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By Harold Lee Schwab

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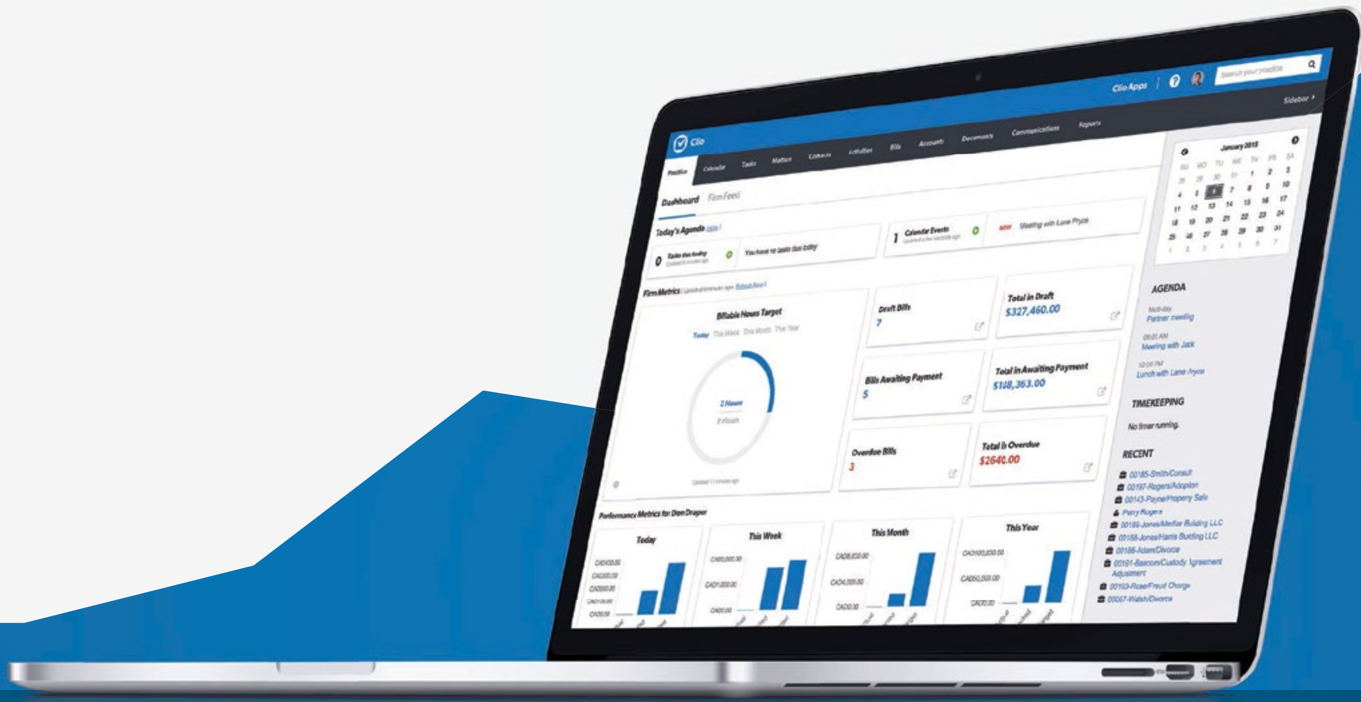

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New Members Welcomed on our website.

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PRESIDENT'S MESSAGE

DAVID P. MIRANDA

Balancing Act

We have met the enemy and he is us.
– Pogo

We are embroiled in a debate over privacy and whether it has limits, which at times takes on the tone of Patrick Henry's statement, "Give me liberty or give me death." Fortunately, we have more than just those two options. In reality, today's less dramatic data-driven rallying cry is closer to something like "give me privacy or at least give me something slightly entertaining." We compromise privacy to give a few dozen of our close friends and followers full access to our most private and personal information – everything from where we are, to who we're with, to what we eat and think and do. There are no regulations against our "sheep-like" uploading and distribution of personal data, but we draw the line when our government says it needs minimal access to help protect us.

Our inability as a nation to reasonably and intelligently address the issue of data privacy is exemplified by the U.S. Justice Department's need to use an 18th century law to force Apple to override privacy protections on a terrorist's iPhone. In seeking its court order, the Justice Department relied on the 1789 statute known as the All Writs Act, which essentially says that courts can compel third parties to comply with and take action to carry out orders in certain circumstances. Clearly, such an order would have met with much less resistance from Apple and the court of public opinion even just a few years ago, before Edward Snowden brought to light the government's rampant collection, storage and review of private telephone communications data.

Regardless of whether one considers Snowden a traitor or a hero, his revelations have shined a hard light on the lengths our government will go to to collect and curate data. Who we talked to, and when and what was said, was and is culled from the massive amounts of phone data collected, including communications with an expectation of privacy, such as attorney-client communications.

One's right to privacy, however, is determined by whether there is a reasonable expectation of privacy. There are, for example, levels of company-employee interaction and control when a device is used for company business. There is a spectrum of privacy – from a device issued by an employer for use in company business only to a personally enabled device – where the individual owns the device and creates a space on it for his or her own private personal use.

In the San Bernardino terrorist case, county officials owned the phone, gave consent to have the phone searched and gave Apple permission to do so. Apple, however, views its role through the lens of protecting the personal data of the user, not the wishes of the owner of the device. It appears to many that Apple's stance is more of branding and marketing than of privacy or patriotism. Particularly if the issue of ownership of a device affects the disposition of data, it's a fair question whether an employee-user would have reasonable expectation of privacy.

The San Bernardino case has encouraged discussion of federal legislation to require companies to decrypt data if a court orders it to do so. But there has been some reluctance in Congress. In response to the California and New York legislatures' introduction of bills to require smartphone makers to include a back door for decryption and to levy fines for noncompliance, Congress has introduced the ENCRYPT Act (Ensuring National Constitutional Rights of Your Private Telecommunications). The Act would prevent states from passing their own decryption laws. The Act's sponsor

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noted in an interview with *Newsweek* that it wouldn't be feasible to "make one smartphone for California and New York and another one for Minnesota and Texas." It is unclear, however, whether Congress intends to introduce legislation to formulate a national policy.

The issue goes beyond our nation's borders, and even wise regulation in the United States might not fit neatly in our digital world. The European Union has taken a very strong stand against the sharing of personal data without one's consent. Thus, even inadvertent sharing of personal data of an employee in a European company with people in its U.S. office (such as a multi-national law firm) could be deemed unlawful, and data transmissions could be halted. After complaints in the EU about the privacy of social media users' online messaging, the EU's previous privacy policy was invalidated. The EU's Safe Harbor had allowed U.S. companies to self-certify that company practices ensured an adequate level of protection for personal data. Now, the EU is implementing a more stringent policy with greater safeguards. The new arrangement, the EU-US Privacy Shield, will greatly affect corporate policies and internal structures on how companies handle personal data. Interestingly, our U.S. Congress recently passed the Judicial Redress Act, which allows citizens of designated foreign countries and regional economic organizations to bring civil actions against U.S. agencies that are in breach of data protection policies.

Europe is also at the forefront of a personal "right to be forgotten." An article by Steven Bennett in the January 2016 issue of the *Journal* covered a decision by the EU Court of Justice, which established not only a fundamental right to privacy, but a right to have information expunged and forgotten. The ruling required review of each case before a "delisting" request is granted, and made clear that mere inconvenience is not grounds for delisting. The question of whether such delisting must occur only in the countries where suit is brought, or whether it must be implemented internationally, still has no clear answer.

Yet, it is hard on some level to square all this with the reality of our data-driven world. The question may, in the end, be moot because we consistently and freely give away our personal data for a $5 coupon or a free app. Whether you are making a purchase in person or online, your data is collected. If you use a discount card, your every purchase is recorded, and marketing pitches are tailored ever more specifically to you. Buy something online and nearly every time you go to a shopping site, your screen will also show you the latest deals and trends from the companies that sold you your most recent purchases. Every transaction requires a compromise or a tradeoff. We can't pick and choose who gets our data – the shoe store or the government – unless we go off the grid entirely.

For lawyers, a breach of privacy or compromised client data spells disaster. Maintaining the confidentiality of client communications is one of the mainstays of our rules of ethics and professional conduct. In 2008, recognizing the ever-growing importance and difficulty of protecting client data in an increasingly electronic world, then-NYSBA President Bernice Leber created a Task Force on Privacy. The Task Force issued its report in April 2009 – generations ago in our digital era. But, based in sound scholarship and logic, the report has much to tell us about the world we live in today and doing our due diligence as lawyers. It took a clear-eyed view ("[we] recognize that just in the time this Report was drafted, the law has changed and technology has advanced. . . . Some parts . . . could therefore become dated even before [it] is distributed") and repeatedly urged "the Association to continue to examine the sufficiency of the law and its enforcement . . . and update this Report regularly on an as-needed basis."

The job of the Task Force was "to examine privacy issues impacting lawyers and their clients." Seeing the enormity of its task, the Task Force narrowed its focus to a few key areas of law: intellectual property, criminal law, health law, employment law, business law and civil litigation. Across the board, a major concern was on data collection – via the Internet and WiFi, cell and smartphone, GPS technology, E-Z Passes, ID badges, credit card use, surveillance cameras and scanning devices in public facilities and airports. Each area of law had particular concerns: criminal law, where limitations on the privacy of attorney-client communications were singled out; health law, where issues of the security of electronic health records came up; employment law, addressing issues of employees' after-work activities; business law, particularly in the area of identity theft; and civil litigation, balancing the need for discovery and the need for privacy. The Task Force concluded:

> [T]he law is developing to address the challenges raised by technological advances that have caused the world to be "smaller" and privacy to be more difficult to maintain. As lawyers, our role as advisors is impacted both personally and professionally. . . . [T]he Task Force suggests the Association proceed to the next step of exploring those issues, identifying a collective view, and outlining a plan of reform, where necessary.

Pogo hinted at what the real issue may be: our biggest problem is not our government, or foreign governments, or corporate interests, but our own willingness to give our privacy away. ■

New-York Tribune.

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DIAGRAMMATIC SKETCH OF THE SURROUNDINGS OF YESTERDAY'S FIRE HORROR

Bodies of some of the unfortunates who jumped from the windows, lying where they struck the pavement.

Scores of Girls Leap to Death in Streets Ten Stories Below Them.

HAD NO CHANCE FOR LIFE

Unable to Reach Elevators or Stairways, Employes Rush to Windows.

CROKER BLAMES ESCAPES

None on Outside of Building, Says Fire Chief, Saying That Is Reason for Fearful Loss of Lives in Disaster.

ELEVATORS SAVE HUNDREDS

Frightful Panic as Trapped Workers Fight Like Furies for Places in Cars, Almost the Only Means of Escape, as Flames Sweep Through the Workrooms.

Nearly one hundred and fifty lives were lost in a fire that swept through the three upper stories of a ten story factory loft building at the northwest corner of Washington Place and Greene street at 5 o'clock yesterday afternoon, occupied by the Triangle Waist Company and a clothing house. At midnight 142 bodies had been taken to the morgue.

Fire Chief Croker said:

"This calamity is just what I have been predicting. There were no outside fire escapes on this building. I have been advocating and agitating that fire escapes be put on buildings just such as this. This large loss of life is due to this neglect."

Thirteen of the victims were men; 129 were women and girls.

The cause of the fire is unknown. No one has tried to do more than guess at it.

Scenes of almost indescribable horror attended the catastrophe. Scores of girls leaped from windows eight, nine and ten stories above the street to their death. In one place so many bodies fell that the glass and iron deadlights in the pavement were brok...

A fire escape in a light shaft ... than fifty girls were found ...

HUMAN BRIDGE BREAKS

Weight of Fugitives Crossing Over Men's Bodies Too Great.

CENTRE MAN'S BACK BREAKS

The Other Two Men Lose Their Grip on Window Sills and All Fail to Death.

TELLS STORY OF FIRE

Samuel Lavine, on Hospital Cot, Describes Horror.

SLID DOWN ELEVATOR ROPE

CROKER SAYS LACK OF FIRE ESCAPES IS CAUSE

KNOCKS OUT HEAD WAITER

Waldorf Attendant Lands on Jaw of Man Above Him.

New-York Tribune.

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LA FOLLETTE MEN ATTACK ROOSEVELT

Ex-President Denounced for Not Withdrawing His Name from Nebraska Presidential Primaries.

SAY HE SEEKS NOMINATION

Nation's Records Fled from Flame in Woman's Trunk

Next Sunday's Tribune

KILLS HOLD-UP MAN TO SAVE HIS FATHER

C. Hoffmann, Hoboken Undertaker, Shoots Robber Through Heart in Fight.

ELDER MAN SEIZES BANDIT

SAYS 'NO' TO CASTELLANE

Vatican Declines to Grant Annulment of His Marriage.

COUNT WILL TRY AGAIN

JURY WILL GET THE TRIANGLE CASE TO-DAY

More Contradictory Testimony as to Locks and Doors When 148 Workers Were Killed.

MAX BLANCK TESTIFIES

TESTIFY IN THEIR OWN DEFENCE

RUSSIAN MENACE TO U. S.

YUAN STANDS FIRM AGAINST A REPUBLIC

Chinese Premier Reported by Tribune Correspondent To Be Still Insisting on Monarchy.

INTERVENTION TALK AGAIN

THREE MEALS AT A BALL

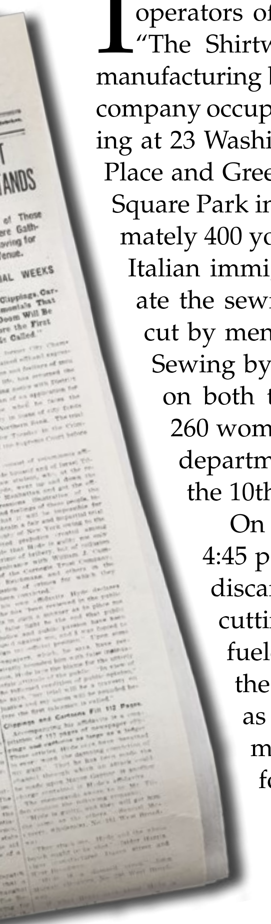
HYDE FINDS OUT WHERE HE ST...

MAY DELAY TRI...

A Tale Too Well Told

The Triangle Shirtwaist Fire Trial and the Cross-Examination of Kate Alterman

By Harold Lee Schwab



Isaac Harris and Max Blanck were the owners and operators of the Triangle Shirtwaist factory. Dubbed "The Shirtwaist Kings," they operated the largest manufacturing business of ladies' blouses at the time. The company occupied the top three floors of a 10-story building at 23 Washington Place, at the corner of Washington Place and Greene Street, on the east side of Washington Square Park in New York City. They employed approximately 400 young women and girls, mostly Jewish and Italian immigrants who spoke little English, to operate the sewing machines. Layers of thin fabric were cut by men on a series of tables on the eighth floor. Sewing by the women took place at their machines on both the eighth and ninth floors. There were 260 women on the ninth floor alone. The shipping department and administrative offices were on the 10th floor.

On Saturday, March 25, 1911, at or about 4:45 p.m., quitting time, a fire began in a bin of discarded cuttings on the eighth floor. Leftover cuttings in other wooden bins under the tables fueled the fire. The layers of cloth on top of the cutting tables and the tables themselves, as well as the sewing tables and the garments being worked on, became more fuel for the fire. Attempts by the workers to put out the fire with buckets of water were unsuccessful and the interior fire hose did not work. The fire spread rapidly throughout the eighth floor, then to the ninth floor and finally to the 10th floor.[1]

Panic set in for everyone in the factory. There had never been a fire drill. It appears most of the workers on the eighth floor were able to use two stairways to exit the building. Those on the 10th floor, including owners Harris and Blanck, exited by taking stairs to the roof and then climbing over to an adjacent New York University roof. However, most of those on the ninth floor mistakenly believed that one of the stairways was impassable because of smoke and the door to the other staircase was apparently locked, although a key may have been nearby. Those fortunate enough were able to escape via the fire escape before it collapsed from overload, the two elevators which rode a series of trips before malfunctioning, or

Harold Lee Schwab is a founding partner of Lester Schwab Katz & Dwyer, LLP and has lectured extensively, written on subjects relating to trial practice, and tried to a verdict more than 125 major cases. He is a Fellow of the International Association of Trial Lawyers and has been continuously listed in *Best Lawyers in America* since inception of that publication in 1983.

by taking a stairway to the 10th floor and roof. However, 146 employees, mostly women, died, principally when jumping from the ninth floor to the street below, or in a few cases, because of smoke inhalation or burns. Some even jumped together with their arms entwined. Safety nets and those improvised from blankets and tarpaulins did not save those who jumped. Falling bodies just broke through. Fire department ladders were of no use since they only reached the sixth floor. Ironically, the building itself survived, including its floors, walls, and stairways. This was one of the greatest losses of life in New York City to date and the public demanded justice.[2] Although the Building Department came under attack, the owners were viewed as the primary culprits. Within weeks of the tragedy, they were indicted for manslaughter.

The Death of Margaret Schwartz

The trial of *People v. Harris*[3] before Judge Thomas Crain commenced in December 1911 with Assistant District Attorney Charles Bostwick heading the prosecution and the defendants represented by Max D. Steuer, a leading member of the New York Trial Bar. The prosecution focused its case on the death of Margaret Schwartz, a ninth floor victim. It was alleged that she could not escape because the exit door was locked in violation of the New York Labor Code. The last witness called by Bostwick was Kate Alterman. She had been with Margaret when the two of them came out of the dressing room and found the ninth floor ablaze. Her principal testimony on direct examination was as follows:

> Q. Margaret Schwartz was with you at this time?
> A. At this time, yes, sir.
> Q. Then where did you go?
> A. Then I went to the toilet room, Margaret disappeared from me and I wanted to go up Greene Street side, but the whole door was in flames, so I went and hid myself in the toilet rooms and bent my face over the sink, and then ran to the Washington side elevator, but there was a big crowd and I couldn't pass through there. Then I noticed someone, a whole crowd around the door and I saw Bernstein, the manager's brother, trying to open the door, and there was Margaret near him.
> Bernstein tried the door, he couldn't open it. And then Margaret began to open the door. I take her on one side I pushed her on the side and I said, "Wait, I will open that door." I tried, pulled the handle in and out, all ways – and I couldn't open it. She pushed me on the other side, got hold of the handle and then she tried. And I saw her bending down on her knees, and her hair was loose, and the trail of her dress was a little far from her, and then a big smoke came and I couldn't see. I just know it was Margaret, and I said, "Margaret," and she didn't reply. I left Margaret, I turned my head on the side, and I noticed the trail of her dress and the ends of her hair began to burn. Then I ran in, in the small dressing room that was on the Washington side, there was a big crowd and I went out from there, stood in the center of the room. Between the machines and between the examining tables, I noticed afterwards on the other side, near the Washington side windows, *Bernstein, the manager's brother, throwing around like a wildcat* at the window, and he was chasing his head out of the window, and pulled himself back. He wanted to jump, I suppose, but he was afraid. And then I saw the flames cover him. I noticed on the Greene Street side someone else fell down on the floor and, the flames cover him. And then I stood in the center of the room, and I just turned my coat on the left side with the fur to my face, the lining on the outside, got hold of a bunch of dresses that was lying on the examining table not burned yet, covered my head and tried to run through the flames on the Greene Street side. *The whole door was a red curtain of fire*. A young lady came and she began to pull me in the back of my dress and she wouldn't let me in. I kicked her with my foot and I don't know what became of her. I ran out through the Greene Street side door, right through the flames on to the roof (emphasis added).

How does one cross-examine a Kate Alterman given the enormity of the tragedy? One of the cardinal rules for cross-examination is to control the witness by asking leading questions. You do not ask an open-ended question because it may give the witness the opportunity to reinforce prior testimony. Worse still, an open-ended question can result in the witness repeating fake or mistaken testimony. The subliminal effect of someone crediting as true a false statement due to its repetition is well-recognized. However, more than 100 years ago a New York attorney successfully violated the rule in what was the most important criminal trial of its time.

The Impact of Repetition

Steuer initially questioned the witness on collateral matters, which suggested coaching by the District Attorney. However, more was obviously required. Steuer asked Alterman to repeat her story not one time, which might enhance credibility, but rather three times. He first asked on cross-examination:

> Q. Now tell us what you did when you heard the cry of fire.
> A. I went out from the dressing room, went to the Waverly side windows to look for fire escapes, I didn't find any and Margaret Schwartz was with me, afterwards she disappeared. I turned away to get to Greene side street, but she disappeared, she disappeared from me. I went to the toilet rooms, I went out from the toilet rooms, bent my face over the sink, and then went to the Washington side to the door, trying to open the door, but there I saw Bernstein, the manager's brother, trying to open the door; but he couldn't; he left; and Margaret was there too, and she tried to open the door and she could not. I pushed her on a side. I tried to open the door, and I couldn't and then she pushed me on the side and she said, "I will open the door" and she tried to open the door. And then a big smoke came and Margaret Schwartz I saw bending down on

her knees, her hair was loose and her dress was on the floor and little far from her and then she screamed at the top of her voice, "Open the door! Fire! I am lost, there is a fire!" and I went away from Margaret. I left, stood in the middle of the room, went in the middle of the room, between the machines and examining tables, and then I went in. I saw Bernstein, the manager's brother, throwing around the windows, putting his head from the window – he wanted to jump, I suppose but he was afraid – he drawed himself back, and then I saw flames cover him. And some other man on the Greene Street side, the flames covered him, too, and then I turned my coat on the wrong side and put it on my head with the fur to my face, the lining on the outside, and I got hold of a bunch of dresses and covered up the top of my head. I just got ready to go and somebody came and began to chase me back, pulling my dress back, and I kicked her with the foot and she disappeared. I tried to make my escape. I had a pocketbook with me, and that pocketbook began to burn, I pressed it to my heart to extinguish the fire, and I made my escape right through the flames – the whole door was aflame right to the roof.

Q. It looked like a wall of flame?

A. *Like a red curtain* (emphasis added).

Q. Now, there was something in that you left out, I think, Miss Alterman. When Bernstein was jumping around, do you remember what that was like? Like a wildcat, wasn't it?

A. *Like a wildcat* (emphasis added).

Q. You left that out the second time. How long have you lived in Philadelphia?

Mr. Bostwick: There being no question predicated upon that I move that that statement be stricken out.

The Court: Yes, I will strike it out.

Mr. Steuer: I accept.

Mr. Steuer continues cross-examination.

Q. You did leave that out didn't you, just now, when you told us about Bernstein, that he jumped around like a wildcat?

A. Well, I didn't imagine whether a wildcat or a wild dog; I just speak to imagine just exactly.

After more preliminaries, Steuer asked a second time:

Q. Now could you tell us again what you did after that time?

A. After going out from the dressing room?

Q. Yes.

A. I went out to the Waverly side windows to look for fire escapes. Margaret Schwartz was with me, and then Margaret disappeared. I called her to Greene Street, she disappeared and I went into the toilet room, went out, bent my face over the sink, and then I wanted to go to the Washington side, to the elevator. I saw, there a big crowd, I couldn't push through. I saw around the Washington side door a whole lot of people standing, I pushed through and there I saw Bernstein, the manager's brother, trying to open the door; he could not and he left. Margaret Schwartz was there, she tried to open the door and she could not. I pushed Margaret on the side, and tried to open the door, I could not. And then Margaret pushed me on the side, and she tried to open the door. But smoke came and Margaret bent on her knees; her trail was a little far from her, just spreading on the floor far from her and her hair was loose, and I saw the ends of her dress and – the ends of her hair began to burn. I went into the small dressing room, there was a big crowd, and I tried – I stood there and I went out right away, pushed through and went out and then I stood in the center of the room between the examining tables and the machines. Then I noticed the Washington side windows – Bernstein, the manager's brother, trying to jump from the window, he stuck his head out – he wanted to jump, I suppose but he was afraid. Then he would draw himself back, then I saw the flames cover him. *He jumped liked a wildcat on the walls*. And then I stood, took my coat, turning the fur to my head, the lining to the outside, got a hold of a bunch of dresses that was lying on the table and covered my head, and I just wanted to go and some lady came, she began to pull the back of my dress; I kicked her with the foot and I don't where she got to. And then I had a purse with me and that purse began to burn, I pressed it to my heart to extinguish the fire. The whole door was a flame, *it was a red curtain of fire*, and I went right on the roof (emphasis added).

Q. You never spoke to anybody about what you were going to tell us when you came here, did you?

A. No, sir.

Q. You have got father and a mother and four sisters?

A. Five sisters. I have a father, I have no mother – I have a stepmother.

Q. And you never spoke to anybody else about it?

A. No, sir.

Q. They never asked you about it?

A. They asked me and I told her once, and then they stopped me; they didn't want me to talk anymore about it.

Q. You told them once and then they stopped you and you never talked about it again?

A. I never did.

Q. And you didn't study the words in which you would tell it?

> Although the general rule on cross-examination is to avoid repetition favorable to the witness, Max Steuer here had successfully impeached through continued repetition a most sympathetic witness.

A. No, sir.

Q. Do you remember that you got out to the center of the floor – do you remember?

A. I remember I got through the Greene Street side door.

Q. You remember that you did get to the center of the floor, don't you?

A. Between the machines and the examining tables, in the center.

So as to conclusively prove that the "jumping like a wildcat" and flames like a "red curtain of fire" were memorized and rehearsed, Steuer after the luncheon recess asked a third time:

Q. Now tell us from there what you did; start at that point now instead of at the beginning.

A. I saw Bernstein on the Washington side, Bernstein's brother, *throw around like a wildcat*; he wanted to jump, I suppose but he was afraid. And then he drawed himself back and the flames covered him up. And I took my coat, turned it on the wrong side with the fur to my face and the lining on the outside, got hold of a bunch of dresses from the examining table, covered up my head, and I wanted to run. And then a lady came and she began to pull my dress back, she wanted to pull me back, and I kicked her with my foot – I don't know where she got to. And I ran out through the Greene Street side door, which was in flames; it was *a red curtain of fire on that door* to the roof (emphasis added).

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Q. You never studied those words did you?

A No, sir.

On re-direct examination, the witness endeavored to explain that she used the same language when repeating a story "because he asked me the very same story over and over." However, the remarkable similarity of the versions strongly suggested that Kate Alterman had been coached, if not in fact programmed. Surely for this young girl "red curtain of fire" and "like a wildcat" were not words of her own choosing. Although the general rule on cross-examination is to avoid repetition favorable to the witness, Max Steuer here had successfully impeached through continued repetition a most sympathetic witness who had survived a major tragedy. At the very least, her credibility after cross-examination was suspect.

The defense subsequently called approximately 50 witnesses to testify and therefore it cannot be said the cross-examination of Kate Alterman was the *sine qua non* of the jury verdict of acquittal returned after only two hours of deliberation. However, it surely assisted in the result since Kate Alterman was undeniably a critical prosecution witness.[4]

Conclusion

By way of postscript, the Shirtwaist Fire tragedy ushered in what has become known as a golden era of remedial factory legislation. The New York State Legislature created the Factory Investigating Commission which was chaired by Robert F. Wagner, Sr. and co-chaired by Alfred D. Smith (future New York senator and governor, respectively). That commission in its first year aggressively interrogated 220 witnesses and inspected 1,836 buildings. In its first three years of existence it produced 36 new laws to the labor code.[5] Many who died in the fire were members of the International Ladies Garment Workers' Union (ILGWU). On the 50th and 100th anniversaries of the tragedy the ILGWU, together with other notables, participated in special memorial services at the site of the fire. ■

1. The structure, then known as the Asch Building, was erected in 1901. There was no fire sprinkler system and the code did not require one when the building was erected. It purportedly complied with the building code although it had only two stairways instead of the required three (based upon the size and number of occupants). A fire escape was deemed a stairway substitute although it did not extend to the ground below. The doors to the stairways opened inward although the code preference was to open outward so that individuals could exit and not block egress.

2. A *Daily News* article of April 26, 2015 concerning the N.Y.C. Fire Department, titled "150 Years of Courage," referenced the loss of at least 278 lives on December 5, 1876 in a fire at the Brooklyn Theater and 1,021 people on June 15, 1904 when the vessel PS General Slocum sank due to fire in the East River. However, the mass of humanity jumping from windows on March 25, 1911 had no counterpart until September 11, 2001.

3. 74 Misc. 353 (N.Y. Misc. 1911).

4. Certainly contradictory testimony as to whether there was a key in a door lock, the effect of bodies blocking the opening of a stairway door, and a legal requirement of knowledge by the owners were also important factors in the jury verdict.

5. *See* Leon Stein, The Triangle Fire (J.B. Lippincott Co., 1962).

BY DAVID PAUL HOROWITZ

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The Flight of *Pegasus*

Introduction

In Greek mythology, Pegasus was a winged horse that sprang from the blood of Medusa when Perseus cut off her head. In New York Practice, *Pegasus*[1] is the decision that sprang from the Court of Appeals on December 15, 2015, when the Court confronted, for the first time, spoliation of electronically stored information (ESI).

Pegasus in the Courts Below

Three entities, collectively "Pegasus," were plaintiffs that leased cargo aircraft to a Brazilian company, Varig Logistica, S.A., referred to as "VarigLog." VarigLog went bankrupt and was purchased out of bankruptcy by defendant MP, and operated for a time as a subsidiary of MP. Shockingly, at some point ESI in the possession of VarigLog went missing, and the plaintiff moved for contempt against VarigLog and for an adverse inference against MP:

> Supreme Court granted Pegasus's motion, holding that VarigLog's failure to issue a "litigation hold" amounted to gross negligence as a matter of law, such that the relevance of the missing ESI was presumed. Supreme Court also found that the MP defendants, having been charged by the Brazilian court with the duty to "manage" and "administer" VarigLog, were in "control" of VarigLog for purposes of putting a "litigation hold" into place to preserve the ESI, and their failure to do so amounted to gross negligence. The court therefore struck the answer of VarigLog and imposed a trial adverse inference sanction against the MP defendants with regard to ESI and paper records relevant to the action and within the MP defendants' control.[2]

MP appealed, and a majority[3] of the First Department reversed, holding that, while Pegasus had established that MP had sufficient control over VarigLog to trigger a duty to preserve, the failure to do so was not gross negligence, the failure to institute a litigation hold was not *per se* gross negligence, and "because Pegasus failed to prove that the lost ESI would have supported Pegasus's claims, a trial adverse inference sanction could not stand (citation omitted)."[4] One justice dissented in part and would have held that "the matter should have been remanded to Supreme Court 'for a determination of the extent to which [Pegasus has] been prejudiced by the loss of the evidence, and the sanction, if any, that should be imposed' (citation omitted)."[5] The fifth justice agreed with the motion court that the failure to take any steps to preserve constituted gross negligence, and would have affirmed the adverse inference.[6]

The First Department granted Pegasus's motion for leave to appeal to the Court of Appeals.[7]

Pegasus in the Court of Appeals

The Law

As it so often does, the Court, in a majority opinion[8] by Judge Pigott, opens with a succinct overview of the law, followed by an equally unencumbered recital of the issue presented and the resolution of that issue:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (citations omitted). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (citation omitted). On the other hand, if the evidence is determined to have been negli-

gently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (citation omitted).

On this appeal, we are asked to decide whether the Appellate Division erred in reversing an order of Supreme Court that imposed a spoliation sanction on the defendants. We hold that it did, and remand the matter to the trial court for a determination as to whether the evidence, which the Appellate Division found to be negligently destroyed, was relevant to the claims asserted against defendants and for the imposition of an appropriate sanction, should the trial court deem, in its discretion, that a sanction is warranted.[9]

For the three elements required to prove spoliation, *to wit*, that the party had control over the evidence, that the evidence was destroyed with a "culpable state of mind," and that the destroyed evidence was relevant to, and would support, the opposing party's claim or defense, the Court cited both the First Department's 2012 decision in *Voom HD Holdings LLC v. Echostar Satellite L.L.C.*[10] and Southern District Judge Sheindlin's 2003 *Zubulake v. UBS Warburg LLC (Zubulake IV)*[11] decision. Those courts had held that the "culpable state of mind" element includes ordinary negligence.[12]

When it came to establishing relevance where spoliation had been established, the Court of Appeals cited only to *Zubulake IV* as a source for its holding. However, the First Department in *Voom* "adopted" the standards set forth in *Zubulake IV* citing, however, a subsequent decision by Judge Scheindlin in *Pension Comm. of Univ. of Montreal Pension Plan*:[13]

The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (citation omitted).[14]

Again quoting *Pension Plan*, the First Department in *Voom* noted that the presumption was rebuttable:

When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required (citation omitted).[15]

Thus, the Court of Appeals has adopted, *in toto*, *Voom*. *Voom*, of course, similarly adopted *Zubulake IV*. And for a time, lawyers shuttling between state and federal court in New York were working from the same playbook when it came to spoliation of ESI. More on that later.

The Facts

After reciting the broad discretion possessed by trial courts to provide relief to a party for lost or destroyed evidence, the Court of Appeals explained its role in *Pegasus* based upon the record in the case:

Here, the order of the Appellate Division reversed the order of Supreme Court "on the law and facts" (citation omitted). In its certified question to this Court, the Appellate Division certified that the "determination was made as a matter of law and not in the exercise of discretion." However, we are not bound by the Appellate Division's characterization in its certification order, and instead "look to see whether the Appellate Division's decision, regardless of the characterization, nonetheless reflects a discretionary balancing of interests" (citation omitted).[16]

After reciting the different factual conclusions reached by each of the Justices below, the Court concluded, "[t]hus, whether the MP defendants' "culpable mental state" rose to the level of gross negligence, as opposed to ordinary negligence, constituted differing factual determinations by the trial court and the Appellate Division."[17]

When confronted with differing factual determinations, "'the scope of [the Court's] review is limited to determining whether the evidence of record . . . more nearly comports with the trial court's findings or with those of the Appellate Division' (citation omitted)."[18] In *Pegasus*, the Court of Appeals held that "the record evidence comports more with the Appellate Division majority's findings."[19]

The Court held that the failure to institute a litigation hold did not amount to gross negligence – instead it was but one of several factors for a court to consider in determining culpable state of mind[20] – and noted that the First Department had considered a number of relevant factors in reaching its "ultimate conclusion that, at most, the MP defendants' failures amounted to 'a finding of simple negligence' (citation omitted)."[21]

There were two linked findings that all six justices on the trial and appellate courts agreed upon, and the Court of Appeals agreed:

[W]e see no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over VarigLog to trigger a duty on its part to preserve the ESI. Nor is there any basis to disturb the findings of fact by the Appellate Division that the

MP defendants were negligent in failing to discharge that duty.[22]

However, there were two errors the Court of Appeals identified in the First Department's decision. First, it erred in determining that Pegasus had failed to make any arguments related to relevance, leading it to conduct its own inquiry:

[A]lthough the Appellate Division possesses the authority to make findings of fact that are as broad as the trial court, in this instance, where it all but ignored Pegasus's arguments concerning the relevance of the documents, we conclude that the prudent course of action is to remit the matter to Supreme Court for a determination as to whether the negligently destroyed ESI was relevant to Pegasus's claims against the MP defendants and, if so, what sanction, if any, is warranted.[23]

Second, the Court held that it was error to conclude that granting an adverse inference in an "alter ego" case was tantamount to a grant of summary judgment:

Contrary to the Appellate Division majority's contention, a trial adverse inference sanction would not be akin to granting summary judgment to Pegasus on its alter ego claim, since such a charge is permissive and can be appropriately tailored by the trial court (citations omitted).[24]

Conclusion

As *Pegasus* takes flight, a number of important issues concerning the preservation of ESI have been clarified, and clarity in New York Practice is helpful to practitioners. However, the time when lawyers in state and federal courts in New York could use the same playbook for spoliation of ESI ended two weeks before the Court of Appeals issued its decision in *Pegasus*. Effective December 1, 2015, there were a number of significant changes to the Federal Rules of Civil Procedure. Changes to Fed. R. Civ. P. 37 alter what had been, in many important ways, the *Zubulake* landscape in federal court, and the two court systems' rules for spoliation of ESI are no longer congruent. More on that next month.

While life for New York State practitioners may have gotten a bit harder, at least spring will have sprung by the time you read this column, something I am sure we all look forward to. ■

1. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 2015 N.Y. Slip Op. 09187 (2015).
2. *Id.*
3. Justices Friedman, Sweeny, and Saxe.
4. *Pegasus*, 2015 N.Y. Slip Op. 09187 at *4.
5. Justice Andrias.
6. Justice Richter.
7. *Pegasus*, 2015 N.Y. Slip Op. 09187 at *4–5.
8. Judge Stein wrote a dissenting opinion in which Judge Rivera joined.
9. *Pegasus*, 2015 N.Y. Slip Op. 09187 at *1–2.
10. 93 A.D.3d 33 (1st Dep't 2012).
11. 220 F.R.D. 212 (S.D.N.Y. 2003).
12. *Voom*, 93 A.D.3d at 46 (citing *Zubulake*, 220 F.R.D. at 221).
13. 685 F. Supp. 2d 456 at 467–68 (S.D.N.Y. 2010).
14. *Voom*, 93 A.D.3d at 45.
15. *Id.*
16. *Pegasus Aviation I, Inc. v. Varig Logistica, S.A.*, 2015 N.Y. Slip Op. 09187, *5 (2015).
17. *Id.* at *6.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *7.
22. *Id.*
23. *Id.*
24. *Id.* at *7–8.

"Moments in History" is an occasional sidebar in the Journal, *which will feature people and events in legal history.*

Moments in History

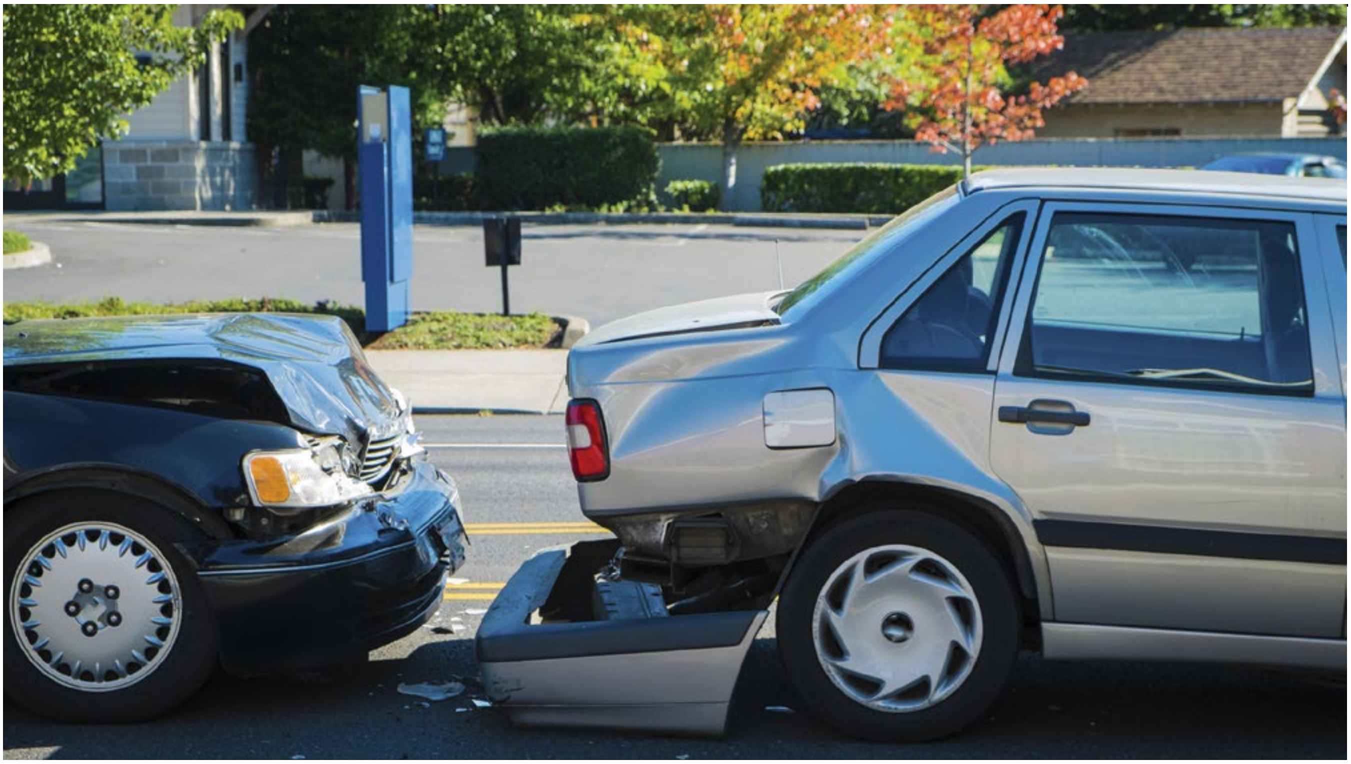
The Oldest Written Will

In 1889, news broke that renowned English archaeologist and Egyptologist Flinders Petrie had discovered what is believed to be the oldest known will. The ancient papyrus, located about 60 miles south of Cairo, Egypt, bears an approximate date of 2548 BCE and appears to have been from someone identified as Sekhenren, who devised to his wife, Teta, "all the property given him by his brother for life."

The will went on to forbid her from "pulling down" the houses his brother built for him but authorized her to give them to any of her children. It also bears an attestation clause indicating that two scribes witnessed its execution.

Commentators at the time of the discovery were surprised by the disposition of the husband's property to his wife at a time when women were thought not to have the right to acquire or exercise rights over property. According to the *London Standard* at the time of the discovery, the will was also remarkable for its "singularly modern form" and the article remarked "that it might almost be granted probate today."

From *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* by Michael H. Roffer.



2014-2015 Review of UM/UIM/SUM Law and Practice

By Jonathan A. Dachs

This is the first in a two-part series detailing changes in uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and practice in New York. This first part will include general information and highlights vital to UM practice. Part two will cover developments in UIM and SUM practice.

Yet again, I am honored and pleased to present this annual survey of recent developments in the area of UM, UIM and SUM law and practice, this time covering the period of 2014 and the first half of 2015. As in the past, this period was marked by a great deal of significant activity in this highly litigated, ever-changing and complex area of the law.

GENERAL ISSUES

Policy Construction and Interpretation

In *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*,[1] the Court of Appeals observed that in interpreting the provisions of the UM and SUM endorsements, the general rule of construction of ambiguities against the drafter (insurer) (*contra proferentem*) will not hold because the insurers did not choose the terms of these endorsements of their own accord, but, rather, were required to include them in compliance with the statutes.[2] Policy provisions mandated by statute "must be interpreted in a neutral manner consis-

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tent with the intent of the legislative and administrative sources of the legislation."

"Motor Vehicle"

In *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, *supra*, the Court of Appeals addressed the question of whether a police vehicle qualifies as a "motor vehicle," as that term is used in the Supplementary Uninsured/Underinsured Motorist (SUM) endorsement, and held that it does not.

Fitzgerald, a police officer, was injured in an accident with an underinsured vehicle while riding as a passenger in an NYPD vehicle being driven by a fellow officer, Knauss. He demanded SUM arbitration under Knauss' personal auto policy with State Farm, which defined an "insured" as the named insured (i.e., Knauss) and "any other person while occupying . . . any other motor vehicle . . . being operated by [Knauss]." Judge Abdus-Salaam, writing for the majority, stated,

> An unbroken line of historical practice, legislative history, statutory text and precedent establishes that a SUM endorsement prescribed by Insurance Law §3420(f)(2)(a) exempts police vehicles from its definition of the term "motor vehicle" absent a specific provision to the contrary in a given SUM endorsement. Since there is no contrary provision in the SUM endorsement here, it does not cover liability for injuries arising from the use of a police vehicle of the sort occupied by Fitzgerald during his accident. While Fitzgerald may pursue the available remedies, if any, under the No-Fault Law, a lawsuit or any insurance policy he has purchased for himself, he cannot recover under the SUM endorsement of Knauss's policy.

In *State Farm Mut. Auto. Ins. Co. v. Jones*,[3] which involved an accident between two *snowmobiles*, the insurer for the snowmobile on which the claimant was riding denied his claim for SUM benefits on the ground that a snowmobile is not a "motor vehicle" as that term appears in the SUM endorsement, relying on the definition of "motor vehicle" contained in Vehicle and Traffic Law §§ 125 and 2229. Noting that the subject policy contained only one vehicle – a snowmobile – included a "Car Policy Booklet," a standard New York SUM endorsement, which defined an "insured," in pertinent part, as "any other person occupying . . . a motor vehicle insured for SUM under this policy," and a New York snowmobile endorsement, which amended the definitions of "car" and "private passenger car" in the policy to mean "snowmobile," the court held that "the policy, *when read as a whole*, is ambiguous as to whether the term 'motor vehicle' in the SUM endorsement refers to the snowmobile, the only vehicle covered by the policy. (emphasis added)." Construing that ambiguity against the insurer, the court rejected the insurer's disclaimer and denied the petition to stay arbitration.

Occupancy

Among the definitions of an "insured" under the UM and SUM endorsements is a person "occupying" a motor vehicle covered by those endorsements. The term "occupying" is defined as "in, upon, entering into, or exiting from a motor vehicle."

In *Boyson v. Kwasowsky*,[4] the court noted that in the UM/SUM context (as opposed to the No-Fault context), "A person may be vehicle oriented with respect to a particular vehicle (and thus considered an 'occupant' thereof) when not in physical contact with that vehicle, as long as the separation from the vehicle is temporary and brief, and provided there has been no severance of connection with it."[5]

In that particular case, dealing with no-fault coverage and involving an accident in which, in order to avoid a collision between a pickup truck and the motorcycle the plaintiff was riding as a passenger, the motorcycle driver veered to the left and dropped the motorcycle on its side, causing him and the plaintiff to fall off the motorcycle, and the riderless motorcycle to collide with the truck, become airborne, and land on top of the plaintiff. The court held that the plaintiff was "occupying" the motorcycle at the time of her injuries and concluded that there was a single accident and that the plaintiff was continuously "occupying" the motorcycle within the meaning of the insurance policies under which she made claim. "Although plaintiff was briefly separated from the motorcycle during the incident, she remained 'vehicle oriented.' Her separation from the motorcycle did not transform her status from an occupant of the motorcycle to a pedestrian during the brief interval between striking the ground and being struck by the motorcycle."[6]

Exclusions

In *Government Employees Ins. Co. v. Beltran*,[7] the court held that the exclusion in the SUM endorsement for bodily injury sustained by an insured while occupying a motor vehicle *owned by the insured but not covered under the policy under which the claim was made* was not ambiguous, and, therefore, the insurer was entitled to rely upon it to disclaim coverage to the claimant, who was riding his *own* motorcycle at the time of the accident.

In *New York Central Mut. Fire Ins. Co. v. Byfield*,[8] the court held that an exclusion in a liability policy relating to "any vehicle used to carry passengers or goods for hire [except a] vehicle used in an ordinary carpool on a ride sharing or cost-sharing basis," while perhaps broader than a "public or livery conveyance" exclusion, should not be construed so as to extend its scope beyond the public or livery conveyance exclusion.

The court also noted that "a single use of a vehicle for hire has been held not to make out use as a 'public livery or conveyance' [citing *National Grange Mut. Ins. Co. of Keene, N.H. v. Cervantes*[9]]."

In *State Farm Mut. Auto. Ins. Co. v. O'Brien*,[10] the claimant, who was employed as a mechanic, was asked by a customer to return the customer's loaner car to the dealer on his behalf. While doing so, the claimant was injured when the loaner vehicle, which the parties stipulated was a "*temporary substitute vehicle*" for the customer, was struck in the rear by another vehicle that carried only a basic $25,000/$50,000 policy. After receiving a tender of the offending vehicle's full available policy limits ($25,000), the claimant sought to recover SUM benefits under the customer's SUM policy with State Farm. Finding that State Farm had the burden to establish that the claimant's use of the "substitute temporary car" was excluded from SUM benefits, the court held that the purpose of the provision in the policy to which the SUM endorsement was attached relating to a temporary substitute vehicle

> is to afford continuous coverage to the insured during the period that a vehicle scheduled under the policy is out of commission, and at the same time limit the risk to the insurer to one operating vehicle at a time for a single, fair premium. Coverage for a substitute vehicle ceases when the insured vehicle is repaired and returned to its owner (citations omitted). Here, the SUM endorsement fails to articulate any exclusion for a "temporary substitute car."[11]

Therefore, the court denied State Farm's petition to stay and directed the parties to proceed to arbitration.

Claimant/Insured's Duty to Provide Timely Notice of Claim

In *Kleinberg v. Nevele Hotel*,[12] the court reiterated the well-known principle that "[w]here a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time." The court also noted that because an injured party is allowed by law to provide notice to an insurance company,[13] he or she is generally held to any prompt notice condition precedent of the policy, but such an injured party can overcome an insurance company's failure to receive timely notice – which would otherwise vitiate coverage – by a demonstration that he or she did not know the insurer's identity despite his or her reasonably diligent efforts to obtain such information.[14]

In *Integrated Construction Services, Inc. v. Scottsdale Ins. Co.*,[15] the court observed that "'[a] provision that notice be given "as soon as practicable" after an accident or occurrence, merely requires that notice be given within a reasonable time under all the circumstances' (citations omitted). An insured's failure to provide the insurer notice within a reasonable period of time constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract (citations omitted)."

In *Guideone Ins. Co. v. Darkei Noam Rabbinical College*,[16] the court reminded that the amendment to the "no prejudice" rule for late notice may not be applied to cases involving policies issued before January 17, 2009; in such cases, the old common law rules apply.[17]

Discovery

In *USAA Ins. Co. v. Armstrong*,[18] the court noted that "while the SUM endorsement requires [the insurer] to pay respondents any amount to which respondents are 'legally entitled,' such payment is contingent upon the satisfaction of the 'Exclusions, Conditions, Limits, and other provisions of [the] SUM endorsement (citations omitted).' The conditions to be satisfied include the discovery provisions set forth in the SUM endorsement (citations omitted)."

The First Department, in *Governmental Empls. Ins. Co. v. Giamo*,[19] held, *inter alia*, that where a petition to stay arbitration is untimely brought, the court has no authority to direct the respondent to provide discovery to the petitioner.

In *Heimbach v. State Farm Ins. Co.*,[20] an action to recover SUM benefits, the court granted the plaintiff's motion to compel the defendant insurer to produce its entire claim file and to compel representatives of the insurer, including the claims representatives who handled the claim, to appear for depositions, on the ground that "[g]iven the scope of the liability and damages issues framed by the pleadings . . . plaintiff's request for the entire claim file was not palpably improper and . . . the disclosure was 'material and necessary' for the prosecution of plaintiff's action." The court also noted that the defendant insurer "failed to meet its burden of establishing that those parts of the claim file withheld from discovery . . . contain material that is privileged or otherwise exempt from discovery."[21]

In another action to recover SUM benefits, *Lalka v. ACA Ins. Co.*,[22] the plaintiff moved for an order compelling the insurer to disclose its entire claim file, or, in the alternative, to produce all documentation claimed to be privileged and/or confidential for *in camera* inspection. The court, citing *Nicastro v. New York Central Mutual Fire Ins. Co.*,[23] held that the part of the motion seeking disclosure of documents in the claim file created after the commencement of the action should be denied, but the Supreme Court abused its discretion in denying disclosure of those documents submitted for *in camera* inspection because

> it is well settled that "[t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business" (*Nicastro*, 117 A.D.3d at 1546). "Reports prepared by . . . attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable . . . even when those reports are 'mixed/multi-purpose' reports, motivated in part by the potential for litiga-

tion with the insured." (*Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648 [2004]; *see Bertalo's Restaurant v. Exchange Ins. Co.*, 240 A.D.2d 452, 454–455 [1997], *lv. dismissed* 91 N.Y.2d 848 [1997]).

In *Encompass Indemnity Co. v. Rich*,[24] the court held that the insurer was not entitled to a temporary stay of arbitration and an order directing the respondent to provide pre-arbitration discovery because the insurer "had ample time to seek discovery before commencing this proceeding and unjustifiably failed to do so."

Proceedings to Stay Arbitration

Civil Practice Law & Rules 7503(c) (CPLR) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded."[25]

Filing and Service of Petition to Stay

The 20-day time limit in CPLR 7503(c) is construed as a period of limitations and is, thus, jurisdictional. Absent special circumstances, courts have no authority to consider an untimely application.[26]

However, in *Liberty Mutual Ins. Co. v. Mohabir*,[27] the court held that the 20-day limitation, like any other statute of limitations defense, "is waivable [by a party], and failure to raise it does not deprive the court of jurisdiction." In this case, the claimants sent Liberty demands for arbitration of their alleged hit-and-run claims on July 12, 2007, and then again on July 31, 2007, which were received by Liberty on July 13, 2007 and August 1, 2007, respectively. Liberty moved to stay arbitration on August 20, 2007 on the ground that the alleged offending vehicle was identified and insured. In opposition to Liberty's petition to stay arbitration, the claimants did not raise an untimeliness defense. Nevertheless, the court denied the petition without prejudice on the ground that the evidence in support of the petition was "too sparse." Liberty subsequently moved again to stay arbitration, and the claimants again did not raise a timeliness defense. In March 2008, the court granted a temporary stay pending a framed issue hearing on the issues of insurance coverage. In July 2008, the court granted Liberty's motion to reargue, but adhered to its prior determination, and in December 2009, the Appellate Division affirmed. A framed issue hearing was held in June 2011, and resulted in an order granting a permanent stay of arbitration, dated July 20, 2011 and served with notice of entry on February 6, 2012. On April 19, 2012, the claimants moved by order to show cause to vacate the July 20, 2011 order, arguing for the first time that the court lacked jurisdiction to stay the arbitration because the initial petition was untimely insofar as it was filed more than 20 days after Liberty had received the first arbitration demand. Although the Supreme Court granted the claimants' motion and dismissed the petition as untimely, the First Department reversed.

As stated by the court,

> Under the particular circumstances of this case, respondents waived their statute of limitations defense when, after serving the request for arbitration a second time on July 31, 2007, they participated in the litigation for five years, during which time they failed to raise the CPLR 7503(c) defense in their opposition to petitioner's applications for a stay, in the prior appeal in which this Court ordered a framed issue hearing on coverage issues, or at the framed issue hearing itself (citations omitted).[28]

In *Governmental Empls. Ins. Co. v. Giamo*,[29] the court rejected the petitioner's attempt to excuse its failure to move to stay arbitration within 20 days of receipt of the demand by arguing – without sufficient proof – that the demand was "purposely concealed" in a package that included copies of the respondent's medical records. The evidence established that the petitioner's claims adjuster acknowledged receipt of the respondent's "demand letter," and subsequently denied the claim based upon a conclusion about the extent of the alleged injuries, which must have been made after review of the records provided in the package. Also, the package included a copy of an affidavit of service indicating that an arbitration demand had been served. Thus, the court concluded that "rather than demonstrate concealment, the record indicates that petitioner was likely careless in failing to note the demand."[30]

The court, in *Allstate Ins. Co. v. Laldharry*,[31] held that an insurer seeking to stay arbitration on the ground that the claimant(s)/respondent(s) failed to comply with the terms of the uninsured or supplementary uninsured/underinsured motorists endorsement must submit a copy of the portions of the policy that contain those terms or the petition may be denied.

In *Allstate Ins. Co. v. Marke*,[32] the court held that where there is *no agreement to arbitrate*, a petitioner seeking a stay of arbitration is not bound by the 20-day period of limitations set forth in CPLR 7503(c). In that case, there was no agreement to arbitrate, and therefore, the 20-day limitation

An insured's failure to provide the insurer notice within a reasonable period of time constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract.

did not apply because the respondent was a pedestrian struck by the vehicle operated by the Allstate insured, and not an occupant of that vehicle, and, thus, not an insured within the meaning of the SUM endorsement.[33]

The Second Department, in *Government Empls. Ins. Co. v. Terrelonge*,[34] noted that the 20-day period for filing a petition to stay arbitration begins to run only upon receipt of the notice of intention to arbitrate (demand for arbitration). Furthermore, "'[t]he timeliness of a proceeding for a stay of arbitration is measured with respect to the earlier filing of the petition, not with respect to its later service' (citations omitted)."[35] Because, in this case, GEICO received the notice of intention to arbitrate on July 15, 2013, and commenced the proceeding to permanently stay arbitration by filing its notice of petition on August 1, 2013, the proceeding was deemed timely commenced.[36]

In *American Commerce Ins. Co. v. Nowicki*,[37] where the petitioner received the demand for arbitration on June 3, 2013, but did not file its notice of petition and petition until July 1, 2013, which was beyond the 20-day limitation period, the court held that the proceeding was time-barred.

The court also noted, in *Travelers Property Casualty Ins. Co. of America v. Archibald*,[38] that the application to stay arbitration is deemed made when the petition is *filed*.

In *Preferred Mutual Ins. Co. v. Fisher*,[39] the claimant and the SUM insurer entered into a stipulation to temporarily stay arbitration to enable pre-arbitration discovery. The insurer subsequently moved for a permanent stay of arbitration on the ground that the claimant was not a *resident relative* of the insureds. Although the Supreme Court denied the petition to stay arbitration on the ground that the stipulation waived the issue of the claimant's entitlement to benefits, the Appellate Division reversed, holding that

> although the stipulation stated that "[u]pon the completion of [certain] discovery set forth [in the stipulation, petitioner] agrees to proceed to arbitration," a stipulation cannot create coverage of an individual, nor the obligation to arbitrate the issue of coverage, where the individual does not meet the relevant contractual prerequisites for coverage (citations omitted). Stated differently, the stipulation cannot independently bind petitioner to supply coverage where no such coverage exists under the policy.[40]

In *New York City Transit Authority v. Powell*,[41] the court reversed the determination of the Supreme Court that the injured parties/claimants had abandoned their demand for arbitration of their UM claims, and held that the issue of undue delay or abandonment could be ruled upon by the arbitrator. Although more than three years had elapsed between the service of the original demand and the filing of that demand with the AAA, there was evidence in the record that was inconsistent with an intent to abandon, and the demand was filed within the six-year limitation period for filing a UM claim against a self-insurer.

Absent special circumstances, courts have no authority to consider an untimely application.

Burden of Proof

In *Merchants Preferred Ins. Co. v. Waldo*,[42] the court noted that "'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' (citations omitted). Thereafter, the burden shifts to the party opposing the stay to rebut the *prima facie* showing (citations omitted)."

Appealability of Order Denying Stay of Arbitration

Although the right to take a direct appeal from an order denying a petition to stay and directing arbitration exists, such right may be illusory unless the petitioner obtains a stay of the arbitration pending the determination of the appeal.

In *State Farm Ins. Co. v. Banyan*,[43] the respondents filed a demand for SUM arbitration based on the allegation that a vehicle operated by Respondent Victor Banyan had been struck by an unidentified vehicle that left the scene of the accident. State Farm contested the claim that the accident was caused by physical contact with the other vehicle, and commenced a proceeding to stay arbitration.

After a hearing, the Supreme Court determined that physical contact had occurred and, among other things, denied the petitioner's request for a permanent stay of arbitration. Although State Farm then filed a notice of appeal, it did not seek an interim stay, nor did it perfect the appeal within the requisite time period. Meanwhile, the parties proceeded to arbitration and the respondents were awarded the full value of the policy. Only thereafter did State Farm move for an extension of time to perfect the appeal from Supreme Court's order finding physical contact. Although the court granted the motion, and allowed State Farm to perfect its appeal, it subsequently dismissed the appeal on the ground that State Farm "waived its right to appeal by proceeding to arbitration without seeking a stay pending determination of its appeal."[44]

Arbitration

In *Fiduciary Ins. Co. v. American Bankers Ins. Co. of Florida*,[45] the court noted that "[a]n arbitrator's authority generally 'extends to only those issues that are actually presented by the parties' (citations omitted). Therefore, an arbitrator is precluded from identifying and considering an affirmative defense that is not pleaded by a party to the arbitration."

In *Serrano v. Progressive Ins. Cos.*,[46] the court noted that where, as in that case, the coverage amount was limited to the statutory minimums of $25,000 per person/$50,000 per accident, arbitration of a dispute with respect to the amount owing under either the UM provision or the SUM coverage provision was mandatory. Practitioners should note that pursuant to the terms of the Regulation 35-D (Condition 12) SUM endorsement, where the coverage amount *exceeds* 25/50, the insured has the option of either arbitration or a lawsuit.

Arbitration Awards

Scope of Review. In *Government Employees Ins. Co. v. Schussheim*,[47] the court observed that "'judicial review of arbitration awards is extremely limited' (citations omitted). 'A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears a "heavy burden" (citations omitted).' The movant has to demonstrate that vacatur is appropriate by clear and convincing evidence (citations omitted).'" Here, the claimant failed to establish by clear and convincing evidence that the arbitrator was biased against her and in favor of her adversary. Her contention that the arbitrator had *ex parte* communications with opposing counsel about the case while they waited in the hearing room for her, because she was more than a half hour late, was rejected as "speculative."

The Second Department, in *David v. Byron*,[48] held that "[a] party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears a heavy burden, and must establish a ground for vacatur by clear and convincing evidence (citations omitted)." Furthermore, "[a]n arbitrator's partiality may be established by an actual bias or the appearance of bias from which a conflict of interest may be inferred (citations omitted)."[49]

In *Merkin v. Born*,[50] the court stated that "[t]he adequacy of an arbitral award is not grounds for review."[51] ■

1. 25 N.Y.3d 799 (2015), *rev'g*, 112 A.D.3d 166 (2d Dep't 2013).

2. Insurance Law §§ 3420(f)(1) and (f)(2) (Ins. Law); N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3(f) (N.Y.C.R.R.).

3. 128 A.D.3d 1074 (2d Dep't 2015).

4. 129 A.D.3d 151 (4th Dep't 2015), *motion for lv. to appeal denied*, 26 N.Y.3d 901 (2015).

5. *Id*. at 155 (citing, *inter alia*, *Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 11 (1973)).

6. *Id*. at 157.

7. 120 A.D.3d 684 (2d Dep't 2014).

8. 126 A.D.3d 704, 705 (2d Dep't 2015).

9. 17 A.D.2d 1002 (3d Dep't 1962).

10. 120 A.D.3d 1252 (2d Dep't 2014).

11. *Id*. at 1253.

12. 128 A.D.3d 1126, 1127 (3d Dep't 2015).

13. *See* Ins. Law § 3420(a)(3).

14. *See also 24 Fifth Owners, Inc. v. Sirius Am. Ins. Co.*, 124 A.D.3d 551 (1st Dep't 2015).

15. 123 A.D.3d 770, 771 (2d Dep't 2014).

16. 120 A.D.3d 625 (2d Dep't 2014).

17. *See also Castlepoint Ins. Co. v. Hilmand Realty, LLC*, 130 A.D.3d 475 (1st Dep't 2015).

18. 124 A.D.3d 1383, 1384 (4th Dep't 2015).

19. 115 A.D.3d 458 (1st Dep't 2014).

20. 114 A.D.3d 1221, 1222 (4th Dep't 2014).

21. *Id*.

22. 128 A.D.3d 1508 (4th Dep't 2015).

23. 117 A.D.3d 1545 (4th Dep't 2014), *lv. dismissed*, 24 N.Y.3d 998 (2014).

24. 131 A.D.3d 476, 479 (2d Dep't 2015).

25. *See Gov't Empls. Ins. Co. v. Terrelonge*, 126 A.D.3d 792, 793 (2d Dep't 2015).

26. *See Liberty Mut. Ins. Co. v. Mohabir*, 115 A.D.3d 413 (1st Dep't 2014); *Gov't Empls. Ins. Co. v. Giamo*, 115 A.D.3d 458 (1st Dep't 2014) (20-day limitation is "strictly enforced and a court has no jurisdiction to entertain an untimely application").

27. 115 A.D.3d 413, 414 (1st Dep't 2014).

28. *Id*.

29. 115 A.D.3d 458 (1st Dep't 2014).

30. *Id*.

31. 130 A.D.3d 814 (2d Dep't 2015).

32. 121 A.D.3d 1107 (2d Dep't 2014).

33. *See Progressive Specialty Ins. Co. v. Louis*, 122 A.D.3d 637 (2d Dep't 2014).

34. 126 A.D.3d 792 (2d Dep't 2015).

35. *Id*. at 793.

36. *See also Travelers Prop. Casualty Ins. Co. of Am. v. Archibald*, 124 A.D.3d 480 (1st Dep't 2015).

37. 120 A.D.3d 670 (2d Dep't 2014).

38. 124 A.D.3d 480 (1st Dep't 2015).

39. 127 A.D.3d 1328 (3d Dep't 2015).

40. *Id*. at 1329.

41. 126 A.D.3d 705 (2d Dep't 2015).

42. 125 A.D.3d 864, 865 (2d Dep't 2015).

43. 131 A.D.3d 747 (3d Dep't 2015).

44. *Id*. at 748. *See Commerce & Indus. Ins. Co. v. Nester*, 90 N.Y.2d 255, 264 (1997); *One Beacon Ins. Co. v. Bloch*, 298 A.D.2d 522, 523 (2d Dep't 2002).

45. 132 A.D.3d 40, 44 (2d Dep't 2015).

46. 123 A.D.3d 1000 (2d Dep't 2014).

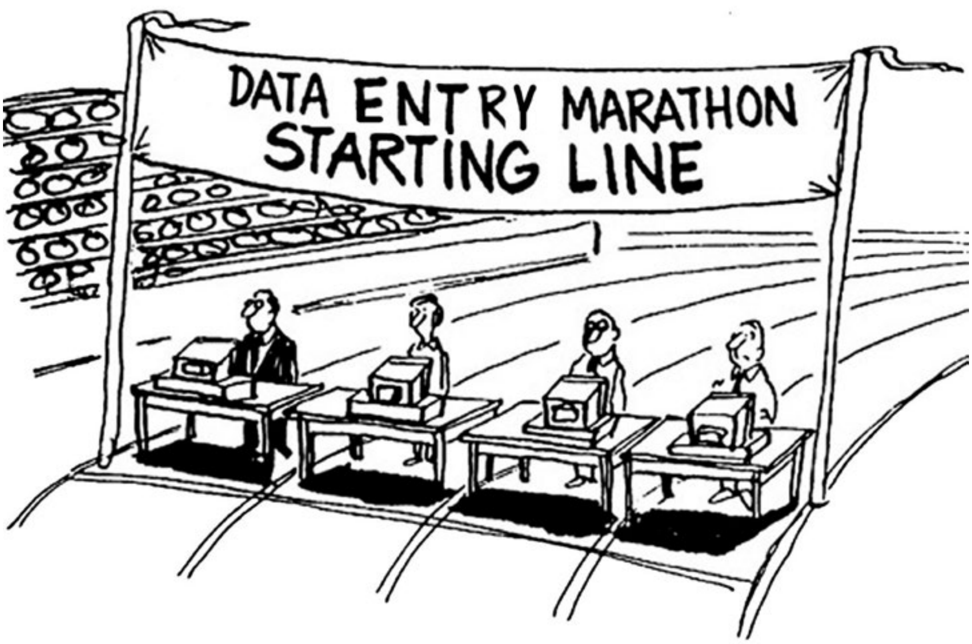
47. 122 A.D.3d 849, 849–50 (2d Dep't 2015), *motion for lv. to appeal denied*, 26 N.Y.3d 901 (2015).

48. 130 A.D.3d 772, 773 (2d Dep't 2015).

49. *Id*.

50. 127 A.D.3d 576, 577 (1st Dep't 2015).

51. *See also Fiduciary Ins. Co. v. Am. Bankers Ins. Co. of Florida*, 132 A.D.3d 26 (2d Dep't 2015) ("in this proceeding pursuant to CPLR article 75 to vacate the arbitrator's award, our judicial review is limited").



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The Double-Edged Sword of Autofill

The Need for Speed While Avoiding Errors

By Robert D. Lang

Tom Cruise's character, Maverick, in "Top Gun," famously announced that he "feel[s] the need for speed." Attorneys today feel much like Maverick, not in flying F-14s, but in trying to respond timely to deadlines from clients, demands (reasonable and otherwise) from opposing counsel, meeting court-ordered discovery orders, and a host of administrative matters.

Unquestionably, lawyers are increasingly time-pressed to address issues of every grade and order, which, when combined, produce a perceived need for increasingly faster results and quicker turnaround time. With people carrying smartphones seemingly everywhere they go, emails, texts and calls now take place not just in the office but in the hallways of courts; while waiting in court for cases to be called; during breaks in depositions, mediations or conferences; outside or inside elevators; while waiting for travel signals to change on the street; while riding in cars, etc.

To keep up the pace, lawyers look for ways to better manage their time. Techniques and apps that seek to reduce the time to send and receive messages are highly sought after. Even if each communication lasts only a minute, because of the sheer number of emails the overall time savings can be substantial (at least in our minds) when taken in the aggregate. However, with these time-saving devices comes the risk of inadvertent disclosures with co-counsel, adversaries, the courts and – within the attorney's own law firm – partners, associates, assistants, paralegals and administrators.

Any number of problems can result when we are pressed for time and we respond by using autocorrect time-saving devices. Notwithstanding its reassuring name, autocorrect can cause inappropriate "revisions," sometimes humorous, but often with serious consequences in briefs, affirmations and correspondence.[1] Other problems, often more delicate, can result from autofill errors, due to the need for speed in responding to the mounting number of emails received on desktop computers and handheld devices.

Briefly stated, autofill is a function which many computer applications and programs have that automatically fills in a field. The benefit of autofill is evident and obvious: rather than key stroking the full name of every individual or email contact in one's address book, if you type in the first few letters of an individual's name, autofill completes the name in full. That is all well and good if you have only one Melvin Taylor, even when sending Melvin a confidential email on a particularly sensitive matter.

However, if you previously sent an email to Melvin Smith and autofill has filled in the name of Melvin

Smith for that new email, you may wind up sending that email to the wrong individual. This creates several immediate problems, the first of which is that Melvin Taylor never received the email, thus defeating the purpose of the communication. The second is that Melvin Smith is now conversant with your strategy and tactics on the matter of which, until reading your email, he was unaware. Upon realizing your error, if Melvin Smith happens to be your adversary or can fairly be characterized as someone who does not wish you well, there is good reason for you to have a lump in your throat and feel your temperature rising, recognizing that the panic attack now under way has a substantial basis in reality.

Autofill can prove the undoing of time-pressed lawyers, unintentionally sending emails to persons who were never intended to know the contents of the communication. Incorrect autofill threads can also take up a great deal of time. The wrong recipients are caught in a series of emails they should never have received.[2] It may be that these individuals have no interest in the content of the email. However, that is a matter of chance, and it may also be that they are, or will become, curious and now interested in the information.

The last thing an attorney wants to do is send an email detailing strategic confidential advice to an adversary or a third party. No real comfort can be taken if the recipient replies to the inadvertent email by saying that he or she is not the intended party; by definition, the recipient read the email first before coming to that conclusion. Attorneys, in particular, are far too cynical to believe that their adversaries, should they receive such an email, will ignore the content and erase what they have read from their memory.

For example, in *Sun River Energy, Inc. v. Nelson*,[3] defendant Erik Nelson, intending to send an email to co-defendant Steve Stephens, inadvertently sent the email to a different Steve, Steve Csajaghy, who unfortunately was the attorney for the plaintiff. Autofill had done its worst since the one person whom the defendant did not want to read his message, the opposing party, received the email. Within one minute after the inadvertent disclosure, the defendant asked plaintiff's counsel to delete the entire message as it contained attorney-client information, and followed up seven minutes later, again asking for deletion of the email. In these circumstances, U.S. Magistrate Judge Hegarty found there was no waiver of the privilege, as there was no indication that the defendant intended the counsel for the plaintiff to be a party to the confidential communications. The court held that "considerations of fairness weigh in favor of finding no waiver."[4]

It is also embarrassing if an email intended for one client is inadvertently sent to a different client courtesy of an autofill mistake. The attorney can speculate whether the client who received the unintended email may now think twice about the lawyer's competence. That same client also may wonder what emails intended for him or her have similarly been misdirected by that attorney, and may well consider whether he or she may be better served by retaining a different, more careful attorney next time.

The problems don't stop there. When an email addressed to the wrong person is sent to several persons, they may, just as a matter of course, respond to all those who were previously addressed in the original email. Thus, the original error is compounded because the wrong person becomes part of the email chain and the individual to whom the email was originally intended remains excluded. The net result is that the original mistake is multiplied with each successive email sent to the wrong individual, and the "correct" recipient is continuously and consistently excluded from the mail chain and further discussion.

A confidential email sent to the wrong person because the sender, seeking to save a few seconds, inadvertently entered the email name (therefore the address) of Melvin Smith rather than Melvin Taylor can result not only in embarrassment but in the disclosure of confidential information to the wrong parties. When that happens, it is impossible to put the toothpaste back in the tube.

New York Rules of Professional Conduct Rule 4.4(b) provides that when confidential documents are inadvertently disclosed, the attorney who receives them is obligated to notify the attorney who made the mistake.[5] Once learning of an inadvertent disclosure caused by autofill, the attorney should act promptly to rectify the error.[6]

These are not hypothetical bad dreams. Autofill errors can cause real life nightmares. For example, in 2008, Eli Lilly & Co. was in confidential settlement talks with the federal government. An attorney at a major law firm representing Eli Lilly intended to send an email regarding negotiations to her co-counsel, Bradford Berenson, working at another major law firm. Unfortunately, the email was sent to a different Berenson, Alex Berenson, who happened to be a reporter for *The New York Times*.[7] One result was that the reporter started calling his contacts for more information. Another was the publication of a front-page article in *The New York Times* regarding the ongoing settlement talks between Eli Lilly and the government. In addition, Eli Lilly at first suspected the federal government of leaking the details. After further investigation, the company learned about the misdirected email from its lawyer. *The New York Times* reporter later said the subject email did not specifically mention Eli Lilly but referred to high dollar numbers in settlement discussions.[8]

Consider *Multiquip, Inc. v. Water Management Systems LLC*,[9] where the autofill feature on the defendant's email program incorrectly supplied the name of another attorney who, in turn, forwarded the email chain to the Italian counsel for the plaintiff, who then sent the case correspondence to the U.S. plaintiff's counsel. The parties could not agree on a protective order relating to the unintentional email disclosure. The court ruled that the disclosure was inadvertent and no waiver of privilege had taken place. In so ruling, Magistrate Judge Bush aptly commented that "it must be recognized that in email programs, auto-fill function operates as both a blessing and curse – saving users time when addressing email correspondence, yet risking the potential for sending that correspondence to an unintended recipient." Although the court had found that counsel's "care in addressing its email was hasty and imperfect," the court also found that

Whether it is concern for legal malpractice as a result of inadvertent email disclosure resulting from autofill gone wild, or fear of losing a client because autofill sent a sensitive email to the wrong person, the fact is that the error never would have happened had the attorney spent more time up front to address emails (pun intended) appropriately.

The ease of email obviously saves time, but it is also a potential danger, as using an email address supplied by autofill can result in an important message going astray.

> "It must be recognized that in email programs, autofill function operates as both a blessing and curse."

the attorney took reasonable steps to address the error, within the same day, almost within the same hour that he became aware of the inadvertent disclosure. Additional steps taken by the attorney to prevent this error from happening again included removing the other address from his email contact list; checking to see that his autofill program worked as expected; developing a procedure to send an email to just one attorney, who would then forward it as necessary; and creating a "group" to receive certain emails rather than rely again on autofill.[10]

Rule 1.6 of the N.Y. Rules of Professional Conduct prohibits an attorney from revealing information relating to the representation of a client unless the client gives informed consent, unless disclosure is implicitly authorized in order to carry out the representation, or unless the disclosure is otherwise permitted. An email revealing client confidences and strategies in business transactions or litigation, sent to the wrong persons courtesy of autofill rather than by design, is a breach of that requirement. A breach may not only lead to a damaged attorney-client relationship, but also to a potential claim of legal malpractice. At a minimum, a good relationship between the attorney and the client may be challenged. Should the client not send future business to that attorney, the lawyer may wonder whether the autofill error was the cause.

Attorneys who step on mines of their own making through autofill errors that result in motion practice would do well to pause before billing their client for any motion practice in discovery resulting from the unintended disclosure and any "clawback" for documents and information that wound up in the hands of the adversary. Chutzpah might be one word the client would use to describe the attorney's billing for addressing the problem that the attorney himself created. The firm's managing attorney will choose a different word to describe writing off the time spent in such motion practice.

Although it may be better, in terms of avoiding errors, to physically enter each email address of a recipient, rather than rely on email contact lists and autofill, few organizations and law firms will endorse, and fewer clients will pay for, the additional time and painstaking effort that would require. Nor is encrypting each business email proving to be a realistic solution.[11]

Let us remember that the "need for speed" in "Top Gun" did not work out well for Goose, Maverick's partner. At the end of the movie, before their manly embrace on the deck of the aircraft carrier USS Enterprise, Iceman, Val Kilmer's character, addresses Maverick and publicly states, "You! You are still dangerous. You can be my wingman any time." So it should be with autofill: it can be your wingman anytime, but not your pilot. ■

1. Robert D. Lang, *"From Sua Sponte" to "Sea Sponge": The Mixed Blessings of Auto-Correct*, N.Y. St. B.J. (July/August 2015) p. 28.

2. See Judith Newman, *Hung by a Thread*, N.Y. Times (Aug. 30, 2015), which discusses a number of autofill error misadventures.

3. 2011 WL 3648600 (D. Colo. 2011).

4. Id. at *3.

5. Paula Schaefer, *Transactional Lawyers and Inadvertent Disclosure*, 13 Tenn. J. Bus. L. 107 (2011).

6. *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032 (N.D. Ill., E. Div. 2009).

7. Katherine Eban, *Lilly's $1 Billion E-Mailstrom*, Upstart Bus. J. (Feb. 5, 2008).

8. Debra Cassens Weiss, *Did Lawyer's E-Mail Goof Land $1 B Settlement on NYT's Front Page?*, Am. B. Assoc. J. (Feb. 6, 2008).

9. 2009 WL 426124 (D. Idaho 2009).

10. Id. at *2, n.6.

11. Victor Li, *Lawyers Slow to Adopt Email Encryption and Other Forms of Secure Communications, ABA Survey Finds*, Am. B. Assoc. J. (Oct. 5, 2015).

Life Insurance and Retirement Plan Benefits: Are Your Clients Achieving Their Intended Goals?

By Albert Feuer

Life insurance and retirement plan benefits can make up a substantial portion of the assets of a decedent's estate. Yet benefit payments to a decedent's plan beneficiaries are often not consistent with the decedent's intended goals. Some inconsistencies result from the decedent's failure to make or update a designation; others crop up when traditional statutory rules of construction of a decedent's presumed intention about probate assets are inapplicable to life insurance and retirement plan benefits. In some cases, the decedent's intentions may be overridden by a statute or a beneficiary's disclaimer.

Suggested Practitioner Checklist

A designator and his or her advisors may want to formulate and implement a strategy to best achieve the

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designator's intended goals, taking the following concerns into account:

- Who will obtain each of the designator's other assets following the designator's death, including those that will be transferred by will, intestacy rules, trust, or other forms of property ownership transfer?
- Who may be designated as a beneficiary, including whether the plan limits the number of beneficiaries, and the available benefit payment forms?
- How the plan benefits may be divided among the designator's primary beneficiaries and among the designator's contingent beneficiaries.
- Who will be the designator's default beneficiaries if none of the beneficiaries chosen by the designator qualify to receive the plan benefits, whether because all predecease the designator or none otherwise qualify for the benefits?
- How to make effective designations and how to verify whether the plan designation records are consistent with the desired designations.
- How plan terms, statutory laws of construction, or beneficiary disclaimers may override a designator's explicit designation.
- How the designator may choose his or her estate as the plan beneficiary and use his or her will to make the desired benefit allocations, particularly if the plan will not allow the designation of a desired person or persons under the desired limitations, and it is not feasible to transfer the plan benefits to another plan that will permit the desired allocations.

This discussion is limited to cases where (1) the designator is the individual whose death will result in the beneficiaries being entitled to survivor benefits (for retirement plans) or death benefits (for life insurance plans); and (2) there is no dispute between the designator and the designator's spouse or former spouse about the significance of a marital agreement or a domestic relations order for these plan benefits.[1] The plans may be either employer-based, such as employer group-life policies, or non-employer based, such as individual life insurance policies or individual retirement accounts. The employer plans may be governed by New York state law;[2] by the Employee Retirement Security Act of 1974, as amended (ERISA), for most private employer plans that are neither sponsored by churches nor restricted to owner-employees and their spouses;[3] or by other federal laws, such as those governing the Federal Thrift Savings Plan for federal civilian workers.

Permissible Beneficiaries and Benefit Payment Forms

Life insurance and retirement plans often limit the kind of person who may be a designee, the number of persons who may be designees, and the benefit payment forms.[4] Few such limits apply to testamentary dispositions or trust dispositions.[5] Testamentary and trust dispositions may also give a third party the discretion to decide when to make benefit payments to the designee.

In general, defined-benefit retirement plans that provide survivor benefits only in the form of an annuity, i.e., payments during an individual's life or during two individuals' lives, do not permit a designee other than the individual whose life determines the period of the survivor's payments.[6] Thus, such payments may usually not be made to the decedent's estate or multiple beneficiaries. Moreover, some of these plans only permit survivor benefits to be paid to the decedent's surviving spouse, if any.[7]

By contrast, life insurance and defined-contribution retirement plans, such as 401(k) plans, provide more options, but may not permit annuity payments. These plans always provide for lump-sum payments, and, sometimes, for a fixed number of installment payments. Lump-sum and installment payments generally may be made to the designator's estate or to multiple beneficiaries. However, such plans often limit the number of permissible multiple beneficiaries and may be reluctant to permit different beneficiaries to obtain different shares. If beneficiaries are not entitled to the same benefit percentage, the designations would be ambiguous if the sum of the percentages was not 100%. Those plans may also not permit class designations, such as to all my children, or designations of non-individuals other than the decedent's estate, such as charities, trusts, partnerships, or limited liability companies. Plan sponsors often impose these limitations to minimize the plan's administrative costs.

At times, the designator may overcome these limitations by making lifetime tax-free benefit transfers to similar plans that are not subject to income tax under the Internal Revenue Code of 1986, as amended (Code). For example, no income tax is imposed when benefits are transferred between two tax-qualified retirement plans.[8] However, such transfers may not always be feasible. Many employer retirement plans, such as 401(k) plans, do not permit benefit transfers to other plans while an individual is an active employee.[9] Even if the plan permits such transfers, as is often the case with IRAs, the designator may prefer the investment advisor and investments associated with the current retirement plan. Similarly, the designator for a life insurance plan, even for an individual policy, may also be reluctant to give up the investment advisor and investments associated with the policy, and other advantages of the policy,[10] by making a tax-free exchange to another policy.[11]

Primary Beneficiaries, Contingent Beneficiaries and the Advisability of Updates

A designator's primary beneficiaries are the persons selected by the designator to be entitled to survivor or death benefits by virtue of surviving the decedent. There may be a question whether a non-individual designee has survived the designator, which is rarely addressed in plan documents.[12] The designator may eliminate this question by keeping designations up to date. A designator's secondary beneficiaries (contingent beneficiaries) are the persons selected by the designator who are entitled to survivor or death benefits by virtue of surviving both the decedent and either a primary beneficiary or all the primary beneficiaries. The designator's primary beneficiaries and contingent beneficiaries shall be hereinafter described as the designator's designees.

Questions about beneficiary choices often arise when the designator does not update designations to reflect changes in his or her planning goals. For example, those goals may change when (1) the designator's marital status changes; (2) the identity of other members of the designator's family changes; (3) the designator's friends change; (4) the designator's designees become more able to handle the benefits and do not need the protection of a trust; (5) the designator's designees become less able to handle the benefits and need the protection of a trust; (6) the designator's charitable preferences change; or (7) a designator's designee dies or no longer exists.

Some plans do not permit contingent beneficiaries to obtain benefits unless none of the primary beneficiaries survive the designator.[13] Thus, if the designator's primary beneficiaries were his or her surviving brothers, the designation could not provide that if any of the designator's three brothers predecease the designator, the share of the deceased brother would be divided among his surviving children, if any. More generally, such a plan would not permit *per stirpes*,[14] *per capita*,[15] or by representation[16] designations if there were more than one primary beneficiary, and at least one, but not all, survived the designator. In these cases, plan documents often do not address whether non-individual beneficiaries, such as trusts, may transfer their plan beneficiary interests to their successors in the process of winding up the affairs of the non-individual. The designator may eliminate these questions by keeping designations up to date.

Questions about contingent beneficiary choices often arise when the designator seems to follow the preferences of a primary beneficiary rather than his or her own preferences if the primary beneficiary predeceases the designator. For example, if a designator is a friend of an individual, F1, who is a beneficiary, but F1 does not survive the designator, would it be the designator's intention that F1's relatives be entitled to the benefits rather than relatives or other friends of the designator?[17]

Most, but not all, plans do not permit primary beneficiaries to choose their contingent beneficiaries if the primary beneficiary survives the designator, but passes away before receiving the beneficiary's complete death or survivor benefit. If primary beneficiaries are given such authority,[18] it is important to determine when and how such authority may be exercised, and what happens if such authority is not exercised. If primary beneficiaries are not given such authority, either their estate or a beneficiary selected by the designator is usually entitled to the unpaid benefit.[19]

Plan Default Rules vs. Rules of Intestacy

All life insurance and retirement plans provide for a default beneficiary if the designator has made no effective designation for the plan's death or survivor benefits, or if all surviving designees selected by the designator disclaim their benefits. There are four usual choices:

- the designator's estate;
- the designator's surviving spouse, if any;
- the designator's surviving children, if any; and
- the designator's surviving parents, if any.

Choosing the estate imposes the least responsibility on the plan administrator. In such cases, the administrator may simply pay proceeds to the personal representative of the estate. With other defaults, the plan administrator must verify family relationships.

It appears that no plan uses the extensive EPTL 4-1.1 rules of intestacy to determine the default beneficiaries because no one ever wants to be compelled to identify the closest relatives who survived the designator. Any prudent plan sponsor that preferred such a disposition would choose the estate as a default. In such case, the appropriate Surrogate's Court would apply the intestacy rules to the plan benefits unless a will that determines who is entitled to the benefits is probated.

Plan default terms for spousal survivor benefits may, as described *infra*, require that the spouse consent to the plan participant's waiver of such benefits.

Designation Procedures

A plan's designation terms describe how to make effective designations for the plan's benefits. Those terms are almost always less demanding than the New York standards for the execution of a will.[20] Plan terms may require a designation to be made in writing, and if in writing, to be signed, and perhaps either witnessed or acknowledged before a notary. However, as with testamentary dispositions, a designation meeting the formalistic requirements for a plan designation may be challenged on the grounds that the designator lacked capacity, was under duress, or that the designation was fraudulently obtained.[21]

New York law requires that certain beneficiary designations, i.e., those involving New York state and local government retirement plans, life insurance not governed by federal law, individual retirement accounts (IRAs) and retirement plans sponsored by private employers that are not governed by ERISA (all referred to here as New York Regulated Plans) be made in signed writings.[22] The relevant statutes do not discuss the availability of online designations, but the New York State Retirement System permits online designations.[23]

State designation laws do not govern retirement or life insurance plans operated by the federal government for its employees.[24] Similarly, those laws do not govern an ERISA retirement or life insurance plan except to the extent the plan incorporates a state law.[25] Thus, these plans may provide for online designations or for designations by telephone. However, none of the plans for federal employees currently appear to permit such designations.

Plan designation rules generally require designations to be submitted to a plan representative, sometimes, but not always, before death.[26] It is thus prudent for a designator to verify that designations have been duly received and properly entered in the plan records, so that the intended designation is effective. Verification is particularly important for designations that are not physically made in the plan administrator's offices, such as those made by telephone, online, or by a writing that was mailed pursuant to the plan terms. This may be difficult to do if a designator wishes to update a designation while on his or her deathbed.

Implications of Using a Will to Make Designations for a Life Insurance or Retirement Plan

A designator who may not designate the desired beneficiaries from a plan in which he or she wishes to remain a participant may instead designate his or her estate as the plan beneficiary and use his or her will to obtain the desired beneficiaries.[27] Moreover, the designator may subsequently change his preferred designation for the plan benefits by executing a new will or codicil. The designator may achieve similar results by establishing an *inter vivos* trust that can be amended. Such trusts may avoid creditor and tax issues as described below. However, many plans that do not permit the desired beneficiary choices also do not permit trusts as beneficiaries.

Designating the estate as the plan beneficiary raises two main questions, one about creditor rights and another about income tax consequences.

First, will the benefits be subject to claims by the designator's creditors? In many cases, the answer is "no." New York protects beneficiaries of life insurance and retirement plans from the claims of the designator's creditors.[28] Moreover, enforcing such claims against the plan benefit payments would result in the alienation of retirement benefits that is prohibited for ERISA plans,[29] plans for federal employees,[30] plans for state and local employees,[31] and tax-qualified pension plans that are not governed by ERISA.[32] Furthermore, the protection continues after the beneficiary has received the plan benefits for federal employees,[33] and for a New York Regulated Plan other than a life insurance plan.[34] There is uncertainty whether this post-distribution protection continues for ERISA pension benefits,[35] but if it does not, the protection for New York Regulated Plans would protect most ERISA pension plan distributions.[36] These protections for New York Regulated Plans do not apply to fraudulent transfers,[37] such as a contribution by an insolvent employee to a retirement plan.[38] The extent of these creditor protections is often not a serious issue because the designator plans to pay all creditor claims, but wishes to achieve other planning goals with his or her beneficiary choices. However, if they are an issue the designator may wish to choose an amendable trust as the beneficiary.[39]

Second, do payments through an estate designation have adverse income-tax consequences for beneficiaries? Retirement benefit payments may be stretched out over an individual beneficiary's, B1's, expected lifetime, but must be paid within five years of the designator's death if payable to the estate, even if the benefit is ultimately payable under the designator's will to B1.[40] This may not be a serious issue unless the beneficiary seeks such a stretch-out to defer taxes on the benefit payments, and the plan would have permitted benefit payments to the individual beneficiary. If a stretch-out is desired, the designator may wish to choose an amendable trust as the beneficiary, if such trusts are permissible beneficiaries.[41] There is no similar tax disadvantage for payments from a life insurance plan to an estate rather than directly to the individual.

Effects of Significant Others, Marriages, and Divorces on Beneficiary Designations

Marriages and marital dissolutions (divorces) affect a plan's designations differently for New York Regulated Plans than for those regulated by federal law. For simplicity, this article contains a very limited discussion of the effects of domestic relations orders.[42]

Effects of Marriages on Plans Governed by Federal Law

Spousal Survivor Benefit Plans are ERISA retirement plans other than those plans for executives known as Top-Hat Plans,[43] or those plans funded with IRAs.[44] Plans are called Spousal Survivor Benefit Plans because, if a participant is married, (1) the participant's default benefit must include a spousal survivor benefit;[45] and (2) this default benefit may not be waived without the consent of the spouse.[46] Such waivers may not generally be made with pre-marital agreements or marital agreements (including separation agreements in which there is no court involvement).[47] Top-Hat Plans and ERISA life insurance plans need not provide any spousal survivor benefits, but may choose to do so.

Similarly, retirement plans for federal employees generally provide that the default designee of a married employee who dies prior to the termination of employment is the surviving spouse.[48] However, such benefits may be waived without the spouse's consent.[49] Federal life insurance plans generally provide that the default designee of a married employee is the surviving spouse, but the default may be waived without the spouse's consent.[50] On the other hand, retirement benefit plans for federal employees generally provide that the retirement benefit for a married employee is provided in the form of a joint and 50% survivor annuity with the employee's spouse being entitled to the survivor annuity,[51] and such benefit may only be waived with the spouse's consent.[52] As with ERISA plans, the waivers may not generally be made with prenuptial agreements or marital agreements.[53]

Effects of Divorces on New York Regulated Plans

New York defined-benefit plans for public employees generally provide that the default benefit is a single life annuity,[54] although an employee may choose a joint-and-survivor annuity in which the surviving spouse will obtain the survivor benefit.[55] New York defined-contribution plans for public employees generally provide that a married participant's default beneficiary is the participant's spouse, but the participant may choose another beneficiary regardless of the spouse's wishes.[56] The default beneficiary for a New York public life insurance plan or an individual life insurance policy may, but need not, be the designator's estate.[57]

Effects of Marital Dissolutions on Plans

New York Regulated Plans treat marital dissolutions differently than do plans regulated by federal law. For New York Regulated Plans, a designator's spousal designations are revoked by the designator's divorce unless there is explicit provision to the contrary in the plan or the divorce instrument.[58] Plans for federal employees disregard state revocation upon divorce statutes because of the Supremacy Clause of the U.S. Constitution.[59] For similar reasons, ERISA plans disregard state revocation upon divorce statutes, and the laws do not affect the right of designees to keep such benefits.[60]

> Designators may not rely on many of the traditional rules of construction for probate asset dispositions to conform their designations to their intended goals.

Effects of Non-Marital Partners

No statutory or plan requirements make a non-marital partner of the designator his or her default beneficiary. Nor are there any statutory or plan requirements that remove a person as a beneficiary when the person is no longer the designator's non-marital partner. No plan sponsors include either such provision because they would impose an excessive administrative burden on plan administrators. For simplicity, this article will not discuss the extent to which a designator's non-marital partners may compel the designator to provide the partner with plan benefits.

Disclaimers by Beneficiaries

Implications of a Beneficiary Disclaimer After the Designator's Death

Post-mortem disclaimers by the designator's designee may allow a person younger than the designee to defer taxes on retirement benefit payments by stretching the payments over the younger person's longer lifetime.[61] Disclaimers are usually done for income-tax reasons for retirement plans that are subject to the minimum distribution rules set forth in Code §§ 401(a), 403(a) 403(b) and 457 plans.[62]

These disclaimers raise two distinct issues: risk of loss of tax-qualified status and the Supreme Court's narrowing of availability of disclaimers. First, the plan could lose its tax-qualification if, as is the case with many prototype plans, the plan terms do not explicitly permit disclaimers but the plan arguably violated those terms by permitting a disclaimer.[63] Amending a prototype plan to permit the desired disclaimer would result in such plans losing the tax qualification advantage of a prototype plan.[64] Second, the U.S. Supreme Court held that a plan may not accept a disclaimer if the plan makes no provision for a disclaimer,[65] but explicitly declined to express an opinion about the issue if the plan permits such a disclaimer.[66]

If the plan does not clearly authorize disclaimers, both issues may be avoided by paying the benefit to the disclaimer's designee, who may rely on the provisions of Code § 2518(c)(3). That provision permits a designee to receive disclaimed property and pay it to the contingent designee while still being treated as having made a disclaimer for purposes of the estate and gift-tax subtitles. The IRS has issued a revenue ruling permitting a Code § 2518 disclaimer to be applied for purposes of the desired minimum-distribution rules of the income-tax subtitle.[67]

Implications of a Beneficiary Disclaimer Before the Designator's Death

Prior to the 2010 introduction of no-default divorce in New York it was common for parties seeking no-fault divorces to rely on having lived apart for at least a year pursuant to an informal separation agreement.[68] Divorce decrees usually incorporated the agreement's terms. These often included a waiver of each party of an interest in the other's property, explicitly including the other party's plan benefits.

This plan waiver inclusion was odd because it was unclear what was being waived, and whether the waiver had any value. Each party's interest in the party's plan consisted of two kinds of rights: (1) lifetime rights, such as investment and withdrawal rights, and (2) death rights, i.e., the right to choose beneficiaries. Did the other party's waiver simply mean that the other party acknowledged having none of those rights? This seemed obvious if the agreement did not award the other party any of those rights. Or did the waiver also mean that the other party gave up any rights the party may have then had as a named beneficiary? There was almost never a beneficiary commitment to be renounced by the other party, so nothing seemed to be gained by this interpretation other than a revocation of a spousal designation, which the party could do without the other party's permission.[69] Moreover, as discussed above, such waivers did not affect the retirement benefits provided to spouses of federal employees or of participants in ERISA Spousal Survivor Benefit Plans, whose federal rights to survivor benefits may not be waived in such agreements. Family law attorneys thus added a provision by which spouses agreed not to claim the other party's benefits, which was apparently designed to make the waiver effective in practice. This provision appears to be no more effective than the original waiver.[70]

The divorce decree often incorporated the substantive terms of the separation agreement, including benefit waiver provisions. Such incorporation was of dubious value because absent other terms in the decree pertaining to those plans, each spouse could remove his or her former spouse as a beneficiary following the divorce. However, those provisions were often held to be of considerable value in determining entitlements to death or survivor benefits after the divorce. Questions about the significance of those commitments arise when one party did not change a spousal designation between the time of the execution of the separation agreement and the party's death following the divorce. Such inaction strongly suggests that the deceased placed little value on those waivers, and gave up nothing of value to obtain the waivers.

There is considerable disagreement about whether disclaimers in divorce decrees may be used to compel a designator's former spouse to give up to the designator's estate retirement or life insurance benefits that he or she agreed not to claim.[71] Rather than arguing which position is correct, it seems most prudent for the designator to review and redo his or her primary and secondary designations following a divorce. These new designations could name the former spouse, a relative or friend of the designator, a charity, another preferred party, or the designator's estate. There will be then be no question that all the designations reflect his or her post-divorce intentions, which will discourage any litigation about the significance of the former spouse's commitment.

Applicable Statutory Rules of Construction

There are five traditional rules of construction that are applicable to retirement and life insurance benefits left entirely to the designator's estate that apply in a very limited sense to plan benefits with other designations:

- The EPTL 4.1-1 rules of intestacy almost never apply.
- The EPTL 3.3-3 anti-lapse rules that absent clear statements to the contrary dispositions to issue and siblings do not lapse, but go to their surviving issue almost never apply.
- The EPTL 5.3-2 rules to protect children born after the execution of the designation almost never apply.
- The EPTL 2-1.6 simultaneous death rules treating the death of a beneficiary within 120 hours as having occurred before the designator's death apply to New York Regulated Plans. The federal government and ERISA plan sponsors may choose to include one or more of these rules but it appears that they rarely do so.
- As discussed above, the EPTL 5.1-4 Revocation Upon Divorce rules apply to New York Regulated Plans, but not to ERISA or federal employee plans.

Conclusions

As a designator's family, friends, and preferred charities change, his or her intended goals with respect to the disposition of probate assets and plan benefits may change. Moreover, designators may not rely on many of the traditional rules of construction for probate asset dispositions to conform their designations to their intended goals. This is particularly the case for benefits from ERISA plans and for plans for federal employees that are not governed by any of those rules. Therefore, it is advisable for a designator to:

(1) regularly check that the primary and contingent beneficiary designations of his or her life insurance and retirement plans reflect his or her current intentions;
(2) consider beneficiary designations in the context of the disposition of his or her other assets;
(3) review, change or redo all beneficiary designations if his or her marital status changes, his or her children's marital status changes, he, she or they gain or lose significant others, children change, or preferred charities change; and
(4) consider the extent, if any, it is advisable to make his or her estate or a trust the plan beneficiary in order to provide the desired beneficiaries with the desired benefits, if plan designation terms do not permit those choices. ■

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1. With regard to marital dissolution disputes, this article will discuss disputes between the personal representatives of the decedent's estate and the decedent's former spouse, but not how the surviving spouse's right of election may affect the ability of a designee to keep distributed plan benefits.

2. This article will not consider an employer plan or non-employer plan governed by the law of a state other than New York.

3. *See generally* Albert Feuer, *Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such a Beneficiary*, 54 Tax Mgmt. Memo. 323 (August 26, 2013) (Feuer's ERISA Beneficiaries), http://ssrn.com/abstract=2315889.

4. *But see* Federal Thrift Savings Plan Form TSP-3, Designation of Beneficiary (Oct 2013), https://www.tsp.gov/PDF/formspubs/tsp-3.pdf (permitting and illustrating a wide choice of beneficiaries).

5. *But see* Estates Powers & Trusts Law 9-1.1 (EPTL) (rules against perpetuities apply to testamentary and trust dispositions). *Cf.* ACTEC, *The Rule Against Perpetuities: a Survey of State (and D.C.) Law* (March 2012), www.actec.org/public/Documents/Studies/Zaritsky_RAP_Survey_03_2012.pdf (describing how the states apply the rule, including some that do not follow it).

6. A will or a trust may provide for annuity payments to a person whose life is not used to measure the duration of the annuity payments.

7. A domestic relations order may compel a plan to treat a former spouse of a plan participant as the participant's surviving spouse. *See, e.g.*, ERISA § 206(d)(3)(F), 29 U.S.C. § 1056(d)(3)(F).

8. Rev. Rul. 78-406, 1978-2 C.B. 157 (plan transfers not subject to income tax).

9. *But see* Code § 401(k)(2)(B(i) (permitting distributions under other circumstances, such as attaining age 59½).

10. For example, advantages of keeping the policy could include maintaining a disability rider and avoiding surrender charges.

11. Code § 1035.

12. For example, if the designee is a terminated trust that has distributed all of its other assets to its beneficiaries while the designator is alive, has the trust survived the designator? If the inchoate and contingent rights of the trust are transferred to the trust beneficiaries in such case, trusts would always survive the designator, although the rights of those beneficiaries may be unclear. This argument is most persuasive if the trust has been terminated and all its other assets have been apparently distributed prior to the designator's death because of a finding that it is uneconomical to continue the trust, although court intervention may be needed to revive such a trust and to determine the interests of the trust beneficiaries. This argument is least persuasive if the trust was terminated and all its other assets distributed before the designator's death because it has reached the end of its term or attained its purpose, such as all the beneficiaries of a Code § 2503(c) trust attaining age 21.

13. *See, e.g.*, NYSTRS Active Members' Handbook (2013) (describing the New York Teachers' Retirement System for public school teachers) at 35, https://nystrs.org/NYSTRS/media/PDF/Library/Publications/Active%20Members/handbook.pdf.

14. EPTL 1-2.11.

15. EPTL 1-2.14.

16. EPTL 1-2.16.

17. *See, e.g.*, *In re Estate of Lewis*, 25 N.Y.3d 456 (2015) (holding that property in family for generations did not go to decedent's surviving brothers, but to parents of divorced spouse under terms of will). Although the issue was the effect of the New York State revocation of divorce statute, the same issue would have arisen if the spouse had predeceased the decedent.

18. *See, e.g.*, John Hancock Investments IRAs – Individual Retirement Custodial Account Agreement §§ 8.06 at 2 and 9.06 at 6 (IRAFM 7/15), www.jhinvestments.com/CMS/DownloadableItems/FormsAndApplications/Shared/p_iradoc.pdf.

19. *See, e.g.*, Natalie Choate, *What Happens When the Beneficiary Dies?*, Morningstar Advisor (Sept. 12, 2014), www.morningstar.com/advisor/t/96646616/what-happens-when-the-beneficiary-dies.htm (discussing the tax consequences of different choices if a beneficiary dies before receiving all his survivor benefits from an individual retirement account).

20. EPTL 3-2.1. For example, plans rarely have a will's publication requirement.

21. *See, e.g.*, Feuer's ERISA Beneficiaries, *supra* note 3, at 335–36 (discussing the extent, if any, to which courts will grant such objections).

22. EPTL 13-3.2(e).

23. *See, e.g.*, NYSTRS Form NET 11.4 (3/06), Designation of Beneficiary, https://www.pdffiller.com/en/project/37902558.htm?form_id=41931487.

24. *See generally* U.S. Const. art. VI, cl. 2 (federal law preempts state and local law). *See, e.g.*, Supremacy Clause and 5 U.S.C. ch. 84 (setting forth the designation provisions for the Federal Employees' Retirement System, a defined benefit plan, and the Federal Thrift Savings System, a defined contribution plan).

25. ERISA § 514(a), 29 U.S.C. § 1144(a) (ERISA preempts any state law relating to an ERISA plan).

26. The designation form for Federal Thrift Savings Plan Benefits may be mailed but must be received by the plan record keeper before the designator's death. 5 C.F.R. § 1651.3(c).

27. "Desired beneficiaries" encompasses the terms of payment to the designee, such as lifetime payments rather than lump-sum payments or the use of a named trustee to decide when to make the payments.

28. *In re King*, 196 Misc. 2d 250 (Sur. Ct., Broome Co. 2003) (EPTL 13-3.2 protects life insurance and retirement plan beneficiaries from the decedent's creditors). There is no exception from the statutory protections if the beneficiary is the designator's estate.

29. ERISA § 206(d)(1), 29 U.S.C. § 1056(1). Such protections are not available to the plans described in ERISA § 201, 29 U.S.C. § 1051, such as non-pension plans, plans funded with IRAs and unfunded pension plans primarily for executives.

30. *See, e.g.*, 5 U.S.C. § 8346 (prohibiting the alienation of the Civil Service Retirement System benefits).

31. *See, e.g.*, N.Y. Education Law § 524 (Educ. Law) (prohibiting the alienation of New York State Teachers' Retirement System benefits).

32. CPLR 5205(c)(2).

33. *See, e.g.*, *In re Anderson*, 410 B.R. 289 (Bankr. Ct., W.D. Mo. 2009) (holding that distributed benefits not subject to execution and arguing that this finding is consistent with the most recent case-law).

34. CPLR 5205(d)(1). *Cf.* N.Y. Insurance Law § 3212(b) (the creditor protection for a life insurance beneficiary from the beneficiary's creditors is limited to case where the beneficiary is not the insured, i.e., the protection is not applicable if the beneficiary is the insured's estate).

35. *See generally* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. Marshall L. Rev. 145 at 338–75 (Aug. 26, 2013), http://ssrn.com/abstract=2440008 (discussing whether the ERISA alienation prohibition protects distributed benefits).

36. CPLR 5205(d)(1) does not apply to ERISA retirement plans funded with annuities, such as 403(a) or 403(b) plans.

37. CPLR 5205(c)(5) and EPTL 13-3.2(b).

38. *See, e.g.*, *Planned Consumer Mktg. v. Coats & Clark*, 71 N.Y.2d 442, 450 (1988) (finding ERISA did not preempt judgment creditor's cause of action for turnover of funds deposited into a qualified ERISA plan, the creation of which was in violation of that New York law because the employer was insolvent when making the plan contribution). *But see Majteles v. AVL Corp.*, 182 Misc. 2d 140, 145 (Sup. Ct., Kings Co. 1999) (finding that the Court of Appeals' decision in *Planned Consumer Mktg.* was no longer valid for ERISA plans subject to the prohibition of the alienation of benefits but applicable to plans not subject to the prohibition).

39. EPTL 13-3.3(c) (providing the same creditor protection for payments to trusts payments as if payment were made directly to the beneficiaries).

40. *See, e.g.*, Natalie B. Choate, Life and Death Planning for Retirement Benefits (Ataxplan Pubs. 2011), 59–107.

41. *Id.* at 394–475 (describing how trusts may qualify for the stretching advantage).

42. *But see* Feuer's ERISA Beneficiaries, *supra* note 3, at 330–32 (discussing QDROs and their application to ERISA plans).

43. ERISA § 201(2), 29 U.S.C. § 1051(2) (describing the exemption for plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees).

44. ERISA § 201(6), 29 U.S.C. § 1051(6) (describing the exemption for IRAs, which include SEP plans, defined in Code § 408(k), and SIMPLE plans, defined in Code § 408(p)).

45. ERISA § 205, 29 U.S.C. § 1055, which does not include plans described in ERISA §§ 201(2) and (6), 29 U.S.C. §§ 1051(2) and (6).

46. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2).

47. Treas. Reg. § 1.401(a)-20 Q&A-28 (discussing the ineffectiveness of prenuptial agreements). The same reasoning implies that marital agreements are also ineffective.

48. *See, e.g.*, 5 U.S.C. § 8424(d) (describing default pre-retirement death benefit for Federal Employee Retirement System (FERS)) and § 8433(e)(1) (describing default pre-retirement death benefit for Federal Thrift Savings Plan (FTSP)).

49. *See, e.g.*, 5 C.F.R. § 843.205(e) (no consent is needed to change FERS death benefit designation) and 5 C.F.R. § 1651.4 (no consent of spouse is needed to change FTSP death benefit designation).

50. *See, e.g.*, 5 U.S.C. § 8705 (describing the beneficiary of life insurance benefits for civilian employees of the federal government).

51. *See, e.g.*, 5 U.S.C. §§ 8416 and 8419 (governing the FERS retirement benefits) and 5 U.S.C. § 8435 (governing the FTSP retirement benefits).

52. *Id.*

53. *See, e.g.*, 5 C.F.R. § 842.606(b) (the FERS waiver must be on a federal government form).

54. *See, e.g.*, Educ. Law §§ 510, 511, 511-a, and 512-a (defining default single life annuity benefit for New York State Teachers' Retirement System).

55. *See, e.g.*, Educ. Law §§ 511, 511-a, 512-a, and 513 (permitting participant to choose a joint and survivor annuity benefit for New York State Teachers' Retirement System).

56. *See, e.g.*, Summary Guide of 457 and 401(k) [NYC] Plan Provisions at 9, www1.nyc.gov/assets/olr/downloads/pdf/deferred/sumguide.pdf.

57. *See, e.g.*, N.Y. Retirement and Soc. Sec. Law § 60(c) (providing that the default beneficiary for the death benefit payable to an employee who dies prior to his or her retirement under the New York State Employees' Retirement System is the employee's estate).

58. EPTL 5-1.4

59. *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (holding that a state revocation upon divorce statutes may not be used to wrest life insurance benefits provided to federal civilian employees from a designated beneficiary).

60. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding that ERISA prevents state revocation upon divorce statutes from being used to wrest retirement or life insurance benefits from a designated beneficiary).

61. Natalie B. Choate, Life and Death Planning for Retirement Benefits (Ataxplan Pubs. 2011), 276–86.

62. When estate taxes were assessed on smaller estates than is now the case in New York, disclaimers were often made so that an older person could avoid estate tax on a subsequent transfer to a planned beneficiary or to use a credit shelter trust. Disclaimers are usually not made to prevent a creditor of the designee from obtaining the disclaimed property because as discussed above with respect to estate distributions under New York law the designee's creditors do not usually have the ability to obtain distributed retirement benefits.

63. *See, e.g.*, Lee A. Shephard, Treatment of Tax-deferred Retirement Accounts in Estates, 63 The Record of The Ass'n of the Bar of the City of N.Y. 805 at 814–15 (2007) (the tax-qualification question is raised but not fully discussed). However, one may argue that accepting a disclaimer where the plan obtains a sufficiently clear and binding disclaimer is simply the adoption of an administrative procedure that is consistent with the plan terms, rather than the adoption of new plan terms.

64. The advantage is that the plan document's compliance with the tax-qualification rules is assured. Such a benefit has increased in value now that the IRS will no longer provide determination letters for individually designed plan that are not being terminated. *See* IRS Announcement 2015-19, www.irs.gov/pub/irs-drop/a-15-19.pdf.

65. *Kennedy v. Plan Adm'r of the Du Pont Sav. & Inv. Plan*, 555 U.S. 285 (2009) (holding that an ERISA plan must disregard a disclaimer within a divorce decree when the plan had no disclaimer provisions, although the situation may be distinguished because the designee was seeking to avoid rather than to enforce the disclaimer).

66. *Id.* at 300, n.10.

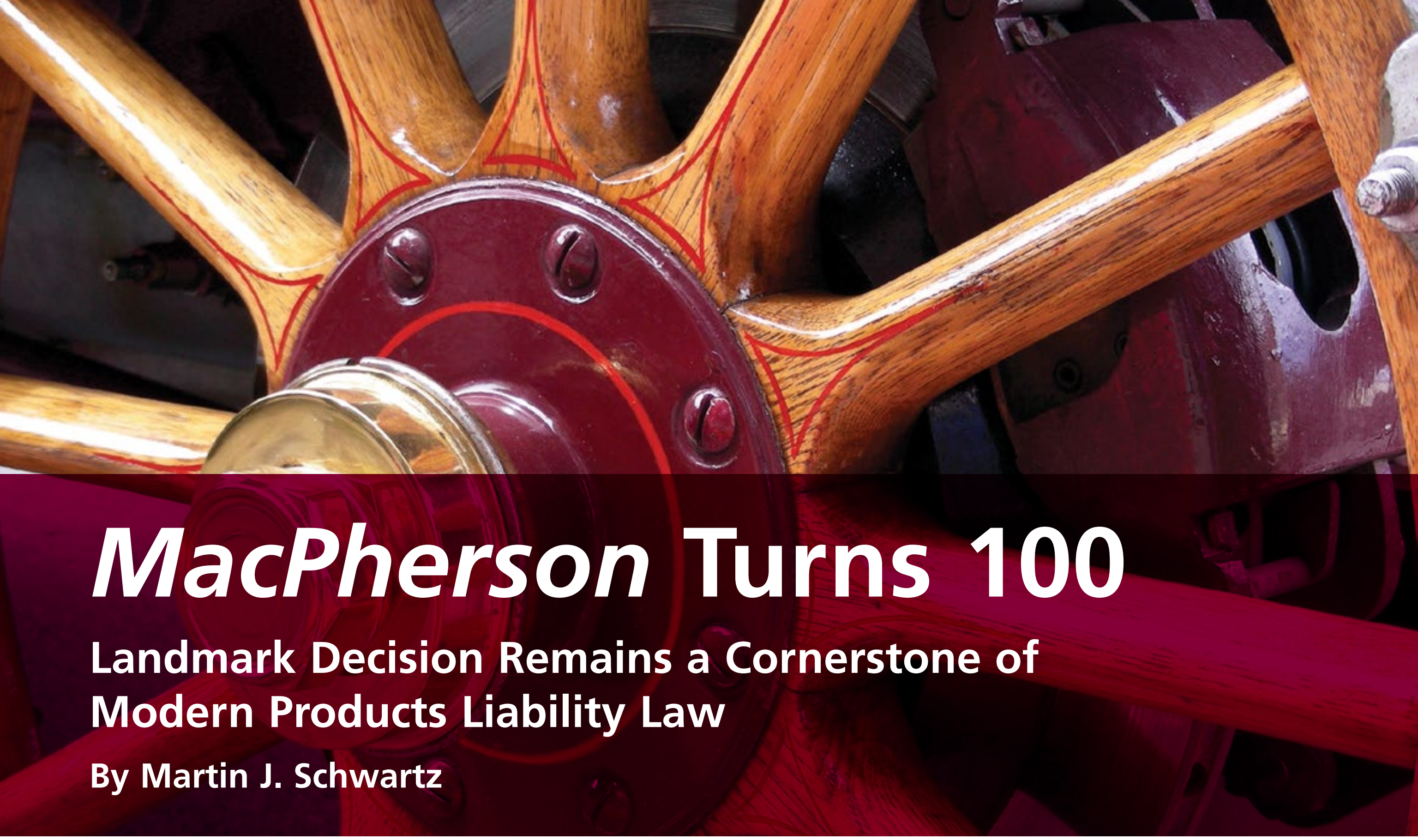
67. Rev. Rul. 2005-36, 2005-1 C.B. 1368 (IRS approved a disclaimer of an interest other than the minimum distribution and accrued income that were distributed to the disclaimant for purposes of who could use their lifetime to determine the minimum distribution period).

68. 2010 N.Y. Laws ch. 384, § 1, eff. Oct 12, 2010, added N.Y. Domestic Relations Law § 170(7), but retained the separation section in the prior paragraph (6).

69. *But see Curley v. Giltrop*, 68 N.Y.2d 651 (1986) (holding that a participant's former wife's waiver in a divorce decree of her rights to the participant's benefits not otherwise awarded to her required her to pay to participant's estate the life insurance proceeds and retirement survivor benefits she received as a plan beneficiary).

70. *See, e.g.*, *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that after a participant's death, the participant's spouse may not be compelled to follow a prenuptial agreement to waive ERISA pension interest).

71. *See generally* Andrew L. Oringer and Albert Feuer, *In the Pursuit of Domestic Tranquility – Matrimonial Attorneys Should Follow the Bouncing Beneficiary Designations*, 43 Comp. Plan. J. 43 (March 6, 2015), http://ssrn.com/abstract=2579403; and *Silber v. Silber*, 99 N.Y.2d 395 (2003) (holding that such a waiver may be used to compel the former spouse to disclaim the benefit). *See also Van Den Broek v. Tang*, 88 Va. Cir. 65 (Va. Cir., Fairfax Co. 2014) (holding that *Hillman* implies that a waiver of the federal retirement benefits for a former federal employee, similar to the one in *Kennedy*, may not be used to wrest benefits from the participant's former spouse and beneficiary).



MacPherson Turns 100

Landmark Decision Remains a Cornerstone of Modern Products Liability Law

By Martin J. Schwartz

In February 1909, an upstate New Yorker visited an automobile dealer in Utica and bought a new car. A few months later, he was seriously injured when one of the wheels collapsed while he was driving and he was thrown from the car. He sued the automobile manufacturer, claiming that the spokes of the wheel had been made of rotten wood. The carmaker did not dispute this but denied that it knew the wood was rotten and showed that it had purchased all of its wheels from a reputable manufacturer who agreed to use the best obtainable second-growth hickory. The plaintiff's evidence showed that if the carmaker had carried out a simple inspection and test of the wheels, it would have discovered the decayed spokes, and the defective wheel would have been rejected. The jury found the carmaker was negligent and gave a verdict for the plaintiff in the amount of $8,000, and the court entered judgment accordingly.

The plaintiff's name was Johnson, the car he bought was a Cadillac, and the case he brought is not famous because the judgment he won was reversed by the Second Circuit Court of Appeals due to his lack of any contractual relationship, or privity, with Cadillac. The controlling common law rule, as stated by the court, was as follows:

> [O]ne who manufactures articles *dangerous only if defectively made*, or installed, e.g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in cases of willful injury or fraud.[1]

About a year after Johnson purchased his Cadillac, Donald C. MacPherson, a resident of Galway in Saratoga County, bought a 1910 Buick Runabout from an automobile dealer in Schenectady. MacPherson later sustained serious injuries in much the same way Johnson had, and due to a defect substantially identical. Like Johnson, he brought a negligence action against the carmaker based on its failure to inspect or test the wheels, which suit Buick defended on much the same grounds as Cadillac. Like Johnson, MacPherson won at trial. Unlike Johnson, MacPherson, on the carmaker's appeal, kept his judgment, in the process giving his name to a decision issued 100 years ago this month, *MacPherson v. Buick Motor Company*,[2] that became a landmark in the historic assault against the "citadel of privity"[3] and a cornerstone of modern products liability law.

In his opinion for the N.Y. Court of Appeals, Benjamin Cardozo famously wrote:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that it will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.[4]

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Thus did Cardozo recast familiar legal concepts into a cogent new statement of the law and redirect the focus of bench and bar to the foreseeability of danger from a manufacturer's negligence, and away from the increasingly capricious classification of myriad products of the modern age as either "inherently dangerous" or not.

Elaborating on the Knowledge Required

To reduce the risk that the principle he had framed would be applied too restrictively, Cardozo elaborated on the nature of the knowledge required, rendering the words "reasonably certain," just used by him, largely innocuous:

> There must be knowledge of a danger, *not merely possible, but probable*. . . . There must also be knowledge that *in the usual course of events* the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction.[5]

As to the first type of knowledge, Cardozo said, "Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective."[6] In case this was not self-evident, he explained, "This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain" – again treating certainty and probability as linguistic or legal equivalents.[7] Cardozo found the second type of required knowledge – that persons other than the buyer will share the danger – in the mere fact that Buick sold the vehicle to "a dealer in cars, who bought to resell." He could not resist adding that there were seats for three people in the car.[8]

In the view of Judge Richard A. Posner, who has made a study of Cardozo's judicial career, "*MacPherson* is Cardozo's most influential opinion: by greatly limiting the requirement of privity of contract in products liability cases – the requirement that the injured consumer have a contract with the manufacturer he is suing – *MacPherson* inaugurated fundamental changes in American tort law."[9] The opinion not only changed the law in New York but was cited in many hundreds of cases by state and federal courts throughout the United States.

That Cardozo happened to be sitting on New York's highest court when *MacPherson* came up for decision was attributable to a fortuitous conjunction of an unusual gubernatorial power with an odd anomaly in the compensation of New York judges. In November 1913, Cardozo, a successful 43-year-old litigation attorney, won election on the Fusion ticket to the Supreme Court for the First Judicial District (then comprising Manhattan and the Bronx). Under New York's constitution of 1894, as amended in 1899, the governor was authorized to appoint up to four sitting Supreme Court justices to temporary seats on the Court of Appeals, to help reduce backlog problems encountered by the seven regular members. Toward the end of 1913, Governor Martin Glynn, who had been elevated to his office following the impeachment of William Sulzer, offered a temporary Court of Appeals seat to Samuel Greenbaum, a long serving justice from Manhattan.

Greenbaum turned down Glynn's offer because he could not afford the cut in pay. Supreme Court justices in the Bronx and Manhattan at the time were entitled to significantly higher salaries than N.Y. Court of Appeals judges – $17,500 vs. $13,700. Greenbaum urged Glynn to offer the seat to Cardozo, and the governor followed the advice. Cardozo, a bachelor whose household included only a sister, felt able to accept the promotion despite the reduction in salary. Thus, in February 1914, after a month of trying cases and hearing motions as a trial judge, Cardozo, instead of Greenbaum, was elevated to the Court of Appeals.[10]

For an opinion celebrated as launching fundamental change, *MacPherson* is remarkable for its thorough survey of cases going back to the middle of the previous century and its paucity of reference to any public policy considerations. As to the former, Cardozo, rather than declaring any case overruled, discerned *in the cases* a fundamental underlying principle, which he subtly developed to reach the result he announced. As to the latter, Cardozo's recognition of a right to sue negligent manufacturers was of profound, albeit unspoken, social consequence.

The importance of a right to sue remote manufacturers derived in large measure from the inability of injured consumers in most instances to recover compensation from those with whom they were in direct privity. The retailer of a finished product could not generally be judged negligent if the product, manufactured by another firm, later proved defective. While an action for breach of warranty against the seller of a defective product might be available (to the immediate purchaser, but not to third parties, such as other authorized users or bystanders), any right to recover damages for personal injuries in such a case was uncertain at best. Fifteen years after *MacPherson*, the Court of Appeals upheld an award of personal injury damages against a retail store for breach of implied warranty of merchantable quality.[11] But in earlier years, it was much more likely that personal injury damages would be disallowed as "consequential" or "remote" in a warranty case, with recovery limited to the difference between the value of the product if it had corresponded with the warranty, express or implied, and its actual value.[12]

Even if a meaningful judgment could be obtained, most retail stores and dealers, such as the one from whom MacPherson purchased, were local proprietorships who were financially incapable of paying it – a point emphasized by MacPherson's attorney in his argument to the Court of Appeals.[13] Cardozo's opinion did not refer to any of these practical and doctrinal limitations on an injured consumer's ability to obtain redress.

More startlingly perhaps, when Cardozo a few years later sought to explain the circumstances under which an appellate court could prudentially move beyond existing precedent, he cited *MacPherson* in saying:

> There is small chance, whichever party prevails, that conduct would have been different if the rule had been known in advance. The manufacturer did not say to himself, "I will not inspect these wheels, because that is not my duty." Admittedly, it was his duty, at least toward the immediate buyer.[14]

David W. Peck, writing in 1961, as a former Presiding Justice of the Appellate Division for the First Department, dismissed any suggestion that *MacPherson* did not affect conduct, but agreed with Cardozo that the decision ultimately imposed no hardship on the manufacturer. Peck summed it up this way:

MacPherson has been aptly characterized as "the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities."

> Responsibility begets care and care is the core of commerce. If the automobile industry had not been required to meet the standard of care established by the decision in *MacPherson v. Buick*, it would almost surely not have risen as rapidly or as fully to the giant proportions it has attained. . . . Safety in the use of the modern car and all other articles in which defects would be dangerous can be traced to the responsibility for care in manufacture which the law imposes.[15]

Peck wrote four years before Ralph Nader became a nationally known figure by publishing his industry exposé *Unsafe at Any Speed.* Nader made the case for a more active intervention by the law to prevent potentially lethal design defects, and his book and congressional testimony contributed to the passage of the National Traffic and Motor Vehicle Safety Act of 1966. That statute created an agency, which evolved into today's National Highway Traffic Safety Administration, empowered to order vehicle recalls and to implement regulations requiring numerous safety features, starting with seat belts. In 1984, New York became the first state to pass a law mandating use of those seat belts – which, had they been available in an earlier day, could have prevented MacPherson from being thrown from his Buick and Johnson from his Cadillac.[16]

MacPherson has been aptly characterized as "the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities."[17] Had his judicial opinions been unsettling, Cardozo, a (politically inactive) Democrat, would not have won his eventual seat on the U.S. Supreme Court by a nomination from President Hoover, followed nine days later by the voice vote confirmation of a Republican-controlled Senate.[18] If Cardozo had not been on the Court of Appeals in 1916, MacPherson might well have prevailed anyway. Privity was still the recognized rule across the United States, but it had been of puzzlingly uncertain application in New York for years. An Appellate Division panel had already ruled unanimously in 1912 that MacPherson's case could proceed to trial against Buick on a negligence theory despite the lack of privity.[19] And there had been a vigorous dissent in the 1915 decision reversing Johnson's judgment against Cadillac.[20]

What almost surely would have been missing from a *MacPherson* without Cardozo is an articulately reasoned statement of the law explaining not only why Buick was liable, but how future cases involving different products should be analyzed to determine liability without recourse to vague legal classifications whose application had become increasingly arbitrary. Cardozo's legal restatement, which implicitly recognized the growing public demand for safe products, gave less leeway to judges to insulate careless manufacturers from potential liability.

The Age of the Automobile and Its Impact on *MacPherson*

MacPherson was decided on the cusp of major industrial change that was beginning to have profound effect on the lives of Americans. The burgeoning automobile industry had left the machine shops and entered the age of the assembly line made famous by Henry Ford, and cars were becoming increasingly affordable. While just 8,000 motor vehicles were registered in the United States in 1900, by 1916 there were already more than 3.6 million, of which more than 314,000 were in New York.[21]

There were as yet few roads whose physical condition would permit a sane driver to harbor any notion of reaching the 50 mph capability advertised by Buick. But it was apparent that the future would be increasingly accommodating to high speeds. In 1907, work had started in Westchester County on the Bronx River Parkway, the earliest limited access automobile route to begin construction in the United States. A large portion was opened to traffic in 1922.[22] Even before then, a 10-mile stretch of privately built toll highway known as the Long Island Motor Parkway opened in 1908, and by 1911 had been extended eastward to Lake Ronkonkoma, and later westward into Queens, a total length of about 45 miles. With overpasses and bridges permitting drivers to glide over intersections and railroad tracks, it was the first highway in the United States made of reinforced concrete and specifically designed for automobiles. From the beginning it was built to accommodate speeds of 40 mph.[23]

People increasingly recognized the advantages and the hazards of automobile travel, including the special danger if a car was poorly made. In 1916, there were 7,766 recorded highway fatalities in the United States, and with more and more cars being sold and ever increasing miles of road available to drive, that figure predictably rose every year, to more than 20,000 by 1925, eventually peaking at 55,600 in 1972.[24]

Cardozo, characteristically, did not speak of any of these developments in *MacPherson*, but trusted the readers of his opinion to be conscious of them when he wrote that "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day."[25] His reference to stage coaches was an allusion to *Thomas v. Winchester*,[26] the mid-19th century fountainhead of the privity rule in New York.

Thomas v. Winchester

The Court of Appeals in *Thomas* relied for the privity rule on an English decision, *Winterbottom v. Wright*,[27] in which Queen's Bench disallowed the claim of a driver who was crippled upon being thrown from a mail coach. The coach had been negligently maintained by the defendant, whose contractual relationship was with the postmaster general. The New York court in *Thomas* derived the following illustrative limitation on manufacturer liability:

> If A. build a wagon and sell it to B., who sells it to C., and C. hires D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.[28]

The fact that *Thomas* became the leading authority for privity by discussing coaches and wagons made it particularly difficult for some judges, including Cardozo's senior colleague Willard Bartlett, to find the rule inapplicable to cars. Automobiles of the day, including their wheels, were apt to look less like those with which we are familiar and more like the proverbial "horseless carriage." Bartlett, in a solo dissent in *MacPherson*, thought it worthy of notice – which Cardozo did not – that at the time of the accident, the plaintiff's car was "moving only eight miles an hour," making the defective wheel "not any more dangerous to the occupants . . . than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed."[29]

But, significantly for Cardozo, the facts in *Thomas* actually had nothing to do with a coach or wagon, but with belladonna that had been negligently mislabeled as dandelion. Referring to belladonna as a "deadly poison" and characterizing the defendant, Winchester, as a "dealer in poisonous drugs," the *Thomas* court upheld judgment for the plaintiff despite the absence of any contractual relations with the defendant. The Court of Appeals thereby created an exception to the privity rule in the very case that announced it.[30] Casting the determining principle of the case in terms of duty, as Cardozo later would, the *Thomas* court stated:

> The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. . . . [T]he distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.[31]

Attorneys for victims of product failure picked up on *Thomas* by attempting, unsuccessfully, to classify a variety of other products as inherently or imminently dangerous. In one case, where death was caused by a defectively fabricated flywheel in a circular saw, the court declared that dangerous instruments were such things as poison, gunpowder, a torpedo, a spring gun, a loaded gun – articles "in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose."[32] Negligence in connection with the production of such an article was "imminently dangerous" to the extent it rendered the article "necessarily injurious" to whoever used it.[33] Three years later, the court, citing the flywheel case, tersely affirmed dismissal of a negligence claim against the maker of a defective boiler, which suddenly exploded after three months use, killing two people and damaging the plaintiff's property.[34]

Devlin v. Smith

Beginning in the 1880s, things began to change a little. *Devlin v. Smith* [35] was brought by the estate of a painter who fell to his death when a scaffold erected beneath the dome of the Kings County courthouse broke down. The opinion in *Devlin*, allowing the case to proceed to trial, ignored earlier judicial statements confining the privity exception to articles "in their nature calculated to do injury to mankind," nor did it otherwise explicitly classify scaffolds as inherently dangerous. Instead, the court focused on the concept of *negligence* that is "imminently dangerous." The defendant knew the scaffold was to be used by his customer's workmen and that "[a]ny defect or negligence in the [the scaffold's] construction, which would cause it to give way, would naturally result in these men being precipitated from that great height."[36] In a wide-ranging national survey of the privity rule in 1908, New York was identified by a prominent federal jurist as a possible outlier (along with one other state) by reason of its deviant decision in *Devlin*.[37]

Torgeson v. Schultz

Later that year, in *Torgeson v. Schultz*,[38] a negligence case brought by a domestic servant who lost an eye to an exploding siphon bottle of aerated water, New York's high court allowed trial to go forward against a bottler in the absence of privity. The bottler allegedly failed to perform adequate testing of the siphon bottles despite knowing the risk of explosion and consequent injury when a pressurized bottle with defects in the glass is exposed to sudden temperature changes, such as by being placed next to ice on a hot summer day.

Willard Bartlett, who wrote for the court, did not refer to any requirement that negligence be "imminently dangerous," presumably because New Yorkers of the day might reasonably doubt that a seltzer bottle unless flawless would *necessarily* be injurious to whoever happens to use or stand near it. Invoking *Thomas* "and similar cases," Bartlett, instead, found a

> duty of the vendor of an article dangerous in its nature, or likely to become so in the course of the ordinary usage to be contemplated by the vendor, either to exercise due care to warn users of the danger or to take reasonable care to prevent the article sold from proving dangerous when subjected only to customary usage.[39]

Bartlett's formulation was ambiguous. Its first half did not refer to any defect making the article "dangerous," but the second half, delineating the defendant's duty, tacitly assumed the article was *not* "dangerous" unless it had defects, which could have been avoided by the exercise of due care. Bartlett arrived at what he perceived to be a just result, but was unwilling to articulate the doctrinal change that would logically justify that result. Eight years later, dissenting in *MacPherson*, Bartlett felt free to cite his own decision in *Torgeson* as just another example of the common law rule requiring privity as a condition of suit unless "the article sold was inherently dangerous."[40]

Statler v. Ray Mfg. Co.

In its last important decision on the subject prior to *MacPherson*, the Court of Appeals referred to a dual requirement that the product (even if well-made) be "of an inherently dangerous nature" *and* that, when constructed negligently, be "imminently dangerous."[41] Although the court applied these tests to find that the manufacturer of a defective coffee urn could be liable, without privity, to a hotel officer who was scalded when the urn exploded, its statement of the law was something of a doctrinal retrenchment. The court offered no objective criteria that would limit the ability of judges to use these vague categorical tests to dismiss lawsuits by consumers injured by countless other defective products.

Discussing all these cases in *MacPherson*, Cardozo went straight back to the oldest, *Thomas v. Winchester,* which, he said, recognized liability irrespective of contract where the "'defendant's negligence . . . put human life in imminent danger.'"[42] Cardozo then deftly equated the imminence of danger with its foreseeability: "Because the danger is to be foreseen, there is a duty to avoid the injury."[43] Cases in which manufacturers were held not subject to any duty without a contract, he said, were distinguished on the ground that the risk of injury to anyone other than the purchaser was considered remote. "We are not required to say whether the chance of injury was always as remote as the distinction assumes."[44] The rule permitting liability was applied narrowly at first and later more liberally, but the distinction between the two classes of cases, by his analysis, had been maintained throughout.

Even though Cardozo's own formulation of the standard of liability, quoted earlier, found no need to quibble over whether a danger was "imminent" or "inherent," his opinion did not simply discard the traditional terminology. Rather, he employed it to assure practitioners and judges that long familiar precedent was still being respected. Thus, he concluded his discussion of the leading New York cases by saying:

> The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[45]

By this point in the opinion, however, Cardozo's show of deference to a hoary legal classification would not obscure his meaning, since he had earlier crystallized what he truly intended:

> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[46]

Cardozo's opinion did not (and was not intended to) lead immediately to the abrogation of the privity requirement in all products liability cases. In the following year, for example, an Appellate Division panel refused to allow suit against a manufacturer whose bed collapsed while the plaintiff was lying upon it about to give birth, stating that "[a]n ordinary bed [unlike an automobile] is not an article that is reasonably certain to place life and limb in peril when negligently constructed."[47] Cardozo, however, expected that the products removed from the privity requirement would be "steadily extended."[48] By the time Judge Peck wrote in 1961, he could fairly state that "there are few manufactured articles which would not now be considered subject to the rule of responsibility enunciated in the *MacPherson* case."[49]

Conclusion

Speaking at Yale Law School in 1921, Cardozo discerned "a spirit and a tendency to subordinate precedent to justice," which he believed was "growing and in the main wholesome."[50] He did not ground his perception on the case of MacPherson's Buick but on that of Johnson's Cadillac.[51]

After the Second Circuit reversed his damages award against Cadillac in 1915, Johnson had been permitted to file an amended complaint. A second trial followed based largely on the record of the first. At the conclusion, the federal district judge dismissed Johnson's complaint on the authority of the Second Circuit's 1915 opinion. When the case came up for review again, the Second Circuit reversed again, but this time in Johnson's favor.[52] Finding the doctrines of *stare decisis* and law of the case to be less than absolute, the court held itself free to revisit the applicable law. Then, having discussed Cardozo's 1916 opinion in *MacPherson,* the Second Circuit panel determined that a "serious mistake" was made in its prior decision, the reasons for which "may be found in the opinion in the Buick Case, to which we have already referred, and which render it unnecessary to traverse the ground anew."[53]

The Second Circuit was under no obligation to conform with *MacPherson.* Prior to 1938, federal courts deciding common law cases could disregard judicial decisions of the local state's highest court, and were apt to do so if "the great weight of authority in other states is to the contrary. . . . [F]or upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is."[54] The Second Circuit in 1919 therefore independently determined that Cardozo's 1916 opinion, rather than its own in 1915, had stated the general law correctly. Thus did Johnson – his case still not famous – prevail in the end against Cadillac. As for the author of *MacPherson*, one might not be amiss in imagining that he derived more satisfaction from the decision in *Johnson v. Cadillac* than from his own much more illustrious one. ■

1. *Cadillac Motor Car Co. v. Johnson*, 221 F. 801, 803 (2d Cir. 1915) (emphasis added).

2. 217 N.Y. 382 (1916).

3. The phrase was not used in *MacPherson*, but in law school lectures Cardozo delivered several years later. Benjamin N. Cardozo, The Growth of the Law 77 (Yale Univ. Press 1924). In *Ultramares Corporation v. Touche*, 255 N.Y. 170, 180 (1931), Cardozo again referred to the "assault upon the citadel of privity," but, speaking for the court, rebuffed the assault in that case where a lender sought to recover against accountants for negligently certifying a borrower's financial statements.

4. *MacPherson*, 217 N.Y. at 389 (emphasis added).

5. *Id.* at 389–90 (emphasis added).

6. *Id.* at 390.

7. *Id.* at 390–91.

8. *Id.* at 391.

9. Richard A. Posner, Cardozo: A Study in Reputation 41–42 (1990).

10. *See* Andrew L. Kaufman, Cardozo 126-29, 614 n. 47 (1998).

11. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388 (1931) (pin in loaf of packaged bread).

12. *See, e.g.*, *Birdsinger v. McCormick Harvesting Mach. Co.*, 183 N.Y. 487 (1906) (purchaser who lost right hand to a defective corn husker could not recover for personal injury on breach of warranty claim).

13. David W. Peck, Decision at Law 62-63 (Cornerstone 1961). By contrast, the automobile industry was increasingly concentrated in a few large national corporations. On its way to becoming the world's biggest automaker by 1931, and the largest American corporation by 1936, General Motors before 1916 already owned, among others, Buick Motor Company, Oldsmobile, Cadillac and Oakland (soon to be Pontiac), with Chevrolet to follow shortly. *See* Ed Cray, Chrome Colossus: General Motors and Its Times 9, 70–82, 142–155, 247–48, 268, 280 (1980); Encyclopedia Britannica, General Motors Corporation, britannica.com.

14. Benjamin N. Cardozo, The Nature of the Judicial Process 146 (Yale Univ. Press 1921).

15. Peck, *supra* note 13, at 68.

16. Cray, *supra* note 13, at 422–27; Michael Goodwin, *Cuomo Cites Safety Studies As He Signs Seat-Belt Law*, N.Y. Times, July 13, 1984.

17. Posner, *supra* note 9, at 109.

18. *See* Kaufman, *supra* note 10, at 467–70.

19. *MacPherson v. Buick Motor Co.*, 153 App. Div. 474 (3d Dep't 1912) (citing cases said to involve "inherently dangerous" products). The Appellate Division later unanimously affirmed the judgment after trial in plaintiff's favor. *MacPherson v. Buick Motor Co.*, 160 App. Div. 55 (3d Dep't 1914).

20. *Cadillac Motor Car Co. v. Johnson*, 221 F. 801, 805 (Coxe, J., dissenting).

21. U.S. Dep't of Transportation, Federal Highway Administration, Office of Highway Information Management, Highway Statistics Summary to 1995, Section II, Tables MV-200 & 201, https://fhwa.dot.gov.

22. N.Y. State Dep't of Transportation, *New York Scenic Byways: Bronx River Parkway*, https://dot.ny.gov; *City Opens Bronx Parkway to Traffic*, N.Y. Times, Sept. 17, 1922; *Bronx Parkway Officially Opened*, N.Y. Times, Nov. 6, 1925; Tom Lewis, Divided Highways 29 (Cornell Univ. Press 1997).

23. *Forgotten New York: Long Island Motor Parkway*, forgotten-ny.com; Lewis, supra note 22, at 29–30, 36–37. The Long Island Motor Parkway was acquired by New York State in 1938 and closed as redundant.

24. U.S. Dep't of Transportation, Federal Highway Administration Office of Highway Information Management, Highway Statistics Summary to 1995, Section V, Table FI-200, fhwa.dot.gov.

25. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 391.

26. 6 N.Y. 397 (1852).

27. 10 M. & W. 109 (1842).

28. 6 N.Y. at 408.

29. *MacPherson*, 217 N.Y. at 400 (Bartlett, C.J., dissenting).

30. *Thomas*, 6 N.Y. at 405, 408–09.

31. *Id.* at 410.

32. *Loop v. Litchfield*, 42 N.Y. 351, 359 (1870).

33. *Id.* at 359–60.

34. *Losee v. Clute*, 51 N.Y. 494, 497 (1873).

35. *Devlin v. Smith*, 89 N.Y. 470 (1882).

36. *Id.* at 478.

37. *See Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 869 (8th Cir. 1903) (Sanborn, J.).

38. *Torgeson v. Schultz*, 192 N.Y. 156 (1908).

39. *Id.* at 159.

40. *MacPherson*, 217 N.Y. 382, 396, 398 (dissenting opinion).

41. *Statler v. Ray Mfg. Co.*, 195 N.Y. 478, 482 (1909).

42. *MacPherson*, 217 N.Y. at 385, quoting *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852).

43. *Id.* at 385.

44. *Id.*

45. *Id.* at 391.

46. *Id.* at 390.

47. *Field v. Empire Case Goods Co.*, 179 App. Div. 253, 257 (2d Dep't 1917).

48. Cardozo, *supra* note 3, at 77.

49. Peck, *supra* note 13, at 69.

50. Cardozo, *supra* note 14, at 160.

51. *Id.* at 158–60.

52. *Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (2d Cir. 1919).

53. *Id.* at 886. In its 1915 decision against Johnson, the Second Circuit had tersely stated that it was "not persuaded to the contrary by the decision in *MacPherson v. Buick Motor Co.*, 160 App. Div. 55, 145 N.Y. Supp. 462." *Cadillac Motor Car v. Johnson*, 221 F. 801, 804.

54. *Tompkins v. Erie R. Co.*, 90 F.2d 603, 604 (2d Cir. 1937), *rev'd sub nom. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842)). Cardozo, although then a member of the Supreme Court, did not participate in this landmark decision, having suffered a crippling stroke a few weeks earlier, which later caused his death in July 1938. Kaufman, *supra* note 10, at 567.

CONTRACTS

BY PETER SIVIGLIA

Peter Siviglia has practiced law in New York for more than 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on contract matters and negotiating. Peter is the author of *Commercial Agreements - A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; and numerous articles on writing contracts and other legal topics, many of which have appeared in this *Journal.*

I acknowledge and appreciate the contribution to this article by Stephen D. Brodie, Esq., Co-chair of the Corporate Department and Member of the Executive Committee, Herrick, Feinstein LLP, New York, New York.

Options to Purchase Real Estate

An article on options in the November/December 2014 issue of the *Journal* provided a blueprint on how to construct a playground for litigators: Leave terms of an option open to be settled only after the option is exercised. The article quoted portions of a complaint in a lawsuit concerning an option agreement pertaining to real estate prepared by two well-known New York law firms. Repeating here those portions of the complaint provides a grim reminder of the incident and the importance of the mandate: *Leave nothing to later determination*.

> Pursuant to the Agreement, if [Plaintiff] exercised the option on or before January 31, 1995, then [Plaintiff] and [Defendant] were to enter into a definitive Contract of Sale of the Premises . . . for the sum of $18,000,000 . . . [with] a deposit in the sum of $1,800,000. The Agreement expressly provided that *the Contract of Sale was to be "reasonably satisfactory to [Plaintiff] and its counsel"*(emphasis supplied).
>
> Prior to January 1, 1995, [Plaintiff] attempted to exercise the option under the Agreement and advised defendant that it was ready, willing and able to enter into a contract of sale and make the required deposit.
>
> *[Defendant], in response to [Plaintiff's] exercise of its option, proposed a contract of sale that contained terms that were not reasonably satisfactory to [Plaintiff] and its counsel. Among other things, [Defendant's] proposed contract (i) would have required .* (emphasis supplied).

… and straight on 'til morning.

Following are models[1] of an option and a right of first refusal to purchase real estate.

Regarding rights of first refusal: I urge against granting those rights because the delays and complexities inherent in the procedures can discourage a prospective buyer and result in loss of a market. ■

1. The models in this article will comprise part of the 2018 supplement to *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Copyright © 2015 Thomson Reuters/West. It is pre-printed here with the permission of Thomson Reuters/West. For more information about this publication, visit http://legal solutions.thomson reuters.com/. *Commercial Agreements* also contains models for other types of options accompanied by appropriate commentary.

Lessee's option to purchase real estate during lease term[1]

<u>NOTE: ADJUSTMENTS TO THE MODEL BELOW MAY WELL BE REQUIRED TO CONFORM IT TO THE TERMS AND TERMINOLOGY OF THE APPLICABLE LEASE.</u>

Lessee will have the option to purchase the Property on the terms set forth in this Section by giving Owner notice of its election [Specify election period. For example:

A. not more than one hundred eighty (180) days and not fewer than one hundred (100) days prior to the end of the lease term.

B. at any time after the {specify number} anniversary of the date of this Lease and not fewer than one hundred (100) days prior to the end of the lease term.]

If Lessee elects to purchase the Property,

(i) Owner will sell the Property to Lessee and Lessee will purchase the Property from Owner pursuant to the contract of sale attached hereto as an <u>Exhibit</u> and at the purchase price as hereinafter determined,

(ii) the term of this Lease will end on closing of title, but if title does not close at or be fore the end of lease term, the term of the lease will be extended to the closing of title or until termination of the contract of sale, whichever is the first to occur, and

(iii) if the contract of sale is terminated before the end of the term of this Lease, this Lease will, nevertheless, remain in effect until the end of its then stated term.

Closing of title will be without prejudice to rights and obligations accrued under this Lease to the time title closes.

To be effective, Lessee's notice of its election to purchase <u>must</u> be accompanied by payment by bank check of *[specify amount in words]* dollars ($*[specify amount in figures]*), which will constitute the down payment specified in the <u>Exhibit</u>. Notice by Lessee to Owner in accordance with this paragraph will constitute execution by Owner and Lessee of the contract of sale set forth in the <u>Exhibit</u>, and the date of that contract will be the date of Lessee's notice.[2]

The purchase price for the Property will be its market value as determined by two members of The American Institute of Real Estate Appraisers, one appointed by Owner and the other appointed by Lessee. Lessee's notice of its election to purchase will provide the name, address, telephone numbers, and e-mail address of the person it appoints. Within ten (10) days after Owner receives Lessee's notice of election, Owner will notify Lessee of the name, address, telephone numbers, and e-mail address of the person it appoints.

The appointees of the parties must be familiar with the real estate market for the sale of like properties where the Property is located.

If the persons appointed by Owner and Lessee do not agree on the market value of the Property within thirty (30) days after Owner notifies Lessee of the person that it has appointed, the appointees of Owner and Lessee will, at the request of Owner or Lessee and within ten (10) days after that request is made, appoint to value the Property a neutral, independent member of The American Institute of Real Estate Appraisers familiar with the real estate market for the sale of like properties where the Property is located. The person so appointed will determine the Property's market value within thirty (30) days after accepting the appointment.

To determine the market value of the Property, the persons making that determination may consider any potential use or disposition of the Property, and in making that determination they will assume a willing buyer and a willing seller.

The determination of the persons appointed by Owner and Lessee or, as the case may be, by the person appointed by those two, will be final, binding and conclusive on Owner and Lessee.

Owner and Lessee will each pay the charges of the person it appoints, and Owner and Lessee will each pay one-half of the charges of the person that their appointees appoint.

If any matter under this Section is not determined within the period specified, either party may, at any time prior that matter's being determined, submit to arbitration in accordance with the arbitration provisions of this Lease (i) the determination of that matter, and (ii) amendment to any of the time periods under this Section required in order not to frustrate the provisions of this Section.

Time is of the essence.

As used in this Section, Owner includes any transferee of the Property.

* * *

<u>Alternate Valuation Clause</u>

The purchase price for the Property will be the product of

(A) *[specify a mutually acceptable current value of the property in words and figures]*, and

(B) a fraction, the denominator of which is *[specify the current level of a real estate valuation index applicable to the type of property and, to the extent possible, applicable to the region where the property is located]*, and the numerator of which is the level of that index for the period during which the notice of the election to purchase the property is given.

If the *[specify issuer of the index]* changes the base period or any other aspect of the methodology for the Index, appropriate adjustment will be made to provide an accurate comparison to the Index as of the date of this Agreement.

NOTES

As a precaution, in case the index ceases to be published, consider adding as an alternative the valuation method by appraisal set forth preceding model.

If a valuation clause based on a formula like the one above is used, the foregoing model will require appropriate changes.

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1. In a majority of jurisdictions, options (including rights of first refusal) to purchase real estate are subject to the rule against perpetuities. However, options contained in a lease of real estate, like the one below, are often excepted. *See* John C. Murray, *Options and Related Rights and the Rule Against Perpetuities*, N.Y. Real Prop. L.J. (Fall 2014).

The lease should deal with the effects on both the lease and the option of damage to the property prior to exercise of the option, and the contract of sale between the owner of the property and the lessee, which is attached as an exhibit to the lease and which is deemed signed on exercise of the option, should deal with damage to the property after exercise of the option.

The lessee should arrange insurance to protect its interest in the property once the option is exercised.

2. Since the price will be determined under the following paragraphs *only after* the option is exercised, the lease must state an amount for the down payment so that it can be paid with exercise of the option.

The contract of sale between owner and lessee as set forth in the exhibit should state that on closing of title *the condition of the property will be its condition as of the date of the contract*, subject to ordinary wear and tear and to any other mutually acceptable changes. *Hence*, the option provides that the date of the contract between owner and lessee will be the date of lessee's notice of exercise.

In addition, the exhibit (i) should state that the price for the property will be the price as determined under the applicable option section of the lease, and (ii) should include for the down payment the amount thereof specified in the option section of the lease. Provision should also be made on how to complete any blank spaces. *Nothing should be left to negotiation.*

Lessee's right of first refusal to purchase real estate under lease[1]

<u>NOTE: ADJUSTMENTS TO THE MODEL BELOW MAY WELL BE REQUIRED TO CONFORM IT TO THE TERMS AND TERMINOLOGY OF THE APPLICABLE LEASE.</u>

Owner will not sell all or any portion of the Property prior to the end of the lease term except as provided in this Section.

If Owner receives a "good faith offer" (as that term is hereinafter defined) to purchase the entire Property, Owner will promptly notify Lessee thereof, including with that notice a copy of that offer ("Notice of Offer").

A "good faith offer" is a contract signed by Owner and a buyer (the "buyer) providing for the sale of the Property to the buyer in its condition as of the date of the contract, ordinary wear and tear excepted, free and clear of all liens, claims, violations and other encumbrances, with the entire purchase price payable in cash at closing of title and with title to close not later than *[specify number in words]* (*[specify number in figures]*) days after expiration of the "Offer Period" (as hereinafter defined), with no provision for adjustment to – or for reimbursement of any portion of – the purchase price, with real estate taxes, transfer taxes and other fees, charges and costs pertaining to the sale or to the Property allocated between Owner and the buyer as provided in Sections *[specify section numbers]* of the Exhibit,[2] and subject to the following conditions and to no other condition:

(i) Lessee's rights under this Lease, *[as applicable (see alternative provisions at the end of this model): including // excluding this Section]*;

(ii) conveyance to buyer of marketable title; and

(iii) if desired, buyer's obtaining a loan secured by a mortgage on the Property to enable buyer to purchase the Property provided that such loan is at a then current market rate of interest for that type of loan and that the amount of the loan does not exceed *[specify percentage in words and figures, but not more than 80%]* of the purchase price.

[Add any other mutually acceptable conditions]

Within *[specify number in words]* (*[specify number in figures]*) days after Lessee receives the Notice of Offer (the "Offer Period"), Lessee will notify Owner whether it will purchase the Property at the price for the Property specified in the good faith offer. If Lessee notifies Owner that it elects not to purchase the Property, or if Lessee does not notify Owner of its election within the Offer Period, or if Lessee's election is not made in accordance with the requirements of the following paragraph, Lessee's rights in respect of that good faith offer will terminate, and Owner may sell the Property to the buyer in accordance with the terms of that good faith offer, within *[specify number in words]* (*[specify number in figures]*) days after expiration of the Offer Period[3], and *[select: without amendment to the good faith offer // with only such amendments to the good faith offer that do not preclude the sale under the next paragraph].*

If Owner does not sell the Property to the buyer in accordance with the provisions of the preceding paragraph, including within the time period specified in that paragraph, or

[as applicable:

if the good faith offer is amended, //

if the price for the Property under the good faith offer is [consider: reduced // changed], or if any other arrangement is made that would have the effect of [consider: reducing // changing] that price (including, without limitation, any arrangement with regard to payments on account of taxes, fuel, utilities, or any other charges respecting the Property),]

then Owner may not sell the property to the buyer or any other buyer except by complying with the provisions of this Section in respect of any new good faith offer or in respect of the changed good faith offer as if it were a new good faith offer subject to the provisions of this Section.

If Owner does sell the Property to the buyer, Owner will promptly notify Lessee of the date title closed, including with that notice a statement *[consider: under oath]* that the sale was made entirely in accordance with the provisions of this Section.

If, however, Lessee notifies Owner within the Offer Period that it elects to purchase the Property, Owner will sell the Property to Lessee and Lessee will purchase the Property from Owner at the price for the Property under the good faith offer and pursuant to the terms of the contract of sale attached hereto as an Exhibit. To be effective Lessee's notice of its election to purchase must be accompanied by payment by bank check of the down payment specified in the Exhibit. Notice by Lessee to Owner in accordance with this paragraph will constitute execution by Lessee and Owner of the contract set forth in the Exhibit, and the date of that contract will be the date of the good faith offer.[4]

If Lessee elects to purchase the property

(i) the term of this Lease will end on closing of title, but if title does not close at or before the end of lease term, the term of this Lease will be extended to the closing of or until termination of the contract of sale, whichever is the first to occur, and

(ii) if the contract of sale is terminated before the end of the term of this Lease, this Lease will, nevertheless, remain in effect until the end of its then stated term.

Closing of title will be without prejudice to rights and obligations accrued under this Lease to the time title closes.

Lessee's rights and Owner's obligations under this Section will terminate on proper termination of this Lease due to Lessee's default.

* * *

<u>Select one of the Following Alternatives</u>

<u>A</u>

Lessee's rights under this Section will also terminate upon sale of the Property to a buyer in accordance with the provisions of this Section.

<u>B</u>

While this Lease remains in effect, a sale of the Property to a buyer will not extinguish the provisions of this Section: Lessee's rights under this Section will obtain in respect of any purchaser of the Property.

* * *

1. Time is of the essence.

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2. See note 1 in *Lessee's option to purchase real estate during lease term*, above.

This exhibit is the form of contract – referenced later in the model – between the owner and lessee in the event the lessee exercises its option to buy the property.

With regard to the allocation of taxes and other fees, charges and costs between owner and lessee: In the case of a net lease, the lessee pays those items, so they would not be allocated. But transfer taxes and other fees and charges pertaining to the sale must be addressed.

3. Also add, as appropriate under the circumstances, any other terms that a good faith offer must contain.

4. The number of days here should be the same as the number of days in the definition of a "good faith offer" (third paragraph of this model).

The contract of sale between owner and lessee as set forth in the exhibit should state that on closing of title *the condition of the property will be its condition as of the date of the contract*, subject to ordinary wear and tear and to any other mutually acceptable changes. *Hence*, the option provides that the date of the contract between owner and lessee will be the date of the good faith offer – that is, the date of the contract between owner and the third party buyer.

In addition, the exhibit should state: (i) the price for the property will be the price as determined under the applicable section of the lease, and (ii) the percentage of that price required for the down payment. Provision should also be made on how to complete any blank spaces. *Nothing should be left to negotiation.*

BY PETER SIVIGLIA

Confidentiality Agreements: Supplemental

Edward A. Steen, Esq., Chief Intellectual Property Counsel for Vale Americas Inc., retired, had two comments regarding the article on confidentiality agreements which appeared in the January 2016 issue of the *Journal*.

Expiration dates

Mr. Steen takes issue with my advice that a confidentiality agreement must not contain an expiration date. Mr. Steen always required a mutually agreed-upon date certain for termination, generally from three to seven years. His personal view is that in the vast number of situations it is risky to bind the parties to potentially perpetual agreements.

On the other hand, I always insist on no temporal limitation because, in my opinion, proprietary information of a business should not have an expiration date unless and until it is released under the exclusion for information that comes into the public domain without breach of an obligation of confidentiality.

Interestingly, neither Mr. Steen nor I have ever encountered resistance to our respective positions – possibly because our clients never did a deal together.

Identifying the information

Mr. Steen also commented that his confidentiality agreements always required each party to identify the information that it considers confidential – either in writing or some other manner. The sample agreement in the article does not contain that requirement.

Mr. Steen's comment is certainly reasonable; and many confidentiality agreements, including some that I have written, contain that requirement. However, I prefer the version in the article (1) because forgetting and making mistakes are part of the human condition, and (2) because of the diligence required to properly execute that requirement. I believe the exclusions for prior knowledge and information in the public domain properly address this concern. Nevertheless, for those who prefer Mr. Steen's approach, below is a provision requiring parties to identify information they consider confidential.

> You and we are discussing the possibility of [describe project] (the "Project"). During these discussions, we may furnish information to you and you may furnish information to us which is confidential or constitutes a trade secret (collectively called "Proprietary Information"). The term "Proprietary Information" includes, but is not limited to, plans, drawings, designs, specifications, trade secrets, processes, systems, manufacturing techniques, models and mock-ups, and financial, pricing, sales and cost information. Only information which is clearly identified with a proprietary or confidential notation, marking or legend and, in the case of information delivered orally, visually or electronically, which at the time of delivery or [promptly/within ### days] thereafter is identified as being confidential, will constitute Proprietary Information that is subject to the terms of this agreement governing its use and disclosure.[1]

1. The sample is taken from a confidentiality agreement that appears in Chapter 16B of Siviglia, *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually.

When Does "No" Mean "Yes"?

With Expungements, of Course

By David A. Weintraub

Putative financial advisors seeking to enter the securities industry are required to register with the Financial Industry Regulatory Authority, otherwise known as FINRA. The required registration application is called the Form U4. Question 14A(1)(b) asks whether the applicant has "*ever* been charged with a felony."[1] Question 14I asks a series of questions about whether the applicant has "*ever*" been the subject of certain customer complaints or arbitrations. While these questions are unambiguous, the answers may not be when the applicant has previously had a felony charge or a customer complaint "expunged" from his or her past. If an applicant has been charged with a felony, or has been the subject of a customer complaint, can the applicant lawfully deny either occurrence when completing the U4?

Prior Felony Charges

Being charged with a felony is problematic enough when it occurs. It can remain problematic for years to come, whether in the context of loan, housing or employment applications. In the context of the financial services or securities industry it is especially serious at multiple levels. First, Form U4 is essentially a job application. In many cases, Form U4 represents the first step in the application process, with several more steps before an employment offer is extended. If in step one, an applicant discloses a felony charge from earlier in life, will that applicant ever see step two in the employment application process? Will the second interview even occur? Will a hiring manager accept an explanation such as, "It was mistaken identity. Once the prosecutor realized that I was the wrong guy, the larceny charges were dropped."

The answer is – not likely. In the securities industry, unlike any other industry or profession, the disclosure of a prior felony charge, regardless of whether it led to a conviction or was voluntarily dismissed by a prosecutor, will be part of one's permanent public record. That public record appears on the "BrokerCheck®" portion of FINRA's website and is available to anyone with an Internet connection. In this illustration, the applicant's CRD report will permanently reflect that he was charged with larceny.[2] The CRD report will also reflect that the charges were dropped. Indeed, FINRA aggressively promotes to the general public that investors should investigate their broker. In one advertisement, FINRA writes, "You Check Everything. So Why Not Check Your Broker? Start Searching."

So, from the perspective of a hiring manager, under what circumstances would it be reasonable to hire a person who will forever be forced to wear the "felony badge," especially when compared with hiring the similarly situated person without it? The answer is that the otherwise innocent (but perhaps higher risk) applicant will rarely receive the job offer. That applicant's "felony badge," or label, will essentially be a target on his or her back, even if wrongfully charged or acquitted.[3]

A dilemma faced by any job applicant is whether to disclose the earlier felony charge. In the securities industry, the applicant completing a U4 application is required to answer whether he or she has ever been charged with a felony. It is easy to rationalize that the employer will never discover the 10-year-old felony charge that was dropped two days after being brought. In most industries, including the securities industry, that would be a mistake. Every U4 applicant is fingerprinted. The fingerprint cards are then sent to law enforcement agencies. The felony charges will thus be discovered by either state or federal authorities. The intentional misrepresentation of a fact on a U4 will lead to a statutory disqualification from

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the securities industry. In other words, don't let the door hit you on the way out.

The more difficult dilemma is faced by the "innocent felon" – the one whose criminal record has been expunged by a court of law. Does a judicially granted expungement, or expunction, in the context of an employment application give one the right to dishonestly answer "no" when the truthful answer is "yes"? The answer is not always apparent. Rather, it is a function of (1) the specific language used in the application question, (2) state law, (3) FINRA policy, or (4) a combination of these factors.

In general, if a Walmart job application asks whether an applicant has ever been charged with a felony, under what circumstances could an applicant respond in the negative, when in fact the applicant had been charged with a felony? The only circumstance in which the applicant could deny the prior felony charge is if the applicant received a judicial expungement, or the charge was set aside by some other operation of law. In order to understand the specific rights conferred by an expungement, one must look at state law.

State Laws

An example of a licensing application that provides for no wiggle room is the Nebraska State Bar application. Questions 21 and 22 of the application, like question 14 of the U4, ask whether an applicant has ever been charged with violations of any law in a criminal context. Unlike the U4, however, the Nebraska State Bar application contains the following language: "NOTE: Your responses . . . must include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside." Accordingly, given the very specific language on the Bar application, an applicant would presumably be required to disclose a prior felony charge.[4]

The U4, unlike the Nebraska Bar application, does not contain any similar note or instruction. It is silent. One must therefore look to applicable law to determine what rights an applicant acquired upon obtaining a lawful, court-ordered expungement. Nebraska's expungement statute, R.R.S. Neb. § 29-3523, provides a mechanism for obtaining an expungement of a criminal history. The statute does not, however, describe the rights one acquires upon receiving a criminal history record expungement, or expunction. Those rights are not always clear. Accordingly, a Nebraska resident completing a Form U4 may be left with nothing more than FINRA's guidance on the issue.[5] Residents of other states must look to their home states' statutes in order to understand their expungement rights and limitations.

In New York, when an expungement is judicially granted, "the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution."[6] In other words, if a person is entitled to the statutory sealing of a criminal history in New York, or expungement, it would be reasonable to deny the existence of a prior felony charge when completing a U4.

Florida's expunction statute, § 943.0585, provides that an expungement recipient "may lawfully deny or fail to acknowledge the arrests covered by the expunged record," except under certain explicitly defined circumstances. Those circumstances include candidates for admission to the Florida Bar, those seeking employment with the Florida Department of Children and Families, and certain other categories. The Florida legislature did not create an exception for applications for securities licenses (the U4) that are filed with FINRA and the Florida Office of Financial Services. Accordingly, a Florida resident who obtains a lawful, court-ordered expungement may reasonably believe her or she has the right to "lawfully deny" ever having been charged with a felony. In responding to the question of whether the Florida applicant has ever been charged with a felony, it would not be surprising that Florida applicants would check the "no" box. Moreover, it would be reasonable for the Florida applicant to believe that he or she does not need to ask for FINRA's permission, through its Registration and Disclosure Department, to answer "no." After all, the entire point of conferring the expungement is to provide individuals with a fresh start, or clean slate. Being forced to ask FINRA for permission to lawfully answer "no" is tantamount to letting the cat out of the bag – both FINRA and the prospective employer will have information to which they are not entitled. That is manifestly unfair to the individual who obtained a lawful expungement. Furthermore, there exists the risk that FINRA will not uniformly apply its unpublished criteria for determining whether one can deny the existence of a felony charge.

In Connecticut, an individual who receives a judicially granted erasure of criminal records "shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath."[7] The Connecticut Supreme Court noted that one entitled to an erasure shall be "placed in the same position he would have occupied had he not been arrested."[8]

Galligan v. Edward D. Jones & Co.[9] involved a financial advisor who was terminated by Edward D. Jones & Company, a Missouri-based broker-dealer. Galligan claimed that he was terminated after denying on his U4 that he had previously been convicted or pled guilty or no contest to certain drug-related charges. Pursuant to Connecticut General Statutes § 54-142a, Galligan claimed that his criminal record had been erased, and that as a matter of law he was entitled to deny that the arrest ever occurred. In the context of denying Edward D. Jones's motion for summary judgment on the claim for wrongful termination, the court applied Missouri law in holding that two exceptions to Missouri's employment-at-will policy existed under these facts. First, the court held that a jury could find that Galligan was terminated for his refusal to perform an illegal act. Under these facts, the "illegal act" was the employer's effort to compel Galligan to check the "yes" box when he believed he was entitled to check the "no" box on the U4. Second, the court held that a jury could reasonably find that the "discharge [was] because the employee participated in acts that public policy would encourage."[10] This case clearly illustrates how quickly one can lose his or her career by what is perceived to be an inaccurate or misleading answer to a U4 question. These scenarios will only continue, given the lack of uniformity among the various state statutes, and the difficulty of interpreting those statutes in the context of U4 applications that can conceivably be submitted to more than 50 states and territories.[11]

As another example of the disparity, West Virginia's expungement statute provides that upon expungement, "the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit or other type of application."[12]

Maryland Criminal Procedure Code Ann. § 10-109 defines one's post-expungement rights in connection with employment applications, stating a "person need not refer to or give information concerning an expunged charge when answering a question concerning: (i) a criminal charge that did not result in a conviction." Maryland's statute, like Nebraska's, is not as clear as the statutes in Florida, New York, Connecticut, and West Virginia. The expungement statutes in those states transform criminal records into nullities, thereby giving one the right to deny that the event ever occurred. Notwithstanding the Maryland statute's ambiguity, a Maryland expungement recipient would be reasonable in concluding that he or she may deny the existence of a prior felony charge on a U4 application. However, simply because this position might be reasonable, adopting it may be akin to "cutting off your nose to spite your face." In the financial services industry, the employer is likely to learn of the expunged charge through the fingerprint search process. The U4 applicant therefore has a dilemma – whether to stand on principle and deny the existence of an expunged event, or simply disclose the event, knowing that it will ultimately be revealed in the fingerprint search.[13]

It should be noted that some states do not have statutory mechanisms for the expungement of non-conviction records.[14] Other states have expungement mechanisms that confer limited rights. As previously noted, Florida's expungement statute carves out specific circumstances under which one may not deny the existence of an expunged record. Missouri's expungement statute, § 610.140 R.S.Mo., precludes one from denying the existence of an expunged offense "when the disclosure of such information is necessary to complete any application for: (1) A license, certificate, or permit issued by this state to practice such individual's profession." Because the U4 serves as an application for a securities license within the state of Missouri, one could not deny the existence of a prior criminal record. Each state's statute is unique.

The Uniform Collateral Consequences of Conviction Act

At present, those state statutes providing mechanisms for the expungement of non-conviction records are a hodgepodge. The same is true for mechanisms for the expungement of conviction records. With respect to the expungement of conviction records, which is also relevant for purposes of the U4 application, the state of the law may be changing. In 2010, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Collateral Consequences of Conviction Act.[15] Because of the growth of the convicted population in the United States, millions of people are released from incarceration, probation, and parole supervision every year. A Department of Justice study estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time during their lives.[16] An even greater percentage of Americans will be convicted of crimes but not imprisoned. And an even greater percentage will be *charged* with felonies. This entire population, a high percentage of which is comprised of minorities, is subject to question 14A(1)(b) of the Form U4. An April 2013 report by the U.S. Government Accountability Office noted that from 2007 to 2011, there have been no substantial changes in the number of minorities and women in management in the financial services industry. The representation of minorities in senior management level positions is only 11% at financial firms.[17] According to U.S. Rep. Maxine Waters, of California, author of Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), although the lack of inclusion of women and minorities is not limited to the financial services industry, that sector is the worst offender. One must wonder whether one cause of this is the inclusion of question 14A(1)(b) on Form U4. How many minorities never seek employment in the financial services industry because they will be compelled to disclose felony charges, even though they may have been dropped or expunged?

The reality for any U4 applicant is that a state and/or federal fingerprint search is likely to uncover any prior criminal charges. The day of reckoning will come when the applicant will be required to explain why the "no" box was checked when the perceived correct response was "yes." Before checking the "no" box in reliance upon a court-ordered expungement, any applicant should consult with legal counsel in order to understand what rights were acquired from the expungement, and the practical consequences of exercising those rights.

Prior Customer Complaints

Question 14I of the U4 contains a series of queries regarding prior customer complaints and how they were resolved. FINRA Rule 2080 provides a mechanism for the expungement of customer complaints. Rule 2080's predecessor, Rule 2130, is discussed in NASD[18] Notice to Members 04-16. Unfortunately, neither Rule 2080 nor NASD Notice 04-16 contains a definition of "expungement." The recipient of an expungement, therefore, will simply have information removed, or expunged, from the CRD system. The individual is without guidance as to any additional rights that may have been acquired from the expungement. For instance, if the individual changes jobs within the securities industry and is required to complete a new U4, may the individual deny the existence of the expunged customer complaint? What if the individual applies for employment outside the securities industry? Can the individual deny having been the subject of the expunged matter? Again, availing oneself of the apparent right to say "no" when the answer is actually "yes" carries risk.

Conclusion

Question 14A(1)(b) on Form U4 is antiquated. It serves no legitimate business purpose, especially in view of the fact that an affirmative answer, regardless of the underlying circumstances, will forever appear on an applicant's public CRD (assuming the applicant ever gets through the hiring process), or BrokerCheck® record. The public disclosure of a felony charge that was dropped serves only to embarrass. If indeed such public disclosure served any legitimate business purpose, it would be adopted by the legal, public accounting, and medical communities. Finally, because expungements are neither universally available nor uniformly defined, there will always be confusion in trying to answer questions 14A(1)(b) and 14I of the U4. Although it makes sense for question 14A(1)(b) to be removed in its entirety, a reasonable compromise would be for the otherwise useless responsive information to be removed from one's BrokerCheck® report, and be relegated to the non-public section of Web CRD®. ■

1. Questions 14A(2)(b), 14B(1)(b), and 14B(2)(b) also ask about prior charges, but in other contexts.

2. All of the information contained within a U4 application is submitted to the Central Registration Depository system, operated by FINRA. According to FINRA, Web CRD® "contains the registration records of more than 3,955 registered broker-dealers, and the qualification, employment and disclosure histories of more than 643,320 active registered individuals." The publicly available BrokerCheck® report is essentially a watered down, or redacted version of the Web CRD® report. The Web CRD® report is a publicly available document, but is only available from state regulators, such as the Florida Division of Securities.

3. Lawyers, certified public accountants and physicians do not wear this very public target. As an example, the Florida Bar's website only discloses an attorney's 10-year disciplinary record. There are numerous attorneys admitted to the Florida Bar with felony records. They have been admitted (or allowed re-admission) because their backgrounds have been thoroughly vetted by the Florida Bar. That aspect of their background, unlike in the securities industry, is not placed on public display on the Bar's website, or anywhere else. The Florida Bar does not have a BrokerCheck® equivalent.

4. Query whether a Nebraska Bar applicant, who has obtained a lawful expungement in a state whose statutes explicitly provide that the receipt of an expungement is absolute, can argue that disclosure to the Nebraska Bar is not required? Can the Nebraska Bar applicant rightfully treat the expunged charge as a nullity? Or has the applicant just added a year or two to the licensing process?

5. On March 5, 2015, FINRA released *Form U4 and U5 Interpretive Questions and Answers*. FINRA was asked whether one is required to report a conviction which was ultimately pardoned. From FINRA's perspective, FINRA is the sole arbiter of whether an item is reportable. Any court order granting a pardon is required to be sent to FINRA's Registration and Disclosure Department for review. FINRA employees within that department then determine whether the item must be disclosed on Form U4. Because this interpretation requires one to disclose a prior felony conviction or charge to both FINRA and a prospective employer, it is inconsistent with the legislative intent of those states that have enacted laws recognizing the right to both privacy, and a fresh start, where a judge has explicitly ruled that the prior charge or conviction may forever be considered a nullity – as if it had never occurred. *See, e.g.*, N.Y. Criminal Procedure Law § 160.60 (CPL) and Fla. Stat. § 943.0585.

6. CPL § 160.60.

7. Conn. Gen. Stat. § 54-142a.

8. *City of New Haven v. AFSCME, Council 15, Local 530*, 208 Conn. 411, 544 A.2d 186 (Conn. 1988).

9. 2000 WL 1785041 (Conn. Super. Ct. Nov. 13, 2000).

10. It should separately be noted that regardless of the statutory "erasure," Galligan answered U4 question 22 correctly. He was only charged with a misdemeanor, and the charge did not involve the investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion.

11. Typically, an individual would sign a single U4 application. That application is then sent to each state in which the applicant wishes to be registered.

12. W. Va. Code § 61-11-25.

13. In the event the employee is later terminated after refusing to disclose information about the criminal charges, the employer may be subjected to criminal charges. Md. Criminal Procedure Code Ann. § 10-109(b)(1).

14. Idaho, Montana, North Dakota and Wisconsin do not have statutory provisions for expungements of non-convictions.

15. The Uniform Collateral Consequences of Conviction Act was first put into law in Vermont and signed into law on June 10, 2014. Uniform Collateral Consequences of Conviction Act (Added 2013, No. 181 (Adj. Sess.), § 1, eff. Jan. 1, 2016). With respect to expungements of non-convictions, §§ 7603 and 7606 apply. Section 7606, signed into law in 2012, provides, "In any application for employment, license, or civil right or privilege or in an appearance as a witness in any proceeding or hearing, a person may be required to answer questions about a previous criminal history record only with respect to arrests or convictions that have not been expunged."

16. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974 – 2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976), as cited in Prefatory Note to Uniform Collateral Consequences of Conviction Act.

17. Doreen Lilienfeld and Amy Gitilitz Bennett, *Will Dodd-Frank's Diversity Mandates Go Far Enough?*, Law 360, cited in U.S. Magistrate Karen Wells Roby, *Diversity and Inclusion: The Financial Services Sector and Dodd-Frank*, ABA Section of Litigation, 2015, http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/financial-services-sector-dodd-frank-diversity.html.

18. National Association of Securities Dealers, now known as FINRA, or Financial Industry Regulatory Authority.

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Tax-Advantaged Investing in Booming ASEAN Economies

By Robert W. Wood and Huy C. Luu

Investors venturing into foreign lands for acquisitions or investments may seek stellar returns, enhanced by a mixture of attractions that is hard to define. Structuring a deal may be daunting in the fluid legal and regulatory environment of an emerging economy. They are far less established and regulated than Americans are accustomed to seeing. For some investors, the tax impact of a transaction may be an afterthought or may not be considered at all. Taxes should be considered in any investment, foreign or domestic. That is certainly true with investment into members of ASEAN (the Association of Southeastern Asian Economies), which is comprised of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. To avoid unpleasant tax surprises, investors in these emerging Asian economies should plan their structures carefully.

Tax Treaty Considerations

Tax treaties often play a critical role in cross-border transactions. Investors want to maximize profits in a tax-efficient manner without leaving too much cash trapped in the jurisdiction. Investors should understand the tax implications on profit repatriation and potential future capital gains on the investment.

Some of the typical checklist issues to consider include:

- Whether paying dividends (or other profit repatriation measures) will attract withholding tax in the host jurisdiction (i.e., the jurisdiction of the entity that is making the payments);
- Whether the receipt of foreign dividends or other foreign source income by the investor will be subject to tax in the investor's home jurisdiction;
- Whether mechanisms can be put in place to minimize the effect of double taxation;
- The capital gains tax impact on a future divestment of the investment.

With all of these concerns, investors should analyze applicable tax treaties to determine whether taxes can be minimized. If the investor is a U.S. resident, the investor should see if the U.S. has concluded a tax treaty with the host jurisdiction. Without a tax treaty, the taxes in the host jurisdiction and the investor's jurisdiction may result in double taxation on any profits.

Example:

> A U.S. company has investments in Indonesia. Upon earning profits, the Indonesian entity distributes dividends. The withholding tax rate for dividends to a non-resident of Indonesia is 20%. Thus, if the dividend payment is $100, the Indonesian entity must withhold $20 and send $80 to the U.S. investor. Upon receipt of the net $80 in dividends, the investor must also pay U.S. tax.

Fortunately, under the U.S. tax treaty with Indonesia, the maximum withholding tax rate for dividends is 15%. As a result, Indonesia's 20% withholding tax is reduced to 15%.[1]

If the U.S. investor sells its shares in the Indonesian entity, the gain (if any) would be taxed at Indonesia's 25% ordinary income rate. However, the U.S.-Indonesia tax treaty exempts the U.S. investor from paying taxes on capital gains in Indonesia. The result is that only the U.S. may impose tax on the gain.[2]

Most tax treaties contain a clause providing relief from double taxation. In general, if the U.S. imposes taxes on the same income that was subject to tax in the foreign jurisdiction, a tax credit is generally permitted to provide relief from double taxation.[3]

The Internal Revenue Service provides a list on its website of U.S. tax treaties that are currently in effect.[4]

Administrative Hurdles

Tax treaty benefits in many Asian jurisdictions are not always automatic. Indonesia, for example, requires foreign investors to complete relevant forms and detailed questionnaires and to submit them to the Indonesian tax authorities. Vietnam requires notification to the tax authorities that the foreign investor is claiming entitlement under a tax treaty.

Moreover, the investor must generally obtain a tax residency certificate in the investor's home jurisdiction. In some countries, there are timing constraints as well, with treaty benefits conceivably being lost because the foreign investor is not timely in making requisite treaty benefits claims.

Some jurisdictions have anti-tax avoidance rules that may give tax authorities discretion to deny treaty benefits if they determine that the recipient is not the true beneficial owner of the payments. This latter danger can sometimes loom large with complex structures.

Direct or Indirect Holdings?

There are many reasons a U.S. investor may decide not to hold an interest in a foreign company directly. The U.S. investor may want to employ an intermediary foreign entity. In the context of emerging Asian economies, a typical intermediary company would be located in either Singapore or Hong Kong.

Both Singapore and Hong Kong offer tremendous tax benefits for offshore investments. For one thing, the receipt of foreign dividends by the investor generally does not trigger taxation (subject to certain conditions). Another tax benefit is that neither Singapore nor Hong Kong has a capital gains tax.

There are operational tax advantages, as well. Corporate income tax rates in Singapore (17%) and Hong Kong (16.5%) are relatively low when compared to other developed jurisdictions. Both jurisdictions are stable, predictable, and easy to navigate.

Moreover, Singapore and, to a lesser extent, Hong Kong, have concluded tax treaties with most emerging Asian economies. Many of Singapore's tax treaties include a favorable clause with respect to capital gains. Under a typical provision, only the state in which the transferor is a resident (i.e., Singapore) is allowed to impose capital gains tax on the transaction.[5] This is significant because, as noted, Singapore does not impose any capital gains tax.[6]

Example:

> A U.S. investor uses a Singapore intermediary to acquire a company in Vietnam. Under Vietnam's tax law, the payment of dividends by the Vietnamese entity to the Singapore intermediary is not subject to withholding tax in Vietnam. In addition, dividends received by the Singapore intermediary are not taxable in Singapore.
>
> What if the Singapore entity sells the investment in Vietnam at a gain? Normally, there would be a capital gains tax in Vietnam. However, the Singapore-Vietnam tax treaty only permits *Singapore* to tax the gains (as long as the Vietnamese company does not principally hold immovable property).[7] As a result, Vietnam is not allowed to impose *any* tax on the sales transaction, and Singapore does not have a capital gains tax.

Despite this impressive example, one should use caution with intermediary companies in Singapore, Hong Kong, etc. One should also consider the tax consequences under the U.S.-controlled foreign corporation (CFC) rules.[8] They would capture Subpart F income of the intermediary company.

Of course, under U.S. law, there would generally be an immediate tax on the income in the U.S. With proper U.S. tax planning (such as check-the-box rules) the risks imposed by the CFC rules can often be mitigated. But one must plan ahead to avoid an unpleasant surprise.

Another word of caution: both Singapore and Hong Kong adhere to a general anti-tax avoidance stance. Neither wants to be seen as a tax haven. An investor should not employ a mere conduit or shell company in Singapore or Hong Kong to take advantage of tax treaty benefits. The transaction and the entity should always have economic substance. Economic substance may include having operational activities, having employees, filing tax returns, having a physical office, etc.

BIT Considerations

Another consideration for U.S. investors is the investment protection of their interests in foreign jurisdictions. Such concerns are often palpable, particularly in an emerging market where the rule of law may not be consistently applied. Investment protection typically comes in the form of a bilateral investment treaty (BIT).

A BIT is meant to encourage investments between the signatory countries. Moreover, it is also meant to protect the investment interest(s) of the foreign investor. A BIT generally includes clauses relating to national treatment. A foreign investor must be treated fairly, and in the same manner as a domestic investor.[9] A BIT also includes a clause limiting expropriation by the foreign government.[10]

The U.S. has concluded a number of BITs with other countries. Curiously, though, very few are in Asia.[11] Thus, a U.S. investor that plans to invest directly into a region where no BIT has been concluded (for example, Southeast Asia) would not be guaranteed certain investment protection afforded under the BITs to which the U.S. is a signatory.

Intermediary BIT Shopping?

In certain cases, one can invest through another entity in a jurisdiction that *has* concluded a BIT with the host country. In the context of emerging Asian economies, an investor may consider the ASEAN Comprehensive Investment Agreement (ACIA).

ACIA is a type of BIT among the ASEAN countries that protects foreign investments in certain industries, such as manufacturing, agriculture, fishery, forestry, mining and quarrying, as well as other types of investments to which the member states agree.[12] The ACIA includes clauses regarding national treatment[13] and expropriation[14] that are similar to the U.S. Model Bilateral Investment Treaty provisions.

Although taxation is not explicitly addressed in the ACIA, it may be applied indirectly. For example, the national treatment clause would require the foreign jurisdiction to treat domestic and foreign investors in the same manner. Arguably, that nondiscrimination would include application of the tax laws.

Domestic Tax Considerations

There is much talk today of prevailing corporate tax rates. In order to attract more foreign investment, many emerging markets in Asia have recently reduced their corporate income tax rates. Some of the emerging markets offer additional tax incentives in an effort to compete with more stable and developed Asian economies, such as Singapore and Hong Kong.

Thus, U.S. investors should not be focused solely on tax treaties and BITs. Understanding the domestic tax landscape is also important. Different jurisdictions may have different tax incentives that could be attractive.

One notable incentive offered by some jurisdictions in Asia is the regional operating headquarters (ROH) incentive. Multinational corporations tend to focus their regional headquarters in Singapore or Hong Kong due to attractive tax benefits. These include low corporate income tax rates, no capital gains tax, and an exemption on foreign-source income.

There are changes occurring here, as well. In an effort to remain competitive and to lure foreign companies to establish their headquarters there, Thailand implemented a comprehensive ROH regime.[15] It offers tax incentives to foreign investors designed to make Thailand competitive with other regional hubs.

Malaysia has a comparable ROH regime referred to as the principal hub tax incentive regime.[16] It provides tax incentives to companies using Malaysia as a base for conducting regional and global operations.

Another incentive some jurisdictions offer is tax exemption for certain projects located in lesser developed areas. For example, Vietnam has moved to encourage investments in rural and economically disadvantaged areas.[17] The government is empowered to provide attractive tax incentives for investing into such regions for a stated length of time.

In Myanmar, economic development stalled for more than six decades due to military dictatorships. However, the country has recently opened to foreign investment. Myanmar now offers tax incentives for certain new investments approved by the Myanmar Investment Commission.[18]

Cambodia may also be attractive, as it provides for tax incentives for projects that meet certain investment thresholds. Curiously, though, the tax incentives are not available for investments on a so-called "negative list" proscribed by the government.[19]

Good, Bad or Ugly?

There are so many different tax incentives in the ASEAN region that the hopscotch can at times seem random. The changing patterns clearly prove the importance of understanding the local tax landscapes when investing there. From a tax viewpoint, not all countries are created equal.

Moreover, some jurisdictions may have larger international exposures than others, and some may be better equipped to handle complex tax matters. In addition, one jurisdiction may have specific incentives that are not available in neighboring countries.

It is a useful reminder that there is usually a mixture of considerations in the region. Benefits one may receive with one hand may be deprived with another. And since an environment can change, there is an inevitable focus on the timeline for an investment. There must be some recognition that in emerging economies and shifting legal environments, things can change.

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means the actual knowledge of Seller's directors and officers, and the knowledge that such directors and officers would have after due inquiry." By defining knowledge to include knowledge that would be obtained after due inquiry, the buyer's risk minimizes that the seller might negligently or unintentionally refuse to learn about non-compliance.

The words "shall" and "shall not" should always be used in covenants.[25] Some commentators propose "will" and "must" as alternatives to "shall," but using "will" and "must" in creating obligations gives rise to ambiguities. "Shall" expressly creates an obligation. It means "has a duty to."[26] For example, a clause could read: "Purchaser shall wire the Purchase Price to Seller." This clause provides that the purchaser has a duty to wire the purchase price to the seller, thereby imposing an obligation on the seller. To convey a prohibition, "shall not" should be used to state that the party "has a duty not to" do something.[27] The word "will" may appear in a covenant but will not always be construed to convey an obligation.[28] "Will" can be used to express an action in the future, but not current obligations.[29]

A statement using the word "will" could look like this: "If the prevailing interest rates drops below the adjusted rate, then this agreement will terminate." *Example*: "The General Partner shall use commercially reasonable efforts to find at least ten limited partners, each of whom will invest $1 million in the Partnership."[30] Because the word "will" can be construed in different ways, "shall" is the preferred term in creating obligations. The word "must," though sometimes used as an alternative to "shall," can signify a condition. *Example:* "If the company must [is required to] pay an excise tax on the Product of 20% or less under applicable law, then Newcomer Co. shall [hereby has a duty to] sell the Product."[31] Commentators have explained that "[m]ust does not create a duty; it only asserts that a duty exists."[32] "Must" often signifies an obligation that derives from a provision other than the one being used.

Because of the ambiguities arising from using "must" and "will," consistently using "shall" in creating obligations promotes contractual clarity. Phrases like "is obligated to," "agrees to," "covenants and agrees to," and "undertakes to" don't carry the same weight. To ensure that a party is obligated to do something, stick with "shall."

A practice tip for the proper use of the word "shall" is to substitute in your mind the phrase "hereby has/have the duty to" in place of "shall."[33] Following this tip limits the potential that someone will misconstrue the contract.

Different ways of expressing a party's obligations create varying degrees of obligations that allocate risk among the parties to a covenant.[34] An example of a covenant: "Seller shall not alter in any manner the overall state of the business before the Closing Date." As the seller's counsel, you can minimize the seller's risk by including a "material" qualification, such as: "Seller shall not alter in any *material* manner the overall state of the business. . . ." By inserting the word "material" before "manner," the seller's obligation not to alter has been reduced.

A contract right, on the other hand, flows from another party's covenant.[35] If there's a covenant, there's generally a correlative right. For example, a provision that provides that "Buyer shall pay Seller the Purchase Price at Closing Date" is a covenant. The seller's right may then be expressed as "Seller is entitled to be paid the Purchase Price at Closing Date." The main purpose of contracts, however, is to create obligations. Thus, it's always better to phrase rights as covenants.[36]

You can't impose obligations on non-parties to a contract. For example, "Accountants must issue a report showing a calculation of the Final Net Working Capital." Rephrase this provision to impose the obligation on the contracting party: "The parties shall use their respective reasonable best

Covenants are critical for long-term contractual relationships.

Covenants and Rights

An obligation is a statement indicating what a party must do under a contract.[15] Some obligations are prohibitions, or statements indicating what a party is prohibited from doing under a contract. These statements, otherwise known as covenants, are defined by the Restatement (Second) of Contracts as commitments "to act or refrain from acting in a specified way."[16] When covenants are breached, the injured party can successfully sue for damages and specific performance.[17] If there's a material and incurable breach, a party might have the right to cancel the contract, together with other remedies.[18] Covenants don't guarantee that the party will or won't do what the party promised.[19] They give the other party a breach-of-contract claim if the covenant is not met or violated.[20]

Covenants are critical for long-term contractual relationships.[21] They outline the conduct parties must maintain for the duration of the contract.[22] For example, a covenant for a year-long consulting contract may look like: "Consultant shall perform the consulting services in a professional manner and to the Company's reasonable satisfaction."[23] If this covenant has been breached, it allows, with a termination provision, the company to terminate the contract early.[24] For this reason, expressing a party's obligation clearly and unambiguously is paramount.

efforts to cause the Accountants to reach a final determination . . . ."[37]

You can impose a consequence on a single party, or both parties, to the agreement if an outside event involving a third party takes place. When selling a home, for example, delays before the closing occur frequently because the buyer needs to obtain financing, a situation that depends on a third party.[38] To account for this, include in the contract a financing covenant in which the buyer's obligation to close arises only after the buyer obtains financing.[39] Similarly, the buyer might be concerned that the seller will fail properly to maintain the property between the time the offer is accepted and the closing. The buyer's attorney in that case might want to include a covenant that the seller will maintain the property until the closing.[40]

Conditions

Conditional clauses modify languages of obligation, discretion, prohibition, and policy.[41] The Restatement (Second) on Contracts provides that "[a] condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."[42] An uncertain event must occur in a condition before a party is obligated to perform.[43] Others have defined "conditions" to be operative facts on which the existence of some legal relation depends.[44]

In drafting conditional clauses, your primary concern is to get the parties to decide on the state of facts that must exist before a party is obligated to perform.[45] Lawyers normally use the following words or phrases in drafting conditions: "if/then," "must," "when," "subject to," "provided that," "if," "on condition that," and "on."[46] But "these words do not guarantee that the court will construe the provision as a condition."[47] When it's not clear, courts prefer to construe provisions as covenants instead of conditions, because conditions often result in parties' forfeiting their rights.[48] If you want to make a provision clearly a condition, state that a provision is a condition. Use "must" and state that "must" signals a condition; use "if/then" sentence structure; and outline the consequences of failing to comply with the condition.[49] By agreeing to a condition, the parties agree to allocate risk. There's risk because a failure to satisfy a condition discharges the performing party's obligation.

> Conditions allocate risk. There's risk because the facts making up a condition are uncertain to occur.

There're conditions to performance, discretionary authority, and declarations. An example of a condition to performance is this: "As a condition to Buyer's obligation to close, Buyer must receive an opinion from its counsel that the sale of ABC Co. to Buyer shall qualify as a reorganization under Section 368(a) of the Code." To reduce the risk that the buyer won't comply with its obligations to the seller, the seller's counsel can rephrase the provision to focus on the buyer's degree of effort, such as: "Buyer shall use its reasonable best efforts to cause its counsel to provide an opinion that the sale of ABC Co. . . . ." With this rephrasing, the buyer's obligation to close arises, even if the buyer doesn't receive the required opinion from its counsel, for as long as it used its reasonable best efforts to cause its counsel to provide the required opinion.

Discretionary Authority

Discretionary authority essentially grants a contract party the permission to act.[50] This choice or permission to act allocates risk because "[i]t subjects the party without the discretion to the consequences of the actions of the party with the discretionary authority."[51] The word "may" is generally used to signal a grant of discretionary authority. In *Pravin Banker Assocs. Ltd. v. Banco Popular del Peru*, the court interpreted the following provision as an explicit permission, and not a restriction: "We [the Bank] may assign all or any part of our interest in this letter agreement to any financial institution."[52] With this provision, the bank could assign its rights to any financial institution, but not to the exclusion of all other institutions. Because the contracting parties' intent was to create a condition and not seek permission, more precise and concise language could've been used, such as: "The Bank may assign all or any part of its rights in the Loan but only to a Qualified Financial Institution," or "The Bank shall not assign all or any part of its rights in the Loan to any Person, except to a Qualified Financial Institution."

Sometimes discretionary authority is subject to a condition. *Example*: "If an Event of Default occurs and is continuing, the non-defaulting party may terminate this Agreement." The use of the word "may" in this example authorizes the non-defaulting party to terminate the agreement if a specified condition occurs.

According to one expert, "[a] grant of discretionary authority often appears as an exception to a prohibition."[53] *Example*: "Buyer shall not assign any of his rights under this Agreement without Seller's prior written consent." As counsel for the buyer, you might allocate risk by adding the clause, "which consent Seller shall not unreasonably withhold."

Declarations

"A declaration is a statement of fact or policy that the parties agree will govern their actions during the agreement."[54] No rights or remedies are associated with it.[55] All definitions are declarations. The governing-law provision is a declaration. Acknowledgments, which are statements in a contract that a party accepts as true, also take the form of declarations. Declarations align the parties' intentions, serve as an estoppel, and are stronger than recitals.[56] The language needn't say, "The parties acknowledge and agree" to the declarations. Parties shouldn't use acknowledgements to introduce other categories of language. For example, it is improper to say, "The Purchaser acknowledges that it shall pay the Closing Costs at the Closing . . . ." Proper language in drafting declarations can solidify what both parties know is true. *Example:* "This Agreement is the parties' complete and exclusive agreement on the matters contained in this Agreement."[57]

A condition may also exist in a declaration: "If any party assigns its rights under this Agreement in violation of this section, that assignment is void." In this sentence, a state of facts or condition must exist — the assignment of rights in violation of the section — before a policy or declaration (void assignment) has substantive consequences.

In the next issue of the *Journal*, the *Legal Writer* discusses contractual endgame and boilerplate provisions.

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1. Tina L. Stark, Drafting Contracts: How and Why Lawyers Do What They Do 9 (2d ed. 2014).
2. Black's Law Dictionary 1493 (10th ed. 2014).
3. Stark, *supra* note 1, at 13 (citing Restatement (Second) of Contracts § 159 cmt. c (1981)).
4. Deborah B. McGregor & Cynthia M. Adams, International Lawyer's Guide to Legal Analysis and Communication in the United States 307 (2008).
5. *See* Restatement (Second) of Torts § 552C (1977); Stark, *supra* note 1, at 16 (citing *Bortz v. Noon*, 729 A.2d 555, 563–64 (Pa. 1999)).
6. Stark, *supra* note 1, at 16 (citing *Liberty Mut. Ins. Co. v. Decking & Steel, Inc.*, 301 F. Supp. 2d 830, 834 (N.D. Ill. 2004)); Restatement (Second) of Torts § 552 (1977)).
7. *See* Restatement (Second) of Torts § 525 (1977); Stark, *supra* note 1, at 16 (citing *Skurnowicz v. Lucci*, 798 A.2d 788, 793 (Pa. Super. 2002)).
8. Restatement (Second) of Torts § 537 (1977).
9. Charles Fox & Jane Scott, *Contract Drafting in 90 Minutes*, https://www.youtube.com/watch?v=d3VuHSmeAIw (last accessed July 29, 2015).
10. *See* Restatement (Second) of Contracts § 2 cmt. d. (1981).
11. *See* Brian Stuart Duba & Frost Brown Todd LLC, Proceedings of the 33rd Annual Inst., § 17.11 Indemnification, 33 E. Min. L. Found § 17.11 (2012).
12. *See CBS Inc. v. Ziff-Davis Pub. Co.*, 75 N.Y.2d 496, 500–05, 553 N.E.2d 997, 999–1002, 554 N.Y.S.2d 449, 452–54 (1990).
13. Stark, *supra* note 1, at 16.
14. *Id.* at 19.
15. Restatement (Second) of Contracts §§ 1 & 2 cmt. a.
16. *Id.* § 2(1).
17. Stark, *supra* note 1, at 25.
18. *See* U.C.C. §§ 2-106(4), 2-612, 2-703.
19. William K. Sjostrom, Jr., An Introduction to Contract Drafting 15 (2d ed. 2013).
20. N.Y. Prac., Contract Law § 11:23, at 28.
21. Sjostrom, *supra* note 19, at 18.
22. *Id.* at 18–19.
23. *Id.* at 19.
24. *Id.*
25. *See* Stark, *supra* note 1, at 151.
26. *Id.*
27. *See id.* at 154.
28. *See id.* at 151.
29. McGregor & Adams, *supra* note 4, at 304.
30. Stark, *supra* note 1, at 152.
31. Adapted from Vincent R. Martorana, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider, PPT slide 41 (N.Y. St. B. Ass'n, CLE, Feb. 2015).
32. McGregor & Adams, *supra* note 4, at 303.
33. *Id.* at 96.
34. Stark, *supra* note 1, at 24.
35. *Id.* at 11–12.
36. *Id.* at 152.
37. Adapted from Vincent R. Martorana, Supplemental Outline, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider 11, 12 (N.Y. St. B. Ass'n, CLE, Feb. 2015).
38. Sjostrom, *supra* note 19, at 14.
39. *Id.* at 15.
40. N.Y. Law & Practice of Real Property §33.67, at 2 (2d ed.).
41. Kenneth A. Adams, Legal Usage in Drafting Corporate Agreements 40 (2001).
42. Restatement (Second) of Contracts § 224.
43. Stark, *supra* note 1, at 29.
44. *See, e.g.*, Adams, *supra* note 41, at 39 (citing 3A Arthur L. Corbin, Corbin on Contracts § 627(1960)).
45. Stark, *supra* note 1, at 163.
46. Restatement (Second) of Contracts § 226, cmt. a; Stark, *supra* note 1, at 164 (citing *Ross v. Harding*, 391 P.2d 526, 531 (Wash. 1964)).
47. Stark, *supra* note 1, at 164 (citing *Cedar Points Apts., Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748, 752-53 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983)).
48. *See McAndrew v. Lanphear*, 280 A.D. 6, 9, 111 N.Y.S.2d 238, 241–42 (4th Dep't 1952).
49. *Id.*
50. Stark, *supra* note 1, at 36 (citing *Arostook Valley R.R. Co. v. Bangor & Arostook R.R. Co.*, 455 A.2d 431, 433 (Me. 1983)).
51. *Id.*
52. *Id.* at 175 (citing *Pravin Banker Assocs. Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 856 (2d Cir. 1997)).
53. *Id.* at 37.
54. *Id.* at 38.
55. *Id.* (citing TriBar Opinion Committee, *Third Party "Closing" Opinions*, 53 Bus. Law. 592, 605–06, 620 (1998)).
56. Martorana, *supra* note 37, at 16.
57. Stark, *supra* note 1, at 179.

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Daniel Eth *Hackensack, NJ*	Richard J. Inzerillo *Williston, FL*	Susan A. Sovie *Watertown, NY*

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Conclusion

Direct, indirect, wholly owned or fractional joint venture? However and wherever one does it, dipping a toe into a foreign jurisdiction can be exciting. Even relatively small investments can yield significant profits for an investor.

However, planning and local knowledge are key. If the investment is not carefully planned from a tax perspective, the consequences may be unimpressive, perhaps even disastrous. The very nature of cross-border transactions involves multiple sets of laws often laced together with tax and other treaties. Investors should consult savvy tax advisors, and be wary of paths that appear to be too well-worn.

Yet, they should also be careful about going down paths that have never been tread. And wherever possible, they should make contingency and repatriation plans. Legal, political, and tax matters can change quickly, and being nimble pays dividends. By observing these rules, investors can earn handsome returns on their investments in emerging economies. ■

1. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, U.S.-Indonesia, art. 11, July 11, 1988.

2. *Id.*, art. 14(2).

3. *See* U.S. Model Income Tax Convention, art. 23, Nov. 15, 2006.

4. www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z.

5. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to the Taxes on Income, Singapore-Thailand, art. 13(3), Apr. 27, 1976; Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Singapore-China, art. 13(6), July 11, 2007; Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Singapore-Vietnam, art. 13(5), Sept. 9, 1994.

6. *See* https://www.iras.gov.sg/IRASHome/Individuals/Locals/Working-Out-Your-Taxes/What-is-Taxable-What-is-Not/Gains-from-Sale-of-Property--Shares-and-Financial-Instruments/; *see also* Singapore Income Tax Act, § 10(1) (imposing income tax on profits that are income in nature, not capital in nature).

7. *See* Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Singapore-Vietnam, art. 13, Sept. 9, 1994, amended by the Second Protocol, Jan. 11, 2013 (providing, in part, that:

> 4. Gains derived by a resident of a Contracting State from the alienation of shares, other than shares of a company quoted on a recognized stock exchange of one or both Contracting States, deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.
>
> 5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.).

8. Internal Revenue Code §§ 951–964.

9. 2012 U.S. Model Bilateral Investment Treaty, art. 3.

10. *Id.*, art. 6(1).

11. A full list of BITs concluded by the U.S. is available at www.state.gov/e/eb/ifd/bit/117402.htm.

12. ASEAN Comprehensive Investment Agreement, art. 3, Feb. 26, 2009.

13. *Id.*, art. 5.

14. *Id.*, art. 14.

15. *See* Royal Decree No. 405, Dec. 22, 2001.

16. *See* Malaysia 2015 Budget.

17. *See* Circular No. 78/2014/TT-BTC, June 18, 2014, as amended and supplemented by Circular No. 96/2015/TT-BTC, July 1, 2015.

18. *See* Foreign Investment Law, Feb. 24, 2015; Union Parliament Law No. 21, Nov. 2, 2012.

19. *See* Law on Taxation (1997, as amended in 2003); Sub-Decree No. 111 (2005).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am the lead attorney on a big and important case for the litigation group at my firm, which is currently short-staffed. When I received an email from our managing clerk that our opposition papers to our adversary's motion to dismiss would be due in one week, I started to panic!

Not only was my mother recently hospitalized, but the senior associate on the case (and his wife) just had a baby and he was going to be out of the office for the next week. With so many personal and professional commitments, I had just completely overlooked this looming deadline.

Out of desperation, I called my adversary. I calmly and politely explained the situation and asked for a 30-day extension of time to draft our opposition. My adversary did not seem sympathetic at all and told me he would consult with his client and get back to me. Within the hour, my adversary called me back and told me that his client wanted to aggressively pursue this case and was tired of what he perceived as constant delays and postponements. In short, my adversary informed me that his client wanted a "take no prisoners" approach in the case and was instructed by his client to not grant any requests to extend deadlines or courtesies. Although I tried to reason with opposing counsel and explain that an extension of time is a basic courtesy and would not prejudice his client, he responded that his client was "sick and tired of lawyers being nice to each other," and the extension was denied.

Is my adversary's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
A.M. Civil

Dear A.M. Civil:

We wrote in a prior Forum about civility best practices between opposing counsel (Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2012); your question allows us to revisit the issue.

Your panicked predicament is one that many litigators can relate to! It is to be expected that during the course of one's career, both personal and professional commitments, including the unforeseen circumstances you have described, may require attorneys from time to time to seek courtesies and flexibility from opposing counsel. But sadly, one lawyer's personal problem is often seen by an adversary as an opportunity to gain a tactical advantage. In a professional moment, when you rightly expected your adversary to understand and perhaps sympathize with your situation, instead of granting you a basic courtesy you literally got the door slammed in your face. While the refusal to extend you such a courtesy is not a *per se* violation of the New York Rules of Professional Conduct (NYRPC), or the basis for a report to the Disciplinary Committee at this time, the behavior you experienced, in our view, certainly violates the New York State Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), particularly if this is the first time you are asking for an extension on this motion.

The Standards, which were first proposed by the NYSBA's Commercial and Federal Litigation Section, were adopted by the courts to guide the legal profession, including lawyers, judges and court personnel, in observing principles of civility. Although the Standards are not intended to be enforced by sanctions or disciplinary action, they give us basic principles of behavior to which lawyers should aspire.

Part II(B) of the Standards states that "[l]awyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case."

Part III of the Standards states that "[a] lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of their clients' interests." Part III is divided into five sub-points:

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.
B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are 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.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

See Standards Part III. (A)–(E).

In the situation you have described, where it does not appear that the extension of time requested for your opposition papers would prejudice your adversary's client, one should expect an adversary to consent to a reasonable extension of time purely as a professional courtesy. Trying to take advantage of an adversary's scheduling conflict to gain some kind of tactical advantage is not just bad form, it reflects poorly on the attorney and/or his law firm. Practically speaking, this strategy is also unwise and does not pass for effective advocacy. Attorneys and their clients should know that an attorney who establishes a bad relationship with his adversary (and ultimately the court) is taking a big risk should problems arise for him or his client in the future of the case. As the saying goes, what goes around comes around, and if the uncooperative attorney needs a professional courtesy in the future, he should not expect one in return.

We are sure that some may argue that your adversary's behavior is justified because he is simply following his client's orders and is acting within the confines of zealous advocacy. We disagree with that view and believe that there is a better tack that our profession should take in these situations that keeps us on a proper course. First, as stated in our prior Forum, the decision of whether to grant an extension of time is a matter that ought to be decided only amongst the attorneys involved in a particular case and should not require express client consent. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2012. Second, while lawyers are surely charged with representing their clients zealously, refusing to provide a common courtesy such as an extension of time does not, in our view, generally advance the client's case or our profession. To the contrary, incivility between attorneys disserves the profession and the client. In the words of the Honorable Sandra Day O'Connor:

> [T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and system itself lose esteem in the public eyes.
>
> . . .
>
> [I]ncivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.
>
> The Honorable Sandra Day O'Connor, Civil Justice System Improvements, Speech to American Bar Association (Dec. 14, 1993) at 5.

Among other things, incivility between attorneys lessens the chances for successful negotiations and thus reduces the attorney's opportunity to render competent service both to the client and to the court.

The lawyer refusing to grant a first-time or other reasonable extension also should be wary of the impression he is making on the judge or jury. In the ordinary course, requests for extensions of time, like the one you have described, should be handled by the attorneys in the case, not by the courts, which will not appreciate having to expend court time and resources on such routine matters. In *Bermudez v. City of New York*, 22 A.D.2d 865, 866 (1st Dep't 1964), the court begrudged having to waste precious court time resolving an extension of time to answer a complaint, explaining that a scheduling dispute is "a matter that properly should have been disposed of by the exercise of simple courtesy between attorneys." In *Lewis v. Miller*, 111 Misc. 2d 700, 704 (City Ct. 1981), the court noted that "reasonable time extensions are usually routine manners of courtesy between lawyers in which the Court should not be involved." And, in *Wonder Works Const. Corp. v. Seery*, No. 100096/2010, 2011 WL 5024486 (Sup. Ct., N.Y. Co. 2011), where the plaintiff attempted to seize on the defendant's untimely service of the answer to obtain a default judgment against him, even though defendant's counsel had participated in many court conferences, exchanged substantial discovery and entered into a confidentiality agreement, the court denied the plaintiff's motion for a default judgment and compelled the plaintiff to accept the defendant's untimely answer *nunc pro tunc*. According to the *Wonder Works* court, "disputes regarding timeliness of filings are generally resolved amongst counsel." *Id*. (internal quotation marks omitted).

As evidenced by the holdings in the cases cited above, a lawyer who unreasonably denies his adversary a time extension is likely to be overruled by the judge should the matter be brought to the court's attention. What's more, the judge is likely to be annoyed that he needed to waste time on this kind of application and may form a negative opinion about the lawyer and/or his firm. At all times, it is important to remember that as attorneys we are officers of the court, and that our reputations and credibility are paramount. Once compromised, the ability of the attorney to be persuasive with the judge or jury is significantly diminished.

We recognize, however, that under certain circumstances it may be entirely appropriate for your adversary to deny your request for an extension of time where that request would be prejudicial to his or her client's interests. For example, in situations where an adversary has repeatedly requested adjournments of various deadlines in what is a clear attempt to delay the litigation, a refusal of the extension may be justified. In fact, where an attorney is repeatedly neglectful of deadlines and constantly asks for extensions to file briefs, he may be in violation of several of the NYRPC (specifically, Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 3.2 (Delay of Litigation)), and may be subject to a report to the Disciplinary Committee. This is exactly what happened in *In re Adinolfi*, 90 A.D.3d 32 (1st Dep't 2011), where an attorney was publicly censured for failing to timely file briefs, often requesting extensions to file briefs, failing to timely file for reinstatement of cases, and failing to respond to court orders. However, this does not appear to be the case here.

Several of the NYRPC may also be relevant to the analysis. NYRPC 3.1(a) (Non-Meritorious Claims and Contentions) holds that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." In this situation, because it does not appear that giving you a time extension will prejudice the other side at all, your adversary's staunch refusal to grant you a first-time extension on the motion is arguably a frivolous position. In addition, NYRPC 8.4(d) (Misconduct) holds that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." For the reasons discussed above, your adversary's stubbornness on this issue and his overall lack of cooperation and civility is detrimental to the administration of justice. However, Comment 3 to Rule 8.4 provides that the Rule is generally invoked to punish conduct that results in "substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding." Your adversary's conduct does not currently rise to the level of the more egregious conduct deemed a violation of Rule 8.4(d). Finally, Rule 1.2(g) (Scope of Representation and Allocation of Authority Between Client and Lawyer) provides that: "A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process." This specific language urges lawyers to conduct themselves with the principles of courtesy and civility in mind.

Accordingly, while your adversary's behavior is certainly not civil, considerate, or courteous, it does not rise to the level of violating the Rules of Professional Conduct or warrant sanctions. So, at this point, instead of attempting to get in papers, an application to the court is your best choice. Surely, the judge has better things to do; hopefully, your adversary will come to learn that what he did was not just unprofessional, it was not very smart!

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Maryann C. Stallone, Esq.
(stallone@thsh.com) and
Hannah Furst, Esq.
(furst@thsh.com)
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate in the M&A group at an Am Law 100 firm. After a deal my team and I had been working on for months closed, a few of the associates and I decided to go out to a bar to celebrate. "Work hard, play hard" as they say in big law. Because I had been so tied up on this deal and had not had much time out of the office to socialize, I decided to invite a few of my non-lawyer friends out to the bar to meet us.

It only took a few drinks before the lawyers and non-lawyers alike in our group were all having a great time. Just before 2 a.m., as I was getting ready to leave, I overheard an associate sitting next to me talking to one of my non-lawyer friends. The associate was slurring his words and sounded like he had a few too many drinks. What I overheard was alarming – the associate was talking to my non-lawyer friend about a major and highly confidential M&A deal that the firm was currently engaged in. I was tired and ready to call it a night so I decided not to interrupt the conversation and I grabbed my coat and left. I didn't think much more about the incident.

Two weeks later, I met up with my non-lawyer friend for lunch. During our lunch, he casually mentioned to me that after the conversation he had two weeks ago with the associate at the bar, he had decided to invest in the stock of the company being purchased in the major deal the associate in my group had told him about.

Now I'm starting to worry about the serious implications of this bar night! Should I report the associate in my group, and if so, to whom? Does the firm, the associate or my non-lawyer friend have potential liability for insider trading? What policies should my firm have in place regarding divulging such insider information?

Sincerely,
N. O. Insider

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BY GERALD LEBOVITS

Making Offers No One Can Refuse: Effective Contract Drafting — Part 3

In the last issue of this five-part series, the *Legal Writer* discussed the main parts of a contract. In this issue, we discuss other substantive parts of a contract.

Many contracts include substantive provisions that take the form of representations, warranties, covenants, rights, conditions to obligations, discretionary authority, and declarations.[1] These substantive provisions create risk and affect a party's potential liability. Understanding these contract concepts will help you spot language that gives rise to potential liability and make you aware of the need to rephrase the language to reduce your client's risk.

Representations and Warranties

A representation is "[a] presentation of fact — either by words or by conduct — made to induce someone to act."[2] The party's action based on the assertion is also known as "reliance." "Reliance" is used to decide whether the parties should proceed with the contract in the first place. If a buyer buys ABC Co. from a seller, for example, it's a representation when the contract states that the seller told the buyer that ABC Co.'s business has been and is being conducted in compliance with applicable laws. In this case, the seller's representation refers to past and present facts. The past or present fact needn't be in the control or knowledge of the party making the representation. A party may not, however, make a representation with respect to a future fact.[3] If the representing party has no control over a future situation in which a representation is made, this statement should be framed as a condition. Covenants should be used when the party can control the future situation.[4]

In the above example, if ABC Co.'s business hasn't been or isn't being conducted in compliance with applicable laws, the buyer has a cause of action against the seller for innocent,[5] negligent,[6] or fraudulent[7] misrepresentation. To prove this tort, the seller's statement must have been false; the seller must have innocently or negligently not known, or fraudulently known, of the statement's falsity when made; the buyer must have relied on the seller's false statement; and that reliance must have been justifiable.[8] Because the reliance requirement is hard to prove in innocent, negligent, or fraudulent misrepresentation, contracts use warranties. For this reason, you'll normally see the following language in a contract: "Seller represents and warrants to Buyer . . . ." This results in individual statements of fact acting as both a "representation" and a "warranty."[9]

A "warranty" is a promise to indemnify the promisee for any loss if the represented fact is untrue.[10] Breach of warranty results in indemnity because the warranty requires the statement's maker to pay damages to the statement's recipient if the statement is false and the recipient has been damaged.[11] Most courts agree that there's no need to prove reliance in a breach-of-warranty action, unlike a misrepresentation action.[12] In determining whether there's a breach of warranty, the truthfulness of the representation is determined when the representation was made.[13] In the above case, ABC Co.'s business must have been and was being conducted in compliance with all applicable laws when the seller made the statement, and not when the buyer examined the truthfulness of the seller's representation. The parties, however, can specify that representations and warranties are accurate as of both the signing and closing dates.

Representations and warranties create liability.

Representations and warranties create liability. Be aware of these provisions to limit risk. Representations can be flat or qualified.[14] The representation that "ABC Co.'s business has been and is being conducted in compliance with all applicable laws" is a flat, absolute, and high-risk statement. As the seller's counsel, you can minimize your client's risk by putting in a knowledge or full-disclosure qualification, such as: "To Seller's knowledge and except as stated in Disclosure Schedule 3, ABC Co.'s business has been and is being conducted in compliance with all applicable laws." With these qualifications, or qualified representations, the seller's risk in breaching the warranty has been minimized.

But the buyer runs the risk that a seller will intentionally not learn about ABC Co.'s non-compliance with the laws. For this reason, the buyer's counsel might insert a provision defining the seller's knowledge to minimize the buyer's risk, such as: "Knowledge

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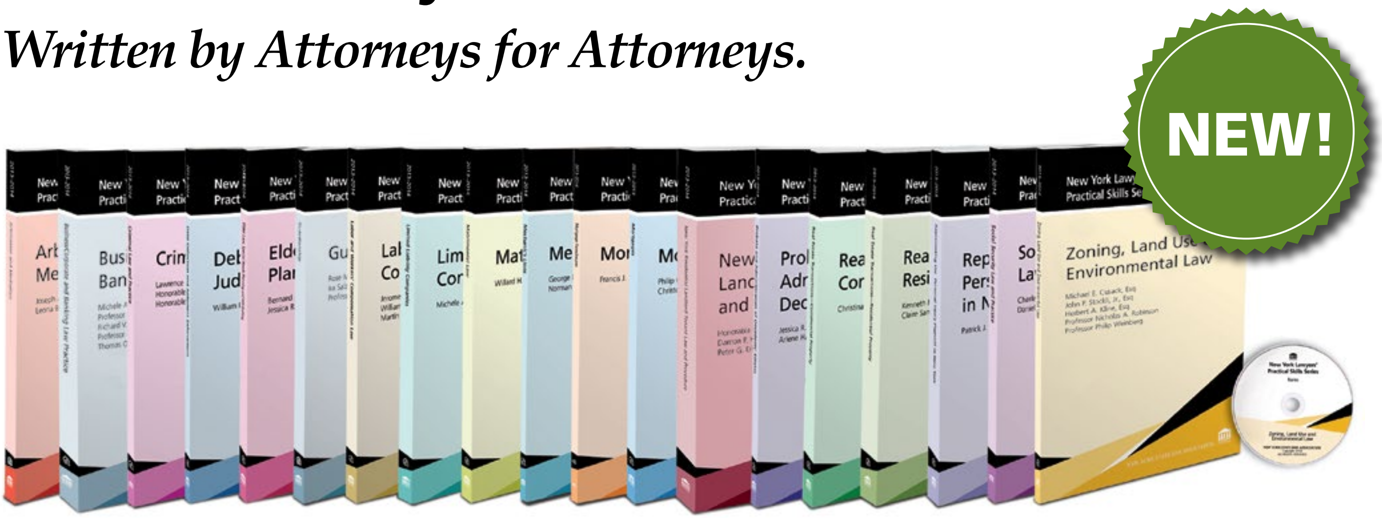

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Elise Rose Friello
Justin Jonathan Fung
Amanda Anne Godkin
Julie Mae Gondar
Zachary Peter Halperin
Brian Patrick Henchy
Jamie Dughi Hogenkamp
Melisande Hadley Johnson
Rose Landau
Max Thomas Lindsey
Tara Lynn Macneill
Ashley Lydia Mahserjian
Jocelyn A. McGrath
Qian Meng
Joseph John Montanye
Courtney Jean Morettoni
Gregory Taylor Myers
Matthew Warren O'Neil
Joseph O'Rourke
Yacine Ounis
Zoe Paolantonio
Charles Paul Pensabene
Stephanie Rivera
Eamon Gilroy Rock
Erik Roth
Rebecca Judith Lauren Ruscito
Christoper M. Sanchez
Hannah Schwager
Alyson Rose Schwartz
Jacqueline M. Seitz
Corinne Rose Smith
Jessica Leigh Sorrendino
Annmarie Stepancic
Caitlin Stephen
Tara Marie Ward
Amber Leigh Wright
Lindsay Zanello

FOURTH DISTRICT
Daniel Patrick Bulger
William Tracy Carris
Marquetta Karin Christy
Karen R. Crandall
Aliza Keen
Kathryn LaForest
Robert Roy Lawyer
Colin S. Loomis
Mark Joseph
Nicholas M. Martin
Mark Joseph Minick
Emily Elizabeth Page
David J. Park
Herim Park
Daniel Romeo Smalls
Michael Socoloski
Christopher Matthew Stanyon
Ashley Welsch

FIFTH DISTRICT
Danny Paul Karim Essadiq
Alexandra S. Lechman
Jeffrey Michael Narus
Nicole Elizabeth Petrone
Susan Elizabeth Upward

SIXTH DISTRICT
Corey Ross Barklow
Jennifer Stepp Breen
Corrie Ann Damulis
Justin Phillip Harmon
Carl M. Learned
Jared Mack
Jared Richard Mack
Donielle Krista Maier
Arthur John Meldrim
Alexandra Norton Sullivan

SEVENTH DISTRICT
Alexia K. Mickles
Kyle P. Riter
Andrew David Spink
Matthew Raymond St. Martin

EIGHTH DISTRICT
Christine Lauren Donovan
Katherine Ellis
Samuel Richard Miserendino
Melissa Anne Mummery
Mark Chaplain Murphy
Delroy Pinnock
Crystal Jeanette Rodriguez
Hyder Syed

NINTH DISTRICT
Rana Chanel Balesh
Oliver M. Bather
Zamir Ben-dan
Michelle Berman
Michael J. Callan
Edmund Chang
Ryan Mckenzie Paul Cloutier
Sean Patrick Convie
Darin Darakananda
Aaron Mathew Esman
Alci Espinosa
Raffaele P. Ferraioli
Reed Daniel Forbush
Nicole Diana Garcia
Samantha Lynn Garrison
Travis B. Grodin
Matthew E. Guarnero
Lisa Locascio Huffman
David Tatsuo Imamura
Ashley Nicole Jacoby
Masakazu Karakawa
Jake Sangwook Kim
Maria Yurievna Kostenko
Jared La Porta
Jeffrey R. Laurice
Cali Ann Lieberman
Tricia Sophia Lindsay
Elizabeth Z. Marcus
Anna Orsini Margius
Chelsea Elisabeth Marmor
Ryan Christopher Marrano
Sofia Mastandrea
Trudy-anne McLeary
Mayya Mesonzhnik
Srdjan Milenkovic
Nicole Miraglia
Sean P. O'Fallon
Jessica Lee Piperis
Sameer Prabhu Ponkshe
Kimberly Lynn Quintano
Julie Samantha Raphael
Michelle Susan Rattoballi
Peretz Riesenberg
Joshua Eric Roberts
Kimberly Sara Rubin
Peter Saljanin
Jacob Isaac Seelig
Marcella Sgroi
Elyssa Shifren
Samantha Elizabeth Stahl
Marley Kadis Strauss
Justin Lawrence Thompson
Matthew David Trauner
Andrew Paul Yacyshyn
Ari J. Zaltz

TENTH DISTRICT
Danielle Alvarado
Gabriella Sarina Amato
Robert Richard Aragona
Paola M. Arango
Dana Aronow
Avi Arounian
Parisa Bagheri
Timothy Jihun Bang
Bryan Douglas Barnes
Matthew Joseph Berger
Pooja Bhutani
Gina Boccio
Trista L. Borra
Craig Warren Brinckerhoff
Bilal Chaudry
Li Cheng
Donna Cheung
John Cordell
Daniel D'Costa
Tara Darling
Anthony Sergio De Ingeniis
Kamille Dean
Alyse Delle Fave
Gina Marie Delustro
Adam Michael Derosa
Steven Mark Desena
Caitlin B. Esposito
Jonathan E. Feder
Helen Irene Feingersh
Jaren Michael Fernan
Taylor Michelle Ferris
Charles Dymond Frank
Michelle A. Frankel
Brian Charles Fredrickson
Brittany Lynn Froning
Daniel Thomas Gallagher
John Francis Gamber
Reuven Garrett
Paulina Ann Giampietro
David Morris Giller
Barry Maxwell Golden
Sean Patrick Gorton
Max Aaron Greenwald
Helena A. Habib
Simon Heimowitz
Karlesha Veronica Hewitt
Lindbergh Hramza Hmung
Michael Neal Impellizeri
Cheryl L. Jakinovich
Ryan M. Jennings
Yuwei Ji
Zachary Scott Kaplan
Janine Lucia Kapp
Addie Tal Katz
Sandra Kennedy
Carolyn Ji Yun Kim
Hanna Kirkpatrick
Courtney Hope Klapper
Ada Kozicz
Patrick James Lanciotti
Ashley Jessica Lherisson
Gaelle Cecile Ligonde
Michael John Lipetri
Samantha Angelina Litrenta
Chang Liu
Qijun Lu
Deborah P. Machalow
Raymond Mak
Kelly Mariah Maloney
Alexandra Mayen Rivera
Anthony Vincent Merrill

Blythe Catherine Miller
Matthew Jon Mincone
Alexandra Mink
Joshua Neal Nadelbach
Jennifer Lauren Nadraus
Daniel Joseph Niamehr
Anthony Noonan
Robert Thomas Nothdurft
Danielle Marie O'Boyle
Odisina Okeya
Daniel Gustav Olsen
Olanike Alice Otegbade
Joseph Carmine Palermo
Devon Elizabeth Palma
Daniel Patrick Pembroke
Riley T. Perry
Jennifer Ashlee Risener
Sarah Marie Roe
Jason Michael Rosenbaum
Giuseppe Tommaso Rosini
Ross Andrew Ruggiero
Jaymie Brooke Sabilia-Heffert
Omar Hasani Samuel
Kyle Ethan Scheiner
Maria Christi Scheuring
Sean Nicholas Simensky
Eric J. Small
Jacqueline Ann Smith
Joanna Betty Sobel
Nicholas Michael Stratouly
Stephanie Lyn Tanzi
Jennifer D. Tierney
Tara Ayn Turner
Jacqueline Valenza
William Thomas Valet
Christopher Valletta
Julianna Zitz

ELEVENTH DISTRICT

James Arturo Aliaga
Christopher Michael Antonino
Samantha Arena
Chidera Nonyem Atuegbu
Marta Bachynska
Abeeb Kolapo Balogun
Leah E. Barnes
Jeffrey Trent Beauchesne
Okeano Bell
Christopher F. Bolz
Sean Jarryd Bowen
Cassandra Natasha Branch
Paula Cajdler
Peter G. Capacchione
Marisela A. Carpio
Anthony Peter Casale
Jennifer Marie Catera
Ellen Yueh-ning Cheong
Ivy Chiu
Mina Choi
James Thomas Christie
Anne Jackson Collins
Nolan P. Comfort
Catherine Wallace Costigan
Fengyuan Cui
John D'Baptist
Sergey Davydov
Daniel Lee Day
Shea Ivy Donato
Adam Scott Eisen
Luis Daniel Felix
David Ferrari
Michael Christopher Foster
Daria M. Frost
Anastasia Gadayeva
Aryeh E. Goldman
Aura Maria Gomez Lopez
Joseph Angelo Grasso
Daniella Jenny Grossman
Samuel Joseph Hahn
Evan Brahm Heckler
Margaret Ann Hilton
Aiyun Huang
Yue Huang
Robert Andrew Hupf
Aileen Elizabeth Iorio
Dan Jiang
Enlin Jiang
Judy Jae Eun Jun
Satwant Kaur
Aminta C. Kilawan
Jason Jongho Kim
Chiha Ko
Akhila Kolisetty
Yitzchok Kotkes
Christina Yan Kee Kwok
Brian Philip Lanciault
Dong Hun Lee
Ling Li
Qing Lin
Jiajie Liu
Maria Luna
Hilary Ann Martin
Chandra Sekhar Meesaraganda
Bari R. Nadworny
Kathy Hong Oanh Nguyen
Steve Hieu Nguyen
Maya Hodis Nuland
Nicholas Pagano
Ariadne Anna Panagopoulou Alexandrou
Ting Poon
Wanglin Rao
Momo Ren
Kathleen M. Rende
Julian Manuel Rodriguez
Laura Gerace Rodriguez
Dorian E. Rojas
Alan Michael Ruiz
Elliot Samuels
Samantha Sharma
Alison Sher
Medhavi Singh
Erin Elizabeth Sisson
Tanya Sukhija
Frederick C. Sung
Joseph Diego Taylor
Margaret Teich
John Patrick Travis
Danielle Renee Turcotte
Johana Marcela Vesga
Tiffany Villalobos
Robert Brian Volynsky
Shanitra Waymire
John Francis Whelan
Krista Nicole Whitaker
Roberta Elada Wolf
Marshall Iav Yeh
Michelle Zaretsky
Qiying Zhu
Sharon Toby Ziegler

TWELFTH DISTRICT

Rebecca Chapman
Teril M Holston
Casey Jean McGowan
Amory Cummings Minot
Ashley V. E. Payne

THIRTEENTH DISTRICT

Yvie Miriana Cherenfant
Jessica Lynne Fiorillo
Gregory Steven Liss
Melissa Nicole Magill
Jennifer I. Montello
Kathleen Deborah Reilly
Thomas John Reilly
Louis Michael Russo
Richard Sanvenero
Genta Stafaj
Anthony Robert Troise
Cesar Adrian Vargas
Michael Edgar Vitaliano

OUT-OF-STATE

Marion C. Abecassis
Aaron Jesse Abramson
Nadia Shoshana Abramson
Liana Remigio Abreu
Teresita Acedo Betancourt
Kathleen Denise Adda
Alexander Gerard Ahern
Sarah Ahmad
Jee Eun Ahn
Pious P. Ahuja
Jordan A.D.F Aikman
Oluwafunmilayo Ayoka Akinosi
Dionne Poku Akom
Franziska Albers-Schoenberg
Paul Stiles Alexander
Elena Alexeeva
Mohammad Musaed Rashed A. Alharoun
Zainab Ali
Thomas Dewayne Allison
Brian Michael Alosco
Mohammed Saud Alrasheed
Ernesto Joaquin Alvarado
Rita Ambrosetti
Kelly Louise Anderson
Dmitry Alekseyevich Andreev
Lucille Catherine Andrzejewski
Kahina Ines Aoudia
Alyssa Ann Aquino
Robert D. Argen
Rebecca Arriaga
Benjamin Harry Asch
Masayuki Atsumi
Norah Christina Avellan
Angela Rae Avery
Ava Azad
Gabriela Baca
Kathryn Elaine Bacharach
Fatme Bachir
Michael Cory Bachmann
Brianna Baily
Stuart Benjamin Baimel
Courtney Elizabeth Baker
Joseph Wilson Banks
Omid Gabriel Banuelos
Melissa L. Barbee
Noah B. Baron
Dhan Bahadur Basnet
Reem Adel A. Basri
Margaret Barnes Beasley
Megan Alicia Behrman
Amanda M. Belanger
Nicole Alexandra Rioux Beletsky
Leland Samuel Benton
Roberto C. Berrios
Samuel Jared Berse
Nicholas Bertram
Samina Mohsin Bharmal
Rachita H. Bhatt
Magdalena Biereder
Sarah Jane Bily
Joseph Michael Bimonte
Aaron David Blacksberg
Tamara Antoinette Bland
Victoria O'Connor Blazeski
Laura Louise Blumenstein
Kyle Andrew Blyth
Emily Kaitlin Bolles
Lillian Christine Merritt Bond
Eugene Bondar
Andrea Laura Bonvicino
Rita Bowles
Brandon Boxbaum
Monique N. Boyce
Robert Abraham Braun
Daniel T. Brier
Jean-Phillip Brignol
Dustin J. Brockner
Dustin Jacobs Brockner
Jennifer Brokamp
Howard Stuart Brown
Vincent Anthony Bruno
Rui Bu
Ari Buchen
Christian Russo Burset
Dane Hal Butswinkas
Marc Daniel Cabrera
Adrian Cabrero Alcocer
Alaina Angela Caliendo
Andres Felipe Callejas
Erika Carmona Callejas
Frank Dennis Camera
Courtney Cannon
Robert Charles Caplehorn
Christine Marie Carletta
Ainsleigh Cartwright
Simona Cervasio
Tamir Benyamin Chagal
John Chamberlain
Matthew Yuenlone Chan
Hui-Chun Chen
Li Cheng
Ya-En Cheng
Ka Hye Chin
Jaechul Cho
Eunjin Choi
Stephanie Yan Ki Chu
Erika Rae Clark
Kevin Andrew Clement
Christopher Gordon Closter
Paige Alfreda Cobbs
Tim A. Cochrane
Alexander I. Cohen
Janis Cohen
Ruchama Leah Cohen
Jessica Drew Cohn
Katrina Cokleski
Kathryn Collard
Lindsay Rachel Colvin
Juan Camilo Congote
Mary Theresa Connolly
John Joseph Cooper
Thomas David Copley
Amanda D. Corsaro
Michelle Cortese
Patrick Kevin Coughlin
Paul Vincent Courtney
Maeva Coutanceau-Domini
Colleen Mary Cowgill
Todd Gregory Crawford
Graham Robert Cronogue
Robyn Crowter
Madeleine Zarya Cynader
Matteo D'Agostini
Jonathan Ryan D'agostino
Christopher Edward D'Alessio
Eleanor Daley
Melissa Cathleen Danforth
Olivia Darius
Ololiviaivia Darius
Maria Davies
Tatevik Davtyan
Elizabeth Bower De Moll
Apolline De Noailly
Alice Susan Debarre
Brittany Wood DeBord
Emily Deddens
Alejandra Andrea Del Pino
Kevin W. Delaney
Michael Timothy Denny
Lucas Deppermann
Rickin Desai
Leeor Deutsch
Diamond L. Deza
Javier David Diaz
Marc Tony Dib
Yisha Ding
Chelsea E. Dixon
Matthew Patrick Donelson
Thomas Willett Donovan
Sarah A. Dowd
Craig Drachtman
Scott P. Drake
Keegan Ann Drenosky
Michael Ryan Drummond
Grace Marie Duffin
Grace Duttin
Kunal Janak Dwarkadas
Logan Quinn Dwyer
Emily Christen Eaton
Ariel Ebi
Cayleigh Shannon Eckhardt
Douglas Anthony Edwards
Matthew Eisenson
Sara Zaher Elhawi

Richard Milton Elias
Matthew Sean Ellis
Seham K. Elmalak
Emily Elizabeth England
Pinar Caglayan Erduran
Christopher Thomas Errico
Frank W. Eucalitto
Ihuaku Geraldine Ezeh
Tianqi Fang
Cecile Laurence Farmer
Timothy John Farmer
Kris Elizabeth Fendrock
Samuel John Fillman
Katie L. Filous
Aaron Samuel Fischer
Craig W. Fitch
Trevor O. Flike
James Anglin Flynn
Brandon B. Fontaine
Gaelle Paule Christiane S. Forget
Ronald Louis Francis
Elizabeth Hanna French
Kristen Nicole French
Siddharth Fresa
Stephanie Freudenberg
Marine Fritsch
Leland Frost
Susan Frye
Ashley Elizabeth Gaillard
Ross Galvin
Thomas Nicholas Gamarello
Hang Gao
Wen Chao Gao
Yuan Gao
Roberto Rene Garcia
Kelsey A. Garlock
Caitlin Garrigan-Nass
Husain Ahmaad Gatlin
William Gattoni
Pamela Gelfond
Frances Harman George
Shayna Allison Gilmore
Lauren Jane Glozzy
Claudette Gomez
Peijing Gong
Julian Gonzalez
Gordon James Goodnow
Matthew J. Gordon
Sarah Devins Durnan Gore
Natalie Gorelishvili
William Hillel Gotlieb
Benjamin Julius Gottesman
Katy Marie Gottsponer
John Kirk Goza
Benjamin Walker Graham
Daniel John Granatell
Shontae Denise Gray
Evan Martin Greenberger
Samantha Nicole Greer
James R. Grimes
Elizabeth Maryanne Grosso
Robert Bradley Guest
Shauna Guner
Andrew Ralston Gunther
Jingwen Guo
Qing Hua Guo
Jessica Naomi Guzik
Hyun Jin Ha
Sarah Ruth Haag
Andrew Hampton Haas
Michael James Haas
Ericka Haddadin
James Roger Hagerty
Bouchra Haji
Corey Alexander Hall
Carl Oscar Henning Sebast Hallen
Huiling Han
Nina Han
Qiming Han
Gayle Ellen Hanlon
Brian Gregory Hannon
David G. Hardin
Carolyn Lieber Hart
Nina Mee Hart
Dorian Savohn Hawkins
Eleanor Elizabeth Hedley
Jason Onontiyoh Heflin
Christopher James Hegan
Tiffany Leigh Heineman
Haden Leonard Henderson
Randy Henry
Elizabeth Lynn Henthorne
Yonicio Hernandez
Mark Mellen Higgins
Shuenn Ho
Bernhard Hofer
Erica E. Holland
Allison L. Hollows
David A. Honig
Daniel Julius Honold
Joshua Horn
Sabine Margaret Houben
Brian James Howaniec
Stephanie Brown Howaniec
Theodore Bogardus Howell
Dwight Alexander Howes
Yanyan Hu
Yanyan Hu
Aoibheann Kathleen Hughes
Taggart Baim Hutchinson
Jihoi Hwang
Jongphil Hwang
Leslie Joan Hylton
Amanda Mariam Ibrahim
Masashi Ichikawa
Stephen Joseph Immelt
Paul Rodulfo Bautista Imperial
Maya Terada Inuzuka
Aarthi Balasubramanian Iyer
Margie Lys Jaime
Jessie Elizabeth Jamar
Cindy Jasmin
Ki-chan Jeon
Mishita Jethi
Sejal Parimal Jhaveri
Enlin Jiang
Christopher Stephen Johns
Katherine Marthe Annie Jonckheere
Linda Frances Chechoter Jones
Stephanie Marie Jordan
Joanne Joseph
Nicole Marie Joyce
Maya Simone Jumper
Angelyn M. Justian
Jason Brandon Kane
Paul Kanellopoulos
Rene Kang
Sarina Mindel Kaplan
Anna Brennan Ross Kastner
Nickolaos K. Katsanos
Daniel Mark Katz
Jaclyn M. Kavendek
Krishna M. Kavi
Alanna Kearney
Michael Joseph Kearney
Eileen Katherine Kelly
James Patrick Kelly
Robert Thomas Kelly
Aliza Conway Kempner
Seth Benjamin Kennedy
Elisabeth Lee Kent
Anja-katharina Kettgen-hahn
John Joseph Khouri
Hyeji Kim
Hyun Jeong (Janet) Kim
Sanghyun Kim
Seung Hyun Kim
Yeonsoo Kim
Amanda Alexandra King
Hiroki Kishi
Robert Kissner-Ventimiglia
Lauren Elizabeth Koester
Yusuke Kondo
Robert Benjamin Kornweiss
Jaakko Kasperi Korpelainen
Lauren Nicole Kostes
Ashley Ann Krapacs
Ayla Kremen
Elizabeth Victoria Krupar
Kristen Kuan
Jingting Kuang
Julian Michael Kurz
Michael Robert L'homme
Anniki L. Laine
Jacob Laksin
Marc Howard Lamber
Paul Maurice Lambert
Ryan Daniel Lang
Timothy Michael Lanni
Christopher Ian Lapp
Amanda Laterza
June Wa Tsun Lau
Lai Ho Leo Lau
Autumn Sky Laughton
Nicholas Lawson
David Gregory Leach
Hosuk Lee
Hyowon Lee
Jee Aei Lee
Hannah M. Lepow
Cheng Li
Choi Man Li
Yingxia Li
Ming Xin Liang
Vivien Joyce Hui Yan Liang
Xiaoyi Liang
Rachael Beth Liebert
Tess Remy Liegeois
Damian Joel Lightbound
Donghee Lim
Grace Lin
Zhifang Liu
Zixiang Liu
George Edward Loeser
Joan Badere Lopez
Oscar Lopez
Shawn M. Lopez
Jun Lou
Megan Elizabeth Low
Matthew Richard Lowe
Christopher Tolosa Lucero
Sarah Anne Ludlam
Emily Luken
William Greer Mackebee
Alberto Jose Madero Rincon
Colleen Marie Maker
Anica Shalimar Malabanan
Myrane Nadine Malanda
Fationa Mamo
Amy Lee Manfred
Cecile Manong
Renee Leigh Mantone
Colleen Alexis Maranges
Kristin Lynne Marsalese
James Malcolm Marshall
Geoffrey Niall Martin
Thene Mishon Martin
Francisco Javier Martinez Diaz
Mayra B. Martinez
Anthony Paul Marzocca
Marissa Ann Mastroianni
Amelia R.V. Maxfield
David Maystrovsky
Virginia Ruth McCalmont
Michael C. Mccarthy
Scott K. McClain
Cara McClellan
Jaimie Krista Mcfarlin
Mark Campbell McLawhorn
Kailee D. McMahon
Carlos Andres Medina
Pinky Pankaj Mehta
William Dennis Melofchik
Jeremy T. Merkel
Daniel Merzel
Yuqian Miao
Anny Milgram
Benjamin Michael Miller
Casey Leigh Miller
Matthew Charles Mills
Sophia Marie Mire
Rebecca L. Mishner
Britney R. Monroe
Lauren Ashley Montanile
Alexandra Morancais
Emiko Morisato
Sally R. Morris
Arin Hotchkiss Mossovitz
Njeri Mugure
Juliet Y. Mun
Michael Scott Nagurka
Angela R. Nascondiglio
Adrian S Nasr
Michelle Amelia Newman
Catherine M. Newnham
Dung Thi Thuy Nguyen
Daniel Arion Nicholson
Qian Nie
Qian Nie
Chaim Jimmy Nieman
Kenji Nishio
Shunsuke Nohara
Shunsuke Nohara
Anthony John Noonan
Kasey Garrett Nordeen
Bradley J. Nowak
Ricardo Dutra Nunes
Devanne Margaret Christine O'brien
Brian O'Connell
Francis X. O'Connor
Patrick James O'connor
Paul Bernard O'Donnell
Kim Paula O'Dowd
Melissa Ann O'Neill
Yasunori Ohseki
Ifeanyichukwu Victor Ekene Ojukwu
Matthew S. Olesh
Walker Micah Oliver
Stephanie Nicole Osman
Jess Donovan Oyer
Michael Stephen Papadopoulos
Jason Bradley Paperman
Anthony Gerard Papetti
Alexa Dinsmore Parcell
Tara Marie Parente
Daehoon Park
Dami Debbie Park
Erin Dong Eun Park
Joon Yong Park
Kevin Minsoo Park
Sang Hee Park
Sun Young Park
Quentin Charles Parmentier
Melan Patel
Stephanie Elise Pearl
Steven Robert Pedersen
Lizzy Felice Peijs
Alvaro J. Peralta
Elke A. Perkuhn
Bibiana Cristina Pesant
John Wellington Peterson
Matthew Joseph Petrozziello
Lizzy Peys
Darren Mathew Pfeil
Jasmine Marie Phillips
Neil Thomas Phillips
Rupert William Phillips
Addison Foster Pierce
Hugo Piguet
Brian Carl Pike
Nicola Anthony Pisano
Isabella Regina Pitt
Tevia Kelsey Pollard
Shoubert Polynice
Elina Portman
Ian K. Portnoy
Robert Pratt
Leah Mary Prestamo
Elizabeth Anne Purcell
Do Yhup Pyun
Tian Qiu
Robin Rabinowitz
Cynthia Ramkellawan
Alexander Hector Ramon
Justin Louis Rand
Raul Rangel Miguel

Khrystyna Rayko
Dillon Alexander Redding
Janie Alex Reilly
Rita Resende Soares
Ronald Jason Resmini
Sarah Arnold Ricciardi
Timothy Richard
David Michael Riley
Simone Monique Riley
Elizabeth Rivera
Michael David Robbins
Ashley Roberts
Chaunelle Robinson
Michael Macrae Robinson
Luciana Souza Rodrigues
Kaytlin Lara Roholt
Keith Patrick Ronan
Daniel M. Rosales
Steven P. Roth
Jacob Rothschild
Raquel C. Rothschild
Ronald Y. Rothstein
Brett Hayden Ruber
Eric Matthew Rubin
Alyssa Holland Ruderman
Brendan James Rush
Alysha M. Sabarwal
Scott David Salmon
Krista Reale Samis
Lauren Alexa Sampson
Jorge Arnaldo Sanchez
Erica Sanders
Yoshio Sano
Tory A. Sansom
Allyson Jill Saperstein
Satoko Sawada
John David Saxon
Alexander Charles Schaffel
Elyse Schier
Gene Louis Schlack
Jason W. Schnier
Justin Lee Schwegel
Miguel E. Sciancalepore
Bryan Robert Seelig
Kate Elisabeth Segal
Adil Shafi
Ori Shafirstein
Arnav Shah
Zharna Shah
Anahita Shahrokhi
Priya Sharma
Joseph Nabil Shayeb
Liang Shi
Xiaoxin Shi
Hochul Shin
Jessica Shin
Joyce Shin
Myung Faye Shin
Philip K. Sholts
Lauren Elizabeth Shor
Richard Daniel Shore
Amanda Lynn Sicinski
Mallory Suzan Sidali
Cesare Silvani
Darrin Michael Simmons
Olivia Ruth Singer
Devanand Jonathan Singh
Gutman Skrande
Michael David Slade
Sui Hing So
Giuliana Soldi Ciccia
Michael Spinnicchia
Michael Anthony Spizzuco
Dragos Alexandru Stana
Jana Beth Steenholdt
Micah David Stein
Jasmine Nadiyah Story
Sarah C Styslinger
Zubin Su
Danielle Brittany Sullivan
Xin Sun
Kristi R. Sutton
Max S. Sverdlove
Michael J. Sweeney
Trent Joseph Swift
Kathryn Ann Sylvester
Lauren Talerman
Tianying Tang
Zhuoran Tang
Ryosuke Tateishi
Kristin S. Teager
Logan Hayes Teisch
Logan Hayes Teisch
Alexander Jason Leonidas Theoharis
Ashish Thomas
Jason Patrick Thompson
Aimee D. Thomson
Robert William Tomilson
Kristin Toretta
Kali Ann Trahanas
Brian Joseph Trembley
Annie Catherine Tsao
Chun Tseung
Benjamin Tso
Alex Tsouristakis
Justin Edward Turman
Christine Elizabeth Turner
Joshua Montgomery Turner
Steven Unterburger
Charles J. Vaccaro
David Paul Vallas
Yomayra Vallejo Cortez
Eric Frank Van Ausdal
Eric Van Eyken
Shayda Daniela Vance
Tristan Merrill Vandeventer
Adarsh Abraham Varghese
Lois Elizabeth Varughese
Anna Vaysberg
Paul Joseph Veneziano
Lily-Diem Phoung Vo
John Francis Wagner
Nicholas Wagner
Ignacio Jose Walker
Hillary Wallace
Hillary Alexis Wallace
Molly B F Walls
Chun Hing Wan
Valerie R. Wane
Kai Wang
Qi Wang
Yueduan Wang
Yueyue Wang
Paris Shavelle Waterman
Joanne E. Waters
Mary La Montagne Watkins
Thomas Christopher Weatherall
Kyle Joseph Weber
Jon Christopher Weingart
Jonathan James Weisbrod
Melissa Elizabeth Kearney Welch
Alexander Hammond Wharton
Allison Maureen Whelan
Cory White
Bailey Cathleen Wilson
Julie Marissa Wolf
Robert Woll
Chun T. Wong
Gregory Wong
Daniel L. Woodard
Charlie C. Wu
Yu-chen Wu
Jeffery Merrick Wyble
Kathleen T. Wysocki
Yingchen Joshua Xiong
Jiawang Xu
Michael Chun Yang
Yifan Yang
Ziyi Yang
Chuan Tat Yeo
Seth Jason Yockel
Claudia Yoo
Andrew John Yu
Angela Li-hwa Yu
Jia Yu
Jia Yu
Yelena Yukhvid
Megan Y. Yung
Matthew Charles Yurus
Lele Erin Yutzy
Brita Catherine Zacek
Reuben Zaramian
Chen Zeng
Jia Zhan
Liwen Zhang
Richard Zheng Zhang
Yuanying Zhang
Yuxuan Zhang
Ethan Zhong
Yevgeniy Zilberman