

**CIVIL LITIGATION
IN
NEW YORK**

Fifth Edition

2009 Up-Date Memorandum

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This memorandum was prepared by Oscar G. Chase and Robert A. Barker for the benefit of students and faculty. The closing date for materials was June 30, 2009. Permission is granted to distribute copies free of charge to students in classes using the casebook.

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Chapter 1 Jurisdiction

§ 1.06 Jurisdiction Based on Specific Contacts

Page 68: Add to Note (2): *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381, 849 N.Y.S.2d 501, 506, 880 N.E.2d 22, 27 (2007), further reduces the importance of physical presence, stating that it was “immaterial” that the non-resident never entered New York in connection with the transaction. The Court of Appeals unanimously upheld the extension of long-arm jurisdiction under CPLR 302(a)(1) over two defendants, residents of California, who had retained the plaintiff, a New York attorney, to represent them in a suit in Oregon. Over the course of the representation, the clients, now defendants, never entered New York. The defendants communicated twice a week over the phone with the attorney, and sent several emails, faxes, and mailed documents, all pertaining to the suit in Oregon. After a dispute about the terms of compensation, the plaintiff sued for his lawyer’s fees. The Court of Appeals applied the criteria set forth in *Deutsche Bank*, requiring, first, that the defendants purposefully avail themselves “of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,” (*Fischbarg*, 9 N.Y.3d at 380), and second, that there was a “substantial relationship” between the defendants’ activities and the plaintiff’s claim. Physical presence within the state was irrelevant: the primary concern was the quality of the defendant’s interactions with New York. Since the defendant had retained the New York attorney, and maintained an ongoing professional relationship with him (a relationship protected under New York law), jurisdiction was proper.

Although a literal reading of 302(a)(1) would suggest that physical presence “within the state” is required for jurisdiction, recent cases such as *Fischbarg* seem to suggest that the physical presence requirement has been supplemented by a requirement for a virtual or “projected” presence. In *Fischbarg*, the defendants “projected themselves into our state’s legal services market.” 9 N.Y.3d at 383. In *Parke Bernet*, the court held that the defendant, by means of the open-line phone call, “in a very real sense, projected himself into the auction room in order to compete with the other prospective purchasers who were there.” 26 N.Y.2d at 18. The *Fischbarg* case did, however, confirm that *M. Katz & Son* was still a valid decision in that: “merely telephoning a single order” to New York was insufficient to confer jurisdiction. *Fischbarg*, 9 N.Y.3d at 380. Perhaps the court felt that a single, routine phone purchase order did not involve enough “active participation” (*Parke Bernet*, 26 N.Y.2d at 17) by the defendant to establish a sense of presence.

Page 70: Add before last paragraph of Note (5):

Fischbarg, note 2, *supra*, however, does not clarify precisely what level of communication is necessary to constitute a transaction of business. Would a client’s retention of a New York attorney, by itself, be sufficient? What if the client retained an out-of-state attorney

to litigate a case in New York? See *Haar v. Armendoris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70 (1973), in which the plaintiff, a Massachusetts attorney, sued a Delaware corporation that had hired him to litigate a case in New York. The Court of Appeals emphasized that the plaintiff could not rely solely on his own work in New York for 302(a)(1) jurisdiction. Since the record did not show any evidence of the defendant's independent activities or communications with New York, jurisdiction could not be extended. In *Fischbarg*, the court distinguished *Haar* by pointing out that in *Fischbarg* the record was replete with evidence of the *defendants'* purposeful contacts with New York.

Page 71: Add a new Note (7): The problem of "libel tourism" has led to case law and legislative developments. Libel tourism has been defined as the act of obtaining libel judgments in foreign countries with plaintiff-friendly libel laws, such as England. See Paul H. Aloe, *Unraveling Libel Tourism*, N.Y.L.J., June 18, 2008, at 4. Professor Aloe explains:

A party who is libeled can generally bring suit in any jurisdiction in which the libelous statement may have been published. Effectively, with modern commerce, this means that a libel plaintiff can choose to sue virtually anywhere the work may have been sold. The effect and intent of these tactics is to strip U.S. authors of the protections they would have under U.S. law even though the publication occurred in the United States.

Do libel tourists seeking to enforce judgments against New York residents make themselves amenable to suit in New York? The Court of Appeals held in *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, N.Y.S.2d 381, 881 N.E.2d 830, 851 (2007) that long-arm jurisdiction did not extend to suits against foreign litigants by New York victims of libel tourism. In this case, the plaintiff, a New York author, had written a book, published in the United States, that accused the defendant, a Saudi businessman, of supporting terrorism. Even though only 23 copies of the book were purchased in the England via the internet, the businessman was able to sue the author in England for libel. When the author (now the plaintiff) refused to appear, the businessman obtained a judgment by default. The plaintiff then sued the defendant in the U.S. District Court for the Southern District of New York to have the foreign libel judgment declared unenforceable in the U.S. The defendant responded by claiming a lack of personal jurisdiction, since the defendant's contacts with New York were limited to providing the plaintiff with information regarding the foreign libel case. The defendant had served papers on the plaintiff in New York, his lawyers had contacted the plaintiff through e-mail and mail, and the defendant had also reported the English court order on his website, which was accessible in New York. The New York Court of Appeals, on referral from the U.S. Court of Appeals for the Second Circuit, held that these contacts did not constitute a "transaction of business" under 302(a)(1), since the defendant did not purposefully avail himself of the privileges and benefits of New York's laws, nor did he seek to initiate any business transaction. *Ehrenfeld*, 9 N.Y.3d at 509. Compare this to *Fischbarg*, in which the court notes that the defendant had received the benefits that New York law provides to clients of New York attorneys. 9 N.Y.3d at 383, n.7. ("See e.g. 22 NYCRR 1210.1 [setting forth New York's "Client Bill of Rights," which provides, among other things, that clients, such as defendants, are "entitled to be charged a reasonable fee"]").

The New York legislature has responded by overturning *Ehrenfeld*, and permitting jurisdiction in such cases. This controversial law, entitled the “Libel Terrorism Protection Act,” creates a new subdivision (d) to CPLR 302:¹

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided: 1. the publication at issue was published in New York, and 2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

Note the two New York nexus requirements: New York publication, and the potential effect that foreign defamation judgment might have on behavior or assets in New York. Are these requirements overbroad? Commentators have voiced concerns that the literal reading of 302(d) might give rise to a “reverse libel tourism.” In this situation, any author with enough contacts and assets in New York might be able to sue a foreign libel judgment holder. Would there be jurisdiction under the new CPLR 302(d) under the *Ehrenfeld* facts? If so, would it be constitutional?

The Libel Terrorism Act also adds a new subsection (8) to CPLR 5304(b). It provides that a foreign judgment for defamation will not be entitled to recognition in New York unless the “defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.”

Page 74: Add to end of the Note: A recent example of a cause of action ‘arising from’ an act enumerated in CPLR 302(a) comes from *Fischbarg v. Doucet*, supra, where the plaintiff, a New York attorney, sued his out-of-state clients for legal fees. The defendants’ conversations with the plaintiff centered on the plaintiff’s work in representing the defendants, and thus the plaintiff’s claim for legal fees was directly dependent on these interactions. 9 N.Y.3d at 384.

¹ Act of Apr. 28, 2008, ch. 66, 2008 McKinney’s Sess. Laws of N.Y.

Chapter 2 Judicial Discretion to Decline Jurisdiction

Page 126: Add to Note (1): In *A.I.G. v. Greenberg*, 23 Misc.3d 278, 877 N.Y.S.2d 614 (Sup. Ct. 2008), the Supreme Court in New York County held that even when a corporation is incorporated in another state (Delaware), the plaintiff's choice of New York as a forum will sometimes be respected. Here the court emphasized that New York was the factual nexus of the action, the location of the corporation's headquarters as well as key documents and witnesses, and the residence of several defendants. The defendants failed to show the action would cause personal hardship or a burden on New York courts. The court also pointed to related litigation that was ongoing in New York at the time of the action and the absence of such litigation in Delaware.

Chapter 3 Choosing the Proper Forum within the State

§ 3.02 The Concept of Subject Matter Jurisdiction

Page 145: Add to the Note beginning on page 144: *Financial Industry Regulatory Authority, Inc. v. Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267, 882 N.E.2d 879 (2008) provides an example of the non-waivability of a defect in subject matter jurisdiction. There, a government agency sued a stockbroker for failure to pay fees incurred for violations of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C.S. § 78a et seq. However, since 15 U.S.C.S. § 78aa stipulates that district courts of the United States have exclusive jurisdiction of violations of the Exchange Act and its implementing rules, the Court of Appeals, on its own initiative, dismissed the action for lack of subject matter jurisdiction. It bears emphasizing that a court's lack of subject matter jurisdiction may be raised at any stage of the proceedings, including sua sponte by the court.

§ 3.04 Subject Matter Jurisdiction of the Various Courts

Page 158: Add new Note (4): The Commercial Division of the of the Supreme Court was established in 1995, and now sits in ten different venues statewide, including New York County, Queens, Nassau, Albany, and the Seventh Judicial District. The Commercial Division was created by rule of the Chief Judge of the Courts pursuant to the recommendation of the Commercial Courts Task Force. *New York State Unified Court System, History of the Commercial Division*, <http://www.nycourts.gov/courts/comdiv/history.shtml>, (last visited June 19, 2009). The Commercial Division was established to expedite resolution of complicated commercial disputes. The Rules of Practice for the Commercial Division (Section 202.70 of the Uniform Civil Rules for the Supreme Court and the County Court, hereinafter 'Uniform Rules') contains many innovations that help expedite proceedings. The court can order mandatory Alternative Dispute Resolution, submitted papers are limited in length, and motions are scheduled in advance. The Rules also explicitly require that any attorney practicing before the Division be on time, have the authority to enter into agreements, be prepared to discuss any motion that has been submitted, and be fully familiar with the case. Uniform Rules, 22 NYCRR § 202.70. The Supreme Court Justices are assigned to the Commercial Division on the basis of their interest in and knowledge of complex commercial litigation and who are proactive in their case management and scheduling. Although the Commercial Division has a uniform set of rules, some judges have promulgated additional rules that apply in their courtrooms.

Not all commercial disputes are eligible for adjudication in the Commercial Division. There are varying monetary thresholds for different counties, which currently range from \$25,000 to \$150,000, unless equitable or declaratory relief is sought, Uniform Rules, 22

NYCRR 202.70 (a). In general, above the monetary threshold most cases involving breach of commercial contract, UCC cases, business transactions involving most financial institutions, and commercial insurance coverage are allowed into the Commercial Division. Commercial class actions and dissolutions of limited liability companies and partnerships are also eligible without consideration of the monetary threshold. *Id.* at (b). Assignment to the Commercial Division must be sought affirmatively, either by designating the action as a commercial case in the Request for Judicial Intervention and submitting a supporting statement or by application of another party to transfer it to the division, Uniform Rules, 22 NYCRR 202.70 (d),(e).

The creators of the Commercial Division sought to give sophisticated commercial litigants an appealing state alternative to removal to federal courts, as well as to make state court more amenable to practitioners who are accustomed to federal court. Commercial Division, *Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups 4* (2006), available at <http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>. The Commercial Division Rules borrow some innovations from the Federal Rules of Civil Procedure, especially with regard to efficient case management. There are signs of success in the endeavor, especially the growing use of the Division. *See generally*, New York State Supreme Court: Commercial Division, <http://www.nycourts.gov/courts/comdiv/> (last visited June 16, 2009).

Chapter 5 Commencing the Action and Service of the Summons

§ 5.02 Commencement by Filing

Page 192: Add a new Note (4): CPLR 2001 was amended in 2007 to give the courts discretionary authority to disregard non-prejudicial errors in commencing an action. As amended, it now reads (with new language in bold type):

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**.

Thus, “ non-prejudicial defects in commencement, such as late payment of the fee because of a bounced check (which is subsequently cured) or the failure to purchase a second index number under the facts of *Harris* would be excusable deficiencies.” 2007 Rep. of Advisory Comm. on Civ. Prac. to the Chief Admin. Judge of the Courts of the State of New York *reprinted in* 2007 N.Y. Sess. Laws 2218 (McKinney).

The amendment does not rescue all cases in which mistakes are made in filing, however. For example, the legislature did not overrule *Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316 (1984) *supra* at 354. Rep. of Advisory Comm. on Civ. Prac. at 2218. *Parker* held that the filing of a bare summons (without a complaint and which failed to recite the nature of the relief sought) was a nullity. It has been held that filing with the wrong clerk remains a fatal flaw in commencement. Thus, in *Miller v. Waters*, 51 A.D.3d 113, 853 N.Y.S.2d 183, 2008 N.Y.App. Div LEXIS 1630 (3d Dep’t 2008) the petitioner had improperly filed with the office of the Administrative Clerk of the Supreme and County Courts, instead of with the local County Clerk, and the Third Department held that this filing defect deprived the court of subject matter jurisdiction. The Court therefore had no power to excuse the defect. The action was dismissed under the rule of *Mendon Ponds*, despite the applicability of the 2007 amendment to CPLR 2001. A 2007 amendment to CPLR 105 further clarifies that “clerk” means the clerk of the county.

Page 192: Add new Note (5): In *Jones v. Bill*, 10 N.Y.3d 550, 860 N.Y.S.2d 769, 890 N.E.2d 884 (2008), the Court of Appeals was presented with the question of when an action is commenced against a party added after the commencement against the original defendant. The issue arose in an auto accident case which had been leased by the defendant driver. Recovery

against the lessor turned on whether or not the action was commenced before or after the effective date of an amendment to federal law which prohibits the imposition of vicarious liability on lessors whose vehicles are operated negligently by the lessee (the “Graves Amendment”, 49 U.S.C. 30106). The amendment applies only to actions commenced after the date of its enactment. The plaintiff in *Jones* had filed a summons and complaint against the defendant driver before the amendment became effective but had joined the defendant lessor after the effective date by filing an amended summons and complaint. The Supreme Court and the Appellate Division found that the action was "commenced" against the lessor when the lessor was joined, but the Court of Appeals reversed, holding that “the action” was commenced by filing the original summons and complaint and therefore the amended complaint should not have been dismissed. The Court relied on the plain language of CPLR 304.

§ 5.04 Form of Summons

Page 197: Add to Note (3): Despite efforts by law enforcement and others, the problem of “sewer service” continues to plague primarily low income defendants. In early 2009, the Attorney General of New York filed criminal charges against a firm hired to serve debt collection lawsuits on thousands of New Yorkers. The A.G. alleges that the firm filed in court thousands of false records in an attempt to cover up their failure to properly attempt service of notice. In many cases, the defendants who were supposed to be served failed to appear in court, unaware of proceedings against them until their bank accounts were frozen. The Attorney General points to the records kept by the firm, which suggest that individual process servers were in as many as four places at once, or that they drove more than 10,000 miles in a single day, as evidence that the records are fraudulent. David B. Caruso, *Court Papers Went Undelivered; Process Server Faces Charges*, N.Y.L.J., April 15, 2009 at 1. A related study by MFY Legal Services found that only 8.5 percent of defendants appeared in the approximately 180,000 civil court cases filed by seven debt-collection law firms in New York. *Id.*

§ 5.08 Proof of Service

Page 236: Replace current Note (4) with: Service on a defendant in a nation that is not a signatory to the Hague Convention may, under New York law, be made pursuant to CPLR 313. In *Morgenthau v. Avion Resources, Ltd.*, 11 N.Y.3d 383, 869 N.Y.S.2d 886, 898 N.E.2d 929 (2008), the court found that service in a foreign country can be made using any of the methods available under CPLR 313, CPLR 308 and CPLR 311(b), regardless of whether the method of service comports with laws of the nation where service is made. In this case, the defendant was served in Brazil (not a signatory of the Hague Convention) which required that service on a local domiciliary made by a foreign party be made by letter rogatory (a request by one state's court for the help of another). The plaintiff failed to use a letter rogatory, but service was held to be valid since it was consistent with the CPLR. The court declined to import foreign law into the CPLR absent its explicit inclusion.

Chapter 7 The Statutes of Limitations

§ 7.02 Finding the Applicable Statute of Limitations

Page 275: Add to end of Note (4): In *Riverside Syndicate v. Munroe*, 10 N.Y.3d 18, 24, 853 N.Y.S.2d 263, 882 N.E.2d 875, 878 (2008), a landlord brought a declaratory judgment action to declare illegal and invalid an agreement previously made with the defendant tenants. The landlord alleged that the agreement was violative of the applicable rent regulation law. As the agreement had been entered into eight years prior to the commencement of the action, the tenants raised a statute of limitations defense. The Court of Appeals held that the six-year statute of limitations for contracts did not apply to an action “to declare that no valid contractual obligations ever existed.” In other words, the statute of limitations may not be invoked to make an otherwise void contract valid.

Page 313: Add to end of Note (1): Recent cases may have further narrowed the application of the equitable estoppel doctrine. See *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 491-92, 836 N.Y.S.2d 509, 517-18, 868 N.E.2d 189, 197-98 (2007) (holding that adoptive parents could not use the doctrine to excuse the lateness of negligence claims against an adoption agency); *Pahlad v. Brustman*, 8 N.Y.3d 901, 902, 834 N.Y.S.2d 74, 74, 865 N.E.2d 1240, 1240 (2007) (barring parents of three-year-old born with birth defects from using equitable estoppel to pursue a medical malpractice claim against the obstetrician).

Page 314: Add to end of second paragraph: In *Williamson ex rel. Lipper Convertibles, L.P., v. PriceWaterHouse Coopers LLP*, 9 N.Y.3d 1, 840 N.Y.S.2d 730, 872 N.E.2d 842 (2007), the plaintiff, representing private investment funds, sued its accountant auditors for malpractice. The defendant’s work consisted of an annual audit review. Plaintiff argued that because the audits were done annually there was continuous representation and that a malpractice action was timely even as to audits done more than three years prior to the commencement of the action. The Court rejected that argument, holding that each audit was a discrete act: Once the review was completed, the defendant’s work for the year was done. Since the work was not continuous, the court held that it did not constitute a course of representation.

Page 317: Add to end of note on Defamation: The “single publication” rule applies to actions for violation of privacy under New York’s Civil Rights Act, as well as to defamation actions. *Nussenzweig v. DiCorcia*, 9 N.Y.3d 184, 848 N.Y.S.2d 7, 878 N.E.2d 589 (2007). The plaintiff sued a photographer who had taken and exhibited candid photos of street life in which the plaintiff appeared. The photographer’s exhibit had taken place in 2001, but it was not until 2005 that the plaintiff became aware of the photographs and commenced suit. The Court of Appeals granted dismissal of the case, since the one-year statute of limitations had expired more than one year prior to commencement.

§ 7.07 Tolls and Extensions

Page 354: Add to Note (2): In *Reliance Ins. Co. v. Polyvision Corp.*, 9 N.Y.3d 52, 845 N.Y.S.2d 212, 876 N.E.2d 898,(2007), the Court of Appeals held that a corporation cannot use CPLR 205(a) to relate its claim back to an earlier action brought by a different, but related, entity. In this case, a wholly-owned subsidiary had mistakenly sued on bonds issued by its parent corporation. The original action stretched over nearly a decade of motion practice and delay. When the parties discovered that the underlying right belonged to the parent of the plaintiff rather than the plaintiff, the parent argued that CPLR 205(a) should be read to allow it to re-file within the six-month grace period. The Court disagreed, emphasizing that Section 205(a) extends its benefits to *the plaintiff*, not third parties. The parent was not allowed to use litigation to which it was not a party (regardless of the close relationship between the parent and subsidiary) to extend the statute of limitations. The Court also expressed general reluctance to give litigants new ways to revive old claims.

Page 357: Add new Note (3): CPLR 205(a) was amended in 2008 to require that when an action is dismissed for neglect to prosecute, the judge must set forth on the record the specific conduct constituting neglect. The conduct specified must demonstrate a pattern of delay in prosecuting the action. Although the meaning of "pattern of delay" is not clear, in *Lopez v. State of New York*, 21 Misc. 3d 563, 566 (Ct. Cl. 2008) the court found that where an action had been filed more than twelve years ago, a claimant's failures to keep the court apprised of her current address, to file a Note of Issue and Certificate of Readiness, and to respond to the court's other inquiries and directives constitutes a general pattern of delay.

The consequences of a court failing to set forth on the record the specific conduct constituting delay are not specified. Professor Siegel infers that such a failure would mean that the plaintiff's neglect to prosecute the action would not disqualify the action from the six-month extension in 205(a). David Siegel, *Amendment Bars 'Neglect to Prosecute' Dismissal*, N.Y. L. J. September 15, 2008, at 4.

§ 7.08 The Borrowing Statute

Page 367: Add to end of Note (1): In *GML, Inc v. Cinque and Cinque, P.C.*, 9 N.Y.3d 949, 950, 846 N.Y.S.2d 599, 599, 877 N.E.2d 649, 649-50 (2007), a legal malpractice action was brought by Tennessee clients against New York attorneys. The claim arose in Tennessee, but the suit was filed in New York. Under CPLR 202, Tennessee's shorter period of limitations applied and required dismissal of the action.

§ 7.09 Conditions Precedent

Page 379: Add to Note (1): In *Rosenbaum v. City of New York*, 8 N.Y.3d 1, 828 N.Y.S.2d 228, 861 N.E.2d 43 (2006), the Court of Appeals dealt with the question of what counts as notice of claim. General Municipal Law § 50-e requires that notice of claim be served within 90 days of accrual of the claim. In *Rosenbaum*, the plaintiff's attorney had sent a letter to the city suggesting that if the city failed to lift liens against the plaintiff's property, litigation would ensue. The letter was sent within the 90 day time limit, but no other action was taken until after the 90 days had passed. The plaintiff wanted to treat the letter as notice of claim, but the Court refused, saying that, "[t]he requirements of General Municipal Law §50-e (2) are not fulfilled when a plaintiff or an attorney writes a letter to a city agency suggesting that unmet demands might lead to litigation. If they were, the City would be placed in an untenable position since any number of everyday disputes between citizens and city agencies will inevitably yield streams of similar, vaguely threatening correspondence. Section 50-e does not abet notice of claim by stealth." *Id. at* 12.

Page 380: Add to Note (3): New York City law requires that in order for a plaintiff to recover for injuries resulting from defective or unsafe sidewalks, the City must have had actual notice of the defects in advance of the accident. Administrative Code of City of N.Y. § 7-201(c)(2) (the Pothole Law). The Trial Lawyers Association responded by creating a map of the city using symbols to detail each section of uneven sidewalk, each pothole, and each section of sidewalk containing cracks and holes. Several recent cases have turned on the adequacy of the map's notice-giving function. In 2008, *D'Onofrio v. City of New York*, 11 N.Y.3d 581, 873 N.Y.S.2d 251, 901 N.E.2d 744 (2008), dealt with two instances in which the map's notice-giving was challenged by the City. In both cases, the notice was held inadequate. In one, the symbol on the map did not correspond to the actual defect in the sidewalk, and in the other, the symbol itself was unclear.

Chapter 8 Joinder of Parties

§ 8.03 Compulsory Joinder: CPLR 1001

Page 405: Add new Note (1): In *Windy Ridge Farm v. Town of Shandaken*, 11 N.Y.3d 725, 894 N.Y.S.2d 794, 894 N.E.2d 1183 (2008), the Court of Appeals upheld the dismissal of a case for failure to join necessary parties where an expired statute of limitations was the reason for the plaintiff's failure. The Court answered the question that they had left open in *Red Hook*, in § 8.03, *supra*, of whether a necessary party is subject to the jurisdiction of the court under CPLR 1001 if the statute of limitations has run. The Court held that such a party is subject to jurisdiction since the statute of limitations is merely a defense available to the defendant, rather than a jurisdictional bar to litigation. The case involved property owners challenging the methodology of a tax assessment, and who failed to join two necessary parties within the thirty-day limit. CPLR 1001 provides that joinder of a necessary party may be excused when jurisdiction can only be obtained by the consent or appearance of the necessary party. The plaintiffs in *Windy Ridge* argued that the expired statute of limitations meant that the court lacked jurisdiction within the meaning of CPLR 1001, but the court refused to read "jurisdiction" so loosely, concluding that the court did have jurisdiction over the parties, regardless of whether recovery was barred by time limitations. The plaintiffs were therefore unable to pursue their claim against any defendant.

§ 8.04 Class Actions: CPLR Article 9

Page 414: Add new Note (4): The recently decided *Alix v. Wal-Mart Stores, Inc.*, 57 A.D.3d 1044, 868 N.Y.S.2d 372 (3d Dep't 2008) is typical of the many recent attempts to form class actions against Wal-Mart, the massive discount retail chain. In this case, the putative class (containing approximately 200,000 members) alleged that Wal-Mart policies systematically deprived employees of proper compensation by manipulating time records and adopting practices designed to compel employees to work off the clock. The class certification failed because the named plaintiffs' claims were not typical of those of the class, the named plaintiffs could not fairly and adequately protect the interests of all members of the class, the common questions of law or fact did not predominate over individual questions, and a superior administrative resolution exists. While the plaintiffs proposed the use of statistical analysis to establish the existence of the unfair employment practices, the court found that such an inquiry would still require allowing the defendant to examine each datum on which the plaintiffs relied, an essentially individual inquiry. Contrast *Lamarca v. Great Atlantic and Pacific Tea Co. Inc.*, 55 A.D.3d 487, 868 N.Y.S.2d 8 (1st Dep't 2008) where the First Department affirmed the certification of a very similar class. Here the plaintiffs allege that the defendant put pressure on

individual store managers to keep payroll costs down, resulting in understaffing that pressured staff to work overtime without compensation.

Page 432 Note 2: On the preclusive effect of class action settlements, see also *People v. Applied Card Systems, Inc.*, 11 N.Y.3d 105, 863 N.Y.S.2d 105, 894 N.E.2d 1 (2008), § 23.04 *infra*.

Chapter 10 “Special” Parties: Indigents, Infants, Incompetents and Conservatees

§ 10.01 Poor Persons: CPLR Article 11

Page 507: Add to Note (2): For a critical evaluation of the struggle to secure counsel for indigent people in eviction proceedings, see Ray Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *Touro L. Rev.* 1 (2009). The author, after expressing pessimism about the likelihood of securing in court a constitutional right to a lawyer in such proceedings any time soon, concludes that advocates should supplement traditional, rights-based arguments for publicly funded counsel with arguments that emphasize the cost (from homeless shelters, missed days at work and school, and the loss of affordable housing units) of not funding such counsel. While the author is clearly sympathetic to the ultimate goal of establishing a constitutional right to counsel, he advocates strategies for influencing governments and philanthropic entities, as well as courts, to reduce the number of indigent people who must face eviction or foreclosure proceedings unrepresented.

Chapter 11 Motion Practice

§ 11.01 Making a Motion

Page 520: Add to Note (3): CPLR 2214(b) was amended in 2007 so that “[a]nswering affidavits and any notice of cross-motion . . . shall be served at least seven days before [the return date] if a notice of motion served at least sixteen days before such time so demands. . . .” A conforming amendment was made to CPLR 2215, which previously required that the cross-motion be served a minimum of three days prior to the return date, regardless of when the notice of the original motion was served. As amended, CPLR 2215 allows the movant to demand service of the cross-motion no later than seven days before the return date, so long as the notice of motion is served at least sixteen days prior thereto.

CPLR 2215 was also amended to provide that if the cross-motion is served by mail, it must be served three days earlier than otherwise required, and if served by overnight delivery it must be served one day earlier. See CPLR 2215(a),(b).

Page 529: Add to first full paragraph: In *Farkas v. Farkas*, 11 N.Y.3d 300, 869 N.Y.S.2d 380, 898 N.E.2d 563 (2008), a tangled matrimonial case, the trial judge granted a money judgment to plaintiff wife who did not submit it within 60 days causing the Appellate Division to deny her the judgment, no reasonable cause for the delay being shown. The Court of Appeals reversed since the judgment’s decretal paragraph had already granted the judgment and Rule 202.48 therefore did not apply. There was nothing to submit or settle.

Chapter 12 Provisional Remedies

§ 12.07 Notice of Pendency: CPLR Article 65

Page 580: Substitute for third paragraph: The constitutionality of the procedure under which the notice of pendency is available in New York has been upheld in *Diaz v. Paterson*, 547 F.3d 88 (2d Cir. 2008). The argument was made that the procedure deprived the owners of due process because the marketability of the property was affected without affording the owners an opportunity to be heard. Reliance on *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991) (noted at p. 553, main volume) was misplaced said the court because *Doehr* involved an attachment of defendant's home in an unrelated tort action. The notice of pendency relates directly to a claim on the property and does not restrain its transfer; it merely provides notice that an action is pending that may affect title to that property.

Chapter 13 Pleadings

§ 13.02 The Complaint

Page 595: Add to end of Note (4): The Court of Appeals resolved the conflict regarding the pleading of long-arm jurisdiction and provided additional pleading guidance in *Fischbarg v. Doucet*, 9 NY3d 375, 381, n. 5, 849 N.Y.S.2d 501, 506 n.5., 880 N.E.2d 22, 27 n.5 (2007). Citing and quoting Vincent C. Alexander's Practice Commentary, the Court held that a complaint is not subject to dismissal simply because it does not allege a basis for personal jurisdiction. If, however, the defendant moves to dismiss on the ground that there is no basis of personal jurisdiction, "the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction." *Id.*

Page 598, add to Note (1): In *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 860 N.Y.S.2d 422, 890 N.E.2d 184 (2008) the complaint contained a cause of action based on defendants' fraud in deceptively concealing pages of a lease placed beneath the top sheet signed by plaintiffs. Over defendants' CPLR 3016(b) argument that the complaint was not sufficiently particular in that no allegations of fraud were directed at any individual defendant, the Court stated that CPLR 3016(b) "should not be read to require plaintiff to state the details of the individual defendants' personal participation in, or actual knowledge of, the alleged concealment, as those facts are peculiarly within their knowledge." 10 N.Y.3d at 491, 890 N.E.2d at 186 [internal quotation marks and citations omitted.] To satisfy the statute's requirement that detailed facts should be stated in the complaint it is sufficient that "less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud." *Id.* at 5. Such circumstances were found here where plaintiffs, small business owners from various states, all presented parallel complaints alleging the same kind of concealment. This, at least for pleading purposes, suggests complicit conduct on the part of defendant corporate officers in their individual capacity.

§ 13.08 Amendments

Page 636: Add to Note (3): The Appellate Division, Second Department had required a similar showing of merit to support a CPLR 3025(b) motion for leave to amend (*Bedarf v. Rosenbaum*, 286 A.D. 1103, 145 N.Y.S.2d 857 (1st Dep't 1955)), but this year in *Lucido v. Mancuso*, 49 A.D.3d 220, 85 N.Y.S.2d 238 (2d Dep't 2008), the court expressly overruled *Bedarf* and held that in the absence of prejudice or surprise such applications are to be freely granted unless the proposed amendment is patently meritless.

Page 636: Add to Note (5): Would a statute of limitations defense, otherwise waived if not raised by motion or in the answer (CPLR 3211(e)), be preserved if raised for the first time in the answer to an amended complaint? In a medical malpractice action the complaint was amended to add a wrongful death cause of action. The court held that since the amended complaint “supplants” the original complaint (rather than simply adding to it as would a supplemental complaint) defendant’s initial assertion of the defense to the new complaint would be proper even though it could have been raised originally. Where the original complaint has no effect, said the court, defendant should not be bound by the answer to that complaint. *Mendrzycki v. Cricchio*, 58 A.D.3d 171, 868 N.Y.S.2d 107 (2d Dep’t 2008).

Chapter 15 Disclosure

§ 15.02 The Scope of Disclosure: CPLR 3101

Page 665: Add new Note (5): With the increased use of electronic means of data storage, discovery of electronically stored materials has become a matter of great concern to litigants. The volume of many litigants' electronically stored records and the complexity of retaining and retrieving relevant data can render electronic discovery excessively burdensome. With these problems in mind, the Chief Administrative Judge promulgated a new rule requiring courts (where they deem it appropriate) to establish at the preliminary conference a method *and scope* of any electronic discovery. 22 NYCRR § 202.12. The court must consider many factors including implementation of a data preservation plan, the scope of electronic data review, identification and redaction of privileged data, the anticipated costs of electronic discovery and which party should bear the costs, and identification of the systems and individuals necessary for data preservation. This new rule gives courts more power to manage and delimit electronic discovery.

§ 15.03 Who is Subject to Disclosure

Page 691: Add Note 4: The Court of Appeals has held in *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831 (2007) that counsel may informally interview an adversary party's treating physician so long as counsel's identity and interest is disclosed to the interviewee and the interviewee is cautioned not to disclose privileged or otherwise confidential information. The court could see no reason why a nonparty treating physician should be off limits when corporate employees, not considered parties, have been held available for interviews. (The court relied extensively on the rationale of *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 [1990].) Moreover, such interviews are not covered by CPLR Art. 31, or Uniform Rules provisions which would either authorize or forbid such informal contact. Also addressed were the rather involved ramifications of the federal privacy requirements under the Health Insurance Portability and Accountability Act (HIPAA). The short of it is that under HIPPA counsel may apply for the needed authorization to interview the health provider, and that if the adversary is unwilling to agree to this, counsel may obtain a court order compelling such agreement. Such orders were obtained in the cases covered under *Arons*. But then it was pointed out that under the act the health provider remains perfectly free to decide whether or not to cooperate in the proposed interview. The number of hurdles facing the prospective interviewer would seem to minimize the use of this newly recognized investigatory technique.

§ 15.04 Devices Used for Disclosure

Page 716: Note (5): As noted above, the Court of Appeals has held that counsel may interview a party's treating physician without going through the formalities of a deposition or other disclosure device. See *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831 (2007).

Chapter 16 Accelerated Judgment

§ 16.03 The Motion to Dismiss A Defense: CPLR 3211

Page 744: Add to Note (3): The Second Department ultimately found this position sound (that the pleaded defense of failure to state a cause of action is harmless surplusage and a motion to strike it should be denied) and stated that its decisions to the contrary should no longer be followed. *Butler v. Catinella*, 58 A.D.3d 145, 868 N.Y.S.2d 101 (2d Dep't 2008).

§ 16.04 The Motion for Summary Judgment: CPLR 3212

Page 748: Add to Note (1): Consider *Ramos v. Howard Indus., Inc.*, 10 N.Y.3d 218, 855 N.Y.S.2d 412, 885 N.E.2d 176 (2008), a products liability case, where plaintiff lineman was injured allegedly due to an exploding transformer manufactured by defendant. It was held that defendant was entitled to summary judgment because plaintiff failed to exclude all other causes for the alleged malfunction not attributable to defendant. Defendant, through its expert engineer's affidavit, asserted that its manufacturing process was state of the art and listed other possible causes of the explosion. Plaintiff's expert's affidavit offered the view that a superheated coil in the transformer caused the explosion. The court held that this was pure speculation, and that the expert failed to exclude the possibility of other causes.

Page 756: Add to Note (1): In *Crawford v. Liz Claiborne, Inc.*, 11 N.Y.3d 810, 869 N.Y.S.2d 378, 898 N.E.2d 561 (2008), in a complex question of timing, the Court of Appeals held *Brill* inapplicable to the case. When the preliminary conference order was made, the judge specified that dispositive motions were to be made "per local rule". At that time, local rule gave a time-limit of 60 days after the filing of the note of issue. Shortly thereafter, the local rule was changed to 120 days, and the judge issued an individual rule with a 60 day limit. A month later, the note of issue was filed and 62 days after that, the defendant made a motion for summary judgment. The trial judge granted the motion, although untimely but finding good cause to allow the late filing. The Appellate Division reversed, but the Court of Appeals reinstated the motion because under the "local rule" when the note of issue was filed (after the amendments to the local rules), the time limit was 120 days. The plaintiff, who had raised only the issue of timeliness in his response to the motion (he had not addressed the merits) found himself out of court, without a chance to address the merits of the summary judgment motion: on remand, the Appellate Division found that the plaintiff should known to address the merits of the motion as well as timeliness issue, or that he should have sought clarification of what was expected. *Crawford v. Liz Claiborne, Inc.*, 57 A.D.3d 270; 869 N.Y.S.2d 40 (1st Dep't 2008).

§ 16.05 Judgment by Default

Page 771: Add to Note (3): In *Wilson v. Galicia Contr. & Restoration Corp.*, 10 N.Y.3d 827, 860 N.Y.S.2d 417, 890 N.E.2d 179 (2008) the Court of Appeals considered a situation where defendant's answer was stricken for failure to comply with a self-executing discovery order, leaving plaintiff's verified complaint alleging negligence unrebutted. During the CPLR 3215 default judgment proceeding, the IAS Court allowed plaintiff to proceed to an inquest over defendant's argument that plaintiff's claim was fraudulent since there was strong evidence that his injury occurred in a way not ascribable to defendant. This ruling was affirmed by the Appellate Division and the Court of Appeals. The Court of Appeals majority held that the fraud argument was precluded by defendant's non-compliance with the discovery order and resultant default. This echoes the Court's "get tough" policy emphasized in *Brill v. City of New York*, supra, page 754.

Chapter 18 Pre-Trial and Calendar Practice

§ 18.04 Abandonment of Calendared Cases: CPLR 3404

Page 797: Add new paragraph: In *Okun v. Tanners*, 11 N.Y.3d 762, 867 N.Y.S.2d 25, 896 N.E.2d 660 (2008) the court gave CPLR 3404 very strict construction, ruling that plaintiff's inactivity during the year after the action was marked off the calendar constituted a final abandonment which could not be ameliorated by any excuses offered by plaintiff. This construction tends to put in question those holdings noted in the second full paragraph on p. 797 which allow plaintiff to make a motion to restore even after the year expires if a reasonable excuse can be shown.

§ 18.06 Pretrial Conferences

Page 800: Add to Paragraph [A]: CPLR R3408 was added in 2008 and requires trial judges to hold a settlement conference in some residential foreclosure cases. The new rule only applies to foreclosure actions involving high-cost and sub-prime home loans (generally those where the APR is more than 3 percentage points over treasury bonds with similar maturity periods) consummated between Jan. 1, 2003 and Sept. 1, 2008 where the defendant resides in the property in question. The conference must be scheduled within 60 days after proof of service of the complaint is filed. The settlement discussions should include determination of whether the parties can reach an agreement that will allow the defendant to avoid losing his or her home, and evaluation of potential modification of loan terms, including scheduling of payments and payment amounts.

Chapter 19 Trial

§ 19.03 Some Procedural Aspects of the Trial

Page 852: Add to Note (5): It is customary for counsel to poll the jury concerning their votes when the verdict is announced. This practice was addressed in *Duffy v. Vogel*, 12 N.Y.3d 169, ___ N.Y.S.2d ___, ___ N.E.2d ___ (2009) where the trial judge refused counsel's polling request on the ground the verdict was perfectly clear. The Court of Appeals held that counsel has an absolute right to poll the jury and that the denial of this right, regardless of the apparent clarity of the verdict, could not be deemed harmless error.

Chapter 20 Judgments and Relief from Judgments

§ 20.05 Interest, Costs, and Disbursements

Page 904: Add to Note (2): CPLR 1006(f) provides for interest against a stakeholder in an interpleader action up to the time of discharge, but not against unsuccessful claimants. Thus, where subcontractors made claims to funds put in escrow by the general contractor, and the subcontractors were found not entitled to the funds in an interpleader action brought by the stakeholder, there was no sum awarded against the subcontractors and thus no reason for an award of interest against them. Nor would CPLR 5001(a) authorize such an interest award since the subcontractors received no benefit out of this action and were not found to have committed any contractual breach. *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 8 N.Y.3d 583, 838 N.Y.S.2d 806, 870 N.E.2d 124 (2007).

Chapter 22 Enforcement of Judgments

§ 22.06 Foreign Judgments

Page 953: Add to first paragraph in § 22.06: To be enforceable in New York under CPLR 5402 a judgment must be enforceable in the rendering state. Thus, where a judgment was awarded to plaintiffs in a Louisiana class action brought because of property losses due to a flood, and remained unpaid because there was no appropriation of funds by the Louisiana legislature, which was a condition for payment, plaintiffs could have no greater access to relief in New York than they could have had in Louisiana. *Boudreaux v. State of La.*, 49 A.D.3d 238, 849 N.Y.S.2d 262 (1st Dept 2008), *aff'd Boudreaux v. State of La.*, 11 N.Y.3d 321, 868 N.Y.S.2d 575, 897 N.E.2d 1056 (2008).

Chapter 23 Res Judicata

§ 23.02 Claim Preclusion

Page 970: Add to Note (2): Where the federal Bankruptcy Court created certain monies as part of the bankrupt wholesaler's collateral available to satisfy creditors, a particular creditor could not claim an exclusive right to these funds in a subsequent New York action since it had received full notice of the bankruptcy proceedings and had full and fair opportunity to litigate in the bankruptcy proceeding. Although there seems to be no measurable distinction between the principles of claim preclusion as between federal and state rules as applied in this case, the court, in explaining why it relied on federal case authority in its analysis, noted that even though New York's transactional approach might be broader than the approach taken in federal cases, New York will apply the rules used in the jurisdiction which rendered the prior judgment. *Insurance Co. of the State of Pa. v. HSBC Bank USA*, 10 N.Y.3d 32, 852 N.Y.S.2d 812, 882 N.E.2d 381 (2008).

Page 973-74: Add to Note (3): Where the first action is dismissed without prejudice on a finding that plaintiff lacked standing, the second action on the same cause of action was not barred where intervening events now provided plaintiff with proper standing. *Landau v. LaRossa Mitchell*, 11 N.Y.3d 8, 862 N.Y.S.2d 316, 892 N.E.2d 380 (2008). Even though the new action involved the same parties and the same claim, the new action was not precluded. Since the original action dealt only with standing and capacity to sue, the plaintiff never had an opportunity to litigate the merits of its claim.

§ 23.03 Issue Preclusion

Page 987: Add new Note after the *O'Connor* case: In *Tydings v. Greenfield, Stein*, 11 N.Y.3d 195, 868 N.Y.S.2d 563, 897 N.E.2d 1044 (2008) the court relied on *O'Connor* for the proposition that when a decision rests on two independent grounds, either of which could support it alone, the rule is that neither holding is binding. Plaintiff sued a law firm for malpractice in representing her as defendant in Surrogate's Court where a proceeding was brought seeking a compulsory accounting. She had been trustee of a trust established by a relative, but had been replaced six years earlier by a successor trustee. There had been no accounting since that time. The law firm retained to represent her (defendant in her malpractice action) failed to assert a statute of limitations defense. She retained new counsel who raised this defense, but it was denied by the Surrogate on alternative grounds: 1) that she had failed to show the statute expired before the proceeding to compel the accounting was started, and 2) that the defense was unavailable because she had not timely raised it initially in the proceeding, i.e.,

that she had waived it. The Appellate Division affirmed on the second ground only.

In the malpractice action the law firm argued that on either ground the statute of limitations defense was not available to her so there could be no cause of action for malpractice in not raising it, and the holdings in the prior Surrogate's proceeding were binding. Supreme Court agreed, but the Appellate Division reversed on the ground no collateral estoppel effect should be given the Surrogate's statute of limitations holdings. The Court of Appeals affirmed. The prior determination could have been based either on the ground the statute of limitations had run, or on the ground that it had been waived, and the former ground had never been addressed by the Appellate Division. Thus, as in *O'Connor*, it was not clear that the prior determination squarely addressed and specifically decided the issue.

The Court of Appeals went on to hold that the statute had indeed expired prior to the Surrogate's proceeding and that the defense would have been available.

Page 995: Add to Note (2): Plaintiff's cause of action for legal malpractice was not collaterally estopped by the holding in a special proceeding confirming an arbitration award which plaintiff claimed resulted in inadequate damages due to his lawyer's negligence. The special proceeding did not address whether plaintiff might have been shown to have sustained further loss had his attorney adduced additional testimony, i.e., there was no identity of issues. *Kaminsky v. Herrick*, 59 A.D.3d 1, 870 N.Y.S.2d 1 (1st Dep't 2008).

§ 23.04 The Privity Problem

Page 1006: Add Note (6): Although not strictly a privity question, the "virtual representation theory" posits that a judgment may be preclusive against a non-party whose interests were the same as that of the party against whom the judgment was granted and who is seeking the very same relief denied to the prior plaintiff, but who is not an agent of the first party. This doctrine was disapproved by the U.S. Supreme Court in *Taylor v. Sturgell*, 128 S. Ct. 2161, 171 L. Ed 2d 155 (2008). The Court held that non-party preclusion was available only pursuant to previously recognized exceptions to the general rule against binding non-parties. The Opinion of Justice Ginsburg for the majority contains a useful description of the exceptions. The Court reversed the lower court's use of preclusion and remanded the case for a determination of whether one of the traditional exceptions applied. The Court noted that the doctrine of *stare decisis* would be a barrier to many cases in which preclusion was not available, and that the common sense of potential litigants and financial considerations would deter repetitive litigation in many other cases.

Privity was found in other circumstances by the New York Court of Appeals in *People v. Applied Card Systems, Inc.*, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), an action brought by the Attorney General of New York against a credit card issuer. The suit alleged

violations of the Executive Law and the Consumer Protection Act and sought civil penalties, injunctive relief, and restitution to victims of the fraudulent acts. The defendant sought dismissal on two grounds. The first (which the Court rejected) was that the New York consumer protection statutes were pre-empted by federal law. Second, that the settlement of a prior class action brought in California barred the restitution claims of any New Yorkers who had opted in to the California action. The A.G. argued that since he had not been a party to the California action and had not participated in the settlement, his action could not be subject to res judicata. The Court held, however, that the restitution claims on behalf of New York parties were identical to the claims that had been interposed on behalf of the class in California and that those claims were barred because the Attorney General was in privity with those class members who had opted in to the settlement. The Court nonetheless allowed the claims for injunctive relief and statutory penalties to proceed, along with restitution claims on behalf of non-class members.

Page 1006: Add new Note (7): One must be very careful, especially in the multi-party vehicle accident cases, that even though the “party against whom” test or the privity test may be satisfied, the prior determinations were consistent. Thus, where plaintiff sought to apply two previous holdings relating to other plaintiffs against an insurer that there was coverage for the same accident, but where the insurer pointed to another holding relating to another plaintiff arising out of the same accident that coverage did not exist, the court was unwilling to allow the use of collateral estoppel. *Gaston v. American Transit Ins. Co.*, 11 N.Y.3d 866, 873 N.Y.S.2d 250, 901 N.E.2d 743 (2008). If all the claims were consolidated, of course, this problem would not arise since there would be but one prior holding.

Chapter 24 Confronting Unlawful Government Activity

§ 24.02 Choosing a Proper form of Suit

Page 1011: Add to the end of the Section entitled *The Declaratory Judgment*: CPLR 3001 was amended in 2009 to allow claimants in personal injury suits to simultaneously commence declaratory judgment actions directly against defendants' insurers as provided in Insurance Laws § 3402(a)(6), where the insurer denies coverage to the insured based on the insured's failure to provide timely notice, and where neither the insurer nor the insured has commenced a declaratory judgment action (naming the injured person or other claimant as a party) within 60 days of the disclaimer.

Under prior law, plaintiffs could not bring an action against the insurer until they had obtained a judgment against the insured. *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 787 N.Y.S.2d 211, 820 N.E.2d 855 (2004). The bill's purpose is to prevent situations where plaintiffs engage in expensive and protracted litigation only to discover after judgment that the defendant lacks insurance and is judgment-proof. *N.Y. State Assembly: Memorandum in Support of Legislation*, Bill No. A11541 (June 11, 2008) (Weinstein, Sponsor). The defendant in such cases may have no incentive or means to seek declaratory judgment regarding coverage, leaving the plaintiff uncertain of the potential value of the suit.

§ 24.03 The Varieties of Article 78 Proceedings

Page 1044: Add new Note (4): Ten foreign nurses were indicted on charges of conspiracy and endangering patients in the institutions where they were employed when they quit employment on advice of counsel who was also indicted. Counsel's advice was given because the terms of the nurses' employment had been materially changed which, in counsel's view, constituted involuntary servitude under the Thirteenth Amendment to the United States Constitution. A proceeding for a writ of prohibition was brought to challenge the indictments. This remedy was held proper since the question raised addressed the assertion of constitutional rights – an action in excess of the prosecution's power rather than a mere error of law. *Matter of Vinluan v. Doyle*, 60 A.D.3d 237, 873 N.Y.S.2d 72 (2d Dep't 2009).

Page 1044: Add a new Note (5): In *Matter of Garner v. New York State Dep't of Correctional Services*, 10 N.Y.3d 358, 859 N.Y.S.2d 590, 889 N.E.2d 467 (2008), the Court of Appeals held that an article 78 writ of prohibition was warranted where the Department of Corrections (DOC) administratively imposed a five-year term of post-release supervision on a criminal defendant, the petitioner. The petitioner had received a five year determinate sentence for

attempted burglary. Neither at the plea allocation nor at sentencing did the Supreme Court inform the defendant that a five year term of supervision was part of his sentence (even though it was statutorily required), and the supervision was not included on his commitment order. During the supervision period, the petitioner used drugs and failed to participate in drug treatment, so was taken back to prison. The Court found that (1) the DOC was acting in a judicial or quasi-judicial capacity, (2) the DOC was proceeding in excess of its jurisdiction, and (3) the petitioner had a clear legal right to the relief requested. They also found that the harm to the petitioner was sufficiently grave to warrant relief. The writ was therefore granted, and the DOC was prohibited from imposing the post-release supervision. The People were free to seek resentencing in the proper forum.

Chapter 25 Arbitration: An Alternative to Litigation

§ 25.02 The Arbitration Agreement

Page 1060: Add to Note (1): That *Matarasso* is to be read narrowly is also supported by *Matter of Fiveco, Inc. v. Haber* 11 N.Y.3d 140, 863 N.Y.S.2d 391, 893 N.E.2d 807 (2008), in which the Court of Appeals held that where there is a dispute about whether an agreement to arbitrate had expired, untimely petitions to stay arbitration will not be entertained. Even if one party asserts that the agreement to arbitrate no longer exists, the *Matarasso* exception will not apply.