

MINUTES OF THE MAY 10, 2013 NYSBA CPLR COMMITTEE MEETING
Held at Kelley, Drye & Warren, 101 Park Avenue, New York, NY

In attendance:

Paul H. Aloe, Esq., William Altreuter, Esq. (by telephone), James N. Blair, Esq., Blaine Bortnick, Esq., Raymond Brayer, Esq. (by telephone), Steven M. Critelli, Esq., Thomas M. Curtis, Esq., David L. Ferstendig, Esq., Daniel Finger, Esq., Ellen B. Fishman, Esq., Sharon Stern Gerstman, Esq., David Hamm, Esq., Leah Heifetz, Esq., Paul D. Horowitz, Esq. (by telephone), Michael Hutter, Esq. (by telephone), Souren Israelyan, Esq., Ken Jewell, Esq., Helene Hechtkopf, Esq., Seunghwan Kim, Esq., Robert P. Knapp III, Esq., Thomas E. Myers, Esq. (Executive Committee Liaison)(by telephone), Harold Obstfeld, Esq., James E. Pelzer, Esq., Christine M. Rodriguez, Esq. Jorge A. Rodriguez, Esq., Steven L. Sonkin, Esq., Hon. Michael Stallman.

The meeting was called to order by the Chair, Robert P. Knapp III, Esq. at 12:___ p.m.

Agenda

- I. Approval of Minutes: On motion to approve the minutes, which motion was seconded, the minutes of the January 25, 2013 minutes were unanimously approved.
- II. Current legislative session/developments
 - A. Discussion of bills that have been passed by the Legislature
 - a. A 195 – D. Ferstendig reported on amendment to CPLR 3015, removing provision which had allowed plaintiff to amend complaint to include a license acquired after commencement of action. No further action taken by the Committee.
 - b. A1051 –Paul Aloe mentioned bill making technical changes to notice-of-claim filing requirements. No further action taken by the Committee.
 - B. Discussion of bills presently being considered by the Legislature which have a likelihood of passage, and of the reports relating thereto.
 - a. A6550 – Bill making failure to file notice of claim against a municipality a waivable defense. It was reported that the bill was passed by the Assembly and that it has been referred to the Senate Judiciary Committee for consideration. David Hamm, Esq. volunteered to report on the bill.

- b. A479. Bill would broaden the venue for certain special proceedings under Article 78 of the CPLR. It was reported that the bill was passed by the Assembly and has been referred to the Senate Judiciary Committee for consideration. Robert Knapp, Esq. volunteered to prepare report on the bill.
- c. A1002/S555. Bill would enact a new CPLR 1405 and permit recovery by a plaintiff against a third-party defendant without plaintiff having alleged a direct claim against said defendant. The Committee agreed to reissue its prior report, written by Mr. Hamm, in opposition to an earlier version of this bill. No new vote was taken.
- d. A1085/S887. Bill would amend General Obligations Law § 15-108 to require non-settling defendant to elect method of reducing its share of verdict, prior to entry. Members of the Committee wondered whether a report was previously issued by this Committee on this bill. Mr. Knapp will check with Mr. Kevin Kerwin (Interim Legislative Liaison) on whether this bill has been reported on in the past. If no report has been issued, Ms. Gerstman volunteered to prepare a report on the bill, which will be circulated among the membership.
- e. A2635/S1046. Bill would forbid *ex parte* interviews with treating physicians. The CPLR Committee has reported against this bill and per Ms. Stern, the Executive Committee has already taken a position against the bill on behalf of the entire Association. Kevin Kerwin, Esq. (subsequently e-mailed by Mr. Knapp) would know how to transmit EC's position to Legislature.
- f. A6871/S4949. Under this bill, class certification would not be denied simply on grounds that case relates to government operations. Mr. Obstfeld recalled that Committee had opposed this bill in the past, but was not sure if report had been issued. Mr. Knapp is to check with Mr. Kerwin. If no report has been issued in the past, Mr. Obstfeld said he might be able to report on the bill.
- g. Consumer Credit Fairness Act: This bill would make consumer credit claims harder to bring, by among other things shortening the statute of limitations on such claims from six years to three years, and making compliance with the statute of limitations an element of the claim. The Committee discussed the substance of the bill and the issues addressed by the proposed legislative report previously circulated by Mr. Jorge Rodriguez to the Committee. Mr. Paul Aloe moved that the proposed report be revised to deal only with the technical issues of the bill (*e.g.*, retroactivity of

shortened statute of limitations, with no transition provision) and to exclude policy reasons for objecting to bill. Motion seconded and approved by Committee with one objection. Mr. Jorge Rodriguez to draft narrower report, based on Mr. Aloe's comments.

- h. S713. This bill would change the definition of "prevailing party" in CPLR 8602(f) for the purpose of awarding counsel fees in certain actions against the state, and would adopt the "catalyst" theory rejected by the Supreme Court under the Equal Access to Justice Act. Ms. Helen Hechtkopf summarized her report disapproving the bill. A motion was made and seconded to approve the report, subject to correcting certain typos noted by Ms. Fishman and to adding a reference to a Court of Appeals decision declining to decide whether the Supreme Court *Buckhannon* decision applies under New York law. Motion passed unanimously.
- i. Proposed amendments to Rule 202.16(g) to permit the deposition of expert witnesses in matrimonial actions. Mr. Ken Jewell summarized substance of the proposed rule and stated reasons for disapproving it, one of which is that the OCA rule would contradict CPLR 3101(d), governing expert disclosure. A motion was made to approve the report subject to the following revisions: (1) report to note that the courts must decide on a case-by-case basis whether expert discovery is appropriate in a given litigation; (2) add reference to Fourth Department *Sciara* decision; (3) while the Committee is not categorically opposed to expanding expert discovery, matrimonial litigation is not the place to broaden expert discovery. The motion was seconded and approved unanimously.
- j. Proposal on possible CPLR 2221(g) or OCA rule to overrule *Biscone v. JetBlue Airways Corp.*, concerning materials required to be submitted on motion to reargue. The Committee discussed issues surrounding the requirement to attach all prior motion papers to a motion for rehearing or reconsideration and whether hyperlinks to documents already in the court's record should be sufficient to satisfy the court's need to review the entirety of the motion that is being reconsidered. A motion was made to recirculate a proposed CPLR 2221(g), requiring the parties to submit copies only of those of prior pleadings 'necessary' for the motion to be reargued. The motion was seconded. Eight members of the Committee approved motion and eleven members disapproved. The motion failed. Mr. Pelzer agreed to circulate a new draft CPLR 2221(g), now requiring attachment of all papers from the last motion

- k. A357. Bill establishing a time limit of no more than ninety days after completion of deposition of the original parties for third-party practice. Brief discussion held on the pending bill. A motion was made to reissue Mr. Critelli's prior Committee report on this bill. The motion was seconded and approved unanimously.

 - l. A999. Bill amending CPLR 1207, et seq. to provide for payment of pre-judgment interest on settlements requiring judicial approval, such interest to accrue from date of settlement. Ms. Ellen Fishman summarized bill and her proposed legislative report, and noted that the Committee had disapproved a similar bill in 1999. Members of the Committee mentioned court delays in approving settlements, which could lead to substantial interest accrued on such settlements, and that if the bill passed, defendants would simply reduce settlement offers to account for the interest to become due. A motion was made and seconded to adopt the report and opposed the bill. Eleven members voted in favor and three in opposition of report. The report was approved.

 - m. Possible bill or constitutional amendment overruling *Hecker v. New York*, giving the Appellate Division power to make unreviewable rulings of law when the Appellate Division exercises its 'interest of justice' jurisdiction. Mr. Hamm briefly described the proposal and noted the possibility that any such bill would be ruled unconstitutional. As such, it is not likely that the Committee will pursue the issue.
- C. Proposal to amend CPLR 4547 to conform with current FRE 408: to go before Executive Committee in November.
- D. Remaining Agenda Items: Per Mr. Knapp, the other items on the agenda will be addressed at the next Committee Meeting.
- E. Next Meeting: The next Committee Meeting will be scheduled for October 4, 2013 at a location to be determined subject to availability.