NEW YORK STATE BAR ASSOCIATION

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Journal

Whiplash at any speed

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This year's report describes the Association's expanded initiatives to advance its legislative action, access to the legal process, public communications, and diversity and opportunity in the profession.

On The Cover

This cover illustration for this issue displays a montage of illustrations from the article on the medicolegal aspects of whiplash injuries.

Cover Design by Lori Herzing.

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President's Message

A. Thomas Levin

Skeleton Dance

If you can't get rid of the skeleton in your closet, you'd best teach it to dance. George Bernard Shaw (1856–1950)

When choosing between two evils, I always like to try the one I've never tried before. Mae West (1892–1980)

I don't make jokes. I just watch the government and report the facts. Will Rogers (1879–1935)

This past month, I testified at the first hearing of the Commission to Promote Public Confidence in Judicial Elections. Unfortunately, that body is operating under restrictions about the issues under consideration, and it is unable to hear comments which go to the heart of the issue. Instead, it is starting with the premise that judicial elections will continue, and it is trying to find ways to make the public more confident in that process.

The members of the Commission are dedicated, hard-working people, who are sincerely trying to fulfill their mandate. They are holding hearings in different locations around the state, and they are expected to issue a report in early 2004. Based on the testimony during the time I was present, the Commission is going to focus on changes in the process by which candidates for judicial election are selected, improvements in the process of informing the public about the various candidates for judicial office. Other subjects that received substantial attention were the public financing of judicial elections and holding judicial elections on a non-partisan basis.

In my remarks, I adhered to the Commission's admonition that it would not hear testimony regarding alternative methods for selecting judges. Nevertheless, I did observe that the State Bar Association has long been on record in support of a merit selection process for selection of judges. Having made that point, I moved on to the issues that the Commission did want to hear about.

My testimony focused on the screening process that is part of the NYSBA merit selection proposal, and on whether it could be adapted to the election process. NYSBA's recommendations for merit selection include the establishment of merit selection panels, composed of outstanding members of the Bar and distinguished public representatives, that would generate a list of well-qualified candidates for appointment to the bench. If this approach were to be applied to the elective system, the panels would review the qualifications of persons who wish to run for judicial office, and thereafter only those who are found well-qualified would be eligible for nomination to run in the election. Clearly, implementing this concept would require statutory amendment, if not constitutional change, and I will leave to others to prognosticate on the likelihood of either.

Within the past several months, the Fund for Modern Courts, which has also long been a supporter of the merit selection process, expressed the view that the constitutional and legislative changes necessary to implement that process were not likely in the foreseeable future. Instead, Modern Courts is operating on the assumption that the elective process will be with us for some time to come, and it is proposing that we improve that process by instituting a merit qualification process to determine who will be eligible to run for judicial office in those elections.

After my testimony and that of several others, I left the hearings with the uneasy sense that this was not the way to make progress. It was some time afterward that I was able to identify why I felt that way, because so many knowledgeable people had testified, and so many ideas and statistics had been bruited about, in discussions about how to change the way judicial elections are conducted. In the end, I concluded that while all of these suggestions are well-meaning and thoughtful, none of them really comes to grips with the real issues.

What is the goal the Commission seeks to fulfill? According to its title, it is to foster public trust and confidence in the state's elected judges, and in the process by which they are elected. Inherent in this focus is the assumption that the public's trust and confidence in elected judges, and judicial elections, is either diminished or needs to be bolstered.

If the comments I have been receiving about our judicial system are any indication, there is little doubt that the public's trust and confidence in the judicial system are diminishing. This is truly regrettable, because the functioning of a judiciary that is considered fair and impartial is at the heart of the American legal system.

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What is causing this public attitude? After considerable thought, I submit that it is not the details of the process by which judges are elected, rather it is the process itself. This should in no way be taken as criticism of the many fine judges who serve on the bench after having been elected to their positions. Those of us who practice in the courts know the quality of our elected judiciary.

The public perception, however, derives from other sources. Sometimes it is personal experience in the courts, either as a litigant, witness or juror. More often than not, it is from the media, either due to the tendency of some media to focus on the sensational or extreme, or the entertainment shows that masquerade as courtroom drama. No doubt, the extent of public dissatisfaction is overstated by the media as it focuses on the few more troublesome and sensational situations, without giving any credit to the hundreds of judges who toil hard every day to dispense justice in a fair and impartial manner. Regardless, the fact is that the public distrusts the judicial process. And, this distrust will only be magnified if campaigns for judicial office are permitted to deteriorate to the level of campaigns for other public office.

This dissatisfaction is evident in public discourse, and in late night show humor. It also shows in election statistics, which demonstrate that even voters who take the time to go to the polls vote for judicial nominees in smaller numbers than they do for other candidates. Those statistics also show that voters are more likely to vote along party lines when they vote for judicial candidates, whereas they will be more individually selective when they vote for candidates for executive or legislative office.

At present, the voters have little idea who they are choosing in judicial elections, and they have no knowledge of the candidates, their demeanor or their relevant experience. They don't understand the court system, and they don't understand the role judges play in that system. The cost of political advertising makes it prohibitive for most judicial elections. To the extent that a judicial candidate seeks to advertise, fund raising becomes even more important, further enhancing public distrust. Cross-endorsement of candidates, which is common in some areas, further reduces the voter's confidence in the process. As a result, voters have no choice but to fall back upon their fundamental political beliefs, and cast votes based upon the party lines on which the candidates are running rather than on the qualifications of the candidates.

If we blind ourselves to the real source of the public's diminished confidence in the judiciary, we cannot hope to change those attitudes. And without changing those attitudes, we can expect more and stronger attacks on the function and independence of the third branch, and more legislation and administrative directives that further infringe on the ability of the courts to perform their adjudicative functions. In the long run, the integrity of the judicial branch may be at stake.

It is my sense that the public's distrust of the judiciary and the judicial process is based on the belief that the judicial election process is riddled with politics, and money. This belief supports the common public perception that judicial candidates are hand-picked by political leaders as a form of patronage, and that those who are political sponsors of, or contribute money to, judicial candidates expect to, and do, receive favored treatment.

If this is, in fact, the public perception of judicial elections, the Commission's study is not likely to result in proposals that will improve that perception, because the Commission's charge precludes it from considering the real issue. It would be a better idea, and a more fruitful endeavor, to use this opportunity to address the public's distrust in the existing system by proposing a fundamental change in the system of judicial selection.

This is not the time to prop up a failing system. Rather, this is the time to institute a public debate on merit selection. Most of our neighboring states have adopted this selection method for their trial courts, and New York already has done so for the Court of Appeals. Lesser palliative measures at best will generate false confidence in the selection process, and after a short while the public will come to view the process as business as usual. Let's not spend our time teaching skeletons to dance.

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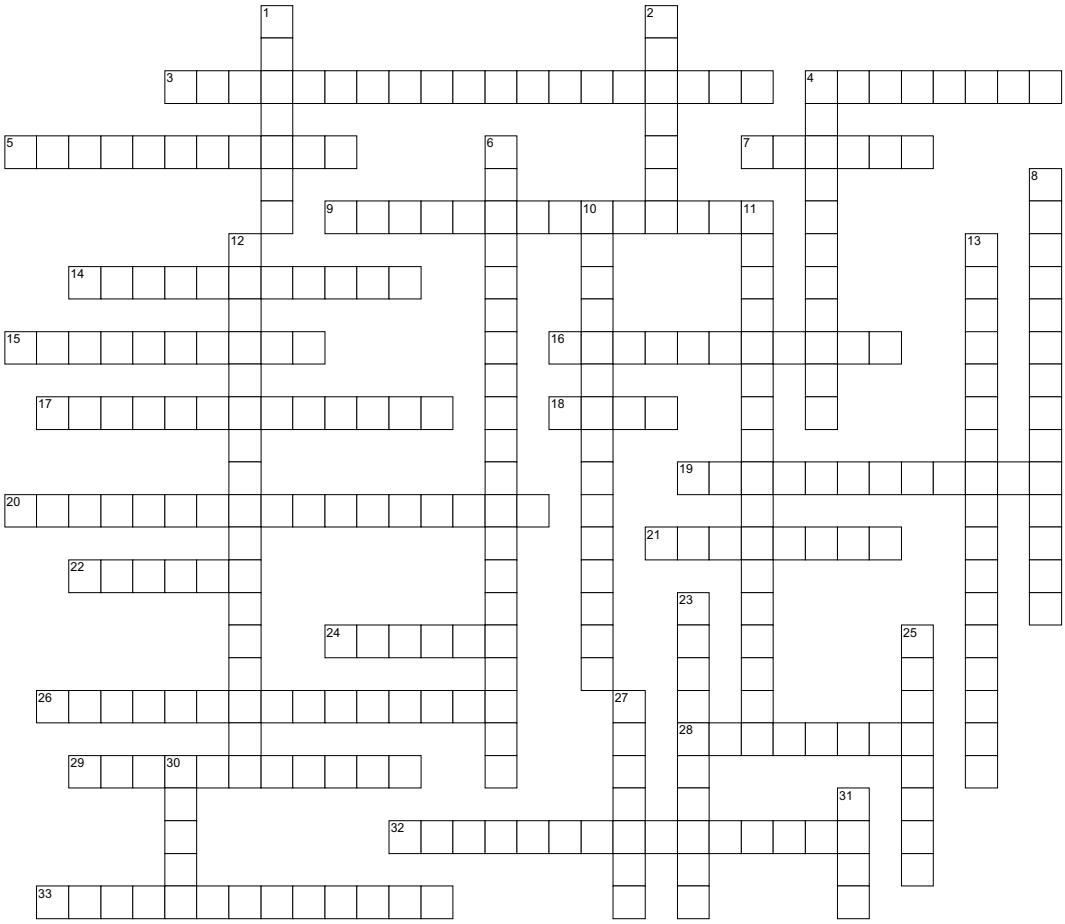
CROSSWORD PUZZLE

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 50.)



More Real Property, by J. David Eldridge

Across

3 Remedy requiring exact adherence to provisions of a contract, usually to compel conveyance of property

4 A written agreement promising to do or not do something relating to real estate

5 A right, claim or interest in land which subsists in another, diminishes its value and survives conveyance

7 Nonpossessory right to enter another's land to take soil, timber, minerals, etc.

9 Land benefiting from an easement over another parcel

14 The surrender or relinquishment of property or rights

15 An estate limited by the span of a human's time on earth

16 Property owner only owns interior of each unit and interest in common areas

17 Statutes requiring filing to give notice to the world that title to certain property has been conveyed

18 A claim, encumbrance or charge on real property for payment of a debt, duty or obligation

19 The ancient rule against remainders in a grantee's heirs

20 Acquiring title to real property by possession for a statutory period under certain circumstances

21 A tenant who remains in possession after expiration of lease

22 To put out and/or deprive one of possession or use of property

24 Process whereby a parcel of land is measured and its boundaries, courses and contents defined

26 Property owners of a single parcel, each owning a distinct, proportionate and undivided interest in the property, are _____

28 Right to use another's property

29 Written result of an examination of deeds and other records of title

32 When a life tenant allows property to fall into disrepair or fails to protect land

33 State's power to take private property for public use

Down

1 Revocable right to use another's land

2 The transferor of property

4 Property ownership where title is held by a corporation with apartments leased to its shareholders

6 Transfer of real property with the intent to hinder, defraud or delay a creditor

8 A covenant allowing subsequent owners of land to enforce its provisions is said to _____

10 Tenancy continuing for successive fractions (usually month to month) until terminated by either party

11 Sum agreed to be paid by party to contract if promise is broken

12 One who purchases real property without notice of defects in title

13 Acts that benefit property economically despite substantial change in use

23 Lat. a pending suit

25 An interest in land created by written instrument providing security payment of a debt

27 Final transaction where consideration is paid, mortgage secured, deed delivered, etc.

30 Any agreement creating a landlord/tenant relationship

31 Written conveyance transferring title from one to another

Medicolegal Aspects of Whiplash Injury – A Primer for Attorneys

By Anthony V. D'Antoni, D.C., M.S.

"The truth is always the strongest argument." – Sophocles, *Phaedra*.[1]

Mr. John Rossi allegedly sustained a whiplash injury when his car, which was stopped at a red traffic light, was struck from behind at an intersection. This was considered a low-speed rear impact crash (LOSRIC) because the vehicle that struck Mr. Rossi's car was traveling at a velocity of 5 mph. During the trial, the attorney representing the defendant's insurance company made the following statement: "Ladies and gentlemen of the jury, common sense dictates that Mr. Rossi could not possibly have been injured in the collision because there is no damage to the car. In fact, here are photographs of Mr. Rossi's bumper that clearly show that no damage was done to the car." The defense hired an auto crash reconstructionist to testify that the injury could not have occurred because the velocity of the impact was below "injury threshold." Despite testimony from Mr. Rossi's chiropractor that an injury was present, the jury was swayed by the auto crash reconstructionist's testimony and gave a verdict in favor of the defense – Mr. Rossi lost the case.

This article reviews the scientific basis of whiplash injury and concentrates on the medicolegal issues that are relevant to personal injury attorneys who represent whiplash victims. These attorneys will then be able to approach these cases with confidence that their expert will be able to expose the truth and avoid a decision like the one delineated above.

Nomenclature

The first whiplash injuries were sustained by U.S. Navy pilots shortly after World War I. At that time, planes were catapulted off naval ships and, with no head restraints in the planes to prevent injury, the pilots experienced severe forces to their cervical spines that later manifested as pain.[2] In the 19th century, similar whiplash injuries occurred when train passengers were suddenly jolted during the adjoining of trains on the tracks.[3] The term "whiplash" was first coined by a Dr. H.E. Crowe at an orthopedic convention in 1928. Because this term does not describe the mechanism of injury, a newer term has been proposed – that is, cervical acceleration/deceleration (CAD) injury.[4] This is a more scientific term, and one that I will use throughout the remainder of this article. By definition, CAD injury is a musculo-ligamentous strain/sprain of the cervical region without fractures or dislocations of the cervical spine, herniations of the intervertebral discs, head injury or alteration of consciousness (including post-traumatic amnesia)[5] that can result from a rear- or side-impact car crash.[6] Unfortunately, these sequelae sometimes occur in conjunction with CAD injuries.

Epidemiology

The epidemiology of CAD injury is staggering. It has been estimated that three million new CAD injuries occur in the U.S. annually,[7] and the number is rising. This increased incidence is partly due to the increased stiffness of newer car chassis to improve crashworthiness in higher speed tests and stiffer seat back design. There is an overwhelming body of scientific literature in support of CAD injuries, and the few articles that refute the existence of these injuries have recently been scrutinized for methodologic errors.[8]

The "No Crash – No Cash" Misconception

Perhaps the most important point of this article is to dispel the myth held by many attorneys that no vehicu-

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lar damage means no award settlement. This concept, referred to as "no crash – no cash," has been promulgated to the point that many attorneys now turn down LOSRIC cases, despite the fact that occupants were injured. In order to appreciate the inverse nature[9] of LOSRICs – that is, the lower the impact velocity, the greater the forces generated to the neck – one must appreciate two basic physical laws as they relate to crash dynamics: elastic and plastic crashes.[10] An elastic crash is one where there is no deformation between two colliding objects. For example, a billiard ball hits another in the game of pool; this is an elastic crash because neither ball deforms. In fact, the energy from the first ball is almost completely transferred to the second. In contrast, a plastic crash is one where deformation between two colliding objects occurs. Keeping with the billiard analogy, if both balls were made of clay and the first ball struck the second, they would both deform and experience a plastic crash. LOSRICs are elastic in nature, often resulting in no visible damage to the vehicle; however, energy is transferred to the unsuspecting occupant of the vehicle, which may result in injury. A study of rear impact crashes in New York[11] found that females and males have a risk for neck injuries of 45% and 28%, respectively. Furthermore, the largest category of injury crashes were graded as having no damage – in these crashes, 38% of females and 19% of males had symptoms. This data suggests that many CAD injuries occur in the absence of property damage.

Recently, Akihiko Hijioka et al.[12] published a study that offers compelling evidence that the "no crash – no cash" notion is unsubstantiated. The authors looked at 400 cases from a Japanese insurer database where most occupants were injured in rear impact crashes. They proceeded to classify vehicle property damage into the following 6 grades:

Degree of property damage[13]	
Grade	**Damage**
Grade 0	No damage
Grade 1	Slight damage
Grade 2	Damage to bumper
Grade 3	⅓ of car damaged/trunk damaged
Grade 4	½ of car damaged
Grade 5	Total destruction of car

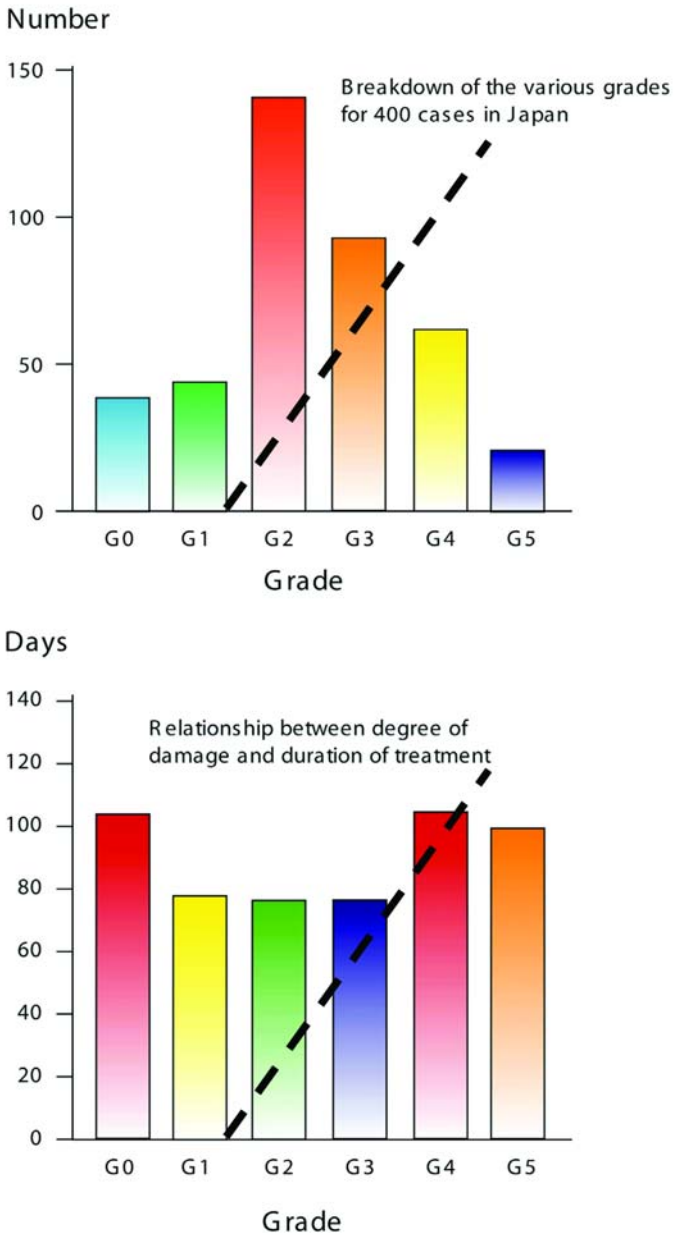

Figure 1:
Hijioka A, Narusawa K: Risk factors for long-term treatment of whiplash injury in Japan: analysis of 400 cases. Arch Orthop Surg 121:490-493, 2001

Figure 1. The dashed lines predict the basis of the "no crash – no cash" notion; that is, a positive relationship exists between property damage and injury risk and severity. As can be appreciated by looking at the data, this is a completely incorrect notion.[14]

Grade 1 damage was cosmetic and may have included scuff marks, scratched paint, and/or broken trim pieces. Figure 1 delineates the data in a graphic format. The first histogram displays the number of injured occupants in each grade. Notice that approximately 100 patients (one-quarter of the total) were collectively injured in grades 0 and 1, with the largest number of patients injured in grade 2. If the "no crash – no cash" notion were true, then the number of injured patients

should be proportional to the grades (*i.e.*, the number of patients injured increases as the grade increases). The dashed line predicts this incorrect positive relationship. It is clear, however, that the data do not follow this pattern because as the grades increase from 2 to 5, the number of patients injured decreases, which, of course, is a negative relationship. The second histogram displays the relationship between the degree of vehicular damage and duration of treatment. Again, if the "no crash – no cash" notion were true, the duration of treatment would increase as the grades increase because, presumably, more severe injuries in the higher grades would require longer treatment (see dashed line). The data, however, show that the duration of treatment was fairly equal among all grades. In fact, the treatment duration of grade 0 was the same as grade 4. This study strongly suggests that injury can occur with little or no vehicular damage and dispels the "no crash – no cash" notion.

The Biomechanical Model of CAD Injury

The biomechanics of CAD injury are fascinating. It is, however, a highly complex subject, so I will provide a brief summation of the events that result in CAD injury. It is important to realize that our understanding of CAD injury stems from an array of research subjects that include animals, post-mortem human subjects (cadavers), mathematical models and human volunteers.[15] The biomechanical model can be described in four phases.[16]

Phase 1. Begins when a car (the target vehicle) containing an unsuspecting occupant is struck from behind by another vehicle. After impact, the target vehicle and the seat back move forward against the initial inertia of the occupant. The occupant's neck (which, like the torso, is in a state of inertia) assumes a unique shape called the S-shaped[17] curve, where the upper cervical spinal segments are in a state of flexion while the lower segments are in hyperextension. This aberrant curve can cause injury to the occupant's neck.

Phase 2. The thoracic spine will flatten due to contact with the seat back, resulting in a lifting of the torso – a process called *ramping*.[18] This ramping effect causes the occupant's head to move up and over the head restraint, increasing the risk for injury (see figure 2).[19]

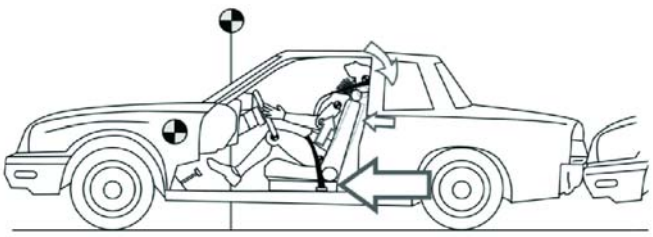

Figure 2: Used with permission from Dr. Arthur C. Croft.

Figure 2. Phase 2 of CAD injury. Notice how the occupant's head ramps up and over the head restraint. Of particular interest in this diagram is that the occupant's foot is off the brake pedal, a common finding in CAD injury. This unintentional occurrence is due to the fact that the occupant is moving backwards relative to the seat. Unfortunately, this occurs at a time when you want the brakes locked.

Phase 3. The occupant's torso is now moving forward with the seat back. As the torso continues its forward movement, the neck pulls the lagging head forward.[20] As a consequence, the occupant's head and neck are at an acceleration greater than that of the car (see figure 3).[21]

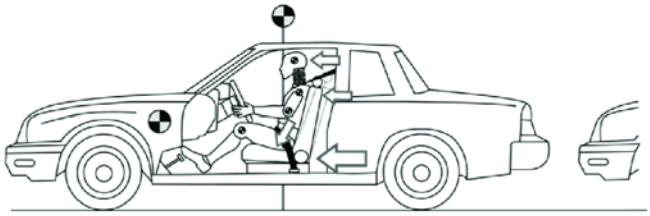

Figure 3: Used with permission from Dr. Arthur C. Croft.

Figure 3. Phase 3 of CAD injury. The occupant's head and neck are at peak acceleration as the torso is thrust forward. Notice the change in proximity between the foot and brake pedal, as compared to figure 2.

Phase 4. The torso makes contact with the seat belt as the head is thrust forward violently, which may further result in injury. As the foot forcibly makes contact with the brake pedal, the car abruptly stops. Meanwhile, the neck flexes forward, and this results in increased tension on the brain and spinal cord.[22] Any number of anatomical structures may be damaged throughout the four phases such as the cervical facet joints, ligaments and muscles of the neck.

Diagnosis and Treatment of CAD Injury

A comprehensive treatise on the diagnosis and treatment of CAD injury is beyond the scope of this article; however, attorneys should have a basic understanding of these issues because they may arise in litigation. For example, the defense may argue that since the radiographs of the plaintiff's cervical spine were negative (*i.e.*, no lesions were observed), then a CAD injury does not exist. The diagnosis of a CAD injury, like any disease, is based on a comprehensive history and physical examination. Moreover, radiographs are usually taken after the crash to rule out any unstable fractures that require a surgical consultation. From a clinical standpoint, after these procedures are performed and a diagnosis is made, treatment may begin. Some chiropractors may opt to have an adjunctive imaging study of the cervical spine performed, called videofluoroscopy (VF).[23] VF, a motion radiograph that allows one to observe a patient's cervical spine moving in different planes, is usu-

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ally recorded on standard VHS tape or DVD and has served as a teaching device at trial. By allowing visualization of motion, the VF may indirectly suggest ligament damage (by displaying excessive motion and aberrant joint alignment), presumably due to the CAD injury. It is my opinion that the VF be read by a board-certified chiropractic radiologist, since the inter-examiner reliability of these specialists with respect to reading VF has been investigated.[24]

A grading system[25] for CAD injury has been developed so that a clinician can establish a baseline for the patient prior to treatment. This baseline will allow the clinician to devise an appropriate treatment plan, as well as, monitor the patient's progress throughout treatment. A rather large study conducted by the Quebec Task Force (QTF) looked at different treatment strategies for CAD injury, including spinal manipulation[26] (a therapy at which chiropractors are experts). A multifaceted approach to treatment is usually implemented, which may include spinal manipulation or mobilization, deep-tissue massage and home exercises. Ultimately, the treatment plan is based upon the chiropractor's assessment of the patient.

A grading system for CAD injury has been developed so that a clinician can establish a baseline for the patient prior to treatment.

The Role of Logical Fallacies in Litigation

In Mr. Rossi's case, presented in the beginning of this article, the defense hired an auto crash reconstructionist to refute the chiropractor's testimony. In actuality, the defense can hire an engineer, biomechanist or independent medical examiner (IME) to act as an expert. If the case involves a substantial amount of money, the defense may hire two or more experts. Regardless of whom the defense hires, all of these experts rely on *logical fallacies*[27] to some degree. "A logical fallacy is an argument that gives a reason in support of a conclusion when the reason does not, in fact, support the conclusion," according to Dr. Michael D. Freeman. There are a number of logical fallacies used by the defense and the reader is referred to another article for a comprehensive review of the topic.[28] It is important to be prepared to expose these fallacies prior to trial, and we will discuss two of the more common fallacies: the fallacy of generalization and the fallacy of authority.

Fallacy of generalization. By definition, "A generalization is a statement that may be true part of the time, but not always."[29] This fallacy was used in the Rossi example, when the auto crash reconstructionist testified that Mr. Rossi could not have been injured because the change in velocity was 5 mph, which is below the 7 mph "injury threshold." In order to expose this fallacy, first explain to the jury that this argument is a generalization, citing the definition above. Then proceed to explain that because it is a generalization, it cannot be applied to everyone, including the patient under discussion who is in fact injured. Another approach that has proven effective (see the "recent cases" section of this article) is to argue that the auto crash reconstructionist has absolutely no training in medicine and therefore is not qualified to judge whether the patient is an exception to the generalization – a judgment that can only be made by the treating chiropractor.[30]

Fallacy of authority. The defense expert may use an *anonymous authority*[31] to purport expertise in their field. As an example, an IME may say: "Many studies show that CAD injury is psychosomatic in nature. In fact, CAD injury does not even exist in certain countries." (Psychosomatic means that the disorder stems from the patient's perception, implying that a real lesion does not exist.) Query the expert as to his source of information and, if he cites any articles, expose their methodologic flaws.[32] For example, there are about 20 articles that refute the existence of CAD injury but these are versus hundreds that prove the existence of the injury. Most important, these articles had major methodologic flaws to the point that an excellent article was published to expose them.[33] (Interestingly, many of the references in these articles are from opinions and editorials – not from primary research literature.[34]) The comment by the expert suggesting that people in other countries do not have CAD injuries stems from a few Lithuanian studies that contained inappropriate conclusions.[35]

Recent Cases

A number of cases illustrate the changes that have recently occurred in CAD injury litigation.

Davis v. Maute[36] In this case, the Supreme Court of Delaware ruled that crash photos were inadmissible unless the lawyer displaying them had an expert to testify as to their significance and meaning in the case.

Yorston v. Baily[37] In this case, the Maricopa County Superior Court of Arizona ruled that a biomechanist/ACR is only allowed to opine as to crash metrics and not injury risk.

New York In New York, the courts have followed the ruling in the Arizona case.

CONTINUED ON PAGE 16

Glossary of Terms

Anonymous authority – the authority being cited is not named.[1]

CAD injury – a more scientific term for whiplash. This injury occurs when the cervical spine hyperextends and then flexes due to outside forces, most commonly generated in a LOSRIC.

Delta V (change in velocity) – is the difference between a vehicle's pre- and post-impact velocities.[2]

Facet joints – also called zygapophysial joints, are the joints of the spine that allow movement. These joints may be damaged in CAD injury.

Head restraint – is the correct term for "head rest."[3]

Inertia – is the tendency of a body to oppose any attempt to put it in motion; it is a passive property and thus does not do anything except oppose forces.

Logical fallacy – is an argument that gives a reason in support of a conclusion when the reason does not, in fact, support the conclusion.[4]

Ramping – is a phenomenon that occurs in the second phase of CAD injury when the occupant's head moves up and over the head restraint.

Spinal manipulation – is a skilled, passive manual therapeutic maneuver during which a facet joint is carried suddenly beyond the normal physiological range of movement without exceeding the boundaries of anatomical integrity.

Spinal mobilization – is a skilled, passive manual therapeutic maneuver during which a facet joint is carried beyond the active range of motion (ROM) without entering the paraphysiological space of the joint.

S-shaped curve – this is an abnormal curve of the cervical spine that occurs at approximately 60 milliseconds post-collision. The lower cervical segments are in hyperextension while the upper cervical segments are in relative flexion.

Torso – anatomically refers to the trunk of the body, excluding the head, neck and extremities.

1. Michael D. Freeman, *Don't Fall for Defense Fallacies*, 36 Trial 88 (2000).
2. Arthur C. Croft, *Whiplash and Brain Injury Traumatology: Module 1*, Spine Res. Inst. of San Diego (2003).
3. Arthur C. Croft, *Whiplash: A Patient's Guide to Recovery*, Spine Res. Inst. of San Diego (2001).
4. Freeman, *supra* note 1.

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Schultz v. Wells[38] In this case, "The Colorado Supreme Court ruled that evidence indicating there is a threshold force level below which a person probably could not be injured in a rear-end automobile accident collision is inadmissible under both the test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1993), and the Colorado Rules of Evidence."

The Expert Witness

In general, the testimony of the treating doctor is more credible than the defendant's expert because of the strength of the doctor-patient relationship. If, however, the doctor does not have a mastery of the medicolegal issues of CAD injury, the outcome of the case will most assuredly be that of the one given in the beginning of this article. Therefore, an important question is: What kind of doctor is best qualified to manage CAD patients and understand the medicolegal issues if the case goes to trial? According to the QTF, the person most qualified to treat CAD patients

> must possess the qualities of a clinical anatomist. In addition to his or her basic knowledge of topographic anatomy, this clinician must have an in-depth knowledge of neuroanatomy and more particularly, of peripheral anatomy. He or she must have basic knowledge of the autonomic nervous system and its influence on the locomotor system.[39]

Because chiropractic education invests a substantial amount of time on these very subjects, a chiropractor is a logical choice as an expert both to manage these cases and testify. In fact, a recent study comparing chiropractic and medical education found that chiropractic students spend more didactic hours than medical students in the following basic science courses: anatomy (570 vs. 368), biochemistry (150 vs. 120), physiology (305 vs. 142) and pathology (205 vs. 162).[40] However, as can be appreciated from this article, the field of CAD injury requires knowledge well beyond that taught in chiropractic or medical school; such knowledge includes biomechanics, engineering, auto crash reconstruction and fundamental statistics (a discipline needed to assess research methodology). So, where can an attorney find a well-trained doctor? The Web site[41] of the Spine Research Institute of San Diego contains an accessible database of doctors who have completed advanced training in CAD injury, as well as those certified as LOSRIC reconstructionists from the institute. The institute is the only organization of its kind that conducts ongoing human subject crash tests.[42] Ideally, your expert should be able to act as both an attending physician and consultant, as well as be knowledgeable in auto crash reconstruction.

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Summary

The first whiplash injuries were experienced by U.S. Navy pilots shortly after World War I. A new term – CAD injury – has recently been proposed to replace the antiquated term "whiplash," although this term is still used in the literature. It is estimated that three million new CAD injuries will occur in the United States this year. The "no crash – no cash" notion among some attorneys is unfounded based upon solid scientific research. The biomechanical model of CAD injury includes four phases, and each phase may contribute to occupant injury. The diagnosis of CAD injury is based on a comprehensive history and physical examination and can be aided by advanced imaging such as videofluoroscopy. Treatment of CAD injury usually takes a multidimensional approach that includes spinal manipulation or mobilization, deep-tissue massage and home care. Logical fallacies are often used by the defense to impart doubt on the jury; however, a knowledgeable expert can expose these fallacies at trial. Finally, a number of recent cases from New York and other states have discredited auto crash reconstructionists' testimony as it relates to risk of injury.

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3. Arthur C. Croft et al., *'Railway spine' to 'late whiplash.' Cases of wrongful controversy?*, 5 Topics in Clinical Chiropractic 54 (1998).
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15. Croft, *supra* note 5.
16. Arthur C. Croft, *Whiplash: A Patient's Guide to Recovery*, Spine Res. Inst. of San Diego (2001).
17. Jonathan N. Grauer et al., *Whiplash produces an S-shaped curvature of the neck with hyperextension at lower levels*, 22 Spine 2489 (1997).
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39. Spitzer et al., *supra* note 6.
40. Ian Coulter et al., *A Comparative Study of Chiropractic and Medical Education*, 4 Altern. Ther. Health Med. 64 (1998); Anthony V. D'Antoni, *A Comparison of Chiropractic and Medical Education*, 23 The Synapse 13 (1999).
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New York Adopts Procedures For Statewide Coordination Of Complex Litigation

By Mark Herrmann and Geoffrey J. Ritts

For lawyers practicing in the areas of complex or mass-tort litigation, familiarity with the new Litigation Coordinating Panel and its rules will be essential. Attorneys acquainted with the federal Judicial Panel on Multidistrict Litigation will find similarities between the federal and state procedures, but must understand important differences as well.

The process of establishing the new approach began in January 2002 when the Uniform Civil Rules of the Supreme and County Courts were amended to add a new § 202.69 (22 N.Y.C.R.R. § 202.69), entitled "Coordination of Related Actions Pending in More Than One Judicial District." The section established a framework to allow related lawsuits filed in different judicial districts to be coordinated for pretrial proceedings – and in some instances for trial as well – before a single judge.

Section 202.69(b) created a Litigation Coordinating Panel, the members of which have now been selected. On June 2, 2003, the Panel adopted rules governing practice before it.[1] These rules lay out a map for practitioners to follow when seeking coordination of related cases pending in different state courts.

Role of the Litigation Coordinating Panel

Under § 202.69(b)(2), the Panel is given the power to direct coordination of proceedings in related cases pending in different New York state courts. One justice of the Supreme Court from each judicial department sits on the Panel. The chief administrator of the courts, in consultation with the presiding justice of each Appellate Division, chooses its members. At present, they are Justices Helen E. Freedman of the First Department, Joseph J. Maltese of the Second Department, E. Michael Kavanagh of the Third Department, and Raymond E. Cornelius of the Fourth Department. Section 202.69 does not set any particular term for justices serving on the Panel.

Although § 202.69 permits the Panel to establish its own rules of procedure, the Uniform Rule itself lays out the basic structure of the coordination process. It calls upon the Panel to determine, either *sua sponte* or upon the motion of a litigant, trial judge or administrative judge, whether related actions should be coordinated before one or more justices.[2] The section lists non-exclusive criteria the Panel will consider in deciding whether to coordinate cases:

- The complexity of the actions;
- Whether common questions of fact or law exist;
- The importance of the common questions to the determination of the cases;
- The risk that coordination may delay the actions or increase expense for the parties;
- The risk of duplicative or inconsistent rulings, orders or judgments if the cases are not coordinated;
- The convenience of the parties, witnesses and counsel;
- Whether coordinated discovery would be advantageous;
- Judicial economy;
- The manageability of coordinated litigation;
- Whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and

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The views expressed in this article are those of the authors and not necessarily those of their clients or firm.

• The pendency of related matters in federal courts or other states' courts.[3]

The Panel decides whether one or more "coordinating justices" should be appointed to preside over the related cases, and selects the county or counties where the coordinated proceedings will be venued.[4] Unlike the federal Multidistrict Litigation (MDL) system, under which the Judicial Panel on Multidistrict Litigation (JPML) chooses the judge who will preside over an MDL, the state court Litigation Coordinating Panel does not select the coordinating justice.[5] That selection is made by the "Administrative Judge charged with supervision of the local jurisdiction within which coordinated proceedings are to take place, . . . in consultation with the appropriate Deputy Chief Administrative Judge."[6]

The Role of the Coordinating Justice

After transfer by the Panel, the coordinating justice has broad power over pretrial matters, just as federal judges do when presiding over MDLs.[7] The rule authorizes a coordinating justice to take certain steps to streamline litigation; among other things, the judge may create a central file and docket, issue case management orders, appoint a steering committee, establish a document depository, and direct the parties to prepare coordinated pleadings and uniform discovery requests.[8] The coordinating judge has the authority to rule on dispositive motions and to "require the parties to participate in settlement discussions and court-annexed alternative dispute resolution."[9]

The coordinating justice will usually decide when the coordination process ends, because he or she "may terminate coordination, in whole or in part, if the justice determines that coordination has been completed or that the purposes of this section can be best advanced by termination of the coordination."[10] In an interesting twist on federal practice, the coordinating justice is expressly allowed to try all or part of any coordinated case if the parties consent; under federal MDL practice, cases must be remanded to their original courts for trial.[11]

One beneficial feature of § 202.69 is its requirement that a coordinating justice work to coordinate complex litigation in the New York court system with similar cases pending in other states or in the federal system. The rule makes this an affirmative mandate for the coordinating justice, who must, in such a circumstance,

> . . . consult with the presiding judge(s) in an effort to advance the purposes of this section. Where appropriate, the Coordinating Justice, while respecting the rights of parties under the Civil Practice Law and Rules, may require that discovery in the cases coordinated pursuant to this section proceed jointly or in coordination with discovery in the federal or other states' actions.[12]

New Rules of the Panel

The new Procedures of the Litigation Coordinating Panel expand upon § 202.69 by providing specific rules covering such matters as filing motions before the Panel, the Panel's hearing and decision process, and the treatment of later-filed related cases.[13]

The Office of the Litigation Coordinating Panel has been established in the Supreme Court of New York County. Papers and proceedings before the Panel, described below, are to be filed in this office. The Panel has designated Pablo Rivera as clerk of the Panel, and parties are permitted to communicate with the clerk by mail, telephone, facsimile or e-mail.[14]

The procedures provide three ways to trigger a coordinated proceeding: (1) by request of a presiding justice or an administrative judge, (2) by *sua sponte* action of the Panel or (3) by a party's motion. A justice who is presiding over an action that he or she believes should be coordinated with others, or an administrative judge in whose district such a case is pending, may submit to the Panel a letter application seeking coordination. The letter must, "to the maximum extent possible," identify the purportedly related actions by caption, index number and county, and must name the attorneys for all the parties in the actions.[15] The letter application will be submitted to the parties for them to respond in accordance with a schedule to be provided by the Panel.

If the Panel wishes to raise the question of coordination *sua sponte*, it will issue an order to show cause to all the parties in the subject cases, calling upon them to show why coordination should or should not be ordered.[16]

A party applying for coordinated treatment of cases must file a motion for an order of coordination. The motion is filed under the caption of the actions proposed to be coordinated, but is returnable before the Panel. Moving papers must identify by caption, index number and county all of the cases for which coordination is sought and the names and addresses of all counsel in those cases. A copy of the moving papers must be served on the parties and also on the justices presiding over each allegedly related case. The Panel will issue a briefing schedule for the motion.[17] Submissions must address the standards for coordination listed in § 202.69(b)(3), such as complexity of the actions, the existence of common legal or factual questions, and so forth.[18] An original and four copies of all papers relating to an application for coordination must be filed with the Panel's clerk.[19]

The Panel may, but need not, allow for oral argument of an application for coordination.[20] The Panel, or any justice on the Panel, can stay proceedings in any of the actions for which coordination is sought, pending the Panel's decision on the application. Unless such a stay is

ordered, however, the mere pendency of an application for coordination "shall not affect proceedings in the actions that are the subject of the application."[21] Under its procedures, the Panel is to decide an application within 30 days after the close of briefing or oral argument, whichever is later.

The Panel's decisions must be in writing and must state the reasons for granting or denying the application. An order granting coordination must identify the actions to be coordinated and the venue(s) for the coordinated proceedings. The order may also address "tag-along" cases – those that may later be filed but are related to the cases being coordinated by the Panel's order.[22] The decision on an application for coordination is apparently final and non-appealable: "The determinations of the Panel are purely administrative in nature. Hence, no appeal lies therefrom and none is provided for in Section 202.69."[23]

As noted, the procedures provide for treatment of subsequently filed tag-along cases. They also address pending related cases that may have been overlooked in an application submitted to the Panel. A party to such a case may serve a notice requesting coordination, with a copy of the Panel's coordination decision, on all counsel in the related case, the justice assigned to the related case and the coordinating justice. Unless one of the parties in the purportedly related case raises an objection within 21 days, the case will be included as part of the coordinated proceeding.[24]

Comparison of State and Federal Case Coordination

The advantages and disadvantages of seeking coordinated treatment of related cases scattered around the federal court system have been analyzed frequently.[25] On the other hand, the parallel mechanisms being developed in many states to allow for coordination of state court litigation are less familiar to most lawyers, and are rarely commented upon.[26] Practitioners must become familiar with both, however, because there are differences as well as similarities.

In contrast to the laundry list of factors found in § 202.69, the federal multidistrict litigation statute, 28 U.S.C. § 1407, sets forth only two criteria for establishing a federal MDL: whether "one or more common questions of fact" exist, and whether coordination would serve "the convenience of parties and witnesses and will promote the just and efficient conduct" of the related cases. The factors that were included in § 202.69 are, however, ones that the Judicial Panel on Multidistrict Litigation (JPML) regularly has considered in its rulings over the past 30-plus years. One would expect, therefore, that the ample body of JPML precedent will prove useful for proceedings before the state court Litigation Coordinating Panel.

Once the Panel has acted and a coordinated proceeding is assigned to a coordinating justice, federal precedent regarding the authority of an MDL judge should likewise be instructive. This is so because the New York scheme gives the coordinating justice broad pretrial powers, as in the federal scheme.

However, a significant distinction also exists between the two systems with regard to the role of the presiding judge. The coordinating justice in New York has the power to try cases if the parties consent, and can be expected to do so with some regularity. That is not the case in federal MDL practice, where the requirement of remand to the original court for trial can be a source of delay and inefficiency. The remand often means moving the case from a judge with a deep knowledge of the litigation – frequently formed by years of presiding over the MDL – to a judge who has had no meaningful contact with the case at all.

Coordination With Another Related MDL

As indicated above, § 202.69(c)(3) requires the coordinating justice to affirmatively attempt coordination of New York proceedings with MDLs in the federal system, or in other states. This should promote development of state-federal or state-state coordination mechanisms; this has been attempted in the past, with varying degrees of success. These new mechanisms might include such straightforward measures as requiring depositions in a federal MDL to be cross-noticed in a New York coordinated proceeding, providing for form written discovery requests to be used in both a federal MDL and a New York coordinated proceeding, or naming the same lawyers to steering committees in MDLs and coordinated state proceedings.

State-federal or state-state coordination mechanisms could be even more ambitious. For instance, courts might conduct joint hearings on discovery issues or dispositive motions, or jointly sponsor alternative dispute resolution proceedings. The extent and success of state-federal or state-state coordination is likely to depend heavily on the rapport between the judges involved in a particular case.[27]

Establishing a functional state MDL system in New York's courts could even lead to more federal MDLs being venued in New York, because one factor considered by the federal JPML in deciding where to locate federal proceedings is the extent to which state courts have effectively coordinated related litigation.[28]

Conclusion

The development of a uniform New York State approach to multidistrict litigation, including the procedures that have been disseminated by the Litigation Coordinating Panel, offers the New York bench and bar a better way to handle the issues that arise in mass tort

and complex litigation. Practitioners in this area are well advised to become familiar with the new system.

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1. *See* Procedures of the Litigation Coordinating Panel (promulgated June 2, 2003) *available at* <http://www.courts.state.ny.us/supctmanh/lcp/procedures/htm>.
2. Unif. Civ. R., Trial Cts. § 202.69(b)(2).
3. Unif. Civ. R., Trial Cts. § 202.69(b)(3).
4. Unif. Civ. R., Trial Cts. § 202.69(b)(4)(ii).
5. *Compare* Unif. Civ. R., Trial Cts. § 202.69(c)(1) *with* 28 U.S.C. § 1407(b).
6. Unif. Civ. R., Trial Cts. § 202.69(c)(1).
7. *Compare* Unif. Civ. R., Trial Cts. § 202.69(c)(2) ("The Coordinating Justice shall have authority to make any order consistent with this section and its purposes") *with* 28 U.S.C. § 1407(b) (MDL judge "may exercise the powers of a district judge in any district").
8. Unif. Civ. R., Trial Cts. § 202.69(c)(2).
9. *Id.*
10. Unif. Civ. R., Trial Cts. § 202.69(d).
11. *Compare* Unif. Civ. R., Trial Cts. § 202.69(c)(2), (d) *with* 28 U.S.C. § 1407(a) ("Each action . . . transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."). *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37–41 (1998) (MDL transferee judge cannot try coordinated case).
12. Unif. Civ. R., Trial Cts. § 202.69(c)(3).
13. Even before issuing its new Procedures, the Panel had considered coordination in a handful of cases. Copies of these decisions are located at <http:///www.nycourts.gov/supctmanh/lcp/Decsions/htm>.
14. Procedures of the Litigation Coordinating Panel (A) ("Pro. L.C.P.").
15. Pro. L.C.P. (B)(2).
16. *Id.*
17. Pro. L.C.P. (B)(4).
18. Pro. L.C.P. (B)(5).
19. Pro. L.C.P. (B)(6).
20. Pro. L.C.P. (C).
21. Pro. L.C.P. (D).
22. Pro. L.C.P. (E)(1).
23. Pro. L.C.P. (E)(3).
24. Pro. L.C.P. (F)(1).
25. *See, e.g.*, Mark Herrmann, *To MDL Or Not to MDL? A Defense Perspective*, 29 Litigation 43, 44 (1998).
26. *See* Mark Herrmann, Geoffrey J. Ritts & Katherine Larson, Statewide Coordinated Proceedings: State Court Analogues to the Federal MDL Process (Andrews Pubs. 2003).
27. *See id.*, chs. III and IV (discussing attempts at state-federal and state-state coordination in various jurisdictions); Francis E. McGovern, *Rethinking Cooperation Among Judges In Mass Tort Litigation*, 44 U.C.L.A. L. Rev. 1851, 1865–66 (1997) (discussing prerequisites for successful cooperation between state and federal judges); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689, 1700–31 (1992) (reviewing ad hoc coordination efforts in 11 instances of federal-state multiforum litigation).
28. *See* David F. Herr, Multidistrict Litigation 152–53 (1986) (citing cases where opportunity for state-federal coordination was cited by JPML as reason for selecting transferee court for federal MDL proceeding).

Third Parties Can Have Rights To Property Insurance Proceeds In Specific Circumstances

By Mark Ian Binsky

With the loss or damage to a debtor's property, creditors are often without recourse. If they were secured and gave the debtor's carrier proper notice of their interest, or if they had the foresight to be named on the debtor's insurance policy, they have some measure of protection. But what if they didn't? What is the difference, if any, between "mortgagees" and "loss payees" in insurance contracts? Do bailors and consignors of merchandise have any special rights in their customers' polices?

This article explores how third parties can receive compensation from their obligors' property insurance.

Traditional Third Party Beneficiary Rules

It is not enough that the person claiming under the policy simply have an insurable interest. In general, a claimant must look to the terms of the policy to determine who is covered and the extent of coverage.[1] The Appellate Division, First Department has used these terms to define the approach:

> In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of him who seeks to recover on the policy. As with other contracts, unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions.[2]

That decision involved a television broadcaster, who asked RCA to install a tower antenna. RCA then hired the plaintiff to design and erect it. The structure eventually collapsed and the plaintiff sought recovery under the broadcaster's all-risk property insurance policy even though the plaintiff was not named in the policy and there was no contractual relationship between the plaintiff and the broadcaster. The court would not allow it. While the plaintiff may have had an insurable interest in the tower, only the broadcaster was a named insured, and nothing in the policy indicated that anyone expected the plaintiff to benefit from it as a third party.

In another pace-setting decision,[3] a woman tried to assert rights in a property insurance policy by intervening in a lawsuit that the named insured brought against the carrier after the insurer refused to pay a fire damage claim. She argued that as a tenant in common with the plaintiff in the insured premises, she too was entitled to payment under the plaintiff's policy, even if it didn't mention her by name. The court found that she had an insurable interest in the premises, but no third-party interest in the policy.

Bailors and Consignors

Bailors and consignors of property, even if they are unnamed in the policy, are third parties who are often, but not always, entitled to its protection.[4] For example, a man asked a jewelry company to sell a ring for him. The piece was stolen while at the company's premises and the bailor sued both the company and its insurer. The court ruled that the man, as a non-dealer in jewelry, was indeed a beneficiary of the company's jeweler's block policy and was entitled to be paid.[5]

In another case, some furriers had consigned merchandise for sale to another party, but when those goods along with property belonging to the other party were stolen, that party submitted a claim to his property insurer with the representation that he was entitled to receive payment for all the lost items. When he recovered the proceeds of the policy, he refused to share them with the furriers, who then sued him and his insurer. The furriers relied on policy language allowing coverage for "'furs . . . for which [the insured] are responsible in-

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cluding customers [*sic*] goods.'"[6] This, the furriers contended, gave them third-party rights.

The Appellate Division conceded that the furriers were third-party beneficiaries under the policy and had standing to bring an action against the consignee's insurer. But the furriers were not entitled to recover in this instance because they had not notified the carrier of their claim before the carrier paid the insured. Once such payment was made, the insurance company was absolved of any further liability under the policy. While it was true that the insurer was aware that some of the stolen furs belonged to the plaintiffs, the court said this did not alter its duty to pay the entire proceeds to its insured.

Many property insurance policies, like the one that involved the furrier, promise that the carrier will pay for the loss of "property of others" while in the insured's care. The provision usually also gives the insurer the right to adjust the loss of the item directly with its owner. A clause of this type appeared in the policy at issue in *CBF Trading Co., Inc. v. Hanover Insurance Co.*,[7] where a third party sued an insurance company when the named insured lost its jewelry. The court began its analysis by noting that, as a general rule, a third party not in privity with the carrier has no right of direct action against it; but in this case, the existence of the "property of others" provision showed that the carrier intended to provide bailors with such a right, and the third party was allowed to recover.

Coverage for "property of others" is provided in a variety of types and in different ways, but a review of the case law in this area shows that courts consistently find that such provisions afford bailors third-party rights in the bailee's insurance.[8]

Secured Creditors

Secured creditors can escape the traditional third-party beneficiary rules and under certain circumstances may successfully stake a claim to insurance proceeds even if the policy shows no intention to provide for their interest. The Court of Appeals solidified the rules under which this might be done in *Rosario-Paolo, Inc. v. C & M Pizza Restaurant, Inc.*[9] and *Badillo v. Tower Insurance Co. of New York*.[10]

In *Rosario-Paolo*, the plaintiff sold a pizzeria to an entity called C & M, which signed a security agreement promising to keep the premises insured and to have the plaintiff listed as a beneficiary in the policy. C & M obtained a policy but did not add the plaintiff's name to it.

After a fire destroyed the restaurant, the plaintiff notified C & M's insurance carrier by certified letter that it was claiming the right to receive any insurance monies stemming from C & M's claim. The carrier ignored the letter and paid only its insured, which prompted the plaintiff to sue.

The Court of Appeals found that the debtor's promise to insure for the plaintiff's benefit gave the plaintiff an equitable lien on the property, and that once the insurance company got actual notification of it by way of the plaintiff's certified letter the company acted at its peril in not at least protecting the creditor's equitable rights to the insurance money. The Court said that the way to accomplish this when faced with the conflicting interests of the insured and its creditor was to commence an interpleader action and have a court sort out the matter.

The *Rosario-Paolo* plaintiff had filed a UCC-1 on the collateral, but the decision did not address whether that alone would have given the carrier sufficient notice of its interest. This forced the Court of Appeals to revisit the matter a few years later in *Badillo*, which removed the uncertainty about when an insurance company must honor a secured creditor's claim over that of the insured.

In *Badillo*, a tenant operating a supermarket gave its landlords a security interest in all its personal property as well as in all insurance proceeds pertaining to it. The landlords duly filed a UCC-1, apparently thinking that they were fully protected even though they were not named in the tenant's insurance policy. Imagine their frustration when, after a fire, the insurance carrier paid the supermarket for the loss of the collateral and rejected the landlords' claim.

The Court of Appeals held that the landlords had no claim on the insurance money. The constructive notice inherent in the UCC filing was not sufficient to obligate the carrier to anyone other than the policyholder.

In *Badillo* the Court of Appeals did nothing to back away from the traditional equitable lien approach used in *Rosario-Paolo* (and earlier cases). It merely distinguished *Rosario-Paolo* on notice grounds: unlike the plaintiff in *Rosario-Paolo*, the landlords in *Badillo* failed to give the insurer *actual* notification of their claim before the named insured was paid. But why wasn't the landlords' UCC-1 filing sufficient notice of their interest when it is in most other creditor/debtor situations?

The answer may be found in the old maxim by Justice Oliver Wendell Holmes that the life of the law is not logic, but experience. There is considerable practical justification for the exception the Court of Appeals carved out. For insurance to be as cost-effective as possible, the carrier must know who it has to pay. Recognizing this, the *Badillo* decision explains:

> The policy behind the constructive notice provided by UCC-1 financing statements is not applicable to carriers in the context of good faith payment of loss proceeds under insurance contracts . . . [to hold otherwise] would complicate and delay the payment of claims. Before carriers could safely make loss payments, they would need

> to perform UCC searches that may involve multiple parties, multiple interests, and the prospect of investigating and evaluating the efficacy of particular filings, in various jurisdictions. For fear of having to pay twice, carriers would be discouraged from paying claims promptly, and the claims process would be disrupted. . . . The existence or non-existence of a duly prepared and filed UCC-1 financing statement seems easily discernible, and usually is, but given the alternatives, there is no need to subject the insurance claims process to the vagaries surrounding the adequacy of UCC-1 filings, which are often enough the subject of protracted litigation.

Ultimately, the Court of Appeals said, there is a simpler solution. The secured creditor can always give the actual notice the *Rosario-Paolo* plaintiff did, or it can have itself named in the debtor's insurance policy.

Choosing the first course of action can be risky because creditors often do not find out until too late that their collateral is gone, and they cannot give the carrier notice of their interest in time. The second approach is clearly the better one. It is safer because it puts the carrier on notice automatically, and it can be done easily. Typically, a property insurer will agree, for no additional premium, to add a secured creditor to the policy and to provide wording that will protect its interest. All the creditor has to do is ask.

The Standard Mortgagee Clause

In most cases, the additional provision incorporated into the policy is the so-called standard mortgagee clause under which a mortgagee's interest in any claim proceeds "is coextensive with the debt secured by the mortgage."[11] Although the exact wording may differ from policy to policy, the standard clause always puts the secured creditor in a better position than the named insured when it comes time to collect on a claim.

By a policy's express terms, an insurer is required to first pay the mortgagee the full amount of its interest before the policyholder gets anything. The insured is only entitled to what is left of the claim proceeds after the mortgage is paid, providing the insured is not in default of any conditions of the policy.[12] Of course, the aggregate of the carrier's payments to the creditor and the insured can never exceed the face amount of the policy.[13] The mortgagee is bound to apply the insurance money to satisfy the principal of the mortgage[14] and, under certain statutorily defined conditions, must hold the proceeds for the repair of the insured premises.[15]

The liability of an insurance company to a mortgagee "is quite different" from its liability to the insured.[16] The standard mortgagee clause creates an independent contract between the creditor and the insurer that cannot be invalidated by any act or neglect of the policyholder.[17] In other words, if the insured fails to comply with any of the terms of the policy or any condition precedent to payment or even if the insured procures the loss, the mortgagee can still collect.[18]

The standard clause does not leave the carrier bereft of rights in such a situation. Because it requires the insurance company to honor a claim notwithstanding the insured's acts or omissions, the clause states that upon payment to the mortgagee the carrier will be subrogated to the mortgagee's interest, or (the clause continues) it may pay off the entire debt and take an assignment of it.[19] The carrier can then sue the insured in foreclosure to recover its payment to the mortgagee.[20]

But here the insurance company must be very careful. Its subrogation rights will not vest on a "mere assertion" of non-liability to the insured or a "mere disclaimer"; the non-liability must be valid and well-founded.[21] If the carrier sues the insured in subrogation, the insured may raise the defense that the carrier's denial of its claim was improper. If it was, the carrier loses its ability to recover in subrogation.[22]

The Mortgagee's Obligations Under the Policy

The precedents make it very clear that the mortgagee does not have the same obligations under the policy as the insured, unless the policy specifically says so.[23] The version of the standard mortgagee clause in *Annunziata* called for the mortgagee to submit a proof of loss, and it would be bound by this requirement. But because there was no mention in the clause about the mortgagee having to appear for an examination under oath, something the policy demanded of the named insured, the mortgagee did not have to do so.

A mortgagee is subject to the shortened contractual statute of limitation contained in property insurance policies because the standard clause so provides, but the time period would not begin to run until the insurer gives the creditor notice that there has been a loss.[24]

Most versions of the standard clause require the mortgagee to notify the carrier of any change in the ownership or occupancy of the covered premises or of any substantial change in risk that is known to him.[25]

While there have been versions of the standard mortgagee clause that omitted the requirement for the creditor to submit a proof of loss,[26] there is a widespread version that makes the mortgagee subject to all the terms of the policy, including the examination under oath requirement and other conditions precedent to payment. It is important to remember that the standard mortgagee clause is sometimes not so standard after all, and the lesson to be learned is that each policy must be read carefully to know what the mortgagee's obligations are.

The Carrier's Obligations to the Mortgagee

If the insurance company ignores the mortgagee named in the policy and pays only the insured, it is in

for trouble. The mortgagee, because it has its own independent contract with the insurer under the standard mortgagee clause, can sue for what it is entitled to and the carrier may end up paying twice. This is precisely what happened in *Rosario-Paolo*.[27]

The Court of Appeals has determined that no settlement between the owner of insured property and the insurer "can operate in any way to the detriment of a mortgagee."[28] If the insured sues the carrier over the claim but does not name the mortgagee in the action, the mortgagee is not bound by the outcome; nor would it be bound by the results of any policy-mandated appraisal proceeding between the insured and the company if it was not invited to participate.

How much does the mortgagee get under the standard clause when it makes a claim? The most comprehensive answer to this question is given in *Grady v. Utica Mutual Insurance Co.*[29] The court held that under a standard mortgagee clause the most a mortgagee could recover was the extent of his lien upon the property as it existed on the day of loss, up to the face amount of the policy. This would include the outstanding loan principal, interest due on it to the date of computation, any funds paid by the mortgagee to protect the security on account of overdue taxes and assessments that the insured had not paid, as well as the costs and disbursements of any foreclosure action.

The mortgagee does not have the same obligations under the policy as the insured, unless the policy specifically says so.

Where the cost of the damages to the insured premises is less than the full extent of this insurable interest, the insurance company's liability to the mortgagee is capped at the actual amount of the loss. Although *Grady* allowed for recoupment of foreclosure costs and tax payments, another decision involving Travelers Insurance states that these are not recoverable if incurred subsequent to the loss.[30]

The difference between the holdings in *Grady* and *Travelers Insurance* with regard to the recoverability of expenses reflects the long-recognized principle that the rights of the parties to an insurance contract crystallize on the day of the loss.[31] As settled as this rule is, it has a surprising exception that can be devastating to the mortgage holder. Where a mortgagee obtains a foreclosure judgment and then bids in the full amount of the outstanding debt at the foreclosure sale, it terminates its rights in the policy and cannot recover under it for any previously occurring losses, although the insured's ability to collect on the policy remains unimpaired.[32] The mortgagee's interest in the insurance proceeds, however, is preserved after the foreclosure sale to the extent of any surviving deficiency judgment.[33]

The Loss Payee

Anyone reading the precedents in this field must remain cognizant of the fact that courts are sometimes careless about terminology – the decisions routinely interchange the words "loss payee" and "mortgagee." This can be very confusing because they really have very different meanings.

Generally, a simple loss payee is an additional insured under a policy's loss payee provision which, unlike the standard mortgagee clause, does not constitute a separate insurance contract with the carrier. A loss payee is merely the designated person to whom the claim is paid.[34] The loss payee does not normally have the right to collect where the insured does not and can only do so if the insured can.[35]

Because the typical loss payable clause does not provide for the insurer's subrogation upon payment as the standard mortgagee provision does, it has been held that a carrier's payment to a loss payee cannot be recouped from an insured if it is found that the carrier owed the insured no coverage under the policy.[36]

Conversely, if the insurance company pays the insured and overlooks the loss payee, it will still be liable to the latter.[37] To make matters more confusing, some loss payable provisions happen to carry language that gives the loss payee the same rights as a mortgagee under the standard clause.[38] Again, reading the policy is indispensable to determine what the policyholder's creditor is entitled to receive.

The Tax Lien

There is a third party who is a beneficiary of every fire policy issued in this state on any real property other than a one- or two-family residential structure: the taxman. Under Insurance Law § 331(d) in conjunction with General Municipal Law § 22, once a carrier makes a final determination on its obligation to honor a claim for fire damage it must pay any tax liens perfected in accordance with these statutes before it pays the insured. General Municipal Law § 22(2) makes the tax lien on the fire policy proceeds superior to any other claim or lien except that of a mortgagee of record named in the policy. Sometimes, however, the policy's mortgagee clause puts the creditor's interest behind that of the taxing authority.

Practitioners doing insurance coverage work involving tax liens soon come to realize that many municipalities can be very lax in complying with all the details of the applicable law, thereby losing their right to the lien – so one should not automatically assume that it exists.

It is always a good idea to check with the taxing authority to confirm compliance with the governing statutes before telling the carrier how to make out the checks.

Assignments

It is axiomatic that contract rights can be assigned to third parties; but this is not necessarily the case with insurance policies. Most have a clause prohibiting assignments without the carrier's permission, and courts will uphold this requirement where the insured seeks to assign the policy prior to a loss.[39] After the loss, however, assignments of claim proceeds may be made freely.[40]

Conclusion

Property insurance in its many forms pervades the modern business world as do concerns about how to reach its proceeds when things go wrong. With a little foresight, creditors can structure their transactions to maximize their ability to protect themselves through the debtor's coverage at very little or no expense. That protection may even already be in place given the wording of some policies.

The creditor's lawyer will be doing clients a favor by reviewing the obligor's policy before the closing, and even if the lawyer does not, the insurance may nevertheless be there for the client when the loss occurs if proper notice of the creditor's interest is given to the carrier.

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State and Federal Standards Require Proof of Discriminatory Intent In Ethnic Profiling Claims

BY J. MICHAEL MCGUINNESS

Ethnic profiling allegations in law enforcement activities have emerged as one of the leading headline-grabbing legal and social issues of the new millennium. President Bush joined the rush to declare profiling evil: "Racial profiling is wrong, and we will end it in America."[1]

African-Americans and other ethnic groups have begun to frequently challenge routine motor vehicle stops and other law enforcement activities on grounds of alleged racial profiling. A number of perplexing constitutional issues have emerged. Under what circumstances is ethnicity an appropriate consideration in law enforcement investigations? Where ethnicity is not an appropriate consideration, how does a reviewing court determine whether considering ethnicity is unconstitutional?

Ethnic profiling claims are generally analyzed under selective enforcement and equal protection principles.[2] Although a few cases have recognized that intentional discriminatory profiling may state a valid claim under the Equal Protection Clause under certain circumstances,[3] the particular constitutional proof standards in profiling cases remain unclear.[4]

Courts have not settled on any of the several alternative discriminatory intent tests that appear in profiling cases. For instance, does one have to prove that race was the "determinative factor" or the "sole factor" in the law enforcement activity? Or is the "substantial or motivating factor" test applicable? All that we generally know is that intentional discrimination must be established. There are far more questions than there are answers in this developing area of law.

Despite being colorblind, even police dogs are now being accused of racial profiling.[5] Although "profiling" has nearly become a household term, there is compelling evidence that law enforcement racial profiling is a media-driven myth.[6] There has been virtually no appellate confirmation of any actual law enforcement racial profiling.[7] There is a perplexing lack of consensus about what constitutes unconstitutional racial profiling in the law enforcement context.[8]

This article does not significantly address the sharp debate about whether racial profiling is actually practiced by the law enforcement profession. Rather, it explores traditional stop criteria and the underlying constitutional standards to determine whether racial profiling is constitutionally actionable.

Some New York and Related Profiling Issues

No apparent published Second Circuit or New York appellate case has ever found any actual law enforcement racial profiling. In *United States v. Davis*,[9] the Second Circuit observed that the court "takes seriously an allegation of racial profiling." The court held that there must be evidence of "intentional discrimination" to establish a profiling claim, but it did not attempt to define any elements of intentional discrimination or methodology for analyzing profiling claims.

In *United States v. Bridges*,[10] Judge Baer denied a motion to suppress in a drug case involving racial profiling allegations. The court explained that

> [r]acial profiling by law enforcement is an odious practice that often unfairly burdens people of color, but in this case, there is not a scintilla of evidence that the DEA targeted the Defendant . . . based on a racial profile.

The court concluded that law enforcement did not use a racial profile but rather an appropriate drug-trafficking profile.

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A classic example of an appropriate use of race appears in *Brown v. City of Oneonta*,[11] where the victim of a crime reported that the suspect was a young black male and that he had cut his hand with a knife during the contact. A police dog followed the scent of the suspect to a local college campus, where 2% of the students were black. Officers obtained a list of all black male students, who were located and questioned. When that failed, officers conducted a "sweep" of the city and questioned black persons and inspected their hands for cuts. Several who were questioned asserted claims and contended that they had been questioned solely on the basis of their race. The Second Circuit rejected their contentions and reasoned that they were questioned on the legitimate basis of a physical description given by the victim of a crime. *Brown* observed, however, that an equal protection violation may be premised upon racial profiling.[12]

Law enforcement officers are entitled to consider profile evidence along with the totality of all the other available evidence in order to properly establish reasonable suspicion for a stop.

In *People v. Robinson*,[13] the court addressed motions to suppress evidence from traffic stops where the stops were allegedly pretextual. *Robinson* involved three consolidated cases, with each involving alleged pretextual stops but none involved any allegations of racial or ethnic profiling. The fundamental issue was whether a police officer who has probable cause to believe that a driver has committed a traffic infraction violates the New York Constitution where the officer's primary motivation is to conduct another investigation other than the traffic infraction. The court expressly adopted *Whren v. United States*[14] and concluded that there was no New York constitutional violation for pretextual stops. In dicta, the court observed:

> [w]e are not unmindful of studies, some of which are cited by defendants and amici, which show that certain racial and ethnic groups are disproportionately stopped by police officers. . . . The fact that such disparities exist is cause for both vigilance and concern about the protections given by the New York State Constitution. Discriminatory law enforcement has no place in the law.

However, the court in *Robinson* made clear that "there is no claim in any of the three cases before us that the police officers engaged in racial profiling." Justice Levine's dissenting opinion said that "drug courier interdiction through traffic infraction stops has a dramatically disproportionate impact on young African American males."[15] Justice Levine observed the proof constraints in profiling claims. He noted that "a racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove" and concluded that "the problems of proof in establishing an equal protection claim may be all but insurmountable."

In *State v. Donahue*,[16] the Connecticut Supreme Court found that there was no evidence or even any suggestions that the officers involved had engaged in "the insidious specter of 'profiling.'"[17] The court generally defined racial profiling as "the practice of singling out black and Hispanic drivers based on ostensible traffic violations and subjecting them to criminal searches."

In *Fishbein v. Kozlowski*,[18] Justice Berdon's dissenting opinion attempted to inject an issue of racial profiling in a case where no party had made such an allegation. Without citing any legal authority or evidence in the case, Justice Berdon complained in dissent that "the majority fails to face the reality that Connecticut law enforcement officials continue to use racial and other types of profiling. Minorities who live in Connecticut and those who pay attention to news reports cannot help but come to this conclusion."[19] It seems odd that a jurist would rely strictly upon media hearsay allegations without at least some supporting admissible evidence. *Fishbein* contained no racial profiling or discrimination allegation, yet the dissenting justice purported to make such findings anyway.

Justice Levine's dissenting opinion in *Robinson*, Justice Berdon's dissenting opinion in *Fishbein* and the *Donahue* case demonstrate how courts are frequently overreaching with anti-profiling dicta in order to address profiling issues in cases where ethnicity is not involved.

Traditional Law Enforcement Stop Standards

To have grounds for stopping a moving vehicle, an officer need only meet the "reasonable suspicion" standard.[20] Law enforcement officers may engage in investigatory seizures and detentions of motorists where police have a reasonable and articulable suspicion that the occupants of a vehicle have engaged, are engaged or are about to engage in criminal activity.[21] Officers enjoy substantial police discretion in determining which leads to pursue and which suspects to stop.[22]

Profiling or the consideration of certain characteristics has long been a legitimate law enforcement investigative tool. The U.S. Supreme Court has recognized the use of "drug courier profiles" in combating the narcotics trade. For example, in *Florida v. Royer*,[23] the Court explained the "drug courier profile" as being an abstract of characteristics found to be typical of persons trans-

porting illegal drugs.[24] Chief Justice Rehnquist has suggested that "drug courier profiling" involves the "collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers."[25] Common identifying signs of drug couriers include conflicting information about origin and destination, the lack of luggage for a long trip, the lack of a driver's license or insurance, loose screws or scratches near the vehicle's hollow spaces, and rental license plates from key distribution states. There is a "compelling interest" in detecting illegal drugs.[26]

Courts have generally concluded that a simple profile match alone is generally inadequate to conduct an investigative detention or arrest.[27] Law enforcement officers, however, are entitled to consider profile evidence along with the totality of all the other available evidence in order to properly establish reasonable suspicion for a stop.

Race may serve as a proper and necessary factor to consider during law enforcement investigative activities.[28] For example, the consideration of race based upon a witness's or victim's description of a suspect is entirely proper.[29] However, the appearance of being an ethnic minority alone is insufficient to justify a stop.[30]

The Constitutional Standard For Selective Enforcement and Profiling

In *Whren v. United States*,[31] the U.S. Supreme Court considered a case involving an alleged pretextual stop. *Whren* addressed whether a subjective or objective standard is employed in determining whether an officer's basis for stopping a vehicle is constitutionally valid. Here, officers stopped the defendant's vehicle after he made an illegal U-turn. Officers had earlier observed the same defendant enter his vehicle after leaving an area where drugs were believed to be distributed. The stop led to an arrest for drug possession.

The defendant contended that he was stopped only because the officer suspected the driver of possessing narcotics. The Court held that even if an investigating law enforcement officer is motivated by some improper motive, that does not render the stop unconstitutional under the Fourth Amendment as long as there were otherwise valid grounds for reasonable suspicion to stop. Thus, an officer's motivation does not invalidate an objectively justifiable stop under the Fourth Amendment. Pretextual stops became *per se* permissible under *Whren*.[32]

In *Whren*, the Court explained how the Fourteenth Amendment "prohibits selective enforcement of the law based on considerations such as race." The Court held that the appropriate constitutional provision to challenge racially based selective law enforcement is the Equal Protection Clause, rather than the Fourth Amendment.[33]

Whren fundamentally changed the landscape of stop law by making equal protection the applicable standard in determining whether there has been unconstitutional selective enforcement of the law. It also eliminated subjective intentions of officers in determining whether stops are constitutional under the Fourth Amendment. *Whren* and other cases provide that the applicable constitutional standard requires proof of *discriminatory intent* in order to establish a racial profiling claim. No case, however, has enunciated a clear model of discriminatory intent proof for application to profiling cases.

Basic Equal Protection Principles

To establish an equal protection violation, one must show that the alleged discriminatory conduct is the product of *intentional discrimination*.[34] The discriminatory intent standard has been consistently applied in a variety of contexts including public personnel, school desegregation, election districting, jury selection and other areas.[35]

It is well settled that discriminatory impact or effect alone is insufficient to establish a violation of the Equal Protection Clause.[36] *Yick Wo v. Hopkins*[37] provides some remote possibility of establishing an equal protection violation where there is evidence of an extraordinarily stark pattern of disparate impact.

In *Yick Wo*, the Court addressed a claim of discrimination by Chinese laundry operators. An ordinance required consent of the city for the construction of laundries made of wood. Of approximately 320 laundries, about 310 were wooden. Petitions by Yick Wo and other Chinese for relief were denied while the petitions from non-Chinese, with a single exception, were granted. Thus, the effect of the governmental action presented a stark scenario where the Court examined the totality of the governmental conduct and concluded that the local law was "applied and administered by public authority with an evil eye and an unequal hand."

None of the academic studies suggesting that ethnic minorities are disproportionately stopped present data anywhere near as compelling as in *Yick Wo*. The data in *Yick Wo* were constitutionally relevant, whereas most vehicle stop data are not, because of their limitations.[38] Constitutional scholars have observed that "statistical proof is usually relevant but rarely determinative" in addressing equal protection issues.[39]

Most profiling claims in part rely upon academic studies suggesting some statistical disparity of police stops along racial lines. However, statistical analysis of vehicle stops does not ordinarily yield constitutionally relevant data.[40] Among other problems, such data do not address the fact that in the overwhelming majority of vehicle stops, the officers cannot determine the race or ethnicity of the driver when the police pursuit begins. Night stops, weather conditions, tinted windows, dis-

tance and many other visual obstructions and limitations typically preclude officers from being able to see the precise skin of drivers who are seated, and usually fully clothed, in vehicles. Speed detection devices such as radar are incapable of detecting the race of drivers.

In *United States v. Armstrong*,[41] the Court addressed a selective prosecution claim arising out of allegations that two defendants were prosecuted because of their race. The Court held that a selective prosecution claimant must prove that the prosecutorial decision had both a discriminatory purpose and a discriminatory effect. One has to establish that similarly situated defendants of other races could have been prosecuted but were not.[42] These principles appear to be directly applicable to profiling claims.

No case has addressed which particular discriminatory intent test applies to profiling claims, other than the threshold that race or ethnicity may not be the sole basis for police investigative decisions.

The authors of a law enforcement treatise suggest that the "three-part equal protection test established by the Supreme Court in *Batson v. Kentucky*[43] constitutes an appropriate framework for analyzing statistical and circumstantial evidence of discriminatory intent in racial profiling cases where no express classification has been demonstrated."[44] The authors suggest that under the *Batson* test, "an individual challenging a racial discriminatory law enforcement action may offer statistical and other circumstantial evidence to create a 'rebuttable *prima facie* case that race is a motivating factor. Once a *prima facie* case is established, the government must articulate a race-neutral reason for its action, identify a compelling governmental interest in the race-based action.'"[45]

Professor Martin Schwartz and retired Second Circuit Judge George Pratt suggest in a proposed jury instruction entitled "Racially Motivated Arrest – Mixed Motives – Use of Force and Initiations of Criminal Proceedings" that a plaintiff must prove two elements: (1) that the plaintiff, as compared with others similarly situated, was selectively treated by the officer; and (2) that the officer's selective treatment of the plaintiff was deliberately based on the plaintiff's race:

> The second element is satisfied if you find, by preponderance of the evidence, that Officer Doe's conduct toward the Plaintiff was motivated, and at least in substantial part, by the Plaintiff's race. Officer Doe must have acted deliberately, with this impermissible purpose in mind. . . . If the Plaintiff does prove this claim, then you must also consider whether Officer Doe has proved, by preponderance of the evidence, that he would have taken the same action even if his was not motivated by the Plaintiff's race.[46]

United States v. Travis

In *United States v. Travis*,[47] the suspect alleged that she was targeted for questioning because of her race. The investigation focused on a particular flight from Los Angeles because numerous passengers from the same flight had been arrested for drug possession in previous cases. A list of passengers was examined for possible connection to anyone known for drug distribution. While reviewing the passenger list, the officer observed the name "Angel Chavez." The officer was attracted to the name because of the unusual first name coupled with a popular last name.

The officer investigated and found that the ticket was a one-way ticket and it was purchased five hours before departure from a travel agency located within the Los Angeles airport that had sold tickets to several drug couriers in other cases. The officer observed two women who were apparently traveling alone, both of whom were black. The officer eliminated one woman and then approached the other person who identified herself as "Angela Chavez" but who offered a driver's license with the name of Angela Travis. A consensual search resulted in the discovery of narcotics. Travis moved to suppress and alleged racial profiling. She offered statistics compiled from incident reports prepared by airport police.

In rejecting Travis's contentions, the court explained how her statistical evidence was not relevant to establish her contentions. The statistics only revealed police encounters that ended in arrest that were sufficient to justify a report. The statistics did not include all consensual encounters at the airport. Some of the reports did not include the race of the person involved, therefore the statistics were flawed. *Travis* demonstrated how race or ethnicity may become a legitimate consideration when investigators have information about a particular suspect.

Conclusion

The law enforcement profession is required to diligently investigate all types of criminal activity, especially the transport of illegal drugs and terrorist activity. A consensus of cases hold, however, that race or ethnicity may not serve as the sole factor in law enforcement investigative decisions. Regretfully, no case has addressed which particular discriminatory intent test applies to profiling claims, other than the threshold that race or ethnicity may not be the *sole basis* for police investigative decisions.

Ethnicity sometimes has a proper limited role in law enforcement decision making. However, invidious racially based law enforcement decisions unconnected to legitimate investigative needs are inconsistent with the Equal Protection Clause and should be constitutionally actionable.

Ethnic profiling claims are generally difficult to establish because of the ill-defined intent-based discrimination standard. The thousands of vehicle stops necessary for highway safety will likely generate a plethora of purported "profiling" claims even where there is no evidence of invidious discriminatory animus. Clarification of equal protection law in this area is sorely needed in order to freely permit legitimate law enforcement missions but proscribe illegitimate discrimination.

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1. *See* White House Press Release, Feb. 28, 2001, *available at* <http://www.city-journal.org/html/11_2_the_myth.html>.
2. *Whren v. U.S.*, 517 U.S. 806 (1996).
3. *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (discriminatory intent required to state racial profiling claim grounded in equal protection).
4. *See* Gross & Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413, 1416 (2002) ("equal protection law in this area is not well developed").
5. *E.g.*, Local6.com, *Police Dog Accused of Racial Profiling*, June 11, 2002, at <http://www.local6.com/news/1506422/detail.html>.
6. *E.g.*, Heather Mac Donald, *The Myth of Racial Profiling*, 11 City J. (2001) (demonstrating how there is no credible evidence that law enforcement agencies are engaging in racial profiling. "The anti-racial profiling juggernaut must be stopped, before it obliterates the crime fighting gains of the last decade . . ."); Mac Donald, Are Cops Racist? (Ivan R. Dee 2003).

   Numerous authorities have demonstrated how the media "has been by far the most significant contributor" to fueling the fires of racial profiling allegations. *E.g.*, Leone, *Massachusetts Addresses Racial Profiling Head On: The Efficiency of Chapter 228 of the Acts and Resolves of 2000*, 28 New Eng. J. Crim. & Civ. Confinement, 335, 347 (2002).
7. Numerous cases reaffirm that profiling allegations are frequently made but often completely without any evidentiary support: "nothing in the record supports [the] assertion" of racial profiling. *U.S. v. Aliperti*, 2002 WL 1634440 (D. Kan. June 11, 2002). In *U.S. v. Arreola-Delgado*, 137 F. Supp. 2d 1240 (D. Kan. 2001), the court denied a motion to suppress after hearing racial profiling allegations. The court observed that the defendant's argument was "sheer speculation." In *U.S. v. Bridges*, 2000 WL 1170137 (S.D.N.Y. Aug. 16, 2000), the court concluded that "there is not a scintilla of evidence that the DEA targeted the Defendant . . . based on a racial profile."
8. The New York City Police Department has offered a working definition: "Racial profiling is defined as the use of race, color, ethnicity or national origin as the *determinative factor* for initiating police action." N.Y.P.D. Department Policy Regarding Racial Profiling (emphasis added). The Policy is discussed at <http://www.scottmx.com/dispatch/2002/927.htm>. Heather Mac Donald has just authored the most definitive book analyzing alleged racial profiling: *Are Cops Racist?* (Ivan R. Dee 2003).
9. 2001 WL 568104, 11 Fed. Appx. 16 (2d Cir. 2001).
10. 2000 WL 1170137 (S.D.N.Y. Aug. 16, 2000).
11. 195 F.3d 111 (2d Cir. 1999).
12. *Id.* at 118–19.
13. 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001).
14. 517 U.S. 806 (1996).
15. The only authorities cited by Justice Levine were law review articles.
16. 251 Conn. 636, 742 A.2d 775 (1999), *cert. denied*, 531 U.S. 924 (2000).
17. As Justice Callahan observed in his dissent, the defendant was not even a racial minority, thus, the majority's reference to profiling was misplaced. *Id.* at 786. The majority's reference to race is puzzling and is pure dicta.
18. 252 Conn. 38, 743 A.2d 1110 (1999).
19. *Id.* at 1121. This further demonstrates Heather Mac Donald's point that profiling is a media-driven myth.
20. The requirement of "reasonable articulable suspicion" for a traffic stop is black letter criminal procedure. *See* Kwasnoski et al., Officer's DUI Handbook 78 (2000 ed.).
21. *See U.S. v. Cortez*, 449 U.S. 411 (1981); *see also U.S. v. Hensley*, 469 U.S. 221 (1985); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (Fourth Amendment prohibits officers from randomly stopping vehicles for the purpose of checking whether the driver has a proper driver's license and vehicle registration).
22. In *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987), the Supreme Court explained that law enforcement "discretion is essential to the criminal justice process." *See City of Chicago v. Morales*, 527 U.S. 41 (1999) ("Some degree of police discretion is necessary to allow the police to perform their peacekeeping responsibilities satisfactorily.") (O'Connor, J., concurring).
23. 460 U.S. 491 (1983).
24. *See U.S. v. Sokolow*, 490 U.S. 1 (1989).
25. *Florida v. Royer*, 460 U.S. 491, 525 (1983) (Rehnquist, J., dissenting).
26. *U.S. v. Mendenhall*, 446 U.S. 544, 561–62 (1980) (Powell, J., concurring).
27. *See Reid v. Georgia*, 448 U.S. 438 (1980). Numerous cases have followed *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975), that race cannot serve as the sole factor justifying a stop. *U.S. v. Anderson*, 923 F.2d 450, 455 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991); *U.S. v. Alarcon-Gonzalez*, 73 F.3d 289, 293 (10th Cir. 1996).
28. *See Brignoni-Ponce*, 422 U.S. at 887.
29. See cases *infra*, including *U.S. v. Travis*, 62 F.3d 170 (6th Cir. 1995), *cert. denied*, 516 U.S. 1060 (1996).
30. *Brignoni-Ponce*, 422 U.S. at 886–87. *Cf. Washington v. Davis*, 426 U.S. 229 (1976).
31. 517 U.S. 806 (1996).
32. *Whren* has been subsequently reaffirmed. *Arkansas v. Sullivan*, 532 U.S. 769 (2001).
33. 517 U.S. at 813 n.22. Stopping someone solely because of race violates equal protection. *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997).
34. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252

(1977). *See* Gross & Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413 (2002) (recognizing that racial profiling may be prohibited under equal protection principles "at least in the absence of a finding that it is narrowly tailored to serve a compelling state interest").

The application of non-suspect class disparate treatment may also become an issue in law enforcement investigative decisions. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (class of one disparate treatment); *Snowden v. Hughes*, 321 U.S. 1, 8–9 (1944) (equal protection claim premised upon deliberate selective enforcement); *Toomer v. Garrett*, 2002 WL 31889984 (N.C. App. Dec. 31, 2002) ("The Fourteenth Amendment also protects against arbitrary government action . . . [and how] the right to be free of arbitrary and discriminatory application of law is not a new one"); McGuinness, *The Rising Tide of Equal Protection: Willowbrook and Non-Suspect Class Disparate Treatment and Arbitrariness Claims*, George Mason U. Civ. Rts. L.J. 263 (2001).

35. See *Keyes v. School Dist.*, 413 U.S. 189 (1973) and numerous other cases cited in *Arlington Heights*, 429 U.S. at 265 n.10.
36. *Washington v. Davis*, 426 U.S. 229, 242 (1976).
37. 118 U.S. 356 (1886).
38. *Cf. Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605 (1974) ("simplistic percentage comparisons" was found to not have "real meaning" in the case which involved a mayor's practices in selecting persons for a panel for the school board); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (even severe disparate impact insufficient to establish constitutional violation).
39. Rotunda & Nowak, 3 Treatise on Constitutional Law § 18.4 at 257 (3d. ed. 1999).
40. *E.g., U.S. v. Taylor*, 956 F.2d 572 (6th Cir.) (en banc), *cert. denied*, 506 U.S. 952 (1992); other cases cited herein *infra*. Heather MacDonald, *The Myth of Racial Profiling*, 11 City J. (2001); Oliver, Atwater v. City of Lago Vista*: The Disappearing Fourth Amendment and Its Impact on Racial Profiling*, 23 Whittier L. Rev. 1099, 1122 (2002) (reviewing selective prosecution and other equal protection principles and the context of racial profiling). The *Armstrong* standard requires victims of racial profiling to not only show that members of his or her race were selectively prosecuted but also that individuals of a different race, who are similarly situated, were not prosecuted). The article further demonstrates how acquiring the necessary racial profiling statistics is virtually impossible. *Id.* at 1123–34. The author demonstrates how racial profiling statistics being acquired by states and law enforcement agencies only meet half of the *Armstrong* proof burden. *Id. See People v. Robinson*, 97 N.Y.2d 341, 365–68, 741 N.Y.S.2d 147 (2001) (Levine, J., dissenting).
41. 517 U.S. 456, 465 (1996).
42. *See Wayte v. U.S.*, 470 U.S. 598, 608 (1985).
43. 476 U.S. 79 (1986).
44. Avery et al., Police Misconduct: Law and Litigation § 2:6 at 2-16 (3d ed. 2001). *See U.S. v. Avery*, 137 F.3d. 343, 356 (6th Cir. 1997).
45. *See U.S. v. Weaver*, 966 F.2d 391 (8th Cir. 1992) (finding that an airport stop was justified based on totality of facts and circumstances including that the arresting officers had attached suspicion to the defendant race base on "intelligence information and . . . past arrest history"), *cert. denied*, 506 U.S. 1040 (1992).
46. *See* Schwartz & Pratt, *Section 1983 Litigation: Jury Instructions*, Instruction 5.01.2 at 5-8.
47. 62 F.3d 170 (6th Cir. 1995), *cert. denied*, 516 U.S. 1060 (1996).

Take the Money and Run: The Fraud Crisis In New York's No-Fault System

By Robert A. Stern

When New York's "No-fault"[1] auto insurance law took effect in 1973, the objective was to speed the handling of claims. Today, the process is afflicted by extensive fraud and abuse.

The effects go beyond the impact on insurance premiums and the payment of claims for injuries in automobile accidents. Healthcare dollars are being diverted from more productive uses, and the already scarce resources of the court system are being burdened with litigation gamesmanship designed to extract unwarranted cash settlements.

The No-fault Law allows policyholders and others who sustain injuries in automobile accidents to be compensated by a policyholder's automobile insurance company for basic economic loss, which consists of lost wages and reasonable and necessary medical expenses, generally subject to a maximum of $50,000 per person.[2] Reimbursement for reasonable and necessary medical expenses includes examinations, treatments, tests and medical equipment provided or ordered by properly licensed healthcare providers. Under the No-fault Law, licensed healthcare providers are allowed to accept assignments from their patients and bill insurance companies directly for their services.

The intent of the No-fault Law was to provide a tradeoff: prompt first-party insurance benefits (*i.e.*, reimbursement of basic economic loss to eligible injured persons or covered persons) in exchange for a limit on the right to sue in tort for non-serious injuries.[3] In accepting the derogation of their common law right to sue, parties injured in automobile accidents were promised prompt reimbursement of lost wages and reasonable and necessary medical expenses.

When enacted, the No-fault Law championed two simple and laudable objectives. First, provide quick compensation to injured parties, regardless of fault. Second, reduce the strain on the tort system and judiciary by limiting the ability to sue to only those cases involving serious injuries.[4]

While there might be debate about whether the No-fault Law ever achieved its objectives, today one thing is clear: it is a system that lends itself to fraud and abuse on an unprecedented scale. The majority of providers are legitimate healthcare professionals supplying valuable services to injured people, but today's no-fault system has been infiltrated by organized crime and by criminals masquerading as healthcare providers. In recent years, local, state and federal agencies have announced arrests and prosecutions of no-fault insurance fraud rings on an alarmingly routine basis.[5]

The commitment of significantly greater law enforcement resources to the investigation and prosecution of insurance fraud is an important and welcome development, but the funding that law enforcement needs to eradicate a systemic problem that threatens the financial basis for the no-fault system still falls short of the mark. If meaningful reform of the No-fault Law and additional anti-fraud funding are not provided, more insurers will be likely to withdraw coverage from the state, leaving consumers with fewer competitive choices for their insurance.

Such a problem was encountered in New Jersey in the late 1990s, when State Farm Insurance left the state because of the rising cost of fraud, and others threatened to follow. As a result, New Jersey enacted significant insurance fraud measures, including pre-certifica-

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The author wishes to acknowledge that many legitimate medical providers and reputable law firms are providing valuable services under the No-fault Law.

tion of medical services and the creation of an insurance fraud prosecutor's office. These and other measures led to significantly reduced insurance fraud in that state, resulting in lower automobile insurance premiums for its residents.

The No-fault Law Today

The legislators who enacted the no-fault system in New York in 1973 would be shocked at what has become of the law. They could hardly have imagined that a consumer-driven statute with important public policy goals would become the conduit by which organized crime would launder money through sham professional corporations or medical mills.[6]

Exploitation of the No-fault Law is diminishing the resources of the judiciary, particularly the Civil and District Courts in New York City and Long Island.

Licensed doctors now sell their names and licenses to lay individuals for a fee, thereby allowing the lay individuals, who are unlicensed and not authorized to own professional corporations in New York State, to assume ownership in violation of Article 15 of the Business Corporation Law.[7] The sole purpose of these sham professional corporations and/or medical mills is to fraudulently bill insurance companies for services that were medically unnecessary and/or never rendered.

In turn, these corporations and medical mills (so-called "clinics") have created an insatiable demand for a patient population, as well as for runners who satisfy that demand by paying individuals for participating in staged or paper accidents. Clinics pay the runners as much as $2,000 per individual for each referral. Participants in the staged and paper accidents are referred to the clinics for a fee paid by the runner, often between $400 and $800, and undergo treatment for injuries they did not suffer, because the accidents in which they sustained their "injuries" never happened. These individuals are also offered the prospect of a monetary settlement from their personal injury claim pursued by attorneys, many of whom were assigned to them by the clinics to which they were referred by the runner.

Claimants who were involved in actual accidents but were not injured are also contacted by runners and referred to no-fault clinics, with the promise of money through a personal injury claim in which legal representation would be provided through a referral from their provider.

The clinics create fictitious reports and generate boilerplate narratives. The services for which they bill insurers often do not vary from patient to patient, or reflect any changes in the patient's condition. Their billing procedures exploit the no-fault process and drain the maximum amount of dollars from insurance companies for every patient, regardless of whether treatment was required.[8] Through the use of runners providing a steady flow of patients, the owners of these medical mills are able to engage in a systematic, fraudulent billing scheme premised on their ability to pass millions of dollars through illegally created professional corporations. In the realm of no-fault, the profession of medicine has frequently been converted to the illegitimate business of medicine.

The surreal world of no-fault today is the primary cause of escalating automobile insurance premiums. The Coalition Against Insurance Fraud has estimated that New York residents pay an additional $75 to $115 in automobile premiums to cover losses attributable to insurance fraud. Other insurance industry estimates place the cost to consumers as high as $400 each year per premium.[9] In 2001, New York ranked second highest in the nation in automobile premiums,[10] the primary cause of which is the escalating cost of insurance fraud. Between 1995 and 2000, the average no-fault claim increased by more than 63%, including an increase of 32% in 2001.[11] The number of no-fault claims filed in New York State in 2000 rose twice as fast as in Florida, the next highest state in Personal Injury Protection (PIP) claim occurrence.[12] The average no-fault claim in New York State is now 47% higher than the national average.[13] All told, the New York State Insurance Department and the insurance committees in both the New York State Senate and Assembly each estimate that no-fault insurance fraud is costing New York State consumers in excess of $1 billion a year.[14]

Effect on Healthcare Resources

No-fault insurance fraud schemes also deplete the limited healthcare resources that are already under strain to meet legitimate healthcare needs.

Sham professional corporations deprive certain communities of access to legitimate doctors, because healthcare professionals will not establish businesses in locations where they believe the marketplace may already be overcrowded. Consequently, fraud in the no-fault system subjects patients to treatment by non-physicians, disguised as medical doctors, who are simply seeking to profit from a system designed to protect consumers. Furthermore, the very schemes that bring patients into the clinics through staged accidents compromise street and highway safety, exposing innocent, unsuspecting individuals to potentially life-threatening conditions.[15]

Even the claimants who participate can become victims of their own fraud. "Patients" from staged and paper accidents are often subjected to unnecessary diagnostic testing and "treatment" performed without regard to the risks involved. To the extent that services are provided at all, these "patients" are unnecessarily exposed to radiation for x-rays and video fluoroscopy, in which the ionization-producing equipment that is used may not be properly licensed, registered or maintained, and the testing may not be administered by a properly licensed and/or trained healthcare professional. These tests and others, including nerve conduction velocity tests and electromyography (EMG), are all expensive diagnostic procedures that expose the patients to unnecessary invasive and potentially dangerous procedures conducted on a routine basis for no reason other than pecuniary benefit.

Effect on the Courts

Exploitation of the No-fault Law is diminishing the resources of the judiciary, particularly the Civil and District Courts in New York City and Long Island, where the vast majority of no-fault suits are filed in downstate New York.

Such actions, which are filed under the mandatory Personal Injury Protection endorsements required under New York's No-fault Law, are commonly referred to as PIP suits. Under the No-fault Law and implementing regulations, a provider who disputes the denial of its claim by an insurer has the option to file for arbitration or commence an action contesting the denial.[16]

Recent statistical trends involving PIP litigation reveal that the courts have increasingly become the forum of choice for no-fault clinics.[17] Between 1999 and 2002, arbitrations and court actions reversed places in the volume of cases filed. During this period, filings for arbitrations remained relatively steady,[18] while PIP lawsuit filings increased, eclipsing arbitrations in the number of cases filed each year. The fact that arbitrations have remained constant while PIP suits have increased points to a conclusion that PIP litigation in general is spiraling out of control.

The explanation can be attributed to a reversal of fortune. Before 1999, providers generally preferred to file for arbitration because it provided a more efficient and speedier dispute resolution process than the courts. More important, they stood a better chance of winning. Over time, an increasing number of arbitrators became aware of some of the more common patterns of fraud and abuse in the claims that the clinics were presenting, and they began to rule against them with greater frequency. As arbitration became a less hospitable environment for fraudulent claims, the no-fault clinics turned to the courts.

With the shift to court filings, however, the clinics had to deploy new litigation tactics to hasten the process of securing a judgment as quickly as they once obtained awards through arbitration. Indeed, for many clinics, no-fault is a volume business, predicated on billing and collecting. If collections lag, there is a resulting inability to pay kickbacks to the various associated providers, runners and others involved in fraudulent schemes.

Adapting quickly to the new environment, the no-fault clinics retained counsel with sophisticated tickler and computer systems that positioned them to take a default judgment on the 30th day that an answer was due. In any other area of litigation, it is unusual for a plaintiff to immediately take a default judgment against a large company, such as an automobile insurer. Plaintiffs generally prefer to deal with the defendant on the merits rather than waste time arguing a motion to vacate a default judgment that is almost invariably granted. In the no-fault arena, however, the paradigm shifts, and no-fault stands apart from any other area of practice.

Another tactic used to hinder insurers from timely filing answers involves serving hundreds of complaints at a time, all of which need to be identified by the insurer, routed to the appropriate claims processing unit, logged into a system and forwarded to the insurer's counsel to serve an answer and defend. If the insurer is unable to do this within 30 days, the clinics file papers seeking default judgments.[19]

Filing for a default judgment on the 30th day brings the clinics closer to their ultimate goal of collecting money. The taking of a default judgment often represents the first of three occasions during litigation when many no-fault clinics attempt to force a settlement. Because many judgments are for nominal amounts, ranging from a few hundred to a few thousand dollars, the clinics believe that the insurers will advise their counsel to settle rather than incur the costs associating with filing a motion to vacate the default judgment.[20]

Next, if the insurer does not settle and successfully moves to vacate the default judgment, a number of clinics will file a motion for summary judgment, regardless of the merits of the litigation. The gamble and hope is that the insurer will instruct counsel to settle, as opposed to having to draw up and submit opposition papers to defeat the motion.

Finally, if the insurer successfully opposes the motion for summary judgment, counsel for a number of clinics will file a notice of trial, even if outstanding discovery remains. In doing so, they falsely certify that all discovery has been completed when in fact it has not. The gamble is that the insurer will instruct its counsel to settle, as opposed to authorizing counsel to file a motion to strike and seek sanctions for such wrongful filings.

In their haste to force settlements, some lawyers file many notices of trial at once wherein they make the same false certification concerning the completion of discovery, even though they have no intention of trying the case when it first appears on the trial calendar. In the process, court dockets are inundated with so many of these cases that they begin to seem like No-fault Parts. Even in situations where motions to strike are filed by counsel for an insurer, many judges are so overwhelmed with no-fault cases that they do not take the measures necessary to deter the improper filings, such as awarding costs and sanctions.

In yet another abusive tactic, some law firms send what they denominate in correspondence to insurers as "courtesy copies" of complaints that they purportedly will serve if the matter is not settled within 30 days. Notwithstanding the fact that the summons and complaint have not been properly served, the same law firms file papers for default judgments based on the "courtesy copies" they sent to the insurer, in the hope that the insurer will settle rather than move to vacate and dismiss based on lack of personal jurisdiction.

The litigation tactics of the clinics' lawyers are intended to overwhelm the insurers through the filing of complaints, the taking of default judgments, the filing of motions for summary judgment, regardless of merit, and having matters placed on the trial calendar as soon as possible through the false filings of certificates of readiness. By doing so, the clinics try to extort settlements and speed up collections, something that they once were able to do more easily through arbitration.

On a daily basis, the Civil and District Court dockets are overloaded with PIP matters. PIP litigation is exploding, and the courts do not have the resources or time to deal with the influx of cases involving nominal amounts, particularly if the insurers are intent on defending the claims based on fraud.

In encountering such resistance, insurers find themselves in a paradox. Article 4 of the Insurance Law requires the insurers to investigate and report suspected fraudulent claims to the Insurance Department. The Insurance Department's Regulation 95[21] requires insurers to maintain special investigative units with the mandate to investigate suspect claims. Article 4 of the Insurance Law and Regulation 95 were implemented in recognition of the spiraling costs of insurance fraud and the impact it has on consumers and the economy due to rising premiums.

In attempting to fulfill their mandate, however, insurers are confronted with courts that cannot afford to allow each case to proceed to trial, let alone decide each and every motion that is filed. Accordingly, each time a case is forced on the court's calendar by the provider, the courts prefer to see the parties settle as opposed to having to decide a motion, even if false representations were made by providers and their lawyers in the process.

The fraud problem confronting the no-fault system has been acknowledged by insurance regulators and is supported by overwhelming statistical evidence.

Ironically, insurance companies provide the perfect foil for the schemes that have permeated the no-fault system, because the companies are widely perceived as monolithic and unsympathetic big businesses. As a consequence, insurers are unable to garner meaningful support for legislative reform, or to persuade the courts of the magnitude of the problem. Moreover, in this "Alice in Wonderland" world that is the no-fault system, no-fault providers and their lawyers are perceived as the ones championing the rights of the consumer. In no-fault, however, where many personal injury claims are made and settled pre-suit, fraud and abuse are often the outcome being championed by the providers and the claimants.

The fraud problem confronting the no-fault system has been acknowledged by insurance regulators and is supported by overwhelming statistical evidence. It has become too costly to everyone for it to continue to be ignored by the legislature and the courts.

Potential Remedies

Problems with the no-fault system that require attention include the relaxation, if not overturning, of the Court of Appeals' decision in *Presbyterian Hospital v. Maryland Casualty*,[22] wherein the Court held that, in the absence of a timely denial, insurers were precluded from contesting the medical necessity of billed-for services. Since that 1997 ruling, many lower courts have misinterpreted *Presbyterian*, resulting in the 30-day rule being used as both a sword and a shield by fraudulent and sham professional corporations.

To ease the strain on the courts and return no-fault to the speedy dispute resolution that it originally promised, one possible solution is to require compulsory arbitration. Currently Insurance Law § 5106(b) provides claimants and their assignees with the unilateral option to choose whether to submit a disputed claim to binding arbitration or commence an action in court.

Any attempt to make arbitration of no-fault disputes compulsory for all parties, not just insurance companies, is likely to be met with constitutional challenges by

the plaintiff's bar. Importantly, however, compulsory arbitration would be limited to resolving disputes of first-party no-fault claims; third-party bodily injury claims could still be litigated in the courts. As such, the expeditious resolution of no-fault disputes through the no-fault system would fulfill the original intent of the No-fault Law – prompt payment of claims and dispute resolution. Moreover, because the current no-fault arbitration mechanism is considered to be compulsory, any due process concerns will similarly require the courts to exercise a broader scope of review than in cases of consensual arbitration.[23] As such, appropriate safeguards will be in place to ensure that the arbitration awards are, among other things, supported by the evidence and rationally based.[24]

Alternatively, if appropriate amendments are made to the No-fault Law, the Department of Insurance could amend the PIP endorsements to allow insurers to include a provision for mandatory arbitration in their automobile insurance contracts. To avoid any ambiguity that the endorsements apply to healthcare providers who accept assignments, the assignment of benefit forms promulgated by the Department of Insurance can also be amended to include the provision that the assignment is subject to all terms and conditions of the policy of insurance, including the submission of any disputes to arbitration. If such a provision is included in the insurance policies, the parties will have contractually and consensually agreed to arbitrate any and all no-fault disputes. Accordingly, the courts should deem the arbitration provisions consensual and therefore withstand any challenges to their enforceability.

Whether no-fault reform is accomplished by statute, regulation, contract changes or any combination thereof, the need to overhaul the system is clear.

Compulsory arbitration, with experienced, knowledgeable and fair arbitrators, provides one important way to ensure that fraudulent claims are denied payment. Such arbitrators, with specialized training, would be able to commit the time and resources necessary to hear arguments relating to contested claims, something the courts are not equipped to do at this time. Moreover, the public will benefit from a system that efficiently processes meritorious claims and roots out those grounded in fraud. Compulsory arbitration will also free the courts to attend to the needs of other more pressing litigations. Similarly, compulsory arbitration would also reduce the litigation costs associated with disputed no-fault claims, thereby reducing insurance premiums.

In the absence of mandatory arbitration, the legislature could amend the Civil and District Court Acts to require that PIP suits be commenced by the filing of the summons and complaint or summons with notice with the clerk of the court, as is required in the Supreme and County Courts.[25] Currently, PIP suits under the monetary jurisdiction threshold of $25,000 and $15,000[26] are filed in the Civil or District Courts of New York, respectively, and commenced by service.[27]

In addition, to promote the voluntary filing of arbitrations, the legislature could remove the incentive for filing lawsuits by limiting the right of the claimant to recover attorneys' fees and interest only in arbitration.[28] At present, the right to recover such penalties is available to the claimant who seeks dispute resolution in either forum.

Conclusion

As currently constituted, New York's no-fault system lends itself to fraud and abuse. Where it once provided meaningful, affordable coverage to consumers, no-fault often exists today as a cash cow being milked by certain greedy and nefarious medical providers. No-fault reform would accomplish important public policy objectives.

Compulsory arbitration would represent one such reform. Other reform measures would include allowing insurers to assert defenses beyond the 30-day rule on claims based on fraud, and new anti-fraud laws.

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1. The "Comprehensive Motor Vehicle Insurance Reparations Act," enacted by the New York Legislature in 1973.
2. Under the No-fault Law and implementing regulations promulgated by the Department of Insurance, an insured has the option of increasing the amount of basic economic loss coverage. *See* 11 N.Y.C.R.R. §§ 65-3 *et seq*.
3. *See Montgomery v. Daniels*, 38 N.Y.2d 41, 378 N.Y.S.2d 1 (1975) (upholding the constitutionality of the No-fault Law and discussing the legislative history and reasons for its enactment).
4. *See id.* at 46.
5. *See* Department of Insurance Web site, *at* http://www.ins.state.ny.us/news1.htm> (containing press releases announcing numerous no-fault insurance fraud-related arrests).

   See also Suffolk Cty. Dist. Att'y Office, Press Release, August 2003 (85 individuals, including medical providers, attorneys and runners indicted in a massive insurance fraud bust, with the District Attorney indicating that nearly 500 additional related arrests are expected to be announced in the future); N.Y. Dist. Att'y Office, Press Release, Feb. 26, 2003 (attorneys indicted for participation in insurance fraud scam, illegal fee-splitting and violations of the anti-kickback statute); *68 Reportedly Stolen Vehicles Worth $1.6 Million Recovered in 26-month Undercover Insurance Fraud Sting Operation; Thirty Individuals Charged Including Owners Who Allegedly Falsely Reported That Their Cars Had Been Stolen in Order to Get Large Insurance Settlements and Middlemen Who Allegedly Sold the Cars to Undercover Detectives Posing as Junkyard Dealers,* Queens Dist. Atty. Office, Press Release, March 12, 2002; *Sting Operation Implicates Health Care Providers at Two Bronx Clinics in Scam to Cheat Auto Insurance Companies*, Bronx Dist. Att'y Office, Press Release, March 7, 2002 (healthcare providers

charged with insurance fraud for enlisting undercover detective to bilk insurance company); *Department Announces Top 10 "Rotten Apples" for 2001*, N.Y.S. Ins. Dept., Press Release, Feb. 11, 2002; *Serio, Spitzer Announce 20 Arrested in Auto Insurance Fraud Sweep by New Unit*, N.Y.S. Ins. Dept., Press Release, Jan. 24, 2002 (20 people arrested for staging accidents, filing false reports and submitting phony medical bills); *Former NYPD Aide Pleads Guilty in Insurance Fraud Ring*, N.Y.S. Ins. Dept., Press Release, Jan. 24, 2002 (former police aide pleaded guilty for her role in multi-million-dollar automobile insurance fraud ring in New York metropolitan area; three medical doctors, two medical clinics, two chiropractors, one physical therapist and an acupuncturist, and two lawyers also charged); *Department Declares 2001 Another Record Year Fighting Insurance Fraud; Number of Arrests at All Time High*, N.Y.S. Ins. Dept., Press Release, Jan. 16, 2002; *Department Responds to Record Number of Insurance Fraud Reports*, N.Y.S. Ins. Dept., Press Release, Jan. 10, 2002; *Individuals and Corporations Charged In Massive Undercover Automobile Insurance Fraud Investigation: Doctors, Medical Clinics, Chiropractors, Physical Therapists, Acupuncturists, Lawyers and NYPD Police Administrative Aide Among Those Charged*, Queens Dist. Atty. Office, Press Release, Dec. 5, 2001 ("Operation Whiplash" name of 14-month investigation that uncovered an organized network of individuals and corporations engaged in systematic scheme to defraud insurance companies through the filing of false accident reports and fictitious claims of physical injury); *67 Named in Largest Automobile Accident Fraud Ring Ever Charged in New York*, N.Y.S. Ins. Dept., Press Release, Aug. 15, 2001 (accident fraud ring involved staging accidents and fabricating police reports for fake accidents); *53 Charged in Largest-Ever Crackdown on No-Fault Automobile Insurance Fraud in New York-Defendants Purposely Caused Automobile Accidents With Innocent Victims*, N.Y.S. Ins. Dept., Press Release, Nov. 16, 2000 ($1 million worth of fraudulent insurance claims filed as a result of staged accidents solicited by owners and managers of medical clinics); *Department's Year-End Fraud Statistics Show Criminal Convictions Almost Doubled in 1999*, N.Y.S. Ins. Dept., Press Release, Feb. 9, 2000 (insurance fraud arrests increase 41% over 1997 and 240% over 1994).

See also Shaila K. Dewan, *51 Are Arrested in Scheme to Collect Millions for Fake Accidents*, N.Y. Times, Sept. 29, 2003, at B2; Corey Kilgannon, *19 Are Accused of Running Insurance Fraud Ring*, N.Y. Times, June 20, 2003, at B3; Mark Hamblett, *Two Lawyers Charged With Mail Fraud*, N.Y. L.J., Sept. 25, 2002, at * (PIP attorneys defrauded clients by switching retainer agreements); Herbert Lowe, *Dozens Arrested in Car Insurance Scam*, N.Y. Newsday, Mar. 12, 2002, at 8 (multi-million-dollar insurance fraud ring where vehicles falsely reported stolen were sold to undercover detectives); Robert Gearty, *8 Charged in Scheme to Rip Off Med Insurers*, Daily News, Mar. 8, 2002, at * (doctor and lawyer charged in staged auto accident ring that defrauded insurance companies); Kristoffer A. Garin, *Guilty Plea in Medical Scam*, The J. News, Mar. 8, 2002, at 8 (doctor and chiropractor plead guilty to fraud charges for circumventing N.Y. Bus. Corp. Law art. 15 (BCL) and for fraudulently billing for services never rendered or that were medically unnecessary).

6. As used herein, the term "medical mill" applies to a clinic that may lawfully be owned by a licensed professional, but nevertheless fraudulently bills for services that were not medically necessary, rendered improperly or not rendered at all.
7. Although not the subject of this article, absent certain exceptions, if licensed healthcare professionals, such as physicians, chiropractors, physical therapists or acupuncturists (who are among the traditional no-fault service providers who appear on most claims filed in the downstate area) wish to practice their profession through a corporation, that licensed professional must do so through a professional corporation. *See* BCL §§ 1503–1507; N.Y. Educ. Law § 6512. To circumvent the stringent restrictions placed on the corporate practice of licensed healthcare professionals, unlicensed individuals, who are prohibited from maintaining an ownership interest in such corporations, purchase the names and licenses from licensed professionals who represent that they are the owners of such corporations, when in fact they are not.
8. New York state and federal courts are replete with recent filings by insurers against hundreds of providers wherein the allegations are similar to those noted above.
9. *NY Auto-Fraud Unit Announces Arrests*, N.Y. Newsday, Jan. 25 2002 at A46; Insurance Information Institute, No-Fault Auto Insurance Fraud in New York State, *at* <http://www.iii.org/media/hottopics/insurance/nofaultauto> (last visited June 26, 2003).
10. *See NY Auto-Fraud Unit Announces Arrests*, N.Y. Newsday, Jan. 25 2002 at A46; *City Power*, N.Y. Newsday, Aug. 1, 2002, at A39.
11. Insurance Information Institute, No-Fault Auto Insurance Fraud in New York State, *at* <http://www.iii.org/media/hottopics/insurance/nofaultauto> (last visited June 26, 2003).
12. Coalition Against Insurance Fraud, Fraud Losses & Costs, *at* <http://www.insurancefraud.org/rc_research_set.html> (last visited June 26, 2003).
13. *Id.*
14. N.Y. State Assembly Bill Summary A08654, June 11, 2001. *See also* Coalition Against Insurance Fraud, Fraud Losses & Costs, *id*.
15. Last April, the Queens District Attorney's Office indicted Waurd Demolaire on charges of second-degree murder, second-degree manslaughter and sixth-degree conspiracy to commit insurance fraud in connection with the death of an innocent woman who was killed during the staging of an accident.
16. Ins. Law § 5106(b).
17. The Insurance Information Institute recently reported that in 2000 most insurers reported that PIP lawsuits filed against them in New York State increased by as much 200% compared to the previous year. *See* Insurance Information Institute, No-Fault Auto Insurance Fraud in New York State, *id*.
18 New requests for PIP arbitrations for the past three years were estimated as follows: 2000: 73,352; 2001: 84,977; and 2002: 77,566. Source: American Arbitration Association and Insurance Information Institute.
19. A simple amendment to the CPLR requiring that an additional 30 days' notice be given to the carrier before a clinic is allowed to file a complaint would greatly ease the burden on the courts. Florida has such a provision, and many potential suits are resolved even before they are filed. *See* Fla. Stat. § 627.736(11)(a).
20. Although each individual case may appear to be for a nominal amount, the courts do not have the benefit of knowing the tremendous volume of claims involved for each particular provider. In actuality, many no-fault clin-

ics have millions of dollars passing through their bank accounts.

21. *See* 11 N.Y.C.R.R. §§ 86, *et seq*.
22. 90 N.Y.2d 274, 660 N.Y.S.2d 536 (1997). *See also Central Gen. Hosp. v. Chubb Group of Ins.*, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997) (decided on the same day as *Presbyterian*).
23. *See Furstenberg & Aetna v. Allstate Ins.*, 49 N.Y.2d 757, 426 N.Y.S.2d 465 (1980). *Cf. Mount St. Mary's Hosp. of Niagara Falls v. Catherwood*, 26 N.Y.2d 493, 311 N.Y.S.2d 863 (1970); *Nyack Hosp. v. Gov't Employees Ins. Co.*, 139 A.D.2d 515, 526 N.Y.S.2d 614 (2d Dep't 1988).
24. *Id.*
25. Effective July 1, 1992, the filing method of commencing actions in supreme and county courts were changed from service to filing. *See* CPLR 304, 306(b).
26. *See* N.Y. City Civ. Ct. Act §§ 201–202; N.Y. Uniform Dist. Ct. Act §§ 201–202.
27. *See* N.Y. City Civ. Ct. Act § 400; N.Y. Uniform Dist. Ct. Act § 400.
28. Michael Billy, Jr. & Skip Short, *No-Fault Automobile Insurance* § 50.13(4), 4 New York Insurance Law (Wolcott B. Dunham, Jr., ed., Matthew Bender & Co., Inc. 2000).

Eulogy

In Memoriam: Charles E. Heming 1926 – 2003

Following are remarks that Henry G. Miller, a former president of the NYSBA, made at a memorial service held in August for one of his successors as president, Charles Heming, who died in June.

When future generations visit the "Heming Room" atop the State Bar Building in Albany, they may wonder: Who was Heming? They may correctly surmise he was among the most generous contributors to the State Bar Building Project. They may even research the fact that for three years he was president of the New York Bar Foundation and spent countless hours presiding over the dispensation of funds to worthy causes.

But will they really think about him as a man – not just one of those distant benefactors we take for granted?

Who was Charles Heming? And if from each death we learn, what does he teach us? I say: Charles' life teaches us much.

He believed that lawyers must put clients' interest before their own. He believed our joy was in helping others. Listen to his first words when he became president of the NYSBA.

"Let us never become so absorbed in the problems of the day that we lose sight of the rewards we receive from our profession. We have reason to rejoice that we have chosen a career that gives us the opportunity to do work that is challenging and interesting and provides us the satisfaction of knowing we are helping others solve problems that are vital to them."

Whence comes such a person? – the kind of person so desperately needed now – when too many lawyers see their calling as nothing more than a business pursuit of profit.

Charles was born to privilege and grew up on Park Avenue. Yet he quickly learned of life's uncertainty when his father died at the age of 33. His mother, left with four children, led a life of accomplishment and set a strong example by not only raising her children but becoming a major figure in the League of Women Voters.

Charles, the only son with three sisters, became not only the man in the family, but the spoiled prince who was only held in check by his strong German governess.

He also started to develop that streak of contrariness which made him such a valuable addition to our discussions at the State Bar. Coming from a family of Democrats, he became a Republican. Admitted to Harvard Law, he stayed home and went to Columbia.

Justin Vigdor, who preceded Charles as State Bar president, said Charles always balanced Justin's liberalism with a bit of Charles' conservatism. But he said he admired Charles for always speaking out of conviction. It never interfered with friendship, and Justin recalls a wonderful weekend of skiing at Charles' beloved Mad River Glen.

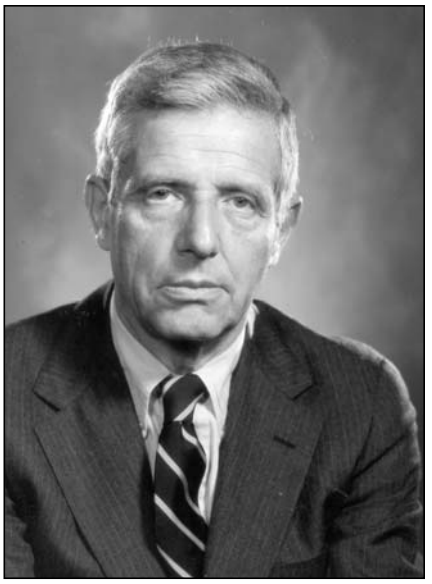
Even in Scarsdale, Charles believed in being an involved citizen to make a better community. He was a valuable trustee and it was said of him: He never raised his voice but he was always heard and was always prepared.

At the State Bar, one of my main initiatives was to seek a way to strive for simplification of the law. There was only one person I would trust with this project. Charles had already chaired the Project to Simplify Government under President Tony Palermo. Charles quickly undertook this further project and did a memorable job of planting a seed for future generations. How pleased I was that the headline in the *New York Times* obituary cited his leadership on the issue of simplification.

His dedication to the State Bar never stopped. Two weeks before he died, he participated on the phone in the vigorous deliberations of the Committee on Governance.

> ***Let us never become so absorbed in the problems of the day that we lose sight of the rewards we receive from our profession.***

But it is as a friend that I most remember Charles. There we were in Australia following the ABA meeting. Barbara and Charles and me with my teenage son, Matthew. We were watching sheep get sheared or hiking some inaccessible trail or not knowing where to eat since Matthew only wanted Burger King or Hard Rock Café; or we were running in a race in Sydney with the usual result of my trailing Charles, like in the New York Marathon where at 3 hours 28 minutes, he finished one hour ahead of me. The only consolation being we both always followed Barbara. Or the ride up from Scarsdale to Albany to honor Bill Carroll when Charles told me he was on to the tricks I used in putting a speech together or the endless meetings we



endured together in the hopes of making our profession better, and all the time having the wisdom to know that our greatest reward was the fellowship and friendship we all had in each other, placing those times among the finest moments of our lives. For nothing can be more exhilarating than friends striving mightily for a worthy cause. But for these endeavors, I never would have known Charles, and my life would have been poorer for that.

I did not know at the January meeting, it would be the last time we met. On June 1st, the day of my recent marriage, I looked around at many happy faces but sensed an absence. Charles was not there. On June 5th, he passed from us.

Charles, you led a life of high value. You played many roles. You were a brother, a father, a grandfather, a husband, an exemplary lawyer, a Bar leader of stature, a son who had the greatest success by fulfilling every hope your parents had for you. And for me, you were a friend.

Your life enriched us and made the world a little better than you found it. Thank you and good-bye.

Attorney Professionalism Forum

To the Forum:

I am a second-year law student and hope to concentrate my practice in family law.

My sister, Mary, had her divorce finalized about a year ago. She tells me that throughout the legal process of her divorce she was very impressed by her husband's attorney, Mr. Hans Summ. She says that he was very polite, organized and efficient at all the depositions and conferences that she attended and seemed incredibly knowledgeable and sophisticated throughout the proceedings.

Mary believes that Mr. Summ's expertise and professionalism resulted in getting her volatile ex-husband to come to an agreement and thus spared her the trauma of a trial.

As part of Mary's property settlement she received their summer home in Lake Chautauqua in upstate New York. Mary has now decided to sell the summer home and she called Mr. Summ to represent her in the sale. Mr. Summ not only agreed to do so but also asked Mary to go to dinner with him. I know my sister has been very lonely and depressed as a result of her divorce and she was both surprised and delighted at Mr. Summ's invitation.

Somehow, although I am not sure why, Mr. Summ's agreeing to represent her on the sale of the property and inviting her to dinner don't seem right to me.

Is it proper for Mr. Summ to represent my sister? Is there anything wrong with his asking my sister out to dinner?

Sincerely,

Worried in Williamsville

Dear Worried:

Your sense that something is "not right" with Mr. Summ's response to your sister is justified.

It is, after all, that indefinable sense of unease that can motivate even an attorney who has practiced for many years to re-examine the situation that gives rise to the feeling. Mr. Summ appears to be an experienced matrimonial attorney. That being so, he would know, as would any attorney who practices matrimonial law, that the trauma of a divorce can make a client feel "lonely and depressed," as your sister apparently now does. This can be all the more intense in women whose lives have been devoted to being wives, mothers and homemakers. Not surprisingly, such women often have looked chiefly to their husbands for social and emotional support, and have had few outside contacts other than with family members and friends, most of whom have known them only as part of a married couple. Obviously, not all women who stay at home fit this profile; however, reading between the lines of your description, Mary might.

Further, even clients who have functioned as professionals or in other demanding positions throughout the marriage find themselves apprehensive, anxious, and unsettled, and have difficulty coping in their personal lives.

It therefore is not surprising that an "organized," "efficient," "incredibly knowledgeable and sophisticated" attorney would seem to be the very sort of take-charge person who could provide the solution to the unhappy condition of the recently divorced.

Mr. Summ is well aware, or certainly should be aware, of the dynamics at play in your sister's case. If he needs any additional clue, he should ask himself why a prospective client, who knows him only as a matrimonial lawyer, would ask him to handle a real estate matter. The guess here is that he knows very well why – hence the invitation to dinner. Under these circumstances, an experienced matrimonial attorney might well be overstepping the bounds of proper conduct by encouraging the personal relationship.

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism, and is intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

The Attorney Professionalism Committee welcomes these articles and invites the membership to send in comments or alternate views to the responses printed below, as well as additional questions and answers to be considered for future columns. Send your comments or your own questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.

The Code of Professional Responsibility provides some guidance. EC 7-l1 teaches that the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, and DR 5-111(B)(3) provides that in domestic relations matters, a lawyer shall not have sexual relations with a client during the course of the lawyer's representation of the client.

Of course, Mary wasn't his client, and the matrimonial matter has been concluded. However, Mary's husband *was* his client and DR 4-101 and DR 5-108(A) prohibit a lawyer from revealing confidences and secrets of a client. This includes any information gained in the professional relationship, that would be embarrassing or detrimental to the client. Is it unreasonable for Mary's ex-husband to fear that his revelations to Mr. Summ might slip out as pillow talk with Mary?

Perhaps certain confidences imparted to Mr. Summ by Mary's ex-hus-

band, which may have had no bearing on his case, but which some matrimonial clients feel the need to disclose, will never cross Mr. Summ's lips. Perhaps Mr. Summ has no motive other than to enjoy Mary's company at dinner, at which time he will give Mary the names of competent real estate attorneys. Perhaps, but unlikely.

In any event, EC 9-6 provides that attorneys must strive to avoid not only professional impropriety but also the appearance of impropriety. Coming so close on the heels of the divorce, and the property to be sold by Mary having been the fruit of that litigation, the potential relationship you describe between Mary and her ex-husband's attorney might be seen as creating such an appearance.

Mary should be encouraged to get out more, join community groups and to call her local bar association's lawyer referral service for a real estate attorney to handle the sale of her property. Mr. Summ should reconsider.

The Forum, by
Grace Marie Ange
Ange & Ange
Buffalo

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I have a couple of friends who live in the Albany area, as I do. For over 30 years we have gone fishing at Tom's vacation place up in Vermont. We get to fish in a great stream, with the best equipment (and go broke in the process). Tom is retiring to Florida and wants to sell his property. Bob, another friend in the group, wants to buy it. Bob and Tom are close friends and have asked me to represent both of them.

I have something of a familiarity with Vermont property, but am not licensed in the state and I have never handled a real estate transaction there; in fact, real estate is not my strength, as I am a negligence attorney. This particular transaction involves a very substantial purchase price, and has a number of complexities, including substantial environmental questions and arcane Vermont rules regarding riparian owners – such as what qualifies a person as a riparian owner in the first place.

On the other hand, Bob and Tom have never had any problems with each other, and I can order a title insurance policy which will take care of most of the legal questions, leaving only the review of the policy. I am concerned that if I decline the matter, Bob may be reluctant to invite me back once he owns the place, thereby ending a 30-year tradition of which I am extremely fond. "Moonlight in Vermont" is more than just a song to me. I am not getting a fee, but I think Bob and Tom will agree to cover my out-of-pocket expenses, such as court fees and costs, the title search, and the like. I know from my own practice that the client ultimately must remain responsible for the expenses of litigation. But I am not certain whether or not an attorney in a real estate matter can pay for the type of expenses that I will encounter in a circumstance such as this, where there is no adversarial relationship between the seller and buyer.

I need to know whether I am ethically prohibited from undertaking the representation.

Sincerely,
The Fisherman from Fonda

POINT OF VIEW

Chess and The Art of Litigation

BY GREGG L. WEINER

A book I've been reading on chess strategies has not done much to improve my chess game, but it led to a surprising and useful appreciation that chess strategies are remarkably apposite to litigation strategies and techniques. Here are just a few examples:

Develop your strong pieces quickly. In chess, your more powerful pieces – the queen, bishops and knights – should be developed quickly to put pressure on your opponent and to give them room on the board to operate. In litigation, the strategy is equally apt.

Cases have strong and weak points. The litigator's job is to separate the wheat from the chaff, quickly developing the strong points of the case, while removing the clutter that blocks their clarity and leads to delay. The goal in every case is to persuade. Inevitably, your five strongest points control the outcome of your case. The prosecution's failure in the O.J. Simpson case to develop its strong points early in the trial no doubt contributed to the acquittal result.

An added bonus to developing your strong points quickly is that it may dispirit the other side and lead to an early, favorable settlement – the analogue to an early resignation in chess.

Develop pieces as a unit and place in most favorable position. In chess, all the pieces should work together, and each piece should be placed in an optimal position according to the particular strengths of the piece. Similarly, to develop a coherent theory and theme of your case in litigation, all the witnesses and evidence should support your unified theme.

Even one stray witness who is discordant with the unified theme can badly hurt your case. As Edward Bennet Williams crudely put it, he wanted everyone on the inside of the tent pissing out. As for positioning, you want to place your best evidence in the position where it can have the most significant impact, while reducing the focus on your weak points. Thus, determining the order of proof that you will present is always an artful process. The focus is on both the order of witnesses to be called and the order of the evidence adduced within each examination. The common wisdom is that one should begin with the witness who knows the most about the case and end with your most sympathetic witness and that with respect to the testimony of any particular witness, to begin and end strong. But see the rule discussed below about blindly following the rules.

Once you pin a piece, leave it. In chess, a pin occurs when a piece cannot move without leaving another piece open to capture. Apprentice chess players will immediately close out the pin. The better strategy is to wait so as to pile up on the pin and win even more material. In litigation, the analogue is a piece of information that is damaging to the other side's case and that it cannot explain without exposing other weaknesses in its case.

When you have the opposing party pinned, make the most of it. Prolong the focus on it. Pile on. David Boies graphically did this in the government's Microsoft antitrust case, taking Bill Gates through e-mail after e-mail related to a meeting between Microsoft and its competitor, Netscape, that Gates claimed not to have been involved with.

Do not tip your hand early by castling. When you castle early, you allow your opponent to concentrate his attacks on the particular side where you have castled. In litigation, it is important not to tip your hand early by disclosing your trial strategy. The corollary to this, to use the vernacular, is to make the other guy put his cards on the table first.

Your moves in litigation should all be part of a cohesive trial strategy.

There are always arguments and evidence that you have not anticipated. Better to hear the other side's strategy and theories first, so you can address them in a thoughtful, measured way, than to be blindsided at trial where you will have to address them on your feet. In addition, by getting the other side to commit to a theory early in a case, you limit its ability to change course as the evidence is developed.

Do not ape your opponent's moves. In chess, aping your opponent's moves is a losing strategy because certain checks and captures cannot be duplicated. In litigation, there is often a similar temptation to copy your adversary. If he serves requests for admission, you do too. If he focuses discovery on a particular point or particular witness, you do too. If he brings large charts to trial, you do too.

While this approach may provide some psychological comfort that you are matching your adversary move for move, it is destined to fail. First, if you are aping your opponent, you are always reacting rather than acting, and thus inevitably beaten to the punch.

The futility of such a strategy in boxing is patent. Do not do it in litigation either.

Second, your moves in litigation should all be part of a cohesive trial strategy. If you simply follow your adversary's moves, you will be diverted from pursuing your own strategy. Run your case as you deem best. Don't let the other side dictate your strategy.

Think creatively and do not blindly follow the rules. Chess and litigation both place great emphasis on precedents. In chess, there are standard openings and defenses that have been developed over the years. These are quite useful for beginning players, but blind adherence to them leaves one open to attack because your opponent surely knows them too. Thus, if all you do is pursue a standard opening without variation, you will have given your opponent a perfect road map to your strategy. The same is true in litigation. Perfunctorily following the case precedents, prior experience or conventional wisdom is not wise.

Each case is truly different. The facts, the evidence, the witnesses, the venue, the judge, the jury, the times. The approach used in defending against a claim of securities fraud in 1999 will not work in the post-Enron/WorldCom era. Trying a case in New York is not the same as trying one in Texas. Hence, as in chess, use precedents, experience and conventional wisdom as building blocks from which to develop a strategy tailored to the particularities of your case.

A major difference. There is at least one major difference between chess and litigation. In chess, the rules of the game objectively determine who wins or loses. The player who plays best and checkmates his opponent wins. In litigation, judges and juries decide who wins, more often than not based on their subjective impression of which party should win rather than based on objective criteria that dictate the result.

As a result, sometimes the lawyer who litigated best will lose. (Or, thinking about it from the client's perspective, the party with the better case will lose.) Although this may hurt your professional pride or upset your clients, there may be no better alternative given the breadth and variety of issues courts are asked to address. Come to think of it, introducing chess to a judge or jury who could bail a player out of a losing game doesn't sound like such a bad idea.

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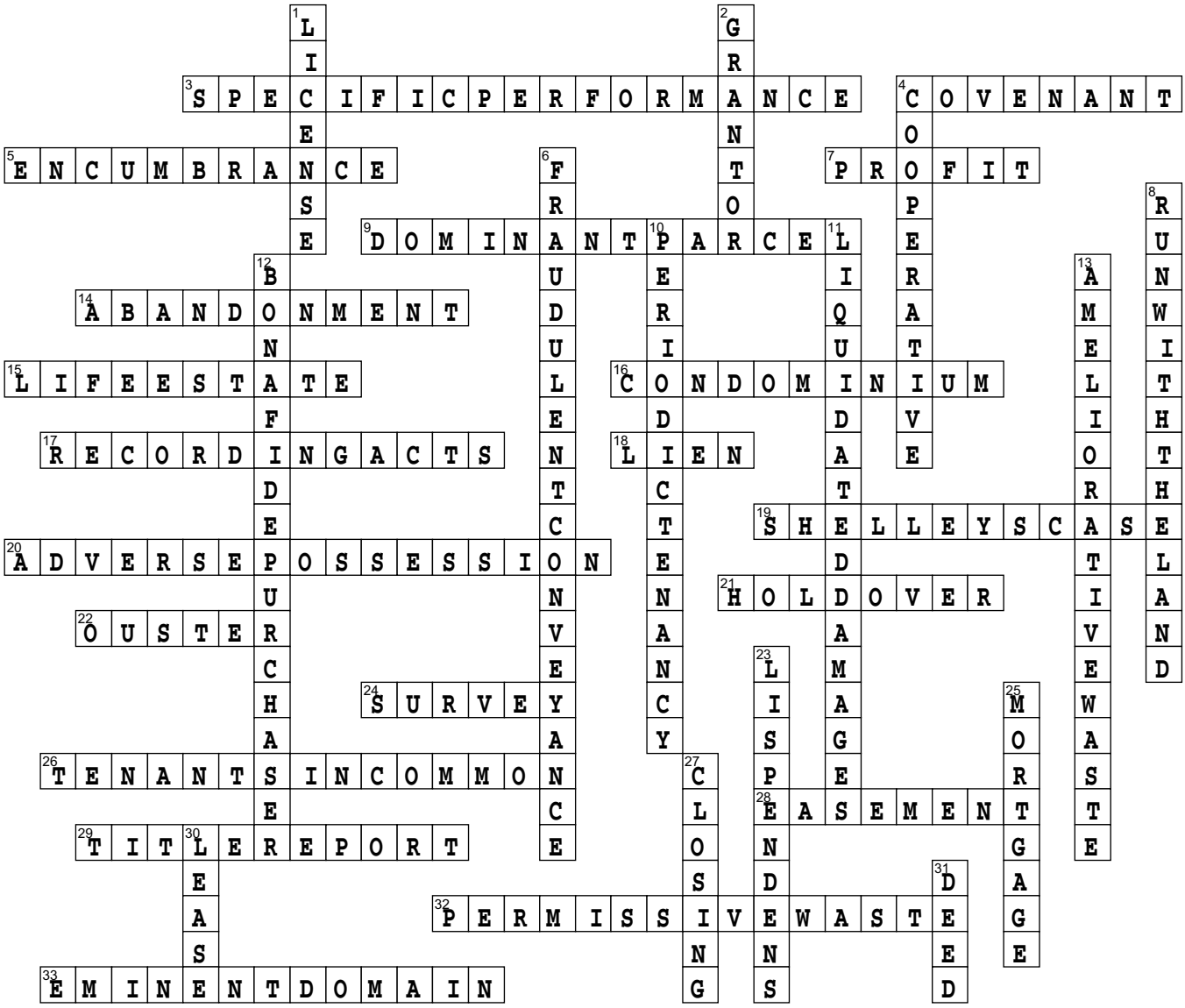

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Thomas J. Newman of Suffern
Thomas R. Newman of New York
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Karen Norlander of Rensselaer
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M. Catherine Richardson of Syracuse
Kieth I. Rieger of Garden City

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Paul E. Roberts of Boulder, Colo.
Nathan J. Robfogel of Rochester
Susan S. Robfogel of Rochester
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Marvin S. Robinson of New York
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Stuart M. Rosen of New York
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Suzzanne Yao
Julie Ly Yip
Daria Elise Zawadzki
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Anastasia Zhadina

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Abdul Aaron Lloyd-Bey
Christopher Maffia
David Marcus

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Jodi Marie Materna
Tamika Shaarii Mendoza
Liza Milgrim
Keisha Shanell Millon
Emily Johnson Murphy
Osita Chijindru Ogbunamiri
Norma Ortiz
Aretha Ama Owusu
Ashwani Prabhakar
Arlene Charmaine Preddie
Susan Linda Quarles
Susan Elizabeth Sawyers
Daniel Stern Silver
Lyle Patrick Smith
Jenni B. Spiritis
Jeffrey Stern
Thomas D. Tangney
Kathryn H. Thiesenhusen
Joju John Thomas
Carolyn Ann Zapanta

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Kirk Ormond Orseck
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Aaron Dean Carr
Robert H. Hoaglund
Alma Louise Lowry
Wendy Sue Reese

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Kevin Arthur Jones

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Suzanne Marie Dissinger
Kristin Joseph Graham
Jamie Nobles
Jamie Lee Nobles
Andrew R. Randisi

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Andrew Neubauer
Rebecca S. Raye

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Dennis James Feliciano
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Dawn Marie Salas
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Les Zakutinsky

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Vladimir Shuster
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Christopher Peter Toscano
Seth Matthew Weinfeld

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Gilda Austrie
Joy Wendy Ann Bernard
Daniel Boldi
Yunsung Choi
Michelle Yvonne Cort
Loyaan A. Egal
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Hao Jiang
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Christine Tricia Panza
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Shira Beth Albert
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Nazha Joseph Attal
Yuri Nicolaevich Babin
Tae-ung Baik
Jonathan Israel Bakalarz Trujillo
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Zachary Razzarq Bello
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> as defendant and respondent, he wins! It is hard to imagine a more even handed application of justice. Truly, it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs.[14]

The court closed with a costly assessment: "[E]ach party will bear his own costs.

The Second Circuit in *Miller v. Silverstein*[15] affirmed a 28-page order that rejected a Vietnam veteran's claim for $49 million from President Clinton and others for conspiring to commit dozens of assassinations, for paying off the New York Police Department to distribute heroin, and for laundering the profits through Goldfingers International, a company that provides nude dancers for dance clubs.

In *Gordon v. Secretary of State of New Jersey*,[16] a prisoner charged that he was denied the presidency of the United States because of his illegal incarceration. The court wrote that "nothing prevented Gordon from seeking to gain the votes of enough electors to have been elected President of the United States. The classic example is that of Mayor Curley of Boston, who was re-elected while in jail. Eugene V. Debs ran for President four times and was a candidate while in jail. Gordon was free to do the same."[17]

Another case, *Peek v. Ciccone*,[18] concerned a prisoner's suit to be allowed to tell the Pope that he is Christos, the spirit of the reincarnated Christ. The prisoner prevailed:

> Petitioner contends that because he is the "messenger of love" referred to in the secret prophecy of Fatima, he is entitled to communicate his revelation and claims to the Pope for recognition of the fact that he has fulfilled the secret prophecy and is the spirit of Christ reincarnated. His beliefs are entertained in good faith . . . . Therefore, the petitioner should be allowed to communicate his religious experience and claims to the Pope.

In *Washington v. Alaimo*,[19] a plaintiff in jail for life for murder sued the judges responsible for his incarceration. During the litigation, the plaintiff filed a motion "entitled 'Motion to Kiss My [Derrière]' (Doc. 107) in which he moved 'all Americans at large and one corrupt Judge Smith [to] kiss my got [sic] damn [derrière] sorry mother [* * *] you.'" The court demanded that plaintiff respond to a motion for sanctions under Rule 11, but the plaintiff did not respond. The court dismissed the suit with these remarks:

> This Court is quite sure that, if the villagers who heard the boy cry "wolf" one time too many had some form of reassurance that the boy's last cry was sincere, they would have responded appropriately and he would be alive instead of being dinner for the ravenous canine. If anything, that story teaches that repetitious tomfoolery can result in disaster for the knave. This Court will not turn a deaf ear to Plaintiff's future cries. However, it will require Plaintiff to structure his pleas for help in a more sincere manner so that the energies of the villagers are not wasted on the repeated runs up the grassy hill atop which the mischievous boy sits laughing.[20]

The plaintiff–appellant in *Schlessinger v. Salimes*[21] was told the following: "If your meal is not tasty, you do not throw a tantrum, upset the other diners, and then sue the mayor of the town where the restaurant is located. Perhaps the dispute about the bill was meat for small-claims court in Wisconsin; it was nothing to make a federal case about."

The following is the entire opinion, other than the decretal paragraph, in *Jones v. God*:[22]

> In what purports to be a civil rights action, the only defendants identified by name are God and Jesus. The complaint simply states "Treating Inhuman Sex." The papers were accompanied by a petition to proceed in forma pauperis and it would appear that plaintiff qualifies to do so. Nevertheless, the complaint must be dismissed because quite apart from the question of service on the principal defendants, there is no factual basis for the exercise of this court's subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

The defendant in *Trustees of Columbia University v. Jacobsen*[23] was sued for not paying tuition. He counterclaimed because he was not taught wisdom. Defendant lost, with these words:

> We note, in passing, that he has cited no legal authority whatsoever for his position. Instead, he has submitted a dictionary definition of "wisdom" and quotations from such works as the Bhagavad-Gita, the Mundaka Upanishad, the Analects of Confucius and the Koran; excerpts from Euripides, Plato and Menander; and references to the Bible. Interesting though these may be, they do not support defendant's indictment of Columbia. If his pleadings, affidavit and exhibits demonstrate anything, it is indeed the validity of what Pope said in his Moral Essays:
>
> *A little learning is a dangerous thing;*
>
> *Drink deep, or taste not the Pierian spring . . . .*

A little learning is also a dangerous thing for judges and advocates who make merry at the plight of the mentally disturbed. One ought never laugh at or make fun of delusional claims or claimants. Don't delude yourself: Doing so is unproductive and brutish. Without a sympathetic ear and a just heart, a grammatical mind is the Devil itself.

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. A safe and ethical policy in Housing Court, where I work, is to ask the court to appoint a guardian ad litem for the disturbed self-represented adversary.
2. *See, e.g.*, Sean Munger, Comment, *Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts*, 72 Tulane L. Rev. 1809 (1998).
3. 54 F.R.D. 282, 282–83 (W.D. Pa. 1971) (Weber, J.).
4. 1990 U.S. Dist. Ct. LEXIS 8792 (W.D. Mich., July 12, 1990) (Enslen, J.).
5. *See id.* at *2 n.1.
6. 95 F.R.D. 476 (D. Or. 1982) (Redden J.).
7. *Id.* at 477.
8. 676 F. Supp. 175 (S.D. Ill. 1987) (Stiehl, J.).
9. *Id.*
10. *Id.* at 176.
11. 151 F.R.D. 537 (S.D.N.Y. 1993) (Haight, J.), *aff'd*, 41 F.3d 1500 (2d Cir. 1994) (table).
12. 412 F. Supp. 413 (D. N.J. 1976) (Biunno, J.).
13. 173 Cal. App. 3d 628, 219 Cal. Rptr. 117 (3d Dist. 1985) (Sims, J.).
14. *Id.* at 632, 219 Cal. Rptr. at 119.
15. 12 F.3d 1056 (table), 1997 WL 55760, *1 (2d Cir, Sept. 9, 1997).
16. 460 F. Supp. 1026 (D.N.J. 1978) (Biunno, J.).
17. *Id.* at 1027 (footnote omitted).
18. 288 F. Supp. 329 (W.D. Mo. 1968) (Becker, Ch. J.).
19. 934 F. Supp. 1395, 1396 (S.D. Ga. 1996) (Moore, J.).
20. *Id.* at 1400–01.
21. 100 F.3d 519, 523 (7th Cir 1996) (Easterbrook, J.).
22. 1991 WL 42399, *1 (E.D. Pa., Mar. 25, 1991) (McGlynn, J.).
23. 53 N.J. Super. 574, 580, 148 A.2d 63, 66 (App. Div.) (Goldman, J.), *appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959) (per curiam), *cert. denied*, 363 U.S. 808 (1960).

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Nizin, Leslie S.
Rosenthal, Edward H.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, 2d
Peskoe, Michael P.
Smith, Beverly McQueary
* Walsh, Lawrence E.

The Legal Writer

The Devil's in the Details For Delusional Claims

By Gerald Lebovits

Many courts have considered claims from distraught litigants. If are a judge, how do you use the power of an opinion to adjudicate a peculiar claim? If you are an attorney, how do you face off against a disturbed self-represented adversary?[1] Delusional claims are, regrettably, common enough that law-review articles have been written about them.[2]

The issue for the opinion writer, for whom the way something is said counts for as much as what is decided, is how to resolve these claims quickly — yet sympathetically and justly. For the attorney, the issue is how to combine integrity and decorum with effective advocacy.

Below are some examples of how opinion writers have treated delusional claims. Some approaches in these cases work. Some fail.

After discussing Stephen Vincent Benét's classic short story "The Devil and Daniel Webster," the court did the Devil's work in *United States ex rel Mayo v. Satan & His Staff*[3] by considering whether it had jurisdiction over the defendant, Satan. *Satan & His Staff* is the most famous case on the subject, and the most cited.

A plaintiff with a devilish name sued in *I Am the Beast Six Six Six of the Lord of Hosts in Edmond Frank Macgillivray Jr Now. I Am the Beast Six Six Six of the Lord of Hosts Iefmjn. I Am the Beast Six Six Six of the Lord of Hosts. I Am the Beast Six Six Six Otlohiefmjn. I Am the Beast Sssotlohiefmjn. I Am the Beast Six Six Six. Beast Six Six Six Lord v. Michigan State Police*.[4] The court dismissed the plaintiff's federal section 1983 claim on Eleventh Amendment grounds, but only after discussing his religion at some length and shortening the plaintiff's name to "I am the Beast."[5]

In *Kent © Norman v. Reagan*,[6] a man with a copyrighted name sued President Reagan for causing "'civil death' without legislation" and to enjoin the "White Line Fevers from Mars," a fruit company that shipped marijuana and cocaine in fruit boxes for Mother's Day. After the court dismissed the case as frivolous, the Ninth Circuit reversed. In his second go 'round, the district judge dismissed for want of prosecution. Before dismissing, however, he recited a poem the plaintiff wrote about birds, crickets, ants, and a butterfly and then explained, somewhat sardonically, "It is possible, of course, that [plaintiff's poem] is not intended as a claim at all, but as a literary artifact. However it may be that, liberally construed, the references to the birds, crickets, ants, and butterfly could constitute a *Bivens* claim. *See Bivens v. Six Unknown–Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)."[7]

The petitioner in *Collins v. Henman*[8] brought a federal habeas corpus proceeding to challenge a state conviction. He argued that his double-murder conviction and 175-year sentence were illegal because, among other things, "Petitioner is not Raymond Collins but the 'Prophet Muhammed,' and he was convicted under the wrong name."[9] The Prophet may have died in 632, but the court assumed that petitioner was the Prophet. As the court wrote, "it is not the place of a federal court to decide which is the true faith or who is a true prophet."[10] The court then dismissed the action because the petitioner failed to exhaust state remedies.

A persecuted cyborg-woman sued Presidents Jimmy Carter and Bill Clinton, and others, for $5.6 billion in *Tyler v. Carter*.[11] She claimed that the defendants reinstituted slavery, played loud rock music, and used airplanes and helicopters to strafe her dorm room. In an extensive opinion, the court dismissed the suit, respectfully but firmly.

The court in *Searight v. New Jersey*[12] dismissed a claim of a prisoner who heard voices after a prison physician injected his left eye with a radium electric beam. Before dismissing, the court speculated that "taking the facts as pleaded, and assuming them to be true, they show a case of presumably unlicensed radio communication, a matter which comes within the sole jurisdiction of the Federal Communications Commission, 47 U.S.C. § 151, et seq." With sarcasm everyone but the plaintiff will detect, the court also suggested that the plaintiff block the broadcast to the antenna in his brain by grounding his antenna with a paperclip chain extending from his trousers to the floor. *Searight* is an example of humor at the expense of mentally ill litigant.

Without a sympathetic ear and a just heart, a grammatical mind is the Devil itself.

A California intermediate appellate court in *Lodi v. Lodi*[13] pondered the claim of a man who sued himself for raiding his own trust fund and who then represented both sides on appeal. Not surprisingly, Mr. Lodi prevailed below and on appeal. Not surprisingly, he also lost below and on appeal. After it affirmed the lower-court's dismissal, the court wrote:

> In the circumstances, this result cannot be unfair to Mr. Lodi. Although it is true that, as plaintiff and appellant, he loses, it is equally true that,

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