<sup>114</sup>

### H. Pretrial Seizure Orders

Article 13-A<sup>115</sup> of the CPLR was enacted in 1984 and amended earlier during the *Survey* year.<sup>116</sup> This provision allows assets of criminal defendants to be frozen, pending the outcome of their criminal trials, in order to satisfy a possible judgment allowing a recovery against their gains from illegal activities. In *Morgenthau v. Citisource, Inc.*,<sup>117</sup> the Court of Appeals reversed the appellate division which, in an issue of first impression, had ruled that pretrial seizure orders under Article 13-A of the CPLR<sup>118</sup> were limited to funds that could be directly traced to the proceeds of a crime.

### I. Jurisdiction of the Court of Appeals

Newly amended CPLR 5601,<sup>119</sup> which became effective on January 1, 1986, dramatically effects the jurisdiction of the New

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111. See N.Y. CPLR 8303(a).

112. See *infra* notes 127-38 and accompanying text.

113. See *infra* notes 505-11 and accompanying text.

114. See Fox, *Sanctions Weighed Against Law Firm on Conflict Issue*, N.Y.L.J., Oct. 28, 1986, at 1, col. 3; see also *A.G. Ship Maintenance Corp. v. Lezak*, N.Y.L.J., Dec. 29, 1986, at 1, col. 6 (N.Y. Ct. App. 1986) (the Court of Appeals held that courts have the power to impose money sanctions, but left open the issue of whether the power "is inherent to the judicial function or is merely delegable by the Legislature under our Constitution"); *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 489 N.Y.S.2d 914 (2d Dep't 1985);

115. N.Y. CPLR Art. 13-A (McKinney Supp. 1987).

116. See N.Y. CPLR 1349(d). This section was amended by replacing the condition of a pre-conviction forfeiture crime with a felony. Paragraph (e) was amended by replacing the condition of a post-forfeiture crime with "all other crimes." Both amendments became effective on July 1, 1986. See N.Y. CPLR 1349(d), (e) (McKinney Supp. 1987).

117. 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

118. See N.Y. CPLR art. 13-A.

119. See N.Y. CPLR 5601 (McKinney Supp. 1987).

York Court of Appeals.<sup>120</sup> No longer will a reversal or modification by the appellate division, or the presence of a single dissenter in an affirmance support an appeal of right.<sup>121</sup> Two dissenters are now necessary in the appellate division for an automatic appeal.<sup>122</sup> Similarly, appeal by permission is expanded. Where the appeal of right was, but is no longer available, the appellant must apply for leave to appeal. CPLR 5602(a)<sup>123</sup> was amended and requires the Court to adopt rules assuring that if any two of the Court's seven judges vote to grant leave, such leave will be granted.<sup>124</sup>

The Court of Appeals has also adopted Rule 500.17,<sup>125</sup> effective January 1, 1986, which authorizes a certification procedure whereby other courts may, by written application, request from it the answer to questions of New York law. This rule allows the Court of Appeals to render advisory opinions at the request of the United States Supreme Court, a federal court of appeals, or a court of last resort of another state.<sup>126</sup>

#### *J. New Uniform Rules and Individual Assignment System*

Last year's Civil Practice segment of the *Survey* briefly discussed the new Individual Assignment System (IAS),<sup>127</sup> which was implemented on January 6, 1986. During its first seven months of operation the IAS has succeeded in cutting caseloads in the State Supreme Court in New York City by more than ten percent.<sup>128</sup> In

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120. See Gleason & Ferlazo, *The Court of Appeals Moves Towards "Certiorari" Status*, 58 N.Y. St. B.J. 4 (May 1986).

121. Previously under New York CPLR section 5601, one dissenter was sufficient for an appeal of right; that subdivision was amended, effective January 1, 1986, to offer an appeal of right only when there are two dissenters in the appellate division. See N.Y. CPLR 5601.

122. See *id.*

123. See N.Y. CPLR 5602(a).

124. The Court of Appeals implemented New York CPLR 5602(a) by amending its Rule 500.11, also effective January 1, 1986, to provide that two judges can grant leave for appeal. See MCKINNEY'S 1987 N.Y. RULES OF THE COURT § 500.11 (22 NYCRR 500.11). Another rule of the Court of Appeals, effective on the same date, dispenses with separate papers for notice of motion, brief and affidavit, and allows a single document to contain all of these items.

125. MCKINNEY'S 1987 N.Y. RULES OF THE COURT § 500.17 (22 NYCRR 500.17).

126. See *Kidney v. Kolmar Laboratories*, No. 86-2-7194 (2d Cir. Jan. 5, 1987) (the first use of certification procedure, this case involved an interpretation of section 104-B(2) of the New York Social Services Law).

127. See Brodsky, *Civil Practice, 1985 Survey of N.Y. Law*, 37 SYRACUSE L. REV. 264, 288 (1986).

128. See Wise, *7-Month Report On IAS Hailed by Bellocosa*, N.Y.L.J., July 31, 1986, at

addition, by July 20, 1986 the new system had disposed of 16,255 notes of issue and thus pared the number of pending notes by nine-percent.<sup>129</sup> A full discussion of the IAS is set forth by Professor Siegel in volumes 312 through 315 of the New York State Law Digest.<sup>130</sup>

Reference should also be made to the Uniform Rules of the Court (U.R.) which became effective on January 6, 1986.<sup>131</sup> The new rules formally require two conferences. One is the "preliminary conference" and the other is a "pretrial conference." The preliminary conference is mandatory<sup>132</sup> in all situations except where there is no occasion to require a Request for Judicial Intervention and the parties are able to conduct pretrial disclosure without a judicial supervisor. Otherwise, the conference is held and usually serves the purpose of establishing a time table for disclosure proceedings. These proceedings generally must be completed within twelve months of the assignment of the action to the judge. Compliance with the disclosure order is important in view of U.R. 202.12(g),<sup>133</sup> which provides for sanctions. The pretrial conference occurs after a notice of issue is filed,<sup>134</sup> and serves to explore settlement and to prepare the case for trial.

The practitioner should also note U.R. 202.15<sup>135</sup> on the vide-

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1, col. 2; IAS STUDY REPORT by Office of Court Administration, cited in, IAS "Effective" in *First Year But Needs Some Improvement*, N.Y.L.J., Feb. 20, 1987, at 1, col. 3; IAS STUDY REPORT by Office of Court Administration, reprinted in, N.Y.L.J., Feb. 24, 1987, at 5, col. 1.

129. See *id.*; see also N.Y. COUNTY LAWYER, Sept. 1986, at 3. Justice Xavier C. Riccobono, Administrative Judge for the Civil Branch of New York County points out that under the IAS 6,218 matters were disposed of during the first five terms of 1986, compared to 2,048 for the same period in 1985. Furthermore, Justice Riccobono notes that under the IAS 37.9% more settlements have been achieved than under the Master Calendar system and 84.7% more jury trials were commenced. See *id.*

130. See Siegel, *The Uniform Rules Take Effect*, 312-15 N.Y. ST. L. DIG., Dec. 1985-Mar. 1986, at 1.

131. See generally, Siegel, *The Uniform Rules Take Effect (January 6, 1986)*, Part I: *The Individual Assignment System*, 312 N.Y. ST. L. DIG., Dec. 1985, at 1.

132. See MCKINNEY'S 1987 N.Y. RULES OF THE COURT § 202.12 (22 NYCRR 202.12).

133. See *id.* § 202.12(g), which states in pertinent part:

In the discretion of the court, failure of a party to comply with the order or transcript resulting from the preliminary conference, or the making of unnecessary or frivolous motions by a party, shall result in the imposition upon such party of costs or such other sanctions as are authorized by law.

See also *McLaughlin v. Henke*, 130 Misc. 2d 109, 499 N.Y.S.2d 332 (Sup. Ct., Queens Co. 1986) (first case involving sanctions under the new rules).

134. See MCKINNEY'S 1987 N.Y. RULES OF THE COURT § 202.26 (22 NYCRR 202.26).

135. *Id.* § 202.15 (22 NYCRR 202.15).

otaping of depositions, U.R. 202.16<sup>136</sup> governing financial disclosure in matrimonial actions, and U.R. 202.17<sup>137</sup> relating to the exchange of medical reports in tort actions. Also, calendar and preference rules are, for the most part, left to each individual judge's discretion.<sup>138</sup>

Finally, it is essential for the practitioner to become familiar with the individual rules of each judge. Rules relating to when a judge will hear motions or allow oral argument have been issued in "information sheets" which are readily accessible to members of the bar. Thus, as in federal practice, it is a good idea to contact a judge's law secretary to determine what particular procedures, if any, other than those of the CPLR and Uniform Rules are to be followed.

### III. JURISDICTION

#### A. *Constitutional Limitations on In Personam Jurisdiction*

Last year's *Survey* Civil Practice segment did not discuss the constitutional standards upon which the bases of New York courts' assertions of jurisdiction are based.<sup>139</sup> The most recent United States Supreme Court decision analyzing these standards is *Burger King Corp. v. Rudzewicz*.<sup>140</sup> In *Burger King*,<sup>141</sup> the plaintiff, a Florida corporation, sued the defendant, a Michigan resident, for breach of a franchise agreement.<sup>142</sup> The agreement provided that the defendant and his business partner would operate a Burger King restaurant in Michigan for twenty years.<sup>143</sup> The contract,

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136. *Id.* § 202.16 (22 NYCRR 202.16).

137. *Id.* § 202.17 (22 NYCRR 202.17).

138. *Id.* § 202.22 (22 NYCRR 202.22).

139. The constitutional limits on jurisdiction were discussed by Professor Herzog in the *Survey's* Conflict of Laws section. See Herzog, *Conflict of Laws*, 1985 *Survey of N.Y. Law*, 36 SYRACUSE L. REV. 362, 363, 372 (1986).

140. 471 U.S. 462 (1985); see also Herzog, *supra* note 139, at 363. For a complete discussion of the relevant constitutional considerations necessary for the assertion of jurisdiction in New York, see CPLR MANUAL, *supra* note 29, at § 3.03 (1986); see also *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385, *rev'd*, 107 S. Ct. 1026 (1987) (a state court may not exercise jurisdiction over a case which both parties are foreign and the only contact of the defendant with the state is through the indirect stream of commerce; this recent decision will be discussed in the next edition of the *Survey*).

141. See *Burger King*, 471 U.S. at 462.

142. See *id.*

143. See *id.* at 467.

which was negotiated in Michigan, stipulated that the franchise relationship originated in Miami and would be governed by Florida law.<sup>144</sup> The agreement also required that all monthly payments and fees be forwarded to Florida and that the Miami headquarters would set all policies.<sup>145</sup> Moreover, the defendant's business partner attended training classes in Florida,<sup>146</sup> and the defendant purchased equipment from Florida.<sup>147</sup>

When the defendant fell behind in his payments and negotiations to rectify the situation failed, the plaintiff brought suit in Florida alleging jurisdiction pursuant to the Florida long-arm statute which conferred jurisdiction over any person who breaches a contract in the state by failing to perform acts that the contract requires to be performed.<sup>148</sup> The Supreme Court held that the exercise of jurisdiction did not offend due process because the defendant, a sophisticated businessman, had knowingly and intentionally reached out beyond Michigan and established a long-term relationship with a Florida plaintiff.<sup>149</sup> Thus, the Court held that the defendant had established sufficient minimum contacts with the former state to satisfy the purposeful availment requirement.<sup>150</sup>

The Court also held that minimum contacts, which must comply with "fair play and substantial justice," may in appropriate cases be considered in light of other factors which may serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.<sup>151</sup> The Court defined these factors in terms of "the burden on the defendant," "the former State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several states in furthering fundamental substantive social policies."<sup>152</sup> Thus, if a defendant has purposefully availed himself of the benefits and burdens of a forum, he may still defeat jurisdiction, but the burden

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144. *See id.* at 465-66.

145. *See id.* at 466.

146. *See id.*

147. *See id.* at 468.

148. *See id.* at 479-80.

149. *See id.* at 480-81.

150. *See id.* at 481-84.

151. *See id.* at 484.

152. *See id.* at 462.

shifts to him to present a compelling argument that some or all of these factors would render jurisdiction unreasonable.<sup>153</sup> Similarly, if the defendant's contacts with the forum are not sufficient to satisfy the purposeful availment requirements, the plaintiff may show that some or all of these factors warrant a constitutional assertion of the forum's jurisdiction.<sup>154</sup>

The effect of *Burger King*<sup>155</sup> on CPLR 302(a)(1)<sup>156</sup> remains unclear. Although the case manifests an expansive approach for contract-based transactions, it seems to be limited to franchise agreements.<sup>157</sup> Furthermore, the *Burger King* Court rejected the notion that a forum could assert jurisdiction solely on the basis of a single contact<sup>158</sup> which is a situation that an actual reading of CPLR 302(a)(1)<sup>159</sup> seems to embrace. Nonetheless, the *Burger King* rationale may be applicable to any national franchise entity. The decision also affirms recent decisional law under CPLR 302(a)(1)<sup>160</sup> which permits assertion of jurisdiction even if a defendant does not physically enter New York.<sup>161</sup> Mail and wire communications are enough if the defendant has an ongoing relationship with the plaintiff.

It is clear that plaintiffs seeking to rely on *Burger King*<sup>162</sup> in New York must satisfy the state's long-arm statute and the state and federal constitutions.<sup>163</sup> The relevant statute in New York is CPLR 302(a)(1),<sup>164</sup> which applies if the defendant "transacts any

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153. See *id.* at 481-84.

154. See *id.*

155. See *id.*

156. See N.Y. CPLR 302(a)(1) (McKinney Supp. 1987). CPLR 302(a)(1) states in pertinent part that "a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." See *id.*

157. See Siegel, *U.S. Supreme Court, In Case With Mixed Signals For New Yorkers, Upholds Florida Long-arm Jurisdiction Against Michigan Burger King Franchisee*, 308 N.Y. St. L. Dig., Aug. 1985, at 1.

158. See *Burger King*, 471 U.S. at 478. "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." See *id.*

159. See N.Y. CPLR 302(a)(1).

160. *Id.*

161. See CPLR MANUAL, *supra* note 29, at § 306(b) (1986).

162. See *Burger King*, 471 U.S. 462.

163. See *id.*

164. See N.Y. CPLR 302(a)(1).

business within the state or contracts anywhere to supply goods or services in the state.”<sup>165</sup> Whether contracting to make payments in New York will by itself fit into CPLR 302(a)(1)<sup>166</sup> is questionable. In addition, while *Burger King* held that federal due process was satisfied,<sup>167</sup> New York’s constitution also has a due process clause which, as the Court of Appeals has made clear, may require more than its federal counterpart.<sup>168</sup>

### B. Bases for Exercise of Jurisdiction

#### 1. Attachment as the Basis for Jurisdiction

The practitioner should realize that even if a defendant’s contacts with New York are of such a limited scope that he would not be subject to the requirements of CPLR 302(a)(1)<sup>169</sup> or of 302 in general, it may still be possible to obtain *quasi in rem* or “attachment” jurisdiction over him if his assets are located within the state.<sup>170</sup> In *Banco Ambrosiano S.P.A. v. Artoc Bank & Trust, Ltd.*,<sup>171</sup> the plaintiff, an Italian banking corporation, sought to recover \$15,000,000 allegedly loaned to the defendant, a Bahamas banking corporation.<sup>172</sup> In order to obtain jurisdiction, the plaintiff attached \$8,000,000 in the defendant’s account with its correspondent New York bank.<sup>173</sup>

In *Banco Ambrosiano*, negotiations concerning the loan agreement were made outside of New York, and neither the plaintiff nor the defendant was authorized to do business in New York.<sup>174</sup> The defendant’s sole contact with New York was the funds deposited by the plaintiff in a New York bank account maintained by the defendant and were to be repaid to another New York bank account.<sup>175</sup> The plaintiff conceded the lack of *in personam* jurisdic-

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165. *Id.*

166. *See id.*

167. *See Burger King*, 471 U.S. at 462.

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

169. *See* N.Y. CPLR 302(a)(1).

170. *See* N.Y. CPLR 314(3) (McKinney Supp. 1987).

171. 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

172. *See id.*

173. *See id.* at 68, 464 N.E.2d at 433, 476 N.Y.S.2d at 65.

174. *See id.* at 69, 464 N.E.2d at 434, 476 N.Y.S.2d at 66.

175. *See id.*

tion.<sup>176</sup> The Court of Appeals upheld the exercise of *quasi in rem* jurisdiction based on attachment of the defendant's New York bank account, noting that CPLR 302<sup>177</sup> did not provide for *in personam* jurisdiction in every case in which due process would permit it. "Thus, a 'gap' exists in which the necessary minimum contacts, including the presence of defendant's property within the state, are present, but personal jurisdiction is not authorized by CPLR 302. It is appropriate, in such a case, to fill that gap utilizing *quasi in rem* principles."<sup>178</sup>

## 2. Long-Arm Jurisdiction

Two jurisdictional decisions during the *Survey* year are also worthy of comment. In *Morse Typewriter Co. v. Samandar Office Communications*,<sup>179</sup> a subsidiary of the defendant was doing substantial business in New York and the question was whether the parent corporation was subject to the jurisdiction of a New York federal district court.<sup>180</sup> The plaintiff argued that the parent was a "corporate shell" or, in the alternative, that the subsidiary was a "mere department" of the parent.<sup>181</sup> Judge Weinfeld held that a defendant, which conducted most of its business through its various subsidiaries, could not be characterized as a corporate shell unless it did no business of its own, independent of its subsidiaries.<sup>182</sup> Judge Weinfeld also explained that under CPLR 301 there are four factors to use in an analysis of whether personal jurisdiction exists over a parent corporation by virtue of the activities of its subsidiary in New York.<sup>183</sup> The four factors are: common ownership, financial dependency of the subsidiary on the parent corporation, the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and the degree of the parent's control

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176. *See id.* at 70, 464 N.E.2d at 434, 476 N.Y.S.2d at 66.

177. *See* N.Y. CPLR 302.

178. *See Banco Ambrosiano*, 62 N.Y.2d at 71-72, 464 N.E.2d at 435, 476 N.Y.S.2d at 67 (citing SIEGEL, N.Y. PRACTICE, § 104, at 124 (1978)); Note, *Minimum Contacts and Jurisdictional Theory in New York: The Effect of Shaffer v. Heitner*, 42 ALB. L. REV. 294, 306 (1978).

179. 629 F. Supp. 1150 (S.D.N.Y. 1986).

180. *See id.* at 1151.

181. *See id.* at 1152.

182. *See id.*

183. *See id.* at 1153.



over the subsidiary's marketing and operational policies.<sup>184</sup> After weighing all of the factors, Judge Weinfeld concluded that the plaintiff had failed to allege facts sufficient to establish a prima facie case of *in personam* jurisdiction over the defendant under the "doing business" doctrine.<sup>185</sup> The court held that for a subsidiary to be a "mere department" of a parent requires that the parent control "virtually every aspect [of the subsidiary's] marketing efforts."<sup>186</sup>

The plaintiff in *Morse*<sup>187</sup> also alleged long-arm jurisdiction over one of the defendants under CPLR 301(a)(1) and (a)(3).<sup>188</sup> Judge Weinfeld pointed out that none of the defendants' numerous contacts with the plaintiff constituted a transaction of business within the state or a contract to supply goods in New York.<sup>189</sup> Judge Weinfeld also considered whether the ties between the defendant and another party established an agency relationship for purposes of CPLR 301(a)(1).<sup>190</sup> Relying on *George Reiner & Co. v. Schwartz*,<sup>191</sup> he held that in order to make out a prima facie case of an agency relationship it must be shown that a defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."<sup>192</sup>

With respect to personal jurisdiction under either 302(a)(3)(i) or (ii),<sup>193</sup> Judge Weinfeld stressed that a tortious act without the state, injuring the person or property within the state, does not occur merely because the injured party is domiciled in New York and sustains a financial loss.<sup>194</sup> New York is not the situs of the

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184. See *id.* (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 122 (2d Cir. 1984)).

185. See *id.*

186. See *id.* at 1154 (citing *Volkswagenwerk*, 751 F.2d at 122).

187. See *id.* at 1150.

188. See N.Y. CPLR 302(a)(1), (3) (McKinney Supp. 1987).

189. See *Morse*, 629 F. Supp. at 1152.

190. See *id.* at 1156.

191. 41 N.Y.2d 648, 651, 363 N.E.2d 551, 553, 394 N.Y.S.2d 844, 846 (1977).

192. See *Morse*, 629 F. Supp. at 1156 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); see also *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 121 A.D.2d 870, 503 N.Y.S.2d 792 (1st Dep't 1986) (long-arm statute, CPLR 302, does not preclude the assertion of personal jurisdiction over an agent who commits a tort while acting in the state on behalf of a corporation).

193. See N.Y. CPLR 302(a)(3).

194. See *Morse*, 629 F. Supp. at 1156-57.

injury, at least in cases involving commercial torts, unless there is an allegation that the tortious misrepresentation was made in New York or was received and relied upon in New York, or that as a result the plaintiff lost business in New York.<sup>195</sup>

In *Rates Technology, Inc. v. Diosio*,<sup>196</sup> Judge McLaughlin pointed out that the issue of personal jurisdiction must be determined separately for each cause of action asserted in the plaintiff's complaint.<sup>197</sup> He also observed that Second Circuit federal district courts have considerable leeway in deciding a pretrial motion to dismiss for lack of personal jurisdiction.<sup>198</sup> A court may determine the motion on the basis of affidavits alone, or it may permit discovery in aid of the motion, or it may conduct an evidentiary hearing on the motion.<sup>199</sup> If the court does not conduct a full blown hearing, the plaintiff need make only a prima facie showing of jurisdiction; however, he must ultimately establish jurisdiction by a preponderance of the evidence at a pretrial hearing or at trial.<sup>200</sup>

In *Rates*,<sup>201</sup> certain of the plaintiff's officers met with the defendants in New York for three to four hours.<sup>202</sup> Following further negotiations, which occurred by telephone or at meetings outside of New York, the parties entered into a contract which one of the defendants signed in Washington, D.C.<sup>203</sup> In assessing whether the meeting in New York was sufficient for the assertion of long-arm jurisdiction under CPLR 302(a)(1),<sup>204</sup> Judge McLaughlin stressed that the "relevant inquiry is whether the defendant has performed 'purposeful acts' in New York 'in relation to the contract, albeit

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195. See *id.* at 1157; see also *Cooperstein v. Pan Oceanic Marine, Inc.*, N.Y.L.J., Nov. 14, 1986, at 15, col. 3 (2d Dep't 1986) (a Virginia savings and loan association cannot be sued in a New York court on fraud and misrepresentation charges because the bank performed no purposeful acts in New York to justify long-arm jurisdiction).

196. 626 F. Supp. 1295 (E.D.N.Y. 1986).

197. See *id.* at 1297.

198. See *id.*

199. See *id.*; see also *National Union Fire Ins. Co. v. Ideal Mut. Ins. Co.*, 122 A.D.2d 630, 505 N.Y.S.2d 416 (1st Dep't 1986) (if additional jurisdictionally related facts are required to establish jurisdiction, plaintiff can request discovery pursuant to CPLR 3211(d) and the court must grant limited discovery if plaintiff can establish that jurisdictional facts "may exist").

200. See *Rates*, 626 F. Supp. at 1297.

201. See *id.* at 1295.

202. See *id.* at 1296.

203. See *id.*

204. See N.Y. CPLR 302(a)(1).

preliminarily or subsequent to its execution.' ”<sup>205</sup> Because the New York meeting “concluded the substance of the agreement that [formed] the hard core of [the] litigation,”<sup>206</sup> the court held that the meeting, which substantially advanced and was essential to the formation of a contract, constituted a transaction of business in New York.<sup>207</sup>

With respect to the plaintiff’s allegations of jurisdiction under CPLR 302(a)(3),<sup>208</sup> Judge McLaughlin recognized the problems in applying the “injury within the state” requirement to commercial cases and concluded that an allegation of “loss of customers” by the plaintiff satisfied the requirement.<sup>209</sup> He also directed the parties to brief the issue of the “fiduciary shield doctrine” for further consideration by the court.<sup>210</sup> This doctrine requires that the plaintiff establish that the agent act only in his corporate capacity rather than in his own interest.<sup>211</sup>

### C. Forum Selection Clauses

CPLR 327(b)<sup>212</sup> was amended in 1984 to permit parties to large commercial contracts to stipulate to: (1) the application of New York substantive law to the parties’ rights and duties, (2) the parties’ submission to the jurisdiction of the New York courts, and (3) the entertainment of a matter by the New York courts whether or not the *forum non conveniens* doctrine might otherwise dismiss

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205. See *Rates*, 626 F. Supp. at 1297-98 (quoting *American Contract Designers, Inc. v. Cliffside, Inc.*, 458 F. Supp. 735, 739 (S.D.N.Y. 1978)).

206. See *id.* at 1297 (quoting *Trafalgar Capital Corp. v. Oil Producers Equip. Corp.*, 555 F. Supp. 305, 309 (S.D.N.Y. 1983)).

207. See *id.* at 1298. For discussion of recent federal cases reaching conflicting results regarding liability to long-arm jurisdiction in breach of contract actions based upon meetings held in New York, see *Berk v. Nemetz*, 646 F. Supp. 1080 (S.D.N.Y. 1986); *Penthouse Films Int’l, Ltd. v. Russell Films, Ltd.*, No. 86 Civ. 503 (S.D.N.Y. 1986); *Berger v. Gorleck*, No. 85 Civ. 8609 (S.D.N.Y. 1986); *Gates v. Pinnacle Communications, Inc.*, 623 F. Supp. 38 (S.D.N.Y. 1985).

208. See N.Y. CPLR 302(a)(3).

209. See *Rates*, 626 F. Supp. at 1298.

210. See *id.*

211. See *Kreutter v. McFadden Oil Corp.*, 122 A.D.2d 614, 504 N.Y.S.2d 915 (4th Dep’t 1986) (Texas owner of Texas oil well development corporation, who acted in capacity as corporate officer, rather than in his own interest, was protected by fiduciary shield doctrine and, therefore, was not subject to personal jurisdiction of New York court under long-arm statute).

212. See N.Y. CPLR 327 (McKinney Supp. 1987).

the action.<sup>213</sup> Several recent cases illustrate the usefulness of forum selection clauses. In *Credit Francais International, S.A. v. Sociedad Financiera DeComercio, C.A.*,<sup>214</sup> the court asserted jurisdiction over non-resident parties whose only contact with New York was a contractual agreement designating New York as a forum. Similarly, in *Rokeby-Johnson v. Kentucky Agricultural Energy Corp.*,<sup>215</sup> the Appellate Division, First Department, recognized that forum selection clauses must be a substantial factor in the determination of a proper forum. The Appellate Division, Second Department, confirmed during the *Survey* year that while "the availability of another suitable forum is not a prerequisite for applying the doctrine of *forum non conveniens*," it is the most important factor to be considered in determining whether to grant a defendant's CPLR 327<sup>216</sup> motion to dismiss.<sup>217</sup>

#### D. Statutory Requirements—Service of Summons

In view of the fact that decisional law during the *Survey* year demonstrates that New York courts continue to require strict compliance for service of summons,<sup>218</sup> it is useful to review CPLR 308.<sup>219</sup>

##### 1. Service on a Natural Person

Personal service must be distinguished from personal delivery

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213. See N.Y. CPLR 327(b); see also N.Y. GEN. OBLIG. LAW §§ 5-1401 & 5-1402 (McKinney Supp. 1987).

214. 128 Misc. 2d 564, 573, 490 N.Y.S.2d 670, 678 (Sup. Ct., N.Y. Co. 1985).

215. 108 A.D.2d 336, 340, 489 N.Y.S.2d 69, 73 (1st Dep't 1985).

216. See N.Y. CPLR 327.

217. See *Broukhim v. Hay*, 122 A.D.2d 9, 10, 504 N.Y.S.2d 467, 468 (2d Dep't 1986); see also Herzog, *Conflict of Laws, 1984 Survey of N.Y. Law*, 36 SYRACUSE L. REV. 119, 134 (1985); Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 385 (1986); Wise, *Federal Judge Rules India is Forum for Bhopal Claims*, N.Y.L.J., May 13, 1986, at 1, col. 3.

218. See, e.g., *Macchia v. Russo*, 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986); *De Zego v. Bruhn*, 67 N.Y.2d 875, 492 N.E.2d 1217, 501 N.Y.S.2d 801 (1986); *Rossetti v. DeLagarza*, 117 A.D.2d 793, 499 N.Y.S.2d 117 (2d Dep't 1986); *Ariowitsch v. Johnson*, 114 A.D.2d 184, 498 N.Y.S.2d 891 (3d Dep't 1986); *Costa v. Franklin Gen. Hosp.*, 121 A.D.2d 368, 502 N.Y.S.2d 795 (2d Dep't 1986); *Tilden Fin. Corp. v. Comm'n*, 118 A.D.2d 848, 500 N.Y.S.2d 335 (2d Dep't 1986); *Monroe v. Albert Antor & Son Jewelers*, 117 A.D.2d 657, 498 N.Y.S.2d 170 (2d Dep't 1986); *Vogel v. Meixner*, 119 A.D.2d 877, 500 N.Y.S.2d 570 (3d Dep't 1986); *Cornell v. Amell*, 132 Misc. 2d 144, 502 N.Y.S.2d 949 (Sup. Ct., Albany Co. 1986).

219. See N.Y. CPLR 308 (McKinney Supp. 1987).

of the summons to the defendant. The latter is one method of "personal service upon a natural person" authorized by CPLR 308.<sup>220</sup> Under 308(1),<sup>221</sup> delivery of a summons may be accomplished by delivering it to the defendant or sometimes "by leaving it in the general vicinity of a person to be served who resists service."<sup>222</sup> Thus, when a defendant acknowledged his identity to a process server, who pressed the buzzer of the defendant's apartment, service of process in the mail slot was sufficient.<sup>223</sup> Similarly, a process server, who was denied access to a defendant's residence and later unsuccessfully pursued the defendant by foot to make personal delivery of a summons, effected service under 308(1)<sup>224</sup> by affixing the summons under the defendant's windshield wiper.<sup>225</sup>

The Court of Appeals, however, held in *Macchia v. Russo*<sup>226</sup> that the delivery of a summons to the wrong person does not confer jurisdiction over a defendant, even though the summons shortly thereafter comes into the possession of the party to be served.<sup>227</sup> In *Macchia*, a summons was delivered to the defendant's son outside the family house, and the son entered the house and gave the summons to his father.<sup>228</sup> The Court held that this "redelivery" was not valid service under 308(1).<sup>229</sup> The Court, resting its decision on the requirements of CPLR 308(1),<sup>230</sup> observed that "[w]e see no reason to extend the clear and unambiguous meaning of CPLR 308(1)."<sup>231</sup>

The Court of Appeals' message is clear. Strict compliance with the service statute is required. The practitioner is obligated to debrief his process server and if there is any doubt as to whether proper service has been made, service must be repeated in its origi-

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220. *See id.*

221. *See* N.Y. CPLR 308(1) (McKinney Supp. 1987).

222. *See* *Spector v. Berman*, 119 A.D.2d 565, 500 N.Y.S.2d 735 (2d Dep't 1986).

223. *See id.*

224. *See* N.Y. CPLR 308(1).

225. *Union Nat'l Bank v. Pacamor Bearings, Inc.*, 132 Misc. 2d 269, 503 N.Y.S.2d 671 (Sup. Ct., Albany Co. 1986).

226. 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986).

227. *See id.*

228. *See id.*

229. *See id.*

230. *See id.* at 593, 496 N.E.2d at 681, 505 N.Y.S.2d at 592.

231. *Id.* (citing *Espy v. Giorlando*, 85 A.D.2d 652, 445 N.Y.S.2d 230 (2d Dep't 1981), *aff'd*, 56 N.Y.2d 640, 450 N.E.2d 193, 450 N.Y.S.2d (1982)).

nal form or by alternative methods under CPLR 308.<sup>232</sup> Similarly, the practitioner should not hesitate to use the sixty day toll of CPLR 203(b)(5)(i),<sup>233</sup> but service should be made well before the statute of limitations expires.

When there is a sworn denial of service under subdivision (1) of section 308 by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. Decisions during the *Survey* year by the Appellate Division, Second Department,<sup>234</sup> and by the Court of Appeals<sup>235</sup> impose a heavy burden on the moving party. This suggests that if there is any doubt that service has been completed under 308(1),<sup>236</sup> the plaintiff should also use alternative methods of service.<sup>237</sup> Also during the *Survey* year, several trial courts liberally interpreted 308(1)<sup>238</sup> with respect to service of supplemental pleadings<sup>239</sup> and service of an order to show cause in civil contempt proceedings.<sup>240</sup> One appellate division has held that personal delivery of an order to show cause is necessary for imposition of civil contempt sanctions.<sup>241</sup>

## 2. *Leave and Mail*

CPLR 308(2)<sup>242</sup> permits service by leaving the papers with “a

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232. See N.Y. CPLR 308; see also N.Y. CPLR 327(b); N.Y. GEN. OBLIG. LAW §§ 5-1401 & 5-1402.

233. See N.Y. CPLR 203(b)(5)(i) (McKinney Supp. 1987) (sixty day statute of limitations toll).

234. See *Laurence v. Hillcrest Gen. Hosp.—GHI Group Health, Inc.*, 119 A.D.2d 808, 501 N.Y.S.2d 436 (2d Dep’t 1986).

235. See *DeZego v. Bruhn*, 67 N.Y.2d 875, 492 N.E.2d 1217, 501 N.Y.S.2d 801 (1986).

236. See N.Y. CPLR 308(1).

237. The plaintiff’s affidavits of service must contain the requisite factual and descriptive information to show that plaintiff’s summons was delivered to the defendant personally. Moreover, even if the affidavits are entitled only to a general presumption of regularity that can be overcome by the defendant’s sworn testimony, the credibility of the defendant’s testimony that he was not personally served is determined “by the hearing court whose decision should not be disturbed if supportable by a fair interpretation of the evidence.” See *Laurence*, 119 A.D.2d at 808, 501 N.Y.S.2d at 436 (citing *Feeney v. Booth Memorial Medical Center*, 109 A.D.2d 865, 866, 487 N.Y.S.2d 60, 61 (2d Dep’t 1985)).

238. See N.Y. CPLR 308(1).

239. See *Cooky’s Island Steak Pub v. Yorkville Elec.*, 130 Misc. 2d 869, 497 N.Y.S.2d 1005 (Sup. Ct., N.Y. Co. 1986).

240. See *Department of Hous. Preservation & Dev. v. Arick*, 131 Misc. 2d 950, 503 N.Y.S.2d 489 (N.Y.C. Civ. Ct., N.Y. Co. 1986).

241. See *Lu v. Betancourt*, 116 A.D.2d 492, 496 N.Y.S.2d 754 (1st Dep’t 1986).

242. See N.Y. CPLR 308(2) (McKinney Supp. 1987).

person of suitable age and discretion at the actual place of abode" of the defendant and by mailing the summons to the defendant at his last known residence.<sup>243</sup> If one of the two steps is omitted, the service is invalid.<sup>244</sup> In *Roldan v. Thorpe*,<sup>245</sup> the Appellate Division, Second Department, held that a landlord who lived on the second floor of a house above the defendant's basement apartment qualified as a person of suitable age and discretion within the meaning of CPLR 308(2).<sup>246</sup> In addition, the Second Department concluded that because the defendant's apartment was not identifiable, service on the landlord on the first floor of his apartment constituted service at the "actual dwelling place" or "usual place of abode" of the defendant.<sup>247</sup>

### 3. Service on Defendant's Agent

CPLR 308(3)<sup>248</sup> permits service to be effected by delivery of the summons to an agent "designated under rule 318."<sup>249</sup> Although there are no significant 1986 decisions interpreting CPLR 308(3), one appellate division court has held that there are situations where an unauthorized appearance by an attorney on behalf of a resident of New York constitutes reason to vacate a judgment on jurisdictional grounds.<sup>250</sup> In *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*,<sup>251</sup> the Second Department extended the Court of Appeals' 1890 ruling in *Vilas v. Plattsburgh & Montreal R.R.*,<sup>252</sup> to residents of the state who do not authorize an attorney to act on their behalf.<sup>253</sup>

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243. See *Bossuk v. Steinberg*, 58 N.Y.2d 916, 447 N.E.2d 56, 460 N.Y.S.2d 509 (1983).

244. See *id.* It must also be noted that filing is necessary in order to effectuate service. See N.Y. CPLR 308(2).

245. 117 A.D.2d 790, 499 N.Y.S.2d 114 (2d Dep't 1986).

246. See *id.* at 792, 499 N.Y.S.2d at 117.

247. See *id.*; see also *Percia v. Zdanowicz*, 116 A.D.2d 558, 497 N.Y.S.2d 413 (2d Dep't 1986) (affirmation of defendant's counsel not sufficient to rebut plaintiff's affidavit of proper service); accord *Gill Cos. v. Gutierrez*, 116 A.D.2d 696, 498 N.Y.S.2d 15 (2d Dep't 1986) (hearing court's finding that plaintiff's process server was credible must be considered controlling on appeal).

248. See N.Y. CPLR 308(3) (McKinney Supp. 1987).

249. See *id.*

250. See *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dep't 1986).

251. *Id.*

252. 123 N.Y. 440, 25 N.E. 941 (1890) (the Court of Appeals declined jurisdiction in the case of an unauthorized appearance by an attorney on behalf of an out-of-state resident).

253. See *id.* at 488, 25 N.E. at 943; accord *General Elec. Credit Corp. v. Salamone*, 42

#### 4. *Nail and Mail*

If diligent efforts at making personal delivery or "leave and mail" service have failed, CPLR 308(4)<sup>254</sup> permits service to be made "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" of the defendant and by mailing the summons to his or her last known residence.<sup>255</sup> Professor Farrell has recently alerted the bar to the fact that the provisions of CPLR 308(4)<sup>256</sup> have been so rigidly construed by the courts so as to make the user of that statute almost always subject to a successful motion to dismiss on the ground that service was not properly made.<sup>257</sup> He points out that the due diligence mandated by the statute makes reliance upon service under CPLR 308(4)<sup>258</sup> unusually hazardous and suggests that to be on the safe side, one should supplement service under CPLR 308(4)<sup>259</sup> with an application for "expedient" service under CPLR 308(5).<sup>260</sup> It should be noted that nail and mail service requires proof of "due diligence" efforts to make service under CPLR 308(1)<sup>261</sup> and (2),<sup>262</sup> while service under CPLR 308(5)<sup>263</sup> can be made if service is impracticable under CPLR 308(1),<sup>264</sup> (2)<sup>265</sup> and (4).<sup>266</sup> Professor Farrell's admonitions are justified by several appellate division decisions during the *Survey* year,<sup>267</sup> and by the

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A.D.2d 506, 349 N.Y.S.2d 446 (3d Dep't 1973); *see also* N.Y. CPLR 320 (McKinney Supp. 1987).

254. *See* N.Y. CPLR 308(4) (McKinney Supp. 1987).

255. *See id.*

256. *See id.*

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

258. *See* N.Y. CPLR 308(4).

259. *See id.*

260. *See id.* § 308(5).

261. *See id.* § 308(1).

262. *See id.* § 308(2).

263. *See id.* § 308(5).

264. *See id.* § 308(1).

265. *See id.* § 308(2).

266. *See id.* § 308(4).

267. *See, e.g.,* Rossetti v. DeLagarza, 117 A.D.2d 793, 499 N.Y.S.2d 117 (2d Dep't 1986) (process server's opportunity to serve person of suitable age and discretion at defendant's place of business or residence and opportunity to mail copy to his last known residence precluded "nail and mail" service); Costa v. Franklin Gen. Hosp., 121 A.D.2d 368, 502 N.Y.S.2d 795 (2d Dep't 1986) ("nail and mail" service invalid when process was placed on the front door of a house in which the respondent had a separate and clearly marked office) Ariowitsch v. Johnson, 114 A.D.2d 184, 498 N.Y.S.2d 891 (3d Dep't 1986) ("nail and mail"



Court of Appeals for the Second Circuit's holding in *Sterling v. Environmental Control Board*.<sup>268</sup>

### 5. *Expedient Service*

Should personal delivery, "leave and mail" or "nail and mail" service all prove, or appear to be, "impracticable," CPLR 308(5)<sup>269</sup> permits service to be made "in such manner as the court, upon motion without notice, directs."<sup>270</sup> Although CPLR 308(5)<sup>271</sup> does not require proof of due diligence or of actual prior attempts to serve a party under each and every method provided in the statute,<sup>272</sup> the Appellate Division, Second Department, in *Saulo v. Noumi*,<sup>273</sup> rested its decision authorizing expedient service on the fact that the plaintiff had tried to personally deliver the summons to the defendant and thereafter made numerous inquiries as to his whereabouts.<sup>274</sup> Thus, the practitioner should expect the "impracticable" requirements of CPLR 308(5)<sup>275</sup> to be strictly construed.

### 6. *Related Service Tips*

Several decisions during the *Survey* year indicate that the practitioner should be careful to follow the prescribed method of service required by other provisions of the CPLR. For example, service of process on a defendant-partnership should be pursuant to CPLR 310,<sup>276</sup> which mandates personal service within the state upon any one of the partners.<sup>277</sup> Similarly, partnerships must remember to comply with General Business Law section 130 which

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service invalid if effectuated at the wrong apartment in the defendant's building).

268. 793 F.2d 52 (2d Cir. 1986) (court of appeals held that Chapter 623, formerly section 1404(d)(2) of the New York City Charter (nail and mail service statute), was unconstitutional as applied to absentee landlords because summons was not mailed to defendant's last known address). A petition for *certiorari* was filed by the city in the United States Supreme Court on October 6, 1986.

269. See N.Y. CPLR 308(5).

270. See *id.*

271. See *id.*

272. See *Markoff v. South Nassau Community Hosp.*, 91 A.D.2d 1064, 458 N.Y.S.2d 672 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 283, 461 N.E.2d 1253, 473 N.Y.S.2d 766 (1984).

273. 119 A.D.2d 657, 501 N.Y.S.2d 95 (2d Dep't 1986).

274. See *id.* at 657, 501 N.Y.S.2d at 96.

275. See N.Y. CPLR 308(5).

276. See N.Y. CPLR 310 (McKinney Supp. 1987).

277. See *Monroe v. Albert Antor & Son Jewelers*, 117 A.D.2d 657, 498 N.Y.S.2d 170 (2d Dep't 1986).

requires that any change of address must be disclosed within thirty days of the change.<sup>278</sup> Also, the service of a summons and complaint upon a real estate agent, who does not own the property, without serving the executors of an estate who are available for service, will invalidate a notice of pendency as to owners who purchase the property from the executors.<sup>279</sup> Similarly, improper service of process made under Vehicle and Traffic Law section 253<sup>280</sup> does not permit a party to rely on CPLR 317,<sup>281</sup> which is only applicable to actions properly commenced under CPLR 308(2)-(5)<sup>282</sup> and CPLR 313,<sup>283</sup> and to which the defendant did not actually receive notice.<sup>284</sup>

Finally, the practitioner should also be wary of making service by publication. This type of service is authorized in an action based on *in rem* jurisdiction, and even there it is available only when service cannot be made by another prescribed method. In *Caban v. Caban*,<sup>285</sup> the Appellate Division, Third Department, invalidated a divorce decree obtained with service by publication when one spouse had the other's army post office address and made no effort to effect service through that address.<sup>286</sup>

#### IV. STATUTE OF LIMITATIONS

##### A. *Borrowing Statute*

CPLR 202,<sup>287</sup> the borrowing statute, applies to actions brought by non-residents based on causes of action which occurred outside New York.<sup>288</sup> These actions are subject to the limitations period of New York and of the state in which they accrued and, thus, are barred if either period has expired.<sup>289</sup> Two federal district court

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278. See *Parks v. Steinbrenner*, 115 A.D.2d 395, 496 N.Y.S.2d 25 (1st Dep't 1985).

279. See *Vogel v. Meixner*, 119 A.D.2d 877, 500 N.Y.S.2d 570 (3d Dep't 1986).

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

281. See N.Y. CPLR 317 (McKinney 1986).

282. See N.Y. CPLR 308(2)-(5) (McKinney 1986).

283. See N.Y. CPLR 313 (McKinney 1986).

284. See *Cornell v. Amell*, 132 Misc. 2d 144, 502 N.Y.S.2d 949 (Sup. Ct., Albany Co. 1986) (defendant, improperly served under New York Vehicle and Traffic Law section 253, did not have to show he had a meritorious defense in order to vacate judgment).

285. 116 A.D.2d 783, 497 N.Y.S.2d 175 (3d Dep't 1986).

286. See *id.* at 784, 497 N.Y.S.2d at 176.

287. See N.Y. CPLR 202 (McKinney Supp. 1987).

288. See CPLR MANUAL, *supra* note 29, at § 207.

289. See *id.*

decisions during the *Survey* year have interpreted the statutory meaning of accrual under CPLR 202.<sup>290</sup>

In *Bank of Boston International v. Arguello Tefel*,<sup>291</sup> Judge Glasser correctly pointed out that the New York Court of Appeals has furnished little guidance in determining where a cause of action accrues for the purpose of the borrowing statute.<sup>292</sup> Judge Glasser noted that the traditional doctrine holds that the place of injury determines where a cause of action arises.<sup>293</sup> If this doctrine were applicable, the plaintiff's action would have been time-barred; however, the court held that Massachusetts was where the cause of action accrued because the relevant breaches in the contract action occurred when payments were not made in Massachusetts.<sup>294</sup> A similar result was reached by Judge Weinfeld in *Appel v. Kidder, Peabody & Co.*<sup>295</sup> In *Appel*, trust beneficiaries of a Connecticut corporation brought an action against a broker and its employee under the Securities and Exchange Act of 1934.<sup>296</sup> The court looked to the laws of the forum state, New York, including its borrowing statute, because the 1934 Act does not provide a federal statute of limitations on claims brought under section 10(b) of the Act.<sup>297</sup> The defendant maintained that the applicable statute of limitations was the two year Connecticut blue-sky limitation.<sup>298</sup> The plaintiff argued that the applicable statute was the six year limitation period for fraud claims in New York.<sup>299</sup> Judge Weinfeld framed the question as:

[W]hether the New York borrowing statute should be applied, and this determination depends upon where the cause of action accrued. For the purposes of the New York borrowing statute, the cause of action accrued where the loss was sustained. Where, as here, the harm claimed is economic, the loss is sustained when the economic impact of the defendant's conduct is felt, usually

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290. See N.Y. CPLR 202.

291. 626 F. Supp. 314 (E.D.N.Y. 1986).

292. See *id.* at 316-17; see also *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 801 (E.D.N.Y. 1984).

293. See *Bank of Boston Int'l*, 626 F. Supp. at 317.

294. See *id.*

295. 628 F. Supp. 153 (S.D.N.Y. 1986).

296. See *id.* at 155.

297. See *id.*

298. See *id.*

299. See *id.*

but not invariably at the plaintiff's place of residence.<sup>300</sup>

Although the loss was sustained in New York where the corpus of the trust was located, Judge Weinfeld held that the economic loss, if any, resulting from the defendant's alleged conduct was felt in Connecticut.<sup>301</sup> Thus, under CPLR 202,<sup>302</sup> the Connecticut limitation period would govern.<sup>303</sup>

Another important decision during the *Survey* year which relates to CPLR 202<sup>304</sup> is *Rossi v. Ed Peterson Cutting Equipment Corp.*<sup>305</sup> The plaintiff, a New York resident, brought a products liability action for injuries sustained from a paper cutting machine in Stamford, Connecticut.<sup>306</sup> The defendant asserted an affirmative defense that the claims were barred by the applicable Connecticut statute of limitations.<sup>307</sup> In support of its motion, the defendant argued "that because the plaintiff traveled every day to Connecticut to work, was employed by a Connecticut company, was injured and was treated in Connecticut, Connecticut ha[d] the most significant contacts with the case, and therefore the substantive law of that state sh[ould] govern."<sup>308</sup> The court rejected the defendant's argument and held that CPLR 202<sup>309</sup> was controlling.<sup>310</sup> CPLR 202<sup>311</sup> directs that when a cause of action accrues outside New York in favor of a New York resident, the three year statute of limitations under CPLR 214(5)<sup>312</sup> is applicable.<sup>313</sup>

### B. *Equitable Estoppel*

Despite the prohibition against judicial extension of statutes of limitations,<sup>314</sup> courts have the power to prevent a defendant from asserting a time-bar if it would be inequitable to do so. In

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300. *Id.* at 155-56.

301. *See id.* at 156.

302. *See* N.Y. CPLR 202.

303. *See Appel*, 628 F. Supp. at 156.

304. *See* N.Y. CPLR 202.

305. 131 Misc. 2d 31, 498 N.Y.S.2d 283 (Sup. Ct., N.Y. Co. 1986).

306. *See id.* at 33, 498 N.Y.S.2d at 285.

307. *See id.* at 34, 498 N.Y.S.2d at 286.

308. *Id.* at 33, 498 N.Y.S.2d at 285.

309. *See* N.Y. CPLR 202.

310. *See Rossi*, 131 Misc. 2d at 33, 498 N.Y.S.2d at 285.

311. *See* N.Y. CPLR 202.

312. *See* N.Y. CPLR 214(5) (McKinney Supp. 1987).

313. *See Rossi*, 131 Misc. 2d at 33, 498 N.Y.S.2d at 285.

314. *See* N.Y. CPLR 201 (McKinney Supp. 1987).

this respect, several *Survey* year decisions, none of which apply the doctrine, should be mentioned.

First, equitable estoppel will be applied against governmental agencies only in exceptional cases.<sup>315</sup> Second, the doctrine is inapplicable if the plaintiff fails to specifically allege that he deferred commencing an action until after expiration of the statutory period because of reliance on fraudulent misrepresentations of the defendant.<sup>316</sup> Third, the plaintiff must exercise due diligence when he seeks the shelter of the doctrine.<sup>317</sup>

### C. Relation of Claim in Amended Pleadings

CPLR 203(e)<sup>318</sup> provides that added claims in amendments permitted by leave of the court are timely unless the original claim did not give notice of the transactions or occurrences "to be proved pursuant to the amended pleading. The test is whether a party will be prejudiced."<sup>319</sup> In this respect, during the *Survey* year the appellate divisions liberally construed CPLR 203(e)<sup>320</sup> to permit amendment of pleadings.<sup>321</sup> Nonetheless, it is clear that mere notice of transactions or occurrences to be proved, independent of the original pleadings, is inadequate.<sup>322</sup>

Mention should also be made of the Court of Appeals decision in *Duffy v. Horton Memorial Hospital*.<sup>323</sup> The Court held that a

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315. See *DiGeloromo v. Metropolitan Suburban Bus Auth.*, 116 A.D.2d 691, 691, 498 N.Y.S.2d 8, 9 (2d Dep't 1986).

316. See *Valenti v. Trunfio*, 118 A.D.2d 480, 483, 499 N.Y.S.2d 955, 957 (1st Dep't 1986); *McIvor v. DiBenedetto*, 121 A.D.2d 519, 520, 503 N.Y.S.2d 836, 837 (2d Dep't 1986); *Rains v. Metropolitan Transp. Auth.*, 120 A.D.2d 509, 509, 501 N.Y.S.2d 709, 710 (2d Dep't 1986).

317. *Schroeder v. Brooklyn Hosp.*, 119 A.D.2d 564, 500 N.Y.S.2d 733, 734 (2d Dep't 1986); *Roe v. Bonura*, 132 Misc. 2d 390, 394, 503 N.Y.S.2d 977, 979 (Sup. Ct., Suffolk Co. 1986).

318. See N.Y. CPLR 203(e) (McKinney 1972).

319. See SIEGEL, *NEW YORK PRACTICE*, *supra* note 110, § 237.

320. See N.Y. CPLR 203(e).

321. See *Bobrick v. Bravstein*, 116 A.D.2d 682, 497 N.Y.S.2d 749 (2d Dep't 1986); *Grosse v. Friedman*, 118 A.D.2d 539, 498 N.Y.S.2d 863 (2d Dep't 1986); *Muntner v. Lane*, 116 A.D.2d 702, 498 N.Y.S.2d 21 (2d Dep't 1986); *Schuler v. Grand Metro Bldg. Corp.*, 118 A.D.2d 633, 499 N.Y.S.2d 786 (2d Dep't 1986); *March v. St. Volodymyr Ukrainian Catholic Church*, 117 A.D.2d 864, 498 N.Y.S.2d 578 (2d Dep't 1986) (plaintiff entitled to amend complaint to add lost earnings in addition to lost wages).

322. *Glatzer v. Scappatura*, 116 A.D.2d 697, 498 N.Y.S.2d 15 (2d Dep't 1986); *Shapiro v. Schoninger*, 122 A.D.2d 38, 504 N.Y.S.2d 199 (2d Dep't 1986).

323. 66 N.Y.2d 473, 488 N.E.2d 820, 497 N.Y.S.2d 890 (1985).

plaintiff's amendment to assert a direct claim against an impleaded party can be deemed interposed as of the time the party was first impleaded by the defendant.<sup>324</sup> Whether or not to allow the amendment depends on whether the third party defendant can show any operative prejudice.<sup>325</sup>

*D. Discovery of Foreign Objects and Continuous Treatment Doctrine*

Medical and dental actions are governed by CPLR 214-a.<sup>326</sup> This provision, amended on July 21, 1986, also applies to actions for podiatric malpractice.<sup>327</sup> Actions covered by CPLR 214-a<sup>328</sup> must be brought within two years and six months of the act or omission at issue.<sup>329</sup> Exceptions are provided for cases involving the discovery of foreign objects and for actions commenced after a period of continuous treatment.<sup>330</sup>

The applicability of the continuous treatment doctrine requires that there be more than merely a continuing relationship between the physician and the patient.<sup>331</sup> The underlying rationale is the existence of a "continuing trust and confidence" which warrants the tolling of the limitations period.<sup>332</sup> In this respect, courts during the *Survey* year restrictively read CPLR 214-a.<sup>333</sup> Thus, continuous treatment contemplates "scheduled appointments" for "future visits" and not merely a written request by a physician to see his patient seven months after surgery was performed.<sup>334</sup> In addition, absent a clear agency relationship, the doctrine cannot be

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324. See *id.* at 478, 488 N.E.2d at 823, 497 N.Y.S.2d at 893.

325. See *id.*

326. See N.Y. CPLR 214-a (McKinney Supp. 1987).

327. See Act of July 21, 1986, ch. 485, 209 MCKINNEY'S SESS. LAWS OF N.Y. 1072 (to be codified at N.Y. CPLR 214 (McKinney Supp. 1987)).

328. See N.Y. CPLR 214-a.

329. See *id.*

330. See CPLR MANUAL, *supra* note 29, § 2.18(e)(3).

331. See *infra* notes 332-36 and accompanying text.

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

333. See N.Y. CPLR 214-a.

334. See *DePeralta v. Presbyterian Hosp.*, 121 A.D.2d 346, 503 N.Y.S.2d 788 (1st Dep't 1986). But see *Ward v. Kaufman*, 120 A.D.2d 929, 502 N.Y.S.2d 883 (4th Dep't 1986) (doctor's telephone call to plaintiff approximately two weeks after he applied a left tibial cast brace to her leg qualified as continuous treatment).

imputed from one doctor to another.<sup>335</sup> Finally, treatment is not considered continuous when the interval between treatments exceeds the two and one half year limitation period.<sup>336</sup>

If a foreign object has been left in the patient's body, the statute of limitations will not begin to run until the patient could have reasonably discovered the malpractice.<sup>337</sup> If the exception applies, the action must be commenced within one year of the actual or imputed discovery.<sup>338</sup> The major case decided during the *Survey* year was *Goldsmith v. Howmedica, Inc.*,<sup>339</sup> where the Court of Appeals held that the statute of limitations in a medical malpractice action based on a malfunctioning prosthetic device begins to run when the device is installed and not from the time a patient is injured.<sup>340</sup> The Court rejected the plaintiff's argument that an implanted device was a foreign object exception.<sup>341</sup> The court rested its decision on a narrow reading of CPLR 214-a<sup>342</sup> which specifically excludes prosthetic devices from the exception.<sup>343</sup> Apparently intrauterine devices still qualify, at least in some courts, for the foreign object exception rule.<sup>344</sup>

#### *E. Proceedings Against Body or Officers*

No prior edition of the *Survey* has reminded the practitioner of the obvious—there is a four month statute of limitations for a proceeding against a body or officer after the determination to be reviewed becomes final or binding upon the petitioner.<sup>345</sup> Several

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335. See *Modzelewski v. Kingsbrook Jewish Medical Center*, 120 A.D.2d 498, 501 N.Y.S.2d 699 (2d Dep't 1986); see also *Otero v. Presbyterian Hosp.*, 116 A.D.2d 511, 497 N.Y.S.2d 381 (1st Dep't 1986); *Meath v. Mishrick*, 120 A.D.2d 327, 501 N.Y.S.2d 350 (1st Dep't 1986).

336. See *Sherry v. Queens Kidney Center*, 117 A.D.2d 663, 664, 498 N.Y.S.2d 401, 402 (2d Dep't 1986).

337. See *supra* note 39.

338. See *infra* note 344 and accompanying text.

339. 67 N.Y.2d 120, 491 N.E.2d 1097, 500 N.Y.S.2d 640 (1986).

340. See *id.* at 123, 491 N.E.2d at 1098, 500 N.Y.S.2d at 641. The plaintiff received a total hip replacement during an operation in 1973. The femoral component of the implant broke in 1981. Two years later, the plaintiff sued the doctor and the manufacturer. See *id.*

341. See *id.*

342. See *id.*

343. See *id.*

344. See, e.g., *Mayotte v. Bauer*, 130 Misc. 2d 946, 497 N.Y.S.2d 1003 (Sup. Ct., Onondaga Co. 1986); *Taddeucci v. Weitzner*, 130 Misc. 2d 853, 497 N.Y.S.2d 997 (Sup. Ct., Queens Co. 1986).

345. See N.Y. CPLR 217 (McKinney Supp. 1987).

cases this year indicate, however, that there is some confusion as to when the period is applicable and when it begins to run. The four month period is inapplicable if the body or officer is acting in its legislative capacity.<sup>346</sup> Thus, an Article 78 proceeding challenging the constitutionality of an administrative regulation is subject to a six year statute of limitations rather than a four month period.<sup>347</sup> Similarly, the limitation under CPLR 217<sup>348</sup> commences to run—becomes “final” and “binding”—as soon as the aggrieved party is notified, and not when the action directed by the determination is taken.<sup>349</sup>

### F. Miscellaneous

During the *Survey* year, some other decisions emerged that merit at least brief mention.

#### 1. Toll by Reason of Insanity

In *Kelly v. Solway Union Free School District*,<sup>350</sup> the Appellate Division, Fourth Department, held that a hearing must be held to determine if a mentally handicapped individual was suffering from insanity under CPLR 208.<sup>351</sup> The Fourth Department pointed out that there were no cases dealing specifically with mental retardation as a condition of insanity.<sup>352</sup> It concluded that, because CPLR 208<sup>353</sup> does not define the term but applies “to only those individuals who are unable to protect their legal rights be-

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346. See *Norman v. Town Bd.*, 118 A.D.2d 839, 500 N.Y.S.2d 324 (2d Dep't 1986); *Chandler v. Coughlin*, 131 Misc. 2d 442, 500 N.Y.S.2d 628 (Sup. Ct., Albany Co. 1986), *rev'd sub nom.*, *In re Chandler*, — N.Y.S.2d — (1987).

347. See *Chandler*, 131 Misc. 2d at 445, 500 N.Y.S.2d at 630.

348. See N.Y. CPLR 217.

349. See *Edmead v. McGuire*, 67 N.Y.2d 714, 714-15, 490 N.E.2d 853, 854, 499 N.Y.S.2d 934, 935 (1986). The Court of Appeals dismissed the petitioner's claim because, even though the respondent's action did not become final until October 27, 1982, he was unequivocally notified of the respondent's action on September 8, 1982 and then sought relief five months later. See *id.*; see also *Gerasimou v. Ambach*, 636 F. Supp. 1504 (E.D.N.Y. 1986); *Rappo v. New York Human Resources Admin.*, 120 A.D.2d 339, 501 N.Y.S.2d 669 (1st Dep't 1986); *Carroll v. Gunn*, 116 A.D.2d 686, 497 N.Y.S.2d 753 (2d Dep't 1986); *Dionisio v. Board of Educ.*, 118 A.D.2d 854, 500 N.Y.S.2d 343 (3d Dep't 1986); *Barner v. Jeffersonville-Youngsville Cent. School Dist.*, 117 A.D.2d 162, 502 N.Y.S.2d 285 (3d Dep't 1986).

350. 116 A.D.2d 1006, 498 N.Y.S.2d 935 (4th Dep't 1986).

351. See N.Y. CPLR 208 (McKinney Supp. 1987).

352. See *Kelly*, 116 A.D.2d at 1006, 498 N.Y.S.2d at 935.

353. See N.Y. CPLR 208.



cause of an overall inability to function in society," a handicapped person may qualify for the insanity toll under CPLR 208.<sup>354</sup>

## 2. Toll by CPLR 215(8)

CPLR 215(8)<sup>355</sup> was added in 1983 and provides for a one year toll of the statute of limitations when it is shown that a criminal action has been commenced with respect to the event or occurrence from which a civil claim arises. In *Von Bulow v. Von Bulow*,<sup>356</sup> the court held that CPLR 215(8)<sup>357</sup> is available only to those who are victims of crimes prosecuted in New York.<sup>358</sup> The tolling provision was not available to a New York victim because Claus Von Bulow was prosecuted in Connecticut.<sup>359</sup>

## 3. CPLR 214-a

If a chiropractor's services constitute medical treatment he will be subject to a two and one-half year statute of limitations instead of a three year period.<sup>360</sup> Similarly, a patient suing a hospital for injuries he sustains as a result of the negligence of hospital personnel—non doctors—is governed by a three year statute of limitations for negligence, and not two and one-half years for medical malpractice.<sup>361</sup>

## 4. Toll for Civil Rights Actions Under 42 U.S.C. Section 1983

New York's three-year limitations period for personal injury actions (CPLR 214(5))<sup>362</sup> governs in civil rights actions under 42 U.S.C. section 1983.<sup>363</sup> This is true even though New York provides a one-year statute for actions arising from assault, battery, false imprisonment, malicious prosecution, libel or slander.<sup>364</sup>

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354. See *Kelly*, 116 A.D.2d at 1006, 498 N.Y.S.2d at 935.

355. See N.Y. CPLR 215(8) (McKinney Supp. 1987).

356. 634 F. Supp. 1284 (S.D.N.Y. 1986).

357. See N.Y. CPLR 215(a).

358. See *Von Bulow*, 634 F. Supp. at 1299.

359. See *id.*

360. See *Foote v. Picinich*, 118 A.D.2d 156, 503 N.Y.S.2d 926 (3d Dep't 1986).

361. See *White v. Sheehan Memorial Hosp.*, 119 A.D.2d 989, 500 N.Y.S.2d 885 (4th Dep't 1986); *Coursen v. New York Hosp.—Cornell Medical Center*, 114 A.D.2d 254, 499 N.Y.S.2d 52 (1st Dep't 1986).

362. See N.Y. CPLR 214(5) (McKinney 1972).

363. 42 U.S.C. § 1983 (1982).

364. See *Okure v. Owens*, 625 F. Supp. 1568 (N.D.N.Y. 1986).

## V. RES JUDICATA AND COLLATERAL ESTOPPEL

The *Survey* has yet to highlight recent decisional law expanding the scope of claim preclusion<sup>365</sup> and issue preclusion<sup>366</sup> in New York. Both doctrines, which may be invoked offensively and defensively, are being increasingly applied by courts to bar parties from having their day in court.<sup>367</sup>

## A. Claim Preclusion

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 re-litigating the same cause of action. It bars the re-litigation of issues which might have been litigated, as well as those which actually were litigated. The "might have been" requirement has been substantially broadened by the Court of Appeals.<sup>368</sup> Thus, the doctrine is operative even if a party in a second action raises a plausible ground for relief that was not raised in the first action. New facts and new theories, whatever they might be,

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365. Claim preclusion or *res judicata* is the doctrine that once a claim is brought to a final conclusion all other claims, including those which might have been litigated, which arise out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. See generally 5 WEINSTEIN-KORN-MILLER, *supra* note 44, at § 5011.10-5011.22 (1985).

366. Modern approaches generally refer to collateral estoppel as "issue preclusion." See generally RESTATEMENT (SECOND) OF JUDGMENTS, Chapter 3 (1957). The principle of collateral estoppel precludes re-litigation of factual issues that a court decided in a prior suit. See generally 5 WEINSTEIN-KORN-MILLER, *supra* note 44, § 5011.23. New York courts have adopted the modern terminology set forth in the Restatement Second. See *In re American Ins. Co.*, 143 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).

367. For examples of claim preclusion, see *O'Brien v. Syracuse*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981); *Smith v. Russell Sage College*, 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981); see also Note, *The Expansion of Res Judicata in New York*, 48 ALB. L. REV. 210 (1983). For examples of issue preclusion, see *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584 (1985); *Clemens v. Apple*, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985); *Koch v. Consolidated Edison Co.*, 62 N.Y.2d 548, 468 N.E.2d 1, 479 N.Y.S.2d 163 (1984); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); see generally Siegel, *Expanding Applications of Collateral Estoppel*, 309 & 310 N.Y. ST. L. DIG., Sept. & Oct., 1985.

368. See *O'Brien*, 54 N.Y.2d at 353, 429 N.E.2d at 1158, 445 N.Y.S.2d at 687. In this decision, the Court of Appeals fully adopted the Restatement (Second) of Judgments transactional analysis approach. This requires 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 upon different theories or if seeking a different remedy." See *id.* at 357, 429 N.E.2d at 1159, 445 N.Y.S.2d at 688.

are barred if a party could have initially raised them. This has great significance for the practitioner who must endeavor to include every possible theory of relief in his first pleading. It also contemplates diligent investigation by the lawyer to discover all relevant facts the first time around.

During the *Survey* year, the doctrine of claim preclusion was applied in a variety of contexts. In *El Sawah v. Penfield Mechanical Contractors, Inc.*,<sup>369</sup> the Appellate Division, Fourth Department, applied the doctrine to dismiss the plaintiff's action based on breach of contract and negligence. In a prior action instituted by the defendant to collect the balance due on a plumbing contract, the plaintiff (then defendant) interposed two counterclaims seeking damages for negligent performance of the contract.<sup>370</sup> Because the counterclaims were dismissed, the plaintiff was barred from raising them in a second action based on negligence.<sup>371</sup> The Fourth Department pointed out that in determining whether causes of action are the same as those asserted in a prior action, a transactional analysis is utilized.<sup>372</sup> Thus, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction are barred, even if based upon different theories or if seeking a different remedy."<sup>373</sup>

Claim preclusion has also been applied to a surrogate's decree barring a demand for arbitration arising out of the same transaction.<sup>374</sup> In *Reed*, a surrogate's settlement decree providing that a settlement was intended to encompass all of the issues raised or which could have been raised in litigation was entitled to preclusive effect so as to bar a demand for arbitration.<sup>375</sup> This was true even though some of the alleged wrongdoings asserted in the arbitration demand occurred after the plaintiff had filed a supplemental complaint in the prior action.<sup>376</sup>

In *Hodes v. Axelrod*,<sup>377</sup> the Court of Appeals had previously annulled the revocation of petitioners' certificates of relief from

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369. 119 A.D.2d 980, 500 N.Y.S.2d 878 (4th Dep't 1986).

370. See *id.* at 981, 500 N.Y.S.2d at 879.

371. See *id.*

372. See *id.*

373. See *id.*

374. See *Reed v. Cohen*, 120 A.D.2d 598, 502 N.Y.S.2d 497 (2d Dep't 1986).

375. See *id.* at 598, 502 N.Y.S.2d at 498.

376. See *id.*

377. 116 A.D.2d 75, 500 N.Y.S.2d 379 (3d Dep't 1986).

civil disabilities and forfeitures. Thereafter, the legislature amended Public Health Law section 2806(5)<sup>378</sup> and made it retroactive for the purpose of avoiding the result reached by the Court of Appeals.<sup>379</sup> The Commissioner of Health then commenced new proceedings to revoke the petitioners' certificates.<sup>380</sup> The Appellate Division, Third Department, held that the second action was barred by claim preclusion and rejected the respondent's contention that decisional law creates an exception to the application of claim preclusion when there is a subsequent change in the law underlying the initial adjudication.<sup>381</sup> Similarly, in *Burns v. Egan*<sup>382</sup> the plaintiffs' complaint was dismissed under the doctrine of claim preclusion.<sup>383</sup> In a prior action, the court held that the plaintiffs lacked standing to sue under the State Finance Law Article 7-A, and, therefore, the Appellate Division, Fourth Department, held that they were precluded from asserting an alternative basis for standing as voters in a second action.<sup>384</sup> Moreover, in *Partlow v. Kolupa*,<sup>385</sup> the Appellate Division, Third Department, applied the doctrine to hold that a former spouse's failure to assert a conversion claim in a prior action precluded re-litigation of disputed equitable distribution issues.<sup>386</sup>

Although several appellate division decisions have qualified the doctrine's use,<sup>387</sup> the general trend in New York is for courts to liberally apply claim preclusion.<sup>388</sup> Thus, practitioners should explore every possible theory of relief available before filing the initial complaint. Similarly, if subsequent investigation or disclosure yields additional facts upon which to base a new claim, a motion to amend the complaint should be made immediately.

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378. See N.Y. PUB. HEALTH LAW § 2806(5) (McKinney Supp. 1987).

379. See *Hodes*, 116 A.D.2d at 76, 500 N.Y.S.2d at 380.

380. See *id.*

381. See *id.* at 79, 500 N.Y.S.2d at 382.

382. 117 A.D.2d 38, 501 N.Y.S.2d 742 (4th Dep't 1986).

383. See *id.*

384. See *id.* at 42, 501 N.Y.S.2d at 746.

385. 122 A.D.2d 509, 504 N.Y.S.2d 870 (3d Dep't 1986).

386. See *id.*

387. See *Wald v. Wald*, 119 A.D.2d 569, 500 N.Y.S.2d 722 (2d Dep't 1986); *Abdella v. NeJame*, 120 A.D.2d 793, 501 N.Y.S.2d 528 (3d Dep't 1986); *Kleinberger v. Sharon*, 116 A.D.2d 367, 501 N.Y.S.2d 746 (3d Dep't 1986).

388. See *supra* note 387.

*B. Issue Preclusion*

During the past two years the Court of Appeals has expanded the doctrine of issue preclusion.<sup>389</sup> Throughout the *Survey* year courts have continued to apply the doctrine in a variety of contexts.<sup>390</sup>

As the doctrine now stands, a valid final judgment<sup>391</sup> on the merits<sup>392</sup> rendered by a forum of competent jurisdiction prevents re-litigation by the parties, or their privies,<sup>393</sup> of matters of fact or law actually litigated or necessarily determined,<sup>394</sup> in the earlier action. Two prerequisites must be met. "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 contest the prior determination."<sup>395</sup>

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389. See *Koch*, 62 N.Y.2d at 548, 468 N.E.2d at 1, 479 N.Y.S.2d at 163. In an action by a grocer for property damage caused by the 1977 New York City blackout, Consolidated Edison (Con. Ed.) was found to be grossly negligent. See *id.* This finding was later given preclusive effect in a multimillion dollar damage suit brought against Con. Ed. by New York City Mayor Edward Koch and public benefit corporations. See *id.*; *Ryan*, 62 N.Y.2d at 494, 467 N.E.2d at 487, 478 N.Y.S.2d at 823 (preclusive effect given to administrative findings made in unemployment insurance proceeding to estop plaintiff from maintaining a plenary damage suit for slander, false arrest and wrongful discharge); *Clemens*, 65 N.Y.2d at 746, 481 N.E.2d at 560, 492 N.Y.S.2d at 20 (issue preclusion applied to no fault arbitral determination to bar plaintiff from re-litigating whether his herniated disc condition was causally related to an automobile accident); see also *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 488 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

390. See *Genova v. Southampton*, 776 F.2d 1560 (2d Cir. 1986) (disciplinary hearing); *Bernstein v. IDT Corp.*, 638 F. Supp. 916 (S.D.N.Y. 1986) (criminal proceeding); *Meyn v. Meyn*, 119 A.D.2d 644, 501 N.Y.S.2d 989 (2d Dep't 1986) (matrimonial action); *Rella v. State*, 117 A.D.2d 591, 498 N.Y.S.2d 63 (2d Dep't 1986) (contract action); *Ford v. Ford*, 118 A.D.2d 1004, 500 N.Y.S.2d 373 (3d Dep't 1986) (action for arrearages).

391. See *Dunleavy v. First American Title Ins. Co.*, 117 A.D.2d 952, 499 N.Y.S.2d 264 (3d Dep't 1986); *Nassau Roofing & Sheet Metal, Inc. v. Facilities Dev. Corp.*, 115 A.D.2d 48, 499 N.Y.S.2d 820 (3d Dep't 1986).

392. See *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dep't 1986) (breach of contract action not barred by prior actions, one of which had been dismissed for insufficiency of the pleadings, one of which had been abandoned, and one of which had been dismissed for lack of *in personam* jurisdiction); *Holley v. Mandate Realty Corp.*, 121 A.D.2d 202, 503 N.Y.S.2d 350 (1st Dep't 1986) (dismissal for failure to prosecute is not on the merits).

393. See *Home of Histadruth Ivrit, Inc. v. State Facilities Dev. Corp.*, 114 A.D.2d 200, 498 N.Y.S.2d 883 (3d Dep't 1986); *National Fuel Gas Distrib. Corp. v. State Bd. of Equalization & Assessment*, 117 A.D.2d 948, 499 N.Y.S.2d 260 (3d Dep't 1986).

394. See *Freeport v. Sanders*, 121 A.D.2d 429, 503 N.Y.S.2d 128 (2d Dep't 1986).

395. *Kaufman*, 65 N.Y.2d at 449, 482 N.E.2d at 67, 492 N.Y.S.2d at 588.

The identity of issue requirement has been the subject of considerable litigation in New York.<sup>396</sup> Nonetheless, a review of the record in the first action will usually determine if an issue necessary to a final judgment on the merits is the same as an issue decisive to the second action. Thus, if the legal theory in both actions is the same and if there are no significant differences in the facts upon which both theories are based, identity of issue is generally satisfied.<sup>397</sup> This is true even when many persons assert claims against the same defendant which arise from one transaction or occurrence.<sup>398</sup>

Satisfaction of the full and fair opportunity test requires examination of a number of factors articulated by the Court of Appeals in *Koch v. Consolidated Edison Co.*<sup>399</sup> These factors include: the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and foreseeability of future litigation.<sup>400</sup> The full and fair opportunity requirement extends beyond terms of traditional notions of due process.<sup>401</sup> It also prohibits the application of issue preclusion if a forum in the second action affords a party, against whom preclusion is invoked, new procedural opportunities which could result in the same issue being determined differently.<sup>402</sup> Several decisions during the *Survey* year applied issue preclusion and are worthy of mention.

In *Preview Construction Co. v. Roth*,<sup>403</sup> the Appellate Division, Second Department, held that a plaintiff's action to recover damages for conversion and intentional interference with contract was barred by issue preclusion.<sup>404</sup> In the prior action, plaintiff had sued Roth and another defendant for intentional interference, but

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396. See 5 WEINSTEIN-KORN-MILLER, *supra* note 44, § 5011.26.

397. See *id.* But see *Vincent v. Thompson*, 50 A.D.2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975).

398. See *Koch*, 62 N.Y.2d at 548, 468 N.E.2d at 1, 479 N.Y.S.2d at 163.

399. *Id.* at 550, 468 N.E.2d at 3, 479 N.Y.S.2d at 165.

400. See *id.*

401. See *People v. Plevy*, 52 N.Y.2d 58, 417 N.E.2d 518, 436 N.Y.S.2d 224 (1980).

402. See *Koch*, 62 N.Y.2d at 554, 468 N.E.2d at 7, 479 N.Y.S.2d at 169.

403. 117 A.D.2d 591, 498 N.Y.S.2d 62 (2d Dep't 1986).

404. See *id.*

the court concluded that no valid contract existed.<sup>405</sup> Therefore, the Second Department barred not only the re-litigation of the contract claim but also concluded that because the evidence presented by the plaintiff in the first action would not support a cause of action against the respondents for conversion, that claim could not be re-litigated.<sup>406</sup>

In *Ford v. Ford*,<sup>407</sup> the Appellate Division, Third Department, applied the doctrine to bar a wife's motion seeking a money judgment for arrearages.<sup>408</sup> A judgment of divorce had been entered against the defendant upon his default in September of 1977.<sup>409</sup> Thereafter, the defendant paid the plaintiff a reduced biweekly sum in maintenance and child support for seven years.<sup>410</sup> When the defendant won a substantial amount of money in the state lottery, the plaintiff moved to punish him for contempt for failing to pay the full amount of maintenance and support.<sup>411</sup> Special Term denied the motion and held that plaintiff's conduct in accepting the reduced payments for seven years operated as a waiver.<sup>412</sup> The plaintiff did not appeal the order but filed a separate action for arrearages.<sup>413</sup> The Third Department pointed out that the only issue decided in the prior motion was that plaintiff did not have a claim for arrearages.<sup>414</sup> The court concluded that "all the elements of [issue preclusion] are present" and applied the doctrine.<sup>415</sup>

Similarly, in *Meyn v. Meyn*,<sup>416</sup> the plaintiff's action for divorce on the ground of cruel and inhuman treatment was barred by issue preclusion because the same decisive facts had been necessarily determined against her after a full and complete hearing in a prior action regarding execution of a separation agreement.<sup>417</sup> The Appellate Division, Second Department, rested its decision on the fact that the record for the prior hearing indicated that the deci-

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405. *See id.*

406. *See id.*

407. 118 A.D.2d 1004, 500 N.Y.S.2d 373 (3d Dep't 1986).

408. *See id.*

409. *See id.*

410. *See id.*

411. *See id.*

412. *See id.*

413. *See id.*

414. *See id.*

415. *See id.*

416. 119 A.D.2d 644, 501 N.Y.S.2d 89 (2d Dep't 1986).

417. *See id.* at 645, 501 N.Y.S.2d at 90.

sive issues of fraud and deceit had already been litigated.<sup>418</sup>

In *White v. Burke*,<sup>419</sup> both parties sought a declaratory judgment in the supreme court to determine the status of their common law relationship.<sup>420</sup> The court applied issue preclusion on the grounds that a prior decision by the family court had concluded that the parties were common law husband and wife.<sup>421</sup> The court applied issue preclusion because the procedures followed by the family court were not significantly different from those which would be utilized by the supreme court in a declaratory judgment action.<sup>422</sup>

### C. Administrative and Arbitral Determinations

During the *Survey* year, several decisions have qualified *Ryan v. New York Telephone Co.*<sup>423</sup> and *Clemens v. Apple*,<sup>424</sup> both of which expanded the doctrine of issue preclusion to administrative and arbitral determinations. *Ryan* and *Clemens* should be analyzed because they have not previously been discussed in the *Survey*.

In *Ryan*, the plaintiff had been discharged from the employ of the New York Telephone Company after being arrested for theft of company property.<sup>425</sup> His arrest was based on testimony from two security investigators who claimed that Ryan had removed company property from the workplace.<sup>426</sup> 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 his own misconduct.<sup>427</sup> Ryan filed an administrative appeal and was granted a hearing before the Unemployment Insurance Administrative Law Judge (ALJ).<sup>428</sup> After considering

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418. *See id.*

419. 131 Misc. 2d 59, 498 N.Y.S.2d 990 (Sup. Ct., Saratoga Co. 1986).

420. *See id.*

421. *See id.*

422. *See id.* at 60, 498 N.Y.S.2d at 991.

423. 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); *see also* Carlisle, *Getting a Free 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 (1986).

424. 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985).

425. *See Ryan*, 62 N.Y.2d at 497, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

426. *See id.* at 498, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

427. *See id.*

428. *See id.*



the testimony of Ryan and one hearsay witness, the ALJ sustained the ruling of the claims examiner and found that "claimant was seen . . . removing company property."<sup>429</sup> As a result of the finding that Ryan had stolen the property, the ALJ concluded that he was terminated because of his own misconduct.<sup>430</sup> The ALJ then affirmed the denial of Ryan's unemployment benefits.<sup>431</sup> This determination was affirmed by the Unemployment Insurance Appeals Board, and was later upheld by the appellate division.<sup>432</sup>

After criminal charges against Ryan were dismissed in the interests of justice, but before the appellate division's affirmance of the administrative determination, Ryan filed a tort action for wrongful discharge and slander.<sup>433</sup> The defendant moved to dismiss this action on the ground that it was based on the issue of Ryan's misconduct which had already been litigated at the administrative hearing.<sup>434</sup> The motion was denied by special term and affirmed by the appellate division.<sup>435</sup>

When the case reached the Court of Appeals, it reversed the lower court's decision and held that issue preclusion applied.<sup>436</sup> The Court found that there was an identity of issue because it was logically inconsistent for Ryan, who had lost on the issue of his misconduct in the administrative proceeding, to later claim that he had been falsely accused of taking property or that he had been unjustifiably terminated.<sup>437</sup> The issue was material to the administrative determination and decisive of the claims raised by Ryan in his lawsuit.<sup>438</sup> The Court pointed out that Ryan had testified on his own behalf and, through his union representative, Ryan cross-examined the defendant's witnesses at the hearing.<sup>439</sup> Thus, the Court held that the realities of the prior litigation had been sufficiently extensive and adversarial to constitute a full and fair hearing.<sup>440</sup> In addition, the Court relied on the fact that the adminis-

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429. *See id.*

430. *See id.*

431. *See id.*

432. *See id.*

433. *See id.* at 499, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

434. *See id.*

435. *See id.*

436. *See id.*

437. *See id.* at 502-03, 467 N.E.2d at 491-92, 478 N.Y.S.2d at 827-28.

438. *See id.* at 502, 467 N.E.2d at 491, 478 N.Y.S.2d at 827.

439. *See id.*

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

trative hearing was presided over by an ALJ, that the hearing was voluntarily initiated by Ryan, that he knowingly chose not to appear with legal counsel, and that the record demonstrated that the administrative procedure was fair and that Ryan had a full opportunity to litigate the issue of misconduct.<sup>441</sup>

In *Clemens*, the issue was whether a herniated disc condition was causally related to an automobile accident which occurred in December of 1977.<sup>442</sup> Two years after the accident, Clemens underwent surgery for removal of the disc and then sought no-fault insurance benefits of \$1,798.02 to cover the costs of surgery.<sup>443</sup> The plaintiff's carrier denied the benefits on the grounds that the herniated disc was not caused or aggravated by the car accident.<sup>444</sup> Clemens proceeded to arbitration before a Health Services Administration Panel (HSA) which rejected his claim.<sup>445</sup> After the adverse HSA determination, defendant Apple sought partial summary judgment in a \$250,000 personal injury lawsuit that Clemens had filed on the ground that the plaintiff was collaterally estopped from re-litigating the issue of whether the herniated disc was caused by the automobile accident.<sup>446</sup>

The trial court granted Apple's motion and the appellate division affirmed.<sup>447</sup> The Court of Appeals adopted Justice Yesawich's opinion granting estoppel but added that the decision was fully consistent with *Ryan*.<sup>448</sup> The Court emphasized that the full and fair opportunity requirement had been satisfied; moreover, the court distinguished this case from *Gilberg v. Barbieri*<sup>449</sup> by stressing that Clemens, who was represented by counsel, freely chose the arbitration forum after the commencement of his personal injury action and, therefore, could have foreseen the possibility of an adverse arbitral award precluding re-litigation of the

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441. *See id.*

442. *See Clemens*, 65 N.Y.2d at 747, 481 N.E.2d at 561, 492 N.Y.S.2d at 21.

443. *See id.*

444. *See id.*

445. *See id.*

446. *See id.*

447. *See id.*

448. *See id.* (citing *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984)).

449. 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981) (issue preclusion not applied because defendant did not have a full and fair opportunity to litigate issue of his alleged striking of the plaintiff).

causal factors relating to his disc injury.<sup>450</sup> The *Clemens*<sup>451</sup> case was remanded for trial after the Court's decision and was settled for \$3,000 on the remaining claim.<sup>452</sup>

The Court of Appeals qualified the *Ryan* and *Clemens* holdings in *Liss v. Trans Auto Systems*.<sup>453</sup> The Court held that if a party is not afforded an opportunity to cross-examine witnesses or present evidence at an administrative hearing, the outcome of the hearing cannot have preclusive effect.<sup>454</sup> The practitioner should also be aware that the *Liss* decision does not overrule the Court of Appeals' holding in *Brugman v. City of New York*,<sup>455</sup> where the doctrine was applied to give preclusive effect to an administrative determination against a party who was denied a hearing of any type.<sup>456</sup> The *Liss* decision makes it clear that an administrative determination is not entitled to preclusive effect against one who is not a party to the administrative proceeding.<sup>457</sup>

Three other decisions during the *Survey* year are important. In *Fischer v. Fischer*<sup>458</sup> the Appellate Division, Second Department, applied issue preclusion to bar a plaintiff's action for personal injuries on the grounds that an earlier arbitration decision had denied the plaintiff recovery of basic economic loss for failure to establish proximate cause. In *Hill v. Coca-Cola Bottling Co. of New York*,<sup>459</sup> the United States Court of Appeals for the Second Circuit refused to apply issue preclusion to bar the plaintiff's racial discrimination claim.<sup>460</sup> Although a prior administrative determination by the Unemployment Insurance Board that the plaintiff's misconduct led to his termination was binding, the court held that the prior determination would not necessarily negate a subsequent finding of discrimination.<sup>461</sup> The court also rested its decision on

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450. See *Clemens*, 65 N.Y.2d at 747, 481 N.E.2d at 561, 492 N.Y.S.2d at 21.

451. See *id.*

452. See *id.*

453. 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986).

454. See *id.* at 16, 496 N.E.2d at 852, 505 N.Y.S.2d at 832.

455. 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985) (issue preclusion applied to administrative findings in a disability proceeding to preclude plaintiff from litigating the issue of the defendant's negligence in a tort lawsuit for damages).

456. See *id.*

457. See *Liss*, 68 N.Y.2d at 19, 496 N.E.2d at 856, 505 N.Y.S.2d at 836.

458. 118 A.D.2d 828, 500 N.Y.S.2d 313 (2d Dep't 1986).

459. 786 F.2d 550 (2d Cir. 1986).

460. See *id.* at 551.

461. See *id.* at 552.

the fact that the employee's racial claims were only "briefly explored" in the administrative hearing.<sup>462</sup>

The court did apply issue preclusion in *Genova v. Town of South Hampton*,<sup>463</sup> where a discharged police officer brought a civil rights suit against the town board.<sup>464</sup> After a disciplinary hearing before the board, where it was determined that plaintiff had disobeyed orders, the board declined to follow a hearing officer's recommendation to suspend the plaintiff for ten days and instead discharged him.<sup>465</sup> The Second Circuit, citing *Migra v. Warren City School District*,<sup>466</sup> held that because New York State principles of issue preclusion would prevent Genova from contesting the same factual issues in any later suit against the same parties, the "appellant may not re-litigate these factual issues in a federal forum . . . ."<sup>467</sup>

Finally, the practitioner's attention should also be directed to *University of Tennessee v. Elliot*,<sup>468</sup> which is the most recent pronouncement by the United States Supreme Court regarding the application of issue preclusion to a state administrative determination. In *Elliot*, a state ALJ determined that the petitioner was not motivated by racial prejudice in seeking to discharge the respondent.<sup>469</sup> The question was whether this finding was entitled to preclusive effect in a federal court, where the respondent raised discrimination claims under various civil rights laws.<sup>470</sup> The Supreme Court held that section 1738 of title 28 of the United States Code does not require that a determination by an administrative assistant to the Vice-President for Agriculture of the University of Tennessee be given full faith and credit in subsequent federal litigation.<sup>471</sup> The Court also refused to fashion a federal common-law rule of preclusion that would bar the respondent from litigating his claim against the University under Title VII of the Civil Rights

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462. See *id.* at 553-54.

463. 776 F.2d 1560 (2d Cir. 1986).

464. See *id.*

465. See *id.*

466. 465 U.S. 75 (1984).

467. See *Genova*, 776 F.2d at 1561.

468. 106 S. Ct. 3220 (1986).

469. See *id.* at 3222.

470. See *id.*

471. See *id.* at 3224.

Act of 1984.<sup>472</sup> The Court, however, did conclude that the findings of the administrative assistant barred respondents claims under 42 U.S.C. 1983 and other sections of the Civil Rights Act.<sup>473</sup>

## VI. DISCLOSURE

Of the many disclosure decisions rendered during the *Survey* year, the following areas should be of interest to the practitioner.

### *A. Scope of Disclosure Under CPLR 3101*

#### *1. CPLR 3101(a)*

Although case law during the *Survey* year continued to recognize that disclosure pursuant to CPLR 3101<sup>474</sup> is wide and embraces all information necessary to the prosecution or defense of an action,<sup>475</sup> there are some limitations to what a party may discover. In *Seltel, Inc. v. Channel Communications, Inc.*,<sup>476</sup> the issue in a contract action was whether the defendant's obligation under the contract was excused by the plaintiff's failure to make "best efforts" as a national sales representative.<sup>477</sup> The defendant's request to discover information relating to the plaintiff's failure to perform under other contracts was denied.<sup>478</sup> The Appellate Division, First Department, held that although the data might lead to relevant information, it was not necessary or material to the defense.<sup>479</sup> Similarly, the Appellate Division, Third Department, held that a plaintiff's demand for production of certain correspondence, documents, statements, tape recordings and records relating to a deceased person was overbroad.<sup>480</sup> The Third Department stressed that the plaintiff could prove his case without this material.<sup>481</sup>

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472. See *id.* at 3225.

473. See *id.*

474. See N.Y. CPLR 3101 (McKinney Supp. 1987).

475. See *Seltel, Inc. v. Channel Communications, Inc.*, 120 A.D.2d 991, 505 N.Y.S.2d 628 (1st Dep't 1986); *Hughes v. Elias*, 120 A.D.2d 703, 502 N.Y.S.2d 772 (2d Dep't 1986); *Sabro Realty Corp. v. Kradjian*, 116 A.D.2d 866, 498 N.Y.S.2d 188 (1st Dep't 1986); *Carp v. Marcus*, 116 A.D.2d 254, 498 N.Y.S.2d 174 (3d Dep't 1986).

476. 120 A.D.2d 991, 505 N.Y.S.2d 628.

477. See *id.* at 992, 505 N.Y.S.2d at 628.

478. See *id.*

479. See *id.* at 992, 505 N.Y.S.2d at 629-30.

480. See *Carp*, 116 A.D.2d at 254, 498 N.Y.S.2d at 174.

481. See *id.* at 256, 498 N.Y.S.2d at 177.

## 2. CPLR 3101(d)

CPLR 3101(d)<sup>482</sup> was amended in 1985 to liberalize discovery relating to trial experts. The new provision, which is similar to Federal Rules of Civil Procedure 26(b)(4), applies to cases filed on or after July 1, 1985. Thus, parties are required in all cases, other than medical, dental and podiatric<sup>483</sup> matters, to disclose the name of any expert witness they intend to call at trial.<sup>484</sup> Three decisions interpreting this new provision should be noted. In *Pierson v. Yourish*,<sup>485</sup> the Appellate Division, Third Department, held that CPLR 3101(d)<sup>486</sup> could not serve to protect the report of an unnamed physician from disclosure.<sup>487</sup> In *Dunn v. Medina Memorial Hospital*,<sup>488</sup> the defendants in a medical malpractice action moved for an order compelling plaintiff to retain an expert immediately or to be precluded from offering expert testimony at trial.<sup>489</sup> The court held that, in the absence of evidence that there was insufficient time prior to the start of a trial, the defendants could not force the plaintiff to retain an expert.<sup>490</sup> On the other hand, if the plaintiff intentionally did not comply with CPLR 3101(d),<sup>491</sup> the court noted that it could exclude the testimony of the expert altogether.<sup>492</sup> Finally, in *Rogowski v. Royce W. Day Co.*,<sup>493</sup> a third-party defendant sought discovery of information concerning an ex-

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482. See N.Y. CPLR 3101(d) (McKinney Supp. 1987).

483. See N.Y. CPLR 3101(d)(1), which was amended by Chapter 485 of the Laws of 1986 to include podiatric experts. The amendment became effective on July 21, 1986. See *id.*

484. See 3A WEINSTEIN-KORN-MILLER, *supra* note 44, at § 3101.52 (1985); see also *Penucci v. Mercy Hosp.*, N.Y.L.J., Dec. 1, 1986, at 14, col. 3 (2d Dep't 1986). In a ruling of apparent first impression, the Second Department limited the scope of discovery available to attorneys in medical malpractice actions under CPLR 3101(d). The court, in affirming an order striking the defendant's demand in its entirety, ruled that "absent a showing that a party seeking discovery has need of materials in the preparation of the case and is unable without undue hardship to obtain a substantial equivalent by other means, material prepared 'in anticipation of litigation or of trial' are exempt from disclosure." Thus, a medical report by an expert remains exempt under CPLR 3101(d). Therefore, the court's decision curtails extensive disclosure by either side regarding expert witnesses in terms of providing their identity, qualifications, and findings. See *id.*

485. 120 A.D.2d 899, 505 N.Y.S.2d 165 (3d Dep't 1986).

486. See N.Y. CPLR 3101(d).

487. See *Pierson*, 120 A.D.2d at 902, 505 N.Y.S.2d at 166.

488. 131 Misc. 2d 971, 502 N.Y.S.2d 633 (Sup. Ct., Erie Co. 1986).

489. See *id.* at 973, 502 N.Y.S.2d at 634.

490. See *id.* at 974, 502 N.Y.S.2d at 635.

491. See N.Y. CPLR 3101(d).

492. See *Dunn*, 131 Misc. at 972, 502 N.Y.S.2d at 635.

493. 130 Misc. 2d 801, 497 N.Y.S.2d 864 (Sup. Ct., Albany Co. 1986).

pert witness who would testify at trial.<sup>494</sup> The court held that the third-party action did not benefit from CPLR 3101(d).<sup>495</sup> Although the third-party complaint and summons were served after July 1, 1985, that action was merely a part of the principle litigation that was commenced prior to the amendment's effective date.<sup>496</sup>

### B. *Physical or Mental Examinations*

Two issues of apparent first impression were decided by courts during the *Survey* year. In *Reardon v. Port Authority*,<sup>497</sup> the defendant sought an order directing the plaintiff to appear at a psychiatric examination and a further order excluding the plaintiff's attorney from the examining room.<sup>498</sup> In a well reasoned opinion, the court concluded that the attorney could attend the examination<sup>499</sup> and held that a party has the right to have counsel present at every crucial stage of the litigation process.<sup>500</sup> In *Soybel v. Gruber*,<sup>501</sup> the plaintiff landlord moved to conduct a physical examination of a holdover tenant to determine whether the tenant could return to the apartment and maintain the premises as her primary residence.<sup>502</sup> The court denied the motion on the ground that the defendant did not affirmatively place her physical condition in controversy.<sup>503</sup> Furthermore, the court found that the physical examination might be unduly burdensome to the defendant.<sup>504</sup>

### C. *Penalties for Refusal to Comply with Order to Disclose*

Under CPLR 3126<sup>505</sup> any party or person who refuses to obey an order for disclosure or willfully fails to disclose information is subject to sanction.<sup>506</sup> During the *Survey* year, the appellate division frequently affirmed the imposition of sanctions which include

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494. *See id.*

495. *See id.* at 801, 497 N.Y.S.2d at 865; N.Y. CPLR 3101.

496. *See Rogowski*, 130 Misc. 2d at 801, 497 N.Y.S.2d at 865.

497. 132 Misc. 2d 212, 503 N.Y.S.2d 233 (Sup. Ct., Nassau Co. 1986).

498. *See id.*

499. *See id.* at 213, 503 N.Y.S.2d at 235.

500. *See id.*

501. 132 Misc. 2d 34, 504 N.Y.S.2d 354 (N.Y.C. Civ. Ct., N.Y. Co. 1986).

502. *See id.* at 35, 504 N.Y.S.2d at 355.

503. *See id.* at 36, 504 N.Y.S.2d at 356.

504. *See id.*

505. *See* N.Y. CPLR 3126 (McKinney Supp. 1987).

506. *See id.*

finer to be personally paid by a plaintiff's attorney<sup>507</sup> as well as dismissal of an action for the plaintiff's failure to attend a court ordered deposition.<sup>508</sup> In *Conklin v. Howell*,<sup>509</sup> the Appellate Division, Third Department, imposed monetary sanctions against plaintiff's counsel when both sides agreed to adjourn court ordered depositions to a later date.<sup>510</sup> The message is clear that attorneys are being held accountable to strict compliance with CPLR 3126.<sup>511</sup>

## VII. MOTIONS

### A. Motion to Vacate

CPLR 5015(a) lists the principal grounds for vacating a judgment or order. They are: excusable default, newly discovered evidence, fraud, misrepresentation or other misconduct of an adverse party, lack of jurisdiction to render the judgment or order, and revival, modification or vacatur of a prior judgment or order upon which it is based.<sup>512</sup> Several decisions<sup>513</sup> during the *Survey* year demonstrate that the provisions providing for vacating a default judgment under CPLR 5015(a)<sup>514</sup> are liberally interpreted, particularly if a party has a meritorious defense.

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507. See *Farrell v. New York State Elec. & Gas Corp.*, 120 A.D.2d 778, 501 N.Y.S.2d 235 (3d Dep't 1986).

508. See *Henderson v. Stilwell*, 116 A.D.2d 861, 498 N.Y.S.2d 183 (3d Dep't 1986).

509. 120 A.D.2d 637, 502 N.Y.S.2d 239 (3d Dep't 1986).

510. See *id.*

511. See *Klein v. Mount Sinai Hosp.*, 121 A.D.2d 164, 502 N.Y.S.2d 1018 (1st Dep't 1986); *Higdon v. County of Nassau*, 121 A.D.2d 366, 502 N.Y.S.2d 797 (2d Dep't 1986); *Anteri v. NRS Constr. Corp.*, 117 A.D.2d 696, 498 N.Y.S.2d 435 (2d Dep't 1986); *Fremer v. Woodcrest Club, Inc.*, 117 A.D.2d 646, 498 N.Y.S.2d 387 (2d Dep't 1986); *Glen Travel Plaza v. H.G. Anderson Equip.*, 118 A.D.2d 185, 504 N.Y.S.2d 298 (3d Dep't 1986); *Passaro v. Passaro*, 120 A.D.2d 658, 502 N.Y.S.2d 253 (3d Dep't 1986).

512. See N.Y. CPLR 5015(a) (McKinney Supp. 1987). CPLR 5015(a) provides that "the Court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct upon the ground of [(1), (2), (3), (4), or (5)]." See *id.*

513. See *Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber*, 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 (1986); *Picinich v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 497 N.Y.S.2d 924 (1st Dep't 1986); *Vodola v. Lambert*, 116 A.D.2d 641, 497 N.Y.S.2d 720 (2d Dep't 1986); *DeFalco v. J.R.S. Confectionary*, 118 A.D.2d 752, 500 N.Y.S.2d 143 (2d Dep't 1986); *Jacobs v. Haber*, 118 A.D.2d 686, 500 N.Y.S.2d 135 (2d Dep't 1986); *Rainbow Food Corp. v. Tasty Donut, Inc.*, 119 A.D.2d 648, 500 N.Y.S.2d 794 (2d Dep't 1986); *Berlin v. Schlotthauer*, 117 A.D.2d 768, 499 N.Y.S.2d 421 (2d Dep't 1986); *Woodward v. New York*, 119 A.D.2d 749, 501 N.Y.S.2d 159 (2d Dep't 1986); *Nahal v. C & S Bldg. Materials, Inc.*, 116 A.D.2d 822, 497 N.Y.S.2d 209 (3d Dep't 1986).

514. See N.Y. CPLR 5015(a).



In *Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber*,<sup>515</sup> the Court of Appeals held that the moving party must demonstrate both a reasonable excuse for failing to appear and answer the complaint and a meritorious defense to the action.<sup>516</sup> The Court, however, held that a trial court sometimes has the discretion to treat a CPLR 5015(a)<sup>517</sup> motion as having been made as well as pursuant to CPLR 317.<sup>518</sup> This is important because CPLR 317<sup>519</sup> does not require a defendant to show a "reasonable excuse for its delay."<sup>520</sup>

A motion made under subdivision (1) of CPLR 5015(a)<sup>521</sup> should be made in either one of two ways. First, the motion may be made within one year after service of a copy of the judgment or order along with written notice of its entry upon the moving party, or second, the motion may be made if the moving party has entered the judgment or order, within one year after the entry.<sup>522</sup> If a party fails to serve a copy of the order with the notice of entry, the one year time limitation does not begin to run.<sup>523</sup> Excusable neglect exists if one co-defendant was absent from the country and the other co-defendant believed that settlement negotiations were underway.<sup>524</sup> Similarly, a forty-eight hour delay in filing an answer due to law office failure was held to be excusable.<sup>525</sup> Also, a corporate defendant's failure to answer after service upon it was made by delivery of a summons and complaint to the Secretary of State was excused when the corporation had failed to update its address.<sup>526</sup> A defendant's belief that another proceeding vitiated the default judgment does not excuse his failure to file an answer and

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515. 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 (1986).

516. *See id.* at 140, 492 N.E.2d at 119, 501 N.Y.S.2d at 11.

517. *See* N.Y. CPLR 5015(a).

518. *See DiLorenzo*, 67 N.Y.2d at 140, 492 N.E.2d at 119, 501 N.Y.S.2d at 11. Thus, "where a defendant cites only CPLR 5015(a) in support of a motion to grant a default judgment, the court . . . has the discretion to treat a CPLR 5015(a) motion as having been made as well pursuant to CPLR 317." *See id.*

519. *See* N.Y. CPLR 317 (McKinney Supp. 1987).

520. *See DiLorenzo*, 67 N.Y.2d at 140, 492 N.E.2d at 119, 501 N.Y.S.2d at 11.

521. *See* N.Y. CPLR 5015(a).

522. *See supra* note 512; *see also* *Friedberg v. Bay Ridge Orthopedic Assocs., P.C.*, 122 A.D.2d 194, 504 N.Y.S.2d 731 (2d Dep't 1986) (plaintiff, who did not move to vacate default judgment until more than two years after case was marked off calendar, failed to overcome presumption of abandonment created by rule after passage of one year).

523. *See DeFalco*, 118 A.D.2d at 752, 500 N.Y.S.2d at 143.

524. *See Jacobs*, 118 A.D.2d at 686, 500 N.Y.S.2d at 135.

525. *See Picinic*, 117 A.D.2d at 504, 497 N.Y.S.2d at 924.

526. *See DiLorenzo*, 67 N.Y.2d at 138, 492 N.E.2d at 116, 501 N.Y.S.2d at 8.

the default judgment will stand.<sup>527</sup> In another case, the Appellate Division, Third Department, held that a defendant, who claimed that his default in a mortgage foreclosure proceeding was due to his involvement in a proceeding before the State Commission on Judicial Conduct, failed to establish that his default was excusable.<sup>528</sup> When asserting facts constituting a meritorious defense, the practitioner must establish the defense by specific, and not conclusory, allegations.<sup>529</sup> If the defense is established with particularity, courts will usually, assuming an excusable default, vacate the judgment.<sup>530</sup>

Lawyers seeking to use subdivision (2) of CPLR 5015(a)<sup>531</sup>—newly discovered evidence—are held accountable to a strict due diligence test.<sup>532</sup> Thus, in *Federal Deposit Insurance Corp. v. Schwartz*,<sup>533</sup> a letter discoverable with due diligence prior to entry of summary judgment against a guarantor was not newly discovered evidence.<sup>534</sup> On the other hand, evidence that a title holder conveyed real property to a possessor in satisfaction of gambling and loan sharking debts constituted newly discovered evidence sufficient to vacate a judgment against defendants in an action to recover possession of real property.<sup>535</sup>

Subdivision (3) of CPLR 5015(a)<sup>536</sup>—fraud, misrepresentation or misconduct of an adversary party—requires that a party establish by a preponderance of clear, positive and satisfactory evidence any fraud, misconduct or other circumstances that would require the judgment in question to be set aside.<sup>537</sup>

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527. See *Hoosac Valley Farmers' Exch. v. Lewis*, 117 A.D.2d 859, 498 N.Y.S.2d 568 (3d Dep't 1986).

528. See *Glens Falls Nat'l Bank & Trust Co. v. Katz*, 118 A.D.2d 906, 499 N.Y.S.2d 474 (3d Dep't 1986); see also *Rainbow Food*, 119 A.D.2d at 648, 500 N.Y.S.2d at 794.

529. See *State v. Wiley*, 117 A.D.2d 856, 498 N.Y.S.2d 556 (3d Dep't 1986).

530. See *DiLorenzo*, 67 N.Y.2d at 138, 492 N.E.2d at 116, 501 N.Y.S.2d at 8; *Berlin*, 117 A.D.2d at 768, 499 N.Y.S.2d at 421; *Nahal*, 116 A.D.2d at 822, 497 N.Y.S.2d at 209; *Woodward*, 119 A.D.2d at 749, 501 N.Y.S.2d at 159.

531. See N.Y. CPLR 5015(a)(2) (McKinney Supp. 1987).

532. See *Federal Deposit Ins. Corp. v. Schwartz*, 116 A.D.2d 619, 497 N.Y.S.2d 477 (2d Dep't 1986).

533. *Id.*

534. See *id.* at 621, 497 N.Y.S.2d at 479.

535. See *Vodola*, 116 A.D.2d at 641, 497 N.Y.S.2d at 720.

536. See N.Y. CPLR 5015(a)(3) (McKinney Supp. 1987).

537. See *Poughkeepsie v. Albano*, 122 A.D.2d 14, 504 N.Y.S.2d 183 (2d Dep't 1986); *Imor v. Imor*, 119 A.D.2d 913, 501 N.Y.S.2d 195 (3d Dep't 1986).

*B. Motion to Amend*

CPLR 3025(b) provides that a party may amend his pleadings, or supplement them by setting forth additional or subsequent transactions or occurrences at any time by leave of court or by stipulation of the parties.<sup>538</sup> This provision is one of the most important and often used provisions in New York practice.<sup>539</sup> It permits a party to conform his pleadings to the substantive rights involved, whenever it can be achieved without prejudice.<sup>540</sup> If there is no prejudice to one's adversary, leave to amend must be freely given.<sup>541</sup> If, however, the facts on which a proposed amendment are based were known to the moving party when he filed the original pleading, courts are less likely to grant the motion. This assertion is particularly accurate when lateness is accompanied by significant prejudice.

Several decisions during the *Survey* year illustrate the importance of the term "prejudice." In *Bellini v. Gersalle Realty Corp.*,<sup>542</sup> the plaintiff was permitted to amend his complaint to drop a co-plaintiff despite the defendant's contention that by doing so the effect would be to revive a time-barred action.<sup>543</sup> The Appellate Division, First Department, held that the amendment related back to the original pleading, which gave the defendant sufficient notice from which the new claim arose.<sup>544</sup> The First Department pointed out that leave to amend should be freely given in the absence of prejudice to the other party traceable to the omission from the original pleading, some change of position, hindrance in the preparation of a case, or significant trouble or expense that could have been avoided had the original pleading contained what the amended one seeks to add.<sup>545</sup>

Similarly, in *Duffy v. Horten Memorial Hospital*,<sup>546</sup> the Appellate Division, Third Department, held that the plaintiff could

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538. See N.Y. CPLR 3025(b) (McKinney Supp. 1987).

539. See *id.*

540. See *id.*

541. See *Bellini v. Gersalle Realty Corp.*, 120 A.D.2d 345, 501 N.Y.S.2d 674 (1st Dep't 1986).

542. *Id.*

543. See *id.* at 346, 501 N.Y.S.2d at 676.

544. See *id.* at 347, 501 N.Y.S.2d at 677.

545. See *id.* at 346, 501 N.Y.S.2d at 676.

546. 109 A.D.2d 927, 486 N.Y.S.2d 402 (3d Dep't 1986); see also Note, *The Relation Back of Claims Against Third Party Defendants*, 118 CARDOZO L. REV. 281 (1986).

amend her complaint to assert a direct cause of action against a third-party defendant because she was apprised of the underlying lawsuit. The court stated: "[p]laintiff's amended complaint . . . involves the same transactions and facts as the underlying suit."<sup>547</sup> In *Martin v. Board of Elections*,<sup>548</sup> the Court of Appeals held that failure to name all necessary parties in the petition was a jurisdictional defect and because the statute of limitation had run, the amendment was prohibited and the petition dismissed.<sup>549</sup>

In *Stow v. City of New York*,<sup>550</sup> a city fire fighter sued the city to recover for personal injuries allegedly sustained while fighting a fire.<sup>551</sup> The city moved under CPLR 3025(b)<sup>552</sup> to amend its answer to include a denial of ownership of the building where the accident allegedly occurred.<sup>553</sup> The city had previously answered incorrectly, admitting ownership of the building.<sup>554</sup> The plaintiff's claim of prejudice was disregarded because he had earlier testified at an administrative hearing that he had actually known that another person owned the building.<sup>555</sup>

Finally, the practitioner should be careful, when moving to amend to add a new cause of action, to attach affidavits to his moving papers which particularize his reasons for the amendment.<sup>556</sup>

### VIII. JOINDER AND INTERVENTION

Several significant decisions during the *Survey* year effect

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547. *Duffy*, 109 A.D.2d at 929, 486 N.Y.S.2d at 404; see also *Buley v. Beacon Tex-Print, Ltd.*, 118 A.D.2d 630 499 N.Y.S.2d 782 (2d Dep't 1986) (while plaintiff's amendment to add a strict products liability claim to a personal injury action would prejudice the defendant, the defendant had knowledge of the underlying transaction from the original complaint and the proposed cause of action contained no factual allegations which were not set forth in the prior pleading).

548. 67 N.Y.2d 634, 490 N.E.2d 531, 499 N.Y.S.2d 664 (1986).

549. See *id.* at 635, 490 N.E.2d at 531, 499 N.Y.S.2d at 664.

550. 122 A.D.2d 45, 504 N.Y.S.2d 205 (2d Dep't 1986).

551. See *id.*

552. See N.Y. CPLR 3025(b).

553. See *Stow*, 122 A.D.2d at 45, 504 N.Y.S.2d at 205.

554. See *id.* at 46, 504 N.Y.S.2d at 206.

555. See *id.*

556. See *Liebman v. Newhouse*, 122 A.D.2d 252, 505 N.Y.S.2d 6 (2d Dep't 1986). Plaintiff's motion to amend his medical malpractice action to add a claim for wrongful death was denied, without prejudice, because the affidavit submitted by plaintiff was silent as to any malpractice by the defendant. The affidavit also failed to allege a causal connection between the malpractice and the decedent's death. See *id.*

joinder and intervention under Article 10 of the CPLR.

### A. Joinder

In *Martin v. Board of Elections*,<sup>557</sup> the Court of Appeals affirmed a decision of the supreme court dismissing the petitioner's suit for failure to name certain indispensable parties.<sup>558</sup> The petitioners sought to invalidate the nomination and designation by the Liberal Party of Walter F. Mondale for President and Geraldine A. Ferraro for Vice-President.<sup>559</sup> The petition named the chairman and secretary of the Liberal Party as respondents but failed to join other necessary party officers as defendants.<sup>560</sup> The petition would normally have been dismissible without prejudice under CPLR 1003 because these persons might have been inequitably affected under CPLR 1001<sup>561</sup> by a judgment in the action.<sup>562</sup> The Court held the defect in the initial pleading was jurisdictional and, because the statute of limitations had run, dismissed the petition with prejudice.<sup>563</sup> Thus, the practitioner should be careful to include all necessary parties when his complaint is filed. If he or she fails to do so, a timely amendment should be made.

In *Joanne v. Carey*,<sup>564</sup> the Appellate Division, First Department, reversing a decision by the supreme court, held that New York City municipal agencies were necessary or indispensable parties in an action brought by state psychiatric hospital patients.<sup>565</sup> The court emphasized that the controversy could be settled without considering the interest of the city agencies because the primary responsibility rests with the state for assuring that discharged state mental patients are properly placed.<sup>566</sup> Furthermore, joinder of these non-adversarial parties would impede and delay

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557. 67 N.Y.2d 634, 490 N.E.2d 531, 499 N.Y.S.2d 664 (1986).

558. *See id.*

559. *See id.*

560. *See id.*

561. *See* N.Y. CPLR 1001 (McKinney Supp. 1987).

562. *See* *Martin*, 67 N.Y.2d at 635, 490 N.E.2d at 532, 499 N.Y.S.2d at 655.

563. *See id.*

564. 115 A.D.2d 4, 498 N.Y.S.2d 817 (1st Dep't 1986).

565. *See id.* at 5, 498 N.Y.S.2d at 818.

566. *See id.* Moreover, the First Department pointed out that the primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter. The court concluded that because section 29.15 of the Mental Hygiene Law merely required the city agencies to cooperate with the state, they were not necessary parties. *See id.*

the disposition of the plaintiff's claims.<sup>567</sup>

### B. Intervention

Intervention is sometimes available as a right,<sup>568</sup> and sometimes in the court's discretion,<sup>569</sup> though it must always be sought by motion. Although courts are liberal in their allowance, several cases during the *Survey* year caution the practitioner to read CPLR 1012,<sup>570</sup> 1013<sup>571</sup> and 1014<sup>572</sup> carefully. First, in the absence of a timely motion made in accordance with CPLR 2214<sup>573</sup> and accompanied by a proposed pleading as required by CPLR 1014,<sup>574</sup> a court cannot entertain a request to intervene.<sup>575</sup> Second, courts can be expected to strictly interpret the requirements of CPLR 1012(a)(2).<sup>576</sup> Thus, in *Kaczmarek v. Shoffstrall*,<sup>577</sup> the Appellate Division, Fourth Department, refused to permit an insurer to intervene in a personal injury action even though its interests would not be adequately represented by the parties because of a possible conflict of interest.<sup>578</sup> The court, citing *Ryan v. New York Telephone Co.*,<sup>579</sup> rested its decision on the fact that under the principles of *res judicata*, the insurer would not be bound by the judgment.<sup>580</sup> Similarly, the court held that the insurer would not be collaterally estopped from litigating the issue of indemnification in a subsequent action because it would not be given a full and fair opportunity to contest the decision said to be dispositive.<sup>581</sup> The *Kaczmarek*<sup>582</sup> decision seems to be contrary to notions of judicial economy advanced by the Court of Appeals in *Ryan*<sup>583</sup> and *Gilberg*

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567. *See id.*

568. *See* N.Y. CPLR 1012 (McKinney Supp. 1987).

569. *See id.* § 1013.

570. *See id.* § 1012.

571. *See id.* § 1013.

572. *See id.* § 1014.

573. *See id.* § 2214.

574. *See id.* § 1014.

575. *See* *Rozewicz v. Ciminelli*, 116 A.D.2d 990, 498 N.Y.S.2d 613 (4th Dep't 1986).

576. *See* N.Y. CPLR 1012(a)(2).

577. 119 A.D.2d 1001, 500 N.Y.S.2d 902 (4th Dep't 1986).

578. *See id.* at 1001, 500 N.Y.S.2d at 903.

579. *See* *Ryan*, 62 N.Y.2d at 494, 467 N.E.2d at 487, 478 N.Y.S.2d at 823.

580. *See* *Kaczmarek*, 119 A.D.2d at 1002, 500 N.Y.S.2d at 903.

581. *See id.* at 1003, 500 N.Y.S.2d at 903.

582. *See id.* at 1001, 500 N.Y.S.2d at 902.

583. *See* *Ryan*, 62 N.Y.2d at 494, 467 N.E.2d at 487, 478 N.Y.S.2d at 823.

*v. Barbieri*.<sup>584</sup>

## IX. VENUE

The venue cases reported during the *Survey* year mainly involved a routine application of statutory provisions.<sup>585</sup> Worthy of note is *Thomas v. Small*,<sup>586</sup> where the court held that a defendant's proffer of the witnesses' names and addresses, their occupations, their expected testimony, and the materiality of that testimony was sufficient to show whether the convenience of the witnesses would be promoted by changing venue.<sup>587</sup>

The convenience of nonparty witnesses was addressed in *Troy Savings Bank v. American Equity Funding, Inc.*,<sup>588</sup> where the court held that to determine proper venue in a case where a party seeks to consolidate two separate actions that were brought in two separate counties, the overriding consideration is the location of the principal nonparty witness.<sup>589</sup> Consolidation cases, require a more precise analysis than nonconsolidated cases. For example, in *Heyco, Inc. v. Heyman*,<sup>590</sup> the court stated that the determination of whether an action should be transferred for the convenience of parties and witnesses depends upon a balancing of a multitude of

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584. See *Gilberg v. Barbieri*, 53 N.Y.2d 285, 424 N.E.2d 807, 441 N.Y.S.2d 49 (1981); see also *Carlisle*, *supra* note 423, at 87-98.

585. See *Brenner v. Joubert*, 118 A.D.2d 424, 499 N.Y.S.2d 87 (1st Dep't 1986). Venue was originally placed in New York County solely on the basis that the A-Corp maintained a place of business in that county. Nevertheless, the Appellate Division, First Department, granted a motion for change of venue under CPLR 510(3) because venue of a transitory action should ordinarily be in the county where the cause of action arises. This is especially so where the preponderance of witnesses resided in the county in which the action arose. See *id.*; see also *Ohesnstein v. LaGuardia Racquet Club, Inc.*, 118 A.D.2d 515, 500 N.Y.S.2d 177 (1st Dep't 1986) (county in which cause of action arose, and every nonparty witness resided, was proper county for venue rather than county in which the plaintiff resided); *McGuire v. General Elec. Co.*, 117 A.D.2d 523, 498 N.Y.S.2d 137 (1st Dep't 1986) (trial court abused its discretion in denying a motion for change of venue to the location where the cause of action arose even though venue as originally placed was not improper); *Tepper v. Feldman*, 117 A.D.2d 523, 498 N.Y.S.2d 65 (2d Dep't 1986) (Special Term did not abuse its discretion in granting a change of venue to the county where the cause of action arose and the trial calendar was less congested even though the motion for change of venue was made approximately one year after commencement of the suit).

586. 121 A.D.2d 622, 504 N.Y.S.2d 132 (2d Dep't. 1986).

587. See *id.* at 623, 504 N.Y.S.2d at 133.

588. 120 A.D.2d 828, 502 N.Y.S.2d 107 (3d Dep't 1986).

589. See *id.* at 829, 502 N.Y.S.2d at 109.

590. 636 F. Supp. 1545 (S.D.N.Y. 1986).

factors.<sup>591</sup> These factors include the ease of access to proof, availability of witnesses, where operative facts occurred, the location of particular documents, and the existence of a forum selection clause in the parties' contract.<sup>592</sup> This case-by-case balancing test is consistent with prior venue determinations,<sup>593</sup> but *Troy Savings Bank*<sup>594</sup> shows that the determination of proper venue for purposes of consolidation does not require as thorough a balancing test as generally required for venue determinations.<sup>595</sup> This issue of convenience is only addressed after venue is found to be proper.<sup>596</sup>

In *Ziegler v. Rieff*,<sup>597</sup> the court held that in federal admiralty practice, venue is proper in any district in which valid service of process may be made on the defendant.<sup>598</sup> This merger of the analysis of personal jurisdiction and service was also relied on in *New York Higher Education Services Corp. v. Melendez*.<sup>599</sup> In *Melendez*,<sup>600</sup> a guarantor brought an action seeking reimbursement from the debtor after the debtor defaulted in payment on a student loan.<sup>601</sup> Defendant moved to dismiss the action for lack of personal jurisdiction.<sup>602</sup> The court said that venue in the first instance was proper. The trial court, however, did not abuse its discretion in granting the defendant's motion for change of venue because the defendant raised a genuine issue of fact as to whether personal jurisdiction was ever obtained.<sup>603</sup> Consequently, even though personal jurisdiction and venue are separate doctrines, personal jurisdiction still plays a significant part in the determination of proper venue.

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591. See *id.* at 1548.

592. See *id.*

593. See 5 WEINSTEIN-KORN-MILLER, *supra* note 44, § 5.06[d].

594. See *Troy*, 124 A.D.2d at 828, 502 N.Y.S.2d at 107.

595. See *id.*

596. See 5 WEINSTEIN-KORN-MILLER, *supra* note 44, § 5011.10-5011.21.

597. 637 F. Supp. 675 (S.D.N.Y. 1986).

598. See *id.* at 676.

599. 120 A.D.2d 801, 501 N.Y.S.2d 539 (3d Dep't 1986).

600. See *id.*

601. See *id.*

602. See *id.*

603. See *id.*



## X. APPENDIX

*1986 CPLR Legislation*

<u>CPLR</u>	<u>SYNOPSIS</u>	<u>DATE AMEND- MENT AFFECTIVE</u>	<u>CHAPTER</u>
102	Reference to Judiciary Law § 229(3) was deleted.	7/17/86	334
208	Statutory change to make the ten-year maximum under the disability of infancy or insanity applicable to actions for podiatric malpractice.	7/21/86	485
214	Statutory change to exclude actions for podiatric malpractice from those actions which must be commenced within three years.	7/21/86	485
214(4),(5)	Statutory addition to add references to new section 214-c	7/30/86	682
214-a	Statutory addition to apply to actions for podiatric malpractice.	7/21/86	485
214-c	Statutory addition applicable to "substance" cases changing accrual from date of last exposure to date of discovery.	7/30/86	682
308	Repeal of portion of paragraph (5) relating to the entry of a default judgment in	1/1/87	77

	a nonpayment action to become new paragraph (3) of CPLR 3215(f).		
506(b)(2)	Statutory addition to include proceedings against the commissioner of taxation and finance and the tax appeals tribunal.	9/1/87	282
1206(b)	Statutory change of three thousand dollars as the value of the property which a court may order distributed to five thousand dollars.	9/1/86	125
1207	Statutory addition of the phrase "Unless otherwise provided by rule of the chief administrator of the courts."	7/17/86	355
1310	New paragraph 14 added including the special D.A. in charge of the office of Special Prosecutor, special narcotics court of New York City within the definition of "district attorney" for purposes of forfeiture actions.	11/1/86	8
1310(12)	Statutory change to add under sheriffs and deputy sheriffs of New York City to the definition of claiming agent for	11/1/86	174

	purposes of forfeitures.		
1349(d),(e)	Statutory change of paragraph (d) by replacing condition of a pre-conviction forfeiture crime with a felony; paragraph (e) was amended by replacing the condition of a post-forfeiture crime with "all other crimes."	7/1/86	231
1600	Joint liability rule partially abolished by addition of Article 16. Only personal injury and non-economic loss affected.	7/30/86	682
2212(c),(d)	Statutory change of subdivisions (c) and (d) by replacing references to the appellate division or appellate division rules with "chief administrator of the courts" and "rules of the chief administrator of the courts."	7/17/86	355
2213	Statutory change by including reference "chief administrator of the courts" instead of appellate division.	7/17/86	355
2217	Statutory addition allowing the chief administrator of the courts to exclude motions, by rule,	7/17/86	355

	within a department, district, or county from operations of CPLR 2217(a) and (c).		
2221	Statutory addition of new subdivision (b) allowing chief admin- istrator of the courts to exclude motions within department, district or a county from operation of CPLR 2221(a).	7/17/86	355
2306(a)	Statutory addition to allow full sized legi- ble reproduction of hospital records in response to a <i>sub- poena duces tecum</i> . Changes time for service of subpoena from twenty-four hours to three days before the time fixed for the production of records.	1/1/87	CH.4
3012-a	Statutory addition of section 3012-a relat- ing to certificates of merit in medical and dental malpractice actions.	7/8/86	266
3016	Statutory addition of new subdivision (h) requiring a verified complaint in actions based upon § 720(a) of the Not-For-Profit Corporation Law.	6/28/86	220
3045	Statutory addition	7/8/86	266

	entitled "Arbitration of damages in medical and dental malpractice actions."		
3101(d)(i)	Statutory change to provide that in actions for podiatric malpractice, a party responding to a request for pretrial disclosure of expert testimony may omit the names of podiatric experts.	7/21/86	485
3101(d)(ii)	Statutory change to provide that in podiatric malpractice actions a party may, without court order, take the testimony of a person authorized to practice podiatry who is the party's treating or retained expert.	7/21/86	485
3125	Statutory change to add phrase "Unless otherwise provided by rule of the chief administrator of the courts" to the beginning of the paragraph.	7/17/86	355
3130(1)	Statutory change of CPLR 3130(1) to allow service of written interrogatories after commencement of a matrimonial action.	9/1/86	257
3130(1)	Statutory change that parties cannot	8/21/86	467

	serve interrogatories on or conduct a deposition of the same party pursuant to CPLR 3107 without leave of court.		
3211-a	Statutory addition of paragraph (11) to provide for a motion to dismiss when a party is immune from liability under § 720(a) of the Not-For-Profit Corporation Law.	6/28/86	220
3214(a)	Statutory addition of the phrase "Unless the chief administrator of the courts has, by rule, provided otherwise" to the beginning of the paragraph.	7/17/86	355
3215(d)	Statutory change of reference to local court rules to rules "of the chief administrator of the courts."	7/17/86	355
3215(f)	Statutory addition of paragraph (3) relating to the additional notice required to take a default action in an action against a natural person based upon nonpayment of a contractual obligation.	1/1/87	77
3222(b)(3)	Statutory change to provide that either	7/17/86	355

	the supreme court or appellate division may determine a submission made to the supreme court; reference to special term was deleted.		
3401	Statutory change to replace the reference to the appellate division with "chief administrator of the courts" and replacing the phrase "supreme court in each department" with "courts of the unified court system."	7/17/86	355
3403(a)(5)	Statutory change to apply to podiatric malpractice actions.	7/21/86	485
3406(a)	Statutory change to apply to podiatric malpractice actions.	7/21/86	485
4102(d)	Statutory change to replace reference to appellate division with "chief administrator of the courts."	7/17/86	355
4111	Statutory addition of subdivision (f) requiring an itemized verdict in certain actions to recover damages for personal injury, injury to property or wrongful death.	7/30/86	682
4111(d)	Statutory change to apply to podiatric malpractice actions.	7/21/86	485

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4213(b)	Statutory change to apply to actions involving personal injury, injury to property or wrongful death.	7/30/86 485
4532	Statutory change to allow for the self-authentications of newspapers and periodicals of general circulation for purposes of admissibility at trial.	5/28/86 89
4545(a)	Statutory change to apply to podiatric malpractice actions.	7/21/86 485
4545(c)	Statutory addition of paragraph (c) to CPLR 4545, providing that in an action for injury to person or property or wrongful death, recovery will be reduced by the amount paid to plaintiff from any collateral source, such as insurance, social security, etc.	6/28/86 266
4546	Statutory addition relating to loss or impairment of earning ability in medical or dental malpractice actions.	7/30/86 266
5014	Statutory addition of paragraph allowing renewal judgments the year prior to the expiration of ten	9/1/86 123



	years since the first docketing of the judgment.		
5031	Statutory change to apply to podiatric malpractice actions.	7/21/86	485
5037	Statutory change to apply to podiatric malpractice actions.	7/21/86	485
50-B	Statutory additions of CPLR 5041 through 5049, enti- tled "Periodic pay- ment of judgments in personal injury, injury to property and wrongful death actions."	7/30/86	682
5205(h)(2)	Statutory change to exempt "service dogs" from property applicable to the sat- isfaction fo a money judgment.	7/21/86	404
5231(1)	Statutory change to reduce from six months to ninety days the amount of time for an account- ing of monies col- lected by a sheriff.	8/1/86	241
5501(c)	Statutory change to allow the appellate division to decide whether a money judgment is an ac- tion in which an itemized verdict is required under CPLR 4111 is exces- sive, inadequate or	7/30/86	682

	unreasonable.		
5522	Statutory addition of subdivision (b), requiring the appellate division, in appeals for money judgments in actions where an itemized verdict is required under CPLR 4111, to set forth in its decision the reasons it found such award to be excessive or inadequate.	7/30/86	682
5601(d)	Statutory change to allow appeal to the Court of Appeals as of right from a final arbitration award.	1/1/87	316
5602(1)(a)	Statutory change to allow appeal to the Court of Appeals by permission in actions originating in an arbitration from a final arbitrator's award.	1/1/87	316
7002(b)(1),(5)	Statutory change deleting references to special term.	7/17/86	355
75-A	Statutory addition of Article 75-A, entitled "Health Care Arbitration" and comprising CPLR 7550 through 7565.	7/8/86	266
7804(b),(h)	Statutory change by deleting references to special term.	7/17/86	355
8303-a(a)	Statutory addition to allow for costs upon	6/28/86	220

frivolous claims and counterclaims, and statutory deletion of references to dental and medical malpractice.

8303-a(a)	Statutory change to apply to podiatric malpractice actions.	7/21/86	485
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9002	Statutory addition of the phrase "Unless otherwise provided by rule of the chief administrator of the courts" at the beginning of the second sentence.	7/17/86	355
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