NYSBA SPRING 2007

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair


Justina Cintrón Perino

This year, I have been consistently amazed at how time has seemed to be at a standstill and yet also appeared to be moving at lightening speed. On May 31, 2007, my term as Chair of the Young Lawyers Section will officially come to a close. While there will be some great sense of satisfaction, I am certain I will feel a great sense of loss, especially since there is still so much more to be done!

In my last message, I updated you on the many new and exciting initiatives that were being undertaken by the Section and the progress that we had made, including the completion of our Fall conference in Albany in October. In this message, I would like to tell you about the Section's programs, events, and activities since our Fall gathering, our plans for the Spring, and the upcoming leadership transition in May.

Building upon the successes of the Fall meeting, the focus of the months of November and December was the Section's three-day annual meeting program, held in conjunc-

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The Future of New York State Thoroughbred Racing Franchise and a Review of the Bidding Process

By Robert J. Lalley

The ad hoc bid review process that New York State has used in its effort to award the thoroughbred racing franchise is inappropriate and inefficient. Three months since the New York State's Ad Hoc Committee [hereinafter "committee"] on the Future of Racing made its non-binding recommendation regarding the New York State thoroughbred racing franchise, it released its report and formal recommendation to the governor, the legislature and the public. This release came more than five months since the committee was originally supposed to make that report public.[1] A lot has changed in the past five months: we had a new legislature take their seats in Albany—accompanied by a new governor; the current franchise operator has filed for bankruptcy; the "war of words" between the state and the franchise operator over who owns the tracks is now a legal reality; and now a new panel has been created by the governor to re-review bid proposals. This panel will not only review those bids that were submitted to the now-defunct ad hoc committee, but it will also entertain bids from any group that would now like to make a proposal. The creation of this new panel provides uncertainty over racing's future and the fact that the state is a little less than ten months away from the expiration of the current franchise, and New York does not have a designated operator for its billion-

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Inside

From the Editor's Desk . . .

Welcome to the Spring 2007 issue of *Perspective*. Once again, I have been fortunate to obtain substantive and practical legal articles from our membership and well-known attorneys around the country. I am confident you'll find the articles presented in this issue both interesting and informative.

In this issue, Robert J. Lalley provides a piece on the future of the New York State thoroughbred racing franchise; Joseph M. Hanna authored an article about CBS's breach of contract suit against former NFL player Brent Jones; Samantha M. French discusses *MedImmune, Inc. v. Genentech, Inc*., a case involving the patent licensor-licensee relationship recently decided by the United States Supreme Court; Cordell Parvin provides a practical approach to achieving success in your professional life; Colm Patrick McInerney analyzes *Shondel J. v. Mark D*., a recent New York Court of Appeals case addressing paternity by estoppel; Justin S. DuClos authored an article on extraterritorial application of the Carmack Amendment; Elliott Wilcox provides instruction on using vocal emphasis in the courtroom; Alexandria R. Harrington discusses the State Environmental Quality Review Act; and finally, Christa M. Book gives us a behind-the-scenes look at guiding a victim through the criminal justice system. I'd like to thank all of the authors for contributing to this issue of *Perspective*, as well as the newsletter department at the New York State Bar Association for assisting me with this issue.

Perspective is published in both the spring and fall. If you would like to author or have authored an article, report, summary, or update that would be appropriate for inclusion in the journal and has not yet been published, please contact me by email at mcassidy@nysbar.com. The deadline for submissions for the next issue is August 1, 2007. Submissions should be sent in electronic format to my attention at the above email address. I look forward to hearing from you.

Michael B. Cassidy
Editor-in-Chief

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Young Lawyers Section Newsletter (*Perspective*)

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***Perspective* Index**

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Brent Jones Scores a Touchdown in a Big Victory Over CBS

By Joseph M. Hanna

After a spectacular NFL career as a tight end for the San Francisco 49ers in which he collected 33 touchdown catches, three Super Bowl rings and four Pro Bowl selections, Brent Jones decided to take his football experience to the broadcasting booth. In 1998, Jones joined CBS Broadcasting, Inc.'s ("CBS") broadcast team. CBS and Jones entered into a written contract (the "Agreement") in which Jones would provide on-air analysis for NFL games. The original Agreement ran until February 15, 2003. In January of 2003, CBS extended the Agreement through 2006.

Stating that he wanted to spend more time with family and focus on other business ventures, Jones resigned from CBS on September 29, 2005, refusing to honor the remainder of his contract. At the time of his resignation, CBS had paid Jones approximately $123,000 of his $200,000 2005 salary; however, Jones had provided on-air services for only three games of the 2005 NFL season.

CBS refused to pay the remainder of Jones' salary for that season. In fact, the network felt that Jones was only entitled to 3/17ths of his $200,000 salary (approximately $35,294), and demanded that it be reimbursed for any amounts paid above that for the 2005 contract year. Jones refused to reimburse CBS.

On October 27, 2005, CBS filed a complaint in the Supreme Court of New York, County of New York, alleging breach of contract and unjust enrichment. On December 19, 2005, Jones removed the case to the United States District Court for the Southern District of New York based on diversity of the parties.[1] Jones then filed a motion for judgment on the pleadings seeking dismissal of the claim against him.

Jones made two arguments in support of his motion for judgment on the pleadings: (1) CBS's breach of contract claim must be dismissed because CBS has already exercised its sole remedy of terminating payment to Jones for the breach; and (2) CBS's unjust enrichment claim must be dismissed as a matter of law because a valid enforceable contract existed between the parties.

After analyzing the facts of the case and applying basic contract law, the district court rejected CBS's breach of contract and unjust enrichment claims and granted Jones' motion to dismiss.

The Breach of Contract Claim

By the time Jones breached his contract, CBS had paid him for approximately eight months of the calendar year. However, as of the date of his resignation from the network, Jones had worked only three games of the NFL season. Thus, CBS argued that Jones only should have been paid 3/17ths of his $200,000 salary and that it should be reimbursed for all amounts paid above that for the 2005 contract year. Jones did not dispute that he breached his contract with CBS; however, he argued that CBS had already exercised its sole remedy for a breach of contract by ceasing further payment to him, and that reimbursement was not a remedy available to CBS. The court agreed.

In dismissing CBS's breach of contract claim, the court focused on the contract itself. Paragraph 1(a) of the Agreement stated that Jones was to provide services as "an On-Air Analyst and in related capacities in connection with the National Football League game and studio coverage and any related NFL program and/or coverage." Paragraph 1(b) provided that CBS and Jones "will negotiate in good faith regarding appropriate additional compensation to be paid" if any services other than those detailed in paragraph 1(a) were requested. The contract between the parties also detailed a list of services that Jones had to provide at CBS's request, including "attendance at rehearsals, program conferences, publicity photographic sessions, sales promotion meetings, affiliate meetings and conventions, trade shows and other events and functions."

CBS began compensating Jones for the 2005 contract year on February 13, 2005. The Agreement stated that payment was to be made "in accordance with CBS's payroll practices." He specifically stated that Jones was to be compensated at the rate of "1/52nd of Two Hundred Thousand Dollars ($200,000.00) per week." Therefore, the Agreement called for Jones getting paid on a weekly basis. The Agreement did not reference the number of football games Jones was expected to call each year, nor did it contain a provision for the return of any payment to CBS in the event Jones terminated the Agreement prematurely. Rather, Paragraph 19 of the Agreement between CBS and Jones provided that:

> If Contractor or Artist at any time materially breaches any provision of this Agreement . . . CBS may . . . reduce Contractor's Compensation pro rata, and/or CBS may, by

> so notifying Contractor during or within a reasonable time after such period, terminate this Agreement.

"Pro rata" was not defined in the Agreement.

The district court held that the Agreement between CBS and Jones "is not wholly without ambiguity." However, in rendering its decision, the court referred to well-known contract principles involving the language of a contract and whether that language is considered ambiguous,[2] acknowledging the well-known rule that contractual language is unambiguous if it has a "definite and precise meaning" and "there is no reasonable basis for a difference of opinion" as to its interpretation.[3] Conversely, "contract terms are ambiguous if they are capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[4]

The court further relied on the well-established principle that "[l]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations. . . . The court is not required to find the language ambiguous where the interpretation urged by one party would 'strain the contract language beyond its reasonable and ordinary meaning.'"[5]

The court analyzed the section of the Agreement which allowed CBS to "reduce Contractor's compensation pro rata." However, the term pro rata was never defined. The court held that a "reasonably intelligent and objective person could give the Agreement only one interpretation—that "pro rata" means a proportion based not on the number of games called out of seventeen; but, rather on the number of weeks out of the year the Agreement was in effect." It reached this conclusion by looking at the express language of the Agreement, which it found undermined CBS's argument. In the Agreement, CBS agreed to pay Jones according to its "regular payroll practices." Furthermore, CBS agreed to pay Jones at the rate of 1/52d of $200,000 per week for the 2005 contract year. The court concluded that the plain language of the Agreement suggested that "pro rata" was to be based on the number of weeks worked out of the year.

The court also noted that there was no language in the Agreement to support CBS's contention that Jones was obligated to call a certain number of games per year. Therefore, it found CBS's contention that Jones was obligated to call seventeen games, the number of games in the NFL regular season, to be completely misplaced. There was also no provision in the Agreement that called for Jones to reimburse CBS in the event of a breach. The specific remedies set out in the contract were a reduction of Jones' salary and/or termination. CBS had exercised one of its available remedies by terminating the contract at the time of the breach.

The court concluded its analysis of the breach of contract issue by stating that CBS's interpretation of the Agreement "does not make sense." The number of games was not specified in the contract—i.e., there could have been more than seventeen games. Jones may have been asked to call exhibition games, playoff games, and the Pro Bowl. Also, Jones had other obligations to CBS that were not limited to calling games, such as trade shows, publicity photographic sessions, and press conferences.

The court concluded by saying that "the parties could not have intended that [Jones] would be paid on a weekly basis throughout the year, subject to a refund if Jones did not call all the games. If that had been the parties' intention, they surely would have spelled that out in the Agreement."[6]

Unjust Enrichment

The court also dismissed CBS's claim that Jones was unjustly enriched because he was paid for work that he did not perform. "To state a claim for unjust enrichment in New York, a plaintiff must allege that: (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution."[7]

Under New York law, however, "[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter."[8] On the other hand, where "there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, [a party] may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies."[9]

The court held that there was a valid and enforceable contract between CBS and Jones and that the subject matter of the unjust enrichment claim was covered by the contract. Therefore, CBS could not recover under any theories of quasi-contract, and Jones' motion to dismiss the unjust enrichment claim was granted.

CBS also argued that the unjust enrichment claim was permissible under Rule 8(e)(2) of the Federal Rules of Civil Procedure. However, in dismissing the claim, the court determined that the cases that CBS cited to support its argument were inapplicable because in each of the cases the validity of the contract was at issue.[10] The court explained that the alternative pleading rules may allow for an unjust enrichment claim where there was a question as to the validity or enforceability of a contract. In the present case, however, there was no dispute that a valid, enforceable contract existed.

Conclusion

Based upon fundamental contract law and a practical interpretation of the Agreement, the district court held that CBS's Agreement was ambiguous and did not properly set out safeguards to protect itself in case a party to the contract was to breach it. And like the paydays that he had waiting for him in the end zone from the golden arms of Joe Montana and Steve Young, Jones cashed in one more time, when the district court ruled in his favor by dismissing CBS's case.

Endnotes

1. *CBS Broadcasting Inc. v. Brent Jones and Brent Jones, Inc.*, 2006 WL 3095916 (S.D.N.Y. 2006).
2. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 443 (2d Cir. 1995).
3. *Sayers v. Rochester Tel. Corp. Supplemental Mgt. Pension Plan*, 7 F.3d 1091, 1094-95 (2d Cir. 1993) (quoting *Breed v. Ins. Co. of North America*, 413 N.Y.S.2d 352, 355 (1978)); *see Lucente v. IBM Corp.*, 310 F.3d 243, 257 (2d Cir. 2002).
4. *Nowack v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *Space Imaging Europe, Ltd. v. Space Imaging L.P.*, 38 F. Supp. 2d 326, 334 (S.D.N.Y. 1999); *Sayers v. Rochester Tel. Corp.*, 7 F.3d 1091, 1095 (2d Cir. 1993).
5. *Hunt Ltd. V. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459, 161 N.Y.S.2d 90, 141 N.E.2d 590 (1957)).
6. *CBS Broadcasting Inc. v. Brent Jones and Brent Jones, Inc.*, 2006 WL 3095916 (S.D.N.Y. 2006).
7. *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 177 (S.D.N.Y. 2004) (citing *Astor Holdings, Inc. v. Roski*, No. 01 Civ. 1905 (GEL), 2002 WL 72936, *17 (S.D.N.Y. Jan. 17, 2002) (citing *Louros v. Cyr*, 175 F. Supp. 2d 497 (SDNY 2001)).
8. *Eagle Comtronics, Inc. v. Pico Products, Inc.*, 682 N.Y.S.2d 505, 506 (4th Dep't 1998) (citing *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 521 N.Y.S.2d 653, 656 (Ct. App. 1987)).
9. *Leroy Callendar, P.C. v. Fieldman*, 676 N.Y.S.2d 152, 153 (1st Dep't 1998) (quoting *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 594 N.Y.S.2d 144, 146 (1st Dep't 1993)).
10. *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 621 (SDNY 2003) (noting that whether or not a contract existed was yet to be decided); *Cosmocom, Inc. v. Marconi Communs, Int'l, Ltd.*, 261 F. Supp. 2d 179, 187 (E.D.N.Y. 2003) (refusing to dismiss the claim because of the possibility the contract was terminated before the plaintiff claimed the defendant was unjustly enriched).

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Having Their Cake and Eating It Too: The Supreme Court Permits Compliant Patent Licensees to Simultaneously Challenge Patent Validity

By Samantha M. French

I. Introduction

In a case certain to provide new perspectives on the patent licensor-licensee relationship, the United States Supreme Court recently issued its decision in the much-anticipated case of *MedImmune, Inc. v. Genentech, Inc*.[1] The high court held that a patent licensee in good standing is not precluded from asserting a declaratory judgment action challenging the validity of the licensed patent. The case involves a unique blend of conflicting precedent, issues of standing under the United States Constitution, as well as matters unique to patent law. The end result ensures that patent owners and licensees—as well as the entirety of the legal community—will carefully scrutinize existing and future licensing agreements to guarantee compliance with the far-reaching implications of this landmark decision.

II. Background

In 1997, respondent Genentech, Inc. ("Genentech") entered into a license agreement with petitioner MedImmune, Inc. ("MedImmune") encompassing an existing patent for recombinant immunoglobins, as well as a then-pending continuation application for coexpression of immunoglobulin chains within recombinant host cells. Upon issuance of the second patent (the so-called "Cabilly II patent"), Genentech demanded royalty payments from MedImmune for the latter's manufacture and sale of Synagis®, a drug that targets the prevention of respiratory virus in children.

MedImmune interpreted Genentech's request as constituting a threat of enforcement of the Cabilly II patent by institution of an infringement action. Importantly, MedImmune foresaw that defeat in such an action would render it susceptible to treble damages, attorney's fees, and the possibility that production and sale of the highly profitable Synagis® would be enjoined. As such, MedImmune filed a declaratory judgment action in the United States District Court for the Central District of California seeking the court's declaration under the Declaratory Judgment Act[2] that the Cabilly II patent was invalid or unenforceable.[3] Meanwhile, petitioner continued to pay royalties under the licensing agreement "under protest and with reservation of all of [its] rights."

> "[MedImmune] *involves a unique blend of conflicting precedent, issues of standing under the United States Constitution, as well as matters unique to patent law.*"

Before the district court, MedImmune relied primarily on *Lear v. Adkins*, a Supreme Court decision that effectively abolished the doctrine of licensee estoppel, further holding that a patent licensee is justified in engaging in a challenge to the validity of the licensed patent, during which time the licensee is not required to pay royalties under the contract.[4] However, the district court chose instead to apply Federal Circuit precedent in the form of *Gen-Probe, Inc. v. Vysis, Inc.*, which held that a licensee in good standing was prohibited from filing a declaratory judgment action due to a failure to satisfy the "case or controversy" requirement of Article III, § 2 of the U.S. Constitution.[5] The Federal Circuit agreed, holding that *Gen-Probe* applied and that where a licensee "assiduously avoid[s]" breach, a declaratory judgment action is improper.[6]

III. The Supreme Court Decision

In an 8 to 1 decision penned by Justice Scalia, the Supreme Court reversed the Federal Circuit ruling, holding that MedImmune's actions were aimed at avoiding imminent harm, and were thus coerced. The Court noted that the law is clear in that a plaintiff is not required to expose himself to liability "where threatened action by *government* is concerned." Specifically, the Court referenced *Steffel v. Thompson*, in which it held that a plaintiff engaging in illegal distribution was not required to actually break the law and risk prosecution prior to challenging the constitutionality of the state statute forbidding the action.[7]

However, in the instance in which threat arises from a private party, the Court admitted that relevant jurisprudence is less common. The justices relied heavily on *Altvater v. Freeman*, in which patent licensees continued to pay royalties "under protest" while concurrently challenging the validity of the underlying patent.[8] There the Court agreed that "[t]he fact that royalties were being paid did not make this a 'difference or dispute of a hypothetical or abstract character.'"[9] The Court equated

a demand for involuntary royalty payments to the coercion inherent in a governmental threat of prosecution, insisting that a licensee who pays royalties under compulsion of a privately obtained injunction experiences sufficient "reasonable apprehension of suit" to create subject matter jurisdiction under the Declaratory Judgment Act. The Court held that "[t]he rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business, before seeking a declaration of its actively contested legal rights finds no support in Article III."[10]

Genentech argued fortuitously for the public policy and common law rationale that forbids the use of a contract for gain while simultaneously attacking the legitimacy of the agreement. More specifically, Genentech (along with numerous amici) contended that *Lear* does not suspend the common law rule for patent licensing agreements, as the plaintiff in *Lear* had previously repudiated the contract. The Supreme Court rejected this argument, noting that MedImmune had not renounced the contract, but rather had asserted that the contract did not prevent it from asserting invalidity while continuing to pay royalties.

Justice Thomas, the lone dissenter, argued that the Court sought to impose an "advanced" or "premature" ruling on a matter that would be addressed in a forthcoming case of actual controversy. Justice Thomas further insisted that "[p]atent invalidity is an affirmative defense to patent infringement, not a freestanding cause of action," and disagreed with the Court's application of *Altvater* by citing language that seemingly suggests that a claim for patent invalidity may be asserted only in response to an existing infringement action. Notwithstanding the majority's rejection of Thomas' stance, it remains to be seen whether on remand the district court will dismiss MedImmune's claims for discretionary reasons.

IV. Implications for Patentees

The patentee-licensor bears the burden of the Supreme Court's decision in *MedImmune*. Specifically, because the licensee has been granted a seemingly unbridled power to attack the validity of the underlying patent, a careless patentee may theoretically spend a large portion of the license term defending the patent's validity.

"[T]he MedImmune *decision has undeniably created a more unstable and hostile environment for patentees wishing to undertake licensing agreements."*

As articulated by the Federal Circuit decision, discord will result where a patentee-licensor, having essentially contracted away its right to sue, must constantly fear attack on patent validity from its licensee. Furthermore, during oral arguments, Chief Justice Roberts articulated his concern that a slippery slope might arise if licensees were allowed to sue over patents they had previously agreed to respect. The Court's opinion anticipated this argument, contending that "it is not clear where the prohibition against challenging the validity of the patents is to be found" within the larger scheme of a licensing agreement. One could argue that the decision—as well as the Court's failure to conscientiously and completely address this valid concern—may result in a noticeable increase in litigious behavior among otherwise legitimately contracting parties to patent licenses.

A patentee will need to be highly cognizant of the manner in which the licensing agreement is negotiated and drafted. In particular, a licensor will need to pay careful attention to the circumstances surrounding the formation of the licensing agreement, as an agreement deemed to be created under any threat of legal action may fall within the Court's seemingly broad definition of "coercion," thereby readily subjecting the patentee to seemingly limitless invalidity challenges by the licensee.

First and foremost, a licensor may attempt to eradicate or otherwise limit the right of the licensee to challenge patent validity. It may also be advisable for potential licensors to include language in the agreement to provide for penalty-free termination of the license by the patentee in the event the licensee elects to challenge patent validity. Lastly, patentees may begin requiring additional up-front security fees to guard against future loss should the licensee decide to challenge the patent's validity during the course of the license term.

At present it is unknown whether these measures will be legally tolerated in light of the ruling issued in *MedImmune*. All that may be said with certainty is that the *MedImmune* decision has undeniably created a more unstable and hostile environment for patentees wishing to undertake licensing agreements.

V. Implications for Licensees

The obvious effect of the Supreme Court's ruling is to provide compliant licensees with the means to challenge issued patents that are the subject of their underlying licensing agreement. Incidentally, the ruling discourages breach, thereby upholding a strong public policy favoring freedom of contract. Licensees will undoubtedly feel as though they are able to more fully assess the validity of the underlying patents, and will feel safer asserting a claim of invalidity without subjecting themselves to lawsuits alleging breach of contract and infringement. It is logical to assume that the number of declaratory judgment actions involving licensee challenges to patent legitimacy will increase as a result of the Supreme Court's recent *MedImmune* ruling.

In the course of negotiating and drafting the license agreement, a potential licensee is wise to preserve

the right to challenge patent validity at a later date by carefully considering and documenting all evidence tending to suggest that the license was entered into under threatening circumstances. Additionally, just as it behooves the patentee to explicitly describe the non-coercive and non-threatening nature of the licensing agreement, so too should a shrewd licensee include language attesting to the hostile nature of the agreement. In a similar vein, wherever possible, licensees should attempt to reserve all rights to challenge patent validity by indicating that payments are made under protest, as was done by MedImmune. Ideally, where feasible a potential licensee must attempt to include language explicitly reserving the right of the licensee to challenge patent validity at any point throughout the life of the agreement.

VI. Conclusion

The *MedImmune* decision will impact numerous legal spheres, from contract formation to litigation strategy. The Supreme Court's holding that otherwise compliant patent licensees possess standing to bring declaratory judgment actions challenging patent validity will have numerous and long-lasting effects. As drafters of licensing agreements, litigators of disputes arising under said agreements, and advocates for various Constitutional interpretations, it is incumbent upon all attorneys to monitor the developing significance of *MedImmune v. Genentech*.

Endnotes

1. 127 S. Ct. 764 (2007).
2. 28 U.S.C. § 2201(a). The Declaratory Judgment Act requires a "case of actual controversy" in order to hear an action for a declaratory judgment. The Supreme Court has interpreted this to require "a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).
3. 2004 WL 3770589 (C.D. Cal. 2004).
4. 395 U.S. 653 (1969).
5. 359 F.3d 1376 (Fed. Cir. 2004).
6. 427 F.3d 958 (Fed. Cir. 2005).
7. 415 U.S. 452 (1974).
8. 319 U.S. 359 (1943).
9. *Id*. at 364 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).
10. The dissent, written by Justice Thomas, argues that the coercion principle asserted by the majority should not apply to "voluntarily accepted contractual obligations between private parties." However, the majority insists that "Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action," and finds the threat of treble damages and a substantial loss of business to be "every bit as coercive" as modest penalties imposed for criminal actions such as that which is the subject of *Steffel v. Thompson*.

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Making 2007 Your Best Year Ever

By Cordell Parvin

Introduction

I have spent a lifetime studying why some people are very successful and why others are not. Interestingly, many of the people who are truly successful also have a great personal life and are very family oriented. How can this be so? Put simply, they understand their priorities and use their time wisely.

I am coaching two junior partners. They are both women. They are both in about the same size firms. They both bill about the same number of hours. Christy, who has two children, is incredibly successful and will become even more successful. Samantha is incredibly bright. She is a graduate of an Ivy League school. Yet, she feels overwhelmed and like she is burning out. What are these two people doing differently and how can you apply it to make 2007 your best year ever?

Attitude

It begins with attitude. We all talk to ourselves and we sometimes convey our attitude about things when we talk to others. When I meet with young lawyers I am listening to what they say to learn what they are likely saying to themselves. To borrow a quote from Winston Churchill, less successful lawyers see the problem in every opportunity and successful lawyers see the opportunity in every problem. Less successful lawyers frequently say: "Yes, but." Successful lawyers say: "Sure, how." Less successful lawyers say: "My problem is." More successful lawyers say: "My opportunity is." Less successful lawyers say: "I need to . . ." More successful lawyers say: "I want to . . ." Less successful lawyers say: "I am not willing to be successful if it means . . ." More successful lawyers say: "I can be successful and . . ." Less successful lawyers say: "I will try my best to . . ." More successful lawyers say: "I will achieve . . ." Less successful lawyers find something wrong with any new idea. More successful lawyers figure out how they can use the new idea. So, the first step to making 2007 your best year ever is to listen to yourself talk and if necessary consciously make a change in what you are telling yourself.

"Interestingly, many of the people who are truly successful also have a great personal life and are very family oriented. How can this be so? Put simply, they understand their priorities and use their time wisely."

Clear Idea of What You Want

Second, successful lawyers like Christy have a very clear idea of what they want to accomplish. They know where they want to be five years from now, maybe even 20 years from now. Having clarity on what you want to accomplish with your career actually enables you to have more time for your family. How do you suppose that happens? Put simply, lawyers with clarity on what they want to do with their career do not waste lots of time. Lawyers without clarity do waste time and frequently are spinning their wheels and frustrated by it. Clarity about what you want also gives you energy.

In my case, in 1978 I decided I wanted to be the best transportation construction lawyer in the United States. In Christy's case, she wants to become the best long-term care attorney in the United States. She also has a very clear idea of what she wants to do in her personal life. One way to gain clarity on what you want is to write down what you are doing and what your life is like five years from now.

Setting Goals

Really successful people set goals and have a plan to achieve them. Years ago I was giving a presentation at my firm's orientation for new partners. I was teaching them how to prepare a Business Plan. I asked how many had set goals for that year. Not one of them had set goals. It caused me to wonder why young lawyers do not set goals. Here are four reasons:

- They don't see the value in it
- They don't know how
- They are afraid of being criticized by someone
- They are afraid of not achieving them

There is a quote I like. It is "Most people aim at nothing and hit it with amazing accuracy." There are scientific studies showing that people who have written goals achieve far more than those who do not and they are happier with their careers and life. Why is that? I think it is in part because they feel they have more control of their destiny. They also are going after something. Some of you have already set goals for 2007. For those of you who have not, let me show you how to set goals you will actually achieve.

Over the next two minutes list 10 things you want to achieve in 2007. Leave some space in between each item. They should be specific and measurable so you will know if you achieved them. They might be:

- Bill ____ hours
- Originate $____
- Obtain ____ new clients
- Expand existing business with _____
- Speak at ____ industry meetings
- Write _____ articles and get them published
- Contact_____ law school classmates
- Meet with ____ contacts
- Add_____ to my web page bio

Here are some goals I had in 1999:

- Originate $3 million in business
- Bill 1,800 hours
- Speak at 6 construction industry meetings
- Visit 8 construction clients
- Write the second edition of my Transportation Construction Claims Book
- Conduct 4 in-house client workshops
- Conduct 3 workshops on Innovative Contracting
- Have a client roundtable meeting in Dallas

Now that you have written down 10 goals, go back through and prioritize them. In other words, decide which is the most important and so forth. Next, I want you to answer why achieving each goal is important to you. Here is the reason to do that. If you do not have a good answer to the why question, then your goal will be like a New Year's resolution that you give up on achieving the first time there is a roadblock You have to have a good answer to the why question to motivate you, energize you and cause you to have the discipline and commitment to achieve the goal.

Now that you have answered the why question, write down any obstacles you have to achieving the goal. The obstacles can be internal or external. In my experience most of them are internal. In other words, I have to do something different than I have been doing. My greatest obstacle is usually staying focused and not wasting time.

Now that you have identified obstacles, identify any people who can help you achieve your goal. Here is an interesting thing to consider. When you are not taking responsibility for your career success, no one wants to help you. But, when you are taking responsibility for your success, you will find people who do want to help you, both inside and outside your firm.

Now I want you to write down as many actions as you can think of to achieve your goal. Using one of my goals as an example, for my goal of conducting 4 in-house workshops I need to:

- Determine which clients
- Identify a topic that would give them value
- Prepare written materials
- Prepare presentation materials
- Establish dates and locations (at client's facility or elsewhere)
- Conduct the workshops

Ok, so make your list of activities you will do to achieve your goal.

Now that you have your list, I want you to write down for each goal something you can do in the next week to get started. We need for the train to get out of the station.

Let's stop there for a minute. My experience has shown me that if you write down your goals and develop a plan of activities to achieve them, you will be one of about 3% of the lawyers and you will be far more likely to achieve them. So, you have made the first step to achieving your own definition of success.

I have always had lifetime goals. Recently, I put my lifetime goals into four categories:

- Physical/Economic
- Mental/Growth
- Emotional/Relationships
- Spiritual/Core Values

I share my lifetime goals with lawyers I am coaching and I am sharing them with you. Many of the lawyers I am coaching have developed their own lifetime goals and shared theirs with others. Christy shared hers with all the associates in her firm. Here are a few of them:

Physical/Economic

- Be the best Long-Term Care Attorney in the country.
- Make Baker Donelson the best firm in the southeast.
- Sleep 8 hours a day.
- Eat healthy.
- Buy a beach home.

Mental/Growth

- Learn Yoga.
- Live in the moment.
- Learn to scuba and dive the Great Barrier Reef.

Emotional/Relationships

- See my three best friends in person every year.
- Be there every time my children need me and most times when they want me.
- Be a mentor and role model for other lawyers.

Spiritual/Core Values

- Raise children who love God and respect others.
- Be grateful.
- Live each day apportioning time to my core values: spiritual, family, health, work.

So, consider thinking about your own lifetime goals in those four categories. If you want to share them with me for my thoughts I would be happy to take a look at them.

Getting Better

Really successful people are constantly getting better. Tiger Woods is a great example. Last year he was interviewed by Ed Bradley on *60 Minutes*. Ed Bradley asked Tiger Woods why he had completely changed his golf swing when he was the number one golfer in the world. Tiger Woods answered: "I knew I could get better." There is a commonly heard phrase that if you are not getting better, you are actually getting worse. That has never been more true for lawyers than it is today because there are so many changes going on in our profession. In my top 10 tips I suggest that you take one area of your practice to focus on getting better. It might be communication skills, drafting skills, a particular legal topic. When I pick that one area I find every book I can on the topic, read articles, attend CLEs, listen to CDs and actually practice what I am trying to learn.

So, what do you want to do in 2007 to improve your skill? What is the one area that you want to focus on?

Reading on Success, Client Development

In addition to improving my skills as a lawyer, I have always been an avid reader of books I thought would improve my skills on client development, help me use my time more effectively, leadership, teamwork and a variety of other topics. I have provided you with a suggested reading list for 2007. At my old firm, we had a group who would read the same book and we had people assigned to discuss chapters and give practical examples of how what was in the chapter could be applied.

I learned long ago a way to read business books. I first skim the book. In that process I decide what is important that I want to go back and read in detail.

Use Your Time More Effectively

Time is our most valuable resource and we cannot afford to waste it. If you have a clear idea of what you want in your career, have goals and have decided what you want to learn in 2007, you are well on your way to not wasting time because you can see whether a potential activity advances you towards your goals or not.

There are 168 hours in a week. I want you to make a rough sketch pie chart. The first piece of the pie is how many hours you sleep. If you sleep 8 hours a night, that would be 56. I sleep less than that and you may as well. The next piece of the pie is the number of hours you work a week that are billable. You might record 40 billable hours a week. If so fill in that number. If it takes you longer because you have to write off time, then put down the higher number. The next piece of the pie is your non-billable time you are using to invest in your career. This could be firm administrative activities, time you plan to spend for your development, time you plan to spend for client development. When I was a young lawyer, I tried to spend at least 10 hours a week investing in my career. So, I would have 10 on my pie chart. If I slept 56 hours a week, billed 40 hours a week, spent 10 hours a week on my career, that would leave 62 waking hours for my personal life including being a good father, husband and son, exercising, being involved in my church and community and any other personal activity. I like to tell lawyers that how well they plan and execute the 10 hours a week they invest in their career will determine the quality of their career and how well they plan and execute the 62 waking hours of personal time will determine the quality of their lives.

Stephen Covey suggests that we have four quadrants of activities:

1. Urgent and Important
2. Not Urgent, but Important
3. Urgent, but not Important
3. Not Urgent and Not Important

The real key for a successful career and for a fulfilling life is to focus on the quadrant 2 activities.

Christy is doing that. She plans based on her priorities and she plans her personal time, and her career investment time the same way she plans her billable time.

Let's look at her calendar for December.

Keep in mind that you have to make choices both in your non-billable investment activities and in your personal time. Christy was a deacon in her church. While her church is really important to her, being a deacon took her away from her family. She decided to give up being a deacon and started the children's choir. Now, she is both doing a church activity that is important to her while at the same time spending that time with her children. Interestingly enough she also added a marketing activity for her law practice.

Christy also is very good about delegating things that her assistant is better equipped to do. Here is a list of some of the things Christy delegates:

- Book a flight
- Calendar deadlines
- Register me for conferences
- Research opposing counsel on the internet
- Type letters
- Put together seminar packets
- Add information in my contacts
- Address firm Christmas cards
- Order client Christmas gifts

Pareto's Principle—The 80/20 Rule

I am coaching a young partner named Pam. She is a truly outstanding lawyer and is very well known in her city. She is working to a frazzle on client development activities and not achieving the results she desires. Why is that? She simply has not distinguished between really good opportunities and those that border on being a waste of her time. When I am with Pam I keep telling her: 'Focus, focus, focus" and I tell her that for her "less can be more." She will become way more successful by not doing everything, but instead doing a few things really well.

In the early 1900s a gentleman by the name of Pareto did a study in Italy and found that 20% of the people owned 80% of the wealth. That led to many others finding the same principle applied to their own field. There are a variety of ways this might apply to us. It might be that 20% of our clients produce 80% of our fees. It might be that 20% of our time spent on client development might produce 80% of our business. The point is simple.

Face Time

We have gotten to the point that email and instant message are our main ways of communicating. I get emails all day and I am sure you do also. But, you do not connect with people by email and you do not build trust by email.

Jackie is a banking lawyer I am coaching. Her office is in the same building as her firm's largest banking client. Before meeting me, if there was a conference on a deal she was working on, Jackie's client representatives would be gathered in a conference room and Jackie would participate on the call at her desk. I suggested that Jackie actually go down and be in the conference room when these calls occurred. Interestingly, the first time she did, she came away with a new piece of business. Out of sight is truly out of mind.

Rusty is a labor and employment lawyer. He was just completing a really difficult employment case for a client that was headquartered in Chicago. Rusty is in the southeast. He asked me what he should do at that point. I told him he needed to go to Chicago and meet with the two founders of the company and give them an in-person report. I told him he should also tell them he wanted to learn as much as he could about their company. I told him not to go up there to sell them anything. I suggested he bring only one "prop" with him: A map with an overlay showing where the company's plants were located and where Rusty's firm has offices. Making a long story short, a few months later the client had a small lease matter in a state where Rusty's firm has an office. They called him from Chicago and he got one of his partners to work on it. The lease matter took only a couple of hours and Rusty and the partner decided not even to charge for it. A few months later the company was sued in a class action labor matter in that same state. Once again, the founders of the company called Rusty and Rusty was able to get the same partner involved in the case. This all resulted from a trip to Chicago to meet the founders.

Rusty began visiting other clients. He visited two clients in Florida. He conducted workshops on hiring and firing for each. Those workshops resulted in additional work for Rusty and his firm in putting together company employment manuals and policies. While learning about the companies he discovered that one company could actually provide a valuable service to another of the firm's major clients. So, Rusty set up a meeting of the two companies. Both companies were so grateful that they are both sending more business to the firm. This all came from getting out of the office and meeting in person.

Why Should I Hire You?

I want you to pretend for the moment that I can refer business to you. I want you to provide me with the information I need to recommend you to a potential client. In 25 words or less tell me about you, your practice, what makes you unique and why a client should hire you.

How to Stand Out in Any Crowd

If you look at law firm web pages, most firms look alike. They are "full service" "represent small and large companies." They are "client focused" and so forth. As lawyers we all are alike in many ways. We all went to law school, we use the same statutes, regulations and case law. Obviously we have to do top notch legal work or we would have no clients

I subscribe to a magazine *Selling Power*. As you would expect, it is for salespeople and sales managers. Yet, each and every issue I find something of value to lawyers. It only costs $27 for one year (6 issues) and is well worth it.

In the November/December issue the cover story is "How to Stand Out in Any Crowd." Seth Godin talks about marketing, change and work. I was fascinated by the article and plan to apply some of Godin's points myself.

According to the article Seth Godin likes to give things away and has built his career on it. I have long advocated that lawyers find things of value to give away. Whenever I write an article, I am anxious to give it away. When Godin wrote his first book he offered a third of its contents online at no charge. He got 175,000 responses requesting the free third of the book. Most of the 175,000 who received the free third of the book clicked the link built into the page and bought it, making it a year-long best-seller. Guess what I am planning to do with the three books I have written?

Later in the article, Godin talks about three kinds of people. I will put it in the context of clients:

1. Clients who don't need the services you or your firm offer.
2. Clients who need the services you or your firm offer, but are using another lawyer or firm.
3. Clients who are ignoring you.

Godin says you can't market directly to the second and third group. "Instead, have them come to you." How do you suppose you can get them to come to you? Godin suggests you have to create something "remarkable."

I like to tell young lawyers that I owe a great deal of my success to one sales principle. I frequently created something remarkable, was first to market and I gave it away. For example, I have two books on my law firm web page that potential clients can download at no charge.

I have taught others to do the same thing. Jennifer is a labor and employment lawyer I am coaching. She created the "Easy Guide" which is a compilation of labor and employment laws on laminated cards which an HR person can attach to his or her monitor. Jennifer has the clients in the second and third category coming to her.

I urge you to implement some of the ideas and let me know what you are doing to make 2007 your best year ever.

Cordell Parvin has practiced law for 36 years. In 2005 he left his law firm to focus his work on helping young lawyers with career and client development. He is the author of *Say Ciao to Chow Mein: Conquering Career Burnout* and two other books on law careers and client development. To learn more go to his website www.cordellparvin.com.

Should Paternity by Estoppel Extend to Paternity by Trick?

By Colm Patrick McInerney

The recent New York Court of Appeals case of *Shondel J. v. Mark D.*[1] reaffirmed the applicability of paternity by estoppel in New York law. A man who had mistakenly represented himself as a child's father was estopped from subsequently denying paternity, even though a DNA test proved that he wasn't the father.

The appellant, Mark, a U.S. citizen, had dated the respondent, Shondel, in Guyana. Following his return to America, Mark was informed by Shondel in January 1996 that she had given birth to a child. Mark agreed to provide financial support and declared in a notarized statement that he was the child's father. Shondel later moved to New York, and commenced a Family Court proceeding for orders of filiation and support. Mark then requested DNA testing, which proved that he was not the father. However, the Family Court, Appellate Court and most recently the Court of Appeals all held that Mark was equitably estopped from denying he was the child's father.

Paternity by estoppel, the decisive issue in this case, has long been applied by New York courts. It is now codified in sections 418(a) and 532(a) of the Family Court Act. The Court of Appeals' view was that where a man holds himself out as the child's father, and the child justifiably relies on that representation, the man may later be estopped from denying paternity. Section 418(a) makes it clear that a court may not order a DNA test, when paternity is contested, if it is not in the best interests of the child based on res judicata, equitable estoppel (as in this case) or the presumption of legitimacy of a child born to a married man.

The Family Court mistakenly inverted the sequencing of the events: it ordered DNA testing and then *afterwards* it held that Mark was estopped from denying paternity based on the best interests of the child. The Court of Appeals, correcting this error, said that a court should always first consider paternity by estoppel before giving a green light for DNA testing.

Shondel J. v. Mark D. raises the question of whether paternity by estoppel should operate without exceptions. The majority opinion, written by Judge Rosenblatt, gave several justifications for the doctrine and its application in the case. Firstly, by codifying the practice, the legislature had put the child's interests as the paramount factor in parental cases. Secondly, it is not the equities of the two adults that are at issue (i.e., how they acted); rather the issue is solely what is in the child's best interests. Thirdly, if a man is unsure whether he is the father, he should immediately request a biological paternity test; otherwise he risks being estopped from later denying parenthood.

Judge G.B. Smith, dissenting, disagreed with a fundamental tenet of the majority's reasoning. The issue was not whether equitable estoppel has a rightful place in New York law; rather, he said one must check that the elements of estoppel are present in this case. In Smith's view, an essential component of equitable estoppel—fraud or misrepresentation on the part of Mark—was not present. He also disagreed with the majority's assertion that Mark and the child had built up a strong parent-child bond. They had lived in different countries for most of the child's life, and had mainly communicated on the telephone. Mark had only visited the child several times in person. He had had no contact at all with the child since 2000, and any future support would be purely financial, as he had no interest in continuing a relationship with a child that was not his.

Where, then, does *Shondel J. v. Mark D.* leave us? The majority holding is that paternity by estoppel is to be decided exclusively based on the best interests of the child. The dissent favors an exception to this harsh rule for individuals who have been enticed into creating a parental relationship based on fraud on the part of the other parent. And fraud did occur here, in the form of a misrepresentation to Mark by Shondel about her monogamy during the period that she became pregnant.

One line of the majority opinion sticks out: "The Legislature did not create an exception for men who take on the role of fatherhood based on the mother's misrepresentation."[2] The majority adopts this wholeheartedly, and does not seem to have a problem with Shondel's assertion to Mark that she had not slept with anyone else in the period prior to her pregnancy, when the DNA test subsequently proved that she had.

In the twenty-first century, adults frequently choose to maintain relationships and have children outside of marriage. The law is increasingly forced to stretch many of its traditional principles to re-align itself to this modern trend. Some changes work, some don't. Of course a child's interests should generally be the most important and protected aspect of a paternity dispute. However, there have to be limits. As desirable as it is for all children to have a mother and a father, a man (or wom-

an) cannot be effectively entrapped into becoming a *de jure* parent if they are not a *de facto* parent. Judge Smith emphasizes that New York is a society valuing freedom of association in his dissent. The *Shondel* decision arguably infringes upon this freedom too strongly.

The Court should recognize a difference between a marriage or long-term relationship and short-term dating. The former may correctly adhere to the paternity by estoppel exception to DNA testing for establishing paternity; the latter should not. Otherwise, individuals may fraudulently entice others into providing financial support for their child for the next eighteen years. And, equally as worrying, single mothers or fathers will effectively have a precautionary bubble around them when they attempt to initiate new relationships. A potential partner may worry that, if they begin to see the single parent and their child on a recurring basis, a legal relationship will be crystallized by paternity by estoppel.

One addendum to the case is an issue raised by Mark that was left undecided by the Court. Mark argued that his constitutional rights had been violated as he had been deprived of his property (in the form of financial support payments to the child) in violation of due process, contrary to the federal and state constitutions.[3] The dissent did not discuss this argument as it felt that the elements of equitable estoppel had not been met. The majority said that the doctrine of paternity by estoppel could only be overturned by legislative repeal or a finding of unconstitutionality. However, Mark had failed to raise the constitutional question in the lower courts, and therefore the Court of Appeals would not entertain this argument.

But a future litigant may well timely raise such an argument of unconstitutionality. In that scenario, the court may have to weigh the importance of the interest to the individual, and the need for procedural safeguards to protect that interest, against the government interest in redistributing the property. Although a child's welfare is likely to be held as an important governmental concern, a court process that decides to award child support exclusively on the basis of the child's interest, ignoring the adult individual's claim to their own money, is arguably on shaky constitutional ground.

Endnotes

1. *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006).
2. *Id.* at 331.
3. The Fifth Amendment of the U.S. Constitution provides that private property may not be taken for public use without just compensation. This rule is applicable to the states via the Fourteenth Amendment. It is popularly known as the "Takings Clause."

Colm Patrick McInerney graduated from University College Dublin (UCD) in 2005, with a law and business degree. He completed an LL.M. in Commercial Law at UCD in 2006 and was admitted to the New York State Bar. Currently, Mr. McInerney is completing an LL.M. at Duke University.

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Extraterritorial Application of the Carmack Amendment as Applied to Overland Motor Carriage from the United States to an Adjacent Foreign Country

By Justin S. DuClos

The Carmack Amendment

The Carmack Amendment (Carmack) was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887 in an effort "to create a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading."[1] Amongst its important provisions are those that deal with straightforward liability and the ability to limit liability if certain requisites are met.[2] We deal here with that aspect of Carmack governing motor carriers, though the jurisdictional analysis that governs its application is the same under all types of carrier regimes.[3]

Originally part of the Hepburn Act,[4] and originally codified at 49 U.S.C. § 20, Carmack has since been twice recodified, first in 1978[5] and then in 1995 (effective January 1, 1996).[6] In 1995, Congress recodified Carmack by enacting the Interstate Commerce Commission Termination Act of 1995,[7] which, amongst other changes to the original Act, replaced the Interstate Commerce Commission with the Surface Transportation Board (Board). But, the current codification derives largely from the 1978 codification.[8] During the latest recodification, no substantive changes were made.[9]

The primary operative statutory language for the applicability of Carmack to overland motor carriage is set forth at 49 U.S.C. § 13501:

> The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier—
>
> (1) between a place in—
>
> (A) a State and a place in another State;
>
> (B) a State and another place in the same State through another State;
>
> (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
>
> (D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
>
> (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and
>
> (2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

Applying the Carmack Amendment to Overland Carriage from the United States to an Adjacent Foreign Country

Though Carmack is the exclusive federal American regime governing transportation losses such as the one at issue in this case,[10] it does not apply extraterritorially to events occurring while carriers are located outside of the United States. Carmack, by the first two sentences of its very terms, only applies to those motor carriers that are subject to the jurisdiction of the Board under 49 U.S.C. § 13501.[11] If transportation on a motor carrier is between a place in the United States and a place in an adjacent foreign country, a plain reading of § 13501(1) limits the jurisdiction of the Board to that portion of the transportation that took place in the United States.

Whether treating imports or exports (a distinction which has caused some courts concern when the loss occurs domestically), cases discussing the relationship between Carmack and Board jurisdiction uniformly agree with this straightforward textual analysis. "It is clear that in order for the Carmack Amendment to apply, the [Board] must have jurisdiction over the shipment in question."[12] "The [Board] has jurisdiction over shipments between a place in 'the United States and a place in a foreign country to the extent the transportation is in the United States.' This is known as the 'continuation of foreign commerce' provision."[13]

The Interstate Commerce Act originally codified the "to the extent transportation is in the United States" language in one form or another early in the statutory scheme at 49 U.S.C. § 1. But, in a somewhat conflicting manner, the original Carmack Amendment, codified deeper in the scheme at 49 U.S.C. § 20, used to read (emphasis added):

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation . . . from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefore, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered *or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading*. . . .

Upon recodification of the Carmack Amendment, the italicized portion of the above statute was not retained, and the current "to the extent the transportation is in the United States" language, which, again also appeared early in the original Interstate Commerce Act, was retained and implemented through the jurisdictional provisions applicable to the current motor carrier codification at 49 U.S.C. § 14706.

In *Strachman v. Palmer*, 82 F. Supp. 161, 163-164 (D.C. Mass. 1949) (*vacated on other grounds*), the court discussed more of the history behind the territorial application of Carmack because there was some confusion after what is known as the Cummins Amendment of 1915 extended the jurisdiction of the Interstate Commerce Commission (at that time) to exports:

> It is true that where a Canadian carrier accepts in Canada a shipment to be imported to the United States on a through bill of lading Congress could regulate the carrier's liability for events occurring after the shipment entered the United States. *News Syndicate Co. v. New York Central R. Co.*, 275 U.S. 179, 48 S.Ct. 39, 72 L.Ed. 225. But it is at least doubtful whether Congress could constitutionally regulate the Canadian carrier's liability for an event prior thereto occurring in Canada in connection with a contract made in Canada by a Canadian corporation which happened to carry on some operations in the United States. *Southern Pacific R. Co. of Mexico v. Gonzales*, 48 Ariz. 260, 61 P.2d 377, 106 A.L.R. 1012. When a shipment from Canada to the United States is damaged, it is usually uncertain whether the damage occurred in Canada or the United States. To presume that the damage occurred in that part of the journey which Congress could clearly regulate might raise problems of constitutional delicacy. Even if those problems were eliminated, the presumption might seem to laymen to be unfair.[14]

Today, again regardless of importation or exportation and court analyses on that score, Carmack appears to apply only to domestic transport, and sometimes not even to domestic transport.

> Our interpretation of Carmack—*that it applies to the domestic inland portion of a foreign shipment regardless of the shipment's point of origin*—also comports with Congress's view of the law. . . . Congress indicated that, in order to determine Carmack's applicability, one must consult the [Board] jurisdiction provision. . . . [T]his structural [arrangement] of Carmack reflects Congress's understanding that the boundaries of Carmack's applicability have always been co-extensive with those of the [Board's] jurisdiction.[15]

In *Kyodo*, 2001 WL 1835158, the court treated exports the same way.

> The jurisdictional reach of the Carmack Amendment is determined by reference to 49 U.S.C. § 13501. In relevant part, § 13501 provides jurisdiction over ground transportation of property by motor carrier (1) between a place in . . . (E) the United States and a place in a foreign country to the extent the transportation is in the United States. Thus, if the final intended destination at the time the shipment begins is a foreign nation, the Carmack Amendment applies throughout the entire portion of the shipment taking place within the United States.[16]

Also treating exports, in the *Project Hope* case, shipper Project Hope initially contracted with carrier Blue Ocean for transport of a type of insulin from Winchester, Virginia, to Cairo, Egypt, via the port of Norfolk, Virginia. Blue Ocean, in turn, subcontracted with a carrier for the overland portion of the transport in Virginia, and with another carrier for the oceangoing leg of the transport. When the first subcontracted carrier transported the insulin at the wrong temperature, it spoiled. The court stated that

> The Carmack Amendment's reach is determined by reference to 49 U.S.C. § 13501, the provision of the Interstate Commerce Act that now establishes the regulatory jurisdiction of the U.S. Surface Transportation

> Board (formerly the Interstate Commerce Commission) with respect to the transportation by motor carrier of passengers and property * * * [I]f the final intended destination at the time the shipment begins is a foreign nation, the Carmack Amendment applies throughout the entire portion of the shipment taking place within the United States. . . .[17]

The analysis of this issue is more explicitly stated in an import context by *Berlanga*, 269 F. Supp. 2d 821:

> The [Carmack] Amendment's applicability turns on whether the Secretary or the [Surface Transportation Board] exercises jurisdiction over the shipment, not on the direction of the shipment. This . . . depends on whether transportation is between two points, one of which is in the United States. *See Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000). This change in the [Carmack] Amendment's scope is also apparent in the phrase "to the extent the transportation is in the United States." 49 U.S.C. § 13501. This language did not appear in earlier versions of the statute. While the domestic legs of shipments between a place in the United States and a place in a foreign country are covered regardless the point of origin, *it is now plain that the international leg of such a shipment is not covered by Carmack.*[18]

Finally, as internally cited above, *Southern Pac. R. Co. of Mexico v. Gonzalez*, 48 Ariz. 260, 270-280, 61 P.2d 377, 381-385 (Ariz. 1936), also treats this issue head-on (though in the context of the original incarnation of the Interstate Commerce Act) by heeding the limits placed on extraterritorial jurisdiction by international law and denying the application of Carmack to transportation in Mexico.

> It is a general rule of international law that no law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. As was said by Chief Justice Marshall in the case of *The Antelope*, 10 Wheat. 66, 122, 6 L.Ed. 268: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone." In *Polydore v. Prince*, 19 Fed. Cas. page 950, No. 11,257, it was held as follows: "It is among the first maxims of the jus gentium that the legislative power of every nation is confined to its own territorial limits. This is a principle which results directly and necessarily from the independence of nations. Whatever may be the nature of the law, whether it relates purely to persons and their civil qualities, or to things, it can, *proprio vigore*, have no force within the territorial limits of another nation." And in *Roche v. Washington*, 19 Ind. 53, 81 Am.Dec. 376, the court held: "Now, it is true as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach to acts done in such other nation." This rule is clearly consonant with the fundamental principles of international law and the rights of independent sovereignties. It would, therefore, seem to follow directly therefrom that it is beyond the power of the federal government of the United States to pass a law which shall impose a liability even on citizens of this country for acts done wholly within the limits of a foreign country. This principle is so fundamentally just that it apparently should be accepted as axiomatic * * * [In *Galveston, H. & S. A. R. Co. v. Woodbury*, 254 U.S. 357, 41 S.Ct. 114, 115, 65 L.Ed. 301 (1920)] . . . [t]he court reviewed the situation, and said: "We think the language of section 20 of the Interstate Commerce Act in this respect is not materially different from that employed in section 1 . . . since it appears from the allegations of the plea that all of the defendant's services were to be performed in Canada, the Interstate Commerce Act cannot apply, because it cannot be given any extraterritorial effect."

But, to be thorough, one must compare *Fine Foliage of Florida, Inc. v. Bowman Transp., Inc.*, 698 F. Supp. 1566 (M.D. Fla. 1988), where Carmack was applied to a loss occurring on the domestic leg of a shipment from the United States to Japan. Also, one must compare *DiPaolo*, 998

F. Supp. 229, where a loss caused during a shipment from Mexico to Canada, through the United States, was governed by Carmack when the goods arrived in Canada damaged—presumably because it was assumed that the damage occurred during that portion of transport through the United States. These cases generally stand out as anomalies.

Transportation

Lastly, and quite simply, since the governing jurisdiction provision relies on the term "transportation" for its coverage ("to the extent *transportation* is in the United States"), we must also know what transportation is to round off Carmack's application in this context. Transportation, as to motor carriers, is defined at 49 U.S.C.A. § 13102(19)(A-B) as "a motor vehicle . . . warehouse . . . yard, property, facility . . . related to the movement of . . . property . . . regardless of ownership or an agreement concerning use; and services related to that movement, including . . . transfer in transit . . . handling, packing, unpacking, and interchange of . . . property." This definition is extremely broad and tends to cover great ground.

Concluding Summary

Despite some cases that either plainly err or unsafely create assumptions for purposes of equity, Carmack by its terms and through sufficient judicial interpretation does not apply to a loss on transportation occurring extraterritorially, regardless of the point of origin or destination, or whether transportation was at some point across American soil. The liability provisions of Carmack can be applied only to losses occurring within the United States.

Endnotes

1. *Ting-Hwa Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 704 (4th Cir. 1993).
2. *See* 49 U.S.C. § 14706.
3. *Compare* 49 U.S.C. §§ 10501(a)(2)(F) (rail) *and* 13501(1)(E) (motor).
4. Ch. 3591, 34 Stat. 584 (1906).
5. 49 U.S.C. § 11707.
6. 49 U.S.C. § 14706; *see DiPaolo Mach. Works, Ltd v. Prestige Equipment Corp.*, 998 F. Supp. 229, 233 (E.D.N.Y. 1998).
7. Pub.L. 104-88, 109 Stat. 803 (1995).
8. *See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Allite, Inc.*, 430 Mass. 828, 831 n. 4, 724 N.E.2d 677, 680 n. 4 (Mass. 2000).
9. *See Kyodo U.S.A., Inc. v. Cosco North America Inc.*, 2001 WL 1835158, *3 (C.D. Cal. 2001).
10. *See, e.g., Adams Express Co. v. Croninger,* 226 U.S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1913) (leading case on preemption of state regulation relating to carriage).
11. *See, e.g., Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC,* 2006 WL 2239239 * 3-4 (11th Cir. 2006); *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 826 (N.D. Tex. 2003); *Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc.*, 243 F. Supp. 2d 1064, 1068 (C.D. Cal. 2002); *King Ocean Cent. America, S.A. v. Precision Cutting Services, Inc.*, 717 So.2d 507, 512 (Fla. 1998) (stating that Carmack by its very terms limits its applicability to the extent that transportation is in the U.S.).
12. *Russell Stover Candies, Inc. v. Double VV, Inc.*, 983 F. Supp. 1359, 1361 (D. Kan. 1997).
13. *Canon USA, Inc. v. Nippon Liner System, Ltd.*, 1992 WL 82509, *6 (N.D. Ill. 1992) (emphasis added) (some internal citations omitted) (citing *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 699 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987)).
14. *See also Sompo Japan Ins. Co. of America v. Union Pacific R. Co.*, 456 F.3d 54, 68 (2d Cir. 2006); *Alwine v. Pennsylvania R. Co.*, 141 Pa.Super. 558, 15 A.2d 507 (1940).
15. *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.*, 456 F.3d 54, 68 (2d Cir. 2006) (emphasis added); *see also Duck Head Footwear v. Mason and Dixon Lines, Inc.*, 41 Fed.Appx. 692, 696 (4th Cir. 2002) (also treating the relationship between Carmack and Board jurisdiction).
16. *Id.* at *3 (emphasis added) (internal citations and quotation marks omitted) (citing *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 74 (2d Cir. 2001) (determining that Carmack applies only to domestic legs of transport, if even wholly intrastate, when the intent at the time carriage is procured is to ship from the U.S. to a foreign country)).
17. *Project Hope*, 250 F.3d at 74-75.
18. *Berlanga*, 269 F. Supp. 2d at 827 (emphasis added).

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"I've Never Been Convicted of a Felony": Using Vocal Emphasis to Bring Your Message to Life

By Elliott Wilcox

Your words can take on different meanings depending on how you emphasize them. In this article, you'll learn how to take full advantage of the power of your voice to emphasize words, fill them with meaning, and help your audience understand the message you want to convey.

Imagine for one moment that you're reading through a court transcript when you encounter the following phrase: **"I've never been convicted of a felony."**

What message do you think the witness intended? If you're like most readers, you probably think that the witness intended the literal message: He has never been convicted of, or even accused of, committing a felony.

But that may not necessarily be what the witness intended. Without changing the order of the words, how many different meanings can you assign to that phrase? Using only slight changes in your voice, that single phrase could have up to six different meanings, depending on which word is emphasized.

1. ***"I've*** **never been convicted of a felony."** The other executives were convicted. My family members were convicted. Even my lawyer took a fall. But not me.

2. **"I've *never* been convicted of a felony."** I completely deny your allegations. It's never happened, not once in my entire life. I've never even been charged with a crime. Anyone who says different is a liar.

3. **"I've never *been* convicted of a felony."** I'm about to be. I'll be convicted tomorrow morning at 9:30 A.M., in courtroom 9-D, but up until this point, my record is still untarnished.

4. **"I've never been *convicted* of a felony."** Oh sure, I've been arrested, indicted, and brought to trial on numerous occasions. But somehow (wink wink, nudge nudge) the jury has never returned with a "Guilty" verdict.

5. **"I've never been convicted of *a* felony."** When I'm convicted, they usually come in multiples of eight. For example, the last time I was convicted, the jury found me guilty of 56 separate offenses. Before that, 24 felony convictions in a single sitting. But never a single felony…

6. **"I've never been convicted of a *felony*."** Misdemeanors? Oh, sure—hundreds, probably, thousands of those. But I'm proud to tell you that none of my convictions are for felony offenses.

That single phrase takes on a variety of meanings when spoken aloud. By emphasizing different words, you breathe life and vibrancy into your words. Depending on where you place your emphasis, you completely change the meaning of the phrase.

If you want to develop that vocal skill so you can bring words to life, emphasize important phrases, and help your audience understand what you mean, you need to master the skill of vocal emphasis. Here's how:

Start by asking a friend to listen as you say the phrase, "I've never been convicted of a felony." Before you say the phrase aloud, you need to pick one of its six different meanings, but don't tell your listener which meaning you intend to convey. Next, repeat the phrase aloud, doing your best to emphasize the meaning without overexaggerating the emphasis or making it sound forced.

After you've repeated the phrase, ask your friend to tell you what message they thought you were trying to get across. Did they get it right? If they did, then you're properly emphasizing your words to convey meaning to your audience. Continue to work your way through the other variations, until you've completed all six iterations. If your listener didn't understand what message you were trying to convey, you need to keep practicing until you get it right before moving onto the next variation.

Your voice adds flavor and texture to your word choices. Don't neglect the power of emphasizing words to help your audience understand your message. Practice the skill of vocal emphasis until you master it, and you'll never be misunderstood again.

Elliott Wilcox is the creator of Trial Tips Newsletter, a free weekly ezine for trial lawyers (www.Trial-Theater.com).

Shedding Light on SEQRA

By Alexandra R. Harrington

The State Environmental Quality Review Act, commonly referred to as SEQRA or SEQR, is more than a legislative statement of commitment to the ecological, historical, and cultural resources of New York State and its communities; it is a powerful land use and litigational tool that has taken on more significance in recent years.[1] As communities throughout New York are faced with issues regarding urban sprawl, changing community composition and structure, and the maintenance of open spaces—and many communities are considering or are currently in the process of revising their zoning laws—SEQRA provides local government officials, citizens, and lawyers a consistent guide for the evaluation of land use proposals.

An appreciation of SEQRA is very helpful, but it leads to two key practical questions: what is it and what do I do with it? As a lawyer, you might encounter SEQRA issues in different ways. A client seeking to develop property could seek your counsel as to the necessary steps he should take to obtain permissions from local governmental bodies. A client representing a community group might need counsel on ways in which she might effectively object to a land use project in her community. Homeowners might wish to alter their residential property, or develop their property for commercial or business use, and come to you for advice. Or, if you represent or are affiliated with a village, town, or municipality, or any state entity that has jurisdiction, you might be called upon to assist that entity in its handling of SEQRA issues in relation to public and/or private projects.

Any land use project will be governed by the local code of the village, town, or municipality where the property at issue is located, as well as the applicable county code, and the provisions of the New York Village Law, Town Law, General Cities or Second Class Cities Law, and the General Municipal Law, depending on the governmental entity involved.

"An appreciation of SEQRA is very helpful, but it leads to two key practical questions: what is it and what do I do with it?"

These statutes, and the cases construing them, should be consulted first for guidance as to the feasibility of the land use project at hand and the extent to which variances, zoning and land use permissions, or other permits will be necessary. However, you will soon encounter references to SEQRA, and perhaps be struck by the fact that a quick reading—or even an in-depth reading—of the Environmental Conservation Law leaves you with only a basic understanding of SEQRA.[2] The bad news is that the nuts and bolts of SEQRA law are found in the New York Code, Rules and Regulations (N.Y.C.R.R.);[3] the good news is that the SEQRA rules are available at no cost on the New York State Department of Environmental Conservation (DEC) website,[4] and also in the NYSBA library.

The provisions of SEQRA contained in the N.Y.C.R.R. are myriad, but several determinations are critical to the evaluation of SEQRA to your client's concerns. First, determine whether the land use project at issue is in fact subject to SEQRA jurisdiction;[5] and, if it is, the applicable type of action.[6] Second, whether you represent the developing party, the objecting party, or a governmental entity, determine what governmental entities will be "involved" and "interested" parties. Each of these terms carries a distinct meaning and level of interest in the SEQRA process.[7] Even if a governmental entity has not appeared in the SEQRA process yet, it is imperative to be aware of potential involvement and interest as early as possible. For example, the New York State Historic Preservation Office (SHPO) is charged with protecting various levels of historical and potentially historical lands;[8] the New York State Department of Health has jurisdiction over various public health issues, and not all of these issues have been delegated to county officials;[9] the DEC designates state wetland areas;[10] and it is possible that, although the DEC has not designated the property as a wetland area, the U.S. Army Corps of Engineers might. Although the scope of the Army Corps' jurisdiction over wetlands has been weakened, the Army Corps is still vested with authority to designate federally protected wetlands.[11]

If your client is the developer, speak with your client and any other persons who have knowledge of the property and the project, such as engineers and architects. Also, consult the appropriate village, town, municipality, and county officials to determine the forms and procedures necessary for both zoning and SEQRA applications. If your client has objections to the land use project, gather as much information as you can from your client and consult the appropriate village, town, municipality, and county officials to determine the forms and procedure necessary and whether applications or docu-

ments have been filed. Applications of this type should be made available to the general public, and are covered by the provisions of Freedom of Information Law (FOIL) as well. Be sure to keep checking with the appropriate governmental entities to make sure that you have the most recent and complete copies of any such applications and documents.

The zoning and SEQRA application process can be a lengthy one. If you represent the developing party, it should be explained to your client that the duration of the SEQRA process has a correlation to the amount of information available to the lead agency (and involved and interested entities); an evaluation of the quality and quantity of information available should be made by you and your client prior to seeking to place the land use project on the agenda for any governmental entity. If you represent the objecting party, you and your client should attend public meetings of the governmental bodies that will be evaluating the land use project.

Once the appropriate state and local governmental entities have been contacted by the developer or the village, town, or municipality, a "lead agency" will be designated by consensus.[12] The lead agency serves as the ultimate arbiter of the SEQRA impacts, and will determine the type of SEQRA declaration issued. The designation of a lead agency stays any pending applications that require a SEQRA determination.[13]

If you represent the developer, you should ensure that all parties to the intended development process are made aware of SEQRA requirements. This includes explaining the necessity of hiring traffic consultants and environmental engineers, having architectural information prepared, and—if the property is in an area of established or potential historical significance—an archeologist.

If you represent the objecting party or group, you should advise your client that it might become necessary to hire traffic consultants, environmental engineers, architectural consultants, and even archeologists to perform independent evaluations of the developer's application materials. This might seem counterintuitive because the burden of meeting SEQRA standards is placed on the applicant. However, courts have stressed the importance of providing evidence for objections, and often lead agencies appreciate receiving such information. SEQRA invites and requires public participation, and you and your client should seize this opportunity not only to present objections, but also to provide documents relevant to these objections. Unless a lead agency states otherwise, don't be afraid to ask for the opportunity to present a written summary or report of your client's reasons for objection.

Ideally, the lead agency's declaration will balance the needs and desires of the developer and the community. However, a SEQRA declaration is subject to challenge through an article 78 action. After the issuance of a contested SEQRA declaration, consult applicable state and local statutes for the type of governmental body which acted as the lead agency because, although the SEQRA statute of limitations is four (4) months,[14] some governmental bodies, such as Zoning Boards of Appeal,[15] have their own statute of limitations which can be shorter than four (4) months.

Endnotes

1. *See* ECL art. 8 (McKinney 2006).
2. *See id*.
3. *See* 6 N.Y.C.R.R. pt. 617.
4. Rules and Regulations, New York State Department of Environmental Conservation, *available at* http://www.dec.state.ny.us/website/regs/part617.html (last visited Dec. 29, 2006).
5. 6 N.Y.C.R.R. §§ 617.4 – 5.
6. *Id*.
7. *Id*. § 617.2(s), (t).
8. *See* PAR art. 14 (McKinney 2006); *see also* New York State Historic Preservation Office, *available at* http://nysparks.state.ny.us/shpo/ (last visited Dec. 29, 2006) (providing information on the many facets of SHPO's jurisdiction and activities).
9. *See* Laws & Regulations, New York State Department of Health, *available at* http://www.nyhealth.gov/regulations/ (last visited Dec. 29, 2006) (providing a full list of jurisdictional areas covered by the Department of Health; of these, the most important are typically titles 10 and 18 of the N.Y.C.R.R.).
10. *See* ECL arts. 24, 25 (McKinney 2006).
11. *See generally* 33 C.F.R pts. 320 *et seq*. *See also Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (attempting to limit the jurisdiction of the Army Corps of Engineers in relation to wetland areas).
12. 6 N.Y.C.R.R. § 617.2(u).
13. *Id*.
14. CPLR 217(1) (McKinney 2006).
15. Town L § 267-c (McKinney 2006).

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Guiding a Victim Through the Criminal Justice System

By Christa M. Book

As an Assistant District Attorney in the Special Victims/Domestic Violence Unit, I work with hundreds of victims each year.[1] The cases that I prosecute include child abuse, either sexual or physical, and domestic violence. For prosecutors, it is essential to remember that the case goes much further than the file sitting on your desk. All of my cases involve a victim. Keeping the victim apprised of the criminal justice process is one of the most important aspects of my job. My job is to do justice.

When I first speak to a victim, whether it is in person or over the phone, I inform the victim of the charges against the defendant. Generally, because a victim goes to the police to simply relay the events that have occurred, the victim is unaware of the actual charges. In explaining the crimes charged, I explain to the victim the level of each crime and the possible sentences.

For example, if I had a case where a defendant went to a victim's home where a full stay-away order of protection[2] was in force, and the defendant has therefore violated that order, the defendant likely will be charged with Criminal Contempt in the Second Degree—a class "A" misdemeanor.[3] In such case, I would let the victim know that there are class "A" and "B" misdemeanors in the State of New York and that the defendant is charged with the more serious of the two misdemeanors. Thereafter, I would explain that a class "A" misdemeanor has a maximum punishment of one year in the county jail. In addition, I would provide the victim with some alternate punishment options carrying a lesser sentence, such as: (1) up to sixty days in jail and three years probation, which is known as a "split" sentence; (2) three years probation without any jail time; (3) community service; or (4) a fine. I would inform the victim that, in domestic violence cases, probation also could include the condition of the Batterer's Intervention Program. The Batterer's Intervention Program is typically a fifty-two week program where the defendant has to attend a class once a week paid for out of his own pocket, having a very strict attendance policy.

"For prosecutors, it is essential to remember that the case goes much further than the file sitting on your desk. . . . Keeping the victim apprised of the criminal justice process is one of the most important tasks of my job. My job is to do justice."

Following explanation of the charges, I ask the victim for her input in the case. Although I explain to the victim that her input is an important part of the offer that I will eventually present to the defendant, I clarify that I also take other factors into consideration.

All too often, victims in domestic violence cases tell me that they do not wish to pursue charges against the defendant. There appears to be a myth that victims control whether a defendant's case is prosecuted. Even if the victim does not wish to pursue charges against a defendant, the District Attorney's office may still chose to prosecute the case. If these circumstances arise, I make the victim aware that I plan to continue prosecuting the defendant. Also, in my experience, most victims of domestic violence do not wish to see the defendant to go jail. However, where probation is no longer an option,[4] I explain to the victim that I intend on recommending incarceration.

Next, I typically walk a victim through the court process. In the example provided above, if a defendant is offered a plea to the charge with three year's probation, he may decide to accept that offer at his first appearance. If such is the case, I will explain to the victim that the defendant will be pleading guilty to the charges against him and that this will result in adjournment of the case for approximately eight weeks while the probation department completes a "pre-sentence" investigation. Thereafter, I explain to the victim that a pre-sentence investigation is a process by which the defendant is interviewed by the probation department, and the department investigates the defendant's prior criminal history (if any) and the facts and circumstances surrounding this arrest. This information is used by the department to determine its orders and conditions of probation.

In the event that the defendant rejects the plea offer at the initial appearance, I explain to the victim that the prosecution must begin preparing the case for a trial. This involves the defendant filing a demand for discovery and a bill of particulars. The District Attorney's Office then must turn over all materials that are discoverable pursuant to Criminal Procedure Law § 240.20. Also, the prosecution must particularize the crimes charged. After this process is complete, the defendant will file pretrial motions, such as motion to dismiss, motion to preclude certain evidence from admissibility at trial, and

motion to preclude and/or suppress a statement that a defendant made to law enforcement personnel.

After the District Attorney's Office answers the motions, I again contact the victim to explain the specifics of the trial process. I explain that the case typically will be set on the judge's calendar for a pre-trial conference—a final attempt to come to a plea bargain before the case is set for trial. If there is no meeting of the minds at this conference, the case will go to pre-trial hearings and then to trial. As victims are not generally aware of the lengthy process that must take place prior to the trial date being set, it is important to keep victims apprised at each stage of the pre-trial preparation. Failing to keep the victims informed often results in miscommunication as to the state of the proceeding, and may result in adverse feelings by the victim.

In cases of domestic violence, the practice of keeping in touch with the victim is crucial. Frequently, these victims, although initially interested in pursuing charges, upon further contact, tend to become increasingly less interested in pursuing charges.[5] Under such circumstances, I try to talk to the victim as much and as often as possible to preclude any feelings that the District Attorney's Office is the enemy and, instead, realize that I am working to move her case forward.[6]

In the event that the case goes to trial, the victim must be prepared for what lies ahead. I prepare the victim to testify at trial by meeting with her in person at least once prior to the trial. Next, if possible, I will take the victim inside the courtroom. I will show her the general layout of the courtroom and explain the order in which a trial proceeds. In a case where the victim is fearful of the defendant, I explain that there will be court officers standing near her and near the defendant. I do this hoping that this will make her feel a little safer about the task of testifying. I also tell her that there will only be one time when she has to look at the defendant during the court proceeding, and that is when she will have to identify him for the record. I do all of this to eliminate some of the fear of the unknown. Checking in with the victim the day before the trial also makes her feel more comfortable. They often have last minute questions that they forgot to ask.

After the trial, whether the verdict is guilty or not guilty, the first thing I do is call the victim and let her know what happened. She needs to know whether she still has an order of protection, whether the defendant is in jail or out walking the streets, and what will happen next. Most importantly, I make it a point to convey to the victim that regardless of the outcome, she was very brave to have testified.

I try to keep everything in perspective. I may see three domestic violence assaults and one sexual abuse case come across my desk every week. However, for many victims, this may be the first time that they have had to cope with such traumatic events in their lives. No matter how many times I see a similar fact pattern in a case, I try to keep this in the forefront of my mind. I am sensitive to this, and I always have a minute for a question or to listen to how this makes the victim feel.

Endnotes

1. For purposes of this article I will be referring to the defendant as a male, and the victim as a female.
2. A full stay-away order of protection requires that the defendant maintain no contact with the victim.
3. *See* N.Y. Penal Law § 215.50(3).
4. If a defendant has been unsuccessful several times on probation, most likely the Judge will not go along with yet another sentence of probation.
5. There are many possible reasons for the change in the victim's position. It may be because there is not a full stay-away order of protection, but instead a "limited" order of protection. This limited order of protection essentially means that the defendant cannot do anything illegal toward the victim, but he can be in her presence. If the order changes to a limited, a lot of victims will tell me a few weeks down the road that everything is going really well, and that they are not really interested in pursuing charges against the defendant. Children also frequently factor into the equation. Family court may make an order that says the victim and the defendant can contact each other to "discuss the child." This opens the door to allow other conversations. I also have seen victims ask to drop charges because the defendant's family watches their child for them while they are working, and they do not want to pursue charges and possibly lose the defendant's family as a source of caring for their child. There is no real way to firmly stop this process.
6. In domestic violence cases, I try to keep in mind the other evidence in the case. It is possible to move a case forward without a victim who is willing to testify. I check into whether or not the victim called 911 on the date of the incident. Also, if the case involves an assault, or some sort of physical brutality, I will check to see if the police took photographs. I would be able to introduce these with the Officer who took the photo without having to call the victim to the stand. If a victim has to go to the emergency room, her medical records will be at the hospital. These medical records can be introduced through the doctor who saw the victim. At times a weapon will be involved. If the police collected a weapon from the scene this can be introduced through the police officer's testimony. Basically, when a victim is no longer willing to testify, I consider whether or not I will subpoena her anyway, or whether I have enough evidence to move the case forward without calling her as a witness.

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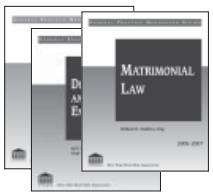

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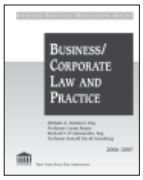

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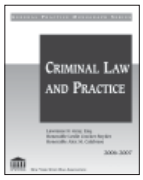

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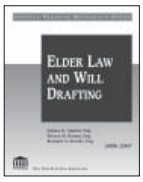

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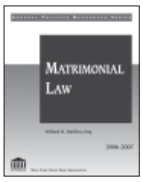

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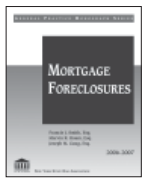

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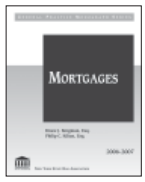

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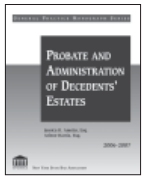

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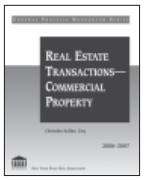

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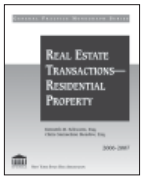

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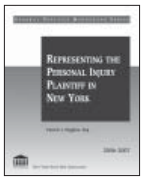

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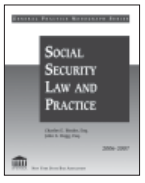

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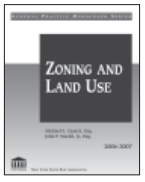

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Message from the Chair

Continued from page 1

tion with the Association's Annual Meeting in January. Our biggest event of the year, four planning co-chairs put together a truly outstanding lineup of programs.

We kicked off our program with a three-hour professional development CLE seminar, entitled "Career Development—Personal and Professional Strategies for Young Lawyers." Offered in two-parts, young lawyers who attended this portion of the meeting had an opportunity to engage in an interactive discussion with Dallas attorney, mentor, and career coach Cordell Parvin about strategies for developing career goals and a career path that is meaningful and satisfying. Young lawyers attending this program also heard from a diverse panel of seasoned practitioners about transitions in the practice of law, making a career change or choosing a new area of practice. Panelists included a former counsel to a New York State Governor and current partner in a New York City law firm, an Assistant District Attorney and adjunct professor of law, a former judicial law clerk and current associate in a New York City law firm, and an attorney serving on the Suffolk County Legislature.

Following our first day of programming, the Section held its annual general membership and executive committee luncheon meetings, where the leadership reported on the activities of the Section for 2006-2007 and elected the YLS officers and Executive body for 2007-2008. We concluded the events of the first day with the presentation and reception to honor the recipient of the Section's 2007 Outstanding Young Lawyer Award, Laurie Giordano, an extraordinary, accomplished, and extremely deserving young lawyer who is truly a model for us all!

Our annual transitional CLE program for newly admitted attorneys, Bridging the Gap 2007: From Practice to Purpose, concluded the YLS' Annual Meeting program. This specially designed, two-day event offered a total of 16 MCLE credits to attendees; covered topics in the areas of torts/insurance/compensation law, family law, criminal law, alternative dispute resolution, estate planning, and immigration law, ethics, landlord/tenant law, and evidence; featured a law practice management session and sessions on NYSBA's Empire State Counsel Program, designed to give special recognition to attorneys who provide 50 hours of pro bono services to the poor each year; NYSBA's Lawyer Assistance Program (LAP), a service that provides education and confidential assistance to lawyers, judges, law school students, and immediate family members who are affected by the problem of substance abuse, stress, or depression; included a discussion of legal practice alternatives; and offered a view from the Bench—where trial and intermediate court judges gave practical guidance and tips for effective advocacy. Attracting more than 200 young lawyers practicing in, around, and outside of the State of New York and featuring more than 25 distinguished jurists, seasoned practitioners, and expert presenters, the YLS' 2007 Bridge the Gap Program was, for the second year in a row, a huge success!

I would like to thank Annual Meeting Program Co-Chairs Christina H. Bost Seaton, Esq., Patrick Foster, Esq., Valerie Cartright, Esq., and Marjorie Mesidor for their extraordinary efforts in the planning, coordination, and facilitation of the meeting program events.

The leadership of the YLS began working in close collaboration with the American Bar Association Young Lawyers Division (ABA YLD) in the Fall to help increase the participation of New York young lawyers in the American Bar Association. With the advice, assistance, and guidance of Claire Gilmartin, District 4 Representative for New York in the ABA YLD, the Section leadership invited the more than 3,500 YLS members to be considered for appointments to nineteen (19) designated Delegate slots and nine (9) Alternate Delegate slots for New York young lawyers to the ABA YLD Assembly, which is the principle policymaking authority within the Division. To date, ten (10) appointments have been made, and the Section is seeking to make additional appointments. Three Delegates, myself included, had an opportunity to attend the YLD's Assembly at the ABA Midyear Meeting in Miami in February and learn more about the activities of the Division, the ways in which the Division assists affiliate members, like the NYSBA YLS, with projects and activities at the state and local levels, and opportunities for collaboration. There are tremendous resources available at the national level that could truly benefit the membership of the YLS. I invite you to consider serving as a YLS Delegate to the ABA YLD to fill one of the remaining Delegate or Alternate Delegate slots. It is a terrific opportunity to learn about and become active in both Associations. You will be an important part of the Section's efforts to rebuild and redefine the New York delegation within the ABA YLD. And, you will have an opportunity to meet and network with some of the nicest, most interesting, and truly diverse group of young lawyers from around the country!

Mentoring, as you may know from previous communications, has been the focus of initiatives at the committee level and the member benefits and services level this year. Over the course of my term, I have been working very closely with a reorganized Committee on Mentoring, chaired by Christina H. Bost Seaton, Esq., to update the Section's

Mentor Directory and to plan and coordinate the implementation of a new mentoring project modeled after the Texas Bar Association Young Lawyer Division's 10-Minute Mentor Program. While progress has been made in both of these areas, there is still work to be done. The Mentor Directory has been updated, and is currently being reviewed and refined for a relaunch on the YLS website in late Spring, early Summer, with the goal of making it less intimidating and a more user friendly to the membership. The new mentoring project has been the subject of a great deal of communication amongst the committee, the leadership, and the Association. While there has been a slow start due to some unforeseen logistical issues that had to be worked out, the Section plans to begin taping mentoring segments this Spring, and hopes to launch the project sometime this Summer. Stay tuned for updates and details as this project develops.

I am pleased to report that a Chair of the Diversity Committee, Ricja Rice, Esq., has been appointed, and we are looking forward to the work of this Committee in implementing the action items of the Section's Diversity Plan. The Committee on Community Service and Pro Bono began organizing in late Fall, and is off to a terrific start. Chaired by Michael L. Fox, Esq., the Committee was part of the Third and Fourth Districts' Annual Holiday Reception, which drew more than 70 young lawyers from the Capital District and Saratoga areas who donated toys to the local Toys-for-Tots chapter. The Committee, in cooperation with the NYSBA's Committee on Law, Youth, and Citizenship, has also been working on an update of *Now that You've Turned 18*, a pamphlet created by the Committee several years ago for distribution to high school students throughout the State, and has been putting together resources on pro bono and public service law for the Section's web site.

With any progress, there are always a few setbacks. In my first Chair's message, I reported about the development of a brownbag conference call series, which we had hoped to launch this year. Unfortunately, the series did not take off as we had planned despite the great deal of early-stage planning that occurred amongst the working group. I thank the members of the group for their efforts, and hope that the Section will continue to conceive of innovative ways to provide services and benefits to our membership that are practical, useful, and convenient. In my first message, I also reported on an editorial transition for our monthly electronic newsletter. Regrettably, after only a few months of service, the new editor notified the Section that he could no longer continue to serve as editor of the publication. While I will resume editorial responsibilities for Electronically *In Touch* during this transition, I hope to appoint a new editor in the next few months. I would like to thank Seth Azria, Esq. for his work on the newsletter, and wish him well as he embarks on a new and exciting endeavor overseas. Any young lawyer interested in serving as editor of the newsletter is invited and encouraged to contact me.

As warmer weather approaches, we are looking forward to the programs and events that have been planned and/or are in the process of being planned for the membership in the Spring, including the 2007 Supreme Court Admissions Program scheduled for early June in Washington, D.C.; a financial planning seminar for young lawyers being piloted in Albany in May; and Spring district events throughout the State in May and early June. In addition, revisions and technical updates to the Section's Bylaws are expected to be completed, and a reimbursement policy for YLS Executive Committee members will be circulated to the Committee and the Association for comment, review, and approval.

Finally, in the next few months, I, along with the three other officers of the Section will be preparing for the leadership transition, which will take place on June 1, 2007. I invite and encourage you to reach out to me with any thoughts, advice, guidance, comments, or input you may have about the Section and the ways in which we can better serve you for the upcoming year!

Justina Cintrón Perino
Chairperson

Continued from page 1

dollar thoroughbred franchise should be a cause of concern. This leads to the conclusion that New York has implemented a bidding process that is inappropriate and inefficient and has wasted time that could have been valuable in determining who should be running New York's thoroughbred racing franchise for the next twenty years.

This article will focus primarily on the deficiencies in the defunct ad hoc committee process in light of the fact that Governor Spitzer's new review panel will not proceed until after this article is submitted for publication.[2] While the creation of a new panel provides additional substance to the argument that the state's initial process in awarding the thoroughbred racing franchise is inappropriate and inefficient, several arguments still exist as to why no weight should be given to the earlier ad hoc recommendation.

I. A History of New York Racing and New York's Racing Franchise

Thoroughbred racing has long been part of the history and culture of New York State. The first American racetrack was established on Long Island in 1665.[3] These original racetracks were run by the rich and famous as a way to showcase their horses.[4] It was not until the Civil War that entrepreneurs became interested in racetracks, and began operating them as a business.[5] At a popular summer health resort in Saratoga Springs, New York, two men, John Hunter and W.R. Travers, established a racetrack and conducted their inaugural meeting in 1864.[6] The success of Saratoga led to a host of competing tracks being built in New York City areas that included Fordham, Coney Island, Brooklyn, Queens, and Westchester.[7] Several racetracks opened and closed their doors between the years of 1866 and 1910 when Governor Charles Evan Hughes pushed through legislation to make wagering on horse racing illegal.[8] This prohibition was short lived however, as racing returned to New York in 1913, but with only Jamaica (Queens), Aqueduct (Ozone Park), Belmont (Elmont), and Saratoga open for business.[9]

By the 1950s, legislators, joined by racing officials, determined that something needed to be done to ensure New York maintain its historic place at the forefront of thoroughbred racing in America.[10] The solution they adopted was that one association would control New York thoroughbred racing, and that it would be done on a non-profit basis.[11] So in 1955 the New York Legislature granted the New York Racing Association[12] [hereinafter "NYRA"] the exclusive right to conduct racing and operate pari-mutuel wagering at the Aqueduct, Jamaica, Belmont and Saratoga racing facilities for 25 years.[13] In 1970 the legislature revisited this matter and extended NYRA's exclusive franchise until 1985.[14] Again, in 1983, the state legislature passed legislation extending the current operator's franchise until 2000.[15] However, before the 2000 expiration, in 1997, the legislature passed, and Governor George E. Pataki signed, legislation extending the franchise until 2007.[16] This latest extension is set to expire on December 31, 2007.

In accordance with its 1983 revisions to state law, the New York Legislature has since opened the franchise to competitive bidding.[17] While this background is entertaining and provides interesting facts about the history of New York racing, it is intended to serve another purpose. Parallels exist between the 1950s legislators and those who sit in Albany today. In 1955 the legislature was required to act in order to preserve New York's standing in the thoroughbred racing industry just as today's legislature needs to do the same.

II. What Is at Stake?

When people speak of horse racing, it is important for them to realize that horse racing is more than horses running around a track and someone betting $2 to win/place/show on their chosen horse. The horse racing industry is a key component of something much larger and is vital to the people of New York State due to its economic and cultural value.

Economically, the equine industry is extremely important to New York; its "total economic impact" is approximately $2.4 billion.[18] The Deloitte Report on New York's equine industry includes figures from the racing, showing, and recreation industries. "Total economic impact" takes into consideration out-of-state impact. About $1.4 billion of that is generated by horse racing—three-quarters of that amount is from thoroughbred racing, and one-quarter is from harness racing.[19]

The equine industry has a "direct economic impact" of $1.4 billion, of which $869 million is generated by the racing industry, and roughly three-quarters is attributed to thoroughbred racing.[20] "Direct economic impact" deals with revenue generated in the state. In 2005, the racing industry generated approximately $124 million in annual taxes for New York. Eighty-eight million dollars of that was paid to the state government with the remaining $13 million going to local governments.[21]

Culturally, the equine industry encompasses approximately 152,000 New Yorkers including 56,400 owners, 19,100 employees, and 76,500 volunteers.[22] The equine industry generates approximately 12,700 direct jobs and 35,200 total jobs.[23] Of these jobs, the racing industry is responsible for 6,600 direct jobs and

16,900 total jobs.[24] Looking at these numbers more closely will help establish the importance of New York's thoroughbred racing industry. While the Deloitte Report does not identify the number of jobs attributed to the thoroughbred industry alone, if we use the percentage of the economic impact attributed to thoroughbred racing we can make a relatively safe assumption that between seventy and seventy-five percent of all racing industry jobs are in the thoroughbred industry (between 4,800 direct jobs and 12,200 total jobs).

It cannot be made clear enough that New York State's thoroughbred racing franchise is more than three racing facilities at Aqueduct, Belmont Park, and Saratoga and some tax revenue. New York's thoroughbred franchise is extremely important to New Yorkers and when deciding who the next franchisee is, New York needs to remember that the thoroughbred racing franchise is not only a revenue generator for the state but it is an important economic asset.

III. New York's Franchise Legislation

Now that we have identified what is at stake, it is necessary to address the current process being utilized by the state. The following section will examine the ad hoc process outlined in state statute. After outlining the basic process, the current system including its flaws and problems will be identified and addressed. Through this examination, it will be determined if this is the best process for New York State and the state's thoroughbred racing industry.

The New York Legislature amended the New York State Racing, Pari-Mutuel Wagering and Breeding Law in 1983 to include language that stated "no franchise shall be granted by the racing and wagering board . . . unless such grant is made in accordance with the provisions of [§208(11)(a)-(d)]."[25] These sub-sections were added to section 208 by the legislature in an effort to ensure that "franchises of reasonable length are awarded to private racing corporations or nonprofit racing associations to conduct thoroughbred racing and pari-mutuel betting at such facilities and that such franchises are awarded in an open and timely manner. . . ."[26] The legislature believed that such a process would: (1) eliminate the possibility of lapses when the franchise is authorized; (2) secure the benefits associated with competition and the free enterprise system for the people of New York; (3) give the franchisees involved time for adequate planning; and (4) allow for a transition process where the primary goal and objective of all parties involved would be the continuation of high quality thoroughbred racing in the event that the corporation or association then holding the franchise is not selected to continue operations.[27] The legislature is clear that this process is necessary to ensure that the people of New York, as well as the racing industry itself, are protected.

The legislature stated that the amendments to the racing statutes in 1983 were done to "promote, develop and encourage the continuation of high quality thoroughbred racing at the thoroughbred racing facilities located in New York State and to protect and promote legitimate interests of the various components of the racing industry in the state to the extent those interests are consistent with the interests of the public."[28] The legislature went on to find that such legislation was needed to provide an "orderly process pursuant to which the franchise [would] be awarded. . . ."[29] Based on the aforementioned reasoning the legislature found it prudent to develop a process that would aid in the awarding of the New York State thoroughbred racing franchise.

The process called for the creation of a special ad hoc committee.[30] This committee would be comprised of nine members: three who were to be appointed by the governor;[31] three would be made on the recommendation of the Senate Majority Leader; another three would be made on the recommendation of the Speaker of the Assembly.[32] This committee was also given full power to hold and conduct hearings.[33] The committee's purpose was to solicit proposals from all corporations and associations interested in the exclusive right to operate the three racing facilities, "including but not limited to race meetings, pari-mutuel betting, and operating a Video Lottery Terminal (VLT) gaming facility at Aqueduct."[34]

The legislation outlined additional required deadlines that this committee had to comply with. These included: giving public notice that it would issue a formal request for proposals within one month of being established,[35] issuing a formal request for proposals within one year of being established,[36] and prescribing the form by which the proposals will be made.[37] The committee was also charged with determining which group had the best proposal. It had to determine this based not only on the proposals submitted, but also any other evidence the committee deemed relevant, including who would best provide "for the operation and maintenance of the racing facilities involved and/or for the conduct of race meetings at such facilities and pari-mutuel betting on races . . . in a sound and economical manner which is consistent with the traditions of thoroughbred racing in this state, which will ensure the long-run viability of thoroughbred racing in this state, and which will produce reasonable revenue for the support of government."[38]

The special committee is then responsible for submitting a report to the legislature with its recommendation, along with the actions necessary to implement its determinations, including the legislation to be enacted and the responsibilities assigned to the Racing and Wagering Board[39] and the state.[40] It is important to note that while the legislature asks the special committee to make a recommendation, it will be non-binding—the legislature is free to award

the franchise to whomever it feels is the best choice.

The legislature added these provisions as a measure to provide an orderly process to determine who should be awarded the franchise,[41] but also to ensure that the decision would be made in an "open and timely manner."[42] In addition, it was to be a process that identifies the bidder who would best provide the "long-run viability of thoroughbred racing" in New York.[43] These are all important components to keep in mind when reviewing the report of New York State's Ad Hoc Committee on the Future of Racing.

IV. The Creation of the New York State Ad Hoc Committee on the Future of Racing

In June of 2005 New York passed legislation that required the New York State Ad Hoc Committee on the Future of Racing to be created on or before December 1, 2005.[44] In August 2005 Governor Pataki and Senate Majority Leader Joseph Bruno nominated their respective appointees. However, it was not until early February of 2006 that Assembly Speaker Sheldon Silver nominated his three appointees.

The committee held two meetings in Albany and Manhattan to hear from New York racing participants, as well as groups interested in bidding on the franchise.[45] In addition to these initial meetings, the committee scheduled two public hearings so that it could get input from racing fans.[46] Also, the committee held two roundtable panel discussions to "educate [the committee] members" about racing.[47] After this initial fact and information gathering was concluded, the committee then developed and authored its request for proposal (RFP) that was to be completed by those interested in operating the franchise.[48]

In issuing the RFP, the committee outlined requirements that the bidders would need to comply with in order to have their submission reviewed and considered. These requirements included restrictions on proposal format, proposal appearance, proposal content, proposal disclosure, and even required bidders to post a $1 million litigation bond in an effort to prohibit legal contestation of the recommendation by the bidders.[49] In addition to the aforementioned requirements, the committee established a scoring system based on the criteria it deemed to be important for the bidders to establish.

The scoring system was broken down into two components. The first would give points based on six established criteria categories. Each area would receive a score based on a one hundred (100) point system with a maximum achievable score of six hundred (600) points.[50] The six established criteria categories are the bidder's proposal, the bidder's integrity and responsibility, the bidder's financial viability, the bidder's approach and managerial theory, the bidder's experience and qualification, and the bidder's proposed lease payments.[51] The second component of the scoring system allotted a specific weight to each category that was used to calculate the bidder's overall score. The committee determined that the weighting of each category should be as follows: fifty (50) percent for bidder proposal, twenty (20) percent for bidder's integrity and responsibility, ten (10) percent for financial viability, ten (10) percent for the bidder's approach and managerial theory, five (5) percent for bidder's experience and qualification, and the remaining five (5) percent for the bidder's proposed lease payments.[52]

Additionally, the Ad Hoc Committee provided bidders with three different options, each with two suboptions. The first option called for bidders to submit proposals based on the existing structure of New York racing.[53] The second option called for moderate changes to be made to the racing law, including the extension of racing dates at Saratoga, account wagering, in-home simulcasting, rebates, taxation changes, and the permissive joinder of operations between the franchise and off-track betting corporations (OTBs).[54] The third option called for moderate racing law change and off-track betting restructure.[55] The two sub-options are: first, calling for VLTs only at Aqueduct, while the second option calls for bids that include VLTs at both Aqueduct and Belmont Park.[56]

At this point it is necessary to clarify New York's racing and off-track betting relationships. New York is one of the only jurisdictions that has its on-track operator competing against its off-track betting providers. This relationship and New York's laws providing for it have often been criticized as antiquated and inefficient and that a partnership of the on-track and off-track providers would eliminate this competition.

While the Ad Hoc Committee's RFP process is only the beginning of the franchise awarding process,[57] there are already significant problems that could cause one to speculate as to whether this was the most proper process in recommending who should operate New York's thoroughbred racing franchise.

V. Problems with the Franchise Awarding Process

A. Did the State Fail to Comply with State Law?

An argument can be made that this process has been in violation of state statute since December 2, 2005. In 2005, the legislature amended the original 1983 language to state that "[o]n or before December 1, 2005 . . . the governor shall take such action as necessary to create a special ad hoc committee. . . ."[58] The statute went on to state that the committee "shall consist of nine members to be appointed by the governor. . . ."[59] However, despite this state edict the committee was not fully appointed until

February 2006. This creates the issue of what did the legislature mean when it used the language "take such action necessary to create," and did New York fail to comply with the statute?

The legislature is vague in defining what would constitute the "action" necessary for creation of the committee, and therefore it can be left open to interpretation as to whether this process was in violation of state statute. Does "action" refer to the governor nominating his three appointees or does it mean that the governor must appoint all nine nominees? The term "action" is broad and it remains unclear when "action" is satisfied.

The statutory language found in § 208(11)(b) explains that "[s]uch special committee shall consist of nine members to be appointed by the governor . . ." when read in conjunction with the language in § 208(11)(a) "the governor shall take such action as is necessary to create a special ad hoc committee . . ." it seems to indicate that the governor needed to appoint all nine members to the ad hoc committee to be in compliance with the December 1, 2005 deadline.[60] Seeing that all nine appointments were not made by this designated time, one could conclude that New York was in violation of state statute that calls for all appointments to be made by the governor. The statute prescribes that "no franchise shall be granted . . . unless such grant is made in accordance with the provisions of § 208(11)(a)-(f).[61] However, the statute did not specifically identify a remedy in the case that the ad hoc committee was not created by the December 1, 2005 deadline. Therefore, even if the state was in violation it is unclear what could be done to rectify the situation.

Regardless of the actual language used, the argument could be made that by appointing his three nominated members the governor fulfilled his obligation to take action. Additionally, because the other six members were to be appointed based on the recommendation of the Senate Majority Leader and the Speaker of the Assembly, it would be unfair to deem the governor as inactive on the matter when waiting for their nominees. One can argue that "action" does not necessarily mean that all nine members have to be appointed because the governor appoints six of the members based on the Majority Leader's and the Assembly Speaker's recommendations. Therefore, the governor is at the mercy of the other state officials until they decide to make their recommendations.

In this case, Speaker Silver did not make his nominations until after December 1, 2005, prohibiting Governor Pataki from appointing all nine members by the deadline. It can be argued that it was not the intent of the legislature to give one of the nominating individuals the power to stymie or derail the process simply by waiting for the deadline to pass. That being said, one can surmise that once the governor appointed his three nominees, he had acted sufficiently to create the committee.

Additionally, the fact that the committee began holding roundtable discussions and public hearings despite having only six members effectively rises to the statutory requirement of "action." Because the committee had begun the process to solicit proposals, it could only be reasoned that the special committee was acting and thus "created" despite the absence of three of the members.

Despite the fact that no one has challenged the validity of the Pataki-appointed committee on this issue, it seems that there is a reasonable argument to be made regarding the statutory interpretation of § 208(11)(a)-(f). While the committee has yet to make its formal report and recommendation, and there is no guarantee that the legislature and governor will accept that recommendation, those who were not chosen during this ad hoc committee process may have grounds to challenge the recommendation and ultimately the franchise bidding process.

B. The Committee's Lack of Racing Knowledge

New York's Ad Hoc Committee on the Future of Racing was comprised of nine members from a variety of backgrounds: i.e., business, state government, local government, land developers, and legal—the number of individuals who are actually part of the New York horse industry is clearly lacking. Critics of the ad hoc committee raised the concern that a group charged with making decisions vital to the horse industry should have more racing experts on the committee.[62] In fact only two of the ad hoc committee's members are "horsemen."[63] While the committee members do not seem to mind the lack of industry representation, stating "'[s]ometimes you can be too close to a subject, to not be able to pull yourself back and not let your emotions affect your judgment,"[64] some racing enthusiasts disagreed: "there doesn't seem to be an organized front to provide any input at all from the standpoint of horsemen and bettors."[65] It is not the intent of this section to question the capabilities of the committee, it is to question the logic with regards to how the nominations and subsequent appointments were made.

In determining who should have been on the committee, the governor, the Majority Leader and the Speaker could have considered nominating individuals with more experience and knowledge with regards to the thoroughbred racing industry. There are several groups in the industry that could have brought their expertise to this ad hoc process in an effort to ensure that the legislature's intention for "high quality" racing was maintained. The committee could have included members from the New York Thoroughbred Breeders, the New York Thoroughbred Horseman's Association, and possibly a representative from the Jockey's Guild. All of these groups have a significant interest in the future of thoroughbred racing and the next franchisee, and could have provided

vital information and insight to a process that contributes to the determination of the next thoroughbred racing operator.

C. Scoring

There are several issues that need to be addressed when discussing the committee's scoring process. First, the questions raised by elected officials and state lawmakers need to be addressed. Also, it is important to know whether the committee strayed from the legislature's intentions for the franchise bidding process.

The following explanation of scoring for each category was made by the committee when they made their public recommendation and is outlined in their final report.[66] The committee devised a scoring process where each of the six categories was on a one hundred (100) point system. In each category the bidder that "won" first place was awarded the full one hundred (100) points, while second and third places were given ninety (90) and eighty (80) points respectively. In scoring each category the committee used a "consensus method of voting." This method of voting required the committee to vote with a seven-to-two majority in order to award the first, second, and third place points.

This is a questionable method to score each bid because it does not allow each member to voice individual opinions. If the committee does not get a seven-to-two majority they must keep voting until they do, ultimately requiring that one or several members change their vote or opinion in an effort to get to the required majority if they had not done so on the first vote. In fact, if an instance arises where all three bidders garnered votes for a category, when determining the consensus the committee will eliminate the bidder with the lowest number of votes.[67] Therefore, in the case where one bidder gets four votes, one bidder gets three votes, and a third bidder gets two votes in the first place voting, despite the support it had for the best proposal, bidder three will be eliminated from consideration for those points. This does not seem to give each bidder a just review and can be misleading with regards to the support for the "winning" bid for each specific category.

In addition, allotting a set number of points for a specific place in the scoring can also be misleading. In a process that had three bidders,[68] each was guaranteed at least eighty (80) points in the six categories. This method of scoring allowed bidders to continue to be considered by the committee even when it might be prudent for the state to pass altogether on the bidder. For example, a group that could not prove itself to be financially viable would still be awarded eighty points under this process. This could not be the intent of the legislature when they devised this process.

This concern has become a reality in the light of the fact that the ad hoc committee recommended a group that scored last in thoroughbred racing experience and qualifications. For example, it would be inconceivable to think that New York would award a contract to renovate a state office building to a contractor that had no such experience, but in the case of the state's billion-dollar thoroughbred franchise the ad hoc committee deemed it appropriate to not only entertain such a bid, but recommend it. This example demonstrates the impropriety of a process that allots a set number of points regardless of the completeness or quality of a group's bid.

It is necessary to address the committee's scoring weight for each category. Weight was assigned based on the committee's beliefs; there was no vetting done by the legislature with regards to the categories to be scored or the criteria used in the scoring. As stated earlier, the committee outlined six categories it would score: proposal detail (50 percent), integrity (20 percent), financial viability (10 percent), approach and managerial theory (10 percent), experience and qualification (5 percent) and lease payments (5 percent). The weight given to the categories has been questioned by elected officials and state lawmakers since the committee released its RFP. Despite these concerns the ad hoc committee did not address or revise its criteria or scoring system.

When he was attorney general, Eliot Spitzer criticized the way the RFP was written and said integrity should be a prerequisite not a consideration.[69] Other state officials commented on the scoring process as well; ex-state comptroller Alan Hevesi told the committee before it had made its recommendation that it should require bidders to demonstrate their commitment to integrity.[70] Since it made its recommendation, Assembly Speaker Sheldon Silver has "mocked the ad hoc committee's grading system" and questioned a process that would allow an unethical bidder to win simply by offering more money.[71] It must be noted that Speaker Silver was condemning the process and not referring to any one of the bidder's integrity. It is clear that several state lawmakers have publicly disagreed with the scoring on such categories as integrity and experience, and despite such concerns the ad hoc committee has chosen to ignore them. There is a fundamental problem when members of the legislature, the ultimate decision makers, are being ignored by the entity that they created through their legislation.

Another issue that should be addressed is the questionable weighting of the approach and managerial theory category. According to members of the committee, this boiled down to "for profit" versus "non-profit" managerial theories.[72] The issue that should be addressed is whether this should have been a scored category at all. The legislature created the ad hoc committee to solicit "proposals from all corporations and associations . . . "[73] and in doing so deemed both "for profit" and "non-profit"

entities as acceptable bidders in this process. For the ad hoc committee to use the fact that a bidder was "for profit" or "not-for-profit" as a consideration seems to contradict the elected legislature's opinion that either would be an acceptable managerial theory. It seems burdensome that the ad hoc committee would hold an entity's "profit" status against them when statute clearly allows both to bid. If the legislature favored a specific managerial theory they would have limited bidding to that specific type of entity.

The fact that "approach and managerial theory" was given a higher weight than "qualification and experience" is also questionable seeing how this process was "to promote, develop, and encourage the continuation of high quality thoroughbred racing. . . ."[74] One would think that if the legislature believed that while both "for profit" and "non-profit" entities should be able to bid on the franchise, and the purpose of the bidding process was to continue "high quality" thoroughbred racing, that the committee making the recommendation would at least develop a scoring system that adequately represented qualification and experience. In this respect, the ad hoc committee has failed to consider the intent of the legislature when devising its scoring method to determine the most qualified bidder.

The flaws in the process itself and its scoring system are clear. Elected officials and state lawmakers have made their concerns public with little response from the committee. Questions can be raised as to the timing of the committee nominations and whether the committee was in fact "created" in violation of state law. Additionally, serious issues can be alleged with respect to the racing experience of those on a committee that is supposed to recommend the next racing operator. While there may be some cases when it is true that "you can be too close to a subject," when a billion dollar industry hangs in the balance it would seem that the more members with racing knowledge and experience with how the industry works would be welcomed. The current process that is being utilized by the state in its quest to award the thoroughbred franchise was not the most proper and New York should consider revising its laws to better address the awarding of the thoroughbred racing franchise.

VI. Conclusion

New York State law outlined the present process to be utilized in awarding the bid. A primary component of that process was the creation of an ad hoc committee responsible for soliciting bids from potential operators. The flaws of the current process have been identified and the ultimate problem stems from the process itself. As stated above, the legislature set out to develop a process that was "open and timely" in an effort to "promote, develop, and encourage the continuation of high quality thoroughbred racing." However, the current process can be called anything but "open and timely" And as explained earlier, it did not satisfy the legislature's intent to "promote, develop, and encourage high quality thoroughbred racing."

Additionally, New York utilized an ad hoc process to solicit bids for a franchise that will conduct racing operations. While the ad hoc committee did a commendable job, serious questions loom as to the criteria it used to score the bids and the scoring system it employed. The ad hoc committee and its subsequent recommendation have been called into question, even going as far as having the Speaker of the Assembly state that the process should be started all over.[75] This is direct evidence that the current process is wrong for New York.

The legislature would have been better served outlining their own set of criteria and requiring the bidders to submit bids directly to the legislature. After the bids were submitted the legislature could have called public hearings to allow bidders to explain the contents in an open manner, while also receiving input from those in the industry whose livelihood this decision will affect. While this is just one possible solution, it addresses the major components that the current process has failed on.

When the recommendation was made, it was issued with the general agreement that it should have no bearing on who would be the next franchisee. The recommendation has been consistently referred to as a good start, but the current administration is not bound by the recommendation.[76] Even members of the committee seemed to agree and despite its recommendation, its choice, Excelsior Racing, might not be the best choice,[77]and the governor's office has since made it clear that it will employ its own process to determine who will be the next franchisee.

Governor Spitzer released a statement initiating his own process in which a panel will be convened to publicly evaluate proposals from potential operators of the New York State thoroughbred franchise.[78] This includes franchises that were disqualified from the ad hoc process or even those that had not yet submitted a bid. In the release it was stated that this new panel, consisting of experts from the State Racing and Wagering Board, Empire State Development Corporation and the Division of Budget, and chaired by Richard Rifkin, Special Counsel to the Governor, will use the ad hoc committee's report as "a starting point for evaluation."[79] The creation of this new panel can only lead to one conclusion—that the ad hoc process, and more importantly, the awarding process as a whole does not work.

With 18 months of preparation, hearings, information sessions, in addition to the countless hours reviewing bids, not to mention the bidders who spent time, money and resources to prepare these bids, and with just 10 months before the current franchise expires, New York State has finally reached its "starting

point" in the process to award its billion-dollar thoroughbred racing industry. This only strengthens the argument that New York State's bid awarding process was inappropriate, unnecessary and needs to be drastically changed. When the New York State Legislature takes up the issue of reforming its racing laws, creating an adequate and efficient awarding process should be a major priority. As New Yorkers have just witnessed, the current process is neither adequate nor efficient, and has cost many people, including the state taxpayers, time and money.

The legislature in its wisdom has ultimately left the decision in the right hands: theirs. They still have the ability to establish their own set of criteria and score the bidders on the significant categories that pertain to the thoroughbred racing industry and franchise. With the creation of the governor's "review panel" there will be a transparent process that will allow the panel to publicly vet the bidders. This will provide the legislature a chance to digest the bidder's proposal firsthand instead of relying on what could be argued as a misleading 270-page report. In any event, this should be an excellent learning experience for New York and the legislature, and it will be beneficial when attempting to avoid these same problems when the process needs to be done again, the next time this franchise comes up for bid.

Endnotes

1. Ad Hoc Committee on the Future of Racing, Request for Proposal for the New York State Racing Franchise, p. 2 (June 13, 2006). The ad hoc committee made its formal report and recommendation on February 21, 2007.
2. Governor's Press Release, New Panel to Review Thoroughbred Racing Franchise, February 28, 2007 (stating that intent to present a bid before the committee should be made by March 6, 2007).
3. New York Tracks—A Short History, Ron Hale, *available at* http:// horseracing.about.com/library/blnytracks.htm (1997).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. New York Tracks—A Short History, Ron Hale, *available at* http:// horseracing.about.com/library/blnytracks.htm (1997).
10. *Id.*
11. *Id.*
12. NYRA was originally known as the Greater New York Association.
13. *See* Chapters 812 and 813, L. 1955.
14. Chapter 757, L. 1970.
15. Chapter 1006, L. 1983.
16. Chapter 445, L. 1997.
17. *See* Racing, Pari-Mutuel Wagering, and Breeding Law Art. II, § 208(11)(a) (2006) (outlining a process for which the state ad hoc committee will entertain proposals from those corporations or associations interested in bidding on the racing franchise).
18. New York Economic Impact Report [hereinafter "The Deloitte Report"], The American Horse Council Foundation, p. 2 (2005). This report was conducted by Deloitte Consulting, LLC on behalf of the American Horse Council Foundation.
19. *See id*.
20. *Id.*
21. *Id.* at p. 2.
22. *Id.*
23. New York Economic Impact Report, The American Horse Council Foundation, p. 2 (2005).
24. *Id*.
25. *See* Racing, Pari-Mutuel Wagering, and Breeding Law Art. II, § 208(11)(a) (2006).
26. *See* Historical and Statutory notes of Art. II § 208.
27. *Id.*
28. *Id.*
29. *Id.*
30. Racing, Pari-Mutuel Wagering, and Breeding Law Art. II, § 208(11)(a) (2006).
31. *Id*. at § 208(11)(b).
32. *Id*.
33. *Id*.
34. *Id.* at § 208(11)(a).
35. Racing, Pari-Mutuel Wagering, and Breeding Law Art. II, § 208(11)(c).
36. *Id*. at § 208(11)(d).
37. *Id*.
38. *Id*. at § 208(11)(e).
39. The Racing and Wagering Board is responsible for licensing, investigating, and auditing all racing and gaming entities in New York State.
40. *Id*. at § 208(11)(f).
41. *See* Historical and Statutory notes of Art. II, § 208.
42. *Id*.
43. Racing, Pari-Mutuel Wagering and Breeding Law, Art. II, § 208(11)(e).
44. *Id*. at § 208(11)(a); *see also* Laws of New York, 228th Session 2005, vol. III, chap. 354, p. 3074 (2005).
45. The Jockey Club Annual Roundtable Conference, transcript of the speech of Patrick Barrett (2005). Patrick Barrett is the chairman for New York's Ad Hoc Committee on the Future of Racing.
46. *Id*.
47. *Id*.
48. The language in the committee's RFP was taken from a report released from The Friends of New York Racing. *See*, Friends of New York, The Way Forward, December 13, 2005.
49. Request For Proposal for the New York State Racing Franchise, Ad hoc Committee on the Future of Racing, pp. 3-5, 11 (June 13, 2006).
50. *Id*. at p. 37.
51. *Id*.
52. *Id*.
53. *Id*. at p. 15.
54. *Id*. at pp. 15-16.
55. *Id*. at p. 18.
56. *Id*. at pp. 15-19.
57. After the committee reports their non-binding recommendation to the legislature, the 213 elected legislators, including the governor, will decide who the next franchisee should be.
58. *See* Racing, Pari-Mutuel Wagering and Breeding Law, Art. II § 208(11)(a) (2005).
59. *Id*. at § 208(11)(b).
60. *See id*. at § 208(11)(a)-(b).
61. *See id*. at § 208(11)(a).
62. *See* Keehn Named to Racing Panel, Paul Post, The Saratogian, February 8, 2006.
63. *Id*.
64. *Id*. Comment made by Saratoga Mayor Valerie Keehn, a member of the ad hoc committee.
65. Left at the Gate Horse Racing Blog, February 2006, *available at* http://leftatthegate.blogspot.com/2006_02_01_leftatthegate_archive.html.
66. Final Report, The Ad Hoc Committee on the Future of New York Racing, p. 197, February 21, 2007.
67. *See id.* (outlining consensus scoring).
68. Four groups had submitted bids to be reviewed by the ad hoc committee; however, one bidder was disqualified

from the process for failing to submit the $1 million surety bond with its bid.

69. *See* Racing Decision Unlikely Before Election, Paul Post, The Saratogian, October 24, 2006.

70. *See* Comptroller Press Release, *available at* http://www.osc.state.ny.us/press/releases/aug06/081406b.htm. It must be mentioned that since this release Alan Hevesi has resigned as New York State comptroller after pleading guilty to felony fraud charges.

71. Speaker Dislikes Pataki-Era Plan on Horse Racing, New York Sun, January 26, 2006.

72. *See*, Excelsior in Lead to Run N.Y. Tracks, The Saratogian, Paul Post (November, 25, 2006) (explaining committee member Mayor Valerie Keehn's vote for a "non-profit" racing component separate from VLTs).

73. New York State Racing, Pari-Mutuel Wagering, and Breeding Law, Art. II, § 208(11)(a).

74. Historical Notes, § 208.

75. *See* Speaker Dislikes Pataki-Era Plan on Horse Racing, NY Sun, January 27, 2006.

76. See, New York Franchise: No Re-Bid, But No Decision, Tom Precious, *available at* http://news.bloodhorse.com/viewstory.asp?id=37671, February 21, 2007.

77. See *id.* (reporting that committee member Jack Knowlton stated that there is "more than one viable proposal . . . [and] it is not to say racing couldn't survive and thrive in New York state" if the governor and legislature did not choose Excelsior).

78. Governor's Press Release, New Panel to Review Thoroughbred Racing Franchise, February 28, 2007.

79. *Id.*

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3:00 - 5:00 PM

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June 3-4, 2007

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