NEW YORK STATE BAR ASSOCIATION

Journal

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Homeowners and Gas Drilling Leases: Boon or Bust?

By Elisabeth N. Radow

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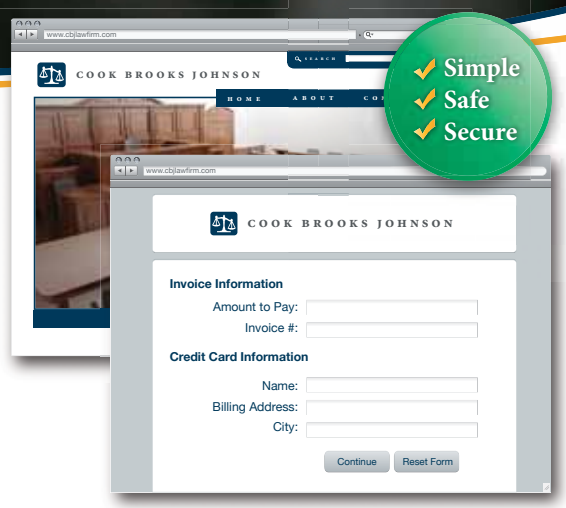

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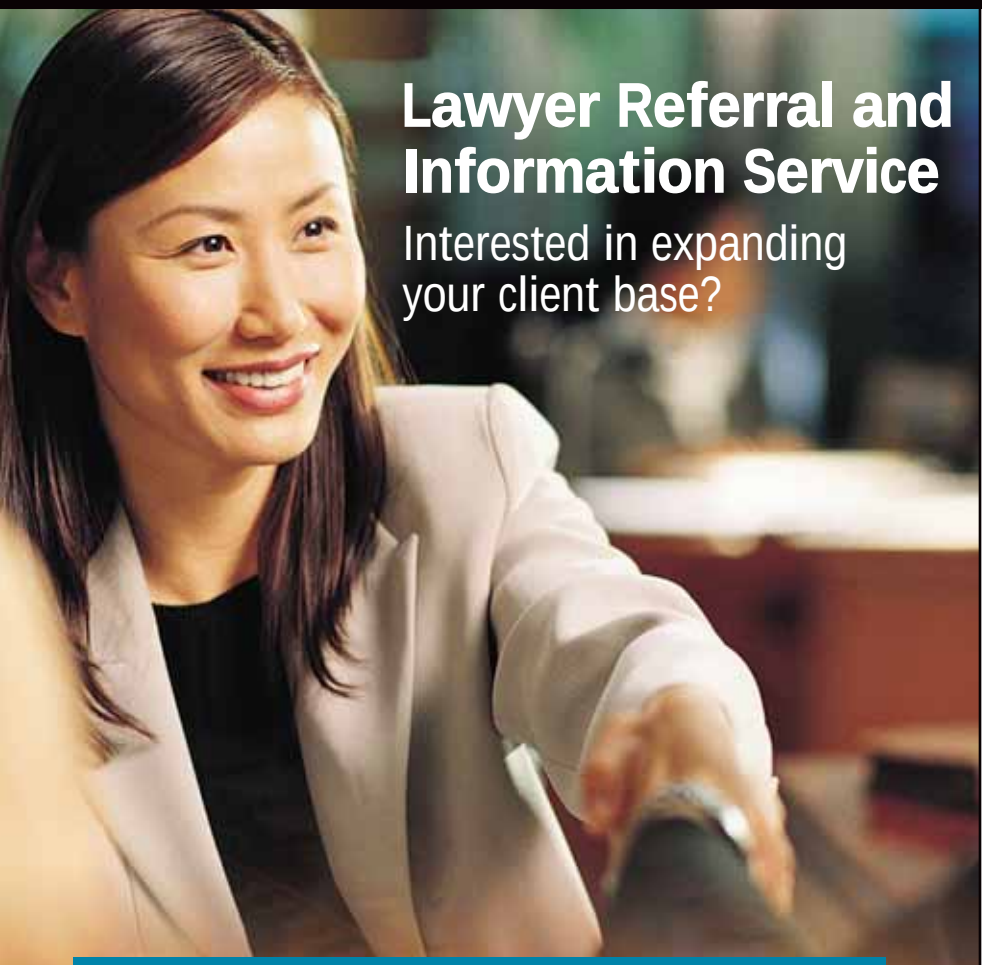

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VINCENT E. DOYLE III

Honoring Our Veterans' Dedication and Service

This month, we are proud to join with millions of other Americans in observing Veterans Day to honor our veterans and thank them for all they have done to protect our freedom and security at home and around the world. As we recognize veterans for their service, it is also important to remember the sacrifices they have made, as well as some of the unique challenges many veterans face upon returning home from active duty. Some of these challenges may involve frustrating legal matters. As attorneys, we can honor veterans by doing our part to make sure their needs are met.

Many veterans endure the strain and dangers of active duty, and then face a host of other difficult issues as they re-enter civilian life. Some suffer from physical and psychological injuries or disabilities related to combat. They may also experience indirect financial and personal consequences such as consumer credit problems, stress in their family relationships, mental health issues, and even substance abuse and homelessness. Some veterans may be reluctant to seek assistance, fearing that it could be viewed as a sign of weakness or failure. Those who choose to seek help may not know where to turn. Many civilian lawyers are unfamiliar with the benefits and services available to veterans. Military lawyers may not be familiar with state laws governing landlord-tenant disputes, or matrimonial or family law cases. And while many veterans require help with routine legal matters, these issues may be compounded by untreated emotional problems or substance abuse.

Earlier this year, we designated veterans' issues as a top priority for the Association and formed a Special Committee on Veterans to focus on this important area. The Special Committee has already begun its work identifying issues that merit further examination and developing proposals for reforms. Special Committee co-chairs Karen R. Hennigan of Brooklyn and Michael C. Lancer of Buffalo are hard at work, along with the rest of the committee's dedicated members from across the state.

One of the Special Committee's goals is to help veterans identify their legal problems and to connect them with qualified attorneys. The Special Committee will compile information about existing legal services that are currently available and develop a manual for distribution to veterans to help them find free or affordable legal assistance. The Special Committee is also working to bolster the quality and availability of legal representation by identifying areas in which civilian lawyers may need specialized substantive training, such as how to navigate the various benefit systems. The Special Committee is developing training to address those substantive areas as well as issues related to military culture in order to encourage sensitivity to veterans' unique needs. The Special Committee will also examine existing lawyer referral services and propose ways in which they could be revamped to screen for veterans in need of legal assistance and put them in contact with lawyers who are qualified and eager to help.

Unfortunately, some veterans become involved in the criminal justice system. Due to issues that may be present in these cases, such as post-traumatic stress disorder, traumatic brain injury, depression, and other mental health issues, a separate intervention is often more conducive to veterans' rehabilitation than typical criminal prosecution. Veterans courts or special veterans treatment tracks are currently operating in Erie County, Monroe County, Suffolk County, Brooklyn and Queens. These specialized courts and programs recognize that issues related to veterans' service may contribute to involvement in criminal activity and deal with veterans in a constructive, non-adversarial manner. They work to treat the underlying factors and help veterans get their lives back on track. The Special Committee aims to facilitate the implementation of additional veterans courts around the state and to encourage the transfer of veterans' criminal cases to these programs.

Veterans sacrifice so much for our country; they should not suffer as a result of their service. We look forward to seeing the results of the Special Committee's work. If you would like to get involved in this effort, you may wish to consider participating in the Special Committee's upcoming CLE program, scheduled to take place during our Annual Meeting in January 2012. You can find more information in our forthcoming Annual Meeting brochure, or by visiting the Special Committee on Veterans area of our website at www.nysba.org. ■

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.

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November 8	Long Island
November 9	Albany
November 10	New York City
November 16	Syracuse

Operating the New York Not-for-Profit Organization: Current Issues and Best Practices

November 9	Rochester
November 15	Albany
December 1	Long Island
December 14	New York City

Drafting Organizational Documents for LLCs and Corporations

(9:00 am – 1:00 pm)

November 9	New York City
November 15	Long Island
December 13	Albany

Tax Aspects of Real Property Transactions

November 10	Albany; Buffalo

Practical Skills: Basics of Civil Practice

November 15	New York City; Syracuse
November 16	Albany
November 17	Buffalo; Long Island; Westchester

Henry Miller – The Trial

November 16	New York City

Ninth Annual Sophisticated Trusts and Estates Institute

(two-day program)

November 17–18	New York City

New York Appellate Practice

November 18	Westchester
December 2	New York City

Successfully Handling Custody and Vocational Expert Witnesses in Your Matrimonial Practice

(9:00 a.m. – 12:35 p.m.)

November 18	Buffalo
December 2	Albany
December 9	New York City

Update 2011

†(video replay session)

November 30	Corning; Jamestown
December 1	Canton; Ithaca
December 2	Buffalo
December 6	Plattsburgh; Poughkeepsie
December 7	Albany; Long Island; Watertown
December 13	Westchester; Watertown

Avoiding Ethical Dilemmas in Day-to-Day Practice

(9:00 a.m. – 12:35 p.m.)

November 30	Syracuse; Westchester
December 1	Albany
December 5	Buffalo; Long Island
December 8	Rochester
December 12	New York City

Basic Securities Law for the Business Practitioner

December 1	New York City

Employment at Will and New York State Exceptions – A Guide to New York Law

(10:00 am – 1:00 pm)

December 2	Brooklyn

Construction Site Accidents

December 2	Long Island; Syracuse
December 9	Albany; New York City

Advanced Real Estate Practice

December 8	New York City

Evidence Program – Live and Webcast

(1:00 p.m. – 3:15 p.m.)

December 15	New York City

The Art of Deposition in the Digital Age

December 16	Westchester

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Gas drilling in Dimock, PA

POINT OF VIEW

Homeowners and Gas Drilling Leases: Boon or Bust?

By Elisabeth N. Radow

The Conundrum

Gas companies covet the shale gas deposits lying under homes and farms in New York's Marcellus Shale region and are pursuing leasing agreements with area property owners. Many homeowners and farmers in need of cash are inclined to say yes. In making their argument, gas companies reassure property owners that the drilling processes and chemicals used are safe. Yet aside from arguments about the relative safety of the extraction process are issues not often discussed, such as the owner's potential liability and the continued viability of the mortgage. The property owner can be particularly vulnerable when the drilling process involves high-volume, horizontal hydraulic fracturing, or "fracking."

For example, when Ellen Harrison signed a gas lease agreement in 2008, the company representative made no mention of fracking. Harrison received no details, only the chance for a "win-win" with "clean" gas for the locals and royalties for her. Like most Americans, Harrison has a mortgage loan secured by her home. All mortgages, Harrison's included, prohibit hazardous activity and hazardous substances on the property.

Waste pond at hydro-fracking drill site, Dimock, PA

Elisabeth N. Radow (eradow@cuddyfeder.com) is Special Counsel to the White Plains law firm of Cuddy & Feder LLP. Ms. Radow chairs the Hydraulic Fracturing Committee for the League of Women Voters of New York State. Ms. Radow's Law Note, *Citizen David Tames Gas Goliaths on the Marcellus Shale Stage*, was published in the 2010 Spring issue of the *Cardozo Journal of Conflict Resolution*. This analysis and the assertions made in this article are attributable to the author alone.

Photographs courtesy of J Henry Fair. Mr. Fair's work has appeared in the *New York Times, Vanity Fair, Time and National Geographic*. His new book, *The Day After Tomorrow: Images of Our Earth In Crisis* is a series of essays and startling images. www.industrialscars.com.

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Tanker trucks filling water reservoir at hydo-fracking gas drilling operations near Sopertown, Columbia Township, PA

Overspray of drilling slurry at hydro-fracking drill site, Dimock, PA

Residential fracking carries heavy industrial risks, and the ripple effects could be tremendous. Homeowners can be confronted with uninsurable property damage for activities that they cannot control. And now a growing number of banks won't give new mortgage loans on homes with gas leases because they don't meet secondary mortgage market guidelines. New construction starts, the bellwether of economic recovery, won't budge where residential fracking occurs since construction loans depend on risk-free property and a purchaser. This shift of drilling risks from the gas companies to the housing sector, homeowners and taxpayers creates a perfect storm begging for immediate attention.

> A home represents a family's most valuable asset, financially and otherwise.

The introduction of fracking in homeowners' backyards presents a divergence from typical current land use practice, which separates residential living from heavy industrial activity, and the gas leases allocate rights and risks between the homeowner and gas company-lessee in uncharacteristic ways. Also, New York's compulsory integration law can force neighbors who do not want to lease their land into a drilling pool, which can affect their liability and mortgages as well.

The Marcellus Shale Region

The Marcellus Shale region, located across New York's Southern Tier, represents a portion of one of America's largest underground shale formations, with accessibility to gas deposits ranging from ground surface to more than a mile deep. The decade-old combined use of horizontal drilling and high-volume hydraulic fracturing is the current proposed means of extracting the trapped shale gas. Horizontal drilling, which dates back to 1929, became widely used in the 1980s, with the current technology providing lateral access to mile-deep shale in multiple directions from a single well pad.

To envision what this looks like, imagine one well pad that accommodates eight or more vertical wells with each well engineered to extend a mile or more in depth then turn and drill horizontally in its own direction, up to a mile through shale across residential properties and farms owned by a cluster of neighboring residents. High-volume hydraulic fracturing, first introduced by Halliburton in 1949, mixes millions of gallons of water with sand, brine and any of a number of undisclosed chemicals, which are injected into the well bore at pressure sufficient to rupture open the formation, prop open the mile-deep shale fractures with sand and release the trapped gas back into the well. Fracking-produced wastewater, with concentrated levels of these toxic chemicals, drilling mud, bore clippings and naturally occurring radioactive material, such as uranium, radium 226 and radon, is released from the well into mud pits and holding tanks, then trucked out for waste treatment or reused. Reuse of frack fluid, currently the favored practice because it spares the finite water supply, concentrates the waste toxicity. The Environmental Protection Agency estimates that 20%–40% of the fracking wastewater stays underground. The Marcellus Shale sits amid an intricate network of underground aquifers that supply drinking water in New York and surrounding states via municipal water supplies, private wells and springs. Shallow private wells constitute the primary source of drinking water for the upstate New York residences and farms where fracking for shale gas would take place, posing a cumulative threat to the state's complex matrix of aquifers that source our groundwater.

The Risks

The use of fracking expanded in 2005 when Congress exempted it through statutory amendments from complying with decades-old federal environmental laws governing safe drinking water and clean air. (This exemption is now commonly known as the Halliburton loophole.) Also in 2005, New York changed its compulsory integration law to pave the way for fracking.

According to the 2010 Form 10-Ks of Chesapeake Energy and Range Resources (both doing business in the Marcellus Shale region), natural gas operations are subject to many risks, including well blow-outs, craterings, explosions, pipe failures, fires, uncontrollable flows of natural gas or well fluids, formations with abnormal pressures and other environmental hazards and risks. Drilling operations, according to Chesapeake, involve risks from high pressure and mechanical difficulties such as stuck pipes, collapsed casings and separated cables. If any of these hazards occur it can result in injury or loss of life, severe damage or destruction of property, natural resources and equipment, pollution or other environmental damage and clean-up responsibilities,[1] all in the homeowner's backyard.

American culture traditionally favors land use that keeps heavy industrial activity out of residential neighborhoods. The reasons range from safety to aesthetics. A home represents a family's most valuable asset, financially and otherwise. In legal terms, homeownership or "fee simple absolute title" means a bundle of rights encompassing the air space above and the ground below the land surface. It entitles homeowners to build up and out, pledge the house and land as collateral for a mortgage loan, and lease or sell the property. Part of a home's purchase price pays for this bundle of rights. Another bundle of rights attributable to homeownership

CONTINUED ON PAGE 14

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consists of the actual roof over one's head; clean, running water; and access to utilities. A third bundle of rights is attributable to the intangibles that make a house a home, such as peaceful sanctuary, fresh air, and a safe, secure haven for budding children. Residential fracking challenges all of these attributes of home ownership.

Shifting Risk

Gas leases provide the bundle of rights from which gas companies generate financing and operate gas wells. Profitable gas *extraction* benefits from broad rights to access, extract, store and transport the gas, on the company's timetable. Gas leases contain these rights. Profitable gas *investment* benefits from latitude on timing of gas extraction and the latitude not to extract gas at all. Gas leases contain these rights too. The gas company has the sole discretion to drill, or not to drill. Leases provide the currency in trade. The longer the lease term, the more latitude a leaseholder has to manage market fluctuations. With its broad gas storage rights, a leaseholder can store gas from other sources, on-site and wait for the demand curve to peak before executing the most favorable transactions. In August 2011, the U.S. Geologic Survey estimated reserves of "technically recoverable" shale in the Marcellus Shale play at 84 trillion cubic feet, reflecting a significant reduction from DEC's long-standing website estimate of between 168 trillion and 516 trillion cubic feet. Shale gas projections have an inherent value, separate and apart from the extracted gas. People invest capital based on the anticipated reserves. Time will tell how the new estimates change if and where gas companies actually drill in New York. Some regions may be too difficult or expensive to access; others will be off-limits by law. The terms of the gas leases nevertheless entitle the gas lessee to maintain the leasehold, which can facilitate investor activity. The Form 10-K appended to the 2010 Chesapeake Energy Annual Report states,

> Recognizing that better horizontal drilling and completion technologies, when applied to new unconventional plays, would likely create a unique opportunity to capture decades worth of drilling opportunities, we embarked on an aggressive lease acquisition program, which we have referred to as the "gas shale land grab" of 2006 through 2008 and the "unconventional oil land grab" of 2009 and 2010. We believed that the winner of these land grabs would enjoy competitive advantages for decades to come as other companies would be locked out of the best new unconventional resource plays in the U.S. We

Hydro-fracking drill sites, feeder pipelines, and access roads and gravel banks for road building (Dimock, PA)

> believe that we have executed our land acquisition strategy with particular distinction. At December 31, 2010, we held approximately 13.2 million net acres of onshore leasehold in the U.S. and have identified approximately 38,000 drilling opportunities on this leasehold. We believe this extensive backlog of drilling, more than ten years worth at current drilling levels, provides unmistakable evidence of our future growth capabilities.[2]

The broad bundle of rights granted by gas leases enables gas companies to raise capital in the millions or billions of dollars once the up-front per-acre signing bonus is paid to the homeowner. This is beneficial for the drilling investment itself and for maintaining the company's competitive advantage. On the other hand, the effect of the lease encumbering the homeowner's residence can have repercussions for mortgage financing, as will be discussed below.

Getting the Gas

Drilling companies derive the right to drill underneath residential (and non-residential) property in three ways:

- deed to the subsurface rights below the fee estate (a practice not typically used in New York);
- lease agreement with the fee owner; and
- compulsory integration, which involves government action that forces a property owner who wishes no drilling activity below its property into a drilling pool if the lessee otherwise has control of a statutorily prescribed percentage of land (in New York it is 60%).

A drilling application submitted to DEC must show the area (up to 640 aces), known as a spacing unit, assigned to the well. The spacing unit becomes officially established when DEC issues the well permit.

Deed to Subsurface Rights

A deed to the subsurface or mineral rights splits the fee estate between the surface property and the subsurface property, with separate deeds for each estate. Subsurface deeds are common in Western states where drilling is an established practice; it gives the deed holder the full range of rights to the subsurface. As with the surface deed, it is considered a real property interest and is also recorded in the land records against the section, block and lot for the surface property. The rights do not extend above the subsurface and should not, as a legal matter, interfere with the rights of the surface owner. As a practical matter, because of drilling lifecycle hazards, the surface owner may sacrifice some of the attributes of home ownership discussed in this article.

Standard Lease Agreement With Fee Owner

The standard space lease, between a building owner (landlord or lessor) and a tenant (or lessee) grants the right to occupy a specified space in the building for a finite time, in exchange for an agreed upon rent payable in regular installments. If the lease contains a percentage rent (a commercial lease concept based upon tenant revenue), it includes a formula for calculating the percentage rent and gives the landlord the right to inspect the tenant's books to verify that the landlord receives the agreed upon percentage. Except for the space leased to the tenant, the landlord retains all rights of ownership. When the lease expires, the tenant moves out, or the tenancy converts to a month-to-month tenancy. No duration of month-to-month holding over on the tenant's part converts the month-to-month arrangement into a lease for years. To end the relationship, either the landlord or tenant can give 30 days' written notice to the other.[3] To extend beyond the month-to-month relationship, the parties must enter into a new written lease.

In contrast, gas leases function more like a deed with a homeowner indemnity than a space lease – revealed by an assessment of the cumulative impact of the broad bundle of rights granted to the gas company-lessee and the corresponding bundle of rights relinquished by the homeowner. Standard pre-printed gas leases presented to New York homeowners by landmen and signed, *without negotiation*, represent the typical practice (until recently) in our state, and will be used here to illustrate the impact this has on the of rights and responsibilities of the homeowner. Depending upon the DEC's ultimate regulatory framework, homeowners who negotiate gas leases can expect similar impacts given the industrial sized risks involved.

The Use

A gas lease grants the right to extract the gas and a litany of related gas-constituents; it also grants the right to explore, develop, produce, measure and market for production from the leasehold and adjoining lands using methods and techniques which are not restricted to current technology.

The Space

In a standard gas lease, the physical leased space consists of the subsurface area within the property boundaries and undesignated portions of the surface lands

> to set up and store drilling equipment; create a surface right of way to use or install roads, electric power and telephone facilities, construct underground pipelines and so-called "appurtenant facilities," including data acquisition, compression and collection facilities for use in the production and transportation of gas products to, from and across the leased property; and store any kind of gas underground, regardless of the source, including the injecting of gas, protecting and removing gas, among other things.

The lessee's expansive, undesignated, reserved surface rights can result in acres going to support the operation, jeopardize a home mortgage and eliminate the homeowner's ability to build on the surface in

areas the lessee determines would interfere with drilling operations. Without limiting the location, size and type of pipeline, the homeowner leaves open the chance of a high-pressure gas line running under the property.

The Term

The lease runs for a five-year primary term (a portion contain a five-year renewal term), which in a standard lease the lessee can unilaterally transform into an indefinite, extended term, without signing a new lease, for any of the following reasons:

> exploration anywhere in the spacing unit, or a well in the spacing unit is deemed "capable of production," or gas from the spacing unit is produced, or the spacing unit is used for underground gas storage, or the prescribed payments are made.

The term "capable of production" is defined broadly enough to include off-site preparatory work. Regardless of the stated lease term, once a well is "capable of production," the rights continue for as long as operations continue, possibly decades.

The Rent

Homeowners receive a signing bonus ranging from dollars to thousands of dollars per acre of leased land. This single payment can potentially tie up the property, indefinitely. References in so-called "paid-up" leases (common in New York) to other potential additional payments (except for the royalty payment) are deemed satisfied by the signing bonus. Absent negotiation, royalties consist of a percentage (typically 1/8 or 12.5%), net of production-related expenses and any loss in gas volume that reduces the revenue received. Late payments or failure to make a royalty payment can "never" result in an automatic lease termination. Homeowners share the royalty with other members of the drilling pool on a pro-rated basis. This is known as correlative rights. The larger the drilling pool, the smaller the royalty. Unlike the percentage rent provision in a commercial lease, a gas lease contains no detailed formula for calculating the net royalty payment, no pro-rata share corollary to calculate the relative percent the homeowner bears to the pool of all other property owners entitled to divide the royalty pie and no right to review the lessee's books and records.

Assignment

Space leases require a tenant to obtain landlord consent for a third-party lease assignment. In contrast, a gas lessee can sell and assign to or finance the gas lease (or any interest) with any party it selects, without providing notice to the homeowner. This continuing right deprives homeowners of control over confirming consistency between the initial lease and the terms of the assigned document – who ends up with the lease, who gets hired and allowed onto the family's private property and the quality of the drilling activity performed in their backyard. As the record title holder, homeowners remain potentially liable for the activity that occurs on their property, if it is not effectively delegated.

Hazardous Activity/Hazardous Substances

Space leases expressly prohibit hazardous activity and the presence or storage of hazardous substances on the property, such as chemicals and flammable or toxic petroleum products. Gas leases permit both the drilling activity and the use of hazardous substances and flammable products, such as the methane gas itself. Gas leases reserve the right to store gas of any kind, indefinitely, underground, regardless of the source, which can create additional risk to the homeowner's personal safety and adversely impact, as will be discussed, a homeowner's responsibility to its lender.

Easements

Gas leases contain grants of easements, which is not typical for a lease. This grant includes the lessee's right, even after surrendering the leasehold, to "reasonable and convenient easements" for the existing wells, pipelines, pole-lines, roadways and other facilities on the surrendered lands. Assuming its enforceability, a driller can surrender a lease and still assert a range of potentially perpetual surface and subsurface rights as superior to those of the fee owner without any further payment and without the obligation for repair, maintenance or resulting damage. However, unless the actual lease containing the easement grant gets recorded against the residential property in the public records, which, apparently is often not the case, the lessee has no assurance the easements will be protected. Even so, leases reserving potentially perpetual, undesignated easements for roads and pipelines raise expensive, long-term liability concerns for homeowners, their lenders and, potentially, fellow taxpayers.

Insurance/Indemnification-Risk Allocation to Homeowner

Space leases typically require the tenant to post a security deposit to cover late rent or property damage. Gas leases do not contain a similar provision. Space leases also require tenants to purchase general liability insurance naming the landlord as an additional named insured with an indemnity covering costs for uninsured damage and other costs occasioned by the tenant and its invitees. Risks associated with typical leasehold property damage belong to tenants since they control the space. Drilling leases typically omit these points. Absent negotiation, gas leases contain no insurance and no indemnification. Even assuming the existence of an indemnification, federal protection via the Halliburton loophole can provide cover. Unless anticipated DEC rules change, New York intends to require disclosure only of fracking chemicals by gas companies. While this represents a step in the right

direction, it also gives companies an "out" by merely requiring them to disclose which chemicals they use. It does not necessarily make companies liable for the damage those chemicals cause. Eliminating the right to frack with toxic and carcinogenic chemicals by reinstating the laws amended by the Halliburton loophole would eliminate the shift of financial responsibility away from the gas company as it relates to this aspect of the gas drilling lifecycle. Regulating use of benign fracking additives that can boost risk would be useful as well. For example, radioactivity, a known danger at elevated levels, poses greater risks when it interacts with frack-fluid additives that contain calcium.[4] By not restoring liability to the companies that control drilling operations and coupling it with economic reasons to prevent casualties, a homeowner will have to first experience the property damage or personal injury, then successfully arbitrate or litigate against the gas lessee for reimbursement and remediation, a burden most homeowners can't afford or mentally handle. Even assuming a homeowner's fortitude to sue, focus on damages and remediation misses the fact that residential fracking introduces irreparable risks to homes and the families that live there.

> Assuming its enforceability, a driller can surrender a lease and still assert a range of potentially perpetual surface and subsurface rights as superior to those of the fee owner.

Gas Lease Mortgages

New York law[5] recognizes minerals (before extraction) as real property. In May 2011, a Chesapeake Energy subsidiary, Chesapeake Appalachia, pledged mineral rights on over 1,000 Bradford County, Pennsylvania, mineral leases as collateral for a $5 billion line of credit mortgage loan with Union Bank of California, while in July, 2011, another Chesapeake Energy subsidiary, Appalachia Midstream Services, pledged pipeline rights-of-way on over 2,000 Bradford County properties to access an unspecified line of credit mortgage loan with Wells Fargo. Although the mortgage was properly recorded in the county recorder's office against the section, block and lot of the fee/surface property, the news of a $5 billion loan linked to their property surprised mortgage-seeking homeowners. Legally, Chesapeake's mortgaged interests are distinguishable from the surface owner's, so that shouldn't interfere with a home loan, but residential fracking might. It is worth noting that Wells Fargo, one of Chesapeake's lenders, stands among national lenders that do not grant mortgage loans to homeowners with gas leases.

Homeowner Predicament

Despite DEC website warnings about the potential adverse impacts of gas leases,[6] the government plays no role in the lease process. Contract law favors the rights of private parties to enter into arm's-length transactions without government intervention. Yet, when large numbers of complaining upstate homeowners recount consistent practices employed by the landmen that resulted in pre-printed standard gas leases signed without negotiation, it would be appropriate to involve the New York Attorney General, to examine the facts. In consumer protection contexts, the government (on its own or as a result of litigation) has seen fit to offer protection. Homeowners who signed gas leases do not constitute consumers *per se*, but the analogy supports Attorney General involvement to restore to the landowner the bulk of rights attributable to fee ownership and, by extension, the property's value. Paradoxically, for example, gas leases reciting "good faith negotiations" between the parties lock in homeowners with lessee-favored termination clauses. Unlike space leases that terminate on a stated expiration date, gas leases give lessees latitude to extend a stated lease term, indefinitely, by asserting it is "capable of production" or "paid up" or otherwise, subject to "force majeure," asserting New York's de facto drilling moratorium as the event beyond their control. "Force majeure" litigation is now on the dockets across New York's Southern Tier.

Municipal Backlash; Indefinite Leases

Municipalities within the 28 counties sitting on top of New York's Marcellus Shale differ on the benefits of fracking. Municipalities in favor of fracking focus on local economic growth.[7] Municipalities opposing fracking take into consideration competing established economies, such as agriculture and tourism. By asserting home rule, municipalities have enacted moratoria, amended master plans or codes to prohibit heavy industry, including gas drilling, and banned drilling on public land or altogether.[8] In September 2011, Anschutz Exploration Corp. filed a lawsuit against the Town of Dryden asserting the supremacy of the state to issue a drilling permit over the right of the municipality to amend its zoning law to prohibit drilling or storage of natural gas.[9] The outcome of this case will have significant ripple effects throughout the state.

When municipalities favor fracking, homeowners with questions or concerns are on their own. Residents who do not wish to renew and residents who are committed to leasing but want to renegotiate terms when their lease expires, as with an expired space lease, are meeting some resistance from the gas

companies, who are using General Obligations Law § 15-304 (GOL) to reinstate expired leases. That statute states that after a recorded drilling lease expires by its own terms, the owner "may" serve a cancellation notice to the lessee triggering a lessee right to file an affidavit affirming that the lease is in full force and effect. Then, more papers get filed to confirm and preserve that right. Unlike the space lease which terminates on a certain date, GOL § 15-304 gives drillers a second chance which (so long as the driller has recorded the full lease) can tie an unwilling homeowner indefinitely to a gas lease the homeowner no longer wants. Homeowners electing not to give the statutory notice live in limbo, uncertain as to where they stand.

If a lessee decides to drill for gas but lacks the total acreage it needs, the lease provides the statutorily required leverage to form a so-called "spacing unit" by forcing unwilling property owners surrounding the voluntarily leased property into a drilling pool, a process called compulsory integration.

Compulsory Integration

Involuntary compulsory integration represents the most controversial method drilling companies use to access gas. Compulsory integration (or forced pooling) exists by statute in 39 states.[10] It replaced the common law rule of "capture" which allowed Person A to legitimately collect and own gas from Person B's supply if it flowed into Person A's well. To capture gas before a neighbor did, surface wells proliferated in close proximity to one another, causing the overall gas pressure to drop and making gas extraction inefficient for all involved. It also blighted the surface lands. Today, Environmental Conservation Law § 23-0901 (ECL) deputizes a driller, subject to a DEC hearing, to force an unwilling property owner into a spacing unit if the drilling company otherwise controls 60% or more of the acreage in the spacing unit either by lease, deed or voluntary integration,[11] which itself involves lease swaps among leaseholders to form the spacing unit.

Proponents assert that forced pooling makes the drilling infrastructure investment more cost efficient by maximizing access to gas while also maintaining the surface landscape and fairly compensating the noncontributing "integrated" homeowner with a shared net 12.5% royalty. Opponents consider it a form of eminent domain. The constitutionality of forced pooling under a predecessor statute was confirmed in dicta by the New York Court of Appeals in *Sylvania v. Kilborne*, itself citing the United States Supreme Court, which held that "a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of migratory gas and oil underlying their land fairly distributing among them the costs of production and the apportionment."[12]

Yet, the updated statute's effect eliminates the homeowner's right to control the homestead, creates financial risk for the driller's acts by not expressly holding the driller responsible, and jeopardizes access to a mortgage or the ability to sell the property. The ECL permits objection by a homeowner to the forced pooling within prescribed guidelines (having a scientific basis) none of which includes asserting a conflict with other (existing or intended) contract obligations, such as a mortgage. ECL § 23-0503, empowers DEC to schedule an adjudicatory hearing if it determines that "substantial and significant issues have been raised in a timely manner." Whether a driller's rights of involuntary compulsory integration come after, or trump, sanctity of contract between a homeowner and its mortgage lender needs clarification.

$6.7 Trillion Secondary Mortgage Market

The Federal Housing Finance Agency (FHFA) was created in July 2008 on the heels of the mortgage crisis, to provide supervision, regulation and housing mission oversight of Fannie Mae and Freddie Mac and the Federal Home Loan Banks (FHLB) and to support a stable and liquid mortgage market. As of September 2010, according to FHFA, the combined debt obligations of these government-sponsored entities totaled $6.7 trillion, with Fannie Mae and Freddie Mac purchasing or guarantying 65% of new mortgage originations. FHFA, as conservator of the secondary mortgage market, has a fiduciary responsibility to promote the soundness and safety of the secondary mortgage market. It is in FHFA's interest to limit mortgage defaults.

Most American homeowners hold a mortgage loan and 90% of all residential mortgage loans are sold into the secondary mortgage market (exceptions exist for million dollar homes which do not get sold by the lending bank). It is assumed that most upstate New Yorkers who signed gas leases have a mortgage, will want one in the future or want that right for a future purchaser. Mortgage lending favors low-risk activity on its mortgaged properties. Fannie Mae, Freddie Mac and the FHLB establish lending guidelines for appraisers and underwriters that dictate whether a home is a worthy investment. This helps to facilitate their combined mission to attract investors, such as pension funds, who provide liquidity in the secondary mortgage market. Primary lenders, in turn, rely on their borrowers' compliance with mortgage covenants mirroring these lending guidelines for the life of the loan.

Assuming 10% of the existing secondary mortgage market portfolio includes residential properties subject to drilling activity, this amounts to $670 billion of secondary mortgage market debt; assuming the number is only 1%, this amounts to $67 billion. Eventually, gas drilling may span up to 34 of the lower 48 states, including densely populated cities such as Fort Worth,

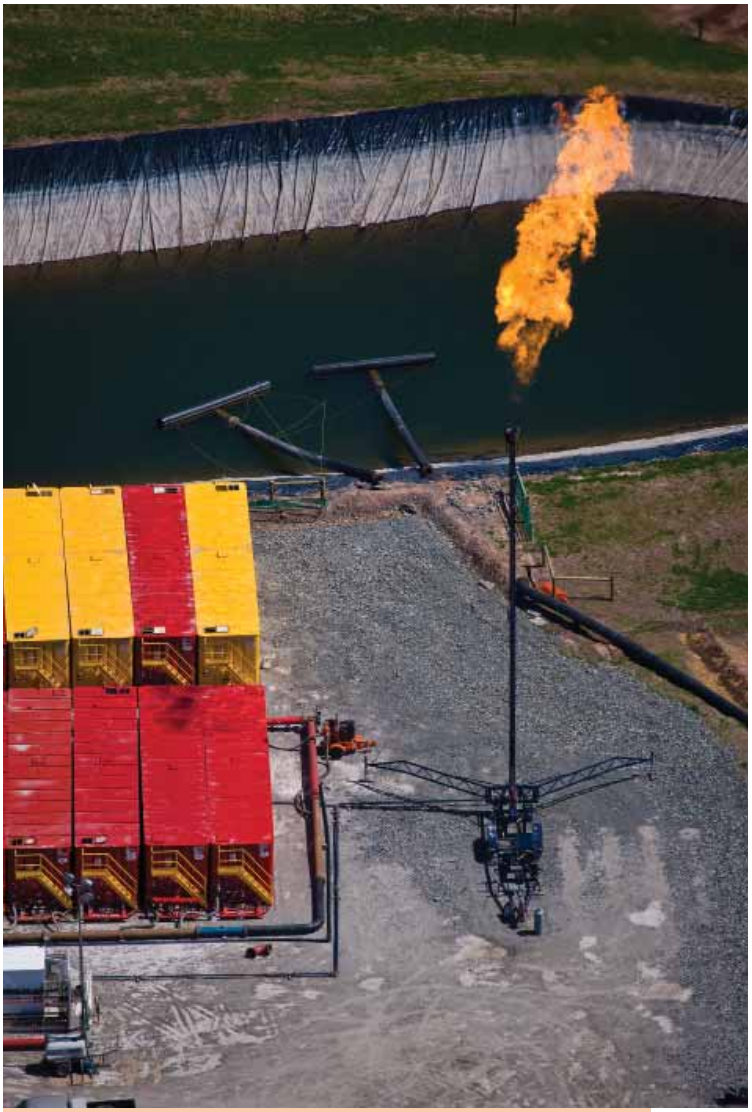
Texas. If so, a substantial portion of the secondary residential mortgage market portfolio may be at risk from residential fracking.

Loan Underwriting Reveals Collateral Flaws With Residential Fracking

Home Appraisal

All mortgage loans require a property appraisal, title insurance covering the lender or its assignees and homeowner's insurance. Home and land appraisals are based upon like-properties, similarly situated, and are used to determine market value, the loan-to-value ratio and the maximum loan amount. Reliable appraisals of properties subject to gas leases are difficult to obtain and potentially prohibitively expensive; it would require a comprehensive title search of area properties encumbered by gas leases. Often a memorandum of the gas lease and not the lease itself is recorded, and a read-through of the entire gas lease is required to make a fair comparison between lease-encumbered properties. Underwriters need to evaluate the risks and know who pays for them; without the full lease in hand, they can't make such an evaluation.[13]

Evaluating the driller's identity can be another underwriting challenge; with unrecorded lease assignments, lenders don't know who is performing the heavy industrial activity on their residential collateral. Federal Housing Authority guidelines for federally insured mortgage loans, which make up a portion of the secondary mortgage market debt, require that a site be rejected "if property is subject to hazards, environmental contaminants, noxious odors, offensive sights or excessive noise to the point of endangering the physical improvements or affecting the livability of the property, its marketability or the health and safety of its occupants,"[14] all of which are potential characteristics of residential fracking.



Flare at hydro-fracking gas drilling operations near Sopertown, Columbia Township, PA

Lender's Title Insurance

A lender's title policy insures the mortgage lien, as of the date of the policy (up to the loan amount), against loss or damage if title is vested in someone other than the homeowner. Gas leases signed after the policy date are not covered by the policy. Gas leases in effect when the policy is issued will be listed as a title exception. Coverage won't include the gas lease or any claims arising out of it. Title endorsements don't eliminate this exception to coverage. Underwriters consider these exceptions a red flag, sufficient to jeopardize the loan. Lenders financing properties subject to compulsory integration won't discover the title encumbrance from a title search because ECL § 23-0901 makes no apparent reference to recording the DEC determination of compulsory integration in the land records. New York title policies expressly exclude from coverage loss or claims relating to any permit regulating land use. It remains unclear whether a gas drilling permit which includes forced pooled property would fall within this exclusion. Either the Legislature will clarify the statute or the ambiguity will be a source of future litigation. Rating agencies and secondary mortgage market investors should be apprised if a loan portfolio which they have rated or in which they have invested, as the case may be, contains gas leases or forced pooled properties, since both add new risk.

Homeowner's Insurance

All residential mortgage lenders require homeowner's insurance from their borrowers. Even the most comprehensive homeowner's coverage, known as "broad risk form" or "special form" insurance excludes the types of property damage associated with the drilling lifecycle, such as air pollution, well-water contamination, earth movement and other risky commercial activity performed on residential property.

The Mortgage: No Hazardous Activity/Substances, No Gas/Gas Storage, No Radioactive Material

Residential mortgages prohibit borrowers from committing waste, damage or destruction or causing substantial change to the mortgaged property or allowing a third party to do so. This includes operations for gas drilling. Standard residential mortgages prohibit borrowers from causing or permitting the presence, use, disposal, storage, or release of any "hazardous substances" on, under or about the mortgaged property. In mortgages, "hazardous substances" include gasoline, kerosene, other flammable or toxic petroleum products, volatile solvents, toxic pesticides and herbicides, materials containing asbestos or formaldehyde and radioactive materials. Borrowers are also prohibited from allowing anyone to do anything affecting the mortgaged property that violates any "environmental law." "Environmental law" means federal, state and local law that relates to health, safety and environmental protection. Mortgages obligate borrowers to give lenders written notice of any release, or threat of release, of any hazardous substances and any condition involving a hazardous substance which adversely affects the value of the mortgaged property.

Mortgages prohibit the activities gas leases permit to preserve the property's marketability. For example, shallow water wells and springs, typical in the northeast, represent the home's drinking water source; they become susceptible to contamination from drill site spills and leaks or flooding from frack wastewater. Frack fluid chemicals, pollutants and naturally occurring radioactivity in the waste have been reported to far exceed levels considered safe for drinking water. A contaminated well cannot be easily remediated, if at all. A home or a farm without on-site potable water may not sell. Migrating methane gas from the drilling process risks explosions both inside and outside of the home.

Because water and migrating methane gas each defy boundaries, following minimal underwriting setback requirements between the home and the drill site may prove inadequate to protect a water well from irreparable contamination or a home from explosion. A bank can consider these factors when approving a mortgage loan, and once financed, when declaring a mortgage loan in default.

Homeowner and Lender Vulnerability

The 2010 Form 10-K issued by Chesapeake states:

> There is inherent risk of incurring significant environmental costs and liabilities in our operation due to our generation, handling and disposal of materials, including waste and petroleum hydrocarbons. We may incur joint and several liability, strict liability under applicable U.S. federal and state environmental laws in connection with releases of petroleum hydrocarbons and other hazardous substances at, on, under or from our leasehold or owned properties, some of which have been used for natural gas and oil exploration and production activities for a number of years, often by third parties not under our control. For our non-operated properties, we are dependent upon the operator for operational and regulatory compliance. While we maintain insurance against some, but not all risks described above, our insurance may not be adequate to cover casualty losses or liabilities, and our insurance does not cover penalties or fines that may be assessed by a governmental authority. Also, in the future we may not be able to obtain insurance at premium levels that justify the purchase.[15]

In the Form 10-K appended to its 2010 Annual Report, Range Resources adds:

> We have experienced substantial increases in premiums, especially in areas affected by hurricanes and tropical storms. Insurers have imposed revised limits affecting how much the insurer will pay on actual storm claims plus the cost to re-drill wells where substantial damage has been incurred. Insurers are also requiring us to retain larger deductibles and reducing the scope of what insurable losses will include.[16]

Signing a gas lease without lender consent is likely to constitute a mortgage default. At any time before or after the drilling begins, a lender can demand the borrower to either terminate the lease or pay off the loan. Since the gas companies have pledged the gas leases as collateral for loans or brought in investors based upon the potential income the gas lease can produce, facilitating a lease termination may require protracted litigation. Further, it is not likely that most homeowner-borrowers will have the ready cash to repay the loan. This places the lender in an untenable position.

Residential fracking, perpetual unfunded easements and long-term gas storage beneath mortgaged homes create a cumulative threat to the repayment of mortgage loans tranched in secondary mortgage market portfolios. Homeowners suffering irreparable property damage, such as well water contamination, structural damage or casualty from a gas explosion, won't have coverage from homeowner's insurance and may have no recourse against the gas company holding the lease. This is so even if homeowners sue and succeed in court since the gas companies' own disclosure statements state they are underinsured. New York State Comptroller Thomas Di Napoli has proposed an up-front gas company–funded emergency fund to remediate those emergencies that can be fixed. As of yet, the gas industry, the Governor, the state Senate and the Assembly have not offered support for such a fund. The Form 10-K for Chesapeake Energy and Range Resources, for example, cite the risks attendant to gas drilling. They do not indicate the source of funding to support the numerous risks from the drilling activity. Unless this source of funding can be identified, the secondary mortgage market, as holder of 90% of the nation's home mortgages, may be left with the

clean-up bill. Ultimately, financial responsibility could fall on the taxpayers.

New York homeowners who signed gas leases without the facts about this unconventional drilling claim they did not know the risks involved. These homeowners did not know that they violated their mortgage by entering into the gas lease or have potentially no insurance coverage in case of a drilling loss. Impacted homeowners can write to New York's Attorney General to (1) document their experience; (2) request a reprieve from a mortgage loan default; and (3) institute a "no gas drilling" policy until it is determined that the mortgaged collateral won't be at risk from the driller's plans. To achieve this, gas leases should be revised to modify or omit the risky clauses, such as gas storage, surface rights and undesignated, unfunded easements. In the alternative, the gas leases can be terminated. Homeowners need help before gas permitting begins, in order to spare the homestead and the home mortgage market too.

New Mortgages for Homeowners With Gas Leases and New Construction[18]

Even before the drilling commences, many upstate New York homeowners with gas leases cannot obtain mortgages. Bank of America, Wells Fargo, Provident Funding, GMAC, FNCB, Fidelity and First Liberty, First Place Bank, Solvay Bank, Tompkins Trust Company, CFCU Community Credit Union and others[17] are either imposing large buffer zones (too large for many borrowers) around the home as a condition to the loan or not granting a mortgage at all.

Once lenders connect the "no hazardous activity" clause in the mortgage with the mounting uptick in uninsurable events from residential fracking, this policy can be expected to expand. Originating lenders with gas industry business relationships may decide to assume the risk, make mortgage loans to homeowners with gas leases and keep the non-conforming loans in their own loan portfolio. However, there is a limit to what an originating bank can keep in its own loan portfolio. Eventually, cash infusions from the secondary mortgage market will become a necessity; and secondary mortgage market lending guidelines will be a reality. If homeowners with gas leases can't mortgage their property, they probably can't sell their property either (this assumes the purchaser will need mortgage financing to fund the purchase). The inability to sell one's home may represent the most pervasive adverse impact of residential fracking.

Real estate developers and contractors rely on construction financing and financeable homeowners to stimulate construction starts. New York's upstate construction future depends upon the ability to sell what one builds. Washington County, Pennsylvania, for example, reported improved home sales servicing the gas industry in 2010, but apparently not of properties built on drill sites.

The Conundrum Revisited

The energy and housing sectors both rely on investor dollars to fund their future. Pension funds and other money sources that still invest in housing but now consider natural gas the preferred investment raise a potential paradox: Will individuals' retirement funds expand as their homeownership rights fade away? The conundrum to consider: how can a nation with $6.7 trillion in residential secondary mortgage market debt that measures economic recovery by construction starts and new mortgage loans also accommodate risky and underinsured residential fracking involving a still-unknown quantity of this residential mortgage collateral? Before New York embraces fracking as a new frontier, it would be wise for our corporate and government leaders focused on the vitality of our housing and energy sectors to address and resolve this conundrum. ■

1. Chesapeake Energy Corp., *10-K: Annual Report Pursuant to Section 13 and 15(d)* 27 (2011) (Chesapeake Energy 10-K: Annual Report); Range Resources, Uncovering Tomorrow's Energy: 2010 Annual Report 13 (2010) (Range Resources 2010 Annual Report).

2. Chesapeake Energy 10-K: Annual Report 4.

3. N.Y. Real Property Law § 232-b.

4. Mark Greenblatt, *Texas drinking water makes pipes and plumbing radioactive,* KHOU.com (May 18, 2011) at http://www.khou.com/home/-I-Team-Texas-drinking-water-makes-pipes-and-plumbing-radioactive-1221408194.html.

5. N.Y. Jurisprudence, Mines § 7; *see* N.Y. Uniform Commercial Code § 9-102.

6. Div. of Mineral Res., A Landowner's Guide to Oil & Gas Leasing, Dep't of Envtl. Conservation (2008), http://www.dec.gov/docs/materials_minerals_pdf/brochure.pdf.

7. Cornell University Professor Susan Christopherson cautions against boom-bust impacts. *See* Susan Christopherson, *Marcellus Gas Drilling*, Cornell Univ. 2011, http://www.greenchoices.cornell.edu/development/marcellus.

8. Joe Hoff, *Moratoria, Bans, Resolutions Opposed to Hydrofracking: A Local and Global Sampling*, R-Cause (Sept. 20, 2011) www.r-cause.net/bans-moratoria.

9. *Anschutz Exploration Corp. v. Town of Dryden & Town of Dryden Town Bd.*, Supreme Court, Tompkins County; N.Y. Environmental Conservation Law § 23-0303(2) (ECL).

10. ECL § 23-0901; Marie C. Baca, *State Law Can Compel Landowners to Accept Gas and Oil Drilling*, Pro Publica (May 19, 2011), http://projects.propublica.org/tables/forced-pooling.

11. ECL § 23-0901.

12. *Sylvania Corp. v. Kilborne*, 28 N.Y.2d 427 (1971) (quoting *Hunter Co. v. McHugh*, 320 U.S. 222 (1943)).

13. *See* Greg May, VP, residential lending, *Gas and Oil Leases Impact on Residential Lending*,Tompkins Trust Co., White Paper,(Mar. 24, 2011), http://www.tompkins-co.org/tccog/Gas_Drilling/Focus_Groups/Assessment%20Documents/White%20Paper.pdf

14. Dep't of Hous. & Urban Dev., *Valuation Analysis for Single Family One-to-Four Unit Dwellings* (4150.2) (2011).

15. Chesapeake Energy 10-K: Annual Report 29, *supra* note 1.

16. Range Resources 2010 Annual Report 13, *supra* note 1.

17. Greg May, VP, residential lending Tompkins County Trust, telephonic update of white paper, *supra* note 13, and Joseph Heath, Esq.

18. *See* Ian Urbina, *Rush to Drill for Natural Gas Creates Conflicts With Mortgages*, N.Y. Times, Oct. 20, 2011, p. 1. Mr. Urbina's article used Elisabeth Radow's August 11, 2011, letter to Freddie Mac and the federal agency that oversees Freddie Mac, warning the agencies about potential conflicts in the mortgage market, as a documentary source for his piece. The letter may be viewed at http://www.nytimes.com/interactive/us/drilling-down-documents-8.html#document/p12/a33448.

BY DAVID PAUL HOROWITZ

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Everything You Needed to Know (About Practicing Law) . . . You Learned at the Movies

Introduction

In the May 2009 issue of the *Journal*, Prof. Gary A. Munneke wrote an article titled "Everything You Needed to Know (About Practicing Law) . . . You Learned in Law School." Thinking back on my law school days, the article struck a chord, and as an adjunct at Brooklyn Law School, I felt pride in being a part of the critical process described by Prof. Munneke.

Later, thinking about the column, I had a nagging feeling that the seeds for successfully practicing law might, in fact, have been planted earlier than law school. A few hours later it came to me: everything I needed to know about practicing law I learned at the movies.

Million Dollar Movie

As a boy growing up on Featherbed Lane in the Bronx, just north of Yankee Stadium, my local movie theater was the Surrey on Mt. Eden Avenue, a theater that did not show a first-run film in my lifetime and that screened movies long past their initial release. About a mile and a half away on the Grand Concourse was the Lowe's (pronounced "Loweys") Paradise, a true movie palace that was the rival of Radio City Music Hall, but was visited only on birthdays and for special events. However, every weeknight, I had a front-row seat to "Million Dollar Movie" on WOR Channel Nine; every weeknight at 8:30 pm a classic movie unfolded in my living room.

Now, "Million Dollar Movie" had one major shortcoming: every movie was edited, often poorly, to fit into its 90-minute time slot, including commercials. Years later when, in a different venue, I would watch movies I had first seen on "Million Dollar Movie," I was stunned to discover important characters and plots that had been edited out completely by "Million Dollar Movie."

I discovered one other thing years later: The music that introduced "Million Dollar Movie" every weeknight, which I believed was original to "Million Dollar Movie," was, in fact, the overture to *Gone With the Wind*.[1]

Remembering "Million Dollar Movie," I realized that the most important lessons I learned about being a lawyer I first learned from movies (occasional truncated form notwithstanding). Here is a sampling.

On Cross-Examination, Don't Ask a Question You Don't Already Know the Answer To

One of the fundamental rules taught in every trial advocacy class is never to ask a witness, on cross-examination, a question to which you, the questioning attorney, do not already know the answer.

1982's *The Verdict*, starring, *inter alia*, Paul Newman, James Mason and Charlotte Rampling, illustrates this concept beautifully. Nurse Caitlin Costello Price is being cross-examined by Ed Concannon, who has just elicited that Price had signed the admitting form stating that Deborah Ann Kaye had last eaten nine hours before arriving at the hospital to deliver her baby, confirming the defendant doctors' testimony. Price claims the defendants lied:

> Ed Concannon: They lied. They lied? They lied? When did they lie? Do you know what a lie is?
>
> Nurse Price: I do, yes.
>
> Ed Concannon: You swore on this form that the patient ate nine hours . . .
>
> Nurse Price: That's not what I wrote.
>
> Ed Concannon: You just told me that you signed it.
>
> Nurse Price: Yes, I did, yes, I signed it, yes, but I didn't write a nine, I wrote a one.
>
> Ed Concannon: You didn't write a nine, you wrote a one? And how is it you remember so clearly after four years?
>
> Nurse Price: Because I kept a copy. I have it right here.
>
> Ed Concannon: Objection!

Snatching Defeat From the Jaws of Victory

Lawyer films are replete with scenes of lawyers snatching victory from the jaws of defeat, often via the proverbial "Hail Mary Pass." Not something to be counted on and much rarer in real life than in the movies. The painful corollary to snatching victory from the jaws of defeat, undoubtedly experienced with greater frequency by practicing lawyers, is the misstep that

brings about defeat in a case on the cusp of victory.

A heartbreaking example appears in one of my all-time favorite movies, *To Kill a Mockingbird*. Atticus Finch has done a masterful job of defending Tom Robinson, skating on the razor's edge between the institutional racism and the inherent desire to be just embodied in his neighbors on the Maycomb County jury.

Tom Robinson, after a strong direct examination, is asked by the prosecutor, Mr. Gilmer, why he did work for Mayella Ewell without getting paid. When Tom volunteers that he felt sorry for her, his fate is sealed:

> Mr. Gilmer smiled grimly at the jury. "You're a mighty good fellow, it seems – did all this for not one penny?"
>
> "Yes, suh. I felt right sorry for her, she seemed to try more'n the rest of 'em–"
>
> "*You* felt sorry for *her*, you felt *sorry* for her?"
>
> Mr. Gilmer seemed ready to rise to the ceiling. The witness realized his mistake and shifted uncomfortably in the chair. But the damage was done. Below us, nobody liked Tom Robinson's answer. Mr. Gilmer paused a long time to let it sink in.

How to Deal With a Judge Who Is Killing Your Case

In *The Verdict*, Frank Galvin's efforts to elicit testimony from his medical expert, Dr. Thompson, are stymied by Judge Hoyle. The judge takes over the questioning and torpedoes Frank's examination. Galvin's reaction is priceless, albeit difficult to pull off outside of the cinema:

> Judge Hoyle: Are you saying that the failure to restore the heartbeat within nine minutes, in itself, constitutes bad medical practice?
>
> Frank Galvin: Your Honor.
>
> Judge Hoyle: Yes Mr. Galvin?
>
> Frank Galvin: If I may be permitted to question my witness in my own way.
>
> Judge Hoyle: I'd just want to get to the point . . . I believe I have the right to ask the witness a direct question. Now let's not waste these people's time. Now answer the question Mr. Witness, please. Would a nine-minute lapse, in and of itself, be negligence?
>
> Dr. Thompson: In that small context I would have to say no.
>
> Judge Hoyle: Then you're saying there's no negligence, based on my question.
>
> Dr. Thompson: Given the limits of your question, that's correct.
>
> Judge Hoyle: The doctors were not negligent.
>
> [No answer].
>
> Judge Hoyle: Thank you.
>
> Frank Galvin: I'm not through questioning. . . . Your Honor, with all due respect, if you're going to try my case for me I wish you wouldn't lose it.
>
> Judge Hoyle: Thank you, I think that's enough for this morning. I'll see counsel in my chambers. Now, please!

Summation: "Mercy Is the Highest Attribute of Men"

In *Compulsion*, Orson Wells plays Clarence Darrow as he defends the cold-blooded murderers Leopold and Loeb. His summation, where he pleads for a sentence of life imprisonment rather than death, is a tour de force; he concludes:

> Your Honor, if you hang these boys you turn back to the past. I'm pleading for the future. Not merely for these boys but for all boys, all the young. I'm pleading not for these two lives, but for life itself. For a time when we can overcome hatred with love, when we can learn that all life is worth saving, and that mercy is the highest attribute of men. Yes, I'm pleading for the future, in this court of law, I'm pleading for love.

The Importance of Procedure

Having taught New York Practice and Evidence for many years, I am quick to highlight the importance of procedure, yet I know that as a practicing attorney, there will be times when I will not know the relevant procedure. What to do in that situation is nicely illustrated in *Mr. Smith Goes to Washington*. Senator Jefferson Smith is filibustering, is asked to yield the floor, and is uncertain under the rules what will happen if he does:

> Knowing the rules of procedure does not always carry the day.

> Senator: Will the Senator yield for a question?
>
> Jeff Smith: I yield.
>
> Senator: In view of the gentleman's touching concern for the Senators, and in view of the fact that he has been talking for seven and one-half hours and must be very, very tired, will he permit a motion to recess until the morning, at which time he may be able to better continue with his profound babblings?
>
> Miss Saunders: No, no don't, ask him, ask him [pointing to the President pro tem of the Senate].
>
> Jeff Smith: Mr. President, what happens to me in the morning, I mean about my having this floor to go on with my babblings?
>
> President Pro Tem: If the Senator permits this motion for recess, he won't have the floor in the morning to babble with or anything else, unless he is recognized first by this chair.
>
> Jeff Smith: Uh-huh. As I was saying gentlemen, I'm either dead right or I'm crazy, and I feel fine . . .

Of course, knowing the rules of procedure, or knowing enough to ask when you don't know, does not always carry the day. The following vignette from *My Cousin Vinny*, where Vinny timely and cogently objects to the prosecution's calling of an expert witness who was not noticed, illustrates this sad but often true fact:

> Mr. Gambini: I object to this witness being called at this time. We have been given no prior notice

he'd testify, no discovery of any tests he has conducted or reports he has prepared. As the Court is well aware, the defense is entitled to advance notice of any witness who will testify, particularly to those who will give scientific evidence so that we can properly prepare for cross-examination, as well as to give the defense the opportunity to have the witness's reports examined by a defense expert whom might then be in a position to contradict the veracity of his conclusions.

Judge Haller: Mr. Gambini, that is a lucid, intelligent, well-thought-out objection.

Mr. Gambini: Thank you Your Honor.

Judge Haller: Overruled!

The Importance of Stipulations and Judicial Notice

In this November/December issue, which dovetails with the season from Thanksgiving through Christmas, what better film to conclude with than *Miracle on 34th Street*, which begins on Thanksgiving Day and ends on Christmas Day.

The film drives home the importance of stipulations and judicial notice. At Kris Kringle's civil commitment hearing, after Kris promises Tommy Marrah, the District Attorney's son, "a real official football helmet," Mr. Marrah seems to trap Kris's attorney, Fred Gailey, in the legal equivalent of checkmate:

Mr. Marrah: Your Honor, the state of New York concedes the existence of Santa Claus. But we ask that Mr. Gailey cease presenting personal opinion as evidence. We could bring witnesses with opposite opinions but we desire to shorten this hearing rather than prolong it. I request that Mr. Gailey now submit authoritative proof that Mr. Kringle is the one-and-only Santa Claus.

Judge Harper: Your point's well taken. I'm afraid we must agree. Mr. Gailey, can you show that Mr. Kringle is Santa Claus on the basis of competent authority?

Mr. Gailey: Not at this time, Your Honor. I ask for an adjournment until tomorrow.

Judge Harper: Court stands adjourned till tomorrow afternoon.

After the postmen at the dead letter office decide to deliver all of the letters addressed to Santa Claus to the courthouse, the trial resumes the next day:

Judge Harper: Mr. Gailey have you anything further to offer?

Mr. Gailey: Yes, I have, Your Honor. I'd like to submit the following facts in evidence. It concerns the Post Office Department of the United States government. The Post Office Department was created by the Second Continental Congress. The first postmaster general was Benjamin Franklin. The Post Office is one of the world's largest business concerns. Last year, under Robert Hannigan, it did a gross business of four hundred fifty-five million dollars.

Mr. Marrah: We're all gratified to know the Post Office is doing nicely but it hardly has any bearing on this case.

Mr. Gailey: It has a great deal, Your Honor, if I may be allowed to proceed.

Judge Harper: By all means, Mr. Gailey.

Mr. Gailey: Your Honor, the figures I have just quoted indicate an efficiently run organization. United States postal laws and regulations make it a criminal offense to willfully misdirect mail or intentionally deliver it to the wrong party. Consequently the Department uses every possible precaution.

Mr. Marrah: The state of New York admires the Post Office. It is efficient, authoritative, and prosperous. We're happy to concede Mr. Gailey's claims.

Mr. Gailey: For the record?

Mr. Marrah: For the record. Anything to get this case going.

Mr. Gailey: Then I want to introduce this evidence.

Judge Harper: I'll take them, please.

Mr. Gailey: I have three letters addressed simply "Santa Claus." No other address whatsoever. Yet these were just now delivered to Mr. Kringle by bona fide employees of the Post Office. I offer them as positive proof that . . .

Mr. Marrah: Uh, three letters are hardly positive proof. I understand the Post Office receives thousands of these.

Mr. Gailey: I have further exhibits, but I hesitate to produce them.

Mr. Marrah: We'll be very happy to see them.

Judge Harper: Yes, yes. Produce them, Mr. Gailey. Put them here on my desk.

Mr. Gailey: But, Your Honor . . .

Judge Harper: Put them here on the desk. Put them here.

Mr. Gailey: Yes, Your Honor.

[Multiple sacks of mail are opened and their contents dumped onto Judge Harper's bench].

Judge Harper: [Pounding gavel]

Mr. Marrah: Your Honor! Your Honor!

Mr. Gailey: Your Honor, every one of these letters is addressed to Santa Claus. The Post Office has delivered them. Therefore, the Post Office, a branch of the federal government, recognizes this man, Kris Kringle, to be the one-and-only Santa Claus!

Judge Harper: Since the United States Government declares this man to be Santa Claus, this court will not dispute it. Case dismissed.

Conclusion

This holiday season, after one of many nights of mandatory gluttony, consider curling up on the couch and watching one of these classics. You will certainly enjoy yourself, and you might just hone your legal skills.

Until next year, peace and happiness to all. ■

1. Something I learned, ironically, when I first saw *Gone With the Wind* at the Surrey Theater.

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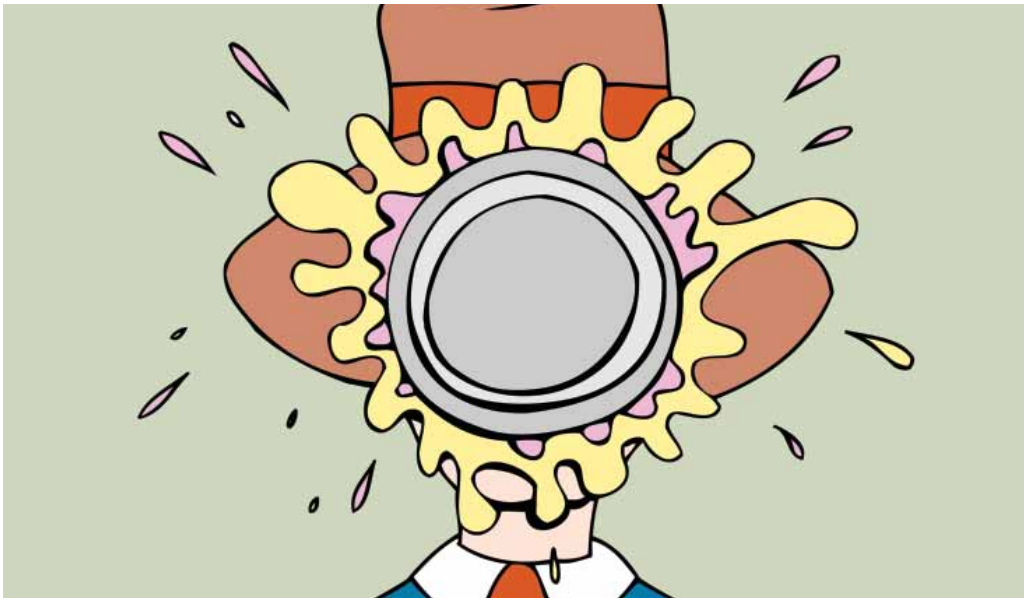

Retaliation Claims

By Sandra J. Mullings

Retaliation claims under the antidiscrimination statutes have been on the rise, despite evidence that there is a high level of retaliation for filing claims[1] and that fear of retaliation discourages many employees from filing claims.[2] The upward trend in retaliation claims is likely to continue, especially in light of several Supreme Court decisions over the past five years.[3] Three of those decisions were particularly significant, as each answered an important question about retaliation claims, without dissents, in a manner considered favorable to employees.

The Court delineated fairly expansive standards of what constitutes retaliation and what constitutes protected activity under Title VII in *Burlington Northern & Santa Fe Railway Co. v. White*[4] and *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*,[5] respectively. In the most recent case, *Thompson v. North American Stainless Co.*,[6] the Court held that an employee who had not engaged in any protected activity could nonetheless state a claim based on allegations that his termination was in retaliation for his fiancée's protected activity. In recognizing what has been called a pure third-party retaliation claim, the Court opened the door to a category of claims that had been rejected by each of the four Courts of Appeal that had expressly considered the issue and thus may be the most radical of the three decisions. Each of these decisions not only expanded the potential reach of the antiretaliation statutes but also left open the contours of the rules for future cases and, thus, may encourage the filing of retaliation claims that test the boundaries.

Retaliation Claims

Each of the federal antidiscrimination statutes has a provision proscribing employer retaliation for two types of protected activity: "opposition" and "participation." For instance, § 704(a) of Title VII forbids an employer from discriminating against an employee or applicant "because he has opposed any practice made unlawful by this subchapter or because he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter."[7] The Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) contain similar antiretaliation provisions.[8]

A retaliation claim may arise in conjunction with a claim for another act of alleged discrimination against the target of retaliation. For instance, an employee who has filed a charge with the EEOC might claim that she was terminated in retaliation for filing the first charge. A claim of retaliation, however, may arise independently of some other act of alleged discrimination against the target of retaliation. For instance an employee could state a claim based on allegations that she was demoted for giving testimony favorable to another employee's claim of discrimination.

The past two decades have seen significant increases in retaliation claims. In 1992, charges of retaliation

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constituted only 15.3% of the charges filed with the EEOC.[9] By 1999, retaliation claims were 25.4% of the charges.[10] Retaliation claims have continued to be an increasing percentage of the total, and are now more than one third of the claims, 36.3% for the last fiscal year.[11]

Issues in Retaliation Claims

Stripped to its essence, the prima facie retaliation case established by case law requires a plaintiff to prove that (1) she engaged in protected activity; (2) she suffered an adverse action; and (3) there is a causal nexus between the adverse action and the protected activity. As the case law developed, a number of questions arose. For instance, what actions could be considered retaliatory acts? Must the action be employment related? How "adverse" must the action be – that is, must it be an ultimate employment action, such as termination, or would a less severe action, such as transfer or harassment, suffice? What conduct by an employee is protected activity under the statutes? Does an employee who is terminated in retaliation for someone else's protected activity have a claim? Often these questions were answered differently by different courts.

Consider the following scenarios:

1. W, after making complaints of gender discrimination, is reassigned to different job duties, although she suffers no change in job title, pay or benefits. She files a charge with the EEOC a few weeks later. Two months later, after an incident with a supervisor, W is accused of insubordination and is suspended without pay for 37 days. She is eventually reinstated and given full back pay after a company hearing officer concludes she had not been insubordinate. Does either the reassignment or the suspension constitute "adverse action" that may be the basis of a retaliation claim by W?

2. C's employer investigates complaints by another employee about sexual harassment by a supervisor. In the course of the investigation, a human resources officer asks to speak to C, and C relates several instances of inappropriate behavior by the supervisor. Shortly after the investigation concludes, the employer begins an investigation into practices in C's area, and C is eventually terminated for alleged embezzlement. Did C, by relating the incidents to the human resources officer, engage in activity protected under the antiretaliation provision of Title VII?

3. T and his fiancée, R, work for the same employer, and their relationship is well known at the workplace. R, believing that she has been the victim of gender discrimination, files charges with the EEOC. Three weeks after the employer is notified of R's charge, T is fired. Does T have a claim for retaliation, although he engaged in no protected activity?

As recently as five years ago, the answers to these questions might be significantly different depending on the federal circuit in which the plaintiff's claim was brought. Each of these questions has now been addressed by the Supreme Court, in decisions that not only are favorable to employees, but which also contain strong statements about the purposes and breadth of the antiretaliation provisions.

Burlington Northern

The question of what constitutes an adverse action sufficient for a retaliation claim, in scenario one, was presented in *Burlington Northern & Santa Fe Railway Co. v. White*.[12] The Court was confronted with at least four different standards developed in the lower courts: (1) the most restrictive standard, requiring an "'ultimate employment decision,'" such as "'hiring, granting leave, discharging, promoting and compensating'";[13] (2) a slightly less restrictive standard requiring a materially adverse effect "'on the terms, conditions or benefits of employment'";[14] (3) a more expansive standard, requiring only that the action be one that would have been "material to a reasonable employee" and thus "would likely have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'";[15] and (4) one requiring only "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'"[16]

> A claim of retaliation may arise independently of some other act of alleged discrimination against the target.

The Court first determined that actions covered by the antiretaliation provision of Title VII are not limited "to those that are related to employment or occur at the workplace."[17] In reaching that result, the Court rejected the argument that the antiretaliation provision must be read *in pari materia* with the substantive antidiscrimination provision, which refers only to employment-related actions. The Court noted that the language of the antiretaliation provision is not so limited but, more generally, prohibits discrimination.[18] Moreover, the Court observed, the objective of the substantive provision is to prevent discrimination related to employment, but the antiretaliation provision serves the broader purpose of preventing employer interference with employees obtaining that objective. Since an employer could interfere and retaliate against an employee "by taking actions not directly related to his employment or by causing him harm *outside* the workplace,"[19] the antiretaliation provision, the Court concluded, should not be limited to ultimate employment decisions or even to harms affecting employment and the workplace.

How "adverse," then, must such actions be? The Court held that acts constituting retaliation include those "that would have been materially adverse to a reasonable employee or job applicant" and are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[20] Thus the Court chose a fairly expansive, plaintiff-friendly standard. Applying that standard, the Court concluded that the jury had sufficient evidence from which it could find that the reassignment was sufficiently adverse – because of more onerous duties and less prestige – as was the suspension, given the physical and emotional hardship caused by the lack of income and insecurity about the employee's future.[21]

Burlington did not provide a bright-line test for what actions would constitute retaliation but certainly underscored the need for a broad interpretation to achieve the statute's objectives. However, although purporting to offer an objective standard, the Court stated that the standard was phrased in general terms because the "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."[22] The Court noted, for instance, that job changes, such as schedule changes, may have different effects on different workers (e.g., a young mother with school-age children). Thus the action is to be judged from "the perspective of a reasonable person in the plaintiff's position."[23] Such a standard suggests the importance of a fact-sensitive, case-by-case determination.

Crawford

The second scenario, providing a statement in an employer's internal investigation, was the subject of *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee.*[24] Most retaliation claims involving participation in an employer's internal investigation had been analyzed under the "participation" clause of the antiretaliation statutes. Such claims were usually denied on the reasoning that the clause in question refers to proceedings under the statute and that the internal investigations that preceded the filing of charges, which started the process under the statute, were not such proceedings.[25] Indeed, in *Crawford*, the decisions below were based on the application of the participation clause.[26] Because the Supreme Court found that plaintiff Crawford's conduct amounted to opposition under the opposition clause, it declined to reach the participation clause question, and that issue remains open.

The Court's analysis began with a dictionary definition of "oppose": "'to resist or antagonize . . . ; to contend against; to confront; resist; withstand.'"[27] The Court observed that to "oppose" might be less active than to "resist," noting that "oppose" may be defined as "'to be hostile or adverse to, as in opinion.'"[28] Crawford's statement, the Court held, which described behavior that could constitute employment discrimination, was presumably disapproving of that behavior and thus protected opposition.[29] The Court expressly rejected the Sixth Circuit's view that the clause requires "'active, consistent'" activities, noting that even inaction could constitute opposition. The Court described as "freakish" a rule that would protect an employee who, on her own initiative, reported illegal conduct but would not protect an employee, such as Crawford, who reported the same conduct in response to an employer's questions.[30]

Crawford thus reads opposition to encompass a potentially broad range of activities. Justice Alito's concurring opinion questions whether the language of the decision went too far in suggesting that opposition might include silent opposition, such as holding an opinion. He cautioned that *Crawford* should not be read to reach the issue of whether the opposition clause protects employees "who do not communicate their views to their employers through purposive conduct."[31] Even if that admonition is heeded, what is required for conduct to be purposive in that context remains to be determined. For instance, *Crawford* has been interpreted to preclude a retaliation claim by an employee whose complaints about a promotion process were made to her father, but where there was no evidence that she intended that her views would be communicated by him to her employer.[32] Another court has concluded that an African American's attendance at informal meetings between management and some African American employees, at which alleged racial discrimination was discussed, constituted opposition, even though the particular employee never spoke at those meetings.[33]

> Third-party retaliation, by allowing an employer to accomplish indirectly what it could not do directly, would appear to undermine the protective purpose of the statutes generally and of the antiretaliation provisions in particular.

Thompson

The third scenario of a pure third-party retaliation claim – a claim by an individual who did not himself engage in protected activity but alleged that he suffered adverse action as retaliation for the protected activity of someone else – had arisen in reported cases for decades. Although some lower courts had allowed such claims,[34] all four Courts of Appeal that had expressly considered such claims had refused to allow the claims.[35]

Prior to the Supreme Court decision in *Thompson v. North American Stainless, LP*,[36] the question of whether a victim of pure third-party retaliation could pursue a claim had been analyzed by looking at the language of the antiretaliation provision in question. Denial of such a claim generally rested on the conclusion that the "plain language" of the particular antiretaliation provision required that the person retaliated against must be the person who had engaged in protected activity, and only that person had a claim. For instance, § 704(a) of Title VII forbids an employer from discriminating against an employee or applicant "*because he has* opposed any practice made unlawful by this subchapter or *because he has* made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter."[37]

On the other side, most opinions allowing pure third-party retaliation claims (and some dissents) concluded that it was necessary to go beyond the plain language of the particular antiretaliation provision because that language appears to conflict with the clear purpose of the statute. Those courts reasoned that third-party retaliation, by allowing an employer to accomplish indirectly what it could not do directly, would appear to undermine the protective purpose of the statutes generally and of the antiretaliation provisions in particular.[38]

Remarkably, the Supreme Court's opinion in *Thompson* does not use the plain language versus plain purpose analysis and, indeed, does not cite a single lower court case dealing with third-party retaliation, other than passing references to the decisions below in *Thompson*. Instead, the Court adopted an analysis, first fully developed in dissents to the Sixth Circuit's en banc decision[39] and used by plaintiff Thompson to frame the questions in the petition for certiorari. In the Court's words, the questions presented were, "First, did NAS's firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action?"[40] With the questions thus framed, the Court easily concluded that firing Thompson was prohibited retaliation *against his fiancée* under the *Burlington* test. The Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[41]

To determine whether Thompson had the right to sue for this act of alleged retaliation against his fiancée, the Court looked to § 706(f)(1) of Title VII, which allows a civil action to be brought "by the person claiming to be aggrieved"[42] rather than to § 704(a), the antiretaliation provision. In deciding whether Thompson was aggrieved, the Court found the most useful standard to be its interpretation of the term a person "adversely affected or aggrieved" under the Administrative Procedure Act. The Court held that a person aggrieved under Title VII is one who is "within the zone of interests" protected under Title VII.[43] Since Title VII's purpose is "to protect employees from their employers' unlawful actions" and Thompson was not simply "an accidental victim" of the alleged retaliation, the Court concluded that Thompson was within the zone of interests protected under Title VII and, thus, was aggrieved and had standing to sue.[44]

Thompson, then, ignores at least three decades of lower court analyses and chooses a different route to allow third-party retaliation claims. Because the analysis first focuses on the party against whom the employer intended to retaliate (the "target"), rather than on the plaintiff, the victim of the retaliation, the decision leaves significant questions to be answered in future cases. As the Court acknowledged, the opinion makes no effort to define the type of relationship that would support a claim of third-party retaliation, nor did it identify the type of action against a third party that would be sufficiently adverse. Rather, the opinion states, "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."[45]

The reported cases have involved a variety of relationships. If being engaged is sufficiently close, then the relationship of husband and wife should certainly support a claim.[46] Other than a marital or near-marital relationship, how "close" must the family member victim be? Will a parent/child[47] or sibling[48] relationship suffice? Does it matter whether those family members live in the same household as the target? That is, will some potential economic effect on the target be required or will possible emotional distress be sufficient? Is the relationship of cousins insufficiently close?[49] Does "closeness" speak only to the degree of consanguinity, or will proof be required to show closeness in interactions and affections or be allowed to show the opposite?

Most problematic, of course, will be non-familial co-worker or colleague relationships.[50] *Thompson* repeats the admonition in *Burlington* that the standard for "judging harm" should be an objective one.[51] It would seem, however, that judging whether the target would have been dissuaded from engaging in protected activity if she had known that retaliatory action would be taken against her co-worker must necessarily take into account how close the particular relationship was. It is not a purely objective exercise.

Assuming a sufficiently close relationship between the plaintiff and the party who engaged in protected activity,

how "mild" must a reprisal be to avoid being actionable retaliation? Under *Thompson*, termination is sufficiently adverse. A number of cases involve allegations of refusals to hire or rehire,[52] which would seem comparable to termination, if done in order to retaliate. Other less drastic actions may not as clearly support a claim, when viewed from the perspective of the target rather than that of the victim of the adverse action. Will courts need to use a multifactor balancing test, which also takes into account the degree of closeness between the parties and the nature of the protected activity? For instance, would a husband be dissuaded from filing a charge of race discrimination if he knew that his wife would receive less favorable work assignments?[53] Would he be dissuaded if the same consequences were to be suffered by a co-worker? Would he be dissuaded from testifying on behalf of a co-worker? How might those questions be answered if the retaliatory acts were failure to stop harassment against the victim[54] or merely a reprimand that might affect future salary increases and thus, ultimately, pension payments?[55]

An additional question is the viability of a claim by a "collateral damage" victim. The Court seemed to take particular pains to note that Thompson was not an "accidental victim" or "collateral damage."[56] One commentator has provided an example of how a victim may be regarded as collateral damage rather than the means by which the employer intended to harm the target.[57] In such a scenario, the target has filed a charge of discrimination and later gets into an altercation with the victim, a fellow employee whom the target dislikes. The employer uses the opportunity to retaliate against the target by firing the target, but to disguise his motivation, also fires the victim. Firing the target is certainly retaliation against him, but is firing the victim? At first blush, the answer under *Thompson* would seem to be no, because the animus the target feels toward the victim would suggest that the target would not have been dissuaded from filing his claim if he had known that the victim would be fired. However, one could argue that the retaliatory act was the firing of *both* employees, and thus the victim was aggrieved by a retaliatory act against the target.

Thompson may also have opened the door to unexpected claims by family members who are not employed by the same employer. For instance, post-*Thompson*, one court has allowed a husband to state a claim against his wife's employer for his termination by another employer.[58] The wife had engaged in protected activity and, according to the plaintiff husband, his wife's employer induced its subcontractor, the husband's employer, to have the husband fired. In another case, a court held that a claim had been stated by a husband who alleged that he was retaliated against for the protected activity of his wife, who was not employed by the same employer.[59] Rather, his wife was an attorney who had represented other employees in discrimination cases against his employer.

Conclusion

More than a decade ago, one set of commentators noted that, because of unsettled questions of law, the viability of a retaliation claim could vary wildly according to where a plaintiff brought the claim.[60] Despite the uncertainty of the law, the percentage of claims alleging retaliation increased. In the last five years, the Supreme Court has answered some of the more significant questions in ways that have potentially expanded the reach of the antiretaliation provisions. As a result of those decisions, it is likely that the numbers of retaliation claims will continue to rise. ■

1. B. Glenn George, *Revenge*, 83 Tul. L. Rev. 439, 465–67 (2008).

2. Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 38–43 (2005). Brake's observation was cited by the Supreme Court in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009).

3. In addition to the cases discussed in this article, the Court has held that antidiscrimination statutes encompass antiretaliation claims, even where the statute in question does not expressly provide for such a claim. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (federal sector provisions of the ADEA, 29 U.S.C. § 633a(a)); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008) (42 U.S.C. § 1981); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972). More recently, the Court ruled that the antiretaliation provision of the Fair Labor Standards Act, prohibiting discrimination because an employee "has filed any complaint," covers making an oral complaint. *Kasten v. Saint-Gobain Performance Plastics, Inc.*, 131 S. Ct. 1325 (2011).

4. 548 U.S. 53 (2006).

5. 555 U.S. 277 (2009).

6. 131 S. Ct. 863 (2011).

7. 42 U.S.C. § 2000e-3(a).

8. The antiretaliation section of the ADEA provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d). Similarly, the ADA provision forbids any person from discriminating "against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

9. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1992 Through FY 1996, http://www1.eeoc.gov//eeoc/statistics/enforcement/charges-a.cfm (last visited July 5, 2011).

10. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1997 Through FY 2010, http://www1.eeoc.gov//eeoc/statistics/enforcement/charges.cfm (last visited July 5, 2011).

11. *Id.*

12. 548 U.S. 53 (2006).

13. *Id.* at 60 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997)).

14. *Burlington*, 548 U.S. at 60 (citing *Von Gunten v. Md.*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

15. *Burlington*, 548 U.S. at 60 (citing *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217–18 (D.C. Cir. 2006)).

16. *Burlington*, 548 U.S. at 61 (citing *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000)).

17. *Burlington*, 548 U.S. at 57.

18. *Id.* at 61–63.

19. *Id.* at 63.

20. *Id.* at 57.

21. *Id.* at 70–73.

22. *Id.* at 69.

23. *Id.* at 69–70.

24. 555 U.S. 271 (2009).

25. *See, e.g., EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000) (the participation clause in Title VII covers participation in "'an investigation . . . under this subchapter'"). The ADEA and the ADA each refer to investigations and proceedings "under this chapter." *See* note 8.

26. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 211 Fed. Appx. 373, 376 (6th Cir. 2006), *aff'g* 2005 WL 6011557, No.3:03-0996 (M.D. Tenn. 2005).

27. *Crawford*, 129 S. Ct. 846, 850 (citing Webster's New International Dictionary 1710 (2d ed. 1958)).

28. *Id.* at 850 (citing Random House Dictionary of the English Language 1359 (2d ed. 1987)).

29. *Id.* at 850–51.

30. *Id.* at 851.

31. *Id.* at 854–55.

32. *Pitrolo v. Cnty. of Buncombe, N.C.*, No. 07-2145, 2009 WL 1010634 at *3 (4th Cir. 2009).

33. *Bryant v. Pepco*, 730 F. Supp. 2d 25, 31 (D.D.C. 2010).

34. Cases in which a court has recognized a cause of action for pure third-party retaliation or assumed that such a claim may be stated include *Wegeng v. Papa John's USA, Inc.*, Civil No. 05-636, 2006 WL 1207259 (S.D. Ill. 2006); *Whittaker v. N. Ill. Univ.*, No. 02 C 50503, 2003 WL 21403520 (N.D. Ill. 2003); *Gonzalez v. N.Y. State Dep't of Corr. Servs.*, 122 F. Supp. 2d 335 (N.D.N.Y. 2000); *Thomas v. Am. Horse Shows Ass'n, Inc.*, No. 97-CV-3513, 1999 WL 287721 (E.D.N.Y. 1999), *aff'd*, 205 F.3d 1324 (2d Cir. 2000); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206 (E.D. Cal. 1998); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D. N.Y. 1996); *McKenzie v. Atlantic Richfield Co.*, 906 F. Supp. 572 (D. Co. 1995); *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934 (N.D. Ga. 1994); *Mandia v. Arco Chem. Co.*, 618 F. Supp. 1248 (W.D. Pa. 1985); *Clark v. R.J. Reynolds Tobacco Co.*, No. 79-7, 1982 WL 2277 (E.D. La. 1982); *De Medina v. Reinhardt*, 444 F. Supp. 573 (D. D.C. 1978); *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976).

35. Pure third-party retaliation claims were rejected in *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804 (6th Cir. 2009) (*en banc*) (Title VII); *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002) (ADEA and ADA); *Smith v. Riceland Food, Inc.*, 151 F.3d 813 (8th Cir. 1998) (Title VII); and *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996) (ADEA). The Second Circuit was among the appeals courts, which had not yet decided the issue. *Thomas*, 205 F.3d 1324.

36. 131 S. Ct. 863 (2011).

37. 42 U.S.C. § 2000e-3(a) (emphasis added).

38. *See, e.g., EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).

39. *Thompson*, 567 F.3d 804 at 825–27(Moore, J., dissenting) and 827–29 (White, J., dissenting). The dissent in *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996), may have laid the groundwork for this argument.

40. *Thompson*, 131 S. Ct. at 867.

41. *Id.* at 868.

42. 42 U.S. C. §2000e-5(f)(1).

43. *Thompson*, 131 S. Ct. at 870.

44. *Id.*

45. *Id.* at 868.

46. *See, e.g., Johnson v. Napolitano*, 686 F. Supp. 2d 32 (D.D.C. 2010); *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129 (M.D. Fla. 2005).

47. *See, e.g., Zamora v. City of Houston*, No. 10-20625, 2011 U.S. App. LEXIS 9827 (5th Cir. 2011); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Rainer v. Refco, Inc.*, 464 F. Supp. 2d 742 (S.D. Ohio 2006).

48. *See, e.g., EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).

49. *See, e.g., Higgins v. The TJX Cos., Inc.*, 328 F. Supp. 2d 122 (D. Me. 2004).

50. *See, e.g., Pittman v. Hous. Auth.*, No. 3:08 CV 342, 2010 U.S. Dist. LEXIS 13852 (N.D. Ind. 2010); *Freeman v. Barnhart*, No. C 06-04900, 2008 WL 744827 (N.D. Cal.2008); *Craig v. Suburban Cablevision, Inc.*, 660 A.2d 505, 140 N.J. 623 (1995) (N.J. statute).

51. 131 S. Ct. at 868–69.

52. *See, e.g., EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240 (D.N.M. 2008).

53. *See, e.g., Mutts v. Southern Conn. State Univ.*, No. 3:04 CV 1746, 2006 WL 1806179 (D. Conn. 2006).

54. *See, e.g., Gonzalez v. N.Y. State Dep't of Corr. Servs.*, 122 F. Supp. 2d 335 (N.D.N.Y. 2000).

55. *See, e.g., Clark v. R.J. Reynolds Tobacco Co.*, No. 79-7, 1982 WL 2277 (E.D. La. 1982).

56. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011).

57. Ernest F. Lidge III, *A "Person Aggrieved" – Who May Sue Under Title VII?*, 40 U. Mem. L. Rev. 797, 799–800 (2010).

58. *McGhee v. Healthcare Servs. Grp., Inc.*, No. 5:10 cv279, 2011 U.S. Dist. LEXIS 20897 (N.D. Fla. 2011).

59. *Morgan v. Napolitano*, No. Civ. S-09-2649, 2011 U.S. Dist. LEXIS 64610 (E.D. Cal. 2011).

60. Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo. L. Rev. 115, 116–17 (1998).

CPLR 3211(a)(1) and (a)(7) Dismissal Motions – Pitfalls and Pointers

By John R. Higgitt

CPLR 3211 is the procedural vehicle that allows a defendant[1] to seek dismissal of a complaint or part of it before (and in some instances after) interposing an answer. Subdivision (a) of the statute enumerates specific grounds on which the defendant can seek dismissal. Among the diverse grounds listed are dismissals based on "documentary evidence" (CPLR 3211(a)(1)) and failure to state a cause of action (CPLR 3211(a)(7)). These grounds are similar but not kindred concepts, and the significant differences between the two have important practical consequences. This article will review the particulars of CPLR 3211(a)(1) and (a)(7), as well as the similarities and distinctions between them. Also, it will offer some observations regarding practice with these dismissal tools.

Dismissals Premised on "Documentary Evidence"

CPLR 3211(a)(1) provides that a defendant can seek dismissal of a complaint or part of it on the ground that "a defense is founded upon documentary evidence." This dismissal ground is a relative newcomer to civil procedure, arriving with the CPLR in 1963. The "documentary evidence" provision was designed to fill a void left by other dismissal grounds codified in CPLR 3211(a).[2] A motion pursuant to CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint.[3]

Based on the ordinary meaning of the phrase "documentary evidence," dismissals under CPLR 3211(a)(1) would presumably be available in myriad instances; after all, what motion submissions aren't ultimately reduced to paper? However, CPLR 3211(a)(1) is a decidedly narrow ground on which to rest a motion to dismiss. Employing the test suggested by Prof. David Siegel, courts have concluded that a paper qualifies as "documentary evidence" only if (1) it is unambiguous,

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(2) it is of undeniable authenticity, and (3) its contents are essentially undeniable.[4] Critically, too, the paper must, standing alone, warrant dismissal.[5] Most evidence cannot satisfy this stringent standard. Among the forms of proof on the outside looking in at the reserved class of evidence created by CPLR 3211(a)(1) is the affidavit, the principal form of evidence in motion practice.[6] Although an affidavit can itself demonstrate that an action should be dismissed, the contents of the affidavit can be controverted by other evidence. Other forms of evidence that do not qualify as "documentary" include medical records, letters, newspaper articles, printouts of Internet web pages, and transcripts of radio and television interviews.[7]

Although most evidence will not qualify as "documentary," certain key papers may. Contracts,[8] deeds,[9] leases,[10] mortgages,[11] stipulations of settlement,[12] and judicial records can fall on the "documentary evidence" side of the ledger.[13]

Assuming the movant has adduced "documentary evidence" in support of its CPLR 3211(a)(1) motion, what must that evidence show to warrant dismissal? Under well-settled Court of Appeals precedent, relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to the action.[14] Moreover, several rules of decision applicable to CPLR 3211(a) motions – rules that recognize that the action is in its infancy and the plaintiff has not had the benefit of disclosure – favor the nonmoving party: the complaint is to be afforded a liberal construction, the facts as alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference.[15]

In opposing a motion under the "documentary evidence" provision, a plaintiff is free to submit evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action).[16] Where appropriate, a plaintiff can invoke CPLR 3211(d) to forestall a decision on the merits of the motion pending the plaintiff's receipt of evidentiary materials necessary to frame its opposition.[17] Under subdivision (d), a court can deny a subdivision (a) motion[18] or adjourn it to allow the plaintiff an opportunity to procure affidavits or obtain disclosure. A plaintiff serious about receiving relief under CPLR 3211(d) must submit an affidavit demonstrating that evidence essential to the plaintiff's opposition "may exist" and a reasonable excuse as to why the evidence has not yet been obtained.

Dismissals for Failure to State a Cause of Action

CPLR 3211(a)(7) provides that a defendant may seek judgment dismissing the complaint on the ground that it fails to state a cause of action. The defendant is free to attack the entire complaint or target one or more of the specific causes of action. The motion for failure to state a cause of action is no stranger in New York practice; it's an incarnation of the common law demurrer with a modern name and, as discussed below, a bit more potency. Unlike the motion to dismiss on "documentary evidence," a motion to dismiss for failure to state a cause of action can be made at any point in the action.[19] However, only one motion to dismiss under CPLR 3211(a) is permitted, so if the defendant makes a motion under that subdivision but does not include the (a)(7) ground, the plaintiff will have to seek failure to state a cause of action relief through a different procedural mechanism.[20]

> CPLR 3211(a)(1) provides that a defendant can seek dismissal of a complaint or part of it on the ground that "a defense is founded upon documentary evidence."

Like the demurrer, the CPLR 3211(a)(7) motion can be used to test the facial sufficiency of a pleading. It may be useful in disposing of actions in which the plaintiff has not stated a claim cognizable at law (e.g., the plaintiff purports to assert a claim for educational malpractice) and actions in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action.[21] Where a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to whether, applying the above-mentioned rules of decision applicable to CPLR 3211(a) motions, the allegations stated any claim cognizable at law.[22] If the motion attacks one or more specific causes of action but not the complaint in its entirety, the test is whether the challenged claims were stated in the complaint. In the content of CPLR 3211(a)(7), the word "stated" means pleaded: Do the *allegations*, liberally construed and viewed in the light most favorable to the plaintiff, plead a cognizable claim?

Whether the drafters of the CPLR meant to limit the function of CPLR 3211(a)(7) to testing the facial sufficiency of a pleading – the only task of the demurrer – has been the subject of some debate.[23] Case law has made it clear, however, that a defendant can submit evidence in support of a motion for failure to state a cause of action, thereby permitting the movant to challenge a well-pleaded, cognizable cause of action. Therefore, in stark contrast to a motion under CPLR 3211(a)(1), a defendant moving under CPLR 3211(a)(7) can rely on any form of evidence, including affidavits.[24] When evidence is submitted by the defendant, the standard morphs from whether the plaintiff *stated* a cause of action to whether it *has* one.[25] Thus, if the defendant's evidence establishes conclusively that the plaintiff has no cause of action (i.e., that a well-pleaded, cognizable claim is flatly refuted by

actual evidence), dismissal may be appropriate.[26] As the First Department put it

> where the affidavits on a motion to dismiss made under CPLR 3211(a)(7) conclusively establish that plaintiff has no cause of action, dismissal is warranted. Where the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action.[27]

Regardless of whether the defendant tests the facial sufficiency of the complaint or adduces evidence to challenge the merits of it, the plaintiff may submit evidence of its own. If the defendant's CPLR 3211(a)(7) motion is aimed merely at the face of the pleading, the plaintiff can submit an affidavit to remedy any defects in the pleading.[28] If, however, the defendant's motion is accompanied by evidence that prods at the merits of the complaint, the plaintiff's evidence should demonstrate that it *has* a cause of action – that facts suggested by the plaintiff's evidence (as opposed to mere allegations in the complaint) support its claim.[29]

If representing a defendant, the attorney should consider relying on CPLR 3211(a)(7) and forsaking subparagraph (a)(1).

Two other potential options may be available to a plaintiff faced with a CPLR 3211(a)(7) motion. As discussed above, the plaintiff, where appropriate, can invoke CPLR 3211(d) to forestall a decision on the merits of the motion. Additionally, the plaintiff may wish to request leave to replead in the event the CPLR 3211(a)(7) motion is granted. Repleader permits a plaintiff to file and serve a new pleading in an effort to correct defects in a prior pleading.

Pitfalls and Pointers

Both CPLR 3211(a)(1) and (a)(7) permit a defendant, prior to answering the complaint, to seek dismissal of a complaint (or portions of it) based on evidence. And both can permit dismissal if the evidence on which the defendant relies conclusively defeats the targeted causes of action. These general similarities should not delude the careful practitioner, as critical distinctions between the two dismissal mechanisms lead to markedly different inquiries by the party opposing the motion and the court. With respect to the timeliness of a motion, a motion under CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint, while a motion under CPLR 3211(a)(7) can be made at any time. More importantly regarding the nature of the evidence on which a defendant can rely, when seeking dismissal under CPLR 3211(a)(1), a defendant is confined to "documentary evidence," an exclusive club comprising few members. No restrictions apply, however, to the types of evidence on which a defendant may rely in moving under CPLR 3211(a)(7); the movant's familiar friend, the affidavit, is welcome to join the papers supporting the motion. Thus, within the dismissal armory, CPLR 3211(a)(1) is a precise scalpel and 3211(a)(7) is a broad sword.

What can counsel draw from this discussion? If representing a defendant, the attorney should consider relying on CPLR 3211(a)(7) and forsaking subparagraph (a)(1). This tactic will allow the attorney to submit any evidence he or she wishes to produce and make the motion at any time. Moreover, by placing faith in CPLR 3211(a)(7) and omitting reference to CPLR 3211(a)(1), the attorney will avoid a skirmish over whether the (a)(1) motion is founded on the proper character of evidence. Because CPLR 3211(a)(7) offers everything available under CPLR 3211(a)(1) and more,[30] a pure motion to dismiss for failure to state a cause of action will ensure that the court's attention is focused on the substance of the application – whether the plaintiff has a cause of action – and not on the ancillary point of whether the defendant's evidence is "documentary." If the attorney is leery of passing on the opportunity to press for dismissal under CPLR 3211(a)(1), he or she should invoke both CPLR 3211(a)(1) and (a)(7), and seek dismissal in the alternative under each provision. Given the limitations of CPLR 3211(a)(1), the attorney should exercise caution in grounding a pre-answer motion to dismiss solely on that provision.

There's another option available to defense counsel, one suggested by a higher authority.[31] If counsel has evidence he or she believes warrants judgment in the client's favor, counsel should consider abstaining from motion practice under CPLR 3211(a), serving an answer and moving for summary judgment.[32] This strategy offers the defendant three significant advantages: it permits the defendant to rely on any form of evidence, it allows the defendant to obtain judgment under a less exacting standard than the standard applicable to motions under CPLR 3211(a)(1) and (a)(7) (demonstrating the absence of a triable issue of fact, as opposed to showing conclusively that the plaintiff has no cause of action), and it results in a judgment entitled to res judicata treatment.[33]

If counseling a plaintiff, the attorney should scrutinize the defendant's motion and ascertain whether the motion is in any way based on CPLR 3211(a)(1). If the motion has a CPLR 3211(a)(1) component, the attorney should seek to establish that the evidence on which the defendant relies is not "documentary." Where the defendant's evidence fails to qualify as "documentary," the CPLR 3211(a)(1) motion should be denied for that reason alone.[34] In this connection, counsel should examine whether a good faith argument can be made that the document is ambiguous,

is not undeniably authentic, or that is can be controverted by other evidence.

Regardless of how the defendant styled its motion, if the defendant submitted evidence with the motion, the plaintiff's attorney should attempt to persuade the court that the defendant's evidence does not warrant dismissal of the complaint (or the targeted portion of it) because the allegations in the complaint were not undercut fatally by the evidence. If the plaintiff's attorney harbors any doubt as to whether the defendant's evidence might lead to dismissal, the plaintiff's attorney should submit evidence in opposition to the motion. That evidence should demonstrate to the court that the plaintiff has a viable cause of action, one founded on actual evidentiary facts, not mere allegations. If the plaintiff needs disclosure to muster sufficient opposition to the motion, it should request relief under CPLR 3211(d) and submit an affidavit satisfying that provision.

Additionally, the plaintiff's attorney may wish, when confronting a motion to dismiss based on CPLR 3211(a)(7), to request leave to replead if the court grants the motion. While a request for leave to replead can, in some circumstances, be made even after a motion to dismiss for failure to state a cause of action has been granted,[35] the plaintiff's attorney may wish to seek leave while the court is considering the underlying motion. This course of action affords the plaintiff clarity going forward – if the defendant's motion is granted but the plaintiff is given leave to replead, the plaintiff's counsel can re-draft the complaint and cure its infirmities; if the defendant's motion is granted and the court denies the plaintiff's request for leave, the plaintiff can appeal from that order, including the portion of it that denied leave. Moreover, the determination of whether leave to replead should be granted is discretionary, and a request for leave in the plaintiff's opposition to the motion to dismiss may be viewed as a sign of diligence, which may help swing the discretion pendulum in the plaintiff's favor.

Conclusion

CPLR 3211(a)(1) and (a)(7) are important dismissal tools that can resolve an entire controversy or narrow the scope of the case going forward. These tools, however, must be negotiated carefully, as pitfalls in employing them abound. Thus, whether the proponent or opponent of a CPLR 3211(a) motion, counsel must consider carefully the virtues and vices of each tool, and be particularly sensitive to the limitations inherent in a motion to dismiss under CPLR 3211(a)(1). ■

1. For the sake of simplicity, this article is couched in terms of a defendant seeking dismissal under Civil Practice Law & Rules 3211(a). Any party against whom a cause of action is asserted, however, may seek relief under CPLR 3211(a), e.g., a plaintiff against whom a counterclaim is asserted (Siegel, N.Y. Practice § 257 (5th ed.)).

2. *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211, C3211:10, at 21. CPLR 3211(a)(5) provides most of the grounds on which "documentary evidence" will be used, *e.g.* collateral estoppel, res judicata, etc. (Siegel, N.Y. Practice § 259). Thus, CPLR 3211(a)(1) is a general backup provision designed to provide a dismissal mechanism in situations where a defendant has a document that defeats a plaintiff's cause of action, yet the defendant is unable to point to one of the more specific grounds listed in subdivision (a) (221 Siegel's Practice Review, *Second Department Shows Futility Exclusively on 'Documentary Evidence' Standard of CPLR 3211(A)(1) When What Party Really Wants is Summary Judgment*, at 2 (May 2010)).

3. CPLR 3211(e); *see Holman v. City of N.Y.*, 19 Misc. 3d 600 (Sup. Ct., Kings Co. 2008). Alternatively, a defendant who wishes to invoke CPLR 3211(a)(1) may raise that ground in the answer and seek summary judgment on that ground at some later point.

4. Siegel, Practice Commentaries, *supra* note 2, C3211:10, at 22; *see Fontanetta v. Doe*, 73 A.D.3d 78 (2d Dep't 2010); *see also Mason v. First Cent. Nat'l Life Ins. Co. of N.Y.*, 86 A.D.3d 854 (3d Dep't 2011); *Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship*, 221 A.D.2d 248 (1st Dep't 1995).

5. *See Fontanetta*, 73 A.D.3d 78.

6. *See Crepin v. Fogarty*, 59 A.D.3d 837 (3d Dep't 2009); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346 (2d Dep't 2003); *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289 (1st Dep't 1983).

7. *See Mason*, 86 A.D.3d 854 (medical records); *Integrated Constr. Servs., Inc. v. Scottsdale Ins. Co.*, 82 A.D.3d 1160 (2d Dep't 2011) (letters); *Granada Condominium III Ass'n v Palomino*, 78 A.D.3d 996 (2d Dep't 2010) (letter); *Springer v. Almontaser*, 75 A.D.3d 539 (2d Dep't 2010) (newspaper articles, printouts of web pages, and transcripts of radio and television interviews); *Fonanetta*, 73 A.D.3d 78 (letters, summaries, opinions, and/or conclusions of defendants); *Holman*, 19 Misc. 3d 600 (medical records); *but see Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804 (2d Dep't 2011) (letter can constitute "documentary evidence"). In *VIT Acupuncture, P.C. v. State Farm Auto. Ins. Co.*, 28 Misc. 3d 1230(A) (Civ. Ct., Kings Co. (2010), the court indicated that an affidavit could potentially be used in connection with a motion based on "documentary evidence" "solely to establish the bona fides of . . . documentary evidence," i.e., affidavit could be used to authenticate the "documentary evidence."

8. *See Cochard-Robinson v. Concepcion*, 60 A.D.3d 800 (2d Dep't 2009); *Mazur Bros. Realty, LLC v. State*, 59 A.D.3d 401 (2d Dep't 2009); *Ryan v. Pascale*, 58 A.D.3d 711 (2d Dep't 2009); *150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1 (1st Dep't 2004); *see also Nisari v. Ramjohn*, 85 A.D.3d 987 (2d Dep't 2011)

(insurance policy); *cf. Curran v. Estate of Curran*, 87 A.D.3d 607 (2d Dep't 2011) (agreement to arbitrate is not "documentary evidence" because remedy of party seeking arbitration is to move to compel arbitration).

9. *See Crepin*, 59 A.D.3d 837.

10. *See Leeirv Corp. v. S & E Realty Co.*, 178 A.D.2d 403 (2d Dep't 1991); *Lebowitz v. Mingus*, 100 A.D.2d 816 (1st Dep't 1984).

11. *See Bronxville Knolls, Inc.*, 221 A.D.2d 248.

12. *See Etzion v. Etzion*, 84 A.D.3d 1015 (2d Dep't 2011).

13. *See also* Siegel, Practice Commentaries, *supra* note 2, C3211:10, at 22 ("Judicial records, such as judgments and orders, would qualify as 'documentary,' as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence.").

14. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (2007); *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582 (2005); *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 (2002); *Leon v. Martinez*, 84 N.Y.2d 83 (1994).

15. *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561 (2005); *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005); *Leon*, 84 N.Y.2d 83.

16. *See Thomas A. Sbarra Real Estate, Inc. v. Lavelle-Tomko*, 84 A.D.3d 1570 (3d Dep't 2011).

17. *See* Siegel, N.Y. Practice § 257.

18. Where the court denies the motion under CPLR 3211(d) – instead of adjourning it – the defendant may assert its 3211(a) objections in its answer and seek summary judgment on those objections (*see* Siegel, Practice Commentaries, *supra* note 2, C3211:50).

19. *See* CPLR 3211(e); Siegel, N.Y. Practice § 272.

20. *See McLearn v. Cowen & Co.*, 60 N.Y.2d 686 (1983); Siegel, N.Y. Practice § 273.

21. *See MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 2011 N.Y. Slip Op. 06392, at *3 (1st Dep't Sept. 1, 2011).

22. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977).

23. *See CPLR 3211(a)(7): Demurrer or Merits-Testing Device?*, 73 Albany L. Rev. 99 (2009).

24. Siegel, N.Y. Practice §§ 257, 265; *see Lawrence v. Graubard Miller*, 11 N.Y.3d 588 (2008); *Guggenheimer*, 43 N.Y.2d 268; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976); *but see Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 830 (3d Dep't 1999) ("in determining the motion to dismiss, we must accept the allegations of the complaint as true and *ignore* the affidavits submitted by defendants" (emphasis added)).

25. *See Guggenheimer*, 43 N.Y.2d 268.

26. *See Lawrence*, 11 N.Y.3d 588; *Rovello*, 40 N.Y.2d 633; *see also Guggenheimer*, 43 N.Y.2d 268; *cf. M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 N.Y.3d 798 (2009) (plaintiff's own evidence, submitted in opposition to defendant's CPLR 3211(a)(7) motion, established conclusively that plaintiff had no cause of action).

27. *Allen v. Gordon*, 86 A.D.2d 514, 515 (1st Dep't), *aff'd*, 56 N.Y.2d 780 (1982).

28. *See Rovello*, 40 N.Y.2d 633; *cf. Rau v. Borenkoff*, 262 A.D.2d 388, 389 (2d Dep't 1999) ("Although affidavits may be considered to remedy defects in a complaint, the affidavits submitted by the plaintiff are similarly devoid of specific facts and only confirm that he has no cause of action against the defendants." (internal citations omitted)).

29. *See Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co. of Md.*, 263 A.D.2d 580, 581 (3d Dep't 1999) ("A complaint will not be dismissed for failure to state a cause of action under CPLR 3211[a][7] where affidavits or other documentary evidence submitted by the plaintiff demonstrate that a cause of action may exist.").

30. Because a defendant, under the courts' interpretation of CPLR 3211(a)(7), is permitted to submit any evidence it wishes in support of a motion to dismiss for failure to state a cause of action, it is unclear what, if any, independent function CPLR 3211(a)(1) serves. Notably, too, a motion under CPLR 3211(a)(7) may be made at any time and the standard for dismissal is similar to that of a motion under subparagraph (a)(1). Therefore, CPLR 3211(a)(1) appears, in effect, to have been subsumed by CPLR 3211(a)(7).

31. *See* Siegel, N.Y. Practice §§ 259, 265.

32. Generally, summary judgment cannot be sought before the joinder of issue (*see* CPLR 3212(a)). However, if the record on a CPLR 3211(a) motion is sufficiently developed, the court may, after giving the parties adequate notice, treat the motion as one for summary judgment (*see* CPLR 3211(c)).

33. *See* Siegel, Practice Commentaries, *supra* note 2, CPLR 3211:8.

34. *See Fontanetta*, 73 A.D.3d 78.

35. *See* Siegel, N.Y. Practice § 275; *see also Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15 (2d Dep't 2008).

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Ehrenkranz and Frankel were members of, and O'Donnell was a participant on, the New York City Bar Committees that drafted the initial version of the legislation.

New York Enacts Important New Law Governing a Trustee's Power to Pay Trust Assets to a New Trust

By Pamela Ehrenkranz, Michael I. Frankel and Lindsay N. O'Donnell

New legislation recently enacted as New York Estates, Powers and Trusts Law 10-6.6(b)–(t) (EPTL) substantially alters a trustee's ability to pay assets from one trust to another. Under EPTL 10-6.6(b), prior to the enactment of the new legislation, a trustee was required to have "absolute discretion" to invade the principal of a trust for the benefit of a beneficiary in order to appoint all or part of the principal of such trust to another trust. Under the new law, which became effective August 17, 2011, absolute discretion is no longer a prerequisite. Specifically, under EPTL 10-6.6(c), a trustee with any authority to invade the principal[1] of a trust for the benefit of a beneficiary may appoint such principal to a new trust, so long as the new, appointed trust[2] retains the same standard of distribution governing the original, invaded trust.[3]

In addition to expanding the application of the statute and enhancing its flexibility, the new statute

- clarifies ambiguities that existed under the prior law, including in whose favor the power to invade must be exercised and the permissible scope of powers of appointment granted to beneficiaries under the appointed trust;
- confirms that the term of the appointed trust may be longer than the term of the invaded trust;[4]
- imposes a fiduciary duty on a trustee exercising the power and prescribes a standard of care; and
- takes steps to protect the creator's intent, a

beneficiary's rights, and the tax attributes of the invaded trust.

This article reviews the more significant provisions of the new EPTL 10-6.6(b)–(t).

Background

When EPTL 10-6.6(b)[5] was initially enacted in 1992, it was the first state statute permitting a trustee to pay assets from one trust to another, and its goal was primarily tax oriented.[6] The statute proved, however, to have breadth and vitality far greater than anticipated. Similar statutes passed in other states subsequent to the enactment of the New York statute incorporated additional provisions that augmented a trustee's ability to take advantage of enhanced planning opportunities.[7] Recognizing the need to revitalize EPTL 10-6.6(b), the Trusts, Estates and Surrogates' Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association began working on a proposed new provision to expand the statute and clarify ambiguous provisions. The Committees worked with the Office of Court Administration (OCA) to make additional modifications, and this modified proposal was introduced as Assembly Bill A8297 and Senate Bill S5801 in June 2011; it was enacted as legislation on August 17, 2011.

Overarching Principles of the New Statute

1. The new statute retains the provision of the prior law permitting a trust agreement to override expressly the application of the new statute.

2. The statute clarifies that the existence of the statute itself does not create or imply a duty on a trustee to exercise a power to invade principal, and no inference of impropriety is to be made as a result of a trustee not exercising the power.[8]

3. The trustee exercising the power under the statute has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the power and as a prudent person would exercise the power under the prevailing circumstances.[9]

4. The creator's intent must be considered[10] and the beneficiaries' rights protected.[11]

5. The new statute does not affect the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.[12]

6. Use of the statute is permitted even if the trust agreement includes a spendthrift clause or a general provision that prohibits the amendment or revocation of the trust,[13] and even if there is no current need to invade trust principal.[14]

7. Consistent with prior law, the statute confirms that the exercise of the power to invade trust principal under the statute is considered the exercise of a special power of appointment.[15]

Key Provisions of the New Law

Absolute Discretion No Longer Required.

If a trustee of an invaded trust has the ability to pay trust principal *for any purpose*, new EPTL 10-6.6 permits a trustee of such trust to pay principal[16] to an appointed trust. In contrast, under prior law, a trustee was required to have absolute discretion to pay principal to a new trust.

The applicable provisions of the statute will vary depending on the trustee's authority to invade principal under the invaded trust, which can be classified into three types under the statute:

Invaded Trust Type A: The authorized trustee[17] has unlimited discretion and there is no modification of or limitation on the power to distribute principal.

Invaded Trust Type B: The authorized trustee's ability to pay principal is limited to one or more specific purposes.

Invaded Trust Type C: The authorized trustee has unlimited discretion *and* the authority to pay principal for one or more specific purposes.

Invaded Trust Type A

Invaded Trust Type A, where an authorized trustee has unlimited discretion to invade trust principal, is controlled by EPTL 10-6.6(b). The following six examples[18] will be used to illustrate the application of the statute where an authorized trustee has unlimited discretion to invade principal.

Example 1: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 40. Beatrix is age 12. T has unlimited discretion to make principal distributions to Beatrix.

Example 2: T is the trustee of a trust for the benefit of Beatrix, Bartholomew, and Benedict. The trust is to terminate when the youngest child, Benedict, attains age 25. Beatrix is age 12, Bartholomew is age 8, and Benedict is age 6. T has unlimited discretion to make distributions of principal to any of the beneficiaries.

Example 3: T is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to receive one-third of the principal at age 35 and the balance at 40. Beatrix is age 35. T has unlimited discretion to make principal distributions to Beatrix.

Example 4: T is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to receive all of the trust income upon attaining age 25. The trust is to terminate when Beatrix attains age 40. Beatrix is age 25. T has unlimited discretion to make principal distributions to Beatrix.

Example 5: T is the trustee of a trust for the benefit of Beatrix and Bartholomew. T has unlimited discretion to make distributions of principal to Beatrix; T may only distribute income to Bartholomew.

Example 6: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 50 or sooner dies and the principal is to be held in further trust for the issue of Beatrix's mother. Beatrix has two

brothers and three sisters. T has unlimited discretion to make principal distributions to Beatrix.

a. Lifetime Trusts. Assuming the requisite intent and fiduciary duty standards of EPTL 10-6.6(h) are satisfied, an authorized trustee may appoint the principal of the invaded trusts described in Examples 1 through 6 to appointed trusts under EPTL 10-6.6(b) for a term measured by the lifetime of the beneficiaries.[19]

Based on the foregoing examples, the following payments are permitted under the new statute:

> Example 1(a): T may pay the principal of the trust to an appointed trust for Beatrix to continue for her lifetime.
>
> Example 2(a): T may pay the principal of the trust to an appointed trust that will last until the death of the survivor of Beatrix, Bartholomew, and Benedict.
>
> Example 3(a): T must pay one-third of the principal outright to Beatrix because Beatrix has already attained age 35 and the right to this principal distribution has vested. T may pay the balance of the principal of the trust to an appointed trust for Beatrix's lifetime.
>
> Example 4(a): T may pay the principal of the trust to an appointed trust for Beatrix's lifetime.
>
> Example 5(a): T may pay the principal of the invaded trust to an appointed trust for the benefit of Beatrix and Bartholomew, or to a trust for the sole benefit of Beatrix for Beatrix's lifetime. If the trust is also for the benefit of Bartholomew, Bartholomew may only receive distributions of income.
>
> Example 6(a): T may pay the principal of the trust to an appointed trust for Beatrix for Beatrix's lifetime.

b. Beneficiaries and Standard for Distributions. Where a trustee has unlimited discretion, the authorized trustee can exercise that discretion in any manner, including by paying the principal to a new trust with a narrower standard for distributions than contemplated in the invaded trust. In addition, the trustee can appoint principal to an appointed trust that eliminates a current beneficiary of the invaded trust, so long as such beneficiary's vested rights are not altered[20] and the invaded trust's tax status is not jeopardized.[21] The successor and remainder beneficiaries of the appointed trust, however, must be one, more than one or all of the successor and remainder beneficiaries of the invaded trust (to the exclusion of any one or more of such successor and remainder beneficiaries).

These provisions are illustrated in the following examples based on Examples 1, 2, 4, and 6, above.

> Example 1(b): The appointed trust may retain the same unlimited discretion standard contained in the invaded trust or contain a narrower standard (e.g., the appointed trust may provide that distributions shall be made at the discretion of the trustee only for Beatrix's health, education, maintenance, and support).
>
> Example 2(b): T may pay the principal of the trust to an appointed trust for Beatrix and Benedict or a trust exclusively for Beatrix or any other combination of beneficiaries of the invaded trust.
>
> Example 4(b): Because Beatrix has attained the age of 25, the appointed trust must give Beatrix the right to receive all of the trust income in the appointed trust. Note that if Beatrix were age 12 at the time the authorized trustee appointed the principal to the appointed trust, the appointed trust would not be required to provide for all of the trust income to be paid to Beatrix at age 25, as such right to receive income is not a current right.
>
> Example 6(b): The remainder beneficiaries of the appointed trust may be one or more of Beatrix's brothers and sisters.

c. Power to Appoint. The appointed trust must be for one or more of the same beneficiaries or class of beneficiaries as the invaded trust. The appointed trust cannot add beneficiaries or accelerate a remainder beneficiary's interest. Pursuant to EPTL 10-6.6(b)(1), the appointed trust may, however, grant a beneficiary otherwise entitled to receive the trust principal outright a power of appointment, which includes as permissible appointees persons who are not beneficiaries of the invaded trust. (Presumably, the granting of a power of appointment to a beneficiary in this case does not undermine the creator's intent, as the granting of such power is consistent with giving the beneficiary the asset outright, which, in turn, is consistent with the terms of the invaded trust.) The rationale is that, if the beneficiary were to receive the property outright, the beneficiary could dispose of it as the beneficiary wished. Any power to appoint granted in the appointed trust under EPTL 10-6.6(b)(1) must be very broad and may exclude as permissible appointees only one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

The authority for an appointed trust to include a power of appointment provides additional flexibility, which could be used to avoid or postpone the imposition of a generation-skipping transfer tax on a trust by the exercise of a power of appointment to add a non-skip person to the class of beneficiaries, or permit the beneficiary to change the remainder beneficiaries of a trust.

The foregoing discussion applies to an Invaded Trust Type A if an appointed trust grants a power of appointment to a beneficiary that did not exist under the terms of the invaded trust. The appointed trust may, but is not required to, include a power of appointment that was granted under the invaded trust, so long as the power is exercisable in the same fashion as the power of appointment in the invaded trust.[22] Accordingly, if the invaded trust granted a beneficiary a power of appointment exercisable in favor of a limited class of appointees, such as the creator's descendants (other than such beneficiary), such power could be granted under the appointed trust.

These provisions are illustrated in the following examples based on Examples 1 and 5, above.

Example 1(c): The appointed trust may grant Beatrix a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of Beatrix, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of Beatrix, the creator or the creator's spouse. Such power may be presently exercisable or exercisable at a later point in time, such as at Beatrix's death. If Beatrix had a testamentary power of appointment exercisable in favor of her descendants under the invaded trust, the appointed trust may grant such power to Beatrix, so long as it is exercisable in the same manner as under the invaded trust.

Example 5(c): The appointed trust may grant Beatrix a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of Beatrix, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of Beatrix, the creator or the creator's spouse. The appointed trust may not grant a power of appointment to Bartholomew because, under the terms of the invaded trust, Bartholomew is only an income beneficiary.

Invaded Trust Type B

Invaded Trust Type B, where an authorized trustee does not have unlimited discretion to invade trust principal, is controlled by EPTL 10-6.6(c). Set forth below are two examples describing situations where an authorized trustee does not have unlimited discretion.

Example 7: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 40. Beatrix is age 12. T is required to distribute the income and principal to Beatrix for her health, education, maintenance, and support.

Example 8: T is the trustee of a trust for the benefit of Beatrix (age 12), Bartholomew (age 8), and Benedict (age 6). T is required to distribute income and principal to any of the beneficiaries for their health, education, maintenance, and support until the youngest child attains age 30, at which time the trust terminates and is distributable in equal shares to Beatrix, Bartholomew, and Benedict, or their issue, *per stirpes*.

a. Lifetime Trusts. Assuming the requisite intent and fiduciary duty standards of EPTL 10-6.6(h) are satisfied, an authorized trustee may appoint the principal of the invaded trusts described in Examples 7 and 8 to appointed trusts under EPTL 10-6.6(c) for a term measured by the lifetime of the beneficiaries.[23]

This concept is illustrated by the following examples, based on Examples 7 and 8, above.

Example 7(a): T may pay the principal of the trust to an appointed trust for Beatrix's lifetime.

Example 8(a): T may pay the principal of the trust to an appointed trust for the benefit of Beatrix, Bartholomew, and Benedict that will end at the later of Beatrix's lifetime and such time when Beatrix, Bartholomew, and Benedict have all attained age 30.

b. Ability to Expand Distribution Standard if the Trust Term Is Extended. If the authorized trustee pays the assets to an appointed trust for a term that extends beyond the term of the invaded trust, then for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust may include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during the extended term.[24] The distribution standard of the appointed trust, however, also must be maintained during such extended period.

> The applicable provisions of the statute will vary depending on the trustee's authority to invade principal under the invaded trust.

This provision is illustrated in the following examples based on Examples 7 and 8, above.

Example 7(b): Prior to Beatrix attaining age 40, T can appoint the trust principal to an appointed trust with an extended term, where T has unlimited discretion to make principal distributions to Beatrix after she turns age 40, so long as the appointed trust continues to require distributions to Beatrix for her health, education, maintenance and support for the entire trust period.

Example 8(b): The appointed trust can provide that, once the youngest child attains age 30, T has unlimited discretion to make principal distributions to Beatrix, Bartholomew, or Benedict, provided that the appointed trust continues to retain the same standard of distribution with respect to Beatrix, Bartholomew and Benedict for the entire trust period (even after the term of the invaded trust otherwise would have expired).

c. Beneficiaries and Standard for Distributions. The appointed trust must maintain the same limitations on distributions applicable to the invaded trust and the same beneficiary or class of beneficiaries as the invaded trust. In addition, if a beneficiary or beneficiaries have any vested rights in the invaded trust, such rights cannot be affected.[25] Furthermore, consistent with the provisions applicable to Invaded Trust Type A, the provisions of the appointed trust may not reduce, limit, or otherwise change mandatory distributions of income, or mandatory annuity or unitrust interests, or a right annually to withdraw a percentage of the value of the trust, or a right annually to withdraw a specified dollar amount after such annual right to withdraw a percentage or specified dollar amount *has come into effect* with respect to the beneficiary.[26]

These provisions are illustrated in the following examples based on Examples 7 and 8, above.

Example 7(c): The appointed trust must retain the same standard of distribution (i.e., T is required to

distribute the income and principal to Beatrix for her health, education, maintenance, and support). The appointed trust may not expand T's authority to make distributions or give T greater discretion than T had under the terms of the invaded trust. Note that T may appoint the principal of the invaded trust to an appointed trust even if there is no current need to distribute trust principal to Beatrix for her health, education, maintenance and support.[27]

Example 8(c): The appointed trust must retain the same standard of distribution (i.e., T is required to distribute the principal to Beatrix, Bartholomew, and Benedict for his or her health, education, maintenance, and support).

d. Power to Appoint. With a limited exception, assets from an Invaded Trust Type B cannot be paid to an appointed trust that grants a power of appointment to a beneficiary that was not granted under the terms of the invaded trust. If the trustee appoints the principal of an Invaded Trust Type B to an appointed trust with an extended term, and if a trustee has unlimited discretion to invade principal during such extended term, such appointed trust may grant a power of appointment to the beneficiary, exercisable during such extended term. The appointed trust, however, must include a power of appointment if the invaded trust included such power, and the class of permissible appointees of such power must be the same as in the invaded trust.

These provisions are illustrated in the following examples based on Examples 7 and 8, above.

Example 7(d): The appointed trust may not grant Beatrix a power of appointment unless she had a power of appointment under the terms of the invaded trust.

Example 8(d): After the term of the invaded trust would have otherwise ended, the appointed trust may grant to any beneficiary of the invaded trust a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse, provided that a trustee also had unlimited discretion to invade principal during such extended term.

Invaded Trust Type C

Invaded Trust Type C is a hybrid of Invaded Trust Type A and Invaded Trust Type B. Specifically, an authorized trustee of Invaded Trust Type C has unlimited discretion to invade principal *and* the ability to pay principal for one or more specific purposes. In this case, it is not necessary for the appointed trust to include the same class of beneficiaries as the invaded trust or the same limitation on distributions that was contained in the invaded trust because, in this case, the provisions of EPTL 10-6.6(b) take precedence over EPTL 10-6.6(c).[28]

The concept of EPTL 10-6.6(f) is illustrated in the following Example 9:

Example 9: T is the trustee of a trust for the benefit of Beatrix, Bartholomew, and Benedict. The trust is to terminate when the youngest child, Benedict, attains age 25. Beatrix is age 12, Bartholomew is age 8, and Benedict is age 6. T has unlimited discretion to make distributions of principal to any of the beneficiaries. In addition, T is required to distribute income and principal to any of the beneficiaries for their health, education, maintenance, and support.

a. T may pay the principal of the trust to an appointed trust for the benefit of Beatrix, Bartholomew, and/or Benedict. It is not necessary for the appointed trust to be for the benefit of Beatrix, Bartholomew, and Benedict.

b. It is not necessary for the appointed trust to retain the same standard of distribution.

c. The appointed trust may grant to any beneficiary of the invaded trust a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

d. If T pays the principal of the invaded trust to an appointed trust for the sole benefit of Beatrix, the appointed trust may grant a power of appointment to Bartholomew even though he is no longer a beneficiary of the trust.

Fiduciary Duty, Standard of Care and Respect for the Creator's Intent

EPTL 10-6.6(h) expressly imposes a fiduciary duty on the authorized trustee and applies a standard of care for purposes of reviewing the authorized trustee's actions. Specifically, the authorized trustee has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power[29] and as a prudent person would exercise the power under the prevailing circumstances.

EPTL 10-6.6(h) further provides that the authorized trustee may not exercise the power to appoint if

- there is substantial evidence of the creator's contrary intent; and
- it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power.

The statute confirms that the provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.[30] (A general prohibition on the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift

clause is not deemed to be a prohibition on the exercise of the power by the authorized trustee.[31])

The bar for preventing the authorized trustee from exercising the power is high: the evidence of the creator's contrary intent must be substantial and not overcome by establishing that the creator would likely have changed his or her intention under the circumstances. If the creator is alive (and not incapacitated), an authorized trustee may wish to seek the creator's input prior to the exercise of the power. (The mere expression by the creator of his or her wishes, which is not binding or controlling on the authorized trustee, should not cause estate tax inclusion in the creator's estate under Internal Revenue Code § 2036 (I.R.C.).) In any event, the new statute requires that the creator, if living, receive notice of the authorized trustee's exercise of the power.[32]

Protection of Beneficiaries' Rights

As illustrated by the examples set forth above, the statute protects a beneficiary's vested rights, such as a mandatory right to distributions of income or principal. Furthermore, all persons interested in the trust are required to receive notice of an authorized trustee's exercise of the power, and the exercise does not become effective until 30 days after the date of service (although the persons entitled to notice may consent to a sooner effective date).[33] The notification requirement is especially protective when one considers that a trustee is not required to give notice to any beneficiary prior to making a principal distribution to a beneficiary.

Consistent with prior law, a beneficiary is not required to consent to an authorized trustee's appointment of trust principal in further trust,[34] but under the new law a beneficiary is expressly permitted to object to an authorized trustee's exercise of the power[35] (although such objection will not prohibit the authorized trustee from paying the assets to the appointed trust). A failure to object is not deemed to be a consent or ratification of the action,[36] and no beneficiary (whether such beneficiary objects or is silent) is foreclosed from objecting to an account or compelling a trustee to account after the receipt of notice of the exercise of the power.[37]

Limitation on Ability to Alter the "Tax Status" of the Trust

Prior to its amendment, EPTL 10-6.6(b) did not specifically protect the "tax status" of a trust. Accordingly, a trustee could pay the assets of the trust to another trust and knowingly – or unknowingly – adversely alter the tax structuring related to the funding or ongoing operation of the invaded trust. As amended, the statute requires the authorized trustee to consider the tax implications of the exercise of the power of appointment.[38] The statute also includes a provision to protect and safeguard the tax status and structuring related to the creation of the invaded trust by overriding a trustee's powers under EPTL 10-6.6(b) and (c) to the extent that such powers could affect any right under the invaded trust that is necessary or required for tax purposes or for the creator or trust to receive certain tax results or benefits for income, gift, estate, or generation-skipping transfer tax purposes.[39]

For example, if the trustee could appoint trust principal in further trust and eliminate a beneficiary's vested "five and five" withdrawal power, the credit for tax on prior transfers under I.R.C. § 2013 could be lost. Or, if the initial contribution to the invaded trust qualified for the marital deduction under I.R.C. § 2523, the authorized trustee may not pay the assets to another trust that does not qualify for the marital deduction. Similarly, if the initial contribution qualified for the annual gift tax exclusion under I.R.C. § 2503(b), the appointed trust must retain the right of exercise of any outstanding Crummey withdrawal power. If the invaded trust was created under I.R.C. § 2503(c), the appointed trust must retain a beneficiary's right to receive the principal of a trust upon attaining age 21. If the invaded trust initially qualified as a grantor retained annuity trust, the appointed trust must provide for the fixed annuity interest and include all of the other necessary provisions in order for the appointed trust to qualify as a grantor retained annuity trust under I.R.C. § 2702.

These limitations will not prevent the trustee from converting the invaded trust from or to a grantor trust under I.R.C. §§ 671, et seq. While grantor trust status for income tax purposes may be deemed a benefit from a tax perspective, there is nothing contained in the statute that would prohibit an authorized trustee from appointing principal from a grantor trust to a non-grantor trust (or the reverse).

Other Provisions

The new statute also modifies the notification and court filing requirements of the prior law,[40] settles ambiguities regarding a trustee's commissions,[41] clarifies to which trusts the statute is applicable,[42] defines key terms used in the statute[43] and imposes other limits on the substantive provisions of the appointed trust.[44]

Conclusion

The new statute is a welcome improvement to New York's vanguard statute. It expands the use of the statute and answers questions raised by the prior statute, all while taking steps to protect the rights of beneficiaries and the creator's intent. ■

1. "Principal" is defined under EPTL 10-6.6(s)(8) to include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

2. "Appointed trust" is defined under EPTL 10-6.6(s)(1) as an irrevocable trust which receives principal from an invaded trust (as defined under EPTL 10-6.6(s)(6)) pursuant to the authority granted by the statute, including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust.

3. "Invaded trust" is defined under EPTL 10-6.6(s)(6) as any existing irrevocable *inter vivos* or testamentary trust whose principal is appointed pursuant to the authority granted by the statute.

4. While the prior version of EPTL 10-6.6(b) is silent on this issue, the legislative history confirms that a trustee acting under the prior version of EPTL 10-6.6(b) was authorized to extend the trust term.

5. The act of invading the trust principal and paying the assets to a new trust under this statute commonly is referred to as "decanting"; EPTL 10-6.6(b) sometimes is referred to as the "decanting statute."

6. *See* Turano, McKinnney's Practice Commentaries EPTL 10-6.6 (the principal goal was to permit trustees to take advantage of generation-skipping transfer tax planning opportunities).

7. *See, e.g.*, Alaska Stat. 13.36.157; Arizona Revised Statutes, § 14-10819; Delaware Code Ann Tit. 12 § 3528; Florida Statute § 736.04117(1); New Hampshire Revised Statutes § 564-B:4-418; North Carolina, N.C.G.S. § 36C-8-816.1; South Dakota Statute § 55-2-15; Tennessee Code Ann. 35-15-816.

8. EPTL 10-6.6(l). The fact that EPTL 10-6.6(b) can be used for myriad purposes, many of which could provide administrative, financial, or other benefits to the beneficiaries, raises the specter that a trustee potentially could be sued for failing to utilize the statute. EPTL 10-6.6(*l*) confirms that the failure to pay the assets to a new trust does not give rise to trustee liability.

9. EPTL 10-6.6(h).

10. *Id.*

11. EPTL 10-6.6(j), n(1).

12. EPTL 10-6.6(k).

13. EPTL 10-6.6(m).

14. EPTL 10-6.6(g).

15. EPTL 10-6.6(d).

16. It is not necessary for all of the assets of the invaded trust to be appointed to the appointed trust. If the authorized trustee intends to appoint all of the assets comprising the principal of the invaded trust to an appointed trust, however, any subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust shall also be deemed to have been transferred to the appointed trust. In the event that the authorized trustee does not intend to appoint all of the assets from the invaded trust to the appointed trust, any subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust will remain the assets of the invaded trust. *See* EPTL 10-6.6(i).

17. Under EPTL 10-6.6(s)(2), an "authorized trustee" is defined, with respect to an invaded trust, as any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (1) the creator, or (2) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity). If more than one trustee of the invaded trust qualifies as an authorized trustee, the power may be exercised by any one such trustee only if that trustee could otherwise make principal distributions without another trustee, protector, or other person's consent.

18. All examples are adapted from the New York City Bar Association Report on Legislation by the Trusts, Estates and Surrogates' Courts Committee and Estate and Gift Taxation Committee approving the new legislation.

19. EPTL 10-6.6(e).

20. EPTL 10-6.6(n)(1), which is consistent with the statute prior to its amendment. Notwithstanding the foregoing, the statute facilitates the creation of spendthrift trusts by permitting changes in mandatory rights when the trust pays over to a supplemental needs trust that conforms to EPTL 7-1.12, subject to limitations on changes that would jeopardize any tax benefit received or expected in connection with the contributions to the invaded trust.

21. EPTL 10-6.6(n)(5).

22. EPTL 10-6.6(b)(3).

23. EPTL 10-6.6(e).

24. EPTL 10-6.6(c)(2).

25. For example, if the trust grants a power of appointment, that power of appointment must continue in the appointed trust.

26. EPTL 10-6.6(n)(1). This is consistent with the statute prior to its amendment. *See* EPTL 10-6.6(b)(1)(A) and (b)(2)(A). As mentioned in the discussion of Invaded Trust Type A, the statute prevents changes in the appointed trust that will negatively impact the tax status of the invaded trust. Changes to mandatory distributions rights could negatively impact the tax status of the invaded trust. This concept is discussed in greater detail below, at "Limitation on Ability to Alter the "Tax Status" of the Trust.".

27. EPTL 10-6.6(g).

28. *See* EPTL 10-6.6(f).

29. The authorized trustee does not have to exercise the power in the best interests of all of the beneficiaries. Indeed, if a trust is for more than one beneficiary, exercising the power to appoint trust principal in further trust for the benefit of only one of the beneficiaries is not in the best interests of all of the beneficiaries.

30. EPTL 10-6.6(h). Note that the statute retains the provision of prior law permitting a trust agreement to override the application of the new statute. EPTL 10-6.6(m).

31. EPTL 10-6.6(m).

32. EPTL 10-6.6(j)(2).

33. EPTL 10-6.6(j). Court approval is not required (although an authorized trustee may seek court approval with notice to all persons interested in the invaded trust). EPTL 10-6.6(j)(1).

34. EPTL 10-6.6(j)(1).

35. EPTL 10-6.6(j)(4).

36. *Id.*

37. EPTL 10-6.6(j)(5).

38. EPTL 10-6.6(o). For example, if the invaded trust qualified as a permitted shareholder of an S corporation within the meaning of I.R.C. § 1361(c)(2), consideration should be given to whether any provision of the appointed trust would disqualify the trust which owns S corporation stock from being a permitted shareholder. Similarly, if the invaded trust owns an interest in property subject to the minimum distribution rules of I.R.C. § 401(a)(9), consideration should be given to the provisions of the appointed trust that could shorten the minimum distribution period to which the property is subject under the terms of the invaded trust.

39. EPTL 10-6.6(n)(5).

40. *See* EPTL 10-6.6(j). The new statute removes the requirement of prior law that the instrument exercising the power be filed in court, except in those instances where the invaded trust has previously been the subject of a proceeding in the Surrogate's Court. If the trust is a revocable trust that became irrevocable at death and to which a will transferred assets, it is the authors' position that the filing of the revocable trust as part of the probate proceeding should not make the trust the subject of a proceeding in the Surrogate's Court for purposes of determining whether the filing requirement is triggered under the statute. The new statute also states that the creator (if living), any person having authority under the terms of the invaded trust to remove and replace the authorized trustee exercising the power and all persons interested in the trust must be given copies of the instrument exercising the power, the invaded trust, and the appointed trust. The instrument exercising the power is required to state whether the appointment is of all of the assets comprising the principal of the invaded trust or only a part of such assets and, if only a part of such assets, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

41. *See* EPTL 10-6.6(q).

42. *See* EPTL 10-6.6(r).

43. *See* EPTL 10-6.6(s).

44. *See, e.g.*, EPTL 10-6.6(n)(2) (the appointed trust may not decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and produce) and EPTL 10-6.6(n)(3) (the appointed trust may not eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power unless a court having jurisdiction over the trust specifies otherwise).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I practice in a small town in upstate New York. I am a general practitioner and my one large client owns a local business that employs many local residents. Upon graduation from law school, I hung out my shingle 15 years ago. Other than the three years I spent at law school, I have lived in town all of my life. When working for my clients, including the local business owner, I frequently find myself on the opposite side of neighbors or people I grew up with in contract negotiations, small claims actions, collections matters and employment issues. While I understand that I am an advocate and need to ensure that my clients' interests are protected, it seems that my neighbors fail to understand that I work for the other side. Needless to say, this makes me uncomfortable, especially in matters where the other side does not hire counsel. I tell them that I do not represent their interests, but it seems like it falls on deaf ears. Is there anything I need to do to protect my clients, as well as myself, when this situation arises?

Sincerely,

Walking a Tightrope

Dear Walking a Tightrope:

Your question addresses issues which all attorneys face when litigating against a *pro se* party. However, your situation has the added complication of your past history or relationship with the *pro se* party.

Litigating a case against a *pro se* party has its challenges, since *pro se* litigants often do not entirely understand the judicial system and are not familiar with procedural rules. Moreover, a *pro se* litigant may believe that you, as an attorney, represent his or her interests even though you have been retained by the other side.

While it is certainly difficult to appear against someone whom you have known for many years and who accordingly expects you to be on his or her side, the key to dealing with this dilemma is treating that person as you would any other *pro se* litigant.

Rule 4.3 of the New York Rules of Professional Conduct provides:

> In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

In the scenario you have described, you have reason to believe that the *pro se* litigant misunderstands your role in the case. Therefore, you have a duty to make reasonable efforts to ensure that the *pro se* litigant understands that you do not represent him or her. It is important to note that Rule 4.3 requires "reasonable efforts." Therefore, if you have made reasonable efforts and the *pro se* litigant still confuses your role, you have satisfied your duty.

The best way to protect yourself and to make certain your *pro se* opponent correctly understands your role is to explain not only verbally, but also in writing, that you represent the opposing party and not the *pro se* litigant. You must advise the *pro se* litigant that you cannot provide any legal advice. Moreover, you must advise him or her in writing to obtain separate counsel.[1] In this vein, you should also memorialize every conversation with the *pro se* litigant regarding the case – *in writing*. This may seem strange when you are interacting with someone whom you have known for years. However, it is imperative that you make sincere efforts to avoid any confusion about your loyalties. Moreover, since you may interact with the *pro se* litigant in social settings, you should limit conversations about the ongoing matter to appropriate times (i.e., court conferences and appearances, settlement negotiations and meetings), and should not discuss the ongoing legal matter in a social setting, thereby confusing your role. You should make it clear that you will not discuss the matter outside of the appropriate setting. If the *pro se* litigant brings up the case in a social setting, you should politely refuse to discuss the case at that time, remind him or her that you represent the opposing party, and indicate that you are available during your regular office hours to schedule a meeting. You should again recommend that the *pro se* litigant retain counsel.

CONTINUED ON PAGE 46

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 e-mail 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.

CONTINUED FROM PAGE 45

If you do in fact meet with a *pro se* litigant at your office, it is a good idea to have someone else from your office attend. In the event the *pro se* litigant later claims that you misled him or her about your role, you will have a witness who can attest that you explained your role and did not give the *pro se* litigant legal advice. You or someone from your office should also take contemporaneous notes during any meeting with a *pro se* litigant outside of court. Again, you should also follow up any such meeting with a letter.

Because you are opposing someone that you know personally and who may have confused your role, you may face that party's ire in court when you advocate a position in support of your client which is detrimental to the *pro se* litigant. Despite your best efforts, the *pro se* litigant may feel betrayed that you are not assisting him or her or are taking a contrary position. The *pro se* litigant may attempt to address you personally. When faced with this situation, it is important to remember always to address the court, not the *pro se* party. Attorney Cornelius D. Helfrich notes that exclusively addressing the court "forces your pro se opponent to direct his or her anger, frustration, and otherwise ill-advised commentary to the court. You can force the 'through the court' discussion by looking only at the judge while you speak and while the *pro se* litigant speaks."[2] Obviously, this is not intended to be rude, it is intended to avoid escalation of a conflict and to convey the message that you are simply advocating your client's position rather than personally attacking the *pro se* litigant.

Finally, the key is to remain polite and professional, even if a *pro se* party becomes emotional or angry with regard to the fact that you represent his or her opponent, or attacks you personally. Similarly, you must counsel your client to remain calm and not to react to direct statements by the *pro se* litigant. You can protect your client best by ensuring that he or she understands never to react in kind. An equally emotional response by either of you will only escalate the situation and seriously reduce the chances of reaching an amicable resolution.

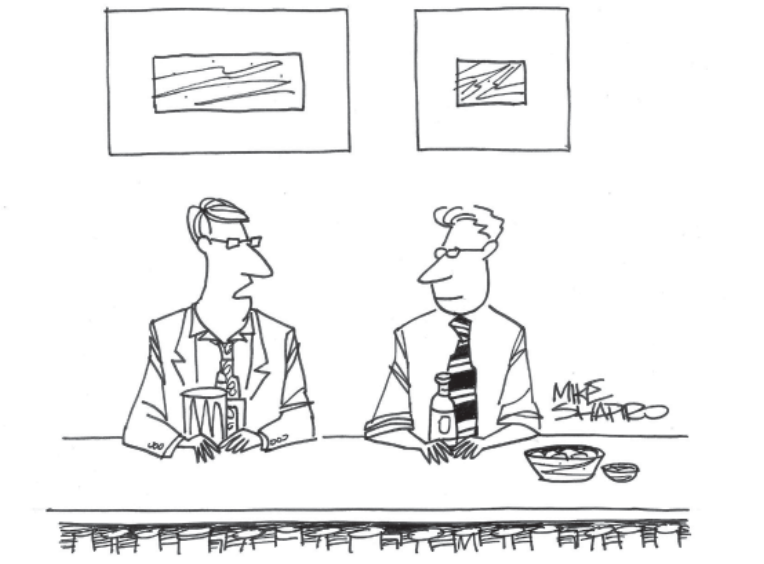
Although Rule 4.3 requires a lawyer to inform *pro se* parties when they appear to misunderstand your role and thereby disabuse them of their misperception, it is probably a good practice to take all of the above steps in any matter when faced with a *pro se* opponent, even where there was no prior relationship. Doing so from the outset and throughout the representation will clearly define your role, and will protect your client's as well as your own interests if any question should arise.

Encountering a *pro se* opponent with whom you are acquainted is challenging. However, more and more parties are choosing to represent themselves. Therefore, it is important that all attorneys are familiar with Rule 4.3, whether the *pro se* litigant on the other side is a stranger or an acquaintance.

The Forum, by
Jennifer Lewkowski
Hawthorne, New York

1. For some excellent advice on how to handle a case against a pro se litigant, see John M. Burman, *Ethically Speaking-Dealing with an Opposing Party Who is Proceeding Pro Se*, Wyoming State Bar, June 2008.

2. Corenlius D. Helfrich, *Facing a Pro Se Litigant*, The Compleat Lawyer, American Bar Association, Summer 1997.



"Whoever said 'We have nothing to fear but fear itself' never had to explain to a managing partner why he hasn't brought in any new clients in the past six months."

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

Following five years of private practice in New York, I am relocating to Oregon where, at least initially, I will be working from my new and very small apartment. My practice in New York was primarily litigation (personal injury and commercial), and some criminal defense work. I must have all of my files out of the office by the time I go in four weeks. What are my responsibilities for retention of these files? Obviously the expense of moving the files cross-country is prohibitive, and in any event, I do not have room to store the files in my new apartment. I have a limited budget for my law office expenses and hope to not have to pay for storage.

Sincerely,
Moving on Out

Update: Did the Comparative Appellate Odds Change in 2010?

Appellate Statistics in New York State Courts and the Second Circuit, U.S. Courts of Appeal

By Bentley Kassal

This is the ninth article covering the same subject; it is intended to provide official statistics, converted into easily comprehensive and pragmatic percentages for the key numerical statistics of value to litigators. The original genesis for these articles was to respond to numerous inquiries over the years from attorneys who, based on my experience as an appellate judge, expected accurate and reliable top-of-the-head answers to statistical questions. Of course, the figures listed below are general figures – unrelated to the specific factual and legal elements of any particular case – based on official court statistical sources, fully available to the public.[1]

Bentley Kassal retired in 1993 as an Associate Justice of the Appellate Division, First Department. He also served as a Judge in the Civil Court; a Justice of the Supreme Court, New York County; and an Associate Judge at the New York Court of Appeals in 1985. He was a New York Assemblyman for six years. He received his law degree from Harvard Law School in 1940 and has been counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP since 1998. On June 6, 2009 in Normandy, Judge Kassal received the French Legion of Honor. This is his ninth consecutive article on the subject of appellate statistics.

The appellate data and comments presented are for the following appellate courts and include civil and, in some courts, criminal statistics for the year 2010:

1. New York Court of Appeals.[2]
2. The Four Departments of the Appellate Division of the New York State Supreme Court.[3]
3. The two Appellate Terms of the New York State Supreme Court for the First and Second Departments.
4. The U.S. Circuit Court for the Second Circuit.
5. The New York Court of Claims (a trial court).

Unless otherwise indicated, all the statistics herein are in percentages and presented in descending consecutive yearly order, with the most recent, 2010, on the left.

This is the fifth consecutive year I have intentionally omitted several appellate statistical dispositions that I have deemed to be irrelevant for this study, as well as distracting (simplicity and accuracy being the objectives of this article). Among the dispositions excluded are those which are not dispositions on the merits, but are basically procedural, usually categorized by the reporting appellate courts as "other" or "dismissed" under "dispositions." As for criminal cases, the statistics included are only for New York State appellate courts, not federal.

New York Court of Appeals[4]

The percentages for appellate statistics for the five-year period, ending 2010, are:

Civil Cases					
	2010	2009	2008	2007	2006
Affirmed	45	(48)	(48)	(56)	(66)
Reversed	42	(41)	(43)	(27)	(25)
Modified	13	(11)	(9)	(17)	(9)

Criminal Cases					
	2010	2009	2008	2007	2006
Affirmed	63	(71)	(70)	(66)	(71)
Reversed	33	(21)	(7)	(30)	(17)
Modified	4	(8)	(23)	(4)	(12)

Comments

For civil cases, the 2010 affirmance rate was slightly less than in 2009 and 2008 and significantly less than for 2007 and 2006.

With regard to criminal cases, the 2010 affirmance figures are also significantly less, dropping more than 10% from 2009, 2008 and 2006 and 5% less than 2007.

Avenues to the Court of Appeals – Jurisdictional Predicates

Civil Appeals for 2010 (2009, 2008, 2007, and 2006 in parentheses)	
Permission of Court of Appeals	48 (44) (48) (48) (49)
Permission of Appellate Division	25 (25) (29) (26) (24)
Dissents in Appellate Division	24 (24) (18) (19) (17)
Constitutional Question	3 (7) (5) (7) (10)

Criminal Appeals for 2010 (2009, 2008, 2007, and 2006 in parentheses)	
Permission of Court of Appeals	77 (70) (72) (78) (85)
Permission of Appellate Division	23 (30) (28) (22) (15)

Comments

Overall, the figures for civil appeals are relatively similar for the past five years, except for 2009. However, for criminal appeals, the Court of Appeals granted leave to appeal 10% more than in 2009, with the Appellate Division granting about 20% less than in 2009.

A question often asked of me, is whether the Court of Appeals generally grants leave when there are basic differences or conflicting determinations by the Appellate Division Departments on significant issues. The answer is in the affirmative.

Significant Other Statistics

1. The average time from argument or submission to disposition of an appeal in normal course was 38 days and, for all appeals, 33 days.
2. The average time from filing a notice of appeal or an order granting leave to appeal to oral argument was about nine months, a month and half greater than in 2009.
3. The average time, from when all papers were served and filed, to calendaring for oral argument was approximately nine months.
4. The total 2010 filings were 380 (328 in 2009).
5. The total number of Appellate Division orders granting leave was 88 (56 civil and 32 criminal) with 68 in 2009 (44 civil and 24 criminal). Of these, the First Department issued 55 (35 civil and 20 criminal) with 39 for 2009 (28 civil and 11 criminal).
6. The total motions filed decreased slightly to 1,380 in 2010 from 1,397 in 2009.
7. Dispositions –
   (a) In 2010, 236 appeals (137 civil and 99 criminal) were decided, with 212 (146 civil and 66 criminal) for 2009.
   (b) Of these 236 appeals, 159 (161 in 2009) were decided unanimously.
   (c) Motions: 1,384 decided in 2010, which was 14 more than in 2009.
   (d) The average time from return date of motions to disposition for all civil motions was 61 days.
   (e) Of the 1,070 motions decided for leave to appeal in civil cases, 6% were granted (7.2% in 2009).
8. Review of State Commission on Judicial Conduct determinations: None were reviewed.
9. Rule 500.27 grants discretionary jurisdiction to the Court to review certified questions from the U.S. Supreme Court, any U.S. Circuit Court of Appeals or a court of last resort of any other state as to determinative questions of New York law involved in a pending case. In 2010, the average time for accepting or rejecting review was 32 days and the average time for disposition of those accepted was 7.4 months. In 2010, the Court accepted eight new cases, with four decided during the year and four pending at the end of 2010.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York[5]

Civil Statistics for 2010 (2009, 2008, 2007, and 2006 in parentheses)	First	Second	Third	Fourth
Affirmed	65 (63) (64) (60) (64)	62 (60) (62) (60) (59)	78 (73) (78) (78) (80)	67 (62) (65) (68) (70)
Reversed	21 (21) (20) (26) (23)	26 (27) (27) (27) (29)	10 (16) (11) (10) (10)	17 (22) (19) (15) (14)
Modified	14 (16) (16) (14) (13)	12 (13) (11) (13) (12)	12 (13) (11) (12) (10)	6 (16) (16) (17) (16)

Criminal Statistics for 20010 (2009, 2008, 2007, and 2006 in parentheses)	First	Second	Third	Fourth
Affirmed	87 (91) (90) (88) (89)	93 (88) (89) (90) (88)	81 (80) (81) (84) (85)	81 (85) (84) (80) (80)
Reversed	7 (4) (5) (6) (3)	9 (7) (6) (4) (5)	6 (11) (10) (6) (6)	10 (6) (6) (9) (9)
Modified	6 (5) (5) (6) (8)	8 (5) (5) (6) (7)	13 (9) (9) (6) (9)	9 (9) (10) (11) (11)

Comments

Affirmance Rates: For 2010, the civil affirmance rate for the First and Second Departments were about the same as 2009. However, the Third and Fourth Departments affirmance rates increased from 2009, with reversal rates similarly decreasing.

Total Appellate Dispositions: The First Department had 2,432 for 2010 (2,816 for 2009). The Second Department had 11,952 (11,665 for 2009). The Third Department had 1,907 for 2010 (1,828 for 2009). The Fourth Department had 1,635 for 2010 (1,554 for 2009). Significantly, the Second Department total was almost five times the First Department.

Total Oral Arguments: The First Department had 1183, the Second Department 2,228, the Third Department 732 and the Fourth Department 926. It is noteworthy that, in contrast to the differential as to the above total disposition rates with the First Department, the First Department had more than 50% of the total oral arguments of the Second.

Total Motions Decided: The First Department had 4,687 motions decided, the Second Department 10,526, the Third Department 6,466 and the Fourth 4,773. Again, note the ratio of total motions decided by the First and Second Departments in relation to their respective total dispositions.

As noted previously, the Third Department's much higher affirmance rate for civil appeals is attributed to its greater number of Article 78 administrative appeals, which are reviewed on the lesser standard of "substantial evidence."

The Appellate Terms of the First and Second Departments

Civil Statistics for 2010 (2009, 2008, 2007, and 2006 in parentheses)	First Department	Second Department
Affirmed	64 (64) (62) (61) (65)	50 (51) (52) (61) (61)
Reversed	24 (28) (31) (29) (23)	43 (38) (37) (28) (27)
Modified	12 (8) (7) (10) (12)	7 (11) (11) (11) (12)

Criminal Statistics for 2010 (2009, 2008, 2007, and 2006 in parentheses)	First Department	Second Department
Affirmed	90 (87) (79) (86) (69)	64 (57) (62) (38) (64)
Reversed	8 (13) (18) (14) (29)	30 (39) (30) (59) (32)
Modified	2 (0) (3) (0) (2)	6 (4) (8) (3) (4)

Comments (Comparable figures from 2009 are in parentheses)

The Second Department had a total of 1,769 (1,528) civil dispositions as contrasted with 495 (452) for the First. As to total oral arguments, the Second Department had 293 (347) as contrasted with 228 (263) for the First.

The affirmance rate of criminal appeals again was much higher for the First Department.

As to the total motions decided, the First Department decided 1,527 (1,568) and the Second Department decided 4,491 (4,416).

U.S. Circuit Courts of Appeal for the Second Circuit[6]

This year, for the fifth time, appellate statistics for civil cases are being presented as they are specifically defined in the official report, namely, as "Other U.S. Civil" (involving governmental entities) and "Other

Private Civil" (involving private parties). Additionally, administrative appeals are included.

	Second Circuit		Administrative Appeals	
	Other U.S. Civil	Other Private Civil		
Affirmed	67 (66) (77) (83)	70 (74) (79) (85)	Affirmed	76 (74) (65) (63)
Reversed	14 (12) (14) (12)	12 (6) (17) (9)	Reversed	15 (11) (19) (20)
Dismissed	17 (21) (4) (2)	17 (19) (1) (3)	Dismissed	4 (13) (13) (12)
Remanded	2 (1) (5) (3)	1 (1) (3) (3)	Remanded	5 (2) (8) (5)

Comments

In comparing civil appeals, the Second Circuit has higher affirmance rates than the New York Court of Appeals and all four Appellate Division Departments.

New York Court of Claims

This is a special trial court whose sole jurisdiction is limited to monetary claims against the State of New York. (Figures in parentheses are for the year 2009).

1. A total of 1,434 (1,506) claims were disposed of in 2010. Awards were made in 70 (82) cases or 4.8% (5.2%) of those disposed of.
2. The 70 successful awards had sought $242,195,234 and the total sums actually awarded was $151,539,546 or 62.5% of the claimed successful awards. ■

1. For the New York state courts, the information may be obtained at the website http://www.nycourts.gov ("Courts," "Court Administration" and "reports"). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its website, http://www.ca2.uscourts.gov.

2. See the Annual Report of the Clerk of the Court of Appeals for 2010 *available at* http://www.nycourts,gov/ ctapps/crtnews.htm.

3. See Reports of the New York State Office of Court Administration *available at* http://www.courts,state,ny.us/ reports/annual/index.shtml.

4. See the Annual Report of the Clerk of the Court of Appeals for 2010 *available at* http://www.nycourts.gov/ ctapps/crtnews.htm.

5. See Reports of the New York State Office of Court Administration *available at* http://www.courts.state.ny.us/ reports/annual/index.shtml.

6. Applicable to the 12-month periods, ending September 30, 2010. This year, for the third time, includes "Remanded."

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In Memoriam

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THE NEW YORK BAR FOUNDATION

or be served with interrogatories:[18] co-defendants may serve interrogatories on each other, and plaintiffs and third-party defendants may serve interrogatories on each other.

• Respond to all interrogatories. If you object to an interrogatory, state "with reasonable particularity" the reasons for objecting to it.[19]

• If the interrogatory seeks excessive or irrelevant information, you may also move for a protective order to strike the interrogatory in its entirety.[20]

• If you've failed to respond to interrogatories, the inquiring party may move under CPLR 3124 to compel your response.

• Move under CPLR 3103 to cure any abuses in interrogatories. If the interrogatories are burdensome, oppressive, or improper, a court might vacate them all rather than cull the proper ones from the improper ones.[21]

Format of Interrogatories

• Put a caption on the first page of your interrogatories.

• Give the document a title: Identify whether it is your first set or a subsequent set of interrogatories. *Examples:* "Defendant XYZ's First Set of Interrogatories of Plaintiff ABC"; "Defendant XYZ's Second Set of Interrogatories of Plaintiff ABC."

• Number your interrogatories. *Example:*

Interrogatory No. 1
[Insert your interrogatory]
Interrogatory No. 2
[Insert your interrogatory]
Interrogatory No. 3
[Insert your interrogatory]

• If your interrogatories have subparts, use letters in alphabetical order to designate the subparts. General format:

Interrogatory No. 4
[Insert your interrogatory];
(a) [Insert the subpart to your interrogatory]; and
(b) [Insert the subpart to your interrogatory].

(See Interrogatory No. 5, below, for a complete example.)

Use interrogatories to learn the identity of each person who has information about the case.

• Make a good-faith effort to resolve the interrogatory dispute with your adversary before you ask a court to intervene.

• Regardless which party initiated the interrogatories or for whom the interrogatories were meant, serve all parties with copies of interrogatories and the responses to the interrogatories.[22]

• Responses to interrogatories "must be under oath."[23] If a party is a business entity, an employee or agent who has knowledge or information must answer the interrogatories.

• Unlimited are the number of interrogatories you may seek. Legislative efforts to set an arbitrary limit on the number of interrogatories you may seek have been unsuccessful.[24] A court may, however, limit the number to protect the responding party from "undue annoyance, expense, or oppression."[25]

• You may include a brief introductory statement that identifies the party initiating the interrogatories, the party's attorney, to whom the interrogatories are directed, the relevant CPLR provisions, and the time period within which the responding party must respond. An introductory statement isn't required under the CPLR. *Example:*

Defendant Abe Frank requests that plaintiff James Doe respond in writing and under oath, within 20 days, in accordance with CPLR 3130, the following interrogatories.

• Although the CPLR doesn't require you to do so, you might also want to include a "definitions" section to define the words, phrases, and terms you'll be using throughout the interrogatories.

Examples:

Definitions

The "contract" means the document plaintiff ABC and defendant XYZ executed on January 1, 2009. A copy is attached as Exhibit A to the complaint in this action.

"Documents" means memorialized information regardless of its medium. This includes writings (such as letters, reports, graphs, posters and transparencies, bills, forms, contracts, and memoranda); photographs; motion pictures; audio and visual recordings; and electronic information (such as word-processing files, emails, spreadsheets, computer databases, and computer-aided-design (CAD) files).

"Identify a person" means to provide the person's name, address, telephone number, employer, and job title or description.[26]

Don't define a commonly understood word just because you've included it in your interrogatories.

• You might want to include, although it's not required, an "instructions" section. In this section you can specify the time period for your interrogatories. If you don't specify the time period, the responding party might object to your vague and unduly burdensome interrogatories. Or the responding party might answer the interrogatories using the time period it believes is relevant. *Example:*

Instructions

Unless otherwise specified, the interrogatories refer to the period between January 1, 2009 and December 31, 2010. All references to documents, and all requests to produce these documents, are limited to this time period.[27]

• Because the responding party might object to an interrogatory on the basis of a privilege, include in your "instructions" section the things the

responding party should provide if asserting a privilege. *Example:*

Instructions: Privileges

If you're asserting a privilege in response to one or more interrogatories, specify the privilege and the basis for each privilege.

If the privilege pertains to a document, (1) identify the document's author or preparer; (2) identify each person who received the document; (3) specify the document's date; and (4) describe the document's subject.

If the privilege pertains to information revealed in a conversation, (1) identify each participant to the conversation; (2) provide the date of the conversation; (3) identify each person who revealed the information; (4) identify the persons, either before, during, or after the conversation, who were privy to the information; and (5) describe the information's subject.[28]

• Sign the interrogatories. Either the pro se party or the party's attorney signs them. Attorneys who sign the interrogatories must provide their names, addresses, and telephone numbers.[29]

Writing Interrogatories

• Use clear, straightforward language.

• Phrase each interrogatory precisely and meticulously. Avoid ambiguities. Minimize the responding party's opportunity to object to your interrogatory or to answer with a generality.

• Don't engage the responding party in a lengthy narrative.[30] Save narratives for EBTs. Don't write an interrogatory like this:

Interrogatory No. 1

Describe the sequence of events that you allege resulted in your injuries.[31]

• Break an issue down into parts. Make each part a separate interrogatory. *Example:*

Interrogatory No. 2

Identify who attended the meeting of July 1, 2009, on behalf of employer TLC Corp.

Interrogatory No. 3

Describe what representations were made about Joanne Doe's employment performance and skills.

Interrogatory No. 4

Describe in what manner Joanne Doe's employment performance changed after the meeting of July 1, 2009.

Or break an issue down into subparts. *Example:*

Interrogatory No. 5

Have you conversed with co-defendant Tom Hail about the contract? If so, specify[32]

(a) the date of the conversation;

(b) the place (if face-to-face);

(c) each person who was present; and

(d) what was discussed during the conversation.

• Frame your interrogatory to get a "yes" or "no" response. Ask a follow-up question to clarify. *Example:*

Interrogatory No. 6

Do you contend that the jacuzzi you purchased from Supplier-of-Jacuzzis, Inc., was substantially defective?[33]

Interrogatory No. 7

If your answer to Interrogatory No. 6 is affirmative, describe how the jacuzzi was defective.

• If a specific statement, oral or written, is in question, quote the exact language. Don't write an interrogatory like this:

Interrogatory No. 8

Do you agree with Bill Jones's statement contained in Exhibit A?[34]

Don't generalize or paraphrase. Otherwise, you're inviting the responding party to object to the interrogatory.

• Don't ask for legal opinions in your interrogatories. Don't write an interrogatory like this:

Interrogatory No. 9

Do you contend that Jar Corp. is strictly liable for Joe Victim's injuries?[35]

• Use interrogatories to learn the identity of each person who has information about the case. Ask the responding party to identify these persons. *Example:*

Interrogatory No. 10

(a) Identify each person you know or believe has knowledge or information about plaintiff's efforts to mitigate its damages.

(b) For each person you identify, describe the knowledge or information the person has.[36]

• Use interrogatories to identify the persons who contributed information to respond to the interrogatories.

Interrogatory No. 11

Identify the individuals who provided information or drafted responses, or both, to plaintiff's interrogatories.[37]

• Use interrogatories to obtain background facts about the responding party, such as education, employment, and medical history. *Example:*

Interrogatory No. 12

List your employers for the last 10 years before the accident. Provide the dates of your employment, the name of your immediate supervisor, and the reason you are no longer working for that employer.[38]

Interrogatory No. 13

List every health-care provider, physical and mental, you consulted or visited in the 10 years before the accident. State the location, telephone number, reason for consultation or visit, and date of consultation or visit.[39]

• Use interrogatories to find out whether the responding party, or the responding party's witnesses, has a criminal conviction. Then impeach a party's or witness's credibility at trial with evidence that the party or witness was convicted of a crime. In your interrogatories, ask the responding party to name the crime, specify the Penal Law section, the court (including the county), the conviction date, and the sentence imposed.

• Use interrogatories to find out information about the responding party's claims or defenses. As explained

earlier, you may not serve demands for bills of particulars and interrogatories on the same party. Thus, if you choose to use the interrogatory instead of the bill of particulars, here's how you might want to elicit information about a claim:

Interrogatory No. 14

State in detail each fact on which you base the allegation in paragraph 10 of the complaint that you suffered damages from the jacuzzi you purchased from Supplier-of-Jacuzzis, Inc.

Here's how you might want to elicit information about a defense:

Interrogatory No. 15

Describe in detail how plaintiff failed to mitigate its damages, as alleged in paragraph 21 of your answer.

• Use interrogatories to find out about any insurance policy.[40]

• Use interrogatories to obtain such information as the identity of witnesses and documents. Based on the information you obtain, you may later seek EBTs or request additional documents. Use interrogatories to create a strategy for your EBTs. In your interrogatories, seek the names of your opposition's potential witnesses, including any expert, to determine what information these witnesses know.[41] *Example:*

Interrogatory No. 16

Identify the individuals at Rock Corp. who negotiated the contract and provide their job titles and duties and their role in the negotiation process.[42]

• Use interrogatories to obtain complex factual information. The responding party must often assemble complex information from multiple sources. Under CPLR 3131, you may seek in your interrogatories copies of papers, documents, or photographs. Use interrogatories to find out about the responding party's damage claims. *Example:*

Interrogatory No. 17

Describe each injury for which you seek damages in this action.[43]

Interrogatory No. 18

(a) For each injury you described in your response to Interrogatory No. 17,

(b) Produce a copy of each document that substantiates, in whole or in part, each injury; and

(c) Produce a copy of each document that substantiates, in whole or in part, the damages you seek.[44]

• Use "contention" interrogatories to get the responding party to reveal the legal and factual theories of its case, if the responding party hasn't sufficiently explained the theories or defenses in the pleadings.[45] *Example:*

Interrogatory No. 19

State whether plaintiff contends that the "malfunctioning" of its jacuzzi, referred to in paragraph 5 of the complaint, was caused in whole or in part by (a) Supplier-of-Jacuzzis Inc.'s negligence; (2) a defect in the manufacture, construction, or design of equipment that Supplier-of-Jacuzzis Inc. supplied; and (3) Supplier-of-Jacuzzis Inc.'s act or failure to act.[46]

• After your contention interrogatories, follow up with interrogatories that ask the responding party for the factual bases for its contentions. Have it state the facts, and the name, the last known address, and the telephone number of each person who has knowledge of these facts, and have the responding party describe the document that supports any contention it made. *Example:*

Interrogatory No. 20

State fully all facts, communications, and documents on which plaintiff relies to support its contention in paragraph 5 of the complaint that the "malfunctioning" of plaintiff's jacuzzi was due to Supplier-of-Jacuzzis Inc.'s negligence.

Interrogatory No. 21

For each person you identified in your response to Interrogatory No. 20,

(1) Identify the person's complete name;

(2) Identify the person's last known address; and

(3) Identify the person's telephone number.

• Use "change-of-heart" interrogatories after you've completed an EBT.[47] After an EBT, the responding party might abandon some of its claims or defenses. Clarify that information in your interrogatories. *Example:*

Interrogatory No. 22

In light of your examination before trial testimony, do you still contend that John Johnson was not acting as your agent when he signed the agreement?[48]

• Use interrogatories to obtain the damages the responding party seeks.

Interrogatory No. 23

State the amount of recovery you seek for each element of damages sought.[49]

• Use "should-have-done" interrogatories to determine what the responding party believes your client should have done to avoid the circumstances that form the basis of the lawsuit.[50] In a slip-and-fall case, for example, you might want to use the following interrogatory:

Interrogatory No. 24

You alleged in the complaint that defendant failed to take the steps that a reasonably prudent homeowner would have taken to avoid black ice forming on the sidewalk. State every step that you claim a reasonably prudent homeowner would have taken to avoid black ice forming on the sidewalk.[51]

In the next issue, the *Legal Writer* will continue with interrogatories

Don't generalize or paraphrase. Otherwise, you're inviting the responding party to object to the interrogatory.

and discuss how to respond to interrogatories.

Gerald Lebovits, a Criminal Court judge in Manhattan, teaches part time at Columbia, Forham, and St. John's law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. Kristy L. Fischmann, *Bills of Particulars & Interrogatories*, N.Y. St. B. Ass'n 107, 127 (Cont'g Legal Educ. Prog., May 25, 2011).
2. *Id.* at 127.
3. Michael P. Graff, *The Art of Pleading — New York State Courts*, N.Y. City Bar Ctr. for CLE 1, 32 (Dec. 8, 2008).
4. Fischmann, *supra* note 1, at 114.
5. *Id.* at 127; CPLR 3132; David D. Siegel, New York Practice § 361, at 590 (4th ed. 2005).
6. CPLR 3130(1); Siegel, *supra* note 5, at § 361, at 590.
7. Fischmann, *supra* note 1, at 130 (citing Fed. R. Civ. P. 33(a)).
8. *Id.* at 130 (citing Fed. R. Civ. P. 33(a)(1)).
9. Graff, *supra* note 3, at 33; CPLR 3130(1).
10. Siegel, *supra* note 5, at § 361, at 590.
11. Fischman, *supra* note 1, at 127.
12. Graff, *supra* note 3, at 33; Siegel, *supra* note 5, at § 361, at 591; Fischman, *supra* note 1, at 129. Fischman notes that if the action isn't predicated solely on a negligence theory, the restriction in CPLR 3130 wouldn't apply. The restriction wouldn't apply, therefore, if the case were based on negligence and on another legal theory, such as strict liability, breach of warranty, or breach of contract.
13. Graff, *supra* note 3, at 33.
14. CPLR 3132.
15. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial at § 29:100, at 29-16 (2006; Dec. 2009 Supp.) (citing *In re Wilfredo G*, 154 Misc. 2d 979, 981, 586 N.Y.S.2d 725, 726 (Fam. Ct. Westchester County 1992) ("[T]his court determines that pursuant to section 165 and part 3 of article 3 of the Family Court Act ('Discovery'), interrogatories cannot be utilized in a juvenile delinquency proceeding.")).
16. CPLR 3130(1).
17. CPLR 3132.
18. Barr et al., *supra* note 15, at § 29:85, at 29-15.
19. CPLR 3133(a).
20. Siegel, *supra* note 5, at § 361, at 592 (citing *Hanover Ins. Co. v. Lama*, 164 Misc. 2d 843, 844–45, 629 N.Y.S.2d 945, 946 (App. Term 9th & 10th Jud. Dists. 1995)).
21. *Id.* at § 361, at 592 (citing *Barouh Eaton Allen Corp. v. I.B.M. Corp.*, 76 A.D.2d 873, 874, 429 N.Y.S.2d 33, 35 (2d Dep't 1980)).
22. CPLR 3132.
23. Siegel, *supra* note 5, at § 361, at 593.
24. *Id.* at § 361, at 593.
25. Barr et al., *supra* note 15, at § 29:86, at 29-15.
26. Adapted from *id.* at § 29:171, at 29-22, 29-23.
27. Adapted from *id.* at § 29:173, at 29-23.
28. Adapted from *id.* at § 29:174, at 29-24.
29. *Id.* at § 29:164, at 29-22.
30. *Id.* at § 29:193, at 29-24.
31. Adapted from *id.* at § 29:193, at 29-25.
32. Adapted from *id.* at § 29:186, at 29-25.
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39. *Id.*
40. CPLR 3101(f).
41. Barr et al., *supra* note 15, at § 29:141, at 29-20.
42. Adapted from *id.* at § 29:141, at 29-20.
43. Adapted from *id.* at § 29:142, at 29-20.
44. Adapted from *id.* at § 29:142, at 29-20.
45. *Id.* at § 29:150, at 29-20.1.
46. Adapted from *id.* at § 29:150, at 29-20.1.
47. *Id.* at § 29:151, at 29-21.
48. Adapted from *id.* at § 29:151, at 29-21.
49. Adapted from *id.* at § 29:153, at 29-21.
50. *Id.* at § 29:154, at 29-21.
51. Adapted from *id.* at § 29:184, at 29-25.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I see the words *duress*, *coercion*, and *intimidation* used separately or together. They all seem to mean the same thing. Are there any legal differences among them?

Answer: There are some differences, but all three nouns also have some meanings in common. For example, all three acts are intentional. All three are by an aggressor. All three are intended to force a victim to substitute the will of the aggressor for the victim's own will. All three are illegal (as defined below). And all three acts are intended to prevent the victim from acting freely.

On the other hand, the nouns are distinguishable, the most noticeable difference being that while both coercion and intimidation indicate the attitude of the aggressor, duress indicates the attitude and the response of the victim as a result of the aggressor's behavior. The victim must believe that the aggressor has the power to accomplish the threatened act. For duress to occur, the victim must reasonably believe that the coercion or intimidation will result in death or bodily injury to the victim *or* to members of his or her family.

Coercion is defined as "compulsion by the application of physical or mental force or persuasion." The defense to an act committed by coercion is "the importunity of the victim," which destroys the victim's free agency and substitutes the will of the aggressor in place of the victim's own. (This coercion is presumed by some older courts as possibly being exercised by a husband to his wife.)

Intimidation need not induce the victim to fear an imminent or immediate danger. And intimidation need not imply an overt act of violence, or even a direct threat of violence. Intimidation is defined as "[t]he act of putting another in fear or a state of timidity by means of a threat or declaration of an intention or determination to injure such person by the commission of an unlawful act."

This response to the reader's question is not intended to be current or legally sufficient. For both purposes, more research is necessary. The definitions found in lay dictionaries are broader and less helpful. For example, in *The American Heritage Dictionary* (Second Edition), the first meaning of coercion is, "to act or think in a given manner by pressure, threats, or intimidation." The noun *intimidation* is not listed. And the definition of legal duress is, "Coercion, illegally applied."

Question: Of the following ways to express this statement, which is correct?

> What it will do is make the process easier.
>
> What it will do is it will make the process easier.

Answer: I too have seen the newer, longer expression. It is also redundant and ungrammatical, but it is widespread. Check *The New York Times*, however, and you will notice that the traditional usage is still preferred. When *The New York Times* adopts the new version, so will I.

I sound prejudiced, and I am. In my view, it is always better to use less language to express the same idea. And to say the same thing twice is a waste of time and language.

Consider the following common locutions:

> I'm good friends with him.
>
> Why not: We're good friends?
>
> We both agreed.
>
> Why not: We agreed?
>
> The reason why is because . . .
>
> Why not: The reason is . . .?
>
> The fact is is that . . .
>
> Why two "ises"?

There are also less obvious redundancies. Some time ago a reader chided me for adding "the" to the phrase *hoi polloi*. He was right: The phrase *hoi polloi* includes "the"; the phrase itself means "the many." To say *the Negev desert* is also a redundant; *Negev* itself means "desert." And the judge who was recently quoted as saying, "The wife's rights are as paramount as the husband's; he had battered her sufficiently enough to be charged with a crime" must not have been thinking.

Attorney William Zinsser, prolific author and critic of legal jargon, has said, "Clutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills, and meaningless jargon."

He was not the first to criticize redundance. In 1736, *The Pennsylvania Gazette* printed an article called "On Amplification," by Benjamin Franklin, who described "the Art of saying little in much." He added:

> Tis highly useful when [gentlemen Retainers to the Law] are to speak at the Bar; for by its Help, they talk a great while, and appear to say a great deal, when they have really very little to say. . . . You must abridge their Performancies to understand them; and when you find how little there is in a Writing of vast Bulk, you will be as surpriz'd as a Stranger at the Opening of a Pumpkin.

From the Mailbag

My thanks to Attorney Richard Kass, who explained the reason the plural form *services* refers to a religious service (a subject discussed in the October "Language Tips"). He wrote that in a synagogue the prayers are divided into sections, each called "a service." Therefore, when attending *a service*, the congregants are really attending several *services*, one right after another.

Potpourri

A customer placed an article on the check-out counter. The checker asked, "What's that?" The customer answered, "It's a vegetable, an artichoke." Then ensued a long silence while the checker scrutinized the price list of vegetables on her cash register. The checker asked, "That starts with an *r*, right?" (Should we blame texting?)

Gertrude Block (Block@law.ufl.edu) is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.).

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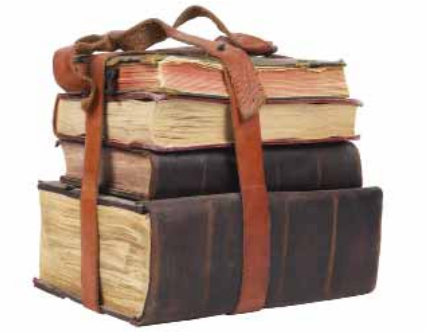

Drafting New York Civil-Litigation Documents: Part XI — Interrogatories

In the last issue, the *Legal Writer* discussed the bill of particulars. The focus in this issue is on interrogatories.

Similar to bills of particulars, interrogatories elicit detailed information about a case.[1] Interrogatories are different from bills of particulars. Interrogatories are a disclosure device. Unlike bills of particulars, interrogatories aren't part of the pleadings; they don't bind the party to the claims the party is seeking.[2] Also, interrogatories, unlike bills of particulars, can seek facts and evidence on the issues that the proponent and the responding party have the burden of proving at trial.[3] Bills of particulars are meant to amplify the pleadings, limit the issues in a case, and prevent surprise. Interrogatories are meant to elicit evidence for trial.[4]

Interrogatories are written questions that one party draws up and serves on another party.[5] You may probe any relevant, unprivileged subject in your interrogatories.[6] The other party — the responding party — responds to, or answers, the interrogatories under oath and sends the responses to the proponent, the inquiring party.

In federal court, practitioners use interrogatories. Bills of particulars don't exist under the federal rules. In federal court, interrogatories are available to all parties in all actions.[7] Unless the parties stipulate to more interrogatories or a court permits that to happen, each party is limited to 25 interrogatories in federal court.[8] So much for federal court. This article will focus on interrogatories in New York state courts.

Lawyers must often choose between bills of particulars and interrogatories. A party may not serve a demand for a bill of particulars and interrogatories on the same party.[9] But you may serve a demand for a bill of particulars on one party and use interrogatories against another party, as long as you don't send both devices to the same party. *Exception:* In a matrimonial action, a party is permitted to demand a bill of particulars and interrogatories on parties and nonparties.[10]

Interrogatories are similar to examinations before trial (EBTs) because interrogatories are a question-and-answer device to gather evidence. But interrogatories are faster, easier, and cheaper than EBTs. You may send interrogatories by mail or electronically; EBTs require you to set up a meeting at a designated time and place. EBTs require you to get a transcription reporter and pay for transcription, witness, and travel fees. Interrogatories give you the opportunity to craft questions or responses carefully. EBTs, however, are "fluid"; they're "a spontaneous inquiry" in which you may follow up and probe a witness for additional information.[11] EBTs might require you to spend hours, perhaps days, to prepare and then depose someone.

Lawyers must sometimes choose between interrogatories and EBTs. In negligence cases, a party may not serve interrogatories and depose the same party without leave of court.[12] Practitioners in negligence cases serve a demand for a bill of particulars and then depose the individual party.[13] This rule is party specific. Thus, in a negligence case, party A may serve interrogatories on party B and seek to depose party C.

Lawyers must also decide when to request documents, depose a party, and serve interrogatories. What strategy to use and when depends on your case.

> Minimize the responding party's opportunity to object to your interrogatory or to answer with a generality.

Guidelines

• The rules for serving and answering interrogatories are in CPLR 3130 through 3133. You may serve interrogatories any time after the action commences. The responding party must respond within 20 days.

• A defendant may serve interrogatories on the plaintiff immediately after the plaintiff has served the complaint. The plaintiff, however, must wait until the defendant's time to serve its "responsive pleading [the answer] has expired" before serving interrogatories on the defendant.[14]

• Interrogatories are prohibited in juvenile-delinquency cases.[15]

• Only parties may propound interrogatories.[16] You may not serve interrogatories on non-parties.[17] Parties need not be adverse to serve

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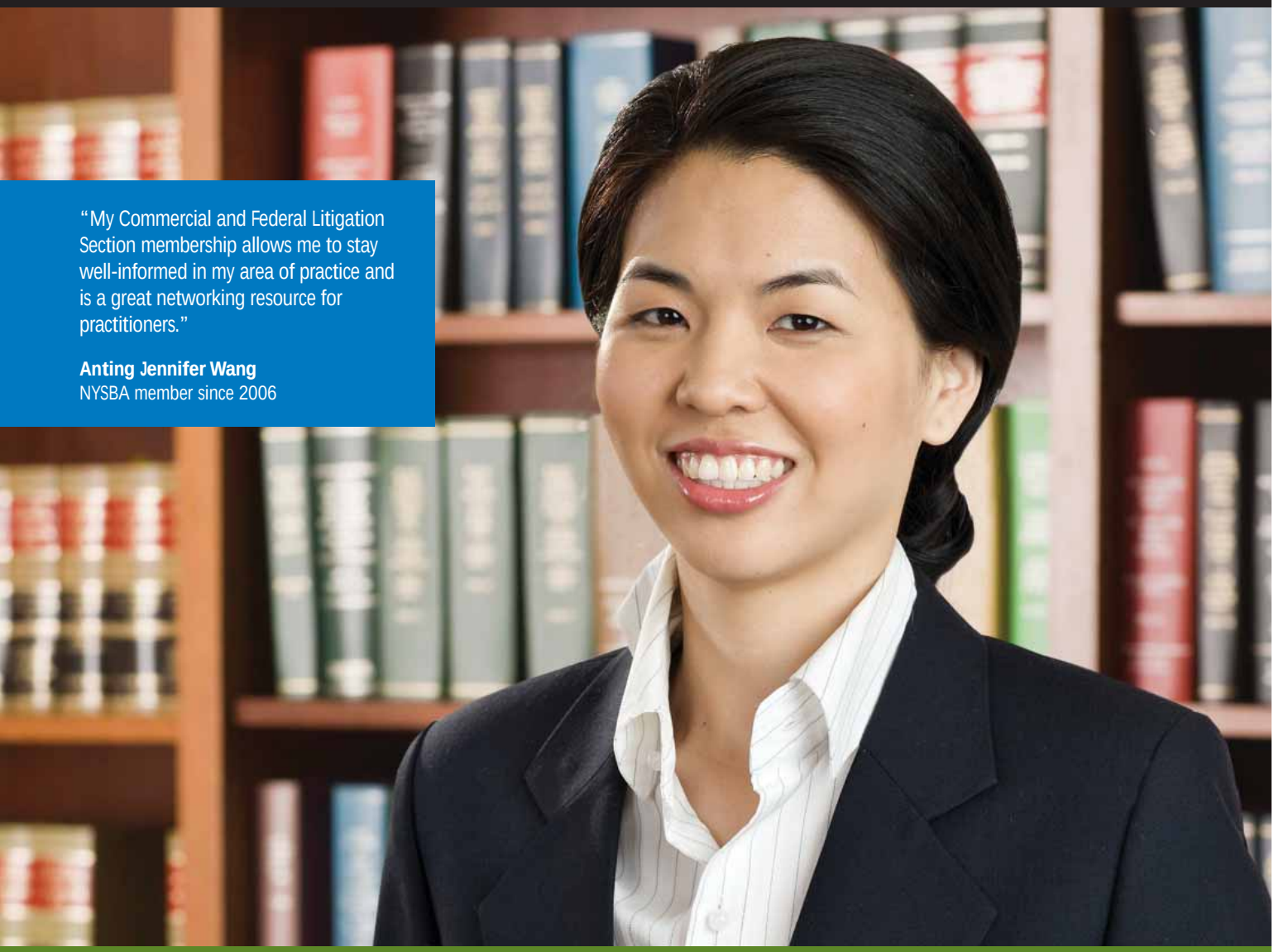

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