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The Senior Lawyer

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

Inside

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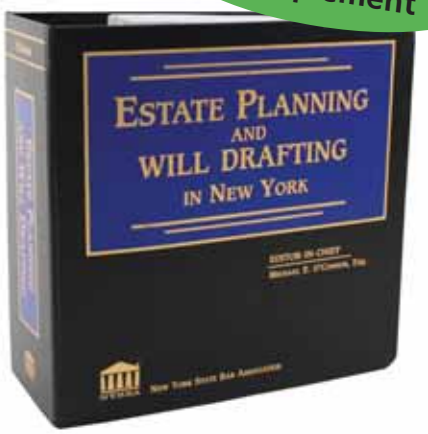
With 2013–2014 Supplement



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Editor-in-Chief

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Table of Contents

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A Message from the Section Chair

In January of this year the Senior Lawyers Section celebrated its fifth anniversary; in that time we have more than doubled our membership by focusing on our stated purpose, the furtherance of the interests and quality of life of senior lawyer members of the New York State Bar Association. The diversity of our membership, which our first Section Chair, Justin L. Vigdor, noted in his Fall 2009 Message, continues to be a significant characteristic of our Section and a substantial factor in choosing our CLE programs, the articles contained in the issues of *The Senior Lawyer*, and our plans for future activity.

This issue of *The Senior Lawyer*, produced with consummate skill and dedication by our co-editors, Stephen G. Brooks and Willard DaSilva, continues the tradition of providing timely and thought-provoking articles that speak to the very varied interests of our membership. These articles include *Granny Snatchers*, about New York's Uniform Guardianship Protective Proceedings Jurisdiction Act, by Anthony J. Enea, Esq., Chair of our Program and CLE Committee; *The Law and Lifelong Learning* by Charles A. O'Connor, III, Esq.; *Planning for Seniority* by Rosemary Byrne, Esq., a Certified Life Coach and Co-Chair of our Financial and Quality of Life Planning Committee; *Defective Metal on Metal Hip Implant Claims in Federal Multidistrict Litigation* by Hadley L. Matarazzo, Esq. and more.

The editors are always interested in receiving suggestions for articles and welcome the submission of articles for their consideration.

Our most recent CLE program, presented on January 28th during the 2014 Annual Meeting, was crafted by Ellen Makofsky and Anthony J. Enea to address certain elements of a subject of continuing interest to our members, financial aspects of planning for retirement. This program, entitled "Strategies for Optimizing and Protecting Your and Your Clients' Assets in Retirement" covered types of house transfers and their consequences, special needs trusts, criteria for when a will and when a trust should be used, factors to consider when deciding when to begin receiving Social Security benefits, and planning for IRA minimum distributions and Roth conversions. The program drew more than 100 attendees and received very favorable evaluations.

Anthony J. Enea, Chair of our CLE and Program Committee, will shortly begin the process of planning our Fall CLE program. Please contact him with any suggestions you may have for program topics and/or speakers, or if you would like to assist in the implementation of the Fall program. We also are exploring the possibility of producing short webcasts this year. Rosemary Byrne is the person to contact if you have an interest in participating in this project.

Our plans for this year also include continued efforts to increase the diversity of our Section with respect to both women and members of minority groups. To that end our Section was a co-sponsor of the January 27, 2014 Annual Meeting Diversity Reception, which members of our Executive Committee attended. We also were a co-sponsor of the Commercial and Federal Litigation Section's April 1st program "Eighth Annual Smooth Moves: Career Strategies for Attorneys of Color." Representatives of our Section attended and applications for membership in our Section were made available to the attendees.

We also are committed to supporting pro bono opportunities for all attorneys in general, and senior attorneys in particular. As part of that commitment this issue includes two relevant articles, *Pro Bono Representation of New York Appeals* by Susan Patnode, Esq., and Cynthia Feathers, Esq., and *New York's Attorney Emeritus Program* by Fern Schair, Esq., Co-Chair of our Pro Bono Committee. Additional information about pro bono opportunities can be found on NYSBA's website.

Participation in our Section's activities is key to achieving our objectives. I am, therefore, urging you to join one or more of our Committees. A list of our Committees, with a brief description of their focus and the names of the Chairs, can be found by visiting our website, www.nysba.org/sls. I know that they will be delighted to welcome new members and new ideas.

Carole A. Burns

Senior Lawyers Section

Visit us on the Web at WWW.NYSBA.ORG/SLS

A Message from the Co-Editor

As the new co-editor of *The Senior Lawyer*, this is my first issue. I want to commend Anthony Enea, whom I have replaced, for his outstanding contributions to this publication. And, I want to thank Bill DaSilva, who has been an editor for many years, for staying on board. His wise counsel is greatly appreciated.

I initially took this assignment as Section Chair Susan Lindenauer was completing her term of office and I extend my thanks to her for this opportunity. Carole Burns is our new Chair and she has been generous with her advice and encouragement. Carole and the Section's Executive Committee see this journal as a vital vehicle for not only communicating with Section members but aiding in the growth of the Section.

The articles in this issue touch upon subjects of both direct and indirect interest to our members. Among others, the topics include protecting elders from abuse, life-planning, pro bono in New York and a nationwide tort matter involving federal Multidistrict Litigation and defective hip implants.

As members of the Section, I urge you to write for this journal. The more articles we have from Section members, the more relevant it will become to us all. If you have written a piece or are thinking about it, please let Bill DaSilva or me know. The next deadline will be in the autumn.

Stephen Brooks

About the Senior Lawyers Section

As people are living and working longer, the definition of what it means to be a senior continues to evolve. The demographics affect us all, including lawyers. In July of 2006, the New York State Bar Association formed a special committee to recognize such lawyers and the unique issues that they face. As the result of the work of this committee, the House of Delegates approved creation of the first Senior Lawyers Section of the New York State Bar Association.

Lawyers who are age 55 or older have valuable experience, talents, and interests. Many such senior lawyers are considering or have already decided whether to continue to pursue their full-time legal careers or whether to transition to a new position, a reduced time commitment at their current position and/or retirement from a full-time legal career. Accordingly, the Senior Lawyers Section is charged with the mission of:

- Providing opportunities to senior lawyers to continue and maintain their legal careers as well as to utilize their expertise in such activities as delivering pro bono and civic service, mentoring younger lawyers, serving on boards of directors for business and charitable organizations, and lecturing and writing;
- Providing programs and services in matters such as job opportunities; CLE programs; seminars and lectures; career transition counseling; pro bono training; networking and social activities; recreational, travel and other programs designed to improve the quality of life of senior lawyers; and professional, financial and retirement planning; and
- Acting as a voice of senior lawyers within the Association and the community.

To join this NYSBA Section, go to www.nysba.org/SLS or call (518) 463-3200.

Cruise Ship Accidents: What Are the Rights of the Passenger?

By John H. (Jack) Hickey

It is Sunday morning and you get a call on your cell phone from your niece Denise who was on the cruise to the Caribbean. She was injured and just returned home yesterday. Denise tells you that it was the cruise from hell. She slipped and fell in a slimy substance on the gangway as she was leaving the ship in Grand Cayman. She fell onto her left leg and it was injured badly. Then Denise was taken to the ship's infirmary where the ship's physician diagnosed a sprained ankle and wrapped up the foot. Based on the diagnosis of the ship's physician, Denise stays on the ship with her family for the remaining 6 days of the cruise. When the ship returned to its home port in Galveston, Texas on Saturday, Denise went to the ER there. The orthopedic surgeon on call to the ER in Galveston took off the wrap and did x-rays and found that Denise suffered a compound and comminuted fracture of the distal tibia and fibula (fracture of the ankle end of both lower leg bones into many pieces). The orthopedic surgeon said that Denise should have had surgery right away and that the cast was applied too tightly. This delay and improper treatment is going to cause her to undergo a more complicated surgery now with a result which will not be nearly as good as if the injury were properly treated. Your niece Denise is mad and wants to sue the cruise line which is based in Miami. What do you tell her? Where can you sue the cruise line? For what? What law applies? What is the statute of limitations?

THE BASICS. This is a brief discussion of some of the issues facing the cruise passenger who has been injured on a cruise. There are three basic tenets which apply to any case of a passenger bringing an action against a cruise line for an injury received onboard or during the course of the cruise. First, **the general maritime law applies** to the case. The general maritime law usually is defined by the Federal Courts but can be defined by state courts as well.

Second, the standard of care applied usually is described as **reasonable care under the circumstances**.[1] As a corollary to this negligence action, comparative negligence of the passenger applies.

Third, the so called **"Passenger Ticket Contract"** governs many aspects of any suit against the cruise line. "Passenger Ticket Contract" is a misnomer. The ticket itself, that is the paper or certificate used to board the cruise ship, is generally not the Passenger Ticket Contract and does not contain all the terms and conditions of passage. The terms and conditions of passage generally are found on the cruise line's website under terms and conditions or Passenger Ticket Contract. These terms and conditions are usually contained in 14-18 pages of legal gobbledygook which have been written over time by maritime lawyers.

The first exception to the application of the Passenger Ticket Contract is where provisions violate U.S. law, most notably 46 U.S.C. § 30509. This section of the Shipping Act provides that a cruise line which transports passengers between ports where one of the ports is in the United States may not include a contract provision which limits "(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction."[2]

The second exception or issue regarding the application of the Passenger Ticket Contract is the **reasonable communication rule.** For example, cases have held that the invocation of the Athens Convention, a treaty to which the United States is *not* a party, must be clearly communicated in the ticket.[3]

4 BASIC TICKET TERMS: VENUE, NOTICE, STATUTES OF LIMITATIONS, AND THE ATHENS CONVENTION. Four issues addressed on the ticket are venue, notice requirements, statute of limitations, and the Athens Convention. These are discussed in this order below.

Generally, the **venue** for bringing an action against a cruise line is the place designated in the Passenger Ticket Contract. These venue selection clauses have been held to be enforceable by the United States Supreme Court in *Carnival Cruise Line v. Shute*.[4] The following are venues for the major cruise lines:

Miami, Florida (Miami-Dade County)
Azamara Cruises
Bimini SuperFast Charter
Carnival Cruise Lines
Celebrity Cruise Lines
Norwegian Cruise Lines
Oceania Cruises
Regent Seven Seas
Royal Caribbean Cruises

Ft. Lauderdale, Florida (Broward County)
Celebration Cruise Line
Costa Crociere (where the cruise touches a U.S. port)

MSC Cruises
Silversea Cruises

Orlando, Florida (Brevard County)
Disney Cruise Line
Victory Casino Cruises

Los Angeles, California
Crystal Cruises
Cunard Line
Princess Cruises

Seattle, Washington
Holland America
Seabourn (The Yachts of Seabourn)

The Court in *Shute* dealt with Carnival's selection of Miami, Florida as the venue. The Court said that "Florida is not a remote alien forum" because Carnival maintains its base of operations in Florida.

More recently, the cruise lines have begun inserting a clause requiring that suit must also be filed in Federal Court. The "Federal Court selection clause" (not a venue selection clause) has been tested in a mid-level appellate state court in Florida which has held that such provisions are enforceable.[5]

The cruise passenger who files in Federal Court and alleges diversity jurisdiction has a right to a jury trial.[6] Where there is no diversity of citizenship between the parties, trial by jury may be granted when both parties consent to it. See, Federal Rule of Civil Procedure 39(c). In cases brought against cruise lines on the admiralty side (because of lack of diversity between the parties), courts have enforced the Federal Court selection clause where the cruise lines have consented to a trial by jury.[7] The cruise passenger who files in state court (where the ticket does not require filing in Federal Court as in the Princess Cruises ticket), the passenger also is entitled to a jury trial.[8]

The Passenger Ticket Contract also requires that a passenger give notice of a claim usually within 6 months of the incident. The notice can be a letter. The notice should contain a description of the incident sufficient to allow the cruise line to investigate. As a practical matter, the cruise line will have received notice of the incident within minutes after it happened and will have investigated.

Usually, failure to provide notice of a claim should not be fatal to the claim. In *Rutledge v. NCL (Bahamas) Ltd.*,[9] for example, the Court held that the mere fact that the passenger advised the cruise line that the passenger had an accident onboard and was injured was *not* notice of a claim. However, the Court held that the next determination was whether the cruise line had been prejudiced by this failure of notice. In that case, as in most cases, the cruise had not been prejudiced and in fact the cruise line already had investigated the accident on the cruise on which it occurred.

The statute of limitations provided for in the typical Passenger Ticket Contract is one year. These statutes of limitations have been upheld.[10] Failure to file within the statute of limitations can be fatal.

The only saving grace for failure to file within the 1st year is "equitable tolling." Equitable tolling refers to the rare circumstances in which a court allows a plaintiff to file and maintain suit despite the fact that the contractual limitation period has run. The plaintiff bears the burden of showing that equitable tolling is warranted. Because it is considered an "extraordinary remedy," courts may use equitable tolling to extend the statute of limitations only when the plaintiff has established that inequitable situations prevented him from timely filing his pleadings.[11]

In *Booth*, the plaintiff initially filed suit in state court just before the expiration of the one-year contractual limitation period. *Id*. at 1149. Shortly after the expiration of the limitation period, the plaintiff filed an identical suit in Federal Court, which dismissed the case because of the pending state action. *Id*. at 1150. Eventually the state action was dismissed based on improper venue because the forum selection clause in the Passenger Ticket Contact specified Federal Court. The District Court then reinstated the action because of the dismissal of the state action but granted the defendant's motion to dismiss on statute of limitations grounds.

The Eleventh Circuit Court of Appeals reversed and held that the statute of limitations was subject to equitable tolling because the plaintiff properly notified the cruise line of the suit within the limitations period, the plaintiff reasonably filed his claim in a state court based on the fact that the state court possessed subject matter jurisdiction concurrently with the Federal Courts, the state suit was dismissed solely on the basis of improper venue, and the plaintiff continued to diligently pursue his claim. *Id*. at 1153. Ultimately, the Court held that equitable tolling was permissible because it best served the interests of justice as the plaintiff's failure to file a timely action was due to a minor technical error rather than negligence. *Id*. at 1152.[12]

Passenger Ticket Contracts typically reference the Athens Convention. The Athens Convention is a treaty. The Passenger Ticket Contracts typically incorporate the terms of the Athens Convention because the Convention provides a cap on damages.

The Athens Convention provisions do not apply to any voyage which touches a U.S. port.[13] That is because the United States has not adopted the Convention. Also, the Athens Convention does not apply to cases of intentional torts such as rape.[14]

Whether the Athens Convention will apply to a claim depends on whether the terms of the convention were reasonably communicated within the Passenger Ticket Contract. That communication has to be reasonable either mechanically or physically within the ticket, for example,

by use of headings and large font. The Athens Convention also has to be communicated clearly using language which does not reference multiple laws and the cap on the amount of recovery has to be presented in terms of U.S. dollars.[15] The ticket can be rendered too confusing to satisfy the requirements of reasonable communication if it includes references to multiple different conventions and statutes.[16]

The most recent version of the Athens Convention provides the cap on damages in terms of special drawing rights (SDRs) as defined by the International Monetary Fund. The 2002 protocol of the Athens Convention increased the limitation to 250,000 SDRs. As of January 22, 2014, 250,000 SDRs were equivalent to $383,225.16. Given the notice requirements of the case law, the Passenger Ticket Contract probably will provide the limitation in U.S. dollars. One question is which limitation will apply, the SDRs as converted at the time of trial, or the U.S. dollars expressed in the ticket.

SLIP AND FALLS. The most common incident causing injuries on cruise ships is a slip and fall. The duties owed by the cruise line can be summarized as a "duty to exercise reasonable care for the safety of its passengers."[17] The cruise line also owes a "duty to exercise reasonable care under the circumstances."[18]

The cruise lines' duty extends "to warn of dangers known to the carrier in places where the passenger is invited to, or may reasonably be expected to visit."[19] The 11th Circuit in *Vierling* has said: "Courts sitting in admiralty have long recognized an obligation on the part of a carrier to furnish its passengers with a reasonably safe means of boarding and leaving the vessel, that this obligation is nondelegable, and that even the 'slightest negligence' renders a carrier liable." The cruise line has a duty to provide safe ingress and egress to and from the ship.[20] The cruise line also has a duty to warn its passengers where there is no safe means of egress and ingress.[21] More specifically "a high degree of care is demanded of common carriers toward their passengers," including the "duty to maintain reasonable, safe means for passengers to board and disembark."[22]

The plaintiff must show that the cruise line had notice, actual or constructive, of the dangerous condition, that notice was not required, or that the cruise line created the dangerous condition.[23] Under the maritime law, the cruise line is charged with the liability for dangerous slippery conditions of which the ship owner had actual or constructive notice.[24]

Evidence of constructive notice can be and usually is circumstantial. Evidence of such notice can be shown through the length of time the slippery substance was on the floor. Evidence of the length of time can be the size of the puddle.[25] In *Erickson*, the appellate court reversed a summary judgment granted in favor of Carnival Cruise Lines where the plaintiff "slipped and fell in a clear puddle of water approximately 3-5 feet in diameter."[26] In *Grayson*, the appellate court also reversed a summary judgment in favor of the defendant cruise line. In *Grayson*, the plaintiff testified that "he stepped from the stairs directly into a puddle 1-2 inches deep and approximately 6' x 12' in diameter and immediately slipped and fell."[27]

Notice also can be shown by evidence that the condition existed with regularity or was a repetitive condition.[28] In *Reggie*, the fast-food restaurant inside a Wal-Mart store maintained its garbage containers at the entrance to the restaurant. A customer slipped and fell on the overflowing garbage from those containers. The appellate court found that constructive notice could be inferred two ways: the length of time the condition had existed or "by evidence that the condition occurred in that area with sufficient regularity as to be foreseeable."[29]

Notice can be shown by evidence that the substance was on the floor for a period of time. This constructive notice can be inferred from the amount of time the substance has been on the floor.[30] Where a substance had remained on the floor of a grocery store at least 15 to 20 minutes prior to the customer's slip and fall, the grocery store was charged with constructive knowledge of the condition, and judgment for the plaintiff was affirmed in *Winn-Dixie* and *Stores, Inc. v. Williams*.[31] In *Gonzalez v. Tallahassee Medical Center, Inc.*,[32] the appellate court reversed summary judgment, finding that a genuine issue of material fact existed where a plaintiff had slipped and fallen in a liquid. The court found that reasonable inferences could be made that the spill had existed for at least 15 minutes where the liquid became syrupy.[33]

The cruise line is deemed to have constructive notice if it should have known or discovered the condition through reasonable inspection.[34] The cruise line is deemed to have constructive notice when a large enough area of a substance has collected which requires clean up by crew members.[35] And notice of a dangerous condition can be shown by evidence that the cruise line previously posted warning signs advising caution of slippery floors.[36]

Notice is not a required element of proof when for example the dangerous condition was caused by the cruise lines' negligent maintenance.[37] In *Smith v. Southern Gulf Marine Co.*, the 5th Circuit held that it did not matter how long the plaintiff showed that the dangerous condition existed (that is vomit at a doorway of a vessel). The Court said: "*Regardless of how long the dangerous condition existed, the question is simply whether Southern Gulf should have discovered it at the time the passengers were about to disembark. We hold in the affirmative.*" (Emphasis added).[38] The 5th Circuit in *Smith* reversed a judgment for the defendant and remanded.

Notice also is not a required element of proof where the cruise line itself caused the dangerous condition. The plaintiff is not required to prove notice in order to

show negligence where the defendant created the unsafe or foreseeable hazardous condition. See, e.g., *Baker v. Carnival Corporation*,[39] in which the District Court denied in part the defendant's Motion to Dismiss in a passenger case against the cruise line and said:

> Where it is alleged, however, that defendant created an unsafe or foreseeably dangerous condition, a plaintiff need not prove notice in order to show negligence. *Rockey v. Royal Caribbean Cruises, Ltd.*, 2001 WL 420993 at 4-5 (S.D. Fla. 2001).

Baker at page 4.[40] See also, *McDonough v. Celebrity Cruises, Inc.*,[41] where the Southern District of New York denied defendant's Motion for Summary Judgment and said:

> To be sure, in a number of cases courts have granted summary judgment or judgment as a matter of law in favor of defendants where the plaintiff, injured while on a cruise due to a defective condition on-board the ship, could proffer no evidence whatsoever that the ship's operator had notice of the condition. *See Monteleone*, 838 F.2d at 65-66 (no notice that defective screw protruded from brass stairway "nosing"); *Rainey*, 709 F.2d at 172 (no proof that appellee had actual or constructive notice of presence of stool on dance floor); *Cummiskey*, 719 F.Supp. at 1188-90 (no notice of wetness of ship's lounge area); *Marchewka v. Bermuda Star Lines, Inc.*, 937 F.Supp. 328, 335 (S.D.N.Y.1996) (no notice of problems with bunk bed ladder); *Lee v. Regal Cruises, Ltd.*, 916 F.Supp. 300, 303 (S.D.N.Y. 1996) (no notice of presence of melting ice cubes on staircase), *aff'd*, 116 F.3d 465, 1997 WL 311780 (2d Cir. 1997). Dismissal was appropriate in those cases because, under "ordinary negligence principles," a ship's owner or operator is "held responsible for defective conditions aboard ship only when it had actual or constructive notice of them." *Calderera*, 1993 WL 362406, at *3.
>
> However, those cases involved "otherwise safe areas where the sudden emergence or presence of an object (the protruding screw, the stool on the dance floor) brought about a defective and dangerous condition," *Friedman*, 1997 WL 698184, at *3, and not a contention by the plaintiff that the defendant(s) themselves *created* unsafe or foreseeably hazardous conditions. This is an important distinction. *See Lee*, 916 F.Supp. at 303 n. 2 ("In a maritime case, of course, the owner may be liable also on the basis of unseaworthiness or for negligently creating a dangerous condition that causes an accident.") (citations omitted); *Saia v. Misrahi*, 129 A.D.2d 621, 621-22, 514 N.Y.S.2d 256 (2d Dep't 1987) ("Where…a theory of liability submitted to the jury is that the appellant itself created a dangerous condition which led to the…injury, notice is not an essential part of the cause of action."). To require a plaintiff to also establish notice in a case where the defendant's own activities created a foreseeable and unreasonable risk of harm would be inappropriate. Such a requirement would have the absurd result that negligence actions could only be brought after a dangerous condition or practice created by a defendant claimed a previous victim, whose own recovery would be barred by the absence of notice.
>
> Plaintiffs do not really posit that defendants were negligent in failing to remedy a defective condition of which they had actual or constructive notice, but rather that they were negligent in creating a situation in which it was foreseeable that cruise passengers could drop a heavy coconut and injure passengers below. Such a claim is akin less to the cases defendants cite concerning defects than to other cases, both state and federal, that discuss the general liability of defendants due to the foreseeable uses of their property or premises. *See, e.g., Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 470-73 (2d Cir. 1995) (holding that plaintiff, injured by a rogue passenger's baggage, raised issues of fact precluding summary judgment as to airline's allegedly negligent management and design of baggage claim area); *Seiders v. Testa*, 464 A.2d 933, 935 (Me. 1983) ("[I]n the case at bar, the jury rationally could have found the defendants negligent, either in placing their tables and chairs in such a configuration that the plaintiff was likely to encounter the obstacle that she did while attempting to arise, or in failing to foresee that patrons could easily move the lightweight tables and chairs around so as to bring about the same result."); *Cruz v. New York City Transit Auth.*, 136 A.D.2d 196, 197, 526 N.Y.S.2d 827, 829 (2d Dep't 1988) (holding that, because alleged defect involving subway railing was created by defendant, "actual notice" of the

> "defect" was established for purposes of a *prima facie* case); *Philpot v. Brooklyn Nat. League Baseball Club,* 303 N.Y. 116, 121, 100 N.E.2d 164, 167 (1951) (finding plaintiff injured by bottle thrown or dropped at Ebbets Field to be entitled to jury determination whether "the means adopted by the defendant…were sufficient to protect the plaintiff as a spectator…from risk of bodily harm reasonably to be foreseen from the misuse or mishandling of empty glass beverage bottles."). Moreover, **that the specific injuries suffered by McDonough were, in part, caused by the intervening act(s) of another passenger does not automatically extinguish liability, provided that the intervenor's actions were "a normal or foreseeable consequence of the situation created by the defendant's negligence.**" *Stagl,* 52 F.3d at 473 (*quoting Derdiarian v. Felix Contracting Corp.,* 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169, 414 N.E.2d 666, 670 (1980)); *see Aponte v. Trans World Airlines, Inc.,* No. 94 Civ. 6337 (LMM), 1996 WL 527339, at *3 (S.D.N.Y. Sept. 16, 1996) (same); RESTATEMENT (SECOND) OF TORTS § 302A (1965) (**"An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."**).

(Emphasis added). *McDonough.*[42]

The defense of open and obvious applies to a failure to warn claim. The defendant has the burden to prove not only that the condition itself was open and obvious but that the dangerousness of the condition was open and obvious. Even if the condition was open and obvious, the defendant is not immunized from suit; the defendant is still obligated to provide a safe place to walk for example without dangerous conditions like water on the floor.[43]

In *Kloster*, the plaintiff slipped and fell on a wet deck which was open to the wind and rain. In *Samulov*, the deck was on a tender for which the cruise line has responsibility. The court of appeal in *Samulov* reversed a directed verdict in favor of Carnival and said:

> A property owner is not absolved of responsibility where the owner has reason to believe that others will encounter the dangerous condition regardless of the open and obvious nature of the condition. *Kloster Cruise Ltd. V. Grubbs*, 762 So.2d 552, 555 (Fla. 3d DCA 2000). **The fact that passengers would have to cross the wet, slippery, exposed upper deck of the tender should have been reasonably anticipated by Carnival.** Therefore, the trial court erred by directing a verdict and should have allowed the case to proceed to a jury verdict.

(Emphasis added). *Samulov.*[44]

SHORE EXCURSION ACCIDENTS. The cruise lines advertise excursions as an integral part of the cruise. And the cruise lines derive a significant portion of their income from the excursions.

Excursions vary in activities and character. Trips sponsored by cruises include scuba diving, snorkeling, biking, boating, zip lining, bus tours, and other activities. The cruise lines describe excursions in their brochures and on their websites, list which excursions are available on which cruises, and tout "their" excursions.

The cruise lines market "their" excursions—as opposed to the cheaper ones that anyone can book on their own in a port—as more reliable and safer because these excursions are associated with a cruise line. Yet, in the fine print located at the back of the site or document, the cruise line represents that the excursion is an independent contractor for which the cruise line is not responsible. The law looks to the realities of the relationships between the parties not to any one representation. The cruise line, for example, has a duty to choose and retain an excursion in a reasonable manner under the circumstances.

There are restrictions on the cruise line's ability to limit its own liability. These limitations arise from the general maritime law and from statute. The general maritime law provides that the cruise line has certain non-delegable duties such as transporting the passenger to and from the ship.[45]

46 U.S.C. § 30509 (formerly codified at 46 U.S.C. § 183c) provides that a passenger vessel may not contractually limit its liability for its own negligence, 46 U.S.C. § 30509(a)(1), and any provision in a passenger contract that attempts to limit the carrier's liability for its own negligence is deemed void, *id.* § 30509(a)(2). This section applies to cruise ship companies that attempt to limit their liability for injuries to passengers due to their own negligence.[46] The Southern District of Florida in *Fojtasek* where a cable on a zip line excursion in Honduras broke causing the death of a cruise line passenger, said: "It is well settled that the owner of a passenger vessel may not contractually limit its own liability for its own negligence" (citing *Kornberg).*

Courts have allowed passenger claims for excursion accidents against cruise lines under various legal theories. Those theories include negligence (based on actual or constructive knowledge of the cruise line of the operations or quality of the excursion), actual agency (between

the cruise line and the excursion operator), apparent agency or agency by estoppel (where the cruise line allows the excursion operator to refer to the cruise line as its partner or to itself as the agent of the cruise line), and breach of a third party contract (between the cruise line and the excursion operator).[47] Cases also have allowed causes of action against the cruise line for the excursion operator's negligence for negligent hiring and retention and negligent misrepresentation.[48]

The excursion accident can occur on land. The question then arises whether maritime jurisdiction and maritime law applies. Generally, cruise lines are liable for accidents and injuries that not only occur onboard the ship, but also for accidents or crimes that befall passengers while the passengers are physically off the ship. Determining which claims are recognized and the amount of damages that a passenger can recover may depend on whether admiralty jurisdiction applies. As a result, as a matter of the public policy favoring the uniform application of maritime law, admiralty courts have adopted an expansive view of admiralty jurisdiction; admiralty jurisdiction does not stop at the shore.[49]

Courts have found that land-based incidents satisfy the test when the incident occurs at a port-of-call or does not occur physically far from the ship.[50] The connection test is satisfied when much of the activity in promoting the excursion was found to be performed on navigable waters. For example, the excursion was heavily advertised aboard the ship, or the excursion was bought onboard.[51] Courts have also found that excursions have a potentially disruptive impact on maritime commerce because cruise line industry is without a doubt maritime commerce and shore excursions attract passengers to participate in cruises. See *id.* Thus, even land-based incidents may implicate admiralty jurisdiction.

The most common type of excursion is the one advertised by the cruise line in its brochures and online. The cruise lines associate these excursions with various cruises and the cruise lines market the excursions, sell them onboard, and allow the passenger to pay for them through their onboard charge account.

A second type of excursion is organized and sponsored by a so called "tour operator" or "cruise operator" which organize cruises and excursions. Often, these operators organize theme cruises or cruises for groups like singles. If they organize the cruise or the excursion, they should do so in a reasonable manner or they will be liable for the injuries they cause.[52]

Also, where the operator of the tour or excursion has some knowledge of the hazards of the trip, or provides guides and promises safety, the tour operator can be liable for injuries caused by that risk of which it did not warn.[53] In *Rookland*, the 9th Circuit said that under California law issues of fact precluded summary judgment on duty to warn claim where the travel agent knew that it was hazardous to ride on Mexican buses but "made no efforts to investigate the safety record" of those buses. But this duty encompasses only 'those dangers which are not apparent and obvious to the passenger.'"[54] The 9th Circuit in *Tradewinds* also said that the duty owed by a transportation company which drove tourists to points of interest, was "to warn them of any unreasonable risk of harm in or about [the site], i.e., a dangerous condition known to [the company] and unknown to the passengers."[55]

In *Stevenson*, the tour was accompanied by an escort and director. The tour brochure stated:

> Four Winds also guarantees that every tour will be escorted by a qualified professional tour director. Our directors have been carefully selected and trained. …Your Four Winds Jet Tour is an escorted tour. From the moment you leave until your journey ends you are cared for by a carefully selected Four Winds tour escort.

Id. at 903. In *Feinswog v. Holland America Line West Tours, Inc.*,[56] the court followed *Stevenson* and held that the operator of a walking tour of a state park who provided a tour guide owed members of the tour group the duty to operate the tour in a reasonably safe manner.

Similarly, in *Kaufman v. A1 Bus Lines, Inc.*,[57] the court reversed a summary judgment and held that a jury question was presented as to whether the bus company served in a capacity beyond that of furnishing transportation to a museum and acted as a tour guide so as to make itself liable for any negligence which may have resulted in the injury sustained by the plaintiff when she fell from a catwalk while part of a tour group visiting the museum. This decision cited to *Restatement of Torts* §§ 323 and 324a, which address voluntary undertakings. The court held:

> First, whether A-1 Bus Lines assumed a duty commensurate with its undertaking to act as tour guide presents a jury question. If the jury finds that A-1 served in a capacity beyond that of furnishing transportation and acted as a tour guide, liability for negligence may result. An action undertaken for the benefit of another must be performed in accordance with a duty to exercise due care.[58]

Other cases draw the same distinction between a passive tour operator who merely books a tour, and participatory or guided tours.[59]

Another type of excursion is one which is offered at a port of call but not sponsored either by the cruise line or by a tour operator. An example of this would be an independent taxi service or any type of excursions that are independent of and not advertised at all by cruise lines but may be purchased by the passengers at certain destinations fall into this category. The cruise line can be

liable for injuries suffered on this excursion if the cruise line knew or should have known of the dangerous conditions at that port of call and perhaps on that particular excursion and either does not warn the passengers away from that excursion or activity or recommends the excursion or activity. The seminal case for liability off of the ship is the Florida mid-appellate court decision in *Carlisle v. Ulysses Line, Ltd., S.A.,*[60] where a crew member directs a passenger to a specific beach which is known to be dangerous and the passenger is assaulted at that beach.

The most recent Federal appeals court case on point is *Chaparro v. Carnival Corporation*.[61] In *Chaparro*, a cruise line employee recommended that the passengers go to a certain beach on St. Thomas. But that area and St. Thomas in general was plagued by gang violence. The passengers on a bus were stuck in traffic when a gang-related gun fight broke out. A passenger was hit and injured by gunfire. The 11th Circuit reversed the trial court's order granting a motion to dismiss, and said:

> In spite of Carnival's objection that *Carlisle* is an improper expansion of a shipowner's liability to passengers, the Southern District of Florida has often acknowledged and applied the standard articulated in *Carlisle. See, e.g., Koens v. Royal Caribbean Cruises, Ltd.*, 774 F. Supp. 2d 1215, 1219-1220 (S.D. Fla.2011); *McLaren v. Celebrity Cruises, Inc.*, No. 11-23924-CIV, 2012 WL 1792632, at *8-9 (S.D. Fla. May 16, 2012); *Gentry v. Carnival Corp.*, No. 11-21580-CIV, 2011 WL 4737062, at *3 (S.D. Fla. Oct. 5, 2011). It is true that federal courts are not bound by a Florida state court's admiralty decision, *see E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 2299, 90 L.Ed.2d 865 (1986), but the rule in *Carlisle* is consonant with the federal maritime standard of "ordinary reasonable care under the circumstances," *see Keefe*, 867 F.2d at 1322.[62]

Where the cruise line should have known that its passengers were going to a particular destination such as a bar on Cozumel where the passengers would be diving off of a seawall in shallow waters, the cruise line has a duty to warn.[63] Where a female passenger was engaged in a pub crawl and became intoxicated from the over service of alcohol and was sexually assaulted by other passengers, the cruise line can be liable. "Further, when the danger is a criminal act carried out by a non-crew-member, a party will be liable in negligence for intervening criminal acts only if the acts were foreseeable."[64] Where the cruise line vouched for and promoted the excursion, and the excursion operators were negligent in assisting the passengers off of the excursion vessel onto a dock resulting in the passenger falling between the boat and the dock injuring her leg, the cruise line can be at fault. "Though cruise ship owners…cannot be held vicariously liable for the negligence of an independent contractor, it is well-established that they may be liable for negligently hiring or retaining a contractor."[65] Where the cruise line or a related corporation participated in the construction of and had an ownership interest in a cruise port (in this case, Mahogany Bay in Honduras), the cruise line can be held liable for the injuries due to a passenger's slip and fall on the walkway to the ship.[66] In *Caldwell v. Carnival*, the Southern District of Florida denied a motion to dismiss and said: "In the present case, plaintiff has alleged that the walkway on which she slipped is the only way to reach Mahogany Bay from the cruise ship at port. Compl. 12. As the Complaint alleges the walkway was the only manner of reaching the port, plaintiff pleaded that defendant reasonably expected passengers of the Legend to use the walkway. The duty to warn 'encompasses only dangers of which the carrier knows, or reasonably should have known.'"[67]

The plaintiff in an excursion case states a cause of action where he or she pleads that the independent contractor excursion operator is incompetent or unfit, that the cruise line knew or reasonably should have known of the particular incompetence or unfitness, and that such incompetence or unfitness proximately caused his injuries.[68] Courts have determined that a competent contractor is one that possesses the knowledge, skill, experience, and available equipment which the cruise line would reasonably realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary. See *id*.

In order to recover under apparent agency, the passenger must show that (1) the cruise line made some sort of manifestation that caused the passenger to believe that the excursion operator had authority to act for the benefit of the cruise line; (2) the passenger's belief was reasonable; and (3) the passenger reasonably acted on such belief to his detriment.[69] An apparent agency relationship may be created by silence, where neither the independent contractor, nor the cruise line explicitly deny their relationship.[70]

Where the passenger shows a certain amount of right of control of the cruise line over the excursion operator, courts have upheld claims based on joint venture.[71]

The presence of disclaimers does not bar such claims.[72] The ticket disclaimer of liability, and explanation that the excursion operator is an independent contractor, does not prevent a cause of action for apparent agency because reasonable reliance is a question of fact.[73]

FIRE ONBOARD; *RES IPSA LOQUITUR*. Fire on a ship is one of the most feared and dangerous events that can happen at sea. On a ship, there is nowhere to

go except to another part of the ship or overboard. And fires can spread quickly. Recently, the Southern District of Florida ruled that a fire onboard the ship was subject to the doctrine of *res ipsa loquitur.* That means that the plaintiff does not have to show the specific acts of negligence of the cruise line, only that the event, a fire, would not have happened absent negligence, that the defendant had control over the mechanism which caused the fire, and that the plaintiff did not cause the fire.[74]

Terry involved the Carnival Triumph "poop cruise." On February 13, 2013, the Carnival Triumph cruise ship left Galveston Texas for a 7 day cruise. Carnival's poor maintenance of fuel lines and filters for those lines in the generators in the engine room caused the fuel to leak. This caused a fire. The fire caused the ship to lose power when the ship was off the coast of Mexico. Carnival decided not to take the ship back to Cozumel or to Progresso Mexico, the site of 2 cruise ports which were close. Instead, Carnival decided to try to get the ship all the way up the Gulf of Mexico and to the Port of Mobile, Alabama. That meant that the passengers on the ship were subjected to at least 4 days of no running toilets. (The toilet system on the ships are vacuum activated and require power to move the sewage). Sewage was leaking out of the toilets and onto the carpets in cabins, passenger hallways, and down walls. On a Motion for Summary Judgment by the plaintiffs on liability, the Court said:

> The doctrine of *res ipsa loquitur* applies if: (1) the injured party was without fault, (2) the instrumentality causing the injury was under the exclusive control of the defendant, and (3) the mishap is of a type that ordinarily does not occur in the absence of negligence. *United States v. Baycon Indus. Inc.*, 804 F.2d 630, 633 (11th Cir. 1986). **No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events.** *Johnson v. United States*, 333 U.S. 46, 49, 68 Sup. Ct. 391, 92 Ed. 468 (1948).
>
> It is undisputed that the plaintiffs were without fault. Carnival argues that there are disputed issues of fact whether the Triumph's engine room, diesel generators and specifically the flexible fuel hose were in the exclusive control of Carnival at relevant times and whether the cause of the fire could only be caused by negligence.
>
> With regard to the second prong of the test, the Court finds that the instrumentalities involved were under the exclusive management and control of the defendant. *Ribovich v. Anheuser Busch , Inc.* Supp. 589, 594 (M.D. Fla. 1997) affd sub nom. *Ribovich v. Anheuser-Busch Cos*., 180 F.3d 273 (11th Cir. 1999). Again looking to Restatement of Torts, regarding defendant's exclusive control, the comment states that: **"[t]he plaintiff may sustain this burden of proof with the aid of a second inference, based on a showing that the cause for the event was within the defendant's responsibility or a showing that the defendant is responsible for all reasonably probable causes to which the event can be attributed. Usually this is done by showing that a specific instrumentality which has caused the event, or all reasonably probable causes, were under the exclusive control of the defendant. Thus the responsibility of the defendant is proved by eliminating that of any other person."** Restatement (Second) of Torts Sec. 328D (1965).
>
> Additionally, comment g states that the defendant may be responsible where he is under a duty to the plaintiff which he cannot delegate to another or he is under a duty to control the conduct of a third person. The essential question in determining ''exclusive control'' becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against. Restatement (Second) of Torts Sec. 328D (1965).
>
> …
>
> Once the inference of negligence is established, the defendant has the burden of rebutting the inference. *Baycon* at 634. Carnival argues that the Triumph's power plant and engines were inspected by the relevant authorities prior to the incident and that engines and equipment were in compliance with the relevant regulatory requirements. Carnival also contends that the subject fuel hose that leaked was replaced six months prior to the incident, well within the manufacturer's requirement and that this case was just an accident. However, the prior inspections, compliance and repairs do not show that Carnival was not in exclusive control at the time of the cruise. The Court finds Carnivals arguments and the record evidence insufficient to rebut the inference of negligence. Specifically, Carnival offers no feasible explanation for the fire absent lack of due care. As such,

> plaintiffs' motion for partial summary judgment is granted.

(Emphasis added). *Terry v. Carnival Corporation*.[75]

DESIGN AND CONSTRUCTION DEFECTS CAUSING INJURES ON THE SHIP. A passenger may also bring claims against the cruise line for injuries arising out of defectively designed structures and furnishings on the ship. The cruise lines have a duty to provide their passengers with an environment which is reasonably safe. Therefore, cruise lines are under a continuing legal duty to provide furniture and structures that are soundly constructed and securely held in place, and strong enough with a reasonable margin of safety, to sustain a passenger.[76]

Where the cruise line creates the dangerous condition, evidence of knowledge is not required.[77]

The plaintiff is required in a negligent design case to show that the cruise line created, participated in, or approved the design process (or afterwards knew of the defect and did not correct it).[78] Furthermore, a cruise line has a duty to inspect all structures and furniture onboard the ship both at inception and throughout at reasonable intervals.[79] Where there is no procedure for inspection or the alleged inspection is not performed by the proper individual, cruise lines can be held liable for negligent maintenance.

The reality is that the major cruise lines have a New Build Department which oversees the design of the interior and the construction of the ships. These departments employ representatives, often architects and engineers, who are stationed at the shipyard in Europe to oversee the process. The cruise line as owner has the ultimate veto power over a design and over construction.[80] The cruise lines also can be held liable under negligent design and construction for injuries that arise out of alterations and deviations from a product's original design.[81]

Res ipsa loquitur may be appropriate where furniture collapses and causes injury or where some other design defect in the architectural details of the ship cause injury.[82] *Res ipsa* is established where (1) the event is of a type which ordinarily does not happen in the absence of someone's negligence; (2) the instrumentality causing the injury was, at the time of the accident, within the exclusive control of the defendant; [and] (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff.'" *Id*. at *7. As to the prong of "exclusive control" it is the right of control, not actual control that is determinative. Thus, the fact that the furniture or structure is located in a common area open to all passengers does not preclude application of *res ipsa*. Thus the cruise line's control is sufficiently established where there is no evidence that either the injured passenger or another third party was at fault.[83] Furthermore, control is exemplified by the fact that the cruise lines own the ship and all the furniture on it and are the only authority responsible for the maintenance, repair and safety of the structures.

MEDICAL MALPRACTICE ONBOARD THE SHIP. The cruise lines are in the business of providing medical care to their passengers because (a) so many of the cruisers are 50 years of age and older; (b) U.S. citizen cruisers expect medical care on cruise ships to be on par with U.S. standards just as the other amenities on cruise ships are; (c) a cruise ship often is isolated and there are no alternatives to obtaining care onboard ship. If an incident or injury or illness occurs at sea, the passenger cannot call an ambulance to pick him up (unless he is within a certain distance from the United States shore in which in certain circumstances a Coast Guard helicopter can be called at great expense); (d) the cruise ship plies the waters of what are essentially third world countries with third world medical care thus eliminating any real alternative even when the ship is in or near one of those ports; (e) under maritime law, the cruise ship is obligated to re route its course in order to provide medical care to a sick or injured crew member or passenger unless it can provide the medical care onboard; (f) the cruise lines advertise and represent on their websites and in their literature that they have onboard medical personnel and facilities; (g) the cruise lines actually do provide onboard medical personnel and medical care onboard the ships; and (h) the cruise lines charge the passengers, through their onboard charge account, for the medical services of the medical personnel and medical facilities onboard and make this a valuable source of onboard revenue.

For all of these reasons, the cruise line has an obligation to provide first-rate medical care to its crew and passengers. First-rate medical care should include adequately trained and qualified doctors and nurses, an adequate number of doctors and nurses, and adequate facilities. The adequacy of the training and competence should be determined upon initial hiring. Despite this expectation, many of the personnel aboard cruise ships are not U.S. trained, licensed, or certified.

The cruise lines benefit from having and publicizing the inclusion of a medical staff and facilities on board their ships. They also market that the facilities and physicians onboard their ships comply with the rules of the Cruise Line International Association and the American Association of Emergency Room Physicians. The Cruise Line International Association, the industry trade group for the cruise lines, actually incorporates the standards of the American Association of Emergency Room Physicians into its own guidelines which it says the cruise lines follow.

Some of the common issues resulting from onboard medical care include:

- Misdiagnosing conditions and injuries;[84]

- Recommending that the ill passenger stay onboard the ship rather than seek medical care at a particular port which may have first class medical facilities;[85]
- Misdiagnosing fractures and other orthopedic injuries;[86]
- Prescribing the wrong medication;
- Failing to treat a heart attack or stroke appropriately and with sufficient urgency, which can and has resulted in permanent brain damage, permanent disability, and death; and
- Failing to provide correct and reasonable follow-up care instructions.

Cruise lines owe their passengers the duty of exercising reasonable care under the circumstances.[87] When it comes to whether a cruise line can be held responsible for the negligence of its medical personnel, the law is in flux and many courts are split on the issue.

For the sake of uniformity, many courts have adopted *Barbetta v. S/S Bermuda*[88] as the governing law for medical malpractice claims arising from medical care on board cruise ships.[89] In *Barbetta*, the Court said that a ship owner could not be held liable under respondeat superior for the negligence of its shipboard doctor. The Court based that conclusion on the belief that the cruise line was not in the business of providing medical care but provided a doctor merely for the convenience of the passenger.[90] And *Barbetta* is based on the belief that the cruise passenger has alternatives. But as discussed above, nothing could be further from the truth.

Lastly, contrary to the proposition set forth in *Barbetta,* the cruise lines are directly involved in the medical care on board their ships. The lines screen and choose the medical personnel. The cruise lines require the onboard physicians to wear uniforms identical to those of the ship's officers and do everything in their power to make passengers believe that the medical personnel are in fact their officers and employees. The cruise lines require that the on board medical staff attend at least yearly training through live seminars or videos. And the cruise lines have land-based U.S. trained and licensed physicians who consult with and often train the onboard medical staff.

Furthermore, the cruise lines pay bonuses to the onboard physicians based upon the revenues that the medical center collects. Thus, the cruise line physician can affect the gross revenues of the medical center by urging, directing, or recommending to passengers certain treatment or that they stay onboard the ship. These bills from the cruise ship medical center can be significant and in the tens of thousands of dollars. Finally, the cruise line bills charges for the services of the cruise ship doctors, nurses, and other personnel and use of the facilities through the passenger's onboard charge account. In other words, the cruise line passenger is required to pay the cruise line directly for those medical services; the doctor does not bill separately.

There is a split of authority among the District Courts as to whether the plaintiff can plead a cause of action for apparent agency where the plaintiff cannot plead an action against the cruise line directly.[91] The 11th Circuit has not ruled on the validity of either position taken by the District Courts in these cases.

A passenger can assert that a cruise line is negligent where it fails to provide reasonable care to an ill passenger. For example, one court has found that if a passenger demands to be taken to a land-based hospital because of the inadequacy of an onboard infirmary and the cruise line fails to timely evacuate the ill passenger, the cruise line can be held liable for the passenger's damages.[92]

Causes of action for apparent agency have also survived motions to dismiss.[93]

Generally, in order to sufficiently plead a claim premised on apparent agency, a passenger must demonstrate that (a) a cruise line makes some sort of manifestation causing the passenger to believe that the doctor has authority to act for the benefit of the cruise line; (b) the passenger's belief is reasonable; and (c) the passenger relied on this belief and this reliance has resulted in damages.[94]

The fact that cruise lines hold their physicians out as independent contractors also permits a passenger to bring claims under the doctrine of negligent hiring and retention.[95] Maritime law requires that if cruise lines choose to hire medical personnel, it must hire people that are competent and qualified.[96] However, an isolated negligent act performed by an otherwise competent physician such as a momentary lapse in judgment does not render the physician incompetent. Instead, the focus of the analysis in negligent hiring and retention of medical personnel hinges on the physician's specific knowledge, degree of skill, sufficiency of experience, and/or adequacy of licensure.[97]

RAPE AND ASSAULT ONBOARD CRUISE SHIPS. Cruise lines market to and want to attract families onto their ships. The cruise lines select their crewmembers, many of whom are young men in their 20's, from third world countries or from countries like Croatia or Bosnia and Herzegovina which have been ravaged by war and suffer from high rates of unemployment. They choose young men from these countries because often these people are desperate for jobs.

The countries from which many of these crewmembers hail oftentimes do not have complete or accurate criminal or employment records. Therefore, an individual's history of employment or crime may not be accurate or complete. This creates issues for employers, such as cruise lines, in terms of conducting background checks.

As a result, cruise lines conduct very minimal screening and background checking on potential employees, relying instead on the cruise lines' "hiring partners"—agents in other countries—to perform these duties during the course of the hiring process.

The result is that these young men are surrounded onboard the ship with female passengers who are all on vacation and many of whom are relaxing and drinking. This creates a volatile situation in which rape, sexual assault, and sexual battery occurs.

The cruise lines often over-serve alcohol to passengers onboard. The cruise lines derive a great percentage of their gross income from their sale of alcohol. They market alcoholic drinks all over the ship from the start of the cruise. Conveniently, they have their waiters carry multiple drinks on trays selling them as they go instead of taking orders.

The cruise lines are strictly liable for sexual assaults committed by its crewmembers on its passengers during a cruise.[98] The sexual assault does not have to take place on the ship. In *Doe*, the assault was in a port where crew frequented.

Other instances of violence on board the cruise ships include attack in the course of a robbery of a passenger's cabin and fights breaking out among both crew members and passengers.[99]

CONCLUSION. The general maritime law which is applicable to each claim by a passenger against a cruise line has its peculiarities. The lawyer who gets a call from Denise the niece or anyone else who was injured on a cruise should know the maritime law (or call a maritime lawyer), provide the proper notice of the claim within 6 months of the incident, and file suit in the appropriate venue within 1 year of the incident.

Endnotes

1. See, *Hall vs. Royal Caribbean Cruises, Limited*, 2004 A.M.C. 1913, 2004 WL 1621209, 29 FLWD 1672, Case No. 3D03-2132 (Fla. 3d DCA Opinion filed July 21, 2004), *Harnesk vs. Carnival Cruise Lines, Inc*, 1992 AMC 1472, 1991 WL 329584 (S.D. Fla. 1991), *Carlisle vs. Ulysses Line Limited*, *S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985), and *McLean v. Carnival Corporation,* 2013 WL 1024257 (S.D. Fla.), citing *Vierling v. Celebrity Cruises, Inc.*, 339 F 3rd 1309, 1319 (11th Cir. 2003).
2. See, 46 U.S.C. §30509(a)(1)(A)-(B). Any provision falling within that description is void. See, 46 U.S.C. §30509(a)(2).
3. *Wallis v. Princess Cruises, Inc.*, 306 F.3d. 827 (9th Cir. 2009) and *Wajnstat v. Oceania Cruises, Inc.*, USDC S.D. Fla., Case No. 09-21850 (July 12, 2011 S.D. Fla.).
4. 499 U.S. 585 (1991).
5. See, e.g., *Leslie v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2008), *affirm'd*, 22 So.3d 567 (Fla. 3d DCA 2009) (en banc), *rev. den'd*, 44 So.3d 1178 (Fla. 2010), *cert. denied*, __ U.S. __, 131 S.Ct. 1603, 179 L.Ed.2d 499 (2011).
6. See, *Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011) (which cited to *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963)) and *Leslie v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2008).
7. See, *Leslie v. Carnival Corp.*, 22 So.3d 561, 563.
8. See, *Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011).
9. Case No. 08-21412-CIV, (S.D. Fla. 2010).
10. See, *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577 (11th Cir. 1985); *Crist v. Carnival Corp.*, 410 Fed.Appx. 197 (11th Cir. 2010); *Psurny v. Royal Caribbean Cruises, Ltd.*, 926 F. Supp. 2d 1325 (S.D. Fla. 2013).
11. *Booth v. Carnival Corp.*, 522 F.3d 1148, 1150 (11th Cir. 2008).
12. But *cf.*, *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d, 1581; *Crist v. Carnival Corp.*, 410 Fed.Appx., 203.
13. See, e.g., *Henson v. Seabourn Cruise Lines, Ltd.*, 410 F. Supp.2d. 1246 (S.D. Fla. 2005).
14. *Farraway v. Oceania Cruises, Inc.*, Case No. 1:10 CV 24312 JLK (S.D. Fla. June 10, 2011).
15. See, e.g., *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2009); *Henson v. Seabourn Cruise Lines, Ltd.*, 410 F. Supp.2d. 1246 (S.D. Fla. 2005); *Ginsberg v. Silversea Cruises, Ltd.*, 2005 WL 565 4644 (S.D. Fla.).
16. See, *Wajnstat v. Oceania Cruises, Inc.*, 684 F. 3d 1153, 1155, 2012 AMC 1805 (11th Cir. 2012).
17. See, *Hall vs. Royal Caribbean Cruises, Limited*, 888 So. 2d 654 (Fla. 3d DCA 2004), 2004 A.M.C. 1913; citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959); *The Moses Taylor*, 4 Wall. 411, 71 U.S. 411, 18 L. Ed. 397 (1866); *Carlisle v. Ulysses Line Ltd.*, 475 So. 2d 248 (Fla. 3d DCA 1985).
18. See, *Harnesk vs. Carnival Cruise Lines, Inc*, 1992 AMC 1472, 1991 WL 329584 (S.D. Fla. 1991).
19. See, *Carlisle vs. Ulysses Line Limited*, *S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985). *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1319-20 (11th Cir. 2003).
20. *Tittle v. Aldacosta*, 544 F.2d 752 (5th Cir. 1977); *Bellocchio v. Italia Flotte* 84 F.2d 975 (2d Cir. 1936); *Samuelov v. Carnival,* 870 So.2d 853 (Fla. 3DCA 2004); and *Chan v. Society Expeditions*, 123 F.3d 1287 (9th Cir. 1997).
21. See, *McLaren v. Celebrity Cruises, Inc.*, 11-23924-CIV, 2012 WL 1792632 (S.D. Fla. May 16, 2012).
22. *McLean v. Carnival Corporation,* 2013 WL 1024257 (S.D. Fla.), citing *Vierling v. Celebrity Cruises, Inc.*, 339 F 3d 1309, 1319 (11th Cir. 2003).
23. See, *Weiner v. Carnival Cruise Lines*, 2012 WL 5199604 (S.D. Fla. 2012).
24. See, e.g., *Erickson v. Carnival Cruise Lines, Inc.*, 649 So.2d 942 (Fla. 3d DCA 1995).
25. See, *Grayson v. Carnival Cruise Lines, Inc.*, 576 So. 2d 417 (Fla. 3d DCA 1991).
26. *Erickson v. Carnival Cruise Lines*, 649 So. 2d at 942.
27. *Grayson v. Carnival Cruise Lines*, 576 So. 2d at 417.
28. *McLean v. Carnival Corp.*, 2013 WL 1024257 (S.D. Fla. 2013) and *Wal-Mart Stores, Inc. v. Reggie*, 714 So.2d 601 (Fla. 4th DCA 1998).
29. *Wal-Mart*, 714 So.2d at 603.
30. See, e.g., *Gonzalez v. B&B Cash Grocery Stores, Inc.*, 692 So.2d 297 (Fla. 4th DCA 1997).
31. 264 So.2d 862 (Fla. 3d DCA 1972).
32. 629 So.2d 945 (Fla. 1st DCA 1993).
33. *Gonzalez*, 629 So.2d at 947.
34. See, e.g., *Ribitzki v. Canmar Reading & Bates,* 111 F.3d 658, 663 (9th Cir. 1997).
35. See, *Galentine v. Holland America Line-Westours, Inc.*, 333 F. Supp. 2d 991 (W.D. Wash. 2004).

36. See, e.g., *Carnival Cruise Lines v. Mabrey*, 438 So.2d 937 (Fla. 3d DCA 1983).

37. *Carnival Cruise Lines v. Mabrey*, 438 So.2d 937 (Fla. 3d DCA 1983). See also, *Smith v. Southern Gulf Marine Co.*, 791 F.2d 416 (5th Cir. 1986).

38. *Smith*, 791 F. 2d at 422.

39. __ F.2d __. Case No. 06-21527 Civ-Huck/Simonton (S.D. Fla. December 5, 2006).

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43. See, *Kolster Cruise Limited v. Grubbs*, 762 So. 2d. 552 (Fla. 3d DCA 2000) and *Samuelov v. Carnival*, 870 So.2d 853 (Fla. 3DCA 2004).

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46. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1335-36 (11th Cir. 1984). See also, *In re Complaint of Royal Caribbean Cruises, Ltd.*, Case No. 11-23070-CIV-SCOLA, S.D. Fla., February 4, 2013 (Order denying motion for summary judgment on the basis of *inter alia* Section 30509). But see, *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1315–17 (S.D. Fla. 2011), which is distinguished and criticized in *In re Complaint of Royal Caribbean Cruises, Ltd. Fojtasek v. NCL (Bahamas) Ltd.*, 613 F. Supp. 2d 1351, 1355 (S.D. Fla. 2009).

47. See, *Belik v. Carlson Travel Group and Carnival Corporation*, 864 F. Supp. 2d 1302 (S.D. Fla. 2011).

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51. See e.g., *Smith v. Carnival Corp.*, 584 F. Supp. 2d 1343 (S.D. Fla. 2008).

52. See, e.g., *Belik v. Carlson Travel Group, Inc.*, 864 F. Supp. 2d 1302 (S.D. Fla. 2011).

53. *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899 (5th Cir. 1972); *Rookard v. Mexicoach,* 680 F.2d 1257, 1261–62 (9th Cir. 1982).

54. *See Isbell,* 462 F. Supp. 2d at 1237. See also *Tradewind Transportation Co. v. Taylor,* 267 F.2d 185, 188 (9th Cir. 1959).

55. *Rawlins v. Clipper Cruise Lines,* 1996 WL 933862, at *3 (E.D.Mo.1996) (adopting standard set forth in *Tradewind Transportation*).

56. 636 So.2d 98 (Fla. 3d DCA 1994).

57. 416 So.2d 863 (Fla. 3d DCA 1981).

58. 416 So.2d at 864.

59. *See, e.g., Antonio v. Pedersen,* 897 F. Supp. 2d 210 (D. Vermont 2012) (complaint stated negligence claim against snowmobile tour operator with respect to the breach of a duty of ordinary care to driver in the operation of the tour); *Cohen v. Heritage Motor Tours, Inc.,* 205 A.D.2d 105, 618 N.Y.S.2d 387 (N.Y. Ct. App. 1994) (tour operator may be held liable for negligence of tour guide which accompanied tour participants). *Cf. Tradewind Trans. Co. v. Taylor*, 267 F.22 185, 188 (9th Cir. 1959) ("It should be emphasized that Tradewind's $6.50 tour service did not include a guided tour through the points of interest themselves").

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62. *Chaparro*, 693 F. 3d at 1336.

63. *Belik v. Carlson Travel Group, Inc.*, 864 F. Supp. 2d 1302 (S.D. Fla. 2011).

64. *Doe v. Royal Caribbean Cruises, Ltd,* 11-23323-CIV, 2011 WL 6727959, at *2 (S.D. Fla. Dec. 21, 2011)." *Doe v. NCL (Bahamas) Ltd*., Case No. 11-22230-Civ-COOKE/TURNOFF. (S.D. Fla. November 14, 2012).

65. *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1318 (S.D. Fla. 2011) (citing *In re Central Gulf Lines, Inc.*, 176 F. Supp. 2d 599, 622 (E.D. La. 2001)). *McLaren v. Celebrity Cruises, Inc*., Case No. 11-23924-CIV-ALTONAGA/Simonton (S.D. Fla. 2012).

66. *Caldwell v. Carnival Corporation,* Case No. 12-24086-Civ-COOKE/TURNOFF (S.D. Fla. April 30, 2013).

67. *McLaren v. Celebrity Cruises, Inc.*, No. 11-23924, 2012 U.S. Dist. LEXIS 68321, at *24 (S.D. Fla. May 16, 2012) (citing *Carlisle,* 475 So. 2d at 251).

68. See, e.g., *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308 (S.D. Fla. 2011).

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71. *Gibson v. NCL (Bahamas) Ltd.*, 11-24343 CIV 2012 WL 1952667 (S.D. Fla. May 30, 2012) (citing to *Fulcher's Point Pride Seafood, Inc. v. M/V Theodora Maria*, 935 F.2d 208, 1993 AMC 2993 (11th Cir. 1991)).

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Defective Metal on Metal Hip Implant Claims in Federal Multidistrict Litigation: More Than 8,500 Filed Cases

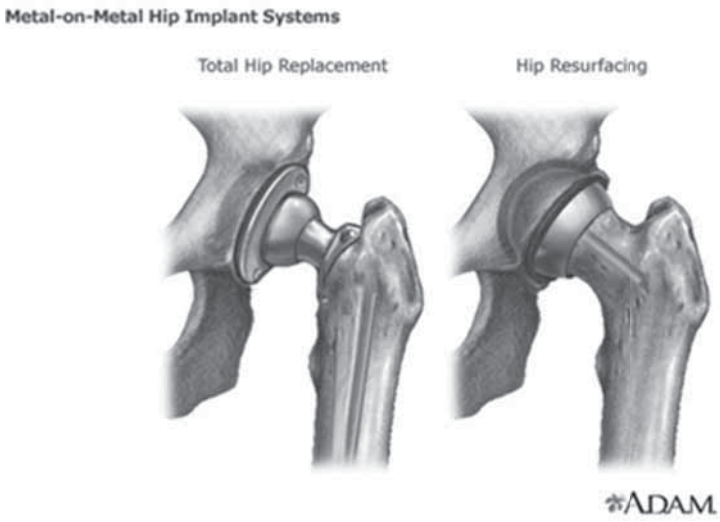
By Hadley L. Matarazzo

The first artificial hips with metal on metal articulation were introduced in 1953 in England and remained on the market until the mid-1970s.[1] The first devices were removed from the market because of a high failure rate associated with their use of polyethylene. A second generation of metal on metal devices was developed in the early 1980s and shortly thereafter a third generation, which was in many respects similar to the second generation implant. However, the wear rates of these second and third generation devices far exceeded those of metal on polyethylene devices, leading to complications associated with metal debris and metal ions in the bloodstream. Device makers continued to work to improve the design of these implants, and the fourth and current generation of metal on metal implants was released in the late 1990s. This article focuses on the fourth generation devices.

Total Hip Replacement Surgery

Hip replacements are among the most common and successful orthopedic surgeries performed in the United States. The average age for a total hip replacement patient is 66 years.[2] According to the Centers for Disease Control, 332,000 individuals had hip replacement surgery in 2010, and the demand for hip replacement surgery is expected to double from 2008 to 2030.[3,4] A large portion of the rise in demand can be attributed to a growing percentage of the population that is over 65 years.

Patients who undergo a total hip replacement have their natural hip replaced with a prosthetic hip that is generally composed of a femoral stem, a femoral head and a cup fitted into the cavity in the hip known as the acetabulum. The components may include, but do not always include a liner or shell. In recent years, patients with arthritis can also undergo hip resurfacing where only the natural femoral head and acetabulum are replaced.[5] There are several hip systems available today, including metal on metal, metal on polyethylene, ceramic on polyethylene and ceramic on ceramic.



The illustrations above, from a U.S. Food and Drug Administration (FDA) publication, show typical options for hip implants.[6]

Common causes of chronic hip pain and disability leading to total hip replacement are osteoarthritis, rheumatoid arthritis, post-traumatic arthritis, avascular necrosis, trauma and childhood hip disease.[7]

In the past, orthopedic surgeons primarily limited hip replacement to patients 60 years and older due to limitations on the life of the device.[8] However, with improvements in the technology and the growing demand for replacement in the younger population, surgeons no longer have a threshold age and instead look at a patient's overall health to determine whether the patient will benefit from a replacement.

The FDA Approval Process: 510(k) Versus Pre-Market Approval

The Medical Device Amendments of 1976 (MDA) created three classes of medical devices, Classes I-III, based on the potential to cause harm.[9] Hip implant devices are Class III devices because they are considered high-risk devices. Under the MDA, less risky devices categorized as Class I and II devices can go through a process as defined by Section 510(k) of the Food, Drug and Cosmetic Act, which requires only a showing of substantial equivalence to devices already on the market.[10]

Class III devices, including hip implant devices, are supposed to undergo the more rigorous pre-market approval (PMA) process, which requires clinical trials.[11] This is not, however, how the vast majority of hip implants get

to market. Instead, due to a loophole in the MDA, Class III devices were temporarily permitted to get to market via 510(k). This loophole was supposed to be closed by the FDA over time as it established effective dates for when each Class III medical device would begin to undergo PMA.[12] As of today, the FDA has not closed this loophole and hip implant devices can still get to market under 510(k).

Under the 510(k) process, the manufacturer must show that the device is substantially equivalent to devices marketed through the 510(k) process (known as a predicate device) prior to May 28, 1976.[13] A substantially equivalent device is one that has the same intended use and technological characteristics or has different technological characteristics, but does not raise new questions of safety and effectiveness and is at least as safe and effective as the predicate device.[14] An FDA finding of substantial equivalence does not mean that the device is safe and effective.

Fourth Generation Metal on Metal Hip Implant Devices: The Promise and the Reality

Metal on metal hip implant devices were developed to provide an alternative to polyethylene and ceramic devices. Polyethylene wear debris causes an immunological reaction that results in osteolysis (destruction of bone tissue) and ceramic implants are prone to fracture. In addition to providing an alternative to avoid these problems, metal on metal devices were also supposed to generate less wear debris than other devices and decrease the risk of dislocation. As of November 30, 2012, the FDA cleared 190 metal device components for market with the vast majority cleared through 510(k).[15] It is estimated that more than 500,000 patients in the United States received a metal on metal hip implant between 2003 and 2010.[16]

No hip implant is without risk, including metal on metal hip implant devices. A significant risk with metal on metal devices is shedding of metal debris and release of metal ions into the bloodstream, which can result in soft tissue destruction and osteolysis. The soft tissue damage and osteolysis cause pain, implant loosening and device failure leading to revision surgery. Although there is not sufficient data to draw any conclusion, there is also concern about adverse systemic reactions to the circulating metal ions. For these reasons, metal on metal hip implants are contraindicated for use in, among others, patients who have known sensitivity to metal, patients with kidney problems, patients who have suppressed immune systems as well as patients who are very overweight or very active.[17]

Unfortunately, the promise of metal on metal hip implant devices for many patients has not been fulfilled. Instead, data from other countries' joint registries, such as the Australian and British, has shown that metal on metal hips have a lower survivorship rate than alternative devices. The high revision rate of metal on metal hips led regulatory agencies in several countries to release healthcare alerts and medical device makers to recall certain metal on metal implants, such as DePuy's ASR device which had an anticipated failure rate of 49% at six years.[18]

On May 6, 2011, the FDA ordered manufacturers of metal on metal hip devices to conduct postmarket surveillance.[19] The manufacturers were required to study adverse events and pre- and post-implantation cobalt and chromium levels in patients' blood—the metals used in such implants—but the results will not be available for years. On June 27-28, 2012, the FDA convened the Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee "to seek expert scientific and clinical opinion on the benefits and risk of MoM hip implants including: Failure rates and modes; Metal ion testing; Imaging methods; Local and systemic complications; Patient risk factors; and Consideration for follow-up after surgery."[20] This was followed by the issuance of an updated FDA Safety Communication on January 17, 2013 and the January 18, 2013 publication of a Proposed Rule in the Federal Register requiring manufacturers to conduct clinical trials if they sought to keep metal on metal hip implants on the market.[21,22]

The medical literature regarding metal on metal hip implants is exploding. New articles come out monthly covering a range of topics, including the clinical significance of metal levels, ways to diagnosis soft tissue through imaging studies, how to determine when to replace an implant through what is known as revision surgery and methods for diagnosing adverse reactions to metal debris. Orthopedic surgeons continue to wrestle with questions as to whether the risk of revision surgery is outweighed by the damage a metal on metal hip implant is causing a patient, as well as the risk of a poor outcome from the surgery.

Metal on Metal Hip Implant Litigation

The United States Supreme Court in *Riegel v. Medtronic*, 552 U.S. 312 (2008), held that the pre-emption clause of the MDA bars state common-law claims that challenge the safety or effectiveness of a medical device that received premarket approval from the FDA. However, the *Riegel* court compared the PMA process to the 510(k) process and also held that under 510(k) there is no formal FDA review of safety and effectiveness. The Court thus allowed state law claims arising from injuries caused by Class III devices marketed via 510(k).[23]

Thousands of cases have been filed around the country by patients who have alleged injury from their metal on metal hip implants. Where litigation is pending in multiple federal districts, either party or both parties can file a motion for centralization with the Judicial Panel on Multidistrict Litigation (the "Panel").[24] The Panel, after hearing argument, will determine whether there are issues of fact common to actions pending in different federal districts such that it would be appropriate to transfer

all the actions to one judge to handle all the pretrial proceedings. If the Panel determines transfer is appropriate, it will create a Multidistrict Litigation ("MDL") and select the venue and judge assigned. The purpose of centralization is to avoid duplication of discovery, inconsistent pretrial rulings and to conserve judicial resources as well as the resources of the parties. Once the pretrial proceedings are concluded, the cases that have not terminated in the MDL are remanded to the originating federal district for trial.

In addition to overseeing pretrial proceedings, an MDL judge can also conduct bellwether or test cases subject to the restrictions imposed by the Supreme Court decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Under *Lexecon*, the Supreme Court held that an MDL court cannot transfer cases to itself for trial because the statute requires the Panel to remand cases back to the originating district court at the end of the pretrial proceedings. However, in many MDLs, the MDL court will issue an order permitting direct filing of cases into the MDL. In this situation, the MDL court can conduct a bellwether trial of the directly filed actions.

The case or cases chosen as bellwethers are deemed to be representative of the range of cases in the MDL. The hope is that these trials will enable the parties to gauge the strengths and weaknesses of their claims and defenses in an effort to facilitate resolution of the remaining cases in the MDL.[25] In addition, the parties can consent to the application, where feasible, of the decisions made leading up to and during the bellwether trial or trials to all cases in the MDL. For example, motions *in limine* that are not specific to the evidence in a particular plaintiff's case, but instead apply to evidence pertaining to the liability of the defendant or defendants can be binding on all cases in the MDL if and when they go to trial.

Metal on metal hip implant cases have been consolidated into several MDLs based on manufacturer and model. At the time this article was written, the following are the pending metal on metal hip implant MDLs as well as the most recent statistics from the Panel regarding the number of cases filed in each MDL:

- MDL 2158 *In re Zimmer Durom Hip Cup* (290 filed cases);
- MDL 2197 *In re DePuy Orthopaedics, Inc. ASR Hip Implant* (8,858 filed cases);
- MDL 2244 *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant* (5,153 filed cases);
- MDL 2329 *In re Wright Medical Technology, Inc. Conserve Hip Implant* (75 filed cases);
- MDL 2391 *In re Biomet M2a Magnum Hip Implant* (978 filed cases).[26]

Once an MDL is created, the MDL judge will set a schedule for the filing of applications to the court by plaintiffs' attorneys who wish to be appointed to leadership positions in the litigation. Although there is some variation, the court generally appoints the positions of plaintiffs' lead counsel or co-lead counsel, plaintiffs' liaison counsel, and the members of the plaintiffs' executive committee and plaintiffs' steering committee. These individuals acting together as plaintiffs' leadership are charged with representing the interests of all plaintiffs in the MDL by, among other things, conducting discovery of the defendant or defendants, hiring experts to help establish liability and otherwise moving the litigation forward. The plaintiffs' leadership is also charged with negotiating settlement if there is an opportunity to do so. At some point during the litigation, the judge usually issues a Common Benefit Order that levies a cost and an attorneys' fee assessment on every case filed in the MDL. This money is then used to compensate the members of the committees for their time and expenses incurred during the pretrial proceedings.

The Pros and Cons of Multidistrict Litigation

MDLs provide benefits for both plaintiffs and defendants. These benefits include lower litigation costs, avoidance of redundancy through coordinated discovery, better case management, uniform judicial decisions and increased potential for resolution. However, there are some pitfalls as well. For example, the parties may not be satisfied with the JPML's choice of forum or, in instances where cases in the MDL are not terminated by settlement or by dispositive motions, there have been situations where the transferee court fails to remand the cases for trial. Another criticism that arises in the context of a global settlement in a MDL is that it tends toward a one-size fits-all approach because there is no way to address the individual circumstances that affect each plaintiff. The discussion regarding the efficiency and fairness of MDLs for litigants is ongoing, and, to date, no feasible alternatives have gained any traction.

Case Study: *In re DePuy Orthopaedics, Inc.* (MDL 2197), ASR Hip Implant Products Liability Litigation

On August 24, 2010, DePuy Orthopaedics, Inc. ("DePuy") issued a worldwide, voluntary recall of its DePuy ASR XL Acetabular System and its DePuy ASR Hip Resurfacing System. The resurfacing system was not approved for use in the United States so, with limited exceptions, United States residents were implanted only with the ASR XL. The recall notice stated that DePuy received unpublished 2010 data from the National Joint Registry of England and Wales showing a higher than

expected revision rate at five years, which led the company to issue the recall.[27] The recall notice was preceded by a Field Safety Notice that DePuy issued in March 2010 regarding a higher than expected revision rate at three years using smaller femoral head sizes, but stating that overall revision rates were normal when compared with other similar metal on metal hip implants.[28]

In addition to the recall notice, on March 1, 2010 DePuy issued a letter to healthcare providers regarding the monitoring and follow up of patients with an ASR implant. Included in the letter was an updated DePuy ASR Hip Recall Resource Packet. Recommendations for monitoring included testing of blood for cobalt and chromium levels and imaging such as x-rays, ultrasounds and MRIs for symptomatic patients or patients experiencing pain. The letter cautioned that patients might develop progressive soft tissue reaction to metal wear debris without exhibiting symptoms. DePuy also stated that metal debris could cause soft tissue damage which might compromise the results of revision surgery, thus DePuy advised that the sooner a hip implant that was generating metal debris was removed the better the outcome.

Within months of the recall, seven cases were filed against DePuy and its parent company Johnson & Johnson in various federal district courts throughout the country, and shortly thereafter five motions were filed before the Panel seeking consolidation of the cases in an MDL.[29] The Panel issued a Transfer Order on December 7, 2010 consolidating the cases before Judge Katz in the Northern District of Ohio, one of the venues proposed by defendants. Plaintiffs' leadership was then appointed by court order on January 26, 2011 and discovery began.[30]

Two years after the Panel issued its Transfer Order, Judge Katz set two bellwether cases for trial in the summer of 2013.[31] Case specific discovery proceeded throughout the winter, spring and summer of 2013, including plaintiffs', treating physicians' and experts' depositions.

As discovery went forward in the bellwether cases in the MDL, two state court cases involving DePuy's ASR went to trial. In March 2013, a Los Angeles jury awarded approximately $8 million to a Montana plaintiff who had undergone revision surgery. The verdict was being appealed as of the time this article was written. In August, a Chicago jury went the other way and found that the defect in the ASR hip implant was not the cause of the plaintiff's injuries.

On the eve of the first bellwether trial, Judge Katz issued an order postponing trial for two weeks and then for 90 days. On November 19, 2013, the parties announced that a global settlement had been reached.[32] Under the agreement, DePuy agreed to pay nearly $2.5 billion to compensate plaintiffs in the MDL as well as in consolidated proceedings in California, Illinois and New Jersey state courts that met certain criteria.[33] (For example, plaintiffs who had not undergone revision surgery by August 31, 2013 did not qualify for settlement under the agreement.)

Under the settlement agreement each plaintiff had until April 1, 2014 to decide whether to accept the settlement and DePuy had the right to walk away from the settlement if a 94% participation rate were not met. The settlement took into account variation in damages to the extent possible. For example, plaintiffs who had two ASR hips that were revised were eligible for an enhanced award. Plaintiffs who suffered from post-ASR revision dislocations, who had to be revised again and/or who suffered serious complications following revision surgery were also eligible for enhanced awards.[34] In addition, the settlement agreement reduced awards for plaintiffs based on certain factors defendants would likely invoke at trial to minimize damages.

Although there are valid complaints about the MDL process, the DePuy ASR MDL is an example of an MDL that moved quickly, met the needs of most plaintiffs, and would provide defendants with finality for the majority of claims currently pending (assuming the settlement moves forward). In many ways, the DePuy ASR MDL is a model for multidistrict litigation.

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Editor's Note: The co-editor of *The Senior Lawyer*, Stephen Brooks, had a defective metal on metal hip implant replaced in 2013. He is not and has not been party to any litigation.

Planning for Seniority: A Baby Boomer's Playbook

By Rosemary C. Byrne

January 1, 2010, marked a watershed moment in American culture and demographics. The first of the trend-setting generation of "baby boomers" would be celebrating their milestone 65th birthday. The generation born between 1946 and 1964 was moving from the "Age of Aquarius" to the "Age of Retirement."

Given the extent of their representation in society, their massive buying power, and their historic impact on so many facets of American life, it is not surprising that this transition was front page news in the *New York Times*. As the *Times* so aptly noted, "[t]his means that the 79 million baby boomers, about 26 percent of this country's population, will be redefining what it means to be older."[1]

A quarter of our population is now over the age of 55 and, in the next 20 years, roughly 10,000 people will turn 65 each day. There are more of us, and we are healthier and living longer. It is estimated that the average 65-year-old woman in good health is expected to live another 23 years; males of the same age and health can expect another 20.

The statistics for attorneys tell a similar tale. Government figures indicate that 31 percent of attorneys in America are age 55 and over. Other studies by the ABA and various state bars reflect that the number could be as high at 35 percent.

I leave it to others far more erudite than I to describe, analyze, and opine about the economic, sociological, and political impact of the aging of the baby boomer population or its overall effect on law firms and our profession. For me, the bottom line is that roughly one-third of the attorneys in America (myself included) are considered senior lawyers, and we are at, or nearing, what was traditionally viewed as retirement age. We will likely have a life span of at least another 30 years. Yet, as many of us approach or pass the "65" mark, there are few norms or models for active retirement or indeed any retirement that our generation will likely find acceptable. "I never plan to retire" is an anthem I frequently hear from attorneys. We tend to identify ourselves by *what we do*; if we cease to do it, one wonders, who will we be? Moreover, the counterculture generation that confronted racism and sexism and came to expect (and insist upon) choices and options is not likely to take kindly to "ageism" or to being marginalized or limited by virtue of age. While boomers are not likely to go gently into the retirement of our parents and grandparents, it is not clear where we will go instead.

Hence, as its title indicates, this piece is not so much about "retirement life planning" as it is about "senior life planning"—devising basic strategies to prepare for and "redefine what it means to be older." I offer you a playbook to facilitate planning for and enjoying senior status. So, even if you never plan to retire (or are not a baby boomer), I hope you will read on.

(Re)Define Retirement

The first strategy in the playbook is to define, redefine, or perhaps even retire the word "retirement."

As attorneys, we all know that words matter. This is especially true when the word in question is retirement. Its meaning and impact are different for each of us. Dictionaries define "retire/retirement" as, among other things, "to retreat," "to seek privacy or seclusion," or "to withdraw from use or active service." In Victorian days, "I've retired" meant you had gone to bed.

These definitions represent the traditional view that retirement is the end of an active life in the workforce, a move into a life of relaxation and leisure, *until we die*. For many attorneys, retirement has strong negative connotations. One of my clients describes it as "being put out to pasture"; another sees it as "being permanently benched"; a third free associates it with death. In the traditional paradigm, retirement is seen as a fixed point in time—an end—often marked by length of service or a birthdate. At some firms and in some courts, it's actually a mandatory event.

In fact, the word "retirement" may be more useful to describe *what you don't do*—work full time in the career in which you spent most of your professional life. It is not, however, particularly helpful in describing what you currently do or plan to do.

Consider social or business events and the typical introductory question, "What do you do?" Now, consider what often happens when the response is, "I'm retired." Depending on the age of the conversants, there is often a pause, the questioner's voice drops a bit, he or she says "Oh," and the conversation frequently stalls. The litigator in me can't help thinking "that answer is nonresponsive," unless, of course, you take retirement to mean "I do nothing."

Given the definitions and possible negative stereotypes surrounding retirement, one may reasonably ask: is this what healthy, engaged, 65-year-old baby boomers would see as a desirable life choice? Would they strive to

achieve or plan for it? The answer is likely a resounding "No!"

The alternative is to reframe our thinking about retirement, to think more broadly, and to see it not as a single static moment, but as a continuum, a span of time or a stage of life. Perhaps we can borrow the concept of taking "senior status" from the federal judiciary. Some use "encore years" or "next chapter" to describe this period. I've opted to side with experts who describe it as seniority or the "Third Age."

Call it what you will, but recognize that the Third Age (or your phrase of choice) is *not a mere euphemism for retirement*. The event we traditionally call retirement is about our *professional* life. I define being retired as "*giving up your current full-time paid primary career or position*." The Third Age is about the *entirety* of our life and best describes "*the period after mid-life and before the afterlife*."

This is the period in which we experience normal (and somewhat inevitable) physical, physiological, and intellectual changes associated with aging. It is a time when our personal and professional priorities may change, a time to reflect on how things are and how we want them to be, and a time to weigh our options and consider those we choose to exercise. I define the Third Age as "a changeable stage of life after mid-life that incorporates education, work life, and leisure in whatever balance we choose."

In this Third Age, there may be one (or more) retirement events. It is easy to confuse the *stage of life* with the *retirement event(s)*. They are not synonymous! While the Third Age happens (the alternative is not a particularly desirable option), retirement event(s) need not. So, rather than focusing on the *retirement* and engaging in (or avoiding) "retirement" life planning, we might be better served by contemplating and planning for "what it means to be older"—what we will do, who we will be, and the work/life/leisure balance we would like to have in the three decades that may constitute our Third Age.

Recognize the Roadblocks and Consider a Plan

Barriers to creative thinking, or perhaps any thinking, about seniority abound. In my coaching practice, I find that many senior attorneys are not preparing for, or even considering, what they will do or who they will be as they grow older because they view aging through a lens clouded by the negative imagery associated with traditional retirement. The social and emotional consequences of old-style retirement can be enormous. We self-identify by what we do. If we retire, we may lose that self-definition and the structure, friends, and colleagues that surround it. We surrender our working persona and environment but aren't quite sure what will replace them. We may need to redefine ourselves—not an easy task at any age! Placing the emphasis on retirement planning tends to block forward thinking about life planning after middle age.

Given the current economy and impact of the recession on IRAs and retirement assets, *money* (or the perceived lack thereof) can also be a significant roadblock to seniority planning. Many conclude, perhaps erroneously, that they will never be able to afford to retire, so they believe there is no need to do any other planning for seniority.

Procrastination may delay the consideration of aging and the development of a seniority plan. Among my clients, I find there are concerns about being marginalized, or diminished, or bored. Some fear facing their own mortality or are reluctant to confront the physical or intellectual changes generally associated with the natural process of aging.

Faced with these roadblocks, real or imagined, many seniors opt to take the path of least resistance, i.e., they "stay the course," expecting to remain employed, conceiving no plan and thereby hoping, perhaps unconsciously, to avoid the negative aspects of retirement or the inevitability of aging. By so doing, they ignore the possibility that mandatory retirement, firm politics or economics, downsizing, or unforeseen health problems may intervene to force the issue.

The first step toward overcoming these road blocks is to recognize them and realize that they may be posing a significant barrier to positive and creative thinking about the joys and options one can have in seniority.

The next step is to take charge of the situation and begin pondering and formulating a plan for seniority. As attorneys, we excel at weighing options and formulating plans. In our careers we have all assisted our clients, our firms, and our friends and family with life and business planning. Consider the plans, choices, and decisions you made throughout your adulthood. You planned for your education (and that of your children), your choice of firm, your area of practice, where you would live, even the make and model of your next car. We often plan our vacations with exacting detail. Why would we do any less when it comes to planning for what we will do in our 30-or-more-year seniority?

Planning for, or at least exploring, our options in seniority has its own benefits. It gives a measure of control and avoids leaving important life decisions to chance or serendipity. With foresight, preparation, and planning, we will have a better chance of having the life we want, rather than accepting whatever comes our way.

Seek Help with Your Planning

Financial Planners

There is much written about the importance of financial planning, and I will not dwell on it here. We all

know that any plan for seniority must involve financial planning. Financial professionals help us determine *what we will have* and *what we will need* in seniority—how we can have a financially successful future. Don't leave these experts out of your seniority planning.

Senior Life Planners/Retirement Coaches

The accuracy of financial planning is greatly improved by life planning. The two go hand in hand. It is difficult to determine our economic needs as we age without envisioning our senior life. Will we opt to continue full-time practice or choose something less or different? Will we relocate or downsize to a smaller home or apartment? Will we start a business or pursue a new career? What leisure activities will we pursue? Each of these decisions and preferences will impact our economic needs. In short, simple logic tells us that we need to consider what we want before we can determine if we can afford it.

More and more of those on the other side of 55 or 60 are turning to a new breed of planning professionals—life coaches, retirement coaches, and senior life planners—to seek help in creating that vision. They are comfortable with the concept of seeking professional help when and where it is needed, whether from a tennis or golf pro, a business consultant, or a fitness trainer. Seeking guidance on retirement or seniority is a natural extension of the process.

Many of you may wonder, as I once did, what does a retirement coach do? Simply put, I assist baby boomer (and beyond) attorneys and other professionals to open the door to thinking about their seniority, to explore possibilities and options, to create a vision for their life after 55 and a plan to achieve that vision, to evaluate their work/life/leisure balance, and prepare and plan for their Third Age—which may (or may not) include retirement.

Generally speaking, the coaching process is designed to help facilitate change. *It is not therapy!* With probing and insightful questions and observations—many of the same skills I rely upon as an attorney—I help clients to identify the changes they would like to make and devise a strategy to achieve them. A coach is an objective, nonjudgmental partner working with a client to create a vision for the future he or she wants and to identify the steps and strategies necessary to achieve it. Together (generally by phone), we analyze how they can best use their time, their energy, their skills, their knowledge, and their assets to achieve their aspirations.

A Page from the Coach's Playbook

Questions to Ask Yourself

There is no single game-changing strategy for a successful senior life. The plays and actions in the seniority playbook are largely designed by the players, in consultation with spouses or partners and family and colleagues, as well as with financial and life-planning professionals when needed.

To assist in the planning process, I have included some basic questions and suggestions I use in my coaching practice. They are intended to help you focus on your aspirations, goals, and strengths, and to expand your thinking about what you want to do in your life, your work, and your leisure time to achieve a successful Third Age.

One of the keys to successful Third Age planning is continuing to ask the questions I've provided here. I suggest you put some time aside. Fifteen or 20 minutes will suffice. Pick a question and think about it. They are not in any order or degree of difficulty. Put pen to legal pad (or fingers to keyboard) and record (and save) your thoughts. Repeat the process with some frequency. It is interesting to observe how your answers may differ over time.

As you continue to go through the process, patterns will likely emerge that will provide insights and help clarify what you want to be doing in the Third Age and assist you in developing an action plan to get you there.

1. If money and health were not an issue, what would you like to be doing in a typical week when you are 60, 65, 70, 75? How would your response change if money and/or health were an issue?
2. Complete the statement, "I've always wanted to _____." Consider what one action or step you could take now toward reaching that goal. Expand the foregoing question and add "but _____." What obstacles do you see, and what one action or step could you take now to overcome that impediment or perceived barrier?
3. As you consider your life today, what do you want more of or less of, and what would you keep exactly the same?
4. As you look back on your life, what do you regret not having done? Can you still do it or something comparable?
5. How do you define success? Do personal and professional success differ? How?
6. If money were not an issue, what would be your perfect job? What makes it a dream job?
7. If money were not an issue, would you have a job at all? Why or why not?
8. What do you like most and least about the work you do and where you do it?
9. Consider the social/business event conversation I mentioned earlier. If you were asked "what do you do?," what would you like your answer to be next year and three or five years from now?

10. What would you do if you took a six-month paid sabbatical?

In the Alternative: Create a Bucket List

Finally, if all of this seems too abstract or just too difficult, consider another alternative. Take a cue from the Rob Reiner film *The Bucket List* with Jack Nicholson and Morgan Freeman. No matter what your age or place on the Third Age transition journey, create a "bucket list"—a list of items (great and small, serious or fun, easy and hard, adventurous or mundane) you want to see, do, go to, achieve, learn, hear, explore, or experience before you "kick the bucket." If the thought of kicking the bucket gets in your way, think of it as a life or dream list! Don't worry about whether you can do them all. Just be creative and keep adding to the list.

Once your bucket list is started, pick an item and either do it or consider what one step you could take toward accomplishing it. Look at your list at least once a quarter (perhaps when filing your estimated taxes) and on January 1 of each year. Note the dates on your calendar to help you remember. The notation may also help remind you of the need to engage in seniority planning. For more bucket list ideas, take a look at www.squidoo.com/100things.

When I started my own bucket list a number of years ago, I included seeing the pyramids (I have), learning to scuba dive (I haven't yet), learning to play bridge (I am), and practicing law part time (I do). Becoming a life coach and writing an article for *Experience* magazine were definitely not on it. Some good things do happen serendipitously! Perhaps that's a story for another article!

Conclusion

The definitions and measures of success in seniority are very personal. Each of us must determine what we will want to do and what we may be physically, financially, intellectually, and emotionally able to do as we age. For each of us, however, the process starts with thinking about and recognizing the inevitability of change and the need to perceive, consider, and weigh our options and plan accordingly. Ideally, we will each have the work/life/leisure balance we choose and the financial and social support we need to maintain it.

Endnote

1. Dan Barry, *Boomers Hit New Self-Absorption Milestone: Age 65*, N.Y. Times, Dec. 31, 2010.

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Are You Ready for the Elder Years?

By Anthony J. Enea

As attorneys we are all too often preoccupied by the lives and problems of others. On a daily basis we go from one client to another, utilizing all of our strength, energy and intellectual resources with the hope of providing our clients with the best legal services possible. Their problems and concerns are inevitably always on our minds. Unfortunately, our profession leaves us little time to focus on our own personal affairs, especially those related to our aging. The demographic studies done of the membership of the New York State Bar Association (NYSBA) reflect that our membership is rapidly aging. The largest demographic group of attorneys is those over the age of 55 years. Believe it or not, if you are 55 or older you qualify to be a member of NYSBA's Senior Lawyers Section.

"[O]ur profession leaves us little time to focus on our own personal affairs, especially those related to our aging."

It is my hope that this article will encourage you to take a step back and assess whether you have taken some of the most basic steps in organizing yourself for the elder years. The following are my suggestions for your consideration.

A. Physically organize your affairs. Locate and organize into separate folders/binders all of the most important legal documents you have executed, such as your original Last Will and Testament, Trust(s), Advanced Directives (Powers of Attorney, Health Care Proxies, etc.), deeds to your properties, mortgages and notes, insurance policies (life, health, disability, home, long term care, malpractice), bank and investment records, income tax returns, passports, birth certificates and military discharge records, etc.

Organizing these documents will surely be a time-consuming process; however, it will be a process that allows you to revisit many matters you may not have paid attention to for a number of years.

Once you have physically organized these documents, I would suggest that you let your spouse and/or loved ones know where they are located. I would also suggest that you not place your Last Will and Advanced Directives in a Safe Deposit Box unless someone other than yourself has a key and is authorized signatory on the box.

B. Review and update your existing Last Wills, Trusts and Advance Directives to ensure they are up to date and reflect your present financial circumstances and wishes. The Last Will you prepared when you were newly married with minor children may not be reflective of your current state of affairs and/or wishes. For example, your existing Last Will and the titling of your assets may not allow for appropriate estate tax planning on your death or the death of your spouse. Additionally, the individuals you selected as the Executors and/or Trustees 25 to 30 years ago may not be the same individuals you wish to act in that capacity now.

An extremely important document to have as one ages, which is often not properly drafted, is the Durable Power of Attorney (POA). It is most important that the Power of Attorney be Durable (survive your subsequent incapacity) and be sufficiently broad enough to allow the agent to take all steps necessary to protect and preserve your assets in the event of your incapacity. The POA you signed appointing your spouse to act as your agent at a house closing may not be the one you need and want if you suffer a debilitating illness. In my opinion, you should have a Durable Power of Attorney with as many powers (including broad gifting powers) as humanly possible. Many Guardianship proceedings would be avoided in their entirety if a sufficiently broad POA was in existence.

C. Organize and review all existing insurance policies. We often know that we have purchased life, disability and long term care insurance, but, it may be years since we assessed the adequacy of the coverage and the policies. For example, do you have life insurance that is term, universal and/or whole life? Is the death benefit sufficient to meet the current needs of your family and/or loved ones in the event of your demise? From an estate tax and planning perspective, it may be wise to have the policy owned by a irrevocable life insurance trust, so that it is not part of your taxable estate. You also may not want your 21-year-old child receiving a million dollars outright upon your death. Generally, most insurance professionals are willing to provide a no-cost review of one's existing policies. Additionally, because of the existing low interest rate environment, the policy may not be meeting its projected rate of return, which may significantly impact the cash value projections made when you purchased the policy.

D. Organize and list the names, addresses and telephone numbers of all the professionals you are currently utilizing for your family and/or loved ones. Upon your incapacity or demise the last thing you want your family to deal with is trying to track down your attorney, CPA and/or insurance professionals. Additionally, you should advise your family and/or loved ones as to the professionals you would recommend they contact upon your incapacity or demise. You obviously do not want someone you despise handling your estate.

E. Organize the names, addresses and telephone numbers of your physicians, therapists, pharmacies and other health care providers. At a time of crisis having this information in one spot will be invaluable.

F. Inventory, organize and keep at least 8 years of your financial and bank records. Many families are unsure and unable to locate all of the bank and financial accounts their loved ones have at a time of illness or death. Additionally, if you need to apply for Medicaid to cover your possible stay in a nursing home (which would cost you approximately $15,000 per month if you are not eligible for Medicaid and don't have long term care insurance) you will need the last 5 years of all bank and investment account statements and records.

G. Review what steps if any you have taken to protect your life savings in the event you and/or your spouse/significant other need long term care in the future. Clearly, no one plans to have a stroke or heart attack and/or develop Parkinsons, Alzheimer's or dementia. It's not part of the commercial with you and your loved one walking down the beach hand in hand enjoying the glorious days of your retirement. Unfortunately, things don't always go as planned. I am often reminded by one of my associates of the Jewish saying that "Man plans, God laughs."

Planning for the potential need of long term care is an endeavor that requires foresight and recognition of the fact that it is possible that you may suffer a debilitating and chronic illness. The purchase of long term care insurance should be strongly considered. There are many new products that are available that are a hybrid of life insurance and long term care insurance. Additionally, utilization of a Medicaid Asset Protection Trust should be high on the list of available planning options, especially as you get closer to the age of 65.

H. Review and assess your retirement goals and plans. Retiring from the practice of law as a single practitioner or as a member of a small firm requires an organized plan and strategy. While many of us want to go out with our boots on, doing so without having a plan in place for the transition of your practice and files to other attorneys will create significant havoc for your clients, your estate and family.

I. Review and assess any pension, social security and annuity benefits you are entitled to. Review potential IRA and/or qualified annuities and their minimum required distributions.

J. Review and organize your burial arrangements. The purchase in advance of a burial plot(s), mausoleum, crypt, etc., while it may sound morbid, will generally alleviate a great deal of stress from your family and loved ones upon your demise.

I regularly find myself extolling the virtues of organization and planning to my associates and staff. As we approach the "elder years" it's important that we apply those organizational virtues to our own personal and professional lives. As Winston Churchill once said, "Let our advance worrying become advance thinking and planning."

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The Law and Lifelong Learning

By Charles A. O'Connor, III

For intellectual challenge, societal value, and personal fulfillment, few professions rival the law. This was certainly true in my case. Soon after graduating from Georgetown Law Center in 1967, I found myself prosecuting or defending military personnel out of Danang, Vietnam, contending intermittently with rocket attacks and monsoon rains, while trying to serve wartime justice. Following Navy JAG, I segued into private practice in Washington, D.C., shortly before President Nixon created the U.S. Environmental Protection Agency in December 1970. Soon I was cross-examining leading scientific experts from wide-ranging disciplines at administrative hearings on the potential human and environmental health effects of pesticides. Reflecting back upon my four decades of environmental practice—all with the same law firm, now called McKenna Long & Aldridge LLP—I could not have asked for a more rewarding professional life. Litigating federal, state, and administrative cases, counseling international companies and their trade associations on their environmental compliance, wrestling with state-of-the-art scientific and public policy issues, and co-writing two leading treatises on U.S. chemical regulation, I found every day a different intellectual adventure.

Despite the breadth of my environmental law practice, however, something seemed missing, some wider frame of reference. The law, that jealous mistress of our profession, had distracted me from life's larger questions of meaning and value. Those questions, admonished Socrates, required personal answers in any examined life, and I had given them scant attention since my Harvard undergraduate days as an English major. Then, in 1980, I discovered Georgetown's Liberal Studies Program, which addressed "the intellectual questions of human beings" and furthered "the quest for knowledge about ourselves and our world," in the words of its former director Dr. Phyllis O'Callaghan. Instantly, I was hooked.

Over the next five years I devoted all my available time, after family and practice, to issues in depth psychology, existential philosophy, and process theology. By 1985, I had a master's degree and a thesis on "The Authentic Life According to Nietzsche, Heidegger, and Whitehead." More importantly, I had regained perspective on life by investigating some of the important questions that face us as human beings, parents, counselors, friends, and colleagues—in the words of American philosopher Richard Bernstein, "what we are, what we know, what norms ought to bind us, [and] what are the grounds for hope."

Even a broad practice area like environmental law tends to narrow one's focus; legal specialties beget subspecialties, in my case, chemical regulation. Liberal studies, I found, matched the legal microscope with the humanistic telescope, coupling the intense focus of law practice with the expansive concern for issues that face us as human beings—how to lead more authentic lives, how to make better interpersonal judgments, and how to enrich our own lives and the lives of others.

During the next two decades I endeavored to preserve this new-found perspective by intermittently dipping back into refresher courses and academic discussions. Then, upon reaching my mid-60s and contemplating retirement, Georgetown resurfaced with a unique Doctoral Program in Liberal Studies. What a stimulating way to phase down from active practice—ratcheting up my appreciation for "the best that is known and thought" in the Western tradition, to quote Matthew Arnold. Withdrawing from the partnership into semi-retired status as senior counsel, I returned to Georgetown and embarked on a broad interdisciplinary study of the cultural impact of World War I. I came to realize that the postwar cultural breakdown had contributed significantly to the rise of the modern secular worldview underlying the omnipresent New Atheism—the worldview that reality is merely mindless matter lacking any meaning and purpose, a godless cosmology resting on reductive materialism and Neo-Darwinism. The unqualified materialist claims for its worldview as scientific truth, its deeming belief in God or the transcendent as indefensible self-delusion, presented an irresistible intellectual challenge. I had found my academic quest!

In 2012, I devoted my lawyerly skills to deconstructing the epistemological and metaphysical limitations of materialism in the doctoral thesis entitled *The Great War and the Death of God: Postwar Breakdown of Western Culture, Retreat from Reason, and Rise of Scientific Materialism* (to be published soon by New Academia Publishing). In retrospect, the Liberal Studies Program had proven to be the perfect complement to my legal career, helping me throughout to tack between the minute details of law practice and the global mystery of human existence. Indeed, law practice provided both the intellectual skills and the irresistible impetus toward lifelong learning both within and outside the workplace—a wonderful collateral benefit to an immensely rewarding profession.

Charles A. O'Connor III is a graduate of Harvard College, AB *cum laude* in English, and Georgetown University, JD and DLS. For over forty years he practiced environmental law in Washington DC with McKenna Long & Aldrich, LLP, and its predecessor firms, co-writing the two leading treatises in the field of chemical regulation, *The Pesticide Regulation Handbook* and the *TSCA Handbook*, and serving as chairman of its Environmental Department. He plans to teach a course this semester on the subject of his forthcoming book, *The Great War and the Death of God.*

The Dangerous Myth of Reinvention

By Marc Freedman

Gary Maxworthy spent three decades in business until a personal tragedy prompted him to reexamine his priorities. He left the corporate world behind, set off to find his true calling, and in the process discovered both a new identity and the path to accomplishing his most important work fighting hunger.

In this telling, Maxworthy is an archetypal example of the reinvention mythology that seems omnipresent today, especially when it comes to those in the second half of life. Self-help columns are packed with reinvention tips. Financial services ads depict beaming boomers opening B&Bs and vineyards. *More* magazine, that bastion of midlife uplift for women over 40, even sponsored a series of reinvention conventions.

Retirement itself, we're advised, is being reinvented.

There's no denying the heroic appeal of the reinvention narrative, especially to 50- (and 60-) somethings confronting uncharted territory and the imperative to forge ahead with a new chapter. And this notion surely beats the counter-narrative that says you're washed up at some arbitrary age, your best work behind you with two choices: hanging on or the abyss.

Yet for all its can-do spirit, I've come to believe the reinvention fantasy—the whole romance with radical transformation unmoored from the past—is both unrealistic and misleading. I'll even go further: I think it is pernicious, the enemy of actual midlife renewal.

For the vast majority of us, reinvention is not practical—or even desirable. On a very basic level, it's too daunting. How many people have, Houdini-like, escaped the past, started from scratch, and forged a whole new identity and life? Sure, it happens—but not often, at least outside of Hollywood.

More troublesome is the underlying assumption that the past—in other words, our accumulated life experience—is baggage to be disregarded and discarded. Isn't there something to be said for racking up decades of know-how and lessons, from failures as well as triumphs? Shouldn't we aspire to build on that wisdom and understanding?

After years studying social innovators in the second half of life—individuals who have done their greatest work after 50—I'm convinced the most powerful pattern that emerges from their stories can be described as reintegration, not reinvention. These successful late-blooming entrepreneurs weave together accumulated knowledge with creativity, while balancing continuity with change, in crafting a new idea that's almost always deeply rooted in earlier chapters and activities.

That's a clear lesson inherent in the work of the 430 winners and fellows of the Purpose Prize, an annual award for social entrepreneurs and innovators in the second half of life (sponsored by my organization, Encore.org). In 2007, Gary Maxworthy was one of them.

As a young man, Maxworthy heard JFK's call to service and aspired to join the Peace Corps. But practicality intervened: He had a family to support, and put his early dreams on hold to work. And work he did, for 32 years in the for-profit food distribution business. Then his wife died of cancer. That tragedy forced him to reevaluate his life, particularly how he would spend the coming decades. Maxworthy then joined VISTA, the domestic sister organization of the Peace Corps, which in its wisdom placed Maxworthy in the San Francisco Food Bank.

The food bank, he quickly realized, was only set up to distribute canned and processed foods. Meanwhile, his years in the food business had taught him that an enormous amount of fresh food is discarded daily by growers throughout the state, simply because it is blemished. Drawing on his knowledge of how to distribute large quantities of food in ways that preserved freshness, he launched Farm to Family—which distributes nutritious food, that otherwise would have been thrown out, to food banks in California and elsewhere.

Maxworthy might have been able to do some good as an idealistic young Peace Corps volunteer, but after a significant body of midlife work, he was able to accomplish something truly remarkable, something at the intersection of experience and innovation—qualities long regarded as oxymoronic in nature. You could say Maxworthy put two and two together, except in this case common-sense logic led to something larger: this year Farm to Family distributed over 100 million pounds of food.

I could recount a hundred other tales with essentially the same pattern, and fundamentally the same lessons—tales of reintegration that are not only more pragmatic than the reinvention fantasies but also, to my mind, far more heartening. They affirm the value of what we've learned from life and remind that the seeds of change—even very big change—are often already within us.

Why, then, has the reinvention myth proved so persistent, even as it serves us poorly? I think the answer lies deep in American character and history. Literary critic

R. W. B. Lewis unearthed this cultural vein in his classic 1955 volume, *The American Adam*. From the earliest days of the republic, Lewis wrote, Americans were enthralled with the idea that they could fashion a future liberated from the past. One magazine of the 19th century movement known as Young America wrote, for example, in 1839: "Our national birth was the beginning of a new history…which separates us from the past and connects us with the future only."

D.H. Lawrence observed in 1923 that glorifying the new and jettisoning the old amounted to "the true myth of America." In this narrative, Lawrence writes, America "starts old, old, wrinkled and writhing in an old skin. And there is a gradual sloughing of the old skin, towards a new youth."

That perspective has not only influenced our view of youth, but of later life. The Golden Years retirement mythology was built around the dream of a second childhood, graying as playing. Retirement communities were age segregated not only to avoid school taxes, but somewhat paradoxically, to evade the idea of old age itself. If everyone was old, then no one was old.

To me that's the most damaging part of the reinvention mythology: the preoccupation not only with rebirth, but with youth itself, even as it is slipping away. Today 70 is upheld as the new 50, 60 the new 40 or even 30, and 50 practically adolescence.

So as we head into the resolution season, let's think less about reinvention and more about forging ahead in ways that draw on our accumulated knowledge—what former Alvin Ailey star Elizabeth Roxas-Dobrish describes as "all the things that life has put into you."

And as the nation enters the year in which the youngest of the boomers will turn 50, and we take another sizable step into the graying century, let's think about a new myth of America, one that breaks free from the notion of eternal youth, and that learns to appreciate the true value of experience.

Marc Freedman is CEO and founder of Encore.org. (formerly Civic Ventures). He spearheaded the creation of Experience Corps (now AARP Experience Corps), mobilizing Americans over 55 to improve the education of low-income children, and The Purpose Prize, an annual $100,000 award for social innovators in the second half of life. He is author of *The Big Shift: Navigating the New Stage Beyond Midlife, Finding Work That Matters in the Second Half of Life, Prime Time: How Baby Boomers Will Revolutionize Retirement and Transform America* and *The Kindness of Strangers*. In 2010, *The NonProfit Times* picked Freedman as one of the 50 most influential individuals in the nonprofit sector.

Granny Snatchers Beware: New York Adopts Uniform Adult Guardianship Act

By Anthony J. Enea

On October 23, 2013, New York Governor Andrew Cuomo signed into law the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which became effective April 21, 2014. The UAGPPJA became Article 83 of the Mental Hygiene Law of the State of New York. The enactment of the UAGPPJA helps fill a significant gap that existed in New York Mental Hygiene Law and the Surrogate's Court Procedure Act relevant to jurisdictional issues between states in guardianship proceedings. By adopting the UAGPPJA, New York now recognizes adult guardianships orders from 37 other states, the District of Columbia and Puerto Rico, with the aforestated jurisdictions being required to recognize a guardianship order from the state of New York.

Prior to enactment of the UAGPPJA if a guardian appointed in another state wished to have said appointment recognized in New York, he or she would need to commence a new action in New York and have to re-establish incapacity and the need for the appointment of a guardian of the person and/or property. Additionally, courts, care facilities and financial institutions located in other states would routinely disregard a guardianship or protective order from the courts in New York. In a society as mobile as ours, this lack of uniformity resulted in the unnecessary and time-consuming duplication of legal proceedings and a burden upon the courts. Most importantly, because New York had not adopted the UAGPPJA, the phenomenon commonly referred to as "granny snatching" became more prevalent. Typically, this occurs when during a familial dispute a senior suffering from dementia or another incapacity is moved from his or her home state by a child or other family member to another state. For example, we recently handled a guardianship proceeding where our clients had been appointed Article 81 guardians in New York for their parent. However, their sibling moved the parent from New York to the State of Pennsylvania. Because the UAGPPJA was not yet adopted and effective in New York, Pennsylvania did not recognize the New York guardianship, thus, a new guardianship proceeding needed to be commenced in Pennsylvania.

Although New York's adoption of the UAGPPJA does not change the state's substantive rules regarding guardianship proceedings, it amends the Mental Hygiene Law and the Surrogate's Court Procedure Act in such a way as to create uniform procedures for guardianships and protective proceedings, which will help significantly ease coordination with the courts of other states and provide for simpler procedures for those needing the protection of a guardianship order across state lines. It essentially creates a mechanism for resolving multi-jurisdictional disputes by helping accomplish the following three goals:

(1) Identifying one singular state court to adjudicate first-time guardianship petitions;

(2) Establishing a system of transferring existing guardianships appointments from one state to the other; and

(3) Establishing a system for recognizing and enforcing guardianship orders of one state in another.

An integral legal concept in the UAGPPJA is the preservation of the ward's "home state" jurisdiction irrespective of where the individual is physically located. In effect, a state is required to recognize the jurisdiction of the individual's home state, and to cooperate with the home state as to a variety of issues. Pursuant to §83.03(E) of the Mental Hygiene Law "home state" is defined as the state in which the alleged incapacitated person (AIP) was physically present (including temporary absences) for at least 6 consecutive months immediately before the filing of the petition; or if none, the state in which the AIP was physically present (including temporary absences) for at least 6 consecutive months prior to the filing of the petition. Section 83.03(M) also contains the definition for a "significant connection state," which is a state other than the "home state" with which the AIP has a significant connection other than mere physical presence and where substantial evidence concerning the AIP is present. Clearly, this is a definition that gives recognition to the phenomenon known as the "snow bird." Thus, there are limited circumstances where guardianship orders can be entered by a state that is not the "home state."

Some of the other noteworthy provisions of the newly enacted Article 83 of the Mental Hygiene Law are as follows:

(a) §83.07 which permits the New York court to communicate with a court in another jurisdiction, and the court may allow parties to participate in the communication for a proceeding under Article 83;

(b) §83.09 encourages cooperation between courts. For example, the New York court can request that the other court hold an evidentiary hearing, order

a person in that state to produce evidence or give testimony, and order that an assessment or evaluation of the AIP be performed;

(c) §83.13 identifies various significant connection factors that may exist in helping to determine whether the AIP has a significant connection with a particular state. For example, ties to the state such as voter registration, location of property, tax return filings, driver's license and social relationships;

(d) §83.15 states this Article will be the exclusive jurisdictional basis for a New York court to appoint a guardian or issue a protective order. Pursuant to §83.01(I), a "protective order" is defined as an order appointing a conservator guardian of the property or other order related to management of an adult's property;

(e) §83.21 except as provided in Article 83.19, a court that has appointed a guardian of the person or issued a protective order consistent with this Article has exclusive and continuing jurisdiction over the proceedings until it is terminated by the court or the appointment or order expires by its own terms;

(f) §83.31 provides the procedures for the transfer of the guardianship from one state to another.

In conclusion, it is anticipated that New York's enactment of the UAGPPJA will create a predictable and expeditious process for the initial appointment of guardians in another state, the transfers of existing guardianships to other states or the recognition of orders from other states. Additionally, it is hoped that granny snatching and elder abuse will be significantly reduced as a result of its enactment. While only time will tell how helpful the UAGPPJA will be, its enactment in New York is clearly a significant and important step in the right direction.

Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has a home office in Somers, New York. He focuses his practice on Elder Law, Guardianships, Medicaid Planning and Applications, Wills Trusts and Estates.

Mr. Enea is the Immediate Past Chair of the Elder Law Section of the New York State Bar Association. He is President of the Westchester County Bar Foundation and is the Vice President of the Columbian Lawyers Association of Westchester County.

Mr. Enea is a Past President of the Westchester County Bar Association. He is a Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA.

AEP: A Significant Opportunity

By Fern Schair and Nicholas Macri

Introduction and History

The recently created Attorney Emeritus Program (AEP) provides a significant opportunity for some experienced attorneys to use their enormous skills and abilities to connect with others and help those in need. As one of his many creative initiatives to tackle the access to justice crisis for low-income, unrepresented litigants, Chief Judge Jonathan Lippman launched the AEP, to encourage experienced attorneys to provide pro bono legal services. The AEP seeks to take advantage of the growing pool of attorneys age 55 years or older and to engage them in pro bono service. This cohort is burgeoning in New York and across the nation and reflects an extraordinary potential resource of seasoned, skilled advocates.

Pro bono resources present both an opportunity and a challenge during these difficult fiscal times, where the demand for civil legal services for low- and moderate-income New Yorkers is higher than ever, but where legal services programs are experiencing lay-offs and diminishing capacity to recruit, supervise, and manage volunteers.

Chief Judge Lippman saw the opportunity to enlist this group of lawyers, some of whom are retired or close to retirement and who have the potential to provide legal services to low- and moderate-income New Yorkers in need.[1] He worked with the Administrative Board of the Courts to create a new attorney registration status, called Attorney Emeritus. Any attorney age 55 or older who has at least 10 years of experience in legal practice and is in good standing may register as an Attorney Emeritus by committing to provide at least 60 hours of pro bono service over a two-year period.

Advisory Council

To help implement the AEP, Chief Judge Lippman created the Attorney Emeritus Program Advisory Council, which consists of statewide representatives of the private bar, the legal services and pro bono communities, the court system, law schools, and the nonprofit sector. To chair the Council, Chief Judge Lippman appointed Professor John D. Feerick and Fern Schair from Fordham Law School's Feerick Center for Social Justice (see pp. 37–38 for a list of Council Members).

Chief Judge Lippman has asked the Council to advise the courts on ways to ensure that volunteers provide high-quality legal services and to make the volunteers' experience satisfying and productive. The Council also serves as a bridge between the AEP and the legal services community, the bar, and the nonprofit sector. The Council has three committees that address specific aspects of the Program: the Recruitment and Matching Committee seeks to improve volunteer outreach efforts and ensure that lawyers are matched with meaningful volunteer opportunities. The second, the Training and Supervision Committee, works to ensure that legal service providers have the ability to provide adequate training for AEP attorneys and to help them make the transition to a pro bono environment. To aid that effort, the New York Community Trust provided a generous grant to survey the field of training resources and to build a network of training opportunities. The third, the Recognition Committee, has advised about potential opportunities to recognize AEP service.

Program Updates—CLE

The most noteworthy change to the program, announced in 2013, has been in the number of CLE credits attorneys can earn for their participation. Previously, attorneys could only earn six CLE credits for doing pro bono work; this has been changed to allow attorneys to earn 10 CLE credits. In addition, attorneys who are enrolled in the AEP can earn up to 15 CLE credit hours by working with an approved AEP host organization or up to 10 CLE credit hours through an Approved Pro Bono CLE Provider and the remaining CLE credit hours through an AEP host organization. The final change to CLE rules is that attorneys can now earn one CLE credit for 120 minutes of eligible pro bono service, rather than the previously required 300 minutes.[2]

Program Demographics

Volunteer Information

There are currently more than 800 attorneys enrolled in the AEP. Approximately 58% of these attorneys changed their attorney registration to "Emeritus" on their biennial registration. There is also an online application that attorneys can submit to enroll in the program (http://www.nycourts.gov/attorneys/volunteer/emeritus/rsaa/). About one-third of the attorneys enrolled used this method, and there is a small number who both changed their registration and submitted an application. The online application allows the AEP to get more information about the attorney, such as their experience, and their preferred placement.

Attorneys all across New York State have enrolled in the AEP. Forty-five percent of these attorneys come from outside the New York City area. There are also a small number of attorneys, 13%, who reside outside of New York State.

Currently there are more males enrolled in the AEP, approximately 71%. This gender distribution is consistent with the historical average of attorneys admitted to the bar during the 1970s and 1980s, the timeframe for the majority of Emeritus attorneys.[3]

AEP Pro Bono Opportunities

There were 41 Legal Services Providers (LSPs) when the program began. That number has been increased to 58. AEP sites provide training and supervision to pro bono attorneys and are required to carry legal malpractice insurance for all volunteers. Organizations seeking to become approved to work with the AEP must submit an application which is reviewed by Justice Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts and Director of the New York State Access to Justice Program. There are AEP pro bono opportunities in 23 counties across the state of New York. Over 200 job descriptions have been developed for the attorneys and more are in progress.

Outreach Efforts

A number of efforts are being undertaken to recruit new volunteers to the program and to match the current volunteers with pro bono programs. These efforts include regional task forces, law firm outreach, and information sessions.

Regional Task Forces

Our efforts to develop a new regional task force have begun in Albany County. Lillian Moy, executive director of The Legal Aid Society of Northeastern New York, recently sent out a request to area law firms to sign on to the Emeritus Program. Feerick Center staff has discussed AEP in several local meetings, including Legal Aid Northeastern's Private Attorney Involvement Committee and a meeting of the Capital District Pro Bono Coordinators, held March 19th. Plans are under way to increase awareness of the Program through publicity by area bar associations and an AEP social event, tentatively slated for this June.

Progress is also being made in Monroe County with the help of Sheila Gaddis of the Volunteer Legal Services Project (VLSP) of Monroe County. In addition, a member of the Feerick Center staff will be attending the next VLSP Board meeting to encourage law firm participation in the area. In the fall of 2013, the Monroe County Bar Association sent out a survey to its members to gauge area lawyers' interest and knowledge of the program. Valuable data was gathered, and the Feerick Center staff members

Court Navigators for Litigants Without Lawyers

New York's Chief Judge Jonathan Lippman announced in his State of the Judiciary address on February 11th another new aid for the literally millions of unrepresented people struggling all alone in New York's courts. For the first time in this state's history, the poor person facing a lawsuit that threatens to evict her and her children from their home or have their financial well-being destroyed will have the right to bring someone into court to be at her side. As we know, most often in these kinds of cases the person who cannot find or afford a lawyer is not only all alone, but faces landlords or debt collectors who do have well-trained lawyers to represent them—hardly the fair, well-balanced judicial system created by our Constitution.

Last year, the Chief Judge created a Committee on Nonlawyers and the Justice Gap to think about new roles for those without formal legal training, and the idea of providing aides to accompany those facing stressful hearings on their own was quickly and forcefully suggested by a number of academicians and advocates. While fairly novel in this country, the role is similar to the supportive role played by nonlawyers in England, Wales and other Commonwealth countries. It has also for some years been authorized in the New York Family Court in some domestic violence cases.

Starting in March of this year, trained nonlawyers provide assistance in preparing the individual for the court appearance so he or she might know what to expect, help to sort through the many papers and documents that are present or may be needed, and inform him or her of appropriate or available court services (e.g., language interpreters). They would not give legal advice, nor discuss legal strategy, nor speak up for them in court. Indeed, unless the judge directed a factual question towards them, they would not speak on the record at all in the courtroom. They are allowed to prepare reminders in writing ahead of time and point to them during the proceeding, are able to whisper suggestions as long as not disruptive to the process, and take notes while the hearing is going on to help the individual remember what he or she is directed or requested to do by the judge.

The popular WebMD website advises those visiting a doctor to "take an advocate" so that the person can be by his or her side, take notes, and can help the individual to understand what happened and remember what comes next. The need in both situations is the same; stress and anxiety can make people poor listeners.

While this is just a small incubator project being started in one landlord/tenant part and one consumer debt collection part, this breakthrough shepherded by New York's Chief Judge is one of many significant advances he has created so that New Yorkers navigating a complex judicial system on their own will not be entirely without resources. Chief Judge Lippman, and anyone else who thinks about these issues, would prefer a trained lawyer to assist every person facing such difficult, stressful situations. But for the over 2 million New Yorkers who were unrepresented and alone last year, some assistance is much better than none.

Fern Schair
Chair, Feerick Center for Social Justice, Fordham Law School
Co-Chair, Committee on Nonlawyers and the Justice Gap

are working to develop programming based on the feedback received.

AEP Council Member James L. Magavern has been instrumental in coordinating outreach in Erie County, where Bob Elardo of the Erie County Bar Association Volunteer Lawyers Project has helped to publicize the program. Another AEP council member, Justin Vigdor, has been very helpful in organizing the efforts in Monroe County.

Large Law Firm Outreach

Because of their expertise and infrastructure to support and develop volunteer attorney efforts, law firms have the potential to be one of the important stakeholders within the AEP. Law firms provide malpractice insurance and are able to support complex litigation and other advocacy efforts. They also sometimes have the resources to provide training, supervision, administrative support, and physical office space for volunteer attorneys. Moreover, the firms often have ready access to partners over the age of 55 and many remain connected to retired partners.

The AEP recognized law firms as key partners in successfully establishing and developing the Attorney Emeritus Program and has encouraged their participation. The chair of the Recruitment and Matching Committee, Robert C. Sheehan, developed a law firm "Statement of Participation," which memorializes and documents the firm's commitment to incorporate AEP and pro bono service into firm culture, and has now been signed by the managing partners of 13 large law firms.[4]

Information Sessions

To help facilitate placement and matching, the Feerick Center began holding information sessions for attorneys enrolled in the AEP. These information sessions offer a chance for attorneys seeking to connect with LSPs who need volunteers. The attending LSPs are able to present their programs to the attorneys, who can then ask questions and see if the project would be suitable for them.

The inaugural information session took place on March 19, 2014. It was held at Fordham Law School in New York City. Seven host organizations were on hand to answer questions from prospective attorneys and hand out job descriptions describing their opportunities. The information session provided a great networking opportunity for the attending attorneys. The Feerick Center scheduled an additional information session at the law school for May 1, 2014.

Volunteer Impact

The legal profession has a long and proud history of pro bono in so many areas all across New York. Some do limited legal advice, some take on full representation of unrepresented clients, and some play a variety of other roles. They assist unrepresented litigants with their legal problems. James E. Privitera, Esq., an Emeritus Attorney located in Erie County commented on the satisfaction many attorneys feel:

> The New York State Attorney Emeritus Program is the icing on the cake to a profession full of opportunity and good fortune. Indeed, there is no need to find an encore career! Through this program, I have been afforded the opportunity to make a genuine difference in our community at a time when there has never been a greater need. Additionally, my volunteerism with the Neighborhood Legal Services, Buffalo, NY in Landlord-Tenant Court has enlightened and enriched me both personally and professionally. The clients I serve could not be more appreciative! I am humbled to join the attorney's before me that have contributed their skills and expertise to countless hours of pro bono legal work in New York State.

Conclusion

The New York bar is notable for its long tradition of prioritizing access to justice issues and providing legal services to those in need. With the development of the Attorney Emeritus Program, under the leadership of Chief Judge Lippman, there is another opportunity for experienced attorneys to draw on that tradition and redouble our efforts to foster equal access to justice for all New Yorkers. In these difficult economic times, it will take a vast amount of resources to meet the challenge of providing civil legal services to New Yorkers in need.

For general information please visit: http://www.nycourts.gov/attorneys/volunteer/emeritus/index.shtml or call 877-800-0396.

Advisory Council Members

Council Co-Chairs

John D. Feerick, Senior Counsel and Founder

Fern Schair, Advisory Board, Chair

Council Members

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T. Andrew Brown, Brown & Hutchinson

Kathy Hirata Chin, Cadwalader, Wickersham & Taft LLP

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Natalie Gomez-Velez, Associate Dean for Academic Affairs, CUNY Law School

Stephen W. Greiner, Counsel, Willkie Farr & Gallagher LLP

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Elizabeth Hubbard, Former Executive Director of the Fund for Modern Courts

James L. Magavern, Counsel, Magavern Magavern Grimm

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Catherine Samuels, Former Director, Access to Justice Program, Open Society Institute

Cynthia Schrock Seeley, Immediate Past President, Women's Bar Association of the State of New York

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Jane R. Stern, Former Program Director, New York Community Trust

Madeline C. Stoller, Former Chair, Public Service Network, New York City Bar Association

Justin L. Vigdor, Senior Counsel, Boylan Brown

Ex Officio

Helaine Barnett, Chair, Chief Judge's Task Force to Expand Access to Civil Legal Services

Charlotte Davidson, Chambers of Chief Judge Jonathan Lippman, New York State Unified Court System

Hon. Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts/Director, Access to Justice Programs, New York State Unified Court System

Antonio E. Galvao, Esq., Counsel to the Chief Judge, New York State Unified Court System

Jonathan Lippman, Chief Judge of the State of New York and Chief Judge of the Court of Appeals

Feerick Center for Social Justice—Administrative Support

Dora Galacatos, Director, Fordham School of Law Feerick Center for Social Justice

Nicholas Macri, Civic Corps Member, Fordham School of Law Feerick Center for Social Justice

Katie McConnell, Vista Co-Director, Fordham School of Law Feerick Center for Social Justice

Wilma Tamayo-Abreu, Administrative Assistant, Fordham School of Law Feerick Center for Social Justice

Samantha Varn, Civic Corps Member, Fordham School of Law Feerick Center for Social Justice

Endnotes

1. There is anecdotal evidence, which suggests that because of the physical and mental demands of law practice and because many lawyers have been able to provide financially for a comfortable retirement, many choose to retire from law practice between the ages of 55 and 70. *See* New York State Bar Association Special Committee on Age Discrimination, Report and Recommendations on Mandatory Retirement Practices in the Profession 5 (Jan. 2007), *available at* http://old.nysba.org/AM/Template.cfm?Section=Home&ContentID=58739&template=/CM/ContentDisplay.cfm.
2. New York State Unified Court System, New York State CLE Board Regulations and Guidelines (July 2012), *available at* http://www.nycourts.gov/attorneys/cle/regulationsandguidelines.pdf.
3. American Bar Association Section of Legal Education and Admissions to the Bar, First Year and Total J.D. Enrollment by Gender 1974-2011, *available at* www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf.
4. Firms completing the Statement of Participation to date include: Chadbourne & Parke; Davis Polk & Wardwell; Debevoise & Plimpton; Hiscock & Barclay; Hughes Hubbard &Reed; Kay Scholer; Proskauer Rose; Reed Smith; Simpson, Thatcher & Bartlett; Skadden Arps, Slate, Meagher & Flom; Sullivan & Cromwell; Weil, Gotshal & Manges; Wilkie, Farr & Gallagher.

Fern Schair has been Chairperson of the Feerick Center Advisory Board since its inception. Her recent professional positions include: Senior Vice President of the American Arbitration Association, Chief Administrative Officer of the New York City Bar Association, Program Development Officer for Civil Justice Programs at the Open Society Institute (Soros Foundation), and Director of Civil Justice Programs at the Fund for the City of New York. Her current civic positions include member of the Board, Immediate Past President, and Co-Founder of the Children's Law Center; former Chair and current Board member of the Fund for Modern Courts; Vice-Chair of the Judicial Committee on Women in the Courts (NY); Co-Chair of the Advisory Committee on Court Interpreters; former Board Chair and current Emeritus Board member of Legal Services-NYC; Co-Chair of the Chief Judge's Advisory Council on the Attorney Emeritus Program; Co-Chair of the Committee on Nonlawyers and the Justice Gap; and member of the Committee on Character and Fitness for the First Judicial Department. Ms. Schair attended Cornell University and graduated from St John's School of Law.

Nicholas Macri is a member of the 2013-2014 New York City Civic Corps and is excited to be working with the Feerick Center as a program coordinator for the Attorney Emeritus Program and CLARO (Civil Legal Advice and Resource Office). Mr. Macri recently graduated from the St. John's University Tobin College of Business with an MBA in Executive Management. Prior to joining the Civic Corps, he participated in a number of service projects including a missionary trip to Chepnyal, Kenya where he worked with the Daughters of Charity on a number of ongoing projects, including facilitating a summer camp for local youth and organizing small business seminars.

Senior Appellate Attorneys Drive Success of New York Pro Bono Program

By Cynthia Feathers and Susan Patnode

Introduction

Cynthia Feathers

"Senior" as a label for an attorney can be based on both age and depth of experience. One realm in which extensive experience of senior attorneys has a significant impact is appellate practice. The seasoning and judgment that come from many appeals over many years can inform strategic decisions made and skills applied. For this reason, the New York State Bar Association's (NYSBA's) Pro Bono Appeals Program (PBAP) decided that a core element of the venture would be using many senior appellate attorneys as volunteers. Several of the PBAP volunteer attorneys are emblematic of the crucial role seniors play in the program.

The Pro Bono Appeals Program

Four years ago, the NYSBA Committee on Courts of Appellate Jurisdiction (CCAJ) joined forces with the Rural Law Center of New York (RLCNY) and the Legal Project to launch the PBAP. The pilot, established with the approval of the NYSBA Executive Committee and funded by The New York Bar Foundation, initially focused on family court appeals in the Third Department and then expanded to include additional topics and appeals in the Fourth Department and the Court of Appeals. Hiscock Legal Aid Society in Syracuse and the Monroe County Public Defender in Rochester are new program partners.

To be eligible for pro bono representation, applicants must have income of 250% or less of Federal Poverty Guidelines and have a case involving the essentials of life, such as custody, divorce, health, housing, unemployment insurance or Workers' Compensation. In selecting cases for acceptance, a group of appellate attorneys from the committee do a careful merits review of every application. For cases not chosen, a discussion of problems with the appeal is provided, along with a pro se appeals manual created by CCAJ.

Cases selected are given a confidential name and described on a listserv distributed to the nearly 100 appellate attorneys on the volunteer panel. About half are non-committee members. The RLCNY pays a salary to two CCAJ members who provide extensive support to the volunteer attorneys, including in-depth case analysis, record on appeal preparation, and motions. Also, RLCNY provides an office in downtown Albany and a paralegal to assist with appeals. PBAP and RLCNY recently met with colleagues at the New York City Bar Association to discuss how that Association could create its own pro bono appeals program for appeals to the First and Second departments.

Susan Patnode

Helping litigants in need and creating favorable precedent that can benefit other similarly situated persons are reasons enough for advancing this mission. But the gratitude expressed by our clients also fuels our efforts and remind us why we created this program. Here's what one client recently emailed his pro bono attorney: "You have given me one of the nicest gifts I have ever received. Your brief was nothing short of superb and has given me a better chance in my appeal and in my life. My deepest thanks to you for embracing the spirit of giving."

Five Senior Attorneys Describe Their Roles

Malvina Nathanson, Esq. (New York City)

> I have been handling appeals for almost all my years of practice (48 years, beginning in January 1966). Although I have concentrated in criminal and post-conviction matters, handling no more than three dozen civil and Family Court matters, the Pro Bono Appeals Program gave me the opportunity to broaden my scope. I was able to settle an appeal from the denial to a grandmother of visitation rights so that she was able to visit her grandchild, and I pursued an appeal for a father whose four-month-old daughter had been temporarily placed in foster care due to what I considered to be unfounded charges of neglect. Unfortunately, the Third Department affirmed, and the Court of Appeals denied permission to appeal, but it was gratifying to "fight the good fight" even though the appellate courts didn't see it my way. I am glad to report father and child are doing well.

Josh Koplovitz, Esq. (Wapner, Koplovitz & Futerfas, Kingston)

> During the more than 50 years I have been a practicing attorney, handling ap-

peals has been my secret passion. For four years close to the very beginning of my professional career, that was pretty much all I did as the chief of Federal criminal appeals for the New York City Legal Aid Society. After I left Legal Aid for private practice, I continued to handle a bunch of appeals. But as I got more and more into a general practice, the appeals became few and far between—and I really missed them. When I heard about the Pro Bono Appeals Program, I did not hesitate to sign up, and I recently completed my first appeal. It was a totally satisfying experience and I anxiously look forward to the next one. It's a great way for a senior attorney to stay involved.

Elizabeth Bernhardt, Esq. (Cohen & Gresser, LLP, New York City)

For nine years (1995 to 2004), I wrote briefs, argued, and supervised junior appellate attorneys at the Bronx District Attorney's Office. I argued before the First Department, the New York Court of Appeals, and the Second Circuit Court of Appeals on many occasions, primarily in criminal cases as respondent, but occasionally in civil matters as well. I have taught brief-writing and oral argument skills at Fordham Law School (1995 to 2003) and Columbia Law School (2008 to the present). At Cohen & Gresser LLP, where I am counsel, I have participated in several civil appeals since 2004. It is a privilege to use this experience to assist the Pro Bono Appeals Program helping to select meritorious appeals and enabling them to be heard.

Alan Pierce, Esq. (Hancock Estabrook, LLP, Syracuse)

I am an appellate attorney in private practice for 28 years after clerking for Judge Simons at the Court of Appeals. Before I became involved in the Pro Bono Appeals Program in 2011, however, I had not handled any Family Court appeals. I thoroughly enjoy the challenge and reward of handling appeals for the program that involve the appellate process I know well but involve substantive law with which I am not completely familiar. I am currently working on my fifth and sixth pro bono appeals and love the professional experience, while simultaneously satisfying both my personal desire and my professional duty to do pro bono. Come join us—you'll love it.

Cynthia Feathers, Esq. (Albany)

From the outset of my legal career in 1988, I have concentrated in appeals, clerking at the Third Department, serving in the Opinions & Appeals Bureau of the state Department of Law and at the Center for Appellate Litigation in Manhattan, and later establishing a solo practice. In analyzing applications and helping select cases for the Pro Bono Appeals Program, the years of experience doing matrimonial, Family Court, and unemployment insurance cases have been invaluable in identifying meritorious issues and problems with appeals and in determining where pro bono resources could most productively be directed.

Conclusion

Pro bono is not just an endeavor to give young attorneys a chance to learn. It is also a place for senior attorneys to apply their unique skills and experience to help vulnerable persons in need. The PBAP welcomes other senior attorneys as volunteers. If you have appellate experience and want to become involved, please contact us at info@probonoappealsny.org. If you do not have appellate experience but would still like to participate, we encourage you to contact us. We will find projects you can help with, such as doing legal research and analysis or offering consultation services in areas where you have expertise in the relevant substantive area of the law.

Cynthia Feathers has 25 years of appellate experience. She served a clerkship at the Appellate Division, Third Department; gained experience at the State Attorney General's Office in Albany and the Center of Appellate Litigation in Albany; and now has a solo practice in Glens Falls and Albany. Ms. Feathers also served as an Adjunct Professor of Appellate Practice at Albany Law School. She recently chaired the Pro Bono Committee of the American Bar Association's Council of Appellate Lawyers. Currently, she co-chairs the New York State Bar Association's Committee on Courts of Appellate Jurisdiction, which is responsible for the Pro Bono Appeals Program, along with the Rural Law Center of New York and other program partners.

Susan L. Patnode is the Executive Director of the Rural Law Center of New York, Inc. Through the Center, she has been engaged in community collaborations and partnerships designed to address systemic rural issues impacting access to justice. She is a certified arbitrator and mediator through the Rural Law Center's five-county Community Dispute Resolution Centers. Ms. Patnode has been an adjunct faculty member at the State University of New York at Plattsburgh for over 10 years, where she has offered courses in Family Law, Social Services Law and Women and the Law.

The Importance of a Life Insurance Performance Evaluation

By Henry Montag, CFP, CLTC

Have you ever discovered a bank entry error in your checking register, resulting in a balance $100 or $1,000 less than what it should be? Imagine how much worse you would feel if your, or a client's Life Insurance policy worth $1,000,000, or more, that you thought would be available to a spouse, child or others upon death, were rendered unavailable due to a technicality.

Flexible Premium Life: The Industry's "Ticking Time Bomb"

Among the important reasons why a Life Insurance contract should have its performance evaluated and monitored is to determine how much longer the contract is expected to remain in force. The reason you need to be proactive, whether your client privately owns or is an amateur trustee responsible for a trusts owned life Insurance contract (TOLI), is because a great majority (85%) of life Insurance contracts that were purchased over the last 25 years were known as Flexible Premium Life Insurance contracts that are now in danger of expiring years earlier than originally anticipated (33%). These flexible premium life Insurance contracts will not sustain death benefit coverage for a lifetime because their originally illustrated performance was geared to last for a finite number of years, usually to age 95, based on a projected annual interest rate that was not guaranteed nor has been achieved.

The problem today is that very few private owners, amateur trustees nor many professionals are aware that their Life Insurance contracts can expire years earlier than originally anticipated. The client and trustee often incorrectly assumed that either the agent or Insurance Company was monitoring the situation to make sure the Insurance contract would continuously remain in force, but that wasn't the case. As a matter of fact, it would be in the Insurance Company's best interest if after all those years of an owner/trustee paying the premium it became exorbitantly expensive to maintain the contract and the Death Benefit had to be reduced or the policy surrendered for its cash value.

Allow me to explain: back in the mid-1980s, when prevailing interest rates were as high as 17%-18%, there were only two types of Life Insurance contracts: Term Life Insurance, in which a specific dollar amount of life Insurance was guaranteed to remain in force for a specific period of time at a specific guaranteed premium; and Whole Life Insurance, which was guaranteed to remain in force for the entire life of the insured. These Whole Life contracts contained an accumulation account known as Cash Value, which was typically earning 3% annually. The Cash Value was available to be withdrawn and used for any purpose, so long as the owner paid a contractual 5% annual interest charge on the money that was withdrawn.

In a Whole Life contract, if a person had an accumulated Cash Value of, say, $100,000 earning 3% interest, the owner had the ability to borrow the money at 5% and then place those dollars in a money market or savings account, where they could have earned, say, 15%. Thus, without any additional risk, the owner would be able to earn an additional 10% on their $100,000 of Cash Value, a meaningful sum.

Due to the competition from banks' significantly higher interest rates of the mid-1980s, the insurance industry watched billions of dollars from their Cash Value coffers being withdrawn and transferred to the individual bank accounts of the people it insured. In order to stop these outflows, the life insurance industry created a new product called "Flexible Premium Life Insurance," which consisted of Universal, Variable, Indexed or Adjustable Life Insurance, all of which paid an interest rate or yield based on prevailing market conditions, rather than a guaranteed fixed rate, as had been the case in Whole Life contracts. If interest rates or yields rose, then one's insurance coverage would become less expensive or last for a longer period of time as a result of the larger amount of accumulated cash value.

What was not as clearly understood, however, was that if interest rates decreased, then the opposite would be true and the length of time their coverage would remain in force would consequently be reduced. And unless a greater annual premium was paid to the Insurance Company, the Insurance coverage would expire years earlier than had originally been anticipated. In other words, the flexible premium life contract provided no guarantee as to how long the coverage would remain in force. If interest rates maintained their projections, everything was fine, but if interest rates fell below their assumed projections, as they did over the last 20+ years, there would be a problem.

The problem being faced today by many private owners and amateur trustees, responsible for maintaining their trust owned life Insurance, is that their coverage is expiring years earlier than originally anticipated as a result of two factors:

1. Steadily, steeply declining interest rates 18% in the mid-1980s to 3% today

2. Failure to adequately adjust premiums upward to keep pace with lowered rates.

   This combination of interest rate risk and neglect on the part of those responsible for the contracts maintenance is resulting in, according to the Industry's own in force illustrations, an anticipated 30-35% of today's Universal Life coverage expiring years earlier than originally projected. To understand how so many individuals have been adversely impacted, let's look back to the mid-to-late 1980s. When flexible premium life Insurance was first offered, agents and brokers would determine the annual required premium in the following manner. First they established a particular dollar amount of life Insurance coverage required, then they would ask their clients how long they wanted the coverage to remain in force. Clients would typically respond that they wanted the coverage to last forever. But, once it was explained that the longer they wanted the coverage to last the more it would cost and conversely the shorter they wanted it to last the less it would cost, clients began looking at a reasonable age that they wished their coverage to remain in force for. A typical age was somewhere between age 90-95. Next an average interest rate was assumed for the 20-30 year period going forward. Once the amount of Insurance, the assumed interest rate, and the length of time the contract was supposed to have remained in force for was established that information would be input into a computer and a specific annual premium was determined. The resulting problems that have since occurred stem from this assumed interest rate that was neither achieved nor guaranteed, nor adjusted upwards to make up for the lost anticipated earnings of Interest rates in universal contracts, or stock or bond yields in the case of variable life contracts.

While this interest-sensitive product stopped the tremendous outflow of monies from the insurance industry's cash value coffers to the banks, the solution was not in the best interest of many of the individuals that purchased this product simply because these same individuals were not aware that going forward they assumed 100% of the performance risk of these non-guaranteed contracts. In the late 1980s, when interest rates were 16-18%, many assumptions were made that interest rates would remain in the 10-12% range for a long period of time. Even the more conservative agents and brokers were projecting 9-10% rates. Although those assumptions seemed perfectly reasonable at the time, our current low interest rate environment of 2-3% has decimated Universal Life contracts with even the most conservative projections.

As a result, the original assumption that a life Insurance contract would last until the person was age 95, has been shortened by as many as 7-9 years. While Universal Life has received the majority of the blame in the Insurance Industry it needs to be pointed out that double- and triple-A-rated Insurers are now beginning to also feel the effects of low interest rates as their Whole Life contract holders are being asked to either reduce their death benefits or increase their premiums as a result of poorly performing dividends, which are not guaranteed.

A performance evaluation of a Universal Life contract examines the actual interest rate return earned each year since the policy was purchased and actuarially determines how long the contract will last based on (1) the historic actual return, (2) the current age of the insured, (3) any outstanding loans, (4) current mortality costs and expenses. Many private owners and trustees responsible for their trust-owned life Insurance have neglected to request this historical projection, and to this day are not aware of the effect this shortfall will have on their life Insurance coverage. The more advance notice a trustee has to discover a potential shortfall, the less additional monies are needed to adjust the coverage simply because they'll have more time to spread out the additional monies needed to restore the coverage back to its originally projected level. I have often referred to the hidden risk of premature expirations of coverage in Flexible Premium Life Insurance contracts as the insurance industry's "Ticking Time Bomb" because sufficient disclosure was not made indicating this new product was Not Guaranteed to last for one's lifetime. The combination of a low interest rate environment and the fact that the octogenarian demographic is the fastest growing segment of the population is causing Life Insurance to expire while a great many grantors are only in their mid-80s at a time when people are living longer. More effort needs to be made to educate grantors as well as amateur trustees of this problem.

My greatest concern is that individual trustees, many of whom are the sons and daughters of the insured (or the grantor of a trust), are to this day not even aware that they have a problem as a result of their "Buy and Hold" rather than what should have been their "Buy and Manage" philosophy. This inaction can be viewed as a failure of their fiduciary responsibility as a trustee, leaving them vulnerable to litigation from other family members/beneficiaries that may lose trust assets in the process. Even if an amateur trustee is not personally sued, the negative family dynamic is certainly one to be avoided. According to Donald Walters, General Counsel for the Insurance Marketplace Standards Association, IMSA, "While Insurers have not publicized the issue there is a growing concern in the Industry about lapsing universal life policies." I'm not surprised as there is currently absolutely no incentive nor obligation on the part of the Insurance Industry, the agents, nor brokers to do anything to correct the situation.

While some institutional trustees are aware of this problem and are employing third parties to conduct independent performance evaluations, there remain

problems with many of the smaller bank and regional trust departments who do not follow any such guidelines. According to a 2003 survey in Trusts and Estates, (1) 83% of professional trustees surveyed admitted that they had no guidelines or procedures for handling these problems, (2) 96% had no policy statements on how to handle Life Insurance investments and (3) over 70% of non-professional trustees had not reviewed their trust-owned life Insurance within the last 5 years. However the largest problem lies with the fact that over 90% of TOLI are managed by private or amateur trustees that are not knowledgeable about their duties and are relying on their adviser's for advice. Unfortunately neither the Attorney nor the CPA seem to feel that the area of policy evaluation is within the realm of their area of responsibility so in many cases no one is currently advocating for the Family. This process is not consistent with the prudent Investor principals UPIA, in which trust fiduciaries are required to follow and liable if they don't, French vs. Wachovia July 2011. According to Jan 2007 Fiduciary Advisor Services "Damage to the beneficial interest in these cases is both measurable and significant. Litigation, therefore, may be anticipated."

The disturbing aspect of this situation is that according to recent Office of the Comptroller of the Currency (OCC) guidelines, these Institutional trustees may be negligent in fulfilling their fiduciary obligation to protect trust assets for their beneficiaries. The OCC continues to require bank fiduciaries to follow 12 CFR 9.6(c) and 12 CFR 150.220, which direct them to conduct annual investment reviews of all assets within each fiduciary account for which the bank or trust company has investment discretion. This review should of course also include life Insurance, and should evaluate the financial health of the issuing insurance company, as well as examine whether the underlying policy is performing as illustrated. If the policy is underperforming, or if the policy can be improved upon, the fiduciary should consider replacement or remediation. If the trustee does not have the necessary skills to make this determination, it is the trustee's fiduciary obligation to obtain this expert service from an outside source.

Harvey Pitt, the former SEC Chairman, cautioned banks that in today's heavily regulated post Sarbanes – Oxley environment, they should learn from their sector's past mistakes and replace inadequate and outdated processes with ones that are more efficient and up-to-date. Many of these flawed, outdated processes merely document and focus on the health of the insurance company instead of the shortcomings of the particular Life Insurance policy. Unfortunately, the mere analysis of the life insurance company fails to consider the appropriateness of policy expense as required under Section 7 of the Uniform Prudent Investor Act (UPIA) and the reasonableness of performance expectations as required under UPIA Section 2 and thus will not provide a strong defense in the event of litigation. In accordance with O.C.C. Reg. 9.6c.11, if a trustee determines that it lacks the expertise to evaluate the premium adequacy risk or the contract's appropriateness to fulfill the beneficiary's objectives, the trustee now has an affirmative duty to bring in the necessary experts and inform the beneficiary of the suggested remediation steps.

Reasons to Monitor the Performance Evaluation of Your Life Insurance Contract

While the foregoing considerations are compelling enough by themselves to highlight the importance of regularly evaluating the performance of a Life Insurance contract, private owners and amateur trustees should also consider conducting such evaluations for reasons other than just monetary reasons. One such reason is that the options and riders available in today's Life Insurance contracts were simply not available when they first purchased their Life Insurance contracts.

One example of such an advantage is the Chronic Care Rider. Notably, the Chronic Care Rider first became available at the end of 2011, so any Universal Life contract purchased prior to 2012 does not have this rider available. The Chronic Care Rider allows an individual to withdraw up to $116,000 tax free in 2014 annually adjusted for inflation from the death benefit of his or her Life Insurance contract to pay for qualifying long-term care expenses. This is only the case if the Insured/Grantor meets two criteria: (1) the individual is healthy enough to purchase a new contract from an Insurance Company that contains these provisions, and (2) that the premium on the new contract would be closely similar to the premiums they are currently paying.

Trusts are wonderful tools as they provide management, distribution instructions, tax savings and flexibility for the trustee. However, to be most efficient, Trusts must be updated and reviewed in terms of today's planning options, and Trustees must be better educated in terms of what those obligations and options are and how they can best be executed for the benefit of the individuals they are protecting. A grantor guidance letter is an excellent tool to insure the client's current beneficiary desires and percentages are still accurate as well as a way to informally communicate the information between the trustee and the grantor.

A private owner or an amateur trustee of trust-owned life Insurance has four avenues of remediation should they find themselves in a position in which their life Insurance may expire prior to life expectancy. They can choose to increase the premium in their existing contract. They can reduce the death benefit of their existing contract both remedies with the intent of lengthening the duration of time that their coverage would remain in force on a guaranteed basis. If their health is good, they can shop the marketplace and perhaps purchase a more com-

petitive contract. Should none of the above-mentioned remedies be an option, they may consider a Life Settlement solution, which is an opportunity to sell their life Insurance contract to an Investment group who may be interested in purchasing your contract for a reduced face amount but at a value higher than the contracts cash value and certainly more than they would have received had they surrendered or lapsed the contract.

In conclusion, being aware of the potential problems and opportunities within the life Insurance arena should be a major point of emphasis for private owners, for the unskilled amateur trustees and the advisers that guide them, as well as for the Institutional trustees in order to protect the assets for the benefit of their beneficiaries and to avoid any intra-family disputes that can and should be avoided. A beneficiary can allege a cause of action in several situations. If the Life Insurance coverage prematurely expires and the beneficiary is never made aware that a shortfall could have been corrected. Or if the Trustee does not examine policy expenses as required under UPIA Section 7, since beneficiaries can claim the Trustee was overcharged and the beneficiaries could/should have had greater death benefits for the same premium.

An independently conducted, fee-based actuarially defensible life Insurance performance evaluation not only safeguards a trustee against litigation risk brought about by other family members, but it also is highly likely to benefit the entire family if a lower cost option with a higher death benefit, longer guarantee periods and new riders not previously available were found to be available.

Henry Montag is an Independent Certified Financial Planner who has been in practice since 1976 with offices in Long Island and New York. He is a principal of The TOLI Center East, which provides independent fee-based performance evaluation and monitoring services to private trustees, Institutional trustees and their advisers regarding trust-owned life Insurance.

He has lectured extensively on the subject of the proper utilization of financial products used to protect and preserve assets to organizations such as the New York State Bar Association and the New York State Society of CPA's New York City, Nassau and Suffolk chapters as well as the National Conference of CPA Practitioners. He has developed an understanding of and an appreciation for the overall coordination of various concepts, products and strategies related to Trust-Owned Life Insurance for business owners, private, professional and institutional trustees.

As a source for the media, he has been quoted in *The Wall Street Journal, Investor's Business Daily, Newsday, Long Island Business News*, and has appeared as a guest on Fox News & News 12, FIOS TV, The Main Street Money show and numerous radio programs. He has had articles published in various publications including *Financial Planning Magazine*, National Conference of CPA Practitioners and the Suffolk County Women's Bar Association.

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Take Action to Maintain Reduction in Real Estate Taxes

By Stephanie Braunstein

If homeowners want to keep their Basic School Tax Relief (STAR) exemption and its reduction in taxes, they need to register with the New York State Tax Department.

Section 425 of the Real Property Tax Law provides a partial exemption from school taxes and is available for owner-occupied, primary residences where the combined income of the resident owner and spouse is $500,000 or less. This exemption is known as the Basic STAR exemption.

The STAR Program was proposed by Governor Pataki and signed into law by the Legislature on August 7, 1997. New legislation included in the 2013-14 state budget requires all homeowners receiving a Basic STAR exemption to register with the New York State Tax Department in order to continue receiving the exemption in 2014 and subsequent years.

Owners of one- two- and three-family houses, condominiums, cooperative apartments, and mobile homes are all eligible for the STAR exemption. To qualify, the property must be the primary residence of at least one owner. Local assessment offices consider many factors to determine whether a property is considered a "primary residence," but the most important factor is the length of time the person resides on the property. According to the STAR Assessor's Guide, published by the New York State Department of Taxation and Finance, other factors include a person's voting residence, driver's license, filing status for purposes of state income taxes, and other conduct and behavior that provide evidence as to which property the applicant considers to be his or her primary residence.[1]

In 2012, eligible homeowners saved a statewide average of $700 through the STAR program. The registration process, the first registration requirement since the program was enacted, is designed to protect taxpayers from the costs of fraudulent STAR exemptions that cost taxpayers millions of dollars each year. It is estimated that the cost of duplicate and improper exemptions could increase taxes by $73 million in the next three years without implementation of the new registration process.[2]

For example, there are many cases of "double dipping" where homeowners receive duplicate STAR rebates on both their primary residence and second home. The application for School Tax Relief (STAR) Exemption (RP-425) specifically asks whether "you or your spouse own any other property that is currently receiving the STAR exemption." Married couples who own more than one home are entitled to a STAR exemption on no more than one residence, unless they are living apart due to legal separation. Those married couples who are not legally separated but maintain separate residences, whether for business or personal reasons, are only entitled to one STAR exemption.

In other instances, the state found evidence of improper exemptions where a relative inherits property and continues to receive the exemption, even though the relative is ineligible.

Assessment offices monitor Basic STAR in their local communities but do not have the ability to determine whether an individual is receiving the STAR exemption outside of that jurisdiction. Based on the information provided this year, the New York State Tax Department will confirm eligibility for future years and eliminate some of the "double dipping" while providing a method for qualified homeowners to retain their exemption through registering with local assessors.

Homeowners who currently receive the Basic STAR exemption should receive instructions in the mail from the New York State Tax Department, which includes a "STAR code" necessary for registration.[3]

Registration can be completed either online (www.tax.ny.gov) or by calling the New York State Tax Department (518-457-2036). Homeowners will need to provide some basic information: (1) STAR code and confirmation of property address; (2) names and social security numbers of the owner(s) of the property and spouse; (3) confirmation that the property is the primary residence of one of its owners; (4) confirmation that the combined income of the owner and spouse who reside at the property does not exceed $500,000; and (5) confirmation that no resident owner receives a residency-based tax exemption from another state.

Those homeowners should receive letters from the New York State Tax Department advising them that the assessor will remove the STAR exemption unless they act promptly and complete late registration. The property owners will have forty-five (45) days to respond, or else the assessor will be directed to remove the STAR exemption.

Most homeowners who receive the STAR exemption will see the tax savings directly on their school tax bills. However, for cooperative apartment shareholders, the tax

savings appears on the school tax bill for the cooperative corporation. Those who receive the Basic STAR exemption related to an interest in a cooperative apartment must register under the new legislation. Local assessors provide a breakdown of the exemptions to the cooperative manager, or managing agent, who should then credit the tax savings against the maintenance fees of the shareholder who receives the exemption.

For homeowners who transferred their primary residence into the name of a trust, the property must also be registered under the new legislation. Transfers into certain types of trusts, such as revocable trusts, in which the Settlor retains the right to reside in the property, do not affect eligibility for the STAR exemption, as long as the other requirements listed above are met. Although the trust is the legal owner of the property, for STAR purposes the trust beneficiary is treated as the owner and remains eligible for all property exemptions. The same rule applies for a life estate interest in property. The life tenant (the homeowner) is deemed to own the property for purposes of the STAR exemption and STAR eligibility is based on the life tenant's qualifications. Not all trusts afford the trust beneficiaries the right to STAR exemption, however, and the terms of the trust must be reviewed.

Homeowners applying for a Basic STAR exemption for the first time are not affected by this year's registration procedure. To apply for the STAR program, the homeowner should complete form RP-425, "Application for School Tax Relief [STAR] Exemption," available on the Tax Department's website and file the application with the local assessor.

Those receiving Enhanced STAR are also not affected by the new registration procedure.

For the 2013-14 school year, Enhanced STAR is available to seniors, age 65 and older, whose combined earnings were less than $81,900 in 2013.

In addition to the requirements listed above for the Basic STAR exemption, for the Enhanced STAR exemption, all owners of the property must be 65 years of age or older as of December 31 of the applicable assessment roll year. Certain exceptions have been legislated as follows: (1) for property owned by a married couple, one of the owners must be 65 years of age or older as of December 31 of the assessment roll year; (2) for property owned by siblings, one of the siblings must be 65 years of age or older as of December 31 of the assessment roll year; and (3) for property owned by a surviving spouse where a STAR exemption was previously granted, the spouse must be 62 years of age or older as of December 31 of the assessment roll year.

In order to receive Enhanced STAR, seniors must continue to apply annually or participate in the Income Verification Program. In order to enroll in the Income Verification Program, homeowners need to complete form RP-425-IVP, "Optional Income Verification Program Application," and submit it to the Assessor along with a traditional STAR application. By enrolling in the Income Verification Program, homeowners no longer have to reapply each year and instead authorize the New York State Department of Taxation and Finance to verify income eligibility on an annual basis. Seniors who do not choose to enroll in the income verification program must reapply each year to keep the Enhanced exemption in effect.

Along with the Basic STAR registration requirement, and in an effort to discourage fraud, there are also increased penalties for intentionally providing misinformation (increased from $100 to as much as $2,500), and a taxpayer whose STAR exemption is revoked will be unable to receive the exemption for six years after the revocation. Homeowners found ineligible for the exemption will have the right to administrative review within the Tax Department and before the state Board of Real Property Tax Services.

In order to remain eligible for the Basic Star exemption, it is advisable for all homeowners currently receiving the Basic STAR exemption, including those with an interest in a cooperative apartment or who transferred the home into a trust or a life estate, to register with the New York State Tax Department as soon as possible.

Endnotes

1. Reference the STAR Assessor's Guide, http://www.tax.ny.gov/pit/property/star/assessorguide.htm (October 16, 2012) for more information regarding specific qualifications and questions regarding the STAR exemption.
2. Reference "DiNapoli Audit Finds Errors and Potential Abuses in STAR Program," http://www.osc.state.ny.us/press/releases/feb13/022813.htm (February 28, 2013) for the full press release.
3. Homeowners who do not receive the necessary "STAR code" can find the information using the STAR code lookup: http://www.tax.ny.gov/pit/property/star13/lookup.htm.

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Self-Insurance and the Affordable Care Act

By Mark L. Stulmaker

Over the past decade, there has been steady growth in the percentage of employees covered by health plans that are self-insured by their employers.[1] Rising health care costs, state-mandated coverage requirements, and premium taxes have encouraged many large employers to evaluate their plans and to opt out of the insurance market in favor of the self-funding of their benefit programs. The Patient Protection and Affordable Care Act (ACA)[2] contains additional incentives for employers, both large and small, municipal and private, to self-insure their health benefit programs and will likely accelerate this trend.[3]

However, self-insurance creates financial risks for any employer and raises issues under New York law that are unique to municipal employers. For example, New York's General Municipal Law prohibits the establishment of a reserve fund to accumulate money for the payment of uninsured health care expenses. It also regulates the contractual relationship that a municipality may have with an administrator of a self-insured program.[4] Furthermore, New York law specifically recognizes only two funding arrangements for a self-insured plan sponsored by a government employer: a municipal cooperative health benefit plan authorized by article 5-G of the General Municipal Law and regulated under Article 47 of the Insurance Law, and a collectively bargained welfare fund recognized by case law and Article 44 of the Insurance Law. Both of these funding arrangements require complicated legal and bargaining relationships that may not coincide with a municipality's own goals and finances.

This article begins with a description of self-funded health plans. It then briefly outlines the federal mandates and requirements that apply to those plans before discussing in detail those changes to be ushered in by the ACA. The article then turns to the special considerations of New York municipalities in connection with offering a self-insured health plan, including the funding options available to municipalities for such plans.

Self-Funded Health Plans

A self-funded health plan is an insurance arrangement in which an employer directly assumes the risk of paying the health expenses incurred by participants in the plan.[5] This contrasts with an insured arrangement, by which the employer contracts with a health insurance company or Health Maintenance Organization (HMO) to assume these risks.[6]

Self-funded plans are most prevalent among large employers that can spread the risk of large claims over a greater number of participants. Of those employed by employers with 200 or more employees in 2012, 81% received their health benefits from plans in which the employer directly assumed some or all the risk, versus only 15% of those employed by employers with less than 200 employees.[7] Overall, 72% of all employees employed by a state or local government were covered by a plan in which their employer self-insured some of the risk.[8]

"[S]elf-insurance creates financial risks for any employer and raises issues under New York law that are unique to municipal employers."

In the past, consultants and actuaries have recommended that employers consider a self-funded arrangement when they have 1,000 or more employees.[9] Claims become more predictable at that level, and any one large claim is not a material financial risk. The New York State Comptroller recommends that municipal employers should consider a self-insured health plan only if they have 500 or more employees.[10] However, as noted above, the majority of employers with 200 or more employees now self-insure at least a portion of their health benefit programs.[11]

Smaller employers can purchase stop-loss insurance to protect themselves against the risk of large claims. Stop-loss coverage reimburses the insured employer for claims exceeding a set attachment point for individual large claims and is also available to insure against a large number of claims over a single plan year.[12] In 2012, 58% of workers covered by self-insured plans were in plans covered by stop-loss insurance.[13]

While stop-loss insurance reduces the financial risk associated with self-insuring health benefits, it does not eliminate those risks.[14] Consultants and human resource professionals report that "lasering"—the practice of excluding high-risk individuals from coverage under the stop-loss policy—is often a problem, especially in a tight insurance market.[15]

Further, stop-loss insurance may create cash flow problems for an employer. Beginning in 2014, the ACA prohibits health plans from imposing an annual cap on essential health benefits for any individual.[16] Claims from any single illness will only grow larger and the stop-loss

contract may require the employer to lay out these claim dollars, even to the extent they exceed the policy's attachment point, prior to being reimbursed by the insurance company after a determination process. Some policies provide for these reimbursements to be advanced by the insurer as claims are paid and reconciled at year-end.[17] Clearly, such a provision would be beneficial to an employer concerned that available cash may fall short of what is needed to timely pay health care providers.

Finally, employers relying on the protection afforded by stop-loss insurance must be aware of the financial condition of the company issuing the policy. Stop-loss insurance is not covered by any of New York's guaranty funds, which protect those insured by life, health, property and casualty insurance companies from a company's insolvency or default.[18]

Federal Mandates and the Affordable Care Act

The Employee Retirement Income Security Act of 1974 ("ERISA")[19] regulates non-governmental, self-insured health plans. Any state regulation of these health plans is preempted by ERISA.[20] States may regulate the content of any insurance policy issued to provide the benefits of a health plan,[21] but a state cannot "deem" an employer plan or trust to be an insurance company in order to mandate the benefits the employer provides.[22] For these reasons, employers can self-insure their health plans to customize and limit their health plan offerings and those employers operating in more than one state can avoid the expense of complying with multiple states' regulations.

Plans that are established or maintained by the government of the United States, by the government of any state or political subdivision, or by any agency or instrumentality of any of the foregoing, are excluded from coverage by ERISA.[23] While this exception for governmental plans would seem to allow more regulation by state legislatures, to date, New York has only mandated benefits offered through group insurance contracts,[24] and this seems to be the case with other states as well.[25]

New York, like many states, mandates insurance coverage for a number of benefits, including substance abuse, chiropractic, and autism-related services.[26] It imposes a number of fees and taxes for health services, some of which can be avoided by self-insured plans.[27]

Self-insured plans also avoid administrative charges and risk charges associated with insurance products. While most self-insured plans have administrative costs of their own, large employers frequently determine that they can administer the plan either on their own or hire a third-party administrator to do it on a cheaper basis.[28]

Although no one of these factors appear to drive employers to leave the insurance market for a self-insured plan, the combination seems to have moved employers over time.[29]

More recently, federal mandates have begun to even the regulatory environment surrounding self-insured and fully insured health plans. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)[30] improved access to coverage by allowing an employee or dependent who has lost his or her coverage to elect to continue the same benefits by paying a monthly premium. The Health Insurance Portability and Accountability Act (HIPAA)[31] limited the extent to which a health plan could exclude preexisting conditions from coverage, and limited premium variations based on health conditions.

Among the additional federal requirements imposed on health plans are those included in the Newborns' and Mothers' Health Protection Act of 1996,[32] mandating minimum covered hospital stays after child birth; the Women's Health and Cancer Rights Act[33] requiring the coverage of reconstructive surgery after a mastectomy; and the Mental Health Parity and Addiction Equity Act of 2008, requiring mental health benefits on a par with benefits for physical health.[34]

The ACA continues this trend, requiring that children be covered up to the age of 26[35] and that certain preventative services be provided without a deductible or co-pay.[36]

ACA Changes to the Small Insured Plan Market

But the ACA also brings changes to the small insured plan market and adds new fees, and it is these changes that may have unexpected results.

Small insured plans will be required to include a set of essential health benefits covering ten categories of claims, to be defined by Health and Human Services. These must include prescription drug coverage and mental health and substance abuse disorder services.[37] In order to improve access to coverage, the ACA imposes new rating requirements on plans in the small group market. The ACA defines a small employer as one that employs an average of at least one but not more than 100 employees on business days during the preceding calendar year.[38] The ACA requires that all fully insured, small group plans (other than plans that have been grandfathered) not vary the premiums they charge except for variations caused by the value of the benefits offered by the plan, the family size covered, the geographic location of those covered, and tobacco use status.[39] Any rating variation based on health status or claim history is prohibited.

Beginning January 1, 2014, a health insurance issuer that offers health insurance coverage in the individual or group markets (regardless of whether the coverage is offered in the large or small group market) is required to accept every employer and individual in the state that applies for that coverage.[40] This is called guaranteed issue, and it removes a big concern for employers considering a move to a self-insured plan. After January 1, 2014, if a small employer's health claim experience is worse than

that of the community's, it can always return to a community-rated policy.

For plan years beginning before January 1, 2016, each state may elect to define a small employer as an employer with less than 50 employees on business days during the preceding calendar year.[41] New York continues to define a small employer as one in this manner and the Governor's proposed legislation directs the New York Health Benefit Exchange to determine whether to increase the size of small employers to not more than 100 employees prior to January 1, 2016.[42]

The ACA has created a series of new fees to help fund various aspects of the law.[43] The most significant is an annual fee on insurers and certain multiple-employer welfare arrangements.[44] The amount payable by each insurance company for a calendar year is the company's proportionate share of the aggregate fee based on net premiums written. The aggregate fee is set by statute and will be $8 Billion in 2014. The first fee payment is due by September 30, 2014, and it has been estimated to add 2.5-3% to premiums in years 2014 to 2018.[45]

In 2016, the ACA's guaranty-issue requirements will apply to employers with less than 100 employees. As a result, there is concern that the move to self-insurance may accelerate.[46] The concern is that younger, healthier groups will leave the insurance market, thereby increasing average claims and premiums for those left behind.[47] Stop-loss insurance with low attachment points can blur the line between insurance and self-insurance, and carriers have begun to market these products.[48]

In New York, stop-loss insurance cannot be sold to a small employer group.[49] This should forestall movements by groups under 50 to self-insured products. It has been recommended that the law be amended in 2016 to provide that stop-loss insurance not be provided to employers with less than 100 employees.[50] Smaller towns and villages should be careful to monitor legislation if they are self-funded or are considering such a move.

The end result of these mandates and fees is to encourage consultants and their clients, regardless of size, to seriously consider self-insurance.

Special Funding Considerations of New York Municipalities

The annual budget process for municipalities in New York is governed by statute.[51] Budgets are prepared under the cash method of accounting, meaning that transactions are recognized only when they occur, either when an expense is paid or when revenue is received.[52] An expense incurred late in a prior fiscal year, such as a medical bill, is budgeted for payment in the subsequent fiscal year, when the bill is paid. This is in contrast with an accrual method of accounting, generally used for a municipality's financial statements, where the medical bill incurred in the prior fiscal year would be recorded as a liability in that prior year.[53]

The budget process for health care expenses under an insured arrangement is quite simple. Premium rates are provided by the insurance company before the fiscal year, and the budget process is completed by estimating the number of employees who will qualify for insurance.[54]

When budgeting for a self-funded program, the employer must estimate claims that have been incurred during the prior fiscal year that will need to be paid in the subsequent fiscal year. These incurred but not reported (IBNR) claims usually amount to 20-25% of total annual claims, meaning that during the first three months of the fiscal year payments will need to be made for claims incurred in the prior fiscal year.[55]

In the first year of a self-insured plan, the employer does not have an obligation for insurance premiums so it can take the opportunity in the first few months to begin to set aside funds that will be needed in subsequent years. Unfortunately, New York law does not allow the municipality to set aside a reserve for these claims. Under the various budget provisions, revenues received in one fiscal year may be reserved and carried over into a subsequent fiscal year only for "stated purposes pursuant to law."[56] Fund balances may be carried over to subsequent fiscal years only if established as a legal reserve fund.[57]

Article 2 of the General Municipal Law does allow for local governments to establish reserve funds for certain purposes, but none would apply here. In particular, General Municipal Law Section 6-n authorizes municipal corporations to establish an insurance reserve fund, but this type of fund explicitly carves out payments for claims for which a municipal corporation can obtain insurance. Further, General Municipal Law Section 6-p authorizes the establishment of an "employee benefit accrued liability reserve fund." In this case, employee benefits are defined to mean payments for the monetary value of accrued but unused and unpaid sick leave, personal leave, holiday leave, vacation time, and time allowances granted in lieu of overtime compensation. These are payments in the nature of wages and not reimbursements for health claims.

There is no provision under New York law allowing for a reserve by a municipal corporation for the payment of health care costs.[58] While this may not be an issue on an on-going basis, it can severely limit a municipality's options in the future. Should a municipality wish to switch back to an insured arrangement, it would have a liability for claims incurred in the prior year that would need to be paid in the first part of its next plan year, together with its liability for insurance premiums. If not funded in advance, the municipality would start with a 20-25% increase in health care costs.

The only possible funding for claim run-outs are those amounts that may be set aside as part of the unappropriated, unreserved fund balance. A "reasonable amount" of unappropriated, unreserved fund balance may be carried each year if consistent with prudent bud-

geting practices and if necessary to ensure the orderly operation of government.[59]

While towns, villages and counties are permitted to retain a "reasonable amount" of any remaining estimated, unappropriated, unreserved fund balance for each of their legal funds, school districts are limited to retaining 4% of the current school budget in unreserved, unappropriated fund balance.[60]

In making a determination of a "reasonable" amount, the following factors may be considered by a town, village or county:

- the size of the fund (a set percentage may not be appropriate);
- cash flow requirements (the timing of receipts and disbursements in an ensuing fiscal year);
- the certainty with which revenues and expenditures may be estimated (the greater the uncertainty, the greater the need may be for unappropriated funds); and
- the government's experience in prior fiscal years.[61]

There is no guidance from the State Comptroller as to what portion, if any, of a municipality's health claim liability might be funded through unappropriated fund balance.

Prudent financial planning would suggest that the IBNR liability be monitored and set aside to insure that a big increase in appropriations is not needed if the municipality wishes to change funding arrangements in the future. Municipal employers should be ready to document claim payments and trends to support any reserve balances they may wish to retain. They may need to retain a consultant to provide an independent report in support of added reserves, especially in the early years of a self-funded arrangement. The State Comptroller has provided links to state procurement contracts for actuarial consulting services in its guidance for the financial reporting of post-employment health costs.[62]

Special Contractual Considerations of New York Municipalities

In addition to funding restrictions placed on municipalities by New York law, New York law also regulates the contractual relationship between the employer sponsor of a self-funded health plan and its contract administrator. Paragraph 6 of Section 92-a of the General Municipal Law requires that any such agreements be entered into pursuant to competitive bidding, or written requests for proposals, in accordance with Section 104-b of the General Municipal Law.

In addition, GML Section 92-a prescribes provisions that must be included in any agreement with a health plan's contract administrator. They include:

- a statement that payment of services will be made only after the services are rendered;
- a provision that the contract administrator will be liable to the public corporation for any loss or damage that may result from any failure of the contract administrator to discharge their duties, or from any improper or incorrect discharge of those duties, and reserves to the public corporation all legal rights are set off;
- a requirement for the contract administrator to hold the public corporation harmless from any loss occasioned by or incurred in the performance of its services for the public corporation;
- a requirement that the administrator post a surety bond, letter of credit or other security to secure its performance under the agreement;
- a requirement that the contract administrator undergo an annual audit by an independent certified public accountant of its accounting procedures and controls; and
- a limit on the term of the agreement of five years but allowing the municipal corporation to terminate the agreement upon 30 days' notice.[63]

These provisions will likely be at odds with the standard service agreement to be proposed by a third-party administrator. These administrators invariably ask for a "gross negligence" standard with respect to imposing liability for their mistakes. Further, the need for an independent audit will eliminate smaller companies that do not currently undergo that process. In order to be sure that their service agreement conforms to General Municipal Law requirements, the employer should enclose a proposed service agreement, with the required provisions, in its requests for proposals from third-party administrators.

Funding Options

New York does recognize two arrangements that will allow for the appropriate funding for a self-insured health plan.

Article 47 of the New York State Insurance Law allows for the establishment of a municipal cooperative health benefit plan (MCHBP), a shared funding arrangement among municipalities to provide health benefits for their employees. The standards for establishing a MCHBP are set forth in detail in Article 47.

Article 47 requires that at least three municipal corporations participate in the plan and that there be at least 2,000 covered employees (including retirees, but not including dependents).[64] The plan must have a written commitment for stop-loss insurance and must have premium rates established by an actuary, evidencing that its premiums will be sufficient to meet its contractual obligations and satisfy reserve and surplus requirements.[65]

A MCHBP must have a reserve fund for the payment of claims and related expenses reported but not yet paid, and claims and related expenses incurred but not yet reported, no less than 25% of the expected incurred claims and expenses for the current plan year.[66]

Section 4706 of the Insurance Law allows a MCHBP to reduce the 25% minimum reserve based upon a demonstration by a qualified actuary that a lesser amount would be adequate. The Superintendent of the Insurance Department must approve the application for a lower reserve.[67]

"While many public employers may be enticed to consider self-funding their health benefit plans to control costs in the new regulatory environment brought about by the Affordable Care Act, the fiscal controls placed on these employers by New York law make budgeting and planning for these changes difficult and compound the risks that apply to any employer that self-insures."

Because of the need to pre-fund these reserves prior to the establishment of a MCHBP, there are currently only eleven of these certified plans in New York State. Only one, the Greater Tompkins County Municipal Health Insurance Consortium, has been certified since 2003. As a result, the Department of Financial Services issued a report on the impact of the claim reserve requirements under Section 4706 of the Insurance Law, recommending additional flexibility in the initial reserves required.[68] That report recommends separate reserve determinations by actuaries for medical claims and prescription drug claims and a reserve of no less than 17% of incurred claims for medical claims and no less than 5% for prescription drug claims. To date, the Insurance Department (now the Department of Financial Services) has agreed to reduce the 25% reserve minimum to a level no less than 17% of expected incurred claims and expenses for all but two MCHBPs now operating in the state.[69]

The second method by which a municipality may set aside funds to self-insure benefits is through payments, pursuant to a collective bargaining agreement, to a union welfare fund that would provide those benefits to its members.[70] The State Comptroller has recognized that municipalities may contract to make fixed contributions under a collective bargaining agreement to a union fund for the purchase of health insurance benefits.[71]

Union welfare funds are governed by Article 44 of the New York Insurance Law and are defined to include any trust fund established or maintained jointly by one or more employers together with one or more labor organizations.[72] Unlike in the private sector, where such funds must be governed by a joint board with an equal number of representatives from employers and unions, many of these welfare funds established by municipal unions are administered solely by union-designated trustees.[73]

Because welfare funds administered only by union trustees are exempt from registration with the State, there is little information on the number of these welfare funds and the assets they hold.[74] Jointly administered welfare funds must file annual financial statements with the New York State Department of Financial Services.[75] As of 2012, there were twenty-two such welfare funds registered with the State.[76]

Article 44 of the Insurance Law does not contain any reserve requirements or any other requirements as to premiums or funding similar to those imposed on municipal cooperative health benefit plans. The bargaining parties must agree upon contribution levels that will cover current costs and maintain adequate reserves. For that reason, any employer that contributes to such a fund should obtain assurances that the fund has adequate reserves to pay any claim run-outs so that employees are adequately protected.

In order for a welfare fund to be considered as maintained pursuant to a collective bargaining agreement, the Department of Financial Services looks to federal regulations.[77] These regulations only allow 10% of the employees covered by the fund to be non-union employees.[78] Therefore, this arrangement may not be an option for the employer's entire workforce.

Conclusion

While many public employers may be enticed to consider self-funding their health benefit plans to control costs in the new regulatory environment brought about by the Affordable Care Act, the fiscal controls placed on these employers by New York law make budgeting and planning for these changes difficult and compound the risks that apply to any employer that self-insures. The lack of an established funding mechanism for reserves needed for incurred but unpaid medical claims and possible changes in the stop-loss insurance market should make employers cautious. Existing funding arrangements permitted by New York Insurance Law require the employer to affiliate with other employers or unions and may not fit the employer's needs.

Endnotes

1. *See* The Henry J. Kaiser Family Foundation, *Section 10: Plan Funding*, Kaiser/HRET Survey of Employer-Sponsored Health Benefits, (Sept. 11, 2012), http://kff.org/report-section/ehbs-2012-section-10 (hereinafter Kaiser/HRET Survey).
2. *See generally* Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010); Health Care and Education Reconciliation Act (HCERA) of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)(providing the statutory requirements for health care reform).

3. *See* Robert Pear, *Some Employers Could Opt Out of Insurance Market, Raising Others' Costs,* N.Y. Times, Feb. 17, 2013, at A9, *available at* http://www.nytimes.com/2013/02/18/us/allure-of-self-insurance-draws-concern-over-costs.html?pagewanted=all&_r=0; *see also* Christopher Weaver & Anna Wilde Mathews, *One Strategy for Health-Law Costs: Self Insure,* Wall St. J., May 27, 2013, *available at* http://online.wsj.com/article/SB10001424127887323336104578503130037072460.html.

4. Reserve Fund for Health Insurance, Op. State Comp. 2004-8 (Oct. 12, 2004), *available at* http://osc.state.ny.us/legal/2004/op2004-8.htm.

5. Kaiser/HRET Survey, *supra* note 1.

6. *Id*. *See also* N.Y. Public Health Law §4401(1) and (2) (McKinney 2013) (providing a program of comprehensive health services to its enrolled members in exchange for periodic payment); *see also* N.Y. Public Health Law §4406 (1) (McKinney 2013) (providing that under New York law, the contract between the enrollee and the health maintenance organization is treated as an insurance contract).

7. Kaiser/HRET Survey, *supra* note 1, at Exhibit 10.3.

8. *Id.*

9. Dean C. Hatfield & Andrew D. Sherman, *Self-Funding Health Benefits Can Help Plan Sponsors Lower Costs,* Benefits & Compensation Dig., Aug. 2009, at 1, 11.

10. Office of the State Comptroller, *Local Government & School Accountability, Cost-Saving Ideas: Containing Employee Health Insurance Costs*, http://www.osc.state.ny.us/localgov/costsavings/emphealth.htm (as visited on August 25, 2013).

11. *See* Kaiser/HRET Survey, *supra* note 1.

12. *Id.*

13. *See* Kaiser/HRET Survey, *supra* note 1, at Exhibit 10.9.

14. Christine Eibner, Federico Girosi, Amalia Miller, Amado Cordova, Elizabeth McGlynn, Nicholas Pace, Carter Price, Raffaele Vardavas & Carole Gresenz, Employer Self-Insurance Decision and the Implications of the Patient Protection and Affordable Care Act as Modified by the Health Care and Reconciliation Act of 2010 (ACA) 6 (The Rand Corporation 2011) (hereinafter referred to as RAND Report).

15. Unfortunately, there is no comprehensive data on stop-loss insurance so conclusions must be drawn from informal conversations with consultants and brokers in the health insurance market. RAND Report, *supra* note 14, at 27.

16. Public Health Service Act (PHSA), ch.373, §2711, 58 Stat. 682 (codified as amended at 42 U.S.C.A. §300gg-11 (West 2010)) (prohibiting lifetime caps on essential benefits since 2011). *Id.*

17. RAND Report, *supra* note 14, at 14.

18. N.Y. Dep't Fin. Serv., Stop-Loss Insurance Provider in Rehabilitation & Insured's Dishonored Claims, Op. O.G.C. No. 02-09-03, *available at* www.dfs.ny.gov/insurance/ogco2002/rg020903.htm.

19. 29 U.S.C.A. §§1001-1003 (West 1974) (amended 1978).

20. 29 U.S.C.A. §1144(a) (West 2006).

21. *Id.*

22. 29 U.S.C. §1144(b)(2)(B) (West 2006).

23. 29 U.S.C.A. §1003(b) (West 2002).

24. *See* N.Y. Ins. Law §§3217-21, 4303 (McKinney 1999). *See also* Opinion of the Office of General Counsel, New York State Department of Financial Services, OGC Op. No. 03-02-24 (concluding that a governmental welfare fund was not required to offer certain benefits mandated for group insurance contracts or HMOs), *available at* www.dfs.ny.gov/insurance/ogco2003/rg/030224.htm.

25. RAND Report, *supra* note 14, at 11.

26. N.Y. Dep't Fin. Serv, *Mandated and Make Available Benefits: Commercial, HMO and Article 43 Insurance Contracts*, http://www.dfs.ny.gov/insurance/health/lbenall.htm (last updated Jun. 6, 2013).

27. The covered lives assessment, varying by region from $8.33 to $196.49 per covered life in 2013, funds graduate medical expenses and is paid by both insured and self-insured plans. *See* N.Y. Pub. Health Law §2807-t (McKinney 2012), *available at* https://www.health.ny.gov/regulations/hcra/gme/2013_surcharges_and_assessments.htm. A surcharge on hospital services to fund charity care, estimated to be 9.2% of hospital bills in 2013, is paid both by self-funded health plans and insurers for 2012-2013. *See* N.Y. Pub. Health Law §2807-j (McKinney 2012) (providing that an assessment on insurers under Section 332 of the Tax Law funds operations of the New York Department of Financial Services. This is not paid by self-funded health plans); *See also* N.Y. Tax Law §1502-a (McKinney 2011) (providing that commercial insurers pay a 1.75% tax on premiums).

28. *See* Hatfield & Sherman, *supra* note 9, at 11.

29. RAND Report, *supra* note 14, at 11.

30. Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (1986).

31. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

32. Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, 110 Stat. 2935 (codified as amended at 29 U.S.C.A. §1185, 42 U.S.C.A. §§300gg-4, -51 (West 1996)).

33. Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, §101(f), 112 Stat. 2681-436 (codified as amended at 29 U.S.C.A. §1185(b), 42 U.S.C.A. §§300gg-6, -52 (West 1998)).

34. Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-460, §1, 122 Stat. 5123 (codified as amended at 42 U.S.C.A. §300gg-5 (West 2008)). There is an opt-provision for non-federal government self-insured plans. *See* Public Health Service Act (PHSA), ch. 373, §2723, 58 Stat. 682 (codified as amended at 42 U.S.C.A. §300gg-22 (West 1996)).

35. Public Health Service Act (PHSA), ch.373, §2714, 58 Stat. 682 (codified as amended at 42 U.S.C.A. §300gg-14 (West 2010)).

36. *Id.* §2713, 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-13 (West 2010)).

37. *Id.* §2707, 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-6 (West 2010)).

38. *Id.* §2791(e)(4), 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-91(e)(1) (West 2010)).

39. *Id.* §2701, 58 Stat. (codified as amended at 42 U.S.C.A. §300gg (West 2010)).

40. *Id.* §2702, 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-1 (West 2010)).

41. *Id.* §2791(e)(6), 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-91 (West 2010)).

42. A. 8514, 234th Sess. (N.Y. 2011).

43. Two of those fees, the Patient-Centered Outcome Research Institute Fee (PCORI) and the fee to establish a re-insurance program for the individual market, apply to both self-insured and insured plans. The PCORI fee, equal to $2.00 times the number of covered lives under the plan, would fund the research of the Patient-Centered Outcome Research Institute to enhance the quality of care. I.R.C. §4376 (2010). The re-insurance payment, operating 2014 through 2016, is a program to shift some of the risk of covering high expenses from the primary insurer to a re-insurer. This latter fee is $5.25 per covered life per month for 2014. PPACA §1341.

44. Patient Protection and Affordable Care Act, PUB. L. NO. 111-148, §§9010, 10905, 124 Stat. 119 (2010).
45. Draft HCRAWG State Rate Review Subgroup Discussion Paper on Inclusion of ACA Fees in 2013 Premium Rates, National Association of Insurance Commissioners, http://www.naic.org/documents/committees_b_ha_tf_related_docs_aca_fees.pdf.
46. Deborah J. Chollet, *Self-Insurance and Stop Loss For Small Employers,* MATHEMATICA POL'Y RES., 2012, at 1, 8, *available at* http://www.naic.org/documents/committees_b_erisa_120626_chollet_self_insurance.pdf.
47. *Id.*
48. *See* Pear, *supra* note 3; *see also* Weaver & Mathews, *supra* note 3.
49. N.Y. INS. LAW §3231(h)(1) (McKinney 2013).
50. HEALTH MGMT. ASSOC., NEW YORK INSURANCE MARKETS AND THE AFFORDABLE CARE ACT 10 (2012), *available at* http://healthbenefitexchange.ny.gov/sites/default/files/Insurance%20Markets%20Study.pdf.
51. *See* N.Y. COUNTY LAW §350 (McKinney 2013); *see also* N.Y. TOWN LAW §100 (McKinney 2013).
52. Kevin M. Bronner, The Budget Crisis Associated with State and Local Government Employee Health Care Costs, 6 ALB. GOV'T. L. REV. 83, 92 (2012).
53. *Id.* at 92.
54. *Id.* at 93.
55. *See* Hatfield and Sherman, *supra* note 9, at 12.
56. *See, e.g.*, Authority to Supersede Village Budget Procedures, Op. State Comp. No. 2007-4 (Mar. 20, 2007), *available at* http://osc.state.ny.us/legal/2007/op2007.4.htm.; *see also*, N.Y. COUNTY LAW §355(1)(g) (McKinney 2013).
57. OFFICE OF THE STATE COMPTROLLER: DIV. OF LOCAL GOV'T & SCH. ACCOUNTABILITY, Understanding the Budget Process, at 13 (2008), *available at* www.osc.state.ny.us\localgov\pubs\lgmg\budgetprocess.pdf.
58. Reserve Fund for Health Insurance, Op. State Comp. 2004-8 (Oct. 12, 2004), *available at* http://osc.state.ny.us/legal/2004/op2004-8.htm.
59. N.Y. COUNTY LAW §355 (1)(g) (McKinney 2013).
60. N.Y. REAL PROP. TAX LAW §1318 (1) (McKinney 2007).
61. OFFICE OF THE STATE COMPTROLLER: DIV. OF LOCAL GOV'T & SCH. ACCOUNTABILITY, *supra* note 56, at 13; N.Y. COUNTY LAW §355 (1)(g) (McKinney 2013); N.Y. VILLAGE LAW §5-506 (1)(c) (McKinney 2000); N.Y. TOWN LAW §107 (1)(McKinney 2000).
62. *See* Local Government and School Accountability, Office of the State Comptroller, Actuarial Valuation and Services, www.osc.state.ny.us\localgov\pubs\oped45faqs.htm as visited on August 29, 2013. Unfortunately, municipalities are also faced with the requirements of General Accounting Standards Board (GASB) 45, which requires them to report on their financial statements the annual required contribution to fund retiree health benefits. *Id.*
63. N.Y. GEN. MUN. LAW §92-a (6)(c) (McKinney 2011).
64. N.Y. INS. LAW §4704(a) (McKinney 2009).
65. *Id.*
66. *Id.*
67. N.Y. INS. LAW §4706(a)(1) (McKinney 1994).
68. See N.Y. DEP'T FIN. SERV.,REPORT ON MUNICIPAL COOPERATIVE HEALTH BENEFIT PLANS: IMPACT OF CLAIM RESERVE REQUIREMENTS UNDER SECTION 4706 OF THE INSURANCE LAW (Dec. 9, 2011), *available at* http://www.dfs.ny.gov/reportpub/muni-coop-resv.pdf.
69. *Id.* at 6.
70. Local 456 Intern. Broth. of Teamsters v. Town of Cortland, 327 N.Y.S.2d 143, 146 (1971).
71. Op. State Comp. No. 1980-281 (N.Y. 1980).
72. N.Y. INS. LAW §4402(a) (McKinney 2012).
73. Labor Management Relations Act, 29 U.S.C.A. §186(b) (West 2013).
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From Egg Creams to Politics

By Bob Abrams

I proudly tell everyone that I'm a boy from The Bronx. My roots in The Bronx are at the core of who I am and produced the value system that guided my life and career.

When I was born, my parents lived at 1165 Simpson Street in the South Bronx. They moved to Pelham Parkway when I was a toddler, and I lived and grew up in a six-story apartment building, 2125 Holland Avenue, just off of Lydig Avenue. It was the same block as the local elementary school I went to: P.S. 105. I have the most positive feelings and recollections of each of the public schools I attended, from kindergarten through 6th grade at P.S. l05, for seventh and eighth grades at P.S. 34 in Van Nest, and my four years at Christopher Columbus High School. I can still reel off the name of every teacher I had in each of those schools. I still remember scores of names of my classmates in those schools. My teachers were terrific. They were very dedicated, and they imparted the important fundamentals of a good education. I developed strong bonds of friendship with my classmates. Every time I meet someone I went to school with, we have such a great time recalling people and incidents from our school days. I still remember the words of the school songs. At Columbus, I spent four great years. I was the manager of the basketball team, coached by Moe Davitch and Roy Rubin. We had great players, like Angelo Lombardo and Jerry Paulson, who went on to star at Manhattan College, with Jerry winning the MVP Award at the Holiday Festival at Madison Square Garden and later going on to play in the NBA for the then Cincinnati Royals. At CCHS (Christopher Columbus High School), I made many friends who helped elect me to leadership positions in the Junior and Senior Arista and the G.O. (General Organization), which was the student government.

My parents owned and worked in a luncheonette/candy store in my neighborhood at 2000 Holland Avenue, across the street from the old Bronxdale Swimming Pool. They worked long hours in the store to provide for me and my younger sister, Marlene. I worked in the store, making egg creams, cherry cokes, malteds, and sundaes, and selling newspapers, magazines, cigars, cigarettes, greeting cards, school supplies, yo-yos, and balsa wood gliders. I carried cases of soda from the basement for my Dad to stock the soda cooler, mopped the floor, and waited on customers at the counter and the few small tables.

When The Bronxdale Pool closed down, the building was converted into a TV antennae factory, and the employees there, as well as those from the Delicia candy factory up the block on Antin Place near Wallace Avenue, would come to our store for sandwiches at lunchtime. Delicia also had a night shift, and so after school I'd come to the store to help my Dad serve those Delicia employees who would come for 7:00 p.m. dinner. We'd serve the customers, clean up, close the store, and walk home together.

My parents didn't have the resources to send me to sleep-away camp, so I spent several summers at the vacation playground summer program run by the Board of Education at P.S. 105. We did handicrafts, lanyards, tumbling, ping pong, basketball, and more. I was on the softball team, and we played different schools throughout the summer in a tournament—a la P.S. 89, 102, 96, 106.

"My roots in The Bronx are at the core of who I am and produced the value system that guided my life and career."

I spent untold hours in the P.S. 105 schoolyard playing softball, stickball, and Lefty Grove. I was so addicted to sports that I would shoot hoops well into the night because the lamppost on Holland lit up the court. That schoolyard was also a special sight on many Sundays, when softball teams from other neighborhoods came to play. There would be hundreds of spectators watching these hard-fought games. When I was 9 or 10, I'd sell cold bottles of soda to the spectators and participants. The bottles would be placed in pails of ice to keep the soda cold. A dime got you a cold soda with a 3-cent profit going to me.

After Columbus, I attended Columbia College for four years. For most of my first year, I commuted by subway, but then I got a room in the dorms and lived on campus. I sold magazines for the Columbia Student Magazine Agency, delivered the *Columbia Daily Spectator* each day, and worked two hours every day in the John Jay Dining Hall to pay for expenses. During the summer, I was a waiter at a hotel in the Catskill Mountains, the Hotel Zeiger (later renamed the EI Dorado) and another summer at Grand Lake Lodge in Lebanon, Connecticut in order to pay for my college tuition.

After college, I attended NYU Law School for three years. During law school and after graduation, I volunteered to work in Congressional campaigns against The Bronx Democratic machine. The Congressman from Pelham Parkway and some other neighborhoods in The Bronx was Charles Buckley, who also served as the powerful and ironfisted Democratic Leader of The Bronx. I joined a small band of idealistic reformers who were seeking to oust old line party officials who we felt were guilty of patronage abuses and were unresponsive

to local neighborhood needs. I worked on the campaign of Jonathan Bingham who, in 1964 in a stunning upset, beat Congressman Buckley. The next year I was recruited by the local reform Democratic Club, The Bronx Pelham Reform Democratic Club at 708 Lydig Avenue near White Plains Road, to challenge the local Assemblyman, John T. Satriale, who was part of the Buckley machine. It was a David and Goliath race. Satriale was a 17-year incumbent and Chairman of the New York State Assembly Ways and Means Committee, the most powerful committee in the Assembly, and had the support of The Bronx Democratic machine, and I was a 27-year-old kid, two years out of law school, with no money.

What happened in that race was truly miraculous. Many people in the neighborhood rallied to my cause. My 86-year-old grandmother sat on a milk crate for 12 hours a day handling out campaign flyers at the corner of Lydig Avenue and White Plains Road with a big homemade button pinned on her coat that said, "Vote for my grandson Bob Abrams for the Assembly." My mom, dad, sister, college and law school friends, and people from the neighborhood petitioned for signatures and campaigned tirelessly.

A friend from Columbus High School, Jack Abrams, would meet me every morning at 5:30 a.m. and we would go to a different subway stop in the Assembly District each day. Jack would hand out my campaign brochures, and I would reach out my hand and say, "Hi, I'm Bob Abrams, the Reform Democratic candidate, running in the primary for the Assembly." I'd shake thousands of hands in the course of a week. I'd also greet people at the subways when they were coming home from work (although they were tired after a full day's work and a long subway ride home and would be less friendly than in the morning). I'd go to several coffee clotches each night to explain the issues in the race. I ordered 10,000 Chinese fortune cookies and would give them to senior citizens who were sitting on park benches. When they would open the cookie, it said, "Your good fortune will be Bob Abrams for the Assembly." They would chuckle, and so I successfully gained their attention.

All of this hard work and loyal Bronx effort enabled me to score an upset victory on primary night in September 1965 and launched my political career. I won three terms in the Assembly, and then won a primary for Borough President against the regular Democratic organization candidate William Kapelman (who stepped down from a judgeship to make the race). I then went on to win twice more for the Borough President.

My strong Bronx base enabled me to run statewide for the office of New York State Attorney General. I won primaries in 1974 and 1978 for the Democratic nomination for Attorney General, and in 1978 won the general election to become the first Democrat to be elected Attorney General in 40 years. My four terms as Attorney General were the highlight of my career in public office. It was an opportunity to take on some important issues which were critical to the lives of New Yorkers. Being an activist Attorney General enabled me to protect New Yorkers as consumers and investors, to enforce laws protecting people's civil rights and civil liberties, prosecute polluters who were jeopardizing the quality of the air we breathe and the water we drink, and ensure workplace safety. It gave me the chance to advocate these issues on the national stage as President of the National Association of Attorneys General. It was challenging, fun, and rewarding.

Since returning to private life 20 years ago, I have been a partner in the law firm of Stroock & Stroock & Lavan with offices in NYC, Washington, D.C., Miami, and Los Angeles. I have represented clients and have also volunteered time to work with not-for-profit organizations on a pro bono basis. I've been fortunate to have the opportunity to travel to far flung places on the globe to do interesting things—to help countries like Poland, Hungary, and the Czech Republic after the fall of communism to craft new constitutions and develop democratic institutions, to monitor programs providing food and social services for desperately destitute people living in the 15 Republics of the former Soviet Union, and to protect people from dictatorial and extralegal actions in violation of international laws and accords.

None of this would have been possible if I didn't have my basic rootings developed in The Bronx as the wellspring of my political support. It's the place where I grew up and lived for the first 40 years of my life, and it's the place where I married my wife, Diane, on that beautiful Sunday in September of 1974 in The Bronx Botanical Gardens, at the Lorillard Snuff Mill on the banks of The Bronx River. My two daughters, Rachel (36) and Becky (26), have heard me endlessly tell Bronx stories and understand how deeply appreciative I am about being a product of Bronx neighborhood life and the values of family and hard work. They and my four grandchildren will see it on display in November when Bronx friends and family will gather outside my Mom and Dad's old store and see a street sign unveiled that says "Dotty and Ben Abrams Way" as a result of a bill passed by the New York City Council, sponsored by Councilman James Vacca and signed into law by Mayor Michael Bloomberg.

You can take the boy out of The Bronx, but you can't take The Bronx out of the boy.

This article originally appeared in the Winter 2014 issue of One on One, *published by the General Practice Section of the New York State Bar Association.*

Senior Lawyers Section Purpose

The purpose of this Section shall be the furtherance of the interests and quality of life of senior lawyer members of the NYSBA. The Section's activities shall include, without limitation: (a) promoting and identifying opportunities for senior lawyers to continue to practice law and/or to engage in other remunerative activities, should they wish to do so; (b) continuing to promote and support efforts to end age discrimination in the profession and working with other sections of the NYSBA and other bar associations in this regard; (c) enhancing the opportunities available to senior lawyers to utilize their experience in various professional and other activities such as community service, *pro bono* activities and mentoring younger lawyers; (d) presenting programs in areas of interest to senior lawyers, such as professional development, continuity and succession arrangements and personal pre- and post-retirement financial planning; (e) providing networking and social and recreational opportunities for its members; (f) preparing and sponsoring publications designed to explore and to advocate on behalf of issues of interest to senior lawyers; and (g) cooperating with other entities interested in any of the foregoing matters.

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Senior Lawyers Section Committees

Age Discrimination Committee

Chair, Gilson B. Gray, III, Esq. Duane Morris LLP

The basic purpose of the Age Discrimination Committee is to help senior lawyers, as well as younger members of the bar, to become more familiar with this area of the law as it may affect their careers and to help promote changes that will end age-related discriminatory practices affecting attorneys. As part of this effort, the Committee intends to continue the excellent work of the Special Committee on Age Discrimination in the Profession.

Diversity Committee

Chair, Susan B. Lindenauer, Esq.

The Diversity Committee of the Senior Lawyers Section has focused on achieving greater diversity in Section membership and leadership through participation in NYSBA diversity initiatives during the Annual Meeting and other regional meetings, and in seeking out diverse participants in Section CLE programs. The Diversity Committee has also secured SLS participation in programs developed by the NYSBA Committee on Women in the Law. The Diversity Committee is actively seeking Section members to participate in its efforts.

Financial and Quality of Life Planning Committee

Co-Chair, Walter T. Burke, Esq. Burke & Casserly, P.C.

Co-Chair, Rosemary C. Byrne, Esq. Step-By-Step Coaching LLC

Our Committee addresses financial issues, life planning and next steps for attorneys and their clients as they prepare for life on the other side of 55. Our objective is to provide programs and information on professional options, work/life/leisure balance, and the challenges and joys of "full time" retirement, as well as the insurance and financial planning vehicles which afford us the opportunity to enjoy the "retirement" years, however we choose to define them and whatever we opt to do.

Law Practice Continuity Committee

Co-Chair, Robert L. Ostertag, Esq. Ostertag O'Leary Barrett & Faulkner

Co-Chair, Anthony Robert Palermo, Esq. Woods Oviatt Gilman LLP

The Mission of the Senior Lawyers Section Law Practice Continuity Committee is to support efforts to assist solo and small firm practitioners in planning for the orderly transition of their practice, as well as to identify ways and mechanisms whereby another qualified attorney can be authorized to intervene and protect the interests of the clients of a deceased, disabled or absent solo and small firm practitioners who have not made adequate provision in advance for his or her inability to continue representing clients.

Legislation Committee

Chair, A. Thomas Levin, Esq. Meyer, Suozzi, English & Klein P.C.

The Legislation Committee reviews pending State and federal legislation of interest to Senior Lawyers, and proposals under consideration by the State Bar Association to support or oppose particular legislation. Where appropriate, the Legislation Committee makes recommendations to the Executive Committee as to action(s) which the Executive Committee may wish to undertake in relation thereto. In addition, the Legislation Committee reviews recommendations and suggestions received from Section

members or the Section Executive Committee, or referred from the NYSBA Executive Committee, with respect to prospective legislative proposals.

Membership Committee

Chair, Hon. Adam Seiden, Mount Vernon City Court Judge

The Membership Committee of the New York State Bar Association Senior Lawyers Section may be the most important committee in the section. Obviously without a strong membership, the Section would not be able to function properly. At present we have a strong membership consisting of more than 2,300 attorneys. There is still a great deal of room for growth. Senior lawyers, those over 55 years of age, who are members of the NYSBA make up 25% of the Association's membership. Our job as the Membership Committee is to increase membership as much as possible.

Pro Bono Committee

Co-Chair, Stephen G. Brooks, Esq.

Co-Chair, Fern Schair, Esq. Fordham Law School

While any lawyer can donate pro bono legal assistance, we believe that senior lawyers, whether retired or not, have a wealth of experience to contribute. It is the Pro Bono Committee's mission to meet more of the legal needs of the public, while at the same time providing senior lawyers with an avenue for meaningful service. We welcome your participation on the Senior Lawyers Section, Pro Bono Committee. Please contact SeniorLawyers@nysba.org at the New York State Bar Association if you are interested in joining.

Program and CLE Committee

Chair, Anthony J. Enea, Esq. Enea, Scanlan & Sirignano, LLP

The mission of the Program and CLE Committee is to present programs of particular interest to our Section's membership. Since our membership is quite diverse, our programs to date have covered a variety of subjects including: financial planning for the transitioning attorney; how to incorporate new technology and applications in your law practice; practice management for a solo or small firm when an emergency strikes; alternatives to the full time practice of law; and the use of social media in the practice of law.

Publications Committee

Chair, Stephen G. Brooks, Esq.

The Section's Publications Committee is responsible primarily for *The Senior Lawyer*, a semi-annual journal provided free to Section members. As described on the journal's website, *The Senior Lawyer* features substantive articles for lawyers who are age 55 or older and is published to help with career continuity and career changes. Articles that have appeared in past issues include such topics as value of important papers, estate planning, ethical issues, life settlements and retaining and maintaining closed files.

Technology Committee

Chair, C. Bruce Lawrence, Esq. Boylan Code LLP

Focus: The Committee focuses on processes, tools and services relating to the use of technology in the practice

Activities: The Committee looks for those tools, services and software that assist, streamline and make easier the practice of law. This is done by looking at developments in office hardware and the use of "cloud" technology.

The Committee provides a forum for discussion and analysis of evolving issues at the intersection of technology, computer systems security and effective use of law office technology.

Meetings: The Committee holds technology-related seminars, coordinates with the Law Practice Management Committee of the New York State Bar Association and at other times throughout the year co- sponsors CLE-accredited programs with guest speakers.

Members: Members include lawyers in private practice (solo, small and large firms), corporate counsel and lawyers in civil service whose practices involve legal issues relating to the development, protection, use and abuse of new technology.

Get involved: Join a Committee!

Once you're a member of the Section, Committee membership is free! ***To join a committee, simply email your request to SeniorLawyers@nysba.org.***

Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers (listed on page 46) or Committee Chairs for further information about these Committees.

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THE SENIOR LAWYER

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Submission Guidelines

The Senior Lawyer welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted via e-mail to any of the Co-Editors, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this journal use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

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SENIOR LAWYERS SECTION

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