



THE SUFFOLK LAWYER

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DEDICATED TO LEGAL EXCELLENCE SINCE 1908

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Attorneys, be prepared – implement a crisis plan

Do not be lulled into believing we will not experience another Sandy in future

By Alison Arden Besunder

My article in the April 2012 issue discussed how to plan for protecting your clients' interests and your own reputational legacy in the event of your death, disability, or incapacity. Hurricane Sandy and its devastating aftermath have highlighted the real need to implement a crisis plan, for ourselves (both personally and professionally), and for clients. This article summarizes some of the basic steps lawyers

should implement to be prepared and have peace of mind that we can act calmly under pressure.

Make a personal disaster plan for yourself and your family - create a plan

Develop a written crisis plan. Samples and guidelines are available on the NYC Office of Emergency Management website: http://www.nyc.gov/html/oem/html/get_prepared/prepared_plan.shtml. Share the plan with your family. Better yet, upload the plan to a document share site on the "cloud" like drop-

box or google docs, and download it to your phone, so you and others can access it even if the computer goes down (see below). Your plan should cover:

- Where your household and family members will reunite after a disaster. Identify two places to meet: one right outside your home and another outside your neighborhood, such as a library, community center, or place of worship.
- Identify all possible exit routes from your home and neighborhood.
- Designate an out-of-state friend or relative who household members can call if separated during a disaster. If New York City phone circuits are busy, long-distance calls may be easier to make. Your out-of-state contact can help you and your family to communicate when local land lines and cell towers are down.
- Identify a place to where you could evac-



Alison R. Besunder

(Continued on page 27)

SCBA Honors Suffolk County's Judiciary

SCBA President Art Shulman presented retiring Judge James F.X. Doyle with a gift from the association to thank him for his service to Suffolk County at the annual Judiciary Night. (See story on page 5 and more photos on page 14)



Photo by Barry Smolowitz

PRESIDENT'S MESSAGE

Mother Nature's tantrum hurt us all

By Arthur E. Shulman

As I write this article on Friday, November 9, like many of our members, I have been without power at my home for the 12th day due to the storm on October 29. Even though five large trees on my property snapped overnight due to the ferocious winds, there is fortunately only minor damage to my house. After enduring the cold that infused our bones (for the first three days after the storm) my wife and I arranged to stay at a hotel, but after five days the room was no longer available. Our compassionate colleagues, Richard and Anne Weinblatt, generously offered the warmth and comfort of Rich's vacant parents' house to us, for which we are tremendously grateful.

An unexpected consequence of this superstorm is the shortage of gasoline for our cars and generators. We've become victims in so many ways. Initially what would have probably come to mind was that we were victims of a ferocious and violent storm predicted several days in advance. But as the gas lines continue it appears that we are suffering not from foreign oil producers withholding their resources, but rather due to the poor planning and utter ineptitude of LIPA and possibly other governmental bureaucrats.

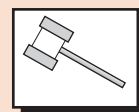
Surely this storm and its aftermath have affected us here on Long Island more than any other in my memory. Our ability to get around is being impeded as much by the long lines at gas stations as by the damage caused by the storm. Hopefully, implementing the odd/even license plate fill-ups will alleviate the gas line mania.

There is no question that my family and I are lucky and our hearts go out

(Continued on page 22)



Arthur Shulman



BAR EVENTS

SCBA Holiday Party
Friday, Dec. 7, 4 to 7 p.m.
At the bar center.

Meeting of Committee Co-Chairs
Tuesday, Jan. 8, 6 p.m.
At the bar center.

Judicial Swearing In and Robing Ceremony
Monday, Jan. 7, 9 a.m.

Touro Law Center
Judges to be robed include:
Supreme Court Justice Elect – Richard Ambro,
John J. Leo
County Court Judges Elect – John Rouse,
Hon. John Iliou
Family Court Elect – Hon. Denise Molia
District Court Judges – Hon. James McDonough,
Hon. Derrick J. Robinson, Hon. Karen Kerr
District Court Judge Elect – Richard Dunne,
Janine Barbera-Dalli

*The Suffolk County Bar Association
wishes everyone
a happy holiday season and
a safe and prosperous new year.*



Suffolk County Bar Association

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Our Mission

"The purposes and objects for which the Association is established shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of the members."

Join Our Leadership

The Nominating Committee of the Suffolk County Bar Association is seeking involved leaders interested in running for the following positions: president elect; first vice president; second vice president; treasurer; secretary; four (4) directors (terms expiring 2016) and three (3) members of the Nominating Committee (terms expiring 2016). The Nominating Committee is accepting résumés from that interest in these leadership positions. Résumés may be sent to the Executive Director at the SCBA, marked for the Nominating Committee.

The members of the Nominating Committee are: John L. Buonora, Ilene S. Cooper, Hon. John M. Czygier, Jr., Annamaria Donovan, Scott M. Karson, Hon. Peter H. Mayer, Matthew E. Pachman, Sheryl L. Randazzo and Ted M. Rosenberg.

— LaCova

Important Information from the Lawyers Committee on Alcohol & Drug Abuse:

THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

SCBA Calendar

All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.

OF ASSOCIATION MEETINGS AND EVENTS

NOVEMBER 2012

26 Monday	Surrogate's Court Committee, 6:00 p.m., Board Room.
27 Tuesday	Solo & Small Firm Practitioners Committee, 4:30 p.m.- 6:00 p.m., Board Room.
28 Wednesday	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.
29 Thursday	Bankruptcy & Insolvency Committee, 6:00 p.m., Board Room.

DECEMBER 2012

3 Monday	Executive Committee, 5:30 p.m., Board Room.
5 Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room
7 Friday	SCBA's Annual Holiday Party, 4:00 p.m. - 7:00 p.m. Great Hall. All members invited.
12 Friday	Elder Law Committee & Estate Planning Committee, 12:30 p.m., Board Room.
	Education Law, 12:30 p.m., Board Room
14 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room
17 Monday	Board of Directors, 5:30 p.m., Board Room.
19 Wednesday	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.
	Real Property Committee, 6:30 p.m., EBT Room.

JANUARY 2013

2 Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room.
7 Monday	Annual Judicial Robing & Swearing-In Ceremony, 9:00 a.m., Touro Law School. District Administrative Judge C. Randall Hinrichs will preside.
	Surrogate's Court Committee, 6:00 p.m., Board Room.
8 Tuesday	Council of Committee Chairs, 6:00 p.m., Great Hall.
9 Wednesday	Education Law Committee, 12:30 p.m., Board Room
11 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room.
14 Monday	Executive Committee, 5:30 p.m., Board Room.
16 Wednesday	Elder Law & Estate Planning Committee, 12:00 p.m., Great Hall.
	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.
28 Monday	Board of Directors, 5:30 p.m., Board Room.
29 Tuesday	Solo & Small Firm Practitioners, 4:30 - 6:00 p.m., Board Room.



THE SUFFOLK LAWYER

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You too can be a power searcher on Google

By Glenn Warmuth

I took a free class given by Google entitled "Power Searching With Google" in Oct. The course was a MOOC ("Massive Open Online Course"), an emerging form of online education. It ran for two weeks with three lessons each week. Each lesson consisted of a series of five to ten minute pre-recorded video lectures followed by a skill assessment task. There were exams at the end of each week.

The instructor was Daniel M. Russell, a Senior Research Scientist at Google. Mr. Russell went over many different types of advanced searching. I am going to describe some of the techniques I found most helpful.

Searchers can use "operators" to limit the results Google will give to a particular search. The "site:" operator can be used to limit the results in a number of ways. For example, if you search for [habeas corpus] the first result will be a wikipedia entry. This type of general information may not be useful to you as a professional. If you use the "site:" operator and search for [habeas corpus site:.gov] all of the results will be from .gov sites and the first result will be from the Library of Congress. You can also limit the searches to .edu sites for educational information, .mil sites for military information, etc.

You can also use the "site:" operator to search only a particular website. If you search for [foreclosure New York court] the results will include news articles, blog entries and attorney advertisements. You will have to search through all of it for court information. If you search for [foreclosure site:courts.state.ny.us] all the results will be from the New York State Unified Court System's website.

The "filetype:" operator allows you to

limit your results to a particular type of file. If you search for [new york bargain and sale deed] the first result will be a form for a bargain and sale deed in ".pdf" format. You may not want to use ".pdf" format because it may limit how much of the text you can change. If you search for [new york bargain and sale deed filetype:doc] all the results will be in ".doc" format which is a format used by Microsoft Word.

You can download the form in .doc format and make all the changes you want.

Using "AND" does nothing special for your Google search. "AND" is not recognized by Google as an operator. Google treats "AND" just like any other word. However, Google does recognize "OR" as an operator. If you search for [indecently Madonna "Lady Gaga"] the top results will be about Katy Perry and how her allegedly indecent behavior compares with that of Madonna and Lady Gaga. If you search for [indecently Madonna OR "Lady Gaga"] the top results focus on particular acts performed by Madonna or Lady Gaga which were perceived as indecent and there is no mention of Katy Perry. When using "OR" it is important to note that the operator "OR" must be in all caps.

The operator "NOT" is not recognized by Google. Instead, Google uses the minus sign. If you search for [Suffolk County foreclosure] the results will be crowded with sites offering foreclosure listing. You can eliminate all of the listing results by searching for [Suffolk County foreclosure -listings] The first result from that search is a court webpage with information about foreclosure settlement conferences. You can switch to another countries version of Google. This can



Glenn Warmuth

be useful for a number of reasons such as seeing how another culture looks at a world event. To switch to the French version of Google you can search for [google.com France]. Then click on the first result "www.google.fr". You are now using the French version. Of course it is written in French so you will need to deal with that.

I searched for French news articles on Lance Armstrong. I found an article by a French author which explained why Armstrong's seven stripped tour victories would not be reassigned to other riders. I was able to read the article in English by using Google Translate which translated the article into English for me. You can set Google Translate to detect the language used and then with the push of a button translate it into any other language. Google Translate can be found at translate.google.com.

You can search for legal decisions and articles by using Google Scholar. Google Scholar can be found at scholar.google.com. To search for legal documents you click "Legal Documents" under the search bar. I looked at the New York decisions and I found that there were only some Appellate Division and Court of Appeals decisions. Frankly, this feature looked like it needed some work and I have not adopted it as a preferred method of conducting legal research.

There is also a way to limit a search by date. To do this you perform a normal search and when the results are listed you click on "Search Tools" which appears at the top of the page.

You can limit the search to items posted in the past hour, past 24 hours, past week, etc. You can even enter a custom date range. Once you choose a time period the

results are limited to that time period. I frequently use this feature when I am trying to see if there is updated information on a particular topic.

By far the most amazing thing taught in the course was the ability to search by image. If you go to google.com and click on "images" on the top bar you will go to the Google Images search page. The basic way of using image search is to type in a search query using words. You will then get results that are all images. If you search for [Alfonse D'Amato Courthouse] the results will all be images, many of them of the Federal Building in Central Islip.

What is much more amazing is the fact that instead of typing in words as your search query you can drag and drop an image file into the search box. Google will then search by image by comparing the image you have provided to all other available images. When I dropped in a photo of the Alfonse D'Amato Courthouse Google's first results was "Best guess for this image: suffolk county ny courthouse."

These are just a few of the techniques I learned during the Power Searching With Google course. There were many more.

If you are interested in taking the course you can find more information at: <http://www.google.com/insidesearch/landing/powersearching.html>. I highly recommend it.

Note: Glenn Warmuth has been working at Stim & Warmuth, P.C. for over 25 years. He currently sits on the Board of Directors for the Suffolk County Bar Association and is an Officer of the Suffolk Academy of Law. At night he teaches a number of courses at Dowling College including Entertainment & Media Law. He can be contacted at gpw@stim-warmuth.com.

Meet Your SCBA Colleague

Sima Ali is a Huntington labor and employment law practitioner. Her parents are both doctors, so it was always expected that she'd become a professional too. But medicine was never a consideration. Sima's passion was always for the law.

By Laura Lane

Why did you choose labor and employment law? I think it is truly fascinating what happens at people's place of work and what they do in their jobs. A lot of areas in law are repetitive, fact pattern-wise. In labor and employment I may have some of the same legal questions presented but the facts change depending on the job so it keeps it fresh.

Sounds like it may be challenging at times. Employment and labor law is a puzzle. There are so many pieces you need to be aware of, have a comprehensive approach for and cover. I loved it as far back as law school where even all of my internships were labor and employment based.

Were you always a solo practitioner? No. My first job was in New York City where I was in the general counsel's office for a large municipal union. It was a very interesting experience.

How so? I did so many administrative hearings and arbitrations. But then I met my husband and went to India and married there. I lived there for six months and then came back to New York. I worked at a few firms on Long Island before opening up my own office.

Why did you open up your own practice? You know, my dad had his own business and he put it in my head that I should own my own business, but I'd say the

biggest reason was because I had children. The options for being at the level I was at and being an attorney working for someone else didn't jive with being a mother. I didn't want to be subject to billable hours and didn't see a return in the near future for all of the efforts I was expending. I thought I'd do better for myself and my family to control my own destiny. It ended up being a risk very well worth taking. I do what I enjoy and it has come back tenfold.

You have another facet to your business, right? Yes. I set up a consulting firm, AliConsultingGroup. I help guide employers so that they will be in compliance with the law by offering training, policy compliance counseling, and preparation of employment handbooks and policies.

I see that you lecture on social media and the workplace. Do you find you have to update your lecture materials often? The laws change a great deal in this area. Every year, every few months, there's a significant piece of legislation that comes out. You have to be aware if you are in this field to know all of the laws out there.

Do employers know what is going on in the area of social media? There's a lot of buzz about social media and I have to educate the employers. I have to explain what it is and then see if their policies comply.

What are common types of litigation arising out of social media? This area of

litigation is evolving. Most common types of cases involving social media have to do with commercial litigation and enforcement of confidentiality agreements and other restrictive covenants. The big question – whose property is the contacts? There are also cases involving harassment in the workplace is one with the evidence being found on social media sites.

When did you join the SCBA? I've been a member for around five years. I joined for the networking and programs at the Academy. I regularly attend the CLEs.

What do you like about being a member? Everyone I meet at the SCBA is passionate about doing things for other attorneys. They really are a nice group of people. They may not be innovative with technology, but they put on very interesting CLE courses and other opportunities that aren't even CLE. The people at the SCBA take the time to find out what attorneys are interested in and they offer it.

Can you relate to the other members? Yes. The majority of the people at the bar are like me, from small firms that face the same issues. The SCBA is very supportive of us.

You are serving your third year as a chair of the Labor and Employment Law Committee. How has the experience been for you? When I came in the committee it seemed at that time that the only reason to have the committee was to prepare for the Law in the Workplace



Sima Ali

Conference which meets once a year. I made it my goal to get people to come to the meetings for other reasons.

What did you do? I arranged for speakers to come to our meetings who discussed interesting topics. And attendance at the committee meetings has increased. I ended up getting sponsors for the workplace conference too. Last year I got around seven sponsors and over 100 people came to the Workplace Conference. I was invited to be an Academy officer last June and have enjoyed it. Being an officer I'm more involved and I've met great people. It's been fun.

COURT NOTES

Appellate Division-Second Department

By Ilene Sherwyn Cooper

Attorney Resignations
Granted/Disciplinary Proceeding
Pending:

Gary G. O'Hagan, admitted as **Gary George O'Hagan**: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent, based on charges, *inter alia*, that he failed to file a biennial registration and pay the designated fee from 2006 to 2011. The respondent was directed to file a verified answer to the petition, and thereafter, the Grievance Committee moved to impose discipline based upon the respondent's default. By affidavit, the respondent answered the motion and requested leave to resign. The respondent presently resides in Minnesota,

and has never practiced law in New York, or anywhere else for a period of 23 years. The Grievance Committee recommended that respondent's resignation be accepted. Accordingly, the court accepted the respondent's voluntary resignation from the practice of law in the state of New York.

Attorneys Suspended:

David A. Collins: The Grievance Committee served a petition upon the respondent containing five charges of professional misconduct and the matter was referred to a special referee. The referee sustained all five charges and the Grievance Committee moved to confirm. The respondent opposed the motion only as to the issue of mitigation and requested that the court limit the sanction to no



Ilene S. Cooper

more than a public censure. The charges alleged, *inter alia*, that the respondent mishandled funds entrusted to him, commingled personal funds with funds in his attorney trust account, made cash withdrawals from his attorney trust account, and improperly entered into a business transaction with clients by failing to advise his clients, in writing, of the desirability of seeking the

advice of independent counsel. In considering the appropriate measure of discipline to impose, the court acknowledged the respondent's request for mitigation, but noted the referee's conclusions that the respondent's conduct was intentional. Accordingly, the court, under the totality of circumstances, suspended the respondent from the practice of law for a period of one year.

Attorneys Disbarred

Daniel Gillen: On August 25, 2011, the respondent entered a plea of guilty to one count of attempted dissemination of indecent material to a minor in the first degree, a class e felony. Accordingly, by virtue of his felony conviction, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the state of New York.

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is a past president of the Suffolk County Bar Association, a member of its Board of Directors, and a member of the Advisory Committee of the Suffolk Academy of Law.

BENCH BRIEFS

Honorable Paul J. Baisley

Petition denied; order to show cause directed personal service; service of the order to show cause on attorney in fact was insufficient to confer jurisdiction.

In *In the Matter of the Petition of John Gomez as Power of Attorney for Carmen Caicedo and Stratcap Investments, Inc. for Judicial Approval of the Sale and Transfer of Structured Settlement Payment Rights, Pursuant to New York General Obligations Law, § 5-1707, et seq. v. Aviva London Assignment Corp.* ("Settlement Obligor") and *Aviva Life & Annuity Company of New York (Annuity Issuer)*, Index No.: 23150/12, decided on October 26, 2012, the court denied the petition of John Gomez as attorney in fact for Carmen Caicedo and Stratcap Investments, Inc., for approval of the transfer of a structured settlement payment rights belonging to respondent-payee Carmen Caicedo. In denying the petition, the court noted that there was no affidavit reflecting that the order to show cause and supporting papers were served on respondent-payee Carmen Caicedo by personal service as directed in the order to show cause. Failure to effect service in accordance with the order to show cause is a jurisdictional defect that rendered the order to show cause a nullity. The general power of attorney executed by Carmen Caicedo appointing John Gomez as her attorney in fact did not constitute a designation of

Gomez as Caicedo's agent for service of process pursuant to CPLR § 318, and the service of the order to show cause on Gomez as attorney in fact was insufficient to confer jurisdiction over Caicedo, who was a necessary party to the proceeding.

Pre-answer motion to dismiss denied; motion was meant to challenge not plaintiff's legal capacity but its standing to bring and maintain the action; complaint sufficiently demonstrated plaintiff's standing.

In *Randy T. Rodecker, Inc. d/b/a Swim King Pools v. Lawrence J. Ferrara and Martin Trejo*, Index No.: 14301/11, decided on September 14, 2011, the court denied defendant's pre-answer motion to dismiss pursuant to CPLR § 3211(a)(3). In denying the motion, the court noted that the defendant's submissions failed to establish that the plaintiff in this action for breach of contract, unjust enrichment, an accounting, tortious interference with a contract, and breach of fiduciary duty, lacked capacity to sue. Indeed, the court stated that it appeared from the submissions that, as suggested by the plaintiff, the defendant's motion was meant to challenge not plaintiff's legal capacity but its standing to bring and maintain the action. In the interest of judicial economy the court deemed the motion to be addressed



Elaine Colavito

to plaintiff's standing, and accordingly denied the motion. The court pointed out that the allegations included that during the course of employment, defendant breached a contractual and fiduciary duty to plaintiff and stole corporate assets and information all to the financial detriment to the plaintiff. The court found that the complaint sufficiently demonstrated plaintiff's standing to maintain the action notwithstanding the sale of a division of the corporate plaintiff to a third person.

Motion to vacate default granted; deterioration of his professional relationship with his prior attorney, which resulted in miscommunication regarding the status of plaintiffs' pending default motion found to be a reasonable excuse; while the record reflected that the defendant was already in default with respect to plaintiffs' outstanding discovery demands, the submissions did not establish an intent to abandon the defense of the action or that the default was willful.

In *Susan Sorrentino and Salvatore Sorrentino v. Sebastian J. Sorrentino and Helen Sorrentino a/k/a Gloria Sorrentino*, Index No.: 3646/06, decided on December 15, 2011, the court granted defendants motion to vacate. By way of history, the court explained that on November 30, 2010, this court granted plaintiffs' motion for a default judgment against defendants and directed plaintiff to file a note of issue and schedule an inquest. The default judgment was predicated on the prior order of this court, dated April 13, 2010 which struck defendants' answer for failure to respond to plaintiffs' discovery demands and/or appear for court-ordered conferences. The defendant now moved to vacate that default. The excuse proffered by the defendant in support of his motion, or to vacate the default judgment previously granted against him, was the alleged deterioration of his professional relationship with his prior attorney, which resulted in miscommunication regarding the status of plaintiffs' pending default motion. The court found that while the record reflected that the defendant was already in default with respect to plaintiffs' outstanding discovery demands, the submissions did not establish an intent to abandon the defense of the action or that the default was willful, and the defendant asserted his willingness to promptly provide any outstanding documents requested by the plaintiffs. Moreover, the court

found that the defendant's submissions established a potentially meritorious defense. However, in recognition of the protracted history of the case caused in substantial part by defendants' noncompliance with plaintiffs' discovery demands, the vacatur of defendant's default was conditioned upon his providing full, complete and substantive responses to plaintiffs' outstanding discovery demands. Upon defendant's failure of timely comply as ordered herein; the court noted that the plaintiffs may proceed with an inquest in lieu of a compliance conference.

Stipulation vacated; the mother and natural guardian of the infant plaintiff failed to execute documents in furtherance of the settlement of the infant's personal injury claim and settlement not made in "open court."

In *Christopher Wolfe, an infant by his Mother and natural guardian, Patricia Wolfe, individually v. Woodmont Sports Complex, LLC and Heartland Golf Pak, Inc.*, Index No.: 6450/06, decided on March 1, 2012 the court granted so much of defendant's motion as sought to vacate the settlement and restore the action to the court's calendar. In rendering its decision, the court noted that the submissions and the court's records reflected that the matter was marked "settled" on October 16, 2008. The submissions further reflected that thereafter, the mother and natural guardian of the infant plaintiff failed to execute documents in furtherance of the settlement of the infant's personal injury claim. The court pointed out that the stipulation was not made in "open court." In light of the foregoing, the court found that the stipulation was not enforceable pursuant to CPLR §2104. Accordingly, the court vacated the stipulation.

Honorable Peter H. Mayer

Motion for summary judgment denied; even assuming that the defendant did not own the property, it failed to demonstrate as a matter of law that it did not occupy, control or otherwise assume liability for the maintenance of the property; moving party may not remedy basic deficiencies in its prima facie showing by submitting evidence in reply.

In *Matilda Massa v. Town of Islip*, Index No.: 19790/10 decided on September 6, 2011, the court denied defendant's motion for summary judgment. The court noted that the motion was made on the sole ground that the defendant allegedly did

(Continued on page 22)

Not Among Our Law School Goals

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Judiciary Night well attended by attorneys and judges

By Laura Lane

The Suffolk County Bar Association thanked Suffolk's judiciary once again at their annual Judiciary Night held at Lombardi's on the Bay on Oct. 18. It was an evening of good food, great conversation and many moments to show the appreciation that attorney's experience each day while working with so many stellar judges in Suffolk's judicial system.

It isn't often that attorneys are granted an opportunity to mingle with so many judges and speak to so many on a social level. Judiciary Night is an event that is always well attended and this year was not any different.

SCBA President Art Shulman extended a warm welcome on behalf of bar association's officers, directors, members and staff. He noted that he was very pleased that four of the bar's executive committee members are former deans of the Academy of Law — himself, John Calcagni, Bill Ferris and Patricia Meisenheimer. Shulman also thanked all past presidents for their continued involvement in the Suffolk County Bar Association. He explained why the bar holds Judiciary Night each year.

"In a small but significant way this event offers our heartfelt thanks and recognition for the fine work our jurists perform throughout the year," he said. "We also take this opportunity to



Above, SCBA President Arthur Shulman presents Suffolk County District Administrative Judge C. Randall Hinrichs with an award for being an honoree at the Lawyers Assistance Foundation Golf Outing. Below, Mr. Schulman with Hon. A. Gail Prudenti, New York Chief Administrative Judge.



acknowledge and honor a distinguished member of the bench, the Honorable A. Gail Prudenti, Chief Administrative Judge, State of New York Office of Court Administration."

Justice Prudenti was presented with a present from the association. Thanking the SCBA, she added that "nothing means more to me than being recognized by this organization. You are never very far away from my heart."

Retiring judges District Court Judge Madeleine Fitzgibbon, Family Court Judge Joan Genchi, and County Court Judge James F.X. Doyle were given crystal globes of the world with the inscription, "A World of Thanks" for their efforts and commitment to Suffolk County for so many years.

"I would like to thank the bar association for all of the years that you've had this event," said Judge Doyle. "I think holding this event for judges and attorneys to get together is very nice."

Shulman also presented Suffolk County District Administrative Judge C. Randall Hinrichs with an award for being an honoree at the Lawyers Assistance Foundation Golf Outing.

Everyone agreed that the evening was indeed a wonderful opportunity to enjoy the camaraderie that the Suffolk County Bar Association offers to members. And an evening of bringing the bench and bar together appeared to be enjoyed by all.

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TAX LAW

Hurricane Sandy brings 1031 Exchange extensions

By Michael S. Brady

Here in the Northeast, Hurricane Sandy wreaked havoc, leaving most of the region without electricity and forcing many people from their homes. The damage caused by flooding and falling trees will take much time and expense to repair. The costs of this storm will be felt for some time.

While not known for its sympathy, the IRS has made several announcements regarding relief that is available to taxpayers affected by the storm. The relief includes expedition of charity applications and allowing owners of low income housing to provide housing to victims of the storm without losing their tax credits. A complete updated list of the relief available can be found at <http://goo.gl/2J294>.

Perhaps the most relevant relief provided to affected taxpayers, was the extension of time to file tax returns and make tax payments that were due in late October.

See <http://goo.gl/r39jl>. Pursuant to Revenue Procedure 2007-56, the extension also applies to “affected” taxpayers who began a 1031 tax deferred exchange prior to the commencement of the storm. Those taxpayers are entitled to an extension of their 45 day identification period and their 180 day exchange period, provided the relevant deadline fell on or after the date of the storm. The extension ends the later of 120 days from the original deadline, or the last day of the general disaster extension provided by the IRS, which is currently February 1, 2013.

The extension applies only to “affected taxpayers,” which automatically includes those who reside in the disaster area declared by FEMA. Other affected taxpayers include those who have difficulty complying with the 45 day identification and 180 day exchange deadlines



Michael S. Brady

due to the disaster for reasons including the relinquished or replacement property being located in the disaster area. Additional reasons and the full text of Rev. Proc. 2007-56 can be found at <http://goo.gl/FfJFm>. Section 17 specifically relates to 1031 exchanges.

For Hurricane Sandy, the disaster area currently includes the following counties:

- In New York (starting Oct. 27): Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk and Westchester.
- In Connecticut (starting Oct. 27): Fairfield, Middlesex, New Haven, and New London Counties and the Mashantucket Pequot Tribal Nation and Mohegan Tribal Nation located within New London County;
- In New Jersey (starting Oct. 26):

Atlantic, Bergen, Burlington, Camden, Cape May, Cumberland, Essex, Gloucester, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Sussex, Union and Warren;

For additional questions, please contact our office. Additionally, any taxpayer who believes they may be entitled to this relief should consult with their accountant.

Note: Michael S. Brady is General Corporate Counsel for Riverside 1031 LLC, a national qualified intermediary for IRC Section 1031 tax deferred exchanges. He has earned Certified Exchange Specialist® designation from the Federation of Exchange Accommodators, where he is also a member of the Government Affairs Committee. Additionally, Michael serves on the advisory committee for the Suffolk Academy of Law.

WORKER'S COMPENSATION

The myth of the great cost of compensation

By Dennis R. Chase

All too rapidly, I approach nearly a quarter century of practicing in an area of law fraught with misconceptions, myths, and downright lies. Robert Fulghum wrote a seemingly innocuous book over a decade ago called *All I Really Need To Know I Learned In Kindergarten*. Unfortunately, for the average practitioner, the only things they know about workers' compensation weren't even taught in law school. In fact, the closest my alma mater came to the subject was a course in administrative law which never once mentioned workers' compensation benefits. The extremely limited knowledge attorneys often possess on the subject is quite often relegated to what they learned about workers' compensation to prepare for the bar examination. “Here,” bellowed the instructor, “are the five things you need to know about the subject; dare not ask anything else about this *bastard child of the personal injury practice*.”

While comforting to know most practitioners refer their compensation matters to those of us concentrating our practices within the field, the growing angst among the population at large for anything deemed to be an *entitlement program* coupled with the continued and concerted efforts by certain factions of the Business Council to scare business owners into believing that costs are skyrocketing is nothing short of alarming. The “Public Policy Institute of New York State, Inc.” (PPI), an arm of the Business Council, recently released a report titled “Revisiting the Reforms,” in a thinly veiled attempt to perpetuate the myth of skyrocketing workers' compensation premiums while dismantling a system designed to protect and provide for injured workers.

Following the tragic Triangle Shirtwaist Company fire in New York City in 1911 where 146 women perished in the blaze, the Legislature sought to enact law for the protection of the lives, health, and safety of employees through a system of compensation to provide benefits without regard to fault as a cause thereof. Injured workers relinquished their rights to sue their employers and in return, were provided a system designed to be construed liberally in order to achieve its humanitarian objectives. While the Workers' Compensation Law has evolved over the past century, the most significant reforms were

enacted in 1996 and 2007, respectively. The purported purpose of the reforms were to reduce the alleged skyrocketing costs of workers' compensation premiums paid by employers transacting business in New York . . . and now, there are claims these reforms have either not gone far enough to reduce these alleged skyrocketing premiums or in other instances, gone too far in providing benefits that are on par with the rest of the injured workers throughout the United States.

A significant part of the 2007 reforms sought to institute time limits or “caps” on the amount of benefits an injured worker could receive if sustaining a permanent disability; closure of the Second Injury Fund; and implementation of medical treatment guidelines. The Business Council contended, based upon data provided by the Compensation Insurance Rating Board (CIRB), these were the real cost drivers of the system. Unfortunately, in the actual figures provided by the CIRB, the cost for \$100 in workers' compensation premium went from \$91.60 in 1995 to \$72.67 in 1996. Despite the steady decline in premiums and the complete lack of accurate and verifiable data, the reforms sought in 2007 were enacted.

Simultaneously, the Legislature, for the first time since 1992 (when the maximum rate was \$400), increased the maximum rate of compensation. The maximum rate is now permanently indexed to change yearly when compared to the state's average weekly wage. This increase was designed to bring New York's rates of compensation in line with the rest of the country and to account for inflation. The actual value of the \$400 rate by 1996 was but a mere \$282. When coupled with dramatic reduction in claims indexed by the Workers' Compensation Board and the drastic reduction in hearings, we see trends that are most likely attributable to a cost shifting to other, primarily tax-payer based benefit systems. The reforms in 2007 also included other provisions designed to not only reduce costs, but moreover, to ostensibly assist the injured worker (1) by requiring private insurers to deposit the present value of future benefits in to the Aggregate Trust Fund to ensure funds would be available to the permanently disabled worker in the future and (2) to award benefits for permanent disability



Dennis R. Chase

based upon the loss of the worker's wage earning capacity rather than medical impairment alone. The impact of these reforms was evaluated by CIRB, which concluded that they warranted an 18.4 percent reduction in workers' compensation costs in 2007 and an additional 6.4 percent reduction in 2008. In total, CIRB estimated that the 2007 reform reduced employer costs by almost 25 percent *saving* employers \$1 billion (Workers' Compensation Rates To Drop By Record 20.5 percent, NYS Ins. Dept. Release July 11, 2007).

However, in the following three years, CIRB reversed course, requesting premium increases totaling 22.7 percent. In essence, from 2009-2011, CIRB disavowed its 2006-2008 evaluation of the reforms, concluding that while they reduced employer costs, the reduction was between 2 and 3 percent, rather than the 25 percent it had originally estimated. *It is of course noteworthy that the net result was still a reduction in employer costs, notwithstanding the increase in the maximum benefit rate for injured workers.*

It must also be noted that in 2012 there was no increase in workers' compensation premiums, and employer costs decreased through a reduction in assessments. Despite the claims by the PPI, premiums today remain about 1/3 lower than they were in 1994, even after full implementation of all of the 2007 reforms. In their blind attempts to account for these fictitious cost increases, blame is placed upon the failure to find permanency and institute the caps; increased costs associated with schedule loss of use awards (for permanent impairment of an extremity, hearing loss, and vision loss); and delay in implementing the medical treatment guidelines.

As a result, the proposed remedies include slashing schedule loss awards for permanent injury, permitting such evaluations by therapists instead of doctors, reducing the maximum benefit rate, imposing artificial, evidence-free caps on temporary total disability, imposing employer-directed medical treatment, eliminating the Aggregate Trust Fund, removing all transparency from pharmacy network programs, and eliminating legal provisions intended to protect injured workers. Invariably, the

target of these cost reduction efforts is directed toward benefits for injured workers, whose claims are portrayed as driving increased costs. However, the driving factor in the debate about workers' compensation is not claim costs, but insurer profits. The simple fact is that insurers benefit from greater system costs. As more money flows through the system, insurer profits increase. To deflect attention from this fact, insurers blame the claims of injured workers when attempting to increase their charges to employers. Meanwhile NCCI, which is essentially a multi-state version of CIRB, has issued its 2012 report.

One interesting piece of information is that NCCI states, workers' compensation costs amount to about 1.5 percent of an employer's overall expenses. In fact, workers' compensation costs are actually a *diminishing* percentage of employer costs in the past 10 years (down from 1.6 percent to 1.5 percent). Over that same period of time, employer costs for health insurance have increased by about 1/3. This certainly makes it difficult to argue that workers' compensation costs are a significant factor in employer costs or that “the high cost of workers' compensation” has any significant impact on employer hiring and relocation decisions . . . and yet the myths persist.

Note: Dennis R. Chase is the current President-Elect of the Suffolk County Bar Association and the current President of the St. John's University School of Law Alumni Association-Suffolk County Chapter. Mr. Chase is the managing partner of The Chase Sensale Law Group, L.L.P. The firm, with offices conveniently located throughout the greater metropolitan area and Long Island, concentrates their practice in Workers' Compensation, Social Security Disability, Short/Long Term Disability, Disability Pension Claims, Accidental Death and Dismemberment, Unemployment Insurance Benefits, Employer Services, and Retirement Disability Pensions. Much, if not all the credit for this article, must be attributed to Robert E. Grey, Esq. of Grey & Grey in Farmingdale, NY, whose tireless efforts continue to be the guiding force in maintaining the rights of injured workers in New York. Most of the article above merely paraphrases the multitude of white papers authored by Mr. Grey.

SYDNEY SIBEN'S AMONG US

On the Move...

Alexandra Michalowicz, a recent graduate of Touro Law School, has joined Sullivan & Kehoe, LLP. She will concentrate in the area of Social Security disability and Veteran's disability law.



Jacqueline Siben

Howard E. Gilbert, of the Law Offices of Howard E. Gilbert has relocated his offices to 425 Broad Hollow Road, Suite 405, Melville, New York 11747-4701. The phone number is (631) 630-0100; fax: (631) 630-0101; website: www.gilbertlegal.net and email address is: HEGILBERT@gilbertlegal.net. The practice will continue its concentration in Labor and Employment Law.

Anne M. Bracken, **Lawrence J. Freeze** and **Christine B. Hickey** have been promoted as partners at the Lewis Johs Avallone Aviles firm. SCBA member Annie Bracken, past chair of the SCBA Judiciary Committee, will focus on medical malpractice and defense and commercial litigation and will work in the Riverhead office; Mr. Freeze will work in the Manhattan office and Ms. Hickey will work in the Islandia office.

Jonathan S. Bodner has joined the Ruskin Moscou Faltischek, P.C. as an associate in the firm's Financial Services, Banking and Bankruptcy Department.

Congratulations...

To five Farrell Fritz Partners who were named to the Best Lawyers in America 2013 list: **John J. Barnosky**; **Ilene S. Cooper** (Past President 2009-2010); **Domenique Camacho Moran**; **Jeffrey P. Rust** and **Robert E. Sandler**.

To **Richard Schaffer**, an SCBA member, who was elected as the Babylon Town Supervisor.

Announcements, Achievements, & Accolades...

John Caravella, a construction attorney at The Law Offices of John Caravella, P.C., will be the guest speaker for *Legal Issues for New York Architects*, presented by HalfMoon Education Inc. The seminar will take place on December 4 from 8:30 a.m. to 5:00 p.m. at the Holiday Inn Long Island-Islip Airport, located at 3845 Veterans Memorial Highway in Ronkonkoma.

Brian Andrew Tully, JD, CELA, Founder, The Elder Law Office of Tully & Winkelman, P.C. will co-host a program on how to detect and prevent elder financial abuse. An Elder Financial Abuse Seminar will take place on November 15 from 7:30 to 9:30 p.m. at Atria Plainview, located at 12 Washington Avenue, Plainview.

The law firm of **Futtermann, Lanza & Block, LLP** is presenting a free two-hour seminar, "Medicaid Planning & Asset Protection," which will take place on December 12 at the law office, located at 400 West Main Street, Suite 106 in Babylon. The morning seminar runs from 10 a.m. to noon, and the evening seminar is from 6 to 8 p.m.

Condolences...

SCBA honorary member **James Russell Grover, Jr.**, 93, passed away. Mr. Grover, an SCBA member since 1954, was a former Republican congressman who dedicated much of his life to public service and protecting Fire Island. He was a founding member of the Fire Island Preservation Society and an active member of the Red Cross.

LeRoy Van Nostrand, Jr., 95, an SCBA honorary member passed. LeRoy a respected lawyer and community leader, was a member of the SCBA since 1947 and a past president 1970 to 1971.

These gentlemen leave behind many friends and colleagues who have been saddened by their passing, but retain many fond memories of the contributions they made to the profession of law and to their local communities.

New Members...

The Suffolk County Bar Association extends a warm welcome to its newest members: **Courtney C. Abbott**, **Michael J. Alber**, **Pierre Bazile**, **Susan F. Bloom**, **Anthony L. Colantonio**, MD, **W. Russell Corker**, **Jason M. Corrar**, **Randy S. Gidseg**, **Christopher M. Gioe**, **Rose Hunter**, **Matthew Kreinces**, **James W. Malone**, **Salvatore Puccio**, **Darren Sheehan**, **Karl J. Silverberg** and **John C. Stellakis**.

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Ivory L. Bishop, Jr.**, **Lisa Bonanni**, **Robert A. Ferrara** and **Criselda Romero**.

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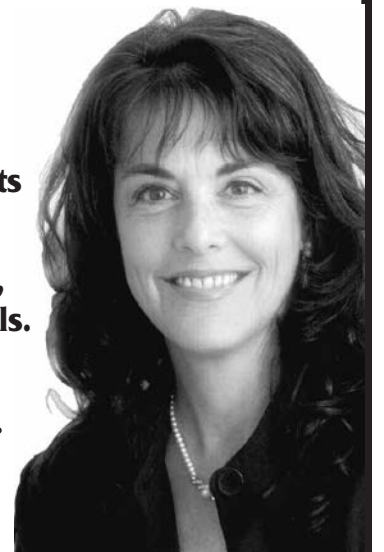
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Recent New York cases

By Patrick McCormick

There have been numerous recent decisions by appellate and trial courts involving landlord/tenant disputes covering a wide variety of issues. A few of those decisions are discussed in this article.

In a decision dated October 5, 2012, the Appellate Term, First Department in *C&A 483 Broadway, LLC v. KLMNI, Inc.*,¹ discussed Yellowstone injunctions. In a short decision that did not discuss many facts, the Appellate Term reversed the lower court's order granting summary judgment to the tenant dismissing the petition, and held a "May 2008 Yellowstone injunction issued by Supreme Court, which restrained landlord from terminating the governing commercial lease agreement based on tenant's conduct in 'affixing a flag or banner' to a flagpole attached to the building's façade, did not bar landlord from terminating the tenancy and maintaining this August 2010 holdover proceeding based on the conditional limitation provision in the lease triggered by the tenant's late payment of rent." This brief decision reminds us that a Yellowstone injunction serves to toll a cure period related to a specific alleged default claimed by a landlord. Where a landlord serves successive default notices each alleging a new default, tenant will need to seek and obtain a new Yellowstone injunction to toll the cure period related to each claimed default.

In *455 Second Avenue LLC v. NY School of Dog Grooming, Inc.*,² the commercial tenant, relying on Multiple Dwelling Law §302, moved to dismiss the nonpayment petition claiming no rent was due because

a proper Certificate of Occupancy had not been obtained for the premises.. The tenant, operating a dog grooming business, and landlord entered into a commercial lease with a termination date of August 31, 2018. In 2008, the tenant sought to renew its dog grooming educational license, which could not be renewed without a proper C of O for the premises. The existing C of O was for a multiple dwelling, with a basement (the premises at issue) used as a restaurant. The tenant stopped paying rent, the landlord commenced the nonpayment proceeding and tenant moved to dismiss alleging that MDL §302(1) relieved tenant of the obligation to pay rent because a proper C of O did not exist for the premises. The New York City Civil Court denied the motion, citing to well settled appellate precedent, holding that MDL §302, by its terms, which the court held were required to be strictly construed, did not apply to commercial premises/tenancies. In reaching its determination, the court referenced a recent Court of Appeals decision in *Chazon, LLC v. Maugenest*, 19 N.Y.3d 410 (2012).

In *Chazon*, the plaintiff/landlord owned a loft building in Brooklyn. The defendant/tenant occupied an apartment in the building but had not paid rent for nine years. Landlord commenced an ejectment action based on the nonpayment of rent. Supreme Court granted summary judgment in favor of landlord awarding landlord possession of the apartment. The Appellate Division affirmed and permis-



Patrick McCormick

sion to appeal was granted by the Court of Appeals. The Court of Appeals reversed based on MDL §302 and MDL art. 7-C (the Loft Law). Briefly, the Loft Law permitted residential occupancy of lofts (apartments in buildings formerly used for commercial purposes) but set deadlines for owners of the buildings to alter the building to conform to certain safety and fire protection standards. The Loft Law allowed for extensions of the deadlines in certain circumstances. Until the standards are met and a proper certificate of occupancy is obtained, tenants are protected by the MDL from eviction. In rejecting opinions from various appellate courts, the Court of Appeals strictly construed what it termed "the law's command" that "No rent shall be recovered by the owner of such premises . . . and no action or special proceeding shall be maintained therefore, or for possession of said premises for nonpayment of such rent." The court, in reversing the Appellate Division, recognized that "the statutes leave these parties in their present stalemate until compliance has been achieved."

In *Disunno v. WRH Properties, LLC*³ the Appellate Division addressed a well-settled principle involving the covenant of quiet enjoyment in commercial leases. Because the issue is raised from time to time, a review of this recent decision is helpful. The tenant commenced an action seeking damages from the landlord for an alleged breach of the commercial lease at issue. The landlord moved under CPLR 3211(a)(7) to dismiss the third cause of

action, which alleged landlord breached an implied warranty of fitness for a commercial purpose. The lower court denied the motion. In reversing that portion of the lower court's determination, the Appellate Division reaffirmed that "[i]n the absence of fraud or of a covenant, a lessor does not represent that the premises are tenantable and may be used for the purpose for which they are apparently intended [citations omitted]. The implied warranty of habitability applies only to residential lease space [citations omitted]."

This case reminds counsel of the importance of careful lease drafting and the need, from the tenant's perspective, to obtain from the landlord proper representations in the lease that the premises can in fact be used for the purpose intended by the tenant.

Note: Patrick McCormick litigates all types of complex commercial and real estate matters. These matters include business disputes including contract claims; disputes over employment agreements and restrictive and non-compete covenants; corporate and partnership dissolutions; mechanics liens; trade secrets; insurance claims; real estate title claims; complex mortgage foreclosure cases; lease disputes; and, commercial landlord/tenant matters in which Mr. McCormick represents both landlords and tenants.

1. 2012 WL 4775143, Appellate Term, 1st Dep't, October 5, 2012
2. 2012 WL 4785239, NYC CIV. Ct. NY Co., October 3, 2012
3. 97 AD 3d 780 (2d Dep't 2012)

REAL ESTATE

Hurricane Sandy, real estate and your practice

By Andrew M. Lieb

Long Beach was destroyed. Patchogue was underwater. Montauk became an island. Hurricane Sandy left her mark on Long Island, both in the short-term and in the long-term. In the short-term, we experienced power outages, flooding and displaced homeowners. In the long-term, questions were raised about our infrastructure, the location of generators in buildings and weather zoning ordinances should be modified to dissuade communities from being built anew on our coastlines. Yet, we are a resilient people and we will rebound. That is, we can be stronger, safer and happier if we choose the correct path. Yet, the answer needs to come from within and our leaders, like members of the Suffolk County Bar Association, need to guide their communities to a better tomorrow.

You see, immediately following the storm my law firm, as I am sure many of yours did as well, received a multitude of panicked questions about what was legal and what our clients should do in the face of their personal loss.

We were asked whether cooperative shareholders had to pay their maintenance while they were displaced. These individuals could not utilize their homes due to destruction and many were forced to either move in with family or into a hotel. Moreover, some estimates were placing the recovery months away and these people needed their limited funds to stay warm in

the cold winter that was fast approaching. By law, a cooperative's proprietary lease is subject to the Implied Warranty of Habitability embodied within Real Property Law §235-b and case law supports a 100 percent abatement of maintenance while a unit is unusable. Nonetheless, by withholding maintenance a shareholder is cursing his building into foreclosure as it will soon become insolvent and unable to meet its ongoing expenses. We received the same question for condominiums, but unlike a cooperative, a condominium's owner does not have the benefit of the warranty and must pay their common-charges in the face of destruction.

Then, came in the questions of risk of loss, from those who were in fully executed contract of sale concerning a real estate transaction where the structure, at issue, had been damaged. They wanted to understand the default rules pursuant to General Obligations Law §5-1311 and how to ascertain whether the vendee had a right to cancel the contract, which they do if there is material damage. We explained that the issue was whether the damage was material or immaterial to the contract. Thereafter, we were asked how to adjust the purchase price for immaterial damage when the contract remained in full force and effect, which we explained was a question of fact requiring estimates for repairs, at the least.

Subsequently, we had calls from fore-



Andrew M. Lieb

closure clients who had not paid their homeowner's insurance in years, but had a pool of water in their living rooms. They wanted to know if their lender had maintained the policy and how they should respond. We explained that lenders generally do maintain insurance to protect their investment, the home. Yet, in the first instance, the lender is not required to maintain insurance as it is optional to them and in the second, that even if insurance did exist, it would be a struggle to get the insurance proceeds from the lender as they often hold those monies hostage in escrow during the foreclosure litigation.

Let us also not forget those gouging their prices while trying to reap a profit from this destruction. There were those who immediately saw profit in Sandy's wake. The weekend warrior instantly became an unlicensed contractor, not mindful of the State's General Business Law's rules on Home Improvement Contracts embodied at §771. These laws are designed to protect the vulnerable. Nor was the weekend warrior aware of the many local municipalities, which often have their own license requirements and laws affecting the trade.

My fellow attorneys, it is time for us to lead. Our job is not only to advocate, but also to educate. We need to guide our communities to a better tomorrow. Yes, our services are necessary and there is

much work ahead. I am asking for your leadership. Review your client's homeowner's insurance policies. Explain to them that the Governor has waived hurricane deductibles within their policies as a result of the hurricane. Articulate the definition of flood insurance and how a policy likely will exclude floods or surface water damage in the absence of a proper endorsement. Identify a policy's provision for replacement value and explain that unlike cash value, depreciation will not be counted in providing coverage if a client's policy contains this valuation for loss. Review the conditions' precedent to coverage like the notice provisions and ensure that they are complied with. Understand that it is not typically the insurance broker's fault if the wrong policy exists and absent a special relationship between client and broker, the broker will not be found liable for poor advice. Then, when you feel that you have provided sufficient education to your client, send them to www.disasterassistance.gov where they can learn of the many resources that our Government is offering to its victims. Stay safe and we will rebuild together.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as Co-Chair to the Real Property Committee of the Suffolk Bar Association and served as this year's Special Section Editor for Real Property in The Suffolk Lawyer.



Honorable Bruce D. Alpert

*Former Justice of the
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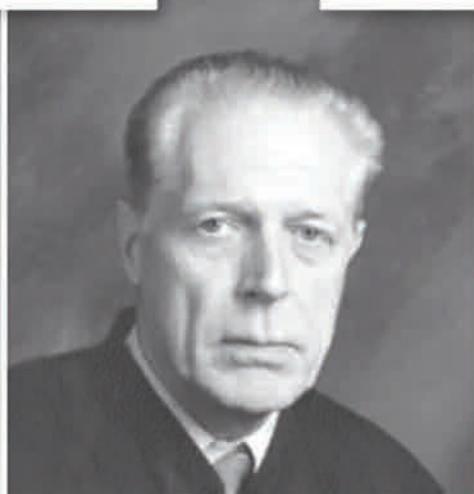
Honorable Robert W. Doyle

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9th and 10th Judicial District, Supreme
Court, 2nd Judicial Dept., Suffolk County*



Lawrence S. Farbman, Esq.

*Former Principal Law Clerk to
Hon. Lally, Hon. Levitt, Hon. Widlitz,
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INTELLECTUAL PROPERTY

Last rights for first sale doctrine?

By Gene Bolmarich

Attention all sellers of anything that might have a copyright attached to it, including online resellers (Craigslist, eBay, etc.), pawn shops, homeowners holding garage sales and literally anyone selling legally owned possessions. You may just find yourself liable for up to \$30,000 in statutory damages per item sold, depending on the outcome of the Supreme Court case *Supap Kirtsaeng v John E. Wiley & Sons*, argued on October 29.

Kirtsaeng addresses the operation of the so-called first sale doctrine under the Copyright Act as applied to goods manufactured outside the U.S. In August 2011, the U.S. Court of Appeals for the Second Circuit upheld a lower court's ruling that the first sale doctrine applied only to U.S. made goods. The impact of this ruling is that a copyright owner can *forever* control any foreign-made product having copyrighted content, even after the product enters the U.S., but the same product made in the U.S. cannot be controlled after its first sale. The United States has filed an amicus brief in which it takes the position of the Second Circuit. This is on its face an extremely odd result with potentially bizarre consequences.

The first sale doctrine is a limitation on the owners of patents, trademarks and copyrights that "exhausts" these rights in products incorporating such intellectual property subsequent to a first sale authorized by the owner of the intellectual prop-

erty right at issue. The doctrine plays out in different ways among these three forms of IP. In general, under trademark law and patent law, the doctrine has been well fleshed out by decisional law and its parameters are well defined. The two major issues that come into play with this doctrine tend to be how to deal with products crossing national borders and the limits placed on the doctrine as a result of various forms of product repairs, modifications or re-packaging by a defendant relying on the doctrine.

Before turning to the case at issue, let's look at how trademark law deals with the first sale doctrine. First and foremost, the law abhors any attempt at a trademark owner controlling downstream sales of "genuine products" in any manner. The first sale doctrine has proven to be an absolute bar on such attempts, however creatively the trademark owner has tried to circumvent it.¹ In cases involving product modification, the courts have resolved such cases solely on the basis of avoiding consumer confusion.² Only when under the specific facts of a case the evidence suggests that an appreciable number of consumers will be confused by material differences between the genuine product and the resold product, will a court allow the trademark owner to enjoin such resale.³ In cases of repaired products and repackaged used products, disclosure of



Gene Bolmarich

the true facts will usually prohibit a trademark owner from preventing resale of its repaired or used products, even in non-original packaging and, in one case, where defendant reapplied the trademark on its own.⁴

The parallel to these kinds of trademark cases in the copyright world turns on whether or not a defendant has created a derivative work. This is a rare fact scenario (most copyright infringement cases involve copying, as opposed to reselling, a copyrighted item) but has arisen in the case law a few times in the context of someone adding something to a copyrighted work of art, such as an ornamental frame. The issue is whether this is merely a resale covered by the first sale doctrine or instead, the sale of an infringing derivative works.⁵

Turning to the territorial issue, under trademark law it is now well settled that items first placed on the market by or under the authority of the trademark owner outside the United States may be imported into and resold in the U.S., but only where there are not material differences between the product sold in the U.S. and the one intended for sale outside the U.S.⁶

At the heart of the controversy surrounding the operation of copyright's first sale doctrine in the context of cross-border transactions is the interplay between three separate provisions of the Copyright Act.⁷

The question presented by *Kirtsaeng* is whether copyrighted goods that are manufactured and first sold outside the U.S., under the authority of the copyright holder and then imported into the U.S. can be legally resold in the U.S. In other words, does the first sale doctrine in 109(a) provide a defense to a claim under the importation right in 602(a)(1)? It is undisputed that 602(a)(1) provides an importation right to the copyright owner when there has not yet been a first sale anywhere (e.g. a foreign publisher breaking its contract by selling into the U.S.).

The meaning of the words "lawfully made under this title" in Section 109 in connection with foreign made copyrighted goods determines whether reselling such goods in the U.S. is protected by the first sale doctrine or is instead a violation of Section 602(a)(1). It has already been determined by the Supreme Court that where copyrighted goods are manufactured in the U.S., exported outside the U.S., and then re-imported into the U.S., that the first sale doctrine cuts off the importation right because of the first sale in the U.S. (albeit to another country).⁸

At its core, *Kirtsaeng* presents a competition between two possible constructions⁹ of the phrase "lawfully made under this title" in § 109(a):

Petitioner's reading is that a copy is "lawfully made under this title"—and the seller gets the benefit of the first-

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PRACTICE MANAGEMENT

Is Your Law Firm Website User-Friendly?

By Allison C. Shields

These days, most law firms have some form of a website. But how well are those websites working? The ability of law firm sites to not only attract visitors (“traffic”), but also to prompt those visitors to take action such as filling in a contact form, calling the firm for a consultation, etc. varies widely. That may be due in large part to how easy the site is for web visitors to use, known as “usability.”

People read and consume information differently online than they do offline. For example, people tend to skim or scan web content looking for specific information. Rarely do web visitors read large quantities of text on a website – at least until they *know* that text contains the information they are looking for. Web visitors make that determination extremely quickly.

According to Jakob Nielsen, considered by many to be the foremost expert on web usability, the average page visit lasts a little less than a minute, and the first 10 seconds of the page visit are critical to a user’s decision to stay or leave. That means that your firm website must clearly communicate your value proposition within 10 seconds to have any hope of gaining user attention.

Photos, images and animation

In today’s increasingly visual world, graphics and images can be an important strategy for gaining and holding attention on law firm websites. But it is important to use those images correctly. Eye tracking

studies reveal that website images can either be extremely effective or completely ignored (and therefore harmful, since they take up valuable real estate on your site).

What is the difference? Images that are “purely decorative” tend to be ignored entirely. By contrast, images considered to be an important part of the content, including photos of real people (as opposed to stock images), draw visitors’ attention. “[U]sers still prefer websites that focus on the information they want,” and that includes information conveyed by images.

When using images and graphics on your site, make sure that the image adds to the information and don’t simply create clutter on the page. Label graphics and photos to clarify their relationship to the text, where necessary. If you use animation on your site, make sure they do not distract from important elements on the page, and consider where they are placed; they may be more effective on internal pages than on the home page. Do not force web visitors into video, audio or animation without warning – let them choose whether to play something, rather than making it automatic.

Web page layout and text

Although photos, graphics and other visuals can be helpful, using visuals doesn’t mean eliminating text from your site – again, most people who will find your site are doing so because they are looking for *information*. Text needs to be there to pro-



vide that information and detail where the web visitor is looking for it, but it needs to be conveyed quickly.

According to Nielsen, web visitors still prefer important information to be located at the top of the page, but they will still scroll if:

- The layout makes scanning easy; and
- The information at the top of the page conveys that the additional information will be valuable to them (and therefore worth the time and effort to scroll).

But beware of large blocks of text. As Nielsen says, “A wall of text is deadly for an interactive experience. Intimidating. Boring. Painful to read.” In fact, it is number four on his list of the top 10 mistakes in web design.

Writing style

If reading is done differently on the web than it is in print, you need to change your writing style to accommodate the web visitors’ needs. In a short period of time, you need to capture their attention and ensure that your content can be easily scanned. Here are eight ways to get started:

1. **Place important content at the top of the page.** Web visitors don’t have time for lengthy introductions, and you only have 10 seconds to convince

them that your site contains the information they need. Give them that information right up front.

2. **Use headers.** Guide readers through your content with headings and sub-heads to introduce important topics. This allows readers to skim for the important information and to stop and read in more detail if they find something particularly valuable.
3. **Write short paragraphs.** Even those who will read a lot of content on the web if it is engaging and interesting are less likely to read large blocks of text; it is intimidating online and may make users leave your site. Instead of following the ‘usual’ rules regarding paragraphs, make them smaller – only a few lines of content per paragraph.
4. **Use callouts for important information.** Sometimes, important information doesn’t lend itself well to a header. In that case, you might use a callout to highlight an important point.
5. **Keep it simple.** Leave out legal jargon. Avoid complex or long sentences. Use the language and words your clients use when they talk about the issues they need your help to resolve.
6. **Use bullet points rather than full sentences.** They are easier to skim and highlight important information without using excess words.
7. **Limit font styles, text sizes and col-**

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COMMERCIAL LITIGATION

Aviation related themes in Breach of Contract cases

By Leo K. Barnes Jr.

This month we review two recent decisions concerning commercial issues which touch the aviation industry. In *Wells Fargo Bank Northwest, N.A. v. U.S. Airways, Inc.*, 2012 WL 3288834 (1st Dep’t 2012), plaintiff Wells Fargo brought suit against defendant U.S. Airways for breach of contract relating to a lease agreement for three commercial aircraft. According to the decision, U.S. Airways’ predecessor company acquired three 737-3G7 aircraft from Boeing. At the time, although each aircraft had a maximum takeoff weight (MTOW) of 124,000 pounds, a special program offered by Boeing permitted each aircraft to operate at an increased MTOW of 138,500 pounds.

In 2005, Wells Fargo purchased the three aircraft from U.S. Airways and then leased the aircraft back to U.S. Airways for a three-year term. Each purchase agreement specified that the MTOW of each aircraft was 138,500 pounds. In addition, the purchase agreements set forth that Wells Fargo would provide U.S. Airways with a “Redelivery Certificate” acknowledging and confirming that U.S. Airways had redelivered the aircraft to Wells Fargo in accordance with the agreement after Wells Fargo completed its final inspection of each aircraft and its corresponding documents.

At the end of the lease term, Wells Fargo had a team of experts conduct the final inspection of each aircraft, and subsequently accepted the aircraft and executed Redelivery Certificates pursuant to the lease agreements. However, it was later discovered that U.S. Airways redelivered each of the three aircraft back to Wells Fargo at a MTOW of 124,000 pounds, not 138,500 pounds, because the increased MTOW obtained from Boeing was not transferrable. Subsequently, Wells Fargo filed suit against U.S. Airways alleging breach

of contract and rescission of the Redelivery Certificates.

Wells Fargo moved for partial summary judgment on its breach of contract claim, which was granted by the trial court on the ground that U.S. Airways breached its contractual obligation to return the aircraft with a MTOW of 138,500 pounds. On appeal, the Appellate Division, First Department reversed. Although the First Department agreed with the trial court that the leases required U.S. Airways to return the aircraft with a MTOW of 138,500 pounds (the MTOW that the aircraft had at the time the leases commenced), the court held “that Wells Fargo’s execution of the Redelivery Certificates without reference to the MTOW discrepancy preclude[d] it from raising or seeking relief for that breach.” The court noted that a section of the leases provided that upon execution of the Redelivery Certificates, the leases were deemed terminated, subject only to specific delineated circumstances. The court found that the MTOW discrepancy did not fall within those delineated circumstances, and as such the section of the lease mandating that the MTOW at redelivery be the same as that at commencement of the leases did not survive the termination of the leases once the Redelivery Certificates were executed. Further, the First Department cited *Jet Acceptance Corp. v. Quest Mexicana*, 87 A.D.3d 850 (1st Dep’t 2011), for the proposition that by executing the Redelivery Certificates, Wells Fargo expressly confirmed that U.S. Airways had fully performed all of its obligations, and by doing so Wells Fargo effectively waived any claim that the aircraft were not in compliance with the return conditions of the lease.



Leo K. Barnes, Jr.

In another recent commercial case involving the aviation industry, the U.S. District Court for the Southern District of New York in *B/E Aerospace v. Jet Aviation St. Louis*, 2012 WL 1577497, 11 Civ. 8569 (S.D.N.Y. 2012), addressed the validity of an arbitration award issued following a dispute between an aircraft interior manufacturer and an installer of aircraft interiors.

B/E Aerospace (B/E) is a developer and manufacturer of interior products for commercial aircraft and business jets. Jet Aviation, formerly known as Midcoast Aviation, installs interiors on private jets. In 2005, Midcoast and B/E entered into an agreement whereby Midcoast would pay B/E \$1.4 million, and in exchange B/E would provide aircraft seating for installation in compliance with Federal Aviation Administration (FAA) regulations.

As a result of incorrect installation instructions provided by B/E along with the seating, the seating was not certifiable by the FAA, and as a result Midcoast incurred over \$3.3 million in costs attributed to engineering and payments to its customers. Thereafter, Midcoast initiated arbitration proceedings against B/E for breach of contract and negligent misrepresentation. Following the arbitration, the arbitration panel issued an award of \$3.3 million in Midcoast’s favor, including \$84,543 in attorneys fees. Subsequently, B/E filed an action to vacate the award in the U.S. District Court for the Southern District of New York, and Midcoast filed a cross-motion to the confirm the award.

In seeking to vacate the arbitration award, B/E argued that the arbitration panel manifestly disregarded New York law and the party’s agreement by awarding damages based on duplicative contract and tort claims in contravention of existing New York law. In

addition, B/E sought to vacate the award of attorneys fees on the ground that the parties’ contract stated that “[e]ach party shall be solely responsible for its own attorneys fees.”

The court rejected both of B/E’s arguments and confirmed the arbitration award in its entirety. In doing so, the court held that the award of damages based on both breach of contract and negligent misrepresentation was not a manifest disregard of New York law because the arbitration panel explicitly found that Midcoast reasonably relied on the specialized expertise of B/E (based on B/E’s presentations of its expertise prior to the parties entering into the contract), which thereby created an independent legal duty to Midcoast beyond the contractual relationship. See also, *Kimmel v. Schaefer*, 89 N.Y.2d 257, 263 (1996)(liability for negligent misrepresentation arising from a commercial transaction is imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified).

Additionally, in rejecting B/E’s argument for the vacatur of the award of attorneys fees, the court found that the award was not a manifest disregard of New York law because the American Arbitration Association (AAA) rules were expressly incorporated into the parties’ agreement. In so finding, the court noted that AAA Rule 43(d) states that an arbitrator’s award may include attorneys fees if all parties have requested such an award. In both Midcoast’s and B/E’s respective demand and answer, both parties sought an award of counsel fees. As such, the Court found the arbitration panel’s award of counsel fees to be proper.

Note: Leo K. Barnes, Jr. a member of Barnes & Barnes, P.C. in Melville, and can be reached at LKB@BARNESPC.COM.

Disability income insurance

What every attorney needs to know

By John J. Marcel

Would you ever show up in the courtroom, or at a client meeting, without properly preparing your case or researching your client's situation? Of course you wouldn't. In fact, for most lawyers, the idea of being poorly prepared at a crucial moment is the stuff of nightmares.

But no matter how well you prepare your cases, there's an all too common scenario that you may not have anticipated fully: what would happen if you were to become disabled? Perhaps you believe that you're fully covered by a group policy your firm has purchased. However, the truth is that while group disability income insurance is often relatively inexpensive and easy to administer, it can also fall short just when you need it most leaving you in for some unpleasant surprises when it's too late to correct the situation.

Furthermore, disability may be far more common than you imagine. Even if you're young and careful, it could happen to you, through an accident...an injury... or a lengthy illness. And in fact it does happen — probably much more often than you might think.

In a recent CDA 2010 Consumer Disability Awareness Survey only 1 percent of employees felt they had a chance of becoming disabled during their working years, but in reality, according to the Social Security Administration Fact Sheet from January 2009, almost one-third of Americans entering the work force today (3 in 10) will become disabled before they retire.

Want to be better prepared? Consider the following:

Learning to speak the lingo

The right disability income insurance (DI) policy can help you keep your household going, even if you suffer a long-term disability.

But before you go shopping for a DI policy, you need to know what features to look for and the language the insurance industry uses to describe them. The following terms are part of the language describing high-quality policies, and are what you should look for to get coverage you can count on:

- **Non-cancellable** — to avoid the possibility of losing your coverage just when you need it most, choose a policy that's non-cancellable and guaranteed renewable to age 65, with premiums also guaranteed until age 65. With group or association group coverage, you run the risk of being dropped and left unprotected at a time in your life when, due to your age or to a change in your health, it would be very difficult to qualify for coverage from another provider.
- **Conditionally renewable for life** — although premiums may increase after age 65, your policy should be renewable for life, as long as you are at work full time.
- **The core of any disability income policy is its definition of "Total Disability"** which outlines what constitutes being "totally disabled" and therefore eligible for benefits. This definition is in every carrier's policy; however, it does not always mean the same thing. For example, some policies pay benefits if you are unable to perform the duties of your own occupation, even if you are able to work successfully in another occupation, while others pay only if you cannot work at all.
- **Residual Disability coverage** — through a rider, a good individual DI policy can provide you with protection against the income loss you may suffer as a result of *partial* (residual) disability, *even if you have never suffered a period of total disability*. This kind of residual coverage is

not available with most group plans.

- **A choice of "riders"** — Riders offer optional additional coverage such as Future Increase Options and Cost of Living adjustments, or "COLA."

Protecting your business, as well as yourself

You must also protect the source of your income, the firm you've worked so hard to establish and grow. Special policies, available from the same DI providers who offer high-quality individual coverage, offer your office protection while you recover from a disability.

To help meet the expenses of running the office while you are disabled, consider a separate type of disability insurance coverage known as Overhead Expense or OE. Benefits reimburse your practice for expenses such as rent for your office, electricity, heat, telephone and utilities, as well as interest on business debts and lease payments on furniture and equipment.

Overhead expense insurance specifically designed for professionals pays some additional costs not included in most overhead expense policies including the salaries of employees except those who are members of your profession. In an office such as yours, for example, salaries for the receptionist and staff would be covered, but not the salary of your law partners or any junior attorneys. However, high-quality professional overhead policies will cover at least part of the salary of a professional temporary replacement for you, such as a lawyer retained to fill in during your total disability.

In addition...

Lawyers who are partners in a group will want to consider a policy known as a Disability Buy-Out or DBO. In much the same way that life insurance benefits can be set aside to fund a buy-out by the remaining

partner (or partners) if one partner dies, DBO is designed to fund the healthy partners' purchase of the disabled partner's share of the business. With the proper agreement in place before disability occurs, hard feelings and the conflicts of interest that result from a partner's disability can be avoided. Furthermore, in combination with the disabled partner's individual Disability Income coverage and OE, a DBO policy can allow the business to continue to generate an income for the healthy partner, while the disabled partner is supported by the benefits from his or her individual DI policy. Any continuing share of the business expenses is reimbursed by the disabled partner's OE policy.

Take the time to consider upgrading your DI coverage today. You know how valuable it is to be fully prepared in all areas of life. Having the right DI coverage could be vitally important to your economic wellbeing in the future and help protect one of your most valuable assets — the ability to earn an income by practicing law.

In the case of DI protection, as in your legal work, a little extra planning and research in advance could prove invaluable at a later date. The truth is, successful professionals often need far more complete DI coverage than is provided through their firm's group policy or through association coverage. How does your coverage stack up? To find out, ask a reputable DI agent for a free consultation —specifically to help you compare your present coverage to an individual own-occupation policy for professionals, tailored to suit your individual needs.

Note: John Marcel is a Certified Financial Planner, CFP®, and principal of Madison Park Consultants, Inc., the provider of discounted Disability Income Insurance products to SCBA Membership. He can be reached at (877) 859-0983 or jmarcel@madisonparkconsultants.com.

LAND TITLE LAW

The value of expertise

By Lance R. Pomerantz

In land title litigation, an expert analysis supporting a motion for summary judgment can be the difference between a full hearing on the issues and an abrupt loss. Or, between a swift disposition and a costly, needless trial. Some recent cases illustrate how things can go wrong.

No Day in Court

Anthony Adamec claimed title to a parcel of land based on a description in a 1974 deed. The Mueller family's source of title was a tax deed from 1989. Unfortunately, the court believed that Adamec's deed on its face "[did] not describe in detail the property being conveyed" and was insufficient to create a question of fact in opposition to the motion. As a result, the Supreme Court granted summary judgment for the Muellers and the Appellate Division affirmed. *Adamec v. Mueller*, 94 AD3d 1212 (3rd Dept., 2012)

The court *did not* rule that the disputed parcel was *not* contained in the deed, just that the description was too vague to tell. Despite his almost 40-year-old claim of title, Adamec never got the chance to tell his story to the jury!

An expert experienced in reading, construing and locating legal descriptions can greatly enhance the position of a litigant faced with an indefinite description. Subject matter expertise can illuminate complex or obscure concepts through affidavits, diagrams or insightful application of legal doctrine. Retaining a land title expert early in the litigation will help in identifying potential difficulties and addressing them before summary judgment can derail the lawsuit.

culties and addressing them before summary judgment can derail the lawsuit.

The industry standard

In *Chisolm, et al. v. Williams, et al.*, 2012 NY Slip Op 51426 (Sup. Ct., Kings Cty., July 26, 2012) the trial court denied both plaintiffs' and defendants' cross motions for summary judgment for lack of expert affidavits.

Dad had owned his house in his own name, but occupied it with his second wife, the plaintiffs' stepmother. His will devised the house to the plaintiffs. Following Dad's death, the will remained unprobated for several years and the stepmother continued to occupy the house.

The stepmother recorded several deeds that purported to transfer title back and forth between herself and a third party. Even though a search of the public records would have revealed the gap in the chain of title, she also gave several mortgages on the house. When the plaintiffs brought this quiet title action, one of the mortgagees intervened to have its interest declared superior to the plaintiffs'. The plaintiffs and the mortgagee both moved for summary judgment.

The court considered whether the mortgagee had exercised the requisite due diligence in searching the ownership records. It determined that both summary judgment motions had to be denied because "neither movant [had] submitted expert witness affidavits" establishing the



Lance Pomerantz

appropriate standard of care.

Many litigators defer the retention of an expert until trial, if at all. In the current climate, courts have shown a marked inclination to dispose of land title disputes at the summary judgment stage. The courts also require the submission of a significant amount of evidence supporting or opposing a motion for summary judgment. Merely proffering a purported deed or chain of title without illuminating its contents will not suffice.

A missed opportunity

Dopf v. 319 W. 101st Street, LLC, et al., 2012 NY Slip Op 32639 (Sup. Ct., New York Cty., Oct. 12, 2012) is not, strictly speaking, a land title case, but is instructive nonetheless. Even though the case seems like it should have been easily dispensed with, the court found that the lack of an expert affidavit necessitated the denial of summary judgment.

Euphrasia Dopf owned a brownstone in Manhattan. Dopf's building shared a party wall with a building owned by 319 W. 101st Street, LLC. Following construction work performed on the adjoining building, Dopf sued 319 W. 101st Street, LLC and the construction contractor for damages allegedly caused by several minor encroachments resulting from the construction.

During discovery, Dopf provided a list of witnesses she would call to testify. She failed to include a valuation expert concerning the

amount of damages allegedly sustained. The defendants moved for summary judgment on the ground that she could not prove actual damages.

The court appeared willing to entertain the motion, but denied it on the grounds that "defendants have failed to establish their prima facie right to partial summary judgment ... as defendants have not provided any evidence that their encroachment onto Plaintiff's Property, however minor, has not devalued Plaintiff's Property." Since this was defendants' motion for summary judgment, "it is the defendants' burden to show that the property has not been devalued" in order to make out their prima facie case.

What started out as a petty squabble between neighbors will now require a much more expensive trial or, at least, a nuisance value settlement.

An ounce of prevention

Trial counsels often find themselves in the difficult position of justifying the additional expense of an expert to the client (or the insurance company). As these cases illustrate, bringing on the right kind of expert early in the litigation can lead to the best outcome in a cost-effective manner.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title newsletter Constructive Notice. For more information, please visit www.LandTitleLaw.com.

CORPORATE & COMMERCIAL LAW

Failure to deny independent contractor no-fault claim insurer's fault

By Mona Conway

The Second Department recently decided a no-fault case as a matter of first impression that is likely to have a great impact on no-fault cases going forward.

A.M. Med. Servs., P.C. v. Progressive Cas. Ins. (2012 NY Slip Op 06902 [October 17, 2012]) held that a no-fault claim contested by an insurer, where

injuries of the insured were treated by an independent contractor for the medical provider submitting the claim, does not fall within the preclusion exception of the No-Fault Law.

No-fault cases are among the most numerous brought in the New York courts. New York's No-Fault Law was enacted to ensure payment by insurance companies for legitimate damages of up to \$50,000 incurred by car accident victims, regardless of blame by any party. The law allows for speedy compensation of claims outside the courts. However, there are serious procedural trappings and very strict time constraints involved. The claimant has only 30 days after the date of the accident to file a claim. "A medical provider, as an assignee of an insured or covered person or applicant, must submit proof of the claim no later than 45 days after medical services are rendered (see 11 NYCRR 65-1.1, 65-2.4[c])." *Id.* If the insurer seeks to verify the legitimacy of the claim, it only has 15 business days within which to request proof of verification of the claim (see 11 NYCRR 65-3.5[b]; 65-3.11[c]). "The insurer must pay or deny the claim within 30 calendar days after receipt of the proof of claim, or after receipt of items pursuant to a request for verification (see Insurance Law § 5106[a]; 11 NYCRR 65-3.8[a][1]; [c])." *Id.* If an insurance carrier fails to deny a claim within the 30-day period, it is precluded from asserting a defense against payment of the claim.

Because of the strict time restraints placed on insurance companies to deny or verify claims, unsurprisingly, carriers look for ways to have claims fall outside the preclusion rule. In a Court of Appeals case, an insurance company tried to argue that a 30-day window is too short a time frame in which to detect billing fraud; but the court held that a change in the statutory time frame would be up to the legislature. *Fair Price Med. Supply Corp. v. Travelers Indem. Co.* (10 NY3d 556). A "narrow exception to this preclusion remedy" is recognized for "situations where an insurance company raises a defense of lack of coverage." *A.M. Med. Servs., P.C.*, 2012 NY Slip Op 06902, quoting *Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312. The reason for this exception is simple: the legislature did not intend to require insurance carriers to pay claims where there never was any insurance in effect. This would create insurance coverage where it never existed. *Id.*

In *A.M. Med. Servs.*, the plaintiff medical provider submitted claims to the insurer, stating that the insured was treated for injuries sustained in a car accident by an independent contractor for the medical provider. The defendant insurer paid part of the two claims submitted by the plaintiff and did not issue a written denial of the claims by stating that the ground for the denial of part of the claims was that independent contractors were the



Mona Conway

treating providers. The plaintiff medical provider brought an action against the insurer Queens County Civil Court to recover the balance of the claims (\$1,762.87) in addition to statutory interest and attorney's fees pursuant to Insurance Law § 5106(a). The defendant moved for summary judgment dismissing the complaint on the ground that the

medical provider had no standing to seek recovery of no-fault benefits because the medical services were rendered by independent contractors, and not A.M. Medical Services' owner or employees. In opposition, the medical provider proffered that the insurer waived this defense by failing to deny the claims upon this basis. The Civil Court granted the defendant's motion and the plaintiff appealed to the Appellate Term. The Appellate Term upheld the dismissal, holding that "[t]he independent contractor defense is nonprecludable," and that "[a]n insurer is not obliged to issue a denial in order to assert the nonprecludable, independent contractor defense." *A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co.*, 22 Misc 3d 70, 72 (App. Term 2d Dept 2008).

The Second Department agreed with a long line of cases which hold that "11 NYCRR 65-3.11(a) does not authorize direct payment to a medical provider which submits a bill identifying the treating provider as an independent contractor." *A.M. Med. Servs., P.C. v. Progressive Cas. Ins.*, 2012 NY Slip Op 06902 (App. Div. 2d Dept, October 17, 2012). The law of agency and propensity for fraud are the key rationales for this rule.

But, the question remained as to whether the insurance carrier could still be precluded from asserting this defense under the statute's rule of preclusion, which kicks in as a statute of limitation. The insurance company argued that it falls outside of the preclusion rule because service by an independent contractor of the medical provider is akin to the "lack of coverage" defense.

In determining whether a specific defense is precluded, the court was guided by the Court of Appeals' analysis in *Fair Price Med. Supply Corp. v. Travelers Indem. Co.* (10 NY3d 556), in which the question was posed: "[i]s the defense more like a normal exception from coverage (e.g., a policy exclusion), or a lack of coverage in the first instance (i.e., a defense implicat[ing] a coverage matter)?" The Second Department court stated that "a defense that the billed-for services were never rendered is more akin to the former. In this case, there was an actual accident and actual injuries." Based on this analysis, the court held that "the independent contractor defense does not fall within the exception to the preclusion rule." The court further stated that its decision "is consistent with the objective of the No-Fault Law to provide prompt uncontested, first-party insurance benefits and a tightly timed process of claim, disputation and payment." (Internal citations omitted).

Note: Mona Conway practices business law and commercial litigation at the firm Conway Business Law Group, P.C. in Huntington. She is also Co-Chair of SCBA's Commercial and Corporate Law Committee.

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A Legacy to Trust

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Request for advice and direction denied

Before the court in *In re Boyer* was a proceeding, pursuant to SCPA 2107, by two of the three trustees of the trust created under the decedent's will, for advice and direction regarding the listing for sale of the real property owned by the trust, and whether the beneficiary of the subject trust had the right to occupy the real property or alternatively be subject to eviction proceedings. The application was opposed by the trust beneficiary as well as the third trustee. Notably, one of the petitioning trustees was a remainderman of the trust, and the second petitioner was the spouse of a trust remainderman. The third trustee was the sister of the trust beneficiary.

The will of the decedent granted the trustees all the powers granted to fiduciaries in EPTL 11-1.1, and also specifically granted them the absolute discretion to sell all or any portion of any real or personal property of the estate or trust. The record also revealed that the subject real property consisted of a horse farm on approximately 67 acres of land. Prior to her death, the decedent owned a horse boarding business on the farm, on which the trust beneficiary resided and worked. The trust beneficiary continued to operate the horse boarding business and reside on the farm after the decedent's death.

In support of the application for advice and direction, and more specifically, for permission to liquidate the farm, the petitioners alleged that the business being operated on the farm did not generate sufficient income to cover the farm's expenses and that the funds contained in the trust for that purpose would be exhausted by 2013. In opposition to the application, the

third trustee maintained that while she did not oppose the sale, she opposed the manner in which it was being handled. Additionally, she claimed that the trustees should be removed and disinterested trustees appointed given each of their potential and actual conflicts of interest.

The court opined that trustees have broad powers to administer a trust including the authority to take possession of trust property, unless specifically disposed of, and to sell same on such terms as the trustees conclude will be the most advantageous to those interested in the trust estate. In exercising this authority, trustees are charged with the duty of equal loyalty to all beneficiaries whether income beneficiaries or remaindermen.

Although a fiduciary may petition the court for advice and direction concerning the administration of a trust, courts are generally loathe to substitute their judgment for those of the fiduciary. On the other hand, the court noted that the statute authorizes a fiduciary to petition for advice and direction concerning the propriety, price, manner and time of a sale "when the value of property of an estate is uncertain or dependent upon the time and manner of sale..." SCPA 2107(1).

On this basis, the petitioners maintained that advice and direction was warranted because they received three different opinions as to the farm's value from four different brokers, and because of their concern that the sale would be thwarted by the trust beneficiary. Nevertheless, the court held that the circumstances did not present a novel or complex valuation issue or an issue of uncertain valuation as contemplated



Ilene S. Cooper

by the statute, so as to justify its rendering advice and direction in connection with the sale of the farm. Rather, the determination of the appropriate sale price and terms of sale were matters to be determined by the trustees in accordance with their fiduciary duties and business judgment. Accordingly, the application for advice and direction pursuant to SCPA 2107(1)

was denied.

The court also rejected petitioners request for relief pursuant to SCPA 2107(2). Although the petitioners alleged that extraordinary circumstances existed by virtue of the conflict among the parties, the court found that the provisions of EPTL 10-10.7 authorized the majority of the trustees to act in relation to the issue of the property sale. Indeed, while the court expressed an appreciation for the difficult situation in which the trustees found themselves, it nevertheless concluded that the question presented was one of business judgment and not of law.

Finally, the court denied the application to remove the trustees finding that the allegations were not severe enough to constitute serious misconduct, or to demonstrate prima facie that the trustees were unfit to continue to serve.

***In re Estate of Boyer*, NYLJ, June 26, 2012, at p. 28 (Sur. Ct. Dutchess County).**

Jurisdiction over foreclosure action

Before the court *In re Johanneson*, NYLJ, Sept. 4, 2012, at 26 (Sur. Ct. Richmond County) was the issue of the Surrogate Court's jurisdiction over a foreclosure action. The petitioner and admin-

istratrix of the decedent's estate sought the court's consent to a transfer of a pending foreclosure action from Supreme Court. The application was opposed by the bank, which claimed that the Surrogate's Court lacked subject matter jurisdiction over such matters. The record reflected that the subject real property was owned by the decedent and her spouse, as tenants by the entirety, and that the decedent's spouse was responsible for her death.

Despite the bank's contentions that the Surrogate's Court lacked the authority to grant judgments of foreclosure and sale, the court, relying on the provisions of the New York State Constitution, the Surrogate's Court Procedure Act, and the opinion in *Matter of Piccione, supra.*, held that the foreclosure of a home in which the decedent had an interest at death affected or related to the administration of the decedent's estate, and was within the scope of its subject matter jurisdiction.

Nevertheless, the court held that it had the authority to decline a transfer of the action from the Supreme Court in the interests of judicial efficiency. To this extent, under the circumstances, the court determined that the Supreme Court was better equipped to hear and determine the foreclosure action, in view of its routine involvement with such matters, and the pendency of the action in that court since its inception.

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is Chair of the New York State Bar Association Trusts and Estates Law Section, and a member of the Board of Directors and a past president of the Suffolk County Bar Association.

CONTRACTS

Statute of Frauds trumps industry custom

By Lisa Renee Pomerantz

William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh
(N.Y. App. Div., 2d Dept. 2012)

Businesses often operate in the context of industry custom. When a contract or the significance of a party's conduct is ambiguous or unclear, courts may consider evidence of industry custom to clarify the parties' intent or determine the reasonableness of their conduct. However, industry custom cannot trump statutory requirements.

Plaintiff was an auction house which sold fine art and antiques on behalf of consignors, some of whom preferred to remain anonymous. Absentee bidders could participate in auctions by completing a form authorizing the use of telephonic bids or permitting the auction house to submit bids on their behalves.

In this case, defendant completed an absentee bid form identifying the item, an antique gilt box, on which it wanted to bid telephonically. That form indicated that payment was due on pur-



Lisa Pomerantz

chased items within five days of the auction.

The auction took place and the auctioneer's records showed defendant was the successful bidder on the designated item.

Plaintiff invoiced defendant who never took possession of the item and then failed to pay.

The trial court awarded summary judgment to plaintiff on the amount of the invoice and defendant appealed.

On appeal, defendant argued that the trial court erred in relying on the auctioneer's records because they did not identify the actual owner of the box that was being sold, but rather referred to the item by number. Even though it was clear that the defendant bid on the item and failed to pay, the Appellate Division reversed the trial court and entered judgment for the defendant.

In so ruling, the court relied on the specific terms of the applicable section of the Statute of Frauds. The Statute of Frauds requires that certain agreements be in writing, signed by the party against which they are to be enforced. The statute contains a specific exception for goods sold at public auction, which reflects the commercial realities of auctions where the buyer's assent may be communicated verbally or by gesture. This section provides that the auctioneer's records are deemed "equivalent in effect to a note of the contract or sale, subscribed by the party to be charged therewith" if they contain certain

information, including "the name of the person on whose account the sale was made."

The court rejected plaintiff's argument that the statutory provision should be interpreted to accommodate the "common practice for auction houses not to disclose the name of their consignors . . ."

Because the statutory language was "clear and unambiguous," the court had to interpret and enforce it as written. Any change in the rule would need to be made by the legislature. Moreover, the result was consistent with other cases arising under the Statute of Frauds holding that where written agreements are required, they must identify clearly the parties to the contract.

In developing contracts for use with customers, vendors and others, businesses should not merely rely on what is common in the industry, or repurpose competitors' contracts. Rather, they should ensure their contracts comply with legal requirements and accurately reflect how they their business operates.

Note: Lisa Rene Pomerantz is an attorney with more than 25 years experience. She works with innovative and creative enterprises to structure and foster successful business relationships and to resolve disputes amicably and cost-effectively. Her dispute resolution activities include membership on the American Arbitration Association's Roster of Neutrals as a Commercial Mediator and Arbitrator.

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CONSUMER BANKRUPTCY

Bankruptcy Court says \$5,000 Chap 13 fee reasonable

Recent decision reviews legal fee factors

By Craig D. Robins

What is a reasonable legal fee for a typical Chapter 13 bankruptcy case? That issue was addressed in a decision just released by Judge Jerome Feller, a bankruptcy judge in the Eastern District of New York, sitting in the Brooklyn Bankruptcy Court.

In that case, Chapter 13 trustee Marianne DeRosa objected to a \$7,500 flat legal fee that the debtor's attorney had charged. She insisted that the debtor's attorney, Paul Hollender, of New York City, bring a formal fee application to approve his fee. She then filed opposition to his fee, arguing that it was in excess of the fees customarily charged for routine cases in this district. Judge Feller issued a 12 page decision on October 11, 2012 in which he concluded that reasonable compensation for a routine Chapter 13 filing in this jurisdiction is \$5,000. *In re: Nicholas Moukakis*, (01-12-42200-jf, Bankr. E.D.N.Y.).

Trustee Marianne DeRosa pointed out that the customary Chapter 13 fees in this jurisdiction are between \$3,500 and \$5,000.

This is important news as Long Island bankruptcy attorneys have at times been at odds with the two Chapter 13 trustees in this district over what a reasonable fee is. For a period of time, Chapter 13 trustee Michael J. Macco insisted that every bankruptcy practitioner charging over \$4,000 had to bring a fee application to seek approval of the fee. Now we have a current judicial determination indicating what is reasonable for routine Chapter 13 cases.

For those who are not familiar with Chapter 13 practice, these bankruptcy proceedings, which involve a payment plan, usually require several court appearances, and often involve at least twice as much work as a typical Chapter 7 case.

Judge Feller began the legal analysis in his decision by reviewing the elementary bankruptcy law concept that the Bankruptcy Court not only has the authority, but the duty, to determine the reasonableness of compensation paid or agreed to be paid for representing a debtor in a bankruptcy case regardless of

whether a party in interest objects to it.

The judge then determined that the following factors were necessary to assess the reasonableness of the legal fee: the necessity of the services rendered, the benefit to the debtor, the time expended, the customary fees and reasonable hourly rates for the services performed, and public policy concerns.

Judge Feller observed that the *Moukakis* case was unexceptional and uncomplicated. The debtors' income was about \$150,000 per year. They owed about \$92,000 in unsecured debt. Their mortgage was current. The plan proposed a distribution of about 44 percent to unsecured creditors. The debtors retained their attorney about seven weeks before the petition was filed. There was only one meeting of creditors. The court confirmed the Chapter 13 plan less than six weeks after that. The attorney performed the legal work well.

The retainer agreement the attorney used provided for the \$7,500 flat legal fee, and also indicated that this was for the bare minimum of possible legal services in a Chapter 13 case. The attorney also indicated that he reserved the right to charge additional fees for services such as amendments, attendance at additional meetings of creditors or hearings, and routine motion practice. Of the \$7,500 fee, the debtors paid \$2,000 prior to filing. In his fee application, the debtor's attorney claimed he spent 12 hours devoted to the case, and that his paralegals expended a total of 23 hours.

The debtors were actually able to afford the higher fee; however, that did not sway the judge. He observed that they were paying a portion of the fee through the Chapter 13 plan, and that unless there is a 100 percent plan, unsecured creditors will effectively pay the fee while receiving a lower *pro rata* distribution.

The judge also commented on the public policy considerations for ensuring that Chapter 13 legal fees are reasonable.

Empirical evidence shows that Chapter 13 cases are much more likely to succeed when debtors are represented by counsel.



Craig D. Robins

Accordingly, in order to ensure that debtors have access to counsel, they should not be overcharged. Thus, a reasonable fee must be one which protects the debtor, while being generous enough to encourage lawyers to render the necessary and exacting services that bankruptcy cases often require.

Some districts in other parts of the country have "fee caps" in consumer cases which essentially permit bankruptcy counsel to charge any fee up to the cap without having to obtain court approval. Our district is not one of them.

Judge Feller, in the decision, expressly stated that "this Court is not hereby endorsing fee limits in Chapter 13 cases" and "does not intend to establish a fee cap in Chapter 13 cases."

Looking back to other decisions which addressed Chapter 13 legal fees in this district, in 2010, Judge Robert E. Grossman, sitting in the Central Islip Bankruptcy Court, addressed the propriety of a \$15,000 fee charged by an attorney who apparently was less than competent in representing the debtor. In that case, Chapter 13 trustee Michael J. Macco objected to the fee and the Judge reduced it to \$4,000 stating that "the bankruptcy proceeding was not compli-

cated" and the attorney "performed at an incompetent level." Judge Grossman pointed out that experienced counsel charged between \$4,000 and \$4,500 for cases in the district. He therefore reduced the fee to \$4,000 for this attorney and ordered him to disgorge the rest.

The attorney appealed to the District Court, which affirmed. *In re Arebello*, 2011 U.S. Dist. LEXIS 37449, 2011 WL 1336676.

The takeaway here is that an experienced Chapter 13 bankruptcy attorney, who does a proper and professional job, can charge as much as \$5,000 for a typical Chapter 13 case, and more if unusual or additional legal work is necessary. In addition, if the trustee or court challenges the legal fee, the bankruptcy attorney bears the burden of demonstrating the reasonableness of the fee.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: www.BankruptcyCan-Help.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Is Your Website User-Friendly? (Continued from page 11)

ors. Too much design can distract from your message.

8. **Incorporate visuals** to accompany content (data visualization). Enhance your reader's understanding by using charts, photos or illustrations to supplement or in place of text in some of your materials, but follow the guidelines above.

These guidelines are only the tip of the iceberg when it comes to web usability. Navigation, consistency, use of white space and many other factors will enhance (or detract from) the usability of your site. Law firm sites are about educating clients, potential clients and referral sources, conveying information about the firm, its lawyers and its practice areas. Focusing on the main design elements and the readability of your web

content should go a long way to increasing user satisfaction with your law firm website.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers management, productivity, client service, business development and marketing consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com. A version of this article originally appeared on the Canadian website, slaw.ca.

1. See Jakob Nielsen's site, useit.com, and specifically, *113 Design Guidelines for Homepage Usability* <http://www.useit.com/homepageusability/guidelines.html> and *Top 10 Mistakes in Web Design*, <http://www.useit.com/alertbox/9605.html>.

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IMMIGRATION

In search of a regulation: cultural competence in law

By Roy Aranda

This is part two of a two part series.

The ABA Model Rules and New York State Rules of Professional Conduct provide that, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation."¹ There is nothing in the Rules of Professional Conduct however, that specifically addresses cultural competence.

Cynthia M. Ward and Nelson P. Miller observe that as a result of growing racial, ethnic, and cultural diversity, lawyers must embrace cultural competence in order to provide competent legal services.² Ward and Miller recommend several ways of bringing cultural competence into the classroom including an elective course on Cultural Competence and the Law as well as through extracurricular activities. They conclude that "[i]t is a good time to re-imagine lawyers" and caution that "[n]o less than the future of the profession depends on it."

Katherine Frank-Hamlet, like Ward and Miller, stresses that "there is little doubt that that law students are better served by law schools that include cultural competency into their curricula."³ Frank-Hamlet points out that, although cultural competency is not an element of any statute, it "can have a significant impact on the delivery of legal services."

Cultural competence, Frank-Hamlet notes, "enables the law student/advocate to view the client through a culturally competent lens." These skills are equally applicable to attorneys in the public sector who serve disenfranchised and marginal populations as they are to attorneys in private practice negotiating inter-cultural transactions and legal disputes. She reminds us that Thomas M. Cooley Law School's Associate Dean and Professor

Nelson P. Miller views cultural competence as a business imperative and cautions that, no longer just a buzz term, cultural competence is a "vital component of law practice and a necessary skill."

Sue Bryan and Jean Koh Peters at the outset of their comprehensive chapter, *Five Habits for Cross-Cultural Lawyering*, emphasize that "[p]racticing law is often a cross-cultural experience."⁴ They urge lawyers to "develop awareness, knowledge, and skills that enhance the lawyers' and clients' capacities to form meaningful relationships and to communicate accurately" to meet cross-cultural challenges.

According to Sylvia Stevens, cultural incompetence implicates three inter-related rules in the absence of explicit Rules of Professional Conduct: the duty to provide competent representation, the duty to pursue the client's objectives, and the duty to communicate.⁵ Thus, "[a] lawyer who doesn't recognize cultural differences may be insensitive to a client's cultural taboos, expectations, family norms or communication and conflict-resolution styles. The lawyer will be less effective in establishing a relationship of trust and confidence with clients from other cultures, and the failure to understand the significance of cultural differences and misinterpretation of client behavior may lead the lawyer to implement ineffective case strategies."

Stevens cautions that, "[w]hether or not there is an ethical obligation of culturally competence, it is a practical necessity in modern law practice if we are committed to equal justice and high-quality client service."

Perhaps the solution lies somewhere between aspiration and mandatory guidelines. This calls for establishing, enhancing, and expanding legal ethical guidelines in the area of cultural competence and



Roy Aranda

diversity.

Language of a proposed regulation

The following statement comes from the *American Psychological Association's Ethical Principles of Psychologists and Code of Conduct, Principle E: Respect for People's Rights and Dignity*:

Psychologists are aware of and respect cultural, individual and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language and socioeconomic status and consider these factors when working with members of such groups.

By changing a single word (psychologists to lawyers) we have:

Lawyers are aware of and respect cultural, individual and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language and socioeconomic status and consider these factors when working with members of such groups.

This might fit under ABA Model Rule 1.1, *Competence, section (a)*:

A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *Lawyers are aware of and respect cultural, individual and role differences, including those based on age, gender, gender*

identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language and socioeconomic status and consider these factors when working with members of such groups.

Lisa Aronson Fontes describes cultural competence as a journey that has a beginning and middle but no end.⁶ It is an ongoing journey towards self-actualization in cultural awareness and sensitivity. In the legal profession, as well as in other helping professions, this will require continuous education and exposure. The journey, as I view it, is one that is best anchored in ethical mandates that underscore explicitly the importance of cross-cultural competence to the profession and practitioner.

Note: Roy Aranda is Secretary of the Long Island Hispanic Bar Association and is on the Editorial Board of Noticias, the official publication of the Hispanic National Bar Association. Dr. Aranda is a psychologist who holds a law degree and has a forensic psychology practice with offices in Long Island and Queens.

1. Rule 2.1 Advisor.

2. Cynthia M. Ward and Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, Michigan Bar Journal, January 2010.

3. Katherine Frank-Hamlet, *The Case for Cultural Competency*, New York Law Journal, April 25, 2011.

4. Sue Bryan and Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in Race, Culture, Psychology, and Law, Kimberly Holt Barrett and William H. George, Eds., Sage Publications, 2005.

5. Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty*, Oregon State Bar Bulletin, January 2009.

6. Lisa Aronson Fontes, *Interviewing Clients Across Cultures: A Practitioner's Guide*, The Guilford Press, 2008.

HEALTH AND HOSPITAL LAW

The Medicare lien trumps GOL 5-335

By James G. Fouassier

On several occasions I have written on the application of various lien and subrogation laws and obligations to tort recoveries secured by settlement or verdict. I routinely advise plaintiffs' counsel to exercise prudence in ascertaining in advance of settlement the nature and extent of any possible claims by lienholders or third parties entitled by law (including claims for equitable subrogation) or by contract (liability and medical insurers) to recover for monies previously disbursed on behalf of the plaintiffs.

In 2009 New York enacted significant changes to what generically are referred to as the "collateral source" rules embodied in the General Obligations Law. In particular, Section 5-335 created a new limitation of the usual reimbursement rights of third parties when such reimbursement arises not out of a statutory duty but instead by a contractual agreement. Subsection "a" recites that unless a "benefit provider's" reimbursement right is established by statute a settlement (but *not* a verdict - an important distinction sustained by courts to which the issue has been presented) "shall not" be deemed to include any compensation for health care costs, loss of earnings or other economic losses. To avoid the obvious prejudice to the third parties ren-

dering benefits, the statute also preserves the right of the "benefit provider" to pursue tortfeasors independently of the settlement. Subsection "b" goes on to hold that no "benefit provider" shall be entitled to a lien or subrogation right and no settling plaintiff shall be subject to subrogation or other reimbursement claim except, again, where the reimbursement right is established by law.

Congress enacted the Medicare Secondary Payer Act ("MSP Act") in 1980 to address some of the already rising costs of Medicare benefits. Under 42 USC 1395y(b)(2)(A) Medicare "may not be made to pay" medical claims on behalf of eligible Medicare beneficiaries if some other source of medical payment is primary (workers' compensation; medical, hospital, general or automobile liability insurance; self insured health plans, etc). Importantly, there is an exception when the primary payer is not likely to render medical payments "promptly;" in such cases Medicare may pay the bills subject to "reimbursement" either by the primary payer or by the beneficiary. (I remind practitioners, as I have on several occasions in the past that unlike the "hospital lien" created by New York Lien Law section 189 or



James G. Fouassier

the "Medicaid lien" established by New York Social Services Law section 104-b, there is no docket to which settling counsel may refer to ascertain the particulars of the "Medicare lien." Affirmative inquiries must be made to Medicare, and settling without accommodating the Medicare lien may expose the plaintiff to a "private cause of action" for up to double damages, 42 USC 1395(y)(b)(3)(A).

Soaring health care costs eventually gave rise to a form of health benefit provider we all know as "managed care." In particular, the value of capitulating the risk of covering large, resource intensive (read "elderly") populations onto managed care organizations was not lost on the federal government, hence the birth of the "Medicare Advantage" ("MA") program, which is similar to a Medicare HMO. The MA plans are authorized by the act to enroll individual members from among the ranks of those who otherwise would be eligible for "original" Medicare, usually by inducing them with enhanced benefits and somewhat lower (or no) deductibles, coinsurance and other member responsible payments. The federal government, through the Centers for Medicare

and Medicaid Services, or CMS, pays a premium to an MA provider like a large Blue Cross affiliate or United Healthcare for each covered beneficiary it enrolls, and the MA plan then takes on the management of the beneficiary's care and the risk of payment to health care providers.

Like any other kind of insurance, the terms and conditions of coverage, the benefit designs, and the mutual duties and obligations of the MA plan and the member-beneficiary are established in the contract between the plan and the member. Included in that contract is the right of the MA plan to recover for benefits paid out under the same circumstances as would require reimbursement to "original" Medicare under the MSP Act.

So, when the plaintiff's MA plan pays out on hospital and medical claims and later asserts its reimbursement rights against the settling plaintiff, is the claim sustained by operation of the MSP Act or denied by operation of GOL 5-335? Are those reimbursement rights derived by statute or are they created by contract? If the conclusion is that they are creatures of the contract between the MA plan and the member, and not the MSP Act, then does the application of GOL 5-335 to bar the claim conflict with the act?

Previously, two New York state courts have
(Continued on page 26)

CONSTRUCTION LAW

Recent decisions on home improvement subcontractors' rights

By Karl Silverberg

Two recent Appellate Division decisions ruled on legal issues affecting subcontractors' rights when performing home improvement work. First, subcontractors performing home improvement work must be licensed as a home improvement contractor to secure their right to payment from the general contractor.¹ Second, subcontractors, as well as suppliers, do not have mechanic's lien rights against a residential homeowner's property when the general contractor is not licensed as a home improvement contractor.²

The CMC case

"A home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit."³ Suffolk, Nassau, Westchester, and New York City counties, as well as certain townships and villages, require that contractors performing home improvement work be licensed by their local department of consumer affairs.

CPLR § 3015(e) states: "Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs . . . the complaint shall allege . . . that plaintiff is duly licensed and shall contain the name and number . . . of such license The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal." "The fact that the homeowner was aware of the absence of a license or even that the homeowner planned to take advantage of its absence creates no exception to the statutory requirement."⁴

In *CMC Quality Concrete III, LLC v. Chris Craftsman Development, Inc.*⁵, the Second Department, without much discussion, concluded that the forfeiture rule noted above extends to unlicensed subcontractors trying to collect payment from a general contractor on home improvement projects.

The *CMC Quality* case appears to be a policy shift. The Second Department had ruled in the past that a home improvement subcontractor was required to be licensed, but that case provided a textual analysis of the East Hampton Town Code at issue. In that case, the court found, "The relevant [Town] Code provisions state that a contract for home improvement services between . . . a contractor and 'an owner or his agent' constitutes a 'home improvement contract' within the meaning of the Code[;] . . . the Code also broadly defines the term 'owner' as including 'any owner, . . . or any other person who orders, contracts for or purchases the services of a home improvement contractor or any person entitled to performance of such service. . . . [T]he record supports the conclusion that the general contractor was the owner's agent for obtaining the services of subcontractors."⁶

The *CMC Quality* court did not conduct a similar textual analysis of the Westchester County Code at issue. The Westchester Code is arguably narrower, and states: "'Home improvement business' means the business of providing for a profit, a home improvement to an owner;" "'Home improvement contract' means an agreement between a 'contractor and an owner.'" Additionally, the "Legislative Findings," states, "[B]ecause of the increase in complaints by residential



Karl Silverberg

dwellers in the County of Westchester about abuses on the part of home improvement contractors, it has become desirable to safeguard and protect such residents by regulating the home improvement, remodeling and repair business."

The Westchester Code appears to be focused on protecting consumers, as opposed to businesses that are presumably knowledgeable enough to protect themselves. Further, CPLR § 3015(e) uses the word "consumer."

It would now appear that all home improvement subcontractors in the Second Department need to be licensed when performing home improvement work no matter which county or local code applies.

The Kamco Supply case

In *Kamco Supply Corp. v. JMT Brothers Realty, LLC*⁷ the First Department affirmed a lower court's ruling dismissing a supplier's mechanic's lien against a residential property. The Appellate Court's decision was based on the trial court's finding that the general contractor was not a licensed home improvement contractor.

The court based its decision on the long standing proposition that mechanic's lien rights of subcontractors and suppliers exist only to the extent that the owner owes a debt to the general contractor. Lien Law § 4(1) states: "If labor is performed [by a] . . . subcontractor[,] . . . the lien shall not be for a sum greater than the sum earned and unpaid on the [general] contract." As stated by the *Kamco* court: "Where a home improvement contract has been rendered unenforceable, there can be no funds due and owing from the owner to the unlicensed general contractor to support a sub-

contractor's mechanic's lien claim."⁸

The rule that lien rights are derivative puts urgency on unpaid subcontractors and suppliers to file mechanic's liens as early as possible while there still might be funds due from the owner to the general contractor. Once the owner pays the general contractor in full, the owner has no obligations to those that file liens after final payment.

As a practical matter, subcontractors and suppliers that improve residential property should confirm that the general contractor is licensed. This should be done to protect their mechanic's lien rights. Confirmation should also be obtained because if the general contractor cannot collect payment from the homeowner, it could make the general contractor insolvent, making it difficult for the subcontractors and suppliers to get paid.

Note: Karl Silverberg, P.E., Esq. is an attorney whose law practice focuses on serving the construction industry. Prior to law school, Mr. Silverberg worked as a civil engineer, and is a licensed professional engineer. He is with the law firm of King & King, LLP. Mr. Silverberg can be reached at (516) 661-5254 or ksilverberg@king-king-law.com.

1. *CMC Quality Concrete III, LLC v. Indriolo*, 95 A.D.3d 924 (2d Dep't 2012).
2. *Kamco Supply Corp. v. JMT Bros. Realty, LLC*, 950 N.Y.S.2d 701 (1st Dep't 2012).
3. *CMC Quality Concrete III, LLC*, 95 A.D.3d at 925.
4. *Racwel Constr., LLC v. Manfredi*, 61 A.D.3d 731, 733 (2d Dep't 2009).
5. 95 A.D.3d 924 (2d Dep't 2012).
6. *Lorenzo Marble & Tile v. Meves*, 236 A.D.2d 448, 449 (2d Dep't 1997).
7. 950 N.Y.S.2d 701 (1st Dep't 2012).
8. *Id.*

REAL ESTATE

The mortgage follows the note . . . or does it?

By Charles Wallshein

Perhaps most frustrating for attorneys defending securitized mortgage foreclosures is not knowing the identity of the loan's actual owner. The case caption often reveals the plaintiff as a large commercial bank acting as the "servicer" or as a large commercial bank acting as "trustee." Even though the caption purports to identify the plaintiff, in more cases than not, the named plaintiff cannot prove it has an interest in the loan. In most cases the entity that appears as the "lender" on the promissory note is not a party to the action. Over sixty percent of all mortgages in the country situate in securitized mortgage pools.

Standing has become the most widely and most successfully used affirmative defense in securitized mortgage foreclosure cases. Standing is the demonstration that the plaintiff is the proper party entitled to relief. The plaintiff in a foreclosure action must make a prima facie case that it has a legal interest in the underlying indebtedness (promissory note) to the security interest (mortgage). Most simply put, the plaintiff has to either own the note or be an agent of the entity that owns the note.

New York law requires that at the time the foreclosure is commenced the entity foreclosing must own the note.¹ New York law also requires that the plaintiff must file its lis pendens 20 days before the entry of its judgment of foreclosure and sale.² Another

requirement is that all mortgages (and assignments of mortgages) being foreclosed must be recorded prior to title to the property being transferred by the referee post-sale.³ This means that besides the plaintiff having to own the note prior to the commencement of the case, the mortgage has to be recorded in that party's name before the plaintiff can enter a judgment of foreclosure and before the referee can transfer title.

These rules make perfect sense. The party cutting off the fee owner's right of redemption and all entities with subordinate interests in the property must be identified with constructive notice to the world via the recording statutes. If this were not the case then anyone could foreclose on anyone. Foreclosure defendants could not defend their rights in real property against the proper parties.

"Who owns the note?" This question is asked most often during the modification process prior to the commencement of a foreclosure. Once the foreclosure is commenced defendants can see the plaintiff in the caption and automatically assume the entity named there owns the note. Too often the named plaintiff does not, cannot and has not ever owned the promissory note. In other words, the plaintiff has no standing.

One would think that a careful examination of recorded assignments at the county clerk's office would reveal the last mortgagee of record and presumably that assignee would also own the note. After all, what sane or right-minded transferee of a

mortgage note would risk its priority position by not diligently recording the security instrument with the county clerk? You would be surprised.

Almost without fail the mortgage is immediately recorded after its creation. The borrower borrows the money and the title insurance company, having insured the priority and validity of the new mortgagee's position, immediately records the mortgage. It is what happens thereafter that the note owner's identity becomes murky.

One court eloquently described the rules governing transfer of notes and mortgages as having dual purposes for dual "worlds⁴. One can be seen as protecting competing interests from each other and the other protects fee owners from unlawful attacks or liens on their title. Real property law is a set of rules that ensures that entities with interests in real property know exactly what they have and their position against superior, subordinate and competing interests. Overriding these rules is the ancient rule against any law that restrains the alienation of property. The law has always favored the marketability of title.

The recording statutes were enacted to give the world constructive notice of the existence of liens and encumbrances on title to real property. Lien perfection is the cornerstone principle enabling existing and prospective lien-holders to have notice of each other's existence for the purposes of determining their respective priority positions. A person who advances money against real property secured by a mortgage should

know whether there is a pre-existing lien on the same property. Likewise, a purchaser of real property should know whether the entity he is taking title from has good and clear title to transfer.

Millions of parcels of real property are encumbered by mortgage liens that may be unenforceable yet those liens can never be removed. The culprit is the Residential Mortgage Backed Securities transaction. The RMBS transaction requires multiple transfers of the underlying mortgage notes and a corresponding number of transfers of the security instruments. It has become apparent that these transfers were improperly executed or not executed at all. None of it made any difference and nobody would have noticed until the entities that thought they owned these loans had to foreclose to recapture their investment.

The RMBS transaction changed the incentives mortgage creditors are compelled to, and the manner by which, they perfected their interests. It is because of this that we are witnessing the total breakdown of the old system caused by the blind acceptance of a brilliantly devised, logical and lawful transaction that was implemented poorly. It is counterintuitive to think that the multi-trillion dollar mortgage industry would systematically neglect to take steps to properly perfect its interests in real property. However, this is exactly what happened. It is called "securitization failure".

Securitization failure is just what it sounds

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VEHICLE AND TRAFFIC UPDATE

New DMV proposed emergency regulations for relicensing of multiple DWI offenders

By David A. Mansfield

Governor Andrew Cuomo announced in a Sept. 25 press release major proposed revisions to Department of Motor Vehicles New York Codes, Rules Regulations 15 NYCRR Parts §132, §134 and §136 effective immediately regarding the relicensing of drivers convicted of multiple alcohol or drug related driving offenses.

Since the beginning of the year, the Department of Motor Vehicles (DMV) had frozen all driver license applications for relicensing for anyone with three or more alcohol or drug related driving convictions or incidents.

The proposed emergency regulations, which seem likely to be promulgated without substantial changes, will require a lifetime review of a driving record by the DMV of all drivers with three or more alcohol or drug related driving convictions or incidents that are seeking to have a license or privilege reinstated after a revocation.

Zero tolerance findings §1192-a is included under proposed Part §132. A finding of a chemical test refusal not arising out of the same incident will be counted separately. If your client was acquitted or a DWI charge was dismissed in satisfaction of a guilty plea, but found to have refused to submit to a chemical test, that will be held against their driving record as per Part §132.1(a).

The proposed emergency regulations, as of this writing, can be found on the DMV website at: <http://www.dmv.ny.gov/proposed.htm#proposedreg>.

There is an excellent chart and FAQ or frequently asked questions section for the technophobes, which can be found at:

<http://www.dmv.ny.gov/problem.htm>.

The official citation for the heart of the proposed emergency regulations are a new 15 NYCRR Part §132. The title is the definition section of dangerous repeat alcohol or drug offenders.

Drivers meeting the criteria include five or more drug or alcohol driving convictions or incidents in a lifetime. These drivers will permanently have their license revoked under proposed Part §132.1(b)(1).

Three or more alcohol or drug related convictions in the last 25 years plus at least one other serious driving offense in that period will be in this classification.

A serious driving offense (SDO) is defined in proposed Part §132.1(b)(d) as a fatal crash, a driving related penal law conviction, 20 or more points assessed for driving for the past 25 years with two or more convictions each with five points or higher.

It is apparent that if your client has two prior alcohol or drug related driving convictions or incidents, that they must be advised that they are in jeopardy of permanent license or privilege revocation in the state of New York. The citation for the license or privilege sanctions is found in proposed emergency regulations Part §136.4, (b), §136.5(a) §136.10.

Should your client have three or four alcohol convictions but no other serious driving offenses in the last 25 years, the DMV will add five years to the statutory minimum revocation period if revoked for an alcohol or drug related driving offense.

The DMV will add an additional two



David Mansfield

years to a minimum period of revocation if your client has three or more alcohol/drug related driving convictions is revoked for a non-alcohol/drug related driving offense such as operating without insurance, speeding, reckless driving or an administrative finding after a fatal accident hearing.

The DMV when restoring a license to a client revoked for a non-alcohol/drug related driving offense will require an additional two year period of a restricted use license which will limit your client's driving to and from work, school and medical visits. An ignition interlock device is not required.

The DMV will require the installation of an approved ignition interlock device on any owned or operated vehicle and a restricted use license for five years for people who are approved to be relicensed after three or more alcohol and drug related driving offenses or incidents.

The Department is also moving to extend the minimum §1192 related suspension or revocation period. The new regulations will provide that completion of the Driving Driver Program will not terminate the revocation and entitle repeat offenders defined as two or more, to have their full licenses restored. This does not apply to first offenders. Please see proposed Parts §134.10, §134.11.

The defense lawyer is at a disadvantage in terms of lifetime driving records because our access is limited to ordinary printouts which only list most DWI convictions for 10 years and chemical test refusals for less than that time. Your client can file a Freedom of

Information Law request with Form MV-15 for their lifetime driving record. The problem is that it may take four to weeks to obtain this vital information.

There should be some mechanism for defense lawyers to have immediate access to the lifetime record if already enrolled with the Department of Motor Vehicles to obtain driving records online in accordance with the department's rules and regulations and the Drivers Privacy Protection Act 18 U.S.C. § 2721 et. seq. DWI convictions are kept on the abstract for 10 years except those involving personal injury accidents and fatal accidents. Convictions for other traffic offenses are off the record after about four years.

You need to know your client's lifetime driving record at the initial intake. Any client who appears to have two previous alcohol or drug related driving offenses or incidents will be subject to the severe sanctions for a repeat offense. Defense counsel must be able to properly advise the client of plea bargain offers and of the collateral consequences. *Missouri v. Frye*, 132 S.Ct. 1399 (2012), *Lafler v. Cooper*, 132 S.Ct. 1375 (2012).

There is, of course, much more to discuss such as the employer's exception for the operation of a vehicle without an ignition interlock device and the terms and conditions of the extended restricted use license and revocation for serious driving offenses. A future article will cover these topics as the regulations become final.

Note: David Mansfield practices in Islandia and is a frequent contributor to this publication.

AMERICAN PERSPECTIVES

Regulations and their impact on small business and entrepreneurs

By Justin Giordano

The long and protracted 2012 election finally came to an end on November 6. Here in the northeast, primarily downstate New York, New Jersey and part of Connecticut, the election took place in the midst of the aftermath of hurricane "Sandy." Many among us who reside on Long Island did not have power or cable television service as late as Election Day. Nonetheless, the oldest and most emblematic of American traditions was upheld as it has been since the inception of the nation. A hurricane, no matter how destructive, was certainly going to impede the most fundamental of American rights, namely the right and privilege to vote. After all not even the bloodiest conflict in American history, the civil war of 1861-1865, could detract a presidential election from taking place.

Congratulations to sitting president, Barack Obama who as a result of the November 6 election, will be returned to the White House for another four year term. There's little doubt that international affairs will be challenging as they always are and unpredictable as ever. Unpredictability in the international arena has been a truism for every administration since George Washington's.

There is also very little doubt that all indications point to continued trying times for the economy for the ensuing four years just as they have been for these past four years. Entrepreneurial activity, be it in the form of small or not so small business, remains the key to unleashing American economic success or a turn around from the current malaise.

While as previously mentioned it is true that the events beyond American borders are by definition extremely difficult, if not impossible to ascertain with exactitude prior to their actual occurrence, there is much greater correlation between domestic economic policy and resulting effects.

"For every action there's a reaction," so the saying goes. What could and should be added is that the impact of said reaction is quite often difficult to precisely predict as another old saying underscores, namely the "law of unintended consequences." This couldn't be truer as it pertains to the enactment of new regulations vis-à-vis small businesses and the entrepreneurial field. As a general rule history has demonstrated that new laws and regulations, even when well intentioned, have added some measure of restraint on wrong doing and excesses but have also had a significant impact on slowing and at times even halting the expansion of new and existing businesses, especially small to id-sized enterprises.

Given the re-election of the Obama administration, which has indicated in no uncertain terms that it intends to continue on its course of heavy handed regulations for business, it's worthwhile to present some of the evidence to support the aforementioned contention.

For example since late 2008 and over the course of the next four years, the budgets of the regulatory or administrative agencies have increased by a whopping 16 percent and exceeded over 54 billion dollars as of



Justin Giordano

2012, this according to the annual "Regulator's Budget," which is compiled by two prominent universities, The George Washington University and Washington University in St. Louis. At the same it's important to note that employment at these agencies has risen by 13 percent under the Obama administration or more than 280,000 new jobs. At the same time the overall unemployment rate has consistently averaged

over 8 percent in the last four years, ranging from as high as 10 percent to the latest 7.9 percent. During the same period private-sector employment shrank by 5.6 percent. Also another point of comparison, the economy as a whole grew only by a rather anemic 5 percent in total over the same four-year time frame while the annual GDP has stubbornly remained stagnant, currently in the 2 percent or lower range. A 3 percent or higher GDL is needed in order to have an economy that is generating enough new jobs to employ the majority of those new entrants into the job market seeking employment such as college graduates and those currently unemployed.

To further make the case, chief economic strategist of the Progressive Policy Institute, Michael Mandel, found through his research that in the period covering one year from March 2011 to March 2012, jobs at federal regulatory agencies grew at a faster rate than those in the private sector or even overall federal government employment. It should be noted that the Progressive Policy Institute is by no means a critic of the administration. Quite the con-

trary they could be deemed as philosophical and political allies of the administration.

The crucial question is whether the new positions were created related to or were a consequence of more regulations. The answer to this question appears rather clear if one simply looks at the numbers. Production emanating from regulatory agencies is significantly up if bases on the number of rules federal agencies are churning out. The administration created 75 new major rules in the first 26 months after coming into office. This translates into a cost to the private sector of more than 40 billion dollars, this according to a study by the Heritage Foundation. The study's author, James Gattuso, commented that "No other president has imposed as high a number or cost in a comparable time period." To further buttress the point, the total number of pages in the Federal Register, where all new rules are published, is an indicator of regulatory activity. It indicates an increase by 18 percent in one year alone, 2010. Furthermore, a total of over 375 new rules were imposed on business, which accounted for a cost in excess of \$9.5 billion, this according to Sen. John Barasso of Wyoming.

A last point of note when compared and contrasted to a business, in terms of size and revenue the federal government's regulatory operations would rank as one of the largest 50 corporations in the United States. Furthermore if one were to contrast regulatory agencies and the private sector with regard to the number of their employees, the former would rank as the third largest in the country.

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The mortgage follows the note . . . or does it? (Continued on page 17)

like. It is the failure of the note to lawfully vest in the possession of the entity claiming an interest therein. Securitization fail occurs in two ways. First, it is the unlawful transfer of notes to, and unlawful acceptance of notes by, the trust pursuant to the terms of the trust agreement. Second, it is the unlawful transfer of notes pursuant to statute.

The legal arguments are thus framed; is “securitization fail” a sound affirmative defense in mortgage foreclosure proceedings? And if it is, how does the defendant prove it? The answers to these two questions require a basic understanding of the rules governing mortgage and mortgage note transfers in securitized mortgage transactions.

Securitization is the conversion of cash flow from a pool of loans (accounts receivable) into a security like a stock or a bond. An entity is created to collect the principal and interest payments from a pool of mortgage loans and redistribute that income to investors (certificate holders) according to the entity’s governing document. The entity is created as a common law trust under New York’s Estate Powers and Trusts law, as a government sponsored entity (Fannie Mae/Freddie Mac) or as a government guaranteed entity (Ginnie Mae). The trust sells certificates that entitle investors to receive a portion of the trust’s income.⁵

The trust has two main objectives; first, it is intended to be insulated from creditors, especially Chapter 7 trustees. Second, the trust has to qualify as a tax free pass through in accordance with the internal revenue code so the cash flow from the loans is only taxed once at the investor level and not twice as if it were regular income.

When financial assets such as accounts receivable or other debts are securitized, parties to the transaction typically attempt to ensure that the assets are “bankruptcy remote.” This means that creditors of the party that originally extended credit cannot reach the financial assets and the assets cannot become part of the originating firm’s estate in the event of a bankruptcy.⁶ Instead, even with the bankruptcy of the originating firm, the securitized assets of the trust can continue to benefit of the certificate holders. Think of Lehman Bros. and Bear Stearns securitizations. The bankruptcy trustees could not invade the trusts created by Lehman and Bear to reach the assets for the benefit of the debtor’s creditors.

Bankruptcy remoteness is typically concerned with establishing three things. First, the sale of assets is a true sale of the assets; second, the transfer of loans to the trust is not a fraudulent conveyance; and third, the assets in the trust will not be comingled with assets from other entities. In other words the trusts are “closed.”

Typically securitizations have three or four parties in between the originator of the loan and the trust. These intermediaries have no real purpose other than to serve as bona-fide purchasers of the assets. Attorneys for the industry apparently felt that if there were three bona fide transactions in between the originator of the loan and the trust, creditors of the originator could not attack trust assets.

The loans therefore have to travel a path from originator to seller to depositor to the trust (A to B to C to D). This means that actual possession of the mortgage notes have to pass from originator to seller to depositor to the trust. Eventually the security instrument (mortgage) has to be recorded in the name of the trust to be enforceable against the borrower. A mortgage is an interest in real property, a mortgage note is not. To establish race/notice priorities, mortgages and assignments of mortgages must be in writing and recorded. Notes and note transfers do not. To satisfy the statute of frauds, mortgages and assignments of mortgages have to be in writing. Note trans-

fers do not.⁷

A promissory note by itself can be lawfully transferred by mere delivery. UCC Article 3 defines “a holder in due course” as one who lawfully possesses a negotiable instrument.⁸ A holder in due course has the presumption that it is the proper party to enforce or negotiate the instrument. UCC Article 9 governs transactions where there is a security instrument attached to the promissory note. If the provisions of Article 9 are not satisfied, a mortgage note that is transferred will not automatically transfer the security interest in the property attached thereto.

UCC §9-203(g) is the codification of the common law maxim “the mortgage follows the note.” New York and every other jurisdiction recognize that a security instrument cannot be enforced independently of ownership of the underlying indebtedness.⁹ In other words, a person cannot have a security interest in nothing. There has to be an underlying promise as the basis for the security interest.¹⁰

The most common affirmative defense in securitized mortgage foreclosures is that the failure to record the assignments of mortgage in each entity’s name in the chain of possession to the note from originator to seller to depositor to trust is fatal to the trust’s ability to maintain its foreclosure action. Contrary to the terms of the trust agreement, it is the norm for assignment of the mortgage directly from the originator, or by MERS as nominee of the originator/lender, to the plaintiff-trust (leaving out the assignment of the mortgage to the seller and from seller to depositor and depositor to trust). Meanwhile plaintiffs argue that lawful delivery of the note from originator to seller to depositor to trust is sufficient to vest standing to foreclose in the plaintiff-trust because the mortgage follows the note.

The securitization industry has relied on both the common law and the codified versions of “the mortgage follows the note” to demonstrate priority of ownership against competing interests in the mortgage and enforceability of the mortgage in securitized mortgage foreclosures.¹¹ The industry was only half correct.

To demonstrate that lawful delivery of the note obviates the need for every assignment of the security instrument to be in writing the securitization industry uses the “Article 9 argument”. The 2001 amendments to Article 9 include sales of promissory notes, accounts, and payment intangibles, not just classical security interests. When a promissory note is sold under Article 9, the buyer is the “secured party.”

The terms used for the participants in the Article 9 revisions have their origins in the section’s secured transactions roots. The note-seller is the “debtor,” and the note is the “collateral.” The buyer’s ownership interest in the promissory note is a “security interest.”¹² The American Securitization Forum’s¹³ Article 9 argument² is as follows:

- The sale of a promissory note is a grant of a security interest in the promissory note;¹⁴
- A security interest is good against the parties to the transaction when it attaches, and good against the rest of the world when it is perfected;¹⁵
- The buyer’s security interest in a purchased promissory note is perfected as soon as it attaches;¹⁶
- The buyer’s security interest in the mortgage attaches as soon as the interest in the note attaches;¹⁷
- and is perfected as soon as the interest in the promissory note is perfected;¹⁸
- While “the creation and transfer of an interest in or lien on real property” is excluded from Article 9, there is an express exception to this rule.¹⁹

In other words, recorded (written) assignments of security interests (mortgage) are irrel-

evant as long as there is lawful transfer of the underlying promises to pay (mortgage notes).

The ASF’s position is that the UCC takes priority over state real property laws even when note transferees do not record the transfer of the associated assignment of mortgage pursuant to state recording statutes. This may be true as to competing interests in the priority of payments with regard to the mortgagee’s priority against other mortgagees. However, extending this argument to give note purchasers priority against subsequent bona fide purchasers of the real property is absurd.

The Article 9 argument seems to reason that a mortgage note endorsed in blank automatically vests the right of the §9-203(g) “note-owner” or the §3-204 “holder in due course” to elect to enforce the equitable remedy in foreclosure against the mortgagor’s property without ever recording the assignment of the security instrument in the public record.

Any practitioner who has conducted a forensic review of the collateral file associated with a securitized mortgage foreclosure has observed that a majority of note transfers in the A to B to C to D chain are indorsed in blank. As a practical matter the Article 9 argument fails because it reduces the security instrument (the mortgage) to nothing more than a personal check made out to a bearer that endorses it in blank. The party entitled to enforce the mortgage in foreclosure is either a mystery or a secret. In either case the proper party’s identity is not a matter of public record.

Irrespective of the enforceability of bearer paper with attached security instruments in foreclosure, plaintiffs still bear the burden of proof that they actually took title to the mortgage notes in a lawful manner. Even if the mortgage follows the note, the alleged note owner still has the burden of proof that it is the note’s lawful owner.²⁰

In New York a foreclosure plaintiff cannot commence a foreclosure unless it owns the mortgage note and cannot complete its foreclosure until it records the assignment of mortgage in its name. So far, there is no decision in New York that states otherwise. Sooner or later a court of review will be called upon to resolve the apparent conflict between the Real Property Law and the

Uniform Commercial Code. If the dicta in *MERS v. Romaine* is any indication of how the Court of Appeals may still feel about secret ownership of mortgages, proponents of the Article 9 argument will have a lot to think about.

Note: Charles Wallshein is with the firm of Macco & Stern LLP, in Melville focusing his practice on real property, banking and finance. Prior to attending law school he spent several years on Wall Street trading stock index futures and options contracts. Since the banking crisis of 2008 Charles’ practice has focused on residential foreclosure defense and commercial loan restructuring.

1. *U.S. Bank v. Collymore*, 68 AD3d 752 (2nd Dept. 2009).
2. Real Property Law §1331
3. Real Property Law §1353
4. *In re SGE Funding Corp.*, 278 B.R. 653 (Bankr. M.D. Ga. 2001).
5. Internal Revenue Code §860.
6. *The End of Mortgage Securitization? Electronic Registration as a Threat to Bankruptcy Remoteness*, John Patrick Hunt, Richard Stanton and Nancy Wallace August 10, 2011
7. New York General Obligations Law §5-703.
8. UCC §3-301, §3-302.
9. UCC §9-203(g) Lien securing right to payment.
10. *Merritt v. Bartholick*, 36 NY 44 (1867).
11. American Securitization Forum, *Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market* [hereinafter ASF White Paper] (Nov. 16, 2010).
12. UCC §9-102(28)(B), (12)(B) & 1-201(35).
13. The American Securitization Forum is the lobbying group that represents the interests of the securitization industry.
14. UCC §9-109(a)(3)
15. UCC §9-308, comment 2.
16. UCC §9-309(4)
17. UCC §9-203(g)
18. UCC §9-308(e)
19. UCC §9-109(d)(11)(A)
20. UCC §9-203(b)(1), (2) & (3)(A)

TAX LAW

Renew your PTIN soon

By Alan E. Weiner

PTIN (Preparer Tax Identification Number) renewal is easy and you have until December 31 to renew but why wait. Provided that you have a credit line of larger than \$63 (the renewal fee), do it now.



Alan E. Weiner

For renewals:

- Go to <http://www.irs.gov/Tax-Professionals/PTIN-Requirements-for-Tax-Return-Preparers>
- Click on “Renew or Sign Up Now”
- Enter your User ID and Password to log in.
- Select “PTIN Renewal”
- All of your information is pre-populated. You will not need your 2011 tax information.
- You will have a few questions to answer such as whether you were convicted of a felony.
- You will need your supervisor’s PTIN if you are not qualified in your own right such as being an attorney, CPA, EA, or one of the other specified categories.

• Enter your professional designation information (such as attorney and/or CPA and/or EA, if you are one)

• Payment with your credit card should be easy; however, if you had the system “Save” your information last year, you may find that you get a message that “Your card could not be authorized.” If so, you may need to “Make Changes” and enter information for a different credit card.

- You’ll have the opportunity to print whichever screens you want.
- Later the same evening, you will receive a “PTIN Renewal Welcome Letter” email. It tells you to log back into the system to retrieve a message. The message is a letter starting with “We’ve accepted your 2013 renewal for your Preparer Tax Identification Number (PTIN).”

Note: Alan E. Weiner, CPA, JD, LL.M is a Partner Emeritus at Holtz Rubenstein Reminick LLP.

President's Message (Continued from page 1)

to those who are dealing with real tragedy - a mother in Staten Island whose two children were washed away after her car broke down, people who lost their entire homes and personal belongings forever, just to mention a few.

Many of our members suffered the double whammy of being without power at their offices as well as their homes. I will not dwell further on the dismal performance of LIPA as that would consume my entire message. I sincerely hope that by the time you read this article, you will all be safe and warm in the comfort of your homes and on the way to rebounding from Mother Nature's tantrum. The generator that my wife Ruth nixed a few days before the storm is on order, with a propane tank, as I certainly do not want to rely on having to fill up gasoline cans on a regular basis. Nevertheless I hope I will never have to use the generator. This storm, although innocuously named Sandy, will remain in our memories along with some other catastrophic storms that directly affected our region, such as Hurricane Gloria back in 1986.

Thankfully an inspection of our Bar Center after the storm disclosed no major physical damage as a result of the storm, but the SCBA was without power, internet, email and phones for a lengthy period of time after the storm. However there was residuary damage on November 9, when a tree branch on the Bar Center's property broke off and fell on one of the beautiful new SCBA lighted signs at the foot of our driveway and demolished it. Executive Director Jane LaCova has received estimates to repair the damage or replace the sign, as well as for the repair of some roof shingles damaged in the storm. I'd like to thank Jane, Barry Smolowitz, our technology director, who is working on the technical problems at the SCBA, and the rest of our staff for doing a great job under trying circumstances.

Many other local bar associations have suffered similar interruptions in their

operations and I have participated in several telephone conference calls with our State Bar President, Seymour James, and all of the down state Bar Presidents.

The SCBA has partnered with Touro Law School in establishing a hot line to be answered by Touro Law School students under the supervision of, and with the guidance of, many of our SCBA members. As of this date, more than 35 of our members have volunteered to participate in this program. All of our members have been notified that a free web cast is available on November 15 to train our members regarding the provision of legal assistance to people experiencing difficulties as a result of the storm (including many of our own members), such as filing insurance claims, dealing with FEMA and other governmental agencies, etc. As new developments are taking place, the SCBA will continue to reach out to our members.

Congratulations to the Hon. Joan Genchi of the Family Court, the Hon. Madeline Fitzgibbons of the District Court and the Hon. James F.X. Doyle of the County Court on their upcoming and well-deserved retirement from the bench at the end of this year. I was unable to attend the retirement party held on November 8 in Riverhead for my longtime friend, Judge Genchi, due to my lack of power at home and my attempt to conserve gas, but I hope she knows that I was there in spirit.

I hope everyone was able to have a warm, safe and Happy Thanksgiving, and I wish you all an exciting winter holiday season. May we all be blessed in the coming New Year with good health and prosperity.

I look forward to seeing all our members and their staff at the SCBA Holiday Party which will be held on Friday, December 7 from 4:00 to 7:00 p.m. This event is one of the highlights of the year; there is no charge for this event and our caterer, Fireside, always provides a sumptuous spread for this gala.

Bench Briefs (Continued from page 4)

not own the property but rather, that it was owned by the Town of Islip Housing Authority, a separate legal entity. The court noted that liability for a dangerous condition on property is generally predicated upon ownership, occupancy or special use of the property, and that the existence of one or more of these elements was sufficient to give rise to the duty of reasonable care. In denying the motion the court noted that even assuming that the defendant did not own the property, it failed to demonstrate as a matter of law that it did not occupy, control or otherwise assume liability for the maintenance of the property. Further, to the extent that the defendant sought to demonstrate in its reply that there was no written agreement or lease pertaining to its use of the property and that the Town of Islip Housing Authority was solely responsible for maintaining the parking lot, the court pointed out that a moving party may not remedy basic deficiencies in its prima facie showing by submitting evidence in reply.

Honorable Arthur G. Pitts

Motion for leave to amend the complaint granted; amendment of the complaint to allege a new cause of action may be allowed, even if it would be time-barred if standing alone, if the new cause of action related back to the facts, circumstances, and proof underlying the original complaint.

In *John Giordano and Laura Giordano v. Randall S. Allen, individually, Randall S. Allen d/b/a Ultra Machine, Randall S. Allen d/b/a MPM, Inc., Setauket Contracting Corp., and Bell Cabot Realty, LLC*, Index No.: 34038/06, decided on June 27, 2012, the court granted the motion by plaintiffs for an order granting leave to serve and file a third amended complaint. The court noted that the matter was one for personal injuries sounding in negligence. The third amended complaint would include an additional cause of action against defendant, Bell Cabot Realty, LLC

under Article 10 of the New York State Labor Law Sections 200, 240, and 241. The court pointed out CPLR §3025(b) provides that leave to amend pleadings should be freely granted on such terms that may be just. Further, the court provided that in the absence of actual prejudice, the plaintiff's delay in seeking leave to amend the complaint did not bar such relief since the mere lapse of time, unaccompanied by proof of actual prejudice to the defendant was not a sufficient ground for denial of the motion. Here, in opposition to the motion, the defendant averred that the new cause of action was time barred pursuant to CPLR § 215.5 and as such, leave to amend must be denied. In granting the motion the court reasoned that an amendment of the complaint to allege a new cause of action may be allowed, even if it would be time-barred if standing alone, if the new cause of action related back to the facts, circumstances, and proof underlying the original complaint. The court found that leave to amend the complaint was warranted under such circumstances.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in

Last rights for first sale doctrine? (Continued from page 10)

sale doctrine—if the copy was made “consistent with” the Copyright Act.

At the other end of the spectrum - the argument that a copy is “lawfully made under this title” only if it was manufactured on United States soil. This is the opinion from the Second Circuit for which the Supreme Court granted cert.

Under the first construction, as long as a copy is made anywhere by or under the authority of the copyright owner, any first sale of that copy extinguishes the copyright owner's right to restrict any further resale in the U.S. This is the position taken in the amicus briefs filed by several parties, such as eBay, for whom free trade in used copyrighted goods in the U.S. is critical. The second construction, which is argued by the United States in its amicus brief, sets up a situation whereby producers of copyrighted goods will be motivated to move their manufacturing overseas in order to avoid the consequences of the first sale doctrine for each and every resale in the U.S. (akin to a perpetual monopoly on every resale of the copyrighted good). An

example of a consequence of this position is that one or two big movie producers, like Sony or Universal, could demolish movie rental services like Netflix and Blockbuster through the simple device of manufacturing DVDs in Mexico. Also, a car manufacturer could prohibit or control resale of all automobiles. It would simply have them manufactured abroad and be sure to include onboard computer systems containing copyrighted software.

It should be clear that this case has many parties very seriously concerned about the viability of existing markets in used goods, and also the prospect of moving the manufacturing of many types of goods away from U.S. soil.

Note: Gene Bolmarcich is a trademark attorney and Principal of the Law Offices of Gene Bolmarcich in Babylon, NY, with a national clientele. In addition to being an independent contractor on trademark matters for other law firms, he offers a virtual trademark registration service at www.trademarksa2r.com. He can be contacted at gxbesq1@gmail.com.

1. *McDonald's Corp. v. Shop at Home, Inc.*, 82 F.Supp.2d 801(M.D. Tenn. 2000)

2. *Karl-Storz Endoscopy-America, Inc. v. Surgical Tech, Inc.*, 285 F. 3d 848 (9th Cir. 2002)

3. See *Davidoff & Cie, SA v. PLD Int'l Corp.*, 263 F.3d 1297 (11th Cir. 2001)

4. *Nitro Leisure Products, L.L.C. v. Acushnet Company*, Case No., 2003 U.S. App. LEXIS 17822 (Fed. Cir. Aug. 26, 2003)

5. See *Mirage Editions, Inc. v. Albuquerque ART Co.*, 856 F.2d 1341, 1343 (9th Cir. 1988)

6. *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc. of Lafayette*, 988 F.2d 587, 593 (5th Cir. 1993)

7. 17 U.S.C. § 106 provides in pertinent part:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending...

17 U.S.C. § 109(a) provides in pertinent part:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made

under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 602(a)(1) provides in pertinent part:

Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.

8. *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998)

9. The Ninth Circuit has taken an intermediate stance, holding that a first sale in the United States of foreign made goods cuts off the copyright owner's rights inside the United States (unlike the Second Circuit's holding that a copy made abroad is never subject to the first-sale defense, even after it is imported into the United States with the copyright owner's permission and no matter how many times it changes hands.



ACADEMY OF LAW NEWS

CLE Course Listings
on pages 24-25

Gifts That Keep on Giving

By Dorothy Paine Ceparano

What better time to reflect on the generosity of the Academy's CLE presenters and coordinators than at the start of the holiday season? Not everyone is aware that our faculty is almost entirely volunteer-based. The lawyers who bring the Academy syllabus to life are unpaid. They take time from their practices and personal lives to share their knowledge, research legal issues, recruit expert

speakers, prepare course materials, and even help with mundane administrative matters. The gifts that emanate from these volunteer efforts are the enhanced skills and knowledge Academy audiences take away from programs – gifts that continue to serve when new matters and challenging issues are confronted.

The giving, however, is not altogether one-sided. Those who plan and present Academy programs state that the process is fun and creative, that they learn through their efforts, and that they make valued

new contacts. Indeed, many long-lasting friendships have gotten their start through the interactive efforts of CLE program planning.

Volunteer efforts led to a jam-packed fall semester, even with Hurricane Sandy and its aftermath causing a number of cancellations. The Academy is now in the process of rescheduling cancelled programs to winter dates and developing new offerings for the coming season. December brings the **Annual School Law Conference**, the **Annual Family Court Update**, and a lunch-time program on **Health Care Appeals**. In January, Academy constituents may look forward to the **DMV Update on the East End**, the **Annual Bankruptcy Update, Part Two of the Securitized Mortgage Foreclosure Series**, a morning program on **Insurance Liability Practices**, a seminar on **Representing Veterans**, a presentation on **Persuasive Writing and Oral Advocacy**, and a program on the **PJI**. In February, the syllabus includes a lunch program on **Working with Parent Coordinators**, the rescheduled **Mockery of a Closing**, a seminar on **Accident Reconstruction**, George Roach's **Annual Elder Law Update**, the rescheduled **Landlord-Tenant Update**, the rescheduled program on **Asset Purchase Agreements**, the rescheduled program on **Predictive Coding**, and a seminar on

Cross Examination (civil and criminal). March, while still largely in the planning stages, already has in place the **Annual Law in the Workplace Conference**, the **Annual Matrimonial Series**, and a seminar on **Handling a Motor Vehicle Case**. And many more winter programs, still just sparks of ideas in the minds of Academy volunteers, will be developed and brought to fruition. It promises to be a season filled with gifts of learning.

The Academy thanks its talented and hard-working volunteers for their efforts to develop another semester of outstanding CLE and for their ongoing dedication to helping colleagues stay well informed and well equipped to serve those they represent.

If you would like to join the ranks of the Academy's well regarded and much appreciated volunteers, why not get started by attending a monthly Academy meeting or a quarterly Curriculum Committee meeting, both of which are open to all SCBA members? Meeting dates are listed in this publication and on the SCBA website calendar (www.scba.org).

We wish all – CLE volunteers and attendees – a happy holiday season and a new year filled with personal and professional gifts of all kinds.

Note: The writer is the executive director of the Suffolk Academy of Law

ACADEMY *Calendar* of Meetings & Seminars

Note: Programs, meetings, and events at the Suffolk County Bar Center (560 Wheeler Road, Hauppauge) unless otherwise indicated. Dates, times, and topics may be changed because of conditions beyond our control. CLE programs involve tuition fees; see the CLE Listings pages in this publication and the SCBA online calendar for course descriptions and registration details. For information, call 631-234-5588.

December

- 3 Monday **Annual School Law Conference.** 9:00 a.m.–3:30 p.m. Hyatt Regency Wind Watch Hotel. Continental breakfast; lunch buffet.
- 5 Wednesday **Annual Family Court Update (Part One).** 6:00–9:00 p.m. Light supper from 5:30
- 6 Thursday **Appealing Health Care & Long-Term Disability Insurance Denials.** 12:30–2:10 p.m. Lunch from noon.
- 7 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.

January

- 4 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
- 9 Wednesday **DMV Update—East End Presentation.** (David Mansfield, Presenter). 5:00–7:30 p.m. at The Seasons in Southampton. Light supper from 4:30 p.m.
- 10 Thursday **Bankruptcy Update.** 6:00–9:00 p.m. Light supper from 5:30.
- 14 Monday **Advanced Standing Issues in Securitized Mortgage Foreclosures. Part II.** 6:00–9:00 p.m. Light supper from 5:30.
- 23 Wednesday **Choosing a Trustee; Fiduciary Liability; Family & Wealth Sustainability.** 6:00–9:00 p.m. Light supper from 5:30.
- 24 Thursday **Representing Veterans.** Presented by the SCBA Military Law Committee. 6:00–9:00 p.m. Light supper from 5:30.
- 29 Tuesday **Persuasive Writing & Oral Advocacy** (Hon. Gerald Lebovits, Presenter). 6:00–9:00 p.m. Light supper from 5:30.
- 30 Wednesday **The PJI: Strategies for Trial Lawyers.** 6:00–9:00 p.m. Light supper from 5:30.

February

- 1 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
- 6 Tuesday **E-Disclosure: Recent Developments in Law & Technology Related to Predictive Coding.** 12:30–2:10 p.m. Lunch from noon.
- 8 Friday **Real Estate: A Mockery of a Closing.** 12:30–2:10 p.m. Lunch from noon.
- 13 Wednesday **Accident Reconstruction.** 6:00–9:00 p.m. Light supper from 5:30.
- 14 Thursday **Elder Law Update** (George Roach, Presenter). 2:00–5:00 p.m. Snacks and sign-in from 1:30.
- 26 Tuesday **Landlord-Tenant Update** (with book signing). 6:00–9:00 p.m. Light supper from 5:30.
- 27 Wednesday **Asset Purchase Agreements.** Noon–3:00 p.m. Lunch from 11:30 a.m.
- 28 Thursday **Cross Examination.** 6:00–9:00 p.m. Light supper from 5:30.

Check On-Line Calendar (www.scba.org) for additions, deletions and changes.



Winners All!

Past Academy Dean Rick Stern picked a long-shot (a horse named Rover) in the first race and won! While others may not have fared as well, everyone attending the Academy's October 27 Day at the Races at Belmont Park seemed to have a good time. They also learned a lot about new developments and new legislation affecting the racing industry at the event's CLE presentation featuring Chris Wittstruck, a lawyer who concentrates his practice in matters related to thoroughbred racing, the SCBA's own Skip Kellner, and representative horse owners and breeders.

The day was organized by Howard Baker, pictured in front with Jockey Joel Rosario, who rode the winning horse, Catalonia, in the third race. That race was "sponsored" by the Academy, and some of the speakers and many of the attendees joined Howard afterwards for the photo op in the Winner's Circle.

ACADEMY OF LAW OFFICERS

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SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

560 WHEELER ROAD, HAUPPAUGE, NY 11788 • (631) 234-5588

WINTER CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during December 2012 and January and February 2013.

REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website (www.scba.org).

RECORDINGS: Most programs are recorded and are available, after the fact, as on-line video replays and as DVD or audio CD recordings.

ACCREDITATION FOR MCLE: The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

N.B. - As per NYS CLE Board regulation, you must attend a CLE program or a specific section of a longer program in its entirety to receive credit.

NOTES:

Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.

Tuition & Registration: Tuition prices listed in the registration form are for **discounted pre-registration. At-door registrations entail higher fees.** You may pre-register for classes by returning the registration coupon with your payment.

Refunds: Refund requests must be received 48 hours in advance.

Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your

SCBA membership dues.

Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA, please let us know.

Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501(c)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

Financial Aid: For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, please call the Academy at 631-233-5588.

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL FAMILY COURT UPDATE

*Part One: Wednesday, December 5, 2012
(Rescheduled Date) Part Two: January TBA*

All the latest developments affecting Family Court practice will be covered by an expert faculty in this two-part presentation.

Part One will cover:

- Assessment and Treatment of Juveniles Who Have Committed Sexual Offenses // Community Based Treatment for Sexually Abusive Youth
- Custody and Visitation Update 101 // Modification of Child Support Orders
- Family Court Child Support and Paternity Update (Income and Deductions; Educational Expenses; Emancipation and Other Defenses)
- Key Ethics Issues

Faculty: Hon. John Kelly; Michael T. Fitzgerald, Ph.D.; Professor Lewis Silverman; Support Magistrate Isabel Buse; Support Magistrate Cheryl Joseph Cherry

Part Two will deal with other Family Court issues, including Domestic Violence, Perspectives of the Attorney for the Child, JDs, PINS Petitions, and other issues. Details TBA.

Coordinators: Hon. John Kelly; Hon. Isabel Buse; Hon. John Raimondi

Each Night: Time: 6:00 – 9:00 p.m. **location:** SCBA Center – Hauppauge **Refreshments:** Light supper

MCLE: 3 Hours (2 professional practice; 1 ethics)

ANNUAL DMV UPDATE

*Wednesday, January 9, 2013 on the East End
(Rescheduled Date)*

This program is a must-attend for all attorneys who represent motorists on issues related to license revocations and suspensions and similar matters.

Presenter: David Mansfield

Time: 5:00–7:30 p.m. (Sign-in from 4:30 p.m.)

location: Seasons of Southampton

Refreshments: Light supper

ANNUAL BANKRUPTCY LAW UPDATE

Wednesday, January 10, 2013

All that is new and significant will be covered by an experienced faculty.

Program Coordinator: Richard Stern

Time: 6:00 – 9:00 p.m. **location:** SCBA Center – Hauppauge

Refreshments: Light supper

MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

ANNUAL ELDER LAW UPDATE

Thursday, February 14, 2013

All that is new and significant will be covered by an experienced faculty.

Program Coordinator: Richard Stern

Time: 6:00 – 9:00 p.m.

location: SCBA Center – Hauppauge

Refreshments: Light supper

MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

Presented in Conjunction with the SCBA District Court Committee LANDLORD-TENANT PRACTICE UPDATE

Tuesday, February 26, 2013 (Rescheduled Date)

Recent changes in landlord-tenant law and their impact on matters involving both residential and commercial properties will be covered. Hon. Stephen Ukeiley generously donated copies of his book, *The Bench Guide to Landlord & Tenant Disputes in New York*, to the Academy, a 501(c)-3 organization; the book may be purchased from the Academy at the discounted price of \$25 for as long as the supply lasts. Purchasers may have their copies signed by Judge Ukeiley prior to the program.

Presenters: Hon. Stephen Ukeiley (Suffolk District Court); Hon. Scott Fairgrieve (Nassau District Court); Victor Ambrose, Esq. (Nassau-Suffolk Law Services); Warren Berger, Esq.; Marissa Luchs Kindler, Esq. (Nassau-Suffolk Law Services); Michael McCarthy, Esq.; Patrick McCormick, Esq. (Campolo, Middleton & McCormick, LLP); Deputy Sheriff Sargent David Sheehan (Suffolk County Sheriff's Dept.)

Coordinator: Hon. Stephen Ukeiley (Academy Advisory Committee)

Time: 6:00 – 9:00 p.m. **location:** SCBA Center – Hauppauge

Refreshments: Light supper

MCLE: 3 Hours (professional practice)

SEMINARS & CONFERENCES

Full Day Program Presented with the Nassau Academy of Law ANNUAL SCHOOL LAW CONFERENCE

*Monday, December 3, 2012 at the
Hyatt Regency L. I. Hotel in Hauppauge*

This annual conference provides valuable information and insights for lawyers, educators, school board members, representatives of bargaining groups, and others with an interest in legal developments affecting the school community. The day includes continental breakfast and a buffet luncheon.

Agenda

Morning General Session: Annual Professional Performance Review: The Saga Continues

Faculty: Richard J. Guercio, Esq. – Guercio & Guercio, LLP; Erin O'Grady-Parent, Esq. – Guercio & Guercio, LLP;

Christopher Venator, Esq. – Ingerman Smith, LLP; Vincent P. Lyons, Esq. – NYSUT Regional Staff Director; Robert E. Waters, Esq. – Lamb & Barnosky, LLP

Morning Concurrent Sessions – Choose one of three.

1. Dignity for All Students Act (DASA): Rights, Responsibilities, and Ramifications

Faculty: Christie R. Medina, Esq. – Frazer & Feldman, LLP;

Randy Glasser, Esq. – Guercio & Guercio, LLP; Carol A. Melnick, Esq. – Jaspan Schlesinger, LLP

2. Annual Special Education Update

Faculty: Bernadette Gallagher-Gaffney, Esq. – Sewanhaka Central High School District; Jack S. Feldman, Esq. – Frazer & Feldman, LLP; Nicholas J. Agro, Esq. – Law Offices of Nicholas J. Agro

3. Fiscal Management in Challenging Times: Procuring and Developing Alternate Revenue Resources, Shared/Consolidated Services, Etc.

Faculty: Laura A. Ferrugiari, Esq. – Frazer & Feldman, LLP;

David Flatley – Superintendent of Schools, Carle Place UFSD; Mary Anne Sadowski, Esq. – Ingerman Smith, LLP; Lawrence Tenenbaum, Esq. – Jaspan Schlesinger, LLP

Afternoon General Session:

Living with the Tax Levy Limit – Tax Cap Part II

Faculty: Gary L. Steffanetta, Esq. – Guercio & Guercio, LLP;

Robert H. Cohen, Esq. – Lamb & Barnosky, LLP; Neil M. Block, Esq. – Ingerman Smith, LLP; John Lorentz – Superintendent of Schools, Farmingdale UFSD; Florence T. Frazer, Esq. – Frazer & Feldman, LLP; Thomas M. Volz, Esq. – Law Offices of Thomas M. Volz, PLLC

Afternoon Concurrent Sessions – Choose one of three.

1. Public Employment Relations Board Update

Faculty: Robert Sapir, Esq. – Cooper, Sapir & Cohen, P.C.;

William A. Herbert, Esq. – Deputy Chairman & Counsel – NYS PERB; Sharon N. Berlin, Esq. – Lamb & Barnosky, LLP

2. Americans with Disabilities Act: Claims by Employees for Reasonable Accommodations; Leaves of Absence; and Ramifications of Disciplinary Proceedings under the Circumstances

Faculty: Howard M. Miller, Esq. – Bond, Schoeneck & King, LLP; Rick Ostrove, Esq. – Leeds Brown Law, PC; Steven C. Stern, Esq. – Sokoloff Stern, LLP; Representative of the Office of Civil Rights, United States Department of Education

3. The Open Meetings Law & the Freedom of Information Law: Unprecedented Public Access under the Latest Amendments, COOG Advisory Opinions, Etc.

Faculty: Douglas Libby, Esq. – Vice Chair, Nassau County Bar Association Education Law Committee; Robert Freeman – Executive Director, NYS Committee on Open Government;

Edward McCarthy, Esq. – Ingerman Smith, LLP

Suffolk Program Chairs: Richard J. Guercio and Gary Lee Steffanetta (Chairs – SCBA Education Law Committee)



SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

560 WHEELER ROAD, HAUPPAUGE, NY 11788 • (631) 234-5588

Time: 9:00 a.m.–3:30 p.m. (Sign-in from 8:30)

location: Hyatt Regency Hotel (Wind Watch) in Hauppauge

Refreshments: Continental Breakfast and Lunch

MCLE: 5.5 credits (professional practice)

Lunch 'n Learn

APPEALING HEALTH CARE & LONG-TERM DISABILITY INSURANCE DENIALS

Thursday, December 6, 2012

This program by a guest presenter who has made law in the field of patients' rights will provide practical insights into the bases, case law, and procedures of health care appeals:

- Determining the Applicable Law and Standard of Review
- Determining the Applicable Time Frame
- Determining the Basis for the Denial
- Levels of Appeal, External Reviews, Expedited Appeals
- Support for the Appeal – Health Care Professionals; Medical Bases; Benefits to the Individual, Etc.
- Preparing the Appeal: Deadlines; Legal Parameters, Etc.

Presenter: David Trueman, J.D., Ph.D. (Law Offices of David L. Trueman, P.C. – NYC and Mineola)

Coordinator: William McDonald, Esq. (Academy Officer; Co-Chair, SCBA Health & Hospital Committee)

Evening Seminar

BEHIND THE CURTAIN? – Advanced Standing Issues in Securitized Mortgage Foreclosure – Part Two

Monday, January 14, 2013

This program continues the discussion of how securitized mortgage transactions have affected the real estate world and the ramifications for foreclosure actions...when it is unclear *who* owns the defendant's loan. You will gain from the discussion even if you did not attend Part One of the program. Topics include:

- Overview of Structured Finance
- What Is a Securitized Mortgage Transaction?
- Document Flow in a REMIC ((Real Estate Mortgage Investment Conduit) Transaction
- Document Flow in a GSE (Government Sponsored Entity) Transaction
- The Polling and Servicing Agreement
- Recordable & Possessory Interests in the Loan
- Statutory and Case Law Requirements for Foreclosing a Mortgage in New York

Faculty: Hon. Jeffrey Arlen Spinner (Suffolk); Hon. Peter Mayer (Suffolk); Charles Wallshein, Esq. (Macco & Stern)

Coordinator: Richard Stern, Esq. (Macco & Stern)

Appreciation for Underwriting Support: Title Resources Guaranty Company

Time: 6:00–9:00 p.m. (Sign-in from 5:30 a.m.) each evening

location: SCBA Center **Refreshments:** Light supper

MCLE: 3 credits (2 professional practice; 1 ethics)

Evening Seminar

CHOOSING A TRUSTEE & RELATED TOPICS

Wednesday, January 23, 2013 (Rescheduled Date)

This program will provide attorneys with valuable strategies for counseling families on managing and sustaining monetary and other potential estate assets. Topics include:

- How to Choose a Trustee (potential candidates; trustee qualities; trust objectives, etc.)
- Fiduciary Liability (Prudent Investor Act; standards of conduct; investment strategies, etc.)
- Family & Wealth Sustainability (wealth trends; defining wealth; family dynamics; children and philanthropy, etc.)

Presenters: Charles J. Ogeka, Esq. (Ogeka Associates, LLC);

Kevin H. Rogers (BNY Mellon Wealth Management) David J.

DePinto, Esq. (Of Counsel–Lazer Aptheker Rosella & Yedid, PC)

Coordinator: Eileen Coen Cacioppo, (Academy Curriculum Co-Chair)

Appreciation for Underwriting Support: BNY Mellon Wealth Management (Daniel Shaughnessy, Senior Director)

Time: 6:00–9:00 p.m. (Sign-in from 5:30)

location: SCBA Center **Refreshments:** Light supper

MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Lunch 'n Learn

E-Discovery: RECENT DEVELOPMENTS IN LAW & TECHNOLOGY RELATED TO PREDICTIVE CODING

Wednesday, February 6, 2013 (Rescheduled Date)

Predictive coding takes electronic-discovery to a new level. It is a method whereby a human identifies whether or not a random selection of documents are responsive to an e-discovery demand; the computer program then takes these responses, "learns" what to search, and gives each document a "relevance score." The end result is the identification of the documents that need to be produced. This seminar will shed light on the use of predictive coding, which has been adopted as an acceptable method of obtaining ESI (electronically stored information), and examine the ground-breaking decision by Judge Peck in *Monique Da Silva Moore v. Publicis Groupe*.

Presenters: Experts from DOAR Litigation Consulting

Glenn P. Warmuth, Esq. (Stim & Warmuth, PC)

Coordinator: Glenn P. Warmuth, Esq. (Academy Officer)

Appreciation for Underwriting Support: Doar Litigation Consulting

Time: 12:30–2:10 p.m. (Sign-in from noon)

location: SCBA Center **Refreshments:** Lunch

MCLE: 2 credits (professional practice)

Lunch 'n Learn

A MOCKERY OF A CLOSING

Friday, February 8, 2013 (Rescheduled Date)

This "Closings 101" course features a skilled faculty who will con-

duct a hypothetical real estate closing where things go awry. The demonstration will include stop-action tips for how to have prevented the problems from arising and, when necessary, how to do quick fix-its to stop setbacks and keep the deal intact. It's a must-attend for the novice – and even the experienced – real estate lawyer!

Presenters: Lita Smith Mines, Esq.; Audrey Bloom, Esq.; Joseph O'Connor, Esq.; Gerard McCreight, Esq.; Peter Steinert, Esq.; Peter Walsh, Esq.

Coordinator: Lita Smith-Mines, Esq. (Academy Officer)

Time: 12:30–2:10 p.m. (Sign-in from noon)

location: SCBA Center **Refreshments:** Lunch

MCLE: 2 credits (1.5 professional practice; 0.5 ethics)

Evening Seminar

ACCIDENT RECONSTRUCTION

Wednesday, February 13, 2013

Learn how to more effectively investigate a vehicular accident in this thorough program covering

- Accident Reconstruction Techniques
- Hardware Design Analysis Techniques
- A Review of and Methodology for Selecting the Lead Area of Expertise

Faculty: Representatives of ARCCA; Others TBA

Coordinator: Hon. James Flanagan (Academy Officer)

Time: 6:00–9:00 p.m. (Sign-in from noon)

location: SCBA Center **Refreshments:** Lunch

MCLE: 3 credits (1.5 professional practice; 1.5 skills)

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DMV Update □ East End	\$100	\$75	\$125	Yes	Yes	2 cpn	2 cpn	N/A	N/A	N/A
Bankruptcy Law Update	\$120	\$50	\$140	Yes	Yes	3 cpn	3 cpn	\$150	\$140	\$20
Elder Law Update	\$125	\$50	\$150	Yes	Yes	3 cpn	3 cpn	\$150	\$140	\$20
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A Mockery of a Closing	\$65	\$45	\$85	Yes	Yes	2 cpn	2 cpn	\$100	\$95	\$20
Accident Reconstruction	\$85	\$50	\$100	Yes	Yes	3 cpn	3 cpn	TBA	TBA	TBA

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The Medicare lien trumps GOL 5-335 (Continued ofrom page 18)

held that GOL 5-335 is not preempted by the MSP Act. In what apparently was a case of first impression in this state, in *Trezza v. Trezza* (32 Misc. 3d 1209; 934 NYS 2d 37 (Sup Ct Kings Co 2011)), a Kings County Supreme Court justice denied a Medicare Advantage program the benefit of the application of the lien presumably established by federal law against the proceeds of a personal injury action. *Trezza* resolved an “apparent” conflict between GOL 5-335(a) and the lien established by 42 USC 1395mm (e)(4) and 42 USC 1395y(2)(B) to secure reimbursement of Medicare funds expended for medical bills. (See, also, 42 CFR 411.20 *et seq.*). Soon thereafter *Ferlazzo v. 18th Avenue Hardware, Inc.*, 33 Misc 3d 421, 929 NYS2d 690 (Sup Ct Kings Co. 2011) followed *Trezza* in finding that federal precedent holding that MA plans were not authorized by statute to institute a “private right of action” to recover on the liens effectively denied those plans the remedy afforded to “original” Medicare by the MSP Act. *Trezza* and *Ferlazzo* also held that unlike “original” Medicare the MSP Act allowed but did not require MA plans to contract subrogation rights against their members. Therefore, since “subrogation in this context remains a state contract law issue” (*Trezza*, *supra* at 1210), *Trezza* and *Ferlazzo* held that the MSP Act liens were extinguished by operation of GOL 5-335. 1

On the other hand, although it agreed with its Kings County counterparts that the MSP Act does not confer a private right of action on MA plans, the court in *Spellman v. Arya*, Index No. 18662/2007, slip op. (Sup Ct Queens Co June, 2011) nevertheless refused to allow 5-335 to supersede the MSP Act. “To the degree that GOL 5-335 eliminates [the MA plan’s] contract right to seek reimbursement from plaintiff out of the settlement proceeds, it is preempted by federal law.” *Id.* at 7-8. So, the issue was not settled.

Recently a group of MA plan beneficiaries, seeking class action certification, brought a declaratory action in Supreme New York seeking judgment that the MA plans and their agents do not have a right to reimbursement against the plaintiffs’ respective tort settlements. The plaintiffs argued, *inter alia*, that unlike “original” Medicare the MA plans were precluded from asserting their subrogation liens by operation of GOL 5-335. (Plaintiffs also raised claims of unjust enrichment and deceptive business practices, which will not be discussed here.) The defendants removed the case to federal court and in due course sought dismissal for lack of subject matter jurisdiction because the plaintiffs failed to exhaust all administrative remedies related to the MA plans’ actions before filing suit. In reply, the plaintiffs argued that

the claims were not a request for a “determination of Medicare benefits” or a challenge to the denial of such benefits and thus did not “arise” under the Medicare laws, but instead were controversies over contract issues subject to state law. Consequently, plaintiffs argued, a requirement that they exhaust administrative remedies prior to instituting suit was inapplicable.

In its decision in *Potts v. The Rawlings Company, LLC*, 2012 US Dist LEXIS 137802 (SDNY; 9-25-12), the federal district court observed that the U.S. Supreme Court previously found that the conditional requirement that a claim “arises” under the Medicare laws must be broadly construed. Since the receipt of Medicare benefits always is conditioned upon the reimbursement rights created by the MSP Act, the issue in the case at bar is whether a beneficiary may retain those Medicare benefits and not reimburse Medicare for them. The claims of the plaintiffs require interpretation of substantive provisions of federal law – the Medicare laws – regardless of whether they are framed as arising under state law. Since the plaintiffs conceded that the exhaustion of remedies principle would deny jurisdiction if the claims “arose under” the Medicare Acts, dismissal for lack of subject matter jurisdiction was warranted.

Turning to the issue which is the subject of this article, the court went on to hold that the MSP Act preempts GOL 5-335. The MSP Act contains broad preemption provisions:

“The standards established [under the Act] shall supersede any State law or regulation (other than state licensing laws or state laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.” 42 USC 1395w-26(b)(3) (See, also, 42 CFR 422.402 for the regulatory enactments.)

To make the point even more clear, 42 CFR 422.108(f) expressly holds that “[a] State cannot take away an MA organization’s right under federal laws and the MSP regulations to bill, or to authorize providers and supplier to bill, for services for which Medicare is not the primary payer.” For the plaintiffs this is not dispositive, however; they argue that, even if all of this is so, the MA plan, unlike “original” Medicare, is not authorized by statute to act privately to recover the reimbursement allegedly due under the MSP, but only by virtue of its contracts with its members. Consequently, the bar created by GOL 5-335 to any *non-statutory* right of reimbursement does not conflict with federal law.

The court held that whether Congress intended that MA plans also have a private right of action is not material to a determina-

tion of the issue. It initially observed that there is a conflict in a series of federal court precedents; some hold that Congress intended only to permit a private right of reimbursement but did not specifically create any federally enforceable cause of action, while others found an express right to do just that. A resolution is unnecessary, however, because the claims at bar did not actually involve whether the MA plans had such a private right of action. Instead they simply involved the issue of whether a state law that directly conflicts with federal laws and regulations is preempted. The court held these to be distinct questions. After analyzing other relevant precedent the court found itself agreeing with the approach of Supreme Queens in the *Spellman* case: whether or not an MA plan has a private right of action, to the extent that GOL 5-335 would deny the MA plan’s right to seek reimbursement the state statute is preempted by the MSP Act.

Unless and until an appellate court addresses this issue it appears that GOL 5-335 will not preclude a Medicare Secondary Payer lien asserted by a Medicare Advantage plan. As is demonstrated by *Potts*, a settling plaintiff relying on section 5-335 in accepting a settlement offer that does not contain funds allocated to an MA plan’s “non-statutory” lien nevertheless may be faced later on with a claim by the MA plan lien holder.

Query: Section 5-335 purports to avoid prejudice to non-statutory lienholders by allowing them to pursue their lien or subrogation claims directly against the tortfeasors. If the MA plan instead sues the settling plaintiff, now defendant, can the latter employ section 5-335 to support the joinder of the former defendant – tortfeasor for indemnification? What instead if the MA plan sues the tortfeasor directly, who then defends by raising the general release that certainly would have been given by the settling plaintiff in consideration of the settlement? Has the settling plaintiff prejudiced the right of the MA plan (presumably in violation of the plaintiff’s own member agreement with the plan) to assert its subrogation rights directly against the tortfeasor?

Another question concerns the amount of the reimbursement. The stated purpose of the 1980 enactment of the MSP Act is to contain the costs of the Medicare program. At the same time, MA plans are commercial entities that make money by taking on risk; this is what they get paid for. The “cost” to the Medicare program when a beneficiary’s coverage is shifted from “original” Medicare to an MA plan is the premium the federal government pays to the MA plan to take on the risk of claims payments so “original”

Medicare does not have to. So, while a lien by “original” Medicare obviously will be in the amount that Medicare disbursed to health care providers, why should a lien by an MA plan be in any amount in excess of the premium paid by the government, which the MA plan then may remit to Medicare to reimburse Medicare for its actual “cost” for covering the beneficiary? Is not the MA plan getting paid precisely to bear such a risk? When the MA plan asserts a lien in the amount it paid out, is it not “gaming the system” by mitigating its risk? (No; it is not the same when I buy an insurance policy. My insurer is not the creation of a statute expressly designed to save me money; an MA plan is a creation of federal laws expressly authorized to save taxpayer dollars. Those taxpayer dollars are preserved by the recovery of the premium, nothing more. The rest effectively is a windfall for the commercially operated MA plan.)

By the way, in the context of the statutory lien established by New York Social Services Law section 104-b, the analogous Medicaid situation has the State of New York paying premiums to the commercially operated Medicaid HMOs, and the HMOs then taking on the management of the Medicaid patients’ care, paying hospitals and other providers the negotiated discounts established in their managed care agreements with “in network” providers. How much is the “value” of the section 104-b lien? A New York Department of Health Administrative Directive on Medicaid Liens and Recoveries, dated April 17, 2002, holds that “correct payments made under Medicaid Managed Care contracts are considered Medicaid correctly paid and are recoverable in accordance with” section 104-b. No doubt the unstated rationale is that the larger the payouts the higher the premiums the Medicaid HMOs must charge the state, and any recoveries in theory will reduce premiums going forward. Perhaps the same holds true for Medicare in the context of the MSP Act. One is hard pressed, however, to find either statutory or regulatory support for this conclusion.

Note: James Fouassier, Esq is the Associate Administrator of Managed Care for Stony Brook University Hospital. He is a past Co-chair of the Association’s Health and Hospital Law Committee. His opinions and comments are his own.

1. *Trezza* was the subject of my article in the *Suffolk Lawyer’s* February, 2012, edition: “MEDICARE HMO MAY NOT ASSERT LIEN AGAINST PERSONAL INJURY SETTLEMENT”. In light of the federal case which is the subject of this article the finding in *Trezza* obviously no longer applies.

Regulations and their impact on small business and entrepreneurs (Continued from page 20)

But the past or even the present is gone and done, one might say. Perhaps but the counterpoints to that argument include the following. If what has been put in place and is still being implemented has not yielded positive results in terms of stimulating the entrepreneurial activity and by extension the creation of a significant employment growth but rather the opposite, then where is the evidence for amelioration if the same course is maintained? Common sense, without the aid of sophisticated research and analysis makes it evident that repeating the same unproductive actions lead to the same unproductive results.

But with the administration having been elected to a second term, a good number of additional regulations are on the way as made amply clear by said administration. In fact based on the aforementioned Federal Register, additional 4,200 or more regula-

tions are in the pipeline and on their way to being implemented in the administration’s second term. This doesn’t even take into account the EPA’s new clean air rules, as well as new derivative rules, and the net neutrality rule from the FCC, which are also forthcoming. One cannot forget that the new Affordable Care Act is scheduled to be fully implemented over the course of the next two years and beyond with its accompanying massive new set of regulations. And of course there are the regulations from the Dodd-Frank act relating to financial transactions as well as the already announced fuel mandates for vehicles.

It would seem that the cumulative effect of all these new regulations, which in essence is handing a great deal of law making powers to the regulatory agencies from the duly elected legislative bodies as was intended by the framers of the U.S.

Constitution will inevitably lead to severe impediments to the establishment and creation of new ventures and contribute in no small measure to limiting or obstructing the growth of already operating businesses.

For example according to the Small Business Administration as far back as 2008, prior even to the current administration coming into office, the cost of complying with federal regulations approximated \$1.75 trillion a year. The numbers are not officially in for 2012 but there’s little doubt based on all of the above that the cost has increased considerably. Even the world’s largest economy, which today approximates between 15 and 16 trillion per annum, can ill afford such a level of expenditures on items not directly related to increasing productivity or additional private sector employment.

Throughout the course of human history and still today, many if not most nation-

states have tried to regulate from top down. Some were under well intentioned leaders while others driven by a need for power and control much less so. All however operated under the notion that those in charge know best and have ultimate knowledge while the individual and the population at large do not.

American success has been founded on the entrepreneurial spirit, based on the principle that excessive interference from an overreaching government should not become so burdensome as to stifle that spirit. Time will tell if we’ve crossed or will be crossing into the path of overwhelming regulations where in the cost-benefit analysis scale, the cost will overshadow the benefits.

Note: Justin A. Giordano is a Professor of Business & Law at SUNY Empire State College and an attorney in Huntington.

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Be prepared - implement a crisis plan (Continued from page 1)

uate in the event of a flood.

- Account for everyone's needs, especially seniors, people with disabilities, and people who do not speak English.
- Ensure that household members have a copy of your household disaster plan and a "short form" card with emergency contact information to keep in their wallets and backpacks.
- Pack a "go" bag that has sufficient emergency supplies for all household members and pets. Make sure this includes cash for immediate money needs (like gas stations, ATM machines do not operate in power outages.)
- Decide how you will handle caring for any pets and whether you will take them with you. Have a copy of your veterinarian's contact information and any pet insurance policies in your "go" bag.
- Your children are never too young to review the plan with you. Instruct them on exit routes in the event of a fire and reinforce the neighborhood meeting place.

When they tell you to evacuate, grab your flashlight and run

Too many people stayed where they were during Hurricanes Irene and Sandy despite clear evacuation orders. This was also what proved Hurricane Katrina to be so disastrous in 2005. The issue is not just surviving the storm, but being able to weather the aftermath if rescue teams cannot get to you.

Know your flood zone and those around you (To see if you are in a flood zone check <http://www.freeflood.net>). The saying, "better safe than sorry" is all too applicable. A family reportedly stayed behind in Sandy because their house was looted during Irene, only to have the mother and son perish in the flood. You can replace the stuff. You can't replace a life. Be smart, be safe and be prepared to leave when necessary.

Make a personal financial crisis management plan

Mitigate the mess. Are you insured?

Where are your insurance policies (homeowners, life, auto, disability)? Are they up to date? Are all your valuables on your homeowner rider? Are you covered in cases of flood or hurricane or do you need a separate rider? Confirm that you do not need any additional insurance to protect you. Take an inventory of all your home, auto, disability, and life insurance policies, put it in writing, upload it to the cloud and keep written copies in your go-bags. You should also keep a detailed list of your bank accounts, investments, trusts, titles and deeds, mortgages and home equity loans, credit and debit cards, and tax records in a safe and secure place, together with all contact information and online passwords.

Make a Legal Plan

Although this should be preaching to the choir, too many lawyers do not have the basic estate planning documents such as a Last Will and Testament, Health Care Proxy, or Power of Attorney. For those with children, an appointment of a Standby Guardian and Medical Authorization is also helpful. Review the documents every few years or anytime you or a close family member experiences a significant life change such as marriage, divorce, or the birth of a new family member. Every review should ensure appropriate beneficiary designations and titling of assets. Keep copies in your go-bags.

Put it Online

Many companies offer "online vaults" to give you secure access to your legal and financial documents from any location with an internet connection. Many financial service companies and financial planners offer this as a courtesy to their customers and clients. Putting everything in a secure online database is a great way to back up your original and photocopy records.

Make a business disaster plan for your law practice - do your research

There is no one-size-fits all plan for every disaster, but you can be better prepared by consulting a variety of resources tailored to your specific practice. NYSBA is providing a free non-accredited informational video on

emergency preparedness strategies for attorneys. The program – *Disaster Planning and Emergency Preparedness: Best Practices for Solos* – was designed to help attorneys prepare for unforeseen crises that can jeopardize their practices. The program also includes helpful information and steps to take following a disaster. The video is available, free of charge, through the month of November, at: <http://www.totalwebcasting.com/view/?id=nysbarlpm>.

Put it in writing

Your business disaster plan should include the following:

- **A business continuity plan.** Make sure your practice can continue to run as smoothly as possible in the event that you or your employees cannot physically get to the office, or when power goes down for some employees. This should include organizing and updating your contact database (see below) keeping a list of client matters and their current status; having a written procedure manual detailing the normal workflow of your practice and all emergency procedures; keeping your billing and time records up to date; and executing estate planning documents for your law firm. You may want to consider moving your files or at least an automated backup to the cloud so that you can access files remotely even if power goes out in your office.
- **Insurance information.** Hurricane Sandy caused significant damage to many businesses. Should any of your business assets be affected by a natural disaster, you need to be able to contact your insurer immediately to ensure maximum coverage under your policy. You should also take photographs of any and all damaged assets, and save receipts for any work done in repairing or replacing business assets. Now is the time to make sure you have the right insurance in the event your office is flooded or inaccessible. A colleague of mine was denied access to her office (and her purse) for two months when she left her 40th Street office after the steam-blast explosion in Manhattan. Business interruption

insurance allowed her the ability to keep her law practice afloat. Look into business interruption insurance which can help cover losses incurred as a result of natural or unanticipated disasters.

- **Loan information.** If you need a business loan following a disaster, you can contact the SBA Office of Disaster Assistance at 1-800-659-2955 or email disastercustomerservice@sba.gov for loans that may be available to your business.

- **Additional support** - Additional support for businesses can be found at the NYC Department of Small Business Services (<http://www.nyc.gov/html/sbs/html/home/home.shtml>) and the NYC Economic Development Corporation (<http://www.nyc-cedc.com/backtobusiness>).

- **Contact information maintenance** - Be sure to retain all contact information in a safe and accessible location so that you can act quickly and efficiently towards business recovery. This should include not only all disaster-related recovery services, but also alternative and emergency contact information for your employees. In our age of smartphones, there is no excuse for not having your contacts synched to your password-protected device.

It is worth the investment of time to prepare a reliable strategy and plan that allows you to be prepared when faced with economic and natural disasters. Be well, stay safe, and do not get lulled into complacency that we won't see a storm like Sandy again.

Note: Alison Arden Besunder is the principal of the Law Offices of Alison Arden Besunder P.C. in Manhattan and Brooklyn, where she focuses her practice on trusts and estate planning for individuals and married couples, as well as trust and estate-related litigation such as contested probate and contested accountings in Suffolk, Nassau, Kings, Queens and New York counties. She also handles intellectual property matters including trademark and copyright prosecution and infringement. Alison is also of counsel to Bracken Margolin Besunder LLP in Islandia.



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