# <u>Civil Litigation in New York, 5th Ed.</u>

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## 2011 Up-date Memorandum

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, 2011. Permission is granted to distribute copies free of charge to students in classes using the casebook.

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## Chapter 1 Jurisdiction

### § 1.03 Presence – Real and Fictional

Page 52: Add Note (3): In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. __, 2011 U.S. LEXIS 4801 (June 27, 2011), the Supreme Court held that the Due Process clause prohibited North Carolina from exercising "general jurisdiction" over a foreign subsidiary of a U.S. corporation. The case arose out of a bus accident in France in which two thirteen-year-old boys from North Carolina were killed. An alleged cause of the accident was a defect in tires manufactured in Turkey by a subsidiary of Goodyear USA, an Ohio corporation that had manufacturing facilities and other commercial contacts in North Carolina. Named as defendants were Goodyear USA (which did not contest the North Carolina court's jurisdiction over it) and three Goodyear subsidiaries that were organized and operating in Europe. None of them had any plants or sales facilities in the U.S. but some thousands of tires manufactured by the subsidiaries did reach North Carolina through the "stream of commerce." Because the claim arose out of the accident in France it was conceded that it was not "related" to the defendants' activities in the state. Plaintiffs argued instead that the sale of the subsidiaries' products in the state allowed the exercise of general jurisdiction over them. The Supreme Court disagreed, noting that while the "stream of commerce" theory might yield jurisdiction over a defendant whose product caused an injury in North Carolina, it fell "far short of the 'continuous and systematic general business contacts' " needed to allow North Carolina's courts to exercise jurisdiction "on claims unrelated to anything that connects them to the State." The Supreme Court did not reach the question of whether general jurisdiction could be exercised over the subsidiaries by virtue of Goodyear USA's operations in North Carolina because the plaintiffs had failed to preserve the argument in the proceedings below.

**§ 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.

In 2008, the Court of Appeals for the Second Circuit decided *Berkshire Capital Group, LLC v. Palmet Ventures LLC*, 307 F. App'x 479 (2d Cir. 2008), which also elaborated upon the "projected" presence requirement discussed in *Fischbarg*. In *Berkshire*, plaintiff contended that the fact that the parties' contract was drafted in New York and stipulated that it would be subject to and construed in accordance with New York law was sufficient to establish that the defendant had contracted business in New York, and therefore had a "projected" presence in the state. *Berkshire*, 307 F. App'x at 480. The Court disagreed, stating that merely having contact with buyers in New York, and agreeing to the use of New York law does not constitute such a presence since it does not amount to invoking the benefits and protections of its laws; further evidence of actual business transactions occurring in New York are necessary to establish a "projected" presence. *Id.* at 481.

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. Armendaris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70, 294 N.E.2d 855 (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, 851 N.Y.S.2d 381, 881 N.E.2d 830 (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 ("*[S]ee 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 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

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

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 added 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. *Fischbarg*, 9 N.Y.3d at 384.

Page 82: The Supreme Court returned to the jurisdictional issues raised by an action against an out-of-state manufacturer whose product injures someone in the state in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S.__, 2011 U.S. LEXIS 4800 (June 27, 2011). Plaintiff Nicastro was injured in New Jersey while using a machine made by defendant McIntyre, a British corporation with no facilities in that state. Jurisdiction was asserted in New Jersey on the ground that McIntyre had sold a machine to a U.S. distributor and therefore knew or had reason to know that it might wind up in New Jersey even though the defendant had not advertised in the state or sent goods there. Moreover, the defendant had attended trade shows in the U.S., though not in New Jersey. A divided Court rejected this theory. Writing for a four justice plurality Justice Kennedy stated that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum: as a general rule it is not enough that the defendant might have predicted that the goods would reach the forum state." (Slip Op. at 7). Justice Breyer wrote a concurring opinion, in which Justice Alito joined, suggesting that the plurality opinion needlessly went too far in stating a categorical limit. Three justices dissented. Taken at face value the plurality opinion raises a serious question about the viability of CPLR 302(a)(3)(ii), which allows jurisdiction over an entity that commits a tortious act outside the state causing injury within the state if it "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Page 86: Add to Note: Further difficulties arise in identifying economic harms caused by activities on the internet. In *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 921 N.Y.S.2d 171, 946 N.E.2d 159 (2011), the Court of Appeals held that an out-of-state digital copyright infringement caused an injury in New York for the purposes CPRL 302(a)(3)(ii) when the copyright holder was based in New York. First, the fact that the infringing act occurred outside of New York carries little weight because by its nature the "intangible and ubiquitous" internet renders uploaded copyrighted

works instantaneously available to anyone in New York or elsewhere. *Penguin Group*, 16 N.Y.3d at 304. Second, the fact that a specific economic harm cannot be identified is not dispositive because copyright owners possess a "unique bundle of rights," such that a New York copyright holder suffers "something more than the indirect financial loss we deemed inadequate in *Fantis Foods*," including incentives to publish and write. *Id.* at 305.

## 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), *aff'd*, 875 N.Y.S.2d 39, 60 A.D.3d 483 (1st Dep't 2009), 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. § 78a et seq. However, since 15 U.S.C. § 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 154: Add a new Note (4): The New York City Human Rights Law protects "persons in" and "inhabitants" of New York City against unlawful discrimination. Administrative Code of City of N.Y. § 8-101, -104. Similarly, the New York State Human Rights Law protects "the people of [the] state [of New York]" against unlawful discrimination. N.Y. Executive Law § 290(2). In *Hoffman v. Parade Publications*, 15 N.Y.3d 285, 907 N.Y.S.2d 145, 933 N.E.2d 744 (2010), an out-of-state plaintiff sued his employer in New York for age discrimination under the City and State Human Rights Laws. The court dismissed the out-of-state plaintiff's claim for lack of subject matter jurisdiction without discussion. Left open is the question of how to distinguish between statutory provisions that speak to subject matter jurisdiction and statutory provisions which merely describe elements of a cause of action.

For a court to have subject matter jurisdiction under the City and State Human Rights Laws, a plaintiff must demonstrate that the discriminatory conduct had an "impact" in the city or state, respectively. *Hoffman*, 15 N.Y.3d at 290. Thus, because the plaintiff lived and worked in Georgia, the impact of the defendant's termination decision was only felt outside New York, despite the fact that the termination was made by phone call from the defendant's New York headquarters. *Id.* at N.Y.3d 292.

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 6, 2011). 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 $100,000, 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 6, 2011).

## 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 2159 (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 2159. *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.

In *Goldenberg v Westchester County Health Care Corp.*, 16 N.Y.3d 323, 921 N.Y.S.2d 619, 946 N.E.2d 717 (2011), the Court of Appeals held that failing to file a summons and complaint was a defect that could not be cured by CPLR 2001. The plaintiff had to file a notice of claim prior to filing a summons and complaint because he was suing a governmental entity. The plaintiff initially failed to file a notice of claim, and to cure this defect he commenced a special proceeding seeking permission to make a late filing. The trial court granted the relief sought, and the plaintiff proceeded to serve a notice of claim, and additionally a summons and complaint. However, the plaintiff submitted the summons and complaint to the court under the same index number as the special proceeding rather than procuring a new index number for the action. The Court concluded that this error was not a mistake in the method of filing, which CPLR 2001 would cure, but rather a complete failure to commence an action beyond the notice of claim. As a result, the Court found that the plaintiff had failed to file the action within the statute of limitations and dismissed the claim.

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.

Page 192: Add new Note (6): In 2010, § 202.5-bb was added to the Uniform Rules for the Supreme and County Courts, making it mandatory for all commercial actions in New York County to be filed and served by electronic means.

**§ 5.04 Form of Summons**

Page 196: Add to Note (2): The Administrative Code of New York City was amended in 2010 to more effectively regulate process servers. See Int. 0008-2010, April 14, 2010, amending §§ 20-403 and related sections. As amended, it is unlawful for "any person doing business as, be employed as or perform the services of a process server without a license therefor." § 20-403 § 1(a). In order to receive a process server license, applicants must pass an examination which tests knowledge of proper service of process within the City of New York, as well as familiarity with relevant laws and rules. § 20-406(c). Applicants must also furnish a surety bond in the sum of ten thousand dollars, conditioned upon the applicant's conformity with relevant provisions, and to be used as payment to the city for any fine, penalty or other obligation imposed by violation, and to a plaintiff for any final judgment recovered in an action arising out of any such violation. § 20-406.1. Any person injured by the failure of a process

server to act in accordance with the laws governing service of process shall have a cause of action against the violating process server/process serving agency. § 20-409.2. Process serving agencies must also provide each process server in their employment with a written statement outlining both the rights of employees and the obligations of process servers. § 20-406.2. Records of these written statements must be retained for up to three years, and electronic records of each process served must be retained for no less than seven years; such record maintenance must be certified in writing in order for a process serving agency to renew their license. *Id.* § 20-409. Lastly, all process servers must be equipped at all times during the commission of their licensed activities with a device which can electronically establish and record the time, date, and location of service or attempted service, and these records must be retained for seven years. § 20-410.

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. alleged that the firm filed in court thousands of false affidavits of service 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. The CEO of the firm in question has since pled guilty to the criminal charges, and will serve a year in prison. Office of the Attorney General, *Cuomo Announces Guilty Plea Of Process Server Company Owner Who*

*Denied Thousands Of New Yorkers Their Day In Court*, http://www.ag.ny.gov/media_center/2010/jan/jan15a_10.html (last visited June 6, 2011).

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.*

Page 200: Add a new Note (7): Failure to include a return date on notice papers may not result in dismissal for lack of personal jurisdiction in cases where no party would suffer prejudice. In *Matter of Garth v. Board of Assessment Review for Town of Richmond*, 13 N.Y.3d 176, 889 N.Y.S.2d 513, 918 N.E.2d 103 (2009), the petitioner served the respondent town with a notice of petition, equivalent to a summons and complaint, but did not include a return date. The respondent argued that the case should be dismissed because the notice of petition was jurisdictionally defective, but the Court of Appeals rejected that argument, observing that "mere technical defects should not defeat otherwise meritorious claims" and that "substance should be preferred over form." *Matter of Garth*, 12 N.Y.3d at 180 (quoting *Matter of Great Eastern Mall v. Condon*, 36 N.Y.2d 544, 548, 369 N.Y.S.2d 205, 330 N.E.2d 628, 630 (1997)). The relevant question was whether the respondent suffered any prejudice as a result of the petitioner's failure to include a return date. The Court found no prejudice, because a respondent's failure to reply to a notice of petition challenging a tax assessment does not result in a default judgment, but is instead deemed a denial of all claims. *See* N.Y. R.P.T.L. § 712 (McKinney 1997). Moreover, it would be unfair to the petitioner to require an accurate return date at the time of service, because often judges and corresponding hearing dates are not assigned until the brief thirty-day statute of limitations for tax certiorari proceedings has already run. In fact, the county clerk had instructed the petitioner to leave the return date blank for this very reason. *See Matter of Garth*, 12 N.Y.3d at 176.

### § 5.06 Corporations and Other Institutional Defendants

Page 228: Add a new Note (5): In *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 915 N.Y.S.2d 204, 940 N.E.2d 909 (2010), the plaintiff served a summons and complaint on defendant corporation's Pennsylvania headquarters. After a default judgment was entered, the defendant moved to dismiss on the grounds that the process server had not been authorized to effect service under CPLR 313 because he was not a New York resident, was not authorized to make service by Pennsylvania law, and was not an attorney. Conceding that the process server was not authorized to serve the defendant, the court nonetheless concluded that the irregularity in service was technical and non-prejudicial under CPLR 2001 and held that the lower court had the authority to disregard the irregularity. *See supra* § 5.02, Note (4) (discussing CPLR 2001).

The court tempered the opinion by noting that the defendant's "actual receipt of the summons and complaint is not dispositive of the efficacy of service," noting that email, mail, and other methods of service that introduce "greater possibility of failed delivery" would not be cured by §2001 even if the defendant actually received notice. *Ruffin*, 15 N.Y.3d at 912. The court distinguished the failure to satisfy a residency requirement as a mere technical infirmity that CPLR 2001 allowed them to disregard. *Id.*

Consider CPLR 2001 in light of the danger of "sewer service." *Supra* at 196-97, Note (3). CPLR 306 sets forth strict requirements for proof of service in an effort to prevent sewer service. Does CPLR 2001's allowance of irregularities undermine this effort?

### § 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 is 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 275: Add new Note (7): In *Portfolio Recovery Associates v. King*, 14 N.Y.3d 410, 901 N.Y.S.2d 575, 927 N.E.2d 1059 (2010), the Court of Appeals considered a case centering on the relationship between choice of law provisions and applicable statute of limitation. The court points out that choice of law provisions typically apply only to substantive law, and therefore, such provisions do not encompass procedural elements, such as statute of limitations. *King*, 14 N.Y.3d at 416. Instead, questions surrounding the statute of limitations should be addressed by looking to CPLR 202 which states that when a non-resident sues on a cause of action accruing outside of the state, that cause of action must be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. *Id.*

Page 275: Add a new Note (8): CPLR 213(7) provides a six-year statute of limitations for actions on behalf of a corporation against a director to recover damages. In *Roslyn Union Free School District v. Barkan*, ___ N.Y.3d ___, 2011 N.Y. LEXIS 654 (2011), the court held that an action by a school district against its school board for negligent failure to identify or respond to the theft of millions of dollars from the district by members of the administration was subject to a six-year statute of limitations. First, the court found that a school district is a corporation within the meaning of CPRL 213(7), as that statute was general and "was intended to apply in a myriad of different circumstances." *Roslyn* at *5. The defendant school board members then argued that CPLR 213(7) applied only to actions in equity, such as actions seeking injunctive relief, and not actions in law, in which damages may be awarded. However, the court found that CPLR 213(7) applies to all actions in law and equity, as the statute includes the phrase "to recover damages" and legislative history supported the application of the statute to actions in law and equity.

Page 294: Add to Note (4): CPLR 214-c(4) allows a plaintiff to commence an action for a latent injury after the three-year statute of limitations has expired if the plaintiff can "prove that technical, scientific, or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" prior to the expiration of the statute of limitations. In *Giordano v Market America, Inc.*, 15 N.Y.3d 590, 915 N.Y.S.2d 884, 941 N.E.2d 727 (2010), the plaintiff suffered a series of strokes, the cause of which doctors could not at the time identify. Four years later, after learning about negative side effects of ephedra, a dietary supplement he had taken prior to his injury, the plaintiff sued, invoking CPLR 214-c(4) to get around the three-year statute of limitations. The Court of Appeals for the Second Circuit certified the question of what standards should be used to review claims under CPLR 214-c(4) to the New York Court of Appeals. The Court held that CPLR 214-c(4) applies based on the time at which the "technical, medical or scientific community" has

sufficient information to ascertain the cause of an injury, not at the time that the general public ascertains such information. *Id.* at 601. Second, the Court held that knowledge "sufficient to ascertain the cause" meant "general acceptance of that relationship in the relevant technical, scientific, or medical community." *Id.*

Page 303: Add to Note (2): See also *Bazakos v. Lewis*, 12 N.Y.3d 631, 883 N.Y.S.2d 785, 911 N.E.2d 847 (2009), in which the defendant doctor, Lewis, allegedly injured the plaintiff, Bazakos, while performing a medical examination as an expert for the defendant in a separate legal action in which Bazakos was the plaintiff. Two years and eleven months transpired after that examination before Bazakos commenced his action against Lewis, and therefore whether Bazakos' claim was time-barred depended on whether his claim was for personal injury, for which CPLR 214(5) sets a three-year statute of limitations, or for medical malpractice, for which CPLR 214-a sets a two-years-and-sixth-months statute of limitations. Bazakos argued that since medical malpractice is a breach of a doctor's duty to a patient, Lewis' actions in the examination could not constitute medical malpractice because Lewis was not Bazakos' personal physician. However, the court concluded that because Lewis was a licensed physician performing medical treatment on Bazakos, his actions fell under medical malpractice. The court observed that there was "no good reason why the statute of limitations should be longer than it would be if Lewis were accused of making exactly the same error on a patient who came to him for consultation or care." *Bazakos*, 12 N.Y.3d at 634.

Page 307: Add to Note (1): In order to qualify for this exception, the course of treatment must run continuously, and be related to the same original condition or complaint. *Id.* In *Torres v. Terence Cardinal Cooke Health Care Center,* 72 A.D.3d 588, 899 N.Y.S.2d 224 (1st Dep't 2010), defendant filed for summary judgment against plaintiff's medical malpractice claim involving pressure ulcers,

stating that the claims were time-barred. The court held that the case fell under the continuous treatment doctrine however, and therefore denied defendant's motion. Since the defendant acknowledged that the decedent was at a high risk for pressure ulcers upon admitting him, the court reasoned that the defendant also acknowledged that the decedent had a condition that had to be monitored and treated. *Torres*, 899 N.Y.S.2d*Id.* at 225. Since the decedent had two pressure sores on his body upon his discharge from the facility, the court also inferred that the condition in question, as well as the defendant's monitoring of it, had persisted for the length of his stay. *Id.*

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 auditors 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,* 864 N.Y.S.2d 282, 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 appraised 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.

Page 358: Add new Note (1): In *Heslin v. County of Greene*, 14 N.Y.3d 67, 896 N.Y.S.2d 723, 923 N.E.2d 1111 (2010), the Court of Appeals held that the infancy toll which is applicable in wrongful death actions where all the distributees are infants, was inapplicable with regards to the statute of limitations for a personal injury cause of action asserted on behalf of the decedent by infants. The court reasoned that wrongful death claims belong to decedents' distributees, while personal injury claims belong to the decedent's estate. Therefore, distributees do not have an interest in personal injury claims, and should not be treated as if the claim were their own. *Heslin*, 14 N.Y.3d at 76.

### § 7.08 The Borrowing Statute

Page 367: Add to end of Note (1): In *GML, Inc v. Cinque & 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 a 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, 864 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 a 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.,* 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 414: Add new Note (5): In *City of New York v. Maul*, 14 N.Y.3d 499, 903 N.Y.S.2d 304, 929 N.E.2d 366 (2010), the Court of Appeals asserted its strong policy of deference to the discretion of lower courts when the issue of whether or not to certify a class action claim. The class action sought injunctive and declaratory relief against City and State agencies for developmentally disabled children placed in foster care. In addressing whether or not the diverse injuries giving rise to the class claim satisfied the commonality requirement in CPLR 901(a), the court held that the lower court had adequately weighed the statutory criteria in accordance with the considerable flexibility CPLR article 9 offers. *Maul*, 14 N.Y.3d at 513-14. The Court noted that the "commonality" requirement required a "predominance" of common issues, not identity of all issues.

Pages 419-20: Add to Note (3): In *City of New York v. Maul*, 14 N.Y.3d 499, 903 N.Y.S.2d 304, 929 N.E.2d 366 (2010), the Court of Appeals held that the Appellate Division did not abuse its discretion in affirming a Supreme Court order granting class action certification. The plaintiffs were a group of children who were or had been in New York City's foster care system who claimed they had not received adequate government services. Defendants, the municipal Administration for Children's Services (ACS) and the state Office of Mental Retardation and Developmental Disabilities (OMRDD), contended that the plaintiffs' claim was for "systemic failure," a concept too broad to fall satisfy the commonality requirement of CPLR 901(a)(2). The Court concluded that commonality could not be defined by a mechanical test, and that predominance of claims, rather that identity or unity of claims, was the linchpin of commonality. *Maul*, 14 N.Y.3d at 514. Because the Appellate Division had identified several concrete legal issues that predominated and were "narrower and more discrete" than systemic failure, the Court affirmed. *Id.* at 513.

Page 421: Add to Note (6): In deciding *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), the Supreme Court opened a door to class action suits which had been previously barred by state law. In a 5-4 decision authored by Justice Scalia, it was held that CPLR 901, which prohibits class actions in suits seeking penalties or minimum damages, conflicted with Rule 23 of the Federal Rules of Civil Procedure and could not be applied in federal diversity suits. The majority held that the Federal Rules apply in such cases where there is diversity jurisdiction. The effect of this ruling is that class action suits which may be barred by state laws, and therefore, would not be able to be filed in state courts, could be brought in federal courts so long as they meet the standards set out in Rule 23 of the Federal Rules of Civil Procedure.

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 6155, 894 N.E.2d 1 (2008), § 23.04 *infra.*

**§ 8.06 Intervention: CPLR 1012-1014**

Page 449: Add to Note (2): Whereas the First, Second, and Third Departments of the Appellate Division have generally denied health insurers' rights to intervene in medical malpractice actions between an insured plaintiff and a tortfeasor, the Fourth Department has permitted intervention. *Compare Halloran v. Don's 47 West 44th St. Restaurant Corp.*, 680 N.Y.S.2d 227, 255 A.D.2d 206 (1st Dep't 1998); *Humbach v. Goldstein*, N.Y.S.2d 950, 229 A.D.2d 64 (2d Dep't 1997); *Berry v. St. Peter's Hospital of City of Albany*, 678 N.Y.S.2d 674, 250 A.D.2d 63 (3d Dep't 1998); *with Kaczmarski v. Suddaby*, 779 N.Y.S.2d 394, 9 A.D.3d 847 (4th Dep't 2004). This split is in part attributable to the First, Second, and Third Departments' view that allowing intervention would create an improper adversarial relationship between the plaintiff and her insurer. The Fourth Department has not considered this relevant, and has allowed intervention. *See Kaczmarski*, 779 N.Y.S.2d at 394. The Court of Appeals remarked on this split, but did not have the opportunity to resolve it, in *Fasso v. Doehr*. 12 N.Y.3d 80, 89, 875 N.Y.S.2d 846, 903 N.E.2d 1167, 1172 (2009).

In response to *Fasso*, the Legislature enacted GOL 5-335, which bears on the split on intervention and may affect the intervention rights of insurers. GOL 5-335 limits a health insurer's right to subrogation in cases where an insured plaintiff and a tortfeasor settle. It provides that:

When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider…

N.Y. Gen. Oblig. Law § 5-335 (McKinney). After this law was passed in 2009, a justice of the Supreme Court in the Second Department observed that GOL 5-335 "removes the only remaining argument against intervention: the intervenor's ability to interfere with the case and block a settlement." *Rizzo v. Moseley*, 913 N.Y.S.2d 905, 30 Misc. 3d 773, 778 (Sup. Ct. 2010). Thus, that court adopted the Fourth Department position and allowed intervention.

Also noteworthy is the fact that there are now strong incentives for plaintiffs and defendants to settle, leaving health insurers uncompensated, because GOL 5-335 prevents insurers from obtaining subrogation from settlement proceedings between insured plaintiffs and tortfeasors. *See* Patrick M. Connors, *New Laws After* Fasso *Leave Health Insurer Out in the Cold*, N.Y.L.J., January 28, 2010, at p. 3.

## Chapter 9 Claims for Contribution and Indemnification

### § 9.02 The Rules of Contribution

Page 470: Add to Note (5): In *Trupia v. Lake George Central School District*, 14 N.Y.3d 392, 901 N.Y.S.2d 127, 927 N.E.2d 547 (2010), the plaintiff was seriously injured after falling from a banister, and sought recovery based on a theory of negligent supervision. The defendant wished to amend its complaint to include a primary assumption of risk defense since the plaintiff had been injured while engaged in the same activity before. The Court of Appeals held that the denial of this amendment by the Appellate Division was proper, stating that there was no compelling policy justification to allow such a defense in this case. *Trupia*, 14 N.Y.3d at 396. The Court noted that despite the Legislature's abolition of assumption of risk as an absolute defense, it has nevertheless survived as a bar to recovery on the theory that it removes any duty that the defendant may have had. *Id.* at 394-395. The Court held that this doctrinal explanation is unsatisfying, and therefore such a defense should only be permitted where there is social benefit in doing so, such as in the case of permitting "free and vigorous" athletic recreation. *Id.*

## 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

### § 12.03 Attachment: CPLR Article 62

Page 559: Add new Note (4): For the purposes of attachment jurisdiction, what counts as property and where is intangible property located? See *infra*, 2011 Supplement § 22.01, Note (1), for a description of *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 900 N.Y.S.2d 698, 926 N.E.2d 1202 (2010).

### § 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) *supra* at 553, 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 N.Y.3d 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 595: Add to Note (6): RPAPL 1304 requires a mortgage loan servicer to provide notice to the borrower at least ninety days before commencing a foreclosure. The statute spells out the required notice in detail, requiring fourteen-point type and specific text, including the New York State Banking Department's toll-free helpline and a list of at least five housing counseling agencies that serve the region where the borrower resides. A companion section, RPAPL 1303 requires the foreclosing party to serve a special notice at the time of commencing the proceeding on colored paper that includes the Banking Department’s toll-free helpline and a warning about foreclosure rescue scams. RPAPL 1320 requires that the summons in an action to foreclose a mortgage on a residential property that contains fewer than three units include a specific notice in bold text. This notice warns mortgagors that if they do not serve an answer a default judgment may be rendered against them, regardless of whether they send a payment to the mortgage company.

In *Aurora Loan Services, LLC v. Weisblum*, 923 N.Y.S.2d 609 (2d Dep't 2011), plaintiff lender served notice to defendant borrower Steven Weisblum, and then commenced a foreclosure action against him ninety days later. However, Steven's wife, Patti Weisblum, was also named on the mortgage agreement, such that Steven and Patti were collectively the "borrower" for the purpose of RPAPL 1304. Additionally, the notice sent to Steven did not contain the statutorily mandated list of counseling agencies and the defendant's motion presented no evidence that the Weisblums received notice by certified mail. The trial court concluded that these errors were not prejudicial and denied the Weisblums' motion to dismiss. The Appellate Division reversed, concluding that the statutorily mandatory content of RPAPL 1304 was a condition precedent to the commencement of the foreclosure action and that "[t]he plaintiff's failure to show strict compliance requires dismissal." *Aurora Loan Services*, 923 N.Y.S.2d at 612. *Aurora Loan Services* does not prevent plaintiff lenders from restarting their actions and effecting proper service.

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.

Although complaints with "less than plainly observable facts" may be sufficient, the Court of Appeals has deemed claims relying on conclusory allegations to be insufficient. In *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 910 N.E.2d 976, 883 N.Y.S.2d 147 (2009), a complaint containing allegations that defendant had a business relationship with a party known to have engaged in fraudulent activity, was deemed insufficient in pleading a cause of action for fraud or aiding and abetting fraud. The court stresses that although the precedent set out in *Pludeman* asserts that there is no requirement of "unassailable proof" at the pleading stage, the facts alleged in the complaint along with surrounding circumstances must still be strong enough to permit a "reasonable inference of the alleged misconduct." *Eurycleia*, 12 N.Y.3d at 559.

The Court of Appeals reached a similar conclusion in *Godfrey v. Spano*, 13 N.Y.3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272 (2009). In this suit, several taxpayers brought action against a county executive, seeking both a declaration that an Executive Order recognizing out-of-state same sex marriages for purposes of public benefits was illegal, as well as a permanent injunction preventing the implementation or effectuation of the order. They also brought a similar suit against the Department of Civil Services and its commissioner regarding a policy memorandum recognizing out-of-state same sex marriages for purposes of public employment benefits. The Court found that the taxpayers failed to state a cause of action in each instance, citing a lacking of requisite specificity. *Godfrey,* 13 N.Y.3d at 373-74. Plaintiffs were unable to "specify a circumstance where taxpayer funds were expended as a result of the Executive Order that would not have been expended in the absence of…the order," or point to any "specific threat of an imminent expenditure." *Id.*

On the other hand, see *Sargiss v. Magarelli*, 12 N.Y.3d 527, 881 N.Y.S.2d 651, 909 N.E.2d 573 (2009). In that case, the Court of Appeals found that a court could consider affidavits in assessing whether the facts alleged permitted a reasonable inference of the alleged fraud. The plaintiff had sued former business associates of her deceased ex-husband for aiding in his false representation of his net worth, but her complaint alleged no facts connecting these business associates to her husband's misrepresentations. Nonetheless, the Court found that the accompanying affidavits allowed the "circumstantial inference" of fraudulent conduct and reversed the lower court's dismissal. *Sargiss*, 12 N.Y.3d at 531 (quoting *Pludeman*, 10 N.Y.3d at 492 n.3).

**§ 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 (2d Dep't 1955)), in 2008 in *Lucido v. Mancuso*, 49 A.D.3d 220, 851 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 14 The Bill of Particulars

## § 14.03 The Effect of the Bill of Particulars

Page 653: Add to Note (3): CPLR 3042(d) allows courts to impose penalties on parties who "willfully" fail to submit a bill of particulars. In *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74, 917 N.Y.S.2d 68, 942 N.E.2d 277 (2010), the plaintiff in a medical malpractice suit failed to submit a bill of particulars and the court issued a conditional preclusion order stating that the plaintiff would be barred from offering evidence of the defendant's negligence if the bill was not served in forty-five days. When the plaintiff failed to comply, the defendant moved to enforce the conditional preclusion order and for summary judgment. The trial court imposed a $500 fine on the plaintiff but did not enforce the conditional preclusion order. The Court of Appeals concluded that the plaintiff's repeated disregard of requests from the defendant and the court was willful, and found that the trial court had abused its discretion in not enforcing the conditional preclusion order. The defendant was entitled to preclusion and summary judgment.

## 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 date 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 date 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.

There is some uncertainty as to which party bears the costs of electronic discovery. In *Waltzer v. Tradescape & Co.*, the Appellate Division stated that under the CPLR, the traditional rule is that "the party seeking discovery should bear the cost incurred in the production of discovery material." 819 N.Y.S.2d 38, 31 A.D.3d 302, 304 (1st Dep't 2006). However, the court made an exception for the cost of discovery of material that is "readily available," which the producing party must bear, on the basis that the "cost of copying [readily available materials]…would have been inconsequential." *See Waltzer*, 31 A.D.3d at 304. In *Clarendon National Ins. Co. v. Atlantic Risk Management, Inc.*, 873 N.Y.S. 2d 69, 59 A.D.3d 281, 286 (1st Dep't 2009), the Appellate Division embraced a rule that seemed to contradict *Waltzer*, stating that there was a "general rule that…each party should bear the expenses it

incurs in responding to discovery requests." In *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 895 N.Y.S.2d 643, 27 Misc. 3d 1061 (Sup. Ct. 2010), the court explained that these two apparently conflicting rules were in fact consistent, as the discovery materials sought in *Clarendon* were "readily available" electronically stored files and thus the producing party bore the cost of production.

What material is "readily available" such that the producing party must bear the cost of discovery? In *Waltzer*, the First Department concluded that electronically stored material on two CDs was readily available, whereas deleted electronically stored information was not readily available. In *Clarendon*, electronically stored insurance policies were readily available. However, in *Response Personnel, Inc. v. Aschenbrenner*, 909 N.Y.S.2d 433, 77 A.D.3d 518 (1st Dep't 2010), the court concluded that the requesting party should bear the cost of the production of electronic files since the cost would "not have been inconsequential," citing *Waltzer*. The documents at issue in *Response Personnel* were tax returns that the requesting party asked the producing party to convert to electronic form. A later case, *Silverman v. Shaoul*, 913 N.Y.S.2 870, 30 Misc. 3d 491 (Sup. Ct. 2010), seems to affirm the principle that the consequentiality of the cost of discovery matters in determining which party must bear that cost. In that case, the court asserted that a court could find data was "not readily available" if the producing party demonstrated that obtaining the data would create an "undue burden." *Silverman*, 30 Misc. 3d at 495. Because that data was neither archived nor deleted, but simply interspersed throughout documents for various business agencies, the court found that the producing party in *Silverman* did not face an undue burden in producing electronic materials for discovery.

Page 665: Add new Note (6): Departing from the previous rule of the Second Department, the court in *Kooper v. Kooper*, 901 N.Y.S.2d 312, 74 A.D.3d 6(2d Dep't. 2010), applied CPLR 3101(a)(4) and ruled against the further application of the "special circumstances standard" in assessing whether discovery from a nonparty is warranted. In place of the special circumstances standard, the court sets

out factors to be considered when making such assessments. Amongst these factors are an inability to obtain the requested disclosure from an adversary or independent source, a disparity in statements between a party and a non-party witness, an unexplained discontinuance of action against a witness who was formerly a party, and previous inconsistencies in a nonparty's statements. *Id.* at 5-6. The court is careful to point out that this list is not exhaustive and that circumstances vary from case to case. *Id.* at 6.

Page 666: Add to Note (2)(b): The Court of Appeals applied this rule in *Howard S. v. Lillian S.*, 15 N.Y.3d 431, 902 N.Y.S.2d 17, 928 N.E.2d 399 (2010), holding that liberal discovery of issues of marital fault should not be permitted except in rare cases of egregious conduct. The Court justified this rule as necessary to avoid abuse and harassment and to avoid creating a situation where one party is induced to agree to a disadvantageous settlement. Though the Court did not define what conduct rose to a level of egregiousness that would permit discovery of issues of fault, the Court did assert that adultery alone did not rise to that level.

**§ 15.03 Who is Subject to Disclosure**

Page 691: Add to note 1: The Court of Appeals in *Howard S. v. Lillian S.*, 14 N.Y.3d 431, 902 N.Y.S.2d 17, 928 N.E.2d 399 (2010) ruled that in matrimonial actions there is a blanket prohibition of discovery on the fault issue unless the court can find extraordinary circumstances to make an exception. Certain of the Appellant Division Departments had held the reverse, i.e., that there should be no prohibition against such discover unless there were extraordinary circumstances requiring an exception (see *Nigro v. Nigro*, 121 A.D.2d 833, 504 N.Y.S.2d 264 (3d Dep't 1986).

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. The Court of Appeals also observed that informal interviews were particularly necessary after the filing of a note of issue because at that point in the litigation it would normally be too late to seek depositions and interrogatories absent unusual circumstances or substantial prejudice. *Arons*, 9 N.Y.3d at 411. However, a defendant may also move to compel authorizations for informal, ex parte interviews of a plaintiff's physician *prior* to the filing of a note of issue. *See Wright v. Stam*, 916 N.Y.S.2d 520, 81 A.D.3d 721 (2d Dep't 2011).

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 695: Add to end of Note (2): The Uniform Interstate Depositions and Discovery Act, 29 N.Y.

C.L.P.R. 3119 (McKinney 2011), allows for disclosure and discovery in New York State in an action pending in another jurisdiction. CPLR 3119. For this statute to be applicable, "party must submit an out-of-state subpoena to the clerk in the county in which discovery is sought to be conducted" in New York. 3119(b). The county clerk must then, in accordance with his court's procedure, issue a subpoena for service upon the person to which the out-of-state subpoena, and contain or be accompanied by information about all counsel of record in the proceeding to which the subpoena relates. *Id.* Service must comply with CPLR 2302-03. 3119(c). An application to quash or modify such a subpoena may be made in accordance with the laws and statutes of New York, and must be submitted in the county in which discovery is to be conducted. 3119(e).

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).

**§ 15.05 Compelling and Avoiding Disclosure**

Page 721: Add to Note (2): In *NYSUT v. Brighter Choice*, 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899 (2010), the Court held that charter schools were not required to disclose names of teachers since it was evidence that plaintiff was seeking to gain new members and this would fall within the area of "sale or release of lists of names…if such lists would be used for commercial or fund-raising purposes." Pub. Officers Law § 89[2][b][iii].

Page 724: Add to Note on the Enforcement Procedures: A preclusion order against defendant for failure to respond to a disclosure request on one issue does not necessarily bar defendant from moving

for summary judgment. Plaintiff must still show he has a triable case. See *Mendoza v. Highpoint*, 83 A.D.3d 1, 919 N.Y.S.2d 129 (1st Dep't 2011) discussed at new Note 4 on p.753 this supplement.

Page 724: Add to Note (1): Although the courts seem reasonably lenient where parties fail to comply with a discovery request ("We recognize that absent a showing that the non-complying party's conduct was willful or contumacious, the harsh sanction of dismissal…will generally not be warranted," *Sawh v. Ridges*, 120 A.D.2d 74, 507 N.Y.S.2d 632 (2d Dep't 1986)), a reasonable excuse for noncompliance and the existence of a meritorious claim or defense must be shown. Thus, where in a medical malpractice action plaintiff failed to respond to defendant physician's periodic requests for a bill or particulars, and did not comply with a conditional preclusion order, defendant was entitled to summary judgment. *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74, 917 N.Y.S.2d 68, 942 N.E.2d 277 (2010).

## 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.

Pages 749: Add to Note (2): In New York, a movant defendant seeking summary judgment has the burden of making an evidentiary showing sufficient to support their defenses. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). In *Chow v. Reckitt & Colman, Inc.*, ___ N.Y.S.2d ___, 2011 N.Y. LEXIS 754 (2011), the plaintiff brought a products

liability action, alleging that the defendant manufacturer of lye provided insufficient warnings with the product. The defendant moved for summary judgment, contending that the plaintiff disregarded warnings and mishandled the lye. But it was not enough for the defendant to merely point out the inadequacy of the plaintiff's claims. Accepting the defendant's argument that the plaintiff had mishandled the lye, the Court of Appeals nonetheless denied the defendant's motion for summary judgment. The defendant had failed to provide any evidence that it was reasonable to sell lye for use by laypeople, a necessary element of a defense to a products liability claim.

In the federal courts, a defendant may move for summary judgment and prevail by merely pointing to plaintiff's failure to allege sufficient evidence to support their claim. *See Celotrex Corp. v. Catrett*, 477 U.S. 317 (1986). Judge Smith concurred in *Chow* to draw attention to the difference between summary judgment in the federal courts and in New York, observing that the federal rule "would probably lead to a different result in this case." *Chow v. Reckitt*, at *4 (Smith, J., concurring).

Page 753: Add new Note (4): Defendant suffered a preclusion order for failure to respond to a request on the issue of liability. Can defendant nevertheless move for summary judgment? Yes says the court in *Mendoza v. Highpoint*, 83 A.D.2d 1, 919 N.Y.S.2d 129 (1st Dep't 2011). Defendant's preclusion from introducing evidence at trial does not necessarily bar his summary judgment motion if he can show that plaintiff has no case, i.e., if plaintiff is unable even to show there are fact questions to be resolved.

In a similar vein, where defendant physician moves for summary judgment on a prima facie showing that he had not departed from good and accepted medical practice, plaintiff must raise a triable issue of fact only as to that part of the cause of action, and not as to causation as well, in order to defeat the motion. *Stukas v. Streeter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dep't 2011).

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 Contracting & 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

### § 18.02 Medical Malpractice Actions

Page 791: Add new Note (2): Effective October 1, 2011, New York Public Health Law § 2999 creates a medical indemnity fund for infants who suffer from birth-related neurological injuries. The fund's stated purpose is "to provide a funding source for future health care costs associated with birth related neurological injuries, in order to reduce premium costs for medical malpractice insurance coverage." N.Y. Pub. Health L. § 2999-g. The statute requires that every settlement agreement for claims arising out of qualified neurological injury shall be paid out "in lieu of that portion of the settlement agreement that provides for payment of such [future medical] expenses." § 2999-g[6](a). Similarly, "in any case where the jury or court has made an award for future medical expenses" arising out of a qualified neurological injury, the future medical expenses of the plaintiff shall be paid out of the indemnity fund and "the court shall ensure that the judgment so provides." § 2999-g[6](b). The fee of the attorney for a qualified plaintiff shall be proportionally reduced to reflect only the "non-fund elements of damages." § 2999-g[14]. This fund is expected to affect between 150 and 200 new babies each year. Joel Stashenko, *Lawyers Await Specific Regulations on Infant Medical Malpractice Fund*, N.Y.L.J., April 20, 2011, at 1.

### § 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, 878 N.Y.S.2d 246, 905 N.E.2d 1175 (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

### § 22.01 Introduction

Page 938: Add sentence at end of note (1): In *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 900 N.Y.S.2d 698, 926 N.E.2d 1202 (2010), where plaintiff had obtained personal jurisdiction over the defendant, it was held that plaintiff could attach defendant's interests in out-of-state companies for security purposes. The defendant's interests were attachable in New York because the garnishee (here, the defendant) was subject to New York's jurisdiction. The Court further held that the situs of the defendant-garnishee's interests in the foreign corporation (which were "intangible" assets, since they were not stock certificates) was New York because the debtor (the garnishee-defendant) was subject to New York's jurisdiction.

### § 22.02 Enforcement Devices

Page 943: Add to [1] Personal Property: In 2010, the legislature amended CPLR 5205, which exempts certain types of personal property from being used to satisfy money judgments, to increase the exempt value of certain property and to add cost of living adjustments to the exemptions for personal and real property. N.Y. C.P.L.R. 5205 (McKinney 2011).

Page 944: Add new note, (3)(a): Although the judgment is good for 20 years, the lien is good for 10 years. What happens when the 10 year period has expired or is about to? Will other judgment creditors be able to establish their liens because the one with priority had lapsed? During the last year of the 10 year lien the judgment creditor may bring a renewal suit to establish a new lien for the balance of the 20 year life of the judgment, thus eliminating any gaps in his priority that might occur

were he compelled to wait to bring the renewal suit until the expiration of the first 10 year period. *Gletzer v. Harris*, 12 N.Y.3d 468, 882 N.Y.S.2d 386, 909 N.E.2d 1224 (2009).

At the eleventh hour, after the sheriff's auction of real property is actually started, may the judgment debtor successfully head off the sale by presenting the sheriff with payment in satisfaction of the judgment? Yes says the Court in *Rondack Const. Svcs. Inc. v. Kaatsbaan Int'l Dance Center*, 13 N.Y.3d 580, 896 N.Y.S.2d 278, 923 N.E.2d 561 (2009).

Page 945: Add to Note (2): In *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 883 N.Y.S.2d 763, 911 N.E.2d 825 (2009), a judgment creditor brought a garnishment proceeding against a bank in possession of stock certificates belonging to the judgment debtor. The judgment creditor sought to compel the bank to deliver the certificates despite the fact that the certificates themselves were located in the bank's Bermuda branch. The Court of Appeals held that a New York court which had personal jurisdiction over a garnishee bank could compel the bank to produce stock certificates located outside of the state. *Koehler*, 12 N.Y.3d 553. The court reasoned that no express territorial limit is contained in CPLR article 52, and that the issuing of a judgment ordering a turn over of out-of-state property is permissible regardless of whether the defendant is a judgment debtor or garnishee. *Id.* at 12 N.Y.3d 539.

**§ 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 Dep't 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).

Page 955: Add Note (1): In *Galliano v. Stallion*, 15 N.Y.3d 75, 904 N.Y.S.2d 683, 930 N.E.2d 756 (2010), the Court of Appeals held that under article 53 of the CPLR, New York courts have the power to enforce foreign money judgments so long as the exercise of jurisdiction used in the foreign court comports with New York's concept of personal jurisdiction, and so long as the foreign jurisdiction shares New York notions of procedure and due process of the laws In *Galliano*, the court found that by entering into a licensing agreement with a forum selection clause, which opened the defendant to submission to the jurisdiction of a foreign court, personal jurisdiction was created. *Id.* Furthermore, the court decided that the papers served do not have to be accompanied by an English translation in order to constitute due process. *Id.* Despite the fact that the defendant only received notice in a foreign language, it was decided that he had ample time to defend himself in the action at hand, and that the service was fair. *Id.*

## 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*, & Ross, 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 974: Add to Note (3): In *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda,* 572 F.3d 93 (2d Cir. 2009) it was held that despite the fact that a real property assessment proceeding had been dismissed as untimely by a New York court, plaintiff could successfully bring a second action in federal court based on the same claim under 42 U.S.C. § 1983 which provided a much longer statute of limitations. The Second Circuit held that dismissal of a case because not brought within the limitation period was not a dismissal on the merits – this based on an interpretation of New York law despite indications to the contrary in the *Smith* and *Meegan S.* cases noted in the first part of this note in the main volume. The state court, incidentally, would have subject matter jurisdiction in a § 1983 matter so that this is a claim that could have been included in the proceeding first brought.

Page 987: Add new Note after the *O'Connor* case: In *Tydings v. Greenfield, Stein & Senior, LLP*, 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*, *Feinstein LLP*, 59 A.D.3d 1, 870 N.Y.S.2d 1 (1st Dep't 2008).

A cause of action for legal malpractice allegedly occurring during the lawyers' representation of plaintiffs in a bankruptcy proceeding was held barred by the final award of attorneys' fees in the bankruptcy proceeding. Plaintiffs were cognizant of their malpractice claim at the time of the lawyers' fee application and could have raised it then. (*Breslin Realty Development Corp. v. J. Stanley Shaw*, 72 A.D.3d 258, 893 N.Y.S.2d 95 (2d Dep't 2010)).

Page 995: Add new Note (3): The "full and fair" principle was imported into a "law of the case" situation where defendants had been determined to be free from negligence on prior summary judgment involving a third-party claim of which the plaintiff had neither adequate notice nor incentive to litigate. Plaintiff was thus not precluded from litigating the issue of defendant's negligence. *Roddy v. Nederlands Producing Company of America, Inc.*, 15 N.Y.3d 944, 916 N.Y.S.2d 578, 941 N.E.2d 1155 (2010).

**§ 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*, 553 U.S. 880, 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.

Page 1018: Add paragraph at end of Note (5): In *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda,* 572 F.3d 93 (2d Cir. 2009) it was held that despite the fact that a real property assessment proceeding had been dismissed by a New York court as not timely brought within four months, plaintiff could successfully bring a second action in federal court based on the same claim under 42 U.S.C. § 1983 which provides a three-year time period. The court's focus was on the claim preclusion

issue (see the précis of this case in § 23.03 this supplement) and there was no treatment of the rather clear policy regarding proper procedure in tax assessment cases as set forth in the *Press* case.

**§ 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.

[In June 2008, the New York State Legislature enacted N.Y. Penal Law § 70.85, which changed the underlying substantive result in *Garner*, stating that those inmates who had not been informed of their post-release supervision period could be resentenced according to their original determinate sentence of imprisonment. N.Y. Penal Law § 70.85 (Consol. 2008). Under this statute, while the post-release supervision period is dropped, this original sentence may be re-imposed by courts with the consent of the district attorney. *Id.* *Garner* remains relevant for its interpretation of article 78 procedure.]

Add the following additional sentence to Note (5) in this supplement: Where a DEC enforcement proceeding was challenged by respondent prohibition was not available to head it off. There was no showing of an obvious lack of jurisdiction, respondent's arguments could be made to the agency, and if respondent lost on the merits certiorari would be available for review. *Chasm Hydro, Inc. v. New York State Department of Environmental Conservation*, 14 N.Y.3d 27, 896 N.Y.S.2d 749, 923 N.E.2d 1137 (2010).

## 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.

### § 25.04 The Award and Attacks On It

Page 1075: Add paragraph to Note (2): As a further example of the wide discretion allowed the arbitrator consider *NYCTR v. Transport Workers Union of America*, 14 N.Y.3d 119, 897 N.Y.S.2d 689, 924 N.E.2d 797 (2010) where the Authority had terminated an employee who had assaulted a member of the public, a penalty modified by the arbitrator to reinstatement without back pay despite a provision in the collective bargaining contract that if an assault did occur the Authority's penalty must be affirmed unless the arbitrator can determine that it was excessive in light of the employee's record and precedent in similar cases. The Court majority found that the application of those guidelines was entirely within the purview of the arbitrator.

Page 1076: Add new Note (6): A party has 20 days after delivery of the award to seek modification under CPLR 7509, so where such relief was sought over two years later the court held the request clearly untimely. *Joan Hansen & Co. v. Everlast World's Boxing Hq. Corp.*, 13 N.Y. 3d 168, 889 N.Y.S.2d 886, 918 N.E.2d 482 (2009). The question which should have been decided by the arbitrator

was whether the subject contract had "expired" or been "terminated" since entitlement to continued royalty payments hung on that distinction. The court noted that nothing prevented the bringing of a new arbitration proceeding to settle the issue.