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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

Vol. 74 / No. 4 / January 2011

Criminal Law: Cases

BY ILENE J. REICHMAN

Ilene J. Reichman

During this past year, the New York Court of Appeals rendered several decisions of interest to criminal law practitioners. Some of the more significant opinions are highlighted in this article.

In *People v. Reome*, 15 N.Y.3d 188 (2010) (decided June 17, 2010), the Court of Appeals clarified the standard for determining when an accomplice's testimony is sufficiently corroborated pursuant to Criminal Procedure Law § 60.22 (1). In *Reome*, the defendant was charged along with three accomplices of rape. At trial, one of those accomplices testified to the events surrounding the offense, including the defendant's participation. However, the victim was unable to identify the defendant as one of the perpetrators. The defense argued that the evidence fell short of satisfying the statutory requirement for corroboration which requires "corroborative evidence tending to connect the defendant with the commission of such offense". The Court of Appeals disagreed and held that there was sufficient corroboration of the accomplice's testimony. In so ruling, the Court held that the victim and the accomplice gave detailed and substantially similar accounts of the offense and that this "harmonizing evidence" provided a "substantial basis for crediting" the accomplice's testimony.

In *People v. Carncross,* 14 N.Y.3d 319 (2010) (decided March 26, 2010), the Court of Appeals upheld the trial judge's disqualification of a defense attorney, in spite of the defendant's expressed willingness to waive any potential conflict of interest. In *Carncross*, the defendant was charged with manslaughter, criminally negligent homicide and reckless driving in connection with the death of a state trooper who was killed in a collision as he attempted to pull the defendant's motorcycle over. When the case was presented to the grand jury, the prosecutor called the defendant's father and girlfriend, both of whom were represented by one of the defendant's retained attorneys who appeared with them in the grand jury room while they testified. Defendant's father testified that when the defendant returned home on the night in question, he told him not to let him ride his motorcycle until he was properly licensed because he was nearly pulled over by the police. Defendant's girlfriend testified that the defendant phoned her shortly after the incident and told her that he was the motorcyclist the police were looking for, and that he thought he was going to jail because a trooper had died.

Prior to trial, the prosecution moved to disqualify *Carncross*' attorney and her partner because of the potential conflict of interest arising out of their representation of the defendant's father and girlfriend in the grand jury. After the trial judge appointed independent counsel to confer with the defendant, that counsel advised the judge that the defendant understood the nature of the conflict and was willing to waive it. Despite that representation, the trial judge granted the prosecution's motion and relieved *Carncross*' defense attorney. Neither the defendant's father nor his girlfriend testified at trial.

In ruling that *Carncross*' Sixth Amendment right to counsel of his choice had not been violated by the trial judge's disqualification of his defense attorney, the Court of Appeals held that even though the defendant's father and girlfriend did not testify at trial, it was reasonable to assume that they would be called as witnesses at the time the disqualification motion was being considered. Given that likelihood, defense counsel surely would have been required to cross-examine them, placing counsel in a very awkward position since she still owed them a duty of loyalty. Under those circumstances, the trial judge acted within his discretion in concluding that allowing defense counsel to continue would severely undermine the defendant's ability to present a cogent defense.

In *People v. Assi*, 14 N.Y.3d 355 (2010) (decided March 30, 2010), the defendant challenged the scope of the Hate Crimes Act - Penal Law §§ 480.05 and 480.10. In *Assi*, the defendant was charged with the attempted arson of a synagogue at approximately 3:00 a.m. Following his arrest, the defendant's car was searched and the police recovered latex gloves and a towel that had been torn to make a Molotov cocktail wick. When he was questioned by the police, the defendant admitted to his participation in the attempted arson and explained that he was angry that a Palestinian child had been shot by the Israeli Army and that the "rich Jews in Riverdale send money over there and they buy guns and they are killing people".

The Court of Appeals rejected *Assi's* argument that article 485 of the Penal Law applied only to crimes against persons, not property, and that the attempted arson of a synagogue did not qualify as a hate crime. In so ruling, the Court noted that although Penal

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CPLR Update 2011

David H. Rosen

BY DAVID H. ROSEN, ESQ.

David H. Rosen served in the Supreme Court, Queens County, as Principal Law Clerk to Justice Arthur W. Lonschein from 1980 to 2000, and as Court Attorney/Referee from 2001 to 2010. Any comments may be addressed to davidhrosenesq@gmail.com

Appellate Practice

A party who stipulates to a modification of damages – up or down – is no longer aggrieved by the modification and may not appeal from it. [1] Recent Court of Appeals decisions in *Whitfield v City of New York* and *Batavia Turf Farms v County of Genesee*[2] expanded on this rule, holding that such a party had stipulated away its right to appeal on any further issues, even on unrelated causes of action. The rationale of these expanded holdings was that since the stipulation was a condition to the issuance of the order actually appealed from, the stipulating party had consented to the order and could not be aggrieved by it. The Court of Appeals has now limited the rule to the original holding, abandoning the more expansive rulings.

Adams v Genie Indus., Inc.,[3] was a products liability action, involving a personnel lift which plaintiff contended was defectively designed. The jury found for the plaintiff. The trial court, among other things, ordered a new trial on damages unless the defendant stipulated to an increase in total damages of $750K. After the Appellate Division affirmed the trial court's order, the defendant stipulated to the additur and appealed to the Court of Appeals. There it raised issues of liability only, not damages, arguing that the design had not been defective and that the jury instructions had been improper. Plaintiff sought to have the appeal dismissed based on the stipulation, relying on the existing precedent.

The Court of Appeals revisited the issue of aggrievement, and concluded that its earlier holdings were unfair to the stipulating party. Where the stipulation was to damages only, unrelated to the issues raised on the appeal, the stipulating party was indeed an aggrieved party as to the issues actually involved and the stipulation did not bar the appeal. The earlier results were "counterintuitive" and the stipulating party might well fail to anticipate that by removing the issue of damages from further appeals it had forfeited those appeals. The Court held that while its original holding, that the stipulation barred appeal on the damages issue, remained valid, the more expansive holdings of *Whitfield* and *Batavia* should not be followed.

Having won on the aggrievement issue, the defendant found no further relief in the Court of Appeals. The Court found sufficient evidence to support the verdict and, while agreeing that certain jury instructions had been erroneous, found the errors to have been

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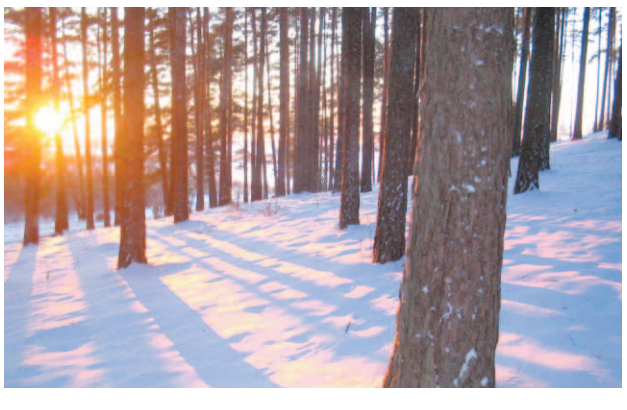
QCBA Donates Toys To Forestdale

Nicole McGregor-Mundy-President, Queens County Women's Bar Assn, Donna Fur ey-President, Flushing Lawyers Assn, Lawrence Litwack-President, Brandeis Assn, Ron LaLande-President, Macon B. Allen Black Bar Assn, Chanwoo Lee-President, Queens County Bar Assn and Nestor Diaz-President (outgoing), Latino Lawyers Assn of Queens County



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being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2011 Winter CLE Seminar & Event Listing

January 2011

Monday,	January 17	Martin Luther King, Jr.'s Birthday, Office Closed
Monday,	January 31	Stated Meeting

February 2011

Tuesday,	February 8	MHL Article 81/Guardianship Training for the Layman
Tuesday,	February 15	Farrell Fritz Seminar PC: Employment Law 2011
Wednesday,	February 16	QVLP Foreclosure Training

March 2011

Wednesday,	March 2	CPLR Update (Tentative)
Wednesday,	March 9	Immigration Seminar
Wednesday,	March 23	Basic Criminal Law - Pt 1
Wednesday,	March 30	Basic Criminal Law - Pt 2

April 2011

Wednesday,	April 6	Equitable Distribution Update
Monday,	April 11	Past Presidents, Golden Jubilarians & Judiciary Night
Thursday,	April 14	Civil Court Committee Seminar
Friday,	April 22	Good Friday, Office Closed
Thursday,	April 28	Membership/Young Lawyers/Mentoring Event

May 2011

Thursday,	May 5	Annual Dinner & Installation of Officers
Tuesday,	May 17	Bankruptcy Seminar (Tentative)

CLE Dates to be Announced

Elder — Juvenile Justice
Labor — Lawyer's Assistance
Surrogate's Court, Estates & Trusts

New Members

Naeem Bawla
Jeffrey M. Benjamin
Joshua A. Bernstein
Kenneth O. Britt
Paul E. DuBois
Daniel Schlein
Rory G. Schnurr
Marc Lewis Schwartz

Necrology

Hon. Steven W. Fisher
Ronald S. Melnyk
Spencer Steele

QUEENS COUNTY BAR ASSOCIATION
90-35 148th Street, Jamaica, New York 11435 • Tel 718-291-4500 • Fax 718-657-1789

Chanwoo Lee, President
Program Committee Chair
Joseph Carola, III

STATED MEETING

FORECLOSURE CONFERENCE UPDATE

Monday, January 31, 2011
5:30 P.M. - 8:00 P.M.

PROGRAM

Foreclosure Settlement Conferences:
Created by statute over 2 years ago –
Where do we stand today?

SPEAKERS

Queens Volunteer Lawyers Project Foreclosure Staff
More to be announced.

COCKTAILS & BUFFET DINNER - $30.00
5:30 p.m. to 6:45 p.m.

PROGRAM - FREE
6:50 p.m. to 7:50 p.m.

FREE PARKING: Available on a first serve basis at 148-15 89th Avenue between 148th & 150th Streets.

To Reserve for the Stated Meeting: Monday, January 31, 2011

Fax or Mail to: Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435 Fax: 718-657-1789

I will be attending: ___DINNER ($30): 5:30 - 6:45 PM ___PROGRAM (FREE): 6:50 - 7:50 PM

Pay by: ___Check ___MC ___Visa ___AMEX ___Disc Authorized Signature: _____

Card #: _____ Exp Date ____/____/____ Amount: $ _____

Name: _____

Address: _____

Tel. No.: _____ Email: _____

Publisher:
Long Islander Newspapers, LLC. under the auspices of Queens County Bar Association.
Queens Bar Bulletin is published monthly from October to May.

Advertising Offices:
Long Islander Newspapers,
149 Main Street, Huntington,
New York (631) 427-7000

Send letters and editorial copy to:
Queens Bar Bulletin, 90-35 148th Street,
Jamaica, New York 11435

Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 252-520) is published monthly except June, July, August and September by Long Islander Newspapers, LLC., 149 Main Street, Huntington, NY 11743, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

President's Message

Strategic Planning Session

I want to thank everyone who made this day-long planning meeting a success, starting with Elizabeth Derrico, who ably facilitated. In addition to the Board of Managers, Arthur Terranova, Executive Director; past presidents David Adler, David Cohen and John Dietz; and newly-admitted attorney Mohammad Saleem all participated. Your work will help QCBA's Executive Board and Board of Managers to maintain continuity and progress toward our goals, even as officers and managers change.

Looking at Tragedy through Dr. King's Eyes

This year, the celebration of Dr. Martin Luther King's birth was marred by the senseless violence that took six innocent lives in Tuscon, Arizona, including those of a judge and a 9-year-old girl. We need to reflect on, and understand, what caused one person to harbor the hatred that led to this killing spree. We also need to choose our own responses to this tragedy carefully.

I believe that, if Dr. King was alive today, his response would be aligned with the Nobel Prize Acceptance Speech that he gave in Oslo, Norway on December 10, 1964. In his speech, Dr. King affirmed that, for people to live together in peace, "Man must evolve, for all human conflict, a method which rejects revenge, aggression and retaliation." I hope that, in the face of this tragedy, and in spite of our national divisions, we will reject complacency and despair, and instead aspire to Dr. King's, "abiding faith in America and ... audacious faith in the future of Mankind."

Chanwoo Lee

News and Upcoming Events

The Queens County Court System recently lost two great people. Our sincere **CONDOLENCES** and prayers go to their families and friends:

Honorable Steven Fisher, Associate Justice of the Appellate Division, Second Department, was a long-time member of the QCBA, and well-respected by all who knew him for his great knowledge of the law, his passion for justice, and his eloquent communication skills. As Gail Prudenti, Presiding Justice for the Second Department, stated, "If there is one lesson to be learned from the judicial legacy of Justice Steven W. Fisher, it can be taken from quotes he used during induction ceremonies for newly admitted lawyers over which he presided: *'There is no freedom without the law'* and *'There is no law without men and women dedicated to its service."*

Honorable Gloria D'Amico became the **County Clerk** of the County of Queens in 1991. Her term was marked by many improvements to the juror experience, including the jury duty call-in system (first implemented in NYC by Queens) that allowed potential jurors to find out if they had to serve by placing a telephone call.

QCBA extends **CONGRATULATIONS**, and looks forward to working with:

Honorable Peter Kelly, Surrogate of Queens County

Tracy Fox-Catalano, **Clerk to the Civil Court, County of Queens** (Tracy is a member of QCBA's Board of Managers.)

Upcoming CLE Sessions:

February 8, 2011,
Guardianship, MHL Article 81 Training

February 15, 2011,
Employment Law 2011

March 9, 2011,
Immigration Law Update 2011

And Finally...

I hope that all of you will partake in QCBA's journey to improve the service we provide to you. Whether your interests and talents tend toward computer technology, IT, public relations, CLE, creative ideas for social activities, or another area, I encourage you to contact me or the QCBA about getting involved.

Your skills, passion and participation will help us make this Year of the Rabbit our best year yet. I look forward to working with you soon!

Chanwoo Lee
President

Family Law Update - 2010

BY MICHAEL DIKMAN & DAVID DIKMAN

During the past year, by far the most noteworthy developments in this field were statutory. The most significant new laws are reviewed below, followed by some other miscellaneous new laws and a discussion of the important decisions handed down in 2010.

LEGISLATION

RETIREMENT ACCOUNTS
IN PAY STATUS LAW
S 5588-A

This law (Chapter 32 of the Laws of 2009) was approved on March 10, 2010 but deemed effective as of September 1, 2009. It amends DRL § 236B (2) (b) (2) to add to the prior prohibition against removal or disposition of retirement accounts or funds an exception - "except that any party who is already in pay status may continue to receive such payments..."

NO FAULT LAW
S 3890-A; A 9753-A
Laws of 2010 Chapter 384

This much-publicized legislation was signed on August 13, 2010, finally adding New York State to all of those others which have had No Fault divorce laws for years. DRL § 170 was amended by adding a new subdivision 7. The old language provides that:

"An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:"

and follows with the prior grounds: 1) Cruel and inhuman treatment; 2) Abandonment; 3) 3 years of prison confinement; 4) Adultery; 5) 1 year of separation pursuant to a separation judgment; and 6) 1 year of separation pursuant to a separation agreement. The new subdivision 7 reads as follows:

"THE RELATIONSHIP BETWEEN HUSBAND AND WIFE HAS BROKEN DOWN IRRETRIEVABLY FOR A PERIOD OF AT LEAST SIX MONTHS, PROVIDED THAT ONE PARTY HAS SO STATED UNDER OATH. NO JUDGMENT OF DIVORCE SHALL BE GRANTED UNDER THIS SUBDIVISION UNLESS AND UNTIL THE ECONOMIC ISSUES OF EQUITABLE DISTRIBUTION OF MARITAL PROPERTY, THE PAYMENT OR WAIVER OF SPOUSAL SUPPORT, THE PAYMENT OF CHILD SUPPORT, THE PAYMENT OF COUNSEL AND EXPERTS' FEES AS WELL AS THE CUSTODY AND VISITATION WITH THE INFANT CHILDREN OF THE MARRIAGE HAVE BEEN RESOLVED BY THE PARTIES, OR DETERMINED BY THE COURT AND INCORPORATED INTO THE JUDGMENT OF DIVORCE."

The effective date of this law was October 12, 2010, 60 days after the August 13, 2010 signing) and it is applicable to actions and proceedings commenced on and after that effective date.

COUNSEL FEE LAW
S 8391; A 7569A
Laws of 2010 Chapters 329 & 415

This law, signed at the same time as the No Fault law, amends DRL § 237 (a) and (b), the sections which previously authorized the court to award counsel fees in various matrimonial matters. This new law creates a "rebuttable presumption" that counsel fees shall be awarded to the less monied spouse. It is further specified that:

"Both parties to the action or proceeding and their respective attorneys shall file an affidavit ... detailing the financial agreement between the party and the attorney" and shall include "the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses."

Payment of any retainer shall not preclude awards that would otherwise be allowed.

Subdivision (b) is amended by adding the same types of provisions, in connection with enforcement, modification, custody and visitation matters, including the rebuttable presumption language, timely awards and the filing of the affidavit by both parties, reflecting all counsel fee arrangements.

DRL § 238 was also amended by this law. This section applies to enforcement and modification proceedings as well as those to declare the nullity of a divorce judgment rendered against a spouse who was a non-appearing defendant in any action outside N.Y., and to injunctions to restrain the prosecution of a divorce action in any other jurisdiction. All of the provisions above are carried forward: rebuttable presumption; timely orders, affidavits, etc.

This was initially to be effective 120 days after signing. However, an amendment was signed (Chapter 415) advanced the effective date to 60 days after signing (October 12, 2010) and applies to actions and proceedings commenced on and after that date.

"LOW INCOME SUPPORT OBLIGATION & PERFORMANCE IMPROVEMENT ACT"
S 5570-A; A 8952
Laws of 2010 Chapter 182

This act Amends the DRL, FCA, Tax Law & SSL relative to the modification of child support orders, employer reporting of new hires and quarterly earnings, work programs and the noncustodial income tax credit.

§ 1 - Establishes the "Short title" of the Act, quoted above.

§ 2 - Amends Tax Law § 606 (d-1) by adding a new ¶ 8, which requires a report from the Commissioner to the Office of Temporary and Disability Assistance, regarding data on tax filings and claiming and receiving of credits under the section, in order to analyze the impact of the credit and effect on child support payments.

§ 3 - Amends Tax Law § 171-a (1). In connection with the department developing a wage reporting system, language was added providing that employers "also shall report if dependent health insurance benefits are available."

§ 4 - Amends Tax Law § 171-h (3) (a) and (b), which requires employers to furnish the state directory with a report regarding new hirings, by adding in (a) that "Employers also shall report if dependent health insurance benefits are available and the date the employee qualifies for the benefits." Subdivision (b) is amended to include the type of forms on which to make the report of this additional data.

§ 5 - Amends Tax Law § 697 (e) (3) regarding the data that is permitted to be sent by the tax department to the Office of Temporary and Disability Assistance. There is added the enhanced earned income credit under § 606 (D-1). (There follows some 5 pages of reprinting of the balance of the amended section, unchanged.

§ 6 - FCA § 451 is amended. This is the section that authorizes the court to have continuing jurisdiction to modify its orders and provides for no retroactive child support modifications prior to application.

2 is new and provides that:

(A) The court may modify a child support order, including "an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment."

(B) In addition, unless the parties have opted out of the following provisions in a valid agreement, the court may modify a child support order where:

"(I) 3 years have passed since the order was entered, last modified or adjusted; or

(II) There has been a change in either party's gross income by 15% or more since the order was entered, last modified or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience."

§ 7 - DRL § 236 B (9) (b) is amended. This section, which authorizes support modifications (including agreed maintenance, based on extreme hardship) had a new subdivision (2) added. First, language is added, identical to the subdivision (A) & (B) language in FCA § 451. (See § 6 above). In addition, a new subdivision (III) is added, providing that child support modifications cannot reduce or annul arrears which accrued prior to the application, how retroactive arrears are to be made payable and enforced, including income executions, and further providing that SCU enforce arrears for recipients of public assistance, through an execution.

§ 8 - Amends FCA § 440 (4), the section dealing with support orders made pursuant to Supreme Court references and the 8 point bold notices that are required, is amended to add a new subdivision (B), requiring that notice advise of the right to seek modification of a child support order upon a showing of:

(I) A substantial change in circumstances, or

(II) 3 years since last order or modification), or

(III) a 15% change in either party's gross income since the last order.

However, "if the parties have specifically opted out of subparagraph II or III" in a valid agreement, that basis for a modification will not apply.

§ 9 - Amends DRL § 236 (B) (7) by adding a new subdivision (d) which requires that any child support order must include on its face in 8 point bold type a notice "informing the parties of their right to seek a modification of the child support order upon a showing of (I, II or III) above, with the proviso that bases II & III will not apply in case of a valid opt out agreement.

§ 10 - The FCA is amended by adding a new section § 437-A. Except for people on Disability or SSI, this gives the court the power to send unemployed respondents to work programs, job training, etc.

§ 11 - Social Services Law § 111-h adds a new

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subdivision 20, precluding SCU from seeking to increase an award for one sent to a work program, for a year.

§ 12 - Amends FCA § 461 (b) refers to orders under § 451.

This was to be effective 90 days after its July 15, 2010 signing (October 13, 2010) except that § 6 & 7 apply to modification proceedings to modify child support orders entered on or after that effective date, with the further exception that if the order incorporated a surviving agreement, the agreement would have to have been signed on or after the effective date. Finally, § 3 & 4 are to be effective 1 year after signing (July 15, 2011).

What does all this mean? The provisions which will be most important to us are those that change the game in connection with child support modifications. Older practitioners will recall that prior to 1977, when we had agreements signed containing child support provisions, we could never rely upon the provisions remaining effective in the future. We always had to explain that child support could be modified in the future, based upon any substantial change of circumstances, agreement, survival, or not. The burden was not much different from that required when seeking to modify court ordered child support, without an agreement. That all changed in 1977, when our highest court decided Boden v. Boden, 42 N.Y0. 2d 210, 397 N.Y.S. 2d 701. The Court made very clear that child support agreements were not to be lightly modified, and in fact limited modifications to cases where there was an "unreasonable or unanticipated change of circumstances". After modification applications were turned away in droves, the Court softened its position, and made a further exception - that child support in surviving agreements could be modified if it was determined that the child's needs were not being met. Brescia v. Fitts, 56 NY 2d 132. This remained the law for a long time, and we could advise our clients that absent some unanticipated or unreasonable change of circumstances, as long as the child's needs were being met, the child support would remain in place. We always feel more confident when the law provides some precision and certainty. But, in the package of bills signed this summer, this one ended all that and returned us to pre-1977! Look again at Sections 6 and 7. Initially, the Family and Supreme courts are now authorized to modify child support orders, including "an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. So, no more Boden v. Boden, supra. It's dead! No more certainty. It's gone! Any substantial change of circumstances can result in a child support modification. But going beyond that, we have the other two components - merely the passage of three years gives a basis for coming back to court, or a 15% change in either party's gross income. So we have come more than full circle over the 33 year period since Boden. We are now back to the day when modifications based on substantial changes of circumstances can result in modified child support - surviving agreement or not. Presumably this modifiability cannot be waived, since the law specifically gives the parties the right to opt out of only the "3 year" and "15% change of income" basis for modification.

Otherwise, we have additional reporting provisions for employers, the codification of some case law, concerning modifications upon a reduction in income (must be involuntary and accompanied by diligent attempts to be re-employed) and in cases where there has been an incarceration. All things considered, this law seems to have ushered in more work for the lawyers and the courts, by making modifications easier to obtain.

One question has already been posed. Several sections of the prior law, including DRL § 240-c, FCA § 413-a and SSL § 111-n, provide for the Support Collection Unit, both for support recipients on public assistance and others who make the request, to make bi-annual cost of living adjustments to support orders. These adjustments, if not challenged, are made in the event the U.S. Dept. of Labor's Bureau of Labor Statistics Consumer Price Index increases 10% or more from the date of the last order or adjustment or two years from the last order, whichever is later.

The question is: What, if any interplay is there between these bi-annual reviews, when SCU is involved, and the 3 year period, after which a modification proceeding can be commenced. The answer is: There is nothing in the new law that relates to these cost of living adjustments.

The only mention is in § 11 - Social Services Law § 111-h which, as I said, precludes SCU from seeking to increase an award for one sent to a work program, for a year.

To the contrary, the DRL & FCA sections specifically contain a subdivision (4), which says: "Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as otherwise provided by law".

Bear in mind that the SCU bi-annual review is supposed to be done administratively, whereas the 3 year passage of time, involved in this new law, only gives one the right to seek a modification - but does not mean he or she will get it.

MAINTENANCE LEGISLATION
A 10984, S 8390
Laws of 2010 Chapter 371

We have saved the WORST (in our opinion) for last! Having worked out the computations required by this law, establishing "guidelines" for maintenance fixation, in most cases the results appear to be unreasonable, particularly when factoring in a child support obligation. Excuse the length of this section of the article. We didn't write the law, we are only trying to bring its provisions to the attention of the bar. A summary of the provisions (without commentary), follows.

This law amends DRL § 236B, adding new sections 5-a & 6-a.

§ 1 - Sets forth the new Subdivision 5-a.

A) Absent an agreement pursuant to subdivision (3), in any matrimonial action temporary maintenance awards are to be pursuant to this subdivision.

B) Definitions:
1) PAYOR: the spouse with the higher income.
2) PAYEE: the spouse with the lower income.
3) LENGTH OF MARRIAGE: date of marriage to the date of commencement.
4) INCOME:
A) As defined in CSSA (DRL § 240 & FCA § 413) &
B) Income from income producing property that is to be distributed pursuant to subdivision (5).
5) INCOME CAP: Up to and including $500,000 of the payor's annual income, provided that commencing 1/12/12 & every two years thereafter the payor's "annual income amount" (PROBABLY SHOULD HAVE SAID INCOME CAP) shall increase by CPI annual percentage changes for all urban consumers (per U.S. Dept. of Labor Bureau of Labor Statistics, for the 2 year period, rounded to the nearest $1,000. OCA shall determine and publish the income cap.
6) GUIDELINE AMOUNT OF TEMPORARY MAINTENANCE: The result of applying ¶ C of this subdivision.
7) GUIDELINE DURATION: The period determined by applying ¶ D of this subdivision.
8) PRESUMPTIVE AWARD: The guideline amount of temporary maintenance award for the guideline duration, prior to the application of any adjustment factors in ¶ 1 (E) of this subdivision.
9) SELF-SUPPORT RESERVE: as defined in CSSA (DRL § 240 & FCA § 413).
C) Court shall determine the guideline amount of temporary maintenance in accordance with this ¶, after determining the income of the parties:
1) If the payor's income is up to and including

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the cap:

A) Court shall subtract 20% of the payee's income from 30% of the payor's income up to the cap.

B) Then multiply the sum of the payor's income and all of the payee's income by 40%.

C) Then subtract the payee's income from the figure derived from clause (B).

D) The guideline amount shall be the lower of the amounts determined by (A) & (C). If the amount determined by clause (C) is 0 or less, the guideline = 0.

2) If the payor's income exceeds the cap:

A) The court determines the guideline amount on the income up to the cap pursuant to subdivision (1), and for the income in excess of the cap the court determines the additional guideline amount by considering the following factors:

(I) The length of the marriage;

(II) The substantial differences in the parties' incomes;

(III) Standard of living established during the marriage;

(IV) Age and health of the parties;

(V) Present & future earning capacity of the parties;

(VI) The need of one party to incur education or training expenses;

(VII) Wasteful dissipation of marital property;

(VIII)Transfer or encumbrance without fair consideration, in contemplation of a matrimonial action;

(IX) The existence and duration of a pre-marital joint household or a pre-divorce separate household;

(X) Acts by one that inhibited or inhibit a party's earning capacity or ability to obtain meaningful employment, including but not limited to domestic violence (pursuant to SSL § 59-A);

(XI) The availability and cost of medical insurance for the parties;

(XII) The care of children or step children, disabled adult children, stepchildren, elderly parents or in-laws that has inhibited or inhibits a party's earning capacity or ability to obtain meaningful employment;

(XIII) The inability of one party to obtain meaningful employment due to age or absence from the work force;

(XIV) The need to pay for exceptional additional expenses for the child or children, including but not limited to schooling, day care and medical treatment;

(XV) The tax consequences to each party;

(XVI) Marital property subject to division pursuant to subdivision 5;

(XVII) The reduced or lost earning capacity of the applicant as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(XVIII) Contributions and services of the applicant as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(XIX) Any other factor the court expressly finds to be just and proper.

B) In any decision pursuant to this sub-paragraph the court shall set forth the factors considered and the reasons for its decision, which cannot be waived by parties or counsel.

3) But, where guideline amount would reduce the payor's income below the self-support reserve for a single person, the presumptive guideline amount shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is to be awarded.

D) The court determines the guideline duration for temporary maintenance in consideration of the length of the marriage. Temporary maintenance shall terminate upon the issuance of a final maintenance award or the earlier death of either party.

E) (1) The court shall order the presumptive temporary maintenance pursuant to ¶ (C) & (D) unless it finds it to be unjust or inappropriate and adjusts the presumptive award in consideration of the following factors:

(HERE FACTORS A THROUGH Q ARE LISTED AND ARE EXACTLY THE SAME AS IN SUBDIVISION (C) (2) (A), FACTORS III THROUGH XIX, INEXPLICABLY OMITTING I [The length of the marriage] and II [The substantial differences in the parties' incomes].

2) In any decision where the court finds the presumptive temporary maintenance award is unjust or improper court and an adjustment is made pursuant to this ¶, the court shall set forth the amount of the unadjusted presumptive award, the factors considered and the reasons that the court adjusted the presumptive award, which cannot be waived by parties or counsel.

(3)Where either party is unrepresented, no temporary maintenance award shall be entered until the unrepresented party(ies) are informed of the presumptive amount of temporary maintenance.

F) After the effective date, a valid agreement in an action commenced after the effective date, to be entered as an order, shall include a provision stating that the parties have been advised of the provisions of this subdivision and that the presumptive award results in the correct amount of temporary maintenance. If the agreement deviates from the presumptive amount, the agreement must set forth the presumptive amount and the reasons why the agreement does not provide for that amount, which may not be waived. Nothing herein shall be construed to alter the rights of the parties to enter agreements that deviate, provided they comply with this subdivision.

The court retains discretion regarding temporary and post divorce maintenance awards pursuant to this section. Any court order, incorporating an agreement which deviates, must set forth the court's reasons for such deviation.

G) When a party defaults and/or the court is otherwise presented with insufficient evidence to determine gross income, temporary maintenance will be based upon the needs of the payee or the standard of living prior to commencement, whichever is greater. Such an order may be retroactively modified upward without a showing of a change of circumstances, upon a showing of newly discovered or obtained evidence.

H) In any action to modify a maintenance order made prior to the effective date, the temporary maintenance guidelines shall not constitute a change of circumstances warranting a modification.

I) In any decision pursuant to this subdivision, the court shall consider the effect of any barrier to remarriage, where appropriate.

§ 2 DRL § 236B (6) (subparagraphs 10, 11 & 12) are amended to read:

6) "POST DIVORCE MAINTENANCE AWARDS" (re-states the law as is - up to factor # 3, then adds the above factors and includes some original ones, so as to include all of the above (I - XIX).

The balance of original subdivision 6 is unchanged.

§ 3 Sets forth the new Subdivision 6-a:

A) It is State policy to achieve equitable outcomes and fairly shared economic consequences for divorcing couples. There are serious concerns that the maintenance laws have not led to equitable results, and they have been inconsistent and unpredictable. A comprehensive review of the state's maintenance laws should be undertaken.

B) The Law Revision Commission is directed to:

1) Review and assess the economic consequences of divorce on parties;

2) Review the maintenance laws and their administration to determine their impact on post marital economic disparities and the laws' effectiveness in achieving the state's goals; and

3) Recommend legislation deemed necessary to achieve those goals.

C) A preliminary report to the Legislature & Governor no later than 9 months from the effective date and a final report by December 31, 2011.

§ 4 Amends DRL § 236B (1) (a) to include in the definition of "maintenance" the provisions of the new subdivision 5-A.

§ 5 Chief administrator of the courts is to promulgate all rules necessary to implement this act.

§ 6 The law takes effect immediately, except for Sections 1, 2 & 4, which will be effective 60 days after the August 13, 2010 signing (October 12, 2010) and it is to apply to all matrimonial actions commenced on or after that date.

* * * * * * *

Now for the commentary (assuming the husband to be the payor spouse). The complicated "rules" for computing the guideline amount can be much more simply stated as follows:

1) If the wife has no income, the temporary maintenance guideline will be 30% of the husband's income (as computed under the CSSA)

2) If the wife has some income, the guideline amount will be the lower of:

a) 30% of the husband's CSSA income less 20% of the wife's;

b) 40% of the combined CSSA income, less the wife's income.

In order to get some rough idea as to how these rules would work, we did some sample computations, based upon certain assumptions: That the husband was in a 40% tax bracket, that the wife was is a 35% bracket and that there were two children. The results were so startling that they can hardly be discussed without presenting the 9 income scenarios arbitrarily selected, the results and the computations in each case.

SAMPLE CALCULATIONS, ASSUMING A 40% FEDERAL TAX BRACKET FOR HUSBAND AND 35% FOR WIFE

Husband's CSSA Income	Wife's CSSA Income	H income after maint, C.S. & 40% Fed. taxes	W income after maint, C.S. & 35% TAXES
1) $100,000	0	$ 24,500	$ 37,000
2) $100,000	$ 50,000	31,500	61,500
3) 200,000	0	49,000	74,000
4) 200,000	50,000	52,500	102,500
5) 200,000	100,000	63,000	123,000
6) 500,000	100,000	129,500	242,000
7) 100,000	75,000	35,000	73,750
8) 500,000	250,000	157,500	307,500
9) 70,000	25,000	19,950	38,950

1) Income of H after CSSA deductions $100,000
Income of W after CSSA deductions 0
H's maintenance obligation 30,000
H's child support obligation on $70,000 income (@ 25%) 17,500
H's Federal Income tax @ 40% of $70,000 28,000
H's disposable income after support & taxes $ 24,500
W's disposable income after 35% taxes on $30,000 ..... $ 37,000

2) Income of H after CSSA deductions $100,000
Income of W after CSSA deductions 50,000
H's maintenance obligation 10,000
H's child support obligation on $90,000 income (@ 25%) 22,500
H's Federal Income tax @ 40% of $90,000 36,000
H's disposable income after support & taxes$ 31,500
W's disposable income after 35% taxes on $60,000 .....$ 61,500

3) Income of H after CSSA deductions $200,000
Income of W after CSSA deductions 0
H's maintenance obligation 60,000
H's child support obligation on 140,000 income (@ 25%) 35,000
H's Federal Income tax @ 40% of 140,000 56,000
H's disposable income after support & taxes $ 49,000
W's disposable income after 35% taxes on $60,000 .....$ 74,000

4) Income of H after CSSA deductions $200,000
Income of W after CSSA deductions 50,000
H's maintenance obligation 50,000
H's child support obligation on 150,000 income (@ 25%) 37,500
H's Federal Income tax @ 40% of 150,000 60,000
H's disposable income after support & taxes $ 52,500
W's disposable income after 35% taxes on 100,000 .....$102,500

5) Income of H after CSSA deductions $200,000
Income of W after CSSA deductions 100,000
H's maintenance obligation 20,000
H's child support obligation on 180,000 income (@ 25%) 45,000
H's Federal Income tax @ 40% of 180,000 72,000

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H's disposable income after support & taxes $ 63,000
W's disposable income after 35% taxes on 120,000.....$123,000

6) Income of H after CSSA deductions $500,000
Income of W after CSSA deductions 100,000
H's maintenance obligation 130,000
H's child support obligation on 370,000 income (@ 25%).....92,500
H's Federal Income tax @ 40% of 370,000 148,000
H's disposable income after support & taxes $129,500
W's disposable income after 35% taxes on 120,000.....$242,000

7) Income of H after CSSA deductions $100,000
Income of W after CSSA deductions 75,000
H's maintenance obligation 0
H's child support obligation on 100,000 income (@ 25%).....25,000
H's Federal Income tax @ 40% of 100,000 40,000
H's disposable income after support & taxes$ 35,000
W's disposable income after 35% taxes on 120,000.....$ 73,750

8) Income of H after CSSA deductions $500,000
Income of W after CSSA deductions 250,000
H's maintenance obligation 50,000
H's child support obligation on 450,000 income (@ 25%).....112,500
H's Federal Income tax @ 40% of 450,000 180,000
H's disposable income after support & taxes $157,500
W's disposable income after 35% taxes on 120,000.....$307,550

9) Income of H after CSSA deductions$ 70,000
Income of W after CSSA deductions 25,000
H's maintenance obligation.. 13,000
H's child support obligation on $57,000 income (@ 25%).....14,250
H's Federal Income tax @ 40% of $57,000 ..22,800
H's disposable income after support & taxes..$ 19,950
W's disposable income after 35% taxes on 120,000.....$ 38,950

In every one of the above scenarios, the husband winds up with less disposable income than the wife! But it gets WORSE, because the above figures do not account for two other issues. First, there will also be some "add-ons" requiring the husband to pay for some portion of uncovered medical and child care expenses. Second, in many cases the husband will not have the disposable income shown, since a part of his CSSA income was his 401K or other deferred income, not available to him, but included in his income for these purposes.

It is obvious that arguments will regularly have to be made to the effect that utilizing the guidelines for both child support (not required on temporary motions) and maintenance, make the result unjust or inappropriate. The extent to which judges will accept such arguments, and write the explanatory decisions required to deviate, remains to be seen. Most significant is that in temporary support cases we are quite used to a court requiring the monied spouse to continue to pay for residential carrying charges, inter alia. While identifying 19 different factors to be considered, none involves the payor's having to pay for carrying charges or other specified family expenses. So, this is one of those factors which clearly falls within factor 19 - Any other factor the court expressly finds to be just and proper.

In numerous cases the 40% Federal tax assumed will be high (although the 40% we used included the State Income Taxes. But the point was to illustrate how the blind utilization of the "guidelines" for temporary maintenance can produce ludicrous results, especially when one adds on the consideration of "add-ons" and deferred income plans.

There are other indications that this law was not as fully thought out as should have been the case. One example is that among the factors to be considered in fixing temporary maintenance, if income is over the $500,000 cap or a claim is made that the guideline amount is unjust or inappropriate (C)(2)(A)(XVI and (E)(1)(N) is: "Marital property subject to distribution..." However, when temporary maintenance motions are made, in most cases it is not yet known what property is marital, which is separate and much less, what type or percentage distribution can be expected. Another question arises from the provisions in & G. If a party defaults, the other will be entitled to temporary maintenance based upon needs or the pre-commencement standard of living. That seems quite appropriate. Then it goes on to authorize a retroactive upward modification, without the need to show a change of circumstances, if based upon newly discovered or obtained evidence. That too seems proper, since subsequent to the initial order, the needy party may get additional data, by subpoena or otherwise, that calls for an increase and the defaulting party should not be permitted to benefit from not appearing. But, why is there no provision for a DECREASE, if called for by newly discovered data? We have a party who defaults and is then served with a temporary maintenance order. If he subsequently appears in the action, or to participate in an inquest, there are factors which should be able to result in a retroactive decrease. For example, if the originally alleged standard of living were shown to be: a) erroneous or exaggerated; b) supported by loans or increasing debt; or c) supported by third party gifts or depletion of assets. The statute could have and should have authorized retroactive decreases in such appropriate cases.

We all understand that this new law mandates the N.Y.S. Law Revision Commission to study the issue, recommend legislation and make a final report by the end of 2011. However, even if the inequities apparent from the above computations were recognized (as well as other questionable provisions there is no space to discuss), and corrective legislation is suggested, there is no guaranty that the legislature will enact it. We all await seeing how this new law will "shake out" with bated breath and potentially angry male clients.

OTHER LEGISLATION

Chapter 421 of the Laws of 2010 authorizes Family Court judges to include a provision in Orders of Protection, barring the accused from intimidating witnesses.

Chapter 446 extended the requirement that law enforcement officials serve petitions for orders of protection, violations and extensions of orders of protection without charge.

Chapter 261 authorizes orders of protection and temporary orders of protection to be transmitted by "facsimile transmission or electronic means for expedited service [as defined in CPLR 2103 (f)].

Chapter 325 amends FCA § 842 to authorize the court to extend an order of protection for a reasonable period of time upon a showing of good cause or upon the consent of the parties. That abuse has not occurred during the pendency of the order, does not, in itself, constitute sufficient ground for denying the extension. But the basis for the court's decision must be specified on the record.

Chapter 341 amends FCA §§ 446, 551, 656, 759, 812, 842 and 1056 as well as DRL § 240 (3)(e), to provide that orders of protection shall not be denied solely upon the ground that the alleged events are not relatively contemporaneous with the date of application. In addition, the duration of any temporary order shall not, by itself be a factor in determining the length of the final order.

DECISIONS

HOWARD S. v. LILLIAN S., 14 N.Y. 3d 431 (Ct. of Appeals, April, 2010)

In this divorce action, the husband alleged that his wife's adultery, resulting in a child she fraudulently led him to believe was his own, constituted egregious fault, which he argued entitled him to discovery in those areas. The Court affirmed the Appellate Division's refusal to permit discovery as a result of the finding that the wife's alleged behavior did not constitute the "egregious fault" necessary to effect equitable distribution and warrant discovery on the issue of fault.

The Court of Appeals reviewed with approval the now old proposition that unless "egregious", fault should not be a factor in equitable distribution awards. It also cited with approval several lower court decisions, establishing that adultery, on its own, is not ordinarily "egregious" for this purpose. It would have to be well outside the bounds of the basis for an ordinary divorce action; a "truly exceptional situation, due to outrageous or conscience-shocking conduct" to warrant an asset distribution adjustment. The conduct alleged did not "fit within the legal concept of egregious conduct".

This decision brought up the multi-year clash of discovery decisions between the Appellate Divisions of the First and Second Departments on one hand and the Third and Fourth Departments on the other. The inquiry starts with CPLR § 3101 (a), which provides for "full disclosure of all matter material and necessary in the prosecution of defense of an action". However, in view of the precedents, limiting property distribution effect to only egregious fault, the court dismissed the general policy in favor of liberal discovery, holding that in the absence of those circumstances "liberal discovery on issues of marital fault ... should not ordinarily be permitted, though there may be

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exceptions in rare circumstances." This policy was bolstered by expressed consideration for avoiding potential abuse or harassment by means of such discovery and pressure to settle against one's interests in order to avoid litigating these personal issues.

This decision is in line with the First and Second Department's general refusal to allow discovery on fault (or custody issues) and contrary to the opposite view traditionally taken in the Third and Fourth Departments. In his dissent, Judge Pigott supported and explained the prior view of the Third and Fourth Departments, allowing liberal discovery on fault issues, subject to protective orders in cases of abuse. His view was that the court should not be deciding if the fault was egregious before discovery was obtained to develop that issue, since that would be premature. He was unimpressed by the majority's rationale - avoiding potential abuse, harassment, litigation over personal issues and avoiding disadvantageous settlements, quoting an observation published by Tim Tippins, suggesting that such discovery can motivate settlement.

But the majority rules - and the First and Second Department position is now the state wide rule - no discovery on fault without a prior application and a showing of egregious conduct. In a footnote the court noted that its holding has no impact upon obtaining discovery relative to claims of dissipation of marital assets.

Interestingly, one word that appears nowhere in the decision was "custody". Generally, the discovery battle between the upstate and downstate departments is discussed in connection with the dual topics of fault and custody, with the respective discovery rulings being essentially the same for both categories of issues. Granted, any discussion of custody discovery would have been outside the issues presented, and purely dictum, but the Court of Appeals has never shied away from that. Will it take the same position, that despite the general CPLR mandate for full disclosure, discovery on custody issues should "not ordinarily be permitted"? We believe the court would expand the general prohibition on such discovery, for the same reasons expressed for avoiding fault discovery (avoiding harassment and avoidance of litigating sensitive issues) and the one not mentioned (reducing the costs of matrimonial litigation).

FIELDS v. FIELDS, 15 N.Y. 3d 158, Ct. of Appeals, June, 2010.

When the Appellate Division, First Department, made its decision in this case it was sharply and unanimously criticized by most commentators and lecturers. The primary result of the case was the characterization of a marital residence as marital rather than separate property. The residence was a five story town house in New York City, with 10 apartments, purchased in 1978 by the husband, with the help of his mother. The $30,000 down payment came from his grandparents, half as an advance against his inheritance and half as a loan his mother agreed to repay. The balance of the purchase price was funded with two mortgages. Title was taken in the name of the husband and later 50% was conveyed to his mother. From 1982 to 2001 he and his mother managed the property as a formal partnership. The decision detailed the various work the wife did in connection with the premises and the approximately $2,000 expended on a vacuum cleaner, a counter top, flooring and a mirror. A separate account was opened, into which rents were deposited. But he also deposited occasional paychecks plus other small amounts of his income from various sources and his $35,000 inheritance, which he used for personal expenses. Occasionally the account was used to pass through the wife's paychecks, which ended up in her separate account, or were cashed, with her getting the cash.

The trial court held that the property was marital and that the husband's share was $1,234,183 after returning to the husband his $30,000 separate property contribution. The wife was awarded 35% of his interest, based upon her direct and indirect (wife and child rearing) services and contributions to the building, even though building expenses were paid with rent proceeds. This was affirmed by the Appellate Division. Their primary focus was on the facts that the building was bought as a marital residence, was used as a marital residence (one or two of the 10 apartments), their son was raised in the residence and the parties had occupied it for 31 years. While the husband was entitled to the return of his $30,000 of separate property, the court held that did not change the fact that this was a "marital asset". The court emphasized that the asset was acquired during the marriage and that the term marital property is to be liberally interpreted. Then, inexplicably, the Court discussed the reasons for the appreciation of the property, attributing it to renovations and market forces, not because of the down payment. If the property were classified as "marital" the issue of its appreciation required no discussion. What the wife may have done or not done, relative to cleaning, vacuuming, etc. might be relevant in consideration of the percentage distribution to be made to each party. But it had nothing to do with the classification issue, which is the part of the decision that received such bad press. Most believed that the property was not a marital asset to which the husband made a separate property contribution. It was his separate property, ab initio. Although it was purchased during the marriage, it was solely with separate property. Therefore, the asset appeared to fall squarely within that part of the definition of separate property that includes "property acquired in exchange for ... separate property" [DRL § 236 (B)(1)(d)]. If that were the case, as argued by the two dissenting judges, then the marital property available for distribution would only be that part of the appreciation brought about by active contributions, not market forces.

If a husband owned $10,000 of premarital stock and then, during the marriage, sold it and used the proceeds to buy a bond, nobody would question that the bond was still his separate property. The fact that this was a house does not change that. If it was acquired solely with separate property, it remains separate property, and whether the wife swept the floors, raised a child there or lived there for many years, makes absolutely no difference. That is why the decision was criticized. BUT, the Court of Appeals affirmed! A careful reading of that decision may cause us not to be too offended by or concerned about the result.

The Court of Appeals repeated the history that led to marital property being construed liberally and separate property, narrowly, and affirmed the marital property designation. Frankly, the long dissent by Judge Smith seems more compelling, explaining why the classification should have been "separate" and how the wife's varied services did nothing to cause any appreciation in value. But at least we have the majority expressing the fact that the facts of this case were "unique". Moreover, this court emphasized some of the other facts, that better justify the conclusion. Key among them was that the account established for the operation of the building, collection of rents, payment of the mortgages, etc. commingled rents with several marital property sources of funds (husband's pay checks and income, and passing through the wife's income checks). Although the court cites numerous cases in which a party buys a house, utilizes some separate property and then has it returned from the sales proceeds of what is classified as a marital asset, most are clearly distinguishable from the facts of the case at bar.

The Court emphasized, as did the Appellate Division, that when the property was purchased it was intended for use as a marital residence, it was so used for some 30 years and the parties' child was raised there. Respectfully, we say:

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PHOTO CORNER

Holiday Party - Wednesday, December 8, 2010

Annamarie Brown, Elisabeth Vreeburg, Jill Stone and Sue Borko

Seymour James and Mark Weliky

Dave Dikman, Richie Gutierrez, Steve Hans and Dave Cohen

Geo Nicholas, Pam Hirschhorn and Hon. George Heymann

Greg LaSpina, Ted Gorycki, Bob Bellone and Dave Wasserman

Greg Newman, Hon. Bernice Siegal and Cliff Welden

Rich Lazarus, Joe Risi and Hon. Lee Mayersohn

Jim McCurry, Gerry and Dom Chiariello, Tom Grippa and Norman Burak

Photos by Walter Karling

PHOTO CORNER

Holiday Party - Wednesday, December 8, 2010

Hon. Sy Boyers, Larry Litwack, Dave Adler and Hon. Robert Nahman

Sam Rosenberg, Jon Darche, Steve Wimpfheimer, Ken Brown and AbbyGoldstein

Ron Ramirez, Joe Car ola, Debbie Garibaldi, Hon. Len Livote, Dave Dikman andGr eg Brown

Jay Abrahams, Ilene Reichman and Randy Unger

Donna Furey, Kenneth Brown and Harold Sokoloff

Jim Pieret, Greg Brown, Joe Carola and Bob Steinberg

Beautiful display of buffet served at party.

Toys donated by attendees for Forestdale, Inc. a foster care agency.

Photos by Walter Karling

CPLR Update 2011

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harmless. The judgment was affirmed.

Matter of Kachalsky v Cacace [4] is notable only for the dissent by Judge Smith. This was an Article 78 proceeding to review the denial of a pistol permit by the County Court, Westchester County. The Appellate Division held, in a brief opinion,[5] that the petitioner had failed to establish "proper cause" for the issuance of a "full carry" permit, and that the denial of the permit was not arbitrary or capricious. The Court of Appeals dismissed sua sponte, for lack of a substantial constitutional question.

Judge Smith's dissented, arguing that the Constitution and the CPLR allow an appeal as of right where the judgment or order appealed from finally determine an action where there "is directly involved the construction of the constitution of the state or of the United States."[6] The Court's jurisprudence has engrafted on that language the qualification that the question must be a "substantial" one, a qualification with which Judge Smith did not quarrel. His objection was that the Court has used that qualification so broadly and loosely as to give itself discretion whether or not to hear cases that really do raise substantial constitutional issues, a discretion the Court does not possess under the Constitution or the CPLR. Here, the petitioner attempted to raise issues of the application of the Second Amendment to the US Constitution to state gun control laws. These issues, which were at that very time under review by the US Supreme Court in *McDonald v Chicago*, could not fairly be characterized as "insubstantial."

As if to underscore Judge Smith's point, within a few months the Supreme Court decided *McDonald*,[7] holding that the Second Amendment does indeed fully apply to the states.

Where an action is dismissed by automatic operation of a statute (such as CPLR 3404), rule or order, it is the dismissal itself which constitutes the final determination for purposes of appealability, and not the denial of a later motion to vacate the dismissal. In *Cadichon v Facelle*,[8] the Court of Appeals considered an order which was ambiguous as to whether dismissal was to be automatic.

Supreme Court had dismissed the complaint for failure to file a note of issue, pursuant to CPLR 3216. Plaintiff moved to vacate the dismissal, which Supreme Court denied. The First Department affirmed in a 3 - 2 decision, finding that the plaintiff had failed to make an adequate showing. Plaintiff then appealed to the Court of Appeals.

The Court initially dismissed the appeal [9] from the affirmance, on its own motion, for non-finality, applying the general rule and finding that it was the dismissal that constituted the final determination of the action, not the order denying vacatur of the dismissal.

Plaintiff moved for reconsideration, which the Court granted. The Court noted that it had originally read the Supreme Court order as directing an automatic dismissal if plaintiff failed to file a note of issue within the specified time. On reconsideration, the Court recognized that Supreme Court's order was ambiguous as to whether the dismissal would be automatic or not. The Court held that where it is unclear whether or not the dismissal was by automatic operation of a statute, rule or court order, the order denying a motion to vacate is to be deemed the final appealable paper. Since here the affirmance of the denial of vacatur had a two-judge dissent, the appeal lay as of right, and the Court retained jurisdiction of the appeal.

It remains to be seen whether or not this appeal will serve as a vehicle for the Court's consideration of automatic dismissals pursuant to CPLR 3216. This Update has noted cases in years past which approved the notion that an automatic dismissal pursuant to CPLR 3216 results when a court issues a 90-day notice and the plaintiff fails to comply.[10] It was submitted then, and is submitted again, that the CPLR says nothing which should make a CPLR 3216 dismissal "automatic," whether the requisite 90-day notice is served by the defendants or by the court, or whether or not the court issues its notice in an order.

Where the 90-day notice is served by the defendants, the action is not to be dismissed unless the defendants move for the dismissal and the plaintiff has an opportunity to show why dismissal is unwarranted. The Court of Appeals has held, in *Baczkowski v Collins Const. Co.*,[11] and *Di Simone v Good Samaritan Hosp.*,[12] that CPLR 3216 is "extremely forgiving" of litigation delay. The courts are authorized to dismiss under that provision, but are never required to do so. Where the plaintiff can show a reasonable excuse for delay and a meritorious claim, the courts are prohibited from dismissing the action. If the court-issued 90-day notice is regarded as setting an automatic dismissal in motion, the plaintiff is deprived of his opportunity to show why dismissal should not result until the action is already dismissed.

Arbitration

In *Grobman v Chernoff,* [13] an automobile accident case, the plaintiff had prevailed after a jury trial on the issues of liability and serious injury, and the jury had awarded damages. The plaintiff successfully appealed as to the jury's failure to award damages for future pain and suffering, and the matter was remitted for a new trial on the damages issue. Rather than have the case tried, the parties agreed to arbitrate the matter of damages. It turned out they did not agree as to the scope of their agreement, and there was litigation and a second appeal as to whether they had agreed to arbitrate the issue of serious injury. The Appellate Division held that the jury verdict in plaintiff's favor on that issue was binding, and could not be relitigated in arbitration.[14]

At the arbitration, the arbitrator set damages at a "net award" of $125,000, without mentioning interest. The issue now became whether or not plaintiff was entitled to an award of interest on top of the $125K, and if so from what date. Supreme Court held that interest ran from the date of the arbitrator's award. The Appellate Division disagreed, citing the holding of the Court of Appeals in *Love v State of New York*,[15] that as a general matter in a bifurcated trial, interest will run from the determination of liability.

The Court of Appeals affirmed. While the parties could have submitted the issue of pre-judgment interest to the arbitrator, they did not do so. Their agreement simply noted the issue to be determined as that of "damages," and damages are not the same thing as interest. Since plaintiff had established her right to interest from the date of the liability verdict, there was no need to relitigate it in arbitration.

In *Matter of NYCTA v TWU*,[16] the arbitration concerned the penalty to be applied to a subway conductor who had laid his hands on a passenger during an altercation. The arbitration clause went into detail as to the procedure to be followed where a Transit employee was accused of conduct which might constitute an assault:

> "If there is presented to the [arbitrator] for decision any charge which, if proved in Court, would constitute a felony, or any charge involving assault, . . . the question to be determined by the [arbitrator] shall be with respect to the fact of such conduct. Where such charge is sustained by the [arbitrator], the action by the Authority, based thereon, shall be affirmed and sustained by the [arbitrator] except if there is presented to the [arbitrator] credible evidence that the action by the Authority is clearly excessive in light of the employee's record and past precedent in similar cases. It is understood by the parties that this exception will be used rarely and only to prevent a clear injustice."

During the arbitration, the Transit Authority presented five separate previous cases as "past precedent," and the respondent Union presented none.

The arbitrator rendered a five-page written decision, in which he carefully considered each of the cases relied on as precedent by the Transit Authority, distinguishing each one from the case before him. He then found that the case fell within the exception, and exercised his authority to modify the penalty from termination to reinstatement without back pay.

The Transit Authority sought in this Article 78 proceeding to vacate the award. Supreme Court and the Appellate Division, in a 3 - 2 opinion, agreed with the Transit Authority that the arbitrator had exceeded his powers. The Court of Appeals did not, and in an opinion by Chief Judge Lippman, directed a dismissal of the petition.

In the Court of Appeals, the Transit Authority argued that since the arbitrator had distinguished each of the past cases submitted to him, and the Union had submitted none, the "past precedent" prong of the test established in the contract could not have been met. The Court, however, found that the parties had left it to the arbitrator to determine whether or not the exception applied. To be sure, the contract provided that the exception was to be applied only in rare cases, but it was for the arbitrator to decide whether this was one of them. Whether the Court agreed with the decision or not was besides the point.

There was a dissent, by Judge Smith joined by Judge Read, in which he would have found that the determining principle was the standard of review to be applied. Since, in his view, the contract provisions constituted an express limitation on the arbitrator's power, the determination was reviewable for "clear error," [17] and Judge Smith found clear error here.

In *Matter of Falzone v NY Cent. Mut. Fire Ins. Co.*,[18] the Court of Appeals held that it is beyond the scope of permissible review to consider whether an arbitrator erred in not giving preclusive effect to a determination of another arbitrator, on the identical issue before him, between the identical parties before him.

Petitioner had been involved in an automobile accident, and had filed for no-fault benefits with the respondent insurer. The respondent denied the claim, asserting that the injury was not related to the accident, and petitioner filed for arbitration. The arbitrator held that the denial was inappropriate and awarded benefits.

Petitioner settled her action against the offending driver for his policy limits of $25,000, and sought SUM benefits from the respondent. Respondent denied this claim, asserting that the determination on no-fault benefits was unrelated to the accident. Petitioner filed for arbitration on the SUM claim. The two arbitration proceedings overlapped, in that the petitioner filed for the SUM arbitration while the no-fault arbitration was still pending, but the determination of the no-fault arbitration came before the hearing in the SUM arbitration.

At the SUM arbitration, the respondent repeated its assertion that plaintiff's injury was unrelated to the accident. Petitioner argued, in vain, that the arbitrator was bound by the prior determination by collateral estoppel. The SUM arbitrator rejected the estoppel argument, and upon the parties' relitigation of the issue held directly contrary to the first arbitrator, finding that the injury was not related to the accident. He also found that the recovery from the driver was sufficient compensation for the injuries.

Supreme Court vacated the arbitration and ordered a new arbitration before a different arbitrator. The Appellate Division reversed, finding that the inconsistency between the arbitration results was not sufficient cause to vacate the second award. There was a dissent on the grounds that by not considering the estoppel issue the SUM arbitrator had exceeded his powers and contravened a strong public policy. The Court of Appeals affirmed the Appellate Division.

Courts are generally precluded from reviewing arbitrators' determinations for errors of law or fact. Petitioner's claim is exactly that: the arbitrator erred in failing to apply the legal doctrine of collateral estoppel. If a court had made that error, the matter could be rectified on

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appeal. An error by an arbitrator, on the other hand, is beyond the court's power to review unless the award violates a strong public policy, is irrational, or clear exceeds a specifically enumerated limitation on the arbitrator's power. The award here, whether or not it was correct on the estoppel issue, "was not patently irrational or so egregious as to violate public policy".

There was a dissent by Judge Pigott, in which he pointed out that the result here encourages insurers to deny no-fault claims, exactly contrary to the intent of the no-fault laws. The balance of risks is heavily against the insured and in favor of the insurer. If the insured chooses to go to arbitration on the no-fault claim and loses on causation, the insured is then precluded from litigating the causation issue against the tortfeasor, [19] and the SUM claim will never arise. If the insured wins on causation at the no-fault arbitration, the insurer is now free to raise the issue all over again at the SUM arbitration. The insured can avoid this "hall of mirrors" only by not proceeding to enforce the insurer's no-fault obligations and having some other entity pay for the medical care she is entitled to. This contradicts the legislative purpose in enacting the no-fault laws. Judge Pigott would have held that the arbitrator, in acting in a way that contravened the purpose of the no-fault laws, had exceeded his authority.

Attorney & Client

In *Moray v Koven & Krause* ,[20] the Court of Appeals applied the provisions of CPLR 321 (c) that impose a stay on an action when an attorney is disabled for any reason.[21]

The action was for legal malpractice. The action was commenced by the filing of a summons with notice on December 31, 2007, and served on the defendant on or about February 5, 2008. In the interim, plaintiff's counsel, Warren Goodman, was suspended from practice. This fact was not communicated to the defendant until after defendant had served a demand for a complaint and, when one was not served, a motion to dismiss for failure to do so.[22] The motion to dismiss was made on April 22, 2008, and on May 6, 2008, a new attorney, Preston Leschins, notified defendant's insurance carrier that he had been consulted by the plaintiff with a view to substituting in for Goodman. The letter apparently did not mention the suspension, but only that Goodman was no longer practicing law.

Defendant's counsel only became aware of the suspension on May 23, 2008, when the dismissal motion was returnable. At Goodman's request the motion was adjourned until June 13, 2008. Defendant's counsel then spoke to Leschins, who did not state unequivocally whether or not he would be appearing for the plaintiff. Goodman submitted an affidavit on the motion[23] in which he indicated that he had advised the plaintiff of the suspension in writing, advising him to obtain new counsel. The date of this communication to the client was not specified. He annexed a draft complaint to the affidavit which, he claimed, had been drafted prior to his suspension and which set forth the facts of plaintiff's claim: defendant attorneys were alleged to have represented the plaintiff in a real property action, and to have allowed it to be dismissed for want of prosecution.

Supreme Court dismissed for failure to serve the complaint. There was neither an affidavit of merit nor a reasonable excuse for failure to serve the complaint. As to Goodman's suspension, the court noted that the plaintiff had known of it since January of 2008 and had made no effort to find new counsel before the time to serve a complaint had lapsed. No further time needed to be allowed, since plaintiff had already had at least five months grace period.

In the Appellate Division plaintiff (now represented by new counsel) invoked CPLR 321 (c) for the first time. The Appellate Division affirmed, for lack of proof of merit or a reasonable excuse. It declined to hear the argument based on 321 (c) since it was raised for the first time on appeal.

The Court of Appeals reversed, and reinstated the complaint. The direction of CPLR 321 (c) is straightforward: When an attorney is disabled for any reason, including suspension, the action is stayed automatically as against his client, until notice to appoint another attorney is served on him, either personally or as the court may direct. The period of the stay lies within the power of the opposing parties, since all they need to do is serve the notice.

Here, where defendant never served a notice to appoint new counsel, the dismissal motion was of no effect and the order granting it should be vacated. So much of 321 (c) as allows proceedings notwithstanding the stay by "leave of court" does not help the defendant, since that provision allows a departure from the stay where the opposing party would otherwise face some hardship, such as the expiration of the time to take an appeal or some other action. The Court did not specifically address the matter of the notice given to the plaintiff by Goodman, but it should be noted that mere service by mail does not suffice under the statute. Service must be made by personal service, and any other method requires court approval.

As to the failure to raise the issue in the Supreme Court, the Court observed that the purpose of this provision is to protect the party who is without representation through no fault of his own. The unrepresented plaintiff should not be penalized for failing to specifically claim the benefits of a stay created to protect him while he was unrepresented.

The defendant lawyers in *People v Taylor*[24] were charged with numerous crimes in connection with legal proceedings, including 4 counts of offering a false instrument for filing in the first degree. The case is noted here because the allegedly false instruments were retainer statements.

The Appellate Division held that there was not sufficient evidence to sustain convictions on any of the charges, and reversed the convictions.[25] The indictment charged that the attorneys filed the false statements with the Office of Court Administration with "intent to defraud." The Appellate Division found no proof of intent to defraud, since a representative of the Office of Court Administration testified that the retainer statements were meant to be filed, but were not acted on at all, or even checked for accuracy.

The Court of Appeals has now reversed and reinstated the convictions, since the question in an "intent to defraud" case is the mental state of the actor. Whether the receiving agency took any steps in reliance on the false filing or was in any way misled to its detriment is not an element of the crime.

In *Matter of Kese Indus. v Roslyn Torah Found.*,[26] a case involving the Nassau County Administrative Code, the Court of Appeals construed the term "legal representative" to mean a person's executors or administrators, and not an attorney employed to represent the person in an action.

Kese Industries was the mortgagee on certain property in Roslyn, in Nassau County. It had commenced a foreclosure action, which had progressed to the point where the court had appointed a referee to sell the property.

There was also tax lien on the property, and the Nassau County Administrative Code required that before the property could be sold the owner of the lien had to serve a notice to redeem the lien on the owners of the property, any mortgagees, and their "legal representatives." The owner of the lien served Kese as mortgagee, but not its counsel in the foreclosure action or the referee. Following existing Second Department precedent, [27] Supreme Court and the Appellate Division held that the foreclosure attorney was a "legal representative," and voided the transfer for failure to give notice.

The Court of Appeals reversed, disapproving of the Second Department precedent. A "legal representative" is a person charged with managing another's legal affairs due to incapacity or death. In contrast to an attorney, who is an agent, a "legal representative" is a principal, to whom the rights and obligations of the party have been assigned.

The referee was not entitled to notice, since he had no independent interest in the property, but was merely the representative of the court performing a ministerial function.

Class Actions

In *City v Maul* ,[28] the Court of Appeals addressed whether a class action is a proper vehicle to hear broad-based claims of failures by state and municipal agencies to carry out their duties to deliver services to large numbers of persons entitled to those services. The Court determined that in this case, at least, and at an early stage of litigation, a class action could be maintained.

The agencies involved here are the NYC Administration for Children's Services ("ACS") and the NYS Office of Mental Retardation and Developmental Disabilities ("OMRDD"). Simplifying the claims greatly for purposes of this discussion, plaintiffs claimed that ACS and OMRDD had not acted properly or promptly to identify developmentally disabled children in need of special placement, and that they refused to provide certain services to children in foster care, while providing them to children not in foster care. Supreme Court granted class action status, and the First Department affirmed.

The Court of Appeals affirmed in a 4 - 2 opinion.[29] There are five prerequisites to class action status, known generally as numerosity, commonality, typicality, adequacy of representation and superiority. [30] Here, the majority viewed the only issue as one of commonality, i.e., whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members".[31] CPLR Article 9 is intended to provide a liberal remedy, and the determination of class status is entrusted to the sound discretion of the trial court (and of the Appellate Division, which may substitute its own discretion even without an abuse of discretion by the trial court). Where there has been an affirmed certification of class status, review by the Court of Appeals is limited to whether there has been an abuse of discretion as a matter of law.

The Court noted prior cases such as *Small v Lorillard*,[32] and *Weinberg v Hertz Corp* .,[33] both cases requiring balancing of individualized questions against common questions, where its determinations had held only that the Appellate Division had properly weighed the relevant factors. Looking to federal cases, on the principle that CPLR Article 9 is similar to the relevant federal class action rule, the Court noted *Baby Neal v Casey* [34] and *Marisol A. v Giuliani*,[35] where individualized concerns were present, but did not defeat class certification.

Applying these concepts to the case before it, the Court found that the Appellate Division had not abused its discretion in identifying common allegations that predominated over individualized issues. The claims made, while not all identical, fell into four similar and interrelated groups, involving harms common to all members of the class. Supreme Court retained the options of creating subclasses with more closely aligned issues, or even of decertifying the class if it turned out to be appropriate.

The dissent would have held that this was a case alleging "systemic failure" by the defendant agencies, and that class actions are inappropriate to such a claim. The individual plaintiffs all evinced individual and quite possibly meritorious claims resulting from the systemic failures, but these did not add up to a class action. Proof of the facts relating to each individual plaintiff would not advance the claims relating to the others, and that is the essence of the predominance aspect of the commonality test.

The dissent would have held class actions inappropriate to "systemic failure" cases gener-

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ally, on the principle that it is beyond the province of the courts to determine how governmental services are to be organized, financed or allocated, and that if relief is granted it must be in the form of a directive to simply fix the system, a directive which is beyond the power of the courts to oversee or enforce.

In *Flemming v Barnwell Nursing Home*,[36] the Court of Appeals held that a member of a class who objects to a settlement of the class action is not entitled to recover attorney's fees, even if the objection results in a benefit to the class.

The action was on behalf of former residents of a nursing home. After the parties reached a settlement agreement, a motion to approve the settlement was made to the Supreme Court. The objectant filed her objections to the compensation of the class counsel and the settlement administrator, and to an incentive award to the representative plaintiff. She did not object to the settlement itself. She also moved for an award of counsel fees on her objection.

Supreme Court approved the settlement, and denied the objectant's objections and her request for counsel fees. It noted that her objections had neither assisted the court nor benefitted the class. On appeal by the objectant, the Appellate Division modified by eliminating the incentive award, reducing fees for the class counsel, and eliminating the fee for the settlement administrator.[37]

The Appellate Division opinion, by the way, provides a precis of the law regarding fixation of counsel fees in a class action. The total settlement here for the class members was $950,000. Class counsel requested $425,000 for fees and expenses, and Supreme Court actually awarded $448,483. The Appellate Division reduced the award to the amount actually requested, observing that the award was justified under the "lodestar" method, by which a reasonable hourly rate is fixed, applied to the reasonable time expended on the case, and then adjusted by subjective criteria. The Appellate Division found the requested fee to be reasonable, given the novelty and complexity of the case, the paucity of guiding case law, and a "tenacious" opposition by the defendant. New York law does not, however, allow the "incentive award" to the representative plaintiff, as federal law does. Competing considerations for and against such an award have apparently been resolved by the Legislature against allowing it. The award for the fees of the settlement administrator is allowable in principle, but there had been no proof of the amount. On this issue, the Appellate Division remitted for further proof.

The Appellate Division left intact so much of Supreme Court's determination as regarded the objectant's counsel fees. The Appellate Division based its determination on the fact that CPLR 909, which allows an award of counsel fees to counsel for the class, does not allow such an award to counsel for any other party or individual.

The only issue before the Court of Appeals was the fee for objectant's counsel, and the Court affirmed. The general rule in New York (as elsewhere in the US) is that a party must bear his own attorney's fees as incidental to litigation. An attorney cannot look to anyone other than his client for payment, merely because that person benefitted by his services. The rule allowing payment to the attorney for a class by the opponent of the class is a common-law exception to that rule codified in CPLR 909. The Legislature could have allowed an award of counsel fees to an objectant, but did not. Here, the Court determined that reference to federal cases, allowing counsel fees to objectants in some circumstances, is not appropriate since CPLR Article 9 has much in common with the federal rules but is not identical to them.[38]

There was a dissent, which found the Court's determination unwise from a policy perspective. Disallowing fees for counsel to a successful objectant would be a disincentive to raising such objections. In practice, they would be made only when an objectant had sufficient personal funds to foot the bill, or where his individual stake in the settlement was great enough to justify the expense. The dissent found common-law support for this position in the common fund rule, which allows fees to counsel for "those who have instituted proceedings for the benefit of a general fund".[39] The dissent would not have read CPLR 909, specifically allowing a fee to the representative of the class, as disallowing a fee to anyone else.

The majority conceded that the dissent's argument was "cogent," but declined to rely on the common fund doctrine, which has not been relied on (at least in a class action) by any court in the state for a century.

Disclosure

A new section, CPLR 3119, has been added, by which New York has adopted the Uniform Interstate Depositions and Discovery Act."[40] Pursuant to this section, if a party to an action pending out-of-state wishes to conduct disclosure proceedings within the state, he merely needs to present a subpoena validly issued in the out-of-state proceeding to the county clerk in the county in which discovery is to be conducted. The county clerk is thereupon directed to issue a New York subpoena for service on the person named in the out-of-state subpoena, incorporating the terms of the out-of-state subpoena and which contains or is accompanied by the names, addresses and telephone numbers of all counsel of record in the underlying proceeding.

Note that the out-of-state proceeding must be in a sister state, the District of Columbia, Puerto Rico, the US Virgin Islands, or any other territory or possession subject to US jurisdiction. A proceeding in a foreign country would not qualify. Also, the statute explicitly allows a New York attorney for a party to the out-of-state proceeding to issue a New York subpoena without going to the county clerk.

There are a few minor issues relating to this new provision. First, the statute specifies that the out-of-state subpoena must have been issued "under authority of a court of record". Does that encompass a procedure similar to New York's, where a subpoena is usually issued by an attorney as an officer of the court, in the name of the court? The statute does not say. Second, the statute says that the clerk is to issue the New York subpoena "in accordance with *that court's procedure*." Later, the statute provides that any application for a protective order, or to enforce, quash or modify the subpoena must likewise be submitted to "*the court* in the county in which discovery is to be conducted." What court is meant? There is no proceeding pending in New York. May we presume that the Supreme Court is meant? Third, what is to occur if the subpoena seeks material, such as the records of a library or of a public officer, which cannot be issued by an officer of the court but require "so-ordering" by a judge?[41]

Eleven years ago, in *Kihl v. Pfeffer*,[42] the Court of Appeals began a line of cases directing litigants, counsel and the courts to abide by and to enforce deadlines for pre-trial procedures in statutes and court orders. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[43] The Court has had several occasions to restate this, in *Brill v City of New York*[44] and *Miceli v State Farm*[45] [time limits on summary judgment motions]; and in *Andrea v Arnone*[46] [dismissal for failure to disclose is equivalent to a failure to prosecute].

In *Gibbs v St. Barnabas Hospital*,[47] the Court of Appeals continued and strengthened that line. Here, the Court gave notice that conditional orders of preclusion, once issued, must be complied with by the parties and enforced by the courts. Even if the original failure leading to the conditional order was not wilful, a failure to comply with the conditional order can be excused only upon a showing of a reasonable excuse for the failure and of a meritorious cause of action. Unless both prongs of the required showing are met, the conditional order must be enforced according to its terms and the noncompliant party must bear the consequences. Having issued a conditional order, the court may not simply excuse the failure to comply with it based upon belated compliance and the payment of a financial sanction.

This was a medical malpractice case, and one of the defendant physicians claimed, at a preliminary conference, that the bill of particulars did not give sufficient details of the claim of negligence against him. The court agreed, and directed the plaintiff to serve a supplemental bill of particulars. Plaintiff failed to comply, and the defendant moved to dismiss the complaint or to preclude plaintiff from proving negligence at trial. Supreme Court now issued the conditional order of preclusion, which said that plaintiff would be precluded from offering proof as to the doctor's negligence unless he served the supplemental bill within 45 days.

The defendant gave the plaintiff the courtesy of a reminder letter a few weeks after the conditional order was issued, but plaintiff failed to comply. The deadline came without the supplemental bill having been served, or the plaintiff having moved for an extension. The defendant moved to enforce the order, and for subsequent summary judgment. After the motion was made, and 75 days after the deadline, plaintiff served a supplemental bill of particulars. Plaintiff opposed the motion, claiming that since had served the bill there was no prejudice to the defendant. His counsel blamed the untimeliness on "law office failure," stating that a different lawyer from the office had attended the proceeding at which the conditional order was issued, and had failed to diary it properly. Plaintiff provided no affidavit of merit, merely asserting that the defendant's motion made no showing of lack of merit.

Supreme Court granted the motion, only to the extent of directing plaintiff to pay $500 costs for the delay. The Appellate Division affirmed, considering the court had not abused its discretion. There was a one-judge dissent, which would have enforced the conditional order in the absence of a reasonable excuse and an affidavit of merit.

The Court of Appeals reversed, and dismissed the complaint. It noted the trial court's broad power to fashion a remedy under CPLR 3126, and that a conditional order is the most common remedy for a failure to disclose.[48] It is well established, and the Court stressed that it was breaking no new ground here, that a failure to comply with a conditional order requires a reasonable excuse and an affidavit of merit. The Court relied on its determination of *Fiore v. Galang*,[49] a brief 1985 memorandum, as being squarely on point and "clearly controlling" with regard to conditional orders directing bills of particulars. Brief though *Fiore* was, it did state that absent a showing of both reasonable excuse and merit a preclusion order must be enforced, as a matter of law and not discretion. Moreover, in a medical malpractice case, expert medical opinion is required to show merit. By simply excusing the failure to comply with the conditional order, treating enforcement as a mere matter of discretion, the courts below undermined this policy.

Kihl v Pfeffer was, like *Gibbs*, a failure to comply with a conditional order, in that case a conditional order of dismissal unless plaintiff complied with the demand for interrogatories. The Court in *Kihl* treated the dismissal as a matter of discretion, stating "when a party fails to comply with a court order . . . it is well within the Trial Judge's discretion to dismiss the complaint."[50] The Court now in *Gibbs* goes further, holding that enforcement of the conditional order is required as a matter of law, unless the mandatory showing for excusing the default is made.

The Court rejected the notion that dismissal at this point required a finding that the original default was "willful." It noted that the issuance of a conditional order is attractive from the trial court's point of view precisely because it obviates the need for a determination of whether the failure to disclose was or was not "willful." Once issued, however, the order must be complied with or it becomes absolute, and the only way out is for the defaulting party to satisfy the two-prong test.

In *Howard S. v Lillian S.*,[51] the Court of Appeals held that disclosure is not available as to allegations of marital fault. In so doing, it implicitly accepted the position of the Appellate Division, First and Second Departments generally prohibiting disclosure as to fault in matrimonial cases while implicitly disapproving authority in the Third and Fourth Departments allowing such disclosure subject to protective orders as necessary.[52] The "implicitly" is necessary since the Court did not note these cases or the conflict between the Departments, merely stating that "Plaintiff cannot obtain discovery for what is essentially an allegation of marital fault." There was a dissent by Judge Pigott, in which he noted the conflict, noted that it had "implicitly" been resolved by the majority, and stated his preference for the contrary rule.

Judgments

CPLR 5203 has been amended to add a new subdivision (c), intended to prevent the use of the Bankruptcy Code as an end-run around state court determinations of interests in real property.[53] The end-run works this way: when a state court has before it a matter which involves competing claims to real property (e.g., a matrimonial action), and declares that one litigant (e.g., the wife) is entitled to the property, there will typically be a delay until the declaration can be reduced to a judgment and docketed. Suppose that the losing litigant takes advantage of the delay to file a petition in bankruptcy, which the modern and efficient electronic filing procedures available in federal courts make easy to do. Under previously existing law, since the state court judgment is not effective to establish the primacy of the successful litigant's lien until it is docketed, the bankruptcy petition has taken priority. Recall that the priority of liens in bankruptcy is defined by the relevant state law, and New York has adhered to the "bright line" rule that gives priority to the first judgment entered and docketed.

That end run is exactly what happened in *Musso v Otashko*,[54] a determination of the US Court of Appeals for the Second Circuit. The New York State Supreme Court had before it the divorce action between Tanya and Vladimir Otashko, and on October 23, 2003, Tanya was awarded 100% of the marital assets, including the marital residence in a written decision after inquest. On December 18, 2003, and before the divorce judgment was entered and docketed, a corporation with which Vladimir was involved, and in favor of which he had executed a consent judgment, filed an involuntary bankruptcy petition against him. Since the petition was filed prior to the divorce judgment, the Second Circuit held that Tanya's interest in the property had not vested under New York law and the property was part of the estate in bankruptcy. Whether Vladimir and the judgment creditor had colluded or otherwise acted improperly was something the bankruptcy court could consider, but the result certainly involved Tanya in further litigation and uncertainty, with Vladimir, the judgment creditor, and any other creditors now having another chance to assert claims on the property.

To obviate this chance at an end run, the new CPLR 5203 (c) deems the New York award of an interest in real property senior to a bankruptcy lien where the award is made on the record (orally or in writing), the bankruptcy petition is filed on or after the date of the award, and the award is reduced to judgment, entered and docketed within 30 days of the award.

The parties in *John Galliano, S.A., v Stallion, Inc.*,[55] had entered into a licensing agreement for the production and distribution of luxury goods in the US, providing that their agreement was to be subject to French law, and that any disputes were to be submitted to French courts. A dispute did arise, and plaintiff commenced suit in the Commercial Court in Paris.

Three attempts at service of process under the Hague Convention were made on Stallion. In each of these the documents were delivered

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to Stallion and a certificate of service was completed.[56] Stallion defaulted in the French action, and a judgment against it was entered in 2004. This proceeding was commenced in 2007, to enforce the judgment in New York.

Stallion resisted enforcement, on the grounds that the French court lacked personal jurisdiction. The documents served on it were in French, it said, with no English translation. Thus, there was no effective notice of the French action, and without notice the French judgment cannot be given recognition here under the Uniform Foreign Country Money-Judgments Recognition Act, CPLR Article 53.

Supreme Court recognized the French judgment, as did the Appellate Division, and the Court of Appeals affirmed. The general rule under CPLR Article 53 is that a foreign money judgment, "which is final, conclusive and enforceable where rendered," is to be enforced, unless one of the grounds for non-recognition applies.[57] These include lack of personal jurisdiction in the foreign court, or failure to receive notice in enough time to defend. These must be read together with CPLR 5305, which provides that lack of personal jurisdiction in the foreign court is not grounds for non-recognition, if the defendant had, prior to the commencement of the foreign suit, agreed to submit to the foreign court's jurisdiction.

Here, Stallion had submitted to French jurisdiction as part of the contract. Nonetheless, Stallion continued its objection in the Court of Appeals, on the grounds that it never received proper notice of the French proceeding since the documents served on it were in French with no accompanying translation. To enforce the judgment under these circumstances would negate notice as an element of personal jurisdiction. The Court of Appeals agreed that notice is an element of the exercise of personal jurisdiction, and also that CPLR 5204 (b)(2) allows lack of notice as a ground for non-recognition of the foreign judgment. If there had been in effect no meaningful notice given, the judgment would not comport with New York's ideas of personal jurisdiction or fairness. Here, however, Stallion had received notice, by personal delivery, and there was no due process objection.

Where a foreign court exercises personal jurisdiction in a manner consistent with our idea of personal jurisdiction, and where the foreign court in addition shares our ideas of procedure and due process, the underlying judgment will be enforced without close analysis of its procedures. These conditions were met here. Stallion knew of the disputes with the plaintiff, and that those disputes were to be litigated in French courts under French law. As long as the procedures employed were not fundamentally unfair, propriety of service under the Hague Convention was a matter for the French court. The Court found it significant that the Hague Convention itself required the French court to consider whether service had been properly made, or if not, whether the process was actually delivered to the defendant under the Convention. Implicit in the judgment against Stallion is the conclusion that the French court found compliance with the Convention to have been established.

In *American Std., Inc. v Oakfabco, Inc*.,[58] the Court of Appeals held that the Appellate Division had correctly interpreted the parties' agreement as to the buyer's assumption of seller's tort liabilities as well as assets. It erred, however, in enjoining the buyer from relitigating the issue in any forum. "As a general rule, parties are allowed to take any position they like in litigation, as long as they can make a good faith argument for it, and we see no reason to make an exception to that rule here. It may well be that our decision today will *preclude* OakFabco from relitigating the issue we decide, in the sense that any attempt to relitigate it should be rejected; but OakFabco should not be *enjoined* from arguing otherwise." [emphasis in original]

Jurisdiction

Last year the Appellate Division, Second Department, issued its decision in *Ruffin v Lion Corp.*,[59] noting a split between it and the First Department as to the effect of service of a summons and complaint by an unauthorized person. The Second Department held that the defect was jurisdictional, and dismissed. The case has now reached the Court of Appeals. [60] Relying on a broad reading of the 2007 amendment to CPLR 2001, the Court held that the defect was a mere irregularity which could and should have been disregarded.

Plaintiff was a passenger on a tour bus, and was injured in New York. Lion Corp., a Pennsylvania corporation, was the owner of the bus. Service of the summons and complaint was made in Pennsylvania. Recall that, pursuant to CPLR 313, service outside New York must be made in the same manner as service within it, either by a New York resident authorized to make service, or by any person authorized to make service in the place of service or by a duly qualified lawyer there. The service at issue was made on a Pennsylvania corporation, doing business in New York as the operator of a tour bus company. The action was commenced in Supreme Court, Kings County, and service of the summons and complaint on Lion Corp., the tour operator, by delivery to a vice-president. The process server was a Pennsylvania resident, and not a sheriff authorized by Pennsylvania to make service, or an attorney, solicitor, barrister or the equivalent. Thus, under the language of CPLR 313, he was not authorized to make the service.[61] The issue was whether the improper server invalidated the service, requiring dismissal of the action as against Lion.

Plaintiff relied on a First Department case, *American Home Assur. Co. v. Morris Indus. Builders, Inc.,*[62] as authority that service by an unauthorized person is a mere irregularity. That case involved service in New Jersey by a New Jersey resident not authorized to serve process there, which the court found did not invalidate service. The court reasoned that it has been held that service by a party is a mere irregularity, and the defect before it was even less serious. The Second Department declined to follow that rule, holding to the contrary that "statutes defining the methodology of service may not be overlooked or ignored", and that consequently jurisdiction had not been obtained. It noted that its holdings as to service by parties is contrary to that relied on by the First Department. The Second Department therefore invalidated the service, and the resulting default judgment was vacated and the case dismissed.

The Court of Appeals began by reviewing the effect of the 2007 amendment to CPLR 2001. That amendment was the legislative reaction to Court of Appeals cases such as *Harris v Niagara Falls Bd. of Ed.* ,[63] in which held that errors in the commencement of actions did not affect the court's subject matter jurisdiction (and could therefore be ignored if there was no objection), but required dismissal if the defendant timely moved to dismiss. The amendment provided that errors in the manner of commencement may be corrected, just as with other errors, subject to payment of any outstanding fees.[64] The intent of the amendment was to avoid dismissals for "technical, non-prejudicial defects."

The Court stated that its earlier opinions suggested that the existing version of CPLR 2001 could not be applied to commencement mistakes, and that the purpose of the amendment was to allow the application of 2001 to correct or disregard technical defects occurring at commencement of an action that do not prejudice the adversary. Recognizing, of course, that commencement of an action and the subsequent service of the summons are different matters, the Court stated that it saw no reason why the Legislature would allow "technical, non-prejudicial defects" in filing to be ignored, but not similar defects in service. The Court then stated: "We therefore reject the Appellate Division's holding that a CPLR statute defining method of service can in no circumstance be disregarded."

The next question was whether the defect here was merely technical and non-prejudicial. The guiding principle is that of notice: whether or not the manner of service is reasonably calculated to give the defendants notice of the action and an opportunity to defend against it. Whether or not the defendants actually receive the papers served does not determine whether the service was sufficient. The Court cited the classic instance of *Macchia v Russo*,[65] in which delivery of the summons and complaint to the wrong person was invalid notwithstanding immediate redelivery to the actual defendant, as embodying a substantial defect which could not be remedied under CPLR 2001. Here, however, the defect was merely in the residence of the process server, and so had no effect on the probability of actual notice being given, and so relief under CPLR 2001 was appropriate.[66]

The Court's view of the 2007 amendment as being relevant to this case is interesting, and its comments will have wider ramifications beyond the rare circumstances presented here. It was not necessary for the Court to have considered the amendment at all. The First Department case relied on by the plaintiff, *American Home Assur. Co. v Morris Indus. Bldrs*.,[67] was on facts substantially identical to those here, and was decided before the amendment. The First Department had no difficulty concluding that the residence of the process server was a mere irregularity, based on the former version of CPLR 2001. There is nothing in the First Department's opinion which is inconsistent with the determination of the Court of Appeals here, and the Court might simply have adopted its reasoning, and stopped there.

Instead, it chose to go farther, based upon the amendment. The amendment was aimed at a narrow class of cases involving a particular kind of defect in commencement of an action, and strictly speaking says nothing at all about other defects at other stages of an action. The Court of Appeals here chose to reach beyond the narrow scope of the amendment, and to use it as justification for a broad rejection of the principle that a violation of a statute defining a method of service may in no circumstance be excused as a mere irregularity. In so doing, it invited arguments that particular errors in service, previously condemned as inexcusable jurisdictional defects, might now be excused as mere "technical, non-prejudicial" irregularities.

Presumably the line of cases in the Second Department, holding that service of process by a party is jurisdictionally defective, must now be viewed as overruled since they rely on the same strict view of CPLR 2001 that was rejected here. What will become of cases such as Van Raalte v Metz? There, service was purportedly made pursuant to the "nail-and-mail" provisions of CPLR 308(4), but was invalid since the process server merely wedged the papers in the doorway instead of nailing or taping them. If, in fact, the papers were wedged in such a manner as to make it equally likely for the defendant to receive them as if they had been nailed to the door, mightn't this now be considered a mere irregularity? At the least, mustn't the court consider the issue, instead of rejecting the service out-of-hand, as formerly? Or, to pick just one more possibility, what of the technical requirements for the mailings in substituted service and nail-and-mail cases? In Broomes Simon v. Klebanow, the process server attempted to utilize substituted service, including mailing the summons and complaint to the defendant's place of business. The envelopes bore indications that they were from an attorney, and failed to bear the legend "personal and confidential," both violations of CPLR 308 (2). Service was invalidated since these were method-of-service errors. Since method-of-service errors are now subject to "technical and non-prejudicial" analysis, shouldn't this and similar cases at least be re-examined?

Limitations

In *Giordano v Market America., Inc.* ,[72] the Court of Appeals construed CPLR 214-c (4), relating to causes of action for injuries due to the latent effects of substances. Responding to certified questions from the United States Court of Appeals for the Second Circuit, our Court of Appeals held: (1) that this subdivision applies only to causes of action for injuries caused by the latent effects of substances, (2) that an injury that occurs within hours of exposure may still be considered "latent," and (3) the scientific knowledge needed to commence the extended limitations period under 214-c (4) begins when the existence of a causal relationship between the exposure and the injury is generally accepted within the scientific community.

CPLR 214-c deals with toxic torts generally, other than the Agent Orange cases, which are dealt with in CPLR 214-b. The section was enacted as a legislative response to a line of Court of Appeals cases which computed the limitations period from the date of exposure, regardless of the date of injury. [73] Subdivision (2) makes such torts subject to the three-year limitations period of CPLR 214, but directs that the time period is to be computed from the discovery of the injury or the date when plaintiff could have discovered the injury with reasonable diligence. Subdivision (3) states that the same actual or imputed discovery date is the date of "accrual" for purposes of notice of claim requirements. Subdivision (4) provides an extension in the situation where the injury was known but the toxic cause was not: If the cause was discovered within five years of the actual or imputed discovery of the injury, the action may be commenced within one year of the discovery of the cause; provided that if the action is commenced beyond the three years from the discovery of the injury he will also be required to allege and prove that "technical, scientific or medical knowledge or information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized."

The questions certified by the Second Circuit were (1) whether 214-c (4) is limited to injuries caused by the latent effect of exposure to a substance, (2) whether effects that manifested themselves within 12 to 48 hours of exposure can still be considered "latent," and (3) what the standards are for evaluating the establishment of scientific knowledge to determine the commencement of the one-year period.

Our Court of Appeals responded to the first question by holding that the only plausible reading of both the statutory language and the legislative history is that the extension provisions of the 214-c (4) are limited to cases based on the latent effects of exposure to substances.

The second question was the more tangled one, and the Court's resolution provoked a three-judge dissent. The problem is that CPLR 214-c does not define what is meant by "the latent effects of exposure." There are, of course, many cases in which the effects of exposure manifest themselves almost immediately, such as allergic reactions, or burning due to corrosive substances such as acids or alkalis. These effects cannot be described as "latent," and so claims based on such exposures would not be given the benefit of CPLR 214-c. There are other cases where the effects clearly are "latent," in that they do not manifest themselves for many years, such as exposure to carcinogens, and these cases would be given the benefits of CPLR 214-c.

The case here involved effects which manifested themselves not immediately, but within a relatively brief period of 24 to 48 hours. Plaintiff had been taking a dietary supplement called ephedra for two years, which eventually caused (the Court assumed) a series of strokes in 1999. In certain individuals ephedra will cause, within a few hours after exposure, certain effects which raise the risk of stroke. [74] Plaintiff alleged that at the time he suffered the strokes, neither he nor his doctors were aware of this effect of ephedra. The relevant possible dates for knowledge of the cause were 1996, when studies were published suggesting a link between ephedra and stroke; 2005, when scientific evidence still failed to establish the link with scientific certainty; and 2003, when plaintiff read about the possible effects of ephedra in news reports. He sued in 2003, and the matter was eventually consolidated with other ephedra cases in the US District Court for the Southern District of New York. Defendants moved to

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dismiss on limitations grounds. The action, commenced more than three years from the date of plaintiff's knowledge of the injury, would be time-barred unless the brief delay in the onset of the effects of ephedra is sufficient to make them "latent," bringing the case within the extension of CPLR 214-c (4).

The Court noted that, while the dictionary definition of "latent" would encompass a condition which exists only a few hours, the application of the term here would seem to make the restriction of CPLR 214-c to "latent effects" essentially meaningless. Intuitively, it might seem that some longer period of latency is intended. That, indeed, was the position of the District Court. The majority rejected that view, however, since even an interval of a few hours between onset and exposure might serve to mask the cause-and-effect relationship sufficiently so that the application of 214-c would serve the legislative purpose of protecting victims where the cause of the injury is difficult to ascertain. While long-term latency cases were the legislature's primary focus, that does not mean that they were the only focus. Indeed, CPLR 214-c (4) would not be needed, if long-term latency were the only concern. That subdivision benefits plaintiffs in plaintiff's very circumstances – he had discovered the injury but not the cause.

The majority rejected as "anomalous" a reading of CPLR 214-c that would allow plaintiffs in long-term latency cases to sue many years after exposure, giving them in addition to the time before discovery of the injury a possible additional six years under subdivision (4), while denying the benefits of CPLR 214-c to persons like the plaintiff here, injured not immediately, but within a few hours of exposure. Allowing application of 214-c to cases such as that here results in a limitations period of at most six years under 214-c (4) (that is, at most five years to discover the cause plus one year after that to bring suit).

The dissent, on the latency issue alone, would have limited the benefits of CPLR 214-c to long-term latency cases only. To the majority's conclusion that the drafters of CPLR 214-c (4) would have considered a brief latency sufficient, the dissent responded: "If this was part of the authors' design, they kept it well hidden. The statute's legislative history evidences only a desire to enact a time of discovery rule for plaintiffs afflicted with latent diseases, such as workers exposed to asbestos or the adult daughters of mothers who ingested DES during pregnancy, not a free floating intention to alter the accrual rule in every case where a disease's etiology is difficult to divine."Finally, the Court answered the Second Circuit's third question by reaffirming earlier holdings that the relevant knowledge of the cause is that of the scientific or medical community, not the knowledge of the individual plaintiff or his lawyers. The Court adopted the standard of knowledge as that of general acceptance of the causal relationship between exposure and injury in the scientific, technical or medical community. That is the standard adopted in *Frye v United States*,[75] and is the test in New York for acceptance of expert testimony on scientific principles.[76] In this way, a causal relationship for purposes of CPLR 214-c (4) will be established at the same point expert testimony will become admissible, but not before.

In *Hernandez v New York City Health & Hosps. Corp.*,[77] the Court of Appeals had construed the statute of limitations in wrongful death cases together with the infancy toll under CPLR 208, holding that where the only distributee is an infant, the distributee's infancy serves to toll the limitations period "until the earliest moment there is a personal representative or potential personal representative who can bring the action," which the Court stated would occur upon the "appointment of a guardian or majority of the distributee, whichever occurs first" (78 NY2d at 693). In *Heslin v County of Greene*,[78] the Court held that the toll applies only to the wrongful death cause of action, and not to an action to recover for the decedent's conscious pain and suffering.

In *Portfolio Recovery Assocs., v King*,[79] the Court of Appeals considered the applicability of CPLR 202, the "borrowing" statute, where the parties have entered into a contract with a choice-of-law provision.

Defendant opened a credit card account with plaintiff's assignor in 1989. The assignor was a Delaware bank, and the agreement had a choice-of-law provision indicating that it would be governed by Delaware law. Defendant was not a Delaware resident at any time. Defendant cancelled the account in 1999. He made no payments on the outstanding balance after December, 1998. Plaintiff received an assignment of the overdue account in August, 2000, but did not commence suit until April 1, 2005, alleging breach of contract and an account stated. Defendant raised a limitations defense, based on CPLR 202 and the Delaware limitations period.

CPLR 202 provides that where a cause of action accrues outside of New York, and plaintiff sues here, the action must be timely under both the laws of the place of accrual and of New York.[80] Delaware's limitations period for breach of a credit contract is three years, [81] and plaintiff argued that the action was therefore untimely under Delaware law. Supreme Court granted summary judgment to the plaintiff, and the Appellate Division affirmed. [82] It held that the choice-of-law provision in the contract did not control, since such provisions apply to substantive law only, and New York's procedural rules apply. It found the action timely under New York law.

The Court of Appeals reversed. While the Appellate Division was correct in holding that the contractual choice-of-law provision was not controlling, that did not mean that CPLR 202 was inapplicable. Regardless of the contract, CPLR 202 still mandated that the court consider the law of the place of accrual. That place was Delaware, where plaintiff's assignor was located at the time of the breach. The Delaware statute must be considered in its entirety, however, and that includes any tolling provisions. The Delaware tolling provision [83] allows a toll when a cause of action accrues against any person, and that person is out of the Delaware and lasts until he comes into Delaware so that he could be served with process with reasonable diligence. Here, where the defendant had no connection with Delaware other than obtaining a credit card from a Delaware bank, Delaware courts have held that the tolling provision is inapplicable. The Delaware three-year statute applied, and the action was untimely.

Provisional Remedies

In *Hotel 71 Mezz Lender LLC v Falor*,[84] the Court of Appeals held that where a nondomiciliary of New York has submitted to jurisdiction here, an attachment is proper upon intangible personal property owned or controlled by him regardless of where it is located. The defendants were guarantors of a debt, and as part of the guarantee had waived defenses and consented to jurisdiction in New York.

The underlying loan was a so-called "mezzanine" loan for a hotel project in Chicago. The borrower defaulted and filed for bankruptcy. The defendants here were the guarantors. The property on which the plaintiff sought an attachment was the interests of the guarantors in 23 out-of-state business entities. The entities were limited liability companies, and the defendants' interest in them were not subject to any form of certificate. Stock certificates are tangible property, but the interests here were intangible. There was no issue concerning either personal jurisdiction over the defendants, or as to whether the particular defendant who was served with the order of attachment was the proper garnishee[85]: the issue was whether the interests in out-of-state entities were subject to attachment at all. The argument against the attachment was that the New York courts could not exercise jurisdiction over the out-of-state intangible assets.

An attachment itself gives the plaintiff no interest in the property. It serves two possible purposes. It may serve to keep the disputed property out of the defendant's control so as to keep it available to satisfy an eventual judgment. An attachment may also serve as a jurisdictional predicate where the defendant is not otherwise subject to personal jurisdiction but owns property in the state ("quasi-in-rem" jurisdiction). Thus, where jurisdiction over the defendant has not been obtained, attachment requires that the property be located in the state.[86] Here, the defendants submitted to New York's jurisdiction, and so "quasi-in-rem" jurisdiction was not relevant. The purpose of the attachment here was to provide security for the plaintiffs if they recovered a judgment. Where a court has personal jurisdiction over a nondomiciliary defendant, it also has jurisdiction over his tangible or intangible property, whether located in or out of the state.

The Court held that the defendants' intangible property interests had no fixed situs, but were with them wherever they traveled. Since the defendant who controlled these interests was the proper garnishee and was present in New York at the time he was served, were "located" in New York and thus were attachable.

Finally, the Court held that the trial court had properly appointed a receiver for purposes of satisfying the judgment.

1. *Dudley v Perkins*, 235 NY 448, 457 [1923]
2. *Whitfield v City of New York*, 90 NY2d 777, 780 fn, 666 N.Y.S.2d 545, 547 [1997] (collecting earlier cases); *Batavia Turf Farms v County of Genesee*, 91 NY2d 906, 668 N.Y.S.2d 1001 [1998]
3. *Adams v Genie Indus., Inc*., 14 NY3d 535, 903 N.Y.S.2d 318 [May 11, 2010]
4. *Matter of Kachalsky v Cacace*, 14 N.Y.3d 743, 899 N.Y.S.2d 748 [February 26, 2010]
5. *Matter of Kachalsky v Cacace*, 65 A.D.3d 1045, 884 N.Y.S.2d 877 [2d Dept., 2009]
6. NYS Constitution, Article 6,§ 3 (b) (1); CPLR 5601 (b)
7. *McDonald v Chicago*, 561 U.S. ___ (2010)
8. *Cadichon v Facelle*, ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 07577 [October 26, 2010]
9. *Cadichon v Facelle*, 15 N.Y.3d 767, 906 N.Y.S.2d 811[July 1, 2010]
10. *Parkin v Ederer*, 27 A.D.3d 633, 810 N.Y.S.2d 901 [2d Dept., 2006]; *Rezene v Williams*, 22 A.D.3d 656, 804 N.Y.S.2d 335 2d Dept., 2005]
11. *Baczkowski v D. A. Collins Const. Co*., 89 NY2d 499, 655 NYS2d 848 [1997]
12. *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 768 NYS2d 735 [2003] discussed above.
13. *Grobman v Chernoff*, ___ NY3d ___, ___ NYS2d ___ 2010 Slip Op. 08768 [Nov. 30, 2010]
14. *Grobman v Chernoff*, 35 A.D.3d 658 826 N.Y.S.2d 709 [2d Dept., 2006]
15. *Love v State of New York*, 78 NY2d 540, 577 NYS2d 359 [1991]; *see also Gunnarson v. State*,70 N.Y.2d 923, 524 N.Y.S.2d 396 [1987]; *Trimboli v Scarpaci Funeral Home*, 37 AD2d 386, *affd on opn below* 30 NY2d 687
16. *Matter of NYCTA v TWU*, 14 N.Y.3d 119, 897 N.Y.S.2d 689 [February 18, 2010]
17. *See, e.g*., *Matter of Henneberry v ING Capital Advisers, LLC*, 10 N.Y.3d 278, 857 N.Y.S.2d 3 [2008]
18. *Matter of Falzone v NY Cent. Mut. Fire Ins. Co.*, ___ NY3d ___, ___ NYS2d ___, 2010 Slip Opn. 07417 [October 21, 2010]
19. *Clemens v Apple*, 65 N.Y.2d 746, 492 N.Y.S.2d 20 [1985], *affirming for the reasons stated at the Appellate Division*, 102 A.D.2d 236, 477 N.Y.S.2d 774
20. *Moray v Koven & Krause*, ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 07573 [October 26, 2010]
21. **(c) Death, removal or disability of attorney**. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.
22. CPLR 3012 (b)
23. The Court stated that Goodman indicated in the affidavit that he was mindful of his suspension and acted only as the "former attorney" for the plaintiff.
24. *People v Taylor*, 14 N.Y.3d 727, 900 N.Y.S.2d 237 [February 11, 2010]
25. 55 A.D.3d 640, 865 N.Y.S.2d 266 [2d Dept., 2008]
26. *Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485 ___ NYS2d ___, 2010 NY Slip Op 08379 [November 17, 2010]
27. *Matter of Hua Nan Commercial Bank Ltd. v. Albicocco*, 270 A.D.2d 265 [2d Dept., 2000]
28. *City of New York v Maul*, 14 N.Y.3d 499, 903 N.Y.S.2d 304 [May 6, 2010]
29. Chief Judge Lippman took no part.
30. See, CPLR 901 (a).
31. CPLR 901(a)(2)
32. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]. Five classes of at least a million members each were denied class certification of their claims against tobacco companies for damages. The Appellate Division there found that individualized issues of proof of addiction and individual knowledge of the dangers of smoking predominated over common questions of fraudulent deception by the corporate defendants.
33. *Weinberg v Hertz Corp*., 69 NY2d 979 [1987]. Plaintiffs alleged three unfair and deceptive practices by the defendant car rental company. The Appellate Division granted class action status even though not all of the class members might have been subjected to all of the practices complained of. The Appellate Division pointed out that class certification may be proper under Article 9 even where there are individualized subsidiary questions of law or fact.
34. *Baby Neal v Casey*, 43 F3d 48 [3d Cir 1994]. Class certification was granted in a case involving failures to provide services to Philadelphia children, the Third Circuit emphasizing that the declaratory and injunctive relief sought in the complaint rendered individualized concerns irrelevant.
35. *Marisol A. v Giuliani*, 126 F3d 372 [2d Cir 1997]. This case involved a large class of children who actually or potentially in custody of ACS, and several different aspects of the child welfare system. The Second Circuit dealt with the tension between common aspects of all claims and the specific groups of claims by directing the district court to divide the class into subclasses involving similar issues.
36. *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 07414 [October 21, 2010]
37. 56 A.D.3d 162, 865 N.Y.S.2d 706 [3rd Dept., 2008]
38. *See, City of New York v Maul*, 14 N.Y.3d 499, 903 N.Y.S.2d 304 [May 6, 2010], noting that the Legislature completely revised the class action article in 1975.
39. *Trustees v Greenough*, 105 US 527, 536 [1882]; *see also Woodruff v. New York, Lake Erie & Western Railroad Co.*, 129 N.Y. 27 [1891]
40. L. 2010, Ch. 29, effective January 1, 2011 as to all actions pending on or after that date.
41. CPLR 2307
42. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 [1999]
43. 94 NY2d at 123
44. *Brill v City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 [2004]
45. *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 786 N.Y.S.2d 379 [2004]
46. *Andrea v Arnone, Hedin, Casker, Kennedy & Drake*, 5 N.Y.3d 514, 806 N.Y.S.2d 453 [2005]
47. *Gibbs v St. Barnabas Hosp.*, ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 09198 [December 16, 2010]
48. To be sure, the bill of particulars is a pleading device, not a disclosure device, but the penalties for a failure to provide a bill are in Article 31, and the point of this decision is that conditional orders are to be enforced, regardless of the nature of the underlying default.
49. *Fiore v. Galang*, 64 N.Y.2d 999, 489 N.Y.S.2d 47 [1985]
50. 94 N.Y.2d 122
51. *Howard S. v Lillian S.*, 14 N.Y.3d 431, 902 N.Y.S.2d 17 [April 29, 2010]
52. Compare *McMahan v. McMahan*, 474 N.Y.S.2d 974, 100 A.D.2d 826 [1st Dept., 1984]; *Ginsberg v. Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233 [2d Dept., 1984]; with *Nigro v. Nigro*, 121 A.D.2d 833, 504 N.Y.S.2d 264 [3rd Dept., 1986] and *Lemke v. Lemke*, 100 A.D.2d 735, 473 N.Y.S.2d 646 [4th Dept., 1984]; see also *Davis v. Davis*, 71 A.D.3d 13, 889 N.Y.S.2d 611 [2d Dept., 2009] where the non-disclosure rule is described as "New York's long-standing rule."
53. L. 2010, ch. 427, effective August 30, 2010, applicable to all actions and proceedings pending or commenced on or after that date.
54. *Musso v Otashsko*, 468 F3d 99]2d Circuit 2006]
55. *John Galliano, S.A., v Stallion, Inc.*, 15 N.Y.3d 75, 904 N.Y.S.2d 683 [June 8, 2010]
56. *See, Volkswagen AG v Schlunk*, 486 U.S. 694, 698-699 [1988]
57. CPLR 5304
58. *American Std., Inc. v Oakfabco, Inc.*, 14 N.Y.3d 399, 901 N.Y.S.2d 572 [April 6, 2010]
59. *Ruffin v. Lion Corp*., 63 A.D.3d 814, 880 N.Y.S.2d 702 [2d Dept., 2009]; *lv granted* 13 N.Y.3d 710
60. *Ruffin v Lion Corp.*, ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 08767 [November 30, 2010]
61. The Appellate Division opinion did not give any detail about the service, and it appeared possible that the process server was the plaintiff himself. Under Second Department precedents, that would have been improper, quite aside from the residence issue (CPLR 2103 (a), 313). The Court of Appeals' opinion makes clear that that was not the case.
62. *American Home Assur. Co. v. Morris Indus. Builders, Inc.*, 176 A.D.2d 541, 575 N.Y.S.2d 14 [1st Dept., 1991]
63. *Harris v Niagara Falls Bd. of Ed.*, 6 N.Y.3d 155, 811 NYS2d 299 [2006]. The legislative memorandum in support of the amendment stated that it was in response to the determinations of the Court of Appeals in *Harris*, as well as in the cases harmonized by *Harris*: *Matter of Gershel v Porr*, 89 NY2d327, 653 NYS2d 82 [1996]; and *Matter of Fry v Village of Tarrytown*, 80 NY2d 714, 658 NYS2d 205 [1997].
64. L. 2007, ch. 529, effective 8/15/07. The new text of CPLR 2001 is as follows:

§ **2001. Mistakes, omissions, defects and irregularities.** At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

65. *Macchia v. Russo*, 67 N.Y.2d 592, 505 N.Y.S.2d 591 [1986]
66. Interestingly, the Court held only that relief under CPLR 2001 was permissible, not that it was necessarily required in this case.
67. *American Home Assur. Co. v Morris Indus. Bldrs*., 176 AD2d 541, 575 N.Y.S.2d 14 [1st Dept., 1991]
68. E.g., *Miller v. Bank of New York (Delaware)*, 650 N.Y.S.2d 737, 226 A.D.2d 507 [2d Dept., 1996]
69. *Van Raalte v Metz*, 161 AD2d 760, 556 NYS2d 112 [2d Dept., 1990]; *see also Werner v. Schweit*, 138 A.D.2d

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Criminal Law: Cases

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Law § 485.05 criminalized an offense against a "person" because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of such person, Penal Law § 10.00 defined the term "person" as "a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality". Since the congregation that owned the synagogue fell under the category of an association of individuals or a religious corporation, it therefore qualified as a "person". In addition, the Court reasoned that although the target of *Assi's* offense was a building, the true victims were the individuals of Jewish faith who were members of the synagogue.

In *People v. Kadarko*, 14 N.Y.3d 426 (2010) (decided April 6, 2010), the Court of Appeals considered the duties imposed on a trial judge under Criminal Procedure Law § 310.30 which provides that when a deliberating jury sends a note to the court, the judge must notify counsel of the note and provide the jury with a "meaningful response". In *Kadarko*, the jury sent a note to the trial judge advising that they were deadlocked and specifying the numerical breakdown of the jurors' votes on each of the offenses they were considering. Upon receiving the note, the trial judge explained its contents to counsel but declined to show counsel the numerical breakdown of the votes. After the trial judge delivered an *Allen* charge to the jury, he showed counsel the note with the number divisions. Ultimately, the jury convicted *Kadarko* of one offense but hung on the others.

On appeal, *Kadarko* argued that the trial judge had committed a "mode of proceedings" error by failing to inform counsel of the verbatim contents of the jury's note, including the numerical divisions. But the Court of Appeals held that while the trial judge's decision not to read the entire note to counsel until after the jury had resumed deliberations may have been erroneous, it was not a mode of proceedings error. The Court further noted that since the trial judge later corrected the error when he read the note's contents to counsel, and since counsel voiced no objection or requested any further instruction at that time, the defendant was not entitled to a new trial.

In *People v. Rivera*, 15 N.Y.3d 207 (2010) (decided May 6, 2010), another case involving a jury issue, the Court of Appeals reached a different result. In *Rivera*, the trial judge submitted eleven counts to the jury. In the course of their deliberations, the jury advised that they had reached a verdict on some counts but were deadlocked on others. The trial judge informed counsel that he would bring the jury into the courtroom to take a partial verdict and "then see where we go from there". After the jury announced its partial verdict, acquitting the defendant of five of the counts and convicting him of a single misdemeanor, the trial judge refused to accept the verdict and ordered the jury to resume deliberations on all eleven counts. The next day, the jury found the defendant guilty of ten of the eleven counts submitted.

In overturning *Rivera's* conviction and ordering a new trial, the Court of Appeals held that the trial judge had violated the requirements of Criminal Procedure Law § 310.70 which provides for two courses of action when a deliberating jury has declared that it has reached a partial verdict: (1) order the jury to render a partial verdict and continue deliberating upon the remainder of the counts submitted, or (2) refuse to accept a partial verdict and order the jury to continue its deliberations upon the entire case. Here, by ordering the jury to render its partial verdict, and then refusing to accept the partial verdict and ordering the jury to resume deliberations on the entire case, the trial judge effectively "took the pulse of the jury deliberations" and exerted improper influence over the jury. As a result, the defendant fundamental right to a trial by jury was violated as well.

In *People v. McBride* , 14 N.Y.3d 440 (2010) (decided April 29, 2010), the Court of Appeals determined that exigent circumstances justified a warrantless search of the defendant's home which resulted in the seizure of clothing and other evidence. In *McBride*, an eyewitness to an armed robbery provided information to the police that led to a positive identification of the defendant's photo in an array. After learning that the defendant was on parole, the assigned investigator obtained the defendant's address from his parole officer. That same evening, at about 11:00 p.m., the investigator and four other officers proceeded to the defendant's apartment and peered through his window and observed a man lying on the floor. After the investigators knocked on the window and announced, police department, open up the door", a young woman came to the door, crying and hyperventilating. When the officers were unsuccessful in eliciting any information from the woman, they entered the defendant's apartment and arrested him.

Though the Court of Appeals acknowledged in *McBride* that it "would have been more prudent if the police obtained a warrant for defendant's arrest before going to his home", exigent circumstances justified the warrantless entry, arrest and seizure of property. The Court also provided hearing judges with a non-exhaustive list of factors that they should consider in determining whether exigent circumstances are present. Those factors include "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause ... to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry".

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So what? None of these factors have any place in determining whether the property was separate or marital. But one factor, which is more convincing, is that the property was not acquired solely with separate property, but also with two mortgages, which wound up being paid down with an account into which there were commingled funds, including the "rent" they paid into said account. That is how the Court of Appeals got around the argument that the property had been in exchange for separate property. However, this is another example of bad law being made to achieve what a court believes in an equitable result. Timothy M. Tippins wrote a Law Journal Article, which was nothing less than as scathing a criticism of this decision as could have been set to paper. It would be worthwhile to read (Law Journal of September 2, 2010).

There is one point that should not be missed. There are conflicting decisions as to whether or not the income from separate property, during the marriage, is marital or separate. In their discussion, the Court of Appeals, in furthering their argument that marital property was used to pay down the mortgages, said that the Husband "failed to establish that the mortgages, the proceeds of which were used to pay the majority of the town house's purchase price, were paid using money derived exclusively from separate property, much less that all of the expenses associated with the property were covered by segregated funds." Can we take a negative inference from that, and argue that if he DID establish that the mortgage and expenses were paid solely from separate property income (rents) that the result would have been different? Can we argue at least that this language strongly suggests income from separate property remains separate? Such arguments appear to be appropriate, although neither of those propositions were specifically held or enunciated. Tune in next year. We will look for the answers.

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592, 526 N.Y.S.2d 175 [2d Dept., 1988]; *Steltzer v. Eason*, 131 A.D.2d 833, 517 N.Y.S.2d 193 [2d Dept., 1988]; *PacAmOr Bearings, Inc. v. Foley*, 92 A.D.2d 959, 460 N.Y.S.2d 662 [3rd Dept., 1983] ("The affixing of a summons to the door is to be accomplished by use of a nail, tack, tape, rubber band or some other device which will ensure a genuine adherence.")

70. CPLR 308 (2) and (4)
71. *BroomesSimon v. Klebanow*, 160 A.D.2d 973, 554 N.Y.S.2d 695 [2d Dept., 1990]
72. *Giordano v Market America., Inc.* , ___ NY3d ___, ___ NYS2d ___, 2010 NY Slip Op 08382 [November 18, 2010]
73. *Matter of New York County DES Litigation* , 89 N.Y.2d 506 655 N.Y.S.2d 862 [1997]
74. It is apparently the case, and the Court accepted, that the allegedly deleterious effects of ephedra are not cumulative over time, and that they will manifest themselves within 48 hours or not at all.
75. *Frye v United States* , 54 US App DC 46, 293 F. 1013 [1923]
76. *See generally, e.g.*, *Parker v Mobil Oil Corp.* , 7 NY3d 434, 824 NYS2d 584 [2006]
77. *Hernandez v New York City Health & Hosps. Corp.* , 78 NY2d 687 [1991]
78. *Heslin v County of Greene*, 14 N.Y.3d 67, 896 N.Y.S.2d 723 [2010]
79. *Portfolio Recovery Assoc., LLC v King* , 14 N.Y.3d 410, 901 N.Y.S.2d 575 [April 29, 2010]
80. Unless, that is, the plaintiff is himself a New York resident, in which case only New York's limitations period will apply (CPLR 202).
81. 10 Del. Code § 8106
82. *Portfolio Recovery Associates, LLC v. King* , 55 A.D.3d 1074, 866 N.Y.S.2d 395 [3rd Dept., 2008]
83. Delaware Code § 8117
84. *Hotel 71 Mezz Lender LLC v Falor*, 14 N.Y.3d 303, 900 N.Y.S.2d 698 [February 16, 2010]
85. The defendant who was served was in New York at the time, having given a deposition that day.
86. See, *Koehler v Bank of Bermuda Ltd.* , 12 N.Y.3d 533, 883 N.Y.S.2d 763 [2009]