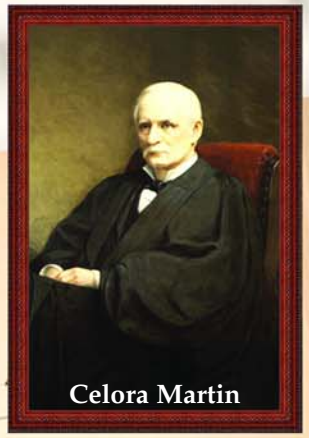
NEW YORK STATE BAR ASSOCIATION

MAY 2004 | VOL. 76 | NO. 4

Journal

THE JAMAICA SCHOOL WAR


Celora Martin


George Danforth

pp. Div.]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ELIZABETH
Appellant, *v.* THE SCHOOL BOARD OF THE BOROUGH OF Q
NEW YORK CITY, Respondent.

Education of negro children, in common schools, by themselves — under wha
stances it is constitutional.

Section 28 of title 15 of the Consolidated School Law (2 R. S. [9th ed.] 1497),
providing "The school authorities of any city or inc
schools of which are or shall be organized under title
this act, or under special act, may, when they shall dee
a separate school, or separate schools, for the instr
of African descent, resident therein, and over fi
school or schools shall be suppo
schools supported therein for
gulations, and be

Inside

Not-for-Profit Corporations
Judge's Role in Settlements
Motorist Insurance Update

BESTSELLERS

FROM THE NYSBA BOOKSTORE

May 2004

Business, Corporate, Tax

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This practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence. You will benefit from numerous forms, practice tips and appendixes.
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Updated with 2003 Supplement

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Commercial Leasing

Edited by Joshua Stein and sponsored by the Real Property Law Section of the NYSBA, this loose-leaf book, although it covers issues specific to New York, could apply to nearly every state. Written by leading experts, this comprehensive book will provide the link between practical issues and what attorneys experience in their daily practice.

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On The Cover

This spring marks the 50th anniversary of the U.S. Supreme Court's decision in *Brown v. Board of Education* overturning earlier precedent that had found separate but equal schools were not a source of racial discrimination. In commemoration of that anniversary, the "Jamaica School War" article featured in this issue describes how a similar debate had been resolved in New York State many years earlier.

This month's cover features the focal point of the New York debate, the Brenton Avenue School, located on what is now 170th Street, just south of Fulton Avenue (Jamaica Avenue) in the Jamaica section of Queens.

Included in the cover montage are two of the principal actors in New York's "separate but equal" debate: Judge Celora Martin of the Court of Appeals, who affirmed the concept in *People ex rel. Cisco v. School Board of Queens*, and Judge George Danforth, who in a dissent written some 15 years earlier in *People ex rel. King v. Gallagher*, had argued that state law barred the practice.

Picture credits: The cover photograph of the school was taken from a postcard, dated 1915, found in the archives of the Long Island Division of the Queensboro Public Library; the pictures of Judge Martin and Judge Danforth, and the picture of Judge Ruger on page 11, may be found on the N.Y. State Legal Historical Society Web site, www.nycourts.gov/history; the picture of George Wallace, on page 12, was published with his obituary in the *South Side Observer*, May 18, 1918, page 1.

Cover Design by Lori Herzing.

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

President's Message

A. Thomas Levin

For Whom[1] The Bell Tolls

Goodbye, Farewell and Amen – M*A*S*H (1983)

Someone always leaves and then we have to say goodbye. I hate goodbyes. I know what I need. I need more hellos. – Snoopy

Pity the nation that welcomes its new ruler with trumpeting, and farewells him with hootings, only to welcome another with trumpeting again. – Khalil Gibran

Farewell, So Long – Bill Haley and the Comets

I want to thank you for making this day necessary. – Yogi Berra

The bell is tolling for my term as NYSBA President, which, like all good things, must come to an end. My good thing ends June 1.

This year has been one of great anticipation, hard work, insufficient sleep, some disappointments, (hopefully) more successes, significant fulfillment, and it gives me boundless optimism about the legal profession. I have tried to bring out significant issues, and present new ideas, and I hope that they have provoked thought and action. The many issues discussed in my past messages are but a sampling of what the State Bar deals with every day, no matter who is president at any particular time.

Lawyers have the privilege of practicing a profession which is highly visible to the public, and which is at the center of every issue of our time. Our greatest challenge is to rise above the cheap humor of lawyer jokes, and to educate the public about the importance of the rule of law, and the role of lawyers. With or without the jokes, lawyers and the legal profession are at the heart of every aspect of American life, and American history.

That theme has been at the heart of every presentation I have made during the past two years, in which I have served as president-elect and president. It is a theme that I believe in strongly, and one that serves the interests of our Association and every member. Because, when all is said and done, the rule of law is the heart of our democratic society, and it is what makes America great. It is what makes us different from the other nations on this planet.

As my term comes to an end, I look back on it with satisfaction. I may not have accomplished all of my goals, but we have made significant progress as an Association. We have elevated our presence with the public, have increased services to our members, presented our positions with dignity, forcefulness and logic, and have taken every opportunity to stand up for the profession.

As I have traveled throughout the state, and to other regions, I have been most impressed with the enormous numbers of attorneys who are willing and ready to devote themselves to the assistance of others. There is one area in particular in which lawyers stand apart from every trade and every other profession: doing pro bono work. There is hardly a lawyer I know who does not willingly provide at least some free legal services for the benefit of others less fortunate, or for civic, charitable, educational or community organizations. And yet, even with these dedicated efforts and generous donation of services, we are criticized for not doing enough.

A recent survey by the Office of Court Administration purports to show that 46% of New York lawyers did pro bono services in the past year for the benefit of poor people or charitable organizations that serve the legal needs of poor people. We should be proud of this result, because this level of participation is better than that of lawyers in any other place. The scope and extent of services voluntarily donated by New York lawyers is remarkable, particularly if one considers that the 46% reported by OCA does not include free services rendered for those who are not indigent, but who cannot pay the customary costs of those services. Neither does it include services provided to organizations which serve the non-legal needs of the poor.

Consider the praise showered upon the Bar for services provided to victims of the September 11 attacks.

A. Thomas Levin can be reached at Meyer Suozzi English & Klein, PC, 1505 Kellum Place, P.O. Box 803, Mineola, N.Y. 11501, or by e-mail at atlevin@nysbar.com.

Clearly, this was one of our finest hours, with literally hundreds of our members coming forth to help the victims and their families. Most of those who received those services were not indigent, so those thousands of hours of service do not register in the OCA survey. Similarly, the millions of dollars in services provided free by attorneys who volunteered to assist the City of New York during its financial crisis do not register in the OCA survey. The time we spend when we volunteer for mock trial programs, when we lecture in the schools, when we speak to our community organizations, does not register in these surveys.

Our House of Delegates recently endorsed the view that the definition of pro bono services should be expanded, so that all free legal services for the benefit of the public are recognized. The Association is working to draft a definition of pro bono for this purpose, which goes beyond only services for the benefit of the poor.

We have much to be proud of when it comes to pro bono publico services. No other profession comes close to doing what we do. But, we must also recognize that there is a great need for these services, and particularly for free legal services to those who are unable otherwise to afford them. So, even while we recognize the extensive free services provided by lawyers in the public interest, we need to keep our focus on increasing the extent of services made available to the poor.

There are many ways for us to do this. Volunteer for your local pro bono project; contact your local legal services office to find out what they need to be done; contribute to those organizations, to assist them in providing qualified staff who can provide services to the needy every day. I promise you that you will find great fulfillment in doing so.

I would like to end this message with some personal commentary, and particularly recognition of some of the many people without whom I could not have undertaken or completed my service these past two years.

John Donne accurately observed that no man is an island. And no person could think of serving as president of NYSBA as a single individual. This task is truly one which requires a team effort. And the NYSBA team is the greatest.

Our Association is fortunate indeed to have the services of an outstanding executive director, Patricia Bucklin. Pat has been with the Association now for some three years, and we are the better for it. Our associate executive director, John Williamson, is the greatest, and even after all the years we have worked together continues to impress me with the quality and quantity of his efforts and abilities. And I have always been able to count upon the contributions and wisdom of L. Beth Krueger, a longtime stalwart on our staff and the newest addition to our upper management.

While I know that beginning to single out individuals for particular mention is a slippery slope, sure to lead to errors of omission, I would be remiss if I did not acknowledge the constant and reliable assistance provided by Kathy Heider, Terry Scheid, Linda Castilla, and Betty Brewer. And Brad Carr and Frank Ciervo, Ron Kennedy and Dan McMahon. And everyone else at the Bar Center, from whom I can only ask forgiveness for not mentioning every one of them individually (now there would have been a way to generate this last message without any work on my part).

Thanks also go to my partners and associates, and the entire staff, at Meyer, Suozzi, English & Klein PC, without whose support I could not possibly have undertaken this task. Probably none of us envisioned the true scope of what was involved, but we have gone through it together and it has made us the better for having done so.

Last on the list, but first in priority and importance, is the love and support of my family and friends, who have been there with frequent cheerful words and encouragement when I was at the low points, and who have been steadfast in support throughout.

I truly cannot express my gratitude for this opportunity to serve our Association. It has been the opportunity and experience of a lifetime. I will never forget it, nor will I ever forget the boundless generosity and support which I have received from every member with whom I have come in contact during my journeys. I know that we will have many more opportunities to work together, for this is only a farewell, certainly not a goodbye.

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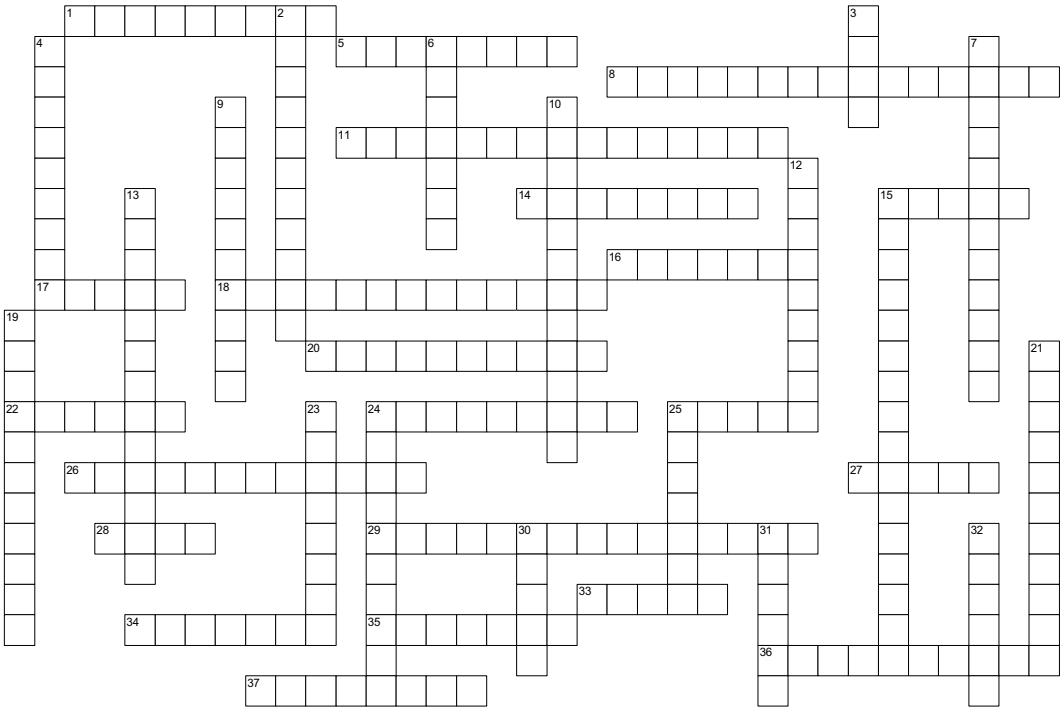
1. With appreciation to those members who wrote to point out to me that the title of last month's message should have been "Whom Do You Trust?"

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 61.)



Pleadings, Motions and Judgments, by J. David Eldridge

Across

1 An informal order often drafted by the clerk
5 A motion to correct or _____ an order to make it accurately reflect the court's decision
8 The complaint's demand for relief required by CPLR 3017(a)
11 CPLR 3211
14 Summary judgment _____ complaint (CPLR 3213)
15 A motion culminates in an _____
16 An application granted at the instance and benefit of one party without notice to another
17 Failure to _____ a cause of action (CPLR 3211(a)(7))
18 An interim order or decision rendered before final judgment
20 An order denying a motion to reargue is not _____
22 Where both parties are required to work out the details of a proposed order so they are mutually confident it complies with the court's decision before it is submitted
24 The only three papers in a lawsuit required to specifically name each party (*i.e.*, not "et al.") are the summons, _____, and judgment
25 The plaintiff's response to a defendant's counterclaims is a _____ (CPLR 3011)
26 A sworn statement that the pleadings are true (CPLR 3020) is a _____
27 An arbitrary (and generally meager) sum provided to a winner (by the loser) for the trouble and expense of having to litigate (CPLR Articles 81 and 82)
28 An interlocutory "injunction" suspending or freezing the entire case or some portion of the proceedings
29 CPLR 3212
33 Pursuant to CPLR 2214(b), answering affidavits must be served at least _____ days before the return date (presuming motion was served at least 12 days prior)
34 A defendant's failure to answer or appear results in a _____ judgment (CPLR 3215)
35 Supersedes and replaces a prior pleading with an entirely new complaint (CPLR 3025)
36 A motion for a more definite statement (CPLR 3014), or to strike prejudicial or scandalous matters in a complaint (CPLR 3024) are _____ motions
37 Generally, the final resolution of a dispute and the note terminating the action (CPLR 5011)

Down

2 The rule that a judgment on the merits is conclusive and bars bringing the same claim(s) in a subsequent action
3 A sum fixed by statute for the taking of various steps in litigation (CPLR Article 80)
4 Pursuant to Uniform Rule 202.48, a party's failure to settle or submit an order for signature within _____ after filing of the decision (or judgment) constitutes an abandonment of the motion or action
6 A paper or document submitted in support of a motion
7 A revised pleading that adds something new that came into existence since the original complaint (CPLR 3025)
9 CPLR 3018(a) requires an answering defendant to respond to the complaint with either _____ or denials
10 A claim the defendant interposes against the plaintiff (CPLR 3019)
12 All pleadings must be _____ construed
13 Pursuant to CPLR 3016, claims alleging, *inter alia*, fraud, misrepresentation, or mistake, must be "stated in detail," meaning they be pled with _____
15 When this *ex parte* substitute for a motion on notice is used, a hearing can be had on the same day it is served
19 When the party opposing a motion also seeks relief
21 CPLR 3017 specifically allows apparently conflicting claims, or _____ pleadings
23 The cost of the use or loss of money from a claim's accrual to verdict (CPLR 5001)
24 A claim by one defendant against another (CPLR 3019)
25 A motion made to convince the court it was wrong and overlooked or misapprehended law or fact in deciding a prior motion (CPLR 2221)
30 A motion made to the court seeking reconsideration of a previously decided motion based upon new or additional proof unavailable when the prior motion was decided (CPLR 2221)
31 CPLR 2214(b) requires at least eight days' _____ of a motion (or 13 if delivered by mail)
32 Where the winning party is required to draft a proposed order and submit it to the court/clerk for entry, without input from the adverse party

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Historical Perspective

Desegregation in New York: The Jamaica School War, 1895–1900

It has been 50 years since the Supreme Court struck down the doctrine of "separate but equal" in Brown v. Board of Education of Topeka.[1] *In retrospect, a sense of historical inevitability often attaches to such events, but for actual participants this is usually not the case. John W. Davis, the 1924 Democratic presidential candidate who had argued 129 cases before the High Court, was so convinced of the constitutionality of segregated schools and so certain that he would win that, against the advice of friends, he agreed to argue for South Carolina in* Brown.

A similar confidence in "separate but equal" once existed among many members of the New York bench. Of the 19 appellate judges who considered the issue between 1884 and 1900, 17 voted to uphold the doctrine.[2] This article chronicles the complicated and protracted legal battle against publicly supported segregated schools in New York that ultimately resulted in a legislative, not a judicial, resolution of the issue.

By William H. Manz

Separate public schools for African-American children were first authorized in New York by a law enacted in 1847.[3] Such authority was again included in both a revised school law enacted in 1864,[4] and the common school act of 1894.[5] Section 28 of the 1894 act, which was taken verbatim from the 1864 act, provided that school boards in cities and incorporated villages could "when they shall deem it expedient, establish a separate school or separate schools for the instruction of children of African descent." Few localities appear to have availed themselves of this option, and several that did – Albany, Poughkeepsie, New York City and Brooklyn – had voluntarily eliminated compulsory black schools by the 1890s.[6]

One municipality that continued to maintain segregated schools was Jamaica in Queens County, which had a well-established African-American community whose presence in the area dated from colonial times.[7] Jamaica first established an all-black primary school in 1854, housed in the local African Methodist Episcopal Church. In the 1880s, an actual school building was finally constructed, located at the edge of the village. This school was legally required to be equal in quality to the white schools, but members of the African-American community did not believe this to be the case. In 1892, Rev. Langford of the Jamaica A.M.E. church, whose children had been refused admission to the white school, filed charges with the school commissioner that the black school had inferior educational facilities.[8] Subsequent complaints about the school included allegations that not one pupil had graduated since it was founded, that it was not graded in the same manner as the white school, that in 1892 and 1894 the teacher had to teach 90 pupils in seven grades all at the same time, and that it was located in a part of town where very few black residents lived.[9]

Responding to a rapid growth in its school-age population, Jamaica opened two brand-new public primary schools on September 3, 1895. One was located on Brenton Avenue, only a few blocks north of the black section of the village, but when African-American parents attempted to register their children at the new school, they were turned away. The following week, a letter signed by "Afro American Citizens" appeared in a local paper, the *Long Island Democrat*. Describing themselves as "law abiding citizens and tax-payers," they related how Superintendent of Schools William J. Ballard, who claimed to be acting under instructions from the school board, had refused to admit their children to the Brenton Avenue School. The letter added that they had been informed that the children were being excluded on "account of color,"[10] and if they wished to challenge the board's policy they would have to resort to the courts.

William H. Manz is senior research librarian at St. John's University School of Law. A graduate of Holy Cross College, he received a master's degree in history from Northwestern University and a J.D. degree from St. John's University School of Law.

He thanks Richard Tuske of the Association of the Bar of the City of New York for making available the record and briefs for the *Cisco* case.

Shortly thereafter, eight parents did file suit against the school board. Their attorney was Alfred C. Cowan, a prominent black lawyer from Manhattan. Cowan, the founder and president of the Colored Republican Association, had previously been involved in several anti-discrimination efforts, including a protest against a New Jersey amusement park owner who excluded blacks,[11] a suit against a Brooklyn saloon keeper for refusing to serve two black men,[12] and the defense of two African-American men charged with "lounging" in lower Manhattan.[13] Cowan applied to the state Supreme Court for a peremptory writ of mandamus to compel the Jamaica Board of Education to admit black children to the public school in the district where they lived.

George Wallace

Cowan and his clients were challenging a system that had already survived several court tests. Suits directed against segregated schools in Troy (1863) and Albany (1872) had both failed.[14] These were followed by two unsuccessful actions that relied on Penal Code § 383,[15] an 1873 statute barring discrimination on the basis of color by officers of common schools and public institutions of learning. In 1875, in *People ex rel. Johnson v. Welch*, a Kings County Supreme Court decision, Justice Jasper W. Gilbert, characterizing public education as a "free gift from the state,"[16] refused to order the Brooklyn Board of Education to admit a black child to a white school. He held that racially segregated schools were "not a violation of the [1873 Act], unless such schools are inferior or at an inconvenient distance, or are obnoxious . . . [and] are not equal to those furnished the other class."[17]

More important, in *People ex rel. King v. Gallagher*,[18] decided in 1884, the Court of Appeals ruled against another challenge to Brooklyn's segregated schools. Affirming the decision of the Brooklyn City Court, General Term, Chief Judge William C. Ruger strongly endorsed the concept of "separate but equal." In a 17-page opinion, he ruled that § 383 provided "only for equal facilities and advantages for the colored race, and these, as we have seen, the relator under the general school laws of the State enjoys."[19] Relying on the *Slaughter-House Cases*,[20] he also found no violation of the Fourteenth Amendment, holding that public education was a privilege solely conferred by New York State.[21]

Instead of § 383, Cowan's action was based on the newly enacted "Malby Law" which provided that all persons were entitled to equal accommodations at places of "public accommodation and amusement."[22] In October, the case was heard by Justice Edgar M. Cullen, who had represented the Brooklyn schools in *Welch*, and whose uncle, Judge Alexander McCue, had written the Brooklyn City Court opinion upholding separate schools in *Gallagher*. Not surprisingly, Cullen denied Cowan's request for a peremptory writ, ruling that the Malby Law did not apply to schools. He held that the law must be construed to apply only to those places it specified (inns, theatres, music halls, restaurants, public conveyances, etc.) and concluded, "It is, therefore, not unlawful to provide separate schools for colored and white children, the former statutes not having been abrogated by the law of 1895."[23]

Cullen, however, did grant an alternative writ of mandamus, noting that the conflicting claims in the affidavits of the parents and school board regarding the quality of the black school could only be tried on the return of an alternative writ.[24] The writ was later set aside on the grounds that the plaintiffs did not state any acts justifying the relief asked. A second writ, however, was then granted to which the school board demurred. In March 1896, Justice Joseph F. Barnard overruled the demurrer, with leave to answer within 20 days. Barnard, a veteran jurist from Poughkeepsie, which had integrated schools, showed little sympathy for the Jamaica school board, stating, "It is merely a prejudice which keeps a colored child from the school founded for his white associates. It is a foolish remembrance of the condition of slavery by which the colored race were held to be inferior to the white race."[25]

Barnard's ruling was an encouraging development for the parents, but they now became the target of school board efforts to enforce the recently enacted compulsory education law.[26] After the board refused to admit African-American children to the Brenton Avenue School, Jamaica Truant Officer William H. Wright reported that 70 black students were not attending school. Their parents were warned that they faced arrest on misdemeanor charges if they continued to refuse to comply with the compulsory education law.[27] In late March 1896, three of the plaintiffs in the mandamus action, Ezra J. Hunter, Samuel B. Cisco and Samuel B. White actually were arrested. In rapid succession, all three were brought to trial before the village justice, B. Frank Wood.

The defendants were quickly convicted and fined $5. Cisco, who had acted as his own lawyer, reacted with defiance, stating, "I will never pay the fine and will go to jail first. Like the Apostle Paul, I am ready to be bound and go to Rome if I can help the cause of God."[28] He also protested the injustice of the board's policy, stating, "I and my father and mother have paid taxes in Ja-

Judge William C. Ruger

maica for eighty years, yet I am denied a place in the school near my house, while Irishmen, Italians and Dutchmen who have been here only three months can go in these, although covered with dirt. I am a man of means in business here and yet on September 3, when my three children were sent to school where my neighbors' children attend, they were put out and sent home crying."[29]

The next development in what the press described as a "school war,"[30] was a mass meeting at Jamaica's Shiloh Baptist Church. Ignoring a school board circular that called on the African-American community to be "good citizens" and to continue to send their children to school while the case was in the courts,[31] those present resolved to refuse to send their children to the black school. A week later, another meeting was held and a series of resolutions were passed, asserting that under the U.S. Constitution no distinctions could be made on the basis of race or color in the common schools, and repeating complaints about the inferiority of the Jamaica "colored school" and its distance from the homes of many black families.

The continuing school boycott led to the second arrests of both Cisco and White. On April 30, after a trial before Justice Wood and a jury, White was again convicted and fined $10. When Cisco appeared in court the next day, he now had an attorney, George Wallace, the senior partner in the Jamaica firm of Wallace & Smith.[32] The attorney was clearly committed to the black parents' cause. In a letter to the editor of the *Long Island Farmer*, he stated, "I am personally in sympathy with them in their struggle for their rights. I do not believe in any discrimination whatever on the grounds of color in public institutions."[33]

Wallace convinced the all-white jury to acquit his client, but a few days later the school board obtained warrants for the third arrest of both White and Cisco. The board denied that it sought to persecute the two men, and claimed that it was obligated to enforce the compulsory education law or they were "liable to lose all the public money to which the village is entitled."[34] When Cisco was arraigned, Wallace moved to dismiss the case on the grounds that his client had been just acquitted of the same offense. Justice Wood denied the motion and held Cisco for trial the following Thursday.

The case now took on yet another dimension when, on the same day as her husband's arraignment, Elizabeth Cisco, in an action which the *Long Island Farmer* termed an "outrage,"[35] filed charges against Superintendent of Schools William J. Ballard, claiming that his refusal to admit black children to the common schools was a violation of § 383 of the Penal Law.[36] Ballard was arrested, released on his own recognizance, and the charges were later dismissed. Commenting on the arrest, Samuel B. Cisco stated, "The war has been carried into Africa and we now propose to carry it into Caucasia."[37] In a letter to Ballard he wrote, "I will endeavor to protect my children by all means known to the law against any discrimination on account of color."[38]

While the case against Ballard was still pending, Cisco appeared for a third trial before B. Frank Wood. In a surprise move, George Wallace deprived the village justice of jurisdiction by presenting an order from Supreme Court Justice Nathaniel H. Clement removing the case to county court.[39] When Cisco was tried on June 30, County Judge Garret J. Garretson dismissed the indictment, holding that the consolidated school act gave black children equal rights with whites in attending the public schools.[40]

In what appeared to be a victory for the black parents, the school board announced that because of Judge Garretson's ruling they would make no more arrests. However, since Justice Barnard's grant of a writ of alternate mandamus had been appealed, African-American children were still refused admission to the white schools. In the words of the board, they would now "roam the streets without any education."[41] In September, Attorney Cowan responded by filing 11 new lawsuits against the board on behalf of the parents as

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guardians *ad litem* for the excluded students, each demanding damages of $500 for alleged violations of the equal rights act. Cowan also unsuccessfully petitioned for a writ of mandamus to force Justice Wood to issue a warrant for the arrest of Superintendent Ballard and the entire school board.

Ultimately, despite all his efforts, Cowan was never able to obtain a court ruling that would force the Jamaica school board to admit black students to the white schools. In addition to the school board's legal defenses, he had to contend with the limited means of his clients; the 11 damages suits and two mandamus actions were all dismissed because of his clients' inability to provide security for costs.[42]

Cowan's last suit against the board to be noted in the press was filed in January 1897.[43] The next reported legal activity in the Jamaica school war did not occur until February 1899, when Mrs. Annie Robinson, who had been arrested for violating the compulsory education law, sought a writ of mandamus to compel the enrollment of her granddaughter, 12-year-old Mary Frances Van Dorn, in an all-white primary school. Her attorney was Burt Jay Humphrey, who, 28 years later, would preside at the trial of *Palsgraf v. Long Island Railroad Co*.[44]

Since Jamaica was now part of Greater New York, the mandamus action was directed against the new Board of Education of the Borough of Queens. Justice Garretson, who, as a County Court judge, had dismissed the case against Samuel B. Cisco, heard it in Supreme Court at Long Island City. Attorney Humphrey argued that the all-black school was not a public school within the meaning of state law, and that attendance there could not be compulsory because it was merely a "special" school, like a night school. He also maintained that the arrest of Mrs. Robinson was illegal because she had sought to have her granddaughter admitted to the all-white primary school in the district where she resided. Arguing for the school board, Assistant Corporation Counsel W.V. Mayo cited *Gallagher* and the recently decided *Plessy v. Ferguson*,[45] described in the press as the "New Orleans horse car case."[46]

In March, Garretson ruled against Mrs. Robinson; but in July, yet another effort was made to break the Jamaica color line. The plaintiff was now Mrs. Elizabeth Cisco, the widow of Samuel B. Cisco. Although her husband had died in April 1897, Mrs. Cisco had continued the effort to enroll the family's children in the all-white Brenton Avenue School. Because she refused to send them to the black school, she received repeated visits from Truant Officer Wright. After each visit, she would take her children to the white school, where they were always refused admission. Eventually, she placed her oldest son, Jacob, in an integrated school in New Brunswick, N.J., but continued to refuse to send her younger children to the black school. She was finally arrested for violating the compulsory education law, but the case was adjourned several times and then discontinued.

Represented by George Wallace, Mrs. Cisco sought a writ of peremptory mandamus compelling the Queens County school board to admit her children to the white school. In her affidavit, Mrs. Cisco maintained that Jamaica's segregated schools violated the New York City Charter and the General School Law, which both provided that the schools were to be open to all persons "over five and under twenty-one years of age."[47] Although it was stipulated that the sole issue in the case was her children's exclusion from the white schools on the basis of color, the affidavit also complained of the inferior quality of the black school. In his reply, Borough Superintendent Edward L. Stevens claimed that § 1094 of the Greater New York Charter authorized "schools for colored pupils," and claimed that since becoming part of the reorganized New York City school system, the Jamaica black school had been made equal in every respect to the white schools.[48]

The case was argued before Justice Wilmot M. Smith in the Supreme Court, Special Term, at Patchogue. On August 22, he issued an opinion denying the application for the writ. Citing *Gallagher*, Smith rejected Wallace's argument that the 1864 law had been repealed by implication, stating, "If the Legislature had intended to change the law it would have done so directly and specifically, as it did by the act in regard to the colored schools in New York City, passed the next year after the decision in the King case."[49] He concluded that "the relief demanded by the relator be denied until it is granted by the Legislature, or until the Court of Appeals revises or reverses the former adjudication."[50]

Wallace promptly appealed to the Appellate Division, Second Department. In his brief, he asserted that by definition a "separate" school could not be a "common" school, and that the 1884 law barring racial discrimination in New York City schools[51] now applied to schools in Queens County because it was now part of Greater New York.[52] A key point in his argument was that a common school education as a statutory right "became fixed . . . when the state adopted the principle of compulsory education. . . . This statutory right became an absolute right in 1894 when the people put it in the constitution."[53] Wallace also presented multiple reasons why the 1884 *Gallagher* decision was no longer good law. These included: *People v. King*,[54] an 1888 Court of Appeals decision holding that the racially based exclusion of African-Americans from a skating rink was a violation of § 383 of the Penal Code; the provision in the

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consolidated school act of 1894 that made common schools free to all except Indian children; and the recent re-enactment of Penal Code § 383.[55] Wallace also addressed social and public policy issues. He maintained that "the same instruction, accompanied by the same competition . . . is impossible in a separate colored school,"[56] that "separate schools are hurtful"[57] and that "such a school is a failure educationally for reasons inherent in human nature."[58]

The Second Department rejected all of Wallace's arguments. In a unanimous opinion by Presiding Justice William W. Goodrich, which relied on *Gallagher*, the court affirmed the special term. Goodrich distinguished *King* from *Gallagher* by noting that *King* dealt with a place of public amusement, which are each different from one another. This, he stated, differed from separate schools that provided equal facilities. As for the state constitution, Goodrich held that it required "no more than that equal facilities be furnished to all children, white or black."[59] Finally, he rejected any argument based on the Fourteenth Amendment, stating, "It is easy to see that the education of children was not devolved by the constitution of the United States upon the federal government, and consequently is reserved to the several states."[60]

Wallace was able to use ties to Governor Theodore Roosevelt, a fellow resident of the new Nassau County and a believer in equality for African-Americans.

The *Cisco* case next went to the Court of Appeals, where the Second Department was unanimously affirmed. Writing for the court, Judge Celora E. Martin quickly disposed of the case in a two-page opinion. Like Justice Goodrich, he denied that *King* modified or overruled *Gallagher*. Martin distinguished the cases by noting that in *King* "no other accommodation or facility was furnished by the defendant . . . [but] [i]n this case the colored children were given the same facilities and accommodations as the others."[61] He also found nothing in the state constitution that would oblige a school board to admit children to a "particular school,"[62] that would deprive the legislature of the ability to determine that "one class of pupils should be educated by themselves,"[63] or that would not allow a school board to "determin[e] where different classes of pupils should be educated, always providing that the accommodations and facilities were equal for all."[64]

Realizing that he might lose in the Court of Appeals, Wallace had attempted to expedite a decision in order to have time to pursue a legislative solution. He presented to the legislature a bill repealing § 28 of the consolidated school law permitting separate schools. Since he had served a term as an assemblyman, from 1897–1898, Wallace was able to capitalize on his legislative connections. He was also able to use ties to Governor Theodore Roosevelt, a fellow resident of the new Nassau County and a believer in equality for African-Americans.[65] In fact, when Wallace showed Roosevelt a copy of the bill, the governor amended it to make its effects even more sweeping.

In commenting on his bill, Wallace stated, "When I first learned . . . that Cisco was arrested three years ago I took up his case and told him that I would fight it out to the finish and see that justice was done him and his people. I have fought the affair in every court – justices' County, Supreme, Appellate and Court of Appeals – and I now appeal to the representatives of the people for justice."[66] He was not disappointed. The bill was introduced in the senate by Manhattan Republican Nathaniel Elsberg, and unlike an attempt to pass a limited integration measure in 1864, it passed.[67] Although there had been some grumbling from senate Democrats who charged that the measure was merely an attempt to get black votes, the bill easily passed in both houses, with only five Democrats opposed.[68] Backed by an emergency message from the governor, it was approved by the senate on March 30, by the assembly on April 3 and was signed by Roosevelt on April 20, 1900.[69]

Conclusion

In conclusion, the question remains, why did New York courts persist in approving segregated schools? New York was hardly unique in this regard. Court challenges to state-supported segregated schools had previously failed in Massachusetts,[70] Ohio,[71] California[72] and Indiana.[73] One commentator has suggested that the outcome of such cases was influenced by party affiliation, with Democratic judges being more likely to uphold separate schools.[74] It is true that Judge Ruger, who wrote the *Gallagher* opinion, was a Democrat, and that the judges deciding the case split along party lines.[75] In *Cisco*, however, the six judges who participated included equal numbers of Democrats and Republicans, and the author of the opinion, Judge Martin, was a Republican from Binghamton.[76]

More than party affiliation, it was prevailing social attitudes that influenced the courts. Most of the New York decisions on separate schools confined themselves to legal arguments, but Chief Judge Ruger's *Gallagher* opinion candidly expressed the then-commonly held views on race relations. He stated, "A natural distinction

exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction . . . can in no just sense be called a discrimination against such race."[77] Citing Chief Justice Shaw in *Roberts v. City of Boston*, he added, "The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result."[78] Finally, he cautioned against laws relating to social interaction that "conflict[ed] with the general sentiment of the community upon whom they are designed to operate."[79]

Such thinking was hardly exclusive to the Chief Judge. For example, in 1895, the *New York Times* published a lengthy article on the efforts of African-Americans to gain equality that was highly critical of both their methods and the effects of the Malby Law.[80] Similar sentiments appeared later that year in a *Brooklyn Daily Eagle* editorial. It lauded Justice Cullen's refusal to grant a writ of peremptory mandamus in the Jamaica school case, noting the aversion of many white parents to the presence of black children in the classroom, and stating flatly, "It is good that the Malby law does not apply to the schools."[81] Given such attitudes, and the fact that the legislature had never explicitly repealed the law authorizing separate schools, the New York courts of the day were unlikely ever to rule against "separate but equal."

Of course, the repeal of the New York law authorizing school segregation, like the *Brown* decision, did not end de facto school segregation or assure equality in education. This national problem is reflected by the current statistical profile of Jamaica High School, which now serves a densely populated multi-ethnic urban area, not the small semi-rural village of a century ago. In 2003, the school was 61.7% black and 3.7% white;[82] it sent 9.1% of its graduates to a four-year college in 2002.[83] The *Cisco* case, however, like *Brown*, does demonstrate how persistence and dedication can eventually overturn the legal basis for state-supported racial discrimination.

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1. 347 U.S. 483 (1954).
2. Voting for "separate but equal" were 10 Court of Appeals judges, five Appellate Division justices, and two judges from the General Term of the Brooklyn City Court.
3. 1847 N.Y. Laws ch. 480, § 147.
4. 1864 N.Y. Laws ch. 555, tit. 10, § 1.
5. 1894 N.Y. Laws ch. 556.
6. Compulsory black schools were eliminated in New York City by statute in 1884. *See* 1884 N.Y. Laws ch. 248. Such schools in Brooklyn were abolished by a decision of the school board.
7. Other locations with compulsory school segregation in 1895 included Flushing, Hempstead and Roslyn in Queens County and Amityville in Suffolk County.
8. *Jamaica Colored Pupils*, Brooklyn Daily Eagle, Dec. 8, 1892, at 10.
9. *Id.*
10. Letter from Afro American Citizens to the editor, L.I. Democrat (Jamaica, N.Y.), Sept. 10, 1895, at 3.
11. *See Colored People Indignant*, N.Y. Times, July 20, 1893, at 1.
12. *Equal Rights Law Tested; Two Actions for Damages Against Saloon Keeper Mohrmann*, Brooklyn Daily Eagle, July 2, 1895, at 4.
13. *See They Are Charged With Lounging*, Brooklyn Daily Eagle, Nov. 7, 1892, at 1. Cowan and the United States District Attorney asserted that the men were respectable Republicans being intimidated by Democrats.
14. *Williams v. City of Troy* is an unreported local court case. For the Albany decision, see *People ex rel. Dietz v. Easton*, 13 Abb. Pr. (n.s.) 159 (Sup. Ct., 3d Dist. 1872).
15. 1873 N.Y. Laws ch. 186, § 1.
16. (Sup. Ct., Kings Co. 1875), *reprinted in* N.Y. Times, Sept. 14, 1875, at 2.
17. *Id.*
18. 93 N.Y. 438 (1883), *aff'g* 11 Abb. N. Cas. 187 (Brooklyn City Ct., Gen. T. 1882).
19. *Id.* at 455. Judge George R. Danforth, joined by Judge Francis M. Finch, dissented, arguing that the 1873 Act barred segregated schools.
20. 83 U.S. (16 Wall.) 36 (1873).
21. *Gallagher*, 93 N.Y. at 447.
22. 1895 N.Y. Laws ch. 1042, § 1. The law was named for its sponsor, George R. Malby, a Republican state assemblyman from Ogdensburg. It formal title was "An Act to Protect All Citizens in Their Civil and Legal Rights." Under a controversial provision, violators would, in addition to a fine, forfeit between $100 and $500 to the aggrieved person.
23. *Race Question in Jamaica*, Brooklyn Daily Eagle, Oct. 14, 1895, at 12.
24. *Id.*
25. *Order From Judge Barnard on the Colored School Question*, Brooklyn Daily Eagle, Mar. 28, 1896, at 5. Barnard had been on the bench since 1863, and was serving past retirement age because of the overcrowded court calendars.
26. 1894 N.Y. Laws ch. 671, § 3.
27. *Village and Editorial Notes*, L.I. Democrat (Jamaica, N.Y.), Oct. 29, 1895, at 5.
28. *A Negro His Own Lawyer*, Brooklyn Daily Eagle, Mar. 26, 1896, at 5.
29. *Order from Judge Barnard on the Colored School Question*, *supra* note 25. Census records verify that Cisco was a long-time Jamaica resident. His name appears in the 1870 and 1880 censuses, with his occupation recorded as a cooper.
30. *See, e.g., Jamaica's School War*, N.Y. Times, Apr. 15, 1896, at 3; *Jamaica Colored School War*, Brooklyn Daily Eagle, Apr. 21, 1896, at 5.
31. *School Board Issues Manifesto*, Brooklyn Daily Eagle, Apr. 17, 1896, at 5.
32. Wallace was born in Ontario and had moved to the United States at about age 18. After teaching school in several Long Island communities, he graduated with honors from N.Y.U. Law School and was admitted to the bar in 1878. Wallace, who was an active member of the

Republican Party, had also been the publisher of a weekly newspaper, the *South Side Observer*, and was involved in the real estate business in Freeport and Rockville Centre. While in the New York State Assembly, he was a major participant in the effort to establish a separate Nassau County. For a description of Wallace's career, see *George Wallace, Former Observer Owner, Succumbs After Brilliant Career*, South Side Observer, May 18, 1918, at 1.

33. Letter from George Wallace to the editor, L.I. Farmer (Jamaica, N.Y.), May 20, 1896, at 8.
34. *Public Moneys Involved*, Brooklyn Daily Eagle, May 4, 1896, at 5.
35. *Outrage on Mr. Ballard*, L.I. Farmer (Jamaica, N.Y.), May 20, 1896, at 4.
36. 1894 N.Y. Laws ch. 692, § 383.
37. *Jamaica's Superintendent of Public Schools Arrested*, Brooklyn Daily Eagle, May 8, 1896, at 5.
38. *Mr. Ballard's New Rule*, L.I. Farmer (Jamaica, N.Y.), May 8, 1896, at 1.
39. *Latest Long Island News, The Colored School War Transferred to County Court*, Brooklyn Daily Eagle, May 14, 1896, at 7.
40. *Cisco on Trial in Queens; Charged With Violating the Education Law*, Brooklyn Daily Eagle, June 30, 1896, at 1.
41. *Colored Children Will Not Be Admitted to Jamaica's Schools and They May Have to Roam the Streets*, Brooklyn Daily Eagle, July 11, 1896, at 5.
42. *Guardians Liable to Arrest*, Brooklyn Daily Eagle, Jan. 5, 1897, at 5 (11 suits for damages); *Jamaica Colored School*, Brooklyn Daily Eagle, Nov. 9, 1896, at 5 (mandamus actions).
43. *Lawyer Cowan's New Move*, Brooklyn Daily Eagle, Jan. 25, 1897, at 4.
44. (Sup. Ct., Kings Co. May 26, 1927), *aff'd*, 222 A.D. 166, 225 N.Y.S. 412 (2d Dep't 1927), *rev'd*, 248 N.Y. 339, 162 N.E. 99 (1928).
45. 163 U.S. 537 (1896).
46. *Colored Woman's Action*, Brooklyn Daily Eagle, Feb. 4, 1899, at 16.
47. New York City Charter of 1898 § 1056; N.Y. Consol. Sch. Law, tit. 7, art. 5, § 26.
48. Respondent's Aff., *People ex rel. Cisco v. Sch. Bd. of Queens* (Sup. Ct., Suffolk Co. Aug. 22, 1899).
49. *People ex rel. Cisco v. Sch. Bd. of Queens* (Sup. Ct., Suffolk Co. Aug. 22, 1899), *reprinted in* Record at 19; *People ex rel. Cisco v. Sch. Bd. of Queens*, 44 A.D. 469, 61 N.Y.S. 330 (2d Dep't 1899).
50. *Id*.
51. 1884 N.Y. Laws ch. 248, § 1.
52. Points for Appellant at 24, *People ex rel. Cisco v. Sch. Bd. of Queens*, 44 A.D. 469, 61 N.Y.S. 330 (2d Dep't 1899).
53. *Id*. at 23. The constitutional argument rested on article 9, section 1, of the Constitution of 1894 which provided: "The Legislature shall provide for the maintenance and support of a system of free common schools, wherein *all the children* of this state may be educated" (emphasis added).
54. 110 N.Y. 418, 18 N.E. 245 (1888).
55. 1893 N.Y. Laws ch. 692.
56. Points for Appellant *supra* note 52, at 20.
57. *Id.*
58. *Id*.
59. *People ex rel. Cisco v. Sch. Bd. of Queens*, 44 A.D. 469, 473, 61 N.Y.S. 330 (2d Dep't 1899), *aff'd*, 161 N.Y. 598, 56 N.E. 81 (1900).
60. *Id*. at 474.
61. *People ex rel. Cisco v. Sch. Bd. of Queens*, 161 N.Y. 598, 601, 56 N.E. 81 (N.Y. 1900).
62. *Id.* at 601.
63. *Id*.
64. *Id*.
65. A few years later, as president, Roosevelt would cause controversy by appointing blacks to federal positions in southern states, and by inviting Booker T. Washington to dine at the White House.
66. *Wallace Will Win His Case*, Brooklyn Daily Eagle, Apr. 2, 1900, at 13.
67. The bill, aimed at integrating the high school in Troy, appears to have died in committee. J. Morgan Kousser, Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools 13 (1986). For the text of the bill, see *Albany Correspondence*, Brooklyn Daily Eagle, Apr. 1, 1864, at 2.
68. Kousser, *supra* note 67, at 42 n.41 (citing Senate Journal 1464-5 (1900); Assembly Journal 3023-4, 3195-6 (1900)).
69. 1900 N.Y. Laws ch. 492. The new law did not repeal § 29 of the consolidated school law permitting union free school districts in unincorporated areas to establish separate black schools by a vote of the citizenry. It is uncertain why this section was not repealed in 1900, but it probably relates to the facts that the *Cisco* decision concerned § 28 and that segregated schools outside cities and incorporated villages were only a minor problem. (When § 29 was finally repealed, it was described as archaic and unused anywhere. *See* Memorandum of the Joint Committee of Teachers Organizations, Bill Jacket, 1938 N.Y. Laws ch. 14.)
70. *Roberts v. City of Boston*, 59 Mass (5 Cush.) 198 (Mass. 1849)
71. *See State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (Ohio 1871).
72. *See Ward v. Flood*, 48 Cal. 36 (Cal. 1874).
73. *See Cory v. Carter*, 48 Ind. 327 (Ind. 1874).
74. *See* Kousser, *supra* note 67, at 12–15.
75. Voting with Ruger were Charles A. Rapallo, Theodore Miller and Robert Earl, all Democrats. The two dissenters, Francis M. Finch and George R. Danforth, were both Republicans.
76. Irving G. Vann, a Republican, did not vote. Overall, of the 17 New York appellate judges who approved "separate but equal," 10 were Democrats and seven were Republicans.
77. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 450 (1883), *aff'g* 11 Abb. N. Cas. 187 (Brooklyn City Ct., Gen. T. 1882).
78. *Id*. at 448.
79. *Id.*
80. *See Equality by Legislation*, N.Y. Times, June 30, 1895, at 20.
81. *In the Matter of Rights*, Brooklyn Daily Eagle, Oct. 24, 1895, at 6.
82. New York City Department of Education statistical profile of Jamaica High School, *at* <http://nycps.schools.net/cgi-bin/ny/students/2003> (last visited Mar. 12, 2004).
83. *Id.*, *at* <http://nycps.schools.net/cgi-bin/ny/achievement/2003> (last visited Mar. 12, 2004).

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Parent-Subsidiary Relationship Of Not-for-Profit Corporations Raises Official Oversight Issues

BY ROBERT P. BORSODY

Given the increasing size and complexity of the not-for-profit sector of the economy,[1] it is important that attorneys who have contact with not-for-profit corporations understand the parent-subsidiary relationship that can exist between and among these types of organizations. This article examines the nature of this relationship and the applicable law – including some conflicting assertions of oversight authority by state agencies.

The Not-for-Profit Parent and Subsidiary, Generally

The term "parent-subsidiary relationship" has a well-understood meaning in the for-profit or business corporation sector. The parent controls one or more subsidiary corporations, usually through ownership of all or a majority of stock. Under the New York Business Corporation Law, ownership of such stock brings with it the right to elect directors. Directors control the corporation by the appointment of officers and the exercise of all other rights and powers over the subsidiary's corporate assets. However, and as will be seen below, the concept is less clear in the not-for-profit area, and cases interpreting the relationship and its implications are few.

In not-for-profits, the parent-subsidiary relationship is created by a provision in the by-laws (or certificate of incorporation) that contains language along the following lines: "[Subsidiary] shall be a membership corporation. [Parent] shall be the sole member of [subsidiary] corporation." To insure that the parent-subsidiary relationship cannot be changed by the subsidiary, the by-laws or certificate of incorporation will also contain a provision that these governing documents may not be changed or amended without the consent of the parent. To provide additional control by the parent entity, the by-laws may also permit the parent to remove directors without cause at any time, and to appoint replacements. A moment's reflection reveals that this combination of provisions gives considerable control to the parent.

Growing Use by Not-for-Profit Health Care Providers

To understand why the parent-subsidiary relationship has gained popularity among health care not-for-profit corporations, an initial overview of their organization and certain practical considerations is helpful.

New York not-for-profit corporations, as is the case with most such corporations in the United States, can be either membership corporations or non-member corporations. Non-member corporations, as the name implies, have no members, and the directors are elected by the directors themselves. If, for example, the by-laws provide that the terms of one-third of a board of nine directors shall expire every three years, then, at the end of three years when the term of three directors ends, the remaining six directors would nominate and elect three directors to replace those whose terms have expired. Similar provisions would exist for any "self-perpetuating" board of directors.

By contrast, a membership corporation will provide that the membership elects directors. These are fairly common for organizations such as soccer clubs, garden clubs, etc. Today, membership corporations are no longer the norm for entities such as hospitals, not-for-profit nursing homes and other not-for-profit health care providers.

At one time, it was common for the by-laws or certificate of incorporation of a hospital membership corporation to provide that the membership of the corporation would consist of those persons who assembled or met at a certain place on a certain date for the purpose of electing directors. The provisions were as simple as that. Others may have provided for membership based on payment of a nominal sum, or for residence in a cer-

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tain area, or the additional qualification of being a recipient of the health care provider's services.

However, as hospital providers have become larger and more complex, with more complicated decisions to be made and heavier responsibilities to be shouldered by those in charge, these simple membership provisions have gradually been eliminated. One key reason is the desire to be more selective in the membership of the board of directors; there is a practical need for people with the business or professional skills and talents to make complicated decisions.

Political reasons exist for the elimination of these membership provisions as well. The writer was present at a membership meeting that demonstrated the potential problem that such provisions can cause for a hospital's management. A small upstate hospital had one of the "just show up" membership clauses described above. Its management became embroiled in a conflict with some members of its medical staff. On the appointed night of the annual membership meeting, those members of the medical staff assembled, with a number of their friends and supporters and, in effect, "took over" the hospital.

The creation of a not-for-profit corporation has been simplified and streamlined in recent years, because the consent of a Supreme Court justice is no longer required.

A similar situation occurred in a downstate neighborhood health center. The health center found itself in a conflict with a major union. Members, their supporters and employees of that union assembled on the night of election for the board of directors. This did not result in the "takeover" of the not-for-profit membership corporation, but the simple membership provisions were eliminated from the by-laws shortly after the hotly contested election was resolved. The health center remained a membership corporation, but the by-laws were changed to provide for a single member. This was intended to create a "parent-subsidiary" relationship that, among other things, would eliminate the possibility that had nearly come to pass. Needless to say, the directors of the parent entity were elected by the "self-perpetuating board" process rather than by a membership from the community at large.[2]

Forms of Organization for Parent and Subsidiary Not-for-Profits

The most frequent configuration for a "parent-subsidiary" relationship occurs when a single hospital creates a parent entity. (In virtually all cases the hospital corporation, which is a New York not-for-profit corporation licensed under Article 28 of the New York Public Health Law, exists before the creation of the parent.) The parent entity is created by putting parent-subsidiary language into the by-laws of the hospital, giving the parent entity the right to elect or appoint the directors of the hospital. The parent entity is also a New York not-for-profit corporation and is usually a non-member corporation. The parent will often have additional subsidiaries. Frequently, one of those subsidiaries will be a fund-raising corporation, which will also have not-for-profit status. Another subsidiary or subsidiaries often are business corporations, such as real estate holding companies or corporations formed for joint ventures with for-profit professionals or professional entities, such as a doctor or doctor groups.

These sister subsidiaries of hospitals are usually formed for the purpose of insulation of liability and for avoiding regulatory control. They are given various popular names, such as Physician Hospital Organization (PHO) or Managed Care Organization (MCO). If the entity were a subsidiary controlled by the hospital, then the agency that regulates the hospital, the New York State Department of Health (DOH), could rightfully assert regulatory jurisdiction over the entity on the basis of such control. Because one of the reasons for creating the entity is to allow for freedom and flexibility, which the highly regulated health care system in New York does not enjoy, a "sister" subsidiary relationship is usually used.

Another minor variation is for the parent entity to be a trust instead of a New York not-for-profit corporation. A trust is quick and inexpensive to set up. The trust instrument – which is basically a contract between a donor and the trustees – contains language almost identical to the boiler-plate language found in most not-for-profit corporations, particularly those that intend to apply for federal tax exemption. Because it is essentially a "private" contractual form, it may be executed and come into existence instantly and at no cost, as compared to and contrasted with a not-for-profit certificate of corporation, which must be filed with the Department of State. It should be noted, however, that the creation of a not-for-profit corporation has been simplified and streamlined in recent years, because the consent of a Supreme Court justice is no longer required, as it was before the 1993 amendment to § 404 of the New York Not-for-Profit Corporation Law.[3]

Although created by an indenture requiring no filing with any agency, a trust is nonetheless a legal entity. It comes into being upon the execution of the trust instrument and the payment of the corpus of the trust from

the donor to the trustees. This "corpus" can consist of any nominal amount, such as $10. The trust created by this process can own property, employ people, sue and be sued and, essentially, do everything that a not-for-profit corporation can do. Such a trust entity is legally identical to a testamentary or *inter vivos* trust set up by an individual to minimize estate taxes, or to provide for the support and protection of the individual's survivors. A "parent" trust, however, has a different purpose, which can generally be described as the support and direction of the subsidiary.

Returning to the more common corporate form, the certificate of incorporation of the parent not-for-profit corporation will not contain any provisions that require regulatory approval, or a consent from any regulatory agency such as the DOH or the Department of Education. This essentially means that the parent entities are "do nothing" corporations. The powers of the corporation must be drafted with care to avoid containing any phrases or words that would act as red flags to the reviewers in the Department of State, and cause them to reject the proposed certificate of incorporation on the ground that the corporation had to obtain a required approval or consent by one of the regulatory agencies before filing. Although a trust is not submitted to the Secretary of State, it should also not contain powers that would require consent, approval or license by any state agency.

Tax Considerations for Not-for-Profit Parent Organizations

Both the parent trust document and the parent not-for-profit corporation certificate of incorporation would contain language in the purposes clause designed to assist in a successful application for tax exemption.

This language would contain all the basic boiler-plate verbiage about no inurement to private parties, and would provide for appropriate disposition of assets in the event of dissolution. In addition to the basic and standard tax exemption language, however, the purposes clause must be drafted with care to set forth, on the one hand, tax exempt functions and, on the other, not to describe a function that will require licensing by some state agency.

A common approach here is simply to use "supporting organization" language that provides for the support of the tax-exempt subsidiary, usually by fund-raising. If, as is usually the case, the supported subsidiary is an entity exempt under § 501(c)(3) of the Internal Revenue Code, then such a supporting organization parent will usually qualify under § 509(a)(3). It should be noted that if the parent entity is not tax exempt, a tax exempt subsidiary cannot "upstream" profits to the parent without risk to its own status, because such a transfer of profits would amount to an improper inurement from an exempt organization to a non-exempt one. At a minimum, it would trigger the application of some intermediate sanction under the 1996 "Intermediate Sanctions Law."[4]

It should be further noted that, if the purposes of a proposed New York not-for-profit corporation include support of an entity licensed under Article 28 of the New York Public Health Law, the approval of the Public Health Council is required.[5] A comprehensive discussion of the complexities of tax exemption is beyond the scope of this article, but the point to be made here is that both parent and subsidiary are almost always tax exempt, and the parent's exemption is usually dependent on or derivative from the subsidiary.

Organization of Multi-Hospital Systems

Multi-hospital systems are an interesting variant on the parent-subsidiary theme. A parent entity may be created to control several hospitals, a form that has become prevalent in downstate New York. In these multi-hospital systems, it is often the case that the "parent" is not the sole member of the subsidiary hospital, but rather exercises its influence through a number of different contractual and non-contractual relationships. These relationships can vary in nature and in importance, depending upon economic issues, the dynamics of power within and among the involved hospitals, and the history of the formation of the system.

Relationships can vary from an "affiliation agreement," providing for no more than the staffing of one hospital by another (certainly not a classic parent-subsidiary relationship), to one in which there are a transfer of assets, guarantees of debt and a "holding out" as a member of a system. The number and nature of these contractual relationships can be fluid. They wax and wane according to political and economic pressures, and are too numerous to describe in any detail here.

Other control relationships in a multi-hospital organization are more clear cut, however. For example, a management contract relationship, which alone would not create parent-subsidiary status, has sometimes been added to a more classic parent-subsidiary relationship to provide for additional control by the parent. Management contracts with an Article 28-licensed hospital are subject to specific and extensive regulation by the DOH.[6]

Another control provision is asset ownership by the parent. This could be accomplished by having the major assets of the subsidiary, such as real estate, transferred to the parent and then leased back to the subsidiary. Issues could arise here – such as the requirement of court approval for transfer of "all or substantially all" of the

assets of a not-for-profit corporation,[7] and the restrictions on transfer of assets of a tax-exempt corporation that might result in an "inurement" to an entity that is not tax exempt. If, however, the parent entity is a not-for-profit corporation and tax exempt as well, these latter problems are minimized.

Special Issues for Religious Organizations Controlling Hospitals

The parent-subsidiary relationship is often created by religious organizations to control hospitals they have founded and continue to fund. Indeed, this is one of the most common and widespread contexts in which this form of relationship is utilized.

Most prominent in the downstate area is the Catholic Archdiocese of New York City, the parent entity for a number of its hospitals. Further, various orders of nuns within the diocese are parent entities for hospitals controlled by those orders. Again, and as is described above, this relationship is created by simply stating that the archdiocese or the order is the sole member of the membership corporation, the subsidiary hospital.

These religious organizations often have specific objectives that are sought to be achieved, or maintained, through the parent-subsidiary relationship. Common examples are based on the position the Catholic Church takes in the area of human reproduction, which would include restrictions on birth control, abortion and family planning. Compliance with the church's position might be achieved by specific wording in the by-laws of the subsidiary, and are often referred to as "reserved powers." This means that certain powers of the subsidiary are "reserved" for exercise by the parent or require consent, approval or some type of involvement by the parent. The obvious question that arises is to what extent a parent may interfere with or control the operations of a hospital subsidiary without requiring some type of consent or approval by the New York State DOH under the provisions of Article 28 of the Public Health Law – which regulates all aspects of creation and operation of hospitals and nursing homes and other types of institutional providers.[8]

Article 28 Regulation and The *Fraidstern* Case

The first New York case examining the parent-subsidiary relationship was *Fraidstern v. Axelrod*.[9] In this case (unreported, unfortunately), the closing of St. Elizabeth's Hospital in northern Manhattan was challenged by a group of community residents, consumers of services and political personalities. The hospital had been transferred from one religious order to another, specifically, to the Missionary Sisters of the Sacred Heart (who also controlled Cabrini Hospital by means of the standard parent-subsidiary relationship) from the Franciscan Sisters of Allegany, who had controlled St. Elizabeth's Hospital through the same arrangement. The new controlling parent elected a new board and that board then proceeded, after proper notice to the DOH, to close St. Elizabeth's Hospital.

The plaintiff group challenged the closure and successfully secured a temporary restraining order to prevent it until a hearing could be had on the legal question raised. That question was whether the new board was properly and duly elected by the new parent, because the DOH's consent was not secured for either the transfer to the new parent or the election of the new board. The argument made by the plaintiffs was that a business corporation that owned and operated a New York hospital licensed under Article 28 was required to secure permission to transfer 10% or more of its stock; under that standard, they asserted, transfer of 10% or more of control of a not-for-profit corporation – and here it was 100% – should also require regulatory approval by the DOH.

The case aroused intense interest. Religious organizations did not want to have to secure regulatory consent for transfers of hospitals between religious orders – and, as it turned out, the DOH was even less willing to review them. The DOH official, who at that time was charged with reviewing Article 28 Certificate of Need applications, testified that the DOH had no jurisdiction over transfers of control of not-for-profit corporations, provided there was no change in the purposes or powers of the Article 28-licensed entity itself.[10]

The case had become a political "hot potato" because the plaintiffs consisted of a large group of concerned citizens and prominent politicians, and the defendants consisted of an order of nuns. It was heard by an upstate judge who was sitting in New York County by designation. The court ultimately found that there was no requirement for Article 28 review by the DOH in the case of transfers of control of not-for-profit hospital corporations. The court stated that the "regulations are devoid of any reference to required approvals for changes in the sponsorship of not-for-profit corporate hospitals operators" and dismissed the case.

After the *Fraidstern* case, regulations were promulgated that clarified when a parent entity has to secure "establishment approval" by the relevant New York State regulatory authorities, such as the Public Health Council or the State Hospital Review and Planning Council, if a transfer of control is to occur. In essence, the regulations provide that if the parent has certain operational authority over a subsidiary that is an Article 28-licensed entity, the parent has to apply to the DOH for "establishment" as a licensed Article 28 provider.[11]

The *Nathan Littauer* Case Limits Role of Attorney General

As described above, the DOH has plenary jurisdiction over certain types of parent-subsidiary relationships. Specifically, when the parent entity has certain operational powers over the Article 28-licensed hospital subsidiary, then the DOH has a right to require that the parent entity be "established," also under Article 28. Along with Article 28 establishment comes continuing regulatory authority by the DOH over the parent.

The New York Not-for-Profit Corporation Law also gives the attorney general the right to review certain activities of not-for-profit corporations. For example, if a not-for-profit corporation wishes to dispose of "all or substantially all of its assets," consent of a Supreme Court justice is required, upon notice to (or advance consent and waiver of the notice by) the attorney general.[12] The attorney general has broad authority to review the activities of not-for-profit corporations under the general *parens patrie* powers of the state. These powers are usually exercised over entities that are not otherwise specifically regulated as licensed organizations by other state agencies – for example, a general fund-raising entity, or a foundation that has been endowed through a grant or will for purposes of benefiting society in some particular manner. The attorney general has the power to act against waste, self-dealing and breaches of fiduciary duty by the trustees or directors of such foundations or entities.[13] That does not mean there never is controversy about the exercise of these powers, however, as indicated below.

The cost of regulatory compliance has been recognized; state and federal laws now come with regulatory impact statements.

In *Nathan Littauer Hospital Ass'n v. Spitzer*,[14] the attorney general was opposed by members of the health care industry regarding the scope of his right to review the actions of hospitals, most of which happen to be not-for-profit corporations.[15] The hospitals in that case had applied to the state regulatory agency, the DOH, for a ruling that their proposed actions would require no regulatory approval, and this ruling was granted. The attorney general, however, was of the opinion that approval of the Supreme Court was required under the Not-for-Profit Corporation Law, including service on and a review by his office under that statute's procedure. The hospitals commenced a declaratory judgment action for a ruling that such approval was not required and the trial court agreed; the Appellate Division, Third Department affirmed.

The facts of the case were as follows: A community hospital, controlled by a parent, proposed a merger with a Catholic-sponsored hospital, also controlled by a Catholic-sponsored parent. It was proposed that the two hospitals combine by transferring control of both hospitals to a single parent. This new parent itself would be a subsidiary of the two entities that were formerly parents of the two hospitals. The proposed resulting structure would consist of the two former parent entities controlling the new single parent entity, which would then control the two hospitals. An issue raised in the case was that the new parent entity of the two hospitals would have certain "reserved powers" requiring that both of the hospitals comply with the Ethical and Religious Directives for Catholic Health Care. These directives would require the elimination of certain reproductive health services in both subsidiary hospitals. The original arrangement also had such reserved powers but only for the Catholic-sponsored hospital.

The attorney general, and a community-based entity that intervened as an *amicus*, argued before the trial court that this proposed reconfiguration constituted a change in corporate purposes, thereby requiring attorney general and court approval under the Charitable Trust Law.

The hospitals, on the other hand, argued that the proposed arrangement did not involve the transfer of assets or a statutory merger of the hospitals, and that those hospitals remained separate corporate entities. They also asserted that there was no change in the corporate purposes of either hospital but, simply, a change in membership. The ruling by the DOH that the new parent entity of the two hospitals did not need to be established under Article 28 of the Public Health Law, on the ground that it had no operational powers, was also cited in support of this argument.

The Hospital Trustees Association, as well as several of its state and regional hospital associations, as *amici*, argued that New York State already had a complex and comprehensive regulatory scheme over hospitals, with which the affiliating entities had complied, and that a further layer of regulation was not needed.

In ruling in favor of the plaintiffs, the trial court cited the statement of the New York State Hospital Association that the association has 234 members, 160 of which are members of hospital networks that exercise "some degree of corporate control over its members' hospitals," and adopted the association's position that the state Healthcare and Reform Act of 1996 reflected the legislature's intention of "reducing the role of regulation" over these health care organizations. Other "gen-

eral legislative trends towards less regulation of hospitals, not more" were noted by the court, as had been argued by the association. The court also noted that the association's counsel, on oral argument, had stated that "200 similar transactions have occurred in the state without need for approval."

The court concluded that the attorney general had no role to play in the proposed transaction, stating that "the statutory scheme envisions DOH overseeing changes in the healthcare services of a hospital. That has been accomplished to their satisfaction in this case. The scheme does not include a role for the court or the attorney general in the proposed affiliation such as this one." As noted above, the lower court's decision was affirmed by the Appellate Division. Leave to appeal was denied by the Court of Appeals.

Conclusion

The New York health care system is already one of the most strictly and carefully regulated in the country. Health care providers strain beneath the weight of repeated legislative initiatives, which, though well-intentioned, often are expensive and onerous to administer – witness the new HIPAA statute.[16] Intended to protect patient privacy, it has instead primarily benefitted consultants, who sell expensive packages and hold seminars and publish books on how to comply with its numerous, complex provisions – among which is the prominently featured possibility of a $250,000 penalty for each violation. Under these circumstances, intervention in the New York health care system by the attorney general (who has certainly shown commendable leadership in other areas) to provide an additional layer of oversight is unnecessary.

The cost of regulatory compliance has been recognized; state and federal laws now come with regulatory impact statements, which attempt to assess the cost of compliance by those entities affected by a new proposed law or regulation. But there is no such required regulatory impact assessment if a state agency or official such as the attorney general begins to assert a quasi-regulatory role in an area where there has not been one before. The New York State DOH and the Office of the New York State Attorney General should come to an understanding that in the area of not-for-profit organizations, especially health care providers, current practices and existing regulatory authority is sufficient to protect the public.

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1. *The New Equation for Charities: More Money, Less Oversight*, N.Y. Times, Nov. 17, 2003, at F1, col 1. The non-profit service sector accounts for 22% of all private sector jobs in New York. 19 Crain's N.Y. Bus. 1, Dec. 8, 2003, 2003 WL 9129409.
2. The provisions of membership corporations providing for election of the directors by members chosen from the community at large is similar to the requirements of federal regulations for federally funded Neighborhood Health Centers funded under § 330 of the U.S. Public Health Law. Regulations under this section require that the board of the directors of a Neighborhood Health Center contain a majority of users from the area served by the center. Formerly, there was no requirement or specification as to how those directors were to be elected, and as in this example they were able to be appointed by a parent entity or elected by a "self perpetuating board," so long as they actually and ultimately complied with the regulatory requirement. This changed in 1997 when the Division of Community and Migrant Health of the Bureau of Primary Health of the Health Resources and Services Administration of the U.S. Dept. of Health and Human Services promulgated Policy Information Notice 97-27, dated July 22, 1997, which provided that a section 330-funded Neighborhood Health Center could not be controlled by another entity. Affiliation Agreements of Community and Migrant Health Centers, *available at* <ftp://ftp.hrsa.gov/bphc/docs/1997PINS/97-27.PDF>.
3. 1993 N.Y. Laws ch. 139, § 1, eff. Aug. 20 1993.
4. 26 U.S.C. § 4958.
5. *See* Not-for-Profit Corp. Law § 404(o), (t).
6. *See* 10 N.Y.C.R.R. § 405.3(f).
7. *See* Not-for-Profit Corp. Law § 510(a)(3). See also the prohibition against payment of distributions or dividends to the membership of a not-for-profit corporation. Not-for-Profit Corp. Law §§ 508, 515.
8. This issue is intended to be addressed by the following regulation in 10 N.Y.C.R.R. § 405.1(d), which provides as follows:

   > (d) Nothing in subdivision (c) of this section [describing what powers would require a parent to be established] shall require the establishment of any member of a not-for-profit corporation, which operates a hospital, based upon such member's reservation and exercise of the power to require that the hospital operate in conformance with the mission and philosophy of the hospital corporation.

9. Index No. 7414/81 (Sup. Ct., N.Y. Co. July 16, 1981).
10. This official was asked by the attorney for the plaintiffs if he wouldn't want to examine the character and competence – one of the requirements of Article 28 Certificate of Need review – of the membership of an Article 28-licensed hospital if that new member was proposed to be the American Nazi Party or the Ku Klux Klan. He replied that he would have no power to do so.
11. The regulations, found at 10 N.Y.C.R.R. § 405.1(c), provide that:

    > (c) Any person, partnership, stockholder, corporation or other entity with the authority to operate a hospital must be approved for establishment by the Public Health Council unless otherwise permitted to operate by the Public Health Law or as provided for by section 405.3 of this Part. For the purposes of this Part, a person, partnership, stockholder, corporation or other entity is an operator of a hospital if it has the decision-making authority over any of the following:
    >
    > (1) appointment or dismissal of hospital management level employees and medical staff, except the election or removal of corporate officers by the members of a not-for-profit corporation;
    >
    > (2) approval of hospital operating and capital budgets;

(3) adoption or approval of hospital operating policies and procedures;

(4) approval of certificate of need applications filed by or on behalf of the hospital;

(5) approval of hospital debt necessary to finance the cost of compliance with operational or physical plant standards required by law;

(6) approval of hospital contracts for management or for clinical services; and

(7) approval of settlements of administrative proceedings or litigation to which the hospital is party, except approval by the members of a not-for-profit corporation of settlements of litigation that exceed insurance coverage or any applicable self-insurance fund.

12. Not-for-Profit Corp. Law §§ 510(a)(3), 511(a), (b).
13. Not-for-Profit Corp. Law § 112(a) lists nine situations where the attorney general may bring actions to enforce these powers.
14. 287 A.D.2d 202, 734 N.Y.S.2d 671 (3d Dep't 2001), *leave to appeal denied*, 98 N.Y.2d 602, 774 N.Y.S.2d 762 (2002).
15. A recent article written by the author noted that there were only three hospitals in the state that were not owned by not-for-profit corporations. Robert P. Borsody, *Institutional Licensing in New York State: Ownership by Public Companies*, 8 Health L.J. 26 (Winter 2003). One of the three has since closed.
16. Health Insurance Portability and Accountability Act of 1966, 42 U.S.C. §§ 201 *et seq.*

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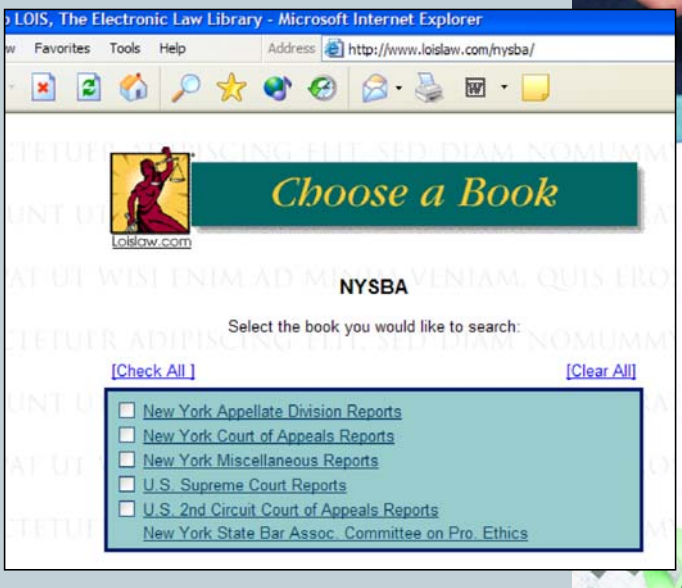

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"Don't Come Back Without a Reasonable Offer" Surprisingly Little Direct Authority Guides How Judges Can Move Parties

This is the second installment of a two-part article on the court's power to foster settlements. In the last issue, the discussion focused on the theory and practice of settlement negotiations before the court. This second segment examines to what extent written New York State court rules, and the court's "inherent authority" to manage litigation, empower a judge to foster settlement. The article concludes with a discussion of some suggested guidelines.

Part Two – The Judge's Role

BY BRIAN J. SHOOT AND CHRISTOPHER T. MCGRATH

In the exercise of their offices, New York State trial judges draw their power to act from several readily ascertainable sources of law. When settlement is the matter at hand, however, there is surprisingly little direct authority on which they may rely as they attempt to move parties toward an agreement. As a result, the boundaries of what is acceptable behavior by a judge can be difficult to define. What follows addresses this issue.

State Court Rules on Court's Power

Section 202.12 of the Uniform Civil Rules for the Supreme Court and the County Court states that any party "may request a preliminary conference at any time after service of process," that the court "shall" order such a conference where one has been properly requested, and that the "matters to be considered" at the conference "shall" include, amongst other listed topics, "settlement of the action."[1]

Yet, while the rules actually require that the topic of settlement be on the agenda at the preliminary conference, the "preliminary conference" is envisioned, as the name implies, as a conference that occurs very early in the lawsuit (within 45 days of the date that the request or judicial intervention is filed), and perhaps too early for the parties to discuss settlement meaningfully – inasmuch as little or no discovery, especially including the personal injury defendant's physical examination of the plaintiff, would have taken place at this juncture. Indeed, one key purpose of the conference is to produce "a timetable which shall provide for completion of disclosure within 12 months of the filing of the request for judicial intervention for a standard case, or within 15 months of such a filing for a complex case."[2]

While the *initial*, mandatory "preliminary conference" may well occur too early to realistically effect settlement of the action, however, the court may order as many additional "preliminary conferences" as it deems warranted. Subdivision (j) of the rule states, "The court, in its discretion, at any time may order such conferences as the court may deem helpful or necessary in any matter before the court."

Apart from the "preliminary conference" identified in § 202.12 of the Uniform Rules, § 202.26 authorizes a "pretrial conference." The rule states that the judge "shall order a pretrial conference, unless the judge dispenses with such a conference in any particular case."[3]

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The pretrial conference *may* occur any time between filing of note of issue and the commencement of the trial, but should occur, when possible, sometime between 15 and 45 days before the start of trial. This preference is expressly stated in subdivision (b) of the pertinent rule.[4] Of course, the difficulty here is that of determining when, precisely, is "45 days before trial is anticipated."

The rule governing the pretrial conference states that the judge "*shall* consider at the conference," among other subjects, "disposition of the action including scheduling the action for trial."[5] Another mandatory topic on the agenda is "insurance coverage where relevant."[6]

Thus, the rules contemplate an early "preliminary conference" at which "settlement of the action" *shall* be discussed and a "pretrial conference" in which "disposition of the action" *must* be on the agenda. Moreover, since there is no limit to the number of pretrial conferences that the judge may *choose* to order,[7] the judge can effectively order a settlement conference at virtually any time from filing of the request for judicial intervention until the trial itself.

What penalties may be imposed where it is clear that some penalty is warranted? . . . Is a monetary sanction ever permissible or appropriate, and against whom?

Yet, while the provisions expressly permit the judge to order that the parties appear at two or more conferences, and while the rules at least impliedly authorize the judge to direct that the persons who appear at such conferences discuss settlement of the action (because that subject is expressly on the agenda), the rules leave much unsaid regarding what the court may do, or what it should do, to promote or encourage settlement. In fact, Chief Judge Kaye's Commission on the Jury is currently studying, among other matters, whether those or other rules that bear upon the settlement process should be supplemented or modified.

In this regard, § 202.12 states that, except when a party appears *pro se*, a party who is directed to appear at the preliminary conference shall appear by "an attorney thoroughly familiar with the action and authorized to act on behalf of the party."[8]

There is a virtually identical requirement for the pretrial conference. The rule states: "Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations or accompanied by a person empowered to act on behalf of the party represented will be permitted to appear at a pretrial conference."[9]

Presumably, because parties who are not *pro se* are expressly required to appear by "thoroughly familiar" or "fully familiar" counsel, the court is empowered to impose some sanction if a party appears by an attorney who is not sufficiently familiar with the action. Similarly, because the appearing attorney is supposed to be authorized to act or to be accompanied by a person who is authorized to act on the party's behalf, a sanction can presumably be imposed if a party appears only by persons who are not empowered to act.

What precisely, however, is meant by "empowered to act" or "authorized to act"? If the attorney appearing for the injured defendant states that he or she had spoken with the insurer and is "authorized" to offer $50,000 – this in a case in which liability in the millions seems probable – is the attorney one who has been "authorized to act" since the attorney has been authorized to offer the $50,000? Or is the defendant in violation, because the attorney's authority is so circumscribed and any arguments or inducements to settle would be wasted upon an individual who can effectively do nothing absent further communications from Atlanta [or wherever]?

Even assuming sanctions are warranted, exactly who would be sanctioned, and what with? If, for example, the violation was failure to appear by or with a person who was empowered to act on the party's behalf, does the court penalize the attorney who may or may not have had any power to compel the party to appear and/or to delegate authority to settle? Does the court penalize the party, even though the problem may be a recalcitrant insurer over whom the party-defendant lacked control? Does the court penalize the insurer, this notwithstanding that the insurer is not a party in the case or may not even have offices within the state? We note that, in a related context, the Appellate Division for the Second Department held that the trial court was not authorized to sanction the insurance company for its role in directing the assertion of a legally frivolous defense.[10] The panel's reasoning was that a statute authorizing sanctions in derogation of common law must be narrowly construed, and that the provisions relied upon (CPLR 8303-a and 22 N.Y.C.R.R. § 130-1.1) authorized sanctions solely against parties, and not against non-parties.

And what penalties may be imposed where it is clear that *some* penalty is warranted? Can the defendant's answer be stricken for willful failure to appear via a person with authority, and will such penalty lie even where the "fault" lay with the party's insurance carrier and not with the named defendant? Is a monetary sanction ever permissible or appropriate, and against whom? Can/should the client be punished, if it appears by an

attorney who lacks familiarity with the case, or should the sanction be levied upon the attorney? None of those questions are answered in the New York State court rules.

Federal Rules and Rules of Sister States

By comparison, the federal rule governing pretrial conferences provides somewhat greater clarity.[11] For one thing, the federal rule expressly states that "the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."[12] The court thus has explicit authority to demand that, in those cases in which the attorney has limited authority to act without express approval from the plaintiff or the defendant, the plaintiff or defendant also appear or be available for telephone consultation. Of course, this of itself does not wholly answer the questions about what can or should be done vis-à-vis the defendant's insurer.

A party can be sanctioned, not for failing to* offer *or* accept *reasonable settlement terms, but instead for failing to meaningfully discuss the subject of settlement.

The federal rule also provides a rather daunting subsection on sanctions, as follows:

> (f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.[13]

Even the federal rule leaves much unsaid and much undefined, however. Most obviously, it does not even begin to define the court's authority vis-à-vis non-parties, particularly including those insurance carriers that may effectively be controlling the litigation. Much more important, while the federal rule includes broad powers to levy sanctions, it provides few guidelines (1) about *how* the court may or should seek to foster settlement or (2) about which among the broad panoply of available sanctions might be imposed in any individual case. Rather, the federal rule provides the District Court with broad powers, but without any standards detailing how those powers are to be exercised, or towards what end.

There are at least some state court rules that go beyond the federal rule in specificity. For example, Michigan's court rules regarding conferences expressly provide:

(1) not only that the appearing attorneys "be thoroughly familiar with the case," but also that "[t]he court may direct that the attorneys *who intend to try the case* attend the conference";[14]

(2) that the court may direct that *parties* and "representatives of lienholders, *representatives of insurance carriers*, or other persons" "*be present at the conference or be immediately available* at the time of the conference";[15]

(3) that the court's order "may specify whether the availability is to be [in] person or by telephone";[16] and,

(4) that "[f]ailure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default . . . or a ground for dismissal . . ."[17]

The key point, for present purposes: although New York's Uniform Rules expressly authorize preliminary and pretrial conferences in which settlement of the action is a mandatory agenda topic, they provide little guidance regarding what the court's powers to effect settlement may be. New York's court rules also provide significantly less guidance than is provided in some other jurisdictions.

The Court's Inherent Authority

As has been shown, New York's court rules expressly authorize the court to conduct conferences in which settlement is the topic of discussion, and the rules require that such conferences be attended by thoroughly familiar attorneys who are "authorized to act." With these exceptions, however, the rules do not expressly grant the court any authority to promote/encourage settlement, nor provide any guidelines as to how to do so. Yet, this does not necessarily mean that New York Supreme Court justices lack the authority to employ the various "weapons" discussed in the first portion of this article. Making that determination requires consideration of whether these judges have the *inherent* authority to do so.

Although little has been written about the inherent power of New York State courts to manage their own affairs generally, or to promote/encourage settlement in particular, such subjects have been much discussed nationally.[18] Specifically, "[f]ederal courts have long asserted equitable power to manage their affairs to ensure the orderly, expeditious, and efficient administration of justice."[19] The existence of such inherent authority, an authority that arises from necessity rather than from any express legislative grant, was definitively acknowledged in *Link v. Wabash Railroad Co.*,[20] wherein the U.S. Supreme Court noted that a District Court's ability to take action in a procedural context may be grounded in "inherent power," governed not by rule or statute, but by "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[21]

Of course, it is one thing to recognize that courts have certain inherent powers and that one such power is to discuss/promote settlement of the case, and quite a different thing to precisely define what conduct is or is not permissible.

At one end of the continuum, there are various instances in which a court may have power to approve or disapprove a proposed settlement (*e.g.*, class actions, actions on behalf of infants). It is, however, axiomatic that a court cannot *dictate* or *compel* a particular settlement.[22]

In a similar vein, while there are reports of judges who penalized one side or the other, whether by monetary sanction or by some other penalty, for failure to offer or accept "reasonable" settlement terms (as discussed last issue), it seems very clear that such conduct is improper.[23]

There is, however, authority for the proposition that a party can be sanctioned, not for failing to *offer* or *accept* reasonable settlement terms, but instead for failing to meaningfully *discuss* the subject of settlement. This has typically occurred when, after being directed to produce a person with knowledge and authority to settle, the party instead appeared by counsel who had no authority to do so.[24]

Yet, while the distinction may seem clear enough in theory, and perhaps even sensible – in essence, the judge can lead the horses to the settlement waterhole, but cannot compel them to drink – the distinction will almost always be more difficult to apply in actual practice.[25] For one thing, it may be difficult to discern the difference between an attorney who is participating in good faith but has a markedly dissimilar opinion about what the case is "worth" and the attorney who has, for one reason or another, adamantly determined not to settle and whose very participation is little more than a charade.

Even more important, it may be difficult to distinguish when a judge's statement of fact or opinion becomes an argument, or when the judge's argument becomes coercive. The latter concern becomes especially problematic when one considers (1) that a threat to render unfavorable rulings or to otherwise "punish" a recalcitrant party or attorney may be implied as well as expressed,[26] and (2) that an attorney may perceive a threat, perhaps from a tone of voice, that the judge may have never intended to make.[27]

The question as to the court's "inherent power" vis-à-vis non-parties, such as an insurance company controlling the defense, injects a further complication. Consider, for example, *In re Novak*.[28] There, upon being informed that the person with authority to settle was an employee of the defendant's insurer, the District Court judge ordered that individual to attend the next conference, this notwithstanding that the insurer was not a party and the individual was out of state. When the individual failed to appear (except for the limited purpose of contesting jurisdiction), the judge ruled that the individual was in contempt of court. On appeal, the Eleventh Circuit held that the District Court had exceeded its authority in directing the individual's attendance. However, the order holding the individual in contempt of court – *criminal* contempt, by the way – was affirmed.

In ruling that the District Court lacked "inherent authority" to direct attendance of the insurer's employee, the Circuit Court acknowledged that settlement conferences become nothing more than "cathartic exercises" if the parties are unprepared or unable to settle.[29] It also noted "that the power to direct parties to produce individuals with full settlement authority at pretrial settlement conferences is inherent in the District Courts."[30] Yet, while allowing that the District Court had "inherent power" to do that which was necessary to effect a meaningful settlement conference, the Circuit Court concluded that such means were actually not "necessary" to achieve the desired end inasmuch as the District Court could have instead directed *the named party* (*i.e.*, the insured) to produce a person of authority. Precisely because the means used were not "necessary" in order to achieve the objective, it was not "authorized."[31] The Circuit Court put it this way:

> When an insurer controls a party's litigation, this party, if ordered to produce such an individual, must turn to his insurer to comply with the order and avoid sanctions; *the insurer either must provide the necessary individual or confer full settlement authority on the party or his attorney*. The insurer, of course, has a strong incentive to prevent the imposition of civil contempt sanctions that would harm its interests. *Thus, the effect of directing an order to the named party (the insured) would be to coerce ac-*

> *tion by the nonparty insurer controlling the litigation.* For example, a district court could coerce the assistance of a nonparty insurer in charge of the litigation by ordering its insured, a named party, to produce an individual at the pretrial conference fully authorized to discuss settlement and informing this party, in advance, that the court will strike his pleadings as a sanction for noncompliance with its order.
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> * * *
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> Thus, the District Court in this case could have issued an order directed at the defendants to achieve its desired result. *Instead, the district court issued an order directed at Novak, an employee of the nonparty insurer of the defendants. That order was neither authorized by Congress nor necessary for the court to perform its duties.* Accordingly, we conclude that *the district court had no authority directly to order the appearance of Novak, an employee of the defendants' insurer, to attend the pretrial settlement conference*.[32]

Ironically, after deciding that the District Court's initial directive compelling the insurer's appearance was unnecessary and therefore unauthorized, the Circuit Court nonetheless affirmed the criminal contempt ruling on the ground that the initial directive "was neither transparently invalid nor patently frivolous," and, for this reason, could not be summarily ignored or flouted with impunity.[33]

Yet, while *Novak* stands as authority for the proposition that a trial court does not have "inherent authority" to directly order that the nonparty insurer appear and that the judge must instead target the party-insured, there is also authority to the contrary.[34]

There is also an almost complete lack of authoritative direction on whether the pursuit of settlement is itself a legitimate, let alone central, judicial goal.

There is, in addition, a further complication. Up until this point, we have primarily phrased the issue in terms of whether the court has *inherent authority* or power to take various actions to promote/encourage settlement. A difficult question that also bears on the inquiry is whether the ethical constraints might restrain or limit such authority as may exist, and, equally important, whether the *perception* of such constraints may practically do so.

In this regard, Canon 1 of the Code of Judicial Conduct[35] requires judges to uphold "the integrity and independence of the judiciary." Although it seems to us that the rule does not obviously relate to conduct designed to settle a case, some out-of-state cases have broadly construed the scope of the rule, and the suggestion has been made that the existence of such decisions "may deter many judges from vigorously promoting settlement for fear that it will be construed as violative of Canon I."[36] Similar concerns exist with respect to Canon 2 and Canon 3,[37] which provisions "can also be interpreted as suppressive of active judicial involvement in settlement activity."[38] Although the observation is now probably less apt than when initially made back in 1988, the theory is that "many judges understandably refrain from active participation in settlement negotiations completely" "[r]ather than risk behavior that might be construed as unethical or result in public condemnation."[39]

In any event, the "bottom line" is that, while one can confidently say that judges *can* order settlement conferences and *cannot* order parties to settle on stated terms, conduct between those extremes remains a matter of some controversy nationally:

> Controversy also surrounds the question of judicial power to compel participation in settlement conferences. One issue is who can be compelled to attend. The [Federal] Rule explicitly authorizes compelled attendance of unrepresented parties and of lawyers for represented parties, but says nothing about represented parties themselves. *Courts have divided on whether represented parties can be compelled to attend.* A second issue is what attendees can be compelled to do. While the judge clearly may not impose a specific settlement on an unwilling party, *courts disagree on whether the court may compel participation in alternative dispute resolution processes, and whether a party may be sanctioned for failure to make or respond to a settlement offer.*[40]

But what have state courts said about their inherent powers to promote or encourage settlement? What have New York courts said about their powers or lack thereof to direct the attendance of an insurer, or to compel attendance of a person with authority to settle, or to sanction bad faith refusal to negotiate? The answer, in two simple words, is this: very little.

There is little case authority supporting, or, for that matter, rejecting, the proposition that courts have "inherent authority," beyond that provided by court rule or statute, to initiate or employ the various settlement tools that are theoretically available. To be sure, there is clear precedent for the proposition that courts have inherent authority do what is necessary to fulfill their functions and, in particular, that the courts have inherent power to oversee attorney conduct in pending matters.[41] But, as recent events indicate, even that power is not limitless, with the consequence that a court lacks "inherent authority to hale before it lawyers who last appeared be-

fore a different judge of coordinate jurisdiction some two-and-a-half years earlier, to start a *sua sponte* inquiry into the appropriate amount of attorneys' fees when no fee application was pending before it, or to review an arbitral award when no party has moved to modify or vacate such award."[42]

Even ignoring that the "inherent authority" to oversee attorneys is not limitless, it is hardly self-evident that inherent power to promulgate rules regarding attorney conduct carries or connotes inherent authority to pro-actively foster settlement.[43]

There is also no New York authority on whether the court has the power to compel the attendance of a non-party insurer. By way of analogy, even though the court's authority to issue a trial subpoena extends no further than the state's border,[44] the court has authority to direct a corporation to produce an individual who is out of state if the corporation is itself subject to the state's supervision and the individual is within the corporation's control.[45] But whether this also provides authority when the corporation itself is not a party in the action is problematic at best.[46]

On the other hand, while there is little or no New York precedent supporting such actions, it cannot be denied that New York judges routinely employ many of the settlement tools discussed in the first part of this article, including some of the more controversial ones. Obviously, there is a wide variation in actual practice, ranging from the judge who may do no more than suggest that the attorneys might consider settlement discussions, to the judge who may offer unsolicited views regarding the parties' respective points of vulnerability or the fair value of the case, to the judge who aggressively pursues settlement in *ex parte* sessions to which the parties may or may not have been asked to consent.

There is also, we believe, a wide range of views among those judges who do not aggressively pursue settlements, regarding *why* they do not do so. Particularly in the absence of clear legal authority to use some of the more aggressive settlement techniques, it is likely that some judges may regard such actions as unauthorized, or even unethical. We believe, however, that most of the judges who adopt a "hands-off" posture to settlements do so not as a result of legal or ethical misgivings, but instead for the simpler reason that they do not *like* to do so and do not see "brokering" or mediating as a part of the job description of a New York Supreme Court justice.

This, in turn, leads to one final observation as to the New York law (or lack of New York law) governing judicial encouragement of settlements. Apart from the two court rules authorizing court conferences in which settlement is an agenda item, and some very general (and vague) canons regarding judicial ethics, as discussed above, there are no codified rules regarding what a New York judge can or cannot do to settle a case. And, apart from some plainly distinguishable cases dealing with "inherent authority" to oversee the legal profession, there is little case precedent to guide us. Above and beyond this virtual lack of precedent defining the limits of a New York judge's powers to aggressively pursue a settlement by the means that have proven controversial in other jurisdictions, there is also an almost complete lack of authoritative direction on whether the pursuit of settlement is itself a legitimate, let alone central, judicial goal.

In this vein, consider two hypothetical Supreme Court justices whose courtrooms are across the hall from each other: Justice Armtwister and Justice Aloof. Justice Armtwister firmly believes that a bad settlement is better, both for the parties and for the taxpayers, than a good verdict. She is famous for her grueling *ex parte* conferences, conferences in which each side is successively and convincingly told why trial will likely end in disaster for them. And, while attorneys may from time to time grumble that they were coerced into settlement by vague yet effective suggestions as to the dire consequences that might follow from being "unreasonable," no one can deny that Justice Armtwister settles a very large number of cases.

By contrast, Justice Aloof will never mediate one of his cases, believing that the roles of mediator and trial judge are fundamentally incompatible. Even in cases that the judge firmly believes should be settled, he will typically do no more than offer that very same observation to the assembled attorneys, perhaps with the further suggestion that they might wish to consider out-of-court mediation conducted by one of the companies that provide such services.

The point is that, given the current state of the law in New York, there is little authority for the proposition that Justice Armtwister is wrong in conducting *ex parte* settlement conferences that involve the proverbial "modicum of arm twisting." There is likewise little authority for the proposition that Justice Aloof is wrong in declining to actively encourage settlements, although such may well be the view of the administrative judge of the county, and even of those attorneys who thought that their cases might have settled with a little "push" from the judge. Simply in terms of the governing rules and precedents, the two judges' diametrically opposed views on the appropriate use of judicial power to foster settlement are equally "right" – which merely underscores how little guidance the law provides.

Conclusion, and Some Recommendations

In her wonderfully written article that effectively served as our initial guide to the out-of-state landscape,

Professor Daisy Hurst Floyd concluded that the standards governing what a judge can and/or should do in promoting settlements were extremely vague. Nevertheless, she continued, the need for clear guidance is apparent, both to assure judges (and parties) that it was not of itself improper or unseemly for the court to proactively promote settlement, and to clearly indicate that certain essentially coercive methods were improper.[47] Although these observations were made almost a decade ago and primarily concerned the federal court system, they seem equally valid as applied to the New York courts in 2004. Beyond this, we would offer the following observations.

First, while some may extol an increase in settlements as a laudable goal, we do not subscribe to the view that a bad settlement is necessarily better than a good verdict. Indeed, just as the legal system lacks the resources to dispose of each case on the merits, and thus inevitably depends on the majority of cases settling, the system also depends on other cases providing the dispositions on the merits that are needed to set guidelines for such settlements.

Second, the question of whether judges should or should not aggressively promote settlement is, in a sense, pointless. It is, we believe, inevitable that some judges will aggressively seek settlements, that other judges will make little or any effort to effect settlement, and that still others will fall between those extremes. Regardless of whether the percentages are up or down, there have always been some "armtwisting" judges and some "aloof" judges and, unless and until human nature becomes standardized, neither species is likely to become extinct.

Third, while it may be pointless to mandate or preclude a "pro-active" pursuit of settlements, there should be, we believe, some guidance as to which procedures are permissible and which are not. Such standards are necessary not only to curb coercive practices, but also to provide positive assurance to judges who may shy away from permissible procedures out of a misguided but understandable concern that such conduct may later be criticized as violating the current amorphous standards.

Finally, in terms of what those standards should be and where the line should be drawn, we would emphasize two distinctions. One distinction, which is no doubt easier to state than to apply, is the distinction between persuasion and coercion. Although that boundary may sometimes be difficult to discern – particularly where a statement that was not intended to be a threat may be perceived as such when it comes from the individual who will be making all of the trial rulings in the case – it is nonetheless critical.

The second distinction, which is far easier to implement, is the difference between compelling the parties to discuss settlement, and compelling the parties to settle.[48] In our view, a court should be able to compel settlement discussions. Moreover, because such a discussion would be an empty charade (as well as a waste of time and money) if the persons discussing settlement had no authority to settle the matter, the court should, we believe, be granted express authority to direct the litigants and/or a representative of the litigant's insurer to be "present . . . or immediately available" in those instances in which the court deems the presence of such persons warranted. This, as has been noted, is the rule in Michigan. We submit that this one, modest change to the Uniform Rules governing conferences would provide, by itself, a very valuable tool to those judges who strive hard to resolve cases that seem amenable to settlement, but who sometimes find that their efforts are wasted because the only persons who actually have the power to settle are beyond the court's reach or hearing.

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1. 22 N.Y.C.R.R. § 202.12(a), (c)(4).
2. 22 N.Y.C.R.R. § 202.12(b).
3. 22 N.Y.C.R.R. § 202.26(a).
4. "To the extent practicable, pretrial conferences shall be held not less than 15 nor more than 45 days before trial is anticipated." 22 N.Y.C.R.R. § 202.26(b).
5. 22 N.Y.C.R.R. § 202.26(c)(3).
6. 22 N.Y.C.R.R. § 202.26(c)(6).
7. 22 N.Y.C.R.R. § 202.12(j).
8. 22 N.Y.C.R.R. § 202.12(b).
9. 22 N.Y.C.R.R. § 202.26(e).
10. *Saastomoinen v. Pagano*, 278 A.D.2d 218, 717 N.Y.S.2d 274 (2d Dep't 2000), *rev'g* 183 Misc. 2d 781, 704 N.Y.S.2d 796 (Sup. Ct., Nassau Co.).
11. Fed. R. Civ. P. 16.
12. Fed. R. Civ. P. 16(c).
13. Fed. R. Civ. P. 16(f). The referenced sanctions in Rule 37(b)(2)(B), (C) and (D) include "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence," "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party," and "an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination."
14. Michigan Court Rules, Rule 2.401(E) (hereinafter "MCR"). In our view, such insistence upon the presence of the trial attorney is (1) unnecessary (since an attorney who is "fully familiar" and who has authority to settle is surely sufficient) and (2) infeasible (inasmuch as, in many if not most offices, the attorney who will try the case is the trial attorney who happens to be free to do so when the case is called to trial). More than this, such gloss might even be counter-productive.

    Regarding the last observation, the basic point is that some attorneys are good at trying cases, others are good at negotiating and settling cases, and the fact that an attorney is accomplished in the first skill does not necessarily mean that the attorney is, by temperament or other-

wise, suited to the latter. Indeed, there are certain "bulldog" trial attorneys, including some very renowned trial attorneys, who are famous for never settling cases. They instead rely on their less argumentative partners to negotiate and settle those cases that can be settled, and the "big name" trial attorney then comes into the case only after it becomes plain that settlement will not occur. In such instances, the very last thing that the judge or the adversary should want is the presence of the trial attorney, for, in some instances, such would effectively guarantee that the case will not settle.

15. MCR 2.401(F).
16. *Id.*
17. MCR 2.401.
18. *See, e.g.*, *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) ("That courts have inherent powers – powers vested in the courts upon their creation . . . and not derived from any statute . . . is not disputed. Inherent power has been frequently invoked by the courts to regulate the conduct of the members of the bar as well as to provide tools for docket management. Courts have thus relied on the concept of inherent power to impose several species of sanctions on those who abuse the judicial process").
19. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Court and the Structural Constitution*, 86 Iowa L. Rev. 735, 760 (2001).
20. 370 U.S. 626 (1962).
21. *Id.* at 630–31. *See* James A. Wall, Jr. et al., *Judicial Participation in Settlement*, 1984 J. Disp. Resol. 25 ("A court's inherent power is grounded in necessity; it arises from the court's need to issue orders necessary for it to function").
22. *See Evans v. Jeff D.*, 475 U.S. 717, 726, *reh'g denied*, 476 U.S. 1179 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed"); *Goss Graphics Sys. Inc. v. DEV Indus. Inc.*, 267 F.3d 624, 627–28 (7th Cir. 2001) (where judge dismissed a suit due to plaintiff's perceived failure to negotiate in good faith. "Federal courts do have authority to require parties to engage in settlement negotiations . . . but they have no authority to force a settlement. . . . If parties want to duke it out, that's their privilege").
23. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (where judge recommended weeks prior to trial that a malpractice case be settled for $20,000 to $30,000, where carrier then waited until the trial itself to offer the $20,000 which settled the case, and where the district judge then sanctioned the defendant $2,480; "Although the law favors the voluntary settlement of civil suits . . . it does not sanction efforts by trial judges to effect settlements through coercion"); *Goss Graphics Sys. Inc.*, 267 F.3d at 627 ("the district judge's annoyance at the parties' failure to settle was not a valid ground for killing the plaintiff's suit").
24. *See Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 593, 595, 596 (8th Cir. 2001) (employer against which employment discrimination action had been brought "did not file the memorandum that was required to be filed at least seven days before the first ADR conference" and then appeared by its "outside counsel" "and a corporate representative of appellant who had no independent knowledge of the facts of the case and had permission to settle only up to $500," and counsel also had advised person with authority not to attend; District Court sanctioned client and counsel $1,390 each, and its order was affirmed); *Pitman v. Brinker Int'l, Inc.*, 216 F.R.D. 481, 485, 486 (D. Ariz. 2003) (defendant was sanctioned when, after having been ordered to appear at the settlement conference with someone who had "full and complete authority to discuss and settle the case," its only representative at the conference was a biased corporate employee with extremely limited authority to settle the case; the Court inferred that the defendant had decided that it was cheaper to violate the Court's order rather than to have a key person attend the conference in person. "Such an unapproved settlement tactic is not negotiating in good faith"); *Lockhart v. Patel*, 115 F.R.D. 44, 45 (E.D. Ky. 1987) (in medical malpractice action, where trial judge instructed defense counsel to bring a representative of the insurance company to the settlement conference and "not to send some flunky who has no authority to negotiate," and where defendant instead appeared with an adjustor who "advised the court that her instructions from the officials at the home office were to reiterate the offer previously made and not to bother to call them back if it were not accepted"; "the court forthwith struck the pleadings of the defendant and declared him in default"; "The drafters of amended Rule 16 knew of the docket pressures to which our courts are subject, and knew that to process 400 cases you have to settle at least 350").
25. *See Kamaunu v. Kaaea*, 99 Haw. 503, 506, 57 P.3d 428, 431 (Haw. 2002) (sanction was improperly imposed; irrespective of whether defendant could be sanctioned for appearing at settlement conference without authority to negotiate, "resolution of this question is irrelevant because the record clearly demonstrates that the trial court's imposition of sanctions was premised on Defendant's failure to make a monetary settlement offer and on his firm intention to go to trial, not on a failure to ensure the presence of a representative with complete settlement authority at the settlement conference"); *see also Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988) (where district judge ordered defendant to submit a "bonafide" pretrial settlement offer or be subject to sanctions and costs, where defendant failed to offer any settlement until the trial itself, where case then settled on the third day of trial for $85,000, and where trial court *sua sponte* held the party-defendant in criminal contempt for the prior failure to submit a bona fide settlement offer; "No one may be held in contempt for violating a court order unless the order is clear and specific and leaves no uncertainty in the minds of those to whom it is addressed. . . . The phrase 'bonafide offer of settlement' is . . . vague and imprecise").
26. Judge Baer, of the Southern District of New York, in fact allows that, in his own conferences, "[t]here may, however, be a modicum of arm twisting . . . [in] an effort to convince one side or the other that a proposed resolution is a fair one." Hon. Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. Ann. Surv. Am. L. 141, at 146 (2001). But, while the judge presumably would not characterize the process as coercive, the simple fact is that when "arm twisting" occurs, someone's arm has invariably been twisted.
27. Daisy Hurst Floyd, *Can The Judge Do That? – The Need for a Clearer Role in Settlement*, 26 Ariz. St. L.J. 45, 90 (1995) ("Judges must be willing to struggle with the fact that the judge's position, as opposed to the particular action of the judge, may have coercive effect. If judges are truly interested in avoiding coercion, more attention needs to be given to this aspect of the judge-litigant relationship and to the unintentionally coercive effect of certain techniques of judicial involvement in settlement").

28. 932 F.2d 1397 (11th Cir. 1991).
29. *Id*. at 1404.
30. *Id*. at 1407.
31. The *Novak* Court did not expressly consider what would occur if the insurer's obstinate failure to participate, a failure that the insured may have been powerless to influence, resulted in a judgment that *exceeded* the coverage. To be sure, one might theorize that the insured might, in such instance, have legal basis to coverage beyond the policy limits, but this seems an unsatisfying answer inasmuch as (1) the insured might have to wait months or even years before obtaining full indemnity, and (2) the imposition of judgment that might not have been warranted on the merits might also have adverse consequences of a non-monetary nature.
32. *In re Novak*, 932 F.2d at 1408 (emphasis added).
33. *Id*.
34. *Lockhart v. Patel*, 115 F.R.D. 44, 45 (E.D. Ky. 1987).
35. 22 N.Y.C.R.R. § 100.1.
36. Susan M. Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 Ohio St. J. on Disp. Resol. 81, 89–90 (1988).
37. 22 N.Y.C.R.R. §§ 100.2, 100.3. Canon 2 states, *inter alia*, that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

    The current, New York version of Canon 3 states, *inter alia*, that "[e]x parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond."
38. Gabriel, *supra* note 36.
39. *Id*. at 89 (emphasis added).
40. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 Hastings L.J. 1, 59–60 (1992).
41. *Stortecky v. Mazzone*, 85 N.Y.2d 518, 626 N.Y.S.2d 733 (1995); *In re Wong*, 275 A.D.2d 1, 710 N.Y.S.2d 57 (1st Dep't 2000).
42. *State v. Philip Morris Inc.*, 308 A.D.2d 57, 58, 763 N.Y.S.2d 32, 40 (1st Dep't 2003), *leave denied*, 1 N.Y.3d 502 (2003).
43. *First Nat'l Bank v. Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875 (1977); *Gair v. Peck*, 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1960).
44. Judiciary Law § 2-b; *Siemens & Halske, GmbH v. Gres*, 37 A.D.2d 768, 324 N.Y.S.2d 639 (1st Dep't 1971).
45. *Standard Fruit & S.S. Co. v. Waterfront Comm'n of N.Y. Harbor*, 43 N.Y.2d 11, 15–16, 400 N.Y.S.2d 732 (1977).
46. *See Saastomoinen v. Pagano*, 278 A.D.2d 218, 717 N.Y.S.2d 274 (2d Dep't 2000), *rev'g* 183 Misc. 2d 781, 704 N.Y.S.2d 796 (Sup. Ct., Nassau Co.).
47. Floyd, *supra* note 27 at 45.
48. *See G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) ("We do not view 'authority to settle' as a requirement that corporate representatives must come to court willing to settle on someone else's terms, but only that they come to court in order to consider the possibility of settlement").

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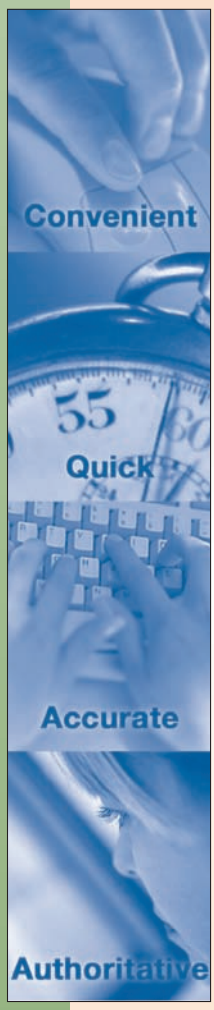

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2003 Update on Issues Affecting Accidents Involving Uninsured And/Or Underinsured Motorists

BY JONATHAN A. DACHS

This eleventh consecutive annual review[1] of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) decisions by New York courts during the past calendar year provides a digest of another busy year in this ever-changing, highly complex area of the law.

GENERAL ISSUES

Insured Persons

"Named Insured" The term "named insured" applies only to persons or entities listed on the declarations page of the policy. Where a policy is taken out on a corporate or government-owned vehicle, and the policyholder is a legal entity, rather than an individual, a question may arise about who is the "named insured."

In *Travelers Indemnity Co. of America v. Venito*,[2] the court held that the respondent, an officer of the named insured corporation, could not make claim for SUM benefits under a policy issued to the corporation because he was not listed as a "named insured" and did not meet the definition of that term as defined in the policy.[3]

In *State Farm Mutual Automobile Ins. Co. v. Russell*,[4] the claimant attempted to establish that he was a family member residing with the "named insured" under the policy issued by the petitioner and, therefore, entitled to seek SUM benefits. The evidence submitted – an "Auto Renewal" form the petitioner sent to the insured – did not say the relative was an additional insured or even an additional driver. Rather, the form said it was for informational purposes only and that the relative was a licensed driver listed in the policy. In the view of the court, "this was insufficient to warrant a determination that the petition should have been dismissed, and, in fact, actually created a factual question as to [the relative's] status" and, thus, as to the claimant's status as well, since his status was directly dependent upon the relative's status.

Resident The definition of an "insured" under the SUM endorsement includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

In *GEICO v. Paolicelli*,[5] the court noted that "the standard for determining residency for purposes of insurance coverage 'requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain.'" The court also noted that usually, the issue of residency is a question of fact to be determined at a hearing. In this case, the defendant's father testified that the defendant left the father's residence and moved in with his girlfriend. Although the defendant maintained that he was living at both residences on a part-time basis at the time of the accident, the court found such testimony to be "equivocal with respect to the amount of time that he lived at his father's residence." In addition, there was no documentary evidence to support the claim that the defendant still resided with his father, or that he had intended to remain in his father's household at the time of the accident. The Appellate Division reversed the decision of the trial court and found that the defendant was not a covered person under the terms of his father's automobile insurance policy. Therefore, GEICO was not obliged to defend or indemnify the defendant in the underlying lawsuit.

In *Lindner v. Wilkerson*,[6] the 25-year-old defendant was living with his then-girlfriend at the time of his au-

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tomobile accident. He returned to his girlfriend's house after the accident. When he was not living with his girlfriend, he lived in hotels upstate, where he was put up by his employer depending upon where his job happened to be located. He testified at his deposition that he had moved out of the house where he grew up, which was owned by his grandmother, when he was in high school, because he did not want to abide by his grandmother's rules. His mother, aunt and grandmother testified that he was in that house only occasionally in 1999 (the year of the accident) and that he had removed most of his possessions from that house, leaving behind just a television and some clothing. The defendant testified that he did not have a permanent address but used his grandmother's address on the accident report, police report and hospital report, and received mail at that address. The court held that the defendant was *not* a resident of his grandmother's house and, therefore, was not a covered person under a policy issued to his aunt, who resided with the defendant's grandmother in that house.

"Use or Operation"/Accidents The UM/SUM endorsements provide benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle.

In *National Grange Mutual Ins. Co. v. Vitebskaya*,[7] the court held that when "loss is the result of an intentional act, there is no coverage," and that "an intentional act may void coverage even if not committed by the claimant." Thus, even though the claimant may be an innocent victim of an intentional or fraudulent collision, the SUM insurer will not be obliged to provide benefits if the collision was the result of an intentional act, rather than an accident.

In *GEICO v. Shaulskaya*,[8] the respondent's claim for SUM benefits under a policy issued to the owner of the vehicle in which he was a passenger was denied because it was established that the collision was "a deliberate occurrence perpetrated in furtherance of an insurance fraud scheme." The court held that the disclaimers by both the insurer of the host vehicle and the insurer of the other vehicle involved in the collision were valid "regardless of whether the intentional collision was motivated by fraud or malice."[9]

In *Farm Family Casualty Ins. Co. v. Trapani*,[10] a driver lost control of her car and struck a utility pole. The impact moved the pole, causing its power lines to short out and rain sparks and hot pieces of wire onto the claimant, a 75-year-old woman who was standing in her garden along the roadway. In attempting to run away from this hazard, the claimant fell and injured herself. After settling with the driver's insurer for its policy limits, the claimant sought additional benefits under her SUM policy. The insurer denied the claim on the basis that the claimant's injuries did not arise out of the use, maintenance or operation of a motor vehicle. The court disagreed, however, holding that "the determinative issue here is whether [the driver's] car was a proximate cause of [the claimant's] injuries." Here, in the court's view, the impact of the car with the utility pole

> was not a cause so remote in either time or space from [the claimant's] injuries "as to preclude recovery as a matter of law," and neither the shorting powerlines nor [the claimant's] flight were so extraordinary or unforeseeable that they should "be viewed as superceding acts which, as a matter of law, break the causal link."[11]

Thus, the court found the proximate causal nexus to allow the claim to proceed.

In *Empire Ins. Co. v. Schliessman*,[12] the court held that injuries sustained by the insured's tenant while he was trying to help his 4-year-old son off of the insured's truck did not arise from "use or operation" of the truck, absent allegations that the truck itself was used negligently, or that the condition of the truck contributed in any way to the accident. Rather, the truck was merely the location of, and incidental to, the accident. "'[N]ot every injury occurring in or near a motor vehicle is covered by the phrase "use or operation." The accident must be connected with the use of an automobile *qua* automobile.'"[13]

Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions.[14]

The interpretation of the phrase "as soon as practicable" was a hot topic once again in 2003.

In *Merchants Mutual Ins. Co. v. Falisi*,[15] the Court of Appeals held that notice should be liberally construed in the claimant's favor.[16] Thus, in *Falisi*, the Court held that the requirement that claimants provide their insurer with timely notice of an uninsured motorist claim was met by the submission of a form given to the insurer 11 days after the accident, which detailed the claim. That form listed a numerical code indicating that the offending vehicle was insured under the Assigned Risk Plan. That form, however, also indicated "NONE" in response to the inquiry regarding the insurance company of the other motorist.

In *C.C.R. Realty of Dutchess, Inc. v. New York Central Mutual Fire Ins. Co.*,[17] the Second Department stated that the duty to give notice arises "'when, from the information available relative to the incident, an insured could glean a reasonable possibility of the policy's involvement.'" The court added that "knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal."

In *Banks v. American Manufacturers Mutual Ins. Co.*,[18] the claimant/insured was informed of the tortfeasor's bodily injury liability limits 25 months after the accident, and 16 months after the personal injury action against the tortfeasor was commenced. Claimant/insured first notified the SUM carrier of his claim seven days later. The court held that

> it cannot be said that this delay establishes as a matter of law that plaintiff failed to give notice "[a]s soon as practicable." In the underinsurance context, the phrase "as soon as practicable" is construed to require the insured to "give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured" (*Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 N.Y.2d 487, 495). Moreover, "underinsurance analyses are intensely fact specific and therefore particularly well suited for determinations of timeliness of notice on a case-by-case basis" (*Id.* at 404-405).[19]

Thus, the court held that "fact-finding proceedings are required to determine whether the delay in plaintiff's ascertaining the limits of the tortfeasor's coverage was due to any lack of diligence on his part."

It is also interesting to note that in *Banks*, the court specifically rejected the contention that the provision in the first-party PIP section of the policy requiring that notice be given no more than 90 days after the accident could be relied upon to defeat the SUM claim, because "such provision is not part of the SUM endorsement, and therefore does not apply to SUM coverage."

In *Hermitage Ins. Co. v. Alomar*,[20] the claimant was injured in August 2000 while a passenger on a motorcycle operated by the petitioner's insured. The insurer did not learn of the personal injury action commenced by the claimant against the motorcycle driver until January 2001, when it received a copy of a motion for default made by the claimant. The insurer immediately sent a letter to the motorcycle driver stating that it was providing "no coverage" for the accident "because of multiple breaches of the policy provisions pertaining to timely notice." This disclaimer caused the claimant to seek UM benefits from the MVAIC, but in June 2001 the MVAIC rejected the claim on the ground that the motorcycle driver's policy provided SUM coverage that was triggered by the insurer's disclaimer of coverage for lack of cooperation. It was only then that the claimant, who was not the owner of the policy and, therefore, had no opportunity to discover its contents because of the motorcycle driver's default in the personal injury action, could have reasonably known of the existence of SUM coverage in that policy. Thus, the court held that the claimant's service of a Demand for Arbitration on the insurer in June 2001, immediately after the MVAIC's denial of UM benefits, was timely and proper, as it was undertaken "as soon as practicable."

In *Murphy v. New York Central Mutual Fire Ins. Co.*,[21] the plaintiff did not seek medical attention on the date of the accident. A few days later, she began to suffer a tingling in her arm and a facial droop. She eventually sought medical attention, and five months after the accident an MRI revealed bone spurs with herniated cervical discs. She claimed that her medical providers did not tell her that her problems were related to the accident. She did not miss any time from work until 14 months after the accident. Her first contact with an attorney was 12 months after the accident, and that contact was motivated by concerns about no-fault payments. Her condition deteriorated significantly 14 months after the accident, to the point that her doctor characterized her as "totally disabled." She commenced a lawsuit against the offending driver a few weeks later, and notified the SUM carrier of her claim three days thereafter. The court found a factual issue regarding whether the plaintiff was reasonably aware, prior to 14 months after the accident, that she sustained a "serious injury" causally related to the accident.

In *State Farm Mutual Automobile Ins. Co. v. Gallo*,[22] the claimant/insured first learned of the limits of the tortfeasor's policy 11 months after the accident. He informed the SUM insurer of his intent to seek SUM benefits within 15 days thereafter. Under the circumstances, the court held that an issue of fact existed regarding the timeliness of the notice, and the claimant/insured's "due diligence" in ascertaining the extent of his injuries and the liability limits of the tortfeasor's policy. The court remanded the case to the Supreme Court for a hearing on those issues.

By contrast, in *State Farm Mutual Automobile Ins. Co. v. King*,[23] the court held that where there was no proof of compliance with the policy provision requiring a sworn notice of claim, or any excuse for such non-compliance, there was no coverage and no basis for any framed issue hearing.

In *Medina v. State Farm Mutual Automobile Ins. Co.*,[24] the court held that the plaintiff established that a 27-month delay in notifying the defendant of her SUM claim was reasonable and that she acted with due diligence in ascertaining the medical facts underlying her SUM claim. Evidence established that she was initially

diagnosed with a neck sprain and thereafter underwent two arthroscopic surgeries on her shoulder; that she was diagnosed with a herniated disc seven months after the accident, but even then, her doctors expected that, with physical therapy, she would make a full recovery. It was not until 12 months later that her chiropractor told her that her condition had become chronic and that full recovery was unlikely. She gave notice shortly thereafter.

In *New York Central Mutual Fire Ins. Co. v. Szymaszek*,[25] the court held that a delay of more than three years in giving notice of a SUM claim was unreasonable as a matter of law. The claimant not only failed to demonstrate a reasonable excuse for the delay in giving notice, but also failed to establish due diligence in ascertaining the insurance coverage of the offending vehicle.

"While a party is entitled to a rebuttable presumption of receipt based upon proof of regular mailing, the respondent failed to submit sufficient evidence attesting to the mailing of the letter . . ."

In *State Farm Mutual Automobile Ins. Co. v. Cybulski*,[26] the court held that the claimant failed to meet his burden of establishing a reasonable excuse for the more than two-year delay in giving notice of his SUM claim where "[t]he extent of [claimant's] injury did not change from the time of the accident until the time when [claimant] provided Petitioner with notice of the SUM claim." The court also held that the claimant did not demonstrate that he acted with "due diligence" in attempting to ascertain the insurance coverage of the tortfeasor, where the record established that he retained an attorney one month after the accident, but did not reflect the efforts of that attorney, if any, to obtain the necessary information.[27]

In *Phoenix Ins. Co. v. Tasch*,[28] the SUM insurer denied receipt of the claimant/insured's notice of intent to file an underinsured motorist claim. In holding that the claimant/insured "failed to establish that he provided timely written notice of the underinsured motorist claim," the court stated: "While a party is entitled to a rebuttable presumption of receipt based upon proof of regular mailing, the respondent failed to submit sufficient evidence attesting to the mailing of the letter . . . , or to the existence of an office practice geared to ensure the proper addressing or mailing of this letter."[29] In *Varella v. American Transit Ins. Co.*,[30] however, the plaintiff submitted an affidavit of service by mail, and the defendant's claims manager did not deny receiving the papers. The court held that the plaintiff's affidavit of service raised a presumption that a proper mailing occurred, and the defendant's papers failed to raise an issue of fact regarding service.

In *Tri-State Consumer Ins. Co. v. Yaskin*,[31] the court restated the general rule that "[a]n insured's reasonable, good faith belief in nonliability may excuse a delay in notifying the insurer of an accident."[32]

Notice of Legal Action

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition precedent to coverage, that the insured or his or her legal representative "immediately" forward to the insurer a copy of the summons and complaint and/or other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In 2002, in *Brandon v. Nationwide Mutual Ins. Co.*,[33] the Court of Appeals held, for the first time, that the insurer must prove that it has been prejudiced by the breach of the Notice of Legal Action condition. This new rule is in contradistinction to the "no prejudice" rule applicable to other types of required notice.[34]

In *Mark A. Varrichio & Assocs. v. Chicago Ins. Co.*,[35] the Second Circuit Court of Appeals examined the scope and effect of *Brandon* – specifically, whether its application was limited to notice of suit provisions in SUM policies, or whether it applied to all notice of suit provisions and "marks the death of New York's traditional no-prejudice rule for notice of suit provisions where there has been a timely notice of claim." The Second Circuit stated that if it were to decide the issue, it would likely conclude "that the general principles that the New York Court of Appeals adopted in *Brandon* suggest that the court would not apply the no-prejudice rule" in the situation where, in a non-SUM contest, the insured complied with the notice of claim provision, but not the notice of legal action provision. However, because the court could not be sure whether a shift to a general prejudice requirement is under way in New York, it certified the following question to the New York Court of Appeals:

> Where an insured has already complied with a policy's notice of claim requirement, does New York require the insurer to demonstrate prejudice in order to disclaim coverage based on the insured's failure to comply with the policy's notice of claim requirement?

This certified question was accepted by the Court of Appeals in 2002,[36] but was subsequently withdrawn[37] because the case was settled by the parties. Thus, this important certified question was never answered.

Discovery The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *GEICO v. Rosenfarb*,[38] the Second Department held that the lower court had improvidently exercised its discretion in granting a temporary stay of arbitration for the purpose of allowing discovery where the record indicated that "the insurance carrier had ample time to seek discovery" but "unjustifiably failed to do so in that time." The same result was obtained in *New York Central Mutual Fire Ins. Co. v Gershovich*.[39]

On the other hand, in *GEICO v. Annamanthadoo*,[40] the Second Department held that the lower court "should have granted the petitioner's request for the disclosure required by the terms of [the] policy."

Once a* prima facie *case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.

Petitions to Stay Arbitration

Arbitration vs. Litigation In *Mahmood v. Fidelity & Guaranty Ins. Co.*,[41] the Second Department, following up on the Fourth Department's decision last year in *Cacciatore v. New York Central Mutual Fire Ins. Co.*,[42] held that under the terms of the SUM endorsement, if the limits of UM coverage are $25,000/$50,000, then any disagreement with respect to the value of the claim "shall" be settled by arbitration. Thus, in such cases, arbitration of the dispute is mandatory.

Filing and Service CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." It is, of course, well-established that the failure to make a timely application to stay arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding.

In *Eagle Ins. Co. v. Pierre-Louis*,[43] the court noted that "[t]he 20-day period in which to apply for a stay of arbitration pursuant to CPLR 7503(c) is measured from the date of receipt of the demand for arbitration."

In *American Transit Ins. Co. v. Carillo*,[44] the court found:

> Jurisdiction over a nonparty to a proceeding to stay arbitration cannot be obtained by the service upon it of the notice of petition and petition by either ordinary mail or certified mail, whether or not such service is authorized by a court order. . . . Once added to the proceeding by the court as an additional respondent, proper service could only [be] effectuated . . . by court-ordered service of a supplemental notice of petition, and a supplemental petition, pursuant to CPLR 1003.[45]

CPLR 7503(c) provides that a Demand for Arbitration or a Notice of Intention to Arbitrate "shall be served in the same manner as a Summons or by registered or certified mail, return receipt requested." In *Blue Ridge Ins. Co. v. Russo*,[46] the claimant served his Demand for Arbitration by regular mail, rather than by registered or certified mail. The petitioner/insurer's contention that the manner of service rendered the demand a nullity was rejected by the court, which held, citing a 1983 decision by the Court of Appeals, that the service did not render the demand a nullity and that the matter could proceed notwithstanding the defect in service.[47]

Burden of Proof An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary. So held the Second Department in *Lumbermens Mutual Casualty Co. v. Quintero*[48] and *CGU Ins. Co. v. Greatheart*.[49]

In *Eagle Ins. Co. v. Kapelevich*,[50] the court held that the petitioner/insurer could establish a *prima facie* case of coverage for the offending vehicle by submitting a portion of a New York State Department of Motor Vehicles Registration Expansion Record showing that such coverage existed for the pertinent time period.[51]

In *Allstate Ins. Co. v. Anderson*,[52] the court held that Allstate made a *prima facie* showing that the offending vehicle was insured on the date of the accident through the submission of the police report and DMV registration records indicating such coverage. In response, the claimant/respondent submitted a copy of a disclaimer letter from the purported insurer. The court held that the disclaimer letter "merely raised issues of fact as to whether [the insured] timely and validly disclaimed coverage of the offending vehicle [citations omitted]." Thus, it held that the insurer "must be joined as party respondent to the proceeding" and, thus, remitted the matter to the Supreme Court for an evidentiary hearing to resolve the issues.

In *American Alliance Ins. Co. v. Eagle Ins. Co.*,[53] an officer of the agent and underwriter for Eagle Insurance

Company testified in detail about the cancellation procedures it followed in terminating a policy for non-payment. This witness established that he had the requisite knowledge to testify with authority regarding those procedures. This testimony was held to be sufficient to prove a proper cancellation in accordance with Ins. Law § 3426(c)(1).

In *Eagle Ins. Co. v. Villegas*,[54] the respondent insurer opposed the Petition to Stay Arbitration by asserting that it had disclaimed coverage due to lack of cooperation by its insured. The court held that this disclaimer raised triable issues as to the propriety and effectiveness of the disclaimer, and that, therefore, the petition should not have been granted without first joining the Respondent insurer, the owner and operator of the vehicle and the insurer for the operator as necessary parties, without affording each of those parties the opportunity to submit evidence, and without conducting an evidentiary hearing in order to determine the factual basis and validity of the disclaimer.[55]

Arbitration Awards

Issues for the Arbitrator In *GEICO v. Sherman*,[56] the court noted that in a SUM arbitration, the arbitrator may properly determine the issues of liability and damages.

In *AIU Ins. Co. v. Cabreja*,[57] the court held that where the driver or owner of the vehicle identified by the claimant denies any involvement in the accident, "there is an obvious conflict as to whether the offending vehicle was properly identified," which poses an issue for judicial (not arbitral) resolution – *i.e.*, a framed issue hearing.

In *National Grange Mutual Ins. Co. v. Vitebskaya*,[58] the court stated, "If there is at least one arbitrable issue, arbitration should proceed."

Scope of Review In *State Farm Mutual Automobile Ins. Co. v. Arabov*,[59] the court noted, "'It is well settled that where a party who has participated in arbitration seeks to vacate the award, vacatur may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived.'"[60]

In *Seligman v. Allstate Ins. Co.*,[61] the court granted the claimant/insured's motion to vacate an arbitration award against him on the basis of the arbitrator's failure to disclose a 20-year employment history with the respondent insurer, even though there was a 25-year gap between the arbitrator's employment with the insurer and the date of the arbitration. As noted by the court,

> In order to protect the integrity of the arbitral process the arbitrator and the American Arbitration Association [AAA] had a duty to disclose any facts within their knowledge which might in any way support an inference of bias. An arbitrator's failure to disclose any information that may reasonably support an inference of bias may be grounds to vacate the arbitration award so long as the relationship was not a trivial one.[62]

Moreover, "[a]n existing or past attorney-client relationship requires disclosure in order to afford the parties the opportunity to make an independent judgment as to whether the past relationship should serve as a basis to challenge the arbitrator. In this court's view a twenty year relationship is not so trivial as to preclude disclosure even with the twenty-five year gap."[63]

In *GEICO v. Sherman*, the court held that the arbitrator did not exceed his authority or commit misconduct in allowing the insurer to call two witnesses despite its failure to comply with the notice requirements of the AAA rules (the "15-day" rule). The court noted, "Although it may have been better if the arbitrator had not allowed [the witnesses] to testify at the hearing . . . , the [respondents] failed to prove by clear and convincing evidence that doing so constituted misconduct within the meaning of CPLR 7511(b)(1)(i)."[64] Rather, any error in allowing the witnesses to testify was deemed by the court to be "harmless" because it was obvious that the arbitrator's decision was not based upon the testimony of those witnesses, but, rather, upon the Respondent's testimony. On the other hand, in *Marcano v. Allstate Ins. Co.*,[65] the court held that where the Claimant neglected to comply with court-ordered discovery by failing to appear for a physical examination and/or to provide the insurer with documents and authorizations, and also failed to comply with the AAA's 15-day rule for the submission of evidence, the arbitrator's award dismissing the claim was "supported by the evidence, not arbitrary and capricious and not in excess of the arbitrator's powers."

In *New York Central Mutual Fire Ins. Co. v. Pinckney*,[66] the arbitrator awarded the respondent $40,000 in an underinsured motorist arbitration. Thereafter, in response to a subsequent letter from the respondent's attorney, the arbitrator amended the initial award by increasing the award to $65,000. The court rejected that amendment and increase, noting that there was no support for the respondent's contention that there had been a miscalculation of figures in the initial award. The court further noted that there was "no other valid basis for amending the award," and that the petitioner had not been afforded its due process right to be heard in opposition to the respondent's request for modification.

Res Judicata/Collateral Estoppel In *Searchwell v. L.G.A. Transportation, Inc.*,[67] the court rejected the claimant's contention that because the arbitrator awarded less than the full available amount (there,

$10,000), the award must be presumed to constitute her total recovery for non-economic loss, and she should be barred from seeking any additional recovery from joint-tortfeasors for the same injuries. Although case law has established that where an arbitrator awards less than the policy amount, "such award must be considered, *prima facie*, to be the total damages due for noneconomic loss" unless the arbitrator indicates that it is limited to the damages caused by the uninsured vehicle.[68] The court noted that "the language of the arbitration award in this case reflected an intention to limit damages to the uninsured vehicle's apportioned share of liability." Thus, there was no bar to the pursuit of additional damages by the claimant. The court also noted that "since the language of the award does not indicate that it was intended to represent the total compensation to which the plaintiff is entitled for her injuries, it cannot be accorded preclusive effect under the doctrines of res judicata and collateral estoppel."

Interest on Arbitration Award In *Church Mutual Ins. Co. v. Kleingardner*,[69] the court noted, "Upon confirmation of an arbitration award, interest should be provided from the date of the award." The court added that "a party may move to confirm an arbitration award despite the fact that payment has been tendered by the respondent [citations omitted]. However, interest in such an action is limited to the period of time from the arbitrator's award to the tender of payment."

Statute of Limitations In *Allstate Ins. Co. v. Venezia*,[70] the court reminded that the statute of limitations applicable to UM/SUM claims is the six-year contract statute of limitations.

UNINSURED MOTORIST ISSUES

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. L. § 3420(d))

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the State of New York.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured. However, where the insured is the first to notify the insurer, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer.[71]

In *GEICO v. Moreno*,[72] the court noted, "While [the insurer] may have properly disclaimed coverage as to the owner of [the] vehicle, the scope of the policy's coverage extended to permissive users of the vehicle. Since the [insurer] never properly disclaimed coverage as to the driver of the offending vehicle, coverage for the vehicle existed. . . ."

In *A.J. McNulty & Co., Inc. v. Lloyds of London*,[73] the court noted that "the timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage." This is so even where the insured has, in the first instance, failed to give timely notice of the claim or the underlying accident.[74]

In *Uptown Whole Foods, Inc. v. Liberty Mutual Fire Ins. Co.*,[75] the court held that a 57-day delay in disclaiming was unreasonable as a matter of law where "the basis alleged for the disclaimer [late notice] was obvious on the face of the summons and complaint, affidavit of service, and the order granting the motion for leave to enter judgment on default . . . ." Further, the court rejected the insurer's attempt to justify its delay on the ground that it had to investigate the claim, because it found that the investigation was "unrelated to the disclaimer based on late notice."

In *Varella v. American Transit Ins. Co.*,[76] the court held that a delay of more than three months in disclaiming on the ground of late notice was unreasonable as a matter of law.[77]

In *Lehrer McGovern Bovis, Inc. v. Investors Underwriting Managers, Inc.*,[78] the court held that the insurer's failure to disclaim liability insurance coverage for two months after the occurrence where the plaintiff failed to directly notify the insurer of the occurrence, as required by the policy, and the plaintiff was aware that the insurer had already timely declined the claim by the named insured, was not unreasonable. In *Travelers Ins. Co. v. Volmar Construction Co., Inc.*,[79] the court held that a 14-day delay after the insurer became aware of the pertinent facts was not unreasonable.

In *Peters v. State Farm Fire & Casualty Co.*,[80] the Court of Appeals held that where the insurer first learned of a claim that evoked its exclusion from coverage for bodily injury which is "either expected or intended by an insured" or "which is the result of willful and malicious acts of an insured," in January 1992, issued a reservation of rights letter in February 1992, and concluded its investigation and disclaimed coverage on April 9, 1992, that disclaimer was timely.

In *New York University v. Jetco Contracting Corp.*,[81] the Second Circuit Court of Appeals stated:

> Under New York Law, it is clear that insurers are afforded the opportunity to investigate an insured's

> claim in order to determine whether coverage is appropriate. New York courts accordingly have found that an insurer's general need to conduct such investigations in a thorough manner constitutes a sufficient reason for delayed notification.
>
> Courts have also concluded that notification delays are reasonable when an external factor beyond the insurer's control unexpectedly interferes with the insurers' ability to investigate the claim in a timely fashion.[82]
>
> * * *
>
> By contrast, courts have deemed insurers' explanations for delayed notification insufficient where the basis for denying coverage was or should have been readily apparent to the insurer even before the onset of the delay.[83]
>
> * * *
>
> [T]he New York Court of Appeals has held that unexcused delays of 60 days or more are unreasonable as a matter of law. There remains some ambiguity, however, as to whether the unreasonableness of a delay as a matter of law is gauged from the length of the delay, or by the lack of explanation by the insurer, or by both.
>
> New York courts seem to be in general agreement that a delay in notification by an insurer is unreasonable as a matter of law when the delay is both two months or longer *and* unexplained.
>
> Yet, some courts have interpreted *Hartford* as indicating that even a delay of *less than* two months, if unexplained or unpersuasively explained, can be unreasonable as a matter of law.[84]

Noting the significance of these issues and their likely recurrence, the Second Circuit certified the following two questions to the New York Court of Appeals:

> 1. Under N.Y. Ins. Law § 3420(d), may an insurer who has discovered grounds for denying coverage wait to notify the insured of denial of coverage until after the insurer has conducted an investigation into alternate, third-party sources of insurance benefitting the insured, although the existence or non-existence of alternate insurance sources is not a factor in the insurer's decision to deny coverage?
>
> 2. If an investigation into alternate sources of insurance is not a proper basis for delayed notification under N.Y. Ins. Law § 3420(d), is an unexcused delay in notification of 48 days unreasonable as a matter of law under § 3420(d)?[85]

The Court of Appeals accepted those certified questions.[86]

On November 20, 2003, the Court of Appeals held in *First Financial Ins. Co. v. Jetco Contracting Corp.*,[87] that an unexcused or unexplained delay of 48 days in giving written notice of disclaimer is unreasonable as a matter of law. As explained by the Court of Appeals, "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage," and "an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay." Moreover, "[a]n insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay. While Insurance Law § 3420(d) speaks only of giving notice 'as soon as reasonably possible,' investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer." However, "[w]e cannot accept . . . that delay simply to explore other sources of insurance for the policyholder – an excuse unrelated to the insurer's own decision to disclaim – is permissible."

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Ins. Law § 3420(d), a distinction must be made between (1) policies that contain no provisions extending coverage to the subject loss, and (2) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Ins. Law § 3420(d) may be dispensed with. In *Lumbermens Mutual Casualty Co. v. Quintero*,[88] the court noted: "An insurer has no obligation to timely disclaim in those situations in which coverage does not exist. Therefore, the appellants' insurer was not required to timely disclaim, as the uninsured motorist coverage of the policy would not attach unless and until it was established that the offending vehicle was uninsured on the date of the accident."[89]

In *State Farm Mutual Automobile Ins. Co. v. Cooper*,[90] the court noted that a notice of disclaimer "must properly apprise the injured party or [any other] claimant, with a high degree of specificity, of the ground or grounds on which the disclaimer is predicated." An insurer which has denied liability on a specific ground may not thereafter shift the basis for its disclaimer to another ground known to it at the time of its original repudiation.[91] Thus, in *Cooper*, the court held that a disclaimer sent to the insured based upon the insured's late notice was invalid as to the injured party because it did not refer to the injured party's late notice.[92]

In *A.J. McNulty & Co., Inc. v. Lloyds of London*,[93] the court held that the service of an answer to a declaratory judgment complaint 20 days after service of the complaint constituted valid and timely notice of disclaimer.

A notice of disclaimer may be sent to the insured's attorney.[94]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled before the accident. Generally speaking, in order to effectively cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or was paid for under premium financing contract.

In *Crump v. Unigard Ins. Co.*,[95] the court held that a cancellation in accordance with Banking Law § 576 occurred when the notice of cancellation sent by a premium finance agency was actually received by the insurer, and not on the date stated in the notice of cancellation. The court specifically concluded that Banking Law § 576, as amended in 1978, did not abrogate the common-law rule requiring that an insurer actually receive the notice before the cancellation becomes effective.[96]

In *General Electric Capital Corp. v. Volchyok*,[97] the insurer attempted to cancel its policy for non-payment of premiums by mailing a notice of cancellation to its insured, the lessee of the vehicle, but not to the lessor. The cancellation notice specifically provided that it was required to be mailed at least 15 days before the effective date of the cancellation to the named insured shown on the declarations page. Since the lessor/owner was named as an additional insured and as a loss payee, the court held that it, too, was entitled to receive notice of cancellation. Thus, the lessor/owner was entitled to summary judgment on its cause of action against the insurer to recover damages for breach of the insurance policy.

In *AIU Ins. Co. v. Mensah*,[98] the court noted that pursuant to Vehicle & Traffic Law § 313(2)(a), in order to effectively cancel an auto insurance policy as against an innocent third party, the insurer must file the notice of cancellation with the Department of Motor Vehicles. The court further noted that "an ineffective notice of cancellation will cause the policy to continue in force after its stated expiration date."[99]

In *McGuiness v. Shamrock Auto Center*,[100] the court held that the insurer properly canceled its liability policy due to the insured's failure to make payment within 15 days of receipt of notice of cancellation, where the insured attempted to make payment to its own broker, who was not an agent of the insurer, one day late.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.

In *Great Northern Ins. Co. v. Ballinger*,[101] the court stated:

> Physical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle. While direct contact between the insured and the unidentified vehicle is not required, the physical contact, as contemplated by Insurance Law § 5217, must involve the continued transmission of force indirectly or simultaneously through an intermediate agency, and the initial impact must be that of a collision between the unidentified vehicle with the complainant, the vehicle occupied by him, an obstruction, or other object causing the bodily injury. Arbitration is not foreclosed when the accident originates with the unidentified vehicle.[102]

Where, as here, the police report fails to indicate that there was any contact with the unidentified vehicle, but the claimant/insured raises an issue of fact in that regard by supplying an affidavit attesting to such contact, a hearing should be held to determine the issue.

In *Eveready Ins. Co. v. Scott*,[103] the court stated: "The failure of the police accident report to mention contact with another vehicle raises a factual issue as to whether there actually was physical contact between [the claimant's vehicle] and a 'hit and run' vehicle." Thus, in such cases, a hearing is required to resolve that issue.

In *State-Wide Ins. Co. v. Chardon*,[104] the police were called to the scene of a three-vehicle accident by the claimant. After attending to some of the injures, the investigating police officer motioned to the operator of the third vehicle to come over and produce his license and registration. That operator subsequently fled the scene without providing the pertinent information. Although the claimant had spoken briefly to the operator of the third vehicle, he did not obtain his identification, believing that the police would accomplish that task. Under these circumstances, the court held that the claimant acted reasonably in calling the police and once they arrived they could not have anticipated that the driver of the offending vehicle would ignore the explicit directions of the police officer and leave the scene without the requisite exchange of information. Thus, the court allowed the claimant to proceed with his uninsured motorist claim.

In *Eagle Ins. Co. v. Brown*,[105] the court held that since the petitioner made an unopposed showing that the respondent failed, among other things, to report the alleged hit-and-run accident to the police within 24 hours, and failed to notify the insurer of the UM claim as soon

as practicable, the Petition to Stay Arbitration should have been granted.

In *Eveready Ins. Co. v. Farrell*,[106] the court held that where two notice provisions in a policy, pertaining to the filing of a statement under oath with respect to a hit-and-run claim – *i.e.*, where one part of the policy requires a claimant to file a statement under oath within 90 days after an accident, and another part of the policy requires a claimant to furnish sworn written proof of claim after written request by the company – "the two notice provisions of the policy are ambiguous, and must be construed against the [insurer]."

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent."

In *American Manufacturers Mutual Ins. Co. v. Morgan*,[107] the court held that, under Regulation 35-D, any situation wherein the tortfeasor's carrier has become insolvent (in liquidation) – whether covered by the Security Fund or not; whether the Fund has money or not – is an uninsured motorist situation and the claimant is entitled to pursue UM benefits under his or her policy.

"An ineffective notice of cancellation will cause the policy to continue in force after its stated expiration date."

Pursuant to *Morgan*, in a Regulation 35-D case involving insurer insolvency, the claimant can proceed to SUM arbitration. If the SUM carrier wishes to pursue a subrogation claim against the tortfeasor and the insolvent insurer, *it* would then have to pursue a claim from the Security Fund, with its attendant delays and risks of non-payment. As stated by the court, quoting the superintendent of insurance,

> The individual insured for supplementary uninsured motorists coverage should not be required to wait for a recovery from the Security Fund on behalf of the insolvent insurer. Because the SUM insurer has a subrogation right against the insolvent insurer, the Security Fund would still remain liable, but the insured would be provided a more prompt recovery from his or her own insurer.[108]

Note: Several courts noted in 2003 that the *Morgan* rule applies only in the context of Regulation 35-D SUM endorsements, but that in non-Regulation 35-D SUM cases, which are governed by the basic, mandatory UM endorsement under Ins. Law § 3420(f)(1) the old rule, which distinguishes between covered and non-covered insolvencies, still applies.[109]

UNDERINSURED MOTORIST ISSUES

Trigger of Coverage In *GEICO v. Annamanthadoo*,[110] the court held that where the bodily injury limits of the claimant's policy exceed the bodily injury limits of the tortfeasor's policy, underinsurance coverage is triggered.

Reduction in Coverage In *Graphic Arts Mutual Ins. Co. v. Dunham*,[111] the court held that the reduction in coverage language of the SUM policy limited SUM benefits to the difference between the SUM limits and the motor vehicle bodily injury liability insurance or bond payments received by the insured. In this case, application of that language resulted in a complete offset and, thus, no SUM exposure existed.

Priority of Coverage In *GEICO v. Shlomy*,[112] the court referred to and applied the "Priority of Coverage" provision of the SUM endorsement, which provides that where an insured may be covered for uninsured or supplementary uninsured motorist coverage under more than one policy, the maximum amount recoverable may not exceed the highest limit of coverage for any one vehicle under any one policy. In such cases, the following order of priority applies: (1) the policy covering the vehicle occupied by the claimant, (2) the policy identifying the claimant as a named insured, and (3) any other policy covering the claimant.

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1. *See* Jonathan A. Dachs, *2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B. J., Vol. 75, No. 5, at 32 (June 2003); *A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001*, N.Y. St. B.J., Vol. 74, No. 6, at 20 (Jul./Aug. 2002); *Actions by Courts and Legislature in 2000 Address Issues Affecting Uninsured and Underinsured Drivers*, N.Y. St. B.J. 26, (Sept. 2001); *Summing Up 1999 "SUM" Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*, 72 N.Y. St. B.J. 18 (Jul./Aug. 2000); *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, 71 N.Y. St. B.J. 8 (May/June 1999); *Legislative and Case Law Developments in UM/UIM/SUM Law – 1997*, 70 N.Y. St. B.J. 46 (Sept./Oct. 1998); *Developments in Uninsured and Underinsured Motorist Coverage*, 69 N.Y. St. B. J. 18 (Sept./Oct. 1997); The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995, 68 N.Y. St. B.J. 42 (Jul./Aug. 1996); *Uninsured and underinsured Motorist Cases in 1994*, 67 N.Y. St. B.J. 24 (Nov. 1995); *Uninsured and Underinsured . . . But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage*, 66 N.Y. St. B.J. 13 (Sept./Oct. 1994).
2. 303 A.D.2d 592, 756 N.Y.S.2d 484 (2d Dep't 2003).
3. *See Buckner v. MVAIC*, 66 N.Y.2d 211, 495 N.Y.S.2d 952 (1985); *Royal Ins. Co. v. Bennett*, 226 A.D.2d 1084 (4th

Dep't 1976); *Hogan v. Cigna Prop. & Cas. Co.*, 216 A.D.2d 442 (2d Dep't 1995).

4. 1 A.D.3d 371, 766 N.Y.S.2d 594 (2d Dep't 2003).
5. 303 A.D.2d 633, 756 N.Y.S.2d 653 (2d Dep't 2003).
6. 2 A.D.3d 500, 769 N.Y.S.2d 551 (2d Dep't 2003).
7. 1 Misc. 3d 774, 766 N.Y.S.2d 320 (Sup. Ct., Kings Co. 2003).
8. 302 A.D.2d 522, 756 N.Y.S.2d 79 (2d Dep't 2003).
9. *See also State Farm Mut. Auto. Ins. Co. v. Laguerre*, 305 A.D.2d 490, 759 N.Y.S.2d 531 (2d Dep't 2003) ("A deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident").
10. 301 A.D.2d 740, 741, 753 N.Y.S.2d 198 (3d Dep't 2003).
11. *Id*. at 741 (citations omitted).
12. 306 A.D.2d 512, 763 N.Y.S.2d 65 (2d Dep't 2003).
13. *Id*. at 513 (citing *Olin v. Moore*, , 518 (2d Dep't 1991)).
14. *See Maxi-Aids, Inc. v. Gen. Accident Ins. Co. of Am*., 303 A.D.2d 469, 756 N.Y.S.2d 431 (2d Dep't 2003).
15. 99 N.Y.2d 568, 755 N.Y.S.2d 703 (2003).
16. *See Greenburgh Eleven Union Free Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 304 A.D.2d 334, 758 N.Y.S.2d 291 (1st Dep't 2003).
17. 1 A.D.3d 304, 766 N.Y.S.2d 856 (2d Dep't 2003).
18. 306 A.D.2d 120, 762 N.Y.S.2d 586 (1st Dep't 2003).
19. *Id.* at 121–22.
20. 301 A.D.2d 465, 754 N.Y.S.2d 15 (2d Dep't 2003).
21. 307 A.D.2d 689, 763 N.Y.S.2d 177 (3d Dep't 2003).
22. 305 A.D.2d 1063, 759 N.Y.S.2d 412 (4th Dep't 2003).
23. 304 A.D.2d 390, 756 N.Y.S.2d 752 (1st Dept, 2003).
24. 303 A.D.2d 987, 757 N.Y.S.2d 18 (4th Dep't 2003).
25. 305 A.D.2d 988, 758 N.Y.S.2d 572 (4th Dep't 2003).
26. 1 A.D.3d 905, 767 N.Y.S.2d 739 (4th Dep't 2003).
27. *See* Norman H. Dachs & Jonathan A. Dachs, *SUM Notice in the Context of Uncertain or Undetermined Injuries*, N.Y.L.J., Sept. 9, 2003, p. 3, col. 1.
28. 306 A.D.2d 288, 762 N.Y.S.2d 99 (2d Dep't 2003).
29. *See Fireman's Ins. Co. of Newark v. Sorto*, 303 A.D.2d 502, 756 N.Y.S.2d 436 (2d Dep't 2003) (claimant's counsel's affirmation in opposition to the petition, in which he contended that notice of the UM claim was given just two days after the accident, was made "without personal knowledge of whether the letter was in fact mailed" and was, therefore, held to be incompetent as evidence of timely notice).
30. 306 A.D.2d 464, 762 N.Y.S.2d 253 (2d Dep't 2003).
31. 304 A.D.2d 560, 756 N.Y.S.2d 906 (2d Dep't 2003).
32. *See C.C.R. Realty of Dutchess, Inc. v. N.Y. Gen. Mut. Fire Ins. Co.*, 1 A.D.3d 304, 766 N.Y.S.2d 856 (2d Dep't 2003).
33. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
34. *See* Norman H. Dachs & Jonathan A. Dachs, *Notice of Legal Action and the Requirement of Prejudice*, N.Y.L.J., July 9, 2002, p. 3, col. 1; *see also Merchants Mut. Ins. Co. v. Falisi*, 99 N.Y.2d 568, 755 N.Y.S.2d 703 (2003); *Banks v. American Mfrs. Ins. Co.*, 306 A.D.2d 120, 762 N.Y.S.2d 586 (1st Dep't 2003).
35. 312 F.3d 544 (2d Cir. 2002).
36. *See* 99 N.Y.2d 545, 753 N.Y.S.2d 805 (2002).
37. *See* 328 F.3d 50 (2d Cir. 2003); 100 N.Y.2d 527, 760 N.Y.S.2d 761 (2003).
38. 306 A.D.2d 478, 761 N.Y.S.2d 512 (2d Dep't 2003).
39. 1 A.D.3d 364, 766 N.Y.S.2d 596 (2d Dep't 2003).
40. 302 A.D.2d 460, 755 N.Y.S.2d 404 (2d Dep't 2003).
41. 303 A.D.2d 385, 755 N.Y.S.2d 667 (2d Dep't 2003).
42. 301 A.D.2d 253, 750 N.Y.S.2d 712 (4th Dep't 2002).
43. 306 A.D.2d 344, 762 N.Y.S.2d 249 (2d Dep't 2003).
44. 307 A.D.2d 220, 763 N.Y.S.2d 561 (2d Dep't 2003).
45. *Id.* at 220 (citations omitted).
46. 2 A.D.3d 728, 769 N.Y.S.2d 592 (2d Dep't 2003).
47. *See Initial Trends, Inc. v. Campus Outfitters, Ins*., 58 N.Y.2d 896, 460 N.Y.S.2d 500 (1983). ("The consequence of failure to strictly comply with the provisions of CPLR 7503 (subd. [c]) in serving a demand for arbitration is to toll the time limit on an application to stay arbitration."). *But see Commercial Union Ins. Co. v. Buckman*, 58 Misc. 2d 164, 295 N.Y.S.2d 16 (Sup. Ct., Monroe Co. 1968) (where demand for arbitration under uninsured motorist policy was served by regular mail only and not by registered or certified mail, demand was a nullity).
48. 305 A.D.2d 684, 762 N.Y.S.2d 82 (2d Dep't 2003).
49. 301 A.D.2d 649, 753 N.Y.S.2d 883 (2d Dep't 2003).
50. 307 A.D.2d 927, 762 N.Y.S.2d 896 (2d Dep't 2003).
51. *See Eagle Ins. Co. v. Villegas*, 307 A.D.2d 879, 764 N.Y.S.2d 15 (1st Dep't 2003) (*prima facie* showing of coverage made by submission of DMV Registration Record Expansion report and Police Accident Report).
52. 303 A.D.2d 496, 755 N.Y.S.2d 724 (2d Dep't 2003).
53. 304 A.D.2d 465, 757 N.Y.S.2d 730 (1st Dep't 2003).
54. 307 A.D.2d 879, 764 N.Y.S.2d 15 (1st Dep't 2003).
55. *See Atlantic Mut. Ins. Co. v. Matera*, 304 A.D.2d 572, 756 N.Y.S.2d 889 (2d Dep't 2003).
56. 307 A.D.2d 967, 763 N.Y.S.2d 649 (2d Dep't 2003).
57. 301 A.D.2d 448, 754 N.Y.S.2d 253 (1st Dep't 2003).
58. 1 Misc. 3d 774, 766 N.Y.S.2d 320 (Sup. Ct., Kings Co. 2003).
59. 2 A.D.3d 531, 767 N.Y.S.2d 905 (2d Dep't 2003).
60. *Id.* at 532 (quoting *GEICO v. Sherman*, 307 A.D.2d 967, 763 N.Y.S.2d 649 (2d Dep't 2003)). *See* CPLR 7511(b)(1).
61. 195 Misc. 2d 553, 756 N.Y.S.2d 403 (Sup. Ct., Nassau Co. 2003).
62. *Id.* at 557 (citations omitted).
63. *Id.* (citations omitted). *See* Norman H. Dachs & Jonathan A. Dachs, *Arbitrator's Obligations of Impartiality and Disclosure*, N.Y.L.J., May 13, 2003, p. 3, col. 1.
64. 307 A.D.2d 967, 969, 763 N.Y.S.2d 649 (2d Dep't 2003).
65. 309 A.D.2d 608, 766 N.Y.S.2d 41 (1st Dep't 2003).
66. 303 A.D.2d 757, 756 N.Y.S.2d 869 (2d Dep't 2003) (citations omitted).
67. 307 A.D.2d 348, 762 N.Y.S.2d 830 (2d Dep't 2003).
68. *See Leto v. Petruzzi*, 81 A.D.2d 296, 298, 440 N.Y.S.2d 343 (2d Dep't 1981); *Velasquez v. Water Taxi*, 66 A.D.2d 691, 411 N.Y.S.2d 261 (1st Dep't 1978), *aff'd*, 49 N.Y.2d 762 (1980); *Gibe v. Hajek*, 166 A.D.2d 502, 561 N.Y.S.2d 50 (2d Dep't 1990).
69. ___ Misc. 2d ___, ___ N.Y.S.2d ___, 2003 WL 22964792 (Sup. Ct., Oswego Co. 2003).

70. 305 A.D.2d 405, 758 N.Y.S.2d 500 (2d Dep't 2003).
71. *See State Farm Mut. Auto. Ins. Co. v. Cooper*, 303 A.D.2d 414, 756 N.Y.S.2d 87 (2d Dep't 2003) (disclaimer sent to insured based upon insured's late notice was invalid as to injured party because it did not refer to the injured party's late notice); *Fisco v. Provident Washington Ins. Co.*, 303 A.D.2d 451, 755 N.Y.S.2d 893 (2d Dep't 2003).
72. 306 A.D.2d 281, 281, 760 A.D.2d 361 (2d Dep't 2003) (citations omitted).
73. 306 A.D.2d 211, 762 N.Y.S.2d 372 (1st Dep't 2003).
74. *See Colonial Coop. Ins. Co. v. Desert Storm Constr. Corp.*, 305 A.D.2d 363, 757 N.Y.S.2d 894 (2d Dep't 2003); *Blue Ridge Ins. Co. v. Cook*, 301 A.D.2d 598, 754 N.Y.S.2d 41 (2d Dep't 2003).
75. 302 A.D.2d 592, 756 N.Y.S.2d 251 (2d Dep't 2003).
76. 306 A.D.2d 464, 762 N.Y.S.2d 253 (2d Dep't 2003).
77. *See Cosgriff v. Allstate Ins. Co.*, 303 A.D.2d 680, 757 N.Y.S.2d 319 (2d Dep't 2003) (unexplained delay of 17 months was unreasonable as a matter of law); *Heegan v. United Int'l Ins. Co.*, 2 A.D.3d 403, 767 N.Y.S.2d 861 (2d Dep't 2003) (no excuse by insurer for failing properly to commence investigation).
78. 303 A.D.2d 278, 757 N.Y.S.2d 27 (1st Dep't 2003).
79. 300 A.D.2d 40, 752 N.Y.S.2d 286 (1st Dep't 2003).
80. 100 N.Y.2d 634, 769 N.Y.S.2d 195 (2003).
81. 322 F.3d 750 (2d Cir. 2003).
82. *Id.* at 754–55 (citations omitted).
83. *Id.* at 755 (citations omitted).
84. *Id.* at 756–57 (citations omitted).
85. *Id.* at 750 (citations omitted).
86. *See First Fin. Ins. Co. v. Jetco Contr. Corp.*, 99 N.Y.2d 649, 760 N.Y.S.2d 98 (2003).
87. 1 N.Y.3d 64, 769 N.Y.S.2d 459 (2003).
88. 305 A.D.2d 684, 762 N.Y.S.2d 82 (2d Dep't 2003).
89. *Id.* at 685 (citations omitted). *See Chumsky v. Danna Constr. Corp.*, 304 A.D.2d 604, 757 N.Y.S.2d 471 (2d Dep't 2003).
90. 303 A.D.2d 414, 756 N.Y.S.2d 87 (2d Dep't 2003).
91. *See Merchants Mutual Ins. Co. v. Falisi*, 293 A.D.2d 678, 741 N.Y.S.2d 273 (2d Dep't 2002), *rev'd on other grounds*, 99 N.Y.2d 568, 755 N.Y.S.2d 703 (2003).
92. *See Fisco v. Provident Washington Ins. Co.*, 303 A.D.2d 451, 755 N.Y.S.2d 893 (2d Dep't 2003).
93. 306 A.D.2d 211, 762 N.Y.S.2d 372 (1st Dep't 2003).
94. *See Fisco*, 303 A.D.2d 451.
95. 291 A.D.2d 692, 738 N.Y.S.2d 425 (3d Dep't 2002), *aff'd*, 100 N.Y.2d 12, 760 N.Y.S.2d 71 (2003).
96. *Id.* at 693 (citing *Savino v. Merchants Mut. Ins. Co.*, 44 N.Y.2d 625, 628–29, 407 N.Y.S.2d 468 (1978), and relying upon the rationale underlying the statute and the common law rule, which is "to protect the insured and third parties by preventing gaps in coverage").
97. 2 A.D.3d 777, 770 N.Y.S.2d 419 (2d Dep't 2003).
98. 307 A.D.2d 921, 762 N.Y.S.2d 898 (2d Dep't 2003).
99. *See Material Damage Adjustment Corp. v. King*, 1 A.D.3d 439, 766 N.Y.S.2d 695 (2d Dep't 2003).
100. 302 A.D.2d 502, 756 N.Y.S.2d 76 (2d Dep't 2003).
101. 303 A.D.2d 503, 757 N.Y.S.2d 309 (2d Dep't 2003).
102. *Id.* at 504 (citations omitted).
103. 1 A.D.3d 436, 767 N.Y.S.2d 31 (2d Dep't 2003).
104. N.Y.L.J., Aug. 11, 2003, p. 17, col. 2 (Sup. Ct., Nassau Co.).
105. 309 A.D.2d 749, 765 N.Y.S.2d 273 (2d Dep't 2003).
106. 304 A.D.2d 830, 757 N.Y.S.2d 859 (2d Dep't 2003).
107. 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dep't 2002).
108. *Id.* at 493–94.
109. *See Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356, 766 N.Y.S.2d 571 (2d Dep't 2003); *Eagle Ins. Co. v. St. Julian*, 297 A.D.2d 737, 747 N.Y.S.2d 773 (2d Dep't 2002). *See also Country-Wide Ins. Co. v. Rashed*, ___ Misc. 2d ___, ___ N.Y.S.2d ___, 2003 WL 22207634 (Sup. Ct., Queens Co. 2003); Norman H. Dachs & Jonathan A. Dachs, *On the 'Top 10,' No-Fault Update, Insolvency and SUM Coverage*, N.Y.L.J., Mar. 11, 2003, p. 3, col. 1.
110. 302 A.D.2d 460, 755 N.Y.S.2d 404 (2d Dep't 2003).
111. 303 A.D.2d 1038, 757 N.Y.S.2d 204 (4th Dep't 2003).
112. 305 A.D.2d 504, 762 N.Y.S.2d 297 (2d Dep't 2003).

Language Tips

By Gertrude Block

Question: This afternoon I wrote this sentence: "Neither Jon nor I are able to . . . . ," which sounded terrible. So I changed it to "Neither Jon nor I is able to . . . . ," which is grammatical, but sounds even worse. So what am I to do with that sentence to make it sound right and also be grammatical? You may quote my agony, but not my name.

Answer: The answer seemed easy. I told the reader to change *is able to* to *can*. The two words are synonymous, but *can* avoids the need to use a form of the verb *be*. However, within minutes, an e-mail came back with the entire context quoted:

> Neither Jon [co-counsel] nor I . . . in a position to advise you as to any other steps that may be required to preserve electronic evidence, but if you wish we would be happy to research that further.

The context made my suggestion unsatisfactory. So I suggested that they change the connector from the disjunction (*nor*) to the conjunction (*and*), "Jon and I are not in a position to advise you . . . . " Apparently this response satisfied the reader, for I heard nothing more from him.

The original question – whether to use *is* or *are* – arises because of the grammatical rule that a verb must agree in number with its subject. The disjunction *nor* creates a singular subject (*I*), requiring the singular verb (*is*). But, as the reader noted, that sounds strange, so the temptation is to make the verb plural (*are*), because the writer's intent, though not his grammar, is plural.

The obvious conflict between semantics and grammar has caused grammarians to establish an exception to the grammatical rule called "attraction," which makes it possible to ignore the grammatical rule when that seems advisable. "Attraction" applies when one member of a pair is plural and the other member is singular:

- Neither the attorney nor her clients were available.
- Neither the outcomes nor the judge's decision was fair.

The principle of attraction operates in other constructions as well:

- Many a recent law school graduate owes large debts.
- All but one plaintiff is withdrawing his suit.

In both sentences the subject is plural (*many* and *all*), but the noun closest to the verb is singular, applying attraction to the number of the verb (*owes* and *is*).

Question: Which is correct: "The couple have three children" or "The couple has three children"?

Answer: This question also concerns the requirement that the verb be the same in number as its subject. So the issue is whether *couple* is a singular or a plural noun, and that is really about style, not grammar. If, in the context, you are thinking of "a couple" as two individuals, it would be a plural noun. If you are thinking of "a couple" as a unit, however, it would be a singular noun.

That was my theory a few years ago. I tested the theory on some colleagues. Of the 10 persons I asked, using the above sentence as an example, all but one chose the plural (*have*). That is, they thought of the members as individuals. But when I changed the sentence to read, "The couple has split up after 10 years of marriage," all the responders chose *has*, indicating that they thought of the couple as a unit or an entity. (The 10-year-marriage probably created that idea.)

When you consider a "couple" to be a unit, you are placing it into the category of collective nouns such as *corporation*, *institution*, *team*, and *jury.* Most Americans treat collective nouns as grammatical singulars, using the singular form *it* and a singular verb. Not so the Britons. They would say, "The corporation are holding their annual meeting" or "The soccer team were performing badly." That choice is a matter of style, not grammar. As George Bernard Shaw is believed to have said (with his usual hyperbole): "England and America are two countries divided by a common language."

A stylistic decision creates an anomaly in the treatment of the word *number*. When *number* is preceded by the indefinite article (*a*), it is considered a plural noun. Thus we say, "A number of persons were present at the meeting." But when *number* is preceded by the definite article (*the*), it is considered a singular noun. So we would say, "The number of persons at the meeting is not known."

Potpourri:

Several persons have e-mailed their objection to the new use of the noun *task* as a verb, during the recent hearings of the "9/11 Commission." I noticed that neologism, too, but apparently it was used more often than I realized. People love to play with words. And one characteristic of English is its versatility, the ability to change nouns to verbs being an example. A few of the numerous English nouns that are also verbs are: *date*, *dream*, *sleep*, *act*, *run*, *view*, *copy*, and *change*. And you may have heard the new verb, "He's just desking it up there." That verb, like the verb *task*, will either take hold and the next generation of speakers will use it without question, or it will not, and will disappear.

Emily Dickinson said it well:

A word is dead when it is said, some say

I say it just begins to live that day.

(Unnamed poem, 1872)

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association).

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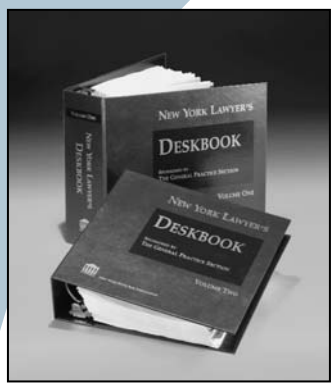

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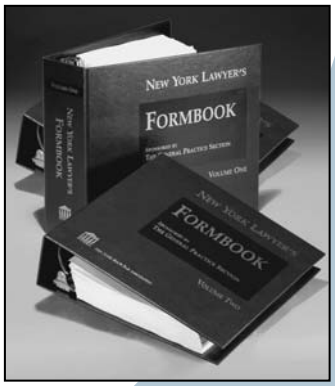

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In the March/April 2004 issue of the Journal *we published a question for the next Attorney Professionalism Forum that was attributed to a fictionalized "Frustrated in Fredonia." We never intended to suggest or imply that such a situation ever occurred in the Village of Fredonia or Chautauqua County. The circumstances described in that question had absolutely no relevance to the District Attorney of Chautauqua County, any member of his staff, or any judicial officer who presides in that jurisdiction. We genuinely hope that no reader misunderstood the question to constitute an assertion of fact about any actual person, and we sincerely apologize for any confusion or embarrassment this may have caused.*

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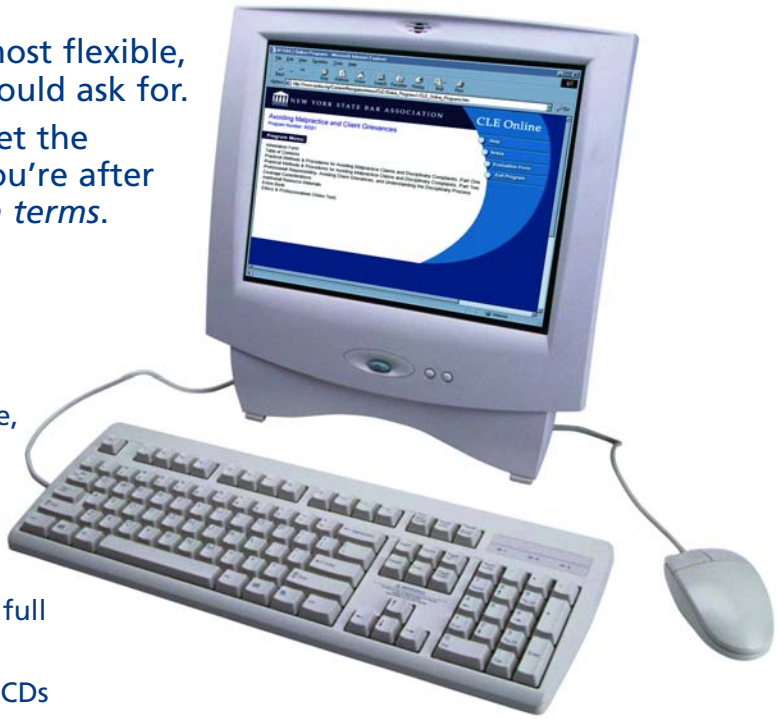

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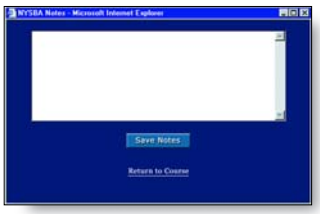

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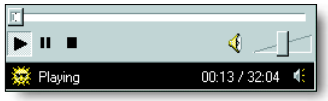

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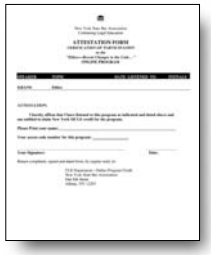

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Lead-ins: Lead-in tag lines introduce the reader to a necessary quotation that might otherwise be skimmed or entirely ignored. Lead-ins prevent sentences and paragraphs from beginning with a quotation. Many lead-ins are boring, but they're better than no introduction at all: "[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *In re Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976). *Becomes:* As the Court of Appeals has explained, "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *In re Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976).

Upshots: An upshot is the most effective way to introduce a quotation. Upshots precede a quotation and paraphrase its meaning. Reserve upshots for important quotations you want to explain and emphasize. Upshots force the reader to read the passage twice and thus give you double the bang for your buck: "[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *In re Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976). *Becomes:* The law-of-the-case doctrine prohibits one co-equal judge from reversing another: "[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *In re Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976). The best upshots are not boring at all. They excite interest by summarizing the quotation that follows the upshot.

Weaves: A direct weave integrates the quotation directly into your sentence: "I believe that a triable issue of fact exists." *X v. Y*, 1 Misc. 2d 1, 2 (Sup. Ct., Nassau County 1991). *Becomes:* Judge Smith denied the summary-judgment motion because he found "a triable issue of fact." *X v. Y*, 1 Misc. 2d 1, 2 (Sup. Ct., Nassau County 1991). An indirect weave uses a preceding comma to link an introductory clause to a quotation.

Quote Accurately

Double check the accuracy of your quotation comma by comma, letter by letter. One slip and the inspector of the quotation police — Ms. Quoting — will knock on your door late at night to arrest you.

> ***"Quote me as saying, 'I was misquoted.'"***
> **— Groucho Marx**

Tow (really *toe*) the line. From Groucho Marx: "Quote me as saying, 'I was misquoted.'" Why are some famous quotations misquoted? Because folk etymology alters the original, often for the better, and because few consult the original. A "Welsh rarebit," for example, a dish of melted cheese on toast or crackers, was originally called a "Welsh rabbit." But the dish contained no rabbit meat, and thus the original changed. The critical lesson is that legal writers must verify the accuracy of every quotation, including every quotation within a quotation, by reading the original. And the original must be read in hard copy. Online sources are sometimes scanned or re-keyed incorrectly.

The following examples are inspired by teaching notes from New York Law School Professor I. Cathy Glaser and Academic Dean Jethro K. Lieberman:

Incorrect: "Hard cases make bad law." *Correct:* "Hard cases, it has been frequently observed, are apt to introduce bad law."[6] *Correct:* "Hard cases, it is said, make bad law."[7] *Correct:* "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[8]

Incorrect: "[F]ree speech would not protect a man shouting fire in a *crowded* theater." *Correct:* "[F]ree speech would not protect a man *in falsely* shouting fire in a theater *and causing a panic*."[9]

Incorrect: "The devil can *quote* Scripture for his own purpose." *Correct:* "The devil can *cite* Scripture for his own purpose."[10]

Incorrect: "All that *glistens* [or *glitters*] is not gold." *Correct:* "All that *glisters* is not gold."[11]

Incorrect: "To gild the lily." *Correct:* "To gild refined gold, to paint the lily."[12]

Incorrect: "Hoisted on his own petard." *Correct:* "Hoist with his own petar."[13]

Incorrect: "Consistency is the hobgoblin of little minds." *Correct:* "*A foolish* consistency is the hobgoblin of little minds."[14]

Incorrect: "I have nothing to offer but blood, sweat, and tears." *Correct:* "I have nothing to offer but blood, toil, tears, and sweat."[15]

Incorrect: "Music hath charms to soothe the savage *beast*." *Correct:* "Music hath charms to soothe the savage *breast*."[16]

Incorrect: "All power corrupts, and absolute power corrupts absolutely." *Correct:* "All power *tends* to corrupt, and absolute power corrupts absolutely."[17]

Incorrect: "A little *knowledge* is a dangerous thing." *Correct:* "A little *Learning* is a dangerous thing."[18]

Incorrect: "I escaped *by* the skin of my teeth." *Correct:* "I escaped *with* the skin of my teeth."[19]

Incorrect: "Money is the root of all evil." *Correct:* "[*T*]*he love of* money is the root of all evil . . . ."[20] Shaw, by the way, popularized this twist: "The lack of money is the root of all evil."[21]

Next month: This column continues with punctuating, blocking, altering, and omitting quotations.

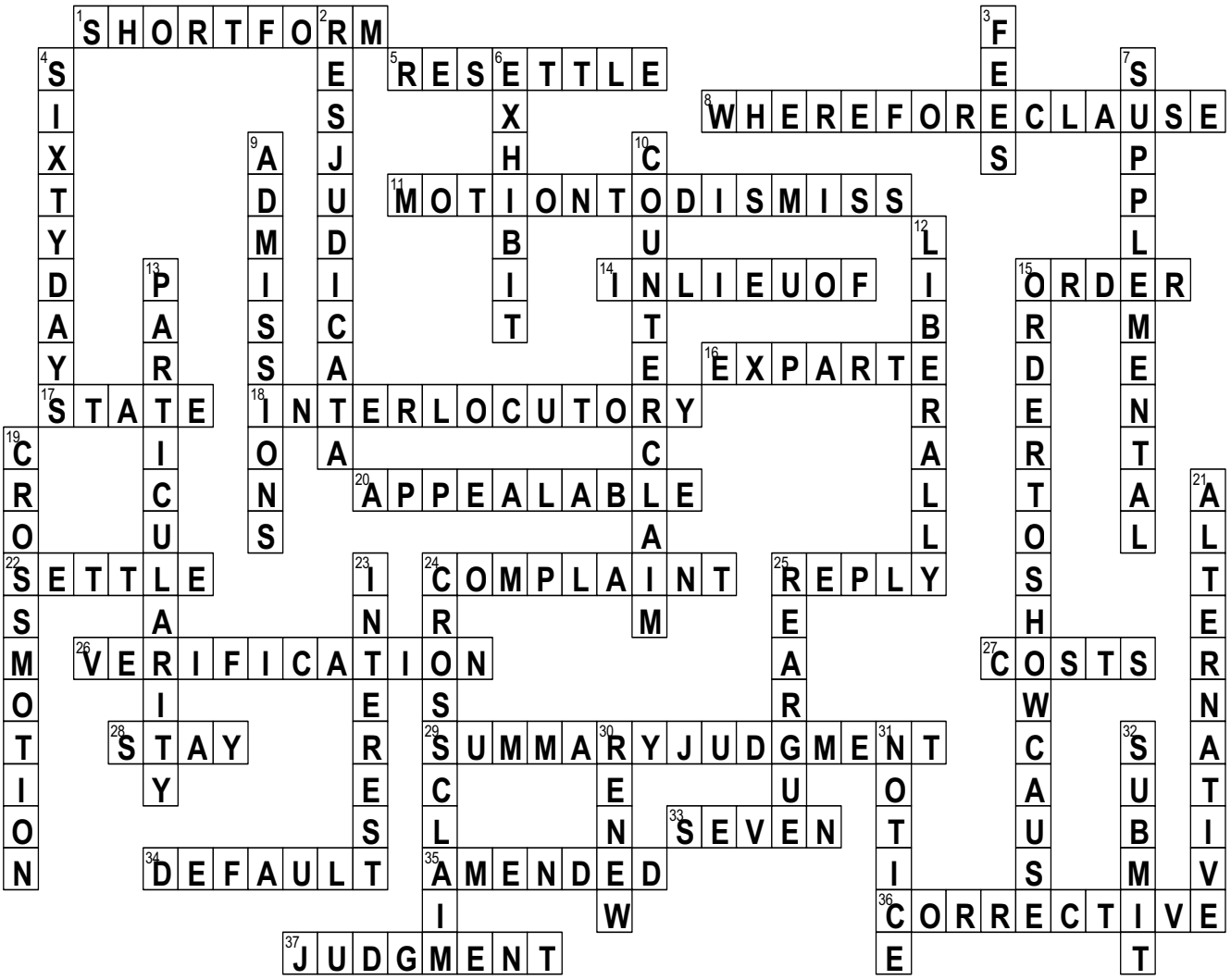
CONTINUED ON PAGE 60

CONTINUED FROM PAGE 59

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is Glebovits@aol.com.

1. American Bar Association–Appellate Judges Conference, Judicial Opinion Writing Manual 13 (1991).
2. *See* Yogi Berra, *The Yogi Book or I Really Didn't Say Everything I Said* (1998).
3. West's Legal News, 1996 WL 399706, "Juris Dictions: Quotes and Notes" (July 18, 1996).
4. For an especially brilliant discussion of why writers shouldn't cite themselves, see Gerald Lebovits, *Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts* 339 (7.3 ed., N.Y.S. Office of Ct. Admin., 2003).
5. John Jay Osborn, Jr., *The Paper Chase* 15 (1971).
6. *Winterbottom v. Wright*, 10 W & M 109, 152 Eng. Rep. 402, 406 (Ex. of Pleas 1842) (Rolfe, B.).
7. *Ex Parte Long*, 3 W.R. 19 (Q.B. 1854, Lord Campbell, Ch. J.).
8. *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
9. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J., dissenting).
10. William Shakespeare, *The Merchant of Venice* act I, sc. III.
11. *Id.* at act II, sc. VII.
12. William Shakespeare, *King John* act IV, sc. II.
13. William Shakespeare, *Hamlet* act III, sc. 4.
14. Ralph W. Emerson, *Self-Reliance* in Ralph Waldo Emerson 131, 137 (R. Poirier ed., 1990).
15. Winston S. Churchill, *Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill* (David Cannadine ed., 1989).
16. Gertrude Block, *Language Tips*, 69 N.Y. St. B.J. 53, 53 (Jan. 1997) (quoting William Congreve).
17. *World Treasury of Religious Quotations* 100 (Ralph L. Woods ed., 1966) (letter of Apr. 5, 1881, from Lord Acton to Bishop Mandell Creighton).
18. Alexander Pope, An Essay on Criticism, in *The Complete Poetical Works of Alexander Pope* 70 (Henry W. Boynton ed., Riverside Press 1903).
19. Job 14:1 (King James).
20. I Timothy 6:10 (quoting St. Paul) (King James).
21. Leonard L. Levinson, *Webster's Unafraid Dictionary* 131 (1967) (quoting George Bernard Shaw).

Answers to Crossword Puzzle on page 8.



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THE LEGAL WRITER

You Can Quote Me: Quoting in Legal Writing — Part I

BY GERALD LEBOVITS

If legal writing is the hardest of the legal arts to master, quoting well is the hardest of the legal-writing arts. Few even know that "quote" is a verb and "quotation," a noun: "Lawyers use too many quotes [should be *quotations*] in their briefs." This column is dedicated to the art of quoting.

Quote the Relevant and No More

Quote the relevant — but only the relevant — part of a case, secondary authority, testimony, opponent's argument, or statutory or contractual provision. Otherwise, eliminate all but pungent quotations. As someone once said, in a passage worth quoting, "I hate quotations. I don't read them unless I must. Tell me what you know, in your own words."

Quote essentials, memorable sound bites, succinct things others have said better than you can, authoritative sources, and anything in dispute. Quoting helps clarify who said what to whom when other signals are weak.

Then give the citation from which you're quoting: the exact pinpoint (jump) page or pages of your case, article, or book; the exact section, down to the subdivision, subsection, or paragraph, of your statute, rule, or regulation; the exact exhibit, including any page and paragraph; and the exact page of testimony. Citing your sources with precision will force you to quote precisely and lead you to other good citations. Citing with precision will also make it easier for your reader to find your references and will lend integrity, authority, and power to your writing. Quoting and then citing precisely tells the judge, "Don't take my word for it. Here's the proof." Offering compelling proof in an understated way is what persuasive advocacy is all about.

When done correctly, in context, accurately, and reasonably, quoting is good. Quotations prove that your argument is reliable, so reliable that the reader needn't consult the source to confirm the reliability of your argument. Paraphrasing often detracts from reliability.

Quoting excessively or at length, however, reveals a lack of analysis. Anyone can cut and paste, and "[r]eaders generally dislike a paste-pot [brief]."[1] Quoting at length also makes legal writing look too dense and can inadvertently contradict or weaken your point.

Legal writers should know their sources before they quote them. Some authors are quoted and cited often; others are never quoted or cited. Most authors quoted and cited often are reputed to be principled, intelligent, sincere, and knowledgeable. Authors not seen as credible sources shouldn't be cited. Don't quote those afflicted by baggage or stigma, no matter how clever or on point their lines are. Never quote an obscure source. Doing so is alienating and confusing, and you'll waste space explaining why you're quoting the obscure.

Don't quote the over-quoted. How many times can Tocqueville appear in print? What of Yogi Berra? Especially because he's quoted as saying, "I never said 85 percent of the things I said."[2]

George Bernard Shaw is reported to have said, "I often quote myself. It adds spice to my conversation."[3] What's true for conversationalists is untrue for judges. Trial judges shouldn't cite or quote themselves. Appellate judges should cite and quote their courts' opinions to show adherence to precedent but should avoid quoting from opinions they wrote. Scholars may cite and quote themselves if relevant and done unpretentiously.[4]

Lead-outs, Lead-ins, Weaves, and Upshots

Don't begin sentences — or, worse, paragraphs — with quotations in legal writing. Beginning with quotations causes your quotations to go unread.

Bad form: The Court of Appeals discussed the law-of-the-case doctrine. "[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of coordinate jurisdiction." *In re Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976).

> ***"I never said 85 percent of the things I said."***
> **— Yogi Berra**

To integrate your quotation into your writing, weave your quotation into your sentence or introduce it with a lead-in or, better, an upshot. These introductions will assure that your reader reads your quotation.

Lead-outs: Use lead-outs in nonlegal writing but not in legal writing. Journalism's single lead-out: "My client is innocent," *the defense lawyer said*. (The lead-out in this example is italicized.) Fiction's double lead-out: After Professor Kingsfield in *The Paper Chase* gave a student a dime and told him to call his mother to tell her that he'll never become a lawyer, the student screamed: "You're a son of a bitch, Kingsfield." "That's the first intelligent thing you've said," *Kingsfield replied*. "Come back. Perhaps I've been too hasty."[5] (The double lead-out in this example is italicized.)

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