

**CIVIL LITIGATION
IN
NEW YORK**

Fifth Edition

2008 Up-Date Memorandum

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This memorandum was prepared by Oscar G. Chase and Robert A. Barker for the benefit of students and faculty. The closing date for materials was June 30, 2008.

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Chapter 1 Jurisdiction

§ 1.06 Jurisdiction Based on Specific Contacts

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

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

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

Fischbarg, note 2, *supra*, however, does not clarify precisely what level of communication is necessary to constitute a transaction of business. Would a client’s retention of a New York attorney, by itself, be sufficient? What if the client retained an out-of-state attorney to litigate a case in New York? See *Haar v. Armendoris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70 (1973), in which the plaintiff, a Massachusetts attorney, sued a Delaware corporation that had hired him to litigate a case in New York. The Court of Appeals emphasized that the plaintiff could not rely solely on his own work in New York for 302(a)(1) jurisdiction. Since the record did not show any evidence of the

defendant's independent activities or communications with New York, jurisdiction could not be extended. In *Fischbarg*, the court distinguished *Haar* by pointing out that in *Fischbarg* the record was replete with evidence of the *defendants'* purposeful contacts with New York.

Page 71: Add a new Note (7): The problem of "libel tourism" has led to case law and legislative developments. Libel tourism has been defined as the act of obtaining libel judgments in foreign countries with plaintiff-friendly libel laws, such as England. See Paul H. Aloe, *Unraveling Libel Tourism*, N.Y.L.J., June 18, 2008, p. 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, 881 N.E.2d 830, 851 N.Y.S.2d 381 (2007) that long-arm jurisdiction did not extend to suits against foreign litigants by New York victims of libel tourism. In this case, the plaintiff, a New York author, had written a book, published in the United States, that accused the defendant, a Saudi businessman, of supporting terrorism. Even though only 23 copies of the book were purchased in the England via the internet, the businessman was able to sue the author in England for libel. When the author (now the plaintiff) refused to appear, the businessman obtained a judgment by default. The plaintiff then sued the defendant in the U.S. District Court for the Southern

District of New York to have the foreign libel judgment declared unenforceable in the U.S. The defendant responded by claiming a lack of personal jurisdiction, since the defendant's contacts with New York were limited to providing the plaintiff with information regarding the foreign libel case. The defendant had served papers on the plaintiff in New York, his lawyers had contacted the plaintiff through e-mail and mail, and the defendant had also reported the English court order on his website, which was accessible in New York. The New York Court of Appeals, on referral from the U.S. Court of Appeals for the Second Circuit, held that these contacts did not constitute a "transaction of business" under 302(a)(1), since the defendant did not purposefully avail himself of the privileges and benefits of New York's laws, nor did he seek to initiate any business transaction. *Ehrenfeld*, 9 N.Y.3d at 509. Compare this to *Fischbarg*, in which the court notes that the defendant had received the benefits that New York law provides to clients of New York attorneys. 9 N.Y.3d at 383, n.7. ("See e.g. 22 NYCRR 1210.1 [setting forth New York's "Client Bill of Rights," which provides, among other things, that clients, such as defendants, are "entitled to be charged a reasonable fee"]").

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

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment

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

should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided: 1. the publication at issue was published in New York, and 2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

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

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

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

Chapter 3 Subject Matter Jurisdiction

§ 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, 882 N.E.2d 879, 853 N.Y.S.2d 267 (2008)

provides an example of the non-waivability of a defect in subject matter jurisdiction.

There, a government agency sued a stockbroker for failure to pay fees incurred for violations of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C.S. § 78a et seq. However, since 15 U.S.C.S. § 78aa stipulates that district courts of the United States have exclusive jurisdiction of violations of the Exchange Act and its implementing rules, the Court of Appeals, on its own initiative, dismissed the action for lack of subject matter jurisdiction. It bears emphasizing that a court's lack of subject matter jurisdiction may be raised at any stage of the proceedings, including sua sponte by the court.

Chapter 5 Commencement By Filing

§ 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.**

The amendment may not rescue all cases in which mistakes are made in filing, however. 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. The Third Department held that this filing defect deprived the court of subject matter jurisdiction and it 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.

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

Page 313: Add to end of Note (1): Recent cases may have further narrowed the application of the equitable estoppel doctrine. See *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 491-92, 868 N.E.2d 189, 197-98, 836 N.Y.S.2d 509, 517-18 (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, 865 N.E.2d 1240, 1240, 834 N.Y.S.2d 74, 74 (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, 872 N.E.2d 842, 840 N.Y.S.2d 730 (2007), the plaintiff, representing private investment funds, sued its accountant auditors for malpractice. The defendant's work consisted of an annual audit review. Plaintiff argued that because the audits were done annually there was continuous representation and that a malpractice action was timely even as to audits done more than three years prior to the commencement of the action. The Court rejected that argument, holding that each audit was a discrete act: Once the review was completed, the defendant's work for the year was done. Since the work was not continuous, the court held that it did not constitute a course of representation.

Page 317: Add to end of note on Defamation: The "single publication" rule applies to actions for violation of privacy under New York's Civil Rights Act, as well as to defamation actions. *Nussenzweig v. DiCorcia*, 9 N.Y.3d 184, 878 N.E.2d 589, 848 N.Y.S.2d 7 (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 in more than one year prior to commencement.

§ 7.08 The Borrowing Statute

Page 367: Add to end of Note (1): In *GML, Inc v. Cinque and Cinque, P.C.*, 9 N.Y.3d 949, 950, 877 N.E.2d 649, 649-50, 846 N.Y.S.2d 599, 599 (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.

Chapter 8 Joinder of Parties

§ 8.04 Class Actions

Page 432 Note 2: On the preclusive effect of class action settlements, see also *People v. Applied Card Systems, Inc.*, __N.Y.3d __ (June 27, 2008), § 23.04 *infra*.

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).

Chapter 13 Pleadings

§ 13.02 The Complaint

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

Page 598, add to Note (1): In *Pludeman v. Northern Leasing Sys., Inc.* (2008 NY Slip Op 04183, May 6, 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." 2008 NY Slip Op 04183 at 3 [internal quotation marks and citations omitted.] To satisfy the statute's requirement that detailed facts should be stated in the complaint it is sufficient that "less than plainly observable facts may be supplemented by

the circumstances surrounding the alleged fraud.” Id. at 5. Such circumstances were found here where plaintiffs, small business owners from various states, all presented parallel complaints alleging the same kind of concealment. This, at least for pleading purposes, suggests complicit conduct on the part of defendant corporate officers in their individual capacity.

§ 13.08 Amendments

Page 636, 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 (1955), but this year in *Lucido v. Mancuso*, 49 A.D.3d 220, 85 N.Y.S.2d 238 (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.

Chapter 15 Disclosure

§ 15.03 Who is Subject to Disclosure

Page 691. Add Note 4:

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

§ 15.04 Devices Used for Disclosure

Page 716, n. 5

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

Chapter 16 Accelerated Judgment

§ 16.04 The Motion for Summary Judgment

Page 748, n. 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.

§ 16.05 Judgment by Default

Page 771, add to Note (3): In *Wilson v. Galicia Contr. & Restoration Corp.* (2008 NY Slip Op 03949, April 29, 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 20 Judgments and Relief from Judgments

§ 20.05 Interest, Costs, and Disbursements

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

Chapter 22 Enforcement of Judgments

§ 22.06 Foreign Judgments

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

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. v. HSBC Bank USA*, 10 N.Y.3d 32, 852 N.Y.S.2d 812, 882 N.E.2d 381 (2008).

§ 23.04 The Privity Problem

Page 1006. Add Note (6): Although not strictly a privity question, the "virtual representation theory" posits that a judgment may be preclusive against a non-party whose interests were the same as that of the party against whom the judgment was granted and who is seeking the very same relief denied to the prior plaintiff, but who is not an agent of the first party. This doctrine was disapproved by the U.S. Supreme Court in *Taylor v. Sturgell*, ___ U.S. ___, 2008 WL 2368748 (June 12, 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.*, __N.Y.3d __ (June 27, 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.

Chapter 25

Arbitration: An Alternative to Litigation

§ 25.02 The Arbitration Agreement

Page 1060. Add to Note (1): The Court of Appeals also construed the *Matarasso* holding narrowly in *Fiveco, Inc. v. Haber*, __ N.Y.3d __ (July 1, 2008)(petition to stay arbitration on the ground that the agreement containing the arbitration clause had expired was barred because the proceeding was commenced more than 20 days after service of the demand to arbitrate).